S.C.C. File No. 25285

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
(Applicants)
(Respondents by Cross-Appeal)

- and -

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

Respondents
(Respondents)
(Appellants by Cross-Appeal)

FACTUM OF THE INTERVENER CANADIAN JEWISH CONGRESS ON THE APPEAL

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FACTUM OF THE INTERVENER
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FACTUM OF THE INTERVENER CANADIAN JEWISH CONGRESS

They came after the Jews,
but I was not a Jew, so I did not object.
Then they came after the Catholics,
but I was not a Catholic, so I did not object.
Then they came after the Trade Unionists,
but I was not a Trade Unionist, so I did not object.
Then, they came after me,
and there was no one left to object.

Martin Niemoller (1892 - 1984)
Pastor of a Protestant Congregation in Germany
Imprisoned in Sachsenhausen and Dachau concentration camps

Introduction

1. As a target of racism and a victim of the Holocaust, the Jewish community uniquely appreciates the importance of being vigilant in the fight against racism and all forms of discrimination. Canadian Jewish Congress ("Congress") views the issues raised in this case not only as issues pertaining to gays and lesbians, but also as human rights issues relevant to all minorities and all Canadians. Congress understands that tolerance of diversity must be a goal for all Canadians. Congress recognizes that it has an obligation to object wherever discrimination exists.

2. Founded in 1919, Congress currently represents a community of approximately 350,000 Jewish Canadians. Virtually all organizations, congregations, societies, ideological groupings and other secular and religious bodies which have a Jewish heritage, including those in Alberta, participate in Congress.

3. Historically, Jews and gay persons have frequently been the targets of discrimination at the same time and from the same sources. In Christianity, Social Tolerance and Homosexuality: Gay People in Western Europe from the Beginning of the Christian Era to the Fourteenth Century (Chicago: The University of Chicago Press, 1980) **(Interveners' Authorities (in support of Appeal))** John Boswell noted that:

> Most societies ... which freely tolerate religious diversity also accept sexual variation, and the fate of Jews and gay people has been almost identical throughout European history, from early Christian hostility to extermination in concentration camps. The same laws which oppressed Jews oppressed gay people; the same groups bent on eliminating Jews tried to wipe out homosexuality; the same periods of European History which could not make room for Jewish distinctiveness reacted violently against sexual nonconformity; the same countries which insisted on religious uniformity imposed majority standards of sexual conduct; and even the same methods of propaganda were used against Jews and gay people - picturing them as animals bent on the destruction of the children of the majority.

4. This shared history of persecution was also noted by Professor Richard Posner: "... statutes that criminalize homosexual behaviour express an irrational fear and loathing of a group that has been subjected to discrimination much like that directed against the Jews, with whom indeed homosexuals - who, like Jews, are despised more for what they are than what they do - were frequently bracketed in medieval persecutions."

> R. Posner, *Sex and Reason* (Harvard University Press, 1992) quoted in R. Wintemute, *Sexual Orientation and Human Rights* (Oxford: Clarendon Press, 1995) at p. 241, n. 43 **(Interveners' Authorities (in support of Appeal))**.

5. During the period of the Holocaust, when over six million Jews perished in history's most extreme example of state-sanctioned and administered racial persecution, homosexuals were also the targets of discrimination in Nazi Germany. Homosexuals were vilified, imprisoned, tortured in concentration and labour camps, and used for "medical" experiments by a regime resolved to eliminate them. Sexual relations between Jews and Germans were outlawed by the infamous "Nuremberg Laws," punishable by death, and sexual relations between males were outlawed by Paragraph 175 of the Criminal Code, often leading to confinement in concentration camps. As Jews were identified by their Nazi persecutors with yellow Stars of David, homosexual prisoners of concentration camps were stigmatized with pink triangles.

> G. Grau, *Hidden Holocaust?, Gay and Lesbian Persecution in Germany 1933-45*, (London: Casell, 1995) at 269 **(Interveners' Authorities (in support of Appeal))**;
> R. Plant, *The Pink Triangle-The Nazi War against Homosexuals*, (New York: Henry Holt & Co., 1986) **(Interveners' Authorities (in support of Appeal))**;
> I. Muller, *Hitler's Justice: The Courts of the Third Reich* (Cambridge: Harvard University Press, 1991) at 90 - 119 **(Interveners' Authorities (in support of Appeal))**.

6. During the period of the Holocaust, the courts in Germany abandoned all concept of constitutionalism and became "servants of the state" and extended the laws of National Socialism further than even the law makers could express in words themselves.

I. Muller, *Hitler's Justice: The Courts of the Third Reich, supra* **(Interveners' Authorities (in support of Appeal))**.

7. Since the Holocaust, significant strides have been taken in Canada towards greater tolerance and protection of minorities with the passage of federal and provincial human rights legislation and the *Canadian Charter of Rights and Freedoms*, and the Jewish community has benefited from this progress. The Jewish community of Canada has frequently invoked the *Charter* and human rights acts to combat racism and bigotry aimed against it and its members. Congress appreciates the importance of such legislation in protecting the interests of minorities in a democratic society. Despite this progress, Congress recognizes that it cannot be complacent in its role as an advocate for human rights while the rights of any minority, particularly a minority which has shared its experiences of intolerance, remain unprotected. Therefore, Congress has chosen to intervene in this case.

8. The position of Congress in this case is captured in these words of Cory J. in *Egan v. Canada*, [1995] 2 S.C.R. 513 **(Appellant's Authorities, TAB 64)** at 594:

> In our democratic society, every individual is recognized as important and deserving of respect. Each individual is unique and distinct. Because of the uniqueness of individuals, their tastes will vary infinitely from matters as prosaic as food and clothing to matters as fundamental as religious belief. Religious belief and the form of worship are personal characteristics. These characteristics may seem extremely peculiar and vastly perplexing to the majority Yet, so long as the form of worship is not unlawful, it must not only be tolerated but also protected by the *Charter*. Similarly, individuals, because of their uniqueness, are bound to vary in those personal characteristics which may be manifested by their sexual preferences whether heterosexual or homosexual. So long as those preferences do not infringe any laws, they should be tolerated. In its attempt to prohibit discrimination, the *Charter* seeks to reinforce the concept that all human beings, however different they may appear to be to the majority, are all equally deserving of concern, respect and consideration.

PART I - STATEMENT OF FACTS

9. Congress adopts the facts set out in the Statement of Facts of the Appellants.

PART II - STATEMENT OF POINTS IN ISSUE

10. **A.** It is respectfully submitted that the Alberta Court of Appeal erred in finding that decisions not to include sexual orientation or the non-inclusion of sexual orientation as a prohibited ground of discrimination in the Preamble and ss. 2(1), 3, 4, 7(1), 8(1), 10 and 16(1) of the *IRPA* do not infringe or deny the rights guaranteed by s. 15(1) of the *Charter*.

11. **B.** It is respectfully submitted that the infringement or denial is not demonstrably justified as a reasonable limit pursuant to s. 1 of the *Charter*.

12. **C.** It is respectfully submitted that the just and appropriate remedy pursuant to ss. 52 and 24(1) of the *Charter* is for the Court to read in "sexual orientation" as a prohibited ground of discrimination in the Preamble and ss. 2(1), 3, 4, 7(1), 8(1), 10 and 16(1) of the *IRPA* and thereby to grant the Appellant, Vriend, the right to pursue his human rights complaint.

PART III - STATEMENT OF ARGUMENT

A. SECTION 15(1)

Summary

13. Congress submits that the exclusion of sexual orientation as an enumerated ground in the *IRPA* infringes s. 15(1) of the *Charter*. Congress submits that:

a) Extending protection to some groups who suffer discrimination but not others, is discriminatory.
b) The deliberate exclusion of sexual orientation as an enumerated ground of discrimination is not neutral silence on the part of the Alberta Legislature.
c) The moral issue raised by this case is equality, not homosexuality.

a) Extending protection to some groups who suffer discrimination but not others, is discriminatory

14. "Discrimination" was defined by McIntyre J. in *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 **(Appellant's Authorities, TAB 67)** at p. 174 as follows:

> ...I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.

15. Recognition under human rights legislation as being worthy of protection not only grants members of the recognized group "access to (the) opportunities, benefits, and advantages" provided by the remedial provisions of the legislation but as importantly, as Cory J. recognized in *Egan (***Appellant's Authorities, TAB 64**) at 594:

> ...confers a significant benefit by providing state recognition of the legitimacy of a particular status. The denial of that recognition may have a serious detrimental effect upon the sense of self-worth and dignity of members of a group because it stigmatizes them even though no economic loss is occasioned.

16. The goal of s. 15(1) of the *Charter* is "...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 (*Egan*, per Cory J. (**Appellant's Authorities, TAB 64**) at 583. This is the message conveyed to members of those groups which are granted protection under human rights legislation - they are "equally deserving of concern, respect and consideration." The inescapable conclusion for a group, members of which are also the subject of bigotry and discrimination, but which is not granted protection, must be that they are not "equally deserving of concern, respect and consideration." It would be naive to suggest that others, outside of the group, would not come to the same conclusion about that group.

17. If the doors that have been closed to minorities in the past are opened only partially to allow some minorities in, then those who have opened the doors have perpetuated the discrimination against those left on the outside. While the Jewish community obviously benefits from the protection afforded by the enumerated grounds of race and religion, it is uncomfortable for the Jewish community to be "distinguished" by being granted protection from discrimination while others who have shared experiences of victimization are not. If Jews can not enter through

those doors, shoulder to shoulder with other minorities who have suffered with them, but instead are required to leave others behind, then can Jews, in good conscience, enter at all?

18. The Jewish Community includes gay and lesbian Jews. It is cold comfort for those gay and lesbian Jews that discrimination on the basis of their religion is prohibited while discrimination on the basis of their sexual orientation is not. Jewish gays and lesbians who are the subject of discrimination and seek relief under the *IRPA* would be required to prove that the discrimination was aimed not at their sexual orientation but at their religion, requiring that they emphasize one of their personal characteristics to the exclusion of another.

b) The deliberate exclusion of sexual orientation as an enumerated ground of discrimination is not neutral silence on the part of the Alberta Legislature

19. Congress submits that it is not possible to be neutral respecting issues of human dignity. In 1985, in an address to President Ronald Reagan, author and Holocaust survivor Elie Wiesel said:

> Forty years ago, a young man awoke, and he found himself an orphan in an orphaned world. What have I learned in the last forty years? Small things. I learned the perils of language and those of silence. I learned that in extreme situations when human lives and dignity are at stake, neutrality is a sin. It helps the killers, not the victims. I learned the meaning of solitude, Mr. President. We were alone, desperately alone.
> ...
> I have learned that the Holocaust was a unique and uniquely Jewish event, albeit with universal implications. Not all victims were Jews. But all Jews were victims. I have learned the danger of indifference, the crime of indifference. For the opposite of love, I have learned, is not hate, but indifference. Jews were killed by the enemy but betrayed by their so-called allies, who found political reasons to justify their indifference or passivity.

20. "Neutral" is defined as "not aligned with, supporting, or favouring either side in a ..dispute" (*Canadian Dictionary of the English Language* (Scarborough: Thomson Canada Limited, 1997) at 921). This dispute is about whether or not to extend protection against discrimination to gays and lesbians, in light of widely recognized historic and current discrimination. Alberta concedes that a deliberate choice has been made not to do so. In the context of this dispute, Alberta's decision can not be described as "neutral."

21. McClung J.A. described the two sides of this dispute as the "divinely driven right and rights-euphoric, cost-scoffing left" (Case at 242), descriptions with which Congress would strongly disagree. Presumably his Lordship meant that the "divinely-driven right" do not wish the Legislature to add sexual orientation to the act and the "rights-euphoric cost scoffing left" do. Alberta has chosen not to add sexual orientation and so it has aligned itself with the "divinely driven right" and has not remained neutral.

22. McClung J.A. argues in favour of a constitution which is readily understood by average Canadians as opposed to "one that is laid upon them by untranslatable processes of judicial carpentry" (Case at 254-55). Congress agrees with that sentiment. Average Canadians understand that to protect some who suffer from discrimination but not all, is discriminatory. To say that if Alberta had passed legislation which expressly prohibits "discrimination on the basis of all personal characteristics except sexual orientation" would be discriminatory but to pass legislation which prohibits discrimination on enumerated personal characteristics not including sexual orientation is not, are precisely the kind of "untranslatable processes of judicial carpentry" (Case at 255) which are to be avoided. Rights as fundamental as those enshrined in s.15(1) can not depend upon the form in which the legislature has chosen to effect its purpose. As Lamer, C.J. stated in *Schacter v. Canada*, [1992] 2 S.C.R. 679 **(Appellant's Authorities TAB 86)** at 698:

> A statute may be worded in such a way that it gives a benefit or right to one group (inclusive wording) or it may be worded to give a right or benefit to everyone except a certain group (exclusive wording). It would be an arbitrary distinction to treat inclusively and exclusively worded statutes differently. To do so would create a situation where the style of drafting would be the single critical factor in the determination of a remedy. This is entirely inappropriate.

c) <u>The moral issue raised by this case is equality, not homosexuality</u>

23. Congress agrees that this case raises a serious moral question, but disagrees with the way in which the moral question has been framed by Alberta and McClung J.A. "Moral" is defined as being "of or concerned with the judgement of the goodness or badness of human action and character" (*Canadian Dictionary of the English Language*, *supra* at 889). The moral issue raised by this case is not about homosexuality - it is about equality. Neither the legislature nor the court (or Congress) is required to judge the goodness or badness of homosexuality in considering this matter, just as when protection was extended on the basis of race and religion, no judgement

about the goodness or badness of Judaism was required. That which is to be judged, as good or bad, is equality. Is it good or bad to treat all human beings with equal concern, respect and consideration? Congress submits that treating all human beings with equal concern, respect and consideration is a moral as well as a legal imperative.

24. Alberta has deliberately chosen to deny homosexuals protection from discrimination while affording such protection to other minorities. It has distinguished between homosexuality and other personal characteristics worthy of protection. According to McClung J.A., its decision was made after "weighing the competing social and political concerns and values behind it" (Case at 267). McClung J.A. identifies the one side of the debate as promoting "core Canadian values" (Case at 255) and protecting "family and societal values" (Case at 261) (the "good" side) and the other side as weakening those values which is "for many people in Western societies, and most others, ... a moral enormity" (Case at 247) (the "bad" side). Congress submits that McClung J.A. has not accurately described the competing concerns and values. Congress submits that the social and political concerns and values arguing in favour of including "sexual orientation" as a prohibited ground are tolerance and equality, and therefore the competing concerns and values must be intolerance and inequality, and these are not values or interests deserving of legislative consideration.

25. Framing the moral question as "homosexuality" requires members of the gay and lesbian community to prove their moral worth to the majority before their human dignity is recognized. Recognition of their human dignity will then be contingent upon convincing the majority of the "goodness" of homosexuality. This approach blames the victims of discrimination. Such approach is evident in McClung J.A.'s suggestion that discrimination against members of the homosexual community may depend upon whether those members are "strident or stolid" (Case at 249). This suggestion is ominously reminiscent of allegations that the failure of Jews to assimilate, their "financial power," their "domineering," "pushy" personalities and their tendency to "stick together," invite antisemitism. It is fallacious to suggest that before a persecuted minority may obtain protection from discrimination it must convince the perpetrators of discrimination that the discrimination is baseless. As Cory J. points out in *Egan* **(Appellant's Authorities, TAB 64** at 584), the "human dignity of every individual" is "innate" - it does not have to be proven.

C. Stember ed., *Jews in the Minds of America* (New York: Basic Books Inc., 1966) at 52-59 **(Interveners' Authorities (in support of Appeal))**;
A. Davies ed., *Antisemitism in Canada* (Waterloo, Ontario: Wilfred Laurier University Press, 1992) at 67 - 92 **(Interveners' Authorities (in support of Appeal))**.

26. Alberta defends its decision not to include sexual orientation as an enumerated ground as an expression of political will. Canadians have chosen not to leave issues of fundamental human dignity to be determined on an ad hoc basis by political will. The political will on this issue - equality - has already been expressed in s.15(1) of the *Charter*. It is not difficult for Congress to substitute "gays and lesbians" with "Jews" in this debate. It would be naive and dangerous for Congress not to recognize that in a different political climate, it may be the practice of Judaism which could be described as "controversial" or as "abhorrent, even threatening" or an "alternative lifestyle" (Case at 247 per McClung J.A.). Congress takes comfort in the fact that the protection afforded to Jews to practice their religion in this country is not dependent upon the changing tides of political will. McIntyre J. in *Andrews* **(Appellant's Authorities TAB 67** at 171) recognized the importance of the security provided to minorities by constitutional guarantees of equality. By enshrining certain fundamental rights in the constitution, Canadians have said the lifeblood of those rights is not dependent upon "tomorrow's ballot box." The experience in Germany between 1933 and 1945 is testament to the fact that a constitution is an appropriate and necessary restraint on political will and that the Court has a critical role to serve as the "guardian" of the constitution and thereby the "guardian" of minority interests.

27. Congress believes that when the *Charter* is invoked to protect the fundamental rights of one minority, all Canadians benefit. The fact that "constituencies" like the Jewish community have been required to "conscript" the *Charter*, means only that there still exists a considerable "barrage" (Case at 254 per McClung J.A) of antisemitic and otherwise discriminatory speech and conduct in our society. The battle for the eradication of intolerance in our society is naturally led by those who suffer from such intolerance, but everyone benefits from their efforts. Their "special interest" is not merely the furtherance of the interests of their own constituencies, but the furtherance of equality for all citizens. As L'Heureux-Dubé J. noted in *Egan* **(Appellant's Authorities, TAB 64)** at 554:

> Put another way, it is merely admitting reality to acknowledge that members of advantaged groups are generally less sensitive to, and less likely to experience, discrimination than members of disadvantaged, socially vulnerable or marginalized groups...

B. SECTION 1

Summary

28. Congress submits that the infringement of s. 15(1) is not demonstrably justified as a reasonable limit pursuant to s. 1 of the *Charter*.

a) The section 1 analysis

29. It is unclear from its s. 1 argument as to precisely how Alberta is attempting to justify its s. 1 violation. As a result, the s. 1 analysis herein will focus on the *concept* of justification rather than the traditional *Oakes* inquiry.

b) Purpose or objective

(i) Which purpose - that of the IRPA, or of the exclusion of sexual orientation from the IRPA?

30. The first step in the justification analysis requires that the state demonstrate a "pressing and substantial objective" for having adopted the right-infringing measure. The Appellants note that two approaches have been taken to the analysis of "objective" under s.1 where the *Charter* claim is based on an omission or under-inclusion in legislation. The first, as set out in detail in the Appellants' factum, is based upon the objective of the legislation itself. The second approach is to focus on the purpose of the exclusion or limit that allegedly infringes the *Charter*. This second approach was the focus of McClung J.A.'s reasons.

31. Congress takes the view that, in this case, when the s. 15(1) infringement is properly characterized, it becomes apparent that the objective of the exclusion is the relevant objective for the purposes of s. 1 analysis. It is submitted that where the impugned state action takes the form of a denial of the fundamental human rights of a group which is enumerated within or analogous to the s. 15(1) grounds, the only relevant issue for s. 1 justification purposes is the objective of the denial.

32. The violation of the Appellants' constitutional rights to equality in this case arises out of the deliberate refusal of the Alberta Legislature to accord statutory human rights protection to persons who are discriminated against on the basis of sexual orientation. Given that the exclusion of sexual orientation is the measure "...responsible for [the] limit on a *Charter* right...", it follows

that this is also the measure whose objective must be ascertained and found to have a sufficiently pressing purpose for the exclusion to survive *Charter* scrutiny.

Oakes, supra at 138.

(ii) The purpose for the exclusion

33. At several points in its argument, Alberta alludes to its reasons for excluding sexual orientation from the *IRPA*. The primary reasons given by Alberta for its deliberate exclusion of sexual orientation as a prohibited ground of discrimination are:

- the fact that amending the *IRPA* could not possibly address all of the concerns of the homosexual community ("the inadequacy argument");
- the fact that sexual orientation is a marginal ground, affecting only small groups of Albertans (the "small groups" argument);
- the fact that Alberta is taking an incremental approach to statutory protection for human rights (the "incremental steps" argument); and
- the fact that the exclusion of sexual orientation is a legislative attempt to strike a balance between "legitimate but competing social values" (the "competing interests" argument).

- **Inadequacy**

34. It is asserted by Alberta that one of the reasons for the refusal to amend the *IRPA* to include sexual orientation as a prohibited ground of discrimination is the recognition that the *IRPA* is an ineffective means by which to address some of the concerns expressed by the homosexual community (Respondent's Factum at p. 18, para. 57).

35. This concern is echoed in the reasons of McClung J.A., in the court below. As he stated (Case at 244-45):

> You cannot legislate morality or successfully order people to love each other... As Thomas Reed ... warned a century ago; "... One of the greatest delusions in the world is the hope that the evils in this world are to be cured by legislation."

36. Implicit in these comments is the concern noted above - that the amendment of the *IRPA* to include protection against discrimination on the basis of sexual orientation will not address all of the concerns expressed by the homosexual community. This assertion, however, assumes that the *IRPA* does, or was intended to, address all of the concerns expressed by any of the communities represented in the enumerated grounds. The purpose of human rights legislation is to

provide protection against discrimination to those groups which have historically been disadvantaged. The purpose of such legislation is not necessarily to address all of the concerns expressed by a group which has been historically disadvantaged. Indeed, the *IRPA* is limited to prohibiting discrimination in the areas of employment, accommodation, public notices and tenancy. All of the protected constituencies have concerns relating to discrimination that go far beyond the limited scope of the *IRPA*. Surely, none of those groups would advance the position that because the *IRPA* does not relieve against discrimination in all of its potential aspects, they do not wish to be included within its protective reach.

37. Although the *IRPA* has a limited reach in terms of prohibited "areas" of discrimination, another purpose of human rights legislation is to eradicate prejudice. The preamble to the *IRPA* describes its purpose as being to "recognize that equality of all persons is the foundation of freedom." This statutory recognition of equality also has the effect of changing attitudes, as was noted by Mr. R. Ghitter, (MLA in 1972 - Alberta Hansard, May 17, 1972 at 52-36) **Appellant's Authorities, TAB 13**:

> ... laws in a very meaningful way may alter situations in which attitudes and opinions are formed. ... Studies, I believe, ... have conclusively shown that law in our society is a formidable means for the elimination of group discrimination and for the establishment of conditions which discourage prejudicial attitudes.

This effect upon attitudes would undoubtedly go a long way towards addressing many, if not all, of the concerns expressed by the gay and lesbian community.

- **"Small groups"**

38. The second reason given by Alberta for its failure to amend the *IRPA* to include sexual orientation as a prohibited ground of discrimination is that its intention in enacting and amending the *IRPA* is to "focus on a broad perspective, and not on issues which affect only a small number of Albertans" (Respondent's Factum at p.20, para. 67, emphasis added).

39. The suggestion implicit in Alberta's submissions, that discrimination on the basis of sexual orientation affects only a small number of Albertans and is therefore a "marginal" ground, demonstrates blatant disregard for the fact that this Court has recognized sexual orientation as an analogous ground of discrimination under s.15(1) of the *Charter* (*Egan*, **Appellant's Authorities TAB 64** per La Forest J. at 528). This argument is particularly chilling to Congress, since the

Jewish community comprises only 1.2 per cent of the Canadian population (Catalogue 93-319, *Religions in Canada, Census 1991* (Ottawa: Statistics Canada, 1993).

40. In his reasons in *Oakes*, Dickson C.J. stated that only the values of a free and democratic society are sufficiently pressing to warrant limits on the rights guaranteed by the *Charter*:

> Inclusion of these words as the final standard of justification for limits on rights and freedoms refers the Court to the very purpose for which the *Charter* was originally entrenched in the Constitution: Canadian society is to be free and democratic. The Court must be guided by the principles essential to a free and democratic society which I believe embody, to name 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.
>
> (*Oakes, supra* at 136).

41. Alberta's proposition, that it is committed to dealing with those issues which are relevant to the majority of Albertans and not concerned with the issues facing "small groups," is clearly inimical to the values of a free and democratic society. The essence of human rights legislation is the protection of "small groups."

- **Incremental steps**

42. Still another purpose advanced by Alberta for its deliberate exclusion of sexual orientation from the scope of the *IRPA* is that the Legislature is attempting to respond to the evolution of human rights in an "incremental" fashion. This assertion appears to rely on the comments made by Sopinka J. in *Egan* **Appellant's Authorities, TAB 64** at 575 concerning incremental steps in the provision of a legislative benefit.

43. It is submitted that Sopinka J.'s comments, taken in context, appear to support a position wholly contradictory to that taken by Alberta. In arriving at the conclusion that it is acceptable for Parliament to proceed toward perfect equality in an "incremental" fashion, Sopinka J. relies, in large measure, on La Forest J.'s reasons in *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229 **(Appellant's Authorities, TAB 70** at 317-319). It is clear from these reasons that La Forest J. was concerned with the legislature being required to deal with all aspects of an equality "problem" at once. La Forest J. stated, at 317:

> ... it 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...to take account of the difficulties, whether social, economic or budgetary, that would arise if it attempted to deal with social and economic problems in their entirety...

As Sopinka J. noted:

> ...human rights legislation operates in the field of employment, housing, use of public facilities and the like. This can hardly be equated with the problems faced by the Federal Government which must assess the impact of extending the benefits contained in some 50 federal statutes.
>
> *Egan*, **(Appellant's Authorities, TAB 64** at 575).

44. It is submitted that in expressing this view, Sopinka J. in effect distinguished his decision in *Egan* from cases such as this one. Sopinka J. apparently considered the "incremental" approach to be applicable in situations where the decision to extend benefits to a particular group has broad financial or legislative implications, and noted that adding protections into human rights legislation can "hardly be equated" to such situations. Thus, Alberta's reliance on Sopinka J.'s reasoning to support an incremental approach to human rights legislation, is misplaced. Indeed, it is difficult to conceive of a more appropriate starting point for an incremental approach to protecting the equality and dignity of homosexual individuals, in every aspect of their lives, than basic human rights legislation.

45. Furthermore, even if Sopinka J.'s reasoning in *Egan* does support an incremental approach to the provision of statutory human rights protection, Alberta cannot avail itself of this reasoning in order to justify its actions. First, the record in this case discloses no consideration of alternatives on the part of Alberta with respect to the issue of including sexual orientation within the *IRPA*. There is no evidence that Alberta considered a single alternative to the outright exclusion of sexual orientation from the *IRPA*. Clearly, the "range of reasonable alternatives" includes more than the two options of either including or excluding sexual orientation as a protected ground. Indeed, Alberta's "incremental" approach argument is belied by the emphasis, elsewhere in its argument, on the deliberate and unequivocal nature of the exclusion, and by Alberta's attempt to justify the s. 15(1) violation on the basis that the *IRPA* is "inadequate" to meet the concerns of the homosexual community.

46. Second, the incremental approach referred to by Alberta would seem to require, at a minimum, that incremental steps be taken with respect to the ground in question. In this case, the s. 15(1) violation arises out of the exclusion of sexual orientation. The fact that Alberta has incrementally added other grounds (e.g., source of income, family status) cannot serve as a justification for the *Charter* breach in this case.

47. It is no answer to a group that has suffered historic discrimination that it must be patient to be recognized at law as human beings equally deserving of concern, respect and consideration. It is not difficult for Jews to put themselves in the shoes of members of the homosexual community and to feel the horror that members of the homosexual community must feel at being told "we'll get to you eventually."

48. As there has been absolutely no investigation into potential alternative solutions, the Court ought not to show deference to the legislative choice made by Alberta in this case. It is telling that the Government itself apparently intended that this issue would be dealt with by the judiciary, thereby, it is submitted, abdicating any claim for judicial deference. (*Alberta, Our Commitment to Human Rights: The Government's Response to the Recommendations of the Alberta Human Rights Review Panel* (Edmonton, December, 1995) **Appellant's Authorities, TAB** 27 at 21).

- **Competing interests**

49. Alberta attempts to justify the exclusion of sexual orientation from the *IRPA* on the basis that the *IRPA's* scope is a response to the need for a balance to be struck between "competing interests."

50. It is submitted that in holding this case out as one in which competing rights are at issue, Alberta wrongly characterizes the case. The cases in which this Court has been concerned with "competing interests" are cases wherein the claim to the right infringed can apparently only be resolved by the restriction of the rights of another individual or group. For example, in *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825, the interests which had to be balanced were Malcolm Ross' right to freedom of expression and Attis' right to be free from discrimination on the basis of religion. In *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892, the Court was called upon to reconcile the competing rights of freedom of expression and freedom from discrimination on the basis of religion. In *R. v. Morgentaler*, [1988]

1 S.C.R. 30, the competing rights at issue were the right of a woman to autonomy and control over her own body, and the interest of the state in protecting the fetus.

51. Alberta has not specified the competing interest at issue, but simply asserts that there are "legitimate but competing social values" involved in this case (Respondent's Factum at p. 25, para. 8). It is submitted that this claim misconstrues the issue which falls to be decided in this case. The effect of the addition of sexual orientation as a prohibited ground of discrimination under the *IRPA* would be to recognize the rights of gays and lesbians to be free from discrimination. The only "interest" that this addition would appear to affect would be the right of others to discriminate against gays and lesbians on the basis of sexual orientation. The function of human rights legislation is not to "carve exceptions out of a pre-existing common law 'right to discriminate'" - there is no such right recognized at common law. Given that there is no "right to discriminate," it becomes apparent that the competing interests argument urged by Alberta is without force.

> W.S. Tarnopolsky & W. F. Pentney, *Discrimination and the Law* (Toronto: Carswell, 1994) at 2-29 **(Interveners' Authorities (in support of Appeal))**;
> *Newfoundland Association of Public Employees v. Newfoundland et al* (1994), 389 A.P.R. 271 (Nfld. C.A.) at 282-83 **(Interveners' Authorities (in support of Appeal))**.

52. At one point in its argument, Alberta attempts to depict this case as involving a competition of interests between religious freedom on the one hand, and protection from discrimination on the basis of sexual orientation on the other (Respondent's Factum at p. 29, paras. 92-95). This depiction is inaccurate, and misinterprets the true issue between the parties. It is submitted that any balancing of rights mandated by human rights legislation takes place in the context of the application of such legislation, not in its enactment. The application of human rights legislation to a particular incident of alleged discrimination is the context in which the rights of others become relevant; it is where defences arise and the issue becomes one of balancing the rights of one group or individual with those of another.

53. The amendment of the *IRPA* to include protection on the basis of sexual orientation would have no impact on the prohibition against discrimination on the basis of religion. It cannot be correct, as Alberta appears to suggest, that the addition of sexual orientation as a prohibited ground under the *IRPA* would of necessity require either the removal of another ground from the Act, or some other alteration to the Act.

54. The irrationality of Alberta's argument is clearly demonstrated by substituting an already enumerated ground for "sexual orientation" and considering its effect on the ground of religion. For the purpose of the example, "marital status" can be substituted for "sexual orientation". In *Caldwell v. Stuart*, [1984] 2 S.C.R. 603 **(Interveners' Authorities (in support of Appeal))**, a teacher was dismissed from her position at a Catholic school because she had married a divorced man in a civil ceremony; she brought a human rights complaint against the school, claiming that she had been discriminated against on the basis of marital status. This case demonstrates that the grounds of marital status and religion, both of which are enumerated in the *IRPA*, can now conflict with one another. This potential conflict did not stop Alberta from adding marital status as an enumerated ground under the *IRPA*.

55. This competing interests argument raises another, very basic, question concerning freedom of religion. In *Bowers v. Hardwick* 92 L.Ed.2d 140 (1986) at 159 per Blackmun J., dissenting, it was recognized, "[t]hat certain, but by no means all, religious groups condemn the behavior at issue...". Congress submits that by adopting the position that protection on the basis of sexual orientation would conflict with freedom of religion, Alberta has shown itself to be concerned only with the religious freedom of groups which do hold such view. This basis for the refusal to include sexual orientation in the *IRPA* thus amounts to the imposition of a state-sanctioned religious view on all Albertans - the antithesis of freedom of religion and a move held to be unconstitutional by this Court.

> *R. v. Big M. Drug Mart Ltd.*, [1985] 1 S.C.R. 295, **Appellant's Authorities, TAB 82** at 350-351 .

56. Congress does not wish to suggest that freedom of religion is a trivial matter that can be brushed aside depending upon the context. As a representative of a religious minority, Congress relies on the *Charter's* guarantee of freedom of religion. Congress recognizes, however, that the *IRPA* contains its own inherent balancing mechanisms which can be employed where concerns arise that involve competing rights. Section 11.1 of the *IRPA* provides a defence to alleged discrimination "where the person who is alleged to have contravened the Act shows that the alleged contravention was reasonable and justifiable in the circumstances." In addition, s. 7(3) provides that it is not impermissible discrimination to refuse or limit access to employment on the basis of the enumerated grounds where the refusal or limit is "based on a bona fide occupational

requirement." An illustration of such balancing is found in *Caldwell, supra*, wherein the school was found not to have breached the British Columbia human rights legislation, as the requirement that Catholic teachers uphold the tenets of the Catholic faith was a bona fide occupational requirement. It is clear that through these balancing mechanisms, there can be respect for both freedom of religion and the inherent and inalienable dignity of homosexual individuals.

57. It is submitted that none of the purposes advanced by Alberta for the exclusion of sexual orientation from the *IRPA* are "pressing and substantial." Therefore, the inevitable conclusion in this case is that Alberta has wholly failed to justify the denial of the equal benefit of the *IRPA* to those who are discriminated against on the basis of sexual orientation.

C. REMEDY

a) The role of the court

58. Alberta advocates a deferential approach to the issue of remedy in this case. It asserts that, where competing social values are at issue, the Court ought not to question the wisdom of the choice ultimately made by the Legislature. In effect, Alberta asks this Court to find that despite:

(i) the s. 15(1) violation, and

(ii) the fact that Alberta has failed to justify that violation under s. 1 of the *Charter*,

the Legislature ought to be accorded deference because it is the sole institution which has the authority to make this decision.

59. The role of the Canadian courts as a restraint on executive and legislative action is not novel. As former Chief Justice Brian Dickson stated:

> Judicial review of executive action is a well established and proper function of courts in all jurisdictions which enjoy the tradition of serving as a buffer against incursions by the State on the rights of the individual.
>
> B. Dickson, "The Canadian Charter of Rights and Freedoms: Context and Evolution" in G.A. Beaudoin & E. Mendes, eds, *The Canadian Charter of Rights and Freedoms*, 3d ed. (Toronto: Carswell, 1996) at 1-15. **(Interveners' Authorities (in support of Appeal))**.

60. The responsibility of the courts as defenders of the rights guaranteed by our constitution is clearly established in s. 52(1) of the *Constitution Act, 1982*. Moreover, as this Court has noted:

> ...the historic decision to entrench the *Charter* in our Constitution was taken not by the courts but by the elected representatives of the people of Canada. It was those representatives who extended the scope of constitutional adjudication and entrusted the courts with this new and onerous responsibility. Adjudication under the *Charter* must be approached free of any lingering doubts as to its legitimacy.
>
> *Reference re: s. 94(2) of the Motor Vehicle Act (B.C.)*, [1985] 2 S.C.R. 486 per Lamer J. (as he then was) at 497.

61. It is in light of this background that Alberta's appeal for judicial deference must be evaluated. As noted above, the Court does not consider the issue of remedies until it has determined, in effect, that the Legislature's choice with respect to the exclusion of sexual orientation from the *IRPA* is not legitimate. Congress submits that:

> ...routine deference by the courts, particularly when it denies a remedy to members of groups that do not have their share of political, economic and social power, seems to us an inappropriate response to the points raised in this debate. Section 15 was enacted in part because of the belief that legislatures do not always give the interests of these groups the consideration they deserve. Antipathy, stereotypes and lack of political power may affect the legislative process, just as they affect other social and economic activities, and the limitation of section 15 to the enumerated and analogous grounds focuses it on those situations in which persistent disadvantage is most common and the democratic process is most likely to go awry ... the response to concerns about the scope of judicial review should, in our opinion, reflect the many factors relevant to this issue rather than serving as a generic justification for judicial inaction.
>
> W. Black & L. Smith, "The Equality Rights", in G.A. Beaudoin & E. Mendes, eds, *The Canadian Charter of Rights and Freedoms*, 3d ed. (Toronto: Carswell, 1996) at 14-40 [footnotes omitted] **(Interveners' Authorities (in support of Appeal))**.

b) Striking down is not an appropriate remedy

- Legislative intent

62. Alberta argues that "reading in" is not an appropriate remedy in this case, and that the only remedial option is invalidation of the *IRPA*. The notion relied upon in support of this assertion is that the Court should act in the manner most in accord with the intent of the Legislature. The obvious flaw in this argument is that there is no evidence on the record that Alberta would prefer to become the only Canadian jurisdiction to have no human rights legislation, as opposed to having a statute which includes sexual orientation as a protected ground.

63. Alberta further asserts that its deliberate and unequivocal refusal to include sexual orientation in the *IRPA* makes it clear that reading in is not appropriate. This argument amounts to the suggestion that when a government denies a *Charter* right, it ought to do so in a deliberate manner so as to shield itself from a particular remedy. Congress submits that the deliberate nature of the exclusion in this case is a clear indication that if the Court does not read sexual orientation into the *IRPA*, that ground will not find its way into the Act.

64. The fact that this Court has repeatedly affirmed the quasi-constitutional nature of human rights legislation provides further support for the assertion that invalidating the *IRPA* cannot be taken to be the remedy most consonant with the intention of the Legislature.

> *Insurance Corporation of British Columbia v. Heerspink*, [1982] 2 S.C.R. 145; *Battlefords and District Co-operative Ltd. v. Gibbs* [1996] 3 S.C.R. 566.

65. Moreover, the argument that striking down is preferable to "reading in" is incompatible with Alberta's insistence that "it is self-evident that the *IRPA* has a pressing and substantial purpose" (Respondent's Factum at p. 24, para. 76).

- Minority rights

66. As noted above, Alberta has attempted to justify the exclusion of sexual orientation from the *IRPA* on the basis that it is a ground which affects only a "small group" of Albertans. This position indicates clearly that members of minority groups in Alberta are in a politically precarious situation if the *IRPA* is struck down. Any "small groups" may find itself excluded when the legislation is redrawn. Congress has intervened in this case to assist in opening the doors for gays and lesbians. The appropriate remedy where the doors are only partially open is not to risk having them slammed shut against all minorities, but to open them for all Albertans without regard to personal characteristics.

PART IV - NATURE OF THE ORDER REQUESTED

67. Congress requests that this Honourable Court:

(a) allow the within appeal;
(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; and

(c) provide the Appellant Vriend the right to pursue his human rights complaint.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 13th DAY OF MAY, 1997.

RONALD A. SOROKIN
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Counsel Canadian Jewish Congress

LYLE S.R. KANEE
CHIVERS GRECKOL & KANEE

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