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)

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PART I STATEMENT OF FACTS

1. The Christian Legal Fellowship (hereinafter "CLF") agrees with the statement of facts as set out by Focus on the Family (Canada) Association.

PART II POINTS IN ISSUE

A. Question Presented

2. This factum will address the question which may be raised under section 1 of the Charter in this appeal. If the *Individual's Rights Protection Act*, R.S.A. 1980 c. I-2, as amended (sometimes the "Act" or "Alberta Act") is inconsistent with section 15(1), is the inconsistency justified in a free and democratic society pursuant to section 1 of the Charter?

B. Brief Answer

3. The enactment of the Act by the Alberta Legislature without sexual orientation is justified under section 1. The interests expressly identified in the Act justify the existence of legislated human rights protection even where the Alberta Legislature chooses not to enact rules regulating how the private sector treats gays, lesbians, bisexuals, heterosexuals, transsexuals and asexuals. This is an issue best left to legislators who are in a much better position to make the political choices that surround this "morally-eruptive divisive issue", as Justice McLung characterized it.

PART III ARGUMENT

A. Section 1 of the Charter Justifies the Alberta Act

1. The Test

4. The section 1 test is set out in *The Queen v. Oakes*, [1986] 1 S.C.R. 103, 138-140; (Tab 24) and *The Queen v. Laba*, [1994] 3 S.C.R. 965, 1006-1011 (Tab 22).

5. The analysis of whether an impugned statute can be justified in a free and democratic society demands that answers be given to the following questions:

1. What is the objective of the challenged law?

2. Is the challenged law a response to a pressing and substantial concern which is important enough to justify contravention of a Charter protected right or freedom?

3. What are the means the challenged law utilizes to accomplish the objective of the challenged law?

4. Do the means rationally promote the attainment of the objective?

5. Do the means impair the infringed right or freedom as little as possible?

6. Is the deleterious impact of the law on those whose rights or freedoms are infringed greater than the ameliorative values associated with the objective the law was designed to achieve?

6. These six queries oblige a constitutional adjudicator to balance a number of factors, such as the nature of the right, the extent of its infringement, the importance of the right to the individual or group concerned and the broader social impact of both the impugned law and its

alternative. *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, 185-6 (Tab 19 Respondents).

7. A constitutional adjudicator entrusted with the task of sensitively applying section 1 must be mindful of all the values the Charter promotes, as well as the legitimate goals which account for non-Charter laws. Justice Wilson's judgment in *The Queen v. Morgentaler*, [1988] 1 S.C.R. 30, 166 (Tab 23) reminds adjudicators of the fact that Charter values are not always complementary:

> The idea of human dignity finds expression in almost every right and freedom guaranteed in the Charter. Individuals are afforded the right to choose their own religion and their own philosophy of life, the right to choose with whom they will associate and how they will express themselves, the right to choose where they will live and what occupation they will pursue. These are all examples of the basic theory underlying the Charter, namely that the state will respect choices made by individuals and, to the greatest extent possible, will avoid subordinating these choices to any one conception of the good life.
>
> Thus, an aspect of the respect for human dignity on which the Charter is founded is the right to make fundamental personal decisions without interference from the state. This right is a critical component of the right to liberty. Liberty, as was noted in *Singh*, is a phrase capable of a broad range of meaning. In my view, this right, properly construed, grants the individual a degree of autonomy in making decisions of fundamental personal importance.
>
> [Emphasis added]

8. The following passage from Justice La Forest's opinion in *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, 280 (Tab 20 Respondents) evidences judicial acceptance of the point Professor Lederman made in an article released shortly after the Charter was proclaimed ("Democratic Parliaments, Independent Courts, and The Canadian Charter of Rights and Freedoms", 11 Queen's L.J. 1, 24 (1985)):

> This balancing task, as the Court recently stated in *United States of America v. Cotroni*, [1989] 1 S.C.R. 1469, at pp. 1489-90,

> should not be approached in a mechanistic fashion. For, as was there said,
>
> "While the rights guaranteed by the Charter must be given priority in the equation, the underlying values must be sensitively weighed in a particular context against other values of a free and democratic society sought to be promoted by the legislature".
>
> [Emphasis added]

9. This position was reaffirmed in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 877, 878 (Tab 12). Rights proclaimed in section 15(1) of the Charter may not be more important than other rights entrenched in the Charter or values which do not appear in the Charter. Courts are to instead engage in a balancing of competing values. Chief Justice Lamer explained this interpretive principle in this way:

> A hierarchical approach to rights, which places some over others, must be avoided both when interpreting the Charter and when developing the common law when the protected rights of two individuals come into conflict, as can occur in the case of publication bans, Charter principles require a balance to be achieved that fully respects the importance of both sets of rights.

2. International Standards and Other Free and Democratic Societies

10. Courts balancing competing values under section 1 have often found it useful to consider Canada's obligations under various international agreements. *The Queen v. Keegstra*, [1990] 3 S.C.R. 697, 733 (Tab 21); *Miron v. Trudel*, [1995] 2 S.C.R. 418, 449 to 450 (Tab 33 Respondents) (The Universal Declaration of Human Rights is binding on Canada).

11. The Alberta Act is consistent with Canada's obligations under international law. International norms under the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights do not bestow special protection on gays, lesbians or bisexuals as opposed to heterosexuals.

12. These documents expressly recognize the right of government to make decisions regarding the sexual rules which will receive the force of law. Article 23 of the International Covenant on Civil and Political Rights reads, in part, as follows:

> 1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the state.
>
> 2. The right of men and women of marriageable age to marry and to found a family shall be recognized.
>
> 3. No marriage shall be entered into without the free and full consent of the intending spouses.

13. Both the European Court of Human Rights and the European Commission of Human Rights have upheld provisions which discriminate on the basis of sexual orientation in the context of marriage, spousal relationships and family. *Application 12513/86* (1987) 85 L.S.G.A.Z. 30, (24 February, 1988) 11 E.H.R.R. 46, 49 (Tab 8) (the refusal to allow a homosexual partner to remain in the United Kingdom with his partner is not contrary to articles 8 or 14 of the Convention as the definition of family life does not include same sex partners); *Application 9369/81* (1983) 5 E.H.R.R. 581 (E.C.H.R.) 601 (Tab 6) (the failure to include a homosexual relationship within the definition of family life under the immigration provisions in the United Kingdom does not violate articles 8 or 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, because such relationship is a matter of one's private life); *Application 9532/81* (1984) 7 E.H.R.R. 409 (E.C.H.R.) 429 (Tab 7). (A contracting state can exclude from marriage persons whose sexual category itself implies a physical incapacity to procreate either absolutely (in the case of transsexuals) or in relation to the sexual category of the other spouse (in the case of individuals of the same sex); *Cossey v. United Kingdom*, (1990) 13 E.H.R.R. 622 (E.C.H.R.) (Tab 11) (failure to allow a transsexual to marry not contrary to articles 8, 12 and 14 of the Convention).)

14. Other jurisdictions have upheld legislation that limits sexual activities of consenting adults. The United States Supreme Court has held that the due process clause of the United States Constitution does not confer any fundamental rights on individuals to engage in acts of consensual sodomy. *Bowers v. Hardwick*, 478 U.S. 186, (1986) (Tab 7 A.F.W.U.F.). In *Equality Foundation of Greater Cincinnati v. City of Cincinnati*, 54 F. 3d 261 (6th Cir 1995)

(Tab 14), the United States Court of Appeals held that Amendment XII of the Cincinnati City Charter which mandated that the City not pass any ordinances, rule or policy which afforded protection to persons based on their sexual orientation did not discriminate against gays and lesbians. The Court of Appeals held that gays and lesbians still had the same rights as other members of society. The Amendment did not deprive gays and lesbians of any rights, nor did it impair their ability to seek relief through other forums.

15. Courts in the United States have recognized that the prohibition of sex discrimination in civil rights statutes and ordinances is not intended to affect homosexuals, lesbians or transsexuals. *Smith v. Liberty Mutual Insurance Co.*, 569 F. 2d 325 (5th Cir. 1978) (Tab 26) (Title VII of Civil Rights Act not violated when employer refused to hire Applicant on ground he was effeminate); *Willingham v. Macon Telegraph Publishing Co.*, 507 F. 2d 1084 (5th Cir. 1975) (Tab 27) (Congress by its proscription of sex discrimination intended only to guarantee equal job opportunities for males and females. The prohibition on sexual discrimination could not be extended to situations of questionable application without some stronger Congressional mandate); *Berg v. Clayton*, 436 F. Supp. 76 (Dist. Ct. 1977) (Tab 9) (dismissal of naval officer because of homosexual activity does not restrict his right to associate and is not in violation of the First Amendment); *Holloway v. Arthur Anderson & Co.*, 566 F. 2d 659 (9th Cir. 1977) (Tab 17) (Title VII does not prohibit the discharge of an employee for initiating the process of sex transformation, nor is it a violation of the doctrines of due process and equal protection.)

16. American courts have recognized that marriages are a uniquely heterosexual construct. Further, they have recognized that the definition of family is not to be extended to include same sex partners. *Singer v. Hara*, 522 P. 2d 1187, 1195 (Wash. App. 1974), (Tab 25) (a statutory prohibition against same-sex marriages did not violate constitutional provision that "equality of rights and responsibility under the law shall not be denied or abridged on account of sex"); *Adams v. Howerton*, 486 F. Supp. 1119, 1123 (C.D. Cal 1980), aff'd 673 F. 1036 (9th Cir. 1982), cert. denied 458 U.S. 111 (1982) (Tab 5); (Homosexual marriage not qualifying alien as citizen's spouse pursuant to *Immigration and Nationality Act*. Spouse must be of the opposite sex.) *Hinman v. Dept. of Personnel Admin* 213 Cal. Rptr. 410 (Cal. App. 3 District 1985) (Tab 16); (Homosexual partner does not fall within definition of "family partner" under state dental plan. This denial is not a violation of the equal protection clause of California.).

3. Application of the Section 1 Test to the Act

17. Neither Justice McLung nor Justice O'Leary had an appetite for a section 1 analysis, both having concluded that the Alberta Act did not contravene section 15(1) of the Charter. Justice McLung indicated that he would have adopted Justice Sopinka's conclusion in *Egan* had it been necessary to apply section 1 of the Charter. 2 C.A. 246. Justice O'Leary said nothing about section 1. 2 C.A. 285.

18. Justice Hunt, on the other hand, had a lot to say about section 1. 2 C.A. 320-29.

10

19. We will now answer the section 1 queries set out in an earlier part of this factum.

a. What Is the Purpose of the Challenged Law?

20. Justice Hunt accepted that the purpose of the Act "is constitutionally sound". 2 C.A. 323. But, as noted already, she diminished the significance of this conclusion when she added, "that is not the issue". 2 C.A. 323.

21. Justice Hunt cited *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, 184 (Tab 19 Respondents) to support her position. 2 C.A. 323-24. This case appears to undermine her approach, not buttress it. The very passage on which Justice Hunt relies is not helpful. Justice McIntyre said this:

> In my opinion, in approaching a case such as the one before us, the first question the Court should ask must relate to the nature and 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]

22. The underlined portion of Justice McIntyre's opinion is an unmistakable judicial direction to consider the "purpose of the enactment". That this was precisely what Justice McIntyre meant is confirmed by a subsequent passage:

> There is no difficulty in determining that in general terms the Barristers and Solicitors Act of British Columbia is a statute enacted for a valid and desirable social purpose, the creation and regulation of the legal profession and the practice of law. The narrower question, however, is whether the requirement that only citizens be admitted to the practice of law serves a desirable social purpose of sufficient importance to warrant overriding the equality guarantee.
>
> [Emphasis added] [1989], 1 S.C.R. 143, 187.

See also *Miron v. Trudel*, [1995] 2 S.C.R. 418, 477-478, 503 (Tab 33 Respondents) (The objective of the standard automobile policy to protect families against economic consequences which may flow from injury, is pressing and substantial, even though the impugned distinction is not rationally connected to the objective of the legislation.)

23. Again, the underlined portion in the preceding passage directs one to ask what the objective of the statute as a whole is. The second sentence leads the reader to a subsequent inquiry, namely do the means promote the attainment of the legislative objective.

24. Justice Hunt also relied on Justice Iacobucci's judgment in *Egan*. Why she did is not readily apparent. The very first question Justice Iacobucci asked is, "What is the goal of the Old Age Security Act?" The second question he posed is, "Is this goal pressing and substantial?" This is the very approach we are following, which is not what Justice Hunt did.

25. What then is the purpose of the Act? The best place to find the purpose the Legislative Assembly had in mind is the preamble:

> Whereas recognition of the inherent dignity and the equal and inalienable rights of all persons is the foundation of freedom, justice and peace in the world; and
>
> Whereas it is recognized in Alberta as a fundamental principle and as a matter of public policy that all persons are equal in dignity and rights without regard to race, religious beliefs, colour, gender, physical disability, mental disability, age, ancestry or place of origin.

One does not have to read very far into the preamble before it become readily apparent that the purpose of the Act is to promote the dignity of all Albertans.

b. Is the Promotion of the Dignity of All Albertans a Response to a Pressing and Substantial Concern?

26. Yes. This is not a hard one to answer.

c. What Means Does the Act Utilize to Pursue the Objective of the Act?

27. Justice Hunt does not answer this question.

28. A review of the Act discloses that the legislators created a mechanism which would allow Albertans to complain if they believed that they were the victims of discrimination.

29. The Act singles out certain realms of human activity which have a significant impact on the dignity of a person if characterized by discrimination. An employer, for example, may diminish a person's dignity if it treats an employee in a manner that is not dependent on the attributes of the worker but some other basis which is not rationally related to the skill under review. It was Sir William Blackstone who said that the employment relationship was one of the three great relationships of life, along with that of husband-wife and parent-child. 1 Commentaries 422.

30. The Act also limited the grounds of discrimination about which a person may complain. Legislators must have concluded that persons with some identifiable traits needed protection. This probably accounts for the inclusion of such categories as race, colour and age, to name but a few.

d. Do the Means Rationally Promote the Attainment of the Objective of the Individual's Rights Protection Act?

31. Justice Hunt asked and answered this question. Predictably, given her decision to concentrate on the omission from the outset, she concluded that the means were suspect. This is how she deals with the question:

> I accept the Respondent's [sic] argument that the correct question is whether the omission of the protection can be seen to be rationally connected to the purpose of the legislation. Russell, J. concluded that it was not and I agree. The purpose of the legislation is to extend protection from discrimination to groups that have been historically disadvantaged; the omission of sexual orientation has exactly the opposite effect.

2 C.A. 326.

32. We argue that the means rationally promote the objective of the Act, which is to enhance the dignity of all Albertans. Can it be said that anything in the Act impedes the pursuit of this objective? We fail to see how this could be the case.

33. Every time the legislature adds to the list of prohibited grounds the effectiveness of the Act is increased. There are twelve prohibited grounds of discrimination in the Act and this ensures that the vast majority of citizens who are the victims of discrimination will have an effective remedy.

34. Justice Hunt's insistence on dealing with what is not in the Act at the start of the section 1 inquiry is premature. The significance of the gap or omission logically arises later when discussing the last two questions.

e. Do the Means Impair the Infringed Right or Freedom as Little as Possible?

35. Justice Hunt had no trouble answering this question in the negative:

> The exclusion of homosexuals from protection under the IRPA is total, so there is a total impairment of the Charter guarantee of equality. There is no evidence that the Alberta Legislature carefully balanced competing interests, for example, concluding that there were sound reasons to afford protection to homosexuals in regard to housing but not in regard to employment.

2 C.A. 328.

36. Why Justice Hunt would write that homosexuals are totally excluded from the Act is not apparent. It is obvious that nothing in the Act precludes a lesbian from complaining that her employer has discriminated against her on account of her sex, race or age, to name but a few grounds. A gay employee could likewise access the Act to complain about unlawful treatment.

37. We concede that a gay, lesbian, bisexual, heterosexual, transsexual or asexual could not meaningfully complain about an employer who has discriminated on the basis of sexual orientation, but this does not warrant the conclusion that homosexuals face "total" exclusion under the Act.

38. One must be mindful of the limited scope of the Act. While it does regulate important commercial and employment relationships, it leaves unregulated the other relationships that Albertans routinely enter into on a daily basis. Albertans have the freedom to determine with whom they will be friends, with whom they will live and with whom they will form business associations, to identify but a few of the many choices not within the aegis of the Act. In this area, gays, lesbians, bisexuals, heterosexuals, transsexuals and asexuals have the same rights and obligations as any other Albertans identified by specified traits.

39. One should not lose sight of the fact that Albertans do have access to the courts if they feel another's conduct diminishes their dignity and may be subject to review under common law principles. *Re Drummond Wren*, [1945] O.R. 778 (H.C.) (Tab 13) comes to mind. Justice MacKay declared a restrictive covenant prohibiting a purchaser from subsequently settling to "Jews, or to persons of objectionable nationality" contrary to public policy. In his judgment he reviewed the United Nations Charter and other international documents. The approach of the Court of Appeal in *Horwood v. Millar's Timber*, [1917] 1 K.B. 305, 314 (Tab 18) may also be of assistance. In that case, the Court of Appeal refused to enforce a loan agreement where the

contract provided that the lender would have control over the "body and soul" and the "most trivial incidents of life" of the lendee.

40. The existence of common law remedies means that a gay, lesbian, bisexual or heterosexual person who has been discriminated against on the basis of sexual orientation may have a legal remedy.

f. Is the Deleterious Impact of Not Including "Sexual Orientation" in the Act on Gays, Lesbians and Bisexuals Greater Than the Ameliorative Values Associated with the Objective the Act Was Designed to Achieve?

41. Justice Hunt's answer to substantially the same question was concise. She opined that "[t]here has been a total denial of his rights and a total failure to justify that denial". 2 C.A. 329.

42. This answer misses the mark. We have already explained why this assertion is incorrect.

43. One must catalogue the harm gays, lesbians and bisexuals endure because they are unable to complain under the Act that in certain facets of their lives they have been discriminated against because of their sexual orientation. This, we acknowledge, frustrates gays like Mr. Vriend and has an emotional cost. There may well also be a monetary loss associated with this inability to register a complaint about sexual orientation discrimination, if there is no other legal remedy which is available.

44. In assessing the loss a gay man suffers because he may not complain about sexual orientation discrimination, it is necessary to keep in mind that there is nothing in the Act which limits the right a gay man has to pursue a complaint relating to the existing grounds of prohibited discrimination. So in those instances where discriminatory conduct features more than one type of discrimination, the inability to plead sexual orientation discrimination may not mean that the victim of discrimination is without an effective remedy. Mr. Vriend's complaint

alleged discrimination on the ground of sexual orientation, but religious belief and gender as well.

45. One must also be mindful, as we noted in our discussion of the last question, that in Alberta a person who believes he or she has been wronged by another in a manner the law recognizes may commence an action against the perceived wrongdoer. Wrongful dismissal actions fall in this category. If the action is successful and in part ameliorates the harmful effects of a discriminatory act prompted by the plaintiff's sexual orientation, the loss attributable to the absence of "sexual orientation" from the list of prohibited grounds of discrimination in the Act is lessened.

46. Now against this loss, a constitutional adjudicator must record the benefits which accrues to society from the Act in its existing form. They are many. First, the Act discharges an educational role. The preamble reminds Albertans how important it is to recognize the "inherent dignity and the equal and inalienable rights of all persons". This benefit exists even though gays, lesbians, bisexuals, heterosexuals, transsexuals and asexuals may not lodge a complaint under the Act about sexual orientation discrimination.

47. Second, all Albertans, including gays, lesbians, bisexuals, heterosexuals, transsexuals and asexuals, labour under no limitations if they wish to register a complaint under the Act alleging a breach of any of the twelve grounds of prohibited discrimination. This point deserves more weight than Justice Hunt was prepared to accord it.

48. Third, it must not be forgotten that the Act has a lengthy list of prohibited grounds of discrimination which compares favourably with all provinces. Albertans are well served by the Alberta Act.

49. When one places the harm associated with the absence of "sexual orientation" from the Alberta Act and evaluates it in light of the good the Act represents, we submit that the scale favours the good component. It follows that one should not conclude that the deleterious impact is greater than the ameliorative values associated with the Act, which is, after all a legislative statement of Albertans' commitment to the equal dignity of persons.

4. Judges Should Defer to the Decision of the Legislative Assembly of Alberta Not to Include "Sexual Orientation" in the Act

50. There is no doubt that the judiciary is responsible for ensuring that the other branches of government operate within the limits the constitution imposes on them. This is part of our history and it is a necessary task. See W. Lederman, Continuing Canadian Constitutional Dilemmas 281 (1981). Dean Rostow discussed this concept in The Sovereign Prerogative: The Supreme Court and the Quest for Law 149 (1962):

> The power of constitutional review, to be exercised by some part of the government, is implicit in the conception of a written constitution delegating limited powers. A written constitution would promote discord rather than order in society if there were no accepted authority to construe it, at the least in cases of conflicting action by different branches of government or of constitutionally authorized governmental action against individuals. The limitation and separation of powers, if they are to survive, require a procedure for independent mediation and construction to reconcile the inevitable disputes over the boundaries of constitutional power which arise in the process of government. British Dominions operating under written constitutions had to face the task pretty much as we have, and they have solved it in similar ways. Like institutions have developed in other federal systems.

51. Chief Justice Lamer in *Cooper v. Canadian Human Rights Commission*, [1996] 3 S.C.R. 854, 867 (Tab 10) recently confirmed that in Canada, as in the United States, the "task of declaring invalid legislation enacted by a democratically elected legislature is within the exclusive domain of the judiciary."

52. Canadian courts have discharged this task for well over 100 years. Distribution of power cases presented judges with problems that required a skill set which included not just intellectual prowess but judgment. Professor Lederman in an insightful article discussed the attributes of a good judge in the context of a distribution of power dispute:

> When a particular rule has features of meaning relevant to both federal and provincial classes of laws, then the question must be asked, Is it better for the people that this thing be done on a national level, or on a provincial level? In other words is the

> feature of the challenged law which falls within the federal class more important to the well-being of the country than that which falls within the provincial class of laws? Such considerations as the relative value of uniformity and regional diversity, the relative merits of local versus central administration, and the justice of minority claims, would have to be weighed. Inevitably, widely prevailing beliefs in the country about these issues will be influential and presumably judges should strive to implement such beliefs. Inevitably there will be some tendency for them to identify their own convictions as those which generally prevail or which at least are the right ones. On some matters there will not be an ascertainable general belief anyway. In the making of these very difficult relative-value decisions, all that can be rightly required of judges is straight thinking, industry, good faith and a capacity to discount their own prejudices.

W. Lederman, Continuing Canadian Constitutional Dilemmas 241 (1981).

53. While Professor Lederman was specifically addressing one type of problem, he made it abundantly clear that he believed what he said applied with equal vigour to American Bill of Rights cases. And it is a similar constitutional inquiry which Canadian courts undertake when hearing Charter cases. A Canadian court must decide if the challenger's claim that a law is inconsistent with the fundamental rights and values proclaimed in the Charter is meritorious.

54. The extract from Professor Lederman's book leaves a reader with no doubt about the nature of the task faced by a judge in a constitutional case. It is this - to determine which values should dominate in a contest of values? Professor Bickel, in The Least Dangerous Branch 55 (1962) said precisely the same thing: "Which values, among adequately neutral and general ones, qualify as sufficiently important or fundamental or whathaveyou to be vindicated by the Court against other values affirmed by legislative acts?"

55. Ultimately, judges must determine whether or not the legislative assessment will prevail. Justice McLung's judgment records some of the reasons why a court should be reluctant to substitute its view for that of the legislators. He noted that the legislative and judicial processes were different and that legislators, unlike judges, were accountable to the electorate for their actions. 2 C.A. 244. He observed that "the governments of the day ... [may] have to answer later to the voters for such a stance". 2 C.A. 240.

56. Judgments of the Supreme Court of Canada acknowledge that the different branches of government have different roles to discharge. Chief Justice Dickson in *Fraser v. Public Service Staff Relations Board*, [1985] 2 S.C.R. 455, 469-70 (Tab 15) covered this ground:

> There is in Canada a separation of powers among the branches of government - the legislature, the executive and the judiciary. In broad terms, the role of the judiciary is, of course, to interpret and apply the law; the role of the legislature is to decide upon and enunciate policy; the role of the executive is to administer and implement that policy.

57. This is an appropriate case for a court to defer to the legislators. There are a number of reasons which counsel judicial caution. First, this is not a case "in which the government ... can be characterized as the singular antagonist of an individual attempting to assert a legal right which is fundamental to our system of criminal justice." *The Queen v. Laba*, [1994] 3 S.C.R. 965, 1009 (Tab22). The Alberta Act is not a statute with any criminal law features. Second, this is human rights legislation with a desirable objective and a means of enforcement that compares favourably to statutes in other jurisdictions. Legislators have consistently demonstrated that they are able to make sound decisions in the human rights area. This precludes the need for an activist judicial role on human rights questions. Third, Alberta's Act is consistent with Canada's obligations under international law. Fourth, the dispute between the litigants does not turn on the object of the Individual's Rights Protection Act, which is the promotion of the dignity of all Albertans. Rather, the litigants are divided on the best means to attain the legislative objective. Justice Sopinka in *The Queen v. Laba*, [1994] 3 S.C.R. 965, 1009(Tab 22) wrote that the "legislature is entitled to some deference in choosing the means of attaining a given objective". Courts must allow legislatures adequate scope to achieve their objectives. *The Queen v. Edwards Books and Arts Ltd.*, [1986] 2 S.C.R. 713, 783 & 794-95 (Tab 20); *Irwin Toy Ltd. v. Quebec*, [1989] 1 S.C.R. 927, 983 & 989-90 (Tab 19).

58. *Egan v. Canada*, [1995] 2 S.C.R. 513, 572-73 (Tab 64 Appellants) is the proper model of judicial restraint. The Supreme Court of Canada declined to impose on Canadians values which democratically elected legislators eschewed. Justice Sopinka approached the issue of legislative choice in a very deferential manner:

> [G]overnment must be afforded some degree of flexibility in extending social benefits and does not have to be pro-active in recognizing new social relationships. ...
>
> ...
>
> This Court has recognized that it is legitimate for the government to make choices between certain disadvantaged groups and that it must be provided with some leeway to do so.

59. Justice Sopinka in *Egan*, [1995] 2 S.C.R. 513, 573-74 (Tab 64 Appellants) quoted from *McKinney* in support of deference to Parliament where an incremental approach to the extension of benefits has occurred:

> [I]t is important to remember that a Legislature should not be obliged to deal with all aspects of a problem at once. It must surely be permitted to take incremental measures. It must be given reasonable leeway to deal with problems one step at a time, to balance possible inequalities under the law against other inequalities resulting from the adoption of a course of action, and to take account of the difficulties, whether social, economic or budgetary, that would arise if it attempted to deal with the social and economic problems in their entirety ... .
>
> ...
>
> > Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think .... Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind .... The legislature may select one phase [of a] field and apply a remedy there, neglecting the others.
>
> ...
>
> But generally, the courts should not lightly use the Charter to second-guess legislative judgement as to just how quickly it should proceed in moving forward towards the ideal of equality.
>
> [Emphasis Added]

60. *Egan* supports the conclusion that governments must be given the discretion to make choices among groups within society, and legislatures should not be compelled by the courts to extend the Act to include sexual orientation as a protected ground.

61. Justice Hunt's views on the wisdom of second-guessing legislators appears to conflict with what *Egan* says on this topic. She said: "This will often require the courts to second-guess legislative choices and make social policy; this is an inevitable part of the Charter task, especially in the context of the s. 15(1) guarantee of equality ..." 2 C.A. 319.

62. Should the court respect or second guess the Legislative Assembly of Alberta in this case? There are a number of reasons, in addition to those set out in paragraph 64, which may lead a court to choose deference with respect to the Act:

1. the diversity of opinion within society, as represented by the strongly stated interventions of both private organizations and governmental entities;

2. the reality that governmental intervention in the private sector on this question will necessarily restrict liberty and compromise the fundamental freedom of individuals;

3. the opportunity which the legislature has to fully investigate the social consequence of amendments to the Act;

4. the efficacy of legislative action with respect to this issue is best determined by the legislature.

5. Conclusion

63. Section 1 of the Charter saves the Act, if it violates section 15(1) of the Charter.

PART IV CONCLUSION

Christian Legal Fellowship seeks an order that the decision of the Court of Appeal of Alberta be affirmed and that the appellants' appeal be dismissed and the cross-appeal be allowed, with no award of costs for or against Christian Legal Fellowship.

Respectfully submitted

MILNER FENERTY

10

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By order of the Court, the Intervener is "entitled to ten minutes for oral argument".

LIST OF AUTHORITIES