# QUEEN'S BENCH FOR SASKATCHEWAN

Citation: **2007 SKQB 450**

Date: **2007 12 11**
Docket: Q.B. 923/2005
Judicial Centre: Regina

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BETWEEN:

WILLIAM WHATCOTT

APPELLANT

- and -

SASKATCHEWAN HUMAN RIGHTS TRIBUNAL,
SASKATCHEWAN HUMAN RIGHTS COMMISSION,
JAMES KOMAR, BRENDAN WALLACE,
GUY TAYLOR and KATHY HAMRE

RESPONDENTS

- and -

ATTORNEY GENERAL FOR SASKATCHEWAN

INTERVENER

**Counsel:**

| | |
|---|---|
| Thomas A. Schuck | for the appellant |
| Janice E. Gingell | for the respondent |
| J. Thomson Irvine | for the intervener |

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JUDGMENT
December 11, 2007

KOVACH J.

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[1] The appeal before this Court is in relation to a decision of the Saskatchewan Human Rights Tribunal (the "Tribunal") ruling that William Whatcott (the "appellant") was in contravention of s. 14 of *The Saskatchewan*

*Human Rights Code*, S.S. 1979, c. S-24.1 (the "*Code*"). Section 14 of the *Code* states:

> **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.

## FACTS

[2] The appellant's breach of s. 14 of the *Code* related to the distribution of flyers which, in the opinion of the Saskatchewan Human Rights Commission, promoted hatred within the meaning of s. 14. As the content of these flyers are central to the issues one must examine them individually.

[3] The first flyer ("Flyer A") is entitled "Keep Homosexuality out of Saskatoon's Public Schools!". The flyer indicates a committee on "Gay, Lesbian, Bisexual and Transgendered Issues", set up by the Saskatoon Public School Board, has recommended information on homosexuality be included in the curriculum and school libraries. The flyer goes on to make the following statements:

> . . . sexual politics of the perverted type . . . Now the homosexuals want to share their filth and propaganda with Saskatchewan's children.
>
> . . . We also believe that for sodomites and lesbians who want to remain in their lifestyle and proselytize vulnerable young people that civil law should discriminate against them. In 1968 it was illegal to engage in homosexual acts, now it is almost becoming illegal to question any of their sick desires. Our children will pay the price in disease, death, abuse and ultimately eternal judgement if we do not say no to the sodomite desire to socialize your children into accepting something that is clearly wrong.



[4] The Second flyer ("Flyer B") is entitled "Sodomites in our Public Schools" and has the flowing hand written comments on the flyer in addition to the printed messages:

> Break the Silence! Born Gay? No Way! Homosexual sex is about risky & addictive behaviour!
>
> Break the Silence! Sodomites are 430 times more likely to acquire Aids & 3 times more likely to sexually abuse children!

[5] In addition to these hand written comments the following comments are found in the printed portion of the flyer:

> The Bible is clear that homosexuality is an abomination. ' Be not deceived neither fornicators, nor idolaters, nor adulterers, nor sodomites will inherit the kingdom of heaven' 1 Cor 6:9. . . .
>
> . . . Our acceptance of homosexuality and our toleration of its promotion in our school system will lead to the early death and morbidity of many children. . .

[6] The third and fourth flyers ("Flyers C and D"), which are identical, are a copy from the classified section of a gay magazine. The hand writing at the top of the flyer states:

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

[7] The reference to men seeking boys arose from an add that stated, "searching for boys/men for penpals, friendship exchanging video, pics, magazines and anything more". In the opinion of the appellant the reference to boys is literal and refers directly to children.

[8] Whether these flyers were distributed by the appellant is not at issue as the Tribunal proceeded on an agreed statement of facts. The sole issue before the Tribunal was whether the flyers contravened s. 14 of the *Code*. More specifically, the issue before the Tribunal, although not characterized as such, is whether the flyers contravened s. 14(1)(b) of the *Code*.

[9] The Tribunal, in their written decision, never identified which portion of s.14 of the *Code* was contravened through the distribution of the flyers. However, no evidence was led in relation to the flyers depriving, or tending to deprive, homosexuals of rights they were entitled to under law which could have led the Tribunal to conclude the flyers violated s. 14(1)(a) of the *Code*. At the human

rights hearing the evidence put forth demonstrated how the flyers affected each of the complainants emotionally and expert evidence relating to discrimination against homosexuals, therefore, it is clear the Tribunal concluded the flyers violated s. 14(1)(b) as opposed to s. 14(1)(a) of the *Code*.



## ISSUES

**[10]** As previously stated, the Tribunal found the distribution of these flyers by the appellant amounted to a violation of s. 14(1)(b) of the *Code*. The appellant's raised several issues on appeal but there was considerable overlap. The essential grounds on appeal can be reduced to two key points:

1) Did the Tribunal err in law by concluding the flyers conveyed hatred or otherwise contravened s. 14(1)(b) of the *Code*?

2) Does s. 14(1)(b) of the *Code* contravene the appellant's freedom of religion pursuant to s. 2(a) of *The Charter of Rights and Freedoms* (the "*Charter*")?

## PRELIMINARY CONSIDERATIONS

### *a. Jurisdiction*

[11] Prior to considering the issues stated above one must establish this Court has appellate jurisdiction over the matter. Jurisdiction for the Court of Queen's Bench to hear an appeal from a human rights tribunal decision arises *via* s. 32(1) of the *Code*, which states:

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



[12] Section 32 of the *Code* allows for an appeal to the Court of Queen's Bench on questions of law. In *Hellquest v. Owens*, 2006 SKCA 41; [2006] 7 W.W.R. 433 (Sask. C.A.) Richards J.A. held interpretation of the *Code* is a question of law. Furthermore, the issue in *Owens* was the interpretation of s. 14 of the *Code* which makes it directly on point. In para. 29 of *Owens* Richards J.A. states:

> 29 . . . 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: *Farm Credit Corp. v. Valley Beef Producers Co-operative Ltd.*, [2002] 11 W.W.R. 587 (Sask. C.A.) at paras. 96-106; *Trinity Western University v. College of Teachers (British Columbia)*, [2001] 1 S.C.R. 772 (S.C.C.) at para. 18.

[13] *Owens, supra*, and the appeal before this Court both relate to interpretation of s. 14 of the *Code* and the relationship between s. 14 and the *Charter*. As a result, this Court has jurisdiction to hear the matter before it.

***b. Standard of Review***

**[14]** When the Tribunal's reasons for judgement were provided the decision of the Saskatchewan Court of Appeal in *Owens*, *supra*, was not yet released. The reasons provided by Richards J.A. are clear in ruling the appropriate standard of review is one of correctness. In paras. 30 to 37 of *Owens* Richards J.A. states:

> 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 (Minister of Employment and Immigration)*, [1998] 1 S.C.R. 982 (S.C.C.) must be applied in order to determine the applicable standard of review. See: *Q. v. College of Physicians and Surgeons (British Columbia),* [2003] 1 S.C.R. 226 (S.C.C.) 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 dignity 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.

[15] The appropriate standard of review for an appellate court when considering if material promotes hatred or otherwise contravenes s.14(1)(b) of the *Code* is one of correctness. The same standard of review, correctness, is appropriate when considering if s. 14 of the *Code* contravenes the appellant's right to freedom of religion under the *Charter*.

[16] Accordingly, the appeal will proceed on the basis the correctness standard of review is applicable to both issues.



## ANALYSIS

**1) Did the Tribunal err in law by concluding the flyers conveyed hatred or otherwise contravened s. 14(1)(b) of the *Code*?**

[17] In order to determine whether the flyers expose homosexuals to hatred, belittlement, ridicule or otherwise affronted their dignity one must first consider the meaning and extent of these words. Once again it is *Owens*, *supra*, that provides guidance as to how these terms should be interpreted.

[18] In *Owens, supra*, Richards J.A. referred to the authorities that are relevant in considering the meaning of s.14(1)(b). The first authority was *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892, which considered s.13(1) of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6:

> **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.



[19] The issue in *Taylor*, *supra*, was whether s.13(1) of the *Canadian Human Rights Act,* was a reasonable limitation on the right of freedom of expression guaranteed by the *Charter*. The Supreme Court of Canada answered in the affirmative. However, *Taylor* did recognize, as stated in para. 49 of *Owen*, *supra*, that:

> 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."

[20] The second authority referred to in *Owens*, *supra*, relating to the meaning of s.14(1)(b) of the *Code* was *Saskatchewan (Human Rights Commission) v. Bell*, [1994] 5 W.W.R. (Sask. C.A.). In *Bell* the Saskatchewan Court of Appeal considered whether s.14(1)(b) of the *Code* was a reasonable limit on freedom of expression which was answered in the affirmative. Richards J.A. in *Owens* made the following comments about the intersection between *Bell* and *Taylor*, *supra*, at para. 52 and 53:

> 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.



[21] It is clear from *Owens, supra*, for the flyers distributed by the appellant to contravene s.14(1)(b) of the *Code* they must be the sort of communication that involves extreme feelings and strong emotions of detestation, calumny and vilification. This being said, and remembering the appropriate standard of review is one of correctness, one must go on to consider each of the flyers individually in relation to s.14(1)(b) of the *Code*.

*Flyer A*

[22] Flyer A makes clear references to homosexuals as paedophiles or molesters of children. There is no other meaning which can be derived from alleging children will pay the price in abuse or that sodomites want to proselytize young children. The question then becomes whether alluding homosexuals are paedophiles amounts to conveying extreme feelings and strong emotions of detestation, calumny and vilification as required by *Owens, supra*.

[23] There is no doubt paedophile and abuse of children is an action which Canadian society as a whole views as extremely vile and detestable. The Tribunal was correct in concluding Flyer A contravened s.14(1)(b) of the *Code*. I find this to be the case in spite of the fact the Tribunal did not have the benefit of the explanation in *Owens, supra*, respecting s.14(1)(b) of the *Code*.



*Flyer B*

[24] Once again, Flyer B makes reference to homosexuals sexually abusing children. The hand written message at the top of Flyer B states homosexuals are three times more likely to abuse children. Granted this statement does not say all homosexuals sexually abuse children but it clearly infers the act is more prevalent in the homosexual community. The Tribunal was correct in concluding Flyer B exposed the homosexual community to hatred in the extreme sense contemplated by *Owen*, *supra*.

*Flyers C and D*

[25] Flyers C and D, in hand writing, say Saskatchewan's largest gay magazine allows ads for men seeking boys. The appellant was clearly referring to boys as young children. Once again, the flyers distributed by the appellant make reference to homosexuals as a group that sexually desires and abuses young children. The Tribunal was correct in concluding the distribution of Flyers C and D amounted a contravention of s.14(1)(b) of the *Code*. I find this to be the case even when considering *Owens*, *supra*, which was released subsequent to the Tribunal's decision.

*The Flyers and Religious Content*



[26] All of the flyers distributed by the appellant had religious references included. These religious references refer to homosexuality as a sin. None of the biblical references were directly related to the allusion made in the flyers that homosexual people sexually abuse children. Although the Tribunal decision was unclear in what weight, if any, the biblical references carried in their conclusion the point is mute. The references in all the flyers to homosexuals, as a group, sexually molesting children were not connected to the biblical aspects of the flyer in any logical manner. The flyers contravene s.14(1)(b) because of these references and not their religious contents or opinion.

**2) Does s. 14(1)(b) of the *Code* contravene the appellant's freedom of religion pursuant to s. 2(a) of *The Charter of Rights and Freedoms* (the "*Charter*")?**

[27] The appellant contends s.14(1)(b) contravenes his right to freedom of religion pursuant to s.2(a) of the *Charter*. In *Owens*, *supra*, the Saskatchewan Court of Appeal recognized s.14(1)(b) is a justifiable limit on religious speech. At para. 57, of *Owens* Richards J.A. states:

> 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: *Attis v. New Brunswick District No. 15 Board of Education,* [1996] 1 S.C.R. 825 (S.C.C.).



[28] The appellant's assertion s.14(1)(b) of the *Code* violates his freedom of religion may be correct but *Owens*, *supra*, recognizes s.14(1)(b) is a justifiable limit on the *Charter* right.

## CONCLUSION

**[29]** The decision of the Tribunal was correct. Granted the Tribunal did not consider *Owens*, *supra*, when coming to their decision as it had not yet been released. The Tribunal's decision, when analyzed in the light of *Owens* stands up to the appropriate standard of review which is correctness. The decision of the Tribunal is upheld as the distribution of the flyers was a contravention of s.14(1)(b) of the *Code*.

J.
F.J. Kovach