Court File No. 33676

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE SASKATACHEWAN COURT OF APPEAL)

BETWEEN:

SASKATCHEWAN HUMAN RIGHTS COMMISSION

APPELLANT
(Respondent in the Saskatchewan Court of Appeal)

-and-

WILLIAM WHATCOTT

RESPONDENT
(Appellant in the Saskatchewan Court of Appeal)

-and-

ATTORNEY GENERAL OF ALBERTA and ATTORNEY GENERAL FOR SASKATCHEWAN
INTERVENERS

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PART I - STATEMENT OF FACTS

1. The Intervener, the Ontario Human Rights Commission ("OHRC"), relies on the statement of facts as set out in the factum of the Appellant. The OHRC takes no position with respect to any disagreement between the parties on factual matters.

PART II - QUESTIONS IN DISPUTE

2. The central issues in this appeal are the constitutionality of s. 14(1)(b) of *The Saskatchewan Human Rights Code* and, if found constitutional, whether the actions of the Respondent, William Whatcott, violate that section of the *Code*. Consideration of both requires recognition of, and may require reconciliation of, competing rights. The OHRC's submissions set out a process, based in existing case law, to analyze and reconcile competing rights. This general process can apply, with appropriate modifications, to any competing rights claim, whether it arises under the Canadian *Charter of Rights and Freedoms* (the *Charter*), human rights legislation or otherwise.

PART III - STATEMENT OF ARGUMENT

A. Rationale for Process for Reconciling Competing Rights Claims

3. As our society continues to diversify, situations where the rights of individuals or groups appear to be in conflict are becoming more common. Some involve *Charter* challenges to state actions or laws. However, most day-to-day competing rights claims do not arise in the context of a *Charter* challenge. Many involve claims under anti-discrimination provisions in human rights statutes in areas such as employment, goods, services and facilities, housing or contracts. For example, a teacher with a guide dog and her student who has an allergy to animals, both have the right to equal treatment without discrimination because of disability. However, it may be argued that the exercise of each one's right may interfere with the enjoyment of the other's. An expert human rights body will decide claims of this nature.

4. Despite the increased number and complexity of such situations, there is limited jurisprudence addressing one person's claim that his or her rights are being detrimentally affected by the assertion of another's rights. To date, decisions have established key principles, but little by way of a concrete analytical approach to address rights in tension. Just as this

Honourable Court has articulated a process and factors to consider in analyzing issues such as the duty to accommodate[1], or publication bans[2], establishing a clear process for addressing such situations will ensure that decision-makers will apply the proper approach to deal effectively with such situations.

5. A comprehensive and understandable framework, consistent with existing jurisprudence, will allow many seeming rights conflicts to be avoided altogether.

6. A clear process for reconciling rights will also mitigate against the risk identified by McLachlin J. (as she then was) in her dissenting judgement in *Taylor*, namely that the application of a rights conferring provision will "overreach" and interfere with another right in a constitutionally impermissible way.[3] It is not possible to avoid the fact that in some cases administrative decision-makers will be called upon to make decisions that will affect an individual's *Charter* rights. However, an analytical framework that promotes the appropriate consideration of any competing rights will reduce the likelihood that the constitutionality of the statutory provision itself will be called into issue. As acknowledged by the Court of Appeal for Ontario, an appropriate approach to rights reconciliation combined with the ability to make "constructive compromises" to lessen any potential harm to both parties' rights better ensures both sets of values can be adequately protected and respected.[4]

B. Overview of Process for Reconciling Competing Rights Claims

7. This Honourable Court should adopt the following process for addressing competing rights claims:

i. Understand the applicable legal and factual context, including the underlying values of mutual recognition or rights and shared responsibility to search for solutions, and the goal of providing guidance to human rights decision makers.

ii. Determine the rights that are being asserted and that are actually engaged. This involves determining whether the claimed rights are appropriately characterized and defined and are legally valid.

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[1] For example, *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3.
[2] For example, *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 836.
[3] *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892.
[4] *R. v. N.S.*, 2010 ONCA 670 at paras. 83 and 84.

iii. Determine whether the protections sought actually fall within the scope of the right in the particular context. This would involve delineating the boundaries of the rights involved. Determine whether proper delineation of, or reasonable adjustments to, the rights makes it possible to avoid any conflict between them. If so, this will effectively end the analysis.

iv. Assess whether there is a substantial interference with the rights in question beyond the trivial and insubstantial. If so, the rights remain in conflict requiring balancing under s. 1 of the *Charter*.

v. Reconcile the rights under s. 1 of the *Charter*. This may require the Court to limit one right in favour of another or to find compromises to both rights. In the case of a claim that does not arise under the *Charter*, the balancing still occurs having regard to the general principles articulated in the s. 1 analysis, along with any limiting provisions contained in human rights legislation. This is particularly so where the legislation specifically requires consideration of a competing right.

8. Not all steps will apply to every competing rights claim. The elements can be applied with some flexibility as required by the circumstances.

C. Legal Foundation for Proposed Reconciliation Process

9. When considering two rights that seem to be at odds, the goal of the court should be to resolve the conflict between the constitutionally guaranteed and equally important rights of two individuals or groups. *Charter* principles require a 'reconciliation' that fully respects the importance of both sets of rights.

10. The term 'reconciling' which implies "harmonizing two seemingly contradictory things so as to render them compatible" is generally preferred over 'balancing' which suggests that one right will ultimately outweigh the other. As noted by this Honourable Court, there is a legal distinction between 'reconciling' and 'balancing' rights under the *Charter*:

> The first question is whether the rights alleged to conflict can be reconciled: *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 772, 2001 SCC 31 at para. 29. Where the rights cannot be reconciled, a true conflict of rights is made out. In such cases, the Court will find a limit on religious freedom and go on to balance the interests at stake under s. 1 of the *Charter*: *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825, at

> paras. 73-74. In both steps, the Court must proceed on the basis that the *Charter* does not create a hierarchy of rights....[5]

11. This Honourable Court has said that there is no hierarchy of *Charter* rights. All have equal status and no right is more important than the others.[6]

12. This case presents an opportunity to also confirm that there is no hierarchy of enumerated or analogous grounds under human rights laws or s. 15 of the *Charter*. While the societal context relevant to a competing rights analysis may vary depending on the particular ground at issue, discrimination because of sexual orientation is no less harmful than discrimination based on a ground such as race or creed. As noted in *Vriend*, if any enumerated or analogous group is denied equality, then the equality of every other minority group is threatened.[7] It cannot be suggested that discrimination based on sexual orientation is not as serious or deserving of condemnation as other forms of discrimination.[8] Such a situation demeans gays and lesbians and perpetuates the view that they are less worthy of protection as members of Canadian society.[9] The same holds true for discrimination based on creed.

13. While there is no hierarchy of rights, no *Charter* right is absolute. Every right is inherently limited by the rights and freedom of others. Each of the rights raised in this appeal has been circumscribed where they have been found to unduly harm or interfere with the rights of others. The freedom to hold religious beliefs has been found to be broader than the ability to act upon them where doing so would injure others[10]; the right to freedom of expression has been limited where it would compromise trial fairness or cause harm to vulnerable members of society[11]; and the right to be free from discrimination based on sexual orientation may be required to yield to religious rights where core religious beliefs are engaged.[12]

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[5] *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698 at para. 50.
[6] *Dagenais supra* note 2 at p. 877; *R. v. Mills*, [1999] 3 S.C.R. 668 at para. 61.
[7] *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at para. 69.
[8] *Ibid.* at para. 100.
[9] *Ibid.* at paras. 101 and 102.
[10] *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295.
[11] *Dagenais, supra* note 2; *R. v. Butler*, [1992] 1 S.C.R. 452; *R. v. Sharpe*, [2001] 1 S.C.R. 445; *R. v. Keegstra*, [1990] 3 S.C.R. 697; *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825, *Taylor, supra* note 3.
[12] *Reference re Same-Sex Marriage, supra* note 5 at paras. 56-60.

14. If rights do come into conflict, *Charter* principles require a 'reconciliation' that fully respects the importance of both sets of rights so that each is given full force and effect within the relevant context, to the greatest extent possible.[13]

15. The reconciliation of competing rights cannot be addressed in the abstract. As noted for example in Iacobucci, J.'s article, "Reconciling Rights: the Supreme Court of Canada's Approach to Competing Charter Rights", *Charter* rights do not exist in a vacuum and their meaning and content are dependent on context. *Charter* rights must be examined in a contextual manner in order to settle conflicts between them. Context determines where the line should be drawn between competing rights in a particular case. Throughout the process of reconciling rights, a court must fundamentally appreciate the full factual context in which the dispute arises and the particular societal and constitutional values at stake.[14]

16. Given the importance of context, the first step in the OHRC's proposed reconciliation process is to understand the particular social and factual context within which the conflict between rights arises. As noted by the Ontario Court of Appeal, before turning to the constitutional concepts and analysis, it is important to understand what is at stake in human terms. [15]

17. An appropriate characterization of context is critical. The Appellant has identified a number of factors that should be considered in assessing the full factual context in a case involving alleged hate propaganda and human rights. For example, it is important that a full appreciation of the historic disadvantage experienced by gays and lesbians inform the analysis in this case. As acknowledged in *Egan*, societal intolerance towards "homosexuality" has not only resulted in discrimination against gays and lesbians in all walks of life but in exposure to public harassment, verbal abuse and even violence. The impact on gays and lesbians has included, among other things, hiding their orientation at great personal cost and, among youth, higher rates

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[13] *R. v. Mills*, *supra* note 6; *Dagenais*, *supra* note 2.
[14] *Mills, supra* note 6 at paras. 17, 21 and 61; *Reference re Same-Sex Marriage, supra* note 5 at paras. 50 and 52; The Honourable Justice Franck Iacobucci, "Reconciling Rights: the Supreme Court of Canada's Approach to Competing Charter Rights" (2003) 20 S.C.L.R. (2d) 137 at pages 140, 141 and 159; *R. v. N.S.*, *supra* note 4 at para. 48.
[15] *R. v. N.S*, *ibid.* at para. 45.

of attempted and successful suicide. Further, a review of context includes an appreciation of the fact that sexual orientation encompasses aspects of "status" and "conduct", with both receiving equal protection against discrimination.[16] Similarly, it is important to understand the importance of creed to the lives of many Canadians.

18. Even slight variations in context may be critical in determining how to reconcile the rights: "Reconciling competing *Charter* values is necessarily fact-specific. Context is vital and context is variable."[17] For example, in a situation that measures the right to freedom of expression against the impact of that expression on a vulnerable group, the precise tone, content and manner of delivery of the impugned message all have a significant impact on assessing its effect and the degree of constitutional protection it should be afforded. As noted by Abella J. in her dissenting judgement in *Bou Malhab* "[T]here is a big difference between yelling "fire" in a crowded theatre and yelling "theatre" in a crowded fire station."[18]

19. In this case, the tone, content and nature of delivery of the message contained in the Respondent's flyers are significant. These must be assessed objectively and not just from the perspective of, or having regard to the purported intent of, the author. For example, one may argue that the fact that some portions of the writing may form a reasoned discourse does not legitimize those parts that cross the line into hateful or discriminatory rhetoric.[19]

20. Next, a court should determine the rights that are being asserted and are actually engaged in the social and factual situation before it. In some cases the engagement of the right may be self-evident. In other cases it may be less clear that a right is triggered. In such circumstances, it may be necessary to conduct a further inquiry and hear evidence to establish that the claim falls within the scope of the right as defined by the courts. This was the case in *R. v. N.S.* where an accused's right to make full answer and defence in a fair trial was obviously engaged, but the

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[16] *Egan v. Canada*, [1995] 2 S.C.R. 513 at p. 600-602.
[17] *R. v. N.S., supra* note 4. at para. 97.
[18] *Bou Malhab v. Diffusion Métromédia CMR Inc.*, [2011] 1 S.C.R. 214 at para. 96.
[19] *Kempling v. British Columbia College of Teachers*, 2005 BCCA 327 (CanLII), application for leave to appeal dismissed [2005] S.C.C.A. No. 381(QL).

witness's right to freedom of religion, namely the ability to wear a niqab while testifying, was not inherently triggered by participation in the criminal justice process.[20]

21. While a proper evidentiary foundation is necessary for all *Charter* challenges, given the subjective and personal nature of a freedom of religion claim as explained in *Amselem*, where the right claimed is freedom of religion, the need for actual evidence to establish the connection to a sincerely held religious belief is particularly important.[21]

22. Courts are fully entitled to conduct legitimate and effective inquiries in order to ensure that a religious belief or practice has a nexus with religion, is held in good faith, is neither fictitious nor capricious, and is not an artifice.[22]

23. To show that an interference with a religious right is more than "trivial or insubstantial" the rights claimant would have to show that his actual religious beliefs or conduct are threatened.[23]

24. In this case, in order to establish that s. 14(1) of *The Saskatchewan Human Rights Code* infringes his religious rights, the Respondent must establish that the ability to distribute material that is contrary to this section is a sincerely held religious belief or practice. He must also demonstrate that being prevented from expressing his religious views in a manner that violates this section is a non-trivial interference with his right. In other words, he must show that his ability to practice his religion is substantially compromised by being restricted from distributing the flyers in question.[24]

25. Many apparent rights conflicts may be avoided by asking whether they actually fall within the scope of the right in the particular context. This would involve delineating the boundaries of the involved rights. Proper delineation of, or reasonable adjustments to, the rights make it possible to avoid any conflict between them. If so, this will effectively end the analysis.

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[20] *R. v. N.S., supra* note 4 at para. 65.
[21] *R. v. N.S., supra* note 4 at para 66; *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551; *Kempling, supra* note 19 at paras. 51-52.
[22] *Amselem, ibid.* at paras. 51-54; *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256.
[23] *Alberta v. Hutterian Brethren of Wilson Colony,* [2009] 2 S.C.R. 567 at para. 32.
[24] *Kempling, supra* note 19 at para. 52.

For example, after properly scoping the boundaries of the rights, it may be that there is no actual intrusion of one right onto the other.

26. Where the scoping exercise does not resolve the conflict, it is necessary to determine the extent of the interference with the rights in question. If an interference with a right is minor or trivial, the right is not likely to receive protection. There is no conflict unless there is a sufficient interference with, burden or intrusion on a right. Where the impact on one right is minimal or insignificant in nature, that right must give way to the other and there is no need to proceed any further in the analysis.[25] If the enjoyment of one right does not result in a real burden or impact on the other, the rights are not actually in conflict and are reconciled. This was the conclusion of this Honourable Court in *Reference re Same-Sex Marriage, supra* and *Trinity Western*[26].

27. If there is substantial interference with the rights in question, then the court must shift to a reconciliation exercise. In a *Charter* case, this is done under s. 1. In a case that does not involve a *Charter* challenge, this balancing may also happen, having regard to the general approach and principles set out in under s. 1. In this case, s. 14(2) of *The Saskatchewan Human Rights Code* specifically requires the decision-maker to have regard to freedom of expression.

28. In the context of a competing rights situation, the test in *R. v. Oakes* should be applied flexibly to achieve a balance between the infringed right and the right that the state seeks to foster to justify the infringement. Once again, this requires close attention to the full context in the particular circumstances of the case before the court.

29. As this Honourable Court noted in *Oakes* and again in decisions dealing with equality, hate propaganda and religion, in undertaking the section 1 analysis, courts must be aware of the values underlying the *Charter*. These values include respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs,

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[25] *Amselem, supra* note 21 at para. 84; *Bruker v. Marcovitz*, [2007] 3 S.C.R. 607.
[26] *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 772.

respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.[27]

30. Reference to international human rights protections, consideration of equality rights guaranteed in s. 15 of the *Charter* and the nature of the association between the expression at stake in the appeal and the rationales underlying s. 2(b) will also be instrumental in assessing whether the legislature's effort to eradicate hate propaganda is a reasonable limit justified in a free and democratic society.[28]

31. As well, rather than specifically pitting freedom of expression and freedom of religion, if religious rights are found to be violated, against equality rights in the section 1 justification, a court should consider a series of contextual factors to determine whether rights are appropriately limited in this type of case,. This was the approach in *Keegstra* and *Ross.*

32. A contextual approach to balancing interests under s. 1 requires a consideration of the extent to which the "core" or fundamental aspect of a right is engaged. Where the conduct is at the "periphery" of a right, it is more likely to be required to give way to a right whose core values are engaged.[29] Specifically, in this case "a contextual approach to s. 1 demands an appreciation of the extent to which a restriction of the activity at issue on the facts of the particular case debilitates or compromises the principles underlying the broad guarantee of freedom of expression."[30] Nothing has changed in the 20 years since *Taylor* and *Keegstra* were decided that would suggest that material which may be hate propaganda should no longer be considered part of a category of expression that strays some distance from the core of s. 2(b).

33. A further consideration that must inform the contextual approach under s. 1 is the role of human rights bodies in interpreting and applying anti-discrimination legislation across the country. As noted in *Ross*, this Honourable Court should "proceed under s. 1 with recognition of the sensitivity of human rights tribunals in this area, and permit such recognition to inform this Court's

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[27] *Ross, supra* note 11 at para. 77.
[28] *Taylor, supra* note 3.
[29] *Brockie v. Brillinger (No. 2)* (2002), 43 C.H.R.R. D/90 (Ont. Sup.Ct.) at para. 51.
[30] *Taylor, supra* note 3 at p. 918.

determination of what constitutes a justifiable infringement of the *Charter*."[31] In Ontario, both the OHRC and the Human Rights Tribunal of Ontario have applied their expertise in human rights when interpreting s. 13 of the Ontario *Human Rights Code* and have appropriately balanced the protections for certain discriminatory publications against freedom of expression.[32]

34. Ultimately, when rights are in conflict and must be balanced under s. 1, a search for "constructive compromises" is necessary. Diverse interests cannot always be given full voice. However, a reconciliation process that appropriately acknowledges and considers rights is more minimally impairing than a situation where competing rights are not analyzed:

> If [the judge's] reasons demonstrate a full and sensitive appreciation of the various interests at stake, the reasons themselves become part of the reconciliation of the apparently competing interests. If a person has a full opportunity to present his or her position and is given a reasoned explanation for the ultimate course of conduct to be followed, the recognition afforded that person's rights by that process itself tends to validate that person's claim, even if the ultimate decision does not give that person everything he or she wanted.[33]

PART IV - SUBMISSIONS WITH RESPECT TO COSTS

35. The OHRC makes no submission with respect to costs.

PART V – ORDER REQUESTED

36. The OHRC seeks to present oral argument, not exceeding ten minutes, at the hearing of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED. Toronto, August 4, 2011.

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[31] *Ross, supra* note 11 at para. 87.
[32] *Whiteley v. Osprey Media*, 2010 HRTO 2152 (CanLII).
[33] *R. v. N.S., supra* note 4 at para. 83.

PART VI – TABLE OF AUTHORITIES

PART VII – LEGISLATION

Human Rights Code (Ontario)

R.S.O. 1990, CHAPTER H.19

Announced intention to discriminate

13. (1) A right under Part I is infringed by a person who publishes or displays before the public or causes the publication or display before the public of any notice, sign, symbol, emblem, or other similar representation that indicates the intention of the person to infringe a right under Part I or that is intended by the person to incite the infringement of a right under Part I. R.S.O. 1990, c. H.19, s. 13 (1).

Opinion

(2) Subsection (1) shall not interfere with freedom of expression of opinion. R.S.O. 1990, c. H.19, s. 13 (2).