IN THE MATTER OF THE INDIVIDUAL RIGHTS PROTECTION OF SECTION 2 OF THE INDIVIDUAL RIGHTS PROTECTION ACT, R.S.A. 1980, c. I-2;

AND IN THE MATTER OF THE PUBLIC INQUIRIES ACT, R.S.A. 1980, c. P-29

BETWEEN:

HARVEY KANE, KEITH RUTHERFORD, JACK C. DOWNEY, HAL JOFFE, NATE FELDMAN, NELL McKEREGHAN, PAUL ARMSTRONG

Complainants

- and -

CHURCH OF JESUS CHRIST CHRISTIAN-ARYAN NATIONS, TERRY LONG REPRESENTING MEMBERS OF THE CHURCH OF JESUS CHRIST CHRISTIAN-ARYAN NATIONS, TERRY LONG AND RAY BRADLEY

Respondents

WRITTEN SUBMISSION

PART I: STATEMENT OF FACTS

The Women's Legal Education and Action Fund (LEAF) and the Canadian Congress of Black Women (CCBW) (hereinafter "the Intervenors") rely on the facts as set forth by the Alberta Human Rights Commission and in particular:

1. The evidence presented to this Board of Inquiry by the complainants has established that at the Ray Bradley farm near Provost, Alberta on September 8th and 9th, 1990:

a) there was a cross burned,

b) a swastika flag was flown,

c) a sign that read "KKK WHITE POWER" was displayed and

d) persons wearing white shirts as shrouds shouted "Death to the Jews!", "White Power!" and "Zieg Heil!"

2. All of these acts were conducted where they could be observed by members of the p

3. The evidence presented by Dr. Frances Henry, an anthropologist who was qualified to give expert opinion evidence with respect to the areas of racial discrimination, established that the effects and functions of symbols such as the triple K, the swastika and the burning cross are:

a) that they have a very important propaganda function (p. 715, lines 6 & 7);
   i) the swastika conveys the hatred of Jews and a commitment to their annihilation (p. 715, lines 10 - 13);
   ii) the triple K and the burning cross conveys that this country should be white (p. 715, lines 25 - 27);

b) that they are used to recruit new members to the movement (p. 716, lines 2 & 3);

c) that they target an vilify their victims (p. 716, lines 6 - 18);

d) that they instill fear and terror and threaten violent action against targeted groups (p.718, lines 13 - 18);

e) that they promote a climate of intolerance which encourages discrimination against the targeted groups.

4. The evidence presented by Dr. Henry established that historically, the principal targets of these acts in the United States have been African Americans or blacks, and have also included Asians of all ethnicities, Jews, and other minorities, and all peoples of colour in general (p. 707,lines 13 - 17).

In addition to the above, the Intervenors rely upon the evidence of Professor Catharine MacKinnon, who was qualified to give evidence as a legal and social expert on equality and freedom of expression.

5. Professor MacKinnon characterized acts such as cross burning, displaying the swastika and the triple K as discriminatory expressive acts (p. 976, lines 1 - 19). They discriminate by dividing the world into two groups:

a) members of targeted groups who live in fear, dread and apprehension;

b) members of the dominant group who are told how to discriminate against the targeted group.

The effect is to mobilize and extend existing discriminatory attitudes and behaviour in society (p. 976, lines 20 - 27).

6. The evidence of Professor MacKinnon further established that specific effect of discriminatory expressive acts on the targeted groups are:

> a) to produce a total lack of sense of personal security because one feels one could at any moment be assaulted with impunity such that there is no place to run and there is no place to be safe (p.979. line 27; p. 980, lines 1 -16);
>
> b) to silence them (p. 980, lines 26 & 27; p. 981, lines 1 - 8);

See generally, "Public Response to Racist Speech: Considering the Victim's Story," Mari Matsuda. (1989) 87 Mich Law Review 2320 (Exhibit 86);

7. The evidence of Professor MacKinnon further established that the actual harm to the targeted groups created by discriminatory expressive acts is to make individuals in those groups vulnerable to illness, affecting their physical, emotional and mental wellbeing, in addition to denying the targeted groups equal access to education, employment, accommodation, and political participation. The net effect is continued subordination of the targeted group by the dominant group (p. 990, lines 3 - 27; p. 991, lines 1 - 17, and Brief, Amicus Curiae of the National Black Women's Health Project in Support of Respondent in R.A.V. v. City of St. Paul, Minnesota (Exhibit 88).

8. The evidence of Professor MacKinnon further established that the effects of discriminatory expressive acts is magnified for those groups who are members of two or more targeted groups such as women of colour and Jewish women. They are in a position to be multiply and interactively terrorized by racist acts. As Professor MacKinnon stated:

> "If one is a black woman, the accumulated effect and the synergistic interconnection between the racism and the sexism create a single discriminatory effect, a single enforcement of inequality against such groups that multiplies the consequences of any particular single act.... Women of colour are say -- are in a position to be multiply terrorized by racist acts which are -- often have sexual undertones or consequences; as well as by any symbolic bigotry that is directed toward all women. It will tend to have an even more aggravated effect on a woman of colour who is already in a less advantaged position within the group women by virtue of not possessing skin privilege" (p. 978, lines 17 - 27; p. 979, lines 1 - 5).

9. Moreover, the effect of this double discrimination is not limited to feeling threatened and worthless, Professor MacKinnon pointed out that it reverberates into employment discrimination:

> "And what happens can be traced through the labour force, where say women of colour are on the bottom of the group women. They aren't just evenly distributed throughout the group women. So they are discriminated against on the basis of both race and sex" (p. 979).

PART II: POINTS IN ISSUE

A. What are the principles of interpretation to be applied to the Individual Rights Protection Act?

B. Did the acts of the Respondents constitute discriminatory behaviour contrary to the provisions of Section 2 of the Individual Rights Protection Act?

C. Is the constitutional guarantee of freedom of expression available to the Respondents as a defence?

PART III: ARGUMENT

A. THE PRINCIPLES OF INTERPRETATION TO BE APPLIED TO THE INDIVIDUAL RIGHTS PROTECTION ACT

10. In Hills et al. v. Canada (Attorney-General), the Supreme Court of Canada found that in interpreting legislation, the values embodied in the Charter of Rights and Freedoms (hereinafter, the Charter) must be given preference over an interpretation which would run contrary to them.

Hills et al. v. Canada (Attorney-General), [1988] 1 S.C.R. 513 at 558.

11. The Supreme Court of Canada has identified equality as one of the underlying values and principles of a free and democratic society, the genesis of the rights and freedoms guaranteed by the Charter, and the ultimate standard against which the objects of all legislation must be measured.

R. v. Oakes, [1986] 1 S.C.R. 103 at 136.

12. Section 15 of the Charter states that:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The Supreme Court has said that the section 15 guarantee "is the broadest of all guarantees in the Charter. It applies to and supports all other rights guaranteed by the Charter."

Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143 at 185.

13. In Andrews v. Law Society of British Columbia, supra, Wilson J. stated at 154 that "s. 15 is designed to protect those groups who suffer social, political and legal disadvantage in our society." In assessing whether a group is discriminated against within the meaning of section 15, the Supreme Court in R. v. Turpin et al., [1989] 1 S.C.R. 1296 at 1331 directed inquiry into "the larger social, political and legal context" and at 1333 enumerated "indicia of discrimination such as stereotyping, historical disadvantage or vulnerability to political and social prejudice." The evidence has clearly established that the bases on which groups are targeted by the activities of the Respondents are all expressly enumerated in s.15 of the Charter and s.2 of the IRPA.

14. The other Charter guarantee which the Supreme Court has considered an important value in a free and democratic government is that of the promotion of multiculturalism found in s.27 of the

Charter. That section states that all freedoms and rights in the Charter must be interpreted and applied in accordance with s. 27 thereof, in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

> R. v. Edwards Books and Art Ltd., [1986] 2 S.C.R. 713 at 752
>
> R. v. Keegstra, (1991) 61 C.C.C. (3d) 1 at 44.

In the latter case the commitment to a multicultural vision of Canada was said to be of acute importance to the objective of eradicating hate propaganda from society. It is respectfully submitted that the same importance would apply to the objective of eliminating discrimination in our society.

15. Discriminatory expressive acts such as those complained of before this Board contradict and erode the multicultural heritage of all Canadians, which section 27 affirms as a fundamental characteristic of Canadian society.

16. Human rights legislation generally, and the Individual Rights Protection Act (hereinafter the IRPA) in particular, constitute fundamental law. The Supreme Court has accepted this premise by elevating human rights legislation to quasi-constitutional status, by holding that persons may not contract out of their human rights and by establishing the primacy of human rights legislation over other statutes.

> Ontario Human Rights Commission et al. v. The Borough of Etobicoke, [1982] 1 S.C.R. 202 at 213.
>
> The Winnipeg School Division No. 1 v. Craton et al., [1985] 2 S.C.R. 150 at 153-54.
>
> Ontario Human Rights Commission et al. v. Simpson Sears Limited, [1985] 2 S.C.R. 536 at 546-47.
>
> Robichaud v. Canada (Treasury Board), [1987] 2 S.C.R. 84 at 89-91.
>
> Insurance Corporation of British Columbia v. Heerspink and Director, Human Rights Code, [1982] 2 S.C.R. 145 at 158-8.

17. The importance of human rights legislation was stressed by Dickson C.J.C. in Canadian National Railway Co. v. Canada (Canadian Human Rights Commission), [1987] 1 S.C.R. 1114, as follows at 1134:

> Human rights legislation is intended to give rise, amongst other things, to individual rights of vital importance, rights capable of enforcement, in the final analysis, in a court of law. I recognize that in the

> construction of such legislation the words of the Act must be given their plain meaning, but it is equally important that the rights enunciated be given their full recognition and effect. We should not search for ways to enfeeble their proper impact.

18. Courts, and in particular the Supreme Court of Canada, have in numerous cases developed legal doctrine in a manner which is sensitive to the reality of the experience of social and economic inequality of women and other disadvantaged groups protected under 15 of the Charter.

Brooks v. Canada Safeway Ltd., [1989] 1 S.C.R.

Janzen and Govereau v. Platy Enterprises Ltd., [1989] 1 S.C.R. 1252.

R. v. Lavallee, [1990] 1 S.C.R. 852.

19. The Intervenors submit that some Charter rights require only that existing law be properly applied. Other Charter rights require affirmative legislation for their achievement. Equality is an example of the second, and human rights laws are examples of such alternative measures. As noted by Dickson C.J.C. in Reference Re Public Service Employee Relations Act (Alta), [1987] 1 S.C.R. 313 at 361, the notion of "rights" is "said to impose a corresponding duty or obligation on another party to ensure the protection of the right." It is submitted that this mandates the Board to interpret s. 2 of the IRPA in a manner consistent with the protection of that obligation. Just as Charter rights can be used to challenge legislation, they can be used to uphold legislation such as s.2 of the IRPA which furthers constitutional equality rights.

20. The Supreme Court has recognized that in interpreting legislation and weighing competing values, the international agreements on human rights to which Canada is a signatory should be taken into account. As the Court stated in Slaight Communications Inc. v. Davidson(1989), 59 D.L.R. (4th) 416 at 427:

> ...Canada's international human rights obligations should inform not only the interpretation of the content of the rights guaranteed by the Charter but also the interpretation of what can constitute pressing and substantial s.1 objectives which may justify restrictions upon those rights.

In its decisions in R. v. Keegstra, supra, at 39-41 and Taylor v. Canadian Human Rights Commission et al.; Attorney General for Ontario et al., Intervenors, (1991) 75 D.L.R. (4th) 577 at 594-5, the Court reviewed those international agreements to which Canada is a signatory and concluded that the fact that the international community has collectively acted to condemn hate propaganda and oblige state parties to prohibit such expression, emphasized the importance of the principles of equality and the inherent dignity of all persons that infuse both international human rights and the Charter. In the

result in both decisions Canada's international obligations were an important factor in weighing competing Charter guarantees of freedom of expression and equality under s.1 of the Charter and the significance of the governmental objective in regards to both pieces of impugned legislation.

21. Finally the provisions of the Interpretation Act, 1980 R.S.A. c.I-7, as amended, provide in s.10 that

> An enactment shall be construed as being remedial, and shall be given the fair, large and liberal construction and interpretation that best ensures the attainment of its objects.

22. The objects of the IRPA are set forth in the preamble to the IRPA:

> WHEREAS recognition of the inherent dignity and the equal and inalienable rights of all persons is the foundation of freedom, justice and peace in the world; and
>
> WHEREAS it is recognized in Alberta as a fundamental principle and as a matter of public policy that all persons are equal in dignity and rights without regard to race, religious beliefs, colour, gender, physical disability, mental disability, age ancestry or place of origin; and
>
> WHEREAS it is fitting that this principle be affirmed by the Legislature of Alberta in an enactment whereby those rights of the individual may be protected.

23. It is respectfully submitted that these principles of interpretation applied to s.2 of the IRPA require that this Board apply a purposive analysis consistent with the promotion of equality of disadvantaged groups in our society. Such an analysis would give a broad interpretation to the provisions of s.2(1) and a narrow interpretation to s.2(2).

B. THE ACTS OF THE RESPONDENTS VIOLATE SECTION 2 OF THE INDIVIDUAL RIGHTS PROTECTION ACT

24. The evidence has clearly established that the Respondents have displayed notices, signs, symbols and emblems which discriminate or indicate an intention to discriminate against people of colour and Jews. (Paragraphs 1,3,4,5,6,7 and 8 of the Intervenor's Statement of Facts).

25. The evidence has clearly established that these signs and the expressive acts such as cross burning were in fact seen by the public.

26. The Intervenors submit that the burning of a cross, the display of a swastika and of the sign reading "KKK WHITE POWER" and the shouting of "White Power!", "Zieg Heil!" and "Death to the

Jews!" are expressive acts which discriminate against persons and classes of persons. They m[illegible] definition of discriminatory acts in that they are acts that maintain systematic social subord[illegible]n and hierarchy. These discriminatory expressive acts inflict their harm through their meaning, that is, through what they communicate.

> Brief, Amicus Curiae of the National Black Women's Health Project in Support of Respondent in R.A.V. v. City of St. Paul, Minnesota (Exhibit 88).

27. In the context of social inequality, the practices such as those prohibited by s. 2(1) of the IRPA form links in systemic discrimination. They keep targeted groups isolated, silenced, stigmatized and disadvantaged through effectuating and promoting fear, intolerance and segregation. (Paragraph 3, 5 and 6 of the Intervenor's Statement of Facts).

28. The damage caused by discriminatory expressive acts on groups such as black women and Jewish women is horrendous. In the context of social inequality, the damage created by discriminatory expressive acts is exponentially greater for women of colour and for Jewish women because they are targeted generally by virtue of their gender and again because they belong to a particular race or religion. (Paragraph 8 of the Intervenor's Statement of Facts).

29. Negative stereotyping and the denial of a group's humanity can adversely affect individual members of the group. Their employment and educational opportunities and the dignity afforded to them may depend as much on the reputation of the group as on their individual abilities. The Intervenors submit that no individual can receive equality of opportunity if surrounded by an atmosphere of group hatred or contempt, which atmosphere is generated and escalated by bigoted expression such as that at bar.

> "Public Response to Racist Speech: Considering the Victim's Story," Mari Matsuda, (1989) 87 Mich Law Review 2320 (Exhibit 86);
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> "Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling," Richard Delgado, (1982) 17 H.C.R. C. L. Law Review 133 (Exhibit 87);

30. In summation the violation of s.2 of the IRPA has clearly been established.

C. FREEDOM OF EXPRESSION IS NOT A DEFENCE:

31. Section 2(2) of the IRPA which states that "nothing in this section shall be deemed to interfere

with the free expression of opinion on any subject" might at first glance appear to grant Respondents a defence. This is not the case. Section 2(2) of the IRPA does no more than restate the guarantee of freedom of expression found in s.(2)(b) of the Charter and is subject to the same analysis that the Courts have given s.2(b).

32. In R. v. Keegstra, supra, the Supreme Court found that no matter how disgusting or hate-provoking the content of a communication, it fell within protected speech under s.2(b) of the Charter, and thus would be entitled to consideration under s.2(2) of the IRPA. Only communications which have a violent form and no content are said to be unprotected forms of expression.

33. The Intervenors do not concede that the display by the Respondents of the various signs and symbols constitute communication within the context of s. 2(b) of the Charter, and ipso facto, do not concede that the display of these signs and symbols constitute protected expression.

34. In order to determine if the guarantee of freedom of expression is breached, it is first necessary to see if the purpose of the legislation is to restrict expressive activity. See, Irwin Toy, supra, at 972 and Taylor v. Canadian Human Rights Commission, supra, at 590. The Intervenors submit that the clear purpose of the section is to promote equality, not to restrict expression. Support for this can be found in the preamble of the IRPA quoted above. The provision protects members of identifiable groups from the direct and extended effects on disadvantaged groups who are targeted by discriminatory signs. In this way, it is clearly aimed at controlling the unequal consequences of particular conduct, some of which are physical, rather than expressions of opinion as such.

35. It is open to this Board to find that although the purpose of the IRPA was not to restrict freedom of speech, the effect of s.2(1) was to do that. In the event of that finding the Board must consider whether the activities of the Respondents promote the underlying values that the Courts have found underlie the protection of free expression in our society. These have been summarized as 1) seeking and attaining the truth; 2) participation in social and political decision-making; and 3) the diversity in forms of individual self-fulfilment. Irwin Toy, supra, at 976. Hatemongering by displaying discriminatory signs does not further any of the values underlying freedom of expression. The respondents have not met their burden of proof to show that the effects of the display of the discriminatory signs fit within the reasons expression is protected. As recognized practices of discrimination, the acts of the Respondents promote inequality and are inconsistent with the reasons why expression is protected.

36. Moreover, the display of discriminatory signs inhibits the targeted groups from seeking to enforce their right to equality because it intimidates the target groups from asserting them. Rather than encouraging community participation, the expression by the Respondents of their opinions by such activities as cross burning restricts the participation of disadvantaged groups by undermining respect for them and spreading fear. If the individuals who engage in communicating such messages are thereby fulfilled, it is at the expense of others. Human flourishing is constrained by the atmosphere of fear and contempt engendered by the display of such discriminatory signs and symbols.

37. Furthermore, it is submitted that section 15(2) of the Charter strengthens this interpretation. Section 15(2) clearly contemplates that the disadvantaged will be the beneficiaries of governmental acts, and defines such initiatives as consistent with constitutional equality. The intervenors submit that to be consistent with section 15, any test developed to evaluate the constitutionality of equality-promoting legislation under section 2(b) should be one that aids the disadvantaged.

38. In Irwin Toy, supra, this Court did not have to consider a conflict between one constitutional right embodied in a statutory provision, equality, and another constitutional freedom, expression. The intervenors submit that the IRPA's purpose of promoting equality, a constitutionally entrenched guarantee, deserves greater judicial consideration than non-constitutional interests such as consumer protection, which was the focus in Irwin Toy. Particular reference should be made to the principles referred to in Part A of this Argument as to the principles of interpretation to be applied to cases such as the one at bar involving human rights legislation.

39. In the result, it is submitted that the prohibition of displays of discriminatory signs and symbols in s.2(1) of the IRPA does not contravene section 2(b) of the Charter.

40. Should this Board decide to the contrary, and find that the discriminatory expressive acts committed by the Respondents are protected forms of expression, the Intervenors respectfully submit that section 2(2) of the IRPA must be interpreted in such a way that the right to express an opinion does not harm any disadvantaged group. If s.2(2) is found to grant an absolute right to express an opinion, no matter how much harm that opinion causes disadvantaged groups, then it would be unconstitutional to apply it, not only as contrary to the intent of the IRPA as expressed in its preamble and in s.2(1), but as contrary to the principles set out in s.15 and 27 of the Charter. This would be the only result consistent with the decisions of the Supreme Court in R. v. Keegstra and Taylor v. Canadian Human Rights Commission, supra.

41. If this Board finds that the acts of the Respondents constitute protected communication, then in order to determine whether the guarantee of freedom of expression in s.2(b) of the Charter protects the Respondents from the consequences of their action under the IRPA, this Board must determine whether the infringement of the Respondents' freedom of expression is justified under s.1 of the Charter. It was this approach which led the Supreme Court to uphold the impugned legislation in both R. v. Keegstra and Taylor v. Canadian Human Rights Commission, supra.

42. In R. v. Oakes, supra, the Supreme Court offered an analysis to be employed in determining whether a limit on a right or freedom can be demonstrably justified in a free and democratic society. Using this analysis in the R. v. Keegstra and Taylor v. Canadian Human Rights Commission, supra, restrictions on the dissemination of hate propaganda were found to be reasonable under s.1. It is submitted that the facts of these two cases are in many ways analogous to the case at bar, and using the same analysis, this Board should find that:

a) the state action which results in the restriction of speech is an objective of such pressing and substantial concern that it is of sufficient stature to warrant overriding a constitutionally protected right; and

b) the proportionality between the objective of the state in passing the legislation and the impugned measure is such that there is:

i) a rational connection between the objective and the legislation;

ii) the restriction in the legislation impairs as little as possible the freedom of speech; and

iii) there is proportionality between the effects of the measures which are responsible for limiting the Charter freedom and the objective of the legislation.

43. It is submitted that the task of section 1 of the Charter in the case at bar is to balance the tension between harms which flow from regulating expression under 2(1) of the IRPA and the harms which, unregulated by law, are actualized through the display of discriminatory signs and symbols. The Intervenors submit that the importance of promoting equality, including equal access to expression by disadvantaged groups, and the absence of any significant infringement of free of expression, significantly weighs the balance in favour of upholding section s.2(1) under section 1 of the Charter.

44. In Irwin Toy, supra, this Court at 990 and 993-94 distinguished between situations where the government mediates between different groups with competing interests and those situations where

government is the singular antagonist of the individual whose right has been infringed. In the case at bar, the Respondents cast themselves as victims of government, when in reality they are the aggressors in a social conflict between unequal groups. Section 2(1) advances the interests of the disadvantaged while the Respondents advance the interests of the advantaged.

45. The Supreme Court also acknowledged in Irwin Toy, supra at 990, that where groups conflict, legislation inevitably draws a line between their claims. In such situations, the Intervenors submit that where Parliament has favoured disadvantaged groups in the sense of Andrews v. Law Society of British Columbia, supra, this Court should support that assessment.

46. The relative burdens of the parties under section 1 should be assessed in this context. The Intervenors submit that the Respondents must justify limiting the equality rights of disadvantaged groups just as the Human Rights Commission must justify limiting freedom of expression, if the display of discriminatory signs and symbols is protected expression, by both upholding the prohibition against displays of such signs in s.2(1), and arguing for the non-implementation of s.2(2) on constitutional grounds in so far as is necessary.

47. In applying section 1 of the Charter, this Board must be guided by the values and principles essential to a free and democratic society. These are referred to in Part A of this Argument, and include, inter alia, respect for the inherent dignity of the human person, commitment to social justice and equality, and respect for cultural and group identity. The Supreme Court has recognized that it may become necessary to limit rights and freedoms in circumstances where their exercise would be inimical to the realization of collective goals of fundamental importance.

R. v. Oakes, supra, at 136

Slaight Communications Inc. v. Davidson, supra, at 1056

R. v. Keegstra, supra,

Taylor v. Canadian Human Rights Commission, supra

48. The Intervenors submit that both the promotion of section 15 equality rights and the preservation and enhancement of Canada's multicultural heritage under section 27 are pressing and substantial concerns.

49. A proscription against discriminatory expressive acts is rationally connected to the objectives of equality and the preservation and enhancement of the multicultural heritage of Canada.

50. It is submitted that if the Board applies the same analysis as did the Supreme Court in R. v. Keegstra and Taylor v. Canadian Human Rights Commission, supra, it will be drawn to the same unavoidable conclusion as did the Supreme Court that the discriminatory expressive acts complained of are antithetical to these essential values and principles, and that the requirements of "pressing and substantial concern" and proportionality are met.

51. The Intervenors submit that legislative action taken to deter discriminatory expressive acts goes some way to redress the imbalance of power between advantaged and disadvantaged groups. Protection from discrimination is necessary to protect the inherent dignity and worth of all human beings in society.

52. The Intervenors submit that section 2(1) does little, if any, damage to freedom of expression because the discriminatory expressive acts complained of are contrary to the principles and values which the Supreme Court has stated underlie the protection of freedom of expression. Any limit on freedom of expression is slight when compared with the deleterious effect group hatred has on target groups, their members, and society as a whole. Moreover, as was posited by the majority and accepted by the minority in the decision of R. v. Keegstra, supra, as a human rights complaint rather than a Criminal Code proceeding, this case evidences the preferable way of dealing with such abhorrent behaviour as that of the Respondents in this case.

53. It might be argued that the premise that the "marketplace of ideas is the appropriate protection for disadvantaged groups unless direct physical harm results from expression" should be applied. The Intervenors do not accept this. For a marketplace of ideas to function there must be equality, including equal ability to speak and be heard. Because equality does not exist in Canadian society as a whole, the use of "the marketplace of ideas" concept to assess permissible limits on freedom of expression is fundamentally flawed when considering that discriminatory expressive acts are against disadvantaged groups. Advantaged groups "own" a disproportionate share of freedom of expression by virtue of their greater share of power and wealth. In a marketplace where some have a greater ability to speak and be heard than others, it is more likely that the ideas of the advantaged will emerge out of the competition of ideas, rather than the truth.

54. Dickson C.J.C. dissenting in Reference Re Public Service Employee Relations Act (Alta), supra, at 194 recognized that government intervention, rather than impeding the enjoyment of fundamental freedoms such as freedom of expression, may in some instances protect and enhance

their enjoyment. The Intervenors submit that this analysis applies directly to the freedom of expression of disadvantaged groups, which is promoted by section 2(1) of the IRPA.

55. The Supreme Court has held that freedom of expression is not absolute. In Fraser v. Public Service Staff Relations Board, [1985] 2 S.C.R. 455, Dickson C.J.C. stated at 463 and 467:

> "All important values must be qualified, and balanced against, other important, and often competing, values. This process of definition, qualification and balancing is as much required with respect to the value of "freedom of speech" as it is for the other values.
>
> ". . . . Sometimes these other values supplement, and build on, the value of speech. But in other situations there is a collision. When that happens the value of speech may be cut back if the competing value is a powerful one." (emphasis added)

56. The Supreme Court has inextricably linked the values of equality and multiculturalism with the concept of a free society. In R. v. Big M. Drug Mart Ltd., [1985] 1 S.C.R. 295, Dickson C.J.C. stated at 335 that: "A free society is one which aims at equality with respect to the enjoyment of fundamental freedoms and I say this without any reliance upon s. 15 of the Charter." This suggests that the value of equality is an inherent limit on section 2(b) without reliance upon section 15. When read with section 15, the conclusion is inescapable that freedom of expression must be interpreted in a manner consistent with the equality rights of others.

57. Section 2(1) of the IRPA therefore constitutionally advances the equality of disadvantaged groups in the sense section 15 of the Charter exists to promote equality, imposes only such limits on expression as are demonstrably justifiable in a free and democratic society that has equality as a constitutional guarantee, and is a narrowly tailored and finely limited instrument that infringes protected expression little, if at all, while advancing equality substantially by the standards of section 1 of the Charter.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

"Patricia Paradis"

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