S.C.C. File No. 24395

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)

BETWEEN:

DELWIN VRIEND and GALA-GAY AND LESBIAN AWARENESS SOCIETY OF EDMONTON and GAY AND LESBIAN COMMUNITY CENTRE OF EDMONTON SOCIETY and DIGNITY CANADA DIGNITÉ FOR GAY CATHOLICS AND SUPPORTERS

Appellants
(Applicants)
(Respondents by Cross-Appeal)

- and -

HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA and HER MAJESTY'S ATTORNEY GENERAL IN AND FOR THE PROVINCE OF ALBERTA

Respondents
(Respondents)
(Appellants by Cross-Appeal)

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INTRODUCTION

1. The Canadian Bar Association - Alberta Branch ("CBA-AB") has 3,400 members in Alberta. The national Canadian Bar Association ("CBA-National") was founded in 1896 and has more than 34,000 members across Canada.

2. The Mission of the CBA-National, which the CBA-AB adopts by reference, includes the objective of promoting equality in the legal profession and in the justice system. One of the specific goals is to assist "in the elimination of discrimination in the law and the administration of justice".

3. In this regard, the CBA-AB holds:

> ...that the recognition and protection of human rights, fundamental freedoms and the dignity and worth of the human person are fundamental to a free and democratic society;
>
> ...to be of fundamental importance the existence of legislation which recognizes human rights, fundamental freedoms and the dignity and worth of the human person in a manner which at minimum complies in all respects with the Canadian *Charter of Rights and Freedoms* and the Alberta *Bill of Rights*;
>
> CBA-AB Resolution re Human Rights in Alberta, Schedule A to CBA-National Resolution 94-06.1-M, Exhibit "D" to the Affidavit of G.A. Harding sworn December 10, 1996.

4. In recent years both the CBA-AB and the CBA-National have called for amendments to human rights legislation across Canada to include sexual orientation as a prohibited ground of discrimination. While many jurisdictions have implemented such amendments, Alberta has not.

CBA-National Resolutions 94-06-A, 94-06.1-M and 96-09-A, Exhibits "C", "D" and "E" to the Affidavit of G.A. Harding sworn December 10, 1996.

5. The CBA-AB supports the Appellant, and respectfully submits that the *Individual's Rights Protection Act*, R.S.A. 1980, c. I-2, as am., now called the *Human Rights, Citizenship and Multiculturalism Act*, R.S.A. 1980, c. H-11.7 (the "*IRPA*"), should be read by this Honourable Court to include sexual orientation as a prohibited ground of discrimination.

PART I
STATEMENT OF FACTS

6. The CBA-AB respectfully adopts the Statement of Facts in the Appellants' Factum.

PART II
STATEMENT OF POINTS IN ISSUE

7. The CBA-AB respectfully adopts the Statement of Points in Issue in the Appellants' Factum, but restricts its submissions to the following points:

(a) the IRPA contravenes the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 (the "*Charter*") by its failure to include sexual orientation as a prohibited ground of discrimination;

(b) the appropriate remedy is to read in to the IRPA protection based on sexual orientation; and

(c) the role of the judiciary in the protection of minority rights, pursuant to the *Charter*, must be an active one.

PART III
STATEMENT OF ARGUMENT

ISSUE A: VIOLATION OF THE *CHARTER*

8. This Honourable Court has previously decided that sexual orientation is an analogous ground under s. 15 of the *Charter*, in *Egan v. Canada* [1995] 2 S.C.R. 513 (Appellants' Authorities, Tab 64).

9. This Court has also recognized the existence of discrimination against gay men and lesbians in this country. As stated by Cory, J. in *Egan* at 600 - 601 (Appellants' Authorities, Tab 64):

> The historic disadvantage suffered by homosexual persons has been widely recognized and documented. Public harassment and verbal abuse of homosexual persons is not uncommon. Homosexual women and men have been the victims of crimes of violence directed at them specifically because of their sexual orientation.... They have been discriminated against in their employment and their access to services. They have been excluded from some aspects of public life solely because of their sexual orientation.... The stigmatization of homosexual persons and the hatred which some members of the public have expressed towards them has forced many homosexuals to conceal their orientation. This imposes its own associated costs in the work place, the community and in private life.

10. The issue in this Appeal is whether the omission of sexual orientation from the IRPA constitutes a breach of s.15(1) of the *Charter*. The CBA-AB respectfully submits that the Court below erred in holding it did not.

(a) Purpose of s. 15(1) of the Charter: Substantive Equality

11. The purpose of s. 15(1) is to ensure that laws are formulated and applied in a manner which ensures equality and promotes the inherent dignity of all persons:

> 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. (*Andrews v. Law Society of British Columbia* [1989] 1 S.C.R. 143 at 171 - 172, per McIntyre, J., Appellants' Authorities, Tab 67).

12. This Intervener respectfully submits the purpose of s. 15(1) is to promote substantive equality. As a result, in cases like this one, the Court must determine whether the purpose or the effect of the impugned legislation, expressly or impliedly, creates distinction and discrimination. The enquiry must also consider legislative silence for, as this Court stated in *Brooks* v. *Canada Safeway*, "[u]nderinclusion may be simply a backhanded way of permitting discrimination" (*Brooks* v. *Canada Safeway* [1989] 1 S.C.R. 1219 at 1240, per Dickson C.J., Appellants' Authorities, Tab 72).

(b) Purpose of the IRPA

13. It is submitted that the purpose of the IRPA is to extend legislative protection to all disadvantaged groups in Alberta and to express commitment to the principles of entitlement to equality and dignity for all persons.

14. The Preamble of the IRPA states:

> ... as a fundamental principle and as a matter of public policy ... all persons are equal in dignity, rights and responsibilities....

15. The purpose of the IRPA and its comprehensive intent was confirmed by Hunt, J.A. in the Court below:

> ... to extend protection from discrimination to groups that have been historically disadvantaged.... (Case at 326)

16. Professor DeCoste, in "Case Comment: *Vriend v. Alberta; Sexual Orientation and Liberal Polity*" (1996) 34 Alta. L. Rev. 950 at 950 - 951 (Appellants' Authorities, Tab 53) writes that:

> The [IRPA] is a legislative affirmation of the moral equality of persons resident in Alberta. Through a series of prohibitions against discrimination, the IRPA in effect declares a principle of equal citizenship.

17. It is submitted that this comprehensive objective of the IRPA provides the context in which to consider whether the exclusion of sexual orientation violates s. 15(1) of the Charter. As this Court found in *Brooks* v. *Canada Safeway*, whether an exclusion from legislation is discriminatory must be judged "when the true character, or underlying rationale [of the legislation] is appreciated" (Appellants' Authorities, Tab 72, at 1237).

(c) <u>Denial of Benefit and Imposition of Burden</u>

18. Sopinka, J., in *Eaton v. Brant County Board of Education* [1996] S.C.J., No. 98, paragraph 62 (Appellants' Authorities, Tab 71) stated:

> There is general agreement that before a violation of s. 15 can be found, the claimant must establish that the impugned provision creates a distinction on a prohibited or analogous ground which withholds an advantage or benefit from, or imposes a disadvantage or burden on, the claimant.

19. The exclusion of sexual orientation from the Preamble of the IRPA denies to homosexuals status in the Province's fundamental pronouncement that all persons are equal in dignity, rights and responsibilities. This clearly implies that all persons except homosexuals are entitled to equality and dignity. Thus, the exclusion creates both distinction and disadvantage in the legislation's enunciation of principle.

20. The exclusion of sexual orientation from the operative sections of the IRPA denies access to the remedial mechanisms of the IRPA to homosexuals, which mechanisms are available to other historically disadvantaged persons resident in Alberta. Thus, the exclusion creates both distinction and disadvantage in the operative elements of the legislation.

21. As Professor DeCoste writes, at 965:

> ... juridical invisibility ... is the minimum requirement of moral equality and equal care and respect because any more significant account of personhood at law defeats, *ab initio*, equality and leads, inexorably, to intolerance through a tailoring of rights to account for difference. (Appellants' Authorities, Tab 53).

22. It is submitted that in the present case each element of the test enunciated by Sopinka, J. in *Eaton* (Appellants' Authorities Tab 71) has been clearly made out: homosexual persons, analogously entitled to protection under s. 15 of the *Charter*, are specifically, albeit implicitly, excluded from the ambit of comprehensive human rights legislation in Alberta. Such exclusion results in the burden of a clear denial of equality for these persons in the law of the Province and in a denial of the benefit of access to the remedial mechanisms of the legislation.

(d) The infringement of s. 15 is not demonstrably justified under s. 1 of the *Charter*

23. This Honourable Court has described the guiding principles for a determination of whether an infringement of the *Charter* is demonstrably justified in *R. v. Oakes* [1986] 1 S.C.R. 103, at 138 - 140, per Dickson C.J. (Interveners' Authorities) and more recently by lacobucci, J. in *Egan* (Appellants' Authorities, Tab 64, at 605). It is submitted that the impugned exclusion of sexual orientation does not meet any of the requirements set out by this Court:

(i) there is no pressing and substantial legislative objective expressed by the exclusion;

(ii) the infringement is not rationally connected to the purpose of the legislation;

(iii) the impugned exclusion does not minimally impair the *Charter* guarantee of equality; and

(iv) there is no proportionality between the effect of the impugned exclusion and the attainment of a legislative objective.

(i), (ii) Legislative Objective and Legislative Purpose

24. It is submitted that the exclusion of sexual orientation from the IRPA is contrary to the purpose and nature of the legislation. The complete exclusion of constituents of an analogous ground of *Charter* protection from legislation, the objective of which is to extend protection to disadvantaged groups, is fundamentally contrary to the purpose of the legislation. Moreover, it is difficult to see any compelling state interest in denying the benefits of the IRPA to lesbians and gay men. Accordingly it is submitted that there can be no pressing and substantial legislative objective and there can be no rational connection of the exclusion to a legislative purpose.

(iii) Impairment

25. It is further submitted that the impugned exclusion represents a complete denial of the *Charter* guarantee of equality to homosexuals and accordingly the impairment cannot be characterized as minimal in nature.

(iv) Proportionality

26. It is submitted that this total denial of a *Charter* guarantee for a purpose antithetical to the IRPA cannot be viewed as a proportional exercise of legislative authority.

27. Dickson, C.J. in *Oakes* (Interveners' Authorities), in considering the criteria by which Courts should approach the question of appropriate limitations of fundamental freedoms, stated at 136:

> The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.

It is submitted that the impugned legislative measure in this case is completely contrary to these values and principles, and is therefore disproportionate to the attainment of the overall legislative objective.

(e) Specific Responses to the Respondents' Factum

(i) Scope of s. 15 Review

28. The Respondents ask this Honourable Court to limit the purview of a s. 15 review to those situations in which legislation provides a benefit to a certain group, but improperly restricts the definition or ambit of the group. As in *Re Blainey and Ontario Hockey Association*, (1986), 54 O.R. (2d) 513 (C.A.) (Respondents' Authorities, Tab 20) and *McKinney v. University of Guelph* [1990] 3 S.C.R. 229 (Appellants' Authorities, Tab 70), the Respondents would limit the ambit of s. 15 to legislation which might prohibit discrimination on the basis of gender or age, but contain inappropriate exceptions or improperly define the class of persons who can rely on the discrimination prohibition.

29. With respect, this approach to s. 15 is inordinately circumscribed. It amounts to saying that when, and only when, legislation expressly prohibits discrimination on a specified basis may the Courts review the law, and then only for the purpose of ensuring that the prohibited discrimination is properly defined.

30. This overly narrow reading of the broad and inclusive provisions of s. 15 of the *Charter* ignores discrimination that arises from underinclusiveness, which has been recognized by this Court in *Brooks v. Canada Safeway* (Appellants' Authorities, Tab 72).

31. It is further submitted that this approach to s. 15 would insulate legislation from *Charter* scrutiny through mere drafting. This would be contrary to the promotion of substantive equality, which is the purpose of s. 15, as discussed above.

(ii) Legislative Silence and Discrimination

32. The Respondents submit that because the IRPA is silent with respect to sexual orientation, it is both neutral on this issue and does not discriminate. The argument appears to be that only positive expression can give rise to discrimination and discrimination cannot arise through underinclusion, even deliberate and repeated underinclusion.

33. This argument can be thought of as follows:

> The IRPA, as it currently reads, does not include "sexual orientation" as a prohibited ground of discrimination. This "neutral silence" is unobjectionable.
>
> However, if the IRPA said that it applied to everyone, or to all forms of discrimination, but not homosexuals or sexual orientation, that would be objectionable.

34. With respect, the argument is fallacious. Though the discrimination is express in the latter example and only implicit in the former, they function identically by denying homosexuals access to the remedial provisions of the IRPA. The legislative silence in the IRPA has the same discriminatory effect as would a positive enactment permitting discrimination on the basis of sexual orientation.

(iii) Regulation of Private Conduct

35. The Respondents argue that the Appellants are trying to do through the back door what they cannot do through the front. That is, the Appellants are trying to have s. 15 of the *Charter* apply to the sphere of private conduct, which the *Charter* was not designed to do.

36. It is the respectful submission of this Intervener that it is the Respondents, not the Appellants, who are attempting to do through the back door what the *Charter* does not allow them to do through the front door. The *Charter* prohibits legislation which discriminates on the grounds set out in s. 15, or on an analogous ground, such as sexual orientation.

37. An express (or "front door") form of discrimination would contravene the *Charter*. Exclusion by silence has the same functional effect and is the "back door" means of permitting the same result, namely discrimination against homosexuals. As such, it should receive the same scrutiny when held up to *Charter* challenge.

38. The focus and effect of the present *Charter* review is not private conduct but Alberta's legislation. This is a "front door" challenge to the IRPA which falls squarely within this Honourable Court's jurisdiction. If that challenge has an effect on private activity, that is a result of the legislation, not the *Charter*.

(iv) <u>"Incremental" Approach</u>

39. The Respondents argue that the rational connection behind Alberta's failure to include sexual orientation in the IRPA relates to its incremental approach toward expanding the scope of the IRPA and its efforts to balance the competing interests between equality rights for homosexuals as protected in s. 15 and religious freedom as protected in s. 2(a) of the *Charter*.

40. As the inclusion of "sexual orientation" has been repeatedly and specifically rejected by the Alberta legislature, it is difficult to see how any form of "incrementalism" is being applied in respect to the protection of the civil rights of gay men and lesbians.

(v) Equality and Religious Freedom

41. Further, this case is not about the competing values of "equality" and "religious freedom", as the Respondents suggest.

42. By reading "sexual orientation" into the IRPA, this Honourable Court would provide Mr. Vriend and other homosexual Albertans with the right to make complaint to the Alberta Human Rights Commission should they feel that they are the victims of prohibited discrimination.

43. In an employment situation, the Commission's determination of whether an alleged discrimination is prohibited or not will take into account two factors. The first is whether the employer can show that the discrimination is justifiable as being based on a *bona fide* occupational requirement (s. 7(3)). The second is set out in s. 11.1:

> A contravention of this Act shall be deemed not to have occurred if the person who is alleged to have contravened the Act shows that the alleged contravention was reasonable and justifiable in the circumstances.

44. Whether a Christian College can legitimately discriminate on the basis of sexual orientation is an open question which will not be answered by this Honourable Court's ruling in the present case. That would be another question for another tribunal, should Mr. Vriend be successful in the present appeal. Accordingly, the remedy sought in the within appeal does not dictate the result in this particular employment dispute.

ISSUE B: REMEDY

45. This Intervener supports the position of the Appellant that the just and appropriate remedy is for this Honourable Court to read "sexual orientation" into the appropriate provisions of the IRPA.

46. If this Honourable Court finds that the legislation offends the *Charter,* there are four possible remedies:

(a) strike down the entire IRPA as contrary to the *Charter,* with or without a delayed implementation;

(b) strike down only that portion of the IRPA that offends the Appellant's *Charter* right to equal treatment in employment, with or without a delayed implementation;

(c) read the phrase "sexual orientation" into all appropriate parts of the IRPA; or

(d) read in "sexual orientation" only in respect of the employment provisions of the IRPA on the basis that they are the only provisions which offend Mr. Vriend's *Charter* rights in this case.

47. With respect, options (b) and (d) should be given little consideration. Both provide only the narrowest possible remedy, and fail to address the absence of protection from discrimination in other areas encompassed by the IRPA. These options leave open the spectre of protracted litigation when homosexual Albertans find themselves discriminated against in the provision of food, lodging, and tenancy, to name a few examples. This Intervener submits that if a remedy is to be granted, it should rectify all those provisions of the IRPA which are discriminatory.

48. The choice between (a) and (c) invites an invocation of the "least violence" principle. That is, which of these remedies does the least violence to the will of the legislature - having no human rights legislation at all or having the protection of such legislation extended to the prohibition of discrimination on the basis of "sexual orientation".

49. The remedy of striking down the entire legislation, as favoured by the Respondents, is punitive to all Albertans, and excessive because it would deny protection from marketplace discrimination to all persons encompassed by s. 15.

50. The Respondents argue that reading in would not be appropriate because it would unduly intrude into the legislature's will to exclude sexual orientation from the IRPA. This objection confuses a breach of s. 15 with the remedy therefor.

51. The Alberta legislature has clearly indicated its unwillingness to include "sexual orientation" within the IRPA on repeated occasions. That gap in the legislation is no slip or oversight.

52. Nor is it any bar to the remedy of reading in. If the legislation is unconstitutional, evidence that the legislature wants it that way does not make it constitutional.

53. The Respondents also argue that reading in puts equality rights for homosexuals on a collision course with freedom of religion. As previously argued, this is not so due to the operation of ss. 7(3) and 11.1 of the IRPA.

54. Should this Honourable Court choose the remedy of reading in, the Alberta legislature still has the last word. It may either repeal the IRPA, thereby accomplishing the effect of striking down the entire Act, or it may repeal the Act and re-legislate it, while invoking s. 33 of the *Charter*.

ISSUE C: ROLE OF THE JUDICIARY

55. This case raises the issue of the role of the judiciary in Canadian constitutional democracy. This Intervener respectfully submits that courts must be active and vigilant in the protection of minority rights, as in this case.

56. The CBA-AB acknowledges that a counter-argument is made by those who challenge such judicial review on the basis that it is "undemocratic", since the court appears to override the will of the legislature.

57. With respect, the Canadian constitution has answered this argument by the inclusion of s. 33 in the *Charter*. This section leaves the final legislative power where it should be - with the people, as expressed through their democratically elected representatives. But where, as here, s. 33 is not invoked, courts have the responsibility to provide effective remedies when legislation runs afoul of the *Charter*.

58. It is respectfully submitted that this case involves the very issue, the protection of minority rights from political undertow, which led to the passage of s. 15 of the *Charter*. That is what is so fundamental about this case.

59. This case will either be Canada's *Plessy vs. Ferguson* 163 U.S. 537 (1896) (Interveners' Authorities) or Canada's *Brown vs. Board of Education* 347 U.S. 483 (1954) (Interveners' Authorities). (See S.K. O'Byrne and J.F. McGinnis, "Case Comment: *Vriend v. Alberta*; *Plessy Revisited: Lesbian and Gay Rights in the Province of Alberta"* (1996) 34 Alta. L. Rev. 892, Appellants' Authorities, Tab 34).

60. In 1896 the United States Supreme Court, in *Plessy,* upheld the legality of the "separate but equal doctrine" which found expression in the post-bellum "Jim Crow" laws, that is, American apartheid. The rationale for so doing can be found in the words of Mr. Justice Brown, who stated, for the majority of the Court, at p. 550, that:

> ...the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of the legislature. In determining the question of reasonableness it is at liberty to act

> with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of public peace and good order.

61. Again, at p. 551, Mr. Justice Brown stated:

> The argument [of Plessy] also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races .... Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation.

62. The Court was not unanimous in this decision. Mr. Justice Harlan dissented and at p. 559 stated:

> There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved. It is therefore to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a state to regulate the enjoyment by citizens of their civil rights solely upon the basis of race.

63. In *Brown vs. Board of Education* (Interveners' Authorities), the United States Supreme Court reversed the "separate but equal" doctrine upheld in *Plessy*.

64. The point is this: if fundamental human rights are to be viewed as falling within the sole jurisdiction of the legislature and if, as the Respondents submit, this Honourable Court ought to show deference and passivity in the face of that jurisdiction, then *Plessy* was not wrongly decided - *Brown vs. Board of Education* was.

65. It is respectfully submitted that, as stated by Chief Justice Stone in *United States vs. Carolene Products* 304 U.S. 144 (1938) at 152 - 153, n. 4 (Interveners' Authorities), the limits of judicial restraint are reached when minority rights are infringed.

66. It is respectfully submitted that this Honourable Court ought not to step back from this issue - the rights of Mr. Vriend, as protected by s. 15 of the *Charter*, have been infringed. He, and all homosexual Albertans, are entitled to the full benefit and protection of the IRPA.

PART IV
NATURE OF THE ORDER REQUESTED

67. The CBA - AB respectfully requests that this Honourable Court:

(a) allow the within appeal; and

(b) read in the words "sexual orientation" to the Preamble and ss. 2(1), 3, 4, 7(1), 8(1), 10 and 16(1) of the *IRPA*.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 9th day of May, 1997.

McCARTHY TÉTRAULT

Per: _____

James L. Lebo, Q.C.
Counsel for the Intervener,
Canadian Bar Association - Alberta Branch

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PART V

TABLE OF AUTHORITIES

Appellants' Authorities, Tab 1	*Individual's Rights Protection Act*, R.S.A. 1980, c. I-2, as am. (now called the *Human Rights, Citizenship and Multiculturalism Act*, R.S.A., c. H-11.7	2, 4, 5, 6, 7, 8, 10, 11, 12, 13, 14, 18
Appellants' Authorities, Tab 34	S.K. O'Byrne and J.F. McGinnis, Case Comment: *Vriend* v. *Alberta*; *Plessy Revisited: Lesbian and Gay Rights in the Province of Alberta* (1996) 34 Alta. L.Rev. 892	15
Appellants' Authorities, Tab 53	F.C. Decoste, "Case Comment: *Vriend v. Alberta; Sexual Orientation and Liberal Polity*" (1996) 34 Alta. L. Rev. 950	5, 6