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## PART I – STATEMENT OF FACTS

1. For the purposes of the constitutional questions, the African Canadian Legal Clinic (“ACLC”) takes no position on the facts as set out by the Appellant or the Respondent.

## PART II – STATEMENT OF POSITION

2. The ACLC agrees that s.14(1)(b) of the *Saskatchewan Human Rights Code*<sup>1</sup> infringes s.2(b) of the *Canadian Charter of Rights and Freedoms*<sup>2</sup>. The ACLC adopts the submissions of the United Church of Canada with respect to the argument that s.14(1)(b) of the *Code* does not infringe s.2(a). The ACLC submits that an infringement of sections 2(a) or 2(b) of the *Charter* is justified under s.1.

## PART III – STATEMENT OF ARGUMENT

### A) Sections 1, 2, 15, and 27 of the *Charter* are Interrelated and Interdependent

3. *Charter* rights are not to be read in isolation; rather, they are to be interpreted in light of one another. All *Charter* rights strengthen and support each other.<sup>3</sup> The African Canadian community, with its history of struggle against inequality and racist speech, is uniquely situated to provide an analytic perspective on the interrelationship between the various *Charter* rights at stake in the present appeal.

4. This Court has highlighted the significant influence of the equality guarantee on other *Charter* rights. In *Law Society British Columbia v. Andrews*,<sup>4</sup> for example, McIntyre J. held, “the section 15(1) guarantee is the broadest of all guarantees. It applies to and supports **all** other rights guaranteed by the *Charter*.”<sup>5</sup> The principles underlying s.15 of the *Charter* are thus integral to the s.1 analysis.<sup>6</sup> Similarly, this Court has taken account of s.27 -- the provision that recognizes that Canada is a multicultural society in

<sup>1</sup> *Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1 [*Code*].

<sup>2</sup> *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*].

<sup>3</sup> *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357 **Tab 1**; *R. v. Rahey*, [1987] 1 S.C.R. 588 **Tab 2**; *R. v. Dubois*, [1985] 2 S.C.R. 350 at para. 40 **Tab 3**; *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46 at para. 112 [*New Brunswick*] **Tab 4**, *R. v. Tran*, [1994] 2 S.C.R. 951 at para. 12 **Tab 5**.

<sup>4</sup> *Law Society British Columbia v. Andrews*, [1989] 1 S.C.R. 143 [*Andrews*] **Tab 6**.

<sup>5</sup> *Ibid.* at para. 52 [emphasis added]; and *New Brunswick*, *supra* note 3 at para. 112 **Tab 4**.

<sup>6</sup> *R. v. Keegstra*, [1990] 3 S.C.R. 697 at para. 75 [*Keegstra*] **Tab 7**.

which diversity is a value to be protected and enhanced -- as, *inter alia*, an element in the s.1 analysis.<sup>7</sup> Thus, the ACLC submits that s.1 must be interpreted through the lens of sections 15 and 27 of the *Charter*.

5. Freedom of expression and religion do not enjoy an enhanced status in relation to other *Charter* rights, such as the equality guarantee. As this Court held in *Dagenais v. Canadian Broadcasting Corporation*,<sup>8</sup> a hierarchical approach to *Charter* rights must be avoided; rather, *Charter* principles require “a balance to be achieved that fully respects the importance of both sets of rights.”<sup>9</sup> This interpretation is also consistent with international human rights instruments,<sup>10</sup> including the *Vienna Declaration and Programme of Action*, which asserts the non-hierarchy and interdependency of all rights.<sup>11</sup>

6. The widespread presence of anti-Black racism in Canadian society<sup>12</sup> and the fact that almost half of the few cases that have proceeded under s.14(1)(b) of the *Code* or its predecessor have involved hate propaganda targeting the Black community<sup>13</sup> underlie the importance of a contextual analysis that takes into account the “social realities”<sup>14</sup> and vulnerability of the African Canadian community. Such an analysis, which is consistent with this Court’s holding that human rights legislation must be given a broad, **purposive** and liberal interpretation,<sup>15</sup> will ensure that the freedom of expression and religion guarantees do not become a “constitutional right to be racist” or weapons with which to

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<sup>7</sup> *Ibid.* at para. 77; *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713 at paras. 193, 202 [*Edwards Books*] **Tab 8**.

<sup>8</sup> *Dagenais v. Canadian Broadcasting Corporation*, [1994] 3 S.C.R. 835 **Tab 9**.

<sup>9</sup> *Ibid.* at para. 72.

<sup>10</sup> *International Covenant on Civil and Political Rights*, (19 December 1966), 999 U.N.T.S. 171, 1976 Can. T.S. No. 47, Arts. 19(2) and (3) **Tab 10**; and *Universal Declaration of Human Rights*, G.A. Res. 217A (III), GAOR, 3d Sess., Supp.No.13, U.N. Doc A/810 (1948) 71, Art. 7 **Tab 11**.

<sup>11</sup> UN General Assembly, *Vienna Declaration and Programme of Action*, 12 July 1993, A/CONF.157/23, available at: <http://www.unhcr.org/refworld/docid/3ae6b39ec.html> [accessed 1 August 2011], Part I, Para 5 **Tab 12**.

<sup>12</sup> *R. v. R.D.S.*, [1997] 3 S.C.R. 484 at para. 46 **Tab 13**; and *Stephen Lewis Report to the Premier on Racism in Ontario* (Ontario: Government of Ontario, 1992) at 2 **Tab 14**.

<sup>13</sup> *Saskatchewan (Human Rights Commission) v. Bell (c.o.b. Chop Shop Motorcycle Parts)*, 88 D.L.R. (4<sup>th</sup>) 71 varied in 114 D.L.R. (4<sup>th</sup>) 370 (Sask. C.A.) [*Bell*] **Tab 15**; and *Singer v. Iwasyk and Pennywise Foods Ltd.*, (1976). This was an unreported case before the Saskatchewan Human Rights Commission. See Queen’s Human Rights Bulletin #5, [www.queensu.ca/humanrights/hreb/Signs/singercase.htm](http://www.queensu.ca/humanrights/hreb/Signs/singercase.htm) (accessed 1 Aug 2011) **Tab 16**.

<sup>14</sup> *Lovelace v. Ontario*, [2000] 1 S.C.R. 950 at para. 4 **Tab 17**.

<sup>15</sup> *New Brunswick (Human Rights Commission) v. Potash Corporation of Saskatchewan Inc.*, [2008] 2 S.C.R. 604 at para. 65 [emphasis added] **Tab 18**.

defend the *status quo*,<sup>16</sup> and that arguments of hate propagandists, cloaked in terms of freedom of expression or religion, are not permitted to obscure the fact that what is truly at issue is the right of marginalized groups to be treated as equals and to be free from hate.<sup>17</sup> As stated by Dickson J. in *Edwards Books*, this Court must be cautious to ensure that the *Charter* “does not simply become an instrument of better situated individuals to roll back legislation which has as its object the improvement of the condition of less advantaged persons.”<sup>18</sup>

### **B) Hate Propaganda and Speech have a Negative Impact on African Canadians**

**9.** The jurisprudence is clear that a direct causal link between hate propaganda and its harms need not be established.<sup>19</sup> Nonetheless, the negative impact of hate propaganda on African Canadians and other marginalized communities is a relevant contextual factor at all stages of the s.1 analysis.<sup>20</sup> The ACLC submits that the dissemination of hate propaganda leads to a number of significant harms including a continuum of “rejective behaviour” from avoidance and discrimination to hate crimes and genocide.<sup>21</sup> These effects are magnified for those persons who are members of two or more targeted groups,<sup>22</sup> such as African Canadian members of the Lesbian Gay Bisexual and Transgender (“LGBT”) community.

**10.** Hate speech is harmful to its individual targets. First, the dissemination of hate propaganda is a practice of discrimination in and of itself,<sup>23</sup> as discrimination can be promulgated by words alone.<sup>24</sup> Second, hate speech has a significant and severe impact on

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<sup>16</sup> Mari Matsuda et al., *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (Boulder: Westview Press, 1993) at 15 **Tab 19**.

<sup>17</sup> *Ibid.* at 14.

<sup>18</sup> *Edwards Books*, *supra* note 7 at para. 136 **Tab 8**. See also *R. v. Sharpe*, [2001] 1 S.C.R. 45 at para. 133 **Tab 20**.

<sup>19</sup> *Keegstra*, *supra* note 6 at paras. 113-114 **Tab 7**; *R. v. Butler*, [1992] 1 S.C.R. 452 at paras. 104-108 [*Butler*] **Tab 21**; and *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 at paras. 60-61 **Tab 22**.

<sup>20</sup> *Keegstra*, *supra* note 6 at paras. 80 and 136 **Tab 7**; *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892 at para. 51 [*Taylor*] **Tab 23**; *Thomson Newspapers Co. (c.o.b. Globe and Mail) v. Canada (Attorney General)*, [1998] 1 S.C.R. 877 at para. 42 [*Thomson Newspapers*] **Tab 24**; and Rosalie Abella, “Equality, Human Rights, Women and the Justice System” (1994) 39 McGill L.J. 489 at 8 **Tab 25**.

<sup>21</sup> Gordon W. Allport, *The Nature of Prejudice* (Cambridge: Addison-Wesley Publishing Company, 1954) at 14-15, 49-67 **Tab 26**.

<sup>22</sup> *Kane v. Church of Jesus Christ Christian-Aryan Nations* (1992), 18 C.H.R.R. 2/268 at para. 218 (Alta Bd. of Inq.) [*Aryan Nations*] **Tab 27**.

<sup>23</sup> *Ibid.* at para. 216.

<sup>24</sup> *Janzen v. Platy Enterprises Ltd.* (1989), 59 D.L.R. (4th) 352 at 369-371, 375 **Tab 28**.

the mental health of its targets.<sup>25</sup> It has been linked to anxiety related symptoms, depression, fear, anger and withdrawal from society.<sup>26</sup> Even more startling, the degree and negativity of hate speech targeting particular immigrant groups has been linked to increased rates of suicide in the target group.<sup>27</sup> Third, and particularly relevant in the context of free expression, hate speech has a “chilling effect” on the expression of the targeted group.<sup>28</sup>

**11.** Further, there is a direct link between the dissemination of hate speech and discrimination in employment, accommodation, and services.<sup>29</sup> Hate messages have the power to convince listeners that members of certain groups are inferior, dangerous, or less than human; this results in their increased vulnerability to acts of discrimination and incidents of violence.<sup>30</sup> As an example, while representing only 3 percent of the Canadian population,<sup>31</sup> in 2008, Blacks were the target of almost 40% of race-motivated hate crimes.<sup>32</sup>

**12.** On a broader scale, the potential for ethnic and racial hatred to elicit violence is clear. The 1994 genocide of the Tutsi in Rwanda, for example, has been attributed to

<sup>25</sup> *Taylor, supra* note 20 at paras 40-41 **Tab 23**.

<sup>26</sup> Richard Delgado and Jean Stefancic, *Understanding Words that Wound* (Boulder: Westview Press, 2004) at 13-15 **Tab 29**; Rodney Clark et al., “Racism as a Stressor for African Americans: A Biopsychosocial Model” (1999) 54(10) *American Psychologist* 805 at 810 **Tab 30**; Naa Oyo Kwate et al., “Experiences of Racist Events are Associated with Negative Health Consequences for African American Women” (2003) 95(6) *Journal of the National Medical Association* 450 **Tab 31**; M.J. Matsuda, “Outsider Jurisprudence: Toward a Victim’s Analysis of Hate Messages,” in M.H. Freedman & E.M. Freedman, eds., *Group Defamation and Freedom of Speech* (Westport: Greenwood Press, 1995), 87-120 at 91 **Tab 32**.

<sup>27</sup> Brian Mullen & Joshua M. Smith, “Immigrant Suicide Rates as a Function of Ethnophaulisms: Hate Speech Predicts Death” (2004) 66 *Psychosomatic Medicine* 343 **Tab 33**.

<sup>28</sup> *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825 at para. 91 **Tab 34**. See also *Aryan Nations, supra* note 22 at para. 220 **Tab 27**; O.M. Fiss, *The Irony of Free Speech* (Cambridge: Harvard University Press, 1996) at 16-18 **Tab 35**; and N.K.S. Banks, “Could Mom be Wrong? The Hurt of Names and Words: Hate Propaganda and Freedom of Expression,” (1999) 6(2) *MurUEJL* at paras. 10, 71, and 83 **Tab 36**.

<sup>29</sup> *Aryan Nations, supra* note 22 at paras. 191, 205-207 **Tab 27**; Allport, *supra* note 21 at 14-15, 49-67 **Tab 26**; *Taylor, supra* note 20 at paras 40-41 **Tab 23**; Abella, *supra* note 20 at 4 **Tab 25**; Clay Calvert, “Hate Speech and its Harms: A Communication Theory Perspective” (Winter 1997) 47(1) *Journal of Communications* 4 at 11 **Tab 37**.

<sup>30</sup> *Taylor, supra* note 20 at paras. 40-41 **Tab 23**.

<sup>31</sup> Statistics Canada, *Population Groups (28) and Sex (3) for the Population of Canada, Provinces, Territories, Census Metropolitan Areas and Census Agglomerations, 2006 Census – 20% Sample Data* (Ottawa: Census of Population Catalogue no. 97-562-XCB2006007, 2006) **Tab 38**.

<sup>32</sup> Statistics Canada, *Police-reported hate crime in Canada, 2008* by Mia Dauvergne (Juristat: Summer 2010) online: <http://www.statcan.gc.ca/pub/85-002-x/2010002/article/11233-eng.htm#a7> at 5, 10 and 18 **Tab 39**.

political hate speech that called for the extermination of this group.<sup>33</sup> In *Mugesera v. Canada*,<sup>34</sup> this Court agreed that Léon Mugesera, through a speech delivered to approximately one thousand people in 1992, both incited hatred,<sup>35</sup> and advocated for genocide of the Tutsi.<sup>36</sup> The words of Professor William A. Schabas are instructive:

Genocide is prepared with propaganda, a bombardment of lies and hatred directed against the targeted group, and aimed at preparing the “willing executioners” for the atrocious tasks they will be asked to perform. Here, then, lies the key to preventing genocide.<sup>37</sup>

**13.** States are under a constitutional duty to respect and protect the dignity of everyone both in the present and **in the future**.<sup>38</sup> Further to international law, they are also under a duty to ensure that the early warning signs of genocide are taken seriously.<sup>39</sup> These early warning signs include hate speech and hate propaganda.

**14.** While genocide, and similar extreme acts, may seem inconceivable in a democratic society such as ours, recent events demonstrate that even the most modern and western democracies are not insulated from the potential harms of hate.<sup>40</sup> Also, Canada’s democratic system did not prevent the degradation of Aboriginal civilization and the forcible placement of Aboriginal children in abusive residential schools. This abuse could not have taken place without the ideology of the “civilizing mission” that formed the discursive background.<sup>41</sup>

### **C) Section 14(1)(b) is a Justifiable Limit on Freedom of Expression**

**15.** In *Taylor*, this Court confirmed that s.13(1) of the *Canadian Human Rights Act*<sup>42</sup> did not violate s.2(b) of the *Charter* in a way that could not be justified pursuant to s.1.<sup>43</sup>

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<sup>33</sup> Alexander Tsesis, “Dignity and Speech: The Regulation of Hate Speech in a Democracy” (2009) 44 *Wake Forest L. Rev.* 497 at 510 **Tab 40**; See also *R. c. Munyaneza*, [2009] Q.J. No. 4913 at paras. 190-193, 418 **Tab 41**.

<sup>34</sup> *Mugesera v. Canada*, [2005] 2 S.C.R. 100 **Tab 42**.

<sup>35</sup> *Ibid.* at para. 107.

<sup>36</sup> *Ibid.* at paras. 96-98.

<sup>37</sup> William A. Schabas, “Hate Speech in Rwanda: The Road to Genocide” (2000) 46 *McGill L.J.* 141 at 171 **Tab 43**.

<sup>38</sup> Jacob Weinrib, “What is the Purpose of Freedom of Expression” (2009) 67(1) *U.T. Fac. L. Rev.* 165 at para. 33 [emphasis added] **Tab 44**.

<sup>39</sup> *International Convention on the Elimination of All Forms of Racial Discrimination*, (21 December 1965), 660 U.N.T.S. 195; G.A. res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), Article 4 **Tab 45**.

<sup>40</sup> Doug Sanders, “Norway shows we must expose dangerous fictions” *The Globe and Mail* (30 July 2011) online: *The Globe and Mail* <http://www.theglobeandmail.com/news/opinions/opinion/norway-shows-we-must-expose-dangerous-fictions/article2114680/> **Tab 46**.

<sup>41</sup> Robert Harding, “Historical Representations of Aboriginal People in the Canadian News Media” (2006) 17(2) *Discourse & Society* 205 at 208-209 **Tab 47**.

<sup>42</sup> *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 [Act] **Tab 48**.

The ACLC submits that since that decision, human rights bodies and hate speech legislation have fallen out of favour with the public.<sup>44</sup> Nevertheless, the determination made in *Taylor* remains valid and the principles articulated in that case continue to reflect essential elements of Canadian constitutional law. Further, the ACLC submits that the objects of human rights legislation and the *Charter* -- protection of the most vulnerable members of society<sup>45</sup> -- take on added importance, particularly when doing so becomes unpopular.

**D) Section 14(1)(b) Has a Constitutionally Precise Standard for “Hatred”**

**16.** Like s.13(1) of the *Act*, the prohibited expression in s.14(1)(b) of the *Code* is sufficiently narrow and precise to limit expression as little as is reasonably possible. On its face, the language of s.14(1)(b) is broader than the provision at issue in *Taylor*. In *Saskatchewan (Human Rights Commission) v. Bell*,<sup>46</sup> however, the Saskatchewan Court of Appeal read down the provision to sever the words “ridicules, belittles or otherwise affronts the dignity of” in s. 14(1)(b) and prohibit only those communications that expose or tend to expose persons to “hatred” as defined in *Taylor*. This interpretation strikes an appropriate balance and has been followed by subsequent tribunals and courts.<sup>47</sup> The constitutionality of s. 14(1)(b) should be determined based not on the “bare words” of the provision but on its judicial interpretation and application.<sup>48</sup>

**17.** In many important respects, the language of s. 14(1)(b) of the *Code* is narrower than s. 13(1) of the *Act*. Section 14(1)(b) of the *Code* (as interpreted) prohibits only communications that expose or tend to expose persons to “hatred”; it does not prohibit communications that are likely to expose persons to “contempt” -- a term that was held

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<sup>43</sup> *Taylor*, *supra* note 20 **Tab 23**.

<sup>44</sup> Jane Bailey, “Twenty Years Later *Taylor* Still Has It Right: How the *Canadian Human Rights Act*’s Hate Speech Provision Continues to Contribute to Equality” in Sanda Rogers & Sheila McIntyre, eds., *The Supreme Court of Canada and Social Justice: Commitment, Retrenchment or Retreat* (Markham: LexisNexis Canada Inc., 2010) 349 at 350 **Tab 49**. See also Richard Moon, “The Attack on Human Rights Commissions and the Corruption of Public Discourse” (2010) 73 Sask. L. Rev. 93 at para. 7 **Tab 50**.

<sup>45</sup> *Zurich Insurance Co. v. Ontario (Human Rights Commission)*, [1992] 2 S.C.R. 321 at para. 18 [*Zurich*] **Tab 51**; and *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3 at para. 21 **Tab 52**.

<sup>46</sup> *Bell*, *supra* note 13 **Tab 15**.

<sup>47</sup> Followed in *Owens v. Saskatchewan (Human Rights Commission)* (2006), 267 D.L.R. (4th) 733, 2006 SKCA 41 **Tab 53**.

<sup>48</sup> *Butler*, *supra* note 19 at para. 76 **Tab 21**. See also *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123 at para. 40 **Tab 54**.

by McLachlin J. to be “broader” than “hatred”.<sup>49</sup> In addition, unlike s. 13(1), which in *Taylor* raised concerns of capturing private communications,<sup>50</sup> s. 14(1)(b) is limited to individuals that “publish” or “display” hateful messages; i.e., public communications.

18. Finally, only a small minority of complaints under s.14(1)(b) actually proceed through the adjudicative process. In the last ten years, human rights complaints on the basis of discrimination in publications have consistently accounted for less than 3% of all complaints filed in Saskatchewan.<sup>51</sup> Also, “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.”<sup>52</sup> This practical reality further demonstrates that s.14(1)(b) is sufficiently precise to vigorously protect free speech and that administrative discretion in Saskatchewan has not been exercised in an over-inclusive fashion.

#### E) Intent is Not Relevant to or Necessary in Human Rights Legislation

19. Canadian courts have repeatedly recognized that human rights and *Charter* equality provisions apply to both intentional and unintentional discrimination.<sup>53</sup> The motives or intentions of those who discriminate are not a central concern; rather, the focus of the law is on the *effect* of the discriminatory act on the vulnerable groups.<sup>54</sup> The reasons are twofold: First, “systemic discrimination is much more widespread in our

<sup>49</sup> *Taylor*, *supra* note 20 at para. 147 **Tab 23**.

<sup>50</sup> *Ibid.* at para. 161.

<sup>51</sup> Saskatchewan Human Rights Commission, *Annual Report 2009-2010* (Annual Report)(Saskatchewan: Saskatchewan Human Rights Commission, 2010) at 28 **Tab 55**; Saskatchewan Human Rights Commission, *Annual Report 2008-2009* (Annual Report)(Saskatchewan: Saskatchewan Human Rights Commission, 2009) at 28 **Tab 56**; Saskatchewan Human Rights Commission, *2007-2008 Annual Report* (Annual Report)(Saskatchewan: Saskatchewan Human Rights Commission, 2008) at 25 **Tab 57**; Saskatchewan Human Rights Commission, *2006-2007 Annual Report* (Annual Report)(Saskatchewan: Saskatchewan Human Rights Commission, 2007) at 28 **Tab 58**; Saskatchewan Human Rights Commission, *2005-2006 Annual Report* (Annual Report)(Saskatchewan: Saskatchewan Human Rights Commission, 2007) at 32 **Tab 59**; Saskatchewan Human Rights Commission, *2004-2005 Annual Report* (Annual Report)(Saskatchewan: Saskatchewan Human Rights Commission, 2005) at 34 **Tab 60**; Saskatchewan Human Rights Commission, *2003-2004 Annual Report* (Annual Report)(Saskatchewan: Saskatchewan Human Rights Commission, 2004) at 34 **Tab 61**; and Saskatchewan Human Rights Commission, *2002-2003 Annual Report* (Annual Report)(Saskatchewan: Saskatchewan Human Rights Commission, 2003) at 34 **Tab 62**.

<sup>52</sup> *Whatcott v. Saskatchewan (Human Rights Tribunal)*, SCC File No.: 33676 (Factum of the Attorney General of Saskatchewan at para. 66).

<sup>53</sup> *Andrews*, *supra* note 4 at para. 37 **Tab 6**. See also *Ontario (Human Rights Commission) v. Simpsons Sears Ltd.*, [1985] 2 S.C.R. 536 at para. 14 [*Simpsons Sears*] **Tab 63**.

<sup>54</sup> *Simpsons Sears*, *ibid.* at para. 12.



society than is intentional discrimination.”<sup>55</sup> Racial stereotyping, as it is understood today, will often stem from unconscious biases or beliefs.<sup>56</sup> As such, most forms of discrimination can only be effectively targeted by ignoring intent.<sup>57</sup> With respect to hate speech, this means that an individual may have a sincerely held belief that Blacks are savages but this will not make his or her communications any less discriminatory.

**20.** Second, human rights legislation is not focused on fault, moral responsibility or punishment, but on the prevention and elimination of discrimination. The absence of an intent requirement “communicates the priority of addressing the effects of discrimination on socially vulnerable groups, rather than on the interests of the respondent or of dominant groups.”<sup>58</sup> To be guided instead by concerns that the unintentional perpetrators of hate speech will be more likely to self-censor is thus to wrongly prioritize the interests of the hater over those of the victim; i.e. African Canadians and similarly marginalized groups.<sup>59</sup> “We must be careful that the ease with which we strike the balance against the regulation of racist speech is in no way influenced by the fact that the cost will be borne by others.”<sup>60</sup>

**F) The Fact that Hate Speech May Also be Political Does Not Make it Legitimate**

**21.** The Respondent argues that speech that is made in a political, moral or religious context should, regardless of its hateful meaning or effect, be afforded constitutional protection. All *Charter* freedoms -- including religious and political expression -- are subject to reasonable limitation.<sup>61</sup> The political, moral and/or religious context in which hate speech is expressed is thus a relevant but not an overriding or determinative consideration.

<sup>55</sup> *Taylor*, *supra* note 20 at para. 67 **Tab 23**.

<sup>56</sup> *Toronto (City) Police Service v. Phipps*, [2010] O.J. No. 4283 at para. 78 **Tab 65**.

<sup>57</sup> *Taylor*, *supra* note 20 at para. 68 **Tab 23**.

<sup>58</sup> *Bailey*, *supra* note 44 at 385 **Tab 49**; and *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84 at para. 10 **Tab 65**.

<sup>59</sup> *Bailey*, *ibid.* at 380.

<sup>60</sup> Charles Lawrence III, “If He Hollers Let Him Go: Regulating Racist Speech on Campus” (1990) 3 *Duke L.J.* 431 at 472 **Tab 66**.

<sup>61</sup> *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at para. 95 **Tab 67**; *Syndicat Northcrest c. Amselem*, [2004] 2 S.C.R. 551 at paras. 61-62 **Tab 68**; *Multani c. Commission scolaire Marguerite-Bourgeois*, [2006] 1 S.C.R. 256 at para. 26 **Tab 69**; *B.(R.) v. Children’s Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315 at para. 226 **Tab 70**; *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 772 at para. 29 **Tab 71**; and *Harper v. Canada*, [2004] 1 S.C.R. 827 at para. 21 **Tab 72**.

**22.** Some of the most egregious phenomena of anti-Black expression such as slavery, apartheid, and genocide have taken place under the guise of political expression or in the course of the fulfilment of political objectives.<sup>62</sup> The political nature of these acts should not insulate them from government regulation nor convert them from prohibited to permissible.

**23.** This Court has repeatedly declared that freedom of expression is (1) an instrument for the realization of truth; (2) an instrument of democratic self-government; and (3) an aspect of self-realization or human dignity.<sup>63</sup> The distinction between political expression, on the one hand, and hate speech that is also political, on the other, is evident when hate speech is examined in light of the three rationales underlying the guarantee of free expression. In *R. v. Keegstra*, Dickson C.J., as he then was, writing for a majority of the Court, held:

[H]ate propaganda contributes little to the aspirations of Canadians or Canada in either the quest for truth, the promotion of individual self-development or the protection and fostering of a vibrant democracy where the participation of all individuals is accepted and encouraged.<sup>64</sup>

Indeed, hate speech, by arguing for a society in which individuals are denied respect and dignity on the basis of personal characteristics, has been held to be “wholly inimical to the democratic aspirations of the free expression guarantee.”<sup>65</sup>

**24.** Further, while limiting hate speech may inhibit the self-realization of the hatemonger, permitting hate speech may inhibit the self-realization of members of the targeted group.<sup>66</sup> The protection and interests of the latter are to be preferred to that of the former. First, it is a “legitimate choice for a government confronted with competing risks to different social groups to prefer to ameliorate the risks posed to the more socially

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<sup>62</sup> Susan Benesch, “Inciting Genocide, Pleading Free Speech” (2004) 21(2) *World Policy Journal* 62 at 64 **Tab 73**; and Brian Levin, “From Slavery to Hate Crime Laws: The Emergence of Race and Status-Based Protection in American Criminal Law” (2002) 58(2) *Journal of Social Issues* 227 at 229 **Tab 74**.

<sup>63</sup> *Taylor*, *supra* note 20 at para. 116 **Tab 23**.

<sup>64</sup> *Keegstra*, *supra* note 6 at para. 94 **Tab 7**. See also *Thomson Newspapers*, *supra* note 20 at para. 116 **Tab 24**; and Weinrib, *supra* note 38 at paras. 20-22 **Tab 44**.

<sup>65</sup> *Keegstra*, *supra* note 6 at para. 90 **Tab 7**.

<sup>66</sup> Weinrib, *supra* note 38 at para. 42 **Tab 44**; and Banks, *supra* note 28 at paras. 10, 71, and 83 **Tab 36**.

vulnerable group.”<sup>67</sup> Second, such prioritization is supported by the rationale underlying the protection of free expression itself:

[Hate speech] denies the capacity of others to freely express themselves and so conflicts with the value that underlies the right, the inherent dignity of human persons. Hate speech ... seeks to use rights that are founded in the value of human dignity in a manner that denies the dignity of others to hold rights, including the right to free expression.<sup>68</sup>

As such, the furtherance of society’s “substantive goals”<sup>69</sup> and the protection of the values central to freedom of expression is best encouraged through the rejection, not the protection, of hate propaganda.<sup>70</sup>

**G) Section 14(1)(b) Facilitates Access to Justice and is Rationally Connected to the Objectives of the Code**

**25.** Access to justice is consistent with and furthers all three objectives of the *Code*.<sup>71</sup> Human rights legislation is the “final refuge of the disadvantaged and the disenfranchised” and represents the “last protection of the most vulnerable members of society.”<sup>72</sup> The human rights regime in Saskatchewan, including s.14(1)(b), facilitates access to justice for vulnerable groups.

**26.** In *Keegstra*, McLachlin J., as she then was, stated that human rights legislation is more suitable than criminal law to address the consequences of hate propaganda.<sup>73</sup> In *Zundel*, this Court declared that s.181 (the prohibition of the publication of false information or news) of the *Criminal Code* is unconstitutional.<sup>74</sup> In *Seneca College of Applied Arts and Technology v. Bhadauria*, this Court held that there is no common law tort action of discrimination.<sup>75</sup> In light of the continued erosion of potential avenues for redress, the ACLC recognizes that the preservation of s.14(1)(b) and similar provisions are imperative to

<sup>67</sup> Bailey, *supra* note 44 at 381 **Tab 49**. See also *R. v. Zundel*, [1992] 2 S.C.R. 731 at para. 212 [*Zundel*] **Tab 75**.

<sup>68</sup> Weinrib, *supra* note 38 at para. 42 [emphasis added] **Tab 44**.

<sup>69</sup> *R. v. Oakes*, [1986] 1 S.C.R. 103 at para. 64 **Tab 76**. See also *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at para. 64 **Tab 77**. As outlined by Dickson C.J. in *R. v. Oakes*, the substantive goals include “respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.”

<sup>70</sup> *Keegstra*, *supra* note 6 at para. 91 **Tab 7**.

<sup>71</sup> *Code*, *supra* note 1 at s.3.

<sup>72</sup> *Zurich*, *supra* note 45 at para. 18 **Tab 51**; and *Battlefords and District Co-operative Ltd. v. Gibbs*, [1996] 3 S.C.R. 566 at para. 18 **Tab 78**.

<sup>73</sup> *Keegstra*, *supra* note 6 at para. 324 **Tab 7**.

<sup>74</sup> *Zundel*, *supra* note 67 **Tab 75**.

<sup>75</sup> *Seneca College of Applied Arts and Technology v. Bhadauria*, [1981] 2 S.C.R. 181 **Tab 79**.

facilitate access to justice for minority communities to address the dissemination of hate propaganda.

**H) A Hierarchy of Prohibited Grounds is Constitutionally Impermissible**

27. The ACLC adopts the submissions of Egale in arguing that a hierarchy of prohibited grounds is constitutionally impermissible. Racial and religious-based discrimination are no more important or harmful than other forms of discrimination.

**PART IV – SUBMISSION ON COSTS**

28. The ACLC does not seek any costs in this appeal and requests that no order for costs be made against it.

**PART V – ORDERS SOUGHT**

29. The ACLC seeks from this Honourable Court an Order: (1) that the ACLC be granted permission to make oral argument at the hearing of this appeal of such length as this Honourable Court may deem just; (2) that s. 14(1)(b) of the *Code* does not infringe s.2(a) of the *Charter*; and (3) that s.14(1)(b) of the *Code* is justified under s. 1 of the *Charter*.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 2 day of August, 2011.

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## **PART VII – STATUTORY PROVISIONS**

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, s 2(b)***

### **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.

### **Multicultural heritage**

27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

***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;

**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.

**Maintien du patrimoine culturel**

27. Toute interprétation de la présente charte doit concorder avec l'objectif de promouvoir le maintien et la valorisation du patrimoine multiculturel des Canadiens.

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 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.