File No. 33676

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 CANADA, ATTORNEY GENERAL FOR SASKATCHEWAN and ATTORNEY GENERAL FOR ALBERTA

Interveners

FACTUM OF THE APPELLANT, THE SASKATCHEWAN HUMAN RIGHTS COMMISSION

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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Part I – Statement of Facts

A. Overview: Hate Expression Causes Real Harm to Real People

1. The evil of hate propaganda is beyond doubt. Hate expression causes real harm to real people. Hate speech demeans, denigrates and dehumanizes its targets. Through hate speech, individuals are told that they are entitled to less than other Canadians simply because of characteristics they possess.[1]

2. With the advent of instant, unfettered electronic communication and home printing presses the opportunity for dissemination of hate is unlimited, and largely uncontrolled. A realistic view of modern society must inform free speech discourse and the limits thereon.

3. This case provides the opportunity for this Honourable Court to set the path that Canada will take in defining what is or is not permissible regarding the publication of hate. This involves a balancing exercise. This is the opportunity to have Canada lead the way in protecting those most in need of protection, and confirming that the publication of hate is not acceptable in Canada, and will not be tolerated.

4. The choice of public sanction, enforced by government, is an important one. The absence of sanctions sends the message about the relative value of different human lives. A legal response to hateful speech is a statement that victims of hateful speech are valued members of Canadian society.

5. The decision of the Court of Appeal below improperly insulates all hate expression from any regulation by human rights legislation. The Court arrived at this conclusion by improperly applying a higher threshold for hate expression directed at citizens based on sexual orientation than for hate expression based on race or religion.

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[1] R. Delgado, "Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling" (1982) 17 Har. C.R.-C.L.L. Rev. 133 at pp. 135-136, 143: Appellant's Book of Authorities ("BA") **Tab 30**; A. Fish, "Hate Promotion and Freedom of Expression: Truth and Consequences" (1989) 2 Can. J. L. & Jurisprudence 111 at p. 122: BA **Tab 31**; D. Kretzmer, "Freedom of Speech and Racism" (1987) 8 Cardozo L. Rev. 445 at p. 477: BA **Tab 33**; Mari Matsuda, "Public Response to Racist Speech: Considering the Victim's Story (1989) 87 Mich. L. Rev. 2320 at pp. 2336-2337: BA **Tab 34**.

B. The Publications and the Tribunal Evidence

6. The respondent, William Whatcott ("Whatcott"), published and distributed four flyers[2] in towns and cities in Saskatchewan in 2001 and 2002. Four individuals filed complaints with the Saskatchewan Human Rights Commission ("the Commission"), the appellant. Each complainant claimed that one of the flyers promoted hatred against individuals based on sexual orientation and therefore violated s. 14(1)(b) of *The Saskatchewan Human Rights Code*[3] which reads:

> 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:
>
> ...
>
> (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.

7. Schedule D[4] is a flyer from the Christian Truth Activists. The following extracts from the flyer were relied on by the Saskatchewan Human Rights Tribunal ("tribunal") and referred to by Hunter J.A. in the Court of Appeal below:

> "children…learning how wonderful it is for two men to sodomize each other";
>
> "Now the homosexuals want to share their filth and propaganda with Saskatchewan's children";
>
> "degenerated into a filthy session where gay and lesbian teachers used dirty language to describe lesbian sex and sodomy to their teenage audience";
>
> "ex-Sodomites and other types of sex addicts who have been able to break free of their sexual bondage and develop wholesome and healthy relationships";
>
> "sodomites and lesbians who want to remain in their lifestyle and proselytize vulnerable young people that civil law should discriminate against them";
>
> "Our children will pay the price in disease, death, abuse…if we do not say no to the sodomite desire to socialize your children into accepting something that is clearly wrong"[5]

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[2] Tribunal hearing exhibits identified as Schedules D, E, F and G: Appellant's Record ("AR") **Tab 18**, pp. 271-274.
[3] S.S. 1979, c. S-24.1, s. 14(1)(b) [*Code*].
[4] Tribunal exhibit: AR **Tab 18**, p. 271.

8. Guy Taylor ("Taylor"), a resident of Saskatoon, received this flyer under his door on a weekend in September, 2001. Taylor, a gay man, had been attending a conference on gay and lesbian health issues that weekend. He was energized by the discussion on the "triumphs and struggles of the queer community across Canada". He learned about the continuing prejudice at all levels of government regarding the distinctiveness of gay health issues.[6]

9. Taylor testified about his experiences as a gay man: he had been threatened with physical violence and he had known people who had been assaulted for being gay; he had been verbally "bashed" and he had observed others being verbally "bashed".[7]

10. Taylor became emotional after reading the flyer. He recalled thinking that being referred to as having a "sex addiction" was untrue. In response to being labelled as "filthy" and "perverted", Taylor felt like "someone was pointing their finger at me and saying them while I stood there, you know, I felt like I was being accosted." He thought the flyer's reference to "proselytizing" was portraying gay persons as predatory. The flyer, overall, made Taylor feel like the advances made by the gay community had been set back 20 years.[8]

11. Taylor stated that being gay is not a lifestyle; it is a life. He testified that "[a]s long as it's not safe to be out in our society, there's work to be done, and it's not safe for a lot of people." In response to being asked whether the flyer had any implications for discrimination against gay persons, Taylor's opinion was that the flyer would be used by people to validate and justify their feelings of hatred for Taylor based on his sexual orientation.[9]

12. Schedule E[10] is also a flyer from the Christian Truth Activists. The following extracts from the flyer were relied on by the tribunal and referred to by Hunter J.A. in the Court of Appeal below:

> "Sodomites are 430 times more likely to acquire Aids and 3 times more likely to sexually abuse children!";

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[5] Judgment of Court of Appeal below at para. 10: AR **Tab 5**.
[6] Tribunal transcript: AR **Tab 10**, pp. 110-114.
[7] *Ibid.* at p. 122.
[8] *Ibid.* at pp. 115-118.
[9] *Ibid.* at pp. 120-123.
[10] Tribunal exhibit: AR **Tab 18**, p. 272; James Komar filed a complaint after having received Schedule E; he was unavailable to testify at the tribunal hearing.

> "Born Gay? No Way! Homosexual sex is about risky and addictive behaviour!";
>
> "If Saskatchewan's sodomites have their way, your school board will be celebrating buggery too!";
>
> "Don't kid your selves; homosexuality is going to be taught to your children and it won't be the media stereotypes of two monogamous men holding hands.";
>
> "The Bible is clear that homosexuality is an abomination";
>
> "Sodom and Gomorrah was given over completely to homosexual perversion and as a result destroyed by God's wrath";
>
> "Our acceptance of homosexuality and our toleration of its promotion in our school system will lead to the early death and morbidity of many children".[11]

13. Schedules F and G are identical.[12] They are a classified ad with Whatcott's handwritten notations above. The following extracts from these flyers were referred to by the Court of Appeal below:

> "Saskatchewan's largest gay magazine allows ads for men seeking boys!";
>
> "If you cause one of these little ones to stumble it would be better that a millstone was tied around your neck and you were cast into the sea"[13]

14. Brendan Wallace ("Wallace"), a resident of Regina, received one of these flyers in his mailbox in April, 2002. He was angry. Initially, he thought that he had been personally targeted and he was fearful for the safety of his partner, his pets and himself. Like Taylor, Wallace had experienced violence and hatred for being gay; and at one time a co-worker tried to have Wallace removed from his job. When Wallace realized that the flyer had been widely distributed in Regina, he became concerned that his parents and grandmother would be fearful for his safety.[14]

15. Wallace testified that the flyer inferred gay men want to abuse children; he testified that Whatcott's opinions "lump me into a group of statements that homosexuals are paedophiles, that homosexuals are a threat to children". In Wallace's view, the flyer was hate literature against gays and Whatcott should be prohibited from putting out flyers that "create hatred against whole groups of people indiscriminately and ultimately could lead to violence against those people."[15]

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[11] Judgment, *supra* note 5 at para. 11: AR **Tab 5**.
[12] Tribunal exhibits: AR **Tab 18**, pp. 273-274
[13] Judgment, *supra* note 5 at para. 10: AR **Tab 5**.
[14] Tribunal transcript: AR **Tab 12**, pp. 218-220.
[15] *Ibid.* at pp. 221-224.

16. Gens Hellquist ("Hellquist") was qualified as an expert on health issues in the gay community, homophobia and discrimination faced by gay persons in Saskatchewan. He testified that approximately ten percent of the population is gay, lesbian or bisexual. Gay persons who do not achieve self-acceptance of their sexuality are at higher risk for depression, suicide, and substance abuse. Self-acceptance requires a support system including the educational system. Barriers to acceptance include the perpetuation of myths like "gay men are pedophiles".[16]

17. Regarding discrimination, Hellquist reiterated the commonplace physical and verbal abuse suffered by the gay community. He noted that gay persons still lose jobs and lose, or are refused, accommodation.[17]

18. In his role as a counsellor, Hellquist testified that he had clients in tears after having received these flyers. He testified that such flyers can be damaging for gay persons who have fragile self-esteem. Hellquist was particularly concerned about the effect of these flyers on adolescents who are struggling with their sexual identity. He described these flyers as being like a "little nick of a razor blade"; one nick may not seem too bad but the accumulated effect of many "nicks" can be devastating.[18]

19. Hellquist testified that the overall message that the gay community would take from Schedule E was that its author was "trying to prevent us from being an accepted part of society, and certainly being part of the public school system, whether it's as teachers or students."[19]

C. The Tribunal Finds a Violation; Court of Queen's Bench Upholds Decision

20. The tribunal found that all four flyers exposed homosexuals to hatred and ridicule. The tribunal also found that Whatcott, in distributing the flyers, showed "a pattern or practice of disregard for protected rights"[20] according to s. 31(4) of the *Code* which reads, in part:

> …a human rights tribunal shall, on an inquiry, be entitled to receive and accept evidence led for the purpose of establishing a pattern or practice of resistance to or disregard or denial of any of the rights secured by this Act, and the human rights tribunal shall be

[16] Tribunal transcript: AR **Tab 11**, pp. 176, 176-183.
[17] *Ibid.* at p. 184.
[18] *Ibid.* at pp. 197-201.
[19] *Ibid.* at p. 195.
[20] Judgment, *supra* note 5 at para. 54: AR **Tab 5**.

> entitled to place any reliance that it considers appropriate on the evidence and on any pattern or practice disclosed by the evidence in arriving at its decision.[21]

21. The tribunal ordered that Whatcott was prohibited from distributing these flyers or any similar material which promoted hatred against individuals based on sexual orientation. It further ordered Whatcott was required to pay fines to the Commission on behalf of each complainant.[22]

22. Whatcott appealed the tribunal's decision to the Saskatchewan Court of Queen's Bench. The matter was heard by Kovach J. who *upheld* the tribunal's decision.

D. Court of Appeal Overturns Specialized Tribunal

23. Whatcott further appealed Kovach J.'s decision to the Saskatchewan Court of Appeal. The decision summarized Whatcott's grounds of appeal as follows:[23]

> ...He argues that there is no violation of the *Code*. Alternatively, he contends that if the material exhibits hate, it is directed toward sexual behaviour, which is not a prohibited ground in the *Code*. Lastly, if sexual behaviour is a prohibited ground under the *Code*, he argues that it is overbroad and conflicts with s. 4 of the *Code* and his s. 2 *Charter* right to freedom of religion. Therefore, pursuant to s. 44 of the *Code*, if criticism of sexual behaviour is considered to be a prohibited ground within the meaning of sexual orientation, then it should be inoperative as it conflicts with ss. 4 and 5 of the *Code*.

24. Sections 4 and 5 of the *Code* read:[24]

> 4 Every person and every class of persons shall enjoy the right to freedom of conscience, opinion and belief and freedom of religious association, teaching, practice and worship.
>
> 5 Every person...shall, under the law, enjoy the right to freedom of expression through all means of communication, including, without limiting the generality of the foregoing, the arts, speech, the press or radio, television or any other broadcasting device.

25. Hunter and Smith J.J.A., in separate but concurring reasons, each *allowed* Whatcott's appeal. Sherstobitoff J.A. concurred with both decisions. The Court determined that the flyers

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[21] *Code*, *supra* note 3, s. 31(4).
[22] Tribunal decision at para. 70: AR **Tab 2**.
[23] Judgment, *supra* note 5 at para. 28: AR **Tab 5**.
[24] *Code*, *supra* note 3, ss. 4-5.

did *not* contravene s. 14(1)(b) and did *not* expose or tend to expose gay persons to hatred as the term hatred was prescribed in *Bell.*[25] The Court opted *not* to address the other grounds of appeal.

Part II – Statement of Issues

Issue 1: Does s. 14(1)(b) of *The Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1 infringe s. 2(b) of the *Canadian Charter of Rights and Freedoms*?

Issue 2: If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

Issue 3: Does s. 14(1)(b) of *The Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1 infringe s. 2(a) of the *Canadian Charter of Rights and Freedoms*?

Issue 4: If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

Issue 5: Did the Saskatchewan Court of Appeal Err in Finding No Violation of s. 14(1)(b) of *The Saskatchewan Human Rights Code*?

Part III – Statement of Argument

Issue 1: Does s. 14(1)(b) of *The Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1 infringe s. 2(b) of the *Canadian Charter of Rights and Freedoms*?

26. The appellant concedes that s. 14(1)(b) of the *Code* restricts protected expression and therefore infringes s. 2(b) of the *Canadian Charter of Rights and Freedoms.*[26]

Issue 2: If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

A. Section 14(1)(b): Analysis Under s. 1 of the *Charter*

27. Having conceded that s. 14(1)(b) infringes s. 2(b), the question becomes whether the provision is justified under s. 1 of the *Charter*.

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[25] Judgment, *supra* note 5 at para. 88: AR **Tab 5**; *Saskatchewan (Human Rights Commission) v. Bell* (1994), 114 D.L.R. (4th) 370 (Sask. C.A.) [*Bell*]: BA **Tab 24**.

[26] *Canadian Charter of Rights and Freedoms* as found in the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 2(b) [*Charter*].

28. In *R. v. Oakes*, this Honourable Court set out the considerations the court must weigh when determining whether a restrictive law is a justifiable limit on a guaranteed right or freedom. First, the objectives of the law must relate to concerns that are pressing and substantial in a free and democratic society. Only such an objective is of sufficient importance to warrant overriding a constitutionally protected right or freedom. Second, the measures must be reasonable and demonstrably justified. This involves three overlapping aspects of proportionality between the objective and the measure: the measure must advance its purpose rationally, it must minimally impair the right or freedom, and its benefits must outweigh the costs to the right or freedom.[27]

29. All stages of this test require a contextual analysis including consideration of other *Charter* values keeping in mind that the s. 1 interpretation should not "reverse advances made by vulnerable groups or to defeat measures intended to protect the disadvantaged and comparatively powerless members of society."[28]

30. This Honourable Court, in *Taylor*, stated that in applying the *Oakes* test to legislation restricting hate propaganda, a meaningful consideration of the principles central to a free and democratic society requires reference to: (i) the international community's acceptance of the need to protect minority groups from intolerance and psychological pain caused by such expression; (ii) other provisions of the *Charter*, in particular ss. 15 and 27 (dealing with equality and multiculturalism); and (iii) the nature of the association between the expression at stake and the rationales underlying the s. 2(b) guarantee.[29]

31. In the recent decision of *Alberta v. Hutterite Brethren of Wilson Colony*, this Honourable Court confirmed that each stage of the s. 1 analysis should be considered with a degree of deference to the legislation when the impugned provision regulates a complex social problem. The "bar of constitutionality must not be set so high that responsible, creative solutions to difficult problems would be threatened."[30]

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[27] *R. v. Oakes*, [1986] 1 S.C.R. 103, at 138-139 [*Oakes*]: BA **Tab 21**.
[28] *R. v. Sharpe*, [2001] 1 S.C.R. 45 at para. 133 [*Sharpe*]: BA **Tab 22**.
[29] *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892 at 916-917 [*Taylor*]: BA **Tab 5**.
[30] [2009] 2 S.C.R. 567 at para. 37 [*Hutterite*]: BA **Tab 1**.

32. When freedom of expression is at issue, deference is also indicated where the impugned expression interferes "with the ability of specific vulnerable individuals to participate in the political process by directly undermining their dignity and membership in the community."[31]

Previous Decisions: Section 14 Meets the Oakes Test; It is a Reasonable Limit

33. This Court, in *Taylor* confirmed that the following provision of the *Canadian Human Rights Act* ("*Act*"), on the prohibited grounds of race and religion, did not violate the freedom of expression guaranteed by s. 2(b) of the *Charter*:[32]

> 13.(1) It is a discriminatory practice for a person or a group of persons acting in concert to communicate telephonically or to cause to be so communicated, repeatedly, in whole or in part by means of facilities of a telecommunication undertaking within the legislative authority of Parliament, any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination.[33]

34. The Saskatchewan Court of Appeal in *Bell* addressed the constitutional validity of s. 14 of the *Code* – it found that the section was a reasonable limit based on the judgment of this Court in *Taylor*. The Court concluded that the words "ridicules, belittles or otherwise affronts the dignity of" in s. 14(1)(b) would not meet the *Taylor* definition of "hatred" and in effect read down the provision to sever this phrase. This interpretation has been followed by the tribunals and the courts in Saskatchewan since *Bell.*[34]

35. Although the respondent raised the constitutionality of s. 14 in his oral appeal in the Court of Appeal below, Hunter J.A. did not address this issue and relied on *Bell* and *Taylor*. Smith J.A. also accepted the constitutionality of s. 14(1)(b) and stated that a "[r]econsideration of the decision in *Taylor* necessarily lies, in my view, with the Supreme Court of Canada."[35]

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[31] *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877 at para. 92 [*Thomson Newspapers*]: BA **Tab 26**.
[32] *Taylor*, *supra* note 29: BA **Tab 5**.
[33] *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, s. 13(1) [*Act*].
[34] *Bell*, *supra* note 25: BA **Tab 24**, followed in *Owens v. Saskatchewan (Human Rights Commission)* 2006 SKCA 41 [*Owens*]: BA **Tab 14**.
[35] Judgment, *supra* note 5, at paras. 88 and 123: AR **Tab 5**.

1. Pressing and Substantive Objective Met

36. This Court recognized in *Taylor* that the legislative intent of s. 13(1) of the *Act* was informed by the objectives of the statute - "the promotion of equal opportunity unhindered by discriminatory practices…" The specific objective of s. 13(1), to prevent harm caused by hate propaganda, was confirmed to be sufficiently important to override the right guaranteed by s. 2(b) of the *Charter*.[36]

37. The three objectives of the *Code* are:

- to *promote recognition* of the dignity and equal rights of all citizens
- to *further the public policy* that all citizens are free and equal
- to *discourage and eliminate* discrimination

These address the same objectives and matters as the *Act.* Provisions of the *Code* prohibit specific discriminatory practices including the s. 14(1)(b) prohibition against the publication of hate-promoting materials.[37]

38. Hate crimes in Canada are on the increase. According to data compiled by Statistics Canada, hate crimes increased by 35% from 2007 to 2008 with crimes motivated by race or ethnicity being the most common. This data also showed that the Jewish faith continued to be the most commonly targeted religious group (64%) for hate crimes. In 2008, hate crime rates reported by the police in Regina, Saskatchewan were higher than the national average for the census metropolitan areas.[38]

39. Section 14(1)(b) addresses social problems which remain sufficiently important to override the s. 2(b) guarantee. As advances are made by one group in achieving equality, immigration and mobility open new doors for discrimination. Promoting equality and combating discrimination are on-going substantial concerns in Saskatchewan and Canada. These objectives are increasingly pressing as new technologies accelerate the ease with which publications can be produced and disseminated.

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[36] *Taylor*, *supra* note 29 at 918, 943: BA **Tab 5**.
[37] *Code*, *supra* note 3, s. 3.
[38] Statistics Canada, *Police-reported hate crime in Canada, 2008* by Mia Dauvergne (Juristat: Summer 2010), online: http://www.statcan.gc.ca/pub/85-002-x/2010002/article/11233-eng.htm#a7: BA **Tab 37**.

2. Proportionality

40. The next step in the s. 1 analysis is to determine whether s. 14(1)(b) of the *Code* is proportionate to its valid objective.

(i) There is a Rational Connection

41. This stage of the *Oakes* test requires courts to consider whether it is reasonable to suppose that the limits imposed by the impugned law may further the legislative objectives. This rational connection can be shown through scientific or empirical evidence or by applying reason and logic.[39]

42. In *Taylor*, this Court reviewed the historical and social evidence and concluded that s. 13(1), when considered in light of the remedial provisions of the *Act*, was rationally connected to the aim of suppressing discrimination. The fact that such legislation was not the sole mechanism by which this objective could be achieved did not make the provision ineffectual.[40]

43. Similarly, s. 14(1)(b) of the *Code* is aimed at prohibiting hate propaganda and its consequence. Hate propaganda continues to plague society and it is deleterious to the objectives of the *Code*. It remains reasonable to conclude that discouraging this serious underlying cause of discrimination will promote the objectives of the legislation.

(ii) Minimal Impairment

44. Does s. 14(1)(b) limit expression as little as is reasonably possible in order to prevent the publication of hate expression? As this Court has previously confirmed, minimal impairment is not the *least* possible infringement on expression; it is achieved as long as the provision falls within a range of reasonable alternatives in the context of a complex social issue.[41]

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[39] *Hutterite*, *supra* note 30 at para. 48: BA **Tab 1**; *RJR-Macdonald Inc. v. Canada (Attorney-General)*, [1995] 3 S.C.R. 199, at para. 158 [*RJR*]: BA **Tab 15**; *R. v. Butler*, [1992] 1 S.C.R. 452 at 502-503 [*Butler*]: BA **Tab 17**; *R. v. Keegstra*, [1990] 3 S.C.R. 697, at 768, 776 [*Keegstra*]: BA **Tab 19**; *Thomson Newspapers, supra* at note 31, paras. 104-7: BA **Tab 26**.

[40] *Taylor*, *supra* note 29 at 924: BA **Tab 5**.

[41] *Hutterite*, *supra* note 30 at para. 53: BA **Tab 1**.

45. A relevant contextual factor is the vulnerability of the group sought to be protected by the provision. Section 14(1)(b) seeks to protect groups who have been traditionally marginalized and systemically disadvantaged.[42]

The Standard for "Hatred" is Sufficiently Precise

46. In *Taylor*, Dickson C.J., speaking for a majority of this Court, articulated the standard for "hatred or contempt" in s. 13(1) of the *Act* as messages of "unusually strong and deep-felt emotions of detestation, calumny and vilification". This standard was "sufficiently precise to prevent the unacceptable chilling effect of expressive activity" as long as tribunals interpret the legislation in light of its purpose while giving effect to the extreme emotive connotations for "hatred and contempt".[43]

47. Human rights tribunals and courts have subsequently applied this standard to the interpretation of s. 14(1)(b) of the *Code*, s. 13(1) of the *Act*, and other provincial legislation. A review of tribunal decisions and jurisprudence reveals some of the "hallmarks of hate expression". This includes the use of highly inflammatory or derogatory language and expression which characterizes members of a target group as:

- A powerful menace ("Jews are liars, cheats, criminals and thugs")
- Predators of the vulnerable such as children ("Gays and lesbians are pedophiles")
- Cause of current social problems ("Jews and Muslims are terrorists")
- Dangerous or violent by nature ("Africans will bring death and violence to Canada")
- Evil and devoid of any redeeming qualities by nature ("Zionist Jews are frauds, war criminals, pedophiles, anti-life and full of hate")
- Requiring banishment, segregation or eradication to save society from harm ("Blacks should be in the jungle and not among civilized society")
- Dehumanized through comparisons and association with animals, excrement and noxious substances ("Aboriginals are primitive savages who have more value as fertilizer than as human beings")[44]

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[42] *Thomson Newspapers*, *supra* note 31 at para. 112: BA **Tab 26**.
[43] *Taylor*, *supra* note 29 at 928-929: BA **Tab 5**.
[44] *Warman v. Kouba*, 2006 CHRT 50, at 6-16: BA **Tab 29**.

48. These indicators confirm that "hatred" has been interpreted narrowly to include only extreme forms of expression inimical to promoting equality and combating discrimination. They fall into the general category of "anti-identity" expression.[45]

49. Defining "hatred" any more precisely than as defined in *Taylor* is fraught with the same difficulties this Court addressed when reviewing the statutory definition of "obscene":

> … the only practicable alternative [to an exhaustive list of instances of obscenity] is to strive towards a more abstract definition of obscenity which is contextually sensitive and responsive to progress in the knowledge and understanding of the phenomenon to which the legislation is directed…The intractable nature of the problem and the impossibility of precisely defining a notion which is inherently elusive makes the possibility of a more explicit provision remote. In this light, it is appropriate to question whether, and at what cost, greater legislative precision can be demanded.[46]

50. The *Taylor* definition of "hatred", as applied in the interpretation of s. 14(1)(b), is reasonably precise within context: it addresses a complex social problem, there is an inherent difficulty in defining "hatred" more precisely, and the target groups who receive protection by the provision are the most vulnerable in society.

Other Code Provisions Narrow the Scope of Prohibited Expression

51. McLachlin J., writing for the minority in *Taylor*, found s. 13 of the *Act* to be overly broad and vague, in part because the legislation did not sufficiently safeguard expression by the inclusion of a provision comparable to s. 14(2) of the *Code* – the "exemption provision".[47] Section 14(2) provides:

> Nothing in subsection (1) restricts the right to freedom of expression under the law upon any subject.[48]

52. Section 14(2) and its counterparts in other provincial legislation have been interpreted to serve as a reminder to tribunals of the need to balance the goals of s. 14(1) with the right to

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[45] Shannon Gilreath, "Tell Your Faggot Friend He Owes Me $500 For My Broken Hand: Thoughts on a Substantive Equality Theory of Free Speech" (2009) 44 Wake Forest L. Rev. 557; a review of the real harm caused by assaultive speech directed at the core identifying characteristics of target groups (specifically gay youth) and its effect on the pursuit of an equality-based speech system as part of achieving substantive social equality: BA **Tab 32**.
[46] *Butler*, *supra* note 39 at 506 [Emphasis added]: BA **Tab 17**.
[47] *Taylor*, *supra* note 29 at 959, 966-967: BA **Tab 5**.
[48] *Code*, *supra* note 3, s. 14(2).

freedom of expression when assessing whether particular expression is justifiably prohibited.[49] Section 5 of the *Code* also guarantees a broad right to free expression for all forms of communication. This too reinforces the importance of the freedom of expression in the application of s. 14(1)(b).

53. The common law has developed contextual factors to assist tribunals in balancing the freedom of expression guarantee with the objectives of the legislation including:

- vulnerability of the target group
- social and historical disadvantage of the target group
- historical and political context in which expression is made
- credibility likely to be accorded to the publication
- content as part of a larger political or public policy debate (*Owens*)
- content and tone of the message
- truthfulness of the content
- how widespread is the dissemination
- opportunity to hear opposing views or question
- ability and opportunity for recipients to assess, question and respond
- intention and belief of publisher[50]

54. The contextual factors only serve to *narrow* the scope of prohibited expression. This is a two-step test: 1) if expression does not meet the *Taylor* standard for hatred, the material is permissible and the analysis ends, and 2) if a publication is deemed to express "hatred", the tribunal must then consider whether the expression is nonetheless permissible because there is little risk that the expression is likely to cause hate in the specific context. This could include, for example, artistic or academic writing aimed at exposing or denouncing hate expression.

An Intent Requirement is Unnecessary

55. In *Taylor*, this Honourable Court confirmed that "an intent to discriminate is not a precondition to a finding of discrimination under human rights codes" because these statutes focus on the effects of discrimination even if caused unintentionally.[51]

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[49] *Taylor*, *supra* note 29 at 930: BA **Tab 5**.
[50] *Elmasry v. Roger's Publishing Ltd.*, 2008 BCHRT 378 at para. 83 [*Elmasry*]: BA **Tab 9**; *Owens*, *supra* note 34 at paras. 63, 65-68, 74-78: BA **Tab 14**; *Kane, Re*, 2001 ABQB 570 at para. 128 [*Kane*]: BA **Tab 10**.
[51] *Taylor*, *supra* note 29 at 931: BA **Tab 5**; *Boissoin v. Lund*, 2009 ABQB 592 at para. 44 [*Boissoin*]: BA **Tab 3**.

56. Incorporating an intent requirement would not narrow the scope of the prohibited expression. Intention of the publisher and the tone of the expression are contextual factors tribunals and courts have used in the application of s. 13 of the *Act* and s. 14 of the *Code*. The "hallmarks of hatred" are likewise used in the initial determination of whether expression is capable of meeting the *Taylor* standard.[52]

Contextual Analysis Favours Deference to the Legislation

57. Minimal impairment favours deference to legislation aimed at protecting vulnerable groups from hate expression and discrimination. When interpreted in the context of the common law principles and the *Charter* values of equality and multiculturalism, s. 14(1)(b) is reasonably and sufficiently precise to capture expression within the *Taylor* standard. A narrower restriction would defeat "measures intended to protect the disadvantaged and comparatively powerless members of society."[53]

(iii) Balancing of Salutary and Deleterious Effects: the Contextual Factors

SCC Has Recognized that Freedom of Expression is Remote from Core Values

58. Courts balance conflicting fundamental values by "weighing freedom of expression claims in light of their relative connection to a set of even more fundamental values" – the core values underlying the s. 2(b) guarantee – at this stage of the *Oakes* test.[54]

59. The three traditional "core values" relied on in Canadian jurisprudence as justifications for this freedom are: 1) the promotion of public participation in the political process; 2) the search for political, artistic, and scientific truth or the "marketplace of ideas"; 3) and the

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[52] *Elmasry, supra* note 50: BA **Tab 9**; See *Report to the Canadian Human Rights Act and the Regulation of Hate Speech on the Internet* by Richard Moon (Ottawa, Canadian Human Rights Commission, 2008) at p. 35 where Moon acknowledges it is unlikely that the presence of an intent requirement would have led to a different result in cases in which a breach of s. 13 has been found by a tribunal: BA **Tab 36**.
[53] *Sharpe, supra* note 28 at para. 133: BA **Tab 22**.
[54] *RJR, supra* note 39 at para. 72: BA **Tab 15**.

protection of autonomy, self-development and human flourishing.[55] This Honourable Court has also recognized that other theories about the freedom of expression may emerge.[56]

60. Not all expression is equally important to the core values. When the expression recedes from the "centre core of the spirit" of these values, a lower standard of justification under s. 1 has been applied. Further, the relative importance of each core value may vary in particular circumstances.[57]

61. This Honourable Court, in *Montréal (City)*, measured the proximity of violent expression to the core values as an example of assessing the constitutional value of expression, in general:

> 72 Expressive activity should be excluded from the protective scope of s. 2(b) only if its method or location clearly undermines the values that underlie the guarantee. Violent expression, which falls outside the scope of s. 2(b) by reason of its method, provides a useful analogy. Violent expression may be a means of political expression and may serve to enhance the self-fulfillment of the perpetrator. However, it is not protected by s. 2(b) because violent means and methods undermine the values that s. 2(b) seeks to protect. Violence prevents dialogue rather than fostering it. Violence prevents the self-fulfillment of the victim rather than enhancing it. And violence stands in the way of finding the truth rather than furthering it.[58]

62. Other forms of expression have been justifiably restricted under s. 1. This Honourable Court concluded that child pornography, for example, makes no contribution to social and political debate or to the search for truth. Although it may promote self-fulfillment, the extreme harm caused by such expressive content justifies a limit on its possession in addition to its publication and distribution.[59]

63. Hate propaganda, like violent expression and pornography, lies far from the core values. Dickson C.J. recognized that even though the political process theory was the linchpin of the s. 2(b) guarantee, the protection of hate propaganda was not integral to this value because it

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[55] See, for example, *Taylor*, *supra* note 29 at 921, 952: BA **Tab 5**; *Keegstra*, *supra* note 39 at 811: BA **Tab 19**; *Sharpe*, *supra* note 28 at para. 23: BA **Tab 22**; *Ross v. New Brunswick District No. 15 Board of Education*, [1996] 1 S.C.R. 825 at para. 89 [*Ross*]: BA **Tab 23**.

[56] *Keegstra*, *supra* note 39 at 805-806: BA **Tab 19**.

[57] *Ibid.*; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480 at 512-513: BA **Tab 6**; *RJR*, *supra* note 39 at para. 72-73: BA **Tab 15**; *Butler*, *supra* note 39 at 501-502: BA **Tab 17**.

[58] *Montréal (City) v. 2952-1366 Québec Inc.*, [2005] 3 S.C.R. 141 at para. 72 [*Montréal(City)*] [Emphasis added]: BA **Tab 12**.

[59] *Sharpe*, *supra* note 28: BA **Tab 22**.

"repudiates and undermines democratic values, and in particular its condemnation of the view that all citizens need to be treated with equal respect and dignity so as to make participation in the political process meaningful..."[60]

64. The "marketplace of ideas" rationale is broad enough to include ideas which cannot be identified as true or false but may be valuable nonetheless. Hate propaganda, however, lacks any inherent value and does not advance the search for scientific, political or artistic truth:

> ...there is very little chance that expression that promotes hatred against an identifiable group is true. Such expression silences the views of those in the target group and thereby hinders the free exchange of ideas feeding our search for political truth. Ours is a free society built upon a foundation of diversity of views; it is also a society that seeks to accommodate this diversity to the greatest extent possible. Such accommodation reflects an adherence to the principle of equality, valuing all divergent views equally and recognizing the contribution that a wide range of beliefs may make in the search for truth. However, to give protection to views that attack and condemn the views, beliefs and practices of others is to undermine the principle that all views deserve equal protection and muzzles the voice of truth.[61]

65. Similarly, hate propaganda may protect self-fulfilment and individual autonomy but this underlying value must be "tempered insofar as it advocates with inordinate vitriol and intolerance and prejudice which views as execrable the process of individual self-development and human flourishing among all members of society." Further, other forms of self-fulfilment do not warrant constitutional protection and the limitations on this underlying value are more readily justified than limits on the other two core values.[62]

Marginal Limit on Expression – Core Values Not at Play

66. Section 14(1)(b) imposes a marginal limit on expression which does not lie near the heart of the core values underlying s. 2(b). It does not restrict the expression of a political, artistic, or scientific truth; it does not restrict political opinion; and, it promotes equality. The provision restricts self-fulfillment to the extent which denouncing others is a form of self-fulfillment.

67. When expression is public and communicated widely, responsibility is attached to the freedom. Every publisher must consider whether such expression violates the *Criminal Code* or

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[60] *Keegstra, supra* note 39 at 763-765: BA **Tab 19**.
[61] *Ross, supra* note 55 at para 91: BA **Tab 23**; see also *Keegstra, supra* note 39 at 792-793: BA **Tab 19**.
[62] *Keegstra, ibid.* at 763, 805.

may be actionable in defamation. The limits on expression imposed by s. 14(1)(b) are only slightly broader than the limits imposed by the *Criminal Code* and therefore this section imposes a very minimal additional burden on the publisher.[63]

Technology Reduces Risk to Limitation on Expression

68. What constitutes a reasonable limit on expression must be informed by the risk that expression close to the core values will be stifled by the impugned law. The rapid advances in communication technologies have fundamentally changed this contextual factor.

69. The likelihood that legitimate public debate can be stifled has been dramatically reduced. Publishing is no longer in the hands of the powerful and wealthy; citizens have ever-increasing access to technologies which advance opportunities to receive and share information, and to publish opinions and beliefs. Governments have increasingly limited abilities to stop the transmission and dissemination of information, ideas and opinions.

Promotion of Equality is Fourth Core Value

70. Historically, the ability of citizens to participate in the traditional "core value" activities was concentrated in the hands of the powerful and privileged. Whole groups within society were denied free expression through, for example, the denial of the right to vote, the right to an education, and the right to housing and employment. Many of the same historically disadvantaged groups continue to struggle for equality which can only be achieved when *all* citizens have the same right to free expression. In a free and democratic society, the promotion of equality must be the fourth "core value" underlying the s. 2(b) guarantee.

71. The systemic dissemination of hate speech against minority groups, over time, reduces the standing and respect of these groups in Canadian society. This in turn creates a state of discrimination and inequality. Toleration of hateful speech is therefore inherently inconsistent with respect to the principle of equality.[64]

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[63] *Criminal Code*, R.S.C. 1985, c. C-46.
[64] S. Medjuck, "Rethinking Canadian Justice: Hate Must Not Define Democracy" (1992) 41 U.N.B.L.J. 285 at p. 294: BA **Tab 35**.

72. The promotion of equality requires the freedom of expression guarantee to include both the positive right of expression and the negative right to be free from dehumanizing expression. Drawing a distinction between expression which furthers legitimate public debate and expression which silences and demoralizes is fundamental to advance this core value.

Competing Speech is an Inadequate Response to Hate Expression

73. One could argue that the best way to tame hate is to allow it to be openly expressed and to expose it to the ridicule it invites. This approach, however, transfers the burden of the effect of the hate speech onto the members of the target group and the community. Many who are offended by the speech will choose not to respond because this validates and perpetuates the vilification. There are no counter-arguments for expression which vilifies based on group affiliation because such expression is not based on objective truths.

74. Compelling members of a vilified group to respond by "counter-speech" imposes an uninvited burden on those who may already be marginalized and isolated. It may expose these individuals to further risks of harm without the security and support created through the human rights complaint process.

75. Counter-speech may not be readily available. A group of Canadian Muslims was denied the opportunity by the editors and owners of Maclean's magazine to publish a response to an article in which it was claimed that the growth rate of the Muslim population globally will lead to violence and *jihad* through the world dominance of the Islamic religion.[65] As a result of this denial, the group filed human rights complaints.

Prohibition Promotes Important Social Values

76. Section 14(1)(b) support the values enshrined in ss. 15 and 27 of the *Charter*. It restricts expression that erodes the values of equality, tolerance and dignity of the individual:

> Canada's strength as a multiracial, multicultural and multireligious country flows from its ongoing ability to develop core and transcendent values that help unify the differences. Sometimes that means tolerating slings and arrows of misunderstanding that will be

[65] *Elmasry, supra* note 50 at para. 15-20, 104: BA **Tab 9**.

> hurtful. And sometimes it means drawing a line because tolerating the "misunderstanding" undermines the core of our core values.[66]

77. The core values underlying the s. 2(b) guarantee are enhanced by the prohibition of hate expression – not by its publication and dissemination. The prohibition advances equality by supporting an environment in which all citizens are welcome to participate in public debate and to pursue self-fulfilment free of the harm caused by anti-identity expression.

78. Section 14(1)(b) is consistent with, and advances, the principles reflected in international law including the limitation of expression which advocates hatred and discrimination.[67]

79. Section 14(1)(b) serves as a statement of the kind of society we strive to create. This includes setting a minimum standard for civil discourse thereby encouraging dialogue and vibrant debate on matters of social and political importance to the community.

The Legislation is a Necessary Civil Remedy

80. A citizen can seek relief for many tortious acts which are all also actionable by the state through criminal law. These different legal mechanisms fulfill different functions:

> [70] …Criminal law and civil law serve different purposes. It is true they share certain deterrent aspects. Yet the principal object of criminal law is the recognition of society's abhorrence of a criminal act and the punishment of criminal behaviour. Civil law has as its main goal compensation through awards of damages for injuries suffered by an individual at the hands of another. Further, although many criminal offences make victims of individuals, criminal law treats all crimes as offences against society. It is the state that prosecutes the offender in a public forum. The interests of the state are paramount while the interests of victims are peripheral. On the other hand, the civil process envisions the victim herself seeking vindication and compensation by confronting the individual who wronged her.[68]

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[66] *Bou Malhab v. Diffusion Métromédia CMR Inc.*, 2011 SCC 9 at para. 97, Abella J., dissenting [*Malhab*]: BA **Tab 4**.

[67] This includes Article 19 of the *International Covenant on Civil and Political Rights* (acceded to by Canada in 1976) which limit expression by laws necessary "for the respect of the rights or reputations of others". Article 20(2) prohibits "[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence…" Article 4 of the *International Convention on the Elimination of All Forms of Racial Discrimination* (ratified by Canada in 1981) requires the state to "condemn all propaganda…based on ideas or theories of superiority of one race…or which attempt to justify or promote racial hatred and discrimination in any form…"

[68] *R. v. Lucas*, [1998] 1 S.C.R. 439 at para. 70: BA **Tab 20**.

81. This dichotomy reflects the importance our society places on fundamental rights protected by both civil and criminal law. It justifies the use of a variety of mechanisms to further social goals such as promoting equality and eliminating discrimination.

82. The regulation of private relationships between citizens through the civil remedies is an essential component in a free society. The tort of discrimination is not yet recognized as a cause of action in Canadian law. The only remedy a citizen has to redress the harm caused by discrimination or the effects of hate propaganda is through human rights legislation. This promotes individual autonomy, a core value underlying the freedom of expression.

The Legislation Is an Effective Remedy

83. An aggrieved citizen is not compelled to make a human rights complaint. But for citizens who choose to assert the right to equality and dignity, the legislation provides accessible and inexpensive access to justice regulated by a public body. This empowers disadvantaged citizens who are often poor or otherwise marginalized.

84. McLachlin J. speaking for the minority in *Keegstra*, found that human rights legislation was more suitable than criminal law to address the consequences of hate propaganda:

> …it is arguable whether criminalization of expression calculated to promote racial hatred is necessary. Other remedies are perhaps more appropriate and more effective. Discrimination on grounds of race and religion is worthy of suppression. Human rights legislation, focusing on reparation rather than punishment, has had considerable success in discouraging such conduct… proceedings under the human rights codes show strong success in achieving their essential purpose, the curtailment of discrimination.[69]

85. The *Criminal Code* hate propaganda provisions regulate only the most extreme forms of expression– those acts which advocate genocide or incite a "breach of the peace". The majority of these offences go unreported. Even reported crimes may go unprosecuted.[70] The perpetrators are unaccountable and are free to continue to victimize the most vulnerable in society.

86. Provincial human rights legislation provides the only control for non-violent hate expression and expression which incites discrimination. Without this sanction, the ability of

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[69] *Keegstra, supra* note at 39 at 861: BA **Tab 19**.
[70] Statistics Canada, *Hate Crime in Canada,* 2006, by M. Dauvergne, K. Scrim and S. Brennan, (Ottawa: Canadian Centre for Justice Statistics Profile Series, 2008 at 8: BA **Tab 37**.

governments to promote equality and reduce discrimination in education, housing and employment is severely compromised.

87. The Commission attempts to reduce discrimination though integrated approaches: public education, systemic advocacy and complaints. The adjudication of complaints allows public comment on expression which falls within s. 14(1)(b); the cases are used to illustrate the limits to expression and further public awareness and discussion.

88. The *Code* provides a range of individual and broad public interest remedies. This addresses the public importance of hate propaganda; it advances equality by transferring some of the burden for achieving equality from the vulnerable and marginalized to regulation by a public body.

89. Human rights decisions are subject to judicial review and/or appeal. This provides the most suitable forum for a final resolution of balancing quasi-constitutional rights between citizens.

B. Conclusion: Section 14(1)(b) is Saved Under s. 1 of the *Charter*

90. The limits imposed by s. 14(1)(b) promote and protect equality rights of the individual and discourage intolerance and discriminatory conduct. Limiting hate expression through the process triggered by a violation of s. 14(1)(b) is part of a civil remedy aimed at a serious and complex social problem. This process fosters civil discourse; the provision itself is a public message of the society we strive to create.

91. Hate expression is restricted for what it does and not what is says. The end product of such expression is actual harm and not hurt feelings or mere offence:

> The evil of hate propaganda is beyond doubt. It inflicts pain and indignity upon individuals who are members of the group in question. Insofar as it may persuade others to the same point of view, it may threaten social stability. And it is intrinsically offensive to people -- the majority in most democratic countries -- who believe in the equality of all people regardless of race or creed.[71]

[71] *Keegstra*, *supra* note 39 at 812 [Emphasis added]: BA **Tab 19**.

92. Without this limit the advances made by the vulnerable and comparatively powerless members of society would be reversed leaving a void in the legal mechanisms available to redress the harm cause by the expression.

93. The significant social benefits flowing from s. 14(1)(b) vastly outweighs the minimal deleterious effects on limiting expression far removed from the core values sought to be protected by the s. 2(b). Section 14(1)(b) is a justifiable limit on the freedom of expression in a free and democratic society.

Issue 3: Does s. 14(1)(b) of *The Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1 infringe s. 2(a) of the *Canadian Charter of Rights and Freedoms*?

A. Section 14(1)(b) and Freedom of Religion

1. Constitutional Analysis Requires a Flexible Approach

94. The Saskatchewan Court of Appeal in *Owens* accepted that s. 14(1)(b) was a "justifiable limit on the religiously inspired speech in effectively the same way as it is a justifiable limit on free speech generally" relying on this Honourable Court's decision in *Ross*.[72]

95. The issue in *Ross* was the constitutionality of a public school board *order* which prohibited a teacher from publishing religious opinions. LaForest, J. found that religiously-inspired speech was within the scope of s. 2(a) protection and he then reconciled competing rights in a s. 1 analysis while recognizing that different analytical approaches may be appropriated in other circumstances:

> … competing values of a free and democratic society have to be adequately weighed in the appropriate context. I need not further explore when or under what circumstances a more peremptory process may be justifiable. I do refer again to Dickson C.J.'s remarks in *Keegstra* that while it is not logically necessary to rule out internal limits within s. 2 it is analytically practical to do so. That approach seems to me compelling in the present case where the respondent's claim is to a serious infringement of his rights of expression and of religion in a context requiring a detailed contextual analysis.[73]

96. Although the *Oakes* analysis provides a more practical tool to balance competing rights than can be achieved by setting internal limits on the scope of the s. 2(a) guarantee, LeBel J., in dissent,

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[72] *Owens, supra* note 34 at para. 57: BA **Tab 14**.
[73] *Ross, supra* note 55 at para. 75 [Emphasis added]: BA **Tab 23**.

revisited the role that the *scope* of the freedom of religion plays; he considered the appropriateness of a less rigid and formalistic approach:

> 146 …it is still necessary to analyse the right in issue, define its content and, where relevant, consider the scope of competing rights. The definition of the content of a right does not correspond systematically to a limit that must be justified by means of the approach developed in the cases on s. 1.
>
> …
>
> 148 …while this Court has indeed favoured resorting to the s. 1 justification process with respect to freedom of religion, its decisions have never definitively established that this approach is the only way to reconcile competing or conflicting fundamental rights. This is not what emerges from the Court's decisions. Nor would it be desirable. The complexity of the situations to which the *Canadian Charter* applies is unsuited to simplistic formulas, as it is to rigid classifications.
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> 149 …The Court has not ruled out the possibility of reconciling or delimiting rights before applying s. 1. This is shown by two cases decided more than 10 years apart, *Young v. Young*, [1993] 4 S.C.R. 3, and a very recent decision, *Montréal (City) v. 2952-1366 Québec Inc.*, [2005] 3 S.C.R. 141, 2005 SCC 62, at paras. 56-57 and 60-61, the first of which deals with freedom of religion and the second with freedom of expression.[74]

97. This Honourable Court applied a s. 1 analysis where the constitutionality of an administrative decision related to a particular religious practice was challenged and where the competing rights and freedoms of individuals or groups was raised in a particular factual matrix. Where, however, there was no conflict between competing rights, or where defining the scope of rights avoided any potential conflict, a s. 1 analysis was unnecessary.[75]

98. When the constitutionality of a law of general application is raised, the scope of the freedom of religion is relevant in determining when it may be practical to use the "internal limits" test and determine whether the aspect of religious freedom alleged to be impaired is within that scope before proceeding to a s. 1 analysis.

2. Harmful Religious Practices are Outside the Scope of s. 2(a)

99. Dickson C.J. explained the scope of and the relationship between religious beliefs and religious practices in *Big M*, including the right to be free *from* religion:

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[74] *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256 at para. 146, 148-149 [*Multani*] [Emphasis added]: BA **Tab 13**.

[75] *Ibid.*; *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 55: BA **Tab 25**; *Ross*, *supra* note 55: BA **Tab 23**; *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 772 [*Trinity*]: BA **Tab 27**.

> Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.
>
> …
>
> The values that underlie our political and philosophic traditions demand that every individual be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, provided *inter alia* only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own.[76]

100. Another articulation of the boundary between the nature of the "injury to neighbours" caused by religious practices not within the scope of s. 2(a) was developed in *B.(R.)*:

> Just as there are limits to the ambit of freedom of expression (e.g. s. 2(*b*) does not protect violent acts: *R. v. Zundel*, [1992] 2 S.C.R. 731, at pp. 753 and 801; *R. v. Keegstra*, [1990] 3 S.C.R. 697, at pp. 732 and 830), so are there limits to the scope of s. 2(*a*), especially so when this provision is called upon to protect activity that threatens the physical or psychological well-being of others. In other words, although the freedom of belief may be broad, the freedom to act upon those beliefs is considerably narrower, and it is the latter freedom at issue in this case.[77]

101. Other limitations on the scope of s. 2(a) include "trivial or insubstantial" effects:

> Section 2(*a*) does not require the legislature to refrain from imposing any burdens on the practice of religion. Legislative or administrative action whose effect on religion is trivial or insubstantial is not, in my view, a breach of freedom of religion.[78]

102. If the limit on a religious practice is non-trivial or substantial or its effects may collide with other significant public rights or interests, proceeding to a s. 1 justification may be necessary. Where it is clear, however, that the practice causes significant physical or psychological harm to others in the community, it can never be within the scope of s. 2(a) protection and it is unnecessary to proceed to a s. 1 analysis.

3. Section 14(1)(b) Does Not Engage s. 2(a) Protection

103. Section 14(1)(b) restricts the right to publish. This has no effect on the right to hold any belief or to engage in any form of worship. It only restricts the publication of beliefs that express hatred for members of the groups protected by the *Code*.

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[76] *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at 337, 346 [Emphasis added]: BA **Tab 16**.
[77] *B.(R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315 at para. 226 [Emphasis added]: BA **Tab 2**.
[78] *R. v. Jones*, [1986] 2 S.C.R. 284 at 314-315, Wilson J., dissenting [Emphasis added]: BA **Tab 18**.

104. The publication of hate propaganda has been recognized by this Honourable Court as causing serious "injury to neighbours" which is in the nature of the harm identified in *B.(R.)* as outside the scope of the protection of s. 2(a):

> [64] … the presence of hate propaganda in Canada is sufficiently substantial to warrant concern. Disquiet caused by the existence of such material is not simply the product of its offensiveness, however, but stems from the very real harm which it causes. Essentially, there are two sorts of injury caused by hate propaganda. First, there is harm done to members of the target group. It is indisputable that the emotional damage caused by words may be of grave psychological and social consequence…
>
> …
>
> [209]The evil of hate propaganda is beyond doubt. It inflicts pain and indignity upon individuals who are members of the group in question. Insofar as it may persuade others to the same point of view, it may threaten social stability. And it is intrinsically offensive to people -- the majority in most democratic countries -- who believe in the equality of all people regardless of race or creed.[79]

105. Sincerely held religious beliefs may impose a duty to publish material that denounces the beliefs and practices of others, that denounces the rights of others to live in the community, and that incites discrimination or violence. If such expression meets the *Taylor* standard for "hatred" and it is directed at a protected group, then the practice of publication is outside the scope of s. 2(a) protection.

106. Any expression that meets the *Taylor* standard is harmful because it may inflict pain and psychological damage on others; all publications which are prohibited by the provision inflict "injury on neighbours". Section 14(1)(b) does not violate s. 2(a) because it can never capture conduct protected by s. 2(a).

Issue 4: If s. 14(1)(b) infringes s. 2(a), is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

A. Lower Standard to be Applied

107. If this Court finds that the publication of hateful religious beliefs is within the scope of s. 2(a), an attenuated analysis is justified when religious views by their very nature are contrary to other *Charter* values:

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[79] *Keegstra*, *supra* note 39 at 746, 812 [Emphasis added]: BA **Tab 19**.

> … religious belief that denigrates and defames the religious beliefs of others erodes the very basis of the guarantee in s. 2(a) - a basis that guarantees that every individual is free to hold and to manifest the beliefs dictated by one's conscience. The respondent's religious views serve to deny Jews respect for dignity and equality said to be among the fundamental guiding values of a court undertaking a s. 1 analysis. Where the manifestations of an individual's right or freedom are incompatible with the very values sought to be upheld in the process of undertaking a s. 1 analysis, then, an attenuated level of s. 1 justification is appropriate.[80]

108. When a religious practice lies further from the core values underlying the freedom, a lower standard of justification is appropriate:

> [93]…the freedom of religion interests they accommodate do not lie at the heart of s. 2(a) of the *Charter*. In other words, the *Options* are concerned only with the ability of marriage commissioners to act on their beliefs in the world at large. They do not in any way concern the freedom of commissioners to hold the religious beliefs they choose or to worship as they wish…
>
> …
>
> [146]…Canadian constitutional jurisprudence has consistently distinguished between the right to hold certain beliefs and the right to act on those beliefs, particularly as one moves out of the fundamental area of religious rites and practices and when acting on a religious belief harms or infringes the rights of others. At the very least, the protection of s. 2(a) of the *Charter*, like s. 2(b) encompasses a range of activities that diminish, as they recede from a fundamental core, in constitutional value.
>
> …
>
> [148]…it is interference that does not threaten actual religious beliefs or conduct. To the extent that this is so, it does not even fall within the protection of s. 2(a) of the *Charter*.[81]

109. Publications which denounce and denigrate members of groups protected by the *Code* are incompatible with tolerance for diversity and eliminating discrimination. This is contrary to the fundamental values triggered by a s. 1 analysis.

110. Limiting the publication of hateful religious beliefs does not interfere with the right to hold beliefs. It limits only one form of the dissemination of beliefs. Publication itself is not a religious rite or practice and limiting the publication of the condemnation of others is far from the fundamental core of the freedom of religion. The right to say what one believes is right or

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[80] *Ross*, *supra* note 55 at para. 94 [Emphasis added]: BA **Tab 23**.
[81] *Marriage Commissioners Appointed Under The Marriage Act (Re)*, 2011 SKCA 3 at para. 93, 146, 148 [Emphasis added]: BA **Tab 11**.

wrong is narrower than the right to say that others do not have the right to hold contrary views or live according to different principles.

111. In conclusion, the harm caused by the publication of hate propaganda is significantly outweighed by the benefit to the public interest in limiting such publications. Section 14(1)(b) is a justifiable limit on the freedom of religion.

Issue 5: Did the Saskatchewan Court of Appeal Err in Finding No Violation of s. 14(1)(b) of *The Saskatchewan Human Rights Code*?

112. Abella J. recently summarized the nature of the debate faced by tribunals and courts in drawing the line between acceptable and unacceptable public expression in the context of defamation law:

> Democracies cherish the right of their citizens to engage in public debate, and to express the widest possible range of views on the widest possible range of subjects. These views may be hugely unpopular. They may also be hugely influential. And they may be hugely hurtful. The right to express those views is not, however, tied to their popularity, influence, or insensitivity. It is tied to that most complicated of barometers: the nature and extent of their harmful impact. That is why we do not protect libellous statements. Or those promoting violence. Or hate.
>
> The challenge lies in how to strike the balance between the need to provide the widest possible scope for freedom of expression, with the need for a narrow interventionist role in those rare circumstances when the words are so deeply harmful that they are no longer entitled to the benefit of the freedom's protective scope. Context and content matter: there is a difference between yelling "fire" in a crowded theatre and yelling "theatre" in a crowded fire station.[82]

113. The principles set out in *Taylor* continue to apply: when evaluating whether expression violates s. 14(1)(b), the focus is on the harmful effects of impugned expression in the context in which the expression is produced, disseminated and received.

A. The Court of Appeal Applied the Wrong Test

1. Section 14(1)(b) Analysis is a Two-Step Inquiry

114. Tribunals and courts have applied either a one-step or a two-step test in the application of the *Taylor* standard when determining whether expression violates s. 14(1)(b) of the *Code* or analogous provisions in other legislation.

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[82] *Malhab, supra* note 66 at para. 95 and 96, Abella J., dissenting [Emphasis added]: BA **Tab 4**.

115. In the one-step test, the evaluation of whether "hatred" is expressed *includes* balancing competing *Charter* values and the consideration of contextual factors. Supporters of this view rely on Dickson C.J.'s finding in *Taylor* that competing interests can be balanced even in the absence of an exemption clause analogous to s. 14(2) and the following statement:

> …there is no conflict between providing a meaningful interpretation of s. 13(1) and protecting the s. 2(b) freedom of expression so long as the interpretation of the words "hatred" and "contempt" is fully informed by an awareness that Parliament's objective is to protect the equality and dignity of all individuals by reducing the incidence of harm-causing expression.[83]

116. This approach was described in *Owens* as:

> ...using an objective approach. The question of whether, when considered objectively by a reasonable person aware of the relevant context and circumstances, the speech in question would be understood as exposing or tending to expose members of the target group to hatred or as ridiculing, belittling or affronting their dignity within the restricted meaning of those terms as prescribed by *Bell.*[84]

117. Hunter J.A. in the Court of Appeal below followed this approach. Even though she noted it must be clear on the face of a publication that the *Taylor* standard is met "without resort to conjecture or speculation", she stated that the "first task is to view the flyers in the entire context" being "situations and conditions in which the message was delivered".[85]

118. Regarding Schedule D, Hunter J.A. concluded that the tribunal had taken six phrases out of context without explaining why these phrases, *in context*, met the definition of hatred. She, too, did not explain why the phrases, in context, did *not* meet the definition of hatred. She did not determine if the publications were capable of expressing hate; she concluded that in the context of a public debate *these* phrases did not reach the level of emotion required to meet the *Taylor* standard and therefore did not violate s. 14(1)(b).[86]

119. A two-step test is supported by Dickson C.J.'s conclusion that the analysis focuses on the *effect* of expression and not the intention of its author. Smith J.A. in the Court of Appeal below set out this approach. First, determine if the meaning of the words is objectively *capable* of

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[83] *Taylor, supra* note 29 at 927: BA **Tab 5**; and see discussion in *Kane, supra* note 50 at paras. 117-127: BA **Tab 10**.
[84] *Owens, supra* note 34 at para. 60: BA **Tab 14**; See also *Elmasry, supra* note 50 at para 80: BA **Tab 9**.
[85] Judgment, *supra* note 5 at paras. 55, 65, 83: AR **Tab 5**.
[86] *Ibid.* at paras. 68, 73, 78.

expressing "unusually strong and deep-felt emotions"[87] or determine if there has been a breach of s. 14(1) and then examine the publication in context so that the decision-maker is able to...

> [121]...weigh the need to protect the vulnerable group from the effects of the impugned speech as against the constitutional value of that speech, not merely at the stage of determining, in the abstract, whether the legislative provision meets constitutional muster, but also in its application, to ensure that, at that stage, an interpretation is not give to the section that would remove it from the s. 1 justification it otherwise enjoys.[88]

120. The first inquiry in the two-step test is whether the publication, on its face, expresses "hatred" such that it is likely to expose the target group to hate (*i.e.* would a reasonable person understand the publication to express hatred?). This may involve interpretation tools including the "hallmarks of hate" and factors related directly to the face of the publication (e.g. insidiousness, how personally directed to target groups).

121. The second inquiry, the context, includes consideration of contextual factors related to the circumstances in which the publication is disseminated (e.g. scale of dissemination, ability and opportunity of recipients to assess and respond) and the balancing of other relevant *Charter* values, including the added precaution directed by s. 14(2) (*i.e.* would a reasonable person understand the publication to expose the target group to hatred? Is it harmful?).

122. After having referred to the two-step test, Smith J.A. applied the one-step test. She concluded that even though the language was extreme, its emotive level was *not important* in the analysis because the target group would have objected to "the essential message" of "disapprobation of same-sex sexual conduct" even without the extreme language. Her view was that the analysis of language coloured by fear and distaste for intolerance and bigotry becomes subjective and unreliable and can lead to incorrect *inferences* of meaning rendering an unreasonable interpretation and application of s. 14(1)(b).[89]

123. Both Hunter and Smith J.J.A. concluded that the publications did not violate s. 14(1)(b) because they related to ongoing public debates; and, the publisher's purpose was not to promote

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[87] *Ibid.* at para. 121.
[88] *Ibid.*; see also the review of the different articulations of the tests in *Elmasry, supra* note 50 at paras. 73-81 where it is noteworthy that the tribunal interpreted the *Owens* approach stated above as the essentially the same as articulations of a two-step test: BA **Tab 9**.
[89] Judgment, *ibid.* at paras. 136-138: AR **Tab 5**.

hate but to express disapproval of specific conduct. Both decisions ignored the *effect* of, or the likely harm caused by, the publications. Each publication was found to be either 'hateful but permissible since it relates to a public debate or conduct' or 'not hateful since it relates to a public debate or conduct'. It is unclear whether the publications were 'not hateful' or 'not harmful'.[90]

124. Both reasons illustrate the deficiency of the one-step approach. As noted by Smith J.A., it runs the risk of ending with "a determination of where, on an emotive continuum, the expression lies" (*i.e.* is it hateful?) without going on to balance the competing interests and constitutional value of the expression, contrary to Dickson C.J.'s direction in *Taylor*. It also runs the risk, as it did in this case, of little or no consideration being given to the first inquiry – would a reasonable person understand this publication as expressing hate?[91]

125. Dickson C.J.'s statement quoted above in *Taylor* referred to the scope and standard of expression capable of being captured by the words "hatred or contempt" and not to an analytical framework for assessing a violation of the prohibition provision. The focus is on the effects or harm of a publication and not the intention of its author. This can only be assessed after a determination has been made as to whether a publication on its face expresses vilification of a target group. Although Smith J.A. articulated the appropriate test, neither judge in the Court of Appeal below applied this test.

2. The Court of Appeal Misapplied Contextual Factors

126. Since *Taylor*, tribunals and courts have identified and applied a range of contextual factors relevant to particular circumstances. These relate, in general, to the form, content, and dissemination the publication, the recipient's ability to assess and respond, the vulnerability of the target group, and the publisher's intentions and abilities. Rooke J., in *Kane* categorized a non-exhaustive list as follows:

- The message – content, tone, images conveyed, reinforcement of stereotypes, surrounding circumstances
- The medium – credibility, circulation, context of the publication

[90] *Ibid.* at paras. 71, 136, 138.
[91] *Ibid.* at para. 121.

- The audience – vulnerability of target group[92]

127. Smith J.A. recognized that different contextual factors may be relevant when hate expression is directed at different target groups. She also noted that context was relevant for interpreting the statute, interpreting the expression (step one), and for balancing the freedom of expression with the competing values (step two).[93]

128. Smith J.A. referred to the following contextual factors:

- Text as a whole, without parsing (as in *Owens*)
- Content as part of public debate (as in *Owens*)
- Content as part of moral debate (as in *Owens*)
- Historical disadvantage and vulnerability of group targeted (including harm caused by publication at issue; as in *Taylor* and *Owens*)
- Intention of publisher (contrary to *Taylor*)
- Whether target groups oppose ideas and opinions without hateful aspect[94]

129. Hunter J.A. relied on publisher's purpose ("the flyer was distributed in the context of a concern") and the role of public debate ("when examined in the context of a debate").[95]

130. Some of the contextual factors relied by the Court of Appeal below have no relevance to the interpretation of s. 14(1)(b). The application of remote contextual factors also obscures the focus of the analysis – the effect of the publication on the reader.

Public Debate Does Not Insulate <u>Hate</u> Expression

131. Hunter and Smith J.J.A. each relied on public or political debate as a contextual factor in determining whether expression violated s. 14(1)(b). Other courts have shared this view.

132. Smith J.A. reasoned that debate about sexual morality involves public policy and individual autonomy and therefore lies near the core values underlying the freedom of expression. She concluded that limits for such debates are *never* justified and the standard for

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[92] *Kane*, *supra* note 50 at para. 130: BA **Tab 10**.
[93] Judgment, *supra* note 5 at para. 120: AR **Tab 5**.
[94] *Ibid.* at, in order listed, paras. 119, 135, 138, 126, 138 and 136.
[95] *Ibid.* at paras. 71, 73, 78, 79.

hate on issues of public policy is the *Criminal Code* standard. Hunter J. A.'s view was that *less emotion* is generated by a publication if it is part of a public debate.[96]

133. These findings support the proposition that public debate either *legitimizes* a hate-promoting publication or it *insulates* opinions or ideas *linked* to hate expression from the application of s. 14(1)(b). In both cases, the freedom of expression is awarded a dominant status over equality, dignity and the objective of the legislation to combat discrimination, contrary to this Honourable Court's decision in *Taylor*.

134. Section 14(1)(b) does not seek to stifle debate: it seeks to restrict hate expression and thereby promote civil debate. Elements of public debate may be *attached to* attacks on people based on group affiliation but opinions and ideas lose legitimacy when associated with hate expression. In a society dedicated to equality, hate expression taints otherwise legitimate opinions; legitimate opinions do not neutralize hate.

135. It is in the context of public debate where the limits on expression are most important because this is where hate expression causes its greatest damage. It is public issues concerned with public spending and social policies where the beliefs, practices, and lifestyle of minority groups may conflict with the majority. The expression of hate and discriminatory opinions is a call to action to discriminate. Public issues give a platform and a vehicle to perpetuate hate and discrimination.

136. Compare "homosexuals are pedophiles" with "homosexuals are pedophiles *and* they should not be allowed to teach in the school system". The first statement is hateful; the second statement calls those who believe the false statement to action – "to let the public school authorities know that you don't want Saskatchewan's children corrupted by sodomite propaganda call the school board" and "call your local trustee as well to let them know they will be gone next election if they vote for implementing any homosexual propaganda in the children's curriculum."[97] This is yelling 'fire' in a crowded theatre.

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[96] *Ibid.* at paras. 138, 73.
[97] Tribunal exhibit: AR **Tab 18**, p. 271.

137. The "line between the rough and tumble of political debate and brutal, negative and damaging attacks upon identifiable groups"[98] is fluid and difficult to draw in some cases, but in no case does the fact of a debate itself exempt a prohibition on the attack upon a target group. In every case the line must be drawn based on the *effect* of the harm. Public debate increases rather than decreases the likelihood that a publication hateful on its face will expose a target group to hatred.

Morality Is Not A Contextual Factor

138. Hunter J.A. identified morality as a contextual factor because morality relates to conduct which is always subject to public debate. She recognized that "there will be a relatively high degree of tolerance for the language used in debates about moral issues, subject, of course, to limitations. Anything that limits debate on the morality of behaviour is an intrusion on the right of freedom of expression."[99]

139. Smith J.A. agreed that morality was a contextual factor. In her view, however, where expression is related to "disapprobation of same-sex sexual conduct in the context of comment on issues of public policy or sexual morality, its limitation is not justifiable in a free and democratic society."[100]

140. Regarding the distinction between expressing disapproval of conduct and expressing disapproval of a target group, Smith J.A. stated:

> [130] It is always logically possible and sometimes important to distinguish expressions of disapprobation of a minority or historically disadvantaged group from disapprobation of some of the conduct or practices in which that group engages. One intervener...made the point that the Jewish practice of circumcising male infants, the Roman Catholic practice of rejecting artificial methods of birth control, and the practice of many religions in excluding women from positions of leadership have all been subjected to extensive public criticism, sometimes in polemical language. Clearly protection of freedom of expression must be sufficiently robust to permit these debates.[101]

141. Prohibiting a publication which includes "children will pay the price in disease, death, abuse and ultimately eternal judgment if we do not say no to the sodomite desires to socialize

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[98] *Keegstra*, *supra* note 39 at 779-780: BA **Tab 19**.
[99] Judgment, *supra* note 5 at para. 62: AR **Tab 5**.
[100] *Ibid.* at para. 138.
[101] *Ibid.* at para. 130.

your children into accepting something that is clearly wrong"[102] is not, as Smith J.A. suggests, the same as prohibiting "I do not approve of same-sex conduct" any more than "Jews celebrate the torture of children and they all belong in Hell" is the same as "I disapprove of circumcision."[103]

142. If freedom of expression must be sufficiently robust to permit debate, it must also be sufficiently civil to promote equality and the debate itself. It may well be that it is "through the democratic processes that people reach their own conclusions as to what behaviours should be permitted, encouraged, discouraged, or forbidden."[104] Expressing opinions on conduct does not require vilification of any target group. There is no rationale to support the Court of Appeal's position that restricting publications with a moral element is not a justifiable limit on expression when such expression is hateful and discriminatory and is therefore not legitimate expression.

'Love the Sinner, Hate the Sin' is Not a Contextual Factor

143. Inextricably linked to morality as a contextual factor for the Court of Appeal below was the distinction between disapproval of identity and disapproval of the conduct or practices when sexual orientation is the basis for a complaint under s. 14(1)(b) of the *Code*.

144. In *Egan*, this Honourable Court confirmed that sexual orientation is a "deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs." Cory J., in dissent, accepted that sexual orientation is more than status and includes "something that is demonstrated in an individual's *conduct* by the choice of a partner" [Emphasis added].[105]

145. L'Heureux-Dubé J., writing a dissenting opinion in *Trinity*, objected to the unrestricted condemnation of the traits upon which discrimination is prohibited.

> 69 ...the argument has been made that one can separate condemnation of the "sexual sin" of "homosexual behaviour" from intolerance of those with homosexual or bisexual orientations. This position alleges that one can love the sinner, but condemn the sin. But, in the words of the intervener EGALE, "[r]equiring someone not to act in accordance with their identity is harmful and cruel. It destroys the human spirit. Pressure to change their behaviour and deny their sexual identity has proved tremendously damaging to young persons seeking to come to terms with their sexual orientation" (factum, at para.

[102] Tribunal exhibit: AR **Tab 18**, p. 271.
[103] Judgment, *supra* note 5 at para. 130: AR **Tab 5**.
[104] *Ibid.* at para. 35.
[105] *Egan v. Canada*, [1995] 2 S.C.R. 513 at 518: BA **Tab 8**.

> 34). The status/conduct or identity/practice distinction for homosexuals and bisexuals should be soundly rejected, as per Madam Justice Rowles: "Human rights law states that certain practices cannot be separated from identity, such that condemnation of the practice is a condemnation of the person" (para. 228). She added that "the kind of tolerance that is required [by equality] is not so impoverished as to include a general acceptance of all people but condemnation of the traits of certain people" (para. 230). [106]

146. In *Owens*, Richards J.A. recognized the relationship between sexual practice and identity but went on to accept that the disapproval of same-sex conduct was not necessarily disapproval of gay persons in the application of s. 14(1)(b):

> …Sexuality and sexual practices are such intimately central aspects of an individual's identity that it is artificial to suggest that the practices of gays and lesbians in this regard can somehow be separated out from those individuals themselves. However, in the present circumstances, it is necessary to recognize that many people do make such a distinction and believe on moral or religious grounds that they can disapprove of the same-sex sexual practices without disapproving of gays and lesbians themselves. This fact is at least part of the overall context in which Mr. Owens' advertisement must be considered. Again this tends to shade the content of the advertisement away from it being the sort of message which falls within the scope of s. 14(1)(b) of the *Code*.[107]

147. Smith J.A. in the Court of Appeal below recognized that this must "ring hollow" for the gay community because it is "intolerance and disapprobation of same-sex *conduct or practices* that cause the loss of dignity and self esteem, marginalize, and cause the mental health consequences for those with same-sex sexual orientation…" She went on to apply the reasoning in *Owens* to conclude that the publications were directed at conduct and therefore addressed a moral debate outside the scope of s. 14(1)(b).[108]

148. Everyone is free to express disapproval and even condemnation of behaviours. McLachlin C.J., writing for the majority in *Chamberlain*, discussed the role of tolerance based on sexual orientation in educational institutions:

> ...the demand for tolerance cannot be interpreted as the demand to approve of another's beliefs or practices. When we ask people to be tolerant of others, we do not ask them to abandon their personal convictions. The belief that others are entitled to equal respect

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[106] *Trinity*, *supra* note 75 at para. 69 [Emphasis added] : BA **Tab 27**.
[107] *Owens*, *supra* note 34 at para. 82 [Emphasis added]: BA **Tab 14**.
[108] Judgment, *supra* note 5 at para. 131: AR **Tab 5**.

> depends, not on the belief that their values are right but on the belief that they have a claim to equal respect regardless of whether they are right.[109]

149. Gonthier J., in dissent, discussed the distinction between acceptance and tolerance and the interplay between s. 2 and s. 15 *Charter* rights when morality is part of the debate:

> ...language espousing "tolerance" ought not be employed as a cloak for the means of obliterating disagreement...the relationship between s. 2 and s. 15 of the Charter, in a truly free society, must permit persons who respect the fundamental and inherent dignity of others and who do not discriminate, to still disagree with others and even disapprove of the conduct or beliefs of others. Otherwise, claims for "respect" or "recognition" or "tolerance", where such language becomes a constitutionally mandated proxy for "acceptance", tend to obliterate disagreement.[110]

150. Condemning sexual practices cannot be separated from sexual identity; condemning the practice *is* condemning identity which includes sexual orientation. Hate expression is not *disapproval* or *condemnation* of conduct or practice; it is expression that the reasonable person would see as exposing members of a group affiliated by sexual orientation to hatred. It is expression that incites discrimination and denies equality to other citizens.

151. The Court of Appeal below evaluated the publications based on the presumption that since some people may believe that there is a distinction between sexual practices and sexual identity, expression directed at practices was not directed at individuals based on sexual identity. Again, the Court of Appeal focussed on the perceived intentions, beliefs and perceptions of its author. This ignores the effect of the publications and reverses the objective analysis set out in *Taylor* and approved of by Hunter and Smith J.J.A.

152. The Court of Appeal erred in finding that the relationship between conduct and identity was a contextual factor in the application of s. 14(1)(b) when publications express hate based on sexual orientation.

Purpose or Intention of the Publisher is Not a Contextual Factor

153. The focus on the effect of expression and not the intention of its author was explained by Dickson C.J. in *Taylor*:

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[109] *Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710 at para. 66 [*Chamberlain*]: BA **Tab 7**.
[110] *Ibid.* at para. 134 [Emphasis added].

> …The preoccupation with effects, and not with intent, is readily explicable when one considers that systemic discrimination is much more widespread in our society than is intentional discrimination. To import a subjective intent requirement into human rights provisions, rather than allowing tribunals to focus solely upon effects, would thus defeat one of the primary goals of anti-discrimination statutes.[111]

154. Hunter J.A. found that Schedule D was distributed for the purpose of expressing a concern about the inclusion of "information on homosexuality" in school curricula and libraries. Smith J.A. identified the author's purpose as expressing disapproval of schools promoting tolerance for same-sex conduct such that the "objective purpose of such discourse is not the promotion of hatred."[112]

155. Purpose or intention of the publisher may be a factor to be considered in the mediation, reconciliation and remedies in the complaint process. It has no relevance in determining whether a publication violates s. 14(1)(b). The Court of Appeal below erred in so finding.

3. The Limits on Hateful Expression Based on Sexual Orientation is Not a Lower Standard

156. Smith J.A. distinguished between hate expression based on race and expression based on sexual orientation:

> This point underscores the difficulty of interpreting s. 14(1)(b) in such a way that it limits or prohibits pejorative expression in relation to same-sex sexual activity. Such speech engages the constitutional values of freedom of expression in a way that the hate propaganda considered in Taylor does not.[113]

157. The Court of Appeal's conclusion, albeit based on a distinction between conduct and identity, creates a hierarchy of prohibited grounds with a corresponding hierarchy of degrees of hate expression. It imposes a higher threshold for hate and harm caused by expression based on sexual orientation than for other protected groups.

158. This Honourable Court concluded in *Vriend*[114] that discrimination based on sexual orientation was as serious and deserving of condemnation as discrimination based on other

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[111] *Taylor*, supra note 29 at 931: BA **Tab 5**.
[112] Judgment, *supra* note 5 at paras. 71, 138: AR **Tab 5**.
[113] *Ibid.* at para. 138.
[114] *Vriend v. Alberta*, [1998] 1 S.C.R. 493 [*Vriend*]: BA **Tab 28**.

grounds. The Court recognized that differential treatment of individuals based on sexual orientation perpetuates and encourages discrimination–a particularly cruel form of discrimination because it may harm the dignity and perceived worth of gay persons.

159. According to the 2004 General Social Survey conducted by Statistics Canada, 44% of gays and lesbians reported experiencing discrimination in the previous five years compared to 14% of heterosexuals. The most common type of discrimination reported was related to employment when members of the gay community applied for a position or a promotion.[115]

160. Data compiled by Statistics Canada based on 2006 police-reported surveys showed that 10% of hate crimes were motivated by sexual orientation. Of these crimes, more than one-half were violent and resulted in physical injury to victims more often than hate crimes directed at other target groups.[116] By 2008, police services reported that 16% of hate crimes were motivated by sexual orientation and these hate crimes were increasingly violent -75% of crimes motivated by sexual orientation were violent whereas 38% of racially-motivated crimes, and 25% of religiously-motivated crimes, were violent. [117]

161. Hate expression which vilifies citizens based on sexual orientation perpetuates discrimination and fosters the intolerance which leads to the serious harm recognized by this Honourable Court in *Taylor*. This harm is no less serious than the harm resulting from racially-directed hate expression. In every case, the "question is about the direct targets of the abuse. Can their lives be led, can their children be brought up, can their hopes be maintained and their worst fears dispelled, in a social environment polluted by these materials."[118]

162. Hate expression based on sexual orientation interferes with the ability of gay persons to make a life in the community – to secure housing, to pursue educational and employment opportunities and to live without fear of physical and psychological violence. The objectives of

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[115] Statistics Canada, *Sexual Orientation and Victimization*, by D. L. Beauchamp, (Ottawa: Canadian Centre for Justice Statistics, 2004) at 11: BA **Tab 39**.
[116] *Supra* note 70: BA **Tab 37**.
[117] *Supra* note 37: BA **Tab 38**.
[118] Jeremy Waldron, "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: BA **Tab 40**.

the *Code* are directed at protecting these societal rights for all of the groups protected by the legislation. This is no hierarchy of protected groups.

163. The Court of Appeal below erred in applying a higher threshold for hate and harm caused by expression directed at citizens based on sexual orientation than for other protected groups.

Conclusion: Hate Expression Requires Regulation by Human Rights Legislation

164. Freedom of expression is vital to our democracy and the flourishing of a vibrant and diverse society. Along with this freedom comes the corresponding responsibility not to harm others or injure the community when exercising one's right to free expression. Advances in communication technologies have changed the values underlying the freedom of expression and made dissemination of hate available at the push of a button for everyone. Human rights commissions must maintain jurisdiction to regulate and monitor the dissemination of hate in Canada. Left only to the extremely high threshold of the *Criminal Code*, hate expression and its consequences will largely go unsanctioned and unregulated. Canada, moving forward, must become more vigilant in its fight against hate, not less. This case provides this Honourable Court with the perfect opportunity to do just that.

Part IV - Submissions on Costs

165. The appellant seeks costs throughout.

Part V – Order Requested

166. The appellant respectfully requests that this Court order that s. 14(1)(b) of the *Code* does not infringe s. 2(a) of the *Charter*, that s. 14(1)(b) is a justifiable limit on s. 2(b) of the *Charter*, that the judgment of the Court of Appeal be set aside and the decision of the Court of Queen's Bench be restored, with costs throughout.

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

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Grant J. Scharfstein, Q.C.
Janice E. Gingell
Deidre L. Aldcorn
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Part VI – Table of Authorities

Articles

Statutory Provisions

Canadian Charter of Rights and Freedoms as found in the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11, s.2(b)

Canadian Human Rights Act, R.S.C. 1985, c. H-6, s.13(1)

Criminal Code, R.S.C. 1985, c. C-46, s. 319

International Convention on the Elimination of All Forms of Racial Discrimination 660 UNTS 195; G.A. res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966)

International Covenant on Civil and Political Rights, U.N.T.S. No. 14668, vol 999 (1976)

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

Relevant Provisions of:

***Canadian Charter of Rights and Freedoms* as found in the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s 2(b)**

Rights and freedoms in Canada

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

Fundamental freedoms

2. Everyone has the following fundamental freedoms:
(*a*) freedom of conscience and religion;
(*b*) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

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

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

Affirmative action programs

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

Multicultural heritage

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

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

Droits et libertés au Canada

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

Libertés fondamentales

2. Chacun a les libertés fondamentales suivantes :

a) liberté de conscience et de religion;

b) liberté de pensée, de croyance, d'opinion et d'expression, y compris la liberté de la presse et des autres moyens de communication;

c) liberté de réunion pacifique;

d) liberté d'association.

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

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

Programmes de promotion sociale

(2) Le paragraphe (1) n'a pas pour effet d'interdire les lois, programmes ou activités destinés à améliorer la situation d'individus ou de groupes défavorisés, notamment du fait de leur race, de leur origine nationale ou ethnique, de leur couleur, de leur religion, de leur sexe, de leur âge ou de leurs déficiences mentales ou physiques.[(84)]

Maintien du patrimoine culturel

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

Relevant Provisions of:

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

Purpose

2. The purpose of this Act is to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence for which a pardon has been granted.

Hate messages

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

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

Objet

2. La présente loi a pour objet de compléter la législation canadienne en donnant effet, dans le champ de compétence du Parlement du Canada, au principe suivant : le droit de tous les individus, dans la mesure compatible avec leurs devoirs et obligations au sein de la société, à l’égalité des chances d’épanouissement et à la prise de mesures visant à la satisfaction de leurs besoins, indépendamment des considérations fondées sur la race, l’origine nationale ou ethnique, la couleur, la religion, l’âge, le sexe, l’orientation sexuelle, l’état matrimonial, la situation de famille, la déficience ou l’état de personne graciée.

Propagande haineuse

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

Relevant Provisions of:

Criminal Code, R.S.C. 1985, c. C-46

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.

Wilful promotion of hatred

(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.

Code criminel, L.R.C. 1985, c. C-46

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.

Fomenter volontairement la haine

(2) Quiconque, par la communication de déclarations autrement que dans une conversation privée, fomente 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.

Relevant Provisions of:

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

Objects

3 The objects of this Act are:

(a) to promote recognition of the inherent dignity and the equal inalienable rights of all members of the human family; and

(b) to further public policy in Saskatchewan that every person is free and equal in dignity and rights and to discourage and eliminate discrimination.

Right to freedom of conscience

4 Every person and every class of persons shall enjoy the right to freedom of conscience, opinion and belief and freedom of religious association, teaching, practice and worship.

Right to free expression

5 Every person and every class of persons shall, under the law, enjoy the right to freedom of expression through all means of communication, including, without limiting the generality of the foregoing, the arts, speech, the press or radio, television or any other broadcasting device.

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.

Relevant Provisions of ***The Saskatchewan Human Rights Code*****, S.S. 1979, c. S-24.1 (cont.)**

Evidence at inquiry

31(4) Without restricting the generality of subsection (2), a human rights tribunal shall, on an inquiry, be entitled to receive and accept evidence led for the purpose of establishing a pattern or practice of resistance to or disregard or denial of any of the rights secured by this Act, and the human rights tribunal shall be entitled to place any reliance that it considers appropriate on the evidence and on any pattern or practice disclosed by the evidence in arriving at its decision.

Act takes precedence unless expressly excluded

44 Every law of Saskatchewan is inoperative to the extent that it authorizes or requires the doing of anything prohibited by this Act unless it falls within an exemption provided by this Act or unless it is expressly declared by an Act of the Legislature to operate notwithstanding this Act.

Relevant Provisions of:

International Covenant on Civil and Political Rights

Article 19

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

Article 20

1. Any propaganda for war shall be prohibited by law.

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 19

1. Nul ne peut être inquiété pour ses opinions.

2. Toute personne a droit à la liberté d'expression; ce droit comprend la liberté de rechercher, de recevoir et de répandre des informations et des idées de toute espèce, sans considération de frontières, sous une forme orale, écrite, imprimée ou artistique, ou par tout autre moyen de son choix.

3. L'exercice des libertés prévues au paragraphe 2 du présent article comporte des devoirs spéciaux et des responsabilités spéciales. Il peut en conséquence être soumis à certaines restrictions qui doivent toutefois être expressément fixées par la loi et qui sont nécessaires:

a) Au respect des droits ou de la réputation d'autrui;

b) A la sauvegarde de la sécurité nationale, de l'ordre public, de la santé ou de la moralité publiques.

Article 20

1. Toute propagande en faveur de la guerre est interdite par la loi.

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.

International Convention on the Elimination of All Forms of Racial Discrimination

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.