Court File No. 25285

IN THE SUPREME COURT OF CANADA
(Appeal from the Court of Appeal for the Province of Alberta)

BETWEEN:

DELWIN VRIEND and GALA-GAY AND LESBIAN AWARENESS SOCIETY OF EDMONTON AND GAY 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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PART I - THE FACTS

1. The Women's Legal Education and Action Fund ("LEAF") offers no comment on the facts.

PART II - THE ISSUES

2. There are four issues in this appeal:

(a) Does the legislative exclusion of "sexual orientation" in the *Individual's Rights Protection Act*, R.S.A. 1980, c.I-2, as am., now called the *Human Rights, Citizenship and Multiculturalism Act*, R.S.A. 1980, c.H-11.7 (the "*IRPA*" or the "*Act*") attract constitutional review pursuant to s. 32 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*")?

(b) If so, does the decision of the Alberta Government (the "Government") not to include "sexual orientation" as a prohibited ground of discrimination in the Preamble and ss. 2(1), 3, 4, 7(1), 8(1), 10 and 16(1) of the *IRPA* violate the guarantee of equality contained in s.15 of the *Charter?*

(c) If so, is the violation of s. 15 demonstrably justified as reasonable limit pursuant to s. 1 of the *Charter?*

(d) If not, what remedy should the Court order to redress the constitutional violation?

PART III - ARGUMENT

A. INTRODUCTION

3. LEAF submits that the deliberate exclusion of "sexual orientation" protection in the *IRPA* is an unconstitutional act of the Alberta legislature, the effect of which is to completely deny lesbians protection from discrimination contrary to s.15(1) of the *Charter*. This violation has not been and cannot be justified under s.1 of the *Charter*. The only constitutional remedy for the infringement consistent with this Court's substantive approach to the *Charter*'s equality guarantees is to read "sexual orientation" into the aforementioned provisions of the *IRPA*.

4. LEAF has intervened in this appeal to ensure that lesbians and lesbian inequality are and remain visible in the legal determinations before this Court, so that gender neutral reasoning is not applied to the analysis or remedy with respect to inequalities which are not gender neutral in their effects.

5. LEAF seeks to highlight the particular discriminatory effects on lesbians of the Government's refusal to extend human rights to lesbians in light of the restrictive approach to the interpretation of prohibited grounds of discrimination now embedded in human rights jurisprudence. In LEAF's submission, the substantive defects of the "watertight compartment" approach to prohibited grounds of discrimination become visible when lesbians and lesbian inequality become visible.

6. LEAF submits that constitutional redress for the discriminatory effects on lesbians of the wholesale exclusion from human rights protection in the province of Alberta must be responsive to inequalities based on sex, as well as race, religion, disability, place of origin, and those based exclusively on sexual orientation.

B. SECTION 32 OF THE *CHARTER*

7. The repeated, deliberate decision of the Government to codify the purported "preference of the Alberta electorate" by steadfastly refusing to prohibit sexual orientation discrimination in Alberta is a "matter" within the authority and control of the Alberta legislature within the meaning of s. 32.

Respondents' Factum on Cross-Appeal at paras. 3-7 and 53

10 D. Pothier, "*Charter* Challenge to Underinclusive Legislation: The Complexities of Sins of Omission" (1993) 19 Queen's L.J. 261 at 282

D. Pothier, "The Sounds of Silence: *Charter* Application when the Legislature Declines to Speak" (1996) 7 Constitutional Forum 113 at 114-116

8. Section 32 of the *Charter* applies to all matters within the authority of the "legislative, executive and administrative branches of the government". The *IRPA*, enacted by the Alberta legislature pursuant to its power to regulate civil rights in the province, is a comprehensive statutory scheme designed to prohibit and provide redress for discrimination in access to services
20 and accommodation, and in employment, in both the private and public spheres. It is the Government's use of its authority and control to formulate and enact legislation in a discriminatory fashion that is subject to *Charter* scrutiny pursuant to s. 32.

RWDSU v. *Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573 at 598 per McIntyre J.

9. Constitutional review of underinclusive laws, as in the case on appeal, is not dependent upon the form of statutory drafting through which a legislature has excluded disadvantaged groups from statutory benefits. Rather, constitutional scrutiny has focused on the substance of

the legislative measure and its effects.

Andrews v. *Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 165 and 182 per McIntyre J.

Egan v. *Canada*, [1995] 2 S.C.R. 513

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

10 10. Although the Government concedes s. 32 is "engaged" in this challenge to the constitutionality of the *IRPA*, it proposes that s. 32 be converted into an interpretation clause to support its claim that intentionally exclusionary legislation should be immune from constitutional scrutiny under s. 15. LEAF submits that this is a s. 15 argument and should be treated as such.

Appellants' (Respondents') Factum on Cross-Appeal at paras. 30 and 36

C. SECTION 15 OF THE *CHARTER*

20

a) The Guarantee of Equality

11. Section 15 has been recognized as "the broadest of all *Charter* guarantees" insofar as it applies to and supports all other rights guaranteed by the *Charter*. The four equality guarantees contained in s. 15 extend to both "the formulation and application of the law." As with all other *Charter* rights, s. 15 is to be given a broad and generous interpretation consistent with realizing its fundamental purposes.

Andrews, *supra*, at 185 per McIntyre J.

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12. Accordingly, this Court has cautioned that the s. 15 analysis must not become "a mechanical and sterile categorization process conducted entirely within the four corners of the

impugned legislation". Rather, the required purposive analysis should proceed in light of the broader social, political and legal context in which the impugned law operates.

R. v. Turpin, [1989] 1 S.C.R. 1296 at 1331-1332 per Wilson J.

13. This Court has established that s. 15 aims "to promote a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration", and "to remedy or prevent discrimination against groups subject to stereotyping, historic disadvantage and political and social prejudice" by eliminating laws which by design or effect "may worsen the circumstances of those who have already suffered marginalization or historical disadvantage in our society". It has acknowledged that the constitutional commitment to realizing these purposes links Canada to free and democratic societies who recognize that the elimination of discrimination "is essential, not only to achieving the kind of society to which we aspire, but to democracy itself."

Andrews, supra, at 171- 172 per McIntyre J.

R. v. *Swain*, [1991] 1 S.C.R. 933 at 992 per Lamer C.J.

Egan, *supra*, at 544 per L'Heureux- Dubé J.

Miron , *supra*, at 494-495 per McLachlin J.

14. Consistent with the purposive remedial approach this Court has applied to both human rights law and to *Charter* equality guarantees for over a decade, proof of discriminatory intent need not be established to find a violation of s. 15.

Re Ontario Human Rights Commission and Simpsons-Sears Ltd., [1985] 2 S.C.R. 536 at 547-550 per McIntyre J.

Andrews, *supra*, at 174 per McIntyre J.

b) Neutral Silence

15. The Government, however, asks this Court to restrict its analysis to the Government's purportedly non-discriminatory intentions when assessing whether its refusal to prohibit "sexual orientation" discrimination through the *IRPA* infringes s. 15. Notwithstanding that the Preamble of the *IRPA* affirms that the "equality of all persons is the foundation of freedom", and recognizes as a "fundamental principle and as a matter of public policy all persons are equal in dignity, rights and responsibilities", the Government insists that its deliberate exclusion of "homosexuals" from its legislated list of Albertans deemed equal in law amounts to no more than "neutral silence" beyond the reach of s. 15.

IRPA, *supra*, Preamble

Respondents' Factum at paras. 1, 3, 8, 19, 24, 25, 27, 39, 49, 50, 51, 58, 68, 70, 80, 81 and Factum on Cross-Appeal at paras. 8, 33 and 57

16. The legislative record and the rationales proffered by the Government to account for its relentless refusal to enumerate "sexual orientation" as an impermissible ground of discrimination in Alberta are neither neutral nor silent. LEAF submits that, on the contrary, they manifest discriminatory attitudes and motives.

F.C. DaCoste, "Case Comment: Vriend v. Alberta, Sexual Orientation and Liberal Polity (1996) 34 *Alta. L. Rev.* 950

Pothier, "The Sounds of Silence", *supra*, at 116-119

17. The Government asserts that it has deliberately chosen to prohibit only "fundamental" grounds of discrimination, not "marginal" grounds like "sexual orientation" and, by implication, not "marginal" citizens like lesbians. It argues that non-heterosexuals are too small a minority to merit statutory protection from discrimination, particularly over the objections of the purported electoral majority. Moreover, the Government has adopted the posture that it may prefer to

repeal the entire *Act* rather than include "sexual orientation".

Respondents' Factum at paras. 66, 67, 97 and 98 and Factum on Cross Appeal at para. 53

18. All of these rationales relied upon by the Government are themselves classic indicia of lesbians' social and political disadvantage. They convey that in the eyes of the Government, and the majority whose imputed preferences it seeks to uphold in law, lesbians are "less worthy of recognition or value as human beings or as members of Canadian society, equally deserving of concern, respect, and consideration." It is simply untenable to characterize such rationales as "neutral", far less as exhibitions of neutral "silence", particularly when advanced publicly in the highest court in the country.

Egan, supra, at 545 per L'Heureux-Dubé J.

19. LEAF submits that legislative exclusion does not constitute "silence" simply because the Government has said so. As acknowledged by this Court, exclusion may be achieved by explicit exemption, by exclusionary definition, by implication through the use of a closed list of categories or by statutory silence: "[a] statute may be worded in such a way that it gives a benefit or right to one group (inclusive wording) or it may be worded to give a right or benefit to everyone except a certain group (exclusive wording)." This Court has recognized that statutory exclusion, in whatever form, "may be simply a backhanded way of permitting discrimination."

Schachter v. *Canada*, [1992] 2 S.C.R. 679 at 698 per Lamer C.J.

Brooks v. *Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219 at 1240 per Dickson C.J.

20. LEAF submits that where a public authority is fully aware of ongoing discriminatory conduct, its silence and inaction may reasonably be characterized as condonation of such conduct. Such implied approval may contribute to an increase in expressions of intolerance

against historic targets of discrimination.

Ross v. *New Brunswick School District No. 15,* [1996] 1 S.C.R. 825

21. By the same logic, other Canadian judges have concluded that the omission of "sexual orientation" protection from human rights legislation may convey a public, state sanctioned message which suggests that discriminatory treatment of non-heterosexuals is "acceptable" and which "reinforce[s] negative stereotyping and prejudice thereby perpetuating and implicitly condoning its occurrence".

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Haig v. *Canada* (1992), 94 D.L.R. (4th) 1 (Ont. C.A.) at 10 per Krever J.

Case on Appeal at 313 per Hunt J.A.

Newfoundland (Human Rights Commission) v. *Newfoundland (Minister of Employment and Labour Relations)* (1995), 127 D.L.R. (4th) 694 (Nfld. S.C.) at 715 per Barry J.

c) Effects of the Exclusion

20 22. The plausibility of the Government's characterization of deliberate exclusion as a "neutral silence" turns, as a practical matter, on asking this Court to ignore the actual effects of the exclusion. For over a decade, this Court has consistently emphasized that equality cannot be realized by an interpretive approach narrowly focused on governments' intentions, benign, invidious or inadvertent. Rather, "it is in essence the impact of the discriminatory act or provision on the person affected which is decisive in considering a complaint".

Simpsons-Sears Ltd., *supra*, at 547-550 per McIntyre J.

Andrews, *supra*, at 165, 174 and 182 per McIntyre J.

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23. While the Government devotes the majority of its s. 15 argument to asserting that its intentions are legitimate, it does offer the offhand suggestion that its actions, because they are

"even-handed", are also neutral in their impact. In substance, the Government contends that the exclusion of "sexual orientation" can have no discriminatory effect because "homosexuals" can always take advantage of the *IRPA*'s existing protections against discrimination on other grounds.

Respondents' Factum at paras. 26 and 38

24. LEAF submits that the human rights jurisprudence demonstrates that the Government's refusal to enumerate "sexual orientation" is indeed discriminatory in effect, especially for lesbians and others for whom non-heterosexuality is but one aspect of their self-definition and, equally importantly, their subordination.

25. Despite this Court's mandate that human rights instruments be given a generous and liberal interpretation consistent with their remedial purposes, the prohibited grounds of discrimination have frequently been read restrictively to exclude claimants who experience discrimination on more than one enumerated "ground" as well as claimants who, for one reason or another, are not seen to "belong" to the group whom the ground was "meant" to protect. The result of this interpretive approach to human rights instruments has been the construction and application of the prohibited grounds of discrimination as if they were mutually exclusive, "watertight compartments".

K. Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics" (1989) U. Chicago Legal Forum 139

N. Duclos (now Iyer), "Disappearing Women: Racial Minority Women in Human Rights Cases" (1993) 6 C.J.W.L. 25 at 50

M. Eaton, "Patently Confused: Complex Inequality and *Canada* v. *Mossop*" (1994) 1 Rev. of Constitutional Studies 203

26. The contradiction between this restrictive and exclusionary approach to human rights legislation and the substantive approach to equality propounded by this Court has been particularly stark in cases litigated by non-heterosexuals. When non-heterosexuals have

advanced equality claims on grounds other than "sexual orientation", they have almost invariably been denied redress no matter the ground under which they have framed their claims nor the arguments they have advanced. Over the past twenty years, almost every extant ground has been systematically foreclosed to homosexuals including "sex", "family status", "marital status" and "race". Even when the legislature has enacted an open-ended guarantee of equality unencumbered by a closed list of prohibited types of discrimination, decision-makers have persisted in excluding "homosexuals" from the protective ambit of these guarantees.

(a) unsuccessful "sex" discrimination cases :
Board of Governors of the University of Saskatchewan v. *Saskatchewan Human Rights Commission*, [1976] 3 W.W.R. 385 (Sask. Q.B.)
Vogel v. *Government of Manitoba* (1983), 4 C.H.R.R. D/1654 (Man. Bd. Adj.)
Vogel v. *Manitoba (No.2)* (1991), 16 C.H.R.R. D/242 (Man. Bd. Adj.)
Knodel v. *British Columbia (Medical Services Commission)* (1991), 58 B.C.L.R. (2d) 356
(S.C.)
Egan v. *Canada* (1991), 87 D.L.R. (4th) 320 (F.C.T.D.)
Nielsen v. *Canada (Human Rights Commission)*, [1992] 2 F.C. 561 (T.D.)

(b) unsuccessful "family status" discrimination cases:
Vogel, supra
Canada (A.G.) v. *Mossop*, [1993] 1 S.C.R. 554
Nielsen, supra

(c) unsuccessful "marital status" discrimination cases:
Vogel, supra
Vogel (No.2), supra
Nielsen, supra

(d) unsuccessful "race" discrimination case:
Williamson v. *A.G. Edwards & Sons Inc.*, 876 F. 2d. 56 (8th Cir. 1989)

(e) open-ended grounds cases:
Gay Alliance Toward Equality v. *Vancouver Sun*, [1979] 2 S.C.R. 435
Vogel, supra

27. Although decision-makers have deployed a number of interpretive devices to support such restrictive readings of human rights guarantees, none has figured as prominently as deemed legislative intent. If the legislature had meant to include "homosexuals" as a protected class, so the analysis goes, it would have explicitly said so by including "sexual orientation" in the list of

proscribed grounds. Even where the legislative record is devoid of any evidence that the legislature meant to preclude non-heterosexuals from grounds which, by their plain terms, bear no relation to heterosexual identification, decision-makers have nonetheless implied a legislative intention to reserve those equality rights to heterosexuals alone.

Mossop, *supra*, at 581-582 per Lamer C.J.

Vogel, *supra*, at 1658

28. Conversely, it has been suggested that when a legislature does expressly include "sexual orientation" among the prohibited grounds, the otherwise heterosexual meaning of such grounds like "race" and "sex" is supplanted by a more inclusive meaning. For example, the ground of "family status" would be interpreted to include non-heterosexual couples.

Mossop, *supra*, at 582 per Lamer C.J.

29. The interpretive techniques, however traditional, used to justify the "watertight compartments" approach to human rights grounds should not obscure the fact that the approach is both discriminatory in origin as well as effects. The scope of the grounds has come to be defined narrowly by reference to those claimants who are most visible to lawmakers and decision-makers and least "different" from society's most dominant groups.

30. For instance, lesbians were not in view when guarantees against "sex" discrimination were enacted, and remained out of view when claims under that guarantee were litigated, first by heterosexual women and later by gay men. The result has been that some decision-makers have read out lesbians from the protective reach of "sex", or erased one dimension of their identity and their disadvantage to force-fit them into the single ground "sexual orientation".

Nielson, *supra*

M. Eaton, "At the Intersection of Gender and Sexual Orientation: Toward Lesbian Jurisprudence" (1994) 3 So. Cal. Rev. L. & Women's Stud. 183

C. Littleton, "Double and Nothing: Lesbian As Category" (1996) 7 UCLA Women's L.J. 1 at 5-7

31. The experience of lesbians in being forced to fashion their claims for redress to conform to a legal regime which never contemplated their existence, let alone the specificity of it, is not unique. For example, Black heterosexual women were neither seen nor heard when "race" and, later, "sex" were recognized as prohibited grounds of discrimination. Like lesbians, Black heterosexual women were mostly ignored as the scope of these guarantees was first elaborated through litigation, the result of which is that the specific experiences of Black heterosexual women have also been read out of the grounds "sex" and "race".

Crenshaw, *supra*, at 139-152

C. MacKinnon, "Reflections on Sex Equality Under Law" (1991) 100 Yale L.J. 1281 at 1283-1284

Duclos, *supra*, at 30-32 and 40-45

T. Grillo, "Anti-Essentialism and Intersectionality: Tools to Dismantle the Master's House" (1995) 10 Berkeley Women's L. J. 16

K. Abrams, "Complex Claimants and Reductive Moral Judgments: New Patterns in the Search for Equality" (1996) 57 U. Pitt. L. Rev. 337

M. Powell, "The Claims of Women of Colour under Title VII: The Interaction of Race and Gender" (1996) 26 Golden Gate U.L. Rev. 413

32. The discriminatory effects of the "watertight compartment" approach on lesbians have gone unnoticed largely because, with very few exceptions, lesbians have been invisible in the litigation and reasoning which have entrenched such unequal legal treatment. Some litigants wholly erase lesbians from view; others do so by referring to "lesbians and gay men" indistinguishably, wrongly presuming an identity of experience and interest between the two. Indeed, the Alberta government has engaged in this same tendency to discount the often distinct interests of lesbians by its use of the term "homosexual" in both its facta.

33. As in any case where the experience of discrimination is not reducible to a single "ground", lesbian oppression cannot always be conceptualized as either a matter of "sex" or of "sexual orientation" alone. To insist that it must, diminishes lesbians and the discrimination they suffer. Lesbian oppression is gendered, but as gender discrimination, it is compounded and distinctive by reason of lesbian women's non-heterosexuality. Within human rights jurisprudence, lesbians are effectively invisible as women targeted for specific forms of "sex" discrimination and sexual harassment, and as non-heterosexuals experiencing gendered variants of "sexual orientation" discrimination.

34. Much lesbian discrimination should be recognizable and redressible as a distinctive form of "sex" discrimination. For instance, lesbians experience particularly hostile or voyeuristic or persistent forms of sexual harassment from men. Similarly, the risk of being discharged from employment on being discovered a lesbian further diminishes the restricted job opportunities faced by lesbians because they are women. In addition, the denial of benefits for non-heterosexuals has a disparate impact on lesbians who, as women, experience greater economic disadvantage.

Crozier v. *Asseltine* (1994), 22 C.H.R.R. D/244 (Ont. Bd. Inq)

Nielson, supra

D. Majury, "Refashioning the Unfashionable: Claiming Lesbian Identities in the Legal Context" (1994) 7 C.J.W.L. 286

Commission des droits de la personne du Québec, *De l'illégalité à l'égalité: Rapport de la consulation publique sur la violence et la discrimination envers les gais et lesbiennes (Montreal: La Commission des droits de la personne du Québec*, 1994) at 22, 29, 31, 65, 69 and 110.

M.V.L. Badgett & M.C. King, "Lesbian and Gay Occupational Strategies" in Gluckman & Reed, eds. *Homo Economics: Capitalism, Community, and Lesbian and Gay Life* (New York: Routledge, 1997) 73

35. Until the discriminatory effects of the "watertight compartment" approach are recognized and eradicated by this Court, the complex discrimination experienced by, *inter alia*, lesbians, lesbians of colour and lesbians with disabilities will remain invisible and unprotected.

36. Whether discrimination is perpetrated or experienced on the basis of "sexual orientation", "sex", both, or any other combination of "grounds" cannot constitutionally determine entitlement to basic human rights. But until the discriminatory logic of the "watertight compartment" approach is purged from human rights guarantees, and the substantive equality principles mandated by this Court are extended to non-heterosexuals and heterosexuals alike, the effect of the exclusion of "sexual orientation" protection is to deny all lesbians -- whose sexual orientation is an integral but not complete element of their identification -- the protection the *Act* is meant to provide.

D. SECTION 1 OF THE *CHARTER*

37. The purpose of s. 1 is to determine whether the government can justify its infringement of constitutional protections. Section 1 recognizes that the *Charter* is paramount in Canadian law and that violation of *Charter* rights is not of small moment, but rather must be demonstrably justified by "cogent and persuasive" evidence. "The task is not easily discharged, and may require the courts to confront the tide of popular public opinion. But that has always been the price of maintaining constitutional rights."

R. v. *Oakes*, [1986] 1 S.C.R. 103 at 138 per Dickson C.J.

RJR - MacDonald Inc. v. *Canada (Attorney General)*, [1995] 3 S.C.R. 199 at 329 per McLachlin J.

38. In assessing the Government's objective under s. 1, LEAF submits that the appropriate focus of the analysis is the infringing measure, not the statute as a whole. Scrutinizing the objective of the statute as a whole obscures the substance of the impugned legislative measure and fails to tailor the analysis to the specific government action which has been found to infringe a *Charter* right.

RJR - MacDonald Inc., *supra*, at 334 per McLachlin J.

39. In this case, the infringing measure is the discriminatory exclusion of "sexual orientation" protection from the grounds of discrimination formally prohibited by the *IRPA*. It is the objective of this exclusion which must be demonstrated by the Government to be of sufficient importance to warrant overriding constitutional equality rights.

40. As analyzed at paragraphs 17 and 18 above, the legislative record which tracks the rationales offered for the Government's exclusion of "sexual orientation" protection from the *IRPA* demonstrates that these rationales were animated by considerations that were in and of themselves discriminatory. Proof of discriminatory intent is, of course, not required for a finding of discrimination under s. 15. However, the presence of discriminatory intent in a government's law-making must inform both the s.1 and remedy analyses.

41. LEAF submits that an infringing legislative measure which is purposefully discriminatory cannot be said to represent a legitimate exercise of the legislative power for the attainment of a desirable social objective, far less an exercise in law-making sufficiently important to warrant overriding constitutional rights.

R. v. *Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at 352 per Dickson C.J.

42. Should this Court accept the submission of the Government that it is the objective of the *IRPA* as a whole whose importance must be assessed in light of *Charter* guarantees, LEAF submits that the Government nonetheless fails to meet its onus in satisfying each leg of the s. 1 test.

43. LEAF strongly agrees that the objective of the *IRPA* as a whole in recognizing and protecting the inherent dignity and equal rights of Albertans is of pressing and substantial importance not least because it reflects and promotes *Charter* rights. Indeed, this Court has recognized on many occasions the quasi-constitutional nature of human rights legislation. However, the Government has not demonstrated that a legislative measure which by intent and effect denies the inherent dignity and rights of non-heterosexual Albertans is a demonstrably

justifiable limit on constitutional equality rights.

Simpson-Sears Ltd., *supra*, at 547 per McIntyre J.

University of British Columbia v. *Berg*, [1993] 2 S.C.R. 353 at 370 per Lamer C.J.

44. The Government purports to meet its onus under the proportionality test by vaunting its twenty-five year record of "progressive incrementalism" in expanding the grounds, and the spheres in which discrimination in the province of Alberta is legally prohibited. This historic overview does not meet the Government's onus to demonstrate proportionality between the total exclusion of "sexual orientation" protection, and the pressing importance of the human rights codifed in the *IRPA*. LEAF submits that this Court should not credit the deliberate, wholesale denial of equality rights to a disadvantaged group, that it has unanimously recognized to be analogous to those enumerated in s. 15, as "progressive" incrementalism.

Respondents' Factum at paras. 60-65, 77-79 and 83

Egan, *supra*

R. v. *Morgentaler*, [1988] 1 S.C.R. 30 at 183-84 per Wilson J.

45. Even according to the deferential standard of s. 1 review urged by the Government, it has failed to offer cogent or persuasive evidence that the exclusion of "sexual orientation" protection bears any rational connection to the *IRPA*'s objectives. Nor has the Government demonstrated that the complete denial to non-heterosexuals of any, much less equal, protection and benefit of provincial human rights law amounts to a "minimal" impairment of their s. 15 rights. Not surprisingly, the Government makes no attempt to establish, as in law it must, proportionality between the salutary and deleterious effects of the exclusion in relation to the *IRPA*'s objectives.

E. REMEDY

46. LEAF submits that the legislative record and rationales offered both to immunize the *IRPA* from s. 15 scrutiny and to justify this discriminatory legislation under s. 1, as well as the

legal history of exclusion of lesbians from entitlement to advance human rights claims on grounds other than "sexual orientation", should be decisive factors in fashioning the appropriate constitutional remedy in this appeal.

47. In *Schachter* v. *Canada*, this Court identified the principles which must inform judicial remedies for unconstitutional government action. The extent of the inconsistency between the infringing legislation and the *Charter* must be determined before the remedy can be properly tailored. While the remedy must intrude as little as possible into the legislative realm and must, where possible, conform to the intent of the legislator in enacting a constitutionally infirm statute, the appropriate remedy must also conform to the underlying purposes of the *Charter* as a whole and to the purpose of the guarantee which has been violated.

Schachter v. *Canada*, [1992] 2 S.C.R. 679 at 717-718 per Lamer C.J.

48. In articulating these principles, it is not plain that this Court contemplated a case like the one on appeal where, on the one hand, the intent codified in the statute as a whole promotes the values underlying the *Charter* and the purposes sought to be advanced by s. 15 and, on the other, the unconstitutionally underinclusive measure is an intended departure from the statute's intent and from *Charter* values and rights. In such an exceptional case, bowing to a government's concerns about judicial intrusion into the legislative sphere and merely declaring the infringement unconstitutional and returning the matter for redress to the Government responsible for it effectively nullifies equality guarantees.

49. In *Schachter*, this Court acknowledged that striking down underinclusive legislation and thereby stripping all its beneficiaries of their present legal entitlements should be rejected when judicially extending those entitlement to a small minority is more consonant with *Charter* values. A suspended declaration of invalidity is, therefore, particularly inapt where, as here, the Government hints it may well adopt "equality with a vengeance" and disentitle all disadvantaged groups in Alberta from human rights protection rather than remedy its unconstitutional conduct

by legislatively recognizing the entitlement of those it choses to marginalize.

Schachter, *supra*, at 718 per Lamer C.J.

50. Reading the words "sexual orientation" into the *IRPA* advances the purposes of the *Act* as a whole as well as of the *Charter* and represents a constitutionally appropriate response to the conduct of the Government in this case.

51. Reading the words "sexual orientation" into the *IRPA* is, at this point in history, a remedy which will make possible for lesbians to pursue full and equal protection and benefit of Alberta's human rights guarantees. In its s.15 arguments, LEAF has sought to demonstrate that the formal exclusion of "sexual orientation" from human rights codes, in combination with substantively exclusionary interpretations of other prohibited grounds of discrimination, has unconstitutionally deprived lesbians of any human rights protection on any grounds.

52. The prohibited grounds of discrimination that have been incrementally recognized in Canadian and international equality law over the past half century can and should be read positively as historic markers in the progressive commitment of free and democratic societies to respect and promote the equal dignity and worth of all people. Instead, in a still unequal world, grounds have been read narrowly as bounded rights accruing first and most to those deemed legally human. The rank order in which rights recognition was extended by law has regrettably come to fetter and confine the remedial reach and purposes of human rights laws. The full humanity of those human rights law was meant to promote has unfortunately been reduced and fractured into artificially "watertight compartments" according to what law makers can or wish to see in those claiming rights protection.

53. Lesbians and all other individuals whose full humanity and whose social, economic, political and legal disadvantages cannot be reduced to any single, circumscribed ground have not been recognized at law and will remain unrecognized at law under the "watertight compartment" approach to human rights entitlement. Such an approach has failed to deliver on the promise of

the *IRPA* articulated in its Preamble, namely that all persons are equal in dignity, rights and responsibilities, and on its promise of equal treatment in access to services, accommodation and employment without discrimination.

54. The inclusive and substantive approach to constitutional equality rights articulated by this Court should have worked to fulfill the promise of the *IRPA* as it renders untenable the premises of the "watertight compartment" approach and its resort to closed lists of mutually exclusive grounds. It also renders lists of enumerated grounds of discrimination superfluous to the guarantee of equality.

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55. Eliminating all of the grounds of discrimination enumerated in the *IRPA*'s Preamble and provisions is responsive to the problem of ameliorating the harm done by the "watertight compartment" approach to those whose disadvantage stems from more than one ground. However, such a remedy is inconsistent with the remedial restrictions articulated in *Schacter*.

56. "Sexual orientation," when read in and properly interpreted, should achieve the same substantive results for all non-heterosexuals. By ordering that "sexual orientation" be read into the *IRPA*, lesbians will be empowered to contest the "watertight compartment" approach to discrimination themselves and can challenge the interpretation of other enumerated grounds,
20 particularly "sex". Once in, lesbians may resist being reduced to their "sexual orientation" and will be able to articulate how their "sex" and/or "race" and/or "disability" and/or "religion" enter into the discrimination they experience.

57. In summary, LEAF submits that the Government's relentless refusal to include "sexual orientation" protection in the *IRPA* is discriminatory in its intent as well as its effects. Accordingly, LEAF submits that no deference should be given to the Government through a trivialization of s.15, by extreme deference under s.1, or by ineffective remedies which return the matter to the Government responsible for the discrimination.

PART IV - NATURE OF THE ORDER SOUGHT

58. LEAF respectfully requests that this Honourable Court read the words "sexual orientation" into the Preamble and ss. 2(1), 3, 4, 7(1), 8(1), 10 and 16(1) of the *IRPA*.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 23RD DAY OF MAY, 1997

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Claire Klassen

Counsel for the Intervenor, Women's Legal Education and Action Fund

PART IV

TABLE OF AUTHORITIES

I. Statutes

II. Articles

Crenshaw, K., "Demarginalizating the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics" (1989) U. Chicago Legal Forum 139..... 9,12

DeCoste, F.C., "Case Comment: *Vriend* v. *Alberta*, Sexual Orientation and Liberal Polity" (1996) 34 Alta. L. Rev. 950..... 6

Duclos (now Iyer), **N.**, "Disappearing Women: Racial Minority Women in Human Rights Cases" (1993) C.J.W.L. 25..... 9,12

Eaton, M., "At the Intersection of Gender and Sexual Orientation: Toward Lesbian Jurisprudence" (1994) 3 So. Cal. Rev. L. & Women's Stud. 183..... 11

Eaton, M., "Patently Confused: Complex Inequality and *Canada* v. *Mossop*" (1994) 1 Rev. of Constitutional Studies 203 9

Grillo, T., "Anti-Essentialism and Intersectionality: Tools to Dismantle the Master's House" (1995) 10 Berkeley Women's L.J. 16..... 12

Littleton, C., "Double and Nothing: Lesbian As Category" (1996) 7 UCLA Women's L.J. 1.....12

MacKinnon, C., "Reflections on Sex Equality Under Law" (1991) 100 Yale L.J. 1281.....12

Majury, D., "Refashioning the Unfashionable: Claiming Lesbian Identities in the Legal Context" (1994) 7 C.J.W.L. 286.....13

Pothier, D., "*Charter* Challenge to Underinclusive Legislation: The Complexities of Sins of Omission" (1993) 19 Queen's L.J. 261.....3

Pothier, D., "The Sounds of Silence: *Charter* Application when the Legislature Declines to Speak" (1996) 7 Constitutional Forum 113.....3,6

Powell, M., "The Claims of Women of Colour under Title VII: The Interaction of Race and Gender" (1996) 26 Golden Gate U.L. Rev. 413.....12

III. Cases