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)

FACTUM OF THE INTERVENER CANADIAN BAR ASSOCIATION

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Part I - Overview and Facts

1. A Saskatchewan Human Rights Tribunal found that William Whatcott contravened section 14(1)(b) of the *Saskatchewan Human Rights Code* for distributing flyers which promoted hatred against individuals because of their sexual orientation. Section 14(1)(b) proscribes speech 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". The Saskatchewan Queen's Bench dismissed Whatcott's appeal; the Saskatchewan Court of Appeal allowed his further appeal, finding that the flyers did not violate the Code. Both courts found the provision constitutional. The Supreme Court of Canada, in granting leave to appeal, posed questions whether section 14(1)(b) of the Code violates the *Canadian Charter of Rights and Freedoms*. Whatcott argues that the provision is unconstitutional, violating the guarantees of freedom of expression and religion and is not saved by section 1 of the Charter.

2. The CBA submits that:

a) international law and the context of the prohibition support the constitutionality of the law;

b) promotion of hatred needs a civil remedy;

c) the prohibition of promotion of hatred enhances Charter values;

d) the Court should respect a precedent which grants Charter protection.

Part II - Issues

3. The CBA addresses only the constitutionality of section 14(1)(b) of the *Saskatchewan Human Rights Code* under section 1 of the Charter.

Part III - Argument

A. International law supports the constitutionality of the law

4. The Charter should be presumed to provide protection from incitement to hatred at least as great as that afforded by its treaty obligation in the *International Covenant on Civil and Political*

Rights (ICCPR). Canada's obligation to prohibit incitement to hatred should inform the interpretation of what can constitute a pressing and substantial objective which may justify restrictions upon the rights to freedom of expression and religion. For purposes of the proportionality inquiry under Charter section 1, the fact that the prohibition against incitement to hatred has the status of an international human right under a treaty to which Canada is a State Party is indicative of a high degree of importance attached to that objective.

Slaight Communications Inc. v. Davidson, [1989] 1 SCR 1038

5. International tribunals have upheld the compatibility of hate speech prohibitions with freedom of expression and religion, often citing Canadian law and jurisprudence. In particular, three United Nations Human Rights Committee (UNHRC) decisions upheld hate speech laws on appeals from national court decisions, under Article 19 of the ICCPR. That article provides that '[e]veryone shall have the right to freedom of expression,' and also states that this right may be limited in order to serve such goals as protecting the rights of others, public order, or public health.

International Covenant on Civil and Political Rights article 19 (2), March 23, 1976, 999 United Nations Treaty Series 171.

6. Two of the UNHRC decisions were from Canada. In *Ross v. Canada*, a schoolteacher had been reassigned to non-classroom work due to his off-duty antisemitic remarks and publications. The UNHRC found that the restrictions on him imposed by a human rights board of inquiry were consistent with the ICCPR, pointing to a causal link between the teacher's statements and a 'poisoned' atmosphere in the school. This UNHRC decision in 2000 upheld a previous 1996 decision of the Supreme Court of Canada finding that the school had a positive obligation to act to "maintain a positive school environment for all persons served by it and it must be ever vigilant of anything that might interfere with this duty."

International Covenant on Civil and Political Rights, Communication No. 736/1997: Canada (Jurisprudence) UN Documents CCPR/C/70/D/736/1997 (2000).

Ross v. New Brunswick School District No. 15, [1996] 1 S.C.R. 825 at para. 50.

7. In *John Ross Taylor and the Western Guard Party v. Canada*, the UNHRC declared

inadmissible a case that arose when Canada barred public telephone service and handed a one-year prison sentence to a Toronto man who repeatedly used recorded messages to warn those who dialled in that 'international Jewry' would lead the world into wars and moral and economic collapse. The Committee found the communication "incompatible with the provisions of the Covenant" because the opinions which Mr. Taylor sought to disseminate through the telephone system "clearly constitute the advocacy of racial or religious hatred which Canada has an obligation under article 20(2) of the Covenant to prohibit". The Supreme Court of Canada later came to a similar conclusion under the *Canadian Charter of Rights and Freedoms*.

International Covenant on Civil and Political Rights, Communication No. 104/1981: Canada (Jurisprudence), U.N Docs. CCPR/C/18/D/104/1981 (*J.R.T. & the W.G. Party v. Canada*) (declared inadmissible April 6, 1983).

Canada (Human Rights Commission) v. Taylor, [1990] 3 S.C.R. 892

8. In *Faurisson v. France*, the UNHRC upheld the conviction and fine imposed against a literature professor who told a monthly magazine that he had 'excellent reasons not to believe' in the existence of 'magic gas chambers' for extermination purposes at Nazi concentration camps. Faurisson was convicted for violating the Gayssot Act of 13 July 1990. That Act amends the law on the Freedom of the Press of 1881 by adding an article 24 bis which makes it an offence to contest the existence of the category of crimes against humanity as defined in the London Charter of 8 August 1945, on the basis of which Nazi leaders were tried and convicted by the International Military Tribunal at Nuremberg in 1945-1946.

International Covenant on Civil and Political Rights, Human Rights Committee, Communication No. 550/1993, UN Doc. CCPR/C/58/D/550/1993 (November 8, 1996).

9. Two European Court of Human Rights cases contesting hate speech laws were brought under Article 10 of the European *Convention for the Protection of Human Rights and Fundamental Freedoms*. That article provides that '[e]veryone has the right to freedom of expression' and also states that there are 'duties and responsibilities' in the exercise of that freedom.

Convention for the Protection of Human Rights and Fundamental Freedoms [European Convention on Human Rights], Articles 10(1) and (2), September 3, 1953, European Treaty Series Number 005.

10. In these two cases, the ECHR upheld government restrictions on speech. In the case of *Surek v. Turkey (No.1)*, the Court upheld a conviction of a publication for printing certain letters to the editor in violation of a law prohibiting hatred among the people. The Court wrote:

> In the view of the Court the impugned letters amount to an appeal to bloody revenge by stirring up base emotions and hardening already embedded prejudices which have manifested themselves in deadly violence.

Surek v. Turkey (No. 1), App. 26682/95, Eur. Ct. H.R. (1999)

11. In *Zana v. Turkey*, the Court upheld the conviction of a former mayor who told journalists that '[a]nyone can make mistakes, and the PKK kill women and children by mistake.' The interview coincided with murderous attacks carried out by the PKK on civilians in south-east Turkey. The Court wrote that the remarks "had to be regarded as likely to exacerbate an already explosive situation."

App. No. 18954/91, Eur. Ct. H.R. (1997)

12. International instances then have upheld Canadian and other laws of the sort under challenge here on human rights grounds. We know quite specifically, because of these international decisions, that the Saskatchewan law fulfils an objective which, in Charter terms, has a high degree of importance.

B. The context of the prohibition supports its constitutionality

13. The proper approach to considering whether speech meets the test in *Taylor* is to examine the impugned expression in its entire historical and contemporary context. This includes considering the targeted group's historical experience of disadvantage and vulnerability, the right of the group to equality, the right of everyone to live in a society in which human dignity and difference is respected, the freedom of expression and freedom of religion of not only the individual respondent, but the impact of the impugned expression on the ability of the targeted group and others in society to exercise those freedoms.

R. v. Keegstra, [1990] 3 S.C.R. 697 at 736 and 756
Ross, at paras. 77, 81 and 85.

R. v. Wholesale Travel Group Inc. [1991] 3 S.C.R. 154 per L'Heureux-Dubé and Cory JJ. at 224-225, dissenting in part.

14 The explicit recognition that s.14(1)(b) of the *Saskatchewan Human Rights Code* must be read in light of freedom of expression and the protections given to freedom of religion in the legislation supports the provision's section 1 justification.

15 In the case of *Ross*, this Court wrote:

> This context relates to one further consideration that must inform a contextual approach under s. 1. It must be recognized that human rights tribunals have played a leading role in the development of the law of discrimination, and this is reflected in the jurisprudence of this Court both in the area of human rights and under the Charter. This 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 determination of what constitutes a justifiable infringement of the Charter.

16. The fact that unsuccessful complaints have been made about speech that may be characterized as 'offensive' and not 'hateful' in other jurisdictions using other hate speech prohibitions is not evidence that s.14(1)(b) is vague or overreaching. The test to be employed from *Taylor,* that speech must engender 'unusually strong and deep-felt emotions of detestation, calumny and vilification' is sufficiently clear and precise.

C. Promotion of hatred needs a civil remedy

i) General justifications

17. To require a government to forego an effective means to protect its citizens from the consequences of hateful speech does not conform to Canada's Charter values. The effect of state toleration of speech which incites to hatred is to compound its effects and corrodes the bonds of citizenship:

> However irrational racist speech may be, it hits right at the emotional place where we feel the most pain. The aloneness comes not only from the hate message itself, but also from the government response of tolerance. When hundreds of police officers are called out to protect racist marchers, when the courts refuse redress for racial insult, and when racist attacks are

officially dismissed as pranks, the victim becomes a stateless person.

Mari Matsuda, "Public Response to Racist Speech: Considering the Victim's Story," [August 1989] 87 Mich. L. Rev. 2320, at 2338.

18. A civil prohibition on hate speech meets the Charter section 1 standard of proportionality. The criminal prohibition in section 319 of the *Criminal Code* sets an extremely onerous standard.

19. For example, in *R. v. Ahenakew*, 2008 SKCA 4 and *R. v. Ahenakew*, 2009 SKPC 10, the accused's conviction of wilfully promoting hatred contrary to s.319(2) of the *Criminal Code* was overturned due to the questions raised as to whether the requisite intent was proved beyond a reasonable doubt. Among the comments at issue were those the accused made during a conference speech indicating that the Jews created the Second World War, and afterwards (to a reporter) indicating that Jews were a 'disease' and that Hitler was attempting to ensure Jews did not take over Europe.

20. A criminal conviction for hate speech, like any other criminal offence, carries with it social stigma and a criminal record. The *Saskatchewan Human Rights Code* provision in question serves a different purpose, providing remedies to target groups for harm, fostering greater respect for target groups, and changing behaviour, and also applies to conduct that falls short of criminal behaviour but nevertheless poses harm to vulnerable groups.

21. Given the importance of freedom of expression, it is appropriate that there be a range of options for society to respond to expression that causes harm. Criminal sanctions should be reserved for the worst cases, rather than the only option. Maintaining a civil prohibition against hate speech is necessary to protect individuals and minorities from its pernicious effects.

ii) Examples from free and democratic societies

22. Foreign law shows that a civil prohibition on promotion of hatred is demonstrably justified in a free and democratic society. France's Gayssot Act (discussed above) includes provisions entitling

individuals or associations dedicated to opposing racism to sue perpetrators of hate speech for "group defamation" racial incitement and racial injury and can be added as a party to a criminal trial and receive damages by "constitution de partie civile."

23. Part IIA of Australia's *Racial Discrimination Act, 1975* (Cth.) prohibits against hate speech (as an act reasonably likely to "offend, insult, humiliate or intimidate"), which may form the basis of a complaint to the Australian Human Rights Commission. While most complaints are resolved through the conciliation process, remedies recommended by the Australian Human Rights and Equal Opportunities Commission can be enforced through the federal court.

24. In California, individuals or the City Attorney, District Attorney or California Attorney General on their behalf, can sue for breaches of the Ralph (Civ. Code ⅄ 51.7) and Bane (Civ. Code ⅄ 52.1) Civil Rights Acts. The Ralph Act provides that it is a civil right to be free of violence or its threat because of a person's race, colour, religion, ancestry, national origin, political affiliation, sex, sexual orientation, age, disability, or position in a labour dispute. The Bane Act's Civil Code section 52.1 provides a civil remedy whenever a person or persons, whether or not acting under colour of law, interferes by threats, intimidation, or coercion, with the exercise or enjoyment by any individual or individuals of rights secured by the federal or state Constitution or laws. Damages, injunctive and equitable relief is available for breach of either provision (Civ. Code ⅄ 52).

D. The prohibition of hatred realizes Charter values

25. As Dickson C.J. writing for the majority in *Taylor* stated:

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

Taylor, at paragraph 41

26. Furthermore, hate speech hinders the freedom of expression of targeted groups. It erodes

their ability to publicly defend themselves against discriminatory stereotypes by undermining their status as legitimate and truthful social commentators. Therefore, such a prohibition should be maintained and located in human rights legislation. As this Court stated in *Ross* at para. 91, (referring there to antisemitic speech):

> 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.

See also Sneiderman, "Holocaust Bashing: The Profaning of History," (1999) 26 Man. L.R. 319 at para. 19, where he notes that Holocaust denial trades upon and reinforces the supremacist portrayal of Jews as liars.

27. The notion of the 'marketplace of ideas' as the best antidote to expression that 'exposes or tends to expose to hatred, ridicules, belittles or otherwise affronts the dignity of any person or class of persons' is unpersuasive. In the market, advertisers often persuade consumers to purchase inferior products. It is the advertising alone that persuades. The 1965 Report of the *Special Committee on Hate Propaganda in Canada* to the Minister of Justice, Maxwell Cohen, chair, page 8, wrote:

> ...it is too often true, in the short run, that emotion displaces reason and individuals perversely reject the demonstration of truth put before them and forsake the good they know. The successes of modern advertising, the triumphs of impudent propaganda such as Hitler's, have qualified sharply our belief in the rationality of man. We know that under strain and pressure in time of irritation and frustration, the individual is swayed and even swept away by hysterical, emotional appeals. We act irresponsibly if we ignore the way in which emotion can drive reason from the field.

The notion of the 'marketplace of ideas' implicitly accepts that the ideas embedded in hate speech, that targets are evil, inferior, etc., may be true. Yet, to accept that would violate human rights values.

28. Because of the advent of the Internet, incitement to hatred in any one jurisdiction can become global. Preventing incitement in any one place helps to prevent its global spread.

E. The Court should respect precedent which grants Charter protection

29. The intervener submits that this Court should not overturn the established precedents on the constitutional validity of hate speech and in particular the case of *Taylor* which upheld the constitutionality of a civil remedy for exposure to hatred. *Taylor* continues to be good law, and

cannot be distinguished on the basis that the impugned provision (at the time) concerned only hate speech delivered telephonically rather than in publications, as recognized by the Saskatchewan Court of Appeal and the Alberta Court of Queen's Bench in *Boissoin v. Lund*, 2009 ABQB 592.

30. This Court has held that precedent should not be overturned lightly. Certainty in the law is a key component of the Rule of Law. This is particularly so for a decision which would diminish already established Charter protection.

31. In the case of *Fraser*, McLachlin C.J. and LeBel J. for the majority wrote:

> [56] Our colleague correctly recognizes at the outset of his reasons that overturning a precedent of this Court is a step not to be lightly undertaken. ... The seriousness of overturning two recent precedents of this Court, representing the considered views of firm majorities, cannot be overstated. This is particularly so given their recent vintage. ...
>
> [58] Rothstein J. suggests that since *Health Services* deals with constitutional law, the Court should be more willing to overturn it (paras. 141-43). In our respectful view, this argument is not persuasive. The constitutional nature of a decision is not a primary consideration when deciding whether or not to overrule, but at best a final consideration in difficult cases. Indeed, the fact that Health Services relates to a constitutional Charter right may militate in favour of upholding this past decision. As Binnie J. stated on behalf of a unanimous Court in *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609,
>
> > '[t]he Court should be particularly careful before reversing a precedent where the effect is to diminish Charter protection. (para. 44).'
>
> Justice Rothstein's proposed interpretation of s. 2(d) of the Charter would diminish the scope of the s. 2(d) right.

Ontario (Attorney General) v. Fraser, 2011 SCC 20

32. The doctrine of precedent applies to a majority judgment, not to a dissent. A judge is not respecting precedent by following his or her own previous dissent. Thus in *Mann v. R.*, [1966] S.C.R. 238, Mr. Justice Cartwright based his decision on the argument that the point at issue had been decided in the previous case of *O'Grady v. Sparling*, [1960] S.C.R. 804 and that the Court in *Mann* was bound was bound by the *O'Grady* decision. He held this position even though he had dissented in the *O'Grady* case. In *Peda v. Q.* [1969] S.C.R. 905, he even went so far as to dissent on the ground that the majority's position in that case might make possible the reopening of the decision in

the *O'Grady* case (at page 911).

F. Summary

33. Neither freedom of expression nor freedom of religion is an absolute. International law, foreign jurisdictions, precedent, context, Charter values, logic and common sense all tell us of the need for a civil remedy for promotion of hatred. A civil remedy for promotion of hatred of the sort found in section 14(1)(b) of the *Saskatchewan Human Rights Code* is a reasonable limit to the rights of freedom of religion and expression that is demonstrably justified in every free and democratic society.

Part IV - Order Sought

34. The CBA makes no submissions with respect to the final disposition of this appeal. The CBA does not seek any costs in this appeal and requests that no order for costs be made against it.

PART V - REQUEST TO PRESENT ORAL ARGUMENT

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

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS ___day of August, 2011.

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