Vriend *v.* Alberta - Equality Rights
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Argued: November 4, 1997 Decided: April 2, 1998

Present: Lamer C.J. and L'Heureux-Dubé, Sopinka (took no part in the judgment), Gonthier, Cory, McLachlin, Iacobucci, Major and Bastarache JJ.

On appeal from the Court of Appeal for Alberta

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.:

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 . . . . we 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." 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?

Factual Background

History of the IRPA

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. These additions were apparently, at least in part, made in response to the enactment of the *Charter* and its judicial interpretation. . . . 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.

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.

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* (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.

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

In December 1987 the appellant Delwin Vriend was employed as a laboratory coordinator by King's College in Edmonton, Alberta. . . . 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. . . .

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.

Vriend [ed. note: and a coalition of interest groups] applied . . . 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 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. . . .

Relevant Statutory Provisions

Individual's Rights Protection Act

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 . . .

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

refuse to employ or refuse to continue to employ any person, or

> 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. . . .

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

Analysis

. . .

Section 15(1)

Approach to Section 15(1)

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.

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.

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.

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:

> 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. . . .

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, "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.

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:

> . . . 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.
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> 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. . . .

In this case, . . . 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.

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

Does the IRPA Create a Distinction?

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*.

These arguments cannot be accepted. They are based on that "thin and impoverished" notion of equality referred to in *Eldridge*. It has been repeatedly held that identical treatment will not always constitute equal treatment. . . .

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. . . .

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: "Underinclusion may be simply a backhanded way of permitting discrimination".

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.

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. . . . 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*. . . .

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 creates the discrimination existing in society in order to determine that it creates a potentially discriminatory distinction. . . .

Denial of Equal Benefit and Protection of the Law

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.

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.

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

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." 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." It may as well be appropriate to consider whether the unequal treatment is based on "the stereotypical application of presumed group or personal characteristics."

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

In *Egan*, it was held, on the basis of "historical social, political and economic disadvantage suffered by homosexuals"and the emerging consensus among legislatures, as well as previous judicial decisions, 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." It is analogous to the other personal characteristics enumerated in s. 15(1); and therefore this step of the test is satisfied.

It has been noted, for example by Iacobucci J. in *Benner* 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.

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

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.

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*). 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. 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.

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 commendable goal of the legislation . . . 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.

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. . . .
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 denial of access to remedial procedures for discrimination on the ground of sexual orientation must have dire and demeaning consequences for those affected. . . . 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. . . .

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*). 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. . . .

Conclusion Regarding Section 15

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. . . .

IACOBUCCI J.:

I. Analysis

A. *Section 1 of the Charter* . . .

Pressing and Substantial Objective

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, others have considered only the purpose of the limitation that allegedly infringes the *Charter*. 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.

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. . . .

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. . . . [T]he 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.

Proportionality Analysis

Rational Connection

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. . . .

At the second stage of the *Oakes* test, the preliminary inquiry is a consideration of the rationality of the impugned provisions. 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*.

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).*

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.

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. . . .

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.

Minimal Impairment

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.

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. [Among them] s. 7(3) [and others] 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.

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. . . .

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.

Proportionality Between the Effect of the Measure and the Objective of the Legislation

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*. . . .

Remedial Principles

The leading case on constitutional remedies is *Schachter*. 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*.

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. . . .

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.

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." . . .

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. . . .

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. . . . However, as I see the matter, by definition, *Charter* scrutiny will always involve some interference with the legislative will.

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.

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.

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* (1995), at p. 21).

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. . . .

As I have already discussed, the concept of democracy means more than majority rule as Dickson C.J. so ably reminded us in *Oakes*. 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; M. Jackman, at p. 680). . . .

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*). . . . There is no evidence before this Court to suggest that any harm resulted from the immediate operation of the remedy in those cases.

[The reasons of L'Heureux-Dubé are omitted.]

MAJOR J.:

[Major, J., agreed with Cory and Iacobucci, JJ., that the employment-related sections of the Alberta legislation violated the Charter] …

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".

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.

> 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. . . .

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.

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.

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* . . . 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.

The only remaining issue is whether the declaration of invalidity ought to be temporarily suspended. . . .

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.