Court File No. 25285

IN THE SUPREME COURT OF CANADA

(ON APPEAL FORM THE COURT OF APPEAL OF ALBERTA)

BETWEEN:

DELWIN VRIEND and GALA-GAY AND LESBIAN AWARENESS SOCIETY OF EDMONTON and GAY AND LESBIAN COMMUNITY CENTRE OF EDMONTON SOCIETY and DIGNITY CANADA DIGNITE FOR GAY CATHOLICS AND SUPPORTERS

Appellants
(Applicants)
(Respondents by Cross-Appeal)

- and -

HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA and HER MAJESTY'S ATTORNEY GENERAL IN AND FOR THE PROVINCE OF ALBERTA

Respondents
(Respondents)
(Appellants by Cross-Appeal)

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TABLE OF CONTENTS

INTRODUCTION

> ***"The level of civilization of a society can be judged by the manner in which it treats its most vulnerable minorities."***
>
> *Mahatma Gandhi* **(Harijan Magazine Weekly, 1936)**

Homosexual Albertans are vulnerable. Homosexual Albertans are denied a forum to address discrimination they experience.

PART I - STATEMENT OF FACTS

10

1. The mandate of the Alberta Civil Liberties Association (ACLA) is to promote Civil Liberties in a non-political public interest fashion. ACLA members are committed to the promotion of equality rights and values enshrined in the Canadian Charter of Rights and Freedoms. ACLA has actively advocated the protection of Albertans from discrimination in employment, housing, and public facilities on the basis of their sexual orientation. (Affidavit of G. Blochert dated October 29, 1996 para 2,6) ACLA believes that Albertans should be able to participate fully and meaningfully in Canadian society free from discriminatory barriers.
2. ACLA is in accord with the agreed facts but notes the additional contextual facts:

20

- Delwin Vriend ("Vriend") was employed with King's College in the capacity of a Laboratory Coordinator. **Case on Appeal Tab 11** p. 30 para 6.
- He received two positive evaluations, promotions and salary increases on June 27, 1989 and June 28, 1990. **Case on Appeal Tab 11** p. 30 para 8-9.
- The Board of Governor's of King's College adopted a position regarding homosexual orientation and practice on January 11, 1991 and circulated a statement of its position January 14, 1991. **Case on Appeal Tab 11** p. 31 at para 17.

PART II - STATEMENT OF POINTS IN ISSUE

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1. ACLA agrees that the points in issue are as set out in Vriend's factum at paragraphs 7 A, 8 B 9C, and not as characterized by the factum of the Crown at paragraph 3A. **App. Factum** p. 3 & **Crown Factum** p. 1 - 3. The inquiry is about whether the exclusion of "sexual

orientation" from IRPA violates s.15 of the Charter of Rights. It is not about whether IRPA must "mirror" every ground in s.15. **Is the government legally entitled to prevent the Alberta Human Rights Commission from inquiring into the fairness of Vriend's termination ?**

PART III - STATEMENT OF ARGUMENT

A. IRPA EXCLUSION INFRINGES S. 15 OF THE CHARTER:

1. International Perspectives

4. The ruling of this Court with respect to the analysis of discrimination and equality in ***Andrews v Law Society of British Columbia*** [1989] 1 S.C.R. 143 **App. Auth. Tab 67** has been used authoritatively by Courts around the world:

> "...In ***Andrews***, the Supreme Court of Canada held that the primary purpose of section 15 was to prevent discrimination on the grounds listed in section 15(1) or on grounds analogous to those listed." *Brink v. Kitshoff* (1996) 6 B.C.L.R. 752 (C.C.) (South African Constitutional Court) **[Joint Book of Authorities of the Interveners " App. Int. Auth."** para 38 & 43]
>
> "...it is clear from the authorities that equality does not mean exactly equal in all respects. In ....***Andrews***...the Canadian Court dealt as follows with the concept of equality... [quoting McIntryre J.]" *Matinkinca v. Council of State* (1994) 1 B.C.L.R. 17 (C.k.) (Supreme Court of South Africa) **App. Int. Auth.** para 54 & 55
>
> "...Not all distinction is discrimination. One must look to the basis for differentiation and also whether the differentiation gives rise to detrimental treatment. This was explained by McIntrye J. in ***Andrews***...., a decision which dealt with the equality rights guaranteed under the Canadian Charter of Rights and Freedoms..." *P. & P. & Legal Aid Commission of New South Wales* May 3, 1995 (Family Ct. of Australia) **App. Int. Auth.** para 105 affirming a substantive equality approach.
>
> "...It follows that as McIntyre J. said in ***Andrews***...the concept of equality is an 'elusive concept', the duty of the Court is to construe human rights legislation in such a way as will best promote that goal, and to carry out its task 'sensibly and broadly', not 'pedantically or rigidly'." *Coburn v. Human Rights Commission* [1994] 3 NZLR 323 (High Ct. Auckland) **[App. Int. Auth.]**
>
> "Applying the principles in ***Andrews***...there was no discrimination against the Appellant on the basis of any of the enumerated heads in s. 15(1) nor on the basis of any other irrelevant personal characteristic analogous thereto." *Ebber & Ebber v. The*

Human Rights and Equal Opportunity Commission (1993) Federal No. 183\95 (Federal Court of Australia - Queensland District) **App. Int. Auth.** para 73.

"...However in ***Andrews***...the Canadian Supreme Court limited the application of s. 15, the equality provision of the Charter." *El-Al, The Israeli Airlines Ltd. v. Danilowitz* May 4, 1994 (Israeli Supreme Court) rejecting the similarly situated test **App. Int. Auth.**

5. ***Schachter v. Canada*** [1992] 2 S.C.R. 679 **App. Auth. Tab 86** has also has become internationally authoritative. In dealing with the appropriate remedy in a case of denial of employment benefits to a homosexual partner, in Lead Opinion, Vice Chief Justice Barak wrote,

> "This remedy is known in certain legal systems as an 'extension of the text' or as 'reading" in'.... The Supreme Court of Canada took the same path, by using the "reading in" rhetoric [cites to ***Schachter v Canada*** .... " *El-Al, The Israeli Airlines Ltd. v. Danilowitz* May 4, 1994 (Israeli Supreme Court) **[App. Int. Auth.]**

6. Further Canada's international responsibilities oblige Her to enact domestic legislation protecting Canadians from discrimination on the basis of sexual orientation. Canada became a signatory to the International Covenant on Civil and Political Rights in 1976. Section 26 states that:

> "All persons are equal before the law and are entitled without discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

While "sexual orientation" is not expressly enumerated the United Nations Human Rights Committee (UNHCR) has interpreted "sex" to encompass "sexual orientation".

> *Toonen v Australia* cite No. 488/1992 Communication from the UNHRC United Nations, 50th Session; 31 March 1994.) **[App. Int. Auth.]**
>
> See also *Brown v. Commissioner For Superannuation* (May 15, 1995) (Administrative Appeals Tribunal - Gen. Div.) Melbourne **[App. Int. Auth.]**

7. This interpretation is consistent with the case law of the European Court of Human Rights.

Harell , A. David Ben Gurion Scholar, Hebrew University, Israel **[App. Int. Auth.]**

Dudgeon v. United Kingdom [1981] 4 E.H.R.R. 149 **[App. Int. Auth.]**

Norris v. Ireland [1988] 13 E.H.R.R. 186**[App. Int. Auth.]**

While these E.H.R.R. cases are not civil right cases but focus on challenging criminalization of sexual acts, they constitute the first judicial steps in recognizing full "equality". In Israel , a Judaic country, the Knesset has legislated protection on the basis of sexual orientation:

> "The Equal Employment Opportunity Act ("Act") 1992 was revised such that discrimination in employment relations on the basis of sexual orientation and marital status was explicitly prohibited....In the summer of 1993 the Israeli Defense Force regulations were changed and discrimination based exclusively on the sexual orientation of the soldier was prohibited. Accordingly, sexual orientation no longer may be used to exclude soldiers from access to special information, or from jobs that require access to such information." Harell , A. **[App. Int. Auth.]**

8. Many jurisdictions have passed legislation expressly prohibiting discrimination on the basis of sexual orientation.

> Wintemute, R. Sexual Orientation and Human Rights 1995 Clarendon Press, Oxford, Appendix 2 p.265-267 **[App. Int. Auth.]**
>
> *Charter on Sexual Harassment in the Workplace* 1991 European Parliament (resolution expressly protects homosexuals from discrimination in employment) see Sanders, D. "Getting Lesbian and Gay Issues on the International Human Rights Agenda" 1996 Human Rights Quarterly Vol 18 p. 67 at 82 **App. Int. Auth.** See generally pp. 78-84.

Such legislative action reflects growing international acceptance of the rights of homosexuals to live their lives free from discrimination .

> *Baehr v. Lewin* (1993) 74 Haw. 530, 852 P.2d 44 (Haw. S.Ct.) **App. Int. Auth.** the marriage law requiring opposite sex marriage was held to be discriminatory on the basis of "sex" and subject to "strict scrutiny" under Hawaii's constitution.
>
> See Sanders, D. "Getting Lesbian and Gay Issues on the International Human Rights Agenda" 1996 Human Rights Quarterly Vol. 18 p. 67 at 71 & generally pp. 70-73 **App. Int. Auth.** listing major states that have decriminalized sexual activity
>
> *Breaking the Silence* (Feb. 1997) Amnesty International , London, England (a report documenting and rejecting the international persecution of homosexuals)

The stance taken by the international community in protecting Human Rights is relevant to Charter analysis, particularly s. 1. *Taylor v. Canadian Human Rights Commission* [1990] 3 S. C. R. 892 Dickson C.J. **App. Int. Auth**

9. It is interesting to note that the dissenting Justice in *El-Al, The Israeli Airlines Ltd. v. Danilowitz* **App. Int. Auth.** used biblical references in responding to submissions advocating a substantive equality model. In this case, Mr. Justice McClung has used the same approach in distancing himself from ***Andrews***. Such an approach is wholly inappropriate for our secular multicultural society.

2. Foreclosure Of Private Civil Action - Impact On Homosexual Albertans Is Discriminatory

> "Legislatures, including the Parliament of Canada, need not, and do not enter every morally- eruptive social controversy and attempt to resolve it by statutory remedy. The experience of government has shown that many of the day's major social conflicts may well find their own level of community resolution in time without legislative, let alone needless, judicial, prod as the acceptance of wider social mores within Canadian society continues...." **(Case** at 241) (Emphasis Added)

13. With respect, Mr. Justice McClung, is wrong. This case arises out of the need for fair treatment of a disenfranchised group of Canadians: Albertans of homosexual orientation. Canadians across the country and in neighboring provinces have legal recourse for discrimination on the basis of sexual orientation; i.e. in British Columbia or Saskatchewan. Albertans who are homosexuals or Albertans who are perceived to be homosexuals have no legal recourse to redress discrimination. It is well accepted that in Human Rights Law discrimination upon a perceived ground constitutes discrimination.

> See *Biggs* v. *Hudson* (1988), 9 CHRR D/5391 (B.C.H.R.C.) or Quebec (Comm. des droits de la personnel) c. Ville de Montreal (1994) C.H.R.R. 22 D/325 (Trib. Que.)

14. Heterosexuals have successfully challenged discrimination on the grounds of perceived homosexuality.

> *Re: Walsh* as reported in *Melbourne Star Observer* No. 348 10 Jan. 1997 p. 4 reported at http:\\www.labyrinth.net.au:80\~dba\di961012.html (GayLawNet) where a man was awarded $1.2 million U.S.D. by an American jury after he was fired because he was believed to be homosexual.

There are also cases wherein heterosexuals have been fired for not being homosexual.

> Eaton, M. "Lesbians, Gays and the Struggle for Equality Rights" (Spring 1994) V. 17 The Dalhousie Law Journal 130 at 180 **App. Int. Auth.**

15. There exists no private tort of discrimination. Human Rights Legislation forecloses civil action based directly upon a breach thereof and any common law action based upon an invocation of the public policy expressed in the Code.

190 *Seneca College of Applied Arts & Technology v. Bhadauria* [1981] 2 SCR 181 *Alpaerts v. Obront* (1993) 45 CCEL 218 (Ont. Gen. Div.)] **App. Int. Auth.** Discrimination complaints must be pursued through the administrative machinery of the Human Rights Commission.

See Alberta Human Rights Commission Complaint Procedure, Appendix "D" Human Rights Law in Canada, Chotalia , S. Carswell Thompson 1995 **App. Int. Auth.**

The result of a lack of access by persons discriminated against upon the grounds of "sexual orientation" to the Alberta Human Rights Commission and to the civil courts is that such persons have no legal redress for discrimination and have no legal forum to test their

200 complaints of discrimination. Such absolute denial of legal remedy constitutes discrimination within the meaning of s. 15. IRPA provides the sole legal mechanism to redress discrimination faced by Albertans in both the private and public sectors. Without the aid of legislative mechanisms to redress discrimination homosexual Albertans are deprived of this avenue of **"community resolution".**

16. The Crown has improperly characterized this case as placing "religion" and fairness for homosexual Albertans on a "collision course". **Resp. Factum** p.29 This case is not about whether Vriend's homosexuality conflicts with the views of King's College. Such evidence only becomes relevant once Vriend obtains the right to legally pursue his claim of discrimination. Then King's College will be able to raise religion as a defence in two manners:

210
- Argue that heterosexuality is a Bona Fide Occupational Requirement [s. 7(3) IRPA] for a Christian College;

- Argue that terminating a homosexual teacher is "reasonable & justifiable" discrimination [s. 11.1 IRPA]

17. Such a defence was raised in *Caldwell v Stuart* [1984] 2 S. C. R. 603 **App. Int. Auth.** wherein this Court held that a teacher could be terminated for marrying a divorced man

contrary to the Roman Catholic faith. Such termination constituted a BFOQ (BFOR) for a Roman Catholic School.

3. Choice Attracts Charter - Facial Neutrality

19. The choice to provide legal redress to some Albertans and not to others is a legislative exercise depriving some Albertans of the "protection of the law" and the "benefit of the law". The "protection" and "benefit" of the law is not accorded equally to Albertans. The government has been neither neutral nor silent:

> "The Human Rights Commission was intended from the very beginning to be independent of the government, an autonomous body." Peter Lougheed, Former Alberta Premier, "Equal in Dignity and Rights" **App. Int. Auth.**

> "On December 5, 1992 the Commission of the day made a decision to investigate complaints of discrimination brought by gays and lesbians on the basis of sexual orientation. The government immediately by Ministerial order vetoed that decision. In a letter addressed to the executive director the Minister directed the staff of the Commission not to investigate these complaints." "Equal in Dignity and Rights"**App. Auth. Tab 26** p. 71 (emphasis added)

20. The Minister by-passed the Commission and wrote to the Commission's Director in an URGENT memorandum:

> "Following the recent proposal on sexual orientation by the Human Rights Commission, please make it clear to public service staff of the Commission...that they should not work on sexual orientation complaints until such time as we have clarification of the various legal issues involved..." **App. Int. Auth.** (emphasis added)

21. **This Ministerial directive interfered with the Commission's direction to its staff to process these complaints**. The Commission, Albertans and ACLA expressed concerns about the government's interference with the Commission. These concerns were examined and documented in "Equal in Dignity and Rights" which report commissioned an independent legal opinion from the Dean of Law , University of Alberta. Dean Christian stated,

> "I have concluded that the IRPA does call for a separation of functions between the Minister and the Commission,..." *Accountability to the Legislature* p. 34 - 38 & Appendix "C" **App. Int. Auth.**

22. This Court has ruled that cabinet decisions come within the meaning of s. 32 and are subject to Charter scrutiny.

> "The Court's jurisdiction to review governmental actions is not affected by the fact that the actions involve matters of a political or foreign policy nature. *Operation Dismantle Inc. v. The Queen* [1985] 1 S.C.R. 441" **App. Int. Auth.**

> "Depending upon the context, the enactment of a permissive provision may indeed support a finding of governmental approval or encouragement of a particular activity sufficient to invoke the protective guarantees of the Charter." *Lavigne v. Ontario Public Service Employees Union* [1991] 2 SCR 211 81 DLR (4th) at p. 247-248 Wilson J. & L'Heureux-Dube J (Emphasis Added)

Section 32 of the Charter is engaged by the government's discriminatory conduct both in its repeated refusal to include sexual orientation in the IRPA and in its obstruction of the Alberta Human Rights Commission.

4. Section 15 Analysis

a. Charter And Human Rights Laws Are "Filial"

23. Human Rights Laws and s.15 of the Charter are "filial".

> Chotalia, S. " Case Comment: The Vriend Decision: *A Case Study in Constitutional Remedies In the Human Rights Context*" **App. Int. Auth.**

Thus the government's obstructive actions towards IRPA and its administration demand a greater level of Charter scrutiny than they would have vis a vis ordinary legislation.

24. Both Charter law and Human Rights Laws have primacy over other laws. IRPA ss. 1(1) & 1(2) expressly provide that IRPA has primacy over other provincial laws unless there is an express declaration to the contrary in other legislation. This Court has repeatedly espoused the "fundamental importance" of Human Rights Laws, and their "near constitutional nature".

> *Battlefords and District Co-Operative Ltd. v. Gibbs* [1996] S.C.J. No. 55 at para.18 *Insurance Corporation of British Columbia v. Heerspink* (1982) 3 CHHR D/1163 at D/1166 (SCC); *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd; Robichaud v. Brennan* [1987] 2 S.C.R. 84 at 88-90; *Canadian National Railway Co. v Canada* (Canadian Human Rights Commission) [1987] 1 S. C. R. 1114 at 1132-1138

25. Human Rights Laws , though not entrenched, are akin to constitutional laws. They incorporate certain basic goals of our society. The essence of Human Rights Laws, like the Charter, is found in the principles and values that they embody, rather than in the specific grounds that they enumerate.

> "... It is recognized in Alberta as a fundamental principle and as a matter of public policy that all persons are equal in dignity and rights..." Preamble of IRPA

> "... the values of equality and multiculturalism are enshrined in ss. 15 and 27 of the Charter .... These Charter provisions indicate that the guiding principles in undertaking the s. 1 inquiry include respect and concern for the dignity and equality of the individual and a recognition that one's concept of self may in large part be a function of membership in a particular cultural group. *Taylor v. Canadian Human Rights Commission* [1990] 3 S. C. R. 892 Dickson C.J. **App. Int. Auth**

Taylor demonstrates that the values of self-worth and equality (S. 15) and multiculturalism (S. 27) are so fundamental that they may supersede freedom of expression.

26. Charter laws and Human Rights Laws are intertwined in their development and nature. The pivotal definition of discrimination as utilized in s.15 analysis was imported from Human Rights jurisprudence. The earliest drafts of the Charter were merely versions of the Canadian Bill of Rights.

> Bayefsky, A. & Eberts, M. Equality Rights and the Canadian Charter of Rights and Freedoms 1985 Carswell Co. Ltd. (Toronto) Chapt. 1 **App. Int. Auth.**

McIntyre J. in dealing with the meaning of "discrimination", asks,

> "What does discrimination mean? The question has arisen most commonly in a consideration of the human rights Acts and the general concept of discrimination under those enactments has been fairly well settled. There is little difficulty, drawing upon the cases in this Court, in isolating an acceptable definition...." *Andrews v. Law Society of British Columbia* **App. Int. Auth.** p. 306

Section 15 analysis continues to borrow from Human Rights decisions.

> In *Symes v. Canada* ((1993) 110 D. L. R. 470 at 552 Iacobucci J. wrote:
>
> "Fortunately, in both *Andrews* and the present case, this court has been able to access a rich jurisprudence associated with human rights legislation. The concept of "discrimination" within s.15(1) of the Charter has been informed by this jurisprudence, and McIntyre J.'s definition of the term in *Andrews* is proof of the its utility." **App. Int. Auth.**

Miron v. Trudel [1995] 2 S.C.R. 418

Reciprocally, Human Rights jurisprudence is the symbiosis of Charter jurisprudence. In *Brooks v. Canada Safeway Ltd.* [1989] 1 S.C.R. 1219 at pp. 1243-1245 **App. Int.** Dickson C.J.C. writing for a unanimous Court over-turned *Bliss v. A.G. Canada* [1979] 1 S.C.R. 183 through reliance on both Human Rights and Charter jurisprudence, particularly *Andrews*.

27. The objectives of both Human Rights Laws and Charter laws are aimed at eradicating civil libertarian violations. S. 15 of the Charter expressly addresses discrimination. Professor Hogg points out in his constitutional law text:

> "The **real threat to egalitarian civil liberties in Canada comes** not from legislative and official action, but **from discrimination by private persons** - employers, trade unions, landlords, Realtors, restaurateurs and other suppliers of goods or services. The economic liberties of freedom of property and contract, which imply a power to deal with whomever one pleases, come into direct conflict with egalitarian values..." Hogg, P. Constitutional Law of Canada 2ed. (Carswell 1985) at 786(Emphasis Added)

Both Human Rights Laws and Charter laws are concerned with the effect of discriminatory act and not with the intent or purpose of the act.

> *Andrews v. Law Society of British Columbia* **App. Auth. Tab 67**
> *Robichaud v. Brennan* [1987] 2 S.C.R. 84 & *Bhinder v. C.N.R.* [1985] 2 S. C. R. 561

28. The legal analysis and defences in Human Rights Laws and Charter laws are similar.

> *Ontario (Human Rights Commission)* v. *Etobicoke (Borough) [1982]* 1 S. C. R. 202
>
> "The onus of proving discrimination is upon the complainant on a balance of probabilities. Once the complainant has established a prima facie case of discrimination he or she is entitled to relief in the absence of justification by the Crown. Even if the Crown provides justification it is open to the complainant to show that the explanation is pretextual. Once the complainant establishes a prima facie case, the onus then moves to the Crown to establish a bona fide occupational requirement (BFOR) in the case of direct discrimination. To constitute a BFOR a limitation must be imposed honestly, in good faith, and in the sincerely held belief that such a limitation is imposed in the interests of the adequate performance of work involved with all reasonable dispatch, safety and economy, and not for ulterior or extraneous reasons aimed at defeating the objectives of Human Rights Laws." (Emphasis Added)

29. In *Dickason* v *The Governors of the University of Alberta,* [1992] 2 S.C.R. 1103 this Court held that the s.11.1 defence in the IRPA should be interpreted akin to the s. 1 Charter defence

as outlined in *Oakes* but with a measure of flexibility. Thus even the onus of proof between the two is similar as noted by Cory J. at p. 1121 **Resp. Auth. Tab 24** The Charter applicant must establish a prima facie case of a Charter violation, and then the onus shifts to the Crown to justify the breach pursuant to s. 1. Although the s.1 analysis is a further step required to justify discriminatory law or conduct, in practice it is akin to the step generally required to be met by Respondent in a Human Rights complaint to establish a specific defence.

b. Meaning Of Equality

i. DENIAL OF LEGAL PERSONHOOD

30. Not only does the Alberta government deny homosexual Albertans the legal and enforcement mechanism available to other groups of Albertans in need of the same, but also does the government deny homosexual Albertans legal personhood:

> "The government's denial of personhood by denying legal recourse may be even more painful than the initial act of hatred." *R. v. Zundel* [1992] 2 S.C.R. 731 at 808 (S.C.C.). Cory & J. Iacobucci quoting Prof. Mari Matsuda

Equality is not merely a formal or substantive principle. It is a structural one. Equality is chiefly a principle of non-degradation.

> "...the overarching purpose of the equality guarantee in the Charter [is] **to prevent the violation of human dignity and freedom** by imposing limitations, disadvantages or burdens through the stereotypical application of presumed group characteristics rather than on the basis of individual merit, capacity or circumstance" *Miron v. Trudel* [1995] 2 S.C.R. 418 at p. 486 McLachlin J. **App. Auth. Tab 66** (Emphasis Added)

> "...at the heart of s. 15 is the promotion of a society in which all are secure in the equal knowledge that they are **recognized at law as equal human beings**, equally capable and equally deserving." *Egan v. Canada* [1995] 2 S.C.R. 513 at 545 L'Heureux Dube, J. **App. Auth. Tab 64** (Emphasis Added)

> "The basic and revolutionary idea of *Brown v. Board of Education* ...[that] the segregation of blacks from whites is necessarily an **unequal treatment of blacks because it is humiliating to blacks... inequitable treatment is the holding of members of a group in lesser moral regard, as less than full human beings, by virtue of their group membership alone**." Mohr, R. "The Perils of Postmodernity for Gay Rights"_D.C.J.L.J. Vol. 8 No.1 Jan **App. Int. Auth.** 1995 p.5 at 12 (Emphasis Added)

31. A meaningful model of must recognize the social, cultural, economic, biological realities of the disenfranchised group and the subordination and violation of the dignity of the group. Personhood and the rights that flow from it must be acknowledged independently of any normative criteria imposed by the dominant group.

> Lahey, Kathleen "Still Not 'Persons' Yet: Gender, Sexuality, and Race in Canada" 1996 **App. Int. Auth.**
>
> "That those who bear children and benefit society as a whole thereby should not be economically or socially disadvantaged seems to bespeak the obvious. It is only women who bear children; no man can become pregnant." *Brooks v. Canada Safeway Ltd.* Dickson C.J over-ruling *Bliss* **App. Auth. Tab 72** at 1243
>
> *Romer v. Evans* 116 S.Ct. 1620 (1996) **App. Auth. Tab 75** wherein the Court linked personhood directly with constitutional guarantees & human rights codes prohibitions in private sector discrimination.

ii. THE PROMISE OF SECTION 15

32. S. 15 guarantees constitute a commitment to equality for future generations of Canadians. In *Andrews* this Court unanimously affirmed,

> "It is consistent with the constitutional status of s. 15 that it be interpreted with sufficient flexibility to ensure 'the unremitting protection' of equality rights in the years to come." *Andrews* [1989] 1 S.C.R. 143 at 324 **App. Auth. Tab 67** cited in *Miron v. Trudel* by McLachlin J. at 494 **App. Auth. Tab 66**
>
> *Benner v. Canada* (1997) S.C.J. 26 (purposive equality model used: son of a Canadian mother was allowed to claim sex discrimination on the basis of discrimination against his mother)
>
> *The Brant County Board of Education and the Attorney General for Ontario* v. *Eaton* [1996] 142 D.L.R. (4th) 385

33. "Accommodation of differences --- is the true essence of equality". This Court in *Eaton* has acknowledged that the purpose of s. 15(1) of the Charter is not only to prevent discrimination based on stereotypes,

> "...but also to ameliorate the position of groups within Canadian society who have suffered disadvantage by exclusion from mainstream society as has been the case with disabled persons". p. 405

In the same manner, homosexual Albertans have been excluded from legal redress mechanisms available to the heterosexual community.

> "Exclusion from the mainstream of society results from the construction of a society based solely on "mainstream" attributes to which disabled persons will never be able to gain access. The blind person cannot see and the person in a wheelchair needs a ramp. ... It is the failure to make reasonable accommodation, to fine-tune society so that its structures and assumptions do not result in the relegation and banishment of disabled persons from participation, which results in discrimination against them. The discrimination inquiry which uses "the attribution of stereotypical characteristics" reasoning as commonly understood is simply inappropriate here. It may be seen rather as a case of reverse stereotyping which, by not allowing for the condition of a disabled individual, ignores his or her disability and forces the individual to sink or swim within the mainstream environment. It is recognition of the actual characteristics, and reasonable accommodation of these characteristics which is the central purpose of s. 15(1) in relation to disability". Sopinka J. Para 62-63 pp. 405-406 (Emphasis Added)

Similarly, Vriend cannot be denied access to a hearing based upon the prejudicial views of some Albertans and some Alberta politicians.

iii. HISTORY OF HUMAN RIGHTS JURISPRUDENCE

35. This substantive and purposive model of "equality" is consonant with the historical legal, social and political framework of Canada.

Explicit Facial Discrimination:

36. Historically government acts of discrimination were explicit. (See ACLA Appendix 1 listing a number of explicitly discriminatory Canadian statutes **App. Int. Auth.**) The Courts were reluctant to strike down discriminatory provisions. (See ACLA Appendix 2 listing a number of judicial decisions wherein Canadian courts refused to strike down the discrimination.) **App. Int. Auth.** The "morally-eruptive controversies" included the following issues: Are women "persons"? *Re Meaning of Word 'Persons'* [1928] S.C.R. 276 Can provinces deny the franchise based on race? *Cunningham v. Tomey Homma* [1903] A.C. 151 (J.C.P.C.) Can land be restricted from transfer to "Jewish, Hebrew, Semitic, Negro, or [persons of] coloured race or blood"? *Nobel & Wolf v. Alley* [1951] S.C.R. 64.

Discrimination - Adverse Impact, Implicit, Systemic

"Equality must be meaningful". This is the unanimous ruling of this Court in *Eaton*. Today most direct legislative discrimination has been expunged from Canadian laws. But Canada cannot yet claim to have evolved into a truly egalitarian society. For example, while *R. v. Edwards* removed the barriers preventing women from being Senators, fifty percent of Senatorial seats are not yet held by women. Equality is not to be denied by a fixed rule or formula. Consideration must be given to the content of the law, to its purpose, and its impact upon those to whom it applies, and also upon those whom it excludes from its application.

> "...the main consideration must be the impact of the law on the individual or the group concerned." *Andrews v. Law Society* (Emphasis Added)
>
> Wilson J. emphasized that this determination is to be made not only in the context of the law which is subject to challenge "...but rather in the context of the place of the group in the entire social, political and economic fabric of our society." The constitutional protection of equality rights, she stated, "is designed to protect those groups who suffer social, political and legal disadvantage in our society."

37. Discrimination may be direct or adverse.

- Charter decisions: *Andrews*; *R. v. Big M. Drug Mart* [1985] 2 S.C.R. 295; *Symes v. Canada* [1993] 4 S.C.R. 695
- Human Rights: *Brooks*; *Bhinder*; *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd.*

38. Discrimination may be explicit or implicit. Indeed, J. O'Leary in Vriend confirms that adverse effect of legislation violates s. 15 of the Charter **Case** 284 at 285 & **Crown Factum** p. 10.

39. Discrimination may be systemic.

> *Eaton* (accommodation & systemic discrimination: society is structured so as to exclude full participation by certain segments of society)

The concept of "indirect" discrimination has been recognized by the U.S. Supreme Court in the case of *Griggs v Duke Power Company* 401 U.S. 424 (1971). This case dealt with Title VII of the Civil Rights Act of 1964, and related to employment criteria which operated to disqualify Black applicants at a substantially higher rate than white applicants. The Court held

that an absence of discriminatory intent or motive did not prevent the criteria in question from amounting to prohibited discrimination.

40. Section 15 protects Canadians from discrimination, in all of its forms. While, historically, direct discrimination needed to be addressed by Courts, today indirect discrimination and systemic discrimination must be eradicated. The greatest harm to the civil liberties of Canadians today is from facially neutral legislation that has a discriminatory impact. It prevents Canadians from contributing fully to Canadian society The courts are empowered and obligated to curb discriminatory behavior by governments in all of its forms.

> ".... the courts should not stand idly by in the face of a breach of human rights in the Code itself, as occurred in *Blainey*." *McKinney v. University of Guelph* [1990] 3 S.C.R. 229 at 318 La Forest J. **[App. Auth. Tab 70]**

There is no meaningful difference between the discriminatory statutory exemption in *Blainey* and the omission in this case.

> "under inclusion may be simply a backhanded way of permitting discrimination" Dickson J. in *Brooks v. Canada Safeway Ltd.*

c. The "Mirror" Misnomer

41. Alberta's promise of statutorily affirming an egalitarian society through IRPA cannot be broken in a discriminatory fashion. The Crown argues that if this Court allows this appeal, all Human Rights legislation must automatically "mirror" s. 15. This position is false and misleading.

42. Constitutional analysis of sections 15 and 1, and appropriate constitutional remedy, is complex and contextual. It examines varying historical, legal and social conditions and balances protected rights with legitimate governmental objectives. Some examples wherein the within case, if successful, will not be instructive are as follows:

> E.G. "criminal record" (as contained in some jurisdictions such as Yukon Territories Human Rights Act, R.S.Y. 1986) This Court may or may not rule that "criminal record" constitutes an analogous ground, may or may not find that it constitutes discrimination, may or may not find a s.1 violation, may or may not read in "criminal record" into IRPA

E.G. "political belief" (as contained in some jurisdictions such as Yukon Territories Human Rights Act, R.S.Y. 1986) Again this Court may or may not rule that "criminal record" constitutes an analogous ground, may or may not find that it constitutes discrimination, may or may not find a s.1 violation, may or may not read in "criminal record" into IRPA

E.G. "citizenship" (again detailed analysis required)

Each of these cases must be litigated on its own merits within the context of the facts of each case. Given the "filial" relationship between section 15 and Human Rights Legislation, certain ground may be read into s. 15, but not all. In Vriend's case we are speaking of "core" rights that potentially pose grave and immediate risks to human existence, let alone dignity. Vriend has been deprived of his right to earn a living. If exclusion form a government benefit constitutes discrimination as in *Egan*, than surely denial of remedy for employment discrimination is also discriminatory.

43. Further, if the Court does, in the future, read in a new ground into IRPA, the result would simply be that the defined group would obtain a forum to legally complain of discrimination. For example, if "citizenship" were read in, a non-citizen could allege discrimination on this ground, and could use the IRPA for mediation, investigation, or adjudication of the complaint. The private sector will be entitled to raise defences of justification (s.7(3) & s.11.1) So, for example, in the case of a bar association denying admission to law graduates on the basis of "criminal record", the bar association may urge that their admission policies are reasonable. Similarly, university refusal to fund students who are non-citizens may be found to be reasonable discrimination (s. 11.1).

44. It should be noted, that Human Rights statutes already include grounds not yet ruled to be s. 15 analogous grounds. (e.g.: "native spirituality" in the Human Rights and Citizenship Act). Incremental expansion of IRPA grounds does not shield the legislature from ardent s.15 scrutiny.

45. Finally given the "filial" relationship, it is appropriate for Human Rights statutes to evolve with the development of s. 15 jurisprudence. Such development is logical and consistent with Canadian values and ideals:

> "It can be anticipated that the discreet and insular minorities of tomorrow will include groups not recognized today. It is consistent with the constitutional status of s. 15

that it be interpreted with sufficient flexibility to ensure the "unremitting protection" of equality rights in the years to come." *Andrews* Wilson J.

46. We as Canadians must constantly evaluate, assess and re-assess our Human Rights Laws and legislation to overcome discrimination. We must transform the lofty dreams of an egalitarian society into reality. We cannot do so without the aid of this Court.

5. Legislative Deference

"The Charter...was expressly framed so as not to apply to private conduct. It left the task of regulating the cause of human rights in the private sector to the legislative branch. This invites a measure of deference for legislative choice....this 'should lead us to ensure that the Charter doesn't do through the back door what it can't do through the front door" *McKinney* at 318 La Forest J. **App. Auth Tab 70**

47. ACLA submits that the inverse questions are in order:

- **Should Alberta be able to discriminate on the basis of a prohibited ground indirectly through omission when it cannot do so directly?**
- **Should the private sector be given a free reign to discriminate because of the discriminatory conduct of the Alberta government?**

48. In balancing competing interests, one cannot act unconstitutionally. While *McKinney v. University of Guelph*, **[App. Tab 70]** permits balancing it does not advocate an imprudent , rash, illegitimate approach; i.e. it does not justify the termination of Jewish professors in the guise of "balancing competing interests" between Jewish persons and anti-Semitic persons. Similarly, in this case, there is a clear demarcation between conferring benefits and recognizing "fundamental" or "core" rights. Mr. Justice Sopinka in *Egan v. Canada* [1995] 2 S.C.R. 513 at 576 **[App. Auth. Tab 64]** differentiates between Human Rights legislation and legislation that "extend(s) the benefits contained in some 50 federal statutes".

49. Unmistakably, it is this Court's duty to rule on the constitutionality of the omission.

"[reading in] does not in any way impinge on Parliament's prerogative to choose amongst constitutionally valid policy options in enacting legislation which conforms to the requirements of the Charter." Heald J. A. *Schacter v. Canada* (1990) 66 D.L.R. (4th) 635 at 651 (Fed. C.A.)

Legislative deference is respected in the very fact that Alberta will retain final control over the legislation:

- Alberta may subject the entire scheme to a notwithstanding clause pursuant to s. 33 of the Charter. *Ford v. Quebec* A.G. [1988] 2 S.C.R. 712, 54 D.L.R. (4th) 577
- Alberta may subject certain grounds to constitutional exemptions pursuant to s. 33;
- Alberta may repeal the entire statute;

Governments will then face the political ramifications of their actions.

6. Remedy - " Reading In"

50. This Court must unequivocally affirm the supremacy of Human Rights Laws to illegitimate exercise of legislative power.

> Chotalia, S. *" Case Comment: The Vriend Decision: A Case Study in Constitutional Remedies In the Human Rights Context"* **App. Int. Auth.**

51. Analysis of precision, legislative objective and safety for purposes of remedy must be cognizant of the special nature of Human Rights legislation. Generally constitutional remedy in under inclusive legislation should be predicated upon the "twin guiding principles" of respect for the role of the legislature and also the giving of effect to the purposes of the Charter. *(Schachter)*. However, legislative intent does not provide constitutional guidance with respect to remedy.

> "How is a court to determine whether extension of under inclusive legislation respects the role of the legislature? Any remedy, whether extending or striking down legislation will depart from the actual intent of the legislature. In the absence of an express severability clause, courts should focus on respect for the role of the legislature and not rely on fictional attributions of legislative intent." Roach, Constitutional Remedies in Canada 1994, Canada Law Book Inc. p. 14-53 (Emphasis Added)

In the case at bar the IRPA has a pressing and substantive objective but the omission does not.

> "A legislative limitation which controverts the very principle it purports to embody is not a legitimate exercise of the legislative power for the attainment of a desirable social objective which would warrant overriding constitutionally protected rights." Hunt J. citing Russell J. **Case on Appeal Tab 32** p. 324.

52. *Schacter* is the only case of this Court which can be similarly classified: i.e. the *Unemployment Insurance Act 1971* was found to have pressing and substantive objectives, but the omission of benefits for natural parents was found to be discriminatory. Yet reading in was held not to be appropriate for two reasons: it was not in keeping with Parliamentary intent, nor with budgetary considerations. *Schacter* is distinguishable from the case at bar. Here Human Rights Legislation is violating the Charter: reading-in is required to give homosexual Albertans a forum to attack unfairness and discrimination.

53. Doubtlessly, striking down of legislation is no more deferential to legislative role than reading in: striking down of validly enacted Human Rights scheme will be detrimental to Albertans. It is not in keeping with the special and fundamental nature of Human Rights legislation. Krever, J.A. in Haig & Birch wrote:

> "....it is surely safe to assume that Parliament would favour extending the benefit of s. 3(1) of the Act to homosexual persons over nullifying the entire legislative scheme....enlightened human rights legislative policy has evolved in this country. It is now an integral part of our social fabric. It is therefore inconceivable to me that Parliament would have preferred no human rights Act over one that included sexual orientation...." (Emphasis Added)

In this case, the Legislature is awaiting a decision of this Court for relief. The government of Alberta has firmly acknowledged the role the Supreme Court in deciding whether sexual orientation should be included in the IRPA:

> **"This recommendation will be dealt with through the current court case *Vriend v. Her Majesty the Queen in Right of Alberta and Her Majesty's Attorney General in and for the Province of Alberta."* App. Auth. Tab 27** "Our Commitment to Human Rights: the Government's Crown to the recommendations of the AHRRP" **App. Auth. p. 21.**

54. The unassailing struggle of disenfranchised minority groups for legal personhood and freedom is part of the democratic process and is not an attempt to subvert it.

> "...constitutional supremacy (including the Charter) was imposed upon the legislators by the legislators, after a full airing in the political arena, the media and the Courts." Heald J. *Schacter v. Canada* (1990) 66 D.L.R. (4th) 635 at 649 (Fed. C.A.)

55. This Court would not overstep its bounds by affirming the fundamental commitments and aspirations of Canadians. A fortori reading in is the least intrusive option in this case. It is consistent with the spirit of IRPA . Lord Denning said:

> "You need have no fear. The Judges...have always in the past and always will be vigilant in guarding our freedoms. Someone must be trusted. Let it be the judges." *"Misuse of Power"* (1981) 55 Australian Law Journal 720 at 726.

Such a violation by Human Rights Laws of the principles of its "sister" Charter legislation cannot be upheld as a legitimate legislative exercise.

56. Granting Vriend his requested remedy is reasonable. It is legally and morally sound. It is consistent with Canada's international obligations. It is complementary to Canada's international reputation of fairness both in practice and in jurisprudence. It is incumbent upon this Court to translate Canadian principles into reality: Canada and this Honourable Court will be judged by the manner in which they treat such vulnerable Albertans. While Canadians have made equitable strides, Nelson Mandela's eloquent words are both instructive and inspiring:

> "When I walked out of prison, that was my mission, to liberate the oppressed and the oppressor both. Some say that has now been achieved. But I know that is not the case. The truth is that we are not yet free; we have merely achieved the freedom to be free, the right not to be oppressed. We have not taken the final step of our journey, but the first step on a longer and even more difficult road. For to be free is not merely to cast off one's chains, but to live in a way that respects and enhances the freedom of others. The true test of our devotion to freedom is just beginning." (Emphasis Added)
>
> Long Walk to Freedom 1995 Little, Brown & Co. U.S.A. Chap 51 p. 624-625

PART IV - NATURE OF THE RELIEF SOUGHT

WHEREFORE the Intervener ACLA prays that Vriend's Appeal be allowed in all respects and that the Crown's cross-appeal be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 12 DAY OF MAY, 1997.

SHIRISH P. CHOTALIA
PUNDIT & CHOTALIA
SOLICITOR FOR THE INTERVENER,
ALBERTA CIVIL LIBERTIES ASSOCIATION

TABLE OF AUTHORITIES

CASES