ALBERTA LABOUR RELATIONS BOARD

AN APPLICATION FOR DETERMINATION BROUGHT BY UNITED NURSES OF ALBERTA, JESSICA WAKEFORD AND ROCHELLE YOUNG AFFECTING ALBERTA HEALTH SERVICES

BOARD FILE NO. GE-07762

AUTHORITIES OF THE NURSE PRACTITIONER ASSOCIATION OF ALBERTA

RE: CHARTER ISSUE

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List of Authorities

BILL 4

2002

PUBLIC HEALTH AMENDMENT ACT, 2002

(Assented to , 2002)

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

Amends RSA 2000 cP-37

1 The *Public Health Act* is amended by this Act.

2 Section 1 is amended

(a) by adding the following after clause (ee):

(ee.1) "nurse practitioner" means a registered nurse within the meaning of the *Nursing Profession Act* who provides health services in accordance with the regulations;

(b) by repealing clause (ll).

3 Section 11 is repealed and the following is substituted:

Nurse practitioners

11 Notwithstanding the *Medical Profession Act* and the *Pharmaceutical Profession Act*, a nurse practitioner may provide the health services permitted under the regulations.

4 Section 22(2) and (3) are repealed and the following are substituted:

(2) Where a physician, a nurse practitioner or a midwife knows or has reason to believe that a person under the care in a hospital of the physician, nurse practitioner or midwife is infected with a disease to which subsection (1) applies, the physician, nurse practitioner or midwife shall, in addition to carrying out the physician's, nurse practitioner's or midwife's responsibilities under subsection (1), immediately inform the medical director or other person in charge of the hospital, and the medical director shall notify the medical officer of health of the regional health authority by telephone or in accordance with the prescribed form.

(3) Where a physician, a community health nurse, a nurse practitioner, a midwife or a person in charge of an institution knows or has reason to believe that a person under the care, custody, supervision or control of the physician, community health nurse, nurse practitioner, midwife or person in charge of an institution is infected with a disease referred to in section 20(2), the physician, community health nurse, nurse practitioner, midwife or person in charge of an institution shall, within 48 hours, notify the Chief Medical Officer in the prescribed form.

5 Section 39(1) is amended by striking out "registered nurse providing extended health services" **wherever it occurs and substituting** "nurse practitioner".

6 Section 66(1)(aa), (bb) and (cc) are repealed and the following is substituted:

(aa) respecting the health services that may be provided by a nurse practitioner and respecting the terms and conditions under which those services may be provided;

(bb) respecting any additional training and experience that may be required by a nurse practitioner to be eligible to provide particular health services;

(cc) respecting any conditions relating to the employment or engagement of a nurse practitioner;

7 The *Health Professions Act* is amended by repealing section 147(6) and substituting the following:

(6) The *Public Health Act* is amended in section 1

(a) in clause (ee.1) by striking out "*Nursing Profession Act*" **and substituting** "*Health Professions Act*";

(b) in clause (g) by striking out "as defined in the *Nursing Profession Act*" **and substituting** "within the meaning of the *Health Professions Act*".

Explanatory Notes

1 Amends chapter P-37 of the Revised Statutes of Alberta 2000.

2 Section 1(ll) presently reads:

(ll) "registered nurse providing extended health services" means a registered nurse as defined in the Nursing Profession Act who is employed or engaged by a regional health authority or a provincial health board established under the Regional Health Authorities Act or the Department to provide the extended health services referred to in section 11;

3 Section 11 presently reads:

11 Notwithstanding the Medical Profession Act and the Pharmaceutical Profession Act, a registered nurse providing extended health services may provide the extended health services permitted under the regulations.

4 Consequential to name change.

5 Consequential to name change.

6 Consequential to name change. Section 66(1)(aa), (bb) and (cc) presently read:

66(1) The Lieutenant Governor in Council may make regulations

(aa) respecting the extended health services that may be provided by a registered nurse providing extended health services and respecting the terms and conditions under which those services may be provided;

(bb) respecting any additional training and experience that may be required by a registered nurse providing extended health services to be eligible to provide particular extended health services;

(cc) respecting any conditions relating to the employment or engagement of a registered nurse providing extended health services;

7 Consequential amendment to Health Professions Act.

BILL 38

2002

MISCELLANEOUS STATUTES AMENDMENT ACT, 2002 (NO. 2)

(Assented to , 2002)

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

Alberta Heritage Foundation for Medical Research Act

Amends RSA 2000 cA-21

1 The *Alberta Heritage Foundation for Medical Research Act* is amended in section 8(2) by striking out "the amounts paid into it pursuant to section 7(2)" **and substituting** "$300 000 000".

Alberta Official Song Act

Amends SA 2001 cA-27.5

2 The *Alberta Official Song Act* is amended by repealing section 7(1) and substituting the following:

Report

7(1) The Committee must make a final report to the Minister on or before March 31, 2004 outlining its work and making a recommendation for an official song for Alberta.

Condominium Property Act

Amends RSA 2000 cC-22

3 The *Condominium Property Act* is amended in section 13(a) by striking out "section 9" **and substituting** "section 12".

Dairy Industry Omnibus Act, 2002

Amends SA 2002 c11

4 The *Dairy Industry Omnibus Act, 2002* is amended in section 1

(a) in subsection (9)

(i) by striking out "agreement" **and substituting** "agreement, including but not restricted to a reference to the Alberta Dairy Control Board as a party to the agreement,";

(ii) by adding ", and agreements entered into by the Alberta Dairy Control Board and in effect on August 1, 2002 are deemed to have been entered into by Alberta Milk" **after** "Milk Plan";

(b) in subsection (11) by adding "and, in accordance with subsection (9), any reference to the Alberta Dairy Control Board in such an agreement, including but not restricted to a reference to the Alberta Dairy Control Board as a party to the agreement, is deemed to be a reference to Alberta Milk" **after** "of the *Marketing of Agricultural Products Act*".

Dental Disciplines Act

Amends RSA 2000 cD-8

5(1) The *Dental Disciplines Act* is amended by this section.

(2) Section 1(h) is repealed and the following is substituted:

(h) "dentist" means a regulated member of The Alberta Dental Association and College under Schedule 7 of the *Health Professions Act*;

(3) Section 66(1)(b) is amended by striking out "the Alberta Dental Association," **and substituting** "The Alberta Dental Association and College,".

(4) Section 75(3)(f) is repealed and the following is substituted:

(f) The Alberta Dental Association and College.

Expropriation Act

Amends RSA 2000 cE-13

6 The *Expropriation Act* is amended in section 15(2) by striking out "5 days" **and substituting** "15 days".

Fair Trading Act

Amends RSA 2000 cF-2

7 The *Fair Trading Act* is amended in section 103(2)(b) by striking out "*Dental Profession Act*," **and substituting** "Schedule 7 of the *Health Professions Act*,".

Fisheries (Alberta) Act

Amends RSA 2000 cF-16

8(1) The *Fisheries (Alberta) Act* is amended by repealing section 19(2) and substituting the following:

Forest officers by virtue of appointments to other offices

19.1 The following individuals are fishery officers by virtue of their appointments to the offices respectively referred to, namely individuals appointed as

(a) members of the Royal Canadian Mounted Police,

(b) conservation officers, under section 1 of Schedule 3.1 to the *Government Organization Act*, and

(c) forest officers, under section 2 of the *Forests Act*.

(2) This section comes into force on Proclamation.

Forests Act

Amends RSA 2000 cF-22

9(1) The *Forests Act* is amended by repealing section 3 and substituting the following:

Forest officers by virtue of appointments to other offices

3 The following individuals are forest officers by virtue of their appointments to the offices respectively referred to, namely individuals appointed as

(a) members of the Royal Canadian Mounted Police,

(b) conservation officers, under section 1 of Schedule 3.1 to the *Government Organization Act*, and

(c) wildlife officers, under section 1.1(1) of the *Wildlife Act*.

(2) This section comes into force on Proclamation.

Government Organization Act

Amends RSA 2000 cG-10

10(1) The *Government Organization Act* is amended by this section.

(2) The following is added after Schedule 3:

Schedule 3.1

Community Development Matters

Appointed conservation officers

1 The Minister may appoint as conservation officers employees of the Crown who are subject to the *Public Service Act*.

Conservation officers by virtue of appointments to other offices

2 The following individuals are conservation officers by virtue of their appointments to the offices respectively referred to, namely individuals appointed as

(a) members of the Royal Canadian Mounted Police,

(b) members of another police service specified in writing by the Minister,

(c) fishery officers, under the *Fisheries Act* (Canada),

(d) wildlife officers, under section 1.1(1) of the *Wildlife Act*,

(e) forest officers, under section 2 of the *Forests Act*, and

(f) other peace officers specified in writing by the Minister.

Powers, duties, jurisdiction and functions of conservation officers

3(1) Conservation officers have the powers, duties and functions assigned to them by law.

(2) The Minister may in writing restrict or negate the jurisdiction relative to which a class of conservation officer referred to in section 2 is entitled to act under any law.

(3) A conservation officer, in the exercise of the powers and the execution of the duties of a conservation officer, is a person employed for the preservation and maintenance of the public peace.

(4) Appointments of conservation officers that were made under section 7(1) of Schedule 5 before the commencement of this section and that were still in force immediately before that time remain valid for the duration of their terms and are deemed to be appointments made under section 1.

(3) Schedule 5 is amended by repealing section 7.

(4) Schedule 9 is amended

(a) by repealing section 1 and substituting the following:

Administration of justice

1(1) The Minister is by virtue of the Minister's office Her Majesty's Attorney General in and for the Province of Alberta.

(2) The Deputy of the Minister is the Deputy Attorney General.

(b) in section 2(e) by striking out "and the Solicitor General of England".

(5) The following is added after Schedule 14:

Schedule 15
Solicitor General

Solicitor General

1 The Solicitor General

(a) shall exercise the powers and is charged with the duties attached to the office of the Solicitor General of England by law or usage insofar as those powers and duties are applicable to Alberta, and

(b) is charged generally with any duties that may be at any time assigned to the Solicitor General by law or by the Lieutenant Governor in Council.

(6) Subsections (1), (2) and (3) come into force on Proclamation.

Health Information Act

Amends RSA 2000 cH-5

11(1) The *Health Information Act* is amended in section 110(2)(a) in the new section 22(1.1) by striking out "(3.2) or (4)" **wherever it occurs and substituting** "(6.1) or (7)".

(2) This section is deemed to have come into force January 1, 2002.

Health Professions Act

Amends RSA 2000 cH-7

12(1) The *Health Professions Act* is amended by this section.

(2) Section 143 is amended by adding the following after subsection (3):

> **(4) The *Fair Trading Act* is amended in section 103(2)(b) by striking out** "*Chiropractic Profession Act*," **and substituting** "Schedule 2 of the *Health Professions Act*,".

(3) Section 146 is amended by adding the following after subsection (6):

> **(6.01) The *Fair Trading Act* is amended in section 103(2)(b) by striking out** "*Medical Profession Act*," **and substituting** "Schedule 21 of the *Health Professions Act*,".

(4) Section 147 is amended by adding the following after subsection (3):

> **(3.1) The *Fair Trading Act* is amended in section 103(2)(b) by striking out** "*Nursing Profession Act*," **and substituting** "Schedule 24 of the *Health Professions Act*,".

(5) Section 149 is amended by adding the following after subsection (2):

> **(3) The *Fair Trading Act* is amended in section 103(2)(b) by striking out** "*Optometry Profession Act*," **and substituting** "Schedule 17 of the *Health Professions Act*,".

(6) Section 150 is amended by adding the following after subsection (2):

(2.1) The *Fair Trading Act* is amended in section 103(2)(b) by striking out "*Pharmaceutical Profession Act,*" **and substituting** "Schedule 19 of the *Health Professions Act,*".

(7) Schedule 3 is amended

(a) in the heading to the Schedule by striking out "**Technicians**" **and substituting** "**Technologists**";

(b) in section 1

(i) in subsection (1) by striking out "the same name" **and substituting** "the name Alberta College of Combined Laboratory and X-ray Technologists";

(ii) in subsection (2) by striking out "Technicians of Alberta" **and substituting** "Technologists";

(iii) in subsection (3) by striking out "Technicians" **wherever it occurs and substituting** "Technologists";

(iv) in subsection (4) by striking out "Technicians" **and substituting** "Technologists";

(c) in section 2

(i) by striking out "Technicians" **and substituting** "Technologists";

(ii) by adding the following after clause (a):

(a.1) combined laboratory x-ray technologist;

(d) in section 3 by striking out "technicians" **and substituting** "technologists";

(e) in section 4 by striking out "Technicians" **and substituting** "Technologists";

(f) in section 5(a), (b), (c) and (e) by striking out "Technicians under this Act" **and substituting** "Technologists under this Act";

(g) in section 6 by striking out "Technicians under this Act" **and substituting** "Technologists under this Act";

(h) in section 7

(i) in subsection (2)

(A) in clauses (a) and (c) by striking out "Technicians, and any" **and substituting** "Technologists, and any";

(B) in clause (b) by striking out "Technicians under this Act" **and substituting** "Technologists under this Act";

(ii) in subsection (5) by striking out "Technicians under this Act" **and substituting** "Technologists under this Act";

(i) in section 8(3)(a), (b), (c), (d), (e), (f), (g), (h) and (i) by striking out "Technicians, and any" **and substituting** "Technologists, and any";

(8) Schedule 14 is amended in section 2 by adding the following after clause (a):

(a.1) doctor of naturopathic medicine;

(9) Schedule 19 is amended in section 2 by adding the following after clause (g):

(g.1) registered pharmacist;

(g.2) pharmacy student;

(g.3) pharmacist student;

(g.4) Pharm. D.;

(10) Schedule 24 is amended in section 2

(a) by adding the following after clause (b):

(b.1) nurse practitioner;

(b) by adding the following after clause (f):

(g) N.P.

Highway Traffic Act

Amends RSA 2000 cH-8

13 The *Highway Traffic Act* is amended in sections 13, 14(1)(d) and 70(6) by striking out "Minister of Environment" **and substituting** "Minister responsible for the *Provincial Parks Act*".

Hospitals Act

Amends RSA 2000 cH-12

14 The *Hospitals Act* is amended in sections 82(2)(b), 97 and 98 by striking out "May 1, 1996" **wherever it occurs and substituting** "August 1, 1996".

Human Rights, Citizenship and Multiculturalism Act

Amends RSA 2000 cH-14

15 The *Human Rights, Citizenship and Multiculturalism Act* is amended in section 11 by striking out "No" **and substituting** "A".

Insurance Act

Amends RSA 2000 cI-3

16 The *Insurance Act* is amended in section 293 by striking out "188(3)" **and substituting** "195(3)".

Interpretation Act

Amends RSA 2000 cI-8

17(1) The *Interpretation Act* is amended by repealing section 28(1)(i).

(2) This section comes into force on Proclamation.

Justice Statutes Amendment Act

Amends RSA 2000 c16(Supp)

18 The *Justice Statutes Amendment Act* (RSA 2000 c16(Supp)) is amended in section 74(4) in the new clause (f.1) by striking out "16(1)(b)" **and substituting** "17(1)(b)".

Legal Profession Act

Amends RSA 2000 cL-8

19(1) The *Legal Profession Act* is amended by this section.

(2) Section 78(5) is repealed and the following is substituted:

(5) Notwithstanding subsections (1) to (4), where the Conduct Committee is of the opinion that there are reasonable and probable grounds to believe that a member has committed a criminal offence, it may direct the Executive Director to advise the Minister of Justice and Attorney General.

(6) Notwithstanding subsections (1) to (4), if following a hearing under this Division, the Hearing Committee or the panel of Benchers is of the opinion that there are reasonable and probable grounds to believe that the member has committed a criminal offence, the Hearing Committee or the panel, as the case may be, shall forthwith direct the Executive Director to send a copy of the hearing record to the Minister of Justice and Attorney General.

(7) On receiving a direction under subsection (6), the Executive Director shall forthwith provide to the Minister of Justice and Attorney General the following:

(a) the member's name;

(b) the criminal offence suspected to have been committed;

(c) copies of all witness statements but not compelled statements given by the member;

(d) copies of all relevant evidence, including transcripts, but not transcripts subject to claims of solicitor-client privilege or client confidentiality, nor transcripts of the member's testimony;

(e) a general description of relevant evidence in the possession of the Society that the Society claims may be subject to solicitor-client privilege;

(f) a general description of relevant evidence in the possession of the Society, that the Society claims may be confidential to the client.

(8) On request by the Minister of Justice and Attorney General, the Executive Director shall forthwith provide to the Minister of Justice and Attorney General any compelled statements of the member or any testimony of the member not subject to claims of solicitor-client privilege or client confidentiality.

Legislative Assembly Act

Amends RSA 2000 cL-9

20 The *Legislative Assembly Act* is amended in section 37(3)(b) by striking out "Member's Lieutenant" **and substituting** "Lieutenant".

Livestock Industry Diversification Act

Amends RSA 2000 cL-17

21(1) The *Livestock Industry Diversification Act* is amended in section 13(2) by striking out "conservation officer" **and substituting** "wildlife officer appointed under section 1.1(1) of the *Wildlife Act*".

(2) This section comes into force on Proclamation.

Metis Settlements Act

Amends RSA 2000 cM-14

22 The *Metis Settlements Act* is amended in section 133(1) and (2) by striking out "Minister of Environmental Protection" **and substituting** "Minister of Environment".

Municipal Government Act

Amends RSA 2000 cM-26

23 The *Municipal Government Act* is amended

(a) by adding the following after section 694:

Division 13
Transitional

695 and **696** Repealed by Revision.

Zoning caveat

697(1) On September 1, 1995 a zoning caveat prepared and signed by the Director of Town and Rural Planning or the Provincial Planning Director and registered in a land titles office under a former Act ceases to have effect.

(2) On and after September 1, 1995, the owner of a parcel of land that is affected by a caveat referred to in subsection (1) may apply to the Registrar to endorse the certificate of title

with a memorandum cancelling the registration of the zoning caveat.

(3) On receipt of an application under subsection (2) and on being satisfied that the caveat is a zoning caveat, the Registrar must cancel the registration of the caveat.

698 to **708** Repealed by Revision.

(b) in Part 18 by striking out "**695 to 709** Repealed by Revision." **and substituting** "**709** Repealed by Revision.".

Off-highway Vehicle Act

Amends RSA 2000 cO-5

24(1) The *Off-highway Vehicle Act* is amended by this section.

(2) Section 1(1)(n) is repealed and the following is substituted:

(n) "peace officer" means

(i) a member of the Royal Canadian Mounted Police,

(ii) a member of a municipal police service,

(iii) a conservation officer appointed under section 1 of Schedule 3.1 to the *Government Organization Act*,

(iv) a wildlife officer appointed under section 1.1(1) of the *Wildlife Act*, or

(v) a forest officer appointed under section 2 of the *Forests Act*;

(3) Section 18(2)(a.1) is amended by striking out "Minister of Environment" **wherever it occurs and substituting** "Minister responsible for the *Provincial Parks Act*".

(4) Subsection (2) comes into force on Proclamation.

Provincial Court Act

Amends RSA 2000 cP-31

25 The *Provincial Court Act* is amended in section 7 by adding ", the presiding justices of the peace" **after** "judges".

Queen's Counsel Act

Amends RSA 2000 cQ-1

26 The *Queen's Counsel Act* is amended in section 5 by adding the following after clause (c):

(c.1) the Solicitor General of Alberta for the time being;

Railway (Alberta) Act

Amends RSA 2000 cR-4

27(1) The *Railway (Alberta) Act* is amended by this section.

(2) Section 58(2) is repealed and the following is substituted:

(2) Section 4 is amended by striking out "and to which the *Railway Act* does not apply,".

(3) Section 61 is repealed and the following is substituted:

61(1) The *Public Utilities Board Act* is amended by this section.

(2) Section 1(i)(iii) is repealed.

(3) Section 89(d) is repealed.

(4) Section 97 is repealed.

(5) Section 105 is repealed.

(4) Subsections (1) and (3) are deemed to have come into force on September 1, 2002.

Safety Codes Act

Amends RSA 2000 cS-1

28 The *Safety Codes Act* is amended in section 50(3) by striking out "45(5)" **and substituting** "49(5)".

School Act

Amends RSA 2000 cS-3

29 The *School Act* is amended in section 1(1)(a) by striking out "119" **and substituting** "129".

Traffic Safety Act

Amends RSA 2000 cT-6

30(1) The *Traffic Safety Act* is amended by this section.

(2) Section 1(1)(ff) is amended by repealing subclauses (iv) to (vii) and substituting the following:

(iv) a park warden appointed under the *Parks Canada Agency Act* (Canada);

(v) a conservation officer appointed under section 7 of Schedule 5 to the *Government Organization Act*;

(vi) a forest officer appointed under the *Forests Act*;

(vii) a wildlife officer appointed under the *Wildlife Act*;

(3) Section 1 is amended by adding the following after subsection (1):

(1.1) For the purposes of this Act, an individual who is a peace officer by virtue of

(a) section 1(1)(ff)(iv) has the powers, duties and functions of a peace officer only while acting in a national park established under the *National Parks Act* (Canada), and

(b) section 1(1)(ff)(vi) has the powers, duties and functions of a peace officer only while acting for the purposes of enforcing this Act with respect to off-highway vehicles as defined in Part 6.

(4) Section 1(1)(ff)(v) is amended by striking out "7 of Schedule 5" **and substituting** "1 of Schedule 3.1".

(5) Sections 17 and 106(b)(vii) are amended by striking out "Minister of Environment" **wherever it occurs and substituting** "Minister responsible for the *Provincial Parks Act*".

(6) Subsection (4) comes into force on Proclamation.

Traffic Safety Amendment Act, 2001

Amends SA 2001 c14

31(1) The *Traffic Safety Amendment Act, 2001* is amended by this section.

(2) Section 2(b) is repealed.

(3) This section comes into force on Proclamation.

Wilderness Areas, Ecological Reserves and Natural Areas Act

Amends RSA 2000 cW-9

32(1) The *Wilderness Areas, Ecological Reserves and Natural Areas Act* is amended by this section.

(2) Section 2(4) is repealed and the following is substituted:

(4) The Advisory Committee shall consist of

(a) 6 employees of the Government, and

(b) 6 persons who are not employees of the Government and not members or employees of an agency of the Government.

(3) Section 6 is amended

(a) in subsection (2) by striking out "of Resource Development" **and substituting** "of Energy";

(b) in subsection (3) by striking out "of Environment" **wherever it occurs.**

(4) Section 15(3) is amended by repealing clauses (b) and (c) and substituting the following:

(b) a member of another police service specified in writing by the Minister,

(c) a conservation officer, appointed under section 1 of Schedule 3.1 to the *Government Organization Act*,

(d) a wildlife officer, appointed under section 1.1(1) of the *Wildlife Act*,

(e) a forest officer, appointed under section 2 of the *Forests Act*, or

(f) another peace officer specified in writing by the Minister.

(5) The Schedule is amended by striking out "Department of Environment" **wherever it occurs and substituting** "Minister's Department".

(6) Subsection (4) comes into force on Proclamation.

Wildlife Act

Amends RSA 2000 cW-10

33(1) The *Wildlife Act* is amended by this section.

(2) Section 1(1) is amended

(a) by adding the following after clause (a):

(a.1) "appointed officer" means a wildlife officer appointed under section 1.1(1) who is an employee of the Crown and subject to the *Public Service Act*;

(b) by repealing clause (u);

(c) by adding the following after clause (mm):

(nn) "wildlife officer" or "officer" means a person holding office as a wildlife officer under section 1.1(1) or 1.2.

(3) The following is added after section 1:

Appointed wildlife officers

1.1(1) The Minister may appoint wildlife officers.

(2) The Minister may in writing restrict the jurisdiction relative to which an officer who is appointed under subsection (1) but is not an appointed officer is entitled to act under this Act.

Wildlife officers by virtue of appointments to other offices

1.2 The following individuals are wildlife officers by virtue of their appointments to the offices respectively referred to, namely individuals appointed as

(a) members of the Royal Canadian Mounted Police,

(b) conservation officers, under section 1 of Schedule 3.1 to the *Government Organization Act*, and

(c) forest officers, under section 2 of the *Forests Act*.

(4) Section 60 is amended

(a) in subsection (1) by striking out "a conservation officer appointed under section 7(1) of Schedule 5 to the *Government Organization Act*" **and substituting** "an appointed officer";

(b) in subsection (2)(b) by striking out "a conservation officer referred to in subsection (1)" **and substituting** "an appointed officer".

(5) Section 65 is amended

(a) by repealing subsection (1) and substituting the following:

Status as peace officer

65(1) A wildlife officer or wildlife guardian, in executing the duties and functions and exercising the powers of that office, is a person employed for the preservation and maintenance of the public peace.

(b) in subsection (3) by striking out "Conservation" **and substituting** "Wildlife".

(6) The heading of Part 9 is repealed and the following is substituted:

Part 9
Regulations and Transitional Provisions

Transitional – orders affecting conservation officers

106 Where a subsisting order of a court or other tribunal made before the commencement of section 33(3) of the *Miscellaneous Statutes Amendment Act, 2002 (No. 2)* makes reference to a conservation officer with regard to a function under this Act or the regulations, the reference in that order is deemed to be to a wildlife officer.

(7) The following provisions are amended by striking out "conservation" **and substituting** "wildlife":

section 1(6)(b);
section 3;
section 11(b);
section 14(2);
section 66(1);
section 67(1);
section 68(1);
section 69(2);
section 70(1)(b);
section 71(1);
section 72(1);
section 73;
section 74(1);
section 75(1);
section 79(1)(b);
section 80(2);
section 81(1);
section 83;
section 85(1)(c);
section 85(7);
section 101(7).

(8) This section comes into force on Proclamation.

Explanatory Notes

Alberta Heritage Foundation for Medical Research Act

1 Amends chapter A-21 of the Revised Statutes of Alberta 2000. Section 8(2) presently reads:

(2) The Provincial Treasurer shall not pay money out of the Endowment Fund if the payment would result in the value of the assets of the Endowment Fund being less than the amounts paid into it pursuant to section 7(2).

Alberta Official Song Act

2 Amends chapter A-27.5 of the Statutes of Alberta, 2001. Section 7(1) presently reads:

7(1) Not later than 18 months after the first members of the Committee are appointed under section 4 or June 3, 2003, whichever occurs first, the Committee must make a final report to the Minister outlining its work and making a recommendation for an official song for Alberta.

Condominium Property Act

3 Amends chapter C-22 of the Revised Statutes of Alberta 2000. Corrects section reference.

Dairy Industry Omnibus Act, 2002

4 Amends chapter 11 of the Statutes of Alberta, 2002. Section 1(9) and (11) presently read:

(9) Any reference to the Alberta Dairy Control Board in an agreement is, on and after the coming into force of this Act, deemed to be a reference to Alberta Milk under the Alberta Milk Plan.

(11) Any agreement referred to in section 12 or 30 of the Dairy Board Act entered into by the Alberta Dairy Control Board with a government or an agent of a government and in effect on the coming into force of this Act is deemed, on and after the coming into force of this Act, to have been entered into by Alberta Milk and to comply with the requirements of section 51 of the Marketing of Agricultural Products Act.

Dental Disciplines Act

5(1) Amends chapter D-8 of the Revised Statutes of Alberta 2000.

(2) Section 1(h) presently reads:

1 In this Act,

(h) "dentist" means a licensed member as defined in the Dental Profession Act;

(3) Section 66(1)(b) presently reads:

66(1) There is hereby established the Dental Disciplines Advisory Committee consisting of

(b) one dentist appointed by the Minister from a list of nominees prepared by the Alberta Dental Association, and

(4) Section 75(3)(f) presently reads:

(3) Before an approval is given by the Lieutenant Governor in Council, the Minister shall consult with

(f) the Alberta Dental Association.

Expropriation Act

6 Amends chapter E-13 of the Revised Statutes of Alberta 2000. Section 15 presently reads in part:

15(1) When the approving authority receives an objection, it shall forthwith notify the Minister.

(2) Within 5 days after receiving notice that the approving authority has received an objection, the Deputy Minister or the Deputy Minister's designate shall appoint an inquiry officer, who is not an officer or employee of the Crown or of any agency of the Crown, to conduct an inquiry in respect of the intended expropriation.

Fair Trading Act

7 Amends chapter F-2 of the Revised Statutes of Alberta 2000 by changing a reference in section 103(2)(b).

Fisheries (Alberta) Act

8(1) Amends chapter F-16 of the Revised Statutes of Alberta 2002. Section 19(2) presently reads:

(2) The following are fishery officers by virtue of their office:

(a) all members of the Royal Canadian Mounted Police;

(b) all forest officers appointed under section 2 of the Forests Act.

(2) Coming into force.

Forests Act

9(1) Amends chapter F-22 of the Revised Statutes of Alberta 2000. Section 3 presently reads:

3 All members of the Royal Canadian Mounted Police, all conservation officers and all fishery officers

(a) are by virtue of their office forest officers, and

(b) have the same powers that are conferred on a forest officer by law.

(2) Coming into force.

Government Organization Act

10(1) Amends chapter G-10 of the Revised Statutes of Alberta 2000.

(2) Adds Schedule 3.1, Community Development Matters.

(3) Section 7 of Schedule 5 presently reads:

7(1) The Minister may appoint as conservation officers employees of the Crown who are subject to the Public Service Act.

(2) The following are conservation officers by virtue of their offices:

(a) members of the Royal Canadian Mounted Police;

(b) members of another police service specified in writing by the Minister;

(c) fishery officers appointed under the Fisheries Act (Canada);

(d) forest officers appointed under the Forests Act;

(e) other peace officers specified in writing by the Minister.

(3) Conservation officers have the powers, duties and functions assigned to them by law.

(4) The Minister may in writing restrict or negate the jurisdiction relative to which a class of conservation officer referred to in subsection (2) is entitled to act under any law.

(5) A conservation officer, in the exercise of the powers and the execution of the duties of a conservation officer, is a person employed for the preservation and maintenance of the public peace.

(4) Schedule 9, sections 1 and 2(e) presently read:

1(1) The Minister is by virtue of the Minister's office

(a) Her Majesty's Attorney General in and for the Province of Alberta, and

(b) Her Majesty's Solicitor General in and for the Province of Alberta.

(2) The Deputy of the Minister is the Deputy Attorney General and the Deputy Solicitor General.

2 The Minister

(e) shall exercise the powers and is charged with the duties attached to the office of the Attorney General of England and the Solicitor General of England by law or usage insofar as those powers and duties are applicable to Alberta;

(5) Adds Schedule 15, Solicitor General.

(6) Coming into force.

Health Information Act

11(1) Amends chapter H-5 of the Revised Statutes of Alberta 2000.
Corrects section reference.

(2) Coming into force.

Health Professions Act

12(1) Amends chapter H-7 of the Revised Statutes of Alberta 2000.

(2) Changes a reference.

(3) Changes a reference.

(4) Changes a reference.

(5) Changes a reference.

(6) Changes a reference.

(7) Changes references.

(8) Adds title.

(9) Adds titles and an abbreviation.

(10) Adds a title and an abbreviation.

Highway Traffic Act

13 Amends chapter H-8 of the Revised Statutes of Alberta. Sections 13, 14(1)(d) and 15 presently read:

13 With respect to a road or highway that is under the direction, control and management of the Minister of Environment, that Minister may by order

(a) control or prohibit the movement of vehicular, pedestrian or other traffic by means of signs posted along the road or highway;

(b) open or close a road or highway.

14(1) In this section, "speed authority" means,

(d) in the case of a provincial park or recreation area, the Minister of Environment;

70(6) Except where a higher rate of speed is authorized pursuant to section 14, no person shall drive on a road or highway that is subject to the direction, control and management of the Minister of Environment at a greater speed than 80 kilometres per hour.

Hospitals Act

14 Amends chapter H-12 of the Revised Statutes of Alberta 2000. Corrects the date that the section came into force.

Human Rights, Citizenship and Multiculturalism Act

15 Amends chapter H-14 of the Revised Statutes of Alberta 2000. Section 11, as published in the RSA 2000, read:

11 No contravention of this Act shall be deemed not to have occurred if the person who is alleged to have contravened the Act shows that the alleged contravention was reasonable and justifiable in the circumstances.

Insurance Act

16 Amends chapter I-3 of the Revised Statutes of Alberta 2000. Corrects section reference.

Interpretation Act

17(1) Amends chapter I-8 of the Revised Statutes of Alberta 2000. Section 28(1)(i) presently reads:

28(1) In an enactment,

(i) "conservation officer" means a person holding office as a conservation officer under section 7 of Schedule 5 to the Government Organization Act;

(2) Coming into force.

Justice Statutes Amendment Act

18 Amends chapter 16(Supp) of the Revised Statutes of Alberta 2000. Corrects section reference.

Legal Profession Act

19(1) Amends chapter L-8 of the Revised Statutes of Alberta 2000.

(2) Section 78(5) presently reads:

(5) Notwithstanding subsections (1) to (3), if, following their respective hearings under this Division, the Hearing Committee or the panel of Benchers is of the opinion that there are reasonable and probable grounds to believe that the member has committed a criminal offence, the Hearing Committee or the panel, as the case may be, shall direct the Executive Director to send a copy of the hearing record to the Minister.

Legislative Assembly Act

20 Amends chapter L-9 of the Revised Statutes of Alberta 2000. Section 37(3)(b) presently reads:

(3) If a Member holds office as a member of a board, commission, committee or other body to which the Member is appointed by the Lieutenant Governor in Council or a Minister of the Crown or by a regulation,

(b) the Member's Lieutenant Governor in Council may authorize the provision of any services or things to or for the use of the Member, if the Member's rate of fees is prescribed at a monthly or yearly rate.

Livestock Industry Diversification Act

21(1) Amends chapter L-17 of the Revised Statutes of Alberta 2000. Section 13(2) presently reads:

(2) If a live species animal that is not an authorized present or prospective game-production animal is found on a farm, the operator shall forthwith notify a conservation officer of that fact.

(2) Coming into force.

Metis Settlements Act

22 Amends chapter M-14 of the Revised Statutes of Alberta 2000. Section 133(1) and (2) presently read:

133(1) At the request of a settlement council, the Minister of Environmental Protection may authorize the council to issue Metis Commercial Fishing Licences to settlement members and members of adjacent settlements for commercial purposes, with or without conditions.

(2) If fishing licences are issued under subsection (1), a proportion of the total catch designated by the Minister of Environmental Protection from the body of water from which it is proposed to take the fish must be set aside as available only for settlement members.

Municipal Government Act

23 Amends chapter M-26 of the Revised Statutes of Alberta 2000. Re-enacts section inadvertently repealed by Revision.

Off-highway Vehicle Act

24(1) Amends chapter O-5 of the Revised Statutes of Alberta 2000.

(2) Section 1(1)(n) presently reads:

1(1) In this Act,

(n) "peace officer" means a member of the Royal Canadian Mounted Police, a member of a municipal police service, a forest officer or a conservation officer;

(3) Section 18(2) presently reads in part:

(2) Notwithstanding subsection (1),

(a) the Minister of Infrastructure may by order authorize persons to operate off-highway vehicles along any portion of any highway or class of highway under that Minister's direction, control and management, subject to any restrictions and conditions the Minister of Infrastructure may prescribe,

(a.1) the Minister of Environment may by order authorize persons to operate off-highway vehicles along any portion of any highway or class of highway under that Minister's direction, control and management, subject to any restrictions and conditions the Minister of Environment may prescribe,

(4) Coming into force.

Provincial Court Act

25 Amends chapter P-31 of the Revised Statutes of Alberta 2000. Adds words added by section 10(6) of the Justice Statutes Amendment Act, 1998, but inadvertently omitted from revision.

Queen's Counsel Act

26 Amends chapter Q-1 of the Revised Statutes of Alberta 2000. Section 5 presently reads:

5 The following members of the Bar of Alberta have precedence in the courts of Alberta in the following order:

(a) the Minister of Justice of Canada for the time being;

(b) the Solicitor General of Canada for the time being;

(c) the Minister of Justice and Attorney General of Alberta for the time being;

(d) the members of the Bar of Alberta who have filled the office of Minister of Justice of Canada, Solicitor General of Canada, Attorney General of Alberta, Minister of Justice and Attorney General of Alberta or Solicitor General of Alberta, according to seniority of appointment as such.

Railway (Alberta) Act

27(1) Amends chapter R-4 of the Revised Statutes of Alberta 2000.

(2) Removes reference to repealed Act.

(3) Corrects section references.

(4) Coming into force.

Safety Codes Act

28 Amends chapter S-1 of the Revised Statutes of Alberta 2000. Corrects section reference.

School Act

29 Amends chapter S-3 of the Revised Statutes of Alberta 2000. Corrects section reference.

Traffic Safety Act

30(1) Amends chapter T-6 of the Revised Statutes of Alberta 2000.

(2) Section 1(1)(ff) presently reads:

1(1) In this Act,

(ff) "peace officer" means

(i) a member of the Royal Canadian Mounted Police;

(ii) a member of a municipal police service;

(iii) a special constable if under that person's appointment as a special constable that person is empowered to carry out the duties of a peace officer under, or to enforce the provisions of, this Act;

(iv) a park warden appointed pursuant to the Parks Canada Agency Act (Canada), while carrying out duties under this Act in a national

park established under the National Parks Act (Canada);

(v) a park ranger appointed pursuant to the Provincial Parks Act while carrying out duties under this Act for the purposes of enforcing this Act;

(vi) a forest officer appointed under the Forests Act while carrying out duties under this Act for the purposes of enforcing this Act with respect to off-highway vehicles as defined in Part 6 and their operation;

(vii) a wildlife guardian appointed under the Wildlife Act while carrying out duties under this Act for the purposes of enforcing this Act;

(3) Limitations in functions of certain peace officers.

(4) Reference change.

(5) Sections 17 and 106(b) presently read:

17 With respect to a highway under the direction, control and management of the Minister of Environment, the Minister of Environment may make regulations

(a) governing, by means of signs erected along the highway, the movement of pedestrians, vehicles or other traffic on the highway;

(b) governing the opening or closing of highways.

106 Subject to a speed limit that is prescribed under section 108 for a highway,

(b) 80 kilometres per hour is the maximum speed limit for

(i) a highway that is subject to the direction, control and management of

(A) the council of a municipal district or Metis settlement, or

(B) the Minister responsible for the Special Areas Act, in the case of a special area;

(ii) a highway that is within a city where the title to the highway is vested in the Crown in right of Alberta pursuant to section 22 of the Public Highways Development Act;

(iii) a highway that

(A) is located on an Indian reserve where the title to the highway is vested in the Crown in right of Alberta, and

(B) is not the subject of an agreement entered into pursuant to section 13 of the Public Highways Development Act;

(iv) a forestry road;

(v) a licence of occupation road;

(vi) a highway located within an improvement district;

(vii) a highway that is subject to the direction, control and management of the Minister of Environment;

(6) Coming into force of subsection (4).

Traffic Safety Amendment Act, 2001

31(1) Amends chapter 14 of the Statutes of Alberta, 2001.

(2) Section 2(b) presently reads:

2 Section 1 is amended

(b) in subsection (1)(ff)

(i) by repealing subclause (v) and substituting the following:

(v) a conservation officer appointed under section 7 of Schedule 5 to the Government Organization Act while carrying out duties under this Act for the purposes of enforcing this Act;

(ii) by repealing subclause (vii);

(3) Coming into force.

Wilderness Areas, Ecological Reserves and Natural Areas Act

32(1) Amends chapter W-9 of the Revised Statutes of Alberta 2000.

(2) Section 2(4) presently reads:

(4) The Advisory Committee shall consist of

(a) 3 employees of the Department of Environment,

(b) one employee of the Department of Agriculture, Food and Rural Development,

(c) one employee of the Department of Resource Development,

(d) one employee of the Department of Community Development, and

(e) 6 persons who are not employed by the Government or a government agency.

(3) Section 6 presently reads:

6(1) Subject to subsections (2) and (3), if at the time any public land is established as part of a wilderness area or ecological reserve or is added to a wilderness area or ecological reserve a person other than the Crown holds, in respect of that land, an interest under or pursuant to

(a) a disposition granted under the Public Lands Act and the regulations under that Act,

(b) a lease, permit, easement or other disposition under the Special Areas Act and the regulations under that Act,

(c) a timber disposition as defined in the Forests Act,

(d) a surface disposition granted under any other Act or regulation, or

(e) a disposition as defined in the Mines and Minerals Act,

the Minister of the Crown who is charged with the administration of the relevant Act referred to in clauses (a) to (e) shall ensure as far as practicable that the interest is withdrawn, cancelled or otherwise terminated as soon as possible.

(2) Subsection (1) does not apply so as to require the Minister of Resource Development to withdraw, cancel or otherwise terminate an interest under a petroleum or natural gas disposition in an ecological reserve.

(3) The Minister of Environment may, when an ecological reserve is established or added to, permit interests under

(a) dispositions granted under the Public Lands Act or the Special Areas Act and the regulations under those Acts in connection with a petroleum or natural gas disposition made under the Mines and Minerals Act,

(b) other dispositions granted under the Public Lands Act and the regulations under that Act,

(c) leases, permits, easements and other dispositions under the Special Areas Act and the regulations under that Act,

(d) timber licences and timber permits under the Forests Act, and

(e) permits to graze livestock granted under the Forest Reserves Act and the regulations under that Act

that exist on or relate to the ecological reserve or the land added to the ecological reserve at the time the ecological reserve is established or added to, as the case may be, to continue until their expiry and to be renewed, but no interest referred to in clauses (a) to (e) may be continued or renewed unless the Minister of Environment consents in writing to the continuation or renewal.

(4) Section 15(3) presently reads:

(3) In this section, "peace officer" means

(a) a member of the Royal Canadian Mounted Police,

(b) a forest officer appointed under the Forests Act, and

(c) a conservation officer.

(5) In the Schedule Department of Environment changed to Minister's Department.

(6) Coming into force.

Wildlife Act

33(1) Amends chapter W-10 of the Revised Statutes of Alberta 2000.

(2) Section 1 presently reads in part:

1(1) In this Act,

(u) "officer" means a conservation officer;

(3) Wildlife officers.

(4) Section 60(1) and (2) presently read:

60(1) If a live big game animal is found on permit premises and its possession on those premises is not authorized by a permit, the owner or person in charge of those premises shall ensure that a conservation officer appointed under section 7(1) of Schedule 5 to the Government Organization Act is notified forthwith of the finding.

(2) Where a wildlife or controlled animal escapes from captivity on permit premises or a game animal production farm, the owner or person in charge of the permit premises or farm shall

(a) make reasonable efforts to recapture the animal, and

(b) ensure that the escape is reported to a conservation officer referred to in subsection (1) within the prescribed period or, if no such period is prescribed, within 48 hours after the escape, unless it is recaptured within that period.

(5) Section 65 presently reads in part:

65(1) A wildlife guardian, in the execution of the guardian's duties and responsibilities and in the exercise of the guardian's powers, is a person employed for the preservation and maintenance of the public peace.

(3) Conservation officers and wildlife guardians

(a) are the persons with the primary responsibility of enforcing this Act, and

(b) without limiting their other powers, have all powers that are required for, that are incidental to or that form part of

(i) the performance of their duties, whether or not those duties are specifically referred to in this Act, or

(ii) any enforcement, investigation, administration or process under or relating to this Act or any directions, requirements, orders or prosecution or other legal proceeding under or relating to this Act.

(6) Transitional provision.

(7) Formal amendments to several provisions, changing "conservation officer" references to "wildlife officer".

(8) Coming into force.

Province of Alberta

LABOUR RELATIONS CODE

REGIONAL HEALTH AUTHORITY COLLECTIVE BARGAINING REGULATION

Alberta Regulation 80/2003

With amendments up to and including Alberta Regulation 22/2016

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Note

All persons making use of this consolidation are reminded that it has no legislative sanction, that amendments have been embodied for convenience of reference only. The official Statutes and Regulations should be consulted for all purposes of interpreting and applying the law.

(Consolidated up to 22/2016)

ALBERTA REGULATION 80/2003

Labour Relations Code

REGIONAL HEALTH AUTHORITY COLLECTIVE BARGAINING REGULATION

Table of Contents

Definitions

1 In this Regulation,

(a) "Act" means the *Labour Relations Code*;

(a.1) "Alberta Alcohol and Drug Abuse Commission agreement" means a collective agreement that applies to employees who were employed by the Alberta Alcohol and Drug Abuse Commission prior to April 1, 2009;

(a.2) "Alberta Cancer Board agreement" means a collective agreement that applies to employees who were employed by the Alberta Cancer Board prior to April 1, 2009;

(b) repealed AR 64/2009 s2;

(c) "contested" means that no single trade union or group of trade unions affiliated with the same parent trade union represents a qualifying majority of employees in the region-wide functional bargaining unit;

(d) "eligible type of collective agreement" means the following types of collective agreement:

(i) a regional health authority agreement;

(ii) an Alberta Alcohol and Drug Abuse Commission agreement;

(iii) an Alberta Cancer Board agreement;

(iv) an emergency health services agreement;

(d.1) "emergency health services" means emergency health services under the *Emergency Health Services Act*;

(d.2) "emergency health services agreement" means a collective agreement that applies to employees employed to provide emergency health services by an employer, other than a regional health authority, prior to April 1, 2009;

(e), (f) repealed AR 64/2009 s2;

(g) "qualifying majority" means at least 80% of the employees in a region-wide functional bargaining unit;

(g.1) "regional health authority agreement" means a collective agreement that applies to employees of a regional health authority;

(h) "region-wide functional bargaining unit" means a bargaining unit referred to in section 2;

(i) "uncontested (multiple locals)" means that a qualifying majority of employees in the region-wide bargaining unit is represented by a group of trade unions affiliated with the same parent trade union but no single affiliated trade union represents a qualifying majority;

(j) "uncontested (single trade union)" means that a qualifying majority of employees in a region-wide functional bargaining unit is represented by one trade union.

AR 80/2003 s1;64/2009

Region-wide functional bargaining units

2(1) Bargaining units for employees of a regional health authority shall consist of all employees in the health region who are represented by a bargaining agent and are employed in one of the following functional groups:

(a) direct nursing care or nursing instruction;

(b) auxiliary nursing care;

(c) paramedical professional or technical services;

(d) general support services.

(2) For the purpose of subsection (1)(c), paramedical professional or technical services includes the provision of emergency health services.

AR 80/2003 s2;64/2009

Designation of bargaining agents and agreements

3 The Board shall designate one bargaining agent and one receiving collective agreement for employees in each region-wide functional bargaining unit in accordance with this Regulation.

Selection of eligible type of agreement

4(1) The Board shall, in accordance with this section, determine the eligible type of collective agreement from which a receiving collective agreement for each region-wide functional bargaining unit will be selected.

(2) The Board may require a regional health authority to provide to the Board, in a form acceptable to and within a time prescribed by the Board, a return showing the names of or numbers of its employees in the health region who are bound by a subsisting collective agreement on April 1, 2009.

(3) Where a regional health authority fails to provide the return, the Board may use any information as to numbers of employees that it considers appropriate for the purposes of this section.

(4) The Board shall determine the numbers of employees in the health region who are bound by each eligible type of agreement on April 1, 2009.

(5) The Board shall identify the eligible type of collective agreement that is applicable to the largest number of employees in each region-wide functional bargaining unit on April 1, 2009 and shall designate that agreement as the eligible type of collective agreement from which the receiving collective agreement will be selected.

(6) For purposes of this section, a person is an employee bound by an eligible type of collective agreement if the person

(a) is employed in a bargaining unit governed by such an agreement on April 1, 2009, and

(b) worked in that bargaining unit at any time in the period from March 1 to March 31, 2009.

AR 80/2003 s4;64/2009

Determination of bargaining units

5 The Board shall, with respect to each region-wide functional bargaining unit, determine whether the unit is uncontested (single trade union), uncontested (multiple locals) or contested.

Determination re uncontested (single trade union) cases

6(1) Where a region-wide functional bargaining unit is determined to be of the uncontested (single trade union) type,

(a) the Board shall designate the trade union or local representing a qualifying majority of the employees in the bargaining unit as bargaining agent,

(b) if a qualifying majority of employees in the bargaining unit is governed by one collective agreement, the Board shall designate that collective agreement as the receiving collective agreement for employees in the bargaining unit, and

(c) if no single collective agreement governs a qualifying majority of employees in the bargaining unit, the Board shall select the collective agreement that will be the receiving collective agreement by means of a vote among employees in the bargaining unit as to which collective agreement they desire.

(2) For the purposes of a vote referred to in subsection (1), the collective agreements are the 2 collective agreements applicable to the largest number of employees in the bargaining unit.

(3) The Board shall designate the collective agreement selected by a majority of employees who vote as the receiving collective agreement for the employees in the bargaining unit.

(4) The collective agreement that is designated by the Board under subsection (3) must be a collective agreement of the type designated by the Board as an eligible type of collective agreement for that region-wide functional bargaining unit under section 4(5).

Determination re uncontested (multiple locals) cases

7(1) Where a region-wide functional bargaining unit is determined to be of the uncontested (multiple locals) type,

(a) the Board shall designate the affiliated trade unions of the parent trade union that together represent a qualifying majority of employees in the bargaining unit as a group of trade unions and shall name the trade unions in the group as joint bargaining agents, and

(b) the Board shall select the collective agreement that will be the receiving collective agreement by means of a vote among employees in the bargaining unit as to which collective agreement they desire.

(2) For the purposes of a vote referred to in subsection (1), the collective agreements are the 2 collective agreements applicable to the largest number of employees in the bargaining unit.

(3) The Board shall designate the collective agreement selected by a majority of employees who vote as the receiving collective agreement for the employees in the bargaining unit.

(4) The collective agreement that is designated by the Board under subsection (3) must be a collective agreement of the type designated by the Board as an eligible type of collective agreement for that region-wide functional bargaining unit under section 4(5).

(5) Where the Board names a group of trade unions as joint bargaining agents under subsection (1)(a) the Act applies to the joint bargaining agents with respect to the settlement of disputes and the administration of the collective agreement as if they were a single trade union.

Determination re contested cases

8(1) For the purposes of this section, the Board shall consider trade unions affiliated with the same parent trade union to be a single trade union.

(2) Where a region-wide functional bargaining unit is determined to be of the contested type, the Board shall determine which trade unions are eligible trade unions to be selected by employees in the bargaining unit as their bargaining agent.

(3) For the purposes of subsection (2), a trade union is eligible to be selected by employees in the bargaining unit as their bargaining agent if, on April 1, 2009, it represents more than 20% of employees in the region-wide functional bargaining unit.

(4) The Board shall require each eligible trade union to nominate the collective agreement that it proposes to be the receiving collective agreement if it is selected as the employee bargaining agent.

(5) An eligible trade union shall nominate its proposed receiving collective agreement from between the 2 collective agreements, if 2 agreements exist, to which the eligible trade union is a party and that are applicable to the largest number of employees in the bargaining unit.

(6) If an eligible trade union fails to nominate a proposed receiving collective agreement, the Board shall designate the collective agreement to which the eligible trade union is a party and that is applicable to the largest number of employees in the bargaining unit as that eligible trade union's proposed receiving collective agreement.

(7) After all eligible trade unions have nominated their proposed receiving collective agreement, the Board shall determine the employee bargaining agent and receiving collective agreement by means of a vote among employees in the bargaining unit.

(8) The Board shall designate the trade union selected by a majority of employees who vote as the bargaining agent for employees in the bargaining unit.

(9) The Board shall designate the successful trade union's proposed receiving collective agreement as the receiving collective agreement for employees in the bargaining unit.

(10) The collective agreement that is designated by the Board under subsection (9) must be a collective agreement of the type designated by the Board as an eligible type of collective agreement for that region-wide functional bargaining unit under section 4(5).

(11) Where the successful trade union consists of 2 or more trade unions considered to be a single trade union under subsection (1), the Board shall designate the trade unions as a group of trade unions and shall name the trade unions in the group as joint bargaining agents.

(12) Where the Board names a group of trade unions as joint bargaining agents under subsection (11), the Act applies to the joint bargaining agents with respect to the settlement of disputes and the administration of the collective agreement as if they were a single trade union.

AR 80/2003 s8;64/2009

Special exercise of Board powers

9 In exercising its powers under section 46 or 48 of the Act for purposes of this Regulation, the Board may

(a) declare which trade union or group of trade unions is the bargaining agent on behalf of employees in a region-wide functional bargaining unit,

(b) declare whether an employer, trade union or group of trade unions is bound by proceedings under the Act and the extent to which those proceedings are binding upon it, and

(c) issue, amend or revoke any certificate issued to any trade union

before the regional health authority and the bargaining agent have negotiated amendments to the receiving collective agreement as required under section 11.

Conduct of votes

10 The Board shall conduct all votes for the purposes of this Regulation and, for those purposes the Board may

(a) by rule or otherwise prescribe all procedural matters respecting votes,

(b) make rules that are not inconsistent with this Regulation respecting eligibility of employees to vote in any vote, and

(c) determine questions of voter eligibility in a vote.

Duty to bargain

11 Within 30 days after the Board has designated a bargaining agent and a receiving collective agreement in respect of each region-wide functional bargaining unit, the regional health authority and the bargaining agent shall meet and commence to bargain collectively in good faith and make every reasonable effort to negotiate amendments to the receiving collective agreement so that the resulting amended agreement contains terms and conditions

of employment for all employees in the region-wide functional bargaining unit.

Joint bargaining agents - rules and procedures

12(1) Where the Board has named the trade unions in a group of trade unions as joint bargaining agents for employees in a region-wide functional bargaining unit, the trade unions in the group shall forthwith establish rules and procedures for the administration of the certificate, collective bargaining in respect of that certificate and the administration of any collective agreements entered into with the regional health authority.

(2) If a group of trade unions fails to establish adequate rules and procedures as required under subsection (1), the Board may, on application, establish those rules and procedures and the rules and procedures so established are binding on each trade union within the group of trade unions.

Complaints

13 A trade union, a group of trade unions or a regional health authority may make a complaint in writing to the Board that there has been a failure to comply with section 11, and the Board may hear and adjudicate such a complaint as if it were a complaint in respect of non-compliance with section 60 of the Act.

Appointment of special officer

14 At any time after bargaining has commenced under section 11, either or both parties to bargaining may make a request to the Board for assistance in the negotiation process, and the Board may appoint any person as an officer of the Board to inquire into the dispute and endeavour to effect a settlement.

Board may make award

15(1) Where the parties are unwilling or unable to negotiate an amended receiving collective agreement as required by section 11, the Board shall make an award with respect to all issues in dispute, and that award shall be binding on the parties to the dispute and shall be included in the terms of the receiving collective agreement.

(2) In making an award under subsection (1), the Board may adopt any procedure that it considers appropriate and, in addition to its powers under the Act, it may exercise any of the powers of a compulsory arbitration board under Part 2, Division 16 of the Act.

Effect of agreement

16 Where the parties negotiate amendments to the receiving collective agreement as contemplated under section 11 or where the Board makes an award under section 15, the resulting agreement is a collective agreement that is in force for the purposes of the Act.

General power

17 In exercising its powers and carrying out its duties under this Regulation, the Board may conduct any inquiries, make any rules, require the provision of any information and determine any questions that it considers necessary.

Extension of time

18 Where this Regulation or an order of the Board requires that anything be done within a certain period of time the Board may, on application or of its own motion and whether before or after the expiry of the period, extend the period where the Board considers it appropriate to do so.

Severance and termination pay

19(1) In this section, "change in governance or restructuring" with respect to a prescribed entity includes

(a) a change in the boundaries of the prescribed authority,

(b) a prescribed entity's ceasing to exist,

(c) a transfer of the responsibility for all or part of the operations of a prescribed entity from one prescribed entity to another, or

(d) a merger or amalgamation of 2 or more prescribed entities.

(2) This section applies only in respect of employees who are represented by a bargaining agent.

(3) Notwithstanding any other enactment or the terms of a collective agreement, where there is a change in governance or a restructuring of one or more prescribed entities, no employee of any of the entities is entitled to severance pay or termination pay or other compensation if the employee's position is substantially the same after the change in governance or restructuring as it was before it.

(4) Nothing in this section precludes an employer from voluntarily giving an employee or former employee severance pay or termination pay or other compensation.

Transitional - existing agreements

20 Where a regional health authority becomes the employer of employees who were, prior to April 1, 2009, governed by one of the types of collective agreement referred to in section 1(d), the collective agreement continues in force and binds the regional health authority, the bargaining agent or agents and the employees until a receiving collective agreement comes into force by virtue of the operation of section 16.

AR 80/2003 s20;64/2009

Board's duty

21 The Board shall exercise its powers and carry out its duties under this Regulation as soon as is practically possible.

Expiry

22 For the purpose of ensuring that this Regulation is reviewed for ongoing relevancy and necessity, with the option that it may be repassed in its present or an amended form following a review, this Regulation expires on March 31, 2021.

AR 80/2003 s22;40/2008;64/2009;51/2015;22/2016

Coming into force

23 This Regulation comes into force on April 1, 2003.

Printed on Recycled Paper

O.C. 19/99

A.R. 16/99

February 3, 1999

The Lieutenant Governor in Council approves the Nursing Profession Extended Practice Roster Regulation set out in the attached Appendix.

For Information only

Recommended by: Minister of Health

Authority: Nursing Profession Act

(section 99)

APPENDIX

Nursing Profession Act

NURSING PROFESSION EXTENDED PRACTICE ROSTER REGULATION

Table of Contents

Definitions

1 In this Regulation,

(a) "Act" means the *Nursing Profession Act*;

(b) "extended practice" means the practice of a registered nurse that is authorized under an enactment and has been recommended by the Registration Committee as extended practice and approved by the Council;

(c) "Roster" means the Nursing Profession Extended Practice Roster.

Roster established

2(1) A register is established by this Regulation with the name "Nursing Profession Extended Practice Roster".

(2) The Roster is, subject to this Regulation, under the administrative control of the Registrar.

(3) The Registrar shall record in the Roster the areas of extended practice that exist under section 1(b).

Criteria for Roster entry

3(1) A registered nurse may be entered on the Roster if the nurse

(a) holds a baccalaureate degree in nursing or other educational qualifications that are considered by the Registration Committee to be at least equivalent to the baccalaureate degree,

(b) has at least 3 years of practice as a registered nurse that is considered satisfactory by the Registration Committee,

(c) successfully completes in an area of extended practice an educational program approved by the Registration Committee, or provides evidence satisfactory to the Registration Committee that the nurse has an education at least equivalent to the education provided by the approved program, and

(d) has, in the Registration Committee's opinion, sufficient knowledge, skills and practice to engage in the area of extended practice to which the application relates.

(2) Notwithstanding subsection (1), during the 2 years following the date this Regulation comes into force, a registered nurse may be entered on the Roster if

(a) the nurse has, in the Registration Committee's opinion, sufficient knowledge, skills and practice to engage in the area of

extended practice to which the application relates,

(b) the nurse completes a self assessment of knowledge, skills and practice in a form prescribed by the Registrar, and

(c) a person satisfactory to the Registration Committee completes an assessment of the nurse's knowledge, skills and practice in a form prescribed by the Registrar.

Application

4 An applicant must

(a) apply to the Registrar in writing, providing any information the Registrar requires, and

(b) pay any fee prescribed by the Council for the application.

Approval, refusal or deferral of applications

5 The Registration Committee may, with respect to an application,

(a) approve the application,

(b) refuse the application, or

(c) defer the decision pending compliance with any condition it considers necessary.

Notice of decision

6(1) The Registration Committee must send a written notice of its decision to the applicant not more than 30 days after it considers the application.

(2) If the decision of the Registration Committee is to refuse or defer decision on the application, it must send written reasons for the decision to the applicant.

Application for review

7(1) An applicant whose application is refused or deferred may request a review or reconsideration in accordance with section 21 of the Act.

(2) Sections 21 to 23 of the Act apply to the review or reconsideration.

Notice of entry on Roster

8(1) After entering the name of a registered nurse on the Roster, the Registrar must notify the person concerned.

(2) Entry on the Roster automatically lapses after the last day of the membership year in which the entry was made, unless it is renewed before then.

Renewal of Roster entries

9**(1)** A registered nurse who is entered on the Roster may apply to renew the entry by

(a) applying to the Registrar in writing, providing any information the Registrar requires, and

(b) paying any fee prescribed by the Council.

(2) If the Registration Committee is satisfied that an applicant for renewal has maintained sufficient knowledge, skills and practice, and the application is made before the recorded entry lapses, or within 12 months of the entry lapsing, the Registrar must renew the entry.

(3) If a registered nurse does not renew an entry on the Roster for more than one but less than 2 consecutive years following expiry of the entry on the Roster, the nurse must satisfy the basic criteria for entry on the Roster specified in section 3, or any modification of them that the Registration Committee directs, either generally or for a specific applicant.

(4) If a registered nurse does not renew an entry on the Roster for 2 or more but less than 5 consecutive years following expiry of the entry on the Roster, the nurse must

(a) satisfy the basic criteria for entry on the Roster specified in section 3, or any modification of them that the Registration Committee directs, either generally or for a specific applicant, and

(b) by means of a self assessment satisfactory to the Registration Committee, satisfy the Committee that the nurse has the knowledge, skills and practice to have the entry on the Roster renewed.

(5) If a registered nurse does not renew an entry on the Roster for 5 or more consecutive years, the nurse must

(a) satisfy the basic criteria for entry on the Roster specified in section 3, or any modification of them that the Registration Committee directs, either generally or for a specific applicant,

(b) by means of a self assessment satisfactory to the Registration Committee, satisfy the Committee that the nurse has the knowledge, skills and practice to have the entry on the Roster renewed, and

(c) successfully complete a challenge examination specified by the Registration Committee, or successfully complete an approved program designated by the Committee, or both.

Responsibility of the Registration Committee

10 The Registration Committee must not renew an entry on the Roster if the Committee is not satisfied that the registered nurse has the knowledge, skills and practice to engage in extended practice.

Extended practice

11 Subject to any other enactment, a registered nurse whose name is on the Roster may engage in the area of extended practice in respect of which the nurse's name is entered on the Roster.

Expiry

12 For the purpose of ensuring that this Regulation is reviewed for ongoing relevancy and necessity, with the option that it may be repassed in its present or an amended form following a review, this Regulation expires on January 31, 2004.

(b) Family Allowance Rate Regulation (Alta. Reg. 402/91);

(c) Braewood Kindercare Exemption Regulation (Alta. Reg. 208/83);

(d) Guarantee and Indemnity Regulation (Alta. Reg. 126/84);

(e) Guarantee and Indemnity Regulation (Alta. Reg. 334/86);

(f) Alberta Capital Loan Guarantee Program Regulation (Alta. Reg. 157/89);

(g) Loan Guarantee Regulation (Alta. Reg. 135/87);

(h) Alberta Small Business Interest Shielding Grant Regulation (Alta Reg. 156/89);

(i) Reports Submission Regulation (Alta. Reg. 103/80);

(j) Administration Regulation (Alta. Reg. 256/84);

(k) Small Business Equity Corporations Regulation (Alta. Reg. 260/84).

Alberta Regulation 224/96

Public Health Act

REGISTERED NURSE PROVIDING EXTENDED HEALTH SERVICES REGULATION

Filed: September 25, 1996

Made by the Lieutenant Governor in Council (O.C. 453/96) pursuant to section 75 of the Public Health Act.

Table of Contents

Definitions

1 In this Regulation,

(a) "employer" means a regional health authority, a provincial health board or the Department;

(b) "registered nurse providing extended health services" means a registered nurse as defined in the Nursing Profession Act who is employed or engaged by a regional health authority or provincial health board established under the Regional Health Authorities Act or by the Department to provide extended health services under this Regulation.

Eligibility

2 No employer shall employ or engage a registered nurse as a registered nurse providing extended health services unless the Alberta Association of Registered Nurses is satisfied as to the registered nurse's competence to provide the extended health services listed in section 5(1).

Minister's approval

3(1) An employer other than the Department may not employ or engage a registered nurse as a registered nurse providing extended health services without the prior approval of the Minister.

(2) The Minister may give approval under subsection (1) if satisfied that there is a need for the services of a registered nurse providing extended health services in a community within the area served by the employer.

Employment agreement

4(1) An employer and a registered nurse providing extended health services who is employed or engaged by the employer shall ensure that there is an agreement between them that sets out the extended health services in section 5(1) that the registered nurse will provide, including any limitation on the kinds of extended health services within any of the categories listed in section 5(1) that will be provided.

(2) The employer and the registered nurse providing extended health services shall ensure

(a) that the extended health services to be provided under the agreement and the terms of the agreement are such that the employer and the registered nurse will be able to comply with section 5(2), and

(b) that by the terms of the agreement the registered nurse will, in addition to providing extended health services, also engage generally in the practice of nursing within the meaning of the Nursing Profession Act.

Provision of health services

5(1) A registered nurse providing extended health services may, subject to the terms of the agreement between the registered nurse and the employer, provide the following extended health services in a community within the area served by the employer:

(a) diagnoses and treatment of common disorders affecting the health of adults and children;

(b) referral;

(c) emergency services.

(2) In providing extended health services under this Regulation, the employer and the registered nurse providing extended health services shall comply with the requirements of the publication Guidelines for Registered Nurses in Advanced Nursing Practice Providing Primary Health Care Services in Under-Serviced Communities in Alberta, 1994, published by the Department of Health, as amended or replaced from time to time.

Repeal

6 The Nursing Services Regulation (Alta. Reg. 555/57) is repealed.

Coming into force
7 This Regulation comes into force on October 1, 1996.

Expiry
8 For the purpose of ensuring that this Regulation is reviewed for ongoing relevancy and necessity, with the option that it may be re-passed in its present or an amended form following a review, this Regulation expires on June 30, 2001.

Alberta Regulation 225/96

Alberta Corporate Tax Act

ROYALTY TAX CREDIT REFERENCE PRICE AMENDMENT REGULATION

Filed: September 26, 1996

Made by the Minister of Energy (M.O. 29/96) pursuant to section 5.2(3) of the Alberta Corporate Tax Regulation (Alta. Reg. 105/81).

1 The Royalty Tax Credit Reference Price Regulation (Alta. Reg. 151/95) is amended by this Regulation.

2 The following is added after section 7:

Price to December 31, 1996
8 The royalty tax credit reference price for the period ending December 31, 1996 is $138.90.

Alberta Regulation 226/96

Marketing of Agricultural Products Act

SUGAR BEET PRODUCTION AND MARKETING
AMENDMENT REGULATION

Filed: September 27, 1996

Made by the Alberta Sugar Beet Growers' Marketing Board pursuant to sections 26 and/or 27 of the Marketing of Agricultural Products Act.

1 The Sugar Beet Production and Marketing Regulation (Alta. Reg. 36/91) is amended by this Regulation.

2 Section 27 is repealed and the following is substituted:

Quota variation
27(1) If the total acreage requirement in an area is reduced, the Board may, by notice in writing to all producers in the area, reduce each producer's quota by a percentage determined by the Board.

(2) If the total acreage requirement in an area is increased, the additional quota resulting from the increase shall be allotted by the Board in accordance with section 28(3).

(3) If the Board considers it appropriate to change the total acreage requirement for Alberta, the Board shall vary the total acreage requirement in all areas by an equal percentage, notwithstanding that such variation may have the effect of varying the quota of a producer in one area by a greater amount than in another area.

3 Section 28(3) is repealed and the following is substituted:

(3) If quota becomes available in an area as a result of the operation of section 27, 38 or 39, the Board shall allot the quota as follows:

(a) 25% of the quota shall be offered to persons who propose to produce and market the regulated product in the area;

(b) 25% of the quota shall be offered to producers in the area who currently hold a quota of less than 40 acres;

(c) the quota remaining after allotment under clauses (a) and (b) may be offered to producers in the area who currently hold a quota;

(d) the quota remaining after allotment under clause (c) may be offered

(i) to producers in other areas who currently hold a quota, and

(ii) to persons who propose to produce and market the regulated product in other areas.

(3.1) An allotment made under subsection (3)(b) must not result in a producer holding a quota of more than 40 acres.

4 Section 34 is amended by adding the following after subsection (3):

(4) If a quota is partially transferred pursuant to subsection (1), the transferor and the transferee are not eligible for an allotment under section 28(3)(b).

O.C. 298/2002

June 25, 2002

A.R. 126/2002

June 26, 2002

The Lieutenant Governor in Council makes the Nurse Practitioner Regulation set out in the attached Appendix.

For Information only

Recommended by: Minister of Health and Wellness

Authority: Public Health Act
(section 66)

APPENDIX

Public Health Act

NURSE PRACTITIONER REGULATION

Table of Contents

Provision of health services

1 Subject to this Regulation, a nurse practitioner may provide the following health services:

(a) diagnosis and treatment;

(b) ordering and performing laboratory, radiological and other diagnostic tests and the interpretation of those test results;

(c) prescribing drugs as defined under the *Pharmaceutical Profession Act*.

Employment requirements

2(1) No person shall employ or engage a registered nurse as a nurse practitioner unless the registered nurse is entered on the Nursing Profession Extended Practice Roster under the *Nursing Profession Act*.

(2) An employer who employs or engages a nurse practitioner shall ensure

(a) that the nurse practitioner has access to the laboratory, radiology and pharmacy services that are necessary for the nurse practitioner to carry out his or her duties, and

(b) that quality assurance mechanisms are in place in respect of the provision of health services by the nurse practitioner.

Practice requirements

3(1) No registered nurse shall provide health services as a nurse practitioner unless the registered nurse is entered on the Nursing Profession Extended Practice Roster under the *Nursing Profession Act*.

(2) A registered nurse providing health services as a nurse practitioner shall provide only those health services that the nurse practitioner is competent to perform and that are appropriate to the nurse practitioner's area of practice.

Nurse practitioners in independent practice

4(1) A registered nurse who is providing health services as a nurse practitioner in independent practice shall comply with the *Standards of Practice for Nurse Practitioners in Independent Practice* established by the Alberta Association of Registered Nurses.

(2) In this section "independent practice" means that the registered nurse, in providing health services as a nurse practitioner,

(a) is self-employed,

(b) is a partner in a partnership, or

(c) otherwise operates other than as an employee.

Consequential

5(1) The *Prescription of Drugs by Authorized Practitioners Regulation* (AR 83/98) is amended by this section.

(2) Section 2 is repealed and the following is substituted:

Prescription of drugs by nurse practitioner

2 A nurse practitioner providing health services within the meaning of the *Nurse Practitioner Regulation* under the *Public Health Act* is authorized to prescribe drugs for the purposes of and in accordance with that Regulation.

Repeal

6 The *Registered Nurse Providing Extended Health Services Regulation* (AR 224/96) is repealed.

Expiry

7 For the purpose of ensuring that this Regulation is reviewed for ongoing relevancy and necessity, with the option that it may be repassed in its present or an amended form following a review, this Regulation expires on June 30, 2012.

Province of Alberta

HEALTH PROFESSIONS ACT

REGISTERED NURSES PROFESSION REGULATION

Alberta Regulation 232/2005

Extract

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Note

All persons making use of this document are reminded that it has no legislative sanction. The official Statutes and Regulations should be consulted for all purposes of interpreting and applying the law.

(no amdt)

ALBERTA REGULATION 232/2005

Health Professions Act

REGISTERED NURSES PROFESSION REGULATION

Table of Contents

Definitions

1 In this Regulation,

(a) "approved nursing program" means a nursing education program approved by the Nursing Education Program Approval Board in accordance with nursing education standards and criteria approved by the Council;

(b) "certified graduate nurse register" means the certified graduate nurse category of the regulated members register;

(c) "College" means the College and Association of Registered Nurses of Alberta;

(d) "Competence Committee" means the competence committee of the College;

(e) "Complaints Director" means the complaints director of the College;

(f) "Council" means the council of the College;

(g) "courtesy register" means the courtesy category of the regulated members register;

(h) "Hearings Director" means the hearings director of the College;

(i) "membership year" means a membership year as determined in accordance with the bylaws under section 132 of the Act;

(j) "nurse practitioner register" means the nurse practitioner category of the regulated members register;

(k) "Nursing Education Program Approval Board" means the Nursing Education Program Approval Board continued pursuant to bylaws under section 132 of the Act;

(l) "registered nurse register" means the registered nurse category of the regulated members register;

(m) "Registrar" means the registrar of the College;

(n) "Registration Committee" means the registration committee of the College;

(o) "registration exam" means a registration examination approved by the Council;

(p) "Reinstatement Review Committee" means a reinstatement review committee of the College;

(q) "temporary register" means the temporary category of the regulated members register.

Register categories

2 The regulated members register established by the Council under section 33(1)(a) of the Act has the following categories:

(a) registered nurse register;

(b) nurse practitioner register;

(c) certified graduate nurse register;

(d) temporary register;

(e) courtesy register.

Registration

Registered nurse register

3(1) An applicant for registration as a regulated member on the registered nurse register must

(a) have successfully completed as an education requirement either

(i) on and before December 31, 2009, a diploma or baccalaureate degree in nursing from an approved nursing program undertaken in Alberta, or

(ii) on and after January 1, 2010, a baccalaureate degree in nursing from an approved nursing program undertaken in Alberta,

and

(b) pass the registration exam.

(2) An applicant for registration under subsection (1) must pass the registration exam and complete the registration process within the 5 years immediately following the date of completion of one of the education programs referred to in subsection (1)(a).

(3) Despite subsection (2), an applicant who meets the requirements of subsection (1)(a) but does not meet the requirements of subsection (2) may be registered as a regulated member on the registered nurse register only if the applicant has

(a) met any additional requirements imposed by the Registration Committee, and

(b) passed the registration exam.

Nurse practitioner register

4(1) An applicant for registration as a regulated member on the nurse practitioner register must

(a) have successfully completed a baccalaureate degree in nursing satisfactory to the Registration Committee,

(b) have completed 4500 hours of registered nursing practice satisfactory to the Registration Committee,

(c) have successfully completed a nurse practitioner education program approved by the Council,

(d) be registered on the registered nurse register, and

(e) have passed any examination respecting nurse practitioner practice approved by the Council.

(2) Despite subsection (1), an applicant who does not meet the requirements of subsection (1)(a) or (c) or subsection (1)(a) and (c) may be registered as a regulated member on the nurse practitioner register if the applicant

(a) provides evidence satisfactory to the Registration Committee that the applicant has education and experience that is substantially equivalent to the requirements of subsection (1)(a) or (c) or subsection (1)(a) and (c),

(b) has, in the opinion of the Registration Committee, sufficient knowledge, skill and experience to practise as a nurse practitioner, and

(c) has met the requirements of subsection (1)(b), (d) and (e).

(3) In determining whether or not an applicant's qualifications are substantially equivalent under subsection (2) and whether the applicant has sufficient knowledge, skill and experience, the Registrar may require the applicant to undergo examinations, testing and assessment activities to assist with the determination.

(4) The Registrar may direct the applicant to undergo any education or training activities the Registrar may consider necessary in order for the applicant to be registered on the nurse practitioner register.

(5) The Council may limit the number of times that an applicant may attempt to pass a nurse practitioner exam approved by the Council under subsection (1)(e).

Certified graduate nurse register

5(1) On the coming into force of this Regulation, only a person who is registered as a certified graduate nurse under the *Nursing Profession Act* continues to be registered as a regulated member on the certified graduate nurse register.

(2) Despite subsection (1), on the coming into force of this Regulation, a person who is not registered as a certified graduate nurse under the *Nursing Profession Act* but had previously been so registered is eligible to be registered on the certified graduate nurse register if

(a) the person has completed 1125 hours of certified graduate nursing practice within the previous 5 membership years satisfactory to the Registrar, or

(b) the person successfully completes a nursing refresher program approved by the Council.

Temporary registration

6(1) An applicant who has applied for registration under section 3, 4, 8 or 9 may, at the discretion of the Registrar, be registered on the temporary register until the requirements for registration have been met.

(2) An applicant who is enrolled in the clinical practicum of a nursing refresher program approved by the Council to meet the requirements for registration may be registered on the temporary register but may practise only within the clinical practicum of the refresher program.

(3) An applicant who is enrolled in additional courses, as required by the Registrar, that have clinical practicums to meet the requirements for registration may be registered on the temporary register but may practise only within the clinical practicums of the courses.

(4) The registration of a regulated member on the temporary register is valid for up to 6 months and each registration may be renewed no more than 2 times, unless, in the opinion of the Registration Committee, there are extenuating circumstances.

(5) If a regulated member on the temporary register passes a registration exam or successfully completes a refresher program approved by the Council, and continues to meet all other registration requirements of the Act and this Regulation, the Registrar must remove the regulated member's name from the temporary register and enter it on the appropriate category of the regulated members register.

Courtesy registration

7(1) A registered nurse or nurse practitioner in good standing in another jurisdiction recognized by the Council who requires registration in Alberta on a temporary basis for a specified purpose approved by the Registrar and who satisfies the Registrar of having competence to provide the services related to the specified purpose is eligible for registration on the courtesy register.

(2) The registration of a person registered on the courtesy register is valid for the term specified by the Registrar but may not exceed one year unless, in the opinion of the Registration Committee, there are extenuating circumstances.

(3) It is a condition of registration on the courtesy register that the person must remain registered in good standing in the jurisdiction

in which the person was registered at the time of the person's application for registration on the courtesy register and if the registration in the other jurisdiction is suspended or cancelled the courtesy registration is cancelled.

Equivalent jurisdiction

8(1) An applicant for registration on the registered nurse register who is currently registered in good standing in another jurisdiction recognized by the Council under section 28(2)(b) of the Act as having substantially equivalent registration requirements is eligible to be registered on the registered nurse register.

(2) An applicant under this section must provide evidence satisfactory to the Registrar of, within the previous 5 membership years,

(a) 1125 hours of registered nursing practice,

(b) successful completion of a degree or a nursing program satisfactory to the Registrar, or

(c) successful completion of a nursing refresher program satisfactory to the Council.

Substantial equivalence

9(1) An applicant who does not meet the requirements under section 3 but whose qualifications have been determined by the Registrar under section 28(2)(c) of the Act to be substantially equivalent to the registration requirements set out in section 3 may be registered on the appropriate register.

(2) In determining whether or not an applicant's qualifications are substantially equivalent under subsection (1), the Registrar may require the applicant to undergo examinations, testing and assessment activities to assist with the determination.

(3) The Registrar may direct the applicant to undergo any education or training activities the Registrar may consider necessary in order for the applicant to be registered.

(4) An applicant under this section must have passed the registration exam and must provide evidence satisfactory to the Registrar of, within the previous 5 membership years,

(a) 1125 hours of registered nursing practice,

(b) successful completion of a degree or a nursing program satisfactory to the Registrar, or

(c) successful completion of a nursing refresher program satisfactory to the Council.

(5) Despite subsection (4), the Registration Committee may waive the requirement to have passed the registration exam if there are extenuating circumstances and the Registration Committee is of the opinion that the applicant has sufficient registered nursing experience, knowledge and competence.

Registration exam attempts

10 An applicant for registration as a regulated member who fails the registration exam 3 times is not eligible to take the registration exam again unless

(a) the applicant completes another entry-level nursing education program that is an approved nursing program, or

(b) the applicant satisfies the Registration Committee that there are extenuating circumstances and the Registration Committee agrees to allow the applicant to write the registration exam an additional time.

Good character, reputation

11 An applicant for registration as a regulated member must provide evidence satisfactory to the Registrar of having good character and reputation by submitting one or more of the following on the request of the Registrar:

(a) written references with respect to the applicant's nursing practice from an employer or educational institution;

(b) a statement by the applicant as to whether the applicant is currently undergoing an investigation or is subject to an unprofessional conduct process or has previously been disciplined by another regulatory body responsible for the regulation of registered nursing or another profession that provides a professional service;

(c) a statement as to whether the applicant has ever pleaded guilty or has been found guilty of a criminal offence in Canada or an offence of a similar nature in a jurisdiction outside Canada for which the applicant has not been pardoned;

(d) any other evidence as required.

Fitness to practise

12 An applicant for registration as a regulated member must, on the request of the Registrar, submit evidence satisfactory to the Registrar, confirming the member's fitness to practise.

English language requirements

13 An applicant for registration as a regulated member whose first language is not English must demonstrate to the Registrar in accordance with the standards approved by the Council proficiency in the English language sufficient to enable the applicant to engage in safe and competent nursing practice.

Titles and Abbreviations

Authorization to use titles, etc.

14(1) A regulated member registered on the registered nurse register may use the title registered nurse and the initials RN.

(2) A regulated member registered on the certified graduate nurse register may use the title certified graduate nurse and the initials CGN.

(3) A regulated member registered on the registered nurse register with an earned doctoral degree may use the title doctor and the initials Dr. in conjunction with the delivery of professional services.

(4) A regulated member registered on the nurse practitioner register may used the title nurse practitioner and the initials NP.

(5) A regulated member registered on the registered nurse register may use the title "specialist" in conjunction with the delivery of professional nursing services in accordance with the standards of practice adopted by the Council in accordance with the bylaws and section 133 of the Act.

Restricted Activities

Authorized restricted activities

15(1) Regulated members on any register may, within the practice of registered nursing and in accordance with the standards of practice governing the performance of restricted activities approved by the Council, perform the following restricted activities:

(a) to cut a body tissue, to administer anything by an invasive procedure on body tissue or to perform surgical or other invasive procedures on body tissue below the dermis or the mucous membrane;

(b) to insert or remove instruments, devices, fingers or hands

(i) beyond the cartilaginous portion of the ear canal,

(ii) beyond the point in the nasal passages where they normally narrow,

(iii) beyond the pharynx,

(iv) beyond the opening of the urethra,

(v) beyond the labia majora,

(vi) beyond the anal verge, or

(vii) into an artificial opening into the body;

(c) to insert into the ear canal under pressure, liquid, air or gas;

(d) to reduce a dislocation of a joint except for a partial dislocation of the joints of the fingers and toes;

(e) to dispense, compound, provide for selling or sell a Schedule 1 drug or Schedule 2 drug within the meaning of the *Pharmaceutical Profession Act*;

(f) to administer a vaccine or parenteral nutrition;

(g) to compound or administer blood or blood products;

(h) to administer diagnostic imaging contrast agents;

(i) to administer radiopharmaceuticals, radiolabelled substances, radioactive gases or radioaerosols;

(j) to prescribe or administer nitrous oxide, for the purposes of anaesthesia or sedation;

(k) to perform a psychosocial intervention with an expectation of treating a substantial disorder of thought, mood, perception, orientation or memory that grossly impairs

(i) judgment,

(ii) behaviour,

(iii) capacity to recognize reality, or

(iv) ability to meet the ordinary demands of life;

(l) to manage labour or deliver a baby.

(2) Despite subsection (1)(e), a regulated member on any register performing the restricted activity described in that subsection shall not distribute, trade or barter for money or valuable consideration, or keep for sale or offer for sale a Schedule 1 drug or a Schedule 2 drug within the meaning of the *Pharmaceutical Profession Act* but may distribute or give away a Schedule 1 drug or a Schedule 2 drug without expectation or hope of compensation or reward.

(3) A regulated member registered on the registered nurse register or on the certified graduate nurse register may, within the practice of registered nursing, perform the restricted activity of ordering or applying non-ionizing radiation in the application of ultrasound imaging.

(4) Despite subsection (3), regulated members on the registered nurse register or on the certified graduate nurse register are authorized to apply ultrasound to a fetus only under the supervision of a person who provides health services and is authorized by a regulation under this Act or by another enactment to apply ultrasound to a fetus.

(5) A regulated member on the nurse practitioner register may, within the practice of registered nursing, perform the restricted activities listed in subsection (1) and the following additional restricted activities when practising as a nurse practitioner:

(a) to prescribe a Schedule 1 drug within the meaning of the *Pharmaceutical Profession Act*;

(b) to prescribe parenteral nutrition;

(c) to prescribe blood products;

(d) to order and apply any form of ionizing radiation in medical radiography;

(e) to order any form of ionizing radiation in nuclear medicine;

(f) to order non-ionizing radiation in magnetic resonance imaging;

(g) to order or apply non-ionizing radiation in ultrasound imaging, including any application of ultrasound to a fetus;

(h) to prescribe diagnostic imaging contrast agents;

(i) to prescribe radiopharmaceuticals, radiolabelled substances, radioactive gases and radioaerosols.

Restriction

16(1) Despite section 15, regulated members must restrict themselves in performing restricted activities to those activities that they are competent to perform and to those that are appropriate to the member's area of practice and the procedures being performed.

(2) A regulated member who performs a restricted activity must do so in accordance with the standards of practice adopted by the Council in accordance with the bylaws and section 133 of the Act.

Students

17(1) A nursing student who is enrolled in an approved nursing program and who is participating in a clinical practicum in Alberta or is employed as an undergraduate nursing employee in Alberta is permitted to perform the restricted activities set out in section 15(1) and (3) under the supervision of a regulated member who is authorized to perform those restricted activities.

(2) A nursing student who is enrolled in a nursing education program outside Alberta that leads to eligibility to write the registration exam and who is participating in a clinical practicum in Alberta or is employed as an undergraduate nursing employee in Alberta is permitted to perform the restricted activities set out in section 15(1) and (3) under the supervision of a regulated member who is authorized to perform those restricted activities.

(3) A nursing student outside Canada who has visiting nursing student status in an approved nursing program in Alberta and who is participating in a clinical practicum of the program in Alberta is permitted to perform the restricted activities set out in section 15(1) and (3) under the supervision of a regulated member who is authorized to perform those restricted activities.

(4) A regulated member who is on the registered nurse register and is enrolled in a nurse practitioner education program approved by the Council is permitted to perform the restricted activities referred to in section 15(5) as part of the clinical practicum of the nurse practitioner education program if the regulated member is under the supervision of a regulated member who is authorized to perform those restricted activities.

(5) A student in a nurse practitioner education program outside Alberta is permitted to perform the restricted activities set out in section 15(5) in a clinical practicum in Alberta if the student

(a) is registered on the registered nurse register,

(b) has visiting student status in a nurse practitioner education program approved by the Council, and

(c) is supervised by a regulated member authorized to perform those restricted activities.

(6) A student in a health services program of studies, other than an approved nursing program, who is authorized by an enactment to perform a restricted activity set out in section 15(1) or (3) is permitted to perform that restricted activity under the supervision of a regulated member who is authorized to perform that restricted activity.

(7) Supervision under this section must be carried out in accordance with the standards for supervision of students adopted by the Council in accordance with the bylaws and section 133 of the Act.

Non-regulated persons, supervision

18(1) A person who is not referred to in section 4(1)(a) of Schedule 7.1 to the *Government Organization Act* is permitted to perform the restricted activity of inserting and removing instruments, devices, fingers and hands beyond the labia majora and anal verge under supervision by a regulated member but only if that person

(a) has the consent of, and is being supervised in accordance with subsection (2) by, a regulated member while performing the restricted activity, and

(b) is engaged in providing health services to another person.

(2) When a regulated member supervises a person referred to in subsection (1) performing a restricted activity, the regulated member must

(a) be authorized to perform the restricted activity being performed,

(b) supervise the person who is performing the restricted activity by being available for consultation while that person is performing the restricted activity, and

(c) comply with the standards approved by the Council governing the provision of supervision by regulated members of persons performing restricted activities pursuant to section 4(1)(b) of Schedule 7.1 to the *Government Organization Act*.

Continuing Competence

Program

19(1) As part of the continuing competence program, regulated members must

(a) complete, in each membership year, a reflective practice review, in a form satisfactory to the Competence Committee, and

(b) meet the renewal requirements of section 21(1)(d) and (3).

(2) A reflective practice review includes

(a) a personal assessment of the member's own nursing practice against the Nursing Practice Standards adopted by the Council in accordance with the bylaws and section 133 of the Act or any other criteria approved by the Competence Committee,

(b) the development and implementation of a written learning plan which follows from the member's assessment of that member's practice,

(c) a written evaluation of the result of the learning pursuant to the plan in clause (b) on the member's practice, and

(d) feedback regarding the regulated member's nursing practice obtained by the regulated member.

(3) A reflective practice review must be completed in each membership year and be retained by the regulated member for 5 membership years from the end of the membership year in which the reflective practice review was completed.

(4) On the request of the Competence Committee, a regulated member must provide satisfactory evidence of having met the requirements of subsections (1) and (2), in each membership year of the 5 membership years preceding the request.

(5) If the results of a review of the evidence submitted under subsection (4) are unsatisfactory, the Competence Committee must direct a regulated member to undertake one or more of the following:

(a) to complete specific continuing competence program requirements or professional development activities within a specified time period;

(b) to report to the Competence Committee on specified matters related to the continuing competence program requirements;

(c) to correct any problems identified in the reflective practice review.

Practice visits

20(1) A person or persons appointed under section 11 of the Act are authorized to carry out practice visits and may, for the purpose of assessing continuing competence, select individual regulated members for a practice visit based on criteria developed by the Competence Committee and approved by the Council.

(2) If the results of a practice visit are unsatisfactory, the Competence Committee may direct a regulated member to undertake one or more of the following:

(a) to complete specific continuing competence program requirements or professional development activities within a specified time period;

(b) to report to the Competence Committee on specified matters on specified dates;

(c) to correct any problems identified in the practice visit;

(d) to complete any other activity required to be completed by the Competence Committee.

Practice Permit

Renewal requirements

21(1) A regulated member applying for renewal of that member's practice permit must provide evidence satisfactory to the Registrar of

(a) completing the continuing competence program requirements,

(b) good character and reputation as set out in section 11,

(c) the regulated member's fitness to practise, and

(d) within the previous 5 membership years, completing

(i) 1125 hours of registered nursing practice,

(ii) a degree or a nursing program satisfactory to the Registrar, or

(iii) a nursing refresher program satisfactory to the Council.

(2) Despite subsection (1), a regulated member who does not meet the requirements of subsection (1) may instead meet any other requirements, as determined by the Registration Committee.

(3) A regulated member who is a nurse practitioner must, in addition to the requirements of subsection (1), provide evidence satisfactory to the Registrar of 600 hours of nurse practitioner practice within the previous 2 membership years.

(4) Despite subsection (3), a nurse practitioner who does not meet the requirements of subsection (3) may instead meet any other requirements, as determined by the Registration Committee.

Conditions

22 When issuing a practice permit, the Registrar may impose conditions, including, but not limited to, the following:

(a) practising under supervision;

(b) limiting the practice to specified professional services or to specified areas of the practice of registered nursing;

(c) refraining from performing specified restricted activities.

Alternative Complaint Resolution

Referral to ACR

23 When the Complaints Director considers whether to make the referral under section 58 of the Act to an alternative complaint resolution process, the Complaints Director must consider the guidelines approved by the Council.

ACR conductor

24 If the Complaints Director considers, under section 23, that a referral is appropriate and the complainant and the investigated person have agreed to enter into an alternative complaint resolution process, the Complaints Director must appoint an individual to conduct the alternative complaint resolution process.

Agreement

25(1) The person conducting the alternative complaint resolution process must, in consultation with the complainant and the investigated person, establish the procedures for and objectives of the alternative complaint resolution process, which must be set out

in writing and signed by the complainant, the investigated person and the representative of the College before proceeding with the alternative complaint resolution process.

(2) The agreement must include

(a) the scope of the process, which may include agreeing to address part of the complaint through separate processes,

(b) who will participate in the process,

(c) the person or persons who will conduct the process and whether that person is to act as mediator, facilitator or conciliator or in some other capacity,

(d) how the process may be terminated and by whom,

(e) the participation and role of the College,

(f) any time frames for progress or completion of the process, and

(g) any other terms that are considered appropriate.

Confidentiality

26 The complainant and the investigated person must, subject to sections 59 and 60 of the Act, agree to treat all information shared during the process as confidential.

Reinstatement

Application

27(1) A person whose registration and practice permit have been cancelled under Part 4 of the Act may apply in writing to the Complaints Director to have the registration and practice permit reinstated.

(2) An applicant must include in the application

(a) the applicant's home address and telephone number, and

(b) actions that the applicant has taken since the cancellation.

(3) An application under subsection (1) may not be made earlier than

(a) 2 years after the cancellation, or

(b) 2 years after the refusal of an application for reinstatement.

Review process

28(1) The Complaints Director must, on receipt of an application under section 27, refer it to the Hearings Director and the Hearings Director must select a Reinstatement Review Committee, in accordance with the bylaws, to hold a hearing in respect of the application.

(2) The Hearings Director must provide to the person making the application, at least 30 days before the date of the hearing, written notice of the time and place of the hearing.

(3) The hearing must be held within 90 days from the date the Hearings Director selects a Reinstatement Review Committee under subsection (1), unless

(a) the Hearings Director has not been able to serve the applicant under subsection (2), or

(b) the applicant and Complaints Director agree otherwise.

Hearing

29(1) The hearing is open to the public unless the Reinstatement Review Committee determines on its own motion or on application by any person that the hearing or part of it should be in private because

(a) of probable prejudice to a civil action or a prosecution of an offence,

(b) of concern for the safety of the person or the public,

(c) the non-disclosure of a person's confidential, personal, property acquisition or financial information outweighs the desirability of having the reinstatement hearing open to the public, or

(d) of other reasons satisfactory to the Reinstatement Review Committee.

(2) The applicant must present evidence of the actions taken since the cancellation.

(3) The Complaints Director or a person that the Complaints Director designates may appear at the hearing on behalf of the College to present evidence, including a copy of the decision and the portions, that the Complaints Director considers relevant, of the record of the hearing at which the applicant's registration and practice permit were cancelled and any other relevant information from the hearing, and to make submissions respecting the application.

(4) The following may be represented by legal counsel at the hearing:

(a) the Reinstatement Review Committee;

(b) the applicant;

(c) the Complaints Director or a person designated under subsection (3).

(5) Evidence may be given before the Reinstatement Review Committee in any manner that it considers appropriate and it is not bound by the rules of law respecting evidence applicable to judicial hearings.

Deliberations

30(1) In making its decision, the Reinstatement Review Committee must

(a) consider the decision that is the subject of the review and any relevant portions of the record of the hearing at which the applicant's registration and practice permit were cancelled, and

(b) consider whether the applicant is fit to practise nursing and does not pose a risk to public safety.

(2) The Reinstatement Review Committee must, within 60 days after completing the hearing, make one or more of the following orders:

(a) an order denying the application;

(b) an order directing the Registrar to reinstate the applicant's registration and practice permit, subject to the applicant meeting the requirements for registration;

(c) an order directing the Registrar to impose conditions on the applicant's practice permit;

(d) an order directing the applicant to pay any or all of the College's expenses incurred in respect of the application as calculated in accordance with the bylaws;

(e) any other order that the Reinstatement Review Committee considers necessary for the protection of the public.

Decision

31(1) The Reinstatement Review Committee must provide reasons to the applicant for the order it makes under section 30.

(2) The Reinstatement Review Committee's decision under section 30 is final.

Access to decision

32 The Reinstatement Review Committee may order that a decision under section 30 be publicized in a manner it considers appropriate.

Information

Providing information

33(1) A regulated member must provide the following information in addition to that required under section 33(3) of the Act when there is a change to the information or at the request of the Registrar:

(a) home address and telephone number;

(b) full legal name and previous names as applicable;

(c) date of birth and gender;

(d) the name of the employers or agencies where the member provides professional services as a paid or unpaid employee, consultant, contractor or volunteer and the addresses of the locations where the professional services are provided;

(e) number of practice hours in previous membership year;

(f) name of educational institution and year of graduation from a nursing program;

(g) information required for reciprocal or federal, provincial or territorial health workforce planning data sharing or research agreements.

(2) Subject to section 34(1) of the Act, the College may release the information collected under subsection (1)

(a) with the consent of the regulated member whose information it is, or

(b) in a summarized or statistical form so that it is not possible to relate the information to any particular identifiable person.

Correcting information

34 The Registrar may correct or remove any information in the register if the Registrar determines it is incorrect or inaccurate or add information required by the bylaws or for proper administration.

Section 119 information

35 The College must disclose the following information referred to in section 119(4) of the Act as follows:

(a) information on cancellation of practice permits and on practice permits with conditions for as long as the cancellation or conditions are in effect;

(b) information from the record of a hearing under Part 4 of the Act for 5 years after the date the record was created;

(c) information as to whether a hearing is scheduled to be held or has been held under Part 4 of the Act in respect of a regulated member until the hearing is completed.

Transitional Provisions, Repeals and Coming into Force

Transitional

36 On the coming into force of this Regulation, a registered member described in section 6 of Schedule 24 to the Act is deemed to be entered on the regulated members register in the register category that the Registrar considers appropriate.

Repeals

37 The following regulations are repealed:

(a) *Registration Regulation* (AR 453/83);

(b) *General Regulation* (AR 454/83);

(c) *Certified Graduate Nurse Regulation* (AR 455/83);

(d) *Code of Ethics Regulation* (AR 456/83);

(e) *Regulation and By-law Approval Regulation* (AR 355/83);

(f) *Nursing Profession Extended Practice Roster Regulation* (AR 16/99).

Coming into force

38 This Regulation comes into force on the coming into force of Schedule 24 to the *Health Professions Act*.

Printed on Recycled Paper

O.C. 353/2018

NOV 2 2 2018

Province of Alberta
Order in Council

ORDER IN COUNCIL

Approved and ordered:

Lois Mitchell

Lieutenant Governor
or
Administrator

The Lieutenant Governor in Council approves the Registered Nurses Profession Amendment Regulation set out in the attached Appendix.

CHAIR

FILED UNDER
THE REGULATIONS ACT
as ALBERTA REGULATION 201/2018
ON November 23 20 18
REGISTRAR OF REGULATIONS

For Information only

Recommended by: Minister of Health

Authority: Health Professions Act
(section 131)

APPENDIX

Health Professions Act

REGISTERED NURSES PROFESSION AMENDMENT REGULATION

1 The *Registered Nurses Profession Regulation* (AR 232/2005) is amended by this Regulation.

2 Section 1 is amended

(a) in clause (a) by striking out "approved by the Nursing Education Program Approval Board" **and substituting** "in Alberta approved by the Nursing Education Program Approval Committee";

(b) by adding the following after clause (a):

(a.1) "approved nurse practitioner program" means a nurse practitioner education program in Alberta approved by the Nursing Education Program Approval Committee in accordance with nursing education standards and criteria approved by the Council;

(a.2) "Bylaws" means the bylaws made by the Council under section 132 of the Act;

(c) in clause (b) by adding "register" **before** "category";

(d) in clause (g) by adding "register" **before** "category";

(e) by repealing clause (i);

(f) in clause (j) by adding "register" **before** "category";

(g) by repealing clause (k) and substituting the following:

(k) "Nursing Education Program Approval Committee" means the Nursing Education Program Approval Committee continued pursuant to the Bylaws;

(h) by adding the following before clause (l):

(k.1) "practice year" means a practice year as defined in the Bylaws;

(k.2) "provisional register" means the provisional register category of the regulated members register;

(i) in clause (l) by adding "register" **before** "category";

(j) by adding the following after clause (p):

(p.1) "Standards of Practice" means the standards of practice adopted by the Council in accordance with the Bylaws and section 133 of the Act.

(k) by repealing clause (q).

3 Section 2 is amended by repealing clause (d) and substituting the following:

(d) provisional register;

4 Section 3 is repealed and the following is substituted:

Registered nurse register — new applicants

3(1) An applicant for registration as a regulated member on the registered nurse register who has not previously been registered on the registered nurse register must

(a) have successfully completed as an education requirement either

(i) on and before December 31, 2009, a diploma or baccalaureate degree in nursing from an approved nursing program, or

(ii) on and after January 1, 2010, a baccalaureate degree in nursing from an approved nursing program,

(b) have passed the applicable registration exam, and

(c) have successfully completed the applicable jurisprudence requirement approved by the Council, if any.

(2) An applicant for registration under subsection (1) must complete the registration process within the 5 years immediately following the date of completion of the applicable education requirement referred to in subsection (1)(a).

(3) Despite subsection (2), an applicant who meets the requirements of subsection (1) but does not meet the requirements of subsection (2) may be registered as a regulated member on the registered nurse register if the applicant has met any additional requirements imposed by the Registration Committee.

5 Section 4 is repealed and the following is substituted:

Nurse practitioner register — new applicants

4(1) An applicant for registration as a regulated member on the nurse practitioner register who has not previously been registered on the nurse practitioner register must

(a) have successfully completed

(i) a master's degree in nursing from an approved nurse practitioner program, or

(ii) a post-master's certificate or diploma from an approved nurse practitioner program,

(b) have completed 4500 hours of registered nursing practice satisfactory to the Registration Committee,

(c) be registered on the registered nurse register,

(d) have passed the applicable registration exam, and

(e) have successfully completed the applicable jurisprudence requirement approved by the Council, if any.

(2) An applicant for registration under subsection (1) must, after completing a degree, certificate or diploma referred to in subsection (1)(a), complete the registration process within the time period set by the Council.

(3) Despite subsection (2), an applicant who meets the requirements of subsection (1) but does not meet the requirements of subsection (2) may be registered as a regulated member on the nurse practitioner register if the applicant has met any additional requirements imposed by the Registration Committee.

6 Section 5 is repealed and the following is substituted:

Certified graduate nurse register

5 An applicant for registration as a regulated member on the certified graduate nurse register who is not currently registered on the certified graduate nurse register must

(a) have previously been registered on the certified graduate nurse register, or

(b) be eligible to be registered on the certified graduate nurse register under section 8.

7 Section 6 is repealed and the following is substituted:

Provisional registration

6(1) An applicant who has applied for registration as a regulated member on the registered nurse register or the nurse practitioner register who has not successfully completed the applicable registration exam or the jurisprudence requirement but has otherwise fulfilled the registration requirements set out in section 3, 4, 8 or 9 may, at the discretion of the Registrar, be registered on the provisional register until the applicant meets the requirements for registration.

(2) A regulated member registered on the provisional register may only practise

(a) in accordance with conditions specified by the Registrar or Registration Committee, and

(b) while being supervised in accordance with the Standards of Practice.

(3) The registration of a regulated member on the provisional register is valid for 6 months or a shorter period specified by the Registrar.

(4) The registration of a regulated member on the provisional register may be renewed, but, except as provided by subsections (7) and (8), a regulated member may not be registered on the provisional register for more than a total period of 12 months.

(5) If a regulated member registered on the provisional register fails the applicable registration exam once, the Registrar or Registration Committee may specify additional conditions under subsection (2)(a).

(6) If a regulated member registered on the provisional register fails the applicable registration exam twice, the Registrar shall cancel the regulated member's registration on the provisional register.

(7) If a regulated member registered on the provisional register satisfies the Registration Committee that there are extenuating circumstances that prevent the regulated member from successfully completing the applicable registration exam or jurisprudence requirement within 12 months after being registered on the provisional register, the Registration Committee may direct the Registrar to renew the registration of the regulated member on the provisional register, but the regulated member may not be registered on the provisional register for more than a total period of 18 months.

(8) In the case of the registration of a regulated member as a graduate nurse practitioner, the registration of the regulated member may be renewed so that the regulated member is registered on the provisional register for more than one year but not more than 2 years, if, in the opinion of the Registrar, it is necessary to renew the registration because the registration exam the regulated member is required to pass for the purposes of section 4(1)(d) may not be offered, or may not be offered in time for the results of the exam to be available, during the first year the regulated member is registered on the provisional register.

(9) If a regulated member registered on the provisional register meets the requirements for registration on the registered nurse register or the nurse practitioner register, the Registrar must remove the regulated member's name from the provisional register and enter it on the appropriate category of the regulated members register.

8 Section 7 is repealed and the following is substituted:

Courtesy registration

7(1) A person is eligible for registration on the courtesy register if

(a) the person is registered and in good standing as a registered nurse or nurse practitioner or equivalent in another jurisdiction recognized by the Council as having substantially equivalent competencies and practice requirements as those of a registered nurse or nurse practitioner,

(b) the person requires registration in Alberta on a temporary basis for a specified purpose approved by the Registrar, and

(c) the person satisfies the Registrar that the person has the competence to provide the services related to the specified purpose.

(2) The registration of a person registered on the courtesy register is valid for the term specified by the Registrar, which must not exceed one year.

(3) On registering a person on the courtesy register, the Registrar shall set out on the courtesy register the title and initials referred to in section 14 that the person is authorized to use.

9 Section 8 is repealed and the following is substituted:

Equivalent jurisdiction

8 An applicant for registration on the registered nurse register, the certified graduate nurse register or the nurse practitioner register is eligible to be registered on the registered nurse register, the certified graduate nurse register or the nurse practitioner register, respectively, if the applicant

(a) is currently registered in good standing in another jurisdiction recognized by the Council under section 28(2)(b) of the Act as having substantially equivalent competence and practice requirements,

(b) meets the requirements of section 10.1, and

(c) successfully completes the applicable jurisprudence requirement approved by the Council, if any.

10 Section 9 is amended

(a) by repealing subsection (1) and substituting the following:

Substantial equivalence

9(1) An applicant who does not meet the requirements of section 3 or 4 but who the Registrar is satisfied under section 28(2)(c) of the Act has a combination of education, experience, practice or other qualifications that demonstrate the competence required for registration as a regulated member may be registered on the appropriate register if the applicant

(a) passes the applicable registration exam within the time specified by the Registrar,

(b) meets the requirements of section 10.1, and

(c) has successfully completed the applicable jurisprudence requirement approved by the Council, if any.

(b) by repealing subsections (4) and (5) and substituting the following:

(4) The Registrar may require an applicant referred to in subsection (1) to provide any information or evidence the Registrar or Registration Committee considers necessary to assess the applicant's application.

(5) Despite subsection (1)(a), the Registration Committee may waive the requirement to have passed the applicable registration exam if there are extenuating circumstances and the Registration Committee is of the opinion that the applicant has sufficient registered nursing experience, knowledge and competence.

11 Section 10 is repealed and the following is substituted:

Registration exam

10(1) An applicant for registration as a regulated member on the registered nurse register must pass the applicable registration exam within 2 years after completion of the educational requirement referred to in section 3(1)(a)(i) or (ii).

(2) An applicant for registration as a regulated member on the nurse practitioner register must pass the applicable registration exam within 3 years after completion of the educational program referred to in section 4(1)(a)(i) or (ii).

(3) If an applicant for registration as a regulated member on the registered nurse register does not pass the applicable registration exam within 2 years after completion of the educational requirement referred to in section 3(1)(a)(i) or (ii), the applicant must, before writing or rewriting the applicable registration exam, as the case may be, successfully complete

(a) an approved nursing program leading to initial entry to practise as a registered nurse,

(b) a nursing education program in a province or territory of Canada other than Alberta that is approved or recognized by the regulatory body in that province or territory having authority to approve or recognize nursing education programs leading to initial entry to practise as a registered nurse, or

(c) additional educational requirements or other requirements determined by the Registrar or the Registration Committee.

(4) If an applicant for registration as a regulated member on the nurse practitioner register does not pass the applicable registration exam within 3 years after completion of the educational requirement referred to in section 4(1)(a)(i) or (ii), the applicant must, before rewriting the applicable registration exam, successfully complete

(a) a master's degree in nursing from an approved nurse practitioner program,

(b) a post-master's certificate or diploma from an approved nurse practitioner program,

(c) a nurse practitioner education program in a province or territory of Canada other than Alberta that is approved or recognized by the regulatory body in that province or territory having authority to approve or recognize nurse practitioner education programs leading to initial entry to practise as a nurse practitioner, or

(d) additional educational requirements or other requirements determined by the Registrar or the Registration Committee.

(5) Despite anything in this section, if an applicant for registration on the registered nurse register or nurse practitioner register satisfies the Registration Committee that there are extenuating circumstances, the Registration Committee may allow the applicant one or more attempts to pass the applicable registration exam after the applicable period referred to in subsection (1) or (2).

Currency of practice

10.1(1) This section applies to the following applicants:

(a) an applicant for registration as a regulated member on the registered nurse register, the certified graduate nurse register or the nurse practitioner register who was previously registered on the registered nurse register, the certified graduate nurse register or the nurse practitioner register but is not currently registered on the register;

(b) an applicant for registration under section 8 or 9;

(c) an applicant for a renewal of a practice permit as a registered nurse, certified graduate nurse or nurse practitioner.

(2) An applicant who is applying for registration as a regulated member on the registered nurse register or the certified graduate nurse register, or for the renewal of a practice permit as a registered nurse or certified graduate nurse, must provide evidence satisfactory to the Registrar that the applicant has, within the 5 complete practice years immediately preceding the date the application is received by the Registrar,

(a) successfully completed a degree or nursing program or course satisfactory to the Registrar,

(b) had 1125 hours of nursing practice satisfactory to the Registrar, or

(c) successfully completed a program leading to re-entry to nursing practice approved by the Nursing Education Program Approval Committee.

(3) An applicant who is applying for registration as a regulated member on the nurse practitioner register, or for the renewal of a practice permit as a nurse practitioner, must provide evidence satisfactory to the Registrar that the applicant has, within the number of complete practice years as specified by the Council immediately preceding the date the application is received by the Registrar,

(a) successfully completed the educational requirement referred to in section 4(1)(a)(i) or (ii), or

(b) had the number of hours established by the Council as the required number of hours for the purposes of this section of nurse practitioner practice satisfactory to the Registrar.

(4) Despite subsections (2) and (3), an applicant who does not meet the requirements of subsection (2) or (3) may instead meet other requirements determined by the Registration Committee.

12 Section 11 is renumbered as section 11(1) and is amended

(a) in subsection (1)

(i) by repealing clause (b) and substituting the following:

(b) a written statement by the applicant as to whether the applicant

(i) is currently undergoing an investigation or is subject to an unprofessional conduct process,

(ii) has ever been disciplined, or

(iii) has ever had conditions imposed on the applicant's practice

by a regulatory body responsible for the regulation of registered nursing in a jurisdiction other than Alberta or by a regulatory body responsible for the regulation of any other profession in Alberta or another jurisdiction;

(ii) by adding the following after clause (b):

(b.1) a written statement by the applicant as to whether an application for registration as a regulated member by the applicant in any other jurisdiction was ever previously rejected or refused;

(b.2) the results of a current criminal records check;

(iii) by repealing clause (c) and substituting the following:

(c) a written statement as to whether the applicant has ever pleaded guilty or has been found guilty of a criminal offence in Canada or an offence of a similar nature in a jurisdiction outside Canada for which neither

(i) a record suspension under the *Criminal Records Act* (Canada), nor

(ii) a pardon

is in effect;

(iv) by adding the following after clause (c):

(c.1) a written statement by the applicant as to whether there has ever been a judgment in a civil action against the applicant with respect to the applicant's practice;

(v) by repealing clause (d) and substituting the following:

(d) any other relevant evidence as required by the Registrar.

(b) by adding the following after subsection (1):

(2) If an applicant has engaged in an activity that has, in the opinion of the Registrar, undermined the applicant's good character and reputation, the applicant may provide evidence satisfactory to the Registrar of rehabilitation.

(3) The Registrar may also consider information other than that provided by the applicant in determining whether the applicant is of good character and reputation, but if the

Registrar considers other information, the Registrar must give the applicant sufficient particulars of that information to allow the applicant to respond to that information.

13 The following is added after section 12:

Liability insurance

12.1 An applicant for registration as a regulated member must provide evidence satisfactory to the Registrar of having the type and amount of professional liability insurance required by the Council.

14 Section 13 is amended by striking out "whose first language is not English".

15 Section 14 is amended

(a) in subsection (1) by striking out "registered nurse and the initials RN" **and substituting** " "registered nurse" and the initials "RN" ";

(b) in subsection (2) by striking out "certified graduate nurse and the initials CGN" **and substituting** " "certified graduate nurse" and the initials "CGN" ";

(c) by repealing subsection (3);

(d) in subsection (4) by striking out "used the title nurse practitioner and the initials NP" **and substituting** "use the title "nurse practitioner" and the initials "NP" ";

(e) by repealing subsection (5) and substituting the following:

(5) A regulated member registered on the registered nurse register or on the nurse practitioner register may, in accordance with the Standards of Practice, use the title "specialist" in connection with providing professional services.

(f) by adding the following after subsection (5):

(6) A regulated member registered on the provisional register as a graduate nurse may use the title "graduate nurse" and the initials "GN".

(7) A regulated member registered on the provisional register as a graduate nurse practitioner may use the title "graduate nurse practitioner" and the initials "GNP".

(8) A regulated member registered on the courtesy register as a registered nurse may use the title "registered nurse" and the initials "RN".

(9) A regulated member registered on the courtesy register as a nurse practitioner may use the title "nurse practitioner" and the initials "NP".

16 The following is added before section 15:

Restrictions

14.1(1) Despite sections 15 to 18, regulated members must restrict themselves in performing restricted activities to those activities that they are competent to perform and to those that are appropriate to their area of practice and the procedures being performed.

(2) A regulated member who performs a restricted activity must do so in accordance with the Standards of Practice.

(3) A regulated member or other person shall not supervise the performance of a restricted activity unless the regulated member or person is authorized or permitted to perform the restricted activity without being supervised.

(4) A regulated member or other person who supervises the performance of a restricted activity under sections 15 to 18 must do so in accordance with the Standards of Practice.

17 Section 15 is amended

(a) in subsection (1)

(i) by striking out the words preceding clause (a) and substituting the following:

Authorized restricted activities

15(1) A regulated member registered on any register may, within the practice of registered nursing, perform the following restricted activities:

(ii) in clause (d) by striking out "except for a partial dislocation of the joints of the fingers and toes";

(iii) in clause (e) by striking out "within the meaning of the *Pharmaceutical Profession Act*";

(iv) by adding the following after clause (j):

(j.1) to order or apply non-ionizing radiation in ultrasound imaging, other than the application of ultrasound to a fetus;

(b) by repealing subsection (2) and substituting the following:

(2) Despite subsection (1)(e), a regulated member registered on any register performing the restricted activity described in subsection (1)(e) shall not distribute, trade or barter for money or valuable consideration, or keep for sale or offer for sale, a Schedule 1 drug or a Schedule 2 drug but may distribute or give away a Schedule 1 drug or a Schedule 2 drug without expectation or hope of compensation or reward.

(2.1) A regulated member registered on the registered nurse register may, within the practice of registered nursing, perform the restricted activity of ordering any form of ionizing radiation in medical radiography.

(2.2) A regulated member registered on the registered nurse register who meets the requirements approved by the Council and who has been authorized to do so by the Registrar may, within the practice of registered nursing, perform the restricted activity of prescribing a Schedule 1 drug.

(c) by repealing subsection (3);

(d) by repealing subsection (4) and substituting the following:

(4) A regulated member registered on the registered nurse register or on the certified graduate nurse register may, within

the practice of registered nursing, perform the restricted activity of applying non-ionizing radiation in ultrasound imaging to a fetus, but only under the supervision of a person who provides health services and who is authorized by this Regulation or another regulation under the Act or by another enactment to apply ultrasound to a fetus.

(e) by repealing subsection (5) and substituting the following:

(5) A regulated member registered on the nurse practitioner register, a regulated member registered on the courtesy register as a nurse practitioner and a regulated member registered on the provisional register as a graduate nurse practitioner may perform the restricted activities listed in subsection (1) and the following additional restricted activities when practising as a nurse practitioner:

(a) to set or reset a fracture of a bone;

(b) to prescribe a Schedule 1 drug;

(c) to prescribe blood or blood products;

(d) to prescribe diagnostic imaging contrast agents;

(e) to prescribe radiopharmaceuticals, radiolabelled substances, radioactive gases or radioaerosols;

(f) to order or apply any form of ionizing radiation in medical radiography;

(g) to order any form of ionizing radiation in nuclear medicine;

(h) to order non-ionizing radiation in magnetic resonance imaging;

(i) to order or apply non-ionizing radiation in ultrasound imaging, including any application of ultrasound to a fetus.

(f) by adding the following after subsection (5):

(6) In this section,

(a) "Schedule 1 drug" means a Schedule 1 drug within the meaning of Part 4 of the *Pharmacy and Drug Act*;

(b) "Schedule 2 drug" means a Schedule 2 drug within the meaning of Part 4 of the *Pharmacy and Drug Act*.

18 Section 16 is repealed.

19 Section 17 is repealed and the following is substituted:

Supervision of students

17(1) A student who

(a) is enrolled in an approved nursing program, and

(b) is participating in a clinical practicum in Alberta or is employed as an undergraduate nursing employee in Alberta

is permitted to perform the restricted activities set out in section 15(1) under the supervision of a regulated member who is authorized to perform those restricted activities and has consented to supervise the restricted activities.

(2) A student who

(a) is enrolled in a nursing education program in a province or territory of Canada other than Alberta that is approved in that province or territory and that leads to initial entry to practise as a registered nurse, and

(b) is participating in a clinical practicum in Alberta or is employed as an undergraduate nursing employee in Alberta

is permitted to perform the restricted activities set out in section 15(1) under the supervision of a regulated member who is authorized to perform those restricted activities and has consented to supervise the restricted activities.

(3) A student who

(a) is enrolled in a nursing education program in a jurisdiction outside Canada that is approved in that jurisdiction, and

(b) has been authorized by an educational institution in Alberta to participate in a clinical practicum of an approved nursing program in Alberta offered by the educational institution

is permitted to perform the restricted activities set out in section 15(1) under the supervision of a regulated member who is authorized to perform those restricted activities and has consented to supervise the restricted activities.

(4) A regulated member who

(a) is registered on the registered nurse register or registered as a registered nurse on the courtesy register, and

(b) is enrolled in an approved nurse practitioner education program

is permitted to perform the restricted activities set out in section 15(5) under the supervision of a person who is authorized to perform those restricted activities and has consented to supervise the restricted activities.

(5) A regulated member who

(a) is registered on the registered nurse register or registered as a registered nurse on the courtesy register, and

(b) is enrolled in a nurse practitioner education program in a province or territory of Canada other than Alberta that is approved in that province or territory

is permitted to perform the restricted activities set out in section 15(5) under the supervision of a person who is authorized to perform those restricted activities and has consented to supervise the restricted activities.

(6) A regulated member who

(a) is registered on the registered nurse register or registered as a registered nurse on the courtesy register,

(b) is enrolled in a nurse practitioner education program in a jurisdiction outside Canada that is approved in that jurisdiction, and

(c) meets any requirements established by the Council for the purposes of this section

is permitted to perform the restricted activities set out in section 15(5) under the supervision of a person who is authorized to perform those restricted activities and has consented to supervise the restricted activities.

(7) A student who

(a) is enrolled in a health services program of studies, other than an approved nursing program or an approved nurse practitioner program, and

(b) is authorized by an enactment to perform a restricted activity set out in section 15(1) or (5)

is permitted to perform that restricted activity under the supervision of a regulated member who is authorized to perform that restricted activity and has consented to supervise the restricted activity.

20 The following is added after section 17:

Applicants for registration

17.1 An applicant for registration as a regulated member who is required by the Registrar or Registration Committee to take a course that includes a clinical component is, when engaged in the clinical component of the course and to the extent necessary to fulfill the requirements of the clinical component of the course, permitted to perform the restricted activities set out in section 15(1) or (5) under the supervision of a person who is authorized to perform those restricted activities and has consented to supervise the restricted activities.

21 Section 18 is amended

(a) in subsection (1)(a) by striking out "in accordance with subsection (2)";

(b) by repealing subsection (2).

22 Section 19 is repealed and the following is substituted:

Continuing competence program

19 The continuing competence program of the College is established and consists of

(a) practice reflection,

(b) continuing professional development,

(c) competence assessment, and

(d) practice visits.

Practice reflection

19.1(1) As part of the continuing competence program, a regulated member registered on the registered nurse register, the nurse practitioner register or the certified graduate nurse register must, at the times specified by the Council and in accordance with the rules made under section 19.5, complete a practice reflection that includes, in a form satisfactory to the Competence Committee, the following:

(a) a personal assessment of the member's own nursing practice using

(i) the Standards of Practice,

(ii) in the case of a regulated member registered on the nurse practitioner register, the competencies for nurse practitioners established by the Council, and

(iii) other criteria selected by the regulated member from criteria provided for in the rules approved by the Council;

(b) recorded feedback of the regulated member's practice obtained by the regulated member;

(c) the development of a written learning plan that is based on the regulated member's personal assessment of the member's practice under clause (a) and the feedback received about the member's practice under clause (b).

(2) A regulated member referred to in subsection (1) must

(a) make records of the personal assessment, recorded feedback and written learning plan referred to in subsection (1) in a form satisfactory to the

Competence Committee and in accordance with the applicable rules made under section 19.5, if any, and

(b) retain the records referred to in clause (a) for the period specified by the Council.

(3) A regulated member referred to in subsection (1) must, on the request of the Competence Committee and in accordance with the direction of the Competence Committee and the applicable rules made under section 19.5, if any, provide evidence of meeting the requirements of this section for the current practice year and for the period specified by the Council.

Continuing professional development

19.2(1) As part of the continuing competence program, a regulated member registered on the registered nurse register, the nurse practitioner register or the certified graduate nurse register must, in each practice year, undertake continuing professional development by

(a) implementing the written learning plan referred to in section 19.1(1)(c) by engaging in learning activities to address learning needs,

(b) preparing a written self-evaluation of the regulated member's learning plan that describes the implementation of the learning plan and the influence that the learning activities have had on the member's practice and indicates any variations in the learning plan and the reasons for the variations, and

(c) successfully completing mandatory education requirements if required by the rules made under section 19.5.

(2) A regulated member referred to in subsection (1) must

(a) in each practice year make records of all of the activities undertaken by the regulated member under subsection (1), including the written self-evaluation referred to in subsection (1)(b), in a form satisfactory to the Competence Committee and in accordance with the applicable rules made under section 19.5, if any, and

(b) retain the records referred to in clause (a) for a period of 5 years after the end of the practice year in which the continuing professional development activities required by subsection (1) were completed.

(3) A regulated member referred to in subsection (1) must, on the request of the Competence Committee and in accordance with the direction of the Competence Committee and the applicable rules made under section 19.5, if any, provide evidence of meeting the requirements of this section for the current practice year and for the period specified by the Council.

Competence assessment

19.3(1) As part of the continuing competence program, the Competence Committee may require a regulated member registered on the registered nurse register, the nurse practitioner register or the certified graduate nurse register to undergo an assessment for the purpose of evaluating the regulated member's competence.

(2) For the purpose of an assessment under subsection (1), the Competence Committee may use any one or more of the following:

(a) multiple source feedback;

(b) case studies;

(c) peer review;

(d) practice visits;

(e) examinations;

(f) any individualized assessments of professional competence provided for in the rules made under section 19.5.

Actions to be taken

19.4 If the Competence Committee considers a regulated member's practice reflection or continuing professional development activities to be unsatisfactory or that a regulated member has not complied with one or more requirements under section 19.1 or 19.2, or if the results of an assessment of a regulated member's competence under section 19.3 are unsatisfactory, the Competence Committee may, when the

regulated member's next application for a practice permit is considered, impose, or recommend the imposition of, one or more of the following conditions on the regulated member's practice permit:

(a) that the regulated member successfully complete specified continuing competence program requirements or professional development activities within a specified time;

(b) that the regulated member successfully complete specified examinations, testing, assessment, training, education or treatment to enhance competence in one or more areas of practice within a specified time;

(c) that the regulated member practise under the supervision of another regulated member or a regulated member of another regulated profession;

(d) that the regulated member's practice be limited to specified procedures or practice settings;

(e) that the regulated member report to the Competence Committee on specified matters on specified dates;

(f) that the regulated member correct any problems identified in the competence assessment;

(g) that the regulated member demonstrate to the Competence Committee competence gained in a specific area within a specified period of time;

(h) any other condition considered appropriate by the Competence Committee.

Continuing competence program rules

19.5(1) The Council may make rules respecting the continuing competence program, including, but not limited to the following:

(a) the requirements pertaining to practice reflections under section 19.1;

(b) the keeping of records under sections 19.1 and 19.2 and the provision of the records to the Competence Committee;

(c) reviews of regulated members' continuing competence program records under section 19.1 or 19.2;

(d) requirements for mandatory education for the purposes of section 19.2(1)(c);

(e) assessments conducted under section 19.3, including rules providing for individualized assessments of professional competence for the purposes of section 19.3(2)(f);

(f) continuing competence program requirements or professional development activities for the purposes of section 19.4(a);

(g) assessment and approval of education as substantially equivalent to required mandatory education;

(h) the approval of criteria established by the Competence Committee for the selection of regulated members for competence assessments, practice visits or both.

(2) The Competence Committee may recommend rules or amendments to the rules to the Council.

(3) Before making or amending a rule under this section, the Council must make the proposed rule or amendment available to all regulated members for their review.

(4) The Council may make a rule or amendment to a rule 60 or more days after the proposed rule or amendment has been made available under subsection (3) and after having considered any comments received on the proposed rule or amendment.

Distribution of rules

19.6 The rules and any amendments to the rules made under section 19.5 must be made available by the College

(a) on the website of the College, and

(b) in printed form on request to any regulated member or applicant for registration as a regulated member.

23 Section 20 is repealed.

24 Section 21 is repealed and the following is substituted:

Renewal requirements

21(1) A regulated member who is applying for renewal of the member's practice permit must provide evidence satisfactory to the Registrar

(a) of meeting the continuing competence program requirements,

(b) of meeting the applicable requirements under section 10.1,

(c) of good character and reputation as set out in section 11,

(d) if requested by the Registrar, confirming the member's fitness to practise, and

(e) of having the type and amount of professional liability insurance required by the Council.

(2) Despite subsection (1)(a), a regulated member who does not meet the requirements referred to in subsection (1)(a) may instead meet other requirements, as determined by the Competence Committee.

25 Section 22 is repealed and the following is substituted:

Conditions

22 When issuing a practice permit, the Registrar, Registration Committee or Competence Committee may impose conditions on the practice permit, including, but not limited to, one or more of the following:

(a) that the regulated member complete any specified examinations, testing, counselling, training or education;

(b) limiting the regulated member's practice to specified professional services, restricted activities or practice settings;

(c) limiting the regulated member's practice to a specified purpose;

(d) limiting the regulated member's practice to a specified time period;

(e) that the regulated member practise under supervision for the period specified on the permit;

(f) that the regulated member report to the Registrar, Registration Committee or Competence Committee on specified dates respecting specified matters;

(g) one or more conditions referred to in section 19.4.

26 Section 28(1) is amended by striking out "bylaws" **and substituting** "Bylaws".

27 Section 29(1)(c) is repealed and the following is substituted:

(c) not disclosing a person's confidential personal, property or financial information outweighs the desirability of having the hearing open to the public,

(c.1) another Act requires that the hearing or part of the hearing be held in private, or

28 Section 30(2)(d) is amended by striking out "bylaws" **and substituting** "Bylaws".

29 Section 33(1) is amended

(a) in clause (a) by striking out "and telephone number" **and substituting** ", telephone number and e-mail address";

(b) by repealing clause (b) and substituting the following:

(b) full legal name, aliases and previous names;

(c) in clause (e) by striking out "membership year" **and substituting** "practice year".

30 Section 34 is amended by striking out "bylaws" **and substituting** "Bylaws".

31 Section 35 is repealed and the following is substituted:

Section 119 information

35 The periods of time during which the College is obliged to provide information on the request of a member of the public under section 119(4) of the Act are as follows:

(a) in the case of information referred to in section 33(3) of the Act about a person, other than the information referred to in section 33(3)(h), during the period while the person is a regulated member of the College;

(b) in the case of information referred to in section 119(1) of the Act,

(i) during the period while the suspension is in effect, in the case of information that a regulated member's practice permit has been suspended;

(ii) during the period that the cancellation is effective, in the case of information that a person's regulated member's practice permit has been cancelled;

(iii) during the period while the conditions are in effect, in the case of information that conditions have been imposed on a regulated member's practice permit;

(iv) during the period while the direction is in effect, in the case of information that a regulated member has been directed under section 118(4) of the Act to cease providing professional services;

(v) during the 5-year period immediately after the date of the order, in the case of information that an order has been made respecting a regulated member by a hearing tribunal, the Council or the Court of Appeal under Part 4 of the Act;

(c) during the period until the hearing is concluded, in the case of information as to whether a hearing is scheduled to be held under Part 4 of the Act with respect to a named regulated member;

(d) during the period beginning at the conclusion of the hearing and ending 5 years after the date that a written decision under section 83 of the Act or an order under section 89(5) or 92(1) of the Act is made, in the case of

information as to whether a hearing has been held under Part 4 of the Act with respect to a named regulated member;

(e) during the 5-year period after the date of the written decision made by the hearing tribunal under section 83 of the Act, in the case of a decision and testimony referred to in section 85(3) or (4) of the Act.

32 The following is added after section 36:

Transitional — provisional register

36.1 On the coming into force of this section, a regulated member registered on the temporary register is deemed to be registered on the provisional register as the Registrar considers appropriate.

33 This Regulation comes into force on May 1, 2019.

Her Majesty The Queen and Canada Employment and Immigration Commission *Appellants*

v.

Shalom Schachter *Respondent*

and

Women's Legal Education and Action Fund *Respondent*

and

The Attorney General for Ontario, the Attorney General of Quebec, the Attorney General for New Brunswick, the Attorney General of British Columbia, the Attorney General for Saskatchewan, the Attorney General for Alberta, the Attorney General of Newfoundland and Minority Advocacy Rights Council *Interveners*

INDEXED AS: SCHACHTER *v.* CANADA

File No.: 21889.

1991: December 12; 1992: July 9.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory and McLachlin JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Constitutional law — Charter of Rights — Equality rights — Remedies — Underinclusive benefit — Natural parents not given same benefits as adoptive parents under Unemployment Insurance Act, 1971 — Whether or not s. 52(1) of Constitution Act, 1982 required court to declare offending section of no force or effect — Whether or not s. 24 of Charter enabled court to order natural parents entitled to same benefits as adoptive parents — Constitution Act, 1982, s. 52(1) — Canadian Charter of Rights and Freedoms, ss. 1, 7, 15(1), 24(1) — Unemployment Insurance Act, 1971, S.C. 1970-71-72, c. 48, s. 32.

Sa Majesté la Reine et la Commission de l'emploi et de l'immigration du Canada *Appelantes*

c.

Shalom Schachter *Intimé*

et

Le Fonds d'action et d'éducation juridiques pour les femmes *Intimé*

et

Le procureur général de l'Ontario, le procureur général du Québec, le procureur général du Nouveau-Brunswick, le procureur général de la Colombie-Britannique, le procureur général de la Saskatchewan, le procureur général de l'Alberta, le procureur général de Terre-Neuve et le Conseil de revendication des droits des minorités *Intervenants*

RÉPERTORIÉ: SCHACHTER *c.* CANADA

N° du greffe: 21889.

1991: 12 décembre; 1992: 9 juillet.

Présents: Le juge en chef Lamer et les juges La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory et McLachlin.

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Droit constitutionnel — Charte des droits — Droits à l'égalité — Réparations — Prestations limitatives — Parents naturels ne bénéficiant pas des mêmes prestations que les parents adoptifs en vertu de la Loi de 1971 sur l'assurance-chômage — L'article 52(1) de la Loi constitutionnelle de 1982 exige-t-il que le tribunal déclare inopérant l'article incompatible? — L'article 24 de la Charte donne-t-il au tribunal le pouvoir de statuer que les parents naturels ont droit aux mêmes prestations que les parents adoptifs? — Loi constitutionnelle de 1982, art. 52(1) — Charte canadienne des droits et libertés, art. 1, 7, 15(1), 24(1) — Loi de 1971 sur l'assurance-chômage, S.C. 1970-71-72, ch. 48, art. 32.

Constitutional law — Charter of Rights — Enforcement — Appropriate remedy — Underinclusive benefit — Natural parents not given same benefits as adoptive parents under Unemployment Insurance Act, 1971 — Whether or not s. 52(1) of Constitution Act, 1982 required court to declare offending section of no force or effect — Whether or not s. 24 of Charter enabled court to order natural parents entitled to same benefits as adoptive parents.

Respondent's spouse received 15 weeks of maternity benefits in 1985 under s. 30 of the *Unemployment Insurance Act, 1971*. Although respondent had intended to stay home with the newborn as soon as his spouse was able to return to work after the birth, he ultimately took three weeks off without pay. He had first applied for benefits under s. 30 in respect of the time he had to take off work, but, since s. 30 was limited to maternity benefits, modified his application to one under s. 32 for "paternity benefits". Section 32 provides for parental benefits for adoptive parents for 15 weeks following the placement of their child with them. These benefits are to be shared between the two parents in accordance with their wishes. The respondent's application was denied on the basis that he was "not available for work", a ground of disentitlement for all applicants except those applying for maternity benefits or adoption benefits.

The respondent appealed the decision to a Board of Referees. The appeal was dismissed and the respondent made a further appeal to an Umpire. This appeal was never heard as the respondent made known his intention to raise constitutional issues and it was agreed by the parties that the Federal Court, Trial Division was a better forum for resolving the constitutional issues. The trial judge found a violation of s. 15 of the *Canadian Charter of Rights and Freedoms* in that s. 32 discriminated between natural parents and adoptive parents with respect to parental leave. He granted declaratory relief under s. 24(1) of the *Charter* and extended the same benefits to natural parents as were granted to adoptive parents under s. 32. The violation of s. 15 was subsequently ceded by appellants. The Federal Court of Appeal upheld the trial judge's decision.

The impugned provision was since amended to extend parental benefits to natural parents on the same

Droit constitutionnel — Charte des droits — Exécution — Réparation appropriée — Prestations limitatives — Parents naturels ne bénéficiant pas des mêmes prestations que les parents adoptifs en vertu de la Loi de 1971 sur l'assurance-chômage — L'article 52(1) de la Loi constitutionnelle de 1982 exige-t-il que le tribunal déclare inopérant l'article incompatible? — L'article 24 de la Charte donne-t-il au tribunal le pouvoir de statuer que les parents naturels ont droit aux mêmes prestations que les parents adoptifs?

En 1985, l'épouse de l'intimé a reçu des prestations de maternité pendant 15 semaines en vertu de l'art. 30 de la *Loi de 1971 de l'assurance-chômage*. Bien qu'il ait eu l'intention de rester à la maison avec le nouveau-né dès que son épouse pourrait retourner au travail, l'intimé a finalement pris trois semaines de congé sans traitement. Il avait tout d'abord fait une demande de prestations en vertu de l'art. 30 pour justifier son absence du travail mais, puisque l'art. 30 était limité aux prestations de maternité, il a ensuite modifié une formule de demande de «prestations de paternité» en vertu de l'art. 32. Cet article prévoit le versement de prestations aux parents adoptifs pendant 15 semaines à la suite du placement d'un enfant dans leur foyer. Les deux parents peuvent se partager ces prestations comme ils l'entendent. La demande de l'intimé a été refusée parce qu'il n'était pas «disponible pour travailler», motif d'exclusion pour tous les prestataires, sauf ceux faisant une demande de prestations de maternité ou d'adoption.

L'intimé a interjeté appel de la décision auprès d'un conseil arbitral. L'appel a été rejeté et l'intimé a interjeté un autre appel devant un juge-arbitre. Cet appel n'a jamais été entendu puisque l'intimé avait fait connaître son intention de soulever des questions constitutionnelles; les parties ont convenu que la Section de première instance de la Cour fédérale serait mieux placée pour résoudre les questions constitutionnelles. Le juge de première instance a conclu à une violation de l'art. 15 de la *Charte canadienne des droits et libertés* en ce que l'art. 32 établit une discrimination entre les parents naturels et les parents adoptifs relativement au congé parental. Il a accordé une réparation sous forme de jugement déclaratoire en vertu du par. 24(1) de la *Charte* et octroyé aux parents naturels les mêmes prestations que celles accordées aux parents adoptifs en vertu de l'art. 32. Les appelantes ont par la suite concédé qu'il y a eu violation de l'art. 15 de la *Charte*. La Cour d'appel a confirmé la décision du juge de première instance.

La disposition attaquée a depuis été modifiée et prévoit maintenant que les parents naturels ont droit, selon

footing as they are provided to adoptive parents for a period totalling 10 weeks rather than the original 15.

The constitutional questions stated in this Court queried: (1) whether s. 52(1) of the *Constitution Act, 1982* required that s. 32 of the *Unemployment Insurance Act, 1971*, given an unequal benefit contrary to s. 15(1) of the *Charter*, be declared of no force or effect, and (2) whether s. 24(1) of the *Charter* conferred on the Federal Court Trial Division the power to order that natural parents are entitled to benefits on the same terms as benefits are available to adoptive parents under s. 32.

Held: The appeal should be allowed. The first constitutional question should be answered in the affirmative, leaving open the option of suspending the declaration of invalidity for a period of time to allow Parliament to amend the legislation in a way which meets its constitutional obligations. The second constitutional question should be answered in the negative. Section 24(1) of the *Charter* provides an individual remedy for actions taken under a law which violate an individual's *Charter* rights. A limited power to extend legislation is available to courts in appropriate circumstances by way of the power to read in derived from s. 52 of the *Constitution Act, 1982*.

Per Lamer C.J. and Sopinka, Gonthier, Cory and McLachlin JJ.: Generally speaking, when only a part of a statute or provision violates the Constitution, only the offending portion should be declared to be of no force or effect. The doctrine of severance requires that a court define carefully the extent of the inconsistency between the statute in question and the requirements of the Constitution, and then declare inoperative (a) the inconsistent portion, and (b) such part of the remainder of which it cannot be safely assumed that the legislature would have enacted it without the inconsistent portion.

In the case of reading in, the inconsistency is defined as what the statute wrongly excludes rather than what it wrongly includes. Where the inconsistency is defined as what the statute excludes, the logical result of declaring inoperative that inconsistency may be to include the excluded group within the statutory scheme. The reach of the statute is effectively extended by way of reading in rather than reading down.

des modalités identiques, aux mêmes prestations que les parents adoptifs, pendant une période totale de 10 semaines au lieu des 15 semaines prévues initialement.

Les questions constitutionnelles formulées en Cour suprême sont de savoir (1) si le par. 52(1) de la *Loi constitutionnelle de 1982* exige que l'art. 32 de la *Loi de 1971 sur l'assurance-chômage*, parce qu'il crée un bénéfice inégal contrairement au par. 15(1) de la *Charte*, soit déclaré inopérant; et (2) si le par. 24(1) donne à la Section de première instance de la Cour fédérale le pouvoir de statuer que les parents naturels ont droit aux mêmes prestations, suivant les mêmes conditions, que celles que peuvent toucher les parents adoptifs en vertu de l'art. 32.

Arrêt: Le pourvoi est accueilli. La première question constitutionnelle reçoit une réponse affirmative, mais l'effet de cette déclaration d'invalidité peut être suspendu pendant un certain temps pour que le Parlement puisse modifier le texte législatif d'une façon qui lui permette de respecter ses obligations constitutionnelles. La seconde question constitutionnelle reçoit une réponse négative. Le paragraphe 24(1) de la *Charte* prévoit une réparation individuelle lorsque des mesures prises en vertu d'une loi violent les droits garantis à une personne par la *Charte*. Dans les circonstances appropriées, les tribunaux ont un pouvoir limité, en vertu de l'art. 52 de la *Loi constitutionnelle de 1982*, de donner une interprétation large à une loi pour en étendre le champ d'application.

Le juge en chef Lamer et les juges Sopinka, Gonthier, Cory et McLachlin: En règle générale, lorsque seulement une partie d'une loi ou d'une disposition viole la Constitution, seule la partie fautive devrait être déclarée inopérante. La doctrine de la dissociation exige du tribunal qu'il précise soigneusement la mesure de l'incompatibilité entre la loi en question et les exigences de la Constitution et qu'il déclare inopérantes a) la partie incompatible, ainsi que b) toute partie du reste de la loi relativement à laquelle il n'y aurait pas lieu de supposer que le législateur l'aurait adoptée sans la partie incompatible.

Dans le cas de l'interprétation large, l'incompatibilité découle de ce que la loi exclut à tort plutôt que de ce qu'elle inclut à tort. Si l'incompatibilité découle de ce que la loi exclut, la déclaration d'invalidité de cette incompatibilité peut avoir pour effet logique d'inclure le groupe exclu dans le texte législatif en question. La portée de la loi est étendue par interprétation large au lieu de recevoir une interprétation atténuée.

Section 52 of the *Constitution Act, 1982* does not restrict the court to the verbal formula employed by the legislature in defining the inconsistency between a statute and the Constitution. Section 52 declares the law, and not the words expressing that law, to be of no force or effect to the extent of any inconsistency with the Constitution. The inconsistency can be defined as what is left out of the verbal formula as well as what is wrongly included.

The purpose of reading in is to be as faithful as possible within the requirements of the Constitution to the scheme enacted by the legislature. In some cases, of course, it will not be a safe assumption that the legislature would have enacted the constitutionally permissible part of its enactment without the impermissible part. There reading in would not be appropriate. Just as reading in is sometimes required in order to respect the purposes of the legislature, it is also sometimes required in order to respect the purposes of the *Charter*. Reading in therefore is a legitimate remedy akin to severance and should be available under s. 52 in cases where it is an appropriate technique to fulfil the purposes of the *Charter* and at the same time minimize the interference of the court with the parts of legislation that do not themselves violate the *Charter*.

The first step in choosing a remedial course under s. 52 is to define the extent of the inconsistency which must be struck down. Usually, the manner in which the law violates the *Charter* and the manner in which it fails to be justified under s. 1 will be critical to this determination.

In some circumstances, s. 52(1) mandates defining the inconsistent portion which must be struck down very broadly. This will almost always be the case where the legislation or legislative provision does not meet the first part of the *Oakes* test, in that the purpose is not sufficiently pressing or substantial to warrant overriding a *Charter* right. Where the purpose of the legislation is itself unconstitutional, the legislation should almost always be struck down in its entirety.

Where the purpose of the legislation or legislative provision is deemed to be pressing and substantial, but the means used to achieve this objective are found not to be rationally connected to it, the inconsistency to be struck down will generally be the whole of the portion of the legislation which fails the rational connection test. It matters not how pressing or substantial the objective

L'article 52 de la *Loi constitutionnelle de 1982* ne restreint pas le tribunal à l'examen du libellé employé par le législateur lorsqu'il détermine l'incompatibilité entre une loi et la Constitution. L'article 52 rend inopérantes les dispositions incompatibles d'une règle de droit et non pas les termes d'une loi. L'incompatibilité peut s'entendre tant de ce qui a été omis du libellé de la loi que de ce qui y a été inclus à tort.

L'objet de l'interprétation large est d'être aussi fidèle que possible, dans le cadre des exigences de la Constitution, au texte législatif adopté par le législateur. Il va sans dire que, dans certains cas, il n'y aura pas lieu de supposer que le législateur aurait adopté la partie d'une loi autorisée par la Constitution sans celle qui ne l'est pas. Dans ce cas, l'interprétation large ne conviendrait pas. S'il est parfois nécessaire de procéder par interprétation large pour assurer le respect des objectifs législatifs, il est également nécessaire parfois de procéder de cette façon pour assurer le respect des objets de la *Charte*. L'interprétation large est donc une mesure corrective légitime semblable à la dissociation et devrait pouvoir être utilisée en vertu de l'art. 52 dans les cas où elle constitue une technique appropriée pour satisfaire aux objets de la *Charte* et réduire au minimum l'ingérence judiciaire dans les parties de la loi qui en soi ne sont pas contraires à la *Charte*.

Dans le choix d'une mesure corrective en vertu de l'art. 52, la première étape consiste à déterminer l'étendue de l'incompatibilité qui doit être annulée. Habituellement, il sera essentiel d'examiner de quelle façon la loi en question viole la *Charte* et pourquoi cette violation ne peut être justifiée en vertu de l'article premier.

Dans certaines circonstances, le par. 52(1) exige qu'on détermine d'une façon très large la partie incompatible à annuler. Cela sera presque toujours le cas si la loi ou la disposition législative ne satisfait pas à la première partie du critère énoncé dans l'arrêt *Oakes*, en ce que l'objectif ne se rapporte pas à des préoccupations suffisamment urgentes et réelles pour justifier une atteinte à un droit garanti par la *Charte*. Si l'objectif même de la loi est inconstitutionnel, cette loi doit presque toujours être annulée dans sa totalité.

Lorsque l'on juge que l'objectif de la loi ou de la disposition législative se rapporte à des préoccupations urgentes et réelles, mais que les moyens choisis pour l'atteindre n'ont pas de lien rationnel avec cet objectif, l'incompatibilité à invalider sera généralement la partie de la disposition qui ne satisfait pas au critère du lien rationnel. Peu importe que l'objectif de la loi se rapporte

of the legislation may be; if the means used to achieve the objective are not rationally connected to it, the objective will not be furthered by somehow upholding the legislation as it stands. Where the second and/or third elements of the proportionality test are not met, there is more flexibility in defining the extent of the inconsistency. Striking down, severing or reading in may be appropriate in cases where the second and/or third elements of the proportionality test are not met.

Having determined the extent of the inconsistency, the means of dealing with it, whether by way of severance, reading in, or striking down legislation in its entirety, must be considered.

One important distinction exists between severing and reading in. In the case of severance, the inconsistent part of the statutory provision can be defined with some precision on the basis of the requirements of the Constitution. This is not always the case with reading in. In cases where the question of how the statute ought to be extended in order to comply with the Constitution cannot be answered with a sufficient degree of precision on the basis of constitutional analysis, the legislature and not the courts must fill in the gaps.

In determining whether reading in is appropriate, the question is not whether courts can make decisions that impact on budgetary policy but rather to what degree they can appropriately do so. A remedy which entails an intrusion into this sphere so substantial as to change the nature of the legislative scheme in question is clearly inappropriate. The court should consider whether the significance of the part which would remain is substantially changed when the offending part is excised. The problem with striking down only the inconsistent portion is that the significance of the remaining portion may change so markedly without the inconsistent portion that the assumption that the legislature would have enacted it is unsafe.

In cases where the issue is whether to extend benefits to a group not included in the statute, the question of the change in significance of the remaining portion sometimes focuses on the relative size of the two relevant groups. The assumption that the legislature would have enacted the benefit is more often sound where the group

à des préoccupations réelles et urgentes, si les moyens utilisés pour l'atteindre n'ont pas un lien rationnel avec cet objectif, le maintien en vigueur de la loi dans sa forme existante n'en favorisera pas l'atteinte. Lorsqu'une loi ne satisfait pas au deuxième ou au troisième élément du critère de la proportionnalité, ou aux deux, on dispose d'une plus grande latitude pour déterminer quelles sont les dispositions incompatibles. Il pourrait convenir de procéder par annulation, dissociation ou interprétation large dans les cas où le texte législatif ne satisfait pas au deuxième ou au troisième élément, ou aux deux.

Un fois établie la mesure de l'incompatibilité d'une disposition, il faut se demander si la bonne réparation est la dissociation, l'interprétation large ou son annulation en totalité.

Il existe une distinction importante entre la dissociation et l'interprétation large. En ce qui concerne la dissociation, la partie incompatible de la disposition législative peut être déterminée avec une certaine précision en fonction des exigences de la Constitution, ce qui ne sera pas toujours possible dans le cas de l'interprétation large. Lorsqu'il n'est pas possible, à partir d'une analyse fondée sur la Constitution, de déterminer avec suffisamment de précision dans quelle mesure il faut élargir la portée d'une loi pour la rendre compatible avec la Constitution, il appartient aux législateurs et non aux tribunaux de combler les lacunes.

Lorsque l'on détermine s'il faut donner une interprétation large à un texte législatif, la question n'est pas de savoir si les tribunaux peuvent prendre des décisions qui entraînent des répercussions de nature financière, mais bien jusqu'à quel point il est de circonstance de le faire. De toute évidence, il ne conviendrait pas d'accorder une réparation qui entraîne un empiétement tellement important sur ce domaine qu'il modifie la nature du régime législatif en question. Le tribunal devrait se demander si le sens du texte qui reste serait grandement modifié par le retranchement des parties fautives. Le problème de l'annulation de la partie incompatible seulement est que le sens de la partie qui reste peut tellement changer en l'absence de la partie incompatible qu'il n'y a pas lieu de supposer que le législateur l'aurait quand même adoptée.

Lorsqu'il s'agit de savoir si l'on doit accorder des bénéfices à un groupe non inclus dans la loi, la question du changement de sens du reste de la loi tourne parfois autour de la taille relative des deux groupes pertinents. La supposition que le législateur aurait adopté le bénéfice est plus souvent fondée si le groupe à ajouter est

to be added is smaller than the group originally benefitted. This assumption, however, is not necessarily safe when the group to be added is much larger than the group originally benefitted. This is not because of the numbers *per se*. Rather, the numbers may indicate that for budgetary reasons, or simply because it constitutes a marked change in the thrust of the original program, it cannot be assumed that the legislature would have passed the benefit without the exclusion.

It is sensible to consider the significance of the remaining portion when asking whether it is safe to assume that the legislature would have enacted the remaining portion. If the remaining portion is very significant, or of a long standing nature, it strengthens the assumption that it would have been enacted without the impermissible portion. The fact that the permissible part of a provision is encouraged by the purposes of the Constitution, even if not mandated by it, strengthens the assumption that the legislature would have enacted it without the impermissible portion.

The final step is to determine whether the declaration of invalidity of that portion should be temporarily suspended. A court may strike down legislation or a legislative provision but suspend the effect of that declaration until Parliament or the provincial legislature has had an opportunity to fill the void. The question of whether to delay the effect of a declaration is an entirely separate question from whether reading in or nullification is the appropriate route under s. 52 of the *Constitution Act, 1982*. Delayed declarations of nullity should not be seen as preferable to reading in cases where reading in is appropriate. The question whether to delay the application of a declaration of nullity should turn not on considerations of the role of the courts and the legislature but rather on considerations relating to the effect of an immediate declaration on the public.

Where s. 52 is not engaged, a remedy under s. 24(1) of the *Charter* may nonetheless be available. This will be the case where the statute or provision in question is not in and of itself unconstitutional, but some action taken under it infringes a person's *Charter* rights. Section 24(1) would there provide for an individual remedy for the person whose rights have been so infringed.

numériquement moins important que le groupe initial de bénéficiaires. Cette supposition n'est cependant pas nécessairement fondée si le groupe à ajouter est numériquement beaucoup plus important que le groupe initial de bénéficiaires. Ce n'est pas seulement une question de chiffres. C'est plutôt que les chiffres peuvent indiquer que, pour des motifs financiers ou simplement parce que cela constituerait un changement marqué de l'objectif du programme initial, on ne peut pas supposer que le législateur aurait adopté le bénéfice en question sans l'exclusion.

Il est raisonnable d'examiner le sens de la partie qui reste lorsqu'on se demande si la supposition que le législateur l'aurait quand même adoptée est fondée. Si la partie qui reste a une très grande importance ou existe depuis longtemps, ce fait vient renforcer la supposition que cette partie aurait été adoptée sans la portion inacceptable. Le fait que les objets de la Constitution favorisent, sans imposer, le maintien de la partie acceptable d'une disposition vient renforcer la supposition que le législateur l'aurait adoptée sans la partie inacceptable.

La dernière étape consiste à déterminer s'il doit y avoir suspension temporaire de l'effet de la déclaration d'invalidité. Un tribunal peut déclarer une loi ou une disposition législative inopérante, mais suspendre l'effet de cette déclaration jusqu'à ce que le législateur fédéral ou provincial ait eu l'occasion de combler le vide. La question de la suspension de l'effet de la déclaration d'invalidité diffère totalement de celle de savoir si l'interprétation large ou l'annulation d'un texte législatif est la solution appropriée en vertu de l'art. 52 de la *Loi constitutionnelle de 1982*. La suspension de l'effet d'une déclaration d'invalidité ne devrait pas être préférée à l'interprétation large lorsqu'il convient de procéder par interprétation large. La question de savoir s'il y a lieu de suspendre l'effet d'une déclaration d'invalidité ne devrait pas dépendre de considérations ayant trait au rôle des tribunaux et des législateurs, mais plutôt de considérations sur l'effet d'une déclaration d'invalidité sur le public.

Même lorsque l'application de l'art. 52 n'est pas déclenchée, il peut y avoir une réparation en vertu du par. 24(1) de la *Charte*. Cela peut se produire quand la loi ou la disposition législative n'est pas inconstitutionnelle en soi, mais qu'elle a donné lieu à une mesure prise en contravention des droits garantis par la *Charte*. Le paragraphe 24(1) offre une réparation à la personne dont les droits ont été violés.

An individual remedy under s. 24(1) of the *Charter* will rarely be available in conjunction with action under s. 52 of the *Constitution Act, 1982*. Ordinarily, where a provision is declared unconstitutional and immediately struck down pursuant to s. 52, that will be the end of the matter. No retroactive s. 24 remedy will be available.

The right which was determined to be violated here is a positive right: the right to equal benefit of the law. This benefit was monetary and not one which Parliament is constitutionally obliged to provide to the included group or the excluded group. What Parliament is obliged to do, by virtue of the conceded s. 15 violation, is to equalize the provision of that benefit if it is to be provided at all. 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.

Without a mandate based on a clear legislative objective, reading the excluded group into the legislation would be imprudent. A consideration of the benefit and size of the group and of the budgetary implications of such a course of action underlined this conclusion. The appropriate action was to declare the provision invalid and suspend that declaration to allow the legislative body in question to weigh all the relevant factors in amending the legislation to meet constitutional requirements. Significantly, Parliament did amend the impugned provision after this action was launched and the amendment was not the one that reading in would have imposed.

Per La Forest and L'Heureux-Dubé JJ.: The legislation concerned concededly violates the *Canadian Charter of Rights and Freedoms* and does not fall within the very narrow type of cases where only a portion of the legislation may be read down or corrected by reading in material as being the obvious intention of the legislature. There is a long tradition of reading down legislation and, where it substantially amounts to the same thing, reading in is possible. These devices, however, should only be employed in the clearest of cases. In light of Parliament's subsequent action, there was no

Il y aura rarement lieu à une réparation en vertu du par. 24(1) de la *Charte* en même temps qu'une mesure prise en vertu de l'art. 52 de la *Loi constitutionnelle de 1982*. Habituellement, si une disposition est déclarée inconstitutionnelle et immédiatement annulée en vertu de l'art. 52, l'affaire sera close. Il n'y aura pas lieu à une réparation rétroactive en vertu de l'art. 24.

Le droit violé en l'espèce est un droit positif: le droit au même bénéfice de la loi. Il s'agit d'un bénéfice pécuniaire, et non pas d'un bénéfice que la Constitution oblige le Parlement à verser au groupe inclus ou au groupe exclu. À la suite de la violation concédée de l'art. 15, le Parlement est tenu d'égaliser la prestation de ce bénéfice, si tant est qu'il doit y avoir prestation. Le bénéfice en soi n'est pas interdit par la Constitution; la disposition pertinente est simplement trop limitative. En conséquence, il ne serait pas approprié de procéder à l'annulation immédiate de la disposition car on priverait ainsi des personnes admissibles d'un bénéfice, sans offrir une réparation à l'intimé. Dans un tel cas, il faut tout au moins que l'effet de la déclaration d'invalidité soit suspendu pour permettre au Parlement d'harmoniser la disposition avec les exigences constitutionnelles.

En l'absence d'un mandat fondé sur un objectif législatif clair, il serait imprudent de donner à la disposition une interprétation large de manière à inclure le groupe exclu. Un examen du bénéfice et de la taille du groupe ainsi que des répercussions financières qui s'ensuivraient vient appuyer cette conclusion. La solution appropriée consistait à déclarer la disposition inopérante et à suspendre l'effet de cette déclaration jusqu'à ce que le législateur concerné ait soupesé tous les facteurs pertinents dans le cadre de la modification de la loi en vue de répondre aux exigences constitutionnelles. Il est révélateur que le Parlement ait modifié la disposition attaquée par suite de la présente action et que cette modification ne soit pas celle qu'aurait imposée une interprétation large.

Les juges La Forest et L'Heureux-Dubé: On a concédé que la loi en cause viole la *Charte canadienne des droits et libertés* et qu'elle ne fait pas partie du genre très limité de causes où seule une partie de la loi peut faire l'objet d'une interprétation atténuée ou d'une correction qui introduit, par interprétation large, des éléments reflétant de toute façon l'intention évidente du législateur. L'interprétation atténuée des lois est riche d'une longue tradition et l'interprétation large est possible lorsque cela revient essentiellement au même. Cependant, on ne devrait utiliser ces techniques que dans les cas les plus clairs. Compte tenu de la mesure prise subséquemment par le Parlement, il n'était pas

reason to declare the impugned legislation invalid and then suspend that declaration.

Further dimensions to the issue of reading in and reading down require qualifications to the propositions set down as guidelines by Lamer C.J. The process of reading down or reading in should not be closely tied with the checklist set forth in *R. v. Oakes* because that might encourage a mechanistic approach rather than an examination of more fundamental issues going well beyond the factual context.

Cases Cited

By Lamer C.J.

Considered: *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143; *Attorney-General of Nova Scotia v. Phillips* (1986), 34 D.L.R. (4th) 633; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232; *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69; *R. v. Seaboyer*, [1991] 2 S.C.R. 577; *R. v. Swain*, [1991] 1 S.C.R. 933; **referred to**: *Attorney-General for Alberta v. Attorney-General for Canada*, [1947] A.C. 503; *Knodel v. British Columbia (Medical Services Commission)* (1991), 58 B.C.L.R. (2d) 356; *R. v. Oakes*, [1986] 1 S.C.R. 103; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *R. v. Morgentaler*, [1988] 1 S.C.R. 30; *Tétrault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22; *Devine v. Quebec (Attorney General)*, [1988] 2 S.C.R. 790; *R. v. Hebb* (1989), 69 C.R. (3d) 1; *Russow v. B.C. (A.G.)* (1989), 35 B.C.L.R. (2d) 29; *Welsh v. United States*, 398 U.S. 333 (1970); *Re Blainey and Ontario Hockey Association* (1986), 54 O.R. (2d) 513; *Reference Re Manitoba Language Rights*, [1985] 1 S.C.R. 721; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038.

By La Forest J.

Referred to: *R. v. Wong*, [1990] 3 S.C.R. 36; *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22; *R. v. Oakes*, [1986] 1 S.C.R. 103.

Statutes and Regulations Cited

Barristers and Solicitors Act, R.S.B.C. 1979, c. 26, s. 42.

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

opportun de déclarer inopérante la disposition attaquée et de suspendre l'effet de cette déclaration.

D'autres dimensions de la question de l'interprétation large et de l'interprétation atténuée commandent que des réserves soient apportées aux propositions que le juge en chef Lamer a énoncées comme étant des lignes directrices. L'application de l'interprétation atténuée ou de l'interprétation large ne devrait pas être liée étroitement à la liste établie dans l'arrêt *R. c. Oakes* parce qu'elle pourrait favoriser une attitude mécaniste, plutôt que l'étude de questions plus fondamentales qui se situent bien au-delà des faits.

Jurisprudence

Citée par le juge en chef Lamer

Arrêts examinés: *Andrews c. Law Society of British Columbia*, [1989] 1 R.C.S. 143; *Attorney-General of Nova Scotia c. Phillips* (1986), 34 D.L.R. (4th) 633; *Hunter c. Southam Inc.*, [1984] 2 R.C.S. 145; *Rocket c. Collège royal des chirurgiens dentistes d'Ontario*, [1990] 2 R.C.S. 232; *Osborne c. Canada (Conseil du Trésor)*, [1991] 2 R.C.S. 69; *R. c. Seaboyer*, [1991] 2 R.C.S. 577; *R. c. Swain*, [1991] 1 R.C.S. 933; **arrêts mentionnés**: *Attorney-General for Alberta c. Attorney-General for Canada*, [1947] A.C. 503; *Knodel c. British Columbia (Medical Services Commission)* (1991), 58 B.C.L.R. (2d) 356; *R. c. Oakes*, [1986] 1 R.C.S. 103; *R. c. Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295; *R. c. Morgentaler*, [1989] 1 R.C.S. 30; *Tétrault-Gadoury c. Canada (Commission de l'emploi et de l'immigration)*, [1991] 2 R.C.S. 22; *Devine c. Québec (Procureur général)*, [1988] 2 R.C.S. 790; *R. c. Hebb* (1989), 69 C.R. (3d) 1; *Russow c. B.C. (A.G.)* (1989), 35 B.C.L.R. (2d) 29; *Welsh c. United States*, 398 U.S. 333 (1970); *Re Blainey and Ontario Hockey Association* (1986), 54 O.R. (2d) 513; *Renvoi relatif aux droits linguistiques au Manitoba*, [1985] 1 R.C.S. 721; *Slaight Communications Inc. c. Davidson*, [1989] 1 R.C.S. 1038.

Citée par le juge La Forest

Arrêts mentionnés: *R. c. Wong*, [1990] 3 R.C.S. 36; *Tétreault-Gadoury c. Canada (Commission de l'emploi et de l'immigration)*, [1991] 2 R.C.S. 22; *R. c. Oakes*, [1986] 1 R.C.S. 103.

Lois et règlements cités

Barristers and Solicitors Act, R.S.B.C. 1979, ch. 26, art. 42.

Charte canadienne des droits et libertés, art. 1, 7, 15(1), 24(1).

Constitution Act, 1982, s. 52(1).
Criminal Code, R.S.C. 1970, c. C-34, s. 542(2).
Criminal Code, R.S.C., 1985, c. C.-46, s. 276.
Federal Court Rules, C.R.C., c. 663, Rule 341A [ad. SOR/79-57, s. 8].
Human Rights Code, 1981, S.O. 1981, c. 53, ss. 1, 19.
Lord's Day Act, R.S.C. 1970, c. L-13.
Unemployment Insurance Act, 1971, S.C. 1970-71-72, c. 48, ss. 30 [am. by S.C. 1980-81-82-83, c. 150, s. 4], 32(1) [am. by S.C. 1980-81-82-83, c. 150, s. 5].

Code criminel, S.R.C. 1970, ch. C-34, art. 542(2).
Code criminel, L.R.C. (1985), ch. C-46, art. 276.
Code des droits de la personne (1981), L.O. 1981, ch. 53, art. 1, 19.
Loi constitutionnelle de 1982, art. 52(1).
Loi de 1971 sur l'assurance-chômage, S.C. 1970-71-72, ch. 48, art. 30 [mod. par S.C. 1980-81-82-83, ch. 150, art. 4], art. 32(1) [mod. par S.C. 1980-81-82-83, ch. 150, art. 5].
Loi sur le dimanche, S.R.C. 1970, ch. L-13.
Règles de la Cour fédérale, C.R.C., ch. 663, règle 341A [aj. DORS/79-57, art. 8].

Authors Cited

Caminker, Evan. "A Norm-Based Remedial Model for Underinclusive Statutes" (1986), 95 *Yale L.J.* 1185.
Duclos, Nitya and Kent Roach. "Constitutional Remedies as 'Constitutional Hints': A Comment on *R.* v. *Schachter*" (1991), 36 *McGill L.J.* 1.
Lajoie, Andrée. "De l'interventionnisme judiciaire comme apport à l'émergence des droits sociaux" (1991), 36 *McGill L.J.* 1338.
Rogerson, Carol. "The Judicial Search for Appropriate Remedies Under the Charter: The Examples of Overbreadth and Vagueness". In R. Sharpe, ed., *Charter Litigation*. Toronto: Butterworths, 1987.

Doctrine citée

Caminker, Evan. «A Norm-Based Remedial Model for Underinclusive Statutes» (1986), 95 *Yale L.J.* 1185.
Duclos, Nitya and Kent Roach. «Constitutional Remedies as 'Constitutional Hints': A Comment on *R.* v. *Schachter*» (1991), 36 *R.D. McGill* 1.
Lajoie, Andrée. «De l'interventionnisme judiciaire comme apport à l'émergence des droits sociaux» (1991), 36 *R.D. McGill* 1338.
Rogerson, Carol. «The Judicial Search for Appropriate Remedies Under the Charter: The Examples of Overbreadth and Vagueness». In R. Sharpe, ed., *Charter Litigation*. Toronto: Butterworths, 1987.

APPEAL from a judgment of the Federal Court of Appeal, [1990] 2 F.C. 129, 66 D.L.R. (4th) 635, 3 C.R.R. (2d) 337, 29 C.C.E.L. 113, 90 C.L.L.C. ¶ 14,005, 108 N.R. 123, dismissing an appeal from a judgment of Strayer J., [1988] 3 F.C. 515, 52 D.L.R. (4th) 525, 20 C.C.E.L. 301, 88 C.L.L.C. ¶ 14,021. Appeal allowed. The first constitutional question should be answered in the affirmative, leaving open the option of suspending the declaration of invalidity for a period of time to allow Parliament to amend the legislation in a way which meets its constitutional obligations. The second constitutional question should be answered in the negative. Section 24(1) of the *Charter* provides an individual remedy for actions taken under a law which violate an individual's *Charter* rights. A limited power to extend legislation is available to courts in appropriate circumstances by way of the power to read in derived from s. 52 of the *Constitution Act, 1982*.

POURVOI contre un arrêt de la Cour d'appel fédérale, [1990] 2 C.F. 129, 66 D.L.R. (4th) 635, 3 C.R.R. (2d) 337, 29 C.C.E.L. 113, 90 C.L.L.C. ¶ 14,005, 108 N.R. 123, qui a rejeté un appel d'un jugement du juge Strayer, [1988] 3 C.F. 515, 52 D.L.R. (4th) 525, 20 C.C.E.L. 301, 88 C.L.L.C. ¶ 14,021. Pourvoi accueilli. La première question constitutionnelle reçoit une réponse affirmative, mais l'effet de cette déclaration d'invalidité peut être suspendu pendant un certain temps pour que le Parlement puisse modifier le texte législatif d'une façon qui lui permette de respecter ses obligations constitutionnelles. La seconde question constitutionnelle reçoit une réponse négative. Le paragraphe 24(1) de la *Charte* prévoit une réparation individuelle lorsque des mesures prises en vertu d'une loi violent les droits garantis à une personne par la *Charte*. Dans les circonstances appropriées, les tribunaux ont un pouvoir limité, en vertu de l'art. 52 de la *Loi constitutionnelle de 1982*, de donner une interprétation large à une loi pour en étendre le champ d'application.

David Sgayias, *Q.C.*, and *Roslyn J. Levine*, for the appellants.

Brian G. Morgan and *Lawrence E. Ritchie*, for the respondent Shalom Schachter.

Mary A. Eberts and *Jenifer Aitken*, for the respondent Women's Legal Education and Action Fund.

Elizabeth Goldberg and *Lori Sterling*, for the intervener the Attorney General for Ontario.

Jean-Yves Bernard and *Madeleine Aubé*, for the intervener the Attorney General of Quebec.

Gabriel Bourgeois, for the intervener the Attorney General for New Brunswick.

George H. Copley, for the intervener the Attorney General of British Columbia.

Ross Macnab, for the intervener the Attorney General for Saskatchewan.

Stanley H. Rutwind, for the intervener the Attorney General for Alberta.

B. Gale Welsh, for the intervener the Attorney General of Newfoundland.

Emilio S. Binavince, for the intervener Minority Advocacy and Rights Council.

The judgment of Lamer C.J. and Sopinka, Gonthier, Cory and McLachlin JJ. was delivered by

LAMER C.J.—

Facts

The respondent, Shalom Schachter, and his wife, Marcia Gilbert, were expecting their second child in the summer of 1985. The respondent intended to stay home with the newborn as soon after the birth as his wife was able to return to work. Ultimately, he took three weeks off work without pay.

David Sgayias, *c.r.*, et *Roslyn J. Levine*, pour les appelantes.

Brian G. Morgan et *Lawrence E. Ritchie*, pour l'intimé Shalom Schachter.

Mary A. Eberts et *Jenifer Aitken*, pour l'intimé le Fonds d'action et d'éducation juridiques pour les femmes.

Elizabeth Goldberg et *Lori Sterling*, pour l'intervenant le procureur général de l'Ontario.

Jean-Yves Bernard et *Madeleine Aubé*, pour l'intervenant le procureur général du Québec.

Gabriel Bourgeois, pour l'intervenant le procureur général du Nouveau-Brunswick.

George H. Copley, pour l'intervenant le procureur général de la Colombie-Britannique.

Ross Macnab, pour l'intervenant le procureur général de la Saskatchewan.

Stanley H. Rutwind, pour l'intervenant le procureur général de l'Alberta.

B. Gale Welsh, pour l'intervenant le procureur général de Terre-Neuve.

Emilio S. Binavince, pour l'intervenant le Conseil de revendication des droits des minorités.

Version française du jugement du juge en chef Lamer et des juges Sopinka, Gonthier, Cory et McLachlin rendu par

LE JUGE EN CHEF LAMER—

Les faits

L'intimé, Shalom Schachter, et son épouse, Marcia Gilbert, attendaient leur deuxième enfant à l'été 1985. Monsieur Schachter avait l'intention de rester à la maison avec le nouveau-né dès que son épouse pourrait retourner au travail. Il a finalement pris trois semaines de congé sans traitement.

Marcia Gilbert received fifteen weeks of maternity benefits under s. 30 of the *Unemployment Insurance Act, 1971*, S.C. 1970-71-72, c. 48, as am. by S.C. 1980-81-82-83, c. 150, s. 4. The respondent first applied for benefits under s. 30 in respect of the time he had to take off work, but ultimately modified an application under s. 32, as am. by S.C. 1980-81-82-83, c. 150, s. 5, for "paternity benefits". This is a section which provides for parental benefits for adoptive parents for 15 weeks following the placement of their child with them. These benefits are to be shared between the two parents in accordance with their wishes. The respondent's application was denied on the basis that he was "not available for work", a ground of disentitlement for all applicants except those applying for maternity benefits or adoption benefits.

The respondent appealed the decision to a Board of Referees. The appeal was dismissed and the respondent made a further appeal to an Umpire. This appeal was never heard as the respondent made known his intention to raise constitutional issues and it was agreed by the parties that the Federal Court, Trial Division was a better forum for resolving the constitutional issues.

The matter proceeded before Strayer J. in the Federal Court, Trial Division. In written reasons, [1988] 3 F.C. 515, Strayer J. found a violation of s. 15 of the *Canadian Charter of Rights and Freedoms* in that s. 32 discriminated between natural parents and adoptive parents with respect to parental leave. He granted declaratory relief under s. 24(1), extending to natural parents the same benefits as were granted to adoptive parents under s. 32.

The appellants appealed to the Federal Court of Appeal. In written reasons dated February 16, 1990, [1990] 2 F.C. 129, the Court upheld the Trial Division's decision, Mahoney J.A. dissenting. The appeal was dismissed.

Marcia Gilbert a reçu des prestations de maternité pendant quinze semaines en vertu de l'art. 30 de la *Loi de 1971 de l'assurance-chômage*, S.C. 1970-71-72, ch. 48, modifié par S.C. 1980-81-82-83, ch. 150, art. 4. L'intimé avait tout d'abord fait une demande de prestations en vertu de l'art. 30 pour justifier son absence du travail, pour ensuite modifier une formule de demande de «prestations de paternité» en vertu de l'art. 32, modifié par S.C. 1980-81-82-83, ch. 150, art. 5. Cet article prévoit le versement de prestations aux parents adoptifs pendant quinze semaines à la suite du placement d'un enfant dans leur foyer. Les deux parents peuvent se partager ces prestations comme ils l'entendent. La demande de l'intimé a été refusée parce qu'il n'était pas «disponible pour travailler», motif d'exclusion pour tous les prestataires, sauf ceux faisant une demande de prestations de maternité ou d'adoption.

L'intimé a interjeté appel de la décision auprès d'un conseil arbitral. L'appel a été rejeté et l'intimé a interjeté un autre appel devant un juge-arbitre. Cet appel n'a jamais été entendu puisque l'intimé avait fait connaître son intention de soulever des questions constitutionnelles; les parties ont convenu que la Section de première instance de la Cour fédérale serait mieux placée pour résoudre les questions constitutionnelles.

L'affaire a été entendue par le juge Strayer de la Section de première instance de la Cour fédérale. Dans son jugement, [1988] 3 C.F. 515, le juge Strayer a conclu à une violation de l'art. 15 de la *Charte canadienne des droits et libertés* en ce que l'art. 32 établit une discrimination entre les parents naturels et les parents adoptifs relativement au congé parental. Il a accordé une réparation sous forme de jugement déclaratoire en vertu du par. 24(1) et octroyé aux parents naturels les mêmes prestations que celles accordées aux parents adoptifs en vertu de l'art. 32.

Les appelantes ont interjeté appel à la Cour d'appel fédérale. Dans ses motifs écrits du 16 février 1990, [1990] 2 C.F. 129, la Cour a confirmé la décision de la Section de première instance; le juge Mahoney était dissident. L'appel a été rejeté.

On November 15, 1990, the appellants were granted leave to appeal to this Court.

It should be noted that the impugned provision has since been amended by Parliament to extend parental benefits to natural parents on the same footing as they are provided to adoptive parents for a period totalling 10 weeks rather than the original 15.

Relevant Statutory and Constitutional Provisions

The relevant provision of the *Unemployment Insurance Act, 1971*, reads as follows:

32. (1) Notwithstanding section 25 but subject to this section, initial benefit is payable to a major attachment claimant who proves that it is reasonable for that claimant to remain at home by reason of the placement with that claimant of one or more children for the purpose of adoption pursuant to the laws governing adoption in the province in which that claimant resides.

The relevant provisions of the *Canadian Charter of Rights and Freedoms* read as follows:

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

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

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

The relevant provision of the *Constitution Act, 1982* reads as follows:

Le 15 novembre 1990, notre Cour a accordé l'autorisation de pourvoi aux appelantes.

Je tiens à signaler que le Parlement a depuis modifié la disposition attaquée, qui prévoit maintenant que les parents naturels ont droit, selon des modalités identiques, aux mêmes prestations que les parents adoptifs, pendant une période totale de 10 semaines au lieu des 15 semaines prévues initialement.

Les dispositions législatives et constitutionnelles pertinentes

Voici la disposition pertinente de la *Loi de 1971 sur l'assurance-chômage*:

32. (1) Nonobstant l'article 25 mais sous réserve des autres dispositions du présent article, des prestations initiales sont payables à un prestataire de la première catégorie qui fait la preuve qu'il est raisonnable pour lui de demeurer à la maison à cause du placement auprès de lui, en conformité avec les lois régissant l'adoption dans la province où il réside, d'un ou plusieurs enfants en vue de leur adoption.

Voici les dispositions pertinentes de la *Charte canadienne des droits et libertés*:

1. La *Charte canadienne des droits et libertés* garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.

15. (1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.

24. (1) Toute personne, victime de violation ou de négation des droits ou libertés qui lui sont garantis par la présente charte, peut s'adresser à un tribunal compétent pour obtenir la réparation que le tribunal estime convenable et juste eu égard aux circonstances.

Voici la disposition pertinente de la *Loi constitutionnelle de 1982*:

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

Judgments Below

Federal Court, Trial Division (Strayer J.)

Strayer J. held that s. 32 denied equal benefit of the law with discrimination on the basis of parental status, thereby infringing the s. 15 rights of the respondent. No s. 1 analysis was undertaken. Having decided that there was an infringement, Strayer J. went on to consider the appropriate remedy. In his view, at p. 543, two options were available:

> I could either declare section 32 to be invalid in its present form, thus denying benefits to those already within it, or I could simply declare the entitlement of natural parents to benefits equal to those now provided to adoptive parents under section 32. Counsel for the plaintiff [respondent] and for the intervenor [LEAF] argued for the latter approach, while counsel for the defendants [appellants] argued that I must, if I concluded there was unequal benefit of the law, strike down the existing benefits in section 32.

Given that Strayer J. found s. 32 to be defective, not because it provided prohibited benefits but because it was "underinclusive", he did not consider it appropriate to deprive those persons already qualified under s. 32 of their benefits. Rather, he decided to make a declaration that other persons in similar circumstances were entitled to the same benefits, until such time as Parliament amended the legislation in a way which met the requirements of s. 15. Further, he ordered that the respondent's application for benefits be reconsidered on the basis that if, apart from his status as a natural parent, he met the requirements of the section, he was entitled to benefits. Pursuant to Rule 341A (*Federal Court Rules*, C.R.C., c. 663, ad.

52. (1) La Constitution du Canada est la loi suprême du Canada; elle rend inopérantes les dispositions incompatibles de toute autre règle de droit.

Les tribunaux d'instance inférieure

Section de première instance de la Cour fédérale (le juge Strayer)

Le juge Strayer a conclu que l'art. 32 déroge au principe du même bénéfice de la loi par voie de discrimination fondée sur l'état parental et porte ainsi atteinte aux droits que l'art. 15 garantit à l'intimé. Il n'a pas procédé à une analyse fondée sur l'article premier. Ayant décidé qu'il y avait eu violation, le juge a ensuite examiné la réparation appropriée. À son avis, il existe deux options (à la p. 543):

> Ou bien je pourrais déclarer que l'article 32 est invalide dans sa forme actuelle, refusant ainsi des prestations à ceux qui y ont déjà droit, ou bien je pourrais déclarer que les parents naturels ont droit à des prestations égales à celles dont les parents adoptifs bénéficient sous le régime de l'article 32. Les avocats du demandeur [de l'intimé] et de l'intervenant [Fonds d'action et d'éducation juridiques pour les femmes] ont penché pour la dernière solution, alors que celui des défenderesses [appelantes] a fait valoir que si je concluais qu'il n'y avait pas même bénéfice de la loi, je devrais déclarer invalides les prestations actuelles prévues à l'article 32.

Puisque le juge Strayer a conclu que l'art. 32 est entaché de vice, non pas parce que les prestations qu'il prévoit sont interdites par la *Charte*, mais parce qu'«il ne couvre pas toutes les situations», il n'a pas jugé bon de priver les personnes visées à l'art. 32 de leurs prestations. Il a plutôt rendu un jugement déclaratoire portant que d'autres personnes, placées dans des circonstances similaires, ont droit aux mêmes prestations, jusqu'à ce que le législateur ait modifié la loi conformément aux exigences de l'art. 15. Il a également ordonné qu'on procède à un réexamen de la demande de prestations de l'intimé en tenant pour acquis que, s'il remplit par ailleurs les exigences de l'article, il a droit à des prestations. Conformément à la règle 341A des *Règles de la Cour fédérale*, C.R.C., ch. 663 (aj. DORS/79-57, art. 8), le juge Strayer a

SOR/79-57, s. 8), Strayer J. suspended the operation of his judgment pending appeal.

Court of Appeal (Heald J.A. for the majority)

Since the parties conceded at the outset that s. 15(1) of the *Charter* had been violated, the Court of Appeal dealt only with the jurisdiction of the trial judge to accord the remedy sought by the respondent.

Heald J.A. noted at the outset that the appellants had conceded that, had the Trial Division had the jurisdiction to grant the remedy it did, the order was "just and appropriate in the circumstances". Heald J.A. determined that the trial judge did have the jurisdiction to grant a remedy under s. 24(1) of the *Charter*. He did not accept the appellants' argument that the only option which was open to the trial judge in the circumstances was to strike down the impugned provision pursuant to s. 52 of the *Constitution Act, 1982*. He found, at p. 137, the distinction made by the trial judge between legislation which "is unconstitutional because of what it provides and legislation which is unconstitutional because of what it omits" to be an apt one. He held that here it was permissible to have recourse to s. 24 because the impugned provision was unconstitutional solely because it was not sufficiently broad in scope. "It is the omission in this case that is unconstitutional, not the legislation itself." Therefore, in his opinion, s. 52 was not engaged.

Heald J.A. further considered the "interface" between ss. 24 and 52 when a violation of s. 15 has been found. He held, at p. 142, that:

> A mere declaration of invalidity is inadequate in the circumstances at bar, because it would not guarantee the positive right conferred pursuant to subsection 15(1). That positive right can only be guaranteed by the fashioning of a positive remedy. That is precisely what the learned Trial Judge attempted to do in the decision *a quo*.

suspendu l'effet de son jugement jusqu'à l'issue de l'appel.

La Cour d'appel fédérale (le juge Heald au nom de la majorité)

Puisque les parties ont concédé d'entrée de jeu qu'il y a eu violation du par. 15(1) de la *Charte*, la Cour d'appel n'a examiné que la compétence du juge de première instance d'accorder la réparation demandée par l'intimé.

Le juge Heald a fait remarquer dès le départ que les appelantes ont concédé que, si l'on tient pour acquis que la Section de première instance a compétence pour accorder réparation, l'ordonnance rendue était «juste et appropriée dans les circonstances». Il a décidé que le juge de première instance avait la compétence requise pour accorder une réparation en vertu du par. 24(1) de la *Charte*. Il n'a pas accepté la thèse des appelantes que le seul recours du juge de première instance dans les circonstances était d'annuler la disposition attaquée en vertu de l'art. 52 de la *Loi constitutionnelle de 1982*. Il a déclaré valable, à la p. 137, la distinction faite par le juge de première instance entre les dispositions législatives qui «sont inconstitutionnelles en raison de ce qu'elles prévoient, et celles qui sont inconstitutionnelles en raison de ce qu'elles omettent». À son avis, il était possible de recourir à l'art. 24 parce que la disposition attaquée était inconstitutionnelle seulement parce qu'elle n'avait pas une portée suffisamment large. «En l'espèce, c'est l'omission qui est inconstitutionnelle, non pas la disposition elle-même.» En conséquence, il a conclu que l'art. 52 ne pouvait s'appliquer.

Le juge Heald a ensuite examiné «l'interaction» des art. 24 et 52 dans le contexte d'une violation de l'art. 15. Il a conclu, à la p. 142:

> Une simple déclaration d'invalidité ne suffirait pas dans les circonstances de l'espèce, car elle ne garantirait pas le droit positif conféré en vertu du paragraphe 15(1). Ce droit positif ne peut être garanti que par l'octroi d'une réparation concrète. C'est précisément ce que le juge de première instance a tenté de faire dans la décision portée en appel.

Heald J.A. was of the view that, as the consequences of a declaration that the legislation was inoperative would be to deprive adoptive parents of the benefits granted to them by s. 32 of the *Unemployment Insurance Act, 1971*, this would be as much an amendment of legislation as the remedy granted by the trial judge. Heald J.A. concluded that where legislation is "underinclusive", positive relief is both warranted and constitutionally permitted through the vehicle of s. 24.

Heald J.A. was not persuaded that the jurisprudence supported the appellants' contention that the order was an appropriation of public funds for a purpose not authorized by Parliament.

Heald J.A. dismissed the appeal, upholding the judgment of the trial judge. He suspended the operation of that judgment pending appeal.

Mahoney J.A. (dissenting)

Mahoney J.A. held that the remedy granted by the trial judge was outside his jurisdiction because he had in effect amended the legislation where, by virtue of the Constitution, the sole power to legislate is reserved to Parliament.

With regard to the issue of the appropriation of funds, Mahoney J.A. was of the view that the remedy fashioned by the trial judge amounted to an appropriation of money by a court which is not permitted by the provisions of the preamble to the *Constitution Act, 1867*. He concluded, at p. 164:

> Even if the power of a court to legislate by way of a subsection 24(1) remedy were found to exist in circumstances which do not entail the appropriation of public monies, no such power can be found to exist where the remedy appropriates monies from the Consolidated Revenue Fund for a purpose not authorized by Parliament. A purposive approach to remedies under subsection 24(1) cannot take a court that far.

De l'avis du juge Heald, un jugement déclaratif d'invalidité des dispositions législatives aurait pour conséquence de priver les parents adoptifs des prestations que leur accorde l'art. 32 de la *Loi de 1971 sur l'assurance-chômage*; un tel résultat, tout comme la réparation proposée par le juge de première instance, équivaut à une modification législative. Le juge Heald a conclu qu'une loi qui ne couvre pas toutes les situations invite à une réparation concrète qui est à la fois justifiée et constitutionnellement permise par le biais de l'art. 24.

Le juge Heald n'était pas convaincu que la jurisprudence étayait la proposition des appelantes selon laquelle l'ordonnance constituait une affectation de fonds publics à une fin non autorisée par le législateur.

Le juge Heald a rejeté l'appel et confirmé le jugement de première instance. Il a suspendu l'exécution du jugement jusqu'à l'issue du pourvoi.

Le juge Mahoney (dissident)

Le juge Mahoney a conclu que le juge de première instance n'avait pas compétence pour accorder la réparation en question parce qu'il avait en fait modifié les dispositions législatives, alors que la Constitution confère au Parlement la compétence exclusive de légiférer.

En ce qui concerne l'affectation de fonds publics, de l'avis du juge Mahoney, la réparation élaborée par le juge de première instance équivaut à une affectation de fonds par un tribunal, non autorisée par le préambule de la *Loi constitutionnelle de 1867*. Il conclut, à la p. 164:

> Même s'il était décidé qu'un tribunal est compétent à légiférer en ordonnant une réparation visée au paragraphe 24(1) dans des circonstances n'impliquant pas l'affectation de crédits publics, il ne pourrait être conclu à l'existence d'un tel pouvoir lorsque la réparation en cause affecte des argents du Trésor à des fins non autorisées par le Parlement. Une approche téléologique des réparations prévues au paragraphe 24(1) ne saurait autoriser les tribunaux à aller aussi loin.

In my opinion, the appellants are correct: the Constitution of Canada does not permit the remedy crafted by the learned Trial Judge. Having found that section 32 of the *Unemployment Insurance Act, 1971* was inconsistent with a provision of the Constitution of Canada, the learned Trial Judge was bound to find it to be of no force and effect. Had that finding been made, the absence of any conflict between subsections 24(1) and 52(1) would be apparent. There is no offending legislation and, therefore, no subsection 24(1) remedy called for.

In my opinion, subsection 52(1) does not provide a "remedy" in any real sense of that word. It states a constitutional fact which no court can ignore when it is invoked in a proceeding and found to apply.

Mahoney J.A. would have allowed the appeal and issued a declaration pursuant to s. 52(1) that s. 32 of the *Unemployment Insurance Act, 1971*, was of no force or effect by reason of its inconsistency with the *Charter*. He could see no compelling reason to order a stay of execution of that judgment to permit remedial legislative action.

Issues

By order dated March 14, 1991 the following constitutional questions were stated by the Chief Justice:

1. Is the Federal Court Trial Division, having found that s. 32 of the *Unemployment Insurance Act, 1971* (subsequently s. 20 of the *Unemployment Insurance Act*, R.S.C., 1985, c. U-1) creates unequal benefit contrary to s. 15(1) of the *Canadian Charter of Rights and Freedoms*, by making a distinction between the benefits available to natural and adoptive parents, required by s. 52(1) of the *Constitution Act, 1982* to declare that s. 32 is of no force and effect?

2. Does s. 24(1) of the *Charter* confer on the Federal Court Trial Division the power to order that natural parents are entitled to benefits on the same terms as benefits are available to adoptive parents under s. 32 (subsequently s. 20) of that Act?

À mon sens, les prétentions des appelantes sont fondées: la Constitution du Canada n'autorise pas la réparation élaborée par le juge de première instance. Ayant conclu à l'incompatibilité de l'article 32 de la *Loi de 1971 sur l'assurance-chômage* avec une disposition de la Constitution canadienne, le juge de première instance était obligé de déclarer cet article inopérant. Si cette conclusion avait été prise, l'absence de conflit entre les paragraphes 24(1) et 52(1) serait évidente. Comme il n'existe aucune disposition législative incompatible, aucune réparation fondée sur le paragraphe 24(1) ne doit être prononcée.

Selon mon opinion, le paragraphe 52(1) n'offre pas de «réparation» au sens réel du terme. Il expose une réalité constitutionnelle dont un tribunal ne peut omettre de tenir compte lorsqu'elle est invoquée et considérée comme applicable dans le cadre d'une instance.

Le juge Mahoney aurait accueilli l'appel et déclaré, conformément au par. 52(1), que l'art. 32 de la *Loi de 1971 sur l'assurance-chômage* est inopérant en raison de son incompatibilité avec la *Charte*. À son avis, il n'existe aucun motif impératif de suspendre l'exécution du jugement pour permettre l'adoption de dispositions législatives correctives.

Les questions en litige

Dans une ordonnance en date du 13 mars 1991, le Juge en chef a formulé les questions constitutionnelles suivantes:

1. Puisqu'elle a conclu que l'art. 32 de la *Loi de 1971 sur l'assurance-chômage* (par la suite l'art. 20 de la *Loi sur l'assurance-chômage*, L.R.C. (1985), ch. U-1) crée un bénéfice inégal contrairement au par. 15(1) de la *Charte canadienne des droits et libertés* parce qu'il établit une distinction entre les prestations que peuvent toucher les parents naturels et les parents adoptifs, la Section de première instance de la Cour fédérale est-elle tenue par le par. 52(1) de la *Loi constitutionnelle de 1982* de déclarer que l'art. 32 est inopérant?

2. Le paragraphe 24(1) de la *Charte* donne-t-il à la Section de première instance de la Cour fédérale le pouvoir de statuer que les parents naturels ont droit aux mêmes prestations, suivant les mêmes conditions, que celles que peuvent toucher les parents adoptifs en vertu de l'art. 32 (par la suite l'art. 20) de la Loi?

Analysis

I find it appropriate at the outset to register the Court's dissatisfaction with the state in which this case came to us. Despite the fact that *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, was handed down in between the trial and appeal of this matter, the appellants chose to concede a s. 15 violation and to appeal only on the issue of remedy. This precludes this Court from examining the s. 15 issue on its merits, whatever doubts might or might not exist about the finding below. Further, the appellants' choice not to attempt a justification under s. 1 at trial deprives the Court of access to the kind of evidence that a s. 1 analysis would have brought to light.

All of the above essentially leaves the Court in a factual vacuum with respect to the nature and extent of the violation, and certainly with respect to the legislative objective embodied in the impugned provision. This puts the Court in a difficult position in attempting to determine what remedy is appropriate in the present context.

I. *Reading in as a Remedial Option under Section 52*

A court has flexibility in determining what course of action to take following a violation of the *Charter* which does not survive s. 1 scrutiny. Section 52 of the *Constitution Act, 1982* mandates the striking down of any law that is inconsistent with the provisions of the Constitution, but only "to the extent of the inconsistency". Depending upon the circumstances, a court may simply strike down, it may strike down and temporarily suspend the declaration of invalidity, or it may resort to the techniques of reading down or reading in. In addition, s. 24 of the *Charter* extends to any court of competent jurisdiction the power to grant an "appropriate and just" remedy to "[a]nyone whose [*Charter*] rights and freedoms ... have been infringed or denied". In choosing how to apply s. 52 or s. 24 a

Analyse

Je trouve opportun de mentionner dès le départ que notre Cour n'est pas du tout satisfaite de la façon dont elle a été saisie du présent pourvoi. Bien que l'arrêt *Andrews c. Law Society of British Columbia*, [1989] 1 R.C.S. 143, ait été rendu entre le moment du procès et celui de l'audition de l'appel de la présente affaire, les appelantes ont décidé de concéder qu'il y avait eu violation de l'art. 15 et d'interjeter appel seulement quant à la question de la réparation. Notre Cour ne peut donc examiner quant au fond la question soulevée par l'art. 15, quels que puissent être ses doutes, le cas échéant, quant à la conclusion des tribunaux d'instance inférieure. En outre, comme les appelantes n'ont pas tenté en première instance d'établir une justification fondée sur l'article premier, notre Cour ne dispose pas des éléments de preuve qui auraient été présentés dans le cadre d'une analyse fondée sur l'article premier.

Notre Cour se trouve donc essentiellement devant un vide factuel en ce qui concerne d'une part la nature et l'étendue de la violation et tout particulièrement d'autre part l'objectif législatif de la disposition attaquée. Il est donc difficile pour notre Cour de tenter de déterminer quelle est la réparation appropriée dans le présent contexte.

I. *L'interprétation large comme mesure corrective en vertu de l'article 52*

Un tribunal jouit d'une certaine latitude dans le choix de la mesure à prendre dans le cas d'une violation de la *Charte* qui ne résiste pas à un examen fondé sur l'article premier. L'article 52 de la *Loi constitutionnelle de 1982* prévoit l'annulation des «dispositions incompatibles» de toute règle de droit. Selon les circonstances, un tribunal peut simplement annuler une disposition, il peut l'annuler et suspendre temporairement l'effet de la déclaration d'invalidité ou il peut appliquer les techniques d'interprétation atténuée ou d'interprétation large. En outre, en vertu de l'art. 24 de la *Charte*, tout tribunal compétent peut octroyer à «[t]oute personne, victime de violation ou de négation des droits ou libertés qui lui sont garantis par la présente charte» la «réparation» qu'il estime «conve-

court will determine its course of action with reference to the nature of the violation and the context of the specific legislation under consideration.

A. The Doctrine of Severance

The flexibility of the language of s. 52 is not a new development in Canadian constitutional law. The courts have always struck down laws only to the extent of the inconsistency using of the doctrine of severance or "reading down". Severance is used by the courts so as to interfere with the laws adopted by the legislature as little as possible. Generally speaking, when only a part of a statute or provision violates the Constitution, it is common sense that only the offending portion should be declared to be of no force or effect, and the rest should be spared.

Far from being an unusual technique, severance is an ordinary and everyday part of constitutional adjudication. For instance if a single section of a statute violates the Constitution, normally that section may be severed from the rest of the statute so that the whole statute need not be struck down. To refuse to sever the offending part, and therefore declare inoperative parts of a legislative enactment which do not themselves violate the Constitution, is surely the more difficult course to justify.

Furthermore, as Rogerson has pointed out (in "The Judicial Search for Appropriate Remedies Under the Charter: The Examples of Overbreadth and Vagueness" in Sharpe, ed., *Charter Litigation* (1987) at pp. 250-52), it is logical to expect that severance would be a more prominent technique under the *Charter* than it has been in division of powers cases. In division of powers cases the question of constitutional validity often turns on an overall examination of the pith and substance of the legislation rather than on an examination of the effects of particular portions of the legislation on individual rights. Where a statute violates the division of powers, it tends to do so as a whole. This is

nable et juste». Lorsqu'il choisit la façon dont il appliquera l'art. 52 ou l'art. 24, un tribunal doit déterminer les mesures qu'il prendra eu égard à la nature de la violation et au contexte de la loi visée.

A. La doctrine de la dissociation

La souplesse du libellé de l'art. 52 n'a rien de nouveau en droit constitutionnel canadien. Les tribunaux n'ont toujours annulé que les dispositions incompatibles des lois en appliquant la doctrine de la dissociation ou de «l'interprétation atténuée». Les tribunaux ont recours à la dissociation de façon à s'ingérer le moins possible dans les lois adoptées par le corps législatif. En règle générale, lorsque seulement une partie d'une loi ou d'une disposition viole la Constitution, il est logique de déclarer inopérante seulement la partie fautive et de maintenir en vigueur le reste du texte.

Loin d'être une technique inhabituelle, la dissociation est une pratique courante en matière constitutionnelle. Par exemple, dans le cas où un seul article d'une loi viole la Constitution, on peut normalement retrancher cet article du reste de la loi afin de ne pas avoir à annuler l'ensemble de la loi. Refuser de retrancher la partie fautive, et en conséquence déclarer inopérantes les dispositions d'une loi qui en soi ne violent pas la Constitution, est certainement le choix le plus difficile à justifier.

Par ailleurs, comme l'a fait remarquer Rogerson («The Judicial Search for Appropriate Remedies Under the Charter: The Examples of Overbreadth and Vagueness» dans Sharpe, dir., *Charter Litigation* (1987) aux pp. 250 à 252), il est logique de s'attendre que la technique de la dissociation soit utilisée plus fréquemment dans les différends fondés sur la *Charte* que dans ceux portant sur le partage des compétences. En matière de partage des compétences, la question de la constitutionnalité nécessite souvent un examen global du caractère véritable de la loi plutôt qu'un examen des répercussions de certaines parties de la loi sur les droits individuels. Lorsqu'une loi porte atteinte au partage des compétences, l'atteinte se retrouve généralement dans l'ensemble de la loi. La situa-

not so of violations of the *Charter* where the offending portion tends to be more limited.

Where the offending portion of a statute can be defined in a limited manner it is consistent with legal principles to declare inoperative only that limited portion. In that way, as much of the legislative purpose as possible may be realized. However, there are some cases in which to sever the offending portion would actually be more intrusive to the legislative purpose than the alternate course of striking down provisions which are not themselves offensive but which are closely connected with those that are. This concern is reflected in the classic statement of the test for severance in *Attorney-General for Alberta v. Attorney-General for Canada*, [1947] A.C. 503, at p. 518:

> The real question is whether what remains is so inextricably bound up with the part declared invalid that what remains cannot independently survive or, as it has sometimes been put, whether on a fair review of the whole matter it can be assumed that the legislature would have enacted what survives without enacting the part that is ultra vires at all.

This test recognizes that the seemingly laudable purpose of retaining the parts of the legislative scheme which do not offend the Constitution rests on an assumption that the legislature would have passed the constitutionally sound part of the scheme without the unsound part. In some cases this assumption will not be a safe one. In those cases it will be necessary to go further and declare inoperative portions of the legislation which are not themselves unsound.

Therefore, the doctrine of severance requires that a court define carefully the extent of the inconsistency between the statute in question and the requirements of the Constitution, and then declare inoperative (a) the inconsistent portion, and (b) such part of the remainder of which it cannot be safely assumed that the legislature would have enacted it without the inconsistent portion.

tion n'est pas la même dans le cas des violations de la *Charte*, la partie fautive se trouvant généralement plus circonscrite.

Si la partie irrégulière d'une loi peut être isolée, il est conforme aux principes juridiques de déclarer inopérante seulement cette partie. On peut ainsi réaliser autant que possible l'objectif législatif. Toutefois, dans certains cas, la dissociation de la partie fautive sera plus attentatoire à l'objectif législatif que l'annulation possible des dispositions qui ne sont pas fautives, mais qui sont étroitement liées à celles qui le sont. Cette préoccupation se reflète dans l'énoncé classique du critère applicable en cas de dissociation mentionné dans l'arrêt *Attorney-General for Alberta c. Attorney-General for Canada*, [1947] A.C. 503, à la p. 518:

> [TRADUCTION] La véritable question qui se pose est de savoir si le reste n'est pas si inextricablement lié à la partie déclarée invalide qu'il ne saurait subsister indépendamment, ou comme on l'a dit parfois, si, après un examen impartial de toute la question, on peut présumer que le législateur n'aurait jamais adopté ce qui subsiste sans adopter la partie qui est ultra vires.

Ce critère fondé sur l'objet apparemment louable du maintien des parties constitutionnelles de la loi repose sur la supposition que le législateur aurait adopté la partie constitutionnelle de la loi en question sans la partie inconstitutionnelle. Dans certains cas, cette supposition ne sera pas fondée. Il sera alors nécessaire de déclarer inopérantes des parties de la loi qui ne sont pas en soi invalides.

En conséquence, la doctrine de la dissociation exige du tribunal qu'il précise soigneusement la mesure de l'incompatibilité entre la loi en question et les exigences de la Constitution et qu'il déclare inopérantes a) la partie incompatible, ainsi que b) toute partie du reste de la loi relativement à laquelle il n'y aurait pas lieu de supposer que le législateur l'aurait adoptée sans la partie incompatible.

B. Reading In as Akin to Severance

This same approach should be applied to the question of reading in since extension by way of reading in is closely akin to the practice of severance. The difference is the manner in which the extent of the inconsistency is defined. In the usual case of severance the inconsistency is defined as something improperly included in the statute which can be severed and struck down. In the case of reading in the inconsistency is defined as what the statute wrongly excludes rather than what it wrongly includes. Where the inconsistency is defined as what the statute excludes, the logical result of declaring inoperative that inconsistency may be to include the excluded group within the statutory scheme. This has the effect of extending the reach of the statute by way of reading in rather than reading down.

A statute may be worded in such a way that it gives a benefit or right to one group (inclusive wording) or it may be worded to give a right or benefit to everyone except a certain group (exclusive wording). It would be an arbitrary distinction to treat inclusively and exclusively worded statutes differently. To do so would create a situation where the style of drafting would be the single critical factor in the determination of a remedy. This is entirely inappropriate. Rowles J. made this point in *Knodel v. British Columbia (Medical Services Commission)* (1991), 58 B.C.L.R. (2d) 356 (B.C.S.C.), at p. 388:

As stated previously, once a person has demonstrated that a particular law infringes his or her *Charter* rights, the manner in which the law is drafted or stated ought to be irrelevant for the purposes of a constitutional remedy. To hold otherwise would result in a statutory provision dictating the interpretation of the Constitution. Further, where B's *Charter* right to a[n equal] benefit is demonstrated, it is immaterial whether the subject law states : (1) A benefits; or (2) Everyone benefits except B.

The first example would require the court to "read in" the words "and B," while the second example would

B. L'interprétation large et la dissociation

La même analyse devrait être appliquée à la question de l'interprétation large car l'élargissement de la portée d'un texte par interprétation large ressemble étroitement à la pratique de la dissociation. Les deux techniques diffèrent quant à la façon de déterminer la mesure de l'incompatibilité. Dans le cas habituel de la dissociation, l'incompatibilité est généralement considérée comme une chose que la loi inclut à tort, et qui peut en être dissociée et annulée. Dans le cas de l'interprétation large, l'incompatibilité découle de ce que la loi exclut à tort plutôt que de ce qu'elle inclut à tort. Si l'incompatibilité découle de ce que la loi exclut, la déclaration d'invalidité de cette incompatibilité peut avoir pour effet logique d'inclure le groupe exclu dans le texte législatif en question. La portée de la loi est ainsi étendue par interprétation large au lieu de recevoir une interprétation atténuée.

On peut libeller une loi de façon à conférer un bénéfice ou un droit à un groupe (par inclusion) ou à tous sauf un certain groupe (par exclusion). Ce serait faire une distinction arbitraire que de traiter différemment ces deux genres de dispositions. On créerait ainsi une situation où le style de rédaction serait le seul critère critique dans la détermination d'une réparation. Cela est tout à fait inopportun. Le juge Rowles a fait remarquer ce qui suit dans l'arrêt *Knodel c. British Columbia (Medical Services Commission)* (1991), 58 B.C.L.R. (2d) 356 (C.S.C.-B.), à la p. 388:

[TRADUCTION] Comme mentionné, lorsqu'une personne a établi qu'une loi particulière porte atteinte aux droits que lui garantit la *Charte*, la façon dont la loi est rédigée ou libellée ne devrait pas être pertinente lorsqu'il s'agit de déterminer la réparation fondée sur la Constitution. Prétendre le contraire serait établir une disposition législative prescrivant l'interprétation de la Constitution. Par ailleurs, lorsque le droit de B au [même] bénéfice en vertu de la *Charte* est établi, il importe peu que la loi visée précise: (1) que A a droit aux bénéfices; ou (2) que tous ont droit aux bénéfices, sauf B.

Dans le premier cas, le tribunal devrait donner une «interprétation large» au libellé de la loi afin d'inclure

require the court to "strike out" the words "except B." In each case, the result would be identical.

Accordingly, whether a court "reads in" or "strikes out" words from a challenged law, the focus of the court should be on the appropriate remedy in the circumstances and not on the label used to arrive at the result.

There is nothing in s. 52 of the *Constitution Act, 1982* to suggest that the court should be restricted to the verbal formula employed by the legislature in defining the inconsistency between a statute and the Constitution. Section 52 does not say that the words expressing a law are of no force or effect to the extent that they are inconsistent with the Constitution. It says that a law is of no force or effect to the extent of the inconsistency. Therefore, the inconsistency can be defined as what is left out of the verbal formula as well as what is wrongly included.

This Court implicitly recognized that the extent of the inconsistency can be defined in substantive, rather than merely verbal, terms in *Andrews v. Law Society of British Columbia*, *supra*. In *Andrews* the statute (*Barristers and Solicitors Act*, R.S.B.C. 1979, c. 26, s. 42) dictated that only Canadian citizens could become lawyers in the following words:

42. The benchers may call to the Bar of the Province and admit as solicitor of the Supreme Court

(a) a Canadian citizen with respect to whom they are satisfied that he . . . .

The Court found that the exclusion of non-citizens violated the right to equality. Instead of striking down the entire section so that everyone would be equally prevented from becoming a lawyer, only the requirement of Canadian citizenship was declared inoperative. However, the section does not make any sense if the words "a Canadian citizen" are deleted and there is, in fact, no way of simply deleting words that would make the section conform to the requirements of the *Charter*.

«B»; dans le second, le tribunal devrait «retrancher» les termes «sauf B». Dans les deux cas, le résultat serait le même.

En conséquence, que le tribunal donne une «interprétation large» à une loi contestée ou décide d'en «retrancher» les parties fautives, il doit mettre l'accent sur la réparation appropriée dans les circonstances et non sur la qualification de la réparation utilisée pour arriver au résultat.

L'article 52 de la *Loi constitutionnelle de 1982* n'a pas pour effet de restreindre le tribunal à l'examen du libellé employé par le législateur lorsqu'il détermine l'incompatibilité entre une loi et la Constitution. L'article 52 ne précise pas que les termes d'une loi qui sont incompatibles avec la Constitution sont inopérants. Il précise que la Constitution rend inopérantes les dispositions incompatibles de toute autre règle de droit. Par conséquent, l'incompatibilité peut s'entendre tant de ce qui a été omis du libellé de la loi que de ce qui y a été inclus à tort.

Dans l'arrêt *Andrews c. Law Society of British Columbia*, précité, notre Cour a implicitement reconnu que la mesure de l'incompatibilité peut être déterminée par rapport au fond d'une loi plutôt que seulement par rapport à son libellé. Dans cet arrêt, la loi visée (*Barristers and Solicitors Act*, R.S.B.C. 1979, ch. 26, art. 42) prévoyait que seulement des citoyens canadiens pouvaient devenir avocats, dans les termes suivants:

[TRADUCTION] **42.** Les membres du conseil du barreau peuvent inscrire au barreau de la province et admettre à titre de procureur de la Cour suprême

a) un citoyen canadien dont ils sont convaincus qu'il . . .

Notre Cour a statué que l'exclusion de personnes n'ayant pas la citoyenneté canadienne portait atteinte au droit à l'égalité. Au lieu d'annuler l'article au complet et d'empêcher ainsi quiconque de devenir avocat, notre Cour a déclaré inopérante seulement l'obligation d'être citoyen canadien. Toutefois, l'article n'a pas de sens si l'on supprime l'expression «un citoyen canadien»; en fait, il n'existe aucun moyen de supprimer simplement des mots afin de rendre l'article compatible avec

Instead of focusing on these verbal formulae, the Court nullified the substantive citizenship requirement which could be said to amount to extending the statute to cover non-Canadians. Thus, *Andrews* is already an example of a case in which the extent of the inconsistency was defined conceptually without being limited to the manner in which the statute was drafted.

C. The Purposes of Reading In and Severance

(i) Respect for the Role of the Legislature

The logical parallels between reading in and severance are mirrored by their parallel purposes. Reading in is as important a tool as severance in avoiding undue intrusion into the legislative sphere. As with severance, the purpose of reading in is to be as faithful as possible within the requirements of the Constitution to the scheme enacted by the Legislature. Rogerson makes this observation at p. 288:

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

Of course, reading in will not always constitute the lesser intrusion for the same reason that severance sometimes does not. In some cases, it will not be a safe assumption that the legislature would have enacted the constitutionally permissible part of its enactment without the impermissible part. For example, in a benefits case, it may not be a safe assumption that the legislature would have enacted a benefits scheme if it were impermissible to exclude particular parties from entitlement under that scheme.

les exigences de la *Charte*. Au lieu de s'en tenir à cette expression, notre Cour a invalidé l'obligation de fond d'être citoyen canadien, ce qui revient à élargir la portée de la loi afin d'inclure les non-Canadiens. L'arrêt *Andrews* constitue donc déjà un cas où l'étendue de l'incompatibilité a été déterminée de façon conceptuelle et non seulement par rapport au libellé de la loi.

C. L'objet de l'interprétation large et de la dissociation

(i) Respect du rôle du législateur

Le parallélisme logique qui existe entre l'interprétation large et la dissociation s'étend également à leurs objectifs. L'interprétation large est un moyen aussi important que la dissociation pour empêcher un empiétement injustifié sur le domaine législatif. À l'instar de la dissociation, l'objet de l'interprétation large est d'être aussi fidèle que possible, dans le cadre des exigences de la Constitution, au texte législatif adopté par le législateur. Rogerson fait l'observation suivante à la p. 288:

> [TRADUCTION] Les tribunaux devraient certainement aller aussi loin que nécessaire pour assurer la protection des droits, mais pas davantage. L'empiétement sur les objets législatifs légitimes devrait être réduit au minimum et les lois devraient demeurer opérantes dans la mesure où il n'y a pas violation de droits. Une loi qui sert des fins sociales souhaitables peut être constitutive de droits qui méritent une certaine protection.

Il va sans dire que l'interprétation large ne sera pas toujours la mesure moins attentatoire, pour le même motif que la dissociation ne l'est parfois pas. Dans certains cas, il n'y aura pas lieu de supposer que le législateur aurait adopté la partie d'une loi autorisée par la Constitution sans celle qui ne l'est pas. Par exemple, dans le cas d'une affaire de prestations, on pourrait ne pas considérer comme fondée la supposition que le législateur aurait adopté le régime en question s'il n'avait pas pu exclure certaines personnes du droit à ces prestations.

(ii) Respect for the Purposes of the *Charter*

Just as reading in is sometimes required in order to respect the purposes of the legislature, it is also sometimes required in order to respect the purposes of the *Charter*. The absolute unavailability of reading in would mean that the standards developed under the *Charter* would have to be applied in certain cases in ways which would derogate from the deeper social purposes of the *Charter*. This point has been made well by Duclos' and Roach's article "Constitutional Remedies as 'Constitutional Hints': A Comment on *R.* v. *Schachter*" (1991), 36 *McGill L.J.* 1, and by Caminker's article "A Norm-Based Remedial Model for Underinclusive Statutes" (1986), 95 *Yale L.J.* 1185. Their argument is that even in situations where the standards of the *Charter* allow for more than one remedial response, the purposes of the *Charter* may encourage one kind of response more strongly than another.

This is best illustrated by the case of *Attorney-General of Nova Scotia v. Phillips* (1986), 34 D.L.R. (4th) 633 (N.S.C.A.). In that case, a form of welfare benefit was available to single mothers but not single fathers. This was held to violate s. 15 of the *Charter* since benefits should be available to single mothers and single fathers equally. However, the court held that s. 15 merely required equal benefit, so that the *Charter* would be equally satisfied whether the benefit was available to both mothers and fathers or to neither. Given this and the court's conclusion that it could not extend benefits, the only available course was to nullify the benefits to single mothers. The irony of this result is obvious.

Perhaps in some cases s. 15 does simply require relative equality and is just as satisfied with equal graveyards as equal vineyards, as it has sometimes been put (see Caminker, at p. 1186). Yet the nulli-

(ii) Respect des objets de la *Charte*

S'il est parfois nécessaire de procéder par interprétation large pour assurer le respect des objectifs législatifs, il est également nécessaire parfois de procéder de cette façon pour assurer le respect des objets de la *Charte*. L'inapplicabilité absolue de l'interprétation large signifierait que les normes élaborées en vertu de la *Charte* devraient, dans certains cas, être appliquées d'une façon qui dérogerait aux objets sociaux fondamentaux de la *Charte*. Ce point a été bien exposé dans l'article de Duclos et Roach intitulé: «Constitutional Remedies as 'Constitutional Hints': A Comment on *R.* v. *Schachter*» (1991), 36 *R.D. McGill* 1 et dans l'article de Caminker intitulé: «A Norm-Based Remedial Model for Underinclusive Statutes» (1986), 95 *Yale L.J.* 1185. Selon ces auteurs, même dans les cas où les critères de la *Charte* permettent plus d'une réparation, les objets de la *Charte* pourraient bien favoriser un type de réponse plutôt qu'un autre.

L'arrêt *Attorney-General of Nova Scotia c. Phillips* (1986), 34 D.L.R. (4th) 633 (C.A.N.-É.) illustre fort bien ce point. Dans cette affaire, la plainte portait sur le fait que les mères célibataires avaient droit à un certain type de prestations d'aide sociale, mais pas les pères célibataires. La cour a statué que ces prestations étaient contraires à l'art. 15 de la *Charte* puisqu'elles auraient dû être accordées tant aux pères célibataires qu'aux mères célibataires. Toutefois, la cour a statué que l'art. 15 exigeait simplement le même bénéfice et que les exigences de la *Charte* seraient tout aussi bien satisfaites si les prestations en question étaient accordées à la fois aux mères et aux pères célibataires ou si elles n'étaient accordées ni à l'un ni à l'autre groupe. Après avoir fait cette observation et conclu qu'elle ne pouvait élargir l'octroi des prestations, la cour a décidé que la seule réparation possible était d'annuler les prestations versées aux mères célibataires. L'ironie du résultat est évidente.

Peut-être dans certains cas l'art. 15 exige-t-il tout simplement une égalité relative à laquelle on pourra tout aussi bien satisfaire en prévoyant un nombre égal de cimetières qu'un nombre égal de

fication of benefits to single mothers does not sit well with the overall purpose of s. 15 of the *Charter* and for s. 15 to have such a result clearly amounts to "equality with a vengeance," as LEAF, one of the interveners in this case, has suggested. While s. 15 may not absolutely require that benefits be available to single mothers, surely it at least encourages such action to relieve the disadvantaged position of persons in those circumstances. In cases of this kind, reading in allows the court to act in a manner more consistent with the basic purposes of the *Charter*.

Reading in should therefore be recognized as a legitimate remedy akin to severance and should be available under s. 52 in cases where it is an appropriate technique to fulfil the purposes of the *Charter* and at the same time minimize the interference of the court with the parts of legislation that do not themselves violate the *Charter*.

II. *Choice of Remedial Options under Section 52*

A. Defining the Extent of the Inconsistency

The first step in choosing a remedial course under s. 52 is defining the extent of the inconsistency which must be struck down. Usually, the manner in which the law violates the *Charter* and the manner in which it fails to be justified under s. 1 will be critical to this determination. In this case, as noted earlier, this Court is hampered by the lack of an opportunity to assess the nature of the violation and the absence of s. 1 evidence.

It is useful at this point to set out the two stage s. 1 test developed by this Court in *R. v. Oakes*, [1986] 1 S.C.R. 103:

vignobles, comme on l'a dit parfois (voir Caminker, à la p. 1186). Cependant, l'annulation des prestations offertes aux mères célibataires n'est pas compatible avec l'objet global de l'art. 15 de la *Charte* et ce résultat équivaut à [TRADUCTION] «l'égalité avec vengeance» comme l'a soutenu le Fonds d'action et d'éducation juridiques pour les femmes, l'un des intervenants en l'espèce. L'article 15 n'exige peut-être pas absolument l'octroi de bénéfices aux mères célibataires, mais au moins il favorise sûrement une telle mesure afin de venir en aide aux personnes qui, dans ces circonstances, se trouvent défavorisées. Dans les affaires de cette nature, l'interprétation large permet au tribunal d'agir d'une façon plus compatible avec les objets fondamentaux de la *Charte*.

En conséquence, l'interprétation large devrait être reconnue comme une mesure corrective légitime semblable à la dissociation et devrait pouvoir être utilisée en vertu de l'art. 52 dans les cas où elle constitue une technique appropriée pour satisfaire aux objets de la *Charte* et réduire au minimum l'ingérence judiciaire dans les parties de la loi qui en soi ne sont pas contraires à la *Charte*.

II. *Les mesures correctives en vertu de l'article 52*

A. Déterminer la mesure de l'incompatibilité

Dans le choix d'une mesure corrective en vertu de l'art. 52, la première étape consiste à déterminer l'étendue de l'incompatibilité qui doit être annulée. Habituellement, il sera essentiel d'examiner de quelle façon la loi en question viole la *Charte* et pourquoi cette violation ne peut être justifiée en vertu de l'article premier. En l'espèce, comme je l'ai déjà mentionné, notre Cour est limitée dans sa démarche puisqu'elle n'a pas l'occasion d'examiner la nature de la violation et qu'elle ne dispose pas d'éléments de preuve fondés sur l'article premier.

Il convient maintenant de présenter le critère à deux volets relatif à l'article premier élaboré par notre Cour dans l'arrêt *R. c. Oakes*, [1986] 1 R.C.S. 103:

(1) Is the legislative objective which the measures limiting an individual's rights or freedoms are designed to serve sufficiently pressing and substantial to justify the limitation of those rights or freedoms?

(2) Are the measures chosen to serve that objective proportional to it, that is:

(a) Are the measures rationally connected to the objective?

(b) Do the measures impair as little as possible the right and freedom in question? and,

(c) Are the effects of the measures proportional to the objective identified above?

(i) The Purpose Test

In some circumstances, s. 52(1) mandates defining the inconsistent portion which must be struck down very broadly. This will almost always be the case where the legislation or legislative provision does not meet the first part of the *Oakes* test, in that the purpose is not sufficiently pressing or substantial to warrant overriding a *Charter* right. Although it predates *Oakes*, *supra*, *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, provides a clear example. There Dickson C.J. found that the purpose of the *Lord's Day Act*, R.S.C. 1970, c. L-13, was itself inimical to the values of a free and democratic society. The case stands as authority for the proposition that, where the purpose of the legislation is itself unconstitutional, the legislation should be struck down in its entirety. Indeed, it is difficult to imagine anything less being appropriate where the purpose of the legislation is deemed unconstitutional; however, I do not wish to foreclose that possibility prematurely.

(ii) The Rational Connection Test

Where the purpose of the legislation or legislative provision is deemed to be pressing and substantial, but the means used to achieve this objective are found not to be rationally connected to it, the inconsistency to be struck down will generally be the whole of the portion of the legislation which fails the rational connection test.

(1) L'objectif législatif que visent les mesures restreignant les droits ou libertés d'une personne se rapporte-t-il à des préoccupations suffisamment urgentes et réelles pour justifier la restriction de ces droits ou libertés?

(2) Les mesures choisies pour atteindre cet objectif sont-elles proportionnelles à ce risque, c'est-à-dire:

a) Les mesures ont-elles un lien rationnel avec l'objectif?

b) Les mesures portent-elles le moins possible atteinte au droit ou à la liberté en question?

c) Les effets de ces mesures sont-ils proportionnels à l'objectif en question?

(i) Le critère de l'objet

Dans certaines circonstances, le par. 52(1) exige qu'on détermine d'une façon très large la partie incompatible à annuler. Cela sera presque toujours le cas si la loi ou la disposition législative ne satisfait pas à la première partie du critère énoncé dans l'arrêt *Oakes*, en ce que l'objectif ne se rapporte pas à des préoccupations suffisamment urgentes et réelles pour justifier une atteinte à un droit garanti par la *Charte*. Bien qu'il soit antérieur à l'arrêt *Oakes*, précité, l'arrêt *R. c. Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295, offre un bon exemple. Dans cette affaire, le juge en chef Dickson a statué que l'objectif de la *Loi sur le dimanche*, S.R.C. 1970, ch. L-13, était contraire aux valeurs d'une société libre et démocratique. Cet arrêt étaye la proposition que si l'objectif même de la loi est inconstitutionnel, cette loi doit être annulée dans sa totalité. En fait, il est difficile d'imaginer qu'une réparation moindre soit appropriée lorsque l'objectif de la loi est réputé inconstitutionnel; toutefois, je ne veux pas écarter prématurément cette possibilité.

(ii) Le critère du lien rationnel

Lorsque l'on juge que l'objectif de la loi ou de la disposition législative se rapporte à des préoccupations urgentes et réelles, mais que les moyens choisis pour l'atteindre n'ont pas de lien rationnel avec cet objectif, l'incompatibilité à invalider sera généralement la partie de la disposition qui ne satisfait pas au critère du lien rationnel.

This Court's decision in *Andrews*, *supra*, can be taken to support this position. Again, this Court held there that the citizenship requirement for admission to the British Columbia bar violated the equality guarantee enshrined in s. 15 of the *Charter*. While the citizenship requirement was held to have a valid purpose (the objectives argued were that lawyers be familiar with Canadian institutions and customs and that they display a commitment to them), the Court determined that the requirement did not meet the proportionality test. The majority on this issue concluded that the means were probably not rationally connected to the objectives put forward, in that citizenship does not ensure familiarity with or commitment to Canadian society and, conversely, non-citizenship does not necessarily point to a lack of familiarity or commitment. The requirement was struck down.

On peut dire que l'arrêt *Andrews*, précité, de notre Cour appuie cette position. Nous avons statué dans cet arrêt que l'obligation d'être citoyen canadien pour être admis au Barreau de la Colombie-Britannique porte atteinte aux droits à l'égalité garantis par l'art. 15 de la *Charte*. Bien que notre Cour ait conclu que cette obligation vise un objectif valide (les objectifs invoqués étaient que les avocats doivent connaître les institutions et les coutumes canadiennes et qu'ils manifestent un engagement envers celles-ci), elle a statué qu'elle ne satisfaisait pas au critère de la proportionnalité. La Cour à la majorité a conclu que les moyens choisis à cette fin n'avaient probablement pas un lien rationnel avec ces objectifs en ce que la citoyenneté ne garantit pas la bonne connaissance de la société canadienne ou un engagement envers celle-ci; inversement, la non-citoyenneté ne signifie pas nécessairement qu'une personne ne connaîtra pas la société canadienne ou n'aura pas un engagement envers elle. Cette obligation a été annulée.

It is logical that in most such cases the appropriate remedial choice will be to strike down the entire portion of the legislation that fails on this element of the proportionality test. It matters not how pressing or substantial the objective of the legislation may be; if the means used to achieve the objective are not rationally connected to it, then the objective will not be furthered by somehow upholding the legislation as it stands.

Dans la plupart des affaires de cette nature, il est logique de déclarer inopérante toute la partie de la loi qui ne satisfait pas à cet élément du critère de proportionnalité. Peu importe que l'objectif de la loi se rapporte à des préoccupations réelles et urgentes, si les moyens utilisés pour l'atteindre n'ont pas un lien rationnel avec cet objectif, le maintien en vigueur de la loi dans sa forme existante n'en favorisera pas l'atteinte.

(iii) The Minimal Impairment/Effects Test

(iii) Le critère de l'atteinte minimale

Where the second and/or third elements of the proportionality test are not met, there is more flexibility in defining the extent of the inconsistency. For instance, if the legislative provision fails because it is not carefully tailored to be a minimal intrusion, or because it has effects disproportionate to its purpose, the inconsistency could be defined as being the provisions left out of the legislation which would carefully tailor it, or would avoid a disproportionate effect. According to the logic outlined above, such an inconsistency could be

Lorsqu'une loi ne satisfait pas au deuxième ou au troisième élément du critère de la proportionnalité, ou aux deux, on dispose d'une plus grande latitude pour déterminer quelles sont les dispositions incompatibles. Par exemple, si le texte législatif ne satisfait pas au critère parce qu'il n'est pas conçu de façon à porter le moins possible atteinte au droit ou à la liberté ou parce que ses effets sont disproportionnés à son objectif, on pourrait déterminer que l'incompatibilité consiste dans les dispositions non incluses dans la loi qui permettraient

declared inoperative with the result that the statute was extended by way of reading in.

Striking down, severing or reading in may be appropriate in cases where the second and/or third elements of the proportionality test are not met. The choice of remedy will be guided by the following considerations.

B. Deciding whether Severance or Reading In is Appropriate

Having determined what the extent of the inconsistency is, the next question is whether that inconsistency may be dealt with by way of severance, or in some cases reading in, or whether an impugned provision must be struck down in its entirety.

(i) Remedial Precision

While reading in is the logical counterpart of severance, and serves the same purposes, there is one important distinction between the two practices which must be kept in mind. In the case of severance, the inconsistent part of the statutory provision can be defined with some precision on the basis of the requirements of the Constitution. This will not always be so in the case of reading in. In some cases, the question of how the statute ought to be extended in order to comply with the Constitution cannot be answered with a sufficient degree of precision on the basis of constitutional analysis. In such a case, it is the legislature's role to fill in the gaps, not the court's. This point is made most clearly in *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 169:

While the courts are guardians of the Constitution and of individuals' rights under it, it is the legislature's responsibility to enact legislation that embodies appropriate safeguards to comply with the Constitution's

qu'elle soit bien conçue ou éviteraient que son effet soit disproportionné. Dans la logique du raisonnement exposé, cette incompatibilité pourrait être déclarée inopérante de sorte que la portée de la loi serait étendue par interprétation large.

Il pourrait convenir de procéder par annulation, dissociation ou interprétation large dans les cas où le texte législatif ne satisfait pas au deuxième ou au troisième élément, ou aux deux. Le choix de la réparation sera guidé par les considérations suivantes.

B. La dissociation ou l'interprétation large

Une fois établie la mesure de l'incompatibilité, la question suivante est de savoir si la solution appropriée est la dissociation ou, dans certains cas, l'interprétation large ou encore si la disposition attaquée doit être annulée dans sa totalité.

(i) La mesure corrective

Bien que l'interprétation large soit le pendant logique de la dissociation et serve la même fin, il importe de se rappeler qu'il existe une distinction importante entre les deux pratiques. En ce qui concerne la dissociation, la partie incompatible de la disposition législative peut être déterminée avec une certaine précision en fonction des exigences de la Constitution, ce qui ne sera pas toujours possible dans le cas de l'interprétation large. Dans certains cas, il ne sera pas possible, à partir d'une analyse fondée sur la Constitution, de déterminer avec suffisamment de précision dans quelle mesure il faut élargir la portée d'une loi pour la rendre compatible avec la Constitution. Il appartient alors aux législateurs et non aux tribunaux de combler les lacunes. Ce point a été très bien établi dans l'arrêt *Hunter c. Southam Inc.*, [1984] 2 R.C.S. 145, à la p. 169:

Même si les tribunaux sont les gardiens de la Constitution et des droits qu'elle confère aux particuliers, il incombe à la législature d'adopter des lois qui contiennent les garanties appropriées permettant de satisfaire

requirements. It should not fall to the courts to fill in the details that will render legislative lacunae constitutional.

In *Hunter*, the Court decided that the scheme for authorizing searches under the relevant legislation did not withstand *Charter* scrutiny. In such a circumstance, it would theoretically be possible to characterize the "extent of the inconsistency" as the absence of certain safeguards. Thus, in the abstract, the absence of appropriate safeguards could have been declared of no force or effect, which would have led to the establishment of the appropriate safeguards. However, this approach would have been inappropriate because this would have required establishing a new scheme, the details of which would have been up to the Court to determine.

Hunter has been applied recently by Justice McLachlin in *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232. The issue in that case was the prohibition of advertising by the members of a professional association, with certain exceptions. McLachlin J. found that the regulation of advertising violated the *Charter* and extended too far to be justified under s. 1. However, some prohibition of advertising would be justifiable if additional exceptions were added. The question then arose whether the Court ought to supply those additional exemptions itself, or simply strike down the prohibition.

McLachlin J. noted, at p. 253, that the drafting of rules which would allow only legitimate advertising would be a difficult and complex endeavour that did not flow with precision from the requirements of the *Charter*:

> I am conscious of the difficulties involved in drafting prohibitions on advertising which will catch misleading, deceptive and unprofessional advertising while permitting legitimate advertising.

Since the exemptions could not be defined with sufficient precision, the section itself had to be struck down (at p. 252):

aux exigences de la Constitution. Il n'appartient pas aux tribunaux d'ajouter les détails qui rendent constitutionnelles les lacunes législatives.

Dans l'arrêt *Hunter*, notre Cour a décidé que le régime d'autorisation des fouilles et des perquisitions établi en vertu de la loi concernée ne résistait pas à une analyse fondée sur la *Charte*. Dans un tel cas, il serait théoriquement possible de qualifier la mesure de l'incompatibilité comme étant l'inexistence de certaines garanties. En conséquence, dans l'abstrait, l'inexistence de garanties appropriées aurait pu être déclarée inopérante, ce qui aurait donné lieu à l'établissement des garanties appropriées. Toutefois, il n'aurait pas été opportun de prendre une telle démarche dans les circonstances puisqu'il aurait fallu établir un nouveau régime dont notre Cour aurait dû déterminer les détails.

L'arrêt *Hunter* a été appliqué récemment par le juge McLachlin dans l'arrêt *Rocket c. Collège royal des chirurgiens dentistes d'Ontario*, [1990] 2 R.C.S. 232. Dans cette affaire, la question en litige portait sur l'interdiction de publicité par les membres d'une association professionnelle, sous réserve de certaines exceptions. Le juge McLachlin a statué que le règlement en question violait la *Charte* et avait une portée trop large pour se justifier en vertu de l'article premier. Toutefois, une certaine interdiction de publicité serait justifiable s'il y avait ajout d'autres exceptions. La question était ensuite de savoir si notre Cour devait établir ces exceptions additionnelles ou annuler tout simplement l'interdiction.

Le juge McLachlin a mentionné, à la p. 253, que la rédaction de règles qui autoriseraient seulement la publicité légitime constitue une tâche difficile et complexe qui ne découle pas précisément des exigences de la *Charte*:

> Je suis consciente des difficultés que soulève la rédaction d'interdictions en matière de publicité qui atteindront la publicité trompeuse, mensongère et non professionnelle tout en autorisant la publicité légitime.

Puisque les exceptions ne pouvaient être déterminées avec suffisamment de précision, l'article a dû être annulé (à la p. 252):

Because the section is cast in the form of limited exclusions to a general prohibition, the Court would be required to supply further exceptions. To my mind, this is for the legislators.

These cases stand for the proposition that the court should not read in in cases where there is no manner of extension which flows with sufficient precision from the requirements of the Constitution. In such cases, to read in would amount to making *ad hoc* choices from a variety of options, none of which was pointed to with sufficient precision by the interaction between the statute in question and the requirements of the Constitution. This is the task of the legislature, not the courts.

(ii) Interference with the Legislative Objective

The primary importance of legislative objective quickly emerges from decisions of this Court wherein the possibility of reading down or in has been considered and determined inappropriate.

In *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69, at p. 104, Justice Sopinka emphasized that it is necessary in fashioning a remedy for a *Charter* violation to both "apply the measures which will best vindicate the values expressed in the *Charter*" and "refrain from intruding into the legislative sphere beyond what is necessary". He determined that reading down was not appropriate in that case but concluded, at p. 104: "Reading down may in some cases be the remedy that achieves the objectives to which I have alluded while at the same time constituting the lesser intrusion into the role of the legislature."

The degree to which a particular remedy intrudes into the legislative sphere can only be determined by giving careful attention to the objective embodied in the legislation in question. This objective may, as suggested above, be obvious from the very text of the provision. In other cases, it may only be illuminated through the evidence put forward under the s. 1 analysis, the fail-

Parce que l'article est rédigé sous forme d'exceptions limitées à une interdiction générale, la Cour serait tenue d'ajouter d'autres exceptions. À mon avis, il appartient au législateur de le faire.

Ces arrêts étayent la proposition que la cour ne devrait pas avoir recours à l'interprétation large dans les cas où la façon de procéder à l'élargissement d'une loi ne se dégage pas avec suffisamment de précision des exigences de la Constitution. Dans ces cas, le recours à l'interprétation large équivaudrait à faire des choix particuliers entre diverses options dont aucune ne ressort avec suffisamment de précision de l'interaction de la loi en question et des exigences de la Constitution. Cette responsabilité incombe au législateur et non aux tribunaux.

(ii) L'ingérence dans l'objectif législatif

L'importance primordiale de l'objectif législatif se dégage rapidement des arrêts de notre Cour, dans lesquels nous avons examiné la possibilité du recours à l'interprétation atténuée ou à l'interprétation large et décidé de ne pas nous en prévaloir.

Dans l'arrêt *Osborne c. Canada (Conseil du Trésor)*, [1991] 2 R.C.S. 69, à la p. 104, le juge Sopinka précise que, dans le choix d'une réparation par suite d'une violation de la *Charte*, il faut veiller à «faire appliquer les mesures les plus propres à assurer la protection des valeurs exprimées dans la *Charte*» et «ne pas empiéter sur le domaine législatif plus qu'il n'est nécessaire». Il a statué que l'interprétation atténuée ne convenait pas en l'espèce mais a conclu, aux pp. 104 et 105: «L'interprétation atténuée peut dans certains cas être la réparation qui, tout en atteignant les objectifs dont j'ai déjà fait mention, représente l'empiétement le moins grave sur les fonctions du législateur».

Ce n'est qu'en examinant de près l'objectif de la loi en question que l'on peut déterminer le degré d'empiétement d'une réparation particulière sur le domaine législatif. Comme mentionné, cet objectif peut ressortir de la lecture même de la disposition. Dans d'autres cas, il faudra examiner les éléments de preuve déposés dans le cadre d'une analyse fondée sur l'article premier, qui aurait échoué. Un

ure of which would precede this inquiry. A second level of legislative intention may be manifest in the means chosen to pursue that objective.

In *R. v. Seaboyer*, [1991] 2 S.C.R. 577, this Court struck down s. 276, the rape shield provision, of the *Criminal Code*, R.S.C., 1985, c. C-46. The majority of the Court held that it violated the accused's *Charter* right to a fair trial. The provision failed the *Oakes* test because of its overbreadth. It could not meet the minimal impairment element of the proportionality test. In considering the question of remedy, McLachlin J. canvassed the possibility of declaring the legislation valid in part through techniques such as reading down and constitutional exemption, but concluded that neither technique was appropriate in the case before her. McLachlin J. arrived at this conclusion because to take either approach would necessitate importing an element into the provision—judicial discretion—that the legislature specifically chose to exclude. She stated, at p. 628: "Where the effect is to change the law so substantially, one may question whether it is useful or appropriate to apply the doctrine of constitutional exemption". Without question, the same is true of extension by way of reading in.

This Court's decision in *R. v. Swain*, [1991] 1 S.C.R. 933, is instructive as to the second level of legislative intention referred to above. There, it was held that s. 542(2) of the *Criminal Code*, R.S.C. 1970, c. C-34, which provides for the automatic detention at the pleasure of the Lieutenant Governor of an insanity acquittee, was in violation of s. 7 of the *Charter* in that it deprived the appellant of his right to liberty without meeting the requirements of procedural fairness that attach to the principles of fundamental justice. In my judgment, I rejected the argument that the requirements of procedural fairness could just be read into the legislation as it stood because it was clear that, to achieve its objectives, Parliament had deliberately chosen the means which ultimately failed the minimal impairment element of the proportionality test under s. 1. Where the choice of means is unequivo-

second niveau d'intention législative peut ressortir des moyens choisis pour atteindre cet objectif.

Dans l'arrêt *R. c. Seaboyer*, [1991] 2 R.C.S. 577, notre Cour a annulé l'art. 276 du *Code criminel*, L.R.C. (1985), ch. C-46, la disposition sur la protection des victimes de viol. Notre Cour à la majorité a statué que cet article portait atteinte au droit de l'accusé à un procès équitable. Cette disposition ne satisfaisait pas au critère de l'arrêt *Oakes* en raison de sa portée trop large. Elle ne pouvait pas répondre à l'exigence d'atteinte minimale que comporte le critère de proportionnalité. Dans l'examen de la réparation, le juge McLachlin a examiné la possibilité de déclarer la disposition valide en partie par l'application de techniques comme l'interprétation atténuée et l'exemption constitutionnelle, mais a conclu que ces techniques n'étaient pas applicables en l'espèce, puisqu'elles incorporeraient dans la disposition un élément que le législateur a spécifiquement choisi d'exclure, le pouvoir discrétionnaire du juge. Elle affirme, à la p. 628: «Lorsqu'elle a pour effet de modifier la loi d'une manière aussi importante, on peut se demander s'il est utile ou approprié d'appliquer la doctrine de l'exemption constitutionnelle». Il n'y a pas de doute que ces propos s'appliquent également à un élargissement par voie d'interprétation large.

La décision de notre Cour dans l'arrêt *R. c. Swain*, [1991] 1 R.C.S. 933, est révélatrice quant au second niveau d'intention législative dont il est fait mention. Dans cette affaire, notre Cour a statué que le par. 542(2) du *Code criminel*, S.R.C. 1970, ch. C-34, qui prévoyait la détention automatique d'une personne acquittée pour cause d'aliénation mentale au bon plaisir du lieutenant-gouverneur, contrevenait à l'art. 7 de la *Charte* en ce qu'il portait atteinte au droit de l'appelant à la liberté sans respecter l'équité en matière de procédure qu'exigent les principes de justice fondamentale. Dans mon jugement, j'ai rejeté l'argument qu'il suffisait de donner une interprétation large au texte législatif pour qu'il fût considéré comme respectant l'équité procédurale parce qu'il était évident que le Parlement avait, pour atteindre ses objectifs, délibérément choisi le moyen qui ne respectait pas

cal, to further the objective of the legislative scheme through different means would constitute an unwarranted intrusion into the legislative domain.

Even where extension by way of reading in can be used to further the legislative objective through the very means the legislature has chosen, to do so may, in some cases, involve an intrusion into budgetary decisions which cannot be supported. This Court has held, and rightly so, that budgetary considerations cannot be used to justify a violation under s. 1. However, such considerations are clearly relevant once a violation which does not survive s. 1 has been established, s. 52 is determined to have been engaged and the Court turns its attention to what action should be taken thereunder.

Any remedy granted by a court will have some budgetary repercussions whether it be a saving of money or an expenditure of money. Striking down or severance may well lead to an expenditure of money. The respondent in this case pointed out that this Court's decision in *Tétrault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22, wherein an exclusion under the *Unemployment Insurance Act, 1971*, S.C. 1970-71-72, c. 48, based on age was found to contravene the *Charter*, necessarily led to an expenditure of government funds in that persons previously not entitled to benefits were thereafter free to apply for them. It has also been pointed out that a wide variety of court orders have had the effect of causing expenditures (see Lajoie, "De l'interventionnisme judiciaire comme apport à l'émergence des droits sociaux" (1991), 36 *McGill L.J.* 1338, at pp. 1344-45). In determining whether reading in is appropriate then, the question is not whether courts can make decisions that impact on budgetary policy; it is to what degree they can appropriately do so. A remedy which entails an intrusion into this sphere so substantial as to

l'exigence d'atteinte minimale que comporte le critère de proportionnalité de l'examen fondé sur l'article premier. Lorsque le choix du moyen est évident, favoriser l'atteinte de l'objectif du régime législatif par d'autres moyens constituerait un empiétement injustifié sur le domaine législatif.

Même si l'élargissement de la portée d'une loi par interprétation large peut servir à atteindre l'objectif législatif par le moyen même choisi par le législateur, il risque, dans certains cas, de constituer un empiétement indéfendable sur des décisions financières. Notre Cour a statué à juste titre que les considérations financières ne pouvaient servir à justifier une violation dans le cadre de l'analyse fondée sur l'article premier. Toutefois, ces considérations sont évidemment pertinentes lorsque l'on a établi l'existence d'une violation qui ne peut être sauvegardée par l'article premier, que l'application de l'art. 52 se trouve déclenchée et que le tribunal examine la mesure à prendre.

Toute réparation accordée par un tribunal entraînera des répercussions financières, que ce soit une économie ou une dépense. L'annulation ou la dissociation pourrait bien donner lieu à une dépense. En l'espèce, l'intimé a mentionné l'arrêt de notre Cour *Tétreault-Gadoury c. Canada (Commission de l'emploi et de l'immigration)*, [1991] 2 R.C.S. 22, dans lequel une restriction fondée sur l'âge prévue dans la *Loi de 1971 sur l'assurance-chômage*, S.C. 1970-71-72, ch. 48, a été jugée incompatible avec la *Charte*, ce qui a nécessairement entraîné une dépense de fonds gouvernementaux puisque des personnes antérieurement inadmissibles aux prestations étaient dès lors habilitées à présenter une demande à cette fin. On a également fait ressortir qu'un vaste éventail d'ordonnances judiciaires ont entraîné des dépenses (voir Lajoie, «De l'interventionnisme judiciaire comme apport à l'émergence des droits sociaux» (1991), 36 *R.D. McGill* 1338, aux pp. 1344 et 1345). Lorsque l'on détermine s'il faut donner une interprétation large à un texte législatif, la question n'est donc pas de savoir si les tribunaux peuvent prendre des décisions qui entraînent des répercussions de nature financière, mais bien jusqu'à quel point il est de circonstance de le faire. De toute évidence, il ne

change the nature of the legislative scheme in question is clearly inappropriate.

(iii) The Change in Significance of the Remaining Portion

Another way of asking whether to read in or sever would be an illegitimate intrusion into the legislative sphere is to ask whether the significance of the part which would remain is substantially changed when the offending part is excised. For instance, in *Devine v. Quebec (Attorney General)*, [1988] 2 S.C.R. 790, this Court found that certain statutory requirements respecting the use of the French language were unconstitutional because they were more stringent than necessary. By way of exception, the statute provided for less stringent requirements in certain circumstances. These less stringent requirements were not in themselves unconstitutional, and it would therefore have been possible to sever them and in that way to implement as much of the legislative intent as possible. However, the Court noted that to do so would really turn the legislative scheme on its head. The exceptions were meant to allow more lenient treatment of persons in certain situations, but if they were upheld while the main provisions were struck down, they would have precisely the opposite effect of dealing more stringently with those persons. This led to the conclusion, at p. 816, that the exceptions were "necessarily connected" to the offending provision, so that even though the exceptions were not themselves impermissible, they must be struck down as well:

> A single scheme is being dealt with, and once the parent section which institutes that scheme has been found unconstitutional, the Court must proceed to strike down those exceptions which are necessarily connected to the general rule. In that way, distortions and inconsistencies of legislative intention do not result from finding the major component of a comprehensive legislative regime contrary to the Constitution.

This built on the comments of Dickson C.J. in *R. v. Morgentaler*, [1988] 1 S.C.R. 30, at p. 80,

conviendrait pas d'accorder une réparation qui entraîne un empiétement tellement important sur ce domaine qu'il modifie la nature du régime législatif en question.

(iii) Le changement de sens du reste du texte

Pour déterminer si l'interprétation large ou la dissociation constituerait un empiétement illégitime sur le domaine législatif, on peut aussi se demander si le sens du texte qui reste serait grandement modifié par le retranchement des parties fautives. Par exemple, dans l'arrêt *Devine c. Québec (Procureur général)*, [1988] 2 R.C.S. 790, notre Cour a statué que certaines exigences législatives concernant l'utilisation du français étaient inconstitutionnelles parce qu'elles étaient plus sévères que nécessaire. La loi en question établissait un régime d'exceptions prévoyant des exigences moins strictes dans certaines circonstances. Ces exigences moins strictes n'étaient pas en soi inconstitutionnelles et il aurait été possible de les retrancher de la loi et de réaliser ainsi autant que possible l'intention du législateur. Cependant, notre Cour a fait remarquer que ce retranchement aurait l'effet inverse de l'intention législative. Les exceptions visaient à faire preuve de clémence envers des personnes se trouvant dans certaines situations; le maintien de ces exceptions parallèlement à l'annulation des dispositions principales aurait eu précisément l'effet contraire et soumis ces personnes à des exigences plus rigoureuses. Notre Cour est arrivée à la conclusion, à la p. 816, que les exceptions étaient «nécessairement reliées» à la disposition fautive et qu'elles devaient être annulées même si les exceptions n'étaient pas en soi inacceptables:

> Il s'agit d'un ensemble, et quand l'article initial qui lui donne naissance est déclaré inconstitutionnel, la Cour doit déclarer inopérantes les exceptions qui sont nécessairement reliées à la règle générale. C'est le moyen d'éviter que l'annulation de la composante principale d'un ensemble législatif contraire à la Constitution ne cause la déformation ou la contradiction de l'intention législative.

Cet énoncé fait fond sur les commentaires du juge en chef Dickson dans l'arrêt *R. c. Morgenta-*

where he observed that the prohibition of abortions must fall with the procedural exceptions which violated the *Charter*, since merely to eliminate the exceptions would be to re-draft a comprehensive code:

Having found that this "comprehensive code" infringes the *Charter*, it is not the role of the Court to pick and choose among the various aspects of s. 251 so as effectively to re-draft the section.

In both these cases, the significance of the non-offending provision was so markedly changed in the absence of the offending provision that the assumption that the legislature would have passed it was unsafe. The problem with striking down only the inconsistent portion is that the significance of the remaining portion changes so markedly without the inconsistent portion that the assumption that the legislature would have enacted it is unsafe.

In cases where the issue is whether to extend benefits to a group not included in the statute, the question of the change in significance of the remaining portion sometimes focuses on the relative size of the two relevant groups. For instance, in *Knodel*, *supra*, Rowles J. extended the provision of benefits to spouses to include same-sex spouses. She considered this course to be far less intrusive to the intention of the legislature than striking down the benefits to heterosexual spouses since the group to be added was much smaller than the group already benefitted (at p. 391):

In the present case, it would clearly be far more intrusive to strike the legislation and deny the benefits to the individuals receiving them than it would be to extend the benefits to the small minority who demonstrated their entitlement to them.

In *Tétrault-Gadoury v. Canada (Employment and Immigration Commission)*, *supra*, this Court decided that persons over 65 should be able to receive benefits that had been explicitly restricted to persons under 65. This is also a case in which

ler, [1988] 1 R.C.S. 30, à la p. 80, dans lequel il a fait remarquer que l'interdiction de l'avortement se classe parmi les exceptions procédurales qui vont à l'encontre de la *Charte*, puisque la simple élimination des exceptions équivaudrait à réécrire un code entier:

Ayant jugé que ce «code entier» enfreint la *Charte*, il n'appartient pas à la Cour de sélectionner divers aspects de l'art. 251 pour, en fait, réécrire l'article.

Dans ces deux arrêts, le sens de la disposition non fautive changeait tellement en l'absence de la disposition fautive qu'il n'y avait pas lieu de supposer que le législateur l'aurait quand même adoptée. Le problème de l'annulation de la partie incompatible seulement est que le sens de la partie qui reste change tellement en l'absence de la partie incompatible qu'il n'y a pas lieu de supposer que le législateur l'aurait quand même adoptée.

Lorsqu'il s'agit de savoir si l'on doit accorder des bénéfices à un groupe non inclus dans la loi, la question du changement de sens du reste de la loi tourne parfois autour de la taille relative des deux groupes pertinents. Par exemple, dans l'arrêt *Knodel*, précité, le juge Rowles a élargi la prestation de bénéfices aux conjoints pour inclure les conjoints du même sexe. À son avis, cette mesure empiétait moins sur l'intention législative que l'annulation des bénéfices accordés aux conjoints hétérosexuels puisque le groupe à ajouter était beaucoup moins important que le groupe existant de bénéficiaires (à la p. 391):

[TRADUCTION] En l'espèce, annuler la loi et refuser les prestations aux personnes qui les reçoivent déjà constituerait un empiétement beaucoup plus important qu'octroyer ces bénéfices à la faible minorité de personnes qui ont établi qu'elles y avaient droit.

Dans l'arrêt *Tétreault-Gadoury c. Canada (Commission de l'emploi et de l'immigration)*, précité, notre Cour a décidé que les personnes de plus de 65 ans avaient droit aux prestations dont le versement avait été explicitement restreint aux per-

the group to be added was much smaller than the group already benefitted.

Where the group to be added is smaller than the group originally benefitted, this is an indication that the assumption that the legislature would have enacted the benefit in any case is a sound one. When the group to be added is much larger than the group originally benefitted, this could indicate that the assumption is not safe. This is not because of the numbers *per se*. Rather, the numbers may indicate that for budgetary reasons, or simply because it constitutes a marked change in the thrust of the original program, it cannot be assumed that the legislature would have passed the benefit without the exclusion. In some contexts, the fact that the group to be added is much larger than the original group will not lead to these conclusions. *R. v. Hebb* (1989), 69 C.R. (3d) 1 (N.S.T.D.), is an example of this.

(iv) The Significance of the Remaining Portion

Other cases have focused on the significance or long-standing nature of the remaining portion. This sort of analysis is most apparent in *Russow v. B.C. (A.G.)* (1989), 35 B.C.L.R. (2d) 29 (S.C.). The court examined the various versions of the relevant provision which had been in force in the province from the time of Confederation to the present, and noted that the permissible portion had been invariably present. This helped the court to come to the conclusion that it was safe to assume that the legislature would have enacted the permissible portion without the impermissible portion (at pp. 33-35).

This consideration was also highlighted by Harlan J. in *Welsh v. United States*, 398 U.S. 333 (1970), at p. 366:

> When a policy has roots so deeply embedded in history, there is a compelling reason for a court to hazard the necessary statutory repairs if they can be made within the administrative framework of the statute and without impairing other legislative goals, even though

sonnes de moins de 65 ans. Dans ce cas également, le groupe à ajouter était numériquement beaucoup moins important que celui des bénéficiaires.

Si le groupe à ajouter est numériquement moins important que le groupe initial de bénéficiaires, c'est une indication que la supposition que le législateur aurait de toute façon adopté le bénéfice est fondée. Au contraire, si le groupe à ajouter est numériquement beaucoup plus important que le groupe initial de bénéficiaires, cela pourrait être une indication que cette supposition n'est pas fondée. Ce n'est pas seulement une question de chiffres. C'est plutôt que les chiffres peuvent indiquer que, pour des motifs financiers ou simplement parce que cela constituerait un changement marqué de l'objectif du programme initial, on ne peut pas supposer que le législateur aurait adopté le bénéfice en question sans l'exclusion. Dans certains contextes, le fait que le groupe à ajouter est beaucoup plus important que le groupe initial ne donnera pas lieu à ces conclusions. L'arrêt *R. c. Hebb* (1989), 69 C.R. (3d) 1 (N.-É.D.P.I.), en est un exemple.

(iv) Le sens de la portion restante

D'autres arrêts ont mis l'accent sur le sens ou l'historique de la partie qui reste. C'est là l'analyse utilisée dans l'arrêt *Russow c. B.C. (A.G.)* (1989), 35 B.C.L.R. (2d) 29 (C.S.). Dans cette affaire, la cour a examiné les diverses versions de la disposition visée en vigueur dans la province depuis la Confédération et elle a mentionné que la portion acceptable avait toujours existé. Cette constatation a aidé la cour à conclure qu'il y avait lieu de supposer que le législateur aurait adopté la portion acceptable sans la portion inacceptable (aux pp. 33 à 35).

Le juge Harlan a également fait ressortir ce point dans l'arrêt *Welsh c. United States*, 398 U.S. 333 (1970), à la p. 366:

> [TRADUCTION] Lorsqu'une politique est profondément ancrée dans l'histoire, il y a une raison convaincante qui permet à un tribunal de procéder à la réparation législative nécessaire si le contexte administratif de la loi s'y prête, sans empiétement sur d'autres objectifs législatifs,

they entail, not simply eliminating an offending section, but rather building upon it.

It is sensible to consider the significance of the remaining portion when asking whether the assumption that the legislature would have enacted the remaining portion is a safe one. If the remaining portion is very significant, or of a long standing nature, it strengthens the assumption that it would have been enacted without the impermissible portion.

The significance of the remaining portion may be enhanced where the Constitution specifically encourages that sort of provision. Earlier I referred to the articles by Duclos and Roach, and Caminker, which point out that the Constitution may encourage particular kinds of remedies even if it does not directly mandate them. This aspect of remedial choice was specifically relied on in *R. v. Hebb*, *supra*. In that case the court considered a provision which required the court to consider the means of accused to pay a fine before incarceration upon default. This provision only applied to persons aged 18 to 22. The court found that this constituted discrimination on the basis of age. The question then was whether the limitation to ages 18 to 22 could be severed from the rest of the provision.

The court observed that either course, severance or nullification, would interfere with the intention of Parliament to some extent. That is, severance would expand the protection of the provision to a group Parliament had not intended to benefit by it, and nullification would remove protection from the group Parliament had intended to have it. The court, at p. 21, then found it important that the protection in question was "constitutionally encouraged," and thought that this was a good reason to favour expansion of the provision rather than nullification:

To sever the age-related phrase provides protection to persons of all ages who are charged with a crime, in that they cannot be incarcerated for failure to pay a fine until a judicial review of their situation is held. On the other

même s'il s'agit non pas simplement d'éliminer une partie fautive, mais de faire fond sur celle-ci.

Il est raisonnable d'examiner le sens de la partie qui reste lorsqu'on se demande si la supposition que le législateur l'aurait quand même adoptée est fondée. Si la partie qui reste a une très grande importance ou existe depuis longtemps, ce fait vient renforcer la supposition que cette partie aurait été adoptée sans la portion inacceptable.

La partie qui reste a un sens encore plus important si la Constitution favorise expressément l'adoption de ce genre de disposition. J'ai mentionné l'article de Duclos et de Roach et celui de Caminker, qui font ressortir que la Constitution peut favoriser des types particuliers de réparation, même si elle ne les exige pas directement. Cet aspect du choix de la réparation a été expressément mentionné dans l'arrêt *R. v. Hebb*, précité. Dans cette affaire, la cour a examiné une disposition lui imposant d'examiner si l'accusé avait les moyens de payer une amende avant d'être incarcéré pour non-paiement. Cette disposition ne visait que les personnes âgées de 18 ans à 22 ans. La cour a statué que cette disposition constituait une discrimination fondée sur l'âge. Il fallait ensuite déterminer s'il était possible de dissocier la restriction relative à l'âge du reste de la disposition.

La cour a précisé que le retranchement de la partie fautive et l'annulation de la disposition empiéteraient tous les deux dans une certaine mesure sur l'intention du législateur. Le retranchement de la partie fautive aurait pour effet de protéger un groupe que le législateur n'avait pas eu l'intention de protéger et l'annulation de la disposition éliminerait la protection offerte au groupe que le législateur avait l'intention de protéger. Ayant jugé important, à la p. 21, le fait que la [TRADUCTION] «Constitution favorise» la protection en question, la cour a décidé que c'était là un motif valable d'élargir la portée de la disposition plutôt que de l'annuler:

[TRADUCTION] En retranchant du reste de la disposition la partie ayant trait à l'âge, on offre la protection de l'article aux personnes de tout âge accusées d'un acte criminel en ce qu'elles ne peuvent être incarcérées pour non-

hand, by severing the complete s. 646(10), this protection is removed for all persons, including the age group which Parliament determined were worthy of that special protection.

It is important that the courts not unjustifiably invade the domain which is properly that of the legislature. In following either of the alternatives above, the court will be interfering to some extent with the efforts of the legislators of the enactment. Where the result is the removing of a protection that is constitutionally encouraged--that is, judicial consideration before incarceration--as opposed to the enlarging of such a protection, it is submitted that the court should favour a result that would expand the group of persons protected rather than remove that protection completely.

This reasoning is sensible given our knowledge of how legislatures act generally. The fact that the permissible part of a provision is encouraged by the purposes of the Constitution, even if not mandated by it, strengthens the assumption that the legislature would have enacted it without the impermissible portion.

This factor may have been important in a case which dealt specifically with human rights statutes. In *Re Blainey and Ontario Hockey Association* (1986), 54 O.R. (2d) 513 (C.A.), the statute (*Human Rights Code, 1981*, S.O. 1981, c. 53) provided, in s. 1, a right to equal treatment without discrimination on the basis of, *inter alia*, sex. Section 19, however, provided that s. 1 was not violated when athletic activities were restricted on the basis of sex. The court found that s. 19 violated the guarantee of equality under the *Charter*. It was argued by the Hockey Association that s. 19 was not severable from s. 1, since it could not be assumed that the legislature would have passed s. 1 without s. 19. It was said that this meant that s. 19 should not be struck down, even though it violated the *Charter*. In fact, if it were true that s. 19 was inextricably linked to s. 1, then the result would be not that s. 19 was saved, but rather that s. 1 would be lost, even though there was nothing impermissible about it, considered in isolation. However, it is clear that it is safe to assume that the legislature would have passed the general prohibition on dis-

paiement d'une amende tant que le tribunal ne s'est pas prononcé sur leur situation. Par contre, l'annulation de tout le par. 646(10) élimine totalement la protection offerte, y compris pour le groupe d'âge que le législateur avait tout particulièrement jugé utile de protéger.

Il importe que les tribunaux n'empiètent pas sans raison sur le domaine qui relève à bon droit du législateur. En optant pour l'une ou l'autre des réparations qui viennent d'être mentionnées, le tribunal empiétera dans une certaine mesure sur les efforts du législateur concerné. Si le résultat est l'élimination d'une protection que la Constitution favorise — l'examen par un tribunal de la situation d'une personne avant son incarcération — et non l'élargissement de cette protection, on soutient que le tribunal devrait viser à élargir le groupe de personnes protégées plutôt qu'à éliminer totalement cette protection.

Ce raisonnement est judicieux par rapport à ce que nous connaissons du fonctionnement habituel des corps législatifs. Le fait que les objets de la Constitution favorisent, sans imposer, le maintien de la partie acceptable d'une disposition vient renforcer la supposition que le législateur l'aurait adoptée sans la partie inacceptable.

Ce facteur pourrait bien avoir joué un rôle important dans une affaire qui portait spécifiquement sur les lois en matière de droits de la personne. Dans l'affaire *Re Blainey and Ontario Hockey Association* (1986), 54 O.R. (2d) 513 (C.A.), l'article premier de la loi en question (*Code des droits de la personne (1981)*, L.O. 1981, ch. 53), prévoyait un droit à un traitement égal sans discrimination fondée, notamment, sur le sexe. Toutefois, aux termes de l'art. 19, ne constituait pas une atteinte au droit reconnu à l'article premier le fait de restreindre des activités athlétiques pour un motif fondé sur le sexe. La cour a statué que l'art. 19 violait la garantie à l'égalité en vertu de la *Charte*. L'association de hockey était d'avis que l'art. 19 n'était pas dissociable de l'article premier puisque l'on ne pouvait supposer que le législateur aurait adopté l'article premier sans l'art. 19, et que l'on ne devait donc pas annuler l'art. 19, même s'il portait atteinte à la *Charte*. En fait, s'il était exact que l'art. 19 était inextricablement lié à l'article premier, il s'ensuivrait non pas le maintien de l'art. 19, mais l'annulation de l'article premier,

crimination even if it could not limit its application in the area of athletics.

(v) Conclusion

It should be apparent from this analysis that there is no easy formula by which a court may decide whether severance or reading in is appropriate in a given case. While respect for the role of the legislature and the purposes of the *Charter* are the twin guiding principles, these principles can only be fulfilled with respect to the variety of considerations set out above which require careful attention in each case.

C. Whether to Temporarily Suspend the Declaration of Invalidity

Having identified the extent of the inconsistency, and having determined whether that inconsistency should be dealt with by way of striking down, severance or reading in, the court has identified what portion must be struck down. The final step is to determine whether the declaration of invalidity of that portion should be temporarily suspended.

A court may strike down legislation or a legislative provision but suspend the effect of that declaration until Parliament or the provincial legislature has had an opportunity to fill the void. This approach is clearly appropriate where the striking down of a provision poses a potential danger to the public (*R. v. Swain*, *supra*) or otherwise threatens the rule of law (*Reference Re Manitoba Language Rights*, [1985] 1 S.C.R. 721). It may also be appropriate in cases of underinclusiveness as opposed to overbreadth. For example, in this case some of the interveners argued that in cases where a denial of equal benefit of the law is alleged, the legislation in question is not usually problematic in and of itself. It is its underinclusiveness that is problematic so striking down the law immediately would deprive deserving persons of benefits without pro-

même s'il ne comporte en soi rien d'inacceptable lorsqu'on l'examine de façon isolée. Toutefois, il est évident qu'il y a lieu de supposer que le législateur aurait adopté l'interdiction générale de discrimination même s'il ne pouvait en restreindre l'application dans le domaine des activités sportives.

(v) Conclusion

L'analyse que je viens d'exposer devrait bien faire ressortir qu'il n'y a pas de formule magique susceptible d'aider le tribunal à décider si la solution appropriée dans un cas donné est la dissociation ou l'interprétation large. Bien que le respect du rôle du législateur et des objets de la *Charte* soient les deux principes directeurs, on ne pourra y satisfaire qu'en examinant soigneusement dans chaque cas les diverses considérations que je viens d'exposer.

C. La suspension temporaire de l'effet de la déclaration d'invalidité

Lorsqu'il a déterminé l'incompatibilité et décidé si cette incompatibilité devrait être annulée, retranchée de la loi en question ou recevoir une interprétation large, le tribunal a identifié la partie de la loi qui doit être annulée. La dernière étape consiste à déterminer s'il doit y avoir suspension temporaire de l'effet de la déclaration d'invalidité.

Un tribunal peut déclarer une loi ou une disposition législative inopérante, mais suspendre l'effet de cette déclaration jusqu'à ce que le législateur fédéral ou provincial ait eu l'occasion de combler le vide. Cette méthode est fort appropriée lorsque l'annulation d'une disposition présente un danger pour le public (*R. c. Swain*, précité) ou porte atteinte à la primauté du droit (*Renvoi relatif aux droits linguistiques au Manitoba*, [1985] 1 R.C.S. 721). Cette méthode pourrait également être appropriée dans les cas où une disposition est limitative par opposition aux cas où elle aurait une portée trop large. Par exemple, en l'espèce, certains intervenants ont fait valoir que si l'on allègue une négation du droit au même bénéfice de la loi, la disposition législative en question ne pose habituellement pas de problème en soi. C'est le fait

viding them to the applicant. At the same time, if there is no obligation on the government to provide the benefits in the first place, it may be inappropriate to go ahead and extend them. The logical remedy is to strike down but suspend the declaration of invalidity to allow the government to determine whether to cancel or extend the benefits.

I would emphasize that the question of whether to delay the effect of a declaration is an entirely separate question from whether reading in or nullification is the appropriate route under s. 52 of the *Constitution Act, 1982*. While delayed declarations are appropriate in some cases, they are not a panacea for the problem of interference with the institution of the legislature under s. 52.

A delayed declaration is a serious matter from the point of view of the enforcement of the *Charter*. A delayed declaration allows a state of affairs which has been found to violate standards embodied in the *Charter* to persist for a time despite the violation. There may be good pragmatic reasons to allow this in particular cases. However, reading in is much preferable where it is appropriate, since it immediately reconciles the legislation in question with the requirements of the *Charter*.

Furthermore, the fact that the court's declaration is delayed is not really relevant to the question of which course of action, reading in or nullification, is less intrusive upon the institution of the legislature. By deciding upon nullification or reading in, the court has already chosen the less intrusive path. If reading in is less intrusive than nullification in a particular case, then there is no reason to think that a delayed nullification would be any better. To delay nullification forces the matter back onto the legislative agenda at a time not of the choosing of the legislature, and within time limits under which

qu'elle ne couvre pas toutes les situations qui pose un problème, de sorte que l'annulation immédiate de la loi priverait des personnes admissibles de bénéfices sans les fournir à celle qui en fait la demande. Par ailleurs, si le gouvernement n'est pas au départ tenu de fournir les bénéfices, il est vraisemblablement inapproprié de les étendre à d'autres. La solution logique est d'annuler, mais de suspendre l'effet de la déclaration d'invalidité afin de permettre au gouvernement de décider s'il doit annuler ou étendre les bénéfices.

Je tiens à préciser que la question de la suspension de l'effet de la déclaration d'invalidité diffère totalement de celle de savoir si l'interprétation large ou l'annulation d'un texte législatif est la solution appropriée en vertu de l'art. 52 de la *Loi constitutionnelle de 1982*. Bien que la suspension de l'effet de la déclaration d'invalidité soit appropriée dans certains cas, ce n'est pas une panacée au problème de l'empiétement, dans le cadre de l'art. 52, sur l'institution que constitue le corps législatif.

Une suspension de l'effet d'une déclaration d'invalidité est une question sérieuse du point de vue de l'application de la *Charte*, car on se trouve alors à permettre que se perpétue pendant un certain temps une situation qui a été jugée contraire aux principes consacrés dans la *Charte*. Il peut exister de bonnes raisons pragmatiques d'autoriser cet état de choses dans des cas particuliers. Toutefois, l'interprétation large est de beaucoup préférable dans les cas appropriés puisqu'elle permet d'harmoniser immédiatement la loi en question avec les exigences de la *Charte*.

Par ailleurs, la suspension de l'effet de la déclaration d'invalidité prononcée par le tribunal n'est pas vraiment pertinente lorsque l'on examine quelle solution, de l'interprétation large ou de l'annulation, empiète moins sur le corps législatif en tant qu'institution. En décidant de conférer une interprétation large à l'incompatibilité ou de l'annuler, le tribunal a déjà choisi le moyen le moins attentatoire. Si dans un cas particulier, l'interprétation large est moins attentatoire que l'annulation, il n'y a pas lieu de croire qu'une suspension de l'effet d'une déclaration d'invalidité serait une meil-

the legislature would not normally be forced to act. This is a serious interference in itself with the institution of the legislature. Where reading in is appropriate, the legislature may consider the issue in its own good time and take whatever action it wishes. Thus delayed declarations of nullity should not be seen as preferable to reading in in cases where reading in is appropriate.

leure option. Suspendre l'effet d'une déclaration d'invalidité entraîne un renvoi de la question au législateur à un moment qu'il n'a pas choisi et lui impose de prendre des mesures à l'intérieur de délais qui ne seraient normalement pas les siens. Il s'agit là d'un grave empiétement sur l'institution qu'est le corps législatif. Quand l'interprétation est la solution appropriée, le législateur peut examiner la question au moment où il le juge opportun et prendre les mesures qu'il désire. En conséquence, la suspension de l'effet d'une déclaration d'invalidité ne devrait pas être préférée à l'interprétation large lorsqu'il convient de procéder par interprétation large.

The question whether to delay the application of a declaration of nullity should therefore turn not on considerations of the role of the courts and the legislature, but rather on considerations listed earlier relating to the effect of an immediate declaration on the public.

La question de savoir s'il y a lieu de suspendre l'effet d'une déclaration d'invalidité ne devrait pas dépendre de considérations ayant trait au rôle des tribunaux et des législateurs, mais plutôt de considérations énumérées précédemment sur l'effet d'une déclaration d'invalidité sur le public.

D. Summary

D. Sommaire

It is valuable to summarize the above propositions with respect to the operation of s. 52 of the *Constitution Act, 1982* before turning to the question of the independent availability of remedies pursuant to s. 24(1) of the *Charter*. Section 52 is engaged when a law is itself held to be unconstitutional, as opposed to simply a particular action taken under it. Once s. 52 is engaged, three questions must be answered. First, what is the extent of the inconsistency? Second, can that inconsistency be dealt with alone, by way of severance or reading in, or are other parts of the legislation inextricably linked to it? Third, should the declaration of invalidity be temporarily suspended? The factors to be considered can be summarized as follows:

Avant l'examen des mesures de réparation distinctes conformément au par. 24(1) de la *Charte*, il serait bon de résumer les propositions précitées relatives à l'application de l'art. 52 de la *Loi constitutionnelle de 1982*. L'application de l'art. 52 est déclenchée lorsqu'une loi est jugée inconstitutionnelle en soi, par opposition à une simple mesure prise sous son régime. Une fois déclenchée l'application de l'art. 52, il faut répondre à trois questions. Premièrement, quelle est l'étendue de l'incompatibilité? Deuxièmement, peut-on régler isolément le problème de cette incompatibilité, que ce soit par dissociation ou interprétation large, ou est-elle inextricablement liée à d'autres parties de la loi? Troisièmement, doit-il y avoir suspension temporaire de l'effet de la déclaration d'invalidité? Voici succinctement les facteurs dont il faut tenir compte:

(i) The Extent of the Inconsistency

(i) L'étendue de l'incompatibilité

The extent of the inconsistency should be defined:

L'étendue de l'incompatibilité doit être déterminée:

A. broadly where the legislation in question fails the first branch of the *Oakes* test in that its purpose is held not to be sufficiently pressing or substantial to justify infringing a *Charter* right or, indeed, if the purpose is itself held to be unconstitutional—perhaps the legislation in its entirety;

B. more narrowly where the purpose is held to be sufficiently pressing and substantial, but the legislation fails the first element of the proportionality branch of the *Oakes* test in that the means used to achieve that purpose are held not to be rationally connected to it—generally limited to the particular portion which fails the rational connection test; or,

C. flexibly where the legislation fails the second or third element of the proportionality branch of the *Oakes* test.

(ii) Severance/Reading In

Severance or reading in will be warranted only in the clearest of cases, that is, where each of the following criteria is met:

A. the legislative objective is obvious, or it is revealed through the evidence offered pursuant to the failed s. 1 argument, and severance or reading in would further that objective, or constitute a lesser interference with that objective than would striking down;

B. the choice of means used by the legislature to further that objective is not so unequivocal that severance/reading in would constitute an unacceptable intrusion into the legislative domain; and,

C. severance or reading in would not involve an intrusion into legislative budgetary decisions so substantial as to change the nature of the legislative scheme in question.

A. de façon large dans le cas où la loi ne satisfait pas au premier volet du critère de l'arrêt *Oakes* en ce que son objectif ne se rapporte pas à des préoccupations suffisamment urgentes et réelles pour justifier l'atteinte à un droit garanti par la *Charte*; ou encore, que l'objectif du texte est jugé inconstitutionnel—et peut-être même la loi dans sa totalité;

B. de façon plus étroite lorsque l'objectif se rapporte à des préoccupations suffisamment urgentes et réelles, mais que le texte législatif ne satisfait pas au premier élément du volet de la proportionnalité du critère de l'arrêt *Oakes* en ce que les moyens choisis pour atteindre cet objectif n'ont pas un lien rationnel avec cet objectif—généralement restreint à la partie qui ne satisfait au critère du lien rationnel;

C. avec souplesse lorsque le texte législatif ne satisfait pas au deuxième ou au troisième élément du volet de la proportionnalité du critère de l'arrêt *Oakes*.

(ii) Dissociation/Interprétation large

Il sera justifié d'opter pour la dissociation ou l'interprétation large seulement dans les cas les plus clairs, chacun des critères suivants devant avoir été respectés:

A. l'objectif législatif est évident ou ressort des éléments de preuve déposés dans le cadre de l'examen fondé sur l'article premier, qui a échoué, et la dissociation ou l'interprétation large favoriserait l'atteinte de cet objectif ou constituerait un empiétement moindre sur cet objectif que l'annulation de la loi;

B. le choix des moyens utilisés par le législateur pour atteindre cet objectif n'est pas assez incontestable pour que la dissociation ou l'interprétation large constitue un empiétement inacceptable sur le domaine législatif;

C. la dissociation ou l'interprétation large ne comporterait pas un empiétement si important sur les décisions financières du législateur qu'elle modifierait la nature du régime législatif en question.

(iii) Temporarily Suspending the Declaration of Invalidity

Temporarily suspending the declaration of invalidity to give Parliament or the provincial legislature in question an opportunity to bring the impugned legislation or legislative provision into line with its constitutional obligations will be warranted even where striking down has been deemed the most appropriate option on the basis of one of the above criteria if:

A. striking down the legislation without enacting something in its place would pose a danger to the public;

B. striking down the legislation without enacting something in its place would threaten the rule of law; or,

C. the legislation was deemed unconstitutional because of underinclusiveness rather than overbreadth, and therefore striking down the legislation would result in the deprivation of benefits from deserving persons without thereby benefitting the individual whose rights have been violated.

I should emphasize before I move on that the above propositions are intended as guidelines to assist courts in determining what action under s. 52 is most appropriate in a given case, not as hard and fast rules to be applied regardless of factual context.

III. *Section 24(1)*

A. Section 24(1) Alone

Where s. 52 of the *Constitution Act, 1982* is not engaged, a remedy under s. 24(1) of the *Charter* may nonetheless be available. This will be the case where the statute or provision in question is not in and of itself unconstitutional, but some action taken under it infringes a person's *Charter* rights. Section 24(1) would there provide for an individ-

(iii) Suspension temporaire de l'effet de la déclaration d'invalidité

Un tribunal sera justifié de suspendre temporairement l'effet de la déclaration d'invalidité afin de donner au législateur fédéral ou provincial concerné l'occasion d'harmoniser la loi ou la disposition législative avec ses obligations constitutionnelles même lorsque l'annulation a été jugée l'option la plus appropriée par rapport à l'un des critères cités précédemment. Cette suspension sera ordonnée dans l'un ou l'autre des cas suivants:

A. l'annulation de la loi sans l'adoption d'un texte de remplacement poserait un danger pour le public;

B. l'annulation de la loi sans l'adoption d'un texte de remplacement menacerait la primauté du droit;

C. la loi a été jugée inconstitutionnelle parce qu'elle est limitative et non parce qu'elle a une portée trop large et son annulation priverait de bénéfices les personnes admissibles sans profiter à la personne dont les droits ont été violés.

Je tiens à préciser que ces propositions ne sont que des lignes directrices destinées à aider les tribunaux à déterminer quelle sera la solution la plus appropriée en vertu de l'art. 52; elles ne se veulent pas des règles rigides qui doivent être appliquées indépendamment des faits.

III. *Le paragraphe 24(1)*

A. Le paragraphe 24(1) seul

Même lorsque l'application de l'art. 52 de la *Loi constitutionnelle de 1982* n'est pas déclenchée, il peut y avoir une réparation en vertu du par. 24(1) de la *Charte*. Cela peut se produire quand la loi ou la disposition législative n'est pas inconstitutionnelle en soi, mais qu'elle a donné lieu à une mesure prise en contravention des droits garantis

ual remedy for the person whose rights have been so infringed.

This course of action has been described as "reading down as an interpretive technique", but it is not reading down in any real sense and ought not to be confused with the practice of reading down as referred to above. It is, rather, founded upon a presumption of constitutionality. It comes into play when the text of the provision in question supports a constitutional interpretation and the violative action taken under it thereby falls outside the jurisdiction conferred by the provision. I held that this was the case in *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, when I determined that a provision which provided a labour adjudicator with discretion to make a range of orders could not have been intended to provide him with the discretion to make unconstitutional orders. The legislation itself was not unconstitutional and s. 52 was not engaged, but the aggrieved party was clearly entitled to an individual remedy under s. 24(1).

B. Section 24(1) in Conjunction with Section 52

An individual remedy under s. 24(1) of the *Charter* will rarely be available in conjunction with an action under s. 52 of the *Constitution Act, 1982*. Ordinarily, where a provision is declared unconstitutional and immediately struck down pursuant to s. 52, that will be the end of the matter. No retroactive s. 24 remedy will be available. It follows that where the declaration of invalidity is temporarily suspended, a s. 24 remedy will not often be available either. To allow for s. 24 remedies during the period of suspension would be tantamount to giving the declaration of invalidity retroactive effect. Finally, if a court takes the course of reading down or in, a s. 24 remedy would probably only duplicate the relief flowing from the action that court has already taken.

par la *Charte*. Le paragraphe 24(1) offre une réparation à la personne dont les droits ont été violés.

Cette mesure a été décrite comme une sorte de technique d'interprétation atténuée; à ne pas confondre avec la véritable interprétation atténuée mentionnée ci-dessus. La réparation accordée se fonde plutôt sur une présomption de constitutionnalité. Elle entre en jeu si le texte de la disposition en question est jugé constitutionnel et que la mesure attentatoire à laquelle il a donné lieu n'est donc pas autorisée par la disposition. J'ai statué en ce sens dans l'arrêt *Slaight Communications Inc. c. Davidson*, [1989] 1 R.C.S. 1038, lorsque j'ai affirmé que le législateur, en conférant à un arbitre le pouvoir discrétionnaire de rendre une gamme d'ordonnances, ne pouvait avoir eu l'intention de lui conférer le pouvoir discrétionnaire de rendre des ordonnances inconstitutionnelles. Le texte législatif n'était pas inconstitutionnel en soi et il n'y avait pas lieu d'appliquer l'art. 52, mais la partie lésée avait clairement droit à une réparation en vertu du par. 24(1).

B. Le paragraphe 24(1) de concert avec l'article 52

Il y aura rarement lieu à une réparation en vertu du par. 24(1) de la *Charte* en même temps qu'une mesure prise en vertu de l'art. 52 de la *Loi constitutionnelle de 1982*. Habituellement, si une disposition est déclarée inconstitutionnelle et immédiatement annulée en vertu de l'art. 52, l'affaire est close. Il n'y aura pas lieu à une réparation rétroactive en vertu de l'art. 24. Par conséquent, si l'effet de la déclaration d'invalidité est temporairement suspendu, il n'y aura pas non plus souvent lieu à une réparation en vertu de l'art. 24. Permettre une réparation fondée sur l'art. 24 pendant la période de suspension équivaudrait à donner un effet rétroactif à la déclaration d'invalidité. Enfin, si un tribunal décide de donner une interprétation atténuée ou une interprétation large, une réparation fondée sur l'art. 24 ne ferait probablement qu'accorder le même redressement que celui découlant de la mesure déjà prise par les tribunaux.

IV. *Remedial Options Appropriate to this Case*

A. The Nature of the Right Involved

The right which was determined to be violated here is a positive right: the right to equal benefit of the law. Positive rights by their very nature tend to carry with them special considerations in the remedial context. It will be a rare occasion when a benefit conferring scheme is found to have an unconstitutional purpose. Cases involving positive rights are more likely to fall into the remedial classifications of reading down/reading in or striking down and suspending the operation of the declaration of invalidity than to mandate an immediate striking down. Indeed, if the benefit which is being conferred is itself constitutionally guaranteed (for example, the right to vote), reading in may be mandatory. For a court to deprive persons of a constitutionally guaranteed right by striking down underinclusive legislation would be absurd. Certainly the intrusion into the legislative sphere of extending a constitutionally guaranteed benefit is warranted when the benefit was itself guaranteed by the legislature through constitutional amendment.

Other rights will be more in the nature of "negative" rights, which merely restrict the government. However, even in those cases, the rights may have certain positive aspects. For instance, the right to life, liberty and security of the person is in one sense a negative right, but the requirement that the government respect the "fundamental principles of justice" may provide a basis for characterizing s. 7 as a positive right in some circumstances. Similarly, the equality right is a hybrid of sorts since it is neither purely positive nor purely negative. In some contexts it will be proper to characterize s. 15 as providing positive rights.

The benefit with which we are concerned here is a monetary benefit for parents under the *Unemployment Insurance Act, 1971*, not one which Parliament is constitutionally obliged to provide to the included group or the excluded group. What Par-

IV. *Les mesures correctives appropriées en l'espèce*

A. La nature du droit en cause

En l'espèce, le droit violé est un droit positif: le droit au même bénéfice de la loi. De par leur nature, les droits positifs sont habituellement assortis de considérations spéciales dans le contexte des mesures correctives. On considérera rarement que l'objectif d'un régime de bénéfices est inconstitutionnel. La violation de droits positifs donnera plus probablement lieu aux mesures correctives de l'interprétation atténuée ou large, ou de l'annulation et de la suspension de l'effet de la déclaration d'invalidité plutôt qu'à une annulation immédiate du texte législatif. En fait, si le bénéfice en question est garanti par la Constitution (par exemple, le droit de vote), il sera impératif de donner une interprétation large au texte en question. Il serait absurde pour un tribunal de priver une personne d'un droit que lui garantit la Constitution par l'annulation d'une loi qui est trop limitative. Certes, un tribunal est justifié d'empiéter sur le domaine législatif de l'élargissement d'un bénéfice garanti par la Constitution dans le cas où ce bénéfice a été lui-même garanti par le législateur par suite d'une modification constitutionnelle.

D'autres droits seront davantage de la nature de droits «négatifs», visant simplement à restreindre l'action gouvernementale. Toutefois, même dans ces cas, les droits peuvent avoir certains aspects positifs. Par exemple, le droit à la vie, à la liberté et à la sécurité de la personne constitue en un sens un droit négatif, mais l'exigence voulant que le gouvernement respecte «les principes de justice fondamentale» peut permettre de qualifier l'art. 7 de droit positif dans certaines circonstances. De même, le droit à l'égalité est une sorte de droit hybride, n'étant ni tout à fait positif ni tout à fait négatif. Dans certains contextes, il conviendra de dire que l'art. 15 confère des droits positifs.

En l'espèce, le bénéfice est une somme d'argent versée aux parents en vertu de la *Loi de 1971 sur l'assurance-chômage* et il ne s'agit pas d'un bénéfice que la Constitution oblige le Parlement à verser au groupe inclus ou au groupe exclu. À la suite

liament is obliged to do, by virtue of the conceded s. 15 violation, is equalize the provision of that benefit. 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. All of the intervening provincial Attorneys General agreed with this proposition, although, for the most part, they intervened on behalf of the appellants. The question which remains is whether this is a case in which it is appropriate to go further and read the excluded group into the legislation. This question must be answered with reference to the specific legislation under consideration.

de la violation concédée de l'art. 15, le Parlement est tenu d'égaliser la prestation de ce bénéfice. Le bénéfice en soi n'est pas interdit par la Constitution; la disposition pertinente est simplement trop limitative. En conséquence, il serait inapproprié de procéder à l'annulation immédiate de la disposition car on priverait ainsi des personnes admissibles d'un bénéfice, sans offrir une réparation à l'intimé. Dans un tel cas, il faut tout au moins que l'effet de la déclaration d'invalidité soit suspendu pour permettre au Parlement d'harmoniser la disposition avec les exigences constitutionnelles. Tous les procureurs généraux intervenants sont d'accord avec cette proposition même si la plupart d'entre eux sont intervenus en faveur des appelantes. Il reste maintenant à déterminer s'il s'agit d'un cas où il faut donner à la disposition une interprétation large afin d'y inclure le groupe exclu. Pour répondre à cette question, on doit examiner le texte législatif en question.

B. The Context of the *Unemployment Insurance Act, 1971*

It is not difficult to discern the legislative objective of this scheme as a whole. The following overall objective emerges from Justice La Forest's judgment concerning the same legislative scheme in *Tétreault-Gadoury*, *supra*, at p. 41:

> ... to create a social insurance plan to compensate unemployed workers for loss of income from their employment and to provide them with economic and social security for a time, thus assisting them in returning to the labour market.

It is, however, not as simple to discern the objective of the particular provision. It is not clear on the text of the provision alone that the purpose of it is to extend benefits to parents of newborns caring for them at home, a purpose which reading in the excluded group would further. Indeed, on the express language of the provision, one could quickly conclude that the benefits were only intended to be conferred on adoptive parents and that natural parents were deliberately excluded. One could postulate that the provision was specifically aimed at responding to circumstances peculiar to adoptive parents. Certainly this possibility

B. Le contexte de la *Loi de 1971 sur l'assurance-chômage*

Il n'est pas difficile d'établir l'objectif législatif de ce régime. Cet objectif global se dégage du jugement du juge La Forest dans l'arrêt *Tétreault-Gadoury*, précité, à la p. 41:

> ... d'établir un régime d'assurance sociale aux fins d'indemniser les chômeurs pour la perte de revenus provenant de leur emploi et d'assurer leur sécurité économique et sociale pendant un certain temps et les aider ainsi à retourner sur le marché du travail.

Toutefois, il n'est pas aussi simple de dégager l'objectif de la disposition attaquée. Le libellé de la disposition n'indique pas clairement que l'objectif est d'étendre les prestations aux parents de nouveau-nés qui demeurent à la maison pour s'en occuper; donner à cette disposition une interprétation large de manière à englober le groupe exclu favoriserait l'atteinte de cet objectif. En fait, à partir du libellé de la disposition, on pourrait rapidement conclure que l'on avait seulement l'intention d'accorder des prestations aux parents adoptifs et que l'on a délibérément exclu les parents naturels. On pourrait supposer que la disposition vise

cannot be ruled out on the basis of the text of the provision alone, and we have not been provided with the further assistance of a s. 1 argument here or in the courts below.

Without a mandate based on a clear legislative objective, it would be imprudent for me to take the course of reading the excluded group into the legislation. A consideration of the budgetary implications of such a course of action further underlines this conclusion. This is not a situation comparable to that in *Tétreault-Gadoury*, *supra*. There, the budgetary implications of severing the provision in question were not extensive. The group of people not previously entitled to benefit by the scheme who would become eligible was a small, discrete group. Here, the excluded group sought to be included likely vastly outnumbers the group to whom the benefits were already extended.

Given the nature of the benefit and the size of the group to whom it is sought to be extended, to read in natural parents would in these circumstances constitute a substantial intrusion into the legislative domain. This intrusion would be substantial enough to change potentially the nature of the scheme as a whole. If this Court were to dictate that the same benefits conferred on adoptive parents under s. 32 be extended to natural parents, the ensuing financial shake-up could mean that other benefits to other disadvantaged groups would have to be done away with to pay for the extension. Parliament and the provincial legislatures are much better equipped to assess the whole picture in formulating solutions in cases such as these. Clearly, the appropriate action for the Court to take is to declare the provision invalid but to suspend that declaration to allow the legislative body in question expressément à répondre à la situation particulière des parents adoptifs. Cette hypothèse ne peut certainement pas être écartée sur le seul fondement du libellé de la disposition; en outre, ni notre Cour ni les tribunaux d'instance inférieure n'ont eu l'avantage additionnel d'examiner des éléments de preuve à l'appui d'une analyse fondée sur l'article premier.

En l'absence d'un mandat fondé sur un objectif législatif clair, il serait imprudent pour moi de donner à la disposition une interprétation large de manière à inclure le groupe exclu. Un examen des répercussions financières qui s'ensuivraient vient aussi appuyer cette conclusion. Il ne s'agit pas d'une situation comparable à celle observée dans l'arrêt *Tétreault-Gadoury*, précité. Dans cette affaire, les répercussions financières du retranchement de la disposition n'étaient pas importantes. En effet, les personnes inadmissibles qui devenaient admissibles constituaient un groupe restreint. En l'espèce, le groupe exclu dont on cherche l'inclusion est vraisemblablement beaucoup plus important que celui à qui sont déjà versées les prestations.

Compte tenu de la nature de la prestation et de la taille du groupe visé par la réparation, introduire par interprétation large les parents naturels dans la disposition constituerait dans les circonstances un empiétement important sur le domaine législatif. Cet empiétement serait peut-être suffisamment important pour modifier la nature de l'ensemble du régime. Si notre Cour devait imposer le versement aux parents naturels des mêmes prestations que celles accordées aux parents adoptifs en vertu de l'art. 32, la grande restructuration financière requise à cette fin entraînerait peut-être l'élimination du paiement d'autres prestations à d'autres groupes défavorisés. Les législateurs fédéral et provinciaux sont en bien meilleure position pour évaluer l'ensemble de la situation lorsqu'ils doivent élaborer des solutions dans des cas comme celui-ci. De toute évidence, notre Cour doit déclarer la disposition inopérante et suspendre l'effet de cette déclaration jusqu'à ce que le législateur concerné ait soupesé tous les facteurs pertinents dans

tion to weigh all the relevant factors in amending the legislation to meet constitutional requirements.

I think it significant and worthy of mention that in this case Parliament did amend the impugned provision following the launching of this action, and that that amendment was not the one that reading in would have imposed. Parliament equalized the benefits given to adoptive parents and natural parents but not on the same terms as they were originally conferred by s. 32. The two groups now receive equal benefits for ten weeks rather than the original fifteen. This situation provides a valuable illustration of the dangers associated with reading in when legislative intention with respect to budgetary issues is not clear. In this case, reading in would not necessarily further the legislative objective and it would definitely interfere with budgetary decisions in that it would mandate the expenditure of a greater sum of money than Parliament is willing or able to allocate to the program in question.

The Constitutional Questions

Following from the above analysis, I would answer the constitutional questions as follows:

1. Is the Federal Court Trial Division, having found that s. 32 of the *Unemployment Insurance Act, 1971* (subsequently s. 20 of the *Unemployment Insurance Act*, R.S.C., 1985, c. U-1) creates unequal benefit contrary to s. 15(1) of the *Canadian Charter of Rights and Freedoms*, by making a distinction between the benefits available to natural and adoptive parents, required by s. 52(1) of the *Constitution Act, 1982* to declare that s. 32 is of no force and effect?

The answer to question one is, in the present circumstances, yes, leaving open the option of suspending the declaration of invalidity for a period of time to allow Parliament to amend the legislation in a way which meets its constitutional obligations. This is not to say that s. 52 does not provide the flexibility to stop short of striking out an unconstitutional provision in its entirety. Given the

le cadre de la modification de la loi en vue de répondre aux exigences constitutionnelles.

À mon avis, il vaut la peine de signaler qu'en l'espèce le Parlement a modifié la disposition attaquée par suite de la présente action et que cette modification n'est pas celle qu'aurait imposée une interprétation large. Le Parlement a accordé les mêmes prestations aux parents adoptifs et aux parents naturels, mais pas aux mêmes conditions que celles que prévoyait initialement l'art. 32. Les deux groupes reçoivent maintenant les mêmes prestations pendant dix semaines au lieu de quinze. Cette situation constitue une illustration utile des risques de l'interprétation large dans les cas où l'intention législative n'est pas claire relativement aux questions financières. En l'espèce, donner une interprétation large à la disposition ne favoriserait pas nécessairement l'atteinte de l'objectif législatif et empiéterait manifestement sur les décisions financières puisqu'on forcerait ainsi le Parlement à affecter au programme plus de fonds qu'il ne le souhaite ou qu'il est en mesure d'affecter.

Les questions constitutionnelles

Compte tenu de l'analyse qui précède, je suis d'avis de répondre aux questions constitutionnelles de la façon suivante:

1. Puisqu'elle a conclu que l'art. 32 de la *Loi de 1971 sur l'assurance-chômage* (par la suite l'art. 20 de la *Loi sur l'assurance-chômage*, L.R.C. (1985), ch. U-1) crée un bénéfice inégal contrairement au par. 15(1) de la *Charte canadienne des droits et libertés* parce qu'il établit une distinction entre les prestations que peuvent toucher les parents naturels et les parents adoptifs, la Section de première instance de la Cour fédérale est-elle tenue par le par. 52(1) de la *Loi constitutionnelle de 1982* de déclarer que l'art. 32 est inopérant?

La réponse à la première question est, dans les circonstances, affirmative, mais l'effet de cette déclaration d'invalidité peut être suspendu pendant un certain temps pour que le Parlement puisse modifier le texte législatif d'une façon qui lui permette de respecter ses obligations constitutionnelles. Cela ne signifie pas que l'art. 52 n'a pas la souplesse requise pour offrir une mesure corrective

appropriate circumstances, a court may choose the options of severance or reading in by which to bring the provision in line with the *Charter*. These options should be exercised only in the clearest of cases, keeping in mind the principles articulated above relating to the nature of the right and the specific context of the legislation.

2. Does s. 24(1) of the *Charter* confer on the Federal Court Trial Division the power to order that natural parents are entitled to benefits on the same terms as benefits are available to adoptive parents under s. 32 (subsequently s. 20) of that Act?

The answer to question two is no. Section 24(1) provides an individual remedy for actions taken under a law which violate an individual's *Charter* rights. Again, however, a limited power to extend legislation is available to courts in appropriate circumstances by way of the power to read in derived from s. 52 of the *Constitution Act, 1982*.

Disposition

In the result, the appeal is allowed and the judgment of the trial judge set aside. Normally, I would order that s. 32 of the *Unemployment Insurance Act, 1971* (subsequently s. 20 of the *Unemployment Insurance Act, 1985*) be struck down pursuant to s. 52 and be declared to be of no force or effect, and I would further suspend the operation of this declaration to allow Parliament to amend the legislation to bring it into line with its constitutional obligations. There is, however, no need for a declaration of invalidity or a suspension thereof at this stage of this matter given the November 1990 repeal and replacement of the impugned provision.

Further, this is not a case in which extending a remedy, for example damages, under s. 24(1) to the respondent would be appropriate. The classic doctrine of damages is that the plaintiff is to be put in the position he or she would have occupied had there been no wrong. In the present case, there are two possible positions the plaintiff could have

autre que l'annulation d'une disposition inconstitutionnelle dans sa totalité. Dans les circonstances appropriées, un tribunal peut opter pour la dissociation ou une interprétation large de façon à harmoniser la disposition avec la *Charte*. On ne devrait exercer cette option que dans les cas les plus clairs, compte tenu des principes énoncés ci-dessus relativement à la nature du droit et au contexte spécifique de la loi.

2. Le paragraphe 24(1) de la *Charte* donne-t-il à la Section de première instance de la Cour fédérale le pouvoir de statuer que les parents naturels ont droit aux mêmes prestations, suivant les mêmes conditions, que celles que peuvent toucher les parents adoptifs en vertu de l'art. 32 (par la suite l'art. 20) de la Loi?

Il faut répondre à cette question par la négative. Le paragraphe 24(1) prévoit une réparation individuelle lorsque des mesures prises en vertu d'une loi violent les droits garantis à une personne par la *Charte*. Toutefois, dans les circonstances appropriées, les tribunaux ont un pouvoir limité, en vertu de l'art. 52 de la *Loi constitutionnelle de 1982*, de donner une interprétation large à une loi pour en étendre le champ d'application.

Dispositif

En définitive, le pourvoi est accueilli et le jugement du juge de première instance est infirmé. Normalement, j'ordonnerais que l'art. 32 de la *Loi de 1971 de l'assurance-chômage* (par la suite l'art. 20 de la *Loi sur l'assurance-chômage*) soit annulé conformément à l'art. 52 et soit déclaré inopérant et je suspendrais aussi l'effet de cette déclaration d'invalidité jusqu'à ce que le Parlement ait modifié la loi pour l'harmoniser avec ses obligations constitutionnelles. Toutefois, je n'ai pas à le faire en l'espèce puisque la disposition attaquée a été abrogée et remplacée en novembre 1990.

Par ailleurs, il ne s'agit pas en l'espèce d'un cas où il serait approprié d'accorder une réparation à l'intimé, par exemple des dommages-intérêts, en vertu du par. 24(1). La doctrine classique en matière de dommages-intérêts est que le plaignant doit être mis dans la situation où il aurait été s'il n'y avait pas eu faute. En l'espèce, le plaignant

been in had there been no wrong. The plaintiff could have received the benefit equally with the original beneficiaries, or there could have been no benefit at all, for the plaintiff or the original beneficiaries. The remedial choice under s. 24 thus rests on an assumption about which position the plaintiff would have been in. However, I have already determined which assumption should be made in the analysis under s. 52, and have determined that it cannot be assumed that the legislature would have enacted the benefit to include the plaintiff. Therefore, the plaintiff is in no worse position now than had there been no wrong.

Despite the fact that the respondent has lost in this Court, I do not feel it appropriate that he should bear the costs. He did win with respect to the s. 15 issue at trial and the subsequent litigation has, upon the concession of the appellants, centred only on choice of remedy. According to this concession, the respondent by his claim brought a deficiency to the attention of Parliament which has since been remedied by the repeal and replacement of the impugned provision. He should not be penalized now because of a dispute solely with respect to remedy. I therefore award the respondent his solicitor-client costs.

The reasons of La Forest and L'Heureux-Dubé JJ. were delivered by

LA FOREST J.— I have had the benefit of reading the reasons of the Chief Justice and I agree with his proposed disposition and answers to the constitutional questions. I take this approach on the simple basis that the legislation concerned concededly violates the *Canadian Charter of Rights and Freedoms* and that it does not fall within the very narrow type of cases where only a portion of the legislation may be read down or corrected by reading in material as being obviously intended by the legislature in any event. As the Chief Justice points out, there is a long tradition of reading down legisla-

aurait pu se trouver dans deux situations différentes: il aurait pu recevoir les prestations au même titre que les bénéficiaires initiaux ou encore ne pas en recevoir du tout, si les prestations n'avaient été offertes ni au plaignant ni aux bénéficiaires initiaux. Le choix de la réparation en vertu de l'art. 24 repose en conséquence sur une hypothèse quant à la situation dans laquelle se serait trouvé le plaignant. Toutefois, j'ai déjà déterminé quelle est l'hypothèse qui doit être faite dans le cadre d'une analyse en vertu de l'art. 52 et j'ai établi que l'on ne peut supposer que le législateur aurait adopté le bénéfice de façon à inclure le plaignant. En conséquence, le plaignant ne se trouve pas maintenant dans une situation pire que celle dans laquelle il se serait trouvé s'il n'y avait pas eu faute.

Bien que l'intimé n'ait pas eu gain de cause devant notre Cour, je n'estime pas approprié de le condamner aux dépens. Il a eu gain de cause relativement à la question fondée sur l'art. 15 en première instance; l'autre poursuite a porté seulement sur le choix de la réparation, à la suite de la concession faite par les appelantes. Compte tenu de cette concession, l'intimé a attiré l'attention du Parlement sur une lacune de la loi à laquelle il a été remédié par l'abrogation et le remplacement de la disposition attaquée. Il ne devrait pas être pénalisé parce que le différend a porté seulement sur la question de la réparation. En conséquence, l'intimé a droit à ses dépens comme entre procureur et client.

Version française des motifs des juges La Forest et L'Heureux-Dubé rendus par

LE JUGE LA FOREST—J'ai eu l'avantage de lire les motifs du Juge en chef et je suis d'accord avec le dispositif qu'il propose et avec ses réponses aux questions constitutionnelles. Ma position repose sur le simple fait que l'on a concédé que la loi en cause viole la *Charte canadienne des droits et libertés* et qu'elle ne fait pas partie du genre très limité de causes où seule une partie de la loi peut faire l'objet d'une interprétation atténuée ou d'une correction qui introduit, par interprétation large, des éléments reflétant de toute façon l'intention évidente du législateur. Comme le souligne le Juge

tion, and I see no reason, where it substantially amounts to the same thing, why reading in should not also be done. I note that the Chief Justice states, and I agree, that these devices should only be employed in the clearest of cases. The courts are not in the business of rewriting legislation. I also agree that there is little point in light of Parliament's subsequent action to declare the impugned legislation invalid and then suspend that declaration.

That is sufficient to dispose of the case, and I find it unnecessary to elaborate further. In limiting my reasons in this way, however, I would not wish it to be thought that I fundamentally disagree with what the Chief Justice has to say regarding the means for assessing when the techniques of reading down or reading in should be adopted. Indeed, I find his reasons very helpful in this regard. Rather I take this narrow approach because the unsatisfactory manner in which this case has been presented to us makes it necessary to respond to the issues in the abstract, which leads to the risk of misleading or insufficiently qualified pronouncements.

To begin with, I am by no means sure there was a violation of the *Charter* in this case. At first sight (and the Chief Justice alludes to this) it does not seem wholly unreasonable that Parliament might have good reason to encourage adoptive parents as a group, and the effect of the judicial intervention has been to divert from that group some of the monies intended to meet the problem Parliament may have had in contemplation. This Court has repeatedly stated that Parliament may constitutionally attack one problem, or part of a problem, at a time. But the manner in which the case was presented requires us to assume constitutional invalidity in the absence of any evidence as to context, which I would have thought was essential to a consideration of the extent of inconsistency with the *Charter*.

en chef, l'interprétation atténuée des lois est riche d'une longue tradition et, à mon avis, l'interprétation large devrait également être appliquée lorsque cela revient essentiellement au même. Je remarque que le Juge en chef mentionne, et je partage son opinion, qu'on ne devrait utiliser ces techniques que dans les cas les plus clairs. Il n'appartient pas aux tribunaux de récrire la loi. Je conviens également qu'il n'est guère opportun, compte tenu de la mesure prise subséquemment par le Parlement, de déclarer inopérante la disposition attaquée et de suspendre l'effet de cette déclaration.

Il n'en faut pas plus pour résoudre l'affaire, et il est inutile de commenter davantage. Il ne faudrait toutefois pas croire que, en limitant ainsi mes motifs, je suis fondamentalement en désaccord avec l'opinion exprimée par le Juge en chef sur les moyens permettant de déterminer les cas où il convient d'appliquer les techniques d'interprétation atténuée ou d'interprétation large. En fait, ses motifs me sont d'une aide précieuse à cet égard. J'adopte plutôt cette démarche restrictive parce que la manière peu satisfaisante dont nous avons été saisis de cette affaire nous oblige à répondre aux questions dans l'abstrait, ce qui entraîne le risque de rendre des décisions trompeuses ou insuffisamment assorties de réserves.

Tout d'abord, je ne suis pas du tout certain qu'en l'espèce la *Charte* ait été violée. À première vue (et le Juge en chef y fait allusion), il ne semble pas tout à fait déraisonnable de croire que le Parlement ait pu avoir d'excellentes raisons d'encourager les parents adoptifs en tant que groupe; l'intervention judiciaire a eu pour effet de priver ce groupe d'une partie des fonds destinés à répondre au problème que le Parlement avait probablement en vue. Notre Cour a, à maintes reprises, mentionné que le Parlement peut, à un moment, s'attaquer par voie constitutionnelle à un problème ou à une partie de celui-ci. Mais la façon dont l'affaire nous a été soumise nous oblige à présumer du caractère inconstitutionnel en l'absence d'éléments de preuve sur le contexte qui, à mon avis, sont essentiels à l'étude de l'étendue de l'incompatibilité avec la *Charte*.

Ordinarily, a case is dealt with in light of facts that define the scope of the Court's pronouncement. Here we are forced to deal with the tests for reading down or reading in in a manner that may give the impression that they are of universal application. 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. Thus this Court has repeatedly stated in cases like *R. v. Wong*, [1990] 3 S.C.R. 36, for example, that it was not the business of the courts to invent schemes that had the effect of increasing police powers (at pp. 56-57). The rationale for this was not so much the complexity of possible schemes (as the Chief Justice appears to suggest at one stage), but rather that this could distract the courts from their fundamental duty under the *Charter* to protect the rights guaranteed to the individual.

Normalement, on étudie une affaire en tenant compte des faits qui délimitent la portée d'une décision de la Cour. En l'espèce, nous sommes contraints d'aborder les critères relatifs à l'interprétation atténuée ou à l'interprétation large d'une façon qui risque de donner l'impression qu'ils sont d'application universelle. Il faut toutefois souligner que l'affaire met en cause un régime d'aide sociale qui peut prescrire une méthode très différente de celle qu'on adopterait dans d'autres domaines. Ainsi, notre Cour a maintes fois énoncé dans ses arrêts, par exemple dans *R. c. Wong*, [1990] 3 R.C.S. 36, qu'il n'appartient pas aux tribunaux d'inventer des régimes ayant pour effet d'augmenter les pouvoirs de la police (aux pp. 56 et 57). Cette opinion s'explique non pas tant par la complexité des régimes possibles (comme le Juge en chef semble le laisser entendre à un certain moment), mais par le risque de détourner les tribunaux de leur devoir fondamental, aux termes de la *Charte*, de protéger les droits garantis aux particuliers.

The simple fact is, as I noted before, that it is for Parliament and the legislatures to make laws. It is the duty of the courts to see that those laws conform to constitutional norms and declare them invalid if they do not. This imposes pressure on legislative bodies to stay within the confines of their constitutional powers from the outset. Reliance should not be placed on the courts to repair invalid laws. In social assistance schemes, there is perhaps more room (and certainly more temptation) for judicial intervention, in cases like *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22, for example, where the remedy is obvious and Parliament would clearly enact it rather than have the whole scheme fail. But when one is dealing with laws that impinge on the liberty of the subject, the judicial stance should be one that does not encourage the legislature to overreach, and the courts should be slow indeed to provide a corrective.

Comme je l'ai remarqué précédemment, le fait est que le pouvoir législatif appartient au Parlement et aux législatures. Les tribunaux ont le devoir de veiller à ce que les lois répondent aux normes constitutionnelles et de les déclarer inopérantes dans le cas contraire. Ils exercent ainsi une pression sur les corps législatifs qui doivent, dès le départ, s'en tenir aux limites de leurs pouvoirs constitutionnels. On ne devrait pas s'en remettre aux tribunaux pour corriger des lois invalides. Les régimes d'aide sociale ouvrent peut-être plus grande la porte à l'intervention judiciaire (et la rendent certainement plus tentante). Dans l'affaire *Tétreault-Gadoury c. Canada (Commission de l'emploi et de l'immigration)*, [1991] 2 R.C.S. 22, par exemple, le Parlement adopterait sûrement la réparation, qui est évidente, plutôt que de voir disparaître le régime entier. Mais lorsqu'il s'agit de lois qui empiètent sur la liberté de la personne, les tribunaux devraient adopter une position dissuadant les législateurs d'adopter des dispositions ayant une portée trop large et devraient se montrer peu empressés à apporter une mesure corrective.

I have added these comments to underline that there are further dimensions (and I have mentioned only a few) to the issue of reading in and reading down that will require qualifications to the propositions set down by the Chief Justice. I note that he has wisely indicated that these propositions are intended as guidelines to assist the courts and not as hard and fast rules to be applied regardless of factual context.

Where I am most doubtful about the Chief Justice's reasons is in closely tying the process of reading down or reading in with the checklist set forth in *R. v. Oakes*, [1986] 1 S.C.R. 103. Though this may be useful at times, it may, I fear, encourage a mechanistic approach to the process, rather than encourage examination of more fundamental issues, such as those to which I have referred above, issues that go well beyond the factual context.

Appeal allowed, with costs to the respondent. The first constitutional question should be answered in the affirmative, leaving open the option of suspending the declaration of invalidity for a period of time to allow Parliament to amend the legislation in a way which meets its constitutional obligations. The second constitutional question should be answered in the negative. Section 24(1) of the Charter provides an individual remedy for actions taken under a law which violate an individual's Charter rights. A limited power to extend legislation is available to courts in appropriate circumstances by way of the power to read in derived from s. 52 of the Constitution Act, 1982.

Solicitor for the appellants: John C. Tait, Ottawa.

Solicitors for the respondent Shalom Schachter: Osler, Hoskin & Harcourt, Toronto.

J'ai ajouté ces commentaires afin de souligner que la question de l'interprétation large et de l'interprétation atténuée comporte d'autres dimensions (je n'en ai mentionné que quelques-unes) en raison desquelles il faudra apporter des réserves aux propositions énoncées par le Juge en chef. Je remarque qu'il a sagement indiqué que ces propositions ne sont que des lignes directrices destinées à aider les tribunaux et qu'elles ne se veulent pas des règles rigides qui doivent être appliquées indépendamment des faits.

J'éprouve le plus de doutes relativement aux motifs du Juge en chef lorsqu'il lie étroitement l'application de l'interprétation atténuée ou de l'interprétation large à la liste établie dans l'arrêt *R. c. Oakes*, [1986] 1 R.C.S. 103. Bien que cette méthode puisse être utile à l'occasion, je crains qu'elle ne favorise une attitude mécaniste face au processus, plutôt que l'étude de questions plus fondamentales, comme celles que j'ai mentionnées précédemment, et qui se situent bien au-delà des faits.

Pourvoi accueilli avec dépens à l'intimé. La première question constitutionnelle reçoit une réponse affirmative, mais l'effet de cette déclaration d'invalidité peut être suspendu pendant un certain temps pour que le Parlement puisse modifier le texte législatif d'une façon qui lui permette de respecter ses obligations constitutionnelles. La seconde question constitutionnelle reçoit une réponse négative. Le paragraphe 24(1) de la Charte prévoit une réparation individuelle lorsque des mesures prises en vertu d'une loi violent les droits garantis à une personne par la Charte. Dans les circonstances appropriées, les tribunaux ont un pouvoir limité, en vertu de l'art. 52 de la Loi constitutionnelle de 1982, de donner une interprétation large à une loi pour en étendre le champ d'application.

Procureur des appelantes: John C. Tait, Ottawa.

Procureurs de l'intimé Shalom Schachter: Osler, Hoskin & Harcourt, Toronto.

Solicitors for the respondent Women's Legal Education and Action Fund: Tory, Tory, DesLauriers & Binnington, Toronto.

Solicitor for the intervener the Attorney General for Ontario: The Attorney General for Ontario, Toronto.

Solicitor for the intervener the Attorney General of Quebec: The Attorney General of Quebec, Ste-Foy.

Solicitor for the intervener the Attorney General for New Brunswick: The Attorney General for New Brunswick, Fredericton.

Solicitor for the intervener the Attorney General of British Columbia: The Attorney General of British Columbia, Victoria.

Solicitor for the intervener the Attorney General for Saskatchewan: Brian Barrington-Foote, Regina.

Solicitor for the intervener the Attorney General for Alberta: The Attorney General for Alberta, Edmonton.

Solicitor for the intervener the Attorney General of Newfoundland: The Attorney General of Newfoundland, St. John's.

Solicitors for the intervener Minority Advocacy Rights Council: Cogan & Cogan, Ottawa.

Procureurs de l'intimé le Fonds d'action et d'éducation juridiques pour les femmes: Tory, Tory, DesLauriers & Binnington, Toronto.

Procureur de l'intervenant le procureur général de l'Ontario: Le procureur général de l'Ontario, Toronto.

Procureur de l'intervenant le procureur général du Québec: Le procureur général du Québec, Ste-Foy.

Procureur de l'intervenant le procureur général du Nouveau-Brunswick: Le procureur général du Nouveau-Brunswick, Fredericton.

Procureur de l'intervenant le procureur général de la Colombie-Britannique: Le procureur général de la Colombie-Britannique, Victoria.

Procureur de l'intervenant le procureur général de la Saskatchewan: Brian Barrington-Foote, Regina.

Procureur de l'intervenant le procureur général de l'Alberta: Le procureur général de l'Alberta, Edmonton.

Procureur de l'intervenant le procureur général de Terre-Neuve: Le procureur général de Terre-Neuve, St. John's.

Procureurs de l'intervenant le Conseil de revendication des droits des minorités: Cogan & Cogan, Ottawa.

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

v.

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

and

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

INDEXED AS: VRIEND *v.* ALBERTA

File No.: 25285.

1997: November 4; 1998: April 2.

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

* Sopinka J. took no part in the judgment.

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

c.

Sa Majesté la Reine du chef de l'Alberta et le procureur général de la province de l'Alberta *Intimés*

et

Le procureur général du Canada, le procureur général de l'Ontario, l'Alberta Civil Liberties Association, Égalité pour les gais et les lesbiennes (EGALE), le Fonds d'action et d'éducation juridiques pour les femmes (FAEJ), la Foundation for Equal Families, la Commission canadienne des droits de la personne, le Congrès du travail du Canada, l'Association du Barreau canadien — Division de l'Alberta, l'Association canadienne des commissions et conseils des droits de la personne (ACCDP), la Société canadienne du SIDA, l'Alberta and Northwest Conference of the United Church of Canada, le Congrès juif canadien, le Christian Legal Fellowship, l'Alberta Federation of Women United for Families, l'Evangelical Fellowship of Canada et la Focus on the Family (Canada) Association *Intervenants*

RÉPERTORIÉ: VRIEND *c.* ALBERTA

N° du greffe: 25285.

1997: 4 novembre; 1998: 2 avril.

Présents: Le juge en chef Lamer et les juges L'Heureux-Dubé, Sopinka*, Gonthier, Cory, McLachlin, Iacobucci, Major et Bastarache.

* Le juge Sopinka n'a pas pris part au jugement.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

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

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

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

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

The appellant V was employed as a laboratory coordinator by a college in Alberta, and was given a permanent, full-time position in 1988. Throughout his term of employment he received positive evaluations, salary increases and promotions for his work performance. In 1990, in response to an inquiry by the president of the college, V disclosed that he was homosexual. In early 1991, the college's board of governors adopted a position statement on homosexuality, and shortly thereafter, the president of the college requested V's resignation. V declined to resign, and his employment was terminated by the college. The sole reason given was his non-compliance with the college's policy on homosexual prac-

EN APPEL DE LA COUR D'APPEL DE L'ALBERTA

Pratique — Qualité pour agir — Contestation fondée sur la Charte — Professeur congédié par un collège en raison de son homosexualité — Orientation sexuelle non incluse dans les motifs de distinction interdits par la législation provinciale sur les droits de la personne — Les appelants ont-ils la qualité pour contester les dispositions législatives ne portant pas sur l'emploi? — Charte canadienne des droits et libertés, art. 1, 15(1) — Individual's Rights Protection Act, R.S.A. 1980, ch. I-2, préambule, art. 2(1), 3, 4, 7(1), 8(1), 10, 16(1).

Droit constitutionnel — Charte des droits — Application — Omission du législateur — Orientation sexuelle non incluse dans les motifs de distinction interdits par la législation provinciale sur les droits de la personne — La Charte s'applique-t-elle à la législation? — Charte canadienne des droits et libertés, art. 32(1) — Individual's Rights Protection Act, R.S.A. 1980, ch. I-2.

Droit constitutionnel — Charte des droits — Droits à l'égalité — Orientation sexuelle non incluse dans les motifs de distinction interdits par la législation provinciale sur les droits de la personne — La non-inclusion de l'orientation sexuelle porte-t-elle atteinte au droit à l'égalité? — Dans l'affirmative, l'atteinte est-elle justifiée? — Charte canadienne des droits et libertés, art. 1, 15(1) — Individual's Rights Protection Act, R.S.A. 1980, ch. I-2, préambule, art. 2(1), 3, 4, 7(1), 8(1), 10, 16(1).

Droit constitutionnel — Charte des droits — Réparation — Interprétation large — La non-inclusion de l'orientation sexuelle dans la législation provinciale sur les droits de la personne porte atteinte au droit à l'égalité — L'orientation sexuelle devrait-elle être tenue pour incluse dans la législation? — Loi constitutionnelle de 1982, art. 52 — Individual's Rights Protection Act, R.S.A. 1980, ch. I-2, préambule, art. 2(1), 3, 4, 7(1), 8(1), 10, 16(1).

L'appelant V a été engagé comme coordonnateur de laboratoire par un collège albertain, et il a obtenu un poste permanent à temps plein en 1988. Pendant toute la durée de son emploi, son travail a été évalué favorablement, et son rendement lui a valu des augmentations de salaire et de l'avancement. En 1990, en réponse à une demande formulée par le président de l'établissement, V a révélé qu'il était homosexuel. Au début de 1991, le conseil des gouverneurs du collège a adopté un énoncé de principe sur l'homosexualité et, peu après, le président de l'établissement a demandé à V de démissionner. Ce dernier a refusé, et il a été congédié par le collège. Le seul motif donné pour justifier le congédiement était

tice. V appealed the termination and applied for reinstatement, but was refused. He attempted to file a complaint with the Alberta Human Rights Commission on the grounds that his employer had discriminated against him because of his sexual orientation, but the Commission advised V that he could not make a complaint under the *Individual's Rights Protection Act* (*IRPA*), because it did not include sexual orientation as a protected ground. V and the other appellants filed a motion in the Court of Queen's Bench for declaratory relief. The trial judge found that the omission of protection against discrimination on the basis of sexual orientation was an unjustified violation of s. 15 of the *Canadian Charter of Rights and Freedoms*. She ordered that the words "sexual orientation" be read into ss. 2(1), 3, 4, 7(1), 8(1) and 10 of the *IRPA* as a prohibited ground of discrimination. The majority of the Court of Appeal allowed the Alberta government's appeal.

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

Per Lamer C.J. and Gonthier, Cory, McLachlin, Iacobucci and Bastarache JJ.: The appellants have standing to challenge the validity of the preamble and ss. 2(1), 3, 4, 7(1), 8(1), 10 and 16(1) of the *IRPA*. A serious issue as to constitutional validity is raised with respect to all these provisions. V and the other appellants also have a direct interest in the exclusion of sexual orientation from all forms of discrimination. Finally, the only other way the issue could be brought before the Court with respect to the sections of the Act other than those relating to employment would be to wait until someone is discriminated against on the ground of sexual orientation in housing, goods and services, etc. and challenge the validity of the provision in each appropriate case. This would not only be wasteful of judicial resources, but also unfair in that it would impose burdens of delay, cost and personal vulnerability to discrimination for the individuals involved in those eventual cases. Since the provisions are all very similar and do not depend on any particular factual context in order

le non-respect de la politique du collège en matière d'homosexualité. V en a appelé du congédiement et a demandé sa réintégration, ce qui lui a été refusé. Il a tenté de saisir l'Alberta Human Rights Commission d'une plainte dans laquelle il soutenait que son employeur avait fait preuve de discrimination à son égard en raison de son orientation sexuelle mais la commission a informé V qu'il ne pouvait formuler une plainte en application de l'*Individual's Rights Protection Act* (l'*IRPA*) parce que l'orientation sexuelle ne figurait pas au nombre des motifs de distinction illicites. V et les autres appelants ont présenté une requête à la Cour du Banc de la Reine de l'Alberta en vue d'obtenir un jugement déclaratoire. Le juge de première instance a conclu que l'omission de protéger les citoyens contre la discrimination fondée sur l'orientation sexuelle constituait une violation injustifiée de l'art. 15 de la *Charte canadienne des droits et libertés*. Elle a ordonné que «l'orientation sexuelle» soit tenue pour un motif de distinction illicite pour l'application des art. 2(1), 3, 4, 7(1), 8(1) et 10 de l'*IRPA*. L'appel du gouvernement a été accueilli par la majorité des juges de la Cour d'appel de l'Alberta.

Arrêt (le juge Major est dissident en partie quant au pourvoi principal): Le pourvoi principal est accueilli et le pourvoi incident est rejeté. Le préambule et les art. 2(1), 3, 4, 7(1), 8(1), 10 and 16(1) de l'*IRPA* portent atteinte au par. 15(1) de la *Charte* et cette violation n'est pas justifiable en vertu de l'article premier. À titre de mesure corrective, les mots «orientation sexuelle» sont tenus pour inclus dans les motifs de distinction interdits par ces dispositions.

Le juge en chef Lamer et les juges Gonthier, Cory, McLachlin, Iacobucci et Bastarache: Les appelants ont qualité pour contester la validité du préambule et des art. 2(1), 3, 4, 7(1), 8(1), 10 et 16(1) de l'*IRPA*. Une question sérieuse est soulevée quant à la validité constitutionnelle de chacune de ces dispositions. V et les autres appelants ont également un intérêt direct à l'égard de l'exclusion de l'orientation sexuelle de l'ensemble des formes de discrimination. Enfin, la seule autre façon dont notre Cour pourrait être saisie de la question relativement aux autres dispositions de la Loi qui ne concernent pas l'emploi serait d'attendre qu'une personne soit victime de discrimination fondée sur l'orientation sexuelle en matière d'habitation, de consommation et de services, etc. et qu'elle conteste la validité de la disposition pertinente. Ce serait non seulement peu rentable sur le plan des ressources judiciaires, mais également injuste pour les personnes en cause, parce qu'elles auraient à surmonter les obstacles que sont les délais, les frais et la vulnérabilité personnelle face à la discrimina-

to resolve their constitutional status, there is really no need to adduce additional evidence regarding the provisions concerned with discrimination in areas other than employment.

The respondents' argument on their cross-appeal that because this case concerns a legislative omission, s. 15 of the *Charter* should not apply pursuant to s. 32 cannot be accepted. The threshold test that there be some "matter within the authority of the legislature" which is the proper subject of a *Charter* analysis has been met. The fact that it is the underinclusiveness of the *IRPA* which is at issue does not alter the fact that it is the legislative act which is the subject of *Charter* scrutiny in this case. Furthermore, the language of s. 32 does not limit the application of the *Charter* merely to positive actions encroaching on rights or the excessive excercise of authority. Where, as here, the challenge concerns an Act of the legislature that is underinclusive as a result of an omission, s. 32 should not be interpreted as precluding the application of the *Charter*. The application of the *Charter* to the *IRPA* does not amount to applying it to private activity. Since the constitutional challenge here concerns the *IRPA*, it deals with laws that regulate private activity, and not the acts of a private entity.

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

Dans le cadre de leur pourvoi incident, les intimés font valoir que, parce qu'il s'agit en l'espèce d'une omission du législateur, l'art. 15 de la *Charte* ne devrait pas s'appliquer en vertu de l'art. 32. Cet argument ne saurait être accepté. Il a été satisfait au critère préliminaire selon lequel il doit s'agir d'un «domaine relevant de [la] législature» lequel est le véritable sujet de l'analyse fondée sur la *Charte*. Que la portée trop limitative de l'*IRPA* soit en cause ne change rien au fait qu'en l'espèce, l'examen fondé sur la *Charte* porte sur l'acte législatif. En outre, le libellé de l'art. 32 n'a pas pour effet de limiter l'application de la *Charte* aux actions positives qui empiètent sur des droits ou à l'exercice abusif d'un pouvoir. Lorsque, comme en l'espèce, la contestation vise une loi adoptée par la législature qui est trop limitative en raison d'une omission, l'art. 32 ne devrait pas être interprété comme faisant obstacle à l'application de la *Charte*. Appliquer la *Charte* à l'*IRPA* ce n'est pas appliquer la *Charte* à une activité privée. Comme la présente contestation constitutionnelle porte sur l'*IRPA*, elle porte sur une loi qui régit l'activité privée et non sur les actes d'une entité privée.

Bien que la Cour n'ait pas adopté une approche uniforme à l'égard du par. 15(1), dans la présence espèce, toute différence pouvant exister quant à la méthode à employer relativement à cette disposition ne modifie en rien le résultat. Les exigences essentielles d'une analyse fondée sur le par. 15(1) sont respectées si l'on se demande premièrement s'il y a une distinction entraînant la négation du droit à l'égalité devant la loi ou dans la loi ou la négation du droit à la même protection ou au même bénéfice de la loi et, deuxièmement, si cette négation constitue une discrimination fondée sur un motif énuméré au par. 15(1) ou sur un motif analogue. L'omission de l'orientation sexuelle dans les motifs de distinction interdits par l'*IRPA* établit une distinction et ce, sous deux rapports différents simultanément. Premièrement, une distinction est créée entre les homosexuels, d'une part, et les autres groupes défavorisés qui bénéficient de la protection de l'*IRPA*, d'autre part. Les homosexuels ne jouissent pas d'une égalité formelle par rapport aux autres groupes protégés puisque ceux-ci sont explicitement inclus alors que les homosexuels ne le sont pas. Deuxièmement, une distinction encore plus fondamentale est créée entre homosexuels et hétérosexuels. Compte tenu de la réalité sociale de la discrimi-

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

The exclusion of sexual orientation from the *IRPA* does not meet the requirements of the *Oakes* test and accordingly cannot be saved under s. 1 of the *Charter*. Where a law has been found to violate the *Charter* owing to underinclusion, the legislation as a whole, the impugned provisions, and the omission itself are all properly considered in determining whether the legislative objective is pressing and substantial. In the absence of any submissions regarding the pressing and substantial nature of the objective of the omission at issue here, the respondents have failed to discharge their evidenNation exercée contre les homosexuels, l'exclusion de l'orientation sexuelle a de toute évidence un effet disproportionné sur ces derniers par comparaison avec les hétérosexuels. En raison de sa portée trop limitative, l'*IRPA* nie donc aux homosexuels le droit à l'égalité réelle. De par sa portée trop limitative, l'*IRPA* crée une distinction qui conduit à la négation du droit au même bénéfice et à la même protection de la loi sur le fondement de l'orientation sexuelle reconnue comme étant une caractéristique personnelle analogue à celles énumérées au par. 15(1). En soi, cela suffit pour conclure qu'il y a discrimination et, partant, violation de l'art. 15. Les effets discriminatoires graves de l'exclusion de l'orientation sexuelle de la Loi renforcent cette conclusion. La distinction a pour effet d'imposer un fardeau ou un désavantage non imposé à d'autres et d'empêcher l'accès aux avantages offerts à d'autres. Le premier effet, et le plus évident, de l'exclusion de l'orientation sexuelle est que les homosexuels victimes de discrimination fondée sur leur orientation sexuelle n'ont pas accès à la procédure établie par l'*IRPA* pour le dépôt d'une plainte officielle et l'obtention d'une réparation. Les conséquences tragiques et infamantes du non-accès aux recours prévus par la Loi sont exacerbées tant par l'exclusion de tout recours au civil que par le peu de succès qu'ont eu les homosexuels qui ont tenté d'obtenir réparation pour une discrimination fondée sur l'orientation sexuelle en invoquant d'autres motifs comme le sexe ou l'état matrimonial. Au surplus, l'exclusion de la protection de l'*IRPA* envoie à tous les Albertains le message qu'il est permis et, peut-être même, acceptable d'exercer une discrimination à l'égard d'une personne sur le fondement de son orientation sexuelle. La souffrance psychologique est peut-être le préjudice le plus important dans de telles circonstances. En soustrayant à l'application de l'*IRPA* la discrimination fondée sur l'orientation sexuelle, le gouvernement a, dans les faits, affirmé que «chacun joui[t] de la même dignité et des mêmes droits», sauf les homosexuels. Un tel message, même s'il n'est que tacite, ne peut que violer le par. 15(1).

L'exclusion de l'orientation sexuelle de l'*IRPA* ne satisfait pas aux exigences du critère énoncé dans l'arrêt *Oakes* et elle ne peut, en conséquence, être sauvegardée en vertu de l'article premier de la *Charte*. Lorsqu'une loi est jugée contraire à la *Charte* en raison de sa portée trop limitative, c'est tout à la fois la loi considérée dans son ensemble, les dispositions contestées ainsi que l'omission elle-même qu'il y a lieu de prendre en compte pour déterminer si l'objectif législatif est urgent et réel. Vu l'absence d'observations quant à la nature urgente et réelle de l'objectif de l'omission en cause, les

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

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

Reading sexual orientation into the impugned provisions of the *IRPA* is the most appropriate way of remedying this underinclusive legislation. When determining whether reading in is appropriate, courts must have regard to the twin guiding principles of respect for the role of the legislature and respect for the purposes of the *Charter*. The purpose of the *IRPA* is the recognition and protection of the inherent dignity and inalienable rights of Albertans through the elimination of discriminatory practices. Reading sexual orientation into the offending sections would minimize interference with this clearly legitimate legislative purpose and thereby avoid excessive intrusion into the legislative sphere whereas striking down the *IRPA* would deprive all Albertans of human rights protection and thereby unduly interfere with the scheme enacted by the legislature. It is reasonable to assume that, if the legislature had been faced with the choice of having no human rights statute or having one that offered protection on the ground of sexual orientation, the latter option would have been chosen.

intimés ne se sont pas déchargés de leur fardeau de preuve et partant, n'ont pas réussi à franchir cette première étape de l'analyse fondée sur l'article premier. Même si la question du fardeau de la preuve était écartée en vue de discerner l'objectif de l'omission dans les dispositions de l'*IRPA*, le résultat serait le même. Lorsque, comme en l'espèce, une omission du législateur est à première vue l'antithèse des principes qu'incarne le texte dans son ensemble, on ne peut dire que l'omission correspond à un objectif qui ressort de la Loi elle-même et qui serait urgent et réel, de telle sorte que soit justifiée une dérogation à des droits constitutionnellement protégés.

Loin d'être rationnellement liée à l'objectif des dispositions contestées, l'exclusion de l'orientation sexuelle en est l'antithèse. En ce qui concerne l'atteinte minimale, le gouvernement de l'Alberta n'a pas démontré qu'il avait un motif raisonnable d'exclure l'orientation sexuelle de l'*IRPA*. Cette loi ne confère aux homosexuels aucune protection contre la discrimination fondée sur l'orientation sexuelle, et encore moins une protection égale. Une telle exclusion constitue une atteinte intégrale, et non minimale, à la garantie d'égalité énoncée par la *Charte*. Enfin, comme le gouvernement de l'Alberta n'a pas établi quels bienfaits cette exclusion apportait à la promotion et à la protection des droits de la personne, il n'y a aucune proportionnalité entre l'atteinte de l'objectif législatif et la violation des droits à l'égalité des appelants.

L'inclusion de l'orientation sexuelle dans les dispositions contestées de l'*IRPA* par le recours à l'interprétation large est la meilleure façon de corriger la portée trop limitative de ce texte de loi. Lorsqu'ils examinent s'il convient d'adopter une interprétation large, les tribunaux doivent tenir compte de deux principes directeurs, savoir le respect du rôle du législateur et le respect des objets de la *Charte*. L'*IRPA* a pour objet de reconnaître et de protéger la dignité inhérente et les droits inaliénables des Albertains au moyen de l'élimination des pratiques discriminatoires. Le recours à l'interprétation large en vue d'inclure l'orientation sexuelle dans les dispositions fautives réduirait l'empiétement sur cet objet manifestement légitime et éviterait ainsi une ingérence excessive dans le domaine législatif, alors que l'annulation de l'*IRPA* priverait tous les Albertains de la protection des droits de la personne, ce qui modifierait indûment l'économie de la loi adoptée par le législateur. Il est raisonnable de supposer que si le législateur avait eu le choix entre renoncer à faire passer une loi relative aux droits de la personne ou en adopter une qui interdit la discrimination fondée sur l'orientation sexuelle, il aurait opté pour la deuxième solution.

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

Per Major J. (dissenting in part on the appeal): The Alberta legislature, having enacted comprehensive human rights legislation that applies to everyone in the province, has then selectively denied the protection of the Act to people with a different sexual orientation. No explanation was given for the exclusion of sexual orientation from the prohibited grounds of discrimination in the *IRPA*, and none is apparent from the evidence filed by the province. The inescapable conclusion is that there is no reason to exclude that group from s. 7 of the *Charter* and to do so is discriminatory and offends their constitutional rights. The words "sexual orientation" should not be read into the Act, however. While reading in may be appropriate where it can be safely assumed that the legislature itself would have remedied the underinclusiveness by extending the benefit or protection to the previously excluded group, that assumption cannot be made in this appeal. It may be that the legislature would

Le juge L'Heureux-Dubé: Il y a accord pour l'essentiel avec les résultats auxquels parviennent les juges majoritaires. Bien que l'approche retenue à l'égard de l'article premier de la *Charte* recueille l'adhésion, la façon dont il convient d'aborder le par. 15(1) est exposée à nouveau. Cette disposition porte d'abord et avant tout sur l'égalité. Son objet principal est de favoriser l'existence d'une société où tous ont la certitude que la loi les reconnaît comme des êtres humains qui méritent le même respect, la même déférence et la même considération. L'analyse fondée sur le par. 15(1) devrait principalement viser à détecter et à comprendre les incidences négatives d'une distinction législative (et notamment, comme en l'espèce, d'une omission du législateur) sur la personne ou le groupe concerné plutôt qu'à déterminer si la distinction en cause a été établie sur le fondement d'un motif énuméré ou d'un motif analogue. L'un des éléments essentiels de l'examen permettant de déterminer si une distinction législative est, de fait, discriminatoire au sens du par. 15(1) est la prise en compte tant de la vulnérabilité sociale de l'individu ou du groupe concerné que de la nature du droit auquel il est porté atteinte quant à son importance pour la dignité humaine et la personnalité. Le paragraphe 15(1) entre en jeu lorsque l'impact négatif d'une distinction législative prive une personne ou un groupe considéré comme défavorisé dans notre société de la protection et du bénéfice de la loi en portant atteinte à leur dignité humaine et à leur personnalité. Quoique les motifs énumérés et les motifs analogues puissent être des indices de discrimination ou puissent même donner naissance à une présomption de discrimination, c'est à l'étape de l'appréciation de la nature de la personne ou du groupe lésé qu'ils doivent être examinés.

Le juge Major (dissident en partie quant au pourvoi principal): La législature de l'Alberta, après avoir adopté une loi d'ensemble sur les droits de la personne qui s'applique à toutes les personnes dans la province, a ensuite sélectivement privé de la protection de la Loi les personnes ayant une orientation sexuelle différente. Aucune explication n'a été fournie pour expliquer l'exclusion de l'orientation sexuelle des motifs de distinction interdits par l'*IRPA* et aucune ne ressort de la preuve déposée par la province. On doit inévitablement conclure qu'il n'existe aucune raison d'exclure le groupe visé de l'art. 7 de la *Charte*, et une telle exclusion est discriminatoire et porte atteinte aux droits constitutionnels des personnes faisant partie de ce groupe. Toutefois, il n'y a pas lieu de recourir à l'interprétation large pour inclure les mots «orientation sexuelle» dans la Loi. Bien que l'interprétation large puisse être appropriée lorsque l'on peut supposer sans risque d'erreur que

prefer no human rights Act over one that includes sexual orientation as a prohibited ground of discrimination. As well, there are numerous ways in which the legislation could be amended to address the underinclusiveness. As an alternative, given the legislature's persistent refusal to protect against discrimination on the basis of sexual orientation, it may be that it would choose to override the *Charter* breach by invoking the notwithstanding clause in s. 33 of the *Charter*. In any event it should lie with the elected legislature to determine this issue. The offending sections should be declared invalid and the legislature provided with an opportunity to rectify them. The declaration of invalidity should be restricted to the employment-related provisions of the *IRPA*, namely ss. 7(1), 8(1) and 10. While the same conclusions may apply to the remaining provisions of the *IRPA*, *Charter* cases should not be considered in a factual vacuum. The declaration of invalidity should be suspended for one year to allow the legislature an opportunity to bring the impugned provisions into line with its constitutional obligations.

Cases Cited

By Cory and Iacobucci JJ.

Referred to: *Egan v. Canada*, [1995] 2 S.C.R. 513; *Haig v. Canada* (1992), 9 O.R. (3d) 495; *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229; *Schachter v. Canada*, [1992] 2 S.C.R. 679; *Miron v. Trudel*, [1995] 2 S.C.R. 418; *Thibaudeau v. Canada*, [1995] 2 S.C.R. 627; *Re Blainey and Ontario Hockey Association* (1986), 54 O.R. (2d) 513, leave to appeal refused, [1986] 1 S.C.R. xii; *Dickason v. University of Alberta*, [1992] 2 S.C.R. 1103; *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315; *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236; *Mahe v. Alberta*, [1990] 1 S.C.R. 342; *Reference re Public Schools Act (Man.), s. 79(3), (4) and (7)*, [1993] 1 S.C.R. 839; *Haig v. Canada*, [1993] 2 S.C.R. 995; *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624; *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573; *Tremblay v. Daigle*, [1989] 2 S.C.R. 530; *Andrews v. Law Society of*

la législature elle-même aurait remédié à la nature trop limitative de la Loi en étendant le bénéfice ou la protection en question au groupe antérieurement exclu, une telle supposition ne peut être faite dans le présent pourvoi. Il se peut que la législature préfère ne pas adopter de loi sur les droits de la personne plutôt que d'en adopter une qui comprenne l'orientation sexuelle comme motif de distinction illicite. De même, il existe de nombreuses façons de modifier la Loi afin de remédier à sa nature trop limitative. Par ailleurs, vu qu'elle persiste dans son refus d'accorder une protection contre la discrimination fondée sur l'orientation sexuelle, la législature pourrait décider d'invoquer l'art. 33 de la *Charte* pour protéger les dispositions qui portent atteinte à la *Charte*. De toute façon, il incombe à la législature, dont les membres ont été élus, de trancher cette question. Il est préférable de déclarer invalides les dispositions fautives et de permettre à la législature de les rectifier. La déclaration d'invalidité devrait être limitée aux dispositions de l'*IRPA* relatives à l'emploi, soit les art. 7(1), 8(1) et 10. Bien que les mêmes conclusions puissent s'appliquer aux autres dispositions de l'*IRPA*, les causes fondées sur la *Charte* ne doivent pas être examinées dans un vide factuel. La déclaration d'invalidité devrait être suspendue pour une période d'un an afin de permettre à la législature de modifier les dispositions contestées de façon à les rendre conformes à ses obligations constitutionnelles.

Jurisprudence

Citée par les juges Cory et Iacobucci

Arrêts mentionnés: *Egan c. Canada*, [1995] 2 R.C.S. 513; *Haig c. Canada* (1992), 9 O.R. (3d) 495; *McKinney c. Université de Guelph*, [1990] 3 R.C.S. 229; *Schachter c. Canada*, [1992] 2 R.C.S. 679; *Miron c. Trudel*, [1995] 2 R.C.S. 418; *Thibaudeau c. Canada*, [1995] 2 R.C.S. 627; *Re Blainey and Ontario Hockey Association* (1986), 54 O.R. (2d) 513, autorisation de pourvoi refusée, [1986] 1 R.C.S. xii; *Dickason c. Université de l'Alberta*, [1992] 2 R.C.S. 1103; *B. (R.) c. Children's Aid Society of Metropolitan Toronto*, [1995] 1 R.C.S. 315; *Conseil canadien des Églises c. Canada (Ministre de l'Emploi et de l'Immigration)*, [1992] 1 R.C.S. 236; *Mahe c. Alberta*, [1990] 1 R.C.S. 342; *Renvoi relatif à la Loi sur les écoles publiques (Man.), art. 79(3), (4) et (7)*, [1993] 1 R.C.S. 839; *Haig c. Canada*, [1993] 2 R.C.S. 995; *Renvoi relatif à la Public Service Employee Relations Act (Alb.)*, [1987] 1 R.C.S. 313; *Eldridge c. Colombie-Britannique (Procureur général)*, [1997] 3 R.C.S. 624; *SDGMR c. Dolphin Delivery Ltd.*, [1986] 2 R.C.S. 573; *Tremblay c. Daigle*,

British Columbia, [1989] 1 S.C.R. 143; *R. v. Turpin*, [1989] 1 S.C.R. 1296; *Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358; *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241; *Knodel v. British Columbia (Medical Services Commission)* (1991), 58 B.C.L.R. (2d) 356; *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219; *Bliss v. Attorney General of Canada*, [1979] 1 S.C.R. 183; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *Romer v. Evans*, 116 S.Ct. 1620 (1996); *R. v. Oakes*, [1986] 1 S.C.R. 103; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22; *R. v. Keegstra*, [1990] 3 S.C.R. 697; *Newfoundland (Human Rights Commission) v. Newfoundland (Minister of Employment and Labour Relations)* (1995), 127 D.L.R. (4th) 694.

By L'Heureux-Dubé J.

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

By Major J. (dissenting in part)

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

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 1, 7, 15(1), 24(1), 32(1), 33.
Canadian Human Rights Act, R.S.C., 1985, c. H-6, s. 3(1).
Constitution Act, 1867, s. 92.
Constitution Act, 1982, s. 52(1).
Criminal Code, R.S.C., 1985, c. C-46, s. 718.2(*a*)(i) [ad. 1995, c. 22, s. 6].
Human Rights, Citizenship and Multiculturalism Act, R.S.A. 1980, c. H-11.7, preamble, ss. 2(1), 3, 4, 7, 8, 10, 11.1, 16(1).
Individual's Rights Protection Act, R.S.A. 1980, c. I-2 [am. 1985, c. 33; am. 1990, c. 23], preamble, ss. 2(1), 3, 4, 7, 8, 10, 11.1, 16(1).
Individual's Rights Protection Act, S.A. 1972 [am. 1980, c. 27], c. 2, ss. 2, 3, 4, 6, 7, 9.
Individual's Rights Protection Amendment Act, 1996, S.A. 1996, c. 25.

[1989] 2 R.C.S. 530; *Andrews c. Law Society of British Columbia*, [1989] 1 R.C.S. 143; *R. c. Turpin*, [1989] 1 R.C.S. 1296; *Benner c. Canada (Secrétaire d'État)*, [1997] 1 R.C.S. 358; *Eaton c. Conseil scolaire du comté de Brant*, [1997] 1 R.C.S. 241; *Knodel c. British Columbia (Medical Services Commission)* (1991), 58 B.C.L.R. (2d) 356; *Brooks c. Canada Safeway Ltd.*, [1989] 1 R.C.S. 1219; *Bliss c. Procureur général du Canada*, [1979] 1 R.C.S. 183; *R. c. Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295; *Romer c. Evans*, 116 S.Ct. 1620 (1996); *R. c. Oakes*, [1986] 1 R.C.S. 103; *RJR-MacDonald Inc. c. Canada (Procureur général)*, [1995] 3 R.C.S. 199; *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 R.C.S. 927; *Tétreault-Gadoury c. Canada (Commission de l'emploi et de l'immigration)*, [1991] 2 R.C.S. 22; *R. c. Keegstra*, [1990] 3 R.C.S. 697; *Newfoundland (Human Rights Commission) c. Newfoundland (Minister of Employment and Labour Relations)* (1995), 127 D.L.R. (4th) 694.

Citée par le juge L'Heureux-Dubé

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

Citée par le juge Major (dissident en partie)

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

Lois et règlements cités

Charte canadienne des droits et libertés, art. 1, 7, 15(1), 24(1), 32(1), 33.
Code criminel, L.R.C. (1985), ch. C-46, art. 718.2*a*)(i) [aj. 1995, ch. 22, art. 6].
Human Rights, Citizenship and Multiculturalism Act, R.S.A. 1980, ch. H-11.7, préambule, art. 2(1), 3, 4, 7, 8, 10, 11.1, 16(1).
Individual's Rights Protection Act, R.S.A. 1980, ch. I-2 [mod. 1985, ch. 33; mod. 1990, ch. 23], préambule, art. 2(1), 3, 4, 7, 8, 10, 11.1, 16(1).
Individual's Rights Protection Act, S.A. 1972 [mod. 1990, ch. 27], ch. 2, art. 2, 3, 4, 6, 7, 9.
Individual's Rights Protection Amendment Act, 1996, S.A. 1996, ch. 25.
Loi canadienne sur les droits de la personne, L.R.C. (1985), ch. H-6, art. 3(1).
Loi constitutionnelle de 1867, art. 92.
Loi constitutionnelle de 1982, art. 52(1).

Authors Cited

Ackerman, Bruce. "The Rise of World Constitutionalism" (1997), 83 *Va. L. Rev.* 771.

Alberta. *Our Commitment to Human Rights: The Government's Response to the Recommendations of the Alberta Human Rights Review Panel*. Edmonton: Alberta Community Development, 1995.

Alberta Hansard, November 22, 1972, at p. 80-63.

Alberta Human Rights Review Panel. *Equal in Dignity and Rights: A Review of Human Rights in Alberta*. Edmonton: The Panel, 1994.

Beatty, David M. *Constitutional Law in Theory and Practice*. Toronto: University of Toronto Press, 1995.

Beatty, David M. "Law and Politics" (1996), 44 *Am. J. Comp. L.* 131.

Beatty, David M., ed. *Human Rights and Judicial Review: A Comparative Perspective*. Dordrecht, The Netherlands: Martinus Nijhoff, 1994.

Bickel, Alexander M. *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, 2nd ed. New Haven: Yale University Press, 1986.

Black, William. "*Vriend*, Rights and Democracy" (1996), 7 *Constitutional Forum* 126.

Dickson, R. G. B. "Keynote Address", in *The Cambridge Lectures 1985*. Montréal: Yvon Blais, 1985.

Ely, John Hart. *Democracy and Distrust: A Theory of Judicial Review*. Cambridge: Harvard University Press, 1980.

Hogg, Peter W., and Allison A. Bushell. "The *Charter* Dialogue Between Courts and Legislatures" (1997), 35 *Osgoode Hall L.J.* 75.

Jackman, Martha. "Protecting Rights and Promoting Democracy: Judicial Review Under Section 1 of the *Charter*" (1996), 34 *Osgoode Hall L.J.* 661.

Khullar, Ritu. "*Vriend*: Remedial Issues for Unremedied Discrimination" (1998), 7 *N.J.C.L.* 221.

Knopff, Rainer, and F. L. Morton. *Charter Politics*. Scarborough, Ont.: Nelson Canada, 1992.

Mandel, Michael. *The Charter of Rights and the Legalization of Politics in Canada*. Toronto: Wall & Thompson, 1994.

Monahan, Patrick. "A Theory of Judicial Review Under the Charter", in *Politics and the Constitution: The Charter, Federalism and the Supreme Court of Canada*. Toronto: Carswell, 1987, 97.

O'Byrne, Shannon K., and James F. McGinnis. "Case Comment: *Vriend* v. *Alberta*: *Plessy* Revisited: Lesbian and Gay Rights in the Province of Alberta" (1996), 34 *Alta. L. Rev.* 892.

Peacock, Anthony A., ed. *Rethinking the Constitution: Perspectives on Canadian Constitutional Reform,*

Doctrine citée

Ackerman, Bruce. «The Rise of World Constitutionalism» (1997), 83 *Va. L. Rev.* 771.

Alberta. *Our Commitment to Human Rights: The Government's Response to the Recommendations of the Alberta Human Rights Review Panel*. Edmonton: Alberta Community Development, 1995.

Alberta Hansard, November 22, 1972, at p. 80-63.

Alberta Human Rights Review Panel. *Equal in Dignity and Rights: A Review of Human Rights in Alberta*. Edmonton: The Panel, 1994.

Beatty, David M. *Constitutional Law in Theory and Practice*. Toronto: University of Toronto Press, 1995.

Beatty, David M. «Law and Politics» (1996), 44 *Am. J. Comp. L.* 131.

Beatty, David M., ed. *Human Rights and Judicial Review: A Comparative Perspective*. Dordrecht, The Netherlands: Martinus Nijhoff, 1994.

Bickel, Alexander M. *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, 2nd ed. New Haven: Yale University Press, 1986.

Black, William. «*Vriend*, Rights and Democracy» (1996), 7 *Forum constitutionnel* 126.

Dickson, R. G. B. «Keynote Address», in *The Cambridge Lectures 1985*. Montréal: Yvon Blais, 1985.

Ely, John Hart. *Democracy and Distrust: A Theory of Judicial Review*. Cambridge: Harvard University Press, 1980.

Hogg, Peter W., and Allison A. Bushell. «The *Charter* Dialogue Between Courts and Legislatures» (1997), 35 *Osgoode Hall L.J.* 75.

Jackman, Martha. «Protecting Rights and Promoting Democracy: Judicial Review Under Section 1 of the *Charter*» (1996), 34 *Osgoode Hall L.J.* 661.

Khullar, Ritu. «*Vriend*: Remedial Issues for Unremedied Discrimination» (1998), 7 *N.J.C.L.* 221.

Knopff, Rainer, and F. L. Morton. *Charter Politics*. Scarborough, Ont.: Nelson Canada, 1992.

Mandel, Michael. *La Charte des droits et libertés et la judiciarisation du politique au Canada*. Traduit de l'anglais par Hervé Juste. Québec: Boréal, 1996.

Monahan, Patrick. «A Theory of Judicial Review Under the Charter», in *Politics and the Constitution: The Charter, Federalism and the Supreme Court of Canada*. Toronto: Carswell, 1987, 97.

O'Byrne, Shannon K., and James F. McGinnis. «Case Comment: *Vriend* v. *Alberta*: *Plessy* Revisited: Lesbian and Gay Rights in the Province of Alberta» (1996), 34 *Alta. L. Rev.* 892.

Peacock, Anthony A., ed. *Rethinking the Constitution: Perspectives on Canadian Constitutional Reform,*

Interpretation, and Theory. Don Mills, Ont.: Oxford University Press, 1996.

Pothier, Dianne. "The Sounds of Silence: *Charter* Application when the Legislature Declines to Speak" (1996), 7 *Constitutional Forum* 113.

Renke, Wayne N. "Case Comment: *Vriend* v. *Alberta*: Discrimination, Burdens of Proof, and Judicial Notice" (1996), 34 *Alta. L. Rev.* 925.

Roach, Kent. *Constitutional Remedies in Canada*. Aurora, Ont.: Canada Law Book, 1994 (loose-leaf updated November 1997, release 4).

Rogerson, Carol. "The Judicial Search for Appropriate Remedies Under the Charter: The Examples of Overbreadth and Vagueness". In Robert J. Sharpe, ed. *Charter Litigation*. Toronto: Butterworths, 1987, 233.

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

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

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

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

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

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

Interpretation, and Theory. Don Mills, Ont.: Oxford University Press, 1996.

Pothier, Dianne. «The Sounds of Silence: *Charter* Application when the Legislature Declines to Speak» (1996), 7 *Forum constitutionnel* 113.

Renke, Wayne N. «Case Comment: *Vriend* v. *Alberta*: Discrimination, Burdens of Proof, and Judicial Notice» (1996), 34 *Alta. L. Rev.* 925.

Roach, Kent. *Constitutional Remedies in Canada*. Aurora, Ont.: Canada Law Book, 1994 (loose-leaf updated November 1997, release 4).

Rogerson, Carol. «The Judicial Search for Appropriate Remedies Under the Charter: The Examples of Overbreadth and Vagueness». In Robert J. Sharpe, ed. *Charter Litigation*. Toronto: Butterworths, 1987, 233.

POURVOI PRINCIPAL et POURVOI INCIDENT contre un arrêt de la Cour d'appel de l'Alberta (1996), 181 A.R. 16, 116 W.A.C. 16, 37 Alta. L.R. (3d) 364, [1996] 5 W.W.R. 617, 132 D.L.R. (4th) 595, 18 C.C.E.L. (2d) 1, 96 C.L.L.C. ¶230-013, 25 C.H.R.R. D/1, 34 C.R.R. (2d) 243, [1996] A.J. No. 182 (QL), qui a infirmé une décision de la Cour du Banc de la Reine (1994), 152 A.R. 1, 18 Alta. L.R. (3d) 286, [1994] 6 W.W.R. 414, 94 C.L.L.C. ¶17,025, 20 C.H.R.R. D/358, [1994] A.J. No. 272 (QL), portant que l'omission d'une protection contre la discrimination fondée sur l'orientation sexuelle dans l'*Individual's Rights Protection Act* constitue une violation injustifiée du par. 15(1) de la *Charte canadienne des droits et libertés*. Pourvoi principal accueilli, le juge Major est dissident en partie. Pourvoi incident rejeté.

Sheila J. Greckol, *Douglas R. Stollery, c.r.*, *June Ross* et *Jo-Ann R. Kolmes*, pour les appelants.

John T. McCarthy, c.r., et *Donna Grainger*, pour les intimés.

Brian Saunders et *James Hendry*, pour l'intervenant le procureur général du Canada.

Robert E. Charney, pour l'intervenant le procureur général de l'Ontario.

Shirish P. Chotalia et *Brian A. F. Edy*, pour l'intervenante l'Alberta Civil Liberties Association.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Cynthia Petersen, pour l'intervenante Égalité pour les gais et les lesbiennes (EGALE).

Gwen Brodsky et *Claire Klassen*, pour l'intervenant le Fonds d'action et d'éducation juridiques pour les femmes (FAEJ).

Raj Anand et *Andrew M. Pinto*, pour l'intervenante la Foundation for Equal Families.

William F. Pentney et *Patricia Lawrence*, pour l'intervenante la Commission canadienne des droits de la personne.

Steven M. Barrett et *Vanessa Payne*, pour l'intervenant le Congrès du travail du Canada.

James L. Lebo, c.r., *James F. McGinnis* et *Julia C. Lloyd*, pour l'intervenante l'Association du Barreau canadien — Division de l'Alberta.

Thomas S. Kuttner et *Rebecca Johnson*, pour l'intervenante l'Association canadienne des commissions et conseils des droits de la personne (ACCDP).

R. Douglas Elliott et *Patricia A. LeFebour*, pour l'intervenante la Société canadienne du SIDA.

Dale Gibson, pour l'intervenante l'Alberta and Northwest Conference of the United Church of Canada.

Lyle S. R. Kanee, pour l'intervenant le Congrès juif canadien.

Barbara B. Johnston, pour l'intervenant le Christian Legal Fellowship.

Dallas K. Miller, pour l'intervenante l'Alberta Federation of Women United for Families.

Gerald D. Chipeur et *Cindy Silver*, pour les intervenants l'Evangelical Fellowship of Canada et la Focus on the Family (Canada) Association.

Version française du jugement du juge en chef Lamer et des juges Gonthier, Cory, McLachlin, Iacobucci et Bastarache rendu par

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. . . . [W]e have committed ourselves to suggest that Alberta is not the place for partial rights or half freedoms, but that Alberta hopefully will become the place where each and every man and woman will be able to stand on his own two feet and be recognized as an individual and not as a member of a particular class" (*Alberta Hansard*, November 22, 1972, at p. 80-63). These are courageous words that give hope and comfort to members of every group that has suffered the wounds and indignities of discrimination. Has this laudable commitment been met?

I. Factual Background

A. *History of the IRPA*

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

LES JUGES CORY ET IACOBUCCI — Dans les présents motifs conjoints, le juge Cory examine les questions relatives à la qualité pour agir, à l'application de la *Charte canadienne des droits et libertés* et à la violation de son par. 15(1). Pour sa part, le juge Iacobucci se penche sur l'article premier de la *Charte* et sur la réparation appropriée; il est en outre l'auteur du dispositif. 1

LE JUGE CORY

L'*Individual's Rights Protection Act*, R.S.A. 1980, ch. I-2 («l'*IRPA*» ou la «Loi»), a initialement été adoptée en 1973. En présentant le projet de loi en 1972, le ministre responsable a formulé certaines observations et a insisté sur la nature et l'importance de la Loi: [TRADUCTION] «. . . notre législature s'engage à reconnaître la primauté de l'Individual's Rights Protection Act sur tout autre texte législatif [. . .] [N]ous nous sommes engagés à montrer que l'Alberta n'est pas un territoire où des droits partiels ou des demi-libertés sont accordés, mais un lieu où, nous l'espérons, chacun, homme ou femme, pourra affirmer son autonomie et être reconnu en tant qu'individu et non en tant que membre d'une catégorie particulière» (*Alberta Hansard*, 22 novembre 1972, à la p. 80-63). Il s'agit de propos courageux qui suscitent l'espoir et apportent du réconfort aux membres de tous les groupes qui ont subi les blessures et les outrages de la discrimination. Ce noble engagement a-t-il été respecté? 2

I. Les faits

A. *L'historique de l'IRPA*

L'*IRPA* interdit la discrimination dans un certain nombre de domaines de la vie publique et elle prévoit la création de la Human Rights Commission pour l'examen des plaintes relatives à la discrimination. Dans sa version initiale (S.A. 1972, ch. 2), elle interdisait la discrimination dans les avis publics (art. 2), l'hébergement, les services et les équipements offerts au public (art. 3), la location (art. 4), les pratiques d'embauchage (art. 6), la publicité en matière d'emploi (art. 7) et l'activité syndicale (art. 9), sur le fondement de la race, des croyances religieuses, de la couleur, du sexe, de 3

grounds, in a series of amendments (S.A. 1980, c. 27; S.A. 1985, c. 33; S.A. 1990, c. 23; S.A. 1996, c. 25). These additions were apparently, at least in part, made in response to the enactment of the *Charter* and its judicial interpretation. In the most recent amendments the name of the Act was changed to the *Human Rights, Citizenship and Multiculturalism Act*. In 1990, the Act included the following list of prohibited grounds of discrimination: race, religious beliefs, colour, gender, physical disability, mental disability, age, ancestry and place of origin. At the present time it also includes marital status, source of income and family status.

l'état matrimonial (art. 6 et 9), de l'âge (sauf les art. 3 et 4), de l'ascendance ou du lieu d'origine. Depuis, une série de modifications (S.A. 1980, ch. 27; S.A. 1985, ch. 33; S.A. 1990, ch. 23; S.A. 1996, ch. 25) a eu pour effet d'ajouter d'autres motifs à ceux déjà prévus. Ces ajouts faisaient apparemment suite, du moins en partie, à l'adoption de la *Charte* et à la jurisprudence s'y rapportant. Lors des plus récentes modifications, le titre de la Loi est devenu *Human Rights, Citizenship and Multiculturalism Act*. En 1990, la Loi énumérait les motifs de distinction illicites suivants: la race, les croyances religieuses, la couleur, le sexe, la déficience physique ou mentale, l'âge, l'ascendance et le lieu d'origine. Depuis, l'état matrimonial, la source de revenu et la situation familiale ont été ajoutés.

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

Malgré des demandes répétées en ce sens, l'orientation sexuelle n'a jamais figuré au nombre des motifs de distinction illicites. En 1984, et à nouveau en 1992, l'Alberta Human Rights Commission a recommandé de modifier l'*IRPA* pour y ajouter l'orientation sexuelle comme motif de distinction illicite. En vue d'obtenir une telle modification, l'opposition a présenté plusieurs projets de loi; cependant, aucun n'a franchi une étape ultérieure à la première lecture. Même si au moins un ministre responsable de l'administration de l'*IRPA* a appuyé la modification, la correspondance avec un certain nombre de membres du Cabinet et de députés établit clairement que l'omission de l'orientation sexuelle était délibérée, et non le résultat d'un oubli. Les raisons invoquées pour ne pas donner suite à la recommandation comprennent les suivantes: l'orientation sexuelle est un motif «marginal», la législation sur les droits de la personne ne peut modifier les mentalités et seulement un petit nombre de cas de discrimination dans l'emploi fondée sur l'orientation sexuelle ont été portés à l'attention du ministre.

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

En 1992, la Human Rights Commission a décidé de faire enquête sur les plaintes de discrimination fondée sur l'orientation sexuelle. Le gouvernement s'y est immédiatement opposé, et le ministre a interdit à la commission de mettre son projet à exécution.

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

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

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

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

En 1993, le gouvernement a confié à l'Alberta Human Rights Review Panel le mandat de procéder à un examen public de l'*IRPA* et de la Human Rights Commission. Après un examen approfondi, le comité a présenté son rapport intitulé *Equal in Dignity and Rights: A Review of Human Rights in Alberta* (1994) (le «rapport sur la dignité»). Celui-ci renfermait un certain nombre de recommandations, l'une d'entre elles étant l'inclusion dans la Loi de l'orientation sexuelle comme motif de distinction illicite. Dans sa réponse au rapport sur la dignité (*Our Commitment to Human Rights: The Government's Response to the Recommendations of the Alberta Human Rights Review Panel* (1995)), le gouvernement a indiqué que le sort de la recommandation relative à l'orientation sexuelle dépendait de l'issue de la présente affaire. 6

B. *Le congédiement de M. Vriend du King's College et la plainte à l'Alberta Human Rights Commission*

En décembre 1987, l'appelant Delwin Vriend a été engagé comme coordonnateur de laboratoire au King's College d'Edmonton (Alberta). En 1988, il a obtenu un poste permanent à temps plein. Pendant toute la durée de son emploi, son travail a été évalué favorablement, et son rendement lui a valu des augmentations de salaire et de l'avancement. Le 20 février 1990, en réponse à une demande formulée par le président de l'établissement, M. Vriend a révélé qu'il était homosexuel. Au début de janvier 1991, le conseil des gouverneurs du King's College a adopté un énoncé de principe sur l'homosexualité et, peu après, le président de l'établissement a demandé à M. Vriend de démissionner. Ce dernier refusant de le faire, il a été congédié le 28 janvier 1991. Le seul motif donné pour justifier le congédiement était le non-respect de la politique du King's College en matière d'homosexualité. Monsieur Vriend en a appelé du congédiement et a demandé sa réintégration, ce qui lui a été refusé. 7

Le 11 juin 1991, M. Vriend a tenté de saisir l'Alberta Human Rights Commission d'une plainte dans laquelle il soutenait que son employeur avait fait preuve de discrimination à son égard en raison de son orientation sexuelle. Le 10 juillet suivant, la 8

Vriend that he could not make a complaint under the *IRPA*, because the Act did not include sexual orientation as a protected ground.

commission a informé M. Vriend qu'il ne pouvait formuler une plainte en application de l'*IRPA*, l'orientation sexuelle ne figurant pas au nombre des motifs de distinction illicites.

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

Monsieur Vriend, la Gay and Lesbian Awareness Society of Edmonton (GALA), le Gay and Lesbian Community Centre of Edmonton Society et Dignity Canada Dignité for Gay Catholics and Supporters (collectivement appelés les «appelants») ont demandé à la Cour du Banc de la Reine de l'Alberta, par voie d'avis de requête introductive d'instance, de rendre un jugement déclaratoire. Les appelants contestaient la constitutionnalité des par. 2(1), 7(1) et 8(1) ainsi que des art. 3 et 4 de l'*IRPA*, pour le motif que ceux-ci étaient contraires au par. 15(1) de la *Charte* en raison de l'omission de l'orientation sexuelle comme motif de distinction illicite. La qualité pour agir des appelants n'a pas été contestée. Le juge de première instance a conclu que l'omission de protéger les citoyens contre la discrimination fondée sur l'orientation sexuelle constituait une violation injustifiée de l'art. 15 de la *Charte*. Elle a ordonné que l'«orientation sexuelle» soit tenue pour un motif de distinction illicite pour l'application des art. 3, 4 et 10 ainsi que des par. 2(1), 7(1) et 8(1) de l'*IRPA*. L'appel du gouvernement a été accueilli par la majorité des juges de la Cour d'appel de l'Alberta. Les appelants ont obtenu l'autorisation d'en appeler devant notre Cour, et les intimés ont été autorisés à interjeter un pourvoi incident. Une ordonnance du juge en chef énonçant les questions constitutionnelles soulevées en l'espèce a été rendue le 10 février 1997.

II. Relevant Statutory Provisions

II. Les dispositions législatives pertinentes

10 Since the time the appellant made his claim in 1992, the relevant statute was amended (*Individual's Rights Protection Amendment Act, 1996*, S.A. 1996, c. 25). The Act is now known as the *Human Rights, Citizenship and Multiculturalism Act*. In these reasons, however, we refer to the statute, as amended, as the *Individual's Rights Protection Act* or *IRPA*, since that is how the legislation was most often referred to by the parties on this appeal. For the sake of convenience, the provisions are set out

La loi applicable a été modifiée (*Individual's Rights Protection Amendment Act, 1996*, S.A. 1996, ch. 25) depuis que l'appelant a présenté sa demande en 1992. Aujourd'hui le titre de la loi est *Human Rights, Citizenship and Multiculturalism Act*. Dans les présents motifs, toutefois, nous employons le titre *Individual's Rights Protection Act* ou l'abréviation *IRPA* pour la désigner puisque c'est le plus souvent ainsi que les parties y ont fait référence dans le présent pourvoi. Par souci de

below first as they existed at the time the action commenced, and then as they currently stand.

commodité, nous reproduisons les dispositions applicables d'abord dans la version qui était en vigueur à l'époque où l'action a été intentée, puis dans la version actuelle.

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

Individual's Rights Protection Act, R.S.A. 1980, ch. I-2, mod. S.A. 1985, ch. 33, S.A. 1990, ch. 23

Preamble

[TRADUCTION] Préambule

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

ATTENDU QUE la reconnaissance de la dignité inhérente et des droits égaux et inaliénables de chacun constitue le fondement de la liberté, de la justice et de la paix dans le monde;

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

ATTENDU QUE l'Alberta reconnaît qu'il est fondamental et dans l'intérêt public que chacun jouisse de la même dignité et des mêmes droits sans égard à la race, aux croyances religieuses, à la couleur, au sexe, à la déficience physique ou mentale, à l'âge, à l'ascendance ou au lieu d'origine;

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 . . . .

ATTENDU QU'il est opportun que ce principe soit consacré par la législature de l'Alberta au moyen d'un texte législatif garantissant ces droits de la personne . . .

2(1) No person shall publish or display before the public or cause to be published or displayed before the public any notice, sign, symbol, emblem or other representation indicating discrimination or an intention to discriminate against any person or class of persons for any purpose because of the race, religious beliefs, colour, gender, physical disability, mental disability, age, ancestry or place of origin of that person or class of persons.

2(1) Nul ne doit publier, faire publier, exposer ni faire exposer un avis, un panneau, un symbole, un emblème ou une autre représentation marquant une discrimination ou l'intention d'exercer une discrimination à l'égard d'une personne ou d'une catégorie de personnes, à quelque fin que ce soit, sur le fondement de la race, des croyances religieuses, de la couleur, du sexe, de la déficience physique ou mentale, de l'âge, de l'ascendance ou du lieu d'origine de cette personne ou de cette catégorie de personnes.

3 No person, directly or indirectly, alone or with another, by himself or by the interposition of another, shall

3 Nul ne doit, directement ou indirectement, seul ou avec un tiers, personnellement ou par l'entremise d'un tiers, sur le fondement de la race, des croyances religieuses, de la couleur, du sexe, de la déficience physique ou mentale, de l'ascendance ou du lieu d'origine d'une personne ou d'une catégorie de personnes:

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

a) soit refuser à une personne ou à une catégorie de personnes l'hébergement, les services ou les équipements habituellement offerts au public;

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

b) soit exercer une discrimination à l'égard d'une personne ou d'une catégorie de personnes relativement à l'hébergement, aux services ou aux équipements habituellement offerts au public.

because of the race, religious beliefs, colour, gender, physical disability, mental disability, ancestry or place

of origin of that person or class of persons or of any other person or class of persons.

4 No person, directly or indirectly, alone or with another, by himself or by the interposition of another, shall

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

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

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

4 Nul ne doit, directement ou indirectement, seul ou avec un tiers, personnellement ou par l'entremise d'un tiers, sur le fondement de la race, des croyances religieuses, de la couleur, du sexe, de la déficience physique ou mentale, de l'ascendance ou du lieu d'origine d'une personne ou d'une catégorie de personnes:

a) soit refuser de louer à une personne ou à une catégorie de personnes un local commercial ou un logement individuel annoncé ou par ailleurs offert en location;

b) soit exercer une discrimination à l'égard d'une personne ou d'une catégorie de personnes relativement aux conditions de location d'un local commercial ou d'un logement individuel.

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

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

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

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

7(1) Nul employeur ni quiconque agissant pour son compte ne doit, sur le fondement de la race, des croyances religieuses, de la couleur, du sexe, de la déficience physique ou mentale, de l'état matrimonial, de l'âge, de l'ascendance ou du lieu d'origine:

a) soit refuser d'employer une personne ou refuser de continuer de l'employer;

b) soit exercer une discrimination à l'égard d'une personne en matière d'emploi ou de conditions d'emploi.

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

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

(2) En ce qui concerne l'âge et l'état matrimonial, le paragraphe (1) est sans effet sur l'application de tout régime de retraite légitime ou des modalités de tout régime d'assurance collective ou d'employés légitime.

(3) Le paragraphe (1) ne s'applique pas aux restrictions, aux conditions, aux préférences ni aux refus fondés sur une exigence professionnelle justifiée.

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

8(1) Nul ne doit utiliser ou mettre en circulation une formule de demande d'emploi, publier une annonce relative à un poste, existant ou éventuel, ni adresser par écrit ou de vive voix à un candidat une demande de renseignements qui:

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

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

a) comporte, directement ou indirectement, une restriction, une condition ou une préférence marquant une discrimination fondée sur la race, les croyances religieuses, la couleur, le sexe, la déficience physique ou mentale, l'état matrimonial, l'âge, l'ascendance ou le lieu d'origine de qui que ce soit;

b) oblige le candidat à fournir de l'information relative à la race, aux croyances religieuses, à la couleur, au sexe, à la déficience physique ou mentale, à l'état matrimonial, à l'âge, à l'ascendance ou au lieu d'origine.

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

(2) Le paragraphe (1) ne s'applique pas aux restrictions, aux conditions, aux préférences ni aux refus fondés sur une exigence professionnelle justifiée.

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

10 Nul syndicat, organisme professionnel et nulle association patronale, ne doit, sur le fondement de la race, des croyances religieuses, de la couleur, du sexe, de la déficience physique ou mentale, de l'état matrimonial, de l'âge, de l'ascendance ou du lieu d'origine d'une personne ou d'un adhérent:

(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.

a) exclure une personne de ses rangs;

b) expulser ou suspendre un adhérent;

c) exercer une discrimination à l'égard d'une personne ou d'un adhérent.

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

11.1 La personne à qui l'on reproche d'avoir enfreint la Loi est réputée ne pas y avoir contrevenu si elle établit que les actes reprochés étaient raisonnables et justifiables dans les circonstances.

16(1) It is the function of the Commission

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

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

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

16(1) La commission a les attributions suivantes:

a) promouvoir le principe selon lequel chacun jouit de la même dignité et des mêmes droits sans égard à la race, aux croyances religieuses, à la couleur, au sexe, à la déficience physique ou mentale, à l'âge, à l'ascendance ou au lieu d'origine;

b) favoriser la compréhension, l'acceptation et le respect de la présente Loi;

c) faire de la recherche, ainsi que concevoir et mettre en œuvre des programmes d'éducation en vue de la suppression des pratiques discriminatoires fondées sur la race, les croyances religieuses, la couleur, le sexe, la déficience physique ou mentale, l'âge, l'ascendance ou le lieu d'origine;

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

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

Preamble

WHEREAS recognition of the inherent dignity and the equal and inalienable rights of all persons is the foundation of freedom, justice and peace in the world;

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

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

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

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

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

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

d) encourager et coordonner la mise en œuvre de programmes et d'activités publics et privés en matière de droits de la personne;

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

[TRADUCTION] Préambule

ATTENDU QUE la reconnaissance de la dignité inhérente et des droits égaux et inaliénables de chacun constitue le fondement de la liberté, de la justice et de la paix dans le monde;

ATTENDU QUE l'Alberta reconnaît qu'il est fondamental et dans l'intérêt public que tous soient égaux en ce qui concerne la dignité, les droits et les obligations, sans égard à la race, aux croyances religieuses, à la couleur, au sexe, à la déficience physique ou mentale, à l'âge, à l'ascendance, au lieu d'origine, à l'état matrimonial, à la source de revenu ou à la situation familiale;

ATTENDU QUE le multiculturalisme reflète la diversité raciale et culturelle de la société albertaine et que son importance est reconnue en Alberta à titre de principe fondamental et de question d'intérêt public;

ATTENDU QUE l'Alberta reconnaît qu'il est fondamental et dans l'intérêt public que tous les Albertains soient sensibilisés à la diversité raciale et culturelle de la société et la valorisent, et que la vie en Alberta est enrichie par l'ouverture à cette diversité;

ATTENDU QU'il est opportun que ces principes soient consacrés par la législature de l'Alberta au moyen d'un texte législatif protégeant ces droits à l'égalité et cette diversité . . .

2(1) Nul ne doit publier, exposer ou émettre en public, ni faire publier, exposer ou émettre en public une déclaration, une publication, un avis, un panneau, un symbole, un emblème ou une autre représentation qui

a) soit dénote une discrimination ou l'intention de faire une discrimination à l'égard d'une personne ou d'une catégorie de personnes sur le fondement de la race, des croyances religieuses, de la couleur, du sexe, de la déficience physique ou mentale, de l'âge, de l'ascendance, du lieu d'origine, de l'état matrimonial, de la source de revenu ou de la situation familiale de cette personne ou de cette catégorie de personnes;

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

b) soit est susceptible d'exposer une personne ou une catégorie de personnes à la haine ou au mépris sur le fondement de la race, des croyances religieuses, de la couleur, du sexe, de la déficience physique ou mentale, de l'âge, de l'ascendance, du lieu d'origine, de l'état matrimonial, de la source de revenu ou de la situation familiale de cette personne ou de cette catégorie de personnes.

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

3 No person shall

3 Nul ne doit, sur le fondement de la race, des croyances religieuses, de la couleur, du sexe, de la déficience physique ou mentale, de l'ascendance, du lieu d'origine, de l'état matrimonial, de la source de revenu ou de la situation familiale d'une personne ou d'une catégorie de personnes:

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

a) soit refuser à cette personne ou à cette catégorie de personnes des biens, des services, l'hébergement ou l'accès à des équipements habituellement offerts au public;

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

b) soit exercer une discrimination à l'égard de cette personne ou de cette catégorie de personnes relativement à des biens, des services, l'hébergement ou des équipements habituellement offerts au public.

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

4 No person shall

4 Nul ne doit, sur le fondement de la race, des croyances religieuses, de la couleur, du sexe, de la déficience physique ou mentale, de l'ascendance, du lieu d'origine, de l'état matrimonial, de la source de revenu ou de la situation familiale d'une personne ou d'une catégorie de personnes:

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

a) soit refuser de louer à une personne ou à une catégorie de personnes un local commercial ou un logement individuel annoncé ou par ailleurs offert en location;

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

b) soit exercer une discrimination à l'égard d'une personne ou d'une catégorie de personnes relativement aux conditions de location d'un local commercial ou d'un logement individuel.

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

7(1) No employer shall

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

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

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

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

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

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

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

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

7(1) Nul employeur ne doit sur le fondement de la race, des croyances religieuses, de la couleur, du sexe, de la déficience physique ou mentale, de l'état matrimonial, de l'âge, de l'ascendance, du lieu d'origine, de la situation familiale ou de la source de revenu d'une personne ni de quiconque:

a) soit refuser d'employer ou refuser de continuer d'employer cette personne;

b) soit exercer une discrimination à l'égard de cette personne en matière d'emploi ou de conditions d'emploi.

(2) En ce qui concerne l'âge et l'état matrimonial, le paragraphe (1) est sans effet sur l'application de tout régime de retraite légitime ou des modalités de tout régime d'assurance collective ou d'employés légitime.

(3) Le paragraphe (1) ne s'applique pas aux restrictions, aux conditions, aux préférences ni aux refus fondés sur une exigence professionnelle justifiée.

8(1) Nul ne doit utiliser ou mettre en circulation une formule de demande d'emploi, publier une annonce relative à un poste, existant ou éventuel, ni adresser par écrit ou de vive voix à un candidat une demande de renseignements qui:

a) soit comporte, directement ou indirectement, une restriction, une condition ou une préférence exprimant une discrimination fondée sur la race, les croyances religieuses, la couleur, le sexe, la déficience physique ou mentale, l'état matrimonial, l'âge, l'ascendance, le lieu d'origine, la situation familiale ou la source de revenu de qui que ce soit;

b) soit oblige le candidat à fournir de l'information relative à la race, aux croyances religieuses, à la couleur, au sexe, à la déficience physique ou mentale, à l'état matrimonial, à l'âge, à l'ascendance, au lieu d'origine, à la situation familiale ou à la source de revenu.

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

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

(a) exclude any person from membership in it,

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

(c) discriminate against any person or member,

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

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

16(1) It is the function of the Commission

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

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

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

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

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

(2) Le paragraphe (1) ne s'applique pas aux restrictions, aux conditions, aux préférences ni aux refus fondés sur une exigence professionnelle justifiée.

10 Nul syndicat, organisme professionnel et nulle association patronale, ne doit, sur le fondement de la race, des croyances religieuses, de la couleur, du sexe, de la déficience physique ou mentale, de l'état matrimonial, de l'âge, de l'ascendance, du lieu d'origine, de la situation familiale ou de la source de revenu d'une personne ou d'un adhérent:

a) exclure une personne de ses rangs;

b) expulser ou suspendre un adhérent;

c) exercer une discrimination à l'égard d'une personne ou d'un adhérent.

11.1 La personne à qui l'on reproche d'avoir enfreint la Loi est réputée ne pas y avoir contrevenu si elle établit que les actes reprochés étaient raisonnables et justifiables dans les circonstances.

16(1) La commission a les attributions suivantes:

a) promouvoir le principe selon lequel tous sont égaux en ce qui concerne la dignité, les droits et les obligations, sans égard à la race, aux croyances religieuses, à la couleur, au sexe, à la déficience physique ou mentale, à l'âge, à l'ascendance, au lieu d'origine, à l'état matrimonial, à la source de revenu ou à la situation familiale;

b) promouvoir la sensibilisation au patrimoine multiculturel de la société albertaine, sa valorisation et son respect;

c) promouvoir un milieu où tous les Albertains peuvent participer et contribuer à la vie culturelle, sociale, économique et politique de l'Alberta;

d) inciter tous les secteurs de la société albertaine à offrir l'égalité des chances;

e) faire de la recherche, ainsi que concevoir et mettre en œuvre des programmes d'éducation en vue de la suppression des pratiques discriminatoires fondées sur la race, les croyances religieuses, la couleur, le sexe, la déficience physique ou mentale, l'âge, l'ascendance, le lieu d'origine, l'état matrimonial, la source de revenu ou la situation familiale;

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

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

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

Canadian Charter of Rights and Freedoms

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

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

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

32. (1) This Charter applies

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

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

Constitution Act, 1982

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

III. Decisions Below

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

f) promouvoir la compréhension, l'acceptation et le respect de la présente loi;

g) encourager et coordonner la mise en œuvre de programmes et d'activités publics et privés en matière de droits de la personne;

h) conseiller le ministre sur les questions se rapportant à la présente loi.

Charte canadienne des droits et libertés

1. La *Charte canadienne des droits et libertés* garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.

15. (1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.

24. (1) Toute personne, victime de violation ou de négation des droits ou libertés qui lui sont garantis par la présente charte, peut s'adresser à un tribunal compétent pour obtenir la réparation que le tribunal estime convenable et juste eu égard aux circonstances.

32. (1) La présente charte s'applique:

a) au Parlement et au gouvernement du Canada, pour tous les domaines relevant du Parlement, y compris ceux qui concernent le territoire du Yukon et les territoires du Nord-Ouest;

b) à la législature et au gouvernement de chaque province, pour tous les domaines relevant de cette législature.

Loi constitutionnelle de 1982

52. (1) La Constitution du Canada est la loi suprême du Canada; elle rend inopérantes les dispositions incompatibles de toute autre règle de droit.

III. Les décisions des tribunaux d'instance inférieure

A. *Cour du Banc de la Reine de l'Alberta* (1994), 152 A.R. 1

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

Les appelants ont demandé au juge Russell, maintenant juge à la Cour d'appel, de rendre un jugement déclaratoire portant 1) que les art. 3 et 4 ainsi que les par. 2(1) et 7(1) de l'*IRPA* sont incompatibles avec le par. 15(1) de la *Charte* et violent leurs droits en raison de l'omission de l'orientation sexuelle comme motif de distinction illicite, 2) que M. Vriend a le droit de formuler, en application de l'*IRPA*, une plainte pour discrimination fondée sur l'orientation sexuelle et 3) que les homosexuels ont droit à la protection de l'*IRPA*. 11

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

Tout d'abord, le juge Russell a conclu que les appelants avaient qualité pour contester la validité de l'art. 10 de même que celle des autres dispositions. 12

Russell J. was satisfied that the discrimination homosexuals suffer "is so notorious that [she could] take judicial notice of it without evidence" (p. 6). She went on to consider whether homosexuals are a discrete and insular minority entitled to protection under s. 15(1) of the *Charter*, and concluded that sexual orientation is properly considered an analogous ground under s. 15(1). This issue has since been resolved by the decision in *Egan v. Canada*, [1995] 2 S.C.R. 513, which held that sexual orientation is an analogous ground.

Elle s'est dite convaincue que la discrimination exercée contre les homosexuels [TRADUCTION] «est si notoire qu'il y aurait lieu, pour le tribunal, d'en prendre connaissance d'office, à l'exclusion de tout élément de preuve» (p. 6). Elle a examiné ensuite la question de savoir si les homosexuels constituaient une minorité distincte et isolée ayant droit à la protection prévue au par. 15(1) de la *Charte* et elle a conclu que l'orientation sexuelle est à juste titre considérée comme un motif analogue à ceux énumérés au par. 15(1). Cette question a été depuis lors tranchée dans l'arrêt *Egan c. Canada*, [1995] 2 R.C.S. 513, où notre Cour a statué que l'orientation sexuelle constitue un motif analogue. 13

Next, Russell J. considered whether the omission of sexual orientation under the *IRPA* constitutes discrimination under s. 15 of the *Charter*. She noted that it has been established that a discriminatory distinction in a law can arise from either a commission or an omission. The Ontario Court of Appeal in *Haig v. Canada* (1992), 9 O.R. (3d) 495, found that, considering the larger social, political and legal context, the omission of sexual orientation in the *Canadian Human Rights Act* constituted discrimination offending s. 15(1) of the *Charter*. Russell J. agreed with this conclusion. She took note of the *obiter* comments of L'Heureux-Dubé J. in *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, at p. 436, that the provinces could prohibit discrimination on some

Le juge Russell s'est ensuite demandé si l'omission dans l'*IRPA* de l'orientation sexuelle comme motif de distinction illicite constituait une discrimination en application de l'art. 15 de la *Charte*. Elle a rappelé qu'une distinction discriminatoire établie par la loi pouvait résulter soit d'une action, soit d'une omission. Dans l'arrêt *Haig c. Canada* (1992), 9 O.R. (3d) 495, la Cour d'appel de l'Ontario, tenant compte du contexte social, politique et juridique plus général, a conclu que l'omission de l'orientation sexuelle comme motif de distinction illicite dans la *Loi canadienne sur les droits de la personne* constituait une discrimination contraire au par. 15(1) de la *Charte*. Le juge Russell a souscrit à cette conclusion. Elle a pris note des remarques incidentes du juge L'Heureux-Dubé 14

grounds but not others without violating the *Charter*. However, in her opinion sexual orientation was related to sex or gender as a prohibited ground and "[w]hile there is no obligation on the Province to legislate to prohibit sexual discrimination, when it does so it must provide even-handed protection in a nondiscriminatory manner, or justify the exclusion" (p. 13).

dans l'arrêt *McKinney c. Université de Guelph*, [1990] 3 R.C.S. 229, à la p. 436, selon lesquelles les provinces pouvaient interdire la discrimination fondée sur certains motifs et non sur d'autres, sans violer pour autant la *Charte*. Toutefois, selon elle, l'orientation sexuelle est liée au sexe comme motif de distinction illicite et, [TRADUCTION] «[b]ien qu'elle n'ait pas l'obligation de légiférer pour interdire la discrimination sexuelle, lorsqu'elle le fait, la province doit garantir une protection égale de manière non discriminatoire, ou justifier l'exclusion» (p. 13).

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

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

Le juge Russell a fait remarquer par ailleurs qu'il n'était pas nécessaire de conclure à l'existence d'une intention d'exercer une discrimination odieuse pour qu'il y ait discrimination et elle a ajouté (aux pp. 13 et 14):

> [TRADUCTION] Peu importe qu'il y ait eu ou non intention d'exercer une discrimination, la décision du législateur de ne pas reconnaître les homosexuels dans la Loi a pour effet de renforcer les stéréotypes et préjugés négatifs et, par conséquent, de les perpétuer et de les tolérer tacitement. Il ressort des faits de cette affaire que la loi a eu un effet particulier sur l'appelant, M. Vriend. Lorsqu'il a été congédié sur la base de ses caractéristiques personnelles, il s'est vu privé du recours légal conféré aux membres d'autres groupes qui sont défavorisés de façon similaire. Il s'agit d'une discrimination portant atteinte au par. 15(1) de la *Charte*.

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

En ce qui concerne la justification sous le régime de l'article premier, le juge Russell a conclu que le ministère public n'avait pas satisfait aux exigences de cette disposition, n'ayant présenté aucun élément susceptible de justifier la violation. Même si le ministère public n'avait pas été tenu d'établir la justification, elle aurait conclu que la violation n'était pas justifiable. Elle est arrivée à la conclusion que la limitation était incompatible avec l'objectif et les principes énoncés dans le préambule de l'*IRPA*, de sorte qu'aucun objectif législatif se rapportant à une préoccupation urgente et réelle ne la justifiait. Elle a conclu en outre que la négation des recours prévus par l'*IRPA* n'avait aucun lien rationnel avec l'objectif de protéger les droits individuels et que, l'omission étant totale, il ne s'agissait pas d'une atteinte minimale.

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

Le juge Russell a examiné les mesures correctives possibles en vertu de l'art. 52 de la *Loi constitutionnelle de 1982* qui ont été énoncées dans l'arrêt *Schachter c. Canada*, [1992] 2 R.C.S. 679, et elle a conclu que les seules solutions qui s'offraient en l'espèce étaient soit l'annulation des dispositions de la Loi, avec ou sans suspension de la déclaration d'invalidité, soit l'interprétation large. Elle a statué que, tout comme dans l'affaire *Haig*, l'interprétation large était la réparation la plus appropriée en l'espèce. L'omission était définie de manière précise et pouvait facilement être corrigée au moyen de l'interprétation large. Au surplus, cette dernière solution était préférable parce qu'elle préservait l'objectif de la Loi, empiétait moins que l'invalidation et n'avait pas de répercussions financières aussi importantes qu'une modification substantielle du texte législatif. Le juge Russell a donc ordonné que les dispositions pertinentes de la Loi soient [TRADUCTION] «interprétées et appliquées comme si les mots "orientation sexuelle" y figuraient» (p. 19). 17

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

1. McClung J.A.

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

B. *Cour d'appel de l'Alberta* (1996), 181 A.R. 16

1. Le juge McClung

Le juge McClung a conclu que la première question à trancher était de savoir si l'*IRPA* [TRADUCTION] «dans sa version actuelle, était visée» par la *Charte* (à la p. 22). Il s'est dit d'avis que l'omission de l'«orientation sexuelle» comme motif de distinction illicite n'équivalait pas à une action gouvernementale pour l'application du par. 32(1) de la *Charte*. Selon lui, les dispositions de la *Charte* ne pouvaient obliger la législature à adopter une disposition portant sur une question «controversée» lorsqu'elle avait décidé de ne pas le faire. Il a conclu que la province n'avait pas exercé son pouvoir dans un domaine de façon à être assujettie à l'al. 32(1)*b*) de la *Charte*. 18

McClung J.A. criticized the reasons of Russell J. as proceeding from the proposition that human rights legislation must perfectly "mirror" the *Charter*. He noted the existence of some variation among provinces with respect to the prohibited grounds of discrimination included in rights legislation, and stated that provinces must have latitude

Le juge McClung a critiqué les motifs du juge Russell parce qu'ils s'appuient sur la proposition voulant que les dispositions des lois sur les droits de la personne doivent «refléter» exactement celles de la *Charte*. Il a signalé l'existence de certaines différences entre les provinces pour ce qui concerne les motifs de distinction illicites prévus dans 19

in implementing their powers under s. 92 of the *Constitution Act, 1867*. To require all legislation to be consistent with the *Charter* would be a "debacle for the autonomy of provincial law-making" (p. 24).

20 Even if the omission by the legislature is subject to *Charter* scrutiny under s. 32(1), McClung J.A. found no violation of s. 15(1). In his opinion the *IRPA* neither drew any distinction between homosexuals and heterosexuals nor resulted in the imposition of burdens, limitations or disadvantages or the denial of benefits or opportunities with respect to homosexuals. He found that any inequality that may exist between homosexuals and heterosexuals exists independently of the *IRPA*; the statute is neutral and "neither confers nor denies benefits to, or withdraws protection from, any Canadian" (p. 29).

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

2. O'Leary J.A.

22 O'Leary J.A. agreed with McClung J.A. that the appeal should be allowed but for different reasons. He assumed that the *Charter* applied to the *IRPA*

les lois sur les droits de la personne, et il a dit que les provinces devaient avoir une marge de manœuvre dans l'exercice des pouvoirs que leur confère l'art. 92 de la *Loi constitutionnelle de 1867*. Exiger que toute loi soit compatible avec la *Charte* [TRADUCTION] «sonnerait le glas de l'autonomie législative provinciale» (p. 24).

Même si l'omission du législateur pouvait faire l'objet d'un examen fondé sur la *Charte* en application du par. 32(1), le juge McClung a conclu qu'il n'y avait pas violation du par. 15(1). Selon lui, l'*IRPA* n'établissait pas de distinction entre les homosexuels et les hétérosexuels non plus qu'elle ne créait de fardeaux, de limitations ou d'inconvénients pour les homosexuels ni ne les privait d'avantages ou de possibilités. Il a conclu que toute inégalité pouvant exister entre homosexuels et hétérosexuels existait indépendamment de l'*IRPA* car cette dernière était neutre, et [TRADUCTION] «n'accordait ni ne refusait d'avantage à personne et ne privait aucun Canadien de sa protection» (p. 29).

Bien qu'il ait conclu à l'absence de violation de la *Charte*, le juge McClung s'est demandé quelle aurait été la réparation appropriée s'il y avait eu non-respect de la *Charte*. Il s'est dit en désaccord avec la décision du juge Russell de recourir à l'interprétation large et il a estimé qu'il était préférable de déclarer la Loi inconstitutionnelle et invalide, puis de suspendre la déclaration afin de [TRADUCTION] «permettre au législateur, plutôt qu'aux tribunaux, de corriger la situation» (p. 29). Le juge McClung a laissé entendre que l'interprétation large constituait un empiétement du pouvoir judiciaire sur le domaine législatif qui devait être évité dans la mesure du possible. Par conséquent, il aurait plutôt déclaré la Loi *ultra vires* et aurait suspendu ce jugement pour une période d'un an afin de permettre à la législature de remédier aux lacunes de l'*IRPA*. Cependant, pour les motifs indiqués précédemment, il a accueilli l'appel.

2. Le juge O'Leary

À l'instar du juge McClung, le juge O'Leary a conclu que l'appel devait être accueilli, mais pour des motifs différents. Il a tenu pour acquis que la

and rested his conclusion on a finding that the *IRPA* does not create a distinction based on sexual orientation. In his opinion, therefore, there was no violation of s. 15(1).

Charte s'appliquait à l'*IRPA* et il a fondé sa décision sur le fait que, selon lui, la Loi n'établissait pas une distinction fondée sur l'orientation sexuelle. À son avis, il n'y avait donc aucune violation du par. 15(1).

O'Leary J.A. looked at the "initial hurdle" of the s. 15(1) analysis, which is to show that "there are one or more provisions in the legislation which create, expressly or by 'adverse effect', a distinction between individuals which is contrary to s. 15(1)" (p. 40). This state of affairs is to be distinguished from one in which the social circumstances exist independently of the provision. According to O'Leary J.A. the *IRPA*'s silence with respect to sexual orientation means that the Act makes no distinction between individuals on the basis of sexual orientation.

23 Le juge O'Leary s'est penché sur l'«obstacle initial» de l'analyse fondée sur le par. 15(1) qui consiste à établir qu' [TRADUCTION] «une ou plusieurs dispositions de la loi créent entre des personnes, expressément ou en raison d'un "effet préjudiciable", une distinction qui est contraire au par. 15(1)» (p. 40). Il y a lieu de ne pas confondre avec une situation sociale dont l'existence n'a rien à voir avec l'adoption d'une disposition. Selon le juge O'Leary, en raison du silence de la l'*IRPA* au sujet de l'orientation sexuelle, aucune distinction n'était établie entre des personnes sur le fondement de l'orientation sexuelle.

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

24 Il a conclu que l'*IRPA* ne créait une distinction qu'entre [TRADUCTION] «les motifs de distinction illicites qu'elle prévoyait et les divers motifs qui auraient pu être interdits, mais ne l'étaient pas (dont l'orientation sexuelle)» (p. 42), et qu'il ne pouvait donc s'agir d'une distinction fondée sur l'orientation sexuelle. Par conséquent, le juge O'Leary était d'avis d'accueillir l'appel et d'annuler le jugement déclaratoire rendu par le juge de première instance, pour le motif que l'*IRPA* n'établissait aucune distinction contraire au par. 15(1).

3. Hunt J.A. (dissenting)

3. Le juge Hunt (dissidente)

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

25 Le juge Hunt était en partie d'accord avec la décision du juge Russell, et elle a conclu que les par. 7(1) et 8(1) ainsi que l'art. 10 de l'*IRPA* violaient le par. 15(1) et n'étaient pas sauvegardés par l'article premier. Elle a estimé toutefois que l'interprétation large ne constituait pas la réparation appropriée. En ce qui concerne la violation de l'art. 15, elle est arrivée à la même conclusion que le juge Russell, mais à l'issue d'un raisonnement légèrement différent, en partie en raison des arrêts *Egan*, précité, *Miron c. Trudel*, [1995] 2 R.C.S. 418, et *Thibaudeau c. Canada*, [1995] 2 R.C.S. 627, qui avaient alors été rendus.

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

27 Hunt J.A. disagreed with Russell J.'s characterization of discrimination on the basis of sexual orientation as being "directly associated" with discrimination on the basis of gender and her analogy between this case and the cases of *Re Blainey and Ontario Hockey Association* (1986), 54 O.R. (2d) 513 (C.A.), leave to appeal refused, [1986] 1 S.C.R. xii, and *McKinney*, *supra*, where protection was offered from discrimination on the basis of gender and age but only in a limited way.

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

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

D'entrée de jeu, le juge Hunt a écarté l'argument voulant que le par. 15(1) ne s'applique pas en l'espèce parce qu'il était question d'une activité privée. C'était une loi de la législature et non une activité privée qui était contestée dans la présente affaire et la législation provinciale était clairement assujettie à la *Charte*.

Le juge Hunt n'est pas d'accord avec le juge Russell pour dire que la discrimination fondée sur l'orientation sexuelle est «directement liée» à la discrimination fondée sur le sexe et qu'une analogie devait être faite entre la présente espèce et les arrêts *Re Blainey and Ontario Hockey Association* (1986), 54 O.R. (2d) 513 (C.A.), autorisation de pourvoi refusée, [1986] 1 R.C.S. xii, et *McKinney*, précité, où une protection était offerte contre la discrimination fondée sur le sexe et l'âge, mais seulement de façon limitée.

Elle a examiné ensuite le contexte et l'objet de l'*IRPA*, de même que son incidence sur les personnes auxquelles elle s'applique et sur celles qui sont exclues de son champ d'application. Elle a conclu que la Loi visait à assurer à tous les citoyens de l'Alberta un traitement égal et que le contexte était celui de l'existence d'une discrimination contre un groupe qui avait de tout temps été défavorisé. Le juge Hunt est arrivée à la conclusion suivante (à la p. 58): [TRADUCTION] «compte tenu de ces éléments et du contexte en l'espèce, je suis d'avis que le fait de ne pas accorder la protection de l'*IRPA* aux homosexuels peut être considéré comme une forme d'action gouvernementale qui équivaut à approuver qu'une discrimination continue d'être exercée contre les homosexuels. Ainsi, en l'espèce, le silence de la loi établit une distinction».

Le juge Hunt aurait donc statué que la distinction établie était suffisante pour conclure à la violation potentielle du par. 15(1). Selon elle, il était dès lors [TRADUCTION] «facile de conclure» (p. 59) que cette distinction niait aux homosexuels, en tant que groupe, le droit à la même protection et au même bénéfice de la loi, étant donné qu'ils ne pouvaient pas invoquer la protection de l'*IRPA* ni recourir au mécanisme prévu pour la faire respecter.

The next question was whether this distinction results in discrimination. Hunt J.A. found that according to any of the approaches set out in *Egan*, discrimination could be found in this case. The denial of the equal protection and benefit of the law here is purely on the basis of sexual orientation, not merit or need, and reinforces the stereotype that homosexuals are less deserving of protection and therefore less worthy of value as human beings. Even taking into account the relevance of the distinction to the goals of the legislation, it is "impossible to see how a statute based upon notions of the inherent dignity of all can have as a relevant legislative goal the unequal treatment of some members of society" on the grounds of their membership in a group (at p. 60). This is a case in which the functional values underlying the omission are themselves discriminatory.

30 La question qui se posait ensuite était de savoir si cette distinction engendrait une discrimination. Selon le juge Hunt, l'application de l'une ou l'autre des méthodes énoncées dans l'arrêt *Egan* permettait de conclure à l'existence d'une discrimination en l'espèce. La négation du droit à la même protection et au même bénéfice de la loi était, dans la présente affaire, purement fondée sur l'orientation sexuelle, et non sur les mérites ou les besoins, et elle renforçait le stéréotype voulant que les homosexuels méritent moins d'être protégés et soient moins dignes d'être valorisés en tant qu'êtres humains. Même en analysant la pertinence de la distinction en fonction des objectifs de la loi, il est [TRADUCTION] «impossible de voir comment une loi fondée sur la notion de la dignité inhérente de chacun peut avoir, comme objectif législatif pertinent, le traitement inégal de certains membres de la société» en raison de leur appartenance à un groupe (à la p. 60). Il s'agit en l'espèce d'un cas où les valeurs fonctionnelles qui sous-tendent l'omission sont elles-mêmes discriminatoires.

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

31 Relativement à l'article premier de la *Charte*, le juge Hunt a fait observer que le ministère public n'avait présenté aucune preuve pour justifier l'omission conformément à cette disposition. Elle a conclu que les éléments compris dans le mémoire du ministère public ne permettaient pas de procéder à une analyse fondée sur l'article premier et elle a estimé que le caractère ténu de la preuve du ministère public à cet égard appuyait en soi la conclusion du juge de première instance selon laquelle il n'a pas été établi que les dispositions incriminées sont justifiées conformément à l'article premier. De toute façon, l'omission ne pouvait satisfaire au critère énoncé dans l'arrêt *Oakes* en matière de justification.

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

32 Bien qu'elle ait estimé injustifiable la violation du par. 15(1), le juge Hunt n'était pas d'accord avec la réparation accordée par le juge de première instance. Elle privilégiait plutôt une réparation ne s'appliquant qu'à la situation considérée en l'espèce et aux dispositions les plus directement visées, soit la discrimination liée à l'emploi (art. 7), les avis en matière d'emploi (art. 8) et l'activité syndicale (art. 10), respectivement.

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

Malgré l'existence de certains éléments militant en faveur du recours à l'interprétation large, le juge Hunt s'est demandé si cette technique permettait une précision suffisante et quelle serait l'incidence possible de l'interprétation large sur le par. 7(2) de l'*IRPA*, qui porte sur les régimes de retraite, de pension et d'assurance.

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

Le juge Hunt est donc arrivée à la conclusion qu'il était préférable de déclarer invalides les par. 7(1) et 8(1) ainsi que l'art. 10 de l'*IRPA* dans la mesure où ils sont incompatibles avec la *Charte*. Comme une déclaration d'invalidité d'application immédiate priverait tous les citoyens de protection, contrairement aux objectifs de la *Charte*, elle aurait suspendu l'application de la déclaration d'invalidité pour une période d'un an afin de permettre à la législature d'harmoniser la Loi avec la *Charte*.

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

C. *Motifs supplémentaires de la Cour d'appel de l'Alberta concernant les dépens* (1996), 184 A.R. 351

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

Le juge O'Leary (avec l'appui du juge McClung) a statué que les circonstances de l'espèce ne justifiaient pas une entorse à la règle habituelle consistant à adjuger les dépens à la partie qui a gain de cause. Il a reconnu que la Cour d'appel avait un pouvoir discrétionnaire en la matière et que le caractère d'intérêt public de l'affaire pouvait être invoqué pour ne pas accorder les dépens à la partie qui a gain de cause. Il a fait cependant remarquer que cette avenue avait été écartée dans certaines affaires.

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

Il a donc adjugé au ministère public les dépens de l'appel sur la base des frais entre parties, ce qui inclut tous les débours raisonnables, sauf les frais de déplacement et d'hébergement, ainsi que les honoraires pour la présentation d'observations écrites sur la question des dépens et celle des honoraires d'un deuxième avocat.

37 Hunt J.A. dissented. She noted that the decision of the Court of Appeal had involved a 2-1 split with three separate reasons for judgment, and that an important and novel point of law was at issue. She also noted several cases in which the courts

Le juge Hunt, dissidente, a fait observer que la décision de la Cour d'appel était partagée à deux contre un, que les trois juges avaient rédigé des motifs distincts et qu'une question de droit à la fois importante et nouvelle était en cause. Elle a égale-

have made no costs award, including *Dickason v. University of Alberta*, [1992] 2 S.C.R. 1103, *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, and *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236.

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

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

IV. Issues

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

1. Do (a) decisions not to include sexual orientation or (b) the non-inclusion of sexual orientation, as a prohibited ground of discrimination in the preamble and ss. 2(1), 3, 4, 7(1), 8(1), 10 and 16(1) of the *Individual's Rights Protection Act*, R.S.A. 1980, c. I-2, as am., now called the *Human Rights, Citizenship and Multiculturalism Act*, R.S.A. 1980, c. H-11.7,

ment relevé plusieurs affaires où aucuns dépens n'ont été adjugés, dont *Dickason c. Université de l'Alberta*, [1992] 2 R.C.S. 1103, *B. (R.) c. Children's Aid Society of Metropolitan Toronto*, [1995] 1 R.C.S. 315, et *Conseil canadien des Églises c. Canada (Ministre de l'Emploi et de l'Immigration)*, [1992] 1 R.C.S. 236.

38 Le juge Hunt a convenu que les ressources de l'État ne devaient pas être tenues pour illimitées et que les ressources relatives des parties ne constituaient pas le facteur déterminant. Elle a fait aussi valoir que, contrairement au niveau fédéral, l'Alberta n'était pas dotée d'un programme d'appui financier aux personnes qui saisissent les tribunaux de questions importantes liées à l'application de la *Charte*. Il s'agissait en l'espèce non seulement d'une affaire sans précédent, mais également d'une affaire qui pouvait [TRADUCTION] «véritablement être qualifiée de cause type», c'est-à-dire que l'établissement de la règle elle-même avait plus d'importance que son incidence sur les parties (à la p. 358). Selon le juge Hunt, la question juridique soulevée comportait un [TRADUCTION] «important volet d'intérêt public» (à la p. 358).

39 Étant donné tous ces facteurs, le juge Hunt a conclu qu'il conviendrait de condamner les intimés (les appelants en cour d'appel) aux dépens, même s'ils avaient eu gain de cause en appel. Cependant, les appelants (intimés en cour d'appel) en l'espèce n'ayant demandé qu'une ordonnance sans frais, telle est l'ordonnance qu'elle aurait rendue.

IV. Les questions en litige

40 Les questions constitutionnelles énoncées par notre Cour sont les suivantes:

1. Est-ce que a) soit la décision de ne pas inclure l'orientation sexuelle, b) soit la non-inclusion de l'orientation sexuelle, en tant que motif de discrimination illicite dans le préambule et dans les art. 2(1), 3, 4, 7(1), 8(1), 10 et 16(1) de l'*Individual's Rights Protection Act*, R.S.A. 1980, ch. I-2, et ses modifications, intitulée maintenant *Human Rights, Citizenship and Multiculturalism Act*, R.S.A. 1980, ch. H-11.7, a pour effet de nier les droits garantis par

infringe or deny the rights guaranteed by s. 15(1) of the *Canadian Charter of Rights and Freedoms*?

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

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

V. Analysis

A. *Standing*

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

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

le par. 15(1) de la *Charte canadienne des droits et libertés*, ou d'y porter atteinte?

2. Si la réponse à la question 1 est «oui», est-ce que la négation ou l'atteinte peut être justifiée en tant que limite raisonnable au sens de l'article premier de la *Charte canadienne des droits et libertés*?

Les parties ont également soulevé certaines questions relativement à la qualité pour agir, à l'application de la *Charte* et à la réparation appropriée.

V. L'analyse

A. *La qualité pour agir*

Les appelants contestent la validité du préambule ainsi que celle des art. 3, 4 et 10 ainsi que des par. 2(1), 7(1), 8(1) et 16(1) de l'*IRPA*. Les intimés dans le cadre du présent pourvoi font valoir que les appelants ne devraient avoir qualité pour agir qu'à l'égard des dispositions de l'*IRPA* qui se rapportent à l'emploi, savoir les par. 7(1) et 8(1) ainsi que l'art. 10, étant donné que les faits de l'affaire concernent la discrimination dans l'emploi. Le procureur général du Canada va même plus loin en soutenant que la seule disposition pertinente en l'espèce est le par. 7(1), qui vise expressément la discrimination dans les pratiques en matière d'emploi.

L'avis de requête introductive d'instance produit par les appelants au greffe de la Cour du Banc de la Reine renvoie aux art. 3 et 4 ainsi qu'aux par. 2(1) et 7(1) de l'*IRPA*. Pendant l'instruction, les appelants ont été autorisés à modifier leur demande afin d'y ajouter l'art. 10 qui avait été omis par inadvertance. Pour rendre cette décision, le juge Russell a appliqué le critère établi dans l'arrêt *Conseil canadien des Églises*, précité, pour déterminer s'il y avait lieu de reconnaître la qualité pour agir dans l'intérêt public, et elle a conclu que les appelants avaient aussi qualité pour contester l'art. 10. La formulation de cette conclusion donne à penser que les appelants avaient également qualité pour contester les autres dispositions de la Loi mentionnées dans l'avis de requête introductive d'instance. Aucun motif ne justifie une remise en question de cette évaluation.

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

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

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

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

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

Dans l'arrêt *Conseil canadien des Églises* (à la p. 253), notre Cour a dit que trois aspects devaient être considérés: 44

> Premièrement, la question de l'invalidité de la loi en question se pose-t-elle sérieusement? Deuxièmement, a-t-on démontré que le demandeur est directement touché par la loi ou qu'il a un intérêt véritable quant à sa validité? Troisièmement, y a-t-il une autre manière raisonnable et efficace de soumettre la question à la cour?

Je suis d'avis que ces critères sont respectés pour chacune des dispositions énumérées par les appelants (le préambule, les art. 3, 4 et 10, ainsi que les par. 2(1), 7(1), 8(1) et 16(1)).

Une question sérieuse est soulevée quant à la validité constitutionnelle de chacune de ces dispositions. La question se pose substantiellement de la même façon pour toutes les dispositions où l'orientation sexuelle est exclue des motifs de distinction illicites. La validité constitutionnelle du par. 7(1) ou des par. 7(1) et 8(1), ainsi que de l'art. 10, n'est pas davantage contestable que celle des autres dispositions relatives à la discrimination. Les intimés prétendent qu'aucune question sérieuse n'est soulevée quant à la validité constitutionnelle du préambule et de l'art. 16 (qui énonce les attributions de la Human Rights Commission), car ceux-ci ne confèrent aucune protection ni aucun avantage précis. Certes, ces dispositions ne confèrent pas directement un avantage ou une protection, mais on peut soutenir qu'elles le font de façon indirecte. Une omission dans ces dispositions pourrait bien avoir à tout le moins certains des effets d'une omission dans les autres dispositions, de sorte qu'elle soulève une question sérieuse sur le plan de la validité constitutionnelle. 45

En outre, M. Vriend et les autres appelants ont un intérêt véritable et valable à l'égard de l'ensemble des dispositions qu'ils cherchent à contester. Monsieur Vriend, en tant que particulier, et les organisations appelantes ont un intérêt direct à l'égard de l'exclusion de l'orientation sexuelle de l'ensemble des formes de discrimination. La question en litige en l'occurrence est l'exclusion de l'orientation sexuelle comme motif ouvrant droit à la protection de la Loi et aux recours que celle-ci prévoit pour la protection des droits de la per- 46

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

sonne. Il ne s'agit pas d'un cas de discrimination dans l'emploi par opposition aux autres formes de discrimination exercées dans le secteur privé et visées par les dispositions législatives provinciales sur les droits de la personne. Dans la mesure où la situation particulière de l'appelant M. Vriend et les faits de l'espèce sont pertinents pour établir quelles sont les questions soulevées par le pourvoi, c'est le non-accès à la procédure relative aux plaintes présentées à l'Alberta Human Rights Commission qui est l'élément essentiel de la présente affaire, et non le congédiement de l'appelant par le King's College. Il appartient à la Human Rights Commission d'examiner les questions relatives au congédiement, lesquelles sont étrangères au présent pourvoi. Il convient aussi de rappeler que M. Vriend n'est que l'un des quatre appelants. Les trois autres sont des organisations qui s'intéressent généralement aux droits des homosexuels et à leur protection contre la discrimination dans tous les domaines. Rien ne limite leur participation au présent pourvoi aux questions liées à l'emploi.

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

Pour ce qui concerne le troisième critère, la seule autre façon dont notre Cour pourrait être saisie de la question relativement aux autres dispositions serait d'attendre qu'une personne soit victime de discrimination fondée sur son orientation sexuelle en matière d'habitation, de consommation et de services, etc. et qu'elle conteste la validité de la disposition pertinente. Ce serait non seulement peu rentable sur le plan des ressources judiciaires, mais également injuste pour les personnes en cause, parce qu'elles auraient à surmonter les obstacles que sont les délais, les frais et la vulnérabilité personnelle face à la discrimination. Ce résultat ne saurait donner satisfaction.

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

Aussi, il importe de rappeler que toutes les dispositions se ressemblent beaucoup et que leur constitutionnalité ne dépend pas d'un contexte factuel particulier. Le fait que les homosexuels ont été victimes de discrimination dans tous les aspects de leur vie est reconnu dans l'arrêt *Egan*, précité. Il n'est donc vraiment pas nécessaire de produire des éléments de preuve supplémentaires quant aux dispositions relatives à la discrimination dans les autres domaines que l'emploi.

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

En conséquence, les appelants ont qualité pour contester la validité de toutes les dispositions mentionnées dans les questions constitutionnelles, soit le préambule, les art. 3, 4 et 10 ainsi que les par. 2(1), 7(1), 8(1) et 16(1) de l'*IRPA*. 49

B. *Application of the Charter*

B. *L'application de la Charte*

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

1. Application de la *Charte* à l'omission du législateur

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

L'article 32 de la *Charte* soustrait-il l'omission du législateur à l'application de l'art. 15? 50

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

Les intimés (les appelants dans le cadre du pourvoi incident) font valoir que, parce qu'il s'agit en l'espèce d'une omission du législateur, l'art. 15 de la *Charte* ne devrait pas s'appliquer en vertu de l'art. 32. Cette prétention ne saurait être acceptée. 51

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

Cette question est donc tranchée simplement en déterminant si l'objet de la contestation en l'espèce en est un auquel la *Charte* s'applique en vertu de l'art. 32. Les questions relatives à la nature de la décision prise par le législateur, à l'effet de cette décision et à son caractère neutre concernent plutôt l'analyse fondée sur l'art. 15. Le critère préliminaire exige seulement qu'il s'agisse d'un «domaine relevant de [la] législature» lequel est le véritable sujet de l'analyse fondée sur la *Charte*. À ce stade initial, aucune conclusion ne doit être tirée concernant la nature ou la validité de ce «domaine» ou de ce sujet. Il ne faut pas accorder une trop grande importance à l'application du critère préliminaire, car cela pourrait bien soustraire inutilement des domaines importants à une véritable analyse fondée sur la *Charte*. 52

Further confusion results when arguments concerning the respective roles of the legislature and the judiciary are introduced into the s. 32 analysis. These arguments put forward the position that courts must defer to a decision of the legislature not to enact a particular provision, and that the scope of *Charter* review should be restricted so that such decisions will be unchallenged. I cannot accept this position. Apart from the very problematic distinction it draws between legislative action

Une confusion supplémentaire résulte des arguments avancés relativement aux rôles respectifs du législateur et des tribunaux dans le cadre de l'analyse afférente à l'art. 32. Selon ces arguments, les tribunaux doivent respecter la décision du législateur de ne pas adopter une disposition en particulier, et la portée de l'examen fondé sur la *Charte* devrait être limitée de façon qu'une telle décision ne puisse être contestée. Je ne peux accepter cette thèse. Outre la distinction très problématique faite 53

and inaction, this argument seeks to substantially alter the nature of considerations of legislative deference in *Charter* analysis. The deference very properly due to the choices made by the legislature will be taken into account in deciding whether a limit is justified under s. 1 and again in determining the appropriate remedy for a *Charter* breach. My colleague Iacobucci J. deals with these considerations at greater length more fully in his reasons.

entre l'action et l'inaction du législateur, cet argument vise à modifier substantiellement la nature des considérations relatives au respect dû au législateur dans le cadre d'une analyse fondée sur la *Charte*. La retenue exercée à juste titre à l'égard des choix du législateur sera prise en compte d'abord pour décider si une limite est justifiée conformément à l'article premier et à nouveau pour déterminer la réparation qu'il convient d'accorder pour remédier à une violation de la *Charte*. Mon collègue le juge Iacobucci approfondit ces questions dans ses motifs.

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

La notion de retenue judiciaire envers les choix du législateur ne devrait cependant pas servir à soustraire certains types de décisions d'ordre législatif à tout examen fondé sur la *Charte*. Le juge McClung de la Cour d'appel de l'Alberta a critiqué l'application de la *Charte* à l'omission du législateur, qu'il voit comme un empiétement du pouvoir judiciaire sur le pouvoir législatif. Il s'est dit opposé à ce que les juges dictent les lois provinciales sous prétexte d'examen constitutionnel. À son avis, la décision du législateur de ne pas légiférer dans un domaine qui relève de sa compétence, spécialement un domaine controversé, devrait échapper à tout examen judiciaire: [TRADUCTION] «La législature provinciale qui opte pour le silence n'a pas à suivre la ligne tracée par la *Charte*. Sur le plan constitutionnel, elle n'a pas à suivre du tout.[. . .] Les provinces n'ont pas souscrit à la *Charte canadienne des droits et libertés* pour autoriser le gouvernement fédéral à établir des lois en leur lieu et place, mais seulement pour assujettir celles-ci à certaines exigences une fois qu'elles sont promulguées — si toutefois elles le sont» (pp. 25 et 28).

55 There are several answers to this position. The first is that in this case, the constitutional challenge concerns the *IRPA*, legislation that has been proclaimed. The fact that it is the underinclusiveness of the Act which is at issue does not alter the fact that it is the legislative act which is the subject of *Charter* scrutiny in this case. Furthermore, the language of s. 32 does not limit the application of the *Charter* merely to positive actions encroaching on rights or the excessive exercise of authority, as

Plusieurs éléments peuvent être avancés pour réfuter cette proposition. Premièrement, la contestation constitutionnelle vise en l'espèce une loi dûment promulguée. Que la portée trop limitative de l'*IRPA* soit en cause ne change rien au fait qu'en l'occurence, l'examen fondé sur la *Charte* porte sur l'acte législatif. En outre, le libellé de l'art. 32 n'a pas pour effet de limiter l'application de la *Charte* aux actions positives qui empiètent sur des droits ou à l'exercice abusif d'un pouvoir,

McClung J.A. seems to suggest. These issues will be dealt with shortly. Yet at this point it must be observed that McClung J.A.'s reasons also imply a more fundamental challenge to the role of the courts under the *Charter*, which must also be answered. This issue is addressed in the reasons of my colleague Iacobucci J. below, and that discussion need not be repeated here. However, at the present stage of the analysis it may be useful to clarify the role of the judiciary in responding to a legislative omission which is challenged under the *Charter*.

comme le juge McClung semble le laisser entendre. Je reviendrai sur ces questions un peu plus loin. Je tiens à signaler à ce stade-ci que les motifs du juge McClung impliquent également une remise en question plus fondamentale du rôle des tribunaux sous le régime de la *Charte*, à laquelle il faut réagir. Mon collègue le juge Iacobucci se penche sur la question dans ses motifs, et il n'y a pas lieu de reprendre ici l'analyse qu'il en fait. Toutefois, il peut être utile, à ce moment-ci, de clarifier le rôle des tribunaux appelés à se prononcer sur une omission du législateur contestée sur le fondement de la *Charte*.

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

56 On prétend que le présent pourvoi constitue un affrontement entre le pouvoir des législatures démocratiquement élues d'adopter les lois qu'elles jugent appropriées et celui des tribunaux d'invalider ces lois ou de prescrire l'intégration de certains éléments à celles-ci. Il s'agit d'une façon trompeuse et erronée de présenter le litige. Ce ne sont tout simplement pas les tribunaux qui imposent des limites au législateur, mais bien la Constitution, que les tribunaux doivent interpréter. Il en est nécessairement ainsi dans toutes les démocraties constitutionnelles. Les citoyens doivent avoir le droit de contester les lois qui outrepassent à leur avis les pouvoirs d'une législature. Lorsqu'un tel recours est dûment exercé, les tribunaux sont constitutionnellement tenus de trancher. On prétend toutefois que la présente affaire se distingue parce que la contestation porte essentiellement sur le fait que le législateur n'a pas accordé la protection d'une loi à un groupe de personnes en particulier. Les tenants de cette théorie tiennent pour acquis que seule l'action positive, par opposition à l'omission, peut faire l'objet d'un examen fondé sur la *Charte*. Pour les motifs exposés ci-après, j'estime qu'une telle distinction n'a aucun fondement juridique. Dans toute affaire, y compris en l'espèce, les tribunaux ont l'obligation de déterminer si la contestation est justifiée. Contrairement à ce qu'a laissé entendre le juge McClung, il ne s'agit pas pour les tribunaux d'imposer leur vision de la législation «idéale», mais bien de déterminer la constitutionnalité de l'action ou de l'omission du législateur qui est attaquée.

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

La proposition du juge McClung selon laquelle l'intervention des tribunaux est inopportune en l'espèce s'appuie sur le postulat voulant que le «silence» du législateur soit «neutre» en l'occurrence. Or, les questions que soulève la prétendue neutralité ne peuvent être analysées que dans le contexte de l'art.15, à défaut de quoi on ne saurait dire si l'omission est neutre ou non. La neutralité ne peut être présumée, sinon l'omission échapperait à l'examen judiciaire fondé sur la *Charte*. Les appelants ont contesté la loi pour le motif qu'elle viole la Constitution du Canada, et les tribunaux doivent statuer sur leurs allégations. Si, comme le soutiennent les appelants, l'*IRPA* prive certaines personnes des avantages et de la protection qu'elle accorde à d'autres et ce, d'une façon qui va à l'encontre des droits à l'égalité garantis par la *Charte*, les tribunaux n'ont d'autre choix que de rendre un jugement en ce sens. Se soustraire à cette obligation compromettrait la Constitution et la primauté du droit.

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

Examinons maintenant les points essentiels de la thèse des intimés sur la question.

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

Les intimés prétendent que le choix délibéré de ne pas légiférer ne doit pas être assimilé à une action gouvernementale et, par conséquent, ne peut faire l'objet d'un examen fondé sur la *Charte*. Cette thèse ne saurait être retenue. Les intimés font valoir qu'il doit y avoir un certain «exercice» du pouvoir dans un «domaine visé à l'art. 32» pour que la *Charte* s'applique à la décision de la législature. Or, ni le libellé de l'art. 32 ni la jurisprudence relative à l'application de la *Charte* n'exigent une telle limitation du champ d'application de la *Charte*.

60 The relevant subsection, s. 32(1)(*b*), states that the *Charter* applies to "the legislature and government of each province in respect of all matters within the authority of the legislature of each province". There is nothing in that wording to suggest that a positive act encroaching on rights is required; rather the subsection speaks only of matters within the authority of the legislature. Dianne Pothier has correctly observed that s. 32 is "worded broadly enough to cover positive obligations on a legislature such that the *Charter* will be

L'alinéa 32(1)*b*) dit que la *Charte* s'applique «à la législature et au gouvernement de chaque province, pour tous les domaines relevant de cette législature». Rien n'indique qu'une action positive empiétant sur des droits soit nécessaire; en fait, l'alinéa parle uniquement des domaines relevant de cette législature. Dianne Pothier a fait remarquer à juste titre que l'art. 32 est [TRADUCTION] «rédigé d'une manière assez générale pour viser les obligations positives du législateur, de telle sorte que la *Charte* s'appliquera même lorsque le

engaged even if the legislature refuses to exercise its authority" ("The Sounds of Silence: *Charter* Application when the Legislature Declines to Speak" (1996), 7 *Constitutional Forum* 113, at p. 115). The application of the *Charter* is not restricted to situations where the government actively encroaches on rights.

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

It might also be possible to say in this case that the deliberate decision to omit sexual orientation from the provisions of the *IRPA* is an "act" of the Legislature to which the *Charter* should apply. This argument is strengthened and given a sense of urgency by the considered and specific positive actions taken by the government to ensure that those discriminated against on the grounds of sexual orientation were excluded from the protective procedures of the Human Rights Commission. However, it is not necessary to rely on this position in order to find that the *Charter* is applicable.

It is also unnecessary to consider whether a government could properly be subjected to a challenge under s. 15 of the *Charter* for failing to act at all, in contrast to a case such as this where it acted in an underinclusive manner. It has been held that certain provisions of the *Charter*, for example those dealing with minority language rights (s. 23),

législateur refuse d'exercer son pouvoir» («The Sounds of Silence: *Charter* Application when the Legislature Declines to Speak» (1996), 7 *Forum constitutionnel* 113, à la p. 115). L'application de la *Charte* n'est pas limitée aux cas où par son action le gouvernement empiète sur des droits.

61 La constitutionnalité de l'*IRPA* est contestée pour le motif qu'elle ne protège pas des droits garantis par la *Charte*, c'est-à-dire en raison de sa portée trop limitative. Le seul fait que la Loi soit contestée pour sa portée trop limitative ne devrait pas nécessairement rendre la *Charte* inapplicable. Si l'omission n'était pas assujettie à la *Charte*, la loi trop limitative, rédigée de façon à simplement omettre une catégorie plutôt qu'à l'exclure expressément, serait à l'abri de toute contestation fondée sur la *Charte*. Si ce point de vue était jugé valable, la forme et non le fond déterminerait si la loi peut être contestée, ce qui serait illogique, mais surtout injuste. Par conséquent, lorsque, comme en l'espèce, la contestation vise une loi adoptée par la législature qui est trop limitative en raison d'une omission, l'art. 32 ne devrait pas être interprété comme faisant obstacle à l'application de la *Charte*.

62 L'on pourrait également soutenir, en l'espèce, que la décision délibérée d'omettre l'orientation sexuelle dans les dispositions de l'*IRPA* est un «acte» du législateur à laquelle la *Charte* devrait s'appliquer. Les mesures concrètes et réfléchies que le gouvernement a prises pour faire en sorte que les victimes de discrimination fondée sur l'orientation sexuelle ne puissent présenter une plainte à la Human Rights Commission étayent cet argument qui n'en est que plus convaincant. Cependant, il n'est pas nécessaire de l'invoquer pour arriver à la conclusion que la *Charte* s'applique.

63 Il est également inutile de se demander si un gouvernement pourrait à juste titre faire l'objet d'une contestation fondée sur l'art. 15 de la *Charte* parce qu'il n'a pas agi du tout, par opposition à un cas où, comme en l'espèce, il a agi d'une manière trop limitative. Notre Cour a statué que certaines dispositions de la *Charte*, notamment celles qui

do indeed require a government to take positive actions to ensure that those rights are respected (see *Mahe v. Alberta*, [1990] 1 S.C.R. 342, at p. 393; *Reference re Public Schools Act (Man.), s. 79(3), (4) and (7)*, [1993] 1 S.C.R. 839, at pp. 862-63 and 866).

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

portent sur les droits d'une minorité linguistique (art. 23), imposent en effet à un gouvernement l'obligation positive de prendre des mesures pour assurer le respect de ces droits (voir *Mahe c. Alberta*, [1990] 1 R.C.S. 342, à la p. 393, et *Renvoi relatif à la Loi sur les écoles publiques (Man.), art. 79(3), (4) et (7)*, [1993] 1 R.C.S. 839, aux pp. 862, 863 et 866).

Il n'a pas été nécessaire jusqu'ici de déterminer si dans d'autres contextes la *Charte* pouvait faire peser sur le législateur provincial ou fédéral, des obligations positives, de telle sorte que le fait de ne pas légiférer pourrait être contesté en vertu de la *Charte*. Cette possibilité a cependant été envisagée, sans être écartée, dans certaines affaires. Par exemple, dans l'arrêt *McKinney*, le juge Wilson a fait la remarque incidente suivante: «il n'est pas évident en soi que le gouvernement ne pourrait être reconnu coupable de violation de la *Charte* pour avoir omis d'agir» (p. 412). Dans l'arrêt *Haig c. Canada*, [1993] 2 R.C.S. 995, à la p. 1038, s'exprimant au nom de la majorité et s'appuyant sur les observations du juge en chef Dickson dans l'arrêt *Renvoi relatif à la Public Service Employee Relations Act (Alb.)*, [1987] 1 R.C.S. 313, le juge L'Heureux-Dubé laisse entendre que la *Charte* pourrait, dans certaines situations, imposer au gouvernement l'obligation positive de prendre des mesures concrètes. Enfin, dans l'arrêt *Eldridge c. Colombie-Britannique (Procureur général)*, [1997] 3 R.C.S. 624, s'exprimant au nom de notre Cour, le juge La Forest laisse sans réponse la question de savoir si la *Charte* pourrait obliger l'État à prendre des mesures concrètes (au par. 73). Toutefois, il n'est ni nécessaire ni opportun d'examiner cette vaste question en l'espèce.

2. Application of the *Charter* to Private Activity

2. L'application de la *Charte* à l'activité privée

65 The respondents further argue that the effect of applying the *Charter* to the *IRPA* would be to regulate private activity. Since it has been held that the *Charter* does not apply to private activity (*RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573; *Tremblay v. Daigle*, [1989] 2 S.C.R. 530; *McKinney*, *supra*), it is said that the application of the *Charter* in this case would not be appropriate.

Les intimés soutiennent en outre qu'appliquer la *Charte* à l'*IRPA* ce serait réglementer une activité privée. Comme il a été décidé que la *Charte* ne s'applique pas aux activités privées (*SDGMR c. Dolphin Delivery Ltd.*, [1986] 2 R.C.S. 573; *Tremblay c. Daigle*, [1989] 2 R.C.S. 530; *McKinney*, précité), les intimés font valoir qu'il serait inapproprié d'appliquer la *Charte* en l'espèce. Cet argu-

This argument cannot be accepted. The application of the *Charter* to the *IRPA* does not amount to applying it to private activity. It is true that the *IRPA* itself targets private activity and as a result will have an "effect" upon that activity. Yet it does not follow that this indirect effect should remove the *IRPA* from the purview of the *Charter*. It would lead to an unacceptable result if any legislation that regulated private activity would for that reason alone be immune from *Charter* scrutiny.

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

C. *Section 15(1)*

1. Approach to Section 15(1)

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

ment ne peut être accepté. Appliquer la *Charte* à l'*IRPA* ce n'est pas appliquer la *Charte* à une activité privée. Il est vrai que l'*IRPA* vise des activités privées et, par conséquent, elle a une «incidence» sur de telles activités. Mais il ne s'ensuit pas que cette incidence indirecte devrait soustraire l'*IRPA* à l'application de la *Charte*. Il serait inacceptable qu'une loi échappe à l'examen fondé sur la *Charte* pour le seul motif qu'elle régit des activités privées.

66 L'argumentation des intimés ne fait aucune distinction entre l'«activité privée» et la «loi qui régit l'activité privée». La première n'est pas assujettie à la *Charte*, mais la seconde l'est manifestement. Le présent pourvoi porte sur une loi qui régit des activités privées. Il s'apparente à l'affaire *McKinney*, où le juge La Forest, au nom de la majorité de notre Cour, a dit qu'«[i]l n'y a aucun doute que puisque le [Human Rights] Code est une loi, la *Charte* s'y applique» (p. 290). Cette conclusion s'applique à la situation considérée en l'espèce. La présente contestation constitutionnelle porte sur l'*IRPA*, qui a été adoptée par la législature albertaine, et non sur les actes du King's College ou d'une autre personne ou entité privée, ce qui, selon moi, est suffisant pour rejeter les prétentions des intimés à cet égard.

C. *Le paragraphe 15(1)*

1. Façon d'appliquer le par. 15(1)

67 Les droits garantis par le par. 15(1) de la *Charte* sont fondamentaux pour le Canada. Ils reflètent les rêves les plus chers, les espérances les plus élevées et les aspirations les plus nobles de la société canadienne. L'adoption du suffrage universel a eu pour effet de reconnaître, jusqu'à un certain point, l'importance de l'individu. En adoptant le par. 15(1), dont les dispositions ont une large portée et se caractérisent par un grand souci de justice fondamentale, le Canada a franchi une autre étape dans la reconnaissance de l'importance fondamentale et de la dignité inhérente de chacun. Cette démarche est non seulement louable, mais essentielle à la réalisation d'un objectif admirable: le droit de chacun à la dignité. C'est le moyen d'inspirer aux Canadiens un sentiment de fierté. Pour qu'il y ait

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.

égalité, la valeur et l'importance intrinsèques de chaque individu doivent être reconnues sans égard à l'âge, au sexe, à la couleur, aux origines ou à d'autres caractéristiques de la personne. Cette reconnaissance devrait alors susciter chez tous les Canadiens un sentiment de dignité et de valorisation tout en leur inspirant la plus grande fierté et la satisfaction d'appartenir à une grande nation.

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

Presque intuitivement, tous comprennent la notion et le principe de l'égalité et y sont attachés. Il est facile de louer l'égalité comme le fondement d'une société juste qui permet à chacun de vivre dans la dignité et l'harmonie au sein de la collectivité. La difficulté consiste à la réaliser concrètement. Si difficile soit-il, cet objectif mérite qu'on livre une rude bataille pour l'atteindre. Ce n'est que dans un contexte d'égalité réelle que la fraternité et l'harmonie peuvent exister. C'est alors que chacun peut véritablement vivre dans la dignité.

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

Il est facile de dire que quiconque «nous» ressemble a droit à l'égalité. Chacun de vous trouve cependant plus difficile de soutenir que les gens «différents», sous un aspect ou un autre, doivent jouir des mêmes droits à l'égalité que nous. Pourtant, dès que nous affirmons qu'un groupe énuméré au par. 15(1) ou un groupe analogue ne mérite pas la même protection et le même bénéfice de la loi, ou n'en est pas digne, toutes les minorités et toute la société canadienne se trouvent avilies. Il est si simple, en apparence, mais tellement préjudiciable, de dire de ceux qui ont une déficience ou dont la race, la religion, la couleur ou l'orientation sexuelle est différente qu'ils sont moins dignes d'estime. Or, lorsque l'égalité prévue à l'art. 15 est niée à un groupe visé ou à un groupe analogue, c'est l'égalité de chacune des autres minorités qui est menacée. Notre Constitution garantit le droit à l'égalité. La reconnaissance de ce droit aux minorités aurait pu, dans le passé, éviter les trop nombreuses tragédies qui ont ponctué l'histoire. Il ne faut jamais oublier que la discrimination est l'antithèse de l'égalité et que c'est la reconnaissance de l'égalité qui assure la dignité de chacun.

70 How then should the analysis of s. 15 proceed? In *Egan* the two-step approach taken in *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R.

Comment, dès lors, l'analyse fondée sur l'art. 15 doit-elle être effectuée? Dans l'arrêt *Egan*, la méthode comportant deux étapes employée dans

143, and *R. v. Turpin*, [1989] 1 S.C.R. 1296, was summarized and described in this way (at paras. 130-31):

The first step is to determine whether, due to a distinction created by the questioned law, a claimant's right to equality before the law, equality under the law, equal protection of the law or equal benefit of the law has been denied. During this first step, the inquiry should focus upon whether the challenged law has drawn a distinction between the claimant and others, based on personal characteristics.

Not every distinction created by legislation gives rise to discrimination. Therefore, the second step must be to determine whether the distinction created by the law results in discrimination. In order to make this determination, it is necessary to consider first, whether the equality right was denied on the basis of a personal characteristic which is either enumerated in s. 15(1) or which is analogous to those enumerated, and second, whether that distinction has the effect on the claimant of imposing a burden, obligation or disadvantage not imposed upon others or of withholding or limiting access to benefits or advantages which are available to others.

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

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

In *Miron* and *Egan*, Lamer C.J. and La Forest, Gonthier and Major JJ. articulated a qualification which, as described in *Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358 (at para. 64), "focuses on the relevancy of a distinction to the purpose of the legislation where that purpose is not itself discriminatory and recognizes that certain distinctions are outside the scope of s. 15". This

les arrêts *Andrews c. Law Society of British Columbia*, [1989] 1 R.C.S. 143, et *R. c. Turpin*, [1989] 1 R.C.S. 1296, est résumée et décrite comme suit (aux par. 130 et 131):

La première [étape] consiste à déterminer si, en raison de la distinction créée par la disposition contestée, il y a eu violation du droit d'un plaignant à l'égalité devant la loi, à l'égalité dans la loi, à la même protection de la loi et au même bénéfice de la loi. À cette étape de l'analyse, il s'agit principalement de vérifier si la disposition contestée engendre, entre le plaignant et d'autres personnes, une distinction fondée sur des caractéristiques personnelles.

Les distinctions créées par les lois n'emportent pas toutes discrimination. C'est pourquoi il faut, à la seconde étape, déterminer si la distinction ainsi créée donne lieu à une discrimination. À cette fin, il faut se demander, d'une part, si le droit à l'égalité a été enfreint sur le fondement d'une caractéristique personnelle qui est soit énumérée au par. 15(1), soit analogue à celles qui y sont énumérées et, d'autre part, si la distinction a pour effet d'imposer au plaignant des fardeaux, des obligations ou des désavantages non imposés à d'autres ou d'empêcher ou de restreindre l'accès aux bénéfices et aux avantages offerts à d'autres.

Le juge McLachlin adopte une méthode semblable dans l'arrêt *Miron* (au par. 128):

L'analyse fondée sur le par. 15(1) comporte deux étapes. Premièrement, le demandeur doit démontrer qu'il y a eu négation de son droit «à la même protection» ou «au même bénéfice» de la loi qu'une autre personne. Deuxièmement, le demandeur doit démontrer que cette négation constitue une discrimination. À cette seconde étape, pour établir qu'il y a discrimination, le demandeur doit prouver que la négation repose sur l'un des motifs de discrimination énumérés au par. 15(1) ou sur un motif analogue et que le traitement inégal est fondé sur l'application stéréotypée de présumées caractéristiques personnelles ou de groupe.

71 Dans les arrêts *Miron* et *Egan*, le juge en chef Lamer et les juges La Forest, Gonthier et Major ont apporté un tempérament dont l'arrêt *Benner c. Canada (Secrétaire d'État)*, [1997] 1 R.C.S. 358 (au par. 64), dit qu'il «met l'accent sur la pertinence d'une distinction par rapport à l'objet du texte de loi, lorsque cet objet n'est pas lui-même discriminatoire, et elle reconnaît que certaines dis-

approach is, to a certain extent, compatible with the notion that discrimination commonly involves the attribution of stereotypical characteristics to members of an enumerated or analogous group.

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

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

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

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

tinctions ne sont pas visées par l'art. 15». Cette méthode est dans une certaine mesure compatible avec l'idée que la discrimination comporte habituellement l'attribution de caractéristiques stéréotypées aux membres d'un groupe énuméré ou analogue.

Toutefois, notre Cour a par la suite précisé que la discrimination ne résulte pas seulement de «l'application stéréotypée de présumées caractéristiques personnelles ou de groupe», bien que celle-ci puisse être observée dans de nombreux cas de discrimination. Comme le dit le juge Sopinka dans l'arrêt *Eaton c. Conseil scolaire du comté de Brant*, [1997] 1 R.C.S. 241, aux par. 66 et 67:

> . . . le par. 15(1) de la *Charte* a non seulement pour objet d'empêcher la discrimination par l'attribution de caractéristiques stéréotypées à des particuliers, mais également d'améliorer la position de groupes qui, dans la société canadienne, ont subi un désavantage en étant exclus de l'ensemble de la société ordinaire comme ce fut le cas pour les personnes handicapées.
>
> Certains des motifs illicites visent principalement à éliminer la discrimination par l'attribution de caractéristiques fausses fondées sur des attitudes stéréotypées se rapportant à des conditions immuables comme la race ou le sexe. [. . .] L'autre objectif, tout aussi important, vise à tenir compte des véritables caractéristiques de ce groupe qui l'empêchent de jouir des avantages de la société, et à les accommoder en conséquence.

Ces méthodes préconisées relativement à l'analyse fondée sur le par. 15(1) ont été résumées et adoptées dans des arrêts ultérieurs, p. ex. *Eaton*, précité (au par. 62), *Benner*, précité (au par. 69), et plus récemment, *Eldridge*. Dans ce dernier arrêt, le juge La Forest a dit ce qui suit au nom de notre Cour (au par. 58):

> Bien que notre Cour n'ait pas adopté une approche uniforme à l'égard de cette disposition, il y a un large accord général sur le cadre d'analyse général: voir *Eaton c. Conseil scolaire du comté de Brant*, [1997] 1 R.C.S. 241, au par. 62, *Miron* et *Egan*, précités. La personne qui allègue une violation du par. 15(1) doit d'abord établir que, en raison d'une distinction faite entre elle et d'autres personnes, elle est privée de la «même protection» ou du «même bénéfice» de la loi. En deuxième lieu, elle doit démontrer que cette privation

of the enumerated grounds listed in s. 15(1) or one analogous thereto.

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

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

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

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* (at para. 73). It has been repeatedly held that identical treatment will not always constitute equal treatment (see for example *Andrews*, *supra*, at p. 164). It is also clear that the way in which an exclusion is worded should not disguise the nature of the exclusion so as to allow differently drafted exclusions to be

constitue une discrimination fondée sur l'un des motifs énumérés au par. 15(1) ou sur un motif analogue.

74 Dans la présente espèce, comme dans les affaires *Eaton*, *Benner* et *Eldridge*, toute différence pouvant exister quant à la méthode à employer relativement au par. 15(1) ne modifie en rien le résultat, de sorte qu'il n'est pas nécessaire de s'y attarder. Les exigences essentielles établies dans ces affaires sont respectées si l'on se demande premièrement s'il y a une distinction entraînant la négation du droit à l'égalité devant la loi ou dans la loi ou la négation du droit à la même protection ou au même bénéfice de la loi et, deuxièmement, si cette négation constitue une discrimination fondée sur un motif énuméré au par. 15(1) ou sur un motif analogue.

2. L'*IRPA* établit une distinction entre le plaignant et d'autres personnes sur le fondement d'une caractéristique personnelle et, à cause de cette distinction, elle prive le plaignant du droit à la même protection et au même bénéfice de la loi

a) *L'IRPA établit-elle une distinction*?

75 Les intimés prétendent que, l'*IRPA* omettant simplement de mentionner l'orientation sexuelle, on ne peut conclure que ce «silence neutre» crée une distinction. Ils font valoir que l'*IRPA* assure tant aux hétérosexuels qu'aux homosexuels une protection entière contre la discrimination fondée sur les motifs qu'elle prévoit de sorte qu'aucune distinction n'est établie et, partant, aucune discrimination n'est exercée. Selon eux, si une distinction est établie sur le fondement de l'orientation sexuelle, elle est imputable à la société, et non à l'*IRPA*.

76 Ces arguments ne peuvent être acceptés. Ils sont fondés sur la notion «étroite et peu généreuse» de l'égalité que mentionne *Eldridge* (au par. 73). Il est bien établi qu'un traitement identique ne constitue pas toujours un traitement égal (voir notamment l'arrêt *Andrews*, précité, à la p. 164). Il est également clair que la formulation d'une exclusion ne devrait pas en masquer la nature de telle sorte que des exclusions libellées différemment soient trai-

treated differently. For example *Schachter*, at p. 698, discussed this point in the context of remedies, and quoted *Knodel v. British Columbia (Medical Services Commission)* (1991), 58 B.C.L.R. (2d) 356 (S.C.), at pp. 384-85:

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

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

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

tées différemment. Par exemple, dans l'arrêt *Schachter*, à la p. 698, cette question est examinée dans le contexte de la réparation à accorder et l'arrêt *Knodel c. British Columbia (Medical Services Commission)* (1991), 58 B.C.L.R. (2d) 356 (C.S.), est cité, aux pp. 384 et 385:

> [TRADUCTION] Lorsque l'État établit une distinction entre deux catégories de personnes, A et B,[. . .] la façon dont la disposition législative ou la loi est rédigée n'est pas pertinente sur le plan constitutionnel; c.-à-d. qu'il importe peu que la loi visée dispose: (1) A a droit aux bénéfices ou (2) tous ont droit aux bénéfices, sauf B. Dans les deux cas, le résultat est le même pour les membres du groupe B.

Les intimés concèdent que si les homosexuels étaient complètement exclus de la protection de l'*IRPA*, c'est-à-dire si elle ne les protégeait contre aucun des motifs de distinction qu'elle énumère, il y aurait discrimination. Manifestement, il s'agirait d'une discrimination des plus insignes. Il est vrai que les homosexuels ne sont pas entièrement exclus de la protection de l'*IRPA*. Ils peuvent en effet réclamer cette protection pour certains motifs. Cela ne veut pas dire pour autant qu'il n'y a pas de discrimination. Par exemple, le fait qu'une homosexuelle et qu'une hétérosexuelle aient toutes deux le droit de déposer une plainte de discrimination fondée sur le sexe ne signifie pas qu'elles jouissent d'une protection égale sous le régime de la Loi. Les homosexuels sont toujours privés de protection contre la discrimination fondée sur le motif le plus susceptible de revêtir pour eux la plus grande importance, soit l'orientation sexuelle.

Les intimés tentent également d'établir une distinction entre la présente espèce et les arrêts *McKinney* et *Blainey*, précités. Dans *Blainey*, la loi ontarienne sur les droits de la personne interdisait la discrimination fondée sur le sexe, mais l'autorisait expressément au sein des organisations sportives. De même, dans *McKinney*, la loi incriminée interdisait la discrimination fondée sur l'âge, mais en matière d'emploi; l'«âge» était défini comme étant la période comprise entre 18 et 65 ans, ce qui privait les travailleurs âgés du bénéfice de la loi en raison de leur âge. Dans les deux cas, le tribunal a conclu que la loi violait le par. 15(1).

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

79 Selon les intimés, dans ces cas, le gouvernement ayant décidé d'assurer une protection, il devait le faire d'une façon non discriminatoire, mais en l'espèce, il y a lieu d'établir une distinction puisque l'*IRPA* est muette au sujet de l'orientation sexuelle. Le fait que le texte législatif limite explicitement la protection prévue (en l'accordant à certaines personnes au sein d'une catégorie, comme dans *McKinney*, ou en excluant un type particulier de discrimination, comme dans *Blainey*) ne permet à lui seul de déterminer si la loi établit une distinction. En l'espèce aussi, une protection partielle est accordée, bien que l'exclusion ou la limitation du régime de protection revête une forme différente de celles considérées dans les arrêts *McKinney* et *Blainey*. La protection contre la discrimination est assurée par le gouvernement, au moyen de l'*IRPA*, mais seulement à certains groupes.

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

80 Si le simple silence de l'*IRPA* suffisait à la soustraire à l'examen fondé sur le par. 15(1), le législateur pourrait facilement contourner les objectifs de cette disposition en rédigeant des textes législatifs qui ne mentionne pas à dessein les groupes exclus. Ce serait faire fi de la reconnaissance, par notre Cour, du principe voulant qu'une loi trop limitative puisse être discriminatoire, lequel a été énoncé très clairement par le juge en chef Dickson dans l'arrêt *Brooks c. Canada Safeway Ltd.*, [1989] 1 R.C.S. 1219, à la p. 1240. S'exprimant au nom de la Cour, il a dit: «La couverture sélective constitue peut-être simplement un moyen détourné de permettre la 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.

81 Il est évident que l'*IRPA*, en raison de sa portée trop limitative, établit effectivement une distinction et ce, sous deux rapports différents simultanément. Premièrement, une distinction est créée entre les homosexuels, d'une part, et les autres groupes défavorisés qui bénéficient de la protection de l'*IRPA*, d'autre part. Les homosexuels ne jouissent même pas d'une égalité formelle par rapport aux groupes protégés, puisque, ceux-ci sont explicitement inclus alors que les homosexuels ne le sont pas.

The second distinction, and, I think, the more fundamental one, is between homosexuals and heterosexuals. This distinction may be more diffi-

82 Deuxièmement, une distinction encore plus fondamentale, selon moi, est créée entre homosexuels et hétérosexuels. Elle peut être plus difficile à

cult to see because there is, on the surface, a measure of formal equality: gay or lesbian individuals have the same access as heterosexual individuals to the protection of the *IRPA* in the sense that they could complain to the Commission about an incident of discrimination on the basis of any of the grounds currently included. However, the exclusion of the ground of sexual orientation, considered in the context of the social reality of discrimination against gays and lesbians, clearly has a disproportionate impact on them as opposed to heterosexuals. Therefore the *IRPA* in its underinclusive state denies substantive equality to the former group. This was well expressed by W. N. Renke, "Case Comment: *Vriend* v. *Alberta*: Discrimination, Burdens of Proof, and Judicial Notice" (1996), 34 *Alta. L. Rev.* 925, at pp. 942-43:

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

See also Pothier, *supra*, at p. 119. It is possible that a heterosexual individual could be discriminated against on the ground of sexual orientation. Yet this is far less likely to occur than discrimination against a homosexual or lesbian on that same ground. It thus is apparent that there is a clear dis-

déceler parce qu'il y a en apparence une certaine égalité formelle: les homosexuels ont un même droit à la protection de l'*IRPA* que les hétérosexuels dans la mesure où ils peuvent saisir la commission d'une plainte de discrimination fondée sur l'un des motifs actuellement énumérés. Cependant, compte tenu de la réalité sociale de la discrimination exercée contre les homosexuels, l'exclusion de l'orientation sexuelle a de toute évidence un effet disproportionné sur ces derniers par comparaison avec les hétérosexuels. En raison de son caractère trop limitatif, l'*IRPA* nie donc aux homosexuels le droit à l'égalité réelle. Cela est fort bien expliqué par W. N. Renke dans «Case Comment: *Vriend* v. *Alberta*: Discrimination, Burdens of Proof, and Judicial Notice» (1996), 34 *Alta. L. Rev.* 925, aux pp. 942 et 943:

> [TRADUCTION] Si hétérosexuels et homosexuels étaient également victimes de discrimination fondée sur l'orientation sexuelle, ni les uns ni les autres ne pourraient se plaindre d'injustice si l'*IRPA* ne conférait aucun recours à l'égard de la discrimination fondée sur l'orientation sexuelle. Les personnes appartenant à un groupe seraient traitées comme celles faisant partie de l'autre. Cependant, lorsque la discrimination est exercée presque exclusivement contre les personnes ayant une orientation sexuelle donnée, l'absence de recours légaux dans le cas de la discrimination fondée sur l'orientation sexuelle a un effet différent. L'absence de recours n'a aucune incidence réelle sur les hétérosexuels, puisqu'ils n'ont aucun motif de plainte concernant l'orientation sexuelle. Elle a par contre un effet véritable sur les homosexuels, car ils sont les victimes de la discrimination fondée sur l'orientation sexuelle. En outre, l'hétérosexuel peut, au besoin, invoquer tous les motifs de discrimination actuellement énumérés dans la Loi. Il est vrai que c'est également le cas pour l'homosexuel, mais il se peut que la seule discrimination exercée contre lui soit la discrimination fondée sur l'orientation sexuelle. Il n'aurait aucun recours contre ce type de discrimination. Dans cette optique, l'*IRPA* établit bel et bien une distinction entre homosexuels et hétérosexuels.

Voir également Pothier, *loc. cit.*, à la p. 119. Il est possible qu'un hétérosexuel soit victime de discrimination fondée sur l'orientation sexuelle. Mais cela risque beaucoup moins de se produire que la discrimination contre un homosexuel pour le même motif. Il appert donc qu'une nette distinc-

tinction created by the disproportionate impact which arises from the exclusion of the ground from the *IRPA*.

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

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

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 dis-

tion est créée par l'effet disproportionné qu'a l'exclusion de ce motif dans l'*IRPA*.

83 La présente espèce s'apparente à certains égards à la récente affaire *Eldridge*, précitée, où notre Cour a confirmé à l'unanimité que l'égalité doit être réelle, et non seulement formelle. Cet arrêt établit également qu'une omission du législateur peut porter atteinte à l'égalité réelle. Le principe est expliqué comme suit aux par. 60 et 61:

> La seule question à trancher en l'espèce est donc de savoir si les appelants ont droit au «même bénéfice de la loi, indépendamment de toute discrimination» aux termes du par. 15(1) de la *Charte*. À première vue, le régime d'assurance-maladie de la Colombie-Britannique s'applique d'une manière égale aux entendants et aux personnes atteintes de surdité. Il ne fait pas de «distinction» explicite fondée sur la déficience en accordant un traitement différent aux personnes atteintes de surdité. Tant ces dernières que les entendants ont droit de recevoir certains services médicaux gratuitement. Les appelants prétendent néanmoins que l'absence de financement pour les services d'interprètes gestuels les empêche de bénéficier du régime établi par la loi dans la même mesure que les entendants. Autrement dit, ils invoquent la discrimination découlant d'«effets préjudiciables».
>
> Notre Cour a statué de façon constante que le par. 15(1) de la *Charte* protège contre ce type de discrimination. [. . .] Le paragraphe 15(1), a statué la Cour [dans *Andrews*], vise à assurer une certaine égalité matérielle et non simplement formelle.

84 Enfin, la prétention des intimés selon laquelle la distinction n'est pas établie par la loi, mais existe en fait indépendamment de celle-ci dans la société, ne peut être acceptée. Il est évidemment vrai que les homosexuels sont victimes de discrimination dans la société. La réalité de cette discrimination cruelle et déplorable est reconnue dans l'arrêt *Egan*. Cet état de fait fournit le contexte dans lequel la distinction législative contestée en l'espèce doit être analysée. La réalité de la discrimination sociale dont les homosexuels sont victimes montre que l'*IRPA* établit une distinction qui nie à ces personnes le droit à la même protection de la loi en les excluant alors même qu'elles ont un pressant besoin de protection à cause de la discri-

crimination 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.

85 Although the respondents try to distinguish this case from *Bliss v. Attorney General of Canada*, [1979] 1 S.C.R. 183, the reasoning they put forward is very much reminiscent of the approach taken in that case. (See S. K. O'Byrne and J. F. McGinnis, "Case Comment: *Vriend* v. *Alberta*: *Plessy* Revisited: Lesbian and Gay Rights in the Province of Alberta" (1996), 34 *Alta. L. Rev.* 892, at pp. 920-22.) There it was held that a longer qualifying period for unemployment benefits relating to pregnancy was not discriminatory because it applied to all pregnant individuals, and that if this category happened only to include women, that was a distinction created by nature, not by law. This reasoning has since been emphatically rejected (see e.g. *Brooks*). *Eldridge* also emphatically rejected an argument that underinclusive legislation did not discriminate because the inequality existed independently of the benefit provided by the state (at paras. 68-69).

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

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

87 It is apparent that the omission from the *IRPA* creates a distinction. That distinction results in a denial of the equal benefit and equal protection of the law. It is the exclusion of sexual orientation from the list of grounds in the *IRPA* which denies

mination exercée contre elles dans la société. Il n'est pas nécessaire de conclure que la loi crée la discrimination qui a cours dans la société pour déterminer qu'elle établit une distinction potentiellement discriminatoire.

Les intimés tentent de distinguer la présente espèce de l'arrêt *Bliss c. Procureur général du Canada*, [1979] 1 R.C.S. 183, mais le raisonnement qu'ils avancent rappelle beaucoup le point de vue adopté dans cette affaire. (Voir S. K. O'Byrne et J. F. McGinnis, «Case Comment: *Vriend* v. *Alberta*: *Plessy* Revisited: Lesbian and Gay Rights in the Province of Alberta» (1996), 34 *Alta. L. Rev.* 892, aux pp. 920 à 922.) Dans cet arrêt, il a été décidé que la fixation d'une période de référence plus longue pour l'obtention des prestations d'assurance-chômage en cas de grossesse n'était pas discriminatoire, car elle s'appliquait à toutes les personnes enceintes, et le fait que cette catégorie n'inclut que des femmes était attribuable à une distinction établie par la nature, non par la loi. Ce raisonnement a été rejeté catégoriquement depuis lors (voir, p. ex., l'arrêt *Brooks*). Dans l'arrêt *Eldridge*, elle a aussi rejeté de manière énergique l'argument voulant qu'une loi trop limitative ne soit pas discriminatoire parce que l'inégalité existe indépendamment de l'avantage que confère l'État (aux par. 68 et 69).

L'omission de l'orientation sexuelle dans les motifs de distinction interdits par l'*IRPA* crée une distinction fondée sur l'orientation sexuelle. Ce «silence» de l'*IRPA* en ce qui concerne la discrimination fondée sur l'orientation sexuelle n'est pas «neutre». Les homosexuels sont traités différemment d'autres groupes défavorisés et des hétérosexuels. Ceux-ci, contrairement aux homosexuels, sont protégés contre la discrimination fondée sur des motifs susceptibles de les concerner.

b) *La négation du droit au même bénéfice et à la même protection de la loi*

Il appert que l'omission du législateur crée une distinction et que cette distinction emporte la négation du droit au même bénéfice et à la même protection de la loi. C'est l'exclusion de l'orientation sexuelle des motifs de distinction interdits par

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.

3. 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" (para. 131). A discriminatory distinction was also described as one which is "capable of either promoting or perpetuating the view that the individual adversely affected by this distinction is less capable, or less worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration" (*Egan*, at para. 56, *per* L'Heureux-Dubé J.). It may as well be appropriate to consider whether the unequal treatment is based on "the stereotypical application of presumed group or personal characteristics" (*Miron*, at para. 128, *per* McLachlin J.).

l'*IRPA* qui prive les homosexuels du droit à la même protection et au même bénéfice de la Loi et ce, de deux manières importantes. Les homosexuels ne sont pas visés par l'énoncé de politique du gouvernement contre la discrimination, et on leur refuse l'accès aux recours permettant d'obtenir réparation en application de la Loi.

88 Par conséquent, en raison de l'omission du législateur ou de la portée trop limitative de l'*IRPA*, celle-ci nie aux homosexuels le droit à la même protection et au même bénéfice de la loi sur le fondement d'une caractéristique personnelle, à savoir l'orientation sexuelle.

3. La négation du droit au même bénéfice et à la même protection de la loi constitue une discrimination contraire au par. 15(1)

89 Dans l'arrêt *Egan*, notre Cour a dit que deux aspects sont pertinents aux fins de déterminer si la distinction créée par une loi constitue une discrimination. Premièrement, il faut se demander «si le droit à l'égalité a été enfreint sur le fondement d'une caractéristique personnelle qui est soit énumérée au par. 15(1), soit analogue à celles qui y sont énumérées». Deuxièmement, il faut se demander si «la distinction a pour effet d'imposer au plaignant des fardeaux, des obligations ou des désavantages non imposés à d'autres ou d'empêcher ou de restreindre l'accès aux bénéfices et aux avantages offerts à d'autres» (par. 131). Notre Cour a également dit qu'une distinction est discriminatoire lorsqu'elle est «susceptible de favoriser ou de perpétuer l'opinion que les individus lésés par cette distinction sont moins capables ou moins dignes d'être reconnus ou valorisés en tant qu'êtres humains ou en tant que membres de la société canadienne qui méritent le même intérêt, le même respect et la même considération» (*Egan*, au par. 56, le juge L'Heureux-Dubé). On peut également se demander si le traitement inégal se fonde sur «l'application stéréotypée de présumées caractéristiques personnelles ou de groupe» (*Miron*, au par. 128, le juge McLachlin).

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

90 In *Egan*, it was held, on the basis of "historical social, political and economic disadvantage suffered by homosexuals" and the emerging consensus among legislatures (at para. 176), as well as previous judicial decisions (at para. 177), that sexual orientation is a ground analogous to those listed in s. 15(1). Sexual orientation is "a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs" (para. 5). It is analogous to the other personal characteristics enumerated in s. 15(1); and therefore this step of the test is satisfied.

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

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

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

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

(i) Discriminatory Purpose

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

a) *Le droit à l'égalité est nié sur le fondement d'une caractéristique personnelle analogue à celles énumérées au par. 15(1)*

Dans l'arrêt *Egan*, il a été décidé, en raison des «désavantages sociaux, politiques et économiques» dont souffrent les homosexuels, de l'émergence d'un consensus législatif (au par. 176) et des décisions judiciaires antérieures (au par. 177), que l'orientation sexuelle constitue un motif analogue à ceux énumérés au par. 15(1). L'orientation sexuelle est «une caractéristique profondément personnelle qui est soit immuable, soit susceptible de n'être modifiée qu'à un prix personnel inacceptable» (par. 5). Elle est analogue aux autres caractéristiques personnelles énumérées au par. 15(1), de sorte que ce volet du critère est respecté.

Il a été souligné, par exemple, par le juge Iacobucci dans l'arrêt *Benner*, au par. 69:

> Lorsque la négation du droit en cause est fondée sur l'un des motifs expressément énumérés au par. 15(1) ou sur un motif analogue, elle sera généralement jugée discriminatoire, bien qu'il puisse évidemment y avoir des exceptions: voir, par exemple, *Weatherall c. Canada (Procureur général)*, [1993] 2 R.C.S. 872.

Pourrait donc être tenue pour discriminatoire la négation du droit à la même protection et au même bénéfice de la loi fondée sur le motif analogue de l'orientation sexuelle. Cependant, d'autres facteurs appuient en l'espèce cette conclusion.

b) *La distinction a pour effet d'imposer des fardeaux ou des désavantages non imposés à d'autres et d'empêcher l'accès aux avantages offerts à d'autres.*

(i) Objet discriminatoire

Les appelants et plusieurs des intervenants font valoir que l'objet que cherchait à atteindre le gouvernement albertain en excluant l'orientation sexuelle est lui-même discriminatoire. Les appelants prétendent qu'en décidant délibérément de ne pas prévoir l'orientation sexuelle comme motif de distinction illicite le gouvernement cherchait à nier que les homosexuels sont ou ont été victimes de discrimination ou, subsidiairement, à nier que les homosexuels soient dignes d'être protégés contre

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.

la discrimination. Il s'agit selon eux d'un objet discriminatoire. Pour leur part, les intimés font valoir l'insuffisance de la preuve concernant l'intention discriminatoire délibérée du gouvernement.

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

93 Il n'est pas nécessaire, toutefois, de statuer sur l'existence d'une preuve établissant l'objet discriminatoire que cherche à réaliser le gouvernement provincial. Il est bien établi que la preuve d'une intention discriminatoire odieuse n'est pas nécessaire pour conclure à l'existence d'une discrimination (voir, p. ex., *Turpin*, précité, et, plus récemment, l'arrêt *Eldridge*, au par. 62). Même une discrimination involontaire peut contrevenir à la *Charte*. Dans toute affaire relative à l'application de celle-ci, un objet inconstitutionnel ou un effet inconstitutionnel peuvent l'un et l'autre suffire à rendre la loi contestée invalide (*R. c. Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295, à la p. 331). Par conséquent, la preuve qu'un objet discriminatoire était poursuivi en l'espèce fournirait simplement un motif supplémentaire de conclure que la loi est discriminatoire, elle ne serait pas nécessaire pour fonder une telle conclusion. Dans la présente affaire, les effets discriminatoires de la loi considérée suffisent en eux-mêmes pour établir l'existence de la discrimination.

(ii) Discriminatory Effects of the Exclusion

(ii) Effets discriminatoires de l'exclusion

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

Les effets de l'exclusion de l'orientation sexuelle des motifs ouvrant droit à la protection prévue par l'*IRPA* doivent être considérés dans le contexte de la nature et de l'objet du texte législatif. L'*IRPA* crée un régime général et complet pour la protection des individus contre la discrimination dans le secteur privé. Son préambule énumère comme suit les objets et les principes qui la sous-tendent:

[TRADUCTION]

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

ATTENDU QUE la reconnaissance de la dignité inhérente et des droits égaux et inaliénables de chacun constitue le fondement de la liberté, de la justice et de la paix dans le monde;

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,

ATTENDU QUE l'Alberta reconnaît qu'il est fondamental et dans l'intérêt public que chacun jouisse de la même dignité et des mêmes droits sans égard à la race,

religious beliefs, colour, gender, physical disability, mental disability, age, ancestry or place of origin; and

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

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

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

97 The first and most obvious effect of the exclusion of sexual orientation is that lesbians or gay men who experience discrimination on the basis of their sexual orientation are denied recourse to the mechanisms set up by the *IRPA* to make a formal

aux croyances religieuses, à la couleur, au sexe, à la déficience physique ou mentale, à l'âge, à l'ascendance ou au lieu d'origine;

ATTENDU QU'il est opportun que ce principe soit consacré par la législature de l'Alberta au moyen d'un texte législatif garantissant ces droits de la personne . . .

L'objectif louable de la loi est donc d'affirmer et de mettre en œuvre le principe selon lequel chacun jouit de la même dignité et des mêmes droits. La discrimination est interdite dans un certain nombre de domaines et sur le fondement de motifs de plus en plus nombreux.

Le fait que la Loi établit un régime complet doit être pris en considération dans l'analyse de l'effet qu'a l'exclusion d'un motif de distinction illicite. Ce n'est pas comme si la législature avait simplement choisi de s'attaquer à un type de discrimination en particulier. En pareil cas, il aurait pu être acceptable de ne viser que ce type de discrimination, et pas les autres. C'est la situation à laquelle fait allusion, je crois, le juge L'Heureux-Dubé dans les remarques incidentes formulées dans son opinion dissidente dans l'arrêt *McKinney* (à la p. 436): «j'estime que si les provinces choisissaient d'adopter des lois sur les droits de la personne qui n'interdisent que la discrimination fondée sur le sexe et non sur l'âge, on ne pourrait dire que ces lois violent la *Charte*». Le juge McClung de la Cour d'appel de l'Alberta a estimé que ces remarques liaient la cour et l'obligeaient à accueillir l'appel. En toute déférence, je crois qu'il a été induit en erreur. Ces remarques avaient trait à une loi d'un caractère différent de celle qui est contestée en l'espèce, savoir une loi visant un problème ou type particulier de discrimination. Les faits de la présente espèce sont très différents. Le texte législatif incriminé vise à assurer à chacun une protection complète contre la discrimination en Alberta. L'exclusion sélective d'un groupe en particulier de cette protection complète a donc un effet très différent.

Le premier effet, et le plus évident, de l'exclusion de l'orientation sexuelle est que les homosexuels victimes de discrimination fondée sur leur orientation sexuelle n'ont pas accès à la procédure établie par l'*IRPA* pour le dépôt d'une plainte offi-

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

cielle et l'obtention d'une réparation. Ainsi, l'Alberta Human Rights Commission n'a pu connaître de la plainte de M. Vriend et ne peut être saisie de la plainte d'une victime de discrimination fondée sur l'orientation sexuelle ni prendre quelque mesure que ce soit pour le compte d'une telle personne. Les conséquences tragiques et infamantes que ne peut manquer d'avoir le non-accès des victimes de discrimination fondée sur l'orientation sexuelle aux recours prévus par la Loi sont exacerbées tant par l'exclusion de tout recours au civil que par le peu de succès qu'ont eu les homosexuels qui ont tenté d'obtenir réparation pour une discrimination fondée sur l'orientation sexuelle en invoquant d'autres motifs comme le sexe ou l'état matrimonial. Contrairement aux personnes protégées par l'*IRPA*, les victimes de discrimination fondée sur l'orientation sexuelle sont privées de tout recours juridique efficace à cet égard.

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

98

Il peut être difficile de saisir d'emblée l'importance d'être exclu de la protection assurée par une loi sur les droits de la personne. Il en résulte cependant un fardeau lourd qui réduit la capacité des personnes touchées par cette exclusion. Comme l'a fait observer la Cour suprême des États-Unis dans *Romer c. Evans*, 116 S.Ct. 1620 (1996), à la p. 1627:

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

[TRADUCTION] . . . en raison de l'exclusion une incapacité particulière frappe ces seules personnes. Les homosexuels se voient refuser les garanties accordées aux autres ou que les autres peuvent revendiquer sans contrainte. [. . .] Il s'agit d'une protection que la plupart des gens tiennent pour acquise parce qu'ils en bénéficient déjà ou qu'ils n'en ont pas besoin; il s'agit d'une protection contre l'exclusion à l'égard d'un nombre presque illimité de rapports et d'activités dont est faite la vie du citoyen ordinaire dans une société libre.

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

Bien que cette affaire porte sur un cas explicite d'exclusion du régime de protection contre la discrimination, l'effet de la loi est semblable en l'espèce. Le refus, par la voie d'une omission du législateur, d'accorder la protection à des personnes fort susceptibles d'en avoir besoin est tout aussi grave que l'exclusion explicite du régime de protection, et ses conséquences sont toutes aussi sérieuses.

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

Outre l'effet immédiat de la privation de tout recours en cas de discrimination, il existe d'autres répercussions qui, bien qu'elles puissent être moins évidentes, sont à tout le moins aussi préjudiciables. Dans l'arrêt *Haig*, la Cour d'appel de l'Ontario a conclu à l'exercice d'une discrimination sur le fondement à la fois [TRADUCTION] «de l'omission de prévoir une voie de recours au bénéfice des homosexuels qui sont victimes d'actes préjudiciables» et «du fait que l'omission permet de conclure que de tels actes sont acceptables» (p. 503). Il est plausible que l'absence de tout recours légal en cas de discrimination fondée sur l'orientation sexuelle perpétue, voire encourage, ce genre de discrimination. Les intimés soutiennent qu'on ne peut supposer que le «silence» de l'*IRPA* renforce ou perpétue la discrimination, étant donné que l'État «ne peut régir les mentalités». Toutefois, cet argument semble captieux étant donné que l'*IRPA* vise expressément à empêcher la discrimination. On ne peut dire qu'une loi sur les droits de la personne contribuera à protéger les individus contre la discrimination et, en même temps, prétendre qu'une exclusion du bénéfice de la loi n'aura aucun effet.

100 However, let us assume, contrary to all reasonable inferences, that exclusion from the *IRPA*'s protection does not actually contribute to a greater incidence of discrimination on the excluded ground. Nonetheless that exclusion, deliberately chosen in the face of clear findings that discrimination on the ground of sexual orientation does exist in society, sends a strong and sinister message. The very fact that sexual orientation is excluded from the *IRPA*, which is the Government's primary statement of policy against discrimination, certainly suggests that discrimination on the ground of sexual orientation is not as serious or as deserving of condemnation as other forms of discrimination. It could well be said that it is tantamount to condoning or even encouraging discrimination against lesbians and gay men. Thus this exclusion clearly gives rise to an effect which constitutes discrimination.

Cependant, supposons, malgré toutes les conclusions qu'il est raisonnable de tirer, que l'exclusion d'un motif ouvrant droit à la protection prévue par l'*IRPA* n'a pas pour effet d'accroître la discrimination fondée sur ce motif. Cette exclusion, établie délibérément dans un contexte où il est évident que la discrimination fondée sur l'orientation sexuelle existe dans la société, transmet néanmoins un message à la fois clair et sinistre. Le fait même que l'orientation sexuelle ne soit pas un motif de distinction illicite aux termes de l'*IRPA*, laquelle constitue le principal énoncé de politique du gouvernement contre la discrimination, laisse certainement entendre que la discrimination fondée sur l'orientation sexuelle n'est pas aussi grave ou condamnable que les autres formes de discrimination. On pourrait même soutenir que cela équivaut à tolérer ou même à encourager la discrimination contre les homosexuels. En conséquence, cette exclusion a manifestement un effet qui constitue de la discrimination.

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

101 L'exclusion envoie à tous les Albertains le message qu'il est permis et, peut-être même, acceptable d'exercer une discrimination à l'égard d'une personne sur le fondement de son orientation sexuelle. On ne saurait sous-estimer l'ampleur des répercussions d'un tel message sur les homosexuels. Sur le plan pratique, ce message leur dit qu'ils ne sont pas protégés contre la discrimination fondée sur l'orientation sexuelle. Privés de tout recours légal, ils doivent accepter la discrimination et craindre constamment d'en être victimes. Il s'agit là de fardeaux que n'ont pas à porter les hétérosexuels.

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

102 La souffrance psychologique est peut-être le préjudice le plus important dans de telles circonstances. La crainte d'être victime de discrimination mènera logiquement à la dissimulation de son identité véritable, ce qui nuit certainement à la confiance en soi et à l'estime de soi. S'ajoute à cet effet le message tacite découlant de l'exclusion, savoir que les homosexuels, contrairement aux autres personnes, ne méritent aucune protection. Il s'agit clairement d'une distinction qui avilit la personne et qui renforce et perpétue l'idée voulant que les homosexuels soient des personnes moins dignes de protection au sein de la société canadienne. L'atteinte potentielle à la dignité des homosexuels et à la valeur qu'on leur reconnaît constitue une forme particulièrement cruelle de discrimination.

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

> The law confers a significant benefit by providing state recognition of the legitimacy of a particular status. The denial of that recognition may have a serious detrimental effect upon the sense of self-worth and dignity of members of a group because it stigmatizes them . . . . Such legislation would clearly infringe s. 15(1) because its provisions would indicate that the excluded groups were inferior and less deserving of benefits.

103 Même si la discrimination est le fait de particuliers, c'est l'État qui nie toute protection aux victimes. Ainsi, les répercussions défavorables sont particulièrement odieuses. C'est ce qui a été reconnu dans l'extrait suivant de l'arrêt *Egan* (au par. 161):

> La loi confère un avantage considérable en attribuant la reconnaissance de l'État à la légitimité d'un statut particulier. Le refus d'une telle reconnaissance risque d'avoir un effet gravement préjudiciable sur le sentiment de valeur personnelle et de dignité des membres d'un groupe car, même s'ils ne subissent aucune perte financière, ils s'en trouvent stigmatisés. [. . .] Une telle loi porterait clairement atteinte au par. 15(1) parce que ses dispositions feraient croire que les groupes exclus sont inférieurs et ne sont pas aussi dignes que les autres de bénéficier des avantages.

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

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

4. "Mirror" Argument

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

106 It is true that if the appellants' position is accepted, the result might be that the omission of one of the enumerated or analogous grounds from key provisions in comprehensive human rights legislation would always be vulnerable to constitutional challenge. It is not necessary to deal with the question since it is simply not true that human rights legislation will be forced to "mirror" the *Charter* in all cases. By virtue of s. 52 of the *Constitution Act, 1982*, the *Charter* is part of the "supreme law of Canada", and so, human rights legislation, like all other legislation in Canada, must conform to its requirements. However, the

Ce raisonnement s'applique à plus forte raison dans le cas où, comme en l'espèce, le refus de reconnaissance porte sur quelque chose d'aussi fondamental que le droit d'être protégé contre la discrimination.

En soustrayant à l'application de l'*IRPA* la discrimination fondée sur l'orientation sexuelle, le gouvernement a, dans les faits, affirmé que «chacun joui[t] de la même dignité et des mêmes droits», sauf les homosexuels. Un tel message, même s'il n'est que tacite, ne peut que violer le par. 15(1), la «disposition de la *Charte*, plus que toute autre, qui reconnaît et défend la dignité humaine innée de chacun» (*Egan*, au par. 128). Cet effet, combiné à la privation de tout recours juridique efficace en cas de discrimination fondée sur l'orientation sexuelle, suffit pour conclure que la distinction créée par l'exclusion de l'*IRPA* constitue une discrimination.

4. L'argument relatif au «reflet»

Les intimés font valoir que si les appelants ont gain de cause, toute loi sur les droits de la personne devra toujours être le «reflet» de la *Charte* et prévoir tous les motifs énumérés dans celle-ci, de même que les motifs analogues. Un tel résultat n'est pas souhaitable selon eux parce que ce serait restreindre indûment les choix du législateur et permettre que la *Charte* régisse indirectement l'activité privée, laquelle devrait continuer de ressortir aux législatures.

Il est vrai que si les prétentions des appelants sont acceptées, l'omission de l'un des motifs énumérés au par. 15(1) ou des motifs analogues dans les dispositions clés d'une loi d'ensemble sur les droits de la personne serait toujours susceptible d'être contestée sur le plan constitutionnel. Toutefois, il n'est pas nécessaire d'examiner la question car il n'est tout simplement pas exact de dire que les dispositions sur les droits de la personne devront toujours être l'exact «reflet» de la *Charte*. Aux termes de l'art. 52 de la *Loi constitutionnelle de 1982*, la *Charte* fait partie de la «loi suprême du Canada», de sorte que les dispositions relatives aux

notion of "mirroring" is too simplistic. Whether an omission is unconstitutional must be assessed in each case, taking into account the nature of the exclusion, the type of legislation, and the context in which it was enacted. The determination of whether a particular exclusion complies with s. 15 of the *Charter* would not be made through the mechanical application of any "mirroring" principle, but rather, as in all other cases, by determining whether the exclusion was proven to be discriminatory in its specific context and whether the discrimination could be justified under s. 1. If a provincial legislature chooses to take legislative measures which do not include all of the enumerated and analogous grounds of the *Charter*, deference may be shown to this choice, so long as the tests for justification under s. 1, including rational connection, are satisfied.

droits de la personne, à l'instar de toute autre loi au Canada, doivent se conformer à ses exigences. Cependant, la notion de «reflet» est trop simpliste. La constitutionnalité d'une omission doit être évaluée en fonction des faits de chaque espèce, compte tenu de la nature de l'exclusion et de la loi en cause, ainsi que du contexte dans lequel cette dernière a été adoptée. La détermination de la conformité d'une exclusion donnée à l'art. 15 de la *Charte* ne consiste pas à appliquer, de façon mécanique, un principe de reflet, mais plutôt, comme c'est le cas pour toute autre mesure, à se demander si l'exclusion s'avère discriminatoire dans son contexte particulier et si la discrimination peut être justifiée conformément à l'article premier. Les tribunaux pourront faire preuve de retenue à l'égard du choix d'un législateur provincial qui décide de prendre des mesures législatives qui n'incluent pas tous les motifs énumérés de la *Charte* ou les motifs analogues dans la mesure où il est satisfait aux critères de justification de l'article premier, y compris le critère du lien rationnel.

5. 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. This analysis will be undertaken by my colleague.

5. Conclusion concernant l'art. 15

107 En résumé, notre Cour n'a d'autre choix que de conclure qu'étant donné l'omission de l'orientation sexuelle comme motif de distinction illicite, l'*IRPA* viole manifestement l'art. 15 de la *Charte*. De par sa portée trop limitative, l'*IRPA* crée une distinction qui conduit à la négation du droit au même bénéfice et à la même protection de la loi sur le fondement de l'orientation sexuelle, caractéristique personnelle reconnue comme étant analogue aux motifs énumérés à l'art. 15. En soi, cela suffirait pour conclure qu'il y a discrimination et, partant, violation de l'art. 15. Les effets discriminatoires graves de l'exclusion de l'orientation sexuelle de la Loi renforcent cette conclusion. En conséquence, l'*IRPA*, dans sa version actuelle, viole de toute évidence les droits à l'égalité de l'appelant Vriend et des autres homosexuels. Il est donc nécessaire de décider si cette violation peut être justifiée conformément à l'article premier, analyse à laquelle procédera mon collègue.

IACOBUCCI J.

I. Analysis

A. *Section 1 of the Charter*

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

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

1. Pressing and Substantial Objective

109 The appellants note that the jurisprudence is somewhat divided with respect to the proper focus of the analysis at this stage of the s. 1 inquiry. While some authorities have examined the purpose of the legislation in its entirety (see e.g. *Miron*, *supra*; *Egan*, *supra*), others have considered only the purpose of the limitation that allegedly infringes the *Charter* (see e.g. *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, *per* McLachlin J.; *McKinney*, *supra*).

LE JUGE IACOBUCCI

I. Analyse

A. *L'article premier de la Charte*

L'article premier de la *Charte* garantit les droits et libertés énoncés dans ce texte de loi, mais prévoit qu'il peut y être porté atteinte dans la mesure où l'État peut démontrer que la violation est raisonnable et justifiable dans une société libre et démocratique. Le cadre analytique servant à déterminer si une disposition législative constitue une limite raisonnable apportée à une liberté ou à un droit garantis par la *Charte* a été exposé à maintes reprises depuis qu'il a été énoncé la première fois dans l'arrêt *R. c. Oakes*, [1986] 1 R.C.S. 103. Le dernier exposé qui en a été fait dans l'arrêt *Egan*, précité, au par. 182, a été cité et approuvé dans l'arrêt *Eldridge*, précité, au par. 84:

> L'atteinte à une garantie constitutionnelle sera valide à deux conditions. Dans un premier temps, l'objectif de la loi doit se rapporter à des préoccupations urgentes et réelles. Dans un deuxième temps, le moyen utilisé pour atteindre l'objectif législatif doit être raisonnable et doit pouvoir se justifier dans une société libre et démocratique. Cette seconde condition appelle trois critères: (1) la violation des droits doit avoir un lien rationnel avec l'objectif législatif; (2) la disposition contestée doit porter le moins possible atteinte au droit garanti par la *Charte*, et (3) il doit y avoir proportionnalité entre l'effet de la mesure et son objectif de sorte que l'atteinte au droit garanti ne l'emporte pas sur la réalisation de l'objectif législatif. Dans le contexte de l'article premier, il incombe toujours au gouvernement de prouver selon la prépondérance des probabilités que la violation peut se justifier.

1. Objectif urgent et réel

Les appelants font observer que la jurisprudence paraît quelque peu divisée sur la portée de l'examen qu'il convient d'effectuer à cette étape de l'analyse fondée sur l'article premier. Dans certaines décisions, en effet, la Cour a examiné l'objet de la loi prise dans son ensemble (notamment dans les arrêts *Miron* et *Egan*, précités), tandis que dans d'autres, seul l'objectif de la disposition limitative censée enfreindre la *Charte* a fait l'objet d'un examen (voir, par ex., les arrêts *RJR-MacDonald Inc.*

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.

c. Canada (Procureur général), [1995] 3 R.C.S 199, le juge McLachlin, et *McKinney*, précité). À mon avis, lorsque, comme en l'espèce, une loi est jugée contraire à la *Charte* en raison de sa portée trop limitative, c'est tout à la fois la loi considérée dans son ensemble, les dispositions contestées ainsi que l'omission elle-même qu'il y a lieu de prendre en compte.

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

110 L'article premier de la *Charte* dispose que ce sont les restrictions apportées aux droits et libertés qui y sont garantis dont la justification doit pouvoir se démontrer dans le cadre d'une société libre et démocratique. Il s'ensuit que suivant la première partie du critère de l'arrêt *Oakes*, l'analyse doit être axée sur l'objectif de la restriction contestée ou, en l'occurrence, de l'omission. De fait, dans l'arrêt *Oakes*, précité, à la p. 138, le juge en chef Dickson a souligné que c'était l'objectif «que visent à servir les mesures qui apportent une restriction à un droit ou à une liberté garantis par la *Charte*» (je souligne) qui devait être urgent et réel.

However, in my opinion, the objective of the omission cannot be fully understood in isolation. It seems to me that some consideration must also be given to both the purposes of the Act as a whole and the specific impugned provisions so as to give the objective of the omission the context that is necessary for a more complete understanding of its operation in the broader scheme of the legislation.

111 À mon avis, toutefois, on ne peut appréhender pleinement l'objectif visé par l'omission si on l'analyse isolément. Il me semble qu'il faut prendre également en considération tant les objets de la Loi dans son ensemble que les dispositions particulières contestées, de façon à situer l'objectif de l'omission dans un contexte permettant d'en mieux saisir le sens eu égard à l'économie générale de la loi.

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

112 Appliquons ces principes à la présente espèce. Le préambule de l'*IRPA* donne à entendre que, dans son ensemble, la Loi vise à reconnaître et à protéger la dignité inhérente et les droits inaliénables des citoyens de l'Alberta par l'élimination des pratiques discriminatoires. Dans notre société, la protection des droits de la personne est certainement un objectif louable qu'on peut à bon droit qualifier d'urgent et de réel. Pour ce qui est des dispositions contestées, on peut dire que de manière générale leur objectif est la protection des Albertains appartenant à des groupes déterminés contre la discrimination exercée dans divers domaines, tel l'emploi et l'hébergement. Cet objectif peut à juste titre être également considéré comme un objectif urgent et réel.

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

- The *IRPA* is inadequate to address some of the concerns expressed by the homosexual community (e.g. parental acceptance) (paragraph 57);
- Attitudes cannot be changed by order of the Human Rights Commission (paragraph 57);
- Despite the Minister asking for examples which would be ameliorated by the inclusion of sexual orientation in the *IRPA* (e.g. employment), only a few illustrations were provided (paragraph 57);
- Codification of marginal grounds which affect few persons raises objections from larger numbers of others, adding to the number of exemptions that would have been needed to satisfy both groups (paragraph 66).

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

Avec cette toile de fond, que dire de l'objectif de l'omission? Les intimés soutiennent qu'il ne faut examiner que l'objectif d'ensemble de la Loi, et leur argumentation ne permet pas de répondre directement à cette question. En cour d'appel, faute de preuve sur ce point, le juge Hunt s'est fondée sur le mémoire des intimés. Elle en a dégagé plusieurs raisons pouvant expliquer pourquoi, lorsque la question a été débattue par la législature de l'Alberta en 1985 et examinée à diverses autres occasions, on a décidé de ne pas ajouter l'orientation sexuelle dans l'*IRPA*. Les intimés ont repris certaines de ces raisons dans le mémoire qu'ils ont présenté à notre Cour, dont les suivantes:

- L'*IRPA* n'offre pas le cadre approprié pour répondre à certaines des préoccupations exprimées par la communauté homosexuelle (par ex. l'acceptation parentale) (paragraphe 57);
- Ce n'est pas une ordonnance de la Commission des droits de la personne qui peut changer les attitudes (paragraphe 57);
- Bien que le ministre ait demandé qu'on lui donne des exemples de cas où l'inclusion de l'orientation sexuelle dans l'*IRPA* (par ex. en matière d'emploi) pourrait apporter une amélioration, seuls quelques cas lui ont été fournis (paragraphe 57);
- La codification de motifs marginaux touchant un petit nombre de personnes soulève des objections de la part de groupes numériquement supérieurs, ce qui ajoute au nombre des exemptions qui seraient nécessaires pour satisfaire les deux groupes (paragraphe 66).

Bien que ces énoncés contribuent, dans une certaine mesure, à expliquer le choix du législateur d'exclure l'orientation sexuelle de l'*IRPA*, ce n'est pas, à mon sens, le type de preuve qu'il faut faire dans le cadre de la première étape du critère de *Oakes*. À cette première étape, le gouvernement doit démontrer que l'«objectif» de l'omission est urgent et réel. Or, la notion d'«objectif», savoir un but ou un objet à atteindre, est très différente de la notion d'«explication», qui signifie rendre clair ce qui n'apparaît pas évident d'emblée. À mon avis,

ion, the above statements fall into the latter category and hence are of little help.

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

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

2. Proportionality Analysis

(a) *Rational Connection*

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

les énoncés susmentionnés relèvent de la dernière catégorie et ne sont donc pas d'un grand secours.

115 Dans ses motifs, le juge McClung fait allusion aux considérations «morales» qui ont vraisemblablement guidé le choix du législateur. Toutefois, même si ces considérations pouvaient être qualifiées d'urgentes et réelles (opinion difficilement acceptable à mon sens en l'espèce), je souligne que, selon une jurisprudence constante, c'est au gouvernement qu'incombe la responsabilité de justifier la violation de la *Charte* (voir par ex. *Andrews c. Law Society of British Columbia*, précité). Vu l'absence d'observations quant à la nature urgente et réelle de l'objectif de l'omission, les intimés ne se sont pas déchargés de leur fardeau de preuve et j'en conclus qu'ils n'ont pas réussi à franchir cette première étape de l'analyse fondée sur l'article premier.

116 L'objectif d'une omission se dégage souvent de la Loi considérée dans son ensemble. Dans le cas contraire, l'on peut examiner les effets de l'omission. Toutefois, même si j'écartais la question du fardeau de la preuve pour tenter de discerner l'objectif de l'omission dans les dispositions de l'*IRPA*, le résultat serait à mon avis le même. Comme je l'ai indiqué précédemment, le but général de l'*IRPA* est la protection de la dignité et des droits de tous les habitants de l'Alberta. Or, l'exclusion de l'orientation sexuelle nie de fait cette protection aux homosexuels. À mon sens, lorsque, comme en l'espèce, une omission du législateur est à première vue l'antithèse des principes qu'incarne le texte dans son ensemble, on ne peut dire que l'omission correspond à un objectif qui ressort de la Loi elle-même et qui serait urgent et réel, de telle sorte que soit justifiée une dérogation à des droits constitutionnellement protégés. Donc, suivant l'une ou l'autre analyse, les intimés échouent à l'étape initiale du critère de l'arrêt *Oakes*.

2. Évaluation de la proportionnalité

a) *Lien rationnel*

117 Compte tenu de la conclusion que je viens de tirer, il n'est pas nécessaire d'analyser la seconde partie du critère de l'arrêt *Oakes* pour trancher le

with this matter more fully, I will go on to consider the remainder of the test. I will assume, solely for the sake of the analysis, that the respondents correctly argued that where the objective of the whole of the legislation is pressing and substantial, this is sufficient to satisfy the first stage of the inquiry under s. 1 of the *Charter*.

présent pourvoi. Toutefois, pour analyser cette question plus avant, j'examinerai les autres aspects du critère. Je présume, uniquement aux fins de l'analyse, que les intimés ont prétendu à bon droit que lorsque le texte législatif dans son ensemble vise un objectif urgent et réel, cela suffit à satisfaire à la première étape de l'analyse fondée sur l'article premier de la *Charte*.

118 At the second stage of the *Oakes* test, the preliminary inquiry is a consideration of the rationality of the impugned provisions (*Oakes*, *supra*, at p. 141). The party invoking s. 1 must demonstrate that a rational connection exists between the objective of the provisions under attack and the measures that have been adopted. Thus, in the case at bar, it falls to the Legislature to show that there is a rational connection between the goal of protection against discrimination for Albertans belonging to specific groups in various settings, and the exclusion of gay men and lesbians from the impugned provisions of the *IRPA*.

À la seconde étape du critère de l'arrêt *Oakes*, l'examen préliminaire porte sur la rationalité des dispositions contestées (*Oakes*, précité, à la p. 141). La partie invoquant l'article premier doit établir qu'il existe un lien rationnel entre l'objectif des dispositions attaquées et les mesures qui ont été adoptées. En l'espèce, il incombe donc au législateur de prouver qu'il y a un lien rationnel entre d'une part le but à atteindre, soit la protection des Albertains appartenant à des groupes déterminés contre la discrimination exercée dans divers domaines, et d'autre part l'exclusion des homosexuels des dispositions contestées de l'*IRPA*.

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

Loin d'être rationnellement liée à l'objectif des dispositions contestées, l'exclusion de l'orientation sexuelle en est l'antithèse. Il serait absurde, en vérité, d'affirmer qu'il existe un lien rationnel entre la protection contre la discrimination et le refus d'accorder cette même protection à un groupe qui, d'après la jurisprudence de notre Cour, a été victime d'un désavantage historique (voir l'arrêt *Egan*, précité), ou de soutenir que l'objectif de protection peut être atteint de cette façon.

120 However, relying on the reasons of Sopinka J. in *Egan*, the respondents submit that a rational connection to the purpose of a statute can be achieved through the use of incremental means which, over time, expand the scope of the legislation to all those whom the legislature determines to be in need of statutory protection. The respondents further suggest that the legislative history of the *IRPA* demonstrates a pattern of progressive incrementalism sufficient to meet the Government's onus under the rational connection stage of the *Oakes*

Les intimés, toutefois, s'appuyant sur les motifs du juge Sopinka dans l'arrêt *Egan*, soutiennent que le lien rationnel peut s'établir de façon graduelle, par élargissement progressif de la portée de la loi, de façon que celle-ci s'applique avec le temps à tous ceux qui, d'après le législateur, ont besoin de protection législative. Les intimés affirment en outre que l'historique de l'*IRPA* montre l'existence d'un élargissement progressif permettant au gouvernement de s'acquitter du fardeau de la preuve qui lui incombe à l'étape relative au lien rationnel

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. Indeed, the trial judge, despite the absence of evidence on this matter, assumed that the budgetary impact on the Human Rights Commission would not be substantial enough to change the scheme of the legislation. Having not heard anything persuasive to the contrary, I am prepared to make this same assumption.

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

de l'application du critère établi dans l'arrêt *Oakes*. Selon moi, cet argument n'est pas fondé.

121 Le contexte ayant amené le juge Sopinka à préconiser la formule graduelle dans l'arrêt *Egan* diffère passablement de la présente situation. Premièrement, dans cette affaire portant sur l'exclusion des couples de même sexe de la définition du terme «conjoint» énoncée dans la *Loi sur la sécurité de la vieillesse*, le procureur général avait soutenu qu'il était possible de parvenir, avec le temps, à des solutions plus acceptables. En l'espèce, par contre, la législature de l'Alberta a refusé à maintes reprises d'ajouter l'orientation sexuelle aux motifs de discrimination interdits par l'*IRPA*. Il est difficile d'y voir une progression graduelle de la protection des droits des homosexuels. Deuxièmement, on s'était beaucoup intéressé, dans l'affaire *Egan*, à la question des répercussions financières qu'entraînerait l'application d'un régime de prestations à un groupe auparavant exclu. L'ajout de l'orientation sexuelle dans l'*IRPA* ne suscite pas les mêmes préoccupations. En fait, le juge de première instance a tenu pour acquis, malgré l'absence de preuve sur ce point, que les conséquences de cet ajout sur le budget de la Human Rights Commission ne seraient pas assez importantes pour modifier l'économie de la Loi. Comme on ne m'a pas convaincu du contraire, j'incline à tirer la même conclusion.

122 En outre, j'ai exprimé l'opinion, dans les motifs que j'ai exposés en mon nom et au nom du juge Cory dans l'arrêt *Egan*, que la nécessité pour le gouvernement de procéder par étape ne pouvait justifier une violation de la *Charte*. Je demeure convaincu que cette approche ne convient pas en général, surtout lorsque la loi en cause est, comme en l'espèce, un code complet des droits de la personne. À mon avis, on ne peut demander à des groupes qui sont depuis longtemps victimes de discrimination d'attendre patiemment que les gouvernements en viennent, étape par étape, à protéger leur dignité et leur droit à l'égalité. Si on tolère que les atteintes aux droits et aux libertés de ces groupes se poursuivent pendant que les gouverne-

guarantees of the *Charter* will be reduced to little more than empty words.

(b) *Minimal Impairment*

123 The respondents contend that an *IRPA* which is silent as to sexual orientation minimally impairs the appellants' s. 15 rights. The *IRPA* is alleged to be the type of social policy legislation that requires the Alberta Legislature to mediate between competing groups. It is suggested that the competing interests in the present case are religious freedom and homosexuality. Relying upon Sopinka J.'s reasons in *Egan*, the respondents advocate judicial deference in these circumstances. I reject these submissions for several reasons.

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

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

ments négligent de prendre des mesures diligentes pour réaliser l'égalité, les garanties inscrites dans la *Charte* ne seront guère plus que des vœux pieux.

b) *Atteinte minimale*

Les intimés prétendent que l'*IRPA*, qui ne fait pas mention de l'orientation sexuelle, porte le moins possible atteinte aux droits des appelants garantis par l'art. 15. Selon eux, l'*IRPA* est un instrument législatif de politique sociale qui requiert de la législature de l'Alberta qu'elle agisse comme arbitre des revendications de groupes opposés. Ils affirment que les intérêts opposés en cause sont la liberté de religion et l'homosexualité. Invoquant les motifs du juge Sopinka dans l'arrêt *Egan*, les intimés exhortent la Cour à faire preuve de retenue judiciaire. Plusieurs raisons s'opposent à ce que je me rende à leurs arguments.

D'abord, je ne puis souscrire à l'opinion selon laquelle la législature de l'Alberta assume un rôle d'arbitre entre des groupes opposés. Si tant est qu'il y ait conflit entre la liberté de religion et la protection des homosexuels, l'*IRPA* renferme des mécanismes permettant de pondérer ces intérêts rivaux. En effet, l'art. 11.1 de l'*IRPA* prévoit un moyen de défense lorsque la discrimination est [TRADUCTION] «raisonnable et justifiable dans les circonstances», et les par. 7(3) et 8(2) excusent la discrimination lorsqu'elle se rattache à une exigence professionnelle justifiée. Ces dispositions de pondération font en sorte qu'aucun des droits conférés n'est absolu. Les droits sont reconnus les uns par rapport aux autres, et aucun n'a automatiquement préséance sur un autre.

Étant donné l'existence de ces mécanismes internes de pondération, l'argument voulant que le rôle d'arbitre entre des intérêts opposés que joue le gouvernement réduit les options qui lui sont ouvertes en matière d'octroi de droits ne saurait être retenu. Il ne s'agit pas de demander à la législature de l'Alberta de renoncer à son rôle de médiateur. En vertu de l'*IRPA*, cette tâche doit plutôt être accomplie, au cas par cas, en fonction des faits de chaque affaire. En l'espèce, par conséquent, il n'est pas fondé d'affirmer que des droits ne peuvent être conférés à un groupe en raison

others. A complete solution to any such conflict already exists within the legislation.

In any event, although this Court has recognized that the Legislatures ought to be accorded some leeway when making choices between competing social concerns (see e.g. *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *Egan*, *supra*, *per* Sopinka J.), judicial deference is not without limits. In *Eldridge*, *supra*, La Forest J. quoted with approval from his reasons in *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22, at p. 44, wherein he stated that "the deference that will be accorded to the government when legislating in these matters does not give them an unrestricted licence to disregard an individual's *Charter* rights". This position was echoed by McLachlin J. in *RJR-MacDonald*, *supra*, at para. 136:

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

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.

d'un conflit avec les droits des autres. La Loi prévoit déjà la façon de régler de tels conflits.

126 Quoi qu'il en soit, même si notre Cour a reconnu que le législateur doit jouir d'une certaine latitude lorsqu'il fait des choix entre des intérêts sociaux divergents (voir les arrêts *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 R.C.S. 927, et *Egan*, précité, le juge Sopinka), le principe de la retenue judiciaire n'est pas sans limite. Dans l'arrêt *Eldridge*, précité, le juge La Forest a repris les motifs qu'il avait prononcés dans l'arrêt *Tétreault-Gadoury c. Canada (Commission de l'emploi et de l'immigration)*, [1991] 2 R.C.S. 22, à la p. 44, et dans lesquels il affirmait que «la retenue dont il sera fait preuve à l'égard du gouvernement qui légifère en ces matières ne lui permet pas d'enfreindre en toute impunité les droits dont bénéficie un individu en vertu de la *Charte*». Le juge McLachlin a fait écho à cette position dans l'arrêt *RJR-MacDonald*, précité, au par. 136:

> . . . il faut prendre soin de ne pas pousser trop loin la notion du respect. Le respect porté ne doit pas aller jusqu'au point de libérer le gouvernement de l'obligation que la *Charte* lui impose de démontrer que les restrictions qu'il apporte aux droits garantis sont raisonnables et justifiables. Le Parlement a son rôle: choisir la réponse qui convient aux problèmes sociaux dans les limites prévues par la Constitution. Cependant, les tribunaux ont aussi un rôle: déterminer de façon objective et impartiale si le choix du Parlement s'inscrit dans les limites prévues par la Constitition. Les tribunaux n'ont pas plus le droit que le Parlement d'abdiquer leur responsabilité. Les tribunaux se trouveraient à diminuer leur rôle à l'intérieur du processus constitutionnel et à affaiblir la structure des droits sur lesquels notre constitution et notre nation sont fondées, s'ils portaient le respect jusqu'au point d'accepter le point de vue du Parlement simplement pour le motif que le problème est sérieux et la solution difficile.

127 En l'espèce, le gouvernement de l'Alberta n'a pas démontré qu'il avait un motif raisonnable d'exclure l'orientation sexuelle de l'*IRPA*. Cette loi ne confère aux homosexuels aucune protection contre la discrimination fondée sur l'orientation sexuelle, et encore moins une protection égale. Une telle exclusion constitue une atteinte intégrale, et non minimale, à la garantie d'égalité énoncée

In these circumstances, the call for judicial deference is inappropriate.

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

128 The respondents did not address this third element of the proportionality requirement. However, in my view, the deleterious effects of the exclusion of sexual orientation from the *IRPA*, as noted by Cory J., are numerous and clear. As the Alberta Government has failed to demonstrate any salutary effect of the exclusion in promoting and protecting human rights, I cannot accept that there is any proportionality between the attainment of the legislative goal and the infringement of the appellants' equality rights. I conclude that the exclusion of sexual orientation from the *IRPA* does not meet the requirements of the *Oakes* test and accordingly, it cannot be saved under s. 1 of the *Charter*.

II. Remedy

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

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

130 Much was made in argument before us about the inadvisability of the Court interfering with or otherwise meddling in what is regarded as the proper role of the legislature, which in this case was to decide whether or not sexual orientation would be added to Alberta's human rights legislation. Indeed, it seems that hardly a day goes by without some comment or criticism to the effect that under

par la *Charte*. Dans ces circonstances, il ne convient pas d'invoquer le principe de la retenue judiciaire.

c) *Proportionnalité entre l'effet de la mesure et l'objectif de la loi*

Les intimés n'ont pas abordé ce troisième élément de l'exigence relative à la proportionnalité. J'estime toutefois que les effets néfastes de l'exclusion de l'orientation sexuelle de l'*IRPA* sont, ainsi que le juge Cory l'a mentionné, nombreux et clairs. Comme le gouvernement de l'Alberta n'a pas établi quels bienfaits cette exclusion apportait à la promotion et à la protection des droits de la personne, je ne puis conclure à l'existence d'une quelconque proportionnalité entre l'atteinte de l'objectif législatif et la violation des droits à l'égalité des appelants. Je suis donc d'avis que l'exclusion de l'orientation sexuelle de l'*IRPA* ne satisfait pas aux exigences du critère énoncé dans l'arrêt *Oakes* et qu'elle ne peut, en conséquence, être justifiée en vertu de l'article premier.

II. Réparation

A. *Introduction: la relation entre le législateur et les tribunaux sous le régime de la Charte*

Vu ma conclusion selon laquelle l'exclusion de l'orientation sexuelle de l'*IRPA* contrevient de façon injustifiable aux droits des appelants à l'égalité, j'aborde maintenant la question de la réparation à accorder sous le régime de l'art. 52 de la *Loi constitutionnelle de 1982*. Il pourrait être utile, avant d'analyser la jurisprudence en cette matière, d'approfondir la question plus générale de la relation existant entre le législateur et les tribunaux à l'ère de la *Charte*.

On a soutenu avec insistance, au cours de l'argumentation, qu'il n'était pas souhaitable que la Cour intervienne ou s'immisce autrement dans ce qui est considéré comme le rôle propre du législateur, savoir, en l'espèce, trancher la question de l'ajout de l'orientation sexuelle au nombre des motifs de discrimination interdits par la loi albertaine relative aux droits de la personne. De fait, il

the *Charter* courts are wrongfully usurping the role of the legislatures. I believe this allegation misunderstands what took place and what was intended when our country adopted the *Charter* in 1981-82.

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

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

However, giving courts the power and commandment to invalidate legislation where necessary has not eliminated the debate over the "legitimacy" of courts taking such action. As eloquently put by A. M. Bickel in his outstanding work *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (2nd ed. 1986), "it thwarts the will of representatives of the . . . people" (p. 17). So judicial review, it is alleged, is illegitimate

se passe rarement une journée, semble-t-il, sans qu'on entende des commentaires ou des critiques selon lesquels la *Charte* permet aux tribunaux d'usurper le rôle du législateur. Je crois que ces propos reflètent une méconnaissance de ce qui s'est passé et de ce que l'on cherchait à accomplir quand notre pays a adopté la *Charte* en 1981-1982.

131 Lorsque la *Charte* a été introduite, le Canada est passé du système de la suprématie parlementaire à celui de la suprématie constitutionnelle, pour reprendre les propos de l'ancien juge en chef Brian Dickson («Keynote Address», dans *The Cambridge Lectures 1985* (1985), aux pp. 3 et 4). Plus simplement, chaque citoyen canadien a reçu des droits et des libertés qu'aucun gouvernement ni aucune législature ne pouvait lui reprendre. Ces droits et libertés n'étant pas absolus, toutefois, les gouvernements et les législatures pouvaient justifier la restriction ou la violation de ces droits constitutionnels en conformité avec l'article premier, ainsi que je l'ai déjà expliqué. Il était inévitable que surgissent des litiges concernant la portée des droits et leur justification et que les tribunaux soient appelés à les régler. Dans de nombreux pays, l'importante tâche de la révision judiciaire a été confiée à la cour suprême ou à la cour constitutionnelle (pour une excellente analyse de cette tendance nouvelle, voir D. M. Beatty, dir., *Human Rights and Judicial Review: A Comparative Perspective* (1994); B. Ackerman, «The Rise of World Constitutionalism» (1997), 83 *Va. L. Rev.* 771).

132 Souvenons-nous que les législatures provinciales et le Parlement ont volontairement décidé, en adoptant la *Charte*, de confier un rôle interprétatif aux tribunaux et de leur prescrire, sous le régime de l'art. 52, de déclarer invalides les lois inconstitutionnelles.

133 Toutefois, le fait de conférer aux tribunaux le pouvoir et l'obligation d'invalider des lois lorsque cela était nécessaire n'a pas éliminé le débat entourant la «légitimité» d'une telle action par les tribunaux. Comme A. M. Bickel l'exprime éloquemment dans son remarquable ouvrage *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (2e éd. 1986), [TRADUCTION] «cela contredit la volonté des représentants du peuple»

because it is anti-democratic in that unelected officials (judges) are overruling elected representatives (legislators) (see e.g. A. A. Peacock, ed., *Rethinking the Constitution: Perspectives on Canadian Constitutional Reform, Interpretation, and Theory* (1996); R. Knopff and F. L. Morton, *Charter Politics* (1992); M. Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (1994), c. 2).

(p. 17). Ainsi, les tenants de cette opinion soutiennent que la révision judiciaire est illégitime parce qu'elle permet à des personnes qui n'ont pas été élues (les juges) d'infirmer les décisions des élus (le législateur), ce qui est antidémocratique (voir par ex. A. A. Peacock, dir., *Rethinking the Constitution: Perspectives on Canadian Constitutional Reform, Interpretation, and Theory* (1996); R. Knopff et F. L. Morton, *Charter Politics* (1992); M. Mandel, *La Charte des droits et libertés et la judiciarisation du politique au Canada* (1996), ch. 2).

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

Pour répondre à ces arguments, il faut, encore une fois, insister sur le fait que, par le truchement de ses élus, le peuple canadien a choisi, dans le cadre de la redéfinition de la démocratie canadienne, d'adopter la *Charte* et, par suite, de donner au tribunaux un rôle correctif à jouer. Notre Constitution a été réaménagée de façon à déclarer que dorénavant le pouvoir législatif et le pouvoir exécutif devront exercer leurs fonctions dans le respect des libertés et droits constitutionnels nouvellement reconnus. La dévolution aux tribunaux du rôle de fiduciaires à l'égard de ces droits en cas de litiges quant à leur interprétation constituait un élément nécessaire de ce nouveau régime.

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

Il s'ensuit obligatoirement qu'en leur qualité de fiduciaires ou d'arbitres, les tribunaux doivent examiner les actes du pouvoir législatif et du pouvoir exécutif, non en leur nom propre mais pour l'exécution du nouveau contrat social démocratiquement conclu. Ce rôle découle implicitement du pouvoir conféré aux tribunaux par l'art. 24 de la *Charte* et l'art. 52 de la *Loi constitutionnelle de 1982*.

136 Because the courts are independent from the executive and legislature, litigants and citizens generally can rely on the courts to make reasoned and principled decisions according to the dictates of the constitution even though specific decisions may not be universally acclaimed. In carrying out their duties, courts are not to second-guess legislatures and the executives; they are not to make value judgments on what they regard as the proper policy choice; this is for the other branches. Rather, the courts are to uphold the Constitution

Parce que les tribunaux sont indépendants des pouvoirs exécutif et législatif, les justiciables et les citoyens en général peuvent habituellement s'attendre à ce qu'ils rendent des décisions motivées et étayées, conformes aux prescriptions constitutionnelles, même si certaines d'entre elles peuvent ne pas faire l'unanimité. Les tribunaux n'ont pas, pour accomplir leurs fonctions, à se substituer après coup aux législatures ou aux gouvernements; ils ne doivent pas passer de jugement de valeur sur ce qu'ils considèrent comme les politiques à adop-

and have been expressly invited to perform that role by the Constitution itself. But respect by the courts for the legislature and executive role is as important as ensuring that the other branches respect each others' role and the role of the courts.

ter; cette tâche appartient aux autres organes de gouvernement. Il incombe plutôt aux tribunaux de faire respecter la Constitution, et c'est la Constitution elle-même qui leur confère expressément ce rôle. Toutefois, il est tout aussi important, pour les tribunaux, de respecter eux-mêmes les fonctions du pouvoir législatif et de l'exécutif que de veiller au respect, par ces pouvoirs, de leur rôle respectif et de celui des tribunaux.

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

137 Ce respect mutuel ressort d'une certaine façon de l'énoncé même de certains droits constitutionnels dans notre Constitution. Par exemple, l'art. 7 de la *Charte* énonce qu'il ne peut être porté atteinte aux droits qui y sont énumérés qu'en conformité avec les principes de justice fondamentale, lesquels comprennent l'application régulière de la loi et l'action législative. L'article premier et la jurisprudence qui s'y rapporte revêtent également une grande importance pour le respect de l'action législative et des intérêts collectifs et sociétaux que représente la législation. De plus, comme nous le verrons plus loin, lorsqu'un tribunal se prononce sur une mesure visant à corriger une contravention à la *Charte*, il ne doit jamais oublier le rôle du législateur. En outre, la disposition de dérogation — l'art. 33 — a pour effet, dans notre régime constitutionnel, de laisser le dernier mot au législateur et non aux tribunaux (voir P. Hogg et A. Bushell, «The *Charter* Dialogue Between Courts and Legislatures» (1997), 35 *Osgoode Hall L.J.* 75).

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

138 À mon avis, la *Charte* a suscité une interaction plus dynamique entre les organes du gouvernement, que d'aucuns ont qualifiée, à juste titre, de «dialogue» (voir par exemple Hogg et Bushell, *loc. cit.*). En examinant la validité constitutionnelle de textes de loi ou de décisions de l'exécutif, les tribunaux parlent au législatif et à l'exécutif. Comme il en a été fait mention, la plupart des dispositions législatives qui n'ont pas résisté à un examen constitutionnel ont été suivies de nouvelles dispositions visant des objectifs similaires (voir Hogg et Bushell, *loc. cit.*, à la p. 82). Le législateur, de cette façon, répond aux tribunaux, d'où l'analogie du dialogue entre les différents organes du gouvernement.

139 To my mind, a great value of judicial review and this dialogue among the branches is that each of the branches is made somewhat accountable to the other. The work of the legislature is reviewed by the courts and the work of the court in its decisions can be reacted to by the legislature in the passing of new legislation (or even overarching laws under s. 33 of the *Charter*). This dialogue between and accountability of each of the branches have the effect of enhancing the democratic process, not denying it.

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

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

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

142 Democratic values and principles under the *Charter* demand that legislators and the executive take these into account; and if they fail to do so,

La révision judiciaire et ce dialogue sont précieux, selon moi, parce qu'ils obligent en quelque sorte les divers organes du gouvernement à se rendre mutuellement des comptes. Les tribunaux examinent le travail du législateur, et le législateur réagit aux décisions des tribunaux en adoptant d'autres textes de loi (ou même en se prévalant de l'art. 33 de la *Charte* pour les soustraire à la *Charte*). Ce dialogue et ce processus de reddition de compte entre organes du gouvernement, loin de nuire au processus démocratique, l'enrichissent.

Un autre aspect de la révision judiciaire contribue à la promotion des valeurs démocratiques. Même si l'invalidation judiciaire d'une disposition législative contredit habituellement la volonté de la majorité, il ne faut pas perdre de vue que l'idée de démocratie transcende la règle de la majorité, toute fondamentale que soit cette dernière. Il serait bon, à cet égard, de ne pas oublier les propos suivants du juge en chef Dickson dans l'arrêt *Oakes*, précité, à la p. 136:

> Les tribunaux doivent être guidés par des valeurs et des principes essentiels à une société libre et démocratique, lesquels comprennent, selon moi, le respect de la dignité inhérente de l'être humain, la promotion de la justice et de l'égalité sociales, l'acceptation d'une grande diversité de croyances, le respect de chaque culture et de chaque groupe et la foi dans les institutions sociales et politiques qui favorisent la participation des particuliers et des groupes dans la société.

Ainsi, par exemple, le tribunal qui interprète une disposition législative présentée comme une limite raisonnable dans une société libre et démocratique au sens de l'article premier de la *Charte*, doit inévitablement définir certaines caractéristiques d'une société démocratique. Bien qu'il ne soit pas nécessaire d'évoquer toutes les caractéristiques démocratiques énumérées dans ces remarques, le commentaire du juge en chef Dickson demeure pertinent (voir également: *R. c. Keegstra*, [1990] 3 R.C.S. 697, le juge en chef Dickson; *B. (R.) c. Children's Aid Society of Metropolitan Toronto*, précité, le juge La Forest).

Le pouvoir législatif et le pouvoir exécutif ont l'obligation de tenir compte des valeurs et des principes démocratiques reconnus dans la *Charte*

courts should stand ready to intervene to protect these democratic values as appropriate. As others have so forcefully stated, judges are not acting undemocratically by intervening when there are indications that a legislative or executive decision was not reached in accordance with the democratic principles mandated by the *Charter* (see W. Black, "*Vriend*, Rights and Democracy" (1996), 7 *Constitutional Forum* 126; D. M. Beatty, "Law and Politics" (1996), 44 *Am. J. Comp. L.* 131, at p. 149; M. Jackman, "Protecting Rights and Promoting Democracy: Judicial Review Under Section 1 of the *Charter*" (1996), 34 *Osgoode Hall L.J.* 661).

et, s'ils ne le font pas, les tribunaux doivent être prêts à intervenir pour protéger comme il se doit ces valeurs et principes. Comme certains auteurs l'ont affirmé avec vigueur, les juges n'agissent pas de façon antidémocratique en intervenant lorsque des décisions d'ordre législatif ou exécutif ne semblent pas avoir été prises en conformité avec les principes démocratiques prescrits par la *Charte* (voir W. Black, «*Vriend*, Rights and Democracy» (1996), 7 *Forum constitutionnel* 126; D. M. Beatty, «Law and Politics» (1996), 44 *Am. J. Comp. L.* 131, à la p. 149; M. Jackman, «Protecting Rights and Promoting Democracy: Judicial Review Under Section 1 of the *Charter*» (1996), 34 *Osgoode Hall L.J.* 661).

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

143 Ayant tendu cette toile de fond, je passe maintenant à l'examen de la jurisprudence portant précisément sur le choix de la mesure corrective à appliquer en l'espèce.

B. *Remedial Principles*

B. *Principes applicables en matière de mesures correctives*

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

144 L'arrêt de principe pour ce qui est des mesures correctives constitutionnelles est *Schachter*, précité. S'exprimant au nom des juges majoritaires, le juge en chef Lamer a dit que la première étape à suivre pour choisir une mesure corrective sous le régime de l'art. 52 consiste à déterminer l'étendue de l'incompatibilité avec la *Charte* qui doit être annulée. En l'espèce, cette incompatibilité est l'exclusion de l'orientation sexuelle des motifs ouvrant droit à la protection de l'*IRPA*. Cette exclusion constitue, suivant la conclusion à laquelle je suis parvenu plus haut, une atteinte injustifiable aux droits à l'égalité garantis par l'art. 15 de la *Charte*.

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

145 Une fois l'incompatibilité précisée, l'étape suivante consiste à déterminer quelle est la mesure corrective appropriée. Dans l'arrêt *Schachter*, notre Cour a signalé que, tout dépendant des circonstances, un tribunal peut choisir entre plusieurs mesures correctives lorsqu'il conclut à l'existence d'une violation de la *Charte* non justifiée en vertu de l'article premier. Il peut notamment annuler la loi, retrancher les dispositions fautives, ordonner l'annulation ou la dissociation assortie d'une suspension temporaire de la déclaration d'invalidité,

declaration of invalidity, reading down, and reading provisions into the legislation.

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

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

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

149 He went on to quote the following passage from Carol Rogerson in "The Judicial Search for Appropriate Remedies Under the Charter: The Examples of Overbreadth and Vagueness", in R. J. Sharpe, ed., *Charter Litigation* (1987), 233, at p. 288:

recourir à l'interprétation atténuée ou inclure des dispositions par interprétation large.

Parce que la violation de la *Charte* découle d'une omission en l'espèce, l'interprétation atténuée n'est pas une option. En outre, je constate que, vu le grand nombre de dispositions en cause et le rôle important qu'elles jouent dans l'économie générale de l'*IRPA*, la dissociation équivaudrait à l'annulation de la totalité de la Loi.

Les appelants affirment qu'il est justifié, compte tenu des circonstances de la présente espèce, d'inclure l'orientation sexuelle, par interprétation large, dans les dispositions fautives de l'*IRPA*. Les juges O'Leary et Hunt de la Cour d'appel de l'Alberta, toutefois, ont tous deux estimé qu'il convenait de déclarer inconstitutionnelles les dispositions visées et de suspendre cette déclaration de façon à permettre à la législature de corriger la situation. Le juge McClung serait allé plus loin: il aurait déclaré invalide la totalité de l'*IRPA*. En toute déférence, je ne puis, pour les motifs suivants, me rallier à aucune des mesures choisies par la Cour d'appel.

Dans l'arrêt *Schachter*, le juge en chef Lamer a fait remarquer que les tribunaux, lorsqu'ils examinent s'il convient d'adopter une interprétation large, doivent tenir compte des «deux principes directeurs» que j'ai précédemment abordés de façon générale, savoir le respect du rôle du législateur et le respect des objets de la *Charte*. Relativement au rôle du législateur, le juge en chef Lamer a affirmé, à la p. 700, que l'interprétation large est un moyen important d'«empêcher un empiétement injustifié sur le domaine législatif. [. . .] [L]'objet de l'interprétation large est d'être aussi fidèle que possible, dans le cadre des exigences de la Constitution, au texte législatif adopté par le législateur.»

Il a ensuite cité le passage suivant du texte de Carol Rogerson, «The Judicial Search for Appropriate Remedies Under the Charter: The Examples of Overbreadth and Vagueness», dans R. J. Sharpe, dir., *Charter Litigation* (1987), 233, à la p. 288:

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

[TRADUCTION] Les tribunaux devraient certainement aller aussi loin que nécessaire pour assurer la protection des droits, mais pas davantage. L'empiétement sur les objets législatifs légitimes devrait être réduit au minimum et les lois devraient demeurer opérantes dans la mesure où il n'y a pas violation de droits. Une loi qui sert des fins sociales souhaitables peut être constitutive de droits qui méritent une certaine protection.

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.

150 Comme je l'ai déjà dit, l'*IRPA* a pour objet de reconnaître et de protéger la dignité inhérente et les droits inaliénables des Albertains au moyen de l'élimination des pratiques discriminatoires. Je crois que le recours à l'interprétation large réduirait l'empiétement sur cet objet manifestement légitime et éviterait ainsi une ingérence excessive dans le domaine législatif, alors que l'annulation de l'*IRPA* priverait tous les Albertains de la protection des droits de la personne, ce qui modifierait indûment l'économie de la loi adoptée par le législateur.

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

151 L'arrêt de la Cour d'appel de l'Ontario *Haig*, précité, étaye mon point de vue. La Cour a ajouté les mots «orientation sexuelle», par interprétation large, au par. 3(1) de la *Loi canadienne sur les droits de la personne*, L.R.C. (1985), ch. H-6, et, à la p. 14, le juge Krever, exprimant l'avis unanime de la Cour, a écrit qu'il était

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

[TRADUCTION] inconcevable que le Parlement aurait préféré qu'il n'y ait pas de loi sur les droits de la personne plutôt que d'en avoir une qui ajoute l'orientation sexuelle à la liste des motifs de discrimination illicites. Conclure autrement serait un affront gratuit au Parlement.

Turning to the second of the twin guiding principles, the respondents suggest that the facts of this case are illustrative of a conflict between two grounds, namely, religion and sexual orientation. If sexual orientation were simply read into the *IRPA*, the respondents contend that this would undermine the ability of the *IRPA* to provide protection against discrimination based on religion, one of the fundamental goals of that legislation. This result is alleged to be "inconsistent with the deeper social purposes of the *Charter*".

152 Relativement au second principe directeur, les intimés plaident que les faits de l'espèce démontrent l'existence d'un conflit entre deux motifs de discrimination, savoir la religion et l'orientation sexuelle. Selon eux, la protection contre la discrimination religieuse, un objet fondamental de l'*IRPA*, serait affaiblie si l'on ajoutait, par interprétation large, l'orientation sexuelle aux motifs interdits. Ce résultat, soutiennent-ils, dérogerait [TRADUCTION] «aux objets sociaux fondamentaux de la *Charte*».

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

Puisque j'ai conclu que les mécanismes internes de pondération de l'*IRPA* permettent de régler tout conflit pouvant surgir entre la religion et l'orientation sexuelle, je ne puis recevoir l'argument des intimés selon lequel l'interprétation large ne respecterait pas les objets de la *Charte*. De fait, de mon point de vue, l'ajout par interprétation large de l'orientation sexuelle aux motifs de discrimination interdits par l'*IRPA* ne peut que servir ces objets. La *Charte*, tout comme la Loi, vise à promouvoir et à protéger la dignité inhérente et les droits inaliénables des citoyens. Ainsi, en allongeant la liste des motifs illicites de discrimination établie par l'*IRPA*, la Cour, en accord avec les objets de la *Charte*, élargirait la portée des protections offertes par la Loi. Si, par contre, elle annulait l'*IRPA* ou en retranchait des dispositions, elle priverait tous les Albertains de leur protection contre la discrimination du marché, ce qui me semble absolument contraire aux objets de la *Charte*.

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

Dans l'arrêt *Schachter*, précité, le juge en chef Lamer a indiqué que, pour satisfaire aux deux principes directeurs susmentionnés, il faut examiner soigneusement plusieurs autres facteurs susceptibles de nous éclairer sur la pertinence de recourir à l'interprétation large, notamment la précision de la mesure corrective, les conséquences financières, les répercussions sur l'économie de la loi et l'empiétement sur les objectifs législatifs.

155 As to the first of the above listed criteria, the court must be able to define with a "sufficient degree of precision" how the statute ought to be extended in order to comply with the Constitution. I do not believe that the present case is one in which this Court has been improperly called upon to fill in large gaps in the legislation. Rather, in my view, there is remedial precision insofar as the insertion of the words "sexual orientation" into the prohibited grounds of discrimination listed in the preamble and ss. 2(1), 3, 4, 7(1), 8(1), 10 and 16(1) of the *IRPA* will, without more, ensure the validity of the legislation and remedy the constitutional wrong.

S'agissant du premier de ces facteurs, les tribunaux doivent être en mesure de déterminer avec «suffisamment de précision» dans quelle mesure il faut élargir la portée d'une loi afin de la rendre compatible avec la Constitution. Je ne crois pas que dans la présente espèce, notre Cour ait été appelée à tort à combler d'importantes lacunes de la Loi. J'estime plutôt que la mesure corrective est précise dans la mesure où l'inclusion des mots «orientation sexuelle» dans les motifs de discrimination illicites énumérés dans le préambule de l'*IRPA* ainsi qu'aux art. 3, 4 et 10, de même qu'aux par. 2(1), 7(1), 8(1) et 16(1) aura pour seul effet d'assurer la validité de la Loi et d'en corriger l'inconstitutionnalité.

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

156 Dans ses motifs, le juge Hunt de la Cour d'appel a conclu que la mesure corrective n'était pas assez précise pour justifier le recours à l'interprétation large, et ce, pour deux raisons. Premièrement, elle a estimé qu'il serait vraisemblablement impossible de parvenir à une précision suffisante sans définir l'expression «orientation sexuelle». Je ne puis, en toute déférence, souscrire à une telle opinion. Cette expression, même si elle est définie dans la loi du Yukon concernant les droits de la personne, est employée sans définition dans la *Loi canadienne sur les droits de la personne* et dans les lois relatives aux droits de la personne de la Nouvelle-Écosse, du Nouveau-Brunswick, du Québec, de l'Ontario, du Manitoba, de la Saskatchewan et de la Colombie-Britannique de même qu'au sous-al. 718.2*a*)(i) du *Code criminel*, L.R.C. (1985), ch. C-46, modifié par L.C. 1995, ch. 22, art. 6. Notre Cour non plus n'a pas défini l'expression quand, dans l'arrêt *Egan*, précité, elle a reconnu que l'orientation sexuelle constituait un motif analogue sous le régime de l'art. 15 de la *Charte*. À mon avis, les mots «orientation sexuelle» sont des mots usuels dont le sens courant se comprend aisément.

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

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

157 De plus, je souscris aux commentaires de R. Khullar (dans «*Vriend*: Remedial Issues for Unremedied Discrimination» (1998), 7 *N.J.C.L.* 221) qui a écrit (aux pp. 237 et 238):

> [TRADUCTION] Si tant est que l'expression «orientation sexuelle» soit ambiguë, elle ne l'est pas davantage que les mots «race», «origine ethnique» ou «religion», lesquels sont tous des motifs de discrimination interdits par la *Charte* qui ne sont pas définis et que les tribunaux ou les législatures n'ont eu aucune difficulté particulière à comprendre ou à appliquer.

Hunt J.A. was also troubled by the possible impact of reading in upon s. 7(2) of the *IRPA*. This section states that s. 7(1) (employment), as regards age and marital status, "does not affect the operation of any bona fide retirement or pension plan or the terms or conditions of any bona fide group or employee insurance plan". As the Court of Appeal heard no argument on this point and as there was no evidence before the court to explain the rationale behind this provision, Hunt J.A. held that, if

158 Le juge Hunt s'inquiétait également des répercussions possibles de l'interprétation large sur le par. 7(2) de l'*IRPA*. Cette disposition énonce que le par. 7(1) (emploi) est, relativement à l'âge et à l'état matrimonial, [TRADUCTION] «sans effet sur l'application de tout régime de retraite légitime et des modalités de tout régime d'assurance collective ou d'employés légitime». Comme la Cour d'appel n'avait entendu aucun argument sur ce point et qu'aucune preuve n'avait été présentée

the protections of the *IRPA* were to be extended to gay men and lesbians, it would be necessary to decide whether this group would be included or excluded from s. 7(2). She found that this was something the court was in no position to do. In light of this difficulty, Hunt J.A. was concerned that the reading in remedy "would engage the court in the kind of 'filling in of details' against which Lamer, C.J.C., cautions in *Schachter* [*supra*]" (p. 69).

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

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

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

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

161 As to the effects on the thrust of the legislation, it is difficult to see any deleterious impact. All persons covered under the current scope of the *IRPA*

pour expliquer le fondement de cette disposition, le juge Hunt a conclu que si l'on étendait la protection de l'*IRPA* aux homosexuels, il serait nécessaire de décider si ce groupe était visé ou non par le par. 7(2). Elle a jugé que la Cour n'était pas en mesure de trancher une telle question. Cette difficulté faisait craindre au juge Hunt qu'en recourant à l'interprétation large [TRADUCTION] «la Cour ne soit amenée à "combler les lacunes" ce contre quoi le juge en chef Lamer mettait les tribunaux en garde dans l'arrêt *Schachter* [précité]» (p. 69).

Selon moi, la question de savoir si le par. 7(2) s'applique ou non aux homosexuels est secondaire et ne fait pas perdre à l'interprétation large le degré de précision requis. Je partage l'opinion de K. Roach, lequel estime que le législateur [TRADUCTION] «peut toujours revenir ensuite sur les détails qui ne sont pas dictés par la Constitution» (*Constitutional Remedies in Canada* (1994 (éd. feuilles mobiles)), à la p. 14-64.1). Je suis donc d'avis qu'en l'espèce, que la mesure corrective est suffisamment précise pour justifier le recours à l'interprétation large.

S'agissant des conséquences financières, elles ne revêtent pas, dans le présent pourvoi, une importance suffisante pour écarter l'interprétation large. Sur cette question, le juge de première instance a écrit (à la p. 18):

> [TRADUCTION] L'ajout de l'orientation sexuelle au nombre des motifs de discrimination illicites aura certainement des conséquences financières pour la Human Rights Commission. Mais contrairement à l'affaire *Schachter* [précitée], celles-ci ne sont pas assez importantes pour modifier la nature du régime prévu par la Loi.

Bien que l'examen de l'*IRPA* effectué par notre Cour a une portée beaucoup plus large que celle que le juge de première instance était appelée à effectuer, je ne suis pas disposé, comme je l'ai déjà mentionné, à modifier ses conclusions en cette matière puisqu'on ne m'a présenté aucune preuve convaincante du contraire.

Quant aux effets sur l'économie de la Loi, il est difficile de concevoir quelque conséquence néfaste. Toutes les personnes actuellement visées

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

par l'*IRPA* continueraient d'être protégées par ses dispositions de la même façon qu'elles l'étaient avant l'ajout de l'orientation sexuelle par interprétation large. Il est donc raisonnable de supposer que si le législateur avait eu le choix entre renoncer à faire passer une loi relative aux droits de la personne ou en adopter une qui interdit la discrimination fondée sur l'orientation sexuelle, il aurait opté pour la deuxième solution. Puisque l'inclusion de l'orientation sexuelle dans l'*IRPA* ne modifie pas substantiellement celle-ci, il est raisonnable de penser que le législateur l'aurait adoptée de toute façon.

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

162 En outre, le juge en chef Lamer, dans l'arrêt *Schachter*, précité, a signalé que lorsqu'il s'agit de savoir si l'on doit accorder des avantages à un groupe exclu de la loi, la question des effets de cette mesure sur l'économie du texte de loi sera quelquefois centrée sur la taille du groupe à ajouter par rapport à celle du groupe initial des bénéficiaires. Il a cité, en les approuvant, les motifs du juge Rowles dans la décision *Knodel*, précité, où le juge a étendu aux conjoints de même sexe le droit à des prestations pour conjoints. Selon elle, l'inclusion par interprétation large portait moins atteinte à l'intention législative que l'annulation du régime de prestations, parce que le groupe à ajouter était beaucoup plus petit que celui qui recevait les prestations.

Lamer C.J. went on to note that, "[w]here the group to be added is smaller than the group originally benefitted, this is an indication that the assumption that the legislature would have enacted the benefit in any case is a sound one" (p. 712). In the present case, gay men and lesbians are clearly a smaller group than those already benefited by the *IRPA*. Thus, in my view, reading in remains the less intrusive option.

163 Le juge en chef Lamer a ajouté: «[s]i le groupe à ajouter est numériquement moins important que le groupe initial de bénéficiaires, c'est une indication que la supposition que le législateur aurait de toute façon adopté le bénéfice est fondée» (p. 712). En l'espèce, les homosexuels forment indéniablement un groupe inférieur en nombre au groupe jouissant du bénéfice de l'*IRPA*. J'estime donc que l'interprétation large demeure la solution la moins attentatoire.

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

164 Le dernier facteur à examiner est celui de l'ingérence dans l'objectif législatif. Dans l'arrêt *Schachter*, précité, le juge en chef Lamer a fait le commentaire suivant au sujet de ce facteur (aux pp. 707 et 708):

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

Ce n'est qu'en examinant de près l'objectif de la loi en question que l'on peut déterminer le degré d'empiétement d'une réparation particulière sur le domaine législatif. [. . .] Un second niveau d'intention législative peut ressortir des moyens choisis pour atteindre cet objectif.

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

Il est évident, comme je l'ai déjà indiqué, que relativement au premier niveau d'intention législative, l'ajout par interprétation large de l'orientation sexuelle dans l'*IRPA* ne porterait pas atteinte à l'objectif du texte de loi; je suis même d'avis qu'il ne pourrait que servir cet objectif. À première vue, toutefois, il semble que l'interprétation large puisse empiéter sur le second niveau d'intention législative mis en lumière par le juge en chef Lamer.

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

Les intimés soutiennent que, la législature de l'Alberta ayant expressément résolu d'exclure l'orientation sexuelle de la liste des motifs de discrimination interdits par l'*IRPA*, l'interprétation large constituerait un empiétement indu sur la volonté du gouvernement. Le juge McClung partage cet avis. Selon lui, le recours à l'interprétation large n'est jamais acceptable lorsque l'omission du législateur résulte d'un choix délibéré. Il affirme que si une loi est inconstitutionnelle, [TRADUCTION] «c'est l'option du renvoi à l'autorité législative compétente pour permettre aux élus de remédier au vice constitutionnel qu'il convient de retenir» (p. 35). De mon point de vue, cependant, l'examen fondé sur la *Charte* comportera toujours, par définition, une forme d'empiétement sur la volonté du législateur.

167 Where a statute has been found to be unconstitutional, whether the court chooses to read provisions into the legislation or to strike it down, legislative intent is necessarily interfered with to some extent. Therefore, the closest a court can come to respecting the legislative intention is to determine what the legislature would likely have done if it had known that its chosen measures would be found unconstitutional. As I see the matter, a deliberate choice of means will not act as a bar to reading in save for those circumstances in which the means chosen can be shown to be of such centrality to the aims of the legislature and so integral to

Lorsqu'une loi est jugée inconstitutionnelle, que le tribunal choisisse d'avoir recours à l'interprétation large ou d'annuler la loi, il y a nécessairement une certaine ingérence dans l'intention du législateur. Par conséquent, la solution qui respecte le plus l'intention du législateur est celle qui consiste à se demander ce que le législateur aurait vraisemblablement fait s'il avait su que ses dispositions seraient jugées inconstitutionnelles. De mon point de vue, le choix délibéré des moyens n'empêche pas le recours à l'interprétation large, sauf dans les cas où l'on peut établir que les moyens choisis revêtent une importance à ce point centrale eu

the scheme of the legislation, that the legislature would not have enacted the statute without them.

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

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*, *supra*, 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 Legisla-

égard aux buts poursuivis par le législateur et sont à ce point essentiels à l'économie de la loi que le législateur ne l'aurait pas adopter sans eux.

168 En effet, comme l'a souligné l'intervenant, le Congrès juif canadien, juger que l'interprétation large n'est jamais applicable à une ligne de conduite expressément choisie par un gouvernement équivaut à dire qu'un gouvernement n'a qu'à contrevenir de façon délibérée à un droit garanti par la *Charte* pour échapper à l'interprétation large. Selon moi, pareil résultat est tout à fait inacceptable.

169 Dans l'affaire qui nous occupe, on peut difficilement soutenir que les moyens choisis par le législateur, savoir l'exclusion de l'orientation sexuelle de l'*IRPA*, sont essentiels à l'économie de la Loi. Je ne suis pas disposé non plus à reconnaître que ce choix revêtait une importance à ce point centrale eu égard aux buts poursuivis par le législateur que celui-ci aurait choisi de sacrifier l'ensemble de l'*IRPA* plutôt que d'intégrer l'orientation sexuelle au nombre des motifs de discrimination illicites, en particulier pour les motifs que j'expose ici.

170 Comme le juge Cory l'a indiqué, la législature de l'Alberta a créé l'Alberta Human Rights Review Panel, en 1993, et a chargé ce comité d'examiner l'*IRPA* ainsi que l'Alberta Human Rights Commission. Le comité, dans son rapport, a formulé plusieurs recommandations, dont celle d'inclure l'orientation sexuelle dans les motifs de discrimination illicites, pour tous les domaines visés par la Loi. Le gouvernement a répondu à cette recommandation en s'en remettant aux tribunaux: [TRADUCTION] «Les suites à donner à cette recommandation seront déterminées par l'issue de l'affaire *Vriend c. 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*, *op. cit.*, à la p. 21).

171 À mon avis, cet énoncé indique clairement que la législature de l'Alberta, tenant compte de la controverse entourant la protection des homosexuels sous le régime de l'*IRPA*, a voulu s'en remettre à la

ture 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.

décision des tribunaux sur cette question. J'y vois, en fait, une invitation expresse faite aux tribunaux d'inclure l'orientation sexuelle dans l'*IRPA* si l'exclusion de ce motif est jugée contraire à la *Charte*. C'est cela, principalement, qui me fait conclure, quoi qu'en dise les intimés, que, dans les circonstances, l'interprétation large est parfaitement compatible avec l'intention du législateur.

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

Le juge McLung de la Cour d'appel, en plus de faire le commentaire que j'ai cité plus haut, formule des critiques plus fondamentales concernant le recours à l'interprétation large. Il considère l'inclusion de dispositions dans une loi par interprétation large comme une ingérence inacceptable des tribunaux dans le processus législatif. Au sujet de la décision du juge de première instance d'ajouter l'orientation sexuelle aux motifs de discrimination interdits par l'*IRPA*, il s'exprime ainsi (aux pp. 29 et 30):

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

> [TRADUCTION] La modifier et en élargir la portée en l'interprétant comme incluant l'orientation sexuelle, c'est, pour un tribunal, s'immiscer considérablement dans les affaires publiques et, à tout le moins, empiéter de façon indésirable sur le pouvoir législatif [. . .] [J]'estime qu'un juge nommé en vertu de l'art. 96, qui se sert ainsi de l'énorme pouvoir de révision qui lui est conféré pour tirer l'autorité législative compétente de ses «erreurs», exerce ce pouvoir de façon excessive.

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

Le juge McClung poursuit en affirmant que le juge de première instance, en recourant à l'interprétation large, a passé outre à la volonté expresse des électeurs de la province de l'Alberta qui, s'exprimant par le truchement de leurs représentants parlementaires, ont décidé de ne pas inclure l'orientation sexuelle dans les catégories protégées par l'*IRPA*.

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

Pour les motifs que j'ai exposés précédemment, je ne puis, en toute déférence, voir dans l'élargissement de la portée de la Loi en l'espèce, un exercice non démocratique du pouvoir judiciaire. Je souscris plutôt aux vues de W. Black lorsqu'il affirme (*loc. cit.*, à la p. 128):

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

[TRADUCTION] . . . la révision judiciaire n'entre pas en conflit avec la démocratie lorsque l'intervention des tribunaux vise des décisions qui ne semblent pas avoir été prises en conformité avec les principes démocratiques. La démocratie exige que tous les citoyens aient la possibilité de prendre part au processus démocratique, directement ou par le truchement de représentants qui leur accordent une considération égale. La souveraineté parlementaire est un moyen de parvenir à cette fin et non une fin en soi.

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

175 À mon avis, le processus par lequel la législature de l'Alberta a décidé d'exclure l'orientation sexuelle de l'*IRPA* n'était pas conforme aux principes démocratiques. Le juge de première instance et les juges de la Cour d'appel ont convenu que l'exclusion de l'orientation sexuelle de l'*IRPA* procédait d'un choix législatif conscient et délibéré. Bien que le juge McClung invoque ce fait pour justifier la non-intervention des tribunaux, plusieurs auteurs arrivent à la conclusion contraire dans les théories relatives à la révision judiciaire qu'ils ont élaborées (voir, par exemple, Black, *loc. cit.*; J. H. Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980); P. Monahan, «A Theory of Judicial Review Under the Charter», dans *Politics and the Constitution: The Charter, Federalism and the Supreme Court of Canada* (1987), aux pp. 97 à 138; D. M. Beatty, *Constitutional Law in Theory and Practice* (1995)).

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

176 Je le répète, la notion de démocratie ne se limite pas à la règle de la majorité, ainsi que nous l'a si bien rappelé le juge en chef Dickson dans l'arrêt *Oakes*, précité. À mon avis, la démocratie suppose que le législateur tienne compte des intérêts de la majorité comme de ceux des minorités, car ses décisions toucheront tout le monde. Si le législateur néglige de prendre en considération les intérêts d'une minorité, en particulier si cette minorité a été historiquement victime de préjugés et de discrimination, j'estime que le pouvoir judiciaire est justifié d'intervenir et de rectifier le processus démocratique faussé (voir Black, *loc. cit*; Jackman, *loc. cit.*, à la p. 680).

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

177 Le juge McClung écrit, à la p. 35 de ses motifs:

Allowing judicial, and basically final, proclamation of legislative change ignores our adopted British parlia-

[TRADUCTION] Permettre au pouvoir judiciaire d'apporter à des dispositions législatives des modifications pra-

mentary safeguards, historic in themselves, and which are the practical bulkheads that protect representative government. When unelected judges choose to legislate, parliamentary checks, balances and conventions are simply shelved.

tiquement définitives c'est méconnaître les garanties parlementaires britanniques, elles-mêmes historiques, que nous avons fait nôtres et qui constituent de fait le rampart du gouvernement représentatif. Lorsque des juges non élus choisissent de légiférer, le système de poids, de contrepoids et de conventions parlementaires est tout simplement écarté.

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

En toute déférence, je ne puis souscrire à cette opinion. Le recours par un tribunal à l'interprétation large pour corriger une loi inconstitutionnelle contraint certainement le processus législatif. En conséquence, il convient de ne pas retenir inutilement cette solution et de ne le faire qu'après mûre réflexion. Toutefois, les «garanties parlementaires» ne disparaissent pas, à mon avis, car les gouvernements demeurent libres de revenir sur la loi modifiée et d'y inclure les exceptions et les moyens de défense qui, d'après eux, peuvent se justifier sous le régime de l'article premier de la *Charte*. Ainsi, lorsqu'un tribunal recourt à l'interprétation large, il ne met pas un terme au processus législatif puisque le législateur peut en réponse adopter une nouvelle loi, comme je l'ai signalé plus haut (voir également Hogg et Bushell, *loc. cit.*). De plus, le législateur peut toujours invoquer l'art. 33 de la *Charte*, la disposition de dérogation, laquelle constitue, selon moi, la «garantie parlementaire» par excellence.

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

L'analyse qui précède m'amène à conclure que l'inclusion de l'orientation sexuelle dans l'*IRPA* par le recours à l'interprétation large est la meilleure façon de corriger la portée trop limitative de ce texte de loi. Les appelants soutiennent que la mesure corrective devrait prendre effet immédiatement. Je partage leur avis. Cette mesure ne risque pas d'entraîner des conséquences néfastes imprévues sur des particuliers ni sur les fonds publics (voir par ex. *Egan*, précité). En outre, les mécanismes permettant l'examen de plaintes de discrimination fondée sur l'orientation sexuelle existent déjà et ne nécessitent aucun aménagement important. L'arrêt *Haig*, précité, et la décision *Newfoundland (Human Rights Commission) c. Newfoundland (Minister of Employment and Labour Relations)* (1995), 127 D.L.R. (4th) 694 (C.S.T.-N.), me confortent dans cette position. Dans les deux cas, la décision d'ajouter l'orientation

suggest that any harm resulted from the immediate operation of the remedy in those cases.

III. Conclusions and Disposition

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

I would answer the constitutional questions as follows:

1. Do (a) decisions not to include sexual orientation or (b) the non-inclusion of sexual orientation, as a prohibited ground of discrimination in the preamble and ss. 2(1), 3, 4, 7(1), 8(1), 10 and 16(1) of the *Individual's Rights Protection Act*, R.S.A. 1980, c. I-2, as am., now called the *Human Rights, Citizenship and Multiculturalism Act*, R.S.A. 1980, c. H-11.7, infringe or deny the rights guaranteed by s. 15(1) of the *Canadian Charter of Rights and Freedoms*?

Answer: Yes.

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

Answer: No.

The following are the reasons delivered by

L'HEUREUX-DUBÉ J. — I am in general agreement with the results reached by my colleagues, Cory and Iacobucci JJ. While I agree with Iacobucci J.'s approach to s. 1 of the *Canadian Charter of Rights and Freedoms*, I wish to reiterate

sexuelle à la loi contestée n'était assortie d'aucune suspension. Aucun élément de preuve n'a été présenté à la Cour pour établir que l'application immédiate de la mesure corrective a causé un quelconque préjudice dans ces affaires.

III. Conclusions et dispositif

180 Pour les motifs exposés par le juge Cory, je conclus que l'exclusion de l'orientation sexuelle des motifs de discrimination interdits par l'*IRPA* enfreint l'art. 15 de la *Charte*. En outre, pour les motifs précédemment énoncés, la loi contestée ne peut être sauvegardée par application de l'article premier de la *Charte*. En conséquence, je suis d'avis d'accueillir le pourvoi principal, de rejeter le pourvoi incident et d'annuler le jugement de la Cour d'appel de l'Alberta avec dépens sur la base de frais entre parties devant toutes les cours.

181 Je suis d'avis de répondre de la façon suivante aux questions constitutionnelles:

1. Est-ce que *a*) soit la décision de ne pas inclure l'orientation sexuelle, *b*) soit la non-inclusion de l'orientation sexuelle, en tant que motif de discrimination illicite dans le préambule et dans les art. 2(1), 3, 4, 7(1), 8(1), 10 et 16(1) de l'*Individual's Rights Protection Act*, R.S.A. 1980, ch. I-2, et ses modifications, intitulée maintenant *Human Rights, Citizenship and Multiculturalism Act*, R.S.A. 1980, ch. H-11.7, a pour effet de nier les droits garantis par le par. 15(1) de la *Charte canadienne des droits et libertés*, ou d'y porter atteinte?

Réponse: Oui.

2. Si la réponse à la question 1 est «oui», est-ce que la négation ou l'atteinte peut être justifiée en tant que limite raisonnable au sens de l'article premier de la *Charte canadienne des droits et libertés*?

Réponse: Non.

Version française des motifs rendus par

182 LE JUGE L'HEUREUX-DUBÉ — Je suis d'accord pour l'essentiel avec les résultats auxquels parviennent mes collègues les juges Cory et Iacobucci. Bien que je souscrive à l'analyse du juge Iacobucci en ce qui concerne l'article premier de la *Charte*

the position which I have maintained throughout with respect to the approach to be taken to s. 15(1).

183 In my view, s. 15(1) of the *Charter* is first and foremost an equality provision. In *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at p. 171, this Court unanimously accepted s. 15's primary mission as "the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration". In *Egan v. Canada*, [1995] 2 S.C.R. 513, at para. 39, I articulated the approach to equality in a similar vein:

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

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

184 Given this purpose, every legislative distinction (including, as in this case, a legislative omission) which negatively impacts on an individual or group who has been found to be disadvantaged in our society, the impact of which deprives the individual or group of the law's protection or benefit in a way which negatively affects their human dignity and personhood, does not treat these persons

canadienne des droits et libertés, je tiens à réitérer l'approche que j'ai toujours préconisée en ce qui a trait au par. 15(1).

À mon avis, le par. 15(1) de la *Charte* est une disposition qui porte d'abord et avant tout sur l'égalité. Dans l'arrêt *Andrews c. Law Society of British Columbia*, [1989] 1 R.C.S. 143, à la p. 171, notre Cour a décidé à l'unanimité que l'art. 15 a pour objet principal de «favoriser l'existence d'une société où tous ont la certitude que la loi les reconnaît comme des êtres humains qui méritent le même respect, la même déférence et la même considération». Dans l'arrêt *Egan c. Canada*, [1995] 2 R.C.S. 513, au par. 39, j'ai exposé de façon similaire la façon dont il convient d'aborder l'égalité:

> [A]u cœur de l'art. 15 se situe la promotion d'une société où tous ont la certitude que la loi les reconnaît en tant qu'êtres humains égaux, tous aussi capables et méritants les uns que les autres. Une personne ou un groupe de personnes est victime de discrimination au sens de l'art. 15 de la *Charte* si, du fait de la distinction législative contestée, les membres de ce groupe ont l'impression d'être moins capables ou de moins mériter d'être reconnus ou valorisés en tant qu'êtres humains ou en tant que membres de la société canadienne qui méritent le même intérêt, le même respect et la même considération. Ce sont là les éléments essentiels de la définition de la «discrimination» — une définition qui insiste davantage sur l'impact (c'est-à-dire l'effet discriminatoire) que sur les éléments constitutifs (c'est-à-dire les motifs de la distinction). [Souligné dans l'original.]

L'un des éléments essentiels de l'examen permettant de déterminer si une distinction législative est, de fait, discriminatoire au sens du par. 15(1), porte tant sur la vulnérabilité sociale de l'individu ou du groupe concerné que sur la nature du droit auquel il est porté atteinte quant à son importance pour la dignité humaine et la personnalité.

Compte tenu de cet objectif, toute distinction législative (y compris, comme en l'espèce, une omission du législateur) qui a un impact négatif sur une personne ou un groupe considéré comme désavantagé dans notre société et prive la personne ou le groupe de la protection et du bénéfice de la loi en portant atteinte à leur dignité humaine et à leur personnalité, n'accorde pas à ces personnes ou à

or groups with "equal concern, respect and consideration". Consequently, s. 15(1) of the *Charter* is engaged. At this point, the burden shifts to the legislature to justify such an infringement of s. 15(1) under s. 1. It is at this stage only that the relevancy of the distinction to the legislative objective, among other factors, may be pertinent.

ces groupes «le même respect, la même déférence et la même considération». Le paragraphe 15(1) de la *Charte* est dès lors engagé. Il incombe alors au législateur de justifier une telle violation du par. 15(1) en application de l'article premier. C'est seulement à cette étape que d'autres facteurs, entre autres la pertinence de la distinction au regard de l'objectif législatif, peuvent être appropriés.

I do not agree with the centrality of enumerated and analogous grounds in Cory J.'s approach to s. 15(1). Although the presence of enumerated or analogous grounds may be indicia of discrimination, or may even raise a presumption of discrimination, it is in the appreciation of the nature of the individual or group who is being negatively affected that they should be examined. Of greatest significance to a finding of discrimination is the effect of the legislative distinction on that individual or group. As McIntyre J. stated for the Court in *Andrews*, *supra*, at p. 165:

185 Je ne suis pas d'accord avec l'approche du juge Cory qui met l'accent sur les motifs énumérés et les motifs analogues dans son analyse du par. 15(1). Quoique ces motifs puissent être des indices de discrimination ou puissent même donner naissance à une présomption de discrimination, c'est dans l'appréciation de la nature de la personne ou du groupe lésé qu'ils doivent être examinés. Lorsqu'il s'agit de déterminer s'il y a discrimination, c'est l'effet de la distinction législative sur cette personne ou ce groupe qui revêt la plus haute importance. Comme le juge McIntyre l'a exprimé au nom de la Cour dans l'arrêt *Andrews*, précité, à la p. 165:

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

> Pour s'approcher de l'idéal d'une égalité complète et entière devant la loi et dans la loi [. . .] la principale considération doit être l'effet de la loi sur l'individu ou le groupe concerné. [Je souligne.]

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

L'analyse fondée sur le par. 15(1) devrait principalement viser à détecter et à comprendre les incidences négatives de la distinction législative sur la personne ou le groupe concerné plutôt qu'à déterminer si la distinction en cause a été établie sur le fondement d'un motif énuméré ou d'un motif analogue. À mon avis, faire de la présence d'un motif énuméré ou d'un motif analogue une condition préalable à la recherche des effets discriminatoires est incompatible, de façon générale, avec une interprétation de la *Charte* qui soit libérale et fondée sur l'objet visé et, en particulier, avec cette promesse de la *Charte* qui est au cœur même de nos aspirations, en tant que société: l'égalité pour tous.

As a final comment, I wish to stress that I cannot agree with Cory J.'s incorporation of La Forest J.'s narrow approach to defining analogous grounds. At para. 90 of his reasons, Cory J. concludes that sexual orientation is an analogous

186 En dernier lieu, je tiens à souligner que je ne puis donner mon adhésion à la reprise par le juge Cory de la définition stricte du juge La Forest en ce qui concerne les motifs analogues. Au paragraphe 90 de ses motifs, le juge Cory conclut que

ground because it is, in La Forest J.'s words from *Egan*, *supra*, at para. 5, "a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs". La Forest J. in *Egan*, at the end of para. 5, also restrictively characterized analogous grounds as being those based on "innate" characteristics. As demonstrated by McLachlin J., writing for the majority in *Miron v. Trudel*, [1995] 2 S.C.R. 418, this Court has endorsed a much more varied and comprehensive approach to the determination of whether a particular basis for discrimination is analogous to those grounds enumerated in s. 15(1). At paras. 148-49, she explained that:

One indicator of an analogous ground may be that the targeted group has suffered historical disadvantage, independent of the challenged distinction: *Andrews*, *supra*, at p. 152 *per* Wilson J.; *Turpin*, *supra*, at pp. 1331-32. Another may be the fact that the group constitutes a "discrete and insular minority": *Andrews*, *supra*, at p. 152 *per* Wilson J. and at p. 183 *per* McIntyre J.; *Turpin*, *supra*, at p. 1333. Another indicator is a distinction made on the basis of a personal characteristic; as McIntyre J. stated in *Andrews*, "(d)istinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed" (pp. 174-75). By extension, it has been suggested that distinctions based on personal and immutable characteristics must be discriminatory within s. 15(1): *Andrews*, *supra*, at p. 195 *per* La Forest J. Additional assistance may be obtained by comparing the ground at issue with the grounds enumerated, or from recognition by legislators and jurists that the ground is discriminatory: see *Egan v. Canada*, *supra*, *per* Cory J.

All of these may be valid indicators in the inclusionary sense that their presence may signal an analogous ground. But the converse proposition — that any or all of them must be present to find an analogous ground — is invalid. As Wilson J. recognized in *Turpin* (at

l'orientation sexuelle est un motif analogue parce qu'il s'agit, comme l'a dit le juge La Forest dans l'arrêt *Egan*, précité, au par. 5, d'«une caractéristique profondément personnelle qui est soit immuable, soit susceptible de n'être modifiée qu'à un prix personnel inacceptable». Le juge La Forest, dans l'arrêt *Egan*, à la fin du par. 5, a également qualifié de façon restrictive les motifs analogues lorsqu'il a dit qu'il s'agissait de motifs fondés sur des caractéristiques «innées». Comme l'a démontré le juge McLachlin, au nom de la majorité dans l'arrêt *Miron c. Trudel*, [1995] 2 R.C.S. 418, notre Cour a adopté une méthode beaucoup plus nuancée et compréhensive pour déterminer si un motif particulier de discrimination est analogue aux motifs énumérés au par. 15(1). Aux paragraphes 148 et 149, elle a expliqué:

Un indice de motif analogue pourrait être le fait que le groupe visé a subi un désavantage historique, indépendamment de la distinction contestée: *Andrews*, précité, à la p. 152, le juge Wilson, et *Turpin*, précité, aux pp. 1331 et 1332. Un autre pourrait être que le groupe constitue une «minorité discrète et isolée»: *Andrews*, précité, à la p. 152, le juge Wilson, et à la p. 183, le juge McIntyre; *Turpin*, précité, à la p. 1333. Un autre indice serait le cas où une distinction est fondée sur une caractéristique personnelle; comme l'affirme le juge McIntyre dans l'arrêt *Andrews*, «[l]es distinctions fondées sur des caractéristiques personnelles attribuées à un seul individu en raison de son association avec un groupe sont presque toujours taxées de discriminatoires, alors que celles fondées sur les mérites et capacités d'un individu le sont rarement» (pp. 174 et 175). Par extension, on a soutenu que des distinctions fondées sur des caractéristiques personnelles et immuables doivent être discriminatoires au sens du par. 15(1): *Andrews*, précité, à la p. 195, le juge La Forest. Une comparaison entre le motif soulevé et les motifs énumérés peut également être utile, de même que la reconnaissance que les législateurs et les juristes considèrent que le motif en question est discriminatoire: voir *Egan c. Canada*, précité, le juge Cory.

Tous ces éléments peuvent être des indices valides au sens où leur présence peut constituer un signe de l'existence d'un motif analogue. Cependant, n'est pas valide la proposition contraire — selon laquelle un ou l'ensemble de ces éléments doivent être présents si l'on veut

p. 1333), they are but "analytical tools" which may be "of assistance". [Emphasis in original.]

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

The following are the reasons delivered by

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

WHEREAS recognition of the inherent dignity and the equal and inalienable rights of all persons is the foundation of freedom, justice and peace in the world; and

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

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

Section 7 of the *IRPA* stated:

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

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

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

because of the race, religious beliefs, colour, gender, physical disability, mental disability, marital status, age,

conclure à l'existence d'un motif analogue. Comme l'a reconnu le juge Wilson dans l'arrêt *Turpin* (à la p. 1333), ils ne sont qu'«un moyen analytique» utilisé pour «déterminer» une question. [Souligné dans l'original.]

Cela dit, je suis d'accord avec les juges Cory et Iacobucci pour accueillir le pourvoi principal et rejeter le pourvoi incident avec dépens. 187

Version française des motifs rendus par

LE JUGE MAJOR (dissident en partie) — Le préambule de l'*Individual's Rights Protection Act*, R.S.A. 1980, ch. I-2 («l'*IRPA*» ou la «Loi»), énonçait à l'époque en cause notamment que cette loi sur les droits de la personne visait à reconnaître le principe que chacun jouit de la même dignité et des mêmes droits et à garantir à chacun l'exercice de ces droits en Alberta. Il était conçu ainsi: 188

[TRADUCTION]

ATTENDU QUE la reconnaissance de la dignité inhérente et des droits égaux et inaliénables de chacun constitue le fondement de la liberté, de la justice et de la paix dans le monde;

ATTENDU QUE l'Alberta reconnaît qu'il est fondamental et dans l'intérêt public que chacun jouisse de la même dignité et des mêmes droits sans égard à la race, aux croyances religieuses, à la couleur, au sexe, à la déficience physique ou mentale, à l'âge, à l'ascendance ou au lieu d'origine;

ATTENDU QU'il est opportun que ce principe soit consacré par la législature de l'Alberta au moyen d'un texte législatif garantissant ces droits de la personne . . .

L'article 7 de la Loi prévoyait:

[TRADUCTION]

7(1) Nul employeur ni quiconque agissant pour son compte ne doit, sur le fondement de la race, des croyances religieuses, de la couleur, du sexe, de la déficience physique ou mentale, de l'état matrimonial, de l'âge, de l'ascendance ou du lieu d'origine:

a) soit refuser d'employer une personne ou refuser de continuer de l'employer;

b) soit exercer une discrimination à l'égard d'une personne en matière d'emploi ou de conditions d'emploi.

ancestry or place of origin of that person or of any other person.

. . .

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

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

33. (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

(3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.

(4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1).

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

Analysis

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

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

. . .

(3) Le paragraphe (1) ne s'applique pas aux restrictions, aux conditions, aux préférences ni aux refus fondés sur une exigence professionnelle justifiée.

L'article 33 de la *Charte canadienne des droits et libertés* prévoit:

33. (1) Le Parlement ou la législature d'une province peut adopter une loi où il est expressément déclaré que celle-ci ou une de ses dispositions a effet indépendamment d'une disposition donnée de l'article 2 ou des articles 7 à 15 de la présente charte.

(2) La loi ou la disposition qui fait l'objet d'une déclaration conforme au présent article et en vigueur a l'effet qu'elle aurait sauf la disposition en cause de la charte.

(3) La déclaration visée au paragraphe (1) cesse d'avoir effet à la date qui y est précisée ou, au plus tard, cinq ans après son entrée en vigueur.

(4) Le Parlement ou une législature peut adopter de nouveau une déclaration visée au paragraphe (1).

(5) Le paragraphe (3) s'applique à toute déclaration adoptée sous le régime du paragraphe (4).

Analyse

Dans le préambule, la province de l'Alberta dit clairement que la Loi vise à reconnaître le principe que chacun jouit de la même dignité et des mêmes droits et à garantir à chacun la jouissance de ces droits en Alberta par la suppression des pratiques discriminatoires.

L'article 7 prévoit que nul employeur ne doit, sur le fondement de la race, des croyances religieuses, de la couleur, du sexe, de la déficience physique ou mentale, de l'état matrimonial, de l'âge, de l'ascendance ou du lieu d'origine, exercer une discrimination contre une personne en matière d'emploi. L'absence de l'orientation sexuelle des motifs énumérés est à l'origine du litige donnant lieu au présent pourvoi.

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

191 La province de l'Alberta a été invitée, dans le cadre du présent pourvoi, à expliquer comment il se faisait que les personnes ayant une orientation sexuelle différente n'étaient pas visées par l'expression «chacun jouisse de la même dignité et des mêmes droits», ce qu'elle a refusé de faire. En outre, elle n'a pas établi en quoi l'exclusion de l'orientation sexuelle de la Loi s'harmonisait avec l'objectif de celle-ci. Il est curieux de constater que la législature, après avoir adopté une loi d'ensemble sur les droits de la personne qui s'applique à toutes les personnes dans la province, voudrait priver de la protection de la Loi certains groupes de personnes ciblés. Aucune explication n'a été fournie ni ne ressort de la preuve déposée par la province.

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

192 On doit inévitablement conclure qu'il n'existe aucune raison d'exclure de l'art. 7 le groupe visé, et je suis d'accord avec les juges Cory et Iacobucci qu'une telle exclusion est discriminatoire et porte atteinte aux droits constitutionnels des personnes faisant partie de ce groupe.

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

193 Même si certains des arguments avancés portaient sur l'emploi de l'appelant à titre d'enseignant, le présent pourvoi ne saurait trancher le litige opposant l'appelant Vriend et son ancien employeur, le King's College. La modification de la Loi, par la Cour ou la législature, de manière à ce qu'elle inclue la protection contre la discrimination fondée sur l'orientation sexuelle constituera une première étape permettant à l'appelant de présenter sa plainte à l'Alberta Human Rights Commission. En bout de ligne, cependant, le succès de cette action dépendra en partie de la question de savoir si le King's College peut établir que son refus de continuer de l'employer était fondé sur une exigence professionnelle justifiée, conformément au par. 7(3) de la Loi. Il appartiendra à l'Alberta Human Rights Commission, et non à notre Cour, de trancher la question de savoir si un collège chrétien privé fondamentaliste peut légitimement refuser d'employer un enseignant homosexuel.

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

194 En ce qui concerne la réparation appropriée, le juge Iacobucci se fonde sur le raisonnement de la Cour dans l'arrêt *Schachter c. Canada*, [1992] 2

words "sexual orientation" ought to be read into the *IRPA*. In my view, the analysis in *Schachter* with respect to reading in is not compelling here. The Court there decided that the appropriate remedy was to strike down the relevant legislation but temporarily suspend the declaration of invalidity. The directions on "reading in" were not as the Chief Justice stated at p. 719, intended "as hard and fast rules to be applied regardless of factual context".

195 In my opinion, *Schachter* did not contemplate the circumstances that pertain here, that is, where the Legislature's opposition to including sexual orientation as a prohibited ground of discrimination is abundantly clear on the record. Reading in may be appropriate where it can be safely assumed that the legislature itself would have remedied the underinclusiveness by extending the benefit or protection to the previously excluded group. That assumption cannot be made in this appeal.

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

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

197 There are numerous ways in which the legislation could be amended to address the underinclusiveness. Sexual orientation may be added as a prohibited ground of discrimination to each of the

R.C.S. 679, pour étayer sa conclusion que la Loi devrait être interprétée comme si les mots «orientation sexuelle» y figuraient. À mon avis, l'analyse faite dans l'arrêt *Schachter* en ce qui concerne l'interprétation large ne s'impose pas en l'espèce. Dans cette affaire, la Cour avait conclu que la réparation appropriée consistait à annuler la disposition en cause, mais à suspendre temporairement l'effet de la déclaration d'invalidité. Comme l'a dit le Juge en chef à la p. 719, les instructions concernant l'«interprétation large» ne se voulaient pas «des règles rigides qui doivent être appliquées indépendamment des faits».

À mon avis, la Cour, dans l'arrêt *Schachter*, n'avait pas envisagé les circonstances de la présente affaire, soit le refus de la législature d'inclure l'orientation sexuelle comme motif de distinction illicite, comme en fait foi très clairement le dossier. L'interprétation large peut être appropriée lorsque l'on peut supposer sans risque d'erreur que la législature elle-même aurait remédié à la nature trop limitative de la Loi en étendant le bénéfice ou la protection en question au groupe antérieurement exclu. Une telle supposition ne peut être faite dans le présent pourvoi.

Il se peut que la législature préfère ne pas adopter de loi en matière de droits de la personne plutôt que d'en adopter une qui comprenne l'orientation sexuelle comme motif de distinction illicite, ou il s'agit peut-être de déterminer comment il faudrait modifier la Loi pour la rendre conforme à la *Charte*. Il vaut mieux laisser à la législature le soin de trancher cette question. Comme il a été dit dans l'arrêt *Hunter c. Southam Inc.*, [1984] 2 R.C.S. 145, à la p. 169:

> Même si les tribunaux sont les gardiens de la Constitution et des droits qu'elle confère aux particuliers, il incombe à la législature d'adopter des lois qui contiennent les garanties appropriées permettant de satisfaire aux exigences de la Constitution. Il n'appartient pas aux tribunaux d'ajouter les détails qui rendent constitutionnelles les lacunes législatives. [Je souligne.]

Il existe de nombreuses façons de modifier la Loi afin de remédier à sa nature trop limitative. L'orientation sexuelle pourrait être ajoutée comme motif de distinction illicite à chacune des disposi-

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.

tions contestées. La législature pourrait alors décider de définir l'expression «orientation sexuelle», ou encore poser des limites constitutionnelles à la portée de la protection qu'accorde la Loi. Par ailleurs, la législature pourrait décider de protéger les dispositions qui portent atteinte à la *Charte*, en invoquant l'art. 33, lequel permet au Parlement ou à la législature d'une province d'adopter une loi qui aura effet indépendamment des droits garantis aux art. 2 et 7 à 15 de la *Charte*. Vu qu'elle persiste dans son refus d'accorder une protection contre la discrimination fondée sur l'orientation sexuelle, la législature pourrait décider d'invoquer l'art. 33. De toute façon, il incombe à la législature, dont les membres ont été élus, de trancher cette question. En effet, ces derniers sont responsables devant l'électorat de la province et c'est à eux de choisir quelle voie prendre, qu'ils décident de modifier la loi ou encore d'invoquer la disposition de dérogation. Leur décision sera ensuite évaluée par les électeurs.

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.

198 La responsabilité d'adopter des dispositions législatives qui s'harmonisent avec les droits garantis par la *Charte* incombe à la législature. Sauf dans les cas les plus manifestes, les tribunaux ne devraient pas imposer la façon dont une disposition de nature trop limitative doit être modifiée. Il va de soi que les tribunaux ont un rôle à jouer dans la protection des droits garantis par la *Charte*, rôle qui consiste à déterminer si les dispositions législatives adoptées par la législature sont valides sur le plan constitutionnel. Cependant, ils doivent faire preuve de retenue et respecter le rôle de la législature lorsqu'il existe plusieurs façons de modifier une disposition législative inconstitutionnelle.

Given the apparent legislative opposition to including sexual orientation in the *IRPA*, I conclude that this is not an appropriate case for reading in. It is preferable to declare the offending sections invalid and provide the Legislature with an opportunity to rectify them. I would restrict the declaration of invalidity to the employment-related provisions of the *IRPA*, that is ss. 7(1), 8(1) and 10. While the same conclusions may apply to the remaining provisions of the *IRPA*, this Court has stated that *Charter* cases should not be considered

199 Étant donné que la législature refuse manifestement d'inclure l'orientation sexuelle dans la Loi, je conclus que la présente affaire ne se prête pas à l'application de l'interprétation large. Il est préférable de déclarer invalides les dispositions fautives et de permettre à la législature de les rectifier. Je limiterais la déclaration d'invalidité aux dispositions de la Loi en matière d'emploi, soit les par. 7(1) et 8(1) ainsi que l'art. 10. Bien que les mêmes conclusions puissent s'appliquer aux autres dispositions de la Loi, notre Cour a déjà dit que les

in a factual vacuum: see *MacKay v. Manitoba*, [1989] 2 S.C.R. 357, at p. 361.

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

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

Conclusion

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

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

Solicitors for the appellants: Chivers Greckol & Kanee, Edmonton.

Solicitors for the respondents: Miles Davison McCarthy, Calgary.

causes fondées sur la *Charte* ne doivent pas être examinées dans un vide factuel: voir *MacKay c. Manitoba*, [1989] 2 R.C.S. 357, à la p. 361.

La seule question litigieuse qui reste à trancher est de savoir si la déclaration d'invalidité devrait être temporairement suspendue. Dans l'arrêt *Schachter*, le juge en chef Lamer a dit que la déclaration d'invalidité pouvait être temporairement suspendue lorsque la loi est jugée inconstitutionnelle en raison de sa portée trop restreinte plutôt que trop large, et que l'annulation de la loi priverait de bénéfices les personnes admissibles sans profiter à la personne dont les droits ont été violés.

La Cour n'a pas l'intention de priver les personnes vivant en Alberta de la protection de la Loi; elle veut uniquement s'assurer que la Loi soit rendue conforme à la *Charte*, tout en respectant le rôle de la législature. Je suis donc d'avis de suspendre la déclaration d'invalidité pour une période d'un an afin de permettre à la législature de modifier les dispositions contestées de façon à les rendre conformes à ses obligations constitutionnelles.

Conclusion

Je suis d'accord avec mes collègues que l'exclusion de l'orientation sexuelle comme motif de distinction illicite des par. 7(1) et 8(1) ainsi que de l'art. 10 de la Loi viole l'art. 15 de la *Charte* et ne peut être justifiée conformément à l'article premier. Je suis d'avis de déclarer inconstitutionnelles ces dispositions, mais de suspendre la déclaration d'invalidité pour une période d'un an.

Pourvoi principal accueilli avec dépens, le juge MAJOR *est dissident en partie. Pourvoi incident rejeté avec dépens.*

Procureurs des appelants: Chivers Greckol & Kanee, Edmonton.

Procureurs des intimés: Miles Davison McCarthy, Calgary.

Solicitors for the intervener the Attorney General of Canada: Brian Saunders and James Hendry, Ottawa.

Solicitor for the intervener the Attorney General for Ontario: The Ministry of the Attorney General, Toronto.

Solicitors for the intervener the Alberta Civil Liberties Association: Pundit & Chotalia, Edmonton.

Solicitors for the intervener Equality for Gays and Lesbians Everywhere (EGALE): Nelligan Power, Ottawa.

Solicitor for the intervener Women's Legal Education and Action Fund (LEAF): Claire Klassen, Toronto.

Solicitors for the intervener the Foundation for Equal Families: Scott & Aylen, Toronto.

Solicitors for the intervener the Canadian Human Rights Commission: William F. Pentney and Patricia Lawrence, Ottawa.

Solicitors for the intervener the Canadian Labour Congress: Sack Goldblatt Mitchell, Toronto.

Solicitors for the intervener the Canadian Bar Association — Alberta Branch: McCarthy Tétrault, Calgary.

Solicitor for the intervener the Canadian Association of Statutory Human Rights Agencies (CASHRA): Thomas S. Kuttner, Fredericton.

Solicitors for the intervener the Canadian AIDS Society: Elliott, Rodrigues, Toronto.

Solicitors for the intervener the Alberta and Northwest Conference of the United Church of Canada: Dale Gibson Associates, Edmonton.

Solicitors for the intervener the Canadian Jewish Congress: Witten Binder, Edmonton.

Procureurs de l'intervenant le procureur général du Canada: Brian Saunders et James Hendry, Ottawa.

Procureur de l'intervenant le procureur général de l'Ontario: Le ministère du Procureur général, Toronto.

Procureurs de l'intervenante l'Alberta Civil Liberties Association: Pundit & Chotalia, Edmonton.

Procureurs de l'intervenant Égalité pour les gais et les lesbiennes (EGALE): Nelligan Power, Ottawa.

Procureur de l'intervenant le Fonds d'action et d'éducation juridiques pour les femmes (FAEJ): Claire Klassen, Toronto.

Procureurs de l'intervenante la Foundation for Equal Families: Scott & Aylen, Toronto.

Procureurs de l'intervenante la Commission canadienne des droits de la personne: William F. Pentney et Patricia Lawrence, Ottawa.

Procureurs de l'intervenant le Congrès du travail du Canada: Sack Goldblatt Mitchell, Toronto.

Procureurs de l'intervenante l'Association du Barreau canadien — Division de l'Alberta: McCarthy Tétrault, Calgary.

Procureur de l'intervenante l'Association canadienne des commissions et conseils des droits de la personne (ACCDP): Thomas S. Kuttner, Fredericton.

Procureurs de l'intervenante la Société canadienne du SIDA: Elliott, Rodrigues, Toronto.

Procureurs de l'intervenante l'Alberta and Northwest Conference of the United Church of Canada: Dale Gibson Associates, Edmonton.

Procureurs de l'intervenant le Congrès juif canadien: Witten Binder, Edmonton.

Solicitors for the intervener Christian Legal Fellowship: Milner Fenerty, Calgary.

Solicitor for the intervener the Alberta Federation of Women United for Families: Dallas K. Miller Law Office, Medicine Hat.

Solicitors for the intervener the Evangelical Fellowship of Canada: Milner Fenerty, Calgary.

Solicitors for the intervener Focus on the Family (Canada) Association: Milner Fenerty, Calgary.

Procureurs de l'intervenant le Christian Legal Fellowship: Milner Fenerty, Calgary.

Procureur de l'intervenante l'Alberta Federation of Women United for Families: Dallas K. Miller Law Office, Medicine Hat.

Procureurs de l'intervenant l'Evangelical Fellowship of Canada: Milner Fenerty, Calgary.

Procureurs de l'intervenante la Focus on the Family (Canada) Association: Milner Fenerty, Calgary.

Northern Lights Health Region (Re), [2005] Alta. L.R.B.R. 201

Alberta Labour Relations Board Reports

Alberta Labour Relations Board

A.C.L. Sims (Vice-Chair), R. Campbell (Member) and K. Kreklewetz (Member)

Decision: June 21, 2005.

Board File No.: GE-04219

[2005] Alta. L.R.B.R. 201 | [2005] A.L.R.B.D. No. 51

IN THE MATTER OF The Labour Relations Code Between Northern Lights Health Region, applicants, and Communication, Energy and Paperworkers Union of Canada Local Union 707, respondents

(71 paras.)

Case Summary

Earlier Alta. L.R.B.R. citations: [2004] Alta. L.R.B.R. LD-006

Reconsideration - s. 12(4) - Bargaining Unit - Exclusions - Challenges - The Board granted the application to reconsider the wording of a certificate to exclude previously unorganized employees. The Board concluded the transitional provisions of Bill 27 that required a move from five to four functional bargaining units were not intended to organize these previously unorganized employees.

The Communications, Energy and Paperworkers of Canada, Local 707 (the "Union") held a certificate as bargaining agent for a unit of employees of the Northern Lights Health Region (the "Region") described as "All employees when employed in general support services." The Region sought to have the certificate considered to eclude from the bargaining unit those employees who prior to the implementation of the Labour Relations (Regional Health Authorities Restructuring) Amendment Act, 2003 ("Bill 27") were not reprsented by a union. The Board declaration made it clear that only previously unionized employees were included in the certificate. The draft certificate contained no such exclusion, and as the no objection was raised, the final certificate was signed in that form. The Union objected to the Region's application.

Held, The Board granted the Region's application. Bill 27 did not intended in the transition process of moving from five to four functional bargaining units to organize the unorganized. Union's remain free in the post-transitioned phase of Bill 27 to organize the unorganized by applying to certify a union of "all employees of a region employed in general support services" including those who are not represented by a trade union.

Appearances

For the Applicant C.E.P.: J. Robert W. Blair (Counsel); Sue Pearce (Union Contact)

For the Respondent Northern Lights Health Region: Dev. A. Chankasingh (Counsel); Lorraine Henderson

A.C.L. SIMS, VICE-CHAIR

1 The Communications, Energy and Paperworkers of Canada, Local 707 now holds a certificate (148-2003) as bargaining agent for a unit of employees of Northern Lights Health Region described as

> "All employees when employed in general support services."

2 The Northern Lights Health Region seeks to have that certificate reconsidered. It was issued as a result of a Board initiated series of applications launched to comply with the provisions of Section 162.1 of the Labour Relations Code, commonly known as Bill 27; the Labour Relations (Regional Health Authorities Restructuring) Amendment Act, 2003.

3 Bill 27 became necessary when the Province decided to reduce and reconfigure the boundaries of the Province's Regional Health Authorities. The bargaining certifications that existed between the various unions and the former regions were disrupted. They had in any event been somewhat out of sync with reorganized health care because of earlier regionalization and the decision to combine both acute and long term care under the regional authorities.

4 The Board has for many years, by policy, established "functional bargaining units" for the health care industry. To avoid uncertainty, and to consolidate the two paramedical units into one professional and technical unit, the government used the vehicle of Bill 27 to reconfigure these units into four new functional bargaining units. These are set out in Section 2 of the Regional Health Authority Collective Bargaining Regulation (the Regulation) which reads:

> 2 Bargaining units for employees of a regional health authority shall consist of all employees in the health region who are represented by a bargaining agent and are employed in one of the following functional groups:
>
> (a) direct nursing care or nursing instruction;
>
> (b) auxiliary nursing care;
>
> (c) paramedical professional or technical services;
>
> (d) general support services.

The key section of Bill 27 that affects this application reads:

> 162.1(1) The Lieutenant Governor in Council may make regulations
>
> (a) providing for the establishment of region-wide functional bargaining units as bargaining units for the purposes of this Act for all regional health authorities and their employees who are represented by a bargaining agent;

5 It is Northern Lights' position that the words "who are represented by a bargaining agent" place a jurisdictional limit on the Board's ability to include, within one of the four functional bargaining units (in this case the General Support Staff Unit) employees who, prior to Bill 27, were not represented by a bargaining agent. Prior decisions of this Board support that interpretation. The CEP contest that interpretation now, and also sought to do so, without being heard on the point, in some of those earlier cases. Little would be served by a chronology of CEP's efforts to be heard on this issue. It is sufficient to quote the Board's comments in a case involving UNA during which the CEP objected on the basis that it raised and decided this issue without notice to CEP.

Re Chinook Regional Health Authority [2004] Alta. L.R.B.R. LD-006 (Wallace)

6 Of the CEP's argument it said:

> 14 In short, the Union says that the Board knew of its interest in challenging the proposition that post-Bill 27 bargaining units must exclude previously non-unionized employees; that the Board should have given notice to a union that it knew to be practically, if not legally, affected by the result; and that it is prejudiced by the failure of notice because its prospects of overcoming the July 14 decision given in its absence are now poor.

7 In answer the Board ruled:

> 17 ... we acknowledge that, in perfect hindsight, it might have been best for the issue raised by UNA and sought to be raised by CEP to be litigated and decided at large, in one proceeding in which all interested parties had their say ... But whether or not that was the best course, it was (again) a matter of procedure and Board discretion, not of entitlement and natural justice.
>
> ...
>
> 18 Here, the scope of CEP's certificate for general support services employees of Northern Lights RHA is not settled. It is expected to come before the Board for decision soon. The Union will have an opportunity to argue its case at that point. Without ignoring the practical difficulties of convincing another panel to depart from the precedent now set, it remains open for a panel to accept a contrary argument of sufficient strength. In that strict sense, CEP suffered no prejudice by the July 14 decision. And if it faces a difficult task in convincing the Board to depart from the earlier case, that is as it should be; it is only right that the considered decision of another panel, given with the benefit of argument from a truly affected party, receive some weight.

Our hearings are the opportunity the Board is speaking of in this case.

The History of Northern Lights Certificates

8 We will return to this interpretation question after we outline more particularly the circumstances surrounding the granting of the general support services certificate the Region seeks to have reconsidered, and the broader circumstances within the Northern Lights Region.

9 In the simplest terms, the basis of Northern Lights' objection to an "all general support services" certificate arose when the Board issued Declaration D2003-64 on November 17, 2003. It read:

> On April 1, 2003, the Board initiated an application under Section 162.1 of the Labour Relations Code.
>
> On November 4, 2003, the Board declared that:
>
> > The Communications, Energy and Paperworkers Union of Canada, Local Union No. 707 is the bargaining agent for all unionized employees in the general support services bargaining unit affecting Northern Lights Health Region and has acquired all of the rights, privileges and duties under the Code effective November 13, 2003.
>
> ISSUED and DATED at the City of Edmonton in the Province of Alberta this 17th day of November 2003 by the Labour Relations Board and signed by its Chair.

10 Northern Lights were content with this declaration, since in their view it was appropriately limited to "all unionized employees in the general support services bargaining unit" and thus excluded those persons who had hitherto not been represented by a certified bargaining agent or covered by a collective agreement. What Northern Lights failed to notice is that the draft certificate sent out with the declaration contained no such limitation and described the unit as "all employees when employed in general support services." Since no objection was raised,

the final certificate was signed in that form. It precipitated this application to reconsider, made some time after the fact. The CEP, with the grace that comes from foresight, waives any objection to timeliness in terms of the reconsideration motion.

11 To understand which employees of Northern Lights it might be said "are not represented by a trade union" we need to go over the prior bargaining relationships within the region. The new region combined the former Northern Lights Regional Health Authority, centred in Fort McMurray, and the former Northwestern Health Region 17, centred in High Level. The existing certificates affecting the newly expanded Northern Lights region were listed in the Board officer's report of May 20, 2003.

Employer	Union	Cert. No.	Unit Description
Northern Lights Regional Health Authority	Communications, Energy and Paperworkers Union of Canada, Local Union No. 707	217-97	All office and clerical employees
Northern Lights RHA	Canadian Union of Public Employees, Local 1399	110-98	All employees when employed in general support services in food services, laundry, and housekeeping, excepting only office and clerical personnel
Northern Lights RHA	CEP Local 707	345-2000	All employees when employed in a community health support capacity.
Northwestern Regional Health Authority	CUPE Local 3266	173-97	All employees when employed in general support services
Northwestern RHA	Health Sciences Association of Alberta	43-97	All employees when employed in a community health support capacity
Alberta Mental Health Board	The Alberta Union of Provincial Employees	E104-99	All employees employed in and out of the Mental Health Clinics except those covered by other bargaining certificates.

12 The two Northwestern certificates are orthodox "all employee" certificates. Every employee in the general support services standard functional bargaining unit was covered. The Alberta Mental Health Board unit too was an "all employee" unit. It is the two prior Northern Lights certificates (covering only Fort McMurray) that create the situation we have to deal with. The standard functional bargaining unit under the Board's pre-existing policies would have been:

> "All employees when employed in general support services."

Instead there are two certificates, each held by a different union.

> "All office and clerical employees"

and

> All employees when employed in general support services in food services, laundry and housekeeping, excepting only office and clerical personnel.

13 This means that there was an unrepresented group that can be described as:

> All employees when employed in general support services except office and clerical employees and food services, laundry and housekeeping employees.

14 While this "empty" unit seems simple enough, in fact it includes a wide diversity of employees. The full general support services unit is itself something of a "tag end unit". What is left after one carves out office and clerical employees and housekeeping, laundry and food service employees is even more so, covering areas as diverse as accounting, technical and computer services, security, tradespersons and several others incapable of any precise but generic description. While "office and clerical employees" and "food services, laundry and housekeeping services" might be considered exceptional but nonetheless appropriate bargaining units, what remains of this tag end unit as described above would be a doubtful candidate for "appropriate bargaining unit" status in its own right. Indeed, the Board said as much at paragraph 17 of the 1998 reconsideration decision (infra).

15 The two unorthodox bargaining units held by CEP and CUPE can only be understood in light of their history outlined in two board decisions issued well prior to Bill 27. They are:

> Northern Lights Regional Health Authority and CEP Local 707 and CUPE [1997] Alta. L.R.B.R. 610 (Wallace)
>
> Northern Lights Regional Health Authority and Certain Employees; CUPE Local 1399 [1998] Alta. L.R.B.R. 135 (Wallace)

We will refer to these two decisions as the "1997 Certification decision" and the "1998 Reconsideration decision." The basic story can be easily described.

16 CUPE Local 1399 had for many years represented a bargaining unit of employees of the Fort McMurray General Hospital described (in pre-functional bargaining unit terms) as

> "ward aids, housekeepers, kitchen workers, laundry workers, both full and part time."

17 When the Board issued replacement certificates in 1990 it became certified for "all employees in general support services except office personnel." The Board described the bargaining history thereafter at paragraph 5 of the 1997 Certification decision:

> CUPE has never bargained for the office and clerical staff. Nor as far as we know have they ever attempted to organize or bargain for this group in the 26-year history of their bargaining unit. To complete the bargaining history of the general support services unit, the Board in 1981 dismissed an application by the International Union of Operating Engineers to be certified for a unit of the maintenance employees and steam engineers at the hospital. To this day, CUPE does not bargain for about 20 non-office employees who normally fall into a general support services unit, including these maintenance employees and steam engineers.

18 In 1997, CEP Local 707 applied to be certified for the office and clerical staff employed at the Fort McMurray General Hospital. The Employed objected on the basis that it was a non-standard unit and would unduly fragment its workforce, creating a variety of difficulties. The Board disagreed and, while recognizing it was creating an anomaly, felt in the circumstances that an office and clerical unit was viable and presented no threat to the standard bargaining unit policies. We note, at paragraph 22 of the decision, in answering the argument that certifying the office and clerical group might pose a threat of fragmentation in the future, the Board said

> ... this application, if successful would certify the last uncertified group of employees in the region.

19 That was true, although while technically certified for "all general support employees except office personnel" CUPE was in fact only bargaining for its old and more restricted pre-replacement certificate unit. This fact laid the foundation for the 1998 Reconsideration case.

20 In 1998 a group of employees from the Fort McMurray Hospital applied to revoke CUPE's certificate. CUPE objected to the application because much of the support for revocation came from employees within the bargaining unit who were covered by the plain words of the certificate but for whom CUPE had never in fact bargained. As the Board said, at paragraph 1:

> The issue this raises is: can and should the Board entertain a revocation application that is dependent on the support of employees whom the Union has "underbargained?"

21 At paragraphs 4-6 of its reasons the Board set out the facts that concerned it at the time, and that had precipitated the revocation application:

> The Board Officer investigating this application identified 35 employees who fall within the unit for which Local 1399 is certified but are not covered by the collective agreement. These employees occupy the classifications of material distribution attendant, processing attendant, equipment loan attendant, stores attendant, operating engineer, utility person, pharmacy aide, radiology aide, ambulatory care attendant, recreation attendant, and therapy assistant.
>
> 5 All these employees normally fall within the Board's standard general support services unit. Their exclusion from the collective agreement is a clear case of a bargaining agent underbargaining its certificate. To be fair, Local 1399 bargained to the full extent of its certificate until 1990. It was only in that year that its certificate was replaced by one specifying a bargaining unit of "all employees employed in general support services except office and clerical." This amounted to an expansion of Local 1399's bargaining rights. By not changing its bargaining practices, Local 1399 embarked on a course of underbargaining its certificate; but the underbargaining is of eight years' duration, not 27 years.
>
> 6 After CEP Local 707's successful certification application for the office employees, Local 1399 took steps to bring its bargaining practice into line with its certificate. On February 10, 1998, Ron Pilling, the CUPE National Representative assigned to Local 1399, notified the Employer that the Union intended to bargain for all employees within the scope of its certificate. This generated a good deal of controversy within the group of employees excluded from the collective agreement. Mr. Pilling convened two meetings with those employees. At the first he learned that the general feeling within the group was strongly against any form of union representation. In response he drafted and discussed with the Employer a letter of understanding by which individual excluded employees would be allowed to opt in or out of the bargaining unit. Before the second meeting, however, and before any further discussions on the letter of understanding, this revocation application was filed. At that point Mr. Pilling concluded that there was no point in asserting the Union's bargaining rights against the wishes of the excluded group and formally withdrew his proposal to include these employees in the next round of bargaining.

22 The Board was in the position where it had proof that 40% in the unit described in the certificate wanted revocation but where 40% of those in the unit covered by the collective agreement did not. It took two steps, when either one alone might have resolved the issue. First, it decided, of its own motion, to reconsider the CUPE certificate to exclude the underbargained classifications; that is those listed in paragraph 4 of the decision set out above.

23 That list, at the time, contained 35 people. However, what the Board in fact did was to recognize the two existing units described above.

> All office and clerical employees

and

> All employees when employed in general support in food services, laundry and housekeeping except office and clerical.

What remained excluded were what are commonly referred to as the "tag end" positions in the standard bargaining unit which, as we note above, translates in bargaining unit terms to:

> All employees when employed in general support services except office and clerical employees and food services, laundry and housekeeping services.

24 Not surprisingly, since this tag end unit turns out to be the "all employees except ..." unit, it has grown and now includes 97 employees (93 in Fort McMurray and 4 in High Level). The Employer's view has been that new positions, even if not on the specific list of excluded positions in 1998, and so long as they don't obviously fall in the CEP or CUPE bargaining unit descriptions, belong in this unorganized tag-end group.

25 The second step the Board took was to dismiss the revocation application. It gave the following reasons for this in paragraph 13 of the reconsideration application:

> 13 We agree with Union counsel that it is contrary to sound labour relations policy to allow members of the underbargained group to bring a revocation application that might strip the entire bargaining unit of union representation. We do not find it necessary, however, to determine whether the terms "unit" and "bargaining unit" in sections 49 and 50 in these circumstances mean the unit defined by the certificate or that defined by the collective agreement. Even if it means the former, we would consider it an "other relevant matter" under section 52(1) that this application possesses 40% threshold support only through the support of employees who have a lengthy history of being underbargained by the trade union. These circumstances warrant the Board exercising its discretion to dismiss the revocation application in any event.

26 In arriving at this conclusion, the Board was influenced by the Board's earlier decision in:

> UFCW Local 373A v. Lucerne Foods Ltd. [1997] Alta. L.R.B.R. 623

In that case the Board refused to declare certain employees to be within a unit where, although they fell within its language, they had been excluded from bargaining for many years. The Board's view was that they should only be brought back into the unit "through a reconsideration application backed by evidence of support from the add-on group. In saying this, it drew on

> Automatic Electric Ltd. [1976] 2 Can. L.R.B.R. 97

Rolling in an add-on unit

27 This reference to the need for majority support in the add-on unit is at the root of one of CEP's concerns in this case. The panel in the 1998 Reconsideration decision set out some comments on future bargaining rights for the excluded group of employees at paragraph 17:

> 17 In argument, Employer counsel cautioned us against creating yet another potential bargaining unit out of the excluded classifications, through the use of our reconsideration power. We wholeheartedly agree with that submission. In reconsidering Local 1399's certificate to exclude the underbargained classifications, we in no way intend to say that these classifications could compromise an appropriate bargaining unit on their own if employees in them later have a change of heart and seek union representation. Though we cannot bind another Board panel faced with that issue in the future, we wish to record our strong view that if employees in the excluded classifications do wish union representation in the future, they would have to acquire it by becoming part of an existing bargaining unit. Practically, we think that they could only become part of CUPE's existing unit; they could not fit into CEP's new office and clerical unit without obliterating the clear dividing line that now exists between the CUPE and CEP units. In our opinion, these employees would have to convince another union to seek certification for an appropriate bargaining unit that includes

> both themselves and the existing CUPE unit; or have Local 1399 add them into its certificate by a reconsideration application backed by proof of support in the add-on group.

28 What is not clear to us and which we need to identify but not decide for this application, is whether this reference to the need for majority support in the add-on unit was intended as a retreat from the other options available to an incumbent union described in the earlier board decision in:

> Re Calgary Regional Health Authority [1997] Alta. L.R.B.R. 549 (Wallace)

and in particular the options in paragraph 12 and the certification during an open period option described in paragraph 14. We see no reason why it should be, but leave that question open.

29 It is our view that taking the position that the transitional processes of Bill 27 are not intended to organize the previously unorganized is not inconsistent with the views expressed in the 1997 Calgary Region case. It is only if one sees the wording of the (now defined by regulation) four functional units as somehow precluding the unorganized from a unit on a "for-all-time" and "go forward" basis that the reasons in 1997 Re Calgary Region case would come into question. As will be seen below, we do not read the words "who are represented by a bargaining agent" in that way for the purposes of a future certification application. This is because, on such applications, all employees in the unit applied for might well be unrepresented. It would be an absurd interpretation to suggest a wholly unorganized unit could never apply for certification under these four new functional units because they are restricted (for anything but the transition) to those already organized.

The Purpose of Bill 27

30 We have described how the Fort McMurray bargaining rights ended up in a decidedly "non-standard" state. The next question is what was Bill 27 designed to do both at its genesis and on an ongoing basis?

31 When Bill 27 came in, the Board issued an Information Bulletin, and modified one of its existing Bulletins - #10 - Bargaining Units for Hospitals and Nursing Homes - to reflect its view of the changes. Before setting out these bulletins, we note that the CEP argues that by doing so, the Board jumped the mark and purported to commit itself to an interpretation that, CEP believes, is fundamentally wrong. The introduction to the T-2 Regional Health Authorities Transition Bulletin reads:

> Effective 1 April 2003, Alberta's 16 Regional Health Authorities ("RHAs") are nine. Certain operations of the Alberta Mental Health Board ("AMHB") will also be transferred to the new RHAs. The Labour Relations (Regional Health Authorities Restructuring) Amendment Act, 2003 and its attendant Regulation addresses labour relations in Alberta's health care system:
>
> * The Regulation mandates four functional bargaining units for RHA employers: (1) direct nursing care or nursing instruction, (2) paramedical professional or technical services, (3) auxiliary nursing care, and (4) general support services. This is a change from the Board's policy of five standard units in acute and continuing care, and three standard units in community health. Full unit descriptions are available in Information Bulletin 10.
> * The Act mandates region-wide units. That is to say, each RHA has four region-wide bargaining units. Non-unionized groups of employees remain as named exclusions on Board certificates.
> * The Regulation requires the successful union and the employer to negotiate a region-wide collective agreement. Until such an agreement has been concluded, all existing collective agreements remain in full force and effect.
>
> The Regulation directs the Labour Relations Board to oversee the integration of the existing bargaining units into the 36 new units.

32 It is the underlined statement CEP says is wrong. The same point, resulting in the same complaint, are reflected

on pages 2 and 3 of Bulletin 10.

> Boundaries of the Unit
>
> The Regulation requires all units to be region-wide. The only exception is the preservation of non-unionized groups of employees as named exclusions on Board certificates.
>
> General Support Services
>
> "All employees when employed in general support services."
>
> This unit includes all employees whose prime function is general support activities. Persons employed in activities such as clerical, office administration, trades, food services, housekeeping, laundry and custodial services are normally in this unit.
>
> As outlined in Bulletin #T-2, non-unionized groups of employees remain as named exclusions on Board certificates. Subsequent certification applications must be made on a region-wide basis. The only exception allowed is where a trade union already represents some of the employees in the region. In such a case, the Board will accept applications for certification for any (or all) of the remaining non-union sites. Revocation applications must be for the entire unit.

33 The way the Board's subsequent case law has dealt with section 162.1(1) - the power to establish regional wide-bargaining units, and Section 2 of the Regulation is described in:

> Re Provincial Health Authorities of Alberta [2003] Alta. L.R.B.R. 181 (Wallace)

This was followed by a letter decision in a case of the same name [2003] Alta. L.R.B.R. LD-050 (Asbell).

34 In the Wallace decision the Board referred to CEP's objection in the following terms:

> CEP, for the first time at our hearing, advised that it was contemplating a challenge to the Regulation on the basis that the exclusion of non-unionized employees from the process set by the Regulation is ultra vires the Act. It elaborated that new section 162.1(1)(a) of the Labour Relations Code, as enacted by the Act, permits the Lieutenant Governor in Council to make regulations "providing for the establishment of region-wide functional bargaining units." CEP contends that the Lieutenant Governor in Council cannot pass regulations that result in bargaining units that are less than truly "region-wide" because they exclude sites, classifications or individual employees that are not currently represented by a trade union. It argued that, in light of the possibility of an ultra vires challenge to the Regulation, the Board should issue ballots to the currently non-unionized employees and leave them sealed pending a count of ballots.
>
> [89] The Board orally rejected this request. We were concerned at the potential for confusion among non-unionized employees if they were to receive ballots. The Board considered that such potential for confusion should be avoided unless there existed a reasonable prima facie case that the Regulation was ultra vires. In our view, CEP has not informed the Board of such a reasonable prima facie case. The Act allows regulations to be made to establish "region-wide functional bargaining units ... for all regional health authorities and their employees who are represented by a bargaining agent." The emphasized words appear to exempt non-unionized employees from the scope of the bargaining units that the Lieutenant Governor in Council may establish; that new bargaining units comprise all employees in a functional group in a region who are not unionized. So, at a first look it would seem that, contrary to CEP's submission, a Regulation that resulted in the establishment of region-wide units that "swept in" existing non-unionized employees would be ultra vires. We therefore considered that the challenge contemplated by CEP did not meet the minimum standard of plausibility that would cause the Board to issue ballots to the non-union employees.

35 This thinking was picked up in the Asbell decision. In that case the UNA argued against allowing the continued

existence of non-union enclaves within a health care region. The Board captured the argument at paragraph 8:

> Specifically, UNA contends there will be constant conflict between non-union and union sites. It is UNA's position the only sensible and consistent interpretation of the Code and Regulations is that a region wide bargaining unit must be just that - a region wide bargaining unit. To include provision for non-union enclaves is not only problematic for both employers and the union but is also contrary to the legislative provisions.

36 Chair Asbell decided, at paragraph 13:

> [13] I concur with the rationale as discussed by Vice-Chair Wallace in reference to the status of non-unionized sites. The Regulations specifically apply only to those employees represented by a bargaining agent. By so stating, the legislation and its regulations are limited to a defined group - that of the unionized workforce. It is clear and unambiguous. By limiting the application of the legislation in this fashion, the Legislature has specifically exempted non-unionized employees from the scope of the bargaining units. I agree that a bargaining unit description that sweeps in existing non-unionized employees would be ultra vires. As the application of the legislation is clearly applicable only to the unionized workforce, I find no discretion to include the non-unionized workforce in the bargaining units. I am therefore not prepared to issue region wide bargaining unit certificates including non-unionized sites.

37 Parts of the Employer's position and certainly the Union's fear is that the Bill 27 process will forever entrench this situation. That, in the Union's view, would perpetually maintain a group of employees that cannot themselves ever be certified separately since their unit is inappropriate, and yet as an "all employees except ..." type of unit, would continue to grow as the excluded classifications grow and new classifications are created.

38 The Union's view is that the Bill 27 process represented an appropriate point to clean-up an unorthodox situation like this, switching the unit to one of the listed standard bargaining units. The Employer says this is jurisdictionally beyond our authority.

39 In our view both sides hitch too large a function to the Bill 27 process. We think it should be seen in context. Part of Bill 27 and the processes it creates are an expeditious and to a degree rough and ready way of getting from point A - the pre-regional consolidation situation, to point B - the post regional consolidation situation. It recognizes that the significant changes to the Employer structures inevitably disrupt established bargaining relationships and at times pit one bargaining agent against another where both previously represented employees within the new regional employer's workforce. It provides mechanisms to deal with such situations. However, it is not designed to perform a more thorough audit of the "standardness" of existing certificates; nor, however, is it designed to exclude that for the future.

40 That said, Bill 27 also makes a significant change to what had previously been the Board's standard bargaining unit policy by (a) reducing the number of standard units from 5 to 4, consolidating the paramedical professional and technical units into one and (b) elevating those standard unit descriptions from board policy to quasi-statutory provisions.

41 The Board discussed a number of aspects of Bill 27 in the 2004 Calgary Health Region case. In particular, it considered arguments as to whether Bill 27 is permanent or transitional in its impact.

> Re Calgary Health Region [2004] Alta. L.R.B.R. LD-029 (Lucas Vice-Chair)

42 A group of Calgary Locals of the UNA were named as the bargaining agent for the nurses in the Calgary Health Region. After Bill 27, the government moved the Didsbury area from the David Thompson Health Region into the Calgary Health Region. The Calgary Health Region applied to reconsider the Calgary certificate and add UNA Local 34 (the Didsbury Local) to the list of locals in the group of locals holding the Calgary certificate. UNA said no, that the bargaining agent for the Didsbury nurses was no longer just local 34, but all the UNA locals in the David

Thompson group of locals. This was as a result of a new certificate issued following the same Bill 27 process as is involved in this case. The Board outlined the parties' respective positions in paragraphs 3 and 4.

> 3 ... UNA urges the Board to accept its interpretation of the Act and Regulation to conclude the transfer of the Didsbury area to CHR should result in there being two bargaining agents for the nurse employees of the CHR, one naming the David Thompson Locals for all nurse employees of CHR when employed in the Didsbury area and the other, by amendment to the existing certificate, naming the Calgary Locals for all other nurse employees except those covered by the new certificate to be issued for the Didsbury area.
>
> 4. The DTRHA filed a submission in support of the application of the CHR and suggested the Board has no jurisdiction to issue the additional certificate sought by UNA. In its view, the creation of two bargaining units for CHR would contravene the Act and Regulation as they clearly mandate only one region-wide functional bargaining unit for, in this case, direct nursing care or instruction, in each regional health authority.

43 In support of its argument, UNA argued (at para. 13):

> 13 UNA argues the Act and Regulation must have been intended to be a one time only event, relating just to April 1, 2003, and cannot be construed as saying the four functional region-wide bargaining units are to be maintained in perpetuity.

44 The Board rejected that argument, saying of this proposition:

> 22 It is no mistake to consider much of what is dealt with in the Regulation as being a one-time event. Once bargaining units are consolidated, bargaining agents are designated for employees in the region-wide functional bargaining units, and receiving collective agreements are designated, it is not anticipated those activities will be repeated. But contrary to what UNA argues, the Act and Regulation will operate in perpetuity, or at least until the Legislature might otherwise determine through legislative action. The suggestion by UNA that section 162.1(c) of the Act is an indication against the perpetual application of its terms cannot be supported. That provision, it will be recalled, states that regulations may be made "providing for the continuation of existing collective agreements." UNA says this is an indication the Act is not intended to operate in perpetuity, because such agreements will, from to time, be renegotiated. But section 20 of the Regulation merely states existing collective agreements in force on April 1, 2003 will continue to bind the parties until a receiving collective agreement comes into force. By providing a method by which existing collective agreements will only continue for a definite period, obviously indicating such agreements are of a limited duration, does not also serve to indicate the legislative scheme itself is to have application only for the one time events related to April 1, 2003. Receiving collective agreements, when finalized by the parties or by Board award, will be like other collective agreements, probably having a specified term of operation and being subject to renewal or renegotiation, which is an indication of the legislation having perpetual operation.
>
> 23 The other provisions of the Regulation, cited by UNA in support of the limited life of the Act and Regulation, are merely examples of necessary steps to be taken by the parties in connection with the transition from the former labour relations scheme applicable to regional health authorities to the new scheme that applies to the lesser number of such authorities. As already mentioned, those provisions of the Regulation raised by UNA are undoubtedly intended to have limited application and will likely not be relied upon again in the future. But that alone does not suggest the entire Act and Regulation are to be given the same limited operation.
>
> 24 We are not convinced that the four region-wide functional bargaining units have application only to the transition events relating to April 1, 2003. Section 2 of the Regulation provides those four bargaining units are to apply to all employees in the health region who are represented by a bargaining agent and, in so far as we are concerned that provision obliges the Board to give continuing effect to its terms in all matters coming before it whether relating to the transitions events or to subsequent matters.

45 We see these comments reflecting the dual purpose of the Bill 27 changes. The first is, as we noted, to modify, and in the process elevate to quasi-statutory status the Board's prior functional bargaining unit policy for the health care industry. That is not transitional. The second is to move from the pre-existing certificates to new bargaining relationships recognizing both the modified policy and the restructuring within the industry. That is transitional; a one-time process designed only to get from A to B. A question that concerns the Union is whether the comments first by the Wallace panel and then by the Asbell panel about the Board's jurisdiction over unorganized enclaves fit into that process. In our view those comments have to be viewed in context. What they were dealing with was the question of what, as part of the transitional process of getting from A to B, the legislature intended with respect to previously uncertified groups. The pre-bill 27 bargaining unit configuration involved many bargaining units that, after Bill 27, would be non-compliant with the new policy. The post-bill 27 configuration would contain fewer and different bargaining units.

46 It is possible to read the words "all employees in the health region who are represented by a bargaining agent" two ways. Employees are only represented by bargaining agents collectively; units of employees are represented by a bargaining agent just as constituents (collectively) in a geographical constituency are represented by an elected official. Thus, the words used could refer to employees in the pre-Bill 27 units represented by a bargaining agent, or it could refer to employees in the post Bill 27 units represented by a bargaining agent.

47 Adopting this view that the "vacant" bargaining units that remained unorganized were not intended to be swept into the new "defined-by-regulation" four functional bargaining units by the transition process raised some difficulties. Chair Asbell alluded to some of them in a follow-up letter decision of October 3, 2003 setting out the wording the Board intended to use in excluding these non-union enclaves. The Union had raised the argument that since some persons worked within the region at a Union and non-Union site, their employment would be difficult to administer.

48 UNA's solution was to add the word "solely" to the proposed exclusion. The Board rejected this, saying at para. 9-10:

> [9] Bargaining unit descriptions define the scope of the bargaining unit. Typically, the Board addresses disputes over the scope of the bargaining unit and whether an individual is included or excluded from the bargaining unit through the use of the prime function test.
>
> ...
>
> In this case, however, that test is of little benefit as this is really a situation of geographic context as opposed to job function. All employees at issue perform direct nursing functions. In this case, the legislation mandates an amalgamation of a number of bargaining units into one region-wide unit while protecting non-union enclaves. (See: [2003] Alta. L.R.B.R. 180, paragraph 89). Under the current bargaining unit structure and descriptions, (as a result of this decision to be replaced by one certificate per region), employees working in bargaining units represented by UNA were subject to, and received the benefit of, UNA's collective agreement. Some of these same employees also worked non-union sites. For these shifts, the employees were subject to different terms and conditions. UNA's proposed phraseology would have the effect of expanding the reach of its collective agreement into areas and sites not previously subject to collective bargaining - some of the employees working at these sites would be unionized while others would not. This could create potential for conflict at these worksites - something this Board tries to avoid when setting bargaining unit descriptions. For instance, if the employer operating the non-union site wished to fill a part-time position previously held by an employee covered by the collective agreement while others at the facility were not, would the employer be required to post the part-time position only with the union or would it be open for all? If a non-union employee successfully applied for the position would that individual be forced to become a union member? How would seniority work? What about other benefits or responsibilities under the collective agreement that may not be identical to those rights and benefits otherwise available to those on a non-union site? Simply put, there is too much room for confusion and conflict under UNA's position.

> [10] In our opinion the legislation was designed to amalgamate existing unionized bargaining units into one, not expand the reach of existing bargaining rights. As discussed by the Board in Information Bulletin T-2, where a trade union already represents the unionized employees in the region, it will have the opportunity to certify the non-union sites site-by-site. The only union having this luxury will be the union holding the functional bargaining certificate for the region. Should another union wish to certify a non-union group, it must certify the whole region because of the requirement of one functional bargaining unit per region.

49 The Board's solution to the potential problems described in paragraph 9 was that the Employers could administer a given employee's non-union and union status differently, that is using two separate employee numbers. Of this arrangement the Chair said:

> [7] This has worked well for these parties and we heard no evidence whatsoever that this arrangement could not successfully continue.

50 With respect, that is not this panel's experience. This use of dual employment status has caused the Board itself difficulty in dealing with managerial exclusions and voting rights. It has caused the parties innumerable difficulties with mobility, seniority, overtime and benefit entitlement issues. It causes difficulties with the Employment Standards Code which treats the employee as having but one contact of employment with the Employer.

51 However, identifying such difficulties does not mean they were difficulties the transitional processes at Bill 27 was designed to overcome. In the event a bargaining unit becomes in any way dysfunctional the Board has the ability under its general reconsideration power, to amend that certificate to turn the unit into one that will be functional in the future. In the case of this industry, the Board's discretion in selecting a future functional unit would have to be guided by the new regulation-based four functional units.

52 Bill 27 makes it clear the Board's general powers remain intact:

> 162.1(2) A power or duty conferred on the Board in regulations under this section shall be construed as being in addition to the other powers and duties of the Board under this Act and not as limiting those powers and duties unless the contrary intention is expressly stated in the regulations or arises by necessary implication.

53 Chair Asbell, in paragraph 10 set out above, opined that the trade unions holding a regional certificate subject to exclusions would have the luxury of being able to apply to certify the excluded group as an add-on to its existing unit. However, if this "right" carries with it the restriction that it cannot apply for certification of the full unit during the open period, then CEP finds it anything but luxurious. This takes us back to the potential for conflict between Vice-Chair Wallace's 1997 decision in Re Calgary Region and the comments we alluded to above suggesting a more restricted approach. That dispute can be dealt with another day.

Conclusion on the Bill 27 Process

54 Our view of Bill 27 is that it provides for transitional processes not of themselves designed to organize the unorganized. It provides a rough and ready way of dealing with a major transition to new regional boundaries and fewer bargaining agents. In our view, it is a reasonable interpretation of the full regulation to say it was not intended to sweep in the unorganized as part of the transition. We would not have used the words jurisdictional or ultra vires in referring to the words that precede the description of the four functional units, but otherwise we think the interpretation of the transitional provision is a reasonable one.

55 In interpreting the four functional bargaining units on a go forward basis, we find they apply to any employees, and draw no distinction for post-transitional purposes between the unorganized and the organized. It would be an absurd interpretation to say a trade union could apply to certify a unit of "all employees of a region employed in general support services" except those who are not represented by a trade union. The whole purpose of such a

certification application would be to determine whether the employees in that unit (a "defined-by-regulation" constituency) wished such representation.

The Reconsideration Application

56 The existing unit is the all general support services unit. The Employer wants to alter that. The Board's jurisprudence has been that from the transition process, unorganized enclaves can be or must be excluded. The Union wants to alter that and argues that only all general service units can be granted. As we have already explored, we are not persuaded by that view.

57 The CEP provided us with several authorities on the subject of the steepness of the hill that an applicant for reconsideration must climb. The applicant's position here is much improved by the contrast between the Board's own declaration and the subsequent certificate. To the extent these differ, and in a significant respect, it is due to a Board error without any obvious rationale. Second, the difference between the two, which is to sweep in, or at least not to exclude "employees who are not represented by a trade union" is said to be a jurisdictional error; that is the Board is said to have done something the statute prohibited it from doing. Despite the CEP's argument that that is a wrong view of the statute, we are persuaded that it has caused an incorrect result and the certificate the Board issued, purportedly as part of the Bill 27 process, was in accord with the transitional aspects of the process. The fact we might not describe it as ultra vires or a jurisdictional error does not detract from the point that we think the transitional processes permitted exclusions for the previously unorganized.

58 The argument against reconsideration is not saved by an "all's well that ends well argument"; that the end result is a standard functional general support bargaining unit. If issuing such a certificate under the guise of the Bill 27 process is beyond what that process contemplated then policy arguments suggesting it is a good, or even the best, result from a labour relations perspective holds little sway. Even if we went so far as to say the question was a matter for Board policy, and the exclusion of non-union enclaves was based solely on a policy choice, we would not reverse that policy in the case at hand since we do not view the Regulation, taken as a whole, as demanding the inclusion of the hitherto unorganized transitional certificates, although we take a different view of what is required in future on an ordinary certification application.

59 The difference between the Board's declaration and its ultimate certificate justifies reconsideration. The next question becomes what bargaining unit description should the transition certificate contain.

Bargaining Unit Description

60 We have decided the bargaining unit in this case will be reconsidered and will now read:

> All employees in general support services except those persons employed at the Fort McMurray Health Centre as trades and utility persons, material distribution attendants, processing attendants, equipment loan attendants, stores attendants, pharmacy aids, radiology attendants, ER attendants, ambulatory care attendants, recreational attendants, therapy assistants and buyers.

61 In arriving at this description we considered several matters. First, the Lieutenant Governor in Council has told us what bargaining unit descriptions should look like for future certification applications. They should be for one of the four functional units, and be limited to one bargaining agent (or group of agents bargaining together) per region. That makes sound labour relations sense. Any departure from such units to avoid sweeping in the unorganized during the Bill 27 transition process should be limited to what is necessary to achieve that purpose and no more.

62 Second, the Board's certificates and the bargaining rights they grant are expressed in generic terms. At any given time there may be persons who fall within a certificate's wording who are being treated as excluded; for example, those not truly exercising managerial functions. Similarly, some may be treated as included, when by reason of their prime function, or their managerial responsibilities they should not be. Nothing in the Bill 27 process is designed to validate these inappropriate allocations. The parties remain free to resolve these issues by bringing

suitable applications for determinations before the Board or, indeed, to settle them on their own without recourse to the Board, another reason not to view Bill 27's treatment of non-union enclaves as having anything more than transitional effect. It is units that are certified, not specific individuals. We see the policy against sweeping in the unorganized as directed at not expanding the scope of unit descriptions rather than excluding particular persons based on some individual claim to be non-union. So, if an Employer has hired a person to a non-Union position that properly falls within a bargaining unit, that person is still in the broad sense covered by a certificate and as a result represented by a trade union. In some of its arguments the Employer, during the Reconsideration decision, argued that, by under bargaining a certificate's scope employees were automatically excluded from that scope. It remains for the Board to reconsider that certificate's scope, which is discretionary and may depend on a number of circumstances.

63 We applied these principles to arrive at the bargaining unit in this case as follows. First, High Level was covered by "all employees in general support service" certificates. There is no basis to grant any exclusions from the unit for that location. If the parties wish to continue individual exclusions by agreement they are free to do so, but the certificate will not be subject to a carve out that the previous certificates never had.

64 The persons not included in the CEP or CUPE units in 1998 were listed in paragraph 4 of the 1998 Reconsideration Certificate. They are persons occupying the following classifications:

Material Distribution Attendants

Processing Attendants

Equipment Loan Attendants

Stores Attendants

Operating Engineers

Utility Persons

Pharmacy Aides

Radiology Aides

Ambulatory Care Attendants

Recreation Attendants

Therapy Assistants

65 As we noted above, the included employees were capable of generic descriptions but the exclusions were not. In accordance with the Board's practice in writing Bill 27 unit descriptions we will list specifically those excluded; all others will be included in the "all employees in general support services" part of the description.

66 We accept that since the 1998 reconsideration application there have been some changes in nomenclature. Our unit description speaks of radiology attendants not aids to reflect this.

67 There were no computer or network technicians or help desk analysts listed in the 1998 decision. The Employer says CUPE and the Employer treated them as out-of-scope. We take this to mean managerial since prima facie they would fall within the office and clerical category. If they remain out-of-scope then they are excluded from the unit description we have ordered since they are not employees. If not, they are included within the words of the certificate. The question of whether there is some agreement that they be excluded can be dealt with in bargaining and failing that by an application to the Board for a declaration.

68 We accept the Employer's evidence that a Radiology Attendant performs essentially the same function as the ambulatory care attendant, and have added it to the list of exclusions. This is also true of the ER attendants.

69 The painter's position is new. We use the generic terms tradesperson to cover the Operating Engineers and the Painter. The buyer is new but did not fall within the old CEP or CUPE unit descriptions.

70 If the Family Support Educators are properly within general support rather than some other bargaining unit, then in our view they are properly viewed as office and clerical employees. We have not excluded them from the unit description.

71 We are fully conscious that this results in a bargaining unit that is fraught with potential difficulties. However, these can be resolved by agreement if the parties have the will. If not, and the bargaining unit proves dysfunctional, the parties can apply to the Board for a further reconsideration. This application is limited to a reconsideration request arising out of Bill 27's transitional process, a process in our view not designed to serve such a broader purpose.

A.C.L. SIMS, VICE-CHAIR
