

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

BETWEEN:

THE SASKATCHEWAN HUMAN RIGHTS COMMISSION

**Appellant
(Respondent)**

-and-

WILLIAM WHATCOTT

**Respondent
(Appellant)**

-and-

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

Interveners

**FACTUM OF THE INTERVENER, THE UNITED CHURCH OF CANADA
Pursuant to Rule 42 of the Rules of the Supreme Court of Canada**

SYMES & STREET
Barristers and Solicitors
133 Lowther Avenue
Toronto, ON, M5R 1E4

Beth Symes (17975B)
Ben Millard (54628V)
Tel: 416-920-3030
Fax: 416-920-3033

Email: symes@symseandstreet.com
Email: millard@symesandstreet.com

**Counsel for the Moving Party,
The United Church of Canada**

BORDEN LADNER GERVAIS
Barristers & Solicitors
Suite 1100, 100 Queen Street West
Ottawa, ON, K1P 1J9

Nadia Effendi
Tel: 613-237-5160
Fax: 613-230-8842
Email: neffendi@blgcanada.com

**Ottawa Agent for the Proposed Intervener,
The United Church of Canada**

Original to the Registrar

Copy to:

<p>SCHARFSTEIN GIBBINGS WALEN FISHER LLP 500, 111 Second Avenue South Saskatoon, SK S7K 1K6</p> <p>Grant J. Scharfstein, Q. C. Deidre L. Aldcorn Janice E. Gingell</p> <p>Tel: 306-653-2838 Fax: 306-652-4747 Email: lawyers@scharfsteinlaw.com</p> <p>Co-Counsel for the Appellant, The Saskatchewan Human Rights Commission</p>	<p>MCMILLAN LLP Lawyers – Patent & Trade Mark Agents Suite 300, 50 O'Connor Street Ottawa, ON K1P 6L2</p> <p>Eugene Meehan, Q. C.</p> <p>Tel: 613-232-7171 Ext 132 Fax: 613-231-3191 Email: Eugene.meehan@mcmillan.ca</p> <p>Ottawa Agent for Counsel for the Appellant, the Saskatchewan Human Rights Commission</p>
<p>NSWB LAW FIRM P. C. INC. 319 Souris Avenue Northeast, Box 8 Weyburn, SK S4H 2J8</p> <p>Thomas A. Schuck</p> <p>Tel: 306-842-4654 Fax: 306-842-0522</p> <p>Email: tschuck@nswb.com Counsel for the Respondent, William Whatcott</p>	<p>VINCENT DAGENAIS GIBSON LLP 325 Dalhousie Street, Suite 600 Ottawa, ON K1N 7G2</p> <p>Albertos Polizogopoulos/ J��r��mie Fournier</p> <p>Tel: 613-241-2701 Fax: 613-241-2599 Email: albertos@vdbg.ca</p> <p>Agent for Counsel for the Respondent, William Whatcott</p>

<p>ATTORNEY GENERAL FOR SASKATCHEWAN 8TH Floor -1874 Scarth Street Regina, Sask S4P 3B7</p> <p>J. Thomson Irvine</p> <p>Tel: 306-787-6307 Fax: 306-787-9111</p> <p>Email: tom.irvine@justice.gc.ca</p> <p>Counsel for the Intervener, Attorney General of Saskatchewan</p>	<p>GOWLING LAFLEUR HENDERSON LLP 2600-160 Elgin Street P.O. Box 466, Station "D" Ottawa, ON K1P 1C3</p> <p>Henry S. Brown, Q.C.</p> <p>Tel: 613-233-1781 Fax: 613-788-3433</p> <p>Email: henry.brown@gowlings.com</p> <p>Agent for Counsel for the Intervener, Attorney General of Saskatchewan</p>
<p>ATTORNEY GENERAL FOR SASKATCHEWAN 1874 Scarth St - 8th Floor PO Box 7129 Regina, Saskatchewan S4P 3V7</p> <p>Thomson Irvine</p> <p>Tel: (306) 787-6307 Fax: (306) 787-9111</p> <p>Counsel for Attorney General for Saskatchewan</p>	<p>GOWLING LAFLEUR HENDERSON LLP 2600 - 160 Elgin St P.O. Box 466, Stn "D" Ottawa, Ontario K1P 1C3</p> <p>Henry S. Brown, Q.C.</p> <p>Tel: (613) 233-1781 FAX: (613) 788-3433 E-mail: henry.brown@gowlings.com</p> <p>Agent for Counsel for Attorney General for Saskatchewan</p>
<p>OSLER, HOSKIN & HARCOURT LLP P.O. Box 50 1 First Canadian Place Toronto, Ontario M5Z 1B8</p> <p>Mark A. Gelowitz Jason MacLean</p> <p>Tel: (416) 862-4743 FAX: (416) 862-6666</p> <p>Counsel for Canadian Constitution Foundation</p>	<p>OSLER, HOSKIN & HARCOURT LLP 340 Albert Street Suite 1900 Ottawa, Ontario K1R 7Y6</p> <p>Patricia J. Wilson</p> <p>Tel: (613) 787-1009 FAX: (613) 235-2867 E-mail: pwilson@osler.com</p> <p>Agent for Canadian Constitution Foundation</p>

<p>PALIARE, ROLAND, ROSENBERG, ROTHSTEIN, LLP 501 - 250 University Avenue Toronto, Ontario M5H 3E5</p> <p>Andrew K. Lokan Jodi Martin</p> <p>Tel: (416) 646-4300 FAX: (416) 646-4301 E-mail: andrew.lokan@paliareroland.com</p> <p>Counsel for Canadian Civil Liberties Association</p>	<p>GOWLING LAFLEUR HENDERSON LLP 2600 - 160 Elgin St P.O. Box 466, Stn "D" Ottawa, Ontario K1P 1C3</p> <p>Henry S. Brown, Q.C.</p> <p>Tel: (613) 233-1781 FAX: (613) 788-3433 E-mail: henry.brown@gowlings.com</p> <p>Agent for Canadian Civil Liberties Association</p>
<p>ATTORNEY GENERAL OF CANADA Bank of Canada Building – East Tower 234 Wellington Street, Room 1212 Ottawa, ON K1A 0H8</p> <p>Christopher M. Rupar Tel: 613-941-2351 Fax: 613-954-1920 Email: Christopher.rupar@justice.gc.ca</p> <p>Counsel for the Intervener, Attorney General of Canada</p>	
<p>ATTORNEY GENERAL OF ALBERTA 9833 - 109 Street 4th Floor Edmonton, Alberta T5J 3S8 David N. Kamal</p> <p>Tel: (780) 427-4418 FAX: (780) 425-0307 E-mail: david.kamal@gov.ab.ca</p> <p>Counsel for Attorney General of Alberta</p>	<p>GOWLING LAFLEUR HENDERSON LLP 2600 - 160 Elgin St P.O. Box 466, Stn "D" Ottawa, Ontario K1P 1C3</p> <p>Henry S. Brown, Q.C.</p> <p>Tel: (613) 233-1781 FAX: (613) 788-3433 E-mail: henry.brown@gowlings.com</p> <p>Agent for Attorney General of Alberta</p>

<p>CANADIAN HUMAN RIGHTS COMMISSION 344 Slater Street Canada Building, 9th Floor Ottawa, Ontario K1A 1E1</p> <p>Philippe Dufresne Brian Smith</p> <p>Tel: (613) 943-9162 FAX: (613) 993-3089 E-mail: philippe.dufresne@chrc-ccdp.ca</p> <p>Counsel for Canadian Human Rights Commission</p>	
<p>ALBERTA HUMAN RIGHTS COMMISSION No. 800 Standard Life Centre 10405 Jasper Avenue Edmonton, Alberta T5J 4R7</p> <p>Audrey Dean</p> <p>Tel: (780) 427-3116 Fax: (780) 422-3563 E-mail: audrey.dean@gov.ab.ca</p> <p>Counsel for Alberta Human Rights Commission</p>	<p>GOWLING LAFLEUR HENDERSON LLP 2600 - 160 Elgin St P.O. Box 466, Stn "D" Ottawa, Ontario K1P 1C3</p> <p>Henry S. Brown, Q.C.</p> <p>Tel: (613) 233-1781 Fax: (613) 788-3433 E-mail: henry.brown@gowlings.com</p> <p>Agent for Alberta Human Rights Commission</p>
<p>SACK GOLDBLATT MITCHELL LLP 1130 - 20 Dundas St West Box 180 Toronto, Ontario M5G 2G8</p> <p>Cynthia Petersen</p> <p>Tel: (416) 979-6440 Fax: (416) 591-7333</p> <p>Counsel for Egale Canada Inc.</p>	<p>SACK GOLDBLATT MITCHELL LLP 500- 30 Metcalfe Street Ottawa, Ontario K1P 5L4</p> <p>Kelly Doctor</p> <p>Tel: (613) 235-5327 Fax: (613) 235-3041 E-mail: kdoctor@sgmlaw.com</p> <p>Agent for Egale Canada Inc.</p>

<p>ONTARIO HUMAN RIGHTS COMMISSION Public Interest Inquiries Branch 180 Dundas street west 8th floor Toronto, ON M7A 2R9</p> <p>Reema Khawja Tony Griffin</p> <p>Tel: (416) 326-9870 Fax: (416) 326-9867</p> <p>Counsel for Ontario Human Rights Commission</p>	<p>GOWLING LAFLEUR HENDERSON LLP 2600 - 160 Elgin St Box 466 Station D Ottawa, Ontario K1P 1C3</p> <p>Brian A. Crane, Q.C.</p> <p>Tel: (613) 233-1781 Fax: (613) 563-9869 E-mail: brian.crane@gowlings.com</p> <p>Agent for Ontario Human Rights Commission</p>
<p>LERNERS LLP 130 Adelaide Street West Suite 2400 Toronto, Ontario M5H 3P5 Mark J. Freiman</p> <p>Tel: (416) 601-2370 Fax: (416) 867-2453 E-mail: mfreiman@lernalers.ca</p> <p>Counsel for Canadian Jewish Congress</p>	<p>BLAKE, CASSELS & GRAYDON LLP 45 O'Connor St. 20th Floor Ottawa, Ontario K1P 1A4 Nancy K. Brooks</p> <p>Tel: (613) 788-2200 Fax: (613) 788-2247 E-mail: nancy.brooks@blakes.com</p> <p>Agent for Canadian Jewish Congress</p>
<p>FASKEN MARTINEAU DUMOULIN LLP 350-7th Avenue S.W. Suite 3400 Calgary, Alberta T2P 3N9</p> <p>Arif Chowdhury</p> <p>Tel: (403) 261-5379 FAX: (403) 261-5351 E-mail: achowdhury@fasken.com</p> <p>Counsel for Canadian Unitarian Council</p>	<p>FASKEN MARTINEAU DUMOULIN LLP 1300 - 55 Metcalfe St. Ottawa, Ontario K1P 6L5 Stephen B. Acker</p> <p>Tel: (613) 236-3882 FAX: (613) 230-6423 E-mail: sacker@fasken.com</p> <p>Agent for Canadian Unitarian Council</p>

<p>WOMEN'S LEGAL EDUCATION AND ACTION FUND 703 - 60 St. Clair Ave. E Toronto, Ontario M4T 1N5</p> <p>Joanna L. Birenbaum Jo-Ann R. Kolmes</p> <p>Tel: (416) 595-7170 Ext: 223 Fax: (416) 595-7191 E-mail: j.birenbaum@leaf.ca</p> <p>Counsel for Women's Legal Education and Action Fund (LEAF)</p>	<p>BORDEN LADNER GERVAIS LLP World Exchange Plaza 100 Queen Street, suite 1100 Ottawa, Ontario K1P 1J9</p> <p>Nadia Effendi Tel: (613) 237-5160 Fax: (613) 230-8842</p> <p>Agent for Women's Legal Education and Action Fund (LEAF)</p>
<p>STOCKWOODS LLP 150 King Street West Suite 2512 Toronto, Ontario M5H 1J9</p> <p>M. Philip Tunley</p> <p>Tel: (416) 593-7200 FAX: (416) 593-9345 E-mail: philt@stockwoods.ca</p> <p>Counsel for Canadian Journalists for Free Expression</p>	<p>CAVANAGH WILLIAMS CONWAY BAXTER LLP 1111 Prince of Wales Drive Suite 401 Ottawa, Ontario K2C 3T2</p> <p>Colin S. Baxter</p> <p>Tel: (613) 569-8558 FAX: (613) 569-8668 E-mail: cbaxter@cwcb-law.com</p> <p>Agent for Canadian Journalists for Free Expression</p>
<p>DAVID MATAS 225 Vaughan Street Suite 602 Winnipeg, Manitoba R3C 1T7</p> <p>David Matas</p> <p>Tel: (204) 944-1831 FAX: (204) 942-1494 E-mail: dmatas@mts.net</p> <p>Counsel for Canadian Bar Association</p>	<p>GOWLING LAFLEUR HENDERSON LLP 2600 - 160 Elgin St P.O. Box 466, Stn "D" Ottawa, Ontario K1P 1C3</p> <p>Henry S. Brown, Q.C.</p> <p>Tel: (613) 233-1781 FAX: (613) 788-3433 E-mail: henry.brown@gowlings.com</p> <p>Agent for Canadian bar Association</p>

<p>MACPHERSON LESLIE & TYERMAN LLP 1500-410 22nd street East Saskatoon, Saskatchewan S7K 5T6</p> <p>Shaunt Parthev, Q.C. Ashley M. Smith</p> <p>Tel: (306) 975-7100 Fax: (306) 975-7145 E-mail: sparthev@mlt.com</p> <p>Counsel for Northwest Territories Human Rights Commission and Yukon Human Rights Commission</p>	<p>MCMILLAN LLP 50 O'Connor Street Suite 300 Ottawa, Ontario K1P 6L2</p> <p>Eugene Meehan, Q.C.</p> <p>Tel: (613) 232-7171 Fax: (613) 231-3191 E-mail: eugene.meehan@mcmillan.ca</p> <p>Agent for Northwest Territories Human Rights Commission and Yukon Human Rights Commission</p>
<p>BENNETT JONES LLP Suite 3400, P.O. Box 130 One First Canadian Place Toronto, Ontario M5X 1A4</p> <p>Robert W. Staley Derek J. Bell Ranjan K. Agarwal</p> <p>Tel: (416) 777-4857 Fax: (416) 863-1716 E-mail: staleyr@bennettjones.ca</p> <p>Counsel for Christian Legal Fellowship</p>	<p>BENNETT JONES LLP 1900 - 45 O'Connor Street World Exchange Plaza Ottawa, Ontario K1P 1A4</p> <p>Sheridan Scott</p> <p>Tel: (613) 683-2302 Fax: (613) 683-2323 E-mail: scotts@bennettjones.com</p> <p>Agent for Christian Legal Fellowship</p>
<p>DALE, STREIMAN & KURZ 480 Main St. N. Brampton, Ontario L6V 1P8</p> <p>Marvin Kurz</p> <p>Tel: (905) 455-7300 FAX: (905) 455-5848</p> <p>Counsel for League for Human Rights of B'nai Brith Canada</p>	<p>GOWLING LAFLEUR HENDERSON LLP 2600 - 160 Elgin St P.O. Box 466, Stn "D" Ottawa, Ontario K1P 1C3</p> <p>Henry S. Brown, Q.C.</p> <p>Tel: (613) 233-1781 FAX: (613) 788-3433 E-mail: henry.brown@gowlings.com</p> <p>Agent for League for Human Rights of B'nai Brith Canada</p>

EVANGELICAL FELLOWSHIP OF CANADA
130 Albert Street, Suite 1810
Ottawa, Ontario
K1P 5G4

Donald E.L. Hutchinson

Tel: (613) 233-9868 Ext: 330

Fax: (613) 233-0301

E-mail: hutchd@efc-canada.com

Counsel for Evangelical Fellowship of Canada

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

David M. A. Stack

Tel: (306) 664-1277

Fax: (306) 653-2669

E-mail: d.stack@mckercher.ca

Counsel for Assembly of First Nations, Federation
of Saskatchewan Indian Nations and Métis Nation-
Saskatchewan

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

Henry S. Brown, Q.C.

Tel: (613) 233-1781

Fax: (613) 788-3433

E-mail: henry.brown@gowlings.com

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

<p>VINCENT DAGENAIS GIBSON LLP 325 Dalhousie Street Suite 600 Ottawa, Ontario K1N 7G2</p> <p>Albertos Polizogopoulos Tel: (613) 241-2701 Fax: (613) 241-2599 E-mail: albertos@vdg.ca</p> <p>Counsel for Association for Reformed Political Action Canada</p>	
<p>BULL, HOUSSE & TUPPER LLP 3000 - 1055 West Georgia Street Vancouver, British Columbia V6E 3R3</p> <p>Ryan D.W. Dalziel Erica J. Toews Tel: (604) 641-4881 Fax: (604) 646-2671 E-mail: rdd@bht.com</p> <p>Counsel for Catholic Civil Rights League and Faith and Freedom Alliance</p>	<p>GOWLING LAFLEUR HENDERSON LLP 2600 - 160 Elgin St Box 466 Station D Ottawa, Ontario K1P 1C3</p> <p>Brian A. Crane, Q.C. Tel: (613) 233-1781 Fax: (613) 563-9869 E-mail: brian.crane@gowlings.com</p> <p>Agent for Catholic Civil Rights League and Faith and Freedom Alliance</p>
<p>AFRICAN CANADIAN LEGAL CLINIC 18 King Street East Suite 901 Toronto, Ontario M5C 1C4</p> <p>Sunil Gurmukh Moya Teklu Tel: (416) 214-4747 Ext: 26 Fax: (416) 214-4748 E-mail: gurmukh@lao.on.ca</p> <p>Counsel for African Canadian Legal Clinic</p>	<p>SOUTH OTTAWA COMMUNITY LEGAL SERVICES 406 - 1355 Bank St. Ottawa, Ontario K1H 8K7</p> <p>Gary Stein Tel: (613) 733-0140 Fax: (613) 733-0401</p> <p>Agent for African Canadian Legal Clinic</p>

TABLE OF CONTENTS

MEMORANDUM OF ARGUMENT	1 – 16
PART I: OVERVIEW	1
PART II: STATEMENT OF POSITION ON THE ISSUES	1
PART III: STATEMENT OF ARGUMENT	1
1) Section 14(1)(b) <i>only</i> applies to hate speech that meets the <i>Taylor</i> test	1
2) Section 14(1)(b) Does Not Infringe Freedom of Religion	4
a) No evidence that the Respondent's beliefs compelled him to engage in hate speech	4
b) Freedom of religion does not protect conduct that harms others	5
c) Hate speech causes very real harm	6
d) No infringement of freedom of religion	8
e) No need to balance competing rights under section 1	8
f) <i>Taylor</i> continues to be the appropriate, constitutionally valid interpretative test for hate speech provisions, including section 14(1)(b)	9
PART IV: SUBMISSIONS ON COSTS	10
PART V: REQUEST TO PRESENT ORAL ARGUMENT	10
PART VI: TABLE OF AUTHORITIES	12
PART VII: LEGISLATION	14

PART I: OVERVIEW

1. The United Church of Canada submits that section 14(1)(b) of the *Saskatchewan Human Rights Code*¹ (“the *Code*”) does not infringe section 2(a) of the *Charter of Rights and Freedoms*² (“the *Charter*”). Freedom of religion does not include the right to engage in hate speech.
2. Historically, section 14(1)(b) of the *Code* has been interpreted as only prohibiting a narrow category of extreme, inherently harmful speech that meets the onerous test set out by this Court in *Canada (Human Rights Commission) v. Taylor*³ (“*Taylor*”). As such, section 14(1)(b) does not infringe section 2(a) of the *Charter* because freedom of religion does not protect conduct, including speech and pamphleteering, that in its hatefulness inflicts harm on others in the manner described by the *Taylor* test.

PART II: STATEMENT OF POSITION ON THE ISSUES

3. The United Church takes the following positions with respect to the issues raised by the Appellant:
 - i. Does s. 14(1)(b) of the *Code* infringe s. 2(a) of the *Charter*? **No.**
 - ii. If so, is the infringement a justified under section 1 of the *Charter*? **Yes.**
 - iii. Did the Saskatchewan Court of Appeal err in finding no violation of s.14(1)(b) of the *Code*? **Yes.**

PART III: STATEMENT OF ARGUMENT

1) Section 14(1)(b) *only* applies to hate speech that meets the *Taylor* test

4. This case is about the regulation of hate speech under section 14(1)(b) of the *Code*. Contrary to the Respondent’s position, this case is not about the right to publicly express religious views about sexual orientation or morality. Rather, it is about whether there exists a

¹ S.S. 1979, c. S-24.1. (“the *Code*”)

² Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. (“the *Charter*”)

³ *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892. (“*Taylor*”), Appellant’s Book of Authorities (“ABA”) **Tab 5**.

constitutionally protected right to engage in hate speech, and more particularly, whether section 14(1)(b) is a constitutionally permissible means of addressing the very real harm that results from hate speech.

5. Section 14(1)(b) **only** applies to a very narrow category of extreme, hateful, dehumanizing speech that meets the test set out by this Court in *Taylor*, namely, that hate speech is an expression of “unusually strong and deep-felt emotions of detestation, calumny and vilification...”⁴ Hate speech has been described as “harm-causing expression”.⁵ The Saskatchewan Court of Appeal has adopted the test in *Taylor* in its interpretation of section 14(1)(b).⁶

6. Subsequent jurisprudence has identified several “hallmarks of hate” that are used by Courts and Tribunals to determine whether the speech in question meets the test in *Taylor*. These hallmarks include speech that uses extreme and inflammatory language, which dehumanizes members of the target group and portrays them as dangerous by nature, as predators of children, as the cause of current social problems, as evil and devoid of redeeming qualities, and/or as requiring banishment or segregation to save society from harm.⁷ Section 14(1)(b) only targets extreme speech that meets this test and that, by its very nature, causes substantial pain, indignity, and social ostracization to its victims, threatens social stability and damages Canadian society.⁸

7. Thus, contrary to the Respondent’s position, section 14(1)(b) does not prevent him or anyone else from engaging in public debates about issues relating to homosexuality or from publicly criticizing the conduct or morality of homosexual persons or of any other identifiable group, provided that the words and expressions used in such debate or criticism are not so extreme, hateful, and inherently harmful that they cross the line into hate speech as defined in *Taylor*. It is only the latter speech that is prohibited by section 14(1)(b).

⁴ *Taylor, supra* at para 61. ABA Tab 5

⁵ *Ibid* at para 60.

⁶ *Owens v. Saskatchewan (Human Rights Commission)*, 2006 SKCA 41 (“*Owens*”) at paras 49-53. ABA Tab 14; *Saskatchewan (Human Rights Commission) v. Bell*, (1994) 114 D.L.R. (4th) 370 (Sask. C.A.) (“*Bell*”) at paras 29-33. ABA Tab 24.

⁷ *Warman v. Kouba*, 2006 CHRT 50 (“*Kouba*”) at paras 21-25, 30-32, 40-41, 45-46, 49-51, 57, 62-63, 67-68, 72, 76-77. ABA Tab 29.

⁸ *R. v. Keegstra*, [1990] 3 S.C.R. 697 (“*Keegstra*”) at para 196. ABA Tab 19.

8. The distinction between permissible public expression of religious beliefs and hate speech can be seen by contrasting the Respondent's summary of his religious beliefs in his factum with the actual words and expressions he used to express those beliefs in the flyers at issue in this appeal. In his factum, the Respondent states that he distributed the flyers in question because of his sincerely held religious belief that:

- a. Perceptions magazine ought not to run advertisements for boys, whose age "is not so relevant"
- b. same-sex sexual activities ought not be introduced into the public schools or universities, and
- c. the conduct in a) and b) ought to be overcome through the process of religious conversion.⁹

9. Nothing in section 14(1)(b) prevents the Respondent from expressing these statements of his beliefs. The Tribunal did *not* make a finding that the expression of these underlying beliefs breached section 14(1)(b) of the *Code*. Rather the Tribunal found that the specific words and expressions used by the Respondent in his flyers met the test for hate speech under section 14(1)(b). In particular, it was the Respondent's words describing gays and lesbians as "sex-addicts", who are "3 times more likely to sexually abuse children" and who "want to share their filth and propaganda with Saskatchewan's children" and his statement that "civil law should discriminate against them", that breached the provision.¹⁰

10. That is, it was the Respondent's use of this extreme, inflammatory and dehumanizing language, which contains many of the "hallmarks of hate" described in the jurisprudence, that breached section 14(1)(b). The Respondent was and is free to engage in public debates regarding sexual orientation and to express his religious beliefs as summarized in his factum. Section 14(1)(b) **only** prevents him from using words and expressions that convey such detestation, calumny and vilification of homosexual persons that they meet the *Taylor* test

⁹ Respondent's Factum at para 4.

¹⁰ Decision of the Saskatchewan Human Rights Tribunal, dated May 2, 2005 ("Tribunal Decision") at paras 51-52. Appellant's Record ("AR") Tab 2, pp.15-16.

11. The question in this case is whether section 14(1)(b) is a constitutionally permissible means of regulating the narrow category of inherently harmful speech that satisfies the *Taylor* test. The United Church submits that section 14(1)(b) is constitutional and, in particular, that it does not infringe freedom of religion as guaranteed in section 2(a) of the *Charter*.

2) Section 14(1)(b) Does Not Infringe Freedom of Religion

a) No evidence that the Respondent's beliefs compelled him to engage in hate speech

12. To establish a breach of freedom of religion, the Respondent must demonstrate that he has a sincerely held religious practice or belief that calls for a particular line of conduct, and that section 14(1)(b) interferes with his ability to act in accordance with those religious beliefs or practices in a manner that is more than trivial or insubstantial.¹¹

13. As noted, the religious beliefs at issue in this appeal are summarized at paragraph 4 of the Respondent's factum. Section 14(1)(b) does not prevent the Respondent from publicly expressing these statements of his beliefs. Section 14(1)(b) only prevents the Respondent from using the hateful and inflammatory words and expressions he used in the flyers which meet the high and onerous test for hate speech as set out in *Taylor*.

14. There is nothing on the record in this appeal to suggest that the Respondent's religious beliefs compelled him to use these hateful and dehumanizing words, as opposed to simply making the statements of belief summarized at paragraph 4 of his factum. Without evidence that his religious beliefs compel him to engage in hate speech, the Respondent has failed to establish that section 14(1)(b), which only prohibits hate speech, interferes with his ability to act on his religious beliefs.

15. This case can be contrasted with *Multani v. Commission scolaire Marguerite-Bourgeoys*¹² in which the Appellant argued that a school board's prohibition on wearing a metal kirpan infringed his son's freedom of religion. In that case, the school board had offered a compromise whereby the student could wear a plastic or a wooden kirpan. It was only the metal kirpan that was prohibited. However, there was evidence before the Court that the son genuinely

¹¹ *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551 ("*Amselem*") at paras 56-57, 59. ABA Tab 25.

¹² 2006 SCC 6. ("*Multani*") ABA Tab 13.

believed that he would not be complying with his religion if he wore a plastic or wooden kirpan: it had to be made of metal.¹³ Thus, this Court held that the prohibition infringed his freedom of religion.

16. There is no similar evidence before this Court that the Respondent genuinely believes that he can only comply with his beliefs by using hateful and dehumanizing language that meets the *Taylor* test, as opposed to simply making the statements summarized at paragraph 4 of his factum, which would not have been prohibited under section 14(1)(b). Without such evidence, the Respondent has not established that section 14(1)(b) interferes with his genuinely held religious beliefs.¹⁴

b) Freedom of religion does not protect conduct that harms others

17. In any event, even if the Respondent could establish that his religious beliefs do compel him to engage in such speech, there would still be no breach of his freedom of religion because the expression of hate speech is not protected under section 2(a) of the *Charter*. Freedom of religion is not absolute. While freedom of belief is broad, and includes the right to hold whatever beliefs and opinions that one's conscience dictates, the freedom to act upon one's beliefs is considerably narrower. In particular, religiously inspired conduct that harms other people, including conduct that infringes the rights or threatens the psychological well-being of others, is not protected under section 2(a) of the *Charter*.¹⁵

18. That is, freedom of religion does **not** extend to conduct that harms or interferes with the rights of others.

¹³ *Ibid* at paras 38-39. ABA Tab 13.

¹⁴ This distinguishes this case from *Owens*, *supra*, (ABA Tab 14) in which all parties conceded that the speech in question was motivated by Mr. Owens' sincere and bona fide religious beliefs. Thus, the Saskatchewan Court of Appeal accepted that section 14(1)(b) of the *Code* infringed Mr. Owens' freedom of religion, but was justified under section 1. (para 54) In any event, given the Court of Appeal's decision in *Owens* that the advertisement did not breach s.14(1)(b), it did not decide the question of whether freedom of religion extends to hate speech that **does** meet the *Taylor* test, and it does not appear that any party raised that issue. For the reasons below, it is submitted that freedom of religion does not extend to protect such speech.

¹⁵ *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, at paras. 224-226 (Per Iacobucci and Major J.J., concurring). ABA Tab 2; *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 772 ("*Trinity Western*") at para 36-37. ABA Tab 27; *R. v. Big M Drug Mart Ltd.*, [1985] S.C.J. No. 17 ("*Big M*") at para 123. ABA Tab 16; *Young v. Young*, [1993] 4 S.C.R. 3. at para 216. United Church of Canada's Book of Authorities ("UBA") Tab 4.

c) Hate speech causes very real harm

19. There is no debate: hate speech causes very real harm to its victims, including homosexual persons. Hate speech encourages derision, hostility and abuse of already vulnerable persons, causing them pain, indignity and loss of self worth. It encourages others to share in a hateful and discriminatory point of view, which damages Canadian society and threatens social stability.¹⁶

20. In *Taylor*, in which this Court upheld a similar “hate speech” provision in section 13(1) of the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6 (“CHRA”) Dickson C.J. summarized the harm from hate speech as follows:

[I]ndividuals subjected to racial or religious hatred may suffer substantial psychological distress, the damaging consequences including a loss of self-esteem, feelings of anger and outrage and strong pressure to renounce cultural differences that mark them as distinct. This intensely painful reaction undoubtedly detracts from an individual's ability to, in the words of s. 2 of the Act, “make for himself or herself the life that he or she is able and wishes to have”...

It can thus be concluded that 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.¹⁷

21. The harm from hate speech has not diminished since this Court’s decision in *Taylor*. On the contrary, in 2009, Canadian police services reported 1,473 hate crimes, an increase of 42% from the previous year.¹⁸

22. Hate speech and discrimination motivated by sexual orientation continues to be a serious problem in Canada and to cause significant harm to its victims and to Canadian society. In a study of Canadian high school students between 2007 and 2009, 74 % of transgendered students and 55% of sexual minority students reported having been verbally harassed in school about their

¹⁶ *Keegstra*, *supra* at paras 61, 196. ABA Tab 12.

¹⁷ *Taylor*, *supra* at paras 40-41. ABA Tab 5.

¹⁸ Statistics Canada, *Police-Reported Hate Crime in Canada, 2009*, by Mia Dauvergne and Shannon Brennan (Juristat: June 7, 2001), online: <http://www.statcan.gc.ca/pub/85-002-x/2011001/article/11469-eng.pdf> (“Statistics Canada 2009”) at p. 5. UBA Tab 5.

gender identity. 37% of transgendered students and 21 % of sexual minority students reported being physically harassed or assaulted in school as a result of their gender identity.¹⁹ Police-reported hate crime incidents motivated by sexual orientation were more likely to involve violence to the victim than those based on other motivations such as race or religion. In 2009 74% of incidents against homosexuals involved violence, as compared to 39% of racially motivated incidents and 21% of religiously motivated incidents. 63% of victims of hate crimes motivated by sexual orientation suffered physical injuries, compared to 39% of racially targeted victims and 23% of religiously targeted victims.²⁰

23. These studies demonstrate the fallacy of the Court of Appeal’s reasoning that the Respondent’s flyers did not meet the *Taylor* test because they merely addressed moral issues relating to sexual orientation that are subject to public debate.²¹ Hate speech does not become permissible simply because it relates to contentious moral issues that are being publicly debated. On the contrary, it is precisely those groups whose rights are not universally accepted by the public, including sexual minorities, who are most vulnerable to the harm caused by hate speech. As the above studies demonstrate, homosexuals suffer very real harm from hate speech, including a greater risk of actual physical harm as compared to other marginalized groups. Hate speech directed at homosexual persons must not be subject to less scrutiny under section 14(1)(b) of the *Code* as compared to hate speech directed at other groups.

24. Smith J.’s reasoning that the flyers did not meet the *Taylor* test because they were directed at sexual conduct as opposed to sexual orientation is equally flawed.²² One’s identity, whether as a homosexual, a Sikh, a Jew, or any other identifiable group, is given meaning through the religious, cultural and intimate practices that express that identity.²³ Describing these fundamental expressions of identity as mere “conduct” renders the so-called protection of section 14(1)(b) hollow and defeats its purpose. The harm from hate speech is the same whether it is

¹⁹ Egale Canada Human Rights Trust, *Every Class in School: Final Report on the First National Climate Survey on Homophobia, Biphobia, and Transphobia in Canadian Schools – Executive Summary*, C. Taylor et al., (Toronto: Egale Canada Human Rights Trust, 2011) at pp. 6-7. UBA Tab 6.

²⁰ Statistics Canada 2009 at p. 13. UBA Tab 5.

²¹ Reasons for Judgment of the Saskatchewan Court of Appeal, dated February 5, 2010 (“Court of Appeal Decision”) at paras 62-64, 138. AR Tab 5, pp. 64-65, 98.

²² *Ibid* at paras 130-134. AR Tab 5, pp. 94-96.

²³ *Egan v. Canada*, [1995] 2 SCR 513, at para 175 (per Cory J. for a majority of the Court on this point) ABA Tab 8; *Trinity Western*, *supra* at para 69 (per L’Heureux-Dubé, dissenting, but not on this point) ABA Tab 27.

directed at one's identity as a Sikh, a Jew, or a homosexual, or at the fact that one wears a turban, attends a synagogue or is involved in a same sex relationship. Section 14(1)(b) targets the very real harm caused by hate speech, and it does not matter whether that speech is directed at a person's identity or at the religious, cultural or sexual practices that express the essence of that identity: the harm is the same.

d) No infringement of freedom of religion

25. Given that section 14(1)(b) is only directed at hate speech which meets the restrictive test in *Taylor*, and which causes the very real harms acknowledged by this Court and confirmed in the studies above, it can never infringe freedom of religion. An allegation of infringement will only arise if there is a finding that the speech violated the *Taylor* test. If it does not meet the test, then the speech is not prohibited, and so there is no infringement of freedom of religion. On the other hand, if the speech does meet the *Taylor* test, then there is still no infringement because by definition it is "harm-causing speech" which is not protected by freedom of religion. Thus, there is no conflict between section 14(1)(b) of the *Code* and freedom of religion.

e) No need to balance competing rights under section 1

26. This Court has held that when the *Charter* right at issue, properly delineated, does not conflict with the impugned legislative provision, there is no need to proceed to section 1 in order to balance competing rights.²⁴ This is such a case. Section 2(a) guarantees freedom of religion but it does not extend to hate speech that meets the test in *Taylor*. Section 14(1)(b) protects the right of individuals and groups to be free from the harm caused by hate speech, but it **only** applies to speech that meets the test in *Taylor*. Since there is no conflict between these provisions there is no need to justify section 14(1)(b) or to balance competing rights under section 1 of the *Charter*.²⁵

²⁴ *Trinity Western*, *supra* at paras 29-31. ABA Tab 27;

²⁵ This absence of conflict between competing rights can be contrasted with *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825 (ABA Tab 23) in which this Court undertook a section 1 analysis to justify the infringement of freedom of religion. *Ross* did not deal with a hate speech provision. Rather it involved a much broader Order of the New Brunswick Human Rights Board of Inquiry which prohibited Mr. Ross from expressing his views about Jews publicly while he was employed the School Board. The Human Rights Commission conceded that the Order, which did not target hate speech, but rather prohibited any expression of Mr. Ross's underlying

27. In the alternative, if there is a conflict between s.14(1)(b) and the Respondent's right to freedom of religion, the provision is justified under section 1 of the *Charter*. The United Church agrees with and adopts the section 1 analysis of the Appellant at paragraphs 27 to 91²⁶ and 107 to 111 of its factum.

f) *Taylor* continues to be the appropriate, constitutionally valid interpretative test for hate speech provisions, including section 14(1)(b)

28. The absence of conflict between section 14(1)(b) of the *Code* and section 2(a) of the *Charter* demonstrates why the *Taylor* test continues to be the appropriate, balanced, and constitutionally valid interpretive test for the hate speech provisions in Canada. The *Taylor* test provides an intelligible standard for identifying hate speech. It is tailored to ensure that it does not infringe on freedom of religion because it only catches "harm-causing speech" which is not protected by freedom of religion. That is, the test is self-limiting to apply only to speech or conduct that falls outside of freedom of religion as guaranteed under section 2(a) of the *Charter*. In this way, the *Taylor* test harmonizes protection of freedom of religion with the protection of the rights of vulnerable persons, including sexual and religious minorities, to be free from the very real harm from hate speech. The *Taylor* test, now over twenty years old, has stood the test of time. It has provided a workable standard that allows Courts and Tribunals to distinguish between speech that crosses the line into hate speech,²⁷ and speech that does not.²⁸

29. Section 14(1)(b), as interpreted using the *Taylor* test, is not only consistent with section 2(a) of the *Charter*, it also enhances freedom of religion and belief by prohibiting speech that vilifies and dehumanizes vulnerable persons, including religious minorities. Almost 30 percent

views, infringed his freedom of religion, and this Court agreed. (paras 75-76) Given that section 14(1)(b) only targets harm-causing hate speech, not the underlying views, there is no conflict with freedom of religion and no need to proceed to section 1.

²⁶ While paragraphs 27 to 91 dealt with a section 1 justification with respect to freedom of expression under section 2(b) of the *Charter*, it is submitted that the same analysis would justify any infringement of freedom of religion under section 2(a).

²⁷ See, for instance: *Bell, supra* at paras 21-25. ABA Tab 24; *Schnell v. Machiabelli and Associates Emprize Inc.*, [2002] C.H.R.D. No. 21 at paras 89, 104. UBA Tab 2; *Kouba, supra* at paras 21, 82-84. ABA Tab 29.

²⁸ See, for instance: *Canadian Jewish Congress v. North Shore Free Press Ltd. (c.o.b. North Shore News)*, [1997] B.C.H.R.T.D. No. 23, at paras 266-270. UBA Tab 1; *Elmasry v. Roger's Publishing Ltd.*, [2008] B.C.H.R.T.D. No. 378 at paras 69-71, 138-139. ABA Tab 9; *Stone v. British Columbia (Ministry of Health)*, [2007] B.C.H.R.T.D. No. 55 at paras 149, 163-164. UBA Tab 3.

of hate crime incidents in 2009 were motivated by the religion of the victim, almost a quarter of which involved physical violence.²⁹ Hate speech stifles freedom of religion and belief because it threatens and discourages vulnerable persons, including religious and other minorities, from openly expressing their identities and beliefs and participating in public life. Section 14(1)(b) places appropriate and constitutionally permissible limits on hate speech so that all people, regardless of their identity or beliefs, may live their lives, raise their children, express their identity and beliefs, and participate in public life without fear of being vilified, dehumanized, and otherwise harmed by hate speech.³⁰

30. Section 14(1)(b) also addresses the very real harm to Canadian society that occurs when its most vulnerable members are vilified by hate speech which dehumanizes them and denies their equal worth as Canadian citizens. The United Church seeks a country of tolerance and mutual respect where all, especially vulnerable minorities who on occasion are under vicious attack, can enjoy their rights. Only then will Canada flourish.

PART IV: SUBMISSIONS ON COSTS

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

PART V: REQUEST TO PRESENT ORAL ARGUMENT

32. The United Church respectfully requests an Order granting the United Church leave to make oral argument at the hearing of this appeal of such length as this Honourable Court may deem just.

²⁹ Statistics Canada 2009, p.5, 13. UBA **Tab 5**.

³⁰ Waldron, Jeremy. "Free Speech & the Menace of Hysteria", Book Review of *Freedom for the Thought That We Hate: A Biography of the First Amendment*, by Anthony Lewis, The New York Review of Books, Vol. 55, Number 9, May 29, 2008. ABA **Tab 40** p. 720-721.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 29th day of July, 2011.



Beth Symes



Ben Millard

SYMES & STREET
Barristers & Solicitors
133 Lowther Avenue
Toronto, ON M5R 1E4
Counsel for the Intervener,
The United Church of Canada

PART VI: TABLE OF AUTHORITIES

CASES	PARAGRAPHS IN FACTUM
<i>B. (R.) v. Children's Aid Society of Metropolitan Toronto</i> , [1995] 1 S.C.R. 315.	17
<i>Canada (Human Rights Commission) v. Taylor</i> , [1990] 3 S.C.R. 892.	2, 5, 20
<i>Canadian Jewish Congress v. North Shore Free Press Ltd. (c.o.b. North Shore News)</i> , [1997] B.C.H.R.T.D. No. 23.	28
<i>Egan v. Canada</i> , [1995] 2 SCR 513.	24
<i>Elmasry v. Roger's Publishing Ltd</i> , [2008] B.C.H.R.T.D. No. 378.	28
<i>Multani v. Commission scolaire Marguerite-Bourgeoys</i> , 2006 SCC 6.	15
<i>Owens v. Saskatchewan (Human Rights Commission)</i> , 2006 SKCA 41.	5, footnote 14
<i>R. v. Big M Drug Mart Ltd</i> , [1985] S.C.J. No. 17.	17
<i>R. v. Keegstra</i> , [1990] 3 S.C.R. 697.	6, 19
<i>Ross v. New Brunswick School District No. 15</i> , [1996] 1 S.C.R. 825.	Footnote 25
<i>Saskatchewan (Human Rights Commission) v. Bell</i> , (1994) 114 D.L.R. (4 th) 370 (Sask. C.A.).	5, 28
<i>Schnell v. Machiabelli and Associates Emprize Inc.</i> , [2002] C.H.R.D. No. 21.	28
<i>Syndicat Northcrest v. Amselem</i> , [2004] 2 S.C.R. 551.	12
<i>Stone v. British Columbia (Ministry of Health)</i> , [2007] B.C.H.R.T.D. No. 55.	28

<i>Trinity Western University v. British Columbia College of Teachers</i> , [2001] 1 S.C.R. 772.	17, 24, 26
<i>Warman v. Kouba</i> , 2006 CHRT 50.	6, 28
<i>Young v. Young</i> , [1993] 4 S.C.R. 3.	17

ARTICLES	PARAGRAPHS IN FACTUM
Egale Canada Human Rights Trust, <i>Every Class in School: Final Report on the First National Climate Survey on Homophobia, Biphobia, and Transphobia in Canadian Schools – Executive Summary</i> , C. Taylor et al., (Toronto: Egale Canada Human Rights Trust, 2011).	22
Statistics Canada, <i>Police-Reported Hate Crime in Canada, 2009</i> , by Mia Dauvergne and Shannon Brennan (Juristat: June 7, 2001), online: http://www.statcan.gc.ca/pub/85-002-x/2011001/article/11469-eng.pdf .	21, 22, 29
Waldron, Jeremy. “Free Speech & the Menace of Hysteria”, Book Review of <i>Freedom for the Thought That We Hate: A Biography of the First Amendment</i> , by Anthony Lewis, The New York Review of Books, Vol. 55, Number 9, May 29, 2008.	29

PART VII: STATUTORY PROVISIONS

<i>Canadian Human Rights Act</i> , R.S.C., 1985, c. H-6, s.13(1).
<i>Charter of Rights and Freedoms</i> , Part I of the <i>Constitution Act, 1982</i> , being Schedule B to the <i>Canada Act 1982</i> (U.K.), 1982, c. 11, ss. 1, 2.
<i>Saskatchewan Human Rights Code</i> , S.S. 1979, c. S-24.1, s.14(1)(b).

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.

Guarantee of Rights and Freedoms

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;
- (c) freedom of peaceful assembly; and
- (d) freedom of association.

La Charte canadienne des droits et libertés, Loi constitutionnelle de 1982 (R.-U.), constituant l'annexe B de la Loi de 1982 sur le Canada (R.-U.), 1982, c. 11

Garantie 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.

Libertés fondamentales

2. Chacun a les libertés fondamentales suivantes :

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

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.