BRITISH COLUMBIA HUMAN RIGHTS TRIBUNAL
IN THE MATTER OF THE
HUMAN RIGHTS CODE, R.S.B.C. 1996, c. 210 (as amended**)**

AND IN THE MATTER OF A COMPLAINT
NOS. 940767 AND 940768

BETWEEN:

CANADIAN JEWISH CONGRESS,

COMPLAINANT

AND:

NORTH SHORE FREE PRESS
d.b.a. NORTH SHORE NEWS
and DOUG COLLINS

RESPONDENTS

MEMORANDUM OF ARGUMENT OF THE INTERVENOR:
BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

Submitted by:

Murray Mollard, Counsel
B.C. Civil Liberties Association

June 19, 1997

Index to the Argument of the B.C. Civil Liberties Association

INTRODUCTION

1. The B.C. Civil Liberties Association (the ABCCLA@) is a charitable, non-profit society established in 1962 to promote and protect the civil liberties of British Columbians. The BCCLA furthers its mandate through education, research, advocacy, assistance to individuals and groups with civil liberties concerns, and legal action. The BCCLA was granted leave to intervene in this matter by Tom Patch, former Member Designate, on April 11, 1997. The BCCLA was granted standing to make oral and written arguments based on principled and legal arguments regarding the constitutionality of section 2 (now section 7) of the *Human Rights Code* (the A*Code*@).

ISSUES

2. The BCCLA will direct its arguments only to the issues related to the constitutionality of section 7(1)(b) of the *Human Rights Code* in the context of the *Charter of Rights and Freedoms* (the A*Charter*@). The Association does not take a position, nor does it have standing to make arguments, on whether this section has been violated on the merits.

ARGUMENT

I. Does section 7(1)(b) of the *Human Rights Code* violate section 2(b) of the *Charter of Rights and Freedoms?*

A. The Principled Justification for Protecting Freedom of Expression as a Fundamental Freedom in the *Charter of Rights and Freedoms*

3. The BCCLA submits that, before considering whether section 7(1)(b) of the *Human Rights Code* (the A*Code*@) violates section 2(b) of the *Charter of Rights and Freedoms*, it is important that the Human Rights Tribunal (the ATribunal@) consider the justification for protecting freedom of expression as a fundamental freedom in Canada=s constitution. A purposive interpretation is necessary for the proper evaluation of whether the right has been

infringed and, more importantly in the case at bar, for a proper assessment as to whether the alleged infringement is saved by section 1 of the *Charter* as a reasonable and demonstrably justified limitation in a free and democratic society.

4. The BCCLA submits that the right to freedom of expression is the most fundamental of freedoms protected by the *Charter of Rights and Freedoms*. In *Edmonton Journal v. Alberta (AG)*, [1989] 2 S.C.R. 1326 at 1336 [Joint Book of Authorities (AJBA@) TAB 12], Mr. Justice Cory stated:

> AIt is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression. Indeed a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions. The concept of free and uninhibited speech permeates all truly democratic societies and institutions. The vital importance of the concept cannot be over-emphasized.@

5. The Supreme Court of Canada recognized the fundamental importance of freedom of expression to the existence of a democratic society long before the advent of the *Charter of Rights and Freedoms*:

> *Switzman v. Ebling* (1957) 7 D.L.R. (2d) 337 at 357-58 [JBA, TAB 93].

6. The BCCLA submits that there are various justifications for the protection of freedom of expression as a fundamental freedom in our *Charter of Rights and Freedoms*. Freedom of expression is vital to the existence of democracy in which citizens, not the government, are the sovereign authority. Freedom of expression is important to our individual and collective search for truth, including the ability to critically assess the fallibility of accepted wisdom. Finally, freedom of expression is important to individual growth and self-development.

7. The BCCLA submits that the pre-eminent justification for protecting freedom of expression as a Afundamental freedom@ in the *Charter* lies in its instrumental necessity for self-governing people in a free and democratic society. The Supreme Court of Canada has at times stressed the importance of the Ademocratic commitment@ justification underlying freedom of expression:

Irwin Toy Limited v. Quebec (AG), [1989] 1 S.C.R. 927 at 971 [JBA, TAB 16]

R. v. Keegstra, [1990] 3 S.C.R. 697 at 727 and 763-64 [JBA, TAB 28].

8. In addition to the Ademocratic commitment@ justification, the BCCLA recognizes that the values of Aseeking and attaining truth@ through the marketplace of ideas and Aindividual self-fulfilment@ are further and important justifications for freedom of expression. Courts in Canada have recognized these three principles or values underlying the justification for the constitutional protection of freedom of expression.

Irwin Toy, supra, at 976 [JBA, TAB 16], cited by Dickson CJC in *Keegstra, supra*, at 728 [JBA, TAB 28].

Democratic Commitment Justification for Freedom of Expression

9. The Ademocratic commitment@ justification for the *Charter*=s expression right is based not simply on free expression=s instrumental value for accountability of elected politicians in a representative democracy. Rather, it is submitted that the importance of freedom of expression to a democracy goes much deeper: free expression is a fundamental right because it is critical to our vision of democracy in which the citizens are, collectively, self-governing sovereign rulers. John Dixon, Past President of the B.C. Civil Liberties Association, stated the importance of freedom of expression as follows:

> A ... the citizens of a democracy form a kind of collegial sovereign, and they cannot tolerate a censorship without compromising a right which is constitutive of their ruling function. Canadians claim a fundamental right to freedom of conscience and expression not because that freedom is pleasant or contingently useful for any subordinate purposes; it is because they must govern that the minds and expressions of citizens must be protected rather than limited by our laws. Our commitment to the protection of expression rights has a >no matter what= character because it is actually a corollary of our commitment (>no matter what=) to being a real democracy.@
>
> Dixon, AFreedom of Expression as a Fundamental Right@ 24 The Democratic Commitment 1 at 12-13. [Respondents, and Intervenors Press Council of B.C. and BCCLA Book of Other Authorities (ARIBOA@), TAB 5]

10. The BCCLA relies extensively upon Alexander Meiklejohn=s writings about the relationship between democracy and freedom of speech in justifying freedom of expression as a fundamental right protected by our *Charter of Rights and Freedoms*. Though his thoughts focus on the First Amendment of the American Constitution, his theoretical ideas about the meaning of democracy and free expression are applicable universally to all truly democratic societies. The following highlights from his work *Political Freedom* capture the core justification for free expression in a free and democratic society:

> AWe believe in self-government. If men are to be governed, we say, then that governing must be done, not by others, but by themselves (at 9) ... [I]n such a society, the governors and the governed are not two distinct groups of person. There is only one group -- the self-governing people. Rulers and ruled are the same individuals. We, the People, are our own masters, our own subjects (at 12) ... *When men govern themselves, it is they -- and no one else -- who must pass judgment upon unwisdom and unfairness and danger. And that means that unwise ideas must have a hearing as well as wise ones, unfair as well as fair, dangerous as well as safe* ... (at 27) ... We have decided to be self-governed. We have measured the dangers and the values of the suppression of the freedom of public inquiry and debate. And, on the basis of that measurement, having regard for the public safety, we have decided that the destruction of freedom is always unwise, that freedom is always expedient. ... We, the People, as we plan for the general welfare, do not choose to be >protected= from the >search for truth=. On the contrary, we have adopted it as our >way of life=, our method of doing the work of governing for which, as citizens, we are responsible. Shall we, then, as practitioners of freedom, listen to ideas which, being opposed to our own, might destroy confidence in our form of government? Shall we give a hearing to those who hate and despise freedom, to those who, if they had the power, would destroy our institutions? Certainly, yes! Our action must be guided, not by their principles, but by ours. We listen, not because they desire to speak, but because we need to hear. *If there are arguments against our theory of government, our policies in war or peace, we the citizens, the rulers, must hear and consider them for ourselves.* That is the way of public safety. It is the program of self-government.@ (at 57) (emphasis added) [RIBOA, TAB 6]

11. In discussing the importance of freedom of expression, as enshrined in the First Amendment, to democracy in America, Meiklejohn=s following comments are directly relevant to the case at bar:

> A[The First Amendment principle] tells us that such books as Hitler=s *Mein Kampf,* or Lenin=s *The State and the Revolution*, or the *Communist Manifesto* of Engels and Marx, may be freely printed, freely sold, freely distributed, freely read, freely discussed, freely believed, freely disbelieved, throughout the United States. And the purpose of that

> provision is not to protect the need of Hitler or Lenin or Engels or Marx ›to express his opinion on matters vital to him if life is to be worth living.‹ We are not defending the financial interests of a publisher, or a distributor, or even of a writer. *We are saying that the citizens of the United States will be fit to govern themselves under their own institutions only if they have faced squarely and fearlessly everything that can be said in favour of those institutions, everything that can be said against them.*@ (at 77) (emphasis added)

The importance of Meiklejohn=s ideas to freedom of expression for our own constitution have received recognition by the Supreme Court of Canada:

> *Keegstra, supra* at 802 per McLachlin J. [JBA, TAB 28]

12. The Ademocratic commitment@ justification for freedom of expression fully protects expression and access to all ideas that fall within the Ademocratic forum@. Often termed Apolitical speech@, every idea that is part of public discourse, be they ideas no matter how controversial or hurtful, about sexuality, race, religion, etc., are rightly protected by freedom of expression. Freedom of expression protects all ideas that involve social or political issues broadly understood because these ideas are central to our responsibility as democratic citizens in deliberating and choosing the laws, public policies and public institutions that we wish to govern ourselves.

> A›Religion and politics‹ are often linked as topics capable of arousing strong feelings; and the reason for this is quite clear -- they are both directly and centrally concerned with the final questions about the human enterprise. They belong to the public agenda because they are centred upon the ›who are we and what should we do‹ issues that so preoccupy the deliberations of any sovereign ...@
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> > Dixon, AFreedom of Expression as a Fundamental Right@, *supra*, at 18 [RIBOA, TAB 5]

13. Freedom of expression does not simply mean the right of citizens to express particular ideas. Rather, the justification for freedom of expression lies as much, if not more, in the right of citizens to have *access* to all ideas that are central to their self-ruling function as members of a democracy. Just as commercial expression protects listeners as well as speakers Ain enabling individuals to make informed economic choices, an important aspect of individual self-fulfilment

and personal autonomy@, political expression, even expression that we abhor, protects listeners in making informed democratic choices about our society=s laws, public institutions and public policies.

Ford v. Quebec (A.G.), (1988) 54 D.L.R. (4th) 577 at 618 [JBA, TAB 55]

14. AFreedom of the press@ is protected as part of the *Charter*=s general protection of freedom of expression. The constitutionally recognized value of freedom of the press is derivative of the general freedom of expression. Canada has enshrined the freedom of the press in our constitution because of media=s central role to freedom of expression generally. The press has been historically, and continues to be, one of the most important mediums for the distribution of ideas within the democratic forum. A free press is vital to self-government by citizens.

B. Does Section 7(1)(b) of the *Human Rights Code* Violate Section 2(b) of the *Charter of Rights and Freedoms*?

15. The BCCLA submits that section 7(1)(b) of the *Human Rights Code* violates section 2(b) of the *Charter of Rights and Freedoms*. The Attorney General of B.C. concedes this point. The test to determine whether the right to freedom of expression is infringed by government has two aspects. First, one must assess whether the alleged expression at issue is protected by the *Charter*. Any activity will be protected if it conveys meaning. Second, one must assess whether the purpose or effect of the government law is to restrict freedom of expression.

Irwin Toy Ltd. v. Quebec (Attorney General), supra, at 967-77 [JBA, TAB 16]

R. v. Keegstra, supra, at 729-32 [JBA, TAB 28]

16. The expression at issue in this case, Mr. Collins= column in the North Shore News, is expressive conduct that conveys meaning and is protected by section 2(b) of the *Charter*. The effect of the law, if not its purpose in part, is to restrict the Respondents=, and all other persons=, ability to express ideas of a particular content. Therefore, section 7(1)(b) of the *Code* violates section 2(b) of the *Charter*.

II. Can the violation of freedom of expression by section 7(1)(b) of the *Human Rights Code* be saved by section 1? Is this provision a reasonable limit on freedom of expression prescribed by law that can be demonstrably justified in a free and democratic society?

A. Preliminary Issues

The General Application of the *Oakes* Test

17. In *RJR MacDonald Inc., supra,* at 329 [JBA, TAB 11], Madam Justice McLachlin framed the general analysis required under the *Oakes* as follows:

> AThe bottom line is this. While remaining sensitive to the social and political context of the impugned law and allowing for difficulties of proof inherent in that context, the courts must nevertheless insist that before the state can override constitutional rights, there be a reasoned demonstration of the good which the law may achieve in relation to the seriousness of the infringement. *It is the task of the courts to maintain this bottom line if the rights conferred by our constitution are to have force and meaning. The task is not easily discharged, and may require the courts to confront the tide of popular opinion. But that has always been the price of maintaining constitutional rights.* No matter how important Parliament=s goal may seem, if the state has not demonstrated that the means by which it seeks to achieve its goal are reasonable and proportionate to the infringement of rights, then the law must perforce fail.@ (emphasis added)

18. In *RJR MacDonald,* Justice McLachlin also noted the importance of facts in the section 1 analysis:

> AThe s. 1 inquiry is by its very nature a fact-specific inquiry. In determining whether the objective of the law is sufficiently important to be capable of overriding a guaranteed right, the court must examine the actual objective of the law. In determining proportionality, it must determine the actual connection between the objective and what the law will in fact achieve; the actual degree to which it impairs the right; and whether the actual benefit which the law is calculated to achieve outweighs the actual seriousness of the limitation of the right. In short, s. 1 is an exercise based on the facts of the law at issue and the proof offered of its justification, not on abstractions.@ (at 331)

Extreme, Controversial & Oppressive Expressions Based on Race, Religion, etc. as a Significant Category of Expression Worthy of Full Constitutional Protection: The Value of Extremist Expression

19. The *Charter of Rights and Freedoms* mandates a contextual approach to understanding the importance of a particular right or freedom outlined in the *Charter*:

> AOne virtue of the contextual approach, it seems to me, is that it recognizes that a particular right or freedom may have a different value depending on the context. It may be, for example, that freedom of expression has a greater value in a political context than it does in the context of disclosure of the details of a matrimonial dispute.@

Edmonton Journal, supra at 1355 per Justice Wilson. [JBA, TAB 12]

The Tribunal should adopt this approach in the case at bar.

20. BCCLA submits that even expressions that are controversial, extreme and potentially oppressive are of important value when considered in their context. These expressions are thus worthy of full constitutional protection. These expressions contribute to the underlying justifications for freedom of expression in several ways. First, as expressions that are legitimately and essentially part of the democratic forum, this type of expression challenges us to determine which ideas will provide the foundation of our laws and public institutions. Therefore, even if most of us vehemently disagree with the merits of these ideas, they must be tolerated if we are committed to democracy as self-government. Second, these expressions are important for the political and social causes of many individuals belonging to historically disadvantaged groups in their pursuit of social justice and truth. Third, these expressions play an important instrumental role for civic activism and public education by forcing citizens to confront these ideas and choose the path of equality. Finally, tolerating these expressions in public permits society to identify and monitor the purveyors of hate to protect against significantly more harmful action: discrimination (understood as conduct rather than expressions) and violence.

Valuable as Part of Democratic Forum

21. The BCCLA submits that expressions about race, religion, sexuality, etc. which are offensive, oppressive or potentially harmful to individuals and groups based on these categories

are expressions worthy of the full protection of our *Charter of Rights and Freedoms* just because they are an essential part of the Ademocratic forum@ of ideas. This type of speech is always part of the democratic forum as Apolitical speech@ because it either explicitly or implicitly challenges the legal and social institutions that our society has created to protect and promote the value of equality. In *Keegstra, supra*, at 764, [JBA, TAB 28] Chief Justice Dickson acknowledged that even this type of expression could Agenerally be categorized as >political=, thus putatively placing it at the very heart of the principle extolling freedom of expression as vital to the democratic process.@ Even those ideas that most individuals would consider to be Abad@ or harmful ideas are valuable as are Agood@ ideas just because they challenge us as sovereign citizens to be continually thinking about and choosing which ideas we as a society want to accept and which ideas we wish to reject as foundations for our law and public institutions.

22. The BCCLA submits that democracy, as a form of social organization, cannot demand politeness or civility in the exchange of ideas crucial to its functioning. On the contrary, democracy is, by necessity, at times a difficult, emotional and unwelcoming challenge:

> AWhat conceivable role can hate-mongering play in the lofty deliberative work of a ruling people? The answer to this question depends upon the answer to another question: Is it not precisely in those areas of human conflict and disagreement that matter the most to all of us, that feelings run highest and form an inextricable element of contending expressions. Or, to put it more bluntly: Who said the deliberative work of a ruling people was going to be >lofty=? ... The contributions of the >the People= (remember us?) to the rather anarchic business of a country thinking out loud simply cannot be limited to the controlled prose of academic journals, without being substantially censored. Though it may be regrettable, it is nonetheless true that hatred is a garden-variety emotional posture of persons who are engaged, heart and soul, in the business of disapproving.@

Dixon, AThe Keegstra Case@, *supra*, at 40-41. [RIBOA, TAB 7]

23. The BCCLA invites the Human Rights Tribunal to consider several contemporary contexts which are centrally important to issues of governance in our day. First, the province of B.C. has entered into long overdue negotiations with the province=s First Nations regarding self-government and land claims. These negotiations and proposed agreements, given their potential impact on the social, political and economic interests of the lives of British

Columbians, have spawned passionate discussion amongst individuals and groups in society. Second, immigration to B.C. and the Lower Mainland in particular has skyrocketed in the past ten years. The influx of people with different cultural backgrounds and customs has sparked heated debates regarding issues such as language education for newcomers and even by-laws regarding removing trees. Third, as new Canadians participate in our democratic institutions, their strategies of appealing to voters in their constituency can become the subject of debate. Finally, a heated debate has recently raged around the issue of whether primary schools should use learning resources that depict same-sex parent families. The principal antagonists in the debate are defined in large part by sexual orientation (gays and lesbians) and religion (Christian fundamentalism). These examples provide a tiny sample of the vast range of issues involving race, religion and sexuality that go to the heart of our project of self-government. Can=t we expect these contexts to generate controversial expressions that may fall within the ambit of section 7(1)(b) of the *Human Rights Code*?

Valuable as AActivist Speech@ - Method for Disadvantaged Groups to Combat Oppression

24. Expressions that are controversial, deeply offensive and provocative are not the exclusive domain of members of the dominant culture. Individuals belonging to historically disadvantaged groups have often used very provocative, offensive, even extreme expressions that may constitute the promotion of hatred or contempt based on race, religion, etc. in their fight against majority oppression:

> AIs it unimaginable that questions of public policy should involve speech of this kind? The Canadian Civil Liberties Association raises the example of a native leader making bitter comments about whites in frustration with governmental failure to recognize land claims. ... Experience shows that in actual cases it may be difficult to draw the line between speech which has value to democracy or social issues and speech which does not.@
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> *Keegstra, supra*, at 841-42, per McLachlin J. [JBA, TAB 28]

25. Moreover, historical and more recent movements in artistic expression illustrate that members of minority groups appropriate, exploit and subvert racist or hateful expressions,

including images and symbols, in order to devalue this expression and instead use it a form of political criticism of the oppressor and his ideas. Amy Adler, Assistant Professor at New York University=s School of Law, describes the recent emergence of this Aactivist@ artistic expression that seeks to subvert racist and sexist speech: A. Adler, AWhat=s Left?: Hate Speech, Pornography, and the Problem for Artistic Expression@ (1996) 84 California L.R. 1499. [RIBOA, TAB 8]. Professor Adler reviews various examples of how recent activist art works Asubvert@ Ahate speech@ (at 1520-23): the pink triangle now symbolizes gay pride and power (formerly it was the equivalent of the yellow star for Jews in the Holocaust for gays and lesbians), how the word Aqueer@ (formerly and even currently a hateful epithet) has been appropriated by some segments of the gay population and worn as a badge of pride (e.g. the activist group AQueer Nation@). Adler adds:

> AEven the hateful word >nigger= has taken on an activist use, functioning, for example, as part of the title of the rap band N.W.A. (>Niggaz With Attitude=). Although the term >nigger= has long been an element of black vernacular, the word has recently emerged into the mainstream, primarily through rap music, and has come to be viewed by some as a term of empowerment when used by blacks. Similarly, some women in rap culture have embraced the word >bitch= to refer to themselves and each other, defiantly responding to the prevailing use of the word by many rappers. ... @ (at 1521)

Adler discusses Catherine MacKinnon=s and Mari Matsuda=s theories of censorship and how those theories would ultimately censor much of this activist expression:

> AAs legal theorists debate one another about banning the words and symbols that constitute hate speech, they have failed to notice that many of these words and symbols have taken an unforseen twist. Hate speech, it seems, can play dual roles. Sometimes, the very words and images that anti-hate speech theorists target serve as instruments of activism in the communities these theorists seek to empower through censorship.@ (at 1520)

26. Professor Adler rejects Aleftist@ theories of censorship as unable to distinguish between Agood@ speech and Aactionable@ speech based on artistic status of expression, context, victim perception of expression or the speaker=s intent. For Professor Adler, the impossibility of determining a fixed meaning for any particular expression and the important contribution of activist artistic expression means that censorship will ultimately prevent beneficial, activist expressions:

> AAny theory that purports to regulate speech must make certain assumptions about how speech works. The theory must grapple with language=s complexities. It must recognize that a large and beautiful portrait of a Klansman may fight racism, a violent picture of rape may oppose sexual violence, and a call to kill ›queers= may be a call to save lives. So far though, leftist censors have devised only a rudimentary theory of interpretation. Ignoring the indeterminacy of language, they imagine a world where all victims know a victimizing statement from a non-victimizing statement, where victimizing speech never has its opposite effect, and where words have only one meaning. ... Denying the complexity of language, these theorists go on to draft definitions of speech that ignore the reality of the very speech most precious to their causes.
>
> Because of the indeterminate nature of language itself -- the way in which, for example, well-intentioned activist speech and oppressive hate speech can have similar effects -- there is no possibility of devising a system of leftist political censorship that could protect the subversive, activist uses of hate speech and pornography. ›Misinterpretation= is inevitable. Speech functions in multiple and contradictory ways. Leftists must therefore make a choice: they can adopt a system of censorship, or they can offer full protection to activism. They can=t do both.@
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> A. Adler, *supra*, at 1571-72 [RIBOA, TAB 8]

Valuable for Civic Activism, Public Education and Identification of Hate Mongers

27. The BCCLA submits that controversial expressions create a variety of beneficial, significant and public opportunities to promote the values of democracy, equality, tolerance and respect for diversity. These opportunities include civic activism, public education and the public identification of individuals or groups who threaten Canadians= commitment to equality, tolerance and respect for cultural diversity.

28. Expressions that promote hatred provide the citizens of British Columbia with the important opportunity for civic activism. The BCCLA submits that just as citizens have the right to express and hear all ideas in the democratic forum, they likewise have a corresponding democratic responsibility to reflect upon and publicly reject ideas that they find repulsive and hurtful. This responsibility applies to **every** citizen, not just the targets of offensive expressions. In this way, offensive expressions provide a direct challenge to us as self-governing citizens to

fully commit ourselves to ideals of equality, tolerance and respect for diversity that the BCCLA believes are ideals shared by the vast majority of Canadians. In a democracy, citizens have a responsibility to respond to this challenge:

> AA democratic people that is self-conscious about its project of self-government cannot take refuge in legal instruments of censorship and repression when its way of thinking is threatened by public expressions of racial or religious hatred. It cannot delegate to either its legislative or judicial agents the related tasks of judgment and engagement that the continuing presence of hateful speech imposes upon it. And judge and engage we must! The insistence of civil libertarians that we provide political freedom even for the ideas of Keegstra and Zundel, is not to be equated with any soft-headed notion of general tolerance. ... We must all, as both ruler and as individuals, live lives of judicious intolerance for hateful ideas and expressions. ... Both experience and reason concur, however, in recognizing that only such a program of democratic responsibility can be at once effectual in changing minds (slowly, oh so slowly) and consistent with our recognition in one another of a collegial identity.@
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> Dixon, AThe Keegstra Case@, *supra*, at 41-42 [RIBOA, TAB 7]

29. The BCCLA further submits that the ideals of equality, tolerance and respect may only be fully realized if individual citizens, without government imposition, are continually debating the merits of these ideals and making a personal commitment to them. Without the opportunity for deliberation and action in response to real-life offensive expressions, citizens, especially young adults who have recently become full members of the democratic polity, lose the opportunity to understand the meaning of these ideals and fully commit to practising them. If citizens simply rely on the state to sanitize the democratic forum of ideas that are hateful, we not only abdicate our commitment to democracy, but we lose the opportunity as citizens to understand and practice these ideals.

30. Controversial expressions provide an important opportunity to counter racist and other intolerant ideas through public education, community building and empowerment of the targets of such speech. The BCCLA submits that the appropriate remedy in a democratic society to ideas (bad speech) that may cause harm is not censorship but rather more good speech. In advocating the effectiveness of Acounterspeech@ to offensive expressions, Professor Charles Calleros illustrates by way of real-life examples at American universities the opportunity for public

education:

> AHowever, proponents of free speech do not contemplate that counterspeech always, or even normally, will be in the form of an immediate exchange of views between the hateful speaker and his target. Nor do they contemplate that the target should bear the full burden of the response. Instead, effective counterspeech often takes the form of letters, discussions, or demonstrations joined in by many persons and aimed at the entire campus population or a community within it. Typically, it is designed to expose the moral bankruptcy of hateful ideas, to demonstrate the strength of opinion and numbers of those who deplore the hateful speech, and to spur members of the campus community to take voluntary, constructive action to combat hate and to remedy its ill effects. Above all, it can serve to define and underscore the community of support enjoyed by the targets of the hateful speech, faith in which may have been shaken by the hateful speech. Moreover, having triggered such a reaction with their own voices, the targets of the hateful speech may well feel a sense of empowerment to compensate for the undeniable pain of the speech.@
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> C.R. Calleros, APaternalism, Counterspeech and Campus Hate-Speech Codes: A Reply to Delgado and Yun@ (1995) 27 Ariz. St. L.J. 1249 at 1258 [RIBOA, TAB 3]

31. Finally, the BCCLA respectfully submits that there is value in permitting this type of speech because it provides society with the opportunity to identify and monitor the activities of those individuals and groups that pose a real threat to Canadians= commitment to equality, tolerance and respect for diversity. Knowing which individuals and groups are promoting hateful ideas assists in protecting against conduct (as opposed to expression) that is discriminatory (access to public services, housing and employment) or violent. Such conduct is the legitimate domain of criminal and human rights legal sanction.

The Human Rights Tribunal is Not Bound by the Decision of the Supreme Court of Canada in *Canada v. Taylor*

32. The BCCLA submits that the Tribunal is not bound by the decision of the Supreme Court of Canada in *Canada (Human Rights Tribunal) v. Taylor*, [1990] 3 S.C.R. 892 [JBA, TAB 6]. It is important to examine the reasons why *Taylor* is not determinative of the issue in the case at bar before we proceed to the full section 1 analysis. First, the Attorney General of B.C., other parties and intervenors significantly rely upon *Taylor* to argue for the constitutionality of section 7(1)(b) of the *Human Rights Code.* Second, this Tribunal=s own section 1 analysis will be determined by

whether it perceives that it is or is not required in law to follow *Taylor*.

33. The BCCLA submits that there are three bases for distinguishing the case at bar from the *Taylor* decision. First, the impugned law in the case at bar is significantly different in its reach and effect on the right to freedom of expression. Second, the factual context of the issues in the case at bar is significantly different than the factual context of *Taylor*. Finally, subsequent decisions of the Supreme Court of Canada have refined the section 1 test such that the section 1 analysis is applied differently today than when it was applied by the Supreme Court of Canada in *Taylor*. The BCCLA submits that the Tribunal cannot rely on *Taylor* because the section 1 analysis is different from what the court employed in Taylor.

34. The first ground that the BCCLA relies on to distinguish the case at bar from *Taylor* is that section 7(1)(b) of the B.C. *Human Rights Code* is significantly different from section 13 of the *Canadian Human Rights Act* [TAB 9 of the Canadian Jewish Congress= Book of Statute Law], the provision at issue in *Taylor*. Section 13 is much narrower in its restriction of expression as it deals only telephonic messages. Section 7(1)(b) is much broader as it deals with Aany statement, publication, notice, sign symbol, emblem or other representation ...@ Such statements, etc. need only be made once, as opposed to section 13's Arepeatedly@ requirement, to fall within the ambit of the section. A sampling of the types of modes of expression restricted by the B.C. law include: posters, billboards, bumper-stickers, buttons, stickers, leaflets, brochures, newspaper and magazine articles/editorials, signs, messages faxed publicly, all forms of public art (e.g. paintings, sculptures, sketches, literature, poetry, etc.), symbolic expressions, films, videos, songs that are displayed/performed publicly, even verbal expressions made in public. It is significant that most of these forms of expression involve the speaker of the idea rather than a third party that publishes or reproduces the expression. Given the broad range of modes of expression covered by the *Code*, section 7(1)(b) casts a net of censorship that is significantly more restrictive of the expression right than the Supreme Court of Canada was required to consider in *Taylor*. Section 7(1)(b) is a much more significant violation of freedom of expression than section 13 of the *Canadian Human Rights Act*.

35. In addition, the court in *Taylor* emphasized the inclusion of the word Arepeatedly@ in section 13. In the court=s view that word directs the restriction of expression to Apublic, larger-scale schemes@: *Taylor, supra,* at 939. Though section 7(1)(b) focuses on expressions that are in some way Apublic@, there is no language to limit the application of the *Code* to public *and* larger-scale schemes of expression in restricting messages. As opposed to section 13, section 7(1)(b) of the *Code* applies equally to one person wearing a button in public with a message that falls within its ambit even if the person displays that button on a solitary occasion. There is no requirement that the expression be widely distributed. In this way, section 7(1)(b)=s ambit is much greater than section 13's because it captures individual citizens speaking their minds often in the heat of political life as opposed to groups organized to specifically promote hatred.

36. With respect to the second distinguishing feature between *Taylor* and the case at bar, the BCCLA submits that a contextual approach, including an assessment of the facts in issue, must be used when determining *Charter* issues: per Justice Wilson in *Edmonton Journal, supra*, at 1355 [JBA, TAB 12]. *Taylor* considered only the factual context regarding telephonic messages conveying offensive messages. One can expect that submissions from parties and intervenors in *Taylor* related to the impact of restrictions on freedom of expression and the justification for these restrictions in the context of telephonic messages only. The Court did not have evidence or argument before it regarding the impact on restricting expression and the adequacy of government justifications in the context of print media, which receives specific acknowledgement in the *Charter* as Afreedom of the press@, nor expressions of citizens in other contexts. To the extent that the Court=s comments in *Taylor* may go beyond the medium of telephonic messages, the BCCLA submits that those comments are clearly *obiter* and of no binding effect. Though the source of justification for Afreedom of the press@ as protected by section 2(b) of the *Charter* is the same as freedom of expression generally (i.e. self-government by citizens), freedom of the press has historically played and continues to play a fundamental and unique role in the distribution of ideas that is essential to a vibrant democratic society. The importance of print media to democracy is in direct contrast to the telephone which, though an

important medium for personal communication, does not play as central a role in the distribution of ideas which is so important to the democratic process.

37. Finally, *Taylor* is not determinative of the case at bar because the law regarding the section 1 analysis has evolved since *Taylor*. The Tribunal is not able to simply rely on *Taylor* without thoroughly applying the revised section 1 analysis itself. The Supreme Court of Canada=s decisions in *RJR MacDonald Inc. v. Canada*, [1995] 3 S.C.R. 199 [JBA, TAB 34] and *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 [TAB 11] provide important guidance for the section 1 analysis that was different than the Court applied in *Taylor*. We will review this jurisprudence in our arguments under the various branches of the *Oakes* test.

38. In sum, *Taylor* is not legally determinative of the issues in the case. For the reasons given above, this Tribunal need not feel legally bound to follow the outcome in *Taylor* in the case at bar.

The Burden of Justification for the Infringement

39. The BCCLA submits that the government bears the onus of proving that the infringement of freedom of expression in the case at bar is a reasonable limit that is demonstrably justified in a free and democratic society:

R. v. Oakes, supra, at 136-37. [JBA, TAB 31]

40. The general standard of proof required of the government to justify legislation that infringes a *Charter* right is the civil standard of proof. This test has been variously characterized as a Apreponderance of probability@: per Dickson CJC in *R. v. Oakes, supra,* at 137, or Aa balance of probabilities at all stages of the proportionality analysis@: per McLachlin J. in *RJR-MacDonald Inc., supra,* at 333. Furthermore, the A*Oakes* test must be applied flexibly, having regard to the factual and social context of each case.@:

RJR-MacDonald Inc., supra, at 330, per McLachlin J. [JBA, TAB 34]

Ross v. New Brunswick School District No. 15, [1996] 1 S.C.R. 826, at 872 [JBA, TAB 37]

41. The BCCLA submits that, in the case at bar, the government faces a heightened burden of justifying the *Code*=s infringement of freedom of expression. There are three bases for this submission. First, the ban on expression in this case is absolute and content based; it is not mere regulation or a limitation on the time, place and manner of expression. Any statements that fall within its content-based ambit are proscribed. Support for this proposition, especially with respect to the minimal impairment branch of the *Oakes* proportionality test, can be found in Madam Justice McLachlin=s comments in *RJR-MacDonald Ltd., supra*, at 343-344 [JBA, TAB 34]:

> AAs this Court has observed before, it will be more difficult to justify a complete ban on a form of expression than a partial ban ... A full prohibition will only be constitutionally acceptable under the minimal impairment stage of the analysis where the government can show that only a full prohibition will enable it to achieve its objective. Where, as here, no evidence is adduced to show that a partial ban would be less effective than a total ban, the justification required by s. 1 to save the violation of free speech is not established.@

42. Though McLachlin J.=s comments were regarding the form of expression as opposed to the content of expression, the BCCLA submits that, given the justification for freedom of expression, absolute prohibitions on particular content, especially if the content is Apolitical@, should be treated with even greater scrutiny than complete bans on the form of expression. In the latter situation, the speaker can communicate the idea, he or she just has to find a different form. However, complete bans on content offer no alternative. The idea itself is proscribed. The fact that section 7(1)(b) permits the exchange of hurtful expressions in private communications does not soften the requirement for heightened scrutiny. The BCCLA submits that an important effect, if not the explicit or implicit intent, of this type of political speech is to convey an opinion to the general public on issues of public concern. Though one might vehemently disagree with the ideas

promulgated, the intent of the speaker and the needs of the citizenry require that political speech not be confined to whispers in dark corners.

> *Peterborough (City) v. Ramsden*, (1993) 106 D.L.R. (4th) 233 at 248.
>
> *Ford v. Quebec (Attorney General)* (1988) 54 D.L.R. (4th) 577 at 622-624. [JBA, TAB 55]

43. Second, a heightened burden of justification is required because the prohibition in section 7(1)(b) of the *Code* is aimed at the core of protected expression commonly referred to as Apolitical speech@ as compared to other categories of expressions such as commercial speech. Expressions that are in nature political deserve even greater scrutiny by the Tribunal because they go directly to the fundamental justification for freedom of expression: self-governance. See also BCCLA=s argument at paragraphs 12 and 21-23 on this point.

44. Finally, heightened scrutiny of governmental justifications for the violation of the expression right in the case at bar is required based on the context of the nature of the expression at issue and the facts of this case. As previously noted, the judicial assessment of the value of the right in issue and the assessment of the state justification for a *Charter* violation under section 1 analysis must both be undertaken in a contextual framework: see *Edmonton Journal, supra*, at 1355 [JBA, TAB 12]. In this case, the expressions at issue were in the context of mainstream media which has received special recognition within section 2(b) *Charter* as Afreedom of the press.@ The media has a historically central role in the distribution of ideas so critical to the function of a sovereign people in a democracy.

45. The BCCLA submits that the Human Rights Tribunal must be cautious in applying jurisprudence from the Supreme Court of Canada to the case at bar that suggests less governmental justification is required for restrictions on expressions that promote hate than other types of expressions. First, the contextual approach requires that the Tribunal consider the differences in the actual content of the speech in question in *Keegstra, Taylor and Ross* and the actual content of the opinion column at issue in the case at bar. Second, the Tribunal must be cognizant of the different contexts in which the expressions were made in the various cases.

46. Considering the context of these cases in turn, in *Keegstra*, *supra*, at 713-14 [JBA, TAB 28], the ideas were distributed to a captive audience of students who were required to digest and reproduce the ideas on exams in order to succeed in the classroom. They were young and impressionable and consequently vulnerable given their relative position of power vis-a-vis their teacher. In contrast, the case at bar involves a newspaper columnist who, though occupying a position of relative privilege in society, is not nearly in the same position of influence as a teacher. Furthermore, there are real and meaningful opportunities for readers who do not agree with his opinions to criticize his ideas either through the North Shore News directly or through many other means including other media, public forums, private meetings, etc. Students, even if capable of criticism, simply do not have the same opportunities for counterspeech.

47. The BCCLA further submits that the case at bar may be distinguished from other jurisprudence involving controversial expressions. In *Taylor*, *supra*, the Court dealt with the expression of ideas of an organization that may be characterized as a fringe, anti-Semitic organization. Though one might not like the general slant of reporting by the North Shore News, the BCCLA submits that this newspaper is not a mouthpiece for an extremist organization. With respect to *Ross v. Human Rights Board of Inquiry (N.B.), supra*, at 836-39 [JBA, TAB 37] like *Keegstra*, the speaker in *Ross* was a teacher who has the very important task of inculcating societal values in impressionable young students. Furthermore, the Court in *Ross* did not have to grapple with a legislative regime of restriction on expression but rather a one-time order of a human rights tribunal. As such, the Court did not have to consider evidence or argument about the extent and overbreadth of the restriction on freedom of expression in its section 1 analysis.

48. Far different from these contexts, the case at bar involves an opinion columnist who works for a Amainstream@ community newspaper. The vast majority of his audience are adults, full members of the democratic polity who collectively constitute the self-governing sovereign in democracy. Our democracy assumes that these individuals are capable of independent thinking, judgement and deliberation. The publication in issue, the North Shore News, is part of the corps of press which are historically of vital importance to the functioning of democracy.

B. Is the Purpose/Objective of section 7(1)(b) of the *Human Rights Code* Pressing and Substantial?

49. The *Oakes* test requires that the objective of section 7(1)(b) of the *Code* must be pressing and substantial. Chief Justice Dickson set out the test in *R. v. Oakes, supra*, at 138 [JBA, TAB 31]:

> AFirst, the objective, which the measures responsible for a limit on a *Charter* right or freedom are designed to serve, must be >of sufficient importance to warrant overriding a constitutionally protected right or freedom=: *R. v. Big M Drug Mart Ltd., supra,* at p. 352. The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are *pressing and substantial* in a free and democratic society before it can be characterized as sufficiently important.@ (emphasis added)

It is also important not to overstate the objective. As Madam Justice McLachlin said in *RJR MacDonald Inc., supra,* at 335: [JBA, TAB 34] AIf the objective is stated too broadly, its importance may be exaggerated and the analysis compromised.@

50. The objective of the law in *Taylor, supra*, at 918 [JBA, TAB 6] was found to be informed by purposes of the *Canadian Human Rights Act*: A... the promotion of equal opportunity unhindered by discriminatory practices based on, *inter alia*, race, religion ...@. More specifically, Chief Justice Dickson stated at 927: A[P]arliament=s objective is to protect the equality and dignity of all individuals by reducing the incidence of harm-causing expression.@ Madam Justice McLachlin summed up the purpose of the law in *Taylor* as being Ato promote social harmony and individual dignity.@ (at 958) The BCCLA submits that the objective of section 7(1)(b) of the *Code* can be similarly characterized given that its language and context in human rights law is similar to that of section 13 of the *Canadian Human Rights Act* at issue in *Taylor*. The BCCLA submits that the objective of section 7(1)(b) is to protect equality and the dignity of individuals by creating a remedy for or mitigating the actual harms associated with expressions that are likely to promote hatred or contempt of individuals or groups because of their race, religion, etc.

51. The BCCLA submits that this objective must be both *pressing*, understood as needing urgent and immediate attention and *substantial*, understood as significantly important. As argued previously (see paragraphs 39-48), the government bears a heightened burden to prove not only that the objective of the law is substantial but also that this objective requires immediate, urgent attention. This requirement accords with the language of section 1 itself which requires that a law abrogating a *Charter* right must be *demonstrably justified*; there must be evidence of a compelling need to abrogate the right. The Attorney General argues that it is not necessary for the government to demonstrate that hate activities were a problem when the government passed this law. The BCCLA submits that to determine whether a law has a pressing objective, evidence of the degree or incidence of the behaviour sought to be controlled, in this case the degree of racial, religious or other similar conflict in the province, is a highly relevant consideration. If there was no or little such activity, the government would face a more difficult challenge in proving that the law responds to a pressing, as in urgent, objective.

52. The objective of the impugned law should not be measured in terms of its importance in the abstract without comparison to the corresponding abrogated *Charter* right. Its importance must be measured in relation to whether it is sufficiently important to *override* a fundamental right, in this case, freedom of expression: *Oakes, supra*, at 138 [JBA, TAB 31]. In an oral ruling of May 14, 1997, the Member Designate of the Tribunal concluded that the enquiry under this branch of the *Oakes* test does not require an examination of the frequency of behaviour sought to be controlled. In particular, the Member Designate pointed to the example of culpable homicide. In the BCCLA=s respectful submission, it is inappropriate to use the example of culpable homicide to justify that a judicial decision maker need not consider matters of frequency of the behaviour that is the object of the law, in the case at bar, expressions promoting hatred or contempt. In the case of culpable homicide there is no corresponding *Charter*-protected right that will be overridden by the creation of the law. There is no *Charter* right to culpable homicide. Rather, the degree to which the behaviour is causing the harm that the legislature seeks to address is a very appropriate consideration for the Tribunal in assessing whether the impugned measure is sufficiently pressing and substantial to override a fundamental freedom.

53. The BCCLA submits that the evidence regarding the negative impact on foreign immigration to B.C. due to reported incidence of hate expressions or other racism in B.C. should be given little weight in consideration of the characterization of the objective of section 7(1)(b): Testimony of Ann Bosoian, May 22, 1997 at 30-32. Ms. Bosoian=s evidence regarding perceptions in foreign communities regarding the racial climate in B.C. is substantially hearsay. There is no empirical evidence regarding the actual extent of distribution of these reports in other countries. Nor is there any evidence or study to gauge whether these reported incidents had any actual effect on immigration to B.C. Given the continued torrid pace of immigration into B.C., the BCCLA submits that the Tribunal should give little weight to this suggested objective. If the Tribunal is willing to accept this characterization as part of the objective, the BCCLA submits that it has not been demonstrated to be of sufficiently pressing and substantial concern to warrant overriding a fundamental freedom. A democracy must, by necessity if it is to thrive, permit the heated exchange of ideas, including those that may be hurtful. It is not a legitimate aim of government to sanitize the political forum in B.C., thus overriding a fundamental freedom of Canadians, in order to attract immigration.

54. The BCCLA further submits that the Tribunal should substantially discount Ms. Bosoian=s testimony with respect to the need for this law to deal with recruitment and distribution of extremist literature within the schools: Testimony of Ann Bosoian, May 22, 1997 at 33-34. Educational authorities (school boards) in B.C. clearly have the power to prohibit individuals and groups from distributing extremist materials to students or recruiting students within the school context. Amendments to the *Human Rights Act* in 1993 were not required to deal with any perceived problem in the schools.

55. The BCCLA submits that the objective of section 7(1)(b) of the *Code* is to protect the equality and the dignity of all people and to remedy/mitigate the actual harms associated with expressions that are likely to promote hatred or contempt of individuals or groups because of their race, religion, etc. The BCCLA acknowledges that this objective is of substantial

importance. However, the BCCLA submits that the government bears a significant onus to prove, based on actual facts, that the law=s objective is also pressing. That is, the government bears an onus to prove that there is sufficient degree of *actual* racial, religious, etc. motivated societal conflict in British Columbia that causes *actual* harm to individuals and society in order to justify this objective as sufficiently pressing to override the fundamental freedom of expression.

C. Proportionality

(i) Rational Connection: Does section 7(1)(b) of the *Human Rights Code* actually achieve its objective?

56. Madam Justice McLachlin summarized the rational connection test in *RJR MacDonald Inc., supra,* at 339 [JBA, TAB 34]:

> A[The government] must show a causal connection between the infringement and the benefit sought on the basis of reason or logic. To put it another way, the government must show that the restriction on rights serves the intended purpose.@

57. The Supreme Court of Canada has recognized that in cases where legislation is directed towards changing human behaviour, as in the case at bar, a causal relationship between infringing the *Charter* right and the benefit sought can be proved on the basis of reason or logic in the absence of compelling scientific evidence: See *RJR MacDonald Ltd., supra,* at 339 [JBA, TAB 34] and other authorities cited therein, per McLachlin J. Thus, in the case at bar, the government can satisfy the rational connection branch of the *Oakes* test if it can demonstrate that it is logical or reasonable to believe that the *Code=s* infringement of freedom of expression prevents the actual harms of this type of speech.

58. The BCCLA submits that, just as the rational connection test can be satisfied on the basis of logic in the case at bar, so can logic and reason be used to refute government arguments to justify the law as rationally connected its objective. Under the rationale connection assessment, the BCCLA submits that the government continues to bear a significant, heightened onus to prove that its logic is more compelling than reasoned arguments to the contrary.

Greater Distribution of Ideas

59. The BCCLA submits that the ideas of a respondent who is the subject of Human Rights Tribunal proceedings in respect of a complaint under section 7(1)(b) of the *Code* will receive infinitely greater publicity and distribution than would otherwise be the case. The general attention in the media and in the public forum that the respondent and his ideas have received in the case at bar should provide ample illustration of this effect. Similarly, the names Keegstra, Zundel and Ross are notorious throughout Canada in large measure due to legal proscriptions which have multiplied many times the public exposure given to their views and causes. Legislation such as section 7(1)(b) can have the even worse effect of making Amartyrs@ out of individuals whose ideas are repugnant.

The Weimar Republic Experience

60. The BCCLA submits that history provides significant guidance that regimes of absolute censorship rarely if ever achieve their objectives. The Attorney General in the case at bar has not provided any historical example in which a censorship regime in fact accomplished its actual objectives. On the contrary, an historical example that provides compelling lessons for our society regarding the success of censorial regimes to combat harmful expressions is the experience of pre-Nazi Germany and the Weimar Republic:

J. Dixon, AThe Keegstra Case@, *supra* at 43 [RIBOA, TAB 7]

61. The Weimar Republic experience reinforces the point that censorship regimes create greater publicity for obnoxious ideas that they seek to control and in doing so ultimately undermine their own objectives:

> AThe point is that the success of the prosecution of anti-Semitic propaganda and insults was of that tragic kind that we term self-defeating. The prosecution became, unsurprisingly, a sustained public drama that fed -- though most certainly did not inspire -- the emerging mythologies of Jewish conspiracy and Aryan martyrdom. ... In fact, if history has any practical lesson to offer in this connection, it is that minds and ideas -- evil or otherwise -- offer a protean resistance to repression.@

Dixon, AThe Keegstra Case, *supra*, at 43-44. [RIBOA, TAB 7]

62. This example also provides evidence of how censorship regimes undermine democracy itself:

> AThe history lesson that bears remembering now is that the failure of German democracy was, most emphatically, not attributable to German resistance to the control of hateful expressions. German democracy failed because the citizens of the Weimar Republic did not take responsibility for the course of their politics. They disengaged; they stood by; they waited for direction; they forgot that as self-governing women and men they must always think and live the lives of rulers. Their acquiescence to censorship of hate propaganda was not an anomaly; it was a symptom of their general conditions of readiness to be ruled. And they got their ruler . . .@:
>
> J. Dixon, *ibid*, at 44. [RIBOA, TAB 7]

63. The BCCLA submits that the harms, whatever they actually are, from extreme and hurtful ideas will not disappear because of section 7(1)(b). That is because these ideas, and the people who believe in them, will not disappear. Regrettably, prejudice is impossible to eradicate. If this provision is at all successful at inducing some people to forego public expressions that convey hatred or contempt of others because of their race, religion, etc., it is likely that these same people will disseminate their ideas in more covert, private environments, by finding ways to communicate their messages to target and other audiences in Aprivate@. The expression of these ideas will simply go Aunderground@. The BCCLA submits that these ideas are potentially more dangerous underground, in terms of potential for discrimination and violence, than they if they are aired in public.

Length of Proceedings/Delay

64. To be effective in remedying/mitigating the harmful effects of extremist expressions, the BCCLA submits that a law that sanctions such expressions must be efficient. The experience of the case at bar suggests that human rights processes will not ensure a timely remedy. On the contrary, the process can be painstakingly long to the dissatisfaction of both the complainant and

the respondent. This phenomenon is not restricted to the case at bar. Despite the existence of other complaints under this section of the *Code* all have yet to be resolved. Furthermore, human rights complaints generally take a significant time to resolve: See Professor Bill Black, The Report on Human Rights in British Columbia (Vancouver: Ministry Responsible for Multiculturalism and Human Rights, 1994) at 142-143 [hereinafter the ABlack Report]); also see the B.C. Human Rights Commission 1995-96 Annual Report at 6. If Ajustice@, by way of the *Code*=s process for dealing with complaints pursuant to section 7(1)(b), cannot be accomplished relatively swiftly, the BCCLA submits that the law will not be ultimately effective in achieving its objective. Prospective complainants forego complaining given the length of the process: see B.C. Human Rights Commission 1995-96 Annual Report at 7. The BCCLA submits that the inefficiency of the process points to a lack of rational connection between this law and its objective.

65. The BCCLA submits that the problems of delay cannot be dismissed by arguing that the delay is caused by the administration of the law rather than the law itself. Parties advocating this argument cite *Little Sisters Book and Art Emporium et al. v. Minister of Justice* (1996), 131 D.L.R. (4^{th}) 486 [JBA, TAB 18] as authority for this proposition. This authority does not adequately respond to the problems of delay for several reasons. First, unlike the case at bar, in *Little Sisters* the obscenity provision of the *Criminal Code* that Customs officials relied on to inspect and seize materials sought to be imported into Canada, pursuant to the *Customs Tariff* and the *Customs Act*, had already been declared constitutionally valid in *R. v. Butler*, [1992] 1 S.C.R. 452 [JBA, TAB 26]. However, in the case at bar, the constitutionality of section 7(1)(b) is presently under challenge; there is no prior judicial declaration or presumption of constitutionality of section 7(1)(b). The Human Rights Commission is not simply administering a constitutionally valid provision. Second, in the case at bar, the government did not create a special form of administration to better process complaints under section 2(1)(b) of the former *Human Rights Act*. Yet it can be presumed that the Attorney General understood that the creation of this provisions would violate citizens= freedom of expression. Further, it must be assumed that the government was well aware of the delays in processing complaints when it amended the

Human Rights Act. The 1991-92 Annual Report of the B.C. Council of Human Rights acknowledges significant problems of delay:

> AAs a result, the Council=s backlog of complaints rose to almost 300 complaints during the reporting period. In real terms this meant that individuals had to wait up to eight months before their complaints were either accepted for investigation or dismissed. Such delays are likely responsible for the sharp increase in complaints that were withdrawn or abandoned by complainants.@

Third, the BCCLA submits that the government should not be able to sidestep the problem of actual delays in process by arguing that it is the administration of the law and not the law that is at fault. This argument should not be accepted in principle because it improperly and unreasonably places the onus on citizens, whose fundamental freedoms are violated by restrictions on expression, to challenge each new administrative scheme that the government might create to deal with delays. Finally, changes to the law created by amendments to the *Code*, have not addressed the problems of delay as is evident in the 1995-96 Annual Report of the Human Rights Commission, at 6-7.

66. If the Tribunal finds that the law is sufficiently rationally connected to its objective to satisfy section 1 scrutiny, the BCCLA submits in the alternative that the Tribunal must consider in subsequent section 1 analysis that this law suffers from various deficiencies as outlined above such that the law is not completely able to satisfy its objective: the law increases the exposure of these messages, the ideas will be forced underground and the length of the process will inhibit people from making complaints.

(ii) Minimal Impairment: Does section 7(1)(b) of the *Human Rights Code* Impair Freedom of Expression as Little as is Reasonably Possible?

67. Does the impugned law utilize the least drastic means possible to achieve the objective of preventing actual harms of extreme expressions? Or are there other less drastic measures that the government could have utilized that would substantially achieve the same objective as section 7(1)(b)? Madam Justice McLachlin=s comments in *RJR MacDonald Inc., supra*, at 342-43 [JBA, TAB 34] provide guidance as to the application of this branch of the *Oakes* proportionality test:

> AAs the second step in the proportionality analysis, the government must show that the measures at issue impair the right of free expression as little as reasonably possible in order to achieve the legislative objective. The impairment must be ›minimal‹, that is, the law must be carefully tailored so that rights are impaired no more than necessary. The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislation. If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement ... On the other hand, if the government fails to explain why a significantly less intrusive and equally effective measure was not chosen, the law may fail.@

Government Obligation to Seriously Consider Alternatives

68. The government bears the significant onus of proving that it made serious efforts to consider alternatives that would better accommodate freedom of expression while meeting its objectives: *R. v. Edwards Books and Arts Limited* [1986] 2 S.C.R. 713 at 717 [JBA, TAB 27] and *R. v. Lewis*, *supra*, at 284. The BCCLA submits that there is no evidence before the Tribunal that the government made sufficiently serious efforts to even consider various options that would less drastically restrict freedom of expression consistent with its objectives in creating section 7(1)(b) of the *Code*. The Attorney General of B.C. has not adduced any evidence that the government seriously considered alternatives to either the wording of the section or implementing alternative government programs that would seek to promote equality while avoiding or reducing the negative impact on the right to freedom of expression. The Attorney General may not wish to disclose evidence in order to protect cabinet confidences in the deliberations about amending the *Human Rights Act* in 1993 to include section 2(1)(b). Nevertheless the government bears the significant onus of proving it gave ample consideration to various alternatives. As Madam Justice McLachlin stated in *RJR MacDonald Inc.*, *supra*, at 344:

> AA full prohibition will only be constitutionally acceptable under the minimal impairment stage of the analysis where the government can show that only a full prohibition will enable it to achieve its objective. Where, as here, no evidence is adduced to show that a

> partial ban would be less effective than a total ban, the justification required by s. 1 to save the violation of free speech is not established.@

As argued previously (paragraphs 39-48), the BCCLA submits that when the expression at issue is Apolitical speech@, as in the case at bar, the Tribunal should scrutinize even more carefully governmental action, or the lack thereof, in the section 1 analysis. In *RJR MacDonald*, *supra*, the expression at issue was commercial speech. The rigour of judicial assessment regarding minimal impairment in the case at bar should even be greater than that in *RJR* given that the expressions at issue in the case at bar can be deemed Apolitical@, not just commercial.

69. The BCCLA submits that a range of alternatives to section 7(1)(b) exist: inclusion of intent and defences, expansion of government programs and assistance to non-governmental organizations, regulating extremist expressions that are intended for or that are received by a significant segment of youth, making membership in the Press Council mandatory, etc. The BCCLA submits that the law fails the minimal impairment test due to the government=s failure to at least seriously consider let alone implement some of these options that fall within a range of less restrictive alternatives.

70. The BCCLA does not in principle support any restrictions on the expression of oppressive speech even if these changes were adopted in the *Code*. However, these measures would at least mitigate the negative impact on freedom of expression. As a matter of law, the impugned provision does not pass the standards of minimal impairment given the government=s failure to adopt these measures instead of resorting to section 7(1)(b), as well as the government=s failure to adduce evidence that it even seriously considered alternatives.

<u>Intent</u>

71. Unlike section 319(2) of the *Criminal Code*, section 7(1)(b) of the *Code* does not require that the speaker *intend* to promote hatred against any identifiable group through his expressions. Thus, section 7(1)(b) captures a whole range of expression for which there is no moral

culpability. The BCCLA submits that this section is unconstitutionally overbroad in scope due to a lack of a requirement that the speaker intend to promote hatred or contempt.

72. Many individuals, groups or institutions, including the media, seek to expose the dangers of truly oppressive expressions by providing a forum for those ideas to alert the public to their dangers, to report on such expressions or to relay these expressions in order to encourage a firm denunciation of the ideas and the speaker. For example, the media play a significant role in

> exposing the ideas and existence of extremist and racist individuals and groups through news reports, interviews and documentaries. If the reporting recites individuals= or group=s hateful expressions that promote hatred or provides them a forum to express their views, the reporter and publisher would also be subject to a complaint under section 7(1)(b). Without a requirement of intent, important journalism that can protect the value of equality is sanctionable under the *Code*: *Jersild v. Denmark* (36/1993/431/510) [European Court of Human Rights] at paragraph 36 [JBA, TAB 44].

73. If the Tribunal finds that the statements by the respondent Mr. Collins contravene section 7(1)(b), reports in the media of the comments by the respondent would also then be subject to a complaint under the *Code*. To further illustrate the extent of the unconstitutionally overbroad character of section 7(1)(b), a human rights group that relays (through its newsletter or other media) racist statements made by others that are likely promote hatred or contempt of others *for the purposes of* (i) alerting the public of the problem and (ii) encouraging a concerted effort to denounce the speaker of these expressions, would also be subject to sanction under section 7(1)(b) of the *Code*.

74. Parties and intervenors arguing that the *Code* is constitutional may rely on Dickson CJC=s comments in *Taylor, supra,* at 931-33 to rebut the arguments about overbreadth above. The BCCLA respectfully submits that the Tribunal is not bound by *Taylor* on this point of law for the reasons it gave earlier in argument. To briefly repeat these, *Taylor* was decided in significantly different context. It dealt only with telephonic communications. The Court in *Taylor* did not have

to consider the effect on freedom of expression of a law that captures myriad other forms of communication. To that extent, the impugned provision in *Taylor* is a much narrower restriction on freedom of expression than is section 7(1)(b) of the *Code*. Thus, the Court in *Taylor* was not forced to consider evidence and arguments of the negative effect of a similar law on all public expressions including freedom of the press, and its consequent negative effects on a democratic society which presumes citizen self-rule. Furthermore, telephone communications simply do not play as central a role as the media in distributing ideas. Finally, *Taylor* was determined by a narrow 4-3 majority. The BCCLA submits that the reasoning of the dissent, delivered by McLachlin J., though this analysis is considered under the rational connection branch, is to be preferred over that of the majority. This reasoning is even more persuasive in the context of the case at bar given the much greater restriction on expression caused by section 7(1)(b) of the *Code* compared to the law in *Taylor*:

> AExpression intended to expose discriminatory practices or demonstrate inequities in the system may equally be caught by s. 13(1). This overbreadth might be more excusable if s. 13(1) required proof of actual harm or discrimination. But in the absence of requirements for either intent or foreseeability of producing such an effect or production of the effect itself, the section is capable of catching conduct which clearly goes beyond the scope of its object.@
>
> *Taylor, supra*, at 962. [JBA, TAB 6]

75. The BCCLA submits that the fact that the *Human Rights Code* is remedial in scope rather than punitive is not a constitutionally adequate response to the problem of lack of intent in the law. An effects-based analysis is appropriate to assessments about whether conduct, as distinct from expression, amounts to discrimination such as denying access to public services, employment or housing based on a person=s race, religion, etc.: See the comments of Chief Justice Dickson in *Taylor, supra*, at 931 [JBA, TAB 6] and authorities cited therein. In assessing whether such conduct is discriminatory, there is no fundamental, constitutionally protected right competing for recognition. No one has a fundamental right to discriminate in denying housing or employment. However, where the Aconduct@ in question is expression (especially valuable political expression as in the case at bar) there is a competing constitutionally protected right vying for recognition: freedom of expression. Furthermore, respondents to a complaint under

section 7(1)(b), as well as the general public, often perceive that the sanctions under a regime of censorship are punishment for airing particular ideas: Transcript of Testimony of Professor Mahoney, June 2, 1997 at 38-39. The BCCLA submits that consideration of the intent of the speaker is a measure that better protects the freedom while still sufficiently achieving the objective of the law.

Defences

76. Section 7(1)(b) further fails to meet the minimal impairment test by excluding defences similar to those that are available under section 319(2) of the *Criminal Code*. These defences include (i) truth, (ii) opinions on religious subjects made in good faith, (iii) expressions that are relevant to the public interest made for public benefit if the speaker had reason to believe the ideas expressed were true, and (iv) good faith efforts to reduce or eliminate the promotion of hatred against identifiable groups (i.e. a lack of intent). A lack of defences further creates problems of overbreadth because section 7(1)(b) captures statements that are true, controversial opinions on religious issues and good faith comments on important public interest issues that are inevitably controversial that may be interpreted as promoting hatred or contempt against others based on race, religion, etc. The BCCLA submits that Madam Justice McLachlin=s reasoning in *Taylor, supra*, at 968, [JBA, TAB 6] is again more persuasive of the issue in the case at bar:

> AThe effort made to accommodate freedom of expression is insufficient. Section 13(1) catches speech which is neither intended nor calculated to foster discrimination. It catches speech which may be entirely accurate and truthful; speech which merely seeks to air legitimate group grievances; speech which merely exposes to ridicule; ... In short, section 13(1) seriously overshoots the mark, going beyond what can be defended as a reasonable limit on free speech justified by the need to combat discrimination against members of particular groups.@

For all these same reasons, section 7(1)(b) of the *Code* seriously overshoots the mark of its objective.

Government Programs and Assistance

77. In addition to drafting alternatives that would impair the expression right less than the wording in section 7(1)(b), the BCCLA submits that the government could have created additional government programs or assisted private individuals and non-governmental institutions to remedy/mitigate the adverse effects of oppressive expressions without having to resort to absolute censorship. For example, the government could have significantly expanded public education programs for both adults and youth or assisted private, non-governmental organizations to undertake education. The former B.C. *Human Rights Act*, in force in 1993, did not even provide a statutory mandate for the B.C. Council of Human Rights to undertake education. The Black Report noted that the former Council of Human Rights had no budget for education in fiscal year 1993-94 (at 70-71). In addition to education, the government could have considered creating more programs to empower human rights and multicultural organizations to effectively counter controversial expressions with information designed to denounce the speaker and his ideas. APublic information campaigns@ could be formulated to directly address the extremist ideas of the speaker but also could be tailored more generally for the public at large. The government could also have devoted greater resources to programs that would diminish the conditions that often foster negative stereotyping of disadvantaged groups such as better access to housing, health care, employment, etc. The BCCLA submits that education and countering oppressive speech can significantly reduce, remedy and mitigate the harms associated with such speech. ACounter-speech@ can in some situations have much more beneficial consequences for equality than restrictions on expression:

> C.R. Calleros, APaternalism, Counterspeech, and Campus Hate-Speech Codes: A Reply to Delgado and Yun@, *supra*, at 1270. [RIBOA, TAB 3]

78. In sum, the BCCLA submits that since the government neither seriously considered alternatives nor implemented these alternatives that could have substantially furthered its objective while reducing the restriction on free expression, the minimal impairment test has not been met.

(iii) Weighing Salutary and Deleterious Effects: Do the Salutary Effects of the Law Outweigh the Negative Impact on the Right of Freedom of Expression? Or vice versa?

79. Even if the government satisfies the first two branches of the proportionality test, it must prove that the effects of the infringement are not too deleterious. As Chief Justice Dickson said in *R. v. Oakes, supra*, at 140 [JBA, TAB 31]: AEven if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve@.

80. This third branch of the proportionality test has undergone a refinement in our jurisprudence. In *Dagenais, supra*, at 887-88 [JBA, TAB 11], the majority of the court approved of Chief Justice Lamer=s Arephrasing@ of the Oakes test:

> AIn many instances, the imposition of a measure will result in the full, or nearly full, realization of the legislative objective. In these situations, the third step of the proportionality test calls for an examination of the balance that has been struck between the objective in question and the deleterious effects on constitutionally protected rights arising from the means that have been employed to achieve this objective. At other times, however, the measure at issue, while rationally connected to an important objective, will result in only the partial achievement of this object. In such cases, I believe that the third step of the second branch of the *Oakes* test requires both that the underlying *objective* of a measure and the *salutary effects* that actually result from its implementation be proportional to the deleterious effects the measure has on fundamental rights and freedoms. A legislative objective may be pressing and substantial, the means chosen may be rationally connected to that objective, and less rights-impairing alternatives may not be available. None the less, even if the importance of the *objective itself* (when viewed in the abstract) outweighs the *deleterious effects* on protected rights, it is still possible that the actual salutary effects of the legislation will not be sufficient to justify these negative effects.
>
> . . . I believe that even if an objective is of sufficient importance, the first two elements of the proportionality test are satisfied, and the deleterious effects are proportional to the objectives, it is still possible that, because of a lack of proportionality between the deleterious effects and the salutary effects, a measure will not be reasonable and demonstrably justified in a free and democratic society. I would, therefore, rephrase the third part of the *Oakes* test as follows: there must be a proportionality between the deleterious effects of the measures which are responsible for limiting the rights or freedoms in question and the objective, *and there must be a proportionality between the deleterious and the salutary effects of the measures*.@ (Lamer CJC=s emphasis)

81. This test was confirmed by Madam Justice McLachlin in *RJR MacDonald Inc.,*

supra, at 331 [JBA, TAB 34]. McLachlin J. stated that it is necessary to consider A... whether the actual benefit which the law is calculated to achieve outweighs the actual seriousness of the limitation of the right.@

82. This rephrased test has also been applied by the Supreme Court of Canada in other cases:

see *Canadian Broadcasting Corporation v. New Brunswick (Attorney General)* [1996] 3 S.C.R. 480 [JBA, TAB 8 at 35-38]. Of particular relevance to the case at bar is the approach of the Court in *R. v. O=Connor* (1995) 130 D.L.R. (4th) 235 which dealt with the issue of an accused=s right to access therapeutic records of complainants in the possession of third parties. The Court also outlined a process which courts should follow in determining whether to disclose such records. Like the case at bar (though the case at bar deals only with competing *values* as opposed to *constitutional rights*), *O=Connor* dealt with competing constitutional rights: the privacy rights of complainants and third parties vs. the right of the accused to a full and fair defence. Applying the rephrased test in *Dagenais*, Madam Justice L=Heureux Dube particularly emphasized the need to weigh the salutary effects of the production of documents for the accused=s ability to defend himself against the deleterious effects on the other party=s privacy (at 285 and 293-95). Similarly, the BCCLA submits that the Tribunal must weigh the salutary effects of section 7(1)(b) of the *Code* against this provision=s deleterious effects on the expression rights of the respondent and all citizens.

83. The BCCLA submits that, on balance, the deleterious effects of section 7(1)(b) of the *Code* on the right to freedom of expression outweigh its salutary effects on achieving its objective. Before considering these two types of effects in the case at bar, we wish to examine the issue of harm.

Extremist Expressions and Harm

84. In both *Keegstra, supra* and *Taylor, supra*, the Supreme Court of Canada considered the objective of the impugned laws as pressing and substantial by focussing on the harm caused by speech that conveys extreme invective based on race, religion or other characteristic. The Court noted that there are two types of harm associated with this type of speech: affront to the dignity and self-worth of individuals who are the target of the expressions and the harm to society that

may result by creating a greater climate of intolerance for diversity. Professors Weinfeld and Mahoney further testified to these harms. Professor Mahoney suggested a third type of harm: this type of speech causes the individual targets of this speech to withdraw from participating in civil society. To that extent, according to Professor Mahoney, this type of speech undermines the goal of participation in democracy that underlies one of the justifications for freedom of expression.

85. The BCCLA acknowledges that expressions influence one=s attitudes and beliefs, which in turn influence one=s actions. It is precisely for that reason that the BCCLA so strongly supports freedom of expression. The BCCLA also acknowledges that some expressions that promote hatred or contempt of others based on race, religion, etc. may cause psychological and emotional harm to some individuals who are the targets of the speech. In addition, such expressions may influence others who are not the target of the speech to adopt a similar attitude, with possible consequent negative effects for individuals/members of minority groups.

86. However, the BCCLA submits that controversial, even extremist expressions may evoke a range of reactions in individuals that receive them whether they be part of the Atargets@ of such speech or otherwise. These reactions range from feelings of hurt and withdrawl (i.e. harm as understood above), to indifference or to outrage and the need to reaffirm the dignity/self-worth of the targets of the speech. Reactions may also include a strong impulse to Acounter@ the speech with more speech in a variety of contexts: mass media responses, public demonstrations, creation of public workshops on racism, homophobia, etc., private discussions, etc. To that extent, this type of speech motivates some individuals to argue against the offensive speech and to argue in favour of values that they think are more important such as equality and respect for the dignity of all persons. Though it is reasonable to conclude that some harm from extremist speech does occur, the government has not presented evidence regarding the degree to which it *actually* occurs on a macro scale. Indeed, such evidence is likely impossible to quantify scientifically. In the view of the BCCLA, harm does not inevitably occur to all who hear the message of the speaker. There is no simple formula of cause and effect between speech and its impact on people. The targets of extreme speech are not all personally affronted by this speech. Some may react

with indifference. Those who are not the targets of this speech, may be influenced by it but in varying, often beneficial ways: they may stand up and denounce racism or other prejudice

87. Professor Amy Adler addresses this point when considering whether a censorship regime could distinguish between Agood@ and Abad@ speech by relying on the judgement of the victims:

> APerhaps we could distinguish Agood@ speech from Abad@ by relying on victim groups to distinguish the two. In her hate speech work, Mari Matsuda has suggested that we could decide hard cases by ›look[ing] to the victim-group members to tell us whether the harm is real harm to real people.= Yet this recipient-based theory of harm is also flawed: victims often disagree on whether a particular example of speech is harmful. Such a problem may not be so difficult to resolve in cases where the victims of speech are discrete and identifiable -- victims, for example, of a face-to-face incident. But what about the cases Matsuda hopes to regulate, such as publicly displayed speech, in which the victims are an entire, widespread group? A theory that charges a coalition of victim group members with distinguishing acceptable from unacceptable speech assumes that all members of a victim group ›know= hate speech when they see it. Such an assumption denies not only the nature of language, but also the diverse reactions to such language within outsider communities.
>
> Matsuda=s theory evidences the influence of ›essentialism,= the belief that all members of a minority community share a certain essential nature. Essentialism has been the subject of heated criticism by a growing number of scholars. These critics, the anti-essentialists, have argued that there are multiple viewpoints based on class, gender, sexual orientation, and race within any one outsider group and that the failure to account for differences within minority communities results in silencing those who are at the margin of any group.@
>
> A. Adler, *supra*, at 1552-53. [RIBOA, TAB 8]

88. The BCCLA submits that it is unreasonable to assume that all targets of offensive expressions are harmed, or that society in general is harmed because the majority of citizens adopt the attitudes of speakers promoting hate. Thinking of harm in this way runs contrary to a basic premise in a democratic society: all citizens are independent, thinking human beings capable of judgement and deliberation. Instead, generalizations and oversimplifications of the harms that may result from extreme expression, tend to mistakenly paint individuals as emotional automatons that react predictably according to preset and clear rules of cause and effect:

Dixon, J. AThe Bessie Smith Factor@ in *Liberties, supra*, at 15-20.

89. Professor Mahoney has testified that extremist speech silences the targets of such speech and causes them to withdraw from participation in democracy. As such, this type of speech, undermines democracy itself. Thus a proscription in the *Code* against this speech is necessary to protect the rights of targets of this speech to participate in democracy.

Transcript of testimony of Professor Mahoney, May 26, 1997 at 129-130

90. The BCCLA respectfully submits that the evidence of Professor Mahoney regarding the harmful effects of offensive speech carries little weight. Professor Mahoney=s professional training and experience is legal. She is not a sociologist, anthropologist or psychologist. She provided no evidence of research that she personally has undertaken regarding the effects of offensive speech. The only scholarly works she relied on for the claims of harm were two well-read law journal articles (Delgado and Matsuda articles) from the United States which themselves rely on anecdotes or other social science regarding harm. The Member Designate has ruled these materials inadmissible as evidence though they can be used in argument: Ruling Regarding Brandeis Brief Materials, June 4, 1997 at 6. Otherwise, Professor Mahoney relies on the work of the Cohen Report, Equality Now and the McAlpine Report for her testimony regarding harms.

91. With respect to the third type of harm identified by Professor Mahoney (silencing of targets), she did not specifically cite studies supporting the contention that offensive speech causes individuals and groups to withdraw from participation in democracy. Professor Mahoney does not identify which groups might be vulnerable to a Asilencing@ effect of extremist speech and on what basis. Professor Mahoney does not recognize that Aparticipation in democracy@ can take many and varied forms, other than responding to extremist speech. Though an individual who is a target of oppressive expression may not be compelled to counter the offensive ideas in particular, her efforts in the public sphere (to fight racism, to advocate for better government programs to fight poverty, to work to reduce taxes, etc.) may continue unabated. Aside from a

lack of empirical evidence for substantiating this contention, the BCCLA submits that Professor Mahoney evidence does not adequately reflect the diversity of responses oppressive expressions can engender. In many instances, far from silencing the participation of the target group in democracy, extremist speech can often motivate individuals and groups to respond with effective counterspeech. For example, individuals and institutions within the Jewish community are often the most outspoken critics of Holocaust denial. Professor Mahoney does not recognize that oppressive speech can engender significant discussion *within* Aoutsider@ communities: S. Gellman, AHate Speech and a New View of the First Amendment@ (1995), 24 Capital University L.R. 309 at 309-312. The BCCLA submits that Professor Mahoney=s contention is more accurately characterized as argument rather than evidence given its nature. To the extent that her testimony is evidence, the BCCLA submits that Professor Mahoney=s evidence regarding harm to democracy must be given little weight in this branch of the proportionality test. To the extent that her contention is considered argument, the BCCLA submits that this argument is far from compelling.

Salutary Effects of the Law

92. The government has not adduced any evidence that demonstrates *in fact* the extent of *actual* benefits of section 7(1)(b). It has not shown how people will in fact be prevented from expressing beliefs that will fall within the section=s ambit. Nor has the government demonstrated how the section will in fact remedy or mitigate the harms associated with truly oppressive expressions. A lack of evidence for this benefit is in part understandable given that it would be difficult for the government to prove *actual* beneficial effects of the law simply because of the nature of the task: it is not a proposition that lends itself to scientific scrutiny. Notwithstanding that problem, the BCCLA acknowledges that (i) some people who would otherwise utter oppressive expressions will be deterred to not actually utter them because of the law and (ii) where someone does utter such expressions, some complainants will be able to bring successful complaints under the *Code* such that they receive a remedy that addresses, at least in part, the harm flowing from the expressions.

93. The BCCLA submits that, in spite of acknowledged, but non-quantifiable, salutary effects of the law, there are various factors which undermine these salutary effects. First, as argued under the rational connection part of the section 1 analysis (paragraphs 59 and 61), legal sanctions that are designed to restrict the expression of ideas of sometimes harmful ideas most often result in even greater distribution of the ideas that are deemed harmful. The only way to prevent such distribution is to create a publication ban on reporting of the hearing. Though the Tribunal may not be persuaded by this effect under the rational connection test, the BCCLA submits that it cannot ignore the degree to which this effect undermines the salutary benefits of the law under this branch of the *Oakes* test. Second, also as argued under the rational connection analysis (paragraphs 64 and 65), the delay caused by the administration of the law will most certainly have a negative effect on the law=s ability to achieve its objective as complainants either give up on their complaints or forego making a complaint due to the length of the process. Finally, the law will force these ideas underground where they are potentially more dangerous (paragraph 63). In sum, the BCCLA submits that the parties or intervenors urging that the law is constitutionally valid **cannot** successfully argue that the law will completely and in all cases fully satisfy its objectives.

Deleterious Effects

94. In contrast, the BCCLA submits that section 7(1)(b) will cause significant deleterious effects on the right of freedom of expression. These effects include:

(i) *Retreat From Democracy* - The BCCLA believes that a primary justification for freedom of expression is the Ademocratic commitment@ (self-governing citizens must have access to all ideas): see paragraphs 7, 9-13 and 20-21of BCCLA=s Memorandum of Argument. The society that permits a regime of censorship like that of section 7(1)(b) of the *Human Rights Code* is no longer a democracy in the true and full sense of the concept. By permitting the Human Rights Tribunal to restrict free expression, we citizens have abdicated our sovereign role: we permit the

government to do our necessary democratic thinking and choosing for us. This restriction is an admission that as a society, we have lost respect for and faith in the minds of ourselves as citizen-rulers. Section 7(1)(b)=s effect is that we as citizens no longer have the democratic right, responsibility and challenge of determining which controversial ideas on issues of race, religion, etc. are worthy of enshrining in our laws and public institutions and which ones we will condemn and discard. In stark contrast to Professor Mahoney=s argument that oppressive expressions harm democracy, the BCCLA submits that the censorship under section 7(1)(b), notwithstanding such censorship may capture some expressions that most of us would reject, fundamentally undermines citizens= sovereignty and thus democracy.

(ii) *Chilling Effect on Freedom of Expression* - Section 7(1)(b) will capture some expressions that can be considered to be legitimately Agood@ speech. The BCCLA has already argued that the law is overbroad because it does not take into account either the intent of the speaker or other defences available in section 319(3) of the *Criminal Code*. Consequently, media and documentary reports of hate activity that serve to play an important educative function will be sanctionable under the *Code*. Furthermore, as discussed in paragraphs 24-26 of the BCCLA argument, Aactivist@ speech (i.e. expressions that are intended to or interpreted as countering hateful attitudes and ideas) will also be caught by the *Code*. Thus, the effect of the *Code* on what we might agree is Agood@ speech will be to either deter people from making those expressions or expose them to sanctions for having expressed the ideas. In addition, individuals who might otherwise make controversial expressions that would not amount to the promotion of hatred, might also be deterred from stating their views for fear of sanction under the *Code*. This is especially true given that the process is, to a significant extent, complaint driven. This Aself-censorship@ is difficult if not impossible to quantify especially given the recent implementation of this provision. Nevertheless, the BCCLA submits that the wide language of section 7(1)(b) and the degree of its overbreadth will cause significant self-censorship where the potential expressions are Agood@ speech or speech that is ultimately not sanctionable under the *Code*.

(iii) *Loss of Opportunities for Civic Activism, Public Education and Identification of Hate Promoters* - As outlined in paragraphs 28-31 of the BCCLA argument, controversial expressions that fall within the ambit of section 7(1)(b) of the *Code* provide citizens with opportunities to recommit or newly commit to the ideals of equality, tolerance and a respect for diversity by speaking out against hateful ideas. With section 7(1)(b), citizens become less reliant on themselves and more on the state to achieve equality. The BCCLA submits that this will ultimately undermine our society=s ability to achieve the goals of equality. Likewise, through section 7(1)(b)=s censorship, we lose our opportunity to undertake public education on issues of intolerance such as racism, misogyny and homophobia. Letters to the editor and opinion columns that rebut racist expressions might not change the mind of the speaker, though they may. But they do have significant salutary public educative effects. Finally, we also lose the opportunity to identify those who promote hate and thus guard against more severe discrimination and violence by these individuals.

(iv) *Time, Expense, Stress on Respondent* - Respondents can be classified in two categories. Those who in fact transgress the law and those who do not in fact promote hatred or contempt in their expressions but are the subject of a complaint. The law and human rights process will have significant negative effects on both classes of respondents including financial expense, time devoted to defend oneself, negative effects on personal reputation and negative effects on the respondent=s personal life and family and friends. Though one has much less sympathy for those that do intend to promote hatred, the law=s negative effects on their expression rights must still be considered in the assessment: all citizens retain their rights to influence public policy even if we don=t like their ideas. For those respondents that are the subject of a complaint under the law, which is significantly complaint driven, but whose expressions do not promote hatred, the negative impacts of the law are severe.

(v) *Respondent=s Perception of Punishment* - Though the human rights process is in theory Aremedial@ rather than penal as understood by lawyers, the practical effect and perception of a respondent subject to the process is that he is subject to Apunishment@ because of the expression

of his beliefs. This perception is likely to exist whether the respondent is exonerated or not.

Testimony of K. Mahoney, June 2, 1997 at 38-39

(vi) *Respondent=s Incentive to Mediate* - Given the significant effort and negative impact on the life of a respondent, it is likely that at least some respondents would simply agree to mediate a resolution (e.g. offer an apology) rather than subject themselves to the entire process.

95. The BCCLA submits that, on balance, the weight of the deleterious effects of the restrictions on freedom of expression caused by section 7(1)(b) of the *Code* far outweigh the salutary benefits of preventing/remedying/mitigating an indeterminate degree of harm caused by controversial and extremist expressions. Therefore, the BCCLA submits that the law fails this branch of the *Oakes* test and is thus unconstitutional.

III. Conclusion Regarding Constitutionality of section 7(1)(b) of the *Human Rights Code*: Appropriate ABalancing@

96. The BCCLA submits that it is not appropriate to consider the trading off or balancing the fundamental freedom of expression with equality values in the case at bar except for considerations in applying the final branch of the *Oakes* proportionality test. The infringement at issue in the case at bar is a violation of freedom of expression. There is no violation of section 15 equality rights at issue. As Madam Justice McLachlin noted in *Keegstra, supra*, at 833 [JBA, TAB 28]: AThis is not a case of the collision of two rights which are put into conflict by the facts of the case. There is no violation of s. 15 in the case at bar, ... The conflict, then, is not between rights, but rather between philosophies.@ (emphasis McLachlin J.=s).

97. Even where constitutional rights compete for primacy, the Supreme Court of Canada has rejected the clash model of competing rights because it recognized that freedom of expression can in various ways promote the value of fair trials: *Dagenais, supra,* at 882-83 [JBA, TAB 11]. The conflict model was also rejected in *R. v. O=Connor, supra,* at 293-94. Similarly, the BCCLA

submits that expression that consists of ideas that might be construed as promoting hatred may in some cases promote the causes of disadvantaged groups and individuals: see paragraphs 24-26, 30. The BCCLA urges the Tribunal to consider carefully the effects of total censorship in section 7(1)(b). For traditionally disadvantaged individuals or groups who do not have ready access to traditional forms of mass media, extremist comments that shock our sensibilities may be the only effective way that they can or know how to express their perspectives. We remind the Tribunal that the nature of democracy is such that it can never be restricted to civility in the exchange of ideas. Whether we like it or not, passionate emotions (including hatred) and politics, go hand in hand.

98. The *Charter* is a document that protects citizens against unwarranted state action. The *Charter* does not create a positive duty on the state to act. Equality is a very important value in Canada=s democracy and receives protection to some degree in section 15 of the *Charter*. But the *Charter* guarantees equality when the state does act. It does not mandate that state action. The BCCLA submits that equality is relevant in the case at bar only as an interpretive aid.

99. The BCCLA submits that federal and provincial governments, including the government in B.C., have adopted a variety of significant measures that promote the value of equality and attack the harmful effects of conduct that is based on prejudicial, hateful attitudes. The BCCLA strongly supports human rights law prohibiting discrimination, understood as conduct as opposed to expression, in the *Human Rights Code*. We also support criminal provisions that outlaw violence generally that protect minority groups. The BCCLA further supports provisions in Bill C-41 that amended the *Criminal Code* to create section 718.2 [Canadian Jewish Congress Brief of Statute Law, TAB 8]. This section codifies the common law and permits a court of law in sentencing a criminal offender to take into account aggravating circumstances such as offences motivated by bias, prejudice or hate. Finally, though the BCCLA in principle does not support this provision because it undermines our society=s democratic commitment, section 319 of the *Criminal Code* already provides sanctions against the most egregious forms of hateful expressions. In sum, various criminal and human rights provisions that sanction harmful

discriminatory conduct, in contrast to expression, provide a significant and strong commitment to the general value of equality. To go further, as does section 7(1)(b) of the *Code*, unjustifiably undermines British Columbians= free expression rights.

100. Considerations of Abalancing@, mandated by section 1 and section 1 jurisprudence, are only appropriate under the third branch of the proportionality test. The BCCLA submits that this legislation does not create an adequate balance between the salutary benefits it seeks to achieve in the name of equality and the negative effects it has on freedom of expression. Nor has the government adequately demonstrated that it seriously considered other alternatives that would better protect freedom of expression while still satisfying its objective.

100. The BCCLA recognizes that freedom of expression in the *Charter of Rights and Freedoms* is not an absolute right to express and receive any idea, wherever, whenever and however. First, free expression may be regulated by government in terms of time, place and manner restrictions where there are competing and compelling interests such as privacy and where the law can be demonstrably justified in a free and democratic society: See *Peterborough (City) v. Ramsden* (1993) 106 D.L.R. (4th) 233 at 248; see also *R. v. Lewis* (1996) 24 B.C.L.R. (3d) 247 at 286 and 291. Second, the BCCLA also accepts prohibitions against Aincitement@ where these expressions have the effect of inducing significant harm such as imminent violence. We support such prohibitions on the basis that, because of the very heated context and circumstances in which the expressions are made, self-governing citizens have no opportunity to engage in, or to delay to engage in, the deliberative process required when considering the merits of any particular idea.

101. The BCCLA submits that section 7(1)(b) of the *Human Rights Code* does not represent an attempt to Abalance@ competing interests or values. Rather, section 7(1)(b) completely sacrifices the constitutionally protected freedom to express particular ideas in favour of the interests of equality. Section 7(1)(b) is not mere regulation of expression. Rather, it is an absolute, content-based prohibition on the expression of particular ideas in public. Nor is it

focussed solely on expressions that are likely to cause imminent lawlessness. Section 7(1)(b) is governmental action that presumes that citizens are incapable of undertaking the important work of self-government. As such, this provision makes us a less free and democratic society.

102. In conclusion, the BCCLA submits that section 7(1)(b) of the *Human Rights Code* violates section 2(b) of the *Charter of Rights and Freedoms* and this violation cannot be reasonably and demonstrably justified in a free and democratic society.

IV. Remedy

103. The BCCLA adopts the submissions of the Press Council of B.C. with respect to remedy.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

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Murray Mollard, Counsel
B.C. Civil Liberties Association

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