Court File No.: C70189

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

HIS MAJESTY THE KING

Appellant

AND:

WILLIAM WHATCOTT

Respondent

FACTUM ON INTERVENTION FOR FREE TO CARE

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I. OVERVIEW

1. This appeal requires the Court to interpret s. 319 of the *Criminal Code*, RSC 1985, c C-46. The Appellant's argument risks equivocating advocacy against a practice central to an identifiable group's identity with advocacy for the eradication of that group. Such an argument, if accepted, would stifle authentic dialogue and curtail the fundamental freedoms of all Canadians, including religious adherents and members of the LGBT community. Accepting these arguments could impose a harsh chill a significant range of expression, given that identifiable groups protected by s. 319 include those distinguished by religion, national or ethnic origin, age, sex, sexual orientation, and gender identity or expression. The position of the Free to Care Society of Canada ("Free to Care") is that Canadian democracy is built on multiculturalism and an understanding that groups can be free to disagree, yet live together peaceably. This foundation was implicit in the *Constitution Act, 1867* and made explicit in ss. 2(a), 2(b), and 27 of the *Charter of Rights and Freedoms* (the "*Charter*"). Section 319 must not be expanded beyond the narrow bounds which were essential to the finding in *R. v. Keegstra* that the provision was constitutional.

II. FREEDOM TO CRITICIZE IS INTEGRAL TO OUR DEMOCRATIC SOCIETY

A) The *Charter* Right to Freedom of Expression Chiefly Protects Unpopular Views

2. Freedom of expression predates the *Charter*. It is fundamental to parliamentary democracy and recognized in common law. The pre-*Charter* jurisprudence on the right to free expression should inform the "purposive approach" to the interpretation of *Charter* rights. It also illustrates the practical effect of enshrinement in the *Charter*, which was to provide a mechanism to protect the expression of unpopular opinions held by minority groups.

> *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 SCR 573 at para. 15.
> *Hunter et al. v. Southam Inc.*, [1984] 2 SCR 145 at 156.

3. One of the oldest defences of free expression, and first of three values underlying the *Charter*'s protection for freedom of expression, is that it is as necessary to arrive at truth. As articulated by John Milton in the 17th century: "[l]et [Truth] and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter?" This recognizes that yesterday's common-sense fact can become tomorrow's antiquated notion. In light of human fallibility, diverse opinions must be tolerated so that public debate can separate the true from the false.

> John Milton, *Areopagitica; A Speech for the Liberty of Unlicenc'd Printing, to the Parliament of England* (1644).
> *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 at 976.

4. The second foundational principle for the protection of free expression is that it is essential to the democratic process. If the legislature represents the public, then the public must have a means to deliberate. An engaged public "demands the condition of a virtually unobstructed access to and diffusion of ideas." Duff C.J. held that "it is axiomatic that the practice of this right of free public discussion of public affairs, notwithstanding its incidental mischiefs, is the breath of life for parliamentary institutions." Regardless of whether free expression leads to better decisions in practice, its is "a necessary feature of modern democracy." Free exchange of ideas is so essential to democratic government that it is "inseparable from our form of organization" and "its surrender or destruction would be the end of such a government."

> *Switzman v. Elbling and A.G. of Quebec*, [1957] SCR 285 at 306.
> *Reference Re Alberta Statutes - The Bank Taxation Act; The Credit of Alberta Regulation Act; and the Accurate News and Information Act*, [1938] SCR 100 at 132-33.
> *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 SCR 573 at 583.
> I. C. Rand, "Man's Right to Knowledge and its Free Use" (1953-1954) 10 U.T.L.J. 167 at 167.

5. The third principle recognizes the value of free expression, not only as a means, but as an end in itself. The freedom to think and express one's thoughts is essential to human flourishing.

"Freedom in thought and speech and disagreement in ideas and beliefs, on every conceivable subject, are of the essence of our life."

Boucher v. the King, [1951] SCR 265 at 288.

6. Section 2(b) did not create free expression; it has long been a part of Canada's legal and political heritage. Rather, s. 2(b) provided a means for those censored for unpopular views to seek recourse from the Courts. Prior to the *Charter*, Parliament and the legislatures served as the primary guardian of freedom of expression. However, for "powerful or majority groups legislative action may be a satisfactory remedy, but for small or unpopular minorities it is of little real value. Minorities are thrown back on the rights guaranteed by the law." Providing legal recourse for those with unpopular views, which is the specific value of constitutional codification, must animate the interpretation of s. 2(b).

W. Glen How, *The Case for a Canadian Bill or Rights*, 1948 26-5 Can. Bar Rev. 759 at 763.

B) Criticism of Meaningful Practices is Integral to the Canadian Constitutional Tradition

7. The Canadian project of protecting viewpoint diversity takes its first constitutional expression in the religious education protections of the *Constitution Act, 1867*. The protections preserved the right of each denomination to maintain separate schools to educate their children in their beliefs and practices. The peaceful coexistence of Protestants and Catholics in Canada is notable given the historical violence between Protestants and Catholics in other parts of the world.

Constitution Act, 1867 at s. 93.

8. Protestants and Catholics maintain practices which are integral to their respective identities. They are both known to hold and express beliefs in direct opposition to foundational practices of the other. Two examples are baptism and communion. First, there is disagreement

about the practice of infant baptism. Catholics maintain that it is "indispensably necessary" and that "parents ought to have their children baptized immediately after their birth." By contrast, some Protestant groups believe that to be baptized, one must be an adult and "demand it for themselves" which "excludes all infant baptism, the highest and chief abomination of the pope."

> *Catechism of the Catholic Church* at paras. 1250-52.
> Rev. Francis Spirago, *The Catechism Explained: An Exhaustive Explanation of the Christian Religion*, Post Falls: Mediatrix Press (2020) at 615-16.
> Lewis W. Spitz et al, eds., *The Protestant Reformation: Major Documents*, "Sattler, The Schleitheim Confession of Faith", St. Louis: Concordia Publishing House (1997) at 91.

9. Second, Catholics and Protestants (and sects within Protestantism) hold deep disagreements about receiving communion. For Catholics, the Eucharist is "the body and blood, together with the soul and divinity" of Jesus Christ. Some Protestants, on the other hand, view the Catholic practice as a "false teaching that the body and blood of Christ are literally present in the bread and wine of the Mass." It has even been described as "idolatry condemned by God" because "the bread is in it taken and adored as God."

> *Catechism of the Catholic Church* at para. 1374.
> Lewis W. Spitz et al, eds., *The Protestant Reformation: Major Documents*, "Farel and Calvin: The Geneva Confession", St. Louis: Concordia Publishing House (1997) at 119.
> John MacArthur, *The MacArthur New Testament Commentary: John 1–11*, Chicago: Moody Press (2006) at 259–60.

10. Historically, the disagreement between the denominations was so fervent that it erupted into violence, including the Thirty Years' War and the Glorious Revolution. Nevertheless, Canada's Constitution sought peace and harmony between the groups by protecting the ability of each to propagate their practices and their beliefs about those practices. Free to Care itself has both Catholic and Protestant supporters. Free to Care, and Canada itself, are proof that disagreement

even on fundamental matters of belief and practice need not be hateful, or even preclude productive cooperation on issues of shared vision.

Affidavit of Jojo Ruba at paras. 4-9, 28.

11. Implicit in the *Constitution Act, 1867* is an understanding that each group can disagree with the other, even about fundamental practices that form their identity, and is free to express that disagreement. This understanding was made explicit in the *Charter*. Section 2(a) protects "the right to declare religious beliefs openly and without fear of hindrance or reprisal." Together with s. 2(b) and s. 27, it provides legal safeguards to ensure a society composed of different cultural and religious viewpoints living together in dialogue. Much as s. 2(b) specifically benefits minority opinions, s. 2(a) "safeguards religious minorities form the threat of 'the tyranny of the majority'."

R. v. Big M Drug Mart Ltd., [1985] 1 SCR 295 at 336-37 (paras. 94, 96).

III. INTERPRETATION OF SECTION 319(2)

12. The Crown raises an argument, which if accepted, would expand the scope of s. 319(2) beyond the bounds of constitutional validity. The Crown argues that "[s]tating that gay male sex should cease to exist advocates the eradication of this group since sexual orientation and practice are central to its identity." The Crown's argument rests on two premises: 1) saying that a group should not exist is promoting hatred; and 2) advocating sexual abstinence between males is equivalent to advocating against the existence of gay men. Therefore, argues the Crown, to advocate against sex between men is the promotion of hatred against gay men.

Appellant's Factum at paras. 48-49.

13. First, advocacy against the existence of an identifiable group can constitute the promotion of hatred when it refers to genocide and murderous eradication. The principle does not extend to

persuasion of members of other groups. The purpose of s. 319(2) is to combat the harms of hate speech identified as ill-treatment escalating from a denial of rights to potential genocide. As examples of the potential harms of hatred, the Supreme Court pointed to "Yugoslavia, Cambodia, Rwanda, Darfur, or Uganda." The Court explained that "[h]ate speech lays the groundwork for later, broad attacks on vulnerable groups. These attacks can range from discrimination, to ostracism, segregation, deportation, violence and, in the most extreme cases, to genocide."

Saskatchewan (Human Rights Commission) v. Whatcott, 2013 SCC 11 at paras. 72-74.

14. Second, while the jurisprudence recognizes that the practice of homosexuality is integral to the identity of gay men, advocating sexual abstinence for gay men is not equivalent to arguing that gay men should not exist. There is a difference between permissible criticism of behaviours and criminal vilification of identifiable groups. The Supreme Court ruled that to run afoul of hate speech prohibitions, "expression targeting certain sexual behaviour" must be "framed in such a way as to expose persons of an identifiable sexual orientation to what is objectively viewed as detestation and vilification". In such a circumstance, the attack on the conduct becomes "a proxy for attacks on the group itself." The Supreme Court went as far as to say that individuals "are free to preach against same-sex activities." Their freedom to express such views is limited only by the "narrow requirement that they not be conveyed through hate speech." Indeed, the very existence of a significant part of Free to Care's constituency, namely lesbian and gay individuals who choose celibacy in accordance with their personal religious convictions, demonstrates that identity cannot be reduced to practice.

Saskatchewan (Human Rights Commission) v. Whatcott, 2013 SCC 11 at paras. 124, 163.
Motion Record, Tab 3, *Affidavit of Jojo Ruba* at paras. 4-8, 14-17, 26, 34.

15. The proposed approach also runs afoul of ss. 2(a) and 27 of the *Charter*. The Crown's argument, if accepted, would make adherents of the world's largest religions criminals for publishing religious texts. The Catechism of the Catholic Church states: "tradition has always declared that 'homosexual acts are intrinsically disordered.' The Qur'an states: "And remember when Lot scolded the men of his people, saying, 'Do you commit a shameful deed that no man has ever done before? You lust after men instead of women! You are certainly transgressors.'"

> *Catechism of the Catholic Church*, at para. 2357.
> *Qur'an*, trans. By Dr. Mustafa Khattab at 7:80-81.

16. Extending the bounds of s. 319(2) to the point that it prohibits moral exhortation and criticism would undermine the vision of Canadian society embodied in ss. 2(a), 2(b), and 27 of the *Charter*. Section 27, which requires the *Charter* to be interpreted so as to preserve Canada's multicultural heritage, protects distinctions among groups in Canada. In conjunction with ss. 2(a) and (b), s. 27 embodies a vision of Canada where groups with different beliefs and practices can live with each other, each free to believe, express, and practice as they feel obligated. Canadians originating from across the globe bring diverse views with them. Sections 2(a), 2(b), and 27 protect a society where those diverse views can co-exist peacefully and dialogue, including possible vigorous disagreement. Prohibiting moral criticism undermines authentic multiculturalism.

> *Andrews v. Law Society of British Columbia*, [1989] 1 SCR 143 at 171 (per McIntyre J. dissenting).

17. Extending the reach of s. 319(2) to criticism of conduct would also harm the LGBT community by chilling debates currently taking place within the community. Groups representing lesbian women have spoken out against being pressured into having sexual relationships with transgender women. On one side of the debate are lesbian feminists who hold that having sex with

women with female sexual organs is integral to their identity. On the other side are those that argue that refusing to have sex with trans-women is transphobic. This argument would be a crime if criticizing practices integral to an identifiable group's identity is criminal hate speech,

Motion Record, Tab 3, *Affidavit of Jojo Ruba* at para. 27.

18. Limiting authentic debate and discussion is particularly harmful to Christian members of the LGBT community. The codified right to free expression is of particular importance to minorities. The LGBT community is a minority of the population. Within that minority, Christians who adhere to biblical sexual ethics and practice and advocate for celibacy are a further minority. They depend on their *Charter*-guaranteed right to free expression to evangelize as they feel called to do. Expansion of the scope of s. 319(2) as is being contemplated would eviscerate that right.

See Motion Record, Tab 3, *Affidavit of Jojo Ruba* at paras. 4-8, 27.

19. To find that criticism of sexual practices is captured by s. 319(2) would expand the scope of the offence in a manner contrary to the rationale for upholding section 319(2) as constitutional. It would disregard the existence of same-sex attracted Canadians who choose abstinence in adherence to their beliefs, undermine s. 2(b)'s protection for minority viewpoints, including those in the LGBTQ community and stifle authentic dialogue essential to the societal vision enunciated by ss. 2(a), 2(b), and 27 of the *Charter*. Accordingly, Free to Care urges the Court against expanding the scope of s. 319 in such a manner.

DATED this 23rd day of May, 2023.

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TABLE OF AUTHORITIES

LEGISLATION RELIED UPON

N/A