

**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-

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

INTERVENERS

**FACTUM OF THE INTERVENER,
LEAGUE FOR HUMAN RIGHTS OF B'NAI BRITH CANADA
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)**

**LEAGUE FOR HUMAN RIGHTS
OF B'NAI BRITH CANADA**
15 Hove Street
Toronto, ON M3H 4Y8

GOWLING WLG (CANADA) LLP
Barristers and Solicitors
160 Elgin Street, Suite 2600
Ottawa ON K1P 1C3

DAVID MATAS

Barrister and Solicitor
602-225 Vaughan Street
Winnipeg, MB R3C 1T7
Tel: (204) 944-1831
Fax: (204) 942-1494
Email: dmatas@mts.net

SARAH TEICH

Barrister and Solicitor
1801-1 Yonge Street
Toronto, ON M5E 1W77
Tel: (647) 280-0850
Email: sarahteichlaw@gmail.com

Counsels for the Intervener, League for
Human Rights of B’Nai Brith Canada

GREY, CASGRAIN, S.E.N.C.

1715-1155 René-Lévesque Ouest
Montréal, QC H3B 2K8

Julius Grey

Geneviève Grey
Tel: (514) 288-6180 Ext: 229
Fax: (514) 288-8908
Email: jhgrey@greycasgrain.net

Counsel for the Appellant

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

360 rue Saint-Jacques, 2e étage
Montréal, QC H2Y 1P5

Stéphanie Fournier

Geneviève St-Laurent
Tel: (514) 873-5146 Ext: 208
Fax: (514) 864-7982
Email: stephanie.fournier@cdpdj.qc.ca

Counsel for the Respondent

Matthew S. Estabrooks

Tel: (613) 786-0211
Fax: (613) 788-3573
Email: matthew.estabrooks@gowlingwlg.com

Ottawa Agent for Counsels for the Intervener,
League for Human Rights of B’Nai Brith
Canada

SUPREME ADVOCACY LLP

100- 340 Gilmour Street
Ottawa, ON K2P 0R3

Marie-France Major

Telephone: (613) 695-8855 Ext: 102
FAX: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

Ottawa Agent for Counsel for the Appellant

SYLVIE GABRIEL
STEVE LAVOIE
JEREMY GABRIEL

Interveners, Self Represented

WALID HIJAZI
404, rue Marie-Morin
Montréal, QC H2Y 3T3

Tel: (514) 840-9119
Fax: (514) 840-0177
Email: mewalidhijazi@gmail.com

Counsel for the Intervener, Association des
professionnels de l'industrie de l'humour

GOWLING WLG (CANADA) LLP
160 Elgin Street, Suite 2600
Ottawa, ON K1P 1C3

Guy Régimbald
Telephone: (613) 786-0197
FAX: (613) 563-9869
Email: guy.regimbald@gowlingwlg.com

Counsel for the Intervener, International
Commission of Jurists (Canada)

BORDEN LADNER GERVAIS LLP
22 Adelaide Street West Suite 3400
Toronto, ON M5H 4E3

Christopher D. Bredt
Laura M. Wagner
Mannu Chowdhury
Tel: (416) 367-6165
Fax: (416) 367-6749
Email: cbredt@blg.com

Counsel for the Intervener, Canadian Civil
Liberties Association

BORDEN LADNER GERVAIS LLP
100 Queen Street, suite 1300
Ottawa, ON K1P 1J9

Nadia Effensi
Tel: (613) 787-3562
Fax: (613) 230-8842
Email: neffendi@blg.com

Ottawa Agent for Counsel for the Intervener,
Canadian Civil Liberties Association

**RUBY SHILLER ENENAJOR
DIGIUSEPPE**

101 - 171 John Street
Toronto, ON M5T 1X3

Annamaria Enenajor

Tel: (416) 964-9664

Fax: (416) 964-8305

Email: aenenajor@rubyshiller.com

Counsel for the Intervener, Canadian
Constitution Foundation

SUPREME ADVOCACY LLP

100- 340 Gilmour Street
Ottawa, ON K2P 0R3

Marie-France Major

Tel: (613) 695-8855 Ext: 102

Fax: (613) 695-8580

Email: mfmajor@supremeadvocacy.ca

Ottawa Agent for Counsel for the Intervener,
Canadian Constitution Foundation

TABLE OF CONTENTS

PART I – OVERVIEW AND STATEMENT OF FACTS	1
A. Overview	1
B. Statement of Facts	1
PART II – STATEMENT OF QUESTIONS IN ISSUE	1
PART III – STATEMENT OF ARGUMENT	1
A. Belgium	1
B. France	3
C. European Court on Human Rights	5
D. Discrimination.....	6
E. Criteria and principles.....	7
PART IV – SUBMISSION CONCERNING COSTS	9
PART V – ORDERS SOUGHT	9
PART VI – TABLE OF AUTHORITIES AND LEGISLATION	10

PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. This case raises the question where the balance between the right to freedom of expression and right to freedom from discriminatory discourse lies where the expression under challenge is defended as comedy. The intervener, a Jewish community based organization, and the Jewish community generally have had to address this particular issue because of the many cases in several jurisdictions brought both by and against M'bala M'bala Dieudonné.

2. M'bala M'bala Dieudonné has claimed his discourse is entitled to protection as comedy. The courts in several jurisdictions have ruled otherwise, finding against him and his discourse on the basis that he has infringed permissible limits of freedom of expression. This factum attempts to draw principles which may be helpful to this Court in deciding this case from the jurisprudence generated by the litigation on the M'bala M'bala Dieudonné defense of comedy.

B. Statement of Facts

3. The Intervener accepts and adopts the statement of facts as set out by the Respondent in their counsel's factum.

PART II – STATEMENT OF QUESTIONS IN ISSUE

4. The Intervener accepts the statement of questions in issue in the factum of the Respondent.

PART III – STATEMENT OF ARGUMENT

Belgium

5. The Criminal Court of Liege on November 25, 2015 sentenced Dieudonné to two months in prison and a fine of 9,000 euros for incitement to hatred, dissemination of hate speech and denial of the Holocaust. He was prosecuted for remarks made on March 14, 2012 during a show in the town of Herstal.

6. The judgment described Dieudonné's show as "a catalog of anti-Semitic clichés". It considered that he called for genocide, when he invited Christians and Muslims to "unite to kill the Jews."¹

7. The Court reasoned that the right to humour does not constitute a justification when the perpetrator intends to incite hateful or violent behaviour. The law does not require that illegal speech taken an established form, but incriminates speech inciting hatred or violence without distinction whether the speech is spoken in an affirmative, interrogative, aggressive, urban, playful, or humorous manner.²

8. The Liege Court of Appeal on January 20, 2017 confirmed the conviction.³ The Belgian Cassation Court validated this decision of the Court of Appeal on June 7, 2017.⁴

9. The Court of Appeal recalled that the laws aimed at combating discrimination, repressing racism and xenophobia and suppressing Holocaust denial are necessary to protect human rights and

¹ Elzie Obiang, "Dieudonné condamné à deux mois de prison ferme par la justice belge", *Le Figaro*, November 25, 2015

<https://www.lefigaro.fr/actualite-france/2015/11/25/01016-20151125ARTFIG00156-dieudonne-condamne-a-deux-mois-de-prison-ferme-par-la-justice-belge.php>

² Chronique semestrielle de jurisprudence, Rev. Dr. Pén. Crim. 2016, page 1124 "Racisme et Xenophobie"

https://dial.uclouvain.be/pr/boreal/object/boreal%3A190330/datastream/PDF_01/view

³ Victor Garcia avec AFP, "Dieudonné "n'ira pas" en prison, malgré sa condamnation à deux mois ferme", *L'Express*, January 20, 2017

https://www.lexpress.fr/actualite/societe/justice/Dieudonné -condamne-en-appel-a-deux-mois-de-prison-ferme-en-belgique_1871000.html

⁴ Le Monde avec AFP, "La condamnation de Dieudonné à deux mois de prison ferme validée par la Cour de cassation belge", *Le Monde*, June 7, 2017

https://www.lemonde.fr/police-justice/article/2017/06/07/la-condamnation-de-Dieudonné -a-deux-mois-de-prison-ferme-validee-par-la-cour-de-cassation-belge_5140270_1653578.html

do not disproportionately infringe on freedom expression. The Court ruled that

"those who make remarks in public, even in a humorous fashion, which pit the Muslim against the homosexual community and which collectively refer to Jews and homosexuals as harmful groups to fight and eliminate violates the law on discrimination. Whoever attacks public figures of Jewish origin and uses crude anti-Semitic clichés is guilty of calls to hatred and to violence based on race or religion, in violation of the law against incitement to racism and xenophobia. Whoever suggests in public a gross minimization of the acts committed by the German Nazi regime and floats a conspiracy theory while suggesting that there has been a use of the Holocaust for commercial purposes commits the offense aimed against Holocaust denial."⁵

France

10. On October 27, 2009, the Paris High Court sentenced Dieudonné for antisemitic insults, to pay a fine of 10,000 euros after having the denialist Robert Faurisson acclaimed in his theatre. Faurisson was awarded the "price of insolence and infrequentability" by an actor disguised as a deported Jew.⁶

11. The Court, in its reasons for decision, wrote:

"Nor can Dieudonné M' Bala M'Bala hide behind the pretext of comedy. Caricature and satire - even of a deliberately provocative or vulgar nature - clearly fall, in a democratic society, within the realm of freedom of expression and creation, involving the free communication of ideas and opinions. Moreover, it is not for the court - which cannot judge the quality of a performance, even though it would suggest that, according to the video-recording, the audience did not find the remarks particularly funny - to determine whether or not the impugned remarks sought to remain within the register of the comedy show that they were bringing to a conclusion. It must be pointed out, however, that the right to humour has certain limits, and in particular that of respect for the dignity of the human person.

In the present case, by announcing his wish to push anti-Semitic provocation to its paroxysm and by publicly paying tribute, to that end, to an individual known for his negationist ideas, calling him on stage to be awarded, by an actor representing a caricature of a Jewish deportee, an object ridiculing a symbol of Judaism, the defendant excessively overstepped the permissible limits of the right to humour."⁷

⁵ Chronique semestrielle de jurisprudence, Rev. Dr. Pén. Crim. 2017, pages 1149 and 50

https://dial.uclouvain.be/pr/boreal/object/boreal%3A206646/datastream/PDF_01/view

⁶ *M' Bala M' Bala v France* (Appl. No. 25239:13), paragraph 15

⁷ Paragraph 16

12. In a judgment of 17 March 2011, the Paris Court of Appeal upheld the judgment as to the applicant's guilt and the sanctions imposed on him. The Court wrote:

"while Dieudonné M'Bala M'Bala has relied on his right to freedom of expression and a kind of 'immunity' that should, in his view, be enjoyed by artistic creation with a comic aim, it should be pointed out that such rights, essential though they may be in a democratic society, are not limitless, particularly where respect for human dignity is at stake, as it was in the present case, and where theatrical acts give way to a demonstration which is no longer in the nature of a performance."⁸

13. In a judgment of 16 October 2012, the Cassation Court dismissed the appeal of Dieudonné from this judgment of the Court of Appeal. It affirmed the finding of the Court of Appeal that the expressions of Dieudonné about persons of Jewish origin or faith was "both insulting and contemptuous".⁹

14. On January 9, 2014, the State Council reversed a judgment of the Administrative Tribunal of Nantes which had suspended the execution of the decree of the prefect of Loire-Atlantique prohibiting the Dieudonné show "Le Mur" in Saint-Herblain. The State Council justified this decision in part by

"the serious risk that serious attacks on respect for the values and principles, in particular of the dignity of the human person, enshrined in the Declaration of Rights of Man and of the Citizen and by the Republican tradition will again be carried out."¹⁰

15. The Minister of the Interior issued a circular on January 6, 2014 calling on local police and city halls to prohibit the presentation of the Dieudonné show "Le Mur". The circular stated in part that the

- the remarks in the show "cannot be regarded as a one-off 'slip of the tongue' which could be explained away by artistic free expression, but they are deliberate and reiterated despite previous criminal convictions and constitute essential components of the show;
- the remarks in question are linked to words or scenes likely to affect the respect due to the dignity of the person, which is a component of public order."¹¹

⁸ Paragraph 18

⁹ Paragraph 20

¹⁰ Conseil d'État, Juge des référés, 09/01/2014, 374508, Publié au recueil Lebon

<https://www.legifrance.gouv.fr/ceta/id/CETATEXT000028460200/>

¹¹ Ministère De L'Intérieur, Circulaire du 6 janvier 2014 relative à la lutte contre le racisme et

16. Dieudonné asked the State Council to invalidate the circular. The Council on November on November 9, 2015 refused to do so, stating that:

"remarks and gestures, in particular those of an antisemitic nature, inciting to racial hatred and defending the discrimination, persecution and exterminations perpetrated during the Second World War, may undermine the dignity of the human person, even though they would not cause material disturbances; that thus, the Minister of the Interior did not exceed his competence by mentioning, among the elements allowing to justify the prohibition of the representation of a spectacle by the police authority, the words or scenes which would be likely to violate the dignity of the human person;"¹²

European Court on Human Rights

17. Dieudonné petitioned the European Court of Human Rights that his rights under European Convention on Human Rights had been violated by the conviction by the Paris High Court in October 2009, affirmed on appeal by the Paris Court of Appeal in March 2011 and the Cassation Court in October 2012. The European Court of Human Rights, in October 2015, rejected his application.

18. The Court wrote:

"39. The Court thus takes the view, like the Court of Appeal, that in the course of the offending sketch the show took on the nature of a rally and was no longer a form of entertainment. The applicant cannot claim, in the particular circumstances and having regard to the whole context, that he acted as an artist with an entitlement to express himself using satire, humour and provocation. Under cover of a comedy show, he invited one of the best known French negationists, who had been convicted a year earlier for denying crimes against humanity, in order to pay tribute to him and give him a platform. In addition, in the context of a preposterously grotesque *mise en scene* he arranged for an actor playing the role of a Jewish inmate of the Nazi concentration camps to award Robert Faurisson a prize. Having regard to the value thus attached to negationism, through the prominence of Robert Faurisson's role on stage and the degrading portrayal of Jewish deportation victims faced with a man who denies their extermination, the Court is of the view that this was a demonstration of hatred and anti-Semitism, supportive of Holocaust denial. It is unable to accept that the expression of an ideology which is at odds with the basic values of the Convention, as expressed in its

l'antisémitisme – manifestations et réunions publiques – spectacles de M. Dieudonné M'BALA M'BALA

<https://bodata.steinertriples.fr/INTK1400238C.pdf>

¹² France, Conseil d'État, 10ème - 9ème ssr, 09 novembre 2015,376107

<https://www.legifrance.gouv.fr/ceta/id/CETATEXT000031464446/>

Preamble, namely justice and peace, can be assimilated to a form of entertainment, however satirical or provocative, which would be afforded protection by Article 10 of the Convention. 40. In addition, the Court emphasises that while Article 17 of the Convention has, in principle, always been applied to explicit and direct remarks not requiring any interpretation, it is convinced that the blatant display of a hateful and anti-Semitic position disguised as an artistic production is as dangerous as a fully-fledged and sharp attack ... It thus does not warrant protection under Article 10 of the Convention.

41. Accordingly, since the impugned acts, both in their content and in their general tone, and thus in their aim, had a marked negationist and anti-Semitic character, the Court finds that the applicant has attempted to deflect Article 10 from its real purpose by seeking to use his right to freedom of expression for ends which are contrary to the text and spirit of the Convention and which, if admitted, would contribute to the destruction of the rights and freedoms guaranteed by the Convention."

Discrimination

19. The dissent in this case in the Court of Appeal was based on the fact that the claim of violation of the Quebec *Charter of Rights and Freedoms* invoked the prohibition against discrimination and that discrimination had to be distinguished from defamation. In light of that distinction, it is worth noting the legislation in the various jurisdictions on which the Dieudonné decisions were based.

20. The Belgian cases found violation of three different prohibitions. One was, according to all levels of the Belgian courts, a prohibition against discrimination. The Belgian law on discrimination states:

"Article 21 For the purposes of this Law, discrimination means any form of direct discrimination intentional, intentional indirect discrimination, injunction to discriminate or harassment, based on a protected ground, as well as refusal to make reasonable accommodation for a person disabled.

Article 22 Anyone is punishable by imprisonment from one month to one year and a fine of fifty euros to one thousand euros, or of one of these penalties only:

1) who, in one of the circumstances referred to in article 444 of the Penal Code, incites to discrimination with regard to a person, because of one of the protected criteria, even outside the areas referred to in article 5;"¹³

21. The French court judgments on the planned Dieudonné performance at Nantes and on the

¹³ Législation consolidée, Loi tendant à lutter contre certaines formes de discrimination, Intégration des modifications en vigueur publiées jusqu'au 21-05-2019 inclus, Moniteur belge

http://www.ejustice.just.fgov.be/img_1/pdf/2007/05/10/2007002099_F.pdf

Ministerial circular both found the guarantee of freedom of expression was not violated, because of concerns about discriminatory discourse. The Court judgment which allowed the suspension of the performance of the Dieudonné show "Le Mur" in Nantes to stand invoked, among other considerations, the attempts in that show to justify the discrimination inflicted on the Jews during World War II.¹⁴ The Court judgment which refused to annul the Ministerial circular asking localities to ban the Dieudonné show "Le Mur" noted similarly, among other considerations, that an attempt to justify the discrimination inflicted on Jews during World War II could undermine human dignity.¹⁵

22. The European Court of Human Rights, as noted, stated that the guarantee of freedom of expression in the European Convention on Human Rights could not be used "for ends which ... would contribute to the destruction of the rights and freedoms guaranteed by the Convention". That general statement would include the rights set out in Article 14 of the Convention. Article 14 provides:

"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

Criteria and principles

23. These various judgements set out general criteria which allow for an informed assessment where the balance lies between the right to freedom of expression and right to freedom from discriminatory in a comedy context. In particular, the cases set out above suggest these criteria:

- a) Are the remarks and gestures repeated in different shows or the same show, or just uttered once?
- b) Are the remarks intentional or just thoughtless slips of the tongue?
- c) Is the show a pretext or disguise for discriminatory discourse?
- d) Is comedy being instrumentalized to propagate discrimination?
- e) Does the comedy routine repeat standard bigoted cliches against the group vilified?
- f) Has the content of speech which is the subject of concern been addressed by other tribunals in other contexts and, if so, how?

¹⁴ Fifth "Considérant"

¹⁵ Eighth "Considérant"

- g) Would the infringement of freedom of expression resulting from a finding against the contested speech be disproportionate?
- h) Is a finding against the speaker of the contested speech necessary to protect the human rights of the victim or target group and the community at large?
- i) Do the impugned remarks and gestures excessively overstep the permissible limits of the right to humour?
- j) Have the theatrical acts become instead a demonstration or rally which is no longer in the nature of a performance or entertainment?
- k) Are the remarks in question linked to words or scenes likely to affect the respect due to the dignity of the person?
- l) Are the impugned remarks an expression of an ideology which is at odds with basic human rights values?
- m) Is the invocation of freedom of expression an attempt to deflect that freedom from its real purpose by seeking to use the freedom for ends contrary to respect for human rights?
- n) Would the impugned remarks, if allowed, contribute to the destruction of human rights?

24. The Dieudonné cases also point out several factors which should be considered irrelevant in determining where the balance lies between the right to freedom of expression and right to freedom from discriminatory discourse in a comedy context.

- a) The right to humour does not constitute a justification for discriminatory discourse.
- b) The law does not require that speech or gestures violating human rights take an established form.
- c) In determining whether speech is discriminatory discourse, it should not matter whether the speech is spoken in an affirmative, interrogative, aggressive, urban, playful, or humorous manner.
- d) The quality of the comedic performance is irrelevant to a determination whether it is discriminatory discourse.
- e) It is not for the court to determine whether or not the impugned remarks sought to remain within the register of the comedy.
- f) The mere fact that the impugned speech is provocative or vulgar is insufficient to make the remarks violative of human rights.

25. The cases set out above also allow us to state certain general principles in addressing where the balance lies between the right to freedom of expression and right to freedom from discriminatory discourse in a comedy context. They are:

- a) The right to humour has certain limits, and in particular that of respect for human dignity.
- b) The right to freedom of expression enjoyed by artistic creation with a comic aim is essential in a democratic society, but not limitless, particularly where respect for human dignity is at stake.
- c) The expression of an ideology which is at odds with basic human rights values cannot be assimilated to a form of entertainment, however satirical or provocative.
- d) Discriminatory discourse disguised as an artistic production is as dangerous as a fully-fledged and sharp attack.

PART IV – SUBMISSION CONCERNING COSTS

26. The Intervener does not seek costs and asks that costs not be awarded against it.

PART V – ORDERS SOUGHT

27. The Intervener takes no position on the outcome of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 25th day of January 2021

A handwritten signature in blue ink, appearing to read 'D. Matas', is written over a light blue rectangular background.

DAVID MATAS
SARAH TEICH
Co-counsel for the Intervener,
League for Human Rights of B'nai Brith
Canada

PART VI – TABLE OF AUTHORITIES & LEGISLATION

Jurisprudence	Paragraph References (to Memorandum)
Conseil d'État, Juge des référés, 09/01/2014, 374508, Publié au recueil Lebon	14
France, Conseil d'État, 10ème - 9ème srr, 09 novembre 2015,376107	16
M'Bala M'Bala v France (Appl. No. 25239:13)	10-13, 17-18
Secondary Sources	
Chronique semestrielle de jurisprudence, Rev. Dr. Pén. Crim. 2016	7
Chronique semestrielle de jurisprudence, Rev. Dr. Pén. Crim. 2017	9
Garcia, Victor avec AFP, "Dieudonné "n'ira pas" en prison, malgré sa condamnation à deux mois ferme", <i>L'Express</i>, January 20, 2017	8
Le Monde avec AFP, "La condamnation de Dieudonné à deux mois de prison ferme validée par la Cour de cassation belge", <i>Le Monde</i>, June 7, 2017	8
Ministère De L'Intérieur, Circulaire du 6 janvier 2014 relative à la lutte contre le racisme et l'antisémitisme – manifestations et réunions publiques – spectacles de M. Dieudonné M'BALA M'BALA	15
Obiang, Elzie, "Dieudonné condamné à deux mois de prison ferme par la justice belge", <i>Le Figaro</i>, November 25, 2015	5-7
Statutes, Regulations, Legislation	
Législation consolidée, Loi tendant à lutter contre certaines formes de discrimination, Intégration des modifications en vigueur publiées jusqu'au 21-05-2019 inclus, <i>Moniteur belge</i>	20-21