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ARPA CANADA'S LEGAL ARGUMENTS

IN

THE KING V. WHATCOTT

THE CASE TO DEFINE THE SCOPE OF CRIMINAL HATE SPEECH IN RELATION TO SEXUAL MORALITY

COURT OF APPEAL

ARPA CANADA

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I. OVERVIEW

1. ARPA Canada's submissions relate to the issue of whether condemning personal conduct that is deeply tied to the identity of members of a protected group constitutes hate propaganda *per se* under s. 319(2), an issue that arises due to the novel line of argument advanced by the Crown in this Appeal. ARPA Canada takes no position on whether the flyer in question constitutes hate propaganda within the meaning of s. 319(2).

2. The Crown's submissions wrongly conflate moral criticism of personal conduct that is tied to the identity of a protected group with promoting the destruction of the group so identified. This conflation is not supported in law and would have the impermissible effect of criminalizing moral debate, religious teaching, and proselytism.

3. A person can simultaneously reject another person's beliefs as false or immoral, or his personal conduct as immoral, while still accepting that person as a person and as an equal member of the political community and without promoting hatred against him. Maintaining a free and democratic society depends on recognizing this distinction. Moreover, merely inviting another person to join one's own religion and live according to its ethics assumes the common humanity, agency, and dignity of persons who are invited to change or to convert.

II. ARGUMENT

a. The Crown misinterprets and misapplies *Whatcott* (2013)

4. The Crown contends that to condemn gay male sex as immoral or unhealthy and to advocate abstinence from it is to call for "the eradication of this group [i.e., gay men] since sexual orientation and practice are central to its identity." This contention is rooted primarily in the Crown's misinterpretation and misapplication of *Whatcott*, in which Rothstein J.

concluded that attacks on sexual behaviour that are framed in such a way as to expose members of an identifiable group to hatred can stand as a proxy for an attack on the group itself.

> Appeal Crown Factum, at para 48; see also paras 2 and 33.
> *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11 at para 124 [***Whatcott***].

5. It is crucial to understand Justice Rothstein's point in context. The Court in *Whatcott* was addressing the argument that criticism of conduct cannot be considered hate speech. The Court's conclusion – that hate speech *can* capture speech framed as criticism of personal conduct – assumes that the expression in question, considered objectively, has the effect of promoting hatred (i.e., extreme detestation that belies reason, etc.). Hence, the Court's explanation: "Framing that speech [i.e., speech that has the proscribed effect] as arising in a 'moral' context or 'within a public policy debate' does not cleanse it of its *harmful effect*."

> *Whatcott* at para 116 (emphasis added).

6. Similarly, the Court states that "where *hate speech* is directed toward behaviour in an effort to mask the true target, the vulnerable group, this distinction should not serve to avoid s. 14(1)(b) [of the *Human Rights Code*]," it assumes what the Crown, in this case, must prove – namely that the speech in question promotes the proscribed harmful effect. The Court does *not* say that any attack on behaviour that is integral to a group's identity equals hate speech. It says that such an attack, *if* framed in such a way as to objectively promote hatred against an identifiable group, cannot hide behind the behaviour-identity distinction.

> *Whatcott* at para 122 (emphasis added).

7. The Court in *Whatcott* "agree[s] that sexual orientation and sexual behaviour can be differentiated for certain purposes." The Court affirms that "Mr. Whatcott can express disapproval of homosexual conduct" and that "Mr. Whatcott and others are free to preach

against same-sex activities, to urge its censorship from the public-school curriculum and to seek to convert others to their point of view." The Court also says, "Genuine comments on sexual activity are not likely to fall into the purview of a prohibition against hate."

Whatcott at paras 119, 122, 164, and 177.

8. The Court explains that moral criticism of types of sexual conduct that are not sexual-orientation-exclusive, such as non-procreative sex acts, "would not implicate an identifiable group." If, however, the criticism in question is exclusively focused on sexual activity between same-sex partners, then an identifiable group is implicated – but this does *not* mean that such criticism automatically amounts to hate speech. As the Court explains, "If, however, he chooses to direct his expression at sexual behaviour by those of a certain sexual orientation, [then] his expression must be assessed against the hatred definition […]."

Whatcott at para 177.

9. Thus, even in a human rights law context, there is a two-part analysis. Criticizing gay male sexual practices does not automatically qualify as promoting hatred. The Supreme Court in *Whatcott* emphasizes that the focus is not on the opinion or belief itself, or how controversial or offensive it may be, but on the objective effect of the communication in question – which depends in large part on the form it takes, the way it is framed, and the language used.

Whatcott at paras 49, 51.

10. Applied in the context of prosecuting an offence under s. 319(2), Rothstein J.'s point in *Whatcott* that speech-attacking behaviour may stand in as an attack on an identifiable group only assists the Crown in establishing the fourth of the five elements that make up the "wilful promotion of hatred offence" – namely the identifiable group element. It simply does not support the Crown's contention that condemning gay male sex promotes hatred *per se*.

R v Harding, (2001) 52 OR (3d) 714 at para 7, 40 CR (5th) 119 (Sup Ct).

b. The importance and limits of the behaviour-identity distinction

11. The Crown tries to use the behaviour-identity *connection* to obliterate the behaviour-identity *distinction* that the Supreme Court also recognizes in *Whatcott*. The former serves to protect identifiable groups from attacks on their basic social standing that may appear to be framed as moral criticism of certain conduct. The latter preserves the freedom to hold and express moral views, however controversial or outside the mainstream.

12. Consider, for example, a claim that a willingness to engage in gay male sex implies a willingness to commit or allow sex acts with children or animals. While someone might try to defend such a claim as stating a moral position regarding conduct, in reality it offers nothing by way of a moral critique of gay male sex *per se*. Rather, it presents a defamatory representation of gay men, which (if believed) may expose them to hatred. Similarly, the antisemitic hate speech in *Keegstra* and similar cases did not consist in criticizing a belief or practice integral to Judaism (e.g. infant male circumcision), but in defamatory representations and generalizations presenting Jews as untrustworthy, dangerous, and a threat to society.

> *R. v Keegstra*, [1990] 3 SCR 697, at para 3, 77 Alta LR (2d) 193 [***Keegstra***]. *Canada (Human Rights Commission) v. Taylor*, [1990] 3 SCR 892, at para 5, 75 DLR (4th) 577.
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> See also: Ronda Bessner, "The Constitutionality of the Group Libel Offences in the Canadian Criminal Code" (1988) 17 *Man. L.J.* 183. And Jeremy Waldron, *The Harm in Hate Speech*, (Cambridge (Mass): Harvard University Press, 2012), at chapter 3, "Why Call Hate Speech Group Libel" [***Waldron***].

13. In his book-length defense of hate speech laws, Jeremy Waldron addresses the criticism that such laws stifle public debate on matters of morality and religion. Waldron insists that, though there are difficult borderline cases, "the basic distinction between an attack on a body of beliefs and an attack on the basic social standing and reputation of a group of people is clear." In fact, Waldron argues, this distinction is a pillar of democracy, in which "we distinguish between the respect accorded to a citizen and the disagreement we might have

concerning his or her social or political convictions. Political life always involves a combination of the sharpest attacks on the latter and the most solicitous respect for the former."

Waldron at p. 119-120.

14. While political belief is not a protected ground against hate speech, the same principle applies to religious beliefs and practices. We can respect a person even while condemning his or her religious beliefs or practices. The U.K.'s *Religious and Racial Hatred Act*, for example, affirms the distinction explicitly by banning "hatred against a group of persons defined by reference to religious belief," but not "discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents."

Religious and Racial Hatred Act, (UK) 2006 c. 1, ss. 29A, 29J; cited in *Waldron* at p. 120.

15. Although this distinction is not as explicit in s. 319(2) of Canada's *Criminal Code*, it is implied in the Supreme Court's reasoning in *Whatcott* regarding the scope of hate speech in two ways. First, the Court concluded (at para 92) that prohibiting speech that "ridicules, belittles or otherwise affronts the dignity" of a protected group is "not rationally connected" to the legislative purpose of protecting protected groups from discrimination. Second, the Supreme Court found that two of the flyers in issue did not promote hatred because:

> [E]ven if, viewed objectively, the words were to be interpreted as calling for homosexuality [i.e. gay male sex] to be illegal, the statement is not combined with any representations of detestation and vilification delegitimizing those of same-sex orientation. Rather, as the Court of Appeal determined, these flyers are potentially offensive but lawful contributions to the public debate on the morality of homosexuality. [*Whatcott* at para 200 (emphasis added)].

16. Waldron also observes that legal protection for the free exercise of religion is "compatible with the most scurrilous criticism of the doctrines and ceremonies that free exercise involves." The parallel with sexual conduct is clear. Canadian law respects the liberty to engage in

consensual sex acts, but this liberty does not entail a corresponding right to be free from moral criticism or a duty on the part of the state to silence such criticism. People are generally free to criticize, condemn, or even mock *beliefs or practices* integral to a group's identity, subject to the narrow limitation that they not do so in a manner that would expose that group to hatred by attacking their basic social standing as human beings worthy of equal concern and respect.

Keegstra at para 76; *Whatcott* at paras 50-54. See also Waldron, at 118-136.

17. Were this Court to endorse the idea that criticizing conduct is equivalent to promoting hatred against persons who engage in said conduct, the Court would undermine a foundational principle on which a free and democratic society is based. On the one hand, it would have a severe chilling effect on moral, political, and religious expression. On the other hand, it would increase the likelihood that such debates will generate social strife by endorsing the idea that moral or religious disagreements should be interpreted as personal attacks or existential threats.

d. Proselytism is not hate

18. The Respondent's impugned flyer calls on people to stop engaging in certain behaviour and to believe in and follow Jesus Christ. Although the Crown condemns the former but not the latter in this case, in Christian teaching these two major life changes – repentance and conversion – go hand in hand. Insofar as the communication in question simply calls for repentance and religious conversion, it should not be found to promote hatred.

19. "Hatred" in s. 319(2) denotes the most extreme form of negative emotion. It also implies that the speaker finds "no redeeming qualities" in the person to whom the hate is directed. Thus, the willful promotion of hatred is inimical to evangelism. Although religious proselytism may offend by saying or implying that the proselyte is on the wrong religious or moral path, it generally assumes a common humanity, inviting the proselyte to voluntarily join the

proselytizers' own religious family. Religious proselytism recognizes that there is something of redeeming value in the potential proselytes and seeks their good – even their eternal life with God. Appealing to someone to voluntarily change their conduct, meanwhile, may be considered a necessary component of evangelism, and it too assumes that the person being addressed has moral agency, which is closely tied to dignity.

Whatcott at para 40.

c. Caution is required when determining whether religious teaching or sacred texts are misused to lend credence to hate speech

20. The Court in *Whatcott* warns against permitting passages of scripture to be used to "lend credibility" to "negative generalizations" and "derogatory representations" of protected groups. Someone should not be allowed to spread the defamatory and damaging allegation that gay men are pedophiles, for example, by citing Bible verses that teach that gay sex is sinful. Misusing scripture in this way may increase the risk that the speech in question has the effect of causing hate by suggesting that the defamatory representation of gay men as pedophiles is directly supported by scripture – which it is not.

Whatcott at para 187.

21. Importantly, the Court in *Whatcott* also urged caution when dealing with arguments that foundational religious writings amount to hate speech. The Court noted that "objective observers would interpret excerpts of the Bible with an awareness that it contains more than one sort of message," including messages of love and forgiveness. The Court made these points in defense of Mr. Whatcott's quoting, in that case, Jesus' warning that it is better to be cast into the sea with a millstone around your neck than to "cause one of these little ones to stumble."

Whatcott at paras 197-199.

e. The freedom to make radical change is a core aspect of human dignity

22. The Crown argues that asserting or implying that gay men can choose not to be gay (i.e. to not engage in gay male sex), or that their choice to be gay is destructive, is to "deny their human dignity and right to equality" and is "a powerful expression of hatred."

Appeal Crown Factum, at para 49.

23. The freedom to choose – to change our minds, behaviour, and even our identity or self-concept – is deeply tied to our human dignity. While dignity is difficult to define precisely, the capacity and freedom to make such important life decisions is an important aspect of it.

R v Jones, [1986] 2 SCR 284 at para 76, 47 Alta LR (2d) 97 [***Jones***].
Law v Canada (Minister of Employment and Immigration), [1999] 1 SCR 497 at para 53, 170 DLR (4^{th}) 1.

24. People can make surprising changes. We might fundamentally change our political or moral views, embark upon a new career in mid-life, quit a bad habit or start a good one, break off an important relationship or form a new one. We might even change our religion.

25. Religious conversion and repentance require radical change. In the words of one influential theologian, repentance as defined in the Bible involves a "turning around" that stems from a "change of mind, will, and action." Repentance requires leaving something behind and a "return to the proper path." The trial judge recognized that, at a very basic level, the Respondent's flyer included a religious call to repentance.

John Calvin, *Institutes of the Christian Religion (1541)*, translated by Robert White (East Peoria, US: Versa Press, Inc., 2014) at p 298.
Trial Decision, *R v Whatcott*, 2021 ONSC 8077 at para 44.

26. In *Jones*, Wilson J. took Dickson C.J.'s famous identification of "respect for the inherent dignity of the person" as an essential principle in a free and democratic society and tied it to the liberty to make important personal choices:

> I believe that the framers of the constitution, in guaranteeing "liberty" as a fundamental value in a free and democratic society had in mind that freedom of the *individual to develop and realize his potential to the full, to plan his own life to suit his own character, to make his own choices for good or ill, to be non-conformist, idiosyncratic and even eccentric* – to be in today's parlance, "his own person" and accountable as such.
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> *Jones* at para 76.

27. The Crown contends that the Respondent tries to extinguish the space for others to direct their own lives by trying to "impose one kind of lifestyle over another." However, a private citizen does not "impose" his views on others in any meaningful sense merely by presenting or advocating for those views, without violence or threats. If anyone is in danger of imposing views on others, surely it is the Crown, which has the power to punish people for speaking. More fundamentally, presenting one's beliefs or moral convictions does not extinguish others' freedom to make their own choices. It arguably enhances that freedom by presenting different views that others may consider and freely accept or reject, in whole or in part.

> Appeal Crown Factum, at para 31.

28. This is not to assert that gay men (or other sexual minorities) can simply choose to change their orientation. Instead, it is to emphasize that advocating a radically different life path of religious conversion and sexual chastity as defined by traditional Christian beliefs does not, *per se*, either impose beliefs on others or promote hatred. Such a life path may seem odd or even offensive in the context of the Pride Parade – but it is a path that anyone, as the proper guardian of their spiritual path and philosophy of life, could choose.

> Appeal Crown Factum, at para 31.
> *R. v. Morgentaler*, [1988] 1 SCR 30, Justice Wilson at paras 229-231, 44 DLR (4th) 385.

29. It is conceivable, regardless of how improbable, that Pride attendees would choose to change their philosophy of life and accept an invitation to religious conversion and Christian

chastity. As such, it is difficult to understand the Crown's assertion that calling on gay men to voluntarily change their conduct or identity is in itself a powerful expression of hatred.

Appeal Crown Factum, at para 49.

30. Such choices made by individuals, as deeply personal as they are, have always been subject to criticism by other members of our free society. In fact, the Supreme Court has gone so far as to say that Canadians have no "freedom from stigma." Freedom to make new and differential spiritual choices logically entails the ability to speak openly about the choices you have made and why. Often this will entail holding one choice up as better than another.

Blencoe v British Columbia (Human Rights Commission), 2000 SCC 44 at para 80.

III. CONCLUSION

31. Any reading of s. 319(2) which broadens the definition of hate to include moral criticism of conduct or proselytism runs afoul of fundamental principles of Canadian law, including respect for personal autonomy, which includes the freedom to express and to consider contrary views and to make radical life changes. To interpret s. 319(2) as the Crown urges this Court to do would criminalize the beliefs and speech of countless religious Canadians.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 23rd day of May, 2023.

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