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 DIGNITE FOR GAY CATHOLICS AND SUPPORTERS INC.

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)

FACTUM OF THE INTERVENOR
CANADIAN HUMAN RIGHTS COMMISSION

WILLIAM F. PENTNEY
PATRICIA LAWRENCE
CANADIAN HUMAN RIGHTS COMMISSION
320 Queen Street, Tower "A", 15th floor
Ottawa, Ontario, K1A 1E1
Tel: (613) 943-9153
Fax: (613) 943-3089
Counsel for the Intervenor
Canadian Human Rights Commission

SHEILA J. GRECKOL
CHIVERS, GRECKOL & KANEE
Barristers and Solicitors
#301, 10328-81 Avenue
Edmonton, Alberta
T6E 1X2
Tel: (403) 439-3611
Fax: (403) 439-8543
Counsel for the Appellants

JOHN H. CURRIE
LANG MICHENER
Barristers and Solicitors
P.O. Box, 747, Suite 2500
BCE Place, 181 Bay Street
Toronto, Ontario M5J 2T7
Tel: (416) 360-8600
Fax: (416) 365-1719
Ottawa Agents for the Appellants

JOHN T. McCARTHY
MILES DAVISON McCARTHY
1600 Bow Valley Sq. 2
205 - 5th Avenue S.W.
Calgary, Alberta
T2P 2V7
Tel: (403) 298-0333
Fax: (403) 263-6840
Counsel for the Respondents

HENRY S. BROWN, Q.C.
GOWLING, STRATHY & HENDERSON
Barristers and Solicitors
2600 - 160 Elgin Street
Ottawa, Ontario
K1P 1C3
Tel: (613) 232-1781
Fax: (613) 563-9869
Ottawa Agents for the Respondents

AND TO: **SHIRISH P. CHOTALIA**
PUNDIT & CHOTALIA
Barristers & Solicitors
#2601 - Canada Trust Tower
10104 - 103 Avenue
Edmonton, Alberta
T5J 0H8
Counsel for the Intervener,
Alberta Civil Liberties Association

AND TO: **BRIAN A.F. EDY**
EDY DALTON
Barristers & Solicitors
c/o #2601 - Canada Trust Tower
10104 - 103 Avenue
Edmonton, Alberta
T5J 0H8
Co-Counsel for the Intervener,
Alberta Civil Liberties Association

AND TO: **RONALD SOROKIN**
WITTEN BINDER
Barristers & Solicitors
2500, 10303 Jasper Avenue
Edmonton, Alberta
T5J 3N6
Tel: (403) 423-0501
Fax: (403) 429-2559
Counsel for the Intervener,
Canadian Jewish Cogress

AND TO: **DALE GIBSON**
DALE GIBSON ASSOCIATES
Barristers & Solicitors
11018 - 125 Street
Edmonton, Alberta
T5M 0M1
Tel: (403) 452-9530
Fax: (403) 453-5872
Counsel for the Intervener
Alberta and Northwest Conference
United Church of Canada

J.J. MARK EDWARDS
NELLIGAN POWER
Barristers & Solicitors
Suite 1900
66 Slater Street
Ottawa, Ontario
K1P 5H1
Ottawa Agents for the Intervener,
Alberta Civil Liberties Association

J.J. MARK EDWARDS
NELLIGAN POWER
Barristers & Solicitors
Suite 1900
66 Slater Street
Ottawa, Ontario
K1P 5H1
Ottawa Agents for the Intervener,
Alberta Civil Liberties Association

LEONARD SHORE
SHORE, DAVIS, PERKINS-McVEY & KEHLER
Barristers & Solicitors
200 Elgin Street
Ottawa, Ontario
K2P 1L5
Tel: (613) 233-7747
Fax: (613) 233-2374
Ottawa Agents for the Intervener,
Canadian Jewish Cogress

JENNIFER McKINNON
BURKE-ROBERTSON
Barristers & Solicitors
70 Gloucester Street
Ottawa, Ontario
K2P 1A2
Tel: (613) 236-9665
Fax: (613) 233-4195
Ottawa Agents for the Intervener
Alberta and Northwest Conference
United Church of Canada

AND TO:

STEVEN BARRETT
SACK GOLDBLATT MITCHELL
Barristers & Solicitors
1130 - 20 Dundas Street West
Toronto, Ontario
M5G 2G8
Tel: (416) 977-6070
Fax: (416) 591-7333
Counsel for the Intervener, Canadian Labour Congress

BURKE-ROBERTSON
Barristers & Solicitors
70 Gloucester Street
Ottawa, Ontario
K2P 1A2
Tel: (613) 236-9665
Fax: (613) 233-4195
Ottawa Agents for the Intervener, Canadian Labour Congress

AND TO:

WOMEN'S LEGAL EDUCATION & ACTION FUND
415 Yonge Street
Toronto, Ontario
M5B 2E7
ANITA BRAHA
Tel: (604) 682-2552
Fax: (604) 682-1335
CLAIRE KLASSEN
Tel: (403) 426-5220
Fax: (403) 420-6277
Counsel for the Intervener, Women's Legal Education & Action Fund (LEAF)

CAROL BROWN
SCOTT & AYLEN
Barristers & Solicitors
Suite 1000
60 Queen Street West
Ottawa, Ontario
K1P 5Y7
Tel: (613) 237-5160
Fax: (613) 230-8842
Ottawa Agents for the Intervener, Women's Legal Education & Action Fund (LEAF)

AND TO:

JAMES L. LEBO, Q.C.
McCARTHY TETRAULT
Barristers & Solicitors
3200, 421 - 7 Avenue S.W.
Calgary, Alberta
T2P 4K9
Tel: (403) 260-3525
Fax: (403) 260-3501
Counsel for the Intervener, Canadian Bar Association - Alberta Branch

COLIN S. BAXTER
McCARTHY TETRAULT
Barristers & Solicitors
Suite 1000, 275 Sparks Street
Ottawa, Ontario
K1R 7X9
Tel: (613) 238-2121
Fax: (613) 563-9386
Ottawa Agents for the Intervener, Canadian Bar Association - Alberta Branch

AND TO:

DALLAS K. MILLER
DALLAS K. MILLER LAW OFFICE
Barristers & Solicitors
Ross Glan Business Park
#1 3295 Dunmore Road, S.E.
Medicine Hat, Alberta
T1B 3R2
Tel: (403) 528-3400
Fax: (403) 529-2694
Counsel for the Intervener,
Alberta Federation of Women
United for Families

HENRY S. BROWN, Q.C.
GOWLING, STRATHY & HENDERSON
Barristers & Solicitors
2600-160 Elgin Street
P.O. Box 466, Station D
Ottawa, Ontario
K1P 3R2
Tel: (613) 232-1781
Fax: (613) 563-9869
Ottawa Agents for the Intervener,
Alberta Federation of Women
United for Families

AND TO:

GERALD D. CHIPEUR
MILNER FENERTY
Barristers & Solicitors
30th Floor, 237 Fourth Avenue SW
Calgary, Alberta
T2P 4X7
Tel: (403) 268-7000
Fax: (403) 268-3100
Counsel for the Intervener,
Evangelical Fellowship of Canada

HENRY S. BROWN, Q.C.
GOWLING, STRATHY & HENDERSON
Barristers & Solicitors
2600-160 Elgin Street
P.O. Box 466, Station D
Ottawa, Ontario
K1P 3R2
Tel: (613) 232-1781
Fax: (613) 563-9869
Ottawa Agents for the Intervener,
Evangelical Fellowship of Canada

AND TO:

GERALD D. CHIPEUR
MILNER FENERTY
Barristers & Solicitors
30th Floor, 237 Fourth Avenue SW
Calgary, Alberta
T2P 4X7
Tel: (403) 268-7000
Fax: (403) 268-3100
Counsel for the Intervener,
Christian Legal Fellowship

HENRY S. BROWN, Q.C.
GOWLING, STRATHY & HENDERSON
Barristers & Solicitors
2600-160 Elgin Street
P.O. Box 466, Station D
Ottawa, Ontario
K1P 3R2
Tel: (613) 232-1781
Fax: (613) 563-9869
Ottawa Agents for the Intervener,
Christian Legal Fellowship

AND TO:

GERALD D. CHIPEUR
MILNER FENERTY
Barristers & Solicitors
30th Floor, 237 Fourth Avenue SW
Calgary, Alberta
T2P 4X7
Tel: (403) 268-7000
Fax: (403) 268-3100
Counsel for the Intervener,
Focus on the Family
(Canada) Association

HENRY S. BROWN, Q.C.
GOWLING, STRATHY & HENDERSON
Barristers & Solicitors
2600-160 Elgin Street
P.O. Box 466, Station D
Ottawa, Ontario
K1P 3R2
Tel: (613) 232-1781
Fax: (613) 563-9869
Ottawa Agents for the Intervener,
Focus on the Family (Canada) Association

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 DIGNITE FOR GAY CATHOLICS AND SUPPORTERS INC.

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)

FACTUM OF THE INTERVENOR
CANADIAN HUMAN RIGHTS COMMISSION

WILLIAM F. PENTNEY
CANADIAN HUMAN RIGHTS COMMISSION
320 Queen Street, Tower "A",
Place de Ville, 15th floor
Ottawa, Ontario, K1A 1E1
Tel: (613) 943-9153
Fax: (613) 943-3089
Counsel for the Intervenor
Canadian Human Rights Commission

TABLE OF CONTENTS

PART I -- STATEMENT OF FACTS

1. The Intervenor, Canadian Human Rights Commission (the "Commission") accepts the statement of the relevant facts as set out at paragraphs 1 through 6 of the Appellants' Factum.

PART II -- STATEMENT OF POINTS IN ISSUE

10 2. The Intervenor, Canadian Human Rights Commission, agrees with the statement of issues raised in this appeal as set out at paragraphs 7 through 9 of the Appellants' Factum. The Canadian Human Rights Commission takes no position with respect to the issue of costs in this appeal.

PART III -- STATEMENT OF ARGUMENT

INTRODUCTION

A key message from the beginning of the adoption of modern human rights laws has been that a violation of an individual's equality rights is more than a mere private wrong. Discrimination wounds the community, and through the passage of comprehensive human rights laws the community has said to the individuals who experience discrimination: we stand with you, we will get involved in your problem, because we think that your problem is really our problem too. That is because discrimination undermines the very essence of our community: the acceptance of others as people equally deserving of concern and respect, simply by virtue of their humanity.

That message, that promise, lies at the heart of this case, and it is submitted that the deliberate exclusion of sexual orientation as a prohibited ground of discrimination under the Alberta human rights law contravenes section 15, and is not a reasonable limit under section 1. It is further submitted that the appropriate remedy in the circumstances of this case is to "read in" sexual orientation as a prohibited ground of discrimination.

A. HUMAN RIGHTS LEGISLATION - GENERAL PRINCIPLES

(a) The purpose of human rights legislation

3. The Preamble to the *Individuals' Rights Protection Act* of Alberta (the "*IRPA*")

recognizes that, as a "fundamental principle and as a matter of public policy all persons are equal in: dignity, rights and responsibilities without regard to race, religious beliefs, colour, gender, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income or family status."

> *Individuals' Rights Protection Act*, R.S.A. 1980, c. I-2, as amended, **Appellants' Authorities, TAB 1.**

4. It is respectfully submitted that the purpose of the *IRPA* is consistent with the general purpose of human rights legislation throughout Canada. That purpose, broadly stated, is to declare **as a matter of public policy** that it is unacceptable to differentiate between individuals, whether in relation to employment or in the provision of services, facilities or accommodation, on the basis of personal characteristics which, except in very rare circumstances (provided for by way of defences), are recognized as being irrelevant to that employment, service, facility or accommodation.

5. This purpose parallels that of section 15 of the *Charter*, which has been expressed by McIntyre J. of this Court as follows:

> It is clear that the purpose of s. 15 is to ensure equality in the formulation and application of the law. The promotion of equality entails the promotion of 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. It has a large remedial component.
>
> *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 171-172, **Appellants' Authorities, TAB 67.**

6. Despite the important differences between human rights legislation and section 15 of the *Charter*, most particularly in respect of the scope of application and structure of each, this Court has acknowledged the similarities between the nature and purpose of these instruments. This Court in *Andrews* accepted that, "the principles which have been applied under the Human Rights Acts are equally applicable in considering questions of discrimination under s. 15(1)."

> *Andrews, supra,* **Appellants' Authorities, TAB 67**, at 175.
>
> See also:
>
> *Egan v. Canada*, [1995] 2 S.C.R. 513, **Appellants' Authorities, TAB 64.**
> *Miron v. Trudel*, [1995] 2 S.C.R. 418, **Appellants' Authorities, TAB 66.**
> *Dickason v. University of Alberta*, [1992] 2 S.C.R. 1103, **Respondents' Authorities, TAB 24.**

(b) The benefit provided under the IRPA

7. The *IRPA*, like the *Canadian Human Rights Act* within the federal sphere, is the statutory instrument which declares the fundamental importance of respect for human rights within the province of Alberta and which provides individuals within the province with a mechanism through which to seek redress for violations of those fundamental human rights.

8. It is submitted that the *IRPA* confers upon individuals living in the province of Alberta two distinct yet equally important benefits:

> (1) the benefit of a statutory declaration to the effect that, **as a matter of public policy within the province**, they are entitled to equal respect and equal protection of their dignity, regardless of irrelevant personal characteristics; and

(2) the benefit of access to a complaints mechanism (which can ultimately culminate in financial and other remedies) where the public policy declared in the *Act* is contravened.

IRPA, ss. 19 to 27, **Appellants' Authorities, TAB 1**.

9. This Court has held that where a Legislature has provided a comprehensive scheme for the filing, investigation and resolution of complaints of discrimination, as the Legislature of Alberta has done in the *IRPA*, there is no private right of action for a breach of human rights legislation. The sole avenue of redress for victims of discrimination is, therefore, the complaints mechanism established under the *Act*.

Bhadauria v. Board of Governors of Seneca College, [1981] 2 S.C.R. 181, **Intervenors' (in Support of Appeal) Authorities**.

B. SECTION 15 OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*

10. Section 15 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*") affords every individual entitled to its protection the right to equality before and under the law and the right to the equal protection and benefit of the law without discrimination on the basis of the grounds listed therein or those analogous to them.

Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 1, **Appellants' Authorities, TAB 2**.

(a) The concept of equality

11. While the members of this Court have expressed divergent opinions as to what might be required in an analysis under section 15(1) of the *Charter* in a particular case, it is respectfully submitted that, at a minimum, an analysis carried out under section 15(1) of the *Charter* involves two separate steps:

> (1) the claimant must establish a denial of the equal protection or equal benefit of the law (sometimes referred to as the requirement to show a "legislative distinction"); and
>
> (2) the claimant must show that this denial is discriminatory. To establish that a denial of equal protection or equal benefit is discriminatory, the denial must be shown to be based on a ground enumerated under section 15(1) or an analogous ground.
>
> *Andrews, supra*, **Appellants' Authorities, TAB 67**, at 182.
>
> *Miron v. Trudel*, per McLachlin J., **Appellants' Authorities, TAB 66**, at 485.

12. The Alberta Court of Appeal in this case recognized, in respect of the first step in a section 15 analysis, that what is required to be shown is "that there are one or more provisions in the legislation which create, expressly or by "adverse effect", a distinction between individuals which is contrary to s. 15(1)" [*per* O'Leary J. at p.4]. This is consistent with section 15 of the *Charter*, which has been interpreted and applied in such a way as to address situations of underinclusion, as well as direct exclusion.

13. After taking into consideration the caution issued by Iacobucci J. of this Court in *Symes v. M.N.R.*, to the effect that courts must be careful to distinguish between effects caused or

contributed to by an impugned provision and those which exist independently of it, Justice O'Leary went on to declare what, it is submitted, is the essence of the Court's rationale for allowing the Crown's appeal in this case:

> The question here is whether, in its complete silence respecting sexual orientation, the *IRPA* "distinguishes" between individuals on a prohibited basis. It is said that the failure of the statute to expressly afford protection to homosexuals is tantamount to government action approving ongoing discrimination against them. Homosexuals are said to be treated unequally as they are denied the benefit of access to the complaint and enforcement provisions of the *IRPA* when they allege discrimination on the basis of a personal characteristic, their sexual orientation. I do not agree with that proposition. ... **In the present case, the *IRPA* makes no distinction whatsoever between heterosexuals and homosexuals or, indeed, between any individuals or groups on the basis of sexual orientation. It is silent on the issue.** (pp. 7-8) [emphasis added]

14. While it is possible to characterize this case as one of either direct discrimination (i.e., an intentional exclusion of a particular group of persons, identifiable by a common personal characteristic, from the scope of the legislative benefit ***because of*** that personal characteristic) or one of adverse effect discrimination (i.e., unequal distribution of a statutory benefit resulting from discrimination which exists independent of the legislation itself), the Commission takes the position that nothing turns on the proper categorization of the discrimination in this case. It is submitted that what is important is the ***effect*** of the exclusion of the ground of sexual orientation and not how one chooses to label it. The application of the *Charter* cannot depend on how the statute is worded.

15. It is submitted that the fundamental error of the Appeal Court of Appeal in this case lies in its failure to give proper consideration to the special nature and purpose of human rights legislation, and to recognize the impact which this has on the analysis required to be carried out under section 15(1) of the *Charter*.

C. APPLICATION OF THE RELEVANT PRINCIPLES TO THIS CASE

16. In assessing whether or not there is, in the *IRPA*, a "legislative distinction" on a prohibited ground, such as would render the *Act* subject to scrutiny under section 15(1) of the *Charter*, the Court of Appeal proceeded on the basis that ***the law itself*** must draw an express distinction on a prohibited or analogous ground before it can be found to violate section 15. It is respectfully submitted that, to have proceeded in this way, without taking into account the special nature and purpose of human rights legislation, and the context within which it operates, constituted an error in law.

10

17. It is submitted that human rights legislation, unlike other benefits-conferring legislation, is enacted precisely because of a particular social reality which is acknowledged to exist separate and apart from the legislation itself (i.e., discrimination). Human rights legislation is remedial legislation, consequently, failure to protect a particular group of people who are subject to discrimination on the basis of a personal characteristic is not a distinction which is incidental to the purpose of human rights legislation but, on the contrary, can be seen as a deliberate and conscious decision on the part of the legislature about which persons within its jurisdiction are worthy of being protected from discrimination and which are not.

20 18. Where the constitutionality of human rights legislation is in issue, it is submitted that it is wrong to ignore "those social circumstances which exist independently of such [legislation]". Human rights legislation is aimed primarily at addressing those social circumstances and to ignore them would be to ignore the very real effect or impact of the legislation within the social context.

19. The effect of the failure to accord coverage under the public policy against discrimination and access to the complaints mechanism under the *IRPA* for persons discriminated against on the basis of their sexual orientation was properly recognized and accounted for by the Trial Judge in this case:

> The facts in this case demonstrate that the legislation had a differential impact on the applicant Vriend. When his employment was terminated because of his personal characteristics he was denied a legal remedy available to other similarly disadvantaged groups. That constitutes discrimination contrary to s. 15(1) of the *Charter*.
>
> **Case on Appeal**, p. 201, *per* Russell J. (Alta. Q.B.).

20. The impact of exclusion from the human rights process to persons discriminated against on the basis of sexual orientation was also properly considered and applied by the Ontario Court of Appeal in the case of *Haig and Birch*:

> One need not look beyond the evidence before us to find disadvantage that exists apart from and independent of the legal distinction created by the omission of sexual orientation as a prohibited ground of discrimination in s. 3(1) of the *Canadian Human Rights Act*. The social context which must be considered includes the pain and humiliation undergone by homosexuals by reason of prejudice towards them. It also includes the enlightened evolution of human rights social and legislative policy in Canada, since the end of the Second World War, both provincially and federally. The failure to provide an avenue for redress for prejudicial treatment of homosexual members of society, and the possible inference from the omission that such treatment is acceptable, create the effect of discrimination offending s. 15(1) of the *Charter*.
>
> *Haig v. Canada* (1992), 94 D.L.R. (4th) 1 (Ont.C.A.), *per* Krever J., **Appellants' Authorities, TAB 78**, at 10.

21. It is submitted that to take the approach adopted by the Alberta Court of Appeal in this case is to ignore this Court's express repudiation of the "similarly situated" approach to equality. As was recognized by this Court in the case of *Andrews*, such an approach to equality is "seriously deficient" because "***it excludes any consideration of the nature of the law***" that is at issue. Furthermore, it has been recognized by this Court on numerous occasions that "identical treatment may frequently produce serious inequality". In order to properly assess whether or not a given law meets the requirements of equality, it is essential to focus on the entire context within which that law operates.

Andrews, supra, **Appellants' Authorities, TAB** 67, at 164 and 166-67.

See also:

R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295 at 347 (*per* Dickson C.J.), **Appellants' Authorities, TAB 82.**

D. THE "MIRROR" QUESTION

22. The Commission agrees, in general, with the submissions of the Appellants in respect of the question: "Must the *IRPA* mirror the *Charter*?" However, given the significance of this issue, and its potential impact on other human rights statutes throughout the country, the Commission makes the following additional submissions in respect of this issue.

23. It is submitted that human rights legislation, like ***all*** other legislation in Canada, must conform to the requirements of the *Charter*, which, by virtue of section 52 of the *Constitution Act*, is declared to be part of "the supreme law of Canada". It is overly simplistic to suggest

that to grant this appeal, and the remedy sought by the Appellants in this case, would necessarily lead to the conclusion that all human rights legislation in Canada must mirror the enumerated and analogous grounds under section 15 of the *Charter*.

24. It is submitted that before a failure to include an enumerated or analogous ground under section 15 of the *Charter* in the list of prohibited grounds set out in a human rights statute will be found to be unconstitutional, the following criteria must be satisfied:

(1) that the legislation is, but for the exclusion, a "comprehensive statement of the 'human rights' of the people living in the jurisdiction";

> *Insurance Corporation of British Columbia v. Heerspink*, [1982] 2 S.C.R. 145 at 157-58, **Intervenors' (in Support of Appeal) Authorities** .

(2) that there is evidence of widespread or substantial "social discrimination" within the jurisdiction on the basis of the excluded ground, within the sphere(s) of activity covered by the statute;

(3) that, taking the statute as a whole into account, including any statutory defences or exemptions, the **effect** of the exclusion is to deny a benefit to persons identifiable on the basis of the excluded ground; and

(4) that the exclusion cannot be justified as a reasonable limit on the right to equality pursuant to section 1.

25. It is further submitted that, even where all of these criteria are satisfied, the appropriate remedy will not, in all cases, be an automatic reading-in of the excluded ground. A determination as to the appropriate remedy in any given case will depend upon a consideration of the relevant facts and the established jurisprudence (which will be discussed in greater detail below).

26. It is submitted that citizenship, a ground which this Court has held to be an analogous ground under section 15 of the *Charter*, provides a useful example of a ground which need not, in all cases, be included in a list of prohibited grounds under a provincial (or federal) human rights statute. Circumstances under which the exclusion of citizenship from the list of prohibited grounds might be found not to be unconstitutional would include:

- where the evidence reveals that the only distinctions being made on the basis of citizenship within the jurisdiction are **legislative**, and therefore properly the subject of *Charter* review, and not within the traditional ambit of human rights legislation;

- where the human rights statute is not comprehensive but only covers the "private sector", and the evidence reveals discrimination on the basis of citizenship only within the public sector (or vice versa);

- where the evidence reveals that the only discrimination that exists within the jurisdiction on the basis of citizenship is discrimination by professional associations (e.g., the medical association, law society, engineering society, etc.) and the statute provides an exemption for such bodies;

- where the statute covers the private sector and there is no evidence of distinctions being made by private companies on the specific ground of "citizenship", and the discrimination which does occur is covered by the other prohibited grounds listed in the statute (i.e., race, ethnic origin, place of origin, nationality, etc.).

E. SECTION 1 ANALYSIS

27. Of the various reasons for decision issued in this case, only Russell J. (Court of Queen's Bench) and Hunt J.A. (Court of Appeal), engaged in an analysis of the issues raised under section 1 of the *Charter*. Russell J. concluded that the Attorney General of Alberta had failed to establish that the s. 15(1) violation was a reasonable limit that could be justified in a free and democratic society under section 1. Hunt J.A. expressed her agreement with this conclusion.

28. This Honourable Court set out the proper approach to the analysis required under section 1 of the *Charter* in *R. v. Oakes*, [1986] 1 S.C.R. 103, and this test has been applied in section 15 equality cases. Section 1 serves both to guarantee rights, and to establish the basic touchstone for judging whether a limit is acceptable. This Court has recognized that limitations on rights must ultimately be judged against the values which are essential in a "free and democratic society", and it is submitted that equality is one of the core values of any society which aspires towards freedom and democracy.

Egan, supra, **Appellants' Authorities, TAB 64**, at 605.

29. It is well-established that the burden of establishing that a limit on a constitutionally protected right meets the requirements of section 1 rests with the party seeking to uphold that limit (i.e., the Attorney General), and that the applicable standard of proof is the balance of probabilities.

R. v. Oakes, [1986] 1 S.C.R. 103, **Intervenors' (in Support of Appeal) Authorities**.

30. With respect to the first branch of the section 1 analysis (i.e., a pressing and substantial legislative objective), it is respectfully submitted that what must be assessed is not the general objective sought to be achieved by the legislation as a whole, but rather, the specific objective sought to be achieved by the provision(s) the constitutionality of which is in issue:

> [T]he first question the Court should ask must relate to the nature and the purpose of the enactment, **with a view to deciding whether the limitation represents a legitimate exercise of the legislative power for the attainment of a desirable social objective which would warrant overriding constitutionally protected rights.** [emphasis added]
>
> *Andrews, supra*, **Appellants' Authorities, TAB 67**, at 184.
>
> *Benner v. Secretary of State of Canada et al.* (February 27, 1997) Supreme Court of Canada [unreported] at 43, **Intervenors' (in Support of the Appeal) Authorities**.

31. To allow a government to justify an otherwise discriminatory legislative provision (or omission) by pointing to a pressing and substantial objective of the legislation as a whole would, it is submitted, encourage strategic decisions on the part of legislatures. It cannot be right that discriminatory provisions can be saved by being incorporated as part of a piece of legislation with a valid objective, rather than being the subject of some other legislation.

32. It is submitted that there was no evidence presented in this case which could support a finding by this Court that the complete exclusion of sexual orientation as one of the prohibited grounds under the *IRPA* is based on a pressing and substantial legislative objective which is constitutionally permissible.

33. In her analysis of the section 1 issues, Hunt J.A. identified the following reasons as having been relied upon by the government of Alberta (in its factum) in support of the exclusion of sexual orientation from the *IRPA*:

> • the *IRPA* is inadequate to address some of the concerns expressed by the homosexual community (e.g., parental acceptance)
>
> • attitudes cannot be changed by order of the Human Rights Commission
>
> • codification of marginal grounds which affects few persons raises objections from larger numbers of others, adding to the number of exemptions that would have been needed to satisfy both groups
>
> • the purpose of the *IRPA* is not undercut by the fact that it does not include "more controversial grounds"
>
> • the legislation has been changed progressively as the Legislature thought the timing was right, both socially and democratically. The content and timing of incremental change should be judged by the Legislature in accordance with the consensus of Albertans as to what at a particular time constitutes social justice.
>
> **Case on Appeal,** p. 321, *per* Hunt J.A. (Alta. C.A.).

34. It is respectfully submitted that none of these reasons can or should be accepted as the sorts of "pressing and substantial" legislative objectives necessary to meet the requirements of section 1. On the basis of these reasons, the inclusion of many of the other grounds listed in the *IRPA* is equally unjustified (i.e., there is no reason to think that racist and sexist attitudes are any more conducive to being changed by order of the Human Rights Commission and many ethnic and religious groups might qualify as "marginal" in terms of their percentages within the population). It is submitted that the reasons set out above for the exclusion of sexual orientation are themselves discriminatory and cannot be relied upon as "pressing and substantial" legislative objectives for the purposes of section 1.

35. With respect to the "rational connection" element of the section 1 test, it is submitted that rational connection to an improper purpose cannot save a discriminatory legislative provision. If, on the other hand, this Court were to decide that the relevant purpose is that of the *IRPA* as a whole, then it is submitted that the exclusion of sexual orientation is not rationally connected to such purpose (i.e., that all persons be recognized as being equal dignity, rights and responsibilities without regard to irrelevant personal characteristics).

36. Insofar as the "minimal impairment" and "proportionality" requirements of the *Oakes* test are concerned, it is submitted that the complete exclusion of sexual orientation from all aspects of the *IRPA* fails on both of these counts. While it **might** be possible for a government (with proper supporting evidence) to justify limited coverage for sexual orientation (e.g., exemption for religious or philanthropic organizations), it is submitted that a complete exclusion can never be justified under either of these two aspects of the *Oakes* test.

F. THE APPROPRIATE REMEDY

37. Section 52 of the *Constitution Act* declares that the Constitution of Canada, including the *Charter*, "is the supreme law of Canada" and provides that, "any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect."

38. It has been recognized by this Honourable Court that section 52 of the

Constitution Act allows the Court flexibility in determining what remedy is appropriate where a law is found to be in violation of the *Charter*, and not saved under section 1. In the case of *Schachter v. Canada*, Lamer C.J. identified four remedial options that are available to the Court in such cases:

> (1) to strike down the unconstitutional law;
> (2) to strike down the unconstitutional law, but temporarily suspend the declaration of invalidity;
> (3) to read down the legislation so as to render it in conformity with the constitution; or
> (4) to read in that which is necessary to render the law constitutional.
> *Schachter v. Canada*, [1992] 2 S.C.R. 679 at 695, **Respondent's Authorities, TAB 44**.

39. In the case of *Schachter*, Chief Justice Lamer, for a majority of this Court, recognized two principles which should govern where a court is considering the remedy of "reading in" under section 52 of the *Constitution Act*. In the words of the Chief Justice, reading in should be considered in cases where "it is an appropriate technique to fulfil the ***purposes of the Charter*** and at the same time *minimize the interference of the court with the parts of the legislation that do not themselves violate the Charter*".

Schachter, *supra*, **Respondent's Authorities, TAB 44**, at 702.

40. It is submitted that, of these two governing principles, consistency with the purposes of the *Charter* must be recognized as being paramount. It is further submitted that the courts should only be concerned with preserving the intentions or objectives of the Legislature which "do not themselves violate the *Charter*". It is submitted that legislative

objectives which are directly contrary to the values which underlie the *Charter* cannot be allowed to stand in the way of a reading-in remedy where such remedy is consistent with the purposes of the *Charter* and considered appropriate by the Court.

41. In *Schachter*, this Court identified three steps which should be followed in deciding which of the identified remedial options should be adopted:

> (1) the Court must define, with as much precision as is possible, the extent to which the law is inconsistent with the *Charter*;
>
> (2) if it is determined that the inconsistency is such as to allow for more than one remedial option, the Court must decide whether reading in or reading down is more appropriate than striking down;
>
> (3) where the Court determines that striking down is more appropriate than reading in or reading down, the Court must then determine whether or not to temporarily suspend its declaration of invalidity.

42. It is respectfully submitted that the inconsistency of the *IRPA* with the *Charter* can be easily and precisely defined in the same terms as the inconsistency found by the Ontario Court of Appeal in *Haig v. Canada* -- i.e., "the omission of sexual orientation from the prohibited grounds of discrimination."

Haig, supra, **Appellants' Authorities, TAB 78**, at 12.

43. It is submitted that all of the factors cited by this Court in *Schachter* as relevant to a determination of the most appropriate remedy -- i.e., remedial precision, avoiding interference with the legislative objective, whether the significance of the remaining portion of the legislation would be substantially changed and the significance or long-standing nature

of the remaining portion of the legislation -- all favour reading in over striking down as the appropriate remedy in this case.

44. It is further submitted that the ability of the Court to temporarily suspend a declaration of invalidity is not a factor to be considered at the stage of deciding which remedy, reading in or striking down, is most appropriate. It only becomes relevant once striking down has been determined to be the more appropriate remedy.

45. Any concerns which this Court might have about the budgetary or resource implications of granting a reading in remedy in this case may be allayed by a review of the experience of jurisdictions which have added sexual orientation as a ground, including the experience within the federal sphere, for the years since the Ontario Court of Appeal ordered sexual orientation read into the federal statute (in *Haig v. Canada*). It is submitted that any attempt to portray the situation that would result from reading in as opening the floodgates to complaints of sexual orientation is simply not borne out by this experience.

CONCLUSION

46. The questions raised in this appeal go the crux of the very purpose of the *Canadian Charter of Rights and Freedoms* in the constitutional fabric of this country. In this case, this Honourable Court is asked to provide constitutional protection for a vulnerable minority, which has been deliberately excluded from the basic human rights law in the province of Alberta. The record is clear that particular governments have refused to amend the law; the Alberta

Legislature has never had the opportunity to vote on the issue. More fundamentally, however, it is submitted that the choice made by the government of Alberta is not one which is open to it under the Constitution. That is what this Court is asked to decide in this case, and for the reasons outlined above, it is submitted that this Court should find that the deliberate exclusion of sexual orientation from the *IRPA* violates section 15, and is not a reasonable limit under section 1.

PART IV -- ORDER SOUGHT

10 47. The Intervenor Canadian Human Rights Commission submits that this Court should allow the appeal, and rule that the exclusion of sexual orientation from the *IRPA* violates section 15 of the *Charter* and is not a reasonable limit under section 1. The appropriate remedy in the circumstances of this case is to "read in" sexual orientation as a prohibited ground of discrimination.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 27th day of May 1997, by Counsel for the Intervenor, the Canadian Human Rights Commission.

20

William F. Pentney
General Counsel

Patricia Lawrence
Legal Counsel

PART V - TABLE OF AUTHORITIES