S.C.C. File No. 24395

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM 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 DIGNITÉ FOR GAY CATHOLICS AND SUPPORTERS

Appellants
(Applicants)
(Respondents on 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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PART I - FACTS

1. This Intervener accepts the facts as set in the Appellants' factum at paragraphs 1 - 6.

PART II - POINTS IN ISSUE

2. This Intervener agrees with the submissions made in the Appellants' factums on all issues, and in particular the submissions to the effect that the *Canadian Charter of Rights and Freedoms* ("*Charter*") is applicable, and is violated by the omission of sexual orientation from the *Individuals' Rights Protection Act*, R.S.A. 1980, 1980 c. I-2, as amended (now the *Human Rights Citizenship and Multiculturalism Act*, S.A. 1996, c. H-11.7) ("*IRPA*"). However, this Intervener will chiefly address the issues relating to s. 1 of the *Charter* and to remedies. This Intervener's position on the latter issues is:

- The omission of sexual orientation from the *IRPA* is not justified by s. 1 of the *Charter* because it is not "prescribed by law".
- The omission of sexual orientation from the *IRPA* does not meet either the "pressing and substantial objective" test or the "proportionality" test under s. 1 of the *Charter*.
- The appropriate remedy in this case is to read "sexual orientation" into the *IRPA*.

PART III - ARGUMENT

A. INTRODUCTION

(a) This Intervener

3. This Intervener, the Alberta and Northwest Conference of The United Church of Canada ("Alberta and Northwest Conference") is the governing body of The United Church of Canada ("United Church") in Alberta, Northeastern British Columbia, the Northwest Territories and Yukon, and has oversight of the religious life of the United Church within those bounds. The United Church is a part of The Church of Christ in Canada, which was formed in 1925 by the union of The Presbyterian Church in Canada, The Methodist Church, and The Congregational Churches, pursuant to an agreement, *The Basis of Union*, which is incorporated into *The United Church of Canada Act*, S.C. 1924, c. 100, s. 26 as Schedule "A". **[Authorities of Interveners in Support of Appeal]**

4. The United Church is the largest Protestant church in Canada, with approximately 740,000 members in Canada, involving approximately 575,000 households. The Alberta and Northwest Conference has approximately 60,000 members in 340 congregations, involving over 50,000 households in Alberta, Northeastern British Columbia, the Northwest Territories and Yukon. **[Affidavit of George Rodgers filed, December 16, 1996 in support of Application for leave to intervene]**

5. The *Basis of Union* sets out the doctrinal roots of the United Church. It includes the following statements:

> "Doctrine
>
> ...we build upon the foundation laid by the apostles and prophets, Jesus Christ Himself being the chief cornerstone. We affirm our belief in the Scriptures of the Old and New Testaments as the primary source and ultimate standard of Christian faith and life. We acknowledge the teaching of the great creeds of the ancient church. We further maintain our allegiance to the evangelical doctrines of the Reformation, as set forth in common in the doctrinal standards adopted by The Presbyterian Church in Canada, by The Congregational Union of Ontario and Quebec, and by The Methodist Church."

Further, Article 2-14, of the *Basis of Union* affirms that

> "We believe that the moral law of God, summarized in the Ten Commandments, testified to by the prophets and unfolded in the life and teachings of Jesus Christ, stands forever in truth and equity, and is not made void by faith, but on the contrary is established thereby."

6. The highest governing body of the United Church is the General Council, which includes amongst its powers "in general to enact such legislation and adopt such measures as may tend to promote true godliness, repress immorality, preserve the unity and well-being of the Church, and advance the kingdom of Christ throughout the World." Section 24(1) *Basis of Union*. **[Authorities of Interveners in Support of Appeal]**

7. The second highest governing bodies in the United Church are the Conferences, of which there are thirteen.

(b) United Church Position on Homosexuality and Discrimination Based on Sexual Orientation

8. Since 1981, both the General Council and the Alberta and Northwest Conference have, on at least seven different occasions, gone on record as condemning discrimination against homosexual persons and/or calling for inclusion of sexual orientation in human rights legislation as a prohibited ground of discrimination. These policies, resolutions and public statements have all been founded upon scholarly interpretations of Christian scriptures, and their application to daily life. **[Affidavit of George Rodgers filed, December 16, 1996 in support of Application for leave to intervene]**

9. In 1988, the 32nd General Council issued a new statement, entitled "Membership, Ministry and Human Sexuality" (the "Statement"), which reaffirmed the important role of marriage to a Christian way of life, and which acknowledged the ongoing debate surrounding a Christian understanding of sexuality, including homosexuality. The Statement declares that "all persons, regardless of their sexual orientation, who profess faith in Jesus Christ and obedience to Him, are welcome to be or become full members of the United Church and would be eligible to be considered for ordination". Further, the Statement urges "all levels of government in Canada to guarantee and ensure that the human rights of their gay and lesbian inhabitants are fully protected by law." **[Exhibit C, Affidavit of George Rodgers filed, December 16, 1996 in support of Application for leave to intervene]**

10. The Alberta and Northwest Conference has specifically called for the inclusion of sexual orientation in Alberta's human rights legislation in 1981, 1991, and 1993. This has included making submissions to the Alberta Human Rights Review Panel which issued its report, *Equal in Dignity and Rights* in 1994 **[App. Auth., Tab 26]**. **[Affidavit of George Rodgers filed, December 16, 1996 in support of Application for leave to intervene]**

B. THE RIGHT: *CHARTER* IS APPLICABLE, AND OMISSION OF SEXUAL ORIENTATION FROM *IRPA* VIOLATES *CHARTER*

11. This Intervener submits, for the reasons set out in the Appellants' factums, on Appeal and Cross-Appeal, that sexual orientation is an analogous ground of distinction under s. 15 of the *Charter*; that the *Charter* applies to the matters in dispute herein, and that the *IRPA* is in violation of s. 15 of the *Charter* because it does not include "sexual orientation" or a synonymous term, among the grounds of discrimination prohibited by that Act. This is discrimination on the basis of sexual orientation. It is not geographic discrimination, however, since the *IRPA* applies to the entire geographic area over which the Alberta Legislature has jurisdiction.

C. THE DEFENCE: OMISSION NOT JUSTIFIED BY S. 1

12. This Intervener will focus its submissions on the contention of the Respondent that the omission of "sexual orientation" from *IRPA* is a "reasonable limit ... prescribed by law ... demonstrably justified in a free and democratic society," within the meaning of s. 1 of the *Charter*.

13. It is submitted that the proper place to consider any balancing of competing rights or values is under s. 1 of the *Charter*. That is what is proposed here. To the extent the Court considers it appropriate to consider the "relevance" of distinctions drawn under s. 15 of the *Charter*, the analysis set out below is also applicable to that exercise.

(a) Section 1 Not Available Because Limit Not "Prescribed"

14. Section 1 of the *Charter* is, by its own terms, applicable only to limits that have been "prescribed by law." Section 1 is not applicable to justify the omission of sexual orientation from the *IRPA* because the omission is not "prescribed".

15. Deriving from Latin words that mean "written in advance", the term "prescribed" is defined in part as: "to lay down a rule ... to lay down as a guide, direction, or rule of action ... to

specify with authority...." *Webster's New Collegiate Dictionary*, (G. & C. Merriam Co.: Springfield, 1975) p. 910 **[Authorities Of Interveners In Support Of Appeal]**.

16. Any limit on a *Charter* right that is sought to be justified under s. 1 must be authoritatively and unequivocally articulated in advance of its application: *R.* v. *Therens* [1985] 1 S.C.R. 613 **[Authorities Of Interveners In Support Of Appeal]**.

17. Professor Hogg suggests that the "prescribed" requirement:

> "...reflects two values that are basic to constitutionalism or the rule of law. First, in order to preclude arbitrary and discriminatory action by government officials, all official action in derogation of rights must be authorized by law. Secondly, citizens must have a reasonable opportunity to know what is prohibited so they can act accordingly."
>
> P.W. Hogg, *Constitutional Law of Canada*, 3d ed., (Supp.) 1994 - Rel. 1, p. 35-12: **[Authorities Of Interveners In Support Of Appeal]**

18. While it is not always essential for a "prescribed" limit to be express, so long as it is necessarily implied, *R.* v. *Thomsen* [1988] 1 S.C.R. 640, p. 650-651: **[Authorities Of Interveners In Support Of Appeal]**, the authorities leave no doubt that a limit will not be necessarily implied unless it satisfies *both* of the values identified by Professor Hogg: (a) authoritative formulation as "law"; and (b) articulation with sufficient clarity that citizens can confidently "act accordingly."

19. The omission of sexual orientation from the grounds of discrimination prohibited by the *IRPA* does not satisfy *either* of those requirements:

(i) **Not Law.** The omission of sexual orientation from the *IRPA* is not "law" for the simple reason that it has never been the subject of a decision by the Alberta Legislature. The Respondents' claim in their factum that: "The Alberta Legislature has decided not to expand the basic protections of the *IRPA*" (para. 56) is wrong. While it may be true, as the Respondents state, that the *Minister* decided against including sexual orientation, (para. 57) the Minister is not the *Legislature*. It may also be true that the Minister's expressed reason for introducing the 1990 amendment changing "sex" to "gender" was to distinguish between "a biological characteristic and ... an activity" (Resp. factum, para. 58); but even if the Legislature shared that reason, which there is now way of knowing, the change has no

necessary implication for the question of sexual *orientation*, since sexual orientation (whether homosexual or heterosexual) exists entirely independently of sexual *activity*. Opposition members have introduced amendments proposing the inclusion of sexual orientation; but, as the Respondents' factum admits, (para. 59) no such amendment has ever been voted upon by the Legislature. In short, the Alberta Legislature has *never* been asked to decide whether sexual orientation should be added to or excluded from the *IRPA*. The Respondents' factum underlines this fact by describing the Alberta situation as one of "neutral silence" (para. 81).

10 **(ii) Not Clearly Articulated.** The requirement that *Charter* limits under s. 1 be "prescribed" by law means that they must be expressed with sufficient clarity and certainty to enable citizens to understand and act in accordance with their rights and obligations. A "neutral silence" does not satisfy that requirement. Consider the position of an employer or restaurant operator in Alberta; or of their employees and customers. Can an Alberta employer refuse to employ someone because of that person's sexual orientation? Can an Alberta restaurateur refuse to serve someone for that reason? If the employer or restaurateur, or the discriminated employee or customer, asked their respective lawyers that question, the answer they would receive today, or at any time since 1985, would probably be something like:

20

> "Well, the legislation doesn't prohibit discrimination based on sexual orientation, but the *Charter* does, and there is both judicial and academic authority indicating that the *Charter* requires the prohibition to be read into the legislation. The Alberta Court of Queen's Bench has supported that position, but it has been rejected by a majority of the Alberta Court of Appeal, and the matter is now under appeal to the Supreme Court of Canada. So it's hard to say what the current legal situation is."

Such advice would not give Alberta citizens "a reasonable opportunity to know what is
30 prohibited so that they can act accordingly," to borrow Professor Hogg's words.

(b) No "Pressing and Substantial Objective"

20. Those who seek to justify a *Charter* violation under s. 1 must prove, by a preponderance of evidence, that the limit, even if "prescribed by law," has an objective that is "pressing and substantial": *R.* v. *Oakes* [1986] 1 S.C.R. 103 at 138-139. **[Authorities of Interveners in Support of Appeal]**. The Respondents have not done so.

21. **(i) Overall Objective of Legislation Not Sufficient.** The Respondents are mistaken in suggesting (para. 75 and 76) that they need only demonstrate the pressing and substantive purpose of the *IRPA as a whole*. It is the "*limits*" to *Charter* rights, not the *legislation* in which they happen to be found, that s. 1 requires to be proved "reasonable" and "demonstrably justified in a free and democratic society". This Court's remarks about "objective" in *Oakes* make that clear at 138-139:

> "[T]he objective, which the measures responsible for a *limit* on a *Charter* right or freedom are designed to serve, must be 'of sufficient importance to warrant overriding a constitutionally protected right or freedom'.... It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important." (emphasis added) [**Authorities of Interveners in Support of Appeal**].

22. It is true, as the Respondents' factum states (at para. 75) that in *Egan* Mr. Justice Iaccobucci (in dissent) restricted his analysis to the objective of the benefit scheme, rather than to that of the impugned exception or limit to that scheme. (In doing so, it should be pointed out, Iaccobucci J. adopted the approach of Linden J.A., who dissented in the Court below **[Resp. Auth., Tab, 25, para. 184]**, who in turn merely accepted the Appellant's "concession" that the objective of the scheme was pressing and substantial **[Resp. Auth., Tab 25, para. 189]**). The Respondents are also correct in stating, in the same paragraph, that Madame Justice McLachlin accepted, in *Miron*, the pressing and substantial nature of the overall goal of legislation, an exemption from which she held on behalf of this Court to be unconstitutional **[Resp. Auth., Tab 33]**.

23. Neither the *Egan* case nor the *Miron* case assists the Respondents, however. The reason for that is that although a s. 1 defence can be *defeated* (as in *Miron*, and as in the *Egan* dissent) by destroying only *one link* in the chain of justification (objective, rational connection, minimal impairment or overall proportionality); it can only be *established* by proving *every link* in the chain. Thus, while it was open to the majority in *Miron*, and to the dissenters in *Egan*, to ignore the "objective" of the limit in question, since they were able to defeat s. 1 on "proportionality" grounds; that approach is not open to the Respondents in the present case, who must satisfy *all four* requirements of the *Oakes* test.

24. The only "pressing and substantial objective" that the Respondents have asserted expressly is that which underlies the *IRPA* as a whole. That objective is unacceptable for the

foregoing reasons. Implicit in the Respondents' submissions, however, are three other possible objectives, which will be addressed next, and will all be shown to be insufficient to satisfy s. 1.

25. **(ii) "Mediation" Between "Religious Beliefs And Homosexuality" Unacceptable.** The Respondents submit that: "The *IRPA* is the kind of social policy legislation that requires the Alberta Legislature to mediate between competing groups" (para. 80); and that "the real competing groups here are...: religious beliefs and homosexuality." (Para. 74). This cannot be a "pressing and substantial objective" justifying the omission of sexual orientation from the *IRPA* for at least three reasons.

26. *First*, it is not "homosexuality" that is in issue here; it is the omission from Alberta's human rights legislation of protection against discrimination based on "sexual orientation". While homosexual persons comprise the largest group injured by that omission, the term "sexual orientation" includes *both* heterosexual and homosexual leanings, and its inclusion in human rights legislation protects persons of both orientations. *Johnston* v. *Rochette* (1982), 3 C.H.R.R. D/1133 (Que.) [**Authorities of Interveners of Support of Appeal**]. The addition of "sexual orientation" to the prohibited grounds of discrimination under the *IRPA* would be no more about "homosexuality" than the present inclusion of "religion" is about "Christianity", or "Judaism", or any other particular religion.

27. *Second*, it is not reasonable for a law, a legislature or a government to pursue an objective that places "religious beliefs" in opposition to either the prohibition of discrimination based on sexual orientation or homosexuality.

28. No church, and certainly no government, can claim to speak for all "religious beliefs", or even for the beliefs of all Christians, in Canada or in Alberta. No doubt there is much debate within Christian communities about appropriate Christian attitudes and positions on the issue of homosexuality. Some who disapprove of homosexual orientation point to the Bible (Old and New Testament) as the source of their position. Others, however, find no clear condemnation of homosexual orientation in the Bible; but do find a message of love and tolerance embracing all humanity. As the United Church, the largest Protestant Church in Canada, has come to understand, accept and respect homosexual persons, it has been constantly guided by its understanding of the Bible. See the policies, resolutions and

public statements of the General Council and the Alberta and Northwest Conference referred to above. See also:

> John Boswell, *Christianity, Social Tolerance, and Homosexuality* (1980, University of Chicago Press) chp. 4, "The Scriptures", chp. 10, "Social Change", and chp. 12, "Conclusions". **[Authorities of Interveners in Support of Appeal]**

29. The United Church is not alone among Canadian churches in its view of this subject. Bishops of the Anglican Church have recently voiced tolerant views about sexual orientation. The Catholic Church has also spoken out against discrimination based on a person's sexual orientation.

> *Anglican News Service*, "Bishops surveyed on changing guidelines for ordaining homosexual persons", April 25, 1997 **[Authorities of Interveners in Support of Appeal]**.
>
> Alberta Human Rights Review Panel, *Equal in Dignity and Rights: A Review of Human Rights in Alberta* (Edmonton, December 1995), at p. 74 **[App. Auth., Tab 26]**.

30. The assertions made by some Interveners at the Alberta Court of Appeal that Christians are opposed to homosexuality, and consider it immoral, represent only the views of those Interveners. They do not speak for all Canadian Christians, and they certainly do not speak for the United Church.

> Amended Factum of the Intervener before the Alberta Court of Appeal, Alberta Federation of Women United for Families, para. 88 **[Authorities of Interveners in Support of Appeal]**

31. To assert, as the Respondents seem to, that prohibiting discrimination on the basis of sexual orientation is opposed to religious beliefs, is to align the Alberta government with the religious beliefs of those Interveners; and it cannot be a "reasonable" objective in Canada's "free and democratic society" for a law, a legislature, or a government to align itself with the religious beliefs of any particular religious group.

32. *Third*, "freedom of religion" does not support the omission. In fact, to the extent that the omission is based on religious considerations, it *violates* freedom of religion.

33. This Court has spoken on the meaning of freedom of religion and its importance in a free and democratic society, *R.* v. *Big M Drug Mart Ltd.* [1985] 1 S.C.R. 295 at 336 [**App. Auth., Tab 82**].

> "The essence of the concept of freedom of religion is the right to entertain such beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hinderance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination."

Recognizing sexual orientation as a prohibited ground of discrimination in the *IRPA* would in no way impede or detract from anyone's right to entertain, declare, manifest or practice their religion.

34. On the other hand, to permit discrimination of the basis of sexual orientation because of the religious beliefs of a particular segment of the community would violate the fundamental freedom of religion of those who do not share the religious beliefs of that particular segment.

35. In purporting to juxtapose the constitutional rights of certain religious groups against the constitutional rights of gays and lesbians, the Respondents adopt a stance that rights are a "zero sum game": that recognizing the right of gays and lesbians not to be discriminated against on the basis of their sexual orientation somehow removes rights from certain religious groups. This represents a false understanding of the nature of constitutional rights and freedoms. The protection of human rights and freedoms is not a zero sum game. At a constitutional level, the fundamental freedoms and equality guarantees are guaranteed to *all* Canadians. By identifying grounds upon which Canadians cannot be discriminated against, the courts are not privileging some Canadians over others. Rather they are recognizing the diversity of Canadians, as s. 27 of the *Charter* directs, and treating all Canadians equally, as s. 15 of the *Charter* directs.

36. Recognizing sexual orientation in the *IRPA*, in accordance with *Charter* requirements, would in no way diminish the guarantees of freedom of religion in s. 2(a) or the right not to be discriminated against on the basis of religion in s. 15. It would merely require those members of religious groups who oppose that recognition to respect and observe the constitutional rights of others, without affecting their own rights, or their own religious beliefs or practices.

Grant et al. v. *Canada (AG) et al.* (1995) 184 N.R. 346 (F.C.A.) at 348, and (1994) [1995] 1 F.C. 158 (T.D.) at 201,202. **[Authorities of Interveners in Support of Appeal]**

37. If there are persons or groups who believe that being prevented by law from discriminating on the basis of sexual orientation would somehow offend their religious scruples, those persons or groups are not able to object on grounds of religious freedom for two reasons: (a) the prohibition against so discriminating would be a "trivial or insubstantial" interference with their religion; and (b) it would be a "reasonable limit" under s. 1 of the *Charter*: *Jones* v. *The Queen* [1986] 2 S.C.R. 284 **[Authorities of Interveners in Support of Appeal]**.

38. Further, the characterization of religious freedom versus sexual orientation assumes that gays and lesbians do not have religious beliefs. It ignores the many homosexual persons who are Christians, or who are of other religious orientations, who find harmony between their sexual orientation and religious beliefs. See excerpts of articles from *the OtherSide: Christians and Homosexuality* 1984 **[Authorities of Interveners in Support of Appeal]**.

39. To the extent that there *may* be a competition between the right to freedom of religion and the right not to be discriminated against on the basis of sexual orientation, which this Intervener denies, the *IRPA* itself already contains a mechanism for reconciling those competing values. The *IRPA* has two sections which address the need to find the proper balance between such private rights: s. 7(3), which provides a defence for discrimination in the employment situation, for instance, on the basis of a *bona fide* occupational requirement; and s. 11.1 which permits a contravention of the *IRPA* to be justified if it was "reasonable and justifiable in the circumstances."

IRPA **[Appellants' Authorities, Tab 1]**.

40. These two justification provisions in the *IRPA* permit a balancing of competing rights to occur on a case-by-case basis in specific factual contexts. In the case at bar, we are not yet at the stage of balancing these competing rights. In the case at bar, only *threshold* questions are being asked: (1) Do the *Charter* guarantees of equality require the *IRPA* to protect from discrimination on the basis of sexual orientation?; and (2) If yes, is the exclusion of sexual orientation demonstrably justified in a free and democratic society?

Mere recognition of sexual orientation in the *IRPA* at this threshold level would not prevent a person against whom the *IRPA* is invoked relying on s. 7(3) or s. 11.1 where he or she consider it appropriate to do so.

41. When considering the Respondents' position regarding the relationship between homosexuality and religion, it is useful to consider an analogous situation: the possible "conflict" between freedom of religion and the freedom not to be discriminated against on the basis of sex or race. Recognizing the constitutional equality of women, or of blacks, in no way diminishes the constitutional freedoms of religious groups, even if it is a tenet of that religion that women or blacks are not entitled to equal status.

42. Further, it must be remembered that the constitutionally guaranteed rights and freedoms are not unlimited. Freedom is subject to limitations necessary to protect, among other things, "the fundamental rights and freedoms of others." *R.* v. *Big M Drug Mart Ltd.* [1985] 1 S.C.R. 295 at 337 [**App. Auth., Tab 82**]. If freedom of religion were considered to be limited by recognition of sexual orientation in the *IRPA*, then it would be a reasonable limit, a limit imposed so as to protect the fundamental freedoms of others — gay and lesbian Canadians. *Ross* v. *New Brunswick School Division No. 15* [1996] 1 S.C.R. 825, p. 878-879.

43. The notion of "mediation" is, in any event, misplaced in the present context. This is not a case, as suggested by Respondents (para. 71-74) where the Legislature was mediating between two competing groups. The reasonableness standard *only* applies when a Legislature has made a policy choice to mediate between competing groups based on competing social science evidence. *McKinney* v. *University of Guelph* [1990] 3 S.C.R. 230 at 305-309 per LaForest J. **[Resp. Auth., Tab 32]** See also *Irwin Toy Ltd.* v. *Quebec* [1989] 1 S.C.R. 927 **[Resp. Auth., Tab 30]**; *RJR-McDonald Inc.* v. *Canada (AG)* [1995] 3 S.C.R. 199 **[Resp. Auth., Tab 41]**; *Edwards Books and Art Ltd.* v. *The Queen* [1986] 2 S.C.R. 713 **[Resp. Auth., Tab 26]**.

44. The Respondents cite the reasons of LaForest J. in *RJR-MacDonald* v. *Canada (A.G.)* [1995] 3 S.C.R. 199 at 277 **[Resp. Auth., Tab 41]** in support of their "mediation" proposition. Besides the fact that LaForest J. was writing in *dissent* on s. 1, it is also important to note that the policy-making which he considered better left to the Legislature

involved compiling and assessing social science evidence, mediating between competing social interests and protecting vulnerable groups. This is not the type of situation involved in the case at bar. [***Case on Appeal*, Hunt J.A., at 328, 329**]

45. What are the competing interests that the Legislature is supposedly mediating between? In *Irwin Toy* it was advertisers versus young children; in *McKinney* it was universities versus professors of retirement age; in *RJR McDonald* it was the tobacco companies versus the Canadian population susceptible to injury from tobacco, especially younger vulnerable Canadians. In this case, there is no such competition. Two groups can admittedly be identified — members of certain religious groups on one hand, and persons susceptible to sexual orientation discrimination on the other — but what is the common social question in respect of which their interests conflict? It cannot be religion, as pointed out above. Is it the right to discriminate? Surely not. And even if the two groups did both have legitimate conflicting interests, how could it be "mediation" to favour one of the competing groups *totally*?

46. **(iii) Deference to Legislature re "Policy Choices" and "Extending Social Benefits" Misplaced.** There is no doubt that the Court must consider the factual and social context of the *IRPA*, but the contextual approach does not reduce the obligation of the Respondents to meet the s. 1 test, as they seem to suggest, (para. 72-73). *RJR-McDonald* v. *Canada (AG)*[1995] 3 S.C.R. 199, per McLachlin J. at 331-333. **[Resp. Auth., Tab 41]**.

47. Mr. Justice LaForest himself noted that "Courts are specialists in the protection of liberty and the interpretation of legislation." in *RJR-MacDonald* v. *Canada (A.G.)* [1995] 3 S.C.R. 199 at 277 **[Resp. Auth., Tab 41]** In that context he was speaking about liberty in the criminal law. This case is about protection of civil liberties, and this too is an area where the courts are specialists.

48. Human rights legislation is all about protecting, promoting, and enhancing dignity of and liberty for individuals. Human rights legislation has a special place in Canadian law as a fundamental law that is nearly constitutional in status. See for instance: *Winnipeg School Division No. 1* v. *Craton* [1985] 2 S.C.R. 150 at 156; *Robichaud v. Brennan* [1987] 2 S.C.R. 84 at 89-91; *Canadian National Railway Co. v. Canada (Canadian Human Rights*

Commission [1987] 1 S.C.R. 1114 at 1134-1136; *McKinney* v. *University of Guelph* [1990] 3 S.C.R. 230, at 413-4 [**Resp. Auth., Tab 32**].

49. When the courts are asked to balance a claim of an individual against the interests of society at large, they are not balancing between two competing groups. Society at large is represented by the *state*. Therefore the courts are mediating the relationship between the individual and the state, which is the very task mandated by constitutional law. It is whether the *state* may choose, advertently or inadvertently, not to protect sexual orientation in the *IRPA* that is the issue. McClung J.A. found that the Alberta government chose to exclude sexual orientation from the *IRPA*, because that was the will of a majority of Albertans. [**Case on Appeal, McClung J.A. at 251, 260**] If so, this is a situation where the will of the majority is being expressed through the *state*. This is precisely the type of situation where courts are best equipped to judicially review the actions of the state against the standard of the *Charter*.

Belczowski v. Canada ([1992] 2 F.C. 440 (F.C.A.) at 451-452 [**Authorities of Interveners in Support of Appeal**]

50. **(iv) Deference To Provincial Jurisdiction on Federalism Principles Inappropriate.** A requirement of the s. 1 analysis is to determine which values of Canada's free and democratic society are relevant to the dispute in question. Some of those values include "respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals in society." *R.* v. *Oakes* [1986] 1 S.C.R. 103, p. 136 [**Authorities of Intervener in Support of Appeal**]. There is no doubt that federalism is also a fundamental principle of Canadian democracy that must be considered (P.W. Hogg, *Constitutional Law of Canada*, 3d ed., (Supp.) 1992, p. 35-29 [**Authorities of Intervener in Support of Appeal**]). However, there is also no doubt that, at least since 1985, an equally fundamental principle and value of Canadian democracy has been equality. Determining the proper balance between equality and federalism principles must be done on a case-by-case basis, in the proper context. It would be untenable to argue that equality principles must *always* give way to federalism principles. Indeed, because the *Charter* is applicable to *both* the federal and provincial orders of government, it will be a rare occurrence when there is any conflict between the *Charter* and principles of federalism.

51. The Respondents' submission could be construed to suggest that considerations of federalism justify, in the present case, the "pressing and substantial objective" of establishing *Charter* compliance standards for Alberta that differ from *Charter* compliance standards in other parts of Canada. It is submitted that federalism does not justify variable levels of *Charter* protection across the country.

52. At issue here are the substantive guarantees of equality before and under the law, and equal protection and equal benefit of the law without discrimination based on sexual orientation: *Egan v. Canada* [1995] 2 S.C.R. 573 **[App. Auth., Tab 64]**. The purpose of s. 15 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 the individual: *Miron* v. *Trudel* [1995 2 S.C.R. 418, per Mclachlin J. at 486-7. **[App. Auth., Tab 66]** See also R. v. *Turpin* [1989] 1 S.C.R. 1296 at 1333. **[App. Auth., Tab 69]** There is no reason to believe that this essential core purpose or value of equality in the *Charter* should be manifested differently in different parts of the country. The notion of "equality for some" is not reconcilable with the concept of a "free and democratic society". One instance of this core equality value must be protection from discrimination on the basis of sexual orientation. A person's sexual orientation goes to the very essence of who he or she is. Recognizing and accepting an individual and her or his sexual orientation is vital to recognizing the essential dignity of each individual. To not do so, in the view of the United Church, and in law, would be to deny individuals the opportunity to be whole persons: *Egan* v. *Canada* [1995] 2 S.C.R. 513, per Cory J. at 600-601 **[App. Auth., Tab 64]**. To say that he or she may be whole in some parts of Canada, but not in others, would be unacceptable.

53. It is submitted, in short, that while federalism is designed to foster a measure of social variation and diverse legislative experimentation from province to province, such variations and experimentation must take place within the ambit permitted by the *Charter*. Section 1 can be used to justify a wide range of province-to-province variations in the *implementation* of *Charter* rights, but no province may, except by an "opt-out" clause enacted under s. 33, ignore a *Charter* right altogether. That would not be reasonable in our free and democratic society.

(c) No "Rational Connection"

54. No rational connection could possibly exist between the only objective ("protection of human rights") identified as such by the Respondents' factum, (para. 76) and the omission of sexual orientation from the *IRPA*. It would be nonsensical to say that the "protection of human rights" is served in any way by the *omission* from the protective legislation of protection for an important vulnerable group.

55. While rational connections can be found between such omission and the other possible objectives listed above by this Intervener (though not specified by the Respondents), it has been explained above why none of those possible (and unclaimed) objectives is operable.

(d) No "Minimal Impairment/Proportionality"

56. The Respondents seem to suggest in their factum (para. 16) that there is a hierarchy of rights between the listed and analogous grounds set out in s. 15 of the *Charter*. They suggest that a requirement that the *IRPA* include "not only the grounds enumerated in s. 15 of the *Charter* but also the analogous grounds, is one which improperly allows 'the Charter to do through the back door what it clearly can't do through the front door'." The implication, presumably, is that the impairment caused by the violation of an analogous ground somehow impairs *Charter* rights only minimally, proportionally less than if listed grounds were involved. If this is the conclusion intended, it is submitted that it is fallacious.

57. The fact that sexual orientation has been recognized as an analogous ground, rather, than a listed ground, under s. 15 of the *Charter* does not imply that discrimination on that basis is less serious than discrimination on the basis of listed criteria. Listed and analogous grounds are of equal importance under s. 15 because they both reflect the same underlying need to protect "the dignity of each human being" from discrimination. One's dignity is no less affronted by discrimination based on one's sexual orientation than by discrimination based on sex, age or national origin. The significance of s. 15's inclusion of both listed and analogous grounds is simply that because of the limited foresight of constitutional and legislative drafters, coupled with the limitless ingenuity of potential malefactors, the categories of prohibited discrimination can never be closed: *Miron* v. *Trudel* [1995] 2

S.C.R. 418, per McLachlin J.A. at 494 and 495; see also 486-7, 492, 496-7 **[App. Auth., Tab 66]** This potential for the growth of s. 15 is essential because since "human rights continue to emerge from the human experience." *McKinney* v. *University of Guelph* [1990] 3 S.C.R. 229, per LaForest J.A., at 295 **[Resp. Auth., Tab 32]**.

58. The discussion of "minimal impairment" in the Respondents' factum (paras. 80-82) makes only two arguments: (a) that "If sexual orientation ought to be added, the *IRPA* would have to be restructured in order to respect and reflect the social values of Albertans"; and (b) that "An *IRPA* that is silent as to sexual orientation best meets the minimal impairment test". It is submitted that neither contention satisfies the "minimal impairment" requirement.

59. As to the alleged need for the legislation to be "restructured":

- This proceeding seeks a judicial "reading in" of "sexual orientation" to the *IRPA* which, if granted, would require no additional legislative action unless the Legislature chose to take such action; and
- The inconvenience that might be experienced by a Legislature as a result of its failure to respect the constitutional rights of a group of citizens has nothing to do with "minimal impairment". The "impairment" in question is that of *citizens' rights*, not of the *government's convenience*.

60. As to the alleged "neutral silence":

- The silence is not "neutral", since it totally denies the rights of those who are vulnerable to discrimination based on sexual orientation, and totally fulfills the wishes of those who are opposed to such protection; and
- The "silence", if interpreted as the Respondents urge, has the same devastating impact on such persons — leaving them entirely open to discrimination — as if the legislation contained an express exemption for sexual orientation.

61. In short, the Respondents have not even asserted, much less demonstrated, any persuasive considerations relevant to the "minimal impairment" requirement. This Intervener submits

that the impairment, being both total and unjustified, cannot be described as "minimal" by any plausible stretch of the English language.

62. The final component of the *Oakes* test — "proportionality" in the sense that the impairment, even if necessary to accomplish the objective, is excessive in relation to the importance of the objective — has not even been addressed by the Respondents. This Intervener submits that the harm resulting from the deprivation for many people of protection from discrimination on the ground of sexual orientation, is out of all proportion to the questionable benefit of satisfying the intolerant beliefs or irrational fears of a small sector of Alberta society.

(e) Respondents Have Not Met Their Onus of Proof

63. Under a s. 1 analysis, the person upholding the validity of the impugned law has the onus of proof. In this case this means the Respondents. The Respondents tendered no evidence to support or justify the "social policy" decision they claim to have made.

[Case on Appeal, per Russell J. (as she then was) at p. 202; Hunt J.A, at 321-322, 327, 328, 329]

For that reason above, it is submitted that even if all the foregoing arguments of this Intervener were mistaken, the Respondents would have failed to meet the onus which s. 1 imposes upon them of proving that it is "reasonable" in a "free and democratic society" to permit discrimination on the basis of sexual orientation.

D. REMEDY

64. This Intervener supports the request of the Appellants for the remedy of "reading in" sexual orientation into the *IRPA* as set out in para. 104-128 of the Appellants' factum. If the Court finds unjustified discrimination, it is this Intervener's submission that the remedy of reading in should be granted for four reasons: (a) legal precedent supports the remedy of reading in; (b) the special nature of human rights law supports the remedy of reading in; (c) *Charter* values and Canadian social values that pre-date the *Charter* support the remedy of reading in; and (d) there is no fair practical alternative to the remedy of reading in.

65. The Appellants have carefully reviewed the legal precedents for reading in, and we will not repeat that analysis. We would only add that the issue of reading sexual orientation into human rights legislation has been considered in an *obiter dictum* by a member of this Court. In *Canada (A.G.) v. Mossop* [1993] 1 S.C.R. 544, **[Authorities of Interveners in Support of Appeal]**, Chief Justice Lamer for the majority, in commenting on the absence of a *Charter* challenge against the *Canadian Human Rights Act*, said the Court was confined to an exercise in statutory interpretation. He noted, however, at p. 582:

> "If the effect of the legislation is in violation of the *Charter*, and a challenge of the constitutionality is made before the courts, *then the courts are commanded under s. 52 of the Constitution Act, 1982 to declare the section inoperative or to amend it when permissible along the lines set out in Schacter, as did the Ontario Court of Appeal in Haig.*" (emphasis added)

It is submitted that a proper *Charter* challenge has been made in this case, and the *IRPA* ought to be amended as suggested above.

66. A second consideration is the special quasi-constitutional nature of human rights law: para. 48 above. While human rights law governs private activity, it is public legislation. It is, at its core, concerned about protecting the essential dignity and self-worth of individuals. These are the core values of the *Charter* as well. To leave the *IRPA* with a gap that denied protection to the dignity and worth of a very vulnerable group of individuals to whom *Charter* protection extends would be inconsistent with *IRPA*'s quasi-constitutional status.

67. Third, the values that underlie the *Charter*, many of which pre-date its enactment, must be honoured. *Hill v. Church of Scientology* [1995] 2 S.C.R. 1130 1169-1172 **[Authorities of Interveners in Support of Appeal]**. Since pre-*Charter* times, civil liberties, protection of the inherent dignity of individuals, and respect for diversity and dignity have been fundamental values in Canadian society. *Reference re: Alberta Legislation* [1938] S.C.R. 100; *Saumur v. Quebec (City)* [1953] 2 S.C.R. 299 **[Authorities of Interveners in Support of Appeal]**. These values are both reflected in and strengthened and reinforced by the *Charter*. Failure to include sexual orientation in the *IRPA* would dishonour those values.

68. Fourth, there is no fair and practical alternative to reading in, since striking down the *IRPA*, or striking out other grounds of discrimination, with or without a period of

suspension, would reduce rather than enlarge human rights protection in Alberta, given the determination of the Respondents, evident throughout this litigation, not to prohibit discrimination based on sexual orientation.

PART IV - NATURE OF RELIEF REQUESTED

69. This Intervener supports the order for relief requested by the Appellants.

10 ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 23rd day of May, 1997, by counsel for the Intervener, Alberta and Northwest Conference of the United Church of Canada.

Dale Gibson

Ritu Khullar

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PART V - AUTHORITIES

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