Alberta Court of Queen's Bench
Vriend v. Alberta
Date: 1994-04-12

Victor Leginsky, for applicants.

Margaret Unsworth, for respondents.

(Doc. Edmonton 9203-02452)

April 12, 1994.

[1] RUSSELL J.: – This is an application by originating notice challenging the constitutional validity of ss. 2(1), 3, 4, 7(1), and 8(1) of the *Individual's Rights Protection Act*, R.S.A. 1980, c. 1-2 (the "Act") under s. 15(1) of the *Canadian Charter of Rights and Freedoms* (the "*Charter*"). *The applicants allege that those sections of the Act are discriminatory and infringe s. 15(1) of the Charter* because they do not include sexual orientation as a proscribed ground. The standing of the applicants to bring the application has not been challenged.

[2] The issues are:

1. May the Court take judicial notice that discrimination against homosexuals exists?

2. Are homosexuals a discrete and insular minority entitled to protection under s. 15(1) of the *Charter?*

3. If so, does the omission of sexual orientation as one of the proscribed grounds in the Act constitute discrimination under s. 15(1) of the *Charter?*

4. If there is a violation of s. 15(1) of the *Charter*, is the violation nonetheless justified?

5. If the violation is not justified, what is the appropriate remedy for the Court to grant?

Facts

[3] Vriend was employed at the King's College in Edmonton, Alberta, commencing December, 1987. On February 20, 1990, in response to an inquiry by the President of the College, Vriend admitted that he is a homosexual. On January 28, 1991 Vriend's employment was terminated by the College. The sole reason given for his termination was his noncompliance with the policy of the College on homosexual practice. Vriend attempted to make a complaint to the Alberta Human Rights Commission in June of 1991 on the grounds of discrimination with regard to employment because of his sexual orientation. He was advised by the Commission on July 10, 1991 that he could not make a complaint because sexual orientation is not included as a protected ground under the Act.

[4] Evidence shows that in a 1984 News Release the Alberta Human Rights Commission announced recommendations for amendments to the Act to include sexual orientation as a prohibited ground for discrimination in employment. Correspondence from the Ministers responsible for the administration of the Act in October, 1984, May, June and July 1989, and October, 1991 indicates their intent to introduce amendments to provide protection on the basis of sexual orientation. However, other correspondence from some Government Members of the Legislative Assembly reveals a lack of support for the amendments.

[5] The *Individual's Rights Protection Act* is a form of human rights legislation proclaimed in force on January 1, 1973. It prohibits discrimination because of the race, religious beliefs, colour, gender, physical disability, ancestry or place of origin of a person or class of persons. Various sections of the Act prohibit such discrimination in specific circumstances. Discrimination is prohibited in public notices by s. 2(1), in public accommodation by s. 3, in tenancy by s. 4, in employment by s. 7(1), and in advertisements for employment by s. 8(1). Section 10 provides:

> 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.

Legal analysis

[6] A preliminary issue arose when it was discovered that the applicants omitted reference in their application to s. 10 of the Act, as a result of an oversight. However, applying the test for public interest established in *Canadian Council of Churches v. R.* (1992), 88 D.L.R. (4th) 193 (S.C.C.), at pp. 204-207 ("*Canadian Council of Churches*"), I am satisfied that they do have standing to challenge that section as well. In that case Cory J. said at pp. 202 and 204 that:

> … the Charter indicates that a generous and liberal approach should be taken to the issue of standing. If that were not done, Charter rights might be unenforced and Charter freedoms shackled …
>
> The increasing recognition of the importance of public rights in our society confirms the need to extend the right to standing from the private law tradition which limited party status to those who possessed a private interest.

He determined that the decision to grant status is discretionary, and requires consideration of three aspects: (a) is there a serious issue raised as to the invalidity of the legislation; (b)

are the applicants directly affected by or do they have a genuine interest in the legislation; (c) is there another reasonable and effective way to bring the issue to court?

[7] There is no dispute in the case at bar that the applicants have a genuine interest in the validity of s. 10. I am satisfied as well that the same serious issue is raised as to the validity of that section as is raised regarding the other sections. There is no basis for distinguishing issues arising from that section and those arising from the other sections.

[8] In *Canadian Council of Churches,Cory* J. found at p. 206 that there were other reasonable methods of bringing the matter before the Court because it was clear that individual claimants had in fact challenged the legislation, and that appeals were heard under the legislation on a daily basis. In this case, the only effective means to challenge s. 10 would be to bring another application similar to the one before the Court. In my view, it is unreasonable to require another comparable application to resolve what is essentially the same issue. For those reasons the application is amended to include s. 10 as well.

May the Court take judicial notice of discrimination against homosexuals?

[9] Section 15(1) of the *Charter* provides:

> 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.

[10] In order to establish that s. 15(1) of the *Charter* applies, the applicants must show that sexual orientation is analogous to the grounds enumerated in that section. The test to be applied is whether the group is a "discrete and insular minority" which has historically suffered discrimination, prejudice or stereotyping by virtue of a personal characteristic: *Andrews v. Law Society* (*British Columbia*), [1989] 1 S.C.R. 143 at 182 [[1989] 2 W.W.R. 289]; *Reference re Workers'Compensation Act,1983* (*Newfoundland*), [1989] 1 S.C.R. 922; *R. v. Turpin*, [1989] 1 S.C.R. 1296 at 1332-33; *Haig v. Canada* (*Chief Electoral Officer*) (1993), 156 N.R. 81 (S.C.C.), at pp. 135-40.

[11] The Crown argues that the applicants have failed to produce evidence necessary to meet that test. It relies on *Mohr v. Scoffield* (1991), 83 Alta. L.R. (2d) 1 (C.A.), at p. 13 ("*Mohr*"). There Côté J.A. stated that by failing to produce statistical evidence to show how bad the effects of legislation were, the plaintiff had not proven the disproportionate effect of the legislation.

[12] Although there is some evidence from the applicants in the form of an affidavit which contains anecdotal information in the form of hearsay regarding other circumstances

known to the affiant which, if true, may be evidence of discrimination, I cannot rely on such evidence as the basis for concluding that homosexuals suffer discrimination. However, I am satisfied that the discrimination homosexuals suffer is so notorious that I can take judicial notice of it without evidence.

[13] Judicial notice may be defined as the cognizance of certain facts which a judge may properly take and act on without proof because she already knows them to be true. Judicial notice may be taken of facts which are (Sopinka, Lederman & Bryant, *The Law of Evidence in Canada* (Toronto: Butterworths, 1992), at p. 976):

> … (a) so notorious as not to be the subject of dispute among reasonable persons, or (b) capable of immediate and accurate demonstration by resorting to readily accessible sources of indisputable accuracy …

There are innumerable matters which may be judicially noticed as notorious facts, including characteristics of human needs and behaviour: Sopinka at pp. 977-78.

[14] Legal theorists are divided over limitations on the application of judicial notice. Thayer in *A Preliminary Treatise on Evidence at the Common Law* (1898), at pp. 279 and 299, and at pp. 308-309, said judicial notice was part of the process of judicial reasoning. He advocated the liberal exercise of judicial discretion to judicially notice facts, including those which are not indisputable. Professor Morgan, on the other hand preferred judicial restraint. In a classic article on the subject he urged the restriction of judicial notice to facts which are indisputable: E.M. Morgan, "Judicial Notice" (1944), 57 Harv. L. Rev. 269. He said at p. 274:

> To warrant such judicial notice the probability must be so great as to make the truth of the proposition notoriously indisputable among reasonable men.

[15] Professor Davis drew a distinction between adjudicative and legislative facts which may be judicially noticed. Facts relating to the parties and their activities which are determined or found by a court or agency are categorized as adjudicative. General facts unrelated to the immediate parties relied upon by a court or agency in developing law or policy are categorized as legislative facts: K. Davis, "Judicial Notice" (1955), 55 Colum. L. Rev. 945. He said at pp. 952-53 the difference between the two is that:

> … apart from facts properly noticed, the tribunal's findings of adjudicative facts must be supported by evidence, but findings or assumptions of legislative facts need not, frequently are not, and sometimes cannot be supported by evidence.

[16] Social policy matters, an example of legislative facts, are seldom indisputable, nor readily verifiable through the adjudicative process. However, they are often pertinent to legal issues. Courts have taken judicial notice of such matters in the process of expansion of the common law, particularly since the advent of the *Charter.*

[17] In *Moge v. Moge*, [1992] 3 S.C.R. 813 [[1993] 1 W.W.R. 481] L'Heureux-Dube J. affirmed that, based on studies she cited, judicial notice can be taken of the fact that a social reality - divorce - has a disproportionately negative impact on women. The suggestion was that even without such studies, judicial notice could be taken of a "social reality." In the case at bar, in the absence of studies, the applicant relies on extra-provincial human rights legislation and previous legal authority, as grounds for judicial notice that homosexuals suffer from discrimination.

[18] In *Knodel v. British Columbia* (*Medical Services Commission*) (1991), 58 B.C.L.R. (2d) 356 [[1991] 6 W.W.R. 728] (S.C.) ("*Knodel*"), and *Haig v. Canada* (1992), 9 O.R. (3d) 495 (C.A.) ("*Haig*"), expert evidence was introduced regarding the incidence of homosexuality and the extent to which homosexuals are disadvantaged. In both cases, the Crown did not introduce evidence to the contrary and expressly conceded that sexual orientation is an analogous ground under s. 15(1) of the *Charter.*

[19] In *Haig* the expert concluded as quoted at p. 498 that "homosexual persons in Canada are an historically disadvantaged group and, in a very real sense, are a 'discrete and insular minority.'" The Crown argues in the present case that since those conclusions were specific to homosexuals, they cannot be relied upon to make similar conclusions about discrimination based more generally on "sexual orientation." Unlike the Crown in *Haig* and *Knodel* it is not prepared to concede the conclusions reached by those experts. The Crown contends, quite properly in my view, that judicial notice may not be taken of a fact proved in another court in another jurisdiction.

[20] In *Mercedes Homes Inc. v. Grace*, [1993] O.J. No. 2610 (Gen. Div.) (QL), Sutherland J. took judicial notice of the widespread solicitude shown in the homosexual community for those suffering from AIDS. He said such knowledge is "commonplace", thus suggesting it is notorious.

[21] In *R. v. Scythes*, [1993] O.J. No. 537 (January 16, 1993) (Ont. Prov. Div.). Paris Prov. J. found that the striking down by other courts of laws which discriminate against homosexuals is an indication that society has moved beyond tolerance to the actual recognition that homosexuals form an essential part of our community. He did so without evidence. However, sexual orientation was not in issue, so his finding was obiter.

[22] In *Egan v. Canada* (1993), 103 D.L.R. (4th) 336 (Fed. C.A.), ("*Egan*"), sexual orientation was in issue, but the case was decided on another basis. Nonetheless, Robertson J.A. in a majority judgment said at p. 381:

> Though the Supreme Court has yet to adjudicate on whether homosexuals constitute a disadvantaged group entitled to Charter protection, I take it to be settled law that sexual orientation can be invoked as an analogous ground of discrimination under s. 15(1) … The respondent conceded this point and, in my opinion, rightly so.

He did not require evidence to reach this conclusion, and underscored the legal rectitude of the Crown's concession on the point. He concluded that sexual orientation is a personal characteristic which is an irrelevant consideration in employment.

[23] Linden J.A. in his dissenting decision in *Egan* stated at p. 352:

> … a discrete and insular minority will be defined by a characteristic associated with an enumerated or analogous ground of discrimination …

His conclusion was based on previous authority and "simple justice", an averment perhaps to the judicial notice concept.

[24] In *Ward v. Canada* (*Minister of Employment & Immigration*), [1993] 2 S.C.R. 689, the Supreme Court of Canada was required to determine what constitutes a "particular social group" which gives rise to refugee status. At p. 739 La Forest J. referred to three possible categories, one of which was "… groups defined by an innate or unchangeable characteristic." He said at p. 739 this category would:

> … embrace individuals fearing persecution on such bases as gender, linguistic background and *sexual orientation …* (emphasis added)

I do not agree with the position of the applicants that the Court thereby assigned sexual orientation an innate and immutable characteristic without the necessity for evidence on the matter. That Court was not taking judicial notice of that fact, but was simply using it as an example.

[25] In *Brown v. British Columbia* (*Minister of Health*) (1990), 66 D.L.R. (4th) 444 [42 B.C.L.R. (2d) 294] (S.C.), Coultas J. stated at p. 457:

> The history of western civilization records that from biblical times to our own, homosexuals have been subjected to discrimination because of their sexual orientation.

Similarly, in *Haig*, Krever J.A. found that homosexuals are disadvantaged. In reaching that conclusion he considered evidence in the form of affidavits, as well as expert opinion evidence from a professor of sociology and anthropology based on empirical evidence that homosexual persons are socially disadvantaged.

[26] Several other Canadian jurisdictions have enacted human rights legislation which prohibits discrimination on the grounds of sexual orientation. They include New Brunswick, Nova Scotia, Quebec, Ontario, Manitoba, Saskatchewan, British Columbia,

and the Yukon Territory. In *Egan*, Linden J.A. found, at p. 354, that such laws "buttressed" judicial recognition that sexual orientation is an analogous ground of discrimination.

[27] In my view, *Mohr*, which held that statistical evidence of the effects of legislation was required to meet the test for judicial notice, is to be distinguished from the present case on its facts. There the Court was asked to consider whether legislation governing gratuitous passengers had a disproportionate effect on women, the young, or the disabled. Unlike the issue before me, it was not open to judicial notice.

[28] By contrast, discrimination against homosexuals is an historical, universal, notorious, and indisputable social reality. It has been the subject of much judicial and social comment, and is already the subject of provincial legislation elsewhere in Canada. I am satisfied for those reasons that I may take judicial notice of it.

Are homosexuals a discrete and insular minority entitled to protection under s. 15(1) of the Charter?

[29] A party who challenges legislation has the onus of establishing a violation of the applicable section of the *Charter*, in this case s. 15(1). The applicants must show that the impugned sections of the Act constitute discriminatory legislation. But they must first establish that they are entitled to protection under s. 15(1) of the *Charter.* That section provides:

> 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.

Though the section specifically protects against discrimination based on particular grounds, it is not restricted to those grounds.

[30] Section 15(1) is not intended to cover each and every group that alleges it has been wrongly distinguished. To invoke the protection of the section it must be shown that the alleged ground is analogous to those enumerated. The test, as mentioned above, is whether the group complaining of discrimination is a "discrete and insular minority" which has historically suffered discrimination, prejudice or stereotyping by virtue of a personal characteristic.

[31] The "analogous grounds" approach was described by McIntyre J. in *Andrews.* His views on this point were concurred in by the majority of the Court. He said at p. 182:

> … it is not enough to focus only on the alleged ground of discrimination and decide whether or not it is an enumerated or analogous ground. The effect of the impugned distinction or classification on the complainant must be considered. Once it is

> accepted that not all distinctions and differentiations created by law are discriminatory, then a role must be assigned to s. 15(1) which goes beyond the mere recognition of a legal distinction. A complainant under s. 15(1) must show not only that he or she is not receiving equal treatment before and under the law or that the law has a differential impact on him or her in the protection or benefit accorded by law but, in addition, must show that the legislative impact of the law is discriminatory.

[32] In *Turpin*, Wilson J. said at p. 1332 (referring to her own judgment at p. 152 of *Andrews*):

> … the determination of whether a group falls into an analogous category to those specifically enumerated in s. 15 is "not to be made only in the context of the law which is subject to challenge but rather in the context of the place of the group in the entire social, political and legal fabric of our society."

[33] Applying this reasoning in *Leroux v. Co-operators General Insurance Co.* (1991), 83 D.L.R. (4th) 694 (Ont. C.A.), the Court concluded that unmarried persons who live together are not members of a disadvantaged group in Canadian society, or of a discrete and insular minority. That conclusion was based on the overall position of unmarried persons which is not disadvantaged, and which is not unchangeable. Similarly, in *Catholic Children's Aid Society of Metropolitan Toronto v. S.* (*T.*) (1989), 60 D.L.R. (4th) 397 (Ont. C.A.), the Court found that the situation of birth parents seeking post-adoption access was in no way analogous to the groups enumerated in s. 15(1). Courts have also refused to give analogous status to groups such as rural mail carriers as employment status (*Rural Route Mail Carriers of Canada,Local 1801 v. Canada* (*Attorney General*) (1989), 29 F.T.R. 105 (T.D.), at p. 111); members of the R.C.M.P. as a type of employment (*Gingras v. Canada* (1989), 69 D.L.R. (4th) 55 (Fed. T.D.), at pp. 82-82); and landlords (*Haddock v. Ontario* (*Attorney General*) (1990), 70 D.L.R. (4th) 644 (Ont. H.C.)).

[34] In *Knodel*, Rowles J. found that homosexuals are a group that constitutes a "discrete and insular minority" within the meaning of s. 15(1) of the *Charter.* That conclusion was based on expert opinion evidence from a professor of psychiatry that homosexual people as a group are stigmatized in our society. In *Veysey v. Canada* (*Correctional Service*) (1989), [1990] 1 F.C. 321 (T.D.) ("*Veysey*"), Dube J. also held that sexual orientation is an analogous ground. Though he apparently had no expert or statistical evidence, he found support for that conclusion in the recognition of sexual orientation in a number of provincial and territorial human rights Acts, as well as in the 1985 Report of the House of Commons Parliamentary Committee on Equality Rights.

[35] In *Haig* and *Knodel*, the Crown had conceded that sexual orientation is an analogous ground to be protected under s. 15(1) of the *Charter.* In *Knodel*, Rowles J. said that the Crown's concession was consistent with the decision of that Court in *Brown.* In

Veysey v. Canada (*Correctional Service*) (1990), 109 N.R. 300, the Federal Court of Appeal was formally informed by counsel for the Commissioner of Correctional Service of Canada that it "is the position of the Attorney General of Canada that sexual orientation is a ground covered by s. 15 of the *Charter*" (at p. 304). Here, the Crown does not concede that sexual orientation is an analogous ground and puts the applicants to the strict proof.

[36] In *Haig*, Krever J.A. expressed the view at p. 501 that the issue is a matter of law, adding that:

> … as a matter of law the concession is right.

That suggests that the Crown had no option but to concede the issue.

[37] Applying the reasoning in *Andrews* and *Turpin*, it is necessary to consider whether, in the larger social, political and legal context, a distinction based on sexual orientation in the application of the Act causes a disadvantage.

[38] It is argued for the Crown that the disadvantage suffered in this case is an issue concerning economic rights or the right to work. If so, it may not be protected under the *Charter. R. v. Greenbaum*;*R. v. Sharma* (1991), 77 D.L.R. (4th) 334 (Ont. C.A.); *Budge v. Alberta* (*Workers'Compensation Board*) (1991), 77 D.L.R. (4th) 361 [78 Alta. L.R. (2d) 193, [1991] 3 W.W.R. 1] (Alta. C.A.); *Smith,Kline & French Laboratories Ltd. v. Canada* (*Attorney General*) (1986), 34 D.L.R. (4th) 584 (Fed. C.A.), leave to appeal to S.C.C. refused [1987] 1 S.C.R. xiv.

[39] However, although the disadvantage suffered here incorporates an alleged infringement of economic rights, it is more fundamental. It is the denial to a group of people as a result of their personal characteristics of the same benefit and protection of rights as are provided under the Act to other similarly disadvantaged citizens of the province, including the denial of equal recognition and respect and attendant legal remedies. That is sufficient to constitute analogous grounds under s. 15(1) of the *Charter.*

Does the omission of sexual orientation under the Individual's Rights Protection Act constitute discrimination under s. 15 of the Charter?

[40] A violation of s. 15(1) of the *Charter* is not made out simply by establishing there is a distinction in legislation based on an enumerated or analogous ground. The party challenging the legislation must also establish that there is discrimination.

[41] It has been established that a discriminatory distinction in a law can arise from either a commission or an omission: *Hoogbruin v. British Columbia* (*Attorney General*) (1985), 70 B.C.L.R. 1 [[1986] 2 W.W.R. 700] (C.A.), at p. 4; *Schachter v. Canada* (1990),

66 D.L.R. (4th) 635 (Fed. C.A.), at p. 644. In *Brooks v. Canada Safeway Ltd.*, [1989] 4 W.W.R. 193 (S.C.C.) ("*Brooks*"), Dickson C.J.C. stated at p. 210:

> Underinclusion may be simply a backhanded way of permitting discrimination.

[42] Not every ground determined to be analogous under s. 15(1) of the *Charter* must be included in human rights legislation throughout Canada. There are fundamental differences between the *Charter* and human rights legislation which were recognized by the Supreme Court of Canada in *Andrews.*

[43] The primary difference is that the *Charter* does not apply to private conduct, whereas review of private activity is the goal of human rights legislation. In *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229 ("*McKinney*"), La Forest J. said at p. 262:

> The exclusion of private activity from the *Charter* was not a result of happenstance …
>
> To open up all private and public action to judicial review could strangle the operation of society and … "diminish the area of freedom within which individuals can act."

He continued at p. 318:

> The *Charter …* was expressly framed so as not to apply to private conduct. It left the task of regulating and advancing the cause of human rights in the private sector to the legislative branch. This invites a measure of deference for legislative choice … the courts should (not) stand idly by in the face of a breach of human rights in the Code itself … But generally, the courts should not lightly use the *Charter* to second-guess legislative judgment as to just how quickly it should proceed in moving forward towards the ideal of equality. The courts should adopt a stance that encourages legislative advances in the protection of human rights … the recognition of human rights emerges slowly out of the human condition …

[44] Another major difference between the *Charter* and human rights legislation relates to the burden of proof under each. Under human rights legislation, once it has been shown that a distinction has been made on the basis of a protected ground, the onus shifts to the employer or service provider to establish that the distinction is justifiable.

[45] In *Haig*, the Ontario Court of Appeal did not discuss the distinctions between the *Charter* and human rights legislation. However, that Court found that the omission of sexual orientation as a proscribed ground in the *Canadian Human Rights Act* created discrimination. In doing so it was apparently not constrained by the different objectives and onus of proof in human rights legislation. *Mc Kinney* was not referred to in that case.

[46] In *Turpin*, Wilson J. said at pp. 1331-32:

> In determining whether there is discrimination on grounds relating to the personal characteristics of the individual or group, it is important to look not only at the impugned legislation which has created a distinction that violates the right to equality but also to the larger social, political and legal context … it is only by examining the larger context that a court can determine whether differential treatment results in

> inequality of whether, contrariwise, it would be identical treatment which would in the particular context result in inequality or foster disadvantage. A finding that there is discrimination will. I think, in most but perhaps not all cases, necessarily entail a search for disadvantage that exists apart from and independent of the particular legal distinction being challenged.

[47] This approach was applied in *Haig.* There, Krever J.A. was of the view that the distinction created by withholding of benefits and advantages available to other persons alleging discrimination is not sufficient alone to justify a conclusion of discrimination within the meaning of s. 15(1) of the *Charter.* He relied on evidence produced before him to find a disadvantage in the larger social, political and legal context, independent of the legal disadvantage created by the omission. He said at p. 503:

> The social context which must be considered includes the pain and humiliation undergone by homosexuals by reason of prejudice towards them. It also includes the enlightened evolution of human rights social and legislative policy in Canada, since the end of the Second World War, both provincially and federally. 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 create the effect of discrimination offending s. 15(1) of the *Charter.*

I share that view.

[48] In *Blainey v. Ontario Hockey Assn.* (1986), 54 O.R. (2d) 513 (C.A.), leave to appeal to S.C.C. refused [1986] 1 S.C.R. xii, it was held that a law which excludes persons constitutionally entitled to equal benefit and equal protection of the law from such statutory right to seek and obtain redress against discrimination infringes s. 15(1) of the *Charter* where the impact of the exclusion can be shown to be discriminatory. There the impugned legislation contained a provision which specifically denied the protection of provincial human rights legislation to persons restricted from participation in athletic activities on the grounds of their sex. The Court had no difficulty in concluding that such a provision was inconsistent with s. 15(1) of the *Charter*, and clearly discriminatory. The situation is not as clear where legislation is impugned because of an omission.

[49] The Supreme Court of Canada has not precluded the possibility that courts may find an infringement of the *Charter* by reason of the omission of a category of discrimination in human rights Codes. Nonetheless, appropriate restraint and deference must be applied before intruding into the legislative sphere beyond what is necessary to give proper effect to the *Charter.* In *McKinney*, supra, L'Heureux-Dube stated at p. 436:

> The *Charter* should serve to prevent overt discrimination in human rights legislation, but it should not be applied in such a manner as to discourage the use of such legislation by the provinces, or to interfere with a legitimate provincial legislative decision not to provide rights in a given area.

> However, there are limits within which this approach should apply. For example, 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.*

Although she was in dissent, her position on this matter was in accord with that of La Forest J. speaking for the majority. However, unlike discrimination on the basis of age, discrimination on the basis of sexual orientation is directly associated with discrimination on the basis of sex. Though the Act uses the term "gender" as opposed to sex, I interpret it to have the same effect. While 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 non-discriminatory manner, or justify the exclusion.

[50] It is also clear that while the Court must minimize interference with the legislature it must also ensure adherence to the principles of the *Charter.* In *Andrews*, Wilson J. said at p. 152:

> While legislatures must inevitably draw distinctions among the governed, such distinctions should not bring about or reinforce the disadvantage of certain groups and individuals …

The Court must seek a proper balance between the integrity of the legislative process and constitutional rights.

[51] In *Brown*, though the Court found at p. 459 that discrimination based on sexual orientation contravened s. 15(1) of the *Charter*, no deliberate discrimination had been shown. Thus, the Court concluded that the decision not to fully fund the cost of drugs in clinical trials in the treatment of AIDS was not contrary to s. 7 or 15 of the *Charter.* The fact that all other provinces had done so was not considered proof of direct discrimination. No administrative unfairness was shown.

[52] But in *Brooks*, Dickson C.J.C. emphasized at p. 210:

> … discrimination does not depend on a finding of invidious intent.

Thus, whether or not there is intent to discriminate, if the omission has a discriminatory effect, discrimination will be established.

[53] 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.*

Is the violation of s. 15(1)of the Charter justified?

[54] The right to equality before and under the law and the right to the equal protection and equal benefit of the law is not an absolute right. A breach of that right will be upheld if the violation is found to be a reasonable limit under s. 1 of the *Charter.* That section provides:

> 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.

[55] In *Haig*, the Crown disavowed reliance on s. 1 of the *Charter* to justify the violation of s. 15. Thus the Court was able to conclude that a denial to homosexual persons of the equal protection and benefit of the law by a denial of access to the remedial provisions of the *Canadian Human Rights Act* was unjustified in a free and democratic society without the necessity of an analysis of the law in that respect. The Crown does not take that position here.

[56] However, the onus is on the Crown to justify any infringement: *Andrews*, at p. 178. The Crown has presented no rationale to show that the violation is justified. Because the Crown has failed to do so, I conclude that the violation of s. 15(1) cannot be justified. Even if the Crown were not required to do so, I would nonetheless conclude that the violation cannot be justified.

[57] The standard of review necessary to satisfy s. 1 of the *Charter* was delineated by the Supreme Court of Canada in *R. v. Oakes*, [1986] 1 S.C.R. 103, 24 C.C.C. (3d) 321 at 347-48, and reiterated at pp. 271-76 per Sopinka J. in *Osborne v. Canada* (*Treasury Board*) (1991), 125 N.R. 241 (S.C.C.). The onus is on the Crown to meet two central criteria. First, the objective of the legislation must be of "sufficient importance to warrant overriding a constitutionally protected right or freedom." Secondly, there must be a balancing of the interests of society with those of individuals and groups. This proportionality aspect has three components:

(a) the measures adopted must be rationally connected to the objective;

(b) the means should impair "as little as possible" the right or freedom in question;

(c) there must be a proportionality between the effects of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of "sufficient importance".

[58] Rigid application of the test enunciated in *Oakes* has been relaxed in relation to legislation held to violate s. 15(1) of the *Charter.* In *Andrews* the need to apply a lower and more flexible standard of "reasonableness" and "proportionality" was recognized. Mr. Justice McIntyre said at p. 184 there are two steps involved in the s. 1 inquiry:

> First, the importance of the objective underlying the impugned law must be assessed … the first question the Court should ask must relate to the nature and the purpose of the enactment, with a view to deciding whether the limitation represents a legitimate exercise of the legislative power for the attainment of a desirable social objective which would warrant overriding constitutionally protected rights. The second step in a s. 1 inquiry involves a proportionality test whereby the Court must attempt to balance a number of factors. The Court must examine the nature of the right, the extent of its infringement, and the degree to which the limitation furthers the attainment of the desirable goal embodied in the legislation. Also involved in the inquiry will be the importance of the right to the individual or group concerned, and the broader social impact of both the impugned law and its alternatives.

Application of the Oakes test

[59] The objective of the Act is the protection of human rights in private relationships. The Act is designed to provide individuals who fall within certain identified groups with a means of redress when they have been the subject of a discriminatory practice in the work place, or as a result of denial of a service, facility or accommodation normally available to the public. That objective is consistent with the purpose of the *Charter* itself, and is of fundamental concern to all Albertans.

[60] The Act is not intended to provide recourse to all persons who allege discriminatory treatment. There may be many other groups who are also omitted. Mere omission is not necessarily indicative of discriminatory action.

[61] The nature of the limitation is a denial of the remedies enjoyed by other disadvantaged groups to those who allege discrimination based on sexual orientation. There is no evidence of a legislative objective of pressing and substantial concern justifying the limitation. The limitation is inconsistent with the statement of principle embodied in the preamble to the legislation which provides that:

> … 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 …

A legislative limitation which controverts the very principle it purports to embody is not a legitimate exercise of the legislative power for the attainment of a desirable social objective which would warrant overriding constitutionally protected rights.

[62] The denial of the remedies found in the Act is not rationally connected to the objective of protecting individual rights. Since the omission is complete it does not

represent minimal impairment. The omission is significant because it precludes homosexuals from obtaining redress for prejudicial treatment in the private sector. There is no other comparable remedy in law.

[63] The paramount issue in determining the proportionality of the omission is whether the abridgement of rights of homosexuals is outweighed by the legislative objective of limiting the intrusion of human rights legislation into the private sector. In *McKinney*, La Forest J. said at p. 262:

> To open up all private and public action to judicial review could strangle the operation of society and … "diminish the area of freedom within which individuals can act".

In *Irwin Toy Ltd. v. Québec* (*Procureur général*) (1989), 58 D.L.R. (4th) 577 (S.C.C.) ("*Irwin Toy Ltd.*"), the majority (Dickson C.J.C., Lamer J. and Wilson J.) said at p. 625:

> Democratic institutions are meant to let us all share in the responsibility for these difficult choices. Thus, as courts review the results of the legislature's deliberations, particularly with respect to the protection of vulnerable groups, they must be mindful of the legislature's representative function.

In that case there was evidence that the Legislature had been faced with a choice of conflicting scientific evidence and differing demands on scarce resources. No similar rationale was presented for the omission in this case.

[64] Weighing the factors to be considered and while mindful of the Legislature's function, I am satisfied that the effect of the omission of sexual orientation from the legislation so severely encroaches upon the rights of homosexuals that the legislative objective, albeit important, is outweighed by the abridgement of rights.

What remedy should be provided?

[65] The two paramount principles to be followed in selecting an appropriate remedy were described in *Osborne v. Canada* (*Treasury Board*) (1991), 125 N.R. 241 (S.C.C.). There, Sopinka J. said at p. 280:

> In selecting an appropriate remedy under the *Charter* the primary concern of the court must be to apply the measures that will best vindicate the values expressed in the *Charter* and to provide the form of remedy to those whose rights have been violated that best achieves that objective. This flows from the court's role as guardian of the rights and freedoms which are entrenched as part of the supreme law of Canada … At the same time, the court must be sensitive to its proper role in the constitutional framework and refrain from intruding into the legislative sphere beyond what is necessary to give full effect to the provisions of the *Charter.*

Though the Court must be wary of enacting a remedy of a legislative nature, it is not always possible to avoid that result.

[66] In *Schachter v. Canada* (1992), 93 D.L.R. (4th) 1, the Supreme Court of Canada prescribed guidelines for choosing the appropriate remedy for unconstitutional, underinclusive legislation. Lamer C.J.C. held that the governing provision in such cases is s. 52 and not s. 24(1) of the *Charter.* He said that the "twin guiding principles" in these cases are that the Courts must respect the role of the Legislature, but must also give effect to the purposes of the *Charter* (at p. 25). He said that if the Court makes a finding of a violation of the *Charter* which is not justified under s. 1, it may choose one of the following possible remedies under s. 52:

1. Strike down the legislation;

2. Strike down and temporarily suspend the declaration of invalidity;

3. Read down or apply the doctrine of severance; or

4. Read in.

[67] To choose the appropriate remedy the Court must first define the extent of the inconsistency, following the two-stage *Oakes* test in relation to a s. 1 analysis. Here, that test has already shown that the legislation is inconsistent in that its purpose is not sufficiently pressing to warrant overriding the *Charter* right and the measures are not proportional to the objective. The next step is to decide upon the appropriate remedy.

[68] Because the issue concerns an underinclusion, reading down and severance are not options in this case. The only options to consider are either striking down the legislation, with or without a suspension of the declaration of invalidity, or reading in. The decision of whether to suspend the declaration of invalidity must be addressed separately from the issue of whether to read in or to strike down.

[69] Where the inconsistency is an omission, reading in is often an important tool in minimizing intrusion into the legislative sphere. It is an appropriate remedy if it furthers the legislative objective. It is necessary to consider whether the Legislature would have enacted the legislation if the omitted section had been included. Reading in is warranted if it allows the Court to act in a manner more consistent with the *Charter* than would a striking down. This is particularly so where, as here, the impugned legislation confers a benefit to some groups which would be extinguished if the legislation were struck down. Reading in will not be an appropriate remedy where the gap cannot be filled in with precision by the Court, where it would involve a significant intrusion into legislative budgetary decisions, or where it would be contrary to the legislative objectives.

[70] It may be preferable to suspend the striking down and declaration of invalidity in cases of underinclusiveness, to allow the government a chance to determine whether to cancel or extend the benefits of the legislation. However, in *Schachter*, Lamer C.J.C. stressed that delayed declarations are not a panacea for the problem of interference with the Legislature, particularly where the delay would allow a situation which has been found to violate the *Charter* to continue. That process may also result in a serious intrusion into the function of the Legislature because it would force a matter on to the Legislature's agenda against its will. It should generally only be applied where a declaration of invalidity could pose a risk to the public, threaten the rule of law, or deprive deserving persons of benefits, or where a reading in would have substantial budgetary implications, could not be achieved with precision, or may be contrary to the legislative objective.

[71] In *Haig*, at p. 507, Krever J.A. found that severance and striking down were inappropriate remedies in that case. The only reasonable options were either to strike down and temporarily suspend the declaration of invalidity, or to read in. Applying the test laid down in *Schachter* he concluded that reading in was the appropriate remedy. He found the inconsistency to be the omission of sexual orientation from the prohibited grounds of discrimination in the *Canadian Human Rights Act.* This omission could easily be determined with precision. Reading in would precisely fill the gap. Reading in was less intrusive than the striking down which included striking down the objective of the legislation. It left the purposes of the legislation intact but enhanced it by making it conform to the *Charter.* It would not have so great a budgetary impact as to substantially change the legislative scheme. He concluded at p. 508:

> … human rights legislative policy has evolved in this country. It is now an integral part of our social fabric. It is therefore inconceivable to me 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.

[72] The same reasoning applies in this case. Striking down the relevant provisions of the Act would not be an appropriate remedy because to do so would not provide a benefit to the applicants, and would remove the existing benefits from those groups presently included under the legislation.

[73] The Crown argues that reading in the words "sexual orientation" would substantially conflict with the legislative intent. It says that unlike the situation in *Haig*, there is no evidence in this case of any (at p. 507):

> … commitment of successive Ministers of Justice on behalf of their governments to amend the legislation to add sexual orientation to the list of prohibited grounds of discrimination …

[74] The Crown has produced evidence that since 1980 Opposition members have introduced several Bills to amend the Act by adding sexual orientation, none of which were discussed, and says that the Government has indicated no desire to add sexual orientation. Though there is evidence that two successive Ministers responsible for the administration of the Act supported the amendment, it appears they were not speaking on behalf of the Government.

[75] Evidence of correspondence with a number of cabinet members and members of the Legislative Assembly makes it clear that the omission was not the result of any oversight requiring correction by a reading in. However, the remedy of reading in is not restricted to cases of oversight. If evidence of Government support were required before the Court could read in a provision in underinclusive legislation, the remedy would seldom be available or necessary. In my view, Lamer C.J.C. did not contemplate the need for such evidence of government support in *Schachter* when he spoke of the need to consider the legislative intent. Though the Court must concern itself with the way in which legislatures act generally, it ought not to transgress into the political arena by conducting an assessment of the political views of the Government or the Opposition.

[76] Reading in would further the legislative objective through the very means the Legislature has chosen and would not substantially change the legislative scheme. I agree with Krever J.A. in *Haig* that because the objective of human rights legislation is consistent with the purposes of the *Charter*, it is safe to assume that the Legislature would have preferred an Act with sexual orientation included than no Act at all. That assumption is supported by the preamble to the Act which recognizes the inherent dignity and the equal and inalienable rights of all persons.

[77] It is not strongly disputed that the inconsistency could be determined with precision by the Court. In *Haig*, Krever J.A. had no difficulty reaching that conclusion. There, reading in merely required s. 3 of the *Canadian Human Rights Act* to be read to include the "sexual orientation." Here, the applicant seeks to have "sexual orientation" included in the list of prohibited grounds of discrimination in ss. 2(1), 3, 4, 7(1), 8(1) and 10 of the Act. That term is used in seven other provinces' and one territory's human rights legislation. The term is defined in the Yukon Territory, but not elsewhere. The lack of definition in other provincial legislation suggests the development of a commonly understood interpretation of that clause, rendering a definition unnecessary. I am satisfied

that the inconsistency in the Act could be easily and precisely remedied by a declaration that it be interpreted, applied and administered as though sexual orientation were included as a prohibited ground of discrimination. Legislative consideration is not required to achieve that end.

[78] 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*, it would not be substantial enough to change the nature of the scheme of the legislation. This is not the type of underinclusive legislation to which Lamer C.J.C. referred in *Schachter* in which he said at p. 30:

> The benefit with which we are concerned here is a monetary benefit for parents … The benefit itself is not constitutionally prohibited; it is simply underinclusive. Thus striking down the provision immediately would be inappropriate as such a course of action would deprive eligible persons of a benefit without providing any relief to the respondent. Such a situation demands, at the very least, that the operation of any declaration of invalidity be suspended to allow Parliament time to bring the provision into line with constitutional requirements.

It is clear that cases involving monetary benefits call for different considerations to permit the Legislature to equalize the payment of benefits and to appropriate the necessary funding. La Forest, J. referred to this at p. 34 when he stated:

> But it must be underlined that the case is one involving a scheme of social assistance which may dictate a quite different approach from that which one would follow in other areas.

In *Haig*, Krever J.A. acknowledged that extending the legislation to include persons who complain of discrimination because of their sexual orientation could have budgetary implications. However, he said at p. 507:

> Although there is no estimate in the evidence before us of this possible increased budgetary burden, it is, I think, safe to assume that it cannot be so great as substantially to change the nature of the legislative scheme created by the Act.

I make the same assumption here.

[79] Reading in would be less intrusive than striking down and temporarily suspending a declaration of invalidity and forcing the matter on to the legislative agenda at a time and within time limits not of its choosing. Reading in will permit the Legislature to consider the matter in accordance with its own agenda and take such action as it considers appropriate.

Conclusion

[80] I conclude that reading in of "sexual orientation" in the relevant provisions is the appropriate remedy in this case.

[81] Accordingly, I declare that (a) ss. 2(1), 3, 4, 7(1), 8(1), and 10 of the *Individual's Rights Protection Act* are inconsistent with s. 15(1) of the *Charter*, (b) such infringements are not demonstrably justified in a free and democratic society pursuant to s. 1 of the *Charter*, and (c) therefore the sections be interpreted, applied and administered as though they contained the words "sexual orientation".

[82] A further remedy under s. 24(1) of the *Charter* declaring that the Applicant Delwin Vriend has the right to file a complaint pursuant to the Act alleging discrimination on the grounds of sexual discrimination is redundant, and is denied.

[83] The declaration is stayed for a period of 30 days to permit the Crown to consider an appeal.

Application allowed.