

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

- AND -

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

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TABLE OF CONTENTS

| | |
|--|----|
| I. OVERVIEW AND CONCISE STATEMENT OF FACTS | 1 |
| II. POSITION ON APPELLANT’S QUESTIONS IN ISSUE | 2 |
| III. STATEMENT OF ARGUMENT | 2 |
| 1. Freedom of expression should be considered in determining prima facie discrimination under s. 10 of the Quebec Charter..... | 2 |
| a. Freedom of expression is a fundamental right on equal footing with equality protected by s. 10 | 2 |
| b. Freedom of expression creates an internal limit on other rights by virtue of s. 9.1 of the Quebec Charter | 4 |
| c. The framework adopted by the Court below was not crafted to respond to the context of equally-placed competing rights | 7 |
| d. The correct analytical approach | 8 |
| e. The analytical framework must consider the private nature of the dispute | 8 |
| IV. SUBMISSIONS ON COSTS..... | 10 |
| V. ORDER REQUESTED | 10 |
| VI. TABLE OF AUTHORITIES | 11 |

I. OVERVIEW AND CONCISE STATEMENT OF FACTS

1. One of the hallmarks of a vibrant democracy is an open and robust right to freedom of thought, conscience, and expression. Freedom of expression underpins most other constitutional rights and allows them to flourish. It allows citizens to hold those in power to account and to debate the architecture of our society. Speech, even controversial or repugnant speech, has social value; it should be protected from unjustified state intrusion.

2. While offensive and distasteful expression — like the Appellant’s comedy routine — may be the subject of a private law claim, it should not be policed by the state. On a broad level, this appeal is of concern because it demonstrates that, through human rights litigation, government bodies in Quebec have expanded the scope of the state’s intrusion into the domain of private expression. Artistic expression lies at the heart of freedom of expression.¹ If human rights bodies are going to police the core content of expression, it is imperative that they develop an analytical framework for assessing discrimination that allocates appropriate consideration to freedom of expression, given its to our constitutional democracy.

3. The *Bombardier* test adopted by the Quebec Court of Appeal considers freedom of expression only when justifying speech already found to be discriminatory. The CCF disagrees with this approach. Relegating the consideration of freedom of expression to the justification stage of the analysis fails to recognize the way in which this democratic value should operate as an internal limit on the scope of all other rights.

4. The CCF argues that the *prima facie* test for discrimination should be modified to reflect the role freedom of expression plays in properly defining the scope of discriminatory speech. When considering whether the speech has the effect of nullifying or impairing the right to full equality in the recognition and exercise of a right or freedom, future courts must take into account that this right or freedom is limited by a *proper regard for democratic values, public order and the general well-being of the citizens of Quebec*. The CCF asks that this language be explicitly added to the *prima facie* test for discrimination at the first stage of the s. 10 analysis.

¹ *R. v. Sharpe*, [2001] 1 S.C.R. 45 at para. 61.

5. This formulation is mandated by the language of s. 9.1 of the *Quebec Charter*. It fills an important gap left by the *Bombardier* framework, which was not crafted to respond to the context of equally-placed competing rights or to private disputes between individuals. To effectively balance between competing rights, a proper analytical framework must consider freedom of expression in determining whether discrimination exists in the first place.

II. POSITION ON APPELLANT’S QUESTIONS IN ISSUE

6. The CCF intervenes with respect to the first question in issue as framed by the Appellant:

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

7. The CCF does not respond to this question, but offers the Court suggestions regarding the appropriate analytical framework to adopt in crafting an answer. The CCF takes no position on the other issues identified by the Appellant.

III. STATEMENT OF ARGUMENT

1. Freedom of expression should be considered in determining *prima facie* discrimination under s. 10 of the *Quebec Charter*

a. Freedom of expression is a fundamental right on equal footing with the right to dignity

8. Freedom of expression is one of the pillars of our modern democracy. It allows individuals to become emancipated, creative and informed. It favours the emergence of truth and encourages the circulation of new ideas.² It is through the exercise of this freedom that we negotiate the contours of all other rights, including equality rights.

9. Safeguarding freedom of expression has long been a key concern of Canadian courts, including those in Quebec.³ This Honourable Court has recognized the free exchange of ideas

² *Bou Malhab v. Diffusion Métromédia CMR Inc.*, [2011] 1 S.C.R. 214 at para. 17 [*Diffusion Métromédia*].

³ *Ibid.*, at para. 21.

facilitated by a robust protection of free expression is an essential democratic value of our society.⁴ Freedom of expression is protected by s. 2 of the *Canadian Charter of Rights and Freedoms* (“*Canadian Charter*”),⁵ as well as by s. 3 of the *Charter of human rights and freedoms*,⁶ (“*Quebec Charter*”). Though not absolute, freedom of expression is broad in scope; it protects “well-prepared speech and wrath-provoking comments alike.”⁷ Punishing free expression that is offensive or distasteful raises the spectre of inappropriate state censorship that can have the effect of chilling debate and suppressing dissent on matters of legitimate public interest.⁸ As the Appellant notes at paragraph 67, freedom of expression is only valuable to the extent that it protects speech considered unpalatable or outrageous.⁹ After all, those who express conventional views are not often the ones in need of constitutional protection.

10. Freedom of expression stands on equal footing with the other fundamental rights and freedoms protected by the *Quebec Charter*. The *Quebec Charter* enshrines the right to dignity and freedom of expression as fundamental rights and freedoms on an equal level.¹⁰ Additionally, one principle that has shaped the interpretation of rights protected by the *Canadian Charter* is the repudiation of the notion of a hierarchy of rights. Where protected rights come into conflict, courts must strike a balance that fully respects the importance of both rights.¹¹

11. This Court favours a consistent interpretation of various provincial human rights statutes — one that is congruous with interpretations of the *Canadian Charter*.¹² Jurisprudence that has developed in the interpretation of the *Canadian Charter*, including the repudiation of the notion

⁴ *Thomson Newspapers Co. v. Canada (Attorney General)* [1998] 1 S.C.R. 877 at 969 [*Thomson Newspapers Co.*]; *Harper v. Canada (Attorney General)*, [2000] A.J. No. 1240 at para. 10 [*Harper*].

⁵ *Canadian Charter of Rights and Freedoms*, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [*Canadian Charter*].

⁶ *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12 [*Quebec Charter*].

⁷ *Diffusion Metromedia*, *supra* note 2, at para. 17.

⁸ *WIC Radio Ltd. v. Simpson*, [2008] 2 S.C.R. 420 at para. 15 [*WIC Radio*].

⁹ See also, *Zundel v. the Queen*, [1992] 2 S.C.R. 731 at para. 22 [*Zundel*].

¹⁰ Articles 3 and 4 of the *Charter* are found under the same chapter, titled “Fundamental Freedoms and Rights.”

¹¹ *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 at para. 72 [*Dagenais*].

¹² *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City)*, [2000] 1 S.C.R. 665, at para. 42 [*City of Montréal*].

of a hierarchy of rights, can assist with the interpretation of the *Quebec Charter*.¹³ Consequently, when the fundamental rights of two individuals protected by the *Quebec Charter* come into conflict — as in the present case — a proper analytical approach fully respects the importance of both rights.¹⁴

b. Freedom of expression creates an internal limit on other rights by virtue of s. 9.1 of the Quebec Charter

12. The Quebec Court of Appeal adopts the framework established in *Quebec v. Bombardier Inc.*,¹⁵ for determining discrimination under the *Quebec Charter*. The framework contemplates two stages of analysis. The first is the “discrimination” stage. At this stage, a claimant must establish the existence of a distinction, exclusion or preference on an enumerated ground that has the effect of nullifying the right to full equality in the recognition and exercise of a right or freedom otherwise guaranteed in the *Quebec Charter*.¹⁶ The second stage is the “justification” stage. Pursuant to the *Bombardier* test, it is only at the justification stage that a court or tribunal must engage in the exercise of balancing between the plaintiff’s right to dignity, honour or reputation and the defendant’s right to freedom of expression.¹⁷

13. Limiting a consideration of freedom of expression to the “justification” stage flows from an impoverished understanding of this right — one that fails to recognize the way in which it is integral to the fulfillment of all other rights. Rather, freedom of expression should be given robust consideration at the first stage of the analysis to determine the existence of discrimination. The CCF submits that this is required by the architecture of the *Quebec Charter*.

14. Through the operation of s. 9.1 of the *Quebec Charter*, freedom of expression should be formally integrated into the test for determining whether discrimination exists in the exercise of a right or freedom listed in ss. 1 to 9 of the *Quebec Charter*. Section 9.1 applies to the fundamental

¹³ *Ontario Human Rights Commission v. Ontario*, [1994] O.J. No. 1732 (C.A.) at para. 18 [Ontario].

¹⁴ *Dagenais*, *supra* note 11, at para. 72.

¹⁵ *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aéronautique Centre de formation)*, [2015] 2 S.C.R. 789 [Bombardier].

¹⁶ *Ward c. Commission des droits de la personne et des droits de la jeunesse (Gabriel et autres)*, [2019] J.Q. no 10380 at para. 157 [Ward].

¹⁷ *Ward*, *ibid.*, at paras. 157, 194.

rights and freedoms enumerated in ss. 1 to 9. It provides that rights and freedoms enumerated therein must be exercised in relation to each other, with proper regard for public order, democratic values and general well-being.¹⁸ Freedom of expression is not only a right protected by the *Quebec Charter*; it is also an important democratic value.¹⁹ It follows that by virtue of the operation of s. 9.1, the Court below should have considered freedom of expression as an internal limit on the scope of all other rights, and not merely as a justification for their infringement. Savard J.A. in the Court below was correct in her dissenting reasons, where she held that *before* concluding that a distinction, based on a prohibited ground, nullifies or impairs an individual's right to dignity, the tribunal must first assess the scope of the right to dignity in light of the Appellant's freedom of expression, in accordance with s. 9.1.²⁰

15. This analytical approach is consistent with the framework adopted by this Honourable Court in *Devine v. Quebec (Attorney General)*.²¹ In that case, the Supreme Court was asked to determine, among other questions, whether the limitations imposed on freedom of expression by certain provisions of the *Charter of the French Language* infringe the guarantee against discrimination based on language protected by s. 10 of the *Quebec Charter*. There, the Court considered the operation of s. 9.1 in its analysis of the third part of the test for discrimination, that is to say, in answering the question of whether the distinction had the effect of nullifying or impairing the right to full and equal recognition and exercise of a human right or freedom recognized by the *Quebec Charter*:

While it is true that s. 9.1 does not apply to the principle of equality enshrined in s. 10, it does apply to the guarantee of free expression enshrined in s. 3. Whenever it is alleged that a distinction on a ground prohibited by s. 10 has the effect of impairing or nullifying a right under s. 3, the scope of s. 3 must still be determined in light of s. 9.1. Where, as here, s. 9.1 operates to limit the scope of freedom of expression guaranteed under s. 3, s. 10 cannot be invoked to circumvent those reasonable limits and to substitute an absolute guarantee of free expression. On the other hand, having specified the scope of free expression, s. 9.1 cannot be invoked

¹⁸ *Aubry v. Éditions Vice-Versa*, [1998] 1 S.C.R. 591, at para. 24 [*Éditions Vice-Versa*].

¹⁹ *Harper*, *supra* note 4, at para. 10.

²⁰ *Ward*, *supra* note 16, at para. 99.

²¹ *Devine v. Quebec (Attorney General)*, [1988] 2 S.C.R. 790 at para. 30 [*Devine*].

to justify a limit upon equal recognition and exercise of the right guaranteed by s. 3.²² [emphasis added]

16. The approach defined above regarding the limits of the scope of the rights protected by s. 3 must likewise apply to rights protected by s. 4. The rights and freedoms enshrined in ss. 1 to 9 are equally subject to internal limits pursuant to s. 9.1.²³

17. This analytical framework is also consistent with the way that courts in Quebec have more recently analyzed this question. In *Calego*, the Quebec Court of Appeal suggests that a reasonable person, in determining the presence of discrimination would temper his or her reaction by taking into account the habits and customs of a pluralist society where freedom of expression is valued and where certain excesses of language in the exercise of this fundamental freedom are tolerated.²⁴ The majority in the Court below referenced the following passage in their analysis on whether a guaranteed right had been infringed, but failed to reconcile the apparent contradiction with their analytical framework:

L'analyse de la compromission du droit garanti doit s'effectuer en fonction d'un critère objectif: la perception qu'aurait une personne raisonnable, « qui tempère sa réaction en tenant compte des us et coutumes d'une société pluraliste où l'on valorise la liberté d'expression et où on tolère certains excès de langage » ou, dit autrement, qu'une personne raisonnable, habituée à une société où l'on valorise la liberté d'expression, considérerait le propos comme un affront particulièrement méprisant. [emphasis added].²⁵

18. In examining the third element of the three-part test for discrimination, the Court below assessed the infringement of s. 4 of the *Quebec Charter* without considering that a reasonable person would place high value on freedom of expression in our democratic society. It erred in concluding that freedom of expression need only be considered to justify discrimination once discrimination has already been established.

²² *Ibid.*

²³ *Ibid.*

²⁴ *Calego International inc. c. Commission des droits de la personne et des droits de la jeunesse*, [2013] J.Q. no 5215, at para. 99 [*Calego*].

²⁵ *Ward*, *supra* note 16, at para. 183.

c. The framework adopted by the Court below was not crafted to respond to the context of equally-placed competing rights

19. The analytical framework for assessing discrimination adopted by the majority in the Court below fails to appropriately recognize the importance of freedom of expression because the framework was not created to reconcile competing rights of equal import. In *Bombardier*, this Honourable Court did not deal with the resolution of a conflict between fundamental rights enumerated in ss. 1 to 9 of the *Quebec Charter*.²⁶ The framework employed in that case was developed in the context of discrimination claims made by employees against employers. It evolved from the three-step test established in *Meiorin* for determining whether an employer had established, on a balance of probabilities, that a *prima facie* discriminatory standard is a *bona fide* occupational requirement. The test requires that once *prima facie* discrimination has been shown, the onus shifts to the employer to justify the discriminatory conduct.²⁷

20. In cases where the onus shifts to an employer to justify discriminatory conduct, the justification does not stem from a competing right that was equally protected under the *Quebec Charter*. In *Bombardier*, for example, the employer advanced two justifications for discrimination found by the Quebec Human Rights Tribunal. The first was based on security reasons, while the second was based on financial considerations.²⁸ In *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*, the justification was a *bona fide* occupational requirement.²⁹ None of these justifications had quasi-constitutional status as protected rights under the *Quebec Charter*. They were all subsidiary to the right to be free from discrimination under s. 10 and could, therefore, only be considered at the justification phase. In cases where the *Bombardier* test is applied, courts have been concerned exclusively with the question of discrimination under s. 10.

21. The *Bombardier* test fails to consider the internal limits in rights posed by s. 9.1 of the *Quebec Charter*. Applying the *Bombardier* framework to a scenario where there are equally

²⁶ *Ibid.*, at para. 101.

²⁷ *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 ("*Meiorin*").

²⁸ *Bombardier*, *supra* note 15, at para. 24.

²⁹ *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*, [2007] 1 S.C.R. 161, at para. 50 [*McGill*].

protected rights has the effect of elevating one above the other, improperly creating a hierarchy of rights. It makes freedom of expression subsidiary to freedom from discrimination in all cases. The proper approach would be a framework that “fully respects the importance of both rights”³⁰

d. The correct analytical approach

22. The appropriate analytical framework to reconcile competing rights enshrined in ss. 1 to 9 of the *Quebec Charter* that come into conflict is as follows:

A claimant must establish:

- i) A distinction, exclusion or preference;
- ii) Based on one of the grounds enumerated in s. 10; and
- iii) That has the effect of nullifying or impairing the right to full equality in the recognition and exercise of a right or freedom *which must be exercised with proper regard for democratic values, public order and the general well-being of the citizens of Quebec.*

23. Consideration of freedom of expression should not be relegated to a “justification” stage. Fidelity to the architecture of the *Quebec Charter* and the value it places on freedom of expression requires its consideration to be embedded in the determination of discrimination under s. 10, as an internal limit to other rights.

e. The analytical framework must consider the private nature of the dispute

24. In determining whether an individual, through his, her or their expression, has violated s. 10 of the *Quebec Charter*, courts should be careful not to hold that individual to the same standard that they would a state actor. In determining whether an individual’s actions constituted discrimination, courts must be mindful that individuals *and not states* have the right to exercise freedom of expression, which tempers the assessment of discrimination.

25. This point is significant because in its decision below, the Quebec Court of Appeal imports an understanding of equality that has been developed in the context of s. 15(1) of the *Canadian Charter* to find that Mr. Ward discriminated against Jérémy Gabriel. At paragraph 165 of the

³⁰ *Dagenais*, *supra* note 11, at para. 72.

decision below, the Court cites *Québec (Procureur général) c. A*³¹ for the proposition that one of the purposes of equality rights is to prevent the violation of human dignity by “eliminating any possibility” that a person will be treated as less worthy than others.³² This absolutist standard of equality is underpinned by the concept of human dignity and the principles of personal autonomy and self-determination, to which self-worth, self-confidence and self-respect are tied.³³

26. The scope of equality and dignity in s. 15(1) jurisprudence has been shaped by the context of protecting individuals against the intrusion of state actors. As a result, the public law doctrines of equality and dignity should be seen as the highwater mark that are not easily imported into the human rights context.

27. This high standard is justified in the context of the *Canadian Charter*—an instrument that recognizes the rights of individuals while imposing corresponding duties and obligations on the state. Care should be taken when importing concepts developed in the context of the relationship between the citizen and state into disputes between private individuals.³⁴ This Honourable Court, for example, has recognized that there is a fundamental difference between a person’s reasonable expectation of privacy in his or her dealings with the state, and the same person’s reasonable expectation of privacy in his or her dealings with other citizens.³⁵ We need not tolerate the spectre of the former, but in a free and democratic society, we must be prepared to live with the risk of the latter.

28. Similarly, individuals must tolerate affronts to dignity from other citizens that would be unacceptable if coming from the state. States do not have a constitutional right to freedom of expression, but individuals do.

29. The transplantation of the *Canadian Charter* concepts of equality and dignity—which were shaped in the context of protection against state intrusion—into the *Quebec Charter* context of conflicting rights of individuals should be undertaken with great care. In this context, it is not self-

³¹ *Québec (Procureur général) c. A*, [2013] 1 S.C.R. 61 [*A*].

³² *A*, *ibid.*, at para. 138.

³³ *A*, *ibid.* at para. 139.

³⁴ *Éditions Vice-Versa*, *supra* note 18, at para. 7

³⁵ *R. v. Duarte*, [1990] 1 S.C.R. 30 at para. 43-44 [*Duarte*]; *R. v. Wong*, [1990] 3 S.C.R. 36 at pp. 48-55 [*Wong*].

evident that the concept of human dignity mandates an absolutist standard of equality as articulated in *Québec (Procureur général) c. A*. While the content of the impugned expression in this case is repugnant and degrading, human dignity is greatly enhanced by pluralistic expression. Like equality, freedom of expression protects the dignity of the individual and enhances personal autonomy and self-fulfillment.³⁶

30. Importing public law concepts into a determination of a dispute between private actors imposes an unfair burden on citizens exercising their right to freedom of expression. In *McKinney*³⁷ this Court explained that conferring *Charter*-like obligations upon private citizens was not desirable, noting that exposing “all private and public action to judicial review could strangle the operation of society and [...] ‘diminish the area of freedom within which individuals can act’.”³⁸ Consequently, courts should not hold the speech of private citizens to the same standard that they would hold the conduct of a state actor. What this means in practice is that greater latitude for inappropriate or socially unpalatable speech should be tolerated when it comes to the expressive actions of private citizens before it qualifies as discrimination.

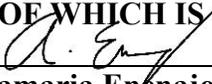
IV. SUBMISSIONS ON COSTS

31. The CCF makes no submissions regarding costs. The CCF does not seek costs and asks that no costs be ordered against it.

V. ORDER REQUESTED

32. The CCF takes no position on the disposition of this appeal and makes no submissions on the ultimate order to be made.

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



Annamaria Enénajor
Stephanie DiGiuseppe

³⁶ *R. v. Keegstra*, [1990] 3 S.C.R. 697 at para. 88.

³⁷ *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229 [“*McKinney*”].

³⁸ *Ibid.* at paras. 20-24.

VI. TABLE OF AUTHORITIES

| CASES REFERENCED IN MEMORANDUM | AT PARA. |
|--|-----------------|
| <i>Aubry v. Éditions Vice-Versa</i> , [1998] 1 S.C.R. 591 | 14, 27 |
| <i>Bou Malhab v. Diffusion Métromédia CMR Inc.</i> , [2011] 1 S.C.R. 214 | 8, 9 |
| <i>British Columbia (Public Service Employee Relations Commission) v. BCGSEU</i> , [1999] 3 S.C.R. 3 | 19 |
| <i>Calego International inc. c. Commission des droits de la personne et des droits de la jeunesse</i> , [2013] J.Q. no 5215 | 17 |
| <i>Dagenais v. Canadian Broadcasting Corp.</i> , [1994] 3 S.C.R. 835 | 10, 21 |
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| <i>McKinney v. University of Guelph</i> , [1990] 3 S.C.R. 229 | 30 |
| <i>Ontario Human Rights Commission v. Ontario</i> , [1994] O.J. No. 1732 (C.A.) | 11 |
| <i>Québec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City)</i> , [2000] 1 S.C.R. 665 | 11 |
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