

IN THE COURT OF QUEEN'S BENCH OF ALBERTA

IN THE MATTER OF THE ALBERTA *HUMAN RIGHTS, CITIZENSHIP AND
MULTICULTURALISM ACT* R.S.A. 2000, c. H-14

AND IN THE MATTER OF A DECISION OF A PANEL OF THE ALBERTA HUMAN
RIGHTS AND CITIZENSHIP COMMISSION, IN REGARDS TO COMPLAINT NO.
S2002/08-0137

BETWEEN:

**STEPHEN BOISSOIN AND THE CONCERNED CHRISTIAN
COALITION INC.**

Appellants

- and -

DARREN LUND

Respondent

- and -

**THE ATTORNEY GENERAL OF ALBERTA, CANADIAN CIVIL LIBERTIES
ASSOCIATION AND CANADIAN CONSTITUTION FOUNDATION**

Interveners

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PART I: POSITION OF THE ATTORNEY GENERAL WITH RESPECT TO FACTS AND ISSUES ON APPEAL

1. The Attorney General intervenes on this Appeal solely for the purposes of defending the constitutional validity of s. 3 of the *Human Rights, Citizenship and Multiculturalism Act, R.S.A. 2000, c. H-14 (HRCMA)*. The Attorney General takes no position with respect to the merits of Dr. Lund's complaint or interpretation of Mr. Boissain's letter.
2. The Attorney General takes the following position with respect to the constitutional issues in this Appeal:
 - (a) That the province has jurisdiction to limit all forms of discriminatory expression (including religious and political expression) that touch upon subject matters falling within s. 92 of the *Constitution Act, 1867*.
 - (b) That s. 3 *HRCMA* is a justifiable limit upon discriminatory expression under s. 1 of the *Charter*.

PART II: ARGUMENT

A. Provincial Jurisdiction

3. It is trite law that the province has jurisdiction to limit discriminatory expression touching upon subject matters falling within s. 92 of the *Constitution Act, 1867*.
4. There is no general principle that certain forms of expression, i.e. religious or political expression, are *prima facie* exempt from such limitation when they touch upon provincial subject matters.
5. There is no general principle that certain forms of communication, i.e., television, newspapers, etc., are *prima facie* exempt from limitation when the expression in question touches upon provincial subject matters.
6. As Justice Beetz stated in the often quoted Supreme Court decision in *Attorney General for Canada v. Dupond*¹:

¹ [1978] 2 S.C.R. 770.

None of those freedoms [speech, assembly, association] is a single matter coming within exclusive federal or provincial competence. Each of them is an aggregate of several matters which, depending on the aspect, come within federal or provincial competence.² [TAB 1]

7. As Tarnopolsky states:

The prohibition of discrimination is a “matter” concerning primarily property and civil rights” or “matters of a merely local and private nature” or “local works and undertaking”- all three being classes of subjects listed in section 92 of the *Constitution Act, 1967* as coming within the exclusive legislative authority of the provinces. Therefore, human rights legislation in Canada, which prohibits discrimination with respect to employment, residential and commercial accommodation, goods, services, facilities, and public accommodation, and publication or broadcasting with respect thereto, is essentially within the legislative jurisdiction of the provinces.³ [TAB 2]

8. As Professor Hogg notes, “the cases establish...an extensive provincial power...to regulate speech in the media that come within provincial jurisdiction, including films, live theatre, books, magazines, newspapers, tapes and records.”⁴ [TAB 3]
9. The Courts have recognized an extensive provincial power to regulate discriminatory expression when such expression has effects that are linked to subject matters falling within provincial jurisdiction. As stated by the Supreme Court in *Scowby v. Saskatchewan (Board of Inquiry)*⁵:

[O]ne does not approach a provincial human rights code on the basis that it is constitutionally presumptively suspect. The great bulk of the protections granted by such codes would appear to be beyond challenge as being legislation in relation to property and civil rights, or to matters of merely local or private nature. They deal, for example, with questions of discrimination in housing and employment, and equal access to goods and services. These legislative protections are valid not because they affirm interests such as liberty, or human dignity, but because the activities legislated, that is, for example, housing, employment, and education, are themselves legitimate areas of provincial concern under ss. 92 and 93.⁶ [TAB 4]

² *Ibid.*, at para. 69.

³ Tarnopolsky, *supra*, at 3- 56.3.

⁴ Hogg, 43-5.

⁵ [1986] 2 S.C.R. 226.

⁶ *Ibid.*, at para. 4.

10. Clearly, the province can limit discriminatory expression that touches upon subject matters falling within provincial jurisdiction. Whether such expression is characterized as being “religious” or “political” does not affect that ability.

B. Section 2(b of the Charter

11. Section 2(b) of the *Charter* states as follows:
Everyone has the following fundamental freedoms:
(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
12. The freedom of expression under s. 2(b) of the *Charter* is not absolute. All forms of expression may be subject to limitation.
13. The Supreme Court has analyzed s. 2(b) claims by their connection to a "core" of democratic values including the search for political, artistic and scientific truth, the protection of individual autonomy and self-development, and the promotion of public participation in the democratic process.⁷
14. The Court accords less weight to forms of expression as they move farther from the core values and if they actually undermine the core values.⁸

C. Political Expression

15. Political expression is subject to reasonable limitation. In *R v. Keegstra*⁹ and subsequent decisions, the Supreme Court has addressed the argument that hate speech is characterizable as a form of political expression and has consistently upheld the limitation such expression.¹⁰ The principled basis for such limitation is, again, that such expression is not only far removed from the core values of s. 2(b) but actually undermines those values:

⁷ See for example, *Irwin Toy Ltd. v. Que. (A.G.)*, [1989] 1 S.C.R. 927, 58 D.L.R. (4th) 577, 39 C.R.R. 193, 25 C.P.R. (3d) 417, 24 Q.A.C. 2, 94 N.R. 167, *R. v. Keegstra* at para. 92; *Attis v. New Brunswick School District No. 15* at para. 89; *RJR-MacDonald Inc. v. Canada* [1995] 3 S.C.R. 199.

⁸ See for example, *R. v. Keegstra* at para. 92-99; *Ross v. New Brunswick School District No. 15* [1996] 1 S.C.R. 825 at paras. 90-91; *R.J.R. MacDonald Inc. v. Canada* [1995] 3 S.C.R. 199 at paras. 72-75.

⁹ [1990] 3 S.C.R. 697.

¹⁰ See for example *Ross v. New Brunswick School District No. 15* [1996] 1 S.C.R. 825 at paras. 90-91; *R.J.R. MacDonald Inc. v. Canada* [1995] 3 S.C.R. 199 at paras. 72-75.

I recognize that hate propaganda is expression of a type which would generally be categorized as "political," thus putatively placing it at the very heart of the principle extolling freedom of expression as vital to the democratic process. Nonetheless, expression can work to undermine our commitment to democracy where employed to propagate ideas anathemic to democratic values. Hate propaganda works in just such a way, arguing as it does for a society in which the democratic process is subverted and individuals are denied respect and dignity simply because of racial or religious characteristics. This brand of expressive activity is thus wholly inimical to the democratic aspirations of the free expression guarantee.¹¹ [TAB 5]

And further,

While I cannot conclude that hate propaganda deserves only marginal protection under the s. 1 analysis, I can take cognizance of the fact that limitations upon hate propaganda are directed at a special category of expression which strays some distance from the spirit of s. 2(b), and hence conclude that "restrictions on expression of this kind might be easier to justify than other infringements of s. 2(b)"¹² [TAB 5]

D. Religious expression

16. Religious expression is subject to reasonable limitation. As stated by Charron J. for the majority of the Supreme Court in *Multani c. Marguerite-Bourgeois (Commission scolaire)*:¹³

This Court has clearly recognized that freedom of religion can be limited when a person's freedom to act in accordance with his or her beliefs may cause harm to or interfere with the rights of others (see *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 (S.C.C.), at p. 337, and *Syndicat Northcrest c. Amselem*, [2004] 2 S.C.R. 551, 2004 SCC 47 (S.C.C.), at para. 62.¹⁴ [TAB 6]

17. Caselaw confirms the provincial ability to limit discriminatory religious expression.
18. In *Whatcott v. Saskatchewan Human Rights Tribunal*¹⁵ [TAB 7], a case on all fours with the present matter, the Saskatchewan Court of Queen's Bench dealt with an appeal of a human rights decision in which Whatcott had distributed several different flyers stating

¹¹ *Keegstra*, supra, at para. 95.

¹² *Ibid.*, at para 99.

¹³ 2006 SCC 6.

¹⁴ *Ibid.*, at para. 26.

¹⁵ 2007 SKQB 450

that all homosexuals are pedophiles. A human rights panel found that Whatcott was promoting hatred contrary to s. 14(1)(b) of *The Saskatchewan Human Rights Code*. Whatcott claimed that the flyers were religious expression and so exempt from the purview of the Code. The Court found that s. 14(1)(b) of Code violated the freedom of religion but was a justifiable limitation.

19. The Court in *Whatcott* relied upon the prior Saskatchewan Court of Appeal decision in *Hellquist v. Owens*.¹⁶ In that case, Owens had taken out newspaper advertisements consisting of Biblical passages followed by an equal sign and then by two stickmen holding hands. A circle with a line running diagonally from the two o'clock to the eight o'clock position (the "not permitted" symbol) was superimposed on the stickmen. The Court found that Owens had not contravened s. 14(1)(b) of the Code because the advertisement did not illicit the sort of extreme negative emotions required.
20. However, the Court of Appeal absolutely rejected Owens' claim that s. 14(1)(b) infringed upon his freedom of religion, stating:

[T]he authorities universally recognize that freedom of religion is not absolute. See: *Singh-Multani c. Marguerite-Bourgeois (Commission scolaire)*, [2006] S.C.J. No. 6, 2006 SCC 6 (S.C.C.) at para. 30.

As is the case with all other rights and freedoms, religious speech and religious practices which harm others are subject to limitation in ways which are reasonable and justifiable within the meaning of s. 1 of the Charter. This is part of the foundation on which our pluralistic society has been constructed. Iacobucci J. recently underlined this point when exploring the allowable limitations on religious freedom in *Syndicat Northcrest c. Amselem*, [2004] 2 S.C.R. 551 (S.C.C.) at para. 61:

In this respect, it should be emphasized that not every action will become summarily unassailable and receive automatic protection under the banner of freedom of religion. No right, including freedom of religion, is absolute: see, e.g., *Big M, supra*; *P. (D.) v. S. (C.)*, [1993] 4 S.C.R. 141, at p. 182; *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, at para. 226; *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 772, 2001 SCC 31, at para. 29. This is so because we live in a society of individuals in which

¹⁶ 2006 SKCA 41

we must always take the rights of others into account. In the words of John Stuart Mill: "The only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it": *On Liberty and Considerations on Representative Government* (1946), at p. 11. In the real world, oftentimes the fundamental rights of individuals will conflict or compete with one another.

The *Constitution* protects all dimensions of freedom of religion. However, it also accommodates the need to safeguard citizens from harm and to ensure that each of them has non-discriminatory access to education, employment, accommodation and services. **In situations where religiously motivated speech involves injury or harm to others, it is necessarily subject to reasonable limitations.** As a result, s. 14(1)(b) is a justifiable limit on religiously inspired speech in effectively the same way as it is a justifiable limit on speech generally. See: *Attis v. New Brunswick District No. 15 Board of Education*, [1996] 1 S.C.R. 825 (S.C.C.).¹⁷ [emphasis added] [TAB 8]

E. Interpretation of s. 3 HRCMA

21. The wording employed in ss. 3(1)(2) *HRCMA* has been subject to considerable judicial consideration – it is well defined and well understood.

22. Sections 3(1)(2) *HRCMA* state:

3(1) No person shall publish, issue or display or cause to be published, issued or displayed before the public any statement, publication, notice, sign, symbol, emblem or other representation that

(a) indicates discrimination or an intention to discriminate against a person or a class of persons, or

(b) is likely to expose a person or a class of persons to hatred or contempt

because of the race, religious beliefs, colour, gender, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income or family status of that person or class of persons.

(2) Nothing in this section shall be deemed to interfere with the free expression of opinion on any subject. [TAB 9]

¹⁷ *Ibid.*, paras. 56-58.

1. s. 3(1)(a) “discrimination or an intention to discriminate”

23. Discrimination occurs under the HRCMA when a person denies goods, services, accommodation, or facilities; tenancy; equal pay; employment opportunity; or membership in a trade union on the basis of the enumerated grounds.
24. There is no intentionality requirement under s. 3. Given that the purpose of human rights legislation is *effects* based, the Supreme Court has upheld the lack of an intention requirement. In *Canada v. Taylor*¹⁸, Dickson C.J. stated for the majority:

An intent to discriminate is not a precondition of a finding of discrimination under human rights codes. 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.¹⁹ [TAB 10]

2. s. 3(1)(b) “is likely to expose...to hatred or contempt”

25. Under s. 3(1)(b) HRCMA “no person shall publish, issue or display or cause to be published, issued or displayed before the public any statement, publication, notice, sign, symbol, emblem or other representation that *is likely to expose a person or a class of persons to hatred or contempt.*”
26. As discussed by Dickson C.J. for the majority in *Taylor*, the connection between hate propaganda and acts of discrimination is the basis upon which the province may limit such expression:

[H]ate propaganda can operate to convince listeners, even if subtly, that members of certain racial or religious groups are inferior. **The result may be an increase in acts of discrimination, including the denial of equal opportunity in the provision of goods, services, facilities, and even incidents of violence.**²⁰ [emphasis added] [TAB 10]

¹⁸ [1990] 3 S.C.R. 892

¹⁹ *Taylor*, para. 67.

²⁰ *Taylor*, para. 40.

27. The definitions of “hatred” and “contempt” are settled.²¹ In *Taylor*, the Supreme Court dealt with a s. 2(b) challenge to s. 13(1) of the *Canadian Human Rights Act*:

13(1) It is 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 or by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination.

28. The majority of the Court in *Taylor* accepted the following definitions proposed by the Canadian Human Rights Tribunal in *Nealy v. Johnston*:²²

In defining "hatred" the Tribunal...applied the definition in the *Oxford English Dictionary* (1971 ed.) which reads: active dislike, detestation, enmity, ill-will, malevolence.

The Tribunal drew on the same source for their definition of contempt. It was characterized as the condition of being condemned or despised; dishonour or disgrace.

As there is no definition of "hatred" or "contempt" within the [*Canadian Human Rights Act*] it is necessary to rely on what might be described as common understandings of the meaning of these terms. Clearly these are terms which have a potentially emotive content and how they are related to particular factual contexts by different individuals will vary. There is nevertheless an important core of meaning in both, which the dictionary definitions capture. With "hatred" the focus is a set of emotions and feelings which involve extreme ill will towards another person or group of persons. To say that one "hates" another means in effect that one finds no redeeming qualities in the latter. It is a term, however, which does not necessarily involve the mental process of "looking down" on another or others. It is quite possible to "hate" someone who one feels is superior to one in intelligence, wealth or power. None of the synonyms used in the dictionary definition for "hatred" give any clues to the motivation for the ill will. "Contempt" is by contrast a term which suggests a mental process of "looking down" upon or treating as inferior the object of one's feelings. This is captured by the dictionary definition relied on in *Taylor*...in the use of the terms "despised", "dishonour" or "disgrace". Although the person can be "hated" (i.e. actively disliked) and treated with "contempt" (i.e.

²¹ *Re Kane* 2001 ABQB 570 at para 107.

²² (1989), 10 C.H.R.R. D/6450

looked down upon), the terms are not fully coextensive, because "hatred" is in some instances the product of envy of superior qualities, which "contempt" by definition cannot be.²³ (Emphasis in original.) [TAB 10]

29. In *Re Kane*,²⁴ Rooke J. for the Alberta Court of Queen's Bench analyzed the phrase "likely to expose," stating:

The definition of "likely to expose" should focus on the impact of the communication on the target group, specifically, whether the communication makes it more likely than not that the target group will be exposed to hatred and contempt. Any test applied to determine whether a representation "is likely to expose a person or class of persons to hatred or contempt" must be highly contextual and responsive to the legislation. Further, such a test should be viewed as an analytical framework rather than as a template. In applying such a framework the Panel should draw from the various factors and considerations used in other cases, including, but not limited to:

- the message -- content, tone, images conveyed, reinforcement of stereotypes, surround circumstances;
- the medium -- credibility, circulation, context of the publication;
- and
- the audience -- vulnerability of target group.²⁵ [TAB 11]

3. s. 3(2) "the free expression of opinion on any subject"

30. Section 3(2) HRCMA states that "nothing in this section shall be deemed to interfere with the free expression of opinion on any subject."
31. There is no caselaw supporting the proposition that s. 3(2) is some sort of saving provision that exempts discriminatory or hateful "opinion" (whether this is political or religious expression) from the ambit of s. 3(1).
32. In *Taylor*, the Supreme Court dealt with a challenge to s. 13(1) of the *Canadian Human Rights Act*. The section prohibited the telephonic communication of messages likely to expose persons to hatred or contempt. During the course of s. 2(b) analysis, the Court commented upon the lack of an apparent "exemption" section equivalent to s. 3(2) HRCMA:

²³ *Taylor*, para. 60. Accepting the decision of the Canadian Human Rights Tribunal in *Nealy v. Johnston* (1989), 10 C.H.R.R. D/6450.

²⁴ 2001 ABQB 570

²⁵ *Ibid.*, at para. 130.

Connected with the argument that the s. 2(b) guarantee is not sufficiently protected by the use of the words "hatred" and "contempt" in the *Canadian Human Rights Act* is the observation that nowhere in the statute is the scope of s. 13(1) tempered by an interpretative provision or exemption designed to protect the freedom of expression. This observation arises out of a comparison of the Act with human rights statutes in most other Canadian jurisdictions, the practice being to prohibit discriminatory notices, signs, symbols or messages, yet to follow such prohibition with an exemption stating, to use as an example the words of Nova Scotia's Human Rights Act, S.N.S. 1969, c. 11, s. 12, "Nothing in this Section shall be deemed to interfere with the free expression of opinion upon any subject in speech or in writing." As the norm is to include in human rights statutes an exemption emphasizing the importance of freedom of expression, the appellants forcefully argue that the absence of such a provision in the federal statute contributes to its being overbroad.

Though not wishing to disparage legislative efforts to bolster the guarantee of free expression, for several reasons **I think it mistaken to place too great an emphasis upon the explicit protection of expressive activity in a human rights statute... [H]aving decided that there exists an objective in restricting hate propaganda of sufficient importance to warrant placing some limits upon the freedom of expression, it would be incongruous to require that s. 13(1) exempt all activity falling under the rubric of "expression".** ²⁶ [emphasis added] [TAB 10]

33. Similarly, in the Alberta Court of Queen's Bench decision in *Re Kane*,²⁷ Rooke J. rejected the view that s. 2(2) *HRCMA* (now s. 3(2)) provided an exemption for "opinion":

In my view, excluding opinions from the reach of s. 2(1) would go a long way in defeating the purpose of the legislation. For example, if one wanted to issue, publish or display statements which were likely to expose persons to hatred or contempt they could do so and avoid any remedial orders under the Act by framing them as opinions.²⁸ [emphasis added] [TAB 11]

34. In *Keegstra*, the Supreme Court addressed the interaction of freedom of expression and hate speech as follows:

The suppression of hate propaganda undeniably muzzles the participation of a few individuals in the democratic process, and hence detracts somewhat from free expression values, but the degree of this limitation is not substantial. I am aware that the use of strong language in political and

²⁶ *Ibid.*, at paras. 63-64.

²⁷ 2001 ABQB 570.

²⁸ *Ibid.*, at para. 70.

social debate -- indeed, perhaps even language intended to promote hatred -- is an unavoidable part of the democratic process. **Moreover, I recognize that hate propaganda is expression of a type which would generally be categorized as "political," thus putatively placing it at the very heart of the principle extolling freedom of expression as vital to the democratic process. Nonetheless, expression can work to undermine our commitment to democracy where employed to propagate ideas anathemic to democratic values. Hate propaganda works in just such a way, arguing as it does for a society in which the democratic process is subverted and individuals are denied respect and dignity simply because of racial or religious characteristics. This brand of expressive activity is thus wholly inimical to the democratic aspirations of the free expression guarantee.**²⁹ [emphasis added] [TAB 5]

35. In *Linklater v. Winnipeg Sun*,³⁰ the Manitoba Human Rights Commission stated:

It would appear unrealistic that on one hand the legislature would enact enlightened legislation whose object was to lessen discrimination of all types and on the other hand would concurrently enact in the same statute legislation which would permit absolutely any type of discriminatory remark or comment and excuse same under the guise of freedom of expression.³¹ [TAB 12]

36. In *Kane v. Church of Jesus Christ Christian-Aryan Nations*,³² the Alberta Board of Inquiry found that s. 2(2) of the *Individual Rights Protection Act* (now s. 3(2) HRMCA) is merely "an "admonition" to "balance" the necessity for "eradicating discrimination with the need to protect free expression."³³ [TAB 13]

37. Professor Tarnopolsky's text, *Discrimination and the Law*,³⁴ has been influential in several decisions, including *Linklater* and *Kane*. He states:

[O]ne has to conclude that although these prohibitions of discriminatory messages are intra vires the provinces, the exemption provisions are probably superfluous. On the one hand, whether these messages indicate discrimination or an intention to discriminate, prohibition of them is a valid restriction on speech and expression and therefore cannot be said to infringe either of those freedoms. On the other hand, if the prohibition

²⁹ *Ibid.*, at para. 95.

³⁰ 1984 CarswellMan 383.

³¹ *Ibid.*, at para. 41.

³² 1992 CarswellAlta 925.

³³ *Ibid.*, at para. 337.

³⁴ (loose leaf edition)(Toronto: Carswell).

were to touch the essence of free speech, free press or free expression, in the sense that it is not related to discrimination and those matters covered by provincial Human Rights Acts, then it is ultra vires the provincial legislature. In either case, **the exemption provision is superfluous, unless it is intended merely as an indication to Human Rights Commissions that it is necessary to balance, on the one hand, the importance and the seriousness of the communication and, on the other hand, its effect on discrimination against those groups protected by the legislation.**³⁵ [emphasis added] [TAB 14]

F. Oakes Analysis

38. It is conceded that s. 3 *HRCMA* infringes upon s. 2(b) of the *Charter*. As such, the legislation must be justified under s. 1 of the *Charter*.
39. In *R. v. Oakes*³⁶ the Supreme Court laid down the criteria that must be satisfied to establish that a *Charter* infringement is reasonable and demonstrably justified in a free and democratic society:
- (a) Sufficiently important objective: The law must pursue an object that is sufficiently important to justify limiting a *Charter* right.
 - (b) Rational connection: The law must be rationally connected to the objective.
 - (c) Least Drastic Means (Minimal Impairment): The law must impair the right no more than is necessary to accomplish the objective.
 - (d) Proportionate effect: The law must not have a disproportionately severe effect on the persons to whom it applies.

1. Sufficiently Important Objective

40. The legislative objective of the *HRCMA* is the protection of the inherent dignity, equal rights, and diversity of all Albertans. This objective is clearly stated in the preamble of the Act:

WHEREAS recognition of the inherent dignity and the equal and inalienable rights of all persons is the foundation of freedom, justice and peace in the world;

³⁵ Tarnopolsky, at 10-33.

³⁶ (1986), 26 D.L.R. (4th) 400 (S.C.C.).

WHEREAS it is recognized in Alberta as a fundamental principle and as a matter of public policy that all persons are equal in: dignity, rights and responsibilities without regard to race, religious beliefs, colour, gender, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income or family status;

WHEREAS multiculturalism describes the diverse racial and cultural composition of Alberta society and its importance is recognized in Alberta as a fundamental principle and a matter of public policy;

WHEREAS it is recognized in Alberta as a fundamental principle and as a matter of public policy that all Albertans should share in an awareness and appreciation of the diverse racial and cultural composition of society and that the richness of life in Alberta is enhanced by sharing that diversity; and

WHEREAS it is fitting that these principles be affirmed by the Legislature of Alberta in an enactment whereby those equality rights and that diversity may be protected:

THEREFORE HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows: **[TAB 15]**

41. Section 3 *HRCMA* supports the larger objectives of the Act by seeking to limit discriminatory actions and the hate propaganda that fosters discrimination.
42. In *Keegstra*, both the majority and minority of the Court found that hate propaganda causes two fundamental harms that are of pressing and substantial concern: Harm to the targeted group and harm to society at large³⁷ **[TAB 5]**. Both the majority and minority of the Court agreed that limitation of hate propaganda was a legitimate and important legislative objective³⁸ **[TAB 5]**.
43. In *Taylor*, the majority and minority of the Supreme Court again agreed that limitation of hate propaganda was an important objective within the context of human rights legislation³⁹ **[TAB 10]**.

³⁷ *Keegstra, supra*, Dickson CJC for the majority at paras 64-66 and McLachlin JJ (as she was then) for the minority at para 304.

³⁸ *Keegstra, supra*, Dickson CJC for the majority at para 85 and McLachlin JJ (as she was then) for the minority at para 306.

³⁹ *Taylor, supra*, Dickson CJC for the majority at paras. 39-45 and McLachlin JJ (as she was then) for the minority at para. 140.

44. It is submitted that the legislative objectives pursued by the *HRCMA* have been recognized and approved by the Supreme Court.

2. Rational Connection

45. In *Oakes*, the Supreme Court stated that in order for legislation to be rationally connected to its objectives “the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations.”⁴⁰ [TAB 16]
46. There are only three cases in which the Supreme Court has struck down legislation for failure to satisfy the rational connection test: In *Oakes*, the Court struck down a reverse onus clause requiring an accused who had been caught in possession of any small or negligible amount of narcotic to prove that they were not trafficking. In *Benner v. Canada*,⁴¹ the Court struck down legislation imposing more stringent requirements for Canadian citizenship on a person born outside Canada before 1977 to a Canadian mother than on a person born outside Canada before 1977 to a Canadian father. In *Canadian Federation of Students v. Greater Vancouver Transportation Authority*⁴² [TAB 17], the Court struck down transit policies prohibiting political advertising on the side of buses on the basis that such advertising did not create an unsafe or unwelcoming environment for transit users.⁴³
47. The *Oakes*, *Benner*, and *Greater Vancouver Transport* cases demonstrate that there must be an obvious disconnect between legislation and objective in order for the rational connection test not to be met.

⁴⁰ *Oakes*, supra, at para. 74.

⁴¹ [1997] 1 S.C.R. 358.

⁴² 2009 SCC 31.

⁴³ Deschamps J. for the majority suggested at para 76 that a different result might have been reached if the political messages had been discriminatory: “I have some difficulty seeing how an advertisement on the side of a bus that constitutes political speech might create a safety risk or an unwelcoming environment for transit users. It is not the political nature of an advertisement that creates a dangerous or hostile environment. **Rather, it is only if the advertisement is offensive in that, for example, its content is discriminatory or it advocates violence or terrorism -- regardless of whether it is commercial or political in nature -- that the objective of providing a safe and welcoming transit system will be undermined.**” [emphasis added]

48. In *Taylor*, the majority of the Supreme Court took a very straightforward approach in finding a rational connection between limitation upon the telephonic communication of hate propaganda under s. 13(1) of the *Canadian Human Rights Act* and the larger of objectives of the Act. Dickson CJC for the majority stated:

Once it is accepted that hate propaganda produces effects deleterious to the guiding principles of...the *Canadian Human Rights Act*, there remains no question that s. 13(1) is rationally connected to the aim of restricting activities antithetical to the promotion of equality and tolerance in society.⁴⁴ [TAB 10]

And further,

[A]s long as the challenged provision can be said to further in a general way an important government aim it cannot be seen as irrational...s. 13(1) of the *Canadian Human Rights Act* promotes the ends sought by Parliament and consequently evinces a rational connection to those ends.⁴⁵ [TAB 10]

49. Importantly, the majority in *Taylor* chose not to complicate the rational connection analysis with issues of overbreadth and vagueness – these issues were dealt with during the minimal impairment stage of analysis.
50. It is submitted that the approach to rational connection taken by the majority in *Taylor* is applicable to the present case:
- (a) s. 3 HRCMA is rationally connected to the legislative objective because it promotes that objective.
 - (b) There is no obvious disconnect between s. 3 and the legislative objective.
 - (c) Arguments concerning overbreadth or vagueness are best dealt with in the minimal impairment stage of analysis.

3. Least Drastic Means (Minimal Impairment)

51. As noted by Professor Hogg, the Supreme Court has recognized that “some margin of appreciation” has to mitigate the least drastic means requirement⁴⁶ [TAB 18] – it is

⁴⁴ *Taylor, supra*, at para 51

⁴⁵ *Ibid.*, at para. 57.

⁴⁶ Hogg, *supra*, at pp. 38-38 to 38-42.

always possible to posit a less drastic means of accomplishing a legislative objective but the Courts should give some degree of deference to legislative choices.

52. As stated by Hogg,

Among the considerations that are invoked by the Court in support of a degree of deference to the legislative choice are: where the law is designed to protect a vulnerable group (children, for example); where the law is premised on complex social-science evidence (about the effect of advertising, for example), where the law deals with a “complex social issue” (smoking, for example), where the law reconciles the interests of competing groups (mandatory retirement, for example).⁴⁷ [TAB 18]

53. It is submitted that anti-discrimination legislation involves the protection of vulnerable groups, complex social issues, and the reconciliation of competing interests. In these respects, this honourable Court should give some degree of deference to the legislative decision to enact s. 3 *HRCMA*.

54. It is submitted that the *Taylor* decision is particularly helpful in the present minimal impairment analysis. In that case, Dickson CJC found that s. 13(1) of the *Canadian Human Rights Act* minimally impaired s. 2(b) on the basis that:

- (a) Human rights legislation should be interpreted according to the “well established principle that the rights established in such a code should be given their full recognition and effect through a fair, large and liberal interpretation.”⁴⁸ [TAB 10]
- (b) The terms “hatred” and “contempt” are well defined and refer to “unusually strong and deep-felt emotions of detestation, calumny, and vilification”⁴⁹ [TAB 10]. These definitions are not so broad as to be vague.
- (c) Limitations upon the small class of extreme expression giving rise to “hatred” and “contempt” will not have an unacceptable chilling effect upon expressive activity.
- (d) Exemption clauses, i.e., s. 3(2) *HRCMA*, are an indication to balance competing rights.
- (e) Absence of an intent requirement is consistent with the general human rights objective of eradicating discriminatory *effects*.

⁴⁷ *Ibid.*, at 38-42.

⁴⁸ *Taylor*, supra, at para 59.

⁴⁹ *Ibid.*, at para 61.

- (f) Any chill upon expression is less severe in the human rights context than in the criminal law context. The aim of human rights legislation is compensation and victim protection and not punishment.

55. It is submitted that the human rights context must be underscored at this stage of analysis. We must be cognizant of the important distinctions to be made between the purposes of human rights legislation and the criminal law power. As Tarnopolsky notes:

It has never been asserted that discrimination is a public “evil” of sufficient magnitude to warrant federal legislation under the criminal law power. Considering the minimal efficacy of a criminal law approach in overcoming discrimination and possibly even its retrograde effect, it is extremely unlikely that the federal criminal law power will ever be resorted to for this purpose.”⁵⁰ [TAB 19]

56. As stated by Dickson CJC in *Taylor*:

The aim of human rights legislation ... is not to bring the full force of the state's power against a blameworthy individual for the purpose of imposing punishment.⁵¹ [TAB 10]

and further:

... the purpose and impact of human rights codes is to prevent discriminatory effects rather than to stigmatize and punish those who discriminate.⁵² [TAB 10]

57. In *Keegstra*, both the majority and minority concurred on the ability of government to address discrimination through human rights legislation. In her dissent, McLachlin J. (as she was then) forcefully argued for the preferential use of human rights legislation over the criminal law power in dealing with discriminatory expression:

[T]he very fact of criminalization itself may be argued to represent an excessive response to the problem of hate propagation... Moreover, the chilling effect of prohibitions on expression is at its most severe where they are effected by means of the criminal law... The additional sanction of the criminal law may pose little deterrent to a convinced hate-monger who may welcome the publicity it brings; it may, however, deter the ordinary individual.

⁵⁰ Tarnopolsky, *Discrimination and the Law* (2004, looseleaf edition) (Toronto: Carswell) at 3-3.

⁵¹ *Taylor*, supra, at para. 37.

⁵² *Ibid.*, at para. 70.

[I]t 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.

It is true that the focus of most human rights legislation is acts rather than words. But if it is inappropriate and ineffective to criminalize discriminatory conduct, it must necessarily be unjustifiable to criminalize discriminatory expression falling short of conduct.

Finally, it can be argued that greater precision is required in the criminal law than, for example, in human rights legislation because of the different character of the two types of proceedings. The consequences of alleging a violation of s. 319(2) of the *Criminal Code* are direct and serious in the extreme. Under the human rights process a tribunal has considerable discretion in determining what messages or conduct should be banned and by its order may indicate more precisely their exact nature, all of which occurs before any consequences inure to the alleged violator.⁵³ **[TAB 5]**

58. All authorities favour the use of human rights legislation to limit discrimination. The province is jurisdictionally bound to stay within certain regulatory parameters in order that it not infringe upon the federal criminal power. The province has chosen to limit certain forms of discriminatory and hateful expression and has chosen a certain administrative process in order to deal with complaints. Given these factors, it is submitted a “margin of appreciation” should be accorded these legislative decisions.
59. It is submitted that s. 3 HRCMA minimally impairs s. 2(b) of the *Charter* when all the relevant factors for analysis are properly considered.

4. *Proportionate Effect*

60. Professor Hogg’s comments on this stage of analysis are helpful:

What the requirement of proportionate effect requires is a balancing of the objective sought by the law against the infringement of the *Charter*. It asks whether the *Charter* infringement is too high a price to pay for the benefit of the law.⁵⁴ **[TAB 20]**

⁵³ *Keegstra*, supra, at paras. 341-344.

⁵⁴ Hogg, supra, at p. 38-43.

And further,

Obedient to *Oakes*, when the Court engages in s. 1 analysis, it nearly always goes through the motion of this fourth step. So far as I can tell ... this step has never had any influence on the outcome of a case...the reason for this is that it is redundant. It is really a restatement of the first step, the requirement that a limiting law pursue an objective that is sufficiently important to justify overriding a *Charter* right ... If the objective is sufficiently important, and the objective is pursued by the least drastic means, then it must follow that the effects of the law are an acceptable price to pay for the benefit of the law. I conclude, therefore, that an affirmative answer to the first step-sufficiently important objective- will always yield an affirmative answer to the fourth step- proportionate effect.⁵⁵ [TAB 20]

61. It is submitted that in the present case, if this honourable Court finds the legislative objective of the HRCMA to be of sufficient importance at the first stage of *Oakes* analysis then it must inevitably lead to the conclusion that the effect of s. 3 is an acceptable limitation upon s. 2(b) of the *Charter* at the fourth stage of analysis.

PART III: RELIEF SOUGHT

62. The Attorney General requests that the Appellants' constitutional challenge be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS _____ DAY OF JULY, 2009.

Estimated time of argument: 45 minutes

Per: _____
David N. Kamal
Solicitor for the Respondent

⁵⁵ Hogg, *supra*, at p. 38-43.

LIST OF AUTHORITIES

TAB

- 1 *Canada (Attorney General) v. Dupond*, [1978] 2 S.C.R. 770, 1978 CarswellQue 77
- 2 Tarnopolsky, Justice W.S., *Discrimination and The Law*, (looseleaf, First Ed.) (Toronto: Carswell) volume 1, pp 3-56.3
- 3 Hogg, P.W., *Constitutional Law of Canada* (looseleaf, Fifth ed. Supplemented) (Toronto: Carswell) p. 45-5
- 4 *Scowby v. Saskatchewan (Board of Inquiry)* [1986] 2 S.C.R. 226, 1986 CarswellSask 249
- 5 *R. v. Keegstra*, 3 S.C.R. 697, 1990 CarswellAlta 192
- 6 *Multani c. Marguerite-Bourgeois (Commission scolaire)*, [2006] 1 S.C.R. 256, 2006 CarswellQue 1368
- 7 *Whatcott v. Saskatchewan Human Rights Tribunal*, 2007 SKQB 450,. 2007 CarswellSask 836
- 8 *Hellquist v. Owens*, 2006 SKCA 41, 2006 CarswellSask 217
- 9 *Human Rights, Citizenship and Multiculturalism Act*, R.S.A. 2000, c. H-14 s. 3
- 10 *Canada v. Taylor*, [1990] 3 S.C.R. 892, 1990 CarswellNat 1030
- 11 *Kane, Re*, 2001 ABQB 570, 2001 CarswellAlta 1066
- 12 *Linklater v. Winnipeg Sun*, 5 C.H.R.R., D/2098,. 1984 CarswellMan 383
- 13 *Kane v. Church of Jesus Christ Christian-Aryan Nations*, [1992] A.W.L.D. 302, 1992 CarswellAlta 928
- 14 Tarnopolsky, Justice W.S., *Discrimination and The Law*, (looseleaf, First Ed.) (Toronto: Carswell) volume 3, p. 10-33
- 15 *Human Rights, Citizenship and Multiculturalism Act*, R.S.A. 2000, c. H-14
- 16 *R. v. Oakes*, [1986] 1 S.C.R. 103, 1986 CarswellOnt 95
- 17 *Canadian Federation of Students v. Greater Vancouver Transportation Authority*, 2009 SCC 31, 2009 CarswellBC 1767
- 18 Hogg, P.W., *Constitutional Law of Canada* (looseleaf, Fifth ed. Supplemented) (Toronto: Carswell) p. 38-38 to 38-42
- 19 Tarnopolsky, Justice W.S., *Discrimination and The Law*, (looseleaf, First Ed.) (Toronto: Carswell) volume 1, pp 3-3 and 3-4
- 20 Hogg, P.W., *Constitutional Law of Canada* (looseleaf, Fifth ed. Supplemented) (Toronto: Carswell) p. 38-43