File No. 33676

IN THE SUPREME COURT OF CANADA
(On Appeal from the Court of Appeal for Saskatchewan)

BETWEEN:

THE SASKATCHEWAN HUMAN RIGHTS COMMISSION
Appellant (Respondent)

-and-

WILLIAM WHATCOTT
Respondent (Appellant)

-and-

ATTORNEY GENERAL FOR SASKATCHEWAN
Respondent (Intervener)

-and-

ATTORNEY GENERAL FOR CANADA and
ATTORNEY GENERAL FOR ALBERTA
Interveners

FACTUM OF THE RESPONDENT, THE ATTORNEY GENERAL FOR SASKATCHEWAN

(Pursuant to Rule 42 of the Rules of the Supreme Court of Canada)

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PART I

OVERVIEW OF POSITION

1. The Attorney General respectfully submits that this Honourable Court's decision in *Canada (Human Rights Commission) v. Taylor*[1] decides the constitutional issue raised by the Respondent Whatcott. To the extent that s. 14(1)(b) of *The Saskatchewan Human Rights Code*[2] infringes either freedom of expression or freedom of religion, as guaranteed by s. 2 of the *Canadian Charter of Rights and Freedoms*, that infringement is a reasonable limit, demonstrably justifiable under s. 1 of the *Charter*.

2. Section 14(1)(b) serves the valuable purpose of protecting individuals from hate speech and publications, by means of a civil remedy. The provision thus advances the constitutional values of equality and multiculturalism, recognized by the *Canadian Charter of Rights and Freedoms*, and does so with civil remedies, not penal measures, consistent with this Court's holding in *Taylor*.

3. Section 14(1)(b) must also be considered in the context of the *Charter's* guarantee of freedom of expression, which is also protected by *The Saskatchewan Bill of Rights*[3] and by s. 14(2) of *The Saskatchewan Human Rights Code*.[4] In the three decisions considering s. 14(1)(b) rendered since this Court's decision in *Taylor*, including the decision under appeal in this case, the Court of Appeal of Saskatchewan has followed this Court's lead and has recognized the importance of restricting s. 14(1)(b)

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1 *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892 (hereafter "*Taylor*").

2 *The Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1, s. 14(1)(b).

3 *The Saskatchewan Bill of Rights*, being Part I of *The Saskatchewan Human Rights Code, supra* note 2, s. 5.

4 *The Saskatchewan Human Rights Code, supra* note 2, s. 14(2).

to the most egregious examples of publications likely to generate hatred. In doing so, the Court of Appeal has relied on s. 5 and s. 14(2) of the *Code*.[5]

4. The Attorney General for Saskatchewan submits that s. 14(1)(b) is a constitutionally valid balance between the need to protect members of minority groups from hate speech, while also recognizing the importance of freedom of expression. It is therefore justifiable under this Court's analysis in *Taylor*.

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[5] *Saskatchewan (Human Rights Commission) v. Bell*, [1994] 5 W.W.R. 458 (Sask. C.A.) (Q.L.); *Owens v. Saskatchewan (Human Rights Commission)*, 2006 SKCA 41, [2006] S.J. No. 221 (C.A.) (Q.L.); *Whatcott v. Saskatchewan (Human Rights Commission)*, Appellant's Record, Tab 5 (hereafter "*Whatcott (C.A.)*").

PART II

POSITION OF THE ATTORNEY GENERAL

5. The Attorney General intervened in the proceedings in this matter in both the Queen's Bench[6] and the Court of Appeal,[7] pursuant to *The Constitutional Questions Act* of Saskatchewan and *The Saskatchewan Human Rights Code*. Under both those Acts, the Attorney General is a party for purposes of any appeals.[8] Since the Court of Appeal upheld the constitutionality of s. 14(1)(b), the Attorney General did not join in the Commission's application for leave to appeal to this Court, and was instead served with the leave application as a Respondent. As the Respondent Whatcott has again raised the constitutionality of s. 14(1)(b) as an alternative ground in support of the decision of the Court of Appeal, the Attorney General files this Factum in response to the constitutional issue.

6. The Attorney General relies upon the Appellant's statement of facts. The Attorney General also draws to the Court's attention that there is no evidence before the Court relating to s. 1 issues, because of the procedural history of this case. In particular, there is no evidence suggesting there have been any changes to social attitudes respecting hate speech since this Court's decision in *Taylor*. The constitutional issues were argued before the Tribunal and the lower courts as a matter of *stare decisis* and this Court's

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6 *Whatcott v. Saskatchewan Human Rights Tribunal et al.*, 2007 SKQB 450, Appellant's Record, tab 63 (hereafter "Whatcott (Q.B.)".

7 *Whatcott (C.A.), supra* note 5.

8 *The Constitutional Questions Act*, R.S.S. 1978, c. C-29, s. 8(7) and (9); *The Saskatchewan Human Rights Code, supra* note 2, s. 32(3). This Court has recognised that an Attorney General has standing to defend the constitutionality of a Province's legislation: *Saskatchewan Indian Gaming Authority Inc. v. CAW – Canada*, [2001] 1 S.C.R. 644; *Procureur général du Québec v. Ministère des ressources humaines et développement social Canada et autres*, SCC No. 33511, reported in *Supreme Court Bulletin of Proceedings*, March 12, 2010, p. 329.

decision in *Taylor*,[9] which had been applied by the Saskatchewan Court of Appeal in previous cases under s. 14(1)(b). The Attorney General was not given notice of the constitutional issue at the Tribunal level and did not participate in the hearing before the Tribunal.

7. The Appellant raises five issues:

Issue 1: Does s. 14(1)(b) of *The Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1 infringe s. 2(b) of the *Canadian Charter of Rights and Freedoms*?

Issue 2: If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

Issue 3: Does s. 14(1)(b) of *The Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1 infringe s. 2(a) of the *Canadian Charter of Rights and Freedoms*?

Issue 4: If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

Issue 5: Did the Saskatchewan Court of Appeal Err in Finding No Violation of s. 14(1)(b) of *The Saskatchewan Human Rights Code*?

8. The Attorney General will only address Issues 2 and 4 in his submissions to this Court. This approach flows from the nature of the Attorney General's participation in this matter in both of the lower courts. The Attorney General confined his submissions in those courts to the s. 1 issue, relying on the

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[9] *Wallace v. Whatcott* (2005), 52 C.H.R.R. D/264 (Sask. H.R.T.), Appellant's Record, Tab 2, paras. 55-57; *Whatcott (Q.B.)*, supra note 6, paras. 27-28; *Whatcott (C.A.)*, supra note 5, paras. 42-44, 53, 122-124.

decision of this Court in *Taylor*. The Attorney General will thus only address the s. 1 issue in this Court. However, the Attorney General does not disagree with the positions taken by the Appellant on Issues 1 and 3.

9. The Attorney General takes no position on the fifth issue, namely the proper interpretation and application of the Code to the facts of this case.

PART III

ARGUMENT

A. Introduction

10. Twenty-one years ago, in the case of *Canada (Human Rights Commission) v. Taylor*,[10] this Court was asked to determine the constitutionality of s. 13 of the *Canadian Human Rights Act*[11] regulating hate speech communicated by telephone. The Court by a 5-4 majority upheld the constitutionality of s. 13 of the federal Act, finding that while s. 13 infringed the Charter's guarantee of freedom of expression, the infringement was justifiable under s. 1 of the Charter.

11. The Attorney General respectfully submits that the same result should follow here. Section 14(1)(b) of *The Saskatchewan Human Rights Code*[12] is similarly circumscribed and focussed on remedying the harm caused by hate speech. The Code provides a civil remedy, aimed at compensating complainants and discouraging the harmful conduct, rather than punishing individuals found to have infringed the Code. That approach is consistent with this Court's holding in *Taylor*.

12. The issue in this case is essentially the same as considered by the Court at the time of the *Taylor* decision: what is the appropriate balance between protection of individuals from the harm of extreme hate speech, and the constitutional protection of freedom of expression? The Attorney General submits that there is no reason to justify altering the section 1 balance drawn by this Court in the *Taylor* decision.

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10 *Taylor, supra* note 1.

11 *Canadian Human Rights Act*, S.C. 1976-77, c. 33, s. 13 [hereafter "federal Act"].

12 *The Saskatchewan Human Rights Code, supra* note 2, s. 14(1)(b).

13. The Attorney General does not propose to re-visit the s. 1 analysis from *Taylor* in detail, which the Attorney General submits continues to be good law. Rather, the Attorney General will review aspects of the majority decision by Dickson C.J.C. and will submit that s. 14(1)(b) of *The Saskatchewan Human Rights Code* fits within that constitutional analysis. In fact, amendments to the Code in the twenty-one years since *Taylor* have brought the Saskatchewan Code even more clearly within the analytical framework of Dickson C.J.C.'s decision.

14. The Attorney General will also review certain aspects of the dissenting decision of McLachlin J. (as she then was) in *Taylor*. The Attorney General submits that the framework of *The Saskatchewan Human Rights Code*, and the case law considering s. 14(1)(b) since the *Taylor* decision, respond to the concerns expressed by McLachlin J.

15. The Attorney General also submits that the s. 1 justification from *Taylor* applies equally to the issue of freedom of religion raised by the Respondent Whatcott under s. 2(a) of the *Charter*. The Attorney General relies on the decision of the Saskatchewan Court of Appeal in the *Owens* case on this point.[13]

16. The Attorney General submits that there is no need for this Court to re-visit its decision in *Taylor*, which remains good law. While this Court has the authority to re-visit its earlier decisions in an appropriate case, the Attorney General submits that none of the factors which this Court has set out for exercising that authority are met in this case.

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[13] *Owens, supra* note 5, para. 57.

B. Analysis of the *Taylor* Decision

(1) The Majority Decision

17. There are four main themes in the majority decision of Chief Justice Dickson in *Taylor*:

(a) the importance of the goal of protecting vulnerable minorities in Canada from hate propaganda;

(b) the civil, remedial nature of the hate speech provisions of the *Canadian Human Rights Act*, which is designed to protect and correct, rather than to punish;

(c) the meaning of hate speech as applying to extreme expressions of "detestation, calumny and vilification," providing a clear and objective standard; and,

(d) the reduced constitutional value of hate speech and consequent implications for restrictions on it.

18. Dickson C.J.C. began his s. 1 analysis with a summary of the serious harm posed by hate propaganda, both to individuals and to society at large. His comments are worth quoting in full:

> Parliament's concern that the dissemination of hate propaganda is antithetical to the general aim of the *Canadian Human Rights Act* is not misplaced. The serious harm caused by messages of hatred was identified by the Special Committee on Hate Propaganda in Canada, commonly known as the Cohen Committee, in 1966. The Cohen Committee noted that individuals subjected to racial or religious hatred may suffer substantial psychological distress, the damaging consequences including a loss of self-esteem, feelings of anger and outrage and strong pressure to renounce cultural differences that mark them as distinct. This intensely painful reaction undoubtedly detracts from an individual's ability to, in the words of s. 2 of the Act, "make for himself or herself the life that he or she is able and wishes to have". As well, the Committee observed that hate propaganda can operate to convince listeners, even if subtly, that members of certain racial or religious groups are inferior. The result may be an increase in acts of discrimination, including the denial of equal opportunity in the provision of goods, services and facilities, and even incidents of violence.
>
> ... It can thus be concluded that messages of hate propaganda undermine the dignity and self-worth of target group members and, more generally, contribute to disharmonious relations among various racial, cultural and religious groups, as a result eroding the tolerance and open-mindedness that must flourish in a multicultural society which is committed to the idea of equality.[14]

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[14] *Taylor, supra* note 1, pp. 918-919.

19. The Attorney General submits that those comments are as accurate today as they were in 1990. Hate speech has a corrosive effect on individuals, minority groups and society as a whole. Restrictions on hate speech respond to a pressing and substantial objective.

20. Dickson C.J.C. also noted that Canada's international obligations require it to take steps to prohibit the advocacy of racial or religious superiority.[15] This concern remains as pressing today.

21. Finally, Dickson C.J.C. concluded that the Charter's guarantees of equality and multiculturalism are additional factors to take into account in the s. 1 analysis.[16] The Attorney General submits these factors are equally as pressing and relevant today.

22. Since the decision in *Taylor*, this Court has also affirmed that respect and protection of minorities is one of the fundamental and organizing principles of the Constitution.[17] Provisions such as s. 14(1)(b) are designed to provide such protection for minorities. The Attorney General submits that this fundamental value further supports the importance of the objective of the provision for the s. 1 analysis.

23. The second major theme which runs throughout Dickson C.J.C.'s decision is that the human rights context is an important factor in assessing hate propaganda restrictions. He repeatedly comments that the purpose of human rights legislation is to compensate and protect the individual harmed by the human

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15 *Taylor, supra* note 1, p. 920).

16 *Taylor, supra*, note 1, p. 920.

17 *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, paras. 32, 79-82.

rights violation, and to discourage the conduct in the future[18]. Human rights legislation is not penal in nature. This civil, remedial component of human rights provisions means that the impact on freedom of expression is less severe than in the case of penal provisions, such as the hate speech provision of the *Criminal Code*. The balancing process under s. 1 therefore supports the conclusion that hate propaganda provisions in human rights legislation are justifiable under s. 1 of the *Charter*.[19]

24. The third theme in Dickson C.J.C.'s decision is that the concept of hate speech is clear and provides ample guidance to human rights commissions, tribunals and the courts. Dickson C.J.C. adopted the interpretation of the federal Human Rights Tribunal: "... s. 13(1) thus refers to unusually strong and deep-felt emotions of detestation, calumny and vilification, and I do not find this interpretation to be particularly expansive."[20]

25. Dickson C.J.C. concluded on this point:

> In sum, the language employed in s. 13(1) of the *Canadian Human Rights Act* extends only to that expression giving rise to the evil sought to be eradicated and provides a standard of conduct sufficiently precise to prevent the unacceptable chilling of expressive activity. Moreover, as long as the Human Rights Tribunal continues to be well aware of the purpose of s. 13(1) and pays heed to the ardent and extreme nature of feeling described in the phrase "hatred or contempt", there is little danger that subjective opinion as to offensiveness will supplant the proper meaning of the section.[21]

26. A fourth and final theme in Dickson C.J.C.'s decision is that hate propaganda is at the outer edges of the guarantee of freedom of expression. He cited his own decision in *R. v. Keegstra*, where he held

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18 *Taylor,* supra note 1, p. 917, 924, 935.

19 *Taylor*, *supra* note 1, at p. 932.

20 *Taylor, supra* note 1, p. 928.

21 *Taylor, supra* note 1, p. 929.

that hate propaganda contributed little to Canadian society. Hate propaganda "...strays some distance from the spirit of s. 2(b)," making it easier to justify restrictions on this type of expression.[22] Further on in his decision, he commented that "... the suppression of hate propaganda does not severely abridge free expression values."[23]

27. In his concluding comments, Dickson C.J.C. stated that:

> It will be apparent from the preceding discussion that I do not view the effects of s. 13(1) upon the freedom of expression to be so deleterious as to make intolerable its existence in a free and democratic society. The section furthers a government objective of great significance and impinges upon expression exhibiting only tenuous links with the rationale underlying the freedom of expression guarantee.[24]

28. Overall, the Attorney General submits that Dickson C.J.C.'s analysis remains compelling. There is no reason for this Court to depart from his decision. Hate speech provisions of human rights laws which come within the scope of his analysis are justifiable under s. 1 of the *Charter*.

(2) The Dissent

29. In her dissent, McLachlin J. disagreed with the s. 1 analysis of Dickson C.J.C. and concluded that s. 13 of the federal Act could not be justified. There are three points from her decision, and a related point from her dissent in *R. v. Keegstra*, which the Attorney General wishes to address before turning to the discussion of the Saskatchewan Code.

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22 *R. v. Keegstra*, [1990] 3 S.C.R. 697, p. 766.

23 *Taylor, supra* note 1, p. 923.

24 *Taylor, supra* note 1, pp. 939-940.

30. One of McLachlin J.'s concerns was that the language of the provision was intentionally overbroad, leaving too much discretion in the hands of the Human Rights Commission and its staff. That, coupled with the "chilling effect" of leaving an overbroad law on the books, appears to have been one of McLachlin J.'s main objections to the provision.[25]

31. With the benefit of twenty years of experience with hate propaganda provisions, and additional developments in Charter jurisprudence, the Attorney General respectfully submits that there are two points in answer to this concern.

32. The first is that in his majority decision in *Taylor*, Dickson C.J.C. highlighted the strict standard required for a publication to meet the test of "hatred." He made it clear that "hatred" is not simply a subjective opinion, but only applies to extremes of unusually strong and deeply felt emotions, as summarized earlier. "Hatred" is an objective standard. Lower courts and tribunals have taken that interpretation to heart, as the subsequent cases law of the Saskatchewan Court of Appeal indicates. By setting such a high interpretive standard, Dickson C.J.C. provided the primary response to McLachlin J.'s concern. The strict interpretation given to the concept of "hatred," and the duty of commissions to screen complaints under that strict standard, have ensured that the provisions are not overbroad.

33. As well, the Attorney General submits that subsequent Charter jurisprudence has acknowledged and developed the principle that the courts must interpret statutes consistently with the *Charter*. That interpretive principle responds to both the overbreadth concern, and the concern about having overbroad

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25 *Taylor*, *supra* note 1, p. 964.

provisions "on the books." It is the statute as interpreted by the courts which is the ultimate expression of the law in an area, and which commissions must apply.

34. One of the best examples of this interpretative principle was in *Canadian Foundation for Children, Youth and the Law v. Canada*, which considered a constitutional challenge to s. 43 of the *Criminal Code*, dealing with the power of parents to use reasonable force to correct their children. Writing for the majority, Chief Justice McLachlin provided an extensive interpretive analysis of the wording of s. 43, and concluded that so interpreted, the provision was consistent with s. 7 of the Charter. She stated:

> *Ad hoc* discretionary decision making must be distinguished from appropriate judicial interpretation. Judicial decisions may properly add precision to a statute. Legislators can never foresee all the situations that may arise, and if they did, could not practically set them all out. It is thus in the nature of our legal system that areas of uncertainty exist and that judges clarify and augment the law on a case-by-case basis.[26]

35. The Chief Justice held that it was the role of the appellate courts to provide guidance in the interpretation of a statutory provision:

> This case, and those that build on it, may permit a more uniform approach to "reasonable under the circumstances" than has prevailed in the past. Again, the issue is not whether s. 43 has provided enough guidance in the past, but whether it expresses a standard that can be given a core meaning in tune with contemporary consensus.[27]

36. The Attorney General respectfully submits that is exactly what this Court did in *Taylor*. By giving a strict interpretation to the concept of "hatred," and by emphasizing the need to take the basic value of

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[26] *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4, [2004] 1 S.C.R. 76, para. 17.

[27] *Canadian Foundation, supra* note 26, para. 39.

freedom of expression into account, both the majority and the dissent in *Taylor* gave clear guidance to the lower courts and commissions as to the interpretation of these provisions.

37. A second point of concern raised by McLachlin J. in *Taylor* was the lack of any recognition in the federal Act of the fundamental value of freedom of expression. There was nothing in the Act which required either the Commission or the Tribunal to take freedom of expression into account in dealing with hate speech complaints.[28]

38. The Attorney General submits that this concern is met in the case of the Saskatchewan Code. Freedom of expression is recognized twice in the Code: as a fundamental freedom set out in s. 5 of the *Saskatchewan Bill of Rights*, which is Part I of the Code, and also in subsection 14(2) of the Code. In turn, the Saskatchewan Court of Appeal has used s. 5 and s. 14(2) for precisely the purpose identified by McLachlin J. in *Taylor*: as a guide to interpret the scope of s. 14(1)(b).[29]

39. McLachlin J.'s third point of concern in *Taylor* was that s. 13 of the federal Act applied to private telecommunications. She concluded that the benefit from prohibiting private conversation between consenting adults was arguably small, while carrying with it a significant invasion of privacy. That increased the significance of the infringement on the right of the individual under the Act.[30]

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28 *Taylor*, *supra* note 1, p. 966.

29 *Bell*, *supra* note 5.

30 *Taylor*, *supra*, note 1, p. 967.

40. By contrast, s. 14(1)(b) of the Saskatchewan Code does not apply to private communications. The section is concerned with hate speech which is published, displayed, broadcast, and other mediums of communication. This restriction on public expression of hate speech is consistent with the goals of an open, non-discriminatory society, which are set out in the objects clause of the Code.[31] Private communications are not affected, which is consistent with McLachlin J.'s concern on this point in *Taylor*.

41. The fourth and final point which the Attorney General wishes to raise relates to McLachlin J.'s dissent in *Keegstra*. McLachlin J. there recognized that there is a significant contextual difference between restrictions set out in the human rights process, compared to criminal prohibitions. She appears to have accepted the argument of Alan Borovoy that human rights codes, with their emphasis on amendment of conduct, show strong success in curtailing discrimination (*Keegstra*, p. 861). She also noted that the penalties of the criminal law are the severest sanctions society can impose and are arguably unnecessary in the face of alternative remedies.[32]

42. The Attorney General submits that these comments are similar to those of Dickson C.J.C. in *Taylor*. The civil, remedial context of human rights codes is a significant difference from the punitive approach of the criminal law. The Attorney General submits that s. 14(1)(b) of the Saskatchewan Code is justifiable under s. 1, consistent with McLachlin J.'s criticisms of the federal Act in *Taylor*.

43. With these comments about the *Taylor* decision in mind, the Attorney General turns to the analysis of the specific provisions of the Code.

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31 Code, *supra* note 2, s. 3.

32 *R. v. Keegstra, supra* note 22, pp. 861, 862.

C. Section 14(1)(b) and *The Saskatchewan Human Rights Code*

(1) The Scope of Section 14(1)(b) of the *Code*

44. The Attorney General respectfully submits that s. 14(1)(b) fully complies with the analytical framework set out by Dickson C.J.C. in *Taylor*. As well, as mentioned earlier, there are key differences between the Code and the federal Act in issue in *Taylor*, on precisely the points of concern raised by McLachlin J. in her dissent. Finally, the Attorney General submits that the amendments to the Code in the twenty years since *Taylor* have moved human right proceedings in Saskatchewan even more clearly towards the *Taylor* analysis of a civil, remedial model, in which mediation is used to resolve disputes, rather than a punitive approach. This remedial approach further strengthens the case for justifying s. 14(1)(b) under s. 1 of the *Charter*.

(2) The Meaning of "Hatred" Under Section 14(1)(b)

45. One of the key points of difference between Dickson C.J.C. and McLachlin J. in Taylor was the meaning of "hatred" in the federal Act. Dickson C.J.C. was satisfied that the concept of "hatred" was sufficiently defined and strict that it provide an objective principle that would only apply in the clearest cases. McLachlin J. disagreed, finding that the term was inherently overbroad.

46. The Attorney General submits that the subsequent decisions of the Saskatchewan Court of Appeal have demonstrated that the concept of "hatred" in s. 14(1)(b) does in fact set out a strict, objective standard. The Court's decision in *Bell* is particularly significant. Speaking for the Court, Sherstobitoff J.A. found that Dickson C.J.C.'s analysis in *Taylor* applied equally to s. 14(1)(b)'s prohibition on speech that "expresses or tends to expose to "hatred" on any of the prohibited grounds.

The wording of s. 14(1)(b), coupled with the interpretive principles set out by Dickson C.J.C., gave a clear standard which would only apply to extreme cases.[33]

47. At the same time, Sherstobitoff J.A. held that other portions of s. 14(1)(b), relating to ridicule, belittling or otherwise affronting the dignity of an individual, did not meet the strict standard set out by Dickson C.J.C. in *Taylor*. He therefore held those aspects of s. 14(1)(b) to be severable and inoperative. In reaching this conclusion, Sherstobitoff J.A. also relied upon the express provisions of the Code protecting freedom of expression, namely sections 5 and 14(2).[34]

48. The Attorney General submits that Sherstobitoff J.A.'s analysis matched that of Dickson C.J.C., by insisting that only speech which meets the strict standard of "hatred" will be caught by the section. Sherstobitoff J.A.'s analysis also responded to the concern raised by McLachlin J. in *Taylor*, in a manner reminiscent of the statutory analysis she later used in *Children's Foundation*. He also relied on the statutory protection for freedom of expression set out in the Saskatchewan Code. Sherstobitoff J.A.'s analysis thus responded to McLachlin J.'s overbreadth concern, and highlighted that the Code mandates the consideration of freedom of expression as part of the analysis, unlike the federal Act in *Taylor*.

49. In the two subsequent cases under s. 14(1)(b), *Owens* and the case under appeal, the Court of Appeal has continued to recognize the necessity for a strict standard for the meaning of "hatred", following the admonition of Dickson C.J.C. and building on the initial analysis by Sherstobitoff J.A. in

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33 *Bell, supra* note 5, paras. 27-34.

34 *Bell, supra* note 5, para. 32.

Bell. In doing so, the Court of Appeal has also responded to the overbreadth concern expressed by McLachlin J. in *Taylor*.

(3) Remedial and Civil Nature of the Code

50. In *Taylor*, Dickson C.J.C. repeatedly commented on the civil and remedial nature of human rights legislation, which is designed to protect the individual from discriminatory conduct and to prevent future infringements. Human rights legislation is not punitive in nature. Dickson C.J.C. also commented on the emphasis which human rights processes place on resolving disputes, through settlements and mediation. Dickson C.J.C. concluded that this approach supported the conclusion that the restriction on hate speech in the federal Act was justifiable under s. 1 of the *Charter*.

51. The Attorney General submits that since the decision in *Taylor*, amendments to the Code have emphasised its civil nature. In fact, two sets of amendments to the Saskatchewan Code, in 2000[35] and in 2011,[36] have brought it even more clearly within the parameters of Dickson C.J.C.'s analysis in *Taylor*, strengthening the civil nature of the *Code*. Those amendments have eliminated any possibility for imprisonment for a breach of the Code, have repeatedly strengthened the mediation and settlement aspects of the Code, and have placed extensive screening duties on the Chief Commissioner to ensure that only the clearest of cases go forward to a hearing. A further amendment provides that new complaints will be heard by the Queen's Bench, rather than by the Human Rights Tribunal. The Attorney General submits that all of these amendments are relevant to the s. 1 analysis in this case.

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35 *The Saskatchewan Human Rights Code Amendment Act, 2000*, S.S. 2000, c. 26.

36 *The Saskatchewan Human Rights Code Amendment Act, 2011*, S.S. 2011, c. 17; proclaimed in force July 1, 2011 (*Saskatchewan Gazette*, June 30, 2011, p. 1527).

(a) No Imprisonment under the Code

52. When the Code was first enacted in 1979, it contained s. 35(2), which made it an offence to contravene any provision of the *Code*.[37] At that time, s. 35(2) would have applied to breaches of s. 14, raising the possibility of a person being prosecuted for a breach of that provision.

53. However, the 2000 amendments repealed s. 35(2).[38] Contravening a substantive provision of the Code is no longer an offence. Now, the only offences are for intentional failures to comply with orders made by the Human Rights Tribunal and the courts under the authority of the *Code*. As Dickson C.J.C. noted in *Taylor*, this is a significant distinction.[39] A person who infringes s. 14(1)(b) of the Code does not commit any offence. If found liable, that person may be ordered to pay monetary compensation to the complainant, or be ordered to refrain from the discriminatory practice in the future,[40] but is not subject to penal sanctions for the infringement. Orders made by the Tribunal have been enforced in the same manner as any other civil order of the Queen's Bench,[41] as will orders made by the Queen's Bench under its new jurisdiction to hear and determine human rights complaints.[42]

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37 *The Saskatchewan Human Rights Code, supra* note 2, s. 35(2).

38 *The Saskatchewan Human Rights Code Amendment Act, 2000, supra* note 35, s. 31(2).

39 *Taylor, supra* note 1, pp. 935-936.

40 Code, *supra* note 2, s. 31.3.

41 Code, *supra* note 2, s. 33, as enacted by *the Saskatchewan Human Rights Code Amendment Act, 2000, supra* note 35; replaced by *The Saskatchewan Human Rights Code Amendment Act, 2011, supra* note 47, consequent upon abolition of Human Rights Tribunal.

42 Code, *supra* note 2, s. 31.3, as enacted by *The Saskatchewan Human Rights Code Amendment Act, 2011, supra* note 47.

54. Nor are there any fines for breaches of the substantive provisions of the Code. The Code thus differs from the current provisions of the federal Act, which now allows for administrative fines, and which in turn have been found to have taken the federal Act out of Dickson C.J.C.'s analytical framework in *Taylor*. Given that significant difference, the Attorney General submits that the decision of the Canadian Human Rights Tribunal in *Warman v. Lemire*[43] is of no relevance to this case. Saskatchewan, unlike the federal government, has amended its human rights legislation to bring it even more clearly within the *Taylor* analysis.

55. Even if a person is convicted of an offence of intentional failure to comply with an order of the Tribunal or the courts, the only sanctions are fines, as set out in s. 35(3) of the Code. Imprisonment is not one of the penalties. As well, s. 41 of the Code provides that even if a person fails to pay a fine imposed under s. 35(3), there cannot be any imprisonment in default. Section 42 in turn provides that the fine is to be collected in the same way as any other judgment in civil proceedings in the Queen's Bench.

56. The Attorney General notes that there is the possibility of civil contempt proceedings, or the general offence under the *Criminal Code* of failing to obey a court order, but those are not features of the Code itself. Those possibilities apply to all civil proceedings in the courts and are not specific to the Code. A person cannot be imprisoned for a breach of s. 14(1)(b).

57. In short, there is no possibility for imprisonment under the Code, either generally, or with specific reference to speech which infringes s. 14(1)(b). Nor are there any fines for breach of the substantive

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[43] *Warman v. Lemire*, 2009 CHRT 26, [2009] C.H.R.D. No. 26.

provisions of the Code, only for intentional failure to comply with orders made under the Code. The absence of any penal provisions in the Code is highly significant for the s. 1 analysis. The restriction set out in s. 14(1)(b) is not intended to punish, but to prevent hate speech and to provide compensation for a complainant who is injured by a breach of that provision. The Code is purely civil and remedial in nature.

58. The Attorney General thus disagrees with the analysis of Professor Moon, who has argued that the hate speech provisions of the federal Act should be repealed and hate speech henceforth governed only by the *Criminal Code*.[44] As McLachlin J. noted in *R. v. Keegstra*, the criminal law is the severest sanction our society can impose.[45] Civil and remedial measures which emphasize compensation and aim to prevent hate speech in the future, without imposing punitive sanctions, are far less intrusive on the constitutional values protected by s. 2, and thus more acceptable under s. 1 of the Charter.

(b) Mediation of Disputes

59. The 2000 amendments formally implemented mediation as an option for the Chief Commissioner to use in attempting to resolve the complaint.[46] Mediation is another civil option, intended to resolve the dispute between the parties short of an adversarial hearing. This change also recognized and strengthened the remedial nature of proceedings under the Code.

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[44] Moon, "Report to the Canadian Human Rights Commission Concerning s. 13 of the *Canadian Human Rights Act* and the Regulation of Hate Speech on the Internet," October 2008, pp. 31-33.

[45] *R. v. Keegstra, supra* note 22, p. 862.

[46] *The Saskatchewan Human Rights Code, supra* note 2, s. 28(1)(a), (b), as enacted by *The Saskatchewan Human Rights Code Amendment Act, 2000, supra* note 35, s. 22.

60. The 2011 amendments further strengthened the mediation option. Now, instead of simply recommending mediation to the parties, the Chief Commissioner has the power to require that the parties enter into mediation, prior to referring the matter to Queen's Bench for a hearing.[47] This provision is a further indication that the trend in Saskatchewan human rights emphasizes the civil, remedial nature of the Code. That approach is consistent with Dickson C.J.C.'s reasons in *Taylor*, which emphasised that the attempt to settle complaints between the parties, including through mediation, is a significant factor in the s. 1 analysis.

(c) Role of the Chief Commissioner

61. This discussion of the statutory framework leads to the next significant contextual factor to consider: the role of the Chief Commissioner. The Attorney General submits that the Chief Commissioner fulfills a significant gatekeeper function, ensuring that frivolous or unmerited complaints are weeded out. The Chief Commissioner is required to assess complaints and to dismiss unwarranted complaints. In doing so, the Chief Commissioner is required to consider the case-law of the courts interpreting the relevant provision of the *Code*.

62. This reviewing function of the Chief Commissioner is set out in s. 27.1, which was added for the *Code* in 2000. In particular, the Chief Commissioner is to consider whether the complaint is without merit (s. 27.1(2)(b)); does not raise a significant issue of discrimination (s. 27.1(2)(c)); is made in bad faith, for improper motives, or is frivolous or vexatious (s. 27.1(2)(e); or lacks a reasonable likelihood

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[47] *The Saskatchewan Human Rights Code, supra* note 2, s. 29.5(1), as enacted by *The Saskatchewan Human Rights Code Amendment Act, 2011*, S.S. 2011, c. 17, s. 13.

that an investigation will reveal evidence of a contravention of the Act (s. 27.1(2)(f)).[48] In addition, the 2011 amendments have given the Chief Commissioner a general discretion to dismiss if a hearing is not warranted, "having regard to all the circumstances" (s. 27.1(2)(g)).[49]

63. The Chief Commissioner thus has a statutory duty to investigate complaints, dismiss complaints that lack merit, and only to allow complaints to proceed which have a firm basis for a possible infringement of the *Code*. The Queen's Bench has recently held that this screening function will include consideration of the jurisprudence from the courts, interpreting the relevant provision of the *Code*.[50] This analysis is detailed in particular by sub-paragraphs 27.1(2)(b) (complaint without merit), (c) (no significant issue of discrimination), and (f) (no reasonable likelihood of evidence of a complaint).

64. In assessing these grounds for a complaint against these provisions the Chief Commissioner will have to take into account the importance of freedom of expression, as a value protected by both the *Charter* and the *Code*, as well as this court's elaboration in *Taylor* of the importance of freedom of expression. This statutory duty of the Chief Commissioner to screen all complaints, and to measure them against the relevant legal provisions, further responds to McLachlin J.'s concern in *Taylor* that hate speech provisions are overbroad.

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48 *The Saskatchewan Human Rights Code, supra* note 2, s. 27.1, as enacted by *The Saskatchewan Human Rights Code Amendment Act, 2000, supra* note 35, s. 22.

49 *The Saskatchewan Human Rights Code, supra* note 2, s. 27.1(2)(g), as repealed and replaced by *The Saskatchewan Human Rights Code Amendment Act, 2011, supra* note 47, s. 9(c).

50 *University of Regina v. Kly*, 2011 SKQB 93, para. 40.

65. The Attorney General submits that the gatekeeper role of the Chief Commissioner, as a public official acting under the *Code*, is a significant contextual factor in assessing the reasonableness of s. 14(1)(b) under the s. 1 analysis. Section 14(1)(b) does not create a free-standing civil action which any litigant can invoke in a civil action. It is a provision which can only be triggered after a thorough factual review by the Commission, and a review of the legal merits of the complaint by the Chief Commissioner.

66. The Attorney General respectfully submits that the proof of the care with which the Commission and the Chief Commissioner take their duties is shown by the fact that in the thirty-two years that s. 14 of the *Code* has been in force, there appear to have been only five complaints which have proceeded to a formal inquiry.[51]

(d) The Role of the Courts

67. One criticism which has sometimes been levelled at the human rights process, and in particular in connection with provisions such as s. 14(1)(b), is that the inquiry is held before an administrative body such as a Human Rights Tribunal, which lacks judicial independence, and which is not bound by the ordinary rules of procedure and evidence.

68. The Attorney General does not agree that the use of administrative tribunals is suspect, since there are sufficient institutional guarantees in the Code and in administrative law to ensure the independence of the Tribunal. However, the recent amendments to the *Code* render this issue moot in any event.

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[51] *McKinlay v. Dial Agencies* (1980), 1 C.H.R.R. D/246 (Sask. Bd.Inq.); *Saskatchewan (Human Rights Commission) v. Engineering Students' Society*, [1989] S.J. No. 35, 56 D.L.R. (4th) 604 (Sask. C.A.); *Saskatchewan (Human Rights Commission) v. Bell, supra* note 5; *Owens v. Saskatchewan (Human Rights Commission), supra* note 5; *Whatcott (C.A.)*, supra note 2.

69. The 2011 amendments abolished the Human Rights Tribunal and transferred the jurisdiction to hear human rights complaints to the Court of Queen's Bench.[52] All disputed human rights complaints will henceforth be heard and decided at first instance by a superior court judge, who will have the highest possible constitutional protections of judicial independence and impartiality. As well, superior court judges have the constitutional responsibility for the interpretation of constitutional values such as freedom of expression, freedom of religion, and equality. The Queen's Bench is ideally placed to determine allegations of hate speech under s. 14(1)(b) of the Code, and to balance those allegations against constitutional values such as freedom of religion and freedom of expression.

70. Henceforth, complaints under the Code will be adjudicated under the same rules as other civil proceedings. *The Queen's Bench Rules* will apply, except where modified by the Code itself.[53] The general rules of evidence set out in *The Evidence Act* will apply to the human rights hearings in the Queen's Bench, subject only to specific rules of evidence set out in the *Code* itself, such as the rule governing evidence of a pattern of discriminatory conduct.[54]

71. Finally, the 2011 amendments have broadened the right of appeal. Instead of being restricted to appeals on questions of law alone, as is currently the case, appeals will be under the general right of appeal to the Court of Appeal which includes questions of fact and questions of mixed fact and law.

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52 *The Saskatchewan Human Rights Code, supra* note 2, s. 29.6, 29.7, as enacted by *The Saskatchewan Human Rights Code Amendment Act, 2011, supra* note 47, s. 13.

53 *The Saskatchewan Human Rights Code, supra* note 2, s. 29.7(3), as enacted by *The Saskatchewan Human Rights Code Amendment Act, 2011, supra* note 47, s. 13.

54 *The Evidence Act*, S.S. 2006, c. E-11.2, s. 3; *The Saskatchewan Human Rights Code, supra* note 2, s. 29.7(4), as enacted by *The Saskatchewan Human Rights Code Amendment Act, 2011, supra* note 47, s. 13.

Broadening the scope of the appeal provides further protections for litigants, by ensuring that the Court of Appeal is able to consider all issues raised by the case, by the same rules as in other civil proceedings.[55]

D. Application of *Taylor* to Freedom of Religion Claims

72. The *Taylor* case only dealt with the issue of freedom of expression under s. 2(b) of the *Charter*. In this case the Respondent Whatcott challenges s. 14(1)(b) under both s. 2(b) (freedom of expression) and also under s. 2(a) (freedom of religion).

73. The Attorney General submits that the s. 1 analysis in *Taylor* applies equally to claims under s. 2(a) and s. 2(b). This very point arose in the *Owens* case in the Saskatchewan Court of Appeal. Speaking for the Court, Richards J.A. held that the Taylor analysis applied to both aspects:

> The Constitution protects all dimensions of freedom of religion. However, it also accommodates the need to safeguard citizens from harm and to ensure that each of them has non-discriminatory access to education, employment, accommodation and services. In situations where religiously motivated speech involves injury or harm to others, it is necessarily subject to reasonable limitations. As a result, s. 14(1)(b) is a justifiable limit on religiously inspired speech in effectively the same way as it is a justifiable limit on speech generally. See: *Ross v. New Brunswick School District No. 15*, 1996 CanLII 237 (S.C.C.), [1996] 1 S.C.R. 825.[56]

74. The Attorney General adopts Richards J.A.'s analysis. Under the principles set out in *Taylor*, the s. 1 justification applies to both the challenge to s. 14(1)(b) under s. 2(b), and to the challenge under s. 2(a).

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55 *The Saskatchewan Human Rights Code, supra* note 2, s. 32, as enacted by *The Saskatchewan Human Rights Code Amendment Act, 2011, supra* note 47, s. 19.

56 *Owens, supra* note 5, para. 57.

E. *Taylor* is Still Good Law

75. The Respondent Whatcott seeks to have s. 14(1)(b) declared unconstitutional. As argued above, the Attorney General submits that the *Taylor* decision is a complete answer to the constitutional challenge. In order to succeed, the Respondent Whatcott must persuade this Court to overturn its own decision in *Taylor*. The Attorney General submits that there is no basis to do so.

76. First and foremost, the rationale for the legislation remains as compelling today as it was in 1990. Dickson C.J.C.'s statement of the harm posed by hate speech, to both individuals and to society as a whole, remains compelling. So too do Canada's international obligations, as well as the more recent recognition by this Court that the protection of minorities is a fundamental constitutional principle.

77. Second, mere dissatisfaction by a litigant with this Court's previous decision is not sufficient to warrant overruling it. The fact that some parties and segments of society disagree with the Court's decision is not sufficient to justify a change.

78. Third, as argued above, there are several differences between the federal Act in issue in *Taylor*, and the Saskatchewan Code. The provisions of the Code respond to the criticisms of the federal Act expressed by McLachlin J. in *Taylor*. The Code is thus consistent with both Dickson C.J.C.'s analysis, and the comments by McLachlin J.

79. Fourth, the amendments to the Saskatchewan Code have brought it even more firmly within the civil, remedial model favoured by Dickson C.J.C. This is not a case where the Legislation has departed from this Court's constitutional framework, as has been held to have happened with respect to the federal

Act.[57] Rather, the amendments have consistently moved the Code's provisions towards this Court's constitutional analysis.

80. Fifth, this Court has provided a clear, strict standard for the interpretation of hatred speech provisions. Subsequent cases in Saskatchewan have shown that the courts are able to use this Court's interpretation in a workable fashion.

81. Finally, the Respondent Whatcott did not call any evidence before the Tribunal to suggest that this Court's s. 1 analysis in *Taylor* was flawed. This Court has repeatedly held that evidence is crucial for supporting a s. 1 justification. The Attorney General submits that once this Court has ruled in a s. 1 issue and upheld a statutory provision, the onus is on the party challenging the decision subsequently to provide at least some evidence suggesting the matter should be reconsidered. Here, none has been provided.

F. Conclusion

82. In conclusion, the Attorney General submits that *Taylor* remains good law. Section 14(1)(b) of the Saskatchewan Code is consistent with the analysis of Dickson C.J.C., and the contextual framework of the Saskatchewan Code responds to McLachlin J.'s concerns. Amendments to the Code have increasingly moved it towards the remedial model accepted by Dickson C.J.C. Section 14(1)(b) is constitutionally valid.

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57 *Warman v. Lemire, supra* note 43, para. 290.

PART IV

COSTS

83. The Attorney General participates in this appeal solely to defend the constitutionality of s. 14(1)(b) of the *Code* and does not take a position on the ultimate disposition of the appeal. Pursuant to the usual practice, the Attorney General does not seek costs, and submits that he should not be liable for costs.

PART V

ORDER SOUGHT

84. The Attorney General submits that this Court should rule that s. 14(1)(b) of *The Saskatchewan Human Rights Code* is constitutionally valid.

85. The Attorney General does not take any position on whether the pamphlets in issue in this appeal did in fact infringe s. 14(1)(b) of the *Code*, and thus does not take any position on the ultimate disposition of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED on July _____ , 2011, at Regina, Saskatchewan.

Thomson Irvine
Counsel for the Attorney General

PART VI

TABLE OF AUTHORITIES

STATUTES

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PART VIII

STATUTES

The Saskatchewan Human Rights Code, S.S. 1979, c. S-24.1