NO. S061281
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

KEVIN BARKER (1118) and VANCOUVER POLICE DEPARTMENT

PETITIONER

AND:

PETER M. HAYES

RESPONDENT

ARGUMENT OF THE INTERVENOR,
THE BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

I. FACTS

1. The British Columbia Civil Liberties Association ("BCCLA", "the Association") accepts the facts and procedural history as set out in the Part II Outline of the Petitioners and the Part III Outlines of the Respondents.

2. In brief, Mr. Hayes contended that the Vancouver Police Department and Kevin Barker refused to grant him a chauffeur's permit for his employment because Mr. Hayes is Pagan and engages in practices that could generally be referred to as a "Lifestyle BDSM" sexual activities.

3. The British Columbia Human Rights Tribunal (the "Tribunal") accepted the part of the complaint alleging discrimination in relation to services on the ground of religion. The Tribunal requested further submissions from the parties with respect to whether the Tribunal would accept the complaint based on the grounds of sexual orientation.

4. In *Hayes v. Vancouver Police Department and Barker*, 2005 BCHRT 590, dated December 28, 2005, as corrected January 23, 2006, a preliminary screening decision of the Tribunal (the "Tribunal Decision"), the Tribunal determined that Mr. Hayes' complaint alleging discrimination on the grounds of sexual orientation would be accepted for filing. (Intervenor's Book of Authorities ("IBA") TAB 8).

5. Tribunal Member Lindsay Lyster held that the alleged behaviours, practices and preferences Mr. Hayes participates in could conceivably be protected under the *Code* on the grounds of sexual orientation, and that the facts alleged in Mr. Hayes' complaint to the Tribunal, if proven, could constitute discrimination contrary to s.8 of the *Code*.

6. The Tribunal held that a final determination of the issue would require, among other things, a fuller exploration of the meaning of the term "sexual orientation" and a full evidentiary record.

7. Mr. Justice Kelleher of this Court granted the BCCLA intervenor status on April 26, 2006. He left it to this Court to decide whether the BCCLA would be granted leave to make oral arguments.

II. THE POSITION OF THE INTERVENOR ON SECONDARY ISSUES

A. Overview

8. The BCCLA, as Intervenor, takes no position with respect to the merits of the underlying cause. The Association's position is that novel claims of the sort advanced by Mr. Hayes in the present case should be considered at first instance on a full evidentiary record because it is not plain and obvious that they could not succeed. As such the Association says that the Tribunal Decision to consider the claim on its merits was correct, and it follows that the present Petition is premature.

B. The Standard of Review

9. The Association does not disagree with the Tribunal's submissions on the applicable standard of review, but says that, at least with respect to the public law questions addressed by the Association, the Tribunal Decision was correct and it is unnecessary to consider whether a lesser standard applies.

C. Prematurity

10. The BCCLA generally adopts the submissions made by the Respondents Mr. Hayes and the Tribunal in their respective Outlines Part III on the issue of prematurity.

11. The question before the Tribunal is not whether Mr. Hayes' sexual practices are or ought to be a protected ground in the *Code*; the question is whether, in the absence of any evidence on point, it must be concluded that the grounds of sexual orientation could never be interpreted so as to protect Mr. Hayes' sexual practices. In accepting Mr. Hayes' complaint for filing, the Tribunal, per Tribunal Member Lindsay Lyster, emphasized that it was exercising its preliminary gate-keeping function:

> …I do not determine whether Mr. Hayes' behaviours, practices and preferences come within the ambit of sexual orientation, but only whether it is possible that they may do so. This is a preliminary gate-keeping function, which will determine

> whether this part of Mr. Hayes' complain will be accepted for filing, thereby setting in motion the Tribunal's processes… It is neither a final determination as to whether the Tribunal has jurisdiction over the complaint nor a decision as to whether the complaint is justified. (para. 13)

12. A hearing on the merits of the issue has not yet taken place and the Tribunal has correctly asserted that a final determination of the issue will require a full evidentiary record. The Intervenor submits that the Court should decline to intervene until the Tribunal has finished its process.

13. The BCCLA says that, in addition to the legal arguments advanced by the Respondents, important public policy considerations discussed below with respect to the proper approach to the interpretation and application of human rights legislation also apply to the question of prematurity. Challenges such as that at bar, should they succeed, will necessarily stymie the growth and evolution of human rights protections.

III. THE TRIBUNAL WAS CORRECT IN ACCEPTING THE COMPLAINT WITH RESPECT TO DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION

A. Special Principles of Construction Apply to Human Rights Legislation

14. Because of the special nature of the goals it pursues and fundamental values it expresses, Canadian courts have recognized that human rights legislation has a unique, quasi-constitutional status and special principles of statutory interpretation apply: see *Sullivan and Driedger on the Construction of Statutes* (4th ed) (Markham: Butterworths, 2002) at 373 -375 (IBA TAB 27).

15. As Driedger notes, this understanding of the special role served by human rights legislation has been endorsed by the Supreme Court of Canada on many occasions. In *Dickason v. University of Alberta*, L'Heureux-Dubé J. summarized at para. 101:

> In order to further the goal of achieving as fair and tolerant a society as possible, this court has long recognized that human rights legislation should be interpreted both broadly and purposively. Once in place, laws which seek to protect individuals from discrimination acquire a quasi-constitutional status, which gives them preeminence over ordinary legislation. (IBA TAB 5)

16. Similarly, in *Ontario (Human Rights Commission) v. Simpsons-Sears Ltd.*, the Court found that rules of statutory construction that advocate strict interpretation of the words employed are not applicable when interpreting the terms of a human rights code. McIntyre J. wrote at para. 12:

> The accepted rules of construction are flexible enough to enable the Court to recognize in the construction of a human rights code the special nature and purpose of the enactment ... and give to it an interpretation which will advance its

> broad purposes. Legislation of this type is of a special nature, not quite constitutional but certainly more than the ordinary -- and it is for the courts to seek out its purpose and give it effect. (IBA TAB 16)

17. In *Insurance Corporation of B.C. v. Heerspink*, [1982] 2 S.C.R. 145, the Supreme Court of Canada stated at para. 32 that "when the subject matter of a law is said to be the comprehensive statement of the "human rights" of the people living in that jurisdiction... then ... that law, and the values it endeavours to buttress and protect, are, save constitutional laws, more important than all others." Mr. Justice Lamer (as he then was) went on to say at para. 33 that the human rights legislation in force in British Columbia at that time "is not to be treated as another ordinary law of general application. It should be recognized for what it is, a fundamental law." (IBA TAB 9)

18. Human rights legislation should be interpreted in a manner so as to best ensure that its objects are obtained. *Canadian National Railway Co. v. Canada (Human Rights Commission)* (IBA TAB 3). In order to advance the broad objectives of the *Code*, the purposes of the *Code* should be taken into account at every stage of interpretation and broad, liberal interpretations that promote the legislative purpose of the *Code* should be adopted. *Québec (Commission des droits de la personne) c. Ville de Brossard*, [1988] 2 S.C.R. 279 (IBA TAB 17); See also *Brooks v. Canada Safeway Ltd*., [1989] 1 S.C.R. 1219; and *Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252.

19. Liberal readings of human rights legislation are justified because they promote the remedial purposes of the legislation. The Tribunal correctly observed that “the Tribunal must keep in mind the Supreme Court of Canada’s repeated guidance as to the large and liberal interpretation to be given to human rights legislation.” *Tribunal Decision* at para. 15. In an oft cited passage from *Canadian National Railway Co.*, Chief Justice Dickson explained the expansive rules of construction that apply to human rights legislation:

> I recognize that in the construction of such legislation the words of the Act must be given their plain meaning, but it is equally important that the rights enunciated be given their full recognition and effect. We should not search for ways and means to minimize those rights and to enfeeble their proper impact. Although it may seem common place, it may be wise to remind ourselves of the statutory guidance given by the federal *Interpretation Act*, R.S.C. 1970, c. I-23, which asserts that statutes are deemed to be remedial and are thus to be given such fair, large and liberal interpretation as will best ensure that their objects are attained. (para. 26, cited in the Tribunal Decision at para. 16.) (IBA TAB 3)

20. The correct approach to interpreting the sexual orientation provisions in the *Code* requires that a provision be interpreted within the context of the objects and purposes of the *Code* as a whole.

21. One of the general objects of human rights legislation "is to secure, as far as is reasonably possible, equality, that is to say, fairness...": *Commission Scolaire Regionale de Chambly v. Bergevin*, [1994] 2 S.C.R. 525 at para, 25, per Cory J. (IBA TAB 4).

22. Section 3 of the *Code* is a guide to its specific objects and legislative purpose. It states that the purposes of the *Code* are, *inter alia*, "to foster a society in British Columbia in which there are no impediments to full and free participation in the economic, social, political and cultural life ..." of the Province and "to promote a climate of understanding and mutual respect where all are equal in dignity and rights."

23. In accepting Mr. Hayes' complaint with respect to discrimination on the basis of sexual orientation, the Tribunal accurately applied the well-established principles of statutory construction of human rights legislation. The Tribunal correctly emphasized that where a Tribunal engages in a preliminary assessment of the merits of a claim it is particularly important that human rights legislation is to be given a liberal and purposive interpretation. Tribunal Member Lindsay M. Lyster wrote at para. 14:

> Given the gate-keeping nature of the function in which the Tribunal is engaged, I consider it especially appropriate to take a liberal and purposive approach. Only if it is clear that the complaint could not come within the Tribunal's jurisdiction should it be dismissed at this stage....To take a more restrictive approach would have the effect of denying those complainants whose complaints may push at the borders of the *Code* all access to the Tribunal and any opportunity to prove their case. It would also have the effect of freezing interpretation of the *Code*, thereby stopping the dynamic process of interpretation of human rights norms in its tracks.

B. Protected Categories in Human Rights Legislation are Open to Expansion

24. Before the Tribunal below, the Petitioner relied on *Haig* v. *Canada,* (1992) 9 O.R. (3d) 495 (C.A.), *McAleer* v. *Canada (Human Rights Commission)*, (1996) 132 D.L.R. (4th) 672, aff'd (1999) 175 D.L.R. (4th) 766 (Fed. CA), *Vriend* v. *Alberta,* [1998] 1 S.C.R. 493, and *R.* v. *Hancock,* 2000 BCSC 1581 for the proposition that the term sexual orientation refers solely to the gender of those to whom an individual's sexuality is directed, that is, to the gayness or lesbianness of an individual, and does not include sexual preferences or behaviours related to that or any other orientation. The BCCLA generally adopts the reasons given by the Tribunal for concluding that the above authorities are not definitive of the issue.

25. In the present case, Tribunal Member Lyster concluded at paras. 37 - 44 that the jurisprudence relied on by the Petitioner in its submission on whether the facts alleged by Mr. Hayes could if proven amount to a contravention of the *Code* on the basis of sexual orientation was not conclusive of the issue of whether the acts alleged by Mr. Hayes could constitute discrimination on the basis of sexual orientation.

26. The BCCLA submits that this analysis is correct. The term "sexual orientation" is not defined in the *Code* and there is not case authority for the proposition that the Tribunal must define the term narrowly.

27. In fact, the B.C. Court of Appeal has held that the term sexual orientation in the *Code* does not refer solely to the gayness or lesbianness of an individual. In *North Vancouver School District No. 44 v. Jubran*, 2005 BCCA 201, a complainant high school student had been subjected to slurs and physical assaults by his classmates, who called him "geek", "faggot", and "gay". The harassers did not actually believe that Mr. Jubran was a homosexual, and Mr. Jubran himself did not self-identify as such. In upholding the Tribunal's decision that sexual orientation discrimination could include discrimination on the basis of the discriminator's perception of a person's orientation, and not on the orientation itself, Levine J.A. held at para. 51 that a broad interpretation of the *Code* was warranted:

> …the relevant words in s.8 are "sexual orientation of that person," not "homosexuality of that person." There can be no doubt that the reference to "sexual orientation" is intended to protect homosexual men and women from discrimination. But nothing about those words requires that a person have a particular sexual orientation or identify himself as homosexual. It was Mr. Jubran's sexual orientation that his harassers persistently focused on. The words they chose to harass him with were neither benign nor irrelevant; rather, the homophobic taunts imported the affront to the equality and human dignity of those that the *Code* seeks to protect. (IBA TAB 15)

28. Even if this Court determines that the term sexual orientation has a plain, well-accepted meaning as the Petitioner contends, then the Association submits that this Court should nonetheless exercise judicial restraint by recognizing that the language of the *Code* is not entrenched and is subject to expanding interpretation. As stated by Walter Tarnopolsky, in *Discrimination and the Law* (Carswell, 2004) at 9-24.1:

> [H]uman rights law should not be restricted to the approaches or definitions which have been adopted in other areas of the law for other purposes, but rather the approach or definition which most effectively advances the purpose of human rights law should be adopted. (IBA TAB 24)

29. Human rights legislation is frequently interpreted more expansively over time in response to changing social conditions. In *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, the Supreme Court, per Madam Justice Wilson, found that section 42 of the British Columbia *Barristers and Solicitors Act*, restricting the right to practise law to Canadian citizens, infringed the equality provisions of s. 15 of the *Charter*. The Court found that non-citizens are in a category analogous to those categories specifically enumerated in s. 15, and are entitled to protection under the section. Madam Justice Wilson, who wrote for the majority, stated at para. 52:

> [I]t is important to note that the range of discrete and insular minorities has changed and will continue to change with changing political and social circumstances. For example, Stone J., writing in 1938, was concerned with religious, national and racial minorities. In enumerating the specific grounds in s. 15, the framers of the *Charter* embraced these concerns in 1982 but also addressed themselves to the difficulties experienced by the disadvantaged on the grounds of ethnic origin, colour, sex, age and physical and mental disability. It can be anticipated that the discrete and insular minorities of tomorrow will include groups not recognized as such today. … (IBA TAB 1)

30. The Supreme Court of Canada, as well as the lower Canadian Courts, have repeatedly taken a flexible approach to interpreting human rights legislation and have on numerous occasions adopted and developed novel concepts within the framework of the *Charter* and the human rights codes. The Tribunal correctly noted that there were many examples of this dynamic process of interpretation: Tribunal Decision at paras. 26-32. The Association generally adopts the Tribunal's discussion of these cases as compelling examples of how human rights codes have been interpreted over time to include new forms of discrimination even though the wording of the legislation hasn't changed. Tribunal Member Lyster said at paras. 25-26:

> I agree with the respondents that the Tribunal must not, in the Court's colourful phrase, "slip the anchor" of the words chosen by the Legislature.…That, however, does not mean that the meaning of the words chosen by the Legislature is frozen in time as of the date of their enactment. The point is made this way in *Sullivan and Driedger on the Construction of Statutes* (4th ed) (Markham: Butterworths, 2002) at p. 373, in discussing the principles appropriate to the interpretation of human rights legislation:
>
> > In responding to general terms and concepts, the approach is organic and flexible. The key provisions of the legislation are adapted not only to changing social conditions but also to evolving conceptions of human rights.

31. The BCCLA submits that this is the correct approach.

C. Presumption of Compliance With Constitutional and International Norms

(1) Overview

32. There is another compelling reason to believe that a Tribunal may, on a sufficient evidentiary record, conclude that Mr. Hayes's sexual practices are worthy of protection. In interpreting its own legislation, the Tribunal may be influenced by constitutional and international law norms.

33. It is presumed that legislation is enacted in compliance with constitutional norms, including the rights and freedoms enshrined in the *Canadian Charter of Rights and*

Freedoms. This presumption acknowledges the crucial significance of constitutional values in the legislative process and the legal and political culture of Canada.
Accordingly, where two readings of a provision are equally plausible, the interpretation which accords with *Charter* values should be adopted. *Sullivan and Driedger on the Construction of Statutes* at p. 367. (IBA TAB 27)

34. McLachlin J. (as she then was) summarized the presumption of compliance with constitutional norms in *R. v. Zundel*, [1992] 2 S.C.R. 731, at para. 59:

> These authorities confirm the following basic propositions: that the common law should develop in accordance with the values of the *Charter* … and that where a legislative provision, on a reasonable interpretation of its history and on the plain reading of its text, is subject to two equally persuasive interpretations, the court should adopt that interpretation which accords with the *Charter* and the values to which it gives expression. (IBA TAB 21)

35. Fundamental constitutional norms must be complied with even if the *Charter* and its values are not directly implicated. Weiler and Sharpe JJ.A. in *LaLonde v. Ontario (Commission de restructuration des services de santé)* (2001), 208 D.L.R. (4th) 577 (Ont. C.A.) held at para. 174:

> Fundamental constitutional values have normative legal force. … This is a long-established principle of our law. Before the advent of the *Charter* and the constitutional entrenchment of rights and freedoms, there can be no doubt that those same rights were fundamental constitutional values. Although they had not been crystallized in the form of entrenched and directly enforceable rights, they were regularly used by the courts to interpret legislation and to assess the legality of administrative action. … (IBA TAB 12)
>
> Similarly, since the enactment of the *Charter*, the application of constitutional values to situations not strictly governed by the text of the Constitution has been recognized and accepted. The *Charter* does not apply as between private individuals, yet *Charter* values are to be applied by the courts in common-law decision making…

36. Legislation is also presumed to comply with customary and conventional values and principles enshrined in international law. *Sullivan and Driedger on the Construction of Statutes*, at 421 - 429. (IBA TAB 27)

37. It has been repeatedly confirmed that human rights instruments of the United Nations and jurisprudence of the European Court of Human Rights and other international courts may be consulted in interpreting provisions of human rights codes. See e.g. *Sheridan v. Sanctuary Investments Ltd*. (1999), 33 C.H.R.R. D/467 (B.C. H.R. Trib.) (IBA TAB 22); and *Québec (Commission des droits de la personne & des droits de la jeunesse) c. Maison des jeunes À-Ma-Baie inc.* (1998), 33 C.H.R.R. D/263 (Trib. Que.). (IBA TAB 18)

38. The Supreme Court has confirmed that Canadian courts should interpret legislation in conformity with its international treaty obligations. In *R. v. Sharpe*, 2001 SCC 2, McLachlin C.J. wrote at paras. 175 - 176:

> While this Court has recognized that, generally, international norms are not binding without legislative implementation, they are relevant sources for interpreting rights domestically….
>
> … [A] balancing of competing interests [in domestic legislation] must be informed by Canada's international obligations. The fact that a value has the status of an international human right is indicative of the high degree of importance with which it must be considered…. (IBA TAB 20)

39. The Association submits that the Tribunal must be afforded the opportunity to consider whether a restrictive interpretation of the sexual orientation provision of the *Code* would infringe the fundamental rights guaranteed by constitutional and international norms. In particular, the Tribunal must consider whether the constitutional rights to expression, liberty, privacy, and equality may militate against a narrow reading of the *Code*'s provisions.

40. While the BCCLA does not in this hearing submit what effect of a review of constitutional and international law norms would have upon the interpretation of the *Human Rights Code*, the Association notes that there is jurisprudence to suggest that a person's sexual choices may be protected both constitutionally and at international law.

(2) The Norms Potentially at Issue in the Present Case

Expression

41. Section 2 of the *Charter* explicitly provides that everyone has the fundamental freedom of expression. The Supreme Court of Canada has defined expression extremely broadly: "Activity is expressive if it attempts to convey meaning." *Irwin Toy v. Quebéc*, [1989] 1 S.C.R. 927 at para 42 (IBA TAB 10). The broadly established rationale for the protection of expression is the realization of "individual self-fulfillment and human flourishing." *Irwin Toy v. Québec* at para. 54. Although no Canadian court has discussed the freedom to engage in consensual sexual activity within the context of the *Charter* right to expression, the Association submits that this *Charter* value may be implicated in Mr. Hayes' complaint before the Tribunal. The Association submits that sexual expression, through the conduct of sexual behaviours and practices, may be a form of expression entitled to *Charter* protection.

Liberty and Privacy

42. Section 7 of the *Charter* provides that:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

43. In *Blencoe v. British Columbia*, [2000] 2 S.C.R. 307, the Supreme Court of Canada, per Bastarache J., asserted at para. 49 that liberty in s. 7 is “no longer restricted to mere freedom from physical restraint.” (IBA TAB 2) The Court determined that s.7 applies whenever the law prevents a person from making “fundamental personal choices” (para. 54).

44. The Supreme Court of Canada has determined that privacy is a constitutional right. In *R. v. O’Connor* [1995] 4 S.C.R. 411, a judgement of L’Heureux-Dube J. with the concurrence of La Forest, Gonthier and McLachlin JJ., the Court found that the right to liberty enshrined in the *Charter* includes the right to privacy; the five other judges acknowledged that privacy was a constitutional right but were silent as to its source. The Court acknowledged that in a free and democratic society, the individual must be left room for personal autonomy to live his or her own life and to make decisions that are of fundamental personal importance. (IBA TAB 19)

45. The right to privacy and respect for private life is a norm of international law. Canada has committed itself to complying with the provisions of the *International Covenant in Civil and Political Rights*, Article 17(1) of which provides:

> No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. (IBA TAB 26)

46. Additional support for the notion that the right to privacy is a customary international norm can be found in article 12 of the *Universal Declaration of Human Rights* (1948), which states:

> No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks. (IBA TAB 28)

47. Similarly, article 8 of the *European Convention on Human Rights* and *Fundamental Freedoms* provides a right to respect for one's "private and family life, his home and his correspondence,” subject to certain restrictions that are "in accordance with law" and "necessary in a democratic society.” (IBA TAB 25)

48. International human rights bodies and foreign courts have recognized that the right to privacy and respect for private life protect sexuality and sexual rights. The European Court of Human Rights and the European Commission of Human Rights have developed a substantial body of jurisprudence that recognizes that Article 8 of the European Convention provides for the right to engage in consensual sexual activity. The

Commission and Court have acknowledged that sexuality and sexual life is at the core of private life and its protection. For example, in *L. & V. v. Austria* (39392/98, 39829/98), judg. 09.01.2003, the Court held at para. 36 that sexuality and sexual life were the "most intimate aspect of private life." (IBA TAB 11)

49. Similarly, the Court in *Dudgeon vs. UK* (7525/76) judg.22.10.1981 stated at para. 41 that "the impugned legislation constitutes a continuing interference with the applicant's right to respect for his private life (which includes his sexual life)" and "concerns a most intimate aspect of private life."

50. The Supreme Court of the United States has found that the U.S. constitution implicitly grants a right to privacy and that the right encompasses aspects of sexuality. In *Griswold v. Connecticut*, 381 US 479 (1965), a case which involved the right if a heterosexual married couple to use contraceptives, the United States Supreme Court defined sexual intimacy as an area of private life that was protected from government intrusion. (IBA TAB 7) In *Lawrence v. Texas*, 539 U.S. 558 (2003), the landmark U.S. Supreme Court case that struck down the criminal prohibition of homosexual sodomy in Texas, the Court surveyed the history of legal prohibitions against homosexual sexual conduct. The Court stated:

> [The Nation's] laws and traditions in the past half century are most relevant here. These references show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex. (IBA TAB 13)

Equality

51. Section 15 of the *Charter* guarantees equality "without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." The Supreme Court has recognized the important influence of the s. 15 equality guarantee on other rights in the *Charter*. In *Andrews v. Law Society (British Columbia)*, McIntyre J. wrote at para. 34:

> The section 15(1) guarantee is the broadest of all guarantees. It applies to and supports all other rights guaranteed by the *Charter*. (IBA TAB 1)

52. Similarly, in *New Brunswick (Minister of Health & Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, L'Heureux-Dubé J. (concurring,) pointed out at para. 112 that the "interpretive lens of the equality guarantee" should influence the interpretation of other constitutional rights. (IBA TAB 14)

53. The *Charter* does not specifically include sexual orientation as a protected ground, but the wording of s.15 ensures that the prohibited grounds of discrimination are unrestricted. The Supreme Court has found on numerous occasions that s.15 protects enumerated and unenumerated grounds of discrimination. In *Vriend v. Alberta*, (IBA TAB 23) the Court 'read in' protection of sexual orientation into the Alberta

Individual's Rights Protection Act (R.S.A. 1980, c. I-2) on the basis that homosexuality was an analogous ground under s.15 of the *Charter*. Relying in the previous Supreme Court decision of *Egan v. Canada*, [1995] 2 SCR 513, the Court found that the failure to provide gays and lesbians with protection against discrimination was unconstitutional.

54. Even in the absence of a direct constitutional challenge to the *Code*, equality considerations must inform the Tribunal's interpretation of the *Code*. The Tribunal should be afforded the opportunity to take into account the principles and purposes of the equality guarantee in promoting the equal benefit of the law and ensuring that the law responds to the needs of disadvantaged individuals and groups whose protection is at the heart of s. 15.

(3) Summary on this Point

55. It is clear that even though Mr. Hayes has not challenged the constitutionality or legality of the definition of sexual orientation in the *Code*, the Tribunal must nonetheless adopt a reading of the *Code* that accords with constitutional values, including the rights and freedoms enshrined in the *Charter*, and fundamental international norms.

56. The BCCLA takes no position with respect to whether constitutional norms and the *Charter* values mandate an expansive reading of the term sexual orientation in the *Code*; nor does the BCCLA say that the term sexual orientation must be read to encompass protection for Mr. Hayes' behaviours, practices and preferences at issue. Rather, the BCCLA says that the Tribunal must be afforded the opportunity to review novel claims of the sort advanced by Mr. Hayes in light of fundamental constitutional values and international norms. This process of interpretation cannot be undertaken in a vacuum; it must be accomplished through a contextual understanding of the norms and values at issue and the particular facts of Mr. Hayes' complaint.

D. The Tribunal Is The Proper Forum

57. The Tribunal is the proper forum to hear arguments and examine evidence regarding whether the grounds of sexual orientation could reasonably be interpreted to protect Mr. Hayes from discrimination on the basis of his sexual practices. To determine whether Mr. Hayes' sexual behaviours and practices at issue in this complaint ought to be protected under the sexual orientation provisions of the *Code*, the Tribunal must be permitted to commence a hearing on the merits. In order to satisfactorily determine the issue, it will be necessary for the Tribunal to amass a full evidentiary record, including evidence of Mr. Hayes' sexual behaviours and practices, as well as expert evidence on these issues. It is the view of the Association that the Tribunal hearing ought to proceed in the normal course to completion.