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 CANADA, ATTORNEY GENERAL FOR SASKATCHEWAN and ATTORNEY GENERAL FOR ALBERTA

INTERVENERS

FACTUM OF THE COALITION, COMPRISED OF: FEDERATION OF SASKATCHEWAN INDIAN NATIONS, ASSEMBLY OF FIRST NATIONS, AND METIS NATION – SASKATCHEWAN, INTERVENERS

MCKERCHER LLP
374 Third Avenue South
Saskatoon, SK S7K 1M5

David Stack
Tel: (306) 653-2000
Fax: (306) 653-2669
Email: d.stack@mckercher.ca

Counsel for the Interveners,
Assembly of First Nations
Federation of Saskatchewan Indian Nations
Métis Nation – Saskatchewan

GOWLING LAFLEUR HENDERSON LLP
Suite 2600, 160 Elgin Street
Ottawa, ON K1P 1C3

Henry S. Brown, Q.C.
Tel: (613) 233-7181
Fax: (613) 563-9869
Email: henry.brown@gowlings.com

Agent for the Interveners,
Assembly of First Nations
Federation of Saskatchewan Indian Nations
Métis Nation - Saskatchewan

SCHARFSTEIN GIBBINGS WALEN FISHER LLP
500, 100 Second Avenue South
Saskatoon, SK S7K 1M6

Grant J. Scharfstein, Q.C.
Deidre L. Aldcorn
Tel: (306) 653-2838
Fax: (306) 652-4747
Email: lawyers@scharfsteinlaw.com

THE SASKATCHEWAN HUMAN RIGHTS COMMISSION
816, 122 Third Avenue North
Saskatoon, SK S7K 2H6

Janice E. Gingell
Tel: (306) 933-5956
Fax: (306) 933-7863
Email: Janice.Gingell@gov.sk.ca

Co-Counsel for the Appellant, The Saskatchewan Human Rights Commission

MCMILLAN LLP
Lawyers – Patent & Trade Mark Agents
Suite 300, 50 O'Connor Street
Ottawa, ON K1P 6L2

Eugene Meehan, Q.C.
Marie-France Major
Tel: (613) 232-7171 Ext: 132
Fax: (613) 231-3191
Email: eugene.meehan@mcmillan.ca

Agents for the Appellant, The Saskatchewan Human Rights Commission

NSWB LAW FIRM P.C. INC.
319 Souris Avenue Northeast, Box 8
Weyburn, SK S4H 2J8

Thomas A. Schuck
Tel: (306) 842-4654
Fax: (306) 842-0522
Email: tschuck@nswb.com

Counsel for the Respondent, William Whatcott

VINCENT DAGENAIS GIBSON LLP
325 Dalhousie Street, Suite 600
Ottawa, ON K1N 7G2

Albertos Polizogopoulos
Tel: (613) 241-2701
Fax: (613) 241-2599
Email: albertos@vdg.ca

Agent for the Respondent, William Whatcott

MINISTRY OF JUSTICE & ATTORNEY GENERAL
Constitutional Law Branch
800 – 1874 Scarth Street
Regina, SK S4P 4B3

J. Thomson Irvine
Tel: (306) 787-6307
Fax: (306) 787-9111
Email: tom.irvine@justice.gc.ca

Counsel for the Intervener,
Attorney General of Saskatchewan

GOWLING LAFLEUR HENDERSON LLP
2600 – 160 Elgin St.
P.O. Box 466, Stn "D"
Ottawa, ON K1P 1C3

Henry S. Brown, Q.C.
Tel: (613) 233-1781
Fax: (613) 788-3433
Email: henry.brown@gowlings.com

Agent for the Intervener,
Attorney General of Saskatchewan

ATTORNEY GENERAL OF CANADA
Bank of Canada Building – East Tower
234 Wellington Street, Room 1212
Ottawa, ON K1A 0H8

Christopher M. Rupar
Tel: (613) 941-2351
Fax: (613) 954-1920
Email: Christopher.rupar@justice.gc.ca

Counsel for the Intervener,
Attorney General of Canada

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PART I – OVERVIEW

1. The Federation of Saskatchewan Indian Nations ("FSIN"), Assembly of First Nations ("AFN"), and Métis Nation – Saskatchewan ("MNS") (collectively referred to as the "Coalition") submissions will begin with a description of the pressing need for s. 14(1)(b) of *The Saskatchewan Human Rights Code,*[1] with reference to international law and the historic mistreatment of Canadian Aboriginal peoples. The Coalition will then address concerns with the contextual analysis of the Court of Appeal, including the concerns that the Judgment could be read to protect hate speech on the basis that it can already be found in the public debate or on the basis that the speech is couched in moral/religious terms. The Coalition's submissions will conclude with a proposal for a purposive contextual analysis under s. 14(1)(b) guided by a concern to protect the societal dignity of target groups.

PART II – QUESTION IN ISSUE

2. The Coalition will address those issues raised by the Appellant that directly impact those groups represented by the Coalition. The Coalition's submissions will focus on the aspects of these issues as identified in the above overview.

PART III – ARGUMENT

A. The Pressing Need For s. 14(1)(b) - The First Nation and Métis Experience

3. The historical experience of Aboriginal peoples and the lingering hatred directed at these peoples demonstrates that there is a pressing need for this legislation. This history also demonstrates that the most damaging hate rhetoric can be "moral" and "political" discourse that invites hatred/destruction of a people or their way of life.

4. The Royal Commission on Aboriginal Peoples ("RCAP") provided a detailed account of the assimilationist policy of obliterating Aboriginal cultures and ways of life.[2] This policy was developed out of pervasive racist social beliefs, often well intentioned, which posited the inferiority and incapacity of these peoples and called for a dismantling of Aboriginal ways of

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[1] S.S. 1979, c. S-24.1 ("the Code").
[2] See *Report of the Royal Commission on Aboriginal Peoples*, Vol. 1 (Ottawa: Canada Communication Group, 1996) ["*RCAP*"] at p. 179.

life.[3] These were not the views of a fringe group. The rhetoric formed part of the public discourse of politicians and was at times cloaked in moral and religious terms.[4] These racist views were ultimately inserted into public policy and were employed in a manner that attacked the ritual life, social organization and the economic practices of First Nations and Métis communities.[5] Hatred of Aboriginal ways of life became so imbued in society that Aboriginal people spent "years of being taught to hate themselves and their culture".[6] Unchecked hate propaganda can achieve no better success than when it is allowed to become pervasive enough to convince some of the target group to hate themselves.

5. While official policies have changed, RCAP importantly noted that the public debate over the issues and rights of Aboriginal people "has reflected and continues to reflect the abiding prejudices of earlier eras."[7] The effects of this historic hatred continue to pervade society, including areas like the administration of justice, as noted by a variety of Commission reports. The Manitoba judicial inquiry into the deaths of Helen Betty Osborne and John Joseph Harper observed unacceptable levels of racism and hatred *within* the justice system, including very strong racist statements about Aboriginal people.[8] The Royal Commission on the Donald Marshall, Jr. Prosecution in Nova Scotia found that his race was an integral element in the abuse of process inflicted on him.[9] The Coalition submits that the history of Métis and First Nations peoples demonstrates how pervasive and unchecked hate propaganda can have devastating and lingering results for a target group. These results prejudice core connections between the target

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[3] "Indian people have been depicted as savage and untutored, wretched creatures in need of the civilizing influences of the new arrivals from Europe": *RCAP*, *ibid.* at 259-260.

[4] Sir J.A. Macdonald informed Parliament of Canada's goal "to do away with the tribal system and assimilate the Indian people": *RCAP*, Volume 1, p. 179. Deputy Superintendent General of Indian affairs, Duncan Campbell Scott, assured Parliament in 1920 that "Our object is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic and there is no Indian question": *RCAP*, *supra* note 2 at 181-183.

[5] *RCAP*, *ibid.* at 185-186. Justice Abella noted: "children were forcibly removed and segregated from their families to facilitate the obliteration of their Aboriginal identify": *E.B. v. Order of the Oblates of Mary Immaculate in the Province of British Columbia*, [2005] 3 S.C.R. 45, 2005 SCC 60 at para. 72.

[6] *RCAP*, *supra* note 2 at 379; and also "The common wisdom of the day ... was that Aboriginal children had to be rescued from their 'evil surroundings', isolated from parents, family and community...By a curriculum aimed at radical cultural change — the second critical element of the vision — the 'savage' child would surely be re-made into the 'civilized' adult": *RCAP*, *supra* note 2 at 339.

[7] *Ibid.* at 250.

[8] Public Inquiry into the Administration of Justice and Aboriginal People, Report: The Deaths of Helen Betty Osborne and John Joseph Harper, vol. 2 (Winnipeg: Queen's Printer, 1991) (Commissioners: Hamilton & Sinclair) <http://www.ajic.mb.ca/volumell/toc.html>.

[9] Nova Scotia, Royal Commission on the Donald Marshall, Jr., Prosecution: Report (Halifax: McCurdy's Printing and Typesetting, December, 1989) (Chair: T.A. Hickman). In *R. v. Gladue*, [1999] 1 SCR 688, this Honourable Court cited the years of discrimination suffered by Aboriginal people and the numerous commission reports that have concluded that the justice system has failed Aboriginal people.

group and society, such as education and the administration of justice, and can chronically undermine the dignity of the target group within society.

B. The United Nations Declaration on the Rights of Indigenous Peoples

6. The history of hate against Aboriginal peoples in Canada, and toward Indigenous peoples in other States, has led the international community to develop a commitment to prevent racism against Indigenous peoples. On November 12, 2010, Canada endorsed the United Nations Declaration on the Rights of Indigenous Peoples (the "Declaration").[10] The Declaration acts as a guide and framework for Aboriginal peoples, Canadian governments, and all Canadians to work together in ways that respect and implement Indigenous rights and Treaty rights.

7. A number of authorities have confirmed that international norms, like the Declaration, are important guides to consider when evaluating the scope of human rights and aboriginal rights.[11] As Chief Justice McLachlin observed:

> More recently, emerging international norms have guided governments and courts grappling with aboriginal issues. Canada, as a respected member of the international community, cannot ignore these new international norms any more than it could sidestep the colonial norms of the past.[12]

8. In the context of international human rights instruments, Chief Justice Dickson wrote:

> Since the close of the Second World War, the protection of the fundamental rights... has become a matter of international concern. A body of treaties (or conventions) and customary norms now constitutes an international law of human rights under which the *nations of the world have undertaken to adhere to the standards and principles necessary for ensuring freedom,* ***dignity*** *and social justice for their citizens*...The various sources of international human rights law--declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, customary norms--must, in my opinion, *be relevant and persuasive sources for interpretation of the Charter's provisions.*

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[10] Indian and Northern Affairs Canada, Media Release, "Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples" (12 November 2010), online <http://www.ainc-inac.gc.ca/ap/ia/dcl/stmt-eng.asp>.

[11] For example, see *Mitchell v. MNR*, 2001 SCC 33, [2001] 1 S.C.R. 911 at para. 81; J. Hartley, P. Joffe & J. Preston, eds., *Realizing the UN Declaration on the Rights of Indigenous Peoples: Triumph, Hope, and Action* (Saskatoon, SK: Purich Publishing Limited, 2010) ["*Realizing the UN Declaration*"]; *Reference re Public Service Employee Relations Act*, [1987] 1 S.C.R. 313 at 348 ["*Reference re PSERA*"].

[12] Beverly McLachlin, "Aboriginal Rights: International Perspectives" (Speech delivered at the Order of Canada Luncheon, Canadian Club of Vancouver, 8 Feb. 2002), quoted in *Realizing the UN Declaration*, *supra* note 10 at 72.

> *...the Charter should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents.*[13]

This approach to international instruments was followed in *R v Keegstra.*[14] Accordingly, international norms, including the Declaration, are a relevant and persuasive factor to be taken into consideration when considering Charter and human rights issues.

9. Importantly, the Declaration includes a fundamental responsibility on States to enact human rights laws that *prevent* and redress propaganda that incites racial hatred:

> 2. States shall provide effective mechanisms for prevention of, and redress for:
>
> (e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them. (Article 8)

10. This international norm, and other elements of international law[15] related to hate propaganda, provides compelling support for the pressing and substantial objective underlying s. 14(1)(b). Aboriginal peoples and other target groups should enjoy at least as much protection from Saskatchewan human rights law as they do according to international law.

11. Furthermore, a civil remedy is an integral part of the effective mechanism contemplated by the Declaration. Section 14(1)(b) does not depend on state prosecution in the same manner as the criminal justice system – a system, as noted above, that has itself failed Aboriginal peoples. Furthermore, it was the assimilationist policy that for too long wrongfully asserted that Aboriginal peoples could not pursue their own rights and that the state must "protect" Aboriginal peoples. Saskatchewan Aboriginal groups should be entitled to bring complaints to assert their own human rights without reliance on criminal prosecution.

C. Concerns with aspects of the Saskatchewan Court of Appeal's Judgment

12. The Coalition is concerned that the Court of Appeal's Judgment may render s. 14(1)(b) an ineffective remedy in preventing and redressing hate propaganda.

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[13] *Reference re PSERA*, *supra* note 11 at p. 348-49. Emphasis added.

[14] *R v. Keegstra* [1990] 3 S.C.R. 697. See also, Anne Warner La Forest, "Domestic Application on International Law in Charter cases: Are We There Yet?" (2004), 37 UBC L. Rev. 157-218.

[15] See Stephanie Farrior, "Molding The Matrix: The Historical and Theoretical Foundations of International Law Concerning Hate Speech" (1996), 14 Berkeley J. Int'l L. 1 ["Farrior"]

13. On the specific issue that "Public Debate Does Not Insulate Hate Expression," as characterized in the Appellant's factum, the Coalition submits that the historic perspective of First Nations and Métis communities provides an important example of why a remedy against hate propaganda should not be denied simply because such hate is extant in the public debate. RCAP noted that the historical assimilationist policies of Canada were preceded by very public and political rhetoric by important public figures that caused Canadians to view it as their "national duty" to "civilize" Aboriginal peoples.[16] First Nations and Métis peoples did not have a remedy to redress this rhetoric, and, therefore, the hatred of Aboriginal cultures and ways of life found its way into public policy. Thus, far from justifying hate rhetoric, the Coalition submits that the historic effects of unfettered hate rhetoric in public debate may in fact underline the need for targeted groups to have a remedy *before* hatred becomes legitimized in the political process. [17]

14. On the "Morality Is Not A Contextual Factor", "Intention of the Publisher", and "Love the Sinner, Hate the Sin" issues raised in the Appeal, the Coalition argues that history demonstrates that "morality-based" racist rhetoric can have a devastating impact on the targeted group. Citizens must be free to practice and espouse their faiths, but moral, political or religious beliefs cannot justify rhetoric that incites hate. The rhetoric underlying the assimilationist policy was based on a drastically misplaced sense of moral and religious duty.[18] This moral dimension did not lessen the impact on those who suffered as a result. The hatred and suppression of the ritual life and the social organizations and practices of First Nations and Métis communities was, notwithstanding "moral" intentions, hatred and suppression of Aboriginal peoples.

15. Justice Neave of the Supreme Court of Victoria, Court of Appeal provided a persuasive analysis of the sin versus the sinner argument in a religious hate speech case:

> ...[T]he fact that a person is a Muslim may be portrayed by some and seen by others as a characteristic which determines their identity. Attributing characteristics to people on the basis of their group membership is the essence of racial and religious prejudice and discrimination which flows from it.
>
> ...

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[16] *RCAP*, *supra* note 2 at p. 179 and see above references.

[17] There are, sadly, international examples that make this point: William A. Schabas, "Hate Speech in Rwanda: The Road to Genocide" (2000), 46 McGill L.J. 141-171.

[18] *RCAP Report*, *supra* note 2 at p. 179

> ...[i]t was open to the Tribunal to regard statements attacking Muslim belief as capable of inciting reactions of severe contempt, revulsion or serious ridicule of Muslim persons.[19]

16. As noted by Ian McKenna, a difficulty with the current approach to hate speech laws is that it is often assumed that only an extreme peripheral segment of society represents the problem.[20] This can result in an analysis that ultimately evaluates whether the publisher sits on one side or the other of a line of fringe extremism. This is a relative analysis that depends on the current state of public debate and awareness. Such an analysis invariably results in toleration of hate language that is already entrenched in society or the public debate, as language that already pervades society is less likely to be perceived as extreme or fringe views or to contain the same level of "vilification" as those hate messages that are not already prevalent in society. This leads to absurd outcomes; eg. if a group is already the subject of prevalent vilification in the political/public/moral debate, then this group will receive less protection from hate rhetoric than those who have been less publicly vilified in the past.

17. Unfortunately, the Court of Appeal Judgment could be perceived as suffering from this weakness.[21] The Court recognized that so long as there are those who oppose same sex practices "there might never be an end to this debate". The Court went on to indicate that the rhetoric of these objectors should be scrutinized on the basis of "a continuum of expression" with the important qualifications that "there will be a relatively high degree of tolerance for the language used in debates about moral issues" and "on the morality of behaviour". The difficulty with this approach is that hate mongers who oppose same sex practices are able to gain for their hate rhetoric a higher degree of tolerance through persistently and publicly categorizing same sex practices as a moral issue. The legislation was intended to address all hate messages, including the pervasive messages that have already infected the public/moral debate and, in some cases, public policy.

18. Similarly, the search for political, artistic, and scientific truth and the concept of the marketplace of ideas should not result in any special tolerance or protection for hate rhetoric.

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[19] *Catch the Fire Ministries Inc v Islamic Council of Victoria Inc*, [2006] VSCA 284 (Vic. Sup. Ct., Court of Appeal) at para. 77. Justice Nettle was more incined to view a distinction between hatred of practice and hatred of the group.
[20] Ian B. McKenna, "Canada's Hate Propaganda Laws - A Critique" (1994), 26 Ottawa LR 159 ["McKenna"].
[21] See especially paragraphs 62-64, 2010 SKCA 26

International sources suggest that there is an implicit weakness in applying the "marketplace of ideas" theory to protect hate propaganda. As noted by U.N. Special Rapporteur, Danilo Türk, a society that permits hate rhetoric may very well be ensuring survival of the hate-filled views emanating from the most powerful sectors of society, as the less powerful struggle to express their views in defence of hate-filled onslaughts.[22] Furthermore, as Stephanie Farrior noted, international law theory rejects "the notion that racist speech must be protected so as not to hinder the discovery of the Truth", as "[t]he bedrock of the international law on hate speech is the belief that there is indeed a wholly unacceptable ideology, one that is not deserving of legal protection: that discrimination on the basis of race, sex, and other prohibited grounds."[23] Hate propaganda, therefore, has no value under international law and merits prohibition.

19. Any prohibition of hate rhetoric must, however, be effective to meet international law standards. Richard Moon's recommendation that "censorship" of hate speech "should be limited to speech that explicitly or implicitly threatens, justifies or advocates violence against the members of an identifiable group"[24] does not meet international standards. The decades of cultural violence inflicted on Aboriginal peoples would not have been effectively, or remotely, addressed by the mechanism advocated by Professor Moon. International sources also conflict with the recommendation of Richard Moon that criminal law should exclusively handle hate speech. Indeed, the United Nations Special Rapporteurs on Freedom of Opinion and Expression raised questions in their report as to whether there may be better forums for addressing hate propaganda than the criminal process, on the basis of proportionality concerns. They wrote "that resort to criminal penalties - accompanied by the reservations just expressed - should form part of a comprehensive policy which *gives priority to the educational and preventive approach.*"[25] As noted below, a civil remedy such as s. 14(1)(b) is intended to play a preventive role so that the violence suffered by target groups in the past is prevented in the future.

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[22] Cited in *Farrior, supra* note 15 at p. 95.
[23] *Ibid.* at p. 97.
[24] Richard Moon, "Report to the Canadian Human Rights Commission Concerning Section 13 of the *Canada Human Rights Act* and the Regulation of Hate Speech on the Internet" (October 2008), online <http://www.chrc-ccdp.ca/pdf/moon_report_en.pdf> at 42.
[25] *The Right to Freedom of Opinion and Expression: Current Problems of Its Realization and Measures Necessary for Its Strengthening and Promotion: Final Report*, prepared by Mr. Danilo Turk and Mr. Louis Joinet, Special Rapporteurs, E/CN.4/Sub.2/1992/9 (14 July 1992) at para. 149. Emphasis added. This report is also cited and discussed in *Farrior, supra* note 15 at p. 92.

D. Purposive Approach to Section 14(1)(b)

20. It is respectfully submitted that the analysis under s. 14(1)(b) should be guided by the remedial purpose of the *Code*. The main purpose of the *Code* is set out in s. 3, which informs the purpose and intended effect of s. 14(1)(b):

> 3 The objects of this Act are:
>
> (a) to promote recognition of the *inherent dignity* and the equal inalienable rights of all members of the human family; and
>
> (b) to further public policy in Saskatchewan that every person is free and *equal in dignity* and rights and to discourage and eliminate discrimination.
>
> ...
>
> 14(1) No personal shall publish or display...representation:
>
> (b) that exposes *or tends to expose* to hatred, ridicules, belittles or *otherwise affronts the dignity* of any person or class of persons on the basis of a prohibited ground.[26]

It is submitted that the concept of "dignity" is the underlying and governing principle in both ss. 3 and 14(1)(b). A society that is honestly committed to the promotion of dignity can never tolerate hate rhetoric, because hate rhetoric undermines the dignity of the target group. Hate rhetoric does so by positing a society where target groups are treated inferior and by inciting others to help fashion such a society. As a consequence, it has been settled internationally "that hate propaganda restrictions are a necessary step to achieve the most fundamental aspects of those instruments: non-discrimination and respect for the dignity of every human person."[27]

21. As noted by Ron Levy,[28] the concept of harm to dignity has been incorporated in many Canadian human rights judgments.[29] Ishani Maitra and Mary Kate McGowan argued that hate speech is as at least as worthy of regulation as other regulated expressions because the messages conveyed are aimed at inciting social changes that mark the target group as socially inferior and

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[26] The Code, *supra*, note 1. Emphasis added.
[27] *Farrior, supra* note 15 at p. 97
[28] Ron Levy, "Expressive Harms and the Strands of Charter Equality: Drawing Out Parallel Coherent Approaches to Discrimination" (2002), 40 Alta. L. Rev. 393-416 ["Levy"].
[29] See Levy, *ibid.* at para. 22, for a summary of Lamer C.J.C.'s articulation of the concept of dignity from *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 SCR 519, and Sopinka J, writing for the majority in *Rodriguez*, stated: "That respect for human dignity is one of the underlying principles upon which our society is based is unquestioned."

that legitimates discrimination against the group.[30] Stephanie Farrior, in analysing the development of hate speech regulation in international law, observed that it is an abuse of speech rights for hate mongers to "seek a society of discrimination where they are the dominant group," and that international law has developed the concept that "[s]ince hate mongers aim to deprive members of the target group of their right to non-discrimination, their hate speech may be prohibited."[31]

22. Similarly, under Saskatchewan law, the commitment to dignity forecloses any room for hate propaganda. The analysis of the contextual factors under s. 14(1)(b) should therefore be guided by concern for preventing such attacks on the dignity of target groups. Under this purposive and preventive approach hate propaganda will not escape scrutiny because: i. the message it conveys is already pervasive in the public; ii. the hate is framed in moral or religious terms, or iii. the message expresses hatred of a characteristic of the group rather than of the group directly. Indeed, an analysis guided by concern for protecting the dignity of the target group will recognize that such hate messages can be the most harmful kinds of propaganda. It is also respectfully submitted that in a s. 14(1)(b) contextual analysis, particular scrutiny should be applied to hate messages directed at fundamental or core connections between the target group and society. History confirms that hate rhetoric must be expediently arrested when its messages encourage deprivation of a target group's involvement and treatment in fundamental civic areas, such as: the justice system, education, the political process, and employment.

23. If Saskatchewan is to meet international standards in preventing and redressing hate propaganda, a purposive approach to s. 14(1)(b) is essential. The human rights process allows for much greater opportunities to fashion educational and preventive remedies, which is consistent with the "comprehensive policy" approach recommended by the U.N. Special Rapporteurs. Furthermore, contrary to the position of Professor Moon, the obligation of international law is not limited to preventing incitement of violence. The obligation is to tackle hate messages that undermine the dignity of the target group with the purpose of stopping such messages from causing lasting and devastating harm.

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[30] Ishani Moitra and Mary Kate McGowan, "On Racist Hate Speech and the Scope of a Free Speech Principle" (2010), 23 Can. J. L. & Juris. 343-372, see particularly paragraphs 86 to 105.
[31] *Farrior*, *supra* note 15 at p. 98.

24. Hateful rhetoric and outright lies continue against the Aboriginal peoples in Canada, and the destinies of these peoples remains a hostage of hate. As noted by RCAP, the public discussion "as recent as the debates of the last decade about Aboriginal self-government — has reflected and continues to reflect the abiding prejudices of earlier eras."[32] RCAP observed that "derision or contempt may well undermine the self-respect of people" and "jeopardizes their ability to participate as active members of their communities and to function effectively as autonomous individuals in work and private life."[33] There is no legitimate juridical reason why any person or group should be subjected to such abuse, and no person or group need any longer suffer such abuse - if Canadian human rights law fully endorses the importance of promoting and protecting dignity.

E. Conclusion

25. There is a pressing and substantial objective underlying s. 14(1)(b); an objective that is confirmed by international law and by the historic mistreatment of Canadian Aboriginal peoples. The most damaging hate rhetoric can be found in the public debate and characterized in moral and religious terms. The contextual analysis under s. 14(1)(b) should be guided by a concern to protect the dignity of target groups and to prevent hate messages from pervading modern society.

PART IV – SUBMISSIONS CONCERNING COSTS

26. The Coalition submits that it should neither receive nor pay costs in this appeal.

PART V – ORDER SOUGHT

27. The Coalition adopts the submissions of the Appellants.

ALL OF WHICH IS RESPECTFULLY SUBMITTED:

August 2, 2011

DAVID STACK
Counsel for Federation of Saskatchewan Indian Nations, Assembly of First Nations, and Métis Nation – Saskatchewan

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[32] *RCAP, supra* note 2 at p. 250.
[33] *Ibid.* at p. 681.

PART VI – TABLE OF AUTHORITIES

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PART VII – STATUTES

Statute

Relevant Provisions of:

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

Objects

3 The objects of this Act are:

(a) to promote recognition of the inherent dignity and the equal inalienable rights of all members of the human family; and

(b) to further public policy in Saskatchewan that every person is free and equal in dignity and rights and to discourage and eliminate discrimination.

Prohibitions against publications

14(1) No personal shall publish or display, or cause or permit to be published or displayed, on any lands or premises or in a newspaper, through a television or radio broadcasting station or any other broadcasting device, or in any printed matter or publication or by means of any other medium that the person owns, controls, distributes or sells, any representation, including any notice, sign, symbol, emblem, article, statement or other representation:

(a) tending or likely to tend to deprive, abridge or otherwise restrict the enjoyment by any person or class of persons, on the basis of a prohibited ground, of any right to which that person or class of persons is entitled under law; or

(b) that exposes or tends to expose to hatred, ridicules, belittles or otherwise affronts the dignity of any person or class of persons on the basis of a prohibited ground.

(2) Nothing in subsection (1) restricts the right to freedom of expression under the law upon any subject.