

BEFORE THE BRITISH COLUMBIA HUMAN RIGHTS TRIBUNAL

BETWEEN:

MOHAMED ELMASRY and NAIYER HABIB

COMPLAINANTS

AND:

ROGERS PUBLISHING LTD and KEN MACQUEEN

RESPONDENTS

WRITTEN SUBMISSIONS OF THE INTERESTED PARTIES
CANADIAN ASSOCIATION OF JOURNALISTS and
BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

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STATEMENT OF POSITION

- 1) The interests at stake in this process are of great importance: on one side of the balance – the freedom of Muslims to participate in democratic society and access the freedoms formally recognized in Canada; on the other side of the balance – free expression, freedom of the press, reputational interests and the prospect of an institution with the power to permanently ban books and magazines from the Province of British Columbia. It is of critical importance that the administrative apparatus of the British Columbia Human Rights Tribunal (“BCHRT”) has the capacity to balance those interests in a principled and defensible manner.

- 2) The Canadian Association of Journalists (“CAJ”) and the British Columbia Civil Liberties Association (“BCCLA”) take the position that the BCHRT must refine its approach to the hate speech provisions of the Human Rights Code (“HRC”). Previous interpretations of the s.7 hate speech provisions provided the BCHRT with an overly expansive jurisdiction and provided complainants with an overly receptive process, and have consequently brought the institutional legitimacy of the BCHRT into question.

- 3) The public perception of the BCHRT's approach to hate speech would be enhanced by formally incorporating a number of more rigorous procedural requirements and criteria for liability, including the following:
 - a) A precise statement of the territorial jurisdiction of the BCHRT with respect to hate speech;
 - b) A principled approach to the rules of evidence that reflects the importance of the interests at stake and the presence of legal counsel; and
 - c) Enhancement of the two-part test set out in *Collins* to include a stricter causation requirement and to permit consideration of the reason or rationale for the speech. The reason or rationale for the speech may include: (i) whether the statement is on a subject of public interest or is worthy of public debate; (ii) whether the statement falls within the core constitutional categories of protected speech; (iii) the truth or perceived truth of the statement; (iv) the speaker's subjective motivation for making the statement. The reason or rationale for the speech would not be formal defences or formal elements of liability, but would be factors for consideration in considering whether the speech in question should be subject to official denunciation and vilification.
- 4) Although the CAJ and BCCLA are ultimately of the view that the hate speech provisions of the HRC are unconstitutional and should be declared of no force and effect, the CAJ and BCCLA commend these formal enhancements to the Tribunal's approach as an improvement to the present situation.

THE ADMINISTRATIVE TRIBUNALS ACT

- 5) CAJ and BCCLA are respectfully of the view that the hate speech provisions of the HRC infringe the right to free expression, as guaranteed by s.2(b) of the Canadian Charter of Rights and Freedoms (the “Charter”), and that this infringement cannot be justified in a free and democratic society. CAJ and BCCLA’s first position is that s.7 of the HRC should be declared to be unconstitutional and of no force and effect under s.52 of the *Charter*. We say this with the greatest respect to the members of the Panel and with unqualified recognition of the expertise of the BCHRT in remediating discrimination in employment, housing and services customarily available to the public.

- 6) Regrettably, the Administrative Tribunals Act prevents the BCHRT from considering the constitutional validity of the hate speech provisions of the HRC. Section 32 of the HRC provides that sections 1, 4 to 10, 17, 29, 30, 34(3) and (4), 45, 46, 48 to 50, 55 to 57, 59 and 61 of the Administrative Tribunals Act apply to the BCHRT. The cumulative effect of these provisions is to prevent CAJ and BCCLA from making Charter arguments before the BCHRT.
- 7) The balance of these submissions concern themselves with the alternative and secondary position of the CAJ and BCCLA – that the BCHRT’s process can be enhanced by incorporating a more rigorous and procedurally balanced approach to hate speech in the Province of British Columbia.
- 8) The CAJ and BCCLA respectfully request that the Panel as a courtesy to the interveners make express note of the CAJ and BCCLA’s primary objection to the constitutional validity of s.7 of the HRC in their written reasons.

ARGUMENT

Part I: The Challenge Facing This Tribunal

- 9) This case represents an opportunity for this Tribunal to consolidate and restate fundamental aspects of its own jurisdiction, its process and its threshold for liability in

relation to hate speech complaints. These issues are a source of great public interest, public debate and public confusion. The convention of a three-member Panel provides an excellent opportunity for the BCHRT to clarify its mandate, process and tests, not only to communicate with the public, but to provide future guidance to members.

Part II: Position on the Facts

10) CAJ and BCCLA do not take a position on the facts.

Part III: Territorial Jurisdiction of the Tribunal

- 11) The CAJ and BCCLA submit that this Tribunal should use this case to clearly articulate and confine its territorial jurisdiction in the area of hate speech. This Panel's work is complicated by the fact that one of the complainants, Mr. Elmasry, and one of the complainants' key witnesses, Mr. Awan, are both residents of the Province of Ontario. Further complications arise from evidence dealing with negotiations, press conferences and subjective reaction to publication in Ontario. And finally, there was evidence of internet-based reaction to both the internet version of the October 2006 article (the "Internet Article") and the paper version of the October 2006 article (the "Paper Article"). The use to be made of this testimony turns on a clear formulation of the territorial jurisdiction of the tribunal.

Jurisdiction over the Internet

- 12) The CAJ and BCCLA agree with the May 16, 2007 decision of the BCHRT that the Tribunal does not have jurisdiction over the publication of the Internet Article. Section 92(10) of the Constitution Act (1867) grant the federal Parliament exclusive jurisdiction over interprovincial works and undertakings related to transportation or communication. This section provides an interpretive basis for the extension of federal jurisdiction over telecommunications and television and radio broadcasting. It is trite law that the jurisdiction of a statutory body cannot exceed the jurisdiction of its enabling legislature.
- 13) Section 7 of the HRC requires a tribunal to consider whether a respondent has "published, issued or displayed, or caused to be published, issued or displayed a statement... or other representation". It is respectfully submitted that this Tribunal should explicitly decline jurisdiction over a complaint if the statement or other

representation forming the basis for the complaint is propagated from computer to computer by way of the internet or by way of telecommunications device.

Real and Substantial Connection to the Province of British Columbia

- 14) The CAJ and BCCLA respectfully submit that the BCHRT should expressly decline jurisdiction over complaints under s.7 unless the statement or representation forming the basis of the complaint has a real and substantial connection to the Province of British Columbia.
- 15) The real and substantial connection test for territorial jurisdiction (or “jurisdiction simpliciter”) has its roots in *De Savoye v. Morguard Investments Limited*, [1990] 3 S.C.R. 1077 (S.C.C.). Although the case speaks to inter-provincial enforcement of in personam judgment, the following general principles dealing with the need for a territorial connection apply in this context:

The taking of jurisdiction by a court in one province and its recognition in another must be viewed as correlatives and recognition in other provinces should be dependent on the fact that the court giving judgment “properly” and “appropriately” exercised jurisdiction. It may meet the demands of order and fairness to recognize a judgment given in a jurisdiction that had the greatest or at least significant contacts with the subject matter of the action. But it hardly accords with the principles of order and fairness to permit a person to sue another in any jurisdiction, without regard to the contacts that jurisdiction may have to the defendant or the subject-matter of the suit. If the courts of one province are expected to give effect to judgments given in another province, there must be some limit to the exercise of jurisdiction against persons outside the province. If it is reasonable to support the exercise of jurisdiction in one province, it is reasonable that the judgment be recognized in other provinces.

The approach of permitting suit where there is a real and substantial connection with the action provides a reasonable balance between the rights of the parties. It affords some protection against being pursued in jurisdictions having little or no connection with the transaction or parties. (emphasis added)

16) The “real and substantial connection” test for jurisdiction simpliciter is subject to mechanical application. Factors to be considered in determining whether there is a real and substantial connection include the following, which were recently cited with approval by the British Columbia Court of Appeal:

- (1) Where each party resides.
- (2) Where each party carries on business.
- (3) Where the cause of action arose.
- (4) Where the loss or damage occurred.
- (5) Any juridical advantage to the plaintiff in this jurisdiction.
- (6) Any juridical disadvantage to the defendant in this jurisdiction.
- (7) Convenience or inconvenience to potential witnesses.
- (8) Cost of conducting litigation in this jurisdiction.
- (9) Applicable substantive law.
- (10) Difficulty... in proving foreign law, if necessary.
- (11) Whether there are parallel proceedings in any other jurisdiction (“Forum shopping” is to be discouraged.)

Roth v. Interlock Services Ltd., [2004] B.C.J. No.1514 (B.C.C.A.)

17) The BCCA in *Roth v. Interlock* clarified that they did not intend the list to be exhaustive, and indicated that other factors might arise in a particular case and be determinative in that case. As in any area of discretion, certain factors can be more important than others from case to case. See also *Braintech, Inc. v. Kostiuk* 1999 BCCA 1069, and, in particular, the application of the test in *Bangoura v. Washington Post*,

[2005] O.J. No.3849 (Ont.C.A.) and *Crookes v. Holloway*, [2007] B.C.J. No.1935 (B.C.S.C.).

- 18) In the case before this Panel, the question to be addressed is whether there is a real and substantial connection between the Paper Article (and its effects) and the Province of British Columbia. The Internet Article (and its effects) should not be taken to support an assertion of jurisdiction simpliciter over either of the complaints before this Panel.

Part IV: Evidentiary Standards

- 19) The HRC confers a wide latitude on the BCHRT to admit evidence in a variety of forms. Section 27.2(1) provides that a member of panel may receive and accept on oath, by affidavit or otherwise, evidence or information that the member or panel considers necessary and appropriate, whether or not the evidence or information would be admissible in a court of law. Although many decisions dealing with admissibility of evidence were made during the course of the hearing, even more decisions respecting the probative value of evidence remain to be made.
- 20) The CAJ and BCCLA respectfully submit that the Panel's approach to the evidence should be influenced by the nature of the proceedings. In this case, two factors suggest a stricter application of evidentiary standards. Firstly, the parties are represented by

experienced counsel. The understandable relaxation of evidentiary standards to diminish barriers to access for unrepresented complainants or respondents does not apply in this case. And secondly, the interests at stake are important. Where, as here, the Tribunal has the power to officially vilify or castigate statements, individuals and publications as racist and antithetical to Canadian values, the Tribunal bears a heightened obligation to increase the quality of adjudication by insisting on clear and reliable evidence. Similarly, a finding of liability in this context will have the effect of banning a book and an issue of a magazine in and for the Province of British Columbia. This is a consequence of some moment and deserves from this Panel a long hard look at the evidence.

- 21) The CAJ and BCCLA urge the Panel to treat the evidence with caution and be acutely aware of the need for indicators of the reliability of the evidence. The Panel is requested to provide words of guidance to adjudicators assigned to future complaints under s.7 of the HRC. The treatment of evidence is of special importance in relation to the exercise of powers under HRC s.27(1)(c).

Part IV: Restatement of the Collins Test

- 22) The CAJ and BCCLA respectfully submit that the test for the application of the hate speech provisions of the HRC would be enhanced by interpreting the provision in light of the *Charter of Rights and Freedoms* and in light of the *Code* itself. A restatement of the test may go some distance in enabling the BCHRT to balance the important interests at stake in a manner that accords with Canadian constitutional values and principles of natural justice.

- 23) The current test for the application of s.7 as set out in *Collins* is a two-part test:
- a) Does the communication itself express hatred or contempt of a person or group on the basis of one or more of the listed ground? Would a reasonable person understand this message as expressing hatred or contempt?
 - b) Assessed in its context, is the likely effect of the communication to make it more acceptable for others to manifest hatred or contempt against the person or group concerned? Would a reasonable person consider it likely to increase the risk of exposure of the target group to hatred or contempt?

Canadian Jewish Congress v. North Shore Free Press Ltd., [1997] B.C.H.R.T.C. No. 23 (sub nom. *Collins*), paras.138-140

- 24) There is no requirement of proof of “actual harm” under this test. Specifically, the test does not require that it be established:

... that any member of the target group was actually exposed to hatred or contempt expressed by a recipient of the communication or, for that matter, any recipient of the communication expressed hatred or contempt at all. All that is required is an objective determination that the effect of the message was to make the manifestation of hatred or contempt more acceptable, thereby increasing the likelihood that the target group would be exposed to it.

Likewise, there is no requirement of proof of active efforts on the part of the communicator to foment hatred or contempt; the focus is on the probable effect of the message.

Collins, supra, para. 145

- 25) Furthermore, the *Collins* test takes the following three non-exclusive factors into consideration: (1) the content of the expression (what was said?); (2) the tone (how

was it said?); and (3) the vulnerability of the target group (about whom was it said?). However, the *Collins* test does explicitly direct the BCHRT to take into consideration the reason or rationale for the speech (why was it said?) in considering whether the statement in question is hateful or contemptuous.

- 26) In the submission of the CAJ and BCCLA, the test for the application of s.7(1)(b) should be restated as follows:
- a) Does the communication itself express hatred or contempt of a person or group on the basis of one or more of the listed grounds, taking into consideration the content of the expression, the tone, the vulnerability of the target group and the reason or rationale for the speech? And
 - b) Assessed in its context, is the exposure to hatred or contempt likely to preclude the targeted person or group from exercising other formally recognized rights?
- 27) This restatement of the *Collins* test coheres with and is supported by the ultimate purpose of the HRC and by the need to protect the competing values of freedom of expression and freedom of religion, both of which are fundamental freedoms guaranteed by the *Charter*.

Principles of Interpretation

- 28) The CAJ and BCCLA submit that the proposed restatement of the test for hate speech under s.7 of the HRC is supported by the “golden rule” of statutory interpretation and by the specific rule that statutes should be interpreted to comport with the *Charter of Rights and Freedoms*.
- 29) Section 7 of the HRC prohibits the publication or any statement or other representation that “indicates discrimination” or “is likely to expose a person or a group or class of persons to hatred or contempt”. Section 7 is aimed directly at

expressive activity and self-evidently constrains free speech. It also limits constitutionally protected religious interests in that freedom of religion includes the right to disseminate beliefs, as noted in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295.

30) The *Charter* guarantees freedom of expression and freedom of religion by providing as follows in ss.2(a) and (b):

2. Everyone has the following fundamental freedoms:

a) freedom of conscience and religion;

b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.

31) It is a constitutional principle of statutory interpretation that a statute should be interpreted to minimize impairment of *Charter* infringements. As noted in *R. v. Zundel*, [1992] 2 S.C.R. 731 at p.771, when a statute is susceptible of alternative interpretations, the one that accords with the *Charter* and the values to which it gives expression should be preferred. The same underlying principle is manifest in the doctrine in *Slaight Communications* that the discretionary powers should always be exercised in conformance with the rights guaranteed in the *Charter*. In the context of s.7, which clearly limits the exercise of the right to free expression, the provision should be interpreted to minimize the impairment of that right.

See also *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42, at paras. 27-30 and 62

32) Aside from the principle that a statute must, if possible, be interpreted to comport with the *Charter*, this Panel's interpretation should be influenced by the general rule of statutory interpretation. In this context, the prohibition on hate speech must be read in the context of the statute as a whole and must be given a construction which is

consistent with the overall purpose of the HRC, the object of the HRC and the intention of the Legislature.

Rizzo and Rizzo Shoes Ltd. (re), [1998] 1. S.C.R. 27 at para.21

Bell ExpressVu, supra, at paras. 26 and 27

33) Section 3 of the HRC sets out the following purpose of the Code:

3. The purpose of this Code are as follows:

- (a) to foster a society in British Columbia in which there are no impediments to full and free participation in the economic, social, political and cultural life of British Columbia;
- (b) to promote a climate of understanding and mutual respect where all are equal in dignity and rights;
- (c) to prevent discrimination prohibited by the Code;
- (d) to identify and eliminate persistent patterns of inequality associated with discrimination prohibited by the Code;
- (e) to provide a means of redress for those persons who are discriminated against contrary to this Code.

34) The overall purpose of the Code supports an interpretation of s.7 that comprehends that hate speech laws are designed as a support and buttress for other rights set out in the Code and in the Charter. Hate speech provisions are not designed to shelter complainants or the public at large from offensive words, but are intended by the Legislature to prevent the use of words, symbols and representations to undermine equality of access to and fair opportunity to exercise other formally recognized rights.

35) In the respectful submission of the CAJ and BCCLA, the Panel should not allow itself to become preoccupied with parsing and dissecting each passage of previous cases, such as *Collins* and *Taylor*. In the submission of the CAJ and BCCLA, those cases, while helpful on some levels, are focused on division of powers issues and the *vires* of the law under the *Charter*. Those cases do not focus on the task at hand, namely, the more modest exercise of considering the possible meaning of the words of s.7 in light of the preferred approach to statutory interpretation as set out in *Rizzo and Rizzo* and *Bell ExpressVu*.

Part A: The Reason or Rationale of a Statement is to be Considered

36) The CAJ and BCCLA submit that the reason or rationale of a statement or other representation should be considered in determining whether a statement is “hateful or contemptuous”. *Collins* already recognizes three non-exclusive factors in making this determination: content; tone; and the vulnerability of the target group. This submission merely proposes the addition of a factor that common sense dictates should enter the equation. In the view of the interveners, the reason and rationale behind the utterance of a statement may include the following aspects:

- a) Whether a statement is on a subject of public interest or is worthy of public debate;
- b) Whether a statement falls within the core constitutional categories of protected speech;
- c) The truth or perceived truth of the statement; and
- d) The speaker’s subjective motivation for making the statement.

37) These four aspects of the reason and rationale of a statement are not in the nature of a formal defence – a respondent would not necessarily avoid liability by raising a doubt

as to one of the four aspects, for example. The four aspects would form part of the analysis of the statement and form an integral part of the assessment of whether a statement can reasonably be found to be “hateful and contemptuous”. Similarly, there would be no requirement for a complainant to “prove” any of the four aspects of the reason and rationale of a statement. Both sides would bear an evidentiary burden with respect to the reason and rationale of a statement.

- 38) The proposed interpretation appropriately limits the breadth of the provision and affords more nuanced protection to freedom of expression. It also provides the BCHRT with access to a more publicly intuitive framework of analysis for an utterance rather than arbitrarily limiting the Panel or member’s ability to balance the interests at stake.

The First Aspect of the Reason and Rationale Factor

- 39) The first aspect of the reason and rationale of a statement is whether the statement is on a subject of public interest or is worthy of public debate. The importance of public debate receives frequent and repeated acknowledgement, but it suffices to refer to *Edmonton Journal v. Alberta*, in which Cory J. cites McIntyre J. at length from *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573:

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

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* (1644), 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.

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.

Edmonton Journal v. Alberta (Attorney General), [1989] S.C.J. No. 124, ¶ 3, 4.

- 40) Section 7 prohibits speech relating to a number of enumerated grounds including race, religion, sex, and sexuality. Discussions of facts and matters falling within these enumerated grounds will often overlap with subjects that are worthy of public debate and are of public interest. It may well be that consideration of this aspect of the reason or rationale for speech is already inherent in the consideration of the content of the speech, but it would be helpful for this Panel to provide express direction to consider whether the statement relates to an issue that is worthy of public debate or for which discussion is in the public interest.

The Second Aspect of the Reason and Rationale Factor

41) The second aspect of the reason and rationale for the statement is whether a statement falls within the core constitutional categories of protected speech. The principles and value underlying the vigilant protection of free expression in a society such as ours were summarize as follows in *Irwin Toy*:

- a) Seeking and attaining the truth is an inherently good activity;
- b) Participation in social and political decision-making is to be fostered and encouraged; and
- c) The diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated.

Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 927, at para.53

42) *Irwin Toy* and subsequent cases support the proposition that expression will receive greater protection to the extent that it approaches or advances the core purposes and values of free speech. There is nothing in the HRC to authorize deviation from this proposition. It is respectfully submitted that, as part of the determination of whether a statement can be considered “hateful or contemptuous”, statement should be measured against the core values of free expression. Anything less would assume that the speech is unlawful before giving consideration to its reason and rationale.

The Third Aspect of the Reason and Rational Factor

43) The third aspect of the reason and rationale factor is the truth or perceived truth of the statement. As outlined above, truth and the pursuit of truth is recognized as one of the core constitutional and common law values and it lies at the heart of every judicial and administrative process. A judicial or administrative process that abandons the value of truth is no better than a coin at resolving disputes.

- 44) This third aspect is responsive to the intuitive proposition that the truth of a statement is a factor that makes it less publicly objectionable. The truth of a statement would only be a factor in the analysis, and the BCHRT would retain the discretion to determine that a statement constitutes hate speech despite the truth of that statement.
- 45) Open consideration of the subjectively perceived truth of a statement would also allow for an honest but mistaken belief in a false statement. Consideration of this factor would not necessarily excuse a speaker who was willfully blind to the truth, or was reckless with respect to the truth, or had failed to inquire into the truth of the matter at hand. Consideration of the perceived truth may well involve consideration of the good faith of the speaker, and whether the intellectual process leading to the utterance could be characterized as giving due respect to the targets' race, religion, sex and sexuality.
- 46) Consideration of truth and perceived truth would in no measure give licence to those who would foment hate. Politically dangerous types seeking to leverage issues of race and religion into political power would obtain no solace from consideration of the truth or perceived truth of a statement.
- 47) On the other hand, professional journalists who engage in fact checking and due diligence and who write with a bona fide belief in the truth of their articles and stories could take some comfort in feeling somewhat less exposed to the vicissitudes and uncertainties of a process in which a complainant bears little risk.

The Fourth Aspect of Reason and Rationale

- 48) The fourth aspect of the reason and rationale of a statement is consideration of the subjective intent of the speaker. This aspect would provide the speaker with an opportunity to explain the motivation and intention behind the utterance.

- 49) The terms “hate” and “contempt”, in both the ordinary meaning and as legal terms of art, have an emotional import. They are, as noted in *Taylor*, redolent of “ill-will” and “emotion” which “allows for no redeeming qualities” in the person at whom the hate and contempt is directed. To make a finding of hate speech is to make a finding about the subjective state of the person who uttered hate speech. It defies logic and common sense to preclude consideration of the subjective state of the speaker or to prevent him or her from testifying as to his or her motives and emotions towards the target of the speech.

Human Rights Commission v. Taylor, [1990] 3 S.C.R. 892 at para.61

- 50) Similarly, “hate” has been characterized as an “extreme emotion that belies reason”. It would be the height of procedural unfairness to make a finding of fact that a respondent “belies reason” without affording an opportunity for the respondent to attempt, to whatever degree possible, to salvage his or her claim to membership in the common humanity of reason.
- 51) Aside from the logical and procedural aspects of the subjective intent of the speaker, there is a societal interest in knowing the intent of the speech. Society deserves to know whether a statement has been made to undermine access to participatory rights, to promote genocide, to promote the invasion and bombing of foreign lands, to receive attention and flattery from those in high places, to sell a few more yards of witty text, or else to nobly provoke an unconscious civilization into awareness. Consideration of subjective intent comports with the BCHRT mandate to identify and eliminate persistent patterns of inequality.

Part B: Causation: Interference with the Exercise of Formally Recognized Rights

- 52) The CAJ and BCCLA submit that a proper interpretation of s.7 must view hate speech, not as a free standing right to be free from deeply offensive material, but rather

as a reinforcement of the other rights protected by the *Code* and the *Charter*.

Consequently, a violation of s.7 should only be found where there is proof that the hateful or contemptuous statement caused or is likely to cause individual recipients of the communication to change their behavior so as to preclude the exercise of rights recognized in the *Code* or *Charter*.

- 53) Of key importance to the interpretation of the scope of s.7 are the purpose of the *Code* set out in s.3, which include:
- a) To foster a society in British Columbia in which there are no impediments to full and free participation in the economic, social, political and cultural life of British Columbia;
 - ...
 - c) to prevent discrimination prohibited by this Code.
- 54) This statutory scheme clearly flows from the general to the specific, in which it is submitted, s.7 is positioned as a buttress to the specific discrimination prohibited by the *Code*. By choosing to structure the Code in this manner, the clear meaning that comes across is the intention to restrict the publication, issue or display of a statement or other representation that results in discrimination in access to services customarily available to the public, housing or employment either (a) through a directly discriminatory statement which in itself precludes the exercise of the rights set out in ss.8 to 14 or (b) indirectly by publishing a statement that causes the recipients of the information to change their behavior so as to preclude the exercise of the rights set out in ss.8 to 14.
- 55) The language of s.3(1) also supports a finding of liability for speech that results in interference with *Charter* rights, including the fundamental freedoms to religion,

expression, assembly and association, the right to vote and mobility rights. This follows from the reference to “no impediments to full and free participation in the political life of British Columbia”.

- 56) Canadian courts are making advancements towards clarifying the tests applicable to causation. The interveners urge this Tribunal to adopt a more clear and concise test for causation that is less ephemeral than the current incantation. In the recent decision of *Mustapha v. Culligan of Canada Ltd.*, the Supreme Court of Canada cautioned against the use of misleading or vague terms in setting out tests for liability. The Court held that terms such as “probable” or “mere possibility” are misleading and, poignantly for the immediate context, held that “[p]ossibility alone does not provide a meaningful standard for the application of reasonable foreseeability”. Rather, there must be a “real risk”.

Mustapha v. Culligan of Canada Ltd., [2008] S.C.J. No.27 at para.13

- 57) It is submitted that “real risk” in the context of the HRC should properly relate to the harm the Code seeks to address, namely “impediments to full and free participation in the economic, social, political and cultural life of British Columbia” as reflected by the formal recognition of those participatory rights in ss.8-14 of the Code and the political rights set out in the *Charter*.
- 58) The CAJ and BCCLA submit that this more stringent standard for causation would breathe new life into the hate speech provisions and allow the prohibition against hate speech to resonate more favourably with the recognized expertise of the Human Rights Tribunal in preventing discrimination in employment, housing, and services customarily available to the public.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 6th DAY OF JUNE, 2008.

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This written submission prepared by the firm of Gratl & Company, Barristers and Solicitors
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