Vriend *v.* Alberta, [1998] 1 S.C.R. 493

**Delwin Vriend, Gala-Gay and Lesbian Awareness Society of Edmonton, Gay and Lesbian Community Centre of Edmonton Society and Dignity Canada Dignité for Gay Catholics and Supporters** *Appellants*

*v.*

**Her Majesty The Queen in Right of Alberta and Her Majesty's Attorney General in and for the Province of Alberta** *Respondents*

and

**The Attorney General of Canada, the Attorney General for Ontario, the Alberta Civil Liberties Association, Equality for Gays and Lesbians Everywhere (EGALE), the Women's Legal Education and Action Fund (LEAF), the Foundation for Equal Families, the Canadian Human Rights Commission, the Canadian Labour Congress, the Canadian Bar Association -- Alberta Branch, the Canadian Association of Statutory Human Rights Agencies (CASHRA), the Canadian AIDS Society, the Alberta and Northwest Conference of the United Church of Canada, the Canadian Jewish Congress, the Christian Legal Fellowship, the Alberta Federation of Women United for Families, the Evangelical Fellowship of Canada and Focus on the Family (Canada) Association** *Interveners*

**Indexed as: Vriend *v.* Alberta**

File No.: 25285.

1997: November 4; 1998: April 2.

Present: Lamer C.J. and L'Heureux-Dubé, Sopinka,* Gonthier, Cory, McLachlin, Iacobucci, Major and Bastarache JJ.

on appeal from the court of appeal for alberta

*Practice -- Standing -- Charter challenge -- Teacher's employment at college terminated because of his homosexuality -- Provincial human rights legislation not including sexual orientation as prohibited ground of discrimination -- Whether appellants have standing to challenge legislative provisions other than those relating to employment -- Canadian Charter of Rights and Freedoms, ss. 1, 15(1) -- Individual's Rights Protection Act, R.S.A. 1980, c. I-2, preamble, ss. 2(1), 3, 4, 7(1), 8(1), 10, 16(1).*

*Constitutional law -- Charter of Rights -- Application -- Legislative omission -- Provincial human rights legislation not including sexual orientation as prohibited ground of discrimination -- Whether Charter applies to legislation -- Canadian Charter of Rights and Freedoms, s. 32(1) -- Individual's Rights Protection Act, R.S.A. 1980, c. I-2.*

*Constitutional law -- Charter of Rights -- Equality rights -- Provincial human rights legislation not including sexual orientation as prohibited ground of discrimination -- Whether non-inclusion of sexual orientation infringes right to equality -- If so, whether infringement justified -- Canadian Charter of Rights and Freedoms, ss. 1, 15(1) -- Individual's Rights Protection Act, R.S.A. 1980, c. I-2, preamble, ss. 2(1), 3, 4, 7(1), 8(1), 10, 16(1).*

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* Sopinka J. took no part in the judgment.

*Constitutional law -- Charter of Rights -- Remedies -- Reading in -- Non-inclusion of sexual orientation in provincial human rights legislation infringing right to equality -- Whether sexual orientation should be read into legislation -- Constitution Act, 1982, s. 52 -- Individual's Rights Protection Act, R.S.A. 1980, c. I-2, preamble, ss. 2(1), 3, 4, 7(1), 8(1), 10, 16(1).*

The appellant V was employed as a laboratory coordinator by a college in Alberta, and was given a permanent, full-time position in 1988. Throughout his term of employment he received positive evaluations, salary increases and promotions for his work performance. In 1990, in response to an inquiry by the president of the college, V disclosed that he was homosexual. In early 1991, the college's board of governors adopted a position statement on homosexuality, and shortly thereafter, the president of the college requested V's resignation. V declined to resign, and his employment was terminated by the college. The sole reason given was his non-compliance with the college's policy on homosexual practice. V appealed the termination and applied for reinstatement, but was refused. He attempted to file a complaint with the Alberta Human Rights Commission on the grounds that his employer had discriminated against him because of his sexual orientation, but the Commission advised V that he could not make a complaint under the *Individual's Rights Protection Act* (*IRPA*), because it did not include sexual orientation as a protected ground. V and the other appellants filed a motion in the Court of Queen's Bench for declaratory relief. The trial judge found that the omission of protection against discrimination on the basis of sexual orientation was an unjustified violation of s. 15 of the *Canadian Charter of Rights and Freedoms*. She ordered that the words "sexual orientation" be read into ss. 2(1), 3, 4, 7(1), 8(1) and 10 of the *IRPA* as a prohibited ground of discrimination. The majority of the Court of Appeal allowed the Alberta government's appeal.

*Held* (Major J. dissenting in part on the appeal): The appeal should be allowed and the cross-appeal dismissed. The preamble and ss. 2(1), 3, 4, 7(1), 8(1), 10 and 16(1) of the *IRPA* infringe s. 15(1) of the *Charter* and the infringement is not justifiable under s. 1. As a remedy, the words "sexual orientation" should be read into the prohibited grounds of discrimination in these provisions.

*Per* Lamer C.J. and Gonthier, Cory, McLachlin, Iacobucci and Bastarache JJ.: The appellants have standing to challenge the validity of the preamble and ss. 2(1), 3, 4, 7(1), 8(1), 10 and 16(1) of the *IRPA*. A serious issue as to constitutional validity is raised with respect to all these provisions. V and the other appellants also have a direct interest in the exclusion of sexual orientation from all forms of discrimination. Finally, the only other way the issue could be brought before the Court with respect to the sections of the Act other than those relating to employment would be to wait until someone is discriminated against on the ground of sexual orientation in housing, goods and services, etc. and challenge the validity of the provision in each appropriate case. This would not only be wasteful of judicial resources, but also unfair in that it would impose burdens of delay, cost and personal vulnerability to discrimination for the individuals involved in those eventual cases. Since the provisions are all very similar and do not depend on any particular factual context in order to resolve their constitutional status, there is really no need to adduce additional evidence regarding the provisions concerned with discrimination in areas other than employment.

The respondents' argument on their cross-appeal that because this case concerns a legislative omission, s. 15 of the *Charter* should not apply pursuant to s. 32 cannot be accepted. The threshold test that there be some "matter within the authority of the legislature" which is the proper subject of a *Charter* analysis has been met. The fact that it is the underinclusiveness of the *IRPA* which is at issue does not alter the fact

that it is the legislative act which is the subject of *Charter* scrutiny in this case. Furthermore, the language of s. 32 does not limit the application of the *Charter* merely to positive actions encroaching on rights or the excessive excercise of authority. Where, as here, the challenge concerns an Act of the legislature that is underinclusive as a result of an omission, s. 32 should not be interpreted as precluding the application of the *Charter*. The application of the *Charter* to the *IRPA* does not amount to applying it to private activity. Since the constitutional challenge here concerns the *IRPA*, it deals with laws that regulate private activity, and not the acts of a private entity.

While this Court has not adopted a uniform approach to s. 15(1), in this case any differences in approach would not affect the result. The essential requirements of a s. 15(1) analysis will be satisfied by inquiring first, whether there is a distinction which results in the denial of equality before or under the law, or of equal protection or benefit of the law; and second, whether this denial constitutes discrimination on the basis of an enumerated or analogous ground. The omission of sexual orientation as a protected ground in the *IRPA* creates a distinction that is simultaneously drawn along two different lines. The first is the distinction between homosexuals and other disadvantaged groups which are protected under the Act. Gays and lesbians do not have formal equality with reference to other protected groups, since those other groups are explicitly included and they are not. The second, more fundamental, distinction is between homosexuals and heterosexuals. The exclusion of the ground of sexual orientation, considered in the context of the social reality of discrimination against gays and lesbians, clearly has a disproportionate impact on them as opposed to heterosexuals. The *IRPA* in its underinclusive state therefore denies substantive equality to the former group. By reason of its underinclusiveness, the *IRPA* creates a distinction which results in the denial of the equal benefit and protection of the law on the basis of sexual orientation, a personal characteristic which is analogous to those enumerated in s. 15(1). This, in itself, is

sufficient to conclude that discrimination is present and that there is a violation of s. 15. The serious discriminatory effects of the exclusion of sexual orientation from the Act reinforce this conclusion. The distinction has the effect of imposing a burden or disadvantage not imposed on others and of withholding benefits or advantages which are available to others. The first and most obvious effect of the exclusion of sexual orientation is that lesbians or gay men who experience discrimination on the basis of their sexual orientation are denied recourse to the mechanisms set up by the *IRPA* to make a formal complaint of discrimination and seek a legal remedy. The dire and demeaning effect of denial of access to remedial procedures is exacerbated by the fact that the option of a civil remedy for discrimination is precluded and by the lack of success that lesbian women and gay men have had in attempting to obtain a remedy for discrimination on the ground of sexual orientation by complaining on other grounds such as sex or marital status. Furthermore, the exclusion from the *IRPA*'s protection sends a message to all Albertans that it is permissible, and perhaps even acceptable, to discriminate against individuals on the basis of their sexual orientation. Perhaps most important is the psychological harm which may ensue from this state of affairs. In excluding sexual orientation from the *IRPA*'s protection, the government has, in effect, stated that "all persons are equal in dignity and rights" except gay men and lesbians. Such a message, even if it is only implicit, must offend s. 15(1).

The exclusion of sexual orientation from the *IRPA* does not meet the requirements of the *Oakes* test and accordingly cannot be saved under s. 1 of the *Charter*. Where a law has been found to violate the *Charter* owing to underinclusion, the legislation as a whole, the impugned provisions, and the omission itself are all properly considered in determining whether the legislative objective is pressing and substantial. In the absence of any submissions regarding the pressing and substantial nature of the objective of the omission at issue here, the respondents have failed to

discharge their evidentiary burden and their case must thus fail at this first stage of the s. 1 analysis. Even if the evidentiary burden were to be put aside in an attempt to discover an objective for the omission from the provisions of the *IRPA*, the result would be the same. Where, as here, a legislative omission is on its face the very antithesis of the principles embodied in the legislation as a whole, the Act itself cannot be said to indicate any discernible objective for the omission that might be described as pressing and substantial so as to justify overriding constitutionally protected rights.

Far from being rationally connected to the objective of the impugned provisions, the exclusion of sexual orientation from the Act is antithetical to that goal. With respect to minimal impairment, the Alberta government has failed to demonstrate that it had a reasonable basis for excluding sexual orientation from the *IRPA.* Gay men and lesbians do not have any, much less equal, protection against discrimination on the basis of sexual orientation under the *IRPA.* The exclusion constitutes total, not minimal, impairment of the *Charter* guarantee of equality. Finally, since the Alberta government has failed to demonstrate any salutary effect of the exclusion in promoting and protecting human rights, there is no proportionality between the attainment of the legislative goal and the infringement of the appellants' equality rights.

Reading sexual orientation into the impugned provisions of the *IRPA* is the most appropriate way of remedying this underinclusive legislation. When determining whether reading in is appropriate, courts must have regard to the twin guiding principles of respect for the role of the legislature and respect for the purposes of the *Charter*. The purpose of the *IRPA* is the recognition and protection of the inherent dignity and inalienable rights of Albertans through the elimination of discriminatory practices. Reading sexual orientation into the offending sections would minimize interference with this clearly legitimate legislative purpose and thereby avoid excessive intrusion into the

legislative sphere whereas striking down the *IRPA* would deprive all Albertans of human rights protection and thereby unduly interfere with the scheme enacted by the legislature. It is reasonable to assume that, if the legislature had been faced with the choice of having no human rights statute or having one that offered protection on the ground of sexual orientation, the latter option would have been chosen.

*Per* L'Heureux-Dubé J.: There is general agreement with the results reached by the majority. While the approach to s. 1 is agreed with, the proper approach to s. 15(1) of the *Charter* is reiterated. Section 15(1) is first and foremost an equality provision. Its primary mission 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. A s. 15(1) analysis should focus on uncovering and understanding the negative impacts of a legislative distinction (including, as in this case, a legislative omission) on the affected individual or group, rather than on whether the distinction has been made on an enumerated or analogous ground. Integral to an inquiry into whether a legislative distinction is discriminatory within the meaning of s. 15(1) is an appreciation of both the social vulnerability of the affected individual or group, and the nature of the interest which is affected in terms of its importance to human dignity and personhood. Section 15(1) is engaged when the impact of a legislative distinction deprives an individual or group who has been found to be disadvantaged in our society of the law's protection or benefit in a way which negatively affects their human dignity and personhood. Although the presence of enumerated and analogous grounds may be indicia of discrimination, or may even raise a presumption of discrimination, it is in the appreciation of the nature of the individual or group who is being negatively affected that they should be examined.

*Per* Major J. (dissenting in part on the appeal): The Alberta legislature, having enacted comprehensive human rights legislation that applies to everyone in the province, has then selectively denied the protection of the Act to people with a different sexual orientation. No explanation was given for the exclusion of sexual orientation from the prohibited grounds of discrimination in the *IRPA*, and none is apparent from the evidence filed by the province. The inescapable conclusion is that there is no reason to exclude that group from s. 7 of the *Charter* and to do so is discriminatory and offends their constitutional rights. The words "sexual orientation" should not be read into the Act, however. While reading in may be appropriate where it can be safely assumed that the legislature itself would have remedied the underinclusiveness by extending the benefit or protection to the previously excluded group, that assumption cannot be made in this appeal. It may be that the legislature would prefer no human rights Act over one that includes sexual orientation as a prohibited ground of discrimination. As well, there are numerous ways in which the legislation could be amended to address the underinclusiveness. As an alternative, given the legislature's persistent refusal to protect against discrimination on the basis of sexual orientation, it may be that it would choose to override the *Charter* breach by invoking the notwithstanding clause in s. 33 of the *Charter*. In any event it should lie with the elected legislature to determine this issue. The offending sections should be declared invalid and the legislature provided with an opportunity to rectify them. The declaration of invalidity should be restricted to the employment-related provisions of the *IRPA*, namely ss. 7(1), 8(1) and 10. While the same conclusions may apply to the remaining provisions of the *IRPA*, *Charter* cases should not be considered in a factual vacuum. The declaration of invalidity should be suspended for one year to allow the legislature an opportunity to bring the impugned provisions into line with its constitutional obligations.

**Cases Cited**

By Cory and Iacobucci JJ.

**Referred to:** *Egan v. Canada*, [1995] 2 S.C.R. 513; *Haig v. Canada* (1992), 9 O.R. (3d) 495; *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229; *Schachter v. Canada*, [1992] 2 S.C.R. 679; *Miron v. Trudel*, [1995] 2 S.C.R. 418; *Thibaudeau v. Canada*, [1995] 2 S.C.R. 627; *Re Blainey and Ontario Hockey Association* (1986), 54 O.R. (2d) 513, leave to appeal refused, [1986] 1 S.C.R. xii; *Dickason v. University of Alberta*, [1992] 2 S.C.R. 1103; *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315; *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236; *Mahe v. Alberta*, [1990] 1 S.C.R. 342; *Reference re Public Schools Act (Man.), s. 79(3), (4) and (7)*, [1993] 1 S.C.R. 839; *Haig v. Canada*, [1993] 2 S.C.R. 995; *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624; *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573; *Tremblay v. Daigle*, [1989] 2 S.C.R. 530; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143; *R. v. Turpin*, [1989] 1 S.C.R. 1296; *Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358; *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241; *Knodel v. British Columbia (Medical Services Commission)* (1991), 58 B.C.L.R. (2d) 356; *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219; *Bliss v. Attorney General of Canada*, [1979] 1 S.C.R. 183; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *Romer v. Evans*, 116 S.Ct. 1620 (1996); *R. v. Oakes*, [1986] 1 S.C.R. 103; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22; *R. v. Keegstra*, [1990] 3 S.C.R. 697;

*Newfoundland (Human Rights Commission) v. Newfoundland (Minister of Employment and Labour Relations)* (1995), 127 D.L.R. (4th) 694.

By L'Heureux-Dubé J.

**Referred to:** *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143; *Egan v. Canada*, [1995] 2 S.C.R. 513; *Miron v. Trudel*, [1995] 2 S.C.R. 418.

By Major J. (dissenting in part)

*Schachter v. Canada*, [1992] 2 S.C.R. 679; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *MacKay v. Manitoba*, [1989] 2 S.C.R. 357.

**Statutes and Regulations Cited**

*Canadian Charter of Rights and Freedoms*, ss. 1, 7, 15(1), 24(1), 32(1), 33.

*Canadian Human Rights Act*, R.S.C., 1985, c. H-6, s. 3(1).

*Constitution Act, 1867*, s. 92.

*Constitution Act, 1982*, s. 52(1).

*Criminal Code*, R.S.C., 1985, c. C-46, s. 718.2(*a*)(i) [ad. 1995, c. 22, s. 6].

*Human Rights, Citizenship and Multiculturalism Act*, R.S.A. 1980, c. H-11.7, preamble, ss. 2(1), 3, 4, 7, 8, 10, 11.1, 16(1).

*Individual's Rights Protection Act*, R.S.A. 1980, c. I-2 [am. 1985, c. 33; am. 1990, c. 23], preamble, ss. 2(1), 3, 4, 7, 8, 10, 11.1, 16(1).

*Individual's Rights Protection Act*, S.A. 1972 [am. 1980, c. 27], c. 2, ss. 2, 3, 4, 6, 7, 9.

*Individual's Rights Protection Amendment Act, 1996*, S.A. 1996, c. 25.

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APPEAL and CROSS-APPEAL from a judgment of the Alberta Court of Appeal (1996), 181 A.R. 16, 116 W.A.C. 16, 37 Alta. L.R. (3d) 364, [1996] 5 W.W.R. 617, 132 D.L.R. (4th) 595, 18 C.C.E.L. (2d) 1, 96 C.L.L.C. ¶230-013, 25 C.H.R.R. D/1, 34 C.R.R. (2d) 243, [1996] A.J. No. 182 (QL), reversing a decision of the Court of Queen's Bench (1994), 152 A.R. 1, 18 Alta. L.R. (3d) 286, [1994] 6 W.W.R. 414, 94 C.L.L.C. ¶17,025, 20 C.H.R.R. D/358, [1994] A.J. No. 272 (QL), finding that the omission of protection against discrimination on the basis of sexual orientation from the Alberta *Individual's Rights Protection Act* was an unjustified violation of s. 15(1) of the *Canadian Charter of Rights and Freedoms*. Appeal allowed, Major J. dissenting in part. Cross-appeal dismissed.

*Sheila J. Greckol*, *Douglas R. Stollery, Q.C.*, *June Ross* and *Jo-Ann R. Kolmes*, for the appellants.

*John T. McCarthy, Q.C.*, and *Donna Grainger*, for the respondents.

*Brian Saunders* and *James Hendry*, for the intervener the Attorney General of Canada.

*Robert E. Charney*, for the intervener the Attorney General for Ontario.

*Shirish P. Chotalia* and *Brian A. F. Edy*, for the intervener the Alberta Civil Liberties Association.

*Cynthia Petersen*, for the intervener Equality for Gays and Lesbians Everywhere (EGALE).

*Gwen Brodsky* and *Claire Klassen*, for the intervener Women's Legal Education and Action Fund (LEAF).

*Raj Anand* and *Andrew M. Pinto*, for the intervener the Foundation for Equal Families.

*William F. Pentney* and *Patricia Lawrence*, for the intervener the Canadian Human Rights Commission.

*Steven M. Barrett* and *Vanessa Payne*, for the intervener the Canadian Labour Congress.

*James L. Lebo, Q.C.*, *James F. McGinnis* and *Julia C. Lloyd*, for the intervener the Canadian Bar Association -- Alberta Branch.

*Thomas S. Kuttner* and *Rebecca Johnson*, for the intervener the Canadian Association of Statutory Human Rights Agencies (CASHRA).

*R. Douglas Elliott* and *Patricia A. LeFebour*, for the intervener the Canadian AIDS Society.

*Dale Gibson*, for the intervener the Alberta and Northwest Conference of the United Church of Canada.

*Lyle S. R. Kanee*, for the intervener the Canadian Jewish Congress.

*Barbara B. Johnston*, for the intervener Christian Legal Fellowship.

*Dallas K. Miller*, for the intervener the Alberta Federation of Women United for Families.

*Gerald D. Chipeur* and *Cindy Silver*, for the interveners the Evangelical Fellowship of Canada and Focus on the Family (Canada) Association.

The judgment of Lamer C.J. and Gonthier, Cory, McLachlin, Iacobucci and Bastarache was delivered by

1 CORY AND IACOBUCCI JJ. -- In these joint reasons Cory J. has dealt with the issues pertaining to standing, the application of the *Canadian Charter of Rights and Freedoms*, and the breach of s. 15(1) of the *Charter*. Iacobucci J. has discussed s. 1 of the *Charter*, the appropriate remedy, and the disposition.

CORY J.

2 The *Individual's Rights Protection Act*, R.S.A. 1980, c. I-2 ("*IRPA*" or the "Act"), was first enacted in 1973. When the legislation was introduced in 1972, the Minister responsible commented upon and emphasized the nature and importance of the Act, stating: "it is . . . the commitment of this legislature that we regard The Individual's Rights Protection Act in primacy to any other legislative enactment. . . . [W]e have committed ourselves to suggest that Alberta is not the place for partial rights or half freedoms, but that Alberta hopefully will become the place where each and every man and woman will be able to stand on his own two feet and be recognized as an individual and not as a member of a particular class" (*Alberta Hansard*, November 22, 1972, at p. 80-63). These are courageous words that give hope and comfort to members of every group that has suffered the wounds and indignities of discrimination. Has this laudable commitment been met?

## I. Factual Background

### A. *History of the IRPA*

3 The *IRPA* prohibits discrimination in a number of areas of public life, and establishes the Human Rights Commission to deal with complaints of discrimination. The *IRPA* as first enacted (S.A. 1972, c. 2) prohibited discrimination in public notices (s. 2), public accommodation, services or facilities (s. 3), tenancy (s. 4), employment practices (s. 6), employment advertising (s. 7) or trade union membership (s. 9) on the basis of race, religious beliefs, colour, sex, marital status (in ss. 6 and 9), age (except in ss. 3 and 4), ancestry or place of origin. The Act has since been expanded to include other grounds, in a series of amendments (S.A. 1980, c. 27; S.A. 1985, c. 33; S.A. 1990,

c. 23; S.A. 1996, c. 25). These additions were apparently, at least in part, made in response to the enactment of the *Charter* and its judicial interpretation. In the most recent amendments the name of the Act was changed to the *Human Rights, Citizenship and Multiculturalism Act*. In 1990, the Act included the following list of prohibited grounds of discrimination: race, religious beliefs, colour, gender, physical disability, mental disability, age, ancestry and place of origin. At the present time it also includes marital status, source of income and family status.

4 Despite repeated calls for its inclusion sexual orientation has never been included in the list of those groups protected from discrimination. In 1984 and again in 1992, the Alberta Human Rights Commission recommended amending the *IRPA* to include sexual orientation as a prohibited ground of discrimination. In an attempt to effect such an amendment, the opposition introduced several bills; however, none went beyond first reading. Although at least one Minister responsible for the administration of the *IRPA* supported the amendment, the correspondence with a number of cabinet members and members of the Legislature makes it clear that the omission of sexual orientation from the *IRPA* was deliberate and not the result of an oversight. The reasons given for declining to take this action include the assertions that sexual orientation is a "marginal" ground; that human rights legislation is powerless to change public attitudes; and that there have only been a few cases of sexual orientation discrimination in employment brought to the attention of the Minister.

5 In 1992, the Human Rights Commission decided to investigate complaints of discrimination on the basis of sexual orientation. This decision was immediately vetoed by the Government and the Minister directed the Commission not to investigate the complaints.

6 In 1993, the Government appointed the Alberta Human Rights Review Panel to conduct a public review of the *IRPA* and the Human Rights Commission. When it had completed an extensive review, the Panel issued its report, entitled *Equal in Dignity and Rights: A Review of Human Rights in Alberta* (1994) (the "Dignity Report"). The report contained a number of recommendations, one of which was that sexual orientation should be included as a prohibited ground of discrimination in the Act. In its response to the Dignity Report (*Our Commitment to Human Rights: The Government's Response to the Recommendations of the Alberta Human Rights Review Panel* (1995)), the Government stated that the recommendation regarding sexual orientation would be dealt with through this case.

B. *Vriend's Dismissal From King's College and Complaint to the Alberta Human Rights Commission*

7 In December 1987 the appellant Delwin Vriend was employed as a laboratory coordinator by King's College in Edmonton, Alberta. He was given a permanent, full-time position in 1988. Throughout his term of employment he received positive evaluations, salary increases and promotions for his work performance. On February 20, 1990, in response to an inquiry by the President of the College, Vriend disclosed that he was homosexual. In early January 1991, the Board of Governors of the College adopted a position statement on homosexuality, and shortly thereafter, the President of the College requested Vriend's resignation. He declined to resign, and on January 28, 1991, Vriend's employment was terminated by the College. The sole reason given for his termination was his non-compliance with the policy of the College on homosexual practice. Vriend appealed the termination and applied for reinstatement, but was refused.

8 On June 11, 1991, Vriend attempted to file a complaint with the Alberta Human Rights Commission on the grounds that his employer discriminated against him because of his sexual orientation. On July 10, 1991, the Commission advised Vriend that he could not make a complaint under the *IRPA*, because the Act did not include sexual orientation as a protected ground.

9 Vriend, the Gay and Lesbian Awareness Society of Edmonton (GALA), the Gay and Lesbian Community Centre of Edmonton Society and Dignity Canada Dignité for Gay Catholics and Supporters (collectively the "appellants") applied by originating notice of motion to the Court of Queen's Bench of Alberta for declaratory relief. The appellants challenged the constitutionality of ss. 2(1), 3, 4, 7(1) and 8(1) of the *IRPA* on the grounds that these sections contravene s. 15(1) of the *Charter* because they do not include sexual orientation as a prohibited ground of discrimination. The standing of the appellants to bring the application was not challenged. The trial judge found that the omission of protection against discrimination on the basis of sexual orientation was an unjustified violation of s. 15 of the *Charter*. She ordered that the words "sexual orientation" be read into ss. 2(1), 3, 4, 7(1), 8(1) and 10 of the *IRPA* as a prohibited ground of discrimination. The majority of the Court of Appeal of Alberta granted the Government's appeal. The appellants were granted leave to appeal to this Court and the respondents were granted leave to cross-appeal. An order of the Chief Justice stating constitutional questions was issued on February 10, 1997.

II. Relevant Statutory Provisions

10 Since the time the appellant made his claim in 1992, the relevant statute was amended (*Individual's Rights Protection Amendment Act, 1996*, S.A. 1996, c. 25). The Act is now known as the *Human Rights, Citizenship and Multiculturalism Act*. In these

reasons, however, we refer to the statute, as amended, as the *Individual's Rights Protection Act* or *IRPA*, since that is how the legislation was most often referred to by the parties on this appeal. For the sake of convenience, the provisions are set out below first as they existed at the time the action commenced, and then as they currently stand.

*Individual's Rights Protection Act*, R.S.A. 1980, c. I-2, am. S.A. 1985, c. 33, S.A. 1990, c. 23

> 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; and
>
> WHEREAS it is fitting that this principle be affirmed by the Legislature of Alberta in an enactment whereby those rights of the individual may be protected . . . .
>
> **2**(1) No person shall publish or display before the public or cause to be published or displayed before the public any notice, sign, symbol, emblem or other representation indicating discrimination or an intention to discriminate against any person or class of persons for any purpose because of the race, religious beliefs, colour, gender, physical disability, mental disability, age, ancestry or place of origin of that person or class of persons.
>
> **3** No person, directly or indirectly, alone or with another, by himself or by the interposition of another, shall
>
> > (a) deny to any person or class of persons any accommodation, services or facilities customarily available to the public, or
> >
> > (b) discriminate against any person or class of persons with respect to any accommodation, services or facilities customarily available to the public,
>
> because of the race, religious beliefs, colour, gender, physical disability, mental disability, ancestry or place of origin of that person or class of persons or of any other person or class of persons.
>
> **4** No person, directly or indirectly, alone or with another, by himself or by the interposition of another, shall

(a) deny to any person or class of persons the right to occupy as a tenant any commercial unit or self-contained dwelling unit that is advertised or otherwise in any way represented as being available for occupancy by a tenant, or

(b) discriminate against any person or class of persons with respect to any term or condition of the tenancy of any commercial unit or self-contained dwelling units,

because of the race, religious beliefs, colour, gender, physical disability, mental disability, ancestry or place of origin of that person or class of persons or of any other person or class of persons.

**7**(1) No employer or person acting on behalf of an employer shall

(a) refuse to employ or refuse to continue to employ any person, or

(b) discriminate against any person with regard to employment or any term or condition of employment,

because of the race, religious beliefs, colour, gender, physical disability, mental disability, marital status, age, ancestry or place of origin of that person or of any other person.

(2) Subsection (1) as it relates to age and marital status does not affect the operation of any bona fide retirement or pension plan or the terms or conditions of any bona fide group or employee insurance plan.

(3) Subsection (1) does not apply with respect to a refusal, limitation, specification or preference based on a bona fide occupational requirement.

**8**(1) No person shall use or circulate any form of application for employment or publish any advertisement in connection with employment or prospective employment or make any written or oral inquiry of an applicant

(a) that expresses either directly or indirectly any limitation, specification or preference indicating discrimination on the basis of the race, religious beliefs, colour, gender, physical disability, mental disability, marital status, age, ancestry or place of origin of any person, or

(b) that requires an applicant to furnish any information concerning race, religious beliefs, colour, gender, physical disability, mental disability, marital status, age, ancestry or place of origin.

(2) Subsection (1) does not apply with respect to a refusal, limitation, specification or preference based on a bona fide occupational requirement.

**10** No trade union, employers' organization or occupational association shall

(a) exclude any person from membership in it,

(b) expel or suspend any member of it, or

(c) discriminate against any person or member,

because of the race, religious beliefs, colour, gender, physical disability, mental disability, marital status, age, ancestry or place of origin of that person or member.

**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.

**16**(1) It is the function of the Commission

(a) to forward the principle that every person is equal in dignity and rights without regard to race, religious beliefs, colour, gender, physical disability, mental disability, age, ancestry or place of origin,

(b) to promote an understanding of, acceptance of and compliance with this Act,

(c) to research, develop and conduct educational programs designed to eliminate discriminatory practices related to race, religious beliefs, colour, gender, physical disability, mental disability, age, ancestry or place of origin, and

(d) to encourage and co-ordinate both public and private human rights programs and activities.

*Human Rights, Citizenship and Multiculturalism Act*, R.S.A. 1980, c. H-11.7

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;

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

WHEREAS multiculturalism describes the diverse racial and cultural composition of Alberta society and its importance is recognized in Alberta as a fundamental principle and a matter of public policy;

WHEREAS it is recognized in Alberta as a fundamental principle and as a matter of public policy that all Albertans should share in an awareness and appreciation of the diverse racial and cultural composition of society and that the richness of life in Alberta is enhanced by sharing that diversity;

WHEREAS it is fitting that these principles be affirmed by the Legislature of Alberta in an enactment whereby those equality rights and that diversity may be protected . . . .

**2**(1) No person shall publish, issue or display or cause to be published, issued or displayed before the public any statement, publication, notice, sign, symbol, emblem or other representation that

(a) indicates discrimination or an intention to discriminate against a person or a class of persons, or

(b) is likely to expose a person or a class of persons to hatred or contempt

because of the race, religious beliefs, colour, gender, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income or family status of that person or class of persons.

**3** No person shall

(a) deny to any person or class of persons any goods, services, accommodation or facilities that are customarily available to the public, or

(b) discriminate against any person or class of persons with respect to any goods, services, accommodation or facilities that are customarily available to the public,

because of the race, religious beliefs, colour, gender, physical disability, mental disability, ancestry, place of origin, marital status, source of income or family status of that person or class of persons or of any other person or class of persons.

**4** No person shall

(a) deny to any person or class of persons the right to occupy as a tenant any commercial unit or self-contained dwelling unit that is advertised or otherwise in any way represented as being available for occupancy by a tenant, or

(b) discriminate against any person or class of persons with respect to any term or condition of the tenancy of any commercial unit or self-contained dwelling units,

because of the race, religious beliefs, colour, gender, physical disability, mental disability, ancestry, place of origin, marital status, source of income or family status of that person or class of persons or of any other person or class of persons.

**7**(1) No employer shall

(a) refuse to employ or refuse to continue to employ any person, or

(b) discriminate against any person with regard to employment or any term or condition of employment,

because of the race, religious beliefs, colour, gender, physical disability, mental disability, marital status, age, ancestry, place of origin, family status or source of income of that person or of any other person.

(2) Subsection (1) as it relates to age and marital status does not affect the operation of any bona fide retirement or pension plan or the terms or conditions of any bona fide group or employee insurance plan.

(3) Subsection (1) does not apply with respect to a refusal, limitation, specification or preference based on a bona fide occupational requirement.

**8**(1) No person shall use or circulate any form of application for employment or publish any advertisement in connection with employment or prospective employment or make any written or oral inquiry of an applicant

(a) that expresses either directly or indirectly any limitation, specification or preference indicating discrimination on the basis of the race, religious beliefs, colour, gender, physical disability, mental disability, marital status, age, ancestry, place of origin, family status or source of income of any person, or

(b) that requires an applicant to furnish any information concerning race, religious beliefs, colour, gender, physical disability, mental disability, marital status, age, ancestry, place of origin, family status or source of income.

(2) Subsection (1) does not apply with respect to a refusal, limitation, specification or preference based on a bona fide occupational requirement.

**10** No trade union, employers' organization or occupational association shall

(a) exclude any person from membership in it,

(b) expel or suspend any member of it, or

(c) discriminate against any person or member,

because of the race, religious beliefs, colour, gender, physical disability, mental disability, marital status, age, ancestry, place of origin, family status or source of income of that person or member.

**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.

**16**(1) It is the function of the Commission

(a) to forward the principle that all persons are equal in: dignity, rights and responsibilities without regard to race, religious beliefs, colour, gender, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income or family status,

(b) to promote awareness and appreciation of and respect for the multicultural heritage of Alberta society,

(c) to promote an environment in which all Albertans can participate in and contribute to the cultural, social, economic and political life of Alberta,

(d) to encourage all sectors of Alberta society to provide equality of opportunity,

(e) to research, develop and conduct educational programs designed to eliminate discriminatory practices related to race, religious beliefs, colour, gender, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income or family status,

(f) to promote an understanding of, acceptance of and compliance with this Act,

(g) to encourage and co-ordinate both public and private human rights programs and activities, and

(h) to advise the Minister on matters related to this Act.

*Canadian Charter of Rights and Freedoms*

**1.** The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

**15.** (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

**24.** (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

**32.** (1) This Charter applies

(*a*) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

> (*b*) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

*Constitution Act, 1982*

> **52.**(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

III. Decisions Below

A. *Alberta Court of Queen's Bench* (1994), 152 A.R. 1

11 The appellants applied to Russell J., as she then was, for an order (1) declaring that ss. 2(1), 3, 4 and 7(1) of the *IRPA* are inconsistent with s. 15(1) of the *Charter* and infringe the appellants' rights, as a result of the absence of sexual orientation from the list of proscribed grounds of discrimination; (2) that Vriend has the right to file a complaint under the *IRPA* alleging discrimination on the grounds of sexual orientation; and (3) that lesbians and gays have the right to the protections of the *IRPA*.

12 At the outset she found that the appellants had standing to challenge s. 10 as well as the other sections.

13 Russell J. was satisfied that the discrimination homosexuals suffer "is so notorious that [she could] take judicial notice of it without evidence" (p. 6). She went on to consider whether homosexuals are a discrete and insular minority entitled to protection under s. 15(1) of the *Charter*, and concluded that sexual orientation is properly considered an analogous ground under s. 15(1). This issue has since been

resolved by the decision in *Egan v. Canada*, [1995] 2 S.C.R. 513, which held that sexual orientation is an analogous ground.

14 Next, Russell J. considered whether the omission of sexual orientation under the *IRPA* constitutes discrimination under s. 15 of the *Charter*. She noted that it has been established that a discriminatory distinction in a law can arise from either a commission or an omission. The Ontario Court of Appeal in *Haig v. Canada* (1992), 9 O.R. (3d) 495, found that, considering the larger social, political and legal context, the omission of sexual orientation in the *Canadian Human Rights Act* constituted discrimination offending s. 15(1) of the *Charter*. Russell J. agreed with this conclusion. She took note of the *obiter* comments of L'Heureux-Dubé J. in *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, at p. 436, that the provinces could prohibit discrimination on some grounds but not others without violating the *Charter*. However, in her opinion sexual orientation was related to sex or gender as a prohibited ground and "[w]hile there is no obligation on the Province to legislate to prohibit sexual discrimination, when it does so it must provide even-handed protection in a nondiscriminatory manner, or justify the exclusion" (p. 13).

15 Russell J. noted also that discrimination does not depend on a finding of invidious intent, and concluded (at pp. 13-14):

> Regardless of whether there was any intent to discriminate, the effect of the decision to deny homosexuals recognition under the legislation is to reinforce negative stereotyping and prejudice thereby perpetuating and implicitly condoning its occurrence. The facts in this case demonstrate that the legislation had a differential impact on the applicant Vriend. When his employment was terminated because of his personal characteristics he was denied a legal remedy available to other similarly disadvantaged groups. That constitutes discrimination contrary to s. 15(1) of the *Charter*.

16 Turning to the s. 1 justification test, Russell J. held that since the Crown had failed to present any rationale to show that the violation was justified, it had failed to meet the requirements of s. 1. Even if the Crown were not required to show justification, she would have concluded that the violation was not justifiable. She found that the limitation was inconsistent with the objective and principles embodied in the preamble to the *IRPA*, and therefore, there was no legislative objective of pressing and substantial concern justifying the limitation. Russell J. further held that the denial of remedies provided by the *IRPA* was not rationally connected to the objective of protecting individual rights, and that, since the omission was complete, it did not represent minimal impairment.

17 Russell J. reviewed the possible remedies under s. 52 of the *Constitution Act, 1982* that were set out in *Schachter v. Canada*, [1992] 2 S.C.R. 679, and concluded that the only options in this case were striking down the legislation, with or without a suspension of the declaration of invalidity, or reading in. She decided that in this case, as in *Haig*, reading in was the most appropriate remedy. The omission was precisely defined and could be readily filled by reading in. As well, reading in was preferable because it left the objective of the legislation intact, was less intrusive than striking down, and would not have so great a budgetary impact as to substantially change the legislative scheme. Russell J. therefore ordered that the relevant sections of the Act be "interpreted, applied and administered as though they contained the words 'sexual orientation'" (p. 19).

B. *Alberta Court of Appeal* (1996), 181 A.R. 16

1. McClung J.A.

18 McClung J.A. held that the first question to be resolved was whether the *IRPA* is "answerable, as it stands" to the *Charter* (at p. 22). He was of the opinion that the omission of "sexual orientation" from the discrimination provisions of the *IRPA* does not amount to governmental action for the purpose of s. 32(1) of the *Charter*. In his view the provisions of the *Charter* could not force the legislature to enact a provision dealing with a "divisive" issue if it has chosen not to do so. He concluded that the province had not exercised its authority with respect to a matter so as to come within s. 32(1)(*b*) of the *Charter*.

19 McClung J.A. criticized the reasons of Russell J. as proceeding from the proposition that human rights legislation must perfectly "mirror" the *Charter*. He noted the existence of some variation among provinces with respect to the prohibited grounds of discrimination included in rights legislation, and stated that provinces must have latitude in implementing their powers under s. 92 of the *Constitution Act, 1867*. To require all legislation to be consistent with the *Charter* would be a "debacle for the autonomy of provincial law-making" (p. 24).

20 Even if the omission by the legislature is subject to *Charter* scrutiny under s. 32(1), McClung J.A. found no violation of s. 15(1). In his opinion the *IRPA* neither drew any distinction between homosexuals and heterosexuals nor resulted in the imposition of burdens, limitations or disadvantages or the denial of benefits or opportunities with respect to homosexuals. He found that any inequality that may exist between homosexuals and heterosexuals exists independently of the *IRPA*; the statute

is neutral and "neither confers nor denies benefits to, or withdraws protection from, any Canadian" (p. 29).

21 Although he found no violation of the *Charter*, McClung J.A. considered what the appropriate remedy would have been had there been a violation of the *Charter*. He disagreed with Russell J.'s decision to use the remedy of "reading in" and stated that the preferable response was to declare the Act unconstitutional and invalid, with a stay of the declaration to "permit legislative, not judicial, repair" (p. 29). McClung J.A. suggested that "reading up" constitutes an intrusion of the judiciary into the legislative domain which should be avoided whenever possible. Therefore, he would have, if necessary, declared the Act *ultra vires*, suspending this judgment for a period of one year to allow the legislature to address the defects in the *IRPA*. However, based on his reasons set out earlier he allowed the appeal.

2. O'Leary J.A.

22 O'Leary J.A. agreed with McClung J.A. that the appeal should be allowed but for different reasons. He assumed that the *Charter* applied to the *IRPA* and rested his conclusion on a finding that the *IRPA* does not create a distinction based on sexual orientation. In his opinion, therefore, there was no violation of s. 15(1).

23 O'Leary J.A. looked at the "initial hurdle" of the s. 15(1) analysis, which is to show that "there are one or more provisions in the legislation which create, expressly or by 'adverse effect', a distinction between individuals which is contrary to s. 15(1)" (p. 40). This state of affairs is to be distinguished from one in which the social circumstances exist independently of the provision. According to O'Leary J.A. the

*IRPA*'s silence with respect to sexual orientation means that the Act makes no distinction between individuals on the basis of sexual orientation.

24 He found that the *IRPA* only distinguishes between "the specified prohibited grounds of discrimination and the various potential grounds (including sexual orientation) which could be included but are not" (p. 42) and that this cannot be called a distinction on the basis of sexual orientation. As a result, O'Leary J.A. would allow the appeal and set aside the declaration made by the trial judge, on the basis that the *IRPA* does not create a distinction that offends s. 15(1).

3. Hunt J.A. (dissenting)

25 Hunt J.A. partially agreed with the decision of Russell J., finding that ss. 7(1), 8(1) and 10 of the *IRPA* violate s. 15(1) and are not saved by s. 1, but she found that reading in was not the appropriate remedy. With respect to the s. 15 violation, she reached the same conclusion as Russell J. but on slightly different reasoning, in part due to the decisions in *Egan*, *supra*, *Miron v. Trudel*, [1995] 2 S.C.R. 418, and *Thibaudeau v. Canada*, [1995] 2 S.C.R. 627, which had by then been released.

26 At the outset, Hunt J.A. dismissed the argument that s. 15(1) was not applicable in this case because it concerned private activity. It is an Act of the legislature which is being attacked in this case, not private activity, and provincial legislation is clearly subject to the *Charter*.

27 Hunt J.A. disagreed with Russell J.'s characterization of discrimination on the basis of sexual orientation as being "directly associated" with discrimination on the basis of gender and her analogy between this case and the cases of *Re Blainey and*

*Ontario Hockey Association* (1986), 54 O.R. (2d) 513 (C.A.), leave to appeal refused, [1986] 1 S.C.R. xii, and *McKinney*, *supra*, where protection was offered from discrimination on the basis of gender and age but only in a limited way.

28 She went on to examine the context and purpose of the law as well as its impact upon those to whom it applies and those whom it excludes. She found that the *IRPA* is a law that is dedicated to achieving equal treatment for all citizens of Alberta. The context is one of existing discrimination against a group which has suffered from historical disadvantage. Hunt J.A. concluded (at p. 58) that "[g]iven these considerations and the context here, it is my opinion that the failure to extend protection to homosexuals under the *IRPA* can be seen as a form of government action that is tantamount to approving ongoing discrimination against homosexuals. Thus, in this case, legislative silence results in the drawing of a distinction".

29 Therefore, Hunt J.A. would have concluded that there was a distinction drawn sufficient to find a potential violation of s. 15(1). In her opinion it was then "easy to conclude" (p. 59) that this distinction resulted in homosexuals as a group being denied equal benefit and protection of the law, since they are denied access to the *IRPA*'s protection and enforcement process.

30 The next question was whether this distinction results in discrimination. Hunt J.A. found that according to any of the approaches set out in *Egan*, discrimination could be found in this case. The denial of the equal protection and benefit of the law here is purely on the basis of sexual orientation, not merit or need, and reinforces the stereotype that homosexuals are less deserving of protection and therefore less worthy of value as human beings. Even taking into account the relevance of the distinction to the goals of the legislation, it is "impossible to see how a statute based upon notions of

the inherent dignity of all can have as a relevant legislative goal the unequal treatment of some members of society" on the grounds of their membership in a group (at p. 60). This is a case in which the functional values underlying the omission are themselves discriminatory.

31 Turning to s. 1 of the *Charter*, Hunt J.A. noted that the Crown had not presented any evidence concerning justification under s. 1. Hunt J.A. found the material in the Crown's factum inadequate to conduct a s. 1 analysis and thought that the paucity of the Crown's case on this matter would, of itself, support the conclusion of the trial judge that s. 1 justification had not been established. In any case, the omission could not satisfy the *Oakes* test for justification.

32 Although she found an unjustifiable violation of s. 15(1), Hunt J.A. disagreed with the trial judge's choice of remedy. Hunt J.A. was of the opinion that the remedy should be limited to the situation presented in this case and the provisions most closely related to it, i.e. discrimination in employment (s. 7), employment notices (s. 8) and union membership (s. 10), respectively.

33 While there were some arguments here in favour of reading in, Hunt J.A. was concerned whether reading in could be accomplished with sufficient precision, and about the possible impact of reading in on s. 7(2) of the *IRPA*, which concerns retirement, pension and insurance plans.

34 Hunt J.A. therefore concluded that the preferable remedy was to declare invalid ss. 7(1), 8(1) and 10 of the *IRPA* to the extent of their inconsistency with the *Charter*. Since an immediate declaration of invalidity would remove protection from everyone, contrary to the *Charter*'s objectives, she would have suspended the declaration

of invalidity for a period of one year to allow the Legislature time to bring the *IRPA* into line with the *Charter*.

C. *Alberta Court of Appeal Supplementary Reasons Regarding Costs* (1996), 184 A.R. 351

35 O'Leary J.A. (McClung J.A. concurring) held that the circumstances in this case did not justify deviating from the customary rule of awarding costs to the successful party. O'Leary J.A. acknowledged that the court had discretion in awarding costs and that the public interest character of litigation could be used as an argument for depriving the successful litigant of costs. He noted, however, that such arguments had been rejected in some cases.

36 He therefore awarded the costs of the appeal on a party-and-party basis to the Crown, to include all reasonable disbursements except travelling and accommodation expenses, and including a fee in respect of its written submission on the issue of costs and a second counsel fee.

37 Hunt J.A. dissented. She noted that the decision of the Court of Appeal had involved a 2-1 split with three separate reasons for judgment, and that an important and novel point of law was at issue. She also noted several cases in which the courts have made no costs award, including *Dickason v. University of Alberta*, [1992] 2 S.C.R. 1103, *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, and *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236.

38 Hunt J.A. agreed that governments should not be assumed to have limitless resources, and that relative resources of the parties is not the critical factor. She also noted, however, that there is no program in Alberta to subsidize the pursuit of important *Charter* litigation, as there is at the federal level. This case was not only novel but was also one that could "truly be described as a test case", where the impact of the rule on the parties is of secondary importance to the settlement of the rule itself (at p. 358). Hunt J.A. was of the opinion that there was a "heavy public interest component" to the legal question (at p. 358).

39 As a result of all of these factors, Hunt J.A. concluded that she would have awarded costs against the respondents (appellants in the Court of Appeal), notwithstanding their success on the appeal. However since the appellants (respondents in the Court of Appeal) in this case merely sought a no costs order that is the order she would have made.

IV. Issues

40 The constitutional questions which have been stated by this Court are:

1. Do (a) decisions not to include sexual orientation or (b) 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 *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, infringe or deny the rights guaranteed by s. 15(1) of the *Canadian Charter of Rights and Freedoms*?

2. If the answer to Question 1 is "yes", is the infringement or denial demonstrably justified as a reasonable limit pursuant to s. 1 of the *Canadian Charter of Rights and Freedoms*?

41 The parties have also raised issues with respect to standing, the application of the *Charter* and the appropriate remedy.

## V. Analysis

### A. *Standing*

42 The appellants seek to challenge the preamble and ss. 2(1), 3, 4, 7(1), 8(1), 10 and 16(1) of the *IRPA*. The respondents on this appeal submitted that the appellants should have standing to challenge only the sections of the *IRPA* relating to employment, namely ss. 7(1), 8(1) and 10, since the factual background of the case involves discrimination in employment. The Attorney General of Canada goes even further by arguing that the only provision at issue in this case is s. 7(1), which specifically addresses discrimination in employment practices.

43 The originating notice of motion filed by the appellants in the Court of Queen's Bench referred to ss. 2(1), 3, 4 and 7(1) of the *IRPA*. At trial, they were allowed to amend their application to include s. 10, which had been omitted as the result of an oversight. In making this decision, Russell J. applied the test for public interest standing from *Canadian Council of Churches*, *supra*, and concluded that the appellants had standing to challenge s. 10 as well. The way in which she articulated this conclusion implies that the appellants also had standing to challenge the other sections of the Act referred to in the originating notice. There is no reason to disagree with this assessment.

44 In *Canadian Council of Churches* (at p. 253), it was stated that three aspects should be considered:

> First, is there a serious issue raised as to the invalidity of legislation in question? Second, has it been established that the plaintiff is directly affected by the legislation or if not does the plaintiff have a genuine interest in its validity? Third, is there another reasonable and effective way to bring the issue before the court?

It is my opinion that these criteria are met with respect to all of the provisions named by the appellants (the preamble and ss. 2(1), 3, 4, 7(1), 8(1), 10 and 16(1)).

45 A serious issue as to constitutional validity is raised with respect to all of these provisions. The issue is substantially the same for all of the provisions from which sexual orientation is excluded as a prohibited ground of discrimination. There is nothing in particular about s. 7(1) or ss. 7(1), 8(1) and 10 that makes their validity any more questionable than the other provisions dealing with discrimination. The respondents argue that there is no serious issue as to the constitutional validity of the preamble and s. 16 (which sets out the functions of the Human Rights Commission), because those provisions do not confer any specific benefit or protection. Although neither of these two provisions directly confers a benefit or protection, arguably they do so indirectly. An omission from those provisions could well have at least some of the same effects as the omission of these rights from the other sections and therefore raises a serious issue of constitutional validity.

46 Further Vriend and the other appellants have a genuine and valid interest in all of the provisions they seek to challenge. Both Vriend as an individual and the appellant organizations have a direct interest in the exclusion of sexual orientation from all forms of discrimination. What is at issue here is the exclusion of sexual orientation as a protected ground from the *IRPA* and its procedures for the protection of human rights. This is not a case about employment discrimination as distinct from any other form of discrimination that occurs within the private sphere and is covered by provincial

human rights legislation. Insofar as the particular situation and factual background of the appellant Vriend is relevant to establishing the issues on appeal, it is the denial of access to the complaint procedures of the Alberta Human Rights Commission that is the essential element of this case and not his dismissal from King's College. The particular issues relating to his loss of employment would be for the Human Rights Commission to resolve and do not form part of this appeal. It must also be remembered that Vriend is only one of four appellants. The other three are organizations which are generally concerned with the rights of gays and lesbians and their protection from discrimination in all areas of their lives. There is nothing to restrict their involvement in this appeal to matters of employment.

47 With respect to the third criterion, the only other way the issue could be brought before the Court with respect to the other sections would be to wait until someone is discriminated against on the ground of sexual orientation in housing, goods and services, etc. and challenge the validity of the provision in each appropriate case. This would not only be wasteful of judicial resources, but also unfair in that it would impose burdens of delay, cost and personal vulnerability to discrimination for the individuals involved in those eventual cases. This cannot be a satisfactory result.

48 As well it is important to recall that all of the provisions are very similar and do not depend on any particular factual context in order to resolve their constitutional status. The fact that homosexuals have suffered discrimination in all aspects of their lives was accepted in *Egan*, *supra*. It follows that there is really no need to adduce additional evidence regarding the provisions concerned with discrimination in areas other than employment.

49 Therefore, the appellants have standing to challenge the validity of all of the provisions named in the constitutional questions, namely the preamble and ss. 2(1), 3, 4, 7(1), 8(1), 10 and 16(1) of the *IRPA*.

B. *Application of the Charter*

1. Application of the *Charter* to a Legislative Omission

50 Does s. 32 of the *Charter* prohibit consideration of a s. 15 violation when that issue arises from a legislative omission?

51 The respondents (appellants on the cross-appeal) argue on their cross-appeal that because this case concerns a legislative omission, s. 15 of the *Charter* should not apply pursuant to s. 32. This submission cannot be accepted.

52 This issue is resolved simply by determining whether the subject of the challenge in this case is one to which the *Charter* applies pursuant to s. 32. Questions relating to the nature of the legislature's decision, its effect, and whether it is neutral, are relevant instead to the s. 15 analysis. The threshold test demands only that there is some "matter within the authority of the legislature" which is the proper subject of a *Charter* analysis. At this preliminary stage no judgment should be made as to the nature or validity of this "matter" or subject. Undue emphasis should not be placed on the threshold test since this could result in effectively and unnecessarily removing significant matters from a full *Charter* analysis.

53 Further confusion results when arguments concerning the respective roles of the legislature and the judiciary are introduced into the s. 32 analysis. These

arguments put forward the position that courts must defer to a decision of the legislature not to enact a particular provision, and that the scope of *Charter* review should be restricted so that such decisions will be unchallenged. I cannot accept this position. Apart from the very problematic distinction it draws between legislative action and inaction, this argument seeks to substantially alter the nature of considerations of legislative deference in *Charter* analysis. The deference very properly due to the choices made by the legislature will be taken into account in deciding whether a limit is justified under s. 1 and again in determining the appropriate remedy for a *Charter* breach. My colleague Iacobucci J. deals with these considerations at greater length more fully in his reasons.

54 The notion of judicial deference to legislative choices should not, however, be used to completely immunize certain kinds of legislative decisions from *Charter* scrutiny. McClung J.A. in the Alberta Court of Appeal criticized the application of the *Charter* to a legislative omission as an encroachment by the courts on legislative autonomy. He objected to what he saw as judges dictating provincial legislation under the pretext of constitutional scrutiny. In his view, a choice by the legislature not to legislate with respect to a particular matter within its jurisdiction, especially a controversial one, should not be open to review by the judiciary: "When they choose silence provincial legislatures need not march to the *Charter* drum. In a constitutional sense they need not march at all. . . . The *Canadian Charter of Rights and Freedoms* was not adopted by the provinces to promote the federal extraction of subsidiary legislation from them but only to police it once it is proclaimed -- if it is proclaimed" (pp. 25 and 28).

55 There are several answers to this position. The first is that in this case, the constitutional challenge concerns the *IRPA*, legislation that has been proclaimed. The

fact that it is the underinclusiveness of the Act which is at issue does not alter the fact that it is the legislative act which is the subject of *Charter* scrutiny in this case. Furthermore, the language of s. 32 does not limit the application of the *Charter* merely to positive actions encroaching on rights or the excessive exercise of authority, as McClung J.A. seems to suggest. These issues will be dealt with shortly. Yet at this point it must be observed that McClung J.A.'s reasons also imply a more fundamental challenge to the role of the courts under the *Charter*, which must also be answered. This issue is addressed in the reasons of my colleague Iacobucci J. below, and that discussion need not be repeated here. However, at the present stage of the analysis it may be useful to clarify the role of the judiciary in responding to a legislative omission which is challenged under the *Charter*.

56 It is suggested that this appeal represents a contest between the power of the democratically elected legislatures to pass the laws they see fit, and the power of the courts to disallow those laws, or to dictate that certain matters be included in those laws. To put the issue in this way is misleading and erroneous. Quite simply, it is not the courts which limit the legislatures. Rather, it is the Constitution, which must be interpreted by the courts, that limits the legislatures. This is necessarily true of all constitutional democracies. Citizens must have the right to challenge laws which they consider to be beyond the powers of the legislatures. When such a challenge is properly made, the courts must, pursuant to their constitutional duty, rule on the challenge. It is said, however, that this case is different because the challenge centres on the legislature's failure to extend the protection of a law to a particular group of people. This position assumes that it is only a positive act rather than an omission which may be scrutinized under the *Charter*. In my view, for the reasons that will follow, there is no legal basis for drawing such a distinction. In this as in other cases, the courts have a duty to determine whether the challenge is justified. It is not a question, as McClung J.A.

suggested, of the courts imposing their view of "ideal" legislation, but rather of determining whether the challenged legislative act or omission is constitutional or not.

57 McClung J.A.'s position that judicial interference is inappropriate in this case is based on the assumption that the legislature's "silence" in this case is "neutral". Yet, questions which raise the issue of neutrality can only be dealt with in the context of the s. 15 analysis itself. Unless that analysis is undertaken, it is impossible to say whether the omission is indeed neutral or not. Neutrality cannot be assumed. To do so would remove the omission from the scope of judicial scrutiny under the *Charter*. The appellants have challenged the law on the ground that it violates the Constitution of Canada, and the courts must hear and consider that challenge. If, as alleged, the *IRPA* excludes some people from receiving benefits and protection it confers on others in a way that contravenes the equality guarantees in the *Charter*, then the courts have no choice but to say so. To do less would be to undermine the Constitution and the rule of law.

58 Let us now consider the substance of the respondents' position on this issue.

59 The respondents contend that a deliberate choice not to legislate should not be considered government action and thus does not attract *Charter* scrutiny. This submission should not be accepted. They assert that there must be some "exercise" of "s. 32 authority" to bring the decision of the legislature within the purview of the *Charter*. Yet there is nothing either in the text of s. 32 or in the jurisprudence concerned with the application of the *Charter* which requires such a narrow view of the *Charter*'s application.

60 The relevant subsection, s. 32(1)(*b*), states that the *Charter* applies to "the legislature and government of each province in respect of all matters within the authority of the legislature of each province". There is nothing in that wording to suggest that a positive act encroaching on rights is required; rather the subsection speaks only of matters within the authority of the legislature. Dianne Pothier has correctly observed that s. 32 is "worded broadly enough to cover positive obligations on a legislature such that the *Charter* will be engaged even if the legislature refuses to exercise its authority" ("The Sounds of Silence: *Charter* Application when the Legislature Declines to Speak" (1996), 7 *Constitutional Forum* 113, at p. 115). The application of the *Charter* is not restricted to situations where the government actively encroaches on rights.

61 The *IRPA* is being challenged as unconstitutional because of its failure to protect *Charter* rights, that is to say its underinclusiveness. The mere fact that the challenged aspect of the Act is its underinclusiveness should not necessarily render the *Charter* inapplicable. If an omission were not subject to the *Charter*, underinclusive legislation which was worded in such a way as to simply omit one class rather than to explicitly exclude it would be immune from *Charter* challenge. If this position was accepted, the form, rather than the substance, of the legislation would determine whether it was open to challenge. This result would be illogical and more importantly unfair. Therefore, where, as here, the challenge concerns an Act of the legislature that is underinclusive as a result of an omission, s. 32 should not be interpreted as precluding the application of the *Charter*.

62 It might also be possible to say in this case that the deliberate decision to omit sexual orientation from the provisions of the *IRPA* is an "act" of the Legislature to which the *Charter* should apply. This argument is strengthened and given a sense of urgency by the considered and specific positive actions taken by the government to

ensure that those discriminated against on the grounds of sexual orientation were excluded from the protective procedures of the Human Rights Commission. However, it is not necessary to rely on this position in order to find that the *Charter* is applicable.

63 It is also unnecessary to consider whether a government could properly be subjected to a challenge under s. 15 of the *Charter* for failing to act at all, in contrast to a case such as this where it acted in an underinclusive manner. It has been held that certain provisions of the *Charter*, for example those dealing with minority language rights (s. 23), do indeed require a government to take positive actions to ensure that those rights are respected (see *Mahe v. Alberta*, [1990] 1 S.C.R. 342, at p. 393; *Reference re Public Schools Act (Man.), s. 79(3), (4) and (7)*, [1993] 1 S.C.R. 839, at pp. 862-63 and 866).

64 It has not yet been necessary to decide in other contexts whether the *Charter* might impose positive obligations on the legislatures or on Parliament such that a failure to legislate could be challenged under the *Charter*. Nonetheless, the possibility has been considered and left open in some cases. For example, in *McKinney*, Wilson J. made a comment in *obiter* that "[i]t is not self-evident to me that government could not be found to be in breach of the *Charter* for failing to act" (p. 412). In *Haig v. Canada*, [1993] 2 S.C.R. 995, at p. 1038, L'Heureux-Dubé J., speaking for the majority and relying on comments made by Dickson C.J. in *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, suggested that in some situations, the *Charter* might impose affirmative duties on the government to take positive action. Finally, in *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, La Forest J., speaking for the Court, left open the question whether the *Charter* might oblige the state to take positive actions (at para. 73). However, it is neither necessary nor appropriate to consider that broad issue in this case.

2. Application of the *Charter* to Private Activity

65 The respondents further argue that the effect of applying the *Charter* to the *IRPA* would be to regulate private activity. Since it has been held that the *Charter* does not apply to private activity (*RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573; *Tremblay v. Daigle*, [1989] 2 S.C.R. 530; *McKinney, supra*), it is said that the application of the *Charter* in this case would not be appropriate. This argument cannot be accepted. The application of the *Charter* to the *IRPA* does not amount to applying it to private activity. It is true that the *IRPA* itself targets private activity and as a result will have an "effect" upon that activity. Yet it does not follow that this indirect effect should remove the *IRPA* from the purview of the *Charter*. It would lead to an unacceptable result if any legislation that regulated private activity would for that reason alone be immune from *Charter* scrutiny.

66 The respondents' submission has failed to distinguish between "private activity" and "laws that regulate private activity". The former is not subject to the *Charter*, while the latter obviously is. It is the latter which is at issue in this appeal. This case can be compared to *McKinney*, where La Forest J., speaking for the majority, stated that "[t]here is no question that, the [Human Rights] Code being a law, the *Charter* applies to it" (p. 290). Those words are applicable to the situation presented in this case. The constitutional challenge here concerns the *IRPA*, an Act of the Alberta Legislature. It does not concern the acts of King's College or any other private entity or person. This, I think, is sufficient to dispose of the respondents' submissions on this point.

C. *Section 15(1)*

1. Approach to Section 15(1)

67 The rights enshrined in s. 15(1) of the *Charter* are fundamental to Canada. They reflect the fondest dreams, the highest hopes and finest aspirations of Canadian society. When universal suffrage was granted it recognized to some extent the importance of the individual. Canada by the broad scope and fundamental fairness of the provisions of s. 15(1) has taken a further step in the recognition of the fundamental importance and the innate dignity of the individual. That it has done so is not only praiseworthy but essential to achieving the magnificent goal of equal dignity for all. It is the means of giving Canadians a sense of pride. In order to achieve equality the intrinsic worthiness and importance of every individual must be recognized regardless of the age, sex, colour, origins, or other characteristics of the person. This in turn should lead to a sense of dignity and worthiness for every Canadian and the greatest possible pride and appreciation in being a part of a great nation.

68 The concept and principle of equality is almost intuitively understood and cherished by all. It is easy to praise these concepts as providing the foundation for a just society which permits every individual to live in dignity and in harmony with all. The difficulty lies in giving real effect to equality. Difficult as the goal of equality may be it is worth the arduous struggle to attain. It is only when equality is a reality that fraternity and harmony will be achieved. It is then that all individuals will truly live in dignity.

69 It is easy to say that everyone who is just like “us” is entitled to equality. Everyone finds it more difficult to say that those who are “different” from us in some

way should have the same equality rights that we enjoy. Yet so soon as we say any enumerated or analogous group is less deserving and unworthy of equal protection and benefit of the law all minorities and all of Canadian society are demeaned. It is so deceptively simple and so devastatingly injurious to say that those who are handicapped or of a different race, or religion, or colour or sexual orientation are less worthy. Yet, if any enumerated or analogous group is denied the equality provided by s. 15 then the equality of every other minority group is threatened. That equality is guaranteed by our constitution. If equality rights for minorities had been recognized, the all too frequent tragedies of history might have been avoided. It can never be forgotten that discrimination is the antithesis of equality and that it is the recognition of equality which will foster the dignity of every individual.

70 How then should the analysis of s. 15 proceed? In *Egan* the two-step approach taken in *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, and *R. v. Turpin*, [1989] 1 S.C.R. 1296, was summarized and described in this way (at paras. 130-31):

> The first step is to determine whether, due to a distinction created by the questioned law, a claimant's right to equality before the law, equality under the law, equal protection of the law or equal benefit of the law has been denied. During this first step, the inquiry should focus upon whether the challenged law has drawn a distinction between the claimant and others, based on personal characteristics.
>
> Not every distinction created by legislation gives rise to discrimination. Therefore, the second step must be to determine whether the distinction created by the law results in discrimination. In order to make this determination, it is necessary to consider first, whether the equality right was denied on the basis of a personal characteristic which is either enumerated in s. 15(1) or which is analogous to those enumerated, and second, whether that distinction has the effect on the claimant of imposing a burden, obligation or disadvantage not imposed upon others or of withholding or limiting access to benefits or advantages which are available to others.

A similar approach was taken by McLachlin J. in *Miron* (at para 128):

> The analysis under s. 15(1) involves two steps. First, the claimant must show a denial of "equal protection" or "equal benefit" of the law, as compared with some other person. Second, the claimant must show that the denial constitutes discrimination. At this second stage, in order for discrimination to be made out, the claimant must show that the denial rests on one of the grounds enumerated in s. 15(1) or an analogous ground and that the unequal treatment is based on the stereotypical application of presumed group or personal characteristics.

71 In *Miron* and *Egan*, Lamer C.J. and La Forest, Gonthier and Major JJ. articulated a qualification which, as described in *Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358 (at para. 64), "focuses on the relevancy of a distinction to the purpose of the legislation where that purpose is not itself discriminatory and recognizes that certain distinctions are outside the scope of s. 15". This approach is, to a certain extent, compatible with the notion that discrimination commonly involves the attribution of stereotypical characteristics to members of an enumerated or analogous group.

72 It has subsequently been explained, however, that it is not only through the "stereotypical application of presumed group or personal characteristics" that discrimination can occur, although this may be common to many instances of discrimination. As stated by Sopinka J. in *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241, at paras. 66-67:

> . . . the purpose of s. 15(1) of the *Charter* is not only to prevent discrimination by the attribution of stereotypical characteristics to individuals, but also to ameliorate the position of groups within Canadian society who have suffered disadvantage by exclusion from mainstream society as has been the case with disabled persons.
>
> The principal object of certain of the prohibited grounds is the elimination of discrimination by the attribution of untrue characteristics based on stereotypical attitudes relating to immutable conditions such as race or sex. . . . The other equally important objective seeks to take into

> account the true characteristics of this group which act as headwinds to the enjoyment of society's benefits and to accommodate them.

73 These approaches to the analysis of s. 15(1) have been summarized and adopted in subsequent cases, e.g. *Eaton* (at para. 62), *Benner* (at para. 69) and, most recently, *Eldridge*. In *Eldridge*, La Forest J., writing for the unanimous Court, stated (at para. 58):

> While this Court has not adopted a uniform approach to s. 15(1), there is broad agreement on the general analytic framework; see *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241, at para. 62, *Miron*, *supra*, and *Egan*, *supra*. A person claiming a violation of s. 15(1) must first establish that, because of a distinction drawn between the claimant and others, the claimant has been denied "equal protection" or "equal benefit" of the law. Secondly, the claimant must show that the denial constitutes discrimination on the basis of one of the enumerated grounds listed in s. 15(1) or one analogous thereto.

74 In this case, as in *Eaton*, *Benner* and *Eldridge*, any differences that may exist in the approach to s. 15(1) would not affect the result, and it is therefore not necessary to address those differences. The essential requirements of all these cases will be satisfied by enquiring first, whether there is a distinction which results in the denial of equality before or under the law, or of equal protection or benefit of the law; and second, whether this denial constitutes discrimination on the basis of an enumerated or analogous ground.

2. The *IRPA* Creates a Distinction Between the Claimant and Others Based on a Personal Characteristic, and Because of That Distinction, It Denies the Claimant Equal Protection or Equal Benefit of the Law

(a) *Does the IRPA Create a Distinction*?

75 The respondents have argued that because the *IRPA* merely omits any reference to sexual orientation, this "neutral silence" cannot be understood as creating a distinction. They contend that the *IRPA* extends full protection on the grounds contained within it to heterosexuals and homosexuals alike, and therefore there is no distinction and hence no discrimination. It is the respondents' position that if any distinction is made on the basis of sexual orientation that distinction exists because it is present in society and not because of the *IRPA*.

76 These arguments cannot be accepted. They are based on that "thin and impoverished" notion of equality referred to in *Eldridge* (at para. 73). It has been repeatedly held that identical treatment will not always constitute equal treatment (see for example *Andrews, supra*, at p. 164). It is also clear that the way in which an exclusion is worded should not disguise the nature of the exclusion so as to allow differently drafted exclusions to be treated differently. For example *Schachter*, at p. 698, discussed this point in the context of remedies, and quoted *Knodel v. British Columbia (Medical Services Commission)* (1991), 58 B.C.L.R. (2d) 356 (S.C.), at pp. 384-85:

> Where the state makes a distinction between two classes of individuals, A and B, . . . the manner in which the legislative provision or law is drafted is irrelevant for constitutional purposes; i.e., it is immaterial whether the subject law states: (1) A benefits; or (2) Everyone benefits except B. In both cases, the impact upon the individual within group B is the same.

77 The respondents concede that if homosexuals were excluded altogether from the protection of the *IRPA* in the sense that they were not protected from discrimination on any grounds, this would be discriminatory. Clearly that would be discrimination of the most egregious kind. It is true that gay and lesbian individuals are not entirely excluded from the protection of the *IRPA*. They can claim protection on some grounds. Yet that certainly does not mean that there is no discrimination present. For example, the fact that a lesbian and a heterosexual woman are both entitled to bring a complaint of discrimination on the basis of gender does not mean that they have equal protection under the Act. Lesbian and gay individuals are still denied protection under the ground that may be the most significant for them, discrimination on the basis of sexual orientation.

78 The respondents also seek to distinguish this case from *McKinney*, *supra*, and *Blainey*, *supra*. In *Blainey*, the Ontario human rights legislation prohibited discrimination on the basis of gender, but expressly allowed it in athletic organizations. Similarly, in *McKinney*, the impugned legislation prohibited discrimination on the basis of age, but in circumstances of employment, "age" was defined as 18 to 65, thereby depriving elderly workers of a benefit under the statute on the basis of their age. In both cases the legislation was found to violate s. 15(1).

79 The respondents suggest that because the government in those cases had decided to provide protection, it had to do so in a non-discriminatory manner, but that the present case is distinguishable because the *IRPA* remains silent with respect to sexual orientation. The fact that the legislation explicitly places limits on protection (to some within a category as in *McKinney*, or excluding a particular area of discrimination as in *Blainey*) cannot provide the sole basis for determining whether a distinction has been drawn by the legislation. This case too is one of partial protection although the exclusion

or limit on protection takes a different form from that presented in *McKinney* and *Blainey*. Protection from discrimination is provided by the Government, by means of the *IRPA*, but only to some groups.

80 If the mere silence of the legislation was enough to remove it from s. 15(1) scrutiny then any legislature could easily avoid the objects of s. 15(1) simply by drafting laws which omitted reference to excluded groups. Such an approach would ignore the recognition that this Court has given to the principle that discrimination can arise from underinclusive legislation. This principle was expressed with great clarity by Dickson C.J. in *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219, at p. 1240. There he stated: "Underinclusion may be simply a backhanded way of permitting discrimination".

81 It is clear that the *IRPA*, by reason of its underinclusiveness, does create a distinction. The distinction is simultaneously drawn along two different lines. The first is the distinction between homosexuals, on one hand, and other disadvantaged groups which are protected under the Act, on the other. Gays and lesbians do not even have formal equality with reference to other protected groups, since those other groups are explicitly included and they are not.

82 The second distinction, and, I think, the more fundamental one, is between homosexuals and heterosexuals. This distinction may be more difficult to see because there is, on the surface, a measure of formal equality: gay or lesbian individuals have the same access as heterosexual individuals to the protection of the *IRPA* in the sense that they could complain to the Commission about an incident of discrimination on the basis of any of the grounds currently included. However, the exclusion of the ground of sexual orientation, considered in the context of the social reality of discrimination against gays and lesbians, clearly has a disproportionate impact on them as opposed to

heterosexuals. Therefore the *IRPA* in its underinclusive state denies substantive equality to the former group. This was well expressed by W. N. Renke, "Case Comment: *Vriend* v. *Alberta*: Discrimination, Burdens of Proof, and Judicial Notice" (1996), 34 *Alta. L. Rev.* 925, at pp. 942-43:

> If both heterosexuals and homosexuals equally suffered discrimination on the basis of sexual orientation, neither might complain of unfairness if the *IRPA* extended no remedies for discrimination on the basis of sexual orientation. A person belonging to one group would be treated like a person belonging to the other. Where, though, discrimination is visited virtually exclusively against persons with one type of sexual orientation, an absence of legislative remedies for discrimination based on sexual orientation has a differential impact. The absence of remedies has no real impact on heterosexuals, since they have no complaints to make concerning sexual orientation discrimination. The absence of remedies has a real impact on homosexuals, since they are the persons discriminated against on the basis of sexual orientation. Furthermore, a heterosexual has recourse to all the currently available heads of discrimination, should a complaint be necessary. A homosexual, it is true, may also have recourse to those heads of discrimination, but the only type of discrimination he or she may suffer may be sexual orientation discrimination. He or she would have no remedy for this type of discrimination. Seen in this way, the *IRPA* does distinguish between homosexuals and heterosexuals.

See also Pothier, *supra*, at p. 119. It is possible that a heterosexual individual could be discriminated against on the ground of sexual orientation. Yet this is far less likely to occur than discrimination against a homosexual or lesbian on that same ground. It thus is apparent that there is a clear distinction created by the disproportionate impact which arises from the exclusion of the ground from the *IRPA*.

83 This case is similar in some respects to the recent case of *Eldridge*, *supra*. There the *Charter*'s requirement of substantive, not merely formal, equality was unanimously affirmed. It was, as well, recognized that substantive equality may be violated by a legislative omission. At paras. 60-61 the principle was explained in this way:

> The only question in this case, then, is whether the appellants have been afforded "equal benefit of the law without discrimination" within the meaning of s. 15(1) of the *Charter*. On its face, the medicare system in British Columbia applies equally to the deaf and hearing populations. It does not make an explicit "distinction" based on disability by singling out deaf persons for different treatment. Both deaf and hearing persons are entitled to receive certain medical services free of charge. The appellants nevertheless contend that the lack of funding for sign language interpreters renders them unable to benefit from this legislation to the same extent as hearing persons. Their claim, in other words, is one of "adverse effects" discrimination.
>
> This Court has consistently held that s. 15(1) of the *Charter* protects against this type of discrimination. . . . Section 15(1), the Court held [in *Andrews*], was intended to ensure a measure of substantive, not merely formal equality.

84 Finally, the respondents' contention that the distinction is not created by law, but rather exists independently of the *IRPA* in society, cannot be accepted. It is, of course, true that discrimination against gays and lesbians exists in society. The reality of this cruel and unfortunate discrimination was recognized in *Egan*. Indeed it provides the context in which the legislative distinction challenged in this case must be analysed. The reality of society's discrimination against lesbians and gay men demonstrates that there is a distinction drawn in the *IRPA* which denies these groups equal protection of the law by excluding lesbians and gay men from its protection, the very protection they so urgently need because of the existence of discrimination against them in society. It is not necessary to find that the legislation <u>creates</u> the discrimination existing in society in order to determine that it creates a potentially discriminatory distinction.

85 Although the respondents try to distinguish this case from *Bliss v. Attorney General of Canada*, [1979] 1 S.C.R. 183, the reasoning they put forward is very much reminiscent of the approach taken in that case. (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, at pp. 920-22.) There it was held that a longer qualifying period for unemployment benefits relating to pregnancy was not discriminatory because it applied to all pregnant individuals, and that if this category happened only to include women, that was a distinction created by nature, not by law. This reasoning has since been emphatically rejected (see e.g. *Brooks*). *Eldridge* also emphatically rejected an argument that underinclusive legislation did not discriminate because the inequality existed independently of the benefit provided by the state (at paras. 68-69).

86 The omission of sexual orientation as a protected ground in the *IRPA* creates a distinction on the basis of sexual orientation. The "silence" of the *IRPA* with respect to discrimination on the ground of sexual orientation is not "neutral". Gay men and lesbians are treated differently from other disadvantaged groups and from heterosexuals. They, unlike gays and lesbians, receive protection from discrimination on the grounds that are likely to be relevant to them.

(b) *Denial of Equal Benefit and Protection of the Law*

87 It is apparent that the omission from the *IRPA* creates a distinction. That distinction results in a denial of the equal benefit and equal protection of the law. It is the exclusion of sexual orientation from the list of grounds in the *IRPA* which denies lesbians and gay men the protection and benefit of the Act in two important ways. They are excluded from the government's statement of policy against discrimination, and they are also denied access to the remedial procedures established by the Act.

88 Therefore, the *IRPA*, by its omission or underinclusiveness, denies gays and lesbians the equal benefit and protection of the law on the basis of a personal characteristic, namely sexual orientation.

### 3. The Denial of Equal Benefit and Equal Protection Constitutes Discrimination Contrary to Section 15(1)

89 In *Egan*, it was said that there are two aspects which are relevant in determining whether the distinction created by the law constitutes discrimination. First, "whether the equality right was denied on the basis of a personal characteristic which is either enumerated in s. 15(1) or which is analogous to those enumerated". Second "whether that distinction has the effect on the claimant of imposing a burden, obligation or disadvantage not imposed upon others or of withholding or limiting access to benefits or advantages which are available to others" (para. 131). A discriminatory distinction was also described as one which is "capable of either promoting or perpetuating the view that the individual adversely affected by this distinction is less capable, or less worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration" (*Egan*, at para. 56, *per* L'Heureux-Dubé J.). It may as well be appropriate to consider whether the unequal treatment is based on "the stereotypical application of presumed group or personal characteristics" (*Miron*, at para. 128, *per* McLachlin J.).

#### (a) *The Equality Right is Denied on the Basis of a Personal Characteristic Which Is Analogous to Those Enumerated in Section 15(1)*

90 In *Egan*, it was held, on the basis of "historical social, political and economic disadvantage suffered by homosexuals" and the emerging consensus among legislatures (at para. 176), as well as previous judicial decisions (at para. 177), that sexual orientation

is a ground analogous to those listed in s. 15(1). Sexual orientation is "a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs" (para. 5). It is analogous to the other personal characteristics enumerated in s. 15(1); and therefore this step of the test is satisfied.

91 It has been noted, for example by Iacobucci J. in *Benner*, at para. 69, that:

> Where the denial is based on a ground expressly enumerated in s. 15(1), or one analogous to them, it will generally be found to be discriminatory, although there may, of course, be exceptions: see, e.g., *Weatherall v. Canada (Attorney General*), [1993] 2 S.C.R. 872.

It could therefore be assumed that a denial of the equal protection and benefit of the law on the basis of the analogous ground of sexual orientation is discriminatory. Yet in this case there are other factors present which support this conclusion.

(b) *The Distinction Has the Effect of Imposing a Burden or Disadvantage Not Imposed on Others and Withholds Benefits or Advantages Which Are Available to Others*

(i) Discriminatory Purpose

92 It was submitted by the appellants and several of the interveners that the purpose of the Alberta Government in excluding sexual orientation was itself discriminatory. The appellants suggest that the purpose behind the deliberate choice of the Government not to include sexual orientation as a protected ground is to deny that homosexuals are or were disadvantaged by discrimination, or alternatively to deny that homosexuals are worthy of protection against that discrimination. This, they contend,

is a discriminatory purpose. The respondents, on the other hand, argued that there is insufficient evidence of a deliberate discriminatory intent on the part of the Government.

93 It is, however, unnecessary to decide whether there is evidence of a discriminatory purpose on the part of the provincial government. It is well-established that a finding of discrimination does not depend on an invidious, discriminatory intent (see e.g. *Turpin*, *supra*, and more recently *Eldridge*, at para. 62). Even unintentional discrimination may violate the *Charter*. In any *Charter* case either an unconstitutional purpose or an unconstitutional effect is sufficient to invalidate the challenged legislation (*R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 331). Therefore a finding of a discriminatory purpose in this case would merely provide another ground for the conclusion that the law is discriminatory, but is not necessary for that conclusion. In this case, the discriminatory effects of the legislation are sufficient in themselves to establish that there is discrimination in this case.

(ii) Discriminatory Effects of the Exclusion

94 The effects of the exclusion of sexual orientation from the protected grounds listed in the *IRPA* must be understood in the context of the nature and purpose of the legislation. The *IRPA* is a broad, comprehensive scheme for the protection of individuals from discrimination in the private sector. The preamble of the *IRPA* sets out the purposes and principles underlying the legislation in this manner:

> 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; and
>
> WHEREAS it is fitting that this principle be affirmed by the Legislature of Alberta in an enactment whereby those rights of the individual may be protected . . . .

95 The commendable goal of the legislation, then, is to affirm and give effect to the principle that all persons are equal in dignity and rights. It prohibits discrimination in a number of areas and with respect to an increasingly expansive list of grounds.

96 The comprehensive nature of the Act must be taken into account in considering the effect of excluding one ground from its protection. It is not as if the Legislature had merely chosen to deal with one type of discrimination. In such a case it might be permissible to target only that specific type of discrimination and not another. This is, I believe, the type of case to which L'Heureux-Dubé J. was referring in the comments she made in *obiter* in her dissenting reasons in *McKinney* (at p. 436): "in my view, if the provinces chose to enact human rights legislation which only prohibited discrimination on the basis of sex, and not age, this legislation could not be held to violate the *Charter*". McClung J.A. in the Alberta Court of Appeal was of the opinion that these comments were binding on the court and compelled the allowance of the appeal. With respect I believe he was mistaken. Those comments contemplated a type of legislation different from that at issue in this case, namely, legislation which seeks to address one specific problem or type of discrimination. The case at bar presents a very different situation. It is concerned with legislation that purports to provide comprehensive protection from discrimination for all individuals in Alberta. The selective exclusion of one group from that comprehensive protection therefore has a very different effect.

97 The first and most obvious effect of the exclusion of sexual orientation is that lesbians or gay men who experience discrimination on the basis of their sexual orientation are denied recourse to the mechanisms set up by the *IRPA* to make a formal complaint of discrimination and seek a legal remedy. Thus, the Alberta Human Rights Commission could not hear Vriend's complaint and cannot consider a complaint or take any action on behalf of any person who has suffered discrimination on the ground of sexual orientation. The denial of access to remedial procedures for discrimination on the ground of sexual orientation must have dire and demeaning consequences for those affected. This result is exacerbated both because the option of a civil remedy for discrimination is precluded and by the lack of success that lesbian women and gay men have had in attempting to obtain a remedy for discrimination on the ground of sexual orientation by complaining on other grounds such as sex or marital status. Persons who are discriminated against on the ground of sexual orientation, unlike others protected by the Act, are left without effective legal recourse for the discrimination they have suffered.

98 It may at first be difficult to recognize the significance of being excluded from the protection of human rights legislation. However it imposes a heavy and disabling burden on those excluded. In *Romer v. Evans,* 116 S.Ct. 1620 (1996), the U.S. Supreme Court observed, at p. 1627:

> . . . the [exclusion] imposes a special disability upon those persons alone. Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint. . . . These are protections taken for granted by most people either because they already have them or do not need them; these are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society.

While that case concerned an explicit exclusion and prohibition of protection from discrimination, the effect produced by the legislation in this case is similar. The denial by legislative omission of protection to individuals who may well be in need of it is just as serious and the consequences just as grave as that resulting from explicit exclusion.

99 Apart from the immediate effect of the denial of recourse in cases of discrimination, there are other effects which, while perhaps less obvious, are at least as harmful. In *Haig*, the Ontario Court of Appeal based its finding of discrimination on both the "failure to provide an avenue for redress for prejudicial treatment of homosexual members of society" and "the possible inference from the omission that such treatment is acceptable" (p. 503). It can be reasonably inferred that the absence of any legal recourse for discrimination on the ground of sexual orientation perpetuates and even encourages that kind of discrimination. The respondents contend that it cannot be assumed that the "silence" of the *IRPA* reinforces or perpetuates discrimination, since governments "cannot legislate attitudes". However, this argument seems disingenuous in light of the stated purpose of the *IRPA*, to prevent discrimination. It cannot be claimed that human rights legislation will help to protect individuals from discrimination, and at the same time contend that an exclusion from the legislation will have no effect.

100 However, let us assume, contrary to all reasonable inferences, that exclusion from the *IRPA*'s protection does not actually contribute to a greater incidence of discrimination on the excluded ground. Nonetheless that exclusion, deliberately chosen in the face of clear findings that discrimination on the ground of sexual orientation does exist in society, sends a strong and sinister message. The very fact that sexual orientation is excluded from the *IRPA*, which is the Government's primary statement of policy against discrimination, certainly suggests that discrimination on the ground of

sexual orientation is not as serious or as deserving of condemnation as other forms of discrimination. It could well be said that it is tantamount to condoning or even encouraging discrimination against lesbians and gay men. Thus this exclusion clearly gives rise to an effect which constitutes discrimination.

101 The exclusion sends a message to all Albertans that it is permissible, and perhaps even acceptable, to discriminate against individuals on the basis of their sexual orientation. The effect of that message on gays and lesbians is one whose significance cannot be underestimated. As a practical matter, it tells them that they have no protection from discrimination on the basis of their sexual orientation. Deprived of any legal redress they must accept and live in constant fear of discrimination. These are burdens which are not imposed on heterosexuals.

102 Perhaps most important is the psychological harm which may ensue from this state of affairs. Fear of discrimination will logically lead to concealment of true identity and this must be harmful to personal confidence and self-esteem. Compounding that effect is the implicit message conveyed by the exclusion, that gays and lesbians, unlike other individuals, are not worthy of protection. This is clearly an example of a distinction which demeans the individual and strengthens and perpetrates the view that gays and lesbians are less worthy of protection as individuals in Canada's society. The potential harm to the dignity and perceived worth of gay and lesbian individuals constitutes a particularly cruel form of discrimination.

103 Even if the discrimination is experienced at the hands of private individuals, it is the state that denies protection from that discrimination. Thus the adverse effects are particularly invidious. This was recognized in the following statement from *Egan* (at para. 161):

> The law 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 . . . . Such legislation would clearly infringe s. 15(1) because its provisions would indicate that the excluded groups were inferior and less deserving of benefits.

This reasoning applies *a fortiori* in a case such as this where the denial of recognition involves something as fundamental as the right to be free from discrimination.

104 In excluding sexual orientation from the *IRPA*'s protection, the Government has, in effect, stated that "all persons are equal in dignity and rights", except gay men and lesbians. Such a message, even if it is only implicit, must offend s. 15(1), the "section of the *Charter*, more than any other, which recognizes and cherishes the innate human dignity of every individual" (*Egan*, at para. 128). This effect, together with the denial to individuals of any effective legal recourse in the event they are discriminated against on the ground of sexual orientation, amount to a sufficient basis on which to conclude that the distinction created by the exclusion from the *IRPA* constitutes discrimination.

4. "Mirror" Argument

105 The respondents take the position that if the appellants are successful, the result will be that human rights legislation will always have to "mirror" the *Charter* by including all of the enumerated and analogous grounds of the *Charter*. This would have the undesirable result of unduly constraining legislative choice and allowing the *Charter* to indirectly regulate private conduct, which should be left to the legislatures.

106 It is true that if the appellants' position is accepted, the result might be that the omission of one of the enumerated or analogous grounds from key provisions in comprehensive human rights legislation would always be vulnerable to constitutional challenge. It is not necessary to deal with the question since it is simply not true that human rights legislation will be forced to "mirror" the *Charter* in all cases. By virtue of s. 52 of the *Constitution Act, 1982,* the *Charter* is part of the "supreme law of Canada", and so, human rights legislation, like all other legislation in Canada, must conform to its requirements. However, the notion of "mirroring" is too simplistic. Whether an omission is unconstitutional must be assessed in each case, taking into account the nature of the exclusion, the type of legislation, and the context in which it was enacted. The determination of whether a particular exclusion complies with s. 15 of the *Charter* would not be made through the mechanical application of any "mirroring" principle, but rather, as in all other cases, by determining whether the exclusion was proven to be discriminatory in its specific context and whether the discrimination could be justified under s. 1. If a provincial legislature chooses to take legislative measures which do not include all of the enumerated and analogous grounds of the *Charter*, deference may be shown to this choice, so long as the tests for justification under s. 1, including rational connection, are satisfied.

5. Conclusion Regarding Section 15

107 In summary, this Court has no choice but to conclude that the *IRPA*, by reason of the omission of sexual orientation as a protected ground, clearly violates s. 15 of the *Charter*. The *IRPA* in its underinclusive state creates a distinction which results in the denial of the equal benefit and protection of the law on the basis of sexual orientation, a personal characteristic which has been found to be analogous to the grounds enumerated in s. 15. This, in itself, would be sufficient to conclude that

discrimination is present and therefore there is a violation of s. 15. The serious discriminatory effects of the exclusion of sexual orientation from the Act reinforce this conclusion. As a result, it is clear that the *IRPA*, as it stands, violates the equality rights of the appellant Vriend and of other gays and lesbians. It is therefore necessary to determine whether this violation can be justified under s. 1. This analysis will be undertaken by my colleague.

IACOBUCCI J.

I. Analysis

A. *Section 1 of the Charter*

108 Section 1 of the *Charter* guarantees the rights and freedoms set out therein, but allows for *Charter* infringements provided that the state can establish that they are reasonably justifiable in a free and democratic society. The analytical framework for determining whether a statutory provision is a reasonable limit on a *Charter* right or freedom has been set out many times since it was first established in *R. v. Oakes*, [1986] 1 S.C.R. 103. It was recently restated in *Egan*, *supra*, at para. 182, which was quoted with approval in *Eldridge*, *supra*, at para. 84:

> A limitation to a constitutional guarantee will be sustained once two conditions are met. First, the objective of the legislation must be pressing and substantial. Second, the means chosen to attain this legislative end must be reasonable and demonstrably justifiable in a free and democratic society. In order to satisfy the second requirement, three criteria must be satisfied: (1) the rights violation must be rationally connected to the aim of the legislation; (2) the impugned provision must minimally impair the *Charter* guarantee; and (3) there must be a proportionality between the effect of the measure and its objective so that the attainment of the legislative goal is not outweighed by the abridgement of the right. In all s. 1 cases the burden of

> proof is with the government to show on a balance of probabilities that the violation is justifiable.

1. Pressing and Substantial Objective

109 The appellants note that the jurisprudence is somewhat divided with respect to the proper focus of the analysis at this stage of the s. 1 inquiry. While some authorities have examined the purpose of the legislation in its entirety (see e.g. *Miron*, *supra*; *Egan*, *supra*), others have considered only the purpose of the limitation that allegedly infringes the *Charter* (see e.g. *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, *per* McLachlin J.; *McKinney*, *supra*). In my view, where, as here, a law has been found to violate the *Charter* owing to underinclusion, the legislation as a whole, the impugned provisions, and the omission itself are all properly considered.

110 Section 1 of the *Charter* states that it is the limits on *Charter* rights and freedoms that must be demonstrably justified in a free and democratic society. It follows that under the first part of the *Oakes* test, the analysis must focus upon the objective of the impugned limitation, or in this case, the omission. Indeed, in *Oakes*, *supra*, at p. 138, Dickson C.J. noted that it was the objective "which the measures responsible for a limit on a *Charter* right or freedom are designed to serve" (emphasis added) that must be pressing and substantial.

111 However, in my opinion, the objective of the omission cannot be fully understood in isolation. It seems to me that some consideration must also be given to both the purposes of the Act as a whole and the specific impugned provisions so as to

give the objective of the omission the context that is necessary for a more complete understanding of its operation in the broader scheme of the legislation.

112 Applying these principles to the case at bar, the preamble of the *IRPA* suggests that the object of the Act in its entirety is the recognition and protection of the inherent dignity and inalienable rights of Albertans through the elimination of discriminatory practices. Clearly, the protection of human rights in our society is a laudable goal and is aptly described as pressing and substantial. As to the impugned provisions, their objective can generally be described as the protection against discrimination for Albertans belonging to specific groups in various settings, for example, employment and accommodation. This too is properly regarded as a pressing and substantial objective.

113 Against this backdrop, what can be said of the objective of the omission? The respondents submit that only the overall goal of the Act need be examined and offer no direct submissions in answer to this question. In the Court of Appeal, absent any evidence on this point, Hunt J.A. relied on the factum of the respondents from which she gleaned several possible reasons why, when the matter was debated by the Alberta Legislature in 1985 and considered at various other times, a decision was made not to add sexual orientation to the *IRPA*. Some of these same reasons appear in the factum that the respondents have submitted to this Court and include the following:

> • The *IRPA* is inadequate to address some of the concerns expressed by the homosexual community (e.g. parental acceptance) (paragraph 57);
>
> • Attitudes cannot be changed by order of the Human Rights Commission (paragraph 57);

> • Despite the Minister asking for examples which would be ameliorated by the inclusion of sexual orientation in the *IRPA* (e.g. employment), only a few illustrations were provided (paragraph 57);
>
> • Codification of marginal grounds which affect few persons raises objections from larger numbers of others, adding to the number of exemptions that would have been needed to satisfy both groups (paragraph 66).

114 In my view, although these statements go some distance toward explaining the Legislature's choice to exclude sexual orientation from the *IRPA,* this is not the type of evidence required under the first step of the *Oakes* test. At the first stage of that test, the government is asked to demonstrate that the "objective" of the omission is pressing and substantial. An "objective", being a goal or a purpose to be achieved, is a very different concept from an "explanation" which makes plain that which is not immediately obvious. In my opinion, the above statements fall into the latter category and hence are of little help.

115 In his reasons for judgment, McClung J.A. alludes to "moral" considerations that likely informed the Legislature's choice. However, even if such considerations could be said to amount to a pressing and substantial objective (a position which I find difficult to accept in this case), I note that it is well established that the onus of justifying a *Charter* infringement rests on the government (see e.g. *Andrews v. Law Society of British Columbia*, *supra*). In the absence of any submissions regarding the pressing and substantial nature of the objective of the omission, the respondents have failed to discharge their evidentiary burden, and thus, I conclude that their case must fail at this first stage of the s. 1 analysis.

116 Often, the objective of an omission is discernible from the Act as a whole. Where it is not, one can look to the effects of the omission. Even if I were to put the evidentiary burden aside in an attempt to discover an objective for the omission from the provisions of the *IRPA*, in my view, the result would be the same. As I noted above, the overall goal of the *IRPA* is the protection of the dignity and rights of all persons living in Alberta. The exclusion of sexual orientation from the Act effectively denies gay men and lesbians such protection. In my view, where, as here, a legislative omission is on its face the very antithesis of the principles embodied in the legislation as a whole, the Act itself cannot be said to indicate any discernible objective for the omission that might be described as pressing and substantial so as to justify overriding constitutionally protected rights. Thus, on either analysis, the respondents' case fails at the initial step of the *Oakes* test.

2. Proportionality Analysis

(a) *Rational Connection*

117 On the basis of my conclusion above, it is not necessary to analyse the second part of the *Oakes* test to dispose of this appeal. However, to deal with this matter more fully, I will go on to consider the remainder of the test. I will assume, solely for the sake of the analysis, that the respondents correctly argued that where the objective of the whole of the legislation is pressing and substantial, this is sufficient to satisfy the first stage of the inquiry under s. 1 of the *Charter*.

118 At the second stage of the *Oakes* test, the preliminary inquiry is a consideration of the rationality of the impugned provisions (*Oakes*, *supra*, at p. 141).

The party invoking s. 1 must demonstrate that a rational connection exists between the objective of the provisions under attack and the measures that have been adopted. Thus, in the case at bar, it falls to the Legislature to show that there is a rational connection between the goal of protection against discrimination for Albertans belonging to specific groups in various settings, and the exclusion of gay men and lesbians from the impugned provisions of the *IRPA*.

119 Far from being rationally connected to the objective of the impugned provisions, the exclusion of sexual orientation from the Act is antithetical to that goal. Indeed, it would be nonsensical to say that the goal of protecting persons from discrimination is rationally connected to, or advanced by, denying such protection to a group which this Court has recognized as historically disadvantaged (see *Egan*, *supra*).

120 However, relying on the reasons of Sopinka J. in *Egan*, the respondents submit that a rational connection to the purpose of a statute can be achieved through the use of incremental means which, over time, expand the scope of the legislation to all those whom the legislature determines to be in need of statutory protection. The respondents further suggest that the legislative history of the *IRPA* demonstrates a pattern of progressive incrementalism sufficient to meet the Government's onus under the rational connection stage of the *Oakes* test. In my view, this argument cannot be sustained.

121 The incrementalism approach was advocated in *Egan* by Sopinka J. in a context very different from that in the case at bar. Firstly, in *Egan*, where the concern was the exclusion of same-sex couples from the *Old Age Security Act*'s definition of the term "spouse", the Attorney General took the position that more acceptable arrangements could be worked out over time. In contrast, in the present case, the inclusion of sexual

orientation in the *IRPA* has been repeatedly rejected by the Alberta Legislature. Thus, it is difficult to see how any form of "incrementalism" is being applied with regard to the protection of the rights of gay men and lesbians. Secondly, in *Egan* there was considerable concern regarding the financial impact of extending a benefits scheme to a previously excluded group. Including sexual orientation in the *IRPA* does not give rise to the same concerns. Indeed, the trial judge, despite the absence of evidence on this matter, assumed that the budgetary impact on the Human Rights Commission would not be substantial enough to change the scheme of the legislation. Having not heard anything persuasive to the contrary, I am prepared to make this same assumption.

122 In addition, in *Egan*, writing on behalf of myself and Cory J., I took the position that the need for governmental incrementalism was an inappropriate justification for *Charter* violations. I remain convinced that this approach is generally not suitable for that purpose, especially where, as here, the statute in issue is a comprehensive code of human rights provisions. In my opinion, groups that have historically been the target of discrimination cannot be expected to wait patiently for the protection of their human dignity and equal rights while governments move toward reform one step at a time. If the infringement of the rights and freedoms of these groups is permitted to persist while governments fail to pursue equality diligently, then the guarantees of the *Charter* will be reduced to little more than empty words.

(b) *Minimal Impairment*

123 The respondents contend that an *IRPA* which is silent as to sexual orientation minimally impairs the appellants' s. 15 rights. The *IRPA* is alleged to be the type of social policy legislation that requires the Alberta Legislature to mediate between competing groups. It is suggested that the competing interests in the present case are

religious freedom and homosexuality. Relying upon Sopinka J.'s reasons in *Egan*, the respondents advocate judicial deference in these circumstances. I reject these submissions for several reasons.

124 To begin, I cannot accede to the suggestion that the Alberta Legislature has been cast in the role of mediator between competing groups. To the extent that there may be a conflict between religious freedom and the protection of gay men and lesbians, the *IRPA* contains internal mechanisms for balancing these rival concerns. Section 11.1 of the *IRPA* provides a defence where the discrimination was "reasonable and justifiable in the circumstances". In addition, ss. 7(3) and 8(2) excuse discrimination which can be linked to a *bona fide* occupational requirement. The balancing provisions ensure that no conferral of rights is absolute. Rather, rights are recognized in tandem, with no one right being automatically paramount to another.

125 Given the presence of the internal balancing mechanisms, the argument that the Government's choices regarding the conferral of rights are constrained by its role as mediator between competing concerns cannot be sustained. The Alberta Legislature is not being asked to abandon the role of mediator. Rather, by virtue of the provisions of the *IRPA*, this is a task which is carried out as the Act is applied on a case-by-case basis in specific factual contexts. Thus, in the present case it is no answer to say that rights cannot be conferred upon one group because of a conflict with the rights of others. A complete solution to any such conflict already exists within the legislation.

126 In any event, although this Court has recognized that the Legislatures ought to be accorded some leeway when making choices between competing social concerns (see e.g. *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *Egan, supra*, *per* Sopinka J.), judicial deference is not without limits. In *Eldridge, supra*, La Forest

J. quoted with approval from his reasons in *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22, at p. 44, wherein he stated that "the deference that will be accorded to the government when legislating in these matters does not give them an unrestricted licence to disregard an individual's *Charter* rights". This position was echoed by McLachlin J. in *RJR-MacDonald*, *supra*, at para. 136:

> . . . care must be taken not to extend the notion of deference too far. Deference must not be carried to the point of relieving the government of the burden which the *Charter* places upon it of demonstrating that the limits it has imposed on guaranteed rights are reasonable and justifiable. Parliament has its role: to choose the appropriate response to social problems within the limiting framework of the Constitution. But the courts also have a role: to determine, objectively and impartially, whether Parliament's choice falls within the limiting framework of the Constitution. The courts are no more permitted to abdicate their responsibility than is Parliament. To carry judicial deference to the point of accepting Parliament's view simply on the basis that the problem is serious and the solution is difficult, would be to diminish the role of the courts in the constitutional process and to weaken the structure of rights upon which our constitution and our nation is founded.

127 In the present case, the Government of Alberta has failed to demonstrate that it had a reasonable basis for excluding sexual orientation from the *IRPA*. Gay men and lesbians do not have any, much less equal, protection against discrimination on the basis of sexual orientation under the *IRPA*. The exclusion constitutes total, not minimal, impairment of the *Charter* guarantee of equality. In these circumstances, the call for judicial deference is inappropriate.

(c) *Proportionality Between the Effect of the Measure and the Objective of the Legislation*

128 The respondents did not address this third element of the proportionality requirement. However, in my view, the deleterious effects of the exclusion of sexual orientation from the *IRPA*, as noted by Cory J., are numerous and clear. As the Alberta

Government has failed to demonstrate any salutary effect of the exclusion in promoting and protecting human rights, I cannot accept that there is any proportionality between the attainment of the legislative goal and the infringement of the appellants' equality rights. I conclude that the exclusion of sexual orientation from the *IRPA* does not meet the requirements of the *Oakes* test and accordingly, it cannot be saved under s. 1 of the *Charter*.

## II. Remedy

### A. *Introduction: The Relationship Between the Legislatures and the Courts Under the Charter*

129 Having found the exclusion of sexual orientation from the *IRPA* to be an unjustifiable violation of the appellants' equality rights, I now turn to the question of remedy under s. 52 of the *Constitution Act, 1982*. Before discussing the jurisprudence on remedies, I believe it might be helpful to pause to reflect more broadly on the general issue of the relationship between legislatures and the courts in the age of the *Charter*.

130 Much was made in argument before us about the inadvisability of the Court interfering with or otherwise meddling in what is regarded as the proper role of the legislature, which in this case was to decide whether or not sexual orientation would be added to Alberta's human rights legislation. Indeed, it seems that hardly a day goes by without some comment or criticism to the effect that under the *Charter* courts are wrongfully usurping the role of the legislatures. I believe this allegation misunderstands what took place and what was intended when our country adopted the *Charter* in 1981-82.

131 When the *Charter* was introduced, Canada went, in the words of former Chief Justice Brian Dickson, from a system of Parliamentary supremacy to constitutional supremacy ("Keynote Address", in *The Cambridge Lectures 1985* (1985), at pp. 3-4). Simply put, each Canadian was given individual rights and freedoms which no government or legislature could take away. However, as rights and freedoms are not absolute, governments and legislatures could justify the qualification or infringement of these constitutional rights under s. 1 as I previously discussed. Inevitably disputes over the meaning of the rights and their justification would have to be settled and here the role of the judiciary enters to resolve these disputes. Many countries have assigned the important role of judicial review to their supreme or constitutional courts (for an excellent analysis on these developments see D. M. Beatty, ed., *Human Rights and Judicial Review: A Comparative Perspective* (1994); B. Ackerman, "The Rise of World Constitutionalism" (1997), 83 *Va. L. Rev.* 771).

132 We should recall that it was the deliberate choice of our provincial and federal legislatures in adopting the *Charter* to assign an interpretive role to the courts and to command them under s. 52 to declare unconstitutional legislation invalid.

133 However, giving courts the power and commandment to invalidate legislation where necessary has not eliminated the debate over the "legitimacy" of courts taking such action. As eloquently put by A. M. Bickel in his outstanding work *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (2nd ed. 1986), "it thwarts the will of representatives of the . . . people" (p. 17). So judicial review, it is alleged, is illegitimate because it is anti-democratic in that unelected officials (judges) are overruling elected representatives (legislators) (see e.g. A. A. Peacock, ed., *Rethinking the Constitution: Perspectives on Canadian Constitutional Reform, Interpretation, and*

*Theory* (1996); R. Knopff and F. L. Morton, *Charter Politics* (1992); M. Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (1994), c. 2).

134 To respond, it should be emphasized again that our *Charter*'s introduction and the consequential remedial role of the courts were choices of the Canadian people through their elected representatives as part of a redefinition of our democracy. Our constitutional design was refashioned to state that henceforth the legislatures and executive must perform their roles in conformity with the newly conferred constitutional rights and freedoms. That the courts were the trustees of these rights insofar as disputes arose concerning their interpretation was a necessary part of this new design.

135 So courts in their trustee or arbiter role must perforce scrutinize the work of the legislature and executive not in the name of the courts, but in the interests of the new social contract that was democratically chosen. All of this is implied in the power given to the courts under s. 24 of the *Charter* and s. 52 of the *Constitution Act, 1982.*

136 Because the courts are independent from the executive and legislature, litigants and citizens generally can rely on the courts to make reasoned and principled decisions according to the dictates of the constitution even though specific decisions may not be universally acclaimed. In carrying out their duties, courts are not to second-guess legislatures and the executives; they are not to make value judgments on what they regard as the proper policy choice; this is for the other branches. Rather, the courts are to uphold the Constitution and have been expressly invited to perform that role by the Constitution itself. But respect by the courts for the legislature and executive role is as important as ensuring that the other branches respect each others' role and the role of the courts.

137 This mutual respect is in some ways expressed in the provisions of our constitution as shown by the wording of certain of the constitutional rights themselves. For example, s. 7 of the *Charter* speaks of no denial of the rights therein except in accordance with the principles of fundamental justice, which include the process of law and legislative action. Section 1 and the jurisprudence under it are also important to ensure respect for legislative action and the collective or societal interests represented by legislation. In addition, as will be discussed below, in fashioning a remedy with regard to a *Charter* violation, a court must be mindful of the role of the legislature. Moreover, s. 33, the notwithstanding clause, establishes that the final word in our constitutional structure is in fact left to the legislature and not the courts (see P. Hogg and A. Bushell, "The *Charter* Dialogue Between Courts and Legislatures" (1997), 35 *Osgoode Hall L.J.* 75).

138 As I view the matter, the *Charter* has given rise to a more dynamic interaction among the branches of governance. This interaction has been aptly described as a "dialogue" by some (see e.g. Hogg and Bushell, *supra*). In reviewing legislative enactments and executive decisions to ensure constitutional validity, the courts speak to the legislative and executive branches. As has been pointed out, most of the legislation held not to pass constitutional muster has been followed by new legislation designed to accomplish similar objectives (see Hogg and Bushell, *supra*, at p. 82). By doing this, the legislature responds to the courts; hence the dialogue among the branches.

139 To my mind, a great value of judicial review and this dialogue among the branches is that each of the branches is made somewhat accountable to the other. The work of the legislature is reviewed by the courts and the work of the court in its decisions can be reacted to by the legislature in the passing of new legislation (or even overarching laws under s. 33 of the *Charter*). This dialogue between and accountability

of each of the branches have the effect of enhancing the democratic process, not denying it.

140 There is also another aspect of judicial review that promotes democratic values. Although a court's invalidation of legislation usually involves negating the will of the majority, we must remember that the concept of democracy is broader than the notion of majority rule, fundamental as that may be. In this respect, we would do well to heed the words of Dickson C.J. in *Oakes*, *supra*, at p. 136:

> The Court must be guided by the values and principles essential to a free and democratic society which I believe to 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.

141 So, for example, when a court interprets legislation alleged to be a reasonable limitation in a free and democratic society as stated in s. 1 of the *Charter*, the court must inevitably delineate some of the attributes of a democratic society. Although it is not necessary to articulate the complete list of democratic attributes in these remarks, Dickson C.J.'s comments remain instructive (see also: *R. v. Keegstra*, [1990] 3 S.C.R. 697, *per* Dickson C.J.; *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, *supra*, *per* La Forest J.).

142 Democratic values and principles under the *Charter* demand that legislators and the executive take these into account; and if they fail to do so, courts should stand ready to intervene to protect these democratic values as appropriate. As others have so forcefully stated, judges are not acting undemocratically by intervening when there are indications that a legislative or executive decision was not reached in accordance with

the democratic principles mandated by the *Charter* (see W. Black, "*Vriend*, Rights and Democracy" (1996), 7 *Constitutional Forum* 126; D. M. Beatty, "Law and Politics" (1996), 44 *Am. J. Comp. L.* 131, at p. 149; M. Jackman, "Protecting Rights and Promoting Democracy: Judicial Review Under Section 1 of the *Charter*" (1996), 34 *Osgoode Hall L.J.* 661).

143 With this background in mind, I now turn to discuss the jurisprudence on the specific question of the choice of the appropriate remedy that should apply in this appeal.

B. *Remedial Principles*

144 The leading case on constitutional remedies is *Schachter, supra*. Writing on behalf of the majority in *Schachter*, Lamer C.J. stated that the first step in selecting a remedial course under s. 52 is to define the extent of the *Charter* inconsistency which must be struck down. In the present case, that inconsistency is the exclusion of sexual orientation from the protected grounds of the *IRPA*. As I have concluded above, this exclusion is an unjustifiable infringement upon the equality rights guaranteed in s. 15 of the *Charter*.

145 Once the *Charter* inconsistency has been identified, the next step is to determine which remedy is appropriate. In *Schachter*, this Court noted that, depending upon the circumstances, there are several remedial options available to a court in dealing with a *Charter* violation that was not saved by s. 1. These include striking down the legislation, severance of the offending sections, striking down or severance with a temporary suspension of the declaration of invalidity, reading down, and reading provisions into the legislation.

146 Because the *Charter* violation in the instant case stems from an omission, the remedy of reading down is simply not available. Further, I note that given the considerable number of sections at issue in this case and the important roles they play in the scheme of the *IRPA* as a whole, severance of these sections from the remainder of the Act would be akin to striking down the entire Act.

147 The appellants suggest that the circumstances of this case warrant the reading in of sexual orientation into the offending sections of the *IRPA*. However, in the Alberta Court of Appeal, O'Leary J.A. and Hunt J.A. agreed that the appropriate remedy would be to declare the relevant provisions of the *IRPA* unconstitutional and to suspend that declaration for a period of time to allow the Legislature to address the matter. McClung J.A. would have gone further and declared the *IRPA* invalid in its entirety. With respect, for the reasons that follow, I cannot agree with either remedy chosen by the Court of Appeal.

148 In *Schachter*, Lamer C.J. noted that when determining whether the remedy of reading in is appropriate, courts must have regard to the "twin guiding principles", namely, respect for the role of the legislature and respect for the purposes of the *Charter*, which I have discussed generally above. Turning first to the role of the legislature, Lamer C.J. stated at p. 700 that reading in is an important tool in "avoiding undue intrusion into the legislative sphere. . . . [T]he purpose of reading in is to be as faithful as possible within the requirements of the Constitution to the scheme enacted by the Legislature."

149 He went on to quote the following passage from Carol Rogerson in "The Judicial Search for Appropriate Remedies Under the Charter: The Examples of

Overbreadth and Vagueness", in R. J. Sharpe, ed., *Charter Litigation* (1987), 233, at p. 288:

> Courts should certainly go as far as required to protect rights, but no further. Interference with legitimate legislative purposes should be minimized and laws serving such purposes should be allowed to remain operative to the extent that rights are not violated. Legislation which serves desirable social purposes may give rise to entitlements which themselves deserve some protection.

150 As I discussed above, the purpose of the *IRPA* is the recognition and protection of the inherent dignity and inalienable rights of Albertans through the elimination of discriminatory practices. It seems to me that the remedy of reading in would minimize interference with this clearly legitimate legislative purpose and thereby avoid excessive intrusion into the legislative sphere whereas striking down the *IRPA* would deprive all Albertans of human rights protection and thereby unduly interfere with the scheme enacted by the Legislature.

151 I find support for my position in *Haig, supra*, where the Ontario Court of Appeal read the words "sexual orientation" into s. 3(1) of the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6. At p. 508, Krever J.A., writing for a unanimous court, stated that it was

> inconceivable . . . that Parliament would have preferred no human rights Act over one that included sexual orientation as a prohibited ground of discrimination. To believe otherwise would be a gratuitous insult to Parliament.

152 Turning to the second of the twin guiding principles, the respondents suggest that the facts of this case are illustrative of a conflict between two grounds, namely, religion and sexual orientation. If sexual orientation were simply read into the *IRPA*, the

respondents contend that this would undermine the ability of the *IRPA* to provide protection against discrimination based on religion, one of the fundamental goals of that legislation. This result is alleged to be "inconsistent with the deeper social purposes of the *Charter*".

153 I concluded above that the internal balancing mechanisms of the *IRPA* were an adequate means of disposing of any conflict that might arise between religion and sexual orientation. Thus, I cannot accept the respondents' assertion that the reading in approach does not respect the purposes of the *Charter*. In fact, as I see the matter, reading sexual orientation into the *IRPA* as a further ground of prohibited discrimination can only enhance those purposes. The *Charter*, like the *IRPA*, is concerned with the promotion and protection of inherent dignity and inalienable rights. Thus, expanding the list of prohibited grounds of discrimination in the *IRPA* allows this Court to act in a manner which, consistent with the purposes of the *Charter*, would augment the scope of the *IRPA*'s protections. In contrast, striking down or severing parts of the *IRPA* would deny all Albertans protection from marketplace discrimination. In my view, this result is clearly antithetical to the purposes of the *Charter*.

154 In *Schachter, supra*, Lamer C.J. noted that the twin guiding principles can only be fulfilled if due consideration is given to several additional criteria which further inform the determination as to whether the remedy of reading in is appropriate. These include remedial precision, budgetary implications, effects on the thrust of the legislation, and interference with legislative objectives.

155 As to the first of the above listed criteria, the court must be able to define with a "sufficient degree of precision" how the statute ought to be extended in order to comply with the Constitution. I do not believe that the present case is one in which this

Court has been improperly called upon to fill in large gaps in the legislation. Rather, in my view, there is remedial precision insofar as the insertion of the words "sexual orientation" into the prohibited grounds of discrimination listed in the preamble and ss. 2(1), 3, 4, 7(1), 8(1), 10 and 16(1) of the *IRPA* will, without more, ensure the validity of the legislation and remedy the constitutional wrong.

156 In her reasons in this case, Hunt J.A. concluded that there was insufficient remedial precision to justify the remedy of reading in. She expressed two concerns. Firstly, she held that adequate precision likely would not be possible without a definition of the term "sexual orientation". With respect, I cannot agree. Although the term "sexual orientation" has been defined in the human rights legislation of the Yukon Territory, it appears undefined in the *Canadian Human Rights Act*, the human rights legislation of Nova Scotia, New Brunswick, Quebec, Ontario, Manitoba, Saskatchewan, British Columbia, and s. 718.2(*a*)(i) of the *Criminal Code*, R.S.C., 1985, c. C-46, as amended by S.C. 1995, c. 22, s. 6. In addition, "sexual orientation" was not defined when it was recognized by this Court in *Egan*, *supra*, as an analogous ground under s. 15 of the *Charter*. In my opinion, "sexual orientation" is a commonly used term with an easily discernible common sense meaning.

157 In addition, I concur with the comments of R. Khullar (in "*Vriend*: Remedial Issues for Unremedied Discrimination" (1998), 7 *N.J.C.L.* 221) who stated (at pp. 237-38) that,

> [i]f there is any ambiguity in the term "sexual orientation," it is no greater than that encompassed by terms such as "race," "ethnic origin" or "religion," all of which are undefined prohibited grounds of discrimination in the *Charter* which have not posed any undue difficulty for the courts or legislatures to understand and apply.

158 Hunt J.A. was also troubled by the possible impact of reading in upon s. 7(2) of the *IRPA*. This section states that s. 7(1) (employment), as regards age and marital status, "does not affect the operation of any bona fide retirement or pension plan or the terms or conditions of any bona fide group or employee insurance plan". As the Court of Appeal heard no argument on this point and as there was no evidence before the court to explain the rationale behind this provision, Hunt J.A. held that, if the protections of the *IRPA* were to be extended to gay men and lesbians, it would be necessary to decide whether this group would be included or excluded from s. 7(2). She found that this was something the court was in no position to do. In light of this difficulty, Hunt J.A. was concerned that the reading in remedy "would engage the court in the kind of 'filling in of details' against which Lamer, C.J.C., cautions in *Schachter* [*supra*]" (p. 69).

159 In my view, whether gay men and lesbians are included or excluded from s. 7(2) is a peripheral issue which does not deprive the reading in remedy of the requisite precision. I agree with K. Roach who noted that the legislature "can always subsequently intervene on matters of detail that are not dictated by the Constitution" (*Constitutional Remedies in Canada* (1994 (loose-leaf)), at p. 14-64.1). I therefore conclude on this point that, in the present case, there is sufficient remedial precision to justify the remedy of reading in.

160 Turning to budgetary repercussions, in the circumstances of the present appeal, such considerations are not sufficiently significant to warrant avoiding the reading in approach. On this issue, the trial judge stated (at p. 18):

> There will undoubtedly be some budgetary impact on the Human Rights Commission as a result of the addition of sexual orientation as a prohibited ground of discrimination. But, unlike *Schachter* [*supra*], it would not be substantial enough to change the nature of the scheme of the legislation.

Although the scope of this Court's review of the *IRPA* is considerably broader than that which the trial judge was asked to undertake, as I noted above, having not heard anything persuasive to the contrary, I am not prepared to interfere with the trial judge's findings on this matter.

161 As to the effects on the thrust of the legislation, it is difficult to see any deleterious impact. All persons covered under the current scope of the *IRPA* would continue to benefit from the protection provided by the Act in the same manner as they had before the reading in of sexual orientation. Thus, I conclude that it is reasonable to assume that, if the Legislature had been faced with the choice of having no human rights statute or having one that offered protection on the ground of sexual orientation, the latter option would have been chosen. As the inclusion of sexual orientation in the *IRPA* does not alter the legislation to any significant degree, it is reasonable to assume that the Legislature would have enacted it in any event.

162 In addition, in *Schachter*, *supra*, Lamer C.J. noted that, in cases where the issue is whether to extend benefits to a group excluded from the legislation, the question of the effects on the thrust of the legislation will sometimes focus on the size of the group to be added as compared to the group originally benefited. He quoted with approval from *Knodel*, *supra*, where Rowles J. extended the provision of benefits to spouses to include same-sex spouses. In her view, the remedy of reading in was far less intrusive to the intention of the legislature than striking down the benefits scheme because the group to be added was much smaller than the group already receiving the benefits.

163 Lamer C.J. went on to note that, "[w]here the group to be added is smaller than the group originally benefitted, this is an indication that the assumption that the

legislature would have enacted the benefit in any case is a sound one" (p. 712). In the present case, gay men and lesbians are clearly a smaller group than those already benefited by the *IRPA*. Thus, in my view, reading in remains the less intrusive option.

164 The final criterion to examine is interference with the legislative objective. In *Schachter*, Lamer C.J. commented upon this factor as follows (at pp. 707-8):

> The degree to which a particular remedy intrudes into the legislative sphere can only be determined by giving careful attention to the objective embodied in the legislation in question. . . . A second level of legislative intention may be manifest in the means chosen to pursue that objective.

165 With regard to the first level of legislative intention, as I discussed above, it is clear that reading sexual orientation into the *IRPA* would not interfere with the objective of the legislation. Rather, in my view, it can only enhance that objective. However, at first blush, it appears that reading in might interfere with the second level of legislative intention identified by Lamer C.J.

166 As the Alberta Legislature has expressly chosen to exclude sexual orientation from the list of prohibited grounds of discrimination in the *IRPA*, the respondents argue that reading in would unduly interfere with the will of the Government. McClung J.A. shares this view. In his opinion, the remedy of reading in will never be appropriate where a legislative omission reflects a deliberate choice of the legislating body. He states that if a statute is unconstitutional, "the preferred consequence should be its return to the sponsoring legislature for representative, constitutional overhaul" (p. 35). However, as I see the matter, by definition, *Charter* scrutiny will always involve some interference with the legislative will.

167 Where a statute has been found to be unconstitutional, whether the court chooses to read provisions into the legislation or to strike it down, legislative intent is necessarily interfered with to some extent. Therefore, the closest a court can come to respecting the legislative intention is to determine what the legislature would likely have done if it had known that its chosen measures would be found unconstitutional. As I see the matter, a deliberate choice of means will not act as a bar to reading in save for those circumstances in which the means chosen can be shown to be of such centrality to the aims of the legislature and so integral to the scheme of the legislation, that the legislature would not have enacted the statute without them.

168 Indeed, as noted by the intervener Canadian Jewish Congress, if reading in is always deemed an inappropriate remedy where a government has expressly chosen a course of action, this amounts to the suggestion that whenever a government violates a *Charter* right, it ought to do so in a deliberate manner so as to avoid the remedy of reading in. In my view, this is a wholly unacceptable result.

169 In the case at bar, the means chosen by the legislature, namely, the exclusion of sexual orientation from the *IRPA*, can hardly be described as integral to the scheme of that Act. Nor can I accept that this choice was of such centrality to the aims of the legislature that it would prefer to sacrifice the entire *IRPA* rather than include sexual orientation as a prohibited ground of discrimination, particularly for the reasons I will now discuss.

170 As mentioned by my colleague Cory J., in 1993, the Alberta Legislature appointed the Alberta Human Rights Review Panel to conduct a public review of the *IRPA* and the Alberta Human Rights Commission. The Panel issued a report making several recommendations including the inclusion of sexual orientation as a prohibited

ground of discrimination in all areas covered by the Act. The Government responded to this recommendation by deferring the decision to the judiciary: "This recommendation will be dealt with through the current court case *Vriend v. Her Majesty the Queen in Right of Alberta and Her Majesty's Attorney General in and for the Province of Alberta*" (*Our Commitment to Human Rights: The Government's Response to the Recommendations of the Alberta Human Rights Review Panel*, *supra*, at p. 21).

171 In my opinion, this statement is a clear indication that, in light of the controversy surrounding the protection of gay men and lesbians under the *IRPA*, it was the intention of the Alberta Legislature to defer to the courts on this issue. Indeed, I interpret this statement to be an express invitation for the courts to read sexual orientation into the *IRPA* in the event that its exclusion from the legislation is found to violate the provisions of the *Charter*. Therefore, primarily because of this and contrary to the assertions of the respondents, I believe that, in these circumstances, the remedy of reading in is entirely consistent with the legislative intention.

172 In addition to the comments which I outlined above, McClung J.A. also criticizes the remedy of reading in on a more fundamental level. He views the reading of provisions into a statute as an unacceptable intrusion of the courts into the legislative process. Commenting upon the trial judge's decision to read sexual orientation into the *IRPA* he stated (at pp. 29-30):

> To amend and extend it, by reading up to include "sexual orientation" was a sizeable judicial intervention into the affairs of the community and, at a minimum, an undesirable arrogation of legislative power by the court. . . . [T]o me it is an extravagant exercise for any s. 96 judge to use the enormous review power of his or her office in this way in order to wean competent legislatures from their "errors".

173 McClung J.A. goes on to suggest that, by reading in, the trial judge overrode the express will of the electors of the Province of Alberta who, speaking through their parliamentary representatives, have decided that sexual orientation is not to be included in the protected categories of the *IRPA*.

174 With respect, for the reasons outlined in the previous section of these reasons, I do not accept that extending the legislation in this case is an undemocratic exercise of judicial power. Rather, I concur with the comments of W. Black, who states (*supra*, at p. 128) that:

> . . . there is no conflict between judicial review and democracy if judges intervene where there are indications that a decision was not reached in accordance with democratic principles. Democracy requires that all citizens be allowed to participate in the democratic process, either directly or through equal consideration by their representatives. Parliamentary sovereignty is a means to this end, not an end in itself.

175 In my view, the process by which the Alberta Legislature decided to exclude sexual orientation from the *IRPA* was inconsistent with democratic principles. Both the trial judge and all judges in the Court of Appeal agreed that the exclusion of sexual orientation from the *IRPA* was a conscious and deliberate legislative choice. While McClung J.A. relies on this fact as a reason for the courts not to intervene, the theories of judicial review developed by several authors (see e.g. Black, *supra*; J. H. Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980); P. Monahan, "A Theory of Judicial Review Under the Charter", in *Politics and the Constitution: The Charter, Federalism and the Supreme Court of Canada* (1987), at pp. 97-138; D. M. Beatty, *Constitutional Law in Theory and Practice* (1995)) suggest the opposite conclusion.

176 As I have already discussed, the concept of democracy means more than majority rule as Dickson C.J. so ably reminded us in *Oakes*, *supra*. In my view, a democracy requires that legislators take into account the interests of majorities and minorities alike, all of whom will be affected by the decisions they make. Where the interests of a minority have been denied consideration, especially where that group has historically been the target of prejudice and discrimination, I believe that judicial intervention is warranted to correct a democratic process that has acted improperly (see Black, *supra*; Jackman, *supra*, at p. 680).

177 At p. 35 of his reasons, McClung J.A. states:

> Allowing judicial, and basically final, proclamation of legislative change ignores our adopted British parliamentary safeguards, historic in themselves, and which are the practical bulkheads that protect representative government. When unelected judges choose to legislate, parliamentary checks, balances and conventions are simply shelved.

178 With respect, I do not agree. When a court remedies an unconstitutional statute by reading in provisions, no doubt this constrains the legislative process and therefore should not be done needlessly, but only after considered examination. However, in my view, the "parliamentary safeguards" remain. Governments are free to modify the amended legislation by passing exceptions and defences which they feel can be justified under s. 1 of the *Charter*. Thus, when a court reads in, this is not the end of the legislative process because the legislature can pass new legislation in response, as I outlined above (see also Hogg and Bushell, *supra*). Moreover, the legislators can always turn to s. 33 of the *Charter*, the override provision, which in my view is the ultimate "parliamentary safeguard".

179 On the basis of the foregoing analysis, I conclude that reading sexual orientation into the impugned provisions of the *IRPA* is the most appropriate way of remedying this underinclusive legislation. The appellants suggest that this remedy should have immediate effect. I agree. There is no risk in the present case of harmful unintended consequences upon private parties or public funds (see e.g. *Egan*, *supra*). Further, the mechanisms to deal with complaints of discrimination on the basis of sexual orientation are already in place and require no significant adjustment. I find additional support for my position in both *Haig*, *supra*, and *Newfoundland (Human Rights Commission) v. Newfoundland (Minister of Employment and Labour Relations)* (1995), 127 D.L.R. (4th) 694 (Nfld. S.C.), where sexual orientation was read into the impugned statutes without a suspension of the remedy. There is no evidence before this Court to suggest that any harm resulted from the immediate operation of the remedy in those cases.

III. Conclusions and Disposition

180 For the reasons outlined by Cory J., I conclude that the exclusion of sexual orientation from the protected grounds of discrimination in the *IRPA* violates s. 15 of the *Charter*. In addition, for the reasons set out above, the impugned legislation cannot be saved under s. 1 of the *Charter*. Accordingly, I would allow the appeal, dismiss the cross-appeal, and set aside the judgment of the Alberta Court of Appeal with party-and-party costs throughout.

181 I would answer the constitutional questions as follows:

> 1. Do (a) decisions not to include sexual orientation or (b) 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 *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, infringe or deny the rights guaranteed by s. 15(1) of the *Canadian Charter of Rights and Freedoms*?

Answer: Yes.

2. If the answer to Question 1 is "yes", is the infringement or denial demonstrably justified as a reasonable limit pursuant to s. 1 of the *Canadian Charter of Rights and Freedoms*?

Answer: No.

//*L'Heureux-Dubé J.*//

The following are the reasons delivered by

182 L'HEUREUX-DUBÉ J. -- I am in general agreement with the results reached by my colleagues, Cory and Iacobucci JJ. While I agree with Iacobucci J.'s approach to s. 1 of the *Canadian Charter of Rights and Freedoms*, I wish to reiterate the position which I have maintained throughout with respect to the approach to be taken to s. 15(1).

183 In my view, s. 15(1) of the *Charter* is first and foremost an equality provision. In *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at p. 171, this Court unanimously accepted s. 15's primary mission as "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". In *Egan v. Canada*, [1995] 2 S.C.R. 513, at para. 39, I articulated the approach to equality in a similar vein:

> [A]t the heart of s. 15 is the promotion of a society in which all are secure in the knowledge that they are recognized at law as equal human beings, equally capable, and equally deserving. A person or group of persons has been discriminated against within the meaning of s. 15 of the *Charter* when members of that group have been made to feel, by virtue of the impugned legislative distinction, that they are less capable, or less worthy of recognition or value as human beings or as members of Canadian society, equally deserving of concern, respect, and consideration. These are the core elements of a definition of "discrimination" -- a definition that focuses on impact (i.e. discriminatory effect) rather than on constituent elements (i.e. the grounds of the distinction). [Emphasis in original.]

Integral to the inquiry into whether a legislative distinction is in fact discriminatory within the meaning of s. 15(1) is an appreciation of both the social vulnerability of the affected individual or group, and the nature of the interest which is affected in terms of its importance to human dignity and personhood.

184 Given this purpose, every legislative distinction (including, as in this case, a legislative omission) which negatively impacts on an individual or group who has been found to be disadvantaged in our society, the impact of which deprives the individual or group of the law's protection or benefit in a way which negatively affects their human dignity and personhood, does not treat these persons or groups with "equal concern, respect and consideration". Consequently, s. 15(1) of the *Charter* is engaged. At this point, the burden shifts to the legislature to justify such an infringement of s. 15(1) under s. 1. It is at this stage only that the relevancy of the distinction to the legislative objective, among other factors, may be pertinent.

185 I do not agree with the centrality of enumerated and analogous grounds in Cory J.'s approach to s. 15(1). Although the presence of enumerated or analogous grounds may be indicia of discrimination, or may even raise a presumption of discrimination, it is in the appreciation of the nature of the individual or group who is

being negatively affected that they should be examined. Of greatest significance to a finding of discrimination is the effect of the legislative distinction on that individual or group. As McIntyre J. stated for the Court in *Andrews*, *supra*, at p. 165:

> To approach the ideal of full equality before and under the law . . . the main consideration must be the impact of the law on the individual or the group concerned. [Emphasis added.]

The s. 15(1) analysis should properly focus on uncovering and understanding the negative impacts of a legislative distinction on the affected individual or group, rather than on whether the distinction has been made on an enumerated or analogous ground. In my view, to instead make the presence of an enumerated or analogous ground a precondition to the search for discriminatory effects is inconsistent with a liberal and purposive approach to *Charter* interpretation generally, and specifically, to a *Charter* guarantee which is at the heart of our aspirations as a society that everyone be treated equally.

186 As a final comment, I wish to stress that I cannot agree with Cory J.'s incorporation of La Forest J.'s narrow approach to defining analogous grounds. At para. 90 of his reasons, Cory J. concludes that sexual orientation is an analogous ground because it is, in La Forest J.'s words from *Egan*, at para. 5, "a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs". La Forest J. in *Egan*, *supra*, at the end of para. 5, also restrictively characterized analogous grounds as being those based on "innate" characteristics. As demonstrated by McLachlin J., writing for the majority in *Miron v. Trudel*, [1995] 2 S.C.R. 418, this Court has endorsed a much more varied and comprehensive approach to the determination of whether a particular basis for discrimination is analogous to those grounds enumerated in s. 15(1). At paras. 148-49, she explained that:

> One indicator of an analogous ground may be that the targeted group has suffered historical disadvantage, independent of the challenged distinction: *Andrews*, *supra*, at p. 152 *per* Wilson J.; *Turpin*, *supra*, at pp. 1331-32. Another may be the fact that the group constitutes a "discrete and insular minority": *Andrews*, *supra*, at p. 152 *per* Wilson J. and at p. 183 *per* McIntyre J.; *Turpin*, *supra*, at p. 1333. Another indicator is a distinction made on the basis of a personal characteristic; as McIntyre J. stated in *Andrews*, "(d)istinctions 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" (pp. 174-75). By extension, it has been suggested that distinctions based on personal and immutable characteristics must be discriminatory within s. 15(1): *Andrews*, *supra*, at p. 195 *per* La Forest J. Additional assistance may be obtained by comparing the ground at issue with the grounds enumerated, or from recognition by legislators and jurists that the ground is discriminatory: see *Egan v. Canada*, *supra*, *per* Cory J.
>
> All of these may be valid indicators in the inclusionary sense that their presence may signal an analogous ground. But the converse proposition -- that any or all of them must be present to find an analogous ground -- is invalid. As Wilson J. recognized in *Turpin* (at p. 1333), they are but "analytical tools" which may be "of assistance". [Emphasis in original.]

187 This being said, I agree with Cory and Iacobucci JJ. to allow the appeal and dismiss the cross-appeal with costs.

The following are the reasons delivered by

188 MAJOR J. (dissenting in part) -- The *Individual's Rights Protection Act*, R.S.A. 1980, c. I-2 ("*IRPA*" or "the Act"), provided at the relevant time in its preamble among other things that the purpose of that human rights Act is to recognize the principle that all persons are equal in dignity and rights and to provide protection of those rights to all individuals in Alberta. It stated:

> 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; and
>
> WHEREAS it is fitting that this principle be affirmed by the Legislature of Alberta in an enactment whereby those rights of the individual may be protected . . . .

Section 7 of the *IRPA* stated:

> **7**(1) No employer or person acting on behalf of an employer shall
>
> (a) refuse to employ or refuse to continue to employ any person, or
>
> (b) discrimination against any person with regard to employment or any term or condition of employment,
>
> because of the race, religious beliefs, colour, gender, physical disability, mental disability, marital status, age, ancestry or place of origin of that person or of any other person.
>
> . . .
>
> (3) Subsection (1) does not apply with respect to a refusal, limitation, specification or preference based on a bona fide occupational requirement.

Section 33 of the *Canadian Charter of Rights and Freedoms* provides:

> **33.** (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.
>
> (2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.
>
> (3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.
>
> (4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1).

(5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

Analysis

189 In the preamble of the *IRPA* the Province of Alberta makes it clear that the purpose of the legislation is to recognize the principle that all persons are equal in dignity and rights, and to provide protection of those rights to all individuals in Alberta through the elimination of discriminatory practices.

190 Section 7 provides that no employer shall discriminate against any person with respect to employment because of the race, religious beliefs, colour, gender, physical disability, mental disability, marital status, age, ancestry or place of origin of that person or of any other person. The absence of sexual orientation from the enumerated grounds gave rise to the litigation resulting in this appeal.

191 The Province of Alberta was invited to but declined at the appeal to explain how people with different sexual orientation were not part of the phrase “all persons are equal in dignity and rights”. As well, the Province of Alberta failed to demonstrate how the exclusion of sexual orientation from the *IRPA* accords with its legislative purpose. It is puzzling that the Legislature, having enacted comprehensive human rights legislation that applies to everyone in the province, would then selectively deny the protection of the Act to certain groups of individuals. No explanation was given, and none is apparent from the evidence filed by the Province.

192 The inescapable conclusion is that there is no reason to exclude that group from s. 7 and I agree with Justices Cory and Iacobucci that to do so is discriminatory and offends their constitutional rights.

193 While a number of submissions related to the appellant's employment as a teacher this appeal will not be determinative of the matter between the appellant Vriend and his former employer, King's College. Extension of the legislation, either by the Court or by the Legislature, to include protection from discrimination based on sexual orientation will provide the first step in allowing the appellant to have his complaint heard by the Alberta Human Rights Commission. The ultimate success of that action, however, will depend in part on whether the College can demonstrate that its refusal to continue to employ Vriend was based on a *bona fide* occupational requirement, pursuant to s. 7(3) of the *IRPA*. The issue of whether a private fundamentalist Christian college can legitimately refuse to employ a homosexual teacher will be for the Alberta Human Rights Commission, and not this Court, to decide.

194 With respect to remedy, Iacobucci J. relies on the reasoning in *Schachter v. Canada,* [1992] 2 S.C.R. 679, to support his conclusion that the words "sexual orientation" ought to be read into the *IRPA*. In my view, the analysis in *Schachter* with respect to reading in is not compelling here. The Court there decided that the appropriate remedy was to strike down the relevant legislation but temporarily suspend the declaration of invalidity. The directions on "reading in" were not as the Chief Justice stated at p. 719, intended "as hard and fast rules to be applied regardless of factual context".

195 In my opinion, *Schachter* did not contemplate the circumstances that pertain here, that is, where the Legislature's opposition to including sexual orientation as a

prohibited ground of discrimination is abundantly clear on the record. Reading in may be appropriate where it can be safely assumed that the legislature itself would have remedied the underinclusiveness by extending the benefit or protection to the previously excluded group. That assumption cannot be made in this appeal.

196 The issue may be that the Legislature would prefer no human rights Act over one that includes sexual orientation as a prohibited ground of discrimination, or the issue may be how the legislation ought to be amended to bring it into conformity with the *Charter*. That determination is best left to the Legislature. As was stated in *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 169:

> While the courts are guardians of the Constitution and of individuals' rights under it, it is the legislature's responsibility to enact legislation that embodies appropriate safeguards to comply with the Constitution's requirements. It should not fall to the courts to fill in the details that will render legislative lacunae constitutional. [Emphasis added.]

197 There are numerous ways in which the legislation could be amended to address the underinclusiveness. Sexual orientation may be added as a prohibited ground of discrimination to each of the impugned provisions. In so doing, the Legislature may choose to define the term "sexual orientation", or it may devise constitutional limitations on the scope of protection provided by the *IRPA*. As an alternative, the Legislature may choose to override the *Charter* breach by invoking s. 33 of the *Charter*, which enables Parliament or a legislature to enact a law that will operate notwithstanding the rights guaranteed in s. 2 and ss. 7 to 15 of the *Charter*. Given the persistent refusal of the Legislature to protect against discrimination on the basis of sexual orientation, it may be that it would choose to invoke s. 33 in these circumstances. In any event it should lie with the elected Legislature to determine this issue. They are answerable to the electorate of that province and it is for them to choose the remedy whether it is changing

the legislation or using the notwithstanding clause. That decision in turn will be judged by the voters.

198 The responsibility of enacting legislation that accords with the rights guaranteed by the *Charter* rests with the legislature. Except in the clearest of cases, courts should not dictate how underinclusive legislation must be amended. Obviously, the courts have a role to play in protecting *Charter* rights by deciding on the constitutionality of legislation. Deference and respect for the role of the legislature come into play in determining how unconstitutional legislation will be amended where various means are available.

199 Given the apparent legislative opposition to including sexual orientation in the *IRPA*, I conclude that this is not an appropriate case for reading in. It is preferable to declare the offending sections invalid and provide the Legislature with an opportunity to rectify them. I would restrict the declaration of invalidity to the employment-related provisions of the *IRPA*, that is ss. 7(1), 8(1) and 10. While the same conclusions may apply to the remaining provisions of the *IRPA*, this Court has stated that *Charter* cases should not be considered in a factual vacuum: see *MacKay v. Manitoba*, [1989] 2 S.C.R. 357, at p. 361.

200 The only remaining issue is whether the declaration of invalidity ought to be temporarily suspended. In *Schachter*, Lamer C.J. stated that a declaration of invalidity may be temporarily suspended where the legislation is deemed unconstitutional because of underinclusiveness rather than overbreadth, and striking down the legislation would result in the deprivation of benefits from deserving persons without thereby benefitting the individual whose rights have been violated.

201 There is no intention to deprive individuals in Alberta of the protection afforded by the *IRPA*, but only to ensure that the legislation is brought into conformity with the *Charter* while simultaneously respecting the role of the legislature. I would therefore order that the declaration of invalidity be suspended for one year to allow the Legislature an opportunity to bring the impugned provisions into line with its constitutional obligations.

Conclusion

202 I agree with my colleagues that the exclusion of sexual orientation as a protected ground of discrimination from ss. 7(1), 8(1) and 10 of the *IRPA* violates s. 15 of the *Charter* and cannot be saved under s. 1. I would declare these sections unconstitutional but suspend the declaration of invalidity for a period of one year.

*Appeal allowed with costs,* MAJOR J. *dissenting in part. Cross-appeal dismissed with costs.*

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