S.C.C. Court File No. 39041

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE QUEBEC COURT OF APPEAL)

B E T W E E N:

MIKE WARD

APPELLANT

-and-

COMMISSION DES DROITS DE LA PERSONNE ET DES DROITS DE LA JEUNESSE

RESPONDENT
(Respondent)

-and-

SYLVIE GABRIEL, STEEVE LAVOIE, JÉRÉMY GABRIEL

INTERVENERS
(Mis-en-Cause)

FACTUM OF THE APPELLANT, MIKE WARD

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW AND STATEMENT OF FACTS

1. Applicant agrees with the statement of facts in the dissenting judgment of Madam Justice Manon Savard at paragraphs 10-17.[1]

2. However, he considers it necessary to add certain elements.

3. Stand-up comedy may always have existed, but in recent years it has become a recognized and acclaimed art form.

4. It is often mordant, crude and even cruel – comedy usually appeals to the public only when it is biting, sarcastic and even outrageous.

5. Applicant has worked as a stand-up comedian since the 1990s; he has been very successful, winning awards and praise in Quebec, in Canada and abroad.

6. The Complainant, Mr. Gabriel, was born in 1996 with a handicap called Treachers-Collins syndrome, and became a popular singer during his childhood.

7. Between 2010 and 2014 when proceedings started, Applicant's routines concerning Mr. Gabriel were popular and appreciated by audiences.

8. Applicant received no complaints from Mr. Gabriel until the notice of action in 2013.

9. Applicant's purpose – to deflate the "sacred cows of Quebec society", of which Mr. Gabriel was only one of many, was clearly a laudable and important one with a clear social purpose.

10. Mr. Gabriel was included in the list of "sacred cows" not because of his age or his handicap, but because the publicity and fame he achieved and the uncritical reverence in which he was held by parts of Quebec society; all levels of court agreed with this point and affirmed that the age or the handicap were not the reason Mr. Gabriel was selected.

11. It is true that the majority in the Court of Appeal tergiversated on this point, but the Human Rights Tribunal judgment was absolutely clear at paragraph 86:

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1 Judgment and Order of the Court of Appeal of Quebec dated November 28, 2019, **[Appellant's Record ("A.R"*)*, Tab 2]**.

> À la lumière de l'ensemble de la preuve, dont le numéro du spectacle "Mike Ward s'eXpose" et le témoignage de monsieur Ward, le Tribunal conclut que, selon la prépondérance des probabilités, c'est parce qu'il est une personnalité publique qui attire la sympathie du public et paraît "intouchable", comme Grégory Charles ou Céline Dion, que Jérémy a été prise pour cible. Il n'a pas choisi Jérémy à cause de son handicap.[2]

12. The dissent in the Court of Appeal was also categoric about this.

13. The other "sacred cows" selected, who included Guy A. Lepage, Louis-Jose Houde, Rene Angélil, Grégory Charles, Jacques Languirand, Ariane Moffat and Céline Dion, were also mocked for their physical traits and their personal characteristics.

14. At no time was it claimed that Mr. Gabriel's age was a factor in Appellant's routine and it is clear that the fact that he was a minor was irrelevant to the allegation of discrimination; age discrimination was simply not raised.

15. Mr. Gabriel was in the public domain from the time he sang for Celine Dion and the Pope (2005 to 2009).

16. He was far from unhappy to be in the public domain, and in fact one of his unsuccessful claims before the Tribunal was that Appellant had damaged his public career.

17. As an artist in the public domain, he was as open to criticism and satire as the other "sacred cows" and in fact was treated in the same way.

18. *L'Association des Professionels de l'Industrie de l'Humour* was granted leave to intervene in the Court of Appeal, and advanced arguments favourable to Applicant's position based on artistic freedom.

19. Applicant at all times invoked both his artistic freedom and the more general freedom of expression; he also denied, from the start, the existence of discrimination and thus the jurisdiction of the Tribunal.

20. He asks that the action against him be dismissed.

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[2] Judgement of the Human Right Tribunal, dated July 20 2016 **[AR Tab 1]**.

PART II – STATEMENT OF THE QUESTIONS IN ISSUE

1. Does political or artistic speech mentioning, or mocking, personal characteristics amount to discrimination, giving the Human Rights Tribunal jurisdiction to grant redress?
2. Is Applicant's comedy routine justified as free speech under the Quebec Charter of Rights and Freedoms?
3. Does artistic freedom merit the same protection as political freedom?
4. Could punitive damages be awarded?

PART III – STATEMENT OF ARGUMENT

Standard of Review:

21. Both the majority and minority judgments of the Court of Appeal concluded that the standard of review of the Tribunal's decision was reasonableness.

22. While Applicant submits the result is the same under any standard, the position taken by both the minority and the majority appears incorrect following the judgment *Minister of Citizenship and Immigration v. Vavilov*[3] and *Bell Canada v. P.G. Canada*[4] rendered in December 2019, and the standard should be held to be correctness.

23. This is so firstly because the issue is clearly one concerning the frontiers of the Tribunal's jurisdiction which depends on proof of "discrimination" and because the reliance on "expertise" of the Human Rights Tribunal by the Court of Appeal is no longer sustainable.

24. At paragraph 31 of *Vavilov, supra*, we read:

> [31] We wish to emphasize that because these reasons adopt a presumption of reasonableness as the starting point, expertise is no longer relevant to a determination of the standard of review as it was in the contextual analysis. However, we are not doing away with the role of expertise in administrative decision making. This consideration is simply folded into the new starting point and, as explained below, expertise remains a relevant consideration in conducting reasonableness review.

25. Paragraph 63 of *Vavilov*, *supra* reads:

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[3] *Minister of Citizenship and Immigration v. Vavilov* [2019] SCC 65.
[4] *Bell Canada v. P.G. Canada* [2019] SCC 66.

> [63] Finally, the rule of law requires that the correctness standard be applied in order to resolve questions regarding the jurisdictional boundaries between two or more administrative bodies: *Dunsmuir*, para. 61. One such question arose in *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*, 2000 SCC 14, [2000] 1 S.C.R. 360, in which the issue was the jurisdiction of a labour arbitrator to consider matters of police discipline and dismissal that were otherwise subject to a comprehensive legislative regime. Similarly, in *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Quebec (Attorney General)*, 2004 SCC 39, [2004] 2 S.C.R. 185, the Court considered a jurisdictional dispute between a labour arbitrator and the Quebec Human Rights Tribunal.

26. The same rationale would seem compelling for determining the border between the Human Rights Tribunal and the courts of general jurisdiction which deal with libel.

27. Another reason for a correctness standard is the part of *Vavilov* which concerns statutory appeals; paragraph 37 of *Vavilov* states:

> [37] It should therefore be recognized that, where the legislature has provided for an appeal from an administrative decision to a court, a court hearing such an appeal is to apply appellate standards of review to the decision. This means that the applicable standard is to be determined with reference to the nature of the question and to this Court's jurisprudence on appellate standards of review. Where, for example, a court is hearing an appeal from an administrative decision, it would, in considering questions of law, including questions of statutory interpretation and those concerning the scope of a decision maker's authority, apply the standard of correctness in accordance with *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 8. Where the scope of the statutory appeal includes questions of fact, the appellate standard of review for those questions is palpable and overriding error (as it is for questions of mixed fact and law where the legal principle is not readily extricable): see *Housen*, at paras. 10, 19 and 26-37. Of course, should a legislature intend that a different standard of review apply in a statutory appeal, it is always free to make that intention known by prescribing the applicable standard through statute.

28. Section 132 of the *Charter of Human Rights and Freedoms* provides for an appeal with leave from the Human Rights Tribunal to the Court of Appeal:

> 132. Any final decision of the Tribunal may be appealed from to the Court of Appeal with leave from one of the judges thereof.

29. In the present case virtually, everything turns on law.

30. There is no dispute as to the content of Appellant's performances nor as to the nature of the "sacred cow" series of shows; the debate turns on whether these productions fit the definition of discrimination and what role the principle of freedom of expression plays in determining this.

31. These are questions of law; the existence of a factual context does not transform them into questions of fact or mixed questions and virtually any case before the courts has a factual context, but many cases like this one are in essence based on disputes as to law.

32. The Court of Appeal hears appeals from the Human Rights Tribunal; it does not perform judicial review.

33. There is therefore no particular deference to be accorded to the Tribunal in view of *Vavilov* and the nature of the questions before the Court.

34. Finally, the questions raised by this appeal and, in particular, freedom of expression in the artistic context and the notion of discrimination as defined below in paragraph 39, qualify as questions of law of central importance to the legal system as a whole[5] such questions require uniform answers across the country and are judged on a standard of correctness.

35. It follows that paragraph 146 of the majority judgment of the Court of Appeal is incorrect and affects the majority's reasoning in the rest of the judgment; there is little room for deference on these questions of law.

36. In the event any part of the case was to be judged under the standard of reasonableness, it is submitted that the decision is unreasonable for reasons which will be expounded below.

Issue 1 – Does political or artistic speech mentioning or mocking personal characteristics amount to discrimination, giving the Human Rights Tribunal jurisdiction to grant redress?

37. The question before the Court was whether Applicant's comments were discriminatory, not whether they were hurtful or libelous; the Tribunal has jurisdiction only for discrimination and does not have the power of a court of general jurisdiction to decide other issues.

[5] *Alberta v. University of Calgary,* 2016 2 SCR 555; *Mouvement Laïque Québécois v. Saguenay,* 2015 2 SCR 3, 2015 SCC 16.

38. In her dissent Madam Justice Savard stressed the importance of the limits of the Tribunal's power; in paragraph 6 she states:

> [6] Contrairement à la coutume, il y a lieu de préciser dès le départ ce sur quoi *ne* porte *pas* le présent pourvoi. Il ne s'agit pas de déterminer si les propos tenus par l'appelant, qu'il veut provocants, insolents et dérangeants, sont moralement condamnables ou même injurieux. Il ne s'agit pas, non plus, de déterminer si, en fonction de mes valeurs personnelles, j'estime que ceux-ci méritent même d'être prononcés ou doivent être dénoncés. Comme la Cour l'a déjà écrit, il ne revient pas aux tribunaux d'agir à titre d'arbitre en matière de courtoisie, de politesse ou de bon goût. Ce n'est pas là le débat soulevé par le présent pourvoi, débat qui ne doit pas être teinté par les seules émotions, aussi légitimes qu'elles puissent être, qu'est de nature à susciter ce que l'appelant qualifie d'humour.

39. Discrimination under Art. 10 of the *Quebec Charter*[6] exists when (a) there is distinctive exclusion or preference; (b) based on a forbidden ground (c) which nullifies or impairs the exercise of human rights and freedoms (par. 46, Savard J.A.); all three conditions must imperatively be met for a finding of "discrimination".

40. It was found by the trial judge that the forbidden ground (handicap) had nothing to do with the choice of Jeremy Gabriel as one of the "sacred cows" Applicant sought to mock; the handicap was indeed mentioned in the various routines, but Mr. Gabriel became a subject because of his notoriety as an artist.

41. It is submitted that the mere mention of the existence of a prohibited ground i.e. – that someone is handicapped, gay, or belongs to a race, ethnic group or religion does not create discrimination, especially if that fact is known; *Quebec v. Bombardier.*[7]

42. To make a simple mention tantamount to discrimination would be directly contrary to *Quebec v. Bombardier supra*; it would also be contrary to common sense as it would be impossible to discuss safely the enumerated categories of discrimination.

43. Such remarks may constitute libel or grievous insult in certain cases but this would be outside the Tribunal's scope.

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[6] *Charter of Human Rights and Freedoms,* CQLR c C-12, Art. 10.
[7] *Quebec v. Bombardier*, 2015 2 S.C.R. 3.

44. In any event, the finding by the Tribunal that Mr. Gabriel's reputation was not harmed would seem to preclude a finding of libel (par. 70 Savard, J.A.); but this is not at issue in this case as Appellant was not sued in libel before the appropriate court.

45. Mr. Gabriel's successful career was grounded on his handicap by him and his parents (Savard J.A. par. 72); the Tribunal's and the majority's decision in the Court of Appeal would make any severe or irreverent criticism of him fraught with danger.

46. Yet it cannot be that such criticism amounts to "discrimination" and that any public artist is sheltered from it.

47. Paragraphs 77 and 78 of Madam Justice Savard's dissent sum this up perfectly:

> [77] À mon avis, cette égalité réelle ne requiert pas d'ériger en principe l'interdiction de tenir des propos à teneur humoristique référant aux caractéristiques personnelles protégées d'une personnalité publique (tels le sexe, le handicap, la religion, la langue, l'orientation politique, etc.) lorsque ces caractéristiques sont au cœur de l'aspect public de la personne. Tout est une question de contexte, que le Juge a omis de considérer en concluant qu'il y avait ici une distinction au sens de l'article 10 de la *Charte* du seul fait que le plaignant était la seule personnalité publique dont les caractéristiques physiques étaient liées à son handicap.
>
> [78] L'égalité réelle exige qu'une personne ne soit pas privée d'avantages, de services ou de bénéfices accordés à d'autres ou ne se voit pas imposer un fardeau différent en raison d'un motif prohibé par la *Charte* (handicap, origine ethnique, croyance religieuse, sexe, etc.). Ici, le fardeau imposé au plaignant, comme à toutes les personnalités publiques ciblées par l'appelant, ne découle pas de son handicap, mais de la teneur des propos de l'appelant qui, à l'égard de toutes, se veulent choquants, provocants et insolents. Ils sont peut-être diffamatoires (ce sur quoi le Juge, faute de compétence, ne pouvait se prononcer), mais pas discriminatoires.

48. The difference between strong criticism and discrimination can be illustrated by two contrasting cases *Saskatchewan Human Rights Commission v. Whatcott*[8], and *Calego International inc. v. Commission des droits de la personne et des droits de la jeunesse.*[9]

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[8] *Saskatchewan Human Rights Commission v. Whatcott,* [2013] 1 S.C.R. 467.

49. In *Whatcott*, *supra*, the Court set aside a human rights law which prohibited ridiculing or belittling people on prohibited grounds; only hate or vitriolic attacks tantamount to hate remained a prohibited form of speech.

50. In paragraphs 91 and 92 Mr. Justice Rothstein explained this distinction:

> [91] There may be circumstances where expression that "ridicules" members of a protected group goes beyond humour or satire and risks exposing the person to detestation and vilification on the basis of a prohibited ground of discrimination. In such circumstances, however, the risk results from the intensity of the ridicule reaching a level where the target becomes exposed to hatred. While ridicule, taken to the extreme, can conceivably lead to exposure to hatred, in my view, "ridicule" in its ordinary sense would not typically have the potential to lead to the discrimination that the legislature seeks to address.
>
> [92] Thus, in order to be rationally connected to the legislative objective of eliminating discrimination and the other societal harms of hate speech, s. 14(1)(b) must only prohibit expression that is likely to cause those effects through exposure to hatred. I find that the words "ridicules, belittles or otherwise affronts the dignity of" in s. 14(1)(b) are not rationally connected to the legislative purpose of addressing systemic discrimination of protected groups. The manner in which they infringe freedom of expression cannot be justified under s. 1 of the *Charter* and, consequently, they are constitutionally invalid.

51. No Court or party suggested that Appellant's show amounted to 'hate' and therefore it cannot amount to discrimination.

52. In *Calego, supra*, the Court made a finding of actual discrimination; as the angry, racist comments were made:

a) By the boss;
b) At work;
c) To Chinese employees only, who were found to be particularly vulnerable;

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[9] *Calego International inc. v. Commission des droits de la personne et des droits de la jeunesse* 2013 QCCA 924.

d) Without any context of humour or artistic performance, but rather as a serious attack.

53. To find discrimination in the present case would give the Human Rights Tribunal jurisdiction over any speech that in the Tribunal's opinion is not in conformity with *Charter* values; not only would we have to abstain from discriminatory acts, which is reasonable, but it would not be safe to disagree with the anti-discrimination laws, to point out exaggerations and excesses, or to mock them.

54. This point was eloquently made at par. 138 of Savard J.A.'s dissent:

> [138] Je termine en reproduisant *in extenso* ce qu'écrivait en *obiter* la juge Bich dans l'affaire *Diffusion Métromédia CMR inc. c. Bou Malhab* (arrêt prononcé par la Cour avant l'arrêt *Whatcott*). Ses propos, transposés à l'égard des personnes souffrant d'un handicap, résument bien l'approche que j'adopte ici :
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> > [105] Il ne s'agit pas évidemment pas de cautionner ici les propos racistes, pas plus du reste que les propos homophobes ou sexistes ou tout propos visant à attaquer un groupe ou à le dépendre d'une façon péjorative sur la base d'un motif de discrimination interdit par l'article 15 de la *Charte canadienne des droits et libertés* ou l'article 10 de la *Charte des droits et libertés de la personne*. D'un côté, il faut rappeler que le droit criminel limite le discours haineux (qui mine les valeurs mêmes que promeut la liberté d'expression) et que l'action en diffamation demeure elle aussi, […], un mode de réprobation juridique. On devra tenir compte aussi, entre individus, des restrictions résultant de l'hypothèse du harcèlement, qui peut être verbal, au sens de l'article 10.1 de la Charte des droits et libertés de la personne (ce dont il n'est pas question ici). Mais de l'autre côté, toutes ces limites étant posées, il ne peut être question de faire de l'article 15 de la *Charte canadienne des droits et libertés* ou des articles 10 et 10.1 de la *Charte des droits et libertés de la personne* la base d'une nouvelle forme de mise à l'index. **Bref, on ne peut pas agir selon nos convictions discriminatoires, mais on peut toujours les exprimer, sans franchir un certain seuil.**[10]
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> [Soulignements ajoutés]

55. It is submitted that the legislator did not intend to give the Human Rights Tribunal broad powers of censorship, but it limited it to "discrimination" as defined above in paragraph 39.

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[10] Judgment of Court of Appeal, **[A.R., Tab 2]**.

56. Applicant's routine was simply not discriminatory and was therefore outside the Tribunal's jurisdiction; the decision must therefore be annulled independently of the following arguments concerning freedom of expression.

Issue 2 - Is Applicant's comedy routine justified as free speech under the Quebec Charter of Rights and Freedoms?

57. Both the majority and the dissenting judgments concurred that freedom of expression was not an argument to justify an otherwise discriminatory action; rather it was to be considered in the course of determining whether the discrimination exists.

58. If comments were justified as free expression, they were not discriminatory.

59. Freedom of expression had to be weighed against Mr. Gabriel's claim that his dignity was not respected; neither of these basic principles, freedom of expression or dignity had automatic precedence over the other.

60. Freedom of expression is not absolute, but its great importance has been affirmed many times: *Libman c. Québec (P.G.)*[11]; *Whatcott*, *Ville de Montreal v. Cabaret Sex Appeal*.

61. The majority judges in the present case did not err when they said at paragraph 197:

> [197] L'importance de la liberté d'expression est bien établie. Elle vise l'épanouissement personnel, la recherche de la vérité par l'échange ouvert d'idées et le discours politique qui est fondamental pour la démocratie. Elle permet aux individus de s'émanciper, de créer et de s'informer, elle encourage la circulation d'idées nouvelles, elle autorise la critique et favorise l'émergence de la vérité. Mais il ne s'agit pas d'une liberté absolue.

62. In his shows, Applicant sought to bring down to size what he considered to be the "sacred cows" of our society.

63. This is surely central to the purpose of free expression and the majority in the Court of Appeal was incorrect when it stated at par. 208 that the public interest was not involved; there is an

[11] *Libman c. Québec (P.G.),* [1997] 3 S.C.R. 569; *Whatcott*, *supra*, *Ville de Montreal v. Cabaret Sex Appeal*, [1994] R.J.Q. 2133 (Que. C.A.).

important public interest in permitting the expression of unorthodox or startling views and in deflating beliefs or individuals one considers to be "sacred cows".

64. Public interest was broadly defined in *Grant v. Torstar Corporation*[12], in paragraph 106:

> [106] Public interest is not confined to publications on government and political matters, as it is in Australia and New Zealand. Nor is it necessary that the plaintiff be a "public figure", as in the American jurisprudence since *Sullivan*. Both qualifications cast the public interest too narrowly. The public has a genuine stake in knowing about many matters, ranging from science and the arts to the environment, religion and morality. The democratic interest in such wide-ranging public debate must be reflected in the jurisprudence. (Underlining ours)

65. Similar findings were made in *Calego, supra* at paragraph 114 and especially in *WIC Radio Ltd. v. Simpson.*[13]

66. In view of this definition it is difficult to imagine that deflating "sacred cows" especially in the artistic world could not be in the public interest; it is the very essence of all satire.

67. Indeed, freedom of expression is only effective to the extent that it legitimizes speech many consider unpalatable or outrageous: *Zundel v. The Queen*[14], *Whatcott;* **those who express conventional views and ideas do not need constitutional protections**.

68. In the exercise of balancing freedom of expression with the right to dignity one would have to consider how central to the purposes of freedom of expression is the present case.

69. One would also have to consider that it is explicitly a stand-up comedy show for adults with no claim to saying the truth, no captive audience that does not wish to hear it and no difference between the comments on Mr. Gabriel and the other "sacred cows" (e.g. Céline Dion).

70. The explicit nature of the comedy show makes it all the more unlikely that anyone would believe the content as fact or that it would breach anyone's right to dignity.

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[12] *Grant v. Torstar Corporation*, [2009] CSC 61.
[13] *WIC Radio Ltd. v. Simpson,* 2008 SCC 40, 2008 SCR 420.
[14] *Zundel v. The Queen* 1992 2 S.C.R. 731.

71. In *Bou Malhab v. Diffusion Metromedia CMR 2011*[15], a far less meritorious form of expression was found not to be libellous because it could not be believed; surely a show advertised as a comedy could not be taken literally.

72. For instance, when Appellant described his target as "intuable" it is not remotely rational to think that he wanted to see him dead or that he ever attempted to kill him; that is clearly comic fiction and nothing more.

73. Applicant obviously never tried, nor wanted, to kill Mr. Gabriel, and reference to him as "intuable" were clearly made in jest, as are references to his auditory equipment as a "sub-woofer"; this clearly only applies to Appellant's comedic performances.

74. One would also have to consider freedom of expression jurisprudence, notably *Whatcott, supra, Cabaret Sex Appeal, supra, Libman supra, Zundel, supra* and the very recent case *UAlberta Pro-Life v. Governors of University of Alberta.*[16]

75. These cases have espoused a broad, permissive view of freedom of expression, limited only by notions akin to hate.[17.]

76. It is useful to consider par. 121-122 of *UAlberta Pro-Life, supra* concerning *DSU v. Dolphin Deliveries:*[18]

> [121] As pointed out by McIntyre J in ***RWDSU v Dolphin Delivery Ltd***, 1986 CanLII 5 (SCC), [1986] 2 SCR 573 at paras 12-14:
>
> > 12 As has been noted above, the only basis on which the picketing in question was defended by the appellants was under the provisions of s. 2(b) of the *Charter* which guarantees the freedom of expression as a fundamental freedom. Freedom of expression is not, however, a creature of the *Charter*. It is one of the fundamental concepts that has formed the basis for the historical development of the political, social and educational institutions of western society. Representative democracy, as we know it today, which is in great part the product of

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[15] *Bou Malhab v. Diffusion Metromedia CMR 2011*, 1 SCR 214
[16] *UAlberta Pro-Life v. Governors of University of Alberta,* [2020] ABCA 1.
[17] *Whatcott*, *supra* and *Zundel, supra*.
[18] *DSU v. Dolphin Deliveries,* [1986] 2 S.C.R. 573.

free expression and discussion of varying ideas, depends upon its maintenance and protection.

13 The importance of freedom of expression has been recognized since early times: see John Milton, *Areopagitica; A Speech for the Liberty of Unlicenc'd Printing, to the Parliament of England* (1664), and as well John Stuart Mill, "*On Liberty*" in *On Liberty and considerations on Representative Government* (Oxford 1946), at p. 14:

> If all mankind minus one were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind.

And, after stating that "All silencing of discussion is an assumption of infallibility", he said, at p. 16:

> Yet it is as evident in itself, as any amount of argument can make it, that ages are no more infallible than individuals; every age having held many opinions which subsequent ages have deemed not only false but absurd; and it is as certain that many opinions now general will be rejected by future ages, as it is that many, once general, are rejected by the present.

14 Nothing in the vast literature on this subject reduces the importance of Mill's words. The principle of freedom of speech and expression has been firmly accepted as a necessary feature of modern democracy. The courts have recognized this fact. For an American example, see the words of Holmes J. in his dissent in *Abrams v. United States*, 250 U.S. 616 (1919), at p. 630:

> Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. ... But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas -- that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.

> [122] McIntyre J added, at para 15, that freedom of expression had constitutional status long before the *Charter*, citing ***Boucher v The King***, 1950 CanLII 2 (SCC), [1951] SCR 265 at 288:
>
> > There is no modern authority which holds that the mere effect of tending to create discontent or disaffection among His Majesty's subjects or ill-will or hostility between groups of them, but not tending to issue in illegal conduct, constitutes the crime, and this for obvious reasons. Freedom in thought and speech and disagreement in ideas and beliefs, on every conceivable subject, are of the essence of our life. The clash of critical discussion on political, social and religious subjects has too deeply become the stuff of daily experience to suggest that mere ill-will as a product of controversy can strike down the latter with illegality. A superficial examination of the word shows its insufficiency: what is the degree necessary to criminality? Can it ever, as mere subjective condition, be so? Controversial fury is aroused constantly by differences in abstract conceptions; heresy in some fields is again a mortal sin; there can be fanatical puritanism in ideas as well as in mortals; but our compact of free society accepts and absorbs these differences and they are exercised at large within the framework of freedom and order on broader and deeper uniformities as bases of social stability. Similarly in discontent, affection and hostility: as subjective incidents of controversy, they and the ideas which arouse them are part of our living which ultimately serve us in stimulation, in the clarification of thought and, as we believe, in the search for the constitution and truth of things generally.

77. A particularly close analogy exists with *WIC Radio Ltd. v. Simpson, supra* where the comments on homosexuals were far more outrageous than those made by Appellant because they were meant seriously and not as stand-up comedy.

78. With regard to dignity, one would have to discover an objective violation of dignity in order to condemn and this, as Savard J.A. pointed out, was missing; in other words, the finding that dignity was breached was subjective and dependent entirely on Mr. Gabriel's personal perception of his dignity.

79. By contrast, the violation of the freedom of expression was undisputed and was at the heart of protected freedom.

80. It is submitted that freedom of expression properly weighed would lead to the conclusion that Applicant's remarks are justified and therefore not discriminatory and therefore outside the statutory function of the Tribunal.

81. This would put them outside the Tribunal`s jurisdiction.

82. If, contrary to the judgments below, freedom of expression was treated as an element possibly excusing a breach of the right to equality and not as a factor used to determine if there was a breach, the result would be the same – the show was justified.

83. Even without the argument based on freedom of expression, the remarks would not be discriminatory (as shown in our first argument) but when one adds freedom of expression into the mix, the dismissal of the action is unavoidable.

Issue 3 - Does artistic freedom merit the same protection as political freedom?

84. The majority of the Court of Appeal state that artistic freedom is not greater than freedom in other areas of endeavour and that it is not unlimited;

85. Clearly, no freedom is totally without limits but artistic freedom is, it is submitted, at the heart of freedom of expression with its goals of emancipation, seeking truth or permitting debate.[19]

86. Artistic creation has been crucial in promoting progress and combatting social evils; it is sufficient to contemplate the works of Charles Dickens, Emile Zola and Harriet Beecher Stowe to realize that it is impossible to draw the line between artistic and political expression and say that political is more crucial and more apt to effect change.

87. Indeed, it might appear that artists have changed society more frequently than politicians.

88. For that reason, artists have often been subjected to censorship and repression; this happened notably to Flaubert, D.H. Lawrence and Oscar Wilde.

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[19] Randall P. Bezanson, *Art and Freedom of Speech*, University of Illinois Press, 2009**[Book of Authorities ("BOA") Tab 4]**.; Paul Kearns, *Freedom of Artistic Expression, Essays on Culture and Legal Censure*, Oxford Hart Publishing. **[BOA Tab 3]**.

89. Different epochs have had varied grounds for censorship; religion, sexual frankness, political opposition to a regime were among the most frequent.

90. Our times have started to enforce a political correctness derived from the notion of equality which can have the effect of stifling debate and enforcing a uniform vision; this is depicted in Marc Angenot's "L'Esprit de la Censure et ses Progrès" 21 Argument 14, especially at p. 16-17 on the subject of "tolerance repressive" and p. 20-23 on "Le politiquement correct".

91. The danger of "political correctness" as a motive for restricting freedom was noted by Baudouin, J.A. in Cabaret Sex Appeal, *supra*, at pages 2-3:

> Une société libre et démocratique comme la nôtre doit nécessairement faire preuve d'un haut degré de tolérance pour l'expression de pensées, d'opinions, d'attitudes ou d'actions qui, non seulement ne font pas l'unanimité ou ne rallient pas les vues de la majorité des citoyens, mais encore peuvent être dérangeantes, choquantes ou même blessantes pour certaines personnes ou pour certains groupes. La liberté d'expression ne doit pas être couchée dans le lit de Procuste du « political correctness ». Ce n'est que dans l'hypothèse d'abus clairs et donc de danger pour le caractère libre et démocratique de la société, qu'au nom de la protection de certaines valeurs fondamentales, alors non négociables, on peut imposer l'intervention légitime de la loi.

92. Courts and indeed societies cannot make confident judgments about the aesthetic or moral values of artistic works; the example of the Marquis de Sade illustrates how works can be viewed as pure smut in their times and be recognized as masterpieces with great social value a few generations later.

93. It is therefore necessary to allow great liberty to creative expression and to give immense weight to freedom of artistic expression when balancing it with other values.

94. In *Handyside v. U.K*[20]the European Court of Human Rights established very broad protection for artistic speech.

95. The decision of the Court of Appeal in the file chanteur Orelsan the Court of Appeal of Versailles states :

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[20] *Handyside v. U.K. 5493/72*

> Le domaine de la création artistique, parce qu'il est le fruit de l'imaginaire du créateur est soumis à un régime de liberté renforcé afin de ne pas investir le juge d'un pouvoir de censure qui s'exercerait au nom d'une morale nécessairement subjective de nature à interdire des modes d'expression, souvent minoritaires, mais qui sont aussi le reflet d'une société vivante et qui ont leur place dans une démocratie.[21]

96. The Cour d'Appel de Versailles continued:

> Les sanctionner au titre des délits d'injures publiques a raison du sexe ou de provocation à la violence et à la discrimination envers les femmes, reviendrait à censurer toute forme de création artistique inspirée du mal-être, du désarroi et du sentiment d'abandon d'une génération, en violation du principe de la liberté d'expression.

97. The decision of the Cour d'Appel de Liege of January 13, 2011, Role no. 2010-RG-198 is particularly relevant here as it deals with comedy, handicap and children; the Court says :

> A cet égard, dans le cadre d'un spectacle comique, il est permis d'émettre des propos qui choqueraient s'ils étaient retirés de leur contexte et prenaient place dans un débat sérieux. L'artiste va, précisément parçe qu'il adopte le ton sarcastique ou humoristique, pouvoir souligner les défauts de tel ou tel personnage de la scène publique, se moquer des vieux ou des jeunes, de la bêtise ou de la prétention, des traits d'un groupe de personnes ou d'un peuple en particulier.
>
> Il n'existe aucune raison d'exclure, a priori, la possibilité de faire rire en mettant en scène des personnes atteintes d'un handicap physique ou mental.[22]

98. The review of the US Jurisprudence on the matter of defamation in the context of stand-up comedy shows that it has the same broad protection for artistic speech as in Europe.[23]

99. The significance of freedom of artistic expression even in the particularly sensitive area of pedophilia is brought out in a recent Superior Court decision, *Yvan Godbout v PG Quebec et al*[24], especially at par 38.

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[21] Cour d'appel de Versailles, 18 fevrier 2016, No de RG:15/02687**[BOA, Tab 2]**.
[22] Cour d'appel- Arret du 13 janvier 2011, Role no. 2010-RG-198 **[BOA, Tab 1]**.
[23] Roy S. Gutterman, *New York Times Co. v. Sullivan*: *No Joking Matter - 50 Years* of *Protecting Humor*, *Satire*, and *Jokers*, 12 First Amend. L. Rev. 497 (2014).
[24] *Yvan Godbout v PG Quebec et al*, 2020 QCCS 2967.

100. While no case exactly like the present one has been decided in Canada, a number of decisions would indicate to the same liberal approach as in Europe.[25]

101. With respect to caricature and parody, the New Brunswick Court of Appeal said *in Ross v. Beutel*[26]:

> The message is an exaggerated statement not to be taken literally. It usually makes its point by invoking an idea through a relatively simple drawing and by commenting on the limitations or other aspects of that idea through devices such as caricature, satire, exaggeration, and parody. Expression through such devices, although often invidious and virulent, is not intended to be taken literally and, in my view, would not be so taken by a reasonable person. To accept the allegations of fact that Ross ascribed to each cartoon is to ignore the very nature and essence of cartoons and the message they convey.

102. This is entirely applicable in the present case.

103. In *Rosenberg v. Lacerte*[27], the Superior Court of Quebec said in paragraph 391:

> La personne raisonnable peut aussi conclure que les photomontages et caricatures respectent les paramètres de leur genre lorsqu'étudiés dans le contexte global des chroniques dans lesquelles ils se retrouvent, et que les références aux hyperliens ne sont pas fautives. Il faut se rappeler que la Cour suprême reconnaît le droit de se moquer des gens qui protestent dans l'arène publique comme étant un droit démocratique.

104. In *Rosenberg, supra,* the mocking often centered on the fact that the Plaintiffs were Hasidic Jews, but this did not make it an actionable delict.

105. One aspect of artistic works – that they do not purport to be real and that reasonable auditors or readers are expected to know that – reduces substantially any damage to dignity or self-esteem.

106. The majority of the Court of Appeal suggested a contextual case by case approach to establishing the proper balance; such an approach does not take into account the "chill factor" which is created by the possibility of being condemned by a Court.

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[25] *Whatcott*, *supra; Trudeau v. AD4 Distribution Canada inc.,* 2014 QCCA 1740; *WIC Radio, supra; Bou Malhab v. Diffusion Métromédia CMR inc., supra; R. v. Sharpe*, [2001] CSC 2; *R. v. Butler,* [1992] 1 S.C.R. 452.
[26] *Ross v. Beutel,* 2001 NBCA 62.
[27] *Rosenberg v. Lacerte,* 2013 QCCS 6286.

107. This aspect is repeatedly mentioned in the US jurisprudence to conclude that there was no defamation.[28]

108. In the US, the chilling effect and public interest are considered in the balancing process to determine if there is defamation. The Court states*: Polygram Records Inc. V. Rege*[29] :

> «For this reason, and in light of the occasion at which the joke was delivered and the attending circumstances, we conclude that, as a matter of law, it was not defamatory. To hold otherwise would run afoul of the 1st amendment and chill the free speech rights of all comedy performers and humorists, *to the genuine detriment of our society*. »

109. Creative artists would choose to stay away from controversial, potentially dangerous subjects; yet allowing such subjects to be aired in public is precisely the purpose of protection of freedom of expression.

110. The "chill factor" is described in *Rocket v. Royal College of Dental Surgeons*[30]*:*

> The danger of leaving legislation in force which is too broad is that it may prevent people from engaging in lawful activities by reason of the fact that the prohibition is still "on the books". In the United States, courts have concluded that where commercial speech is concerned this prospect is not so serious that legislation must be struck down.
>
> I am not convinced that this is the case, at least where professional persons are concerned. Professionals are typically very concerned with their standing in the profession, and few would be inclined to set themselves against their governing bodies. Short of a deliberate test case, there is no reason to expect another dentist to advertise factual information which contravenes the Regulation in a way that should be protected under s. 2(b). I am not prepared to accept the remedy advocated by Dubin A.C.J.O.

111. It follows that deciding each case on its merits without guidelines and jurisprudential protection would create a chill effect which would discourage artists from wading into controversial areas and in particular into areas involving current political correctness; yet, this was precisely the intention of Applicant's show aimed at "sacred cows".

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[28] Roy S. Gutterman, *New York Times Co. v. Sullivan*: *No Joking Matter - 50 Years* of *Protecting Humor*, *Satire*, and *Jokers*, 12 First Amend. L. Rev. 497 (2014), p. 515-522.
[29] *Polygram Records Inc. V. Rege*, 170 Cal. App. 3d 543 (1985), p. 55.
[30] *Rocket v. Royal College of Dental Surgeons,* 1990 2 S.C.R. 232 at p. 252.

112. Only a very strong statement reaffirming a broad definition of freedom of artistic expression can ensure its effectiveness.

113. It follows that the particular importance of artistic freedom reinforces ordinary freedom of expression and leads to a finding of justification and therefore absence of discrimination.

114. No doubt libel can be committed in an artistic work and an injured party would be able to claim reparation subject to the public interest (Torstar, *supra*).

115. Such a remedy would not lie before the Human Rights Tribunal and it would not be based on "discrimination".

Issue 4 - Could punitive damages be awarded?

116. While this is a subsidiary argument, it must be stated that the award of exemplary or punitive damages is a clear break with Quebec's jurisprudence.

117. Such damages are available only under Sec. 49 of the *Quebec Charter of Rights and Freedoms* when the Defendant intended the damages.[31]

118. *Calego, supra* was a far more serious case than this with a finding of actual discrimination at a work-place, yet the Court of Appeal reversed the award of punitive damages.

119. It is difficult to see why punitive damages would be awarded here but not in *Calego, supra.*

120. It is clear from that jurisprudence that even if an action turns out to be illegal, punitive damages are not awarded where the person believed, in good faith, that he was right.[32]

121. Even bad faith is not always enough in the absence of intention to cause damage.[33]

122. In the present case, where Applicant wanted to cause no harm to anyone and reasonably believed he was within his rights, the award of punitive damages is particularly disturbing.

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[31] *Location de main-d'oeuvre Excellence Inc. v. C.C.Q.,* 2012 QCCS 720 (CanLII).
[32] *Montreal v. Kavanaght,* [2013] QCCA 198.
[33] *Location de main-d'oeuvre Excellence Inc. v. C.C.Q., supra.*

123. Once again, this tends to create a "chill factor" which limits freedom.

124. It is tantamount to affirming that disagreement with the concept of equality as interpreted by the Tribunal is in itself culpable and constitutes intentional bad faith; that is an unpalatable conclusion.

125. It is submitted that the Supreme Court should decide the issues raised by this case.

PART IV – COSTS

126. Applicant will ask for costs at all levels.

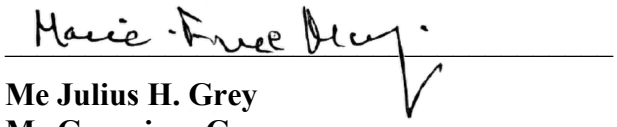
PART V – ORDER SOUGHT

127. Applicant submits that after hearing, his appeal be allowed and Respondent's action be dismissed, or that the court makes such other order in the interest of justice as it sees fit.

PART VI – SUBMISSIONS ON CASE SENSITIVITY

128. Not applicable

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 2nd day of November 2020



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PART VII – TABLE OF AUTHORITIES

Jurisprudence **at Para.**

Other

Marc Angenot, "L'esprit de censure et ses progrès", Discours social, Vol. 7,no 1-2, 1993 ...90

Randall P. Bezanson, *Art and Freedom of Speech*, University of Illinois Press, 2009 85

Roy S. Gutterman, *New York Times Co. v. Sullivan*: *No Joking Matter - 50 Years* of *Protecting Humor*, *Satire*, and *Jokers*, 12 First Amend. L. Rev. 497 (2014) ..98, 107

Paul Kearns, *Freedom of Artistic Expression, Essays on Culture and Legal Censure*, Oxford Hart Publishing. 85

Statutory Provisions

Charter of Human Rights and Freedoms, CQLR c C-12, Art. 10, s. 49
Charte des droits et libertés de la personne, RLRQ c C-12, s. 49