

IN THE COURT OF QUEEN'S BENCH OF ALBERTA  
JUDICIAL DISTRICT OF CALGARY

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. S.2002/08-0137

BETWEEN:

STEPHEN BOISSON 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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**BRIEF OF THE RESPONDENT**  
**DARREN LUND**  
**September 16<sup>th</sup> and 17<sup>th</sup>, 2009**  
**Before the Honourable Mr. Justice E.C. Wilson**

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PATRICK NUGENT  
Chivers Carpenter  
Suite 101, 10426 – 81 Avenue  
Edmonton, AB T6E 1X5

Counsel for the Respondent, Darren Lund

DAVID KAMAL  
Alberta Justice  
Room 410, Bowker Building  
9833 – 109<sup>th</sup> Street  
Edmonton, AB T5K 2E8

Counsel for the Intervener Attorney General of Alberta

JOHN V. CARPAY  
Canadian Constitution Foundation  
235, 3545 – 32 Avenue NE, Suite 641  
Calgary, AB T1Y 6M6

Counsel for the Intervener Canadian Constitution Foundation

GERALD D. CHIPEUR, Q.C.  
Miller Thompson LLP  
3000, 700 – 9<sup>th</sup> Avenue SW  
Calgary, AB T2P 3V4

Counsel for the Appellant Stephen Boissin

J.P. PEACOCK, Q.C./JANET L. MCCREADY  
Peacock Linder & Halt LLP  
1800, 350 – 7<sup>th</sup> Avenue SW  
Calgary, AB T2P 3N9

Counsel for the Intervener Canadian Civil Liberties

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## I. Introduction

Words and ideas have power. That power, while overwhelmingly positive, can also be used to undermine democracy, freedom and equality. It is for this reason that Canada, and many other nations, have enacted laws to limit forms of extreme hateful expression that have very minimal value in the free exchange of ideas, but do great harm to our fellow citizens.

– Canadian Human Rights Commission, *Special Report to Parliament: Freedom of Expression and Freedom from Hate in the Internet Age*,<sup>1</sup> **Tab 1**, page 2

1. This case involves the balancing of equality rights, including the protection of vulnerable groups, with freedom of expression. The Alberta Legislature has declared that equality and the inherent dignity of all persons is a fundamental principle and a matter of public policy (Preamble, *Human Rights, Citizenship and Multiculturalism Act*<sup>2</sup> (“HRCMA”), Appellants’ Authorities Tab 1). Section 3 of the HRCMA, which prohibits discriminatory messages likely to expose to hatred or contempt, is one of the several provisions enacted to promote equality and dignity and prevent discrimination. The Appellants emphasize freedom of expression but ignore the harm caused by expression likely to expose vulnerable, protected groups to hatred or contempt and ignore the constitutionally protected right to equality. Alberta’s human rights legislation, as interpreted in the jurisprudence, provides a balance encompassing both of the rights. Equality is promoted and only extreme forms of discriminatory expression are prohibited. The position advocated by the Appellants (and their supporting Interveners) is unbalanced: they advocate giving effect only to freedom of expression, at the expense of equality rights. The Respondent, Dr. Lund, submits that upholding the constitutionality of s. 3(1) of the HRCMA and the Panel Decision gives proper effect to all rights protected by the *Canadian Charter of Rights and Freedoms*.<sup>3</sup>

## II. Facts

2. The letter that is the subject of the complaint in this matter (the “Letter”) was submitted by the Appellant Steven Boissoin to the *Red Deer Advocate* and was published on June 17, 2002, not on July 20, 2002 as asserted by the Appellants (Appellants’ Brief, para. 2). The date

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<sup>1</sup> June 2009, [http://www.chrc-ccdp.ca/pdf/srp\\_rsp\\_eng.pdf](http://www.chrc-ccdp.ca/pdf/srp_rsp_eng.pdf),

<sup>2</sup> R.S.A. 2000, c. H-14

<sup>3</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11

of the Letter is important in that there was no evidence of any prior letters, editorials or articles to which Mr. Boissoin was responding.

- Return Volume I, Exhibit 1A, and Exhibit 1B; Panel Decision, Return Volume I, TAB D (“Panel Decision”), para. 2

3. Dr. Lund filed a complaint with the Alberta Human Rights and Citizenship Commission (the “Commission”) on July 22, 2002, alleging discrimination on the basis of sexual orientation contrary to s. 3 of the *HRCMA*.

- Return Volume I, Exhibit 1A

4. The Southern Regional Office of the Commission initially dismissed the complaint, due in part to not having the proper respondents named in the complaint. Dr. Lund then filed an appeal to the Chief Commissioner. The Chief Commissioner allowed the complaint to advance to the Panel hearing stage in accordance with s. 27(1) of the *HRCMA*, subject to Dr. Lund agreeing to take carriage of the complaint.

- Panel Decision paras. 3-5

5. A separate complaint naming the *Red Deer Advocate* in relation to publication of the Letter was settled. As a result of the settlement, the *Red Deer Advocate* now includes the following policy statement:

The Advocate will not publish statements that indicate unlawful discrimination or intent to discriminate against a person or class of persons, or are likely to expose people to hatred or contempt because of ... sexual orientation.

- Panel Decision para. 6

6. A Human Rights Panel was appointed and issued two preliminary decisions. The first, dated September 8, 2006, dismissed an application to have the Concerned Christian Coalition (“CCC”) removed as a party. In the second, dated June 28, 2007, the Panel ruled that reference to the *Charter* and its values could be made in argument before the Panel, especially when no *Charter* remedy was being sought.

- Return Volume I, Tabs B and C

7. The Panel heard the matter and issued a Decision on November 30, 2007. The Panel found that Mr. Boissoin and the CCC contravened s. 3 of the *HRCMA*. The Panel said that it would hear submissions from the parties on the issue of remedy at a later date.

– Return Volume I, Tab C

8. To determine whether the publication was likely to expose a class of persons to hatred or contempt under s. 3(1)(b) of the *HRCMA*, the Panel considered the analysis of Justice Rooke in *Re Kane*,<sup>4</sup> **Tab 2** (Panel Decision, paras. 312-320), noting the inquiry articulated by the Court (para. 319).

9. In relation to the communication itself, the Panel considered nine statements from the letter and considered the interpretation in the jurisprudence of “hatred” and “contempt” and concluded that the communication itself expresses hatred or contempt for a group of persons based on their sexual orientation, and that a reasonable person, informed about the context would understand the messages as expressing hatred and/or contempt. The Panel noted that this was obvious from the response to the message in other letters to the editor of the *Red Deer Advocate* that followed the publication of the Letter and from the incident that occurred following the publication of the Letter.

– Panel Decision paras. 320-323, 328-330

10. In relation to the likelihood of exposure to hatred or contempt, the Panel considered and applied the factors discussed in *Re Kane* including (Panel Decision para. 324):

- A. The content of the communication
- B. The tone of the communication
- C. The image conveyed, including whether the issue of quotations and reference sources gives the message more credibility
- D. The vulnerability of the target group
- E. The degree to which the expression reinforces existing stereotypes
- F. The circumstances surrounding the message, including whether the messages appeal to well-publicized issues
- G. The medium used to convey the message
- H. Circulation of the publication and its credibility
- I. The context of the publication, for example whether it is part of a debate or whether it is presented as news or as a purportedly authoritative analysis.

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<sup>4</sup> 2001 ABQB 570, 291 A.R. 71, 2001 CarswellAlta 1066

11. The Panel concluded that on the evidence and the case law, the publication was, on the balance of probabilities, likely to expose homosexuals to hatred and/or contempt (paras. 325, 331).

12. The second issue considered by the Panel was whether s. 3(2) of the *HRCMA* provided a defence to a breach of s. 3(1). The Panel considered *R. v. Keegstra*<sup>5</sup> (“*Keegstra*”), **Tab 3**, and the analysis in *Re Kane* and concluded that s. 3(2) is an admonition to Panels to balance the freedom of expression with the eradication of discrimination but is not a complete defence or a justification for a breach of s. 3(1) (Panel Decision paras. 334-346).

13. The Panel rejected the argument that it did not have jurisdiction to deal with the matter. It found that the matter fell within the ambit of matters reserved to the provinces under property or civil rights, matters of a merely local or private nature, or local works and undertakings (paras. 347-355).

14. In relation to the *Charter*, the Panel stated that it had considered *Charter* values in interpreting the *HRCMA* and in reaching its Decision (paras. 356-357). The Panel considered in effect that the balancing did not render s. 3(1) inoperative.

15. The Panel issued a letter on February 21, 2008 dismissing what appeared to be a second application to remove the CCC as a respondent.

- Return Volume I, Tab E

16. The Panel issued its Decision on Remedy (“Remedy Decision”) on May 30, 2008.

- Return Volume I, Tab F

17. On June 26, 2008 Mr. Boissoin and the CCC filed an Originating Notice appealing the Panel decisions dated September 8, 2006, June 28, 2007, November 29, 2007, February 21, 2008 and May 30, 2008.

- Return Volume I, Tab A

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<sup>5</sup> [1990] 3 S.C.R. 697, [1990] S.C.J. No. 131

18. The Respondent Dr. Lund objects to the Appellants' inclusion of what amounts to new evidence or allegations of fact in their Brief, including: para. 27(c) re letter from Canadian Human Rights Commission to Ezra Levant; para. 72 re allegations about the motive of Dr. Lund; para. 87 re allegations of use of resources of a public institution.

### III. Issues on appeal

19. The Respondent Dr. Lund submits the following short answers to the issues stated by the Appellants:

(A) No issue is taken with the Appellants' constitutional challenges to s. 3(1) of the *HRCMA* being properly before this Court. However, Dr. Lund takes issue with the Appellants' assertion that the constitutionality of s. 3(1) of the *HRCMA* under the *Charter* was fully argued before the Panel.

(B) The Panel interpreted and applied the law correctly to the facts and was correct in its decision that the Letter was likely to expose homosexuals to hatred or contempt and therefore contravened s. 3(1) of the *HRCMA*.

(C) The Panel had the authority to issue a cease and desist order and to provide for compensation to Dr. Lund and a witness. Dr. Lund does not object to other orders being severed and set aside.

(D) In response to the Appellants' *Charter* challenge to s. 3(1) of the *HRCMA*:

- The conduct of Mr. Boissoin in causing the publication of the Letter in the *Red Deer Advocate* does not come within the freedom of religion protected by s. 2(a) of the *Charter*.
- Section 3(1) of the *HRCMA* is justified under s. 1 of the *Charter*.

(E) Section 3(1) is consistent with the provisions of the *Constitution*.

(F) This Court has given authoritative guidance on the interpretation of s. 3(2) of the *HRCMA*. It is an admonition to decision-makers to balance freedom of expression with protection from discrimination.

(G) Section 3(1) of the *HRCMA* is in pith and substance a matter relating to the prevention of discrimination in all the areas of activity addressed in the *HRCMA*, and is therefore within provincial competence under 92(13) and/or s. 92(16) of the *Constitution Act, 1867*<sup>6</sup> (the "*Constitution Act, 1867*").

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<sup>6</sup> (U.K.), 30 & 31 Victoria, c. 3

(H) Should the Appellants be successful in this appeal, there is no basis for an award for full indemnity costs.

#### **IV. Submissions on law**

##### **A. Standard of review**

20. It is submitted that, as set out by the Supreme Court in *Dunsmuir v. New Brunswick*,<sup>7</sup> referred to in *Walsh v. Mobil Oil Canada*<sup>8</sup> (“*Walsh*”), **Tab 4**, para. 45, it is appropriate to determine the applicable standard of review in accordance with prior jurisprudence. If prior jurisprudence does not offer guidance, then the Court engages in the full inquiry as set out in *Dunsmuir*.

21. Prior jurisprudence has established the standard of review for appeals from a Human Rights Panel. The standard of review applicable to the Panel’s interpretation of the law, application of the law to the facts, and inferences from the facts is correctness. However, the Courts have recognized that some deference is appropriate to a Panel’s findings of fact. It is submitted that the standard of reasonableness applies to the Panel’s findings of fact in this case.

– *Walsh*, **Tab 4**, paras. 45, 49, 55

##### **B. Response to issues raised by the Appellants**

###### **(A) The issue of constitutionality is before this Court.**

22. Dr. Lund does not take issue with the submission of the Appellants that their challenge to the constitutionality of s. 3(1) of the *HRCMA* is properly before this Court (Appellants’ Brief paras. 7(A) and 8-13). However, Dr. Lund disagrees that the *Charter* issues were fully argued before the Panel. Similarly, Dr. Lund disagrees with the submission of the Intervener Canadian Civil Liberties Association (“*CCLA*”) that the Panel “failed to undertake a full s. 1 analysis” (*CCLA* Brief heading D.i. and paras. 47-49). The Panel did take *Charter* values into consideration in reaching the Decision (Panel Decision paras. 356-357). The Panel did not have the jurisdiction to decide a question of constitutional law under the *Charter*.

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<sup>7</sup> 2008 SCC 9, [2008] 1 S.C.R. 190, [2008] S.C.J. No. 9

<sup>8</sup> 2008 ABCA 268, [2008] A.J. No. 830, 440 A.R. 199

– *Administrative Procedures and Jurisdiction Act*<sup>9</sup> (“APJA”), **Appendix Tab 1**, s. 11, and the *Designation of Constitutional Decision Makers Regulation*<sup>10</sup> (the “Regulation”), **Appendix Tab 2**, s. 2, Schedule 1 (amendments to the Act and Regulation in force April 15, 2006)

23. In response to para. 47 of the CCLA Brief, and in light of the restrictions of the APJA and the Regulation, even if *Multani v. Commission scolaire Marguerite-Bourgeois*<sup>11</sup> (“*Multani*”), **Tab 5** and Attorney General’s Authorities Tab 6, can be read as requiring administrative decision-makers to themselves carry out a full s. 1 analysis (which, it is submitted, is not what the majority held in *Multani*), such requirement could not apply in Alberta to a decision-maker with no jurisdiction to decide a question of constitutional law under the *Charter*. Justice Rooke in *Re Kane*, **Tab 2**, paras. 84-85, stated that the application of the *Oakes* test would only be necessary where the constitutionality of the legislation is at issue, but not where a Panel is balancing the competing interests in its application of s. 3(1) (than s. 2(1)) of the *HRCMA*. The Panel did take *Charter* values into account in reaching the Decision, and noted the point made by the CCLA from *Multani* (Panel Decision paras. 356-357).

**(B) The Panel was correct in its decision that the Letter was likely to expose homosexuals to hatred or contempt and therefore contravened s. 3(1) of the HRCMA.**

**1. The Panel’s analysis is based on a well-established legal foundation.**

24. In considering whether the Letter breached s. 3(1) of the *HRCMA*, the Panel applied *Re Kane*, **Tab 2**, on which, as the Panel noted, both parties had relied (Panel Decision, para. 301). *Re Kane* established the legal framework for a Panel to analyze whether there has been a contravention of the section involved in this case. *Re Kane* has been applied by each Human Rights Panel since the opinion issued by Justice Rooke considering this section. The outcomes have depended on the differing circumstances.

– *Kane v. Papez*<sup>12</sup> (“*Papez*”), **Tab 6**, paras. 53, 55; *Johnson v. Music World Ltd.*<sup>13</sup> (“*Johnson*”), **Tab 7**, paras. 50-59

<sup>9</sup> R.S.A. 2000, c. A-3, as am.

<sup>10</sup> Alta. Reg. 69/2006

<sup>11</sup> 2006 SCC 6, [2006] 1 S.C.R. 256, [2006] S.C.J. No. 6

<sup>12</sup> (2002), 43 C.H.R.R. D/120, 2002 CarswellAlta 1821,

<sup>13</sup> (2003), 46 C.H.R.R. D/319, 2003 CarswellAlta 1956

25. Section 3(1) of the *HRCMA* provides as follows (with “sexual orientation” read into the list of protected grounds by *Vriend v. Alberta*<sup>14</sup> (“*Vriend*”), **Tab 8**; the *Human Rights, Citizenship and Multiculturalism Amendment Act 2009*, which expressly adds “sexual orientation” to the list has not yet been proclaimed in force):

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 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.

26. This Court in *Re Kane* reviewed the interpretation of “hatred” and “contempt” considered by the Supreme Court in *Canada (Human Rights Commission) v. Taylor*<sup>15</sup> (“*Taylor*”) (Attorney General’s Authorities, Tab 10), para. 60, approving *Nealy v. Johnston*<sup>16</sup> and noted that the definitions have been settled (*Re Kane*, paras. 106-107, 130). “Hatred” involves extreme ill will towards another person or group of persons; “contempt” suggests “looking down” upon or treating as inferior the object of one’s feelings, captured by the terms “despised,” “dishonour” or “disgrace.”

27. In relation to determination of “likely to expose,” Justice Rooke considered jurisprudence from the B.C. Human Rights Tribunal and from the Canadian Human Rights Tribunal. Justice Rooke stated (para. 124):

Beyond the requirements of the specific statute, however, a high degree of flexibility will be required in the application of any test in order to allow for a broad contextual assessment in each case. The tests should be viewed as providing an analytical framework rather than a template to be mechanically applied in every case. In order for such a framework to be viable, it must permit a contextual consideration of both the effect and the content of the message.

<sup>14</sup> [1998] 1 S.C.R. 493, 1998 CarswellAlta 210

<sup>15</sup> [1990] 3 S.C.R. 892, [1990] S.C.J. No. 129

<sup>16</sup> (1989), 10 C.H.R.R. D/6450

28. The appropriate inquiry under s. 3(1)(b) of the *HRCMA* (then s. 2(1)(b)) in Justice Rooke’s opinion is (para. 125):

Does the communication itself express hatred or contempt of a person or group on a basis of one or more of the listed grounds? Would a reasonable person, informed about the context, understand the message as expressing hatred or contempt?

Assessed in its context, is the likely effect of the communication to make it more acceptable to others to manifest hatred or contempt against the person or group concerned? Would a reasonable person consider it more likely than not to expose members of the target group to hatred and contempt?

29. Justice Rooke noted a number of factors considered by tribunals to determine whether a communication is likely to expose to hatred or contempt (para. 128). Justice Rooke recommended that a Panel should draw from the various factors and considerations used in other cases, including (para. 130):

- 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.

30. The Panel considered the analysis in *Re Kane* and carefully applied the factors recommended for consideration (Panel Decision pages 68-70, para. 324).

31. An analysis carried out for Alberta Justice in 1996 found several recurring themes in anti-homosexual materials, as described by Dr. E. Faulkner in “Homophobic Hate Propaganda in Canada,”<sup>17</sup> **Tab 9**, pages 71-80. The themes included: (1) the depravity of homosexuals; (2) disease and sickness spread by homosexuals; (3) AIDS as a homosexual disease and due punishment; (4) homosexuality undermining society’s institutions and very existence; (5) dangers associated with homosexuality; and (6) conspiracy of homosexuals. Some of these themes are present in the Letter.

32. In *Schnell v. Machiavelli & Associates Emprize Inc.*<sup>18</sup> (“*Schnell*”), **Tab 10**, Internet communications were found likely to expose homosexuals to hatred or contempt, contrary to the

<sup>17</sup> (2006/07) *Journal of Hate Studies*, Vol. 5:63, 63-97,  
<http://guweb2.gonzaga.edu/againsthate/journal5/GHS107.pdf>

<sup>18</sup> [2002] C.H.R.D. No. 21 (Sinclair, Member), 2002 CarswellNat 4396

*Canadian Human Rights Act*. Statements in the website included reference to homosexuals as pedophiles, a homosexual agenda, warning about gay and lesbian educators intending to lure and abuse children, and warnings expressed as “Citizens Alert” (paras. 22, 30, 33, 36, 40). The Tribunal considered the jurisprudence on the meaning of “hatred,” “contempt,” and “expose” (paras. 85-89), applied the analysis to the communications at issue (paras. 90-103), and concluded (para. 104):

These comments speak of extreme ill will, detestation, enmity and contempt towards homosexuals. These comments do not admit of any redeeming qualities in gay men or lesbian women. In my opinion, the materials contained in the Offending Pages are likely to expose gay and lesbian persons to hatred and contempt.

33. Other decisions of the Canadian Human Rights Tribunal have also found statements to be likely to expose homosexuals to hatred or contempt, for example *Payzant v. McAleer and Canadian Liberty Net*<sup>19</sup> (“*McAleer*”), **Tab 11**.

34. In response to para. 20 of the Appellants’ Brief, the decision in *Owens v. Saskatchewan Human Rights Commission*<sup>20</sup> (“*Owens*”) (Appellants’ Authorities, TAB 9), does not establish a different analytical approach. The outcome of that case turns on the nature of the communication involved and the Court’s assessment of the context in those circumstances and is distinguishable from this case. The Court in *Owens* set out the inquiry in a framework similar to that of Justice Rooke in *Re Kane*. Both the Court in *Owens* and Justice Rooke in *Re Kane* considered that the respective sections applied to communications involving extreme feelings of detestation, calumny and vilification (*Owens*, para. 52; *Re Kane*, paras. 106-107). In relation of likelihood of exposure to hatred or contempt (or, in Saskatchewan, belittlement, ridicule, etc.), both Courts articulated the inquiry as an objective test – in terms of whether a reasonable person would consider that the communication was likely to expose the target group to hatred or contempt (*Owens*, para. 60; *Re Kane*, para. 125). Both Courts were of the view that the nature of the message and the context are to be considered (*Owens*, paras. 60, 65-68, 69 ff.; *Re Kane*, paras. 128-130).

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<sup>19</sup> [1994] C.H.R.D. No. 4 (Norton, Chairman), judicial review dismissed [1996] 2 F.C. 345 (T.D.), [1996] F.C.J. No. 165 (*sub nom. McAleer v. Canada (Human Rights Commission)*), aff’d [1999] F.C.J. No. 1095 (C.A.), 175 D.L.R. (4<sup>th</sup>) 766

<sup>20</sup> [2006] S.J. No. 221 (C.A.)

35. The Court in *Owens* held that a claim of freedom of religion did not change the analysis (paras. 54-57). The authorities universally recognize that freedom of religion is not absolute, the Court said (paras. 55, 57).

36. The text of the communication in *Owens* is distinguishable from the text in this case. The Court noted (para. 70) that the stick men were drawn very simply and did not suggest undesirable characteristics such as dangerousness, untrustworthiness, etc. as had been the case in *Re Bell and Saskatchewan Human Rights Commission*<sup>21</sup> (“*Bell*”) (CCLA Authorities Tab 9). The Court agreed with the Board of Inquiry that the not permitted symbol “may itself not communicate hatred.” In relation to the Bible citations, the Court noted that allowance had to be made for the fact that they came from an ancient and fundamental religious text (para. 77). The Court was of the view that it was an error for the Board of Inquiry and the Chambers Judge in that case to consider the text as if it were a contemporary communication. The Court also considered that the Biblical passages referred to could be seen in a variety of ways that made them significantly different from a present-day message (para. 81). By contrast, in the case now before the Court, the text expressly communicates undesirable characteristics about the target group. This case is comparable to *Bell*, not *Owens*. The communication is a contemporary communication. What the Letter states cannot be seen in a “variety of ways” – its message targeting homosexuals is contemporary and clear.

37. The Saskatchewan Court of Queen’s Bench in *Whatcott v. Saskatchewan (Human Rights Tribunal)*<sup>22</sup> (“*Whatcott*”) (Attorney General’s Authorities, Tab 8) held that the communications at issue in that case did convey extreme feelings and strong emotions of detestation, calumny and vilification as required by *Owens* (*Whatcott*, paras. 22-25). One of the flyers in that case made clear references to homosexuals as pedophiles or molesters of children; the others made reference to homosexuals sexually abusing children. The Chambers Judge on judicial review found that the Tribunal was correct in concluding that the flyers exposed the homosexual community to hatred and contempt. It is submitted that the Letter is comparable to the communications in *Whatcott* and distinguishable from *Owens*.

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<sup>21</sup> (1994), 114 D.L.R. (4<sup>th</sup>) 370 (Sask. C.A.)

<sup>22</sup> 2007 SKQB 450, [2007] S.J. No. 672, on appeal to the Saskatchewan Court of Appeal, decision reserved

38. “Debate” as a contextual element that could potentially excuse communications that have been found to express hatred or contempt, as considered in *Owens*, should be approached with caution. Does the fact that there is debate about acceptance of head or facial coverings (such as the hijab or the niqab) therefore permit vilification of Muslims? It should not. Similarly, because there has been debate over, for example, same-sex marriage should not therefore permit vilification of homosexuals. There are four reasons for caution in consideration of “debate” as potentially excusing or justifying communications that express hatred or contempt:

- 1) It contradicts the Supreme Court jurisprudence holding that limitations on hate speech are justified.
- 2) It is inconsistent with the educational purposes of human rights legislation.
- 3) It is inconsistent with the concern within human rights on effects rather than intent.
- 4) It inserts a problematic element of uncertainty into the analysis.

39. The Supreme Court in *Keegstra*, **Tab 3**, upheld the *Criminal Code* provisions on hate propaganda while recognizing that hate speech may be part of political and social debate (para. 90 ff.) In other words, the legislative provisions (whether through the *Criminal Code* or human rights legislation) are justified even though there may be a debate. The existence of a debate does not therefore nullify the applicability of the provisions. Whether or not there is an ongoing debate on certain issues, the question in a particular case is whether the particular communication is likely to expose the protected group to hatred or contempt.

40. Human rights decisions have held that communications likely to expose a protected group to hatred or contempt are beyond the parameters of “debate.” This is consistent with the view that the existence of a “debate” does not prevent a finding that a communication is likely to expose to hatred or contempt.

- *Citron v. Zundel*,<sup>23</sup> **Tab 12**, paras. 153-154
- See also *Kane v. Church of Jesus Christ Christian-Aryan Nations*<sup>24</sup> (“Aryan Nations”), **Tab 13**, para. 392: “Multiculturalism is not a tentative notion or vague proposal for public policy. It is a legislated, constitutional concept. Similarly, equality between persons of different races, colours and religious beliefs is not a new concept open to debate. It is basic law.”

<sup>23</sup> [2002] C.H.R.D. No. 1 (CHRT, Pensa, Chairperson), 41 C.H.R.R. D/274, 2002 CarswellNat 4364

<sup>24</sup> (1992), 18 C.H.R.R. D/268 (Alta. Bd. of Inq., Christian, Chair), 1992 CarswellAlta 928

41. The CCLA argues that “norms of behaviour” must be debatable (CCLA Brief paras. 15-16). This fails to recognize that sexual orientation is about intrinsic personhood, not just “behaviour” and that statements in the Letter were about the personhood of homosexuals. The CCLA also argues that there must be a high degree of tolerance for polemical expression. The jurisprudence on hatred/contempt has recognized tolerance for offensive expression – but taking into account all the *Charter* values to be protected, has drawn a line (based on stringent tests) in relation to harmful expression that exposes vulnerable and protected groups to hatred or contempt. The “polemical expression” of Jehovah’s Witnesses in *R. v. Boucher*,<sup>25</sup> relied upon by the CCLA, was not against a vulnerable group protected by human rights legislation nor was it of the nature or tone comparable to statements in the Letter.

42. The role of human rights legislation as expressed in the legislation itself (such as the Preamble of the *HRCMA*), in the functions of human rights commissions (s. 16 of the *HRCMA*), and in the educational role of tribunal decisions, is to forward the principles of equality and dignity. Reliance on “debate” to permit communications that express hatred or contempt against a protected group conflicts with or delays that educational purpose. As noted in *Walsh*, **Tab 4**, para. 132, an interpretation which limits fulfilment of the objectives of the *HRCMA* is to be avoided.

43. It is well established that the concern in human rights law is on effect, not on intent (*Taylor*, Attorney General’s Authorities Tab 10, para. 67; *Walsh*, **Tab 4**, para. 132). The focus on “debate” is more related to intent than effect. The issuer of the communication may have intended only to participate in the “debate,” but it is the effect that matters. Whether or not there is a “debate” ongoing, if the effect of the communication is likely to expose the targeted group to hatred or contempt, that should determine the outcome.

44. Consideration of the existence of “debate” sets up a potentially very uncertain element in the analysis. How is it determined when the “debate” is over? As can be seen in the history of tribunal decisions across Canada, some individuals and organizations continue to “debate” the equality and societal participation of a number of groups based on religion or ethnicity.

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<sup>25</sup> [1951] S.C.R. 265

45. Based on the above, it is submitted that *Owens* should either (a) not be considered persuasive, or (b) should be distinguished, in that the nature of the communication in that case fits more comfortably within the ambit of “debate” than does the Letter in this case.

## 2. There is an evidentiary foundation for the Panel’s Decision

46. In response to the Appellants’ argument that there was no evidentiary foundation for the Panel’s conclusions, it is submitted that there were several evidentiary sources on which the Panel relied for its Decision: the Letter itself; the report and oral evidence of Mr. Jones; the report and oral evidence of Dr. Alderson; the evidence of Ms. Dodd in conjunction with the newspaper report of the incident involving a gay teenager; and the subsequent letters to the editor addressing how the message of the Letter was understood by members of the community. Further, the Letter alone was sufficient as a foundation for the Panel’s conclusion. The findings of fact of the Panel are subject to a standard of reasonableness, and the Panel’s decision was reasonable. Even if the standard is correctness, the Panel’s conclusions were correct in light of the evidence.

### a. The Letter itself

47. The main evidence relied upon by the Panel for its conclusion was, of course, the Letter itself. This is in accordance with the opinion of Justice Rooke in *Re Kane*, which sets out the appropriate analysis based significantly on the communication itself (**Tab 2**, para. 130).

48. As expressed in *Citron v. Zundel*, **Tab 12**, para. 141, while expert evidence may be helpful, ultimately it is the language used in the documents themselves on which the tribunal will determine whether the legislation is contravened.

49. In *Owens* (Appellants’ Authorities TAB 9) the Saskatchewan Court of Appeal assessed whether there had been a contravention of that province’s legislation significantly from the contents of the publication itself. As submitted above, both the content and the context in the case now before this Court are distinguishable from *Owens*.

50. The Appellants in their argument fail to address the Letter as an evidentiary basis for the Panel's conclusion.

**b. The evidence of Mr. Jones**

51. In *Re Kane*, Justice Rooke identified the vulnerability of the target group as an important factor to be considered in the determination of whether it is more likely than not that the target group will be exposed to hatred or contempt (**Tab 2**, para. 130). Mr. Jones' evidence addressed that point, as noted by the Panel (Return Volume I, TAB D, paras. 321, 324 (D)). Mr. Jones had served for 7 years in two portfolios with the Diversity Resources Unit of the Calgary Police Service: Hate/Bias Crime Coordinator and Police Liaison to the Gay/Lesbian, Bi-sexual and Transgendered ("GLBT") communities (Return Volume I, Exhibit 2, page 1; Volume II, page 87). Mr. Jones stated in his report and in his oral testimony that from his experience:

- The GLBT community is the most targeted community for hate crimes and incidents, and the Jewish community is the second targeted community (Return Volume I, Exhibit 2 page 1; Return Volume II, pages 90-91).
- Less than 10% of victims who are targeted with a hate motivated crime actually come forward and report to the police (Return Volume II, page 89).
- The gay community is likely more vulnerable in smaller settings (Return Volume II, page 92).
- The majority of gay bashings that occur in Calgary are perpetrated by small groups of 2 to 4 young people acting out, and the Letter encourages this kind of action (Return Volume I, Exhibit 2, page 1; Return Volume II, pages 98-99).

**c. The evidence of Dr. Alderson**

52. Dr. Alderson was accepted as an expert in psychology, with expertise in gay and lesbian psychology (Return Volume II pages 102-104). He was qualified to give opinion evidence. His evidence included (Return Volume I, Exhibit 3; Return Volume II pages 107-113, 123-134):

- The written word is often more harmful than the spoken word, as a permanent record is created in written speech (Exhibit 3 page 1).
- Human beings are more suggestible to the written word; the written word often carries greater authority and has more impact on changing people's views (Exhibit 3 page 1).

- A letter from a minister has a deeper impact on people’s psyche (Return Volume II page 108).
- The Letter has included some of the same messages used historically to demean and incite hatred toward targeted groups (Exhibit 3 page 4).
- Gays and lesbians have been especially reluctant to report hate crimes (Return Volume II page 106).
- Hate literature has negative effects on people, not only on the targeted group, including (Exhibit 3 pages 1-3, Return Volume II pages 125-132):
  - increasing the threat level to the targeted group; sexual minorities are among the most frequently targeted victims of hate-motivated violence in Canada
  - increasing internalized homophobia and compromised mental health
  - increase in homophobia within heterosexual individuals; hate speech increases the dislike that people have for the targeted group
  - exacerbating distrust of the targeted group.
- In Nazi Germany, before the Jews were exterminated, there was anti-Jewish sentiment. A group will be denigrated before there is a willingness to attack them during a time of stress. As theorized by Gordon Allport, there are stages of what people do to a group they do not like. The first stage is hate speech; followed by avoidance, discriminatory treatment, physical attacks; the final stage is extermination. (Return Volume II page 119; Exhibit 3 pages 1-2.)
- One of the best predictors of behaviour is a person’s beliefs, values and attitudes (Return Volume II pages 119-120).

**d. The evidence of Ms. Dodd and of the assault against a gay teenager in Red Deer**

53. The Panel was authorized by s. 30(2) of the *HRCMA* to receive in evidence the *Red Deer Advocate* article titled “Gay teenager beaten” (Return Volume I, Exhibit 1A) and to derive from it that a violent incident against a member of the protected group occurred after the publication of the Letter. Section 30(2) of the *HRCMA* provides (Appellants’ Authorities Tab 1):

30(2) Evidence may be given before a human rights panel in any manner that the panel considers appropriate, and the panel is not bound by the rules of law respecting evidence in judicial proceedings.

54. As noted in *Discrimination and the Law*, the HRCMA gives Human Rights Panels a wide latitude as to the admissibility of evidence. Further, in general human rights adjudicative bodies may admit and weigh a wide range of evidence even if it would (or might) be wholly or partially inadmissible in other legal proceedings.

- Justice W.S. Tarnopolsky and W.F. Pentney, *Discrimination and the Law*,<sup>26</sup> **Tab 14**, at 15.2(d), pages 15-46.1-47, 15-51

55. The article in the *Red Deer Advocate* was not the only evidence before the Panel relating to an assault on a gay person subsequent to the publication of the Letter. Janel Dodd testified that she was employed as the office manager at the Upper Level Youth Centre in Red Deer, working for Mr. Boissoin, in 2002. She testified that she knew that one of the youths that were involved in the beating was one of the youths that frequented the Centre. She also testified that Mr. Boissoin told her directly who was involved.

- Return Volume II page 72 (lines 15-16), page 77 (lines 15-17), page 78 (line 24)

56. Ms. Dodd was not cross-examined on her testimony.

57. That there is no police evidence of a complaint or no court record is consistent with the evidence of both Mr. Jones and Dr. Alderson that only a minor percentage of individuals in targeted groups come forward to police to report a violent incident against them.

58. The Appellants' assertion (Appellants' Brief, para. 18) that the article did not report that the Letter made the victim "feel fearful" is inaccurate. The article reported that the victim "doesn't feel safe reading anti-gay statements" like the Letter. The Appellants' argument seeks to trivialize the attack on the gay teenager, suggesting that the victim's concern was only about the "gay rights movement."

- Return Volume I, Exhibit 1(A)

59. It was therefore appropriate for the Panel to consider the circumstances of the attack on the gay teenager in relation to (a) the vulnerability of the protected group and (b) the likelihood of exposure to hatred or contempt.

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<sup>26</sup> Volume 3 (Toronto: Thomson Reuters, looseleaf)

**e. How the message of the Letter was understood**

60. The analysis in *Re Kane*, adopted by the Panel, sets out as an element of the inquiry “Would a reasonable person, informed about the context, understand the message as expressing hatred or contempt?” (Tab 2, para. 125; Panel Decision, para. 319). As established in the jurisprudence, the Panel could make such determination from the language of the Letter itself. The Panel also had before it to assist in the determination of the question:

- various letters to the editor published in the *Red Deer Advocate* subsequent to the publication of the Letter,
- the evidence of Dr. Alderson of the reaction expressed to him by members of the gay and lesbian community in relation to the Letter – that they were horrified and fearful (Return Volume II pages 108-109).

61. Letters to the editor of the *Red Deer Advocate* expressed responses to the Letter (Return Volume I, Exhibit 1(A) including:

- “this is perhaps the most vicious, misinformed letter ever written”; the Letter was “poisonous”; “It is one thing to denounce homosexuals; but quote another to hate them”: Grant Hoe, June 21, 2002;
- “Stephen’s letter is a clear illustration of why we have human rights legislation ...”: Phil Rauch, June 21, 2002;
- “This attitude definitely creates the climate for such acts of violence to occur”; “Even though this letter was not aimed at any individual, it certainly was abusive and slanderous to many people. Freedom of speech is one thing; this [is] something else again”: Frances Dietz, July 11, 2002
- “When hatred is spread, no matter what guise it takes, it is still hatred, and still has an effect on our community”: Candace Taylor, July 12, 2002
- “I am a believer in free speech, but I also understand the need for hate crime laws. Spouting mistruths against an identifiable minority is unacceptable and deserves to be punished by law”: Allan Reid, July 13, 2002

62. Most of the material in Exhibits 4 and 5 adduced by Mr. Boissoin at the Panel hearing does not refer to the Letter. Two of the letters to the editor in Exhibit 4 (Hazel McBride,

September 7, 2002, and Louise Stubert, July 17, 2002) defend free speech and do not refer to the nature of the Letter. The letter to the editor of Glen Gles, July 24, 2002, notes that some resort to homophobic rant or hate mongering.

63. The report of Barry Cooper does not address the issue of likelihood of exposure of homosexuals to hatred or contempt. First, Dr. Cooper was qualified as an expert in political science to give evidence on the Constitution and human rights law with respect to equality rights and freedom of expression, not in psychology or social psychology or communication (Return Volume II, pages 200-211). Secondly, Dr. Cooper's report fails to refer to statements in the Letter which were key in leading to the determination that the Letter contravened s. 3 of the *HRCMA*. This is reviewed in detail below.

**f. Conclusion regarding evidence**

64. In summary, and in response to paras. 14-19 of the Appellants' Brief, it is submitted that the Panel had before it evidence on which it could reasonably and correctly conclude that the Letter was likely to expose homosexuals to hatred or contempt.

65. The decision relied upon by the Appellants at para. 19 of their Brief has been superseded by the decision of the Alberta Court of Appeal in *Walsh*, recognizing some deference to a Human Rights Panel's findings of fact and credibility (*Walsh*, **Tab 4**, paras. 54-55). Deference is appropriate to the findings of the Panel leading to the conclusion that the Letter was likely to expose homosexuals to hatred or contempt.

**(C) Orders in the Remedy Decision are valid**

66. In response to para. 22 of the Appellants' Brief, Dr. Lund submits that the Panel's orders in paragraph 14 a, 14 e, and 14 f are valid. Dr. Lund does not object to the Panel's orders in paragraph 14 b, 14 c, and 14 d being severed and set aside (Return Volume I, TAB F, pages 5-6, para. 14 a-f).

- *Ross v. New Brunswick School District No. 15*<sup>27</sup> (“*Ross*”), **Tab 15**, paras. 112-113: components of an order may be severed

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<sup>27</sup> [1996] 1 S.C.R. 825, [1996] S.C.J. No. 40

67. **Paragraph 14 a:** Dr. Lund does not object to this order being set aside. Dr. Lund had made an offer to the Appellants agreeing that this order be set aside. In a letter from counsel dated November 26, 2008, Dr. Lund conceded that portions of the Panel's remedial order were beyond the Panel's jurisdiction and were likely unconstitutional. Dr. Lund offered to consent to an order quashing the tribunal's order and substituting a more narrowly drawn order that did not include this provision.

68. **Paragraph 14 b:** the language used by the Panel in this order corresponds to the language in s. 32(b)(ii) of the *HRCMA*. The Panel is authorized by the *HRCMA* to make such order. This is, in essence, a cease and desist order. Human rights tribunals in other cases have issued comparable orders. The Panel did not refer to “disparaging remarks” in this order. An order restraining the same or similar contravention in the future is constitutional on the same basis that the s. 3(1) of the *HRCMA* is constitutional (discussed below). A cease and desist order in relation to the same type of contravention serves an educational role. Further, such order is in accordance with judicial economy. It would be a waste of judicial and administrative resources, and would thwart the purposes of the legislation, if a Panel were limited to making an order in relation to the one instance of the contravention, with the effect that the respondent could repeat the conduct.

- G.R. Meurin, Q.C., and K.L. Fleming, “Human Rights Remedies,” in J.T. Casey, Q.C., ed., *Remedies in Labour, Employment and Human Rights Law*,<sup>28</sup> **Tab 16**, at 6.4(D)
- *Taylor*, Attorney General’s Authorities Tab 10, para. 53
- *McAleer*, CHRT Decision, **Tab 11**, pages 7-8 QL, ordering McAleer and Canadian Liberty Net to cease communicating the discriminatory message and matters of the type complained of
- *Bell*, CCLA Authorities Tab 9, para. 42: granting a permanent injunction to restrain Bill from selling or otherwise publishing the three stickers in issue
- *Papez*, **Tab 6**, para. 67

69. **Paragraphs 14 c and 14 d:** although there is authority that human rights tribunals may order an apology, Dr. Lund recognizes that an apology issued through an order is not a genuine apology and does not object to these orders being set aside. In counsel’s letter of November 26, 2008, Dr. Lund had offered to agree to set aside these orders.

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<sup>28</sup> (Toronto: Carswell, A Division of Thomson Reuters Canada Limited, looseleaf)

- Meurin and Fleming, in *Remedies in Labour, Employment and Human Rights Law*, **Tab 16**, at 6.4(B)

70. **Paragraph 14 e:** the Panel made a compensatory order for Dr. Lund to recognize two elements: (1) the time and energy he expended in relation to the complaint, and (b) that he had suffered ridicule and harassment as a result of his complaint. In relation to compensation for time and energy expended, this is authorized by s. 32(1)(b)(iv) of the *HRCMA*, which provides for compensation for expenses incurred, and by s. 32(2) of the *HRCMA*, which provides for an order as to costs that the Panel considers appropriate. In relation to compensation for the ridicule and harassment suffered by Dr. Lund as a result of his complaint, s. 10(1) of the *HRCMA* prohibits retaliation against a person because that person has made a complaint under the Act or participated in a proceeding under the Act. The Panel in essence found that there had been retaliation against Dr. Lund, and he therefore was dealt with contrary to the Act. Section 32(1)(b)(v) of the *HRCMA* provides that a Panel may take any other action it “considers appropriate to place the person dealt with contrary to this Act in the position the person would have been in but for the contravention of this Act.” The Panel’s compensatory order was therefore in accordance with the powers granted to it by the *HRCMA*.

- Remedy Decision, Return Volume I, TAB F, page 5, para. 13; TAB G, Exhibit 1, TABS L-M
- The *HRCMA* confers broad remedial jurisdiction: *Berry v. Farm Meats Canada Ltd.*<sup>29</sup> (“*Berry*”), **Tab 17**, paras. 15-16, and quoting from *Robichaud v. Canada (Treasury Board)*<sup>30</sup>
- *Walsh*, **Tab 4**, paras. 65, 80-81

71. **Paragraph 14 f:** the order for reimbursement for expenses of Ms. Dodd related to her testimony at the hearing is consistent with an order for costs relating to disbursements. It therefore fits within the ambit of s. 32(2) of the *HRCMA*, which provides that a Panel “may make any order as to costs that it considers appropriate.”

**(D) Neither s. 3(1) of the *HRCMA* nor the Panel Decision are in breach of the *Charter*.**

72. Dr. Lund submits that neither s. 3(1)(b) of the *HRCMA* nor the Panel Decision are in breach of the *Charter* in that:

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<sup>29</sup> 2000 ABQB 682, 274 A.R. 186, [2000] A.J. No. 1179

<sup>30</sup> [1987] 2 S.C.R. 84, 8 C.H.R.R. D/4326

(1) The statements in the Letter found by the Panel to be likely to expose homosexuals to hatred or contempt are not protected by s. 2(a) of the *Charter*.

(2) The limitation on freedom of expression through s. 3(1)(b) of the *HRCMA* and the Panel Decision are justified under s. 1 of the *Charter*. Similarly, if the Court determines that Mr. Boissoin's freedom of religion was infringed by either s. 3(1)(b) of the *HRCMA* or the Panel Decision, then such infringement is justified under s. 1 of the *Charter*.

**1. The statements in the Letter found likely to expose homosexuals to hatred or contempt are not protected by s. 2(a) of the *Charter*.**

73. The Supreme Court has held that not all conduct will be protected as freedom of religion. Iacobucci and Bastarache JJ., for the majority in *Trinity Western University v. British Columbia College of Teachers*<sup>31</sup> (“*Trinity Western*”), CCLA Authorities Tab 10, para. 29, held that where there is a potential conflict between constitutionally protected rights – in that case freedom of religion and equality rights based on sexual orientation – the potential conflict should be resolved through the proper delineation of the rights and values involved. In relation to freedom of religion, the majority differentiated between beliefs and conduct (paras. 36-37). Iacobucci and Bastarache JJ. wrote (para. 36):

Instead, the proper place to draw the line in cases like the one at bar is generally between belief and conduct. The freedom to hold beliefs is broader than the freedom to act on them.

74. In *Syndicat Northcrest v. Amselem*<sup>32</sup> (“*Amselem*”), CCLA Authorities Tab 7, paras. 38-46, Iacobucci J. for the majority reviewed the development of that Court's jurisprudence considering freedom of religion. Iacobucci J. quoted from *R. v. Big M Drug Mart Ltd.*, in which Dickson J. (as he then was) first defined what was meant by freedom of religion under s. 2(a) of the *Charter*. Dickson J. noted that freedom “must surely be founded in respect for the inherent dignity and the inviolable rights of the human person.” While Dickson J. explained freedom of religion as including the right to manifest religious belief by worship and practice or by teaching and dissemination, he articulated an important proviso (quoted at para. 41 in *Amselem*):

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<sup>31</sup> 2001 SCC 31, [2001] 1 S.C.R. 772, [2001] S.C.J. No. 32

<sup>32</sup> 2004 SCC 47, [2004] 2 S.C.R. 551

... 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.

75. As Iacobucci J. stated in *Amselem*, paras. 61-62:

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 [citations omitted]. This is so because we live in a society of individuals in which 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.

... our jurisprudence does not allow individuals to do absolutely anything in the name of that freedom. Even if individuals demonstrate that they sincerely believe in the religious essence of an action, for example, that a particular practice will subjectively engender a genuine connection with the divine or with the subject or object of their faith, and even if they successfully demonstrate non-trivial or non-insubstantial interference with that practice, they will still have to consider how the exercise of their right impacts upon the rights of others in the context of the competing rights of private individuals. Conduct which would potentially cause harm to or interference with the rights of others would not automatically be protected. The ultimate protection of any particular *Charter* right must be measured in relation to other rights and with a view to the underlying context in which the apparent conflict arises.

76. In *Multani*, **Tab 5**, paras. 24-31, Charron J. for the majority held that the preferable consideration of the limitation on freedom of religion was within a s. 1 analysis, but Charron J. had noted that the case did not involve a reconciliation of competing fundamental rights, in contrast with *Trinity Western* and *Amselem*. In *Ross*, **Tab 15**, paras. 72-75, a decision prior to the jurisprudence set out above, the Court considered that the balancing should occur within the s. 1 analysis.

77. In *Trinity Western*, the majority noted that students attending TWU were free to adopt personal rules of conduct based on their religious beliefs, provided they did not interfere with the rights of others (para. 36), and that if a teacher in the public school system engages in discriminatory conduct, that teacher could be subject to disciplinary proceedings (para. 37). It is submitted that in this case, Mr. Boissoin was free to hold the views he expressed in the Letter, but the statements found likely to expose homosexuals to hatred or contempt, sent as a letter to

the editor to a publication with widespread distribution in the region, constituted conduct interfering with the rights of others and are beyond the protection of freedom of religion.

78. If this Court concludes that freedom of religion encompasses the kinds of statements made in the Letter, then it is submitted that restriction of such statements through s. 3(1)(b) and the Panel Decision is justified under s. 1 of the *Charter*, discussed below.

## **2. Freedom of expression**

79. The Respondent Dr. Lund does not dispute that the content of the Letter comes within s. 2(b) of the *Charter*.

## **3. The limitation is justified under s. 1 of the *Charter***

80. It is submitted that the limitation on freedom of expression and on freedom of religion (if so found by the Court) is justified under s. 1 of the *Charter*. Protection of vulnerable groups from the harm inflicted by hate messages is an important objective for a democratic society that values dignity, equality and inclusion. The stringent interpretation given by Courts and tribunals to hatred/contempt language achieves a careful balance between the constitutional rights of equality, expression and religion.

81. From a review of the jurisprudence, the Respondent submits that every Court and tribunal that has considered a *Charter* challenge to provisions regulating hate propaganda, whether in human rights legislation or the *Criminal Code*, has determined the provisions to be justified and constitutional.

### ***Criminal Code***

- *Keegstra*, **Tab 3**

### ***Canadian Human Rights Act***

- *Taylor*, Attorney General's Authorities Tab 10
- *McAleer*, **Tab 11**, TD and FCA
- *Citron v. Zundel*, **Tab 12**
- *Schnell*, **Tab 10**

### ***Saskatchewan***

- *Owens*, Appellants' Authorities Tab 9, infringement of freedom of expression and freedom of religion justified

- *Bell*, CCLA Authorities Tab 9
- *Whatcott*, Attorney General’s Authorities Tab 8

### ***New Brunswick***

- *Ross*, **Tab 15**: an order of a Human Rights Board of Inquiry under the *New Brunswick Human Rights Act*

### ***British Columbia***

- *Kempling v. British Columbia College of Teachers*<sup>33</sup> (“*Kempling*”), **Tab 18**: order of the B.C. College of Teachers suspending Kempling’s teaching certificate for one month because of professional misconduct relating to an article and letters he wrote to a newspaper associating homosexuals with immorality, abnormality, perversion and promiscuity was demonstrably justified pursuant to s. 1 of the *Charter*
- *Canadian Jewish Congress v. North Shore Free Press Ltd. (c.o.b. North Shore News)*<sup>34</sup> (“*North Shore News*”), **Tab 19**

82. The Supreme Court has recently confirmed that a measure of leeway must be accorded to government in determining whether limits on rights in the regulation of social interactions are justified under s. 1 of the *Charter*: *Alberta v. Hutterian Brethren of Wilson Colony*<sup>35</sup> (“*Wilson Colony*”), **Tab 20**, paras. 35, 37, per McLachlin C.J.:

... The primary responsibility for making the difficult choices involved in public governance falls on the elected legislature and those it appoints to carry out its policies. Some of these choices may trench on constitutional rights.

... Section 1 of the *Charter* does not demand that the limit on the right be perfectly calibrated, judged in hindsight, but only that it be “reasonable” and “demonstrably justified”. Where a complex regulatory response to a social problem is challenged, courts will generally take a more deferential posture throughout the s. 1 analysis than they will when the impugned measure is a penal statute directly threatening the liberty of the accused.

83. Section 3 of the *HRCMA* is a regulatory response to a social problem. Hate propaganda has unfortunately been part of the Canadian landscape for decades. The Cohen Committee Report, referred to in *Taylor*, described the problem in the 1960s. The persistence of the problem is reflected in the decisions of human rights tribunals and Courts over the years, including *Aryan Nations*. Through the jurisprudence from tribunals and the Supreme Court, and

<sup>33</sup> 2005 BCCA 327, 255 D.L.R. (4<sup>th</sup>) 169, [2005] B.C.J. No. 1288, leave to appeal to S.C.C. refused [2005] S.C.C.A. No. 381

<sup>34</sup> [1997] B.C.H.R.T.D. No. 23 (Iyer)

<sup>35</sup> 2009 SCC 37, [2009] S.C.J. No. 37

as reflected in the opinion of Justice Rooke, a careful balance has been set out so that only extreme forms of communication are brought within the ambit of provisions like s. 3(1)(b) of the *HRCMA*. As noted in *Keegstra* and *Taylor*, regulation of hate speech through human rights legislation is an appropriate method for government to prevent discrimination and promote equality and dignity – better, because of its educational and preventive role, than the criminal law. A degree of deference is therefore appropriate in this case.

84. The balancing between competing constitutional rights is recognized within the analysis under s. 1 of the *Charter*, as described in *Multani*, **Tab 5**, para. 30, *Taylor*, CCLA Authorities Tab 10, para. 36, and *Keegstra*, **Tab 3**, para. 40. As noted in *Taylor*, consideration of equality rights and the constitutional protection of multiculturalism (s. 15 and s. 27 of the *Charter*), must also be given full recognition.

85. In response to paras. 25-27 of the CCLA Brief and para. 27(c) of the Appellants’ Brief, *Taylor* continues to be a governing decision. The publication of the Letter in the *Red Deer Advocate* made it extensively available to the public, comparable to the repeated telephonic communication in *Taylor*. The reference to “publish, issue or display or cause to be published, issued or displayed before the public” in s. 3(1) of the *HRMCA* indicates that the concern of the legislation is with dissemination wider than a private communication between two individuals. In *Citron v. Zundel*, **Tab 12**, the Tribunal considered the constitutionality of s. 13(1) post-*Taylor* in the new context of the Internet (paras. 230-242). The Tribunal noted (para. 240) that dissemination of hate messages through the Internet was comparable to dissemination by “repeated” telephonic messages.

86. In response to paras. 7(D) and 27(d) of the Appellants’ Brief, the provisions of the *HRCMA* are in fact similar to s. 13 of the *Canadian Human Rights Act* in that, under both, there is no potential penalty unless the individual is found to be in contempt of court – after the tribunal cease and desist order has been entered with the Court and the individual has intentionally continued the conduct (*Taylor*, Attorney General’s Authorities Tab 10, paras. 71-72, 108, Appellants’ Authorities Tab 6, page 41; *HRCMA* s. 32(1)(b)(i) and (ii), s. 36).

**a. The analytical framework**

87. Section 1 of the *Charter* states:

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.

88. The analysis to be applied to determine whether a limit on a right or freedom can be justified under s. 1 of the *Charter* was set out in *R. v. Oakes*,<sup>36</sup> and was applied by the Supreme Court in *Keegstra*, *Taylor*, and recently in *Greater Vancouver Transportation Authority v. Canadian Federation of Students – British Columbia Component*,<sup>37</sup> (“*Greater Vancouver Transportation Authority*”) **Tab 21**, and *Wilson Colony*, **Tab 20**.

**b. Prescribed by law**

89. Before a proportionality analysis takes place, the court must satisfy itself that the measure is “prescribed by law”: *Wilson Colony*, para. 39. Here, what is at issue is s. 3(1)(b) of the *HRCMA*, clearly a measure “prescribed by law.”

**c. Justification in a free and democratic society**

90. The criteria from *R. v. Oakes* to establish that a limitation is reasonable and demonstrably justified in a free and democratic society are summarized in the Brief of the Attorney General (para. 39).

**(1) The purpose of s. 3(1)(b) of the HRCMA is a pressing and substantial objective**

91. The Respondent Dr. Lund agrees with and adopts the submissions of the Attorney General of Alberta in paras. 40-43 of the Attorney General’s Brief and makes the following additional submissions.

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<sup>36</sup> [1986] 1 S.C.R. 103

<sup>37</sup> 2009 SCC 31, [2009] S.C.J. No. 31

**i. The harm recognized in the jurisprudence, literature, and evidence**

92. The history of discrimination based on sexual orientation, and the vulnerability of homosexual persons, was described by Cory J. in *Egan v. Canada*,<sup>38</sup> **Tab 22**, para. 173 (and referred to in *Vriend*, **Tab 8**, para. 84):

The historic disadvantage suffered by homosexual persons has been widely recognized and documented. Public harassment and verbal abuse of homosexual individuals is not uncommon. Homosexual women and men have been the victims of crimes of violence directed at them specifically because of their sexual orientation: Equality For All: Report of the Parliamentary Committee on Equality Rights (1985), at p. 26; Cynthia Petersen, "A Queer Response to Bashing: Legislating Against Hate" (1991), 16 Queen's L.J. 237; Nova Scotia Public Interest Research Group, "Proud but Cautious": Homophobic Abuse and Discrimination in Nova Scotia (1994); Bill C-41 (1994). They have been discriminated against in their employment and their access to services. They have been excluded from some aspects of public life solely because of their sexual orientation: Equality For All, supra, at pp. 30-32; *Douglas v. Canada* (1992), 58 F.T.R. 147. The stigmatization of homosexual persons and the hatred which some members of the public have expressed towards them has forced many homosexuals to conceal their orientation. This imposes its own associated costs in the work place, the community and in private life.

93. In *Keegstra* and *Taylor*, the Supreme Court majority described the main harms sought to be prevented by legislation addressing hate speech. In *Keegstra*, Dickson C.J. described the harm to the target group (**Tab 3**, para. 61):

In my opinion, a response of humiliation and degradation from an individual targeted by hate propaganda is to be expected. A person's sense of human dignity and belonging to the community at large is closely linked to the concern and respect accorded the groups to which he or she belongs (see I. Berlin, "Two Concepts of Liberty", in *Four Essays on Liberty* (1969), 118, at p. 155). The derision, hostility and abuse encouraged by hate propaganda therefore have a severely negative impact on the individual's sense of self-worth and acceptance. This impact may cause target group members to take drastic measures in reaction, perhaps avoiding activities which bring them into contact with non-group members or adopting attitudes and postures directed towards blending in with the majority. Such consequences bear heavily in a nation that prides itself on tolerance and the fostering of human dignity through, among other things, respect for the many racial, religious and cultural groups in our society.

94. A second harmful effect of hate propaganda is on society at large, as described by Dickson C.J. in *Keegstra*. The active dissemination of hate propaganda can create serious discord between various cultural groups (para. 62), and there is the possibility that prejudiced

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<sup>38</sup> [1995] 2 S.C.R. 513, [1995] S.C.J. No. 43

messages will gain credence, with the attendant result of discrimination and perhaps even violence against minority groups in Canadian society (para. 63).

95. In *Taylor*, Dickson C.J. noted similar concerns and objectives (para. 40):

Parliament's concern that the dissemination of hate propaganda is antithetical to the general aim of the Canadian Human Rights Act is not misplaced. The serious harm caused by messages of hatred was identified by the Special Committee on Hate Propaganda in Canada, commonly known as the Cohen Committee, in 1966. The Cohen Committee noted that individuals subjected to racial or religious hatred may suffer substantial psychological distress, the damaging consequences including a loss of self-esteem, feelings of anger and outrage and strong pressure to renounce cultural differences that mark them as distinct. This intensely painful reaction undoubtedly detracts from an individual's ability to, in the words of s. 2 of the Act, "make for himself or herself the life that he or she is able and wishes to have". As well, the Committee observed that hate 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 and facilities, and even incidents of violence.

96. After the release of the Cohen Committee Report, numerous other study groups echoed the conclusion that hate propaganda presents a serious threat to society, Dickson C.J. noted in *Taylor* (para. 41).

97. One of the main target groups for hate messages in Canada has been gay men and lesbians. The effect of such messages is described in the academic literature. As stated by Professor Banks:

...The idea communicated by such speech is that we are deserving of contempt and unworthy of respect, and that we have no rightful place in society. The purpose of hate speech is to foster ill will and hostility in society. It also serves to create, reinforce and perpetuate odious stereotypes of gays and lesbians as persons to be feared and loathed who are somehow responsible for many of the world's woes and thus legitimate targets of animosity. Those who are the targets of such speech suffer a deep sense of exclusion and loss of dignity on both an individual and group level because of the message that they are social outcasts or inferior citizens.

– N.K.S. Banks, "Could Mom be Wrong? The Hurt of Names and Words: Hate Propaganda and Freedom of Expression,"<sup>39</sup> **Tab 23**, para. 30

– E. Faulkner, "Homophobic Hate Propaganda in Canada," **Tab 9**. As noted by Dr. Faulkner, quoting from a 1992 report (page 81), "anti-gay verbal abuse constitutes a

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<sup>39</sup> (1999), 6 MurUEJL No. 2, <http://www.murdoch.edu.au/elaw/issues/v6n2/banks62nf.html>

symbolic form of violence and a routine reminder of the ever-present threat of physical assault’ and reminds sexual minorities of their outsider and minority status.”

98. As summarized above, the evidence of Dr. Alderson and Mr. Jones in this case is that homosexuals are the main target group for hate speech and hate incidents, and hate messages have a harmful effect on the target group and society at large.

**ii. The Alberta Government’s objective of furthering equality and dignity**

99. The Alberta Government’s objective in furthering equality and dignity through the *HRCMA*, including what is now s. 3, is set out in the legislation itself and in documents leading up to inclusion of s. 3(1)(b) in the *HRCMA*.

100. The purpose of the *HRCMA* (then titled the *Individual’s Rights Protection Act*) was discussed by Cory J. for the majority in *Vriend*. Alberta’s human rights legislation “is a broad, comprehensive scheme for the protection of individuals from discrimination in the private sector,” the majority stated. “The commendable goal of the legislation, then, is to affirm and give effect to the principle that *all* persons are equal in dignity and rights. It prohibits discrimination in a number of areas and with respect to an increasingly expansive list of grounds.”

– *Vriend*, **Tab 8**, paras. 94-95

101. The prohibition of publications likely to expose a person or a class of persons to hatred or contempt was included in Alberta’s human rights legislation in 1996.<sup>40</sup> In June 1994, the Alberta Human Rights Review Panel conducted a comprehensive review of Alberta’s human rights legislation, and in relation to what is now s. 3 (then s. 2 of the *Individual’s Rights Protection Act*), recommended:

In considering the area of signs, notices, and other forms of communication more generally recognized by the term “hate literature”, the Review Panel confirmed a commitment to prohibiting the spread of hatred through public media. Many submissions to the Review indicated that Section 2 of the Act is not broad enough and that other media have been used to spread hatred against particular groups.

The Review Panel recommends that:

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<sup>40</sup> S.A. 1996, c. 25, s. 5

- *the IRPA should be amended to include other public media of communication and that subsection 2(2) be kept as a safeguard of free expression.*

– Alberta Human Rights Commission, *Equal in dignity and rights: A Review of Human Rights in Alberta by the Alberta Human Rights Review Panel*,<sup>41</sup> **Appendix Tab 3**, page 68

102. The Government’s response to the recommendations of the Alberta Human Rights Review Panel, issued in December 1995, accepted that recommendation, stating: “This recommendation broadens the present discrimination protection in the notices provision to include all forms of media.” In the introduction to the Government response, the then Minister of Community Development, responsible for human rights, Gary G. Mar, stated:

Protecting human rights and promoting fairness and access is one of my fundamental beliefs. ...

High quality of life and fair opportunity for *all* Albertans, backed up by core services: that is our commitment to human rights. That is our promise.

...

The Alberta Human Rights Commission provides core services that support this legislation. It works to reduce discrimination and foster equality for all Albertans. ...

Over the years, our commitment has not changed. But times have changed, and so must the way we work to protect human rights in Alberta.

... By preserving the rights and dignity of each citizen, every person in Alberta can fulfil her or his potential. ...

– Alberta Community Development, *Our Commitment to Human Rights: The Government’s Response to the Alberta Human Rights Review Panel*,<sup>42</sup> **Appendix Tab 4**, pages 3-4, 19

103. The Minister made a similar statement in introducing Bill 24, the *Individual’s Rights Protection Amendment Act, 1996* in the Alberta Legislature on March 27, 1996.<sup>43</sup> On moving second reading of Bill 24, the Minister stated:<sup>44</sup>

Martin Luther King Jr. once said: we must learn to live together as brothers or perish together as fools. We’ve stood in this House and commemorated International Human Rights Day, the International Day for the Elimination of Racial Discrimination, Black History Month, Women’s History Month, Persons’ Day, Heritage Day, and many more

<sup>41</sup> (Edmonton: June 1994)

<sup>42</sup> (Edmonton: December 1995)

<sup>43</sup> Alberta Hansard, March 27, 1996, page 857, **Appendix Tab 5**

<sup>44</sup> Alberta Hansard, April 18, 1996, pages 1229-1230, **Appendix Tab 6**

designated days and weeks and months that remind us of the rich diversity of this society and the value that we place upon human rights and human dignity.

Every act of discrimination is a threat. For the victims it is a threat to their dignity and self-esteem. For the perpetrators it is a threat to their respect for human life, to part of their humanity, and to all of us. There are two components to eliminating discrimination: legal protection and education. Today we discuss Bill 24, a Bill designed to strengthen the legal protection and encourage that continued commitment to education. ...

104. The continued relevance of s. 3 as a protection within the grouping of anti-discrimination protections is shown by the steady (although not numerous) complaints and decisions under this section. Not all of the decisions have found contravention of the legislation, showing that decision-makers have been sensitive to the interpretation of the section that takes freedom of expression into account.

– *Aryan Nations*, **Tab 13**; *Re Kane*, **Tab 2**; *Papez*, **Tab 6**; *Johnson*, **Tab 7**

105. In response to para. 20 of the Appellants' Brief, there are flaws in each of the assertions of Professor Moon. The argument that we should have faith in human reason is belied by history. Specifically in the area of hate speech, it has been and continues to be a reality and has manifested repeatedly as an incitement to genocide (the Holocaust, Rwanda, etc.). The argument that because discriminatory views are so widely held, they cannot be eradicated by censorship applies just as much to human rights legislation as a whole. Discriminatory conduct occurs widely, but this is all the more reason to affirm the necessity of the remedial and educational role of human rights legislation.

106. The position of the Sheldon Chumir Foundation (Appellants' Brief para. 31) does not address the jurisprudence that has established narrow and detailed parameters such that only extreme speech is caught by s. 3(1)(b) of the HRCMA. Nor does the Foundation consider the harm effected by hate speech, and in particular the link between hate speech and discrimination (discussed further below). Limiting the scope of s. 3 to circumstances such as a sign saying "No Natives" in a restaurant window makes s. 3 redundant. Such conduct would already be caught by s. 4 (goods, services, accommodation, facilities).

### iii. Balancing *Charter* rights

107. The *Charter* rights that must be taken into account in considering the objective of s. 3 include sections 15, 27, and 28 (Appellants' Authorities Tab 4):

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.

...

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

28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

108. The importance of equality rights was addressed by Cory J. for the majority in *Vriend*, **Tab 8**, paras. 67-69. Cory J. described the equality rights protected by s. 15(1) as reflecting “the fondest dreams, the highest hopes and finest aspirations of Canadian society.” Section 15 recognizes the innate dignity and worth of every individual regardless of the characteristics of the person. Justice Cory noted that it is easier to say that everyone who is just like “us” is entitled to equality than to recognize that those who are “different” should have the same equality rights. “Yet so soon as we say any enumerated or analogous group is less deserving or unworthy of equal protection and benefit of the law all minorities and all of Canadian society are demeaned,” Cory J. said.

109. The Supreme Court has been sensitive to the balance to be respected in relation to equality rights and other rights protected in the *Charter*.

- *Taylor*, Attorney General's Authorities Tab 10, para. 36
- *Keegstra*, **Tab 3**, paras. 74-79

110. In response to the submissions of the CCLA regarding the importance of news media (CCLA Brief paras. 11-14), it is submitted that the location of the expression does not exempt it from review as to whether it is likely to expose to hatred or contempt. As noted by Justice Rooke in *Re Kane* (para. 95), in the past media have played a role in reinforcing attitudes of discrimination. See also: *Kempling*, **Tab 18**, which involved letters to the editor. The CCLA

refers to the dissent in *Cherneskey v. Armadale Publishers Ltd.*,<sup>45</sup> but the majority upheld the judgment at trial that the letter to the editor was defamatory. The majority agreed that a newspaper has the freedom to publish letters expressing views with which it disagrees – but the newspaper cannot publish a *libellous* letter and then disclaim responsibility (CCLA Authorities Tab 3, para. 55).

111. Both s. 3(1)(b) of the *HRCMA* and the Panel Decision further the fundamental right to equality enshrined in the *Charter*. This case involves a balancing of this important right along with consideration of the freedom of expression and freedom of religion.

#### iv. Other Canadian jurisdictions

112. Other jurisdictions in Canada have passed legislation addressing publications indicating discrimination or that are likely to expose a protected group to hatred or contempt, **Appendix Tab 7**. As noted above, several of these statutes have been found to respond to pressing and substantial objectives, and to be constitutional.

- *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, s. 12, s. 13
- *Human Rights Code*, R.S.B.C. 1996, c. 210, s. 7
- *The Saskatchewan Human Rights Code*, S.S. 1979, C. S-24.1, s. 14
- *The Human Rights Code*, C.C.S.M., c. H175, s. 18
- *Human Rights Code*, R.S.O. 1990, c. H.19, s. 13
- *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12, s. 11
- *Human Rights Act*, R.S.N.B. 1973, c. H-11, the Preamble and s. 6
- *Human Rights Act*, R.S.P.E.I. 1988, c. H-12, s. 12, s. 14
- *Human Rights Act*, R.S.N.S. 1989, c. 214, s. 7
- *Human Rights Code*, R.S.N.L. 1990, c. H-14, s. 14
- *Human Rights Act*, S.N.W.T. 2002, c. 18, s. 13
- *Human Rights Act*, S. Nu. 2003, c. 12, as am., Preamble, s. 14
- *Criminal Code*, R.S.C. 1985, c. C-46:
  - s. 318: advocating genocide
  - s. 319: public incitement of hatred
  - See also: ss. 297-317: defamatory libel; held constitutional in *R. v. Lucas*<sup>46</sup>

<sup>45</sup> [1979] 1 S.C.R. 1067, 1978 CarswellSask 103

<sup>46</sup> [1998] 1 S.C.R. 439

**v. International conventions give heightened importance to the objective of prohibiting hate propaganda**

113. The Supreme Court in *Taylor*, Attorney General's Authorities Tab 10, paras. 36, 42-45, noted that a meaningful consideration of the principles central to a free and democratic society requires reference to the international community's acceptance of the need to protect minority groups from intolerance and discrimination. Dickson C.J. considered that the international human rights instruments to which Canada is a party gives heightened importance attached to the objective. See also: *Keegstra*, **Tab 3**, paras. 65-73.

114. A number of international conventions in which Canada has participated recognize limits to freedom of expression in the protection of vulnerable groups (summary at **Appendix Tab 8**; see also Canadian Human Rights Commission, Special Report to Parliament 2009, **Tab 1**, pages 9-10).

115. In *Taylor*, Attorney General's Authorities Tab 10, para. 44, Dickson C.J. noted that Mr. Taylor had made a complaint to the United Nations Human Rights Committee alleging a violation of the freedom of expression guaranteed by the *International Covenant on Civil and Political Rights*<sup>47</sup> ("ICCPR"). The complaint was rejected on the grounds that the opinions he sought to disseminate constituted advocacy of racial or religious hatred, which Canada had an obligation under Art. 20(2) of the ICCPR to prohibit.

116. Chief Justice Dickson also noted in *Taylor* (para. 43) that the jurisprudence of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*<sup>48</sup> ("ECHR") helps demonstrate that the commitment of the international community to eradicate discrimination extends to the prohibition of the dissemination of ideas based on racial or religious superiority. Extracts of provisions of the ECHR are at **Appendix Tab 9**.

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<sup>47</sup> 999 U.N.T.S. 171 (1966, entered into force 23 March 1976, accession by Canada 19 May 1976

<sup>48</sup> 213 U.N.T.S. 222 (1950)

117. Chief Justice Dickson referred to decisions of the European Court of Human Rights (“ECtHR”) (*Taylor*, para. 43). In further decisions, the ECtHR has held that extreme speech either falls outside the ECHR altogether or that restrictions on it are justifiable. Examples are:

- *X v. FRG*, Appl. No. 9235/81: restrictions on Holocaust denial were justified as protecting the rights of others.
- *Otto Preminger Institut v. Austria*, (1994) 19 EHRR 34: the Court upheld seizure and forfeiture of a film portraying the founding figures of Christianity and some other religions in a deeply offensive manner.
- *Norwood v. UK* (2004) 40 EHRR SE 111: Norwood displayed a sign in his shop window stating “Islam out of Britain—Protect British People” and a symbol of the crescent and star with a prohibition sign. He was prosecuted under the U.K. *Public Order Act 1986*. The ECtHR found there was no breach of the Art. 10 free speech provision. The Court held there was a legitimate interest in protecting religious groups from this type of hate speech and in promoting the ECHR values of tolerance, social peace and non-discrimination.

#### vi. Other jurisdictions

118. The discussion in the Appellants’ Brief relating to other jurisdictions is incomplete (Appellants’ Brief paras. 37-50).

##### ➤ United Kingdom

119. While there may have been significant debate about the Racial and Religious Hatred Bill (Appellants’ Brief paras. 37-39), the *Racial and Religious Hatred Act 2006* was ultimately passed. The offence of incitement to racial hatred is addressed in Part III of the *Public Order Act 1986*,<sup>49</sup> **Appendix Tab 10**. The *Racial and Religious Hatred Act 2006* extended that protection to include religious grounds. Inclusion of protections of both groups from incitement to hatred shows that limits on expression in certain contexts are justifiable in a free and democratic society.

120. Further, in October 2007, the U.K. Government introduced provisions to create an offence of incitement to homophobic hatred. Under s. 74 and Schedule 16 of the *Criminal Justice and Immigration Act 2008*,<sup>50</sup> **Appendix Tab 11**, the *Public Order Act 1986* provisions on hatred against persons on religious grounds were amended to add hatred on the grounds of sexual orientation. Section 14 of Schedule 16 clarifies that, for avoidance of doubt, the discussion or

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<sup>49</sup> (U.K.), 1986, c. 64

<sup>50</sup> (U.K.), 2008, c. 4

criticism of sexual conduct or practices or the urging of person to refrain form such conduct would not be taken of itself to be threatening or intended to stir up hatred.

➤ **Sweden**

121. As noted in the *Åke Green* case (Appellants' Authorities TAB 25, page 4), Sweden amended its Penal Code in 2003 to include agitation against homosexuals as a group. As noted by the Court (pages 4-5):

The preparatory work to the amendment stated that homosexuals are a vulnerable group in society, that homosexuals are often exposed to crime due to their sexual orientation and that national socialist and other groups with racial ideology as part of their propaganda, interwoven with racist and anti-Semitic agitation in other respects, agitate against homosexuals and homosexuality ....

122. The segment of the decision quoted in the Appellants' Brief para. 43 appears to be a summary of discussion prior to the amendment introduced in 2003 rather than the Court's interpretation, which appears to commence on page 7. In any event, the statements are similar to the concerns expressed in *Keegstra* and *Taylor*, that the type of speech addressed by the *Criminal Code* or human rights legislation is of an extreme nature. It is to be noted that the discussion includes that a claim of freedom of opinion and the right to criticise does not insulate statements that express contempt.

123. The Swedish Supreme Court found that the Mr. Green's statements expressed contempt for homosexuals as a group (page 7). The Court rejected Mr. Green's argument that his statements were not directed at homosexuals as a group but that they were directed at the behaviour that the Bible, in his opinion, described as a sin. But the Court's ultimate conclusion dismissing the charge against Mr. Green was influenced by the fact that the statements were made in a sermon in a religious setting. The Court noted the ECtHR's application of Article 9 in the context of a sermon situation (pages 11-12) and the ECtHR's consideration of the venue or context of the expression in other cases, such as *Yasar v. Turkey*, involving two individuals who had expressed themselves as politicians at party congresses (page 14). The Swedish Supreme Court concluded (page 15): "... since the statement, seen in the light of what he said in connection with his sermon, is not of such a nature as can be regarded as promoting or justifying hatred of homosexuals" (emphasis added).

124. It is submitted that Sweden’s legislation and jurisprudence support the view that limitation on expression, including religious expression, may be justified in a free and democratic society. The outcome of the *Åke Green* case turned on its facts.

➤ **United States**

125. The United States approach to protection of expression that promotes hatred stands in contrast to the law of many other democracies. It must be noted, however, that United States jurisprudence accepts the limitation on some speech, including in the commercial context, employment context, “fighting words,” child pornography, true threats.<sup>51</sup> While there are advocates of complete primacy to freedom of expression, as referred to in the Appellants’ Brief, there are other perspectives.<sup>52</sup>

126. More importantly, Canadian constitutional analysis differs from First Amendment jurisprudence from the United States, as concluded by Dickson C.J. in *Keegstra*, **Tab 3**, paras. 48-57. The special role given equality and multiculturalism in the Canadian Constitution necessitates a departure from the view that the suppression of hate propaganda is incompatible with the freedom of expression. See also: P.W. Hogg, *Constitutional Law of Canada*, 5<sup>th</sup> ed. Supplemented,<sup>53</sup> **Tab 28**, at 36.9(b).

127. The argument that society should have faith in the “marketplace of ideas” (Appellants’ Brief paras. 50, 79; CCLA Brief para. 29) is unpersuasive in the context of hate propaganda. First, there is no truly free marketplace of ideas when there is unequal access to forums of speech.<sup>54</sup> As noted in *Aryan Nations*, **Tab 13**, para. 230, discriminatory speech affects the target group by discouraging their freedom of expression. Further, such model has intrinsic

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<sup>51</sup> J. Weinstein, “An Overview of American Free Speech Doctrine and its Application to Extreme Speech,” in I. Hare and J. Weinstein, *Extreme Speech and Democracy* (Oxford: Oxford University Press, 2009, 81-91, at 82, **Tab 24**

<sup>52</sup> Examples include: M. J. Matsuda, “Outsider Jurisprudence: Toward a Victim’s Analysis of Hate Messages,” in M.H. Freedman and E.M. Freedman, eds., *Group Defamation and Freedom of Speech* (Westport, Conn.: Greenwood Press, 1995), 88-120, **Tab 25**; K. Lasson, “To Stimulate, Provoke, or Incite?: Hate Speech and the First Amendment,” in Freedman and Freedman, *Group Defamation and Freedom of Speech*, 267-306, **Tab 26**; S.J. Heyman, “Hate Speech, Public Discourse, and the First Amendment,” in I. Hare and J. Weinstein, *Extreme Speech and Democracy* (Oxford: Oxford University Press, 2009, 158-181, **Tab 27**

<sup>53</sup> (Scarborough: Thomson Carswell, looseleaf)

<sup>54</sup> E. Faulkner, “Homophobic Hate Propaganda in Canada,” page 65, **Tab 9**

flaws. Participants in the marketplace are likely to “buy” those ideas that accord with their own interests – and this does not necessarily result in truth.<sup>55</sup> The ideas that “triumph” in the marketplace may well conflict with the most basic interests of some members of society. As stated by Prof. S. J. Heyman:<sup>56</sup>

... To take an extreme example, consider the idea that genocide should be committed against a relatively small and powerless group within the society. Nothing in the marketplace model precludes the possibility that this idea could prevail if a majority of citizens found that it accorded with their interests and beliefs. Plainly, however, this idea would merely represent the subjective views of the majority, not a truth that in principle could be accepted by all reasonable persons within the society, including members of the target group itself. ...

The current economic crisis shows that an unregulated marketplace can go awry. The stability and economic health of Canadian banks compared with counterparts in the U.S. is significantly attributable to more responsible regulation in Canada.

➤ **Australia**

128. There are anti-vilification laws in every State, the Australian Capital Territory and federally,

– *Anti-Discrimination Act 1977* (NSW), ss. 20B-20D, 38R-38T, 49ZS-49ZTA, 49 ZSA-49ZXC; *Anti-Discrimination Act 1991* (Qld), ss. 124A, 131A; *Racial Vilification Act 1996* (SA); *Anti-Discrimination Act 1998* (Tas), ss. 17(1), 19; *Racial and Religious Tolerance Act 2001* (Vic); *Criminal Code* (WA), ss. 76-80H; *Discrimination Act* (ACT), ss. 65-67; *Racial Discrimination Act 1975* (Cth), ss. 18B-18F (all at **Appendix Tab 12**)

**vii. Summary on pressing and substantial objective**

129. Because of the profound effect on vulnerable groups and on society as a whole of discriminatory communications that are likely to expose to hatred or contempt, and because such communications continue to exist, there is a pressing and substantial objective for human rights legislation that seeks to prevent and remedy such communications.

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<sup>55</sup> S.J. Heyman, *Free Speech and Human Dignity* (New Haven: Yale University Press, 2008), pages 173-174, **Tab**

**29**

<sup>56</sup> *Ibid.*

**(2) Rational connection**

130. The Respondent Dr. Lund agrees with and adopts the submissions of the Attorney General on this point (Brief of the Attorney General, paras. 45-50). And as noted by the Tribunal in *North Shore News*, **Tab 19**, para. 181, the majority judgments in *Keegstra* and *Taylor* support the conclusion that s. 3 of the *HRCMA* is rationally connected to the legislative objective of preventing and remediating discriminatory actions and the hate propaganda that fosters discrimination.

131. In response to paras. 29-30 of the CCLA Brief, the jurisprudence, the academic analysis and the evidence in this case describe the connection between hate propaganda and the prevalence of discrimination, as reviewed below in relation to division of powers. There is a rational connection between prevention or remediation in relation to communications likely to expose protected groups to hatred or contempt and the overarching objective of the *HRCMA* of preventing discrimination and enhancing equality and dignity.

**(3) Minimal impairment**

132. The Respondent Dr. Lund agrees with and adopts the submission at paras. 51-59 of the Attorney General's Brief and adds the following.

133. As set out by the Attorney General (para. 57), in *Keegstra*, both Dickson C.J. for the majority and McLachlin J. (as she then was) in dissent concurred that human rights legislation was the preferable way to address the problem of hate propagation (*Keegstra*, **Tab 3**, paras. 131, 324-327). This was also noted by the B.C. Tribunal in *North Shore News*, **Tab 19**, paras. 198-199 in analyzing the minimal impairment branch of the proportionality analysis.

134. In response to para. 30 of the CCLA Brief, the stringent interpretation given to "hatred," "contempt," and "likely to expose" ensures that only the extreme forms of speech are caught by the prohibition. The range of decisions in which human rights tribunals have dismissed complaints under this section or equivalent sections shows that provisions are being interpreted and applied carefully, mindful of the constitutional protection of expression.

– *Johnson*, **Tab 7**

– *North Shore News*, **Tab 19**, para. 265-270

135. The CCLA does not cite any human rights decisions which in its view captured speech which had merit or was true. The sincerity or reasonableness of belief of the person issuing the communication is not the governing issue in the human rights law – it is the effect on the protected group which is of concern. In *Taylor*, Dickson C.J. dealt with the absence of intent, concluding (Attorney General’s Authorities Tab 10, paras. 68-70) that the important Parliamentary objective behind the federal section could only be achieved by ignoring intent, and therefore the minimal impairment element of the *Oakes* test was not transgressed.

136. In response to paras. 33-34 of the Appellants’ Brief, the decision in *Johnson*, **Tab 7** and the dismissals of complaints relating to the Danish cartoons by both the Canadian Tribunal and the B.C. Tribunal show that there is serious doubt that a complaint against the movie “Bruno” would succeed.

#### **(4) Proportionate effect**

137. The third branch of the proportionality test involves a weighing of the importance of the objective of the legislation at issue against the effect of the limit on the *Charter* right. Dickson C.J. in *Taylor* held that the section in the federal legislation furthered a government objective of great significance and impinged upon the type of expression exhibiting only tenuous links with the rationale underlying the freedom of expression guarantee (Attorney General’s Authorities Tab 10, para. 83). Both in *Taylor* (para. 49) and in *Keegstra* (paras. 86-94), Dickson C.J. had concluded that hate propaganda is of limited importance when measured against free expression values.

138. Similarly, in *Kempling*, **Tab 18**, paras. 75-80, the B.C. Court of Appeal was of the view that the nature of some of Mr. Kempling’s writings fell outside of the core values underlying s. 2(b). The Court considered that in a portion of his writings, Mr. Kempling engaged in a rational debate of political and social issues – and that such writing was near the core of s. 2(b) expression. But other portions clearly crossed the line into discriminatory rhetoric. The Court stated (para. 77):

In a number of Mr. Kempling's published writings he relied upon stereotypical notions of homosexuality, and he expressed a willingness to judge individuals on the basis of these notions. In doing so, he ignored the inherent dignity of the individual; this concept is essential to a functioning democracy, and, in my view, political discourse which ignores it is not representative of the core values underlying s. 2(b). Accordingly, Mr. Kempling's published writings, taken as a whole, are not deserving of a high level of constitutional protection.

139. Expression likely to expose vulnerable groups to hatred or contempt is therefore not part of "core" expressive activity, as argued in the CCLA Brief, para. 10. Similarly, LaForest J., writing for the Court in *Ross* said that religious beliefs that deny respect for the dignity and equality of others erodes the very basis of the guarantee in s. 2(a) (**Tab 15**, para. 94; see also *Citron v. Zundel*, **Tab 12**, paras. 266-267).

140. In *North Shore News*, the Tribunal concluded that the salutary effects of suppressing hateful expression and promoting a social climate free of discrimination outweighed the deleterious effects in respect of expression caught by the section (**Tab 19**, para. 257). In relation to expression close to the line, although some of that expression might be chilled, the salutary effects of the provision still outweighed the deleterious effects on freedom of expression (para. 258). The Tribunal noted that given the narrowness of the application of the section, its effect is not to prohibit certain messages entirely, but rather to require authors of communications that might be close to the line to think very carefully about how they say what they wish to say.

141. Upholding s. 3(1)(b) of the *HRCMA* gives effect to equality rights protected under the *Charter*, with only limited effect on freedom of expression – since critical speech, even offensive speech is not prohibited. But removing the protection of s. 3(1)(b) of the *HRCMA* obliterates equality rights in favour of expression.

142. In *Aryan Nations*, **Tab 13**, para. 367, the Board of Inquiry concluded that there was no basis to come to a conclusion different from *Taylor* and *Keegstra*. The Board of Inquiry held that the predecessor legislation to the *HRCMA* did not represent an unacceptable abridgment of expression. It is submitted that the same conclusion is appropriate for s. 3(1)(b) of the current

*HRCMA*. This Court has before it evidence and jurisprudence establishing that s. 3(1)(b) of the *HRCMA* is justified under s. 1 of the *Charter*.

**(E) The Panel could not have adjudicated the constitutionality of s. 3 under the *Charter*.**

143. The Appellants argue at paras. 51-56 of the Appellants' Brief that the *HRCMA* does not "trump" the *Charter*. This is not disputed. However, the Appellants' submissions regarding the Panel's alleged misapplication of the *Oakes* test are off base in that the Panel did not have the jurisdiction to decide a question of constitutional law involving the *Charter*, as set out above. The Appellants' argument relating to justification of s. 3(1) under the *Charter* are addressed above.

**(F) Section 3(2) of the *HRCMA* sets out a balancing between expression and prevention of discrimination.**

144. The Respondent Dr. Lund agrees with the submissions of the Attorney General (paras. 30-37 of the Attorney General's Brief) on the interpretation of s. 3(2) of the *HRCMA*. The Panel was correct in applying the reasoning in *Re Kane* and concluding that s. 3(2) is an admonition for Panels to balance freedom of expression and the eradication of discrimination (Panel Decision, paras. 340-346; *Re Kane*, **Tab 2**, para. 73). Justice Rooke considered the reasoning of Dickson C.J. in *Taylor* and noted that excluding opinion from the reach of s. 3(1)(then s. 2(1)) would go a long way in defeating the purpose of the legislation (*Re Kane*, paras. 68-70).

**(G) Section 3 of the *HRCMA* is within provincial authority.**

145. The Panel was correct in deciding that it had jurisdiction to adjudicate the complaint in that the matter was within provincial authority under the *Constitution Act, 1867* (Appellants' Authorities Tab 3). The Panel found that the Commission had jurisdiction to deal with the matter on the bases that the matter was of a local or private nature, it did not involve criminal law, and the nature of the speech at issue was within provincial jurisdiction (paras. 347-355). The Panel's decision was consistent with the analysis recently summarized by the Supreme Court of Canada and with jurisprudence considering the provincial competence to enact

provisions in human rights legislation relating to the prevention and remediation of discrimination.

### 1. Analytical principles

146. In *Chatterjee v. Ontario (Attorney General)*<sup>57</sup> (“*Chatterjee*”), **Tab 30**, para. 2, Binnie J., writing for the unanimous Court held that the legislation under review in that case was within provincial competence, and rejected the *ultra vires* argument as “an exaggerated view of the immunity of federal jurisdiction in relation to matters that may, in another aspect, be the subject of provincial legislation.” Binnie J. then noted that an approach of “proliferating jurisdictional enclaves” or “interjurisdictional immunities” had been discouraged by the Court’s recent decisions in *Canadian Western Bank v. Alberta*<sup>58</sup> (“*Canadian Western Bank*”), **Tab 31**, and *British Columbia (Attorney General) v. Lafarge Canada Inc.*<sup>59</sup> As stated in *Canadian Western Bank*, and quoted by Binnie J. in *Chatterjee* (para. 2), “a court should favour, where possible, the ordinary operation of statutes enacted by *both* levels of government” (emphasis in original). This is consistent with the presumption of constitutionality: Hogg, *Constitutional Law of Canada*, **Tab 28**, at 15.5(i), page 15-23.

147. In *Canadian Western Bank*, the Court summarized the analysis to be applied in relation to division of powers. This analysis begins with an analysis of the pith and substance of the impugned legislation (para. 25). The inquiry is into the true nature of the law in question for the purpose of identifying the “matter” to which it essentially relates (para. 26). If the pith and substance of the impugned legislation can be related to a matter that falls within the jurisdiction of the legislature that enacted it, the courts will declare it *intra vires*. If the legislation can more properly be said to relate to a matter outside the jurisdiction of the legislature, it will be held to be invalid.

148. Legislation whose pith and substance falls within the jurisdiction of the legislature that enacted it may, as least to a certain extent, affect matters beyond the legislature’s jurisdiction without necessarily being unconstitutional (para. 28). The “dominant purpose” of the

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<sup>57</sup> 2009 SCC 19, [2009] S.C.J. No. 19

<sup>58</sup> 2007 SCC 22, [2007] 2 S.C.R. 3

<sup>59</sup> 2007 SCC 23, [2007] 2 S.C.R. 86

legislation is decisive. Its secondary objectives and “incidental” effects have no impact on its constitutionality. By “incidental” is meant effects that may be of significant practical importance but are collateral and secondary to the mandate of the enacting legislature (para. 28).

149. Some matters are by their very nature impossible to categorize under a single head of power: they may have both provincial and federal aspects. The fact that a matter may for one purpose and in one aspect fall within federal jurisdiction does not mean that it cannot, for another purpose and in another aspect fall within provincial competence. This is the “double aspect doctrine” (para. 30). A classic example is that of dangerous driving: Parliament may make laws in relation to the “public order” aspect, and provincial legislatures in relation to its “Property and Civil Rights in the Province” aspect.

150. Dr. Lund submits that s. 3(1)(b) of the *HRCMA* is in pith and substance a matter relating to prohibition of discrimination in the various areas covered in the *HRCMA*. It may have incidental effects, but those are secondary to the mandate and purpose of the Legislature in addressing equality and discrimination. Alternatively, if it is found to be a matter of speech or expression, then it is submitted speech or expression is a matter of shared jurisdiction, and the aspect of prevention or remediation of discrimination is within provincial competence.

## **2. Provincial jurisdiction over human rights**

151. Provincial jurisdiction over human rights was recognized by the Supreme Court of Canada in *Scowby v. Glendenning*,<sup>60</sup> (CCF Authorities Tab 6). Estey J., for the majority, stated that the bulk of the protections in human rights legislation would appear to be beyond challenge as being legislation in relation to property and civil rights or to matters of merely local and private nature, since they deal with questions of discrimination in housing and employment and equal access to goods and services (para. 4). The Saskatchewan human rights legislation impugned in that case created a right to be free from arbitrary arrest or detention and a right to the determination of the legality of any detention. Estey J. found that the provision trenched on federal criminal jurisdiction insofar as it created *habeas corpus* type of rights for arrests and detentions made under the *Criminal Code*, but it was within provincial jurisdiction insofar as it

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<sup>60</sup> [1986] 2 S.C.R. 226

created rights respecting arrests and detentions under otherwise valid provincial laws (paras. 12, 18).

152. In *Saskatchewan (Human Rights Commission) v. Engineering Students' Society*<sup>61</sup> (“*Engineering Students' Society*”) (CCF Authorities Tab 3), both Cameron J.A. for the majority and Vancise J.A. in dissent concluded that the section in the *Saskatchewan Human Rights Code* prohibiting publication of any notice, sign, etc. which, among other things, ridicules, belittles, or otherwise affronts the dignity of persons because of their race, creed, religion, colour, sex and so on (wording similar s. 3 of the *HRCMA*) was within provincial jurisdiction. The appeal in that case concerned a decision of a Board of Inquiry that two editions of a newspaper published by the respondent Engineering Students' Society ridiculed, belittled and affronted the dignity of women because of their sex, contrary to the section of the *Code*.

153. Cameron J.A. for the majority reviewed the object and scheme of the Act (page 18 CanLII ff.). To further the general purpose of gaining public recognition of human worth and dignity and the more specific purpose of discouraging and eliminating discrimination, Part II of the legislation prohibited discrimination in several fields of activity. Cameron J.A. interpreted the purpose of s. 14, the challenged section, as (i) to render more complete the prohibition of those discriminatory practices covered elsewhere in Part II, and (ii) to discourage some of the underlying causes of those discriminatory practices (page 23 CanLII). The language relating to exposure to hatred, ridiculing, belittling and affronting dignity, which had been added in 1979, “is quite clearly directed at discouraging, if not eliminating, activity which reinforces prejudice and in turn fosters discrimination,” Justice Cameron said (page 26 CanLII). The section should be interpreted as applying to messages that cause or be likely to cause others to engage in one or more of the discriminatory practices prohibited by the other sections, Cameron J.A. held (pages 30-31 CanLII). Construed this way, there was nothing in the section, as it fell to be applied in that case, which was beyond the powers of the provincial legislature (page 32 CanLII).

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<sup>61</sup> (1989), 56 D.L.R. (4<sup>th</sup>) 604 (Sask. C.A.), 1989 CanLII 286, leave to appeal to S.C.C. refused [1989] S.C.C.A. No. 112

154. *Engineering Students' Society* was considered by the Alberta Board of Inquiry in *Aryan Nations*, **Tab 13**, paras. 320-325. The Board of Inquiry noted its concern not to trench upon the Federal criminal power to prohibit racial hatred (para. 322), but the Board also noted the discriminatory impact of the objectives and policy of the Church (para. 324) and of the notices, signs, symbols (described further below) in the areas of provincial competence: goods, services, accommodation, tenancy, employment . The Board held that its application of the section was within provincial competence. The section it was interpreting and applying at that time did not refer to “publications” or to likelihood of exposure to hatred or contempt. The conduct addressed in the current s. 3(1)(b) has equivalent connection to discrimination in goods, services, accommodation, tenancy, employment, etc.

155. The B.C. Tribunal in *North Shore News*, **Tab 19**, paras. 39-43, considered *Scowby v. Glendenning* and the purpose and structure of that province’s challenged section and concluded that the section regulated discrimination in the context of published expression, while other sections addressed discrimination in other contexts, such as employment or accommodation. In *North Shore News*, the respondents and an intervenor challenged the validity of s. 7(1)(b) of the *Human Rights Code*, R.S.B.C. 1996, c. 210, on the ground that it was *ultra vires* the province because it trenched on the federal criminal law jurisdiction and intruded into federal jurisdiction over speech. The section provided:

7(1) A person must not publish, issue or display or cause to be published, issued or displayed any statement, publication, notice, sign, symbol, emblem or other representation that

...

(b) is likely to expose a person or a group or class of persons to hatred or contempt because of the race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age of that person or that group or class of persons.

The Tribunal held that the section was constitutionally valid unless it could be shown that the section was more in the nature of criminal law or that it intruded upon some exclusive federal jurisdiction over certain aspects of speech. The Tribunal’s analysis on those points will be reviewed below.

156. As noted in Tarnopolsky and Pentney, *Discrimination and the Law*, **Tab 14** at 3.7, page 3-56.4, (quotation set out in the Attorney General’s Brief, para. 7), 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 undertakings, all three being classes of subjects listed in s. 92 of the *Constitution Act, 1867*.

157. The connection between publications likely to expose to hatred or contempt to discrimination has been addressed in several decisions and reports. It was also addressed in the evidence in this case.

– *Taylor*, Attorney General’s Authorities, para. 40, referring to the Cohen Committee Report:

... As well, the Committee observed that hate 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 and facilities, and even incidents of violence.

– *Aryan Nations*, **Tab 13**, paras. 198-202, 215-217, 280-281, 290, 294, 296, 297-299, 315. The reasoning applied in relation to notices, signs, symbols indicating discrimination applies equally to the relationship between publications likely to expose to hatred and contempt with promotion of discrimination in employment, housing, etc. The Board of Inquiry also referred to communication of hatred, paras. 290, 293.

– *Papez*, **Tab 6**, paras. 40-41, 59

– *Schnell*, **Tab 10**, para. 70

– N.K.S. Banks, “Could Mom be Wrong? The Hurt of Names and Words: Hate Propaganda and Freedom of Expression,” **Tab 23**, para. 23

158. In response to the CCF Brief para. 67, in *Bell*, the Saskatchewan Court of Appeal recognized the connection between the message of the stickers, depicting the targeted groups as different and inferior, and discrimination (CCLA Authorities Tab 10, paras. 27-30).

159. The connection between publications likely to expose to hatred or contempt and discriminatory treatment was addressed by Dr. Alderson in his evidence given to the Panel. In his written report, which he also read to the Panel, Dr. Alderson gave his expert opinion that hate literature is related to discrimination. He stated:

... The relationship between hate speech, on the one hand, and hate crimes, on the other, has been validated in a recent national and representative American study. The association between these has long been theorized, and one of the major theories along this line is by Gordon Allport (1958). In his five stages of prejudice, the first level he

calls *antilocutions*, which are the verbal assaults launched at a targeted group. This stage is followed by *avoidance* of the disliked group, *discriminatory treatment*, *physical attacks*, and under certain circumstances, *extermination*. ...

- Return Volume I, Exhibit 3; Volume II, pages 125-126
- See also: para. 3, Return Volume I, Exhibit 3; Volume II, page 128: “Hate speech increases the dislike that people have for the targeted group.” And see Panel Decision, paras. 72-73.

160. Mr. Jones also gave evidence to the Panel that he believed that the Letter encouraged verbal abuse and other actions against homosexuals. Verbal abuse is recognized in human rights law as a manifestation of discrimination.

- Return Volume I, Exhibit 2; Panel Decision para. 53
- The Hon. R.W. Zinn, *The Law of Human Rights in Canada: Practice and Procedure*,<sup>62</sup> **Tab 32**, at 8:40, pages 8-28-8-29; at 11.10-11.20, pages 11-1- 11-4

161. The Letter itself establishes links to discrimination: it advocates against employment of homosexuals in schools (*HRCMA*, s. 7), against inclusion of sexual orientation in the curriculum (*HRCMA*, s. 4, goods, services etc.), and against the equality and dignity of homosexuals, which will have repercussions in each of the areas of prohibited discrimination.

162. Communication likely to expose a protected group to hatred and contempt is connected to discrimination, as shown in the literature and the evidence – it is not “remote,” as submitted in the CCLA Brief (para. 8) or unconnected, as argued in paras. 12-13 of the CCF Brief. The analysis used by the Saskatchewan Court of Appeal in *Engineering Students’ Society* applied in this case supports a conclusion that s. 3(1)(b) of the *HRCMA* is within provincial jurisdiction under the *Constitution Act, 1867* in relation to property and civil rights (s. 92(13)) or a matter of local or private nature (s. 92(16)). The Saskatchewan Court of Appeal did not restrict the interpretation to be equivalent to “indicates discrimination or intention to discriminate” as argued in the CCF Brief (para. 29).

163. In response to para. 13 of the CCF Brief, 4 jurisdictions in addition to Alberta include prohibition of communications likely to expose the protected groups to hatred or contempt (or

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<sup>62</sup> (Aurora: Canada Law Book, looseleaf)

equivalent language) as part of the panoply of prohibitions of discrimination: Federal (s. 13), British Columbia, Saskatchewan, and the N.W.T. Further, 5 jurisdictions prohibit the inciting of discrimination, which would affect expression: Federal (s. 12), Manitoba, Ontario, N.W.T. and Nunavut.

164. As noted in *Chatterjee*, **Tab 30**, para. 16, purpose may be derived from the statute itself and from external material, including Hansard. The purpose of the *HRCMA* is discussed above, in relation to the *Charter*. The purpose is the protection of equality rights and diversity through protection from discrimination. The external material relating to the language in s. 3(1)(b) (also reviewed above) indicates that the addition of prohibition of publications likely to expose to hatred or contempt was an expansion of existing protections against discrimination.

165. Headings are a useful source for statutory interpretation: R. Sullivan, *Sullivan on the Construction of Statutes*, 5<sup>th</sup> ed.,<sup>63</sup> **Tab 33**, pages 392-397. Section 3(1)(b) of the *HRMCA* fits within the part of the legislation addressing discrimination in various areas of activity. The heading for the part is “Code of Conduct.” The sub-headings for four of the sections, including s. 3, refer to “Discrimination”:

- s. 3: Discrimination re publications, notices
- s. 4: Discrimination re goods, services, accommodation, facilities
- s. 5: Discrimination re tenancy
- s. 7: Discrimination re employment practices

166. The structure of each of these four sections is similar: a prohibition of conduct because of listed grounds. The conduct occurs locally in the province.

167. Similarly, Dickson C.J. noted in *Taylor* that in denoting the activity described in s. 13(1) of the *Canadian Human Rights Act* as a discriminatory practice, Parliament had indicated that it viewed repeated telephonic communications likely to expose individuals or groups to hatred or contempt by reason of their being identifiable on the basis of certain characteristics as contrary to the furtherance of equality (Attorney General’s Authorities Tab 10, para. 39).

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<sup>63</sup> (Markham: LexisNexis, 2008)

168. How the purpose of the *HRCMA* is put into effect is the same for all the sections in the *HRCMA* addressing the various areas where discrimination may take place. The legislation provides for:

- education: s. 16
- a complaint process involving a dispute between parties: s. 20-43. There is no provision for the Commission itself initiating a complaint. Any person who has reasonable grounds for believing that a person has contravened the *HRCMA* may initiate a complaint.
- remedies by a Human Rights Panel that are compensatory and remedial: s. 32 sets out the discretionary powers of a Human Rights Panel, including ceasing the contravention complained of, refraining from committing the same or similar contravention, compensating the complainant, and “taking any other action the panel considers proper to place the person dealt with contrary to this Act in the position the person would have been in but for the contravention of this Act.” The *HRCMA* does not create an offence for contravention of the protections of the legislation. The offence section (s. 42) relates only to hindering, obstructing or interfering with the Commission, directors or employees in carrying out a duty under the legislation.

169. The compensatory and educational nature of remedies under human rights legislation has been highlighted by the Courts and in academic writing.

- *Taylor*, Attorney General’s Authorities Tab 10, para. 37
- *Berry*, **Tab 17**, para. 16
- Meurin and Fleming, *Remedies in Labour, Employment and Human Rights Law*, **Tab 16**, at 6.1(B)

170. Each of the sections in the Code of Conduct part of the *HRCMA* give effect to the purposes articulated in the Preamble. Section 3 can be interpreted in a manner comparable to the interpretation given by Cameron J.A. to s. 14 of the Saskatchewan legislation: either (i) as completing (or adding to) the other prohibitions in that part of the Act, or (ii) as discouraging some of the underlying causes of those discriminatory practices. In either interpretation, s. 3 is connected with the prevention of discrimination in activities taking place within the province.

171. The exposure of homosexuals to hatred or contempt through the Letter in this case in turn leads to likelihood of discrimination in every other area of activity addressed in the *HRCMA*. The pervasive message of evil of homosexuals encourages marginalization and rejection, which is likely to manifest in discrimination in any and all areas of activity addressed in the *HRCMA*: goods, services, accommodation, facilities, tenancy, employment, membership in occupational associations. The specific references to homosexual educators and to the schools promotes discrimination in employment and in occupational associations. All of these areas are recognized as matters of provincial competence in *Scowby v. Glendenning* and *Engineering Students' Association*. Further, as noted by the Panel (paras. 350, 354), there were other contextual elements supporting a link of the Letter to matters of a local nature: the references in the Letter to the educational system and the evidence of a subsequent beating of a gay teenager in the Red Deer area.

172. It is therefore submitted that s. 3 is in pith and substance a matter within provincial jurisdiction pursuant to s. 92(13) or s. 92(16) of the *Constitution Act, 1867*. Even if it incidentally affects either the criminal law power or the alleged federal area of political speech, this does not deprive the province of its jurisdiction.

### **3. No intrusion into the federal criminal law power**

173. Section 3(1)(b) of the *HRCMA* does not trench into the federal criminal law power, and the Letter is not a matter that can be addressed only through the criminal law. To the contrary, as expressed by Dickson C.J. for the majority and McLachlin J. (as she then was) in dissent in *Keegstra* (**Tab 3**, paras. 131, 324-327), circumstances involving publications likely to expose to hatred or contempt are better dealt with through remedial human rights provisions. The Province of Alberta may validly pursue the purpose of promoting equality and prohibiting discrimination under its human rights legislation while Parliament pursues its purpose of addressing criminal conduct. The provincial legislation addresses a different aspect compared with the *Criminal Code*, and there is no operational conflict between the two statutory regimes.

174. As set out by the Supreme Court in *Chatterjee*, **Tab 30**, para. 36, if the dominant purpose of the provincial enactment is in relation to provincial objects, the law will be valid, and if the

enactments of both levels of government can generally function without operational conflict they will be permitted to do so. The mere existence of a valid federal law bearing some similarities to the challenged provincial law does not, without more, demonstrate invalidity of the provincial law: *Chatterjee*, para. 32.

175. In *Chatterjee*, the impugned statute was the *Remedies for Organized Crime and Other Unlawful Activities Act, 2001*,<sup>64</sup> otherwise known as the *Civil Remedies Act, 2001* or *CRA*, which authorizes the forfeiture of proceeds of unlawful activity. The unanimous Supreme Court found that this was valid provincial legislation. There are other examples of provincial regulation in areas that have a provincial aspect where there is another aspect addressed through criminal law, including:

- dangerous driving: referred to in *Canadian Western Bank*, **Tab 31**, para. 30, which in turn cited *O’Grady v. Sparling*<sup>65</sup>
- securities regulation: *R. v. Smith*,<sup>66</sup> *Multiple Access v. McCutcheon*<sup>67</sup>
- Hogg, *Constitutional Law of Canada*, **Tab 28**, at 15.5(c)

176. Also as set out in *Chatterjee*, paras. 26-30, the jurisprudence offers examples where provincial legislation aimed at suppressing conditions likely to favour the commission of crimes has been upheld: *Bédard v. Dawson*,<sup>68</sup> *Attorney General for Canada and Dupond v. City of Montreal*<sup>69</sup> (“*Dupond*”). Provincial legislation aimed at promoting equality and preventing discrimination can be viewed as suppressing conditions likely to favour the commission of hate crimes.

177. The different purposes and procedures of human rights legislation as compared with criminal law are reviewed in *Keegstra*.

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<sup>64</sup> S.O. 2001, c. 28

<sup>65</sup> [1960] S.C.R. 804

<sup>66</sup> [1960] S.C.R. 776

<sup>67</sup> [1982] 2 S.C.R. 161

<sup>68</sup> [1923] S.C.R. 681

<sup>69</sup> [1978] 2 S.C.R. 770

178. After detailed analysis, the Tribunal in *North Shore News* concluded that s. 7(1)(b) of the B.C. *Code* did not trench on the criminal law power (**Tab 19**, paras. 46-58). The Tribunal noted that the test for determining what is criminal law within the scope of s. 91(27) is well-established (para. 46). Is there a prohibition with a penal consequence? There is also a requirement that a legitimate public purpose must underlie the prohibition. The Tribunal found that s. 7(1)(b) did not trench upon the federal criminal law power (para. 47 ff). There was no explicit penalty. The *Offence Act* did not apply to the *Code*. The remedies flowing from a breach of the *Code* are compensatory and remedial. Even in a case in which an administrative tribunal is given the explicit power to levy a fine, the absence of a legislative cap on the maximum fine does not necessarily make it a penalty (para. 52). The monetary awards made under the *Code* are not fines; they are compensation paid to victims of discrimination. They are private, not public in nature. The Tribunal rejected North Shore's argument that the process of enforcement was analogous to a criminal prosecution (para. 54). The Tribunal also rejected the argument that the section had a criminal public purpose (para. 57).

179. A similar analysis is applicable in relation to s. 3(1)(b) of the *HRCMA*. The prohibition in s. 3(1)(b) does not have penal consequences. As described above, the powers of a Human Rights Panel are remedial and compensatory, as well recognized in the jurisprudence (and contrary to the argument at para. 38 of the CCF Brief). There is no explicit penalty in relation to contravention of the discrimination provisions. The penalty section (s. 42) relates to hindering, obstructing or interfering with the Commission or its staff. The monetary awards are compensatory, not fines. While there is a public purpose to the *HRCMA*, it is not a criminal public purpose. The imprisonment referred to in the CCF Brief para. 37 is in relation to contempt of court, a separate context requiring intentional flouting of a court order: *Taylor*, Attorney General's Authorities Tab 10, paras. 71-72.

180. *Westendorp v. The Queen*,<sup>70</sup> relied on by the CCF, is distinguishable. The Court found that nothing in the impugned section of the By-law had any affinity with the other elements of the By-law. Here, as established in the jurisprudence and the evidence, there is a connection between prohibition of discriminatory messages likely to expose to hatred or contempt and

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<sup>70</sup> [1983] 1 S.C.R. 43 (CCF Authorities Tab 5)

other discriminatory practices prohibited in the *HRCMA*. In relation to reference in the CCF Brief (paras. 56-59) to *Starr v. Houlden*,<sup>71</sup> provincial human rights provisions addressing discriminatory messages are not a substitute for the *Criminal Code*. To the contrary, as set out by McLachlin J. in *Keegstra* (paras. 324-325), they take a different approach to curbing discrimination. *R. v. Morgentaler*,<sup>72</sup> (CCF Brief paras. 61-62) turned on the particular history, purpose and the circumstances surrounding the enactment of those provisions (page 37).

181. It is therefore submitted that s. 3(1)(b) does not trench into the federal criminal law power, and the Panel was correct in concluding that the Province is not reaching beyond its mandate (Panel Decision para. 355).

#### **4. No intrusion into the alleged federal jurisdiction over political or religious speech**

182. As stated by the Tribunal in *North Shore News*, the issue of expression is more properly addressed as a *Charter* issue (para. 37):

In my view, the division of powers arguments, particularly as they relate to provincial legislative jurisdiction over speech, are really an indirect and rather technical way of addressing matters that are much more clearly and openly dealt with under the Charter. Judicial doctrines within division of power analysis to restrict legislative jurisdiction over speech were developed well before the Charter expressly limited the power of any level of government to restrict freedom of expression beyond what is reasonable and demonstrably justified in a free and democratic society. Thus, although at least some of the pre-Charter doctrines retain their vitality today, restrictions on freedom of expression are essentially Charter issues and are more directly decided through the application of Charter doctrines.

– See also: *Greater Vancouver Transportation Authority*, **Tab 21**, paras. 1, 31, 76-77, 80: the analysis of the limit on political speech by the Transportation Authority (*i.e.* pursuant to provincial jurisdiction) occurred in the framework of the *Charter*, not division of powers. Deschamps J., for the majority, referred to political speech as being “at the core of s. 2(b) protection” (para. 80).

183. In response to the argument of the Appellants that the Province or the Panel do not have jurisdiction to limit political or religious speech (Appellants’ Brief, para. 61 ff.), it is submitted that the Supreme Court has held that such matters are of shared jurisdiction. Both the Province in enacting s. 3(1)(b) and the Panel Decision were within the recognized provincial jurisdiction

<sup>71</sup> [1990] 1 S.C.R. 1366 (CCF Authorities Tab 7)

<sup>72</sup> [1993] 3 S.C.R. 463 (CCF Authorities Tab 8)

relating to remediation and prevention of discrimination, with only ancillary effect on political or religious speech.

184. The statements from the *Reference Re Alberta Statutes*,<sup>73</sup> and *Saumur v. The City of Quebec*,<sup>74</sup> referred to in the CCF Brief (paras. 14-17) and in the Appellants' Brief (para. 63) were *obiter*, and did not constitute the *ratios* of those judgments. Subsequent to these decisions (and subsequent to *Switzman v. Elbling*<sup>75</sup>), the Supreme Court held that there was shared jurisdiction in relation to speech: *Dupond*, Attorney General's Authorities Tab 1, para. 69, and quote in the Attorney General's Brief, para. 6.

185. Provincial competence to legislate and regulate in areas of its jurisdiction, even though political speech is incidentally affected was reaffirmed in *Ontario Public Service Employees' Union v. Ontario (Attorney General)*<sup>76</sup> ("OPSEU"), **Tab 34**. At issue in that case were provisions in the *Public Service Act*,<sup>77</sup> which prohibited provincial civil servants and Crown employees from engaging in political activities including running for election to Parliament without taking a leave of absence; canvassing and soliciting funds on behalf of federal political parties; and expressing opinions in public on federal political issues. The provisions were challenged as unconstitutional based on the division of powers. Both Beetz J. for the majority and Dickson C.J. and Lamer J. in concurring judgments held that the legislation was within provincial jurisdiction. Beetz J., for the majority, was of the view that the provisions were in pith and substance matters of amendment of the provincial constitution (under s. 92(1) of the *Constitution Act, 1867*), or matters related to the tenure of provincial offices (under s. 92(4) (establishment and tenure of public officers and appointment and payment of provincial officers)) (paras. 63, 74). Dickson C.J. was of the view that the provisions related to s. 92(4) and s. 92(13) (property and civil rights) (paras. 15-16). Lamer J. (as he then was) was of the view that the provisions were authorized by s. 92(4) (para. 148). The majority rejected the argument of the appellants based on the implied bill of rights and relying on *Reference re Alberta Statutes* and *Switzman v. Elbling* (OPSEU, paras. 136-146). Beetz J. referred to the

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<sup>73</sup> [1938] S.C.R. 100

<sup>74</sup> [1953] 2 S.C.R. 299

<sup>75</sup> [1957] S.C.R. 285

<sup>76</sup> [1987] 2 S.C.R. 2, [1987] S.C.J. No. 48

<sup>77</sup> R.S.O. 1970, c. 386

judgment of Duff C.J. in *Reference re Alberta Statutes* and Abbott J. in *Switzman v. Elbling* and held that neither Parliament nor the provincial legislatures may enact legislation the effect of which would be to substantially interfere with the operation of the basic constitutional structure (para. 144). Beetz J. viewed the impugned provisions as being in essence concerned with provincial heads of power (constitution of the province and regulating the provincial public service) and affecting the federal aspect only in an incidental way (paras. 144, 145). (Beetz J. noted that in the future, the issue would ordinarily arise for consideration in relation to the *Charter* (para. 145)).

186. The determination by Justice Beetz that neither Parliament nor the legislatures could substantially interfere with the operation of the basic constitutional structure is reflected in the analysis of the implied bill of rights jurisprudence in Hogg's *Constitutional Law of Canada*, **Tab 28**, at 34.4(c). As Hogg explains, the implied bill of rights doctrine emerged at a time where there was no express bill of rights. The doctrine emerged in the *dicta* of Duff C.J. in the *Reference re: Alberta Legislation*. Hogg observes that Duff C.J.'s opinion could be read as suggesting that the *Constitution Act, 1867* impliedly forbade both the legislatures and Parliament from curtailing political speech. Similarly, Rand J. in *Switzman v. Elbling*, suggested, and Abbott J. stated, that neither legislatures nor Parliament could abrogate the rights.

187. In *R. v. Edwards Books and Art*,<sup>78</sup> the Supreme Court of Canada upheld provincial legislation that prohibited retail stores from opening on Sundays. The Court held that the law came within provincial power over property and civil rights. Dickson J. (as he then was) stated that "the Constitution does not contemplate religion as a discrete 'matter' falling exclusively within either a federal or provincial class of subjects"; the law's impact on religions would not necessarily be the critical factor: Hogg, *Constitutional Law of Canada*, **Tab 28**, at 42.1, page 42-2.

188. Since *Dupond* and *OPSEU*, it appears there has been no Supreme Court of Canada decision with the *ratio* being that political or religious speech is exclusively within federal

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<sup>78</sup> [1986] 2 S.C.R. 713

<sup>79</sup> **Tab 35**, paras. 20, 32; *Reference re Secession of Quebec*,<sup>80</sup> **Tab 36**, paras. 49-82, particularly para. 68, and see paras. 79-81 on the constitutional principle of protection of minority rights.

189. In *R.W.D.S.U. v. Dolphin Delivery Ltd.*,<sup>81</sup> **Tab 37**, para. 15, the statements of Rand and Abbott JJ. in *Switzman v. Elbling* are quoted, but in the context of the importance of freedom of expression, not a division of powers analysis. In *Reference re Remuneration of Judges*,<sup>82</sup> **Tab 38**, paras. 94-105, and in particular paras. 102-103, Lamer C.J. for the majority in *obiter* referred to “members of the Court” having “taken the position” that the limitation of expression is solely a matter for Parliament, not the provincial legislatures. Lamer C.J. also noted that members of the Court have suggested that Parliament itself is incompetent to abrogate speech rights. However, the judgment did not turn on a division of powers issue; the central issue was judicial independence as protected in s. 11(d) of the *Charter*.

190. In an analysis consistent with that of the Supreme Court in *OPSEU*, the B.C. Tribunal in *North Shore News* held in relation to “political speech” (**Tab 19**, para. 76):

Even if s. 7(1)(b) did affect some speech that could be so described, it is well-established that provincial legislation may validly impinge on matters outside provincial jurisdiction as long as it is *intra vires* the province in its pith and substance: for example, see the unanimous judgment of the Supreme Court of Canada in *G.M. v. City National Leasing*, [1989] 1 S.C.R. 641 at 669-70.

191. Provincial regulation of “political speech” can be seen in the *Election Act*,<sup>83</sup> **Appendix Tab 13**:

- s. 105(2) prohibits persons from communicating any information obtained at a polling place regarding which candidate a voter has voted for, is voting for or is about to vote for;
- s. 133 provides for right of access for campaigning;

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<sup>79</sup> [1985] 2 S.C.R. 455, [1985] S.C.J. No. 71

<sup>80</sup> [1998] 2 S.C.R. 217, [1998] S.C.J. No. 61

<sup>81</sup> [1986] 2 S.C.R. 573, [1986] S.C.J. No. 75

<sup>82</sup> [1997] 3 S.C.R. 3, [1997] S.C.J. No. 75

<sup>83</sup> R.S.A. 2000, c. E-1

- s. 134 sets out a requirement for inclusion of the name and address of the sponsor on every printed or electronic advertisement, handbill, placard or poster having a reference to any election;
- s. 135 prohibits election advertising at a polling place.

192. Even if there were an exclusive Federal jurisdiction to regulate political speech, the statements in the Letter in this case found to be likely to expose homosexuals to hatred or contempt were not “political” in the narrow sense or in a broad sense. They do not relate to the operation of the basic constitutional structure or to policy issues. They constitute categorical statements about evilness and unacceptability of the personhood, the intrinsic identity of homosexuals – a vulnerable group protected by the *HRCMA*. The B.C. Court of Appeal in *Kempling*, **Tab 18**, paras. 76-77, upheld the disciplinary measures set for Mr. Kempling based on his articles and letters expressing discrimination against homosexuals even though portions of the writings did constitute reasoned debate. It is submitted that the worth and dignity of any group protected in the *HRCMA* is not a matter of policy or issues, and therefore does not come within the ambit of “political” speech.

193. Dr. Cooper asserted in his report that other than the introductory statements in the Letter to “unwanted sexual identity” and to “enslavement to homosexuality,” Mr. Boissoin “says nothing further about what homosexuality is” (Return Volume I, Exhibit 7, page 14). Dr. Cooper’s view was that the balance of the Letter was concerned “not with the issue, condition, or status of homosexuality, but about politics” (page 14). Dr. Cooper further stated that the “criticisms Boissoin makes do not concern homosexuality or homosexuals per se, but rather what is colloquially referred to as the gay-rights movement.” It is submitted that Dr. Cooper’s characterization is incorrect, and the Letter as a whole cannot be characterized as “political speech.” As submitted above, the specific statements on which the Panel based its conclusion that the publication is likely to expose homosexuals to hatred and contempt are: (a) directed at homosexuals, (b) about what homosexuality is, and (c) about homosexuality per se. Dr. Cooper’s discussion of the content of the Letter (pages 13-15) fails to refer to statements in the Letter including:

- “our children, your grandchildren are being strategically targeted, psychologically abused and brainwashed by homosexual and pro-homosexual educators” (emphasis added)

- The sentence above refers (in the passive voice) to conduct of homosexuals. The subsequent sentences follow the same pattern, also in the passive voice, but deleting the reference to who is the actor (homosexual and pro-homosexual educators). The message is that homosexual and pro-homosexual educators are also the ones responsible for the following conduct:

- “Our children are being victimized ...”
- “... children ... being subjected to psychologically and physiologically damaging ....”
- “Your children are being warped...”
- “Will your child be the next victim that tests homosexuality positive?”
- “Where homosexuality flourishes, all manner of wickedness abounds.” Although the title of the letter referred to “Homosexual agenda wicked” (emphasis added), Mr. Boissoin’s evidence was that he did not provide the title for the letter (Return Volume II, page 142).
- “psychological disease”
- “the enemy”

194. The Panel did not “recognize that the Complaint arises out of a debate over public policy in the public school system” (emphasis added) as asserted in the Appellants’ Brief para. 71. The Panel’s comments in paras. 351-352 were directed to the issue as to whether the Letter related to matters of a local nature, not to whether the Letter was “political.” However, as discussed above, and as held in *Kempling*, even if some aspect of the Letter was “political,” the particular statements that were found likely to expose homosexuals to hatred or contempt are outside of the ambit of “political” expression.

195. In response to the Appellants’ argument that Panel did not have jurisdiction to deal with matters of religious expression, it is submitted that:

- a) As submitted above in relation to “political speech,” the elements of the Letter found to be likely to expose homosexuals to hatred or contempt were connected to discrimination, a matter within provincial competence.
- b) Merely because some of the statements were expression of religious belief, the statements likely to expose homosexuals to hatred or contempt were not and are not shielded from scrutiny: *R. v. Harding*,<sup>84</sup> **Tab 39**, paras. 46-49. See also: *Amselem*, CCLA Authorities Tab 7, para. 41 (quoting Dickson J. (as he then was) in *R. v. Big M. Drug Mart Ltd.*<sup>85</sup>) and paras. 61-62.

<sup>84</sup> (2001), 57 O.R. (3d) 333 (C.A.), 207 D.L.R. (4<sup>th</sup>) 686, 2001 CarswellOnt 4398

<sup>85</sup> [1985] 1 S.C.R. 295

196. In conclusion on this issue, it is submitted that the Panel was correct in deciding that it had jurisdiction to determine whether the Letter was likely to expose homosexuals to hatred or contempt, and that s. 3(1)(b) is within provincial competence under s. 92(13) and s. 92(16) of the *Constitution Act, 1867*. In pith and substance, s. 3(1)(b) addresses the prevention and remediation of discrimination occurring in the areas of activity covered by the *HRCMA*. In accordance with the guidance from the Supreme Court in *Chatterjee*, the ordinary operation of the *HRCMA* should be supported.

#### (H) Costs

197. In response to the Appellants' request for costs on a full-indemnity basis, Dr. Lund submits that if the Appellants are successful in this appeal, there is no basis for an award for full indemnity costs. A costs award of full indemnity is an extraordinary remedy, granted only in exceptional circumstances, and no such circumstances arise in this case in relation to Dr. Lund. Dr. Lund's complaint was filed and unfolded in accordance with the provisions of the *HRCMA*. Dr. Lund was successful before the Human Rights Panel.

– *Alberta (Human Rights and Citizenship Commission Panel) v. Tequila Bar & Grill Ltd. (c.o.b. Tequila Nightclub)*,<sup>86</sup> **Tab 40**, para. 8

198. The Appellants argue (paras. 80-81) that the human rights process should not be available to “private prosecutors with a cause.” Dr. Lund filed his complaint because he is concerned about recognition of the dignity and equality of all persons and the prevention of discrimination, including on the basis of sexual orientation. Section 20 of the *HRCMA* provides that “any person” who has reasonable grounds for believing that a person has contravened the Act may make a complaint to the Commission.

199. The Appellants argue that they should be awarded full indemnity costs simply because they were respondents in the complaint process under the *HRCMA* (Appellants' Brief paras. 82-83). This does not constitute an extraordinary circumstance warranting an exceptional remedy from the Court. The Saskatchewan Court of Appeal in *Owens* (Appellants' Authorities Tab 9), did not make such award for Mr. Owens even though the Court overturned the tribunal's decision.

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<sup>86</sup> 2009 ABQB 226, [2009] A.J. No. 430

200. In response to para. 84 of the Appellants' Brief, Dr. Lund proceeded with carriage of his complaint in accordance with s. 29 of the *HRCMA*, which provides for a complainant having carriage of the proceeding before a Panel after the Chief Commissioner under s. 26(3) determines that the complaint should not have been dismissed and under s. 27(1)(b) directs the complaint to a Panel hearing. See also: *Northern Alliance*, Appellants' Authorities Tab 15, paras. 4-8.

201. In response to para. 85 of the Appellants' Brief, Dr. Lund did not proceed against the *Red Deer Advocate* because he had settled his separate complaint against it. As noted in the Panel Decision (para. 6), the *Red Deer Advocate* changed its policy statement on letters to the editor.

202. The Panel's award of \$5,000.00 was compensatory, based on Dr. Lund having expended considerable time and energy and having suffered ridicule and harassment as a result of the complaint (Remedy Decision, para. 13). As to the alleged protection from "disparaging remarks," Dr. Lund's position has been and is that the Panel's order relating to "disparaging remarks" may be severed and set aside.

203. Dr. Lund's position with a public institution is irrelevant to the factors considered by a Court in relation to costs. The allegation made by the Appellants in this regard is improper and harmful to Dr. Lund.

204. Dr. Lund submits that even if the Appellants are successful on the appeal, no costs should be awarded against Dr. Lund, on the basis that:

- the allegations made by the Appellants on costs are improper, and
- if the Appellants are successful based on the constitutional issues raised, the costs of such outcome should not be borne by Dr. Lund.

205. Dr. Lund requests that, if the Appellants Boissoin and the CCC are unsuccessful in their appeal, the Court award costs to Dr. Lund payable jointly and severally by Mr. Boissoin and the CCC.

206. In relation to costs, Dr. Lund requests that the Court provide the parties with an opportunity to address this issue further.

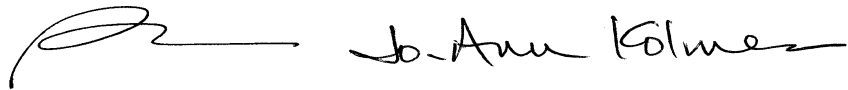
## V. ORDER SOUGHT

207. Dr. Lund requests that this Honourable Court:

- a) dismiss the appeal by the Appellants Mr. Boissoin and the CCC;
- b) pursuant to s. 37(4)(a) of the *HRCMA*, vary the order of the Panel so that:
  - the orders of the Panel in paras. 14 b, 14 e and 14 f are sustained, and
  - the orders of the Panel in paras. 14 a, 14 c, and 14 d are set aside;
- c) award to the Respondent, Dr. Lund, costs, in an amount to be determined by the Court, of this appeal and of the interlocutory motion in which the Court dismissed the application of the Appellants to adduce further evidence, payable jointly and severally by Mr. Boissoin and the CCC.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 11<sup>TH</sup> DAY OF AUGUST, 2009.

**CHIVERS CARPENTER**



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**Patrick Nugent and Jo-Ann R. Kolmes**  
Solicitors for the Respondent, Darren Lund

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