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IN THE COURT OF APPEAL FOR SASKATCHEWAN

BETWEEN:

WILLIAM WHATCOTT

Appellant

-and-

SASKATCHEWAN HUMAN RIGHTS TRIBUNAL,  
SASKATCHEWAN HUMAN RIGHTS COMMISSION,  
JAMES KOMAR, BRENDAN WALLACE,  
GUY TAYLOR and KATHY HAMRE

Respondents

ATTORNEY GENERAL FOR SASKATCHEWAN and  
CANADIAN CONSTITUTION FOUNDATION

Interveners

**FACTUM**

**I - INTRODUCTION**

1. This appeal concerns the right of citizens to peacefully express their religious and political opinions on matters of public policy, and the interpretation and application of Section 14(1)(b) of the *Saskatchewan Human Rights Code* (hereinafter “Code”).

2. In 2001 and 2002, the Appellant, Mr. Whatcott, peacefully distributed flyers in Regina and Saskatoon which conveyed disapproval of homosexual behaviour, opposed the teaching of homosexuality to children in schools, and criticized a gay magazine for its

advertising practices. For having expressed his religious and political views on questions of public debate, Mr. Whatcott was ordered by the Saskatchewan Human Rights Tribunal to pay \$17,500 to those who were offended by the flyers, and to refrain from distributing the same or similar flyers.

3. The Canadian Constitution Foundation (hereinafter “CCF”) does not intervene in this appeal to defend the merits of the Appellant’s views. Rather, the CCF seeks to ensure that the fundamental right to freedom of expression, and the citizen’s freedom of conscience and religion, are given both a broad interpretation and a robust application, as required by the Constitution. It is not the correctness or reasonableness of Mr. Whatcott’s messages that are at issue, but rather whether his speech can be justifiably limited by the Tribunal’s Order.

4. As a Canadian, Mr. Whatcott should be free to declare his opinions and religious beliefs openly, without fear of hindrance or reprisal, and without coercion or restraint imposed on him by government. He has the right to participate in public debate. Mr. Whatcott’s opinions might be offensive, unconvincing or “extreme” to many or even most Canadians, but the expression of such opinions should be tolerated in a mature, robust and self-confident democracy. The distribution of flyers is one of the most effective methods available to communicate one’s ideas and opinions to the community at large, particularly for individuals who lack the means to pay for advertising. The Tribunal’s Order forbidding Mr. Whatcott from distributing the same or similar flyers in the future holds troubling implications for the fundamental rights of *all* Canadians to freedom of expression, conscience, and religion. Canadians who disagree with Mr. Whatcott’s message can avail themselves of their own freedom of expression to repudiate it. In a free and democratic society, the proper response to speech that is unpopular or upsetting is counter-speech.

5. On moral issues, emotions often run high. To a person who is convinced that homosexual behaviour (and other sexual conduct outside of the marriage of a husband and wife) is immoral or sinful, and who feels a religious and moral duty to persuade others of

that belief, putting opinions in polemical terms may be a natural response. Sexual orientation and related issues have attracted significant social and political debate in Canada, which has sometimes been vigorous and confrontational. The right to debate such issues is fundamental to our notions of democracy. Given its fundamental nature, this debate cannot be restricted to polite terms in non-confrontational settings.

6. The CCF submits that Mr. Whatcott's flyers are protected expression under sections 2(a) and 2(b) of the *Canadian Charter of Rights and Freedoms* (hereinafter "*Charter*") and sections 5 and 14(2) of the *Code*. The Tribunal's Order is an unreasonable and unjustifiable violation of both freedom of expression and freedom of religion and conscience.

## **II – JURISDICTION AND STANDARD OF REVIEW**

7. The CCF agrees with the submissions of the Appellant and the Respondents regarding this Court's jurisdiction, and agrees that the appropriate standard of review in this appeal is correctness.

## **III – SUMMARY OF FACTS**

8. In September of 2001, and in March and April of 2002, Mr. Whatcott peacefully distributed flyers in Regina and Saskatoon expressing his political and religious views on matters of morality, sexual behaviour, and public policy. The flyers expressed Mr. Whatcott's opposition to teaching school children about homosexuality, and criticized homosexual behaviour as well as the advertising practices of a gay magazine.

9. Mr. Whatcott distributed the flyers on the basis of his religious convictions, and the flyers' contents reflected these beliefs. Mr. Whatcott believed that he had a moral obligation to speak out.

10. For having peacefully expressed his opinions, Mr. Whatcott was subjected to legal proceedings and summoned before the Saskatchewan Human Rights Tribunal (hereinafter referred to as the “Tribunal”). On May 2<sup>nd</sup> 2005, the Tribunal ordered Mr. Whatcott to pay a total of \$17,500 to four complainants who were offended by his flyers, and ordered him to refrain from distributing the same flyers or similar flyers.

11. On December 11, 2007, the Saskatchewan Court of Queen’s Bench upheld the decision of the Tribunal.

#### **IV – POINTS IN ISSUE**

12. The Appellant raises the following issues in his Factum:

- A. Did the flyers distributed by Mr. Whatcott violate section 14(1)(b) of the *Code*? (Appellant’s Issue A)
- B. Were the flyers distributed by Mr. Whatcott directed towards sexual behaviour rather than sexual orientation? (part of Issue B as set out by the Appellant)
- C. Does “sexual orientation” in the *Code* include sexual behaviour, and does the *Code* protect sexual behaviour from criticism? (included as part of Issues B, C and D as set out by the Appellant)
- D. If the *Code* protects sexual behaviour from criticism, does the *Code* thereby marginalize people who believe that same-sex sexual activities are morally wrong, and discriminate against those people? (Appellant’s Issue C)
- E. If the *Code* protects sexual behaviour from criticism, does the *Code* thereby conflict with the *Charter*’s section 2(a) freedom of religion and section 2(b) freedom of expression? (Appellant’s Issue D)

13. The Respondent characterizes the issues differently from the Appellant:

- A. Applying the appropriate standard of review, did the Trial Judge commit a reversible error in concluding that the flyers violated Section 14(1)(b)?

- B. Is Section 14(1)(b) of the *Code* a reasonable infringement of the freedom of expression and the freedom of religion?
- C. Is the Order of the Tribunal a reasonable infringement of Mr. Whatcott's freedom of expression and freedom of religion?
- D. Applying the appropriate standard of review, did the Tribunal commit a reversible error in determining the award of remedies against Mr. Whatcott?

14. The Respondent's Issue A corresponds to the Appellant's Issue A. The Respondent's Issue B generally corresponds to the Appellant's Issue E. However, the Respondent's Issues C and D do not correspond with the Appellant's Issues B, C and D.

15. The CCF will limit its submissions to the following three Issues:

**1. Did the flyers distributed by Mr. Whatcott violate section 14(1)(b) of the *Code*?**

**2. Does "sexual orientation" in the *Code* include sexual behaviour, and does the *Code* shield sexual behaviour from criticism?**

**3. Is the Order of the Tribunal a reasonable and justifiable infringement of Mr. Whatcott's freedom of expression and freedom of religion?**

## V – ARGUMENT

**1. Did the flyers distributed by Mr. Whatcott violate section 14(1)(b) of the *Code*?**

### **Provincial jurisdiction over speech is limited to preventing actual discrimination**

16. As this Court has previously held, Section 14(1)(b) of the *Code* must be interpreted in light of the division of powers set out in Sections 91 and 92 of the *Constitution Act*,

1867. A province does not have the constitutional authority to restrict expression that may be considered hurtful or offensive, simply because such expression has the capacity to offend. In *Saskatchewan (Human Rights Commission) v. Engineering Students' Society*,<sup>1</sup> (hereinafter "*Engineering Students' Society*") this Court applied Supreme Court of Canada jurisprudence to hold that while the provinces have jurisdiction over property and civil rights, "prohibition of the dissemination of ideas, particularly on political and religious subjects, is part of the criminal law power of Parliament."<sup>2</sup> This Court therefore held that expression prohibited by Section 14(1)(b) must be "such as to cause or be likely to cause others to engage in one or more of the discriminatory practices"<sup>3</sup> prohibited elsewhere in the *Code*, for example discrimination in employment, housing, or contracting.<sup>4</sup>

17. In *Engineering Students' Society*, this Court interpreted the scope of Section 14(1) as follows:

[H]aving regard especially for the division of powers between the federal and provincial governments, the section requires that the affront be productive of a specific discriminatory effect or effects. An adverse general effect upon the class will not be sufficient to engage the provision.

the section requires, by implication that the message have a specific effect or effects in order to be caught by the section. The message must not only ridicule, belittle, or otherwise affront the dignity of the person or the class, it must be such as to cause or be likely to cause others to engage in one or more of the discriminatory practices prohibited by ss. 9 through 13 and 15 through 19.<sup>5</sup>

18. The requirement of a specific link between speech and discriminatory practices is important, not only from a division of powers analysis, but also to ensure that Section 14(1)(b) of the *Code* will not restrict *Charter*-protected expression. Without this link, Section 14(1)(b) can be used to proscribe all manner of speech including the communication of ideas and opinions in the form of editorial commentary, blogs, websites,

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<sup>1</sup> *Engineering Students' Societ v. Saskatchewan (Human Rights Board of Inquiry)* (Sask. C.A.) 56 D.L.R. (4<sup>th</sup>) 604 (Sask. C.A.) (1989).

<sup>2</sup> *Ibid*, citing from Tarnopolsky's *Discrimination and the Law*.

<sup>3</sup> *Supra* note 1 at 621.

<sup>4</sup> *Ibid*, at 615.

<sup>5</sup> *Ibid*.

books, newspaper articles and the like, thereby casting a specter of censorship on virtually all speech in Saskatchewan. Satirists and cartoonists, who are often effective in achieving political change, depend on humour that may “ridicule, belittle, or affront the dignity” of a certain political figure, organization, country, or group of people. If s. 14(1)(b) is interpreted broadly, a satire on Americans’ love of handguns and militarism could be subject to prohibition as “ridiculing” persons based upon the protected ground of nationality. A humorous essay on the foibles of bachelorhood or the bad habits of teenagers could “belittle” persons on the protected grounds of marital status or age. The infamous legal suppression of Jehovah’s Witnesses in Quebec in the 1950s and 1960s (eventually overturned by the Supreme Court), which was defended in part on the rationale that the Roman Catholic Church should be protected from insult, could now be justified on the ground that such writings “affront the dignity” of Catholics because of their religion.

19. The CCF submits that if Section 14(1)(b) is read broadly, this Section will effectively chill a wide range of speech that has an important role to play in the democratic system and in the quest for truth. A broad interpretation will impact not only those faced with a *de facto* prosecution for having violated the *Code*, but also other citizens who will refrain from saying what they would like to say because they, too, fear prosecution. A broad interpretation of Section 14(1)(b) will discourage members of the public from participating in public debates on important political issues, for fear that they may misspeak or be punished for expressing an unpopular or offensive opinion that some listeners may perceive as hateful.

20. The distinction between speech related to discriminatory practices, and offensive speech on topics of public interest, is crucial. For example, if a store owner posted a sign stating “gays and lesbians not welcome here,” this would violate Section 14(1)(b) as discriminatory expression related to a discriminatory practice prohibited by the *Code*. This hypothetical example is very different from the facts of this case, in which the distribution of flyers by Mr. Whatcott was not related to buying, selling, employment, accommodation, or other matters which the *Code* is intended to address.

21. The Tribunal failed to make any finding on whether Mr. Whatcott's flyers would "cause or be likely to cause others" to engage in discriminatory conduct specifically forbidden by the *Code*. The Tribunal's decision implies that Mr. Whatcott's flyers may have had some "adverse general effect," but even if this is so, this is still insufficient to bring Mr. Whatcott's flyers within the ambit of Section 14(1)(b).

22. The CCF urges this Court to rely upon its ruling in *Engineering Students' Society* to hold that Section 14(1)(b) applies only to expression that is directly linked to a prohibited discriminatory practice, and that a province does not possess the constitutional authority to go any further than that in regulating expression.

**Sections 5 and 14(2) of the *Code* require greater protection for freedom of expression**

23. Subsection 14(2) of the *Code* states that "Nothing in subsection 14(1) restricts the right to freedom of expression under the law upon any subject." In similar fashion, Section 5 of the *Code* states that "Every person and every class of persons shall, under the law, enjoy the right to freedom of expression through all means of communication, including, without limiting the generality of the foregoing, the arts, speech, the press or radio, television or any other broadcasting device." The CCF submits that the distribution of flyers commenting on public policy and sexual morality is included in, and protected under, Section 5 and Subsection 14(2) of the *Code*.

24. The CCF submits that Section 5 and Subsection 14(2) raise the bar for the protection of freedom of expression, and establish a higher level of protection for freedom of expression than what the Supreme Court of Canada required in *Taylor v. Canada (Human Rights Commission)* [1990] 3 S.C.R. 892 [TAB 7 of Appellant's Book of Authorities], in which the Court considered legislation which lacked provisions like Section 5 and Subsection 14(2) of the *Code*. Accordingly, even if Mr. Whatcott's flyers violated

the standard set out in *Taylor*, the relevant standard to be applied in this case provides a higher degree of protection for freedom of expression than the standard in *Taylor*.

25. Further, the protection for freedom of expression provided by Section 5 and Subsection 14(2) is consistent with the narrow ambit given to Section 14(1)(b) by this Court in *Engineering Students' Society*.

26. *Sullivan on the Construction of Statutes* states that “it is presumed that the legislature avoids superfluous or meaningless words, that it does not pointlessly repeat itself or speak in vain,” and that “every word and provision found in a statute is supposed to have a meaning and a function. For this reason courts should avoid, as much as possible, adopting interpretations that would render any portion of a statute meaningless or pointless or redundant.”<sup>6</sup>

27. The Tribunal and the Court below erred in law by failing to give effect to – or even consider – Section 5 and Subsection 14(2) of the *Code* in their decisions.

### **The relevant context in which the debate occurred**

28. Mr. Whatcott views homosexual behaviour as sinful or morally wrong, and the introduction of homosexuality into the public school curriculum as harmful to children. He believes that the gay lifestyle is unhealthy at both a physical and spiritual level, resulting in shorter life expectancy and eternal judgment after death. Mr. Whatcott’s flyers focus on sexual behaviour described by his religion as sinful, rather than upon gays and lesbians themselves. In conjunction with this emphasis on the morality of certain sexual behaviour, the flyers commented on the public policy issue of whether homosexuality should be taught to children in the Saskatoon Public School system, and criticized the gay magazine

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<sup>6</sup> *Sullivan on the Construction of Statutes*, Fifth Edition, 2008, page 210, referencing *Quebec (Attorney General) v. Carrières Ste. Therese Ltee*, [1985] 1 S.C.R. 831; and *Communities Economic Development Fund v. Canadian Pickles Corp.*, [1991] 3 S.C.R. 388. See also: *Driedger on the Construction of Statutes*, Third Edition, 1994, page 159, The Presumption Against Tautology.

*Perceptions* for having run a classified ad seeking “men/boys.” To equate the expression of these opinions with the promotion of hatred against gays and lesbians as people is to ignore the relevant context of Mr. Whatcott openly declaring his religious beliefs.

29. With his flyers, Mr. Whatcott made assertions on questions which are properly the subject of public debate, and not for Courts and Tribunals to determine: whether or not school children should be exposed to teachings about homosexuality; whether or not particular kinds of sexual behaviour are immoral, unhealthy, or sinful; whether or not the incidence of a disease is higher among some groups of the population; whether or not a classified advertisement for “boys/men” is appropriate, whether or not a particular lifestyle is healthy or desirable, etc. The CCF submits that the Respondent is essentially inviting this Court to settle these debates by penalizing Mr. Whatcott for having expressed his opinions on these questions.

### **The proper application of *Taylor* and *Bell* in this case**

30. In support of its argument that the breaches are justified, the Respondent relies heavily upon the Supreme Court of Canada’s decision in *Taylor*, and this Court’s decision in *Saskatchewan (Human Rights Commission) v. Bell* 114 D.L.R. (4<sup>th</sup>) 370 (Sask.C.A.) (1994) [TAB 8 of Appellant’s Book of Authorities]. The CCF submits that *Taylor* and *Bell* may be distinguished on the following grounds:

- First, *Taylor* was a narrow decision carefully limited by the Court to its specific context, in respect of legislation which lacked the equivalent of the *Code*’s Section 5 and Subsection 14(2).
- Second, *Taylor* and *Bell* considered only the infringement on the *Charter* guarantee of freedom of expression, and did not consider the Section 2(a) guarantee of and freedom of conscience and religion.

- Third, Mr. Whatcott’s flyers comment on matters of public policy and sexual morality, including criticism of same-sex sexual behaviour, thereby presenting facts which are very different from the facts in *Taylor* and *Bell*.
- Fourth, *Taylor* applied to federal legislation rather than provincial legislation, such that the limit on constitutional jurisdiction set out in *Engineering Students’ Society* did not apply to the legislation considered in *Taylor*.

31. In *Taylor*, the Supreme Court narrowly upheld the constitutionality of a provision in the *Canadian Human Rights Act* that forbade certain kinds of hate speech.<sup>7</sup> The majority in *Taylor* took pains to point out that it was not upholding the constitutionality of all hate speech statutes, regardless of purpose, need or language. Instead, the majority in *Taylor* stated that the section 1 analysis “requires an approach sensitive to the context of a given case”<sup>8</sup> and “an appreciation of the extent to which a restriction of the activity at issue on the facts of the particular case debilitates or compromises the principles underlying the broad guarantee of freedom of expression.”<sup>9</sup> In other words, an abstract balancing of the evils of hate speech against the value of free expression will not suffice. Further, the Court specifically limited its analysis of speech which is “intended or likely to circulate extreme feelings of opprobrium and enmity against a racial or religious group” – hate speech in its most extreme form.<sup>10</sup>

32. In *Taylor*, the *Canadian Human Rights Act* prohibited the repeated dissemination by telephone of discriminatory messages, but did not contain an exemption for free speech of the kind found in Subsection 14(2) and Section 5 of the *Code*. Writing for a majority of the Court, Chief Justice Dickson noted the presence of such exemptions for free speech in other human rights codes then in force, citing by way of example s. 12 of Nova Scotia’s *Human Rights Act*, which stated in language almost identical to that of Saskatchewan’s *Code*:

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<sup>7</sup> *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892[TAB 7 of the Appellant’s Book of Authorities].

<sup>8</sup> *Ibid*, at paragraph 35.

<sup>9</sup> *Ibid*, at paragraph 48.

<sup>10</sup> *Ibid*, at paragraph 2.

“Nothing in this Section shall be deemed to interfere with the free expression of opinion upon any subject in speech or in writing.”<sup>11</sup>

33. In *Taylor*, Chief Justice Dickson took it for granted that exemptions for free speech like that found in the *Human Rights Act* of Nova Scotia constituted a direction to adjudicators to consider *Charter* values. He went further, holding that any prohibition on free speech should be read in light of *Charter* values, whether it contains an exemption for free speech or not, stating at paragraph 65:

Perhaps the so-called exemptions found in many human rights statutes are best seen as indicating to human rights tribunals the necessity of balancing the objective of eradicating discrimination with the need to protect free expression. In any event, I do not think it in error to say that even in the absence of such an exemption an interpretation of s. 13(1) consistent with the minimal impairment of free speech is necessary.<sup>12</sup>

34. In summary, the CCF submits that Mr. Whatcott did not violate the *Code* because:

- the ambit of Section 14(1)(b) is limited to expression which causes or is likely to cause specific discriminatory effects, not merely an “adverse general effect” upon a class;
- Section 5 and Subsection 14(2) require a high level of protection for freedom of expression, and the Tribunal did not consider or give effect to these provisions when applying Section 14(1)(b);
- the relevant context is one of public policy debate and the peaceful dissemination of religious teaching; and
- *Taylor* and *Bell* are distinguishable.

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<sup>11</sup> *Ibid*, at paragraph 63.

<sup>12</sup> *Ibid*, at paragraph 65.

**2. Does “sexual orientation” in the *Code* include sexual behaviour, and does the *Code* shield sexual behaviour from criticism?**

**Freedom of expression includes the right to criticize behaviour**

35. In considering Mr. Whatcott’s statements, it should be borne in mind that it is fundamental to democracy that individuals be permitted to comment on the morality of others’ behaviour. In a free and democratic society, debate about norms of behaviour enables citizens to decide which behaviours to adopt for themselves, and also which behaviours should be permitted, encouraged, or forbidden by society at large. The dangers of taking norms of behaviour to be so self-evidently correct that it is impermissible to question them are illustrated by history. Ironically, it was not long ago that some societies treated homosexuality as self-evidently wrong and punished as blasphemy any attempt to question the Bible’s authority on questions of morality.

36. The CCF submits that the *Code*’s purpose is to prohibit actual discrimination in housing, employment, and the provision of goods and services to the public; the *Code* should not be used as a tool to stifle debate about morality and behaviour, including sexual behaviour.

**People are separate from their behaviour**

37. In *Owens v. Saskatchewan Human Rights Commission*, [2006] Sask. C.A. 41 [TAB 3 of Appellant’s Book of Authorities] at paragraph 82, this Court recognized the right of citizens to make a distinction between sexual behaviour and sexual identity:

. . . it is necessary to recognize that many people do make such a distinction [between sexual behaviour and sexual identity] and believe on moral or religious grounds that they can disapprove of the same-sex sexual practices without disapproving of gays and lesbians themselves. This fact is at least part of the overall context in which Mr. Owens’ advertisement must be considered. Again this

tends to shade the content of the advertisement away from it being the sort of message which falls within the scope of s. 14(1)(b) of the *Code*.

38. The principle that people are separate from their behaviour can be fairly and justly applied in respect of other grounds of discrimination which the *Code* prohibits. For example, the *Code* prohibits discrimination on grounds of religion, but the *Code* should not be construed so as to protect religious behaviour or practices from criticism. The Jewish practice of circumcising male infants, the Roman Catholic practice of rejecting artificial methods of birth control, and the practice of many religions in excluding women from positions of leadership, have all been subjected to extensive public criticism, sometimes in polemical language. Criticizing religiously-based customs or behaviour as wrong, immoral, unfair or destructive does not constitute hate speech or an attack on religious people, *even if the religious practice in question is integral to religious identity*. Further, if religious *behaviour* is condemned in extreme language which some religious people may perceive as hateful, this condemnation still does not constitute hatred towards religious *people*.

39. If the *Code* is interpreted to prohibit criticism of same-sex sexual behaviour, then the *Code* can also be construed as prohibiting criticism of other sexual behaviours, such as adultery, fornication, common-law relationships, and polygamy. The CCF submits that the *Code*'s inclusion of sexual orientation should not be construed so as to prohibit criticism of same-sex sexual behaviour as immoral, in the same way that the *Code*'s inclusion of marital status and family status should not be construed so as to prohibit criticism of adultery, fornication, common-law relationships or polygamy as immoral.

40. The CCF therefore submits that the *Code* should not be construed so as to prohibit criticism of behaviour. Neither sexual behaviour, nor religious customs and practices, nor any other form of behaviour should be shielded from criticism – even if the criticism is expressed in polemical or extreme language which some listeners might perceive as hateful.

**The *Code* should not prohibit the public proclamation of religious teachings**

41. Further, a pluralistic society is one in which there are sharp disagreements on issues of morality and behaviour. Religious texts such as the Bible contain many prohibitions on behaviour, often with specific penalties, that may relate to practices of groups protected by human rights legislation.

42. If this Court interprets the religious denunciation of certain sexual behaviours as constituting hate speech or speech otherwise prohibited by the *Code*, this would place a broad, severe and unreasonable restriction on freedom of religion. If the religious denunciation of same-sex sexual behaviour violates Section 14(1)(b) of the *Code* because this behaviour pertains to the enumerated ground of sexual orientation, it follows that a wide range of religious teachings can no longer be proclaimed openly if such teachings touch upon or relate to religion, creed, marital status, family status, sex, receipt of public assistance, and other grounds set out in the *Code*.

43. Many religions espouse teachings which could easily be viewed by many Canadians as “discriminatory” in respect of grounds enumerated in the *Code*. For example, the Bible prohibits the worship of false gods, which is a religious teaching that could easily be experienced as hurtful or offensive by members of non-Christian religious groups, which in turn correspond with the *Code*’s enumerated ground of religion.

43. The CCF therefore submits that Section 14(1)(b) must be interpreted narrowly, such that religious teachings on matters of morality, sexuality, marriage, gender, family life and other topics are excluded from its ambit. Only a narrow interpretation of Section 14(1)(b) of the *Code*, limiting its ambit to expression that is directly and causally related to specific discriminatory practices, avoids the numerous conflicts which can easily arise between the *Code* and the public proclamation of religious teachings.

45. In summary, the CCF submits that the *Code* does not shield any behaviour, custom or practice from criticism, even if the behaviour, custom or practice is based on, or closely identified with, one of the *Code*'s enumerated grounds. This Court has recognized that the *Code* allows citizens to make a distinction between sexual behaviour and sexual identity. Interpreting the *Code* so as to shield behaviour from criticism would amount to a wide-ranging prohibition of numerous religious teachings which touch on or relate to the *Code*'s enumerated grounds, and a severe restriction on speech generally.

### **3. Is the Order of the Tribunal a reasonable and justifiable infringement of Mr. Whatcott's freedom of expression and freedom of religion?**

#### **Section 2(b) of the *Charter* protects the right to offend**

46. Writing for the majority of the Supreme Court of Canada in *R. v. Zundel*, McLachlin J. (as she then was) stated:

The purpose of [s. 2(b)] is to permit free expression to the end of promoting truth, political or social participation, and self-fulfilment. That purpose extends to the protection of minority beliefs which the majority regard as wrong or false: *Irwin Toy, supra*, at p. 968... [T]he guarantee of freedom of expression serves to protect the right of the minority to express its view, however unpopular it may be; adapted to this context, it serves to preclude the majority's perception of 'truth' or 'public interest' from smothering the minority's perception. The view of the majority has no need of constitutional protection; it is tolerated in any event.<sup>13</sup>

47. The guarantee found in Section 2(b) applies even to speech that is regarded by the public "as wrong or false"<sup>14</sup> or "offensive."<sup>15</sup> The guarantee of free expression exists to protect unpopular minority views, like those of Mr. Whatcott, which the majority may find hurtful, distasteful or extreme. If the purposes of protecting freedom of expression are to be met, freedom of expression must be given a broad interpretation.

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<sup>13</sup> *R. v. Zundel*, [1992] 2 S.C.R. 731, paragraph 22.

<sup>14</sup> *Ibid.*, at paragraph 1.

<sup>15</sup> *Ibid.*, at paragraph 21.

48. The Respondent has not provided any authority for the proposition that Section 2(b) protects only speech that lies at the core of positive values shared by Canadians, or speech that is consistent with other public values such as equality and tolerance.<sup>16</sup> To the contrary, section 2(b) confers a right to cause offense, and protects *all* speech unless prohibition is necessary to prevent a demonstrable and pressing harm.

49. As a constitutional right to cause offense, freedom of expression will sometimes result in hurt feelings on the part of some, or even many, listeners. Indeed, as this Court aptly noted in *Bell* [TAB 8 of Appellant’s Book of Authorities] at paragraph 27 “the very purpose of s. 2(b) is to protect expression which is offensive to somebody.” The CCF submits that, in light of the purpose of section 2(b) of the *Charter*, section 14(1)(b) of the *Code* is not meant to remedy or protect against hurt feelings, nor should it be interpreted in this fashion. Canadian jurisprudence does not recognize hurt feelings on the part of listeners as forming a constitutionally valid basis for restricting freedom of expression.

50. The CCF submits that Section 2(b) of the *Charter* requires Courts to make a distinction between hurt feelings and actual harm. If hurt feelings acquire constitutional status then freedom of expression, which includes the right to offend listeners, becomes a hollow, empty and worthless right. The CCF submits that conferring constitutional status on hurt feelings is wholly incompatible with the nature and purpose of Section 2(b) of the *Charter*.

### **Freedom of expression is the cornerstone of democracy**

51. Canadian courts have repeatedly recognized the crucial role played by freedom of expression in the development and maintenance of a free and democratic society. For instance, in *Edmonton Journal v. Alberta*, Justice Cory stated for the majority of the Supreme Court of Canada that:

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<sup>16</sup> *Ibid*, at paragraph 55.

It is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression. Indeed a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions. The concept of free and uninhibited speech permeates all truly democratic societies and institutions. The vital importance of the concept cannot be over-emphasized. No doubt that was the reason why the framers of the *Charter* set forth s. 2(b) in absolute terms which distinguishes it, for example from s. 8 of the *Charter* which guarantees the qualified right to be secure from unreasonable search. It seems that the rights enshrined in s. 2(b) should therefore only be restricted in the clearest of circumstances.<sup>17</sup>

52. In this discussion of the nature of Canadian democracy in *Reference Re Secession of Quebec*, the Supreme Court again took up the central role of freedom of expression in building and maintaining a free and democratic society, stating *per curium*:

...we highlight that a functioning democracy requires a continuous process of discussion. The Constitution mandates government by democratic legislatures, and an executive accountable to them, “resting ultimately on public opinion reached by discussion and the interplay of ideas” (*Saumur v. City of Quebec*, [1953] 2 S.C.R. 299, at p. 330). At both the federal and provincial level, by its very nature, the need to build majorities necessitates compromise, negotiation and deliberation. No one has a monopoly on truth, and our system is predicated on the faith that in the marketplace of ideas, the best solutions to public problems will rise to the top. Inevitably, there will be dissenting voices. A democratic system of government is committed to considering those dissenting voices, and seeking to acknowledge and address those voices in the laws by which all in the community must live.<sup>18</sup>

53. As the Court here notes, only through continuous discussion and the free interplay of ideas can a free and democratic society flourish. Democracy is therefore well served by robust debate about all topics, including the law, health care, education, welfare, taxation, the environment, morality, and sexuality. Restricting freedom of expression undermines democracy.

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<sup>17</sup>*Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 , at paragraph 3.

<sup>18</sup>*Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at paragraph 668.

54. The CCF submits that if the “marketplace of ideas” is to allow the best ideas to be expressed and ultimately rise to the top, then no group or government agency can be permitted to have a monopoly on truth, or to enforce a particular viewpoint or ideology by penalizing the expression of contrary or unorthodox views. Yet the Tribunal’s Order effectively enforces one particular viewpoint about sexual orientation and sexual behaviour by penalizing Mr. Whatcott for expressing – in polemical language – a dissenting opinion. The CCF submits that the Tribunal’s Order has a chilling effect on the free and uninhibited speech which is vital to democracy.

55. In *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*,<sup>19</sup> the Court addressed the relationship between freedom of expression and democracy as follows:

The freedom of individuals to discuss information about the institutions of government, their policies and practices, is crucial to any notion of democratic rule. The liberty to criticize and express dissentient views has long been thought to be a safeguard against state tyranny and corruption.<sup>20</sup>

### **Section 2(b) protects the rights of listeners and the public’s right to information**

56. The Supreme Court of Canada has recognized that “[d]ebate in the public domain is predicated on an informed public.”<sup>21</sup> Freedom of expression protects the rights of listeners as well as the rights of speakers. In the context of political expression, the right to receive information about public policy issues plays a critical role in enabling individuals to exercise their fundamental democratic rights in an informed manner. Any chilling effect on speakers will result in listeners receiving less information on matters of public policy.

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<sup>19</sup> *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480.

<sup>20</sup> *Ibid.*, at paragraph 18.

<sup>21</sup> *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, at paragraph 23.

**Section 2(b) of the *Charter* requires tolerance for polemical speech**

57. Since long before the enactment of the *Charter*, Canadian courts have displayed tolerance for polemical messages in heated and emotive debates, even if considered “extreme” in the context and circumstances of when the message was spoken or written. For example, in *R. v. Boucher*,<sup>22</sup> the Supreme Court acquitted a Jehovah’s Witness of seditious libel for distributing a pamphlet entitled “Quebec’s Burning Hate for God and Christ and Freedom Is the Shame of All Canada,” containing many strong statements about Quebec society, the clergy, and the courts. Polemical speech plays a crucial role in public debate, and can be an effective method of drawing attention to an issue and stimulating more debate.

58. Similarly, in *R. v. Keegstra* [1990] 3 S.C.R. 697 [TAB 8 of the Respondent’s Book of Authorities] at paragraph 89 Dickson C.J. for the majority explained that:

The connection between freedom of expression and the political process is perhaps the linchpin of the s. 2(b) guarantee, and the nature of this connection is largely derived from the Canadian commitment to democracy. Freedom of expression is a crucial aspect of the democratic commitment, not merely because it permits the best policies to be chosen from among a wide array of proffered options, but additionally because it helps to ensure that participation in the political process is open to all persons.

59. The right to express controversial positions in harsh language is an essential part of free speech. Radical political commentary, whether religious or secular, performs a crucial function in a society that values democracy and freedom of thought, belief, opinion, and expression. Polemical speech can serve to encourage citizens to defend, justify, or re-examine their positions in the quest for truth. Citizens who participate in public debate often hold strong views. Free speech, particularly in the political arena, may not be curtailed merely because one might find the message – or the manner in which it was expressed – offensive.

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<sup>22</sup> *R. v. Boucher*, [1951] S.C.R. 265

60. The CCF submits that the Respondent's argument, essentially, is that Mr. Whatcott violated the *Code* because he hurt the feelings of some individuals by expressing his political and religious views in language they perceived as polemical or hateful. But Canadian Courts have never accepted the notion that speech can be banned because it hurts feelings or offends. To the contrary, the very purpose of the *Charter's* section 2(b) is to enable the expression of ideas which are unpopular, offensive, hurtful, or distasteful. The CCF submits that the Tribunal, in issuing its Order against Mr. Whatcott, ignored the purpose of the *Charter's* section 2(b).

**The Tribunal's Order violates the *Charter's* section 2(a) religious freedom guarantee**

61. This appeal also engages the fundamental right to freedom of religion guaranteed in s. 2(a) of the *Charter*, because Mr. Whatcott acted on the basis of sincerely held religious beliefs.<sup>23</sup>

62. The Supreme Court of Canada has stated the “[t]he protection of freedom of religion afforded by s. 2(a) of the *Charter* is broad and jealously guarded in our *Charter* jurisprudence”<sup>24</sup> and that “human rights codes must be interpreted and applied in a manner that respects [this] broad protection granted to religious freedom”.<sup>25</sup>

63. In *R. v. Big M Drug Mart* [1985] 1 S.C.R. 295 [TAB 13 of Appellant's Book of Authorities] at paragraph 94 Dickson C.J. eloquently discussed the importance of freedom of religion in Canadian society, and specifically noted the relationship between freedom and the absence of coercion:

The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly

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<sup>23</sup> *Factum of the Appellant*, at paragraphs 1 and 12.

<sup>24</sup> *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698, at paragraph 53.

<sup>25</sup> *Ibid*, at paragraph 55.

and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination.

64. In *Trinity Western University v. British Columbia Council of Teachers* [2001] 1 S.C.R. 772 [TAB 10 of Appellant's Book of Authorities] at paragraph 28 the Supreme Court of Canada held:

Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. One of the major purposes of the Charter is to protect, within reason, from compulsion or restraint. Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain or sanction; coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others. Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.

65. The constitutional right “to declare religious beliefs openly and without fear of hindrance or reprisal” is incompatible with any “right” on the part of listeners to be free from hurt feelings or offense. If legislation confers a “right to be free from hurt feelings caused by declarations of religious belief” than such *legislative* right would not be compatible with the *constitutional* right to declare religious beliefs openly and without fear of hindrance and reprisal. The CCF submits that Section 14(1)(b) of the *Code* must be interpreted so as to comply with the *Charter*. Therefore, Section 14(1)(b) does not confer a “right” to be free from hurt feelings or offense caused by another citizen’s declaration or dissemination of religious belief, because such “right” is incompatible with Section 2(a) and 2(b) of the *Charter*.

### **Applying the *Oakes* test to the Tribunal's Order**

66. As the Appellant's *Charter* rights to freedom of expression and freedom of religion and conscience have clearly been infringed by the Tribunal's Order,<sup>26</sup> the onus is on the government to demonstrably justify these violations under section 1 of the *Charter*, pursuant to the test set out in *R. v. Oakes* [1986] 1 S.C.R. 103 [TAB 9 of Appellant's Book of Authorities] the Supreme Court of Canada has held that "[b]ecause of the important of the guarantee of free expression . . . any attempt to restrict the right must be subject to the most careful scrutiny."<sup>27</sup>

### **Relevant context surrounding the flyers and their distribution**

67. The inquiry mandated by *Oakes* is necessarily contextual. In this case, the CCF submits that the following are important contextual factors:

- Mr. Whatcott expressed his political and religious opinions peacefully by distributing flyers;
- Mr. Whatcott's opinions related to matters of public interest, including sexual morality and public policy, in the context of on-going social and political debate about homosexuality and policy;
- Mr. Whatcott's religion teaches him that he should proclaim his religious faith and its teachings to other people; he believed he had a moral obligation to speak out;
- There was no evidence before the Tribunal of any direct or causal relationship between the expression of Mr. Whatcott's opinions and the provision of goods and services to the public;

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<sup>26</sup> *Factum of the Respondent Saskatchewan Human Rights Commission*, at paragraph 56.

<sup>27</sup> *R. v. Sharpe*, [2001] 1 S.C.R. 45, at paragraph 22.

68. These facts contrast with the statements found to be justifiably prohibited in *Taylor* (anti-Semitic comments), *Bell* (racist stickers), and *Ross v. New Brunswick School District No. 15* [1996] 1 S.C.R. 825 [TAB 10 of Respondent's Book of Authorities] (anti-Semitic comments). Those cases each involved additional concerns: in *Taylor*, the anti-Semitic comments often targeted specific persons;<sup>28</sup> in *Bell*, the racist stickers were being sold in a store,<sup>29</sup> leading to a reasonable inference that the store would discriminate on the basis of race; in *Ross*, the unique vulnerabilities of students in an educational setting were at issue.<sup>30</sup>

### **Pressing and substantial objective**

69. To justify a breach of the right, the state must demonstrate a sufficiently compelling harm that is independent and distinct from an objection that the content of speech is offensive or hurtful. This is not a hypothetical inquiry; nor is it an inquiry that is concerned with subjective opinions about the relative value of offensive speech. The Court must determine the *actual* purpose of the impugned provision, the *actual* connection between the provision and its purpose, the *actual* degree to which the provision infringes the right and whether the *actual* benefit of the provision outweighs the *actual* seriousness of the violation.<sup>31</sup>

70. The state's burden and standard of persuasion is great in cases concerning freedom of expression.<sup>32</sup> The CCF submits that prohibiting expression which causes a specific discriminatory effect, as described by this Court in *Engineering Students' Society*, is a pressing and substantial objective. In the alternative, prohibiting expression which hurts feelings or causes offense is not a pressing and substantial objective. In fact, prohibiting

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<sup>28</sup> *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892, [TAB 7 of Appellant's Book of Authorities] at paragraph 7.

<sup>29</sup> *Saskatchewan (Human Rights Commission) v. Bell (c.o.b. Chop Shop Motorcycle Parts (Sask. C.A.))*, 114 D.L.R. (4<sup>th</sup>) 370, [TAB 8 of Appellant's Book of Authorities] at paragraph 19.

<sup>30</sup> *Ross v. New Brunswick Teachers' Assn.*, [2001] N.B.J. No. 198, [TAB 10 of Respondent's Book of Authorities] at paragraph 105.

<sup>31</sup> *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at paragraph 82.

<sup>32</sup> *R. v. Sharpe*, [2001] 1 S.C.R. 45, at paragraph 102.

hurtful and offensive expression is antithetical to a free and democratic society, to the quest for truth and self-fulfillment, and to the very nature and purpose of Section 2(b) of the *Charter*.

### **Rational connection**

71. The CCF submits that if the objective of the Tribunal's Order is to prohibit expression causing specific discriminatory effects, the Order was not rationally connected to that objective because the Order banned the distribution of flyers that had no connection with the provision of goods and services to the public. In the alternative, if the Order's objective was to prohibit hurtful and offensive expression, the Order lacks a pressing and substantial objective and therefore cannot be justified under Section 1 of the *Charter*.

### **Minimal Impairment**

72. The Supreme Court has held that the requirement of careful tailoring is especially important as regards Section 2(b) of the *Charter* and, to this end, it has made clear that the requirement of minimal impairment will allow infringements of freedom of expression only to the extent that is reasonably necessary. The CCF submits that if the Order's objective is to prohibit expression causing specific discriminatory effects, the Order did not minimally impair Mr. Whatcott's *Charter* rights because the Order prohibited the distribution of flyers that addressed public policy matters and had no connection with the provision of goods and services to the public. In the alternative, if the Order's objective was to prohibit hurtful and offensive expression, the Order lacks a pressing and substantial objective and cannot be justified under Section 1 of the *Charter*.

### **Proportionality between benefits and harm**

73. In its decision, the Tribunal fails to indicate what benefits, if any, are expected to result from its Order. Although the Supreme Court does not require empirical proof of beneficial effects before a *Charter* breach can be justified, it does require more than mere

assertion or speculation that a *Charter* infringement will substantially further an important government objective.<sup>33</sup> There is no indication from the Tribunal's reasons that there was any evidence that, under a Section 1 analysis, the marginal, speculative benefits of the Order were proportionate to its limits on fundamental freedoms.

74. The third step of the proportionality analysis calls upon the government to establish that the underlying objective of the challenged measure, as well as the benefits that actually accrue from that measure, outweigh the deleterious effects that the measure has on fundamental rights and freedoms. "[E]ven if the importance of the *objective itself* (when viewed in abstract) outweighs the deleterious effects on protected rights, it is still possible that the actual *salutary effects* of the legislation will not be sufficient to justify these negative effects"<sup>34</sup> (emphasis in original)

75. In applying the third part of the proportionality test, a court must have regard to the particular nature of the rights or freedoms at issue, as well as the particular nature and effects of the limitation imposed. As the Supreme Court of Canada explained in *Oakes*:

Some limits on rights and freedoms protected by the *Charter* will be more serious than others in terms of the nature of the right or freedom violated, the extent of the violation, and the degree to which the measures which impose the limit trench upon the integral principles of a free and democratic society. Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve.<sup>35</sup>

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<sup>33</sup> *Trinity Western University v. British Columbia Council of Teachers*, [2001] SCC 31, [TAB 10 of Appellant's Book of Authorities] at paragraph 35.

<sup>34</sup> *Thompson Newspapers Co (c.o.b. Globe and Mail) v. Canada (Attorney General)*, [1998] 1 S.C.R. 877, at paragraph 124.

<sup>35</sup> *R. v. Oakes*, [1986] 1 S.C.R. 103, [TAB 9 of Appellant's Book of Authorities] at paragraph 71.

76. Measures that restrict expression closely connected to core values – such as the promotion of public participation in the political process – are subject to a “searching degree of scrutiny”<sup>36</sup>.

77. When offensive speech is subject to legal prohibitions like the Tribunal’s Order against Mr. Whatcott, serious dangers arise. Restrictions on freedom of expression – accompanied by *de facto* penalties like the requirement that Mr. Whatcott pay \$17,500 to individuals offended by the peaceful expression of his messages, plus incurring legal costs to defend his rights – cast a chill over all future speakers, leading to self-censorship among all citizens.

79. This chilling effect and resulting self-censorship undermine the quest for truth and self-fulfillment, and undermine Canadian democracy itself. The Tribunal’s Order stifles the free and uninhibited speech that is required for a thriving marketplace of ideas. Further, these dangers are magnified when the speech in issue concerns matters of morality, religious belief, and public policy, as is the case with this appeal. The Order also constitutes a broad and unrestrained attack on the *Charter*’s Section 2(a) protection of freedom of religion and conscience. The Tribunal has not explained what benefits, if any, exist to outweigh these harmful effects. Therefore, the Order fails the test of proportionality under Section 1.

80. In summary, the CCF submits that the Order’s violation of Mr. Whatcott’s Section 2(a) and 2(b) *Charter* rights cannot be justified under Section 1 because:

- the Tribunal failed to consider or recognize that Section 2(b) serves to protect expression that is hurtful, offensive, distasteful, polemical or extreme, or perceived by the majority as wrong or false;

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<sup>36</sup> *Ibid*, at paragraph 65.

- the Tribunal failed to consider the importance of freedom of expression to a healthy democracy, to the rights of listeners, to the quest for truth and self-fulfillment, and to the public's right to information;
- the Tribunal did not properly take into account the nature or the importance of religious freedom guaranteed by Section 2(a) of the *Charter*;
- the Tribunal did not properly consider the relevant factual context in which the flyers were distributed, or why the flyers were distributed;

81. Further, if the Order's objective is to prohibit expression which some listeners find hurtful or offensive, the Order's objective is not pressing and substantial. In the alternative, if the Order has a pressing and substantial objective of prohibiting expression which causes specific discriminatory effects, the Order fails the proportionality test. Either way, the Order is not reasonably or demonstrably justified under Section 1.

#### **V1. RELIEF SOUGHT**

82. The CCF respectfully submits that this appeal should be allowed and this Court set aside the Tribunal's Order. The CCF does not seek costs, and asks that no costs be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS \_\_\_\_ DAY OF AUGUST, 2008.

CANADIAN CONSTITUTION FOUNDATION

Per: \_\_\_\_\_

John V. Carpay

