

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

**B E T W E E N:**

**MIKE WARD**

**APPLICANT**  
(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)

-and-

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INTERNATIONAL COMMISSION OF JURISTS (CANADA),  
CANADIAN CIVIL LIBERTIES ASSOCIATION,  
CANADIAN CONSTITUTION FOUNDATION and  
LEAGUE FOR HUMAN RIGHTS OF B'NAI BRITH CANADA**

**INTERVENERS**

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**FACTUM OF THE INTERVENER  
INTERNATIONAL COMMISSION OF JURISTS, Canada  
(Pursuant to Rule 42 of the Rules of the Supreme Court of Canada)**

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## PARTS I & II - OVERVIEW AND POSITION

[1] The intervener, the International Commission of Jurists (Canada) (“**ICJC**”), relies on the facts as set out by the majority decision in the Court of Appeal of Quebec.

[2] The ICJC agrees with the Court of Appeal of Quebec’s decision that Jérémy Gabriel was discriminated against in relation to his right to dignity under sections 4 and 10 of the Quebec *Charter of Human rights and Freedoms*.<sup>1</sup> ICJC supports the Respondent’s position in relation to the discriminatory nature of the comments made by the Appellant.

[3] ICJC also supports the Appellant’s argument that the comments made were protected under s. 3 of the Quebec *Charter* (and 2(b) of the *Canadian Charter*).<sup>2</sup>

[4] However, ICJC submits that the Appellant’s comments breach the Respondent’s right to his dignity, as protected under s. 4 of the Quebec *Charter*, but also under s. 1457 of the *Civil Code of Quebec*,<sup>3</sup> and at common law.

[5] The right to freedom of speech, like the right to be free from discrimination or the right to dignity, require evaluation and balancing when the exercise of one right conflicts with the scope of another. This Court should exercise caution when balancing the right to freedom of expression and the right to dignity, so as to protect each right to the extent possible, while limiting one right only to the extent necessary to protect the core of the scope of the other right.

[6] The ICJC will present its submissions in four parts. In the first part, the ICJC will examine how freedom of expression has been defined in Canada/Quebec and the limits placed on that freedom. In the second part, the ICJC will examine the right to dignity, specifically how dignity should be understood in Canadian and Quebec law. In the third part, the ICJC will propose the standard that must be applied to establish a violation of the right to dignity. Finally, in the last part, the ICJC will demonstrate how the balance between freedom of expression and the right to dignity must be made.

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<sup>1</sup> *Charter of Human Rights and Freedoms*, CQLR c C-12 [Quebec *Charter*].

<sup>2</sup> *Canadian Charter of Rights and Freedoms*, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [Canadian *Charter*].

<sup>3</sup> *Civil Code of Québec*, CQLR c CCQ-1991. See *Chiasson c Fillion*, 2005 CanLII 10511 (QC CS) at paras 69-71, aff’d in *Fillion c Chiasson*, 2007 QCCA 570; see also *Génex Comm. c ADISQ*, 2009 QCCA 2201 at para 33.

## PART III - ARGUMENT

### 1. The Scope of Freedom of Expression in Canada

#### 1.1 Freedom of Expression has Been Broadly defined in Canada But is Not Unlimited

[7] The Supreme Court of Canada (“SCC”), following the general approach of purposive interpretation,<sup>4</sup> has given a wide and generous interpretation of s. 3 of the Quebec *Charter* and s. 2(b) of the *Canadian Charter*.<sup>5</sup> In *Ford*, the Court accepted as a valid rationale for protecting freedom of expression the concept of a “market-place of ideas.”<sup>6</sup> In addition, the Court found that freedom of expression embraced expressive conduct extending to most areas of human activity, including commerce and the arts. In *Irwin Toy*, the Court affirmed that any activity that conveys or attempts to convey meaning is generally considered to have expressive content and is constitutionally protected.

[8] The SCC has only slightly restricted the scope of freedom of expression under section 2(b) of the *Charter*. In *Keegstra* and *Khawaja*, the Court held that neither violence nor threats of violence were protected forms of expression.<sup>7</sup>

[9] Both of these limits to freedom of expression are the main restrictions that this Court has recognized. As a result of the broad interpretation of freedom of expression in Canadian case law, racist incitement<sup>8</sup>, holocaust denial<sup>9</sup>, obscene materials,<sup>10</sup> child pornography<sup>11</sup>, and other types of

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<sup>4</sup> See, again recently, *Quebec (Attorney General) v 9147-0732 Québec inc.*, 2020 SCC 32. This approach also includes possible references to international law, which in the case of the right to dignity may refer to numerous international instruments and elements of soft law.

<sup>5</sup> *Irwin Toy Ltd v Québec (Attorney General)*, [1989] 1 SCR 927 [*Irwin Toy*]; *Ford v Quebec (Attorney General)*, [1988] 2 SCR 712; Sharpe, Robert and Kent Roach. *The Charter of Rights and Freedom*, 6th ed. Toronto: Irwin Law, 2017 at p 168.

<sup>6</sup> *Ford v Quebec (Attorney General)*, [1988] 2 SCR 712 at para 56.

<sup>7</sup> *R v Keegstra*, [1990] 3 SCR 697; *R v Khawaja*, [2012] 3 SCR 555.

<sup>8</sup> *R v Keegstra*, [1990] 3 SCR 697.

<sup>9</sup> *R v Zundel*, [1992] 2 SCR 731.

<sup>10</sup> *R v Butler*, [1992] 1 SCR 452.

<sup>11</sup> *R v Sharpe*, [2001] 1 SCR 45.

hate speech,<sup>12</sup> have all been recognized as valid forms of freedom of expression protected under s. 3 of the *Quebec Charter* and s. 2(b) of the *Canadian Charter*.<sup>13</sup>

[10] In spite of this generous interpretation, the SCC has limited on several occasions the scope of freedom of expression by way of the reasonable limits clause under s. 9.1 of the *Quebec Charter* and s. 1 of the *Canadian Charter*.<sup>14</sup> For instance, in *Whatcott*, the SCC upheld part of a provision in Saskatchewan’s human rights legislation that limited freedom of expression by prohibiting hate speech that provoked extreme manifestations of “detestation” or “vilification”.<sup>15</sup>

## 1.2 The Values of Freedom of Expression

[11] Freedom of expression includes values that promote the search for and attainment of truth, participation in social and political discourse and the opportunity for individual self-fulfillment through expression.<sup>16</sup> These fundamental values are seen as instrumental to democratic governance in Canada.

## 2. The Scope of the Right to Dignity in Canada

[12] Dignity is a right that has been applied in different contexts in Canadian and Quebec law. In some instances, the right to dignity has been recognized as an underlying right that guides the interpretation of substantive rights. Indeed, while the term “dignity” does not appear in the *Canadian Charter*, the SCC has repeatedly recognized that the right to dignity is an underlying principle and must guide the Court in interpreting fundamental rights and freedoms of the *Charter*. For instance, interpreting s. 1 of the *Canadian Charter* in *Oakes*, Dickson C.J. referred to underlying values and principles, such as the “inherent dignity of the human person”.<sup>17</sup>

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<sup>12</sup> *Saskatchewan (Human Rights Commission) v Whatcott*, [2013] 1 SCR 467 [*Whatcott*].

<sup>13</sup> Roach K., and Schneiderman, D., “Freedom of Expression in Canada”, in E. Mendes and S. Beaulac, eds, *Canadian Charter of Rights and Freedoms*, 5<sup>th</sup> ed., Markham: LexisNexis, 2015, 433-434.

<sup>14</sup> For example, *Néron Comm. Marketing v Chambre des notaires*, [2004] 3 S.C.R. 95 at para 52.

<sup>15</sup> *Whatcott* at para 41.

<sup>16</sup> *Irwin Toy* at para 24; *Whatcott* at para 65.

<sup>17</sup> *R. v Oakes*, [1986] 1 S.C.R. 103, at 136; see also Mendes E.P., “Section 1 of the Charter after 30 years: The Soul or the Dagger at its Heart?”, in E. Mendes and S. Beaulac, eds, *Canadian Charter of Rights and Freedoms*, 5<sup>th</sup> ed., Markham: LexisNexis, 2015, 293.

[13] In other circumstances, the right to dignity has been recognized as a substantive right. This is the case under s. 4 of the Quebec *Charter*. In *Hôpital St-Ferdinand*, the SCC mentioned that the right to dignity in the Quebec *Charter* was both a substantive right and an underlying principle<sup>18</sup> where the Court defined an infringement of dignity as an act that “violate[s] the respect to which every person is entitled by the mere fact that he or she is a human being and the respect that he or she owes to himself or herself”.<sup>19</sup>

[14] However, this Court has yet to clearly define the scope of the right to dignity. Its importance, meaning, and function are commonly presupposed but rarely articulated. Therefore, the ICJC submits that this appeal provides an opportunity for this Court to clarify the definition and scope of the right to dignity.

[15] The right to dignity should not be defined with a rigid definition. Indeed, in imposing such boundaries, the right to dignity becomes either too exclusive or too inclusive. Instead, three different definitions of the right to dignity may be justified under current SCC case law. While these three definitions may help us understand the scope of the right to dignity, they are not exhaustive and other definitions could be added.<sup>20</sup> This approach is consistent with the *Law* decision where Justice Iacobucci writing for the majority noted “that there can be different conceptions of what human dignity means.”<sup>21</sup>

## 2.1 Dignity as a Form of Equality

[16] Following this conception, the right to dignity can be defined as the right to be protected against the perpetration of prejudice and stereotypes. The concept of the “perpetration of

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<sup>18</sup> See also the preamble of the Quebec *Charter*.

<sup>19</sup> *Quebec (Public Curator) v Syndicat national des employés de l'hôpital St-Ferdinand*, [1996] 3 SCR 211 at paras 100, 105 [*Hôpital St-Ferdinand*]. See also *Cinar Corp. v Robinson*, [2013] 3 S.C.R. 1168 at para 116.

<sup>20</sup> See, in general on the different understanding of dignity, Proulx, D., « Le concept de dignité et son usage en contexte de discrimination : deux Chartes, deux modèles » (2003) *Revue du Barreau* 485; see also Henry, L.M., “The Jurisprudence on Dignity”, (2011) 160 *University of Pennsylvania Law Review* 169-233.

<sup>21</sup> *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 [*Law*].

prejudice” and the concept of “stereotypes” are the results of the underlying principle of the right to dignity. This has been confirmed in numerous decisions of this Court.<sup>22</sup>

[17] Although the steps leading to a determination of discrimination have evolved since *Law*, it remains most relevant to recall that the SCC placed the right to dignity at the center of the right to equality. Indeed, the Court then held that “the purpose of section 15(1) is to prevent the violation of essential human dignity.”<sup>23</sup>

## 2.2 Dignity as a Form of Liberty

[18] This definition of dignity was articulated by Justice Wilson in *Morgentaler*. In that decision, the SCC determined that the provisions of the *Criminal Code* that limited access to abortion affected women’s dignity because by removing women’s personal freedom to make fundamental choices about their own bodies, women were treated as means rather than ends.<sup>24</sup>

[19] This definition of dignity was also used by this Court in *Rodriguez* where a majority held that “personal autonomy, at least with respect to the right to make choices concerning one’s own body, control over one’s physical and psychological integrity, and basic human dignity are encompassed within security of the person [...]” and that imposing burdens, psychological and emotional distress may result in loss of dignity and be in breach of s. 7 of the *Canadian Charter*.<sup>25</sup> The new case law on medically assisted death, with *Carter*, also held that: “An individual’s response to a grievous and irremediable medical condition is a matter critical to their dignity and autonomy.”<sup>26</sup>

## 2.3 Dignity as a Form of Personal Integrity

[20] Following this conception, the right to dignity can be defined as the right to protect individuals from views or activities that are damaging at a deep personal level, and impact

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<sup>22</sup> *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143; *R v Kapp*, [2008] 2 SCR 483; *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624 at para 54; *Ontario (Attorney General) v G*, 2020 SCC 38 at para 64.

<sup>23</sup> *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at paras 4, 53-54; see also *Ontario (Attorney General) v G*, 2020 SCC 38 at para 61.

<sup>24</sup> *R v Morgentaler*, [1988] 1 SCR 30 at 164-166.

<sup>25</sup> *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519 at 592.

<sup>26</sup> *Carter v Canada (Attorney General)*, [2015] 1 SCR 331 at para 66.

perceptions of self-worth and self-fulfillment. Examples of this can be found in the case law of the SCC on defamation.

[21] In *Church of Scientology*, the Court held that defamatory statements are only tenuously connected to the core values protected by freedom of expression.<sup>27</sup> Conversely, the right to individual reputation represents and reflects the innate worthiness and dignity of the individual, a value that underlies all *Charter* rights.

[22] The Court adopted a similar approach in *Lucas*, where this Court reiterated the importance attached to the protection of reputation from wilful and false attack, as that protection recognised the innate dignity of the individual.<sup>28</sup>

[23] In *Prud'homme*, the SCC identified three different forms of defamation; with one of them in relation to an individual making unfavourable but true statements about another person without any valid reason for doing so.<sup>29</sup> According to this Court, the right to dignity is the principle underlying the various forms of defamation.<sup>30</sup>

### **3. The test to demonstrate a violation of the Right to Dignity**

[24] The applicable test in determining whether the right to dignity has been limited was discussed in the contexts of discrimination and defamation and ought to be adopted for the purposes of determining whether an individual's right to dignity may limit another's right to freedom of speech.

[25] In *Law*, this Court held that dignity included both a subjective and objective perspective. The test required an examination from the perspective of the claimant and the evaluation was whether "a reasonable person in circumstances similar to those of the claimant would [find that

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<sup>27</sup> *Hill v Church of Scientology of Toronto*, [1995] 2 SCR 1130 at paras 107, 120.

<sup>28</sup> *R v Lucas*, [1998] 1 SCR 439 at paras 48-49, 80-81. But see potential defences that allows a proper balancing of the values underlying freedom of expression, including freedom of the media: *WIC Radio Ltd. v Simpson*, [2008] 2 SCR 420; *Grant v Torstar Corp.*, 2009 SCC 61, [2009] 3 SCR 640.

<sup>29</sup> *Prud'homme v Prud'homme*, [2002] 4 SCR 663 at para 44. See also *Chiasson c Fillion*, 2005 CanLII 10511 (QC CS).

<sup>30</sup> *Prud'homme v Prud'homme*, [2002] 4 SCR 663 at para 44.

the comments have] the effect of demeaning his or her dignity”.<sup>31</sup> That reasonable person must be informed and rationally take into account various contextual factors which determines whether dignity is infringed.<sup>32</sup>

[26] Likewise, in *Whatcott*, an objective test applies as to whether comments constituted “hate speech” and the question is “whether a whether a reasonable person, aware of the context and circumstances, would view the expression as likely to expose a person or persons to detestation and vilification [...]”.<sup>33</sup> Hate speech that exposes a person to detestation and vilification will undoubtedly also be a breach of his or her human dignity.

[27] The application of an objective test as set out in *Law* and *Whatcott* is most appropriate in the context of the balancing of the rights of dignity and freedom of expression. The standard to establish an infringement of the right to dignity should be the standard of the “reasonable person, having the similar characteristics as the claimant alleging infringement of the right to dignity.”

[28] In addition to the objective test, for the right of dignity to prevail, some form of prejudice must have been suffered (that would be the subjective part). For example, for the tort of intentional infliction of mental suffering, there must be an objective assessment of flagrant or outrageous conduct resulting in a visible and provable illness.<sup>34</sup> However, the absence of a medical report is not fatal and the claimant must only prove having suffered depression.<sup>35</sup>

[29] Also relevant, as held in *Hôpital St-Ferdinand*, is that even a temporary interference with a fundamental attribute of a human being is sufficient to violate a person’s dignity under s. 4 of the Quebec *Charter*. In that case, failing to provide necessary care to persons with mental disability so as to cause discomfort was sufficient to interfere with the safeguard to their dignity.<sup>36</sup>

#### **4. Balancing Freedom of Expression and the Right to Dignity**

[30] Where the right to dignity and the right to freedom of expression are in conflict, the Court must strike a fair balance between these two fundamental rights. Under s. 9.1 of the Quebec

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<sup>31</sup> *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at paras 59-61.

<sup>32</sup> *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at para 61.

<sup>33</sup> *Whatcott* at paras 59, 95.

<sup>34</sup> *Colistro v Tbaytel*, 2019 ONCA 197 at paras 14-15.

<sup>35</sup> *Prinzo v Baycrest Centre for Geriatric Care*, 2002 CanLII 45005 (ON CA) at paras 41-48.

<sup>36</sup> *Hôpital St-Ferdinand* at paras 106-109.

*Charter*, the courts must balance and reconcile the claimed right with countervailing rights, values and harm.<sup>37</sup> The Court below properly made that assessment including with regard to s. 10 and the value of equality. In ICJC's view, similar balancing ought to include the right to dignity.

[31] To do so, the ICJC submits two factors to be taken into consideration, both relating to dignity: (1) the specificity of the comments and (2) the prejudicial effect of the comments.

[32] A third consideration, a type of limit may already exist where the comments made are not protected under s. 2(b) (violence) or already be recognized as limited under s. 1 (hate speech).

#### **4.1 The level of specificity of the comments**

[33] The first factor is the level of specificity of the comments. The question is whether the comments are aimed at a very large group of people, or a small group of people - or even at a single person? If the comments are aimed at a very broad group of people, the right to freedom of expression likely prevails over the right to dignity.

[34] In *Bou Malhab*<sup>38</sup> for example, a radio host made provocative remarks about Montreal taxi drivers whose mother tongue were Arabic or Creole. The radio host accused them of uncleanness, arrogance, incompetence, and corruption. Despite this, this Court determined that the remarks were not defamatory because the comments were aimed at a large group. The SCC held that the larger the group, the more difficult it is to prove that personal injury has been sustained, and therefore their dignity could not be sufficiently affected.

[35] On the other hand, the more strictly organized and homogeneous the group, the easier it is to prove a personal injury or impact to the dignity of individuals. *Calego*<sup>39</sup> is an example where comments made to a small group of people may breach the right to dignity. In that case, the President of a company singled out only Chinese employees and accused them of not keeping the kitchen clean. Even if the comments were made to a group, it was made to a group of identifiable individuals and the Court of Appeal of Quebec held that such comments were discriminatory and in breach of their right to dignity under s. 4 of the Quebec *Charter*.

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<sup>37</sup> *Bruker v Marcovitz*, 2007 SCC 54 (CanLII), [2007] 3 SCR 607 at para 77.

<sup>38</sup> *Bou Malhab c Diffusion Métromédia CMR inc*, 2011 CSC 9, [2011] 1 SCR 214.

<sup>39</sup> *Calego International inc. c Commission des droits de la personne et des droits de la jeunesse*, 2013 QCCA 924.

## 4.2 The prejudicial effect of the comments

[36] The second criterion is the prejudicial effect of the comments. In other words, are the comments constructive or denigrating in nature? The more constructive the comments are, the more they will be protected by freedom of expression at its underlying values. Conversely, the more denigrating the comments, the more the right to dignity will prevail.

[37] Criticism of a public performances or of comments made by another person (criticism on “what a person does”) are legitimate and are protected by the values of truth seeking and self-fulfillment underlying freedom of expression. However, denigrating comments (criticism on “who you are” - on a person’s physical attributes, for example) are not so justified by the values underlying freedom of expression. On the other hand, such comments may have an impact on a person’s dignity, including that person’s equal right to self-fulfillment protected therein.

[38] For example, freedom of expression would outweigh the right to dignity when comments are made to critique an artist’s artistic performance. However, the right to dignity may outweigh the right to freedom of expression when the criticism is not on the artist’s performance (“what that artist does”) but rather on the physical appearance (“what the artist is”) in such a way and with such vigor that it causes mental distress to the artist and a reasonable person would also be affected in their own right to dignity.

[39] The balancing exercise, in that sense, is similar to defamation cases. When the right to reputation is infringed, that right to freedom of expression is correspondingly limited.

## 4.3 Comments Constituting “Hate Speech” or “Violence”

[40] In *Keegstra* and *Khawaja*, the Court held that neither violence nor threats of violence were protected under s. 2(b) of the *Canadian Charter*. The same applies to 3 of the *Quebec Charter*.

[41] In *Whatcott*, legislative restriction of “hate speech” was justified under s. 1. However, in that case, the SCC severed the terms “ridicules, belittles or otherwise affronts the dignity of” from the Act.<sup>40</sup> On the other hand, *Whatcott* related to comments made against an identifiable group rather than addressed to a specific individual. When comments are made to an individual, the terms “ridicule, belittle or otherwise affront dignity” severed in *Whatcott* could apply where they impact

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<sup>40</sup> *Whatcott* at paras 88-100, 108, 164, 206.

the dignity of the targeted person. This should especially be the case where the comments come close to criminal harassment.<sup>41</sup>

[42] Continuing bullying, intimidation, denigration, ridicule or belittling of a specific individual may see that individual ostracized by society thereby constituting a category of speech equivalent to “hate speech” or criminal harassment. Likewise, those types of comments may even incite the individual to do self-harm, thereby constituting “violent speech”.<sup>42</sup>

[43] Those types of comments, when affecting dignity and applying a “reasonable person” standard, are therefore not protected under s. 3 of the Quebec *Charter* or s. 2(b) of the *Canadian Charter*, or are *prima facie* justified and do not require a balancing of the considerations just noted. In those circumstances, the right to dignity will prevail and accordingly limit freedom of speech.

## 5. Conclusion

[44] In this case, the comments were made against a single individual, were derogatory in nature and made for personal economical gain. Those comments were not truth seeking or for self-fulfillment, thus irrelevant to freedom of expression’s underlying values.

[45] On the other hand, the factual findings are that those comments caused mental distress, as per s. 1457 *Civil Code of Quebec* (and equivalent tort in common law). To the extent this Court concludes that a reasonable person in circumstances similar to those of the claimant would also have suffered similar distress, then the Respondent’s dignity was infringed.

[46] If that is the case, applying s. 9.1 of the Quebec *Charter* and in balance, the Respondent’s right to dignity and self-fulfillment as protected by s. 4 must prevail over the Appellant’s right to freedom of expression as protected by s. 3 of the Quebec *Charter*.

## PART IV - COSTS

[47] The ICJC seeks no order as to costs and asks that no costs be ordered against it.

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<sup>41</sup> Canada has seen such situations recently where Rehtaeh Parsons and Amanda Todd committed suicide following such bullying and harassment.

<sup>42</sup> Indeed, s. 241 of the *Criminal Code*, for example, prohibits comments that could lead to a person committing suicide.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 22<sup>nd</sup> day of January, 2021.



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## PART V – LIST OF AUTHORITIES

<b>JURISPRUDENCE</b>	<b>PARAGRAPH(S)</b>
<i>Andrews v Law Society of British Columbia</i> , <a href="#">[1989] 1 SCR 143</a>	16
<i>Bou Malhab v Diffusion Métromédia CMR inc.</i> , <a href="#">2011 CSC 9</a>	34
<i>Bruker v Marcovitz</i> , 2007 SCC 54 (CanLII), <a href="#">[2007] 3 SCR 607</a>	30
<i>Carter v Canada (Attorney General)</i> , <a href="#">[2015] 1 SCR 331</a>	19
<i>Chiasson c Fillion</i> , <a href="#">2005 CanLII 10511 (QC CS)</a>	4, 23
<i>Cinar Corp. v Robinson</i> , <a href="#">[2013] 3 S.C.R. 1168</a>	13
<i>Colistro v Tbaytel</i> , <a href="#">2019 ONCA 197</a>	28
<i>Eldridge v British Columbia (Attorney General)</i> , <a href="#">[1997] 3 SCR 624</a>	16
<i>Fillion c Chiasson</i> , <a href="#">2007 QCCA 570</a>	4
<i>Ford v Quebec (Attorney General)</i> , <a href="#">[1988] 2 SCR 712</a>	7
<i>Génex Comm. c ADISQ</i> , <a href="#">2009 QCCA 2201</a>	4
<i>Grant v Torstar Corp.</i> , <a href="#">2009 SCC 61</a>	22
<i>Hill v Church of Scientology of Toronto</i> , <a href="#">[1995] 2 SCR 1130</a>	21
<i>Irwin Toy Ltd v Québec (Attorney General)</i> , <a href="#">[1989] 1 SCR 927</a>	7, 11
<i>Law v Canada (Minister of Employment and Immigration)</i> , <a href="#">[1999] 1 SCR 497</a>	15, 17
<i>Néron Comm. Marketing v Chambre des notaires</i> , <a href="#">[2004] 3 S.C.R. 95</a>	10
<i>Ontario (Attorney General) v G</i> , <a href="#">2020 SCC 38</a>	16, 17
<i>Prinzo v Baycrest Centre for Geriatric Care</i> , <a href="#">2002 CanLII 45005 (ON CA)</a>	28
<i>Prud'homme v Prud'homme</i> , <a href="#">[2002] 4 SCR 663</a>	23
<i>Quebec (Attorney General) v 9147-0732 Québec inc.</i> , <a href="#">2020 SCC 32</a>	7
<i>Quebec (Public Curator) v Syndicat national des employés de l'hôpital St-Ferdinand</i> , <a href="#">[1996] 3 SCR 211</a>	13
<i>R v Butler</i> , <a href="#">[1992] 1 SCR 452</a>	9
<i>R v Kapp</i> , <a href="#">[2008] 2 SCR 483</a>	16
<i>R v Keegstra</i> , <a href="#">[1990] 3 SCR 697</a>	8, 9, 40

<i>R v Khawaja</i> , <a href="#">[2012] 3 SCR 555</a>	8, 40
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<i>Rodriguez v British Columbia (Attorney General)</i> , <a href="#">[1993] 3 SCR 519</a>	19
<i>Saskatchewan (Human Rights Commission) v Whatcott</i> , <a href="#">[2013] 1 SCR 467</a>	9, 10, 11, 26, 27, 41
<i>WIC Radio Ltd. v Simpson</i> , <a href="#">[2008] 2 SCR 420</a>	22
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<i>Loi constitutionnelle de 1982</i> , Annexe B de la Loi de 1982 sur le Canada (R-U), <a href="#">1982, c 11</a>	
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<i>Civil Code of Québec</i> , <a href="#">CQLR c CCQ-1991</a>	4
<i>Code civil du Québec</i> , <a href="#">RLRQ c CCQ-1991</a>	
<b>SECONDARY SOURCES</b>	<b>PARAGPH(S)</b>
Henry, L.M., “ <i>The Jurisprudence on Dignity</i> ”, (2011) 160 <i>University of Pennsylvania Law Review</i>	15
Mendes E.P., “ <i>Section 1 of the Charter after 30 years: The Soul or the Dagger at its Heart?</i> ”, in E. Mendes and S. Beaulac, eds, <i>Canadian Charter of Rights and Freedoms</i> , 5th ed., Markham: LexisNexis, 2015	12
Proulx, D., « <i>Le concept de dignité et son usage en contexte de discrimination : deux Chartes, deux modèles</i> » (2003) <i>Revue du Barreau</i> 485	15

Roach K., and Schneiderman, D., “ <i>Freedom of Expression in Canada</i> ”, in E. Mendes and S. Beaulac, eds, <i>Canadian Charter of Rights and Freedoms</i> , 5th ed., Markham: LexisNexis, 2015	9
Sharpe, Robert and Kent Roach. <i>The Charter of Rights and Freedom</i> , 6nd ed. Toronto: Irwin Law, 2017	7

**PART VI - STATUTES, REGULATIONS, RULES, ETC.**

<p><b>CHARTER OF HUMAN RIGHTS AND FREEDOMS</b></p> <p><u>3.</u> Every person is the possessor of the fundamental freedoms, including freedom of conscience, freedom of religion, freedom of opinion, freedom of expression, freedom of peaceful assembly and freedom of association.</p> <p><u>4.</u> Every person has a right to the safeguard of his dignity, honour and reputation.</p> <p><u>9.1.</u> In exercising his fundamental freedoms and rights, a person shall maintain a proper regard for democratic values, State laicity, public order and the general well-being of the citizens of Québec.</p> <p>In this respect, the scope of the freedoms and rights, and limits to their exercise, may be fixed by law.</p>	<p><b>CHARTE DES DROITS ET LIBERTÉS DE LA PERSONNE</b></p> <p><u>3.</u> Toute personne est titulaire des libertés fondamentales telles la liberté de conscience, la liberté de religion, la liberté d'opinion, la liberté d'expression, la liberté de réunion pacifique et la liberté d'association.</p> <p><u>4.</u> Toute personne a droit à la sauvegarde de sa dignité, de son honneur et de sa réputation.</p> <p><u>9.1.</u> Les libertés et droits fondamentaux s'exercent dans le respect des valeurs démocratiques, de la laïcité de l'État, de l'ordre public et du bien-être général des citoyens du Québec.</p> <p>La loi peut, à cet égard, en fixer la portée et en aménager l'exercice.</p>
<p><b>The Constitution Act, 1982</b></p> <p><b>CANADIAN CHARTER OF RIGHTS AND FREEDOMS</b></p> <p><u>1.</u> The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be</p>	<p><b>Loi constitutionnelle de 1982</b></p> <p><b>CHARTE CANADIENNE DES DROITS ET LIBERTÉS</b></p> <p><u>1.</u> La Charte canadienne des droits et libertés garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient</p>

<p>demonstrably justified in a free and democratic society.</p> <p>2. Everyone has the following fundamental freedoms:</p> <p>(a) freedom of conscience and religion;</p> <p>(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;</p> <p>(c) freedom of peaceful assembly; and</p> <p>(d) freedom of association.</p> <p>15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.</p> <p>(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.</p>	<p>raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.</p> <p>2. Chacun a les libertés fondamentales suivantes :</p> <p>a) liberté de conscience et de religion;</p> <p>b) liberté de pensée, de croyance, d'opinion et d'expression, y compris la liberté de la presse et des autres moyens de communication;</p> <p>c) liberté de réunion pacifique;</p> <p>d) liberté d'association.</p> <p>15. (1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.</p> <p>(2) Le paragraphe (1) n'a pas pour effet d'interdire les lois, programmes ou activités destinés à améliorer la situation d'individus ou de groupes défavorisés, notamment du fait de leur race, de leur origine nationale ou ethnique, de leur couleur, de leur religion, de leur sexe, de leur âge ou de leurs déficiences mentales ou physiques.</p>
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<b>CIVIL CODE OF QUÉBEC</b>	<b>CODE CIVIL DU QUÉBEC</b>
<p><a href="#"><u>1457.</u></a> Every person has a duty to abide by the rules of conduct incumbent on him, according to the circumstances, usage or law, so as not to cause injury to another.</p>	<p><a href="#"><u>1457.</u></a> Toute personne a le devoir de respecter les règles de conduite qui, suivant les circonstances, les usages ou la loi, s'imposent à elle, de manière à ne pas causer de préjudice à autrui.</p>
<p>Where he is endowed with reason and fails in this duty, he is liable for any injury he causes to another by such fault and is bound to make reparation for the injury, whether it be bodily, moral or material in nature.</p>	<p>Elle est, lorsqu'elle est douée de raison et qu'elle manque à ce devoir, responsable du préjudice qu'elle cause par cette faute à autrui et tenue de réparer ce préjudice, qu'il soit corporel, moral ou matériel.</p>
<p>He is also bound, in certain cases, to make reparation for injury caused to another by the act, omission or fault of another person or by the act of things in his custody.</p>	<p>Elle est aussi tenue, en certains cas, de réparer le préjudice causé à autrui par le fait ou la faute d'une autre personne ou par le fait des biens qu'elle a sous sa garde.</p>