

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN)**

BETWEEN:

SASKATCHEWAN HUMAN RIGHTS COMMISSION

Appellant
(Respondent)

- and -

WILLIAM WHATCOTT

Respondent
(Appellant)

- and -

**ATTORNEY GENERAL OF SASKATCHEWAN, ATTORNEY GENERAL
OF ALBERTA, AFRICAN CANADIAN LEGAL CLINIC,
ALBERTA HUMAN RIGHTS COMMISSION, ASSEMBLY OF FIRST NATIONS
AND METIS NATION-SASKATCHEWAN, CANADIAN BAR ASSOCIATION,
CANADIAN CIVIL LIBERTIES ASSOCIATION, CANADIAN CONSTITUTION
FOUNDATION, CANADIAN HUMAN RIGHTS COMMISSION, CANADIAN JEWISH
CONGRESS, CANADIAN JOURNALISTS FOR FREE EXPRESSION, CATHOLIC
CIVIL RIGHTS LEAGUE AND FAITH AND FREEDOM ALLIANCE, CHRISTIAN
LEGAL FELLOWSHIP, EGALE CANADA INC., EVANGELICAL FELLOWSHIP OF
CANADA, LEAGUE FOR HUMAN RIGHTS OF B'NAI BRITH CANADA,
NORTHWEST TERRITORIES HUMAN RIGHTS COMMISSION AND YUKON HUMAN
RIGHTS COMMISSION, ONTARIO HUMAN RIGHTS COMMISSION, UNITARIAN
COUNCIL, CONGREGATION OF SASKATOON AND CANADIAN UNITARIAN
COUNCIL, UNITED CHURCH OF CANADA,
WOMEN'S LEGAL EDUCATION AND ACTION FUND**

Interveners

FACTUM OF THE INTERVENER EGALÉ CANADA INC.
(pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

Sack Goldblatt Mitchell LLP
1100-20 Dundas Street West
Toronto ON M5G 2G8

Cynthia Petersen
Christine Davies
Phone: 416-977-6070
Fax: 416-591-7333
Email: cpetersen@sgmlaw.com
cdavies@sgmlaw.com

Counsel for the Intervener
Egale Canada Inc.

TO: The Registrar
Supreme Court of Canada

AND TO:

Scharfstein Gibbings Walen & Fisher LLP
500, 111 Second Avenue South
Saskatoon SK S7K 1K6

Grant J. Scharfstein, Q.C.
Deidre L. Aldcorn
Janice E. Gingell
Phone: 306-653-2838
Fax: 306-652-4747
Email: gscharfstein@scharfsteinlaw.com

Counsel for the Appellant
Saskatchewan Human Rights Commission

Nimegeers, Schuck, Wormsbecker & Bobbit
319 Souris Avenue NE, Box 8
Weyburn SK S4H 2J8

Thomas A. Schuck
John Carpay
Phone: 306-842-4654
Fax: 306-842-0522
Email: tschuck@nswb.com

Counsel for the Respondent
William Whatcott

Sack Goldblatt Mitchell LLP
500-30 Metcalfe Street
Ottawa ON K1P 5L4

Kelly Doctor
Phone: 613-482-2464
Fax: 613-235-3041
Email: kdoctor@sgmlaw.com

Agent for the Intervener
Egale Canada Inc.

McMillan LLP
50 O'Connor Street, Suite 300
Ottawa ON K1P 6L2

Eugene Meehan, Q.C.
Phone: 613-232-7171
Fax: 613-231-3191
Email: eugene.meehan@mcmillan.ca

Agent for the Appellant
Saskatchewan Human Rights Commission

Vincent Dagenais Gibson LLP
325 Dalhousie Street, Suite 600
Ottawa ON K1N 7G2

J r mie Fournier
Phone: 613-241-2701, Ext. 246
Fax: 613-241-2599
Email: jeremie.fournier@vdg.ca

Agent for the Respondent
William Whatcott

Attorney General for Saskatchewan
Constitutional Law Branch
800-1874 Scarth Street, P.O. Box 7129
Regina SK S4P 4B3

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

Counsel for the Intervener
Attorney General of Saskatchewan

Osler, Hoskin & Harcourt LLP
P.O. Box 50
1 First Canadian Place
Toronto ON M5Z 1B8

Mark A. Gelowitz
Jason MacLean
Phone: 416-862-4743
Fax: 416-862-6666
Email: mgelowitz@osler.com
jmaclean@osler.com

Counsel for the Intervener
Canadian Constitution Foundation

**Paliare, Roland, Rosenberg,
Rothstein LLP**
501-250 University Avenue
Toronto ON M5H 3E5

Andrew K. Lokan
Jodi Martin
Phone: 416-646-4300
Fax: 416-646-4301
Email: andrew.lokan@paliareroland.com
jodi.martin@paliareroland.com

Counsel for the Intervener
Canadian Civil Liberties Association

Gowling Lafleur Henderson LLP
2600-160 Elgin Street
P.O. Box 466, Station D
Ottawa ON K1P 1C3

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

Agent for the Intervener
Attorney General of Saskatchewan

Osler, Hoskin & Harcourt LLP
340 Albert Street
Suite 1900
Ottawa ON K1R 7Y6

Patricia J. Wilson
Phone: 613-787-1009
Fax: 613-235-2867
Email: pwilson@osler.com

Agent for the Intervener
Canadian Constitution Foundation

Gowling Lafleur Henderson LLP
2600-160 Elgin Street
P.O. Box 466, Station D
Ottawa ON K1P 1C3

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

Agent for the Intervener
Canadian Civil Liberties Association

Attorney General of Alberta
9833 – 109 Street
4th Floor
Edmonton, AB T5J 3S8

David N. Kamal
Phone: 780-427-4418
Fax: 780-425-0307
Email: david.kamal@gov.ab.ca

Counsel for the Intervener
Attorney General of Alberta

Canadian Human Rights Commission
344 Slater Street
Canada Building, 9th Floor
Ottawa ON K1A 1E1

Philippe Dufresne
Brian Smith
Phone: 613-943-9162
Fax: 613-993-3089
Email: philippe.dufresne@chrc-ccdp.ca
brian.smith@chrc-ccdp.ca

Counsel for the Intervener
Canadian Human Rights Commission

Alberta Human Rights Commission
No. 800 Standard Life Centre
10405 Jasper Avenue
Edmonton AB T5J 4R7

Audrey Dean
Phone: 780-427-3116
Fax: 780-422-3563
Email: audrey.dean@gov.ab.ca

Counsel for the Intervener
Alberta Human Rights Commission

Gowling Lafleur Henderson LLP
2600-160 Elgin Street
P.O. Box 466, Station D
Ottawa ON K1P 1C3

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

Agent for the Intervener
Attorney General of Alberta

Gowling Lafleur Henderson LLP
2600-160 Elgin Street
P.O. Box 466, Station D
Ottawa ON K1P 1C3

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

Agent for the Intervener
Alberta Human Rights Commission

Ontario Human Rights Commission
Public Interest Inquiries Branches
180 Dundas Street West, 8th Floor
Toronto ON M7A 2R9

Reema Khawja
Tony Griffin
Phone: 416-326-9870
Fax: 416-326-9867
Email: reema.khawja@ohrc.on.ca
christine.elbaramawi@ohrc.on.ca
tony.griffin@ohrc.on.ca

Counsel for the Intervener
Ontario Human Rights Commission

Lerners LLP
130 Adelaide Street West, Suite 2400
Toronto ON M5H 3P5

Mark J. Freiman
Phone: 416-601-2370
Fax: 416-867-2453
Email: mfreiman@lerners.ca

Counsel for the Intervener
Canadian Jewish Congress

Fasken Martineau Dumoulin LLP
3400-350 7th Avenue SW
Calgary AB T2P 3N9

Arif Chowdhury
Phone: 403-261-5379
Fax: 403-261-5351
Email: achowdhury@fasken.com

Counsel for the Intervener
Unitarian Congregation of Saskatoon
and Canadian Unitarian Council

Gowling Lafleur Henderson LLP
2600-160 Elgin Street
P.O. Box 466, Station D
Ottawa ON K1P 1C3

Brian A. Crane, Q.C.
Phone: 613-233-1781
Fax: 613-563-9869
Email: brian.crane@gowlings.com

Agent for the Intervener
Ontario Human Rights Commission

Blake, Cassels & Graydon LLP
45 O'Connor Street, 20th Floor
Ottawa ON K1P 1A4

Nancy K. Brooks
Phone: 613-788-2200
Fax: 613-788-2247
Email: nancy.brooks@blakes.com

Agent for the Intervener
Canadian Jewish Congress

Fasken Martineau Dumoulin LLP
1300-55 Metcalfe Street
Ottawa ON K1P 6L5

Stephen B. Acker
Phone: 613-236-3882
Fax: 613-230-6423
Email: sacker@fasken.com

Agent for the Intervener
Unitarian Congregation of Saskatoon
and Canadian Unitarian Council

Women's Legal Education and Action Fund

703-60 St. Clair Avenue East
Toronto ON M4T 1N5

Joanna L. Birenbaum

Jo-Ann R. Kolmes

Phone: 416-595-7170 Ext. 223

Fax: 416-595-7191

Email: j.birenbaum@leaf.ca

jkolmes@jkolmes.ca

kmahoney@ucalgary.ca

Counsel for the Intervener
Women's Legal Education and Action Fund

Stockwoods LLP

77 King Street West, Suite 4130
P.O. Box 140, Toronto-Dominion Centre
Toronto ON M5K 1H1

M. Phillip Tunley

Paul Jonathan Saguil

Phone: 416-593-7200

Fax: 416-593-9345

Email: philt@stockwoods.ca

pauls@stockwoods.ca

Counsel for the Intervener
Canadian Journalists for Free Expression

Canadian Bar Association

225 Vaughan Street, Suite 602
Winnipeg MB R3C 1T7

David Matas

Phone: 204-944-1831

Fax: 204-942-1494

Email: dmatas@mts.net

Counsel for the Intervener
Canadian Bar Association

Borden Ladner Gervais LLP

1100-100 Queen Street
Ottawa ON K1P 1J9

Nadia Effendi

Phone: 613-787-3562

Fax: 613-230-8842

Email: neffendi@blg.com

cchristie@blg.com

Agent for the Intervener
Women's Legal Education and Action Fund

Cavanagh Williams Conway Baxter LLP

401-1111 Prince of Wales Drive
Ottawa ON K2C 3T2

Colin S. Baxter

Phone: 613-569-8558

Fax: 613-569-8668

Email: cbaxter@cwcb--law.com

Agent for the Intervener
Canadian Journalists for Free Expression

Gowling Lafleur Henderson LLP

2600-160 Elgin Street
P.O. Box 466, Station D
Ottawa ON K1P 1C3

Henry S. Brown, Q.C.

Phone: 613-233-1781

Fax: 613-788-3433

Email: henry.brown@gowlings.com

Agent for the Intervener
Canadian Bar Association

MacPherson Leslie Tyerman LLP
1500-410 22nd Street East
Saskatoon SK S7K 5T6

Shaunt Parthev, Q.C.
Ashley M. Smith
Phone: 306-975-7100
Fax: 306-975-7145
Email: sparthev@mlt.com
asmith@mlt.com

Counsel for the Interveners
Northwest Territories Human Rights
Commission and Yukon Human
Rights Commission

Bennett Jones LLP
3400 One First Canadian Place
P.O. Box 130
Toronto ON M4X 1A4

Robert W. Staley
Derek J. Bell
Rajan K. Agarwal
Phone: 416-863-1200
Fax: 416-863-1216
Email: staley@bennettjones.com
bell@bennettjones.com
agarwal@bennettjones.com

Counsel for the Intervener
Christian Legal Fellowship

Dale, Streiman & Kurz
480 Main Street North
Brampton ON L6V 1P8

Marvin Kurz
Phone: 905-455-7300
Fax: 905-455-5848
Email: mkurz@dsklaw.com

Counsel for the Intervener
League for Human Rights of
B'nai Brith Canada

McMillan LLP
300-50 O'Connor Street
Ottawa ON K1P 6L2

Eugene Meehan, Q.C.
Phone: 613-232-7171
Fax: 613-231-3191
Email: eugene.meehan@mcmillan.ca

Agent for the Interveners
Northwest Territories Human Rights
Commission and Yukon Human
Rights Commission

Bennett Jones LLP
1900-45 O'Connor Street
Ottawa ON K1P 1A4

Sheridan Scott
Phone: 613-683-2302
Fax: 613-683-2323
Email: scotts@bennettjones.com

Agent for the Intervener
Christian Legal Fellowship

Gowling Lafleur Henderson LLP
2600-160 Elgin Street
P.O. Box 466, Station D
Ottawa ON K1P 1C3

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

Agent for the Intervener
League for Human Rights of
B'nai Brith Canada

Evangelical Fellowship of Canada

130 Albert Street, Suite 1810

Ottawa ON K1P 5G4

Donald E. L. Hutchinson

Phone: 613-233-9868 Ext. 330

Fax: 613-233-0301

Email: hutchd@efc-canada.com

Counsel for the Intervener
Evangelical Fellowship of Canada

Symes & Street

133 Lowther Avenue

Toronto ON M4T 1N5

Beth Symes

Ben Millard

Phone: 416-920-3030

Fax: 416-920-3033

Email: symes@symesandstreet.com

millard@symesandstreet.com

Counsel for the Intervener
United Church of Canada

McKercher LLP

374 Third Avenue South

Saskatoon SK S7K 1M5

David M.A. Stack

Phone: 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 and Métis Nation-Saskatchewan

Borden Ladner Gervais LLP

1100-100 Queen Street

Ottawa ON K1P 1J9

Nadia Effendi

Phone: 613-787-3562

Fax: 613-230-8842

Email: neffendi@blg.com

Agent for the Intervener
United Church of Canada

Gowling Lafleur Henderson LLP

2600-160 Elgin Street

P.O. Box 466, Station D

Ottawa ON K1P 1C3

Henry S. Brown, Q.C.

Phone: 613-233-1781

Fax: 613-788-3433

Email: henry.brown@gowlings.com

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

Bull Housser & Tupper LLP
3000-1055 West Georgia Street
Vancouver BC V6E 3R3

Ryan D. W. Dalziel
Erica J. Toews
Phone: 604-687-6576
Fax: 604-641-4949
Email: rdd@bht.com
ejt@bht.com

Counsel for the Intervener
Catholic Civil Rights League and
Faith and Freedom Alliance

African Canadian Legal Clinic
18 King Street East
Suite 901
Toronto ON M5C 1C4

Sunil Gurmukh
Moya Teklu
Phone: 416-214-4747 Ext: 26
Fax: 416-214-4748
Email: gurmuks@lao.on.ca

Counsel for the Intervener
African Canadian Legal Clinic

Gowling Lafleur Henderson LLP
2600-160 Elgin Street
P.O. Box 466, Station D
Ottawa ON K1R 7Y6

Brian A. Crane, Q.C.
Phone: 613-786-0107
Fax: 613-788-3500
Email: brian.crane@gowlings.com

Agent for the Intervener
Catholic Civil Rights League and
Faith and Freedom Alliance

**South Ottawa Community Legal
Services**
406 – 1355 Bank Street
Ottawa ON K1H 8K7

Gary Stein
Phone: 613-733-0140
Fax: 613-733-0401
Email: steing@lao.on.ca

Agent for the Intervener
African Canadian Legal Clinic

TABLE OF CONTENTS

DESCRIPTION	Page No.
PART I – Overview of Egale's Position	1
PART II – Statement of Position on the Issues	2
PART III – Egale's Arguments	2
PARTS IV & V – Costs and Request for Oral Argument	10
PART VI – Table of Authorities	11
PART VII – Excerpts of Legislation	13

PART I
OVERVIEW OF EGALE'S POSITION

1. The legal issues raised in this appeal are:
 - (a) whether s. 14(1)(b) of the *Saskatchewan Human Rights Code* (“the Code”) is unconstitutional as an unjustifiable limit on the *Charter* guarantees of freedom of expression or freedom of religion (or both), and
 - (b) whether the Respondent Whatcott’s publications violate s. 14(1)(b).

2. Egale’s arguments are restricted to the appropriate analytical framework that should be adopted in answering the constitutional questions and the proper interpretive approach to the legislation.

3. This Court’s decision will have a significant impact on the evolution of Canadian human rights jurisprudence as it applies to the rights of lesbians, gays and bisexuals (LGBs).¹ An endorsement of the reasoning applied in the Court of Appeal below would significantly erode the legislative and constitutional safeguards enacted to protect LGBs from discrimination and harassment. The reasoning of the Court of Appeal in this case is fundamentally flawed in two respects:
 - (a) it suggests that different constitutional standards apply in reviewing human rights legislation, and in applying s. 14(1)(b) of the *Code*, depending on which prohibited ground of discrimination is at issue, resulting in heightened constitutional scrutiny of provisions that afford protection from discrimination based on sexual orientation, and lesser protection under them; and
 - (b) it validates a restrictive interpretation of the phrase “sexual orientation”, based on a fallacious distinction between orientation and conduct.

¹ This appeal does not directly involve discrimination on the basis of gender identity or the rights of transgender individuals. However, the Court of Appeal’s distinction between identity and conduct and its characterization of a prohibited ground of discrimination as a matter of morality, thus worthy of lesser protection, would potentially also affect the development of the rights of transgender individuals.

4. Contrary to the purposes of the *Code*, the Court of Appeal's reasoning establishes a dangerous precedent that would limit the scope of protection afforded to LGBs. It would render LGBs' human rights protections more susceptible to constitutional infirmity than comparable statutory protections afforded to racialized and religious minorities, a result inimical to the equality values that underlie s. 15 *Charter* rights and the *Code*. Thus, Egale urges this Court to reject the reasoning of the Court of Appeal.

PART II STATEMENT OF POSITION ON THE ISSUES

5. Egale takes no position with respect to the constitutional validity of the impugned legislative provision and no position on whether or not the Respondent's publications violate s. 14(1)(b) of the *Code*.

6. It bears emphasis that s. 14(1)(b) of the *Code*, as judicially interpreted, limits its reach to expression that is hateful or contemptuous on the basis of a prohibited ground. Caution is warranted when reading the Respondent Whatcott's extensive discussion of "criticism" or "comment" of same-sex practices. The *Code* targets only criticism or comment that reaches the high statutory threshold. While Egale does not address it here, careful application of the statutory language to impugned material may be a proper means to balance protection for vulnerable groups against freedom of expression. However, as argued below, erecting a hierarchy of prohibited grounds and severing "conduct" from "sexual orientation" is not a proper means to achieve such a balance, and is inconsistent with *Charter* equality values and the purposes of the *Code*.

PART III EGALE'S ARGUMENTS

7. To accept the Respondent Whatcott's submission that s. 14(1)(b) of the *Code* is unconstitutional, this Court must reverse or distinguish its decision in *Canada v. Taylor*.² *Taylor* involved anti-Semitic hate propaganda that was found to violate s. 13(1) of the

² *Canada v. Taylor*, [1990] 3 S.C.R. 892.

Canadian Human Rights Act, a provision similar to s. 14(1)(b) of the *Code*. This Court held that the legislative provision, properly interpreted, limited the s. 2(b) guarantee of freedom of expression but was reasonable and justifiable under s. 1 of the *Charter*.

8. In the Court of Appeal below, Justice Smith suggested that *Taylor* might be distinguishable because, in this case, the impugned publications target individuals based on sexual orientation, rather than race or religion.³ This conclusion is constitutionally unfounded. As the Federal Court of Appeal ruled in *McAleer v. Canada*, the fact that the grounds of discrimination in *Taylor* (race and religion) were different from the ground involved in this case (sexual orientation) “obviously cannot give rise to the determination and application of different principles” in the constitutional analysis.⁴

9. The first step in any s. 1 inquiry is to examine the importance of the legislative objective.⁵ In *Taylor*, Chief Justice Dickson, for the majority, held that the suppression of hate propaganda was pressing and substantial because:

...messages of hate propaganda undermine the dignity and self-worth of target group members and, more generally, contribute to disharmonious relations among various racial, cultural and religious groups, as a result eroding the tolerance and open-mindedness that must flourish in a multicultural society which is committed to the idea of equality.⁶

10. Homophobic hate propaganda similarly undermines the dignity and self-worth of LGBs. It contributes to disharmonious social relations by eroding the tolerance and open-mindedness that must flourish in a diverse society committed to LGB equality. The only way to distinguish *Taylor* at this step of the analysis is for this Court to declare that promoting a tolerant society which respects the equality and dignity of LGBs is not as pressing and substantial a legislative concern as promoting racial and religious equality and harmony. This would offend the values underlying s. 15 of the *Charter*.

³ See para. 124 of Justice Smith’s reasons for judgement.

⁴ *McAleer v. Canada (Canadian Human Rights Commission) (re Payzant)*, [1999] FCJ No. 1095 (F.C.A.) at para. 4.

⁵ *R. v. Oakes*, [1986] 1 S.C.R. 103

⁶ *Taylor*, *supra* at p. 922.

11. In any s. 2(b) *Charter* case, the second step of the s. 1 inquiry, the proportionality analysis, must be conducted in light of the nexus (or lack thereof) between the expression in question and the core values underlying the guarantee. This Court ruled in *Keegstra* and *Taylor* that “limitations upon hate propaganda are directed at a special category of expression which strays some distance from the spirit of s. 2(b)” and that such restrictions are therefore easier to justify than other infringements of s. 2(b).⁷

12. The Court of Appeal suggested that these findings are distinguishable because the propaganda at issue is directed at LGBs rather than racialized or religious minorities. Justice Smith explained: “it is the [sexual] activity, rather than the individuals themselves, to which the polemic in the impugned flyers is directed.” Moreover, she held that “questions of sexual morality are questions intricately involved in public policy as well as individual autonomy” and that the type of expression in the impugned flyers therefore lies “near the heart of speech worthy of protection from the chilling effects of legislative prohibition.”⁸ Similarly, Justice Hunter described the type of expression at issue as “comment on the morality of another’s behaviour” and noted that there is “a relatively high degree of tolerance for the language used in [the context of] debates about moral issues.”⁹ (Justice Sherstobitoff concurred with both decisions).

13. By treating homosexuality, lesbianism and bisexuality as “matters of morality,” thus deserving of lesser protection under the *Code* and *Charter*, the Court of Appeal adopted an exclusionary, heterosexist perspective. It allowed the discriminatory view by which only heterosexuality is normal to frame its analysis. Opponents of LGB equality routinely label same-sex sexual practices as “immoral”. *The label is itself a key element of the oppression suffered by LGBs*. It is fundamentally offensive to their dignity. The “morality” paradigm is a pretext used to sanitize and legitimize anti-LGB propaganda. In this case, it serves to elevate the constitutional value of anti-LGB propaganda and mask its tenuous relationship with the core values underlying s. 2(b).

⁷ *Ibid.* at p. 922; *R. v. Keegstra*, [1990] 3 S.C.R. 697 at p. 766. See also *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232 at p. 247.

⁸ See para. 134 of Justice Smith’s reasons for judgement.

⁹ See para. 62 of Justice Hunter’s reasons for judgement.

14. Whatcott's "morality" discourse¹⁰ must not be permitted to taint this Court's reasoning. Expressions of hate based on sexual orientation cannot be attributed greater constitutional value than expressions of hate based on race, religion, or any other prohibited ground. It is constitutionally impermissible to apply different considerations to the constitutional validity of s. 14(1)(b) of the *Code* depending on whether the section is being interpreted in the context of hate propaganda based on sexual orientation or based on other prohibited grounds. Section 14(1)(b), as properly interpreted, either passes constitutional muster or it does not. It cannot be constitutional in respect of hate propaganda based on race/religion but unconstitutional in respect of hate propaganda based on sexual orientation.

15. It also cannot be (as Justice Smith suggested¹¹) that, for s.14(1)(b) of the *Code* to be constitutionally valid, "hatred" must take a more restrictive meaning in cases involving propaganda based on sexual orientation. A hierarchy of equality-seeking groups and of prohibited grounds within human rights legislation, which such an approach would construct, is contrary to *Charter* equality values and the purposes of the *Code*.¹²

16. The "morality" paradigm adopted by the Court of Appeal implicitly incorporates and endorses Whatcott's asserted distinction between sexual orientation and sexual activity. The Respondent asserts that his publications do not violate s.14(1)(b) of the *Code* because they are directed exclusively at (homo)sexual behaviour, which is not a prohibited ground of discrimination. He argues that human rights legislation (and s. 15 of the *Charter*) afford LGBs protection from discrimination "for sexual orientation [only], not for conduct."¹³

17. Anti-LGB proponents have often advanced this orientation/conduct distinction in attempts to undermine and erode the constitutional and quasi-constitutional rights of

¹⁰ See, for example, paras. 23, 30, 35, 63-66, 72, 84, 85, 91, 93, 112 of the Respondent's factum.

¹¹ See para. 124 of Justice Smith's reasons for judgement.

¹² A majority of this Court rejected the notion of a hierarchy of s. 15 grounds in *Lavoie v. Canada*, [2002] 1 S.C.R. 769, per Bastarache J. at para. 51 and McLachlin C.J. (dissenting, but not on this point) at para. 1.

¹³ Respondent Whatcott's factum at paras. 62 and 64 (see paras. 61-77 generally).

LGBs. It has consistently been rejected by this Court¹⁴ and by other courts and tribunals.¹⁵ It must be rejected here.

18. The difficulties in securing protection for LGB rights confirm the importance of rejecting a judicial approach that would undermine them. The inclusion of “sexual orientation” as a prohibited ground of discrimination in human rights statutes, and the recognition of “sexual orientation” as an analogous ground under s. 15 of the *Charter*, resulted from years of public education campaigns, government lobbying and protracted litigation to achieve legal equality for LGBs. Until the late 1980s, Quebec was the only Canadian jurisdiction that had a statutory prohibition against discrimination based on sexual orientation.¹⁶ Despite widespread harassment and discrimination against LGBs in employment, housing and access to public services, LGBs were not afforded the protection of provincial, territorial or federal human rights legislation. This began to change in 1986-1987, when Ontario and Manitoba amended their statutes to prohibit discrimination based on sexual orientation,¹⁷ but other jurisdictions did not immediately follow suit. The *Saskatchewan Human Rights Code* was not amended to include “sexual orientation” until 1993.¹⁸ The federal *Canadian Human Rights Act* (CHRA) was not amended by Parliament to include “sexual orientation” as a prohibited ground of discrimination until 1996 – only after the Ontario Court of Appeal ruled in *Haig v. Canada* that the CHRA was unconstitutional because it failed to provide LGBs with an avenue of recourse in the event that they suffered discrimination.¹⁹ Alberta took eleven years after this Court in *Vriend* struck down its human rights statute for failing to provide

¹⁴ See, for example, *Egan v. Canada*, [1995] 2 S.C.R. 513 at p. 601; *Trinity Western v. B.C. College of Teachers*, [2001] 1 S.C.R. 772 at para. 69 (per L’Heureux Dubé, J. dissenting, but not on this point).

¹⁵ See, for example, *Reference re Marriage Commissioners Appointed under the Marriage Act*, 2011 SKCA 3 at para. 107; *Hayes v. Barker*, [2005] BCHRTD No. 590, aff’d [2008] BCJ No. 592 (C.A.); *Bewley v. Ontario*, [1997] OHRBID No. 24 at para. 22.

¹⁶ *Charter of Human Rights and Freedoms*, R.S.Q. c. C-12, s. 10, as amended by S.Q. 1977, c.6, s.1.

¹⁷ *Equality Rights Statute Law Amendment Act, 1986*, S.O. 1986, c. 64, s. 18; *Human Rights Code*, R.S.M. 1987, c. H175, s. 9(2)(h).

¹⁸ *An Act to amend the Saskatchewan Human Rights Code*, S.S. 1993, c. 61

¹⁹ *An Act to amend the Canadian Human Rights Act*, S.C. 1996, c. 14; *Haig v. Canada*, 1992 CanLII 2787 (ON CA)

LGBs with protection from discrimination based on sexual orientation before passing remedial legislation.²⁰

19. Ever since “sexual orientation” became recognized as a prohibited ground of discrimination, the opponents of LGB equality have argued that it should be interpreted narrowly to exclude sexual conduct and thereby minimize the protection afforded to LGBs. This argument contradicts the principle that human rights legislation has a unique quasi-constitutional nature and ought to be interpreted liberally and purposively to advance the underlying policy considerations.²¹ As this Court has ruled, embracing broad inclusive interpretations of the prohibited grounds of discrimination furthers the purposes of human rights statutes.²²

20. In the first case in which this Court had to interpret “sexual orientation”, it rejected a narrow interpretation. In *Egan v. Canada*, Justice Cory (for a majority on this point) held:

Sexual orientation is more than simply a “status” that an individual possesses. It is something that is demonstrated in an individual’s conduct by the choice of a partner. The *Charter* protects religious beliefs and religious practice as aspects of religious freedom. So, too, should it be recognized that sexual orientation encompasses aspects of “status” and “conduct” and that both should receive protection.²³

²⁰ *Vriend v. Alberta*, [1998] 1 S.C.R. 493; *Human Rights, Citizenship and Multiculturalism Amendment Act*, S.A. 2009, c. 26. Sexual orientation was read into Newfoundland’s Code in 1995: *Newfoundland and Labrador (Human Rights Commission) v. Newfoundland and Labrador (Minister of Employment and Labour Relations)* (1995), 127 D.L.R. (4th) 694.

²¹ *Insurance Corporation of B.C. v. Heerspink*, [1982] 2 S.C.R. 145 at pp. 157-158; *Ontario Human Rights Commission and O’Malley v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536 at pp. 546-547; *Canadian National Railway Co. v. Canada*, [1987] 1 S.C.R. 1114 at pp. 1134-1136; *Robichaud v. Canada*, [1987] 2 S.C.R. 84, at pp. 89-90; and *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219 at pp. 1244-1245; *University of British Columbia v. Berg*, [1993] 2 S.C.R. 353, at p. 370; *Gould v. Yukon Order of Pioneers*, [1996] 1 S.C.R. 571 at para. 120.

²² *B. v. Ontario (Human Rights Commission)*, [2002] 3 S.C.R. 403 at para. 4; *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City)*, [2000] 1 S.C.R. 665 at para. 71.

²³ *Egan v. Canada*, [1995] 2 S.C.R. 513 at p. 601. In subsequent cases, this Court did not restrict its interpretation of “sexual orientation” to include only sexual identity and not sexual conduct. See, for example, *M v. H.*, [1999] 2 S.C.R. 3.

21. In defence of the orientation/conduct distinction, Whatcott argues that, since “not all people with same-sex attractions engage in sexual activity with people of the same sex”, criticism of same-sex sexual conduct is not necessarily directed at “all those with same sex attractions”.²⁴ This is analogous to the discredited argument – rejected by this Court in *Brooks* – that because not all women become pregnant, discrimination based on pregnancy is not a form of sex discrimination.²⁵

22. Whatcott also argues that “some people without same-sex attractions may... engage in same-sex sexual activities, [thus...] one cannot say that criticism of same-sex sexual activities is directed [only at...] those with same-sex attractions.”²⁶ This argument ignores the profound connection between sexual orientation and sexual behaviour. As Justice L’Heureux-Dubé wrote in *Trinity Western* (dissenting, but not on this point):

The status/conduct or identity/practice distinction for homosexuals and bisexuals should be soundly rejected, as per Madam Justice Rowles: “Human rights law states that certain practices cannot be separated from identity, such that condemnation of the practice is a condemnation of the person” ... This is not to suggest that engaging in homosexual behaviour automatically defines a person as homosexual or bisexual, but rather is meant to challenge the idea that it is possible to condemn a practice so central to the identity of a protected and vulnerable minority without thereby discriminating against its members and affronting their human dignity and personhood.²⁷

23. The proposed distinction between sexual orientation and sexual conduct is a false dichotomy. It is utterly incompatible with the lived reality of LGBs, who legitimately experience condemnation of same-sex sexual conduct as a denunciation of their very being/identity. Sexual practices are such an intimately central aspect of an individual’s self-identity that it is unreasonable to suggest that same-sex sexual conduct can be divorced from LGBs themselves.

²⁴ Factum of the Respondent Whatcott at para. 63.

²⁵ *Brooks*, *supra* at p. 1247.

²⁶ Factum of the Respondent Whatcott at para. 53 (emphasis in original).

²⁷ *Trinity Western*, *supra* at para. 69.

24. If Whatcott's narrow interpretation of "sexual orientation" prevails, LGBs would be deprived of any meaningful protection from discrimination. While the present appeal is this Court's first which may turn on the orientation/conduct dichotomy, lower tribunals have concretized the statements in *Egan* and *Trinity Western* in resolving particular cases. Addressing a complaint under the broadcasters' *Code of Ethics*, the Canadian Broadcast Standards Council rejected the orientation/conduct distinction as "fatuous and unsustainable." It rejected the radio host's defence that she was speaking about practices not individuals, on the basis that gays' and lesbians' sexual practices are "inseparable from their personas".²⁸ Similarly, as the B.C. Human Rights Tribunal has noted, if protection from discrimination on the basis of sexual orientation affected only orientation, but not associated behaviours, "the prohibition on discrimination on the basis of sexual orientation would offer scant protection indeed."²⁹

25. The restrictive interpretation proposed by Whatcott would prohibit firing a person for "being" gay, but not for having sex with his male partner. It would permit a hotel operator to deny a room to a lesbian couple, arguing that the discrimination was based on the "conduct" of two women sharing a bed, as opposed to the sexual orientation of the women.³⁰ A landlord could refuse to rent an apartment to a family headed by a gay couple, arguing that the discrimination was based on the "conduct" of the two men parenting a child and sharing a home, rather than on their sexual orientation. To avoid liability for a human rights violation, most anti-LGB discriminatory acts could easily be characterized as directed at some form of "conduct". Acceding to this argument would eviscerate human rights protections for LGBs.

26. Although the Court of Appeal did not outright accept Whatcott's argument that "sexual orientation" excludes sexual conduct, Justice Smith nevertheless incorporated the orientation/conduct distinction into her analysis of whether the impugned publications violate s. 14(1)(b) of the *Code*. She found that disapproval of same-sex

²⁸ *CFYI-AM re the Dr. Laura Schlessinger Show*, [2000] CBSCD No. 1 at paras. 53-55.

²⁹ *Hayes v. Barker*, *supra* at para. 22.

³⁰ See, for example, "Accommodations/Sexual Orientation" in *PEI Human Rights Commission Complaint Update* at <http://www.gov.pe.ca/humanrights/releases/may22-01.php3>

sexual activities, as opposed to the disapproval of LGBs themselves, rendered the content of the publications less likely to be the sort of hateful message that falls within the scope of s. 14(1)(b) of the *Code*.³¹ Justice Hunter similarly situated the Respondent's flyers in a "debate on the morality of behaviour."³² This reasoning, which lends credence to the orientation/conduct distinction, is inconsistent with Canadian human rights jurisprudence. If endorsed by this Court, it would constitute a departure from established principles that would erode the significant equality gains achieved by LGBs over the past three decades.

27. Whatever the ultimate decision of this Court on the facts of this case, Egale urges the Court to reject the orientation/conduct distinction in its reasoning. Based on the above submissions, Egale also urges the Court to decide the appeal without resort to the heterosexist "morality" discourse that tainted the reasons of the Court of Appeal below, and without endorsing a constitutional analysis that creates a hierarchy among prohibited grounds of discrimination.

PARTS IV & V
COSTS AND REQUEST FOR ORAL ARGUMENT

28. Egale is not seeking an order for costs and asks that no costs be awarded against it, other than as provided for in the order of Justice Abella dated June 10, 2011.

29. Egale requests leave of the Court to make oral submissions at the hearing of this appeal. Egale requests 15 minutes or such other time as this Court deems appropriate.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,



Cynthia Petersen
SACK GOLDBLATT MITCHELL LLP

³¹ See para. 133 of Justice Smith's reasons for judgement.

³² See para. 62 of Justice Hunter's reasons for judgement.

PART VI
TABLE OF AUTHORITIES

Case law	Paragraphs
<i>B. v. Ontario (Human Rights Commission)</i> , [2002] 3 S.C.R. 403	19
<i>Bewley v. Ontario</i> , [1997] OHRBID No. 24	17
<i>Brooks v. Canada Safeway Ltd.</i> , [1989] 1 S.C.R. 1219	19, 21
<i>Canada v. Taylor</i> , [1990] 3 S.C.R. 892	7, 8, 9, 10,11
<i>Canadian National Railway Co. v. Canada</i> , [1987] 1 S.C.R. 1114	19
<i>CFYI-AM re the Dr. Laura Schlessinger Show</i> , [2000] CBSCD No. 1	24
<i>Egan v. Canada</i> , [1995] 2 S.C.R. 513	17, 20, 24
<i>Gould v. Yukon Order of Pioneers</i> , [1996] 1 S.C.R. 571	19
<i>Haig v. Canada</i> , 1992 CanLII 2787 (ON CA)	18
<i>Hayes v. Barker</i> , [2005] BCHRTD No. 590, aff'd [2008] BCJ No. 592 (C.A.)	17, 24
<i>Insurance Corporation of B.C. v. Heerspink</i> , [1982] 2 S.C.R. 145	19
<i>Lavoie v. Canada</i> , [2002] 1 S.C.R. 769	15
<i>M v. H.</i> , [1999] 2 S.C.R. 3	20
<i>McAleer v. Canada (Canadian Human Rights Commission) (re Payzant)</i> , [1999] FCJ No. 1095 (F.C.A.)	8
<i>Newfoundland and Labrador (Human Rights Commission) v. Newfoundland and Labrador (Minister of Employment and Labour Relations)</i> (1995), 127 D.L.R. (4th) 694	18
<i>Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd.</i> , [1985] 2 S.C.R. 536	19
<i>Québec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City)</i> , [2000] 1 S.C.R. 665	19
<i>R. v. Keegstra</i> , [1990] 3 S.C.R. 697	11
<i>R. v. Oakes</i> , [1986] 1 S.C.R. 103	9

<i>Reference re Marriage Commissioners Appointed under the Marriage Act</i> , 2011 SKCA 3	17
<i>Robichaud v. Canada</i> , [1987] 2 S.C.R. 84	19
<i>Rocket v. Royal College of Dental Surgeons of Ontario</i> , [1990] 2 S.C.R. 232	11
<i>Trinity Western v. B.C. College of Teachers</i> , [2001] 1 S.C.R. 772	17, 22, 24
<i>University of British Columbia v. Berg</i> , [1993] 2 S.C.R. 353	19
<i>Vriend v. Alberta</i> , [1998] 1 S.C.R. 493	18
<i>Whatcott v. Saskatchewan (Human Rights Tribunal)</i> , 2010 SKCA 26	8, 12, 13, 15, 26
Statutory Provisions	
<i>An Act to amend the Canadian Human Rights Act</i> , S.C. 1996, c. 14	18
<i>An Act to amend the Saskatchewan Human Rights Code</i> , S.S. 1993, c. 61	18
<i>Canadian Charter of Rights and Freedoms</i> as found in the <i>Constitution Act, 1982</i> , being Schedule B to the <i>Canada Act 1982 (U.K.)</i> , 1982, c. 11, sections 1, 2(a), 2(b) and 15	4, 7, 10, 11, 13, 15, 16, 18, 20
<i>Canadian Human Rights Act</i> , RSC 1985, c. H-6, sections 13(1)	7
<i>Charter of Human Rights and Freedoms</i> , R.S.Q. c. C-12, s. 10, as amended by S.Q. 1977, c.6, s.1.	18
<i>Equality Rights Statute Law Amendment Act</i> , 1986, S.O. 1986, c. 64, s. 18	18
<i>Human Rights, Citizenship and Multiculturalism Amendment Act</i> , S.A. 2009, c. 26	18
<i>Human Rights Code</i> , R.S.M. 1987, c. H175, s. 9(2)(h)	18
<i>Saskatchewan Human Rights Code</i> , SS 1979, c. S-24.1, section 14(1)(b)	5, 6, 7, 14, 15, 16, 26
Articles, Secondary Sources, and Other Materials	
"Accommodations/Sexual Orientation" in PEI Human Rights Commission Complaint Update	25

**PART VII
EXCERPTS OF LEGISLATION**

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.

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.

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:

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.