

**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

FACTUM OF THE INTERVENOR, CANADIAN CIVIL LIBERTIES ASSOCIATION

I. OVERVIEW

1. The Canadian Civil Liberties Association (“CCLA”) intervenes in this appeal to make submissions on the following constitutional issues:

- a. Does s.14(1)(b) of the Saskatchewan *Human Rights Code* (“Code”) unjustifiably infringe the fundamental freedoms of expression and religion enshrined in s.2(b) and 2(a) of the *Canadian Charter of Rights and Freedoms* (“Charter”)?
- b. Did the order of the Saskatchewan Human Rights Tribunal (“Tribunal”) unjustifiably infringe the Appellant’s *Charter* rights?

II. FACTS

The Appellant, under the name of the “Christian Truth Activists”, distributed three flyers in 2001 and 2002 which make a series of statements about homosexuality and the morality of certain types of behaviour, often in crude, confronting, and polemical terms.

2. Four complaints were filed with the Saskatchewan Human Rights Commission, which led to the proceedings before the Tribunal. The Appellant was found to have infringed s.14 of the *Code* and was fined \$17,500 by the Tribunal. The Appellant’s challenge to the constitutionality of s.14 was dismissed.¹ On appeal by Mr. Whatcott, the Court of Queen’s Bench upheld the Tribunal’s decision.² Kovach J. held that, *inter alia*, s. 14(1)(b) of the *Code* was a justifiable infringement on Mr. Whatcott’s freedoms of expression and religion under s. 2 of the *Charter*. The Appellant’s appeal to this Court is based in large part on the *Charter*.

III. ARGUMENT

A. THE CCLA’S PERSPECTIVE

3. The CCLA intervenes in this appeal to assist the Court in analyzing the constitutional issues. The CCLA takes no position on any contested issue of fact.

¹ Decision of Saskatchewan Human Rights Tribunal dated May 2, 2005.

² *Whatcott v. Saskatchewan Human Rights Tribunal*, 2007 SKQB 450.

4. The CCLA has participated in several cases in which an individual or group has asserted a right to freedom of expression for messages that many would describe as extreme in their content. These cases include *Canada (Human Rights Commission) v. Taylor*, *Ross v. New Brunswick School District No. 15*, *R. v. Keegstra*, *R. v. Zundel (No.2)*, *R. v. Lucas*, *R. v. Sharpe*, *R. v. Hamilton*, and *WIC Radio Ltd. v. Simpson* in the Supreme Court of Canada.³ The CCLA has also intervened before this Court in *Owens v. Saskatchewan*,⁴ and in *Whatcott v. Saskatchewan Association of Licensed Practical Nurses*.⁵ In each of these cases, the CCLA has sought to articulate a principled approach that does not depend upon agreement or disagreement with, or reaction to, the speech in issue. Indeed, the CCLA has vigorously defended the freedom of expression of members of the LGBT communities, in circumstances where this expression has been challenged as being outside of the mainstream.⁶

5. The CCLA has also intervened in other cases in which complainants have sought to use human rights codes to limit expression that they find offensive. In addition to its interventions in the Supreme Court of Canada in *Taylor* and *Ross*, and in this Court in *Owens*, the CCLA has recently intervened in Alberta in *Lund v.*

³ *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892 (“*Taylor*”); *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825 (“*Ross*”); *R. v. Keegstra*, [1990] 3 S.C.R. 697; *R. v. Zundel (No. 2)*, [1992] 2 S.C.R. 731; *R. v. Lucas*, [1998] 1 S.C.R. 439; *R. v. Sharpe*, [2001] 1 S.C.R. 43; *R. v. Hamilton*, [2005] 2 S.C.R. 432; *WIC Radio Ltd. v. Simpson*, 2008 SCC 40.

⁴ [2006] S.J. No. 221 (C.A.) (“*Owens*”).

⁵ 2008 SKCA 6 (“*Whatcott*”).

⁶ *Chamberlain v. The Board of Trustees of School District #36 (Surrey)*, [2002] 4 S.C.R. 710 (“*Chamberlain*”); *Little Sisters Book and Art Emporium v. Canada (Attorney General)*, [2000] 2 S.C.R. 1120; *R v. Glad Day Bookshop Inc.*, [2004] O.J No. 1766 (Ont. Sup. Ct. Jus.).

*Boissoin and The Concerned Christian Coalition Inc.*⁷ and in B.C. in *Elmasry et al. v. Rogers Publishing Limited et al.*⁸

6. While the CCLA advocates for a robust protection for freedom of expression, the CCLA is also fully cognizant of the countervailing concern for the equality rights of LGBT people. The CCLA has long advocated for the right of members of the LGBT communities to be free from discrimination. In a series of specific cases in which the claims of certain religious groups have been pitted against the equality claims of gays and lesbians, the CCLA has not *a priori* favoured one side or the other, but has sought to articulate a position in each case that accords with civil liberties principles.⁹

B. Submissions

(i) The Importance of Debate on Matters of Morality

7. Mr. Whatcott's messages may well be criticized for being confrontational, extreme, and polemical. Indeed, the CCLA repudiates the content of Mr. Whatcott's expression. However, it is fundamental to democracy that individuals be able to

⁷ (2006), CarswellAlta 2060 (AHRCC). This case examined the extent to which Alberta human rights law can limit a homophobic letter to the editor.

⁸ British Columbia Human Rights Tribunal File Nos. 4885 & 4887. This case concerns a complaint that an article written by columnist Mark Steyn in *Maclean's Magazine* amounts to "hate speech" against Muslims.

⁹ *Trinity Western University v. British Columbia Council of Teachers*, [2001] 1 S.C.R. 772; *Chamberlain v. The Board of Trustees of School District #36 (Surrey)*, [2002] 4 S.C.R. 710; *Brockie v. Ontario Human Rights Commission*, [2002] O.J. No. 2375 (Div. Ct.); *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698.

comment on the morality of others' behaviour. Norms of behaviour must generally be debatable. In this way, people are enabled to reach their own conclusions through democratic processes as to what behaviours should be permitted, encouraged, discouraged, or forbidden.

8. Likewise, the manner in which children in the public school system are exposed to messages about different forms of sexuality and sexual identity is inherently controversial and must always be open to public debate. The CCLA intervened in *Chamberlain* expressly to argue that trustees and parents who were opposed on religious grounds to the presence in public schools of books depicting same-sex parents, could not impose their views on others who disagreed. Neither those who believe homosexuality is sinful, nor those who promote acceptance and tolerance on LGBT issues, can be permitted a monopoly in this debate.

9. The right to debate such issues is fundamental to our notions of democracy. Given its fundamental nature, this right cannot be restricted to the use of polite terms in non-confrontational settings. In a robust democracy, we must have a high degree of tolerance for debates about moral issues, even when expressed in polemical terms, provided the speaker does not engage in violence, incitement to violence, or threats.

10. The CCLA notes that some of Whatcott's statements, relied upon in the court below to support a finding that the flyers promoted hatred, appeared to call for

recriminalization of sexual practices engaged in by gays and lesbians, and characterized such practices as “sick”, “perverted”, “filthy”, “risky”, and generally unhealthy, in terminology more reminiscent of a bygone era than the present. However, these statements, while repugnant to many if not most Canadians, ought to be legally permissible in light of our democratic commitment to freedom of expression. Just as freedom of expression would protect protest *against* anyone seeking to reinstate legal restrictions on homosexuality, it ought to protect those who question prevailing views on morality. A provision or order that prohibits debate on the morality of behaviour represents a serious and unwarranted incursion into freedom of expression and religion.

(ii) This Court is not Bound to Uphold the Constitutionality of s.14(1)(b) under the Doctrine of *Stare Decisis*

11. The Attorney General takes the position that the constitutionality of s.14(1)(b) has already been determined, relying on *Taylor* and *Owens*, and that this Court must uphold the provision as a matter of *stare decisis*. The CCLA disputes this.

12. The CCLA acknowledges that the Supreme Court of Canada upheld a “hate speech” provision in the *Canadian Human Rights Act* in *Taylor*, but submits that *Taylor* is distinguishable on several grounds. The statutory provision at issue in *Taylor*¹⁰ was far more restricted in its scope, prohibiting only hateful material

¹⁰ At that time, s. 13(1) of the *Canadian Human Rights Act*, S.C. 1976-1977, c. 33 read:

It is a discriminatory practice for a person or a group of persons acting in concert to communicate telephonically or to cause to be so communicated, repeatedly, in whole or in

conveyed repeatedly through telephonic communications. The “repeated” nature of the communication was a matter of some emphasis by the Court - yet this feature does not appear in s.14 of the *Code*. Furthermore, since the statutory prohibition in *Taylor* was restricted to “telephonic communications,” in its s. 1 analysis, the Court did not need to concern itself with restrictions on newspapers, broadcasting, publications, or other printed material, which are clearly within the scope of s.14.

13. Moreover, *Taylor* was decided some 17 years ago. Since that time, we have gained significant experience with the manner in which persons who are offended by the content of another’s expression (indeed, sometimes deeply and perhaps justifiably offended), may seek to use human rights commissions for vindication and redress. The CCLA respectfully submits that this experience has demonstrated the extreme difficulty that human rights tribunals (and the courts) have in characterizing contentious expression, and in grappling with amorphous concepts such as “exposes or tends to expose to hatred, ridicules, belittles or otherwise affronts the dignity of” identified persons or classes of persons.

14. This extreme difficulty has not been averted by *Taylor*’s articulation of a standard of requiring “unusually strong and deep-felt emotions of detestation, calumny and vilification”. This is because reaction to speech is highly personal, and ultimately dependent upon the viewpoint of the listener. The CCLA does not

part by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament, any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination.

suggest that this Court can take the position that *Taylor* was wrongly decided, but this Court can, in evaluating the constitutionality of a different provision, take note of the inherent difficulties that tribunals and courts have encountered in applying *Taylor*.

15. The CCLA further acknowledges that in *Owens*, this Court commented on the constitutionality of s.14(1)(b) of the *Code*, in light of *Taylor* and this Court's previous decision in *Saskatchewan Human Rights Commission v. Bell*.¹¹ However, in *Owens* there was no challenge to s.14(1)(b). Mr. Owens, who was self-represented, did not directly attack the constitutionality of this provision, but rather argued that insufficient emphasis had been given to his freedom of religion.¹² Mr. Owens did not serve a notice of constitutional question and the Attorney General did not participate in his case, nor did the CCLA or other interveners make submissions on the validity of s.14. By contrast, in the present appeal, Whatcott argues that if his flyers are found to infringe the *Code*, then the *Code* conflicts with freedom of expression and religion under the *Charter*.¹³

(iii) Section 14(1)(b)

16. The CCLA notes that in the Court below, Whatcott's flyers were found to have met the *Taylor* standard of expression involving "unusually strong and deep-felt

¹¹ *Owens, supra* at paras. 50-57; *Saskatchewan Human Rights Commission v. Bell*, [1994] 5 W.W.R. 460 (Sask. C.A.).

¹² *Owens, supra* at para. 54.

¹³ Appellant's Factum, issues C and D, paras. 70-113.

emotions of detestation, calumny and vilification”. The Appellant (supported by the Canadian Constitution Foundation) argues that this conclusion is wrong because s.14(1)(b) should not be read as extending to criticisms of sexual practices of gays and lesbians. The Appellant argues that there is a clear distinction between people and their behaviour.

17. The CCLA expressly does not rely upon this distinction. While some, notably those from certain religions, have argued that one can “love the sinner, hate the sin”, and can therefore criticize behaviour without spreading hatred against individuals or groups, the CCLA does not believe that people can necessarily be separated from their behaviour in this way. An individual’s sexual practices are frequently a significant part of his or her life, and this is no less true of LGBT people. Sexual orientation may be closely bound up with the sexual practices of members of the LGBT community,¹⁴ just as religious practices may be integral to the religious identity of many persons. There will often be no discernable difference between attacks on the distinctive practices of a group, and attacks on the group itself.

18. Rather, the CCLA submits that the problem with s.14(1)(b) is that it is impossible to create a clear statutory provision that is capable of distinguishing between expressing strong disapproval and spreading hatred. As soon as a speaker characterizes sexual practices engaged in by gays and lesbians as morally wrong, or “perverted”, s/he has denigrated gays and lesbians. The strength of the listener’s reaction to such denigration depends upon his or her viewpoint. A listener

¹⁴ *Owens*, para. 82.

from the LGBT community might well be outraged that such opinions could still be held and expressed in 2001 or 2002. Conversely, adherents to certain religions might well believe that such opinions are entirely appropriate or even religiously mandated. This variation renders the apparent objectivity of the *Taylor* standard illusory.¹⁵

19. The futility of the quest for an objective standard by which to assess polemical speech is illustrated by the arguments made to this Court. According to the Respondent, and the Court below, some of Mr. Whatcott's statements carried the implication that gays and lesbians as a group are predatory and abuse children. According to the Appellant, no such meaning was intended. To a large extent, the meaning is in the eye of the beholder.

20. The CCLA expects that it will be argued that court decisions resolve the question of what the impugned speech "means" objectively, and whether it meets the *Taylor* standard. However, even if this is the case, it must be conceded that this is an extraordinarily difficult process. Both the Appellant (in his previous appeal to this Court) and Mr. Owens have had to bring cases through multiple rounds of litigation, culminating in the highest court in the province, for a determination that their expression fell on the right side of a strongly contested line. In other recent

¹⁵ In *R. v. Zundel*, [1992] 2 S.C.R. 731, at 754-58, McLachlin J. (as she then was) noted the difficulty in assessing the meaning of statements that are "true on one level or for one person" but "false on another level or for another person".

cases, *MacLean's Magazine* has faced an inquiry for publishing an editorial article,¹⁶ and Ezra Levant has faced an inquiry for republishing cartoons of the Prophet Mohammed.¹⁷ Even if such cases do not go to formal hearing, respondents can be required to spend significant time and resources defending their name. The rigours and challenges of the litigation process ensure that very few will take the risk, and much legitimate expression of opinion will be chilled.

21. The CCLA acknowledges that some statements on the flyers amount to statements of purported fact about "Sodomites", including that they are "430 times more likely to acquire Aids & 3 times more likely to sexually abuse children". But there are also serious *Charter* issues in limiting these. The CCLA does not suggest that these purported statements of fact have any basis in published literature of any repute, but notes that s.14 of the *Code* apparently does not permit respondents to raise the sincerity or reasonableness of their belief in these statements, or even truth, as a defence to the fines levied against them. To the extent that s.14 forecloses all statements of this nature, regardless of whether they are genuinely or reasonably believed, or even true, the provision represents an unjustifiable limit on freedom of expression, and should be struck down.

22. In the alternative, s.14 should be read down to apply only to expression that itself signals an intention to engage in otherwise unlawful discriminatory behaviour,

¹⁶ The Canadian Human Rights Commission, after an investigation, decided not to refer the matter to a tribunal hearing: <http://www.macleans.ca/multimedia/pdf/CHRC.pdf>. However, the B.C. Human Rights Tribunal has heard a similar complaint based upon the same article, and its decision is still pending.

¹⁷ <http://ezralewant.com/Complaint%20rejected.pdf>

or seeks to persuade another person to do so, such as a sign on a store saying “No Gays Allowed”. Limiting the application of this provision to circumstances where there is a demonstrable link to such discriminatory conduct, could create arguable grounds for restricting expression consistent with the requirements of s.1. This would prevent expression from being curtailed merely on the basis that listeners are offended (or even outraged). Where a provision can be construed so as to avoid breaching the *Charter*, it should be so construed.¹⁸

(iv) The Tribunal’s Order

23. If this Court upholds the constitutionality of s.14(1)(b), the Court must still consider the validity of the Tribunal’s Order. The CCLA submits that the *Charter’s* protection of freedom of expression and religion requires, at the very least, that ambiguous speech in this area be given the benefit of the doubt.

24. While such a conclusion would not resolve the fundamental issues at stake, nor lift the chill cast by the provision, nor even provide great comfort to respondents who may have had to face extensive investigation and litigation, it could nevertheless provide relief in individual cases.

25. In particular, this Court should not be too quick to conclude that the speech in issue “exposes or tends to expose to hatred” just because it expresses strong (and unpopular) opinions on matters of morality in polemical terms. As noted by this

¹⁸ *R. v. Sharpe, supra*, at para. 32.

Court on Whatcott's previous appeal, at least some of his statements, though polemical, appear to be "expression linked to belief and opinion".¹⁹ Such statements should generally be permissible in a robust democratic system.

IV. ORDER REQUESTED

26. The CCLA respectfully requests that this Court determine the issues in a manner that is consistent with the principles set out above, and grant the following relief:

- Strike down s.14(1)(b) of the *Code*;
- Alternatively, read down s.14(1)(b) as set out above;
- In the further alternative, overturn the Tribunal's order as set out above.

27. The CCLA, as a public interest litigant represented by counsel acting *pro bono publico*, does not ask for costs against any party, and asks that no costs be awarded against it. The CCLA notes that in response to its late intervention motion, some parties expressed concern that the CCLA would broaden the issues beyond those raised by the parties, if permitted to make argument based upon the division of powers principle that a provincial legislature may only legitimately curtail expression when it is directly linked to specific discriminatory acts that the province has the power to prohibit, as affirmed by this Court in *Saskatchewan (Human Rights Commission) v. Engineering Students' Society*.²⁰ The CCLA takes no position on


¹⁹ *Whatcott v. S.A.L.P.N.*, *supra* at para. 73.

²⁰ (1989), 56 D.L.R. (4th) 604 (Sask. C.A.)

whether reference to this principle as an aid to interpreting s.14(1)(b) amounts to raising a new issue. However, to avoid any suggestion of prejudicing the parties, the CCLA has not pursued this issue. The CCLA asks that this be taken into account in any costs award this Court might make.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Toronto, Ontario, this 8th day of September, 2008.

A handwritten signature in black ink, appearing to read 'A. Lokan', is written over a horizontal line.

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