

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

BETWEEN:

THE SASKATCHEWAN HUMAN RIGHTS COMMISSION

Appellants
(Respondent)

and

WILLIAM WHATCOTT

Respondent
(Appellant)

and

ATTORNEY GENERAL FOR SASKATCHEWAN

Intervener
(Intervener)

and

ATTORNEY GENERAL OF ALBERTA, ALBERTA HUMAN RIGHTS COMMISSION,
EGALE CANADA INC., ONTARIO HUMAN RIGHTS COMMISSION, CANADIAN
HUMAN RIGHTS COMMISSION, UNITED CHURCH OF CANADA, UNITARIAN
CONGREGATION OF SASKATOON, CANADIAN UNITARIAN COUNCIL, WOMEN'S
LEGAL EDUCATION AND ACTION FUND, CANADIAN JOURNALISTS FOR FREE
EXPRESSION, CANADIAN BAR ASSOCIATION, NORTHWEST TERRITORIES HUMAN
RIGHTS COMMISSION, YUKON HUMAN RIGHTS COMMISSION, CHRISTIAN LEGAL
FELLOWSHIP, LEAGUE FOR HUMAN RIGHTS OF B'NAI BRITH CANADA,
EVANGELICAL FELLOWSHIP OF CANADA, CANADIAN CIVIL LIBERTIES
ASSOCIATION, CANADIAN CONSTITUTION FOUNDATION, ASSEMBLY OF FIRST
NATIONS, FEDERATION OF SASKATCHEWAN INDIAN NATIONS, METIS-NATION
SASKATCHEWAN, CATHOLIC CIVIL RIGHTS LEAGUE, FAITH AND FREEDOM
ALLIANCE, AFRICAN CANADIAN LEGAL CLINIC, and CANADIAN JEWISH
CONGRESS

Interveners

INTERVENERS' FACTUM
CATHOLIC CIVIL RIGHTS LEAGUE and
FAITH AND FREEDOM ALLIANCE, INTERVENERS

(Rules 37 and 42 of the *Rules of the Supreme Court of Canada*)

Catholic Civil Rights League and Faith and Freedom Alliance, Interveners

Ryan D.W. Dalziel

Erica J. Toews

Bull, Housser & Tupper LLP
3000-1055 West Georgia Street
Vancouver, B.C. V6E 3R3
Telephone: (604) 641-4881
FAX: (604) 646-2671
E-mail: rdd@bht.com

Agent for Catholic Civil Rights League and Faith and Freedom Alliance

Brian A. Crane, Q.C.

Gowling Lafleur Henderson LLP
2600-160 Elgin Street
Ottawa, Ontario K1P 1C3
Telephone: (613) 786-0107
FAX: (613) 788-3500
E-mail: brian.crane@gowlings.com

Saskatchewan Human Rights Commission, Appellant

Grant J. Scharfstein, Q.C.

Deidre L. Aldcorn

Janice E. Gingell

Scharfstein Gibbings Walen & Fisher LLP
500, 111 Second Avenue South
Saskatoon, Saskatchewan S7K 1K6
Telephone: (306) 653-2838
FAX: (306) 652-4747
E-mail: gscharfstein@scharfsteinlaw.com

Agent for the Appellant

Eugene Meehan, Q.C.

McMillan LLP

300-50 O'Connor Street
Ottawa, Ontario K1P 6L2
Telephone: (613) 232-7171
FAX: (613) 231-3191
E-mail: eugene.meehan@mcmillan.ca

William Whatcott, Respondent

Thomas A. Schuck

John Carpay

Nimegeers, Schuck, Wormsbecker & Bobbit
319 Souris Avenue NE, Box 8
Weyburn, Saskatchewan S4H 2J8
Telephone: (306) 842-4654
FAX: (306) 842-0522
E-mail: tschuck@nswb.com

Agent for the Respondent

Jeremie Fournie

Vincent Dagenais Gibson LLP

325 Dalhousie Street
Ottawa, Ontario
K1N 7G2
Telephone: (613) 241-2701
FAX: (613) 241-2599

(counsel continue over page)

Attorney General for Saskatchewan,
Intervener

Thomson Irvine

Attorney General for Saskatchewan
1874 Scarth St – 8th Floor, PO Box 7129
Regina, Saskatchewan S4P 3V7
Telephone: (306) 787-6307
FAX: (306) 787-9111

Agent for Attorney General for
Saskatchewan

Henry S. Brown, Q.C.
Gowling Lafleur Henderson LLP
2600-160 Elgin Street
Ottawa, Ontario K1P 1C3
Telephone: (613) 233-1781
FAX: (613) 788-3433
E-mail: henry.brown@gowlings.com

Attorney General of Alberta, Intervener

David N. Kamal

Attorney General of Alberta
9833 – 109 Street, 4th Floor
Edmonton, Alberta T5J 3S8
Telephone: (780) 427-4418
FAX: (780) 425-0307
E-mail: david.kamal@gov.ab.ca

Agent for Attorney General of Alberta

Henry S. Brown, Q.C.
Gowling Lafleur Henderson LLP
2600-160 Elgin Street
Ottawa, Ontario K1P 1C3
Telephone: (613) 233-1781
FAX: (613) 788-3433
E-mail: henry.brown@gowlings.com

Alberta Human Rights Commission,
Intervener

Audrey Dean

Alberta Human Rights Commission
No. 800, 10405 Jasper Avenue
Edmonton, Alberta T5J 4R7
Telephone: (780) 427-3116
FAX: (780) 422-3563
E-mail: audrey.dean@gov.ab.ca

Agent for Alberta Human Rights
Commission

Henry S. Brown, Q.C.
Gowling Lafleur Henderson LLP
2600-160 Elgin Street
Ottawa, Ontario K1P 1C3
Telephone: (613) 233-1781
FAX: (613) 788-3433
E-mail: henry.brown@gowlings.com

EGALE Canada Inc., Intervener

Cynthia Petersen

Sack Goldblatt Mitchell LLP
1130 – 20 Dundas St West, Box 180
Toronto, Ontario M5G 2G8
Telephone: (416) 979-6440
FAX: (416) 591-7333

Agent for EGALE Canada Inc.

Kelly Doctor
Sack Goldblatt Mitchell LLP
500-30 Metcalfe Street
Ottawa, Ontario K1P 5L4
Telephone: (613) 235-5327
FAX: (613) 235-3041
E-mail: kdoctor@sgmlaw.com

Ontario Human Rights Commission,
Intervener

Reema Khawja

Tony Griffin

Ontario Human Rights Commission
180 Dundas Street West, 8th floor
Toronto, Ontario M7A 2R9
Telephone: (416) 326-9870
FAX: (416) 326-9867

Agent for Ontario Human Rights
Commission

Brian A. Crane, Q.C.
Gowling Lafleur Henderson LLP
2600-160 Elgin Street
Ottawa, Ontario K1P 1C3
Telephone: (613) 233-1781
FAX: (613) 563-9869
E-mail: brian.crane@gowlings.com

Canadian Human Rights Commission,
Intervener

Philippe Dufresne

Brian Smith

Canadian Human Rights Commission
344 Slater Street, 9th Floor
Ottawa, Ontario K1A 1E1
Telephone: (613) 943-9162
FAX: (613) 993-3089
E-mail: philippe.dufresne@chrc-ccdpc.ca

United Church of Canada, Intervener

Beth Symes

Ben Millard

Symes & Street
133 Lowther Ave.
Toronto, Ontario M5R 1E4
Telephone: (416) 920-3030
FAX: (416) 920-3033

Agent for United Church of Canada

Nadia Effendi
Borden Ladner Gervais LLP
1100-100 Queen Street
Ottawa, Ontario K1P 1J9
Telephone: (613) 237-5160
FAX: (613) 230-8842

Unitarian Congregation of Saskatoon and
Canadian Unitarian Council, Interveners

Arif Chowdhury

Fasken Martineau DuMoulin LLP
350-7th Avenue S.W., Suite 3400
Calgary, Alberta T2P 3N9
Telephone: (403) 261-5379
FAX: (403) 261-5351
E-mail: achowdhury@fasken.com

Agent for Unitarian Congregation of
Saskatoon and Canadian Unitarian Council

Stephen B. Acker
Fasken Martineau DuMoulin LLP
1300-55 Metcalfe Street
Ottawa, Ontario K1P 6L5
Telephone: (613) 236-3882
FAX: (613) 230-6423
E-mail: sacker@fasken.com

Women's Legal Education and Action Fund,
Intervener

Joanna L. Birenbaum

Jo-Ann R. Kolmes

Women's Legal Education and Action Fund
703 - 60 St. Clair Ave. E
Toronto, Ontario M4T 1N5
Telephone: (416) 595-7170 Ext: 223
FAX: (416) 595-7191
E-mail: j.birenbaum@leaf.ca

Agent for Women's Legal Education and
Action Fund

Nadia Effendi

Borden Ladner Gervais LLP
1100-100 Queen Street
Ottawa, Ontario K1P 1J9
Telephone: (613) 237-5160
FAX: (613) 230-8842

Canadian Journalists for Free Expression,
Intervener

M. Philip Tunley

Stockwoods LLP
150 King Street West, Suite 2512
Toronto, Ontario M5H 1J9
Telephone: (416) 593-7200
FAX: (416) 593-9345
E-mail: philt@stockwoods.ca

Agent for Canadian Journalists for Free
Expression

Colin S. Baxter

Cavanagh Williams Conway Baxter LLP
1111 Prince of Wales Drive, Suite 401
Ottawa, Ontario K2C 3T2
Telephone: (613) 569-8558
FAX: (613) 569-8668
E-mail: cbaxter@cwcb-law.com

Canadian Bar Association, Intervener

David Matas

225 Vaughan Street, Suite 602
Winnipeg, Manitoba R3C 1T7
Telephone: (204) 944-1831
FAX: (204) 942-1494
E-mail: dmatas@mts.net

Agent for Canadian Bar Association

Henry S. Brown, Q.C.

Gowling Lafleur Henderson LLP
2600-160 Elgin Street
Ottawa, Ontario K1P 1C3
Telephone: (613) 233-1781
FAX: (613) 788-3433
E-mail: henry.brown@gowlings.com

(counsel continue over page)

Northwest Territories Human Rights
Commission and Yukon Human Rights
Commission, Interveners

Shaunt Parthev, Q.C.
Ashley M. Smith
MacPherson Leslie & Tyerman LLP
1500-410 22nd Street East
Saskatoon, Saskatchewan S7K 5T6
Telephone: (306) 975-7100
FAX: (306) 975-7145
E-mail: sparthev@mlt.com

Christian Legal Fellowship, Intervener

Robert W. Staley
Derek J. Bell
Ranjan K. Agarwal
Bennett Jones LLP
Suite 3400, One First Canadian Place
Toronto, Ontario M5X 1A4
Telephone: (416) 777-4857
FAX: (416) 863-1716
E-mail: staleyr@bennettjones.ca

League for Human Rights of B’Nai Brith
Canada, Intervener

Marvin Kurz
Dale, Streiman & Kurz
480 Main St. N.
Brampton, Ontario L6V 1P8
Telephone: (905) 455-7300
FAX: (905) 455-5848

Agent for Northwest Territories Human
Rights Commission and Yukon Human
Rights Commission

Eugene Meehan, Q.C.
McMillan LLP
300-50 O’Connor Street
Ottawa, Ontario K1P 6L2
Telephone: (613) 232-7171
FAX: (613) 231-3191
E-mail: eugene.meehan@mcmillan.ca

Agent for Christian Legal Fellowship

Sheridan Scott
Bennett Jones LLP
1900-45 O’Connor Street
Ottawa, Ontario K1P 1A4
Telephone: (613) 683-2302
FAX: (613) 683-2323
E-mail: scotts@bennettjones.com

Agent for League for Human Rights of
B’Nai Brith Canada

Henry S. Brown, Q.C.
Gowling Lafleur Henderson LLP
2600-160 Elgin Street
Ottawa, Ontario K1P 1C3
Telephone: (613) 233-1781
FAX: (613) 788-3433
E-mail: henry.brown@gowlings.com

(counsel continue over page)

Evangelical Fellowship of Canada, Intervener

Donald E.L. Hutchinson

Evangelical Fellowship of Canada
130 Albert Street, Suite 1810
Ottawa, Ontario K1P 5G4
Telephone: (613) 233-9868 Ext: 330
FAX: (613) 233-0301
E-mail: hutchd@efc-canada.com

Canadian Civil Liberties Association,
Intervener

Andrew K. Lokan

Jodi Martin

Paliare, Roland, Rosenberg, Rothstein, LLP
501 - 250 University Avenue
Toronto, Ontario M5H 3E5
Telephone: (416) 646-4300
FAX: (416) 646-4301
E-mail: andrew.lokan@paliareroland.com

Agent for Canadian Civil Liberties
Association

Henry S. Brown, Q.C.
Gowling Lafleur Henderson LLP
2600-160 Elgin Street
Ottawa, Ontario K1P 1C3
Telephone: (613) 233-1781
FAX: (613) 788-3433
E-mail: henry.brown@gowlings.com

Canadian Constitution Foundation, Intervener

Mark A. Gelowitz

Jason MacLean

Osler, Hoskin & Harcourt LLP
P.O. Box 50, 1 First Canadian Place
Toronto, Ontario M5Z 1B8
Telephone: (416) 862-4743
FAX: (416) 862-6666

Agent for Canadian Constitution Foundation

Patricia J. Wilson
Osler, Hoskin & Harcourt LLP
1900-340 Albert Street
Ottawa, Ontario K1R 7Y6
Telephone: (613) 787-1009
FAX: (613) 235-2867
E-mail: pwilson@osler.com

Assembly of First Nations, Federation of
Saskatchewan Indian Nations and
Métis Nation-Saskatchewan, Interveners

David M.A. Stack

McKercher LLP
374 Third Avenue South
Saskatoon, Saskatchewan S7K 1M5
Telephone: (306) 664-1277
FAX: (306) 653-2669
E-mail: d.stack@mckercher.ca

Agent for Assembly of First Nations,
Federation of Saskatchewan First Nations
and Metis Nation-Saskatchewan

Henry S. Brown, Q.C.
Gowling Lafleur Henderson LLP
2600-160 Elgin Street
Ottawa, Ontario K1P 1C3
Telephone: (613) 233-1781
FAX: (613) 788-3433
E-mail: henry.brown@gowlings.com

African Canadian Legal Clinic, Intervener

Sunil Gurmukh

Moya Teklu

African Canadian Legal Clinic

18 King Street East, Suite 901

Toronto, Ontario M5C 1C4

Telephone: (416) 214-4747 Ext: 26

FAX: (416) 214-4748

E-mail: gurmukhs@lao.on.ca

Agent for African Canadian Legal Clinic

Gary Stein

South Ottawa Community Legal Services

406-1355 Bank Street

Ottawa, Ontario K1H 8K7

Telephone: (613) 733-0140

FAX: (613) 733-0401

Canadian Jewish Congress, Intervener

Mark J. Freiman

Lerners LLP

130 Adelaide Street West, Suite 2400

Toronto, Ontario M5H 3P5

Telephone: (416) 601-2370

FAX: (416) 867-2453

E-mail: mfreiman@lerners.ca

Agent for Canadian Jewish Congress

Nancy K. Brooks

Blake, Cassels & Graydon LLP

45 O'Connor Street, 20th Floor

Ottawa, Ontario K1P 1A4

Telephone: (613) 788-2200

FAX: (613) 788-2247

E-mail: nancy.brooks@blakes.com

TABLE OF CONTENTS

PART I: OVERVIEW OF ARGUMENT..... 1

PART II: POINTS IN ISSUE 2

PART III: ARGUMENT..... 2

 A. *The Reasons Expression-Limiting Laws Must be Clear and Precise* 2

 B. *The Governing Principles* 5

 C. *Taylor Does not Control the Outcome of This Case*..... 6

 D. *Section 14 is Unintelligible and is not Minimally Impairing*..... 9

PART IV: SUBMISSIONS REGARDING COSTS..... 10

PART V: ORDER SOUGHT..... 10

PART VI: TABLE OF AUTHORITIES..... 12

PART VII: STATUTORY PROVISIONS 14

PART I: OVERVIEW OF ARGUMENT

1. Section 14 of the *Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1 (the “Code”), prohibits any form of publication that “exposes or tends to expose to hatred, ridicules, belittles or otherwise affronts the dignity of” any person on the basis of his or her age, disability, family status, race, religion, sexual orientation, or any other protected ground. Then it says that “[n]othing” in the provision “restricts the right to freedom of expression under the law upon any subject.”

2. Yet the only thing that s. 14 purports to do is restrict freedom of expression. And if s. 14 indeed does not restrict freedom of expression, then its first subsection is reduced to meaningless rhetoric. To give effect to one of s. 14’s subsections is to give no effect to the other. The Court is thus confronted for the first time with an expression-regulating provision that is profoundly self-contradictory.

3. The seminal freedom of expression decision in *Irwin Toy, infra*, at p. 983, suggested that a law that does not provide an “intelligible standard” to those tasked with applying it is a law that cannot be justified under s. 1. Section 14 of the Code is not merely ambiguous, vague, or difficult to apply. Each of its two subsections are relatively clear – but taken together, they amount to nonsense. A law such as this one is broken in a way that is amenable to no interpretive repair job. While the Court’s jurisprudence discloses that it will be unusual for a law to be truly unintelligible, s. 14 of the Code is that rare law that falls short of *Irwin Toy*’s standard.

4. Accordingly, the real concern in this case is not with William Whatcott’s flyers. Some people will no doubt find those flyers offensive; others may see them as a part, albeit an inflammatory part, of the debate about sexual morality and education policy, and the link between those two subjects. The parties’ arguments in this Court reflect the divide between those two perspectives. But it would not be fruitful to attempt to resolve the contest of characterization in which the parties have engaged themselves throughout this litigation. The flaw in s. 14’s construction is so fundamental, and its proper application so uncertain as a consequence, that it would be purposeless to speculate about whether the Legislature intended that flyers such as Mr. Whatcott’s would be captured by the provision. Our focus in this case, as in *Taylor, infra*, is properly placed not on Mr. Whatcott’s conduct, “but [on] the validity of s.

[14] of the [Code] which may have ramifications going far beyond those raised by the facts of this particular case” (*per* McLachlin J., dissenting, at p. 959).

5. Abraham Lincoln, echoing the Bible, said that “a house divided against itself cannot stand”.¹ Where freedom of expression and religion are at stake, a law divided against itself must suffer the same fate. Section 14 of the Code is unintelligible, unworkable, and incapable of justification. It should be struck down.

PART II: POINTS IN ISSUE

6. These interveners, the Catholic Civil Rights League and Faith and Freedom Alliance, will advance four points relating to the s. 1 analysis:

- A. Requiring that laws restricting freedom of expression be sufficiently precise is justified by fundamental constitutional principles and is necessary to ensure that expression is fostered, not chilled.
- B. In order to be justifiable under s. 1, laws restricting freedom of expression must be clear enough that they set out an “intelligible standard”, and do not have a chilling effect on substantially more expression than can be reasonably justified.
- C. *Taylor, infra*, does not control the outcome of this case.
- D. Section 14’s vagueness renders it unintelligible and not minimally impairing.

PART III: ARGUMENT

A. *The Reasons Expression-Limiting Laws Must be Clear and Precise*

7. The Court’s jurisprudence has recognized that “vagueness”, understood broadly, is relevant to three elements of the *Charter*: the requirement under s. 1 that infringements of *Charter* rights be “prescribed by law”; the requirement under s. 1 that limitations on *Charter* rights be “reasonable”; and the “principles of fundamental justice” protected by s. 7: see *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, at pp. 621-643. Here we are dealing

¹ See Matthew 12:25, and Lincoln’s speech accepting the Republican nomination for U.S. Senate, given in Springfield at the Illinois Republican State Convention on June 16, 1858.

with “vagueness” in its s. 1 aspects, in circumstances where an infringement of freedom of expression has been established.²

8. Three concerns motivate the need for precision where freedom of expression is at stake.

9. First, the rule of law requires that citizens be given fair notice of what their government forbids, and of the consequences of engaging in the forbidden conduct: *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123 (“the *Prostitution Reference*”), at p. 1152. The “notice” principle finds specific embodiment in the “prescribed by law” element of s. 1, as Justice Deschamps explained in *Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*, 2009 SCC 31, [2009] 2 S.C.R. 295, at para. 50. Judges, too, must be capable of understanding the laws that their constitutional function requires they apply to the cases before them. Accordingly, when a law “so lacks in precision as not to give sufficient guidance for legal debate”, the rule of law is undermined: *Nova Scotia Pharmaceutical*, at p. 643.

10. Second, unduly open-ended laws are amenable to arbitrary or excessively subjective enforcement, at potentially unintended cost to *Charter* rights: see the *Prostitution Reference*, at p. 1152. This concern may be apposite to so-called “hate speech” laws. The instant case is illustrative: Mr. Whatcott alleges that “prosecutions under the *Code* [are] almost entirely based upon the whims of the SHRC and the zeitgeist”, and that the Code has permitted “the SHRC to discriminate against religious speech on sexual behaviour” (respondent’s factum, at paras. 25, 135). He is not alone in these views. Commentator Ezra Levant has levelled a similar charge, claiming that “100% of the CHRC’s targets have been white, Christian or conservative”, and that “[i]n the entire history of section 13 [of the federal statute], stretching back to 1977, not one single Jew, Muslim or gay has been taken before the Canadian Human Rights Tribunal by the CHRC.”³ These suspicions of discrimination may or may not be well-founded. Ultimately, it

² Freedom of religion is also infringed, insofar as s. 14 of the Code sanctions evangelical expression that is intended by the speaker to enhance his or her connection to the divine, or to otherwise fulfill a religious mission: see *Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551, at para. 46. However, because the deleterious effects of s. 14 are primarily visited upon s. 2(b) of the *Charter*, that right is the focus of this factum.

³ Ezra Levant, blog posting entitled “The Jewish Exemption: Section 13 CHRC complaint against me dismissed”, dated November 20, 2008, viewed at <http://ezralevant.com/2008/11/the-jewish-exemption-section-1.html> on July 27, 2011. Mr. Levant, who is Jewish, illustrated his proposition by republishing on his website a Christian-themed letter

does not much matter whether they are. The point, rather, is that where the law uses impressionistic or subjective standards to restrict expression, Canadians may justifiably perceive that certain groups or messages have been targeted for the selective application of that law. This damages public confidence in the administration of justice, and in the particular context of “hate speech”, diminishes respect for human rights.

11. Third, imprecise laws have a “chilling effect” on freedom of expression. As the Supreme Court of the United States expressed the point in the leading case of *Grayned v. City of Rockford*, 408 U.S. 104 (1972):

[W]here a vague statute "abut[s] upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of [those] freedoms." Uncertain meanings inevitably lead citizens to " 'steer far wider of the unlawful zone' ... than if the boundaries of the forbidden areas were clearly marked." [pp. 108-109; quoted by L'Heureux-Dube J., concurring, in *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139, at p. 213]

At times (and this case is one of them), a legislature may by one provision attempt to narrow or clarify vague or overbroad language in another. Importantly, such narrowing or clarifying provisions cannot necessarily be relied upon to prevent expression from being chilled. On this point, L'Heureux-Dube J.'s concurrence in *Committee for the Commonwealth* is apt:

When a law can be read, in effect, as an attempt to eradicate all types of expression, and at the same time be read more narrowly to exclude only certain types of expression, the citizen does not know what to do. In all likelihood, the person will exercise caution. This does not create circumstances in which fundamental freedoms are fully exercised – far from it. [pp. 213-214]

12. At the same time, it must be acknowledged that “[a]bsolute precision in the law exists rarely, if at all” (*Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at p. 983). None of the foregoing concerns necessarily leads to the conclusion that an ambiguous provision is automatically unjustifiable, or that the courts have no interpretive role to play where freedom of expression has been infringed. The Court has proven able, in appropriate cases, to resolve at

that the Alberta Human Rights Commission had concluded was hate speech; the federal Commission dismissed the ensuing complaint against Mr. Levant.

the interpretive stage ambiguities that might otherwise have made certain laws unacceptably vague, by drawing on the context, scheme and purpose of the legislation in question: see, for instance, *Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62, [2005] 3 S.C.R. 141, and *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30, [2007] 2 S.C.R. 610. In other circumstances, apparently vague statutory language may have a judicially-settled meaning at common law, upon which the Legislature may be taken to have drawn: see *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892, *per* McLachlin J., at p. 955. On the other hand, courts must proceed cautiously in performing their interpretive function, to ensure that they do not adopt an approach that “goes beyond what a court is authorized to do by way of interpretation and amounts to impermissible judicial amendment” (*Montreal (City)*, *per* Binnie J., at para. 110).

B. *The Governing Principles*

13. The concerns surveyed above explain and justify the Court’s insistence that a law restricting expression must provide “an intelligible standard according to which the judiciary must do its work” (in the words of *Irwin Toy*). In *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69, the Court proposed an alternative formulation of the same test, that would regard as unacceptable a provision that is “so obscure as to be incapable of interpretation with any degree of precision using the ordinary tools” (*per* Sopinka J., at p. 94). See also *R. v. Butler*, [1992] 1 S.C.R. 452, at p. 490.

14. The unintelligible / incapable of interpretation standard structures the analysis of whether a limit on freedom of expression is “prescribed by law” (see *Osborne, supra*, and *Taylor, per* McLachlin J., at pp. 955-956). However, the “prescribed by law” element of s. 1 does not exhaust the significance of a law’s imprecision. In *Taylor*, McLachlin J. noted that the difficulty in ascribing meaning to the federal hate propaganda provision was also “a factor to be taken into account in assessing whether the law is ‘demonstrably justified in a free and democratic society’” (p. 956). As the Chief Justice further explained in *JTI-Macdonald*:

The argument is that because the language is vague and unclear, it may be applied in a way that in fact goes beyond the legislator’s stated goals. A citizen, corporate or otherwise, who wishes to stay within the law may have no choice but to err on the side of caution.

The result may be that the citizen says less than is required in fact to accomplish the state's object. Indeed, confronted by vague bans on speech, the prudent citizen may be reduced to saying nothing at all. [...]

To ask only whether a trial judge will be able to apply the impugned law when a case comes before him or her provides an inadequate response to the concern that the law may in the future be applied in an overbroad way. [paras. 78-79; emphasis added]

15. In sum, to show that a law is unintelligible is a sufficient but not necessary way of invalidating a law on vagueness grounds. Even if the law is “intelligible” in the sense that it is capable of being interpreted, the court must further ensure that the law’s imprecision does not result in a disproportionate negative effect on the right to freedom of expression.

16. At the latter stage of the analysis, *JTI-Macdonald* indicates that the court’s inquiry looks not merely to the shape of the law itself, but to its probable effects on speakers. Logic suggests that in the course of this inquiry, the relevant factors will include: (1) the breadth of the provision’s widest language, which will demarcate the law’s potential “chill zone”; and (2) the consequences of violating the provision, which will indicate how deep the law’s chill may be.

C. *Taylor Does not Control the Outcome of This Case*

17. In defending the constitutionality of s. 14 of the Code, the argument of the appellant, the Saskatchewan Human Rights Commission, rests upon essentially two propositions. First, the Commission says that ss. 5 and 14(2) of the Code narrow s. 14(1), so as to sanction only communications that “involve extreme feelings and strong emotions of detestation, calumny and vilification”, and to additionally require “balancing freedom of expression with the competing values” (appellant’s factum, at paras. 50, 127). The Commission’s second proposition is that s. 14, so narrowed, should be upheld because it is no more broad (and perhaps is less broad) than the provisions upheld in *Taylor* (appellant’s factum, at paras. 40-57).

18. Neither proposition is correct. The narrowing construction upon which the Commission’s argument depends cannot be produced by any legitimate interpretive exercise. And taken at face value, rather than interpretively amended, s. 14 of the Code is manifestly more problematic than the federal law upheld in *Taylor*.

19. The Court of Appeal for Saskatchewan first adopted its narrowing construction of s. 14 in *Saskatchewan (Human Rights Commission) v. Bell* (1994), 114 D.L.R. (4th) 370. The sole reason given then was that the language of s. 14(1) “is so similar to that considered in *Taylor*” that the same interpretive analysis ought to apply. In its next case to consider s. 14, the Court of Appeal entrenched *Bell*’s interpretation, on the ground that “[n]o other result, of course, could be justifiable”: *Owens v. Saskatchewan (Human Rights Commission)*, 2006 SKCA 41, 267 D.L.R. (4th) 733, at para. 53. Finally, in the instant case, the court held further that “care must be taken to balance the limitation to freedom of expression contained in s. 14(1)(b), with the confirmation provided in s. 14(2)” (para. 66; emphasis added). There are four problems with this approach.

20. First, the Court of Appeal’s narrowing construction misreads the language chosen by the Legislature in s. 14(1), which is not “so similar” to that in the equivalent federal provision. In fact, the language of s. 14(1) is much more broad, both in terms of the offensiveness of the expression captured, and the media to which the provision applies.

21. Second, the narrowing construction fails to give effect to both subsections of s. 14, by reading words out of subsection (1) (“ridicules, belittles or affronts the dignity” are effectively gone), and reading down subsection (2) (“Nothing in subsection (1) restricts” has become “Sometimes subsection (1) restricts”).

22. Third, the “balancing” envisaged by the Court of Appeal is, with respect, pure invention. Nothing in s. 14 expressly or impliedly contemplates a weighing exercise. Consequently, any “balancing” that might be undertaken is destined to be *ad hoc* and standardless. The Court of Appeal was therefore mistaken to have accepted Dickson C.J.’s *obiter* suggestion that such was the intention of subsection (2) (*Taylor*, at p. 930). The Court of Appeal’s interpretation imposes on the provision a meaning that its words simply do not bear.

23. Fourth, in justifying its approach on the basis that no other approach “could be justifiable”, the Court of Appeal performed interpretively a task that can only be performed remedially (and it is the wrong remedial approach in any event, as noted at the close of this factum). Sopinka J. discussed this species of error in *Osborne*, at p. 102:

It is argued that the course of action taken by Walsh J. was less of an intrusion into the legislative sphere than the remedy employed

by the Court of Appeal. This submission is based on the notion that reading down of the statute to conform with the *Charter* does not involve a determination of invalidity of the impugned provisions. The fallacy in this reasoning is that, in order to determine which interpretation is consistent with the *Charter*, it is necessary to determine what aspects of the statute's operation do not conform. The latter determination is in essence an invalidation of the aspects of the statute that are found not to conform. This requires not only a finding that a *Charter* right or freedom is infringed but that it is not justified under s. 1.

24. Turning now to s. 14 as it was written by the Saskatchewan Legislature, it is apparent that there are five key differences between s. 14 and the legislation upheld in *Taylor*.

25. First, and as already noted, the classes of prohibited expression are more broad in Saskatchewan's law, in that they include messages that "ridicule", "belittle" or "affront the dignity" of individuals, whereas the federal law confines itself to expressions of "hatred" and "contempt". Professor Luke McNamara has said that the peculiar choice of language in Saskatchewan's law is "the broadest of the Canadian provincial hate speech laws" ("Negotiating the Contours of Unlawful Hate Speech: Regulation Under Provincial Human Rights Laws in Canada" (2005), 38 *U.B.C. L.Rev.* 1, at p. 49). In fact, subsection (1)'s language is so expansive that it is misleading to call s. 14 a "hate speech" law in the first place.

26. Second, as McLachlin J. noted in *Taylor*, "hatred" and "contempt" can be understood with reference to the common law of defamation, which deploys those terms to determine whether a communication has a defamatory "sting" (p. 955). While "ridicule" is likewise associated with the law of defamation (see *WIC Radio Ltd. v. Simpson*, 2008 SCC 40, [2008] 2 S.C.R. 420, *per* Justice LeBel, concurring, at para. 67), "belittle" and "affront the dignity" are not. The latter have no judicially-settled meaning upon which courts may draw.

27. Third, the federal law before the Court in *Taylor* was a true "hate propaganda" law. It captured only words spoken over a telephone, and Dickson C.J. emphasized the express requirement in the federal law that the telephone communications in question be "repeated", which he thought "must comport a requirement for something in the way of a series of messages" (p. 938). Together, these elements of the federal law narrowed its focus to actual propaganda efforts. Section 14 of the Code is not similarly focussed.

28. Fourth, the consequences of violating s. 14 are more severe. A violator may be ordered to pay up to \$10,000 per complainant (s. 31.4). In *Taylor*, by contrast, the only remedy initially available was a cease and desist order (see pp. 933-934).

29. Finally, and crucially, the federal law contains no equivalent to subsection (2). The internal conflict between the two subsections of Saskatchewan's provision is at the heart of the defect in s. 14; that will be the subject of the next point. For now, it suffices to say that the result of these five legislative differences is that *Taylor* does not control the analysis in this case: while the Court then held unanimously that the federal law was not impermissibly vague, s. 14 of the Code must stand or fall on its own terms. It cannot be propped up by reliance on *Taylor*.

D. *Section 14 is Unintelligible and is not Minimally Impairing*

30. This factum explained at its outset why s. 14 of the Code does not set out an intelligible standard, and is incapable of interpretation: its two halves are in direct and total collision with one another. To prohibit even a tiny bit of expression under subsection (1) is to disavow subsection (2), which claims that nothing in the former restricts freedom of expression. An activity is "expressive", according to *Irwin Toy*, if it "attempts to convey meaning" (p. 968). And it is only by conveying some form of meaning that a person could ever expose another person to hatred, contempt, ridicule, belittlement, or an affront to dignity. Accordingly, to give effect to subsection (2) is to render subsection (1) meaningless, and *vice versa*.

31. This conundrum cannot be resolved by concluding that the Legislature must not have meant what it said. Subsection (1) is unambiguous in its sweep: it aims to capture any seriously and personally offensive message that is targeted at a protected group. Subsection (2) is similarly straightforward. Importantly, in 2000, via S.S. 2000, c. 26, s. 10, the Legislature amended s. 14(2) to substitute "freedom of expression" for "freedom of speech". The Legislature must be taken to have known in 2000 what "freedom of expression" meant, having by then the benefit of *Irwin Toy* and the many cases of this Court that had followed it.

32. The individual is thus left with no notice of, or guidance about, the nature of the law's prohibition. Here, as in *Gentile v. State Bar of Nev.*, 501 U.S. 1030 (1991) (striking down a court rule as void for vagueness), the individual has "no principle for determining when his

remarks pass from the safe harbor of [expression] to the forbidden sea of [hatred, *etc.*]" (p. 1049, *per* Kennedy J., for the Court). This alone is enough to invalidate s. 14.

33. Section 14 also prevents more expression than can be justified. As discussed earlier, at this stage it is the probable effects of the provision that are at the fore of the analysis. Importantly, s. 14's first subsection is framed in the widest of language. This will chill a great deal of speech, some of which is likely to be of the political or religious variety. Though subsection (2) may provide some reassurance to Saskatchewan speakers, the point made by L'Heureux-Dube J. (in *Committee for the Commonwealth*) and the Chief Justice (in *JTI-Macdonald*) still stands: many individuals will exercise caution despite subsection (2), and steer clear of topics that may attract a complaint. That is particularly likely in light of the back-breaking financial consequences that may ensue from widely disseminating a message found to be contrary to the provision. Mr. Whatcott's case shows how cold the chill really is in Saskatchewan: at \$5,000 per complaint, distribution of his flyers in a neighbourhood with a sizable gay population would have risked economic ruin. The result is to prevent expression that the Legislature, in light of subsection (2), in all probability did not intend to stop. In this way, the law's unintelligibility combines with the breadth of its prohibitive subsection, and the consequences of its violation, to excessively impinge upon freedom of expression.

PART IV: SUBMISSIONS REGARDING COSTS

34. These interveners do not seek costs, and ask that no award of costs be made against them.

PART V: ORDER SOUGHT

35. Since it is impossible to divine the Legislature's intent in promulgating s. 14, no lesser remedy than a complete strike-down would be appropriate in this case, lest the Court find itself "creat[ing] something different in nature from what [the Legislature] intended": *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96, at para. 50.

36. The CCRL and FFA seek leave to make oral argument for up to 10 minutes at the hearing of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 4th day of August, 2011.

Ryan D.W. Dalziel

Erica J. Toews

PART VI: TABLE OF AUTHORITIES

CASES	PARAS. CITED
<i>Canada (Attorney General) v. JTI-Macdonald Corp.</i> , 2007 SCC 30, [2007] 2 S.C.R. 610	12, 14, 16, 33
<i>Canada (Human Rights Commission) v. Taylor</i> , [1990] 3 S.C.R. 892	4, 6(C), 12, 14, 17, 18, 22, 24, 26-29
<i>Committee for the Commonwealth of Canada v. Canada</i> , [1991] 1 S.C.R. 139	11, 33
<i>Gentile v. State Bar of Nev.</i> , 501 U.S. 1030 (1991)	32
<i>Grayned v. City of Rockford</i> , 408 U.S. 104 (1972)	11
<i>Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component</i> , 2009 SCC 31, [2009] 2 S.C.R. 295	9
<i>Irwin Toy Ltd. v. Quebec (Attorney General)</i> , [1989] 1 S.C.R. 927	3, 12, 13, 30, 32
<i>Montréal (City) v. 2952-1366 Québec Inc.</i> , 2005 SCC 62, [2005] 3 S.C.R. 141	12
<i>Osborne v. Canada (Treasury Board)</i> , [1991] 2 S.C.R. 69	13, 14, 23
<i>Owens v. Saskatchewan (Human Rights Commission)</i> , 2006 SKCA 41, 267 D.L.R. (4th) 733	19
<i>R. v. Butler</i> , [1992] 1 S.C.R. 452	13
<i>R. v. Ferguson</i> , 2008 SCC 6, [2008] 1 S.C.R. 96	35
<i>R. v. Nova Scotia Pharmaceutical Society</i> , [1992] 2 S.C.R. 606	7, 9
<i>Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)</i> , [1990] 1 S.C.R. 1123	9, 10
<i>Saskatchewan (Human Rights Commission) v. Bell</i> (1994), 114 D.L.R. (4th) 370	19
<i>Syndicat Northcrest v. Amselem</i> , 2004 SCC 47, [2004] 2 S.C.R. 551	7 fn 2
<i>WIC Radio Ltd. v. Simpson</i> , 2008 SCC 40, [2008] 2 S.C.R. 420	26

STATUTES	
<i>An Act to amend The Saskatchewan Human Rights Code and to make consequential amendments to The Labour Standards Act, S.S. 2000, c. 26, s. 10</i>	31
<i>Saskatchewan Human Rights Code, S.S. 1979, c. S-24.1, ss. 14, 31.4</i>	throughout
ARTICLE	
Luke McNamara, “Negotiating the Contours of Unlawful Hate Speech: Regulation Under Provincial Human Rights Laws in Canada” (2005), 38 <i>U.B.C. L.Rev.</i> 1	25

PART VII: STATUTORY PROVISIONS

An Act to amend The Saskatchewan Human Rights Code and to make consequential amendments to The Labour Standards Act, S.S. 2000, c. 26

10 (2) Subsection 14(2) is amended by striking out “speech” and substituting “expression”.

Saskatchewan Human Rights Code, S.S. 1979, c. S-24.1

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.

31.4. The court may, in addition to any other order the court 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 court may determine, to a maximum of \$10,000, if the court 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.