PROVINCIAL COURT FOR SASKATCHEWAN
MOOSE JAW, SASKATCHEWAN

BETWEEN:

HER MAJESTY THE QUEEN

Plaintiff

vs

WILLIAM GARY WHATCOTT

Defendant

SUBMISSION OF DEFENDANT

PART I - THE EVIDENCE

Stephanie Patterson took the stand as a witness for the Crown. She testified that she was disturbed by the graphic images depicted on Bill Whatcott's signs. She also claims that she heard Bill Whatcott swearing at motorists passing by on Main and Caribou Street. She said that she specifically heard Whatcott tell one motorist that "God is not pleased with you" and "Go f-k yourself." She was very offended with this foul language. She also affirmed that she sold videos at Rogers Video that contained obscene language. She also affirmed that she sold videos that contained scenes of graphic violence. She agreed that someone could potentially walk into a room where one of the videos she sold was playing and potentially hear a swear word that they did not want to hear, or see a violent scene that they did not want to see. She knew nothing about loud noise at union protests. She was offended and disagreed with everything in Whatcott's protest.

Chad Spriggs was upset by the graphic images on Whatcott's signs. He had his 3 I/2 year old daughter in his car when he saw the display. He was also angry at the fact that he received anti-abortion and anti-sodomite literature in his mailbox the day before. He testified that he heard Whatcott shouting at the traffic. He testified that he never heard Whatcott swear. He drove into the parking lot and started shouting at Whatcott. He also testified that he swore at Whatcott. He affirmed that he was not arrested for causing a disturbance, even though the police officer saw him yelling and swearing and that Whatcott was arrested for this offence.

Constable Garry Andrejcin testified that he observed Whatcott shout at traffic. He affirmed that Whatcott in no way obstructed traffic or pedestrians. He testified that he never heard Whatcott swear. He testified that Whatcott was polite when approached. He testified that Whatcott sat on the sidewalk and crossed his arms and legs when informed that he was under arrest for "Causing a Disturbance." Whatcott informed him that he would not take part in an illegal arrest. He told Whatcott that he would be charged with AResist Arrest@ as well, the logic being that not walking to the cruiser was a form of passive resistance. Whatcott pointed out in Court that Resist Arrest usually is laid when the accused physically resists arrest. AObstruct Police@ might have been a more appropriate charge, though Whatcott maintains that "Obstruct Police" only occurs when the officer is executing his lawful duty, not when police are illegally breaking up peaceful, albeit offensive to some, demonstrations. Constable Garry Andrejcin affirmed that other protests occurred in the city where there was singing, chanting, yelling, bull horns, etc. He affirmed that there normally was noise on Caribou and Main at 5:00 PM, the time of the arrest. This noise consists of loud trucks, vehicle traffic, possibly pedestrians shouting to each other. He was aware of street preaching in the city and affirmed that a loud street preacher has never been arrested to his knowledge. He affirmed that police show graphic pictures of drunk driving accidents.

John Sidloski testified that he covered some of Whatcott's protests for *Choose Life News*. He testified that he never heard Whatcott swear in public or private. He affirmed that he, John Sidloski, swears, though.

Constable Andy Lynchuck testified that he saw Whatcott stand in one place at the comer of Main and Caribou. He affirmed that Whatcott never obstructed traffic or pedestrians. He never heard Whatcott's preaching, hence he couldn't know if he swore. He saw the pictures and was greatly disturbed. He testified that he might arrest a Health Canada official if the official showed diseased hearts and lungs in public. (There is a billboard with a diseased lung on Highway 16 at the outskirts of Lloydminster, SK.) He affirmed that police showed graphic pictures of drunk driving accidents. He testified that Whatcott was polite when put under arrest and was not physically aggressive. Whatcott sat on the

sidewalk and had to be carried to the police cruiser, but got in without incident.

Dianne Richardson testified she was at the Moose Jaw protest and at other protests with Whatcott. She testified that she never heard Whatcott swear at the Moose Jaw protest or any other protest. She testified she heard Whatcott preach in a loud voice that Canada had to repent of abortion.

Whatcott testified on the stand that he never uses vulgar language when protesting. He testified that he preached in a loud voice to make sure that people heard him. His preaching was political and religious in nature. He preached that Canada stood guilty before God for shedding innocent blood. He preached that the unborn felt pain when they were being aborted. He preached that we could have our sins forgiven if we repent and turn to Jesus. Whatcott said it is his policy not to participate in illegal arrests as it may encourage more municipalities to use this tactic to break up lawful pro-life protests. He said his signs are educational in nature. Just as groups that advocate for holocaust victims show gruesome pictures of their victims, so Whatcott brings a face to the public of the victim of the abortion holocaust.

PART II - SUMMATION OF LAW

The following, we submit, is a summation of the law from a number of cases relating to Section 175(1)(a)(i) of the *Criminal Code*.

R. v. Lohnes (SCC) [1992] 1 S.C.R. 167

This case was decided by the Supreme Court of Canada. *Lohnes* had to do with Section 175(1)(a)(i) of the *Criminal Code*. The accused was charged with causing a disturbance by using insulting or obscene language contrary to this section of the *Code*. On two occasions, he went onto the veranda of his home and shouted obscenities at his neighbour across the street.

This case did not specifically deal with the interplay between section 175(1)(a)(i) of the Criminal Code and an individual's right to express him or herself. However, the Supreme

Court of Canada did comment on balancing the competing interests of peace and tranquillity of the public and the rights of individuals to express themselves by singing or shouting.

Ultimately the Court acquitted Mr. Lohnes and Madam Justice McLachlin (as she then was) indicated that "the disturbance contemplated by s. 175(1)(a) is something more than mere emotional upset. There must be an externally manifested disturbance of the public peace, in the sense of interference with the ordinary and customary use of the premises by the public" *(R. v. Lohnes* at paragraph 30*)*.

R. v. Clarke (M.) (2002), 218 Nfld. & P.E.I.R. 181 (NFPC)

In this case, eight individuals were charged under Section 175(1)(a) of the Criminal Code with causing a disturbance in a public place by shouting. The conduct which gave rise to the charge was that during a city council meeting, the accused stood outside the chamber and chanted slogans and phrases until the meeting was cancelled. The accused argued that they had a right to freedom of expression guaranteed by the *Charter,* and preventing them from exercising that right violated that freedom.

The Court in *Clarke* stated that

> the accused do have a right to freely express their views provided that the method of expression they choose does not interfere with the lawful and ordinary use of the City Council Chamber. In this case the method that they chose, chanting outside the Council Chamber did interfere with the business of city Council (*R. v. Clarke (M.*) at paragraph 21).

In the *Clarke* case, Judge Orr of the Provincial Court of Newfoundland and Labrador referred to the case of *Committee for the Commonwealth of Canada et al. v. Canada*, [1991] 1 S.C.R. 139 in which the Supreme Court Aconsidered the degree to which individuals' Section 2(b) Charter rights could be infringed when they were purporting to exercise them in a government owned building. In that case, the respondents were distributing political pamphlets at an airport" (see R. v. Clarke at paragraph 16).

In *Committee for the Commonwealth of Canada*, Mr. Justice Lamer, for the majority of the

Court, held that

> An individual will thus only be free to communicate in such place if the form of expression he uses is compatible with the principal function or intended purpose of the place and does not have the effect of depriving the citizens as a whole of the effective operation of government services and undertakings. If the expression takes the form that contravenes the function of the place, such a form of expression will not fall under s. 2(b) (see *R. v. Clarke* at paragraph 16)

Ultimately, Orr, PCJ, held that he did

> not find that the accused's Section 2(b) Charter rights were infringed as it is clear that the form of expression that they chose to employ (chanting) was incompatible with the principal function or intended purpose of the place... [The accused] had created an externally manifested disturbance (within the definition of disturbance pursuant to Section 175 as it is clear that chanting would be encompassed by singing or shouting) which had interfered with the customary conduct of the public place, in this case the council meeting at City Hall (R. v. Clarke at paragraph 25)

The current case of R. v. Whatcott is distinguishable from the case of *R. v. Clarke* as Mr. Whatcott was not demonstrating outside a government building. He was on a busy street corner that was already very loud and he was simply standing there preaching. This is not an externally manifested disturbance which had interfered with the customary conduct of the public place.

R. v. Daniel (S.J.) (2001), 287 A.R. 105 (ProvCt)

The accused was charged under Section 175(1)(a)(i) of the *Criminal Code* after he was pulled over for a traffic violation and very loudly began shouting obscenities at the constable who pulled him over.

The Judge reviewed the *Lohnes* case cited above. He reviewed the case and stated

> s. 175(1)(a)(i) requires proof of an externally manifested disturbance of the public peace, in the sense of interference with the ordinary or customary use of the premises by the public. (R. v. Daniels at paragraph 12)

The Court held that the accused's rude, loud, inconsiderate and unprovoked language was contrary to Section 175(1)(a) of the *Criminal Code* and the accused was found guilty. The distinctions between what Mr. Whatcott was doing and what Mr. Daniels was doing are clear and obvious. Mr. Whatcott peacefully and respectfully preached his beliefs. Mr. Daniels was loud, discourteous and aggressive. Mr. Whatcott was not creating a disturbance and Mr. Daniels was.

R. v. Watson (G.S.) (1996), 73 B.C.A.C. 281 (CA)

While this case is not focussed on section 175(1)(a)(i) of the Criminal Code, it is important simply for what the BC Court of Appeal had to say about the accused=s right to do what Mr. Whatcott does.

In *Watson*, the accused was convicted of criminal contempt for disobeying a 1989 Court Order prohibiting specific conduct at or near an abortion clinic. Mr. Watson claimed that this charge denied his right to freedom of religion and freedom of expression. He was convicted and the BC Court of Appeal upheld the decision.

The BC Court of Appeal had the following to say about freedom of expression:

> The trial judge found that Mr. Watson's actions went far beyond communicating his religious views to actively and publicly interfering with the rights of others...Mr. Watson maintains that his private rights to freedom of speech and freedom of religion under the Charter are of more force than the injunction. He refuses to accept that such rights are subject to reasonable restrictions or limitations to preserve public safety and order or to protect the fundamental rights of freedoms of others (see R. v. Watson at paragraph 50 and 51).

Mr. Whatcott was doing what the BC Court of Appeal indicated that Mr. Watson could have been doing but for the order. In breaching the Order, Mr. Watson went beyond what was acceptable. Mr. Whatcott is not bound by any such order. He is free to peacefully preach his beliefs.

R. v. Keegstra (1990) 117 N.R. 1 (SCC)

In this case, the accused was charged under section 319 (formerly section 281.2(2)) of the Criminal Code and not under section 175(1)(a)(i) as Mr. Whatcott has been. This case is being referred to as it outlines the steps to be taken when approaching a claim that a Charter right under s. 2(b) of the Charter has been infringed.

In *Keegstra*, the offence was promoting hatred against an identifiable group. Mr. Keegstra applied to have that section of the code struck down as it violated his right to freedom of expression.

The Alberta Court of Queen=s Bench held that section 319 did not violate the charter but that if it did, it would be saved by section 1 of the Charter of Rights and Freedoms.

The Alberta Court of Appeal quashed the conviction and declared that s. 319 was of no force and effect and that it violated the freedom of expression and the presumption of innocence. Since it was an overly broad section of the code, it was held not to be a reasonable limit as prescribed by law under section 1 of the Charter of Rights and Freedoms.

The Supreme Court of Canada held that section 319 violated section 2(b) of the Charter but was saved by section 1 of the Charter of Rights and Freedoms as a reasonable limitation on that right. The appeal was allowed and the case returned to the Court of Appeal.

Ultimately, the first step in a matter such as this is to determine whether the activity fell within the protected s. 2(b) sphere. The second step is to determine whether the purpose of the impugned legislation restricted freedom of expression. The third step would be to determine whether the infringement on freedom of expression is a reasonable limit and saved by section 1 of the Charter of Rights and Freedoms.

APPLICATION OF LAW TO FACTS

IT IS RESPECTFULLY SUBMITTED that the issues in the within case are the following:

A. Did Mr. Whatcott breach Section 175(1)(a) of the *Criminal Code of Canada*?

B. If Whatcott did breach Section 175, is the breach protected by Section 2(b) of *The Canadian Charter of Rights and Freedoms?* and

C. If Whatcott=s actions are protected by Section 2(b) of the *Charter*, can Section 1 be invoked to uphold a conviction?

WAS THERE A BREACH OF THE *CRIMINAL CODE OF CANADA*?

A. It is respectfully submitted that the facts would support Whatcott, that he was simply preaching to those travelling upon the roadway in vehicles, and was preaching in a voice that was to be heard over the din of traffic.

It is submitted that the primary reason for charging Whatcott was not a loud preaching voice, even if it may have been loud, but the subject matter of his preaching. Had Whatcott been preaching on a less controversial subject matter, it is unlikely he would have been charged.

It is submitted that Whatcott did not interfere with A*the ordinary and customary use*@of the roadway or the video store premises as required to support a conviction pursuant to the *Lohnes* Decision of the Supreme Court of Canada. It is submitted there was no evidence that the users of the roadway were interfered with, and that the only possible evidence may have been the evidence of Stephanie Lynn Patterson. However, it is submitted that there was no evidence that his demonstration interfered with the video store. There is some evidence that she heard a noise and an obscene word, but it is submitted that the evidence of Whatcott ought to be accepted over Patterson=s on this point for the following reasons:

- There is no other evidence of anyone hearing obscene language except Patterson;

- Patterson was inside the video store and could have been mistaken as to whether it was Whatcott or a passing motorist who uttered obscene words;

- The evidence of Sidloski, Diane Richardson and Whatcott were all to the effect that Whatcott did not swear generally, and in particular at the demonstration;

- Patterson only heard swearing on one occasion and Whatcott has been charged with shouting, not swearing, and one occasion of swearing is not sufficient to uphold a conviction under Section 175.

It is respectfully submitted that the evidence would indicate that it wasn=t the preaching that disturbed Patterson, but the subject matter of the preaching. The Crown must establish that Whatcott created a disturbance by shouting;and the Crown, it is submitted, has failed to establish that the volume of Whatcott=s voice did indeed create a disturbance.

There was no evidence by Patterson that the preaching interfered with her conducting business as a video shop operator, or that the noise was any louder than any other peaceful pickets which might take place in Canada or in a labour dispute.

IF WHATCOTT DID BREACH SECTION 175(1)(A) OF THE *CRIMINAL CODE*, IS THE BREACH PROTECTED BY SECTION 2(B) OF THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS?

B. In the event that the Court finds that there is sufficient evidence to Convict Whatcott for creating a disturbance by shouting, it is respectfully submitted that Section 2(b) of the *Charter* would protect him from a conviction as he was simply preaching with a loud voice. It is submitted that the evidence required to register a conviction where the accused is preaching, is much higher than the evidence

required if he was simply yelling at traffic with no purpose, or yelling at a police officer as in the *Daniel* Decision.

Applying the test in the *Keegstra* Decision of the Supreme Court of Canada, it is submitted that it is clear that Section 2(b) applies, and that Whatcott=s right to free speech and religion would be violated if he was forced to stop preaching. The Supreme Court of Canada in Keegstra states that:

> the reach of s. 2(b) is potentially very wide, expression being deserving of protection if Ait serves individual and societal values in a free and democratic society@....the court has not lost sight of this broad view of the values underlying the freedom of expression, though the majority decision in Irwin Toy perhaps goes further towards stressing as primary the Ademocratic commitment@ said to delineate the protected sphere of liberty. Moreover, the court has attempted to articulate more precisely some of the convictions fueling the freedom of expression, these being summarized in Irwin Toy (at page 976) as follows: (1) seeking and attaining truth is an inherently good activity; (2) participation in social and political decisionmaking is to be fostered and encouraged; and (3) diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated in a tolerant and welcoming environment for the sake of both those who convey a meaning and those to whom meaning is conveyed (see R. v. Keegstra at paragraph 27).

With regard to the second step of the test set out in Keegstra, it is important to note that section 175(1)(a)(i) has at its very core, an intention to prevent and restrict free expression. The very wording of the section makes causing a disturbance by expressing one=s self by way of words, whether shouted or sung, etc., a crime.

IF WHATCOTT=S ACTIONS ARE PROTECTED BY SECTION 2(B) OF THE *CHARTER*, CAN SECTION 1 BE INVOKED TO UPHOLD A CONVICTION?

C. The third step, as set out in the *Keegstra* Decision, is to then determine whether the infringement is a reasonable limit and saved by Section 1 of the Charter.

It is submitted that such a ruling would be without precedent. Some forms of free speech are protected more than others. Freedom of speech upon political and religious issues have always demanded a higher degree of protection than the conduct of others who create a disturbance while simply out for a good time.

The Decision of *Ramsden vs. Peterborough* (1993), 157 M.R.2(SCC) is referred to as the authority. In that decision a bylaw prohibiting postering in order to cut down on littering was fond to be contrary to *The Canadian Charter of Rights and Freedoms*. They held that the city went far beyond what was necessary to deal with a littering problem. It would appear that had the city restricted its bylaw to postering which was done for commercial advertising purposes, the bylaw would have been valid, but the postering bylaw prohibited all postering, including postering that might have occurred during elections, or postering in relation to important social and religious matters, and therefore interfered with the right of free speech.

It is respectfully submitted that Astreet preaching@ is a right which has been enjoyed by Canadians and British subjects for centuries. It is further submitted that it was not the preaching *per se* that upset Patterson and the individuals involved, but rather the content of the preaching. It is respectfully submitted that it would be inappropriate to convict Whatcott simply because of the content of his preaching and signs. A conviction would be tantamount to censorship, and is the very thing that *The Canadian Charter of Rights and Freedoms* was passed to prevent.

APPLICATION FOR REMEDY

A. It is respectfully submitted that the police and others of the City of Moose Jaw clearly did not like the pictures which Whatcott displayed. They clearly took a

political interest in stopping Whatcott from showing his pictures and distributing information that exposed people to the reality of abortion. That is not the job of the police. Indeed, it is the job of the police to protect the civil rights of citizens of Canada.

B. Section 24(1) of the *Charter* reads as follows:

> *Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.*

Whatcott has incurred substantial legal costs in preparing for his defence even though he appeared unrepresented at trial. In addition, he has suffered the humiliation of being placed in jail on more than one occasion. He was simply holding pictures and expressing himself on what has been one of the most pressing social issues of our time.

The account of Whatcott with the NSWB Law Firm to date is significant. The account is attached to this Submission showing in detail how it has been calculated.

In addition, Whatcott suffered economic loss in travelling first from Regina and then from Edmonton for his trial and it is requested that some compensation be granted to him as well.

C. The actions of the Moose Jaw police force denied Whatcott=s freedom of speech and expression.

It is acknowledged that Whatcott=s signs and message can be very disturbing to some. However, that is what free speech is all about. If Whatcott was preaching

about something everyone applauded, then of course, he would not need the Charter to protect him. The true tolerance of society only receives a real test when one is confronted with a person and a subject matter one disagrees with. It is submitted that Whatcott ought not to have been charged and brought to trial simply for exercising the most basic of human rights.

It is submitted that this case is a most appropriate case for an award of costs. The costs are not awarded to punish anyone, but to compensate Whatcott because fairness demands it, and because the constitutional right of free speech is too important to have it denied without compensation.

D. Notice has been granted to the Crown pursuant to Section 8(5) of the *Constitutional Questions Act*.

All of which is respectfully submitted.

DATED at the City of Weyburn, in the Province of Saskatchewan, this _____ day of April, 2003.

NIMEGEERS, SCHUCK,
WORMSBECKER & BOBBITT

_____
Solicitors for the Defendant
William Gary Whatcott

TO: The Attorney General of Saskatchewan

AND: The Attorney General of Canada

This document was delivered by:

Nimegeers, Schuck, Wormsbecker & Bobbitt
Barristers and Solicitors

319 Souris Avenue NE (P.O. Box 8)
Weyburn, Saskatchewan S4H 2J8
Whose address for service is: as above

Solicitor in charge of file: Thomas A. Schuck
Telephone: (306) 842-4654
Fax: (306) 842-0522

INDEX