THE COURT OF APPEAL FOR SASKATCHEWAN

Citation: 2006 SKCA 41 Date: 20060413

Between: Docket: 678

Hugh Owens

Appellant

- and -

Saskatchewan Human Rights Commission

Respondent

- and -

Gens Hellquist
Jason Roy and
Jeff Dodds

Respondents

- and -

Saskatchewan Human Rights Board of Inquiry
Valerie G. Watson

Respondent

- and -

Sterling Newspapers Company
operating as The StarPhoenix

Respondent

- and -

Canadian Civil Liberties Association

Intervener

- and -

Canadian Religious Freedom Alliance

Intervener

Coram:
Sherstobitoff, Richards & Smith JJ.A.

Counsel:
Hugh Owens present without counsel
Milton Woodard, Q.C. for the Sask. Human Rights Commission, Gens Hellquist and Jeff Dodds
Andrew Lokan and Louis Browne for the Canadian Civil Liberties Association
Thomas Schuck and Janet Buckingham for the Canadian Religious Freedom Alliance

Appeal:

From:	2002 SKQB 506
Heard:	September 15, 2005
Disposition:	Allowed
Written Reasons:	April 13, 2006
By:	The Honourable Mr. Justice Richards
In Concurrence:	The Honourable Mr. Justice Sherstobitoff The Honourable Madam Justice Smith

Richards J.A.

I. Introduction

[1] Section 14(1)(b) of *The Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1 prohibits the publication of statements which expose or tend to expose to hatred, or which ridicule, belittle or otherwise affront the dignity of any person or class of persons on the basis of various prohibited grounds. One of those grounds is sexual orientation.

[2] A human rights board of inquiry found that the appellant, Hugh Owens, contravened s. 14(1)(b) by publishing a newspaper advertisement which reflected his Biblically-based views about homosexuality. That result was upheld by the Court of Queen's Bench.

[3] I conclude, for the reasons which follow, that Mr. Owens did not violate s. 14(1)(b) and that his appeal should be allowed.

II. Background

A. The Facts

[4] Mr. Owens saw an advertisement in the Saskatoon *StarPhoenix* in June of 1997 announcing an upcoming gay pride week. He thought that his Christian faith required him to respond to the celebration of what he believes God calls a sin. He contacted *The StarPhoenix* with a view to running his own advertisement during gay pride week in the church pages of the paper.

[5] *The StarPhoenix* did not respond until eight days later which, as it turned out, was too late to place the ad in the church pages. Mr. Owens then told *The StarPhoenix* to run the ad wherever there was space. It ultimately appeared in the sports section of the newspaper on June 30, 1997.

[6] The advertisement consisted of the citations of four Bible passages, "Romans 1:26; Leviticus 18:22; Leviticus 20:13; 1 Corinthians 6:9-10", set out prominently in bold type. They were accompanied by a reference in smaller print to the New International version of the Bible. The citations were followed by an equal sign and then by two stickmen holding hands. A circle with a line running diagonally from the two o'clock to the eight o'clock position (the "not permitted" symbol) was superimposed on the stickmen. The following words appeared in small print at the bottom of the advertisement: "This message can be purchased in bumper sticker form. Please call [telephone number]."

[7] The passages referred to in the advertisement, as found in the New International version of the Bible, read as follows:

> **Romans 1:26** Because of this, God gave them over to shameful lusts. Even their women exchanged natural relations for unnatural ones. In the same way the men also abandoned natural relations with women and were inflamed with lust for one another. Men committed indecent acts with other men, and received in themselves the due penalty for their perversion.
>
> Furthermore, since they did not think it worthwhile to retain the knowledge of God, he gave them over to a depraved mind, to do what ought not to be done. They have become filled with every kind of wickedness, evil, greed and depravity. They are full of envy, murder, strife, deceit and malice. They are gossips, slanderers, God-haters, insolent, arrogant, and boastful; they invent ways of doing evil; they disobey their parents; they are senseless, faithless, heartless, ruthless. Although they know God's righteous decree that those who do such things deserve

> death, they not only continue to do these very things but also approve of those who practice them.
>
> **Leviticus 18:22** "Do not lie with a man as one lies with a woman; that is detestable.
>
> **Leviticus 20:13** "If a man lies with a man as one lies with a woman, both of them have done what is detestable. They must be put to death; their blood will be on their own heads.
>
> **1 Corinthians 6:9** Do you not know that the wicked will not inherit the kingdom of God? Do not be deceived: Neither the sexually immoral nor idolaters nor adulterers nor male prostitutes nor homosexual offenders…

[8] Mr. Owens planned to follow-up with a second message. It also featured a not permitted sign superimposed on two stickmen holding hands but, rather than containing a reference to the Bible, it stated "You do have a choice friend, his name is Jesus." In his evidence, he explained his thinking as follows:

> … Christians and the Christian community are accused and rightly so, many times of being all too judgmental, all to condemning, and never offering any solutions, never offering any ways of dealing with certain situations. As I said, this message was crafted in two particular bumper stickers. The first one was, as we already know, the advertisement that was placed that dealt with God's declaration concerning homosexual behaviour, and then the second message was the bumper sticker that offered the solution. As a Christian, there is only one solution, and that is God himself and His name just happens to be Jesus Christ.

[9] *The StarPhoenix* declined to publish the second message given the complaints and protest which had been sparked by Mr. Owens' first advertisement.

[10] The respondents Gens Hellquist, Jason Roy and Jeff Dodds filed complaints with the respondent Saskatchewan Human Rights Commission in

August of 1997. They alleged the publication of the advertisement had offended s. 14 of the *Code*. Section 14 reads as follows:

> **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.

[11] Mr. Hellquist, Mr. Roy and Mr. Dodds each stated the particulars of his complaint in the same way:

> I am a gay man. On or about June, 1997, Hugh Owens caused an advertisement to be published in *The StarPhoenix*, a daily newspaper in Saskatchewan. The advertisement contained a message that certain passages of the Bible were authority for the proposition that gay men should not be allowed. The advertisement indicated the message could be purchased in bumper sticker form.
>
> I have reasonable grounds to believe, and I do believe, that Hugh Owens has caused this representation to be published or displayed in a newspaper, and that he is distributing the representation, which tends to restrict the enjoyment of rights which I am entitled to under the law and which exposes me to hatred and otherwise affronts my dignity of [*sic]* because of my sexual orientation, contrary to Section 14 of the *Saskatchewan Human Rights Code*.

[12] The complaints named both Mr. Owens and Sterling Newspapers Company, the operator of *The StarPhoenix*, as respondents. Sterling Newspapers is no longer involved in these proceedings and, as a result, I need

make no further reference to it in these reasons. I also note that Mr. Roy did not participate in this appeal and has renounced any claim to the compensation awarded to him.

B. The Board of Inquiry Decision

[13] The complaints filed by Mr. Hellquist, Mr. Roy and Mr. Dodds were referred to a board of inquiry for determination.

[14] The Board of Inquiry heard a considerable amount of evidence. The complainants provided a compelling narrative with respect to the difficulties, threats and dangers faced by gay men. They expressed the anger, hurt and frustration caused to them by the message in the advertisement. Mr. Hellquist believed the advertisement gave licence to people who wanted to discriminate against gay men and a licence to people who were inclined to harass or assault gay men. Mr. Roy said the overall message he received from the ad was that "God instructs us that intimacy between two people of the same gender is inappropriate or some type of religious crime and those who engage in such acts should be put to death." Mr. Dodds saw the advertisement in a very similar way.

[15] The Board of Inquiry also heard evidence from several individuals who were qualified as experts. Dr. Madiha Khayatt testified in general terms about human sexuality, including homosexuality, from a sociological point of view. Reverend Brent Hawkes testified about the history of the Bible, the Bible's commentary on homosexuality and possible interpretations of the Bible

passages referred to in Mr. Owens' advertisement. Reverend Canon Clay gave evidence concerning the various degrees of acceptance of homosexuality among different church groups. The Board of Inquiry also heard from individuals who testified as to the approach taken to homosexuality by the Lutheran, Roman Catholic and Jewish faiths.

[16] In its decision, reported at (2001), 40 C.H.R.R. D/197, the Board of Inquiry began by summarizing the evidence which had been presented. It then considered whether the advertisement breached s. 14(1)(b) of the *Code* and concluded that it did. Its finding as to whether the advertisement involved some or all of hate, belittlement, ridicule or an affront to dignity was not stated in a consistent way. The Board first wrote as follows:

> [26] Having reviewed all of the evidence, the Board accepts that the universal symbol for forbidden, not allowed or not wanted, consisting of a circle with a slash through it, may itself not communicate hatred. However, when combined with the passages from the Bible, the Board finds that the advertisement would expose or tend to expose homosexuals to hatred or ridicule, or may otherwise affront their dignity on the basis of their sexual orientation. It is a combination of both the symbol and the biblical references which have led to this conclusion.

[17] After referring to case authority in relation to the significance of the not permitted symbol, the Board stated its views somewhat differently by saying:

> [28] The use of the circle and slash combined with the passages of the Bible herein make the meaning of the advertisement unmistakeable. It is clear that the advertisement is intended to make the group depicted appear to be inferior or not wanted at best. When combined with the biblical quotations, the advertisement may result in a far stronger meaning. It is obvious that certain of the biblical quotations suggest more dire consequences and there can be no question that the advertisement can objectively be seen as exposing homosexuals to hatred or ridicule.

[18] The Board then went on to consider whether the advertisement was a permissible exercise of freedom of speech within the meaning of s. 14(2) of the *Code*. After referring to leading case authority, it presented its conclusion in this way:

> [32] The Board has concluded that the complainants, Jeff Dodds, Jason Roy, and Gens Hellquist, have been discriminated against with respect to the advertisement placed in the Saskatoon *Star Phoenix* on June 30, 1997, and as a result, were exposed to hatred, ridicule and their dignity was affronted on the basis of their sexual orientation. Based on the evidence given by the complainants, the Board finds that the complainants suffered in respect of their feelings and self-respect as a result of the contravention.

[19] The Board made an order prohibiting Mr. Owens from further publishing or displaying the bumper stickers featured in the advertisement and directed him to pay damages of $1,500 to each of the complainants.

C. The Queen's Bench Decision

[20] Mr. Owens appealed the Board of Inquiry's decision to the Court of Queen's Bench. In dismissing the appeal, the Chambers judge purported to agree with the findings of the Board but was also somewhat inconsistent as to whether the advertisement involved only hatred or whether it also involved ridicule, belittlement and/or an affront to dignity. The relevant passages from that aspect of his decision, reported at (2002), 228 Sask. R. 148, are set out below:

> [21] In my view the Board was correct in concluding that the advertisement can objectively be seen as exposing homosexuals to hatred or ridicule. When the use of the circle and slash is combined with the passages of the Bible, it exposes homosexuals to detestation, vilification, and disgrace. In other words, the Biblical passage which suggest that if a man lies with a man they must be put to death exposes homosexuals to hatred.
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> [22] I agree with counsel for the Board that the Board was correct in holding that a reference to statements that call for homosexuals to be put to death in the context

> of equalizing that with a prohibition against them does expose homosexuals to hatred and affronts to their dignity as contemplated by s. 14(1) of the *Code*.

[21] Having stated his conclusion in those terms, the Chambers judge considered whether the advertisement was protected by the guarantees of freedom of speech or religion. His analysis in that regard consisted of quoting from *Saskatchewan (Human Rights Commission) v. Bell*, [1994] 5 W.W.R. 460 (Sask. C.A.) and then stating:

> [24] In my view, s. 14(1) of the *Code* is a reasonable restriction on the appellant's right to freedom of expression and religion as contemplated by s. 2(a) of the *Charter*. See *Bell,* supra. In *Attis v. Board of Education of District No. 15 et al.*, [*Ross v. New Brunswick School District No. 15]*, [1996] 1 S.C.R. 825; 195 N.R. 81; 171 N.B.R. (2d) 321; 437 A.P.R. 321, La Forest J. held that the analysis under s.1 of the *Charter* is the same whether the legislation infringes the respondent's freedom of expression or freedom of religion.
>
> [25] For all the above reasons the appeal is dismissed.

[22] Mr. Owens takes issue with that decision. Two interveners, Canadian Civil Liberties Association and Canadian Religious Freedom Alliance, support his request that the appeal be allowed.

III. Issues

[23] Mr. Owens raised a number of points but there was considerable overlap among them. His essential argument can be reduced to two key contentions. The first is that the Board of Inquiry and the Court of Queen's Bench erred in their characterization of the advertisement. He submits that it does not convey hatred or otherwise offend s. 14(1)(b) of the *Code*. The second is that the Board of Inquiry and the Court of Queen's Bench both failed to give proper

consideration to the fact that, in publishing the advertisement, he was exercising his freedom of religion.

[24] Mr. Owens does not suggest the publication of the advertisement fell outside the reach of s. 14(1) because it was not sufficiently connected to a violation or potential violation of ss. 9 to 13 or 15 to 19 of the *Code* in the sense considered by this Court in *Saskatchewan (Human Rights Commission) v. Engineering Students' Society* (1989), 56 D.L.R. (4th) 604 (Sask. C.A.). Accordingly, we are not here concerned with that point.

[25] For their part, the respondents, *i.e.* the Commission and the complainants, argued that the Board of Inquiry properly identified the import of the advertisement. They accept that the advertisement involved the exercise of Mr. Owens' freedom of religion but say his freedom in that regard is not absolute and that the *Code* justifiably limits religious speech which is hateful or otherwise comes within the scope of s. 14(1)(b).

[26] Although the complaints filed in this matter refer generally to an alleged violation of s. 14 of the *Code,* the case has been presented and adjudicated from the outset as turning solely on s. 14(1)(b) of the *Code*. Section 14(1)(a) is not directly at issue in these proceedings.

IV. Analysis

[27] This appeal is most readily resolved by dealing with each of the following main points in turn: (i) the right of appeal, (ii) the appropriate

standard of review, (iii) the meaning and scope of s. 14(1)(b), and (iv) the proper characterization of Mr. Owens' advertisement.

A. Right of Appeal

[28] These proceedings are grounded on s. 32 of the *Code*. It allows an appeal on a question of law from a board of inquiry decision to the Court of Queen's Bench and a further appeal to this Court.

[29] The respondents accept that the issues raised by Mr. Owens are properly before the Court. Their position in this regard is correct. Mr. Owens' argument self-evidently involves questions of law to the extent it turns on the interpretation of the *Code*. Further, to the extent it turns on the proper application of the *Code* to the facts of this case, it also involves a question of law for purposes of the appeal provisions in s. 32. See: *Valley Beef Co-operative Ltd. v. Farm Credit Corp*., [2002] 11 W.W.R. 587 (Sask. C.A.) at paras. 96-106; *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 772 at para. 18.

B. Standard of Review

[30] Counsel for the Commission, Mr. Hellquist and Mr. Roy agreed in oral argument that this Court was free to make its own assessment of whether the advertisement offended s. 14(1)(b), *i.e.* that it should use the correctness standard in reviewing the question of whether s. 14(1)(b) had been violated. That concession was properly made.

[31] The Supreme Court has said that, even for statutory appeals from administrative tribunals, the "functional and pragmatic" analysis summarized in cases such as *Pushpanathan v. Canada*, [1998] 1 S.C.R. 982 must be applied in order to determine the applicable standard of review. See: *Dr. Q. v. College of Physicians and Surgeons of British Columbia,* [2003] 1 S.C.R. 226 at para. 21.

[32] The factors which are to be considered under the functional and pragmatic approach include (i) the presence or absence of a privative clause protecting the tribunal's decision, (ii) the expertise of the tribunal, (iii) the purpose of the legislative scheme in which the tribunal operates, and (iv) the nature of the problem in issue. These factors must be weighed together to determine the proper standard of review. The overall object of the exercise is to determine whether the question in issue is one the Legislature intended to be left to the exclusive jurisdiction of boards of inquiry.

[33] Essentially the same considerations under the functional and pragmatic analysis are applicable to all aspects of Mr. Owens' appeal. That analysis indicates the Board of Inquiry's decision that Mr. Owens offended the *Code* by publishing the advertisement should be reviewed on a standard of correctness. First, the Board's decisions are not made under the umbrella of a privative clause. To the contrary, the *Code* sets out a right of appeal in relation to questions of law. This points to review on the basis of correctness.

[34] Second, boards of inquiry under the statutory regime in place at the time relevant to this appeal did not have any special expertise in relation to human rights issues. Board members were not full time human rights adjudicators. Rather, they were lawyers involved in private practice who were appointed on an *ad hoc* and file-by-file basis to hear complaints. As a result, at least relative to the judiciary, boards of inquiry had no particular expertise in respect of the legal issues at play in human rights problems. Accordingly, this factor also suggests that a correctness standard of review is appropriate.

[35] Third, the purpose of the board of inquiry system under the *Code* is to establish the rights of the complainant and the respondent through a formal adjudicative process. Decision making is not what the Supreme Court has described as "polycentric" *i.e.* decision making which involves a large number of interlocking and interacting interests and considerations. As a result, this consideration also suggests a correctness standard of review.

[36] Fourth and finally, the nature of the problem under review in this case also points to the correctness standard. The Supreme Court, broadly speaking, has said that questions which impact future decisions of lawyers and judges will tend to attract relatively little deference. Issues of more limited interest and those of a purely factual nature will attract more deference. The questions raised by this appeal are, of course, rooted in a particular set of facts but they ultimately turn on important points of law including the interpretation of s. 14(1)(b) of the *Code* as informed by the basic constitutional values of equality, freedom of religion and freedom of speech. In my view this is very

much the sort of matter which the Legislature would have intended the courts to decide.

[37] I pause here, however, to observe that it could be asked if the Board of Inquiry's findings that Mr. Owens' advertisement exposed the complainants to hatred, affronted their diginity and so forth are essentially questions of fact and, therefore, matters which warrant deference on the part of the Court. The problem with this line of thinking, of course, is that the notions of "hatred," "ridicule," "belittlement" and "affronts to dignity" are the key legal concepts in s. 14(1)(b) itself and, as will be discussed below, are ultimately given meaning by a relatively complex set of constitutional considerations. As a result, the Board's conclusions in this regard do not require deference on the part of the courts.

[38] Moving on from the detail of the functional and pragmatic approach, I note that the application of the correctness standard in the present circumstances is in keeping with what the Supreme Court has said about standards of review in other cases dealing with human rights issues. *Gould v. Yukon Order of Pioneers*, [1996] 1 S.C.R. 571 involved a situation where a woman had been denied membership in an organization on the basis of her gender. As in the present case, the statutory regime allowed for appeals only "on questions of law." The central issue was whether the organization was "offering or providing services… to the public" within the meaning of the Yukon human rights legislation. The majority of the Supreme Court found, at para. 46, that the appropriate standard of review was correctness on the

basis that the issue on the appeal was one of "statutory interpretation and general legal reasoning." In cases grounded on judicial review applications, the Supreme Court has also endorsed a correctness standard in relation to questions of law. See: *Canada (Attorney General) v. Mossop,* [1993] 1 S.C.R. 554; *University of British Columbia v. Berg,* [1993] 2 S.C.R. 353.

[39] Accordingly, I proceed on the basis that the correctness standard of review is applicable in relation to the issues raised in this case.

C. The Meaning and Scope of Section 14(1)(b)

[40] Section 14(1)(b) of the *Code* prohibits the publication or display of any statement or symbol "that exposes or tends to expose to hatred, ridicule, belittles or otherwise affronts the dignity" of any person or class of persons on the basis of a prohibited ground. The task of determining whether Mr. Owens violated the *Code* by publishing the advertisement must begin with a confirmation of the meaning and scope of those statutory terms.

1. Some General Principles

[41] Section 14(1)(b) is aimed directly at expressive activity and hence self-evidently constrains free speech. It also limits constitutionally protected religious interests in that freedom of religion includes the right to disseminate beliefs. Dickson J. confirmed that point in *R. v. Big M Drug Mart Ltd.,* [1985] 1 S.C.R. 295 at p. 336:

> … 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.

[42] The *Charter* guarantees both freedom of speech and freedom of religion by providing as follows in ss. 2(a) and (b):

> **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;

Those guarantees can only be limited in ways which are reasonable and demonstrably justifiable within the meaning of s. 1 of the *Charter*. Section 14(1)(b) would, of course, be constitutionally invalid to the extent it is not a reasonable limitation of guaranteed freedoms.

[43] Freedom of expression and freedom of religion are also enshrined in the *Human Rights Code* itself. The Bill of Rights part of the *Code* expressly protects both freedoms. Sections 4 and 5 of the *Code* state:

> **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.
>
> **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.

Section 14(2), it will be recalled, specifically says that "Nothing in subsection (1) restricts the right to freedom of expression under the law upon any subject."

[44] All of this means freedom of speech and religion must be carefully considered when interpreting s. 14(1)(b). First, as the Supreme Court noted in *R. v. Zundel*, [1992] 2 S.C.R. 731 at p. 771, when a statute is susceptible of alternative interpretations, the one which accords with the *Charter* and the values to which it gives expression should be preferred. Second, as a matter of pure statutory interpretation, s. 14(1)(b) must be read in the context of the *Code* as a whole and, to the extent reasonably possible, given a construction which is consistent with an overall legislative scheme which respects and guarantees freedom of speech and religion. See: *Rizzo and Rizzo Shoes Ltd. (Re),* [1998] 1 S.C.R. 27 at p. 41.

2. The Authorities

[45] With that background, it is appropriate to turn to the authorities which have considered the meaning of s. 14(1)(b). There are two key and controlling cases. The first is *Canada (Human Rights Commission) v. Taylor,* [1990] 3 S.C.R. 892. The second is *Saskatchewan (Human Rights Commission) v. Bell, supra*.

[46] In *Taylor*, the Supreme Court considered the constitutional validity of the hate speech prohibition in s. 13(1) of the *Canadian Human Rights Act*. That provision reads as follows:

> **13.** (1) It is a discriminatory practice for a person or a group of persons acting in concert to communicate telephonically or to cause to be so communicated, repeatedly, in whole or in part by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament, any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination.

The prohibited grounds of discrimination referred to in the section include (but are not limited to) race, national or ethnic origin, colour and religion.

[47] Mr. Taylor had initiated a telephone service whereby members of the public could dial a telephone number and listen to a recorded message. Some thirteen different messages were played over a two year period but they had a consistent overriding theme involving an attack on Jews. A human rights tribunal determined that Mr. Taylor had violated s. 13(1) of the *Human Rights Act* and, in so doing, it summarized the nature of the messages as follows at p. 903:

> Although many of these messages are difficult to follow, there is a recurring theme. There is a conspiracy which controls and programmes Canadian society; it is difficult to find out the truth about this conspiracy because our books, our schools and our media are controlled by the conspirators. The conspirators cause unemployment and inflation; they weaken us by encouraging perversion, laziness, drug use and race mixing. They become enriched by stealing our property. They have founded communism which is responsible for many of our economic problems such as the postal strike; they continue to control communism and they use it in the furtherance of the conspiracy. The conspirators are Jews.

[48] The Supreme Court narrowly upheld s. 13(1) as being a reasonable limitation on the right of freedom of expression guaranteed by s. 2(b) of the *Charter*. Dickson C.J.C. wrote for the majority. In the central part of his reasons, he referred to a decision of a human rights tribunal which had considered the meaning of "hatred" and "contempt" in s. 13(1) and then went on to summarize his own position as follows at pp. 928-929:

> The approach taken in [the decision of the human rights tribunal] gives full force and recognition to the purpose of the *Canadian Human Rights Act* while

> remaining consistent with the *Charter*. The reference to "hatred" in the above quotation speaks of "extreme" ill-will and an emotion which allows for "no redeeming qualities" in the person at whom it is directed. "Contempt" appears to be viewed as similarly extreme, though is felt by the Tribunal to describe more appropriately circumstances where the object of one's feelings is looked down upon. According to the reading of the Tribunal, s. 13(1) thus refers to unusually strong and deep-felt emotions of detestation, calumny and vilification, and I do not find this interpretation to be particularly expansive. To the extent that the section may impose a slightly broader limit upon freedom of expression than does s. 319(2) of the *Criminal Code*, however, I am of the view that the conciliatory bent of a human rights statute renders such a limit more acceptable than would be the case with a criminal provision.
>
> 62 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. [emphasis added]

[49] The key to the *Taylor* decision for present purposes is Dickson C.J.C.'s requirement that, in order to pass constitutional muster, s. 13(1) must be read as being aimed only at expression involving feelings of an "ardent and extreme nature" and, in particular, "unusually strong and deep-felt emotions of detestation, calumny and vilification."

[50] I turn then to *Bell,* a decision of this Court. It involved a human rights complaint under s. 14 of the *Code* arising from a situation where Mr. Bell, the owner of a motorcycle shop, had displayed and offered for sale offensive stickers. The stickers carried crude and demeaning caricatures of a Sikh person, an Oriental person and a Black person superimposed with a red circle and a diagonal bar – the not permitted sign. Mr. Bell challenged the

constitutional validity of s. 14 on the basis that it offended the guarantee of freedom of expression found in s. 2(b) of the *Charter*.

[51] Not surprisingly, the *Taylor* ruling figured prominently in Sherstobitoff J.A.'s reasons upholding the validity of s. 14. He noted that *Taylor* directly governed the question of whether the "hate" aspect of s. 14(1) could be justified. He also found that the reasoning in *Taylor* applied in relation to those aspects of s. 14 which speak to belittlement, ridicule and affronts to dignity. The most significant passage from his reasons is reproduced below in full:

> 29 Insofar as s. 14 prohibits display of material exposing or tending to expose to hatred because of race or religion, it is unquestionably a reasonable limit for all of the reasons stated by Dickson C.J.C. in *Taylor*. We are bound by those reasons and agree with them. Since we have found that the stickers exposed and tended to expose to hatred, there has been a breach of the section, and, ordinarily, that would be an end of the appeal.
>
> 30 However, s. 14 goes beyond prohibiting material exposing to hatred. It also prohibits material which ridicules, belittles or otherwise affronts the dignity of any group because of race or religion. The appellant argued that these additional grounds for prohibition of publication broadened the section to the extent that the reasoning in *Taylor* should not apply, and that, as a result, s. 14 was not a reasonable limit on the right to freedom of expression.
>
> 31 The legislation under consideration in *Taylor* prohibited communications which were "likely to expose ... to hatred or contempt." The prohibition in s. 14 against communications which expose or tend to expose to hatred, or which "ridicule, belittle or otherwise affront the dignity" of persons is so similar to that considered in *Taylor* that the words of Dickson C.J.C. at p. 929 apply:
>
> > 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.

> 32 This reasoning is reinforced by the fact that s. 14 of the *Code* is tempered by interpretative and exemption provisions which were absent in the legislation under consideration in *Taylor*. Subsection (2) of s. 14 provides:
>
> > (2) Nothing in subsection (1) restricts the right to freedom of speech under the law upon any subject.
>
> Section 5 provides:
>
> > 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.
>
> Such provisions are normal in human rights legislation and Dickson C.J.C. said as follows in reference to such provisions at p. 930:
>
> > Perhaps the so-called exemptions found in many human rights statutes are best seen as indicating to human rights tribunals the necessity of balancing the objective of eradicating discrimination with the need to protect free expression (see, e.g., *Rasheed v. Bramhill* (1980), 2 C.H.R.R. D/249, at p. D/252).
>
> 33 Accordingly, in our view, s. 14 of the *Code* is a reasonable limit on the right to freedom of expression as allowed under s. 1 of the *Charter*. Our reasons for this conclusion are rather perfunctory because the result of this appeal would be the same even if we had concluded that the words "ridicules, belittles or otherwise affronts the dignity of" in s. 14(1)(a) had taken the section beyond the reasoning in *Taylor* which justified the limit as being reasonable. [emphasis added]

[52] Thus, while *Bell* upheld s. 14(1)(b) of the *Code* as being a reasonable limit on freedom of expression, it did so on a very particular basis. The Court saw s. 14(1)(b) as operating only in those situations where the “ridicule”, “belittlement” or “affront to dignity” in issue met the standard endorsed in *Taylor*. In other words, the Court interpreted the prohibition against ridicule, belittlement and affronts to dignity as extending only to communications of that sort which involve extreme feelings and strong emotions of detestation, calumny and vilification.

[53] No other result, of course, could be justifiable. Much speech which is self-evidently constitutionally protected involves some measure of ridicule, belittlement or an affront to dignity grounded in characteristics like race, religion and so forth. I have in mind, by way of general illustration, the editorial cartoon which satirizes people from a particular country, the magazine piece which criticizes the social policy agenda of a religious group and so forth. Freedom of speech in a healthy and robust democracy must make space for that kind of discourse and the *Code* should not be read as being inconsistent with that imperative. Section 14(1)(b) is concerned only with speech which is genuinely extreme in the sense contemplated by the *Taylor* and *Bell* decisions.

3. Freedom of Religion

[54] *Bell* concerned the validity of s. 14(1)(b) with reference to freedom of expression as protected by s. 2(b) of the *Charter*. Although he does not directly attack the constitutionality of s. 14(1)(b) itself, Mr. Owens argues that both the Board of Inquiry and the Court of Queen's Bench erred in their deliberations because they failed to give weight or effect to his freedom of religion. In this regard, all parties to this appeal agree and accept that Mr. Owens published the advertisement pursuant to a sincere and *bona fide* conviction forming part of his religious beliefs. As a result, there is no doubt that s. 2(a) of the *Charter* is engaged by the facts of this case and must be examined.

[55] Mr. Owens correctly contends that the Board of Inquiry said nothing about freedom of religion and that the Chambers judge gave it only the briefest of consideration. However, at least insofar as the constitutional validity of s. 14(1)(b) is concerned, the result in *Bell* does not change when freedom of religion is brought into the equation. This is so because the authorities universally recognize that freedom of religion is not absolute. See: *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] S.C.J. No. 6; 2006 SCC 6 at para. 30.

[56] As is the case with all other rights and freedoms, religious speech and religious practices which harm others are subject to limitation in ways which are reasonable and justifiable within the meaning of s. 1 of the *Charter*. This is part of the foundation on which our pluralistic society has been constructed. Iacobucci J. recently underlined this point when exploring the allowable limitations on religious freedom in *Syndicat Northcrest v. Amselem,* [2004] 2 S.C.R. 551 at para. 61:

> 61 In this respect, it should be emphasized that not every action will become summarily unassailable and receive automatic protection under the banner of freedom of religion. No right, including freedom of religion, is absolute: see, e.g., *Big M, supra*; *P. (D.) v. S. (C.)*, [1993] 4 S.C.R. 141, at p. 182; *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, at para. 226; *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 772, 2001 SCC 31, at para. 29. This is so because we live in a society of individuals in which we must always take the rights of others into account. In the words of John Stuart Mill: "The only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it": *On Liberty and Considerations on Representative Government* (1946), at p. 11. In the real world, oftentimes the fundamental rights of individuals will conflict or compete with one another.

[57] The Constitution protects all dimensions of freedom of religion. However, it also accommodates the need to safeguard citizens from harm and to ensure that each of them has non-discriminatory access to education, employment, accommodation and services. In situations where religiously motivated speech involves injury or harm to others, it is necessarily subject to reasonable limitations. As a result, s. 14(1)(b) is a justifiable limit on religiously inspired speech in effectively the same way as it is a justifiable limit on speech generally. See: *Ross v. New Brunswick School District No. 15,* [1996] 1 S.C.R. 825.

4. Applying Section 14(1)(b)

[58] The sensibilities and vulnerabilities of the individuals who are the target of speech which is alleged to breach s. 14(1)(b) should not be disregarded in deciding whether there has been a violation of the *Code*. However, the question of how a particular individual or particular individuals understand a message cannot determine whether it should be found to involve hate, belittlement, ridicule or is an affront to dignity. Injecting that sort of subjectivity into the analysis would make the reach of the section entirely unpredictable and, as a result, would create an unacceptable chilling effect on free speech.

[59] Similarly, the perspective of the person who sends a message cannot control the outcome of the inquiry as to whether the message violates s. 14(1)(b). He or she might have a sense of the meaning of the message

which, because of prejudice or otherwise, is wholly inconsistent with its actual effect. Focusing on the subjective views of the person alleged to have offended s. 14(1)(b) thus runs the risk of making that provision inapplicable to even the most offensive and dangerous messages and, consequently, of defeating its purpose.

[60] As a result, it is apparent that s. 14(1)(b) must be applied using an objective approach. The question is whether, when considered objectively by a reasonable person aware of the relevant context and circumstances, the speech in question would be understood as exposing or tending to expose members of the target group to hatred or as ridiculing, belittling or affronting their dignity within the restricted meaning of those terms as prescribed by *Bell*.

C. The Characterization of the Advertisement

[61] Having confirmed the construction of s. 14(1)(b) and the way in which it must be applied, it is now possible to turn to the particulars of Mr. Owens' advertisement and the question of whether he offended the *Code* by publishing it.

[62] There is no doubt that the advertisement is jarring and would have been seen by many as distressing and offensive. That, however, is not the basis on which the *Code* prohibits speech. The overriding question is whether the advertisement was characterized by the intense feelings and strong sense of detestation, calumny and vilification referred to in *Bell*.

[63] That question can be answered only by considering the contents of the advertisement as a whole in light of the circumstances in which it was published. Context is critically important in this regard. The analysis pursuant to s. 14(1)(b) of the *Code* must be performed carefully and always on a case-by-case basis.

[64] For his part, Mr. Owens says the advertisement simply means "God says no to the behaviour of homosexuality" and, as a result, he submits there was no violation of s. 14(1)(b).

1. Context

[65] Part of the context which must inform the meaning of Mr. Owens' advertisement is the long history of discrimination against gay, lesbian, bisexual and trans-identified people in this country and elsewhere. As Cory J. said in *Egan v. Canada*, [1995] 2 S.C.R. 513 at para. 175, gays and lesbians "whether as individuals or couples, form an identifiable minority who have suffered and continue to suffer serious social, political and economic disadvantage." The evidence of the complainants in this case clearly revealed the marginalization and fear which are part of the life many gay men are obliged to live.

[66] At the same time, it is significant that the advertisement in issue here was published in 1997 and, thus, in the middle of an ongoing national debate about how Canadian legal and constitutional regimes should or should not

accommodate sexual identities. "Sexual orientation" had been added as a prohibited ground of discrimination under *The Saskatchewan Human Rights Code* only in 1993. Sexual orientation had been found by the Supreme Court of Canada to be an analogous ground of discrimination under s. 15 of the *Charter* just two years before the advertisement was published. See: *Egan v. Canada*, *supra*. Parliament would not pass legislation to make government programs and benefits available on an equal basis to gay and lesbian couples until three years after the advertisement appeared. See: *Modernization of Benefits and Obligations Act*, S.C. 2000, c. 12. When Mr. Owens' message was published the judicial sanctioning of same-sex marriage in Saskatchewan was still seven years in the future and its sanctioning by the Supreme Court of Canada was eight years in the future. See: *W. (N.) v. Canada (Attorney General)* (2004), 246 D.L.R. (4th) 345 (Q.B.); *Reference Re Same-Sex Marriage*, [2004] 3 S.C.R. 698.

[67] This does not mean that a newly won right to be free from discrimination should be accorded less vigorous protection than similar rights based on more historically established grounds such as race and religion. But, for purposes of applying a provision like s. 14(1)(b) of the *Code*, it is important to consider Mr. Owens' advertisement in the context of the time and circumstances in which it was published. That environment featured an active debate and discussion about the place of sexual identity in Canadian society. Indeed, the advertisement at issue here was published in connection with gay pride week – an event promoted by the gay community as a celebration of diversity and used in part as a platform for the advancement of gay rights.

[68] Seen in this broader context, Mr. Owens' advertisement tends to take on the character of a position advanced in a continuing public policy debate rather than the character of a message of hatred or ill will in the sense contemplated by *Bell*. Both the Board of Inquiry and the Chambers judge erred by failing to give any consideration to this wider context.

2. The Detail of the Advertisement

[69] In analyzing the advertisement itself, it is useful to begin by separately considering its two main elements: the not permitted symbol superimposed on the stickmen and the Bible passages.

[70] I begin with the stickmen. They are drawn very simply in the classic style of the genre. The two figures are identical and stand side by side with conjoined hands. They are not, as was the case with the caricatures at issue in *Bell,* depicted in a way which suggests undesirable characteristics such as dangerousness, untrustworthiness, lack of cleanliness, dishonesty or deceit. They are presented in a neutral and straightforward fashion. As a result, there is nothing about the stickmen themselves which might engage s. 14(1)(b) of the *Code*.

[71] The significance of the not permitted sign itself is somewhat more difficult to ascertain. In the proper context, I do not doubt that it can confirm or be an integral part of a hateful message. That was the case in *Bell* where it was superimposed on cruel and demeaning racial caricatures. However, at the

same time, the not permitted sign can also be used in ways which do not involve the kind of malevolent feelings described in *Bell* and *Taylor*. The evidence at the Board of Inquiry showed it was employed in a range of circumstances including those which were quite innocuous. Accordingly, in my view, the Board of Inquiry properly concluded that the not permitted symbol "may itself not communicate hatred".

[72] In the result, it is apparent that the part of the advertisement involving the not permitted symbol superimposed on the stickmen does not, in and of itself, satisfy the standard prescribed by *Bell*. The Board of Inquiry and the Chambers judge reached the same conclusion, finding that s. 14(1)(b) of the *Code* was not independently offended by that feature of the advertisement but was offended only by that feature *combined* with the Bible passages.

[73] This leads to the other element of the advertisement, the Bible citations. As an initial point on this limb of the case, Mr. Owens contends that the Board of Inquiry and the Court of Queen's Bench should not have looked beyond the advertisement itself to determine its meaning. In his view, the advertisement should have been evaluated on its face and in isolation from the Biblical text it cites.

[74] I do not accept that proposition. In principle, the effect of s. 14(1)(b) of the *Code* cannot be side-stepped by publishing or distributing what amounts to a direction or invitation to refer to material which offends its terms. That approach would deprive the provision of much of its effect and

does not reconcile with the concept that human rights legislation should be given a generous and purposive interpretation. See: *Gould v. Yukon Order of Pioneers, supra* at paras. 119-120; *University of British Columbia v. Berg, supra*, at para. 39.

[75] The advertisement was, in effect, an invitation to consult the referenced Bible passages. That text, of course, is readily available as the Bible enjoys a wider circulation than any other book. Accordingly, therefore, it is necessary to consider the referenced Bible passages themselves in order to determine whether s. 14(1)(b) was offended.

[76] Those passages, as quoted above from the New International version of the Bible, use undeniably strong language. Romans 1:26 indicates that men who commit indecent acts with other men "deserve death". Leviticus 18:22 says it is "detestable" for a man to lie with a man as he would a woman. Leviticus 20:13 says it is "detestable" that a man lie with a man and that those who do so "must be put to death". 1 Corinthians 6:9 says that "homosexual offenders" will not inherit the Kingdom of God.

[77] The Board of Inquiry and the Chambers judge both took these passages at face value, making no allowance for the fact they are ancient and fundamental religious text. In other words, the passages referred to by Mr. Owens were assessed by the Board and the Chambers judge in the same way as one might consider a contemporary poster, notice or publication saying "Homosexuals should be killed". In my view, that was an error.

[78] I do not mean by this to suggest in some blanket way that a foundational religious text itself could never be hateful or otherwise offend s. 14(1)(b) of the *Code* or that it could never be used in a way that offended the *Code*. That broad issue is not before the Court in this case. However, at the same time, it is apparent that a human rights tribunal or court should exercise care in dealing with arguments to the effect that foundational religious writings violate the *Code*. While the courts cannot be drawn into the business of attempting to authoritatively interpret sacred texts such as the Bible, those texts will typically have characteristics which cannot be ignored if they are to be properly assessed in relation to s. 14(1)(b) of the *Code*. That is certainly true in this case.

[79] First, the passages cited by Mr. Owens are self-evidently part of a larger work, the Bible, and would tend to be seen as such by an objective observer. One need not be a Biblical scholar, or even a Christian, to know that the Bible as a whole is the source of more than one sort of message and, more specifically, is the source of messages involving themes of love, tolerance and forgiveness. It contains many passages of that sort: Mark 12:31 "Love your neighbor as yourself."; Matthew 6:14-15 "For if you forgive men when they sin against you, your heavenly Father will also forgive you. But if you do not forgive men their sins, your Father will not forgive your sins." Matthew 7:1 "Do not judge, or you too will be judged." Leviticus 19:18 "Do not seek revenge or bear a grudge against one of your people, but love your neighbor as yourself." Proverbs 10:12 "Hatred stirs up dissension, but love covers over

all wrongs." Although, as indicated, the Court cannot authoritatively determine the meaning of sacred writings, it is important to recognize that an objective reader of Mr. Owens' advertisement would see it in the context of the other concepts popularly understood as flowing from the Bible. This would tend to colour the advertisement as something falling below the standard prescribed in *Bell*.

[80] A second point concerning the Bible passages cited by Mr. Owens is that an objective observer would understand that their meaning and relevance for contemporary society can and would be assessed in a variety of ways. Some, like Mr. Owens himself, might see them as definitive revelations to the effect that God is opposed to certain gay sexual practices. Other people might see the passages as meaning the Bible opposes such practices but would consider that same-sex sexual activity is a sin no more heinous than various others identified in the text such as sexual immorality, idolatry, adultery and male prostitution. Others might contest the very meaning of the passages and suggest they refer to pederasty (a relationship between an older male partner and a youth) rather than same-sex relationships as understood in contemporary terms. Still others might acknowledge that the Bible opposes same-sex relationships but would see its dictates as so dated in time and rooted in ancient culture, or as so foreign to their own beliefs, as to be irrelevant. See: R. Scroggs, *The New Testament and Homosexuality,* (Philadelphia: Fortress Press, 1983) at pp. 7-16.

[81] The fact that the passages referred to in the advertisement can be seen in such a variety of ways makes them significantly different than the

hypothetical present day message referred to above, *i.e.* a message that "Homosexuals should be killed". Unlike the Bible text in issue, that sort of statement admits of only one meaning. This characteristic of the Bible passages also cuts against seeing them as coming within the scope of s. 14(1)(b).

[82] A third point, stressed by Mr. Owens and the interveners supporting him, is that the Bible passages in issue refer to *behaviour* said to be sinful or morally wrong and do not condemn the mere fact of gay men's sexual identity. In most contexts, I would have difficulty placing stock in what is sometimes referred to as the distinction between the "sin" and the "sinner." Sexuality and sexual practices are such intimately central aspects of an individual's identity that it is artificial to suggest that the practices of gays and lesbians in this regard can somehow be separated out from those individuals themselves. However, in the present circumstances, it is necessary to recognize that many people do make such a distinction and believe on moral or religious grounds that they can disapprove of the same-sex sexual practices without disapproving of gays and lesbians themselves. This fact is at least part of the overall context in which Mr. Owens' advertisement must be considered. Again this tends to shade the content of the advertisement away from it being the sort of message which falls within the scope of s. 14(1)(b) of the *Code*.

[83] As a result, despite its strong language, the Bible text referred to in the advertisement cannot be seen from an objective perspective as involving feeling and emotions that are as categorical or as loaded with the sort of

emotion canvassed in *Bell* as the respondents suggest and as the Board of Inquiry and the Court of Queen's Bench found. At least in the context at issue here, the Bible passages must be seen in a different light than a plain assertion made in contemporary times to the effect that "Homosexuality is evil and homosexuals should be killed."

3. The Advertisement as a Whole

[84] I have separately considered the two basic elements of Mr. Owens' advertisement – the stickmen and the Bible passages. It is now necessary to bring those two elements together and assess their global import.

[85] In my view, the core or gravamen of the advertisement is its first element – the Bible passages. As discussed above, in and of themselves and as presented here, they do not violate the *Code*. Given the benign design of the stickmen and the somewhat ambiguous meaning of the not permitted symbol, I do not believe that the second element of the advertisement transforms the advertisement as a whole into a message which meets the *Bell* standard. Indeed, the stickmen element of the advertisement can be seen as understating the literal meaning of the most extreme parts of the Bible text in that it suggests certain kinds of activity are not allowed rather than suggesting that gay men should be killed.

[86] Overall, although bluntly presented and doubtless upsetting to many, the essential message conveyed by the advertisement is not one which involves the ardent emotions and strong sense of detestation, calumny and vilification required by *Bell*.

[87] None of this is to say, of course, that the Bible passages referred to by Mr. Owens, or any other sacred text, can serve as a licence for acting unlawfully against gays and lesbians. Discrimination on the basis of sexual orientation is prohibited in relation to education, employment, housing, services and facilities by *The Saskatchewan Human Rights Code* and the *Canadian Human Rights Act*. The *Criminal Code* offers protection against assaults and threats of violence and, indeed, says in s. 718.2 that evidence an offence was motivated by bias, prejudice or hate based on sexual orientation is an aggravating factor for purposes of sentencing a criminal offender. The entire community can and should expect that all of these legislative provisions will be actively engaged to protect the dignity, rights and the security of gay men, lesbians, bi-sexual and trans-identified persons.

V. Conclusion

[88] I conclude that the appeal should be allowed. The publication of the advertisement, properly considered in its full context, did not offend s. 14(1)(b) of the *Code.*

[89] Mr. Owens represented himself in these proceedings. Therefore, in keeping with the traditional practice of the Court, there will be no order as to costs.

DATED at the City of Regina, in the Province of Saskatchewan, this 13th day of April, A.D. 2006.

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RICHARDS J.A.

I concur _____

SHERSTOBITOFF J.A.

I concur _____

SMITH J.A.