

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

BETWEEN:

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-and-

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-and-

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## PART I - Overview

1. Hate expression is a practice of discrimination causing harm to vulnerable groups and to society.<sup>1</sup> It causes physical and psychological harm.<sup>2</sup> It perpetuates stereotypes and erects or reinforces barriers to the social, economic, and political participation of the targeted groups.<sup>3</sup> It silences the expression of the targeted groups.<sup>4</sup> It is proliferating and is increasingly accessible because of the Internet.<sup>5</sup> This issue comes before the Court at a time when hate crimes are increasing.<sup>6</sup> Human rights provisions addressing hate speech are “an even more easily justified component of an equality-based response to bigotry, prejudice and hatred than it was almost 20 years ago when the Supreme Court of Canada penned its decisions in *Taylor* and *Keegstra*.”<sup>7</sup>

2. Hate expression has targeted and continues to target women. Against lesbians, hate propaganda has included portrayal as predators, intending to lure and abuse children.<sup>8</sup> Black women have been portrayed as oversexed, diseased, prostitutes, animal-like, and stupid<sup>9</sup>; Aboriginal women as degraded and dispensable “squaws”<sup>10</sup>; Muslim women wearing niqabs as terrorists intending to destroy and

<sup>1</sup> *Canada (Human Rights Commission) v. Taylor*, [1990] 3 SCR 892, at 918-919 [*Taylor*].

<sup>2</sup> *Ibid* at 916, 918-919, 958; *R. v. Keegstra*, [1990] 3 SCR 697, at 746-747, 812 [*Keegstra*]; R Delgado & J Stefancic, *Understanding Words that Wound* (Boulder: Westview, 2004), at 16-18 [Delgado & Stefancic]; MJ Matsuda, “Public Response to Racist Speech: Considering the Victim’s Story,” in MJ Matsuda *et al*, *Words That Wound: Critical Race Theory, Assaultive Speech and the First Amendment* (Boulder: Westview Press, 1993) 17 at 24 [Matsuda]; see further, n 27.

<sup>3</sup> *Keegstra*, n 2 at 745-749, 847; Delgado & Stefancic, n 2 at 17-18.

<sup>4</sup> *Ross v. New Brunswick School District No. 15*, [1996] 1 SCR 825 [Ross], at para 91; KE Mahoney, “Speech, Equality, and Citizenship in Canada” (2010) 39 Comm L World Rev 69, at 80 [Mahoney]; CR Lawrence III, “If He Hollers Let Him Go: Regulating Racist Speech on Campus,” in MJ Matsuda *et al*, *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (Boulder: Westview Press, 1993) 53, at 68-69, 79.

<sup>5</sup> Mahoney, at 70-72; J Bailey, “Twenty Years Later *Taylor* Still Has It Right: How the *Canadian Human Rights Act*’s Hate Speech Provision Continued to Contribute to Equality,” in S Rodgers and S McIntyre, eds, *The Supreme Court of Canada and Social Justice: Commitment, Retrenchment or Retreat* (Markham: LexisNexis, 2010), 349 at 350-351 [Bailey]; R Klein and A Bromberg, “2010 Audit of Antisemitic Incidents: Patterns of Prejudice in Canada” (Toronto: B’nai Brith Canada, 2011), at 2, 9-10, <http://jewishtribune.ca/tribune/PDF/audit2010/ENAudit2010.pdf>. See also KE Mahoney, “Hate Discrimination: A Manifestation of Incipient Malevolence and Violence” *Loy U Chi LJ* (2011) (forthcoming), and see further, n 23.

<sup>6</sup> Statistics Canada, *Police-reported hate crime in Canada 2009* (Ottawa: StatsCan, 2011), <http://www.statcan.gc.ca/pub/85-002-x/2011001/article/11469-eng.pdf>.

<sup>7</sup> Bailey, n 5 at 353.

<sup>8</sup> *Schnell v. Machiavelli Emprize Inc.*, 2002 CanLII 1887 (CHRT) at para 40 [Schnell]; E Faulkner, “Homophobic Hate Propaganda in Canada” (2006/07) *Journal of Hate Studies* 5:63,

<http://guweb2.gonzaga.edu/againsthate/journal5/GHS107.pdf> at 77-79 [Faulkner]; see *Pardy v. Earle*, 2011 BCHRT 101 (CanLII) for an example of a vitriolic, profanity-laced attack against lesbians.

<sup>9</sup> *Warman v. Guille*, 2008 CHRT 40 (CanLII) [Guille] at paras 83, 119; *Association of Black Social Workers v. Arts Plus* (1994), 24 CHRR D/513 (NS Bd Inq).

<sup>10</sup> *Warman v. Western Canada for Us*, 2006 CHRT 52 (CanLII) at para 19; see also Amnesty International, “No More Stolen Sisters” (London, U.K., 2009), <http://www.amnesty.ca/amnestynews/upload/AMR200122009.pdf> at 5-6 [Amnesty International]; Aboriginal Justice Inquiry of Manitoba, *The Changing Image of Aboriginal Women*, ch

debase our society and as “sick[ening].”<sup>11</sup> Against persons with disabilities, hatemongers have advocated eugenics and euthanasia.<sup>12</sup> In a recent example, anti-women messages were displayed on posters and transmitted through e-mails, resulting in the closing of a university women’s centre.<sup>13</sup> For women, hate message provisions in human rights legislation are the only remedial recourse and are thus fundamental to women’s access to justice.

3. This Court has recognized that discrimination may be carried out through expression, as in the poisoning of work environments through sexual harassment.<sup>14</sup> The regulation of hate expression must be similarly understood. Human rights legislation, here s. 14(1)(b) of *The Saskatchewan Human Rights Code*,<sup>15</sup> is an important and justifiable measure to address hate expression as a deeply harmful manifestation of discrimination and to promote a society based on the equal worth and respect of all.

#### **PART II - Issues**

4. LEAF submits that s. 14(1)(b) of the *Code* is constitutional. LEAF’s arguments will address the justification for the provision under s. 1 of the *Charter*.<sup>16</sup> LEAF submits that s. 2(a) is not breached but will not further address this point. LEAF takes no position on whether the publications in this case violated the *Code*, but submits that the Court of Appeal erred by according diminished constitutional and quasi-constitutional status and protection to the ground of sexual orientation.

#### **PART III - Argument**

5. This Court has identified equality as one of the underlying values and principles of a free and democratic society, the genesis of the rights and freedoms guaranteed by the *Charter*, and the ultimate standard against which the objects of all legislation must be measured. Section 15 “applies to and supports all other rights guaranteed by the *Charter*.”<sup>17</sup> This Court has held that the *Charter* must not be used as “an instrument of better situated individuals to roll back legislation which has as its object the

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13, vol 1 (Manitoba: The Aboriginal Justice Implementation Commission, 1999), <http://www.ajic.mb.ca/volume1/chapter13.html#5>

<sup>11</sup> *Warman v. Kouba*, 2006 CHRT 50 (CanLII) at para 47 [*Kouba*]; *Warman v. Beaumont*, 2007 CHRT 49 (CanLII) at paras 16, 18 [*Beaumont*].

<sup>12</sup> *Warman v. Northern Alliance*, 2009 CHRT 10 (CanLII) at para 22 [*Northern Alliance*].

<sup>13</sup> L D’Amato, “Two UW centres closed following anti-female messages,” *The Record*, February 19, 2011, <http://www.therecord.com/news/local/article/489999-two-uw-centres-closed-following-anti-female-messages>.

<sup>14</sup> *Janzen v. Platy Enterprises Ltd.*, [1989] 1 SCR 1252 [*Janzen*]; *Keegstra*, n 2 at 746.

<sup>15</sup> SS 1979, c S-24.1 [*Code*].

<sup>16</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

<sup>17</sup> *R. v. Oakes*, [1986] 1 SCR 103 at 136; *Andrews v. Law Society of British Columbia*, [1989] 1 SCR 143 at 185.

improvement of the condition of less advantaged persons.”<sup>18</sup> Government promotion of equality and expressive rights of targeted groups deserves special constitutional consideration, consistent with the ameliorative objective of the *Charter* equality guarantee.<sup>19</sup> The quasi-constitutional legislation under attack in this case has an equality-seeking objective of profound importance, buttressed by Canada’s international commitments.<sup>20</sup> It provides an effective educational, preventive, and remedial mechanism.<sup>21</sup> Invalidating it would roll back an important protective measure for marginalized and excluded groups.

6. The importance of promoting equality and related *Charter* guarantees (ss. 7, 15, 25, 27, 28), including equal access to expression by disadvantaged groups, significantly tilts the balance in favour of upholding s. 14(1)(b) of the *Code* under s. 1 of the *Charter*, particularly given the minimal impairment of freedom of expression (including religious expression). Since the *Taylor* decision over two decades ago, courts have consistently upheld the constitutionality of hate speech provisions in human rights statutes.<sup>22</sup> There is no compelling reason to change either the law or public policy underpinning these decisions. Limitation on hate expression through these statutes is an important and logical component of our objective to build an inclusive, non-discriminatory community. The narrow interpretation of these provisions achieves a careful and appropriate balance among freedom of expression and equality and related *Charter* guarantees.

**A. The harms of hate speech reach far and deep.**

**1) Hate speech causes harm to society, to targeted groups, and to individuals.**

7. Hate speech continues to proliferate through print media, but its reach has increased dramatically through the Internet.<sup>23</sup> The targets of hatemongers include racialized groups, Aboriginal

<sup>18</sup> *R. v. Edwards Books and Art Ltd.*, [1986] 2 SCR 713 at 779; see also *Ross*, n 4 at para 86.

<sup>19</sup> *R. v. Kapp*, 2008 SCC 41 (CanLII) at para 33.

<sup>20</sup> See relevant international commitments in Part VII of this Factum.

<sup>21</sup> *Friend v. Alberta*, [1998] 1 SCR 493 at para 97 [*Friend*].

<sup>22</sup> *Owens v. Saskatchewan (Human Rights Commission)*, 2006 SKCA 41 (CanLII) at paras 54-57 [*Owens*]; *Saskatchewan (Human Rights Commission) v. Bell*, 1994 CanLII 4699 (Sask CA) [*Bell*]; *Boissoin v. Lund*, 2009 ABQB 592 (CanLII) at paras 117-126 [*Boissoin*], on appeal; *McAleer v. Canada (Human Rights Commission)*, 1996 CanLII 4026 (FCTD). See also *Canadian Jewish Congress v. North Shore Free Press Ltd.*, [1997] BCHRT No 23. In *Warman v. Lemire*, 2009 CHRT 26 [*Lemire*], under judicial review, the Tribunal found unconstitutionality based on penalty provisions and procedural concerns.

<sup>23</sup> N 5, above. See also: DK Citron, “Law’s Expressive Value in Combating Cyber Gender Harassment” (2009) *Michigan L Rev* 108:373 at 374-375; DK Citron, “Cyber Civil Rights” (2009) *Boston Univ L Rev* 89:61 at 64-66, 68-84; L Langevin, “La rencontre de l’antiféminisme et d’Internet : analyse de sites web qui se disent à la défense des droits des pères et des hommes” in J Brun, ed, *Interrelations femmes-médias dans l’Amérique française*, Chaire

peoples, Jews, Muslims, sexual minorities, and women – including particularly women who experience discrimination on intersecting grounds.<sup>24</sup> Hate expression directed at, for example, lesbians, women with disabilities, and Muslim, racialized, and Aboriginal women, depicts and degrades them in uniquely gendered ways.<sup>25</sup>

8. The harmful effects of hate speech were described by this Court in *Taylor and Keegstra*.<sup>26</sup> Subsequent jurisprudence and literature further document the nature and extent of the harm.<sup>27</sup> The harm to lesbians, specifically targeted in this case, along with gay men, includes the perpetuation of odious stereotypes and a deep sense of exclusion and loss of dignity, the instilling of fear and self-hatred and the retreat into avoidance behaviours: retreat into the closet.<sup>28</sup> Hate speech is so potent because it resonates with and reinforces deeply rooted racist, sexist, and homophobic narratives and stereotypes in society.

**2) Hate speech is a practice of discrimination.**

9. This Court recognized in its foundational judgment on sexual harassment that discrimination can be accomplished through words.<sup>29</sup> Regulating expression is therefore central to human rights law. Hate expression is a practice of discrimination in the form of words. It immediately communicates and effects exclusion and rejection as well as foreshadowing even more discrimination in the future. It is an integral link in systemic discrimination, keeping target groups in subordinated positions through fear, intolerance, segregation, exclusion, disparagement, vilification, and degradation. Addressing such discrimination is the core work of human rights law. Statutory provisions addressing hate speech therefore fit logically within the range of anti-discrimination measures included in human rights statutes.

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*pour le développement de la recherche sur la culture d'expression française en Amérique du Nord (CEFAN)* (Québec: Presses de Université Laval, 2009) 223 at 223-226 [Langevin].

<sup>24</sup> For example, *Northern Alliance*, n 12, *Beaumont*, n 11. See also: Faulkner, n 8 at 63-97; Egale Canada Human Rights Trust, "Every Class in Every School: Final Report on the First National Climate Survey on Homophobia, Biphobia and Transphobia, in Canadian Schools, Executive Summary," May 2011, <http://www.egale.ca/extra%5C1489.pdf>; Langevin, n 23 at 226-241.

<sup>25</sup> *Withler v. Canada (Attorney General)*, 2011 SCC 12 (CanLII) at para 63, recognizing intersecting grounds.

<sup>26</sup> *Taylor*, n 1 at 918-919; *Keegstra*, n 2 at 745-749, 846-848.

<sup>27</sup> See references in para. 1 above; *Bou Malhab v. Diffusion Métromédia CMR inc.*, 2011 SCC 9 (CanLII) [Malhab], at paras 68 107; *Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40 (CanLII) at paras 102, 147 [Mugesera]; A Tsesis, *Destructive Messages: How Hate Speech Paves the Way for Harmful Social Movements* (New York: New York University Press, 2002) at 94-98 [Tsesis]; Matsuda, n 2 at 24-26; GM Herek, "Hate Crimes and Stigma-Related Experiences Among Sexual Minority Adults in the United States" (2009) *J Interpers Violence* 24:55 at 57.

<sup>28</sup> Faulkner, n 8 at 80-82.

<sup>29</sup> *Janzen*, n 14.

### 3) Hate expression connects to other discriminatory conduct.

10. An environment permeated with vilification of groups based on gender, race, ethnicity, sexual orientation, etc. enables and encourages discrimination in employment, tenancy, and the provision of goods and services. The reinforcement of negative stereotypes leads to denial of opportunities. The continuum between expression, discrimination, violence and ultimately genocide has been described in the social sciences literature and the jurisprudence.<sup>30</sup> Historical lessons show that “hate-filled ideologies lie at the heart of human tragedies.”<sup>31</sup> Examples of such lessons are too numerous to list, however two recent ones include the horrific attack in Norway on July 22, 2011, which has been linked to the “politics of hate.”<sup>32</sup> In Uganda, homophobic hate propaganda which included language similar to that used by the Respondent recently led to the tabling of a bill calling for the execution of homosexuals.<sup>33</sup> In Canada, the portrayal of Aboriginal women as dispensable, degraded, runaway-prostitutes, has been connected to the disappearance or murder of over 500 Aboriginal women.<sup>34</sup> Similarly, in 1991 the Manitoba Aboriginal Justice Inquiry into the murder of Helen Betty Osborne concluded that the men who abducted and killed her were driven by “vicious stereotypes borne of ignorance and aggression... [T]hey believed that young Aboriginal women were objects of no human value beyond sexual gratification.”<sup>35</sup> The Inquiry relied on evidence that “[t]he portrayal of the squaw is one of the most degraded, most despised, and most dehumanized anywhere in the world...she has no human face, she is lustful, immoral, unfeeling and dirty. Such a grotesque dehumanization has rendered all Native women and girls vulnerable to physical, psychological and sexual violence.”<sup>36</sup>

<sup>30</sup> G Allport, *The Nature of Prejudice* (Cambridge, MA: Addison-Wesley Pub. Co., 1954) at 14-15; B Mullen & T Leader, “Linguistic Factors: Antilocutions, Ethnonyms, Ethnophaulisms, and other Varieties of Hate Speech,” in JF Dovidio *et al*, *On the Nature of Prejudice: Fifty Years after Allport* (Malden, MA: Blackwell Publishing Ltd., 2005) at 195; JB Ruscher, *Prejudiced Communication: A Social Psychological Perspective* (New York: Guilford Press, 2001), at 10-11, 13-14; Taylor, n 1 at 918-919, referring to the Cohen Report; *Mugesera*, n 27 at para 147; *Northern Alliance*, n 12 at para 41; *Schnell*, n 8 at paras 70, 144.

<sup>31</sup> Tsesis, n 27 at 1, and later giving examples such as the Holocaust and U.S. slavery in the antebellum South; *Mugesera*, n 27 at paras 147-148; WA Schabas, “Hate Speech in Rwanda: The Road to Genocide” (2000-2001) 46 McGill LJ 141; Mahoney, n 4 at 73, with examples such as Rwanda and Bosnia.

<sup>32</sup> Devin Burghart of the Seattle office of The Institute for Research & Education on Human Rights, on CBC “The Current,” July 25, 2011, <http://www.cbc.ca/thecurrent/episode/2011/07/25/norway-massacre/>.

<sup>33</sup> J Gettleman, “Americans’ Role Seen in Uganda Anti-Gay Push,” *New York Times*, January 3, 2010, <http://www.nytimes.com/2010/01/04/world/africa/04uganda.html>

<sup>34</sup> Amnesty International, n 10 at 5.

<sup>35</sup> *Ibid.*

<sup>36</sup> Emma LaRocque, Department of Native Studies, University of Manitoba, in a presentation to the Inquiry, quoted in Amnesty International, n 10 at 5 and in Aboriginal Justice Inquiry of Manitoba, *The Changing Image of Aboriginal Women*, ch 13, vol 1, n 10, above.

**B. The analysis demands full recognition of the *Charter* s. 2(b) and s. 15 rights of the targeted groups, and of ss. 7, 25, 27, and 28 of the *Charter*.**

11. At the outset of the analysis under s. 1 of the *Charter* in *Taylor*, Dickson C.J. noted that a meaningful consideration of the principles central to a free and democratic society should give full recognition to other provisions in the *Charter*, in particular ss. 15 and 27 (equality rights and multiculturalism).<sup>37</sup> The *Taylor* majority also emphasized the importance of these *Charter* sections in considering the objective of the legislative provision. Other *Charter* provisions which must be considered in this case include ss. 25, 28, and 7.<sup>38</sup> Under s. 14(1)(b) of the *Code* and counterpart provisions in other jurisdictions, only the extreme band of expression is limited – expression that is far from the core of values underlying freedom of expression<sup>39</sup> and that deters and inhibits the expression of the targeted groups<sup>40</sup> – while equality and other *Charter* rights are given effect.

12. International standards and norms are relevant in assessing what is reasonable and justifiable in a free and democratic society.<sup>41</sup> This includes the international instruments to which Canada is a signatory, as well as other international instruments.<sup>42</sup>

13. A number of statutes across Canada limit hateful expression,<sup>43</sup> supporting the justification of s. 14(1)(b) of the *Code* in relation to the pressing and substantial objective of the provision, minimal impairment of expression, and the final proportionality analysis. Provisions include: 1) under the *Broadcasting Act* (prohibiting programming that tends to or is likely to expose identifiable groups to hatred); 2) *The Canada Post Corporation Act* (denying mail privileges if there are reasonable grounds for believing a hate propaganda offence is being committed); 3) the *Customs Tariff* (prohibiting importation of hate propaganda); 4) regulation of the conduct of inmates (prohibiting behaviour that shows hatred on the basis of a prohibited ground of discrimination); 5) provisions regulating products' and publications' eligibility for tax credits (material capable of inciting hatred is ineligible for tax

<sup>37</sup> *Taylor*, n 1 at 916-917, 919. See also *Keegstra*, n 2 at 755-759; Mahoney, n 4 at 94; *Dagenais v. Canadian Broadcasting Corporation*, [1994] 3 SCR 835 at 839, 877; *Re Marriage Commissioners Appointed under The Marriage Act*, 2011 SKCA 3 (CanLII) at para 66; *Reference Re Same Sex Marriage*, [2004] 3 SCR 698 at para 50; *R. v. N.S.*, 2010 ONCA 670 (CanLII) at paras 47-48.

<sup>38</sup> *Mugesera*, n 31 at para 147.

<sup>39</sup> *Taylor*, n 1 at 922.

<sup>40</sup> *Ross*, n 4 at para 91; Mahoney, n 4 at 80. On the justification for legislation to protect equality of access to discourse, see *Harper v. Canada (Attorney General)*, [2004] 1 SCR 827 at paras 85-88, 91, 101.

<sup>41</sup> *Taylor*, n 1 at 919-920; *Keegstra*, n 2 at 749-755.

<sup>42</sup> *Ibid.*, and see n 20 and Part VII of this Factum; see also Mahoney, n 4 at 75-76.

<sup>43</sup> Relevant provisions are in Part VII of this Factum.



credits); 6) the *Alberta Symbols of Distinction Regulation* (preventing a symbol from being prescribed as an Alberta Symbol of Distinction if it promotes hatred); 7) the B.C. *Security Services Regulation* (prohibiting a licensee from publishing or using as an insignia material that promotes hatred); and 8) the *Defamation Act* of Manitoba (providing for a cause of action for injunction).

**C. S. 14(1)(b) is essential to women's access to justice.**

14. Hate speech provisions in human rights legislation are essential for women's access to justice. Women targeted in hate expression as women or in relation to a number of intersecting grounds have no remedial recourse except through human rights statutes that address hate expression. As noted for this Court by Sopinka J., human rights legislation is "often the final refuge of the disadvantaged and the disenfranchised."<sup>44</sup>

15. The hate propaganda provisions in the *Criminal Code*<sup>45</sup> do not include women as an identifiable group. The *Criminal Code* therefore does not permit recognition of gendered hate speech *qua* women or on intersecting grounds. It prevents the court from considering the full context of the harm that has been perpetrated. The grounds protected in human rights codes are broader and include sex, disability, age, ancestry, marital status, family status and, in some jurisdictions, gender identity and source of income. Further, it is appropriate for a range of options for society to respond to hate speech.<sup>46</sup> Human rights provisions have a different purpose from the *Criminal Code* provisions and "apply to conduct that falls short of criminal behaviour but nevertheless poses harm to vulnerable groups."<sup>47</sup> Human rights legislation focuses on reparation and is educative and corrective rather than punitive.<sup>48</sup> Further, access to justice is more limited under the *Criminal Code* as compared with human rights legislation. Charges of wilful promotion of hatred under s. 319(2) of the *Criminal Code* must be laid by police officers or Crown prosecutors, and the consent of the Attorney General is required for a proceeding to be instituted.<sup>49</sup>

<sup>44</sup> *Zurich Insurance Co. v. Ontario (Human Rights Commission)*, [1992] 2 SCR 321 at 339.

<sup>45</sup> *Criminal Code*, RSC 1985, c C-46, ss 318-320(1) [*Criminal Code*].

<sup>46</sup> Canadian Bar Association, "Hate Speech under the *Canadian Human Rights Act*," Ottawa, 2010, <http://www.cba.org/CBA/submissions/pdf/10-03-eng.pdf>, at 4.

<sup>47</sup> *Ibid*; see also *Keegstra*, n 2 at 861-862, per McLachlin J. (as she then was).

<sup>48</sup> *Ibid*.

<sup>49</sup> *Criminal Code*, n 45 s 319(6).

16. Additionally, there is no remedial avenue through tort law.<sup>50</sup> This Court has held that there is no tort of discrimination,<sup>51</sup> and that a claim for group defamation is not the appropriate remedial route for discriminatory expression.<sup>52</sup>

17. A societal statement through human rights legislation repudiating messages of hate is an important affirmation of equality and an educational tool. A legal response to hate expression is a statement that members of protected groups “are valued members of our polity.”<sup>53</sup> The argument that the marketplace of ideas will provide the necessary balance to resolve the harm is unpersuasive – particularly in the Internet age. Online communication enables the building of groups and presents the ideal breeding grounds for the development of a bigoted mob mentality.<sup>54</sup> Hate expression distorts the marketplace by muting or devaluing the expression of the targeted groups.<sup>55</sup> There is no certainty that the marketplace will result in truth.<sup>56</sup> And “[e]ven if tolerance will eventually rise to the top, the harms victims experience while waiting for justice to burgeon are too heavy a price to pay ....”<sup>57</sup>

**D. Minimal impairment: the legislation applies narrowly and is sufficiently precise.**

18. Section 14(1)(b) of the *Code* and comparable provisions in other human rights legislation have been interpreted and applied narrowly and with careful analysis, so that the provision at issue here minimally impairs freedom of expression. The definitions of “hatred” and “contempt” were established in *Taylor* as applying to extreme, vilifying, and demeaning messages. These narrow definitions have been followed consistently in jurisdictions with a hate expression prohibition in their human rights legislation.<sup>58</sup>

<sup>50</sup> Statutory causes of action have been provided in the *Defamation Act*, CCSM, c D20, s 19 (providing for an action for injunction based on libel against a race, religious creed or sexual orientation, but not gender) and the *Civil Rights Protection Act*, RSBC 1996, c 49, both of which have been seldom used: LJ McNamara, “Negotiating the Contours of Unlawful Hate Speech: Regulation under Provincial Human Rights Laws in Canada” (2005) 38 UBC L Rev 1 at 35, 41.

<sup>51</sup> *Seneca College v. Bhadauria*, [1981] 2 SCR 181; *Honda Canada Inc. v. Keays*, [2008] 2 SCR 362 at para 67.

<sup>52</sup> *Malhab*, n 27 at para 94.

<sup>53</sup> *Matsuda*, n 2 at 18, 25, 49; *Friend*, n 21 at paras 100-101.

<sup>54</sup> *Bailey*, n 5 at 351.

<sup>55</sup> *Mahoney*, n 4 at 80, 97; C MacKinnon, *Only Words* (Cambridge, MA: Harvard University Press, 1993), at 72-73; *Faulkner*, n 8 at 65.

<sup>56</sup> *Keegstra*, n 2 at 762-763.

<sup>57</sup> *Tsesis*, n 27 at 137.

<sup>58</sup> For example, *Owens*, n 22 at paras 48-49; *Kane v. Alberta Report*, 2001 ABQB 570 (CanLII) para. 106 [*Kane*]; *Kouba*, n 11 at para 21; *Lemire*, n 22 at para 8.

19. Courts and tribunals have carried out a careful analysis that draws the line between offensive expression and hate expression.<sup>59</sup> They have also explained that if a portion of a communication crosses the line into hate expression, the other portions do not insulate the communication from a finding of contravention.<sup>60</sup> Similarly, they have made clear that existence of a political or social “debate” does not insulate the communication from contravention of the statutory provision.<sup>61</sup> To the contrary, hate speech that Muslims are destroying Canadian society and must be removed, for example, is not subjected to a less stringent standard due to political or policy discussions of security concerns post-9/11, but must instead be understood in the context of Islamophobia and discriminatory mistrust of Muslims in Canada.

20. The reasoning of the majority in *Taylor* concluding that neither an intent requirement nor a defence of truth is necessary continues to apply.<sup>62</sup> In addition, as noted by McLachlin J. (as she then was) for the majority in *Zundel*,<sup>63</sup> currently accepted “truths” can change over time. Further, a requirement of proof of actual hatred or discriminatory acts resulting from the hate expression is not necessary, and would undermine the purpose of the provision. Such requirement would be counter to the language of s. 14(1)(b) (“tends to expose”) and counterpart provisions (“likely to expose”). Adding such requirement fails to recognize the psychological and social harm caused by hate expression<sup>64</sup> and the preventive purpose of human rights statutes. Such requirement would put an impossible burden on complainants and seriously debilitate the effectiveness of the protection.<sup>65</sup> Justice should not require harm, especially in the hate speech context, when the harm is so odious.

**E. The Court of Appeal erred by according diminished protection to sexual orientation and in failing to give effect to the constitutional protection of equality.**

21. LEAF respectfully submits that the reasons for judgment of the Court of Appeal erroneously devalue the ground of sexual orientation compared with other grounds protected under human rights legislation and rely on the discredited distinction between “conduct” and “identity/status.” Specifically,

<sup>59</sup> *Guille*, n 9 at para 70, summarizing the hallmarks of hate set out in *Kouba*, n 11; *Kane*, n 58 at paras 125-130; *Owens*, n 22 at paras 58-60; *Elmasry v. Roger's Publishing (No. 4)*, 2008 BCHRT 378 (CanLII) at paras 79-83.

<sup>60</sup> *Kempling v. British Columbia College of Teachers*, 2005 BCCA 327 (CanLII) at para 76; *Citron v. Zundel*, 2002 CanLII 23557 (CHRT) at paras 153-154; *Warman v. Tremaine*, 2007 CHRT 2 (CanLII) at para 98, judicial review dismissed 2008 FC 1032 (TD) (CanLII).

<sup>61</sup> *Ibid.*, and see *Lemire*, n 22 at para 205.

<sup>62</sup> *Taylor*, n 1 at 931-933, 934-935.

<sup>63</sup> *R. v. Zundel*, [1992] 2 SCR 731 at 768-769.

<sup>64</sup> *Keegstra*, n 2 at 776.

<sup>65</sup> *Ibid.*

the Court of Appeal erred by distinguishing between the Respondent's disapproval of gays and lesbians and his disapproval of the "morality" of same-sex activities. On this basis, the Court held that the expression in question engaged a public policy debate about the morality of conduct and thus was properly "near the heart of speech worthy of protection," as distinct from hate expression targeted at racial or religious minorities. This reasoning is antithetical to the equality guarantees in the *Charter*.<sup>66</sup> LEAF adopts the submissions on these points in the Factum of Egale Canada Inc.

22. This Court has rejected arguments that attempt to deny discrimination by artificially severing from a ground of discrimination a fundamental aspect of that ground. In *Brooks*<sup>67</sup> this Court rejected the argument, made earlier in *Bliss*,<sup>68</sup> that discrimination on the basis of pregnancy is not sex discrimination because only a subset of women become pregnant. It is impossible to separate pregnancy from sex. It is also impossible to separate same-sex sexual activity from sexual orientation.

23. Further, other than cursory references,<sup>69</sup> the Court of Appeal below did not consider in its interpretation of s. 14(1)(b) of the *Code* the relevance of the constitutional guarantees of equality, Aboriginal rights, multiculturalism, or security of the person. The Court of Appeal reasons referred to statutory protection of equality,<sup>70</sup> but did not consider the constitutional dimension of equality, security of the person, promotion of multiculturalism, or protecting the rights of Aboriginal peoples, whose collective rights as peoples are often targeted by discriminatory expression. The Court of Appeal's consideration of the constitutional dimension was primarily limited to freedom of expression.<sup>71</sup> Full consideration of *Charter* guarantees is essential in the interpretation of human rights provisions addressing hate expression.

#### **PART IV and V – Costs and orders sought**

24. LEAF seeks orders that: (1) LEAF be granted permission to present oral argument at the hearing of this appeal; (2) s.14(1)(b) of the *Code* is constitutionally valid; and (3) no costs of this appeal be ordered for or against LEAF.

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<sup>66</sup> *Vriend*, n 21.

<sup>67</sup> *Brooks v. Canada Safeway Ltd.*, [1989] 1 SCR 1219.

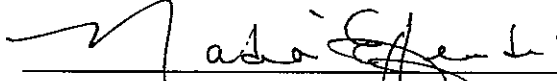
<sup>68</sup> *Bliss v. Attorney General of Canada*, [1979] 1 SCR 183.

<sup>69</sup> *Whatcott v Saskatchewan (Human Rights Commission)*, 2010 SKCA 26 at para 103, through a quotation from *Taylor*, and para. 121.

<sup>70</sup> *Ibid* at paras 56-57, 60-61, 70, 98.

<sup>71</sup> *Ibid* at paras 52, 110, 113, 138.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 4<sup>th</sup> DAY OF AUGUST, 2011.



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Counsel for Women's Legal Education and Action Fund (LEAF)

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**PART VII – Statutes, regulations, rules, etc.**

***The Saskatchewan Human Rights Code***

Relevant provision of *The Saskatchewan Human Rights Code*, SS 1979, c S-24(1):

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

***Canadian Charter of Rights and Freedoms***

Relevant provisions of the *Canadian Charter of Rights and Freedoms*, as found in the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK) 1982, c 11*:

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.

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;

...

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

...

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.

(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.

...

25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

- (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
- (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

...

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

28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

Charte canadienne des droits et libertés:

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.

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;

...

7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

...

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.

(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.

...

25. Le fait que la présente charte garantit certains droits et libertés ne porte pas atteinte aux droits ou libertés -- ancestraux, issus de traités ou autres -- des peuples autochtones du Canada, notamment:

- a) aux droits ou libertés reconnus par la proclamation royale du 7 octobre 1763;
- b) aux droits ou libertés existants issus d'accords sur des revendications territoriales ou ceux susceptibles d'être ainsi acquis.

...

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

28. Indépendamment des autres dispositions de la présente charte, les droits et libertés qui y sont mentionnés sont garantis également aux personnes des deux sexes.

### *Criminal Code*

#### Relevant provisions of the *Criminal Code*, RSC 1985, c C-46:

##### Hate propaganda

##### Advocating genocide

318. (1) Every one who advocates or promotes genocide is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

##### Definition of "genocide"

(2) In this section, "genocide" means any of the following acts committed with intent to destroy in whole or in part any identifiable group, namely,

- (a) killing members of the group; or
- (b) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction.

##### Consent

(3) No proceeding for an offence under this section shall be instituted without the consent of the Attorney General.

##### Definition of "identifiable group"

(4) In this section, "identifiable group" means any section of the public distinguished by colour, race, religion, ethnic origin or sexual orientation.

##### Public incitement of hatred

319. (1) Every one who, by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace is guilty of

- (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or
- (b) an offence punishable on summary conviction.

(2) Every one who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of

- (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or

(b) an offence punishable on summary conviction.



### Defences

- (3) No person shall be convicted of an offence under subsection (2)
- (a) if he establishes that the statements communicated were true;
  - (b) if, in good faith, the person expressed or attempted to establish by an argument an opinion on a religious subject or an opinion based on a belief in a religious text;
  - (c) if the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds he believed them to be true; or
  - (d) if, in good faith, he intended to point out, for the purpose of removal, matters producing or tending to produce feelings of hatred toward an identifiable group in Canada.

### Forfeiture

- (4) Where a person is convicted of an offence under section 318 or subsection (1) or (2) of this section, anything by means of or in relation to which the offence was committed, on such conviction, may, in addition to any other punishment imposed, be ordered by the presiding provincial court judge or judge to be forfeited to Her Majesty in right of the province in which that person is convicted, for disposal as the Attorney General may direct.

### Exemption from seizure of communication facilities

- (5) Subsections 199(6) and (7) apply with such modifications as the circumstances require to section 318 or subsection (1) or (2) of this section.

### Consent

- (6) No proceeding for an offence under subsection (2) shall be instituted without the consent of the Attorney General.

### Definitions

- (7) In this section,

“communicating”

«communiquer»

“communicating” includes communicating by telephone, broadcasting or other audible or visible means;

“identifiable group”

«groupe identifiable»

“identifiable group” has the same meaning as in section 318;

“public place”

«endroit public»

“public place” includes any place to which the public have access as of right or by invitation, express or implied;

“statements”

«déclarations»

“statements” includes words spoken or written or recorded electronically or electromagnetically or otherwise, and gestures, signs or other visible representations.

Code criminel:

## Propagande haineuse

## Encouragement au génocide

318. (1) Quiconque préconise ou fomenté le génocide est coupable d'un acte criminel et passible d'un emprisonnement maximal de cinq ans.

## Définition de «génocide»

(2) Au présent article, « génocide » s'entend de l'un ou l'autre des actes suivants commis avec l'intention de détruire totalement ou partiellement un groupe identifiable, à savoir:

- a) le fait de tuer des membres du groupe;
- b) le fait de soumettre délibérément le groupe à des conditions de vie propres à entraîner sa destruction physique.

## Consentement

(3) Il ne peut être engagé de poursuites pour une infraction prévue au présent article sans le consentement du procureur général.

## Définition de «groupe identifiable»

(4) Au présent article, « groupe identifiable » désigne toute section du public qui se différencie des autres par la couleur, la race, la religion, l'origine ethnique ou l'orientation sexuelle.

## Incitation publique à la haine

319. (1) Quiconque, par la communication de déclarations en un endroit public, incite à la haine contre un groupe identifiable, lorsqu'une telle incitation est susceptible d'entraîner une violation de la paix, est coupable:

- a) soit d'un acte criminel et passible d'un emprisonnement maximal de deux ans;
- b) soit d'une infraction punissable sur déclaration de culpabilité par procédure sommaire.

## Fomenté volontairement la haine

(2) Quiconque, par la communication de déclarations autrement que dans une conversation privée, fomenté volontairement la haine contre un groupe identifiable est coupable:

- a) soit d'un acte criminel et passible d'un emprisonnement maximal de deux ans;
- b) soit d'une infraction punissable sur déclaration de culpabilité par procédure sommaire.

## Défenses

(3) Nul ne peut être déclaré coupable d'une infraction prévue au paragraphe (2) dans les cas suivants :

- a) il établit que les déclarations communiquées étaient vraies;
- b) il a, de bonne foi, exprimé une opinion sur un sujet religieux ou une opinion fondée sur un texte religieux auquel il croit, ou a tenté d'en établir le bien-fondé par argument;
- c) les déclarations se rapportaient à une question d'intérêt public dont l'examen était fait dans l'intérêt du public et, pour des motifs raisonnables, il les croyait vraies;

d) de bonne foi, il voulait attirer l'attention; afin qu'il y soit remédié, sur des questions provoquant ou de nature à provoquer des sentiments de haine à l'égard d'un groupe identifiable au Canada.

#### Confiscation

(4) Lorsqu'une personne est déclarée coupable d'une infraction prévue à l'article 318 ou aux paragraphes (1) ou (2) du présent article, le juge de la cour provinciale ou le juge qui préside peut ordonner que toutes choses au moyen desquelles ou en liaison avec lesquelles l'infraction a été commise soient, outre toute autre peine imposée, confisquées au profit de Sa Majesté du chef de la province où cette personne a été reconnue coupable, pour qu'il en soit disposé conformément aux instructions du procureur général.

#### Installations de communication exemptes de saisie

(5) Les paragraphes 199(6) et (7) s'appliquent, compte tenu des adaptations de circonstance, à l'article 318 et aux paragraphes (1) et (2) du présent article.

#### Consentement

(6) Il ne peut être engagé de poursuites pour une infraction prévue au paragraphe (2) sans le consentement du procureur général.

#### Définitions

(7) Les définitions qui suivent s'appliquent au présent article.

«communiquer»

“communicating”

«communiquer» S'entend notamment de la communication par téléphone, radiodiffusion ou autres moyens de communication visuelle ou sonore.

«déclarations»

“statements”

«déclarations» S'entend notamment des mots parlés, écrits ou enregistrés par des moyens électroniques ou électromagnétiques ou autrement, et des gestes, signes ou autres représentations visibles.

«endroit public»

“public place”

«endroit public» Tout lieu auquel le public a accès de droit ou sur invitation, expresse ou tacite.

«groupe identifiable»

“identifiable group”

«groupe identifiable» A le sens que lui donne l'article 318.

...

#### Other Canadian legislation limiting hate expression

##### 1) Provisions under the *Broadcasting Act*

Relevant provisions of the *Broadcasting Distribution Regulations*, SOR/97-555:

8. (1) No licensee shall distribute a programming service that the licensee originates and that contains:

...

(b) any abusive comment or abusive pictorial representation that, when taken in context, tends to or is likely to expose an individual or group or class of individuals to hatred or contempt on the basis of race, national or ethnic origin, colour, religion, sex, sexual orientation, age or mental or physical disability;

(2) For the purpose of paragraph (1)(b), sexual orientation does not include the orientation towards a sexual act or activity that would constitute an offence under the *Criminal Code*.

Règlement sur la distribution de radiodiffusion:

CONTENU DE LA PROGRAMMATION INTERDIT

8. (1) Il est interdit au titulaire de distribuer un service de programmation dont il est la source et:

...

(b) soit qui contient des propos offensants ou des images offensantes qui, pris dans leur contexte, risquent d'exposer une personne, un groupe ou une classe de personnes à la haine ou au mépris pour des motifs fondés sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'orientation sexuelle, l'âge ou une déficience physique ou mentale;

Relevant provisions of the Pay Television Regulations, 1990, SOR/90-105:

3. (2) No licensee shall distribute programming

...

(b) that contains any abusive comment or abusive pictorial representation that, when taken in context, tends to or is likely to expose an individual or a group or class of individuals to hatred or contempt on the basis of race, national or ethnic origin, colour, religion, sex, sexual orientation, age or mental or physical disability;

Règlement de 1990 sur la télévision payante:

3. (2) Il est interdit au titulaire de distribuer:

...

(b) une programmation qui contient des propos offensants ou des images offensantes qui, pris dans leur contexte, risquent d'exposer une personne ou un groupe ou une classe de personnes à la haine ou au mépris pour des motifs fondés sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'orientation sexuelle, l'âge ou la déficience physique ou mentale;

Relevant provisions of the Radio Regulations, 1986, SOR/86-982:

3. A licensee shall not broadcast

...  
 (b) any abusive comment that, when taken in context, tends or is likely to expose an individual or a group or class of individuals to hatred or contempt on the basis of race, national or ethnic origin, colour, religion, sex, sexual orientation, age or mental or physical disability;

Règlement de 1986 sur la radio:

3. Il est interdit au titulaire de diffuser :

...  
 (b) des propos offensants qui, pris dans leur contexte, risquent d'exposer une personne ou un groupe ou une classe de personnes à la haine ou au mépris pour des motifs fondés sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'orientation sexuelle, l'âge ou la déficience physique ou mentale;

Relevant provisions of the *Specialty Services Regulations, 1990, SOR/90-106:*

3. No licensee shall distribute programming that contains

...  
 (b) any abusive comment or abusive pictorial representation that, when taken in context, tends to or is likely to expose an individual or a group or class of individuals to hatred or contempt on the basis of race, national or ethnic origin, colour, religion, sex, sexual orientation, age or mental or physical disability;

Règlement de 1990 sur les services spécialisés:

3. Il est interdit au titulaire de distribuer une programmation qui contient :

...  
 (b) des propos offensants ou des images offensantes qui, pris dans leur contexte, risquent d'exposer une personne ou un groupe ou une classe de personnes à la haine ou au mépris pour des motifs fondés sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'orientation sexuelle, l'âge ou la déficience physique ou mentale;

Relevant provisions of the *Television Broadcasting Regulations, 1987, SOR/87-49:*

5. (1) A licensee shall not broadcast

...  
 (b) any abusive comment or abusive pictorial representation that, when taken in context, tends to or is likely to expose an individual or a group or class of individuals to hatred or contempt on the basis of race, national or ethnic origin, colour, religion, sex, sexual orientation, age or mental or physical disability;

Règlement de 1987 sur la télédiffusion:

5. (1) Il est interdit au titulaire de diffuser:

...

(b) des propos offensants ou des images offensantes qui, pris dans leur contexte, risquent d'exposer une personne ou un groupe ou une classe de personnes à la haine ou au mépris pour des motifs fondés sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'orientation sexuelle, l'âge ou la déficience physique ou mentale;

## 2) *The Canada Post Corporation Act*

### Relevant provisions of the *Canada Post Corporation Act*, RSC 1985, c C-10:

43. (1) Where the Minister believes on reasonable grounds that any person
- (a) is, by means of mail,
    - (i) committing or attempting to commit an offence, or
    - (ii) aiding, abetting, counselling or procuring any other person to commit an offence,
  - (b) with intent to commit an offence, is using mail to accomplish his object, or
  - (c) is, by means other than mail, aiding, abetting, counselling or procuring any other person to commit an offence by means of mail,

the Minister may make an order (in this section and in sections 44 to 47 called an "interim prohibitory order") prohibiting the delivery, without the consent of the Minister, of mail addressed to or posted by that person (in this section and in sections 44 to 47 called the "person affected").

....

### *Loi sur la Société canadienne des postes:*

43. (1) Le ministre peut, par arrêté provisoire d'interdiction, appelé « arrêté » au présent article et aux articles 44 à 47, interdire la livraison, sans sa permission, du courrier destiné à une personne, appelée « personne visée » au présent article et aux articles 44 à 47, ou posté par cette personne, qu'il soupçonne, avec des motifs raisonnables, de l'un ou l'autre des faits suivants :

- a) elle utilise le courrier:
  - (i) soit pour commettre une infraction ou tenter de la commettre,
  - (ii) soit pour aider, encourager ou inciter une personne à commettre une infraction ou lui conseiller de la commettre;
- b) elle utilise le courrier, dans l'intention de commettre une infraction, pour en arriver à ses fins;
- c) sans utiliser elle-même le courrier, elle aide, encourage ou incite une personne à commettre une infraction au moyen du courrier ou lui conseille de la commettre.

...

## 3) *The Customs Tariff*

### Relevant provisions of *Customs Tariff*, SC 1997, c 36:

136. (1) The importation of goods of tariff item No. 9897.00.00, 9898.00.00 or 9899.00.00 is prohibited.

Schedule, Chapter 98, page 14, item #9899.00.00 00: Books, printed paper, drawings, paintings, prints, photographs or representations of any kind that

...

(b) constitute hate propaganda within the meaning of subsection 320(8) of the Criminal Code.

Tarif des douanes:

136. (1) L'importation des marchandises des n<sup>os</sup> tarifaires 9897.00.00, 9898.00.00 ou 9899.00.00 est interdite.

Chapitre 98, page 14, # 9899.00.00 00 Des livres, imprimés dessins, peintures, gravures, photographies ou reproductions de tout genre qui:

...

b) constituent de la propagande haineuse au sens du paragraphe 320(8) du Code criminel

**4) Regulation of the conduct of inmates**

Relevant provisions of the British Columbia Correction Act Regulation, BC Reg 58/2005:

Rules governing conduct of inmates

21 (1) An inmate must not

...

(h) behave in manner toward a person that shows hatred or contempt for the person based on the person's race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age,

Relevant provisions of the British Columbia Youth Custody Regulation, BC Reg 137/2005:

10 A youth commits a disciplinary infraction if the youth does any of the following:

(i) behaves in a manner toward another person that

...

(ii) shows hatred or contempt for the person based on the person's race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age;

Relevant provisions of the Yukon Corrections Regulation, YOIC 2009/250:

25. ...

(2) An inmate must not

...

(h) behave in a manner toward a person that shows hatred or contempt for the person based on the person's race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age.

5) Regulation of products' and publications' eligibility for tax credits

Relevant provisions of the Manitoba Income Tax Act, CCSM c I10:

MANITOBA BOOK PUBLISHING TAX CREDIT

10.4(3)

"eligible book" means a first edition, non-periodical publication that meets all of the following requirements:

...

(m) it does not contain material that is hate propaganda or child pornography as defined in the Criminal Code (Canada) or is deemed to be obscene under that Act, or any other material the publication, sale or possession of which is an offence under that Act;

INTERACTIVE DIGITAL MEDIA TAX CREDIT

10.5(4)

"interactive digital media product" means a product that

...

(d) is not

...

(iv) a product that contains hate propaganda or child pornography as defined in the *Criminal Code* (Canada) or is deemed to be obscene under that Act, or any other material the publication, sale or possession of which is an offence under that Act, or

Loi de l'impôt sur le revenu:

CRÉDIT D'IMPÔT POUR L'ÉDITION AU MANITOBA

10.4(3)

«livre admissible» Première édition d'une publication non périodique qui répond aux exigences suivantes:

...

(m) il ne contient pas de matériel constituant de la propagande haineuse ou de la pornographie juvénile, au sens que le Code criminel (Canada) attribue à ces termes, ou réputé obscène en vertu de ce code, ni aucun autre matériel dont la publication, la vente ou la possession constitue une infraction au même code;

CRÉDIT D'IMPÔT POUR LES MÉDIAS NUMÉRIQUES INTERACTIFS

10.5(4)

«produit utilisant des médias numériques interactifs» Produit qui:

...

(d) n'est pas:

...

(iv) un produit contenant de la propagande haineuse ou de la pornographie juvénile, au sens que le *Code criminel* (Canada) attribue à ces termes, ou réputé obscène en vertu de ce code, ou tout autre matériel dont la publication, la vente ou la possession constitue une infraction au même code,



Relevant provisions of the Nova Scotia *Digital Media Tax Credit Regulations*, NS Reg 441/2007:

5 A product must meet all of the following conditions to meet the definition of eligible product in clause 47(1)(c) of the Act:

...

(d) the product must not be capable of inciting hatred against an identifiable group, including a section of the public distinguished by colour, race, religion, sex, sexual orientation or ethnic origin;

Relevant provisions of the *General (Regulation to the Corporations Tax Act)*, RRO 1990, Reg. 183:

Part IX, Refundable Tax Credits

903. Despite subsection 43.7 (12) of the Act and section 902, a publication that would otherwise be an eligible publication for the purposes of section 43.7 of the Act is an ineligible publication for the purposes of paragraph 6 of subsection 43.7 (12) of the Act if,

(a) the publication is capable of inciting hatred against an identifiable group, including a section of the public distinguished by colour, race, religion, sex, sexual orientation or ethnic origin.

6) *Alberta Symbols of Distinction Regulation*

Relevant provisions of the *Alberta Symbols of Distinction Regulation*, Alta Reg 120/2007:

Criteria

1. For the purpose of section 11.1 of the *Emblems of Alberta Act*, the following criteria must be met before a thing, including music and works of art, is prescribed as an Alberta Symbol of Distinction

...

(f) must not be offensive or promote hatred, racism or divisiveness.

7) *B.C. Security Services Regulation*

Relevant provisions of the British Columbia *Security Services Regulation*, BC Reg 207/2008:

9(1) A licensee must not publish or cause to be published any advertisement or notice

...

(c) promoting hatred or intolerance of a person or class of persons

(2) A licensee must not use a logo or insignia that

...

(b) promotes hatred or intolerance of a person or class of persons.

8) **Manitoba Defamation Act**

Relevant provisions of the Manitoba Defamation Act, CCSM c D20:

19(1) The publication of a libel against a race, religious creed or sexual orientation likely to expose persons belonging to the race, professing the religious creed, or having the sexual orientation to hatred, contempt or ridicule, and tending to raise unrest or disorder among the people, entitles a person belonging to the race, professing the religious creed, or having the sexual orientation to sue for an injunction to prevent the continuation and circulation of the libel; and the Court of Queen's Bench may entertain the action.

Loi sur la diffamation:

19(1) La publication d'une diffamation écrite portant atteinte à une race, à une croyance religieuse ou à une orientation sexuelle de nature à exposer à la haine, à l'outrage ou au ridicule les personnes appartenant à cette race, professant cette croyance ou ayant cette orientation, et susceptible de provoquer l'inquiétude ou le désordre parmi la population, donne droit à une personne de cette race, de cette croyance ou de cette orientation de demander une injonction afin d'empêcher la continuation et la diffusion de cette diffamation; la Cour du Banc de la Reine peut recevoir l'action.

**International commitments signed by Canada**

Relevant provisions of the International Covenant on Civil and Political Rights, 19 December 1966, 999 UNTS 171 (accession by Canada 19 May 1976):

Article 20

2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

Pacte International Relatif Aux Droits Civils et Politiques:

Article 20

2. Tout appel à la haine nationale, raciale ou religieuse qui constitue une incitation à la discrimination, à l'hostilité ou à la violence est interdit par la loi.

Relevant provisions of the International Convention on the Elimination of All Forms of Racial Discrimination, 13 November 1970, 660 UNTS 195 (ratified on 14 October 1970):

Article 4

States Parties condemn all propaganda and all 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 and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, inter alia:

- (a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;
- (b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;
- (c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

Convention internationale sur l'élimination de toutes les formes de discrimination raciale:

**Article 4**

Les Etats parties condamnent toute propagande et toutes organisations qui s'inspirent d'idées ou de théories fondées sur la supériorité d'une race ou d'un groupe de personnes d'une certaine couleur ou d'une certaine origine ethnique, ou qui prétendent justifier ou encourager toute forme de haine et de discrimination raciales; ils s'engagent à adopter immédiatement des mesures positives destinées à éliminer toute incitation à une telle discrimination, ou tous actes de discrimination, et, à cette fin, tenant dûment compte des principes formulés dans la Déclaration universelle des droits de l'homme et des droits expressément énoncés à l'article 5 de la présente Convention, ils s'engagent notamment:

- a) A déclarer délits punissables par la loi toute diffusion d'idées fondées sur la supériorité ou la haine raciale, toute incitation à la discrimination raciale, ainsi que tous actes de violence, ou provocation à de tels actes, dirigés contre toute race ou tout groupe de personnes d'une autre couleur ou d'une autre origine ethnique, de même que toute assistance apportée à des activités racistes, y compris leur financement;
- b) A déclarer illégales et à interdire les organisations ainsi que les activités de propagande organisée et tout autre type d'activité de propagande qui incitent à la discrimination raciale et qui l'encouragent et à déclarer délit punissable par la loi la participation à ces organisations ou à ces activités;
- c) A ne pas permettre aux autorités publiques ni aux institutions publiques, nationales ou locales, d'inciter à la discrimination raciale ou de l'encourager.

Relevant provisions of the United Nations Declaration on the Rights of Indigenous Peoples, GA Res 61/295 (endorsed by Canada on November 12, 2010):

**Article 15**

1. Indigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information.

2. States shall take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and eliminate discrimination and to promote

tolerance, understanding and good relations among indigenous peoples and all other segments of society.

...

#### Article 22

1. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of this Declaration.

2. States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.

#### Déclaration des Nations Unies sur les Droits des Peuples Autochtones:

#### Article 15

1. Les peuples autochtones ont droit à ce que l'enseignement et les moyens d'information reflètent fidèlement la dignité et la diversité de leurs cultures, de leurs traditions, de leur histoire et de leurs aspirations.

2. Les États prennent des mesures efficaces, en consultation et en coopération avec les peuples autochtones concernés, pour combattre les préjugés et éliminer la discrimination et pour promouvoir la tolérance, la compréhension et de bonnes relations entre les peuples autochtones et toutes les autres composantes de la société.

...

#### Article 22

1. Une attention particulière est accordée aux droits et aux besoins spéciaux des anciens, des femmes, des jeunes, des enfants et des personnes handicapées autochtones dans l'application de la présente Déclaration.

2. Les États prennent des mesures, en concertation avec les peuples autochtones, pour veiller à ce que les femmes et les enfants autochtones soient pleinement protégés contre toutes les formes de violence et de discrimination et bénéficient des garanties voulues.

#### Other international instruments

#### Relevant provisions of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 U.N.T.S. 221 (1950):

#### Article 10 – Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and

are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.