

**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 -

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AND ACTION FUND**

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**FACTUM OF THE INTERVENER
CANADIAN HUMAN RIGHTS COMMISSION
Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada***

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PART I – OVERVIEW AND STATEMENT OF FACTS

Overview

1. Dealing with hate propaganda presents a challenge for human rights law in Canada. On the one hand, both Canadian and International law protect freedom of expression as a foundational piece to a democratic state based on individual freedom and the rule of law. On the other hand, our legal system recognizes and enshrines the equality and dignity of human beings and prohibits discrimination on the basis of race, religion, sexual orientation and other grounds. The delicate and essential balance between these fundamental rights and freedoms is at issue in this appeal.

2. The Canadian Human Rights Commission (the "Canadian Commission") intervenes in this appeal because section 13(1) of its enabling legislation, the *Canadian Human Rights Act*¹, is analogous to the provision here at issue, section 14(1)(b) of the *Saskatchewan Human Rights Code*.² Section 13(1) of the *CHRA* prohibits repeated communications, by means of federal telecommunications undertakings, that are “likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination.” Section 14(1)(b) of the *Code* prohibits the publication or display of any representation 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.”

3. A majority of this Court upheld the constitutionality of section 13(1) of the *CHRA* in its 1990 decision in *Canada (Human Rights Commission) v. Taylor*.³ The Canadian Commission submits that the conclusions reached in that decision apply with equal vigour today, and point to a finding that the analogous provisions in section 14(1)(b) of the *Code* are similarly valid.

¹ *Canadian Human Rights Act*, S.C. 1985, c. H-6 [*CHRA*].

² *Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1 [*Code*].

³ *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892 [*Taylor*], (Canadian Commission Book of Authorities (“BA”) **Tab 1**).

4. In these submissions, the Canadian Commission draws on *Taylor* to make the following two points in support of the proposition that any infringing aspects of section 14(1)(b) of the *Code* are justified in a free and democratic society: (i) Both international and Canadian human rights law recognize that there is no hierarchy of rights and that freedom of expression and religion must be balanced with the right to equality; and (ii) Canadian human rights law achieves this balance by limiting only the most extreme forms of messages: those that dehumanize by suggesting that an entire group of persons identified by a prohibited ground of discrimination is devoid of any redeeming qualities as human beings.

Facts

5. The Canadian Commission relies on the facts as set out by the parties, and takes no position on any facts that may be in dispute.

PART II – QUESTIONS IN ISSUE

6. The Canadian Commission accepts that section 14(1)(b) of the *Code* infringes section 2(b) of the *Canadian Charter of Rights and Freedoms*,⁴ and is prepared to assume for the purposes of this intervention that it infringes section 2(a) of the *Charter* as well. However, the Canadian Commission submits that any such infringements are reasonable limits prescribed by law that can be demonstrably justified in a free and democratic society under section 1 of the *Charter*.

7. The Canadian Commission takes no position herein on the question of whether section 14(1)(b) of the *Code*, properly interpreted, would apply to the particular flyers that were created and distributed by the Respondent.

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

PART III – STATEMENT OF ARGUMENT

(A.) Freedom of expression and religion must be balanced with the right to equality.

In Canadian law

8. Freedom of expression, freedom of religion and the right to equality are all protected under the *Charter*, respectively at sections 2(b), (a) and 15. This Court has confirmed that there is no hierarchy of *Charter* rights, with some rights of more importance than others. Instead, when the protected rights of individuals are in competition, *Charter* principles require that a balance be achieved that fully respects the importance of both sets of rights.⁵

9. The prohibition of hate propaganda gives rise to a competition between freedom of religion and expression on the one hand, and the equality rights of individuals on the other. In such circumstances, courts must resolve the issue, either by “reconciling” the rights alleged to conflict, or by “balancing” the competing interests at stake under section 1 of the *Charter*. In either case, decision-makers are to proceed on the basis that no one *Charter* right is absolute and presumed to trump any other. As this Court has stated:

[...] The collision between rights must be approached on the contextual facts of actual conflicts. The first question is whether the rights alleged to conflict can be reconciled: *Trinity Western University v. British Columbia College of Teachers*, [2001] 1S.C.R. 772, 2001 SCC 31, at para. 29. Where the rights cannot be reconciled, a true conflict of rights is made out. In such cases, the Court will find a limit on religious freedom and go on to balance the interests at stake under s. 1 of the *Charter*: *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825, at paras. 73-74. In both steps, the Court must proceed on the basis that the *Charter* does not create a hierarchy of rights (*Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, at p. 877) and that the right to religious freedom enshrined in s. 2(a) of the *Charter* is expansive.⁶ (Emphasis added)

⁵ *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 836 at p. 877, (BA **Tab 3**); *R. v. Mills*, [1999] 3 S.C.R. 668 at para. 21 (BA **Tab 5**).

⁶ *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698 at para. 50, (BA **Tab 6**). See also: The Honourable Frank Iacobucci, “Reconciling Rights: The Supreme Court of Canada's Approach to Competing *Charter* Rights”, (2003) 20 S.C.L.R. (2d) 137 at 139-142 (BA **Tab 15**).

10. In a context similar to the one in issue here, this Court recently applied the balancing of rights in its re-evaluation of the defence of fair comment in the law of defamation. The Court defined the issue as follows:

This appeal requires the Court to re-examine the defence of fair comment which helps hold the balance in the law of defamation between two fundamental values, namely the respect for individuals and protection of their reputation from unjustified harm on the one hand, and on the other hand, the freedom of expression and debate that is said to be the “very life blood of our freedom and free institutions” [...].⁷

11. This Court rejected the notion of a hierarchy of rights and confirmed that both freedom of expression and the worth and dignity of each individual are fundamental *Charter* values that must to be balanced:

[...] Particular emphasis was placed on the importance of ensuring that the law of fair comment is developed in a manner consistent with the values underlying freedom of expression. However, the worth and dignity of each individual, including reputation, is an important value underlying the *Charter* and is to be weighed in the balance with freedom of expression, including freedom of the media. The Court’s task is not to prefer one over the other by ordering a “hierarchy” of rights (*Dagenais v. Canadian Broadcasting Corp*, [1994] 3 S.C.R. 835), but to attempt a reconciliation. [...].⁸

12. This Canadian approach properly recognizes and protects each right under the *Charter* and ensures that the rights of some individuals are not used to harm or limit the rights of others. In so doing, this approach is consistent with international human rights law which treats human rights as universal, indivisible, interdependent and interrelated.

⁷ *WIC Radio Ltd. v. Simpson*, [2008] 2 S.C.R. 420, at para. 1 (BA **Tab 9**).

⁸ *WIC Radio, supra*, at para. 2 (BA **Tab 9**).

In international law

13. International human rights law recognizes the need for a balancing of freedom of expression with the right to equality and dignity of all human beings. The Canadian Commission submits that a similar balance must be ensured with the right to freedom of religion.

14. The right to equality is recognized in the very first Article of the *Universal Declaration of Human Rights*⁹ which declares that “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood”. In article 7, the Declaration states that “All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.”.

15. The Declaration also carefully protects freedom of expression, stating at article 19 that, “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.” At the same time, Article 29(2) of the Declaration affirms that “in the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.”

16. Article 19(2) of the *International Covenant on Civil and Political Rights*¹⁰ builds on the Declaration, stating that, “Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.” Article 19(3) then qualifies this proposition, stating, “The exercise of the rights

⁹ *Universal Declaration of Human Rights*, GA Res 217(III), UNGAOR, 3d Sess, Supp No. 13, UN Doc A/810 (1948) 71, arts. 1, 7, 19, 29(2) [Declaration] (BA **Tab 12**).

¹⁰ *International Covenant on Civil and Political Rights*, December 19, 1966, 999 UNTS 171, arts. 19(2), 19(3) and 20(2) [ICCPR] (BA **Tab 11**). Canada ratified the ICCPR in 1976, with no reservations to the provisions quoted in this Factum.

provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) for respect of the rights and reputations of others; (b) for the protection of national security or of public order (ordre public), or of public health or morals.”

17. Article 20(2) of the *ICCPR* makes it mandatory to pass laws to protect citizens from hate propaganda, stating, “Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”

18. Indeed, in its 1983 decision applying these principles to section 13 of the *CHRA*, the United Nations Human Rights Committee found that section 13 of the *CHRA*, consistent with Article 19 of the *ICCPR*, prohibited the kind of extreme expression that Canada was obliged under Article 20(2) to prohibit.¹¹

19. Finally, Article 4 of the *International Convention on the Elimination of All Forms of Racial Discrimination*¹² also requires active measures to combat propaganda that promotes or justifies racial hatred and discrimination:

States Parties condemn all propaganda and organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination [...].

20. Consistent with Canada’s approach, international human rights law rejects a hierarchy of rights and holds that all human rights are universal, indivisible and interdependent and interrelated.¹³

¹¹ *Taylor and Western Guard Party v. Canada*, Communication No. 104/1981, Report of the Human Rights Committee, 38 U.N. GAOR, Supp. No. 30 (A/38/40) 231 (1983), at para. 8 (BA **Tab 8**).

¹² *International Convention on the Elimination of All Forms of Racial Discrimination*, December 21, 1965, 660 UNTS 212, art. 4 [ICERD] (BA **Tab 10**). Canada ratified the ICERD in 1981, with no reservations to the provisions quoted in this Factum.

¹³ *Vienna Declaration, World Conference on Human Rights*, Vienna, 14 - 25 June 1993, U.N. Doc. A/CONF.157/24 (Part I) at 20 (1993), art. 5 (BA **Tab 13**).

21. Writing in *Taylor*, Dickson CJ. canvassed the instruments and decision cited above, stating that they expressed "... the international community's acceptance of the need to protect minority groups from the intolerance and psychological pain caused by [hate propaganda]," and thus emphasized the substantial weight to be given to the aim of preventing such harms.¹⁴ In *Keegstra*, the Majority of this Court noted that Canada's international human rights obligations reflect the values and principles in a free and democratic society that underlie the *Charter* itself.¹⁵ For these reasons, Dickson CJ. considered the international instruments to be a required reference in any meaningful consideration under the *Oakes*¹⁶ test of the principles central to a free and democratic society.¹⁷

22. The Canadian Commission submits that section 13 of the *CHRA* and section 14 of the *Code* reflect a balanced approach that is in line with the international consensus reflected in the international instruments set out above.¹⁸

(B.) Canadian human rights law only prohibits extreme messages that dehumanize an entire group on a discriminatory ground.

23. In striking the balance between freedom of expression and the right to equality, the Majority of this Court in *Taylor* held that Canadian human rights law only limits the most extreme forms of expression. Dickson CJ. held that there was no conflict between providing a meaningful interpretation of section 13(1) of the *CHRA* and protecting the section 2(b) freedom

¹⁴ *Taylor*, *supra* at pp. 916-920 (BA **Tab 1**).

¹⁵ *R. v. Keegstra*, [1990] 3 S.C.R. 697, at p. 750 (BA **Tab 4**).

¹⁶ *R. v. Oakes*, [1986] 1 S.C.R. 103 [Appellant's Book of Authorities, Tab 21].

¹⁷ *Taylor*, *supra* at pp. 916-917 (BA **Tab 1**). See also: *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, at p. 1056 (BA **Tab 7**).

¹⁸ The Canadian Commission acknowledges that the United States has taken a different approach, severely restricting any limitation on speech, including hate propaganda. However, as Mr. Justice Russell Juriansz of the Ontario Court of Appeal has written, "It seems fair to say that the American view is becoming the minority one in the world. Canada is part of what appears to be a growing global consensus, which observes that careful restrictions of some forms of speech are both desirable and necessary": see Russell Juriansz, "Combating Hate and Preserving Free Speech: Where is the Line?", in *Canadian Issues: Hate on the Internet* (Association for Canadian Studies: Spring 2006) at p. 22 (BA **Tab 16**).

of expression, so long as the words “hatred” and “contempt” were interpreted with an awareness of Parliament’s objective of reducing the incidence of expression causing harm. He cited a Canadian Human Rights Tribunal decision finding that the terms “hatred” and “contempt” capture only the most extreme forms of expression, then reached the following conclusion:

[...] The reference to "hatred" in the above quotation [from the Canadian Human Rights Tribunal] speaks of "extreme" ill-will and an emotion which allows for "no redeeming qualities" in the person at whom it is directed. "Contempt" appears to be viewed as similarly extreme, though is felt by the Tribunal to describe more appropriately circumstances where the object of one's feelings is looked down upon. According to the reading of the 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 [...].

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.¹⁹ (all emphasis added)

24. These passages from *Taylor* articulate a precise standard for the interpretation of human rights prohibitions on hate propaganda.²⁰ They make clear that the statutory provisions will capture only ardent and extreme expression that suggests an entire group of persons identified by a prohibited ground of discrimination is devoid of any redeeming qualities as human beings.²¹ Messages that are merely offensive, controversial, unpleasant and even hurtful, do not fall within the ambit of hate propaganda.

¹⁹ *Taylor, supra* at pp. 928-929 (BA **Tab 1**).

²⁰ Although *Taylor* dealt specifically with section 13(1) of the *CHRA* as applied in cases relating to race or religion, the Canadian Commission submits the same standard should apply equally to analogous statutory provisions across the country, and to cases dealing with different prohibited grounds.

²¹ The Canadian Commission has recommended that Parliament amend s. 13(1) of the *CHRA* to expressly define “hatred” and “contempt” as described in *Taylor*: see Canadian Human Rights Commission, *Special Report to Parliament: Freedom of Expression and Freedom from Hate in the Internet Age* (June 2009) [Special Report] at p. 33 (BA **Tab 14**). To be clear, the Canadian Commission does not recommend this because it believes amendments are necessary to change or modify the existing

25. A confirmation of the narrow scope of hate propaganda was also given by the Majority in *Keegstra* in defining the concept of hate:

Hatred is predicated on destruction, and hatred against identifiable groups therefore thrives on insensitivity, bigotry and destruction of both the target group and of the values of our society. Hatred in this sense is a most extreme emotion that belies reason; an emotion that, if exercised against members of an identifiable group, implies that those individuals are to be despised, scorned, denied respect and made subject to ill-treatment on the basis of group affiliation.²² (emphasis added)

26. Applying this narrow definition of hate propaganda, the Canadian Human Rights Tribunal in *Zundel* made it clear that the respondent's denial of the Holocaust breached section 13 of the *CHRA* not because of the issue it raised but because of the extreme denigration of Jews that permeated his messages.

[...] Our conclusion is based on the way in which these doubts are expressed, and not on the fact that challenges are raised regarding the historical accuracy of these events. Although it might always be hurtful to raise these questions, we accept that the standard for determining the "promotion of hatred or contempt" must be applied with care so that it remains sensitive to free speech interests.

If this were truly a neutrally worded, "academic" debate, our analysis might be quite different. The tone and extreme denigration of Jews, however, separates these documents from those that might be permissible. We have found that it is the linkage between the author's view of these events and the extreme vilification of Jews as a consequence: it is their denunciation as liars, racketeers, extortionists and frauds that is likely to expose them to hatred and contempt.²³

27. As a result, the Canadian Commission submits that an academic debate, even on a controversial and hurtful topic, would not breach section 13 in the absence of dehumanizing

state of the law. Instead, the Canadian Commission believes the amendments would be beneficial in clarifying the existing state of the law for the general reading audience.

²² *Keegstra, supra* at p. 777 (BA **Tab 4**).

²³ *Citron v. Zundel*, [2002] C.H.R.D. No. 1, at paras. 153 and 154 (BA **Tab 2**).

messages. This was the conclusion reached by the Canadian Commission in the *Canadian Islamic Congress (CIC) v. Rogers Communication* complaint.²⁴

28. By focussing on dehumanization, the narrow interpretation of hate propaganda does not apply to messages that are merely controversial, offensive or even hurtful. This leaves out the vast majority of communications and only targets those extreme messages susceptible of creating the conditions for discrimination or violence. This approach protects both freedom of expression, freedom of religion and the right to equality. This approach is consistent with international human rights law and achieves a delicate and essential balance between fundamental rights and values cherished by Canadians. This approach is in the public interest and is demonstrably justified in a free and democratic society.

PART IV – SUBMISSIONS ON COSTS

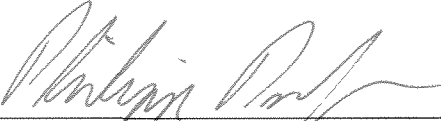
29. The Canadian Commission is not seeking costs in this matter, and submits that no costs should be awarded against it.

PART V – ORDER SOUGHT

30. The Canadian Commission submits that section 14(1)(b) of the *Code* is demonstrably justified in a free and democratic society under section 1 of the *Charter*.

31. The Canadian Commission seeks leave to present oral argument at the hearing of the Appeal, and requests 10 minutes for this purpose.

ALL RESPECTFULLY SUBMITTED this 29th day of July 2011.



Philippe Dufresne / Brian Smith
Counsel for the Intervener,
Canadian Human Rights Commission

²⁴ *Special Report, supra* at p. 31 (BA Tab 14).

PART VI – TABLE OF AUTHORITIES

Paragraphs referred

Caselaw

<i>Canada (Human Rights Commission) v. Taylor</i> , [1990] 3 S.C.R. 892.....	3, 21, 23
<i>Citron v. Zundel</i> , [2002] C.H.R.D. No. 1	26
<i>Dagenais v. Canadian Broadcasting Corp.</i> , [1994] 3 S.C.R. 836	8
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<i>Reference re Same-Sex Marriage</i> , [2004] 3 S.C.R. 698	9
<i>Slaight Communications Inc. v. Davidson</i> , [1989] 1 S.C.R. 1038	21
<i>Taylor and Western Guard Party v. Canada</i> , Communication No. 104/1981, 38 UN GAOR, Supp. No. 30 (A/38/40) 231 (1983)	18
<i>WIC Radio Ltd. v. Simpson</i> , [2008] 2 S.C.R. 420	10, 11

Treaties and Other International Instruments

<i>International Convention on the Elimination of All Forms of Racial Discrimination</i> , December 21, 1965, 660 UNTS 212, art. 4	19
<i>International Covenant on Civil and Political Rights</i> , December 19, 1966, 999 UNTS 171, arts 19-20	16, 17, 18
<i>Universal Declaration of Human Rights</i> , GA Res 217(III), UNGAOR, 3d Sess, Supp No. 13, UN Doc A/810 (1948) 71, arts 1, 7, 19, 29(2)	14, 15
UN General Assembly, <i>Vienna Declaration and Programme of Action</i> , 12 July 1993, A/CONF.157/23, art. 5.....	20

Secondary Sources and Other Materials

Canadian Human Rights Commission, *Special Report to Parliament: Freedom of Expression and Freedom from Hate in the Internet Age* (Ottawa: Minister of Public Works and Government Services Canada, 2009), at p. 3324, 27

The Honourable Frank Iacobucci "Reconciling Rights: The Supreme Court of Canada's Approach to Competing *Charter* Rights", (2003) 20 S.C.L.R. (2) 137, at 139-1429

Russell Juriensz, "Combatting Hate and Preserving Free Speech: Where is the Line?" in *Canadian Issues: Hate on the Net* (Association for Canadian Studies: Spring 2006) 18, at p. 2222

Statutory Provisions

Canadian Charter of Rights and Freedoms as found in the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, sections 1, 2(a), 2(b) and 156, 8, 9, 11, 12, 21

Canadian Human Rights Act, RSC 1985, c. H-6, sections 13(1)18, 22, 23, 26, 27

Saskatchewan Human Rights Code, SS 1979, c. S-24.1, section 14(1)(b)6, 7, 22

Relevant Provisions of:

Canadian Charter of Rights and Freedoms as found in the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11,

Rights and freedoms in Canada

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Fundamental freedoms

2. Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion;

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

Equality before and under law and equal protection and benefit of law

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Affirmative action programs

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Charte canadienne des droits et libertés, Partie I de la Loi Constitutionnelle de 1982

Droits et libertés au Canada

1. La *Charte canadienne des droits et libertés* garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.

Libertés fondamentales

2. Chacun a les libertés fondamentales suivantes :

- a) liberté de conscience et de religion;
- b) liberté de pensée, de croyance, d'opinion et d'expression, y compris la liberté de la presse et des autres moyens de communication;
- c) liberté de réunion pacifique;
- d) liberté d'association.

Égalité devant la loi, égalité de bénéfice et protection égale de la loi

15. (1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.

Programmes de promotion sociale

(2) Le paragraphe (1) n'a pas pour effet d'interdire les lois, programmes ou activités destinés à améliorer la situation d'individus ou de groupes défavorisés, notamment du fait de leur race, de leur origine nationale ou ethnique, de leur couleur, de leur religion, de leur sexe, de leur âge ou de leurs déficiences mentales ou physiques.

Relevant Provisions of:

Canadian Human Rights Act, R.S.C. 1985, c. H-6

Hate messages

13. (1) It is a discriminatory practice for a person or a group of persons acting in concert to communicate telephonically or to cause to be so communicated, repeatedly, in whole or in part by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament, any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination.

Loi canadienne sur les droits de la personne, L.R.C. 1985, c. H-6

Propagande haineuse

13. (1) Constitue un acte discriminatoire le fait, pour une personne ou un groupe de personnes agissant d'un commun accord, d'utiliser ou de faire utiliser un téléphone de façon répétée en recourant ou en faisant recourir aux services d'une entreprise de télécommunication relevant de la compétence du Parlement pour aborder ou faire aborder des questions susceptibles d'exposer à la haine ou au mépris des personnes appartenant à un groupe identifiable sur la base des critères énoncés à l'article 3.

Relevant Provisions of:

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

Prohibitions against publications

14(1) No person 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.