File No. S-212258
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

In the Matter of the *Human Rights Code*, R.S.B.C. 1996, c. 210 (as amended)
and the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 (as amended)

And In the Matter of a Decision made by the British Columbia
Human Rights Tribunal on January 12, 2021

BETWEEN:

BARRY NEUFELD

PETITIONER

AND:

BRITSH COLUMBIA TEACHERS' FEDERATION obo
CHILLIWACK TEACHERS' ASSOCIATION

RESPONDENTS

AND:

HUMAN RIGHTS COMMISSIONER FOR BRITISH COLUMBIA

INTERVENOR

AND:

THE ATTORNEY GENERAL OF BRITISH COLUMBIA

PURSUANT TO THE *CONSTITUTIONAL QUESTION ACT*,
R.S.B.C. 1996, c. 68

WRITTEN ARGUMENT OF THE INTERVENOR,
HUMAN RIGHTS COMMISSIONER FOR BRITISH COLUMBIA

I. INTRODUCTION

1. B.C.'s Human Rights Commissioner (the "**Commissioner**") is an independent officer of the Legislature with a statutory mandate to protect and promote human rights in

the province: *Human Rights Code*, R.S.B.C. 1996, c.210, s. 47.12(1) (the "***Code***").

2. By order of Justice E. MacDonald on October 15, 2021, the Commissioner was granted leave to intervene in Vancouver Registry File No. S-212258 (the "**Neufeld Petition**"). Justice MacDonald granted the Commissioner leave to make written submissions of no more than 25 pages and oral submissions at the hearing of the Neufeld Petition. Per Justice MacDonald's order the Commissioner will neither be entitled to costs, nor will she be liable for costs to any party.

3. The Commissioner did not and does not seek leave to intervene in British Columbia Teachers' Federation obo Chilliwack Teachers' Association's application, Vancouver Registry File No. S-216167 (the "**BCTF/CTA Petition**"), which the parties have consented to be heard jointly with the Neufeld Petition.

4. The Commissioner's submissions concern two discrete legal issues. First, the approach to determining whether s. 7 of the *Code* is within the constitutional competency of the provincial legislature where the factual matrix involves statements published on the internet. Second - to the limited extent the chambers judge determines they need to consider whether the impugned publications could meet the test for hate speech - the Commissioner's submissions address the appropriate application of that test when the protected characteristics at issue are gender identity and gender expression.

5. To summarize the Commissioner's argument on the first issue, there is no constitutional impediment to s.7 of the *Code* being applied to speech published on the internet. Section 7 of the *Code* prohibits certain egregious forms of expression that undermine and offend the purposes of the *Code*, and is a valid provincial law enacted as part of a comprehensive scheme to protect the equality of, and prevent discrimination against, all persons regardless of protected characteristics like gender identity, race, religion, and sexual orientation.

6. Merely because the tool used to facilitate the impugned expression is the internet – as opposed to distributing a pamphlet on the street, for example – does not, in the

Commissioner's respectful submission, convert the dominant characteristic of s. 7 to regulating telecommunications works and undertakings any more than if a respondent posted the same content on telephone poles throughout B.C. The pith and substance of s. 7 falls within the province's power to legislate human rights per its competence over civil rights.

7. It is the Commissioner's further position that there is no principled reason to extend the doctrine of interjurisdictional immunity to expression published on the internet. Applying s.7 to expression on the internet does not impair the core of the federal telecommunications power. Any effect it might have is purely incidental. So too there is no conflict between federal and provincial legislation that warrants application of the doctrine of federal paramountcy. Section 7 is applicable and operable to speech published on the internet.

8. To summarize the Commissioner's argument on the second issue: the approach to assessing whether publications meet the threshold of hate speech under s. 7(1)(b) is a contextual one. To understand that context, decision makers must take into account the particularities of how discriminatory publications target different marginalized groups. Where gender identity and expression are at issue, decision makers must take into account the pernicious stereotypes about transgender, non-binary, and otherwise gender diverse people that are the basis for much of the discrimination against them.

9. The Commissioner takes no position on the merits of the Neufeld Petition.

II. FACTS

10. The Commissioner relies on the facts as set out by the parties and the Attorney General of BC in their Amended Petition and Responses to Amended Petition. She refers and relies specifically to the following facts, most relevant to the issues on which she intervenes:

    a. Mr. Neufeld was an elected school trustee of the Chilliwack School Board at all relevant times (the "**Petitioner**"). He had been a trustee since December

2011: Amended Petition at para. 1;

b. The British Columbia Teachers' Federation (the "**BCTF**") is the certified bargaining agent representing teachers employed by all public school boards in the province. The Chilliwack Teachers' Association is a local of the BCTF (the "**CTA**"): BCTF/CTA's Amended Response to Petition at para. 2;

c. The basis for the BCTF/CTA's underlying human rights complaint were statements, including but not limited to statements made online, by Trustee Neufeld "voicing concerns with respect to learning resources called SOGI 123, which address the topics of sexual orientation and gender identity": Amended Petition at para. 4 and BCTF/CTA Amended Response to Petition at para. 10;

d. The Tribunal was not prepared to dismiss the allegations pertaining to communications that occurred via the internet on the basis of a lack of jurisdiction, at the application to dismiss stage in the proceeding: BCTF/CTA's Response to Amended Petition at para. 41;

e. The Tribunal found that the previous Tribunal cases relied on by the Petitioner did not address "how to determine what brings conduct on the internet within exclusive federal jurisdiction": *Chilliwack Teachers' Association v Neufeld*, 2021 BCHRT 6 at para. 89 (the "**Decision**"); and,

f. The Tribunal was not persuaded that the s. 7 allegations had no reasonable prospect of success. The CTA had met the low threshold to bring the claim that the statements violate section 7 out of the realm of conjecture: BCTF/CTA's Amended Response to Petition at para. 41.

III. <u>ARGUMENT</u>

a. Issue 1: Jurisdiction of the BC Human Rights Tribunal over hate speech on the internet

i. The heads of power at issue are property and civil rights and transportation communications

11. At issue in this judicial review is whether the Tribunal erred in failing to dismiss the CTA's complaint on a preliminary application because it was unable to say "unequivocally" that it lacked jurisdiction because "the internet is within federal jurisdiction": Decision at para. 88. Put another way, the Tribunal was asked to decide on the standard applicable to an application to dismiss, whether s. 7 of the *Code* is a valid exercise of provincial power if applied to expression on the internet, and if it is, whether it nonetheless does not apply to statements published on the internet pursuant to the doctrine of interjurisdictional immunity. The Tribunal found it required "a fuller evidentiary record and more comprehensive submissions" to decide the issue: Decision at para. 89. The Commissioner submits that more "comprehensive submissions" should include express consideration of the contemporary approach to the division of powers.

12. What was implicit before the Tribunal in the application to dismiss is explicit on this judicial review: the Petitioner is relying on s. 92(10)(a) of the *Constitution Act, 1867*, R.S.C. 1985, App. II, No. 5 as the basis for his position that Parliament has exclusive jurisdiction over telecommunications and, by extension, the Tribunal's jurisdiction under s. 7 of the *Code* is ousted (at least to the extent of its application to "internet publications").

13. What was not express before the Tribunal was consideration of s.92(13) of the *Constitution Act, 1867* which establishes exclusive provincial jurisdiction over property and civil rights. Not in dispute is that "civil rights" includes provincial primacy to legislate in the area of human rights. The doctrines of constitutional interpretation discussed in more detail below at paras. 15-63 cannot be applied properly without considering provincial competence over human rights and s. 7's role in that scheme.

14. The Commissioner agrees with and adopts the framework of analysis for the constitutional question set out by the Attorney General of British Columbia (the "**AGBC**"): AGBC's Response to Amended Petition at paras. 11-13. She adds to that framework consideration of cooperative federalism and a discussion of the divided jurisdiction over human rights, including the functional test developed pursuant to

that divided jurisdiction, below at paras.15-25 and 64-70 respectively.

ii. Cooperative federalism is the dominant principle of Canadian federalism

15. The Commissioner submits that the proper approach to jurisdictional questions arising from ss. 91-92 of the *Constitution Act, 1867* must start with understanding the contemporary approach to the division of powers analysis clarified in *Canadian Western Bank v. Alberta,* 2007 SCC 22, and further entrenched over the intervening years.

16. That approach is characterized by the principle of flexible or cooperative federalism, which has repeatedly been affirmed by the Supreme Court of Canada as the "dominant tide" of Canadian federalism: *Canadian Western Bank* at paras. 22-24, 31 and 41; *Reference re Securities Act (Canada)*, 2011 SCC 66 at paras. 9, 57-61 ("*Re Securities*"); *Reference re Genetic Non-Discrimination Act*, 2020 SCC 17 at paras. 22-25 ("*Re Genetic Non-Discrimination*").

17. Co-operative federalism rejects rigid formalism and promotes cooperative intergovernmental efforts. It recognizes and accommodates for a measure of overlap between validly enacted provincial and federal legislation. No one level of government is isolated from the other: the interpretation of their powers and how they "interrelate must evolve and must be tailored to the changing political and cultural realities of Canadian society": *Canadian Western Bank* at para. 23, *Reference re Environmental Management Act (British Columbia)*, 2019 BCCA 181 at para. 17 ("Re *Environmental Management*") aff'd in *Reference re Environmental Management Act*, 2020 SCC 1 at para. 1, *Genetic Non-Discrimination Act Reference* at para. 22.

18. While the internet is by no means a new technology, the Commissioner submits its evolution and integration into almost every aspect of daily life amounts to a changing (or changed) cultural reality. Given the breadth of online content, and its profound impact on almost every aspect of our lives, the constitutional analysis must differentiate between the reasons government regulates the medium of the internet

and the reasons it may regulate the message it carries.

19. Blunt conclusory statements about the federal telecommunications power, with little or no federalism analysis, are inadequate to the task. Rather, it requires fulsome argument and proper attention given to the constitutional analysis - including how that analysis has evolved since *Canadian Western Bank* and cases that further crystalized the relevant doctrines and principles. Without such careful consideration, the Commissioner submits that British Columbia's capacity to protect and promote human rights in the digital age will be seriously and unjustifiably limited.

20. In B.C. today the internet is possibly the most frequently used tool to communicate between individuals and to groups, including by those who spread hate messages in an attempt to radicalize others and grow support for their cause.

21. In the criminal law context, using the internet to willfully promote hatred has been found by this Court to be an aggravating factor on sentencing specifically because "it provides for a wide audience": *R v. Topham*, 2017 BCSC 551 at para. 32. Similarly, the Ontario Superior Court of Justice found the distribution of hate speech was an aggravating factor where the accused had access "to a vast audience in an era where on-line exposure to this material inexorably leads to extremism and the potential of mass casualties": *R. v. Sears*, 2019 ONCJ 607 at para. 27 aff'd 2021 ONCA 522.

22. In the Commissioner's submission, *Topham* and *Sears* make clear that the potential harm of these egregious forms of expression are greater when the internet is used to disseminate these messages, both because of the reach of the audience and, the Commissioner adds, the immediacy of posting and permanency of that content. Creating a watertight compartment around online hate speech would impede the legislature's exercise of its constitutional power over human rights, regardless of the threat such expression poses to marginalized groups and social cohesion in B.C.

23. As the Chief Justice wrote for the majority in *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 at para. 49, federal power cannot be used to gut

the provinces' constitutional grant of power:

> Importantly, the principle of federalism is based on a recognition that within their spheres of jurisdiction, provinces have autonomy to develop their societies, such as through the exercise of the significant provincial power in relation to "Property and Civil Rights" under s. 92(13). Federal power cannot be used in a manner that effectively eviscerates provincial power: *Secession Reference*, at para. 58; *2011 Securities Reference*, at para. 7. A view of federalism that disregards regional autonomy is in fact as problematic as one that underestimates the scope of Parliament's jurisdiction: *R. v. Comeau* 2018 SCC 15, [2018] 1 S.C.R. 342, at para. 82.
>
> [Emphasis added]

24. In the Commissioner's respectful submission, rendering s. 7 inapplicable to expression on the internet would not only effectively eviscerate the provincial power over discriminatory and hateful speech but would do so by ignoring the principles of cooperative federalism and the doctrines developed thereunder.

25. The Attorney General of Canada was served with the Notice of Constitutional Question in this case and has chosen not to participate. The Commissioner submits the chambers judge may attach some significance to his choice and infer that he does not share Mr. Neufeld's concerns about the validity of s. 7 as applied to expression on the internet: *Oger v. Whatcott (No.7)*, 2019 BCHRT 58 at para. 180 ("***Oger***"), cit'ing *O.P.S.E.U. v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2 at para. 20 and *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism & Culture)*, 2002 SCC 31 at paras. 72-73.

26. The Commissioner does not dispute that cooperative federalism cannot override or modify the division of powers as set out in the *Constitution Act, 1867*. However, the principle functions here to illustrate that jurisdiction of online content may be held simultaneously by the federal and provincial governments without violating the principles of federalism, in much the same way that the jurisdiction over human rights is subject to divided jurisdiction (discussed in more detail below at paras. 64-65).

iii. The pith and substance of s. 7 is protecting the human rights of marginalized groups by limiting extreme forms of expression and limiting the societal harms of that expression

27. The Commissioner submits that the pith and substance of s. 7 is two-fold: first, protecting the human rights of marginalized groups by limiting extreme forms of expression that are likely to expose them to detestation and vilification or expression that intends to discriminate (and the personal, emotional and psychological harms that can flow from such expression), and; second, minimizing the societal harms of these egregious forms of expression, including their threat to social cohesion and ability to undermine our collective efforts to achieve equality for all vulnerable groups: *Oger* at para. 215, *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11 at paras. 70-77 ("***Whatcott***").

28. To determine the pith and substance (also referred to in the jurisprudence as the "true, dominant, or most important characteristic or nature of the challenged statute"), decision makers must look at the legal and practical effects of the legislation and then assign it to a particular head of power. Simply put, decision makers must ask themselves "What is this law really about?" (characterization) and then "What constitutional class of subjects does it belong to?" (classification): *Canadian Western Bank* at paras. 25-28, *Greenhouse Gas Reference* at paras. 51-56, *Re Genetic Non-Discrimination Act* at paras. 28-30 and 66, *Procureur général du Québec c. Association canadienne des télécommunications sans fil*, 2021 QCCA 730 at paras. 54-58 leave to appeal den'd, Guy Régimbald & Dwight Newman, *The Law of the Canadian Constitution*, 2nd ed. (Toronto: LexisNexis, 2017) at §5.7 and §5.12.

29. It is settled law that at the pith and substance stage, the dominant purpose of the legislation is determinative:

> Its secondary objectives and effects have no impact on its constitutionality: "merely incidental effects will not disturb the constitutionality of an otherwise *intra vires* law" (*Global Securities Corp. v. British Columbia (Securities Commission)*, [2000] 1 S.C.R. 494, 2000 SCC 21 (S.C.C.), at para. 23). By "incidental" is meant effects that may be of significant practical

> importance but are collateral and secondary to the mandate of the enacting legislature: see: *British Columbia v. Imperial Tobacco Canada Ltd.*, [2005] 2 S.C.R. 473, 2005 SCC 49 (S.C.C.), at para. 28. Such incidental intrusions into matters subject to the other level of government's authority are proper and to be expected.
>
> *Canadian Western Bank* at para. 28

30. In the instant case there does not appear to be a dispute that s. 7 of the *Code* passes constitutional muster generally. What is in dispute is its application to statements made on the internet, which the Petitioner suggests is a "colourable attempt by the provincial government to regulate the content of telecommunications": Amended Petition at para. 41. The Commissioner disagrees and submits that there is no basis on which a finding of colourability can stand.

31. The *Code* is a validly enacted provincial statute, pursuant to the provinces' jurisdiction over property and civil rights. Section 7 is an important component of the *Code's* comprehensive legislative scheme: *Oger* at paras 179-200, *Whatcott* at paras. 102, 105-106.

32. The purposes of the *Code* include fostering a society in which there are no impediments to full and free participation in the economic, social, political and cultural life of British Columbia and identifying and eliminating persistent patterns of inequality associated with discrimination prohibited by this *Code*: *Code*, s. 3. The Supreme Court of Canada has affirmed the key role provisions like s. 7 play in achieving these goals. In *Whatcott* at para. 71, the Court considered the purpose of a hate speech provision identical to s. 7(1)(b), stating:

> 71 Hate speech is, at its core, an effort to marginalize individuals based on their membership in a group. Using expression that exposes the group to hatred, hate speech seeks to delegitimize group members in the eyes of the majority, reducing their social standing and acceptance within society. When people are vilified as blameworthy or undeserving, it is easier to justify discriminatory treatment. The objective of s. 14(1)(*b*) may be understood as reducing the harmful effects and social costs of discrimination by tackling certain causes of discriminatory activity.

[Emphasis added]

33. The Commissioner submits that the legal and practical effects of s. 7 are succinctly and persuasively described in *Oger*. After tracing the legislative history of s. 7 at paras. 92-97 and 185-192, the Tribunal wrote:

> 215 Section 7 of the *Code* is part of the civil law of this province. It aims to reduce and ultimately eradicate discrimination in all areas of provincial life, including in the political life of the province. It provides a mechanism whereby people whose rights have been violated under that section may seek a remedy. In other words: it confers civil rights. There is no criminal law penalty that this Tribunal could impose against a person found to violate s. 7, and Mr. Whatcott has not persuaded me that its impact on expression and religion renders it *ultra vires* the province. Section 7 is, in pith and substance, a matter of civil rights and, as such, falls within the jurisdiction of the province pursuant to s. 92(13) of the *Constitution Act, 1867*.

34. The Attorney General has put before the chambers judge much of the legislative history the Tribunal considered in *Oger*: AGBC's Response to Amended Petition at para. 25. It provides compelling evidence that the true character of s. 7 not an attempt to regulate telecommunications but is an important part of the province's scheme to eliminate discrimination and provide a remedy for those who have been discriminated against, as described further below at para. 42.

35. It has long been held that the *Code* is quasi-constitutional in nature and that the protections it affords are fundamental to our society. In *Canadian National v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114 at para. 26, Chief Justice Dickson described human rights legislation as giving rise to "individual rights of vital importance", and he emphasized that courts "should not search for ways and means to minimize those rights and to enfeeble their proper impact". In short, the *Code* must be interpreted broadly and liberally in order to best achieve its remedial purposes: *British Columbia Human Rights Commission v. Schrenk*, 2017 SCC 62 at para. 31.

36. The Commissioner's position is that absent compelling evidence to the contrary, it would be an affront to decades of jurisprudence affirming the fundamental importance of human rights legislation and debilitate the protections of the *Code* to find that the pith and substance of s. 7 is a colourable attempt to regulate the content of telecommunications, if applied to content on the internet.

37. Any impact on the internet as a telecommunications work is purely incidental to the application of s.7 and there is no dispute that incidental effects are permissible and do not offend Canada's constitutional order, but indeed facilitate it: *Canadian Western Bank* at para. 28.

38. The courts rarely find legislation is a colourable attempt to exceed the enacting government's constitutional competence. One example, though it does not use the term colourable, is *Calgary (City) v. Bell Canada Inc*, 2020 ABCA 211 at para 81, where the Court found the enactment at issue "uses language designed to create an appearance of conformity with the scheme of the *Telecommunications Act*, [but] that appearance is belied by the Bylaw's content. The Bylaw goes much further in its regulation of the work of the Telecoms than does the *Act*."

39. Another example is *R. v. Morgentaler*, [1993] S.C.R. 463. In *Morgentaler* the Supreme Court of Canada was asked to decide whether Nova Scotia's *Medical Services Act* and a regulation made thereunder was *ultra vires* the province because it was, in pith and substance, a matter within the federal government's power over criminal law.

40. In concluding that the impugned law was invalid and outside provincial competence, the Court in *Morgentaler* found the following factors determinative: the subject of the regulation (abortion) was historically considered part of the criminal law and thus the enactment was suspect on its face; its legal effect reproduced a *Criminal Code* provision that the Court had struck down as unconstitutional; and the legislative history and events leading up to the passage of the regulation coupled with lack of evidence that the purported reasons for the enactment were anything more than

incidental concerns of the enacting province. The Court concluded at para. 83:

> There is nothing on the surface of the legislation or in the background facts leading up to its enactment to convince me that it is designed to protect the integrity of Nova Scotia's health care system by preventing the emergence of a two-tiered system of delivery, to ensure the delivery of high quality health care, or to rationalize the delivery of medical services so as to avoid duplication and reduce public health care costs. Any such objectives are clearly incidental to the central feature of the legislation, which is the prohibition of abortions outside hospitals as socially undesirable conduct subject to punishment.

41. Unlike in *Morgentaler* and *Calgary (City)*, there is nothing on s. 7's face or in the background facts leading to its passage that are capable of sustaining the assertion that s. 7's true purpose is to regulate telecommunications.

42. In conclusion, the Commissioner submits that the dominant purpose of s.7 is preventing the harm – both individual and societal - of egregious forms of expression and providing a civil remedy for complainants when s. 7 is breached. It is not concerned with regulating the tool used to deliver those egregious messages. The Tribunal's jurisdiction to limit hate speech and discriminatory speech should not be ousted merely because of the tool chosen to disseminate those views. It is the Commissioner's submission that the legislature's intent in enacting s. 7 would be stymied by such a result. Accordingly, s. 7 is valid provincial legislation that must not be read down to exclude expression published on the internet.

iv. Section 7 does not impair the core of the federal power over telecommunications. Interjurisdictional immunity does not apply.

43. The Commissioner submits that applying s. 7 of the *Code* to content published on the internet does not impair the core of the federal telecommunications power or any federal head of power. Accordingly, the doctrine of interjurisdictional immunity cannot prevent s. 7 from being applied to content published on the internet.

44. The doctrine of interjurisdictional immunity functions to render inapplicable an

otherwise valid provincial law to the extent that the law impairs the core of the federal head of power. In this case, the Petitioner argues that interjurisdictional immunity prevents the application of s. 7 to "internet publications".

45. In order to establish whether interjurisdictional immunity applies a decision maker must determine whether applying s. 7 to content published on the internet "trenches on the protected 'core' of a federal competence". If it does, the decision maker must determine whether the core of the telecommunications power would be impaired by the application of s. 7 to that content: *Canadian Western Bank* at paras. 48-50, *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39 at para. 27 ("***COPA***"), and *Calgary (City)* at para. 123.

46. Interjurisdictional immunity is a limited and exceptional doctrine that is to be applied with restraint. It establishes the threshold - beyond the incidental effects permitted under the pith and substance analysis - where the intrusion by one head of power over the other's is constitutionally prohibited. That threshold is impairment of the core of the head of power and is, in the Commissioner's submission, a purposely high bar to meet. The Supreme Court of Canada has said interjurisdictional immunity should be limited to those cases where it has been applied in past precedents. To do otherwise goes against the fundamental tide of cooperative federalism: *Canadian Western Bank* at paras. 33 and 77-78, *British Columbia (Attorney General) v. Lafarge Canada Inc*, 2007 SCC 23 at para. 41, *Desgagnés Transport Inc. v. Wärtsilä***,** 2019 SCC 58 at paras. 90-93.

47. The Petitioner has not put before the chambers judge, and did not put before the Tribunal, any authority for the proposition that conduct on the internet generally - and internet publications specifically - has been found to be part of the core of the telecommunications power. There can be little doubt that much conduct on the internet falls within the provinces' power over property and civil rights: *Procureur général* at para. 122, and Régimbald & Newman at §11.29.

48. Determining whether a provincial law trenches and impairs the core of a federal power is a distinct analysis with a higher threshold than merely determining that

Parliament can regulate a certain matter as part of its competence over communications. Indeed there appears to be no dispute that person-to-person communication via the internet (ie email) can form the factual matrix giving rise to a complaint under the *Code*: Amended Petition for Judicial Review at para. 44. Such facts could (and do) give rise to complaints within the areas of employment, tenancy, or services.

49. Accordingly, it appears that the only use of the internet as a communicative tool that the Petitioner asserts is constitutionally immune from the province's power to regulate human rights, is in the area of discriminatory publications. With respect, there is no principled basis to draw such a bright line. No authority is before the chambers judge that can justify this distinction. All the areas protected under the *Code* are "contexts of vulnerability" that warrant protection from discrimination: *Schrenk* at paras. 48-49.

50. The Commissioner submits that the logical extension of the Petitioner's position is that provincial competence over discriminatory publications – namely, hate speech and discriminatory speech - is somehow more limited than provincial competence over other areas protected under human rights legislation. The Commissioner submits there is no basis for that conclusion. Just as employment and tenancy are contexts of vulnerability, so to are publications (whether on the internet or otherwise).

51. There is a wealth of appellate jurisprudence, including from the Supreme Court of Canada, interpreting the scope of the telecommunications power. The Alberta Court of Appeal recently reviewed the jurisprudence and found that "Parliament's exclusive jurisdiction over telecommunications encompasses the planning, construction, management, location, use and upkeep of telecommunication networks, as well as the decision whether or not to keep them in place": *Calgary (City)* at para. 94 and 111, *Canadian Western Bank* at paras. 57-58.

52. Notably, the above list does not include the regulation of content that is expressed online as part of the federal government's exclusive grant of jurisdiction, let alone within the core of that grant over telecommunications. In light of the Supreme Court of Canada's direction that interjurisdictional immunity is to be limited to

those circumstances already found to be covered by precedent, it is the Commissioner's submission that it would be an error to apply that doctrine in the case at bar.

53. In the Commissioner's submission, applying s. 7 to internet content does not trench on the core of the telecommunications power and, if it does, the extent of that encroachment is minimal and certainly does not impair its core.

v. Federal paramountcy does not apply but is relevant because the cases relied on by the Petitioner misapplied the doctrine of paramountcy by using an "occupying the field" approach to jurisdiction

54. The Commissioner agrees with the Attorney General that the doctrine of federal paramountcy has no application in the instant case: AGBC Response to Amended Petition at para. 45.

55. The Commissioner submits, however, that paramountcy is of some value to consider, but only for a limited purpose. Specifically, to contextualize how the Tribunal cases relied on by the Petitioner in the decision under review approached the division of powers and how that approach was grounded in the federal government "occupying the field", which, in the Commissioner's submission, is not a proper basis to resolve division of powers issues and is absurd where the provision relied on has been repealed (as it has in this case). Below we outline why the formerly enacted s. 13 of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, is not helpful to the task before the chambers judge.

56. Federal paramountcy establishes that if a valid provincial enactment is incompatible with a similarly valid federal law, then the provincial law is rendered inoperable to the extent of the incompatibility. Like interjurisdictional immunity, the doctrine of federal paramountcy should be applied with restraint:

> 75 An <u>incompatible federal legislative intent must be established</u> by the party relying on it, and the courts must never lose sight of the <u>fundamental rule of constitutional interpretation that, "[w]hen a federal statute can be</u>

> properly interpreted so as not to interfere with a provincial statute, such an interpretation is to be applied in preference to another applicable construction which would bring about a conflict between the two statutes" (*Attorney General of Canada v. Law Society of British Columbia*, at p. 356). To sum up, the onus is on the party relying on the doctrine of federal paramountcy to demonstrate that the federal and provincial laws are in fact incompatible by establishing either that it is impossible to comply with both laws or that to apply the provincial law would frustrate the purpose of the federal law.
>
> *Canadian Western Bank* at para. 75 [Emphasis added]

57. The Commissioner submits it is not enough that Canada has legislated in the area of hate speech and discriminatory publications distributed via telecommunication tools to ground a finding of inoperability due to the paramountcy of the federal statute. That approach has been rejected by the Supreme Court of Canada:

> The fact that Parliament has legislated in respect of a matter does not lead to the presumption that in so doing it intended to rule out any possible provincial action in respect of that subject. As this Court recently stated, "to impute to Parliament such an intention to 'occup[y] the field' in the absence of very clear statutory language to that effect would be to stray from the path of judicial restraint in questions of paramountcy that this Court has taken since at least O'Grady " (Rothmans, at para. 21).
>
> *Canadian Western Bank* at para. 74

58. Any argument that relies, implicitly or explicitly, on Parliament legislating in the area of discriminatory publications on the internet to say s. 7 is inoperable to expression published on the internet relies improperly on an “occupying the field” approach and should not be accepted. Without a finding that the enactments at issue are incompatible, paramountcy cannot apply. In the Commissioner’s submission, the fact that the *Canadian Human Rights Act* contained a provision prohibiting hate speech communicated telephonically was central to the Tribunal’s decisions on jurisdiction relied on by the Petitioner in his application to dismiss. Accordingly, she submits, they are not persuasive and, it is trite to observe, not binding on the chambers judge.

59. There is no dispute that s. 13 of the *CHRA* was repealed in 2013. When in force it read as follows:

> 13 (1) It is a discriminatory practice for a person or a group of persons acting in concert to communicate telephonically or to cause to be so communicated, repeatedly, in whole or in part by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament, any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination.

60. The Tribunal cases relied on by the Petitioner before the Tribunal, in the Commissioner's respectful submission, are steeped in an occupying the field view of federal paramountcy rooted in s. 13 of the *CHRA*. These cases include, but are not limited to, *Strikes With A Gun v. Patel*, 2006 BCHRT 367, *Elmasry and Habib v. Roger's Publishing and MacQueen (No. 4)*, 2008 BCHRT 378, *Fossum v. Society of Notaries*, 2009 BCHRT 392, and *Paquette v. Amaruk Wilderness and another (No. 4*), 2016 BCHRT 35 (the "**Prior Cases**").

61. Seemingly without the benefit of full argument on the division of powers and without stating so expressly, the Prior Cases concluded s. 7 could not operate in relation to content on the internet. Section 13 was central to those determinations, directly (for example, in *Elmasry* at paras. 48-50) or by adopting the reasoning of a case where s. 13 was relied on (for example, in *obiter* in *Paquette* where s. 13 was at issue not s. 7, at paras. 83-84). However, in none of those cases did the Tribunal find s. 7 of the *Code* and s. 13 of the *Canadian Human Rights Act* were incompatible. Accordingly, the Commissioner submits the Prior Cases were decided on the basis that the federal government had occupied the field, which the Supreme Court of Canada says is not enough to oust provincial jurisdiction. The Prior Cases are unpersuasive, should be given no weight in this judicial review, and should not be followed in future.

62. The Petitioner also relies on *Elson v. Facebook, Inc.*, 2021 BCHRT 155, which was decided subsequent to the Decision. The Commissioner submits that *Facebook* was decided primarily on the basis of the functional test (discussed below at paras. 64-70) though it does cite *Elmasry* and *Fossum*: *Facebook* at paras. 12-17. *Facebook* and *Papouchine v. Best Buy*, 2018 FC 1236, both cite *Cristiano v. Canadian Society of Immigration Consultants,* 2016 BCHRT 175 as authority for their decisions. *Facebook*

is therefore distinguishable from the Prior Cases and supports the Commissioner's position on the functional test.

63. In sum, the Prior Cases and *Facebook* are unpersuasive in regards to the jurisdictional issue before the chambers judge and ought not to be given any weight. Even if s.13 remained in force, it would not be enough to oust provincial jurisdiction over expression on the internet unless it was incompatible with the operation of s. 7. The Supreme Court of Canada has said that occupying the field is not a valid basis on which to operationalize federal paramountcy. In the Commissioner's submission, that is what was done in the Prior Cases, and in *Facebook* to the extent that *Facebook* relied on them. They should not be followed or given weight.

vi. Human rights is subject to divided jurisdiction

64. Pursuant to Canada's constitutional order, human rights is subject to divided jurisdiction. This is not in dispute but is, in the Commissioner's submission, important context to understand the jurisdictional landscape. As set out above, it is the Commissioner's position that s. 7 is within provincial competence when expression on the internet is at issue. Nonetheless, just like with other sections of the *Code*, respondents in any particular case may argue that the Tribunal lacks jurisdiction over a complaint because they are a federally regulated undertaking, entity, organization, or person. In these cases, the Commissioner submits the proper test to be applied is the "functional test", described below at para. 66.

65. Under the long-established divided jurisdiction over human rights, both British Columbia and Canada can and have, passed valid human rights legislation. Divided jurisdiction recognizes the primacy of provincial competence under its power to legislate civil rights, with a federal carve out to regulate human rights matters arising in relation to those works, undertakings, and people that fall within federal heads of power. In this regard, human rights is on all fours with labour relations where "provincial competence in labour relations is the rule, and federal competence the exception": Peter W. Hogg, *Constitutional Law of Canada*, 5th Edition, (Scarborough, ON: Thomson Carswell, 2007) at §21.14, *NIL/TU,O Child & Family Services Society*

v. BCGEU, 2010 SCC 45 at paras. 2-4, *Consolidated Fastfrate Inc. v. Western Canada Council of Teamsters,* 2009 SCC 53 at paras. 27-28, 36, *Andrew v. Prism Sulphur Corp,* 2003 BCHRT 51 at paras. 16-17 and 26-27.

66. The functional test determines jurisdiction by first looking at "the normal or habitual activities" of the respondent entity, "without regard for exceptional or casual factors": *NIL/TU,O* at para. 14. If this inquiry is inconclusive, then the decision maker looks at whether the provincial law would impair the core of the federal head of power if applied to the respondent entity: *NIL/TU,O* at para. 20. The functional test applies regardless of which head of federal power is at issue: *NIL/TU,O* at para. 4. This is a distinct test from the analytical approach to determining whether a law passes constitutional muster (which is the subject of the Notice of Constitutional Question in this matter and which the Commissioner addresses in detail above). The functional test is applied when there is no dispute as to the validity, applicability, and operability of a law.

67. It is not uncommon for respondents to argue the Tribunal lacks jurisdiction over them because, they say, they are a federally regulated work, undertaking, or person. The Tribunal has heard and decided many such cases including, but not limited to, those where communications and transportation are at issue (i.e. the classes of subjects that fall under s.92(10)(a) of the *Constitution Act, 1867)*: see, for example, *Andrew* at paras. 16-17 and 26-27, *Chan v. Bell Mobility,* 2003 BCHRT 27 at paras. 7-8, *Hackett v. TWU and another*, 2011 BCHRT 18 at paras. 27-34, *Salway v. Amix Salvage & Sales Ltd.*, 2011 BCHRT 31 at paras. 14-16, and *Cahoose v. Ulkatcho Indian Band,* 2016 BCHRT 114 at paras. 31-41.

68. For reasons the Commissioner explained above at paras. 55-63 the functional test was not applied in the Prior Cases. It is the Commissioner's position that had the proper principles of constitutional interpretation been followed, it would have been readily apparent that the functional test was the correct test to apply. If the chambers judge disagrees, given the timing of those decisions, the Commissioner submits that it is certainly clear given the subsequent Supreme Court of Canada jurisprudence that the functional test is the correct approach.

69. The Federal Court recently affirmed a decision of the Canadian Human Rights Commission applying the functional test: *Papouchine v. Best Buy*, 2018 FC 1236 at paras. 16 – 18. There is no principled reason why it should not apply to complaints arising under s. 7. Going forward the functional test should be applied where a respondent argues the Tribunal lacks jurisdiction because a telecommunications tool was used to allegedly breach s. 7. The functional test is the proper approach and, the Commissioner submits, would be if ever the *Canadian Human Rights Act* is amended to include a provision similar to the repealed s. 13.

70. For greater clarity, once the Court has determined that s.7 is within provincial jurisdiction applying the federalism analysis above at paras. 15-64, the only remaining jurisdictional question that may arise from the constitutional division of powers in cases concerning online discriminatory publications, is whether the respondent in a particular case is a federal or provincial actor. The functional test should be applied in such circumstances to resolve these jurisdictional issues on a case-by-case basis.

vii. **Conclusion on jurisdiction**

71. The Commissioner submits that human rights is a matter of primary provincial competence, federal jurisdiction is secondary and applicable only to entities whose operations habitually fall within a federal head of power. Section 7 of the *Code* is a valid provincial law, the pith and substance of which is to protect the human rights of marginalized groups from egregious forms of expression, and address the societal harms associated with hate speech and discriminatory speech. Interjurisdictional immunity does not apply: the effect of s. 7's application to content on the internet does not impair the core of the federal telecommunications power. There is no constitutional impediment to s. 7's application to expression published on the internet. To say otherwise confuses regulating the medium with regulating the message.

b. Issue 2: Assessing hate speech must include consideration of the particular pernicious stereotypes associated with the targeted group

72. The Commissioner's submits that if the chambers judge sees fit to intervene at this stage of the proceeding on whether the test for hate speech pursuant to s. 7 of the *Code* could have been satisfied, it is incumbent on them to consider how that test applies to the particular group targeted by that speech. Impugned publications must be viewed in context, but it is acceptable to scrutinize more closely those terms and phrases that appear likely to come within the ambit of s. 7's protection: *Whatcott* at para. 174. Such scrutiny must take into account the particular pernicious stereotypes about the targeted group that animates the discrimination against them.

73. In this case, the targeted group are members of the LGBTQ2SIA+ community, particularly people who are transgender, non-binary, or otherwise gender diverse.

74. The Commissioner argues that different marginalized groups may be subject to different stereotypes that underpin and animate the types of hate speech directed towards them. Not all marginalized groups are subject to the same "hallmarks of hate" established by the jurisprudence and as summarized in *Canada (Human Rights Commission) v. Warman*, 2012 FC 1162 at paras. 124-126. It is her position that this is the case for transgender, non-binary, or otherwise gender diverse people. As the Tribunal wrote in *Oger*:

> 60] This is a significant time for trans and gender diverse people. Their long fight for equality is bearing some fruit, as society begins to adjust its traditionally static and binary understanding of gender, and its tolerance for people to identify and express their gender authentically. One indicator of this progress is the 2016 amendment to the *Code* that added the grounds of gender identity and expression.
>
> [61] However, as this hearing made clear, the journey is far from over. Unlike other groups protected by the *Code,* transgender people often find their very existence the subject of public debate and condemnation. What flows from this existential denial is, naturally, a view that transpeople are less worthy of dignity, respect, and rights.

75. As *Oger* explains, recognition of transgender and gender diverse peoples' rights are

relatively new to human rights law and the law in general (as compared with race, ethnicity, and religion, for example). Accordingly, the Commissioner submits, some of the hallmarks of hate established in earlier jurisprudence may not capture the tropes that are likely to expose people to detestation and vilification based on their gender identity and expression. This does not mean, however, that transgender people and communities are not, in fact, being exposed to speech that rises to that threshold but only that the law is relatively new to understanding the nuances of the expression used to vilify them.

76. The Commissioner submits that the Tribunal's decision in *Oger* is persuasive and ought to be followed when considering the particular hallmarks of hate faced by transgender people.

IV. CONCLUSION

77. The Commissioner submits that s. 7 of the *Code* is a valid law, the purpose and effect of which is to protect and promote the human rights of marginalized groups by limiting hate speech and discriminatory speech. It is valid, regardless of whether the tool used to communicate the impugned statements is a flyer distributed on the street or the internet. Federal paramountcy is not at issue, but it is relevant to understanding why the Prior Cases are unpersuasive: those cases rely on an "occupying the field" approach to paramountcy that cannot stand. The Prior Decisions should be given no weight. Divided jurisdiction over human rights dictates that the functional test should apply to future cases where the Tribunal is asked to decide whether it (as opposed to its federal partner) have jurisdiction over discriminatory publications on the internet. Any direction the chambers judge may see fit to provide to the Tribunal ought to take the foregoing into account.

78. To the extent that the chambers judge finds it necessary to review the Tribunal's approach to assessing the facts which are alleged to breach s. 7, the Commissioner submits that *Oger* is persuasive and ought to be followed in terms of the hallmarks of hate that typify expression targeting people on the basis of gender identity and

expression.

All of which is respectfully submitted on behalf of the Human Rights Commissioner for British Columbia.

Date: November 7, 2022

____

Heather D. Hoiness and Sarah Y. Khan, K.C.

Counsel for the Intervenor, Human Rights Commissioner for British Columbia

List of Authorities

Authority
Statutes
Canadian Human Rights Act, R.S.C. 1985, c. H-6, s. 13 (repealed)
Constitution Act, 1867, R.S.C. 1985, App. II, No. 5, s. 91-92
Human Rights Code, R.S.B.C. 1996, c.210, ss.3, 7, 13, 47.12(1)
Case Law
Andrew v. Prism Sulphur Corp, 2003 BCHRT 51
British Columbia (Attorney General) v. Lafarge Canada Inc, 2007 SCC 23
British Columbia Human Rights Commission v. Schrenk, 2017 SCC 62
Cahoose v. Ulkatcho Indian Band, 2016 BCHRT 114
Calgary (City) v Bell Canada Inc, 2020 ABCA 211
Canada (Human Rights Commission) v. Warman, 2012 FC 1162
Canadian National v. Canada (Canadian Human Rights Commission), [1987] 1 S.C.R. 1114
Canadian Western Bank v. Alberta, 2007 SCC 22
Chan v. Bell Mobility, 2003 BCHRT 27
Chilliwack Teachers' Association v. Neufeld, 2021 BCHRT 6
Consolidated Fastfrate Inc. v. Western Canada Council of Teamsters, 2009 SCC 53
Cristiano v. Canadian Society of Immigration Consultants, 2016 BCHRT 175
Desgagnés Transport Inc. v. Wärtsilä, 2019 SCC 58
Elmasry and Habib v. Roger's Publishing and MacQueen (No. 4), 2008 BCHRT 378
Elson v. Facebook, Inc., 2021 BCHRT 155
Fossum v. Society of Notaries, 2009 BCHRT 392
Hackett v. TWU and another, 2011 BCHRT 18
Kitkatla Band v. British Columbia (Minister of Small Business, Tourism & Culture), 2002 SCC 31

NIL/TU,O Child & Family Services Society v. BCGEU, 2010 SCC 45
Oger v. Whatcott (No.7), 2019 BCHRT 58
O.P.S.E.U. v. Ontario (Attorney General), [1987] 2 S.C.R. 2
Papouchine v. Best Buy, 2018 FC 1236
Paquette v. Amaruk Wilderness and another (No. 4), 2016 BCHRT 35
Procureur général du Québec c. Association canadienne des télécommunications sans fil, 2021 QCCA 730
Quebec (Attorney General) v. Canadian Owners and Pilots Association, 2010 SCC 39
Reference re Environmental Management Act (British Columbia), 2019 BCCA 181
Reference re Genetic Non-Discrimination Act, 2020 SCC 17
References re Greenhouse Gas Pollution Pricing Act, 2021 SCC 11
Reference re Securities Act (Canada), 2011 SCC 66
R. v. Morgentaler, [1993] S.C.R. 463
R. v. Sears, 2019 ONCJ 607
R v. Topham, 2017 BCSC 551
Salway v. Amix Salvage & Sales Ltd., 2011 BCHRT 31
Saskatchewan (Human Rights Commission) v. Whatcott, 2013 SCC 11
Strikes With A Gun v. Patel, 2006 BCHRT 367
Commentary
Hogg, Peter W, *Constitutional Law of Canada*, 5th Edition, (Scarborough, ON: Thomson Carswell, 2007) at §21.14
Régimbald, Guy & Newman, Dwight *Strikes With A Gun v. Patel*, 2006 BCHRT 367, *The Law of the Canadian Constitution*, 2nd ed. (Toronto: LexisNexis, 2017) at §5.7, §5.12, §11.29