Const. Lit. Sam. - L. Wants

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

Appellants
(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
(Appellants by Cross-Appeal)

FACTUM OF THE INTERVENER ALBERTA FEDERATION OF WOMEN UNITED FOR FAMILIES

DALLAS K. MILLER
DALLAS K. MILLER LAW OFFICE
Barristers & Solicitors
Ross Glen 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 and Solicitors
2600 - 160 Elgin Street
Ottawa, Ontario
K1P 1C3
Tel: (613) 232-1781
Fax: (613) 563-9869
Ottawa Agents for the Intervener, Alberta Federation of Women United for Families

TO:

JOHN T. McCARTHY
MILES DAVISON McCARTHY
Barristers and Solicitors
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:

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

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

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

AND TO:

RONALD SOROKIN
WITTEN BINDER
Barristers & Solicitors
2500, 10303 Jasper Avenue
Edmonton, Alberta
T5J 3N6
Tel: (403) 428-0501
Fax: (403) 429-2559
Counsel for the Intervener,
Canadian Jewish Congress

LEONARD SHORE
SHORE, DAVIS, PERKINS-McVEY & KEHLER
Barristers & Solicitors
Suite 1900
66 Slater Street
Ottawa, Ontario
K1P 5H1
Ottawa Agents for the Intervener,
Alberta Civil Liberties Association

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 of the United Church of Canada

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 of the 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**
Suite 1800
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) 260-3500
Counsel for the Intervener, Women's Legal Education and 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 and 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) 260-3500
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: **WILLIAM F. PENTNEY**
CANADIAN HUMAN RIGHTS COMMISSION
320 Queen Street, Tower "A", 15th Floor
Ottawa, Ontario
K1A 1E1
Tel: (613) 943-9153
Fax: (613) 993-3089
Counsel for the Intervener
Canadian Human Rights Commission

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

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 Intervener,
The Evangelical Fellowship of Canada

AND TO: **BARBARA B. JOHNSTON**
MILNER FENERTY
Barristers & Solicitors
30th Floor, 237 Fourth Avenue S.W.
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 and Solicitors
2600 - 160 Elgin Street
Ottawa, Ontario
K1P 1C3
Tel: (613) 232-1781
Fax: (613) 563-9869
Ottawa Agents for the Intervener,
Christian Legal Fellowship

AND TO: **THOMAS W. WAKELING**
MILNER FENERTY
Barristers & Solicitors
30th Floor, 237 Fourth Avenue S.W.
Calgary, Alberta
T2P 4X7
Tel: (403) 268-7000
Fax: (403) 268-3100
CINDY SILVER
Tel: (604) 609-7961
Fax: (604) 609-7997
Counsel for the Intervener,
Focus on the Family (Canada) Association

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 Intervener,
Focus on the Family (Canada) Association

AND TO: **DALLAS K. MILLER**
DALLAS K. MILLER LAW OFFICE
Barristers & Solicitors
Ross Glen 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 and Solicitors
2600 - 160 Eglin Street
Ottawa, Ontario
K1P 1C3
Tel: (613) 232-1781
Fax: (613) 563-9869
Ottawa Agents for the Intervener, Alberta Federation of Women United for Families

AND TO: **GRAHAM GARTON, Q.C.**
DEPUTY ATTORNEY GENERAL OF CANADA
239 Wellington Street
Ottawa, Ontario
K1A 0HB
Tel: (613) 957-4842
Counsel for the Attorney General of Canada

AND TO: **RAJ ANAND**
SCOTT & AYLEN
34th Floor, Royal Trust Tower
Box 194, Toronto-Dominion Center
Toronto, Ontario
M5K 1H6
Tel: (416) 368-2400
Counsel for the Intervener, Foundation for Equal Families

JAMES MINNES
SCOTT & AYLEN
60 Queen St.
Ottawa, Ontario
K1P 5Y7
Tel: (613) 237-5160
Ottawa Agents for the Intervener, Foundation for Equal Families

AND TO:

ROBERT E. HOUSTON, Q.C.
BURKE-ROBERTSON
70 Gloucester St.
Ottawa, Ontario
K2P 0A2
Tel: (613) 236-9665
Ottawa Agent for the Intervener, Attorney General of Ontario

AND TO:

JENNIFER McKINNON
BURKE-ROBERTSON
Barristers & Solicitors
70 Gloucester Street
Ottawa, Ontario
K2P 0A2
Tel: (613) 236-9665
Fax: (613) 233-4195
Ottawa Agent for the Attorney General of Newfoundland

AND TO: **THOMAS S. KUTTNER**
FACULTY OF LAW
UNIVERSITY OF NEW BRUNSWICK
P.O. Box 4400
Fredericton, New Brunswick
E3B 5A3
Tel: (506) 453-4728
(506) 453-2881
Fax: (506) 453-3892
Counsel for the Intervener,
The Canadian Association of Statutory Human Rights Agencies ("CASHRA")

AND TO: **PAM MacEACHERN**
NELLIGAN POWER
1900 - 66 Slater St.
Ottawa, Ontario
K1P 5H1
Tel: (613) 231-8276
Fax: (613) 238-2098
Counsel for the Intervener,
Equality for Gays and Lesbians Everywhere ("EGALE")

ROBERT E. HOUSTON, Q.C.
BURKE-ROBERTSON
Barristers & Solicitors
70 Gloucester Street
Ottawa, Ontario
K2P 0A2
Tel: (613) 236-9665
Fax: (613) 233-4195
Ottawa Agent for the Intervener, CASHRA

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INTRODUCTION

1. The Alberta Federation of Women United for Families ("AFWUF") intervenes in support of the constitutional validity of the *Individual Right's Protection Act*, R.S.A. 1980, c. I-2, now called the *Human Rights, Citizenship and Multiculturalism Act*, R.S.A. 1980, c. H-11.7 (hereinafter "the IRPA") and submits that the fact that "sexual orientation" is not a protected ground does not contravene s. 15(1) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.) (hereinafter "*Charter*").

2. AFWUF does not support arbitrary discrimination against any identifiable group in society, including those who identify themselves based on sexual orientation or activity. However, individuals in society are free to make distinctions based on diverging views of what is ethical and moral. Legislatures may refrain from prohibiting individuals from making distinctions on conscientious or religious grounds. Such inaction by the legislature does not mean that the legislature has taken a position with respect to the distinctions made by private individuals. Further, interactions between private individuals are properly outside the scope of *Charter* scrutiny.

3. The Appellants argue for a significant change in the law, one which involves fundamental issues of social and legal policy. Courts should not make fundamental changes to Canadian law without a substantial evidentiary foundation for a finding that a duly enacted statute is constitutional invalid. Such evidentiary foundation has not been established in this Appeal.

4. As concluded by all three justices in the Alberta Court of Appeal McClung, O'Leary and Hunt J.J.A), even if the IRPA is inconsistent with the *Charter*, reading in "sexual orientation" is not the appropriate remedy. In this case, reading in would unacceptably intrude upon the jurisdiction of the legislature.

I. STATEMENT OF FACTS

5. The Intervener agrees with the facts as set out in the Factum of the Appellant.

II. POINTS OF LAW

A. NO DISCRIMINATION

6. The IRPA is facially neutral with respect to distinctions on the basis of sexual orientation. Therefore, any discrimination which is alleged by the Appellants must be based on one of two alternative grounds:

(1) the Alberta Legislature made a deliberately discriminatory choice to exclude "sexual orientation" from the IRPA:

> the purpose of the legislature's refusal to act in this situation is to reinforce stereotypical attitudes about homosexuals and their individual worth and dignity.
> **(Case on Appeal at p. 314 per Hunt J.A., dissenting)**

or;

(2) the fact that "sexual orientation" is not included in the IRPA necessarily causes discrimination against individuals on the basis of sexual orientation:

> Regardless of whether there was any intent to discriminate, the effect of the decision to deny homosexuals recognition under the legislation is to reinforce negative stereotyping and prejudice thereby perpetuating and impliedly condoning its occurrence.
> **(Case on Appeal at p. 201, per Russell J.);**

7. With respect to Hunt J.A., there is no evidence whatsoever on which to impute bad faith or deliberate discriminatory intent to the Alberta Legislature.

8. With respect to adverse effect discrimination, sexual orientation has been deemed an analogous ground by this Court in ***Egan and Nesbit v. Canada*, [1995] 2 S.C.R. 513 [TAB 25, Respondents' Authorities]**. Furthermore, individuals may suffer societal discrimination on the basis of their sexual orientation. Nevertheless, there is no evidence before this Court to establish that any discrimination experienced by the Appellants or any other person in Alberta is created by the IRPA. In particular, there is no evidence that the IRPA has the effect of discriminating or in any way supports discrimination on the basis of sexual orientation.

9. Courts should not make fundamental changes to Canadian law without a substantial evidentiary base for the alleged constitutional invalidity. This principle is effectively summarized in ***MacKay v. Government of Manitoba*, [1989] 2 S.C.R. 357 at p. 361 [TAB 31, Respondents' Authorities]**:

> Charter cases will frequently be concerned with concepts and principles that are of fundamental importance to Canadian society. ... In light of the importance and the impact that these decisions may have in the future, the courts have every right to expect and indeed to insist upon the careful preparation and presentation of a factual basis in most Charter cases. The relevant facts put forward may cover a wide spectrum dealing with scientific, social, economic and political aspects. ... Charter decisions should not and must not be made in a factual vacuum. To attempt to do so would trivialize the Charter and inevitably result in ill-considered opinions. The presentation of facts is not, as stated by the respondent, a mere technicality; rather, it is essential to a proper consideration of Charter issues.

10. The conclusions of Russell J. and Hunt J.A. regarding the discriminatory effect of the omission of sexual orientation from the IRPA lack factual foundation and were based solely upon judicial notice. As Professor Wayne Renke notes in his article: **Renke, W. "Case Comment:**

Vriend v. Alberta **Discrimination, Burdens of Proof, and Judicial Notice" (1996) 34:4 Alta. L. Rev. 925 at p. 945 [TAB 49, Appellants' Authorities]:**

> The final aspect of discrimination, as much as the others, required a factual foundation. There must have been some factual basis for concluding that the *IRPA* reinforced stereotypes or failed to serve its stated values (or served values inimical to *Charter* values). At this point, the objections of McClung and O'Leary J.J.A. emerge: how can the *IRPA* be found to "cause" discrimination? ...
>
> Russell J. and Hunt J.A. do not discuss the factual basis for their conclusions in any detail. Their view appears to be that, given *Egan* and the arguments they have deployed, the finding of discrimination -- and in particular, the finding of reinforcement of negative stereotyping -- is obvious. *Yet there is still a factual gap between the distinction drawn by the IRPA and its purported effects on "social consciousness," where reinforcement of stereotypical views and bolstering of other discriminatory ideations takes place.*
>
> *This gap is crossed by judicial notice.* [Emphasis added.]

11. The causal relationship between a statute and attitudes in the general public is an empirical matter (See **Renke, *supra* at p. 946**). The effect of the omission of sexual orientation from the IRPA on public attitudes was a matter on which the Appellants had the onus of establishing a solid evidentiary foundation in order to substantiate a section 15 violation. Judicial notice is not an appropriate tool for remedying this lack of an evidentiary basis.

12. Professor Renke notes the dangers inherent in the overuse of the doctrine of judicial notice (**Renke, *supra* at p. 927**):

> The source of facts least developed in Canadian jurisprudence and most important to the *Vriend* case is "judicial notice".
>
> ... The judicial notice rules pose several dangers. Parties may have inadequate notice of facts to be judicially noticed and may not be extended an opportunity to

> challenge or support the facts to be judicially noticed. Facts may be noticed which are untrue or at least insufficiently established for the purposes of deciding persons' rights. Facts accepted by judicial notice are not founded on evidence given on oath that is tested by confrontation and cross-examination. The taking of judicial notice is also in tension with our adversary system, which paradigmatically leaves factual matters to be proved, according to the rules of evidence, by parties; in an adversary system, facts should usually not be determined by an independent inquisitorial trier of fact.

13. The conditions under which judicial notice may be taken are cogently set forth in **Sopinka, Lederman & Bryant, *The Law of Evidence in Canada* (Toronto: Butterworths, 1992), at p. 976 [TAB 1]:**

> Judicial notice may be taken of facts which are:
>
> (a) so notorious as not to be the subject of dispute among reasonable persons, or
>
> (b) capable of immediate and accurate demonstration by resorting to readily accessible sources of indisputable accuracy.

14. The proposition that societal discrimination is caused by the silence of the IRPA with respect to sexual orientation as a prohibited ground of discrimination is neither "so notorious as not to be the subject of dispute among reasonable persons" nor "capable of immediate and accurate demonstration by resorting to readily accessible sources of indisputable accuracy". Therefore, it is inappropriate to take judicial notice of such a proposition.

15. Some social realities may be suitable for determination by judicial notice. This is the case where such realities are apparent from factual situations frequently and routinely before the courts, such as drinking and driving (***R. v. Rackow* (1986), 30 C.C.C. (3d) 250 (Alta. C.A.)**), domestic violence (***R. v. Brown* (1992), 125 A.R. 150 (C.A.)**) and the disproportionate negative impact of divorce on women (***Moge v. Moge*, [1992] 3 S.C.R. 813**). But this would not apply

to speculation regarding the effect of a relatively new law on society, particularly where the effect of the judicial notice would be to strike down or re-write legislation.

16. It is very difficult to establish the effect of legislation on discrimination because of the complexity of the interaction between legislation and Canadian society. In any case, the determination of the effect of legislation requires the assistance of the real evidence of experts in the field. Unfortunately, the Court does not have the benefit of such assistance in this Appeal.

17. At paragraph 14 of their Factum, the Appellants make reference to various social science materials. In addition to being untested by cross-examination, these materials are inconclusive at best.

18. The Appellants cite a 1994 study performed in the Province of Nova Scotia: **Smith, C. Gibson, "Proud but Cautious: Homophobic Abuse & Discrimination in Nova Scotia", Nova Scotia Public Interest Research Group (July 1994). [TAB 38, Appellants' Authorities]**. That study revealed an incidence of societal discrimination against homosexuals notwithstanding the fact that sexual orientation had been a prohibited ground of discrimination in Nova Scotia's human rights legislation since 1991. As part of this study the Nova Scotia statistics were compared with the results of a similar survey performed in New Brunswick prior to the addition of sexual orientation to New Brunswick's human rights legislation. Comparable incidences of discrimination were found. The study notes some minor differences between Nova Scotia and New Brunswick but does not attribute the differences to the legislation, but to other factors entirely:

> Explanations for this finding and how it differs from that of the New Brunswick study, in this and other instances, might be explained by differences in sample size, our inclusion of the bisexual sample in our statistics, the larger proportion of women in our sample, and the low number of people of colour in our sample,

> all of which might contribute to the differences in percentages between this and other samples.
>
> **Smith, C. Gibson, "Proud but Cautious: Homophobic Abuse & Discrimination in Nova Scotia", *supra* at pp. 16-17 [TAB 38, Appellants' Authorities]**

19. Furthermore, an article produced as part of a lobbying effort to have sexual orientation recognized in Ontario human rights legislation contains a clear admission that such recognition would not remove the underlying societal factors that lead to discrimination:

> Prejudice and oppression are not automatically eradicated by legal protection, as is shown by the experience of women and people in our community oppressed by racism or religious intolerance. Long after sexual orientation is added to the Human Rights Code, we can expect discrimination against us to continue. Getting rid of deep-rooted anti-gay attitudes will require more fundamental social change than is to be achieved by expanding the interpretation and enforcement of the law.
>
> **Coalition for Gay Rights in Ontario, *Discrimination against Lesbians and Gay Men: The Ontario Human Rights Omission* (1986), at p. 8 [TAB 39, Appellants' Authorities]**

20. By Notice of Motion, dated December 14, 1994, the Appellants brought an application before the Court of Appeal of Alberta to adduce, *inter alia*, the affidavit evidence of Professor Warneke, in support of the Appellants' position. A three-member panel of the Court of Appeal dismissed the application, with costs, by Order dated February 3, 1995, on the grounds that this evidence could have been introduced at trial before Russell J. **[TAB 2]**

21. At paragraph 13 of their Factum, the Appellants now are attempting to rely on a quotation from an article by Drs. Kroll and Warneke which purports, albeit tentatively, to

connect high youth suicide rates in the Province of Alberta with the absence of sexual orientation in the IRPA. No weight can be attributed to this quotation. It is highly improper to attempt to lead new evidence, not adduced at trial, before this Court simply by the insertion of an untested and manifestly partisan quotation. As Finlayson J.A. cautioned in ***M. v. H.*** **(1996), 31 O.R. (3d) 417 (C.A.) at p. 437 [TAB 3]:**

> Expert evidence can, in appropriate cases, be indispensable to the fair resolution of the legal matter. However, we must not lose sight of the fact that measuring legislation against the Charter is a judicial task which cannot be delegated. In discharging their constitutional duty, courts must guard against being derailed by the personal opinions of politically motivated individuals, disguised as expert testimony.

22. Further, the statistical data does not support the Appellants' contention. An illuminating comparison can be made between youth suicide rates in Alberta and those in Quebec (which was the first province to include sexual orientation in its human rights legislation in 1977). According to the statistics published by Health Canada in **"Suicide in Canada, Update of the Report of the Task Force on Suicide in Canada" (1994) [TAB 4]**, Quebec's youth suicide rates rose dramatically between 1977 and 1992. By contrast, Alberta's youth suicide rates slightly decreased in that same period.

23. In fact, not only is there no evidence that legislative silence has, in any way, contributed to suicide rates amongst homosexuals, but it remains undetermined whether there is a higher suicide rate amongst homosexuals than in the general population. Several scientific studies have concluded that there is no statistically significant relationship between homosexuality and suicide:

(a) In a 1994 article in the New England Journal of Medicine, Friedman and Downey state:

> Three psychological postmortem studies conducted in different areas of the United States have not demonstrated an increased frequency of people identified as homosexual among those who committed suicide.

Friedman, R. (M.D.) & Downey, J. (M.D.) "Homosexuality" (1994), 331:14 New England J. of Medicine 923 at p. 926 [TAB 46, Appellants Authorities]

(b) A 1995 study which compared 120 of 170 consecutive suicides under age twenty and 147 community, age, sex and ethnic matched controls living in the greater New York area found that there was not a significantly higher rate of homosexual experience among teen suicides than among the controls:

> We found no evidence that the risk factors among gays were any different than those among straight teenagers.
>
> The debate that links homosexuality to suicide may be a distracting side-issue to two real problems: a) some gay teenagers may experience significant adjustment difficulties that require precise study and appropriate intervention, and b) suicide is most common in individuals with a psychiatric illness, rather than in individuals with a "hard life." It should be reassuring that the data reported here suggest that the painful experience of establishing a gay orientation does not lead disproportionately to suicide.

Shaffer, D., Fisher, P., Hicks, R.H., Parides, M. and Gould, M., "Sexual Orientation in Adolescents Who Commit Suicide" (1995) vol. 25, Supplement, Suicide and Life-Threatening Behaviour 64-71 at pp. 70-71 [TAB 5].

24. In any event, the research to date on the connection between suicide and sexual orientation is inconclusive. This research is clearly an inadequate basis upon which to draw conclusions about the relationship between legislation and societal discrimination against

homosexuals for the purpose of a section 15 constitutional analysis. As concluded by Dr. Muehrer in his comprehensive survey of recent research on suicide and sexual orientation:

> This critical summary has identified several limitations in the research literature on suicide and sexual orientation; a lack of consensus on definitions of fundamental terms such as "suicide attempt" and "sexual orientation," uncertain reliability and validity of measures for these terms, nonrepresentative samples, and a lack of appropriate control groups, among other limitations. These limitations prevent accurate conclusions about: (1) completed or attempted suicide rates among gay/lesbian youth in the general population or in clinical populations, (2) comparisons of completed or attempted suicide rates between gay/lesbian youth and nongay youth in the general population, and (3) the potential role that sexual orientation and related factors may play in suicidal behaviour independently of well-established risk factors such as mental and substance abuse disorders.
>
> **Muehrer, P., "Suicide and Sexual Orientation: A Critical Summary of Recent Research and Directions for Future Research", (1995) vol. 25, Supplement, Suicide and Life-Threatening Behaviour 72-81 at p. 79 [TAB 6].**

25. Since there is no evidence upon which this Court may conclude that discrimination exists, then the Appellants' case must fail as the Appellants have not established a sufficient evidentiary base for a finding that s. 15 of the *Charter* has been infringed.

B. INCLUSION OF SEXUAL ORIENTATION CONFLICTS WITH FUNDAMENTAL RIGHTS

26. If this Court should find that Section 15 of the *Charter* has been infringed, then the Intervener submits that the non-inclusion of sexual orientation can and should be upheld under section 1 of the *Charter* since it "can be demonstrably justified in a free and democratic society".

27. Canadian society is a "free and democratic society" as outlined in section 1 of the *Charter*. Within this free society, people are generally free to make decisions in relation to their personal conscience without unreasonable interference from government. This freedom should include the right to make decisions and choices so as to support or oppose certain sexual practices. The judicial creation of "sexual orientation" as a protected ground in the IRPA would prevent individuals from conscientiously opposing activities which they believe may have a negative influence on society.

28. The Intervener wishes to draw attention to the following facts which are germane to the discussion of this issue:

(a) King's College is an educational institution which is founded upon Christian principles and as such holds strong religious views against certain sexual practices;

(b) Mr. Vriend's employment terminated after he engaged in sexual conduct contrary to the moral and religious values of King's College.

See: Case on Appeal at p. 229, per McClung J.A.

29. In ***Ontario Human Rights Commission v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536 [TAB 35, Respondents' Authorities]**, McIntyre J. stressed that the concept of freedom of religion was well-established within our society and that it was a recognized and protected right long before the human rights codes of recent appearance were enacted. At page 554, Justice McIntyre commented on the balancing of rights which must occur within society:

> In any society the rights of one will inevitably come into conflict with the rights of others. It is obvious then that all rights must be limited in the interest of

> preserving a social structure in which each right may receive protection without undue interference with others.

30. Although Parliament may choose to remove criminal sanctions against certain sexual activity, there is nothing in the *Charter* which supports the opposite extreme: that the legislature must require all citizens to accept the sexual practices of others even where it conflicts with deeply held religious and moral beliefs. That would be a significant departure from the history of our legal system. Burger, J. summarized this history in ***Bowers v. Hardwick*** **92 L Ed 2d 140 (U.S.S.C., 1986) at pp. 149-150 [TAB 7]:**

> The proscriptions against sodomy have very "ancient roots." Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judeao-Christian moral and ethical standards. Homosexual sodomy was a capital crime under Roman law. See Code Theod. 9.7.6; Code Just. 9.9.31. See also D. Bailey, Homosexuality and the Western Christian Tradition 70-81 (1975). During the English Reformation when powers of the ecclesiastical courts were transferred to the King's Courts, the first English statute criminalizing sodomy was passed. 25 Hen. VIII, ch.6. ... To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching.

31. Virtually all major religions have historically viewed certain sexual practices as immoral. To include sexual orientation in the IRPA would clearly contradict and conflict with the rights of individuals who are entitled to follow their beliefs and teaching without fear of hindrance or reprisal.

32. Professor Finnis has accurately characterized the implications of protecting "sexual orientation" within human rights legislation, for those who hold legitimate religious or moral beliefs against certain sexual conduct:

> An example which has been widely reported is the Georgetown University case, requiring a religiously affiliated education institution to give equal access to it's facilities to organizations "participating in and promoting homosexual lifestyles [which necessarily include homosexual conduct]" in manifest opposition to the moral beliefs and teaching of the religion with which that institution professed an association.
>
> It is in fact accepted by almost everyone, on both sides of the political debate, that the adoption of a law framed to prohibit "discrimination on grounds of sexual orientation" would require the prompt abandonment of all attempts by the political community to discourage homosexual conduct by means of educational policies, restrictions on prostitution, non-recognition of homosexual "marriages" and adoptions, and so forth.
>
> **Finnis, J., "Law, Morality and 'Sexual Orientation'", 69:5 Notre Dame Law Review, 1049-1076 at pp. 1054-1055 [TAB 8]**

33. A recent incident in British Columbia demonstrates the legitimacy of the concerns raised by Professor Finnis. Graduates of the provincially accredited education program at Trinity Western University, a Christian university in Langley, B.C., have been refused accreditation by the B.C. Teachers' Federation because of the position of the university that certain sexual conduct is morally wrong. On October 18, 1996, a Petition was filed with the British Columbia Supreme Court in regards to this matter. **[TAB 9]**

34. This Court has consistently taken the position that it is the role of the legislature and not the courts to accommodate disparate social interests and to show particular deference to the legislature in cases where the rights and interests of different groups may be in conflict. As Mr. Justice LaForest commented in ***R.J.R.-McDonald v. Canada (Attorney General)*, [1995] 3 S.C.R. 199 at p. 314 [TAB 10]**:

> Dickson, C.J. stated at p. 782, [in *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713] that "[t]he courts are not called upon to substitute judicial opinions for legislative ones as to the place at which to draw a precise line". He concluded, at p. 783:

> I should emphasize that it is not the role of this Court to devise legislation that is constitutionally valid, or to pass on the validity of schemes which are not directly before it, or to consider what legislation might be most desirable.

I concurred with Dickson C.J. in that case, and stressed, at p. 795, that it was necessary, in that context, to give the legislature "room to manoeuvre" in fashioning legislation to designed to mediate between different social interests and to protect vulnerable groups. My approach was later accepted by this Court in *R. v. Schwartz*, [1988] 2 S.C.R. 443, at pp. 488-89; *Andrews, supra* at pp. 184-86, 197-98; and *Cotroni, supra* at p. 1495.

35. The protection of specific groups within human rights legislation is a matter which inherently involves the balancing of fundamental rights of different parties. This is a matter on which the Alberta legislature is entitled to significant deference by the courts. The balancing in question lies firmly within the jurisdiction of the legislature. In the Intervener's submission, the conflict between long protected religious freedom and the addition of "sexual orientation" as a protected ground in the IRPA, demonstrates that it is "reasonable and demonstrably justifiable in a free and democratic society" for the Alberta Legislature enact the IRPA without including sexual orientation.

C. READING IN IS NOT APPROPRIATE

36. As concluded by all three justices in the Court of Appeal of Alberta (McClung, O'Leary and Hunt J.J.A.), even if the IRPA is inconsistent with the *Charter*, reading in sexual orientation is not the appropriate remedy.

37. Reading in is an exceptional remedy that may only be exercised in the clearest of cases. As set out in ***Schachter v. Canada*, [1992] 2 S.C.R. 679 at p. 718 [TAB 44, Respondents' Authorities]**, reading in is only to be used as a remedy where:

(1) the legislative objective is obvious and reading in would further that objective or interfere less with the objective than would striking down the legislation;

(2) the choice of means used by the legislature to further the objective is sufficiently equivocal that reading in would not unacceptably intrude into the domain of the legislature; and

(3) reading in would not intrude substantially into the legislature's budgetary decisions.

38. The Trial Judge held that the term "sexual orientation" ought to be read into sections 2(1), 3, 4, 7(1), 8(1) and 10 of the IRPA. **[Appellants' Authorities, TAB 1]**. Each of the sections which the Trial Judge rewrote by this reading in deals with a separate subject matter and contains a list of prohibited grounds of discrimination specific to that subject matter. Section 2 deals with public notices, section 3 is concerned with public accommodation and section 4 with tenancies. Section 7 concerns employment practices, section 8 deals with applications and advertisements for employment and section 10 deals with membership in trade unions. Moreover, as noted by Justice Hunt (dissenting, but not on this point) **(Case on Appeal at p. 331)**:

> It is of some significance that these six sections do not all prohibit discrimination on the same grounds. Specifically, ss. 7, 8 and 10 contain reference to marital status as a prohibited ground, which ss. 2, 3, and 4 do not.

39. Justice Hunt also points to another factor which "render[s] even more problematic the task of selecting an appropriate remedy": both section 7 which concerns employment practices and section 8 which concerns applications and advertisements regarding employment contain limitations for *bona fide* occupational requirements ("BFOR"s). At trial, no consideration was given to whether sexual orientation was a BFOR for Mr. Vriend's employment with King's College, in accordance with the religious views espoused by that college.

40. Of particular concern is the fact that Russell J. amended the IRPA in sections which were completely unrelated to the evidence and the facts of the case, which is restricted to the employment context. Justice Hunt addressed this issue as follows (**Case on Appeal at p. 332**):

> I have concluded that, whatever the remedy, it should be limited to the evidence in this case, namely, that Vriend was fired from his job because of his homosexuality. He was not discriminated against by virtue of a public notice (s. 2); denied public accommodation (s. 3); or denied a tenancy (s. 4). Nor, it must be acknowledged, was he discriminated against in an employment notice (s. 8) or denied membership in a union (s. 10).

41. Even if reading in were to be restricted only to the relevant section at issue on this appeal, namely section 7 which deals with employment, there would still be significant uncertainty in the manner in which such reading in would affect the section as a whole. As noted by Justice Hunt (**Case on Appeal at pp. 337-338**):

> Also troublesome is the possible impact of the proposed reading in upon the operation of s. 7(2) of the IRPA. As noted earlier, it states that s. 7(1), as regards age and marital status, "does not effect the operation of any *bona fide* retirement or pension plan or the terms or conditions of any *bona fide* group or employee insurance plan". The remedy granted by Russell J. appears not to include "sexual orientation" in the exclusion found in s-s. (2). We heard no argument on this point and there is no evidence before the court to explain the rationale behind this provision. It seems to me that in extending the protection of the IRPA to homosexuals some thought would have to be given to whether or not that group would be included or excluded from s-s. (2), and, if they were to be excluded, whether the exclusion could be justified under s. 1. This is something the court is in no position to do. Given this difficulty, I am concerned that the reading in remedy would engage the court in the kind of "filling in of details" against which Lamer C.J.C. cautions in *Schachter*.

42. The purpose of reading in is to be as faithful as possible, within the requirements of the Constitution, to the scheme enacted by the Legislature. Where the question of how a statute ought to be extended in order to comply with the Constitution cannot be answered with a

sufficient degree of precision on the basis of constitutional analysis, it is the role of the legislature and not the courts to fill in the gaps. As noted by Chief Justice Lamer in ***Rodriguez v. Attorney General of British Columbia*, [1993] 3 S.C.R. 519 at p. 570 [TAB 11]**:

> As for reading in, the guidelines I discussed in *Schachter v. Canada, supra*, indicate that reading in is not appropriate, given the range of alternative schemes from which the Court would have to choose. In other words, the best constitutional way to achieve the legitimate legislative objective, short of an absolute prohibition, is not obvious. Reading in an assisted suicide "code" ... would also raise serious concerns about the roles of the courts and the legislature.

43. Reading in is only appropriate where it would promote the achievement of the intention of the legislature in originally passing the impugned legislation. In this case, it cannot be assumed that the intention of the legislature was to provide protection on every possible ground. The detail in the list suggests otherwise. Rather, it is likely that the intended list is complete as is. The preamble to the IRPA enumerates the specific grounds which are to be protected therein:

> WHEREAS it is recognized in Alberta as a fundamental principle and as a matter of public policy that 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;

44. It is notable that Alberta does not provide protection for a number of other additional grounds which have been recognized in other jurisdictions: political belief, citizenship, conviction of a criminal offence, drug and alcohol dependency, civil status, linguistic origin, social origin, social condition, place of residence, irrational fear of disease **[TAB 12]**. It is impossible to say that the inclusion of sexual orientation would promote the legislative objective, particularly after the Legislature has consistently refrained from addressing the issue of sexual orientation in legislation.

45. Further, reading in "sexual orientation" is not an appropriate remedy in light of ***Egan, supra***. The legislature has been granted "reasonable room to manoeuvre" given this Court's conclusion in ***Egan, supra,* at pp. 535-38 [TAB 25, Respondents' Authorities]** that Parliament can legitimately provide benefits to certain groups without having a concurrent duty to provide the same benefits to all conceivable groups.

46. In ***Schachter, supra,* at p. 705,** Lamer C.J. pointed out that reading in should not be used when the question of how to amend the statute to comply with the Constitution cannot be answered with sufficient precision, for it is the legislature and not the courts which should fill in the necessary details. As Justice Hunt noted, one of the problems with reading in is that "sexual orientation" is not a clearly defined term **(Case on Appeal at p. 337)**:

> I am concerned about whether, in this case, reading in can be accomplished with adequate precision. One problem is whether it is necessary to have a definition of "sexual orientation".

47. The problem and need of defining terms in legislation is well known. Legislators debate endlessly on the meaning of phrases to be included in legislation. Thereafter, courts struggle with terms even when they are defined in a statute. Given that the term "sexual orientation" cannot be clearly defined by the courts, the remedy of reading in would in and of itself create an unacceptable degree of imprecision and ambiguity.

48. **Webster's New Encyclopedic Dictionary (Black Dog & Leventhal Publishers Inc.: 1993) [TAB 13], Black's Law Dictionary (6th ed.) (West Publishing Co.: 1990) [TAB 14],** and **The Oxford English Dictionary (Oxford University Press, Ely House, London: 1970) (Vol. 7 and Vol. 9) [TAB 15]** do not have a specific entries for the term "sexual orientation". Neither do these dictionaries refer to the terms sexual and orientation being used in conjunction with each other in the examples illustrating the meaning of either word.

49. The Alberta Human Rights Commission in collaboration with the Gay and Lesbian Awareness Society of Edmonton, the Calgary Lesbian and Gay Political Action Guild and the Gay Lines of Calgary, defined sexual orientation as follows:

> General or lasting direction of thought, inclination or interest associated with sex or the sexes.
>
> **Alberta Human Rights Commission, Gay and Lesbian Awareness Society of Edmonton, Calgary Lesbian and Gay Political Action Guild, and Gay Lines of Calgary, *A Study of Discrimination Based on Sexual Orientation* (Edmonton, 1992), at p. 1 [TAB 40, Appellants' Authorities]**

50. John Finnis, Professor of Law and Legal Philosophy at Oxford University and legal advisor to the British government during the patriation of the Canadian Constitution, commented upon the problem of defining "sexual orientation" as a protected class. He stated:

> But the standard modern position deliberately rejects proposals to include in such lists the item "sexual orientation." The explanation commonly given (correctly, in my opinion) is this. The phrase "sexual orientation" is radically equivocal. Particularly as used by promoters of "gay rights," the phrase ambiguously assimilates two things which the standard modern position carefully distinguishes: (I) as psychological or psychosomatic disposition inwardly orientating one towards homosexual activity; (II) the deliberate decision so to orient one's public behaviour as to express or manifest one's active interest in and endorsement of homosexual conduct and/or forms of life which presumptively involve such conduct.
>
> **"Law, Morality and 'Sexual Orientation'", *supra*, at pp. 1053-54 [TAB 8].**

51. He continued and aptly illustrated the implications of including "sexual orientation" in human rights legislation:

> It is also widely observed that laws or proposed laws outlawing "discrimination based on sexual orientation: are always interpreted by "gay rights" movements

> as going far beyond discrimination based merely on A's belief that B is sexually attracted to persons of the same sex. Instead (it is observed), "gay rights" movements interpret the phrase as extending full legal protection to public activities intended specifically to promote, procure and facilitate homosexual conduct... (at pp. 1054-1055)

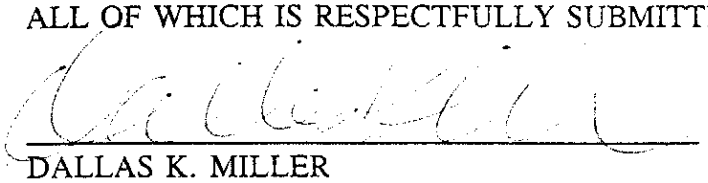
52. There is no basis in the *Charter* for reading in to the IRPA an undefined, controversial and politically sensitive term such as "sexual orientation". If the framers of the *Charter* intended to impose positive legislative obligations on governments, one would expect to find an express statement of that duty. Instead, the only express remedy relating to legislation is found in section 52: a declaration that legislation or a portion thereof is of no force or effect. As Chief Justice Lamer stated in ***R. v. Prosper*, [1994] 3 S.C.R. 236 at p. 267 [TAB 16]**:

> It would be a very big step for this Court to interpret the *Charter* in a manner which imposes a positive constitutional obligation on governments. [Emphasis in original].

ORDER SOUGHT

The Intervener seeks an order that the decision of the Alberta Court of Appeal be affirmed and the Appellant's appeal be dismissed with no award of costs for or against the Intervener.

ALL OF WHICH IS RESPECTFULLY SUBMITTED



DALLAS K. MILLER
Counsel for the Intervener
Alberta Federation of Women United for Families

By order of the Court, counsel are "entitled to ten minutes for oral argument".

LIST OF AUTHORITIES

Cases Cited **Page Reference in Factum**