# CASE COMMENT: *VRIEND* v. *ALBERTA* DISCRIMINATION, BURDENS OF PROOF, AND JUDICIAL NOTICE

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The *Vriend* decision[1] provides a good opportunity to observe the interplay among the substantive law of discrimination, the burdens of proof allocated by that law, and judicial notice as a means of establishing facts to discharge those burdens. My review of the decision shall have three parts. I shall consider (I) the background of the case; (II) some general rules of judicial notice; and (III) the application of judicial notice doctrine to discrimination issues in the case. In this last part, I shall suggest that the majority of the Court of Appeal erred in both principle and application in failing to take judicial notice of the discriminatory effects of the current provisions of the *Individual's Rights Protection Act*.[2]

I shall restrict my comments to the *Vriend* justices' reasoning respecting s. 15(1) and related evidential issues. I shall not address s. 32, s.1 or remedial matters.[3]

## I. BACKGROUND

Delwin Vriend was employed by the King's College in Edmonton, Alberta. The College had a policy on homosexual practice. On January 26, 1991, Vriend's employment was terminated, on the sole ground of non-compliance with the College's policy. Vriend attempted to make a complaint with the Alberta Human Rights Commission, under the *IRPA*. Vriend alleged employment discrimination on the basis of sexual orientation. The Commission rejected Vriend's complaint because sexual orientation is not a prohibited ground of discrimination under ss. 2(1), 3, 4, 7(1), or 10 of the *IRPA*.

Vriend challenged the *IRPA* under the *Canadian Charter of Rights and Freedoms*.[4] The main issues that fell to be determined were as follows:

(1) whether the *IRPA* provisions discriminated against Vriend; and in particular,

(a) whether discrimination against homosexuals exists,

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1 *Vriend* v. *Alberta* (23 February 1996), Edmonton 9403-0380 (Alta. C.A.), [1996] A.J. No. 182 (QL) [hereinafter *Vriend* cited to QL].

2 R.S.A. 1980, c. I-2 [hereinafter the *IRPA*].

3 Some further substantive issues I shall not deal with are whether any discrimination against Vriend only affected his economic rights and so fell outside the ambit of *Charter* protection; whether legislative deference should be a factor in s. 15(1) analyses; whether greater judicial deference is required in the face of legislative silence as opposed to express discrimination; and whether the differences between the *Charter* and human rights legislation entail that not every prohibited ground of discrimination under the *Charter* must be mirrored in human rights legislation.

4 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter the *Charter*].

(b) if so, whether homosexuals are a discrete and insular minority entitled to protection under s. 15(1) of the *Charter*, and

(c) if so, whether the omission of sexual orientation as a prohibited ground of discrimination in the *IRPA* provisions constituted discrimination against Vriend on the basis of sexual orientation;

(2) if the provisions did discriminate, whether the discrimination is justified under s. 1 of the *Charter*; and

(3) if the discrimination is not justified, the nature of the appropriate remedy.

Russell J. of the Court of Queen's Bench of Alberta (as she then was) heard Vriend's application challenging the *IRPA* provisions.[5] She took judicial notice that discrimination against homosexuals exists, held that homosexuals were a discrete and insular minority entitled to protection under s. 15(1) and that sexual orientation is a prohibited ground of discrimination under s. 15(1), and declared that the *IRPA* provisions are inconsistent with the *Charter*, the infringements are not justified under s. 1, and the *IRPA* provisions must be interpreted, applied, and administered as though they contained the words "sexual orientation."

The Province of Alberta appealed Russell J.'s decision to the Alberta Court of Appeal (McClung, O'Leary, and Hunt JJ.A.). The appeal turned on the issue of whether the *IRPA* provisions discriminated against Vriend by omitting sexual orientation as a prohibited ground of discrimination. The majority, McClung and O'Leary JJ.A., held that the provisions did not discriminate, and allowed the appeal. Hunt J.A., in dissent, agreed with Russell J.'s conclusions, but would have declared the *IRPA* provisions to be of no force and effect to the extent that they fail to extend protection to homosexuals, suspending this declaration for one year to permit the Legislature to amend the *IRPA* to comply with the *Charter*.

## II. SOURCES OF EVIDENCE: JUDICIAL NOTICE

The determinations at each stage of the *Vriend* argument — discrimination, justification, and remedy — required factual foundations or concessions on issues by the parties. Very generally, the facts may have been established by agreement, by the tendering of evidence in accordance with ordinary evidential rules, or by the taking of "judicial notice." In civil and criminal proceedings, parties may agree that certain facts occurred, and those facts are generally accepted as established by the tribunal.[6] Where, as in the *Vriend* case, issues respecting history and social interactions are material, the main applicable subset of the ordinary evidential rules would be the expert opinion evidence rules. These rules allow properly qualified witnesses for the parties to testify on oath or provide affidavit evidence respecting inferences and opinions falling within

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5 *Vriend* v. *Alberta*, [1994] 6 W.W.R. 414, 152 A.R. 1 (Q.B.) [hereinafter *Vriend (Q.B.)* cited to A.R.].

6 See *e.g. Alberta Rules of Court*, r. 230 and *Criminal Code*, R.S.C. 1985, c. C-46, s. 655.

the scope of their expertise and allow the witnesses and their testimony to be tested by cross-examination. The hearsay rules would also doubtless be engaged respecting the foundations for the expert evidence. The source of facts least developed in Canadian jurisprudence and most important to the *Vriend* case is "judicial notice."

A fact is "judicially noticed" if the trier of fact accepts it as established even though no party has proven it by evidence admissible under ordinary evidential rules.[7] The judicial notice rules developed at common law to expedite trials, maintain uniformity in decision-making, and ensure that courts take cognizance of social, intellectual, and technological developments.[8] Statute now directs the taking of judicial notice of certain matters, such as Acts or regulations of Alberta or Canada, or signatures of judges.[9] The judicial notice rules pose several dangers. Parties may have inadequate notice of facts to be judicially noticed and may not be extended an opportunity to challenge or support the facts to be judicially noticed. Facts may be noticed which are untrue or at least insufficiently established for the purposes of deciding persons' rights. Facts accepted by judicial notice are not founded on evidence given on oath that is tested by confrontation and cross-examination. The taking of judicial notice is also in tension with our adversary system, which paradigmatically leaves factual matters to be proved, according to the rules of evidence, by parties; in an adversary system, facts should usually not be determined by an independent inquisitorial trier of fact.[10] The degree of restraint in recourse to judicial notice should vary, however, with the type of fact to be noticed.

Three different types of facts may be judicially noticed — (a) "basic facts," (b) "adjudicative facts," and (c) "legislative facts." These facts are not distinguished by their subjects or level of generality, or by being at issue between parties. They are instead distinguished by their relevance — *i.e.* by the issues to which the facts relate in litigation. We shall see in the next part that the rules of judicial notice played an important role in the attempt to satisfy Vriend's burdens of proof.

## A. JUDICIAL NOTICE OF BASIC FACTS

The notice taken by triers of fact and triers of law of "basic facts" has received little attention in Canadian jurisprudence, despite the frequency with which such notice is

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7 *R.* v. *Potts* (1982), 66 C.C.C. (2d) 219 (Ont. C.A.), Thorson J.A., leave to appeal to S.C.C. refused 66 C.C.C. (2d) 219 [hereinafter *Potts*]; see The Honourable Mr. Justice J. Sopinka, S.N. Lederman, Q.C. & A.W. Bryant, *The Law of Evidence in Canada* (Toronto: Butterworths, 1992) at 976; A.F. Sheppard, *Evidence* (Toronto: Carswell, 1988) at § 1185; C.B. Mueller & L.C. Kirkpatrick, *Evidence* (New York: Little, Brown, 1995) at 77.

8 See sources mentioned at *ibid.*; *Moge v. Moge*, [1992] 3 S.C.R. 813 at 873, L'Heureux-Dubé J.

9 *Alberta Evidence Act*, R.S.A. 1980, c. A-21, ss. 33, 43 [hereinafter *AEA*]. The rules relating to judicial notice of adjudicative facts have been codified in the United States Federal Rules of Evidence [hereinafter "FRE"] and in some State codes. See C.B. Mueller & L.C. Kirkpatrick, eds., *Federal Rules of Evidence, 1995 Edition* (New York: Little, Brown, 1995), r. 201 at 53 [hereinafter *FR 1995*].

10 See Mueller & Kirkpatrick, *supra* note 7 at 80; P.W. Hogg, "Proof of Facts in Constitutional Cases" (1976) 26 U.T.L.J. 386 at 394.

taken and even encouraged. Sopinka, Lederman and Bryant refer only to "the tacit judicial notice that surely occurs in every hearing."[11] "Basic facts" comprise the pre-litigation background knowledge or conceptual equipment triers of fact and triers of law must have to understand and evaluate evidence.[12] Basic facts are of two types: "communicative facts," the knowledge of which permits the comprehension of testimony and other evidence; and "evaluative facts," the knowledge of which permits the evaluation, assessment, or drawing of inferences from evidence.[13] A trier of fact employs evaluative facts when applying "common knowledge, observation, and experience gained in the ordinary affairs of life when giving effect to inferences that may reasonably be drawn from the evidence."[14]

Few rules have developed, even in the United States, governing the taking of notice of basic facts. Triers of law or counsel may exhort triers of fact to utilize their knowledge of basic facts, but the trier of fact generally is not and should not be instructed respecting these facts in the course of litigation.[15] Since basic facts are general or common knowledge, triers of fact or law should not use unique knowledge or knowledge gained through personal experience to interpret or evaluate evidence in a case.[16]

## B. JUDICIAL NOTICE OF ADJUDICATIVE FACTS

Courts and commentators have lavished the greatest attention on judicial notice of adjudicative facts. "[A]djudicative facts are those to which the law is applied in the process of adjudication. They are the facts that normally go to the jury in a jury case."[17] Adjudicative facts are the particular facts at issue between the parties — "who did what, where, when, how, and with what motive or intent."[18] In an employment discrimination case, adjudicative facts might include (for example) whether a person was an employee of an employer, whether the employee was fired or resigned, and whether the employer terminated the employee's employment for cause or for some prohibited discriminatory reason.

Judicial notice is taken by the trier of law (the judge). If the judge determines that judicial notice of a fact is to be taken, the judge must direct the trier of fact to find that

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11 Sopinka, Lederman & Bryant, *supra* note 7 at 976.

12 Mueller & Kirkpatrick, *supra* note 7 at 102; *FR 1995*, *supra* note 9 at 56, FRE r. 201(a), Advisory Committee's Note [hereinafter "ACN"].

13 Mueller & Kirkpatrick, *ibid.*

14 *United States* v. *McAfee*, 8 F.3d 1010 at 1014 (5th Cir. 1993); Mueller & Kirkpatrick, *ibid.* at 103.

15 Mueller & Kirkpatrick, *ibid.* at 105.

16 *Ibid.*; *United States* v. *Lewis*, 833 F.2d 1380 at 1385 (9th Cir. 1987).

17 *FR 1995*, *supra* note 9 at 57, FRE r. 201(a), ACN quoting K. Davis, 2 *Administrative Law Treatise* (1958) 353.

18 *Ibid.*

the fact is established. The trier of fact is still free to draw the inferences it considers appropriate from the fact.[19]

Judicial notice may be taken of adjudicative facts if the facts are either:

(a) so notorious as not to be the subject of dispute among reasonable persons, or

(b) capable of immediate and accurate demonstration by resorting to readily accessible sources of indisputable accuracy.[20]

The standard for "notoriety" is high. The facts cannot be the subject of reasonable dispute. Moreover, these facts must be common knowledge or in the general knowledge of reasonably well-informed persons, at least in the territorial jurisdiction where the litigation takes place and at that time.[21] This requirement entails that a judge should not take judicial notice of purely personal experience or knowledge.[22] Examples of "notorious" facts include well-known geographical facts, current events, characteristics of human needs and behaviour, certain business or trade (legal or illegal) practices, and historical events.[23]

A fact may not be so notorious that the judge was either aware of it or considered it beyond reasonable dispute. The judge may nevertheless take judicial notice of the fact upon verifying it in a readily accessible source of indisputable accuracy. Again, the standard for qualification of the source is high. These sources have included "texts, dictionaries, almanacs and other reference works, previous case reports, certificates from various officials and statements from witnesses in the case."[24] Facts judicially noticed on this basis have included facts of geography, history, science, and economics.[25]

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19 Sopinka, Lederman & Bryant, *supra* note 7 at 986-8; *R.* v. *Zundel* (1987), 56 C.R. (3d) 1 (Ont. C.A.) at 55, 57, *per curiam* leave to appeal to S.C.C. refused 56 C.R. (3d) xxviii [hereinafter *Zundel*]. See also *R.* v. *Zundel* (1990), 53 C.C.C. (3d) 161 (Ont. C.A.) rev'd on other grounds (1992), 75 C.C.C. (3d) 449 (S.C.C.) [hereinafter *Zundel (No. 2)*]. Under FRE r. 201(g), in civil proceedings the jury is to be instructed to accept as a fact any fact judicially noticed, but in criminal cases the jury may but not must accept a fact judicially noticed as conclusive, *FR 1995*, *supra* note 9 at 54.

20 *Zundel*, *ibid.* at 55-56; *Potts*, *supra* note 7 at 226; Sopinka, Lederman & Bryant, *ibid.* at 976.

21 Sopinka, Lederman & Bryant, *ibid.* at 976-77; *Potts*, *ibid.* at 226; Sheppard, *supra* note 7 at § 1188-91; Mueller & Kirkpatrick, *supra* note 7 at 82.

22 *Potts*, *ibid.* at 229; Sopinka, Lederman & Bryant, *ibid.* at 985; Sheppard, *ibid.* at § 1190; Mueller & Kirkpatrick, *ibid.* at 82-83. Russell J. defined judicial notice as "the cognizance of certain facts which a judge may properly take and act on without proof because she already knows them to be true," *Vriend (Q.B.)*, *supra* note 5 at para. 13. This claim, standing alone, is at least misleading. If the matters known are purely personal knowledge, those matters should not be judicially noticed. Moreover, as will be seen directly, a judge may take judicial notice of facts not already known, following appropriate inquiries.

23 *Zundel*, *supra* note 19 at 56; *Zundel (No. 2)*, *supra* note 19 at 171; *R.* v. *Sioui*, [1990] 1 S.C.R. 1025 at 1050, Lamer J., as he then was; Sopinka, Lederman & Bryant, *ibid.* at 977-78; Sheppard, *ibid.* at § 1189; Mueller & Kirkpatrick, *ibid.* at 83.

24 Sopinka, Lederman & Bryant, *ibid.* at 979; Sheppard, *ibid.* at § 1192.

25 Sopinka, Lederman & Bryant, *ibid.*; Sheppard, *ibid.*; Mueller & Kirkpatrick, *supra* note 7 at 85.

The taking of judicial notice is discretionary.[26] Prejudice to the opponent should be weighed against taking notice.[27] The high standards that must be met indicate that the judicial notice of adjudicative facts should be taken with restraint.

A judge may take judicial notice either on his or her own motion, or upon the request of a party.[28] A party requesting notice may tender materials justifying the taking of notice. The nature of the materials would depend on the basis for the request for judicial notice. The requesting party would bear the burden of establishing that the appropriate criteria for judicial notice are satisfied. The opponent should be entitled to tender materials in rebuttal. Both parties should be entitled to make submissions. To satisfy procedural fairness, if a judge contemplates taking judicial notice on his or her own motion, the judge should also allow the parties to tender materials and make submissions.[29] Materials tendered in a request for judicial notice need not be admissible under the ordinary evidential rules and should not be admitted as evidence (unless admissible under those rules), since the taking of notice, not the materials, establishes the fact. Technically, then, the materials should not be marked as exhibits, or, if marked as exhibits, they should not go to the jury room. The materials should nonetheless be included in the record or should be adequately described to ensure a complete record for appeal.[30] Similarly, if a judge takes judicial notice on his or her own motion, any materials relied on should be set out in the record.

A court, in its discretion, may take judicial notice of adjudicative facts on appeal.[31] The indicated procedural protections should be extended to the parties.[32] Furthermore, the taking of judicial notice by a trial court may be reviewed by a court of appeal. The determination to take judicial notice is a form of evidential ruling, although the ruling does not admit evidence, but declares a fact in issue to be proved. Since the taking of judicial notice is discretionary, the issue on appeal is whether the discretion was exercised judicially.[33]

Decisions by courts to take judicial notice may constitute "precedents" for lower courts in the jurisdictional hierarchy. If, for example, the Supreme Court of Canada were to take judicial notice of a fact, subject to any intervening changes in the pool of relevant knowledge, that determination should be a strong indication to a lower court

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26 *Zundel, supra* note 19 at 55.

27 *Ibid.* at 57.

28 *Ibid.* at 54-56.

29 *R.* v. *Haines*, [1980] 5 W.W.R. 421 at 426, Perry J.; aff'd on other grounds [1981] 6 W.W.R. 664 (B.C.C.A.). FRE r. 201(c), (d) and (e) provide respectively that "[a] court may take judicial notice, whether requested or not"; "[a] court shall take judicial notice if requested by a party and supplied with the necessary information"; and "[a] party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken" *FR 1995, supra* note 9 at 53-4. See also Mueller & Kirkpatrick, *supra* note 7 at 89-93.

30 Mueller & Kirkpatrick, *ibid.* at 89; *McQuaker* v. *Goddard*, [1940] 1 All E.R. 471 (C.A.) at 478, Clauson L.J.

31 *R.* v. *Sioui*, *supra* note 23 at 1050.

32 Mueller & Kirkpatrick, *supra* note 7 at 96.

33 Sopinka, Lederman & Bryant, *supra* note 7 at 988; *Zundel (No. 2), supra* note 19 at 167.

that the fact is not subject to reasonable dispute and that the source of the fact cannot reasonably be questioned. Decisions respecting judicial notice by lower courts or courts in other jurisdictions might have some persuasive impact, but the ordinary rules of judicial notice would have to be satisfied before notice could be taken of the truth of the facts decided in those courts.[34]

## C. JUDICIAL NOTICE OF LEGISLATIVE FACTS

"Legislative facts" are facts used by a tribunal to develop law or policy; to make legal interpretations or rulings; to interpret constitutions, statutes, or regulations; or to create or modify the common law.[35] Typically, legislative facts concern social and economic conditions and developments.[36] Legislative facts operate at a different level of analysis than adjudicative facts. Legislative facts are considered by tribunals to determine the legal rules applied to adjudicative facts.

Canadian jurisprudence typically makes the adjudicative/legislative fact distinction by holding that special evidential rules apply in constitutional cases.[37] Since constitutional cases frequently involve legislative fact issues (in connection with, for example, the interpretation of constitutional documents and the development of constitutional and common law), this judgment is accurate, *pro tanto*; its main difficulty is that legislative facts are considered in more than constitutional cases.

For Canadian jurisprudence, the main consequence of the adjudicative/legislative fact distinction should be that the tests for judicial notice of adjudicative facts (notoriety, indisputable source) should not apply to judicial notice of legislative facts, although satisfaction of those standards would permit taking notice. Consequently, where judicial notice of legislative facts is in issue, broader, less certain, and potentially less accurate materials should be reviewable than in the case of judicial notice of adjudicative facts. These materials, though, should pass a minimal reliability test: "It seems clear that a trial court, when asked to make findings of legislative fact, has a discretion to admit unsworn evidence that is 'not inherently unreliable.'"[38] Davis defended the use of disputed or disputable materials as the foundation for judicial notice of legislative facts:

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34 Mueller & Kirkpatrick, *supra* note 7 at 87.

35 *Ibid.* at 106; *FR 1995*, r. 201(a), ACN, *supra* note 9 at 54-55. "In the historic case of *Brown* v. *Board of Education*, 347 U.S. 483, the Court relied on social science research on the psychological effects of segregation in reaching its *legal* conclusion that segregated schools are inherently unequal and violate the Equal Protection Clause. These studies, which were cited by the Court in a famous footnote, represent a classic example of legislative facts," Mueller & Kirkpatrick, *ibid.* at 106-7.

36 P.W. Hogg, *Constitutional Law of Canada*, 3d ed. (Scarborough, Ontario: Carswell, 1992) at 1292; Hogg, *supra* note 10 at 395.

37 B.G. Morgan, "Proof of Facts in Charter Litigation" in R.J. Sharpe, ed., *Charter Litigation* (Toronto: Butterworths, 1987) 159 at 172.

38 Hogg, *supra* note 36 at 1296; Hogg, *supra* note 10 at 397. "Material relevant to the issues before the court, and not inherently unreliable or offending against public policy should be admissible," *Reference Re Residential Tenancies Act*, [1981] 1 S.C.R. 714 at 723, Dickson J., as he then was.

> My opinion is that judge-made law would stop growing if judges, in thinking about questions of law and policy, were forbidden to take into account the facts they believe, as distinguished from facts which are "clearly ... within the domain of the indisputable." Facts most needed in thinking about difficult problems of law and policy have a way of being outside the domain of the clearly indisputable.[39]

In a constitutional context, La Forest J. wrote the following:

> There are, of course, dangers to judicial notice, but the alternatives in a case like this are to make an assumption without facts or to make a decision dependent on the evidence counsel has chosen to present. But as Marshall C.J. long ago reminded us, it is a *Constitution* we are interpreting. It is undesirable that an Act be found constitutional today and unconstitutional tomorrow simply on the basis of the particular evidence of broad social and economic facts that happens to have been presented by counsel.[40]

Recourse to judicial notice of legislative facts, then, should be subject to less restraint than judicial notice of adjudicative facts.

Materials which might be considered in taking judicial notice of legislative facts could include unsworn factual materials such as Royal Commission proceedings, Parliamentary Committee proceedings, Hansard, scientific research, medical literature, or statistical studies.[41] These materials could be examined by a judge outside the court record, or could be introduced by the parties. Material filed by a party to support judicial notice of a legislative fact is frequently called a "Brandeis Brief," after a brief filed by Louis D. Brandeis in the *Muller* v. *Oregon*[42] case. Material may also be filed by including it in a factum or authorities filed with a factum.[43] Materials relied on should be entered or adequately referred to in the record, if not entered as exhibits. This is especially important in legislative fact cases, since the scope of this type of notice might encourage some judges to consult extra-record materials that are not reasonable bases for judicial notice.

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39 Quoted in *FR 1995*, FRE r. 201(a), ACN, *supra* note 9 at 55.

40 *R.* v. *Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713 at 803.

41 Hogg discusses the admissibility of evidence of legislative history materials (including Royal Commission and Law Commission Reports, government policy papers, earlier versions of statutes, ministerial statements, testimony by expert witnesses before Parliamentary committees, and speeches in Parliament) in cases concerning the classification of statutes for division of powers purposes, characterization of statutory objects for *Charter* analysis purposes, and interpretation of constitutional documents. See P. Hogg, "Legislative History in Constitutional Cases" in Sharpe, ed., *supra* note 37 at 131.

42 208 U.S. 412 (1907), which concerned the constitutionality of an Oregon statute limiting the hours women can work in laundries and factories. Brandeis collected and filed copies of relevant European legislation and extracts from over ninety reports of committees, bureaus of statistics, commissioners of hygiene, and inspectors of factories, from both the U.S. and Europe. Morgan discusses uses of the "Brandeis Brief" in Canadian constitutional litigation. See Morgan, *supra* note 37 at 177. See also J. Hagan, "Can Social Science Save Us? The Problems and Prospects of Social Science Evidence in Constitutional Litigation" in Sharpe, ed., *ibid.* 213 at 215; Hogg, *supra* note 36 at 1293.

43 Hogg, *supra* note 10 at 398; Hogg, *supra* note 36 at 1295.

Canada has not developed any strict common law rules governing the procedures for the taking of judicial notice of legislative facts.[44] Considerations of procedural fairness or due process, however, suggest that procedures should be similar to those for judicial notice of adjudicative facts. Directions from the court could be sought to ensure procedural regularity.[45]

Mueller and Kirkpatrick point out that since the taking of judicial notice of legislative facts lacks the substantive and procedural protections attending the taking of adjudicative facts, higher courts' notice of legislative facts should have less "precedential" value than their notice of adjudicative facts.[46] Furthermore, lower courts' legislative fact decisions should receive less deference on appeal than adjudicative fact decisions.

## III. APPLICATION: JUDICIAL NOTICE AND THE *VRIEND* CASE

In this part I shall consider (A) the issues and burdens of proof under s. 15(1), (B) the foundations for the taking of judicial notice in the hearing and on appeal, (C) the case for Vriend under s. 15(1), with particular reference to the decisions of Russell J. and Hunt J.A., and (D) the case against Vriend, with particular reference to the decisions of McClung and O'Leary JJ.A.

### A. ISSUES AND BURDENS

Subsection 15(1) of the *Charter* provides as follows:

> 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.

The nature of the "discrimination" which must be proved by a claimant is currently somewhat unclear. The Supreme Court's discrimination trilogy of *Egan*, *Miron*, and *Thibaudeau* demonstrates competing approaches to discrimination.[47] To limn the differences between the approaches falls outside my purposes. Nonetheless, since I speak of facts, I must speak of the issues to which the facts relate. I shall describe the main approaches in *Egan*, the trilogy case most closely approaching *Vriend*, then point out some common features of the approaches.

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44 Hogg, *supra* note 10 at 397; Hogg, *supra* note 36 at 1296. Judicial notice of legislative facts is not covered by the Federal Rules of Evidence: *FR 1995*, r. 201(a), *supra* note 9 at 53-54. A consequence for the relevant American jurisprudence, then, is that the statutory procedural rules applicable to judicial notice of adjudicative facts do not apply to judicial notice of legislative facts.

45 Hogg, *supra* note 36 at 1294, 1296.

46 Mueller & Kirkpatrick, *supra* note 7 at 117.

47 *Egan* v. *Canada*, [1995] 2 S.C.R. 513 [hereinafter *Egan*]; *Miron* v. *Trudel*, [1995] 2 S.C.R. 418 [hereinafter *Miron*]; *Thibaudeau* v. *Canada*, [1995] 2 S.C.R. 627 [hereinafter *Thibaudeau*]. Hunt J.A. provides a useful account of the different approaches in her decision in *Vriend*.

The reasons of Cory J. and La Forest J. in *Egan* disclose two different approaches to discrimination. Cory J. directed a two-step procedure to determine whether a s. 15(1) right has been violated (the "Dignity Procedure"). The claimant must establish the following:

(1) the law in question created a distinction, based on personal characteristics, that has denied the claimant's right to equality before the law, equality under the law, equal protection of the law, or equal benefit of the law;

(2) the distinction gave rise to discrimination, in that

(a) the equality right was denied on the basis of a personal characteristic either enumerated in s. 15(1) or analogous thereto;

(b) the distinction has the effect on the claimant of imposing a burden, obligation, or disadvantage not imposed on others or of withholding or limiting access to benefits or advantages which are available to others; and

(c) the distinction has the effect of infringing the essential human dignity of the claimant (alternatively, the unequal treatment is based on the stereotypical application of presumed group or personal characteristics, and not on the true worth, ability, or circumstances of the claimant).[48]

La Forest J., following Gonthier J. in *Miron* v. *Trudel*, recommended a three-step procedure (the "Relevance Procedure"). The claimant must establish the following:

(1) the law in question created a distinction between the claimant and others;

(2) the distinction results in a disadvantage, in that it imposes a burden, obligation, or disadvantage on the group of persons to which the claimant belongs which is not imposed on others, or does not provide them with a benefit which it grants others; and

(3) the distinction is based on an irrelevant personal characteristic that is either enumerated in s. 15(1) or is analogous thereto; in particular,

(a) the claimant's personal characteristic shared with a group must be identified, and

(b) the personal characteristic must be shown not to be relevant to the functional values underlying the law (and those values may themselves be found to be discriminatory) — relevancy is assessed by reference to a ground enumerated in s. 15(1) or one analogous thereto.[49]

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[48] *Egan*, *ibid.* at 584, 599; *Miron*, *ibid.* at 485, 495, McLachlin J.

[49] *Egan*, *ibid.* at 531; *Miron*, *ibid.* at 435.

If the claimant discharges these burdens, the State bears the burden of proving that any limitation of the s. 15(1) rights was justified under s. 1 of the *Charter*.[50]

On a general level, what remains common to the different approaches to discrimination is that the claimant must prove the following:

(1) the law in question creates a distinction between the claimant and others;

(2) the distinction has the effect of imposing burdens, obligations, or disadvantages not imposed on others or of withholding or limiting access to opportunities, benefits, or advantages available to others;

(3) the personal characteristic on the basis of which the distinction was made is an enumerated or analogous ground under s. 15(1);[51] and

(4) either

(4.1) the distinction violates the human dignity and freedom of the claimant by imposing limitations, disadvantages or burdens through the stereotypical application of presumed group characteristics rather than on the basis of individual merit, capacity, or circumstance ("Dignity Procedure"),[52] or

(4.2) the personal characteristic (an enumerated or analogous ground) on which the distinction is based is irrelevant to the "functional values" underlying the legislation, which themselves must not offend *Charter* values ("Relevance Procedure").

On both approaches, the analysis of discrimination is through-and-through comparative or contextual. Gonthier J. provided a good summary of the role of context throughout the s. 15(1) inquiry:

> Context is indispensible to identifying the appropriate groups to be compared, to determining whether prejudice flows from the distinction, and to assessing the nature and relevancy of the personal characteristic upon which the distinction is drawn. In sum, the larger context importantly informs all stages of the analysis and ensures that it is not narrowly restricted to the "four corners of the impugned legislation" (to use the words of Wilson J. in *Turpin*...).[53]

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[50] *Thibaudeau*, *supra* note 47 at 700, Cory and Iacobucci JJ.; *Miron*, *supra* note 47 at 485, McLachlin J.

[51] When the *Vriend* case was argued, the prevailing view was that analogous ground status was available only for "discrete and insular minorities" which have "historically suffered discrimination, prejudice or stereotyping, by virtue of a personal characteristic," *Andrews* v. *Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 182, McIntyre J.; *R.* v. *Turpin*, [1989] 1 S.C.R. 1296 at 1332-33; *Vriend (Q.B.)*, *supra* note 5 at paras. 10, 30. Under the trilogy, historical disadvantage is not a necessary condition for this status, but it is an indicator of it: *Egan*, *supra* note 47 at 599. Cory and Iacobucci JJ.; *Miron*, *ibid.* at 487, McLachlin J.; *ibid.* at 436, Gonthier J.

[52] *Miron*, *ibid.* at 486-88, 492; *Egan*, *ibid.* at 603.

[53] *Miron*, *ibid.* at 437-38.

## B. THE FOUNDATIONS FOR JUDICIAL NOTICE

Vriend bore the burdens of proving the violation of his rights under s. 15(1). To discharge his burdens of proof, Vriend could have obtained concessions from the Crown, tendered expert evidence, or requested the taking of judicial notice. In the *Haig*,[54] *Knodel*,[55] *Veysey*,[56] and *Egan*[57] cases, the government at least conceded that sexual orientation was a prohibited ground of discrimination under s. 15(1). The Province made no significant concessions in the initial *Vriend* hearing. Vriend could have called evidence under the ordinary evidential rules. *Viva voce* or (more appropriately to an application) affidavit evidence could have been provided by qualified experts, who would have been subject to cross-examination.[58] In the *Knodel*,[59] *Haig*,[60] and *Nolan*[61] cases, expert evidence was also tendered. Vriend, however, did not rely on expert evidence. This left the burden of proof to be discharged primarily through judicial notice. Unless the relevant facts were so notorious that they required no evidential support, materials had to be entered at trial or appeal or both to permit the taking of judicial notice.

### 1. Foundation for Judicial Notice at Trial

The first important issue Russell J. addressed in her decision was whether she could take judicial notice that discrimination against homosexuals exists. Russell J. appeared to characterize the type of facts to be noticed as legislative facts. She briefly recounted the distinction between judicial notice of adjudicative and legislative facts, then described "social policy matters" as an example of legislative facts. She followed this point by referring to judicial notice of "social reality," which she seems to have considered a subset of "social policy matters." She ultimately found discrimination against homosexuals to be a social reality.[62] The (apparent) characterization of the type of facts to be noticed as legislative was correct, important, and confusing. It was correct because the facts concerning discrimination against homosexuals were not facts to which the law was to be applied, but facts relevant to determining the meaning of the law, specifically the ambit of the notion of discrimination. It was important because the standard for taking judicial notice was lower than the adjudicative fact standard — but since Russell J. found that discrimination against homosexuals was notorious, that higher standard too was satisfied — and because the scope for considering social scientific results and other supportive materials was broader than in the case of judicial

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54 *Haig* v. *Canada* (1992), 9 O.R. (3d) 495 (C.A.) at 501, Krever J.A. [hereinafter *Haig*].

55 *Knodel* v. *British Columbia (Medical Services Commission)* (1991), 58 B.C.L.R. (2d) 356 (S.C.) at 371, Rowles J. [hereinafter *Knodel*].

56 *Veysey* v. *Correctional Service of Canada* (1990), 109 N.R. 300 (F.C.A.) at 304, *per curiam* [hereinafter *Veysey*].

57 *Egan*, *supra* note 47 at 528.

58 Morgan, *supra* note 37 at 174; Hogg, *supra* note 36 at 1293.

59 *Knodel*, *supra* note 55 at 364.

60 *Haig*, *supra* note 54 at 497-98.

61 *Re Nolan and the Queen in right of Newfoundland* (1995), 127 D.L.R. (4th) 694 (Nfld. S.C.) at 698, Barry J. [hereinafter *Nolan*].

62 *Vriend (Q.B.)*, *supra* note 5 at paras. 15-17, 28.

notice of adjudicative facts. It was confusing since Russell J. set out the notoriety and textual indisputability tests as if they applied to the taking of notice of legislative facts, and eventually took notice on the basis of a finding of notoriety.[63]

Since Russell J. was open to taking notice of legislative facts, Vriend could have tendered supportive materials. Affidavit evidence was filed, recounting some hearsay anecdotal evidence of discrimination.[64] Russell J. said that she "could not rely" on the evidence.[65] Her point appears not to have been that this evidence was technically inadmissible, but that it failed to meet the test of minimum reliability, weight, or persuasiveness requisite to serve as a legitimate foundation for notice (traditionally, hearsay evidence has been regarded as paradigmatic weak evidence).

Russell J. did rely on two sets of sources. First, she considered cases from other jurisdictions, which are legitimate foundational materials for judicial notice. She quoted various decisions outlining the historical and current plight of homosexuals and upholding sexual orientation as an analogous ground. Expert evidence played a role in many of these cases, but Russell J. correctly held that she was not entitled to take notice of the truth of that evidence solely because it had been accepted in other proceedings.[66] She indicated that the *Veysey* case relied on the 1985 Report of the House of Commons Parliamentary Committee on Equality Rights, but did not quote from that report.[67] Second, Russell J. reviewed human rights legislation from other Canadian jurisdictions. She noted that all but the Northwest Territories, Prince Edward Island, Newfoundland, and Alberta prohibit discrimination based on sexual orientation. Russell J. was entitled to take judicial notice of this legislation under s. 12 of the *Judicature Act*,[68] given the relevance of the extra-provincial statutes to the legislative facts in issue.[69]

Vriend could have filed a "Brandeis Brief" containing social science or statistical information. None was filed. Apparently, the lack of scientific foundation for the taking of notice caused Russell J. some concern. She expressly ruled that even without such studies, judicial notice could still be taken of "social realities" such as discrimination against homosexuals.[70]

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63 *Ibid.* at paras. 13, 28.

64 The evidence before Russell J. consisted of four Affidavits — one by Vriend, setting out the facts of his case; two by representatives of the Gay and Lesbian Awareness Society of Edmonton, and one by a representative of the Gay and Lesbian Community Centre of Edmonton. The latter three Affidavits referred to instances of denial of housing, services, or benefits because of sexual orientation: Factum of the Appellant, Her Majesty the Queen in Right of Alberta, para. 55.

65 *Vriend (Q.B.)*, *supra* note 5 at para. 12.

66 *Ibid.* at para. 19.

67 *Ibid.* at para. 34; *Veysey*, *supra* note 56.

68 R.S.A. 1980, c. J-1.

69 *Ibid.*, s. 12 provides as follows: "When in a proceeding in the Court the law of any province is in question, evidence of that law may be given, but in the absence of or in addition to that evidence the Court may take judicial cognizance of that law in the same manner as of any law of Alberta." See also s. 33 of the *AEA*, *supra* note 9.

70 *Vriend (Q.B.)*, *supra* note 5 at para. 17.

The general principles of judicial notice do not demand recourse to studies in all cases, so Russell J.'s ruling was formally correct. Nonetheless, where scientific evidence is reasonably available (as demonstrated by other cases), and where a case has important social implications, a judge would be justified in insisting on a solid evidential foundation for judicial notice.

### 2. Foundation for Judicial Notice on Appeal

Some additional information was put before the Court of Appeal. The Factum of the Respondents quoted from *Equality of All: Report of the Parliamentary Committee on Equality Rights*, respecting the historic disadvantage suffered by gays and lesbians, and from the Department of Justice's *Toward Equality: The Response to the Report of the Parliamentary Committee on Equality Rights*: "The Department of Justice is of the view that the courts will find that sexual orientation is encompassed by the guarantees of s. 15 of the Charter"; the Factum also referred to other articles and books supporting the existence of discrimination, disadvantage, and prejudice against gays and lesbians.[71] The Factum of the Appellant appended numerous Hansard extracts, supporting the claim that the Legislature explicitly chose not to include sexual orientation as a prohibited ground of discrimination under the *IRPA*. In particular, it included a 1985 speech from the Honourable Mr. Young, the Minister responsible for the *IRPA*, who explained why sexual orientation was not being included.[72] This use of facta to put material before the Court was entirely proper in the context of proof of legislative facts.

The principles of judicial notice were applied to this foundation to determine whether Vriend discharged his burdens of proof.

## C. JUDICIAL NOTICE OF DISCRIMINATION BY THE *IRPA*

We shall turn to the case for holding the *IRPA* discriminatory, through the judgments of Russell J. and Hunt J.A. We shall consider (1) ultimately non-contentious matters, (2) whether the *IRPA* created a legal distinction affecting Vriend, and (3) whether the distinction was discriminatory.

### 1. Non-Contentious Issues

Russell J. found that discrimination against homosexuals is a notorious and indisputable social reality: "It has been the subject of much judicial and social comment, and is already the subject of provincial legislation elsewhere in Canada. I am satisfied for those reasons that I may take judicial notice of it."[73] She also held that

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[71] Factum of the Respondents, Delwin Vriend and GALA- Gay and Lesbian Awareness Society of Edmonton and Gay and Lesbian Community Centre of Edmonton Society and Dignity Canada Dignité for Gay Catholics and Supporters, at para. 29.

[72] Factum of the Appellant, *supra* note 64 at para. 35.

[73] *Vriend (Q.B.)*, *supra* note 5 at para. 28.

sexual orientation (and not merely homosexuality) was an "analogous ground" under s. 15(1).[74]

Following Vriend's application and the hearing of the appeal but before the Court of Appeal rendered its decision, the Supreme Court handed down its *Egan* decision, which determined that discrimination against homosexuals exists and that sexual orientation is a prohibited ground of discrimination analogous to the grounds listed in s. 15(1) of the *Charter*.[75] The Court of Appeal rightly acknowledged the binding nature of these findings.[76] The "analogous grounds" ruling was a legal determination, while the finding respecting discrimination against homosexuals was a finding of legislative fact. These matters could no longer be in dispute. Hence, part of Vriend's burden was discharged. The Supreme Court's rulings did not determine whether the *IRPA*, silent on the issue of sexual orientation, discriminated on the basis of sexual orientation. We shall see that the rulings, however, were relevant to this issue.

2. Distinction

Ordinarily, determining whether legislation draws a distinction involves only the straightforward reading or interpreting of legislation. In the *Vriend* case, this issue was not straightforward. The issue was addressed by (a) attempting to identify "gender," a prohibited ground of discrimination, with "sexual orientation"; and (b) identifying the distinction by setting the *IRPA* in its proper context.

a. Gender as Sexual Orientation

Russell J. apparently concluded that, as a matter of interpretation and highly compressed fact-finding, the *IRPA* does make distinctions by its express language. She began by pointing out that if human rights legislation prohibits discrimination on some express ground, it must define that ground fairly, not in a discriminatory manner. If, for example, legislation prohibited discrimination on the basis of age, but defined "age" in a manner that denied protection to a significant segment of the population, the legislation could be found to have drawn a discriminatory distinction.[77] The *IRPA* does prohibit discrimination on the basis of "gender." Russell J. interpreted this term to have the same effect as "sex."[78] She then suggested that "discrimination on the basis of sexual orientation is directly associated with discrimination on the basis of sex."[79] Her point appears to have been that to prohibit sexual discrimination is, in effect, to prohibit

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74 *Ibid.* at para. 39. The Province had argued, apparently, that since the expert evidence referred to in the cases considered concerned homosexuality, it could not be relied upon to make conclusions about discrimination based (more generally) on sexual orientation, *ibid.* at para. 19.

75 *Egan*, *supra* note 47 at 528, La Forest J.; at 599, Cory and Iacobucci JJ. See R. Wintemute, "Discrimination Against Same-Sex Couples: Sections 15(1) and 1 of the *Charter*: *Egan* v. *Canada* (1995)" 74 Can. Bar Rev. 682.

76 *Vriend*, *supra* note 1 at para. 2, McClung J.A.; *ibid.* at para. 89, Hunt J.A. But see text accompanying note 109, *infra*.

77 Paraphrasing L'Heureux-Dubé J. in *McKinney* v. *University of Guelph*, [1990] 3 S.C.R. 229 at 436.

78 *Vriend (Q.B.)*, *supra* note 5 at para. 49.

79 *Ibid.*

discrimination based only on heterosexual orientation. Hence, the *IRPA* fails to provide even-handed protection and is therefore discriminatory.

Both O'Leary and Hunt JJ.A. rejected this strategem. O'Leary J.A. held that "there is no evidentiary base for a finding that sexual orientation is 'directly associated' with sex or gender, permitting the conclusion that the *IRPA* discriminates by providing only incomplete or under-inclusive protection against gender discrimination."[80] O'Leary J.A. was right. Russell J. identified no evidence, judicially noticed or otherwise, to support her "directly associated" claim. He did not consider, though, whether judicial notice might have been taken of pertinent facts. Hunt J.A. pointed out (taking tacit judicial notice) that there is considerable disagreement about the reasons for sexual orientation. Given this disagreement, she was not prepared to find that sexual orientation is "directly associated with" or "akin to" gender.[81] Discrimination on the basis of gender and discrimination on the basis of sexual orientation remain legally distinct.[82]

b. Distinction in Context

Since gender and sexual orientation could not be identified, Vriend was left with the problem of legislative silence. In McClung and Hunt JJ.A.'s words, the *IRPA* is "facially neutral."[83] McClung J.A. emphasized this point:

> Nothing in the *IRPA* ... purports to draw distinctions between heterosexuals and homosexuals. Nothing in the declarations of the *IRPA* invites or promotes differing social impact, or its expectation, upon homosexuals as opposed to heterosexuals. In fact, the *IRPA* extends full protection to heterosexuals and homosexuals alike who may be discriminated against on the grounds presently specified. No protection is afforded by the legislation which is simultaneously denied to homosexuals.[84]

Russell J. seemed not overly vexed by this problem, reasoning simply that a discriminatory distinction can arise from either a commission or an omission.[85] The *IRPA*'s facial neutrality, however, was perceived as a serious issue in the Court of Appeal.

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80 *Vriend, supra* note 1 at para. 74.

81 *Ibid.* at para. 123.

82 *Ibid.*

83 *Ibid.* at paras. 33, 152.

84 *Ibid.* at para. 14. Furthermore, "the existing language of the *IRPA* does not draw or invite distinction, let alone discrimination, arising from 'sexual orientation,'" *ibid.* at para. 15; "it must still be concluded that the impact of the *IRPA*, in its unaltered wording, is the same upon the homosexual segment of Alberta's population as it is upon the heterosexual segment," *ibid.* at para. 16; "Clearly, the content of the *IRPA*, as it presently reads, is neutral, non-aligned and inclines to neither the homosexual nor the heterosexual communities. 'Sexual orientation' is not mentioned at all," *ibid.* at para. 20.

85 *Vriend (Q.B.), supra* note 5 at para. 41.

(i) Approaches to Facial Neutrality

Hunt J.A. identified two main approaches to whether legislative silence can amount to the drawing of a distinction. First, she described a "purpose and context" approach. The presupposition of this approach is that a s. 15(1) review of legislative silence is justified only if the intention or purpose of the legislation was to discriminate through strategic silence. On this approach, context is examined to determine whether "government [has] significantly encouraged or supported the act which is called into question": context may "support a finding of governmental approval or encouragement."[86] Evidence of effects would be relevant to establish that purpose. If the Legislature (or, perhaps, Cabinet) were found to have supported the refusal to extend *IRPA* benefits to homosexuals, that would amount to a distinction.[87] Second, Hunt J.A. described an "effects" approach. The presupposition of this approach is that a s. 15(1) review of legislative silence is justified if the effect of the legislation was to impose discriminatory distinctions. This approach stops short of requiring inferences respecting purpose. Finding a legislative distinction through silence, then, would be easier on the "effects" on than approach the "purpose and context" approach.

The "purpose and context" and "effects" approaches share a common form. Each sets out to determine whether "legislative silence results in the drawing of a distinction"[88] — *i.e.* whether facial neutrality masks practical inequality. Each begins with a consideration of context. The approaches take their methodological cue from Wilson J.'s decision in *Turpin*:

> In determining whether there is discrimination on grounds relating to the personal characteristics of the individual or group, it is important to look not only at the impugned legislation which has created a distinction that violates the right to equality but also to the larger social, political and legal context.... [I]t is only by examining the larger context that a court can determine whether differential treatment results in inequality *or whether, contrariwise, it would be identical treatment which would in the particular context result in inequality or foster disadvantage*. A finding that there is discrimination will, I think, in most but perhaps not all cases, necessarily entail a search for disadvantage that exists apart from and independent of the particular legal distinction being challenged.[89]

How, though, could these approaches disclose a distinction made through the silence of the *IRPA*?

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86 *Lavigne* v. *Ontario Public Service Employees Union* (1991), 81 D.L.R. (4th) 545 (S.C.C.) at 571, Wilson J.; *Vriend*, *supra* note 1 at paras. 131-32.

87 *Vriend*, *ibid.* at para. 143.

88 *Ibid.* at para. 147.

89 *Turpin*, *supra* note 51 at 1331-32 [emphasis added]. McIntyre J. cautioned in *Andrews* that "identical treatment may frequently produce serious inequality," *Andrews*, *supra* note 51 at 164.

(ii) Disclosing Distinctions: Effects Approach

The *IRPA* treated Vriend distinctly from others in two ways. First, the *IRPA* treated Vriend differentially in relation to other disadvantaged persons, who have remedies under the *IRPA* while he does not.[90] Thus Russell J. held:

> 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.[91]

This argument requires no use of judicial notice. Evidence establishing the facts of Vriend's failed complaint is all that is necessary. This argument did not find favour with O'Leary or McClung JJ.A. Their point was that this alleged differential treatment is not discrimination on the basis of *sexual orientation*. Not only are homosexuals denied *IRPA* remedies, but so are all other groups that are not listed in the *IRPA*.[92] Furthermore, heterosexuals also lack a remedy under the *IRPA*, so, again, the *IRPA* does not discriminate on the basis of sexual orientation. These objections can be met by establishing a second type of distinction.

The *IRPA* treated Vriend differentially in relation to heterosexuals. This might seem an odd claim, since neither homosexuals nor heterosexuals are mentioned by the *IRPA*. The distinct treatment, though, is discernible in context. The context is described by Cory J. in *Egan*:

> The historic disadvantage suffered by homosexual persons has been widely recognized and documented. Public harassment and verbal abuse of homosexual individuals is not uncommon. Homosexual women and men have been the victims of crimes of violence directed at them specifically because of their sexual orientation.... They have been discriminated against in their employment and their access to services. They have been excluded from some aspects of public life solely because of their sexual orientation.... The stigmatization of homosexual persons and the hatred which some members of the public have expressed towards them has forced many homosexuals to conceal their orientation. This imposes its own associated costs in the work place, the community and in private life.[93]

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

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90 *Vriend (Q.B.)*, *supra* note 5 at para. 53; *Vriend*, *supra* note 1 at para. 152.

91 *Vriend*, *ibid.*

92 *Ibid.* at paras. 75, 77.

93 *Egan*, *supra* note 47 at 600-601.

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.

The facts supporting this second type of distinction argument are properly the subject of judicial notice. Cory J.'s remarks specify the facts directly relating to homosexuals. The complementary facts concerning heterosexuals could be noticeable as "social reality," or, if not, on the basis of sociological studies. A weakness of both Russell J. and Hunt J.A.'s accounts of this argument is that they failed to set out explicitly all the facts and the instances of judicial notice requisite to support their position.

One might respond to the effects approach by asserting that the legislation or the Legislature should not, without more, be held even potentially responsible for the effects of neutral legislation on an unequal world. The legislation is silent; it might have an adverse effect, but why should the legislator be responsible for disadvantages its legislation just happens to have caused? Hunt J.A.'s purpose and context position responds to this concern. She argued that the *IRPA* did not just happen to make distinctions respecting homosexuals. Its adverse effects are intentional.

(iii) Disclosing Distinctions: Purpose and Context Approach

The "purpose and context" approach goes farther than the effects approach by seeking not only a discriminatory legislative effect but a discriminatory legislative object. Further facts, then, are required by this approach. This entails the reception of further evidence or the taking of judicial notice. One might be concerned with the nature of these facts of intention — are they adjudicative or legislative facts? Intention or motive might appear to be adjudicative matters. If so, at the very least, the stricter rules of judicial notice of adjudicative facts should apply; one might also argue that the importance of these facts dictates that ordinary evidence be called. The facts, however, are legislative. Evidence of legislative history may be considered to determine whether the purpose of impugned legislation infringes a *Charter* right.[94]

Hunt J.A. found pertinent evidence of legislative history in and outside the hearing record. She referred to the 1984 Alberta Human Rights Commission recommendation to amend the *IRPA* to include sexual orientation as a prohibited ground of discrimination, and the expressed intentions of responsible Ministers to amend the *IRPA*, which were stymied by other government members. These matters were set out in Russell J.'s decision.[95] Hunt J.A. also referred to Alberta Hansard of June 3, 1985, in which the Honourable Mr. Young, Minister responsible for the *IRPA*, gave

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[94] Hogg, *supra* note 36 at 1285.

[95] *Vriend*, *supra* note 1 at para. 148; *Vriend (Q.B.)*, *supra* note 5 at para. 4.

explanations for not adding sexual orientation as a prohibited ground of discrimination.[96] Hunt J.A. commented as follows:

> I think it is plain that the discrimination suffered by homosexuals in society in general and in the work place in particular has been clearly drawn to the attention of the Legislature. The existence of that discrimination further suggests to me that there is, in some sectors of Alberta society, a hostility toward homosexuals for reasons that have nothing to do with their individual characteristics as human beings, and everything to do with presumed characteristics ascribed to them by those members of society based only upon their membership in a group that has suffered historical disadvantage.

She concluded that:

> [g]iven this context and these facts, the purpose of the Legislature's refusal to act in this situation is to reinforce stereotypical attitudes about homosexuals and their individual worth and dignity.[97]

Thus, on the "purpose and context" approach, the Alberta Legislature is responsible for the silence of the *IRPA*, which has the effect of making a distinction on the basis of sexual orientation.

This conclusion is only the first step to finding discrimination, however. The remaining tests for discrimination must also be satisfied.

### 3. Discrimination

If a distinction is considered to have been made through the *IRPA's* silence according to the foregoing analysis, it follows that the distinction is based on the analogous ground of sexual orientation and that the distinction has the effect of denying the benefits or advantages of the *IRPA* remedies to Vriend.[98] Two further aspects of discrimination, then, would be established.

Hunt J.A. considered the final aspect of discrimination to be established pursuant to either the Dignity Procedure or the Relevance Procedure. Using the Dignity Procedure, the legislation infringes essential human dignity, assessed from Vriend's perspective. His employment was terminated because of his presumed characteristics. The denial of access to *IRPA* remedies "reinforces the stereotype that homosexuals are less deserving of the resulting protection and thus ... less worthy of value as human beings."[99] Russell J. reached similar conclusions through her effects approach. Hunt J.A. indicated that if this approach were used, she agreed with Russell J.[100] Russell J. did not develop her position in detail. She did state that she shared the views of Krever J.A. in *Haig*:

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96 *Vriend*, *ibid.* at para. 93; see text accompanying *supra* note 72.

97 *Ibid.* at para. 149.

98 *Ibid.* at para. 155. In *Nolan*, the expert provided evidence that homosexuals are a disadvantaged group who suffer further disadvantage when they fail to receive needed protection which has been granted to others, *Nolan*, *supra* note 61 at 713.

99 *Vriend*, *supra* note 1 at para. 157, Hunt J.A.

100 *Ibid.* at para. 154.

> The social context which must be considered includes the pain and humiliation undergone by homosexuals by reason of prejudice towards them. It also includes the enlightened evolution of human rights[,] social and legislative policy in Canada, since the end of the Second World War, both provincially and federally. The failure to provide an avenue for redress for prejudicial treatment of homosexual members of society and the possible inference from the omission that such treatment is acceptable create the effect of discrimination offending s. 15(1) of the *Charter*.[101]

From the failure to prohibit discrimination on the basis of sexual orientation Russell J. drew an inference matching Hunt J.A.'s conclusion: "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."[102]

Using the Relevance Procedure, the omission to extend protections to homosexuals does not serve the functional values of the *IRPA*, which, as its preamble indicates, serve the "inherent dignity and the equal and inalienable rights of all persons."[103] Moreover, the functional values underlying the omission *per se* are themselves discriminatory, since they are based on stereotypical assumptions and not individual worth.[104]

The final aspect of discrimination, as much as the others, required a factual foundation. There must have been some factual basis for concluding that the *IRPA* reinforced stereotypes or failed to serve its stated values (or served values inimical to *Charter* values). At this point the objections of McClung and O'Leary JJ.A. emerge: how can the *IRPA* be found to "cause" discrimination? We shall return to the McClung and O'Leary JJ.A. position shortly, and consider now the position of Russell J. and Hunt J.A.

Russell J. and Hunt J.A. do not discuss the factual basis for their conclusions in any detail. Their view appears to be that, given *Egan* and the arguments they have deployed, the finding of discrimination — and in particular, the finding of reinforcement of negative stereotyping — is obvious. Yet there is still a factual gap between the distinction drawn by the *IRPA* and its purported effects on "social consciousness," where reinforcement of stereotypical views and bolstering of other discriminatory ideations takes place.

This gap is crossed by judicial notice. The form of Russell J. and Hunt J.A.'s reasoning is this: given certain facts (the facts about discrimination against homosexuals), certain acts (the *IRPA* omission of sexual orientation as a prohibited ground of discrimination) will produce bad effects (further discrimination against homosexuals). How did Russell J. and Hunt J.A. know that the effects would be caused? One might as reasonably ask how judges ever know that a sentence in a criminal case will deter future offenders or how a free speech ruling would have a "chilling effect" on discourse. Judges predict such effects based on their common sense.

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101 *Haig, supra* note 54 at 503.

102 *Vriend (Q.B.), supra* note 5 at para. 53.

103 This conclusion is also drawn in the *Nolan* case. See *Nolan, supra* note 61 at 714-15.

104 *Vriend, supra* note 1 at para. 158.

Judges apply judicially noticed basic, evaluative facts to draw their inferences of causality. That is what Russell J. and Hunt J.A. did. In the appropriate context, it is natural to conclude that if a particular harmful activity is not forbidden when similar harmful activities are, that the harmful activity is implicity approved; it is also natural to conclude that those harmed by that particular activity are not as worthy of protection as those harmed by the forbidden activities.

There may be no practical alternative to the taking of this type of judicial notice. The causal relationship between a statute and attitudes in the general public is an empirical matter, but it is very difficult to trace or test. Russell J. and Hunt J.A. did not claim that the *IRPA*, through some occult process, creates discrimination against homosexuals. Their concern was that the failure of the *IRPA* to provide relief for discrimination on the basis of sexual orientation instead maintains, reinforces, perpetuates, or contributes to discriminatory attitudes and practices. The *IRPA* has this effect not by itself, but by its forming a part of a complicated fabric of laws, customs, and religious and ethical beliefs that result in discrimination. Russell J. and Hunt J.A.'s position also rests on counter-factual hypothesizing: if the legislation protected against discrimination on the basis of sexual orientation, then, directly or indirectly, discrimination would be, in some measure, reduced. Certainly the linkages between the legislation and discrimination cannot be established by simple observations of particular instances of discrimination.

The approach of Russell J. and Hunt J.A. appears to be in keeping with the Supreme Court's approach to difficult issues of social causation. Causal determinations do not have to be exhaustively empirically verified as a condition of acceptance for constitutional purposes. An alleged causal determination may be accepted if "there is a sufficiently rational link" between the purported cause and the purported effect, or a "reasonable apprehension of harm" arising from the anticipated effects of the purported cause.[105] While the conclusions of Russell J. and Hunt J.A. would have been more cogent had they detailed the manner in which they were factually sustained, their conclusions are at least reasonable, as evidenced by their conformity with the legislative and judicial judgments on discrimination to which they referred.

## D. NO JUDICIAL NOTICE OF DISCRIMINATION BY THE *IRPA*

We shall now consider the response of McClung and O'Leary JJ. A. to Russell J. and Hunt J.A.'s use of judicial notice and the difficulties with the majority position from the perspective of judicial notice doctrine.

The majority of the Court of Appeal adopted an "effects" approach to determining distinction and discrimination. The fundamental difference between the majority and Hunt J.A. and Russell J. on the s. 15(1) discrimination issues was that the majority concluded that it had not been established that the *IRPA* drew a distinction on the basis of sexual orientation and had a discriminatory effect. If the *IRPA* made no distinction on the basis of sexual orientation, Vriend's claim had to fail, and the majority so ruled.

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[105] *R.* v. *Butler*, [1992] 1 S.C.R. 452 at 504, Sopinka J.

McClung J.A. emphasized that a real burden of proof is allocated to the party challenging legislation as discriminatory. He quoted Iacobucci J.'s decision in *Symes*:

> If the adverse effects analysis is to be coherent, it must not assume that a statutory provision has an effect which is not proved. We must take care to distinguish between effects which are wholly caused, or contributed to, by an impugned provision and those social circumstances which exist independently of such a provision.[106]

McClung J.A. denied that the findings of distinction and discrimination had any support. Vriend, he might have said, had failed to discharge the burden of proof on the discrimination issue: "There is nothing in the record that we have been given that proves that any 'indisputable social reality' has or will be exacerbated by the neutral silence of the present *IRPA*."[107] This statement suggests three types of error.

First, McClung J.A. seems to be imposing too high a standard on judicial notice of legislative facts. The standard is not the notoriety requisite for judicial notice of adjudicative facts. In fairness, none of the judges in this case worked out the rules properly applicable to the types of facts to be judicially noticed.

Second, a distinction must be drawn between the materials in the record, and the facts which may be noticed in reliance on those materials. This is simply a version of the evidence/facts distinction. While nothing in the record may have been an express, scientifically justified statement of the facts required for Russell J. and Hunt J.A.'s conclusions, the material in the record could justify the taking of notice of the facts in issue. The facts lie in what is noticed, not necessarily in what is expressly set out in the record. McClung J.A. may have been concerned with the displacement of ordinary evidential rules by judicial notice. In the paragraph from which the preceding quotation was drawn, he referred to "the evidence before her" and "an evidentiary foundation."[108] Judicial notice frequently has no evidential foundation. If evidence were available, notice may not have been taken. The materials prompting notice, particularly notice of legislative facts, need not be themselves admissible.

Third, McClung J.A. appears to have failed to attribute to the materials in the record sufficient weight or persuasiveness. Nothing in the record, in his view, proved discrimination. McClung J.A. did refer to the materials relied on by Russell J. — judicial and social comment, extra-provincial legislation. Furthermore, he was aware of the *Egan* case. McClung J.A., however, did not seem convinced. He wrote that:

> I express no view on Russell J. taking judicial notice, in the absence of evidence, of discrimination and on her finding that members of the homosexual community, *whether strident or stolid*, have, for the purpose of the Charter s. 15(1), traditionally been and currently are discriminated against. That issue

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106 *Symes* v. *Canada*, [1993] 4 S.C.R. 695 at 764-65.

107 *Vriend*, *supra* note 1 at para. 16.

108 *Ibid.*

> ... has been overtaken, *at least in law*, by the intervening judgments of the Supreme Court in *Egan*....[109]

He also referred to the risk of homosexuals being dismissed from their employment on the basis of sexual orientation as an "*in terrorem* argument."[110] It is true that the Supreme Court did not take judicial notice in connection with the precise issues involved in the *Vriend* case. It may also be true that judicial notice findings, even by the Supreme Court, are not findings of law and are not technically binding. Yet many judges and many legislatures evidently have been satisfied that the plight of homosexuals is serious, socially intolerable, and raises an obligation to take ameliorative action. In the face of this strong legal consensus, McClung J.A. should have, at least, referred to the facts or evidence which justified his dissent from the taking of judicial notice.

McClung and O'Leary JJ.A. did expressly make a finding of fact contrary to the findings of Russell J. and Hunt J.A. McClung and O'Leary JJ.A. held that any inequality suffered by the homosexual community is not caused or contributed to by the *IRPA*. McClung J.A. stated that "such inequality exists independently of the *IRPA*, or any other Alberta statute, and cannot be a legislative fallout...."[111] O'Leary J.A. came to the same conclusion: "Any distinction between the way that homosexuals and heterosexuals are treated is not due to the *IRPA*, but rather exists independently of the legislation."[112] Homosexuals are not "worse off" than others, even by adverse effect of the legislation.[113] This reasoning engenders three further difficulties.

First, McClung and O'Leary JJ.A. employ a highly restrictive model of "causation." They have in mind a model of what it would be for legislation to cause discrimination, and judge the record against that model. The model of causality they seem to presuppose is linear, isolated, and "positivistic."[114] The *IRPA* is considered to be one "entity"; "discrimination" is a separate event; the issue is whether the legislation produces discrimination or is constantly conjoined with the emergence of discrimination. Russell J. and Hunt J.A. referred to no evidence, judicially noticed or otherwise, that would establish the type of causality required by McClung and O'Leary JJ.A. Gathering such evidence would be extremely difficult.[115] If this model of causality were adopted, it would greatly restrict findings of discrimination. One might

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[109] *Ibid.* at para. 36 [emphasis added].

[110] *Ibid.* at para. 21.

[111] *Ibid.* at para. 34.

[112] *Ibid.* at para. 81.

[113] *Ibid.*

[114] See C.A. MacKinnon, *Toward a Feminist Theory of the State* (Cambridge, Massachusetts: Harvard University Press, 1989) 207-08.

[115] The type of evidence that would suffice could be (for example) evidence relating to some jurisdiction that amended its legislation to incorporate prohibitions on discrimination on the basis of sexual orientation. Instances of discrimination before the amendments and after the amendments would be compared. If after the amendments discrimination events decreased, one might conclude that the earlier legislation encouraged discrimination. Somehow, "discrimination events" would have to be identified and counted, and discount factors for increases in post-amendment reporting would have to be considered.

suggest that the more complex, contextualized notion of cause that seems at work in Russell J. and Hunt J.A.'s decision is better in keeping with *Charter* analysis, and that McClung and O'Leary JJ.A.'s notion of cause is inconsistent with the Supreme Court's "rational link" approach to causation.[116]

Second, McClung and O'Leary JJ.A.'s focus on the independence of discrimination is operationally inconsistent with the method of determining discrimination. A finding of discrimination depends not only on legislative wording, but on a consideration of the factual context of the legislation. As Wilson J. pointed out in *Turpin*, discrimination analyses frequently turn on the identification of disadvantage outside the ambit of the legislation in question. But if "external disadvantage" is established, on the McClung and O'Leary JJ.A. approach, no legislative discrimination could be established, since the legislation did not cause the discrimination. The difficulty here is connected with McClung and O'Leary JJ.A.'s view of cause. The causal linkages of legislation to discrimination may be very fine and complex, yet nonetheless potent. Legislation may be a cause of discrimination, without being a necessary, exclusive, or even major cause.

Third, the conclusion that the *IRPA* does not create a distinction is a conclusion requiring factual support as much as the contrary conclusion. McClung and O'Leary JJ.A. did not refer to evidence that would counter the Russell J. and Hunt J.A. position. They could have taken judicial notice of facts to support their positions. There is no indication, however, that they did so. If they took judicial notice, they did not describe their particular findings or their sources on the record.

On the basis of the foregoing, I must conclude, with all due respect and with regret, that the majority erred both in principle and in weighing the matters tendered for judicial notice.

## CONCLUSION

From an evidential perspective, the *Vriend* case is not a satisfying decision. The judges failed to provide satisfactory accounts of their taking of judicial notice or of their assessments of other judges' taking of judicial notice. The judges failed to identify and apply evidence carefully respecting the matters in issue. Of course, the issues were many, difficult, and sensitive, and apparently minor matters like the doctrine of judicial notice could easily be glossed over. Clarity on small matters, however, may ultimately have led to more secure large conclusions.

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[116] See *supra* note 105 and accompanying text.