S.C.C. File No. 33676

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF SASKATCHEWAN)

BETWEEN:

THE SASKATCHEWAN HUMAN RIGHTS COMMISSION

APPELLANT
(RESPONDENT)

- and -

WILLIAM WHATCOTT

RESPONDENT
(APPELLANT)

- and -

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Part I - A. Overview of Respondent (Appellant) Position

1. This case involves the issue of free speech in relation to one of the controversial issues of our time – sexual conduct. It presents an opportunity for the court to affirm that freedom of expression is not limited only to matters about which there is agreement but to matters about which there can be great – and sometimes heated, disagreement. The case is about how we as citizens in a free and democratic society live together with disagreement.

2. The Respondent (Appellant), William Whatcott, "Whatcott", engaged in same-sex sexual activity until his conversion.[1] He is now a Christian activist who believes he is called by God to speak out against the harm of same-sex sexual relations[2], and to oppose the teachings of the gay culture to Canada's youth.[3]

3. Flyers F and G (Exhibits 7F and 7G)[4] were distributed by Whatcott to draw attention to the content of advertisements found in *Perceptions*, the largest gay magazine of Saskatchewan.[5] Flyer D (Exhibit 7D) objected to homosexual programs entering the public school system of the City of Saskatoon.[6] Flyer E (Exhibit 7E) was distributed to object to the "Breaking the Silence" conference held at the University of Saskatchewan.[7]

4. Objectively read, the reader would conclude that Whatcott distributed the above pamphlets because of his sincerely held views that (a) *Perceptions* magazine ought not to run advertisements for boys, whose age "is not so relevant"; (b) same-sex sexual activities ought not be introduced into the public schools or universities, and (c) the conduct addressed in (a) and (b) ought to be overcome through the process of religious conversion.

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[1]Tribunal Transcript Respondents Record (RR) Tab 4, p 80 and Tab 4, p 90, Q 368, l 1-4
[2]Tribunal Transcript RR Tab 4, p 79-83
[3]Tribunal Transcript RR Tab 4, p 84-124
[4]Tribunal Exhibits 7F RR Tab 12, p 147; 7G RR Tab. 13, p 148,
[5]Tribunal Evidence AR Tab 11, p186, Q140; Tribunal Evidence AR Tab 12, p225, Q567
[6]Tribunal Exhibits 7D RR Tab 10, p 145
[7]Tribunal Exhibits 7E RR Tab 11, p 146

5. Objectively, none of the flyers were distributed to engender hate. The materials express the opinions of Whatcott and his church in the ongoing debate as to the place that same-sex sexual behaviour has in our society and, in particular, in our schools and universities.

6. Flyers 7F and 7G simply reproduced a portion of a homosexual paper, and pointed out the obvious, that Saskatchewan's largest gay magazine allows ads for men seeking boys. The latter was a fair and true comment. The paper did accept ads of this nature when the Flyer was distributed. Indeed, there were two ads on the same page, one that said "any age"…which would include boys, and a second ad that said "Boys/Men"…"Your age…not so relevant".

7. Flyer D objected to the utilization of the public schools to gain acceptance of same-sex sexual activities as normal. At the time of distribution, the Saskatoon Public School System was discussing the inclusion of topics on homosexuality in the school system. Similarly, Flyer E objects to the University of Saskatchewan being used to gain acceptance of same-sex sexual activity among university students. At the time it was distributed, the University was holding a conference on homosexuality on campus. Both Flyers encourage persons with same-sex attractions to abandon same-sex sexual relations and to live chastely.

8. Whatcott's material was criticising sexual behaviour. Sexual behaviour does not have absolute protection under the *Saskatchewan Human Rights Code*[8] ("*Code*") or the *Canadian Charter of Rights and Freedoms* ("*Charter*").[9]

9. Comment upon the sexual behaviour of others has always been allowed as part of free speech in Canada. Similarly, comment upon all manner of human behaviours including sexual behaviours has always been part of the freedoms of conscience and of religion. Within broad parameters, neither Human Rights Commissions ("HRCs") nor the courts should take a definitive position upon what sexual activity is reasonable or unreasonable. Our law must allow some diversity of viewpoints as to what sexual matters are moral or immoral. What is

[8]The Saskatchewan Human Rights *Code*, ss. 1979, C.S-24.1 **(*Code*)**
[9]Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982 (U.K.), 1982, c. 11 **(Charter)**

clear, however, is that both commissions and courts do have an obligation to protect religious freedom under the *Code* and *Charter*.

10. The power given to the Saskatchewan Human Rights Commission (SHRC) to charge individuals under section 14(1)b is too broad , too vague and too susceptible to changing with the zeitgeist and should be found to be unconstitutional under the *Charter*.

Part I: B. Statement on Facts

11. It is agreed that hate does have harmful effects and that it is wrong to spread hate. Whatcott objects, however, to the characterization of his speech as hateful generally, and in particular, its characterization as hateful pursuant Section 14(1)b of the *Code*. Whatcott believes his message is the truth, and if accepted, would be found to be helpful by those who embrace it.[10]

12. The effect on, the feelings and interpretation of the Flyers by the particular complainants are not relevant in these proceedings. An objective test ought to be applied and this Court should make an objective determination as to whether the flyers breached Section 14(1)b of the *Code*. The effect a particular flyer has on a particular person would be an impossible standard. We acknowledge that feelings are real and important. An effective law, however, cannot be founded upon feelings.

13. However, if feelings are deemed relevant, then the Court ought to also consider the feelings of Whatcott, and of Reverend Irwin Pudrycik. Both have had their Christian beliefs and comments on same-sex sexual activity characterized as "hate". Pudrycik testified at the Tribunal that acts of sodomy were wrong.[11] His position was that of the Lutheran Church of Canada, which was entered as Exhibit 6.[12] He testified that he was at the national conference of the Lutheran Church when it was passed. He also testified that if he was prohibited from

[10]Tribunal Transcript RR Tab 4, p 79-83
[11]Tribunal Transcript RR Tab 3, p 26, Q218-219
[12]Tribunal Transcript RR Tab 5, p 125, Exhibit 6

preaching he would feel betrayed and cheated.[13] He testified that he had an obligation to preach and that he did not find the Flyers to be hateful.[14]

14. The Court below did not apply a different standard for expression directed towards orientation as indicated by the Appellant. The comment in the flyers was directed not towards orientation, but towards sexual behavior.

15. The appellant's factum in paragraphs 7 and 12 repeats the error made by the Tribunal by taking words out of context from the Flyers. When the words and phrases used in the Flyers are read in context to capture its true meaning, it becomes evident that the Flyers were created to enter into a serious debate and to change conduct and opinion on a religious, health and political issue.

16. Whatcott delivered his message out of his caring concern for youth and desire for the salvation of souls. His evidence reflects a concern for the health of those engaging in same-sex sexual activities.[15] The health concerns of such activities are serious.[16]

17. The appellant appears to dismiss or ignore the conflict between criticism of same-sex sexual activities and religion, and the health risks associated with such behavior. The position on such activities by two of Canada's largest religious congregations was entered in evidence.[17]

Part II - Respondent's position upon Appellants questions

18. In respect of the Appellant's issues 1 and 3, the Respondent submits that Section 14(1)(b) of the *Code* violates Sections 2(b) and 2(a) of the *Charter*.

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[13]Tribunal Transcript RR Tab 3, p 22-24 and p 32-33
[14]Tribunal Transcript RR Tab 3, p 31-33 Q217-230, and p 34-37, Q 232-240
[15]Tribunal Transcript RR Tab 4, p 79-83, p 95, Q394-423; p 122, Q526;
[16]Exhibit 8 RR Tab 14; p149;
Dr. John Diggs, "The Health Risks of Gay Sex" Respondents Book of Authorities (RBA) Tab 25, p183;
Xtra.ca news story on G. Hellquist, Feb 17/09 on Human Rights Complaint against Health Canada Tab37, p268
[17]Tribunal Exhibits 6, 7A, 7B and 7C RR, Tab 5, Tab 7, Tab 8 and Tab 9 respectively;
Exhibit 7C is reproduced for clarity at RBA Tab 26, p 204

19. The Respondent disagrees with the Appellant on issues 2 and 4, and states that the infringement of s.2(b) and s.2(a) is not a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Charter*.

20. On issue 5, the Court of Appeal did not err in finding the Flyers were not a violation of s. 14(1)b of the *Code*. It is this issue that is the primary issue raised on this appeal.

21. Whatcott's speech was in relation to core principles. It was centered upon the "discovery of truth" and sexual politics as described by Dickson C.J., as follows:

> "…this *Charter* guarantee provides the bedrock for the discovery of truth and consensus in all facets of human life, though perhaps most especially in the political arena."[18]

22. The Appellant is seeking to be the gate-keeper for all debate relating to sexual politics, and to monitor all public discourse to ensure it conforms with its view of the *Code*. That is an impossible standard which casts a chill on public debate and involvement in important issues. This is especially so as it is the SHRC that determines whose rights are protected when dealing with a conflict under the *Code* between religious freedom and non-discrimination based on sexual orientation.

23. The Appellant takes the position that sexual orientation and same-sex sexual behaviour are synonymous. Whether a one or two step analysis is used, the objective purpose of the Flyers was to debate public policy in relation to sexual morality. The Flyers were publications whose purpose was to lead others to a healthier and more fulfilling lifestyle.

24. The guarantee against discrimination based upon sexual orientation is not absolute. The protection granted sexual orientation by the *Code* is wider than the freedom to act on those beliefs through sexual behavior.

25. The definition of hate is so vague and imprecise, that prosecutions under the *Code* is almost entirely based upon the whims of the SHRC and the zeitgeist.

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[18] *Canada (Human Rights Commission) v. Taylor (Taylor)[1990] 3 S.C.R. 892*, at p921, Appellant's Book of Authorities (ABA), Tab 5, p84, Lg-h

Part III Argument and Points of Law

ISSUE A Objectively, the Flyers do not violate Section 14(1)b of the *Code*

26. Each of the flyers must be viewed alone and objectively to determine whether each is a breach of the *Code*.[19]

27. The decision of this Court in *Canada (Human Rights Commission) v Taylor* ("*Taylor*") describes the kind of hatred that must be exhibited to warrant overriding fundamental freedoms of speech and religion.[20] It described the words which could be captured by HRC strictures against promoting hate as expressing "extreme ill will", allowing for "no redeeming qualities" in the person to whom it is directed, and expressing "(u)nusually strong and deep felt emotions".[21] As stated in *Taylor*:

> "In sum the language employed in s. 13(1) of the *Canadian Human Rights Act* extends only to that expression giving rise to the evil sought to be eradicated and provides a standard of conduct sufficiently precise to prevent the unacceptable chilling of expressive activity. Moreover, as long as the Human Rights Tribunal continues to be well aware of the purpose of s. 13(1) and pays heed to the ardent and extreme nature of feeling described in the phrase "hatred or contempt", there is little danger that subjective opinion as to offensiveness will supplant the proper meaning of the section."[22]

28. Whether a one-step or two-step analysis is undertaken, as suggested by SHRC, none of the Flyers in question could be read as material that was objectively made to spread hate. Objectively, a reader could reasonably conclude that the author was urging those engaging in same-sex behaviour to change, and the publication was an attempt to convert the reader to his point of view. One cannot focus primarily upon the effect of the material on the assumption that it will fall into the hands of fragile people. Such an interpretation would end the robust free speech a democracy requires, and place SHRC in the driver's seat of every public debate. Moreover, it would vest one form of dogmatic view on sexuality over another – for what is at

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[19] Judgment AR Tab 6, p 59, para 53: *Owens* (infra), note 27
[20] *Taylor* (supra) at p 927-928 ABA Tab5, p 90,91
[21] *Taylor* (supra) RBA, p928 Tab 3, p 8
[22] *Taylor* (supra) at p929 ABA Tab 5, p 92

issue is a set of competing belief systems both of which should be allowed to compete in the public sphere [see Article by Benson].[23]

29. While the purpose or intent of the publisher may not be a factor in determining a violation of the *Code*, as suggested in paragraph 153 of the Appellant's factum, the *objective* purpose definitely is. It is only through an objective reading of the Flyer that one could determine the purpose of the Flyer and objectively conclude that the reader had some legitimate purpose.

30. The SHRC factum appears to base its definition of "hate" upon the feelings of the complainants, and does not clearly state what words in context they consider to be hate, leaving one to guess what they may be. The word "homosexual" is ambiguous, and it is only when one reads the context that one can determine whether one is writing about a person who engages in same-sex sexual activity or does not.[24] On the other hand, the word "sodomy" and "sodomite" are clear and precise[25]. Some find this precision offensive. However, the use of that word does not equate to hate.

31. Each of the flyers were distributed individually, as single pamphlets. Therefore, each must be read alone in order to objectively determine whether there was a breach of the *Code*.

i. <u>Flyers 7F and 7G</u>

32. Flyers 7F and 7G were simply a photocopy of a page from *Perceptions* on which Whatcott wrote a commentary and then distributed them. The two ads at issue read as follows:

> Edmonton GWM 39, 5'10" 160 lbs, easy going, fit bottom with varied interests, looking for a romantic, caring, taller top, <u>any age</u>, who enjoys passion, closeness and a healthy sex drive as much as I do, for short or long-term. Reply […]
> (underscoring added)

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[23]Benson, Iain; Freedom of Conscience in Canada, Emory International Law Review Vol. 21 2007 p 111 RBA Tab 20 p 118
[24]Merriam-Webster Online Dictionary, definition of homosexual and homosexuality RBA Tab 30, p 255
[25]Merriam-Webster Online Dictionary, definition of sodomy and sodomite RBA Tab 32, p 258

> I'm 28, 160#, searching for boys/men for penpals, friendship, exchanging video, pics, magazines & anything more. Your age, look & nationality is not so relevant. Write […] (underscoring has been added)[26]

33. The first ad is searching for someone of "any age". The second ad is seeking "boys/men", which if one did not understand what the advertiser wanted, goes on to say "age not so relevant". Any fair minded person ought to be able to understand what the ads were for. Whatcott simply added the following commentary:

> Saskatchewan's largest gay magazine allows ads for men seeking boys!
>
> If you cause one of these little ones to stumble it would be better that a millstone was tied around your neck and you were cast into the sea.
>
> The ads with men advertising as bottoms are men who want to get sodomized. This shouldn't be legal in Saskatchewan!

34. Without explaining its reasoning, the Court of Queen's Bench ("QB") Judgment concluded that the material implied that all homosexual people "sexually desire and abuse young children". There was nothing in these Flyers that could possibly lead one to that conclusion. Whatcott simply reproduced a page from a gay publication and pointed out that it "allows ads for men seeking boys". That is not the same thing as saying that all homosexuals sexually desire and abuse young children. Whatcott, in a sense, let the ads speak for themselves so it is absurd to then suggest that his passing on what had already been published by others somehow changed its character because he passed it on. It is respectfully submitted that the conclusion reached by the Judge was not reasonable. Secondly, it would appear that the QB Court was judging Whatcott's intent as one would in a criminal trial. The Court ought to be reviewing each Exhibit separately and objectively, not looking for ulterior motives of Whatcott based upon all of the Exhibits collectively.[27] Whatcott's intent was irrelevant.

35. Dealing with the first comment of the three comments written on the flyer by Whatcott, it was reasonable to assume that the ads were indeed seeking what was being advertised – namely, boys, who may indeed be under the legal age for consensual sex and that Whatcott

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[26] Tribunal Exhibits 7F RR, Tab 12, p 147 and 7G RR, Tab 13, p 148

[27] *Owens v. Saskatchewan (HRC), 2006 SKCA 41* ABA, Tab 14, p215, para 60

was simply pointing out to the public that the ads were seeking boys. The public could draw their own conclusions. If the advertisement caused some people to have less respect for homosexual people, the cause was not Whatcott's actions. The cause was the advertisement and the owner of the gay magazine, *Perceptions*, for facilitating possible criminal behaviour. The definition of "boys" includes under-aged and immature males.[28]

36. Whatcott's comments were a criticism of the magazine and the individuals who owned it. Objectively, there was no reason to believe that the owner of the magazine or even those placing the ads were homosexual. They could be heterosexual, or any other sexual orientation, or have no sexual interest whatsoever.

37. The second comment by Whatcott was the biblical quotation that appeared on the flyers and it did not say to whom it was directed. It did not necessarily apply only to the owner of the paper or the person who placed the advertisements, but could be equally applicable to all those who knew of the advertisements and allowed such advertisements to continue. Those responsible could include the entire readership of the paper, the main stream media for not exposing the ads, the police for not investigating, as well as the Human Rights Commission and all others that see nothing wrong with fining the whistle blower and ignoring possible criminal behaviour.

38. The last comment written by Whatcott on the Flyers was an explanation as to what men advertising "bottoms" meant, and voiced the opinion that this activity should be illegal in Saskatchewan. Sodomy at one time was illegal in Canada, and one should be able to voice an opinion that we should change the law without constituting hate speech. There was no connection between this statement and the conclusion in the QB Judgment, that the appellant thought all homosexuals were child abusers.

39. However, the real issue is not Whatcott's comments or whether the ad was referring to under aged boys. The issue is whether Whatcott's innocuous comments could be in violation of section 14(1)b of the *Code.*

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[28]Merriam-Webster Online Dictionary, definition of boy RBA Tab 29 p 253

40. If pointing out that a magazine that accepts ads for boys, whose age "is not so relevant", is a violation of the *Code*, what possible room is there for fair comment upon the activities of others without concern of prosecution? Who will want to point out possible criminal behaviour of members of favoured minority groups if one member of such a group is overly sensitive to criticism?

41. In order to provide context, it was important to describe the magazine as the largest gay magazine. Without some description about the paper, no one would know what *Perceptions* was, and if they did not know what it was, why would anyone care? Are newspapers and those that leaflet now required to hide the orientation (or race or religion, for that matter) of those one could allege are criminals out of fear that reporting truthful facts and observations might lead to prosecution under the *Code*? Is it an offence to point out the dominate race of students at the University of Toronto or of those imprisoned in Saskatchewan jails? Such truncation of freedom of speech is a dangerous thing in an open society.

42. The point of the Flyers is to protect children. Whatcott simply tells the public to look at two ads in a single page of a gay paper, and states that sodomy should be illegal, and points out in a biblical quotation that we are all accountable if we do not protect children. One does not find anything in the material that evokes "an emotion that allows for no redeeming qualities". The Flyers were just reporting facts and an opinion on the legality of same-sex behavior. It was reporting unemotionally:

a) That a gay paper accepts ads from men seeking boys.
b) A quotation from the Bible urging the protection of children, and
c) An opinion that sodomy should still be illegal.

43. Most people know that same-sex sexual activity is legal in Canada, and therefore, disagreeing with the state of the law ought not to cause anyone to hate homosexuals. Indeed, it is more likely to cause people to hate Whatcott.

44. Reversing the decision of the Court of Appeal will render it impossible to object to anything written in a homosexual paper. The ruling will send the message that if one dares to criticize any same-sex behavior, you had better see a lawyer first to view the material, not to check the truthfulness of what is said, but to determine whether it "evokes emotion" as determined by SHRC. However, in a functioning democracy, evoking emotion is an important aspect of civic discourse. Without emotion many important civic movements (consider civil rights) could be shut down by those who seek to "police emotions" to control the population: if this sort of development does not send a chill down the spine of students of history, nothing will.

ii. <u>Flyer D</u>

45. Flyer D was distributed as part of an ongoing debate about whether positive portrayal of homosexuality ought to be introduced into curricula for the Saskatoon Public School System. The Flyer clearly targeted conduct, as opposed to orientation, with the intention of protecting youth from homosexual propaganda. Objectively, it was not directed to engender hate. Furthermore, the material clearly repeats the traditional Christian message of acceptance of the person with a particular orientation, as opposed to acceptance of same-sex sexual activity. The material thus possesses the redeeming quality referred to in the *Taylor* decision.[29]

46. The author's purpose is to object to homosexual teachings entering the public school system, because he believes homosexual teachings are immoral and harmful to school children. Teaching lifestyles and philosophies can be characterized as a form proselytizing. Many people want to teach their particular philosophy to children. That is why some religions want their own schools and why some states want exclusivity in education. Thus lifestyle-related curricula are clearly matters of public policy and as such, should be open to debate in a democracy.

47. It is reasonable for someone to believe that familiarizing young children with diverse forms of sexual activity will lead to more diverse sexual activity amongst young people (see

[29]Taylor (supra), at p928 RBA Tab 3, p 8

editorial by Columnist, George Jonas).[30] This is especially so when the material is taught without teaching meant to give the students a moral compass or a foundation that encourages abstinence. Promiscuous sexual activity leads to serious health risks and more so in relation to homosexual sexual activity.[31] Children desensitized to the mysteries of sexuality are vulnerable to disease and abuse, even if it is from their own peers. Accordingly, teaching diverse forms of sexual activity is characterized by some as itself a form of "abuse" in children. This point was made by the Roman Catholic Cardinal of Scotland, Keith O'Brien,[32] as reported in the *Guardian Newspaper*. It is not just Christians that believe false teachings are a form of "abuse" of children. Attached is a copy of a portion of an article by an atheist, Richard Dawkins[33]. He is quoted as asserting that Catholic teachings to children are a form of "child abuse".

48. Flyer D was a contribution to debate as to what should be taught to children in the public school system in relation to same-sex sexual activity. It is not condemning all people with same-sex attractions, and indeed, specifically suggests another way through the renunciation of sexual activity and seeks the salvation of homosexual persons.

49. The material is blunt and forthright. There is no polite way of saying, "You are going to hell unless you change your behaviour". Fire and brimstone sermons are still allowed in Canada. Indeed, if Whatcott is correct, he may be saving some people from hell. Surely, it is not up to HRCs or the Courts to tell Canadians who may or may not be going to hell for their behaviour.

50. Flyer D is also political speech, which traditionally has been afforded the highest protection. It addresses the contemporary issue of the Saskatoon Public School Board's programs dealing with homosexual activity. In other words, it deals with behaviour and has the definite and specific purpose of converting the homosexual person and protecting children. An objective reading of the entire message would lead one to conclude that the

[30]Editorial, George Jonas, *Regina Leader Post*, July 25, 2002, RBA Tab 27, p 207
[31]Tribunal Exhibit 8 RR Tab 14, p 149; Diggs (supra) note 16
[32]O'Brien, Keith, *Guardian Newspaper*, August 30, 2004 RBA Tab 34, p 262
[33]Dawkins, Richard, *National Post*, January 7, 2008 RBA Tab 24, p 182

author's feelings were not rooted in hate, but in compassion and concern towards both children and homosexual people. Such a stance may be objectionable to some but in a free society, we ought to be free to openly engage in discussion with not only homosexuals, but with school boards and the general public as to why a homosexual curriculum should or should not be introduced into public schools. To characterize this disagreement as "hatred" is to chill discussion and diminish the meaning of hatred itself.

iii. Flyer E

51. Similarly, the objective purpose of Flyer E was to object to the University of Saskatchewan holding conferences to indoctrinate young students and, in particular, students in the College of Education, into embracing the gay lifestyle, accepting same-sex sexual activities as normal and morally neutral, and teaching these viewpoints and morals in schools. Similar to Flyer D, the material targeted conduct – not orientation. The material spoke of "redemption and healing", and objectively, one would conclude that the author displayed compassion and care for homosexual persons and their souls.

52. Whatcott wrote at the top of Flyer E that homosexuals are three times more likely to abuse children. Whether the statement is true or false can only be determined if an open and fair debate is permitted. When HRCs are entitled to extract a few key words or sentences from rambling dissertations to justify prosecution, there will be a chilling effect upon free speech.

53. Whatcott added the statistics to give additional reasons as to why a program that accepts same-sex sexual activity ought not to be allowed in public schools and universities. Whether those statistics were correct or not is secondary to the purpose of the Flyer, as surely one ought not be convicted of spreading hate for making an error on statistics relating to the behavior of a protected group. However, the statistics were correct. See Exhibit 8.[34]

54. It should be noted that the expert witness relied upon by the SHRC, Gen Hellquist, was in fact the publisher of *Perceptions*, the very news magazine that published the advertisements for

[34]Tribunal Exhibit 8 RR Tab 14, p 149 at 157

"boys" noted in the Flyers marked as Exhibits 7F and 7G.[35] Hellquist was not qualified as an expert in statistics, but he commented that there was more sexual abuse of children by heterosexuals than homosexuals. Whatcott agreed with that statement.[36] That does not, however, refute the fact that homosexuals are three time more likely to abuse children. That is, because heterosexuals are a much larger group, a very small proportion of heterosexuals may abuse children and still constitute a larger absolute quantity of sexual abuse cases than a larger proportion of homosexuals, a much smaller group in absolute numbers.

55. The Court of Appeal appreciated a three-fold political context for Flyer E:

(i) To object to the general acceptance of same-sex sexual activity;

(ii) To encourage the conversion of persons with same-sex attractions and have them reject same-sex sexual activity; and,

(iii) To object to the teaching of same-sex sexual activities as normal to students.

56. These are all valid objections in a free and open society. Whether his position is correct or not on this issue is still open for public debate. Indeed, no Court has ever declared same-sex sexual activity as being moral, nor should they. They should remain neutral on this issue.

iv. <u>Summary re Flyers</u>

57. Human Rights Commissions must not be permitted to over-analyze material to the point where less sophisticated citizens are unable to participate in debates about morality and public education without fear of prosecution. Truth is harder to discover if serious debate is hindered because of fear that one might use words later found to be offensive.

58. It is important to have the highest threshold of tolerance on moral and political issues of public concern so that **all** people are able to participate without fear of prosecution by more favored interest groups. Some people participate in public debates through pickets and pamphlets. Their contribution will not likely have the same polish as the contribution made by university elites, bureaucrats, main stream media and lawyers; however, freedom of speech

[35]Tribunal Transcript AR Tab 11, p151, Q94-96
[36]Tribunal Transcript RR Tab 4, p 87-88, Q348-353

does not restrict public debate to articulate elites. Courts and Tribunals should not nit-pick material to the point that the less sophisticated are unable to participate in debates over morality and what is taught in public schools and universities without concern of prosecution.

59. If one believes that same-sex sexual activity is reasonable, moral and harmless, one may be inclined to see the Flyers as harmful to homosexual persons. On the other hand, if such acts are perceived as unreasonable, immoral and harmful, then the Flyers would be viewed as assisting people with same-sex attractions and protecting young students. Both interpretations are possible among members of the public acting with good will. However, SHRC does not have the authority to impose its beliefs on the reasonableness and morality of sexual acts. Instead, discussion on the reasonableness of sexual behaviour is best left within the jurisdiction of free and open public debate, knowing that with such debate truth may be found.

60. Protection from hate does not mean protection from all criticism – even criticism that uses insulting or objectionable language.[37] In order for the *Code* or *Charter* to operate in a free society, it requires a high degree of tolerance for those whose views do not reflect mainstream or generally accepted ideologies of those in positions of power. As an example of the level of tolerance for strong language on issues relating to homosexuality in United States, the decision of *Snyder v. Phelps et al* of the Supreme Court of United States is referred to this court.[38] In this case a street preacher attended funerals of soldiers killed in action, and blamed homosexuality for bringing God's wrath down upon them.

<u>B) Freedom of conscience, religion, press and speech protects the right of people to preach upon and criticize the sexual behaviour of others pursuant to Sections 2(1) m.2, 4, 5 and 14(2) of the *Code.* and, alternatively, pursuant to sections 2(a) and 2(b) of the *Charter*.</u>

<u>i. The Flyers were not directed towards the "orientation", but rather toward sexual behaviour and, in particular, same-sex sexual behaviour.</u>

[37] *Irwin Toy*, 1989, 1SCR 927, p969 RBA Tab 7, p 38
[38] *Snyder v. Phelps* et al, 562 U.S. (2011) RBA Tab 14, p 54

61. SHRC considers criticism of same-sex sexual behaviour as "hate speech" and discriminatory. However, there is a difference between the sexual identity of a person and the actions of a person. Although "sexual orientation" is a prohibited ground under the *Code*, the actions of people with same-sex attractions are not afforded absolute protection. There is not any sexual behaviour, whether it is heterosexual or homosexual, that has been granted absolute protection from criticism under the *Code* or *Charter*.

62. It is trite law to say that freedom of religion (and speech), is broader than the freedom to act upon such beliefs. However, it is necessary to point out that freedom from discrimination on the basis of sexual orientation, like all other rights, also has limitations.[39] Freedom from discrimination based upon sexual orientation does not mean that any and all sexual conduct has been granted constitutional protection from criticism. The conduct may be incidental to the orientation and granted protection in some contexts, but all conduct cannot always be granted protection. The constitutional protection is for sexual orientation, not for conduct, and it should never trump freedom of speech and the freedom of others to object to and criticize the conduct of others.

63. Not all people with same-sex attractions engage in sexual activity with people of the same-sex. There are no reliable statistics indicating that even a majority of persons with same-sex attractions are sexually active in same-sex sexual relationships. Furthermore, some people <u>without</u> same-sex attractions may also engage in same-sex sexual activities. It is not correct to say that same-sex behaviour is a behaviour unique to people with same-sex attractions and therefore, one cannot say that criticism of same-sex sexual activities is directed at all those with same-sex attractions, or only at those persons.

64. There is ambiguity, often used intentionally, when words such as "homosexual" or "gay" are used, as they are used to describe the person as well as behaviour.[40] However, the phrase "sexual orientation" clearly refers to the "being" of a person, and not the "behaviour.[41] This distinction was not made by the Tribunal or the QB Court. They proceeded on the

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[39]*Trinity Western v. College of Teachers, 2001 SCR 772*, p810 para 29 RBA Tab 16, p 95
[40]Merriam-Webster Online Dictionary, definition of homosexual RBA Tab 30, p 255
[41]Merriam-Webster Online Dictionary, definition of sexual orientation RBA Tab 31, p 257

assumption that "homosexual" or "gay" always meant the same thing as "sexual orientation." This lack of clarity resulted in failure to draw a distinction between the "person" and the "behaviour". This error caused the Tribunal and the QB Court to fail to deal with the real issues.

65. There is a difference between people who have a sexual orientation (whatever the orientation, towards having sexual relations with a person of the same-sex, or with animals, or children, all of which are morally neutral) and that of the sexual *conduct* itself. People in a free country may object to sexual conduct (or religion) without discriminating against persons with particular sexual orientations (or religious beliefs).

66. If same-sex behaviour is protected from criticism, one must then ask whether all forms of that behaviour are granted constitutional protection and placed beyond criticism? What logical reason is there to protect some behaviour from criticism and not others? Can fisting or rimming be criticized? What about gay parades? What about bath houses used for public sexual activity or water games? What about sadomasochism? What sexual activity is "normal" for a person with same-sex attractions, and who decides? What if the same activity is performed by a heterosexual? Could the person be criticized then? Surely there must be some same-sex sexual activities that would make the average Canadian blanch. After all, there are heterosexual sexual activities which can be criticized in public debate, and some which are even criminalized.

67. Not all sexual impulses are acted upon, and not all sexual impulses are moral; however, it is not up to Human Rights Tribunals or Courts to decide what is moral or immoral, or reasonable or unreasonable. In a democratic society, these issues are left within the jurisdiction of religious authorities, and up to individual consciences of Canadians, to hear the facts and freely make their own decision. It is unreasonable to hold that all same-sex sexual activities are synonymous with sexual orientation and worthy of protection from any criticism.

68. The *Taylor* decision stated that what constitutes hate speech should be sufficiently precisely defined so as to protect freedom of speech.[42] This test from *Taylor* is not being followed if no sexual behaviour can be criticized. Why would some sexual behaviour be protected from criticism and not others?

69. The Court of Appeal recognized the reality that not all people in Canada approve of same-sex sexual behavior, notwithstanding the fact that they may tolerate the behavior and freely accept the sexual orientation.

ii) Religious Beliefs Are Founded in Reason

70. Madam Justice Southin summarized the issue in this case aptly in the decision of *Simpson v. Mair*.

> When there is a sea change in the accepted wisdom of a society, those who have adhered to the attitudes of the past, what I call the "old wisdom", in a very short space of time may find themselves denigrated by adherents of the new wisdom.
> In the case at bar, the old wisdom, represented by the plaintiff, was that homosexuality was a sin … and a criminal offence …
>
> The new wisdom, represented by the defendant ... is that homosexual conduct is not only not a sin (it has ceased to be a crime), but also that no distinction should be drawn in any aspect of society between homosexual and heterosexual relationships.
> There are reasonable arguments, by which I mean arguments founded in reason, on both sides. Which side is right (if, in such a contention, there is a right side) is a judgment best left to history.
> [emphasis added][43]

71. Blackstone stated in his introduction to the Laws of England that all Law comes from the Natural Law. He stated the following:

> THIS law of nature, being co-eval with mankind and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe, in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original.[44]

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[42]Taylor (supra), at p929, ABA, Tab 5, p92
[43]*Simpson v. Mair, 2006 BCCA 287* paras 1-4; (rev'd on other grounds 2008 SCC 20) RBA Tab 13, p 53
[44]Blackstone's Commentaries on the Laws of England, Introduction, Section the Second, para 2, RBA Tab 21, p 174

Blackstone's support of a Natural Law approach to the theory of law is valid and still has adherents among legal scholars and thus it is a reasonable approach to law itself.

72. The Catechism of the Catholic Church reflects a similar theory about the relationship between moral law and Natural Law.[45] That is, the catechism states that moral law is derived by the application of reason to the Natural Law. 43% of Canadians identify themselves as Roman Catholic.[46] Censoring such expression as Whatcott's about sexual conduct impairs the rights of an enormous number of Canadians.

73. Religiously-based opposition to same-sex sexual behaviour is not a product of any animosity towards those who disagree, but is a product of reason. The sexual morality held in common among many religions concludes, through the application of reason and experience that same-sex sexual behaviour is harmful not only to society, but also psychologically and physically harmful to the individuals who engage in such activities.[47] This conclusion about the unreasonableness (or, equivalently, the immorality) of same-sex sexual acts, while supported by religious revelation, is also a product of unaided human reason. Conduct is judged to be immoral because it is unreasonable.

74. Arguments – both religious and philosophical – have been made that distinguish between the moral significance of inherently procreative sexual acts and non-procreative (including same-sex) sexual acts. It can be argued – by appeal to either or both of religious and philosophical traditions of thought – that because same-sex sexual activity is inherently non-procreative and can be physically harmful, that it is therefore an unreasonable activity.[48]

75. Those opposed to the position of Whatcott take the explicit or implicit position that his religious beliefs are unreasonable, malicious and discriminatory, and therefore cannot be tolerated. Yet they are presumably willing to entertain debate about the morality of other

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[45]Catechism of the Catholic Church, The Natural Moral Law, para 1954-1960 RBA Tab 22, p 178
[46]2001 Census, Statistics Canada, RBA Tab 36, p 267
[47]Tribunal Exhibits 7A and 7C RR Tab 7, p 129 and Tab 9, p 142 respectively (7C reproduced for clarity at RBA Tab 26, p 204). For health effects see note 16
[48]Exhibit 7C RBA Tab 26, p 204

sexual practices, such as prostitution and intergenerational sex, and the scope of the state's jurisdiction over them.

76. Debate over the reasonableness of same-sex acts is not inherently discriminatory, and is well-represented in academic literature.[49] This court is not called upon to declare an end to this debate and declare a sexual morality for Canada. It is called upon to protect fundamental freedoms, including the freedom to hold unpopular views, and to prevent government entities like the SHRC from imposing its sexual morality upon the people of Canada.

77. Religion is a collective expression based upon thousands of years of human experience. Religions set out reasonable positions about what the majority of people over millennia believe God wants. This religious position is equally legitimate in the public sphere.

iii) Religious Freedom Conflicts with Constitutional Protection for Same-Sex Sexual Activities

78. Sexual conduct has historically been a topic of religious discussion and debate. Resolutions about same-sex sexual conduct were passed by the Lutheran Church of Canada.[50] Documents of the Roman Catholic Church also describe same-sex sexual activities as unreasonable activities and morally wrong.[51] Objection to same-sex sexual activity is common among religious people. They object because they believe this conduct is harmful; and many religious people also believe that they are obligated to do good and warn others of the danger.[52] This action by religious people is allowed as a right under the *Code* and *Charter*.

79. If same-sex sexual behaviour is protected from criticism as part of the protection granted to sexual orientation, then it results in an illogical interpretation of the *Code* and

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[49]See, eg, Sherif Girgis et al, "What is Marriage?" (2010) 34 Harvard Journal of Law and Public Policy 245; Robert George 'Public Reason and Political Conflict: Abortion and Homosexuality' (1997) 106 Yale Law Journal 2475; John Finnis, "Law, Morality, and 'Sexual Orientation'" (1994) 69 Notre Dame Law Review 1049; John Finnis, The Good of Marriage and the Morality of Sexual Relations: Some Philosophical and Historical Observations', (1997) 42 American Journal of Jurisprudence 97

[50]Tribunal Exhibits 6 RR Tab 5, p 125

[51]Tribunal Exhibits 7A and 7C RR Tab 7, p 139 and Tab 9, p 142

[52]Transcript Evidence (supra), notes 14 and 16

Charter. One cannot protect freedom of religion and freedom from criticism of same-sex sexual activity at the same time. They are in collision. Freedom from criticism for behaviour cannot be allowed to trump freedom of speech and religion protected under the *Code and Charter*. The relevant sections of the *Code* protecting freedoms of religion and speech are sections 2(1)m.01, 2(1)m.2, 4, 5 and 14(2).

80. But in Saskatchewan recently Justice Smith allowed freedom from criticism of sexual behaviour to trump freedom of religion when she reviewed the positions of many religions, and then commented:

> The evidence before us clearly establishes that religious disapproval of same-sex relationships is hardly restricted to marriage commissioners. Indeed, it is fair to say that religious belief is at the root of much if not most of the historical discrimination against gays and lesbians. It is fair to ask, then, why it is particularly important to accommodate marriage commissioners' religious beliefs in this respect.[53]

81. The Saskatchewan Court of Appeal in the Marriage Commissioners case ought to have asked why it is important to protect sexual behaviour from any criticism, if it results in religious discrimination and the end of freedom of conscience. The court did not explain why sexual orientation had primacy over freedom of religion in that case. In this case, legal authority can be created to properly address the question of how to balance freedom of religion and non-discrimination on the basis of sexual orientation.

82. The Appeal decision below in this case did recognize this conflict and could appreciate the danger to freedom of speech and religion for individuals critical of different forms of sexual behavior. The Appeal Court recognized that religious freedom allowed people to criticize same-sex sexual practices as unreasonable and harmful to the people who practice them, and the right of people to protect children and those with same-sex attractions from indoctrination into the approved belief system or "religion" of the SHRC, that to be non-discriminatory, citizens must express only moral approval of undefined sexual activities and protect them from any criticism.

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[53]Marriage Commissioner Appointed Under The Marriage Act (Re), 2011 SKCA3 at Para 145 RBA Tab 9, p 44

83. Referring to conduct as "immoral" may cause the person engaging in such conduct to feel his/her rights under the *Code* have been violated. However, religious people undoubtedly also feel "hated, ridiculed, belittled" when they are charged by HRCs for promoting hate by stating their religious beliefs.[54]

84. If criticism of same-sex sexual activities is prohibited under the *Code* because it offends some people, then criticizing premarital sexual activity or adultery would also offend the *Code*, based upon the orientation of heterosexual people. "Marital status" is also a prohibited ground in the *Code* and could also then prevent comment upon other sexual activities. There is little difference in degree between what Whatcott said in his material, and what religions have been saying for two thousand years.

85. Based upon reason, many religions have, at times, condemned sexual relationships outside of marriage, and have reserved marriage for the union of one man and one woman. Will it now be an offense to say someone is living in sin? Or that adultery is a sin, or fornication is a sin? Are there other sexual behaviors whose morality and appropriateness cannot be criticized? What about bestiality or pedophilia? Who decides what sexual activities obtain constitutional protection? Or are same-sex sexual activities the only protected sexual activities prohibited from criticism under the *Code*?

86. Through decriminalizing same-sex sexual activity, the state did not necessarily affirm or encourage the practice of such behavior nor did it require all Canadian citizens to believe in or endorse the behavior as reasonable and moral. SHRC ought to defer to religious faiths in determining the reasonableness and morality of sexual activity. Instead of protecting religious freedom, as administrators of the *Code*, however, the SHRC appears to believe it has the authority to promote their own set of beliefs on sexual morality. Indeed, they appear to seek exclusive protection for dissemination.

[54] Tribunal Transcript Evidence of Irwin Pudrycki RR Tab 3, p 23-28 and 33, Q215-220 and Q228

iv) Discriminatory Statements

87. The position of SHRC skews and hinders genuine public debate on this issue by labeling the views opposed to same-sex sexual activities as "hateful" or "discriminatory". A fundamental component of debate is disagreement and the ability to articulate divergent views. To officially label one set of views as hateful or discriminatory is to effectively terminate the debate because it suggests that those views are unlawful and, therefore, unworthy of legal analysis, expression or debate.

88. In her dissent in *Keegstra,* McLachlin, J. (as she then was) warned against the dangers of labeling speech and thereby pre-determining the results of a section 1 analysis:[55]

> [I]f one starts from the premise that the speech covered by section 319(2)[of the *Criminal Code*] is dangerous and without value, then it is simple to conclude that none of the commonly-offered justifications for protecting freedom of expression are served by it.

89. That is precisely what the Tribunal and QB Court below did in this case. By first labeling Mr. Whatcott's speech as discriminatory, hateful and intolerant, they paved the way to justify the infringement of Mr. Whatcott's freedom of expression. It characterized Mr. Whatcott's material as discriminatory, and shut down one side of the public debate over sexual morality and its public policy implications.

90. The characterization of traditional religious beliefs as "hateful", "unreasonable", "malicious", and less worthy of respect and protection, serves to justify the derogation of the constitutionally guaranteed freedoms of conscience and religion. Calling something "discrimination" does not make it so. Far from being of assistance, the use of these labels assumes the conclusion that the Appellant's Factum fails to establish through legal analysis. Particularly, the Appellant mischaracterizes the reasonableness and good faith nature of Whatcott and religious views on appropriate sexual behavior.

91. The position that same-sex sexual activity is morally equivalent to heterosexual sexual activity is not a neutral view. Rather, it is as much a positive moral assertion as the traditional religious belief, taking a clear position on a contested question. The state is not permitted to

[55] R. v. Keegstra, [1990] 3 S.C.R. 697, at p 841 RBA, Tab 12, p 51

compel its citizens who hold to the traditional belief to abandon it for a contrary and equally positivist view. (see article by Lauwers)[56]

92. To publicly enforce the view that same-sex behavior is morally equivalent to heterosexual behavior is to elevate the SHRC's moral view to the status of a state religion. It is not possible to banish beliefs from the public sphere - - what must be sought is to treat different beliefs fairly. The organized leaders of the gay community too have definite views on sexual morality and may "evangelize" others through gay parades, public events and complaints to HRCs. They work to promote their beliefs within the public school system. Indeed, a remarkable number of cases involving sexual orientation that have reached this Court have been in relation to schools.[57] When a matter is contested it is important to keep open the possibility of the public discussion about it and not foreclose them by state or judicial action.

93. The beliefs of the organized gay community have been furthered by government funding through the former Court Challenge Program and some HRCs have acted as enforcers. To give preferential protection to the moral beliefs about sexual practices of some over the opinions of others, discriminates against members of religious communities and other people who disagree, and ends or severely restricts freedom of conscience and religion in our country. The vulnerable minority groups today is no longer those who engage in same-sex behavior, but those who oppose it, whether religious or non-religious. Neither HRCs nor the Courts should take sides in political debates if freedom of expression and freedom of religion under the *Charter* are to have real meaning.

94. The Courts in USA have recognized the need for neutrality on this issue. In a case where a student insisted upon wearing a shirt that said, "Be Happy, Not Gay", the court

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[56]Lauwers, Peter D.; Religion and Liberal Pluralism, Supreme Court Law Review 2007, 37 SCLR (2d) 1
Tab 28, p 208

[57]Vriend v. Alberta, [1998] 1 S.C.R. 493, at 494 RBA Tab 18, p 114;
Chamberlain v. Surrey School District No. 36, [2002] 4 S.C.R. 710 at para 132 ABA Tab 7, p120;
Trinity Western University v. British Columbia College of Teachers [2001] 1 S.C.R. 772 RBA Tab 16, p 95

stopped the school from suspending the student on the grounds that the school had advocacy days for homosexual students. The court said:

> Thus a school that permits advocacy of the rights of homosexual students cannot be allowed to stifle criticism of homosexuality. The school argued (and still argues) that banning "Be Happy, Not Gay" was just a matter of protecting the "rights" of the students against whom derogatory comments are directed. But people in our society do not have a legal right to prevent criticism of their beliefs or even their way of life. *R.A.V. v. City of St. Paul, supra*, 505 U.S. at 394; *Boos v. Barry*, 485 U.S. 312, 321 (1988). Although tolerance of homosexuality has grown, gay marriage remains highly controversial. Today's high school students may soon find themselves, as voters, asked to vote on whether to approve gay marriage, or to vote for candidates who approve of it, or ones who disapprove.[58]
> [emphasis added]

95. Mr. Whatcott's statements involved core values associated with political speech and the profession of religious belief. The incorrect and premature labeling of such expression as "discriminatory" is not sufficient to justify an infringement of Mr. Whatcott's ss. 2(a) and (b) freedoms. If sexual behavior is protected under the *Charter* and *Code,* then there clearly is a conflict between *Charter* protection for freedom of speech and religion, and sexual orientation.

96. In *Chamberlain v. Surrey School District No. 36*, Gonthier, J., prophetically expressed concern that an approach that transforms disagreement over sexual morality into unlawful discriminatory statements may come to threaten a vibrant notion of pluralism:

> Beyond this, nothing in *Vriend v. Alberta* [1998], 1 S.C.R., 493, or the existing s. 15 case law speaks to a constitutionally enforced inability of Canadian citizens to morally disapprove of homosexual behavior or relationships: it is a feeble notion of pluralism that transforms "tolerance" into "mandated approval or acceptance"…. Surely a person's s. 2(*a*) or s. 2(*b*) *Charter* right to hold beliefs which disapprove of the conduct of others cannot be obliterated by another person's s. 15 rights, just like a person's s. 15 rights cannot be trumped by s. 2(*a*) or 2(*b*) rights…[59]

97. Gonthier, J. pointed out (at para. 150) that to remain true to all *Charter* guarantees, it is important to distinguish between discrimination and the expression of competing beliefs on

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[58]Indian Prairie School District USA Court of Appeals 7th circuit RBA Tab 17, p 97
[59]Chamberlain v. Surrey School District No. 36 (supra), note 57, at para 132 RBA Tab 4, p 25

moral issues. To label one set of views on sexual morality as "discriminatory" would result in s. 15 values trumping all others.

> The moral status of same-sex relationships is controversial: to say otherwise is to ignore the reality of competing beliefs which led to this case. This moral debate, however, is clearly distinct from the very clear proposition that no persons are to be discriminated against on the basis of sexual orientation. The appellants, using the Courts, seek to make this controversial moral issue uncontroversial by saying that s. 15 and "*Charter* values" are required to eradicate moral beliefs, because the hypothesis is that possible future acts of discrimination are likely to emanate from such beliefs. This is not, however, necessarily true. As discussed above, many persons are staunchly committed to the principle of non-discrimination and the inherent dignity of all persons, and yet concurrently hold views which disapprove of the conduct of some persons. To permit the Courts to wade into this debate risks seeing s. 15 protection against discrimination based upon sexual orientation being employed aggressively to trump s. 2(*a*) protection of the freedom of religion and conscience, as well as s. 15 protection against discrimination based on conscience, religious or otherwise. This would be a reading of the *Charter* that is inconsistent with the case law of this Court, which does not permit a hierarchy of rights, as well as inconsistent with the purpose of the *Charter* itself.[60]
> [emphasis added]

v) Religious Beliefs

98. Chastity and conversion from sin have always been common typical values central to religious identity of many believers. It is artificial to separate an individual's religious beliefs on sexuality from his right to publicly express those beliefs. To tell a Christian that he/she can no longer comment in public on harmful forms of sexual conduct is to deny a significant part of Canada's Christian heritage. Indeed, charging an individual with 'hate' for proclaiming views that have historically existed as a central component of the Christian message and, until the last 40 years, have been enshrined in Canadian criminal law, is a sign of oppression, religious bigotry, discrimination and intolerance. It imposes a new form of forced morality. By declaring that those who publicly oppose same-sex sexual activities are hateful and, therefore, immoral, the SHRC is itself making a value judgment on the benefit, reasonableness and morality of certain sexual behaviors. Such judgments are outside the scope of its authority and are best left to public debate.

99. In both Flyers D and E, Whatcott clearly distinguishes between same-sex sexual activities and the person with same-sex attractions. The material exhorts those engaging in

[60]Chamberlain (supra), note 57, at para 150 RBA Tab 4, p 28

same-sex activities to turn away from such activities and find redemption. Clearly, Whatcott does not condemn such people, but simply urges a change in their behavior.

100. If criticizing sodomy, adultery, fornication, or cohabitation is defined as breaching the *Code*, this would have the effect of discriminating against certain religious people, as many religious people believe they have an obligation to God to warn against and to assist in correcting the harmful behavior of others. Their motives in doing so are to help and protect those people from what many religious people believed are the harmful natural consequences of their actions.[61]

101. If Whatcott cannot proclaim this aspect of his religion, he is then exposed to the same kind of hatred and ridicule as he is accused of spreading. Indeed, the Tribunal decision itself belittles and affronts his faith and his dignity as a person, contrary to section 14(1) of the *Code*, because it prevents him from making a statement about harmful sexual practices (teaching) and from expressing his faith to the public, including to people who engage in same-sex sexual practices (for the purposes of promoting conversion).

102. Most religions engage in profound reflection on the moral dimensions of human conduct by asking: what is the right way for a person to live his life if he wants to be happy and fulfilled? Since religions reflect upon and speak to the human condition, their teachings and precepts inevitably touch on matters of human interaction that may also be protected under legal human rights guarantees. Marital status and sexual orientation are two examples of areas of human conduct that attract both religious and legal comment and treatment. The labeling of expression and commentary on such topics as "hateful" or "discriminatory", and therefore less worthy of respect and protection, derogates from and undermines the guarantee of freedom of religion and the nature of a free and democratic society. The effect is to create a hierarchy of rights, with the equality guarantee trumping freedom of religion. This Court has in the past rejected an approach to constitutional jurisprudence that results in such a hierarchy and, in any case, religion itself is an equality right within Section 15 so to pitch one

[61]Tribunal Transcript RR Tab 3, p 31-33, Q224-230.

protected right against another and to ignore that both have protection is to treat the Charter in an asymmetrical way.

103. Mr. Whatcott's material is political opinion on same-sex sexual activities and an expression of his religious faith. He is saying that those people who engage in same-sex sexual behavior are endangering their health and committing an immoral act, and that God disapproves. The Tribunal's decision below ignored the political and religious nature of much of Whatcott's material. Whatcott was participating "in social and political decision-making". He was expressing religiously-founded opinions on important matters of public political debate.

104. "Creed" and "Religion" are as protected as "sexual orientation" and "marital status" in every section of the *Code*.[62] Indeed, section 4 specifically protects freedom of conscience and teaching and section 5 protects freedom of expression.[63]

vi) Religious Persecution

105. Although many courts have pointed out that freedom of religion is wider than the freedom to act upon such beliefs, with respect to sexual orientation there seems to be the assumption that it would be unreasonable to place any such limitations on sexual orientation. ie: to state that the constitutional protection of sexual orientation is wider than any constitutional protection to act upon an orientation through same-sex behaviour. In this case, the freedom to engage in same-sex sexual activities had trumped fundamental freedoms, and in particular, the freedom of some religious people to criticize such activities.

106. Religious people, however, have frequently been denied the right to act upon their belief that same-sex conduct is unreasonable and harmful. This is partly because of an underlying assumption that the religious message is not helpful, but harmful, to those who engage in same-sex activities, and therefore, the message infringes upon their constitutional

[62] *Code* (Supra), note 8, the definition of creed and religion in s.2(1) m.2
[63] Ibid sections 4 and 5

rights. Some refer to "sin", "religion" and "morality" disparagingly as though there was no rational basis for religious beliefs.[64]

107. Many court decisions make the point that freedom to act on one's beliefs ends when they conflict with another's rights.[65] We support that reasoning. However, what is perverse is the underlying assumption in some lower court decisions that the religious message on same-sex sexual activity is hateful, harmful and unreasonable. Those decisions make a definitive judgment on a controversial moral topic. But neither the SHRC or the courts ought to make those decisions. If the religious message is correct, it is not hateful or harmful, but helpful, to those who live their lives with same-sex sexual attractions. But the reasonableness and proper moral limits upon same-sex activity can never be determined in the court of public opinion if HRCs are able to end all debate on this issue.

108. The belief of SHRC and some courts that all same-sex sexual activity is a benign, reasonable or moral activity has led to SHRC enforcing their "politically correct" beliefs upon religious citizens of Canada by fining them. What the SHRC wants to do with this case and others like it, is to force the conversion of religious people who do not believe as they do to their preferred moral position. They are saying that you can believe whatever you want, but you will be fined for proclaiming your beliefs in public, and fined or fired, if you practice what you preach by refusing to assist in the furtherance of same-sex sexual activity.

109. In the last ten years HRCs across Canada have prosecuted or threatened with prosecution several religious people whose conscience did not allow them to assist or approve of same-sex sexual activity that they considered harmful. Here is a partial list:

A) The Roman Catholic bishop of Calgary, Fred Henry, had to meet with his HRC in relation to a complaint after he distributed a letter to his flock explaining why same-sex marriage was not to be supported;[66]

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[64]Marriage Commissioners (supra) ABA Tab 11, p176, para 148; RBA Tab 9, p 44 para 146; Trinity Western University (supra), note 53 ABA Tab 27, p493, para 69

[65]See note 64; R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295 at 337 RBA Tab 11, p 48

[66]Calgary Bishop, CTV.ca, March 31, 2005, report RBA Tab 23, p 180

B) Scott Brockie was partially successful in an appeal from an Ontario Human Rights Commission. He had refused to print material furthering the lifestyle of people with same-sex attractions and was fined;[67]

C) Youth minister Stephen Boisson was fined for writing a letter to the editor criticizing same-sex sexual behaviour. The Tribunal's decision was reversed on appeal;[68]

D) Orville Nichols was fined for making a conscientious objection to officiating at a same-sex wedding. The Tribunal's decision was upheld on appeal; and[69]

E) Christians operating Bed and Breakfasts out of their homes have been charged.[70]

110. In addition to the above, Christopher *Kempling* was suspended as a public school teacher for writing critically about same-sex sexual behaviour[71]

111. The SHRC wants religious people to voice their opinions on same-sex sexual activities only behind closed doors in churches, because it judges their teachings as "hateful". It may be feared that next, churches will become places that spread hate, and HRCs will order that they should be closed. Then the message to many Christians will be, as predicted by Gonthier, J., in Chamberlain, just stay in your "closets".[72]

112. The SHRC's decision promotes exclusivity of public discussion in favour of their sexual beliefs in the public square. This stance gives them the power to act as a modern day Spanish inquisition to enforce acceptance of this sexual morality. Once the critics of same-sex behavior are silenced, the next step is to persecute those who fail to honor this new ideology by removing those with Christian beliefs from employment in positions such as

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[67]Brockie v. Ontario (Human Rights Commission) 161 O.A.C. 324, RBA Tab 2, p 5
[68]Boissoin v Lund [2009] ABQB 592 RBA Tab 1, p 1
[69]Nichols and M.J. and SHRC [2009] SKQB 299 RBA Tab 10, p 45;
[70]Prince Edward Island Human Rights Commission Schedule RBA Tab 35, p 263;
B.C. Human Rights Tribunal charges reported by Canwest News Service Report RBA Tab 19, p 116
[71]Kempling v. British Columbia College of Teachers [2005] BCCA 327 RBA Tab 8, p 40
[72]Chamberlain (supra), note 57, at 789 RBA Tab 4, p 26 at para 135

Marriage Commissioners, as is happening in Saskatchewan[73], or suspending teachers in public school, as happened in British Columbia in the *Kempling* decision.[74]

113. Traditionally, people have looked to the courts to protect religious freedom and freedom of speech. It is unlikely that courts initially were aware that protection of sexual orientation would lead to persecution and severe limitations upon Section 2 freedoms. These consequences were seldom articulated. One could ask, how could some minority groups' section 15 equality rights be read into the *Charter* if the result would be to wipe out some fundamental freedoms that were explicitly included?

114. If this decision is overturned, it will ultimately result in the Whatcotts of Canada being forced to choose between following their conscience by preaching about same-sex sexual behaviour or following the law. This will lead to court orders and ultimately jail for those believers who take their religion seriously. That is religious persecution and "the tyranny of the majority".[75]

115. Human Rights Codes and the *Charter* were established to protect rights which reflected not just a consensus of opinion, but an overwhelming consensus of opinion. The inclusion of sexual orientation has never had similar support and the extension of the meaning to include behaviour has made it even worse. That has resulted in HRCs losing its credibility. Far from protecting religious freedom and free speech, they are perceived by many to be the enemies of both.[76]

vii) Religious Freedom, Freedom of Speech and the Law

116. The purpose of the *Charter's* freedom of expression is to protect controversial speech. As long as an activity is expressive in nature and is conveyed by non-violent means, it enjoys the protection of section 2(b). That is the first step of any s.2(b) analysis.[77] *Irwin Toy*

[73]Marriage Commissioners (supra), note 53 RBA Tab 9, p 44
[74]Kempling (supra), note 71, RBA Tab 8, p 40
[75]Big M (supra), note 65, at 337 RBA Tab 11, p 48
[76]Article by Richard Moon, Saskatchewan Law Review [2010] Vol. 73 RBA Tab 33, p 260;
Elmasry and Habib v. Roger's Publishing and MacQueen's (no.4), 2008 BCHRT 378 (CanLII) RBA Tab 5, p 30
[77]Irwin (supra) at page 967, note 37, RBA Tab 7, p 36

stressed that section 2(b) protects "all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream".[78] Under the second step of the *Irwin Toy* analysis, it was said that if the "…purpose is to restrict the content of expression by singling out particular meanings that are not to be conveyed", then a law contravenes s. 2(b).[79]

117. In *Irwin Toy,* page 969, this Court adopted the wording of the European Court in the *Handyside* case as support for its broad approach to freedom of expression, stating that the guarantee:

> ... is applicable not only to "information" or "ideas" that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broad-mindedness without which there is no "democratic society."[80]

118. This Court has found that the absence of coercion and constraint is essential to the full enjoyment of freedom of conscience and religion and recognize the public dimension of the rights, that is, to express one's faith publicly. In *R. v. Big M Drug Mart Ltd*., this Court had occasion to interpret s. 2(a) of the Canadian *Charter*. Dickson J. (as he then was) made a number of comments that now form the basis of our interpretation of freedom of religion:

> 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 and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination. But the concept means more than that. Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices.[81]

119. A very close link exists between aspects of s. 2(a)'s guarantee of freedom of religion and freedom of expression under s. 2(b). In the case of *R. v. Big M Drug Mart* (supra), Dickson, J. (as he then was), in the course of defining the scope of freedom of religion under the *Charter*, stated that the "essence" of s. 2(a) protects the "right to declare beliefs … without fear of hindrance or reprisal".[82]

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[78]Ibid, at page 968, RBA Tab 7, p 37
[79]Ibid, at page 974, RBA Tab 7, p 39
[80]Ibid, at page 969, RBA Tab 7, p 38
[81]Big M, note 65, at p336-337 RBA Tab 11, p 47
[82]Ibid, at page 336 RBA Tab 11, p 47

120. In the decision of *Syndicat Northcrest v. Amselem*, both the majority and minority of the Supreme Court re-affirmed the expansive definition of freedom of religion articulated in *Big M Drug Mart.*[83] The profession of one's beliefs, including how they apply to matters of morality, thus engages both ss. 2(a) and 2(b) of the *Charter*.

121. The protection of section 2(a) of the *Charter* is not confined to situations where a person is wearing his "personal capacity hat". For many, religious belief goes to the core of their being and influences all aspects of their conduct. The centrality of religion to human dignity was recognized by the Supreme Court in *Amselem*:

> In essence, religion is about freely and deeply held personal convictions or beliefs connected to an individual's spiritual faith and integrally linked to one's self-definition and spiritual fulfillment, the practices of which allow individuals to foster a connection with the divine or with the subject or object of that spiritual faith.[84]

122. In *R.* v. *Keegstra* [85], Dickson, C.J. stated:

> 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.

Further, In *Harper v. Canada (Attorney General)*[86], the Supreme Court of Canada re-affirmed that political speech lies at the core of the guarantee of freedom of expression.

123. The Supreme Court has recognized that a healthy democracy requires robust, critical debate on serious issues and that religious belief should not be precluded from that debate. As stated by Dickson, C.J. in *Irwin Toy*:

> Freedom of expression was entrenched in our Constitution and is guaranteed in the Quebec *Charter* so as to ensure that everyone can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream. Such protection is, in the words of both the Canadian and Quebec *Charter*s, "fundamental" because in a free, pluralistic and democratic society we prize a diversity of ideas and opinions for their inherent value both to the community and to the individual.[87]

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[83] *Syndicat Northcrest v. Amselem [2004], 2 S.C.R. 551* at p614, para 137 RBA Tab 15, p 94
[84] Ibid, at p576, para 39, note 83 Tab 15, p 92
[85] Keegstra (supra), at p 763-764, note 55 RBA, Tab 12, p 49
[86] Harper v. Canada (Attorney General) [2004], 1 S.C.R. 827, at paras 12-16 RBA Tab 6, p 34
[87] Irwin (supra) at page 968, note 37, RBA Tab 7, p37

C. If same-sex sexual activities are protected from Criticism under the *Code* as part of sexual orientation, then there is a collision of rights between freedom of religion, speech and press as protected in the *Code*, and sexual orientation. The SHRC does not appear to recognize this collision. There is also a collision of rights under the *Canadian Charter of Rights & Freedom* and the Tribunal did not follow the analysis for resolving this collision as set out in the Law.

124. If criticism of sexual practices is prohibited by the *Code*, then such prohibition conflicts with freedom of speech and religion. For the purposes of the *Code,* at least, the protection granted for sexual orientation should not include sexual behaviour because this offends the *Charter,* and the *Code* should, therefore, be read down to comply with the *Charter*.

125. If the Court finds that some sexual conduct is protected from criticism in the *Code*, the decision would still violate the *Charter,* as there would be a collision of rights that must be resolved through the methodology set out in the *Irwin Toy* and *Oakes* decisions.[88]

126. The first step of a s.2 (b) analysis is to recognize that freedom of expression and of religion protects controversial speech. The second step, set out in *Irwin Toy,* is to determine if the government's purpose is to restrict the content of expression. That is exactly what the government wished to do in section 14(1)b of the *Code*.[89]

127. The third step, as set out in *Oakes*, is to try to resolve the conflict. It is only if one is unable to resolve the conflict that one would apply the process in *Oakes* to resolve the conflict by determining if the limitation of the *Charter* right can be justified under section 1.[90] In this case, the conflict is easily resolved by limiting the protection of the *Code* to the ordinary meaning of "sexual orientation", a meaning that does not prohibit comment upon different forms of sexual activities because it does not include sexual conduct.

[88]Irwin (supra) note 37, RBA Tab 7, p 36; R. v.Oakes [1986] 1 S.C.R. 103 ABA Tab 21, p 373
[89]Irwin (supra) at page 968-969, note 37, RBA Tab 7, p 37-38
[90]Oakes (supra), note 88 ABA Tab 21, p373

128. Sexual behavior and sexual morality are matters of religious teaching. If the court allows this appeal, the court will have created a hierarchy of rights, one that says protecting people who engage in sexual activity from criticism trumps other fundamental freedoms.

129. Under the *Oakes* test, if the issue is not resolved by recognizing the limited protection given by the *Charter* from criticism for behavior, then two criteria must be satisfied:

a) First, the SHRC must articulate what specific activities they wish to protect and show that protecting such activities from criticism is sufficiently important to warrant overriding fundamental freedoms of conscience, religion and expression.

b) Secondly, the SHRC must show that the means used to protect this behavior from criticism are reasonable and demonstrably justified.

130. The second requirement under *Oakes*, which it is the burden of the party defending the legislative provision to meet, invokes the proportionality test, which requires that:

1) There must be a rational connection to the measures,

2) The measures must impair the rights of freedom of religion and speech as little as possible,

3) The measures must be proportionate to both the effects of the limiting measure and the objective of the measure.

131. The deleterious effect upon freedom of religion and speech, and the uncertainty created for the public with respect to not knowing what behavior gets protected and what can be said about conduct under the auspices of sexual orientation, is out of proportion to the initial objective. Denying the right to criticize sexual conduct grants a protected group the ability to act with impunity in relation to everything sexual, and marginalizes those who disagree with their sexual conduct. For the reasons set out throughout this factum it is submitted the Oakes test is satisfied in favour of the Respondent.

D. Constitutionality of Section 14(1)b of the Saskatchewan Human Rights Code

132. If this Court finds that the Court below erred, Whatcott argues in the alternative, that section 14(1)b of the *Code* is unconstitutional.

133. This Court in *Taylor* speaks of balancing prevention of publication of material that evoked extreme emotions of hate with the effect of an unacceptable chilling of freedom of speech and religion, and indicated that there would be "little danger that subjective opinion as to offensiveness will supplant the proper meaning of the section"[91]. The majority in *Taylor* was overly optimistic about the value bureaucrats would place upon fundamental freedoms.

134. Section 14(1) b of the *Code* clearly seeks to limit fundamental freedoms. The issue is whether the legislation can be justified under section 1 of the *Charter*. When addressing proportionality, McLachlin, CJ, in *Taylor* referred to the lack of serious effort to accommodate freedom of expression. It is true that this *Code* mentions freedom of expression in section 14(2), but if not taken seriously, this protection may become largely window dressing, as prosecutions under the *Code* are based upon Commissioners opinion as to what is "hate". What constitutes "hate" still remains to be defined in the eye of the beholder, the SHRC. The SHRC Factum does not attempt to elaborate on the definition of hate.

135. The "rational connection" required between the legislation and the objective of the legislation has not been shown. Indeed, we have shown that the effect of the legislation is to run counter to the objective. That is, the objective of the legislation was to stop hate speech. But the effect has been: (a) to allow the SHRC to discriminate against religious speech on sexual behaviour; (b) to grant those charged, like Whatcott, a Canada wide audience to promote their martyrdom in the name of Christianity; (c) an increase in hate crimes as noted in paragraph 38 of the SHRC factum; and (d) an increase in hate as described later below.

136. Whatcott's intent, to protect children and to save the health and souls of those engaging in same-sex behaviour was deemed irrelevant, accorded no weight and ignored. The fact that

[91]Taylor (supra) at p929 ABA Tab 5 p92 Ld

truth is no defence means that the SHRC can pick sides in a dispute without consideration as to what the truth might be, primarily based upon their view of an alleged victim's feelings.

137. The effect of Section 14 (1) has been severe. It has now been used to characterise traditional Christian teaching on sexual behaviour as "hate". It did not matter in what manner Whatcott expressed his disapproval of the same-sex activities, the SHRC would still assert that his disapproval spreads hate.[92] SHRC does not believe that the religious position is helpful and seeks to end the public participation of religious (or other conscientiously opposed) people in this debate.

138. Section 14 of the *Code* allows SHRC to arbitrarily pick whose rights they protect. In the conflict between religious freedom and conscience versus sexual orientation, SHRC has chosen to protect sexual orientation, and demonized religious people for spreading "hate". The practical effects of the legislation run counter to the stated objective of the *Code*, in that it overreaches and catches speech which is not hate, but simply opinion on an issue as old as mankind.

139. The practical effect of the legislation is that instead of protecting religious people from hate, religious people are now seen as causing discrimination and spreading hate. Section 14 is not closely tailored to rationally meet its objective of stopping hate, but instead allows SHRC to demonize and prosecute religious people. Thus, the SHRC may in turn cause some to hate Christian people. Others may resent and start to hate homosexuals because they are perceived to be the cause of the activities of SHRC. Who one hates may depend upon their side on this issue. The overall benefit of the legislation then, is minimal, because it may actually be increasing hate. The effect on religious people is significant. Notably, there were more hate crimes committed by reason of religion than sexual orientation.[93]

140. In considering "minimal impairment", the overreach of section 14(1)b allows the SHRC to infringe upon freedoms of religion and speech seriously and unjustifiably. Because

[92] Appellant Factum, p37, para 150
[93] ABA Statistics Canada Tab 37, p 678, Tab 38, p 692

truth is not a defence, whether Whatcott's Flyers were true or not was not even considered. The SHRC argues that it is the effect of material that determines the violation, but this is an impossible standard when consideration of the effect is in conflict with truth. This impairs a core value of freedom of expression, the search for truth.

141. In addition to bishops and pastors, mainstream writers and magazines have now been required to account to HRCs for their material, including *MacLean's Magazine*, Mark Steyn and Ezra Levant. This has had a chilling effect upon free speech and press in Canada, and led to a lack of respect for HRCs and resentment.[94]

142. The deleterious effect of the infringement greatly outweighs any benefits conferred. The fact that Whatcott could be convicted for simply reproducing and objecting to ads for "boys" in Flyers F and G is an indictment of the unreasonableness of some HRCs in applying section 14(1)b, as well as indicting the vagueness of the section. The alleged "benefit" of the section has been to allow HRCs to arbitrarily decide whom to charge. The factum of SHRC does not address the vagueness of the law, but focuses upon the feelings and effect some speech could have on some people. This lack of precision has a disturbing effect upon all speech, and transfers to the state an arbitrary power to monitor and prosecute all speech.

143. In *Owens* (supra), Saskatoon's daily newspaper, *The Star Phoenix*, was convicted as well as *Owens*.[95] The newspaper did not join in the appeal by *Owens*, but simply stopped printing such ads. Owens, who was self-represented, successfully appealed on his own. Most people cannot afford, or do not see the cost benefit in, an appeal from a HRC ruling as the cost of the penalty is less than the cost of legal representation. The power to charge individuals with promoting "hate" has had an effect on all speech, even in newspapers, simply because of the inability to know precisely whether one could successfully defend a charge based upon emotion and feelings more than law.

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[94] *Elmasry* (supra), note 76 RBA Tab 5, p 30; Moon (supra), note 76 RBA Tab 33, p 260
[95] *Owens* (supra), note 27 ABA Tab 14, p215, para 60

144. HRCs have had 20 years of experience with hate laws since the dissenting opinion of Madame Justice McLachlin in the *Taylor* decision. Her opinion has been demonstrated to be correct. The benefit secured by the legislation, which appears to be negligible, is significantly outweighed by the deleterious effect.[96] The charges against Whatcott once again demonstrates the overreach of the legislation, as the legislation permits SHRC to lay charges for speech on social and political issues, issues on which promoting the right of free expression is far more important in a democracy than eradicating so called hate.

145. It is noteworthy that Richard Moon, who was asked to write a report on the regulation of hate speech on the internet by the Canadian HRC, submitted a report that recommended the repeal of s. 13 of the *Canadian Human Rights Act* to remove the provision on hate speech. In the *Saskatchewan Law Review*, Moon wrote:

> Any attempt to exclude from public discourse speech that stereotypes or defames the members of an identifiable group would require extraordinary intervention by the state and would dramatically compromise the public commitment to freedom of expression. Because these less extreme forms of discriminatory expression are so commonplace, it is impossible to establish clear and effective rules for their identification and exclusion.[97]

We agree with Moon and request that s. 14(1)b be declared unconstitutional.

146. Hate is as old as mankind. It is naïve to think that the blunt instruments of the *Code* could change human nature. It may very well be that what is needed to counter hate crimes is more civility, more manners, not less. What is needed is, in a sense, more religion, not less. Unfortunately, Whatcott is now one of a new class of those who can be the subject of public bigotry - - the religious citizen. This new form of bigotry will end only when the law treats people like Whatcott with the respect they deserve and have a right to comment, whether their views comport with those of the majority or the elite groups who dominate Human Rights discourse in Canada today or not.

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[96] *Taylor* (supra), note 18 RBA Tab 3, p 9
[97] Moon (supra), note 76 RBA Tab 33, p 260

Part IV: Costs

147. The Respondent seeks his costs under Section 24 of the *Charter*. It is important that those who are attacked by the resources of the state be granted adequate costs to encourage the legal profession to protect others from government agencies, and to promote *Charter* values. Without a Court Challenge Program, this court ought to provide some meaningful assistance besides the usual costs so that the burden of costs does not fall only on the litigant or his counsel. If sec. 14(1)b is not declared unconstitutional, this additional compensation would also encourage Human Rights Commissions to proceed only with obvious violations, and thus discourage them from encouraging aggressive complaints by favoured minority groups.

Part V: Order Sought

148. It is requested that:

a) This appeal be dismissed with costs.

b) That section 14(1) b of the *Code* be declared to be unconstitutional as being an infringement of section 2(a) and 2(b) of the *Charter*, which infringement cannot be saved by section 1 of the *Charter*.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Weyburn, Saskatchewan, this 6th day of May, 2011.

Thomas A. Schuck,
John Carpay
Co-Counsel for the Respondent
William Whatcott

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CHAPTER S-24.1

An Act respecting the Saskatchewan Code of Human Rights and its Administration

SHORT TITLE

Short title

1 This Act may be cited as *The Saskatchewan Human Rights Code.*

INTERPRETATION

Interpretation

2(1) In this Act:

(a) **"age"** means any age of eighteen years or more;

(b) **"commercial unit"** means any building or other structure or part thereof that is used or occupied, or that is intended, arranged or designed to be used or occupied, for the manufacture, sale, resale, processing, reprocessing, displaying, storing, handling, garaging or distribution of personal property or any space, in any such building, structure or part thereof, that is used or occupied, or that is intended, arranged or designed to be used or occupied, as a separate business, professional unit or office;

(c) **"commission"** means the Saskatchewan Human Rights Commission;

(d) **"creed"** means religious creed;

(d.1) **"disability"** means:

(i) any degree of physical disability, infirmity, malformation or disfigurement and, without limiting the generality of the foregoing, includes:

(A) epilepsy;

(B) any degree of paralysis;

(C) amputation;

(D) lack of physical co-ordination;

(E) blindness or visual impediment;

(F) deafness or hearing impediment;

(G) muteness or speech impediment; or

(H) physical reliance on a service animal, wheelchair or other remedial appliance or device; or

(ii) any of:

(A) an intellectual disability or impairment;

(B) a learning disability or a dysfunction in one or more of the processes involved in the comprehension or use of symbols or spoken language; or

(C) a mental disorder;

(e) **"employee"** means a person employed by an employer and includes a person engaged pursuant to a limited term contract;

(f) **"employer"** means a person employing one or more employees and includes a person acting on behalf of an employer;

(g) **"employers' organization"** means an organization of employers formed for the purpose of regulating relations between employers and employees or for purposes that include the regulation of relations between employers and employees;

(h) **"employment agency"** includes a person who undertakes, with or without compensation, to procure employees for employers and a person who undertakes, with or without compensation, to procure employment for persons;

(h.1) **"family status"** means the status of being in a parent and child relationship and, for the purposes of this clause:

(i) **"child"** means son, daughter, stepson, stepdaughter, adopted child and person to whom another person stands in place of a parent;

(ii) **"parent"** means father, mother, stepfather, stepmother, adoptive parent and person who stands in place of a parent to another person;

(i) **"housing accommodation"** means any place of dwelling and includes any place where other services are provided in addition to accommodation, but does not include a place of dwelling that is part of a building in which the owner or the owner's family resides and where the occupant of the place of dwelling is required to share a bathroom or kitchen facility with the owner or the owner's family;

(i.01) **"marital status"** means that state of being engaged to be married, married, single, separated, divorced, widowed or living in a common-law relationship, but discrimination on the basis of a relationship with a particular person is not discrimination on the basis of marital status;

(i.1) **"mental disorder"** means a disorder of thought, perception, feelings or behaviour that impairs a person's:

(i) judgment;

(ii) capacity to recognize reality;

(iii) ability to associate with others; or

(iv) ability to meet the ordinary demands of life;

(j) **"minister"** means the member of the Executive Council to whom for the time being the administration of this Act is assigned;

(k) **"occupational association"** means any organization, whether incorporated or otherwise, in which membership is a prerequisite to carrying on any trade, occupation or profession, but does not include a trade union or employers' organization;

(l) **"offer"** includes an invitation to treat;

(m) **"person"**, in addition to the extended meaning contained in *The Interpretation Act*, includes an employment agency, employers' organization, occupational association or trade union;

(m.01) **"prohibited ground"** means:

(i) religion;

(ii) creed;

(iii) marital status;

(iv) family status;

(v) sex;

(vi) sexual orientation;

(vii) disability;

(viii) age;

(ix) colour;

(x) ancestry;

(xi) nationality;

(xii) place of origin;

(xiii) race or perceived race; and

(xiv) receipt of public assistance;

(m.1) **"receipt of public assistance"** means the receipt of:

(i) assistance as defined in *The Saskatchewan Assistance Act*; or

(ii) a benefit as defined in *The Saskatchewan Income Plan Act*;

(m.2) **"religion"** includes all aspects of religious observance and practice as well as beliefs;

(n) **Repealed.** 1989-90, c.23, s.3.

(o) **"sex"** means gender, and, unless otherwise provided in this Act, discrimination on the basis of pregnancy or pregnancy-related illnesses is deemed to be discrimination on the basis of sex;

(p) **"trade union"** means an organization of employees formed for the purpose of regulating relations between employees and employers or for purposes that include the regulation of relations between employees and employers;

(q) **"undue hardship"** means, for the purposes of sections 31.2 and 31.3, intolerable financial cost or disruption to business having regard to the effect on:

(i) the financial stability and profitability of the business undertaking;

(ii) the value of existing amenities, structures and premises as compared to the cost of providing proper amenities or physical access;

(iii) the essence or purpose of the business undertaking; and

(iv) the employees, customers or clients of the business undertaking, disregarding personal preferences;

but does not include the cost or business inconvenience of providing washroom facilities, living quarters or other facilities for persons with physical disabilities where those facilities must be provided by law for persons of both sexes.

(2) For the purpose of dealing with any case of alleged discrimination pursuant to this Act, no ground of discrimination shall be interpreted as extending to any conduct that is prohibited by the *Criminal Code*.

(3) Nothing in sections 9 to 19 prohibits a distinction on the basis of age if that distinction is permitted or required by any Act or regulation in force in Saskatchewan.

1979, c.S-24.1, s.2; 1989-90, c.23, s.3; 1993, c.61, s.3; 2000, c.26, s.3; 2007, c.39, s.3.

OBJECTS

Objects

3 The objects of this Act are:

(a) to promote recognition of the inherent dignity and the equal inalienable rights of all members of the human family; and

(b) to further public policy in Saskatchewan that every person is free and equal in dignity and rights and to discourage and eliminate discrimination.

1979, c.S-24.1, s.3.

PART I
BILL OF RIGHTS

Right to freedom of conscience

4 Every person and every class of persons shall enjoy the right to freedom of conscience, opinion and belief and freedom of religious association, teaching, practice and worship.

1979, c.S-24.1, s.4.

Right to free expression

5 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.

1979, c.S-24.1, s.5.

Right to free association

6 Every person and every class of persons shall enjoy the right to peaceable assembly with others and to form with others associations of any character under the law.

1979, c.S-24.1, s.6.

Right to freedom from arbitrary imprisonment

7 Every person and every class of persons shall enjoy the right to freedom from aribitrary arrest or detention.

1989-90, c.23, s.4.

Right to elections

8 Every qualified voter resident in Saskatchewan shall enjoy the right to exercise freely his or her franchise in all elections and shall possess the right to require that no Legislative Assembly shall continue for a period in excess of five years.

1979, c.S-24.1, s.8; 2000, c.26, s.4.

PART II
PROHIBITION OF CERTAIN DISCRIMINATORY PRACTICES

Right to engage in occupations

9 Every person and every class of persons shall enjoy the right to engage in and carry on any occupation, business or enterprise under the law without discrimination on the basis of a prohibited ground.

2000, c.26, s.5.

Discrimination in the purchase of property prohibited

10(1) No person shall, on the basis of a prohibited ground:

(a) deny to any person or class of persons the opportunity to purchase any commercial unit or any place of dwelling that is advertised or in any way represented as being available for sale;

(b) deny to any person or class of persons the opportunity to purchase or otherwise acquire land or an interest in land; or

(c) discriminate against any person or class of persons with respect to any term of the purchase or other acquisition of any commercial unit or any place of dwelling, land or any interest in land.

(2) **Repealed.** 2007, c.39, s.4.

(3) Nothing in subsection (1) prohibits the sale, the offering for sale or the advertising for sale of a place of dwelling for occupancy by persons over 55 years of age exclusively.

1979, c.S-24.1, s.10; 1989-90, c.23, s.6; 1993, c.61, s.5; 2000, c.26, s.6; 2007, c.39, s.4.

Discrimination in occupancy of commercial unit or housing accommodation is prohibited

11(1) No person, directly or indirectly, alone or with another, or by the interposition of another shall, on the basis of a prohibited ground:

(a) deny to any person or class of persons occupancy of any commercial unit or any housing accommodation; or

(b) discriminate against any person or class of persons with respect to any term of occupancy of any commercial unit or any housing accommodation.

(2) Subsection (1) does not apply to discrimination on the basis of the sex of a person with respect to housing accommodation, where the occupancy of all the housing accommodation in a building, except that of the owner or the owner's family, is restricted to individuals who are of the same sex.

(3) Subsection (1) does not apply to discrimination on the basis of the sex or sexual orientation of a person with respect to the renting or leasing of any dwelling unit in any housing accommodation that is composed of not more than two dwelling units, where the owner of the housing accommodation or the owner's family resides in one of the two dwelling units.

(4) Nothing in subsection (1) prohibits the renting or leasing, the offering for rent or lease or the advertising for rent or lease, of any housing accommodation for occupancy by persons over 55 years of age exclusively.

1979, c.S-24.1, s.11; 1989-90, c.23, s.7; 1993, c.61, s.6; 2000, c.26, s.7.

Discrimination prohibited in places to which public admitted

12(1) No person, directly or indirectly, alone or with another, or by the interposition of another shall, on the basis of a prohibited ground:

(a) deny to any person or class of persons the accommodation, services or facilities to which the public is customarily admitted or that are offered to the public; or

(b) discriminate against any person or class of persons with respect to the accommodation, services or facilities to which the public is customarily admitted or that are offered to the public.

(2) Subsection (1) does not apply to prevent the barring of any person because of the sex of that person from any accommodation, services or facilities upon the ground of public decency.

(3) **Repealed.** 2007, c.39, s.5.

(4) Subsection (1) does not apply to prevent the giving of preference because of age, marital status or family status with respect to membership dues, fees or other charges for services or facilities.

1979, c.S-24.1, s.12; 1989-90, c.23, s.8; 1993, c.61, s.7; 2000, c.26, s.8; 2007, c.39, s.5.

Right to education

13(1) Every person and every class of persons shall enjoy the right to education in any school, college, university or other institution or place of learning, vocational training or apprenticeship without discrimination on the basis of a prohibited ground other than age.

(2) Nothing in subsection (1) prevents a school, college, university or other institution or place of learning from following a restrictive policy with respect to enrolment on the basis of sex, creed, religion or disability, where it enrols persons of a particular sex, creed or religion exclusively, or is conducted by a religious order or society, or where it enrols persons who are disabled.

1979, c.S-24.1, s.13; 1989-90, c.23, s.9; 1993, c.61, s.8; 2000, c.26, s.9.

Prohibitions against publications

14(1) No person shall publish or display, or cause or permit to be published or displayed, on any lands or premises or in a newspaper, through a television or radio broadcasting station or any other broadcasting device, or in any printed matter or publication or by means of any other medium that the person owns, controls, distributes or sells, any representation, including any notice, sign, symbol, emblem, article, statement or other representation:

(a) tending or likely to tend to deprive, abridge or otherwise restrict the enjoyment by any person or class of persons, on the basis of a prohibited ground, of any right to which that person or class of persons is entitled under law; or

(b) that exposes or tends to expose to hatred, ridicules, belittles or otherwise affronts the dignity of any person or class of persons on the basis of a prohibited ground.

(2) Nothing in subsection (1) restricts the right to freedom of expression under the law upon any subject.

1979, c.S-24.1, s.14; 1989-90, c.23, s.10; 1993, c.61, s.9; 2000, c.26, s.10.

Duties of commission

25 The commission shall:

(a) forward the principle that every person is free and equal in dignity and rights without regard to religion, creed, marital status, family status, sex, sexual orientation, disability, age, colour, ancestry, nationality, place of origin, race or perceived race or receipt of public assistance;

(b) promote an understanding and acceptance of, and compliance with, this Act;

(c) develop and conduct educational programs designed to eliminate discriminatory practices;

(d) disseminate information and promote understanding of the legal rights of residents of the province and conduct educational programs in that respect;

(e) further the principle of the equality of opportunities for persons, and equality in the exercise of the legal rights of persons, regardless of their status;

(f) conduct and encourage research by persons and associations actively engaged in the field of promoting human rights;

(g) forward the principle that cultural diversity is a basic human right and fundamental human value.

1979, c.S-24.1, s.25; 1989-90, c.23, s.16; 1993, c.61, s.15; 2000, c.26, s.20.

Administration

26 The commission is responsible to the minister for the administration of this Act and any other Acts that are assigned by the Lieutenant Governor in Council to be administered by it.

1979, c.S-24.1, s.26.

PART IV
COMPLAINTS

Complaints

27(1) Any person who has reasonable grounds for believing that any person has contravened a provision of this Act, or any other Act administered by the commission, in respect of a person or class of persons, may file with the commission a complaint in the form prescribed by the commission.

(2) Where a complaint is made by a person, other than the person who it is alleged was dealt with contrary to the provisions of this Act, or any other Act administered by the commission, the commission may refuse to act on the complaint unless the person alleged to be offended against consents.

(3) Where the commission has reasonable grounds for believing that any person has contravened a provision of this Act, or any other Act administered by the commission, in respect of a person or class of persons, the commission may initiate a complaint.

(4) One or more grounds of discrimination may be alleged in any complaint.

(5) Notwithstanding any other provision of this Act, the commission shall refuse to accept a complaint where the complaint is made more than two years after the person making the complaint became aware, or ought to have been aware, of the alleged act of discrimination.

(6) Where subsection (5) applies, the commission shall not initiate a complaint.

1979, c.S-24.1, s.27; 1980-81, c.81, s.2; 2000, c.26, s.21.

Dismissal and deferral of complaint

27.1(1) In this section, **"proceeding"** includes a proceeding authorized by another Act, a civil proceeding or a grievance under a collective agreement.

(2) At any time after a complaint is filed or initiated pursuant to section 27, the Chief Commissioner, or person designated by the Chief Commissioner, may dismiss the complaint where he or she is of the opinion that:

(a) the best interests of the person or class of persons on whose behalf the complaint was made will not be served by continuing with the complaint;

(b) the complaint is without merit;

(c) the complaint raises no significant issue of discrimination;

(d) the substance of the complaint has been appropriately dealt with pursuant to another Act or proceeding;

(e) the complaint is made in bad faith or for improper motives or is frivolous or vexatious;

(f) there is no reasonable likelihood that an investigation will reveal evidence of a contravention of this Act; or

(g) the complaint arises out of circumstances for which an exemption order has been made pursuant to section 48.

(3) The Chief Commissioner may, at any time after a complaint is filed or initiated, defer further action if another proceeding, in the opinion of the Chief Commissioner, is more appropriate having regard to the nature of the allegations and the remedies available in the other proceeding.

2000, c.26, s.22.

Inquiry into a complaint

28(1) Where a complaint is filed with or initiated by the commission, the Chief Commissioner, or any person designated by the Chief Commissioner, shall, subject to subsection 27(5) and section 27.1, do one or more of the following:

(a) attempt to resolve the complaint by mediation between the parties;

(b) attempt to negotiate a settlement of the complaint;

(c) investigate the complaint;

(d) continue an investigation of the complaint after an unsuccessful attempt to mediate or settle the matter.

(2) The Chief Commissioner may, at any time after a complaint is filed or initiated pursuant to section 27, request the chairperson of the human rights tribunal panel to appoint a human rights tribunal to conduct an inquiry respecting the complaint.

(2.1) A complaint shall be considered settled for the purposes of this Act only if the Chief Commissioner has approved the terms of the settlement.

(3) Where a complaint is settled for the purposes of this Act or a decision or order is made pursuant to section 31.3 or 31.4 by a human rights tribunal, the Chief Commissioner may, in his or her discretion, publicize in any manner the results of the settlement, decision or order.

(4) to (8) **Repealed.** 1989-90, c.23, s.17.

1979, c.S-24.1, s.28; 1989-90, c.23, s.17; 2000, c.26, s.23.

Search and seizure

28.1(1) For the purposes of an investigation pursuant to subsection 28(1):

(a) the commission; or

(b) any person authorized by the commission;

may, with the consent of the owner or occupier, enter into any premises that in the opinion of the commission or the person authorized by the commission may provide information relating to the inquiry.

(2) Where permission to enter a premises is denied by an owner or occupier pursuant to subsection (1), the commission or any person authorized by the commission shall not enter into the premises unless authorized to do so by a warrant issued pursuant to subsection (3).

(3) A justice of the peace or judge of the Provincial Court of Saskatchewan, if satisfied by information on oath that access to premises is required for the purposes of an investigation pursuant to section 28(1) may issue a warrant authorizing the commission or a person authorized by the commission to enter and view those premises.

(4) Every warrant issued pursuant to subsection (3) shall be executed between sunrise and sunset unless the judge otherwise directs.

(5) For the purposes of an investigation pursuant to subsection 28(1), the commission or any person authorized by the commission may at any reasonable time:

(a) require the production of books, documents, correspondence, records or other papers that related or may relate to the complaint;

(b) make any inquiries relating to the complaint, of any person, in writing or orally; and

(c) subject to subsection (6), on giving a receipt for books, documents, correspondence, records or other papers, remove any books, documents, correspondence, records or other papers examined pursuant to this section for the purpose of making copies or extracts of those books, documents, correspondence, records or other papers.

Orders by human rights tribunal

31.3 Where the human rights tribunal finds that the complaint to which the inquiry relates is substantiated on a balance of probabilities, the human rights tribunal may, subject to section 31.5, order any person who has contravened any provision of this Act, or any other Act administered by the commission, to do any act or thing that in the opinion of the human rights tribunal constitutes full compliance with that provision and to rectify any injury caused to any person and to make compensation for that injury, including:

(a) requiring that person to cease contravening that provision and, in consultation with the commission on the general purposes of that provision, to take measures, including adoption of a program mentioned in section 47, to prevent the same or a similar contravention occurring in the future;

(b) requiring that person to make available to any person injured by that contravention, on the first reasonable occasion, any rights, opportunities or privileges that, in the opinion of the human rights tribunal, are being or were being denied the injured person and including, but without restricting the generality of this clause, reinstatement in employment;

(c) requiring that person to compensate any person injured by that contravention for any or all of the wages and other benefits of which the injured person was deprived and any expenses incurred by the injured person as a result of the contravention;

(d) requiring that person to pay any compensation that the human rights tribunal considers appropriate, to any person injured by that contravention, for any or all additional costs of obtaining alternative goods, services, facilities or accommodations and any expenses incurred by the injured person as a result of the contravention; and

(e) requiring that person, where the complaint is based on disability and the premises, facilities or services of the person complained against impede physical access or lack proper amenities, to take measures to make the premises, facilities or services accessible or to provide proper amenities, other than measures that would cause an undue hardship.

2000, c.26, s.27.

Order respecting compensation

31.4 A human rights tribunal may, in addition to any other order it may make pursuant to section 31.3, order the person who has contravened or is contravening that provision to pay any compensation to the person injured by that contravention that the human rights tribunal may determine, to a maximum of $10,000, where the human rights tribunal finds that:

(a) a person has wilfully and recklessly contravened or is wilfully and recklessly contravening any provision of this Act or any other Act administered by the commission; or

(b) the person injured by a contravention of any provision of this Act or any other Act administered by the commission has suffered with respect to feeling, dignity or self-respect as a result of the contravention.

2000, c.26, s.27.

Terms of order

31.5(1) No order made pursuant to section 31.3 shall contain a term:

(a) requiring the removal of an individual from a position if that individual accepted employment in that position in good faith; or

(b) requiring the expulsion of an occupant from any housing accommodation if the occupant obtained that housing accommodation in good faith.

(2) An order made pursuant to section 31.3 or 31.4 may require the person against whom the order is made to provide the Chief Commissioner with information respecting the implementation of the order.

2000, c.26, s.27.

Restrictions on tribunals

31.6(1) No human rights tribunal conducting an inquiry respecting a complaint shall have taken part in any investigation or consideration of the complaint before the inquiry or shall communicate directly or indirectly in relation to the complaint with any person or representative of that person except on notice to all parties and with an opportunity for all parties to participate.

(2) Notwithstanding subsection (1), the human rights tribunal may seek legal advice independent of the parties, and in that case, the nature of the advice shall be made known to the parties in order that they may make submissions as to the law.

2000, c.26, s.27.

Appeals

32(1) Any party to a proceeding before a human rights tribunal may appeal on a question of law from the decision or order of the human rights tribunal to a judge of the Court of Queen's Bench by serving a notice of motion, in accordance with *The Queen's Bench Rules*, within 30 days after the decision or order of the tribunal, on:

(a) the human rights tribunal;

(b) the commission; and

(c) the other parties in the proceeding before the human rights tribunal.

(1.1) On the application of any party, the judge may extend the appeal period mentioned in subsection (1) where, in the opinion of the judge, it is just and equitable to do so.

(2) Where a notice of motion is served on the human rights tribunal, it shall immediately file, in the office of the local registrar of the Court of Queen's Bench, the record of the proceedings before it in which the decision or order appealed from was made.

(2.1) The record mentioned in subsection (2) and a transcript of the oral evidence taken before the tribunal, if it is not part of the record of the tribunal, constitutes the record in the appeal.

(3) The minister is entitled to be heard, by counsel or otherwise, upon the argument of an appeal under this section.

(4) Where an appeal is taken under this section, the judge shall determine any question of law relating to the appeal and may affirm or reverse the decision or order of the human rights tribunal or remit the matter back to the human rights tribunal for amendment of its decision or order.

(5) The decision of the Court of Queen's Bench may be appealed to the Court of Appeal.

1979, c.S-24.1, s.32; 1993, c.61, s.16; 2000, c.26, s.28.

Order to become judgment

33(1) Any order made pursuant to section 31.3 or 31.4 by a human rights tribunal shall, on filing of a certified copy thereof in the office of the local registrar of the Court of Queen's Bench at the judicial centre nearest to the place where the inquiry was held, be entered as a judgment of the Court of Queen's Bench and may be enforced as such.

(2) No certified copy of an order mentioned in subsection (1) shall be accepted for filing by the local registrar unless the local registrar is satisfied that 30 days have elapsed since the day on which the order was made and that no notice of appeal has been filed.

(3) The local registrar may accept, as proof that no notice of appeal has been filed, an affidavit that no notice of appeal against the order has been served upon the commission or person filing the order within the thirty-day appeal period.

(4) An application to enforce an order of the human rights tribunal may be made to the court by and in the name of any one or more of the parties to the proceedings, and, upon the hearing of that application, the court is bound by the findings of the human rights tribunal and shall make any order or orders that may be necessary to cause every party with respect to which the application is made to comply with the order of the human rights tribunal.

1979, c.S-24.1, s.33; 2000, c.26, s.29.

Immunity

34 Neither the minister, the commission, a member of the commission, an employee of the commission nor a member of the human rights tribunal panel constituted pursuant to this Act is liable for any loss or damage suffered by any person by reason of any thing done or omitted to be done in good faith pursuant to or in the exercise or supposed exercise of the powers conferred by this Act.

2000, c.26, s.30.

PART V
REMEDIES AND ENFORCEMENT

Offences and penalties

35(1) Every person who contravenes or fails to comply with an order made under section 31.3, 31.4, 32 or 38 or under subsection 47(1) is guilty of an offence and liable on summary conviction to the penalties provided in subsection (3).

(2) **Repealed.** 2000, c.26, s.31.

(3) Any person who is convicted of an offence mentioned in subsection (1) and who is:

(a) an individual is liable to a fine of not more than $500 in the case of a first offence or to a fine of not more than $2,000 in the case of a subsequent offence;

(b) a person other than an individual is liable to a fine of not more than $2,000 in the case of a first offence or to a fine of not more than $3,000 in the case of a subsequent offence.

(4) The penalties provided by this section may be enforced on the information of the Chief Commissioner or any other person in whose favour an order has been made pursuant to section 31.3, 31.4, 32 or 38.

1979, c.S-24.1, s.35; 1980-81, c.41, s.5; 2000, c.26, s.31.

Prosecution of trade union, occupational association or employers' organization

36(1) A prosecution for an offence under this Act may be instituted against a trade union, occupational association or employers' organization in the name of the trade union, occupational association or employers' organization.

(2) For the purpose of this Act, a trade union, occupational association or an employers' organization is deemed to be a legal entity and any act or thing done or omitted to be done by an officer or agent of a trade union, occupational association or an employers' organization who is acting within the scope of the officer's or agent's authority on behalf of the trade union, occupational association or employers' organization is deemed to be an act or thing done or omitted to be done by the trade union, occupational association or employers' organization, as the case may be.

1979, c.S-24.1, s.36; 2000, c.26, s.32.

Proceeding not invalidated by technical irregularity

37 No proceeding under this Act shall be deemed to be invalid by reason of any defect in form or any technical irregularity.

1979, c.S-24.1, s.37.

Injunction

38(1) Where a person has been convicted of an offence under this Act or any other Act administered by the commission, the commission may apply by way of notice of motion to a judge of the Court of Queen's Bench for an order enjoining that person from continuing or repeating the offence, and the judge may make any order that he considers fit.

(2) Any order made under subsection (1) may be enforced in the same manner as any other order or judgment of the Court of Queen's Bench.

(3) The commission or any person may, by statement of claim, bring action in Her Majesty's Court of Queen's Bench for Saskatchewan against any person for an injunction to restrain the person:

(a) from depriving, abridging or otherwise restricting or attempting to deprive, abridge or restrict a person or a class of persons in the enjoyment of a right pursuant to this Act or any other Act administered by the commission; or

(b) from contravening or attempting to contravene any provision of this Act or any other Act administered by the commission.

(3.1) In an action pursuant to subsection (3), the judge may make any order that the judge considers fit.

(4) An appeal lies to the Court of Appeal from the order or decision of a judge made under subsection (3).

1979, c.S-24.1, s.38; 1993, c.61, s.17.

Onus of proof

39(1) Where, in a proceeding under this Act, it is established that the party complained against, directly or indirectly, by himself, herself or any other person on his or her behalf:

(a) deprived or attempted to deprive a person or class of persons of the enjoyment;

(b) abridged or attempted to abridge the enjoyment by a person or class of persons; or

(c) otherwise restricted or attempted to otherwise restrict a person or class of persons in the enjoyment;

of any accommodation, services or facilities which are offered to the public or which are ordinarily available to the public, or to which the public is customarily admitted, or of the occupancy of any housing accommodation or commercial unit, the onus is on the party against whom the complaint is made or the accused, as the case may be, to prove on a balance of probabilities that the deprivation, abridgment, restriction or attempted deprivation, abridgment or restriction was not because of discrimination against that person or class of persons contrary to any provisions of this Act or any other Act administered by the commission.

(2) Where, in a proceeding under this Act, it is established that the party complained against, directly or indirectly, by himself, herself or any other person on his or her behalf, refused to employ or continue to employ or otherwise discriminated against any person or class of persons with respect to employment or any term, condition or privilege of employment, the onus is on the party against whom the complaint is made or the accused, as the case may be, to prove on a balance of probabilities that the refusal or discrimination was not because of discrimination against that person or class of persons contrary to any provision of this or any other Act administered by the commission.

1979, c.S-24.1, s.39; 2000, c.26, s.33.

Court may order compensation to and reinstatement of an employee

40 Where an employer is convicted for violation of section 16 or of having suspended, transferred, laid off or discharged an employee contrary to this Act, the convicting court may, in addition to any other penalty, order the employer to pay to the employee compensation for loss of employment in an amount not exceeding an amount that, in the opinion of the court, is equivalent to the wages, salary or remuneration that would have accrued to the employee up to the date of conviction but for the suspension, transfer, layoff or discharge, and may order the employer to reinstate the employee in his or her employ, at any date that, in the opinion of the court, is just and proper in the circumstances, in the position the employee would have held but for the suspension, transfer, layoff or discharge.

1979, c.S-24.1, s.40; 2000, c.26, s.34.

No imprisonment

41 Notwithstanding any other Act, no person shall be imprisoned for default of payment of a fine imposed pursuant to this Act.

1979, c.S-24.1, s.41.

Conviction entered as judgement

42 Where a fine imposed pursuant to a conviction for a contravention of subsection 35(1) or (2) is not paid within the time designated by the court, the commission may, by filing the conviction, enter as a judgement in the Court of Queen's Bench the amount ordered to be paid, and that amount is enforceable against the accused in the same manner as any other judgement in civil proceedings in that court.

1979, c.S-24.1, s.42.

PART VI
GENERAL

Act binds Crown

43 This Act binds the Crown.

1979, c.S-24.1, s.43.

Act takes precedence unless expressly excluded

44 Every law of Saskatchewan is inoperative to the extent that it authorizes or requires the doing of anything prohibited by this Act unless it falls within an exemption provided by this Act or unless it is expressly declared by an Act of the Legislature to operate notwithstanding this Act.

1979, c.S-24.1, s.44.

Discrimination for taking part in proceedings under this Act prohibited

45 No person shall:

(a) refuse to employ or to continue to employ any person;

(b) threaten to dismiss or to penalize in any other way any person with respect to that person's employment or any term, condition or privilege thereof;

(c) discriminate against any person with respect to that person's employment or any term, condition or privilege thereof; or

(d) intimidate, retaliate against, coerce or impose any pecuniary or other penalty, loss or other penalty, loss or disadvantage upon any person;

on the grounds that that person:

(e) has made or may make a complaint under this Act;

(f) has made or may make a disclosure concerning any matter complained of;

(g) has testified or may testify in a proceeding under this Act; or

(h) has participated or may participate in any other way in a proceeding under this Act.

1979, c.S-24.1, s.45; 2000, c.26, s.35.

Regulations

46 For the purpose of carrying out the provisions of this Act according to their intent, the Lieutenant Governor in Council or the commission, subject to the approval of the Lieutenant Governor in Council, may make regulations that are ancillary to this Act, and every regulation made under this section has the force of law and, without restricting the generality of the foregoing, the Lieutenant Governor in Council or the commission, subject to the approval of the Lieutenant Governor in Council, may make regulations:

(a) defining any word or expression used in this Act but not defined in this Act;

CONSTITUTION ACT, 1982[80]

PART I

CANADIAN CHARTER OF RIGHTS AND FREEDOMS

Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:

Guarantee of Rights and Freedoms

Rights and freedoms in Canada

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.

Fundamental Freedoms

Fundamental freedoms

2. Everyone has the following fundamental freedoms:

(*a*) freedom of conscience and religion;

(*b*) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

(*c*) freedom of peaceful assembly; and

(*d*) freedom of association.

Democratic Rights

Democratic rights of citizens

3. Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

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[80] **Enacted as Schedule B to the *Canada Act 1982*, (U.K.) 1982, c. 11, which came into force on April 17, 1982. The *Canada Act 1982*, other than Schedules A and B thereto, reads as follows:**

An Act to give effect to a request by the Senate and House of Commons of Canada

Whereas Canada has requested and consented to the enactment of an Act of the Parliament of the United Kingdom to give effect to the provisions hereinafter set forth and the Senate and the House of Commons of Canada in Parliament assembled have submitted an address to Her Majesty requesting that Her Majesty may graciously be pleased to cause a Bill to be laid before the Parliament of the United Kingdom for that purpose.

Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. The *Constitution Act, 1982* set out in Schedule B to this Act is hereby enacted for and shall have the force of law in Canada and shall come into force as provided in that Act.

2. No Act of the Parliament of the United Kingdom passed after the *Constitution Act, 1982* comes into force shall extend to Canada as part of its law.

3. So far as it is not contained in Schedule B, the French version of this Act is set out in Schedule A to this Act and has the same authority in Canada as the English version thereof.

4. This Act may be cited as the *Canada Act 1982*.

Maximum duration of legislative bodies

4. (1) No House of Commons and no legislative assembly shall continue for longer than five years from the date fixed for the return of the writs of a general election of its members.[81]

Continuation in special circumstances

(2) In time of real or apprehended war, invasion or insurrection, a House of Commons may be continued by Parliament and a legislative assembly may be continued by the legislature beyond five years if such continuation is not opposed by the votes of more than one-third of the members of the House of Commons or the legislative assembly, as the case may be.[82]

Annual sitting of legislative bodies

5. There shall be a sitting of Parliament and of each legislature at least once every twelve months.[83]

Mobility Rights

Mobility of citizens

6. (1) Every citizen of Canada has the right to enter, remain in and leave Canada.

Rights to move and gain livelihood

(2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right

(*a*) to move to and take up residence in any province; and

(*b*) to pursue the gaining of a livelihood in any province.

Limitation

(3) The rights specified in subsection (2) are subject to

(*a*) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and

(*b*) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.

Affirmative action programs

(4) Subsections (2) and (3) do not preclude any law, program or activity that has as its object the amelioration in a province of conditions of individuals in that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada.

Legal Rights

Life, liberty and security of person

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Search or seizure

8. Everyone has the right to be secure against unreasonable search or seizure.

Detention or imprisonment

9. Everyone has the right not to be arbitrarily detained or imprisoned.

Arrest or detention

10. Everyone has the right on arrest or detention

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[81] **See section 50 and the footnotes to sections 85 and 88 of the *Constitution Act, 1867*.**

[82] **Replaces part of Class 1 of section 91 of the *Constitution Act, 1867*, which was repealed as set out in subitem 1(3) of the Schedule to this Act.**

[83] **See the footnotes to sections 20, 86 and 88 of the *Constitution Act, 1867*.**

(*a*) to be informed promptly of the reasons therefor;

(*b*) to retain and instruct counsel without delay and to be informed of that right; and

(*c*) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

Proceedings in criminal and penal matters

11. Any person charged with an offence has the right

(*a*) to be informed without unreasonable delay of the specific offence;

(*b*) to be tried within a reasonable time;

(*c*) not to be compelled to be a witness in proceedings against that person in respect of the offence;

(*d*) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

(*e*) not to be denied reasonable bail without just cause;

(*f*) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;

(*g*) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;

(*h*) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and

(*i*) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

Treatment or punishment

12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

Self-crimination

13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

Interpreter

14. A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.

Equality Rights

Equality before and under law and equal protection and benefit of law

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.

Affirmative action programs

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.[84]

Official Languages of Canada

Official languages of Canada

16. (1) English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.

Official languages of New Brunswick

(2) English and French are the official languages of New Brunswick and have equality of status and equal rights and privileges as to their use in all institutions of the legislature and government of New Brunswick.

Advancement of status and use

(3) Nothing in this Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French.

English and French linguistic communities in New Brunswick

16.1 (1) The English linguistic community and the French linguistic community in New Brunswick have equality of status and equal rights and privileges, including the right to distinct educational institutions and such distinct cultural institutions as are necessary for the preservation and promotion of those communities.

Role of the legislature and government of New Brunswick

(2) The role of the legislature and government of New Brunswick to preserve and promote the status, rights and privileges referred to in subsection (1) is affirmed.[85]

Proceedings of Parliament

17. (1) Everyone has the right to use English or French in any debates and other proceedings of Parliament.[86]

Proceedings of New Brunswick legislature

(2) Everyone has the right to use English or French in any debates and other proceedings of the legislature of New Brunswick.[87]

Parliamentary statutes and records

18. (1) The statutes, records and journals of Parliament shall be printed and published in English and French and both language versions are equally authoritative.[88]

New Brunswick statutes and records

(2) The statutes, records and journals of the legislature of New Brunswick shall be printed and published in English and French and both language versions are equally authoritative.[89]

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[84] **Subsection 32(2) provides that section 15 shall not have effect until three years after section 32 comes into force. Section 32 came into force on April 17, 1982; therefore, section 15 had effect on April 17, 1985.**

[85] **Section 16.1 was added by the *Constitution Amendment, 1993 (New Brunswick)*. See SI/93-54.**

[86] **See section 133 of the *Constitution Act, 1867*, and the footnote thereto.**

[87] ***Id.***

[88] ***Id.***

[89] ***Id.***

ANNEXE B

LOI CONSTITUTIONNELLE DE 1982

PARTIE I

CHARTE CANADIENNE DES DROITS ET LIBERTÉS

Attendu que le Canada est fondé sur des principes qui reconnaissent la suprématie de Dieu et la primauté du droit :

Garantie des droits et libertés

1. La *Charte canadienne des droits et libertés* garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.

Droits et libertés au Canada

Libertés fondamentales

2. Chacun a les libertés fondamentales suivantes :

Libertés fondamentales

a) liberté de conscience et de religion;

b) liberté de pensée, de croyance, d'opinion et d'expression, y compris la liberté de la presse et des autres moyens de communication;

c) liberté de réunion pacifique;

d) liberté d'association.

Droits démocratiques

3. Tout citoyen canadien a le droit de vote et est éligible aux élections législatives fédérales ou provinciales.

Droits démocratiques des citoyens

4. (1) Le mandat maximal de la Chambre des communes et des assemblées législatives est de cinq ans à compter de la date fixée pour le retour des brefs relatifs aux élections générales correspondantes.[81]

Mandat maximal des assemblées

(2) Le mandat de la Chambre des communes ou celui d'une assemblée législative peut être prolongé respectivement par le Parlement ou par la législature en question au-delà de cinq ans en cas de guerre, d'invasion ou d'insurrection, réelles ou appréhendées, pourvu que cette prolongation ne fasse pas l'objet d'une opposition exprimée par les voix de plus du tiers des députés de la Chambre des communes ou de l'assemblée législative.[82]

Prolongations spéciales

5. Le Parlement et les législatures tiennent une séance au moins une fois tous les douze mois.[83]

Séance annuelle

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[81] **Voir l'article 50 de la *Loi constitutionnelle de 1867* et les notes relatives aux articles 85 et 88 de cette loi.**

[82] **Remplace en partie la catégorie 1 de l'article 91 de la *Loi constitutionnelle de 1867*, qui a été abrogée comme l'indique le paragraphe 1(3) de l'annexe de la présente loi.**

[83] **Voir les notes relatives aux articles 20, 86 et 88 de la *Loi constitutionnelle de 1867*.**

Liberté de circulation et d'établissement

6. (1) Tout citoyen canadien a le droit de demeurer au Canada, d'y entrer ou d'en sortir. Liberté de circulation

(2) Tout citoyen canadien et toute personne ayant le statut de résident permanent au Canada ont le droit : Liberté d'établissement

a) de se déplacer dans tout le pays et d'établir leur résidence dans toute province;

b) de gagner leur vie dans toute province.

(3) Les droits mentionnés au paragraphe (2) sont subordonnés : Restriction

a) aux lois et usages d'application générale en vigueur dans une province donnée, s'ils n'établissent entre les personnes aucune distinction fondée principalement sur la province de résidence antérieure ou actuelle;

b) aux lois prévoyant de justes conditions de résidence en vue de l'obtention des services sociaux publics.

(4) Les paragraphes (2) et (3) n'ont pas pour objet d'interdire les lois, programmes ou activités destinés à améliorer, dans une province, la situation d'individus défavorisés socialement ou économiquement, si le taux d'emploi dans la province est inférieur à la moyenne nationale. Programmes de promotion sociale

Garanties juridiques

7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale. Vie, liberté et sécurité

8. Chacun a droit à la protection contre les fouilles, les perquisitions ou les saisies abusives. Fouilles, perquisitions ou saisies

9. Chacun a droit à la protection contre la détention ou l'emprisonnement arbitraires. Détention ou emprisonnement

10. Chacun a le droit, en cas d'arrestation ou de détention : Arrestation ou détention

a) d'être informé dans les plus brefs délais des motifs de son arrestation ou de sa détention;

b) d'avoir recours sans délai à l'assistance d'un avocat et d'être informé de ce droit;

c) de faire contrôler, par *habeas corpus*, la légalité de sa détention et d'obtenir, le cas échéant, sa libération.

11. Tout inculpé a le droit : Affaires criminelles et pénales

a) d'être informé sans délai anormal de l'infraction précise qu'on lui reproche;

b) d'être jugé dans un délai raisonnable;

c) de ne pas être contraint de témoigner contre lui-même dans toute poursuite intentée contre lui pour l'infraction qu'on lui reproche;

d) d'être présumé innocent tant qu'il n'est pas déclaré coupable, conformément à la loi, par un tribunal indépendant et impartial à l'issue d'un procès public et équitable;

e) de ne pas être privé sans juste cause d'une mise en liberté assortie d'un cautionnement raisonnable;

f) sauf s'il s'agit d'une infraction relevant de la justice militaire, de bénéficier d'un procès avec jury lorsque la peine maximale prévue pour l'infraction dont il est accusé est un emprisonnement de cinq ans ou une peine plus grave;

g) de ne pas être déclaré coupable en raison d'une action ou d'une omission qui, au moment où elle est survenue, ne constituait pas une infraction d'après le droit interne du Canada ou le droit international et n'avait pas de caractère criminel d'après les principes généraux de droit reconnus par l'ensemble des nations;

h) d'une part de ne pas être jugé de nouveau pour une infraction dont il a été définitivement acquitté, d'autre part de ne pas être jugé ni puni de nouveau pour une infraction dont il a été définitivement déclaré coupable et puni;

i) de bénéficier de la peine la moins sévère, lorsque la peine qui sanctionne l'infraction dont il est déclaré coupable est modifiée entre le moment de la perpétration de l'infraction et celui de la sentence.

12. Chacun a droit à la protection contre tous traitements ou peines cruels et inusités. — Cruauté

13. Chacun a droit à ce qu'aucun témoignage incriminant qu'il donne ne soit utilisé pour l'incriminer dans d'autres procédures, sauf lors de poursuites pour parjure ou pour témoignages contradictoires. — Témoignage incriminant

14. La partie ou le témoin qui ne peuvent suivre les procédures, soit parce qu'ils ne comprennent pas ou ne parlent pas la langue employée, soit parce qu'ils sont atteints de surdité, ont droit à l'assistance d'un interprète. — Interprète

Droits à l'égalité

15. (1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques. — Égalité devant la loi, égalité de bénéfice et protection égale de la loi

(2) Le paragraphe (1) n'a pas pour effet d'interdire les lois, programmes ou activités destinés à améliorer la situation d'individus ou de groupes défavorisés, notamment du fait de leur race, de leur origine nationale ou ethnique, de leur couleur, de leur religion, de leur sexe, de leur âge ou de leurs déficiences mentales ou physiques.[84] — Programmes de promotion sociale

Langues officielles du Canada

16. (1) Le français et l'anglais sont les langues officielles du Canada; ils ont un statut et des droits et privilèges égaux quant à leur usage dans les institutions du Parlement et du gouvernement du Canada. — Langues officielles du Canada

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[84] Le paragraphe 32(2) stipule que l'article 15 n'a d'effet que trois ans après l'entrée en vigueur de l'article 32. L'article 32 est en vigueur depuis le 17 avril 1982; par conséquent, l'article 15 a pris effet le 17 avril 1985.

(2) Le français et l'anglais sont les langues officielles du Nouveau-Brunswick; ils ont un statut et des droits et privilèges égaux quant à leur usage dans les institutions de la Législature et du gouvernement du Nouveau-Brunswick.

Langues officielles du Nouveau-Brunswick

(3) La présente charte ne limite pas le pouvoir du Parlement et des législatures de favoriser la progression vers l'égalité de statut ou d'usage du français et de l'anglais.

Progression vers l'égalité

16.1 (1) La communauté linguistique française et la communauté linguistique anglaise du Nouveau-Brunswick ont un statut et des droits et privilèges égaux, notamment le droit à des institutions d'enseignement distinctes et aux institutions culturelles distinctes nécessaires à leur protection et à leur promotion.

Communautés linguistiques française et anglaise du Nouveau-Brunswick

(2) Le rôle de la législature et du gouvernement du Nouveau-Brunswick de protéger et de promouvoir le statut, les droits et les privilèges visés au paragraphe (1) est confirmé.[85]

Rôle de la législature et du gouvernement du Nouveau-Brunswick

17. (1) Chacun a le droit d'employer le français ou l'anglais dans les débats et travaux du Parlement.[86]

Travaux du Parlement

(2) Chacun a le droit d'employer le français ou l'anglais dans les débats et travaux de la Législature du Nouveau-Brunswick.[87]

Travaux de la Législature du Nouveau-Brunswick

18. (1) Les lois, les archives, les comptes rendus et les procès-verbaux du Parlement sont imprimés et publiés en français et en anglais, les deux versions des lois ayant également force de loi et celles des autres documents ayant même valeur.[88]

Documents parlementaires

(2) Les lois, les archives, les comptes rendus et les procès-verbaux de la Législature du Nouveau-Brunswick sont imprimés et publiés en français et en anglais, les deux versions des lois ayant également force de loi et celles des autres documents ayant même valeur.[89]

Documents de la Législature du Nouveau-Brunswick

19. (1) Chacun a le droit d'employer le français ou l'anglais dans toutes les affaires dont sont saisis les tribunaux établis par le Parlement et dans tous les actes de procédure qui en découlent.[90]

Procédures devant les tribunaux établis par le Parlement

(2) Chacun a le droit d'employer le français ou l'anglais dans toutes les affaires dont sont saisis les tribunaux du Nouveau-Brunswick et dans tous les actes de procédure qui en découlent.[91]

Procédures devant les tribunaux du Nouveau-Brunswick

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[85] **L'article 16.1 a été ajouté aux termes de la *Modification constitutionnelle de 1993 (Nouveau-Brunswick)* (TR/93-54).**

[86] **Voir l'article 133 de la *Loi constitutionnelle de 1867* et la note relative à cet article.**

[87] ***Ibid.***

[88] ***Ibid.***

[89] ***Ibid.***

[90] ***Ibid.***

[91] ***Ibid.***