

SUPREME COURT OF CANADA
(ON APPEAL FROM THE SASKATCHEWAN COURT OF APPEAL)

BETWEEN:

SASKATCHEWAN HUMAN RIGHTS COMMISSION

Appellant

- and -

WILLIAM WHATCOTT

Respondent

- and -

**ATTORNEY GENERAL OF SASKATCHEWAN
ATTORNEY GENERAL OF CANADA**

Interveners

- and -

THE EVANGELICAL FELLOWSHIP OF CANADA

Proposed Intervener

**NOTICE OF MOTION FOR INTERVENTION
by THE EVANGELICAL FELLOWSHIP OF CANADA
Proposed Intervener**

Pursuant to Rules 18(1), 55 and 56(b) of the *Rules of the Supreme Court of Canada*

TAKE NOTICE that The Evangelical Fellowship of Canada (“EFC”) hereby applies to a Judge of this Court, at a date to be fixed by the Registrar, pursuant to subsections 18(1), 55 and 56(b) of the *Rules of the Supreme Court of Canada* for an Order granting them leave to intervene and present written and oral arguments in the present appeal or any further or other Order that the Judge may deem appropriate.

AND FURTHER TAKE NOTICE that the following documents will be referred to in support of such motion:

- a. the Affidavit of Bruce J. Clemenger; and,
- b. such further or other material as counsel may advise and as this Honourable Court may permit.

AND FURTHER TAKE NOTICE that the said motion shall be made on the following grounds:

1. The EFC is a national association which represents Protestant Evangelical Christians from affiliates comprised of 39 Protestant denominations, approximately 125 other organizations and post-secondary education institutions and approximately 1,000 individual churches, and can bring that community’s perspective and concerns before the Court which it submits would be helpful to the Court in its deliberations concerning the extremely important and fundamental issues raised in this appeal;
2. The EFC and its members and affiliates have a very direct interest in the public policy and constitutional issues that have been raised in this appeal as those issues will impact its members and affiliates.
3. The EFC’s members and affiliates’ fundamental rights may be adversely affected by the outcome of this appeal.
4. The EFC has a unique perspective on behalf of a broad range of Evangelical Protestant denominations and religious organizations and individuals across Saskatchewan and Canada with respect to the public policy and

constitutional issues to be dealt with.

5. The EFC will make a useful and valuable contribution to the resolution of the issues raised in this case. The EFC's specialized knowledge and expertise will assist the Court and enhance its ability to determine the issues involved in this matter. The perspective offered by the EFC is unique and distinct from that of the other parties.
6. The EFC's intervention will not prejudice the parties in any way and will not change the focus, scope or nature of the proceedings.
7. If intervener status is granted, the EFC wishes to file a factum of no more than 20 pages and make an oral argument of 20 minutes at the hearing of this appeal.

Public Policy Questions

8. The public policy questions on this appeal are as follows:
 - a. What role should the state have in monitoring private expression between citizens on questions of public policy and/or morality? Is it constitutionally appropriate for legislation to limit the peaceful expression of controversial or unpopular opinions regarding the behaviour or actions of other citizens?
 - b. Does freedom of religion in Canada protect the right to freely express religious beliefs about the morality of private or personal conduct and the right to freely engage the public on issues of public policy and morality from a religious perspective?
 - c. Does the expression of critical and moral analysis of private or personal conduct with moral connotations promote hatred against an individual or community, or more colloquially stated, is it permissible for religious people to express their view that they "hate the sin" but "love the sinner"?
 - d. If the appellant's approach to free speech is adopted by this Court,

what are the potential implications for secularism, pluralism and tolerance of free thought, opinion and religious expression in Canadian society?

9. The EFC's position is that the rights of freedom of expression and freedom of religion in Canada must be protected when dealing with public discussions on issues of morality.
10. These rights necessarily include the right to freely express religious views and that the freedoms of expression and religion include the right to freely engage the public on issues of public policy and morality from a faith perspective.
11. The EFC's interest in this appeal rests on the Christian Church's belief that "the Holy Scriptures, as originally given by God, are divinely inspired, infallible, entirely trustworthy, and constitute the only supreme authority in all matters of faith and conduct".¹ The scriptures form the foundation of the Evangelical's worldview. Every human being has a worldview, an exclusive vision of life that informs one's engagement in the public square. Every worldview is based on belief in something; for the Evangelical, it is God – Father, Son and Holy Spirit – Who has expressed Himself through His written word, the Bible.
12. Christians believe that they should live in accordance with Christian standards of morality and also that they are inspired by God to communicate His will to their community. As such, the belief that they must engage their communities in regard to issues of morality is also a sincerely held belief rooted in the Holy Scriptures.² Prosecuting a Christian for publishing sincerely held views on sexual practices restricts his or her religious practices and religious expression and thereby violates his or her religious and expressive freedom.
13. The Christian believes that all human beings, including him or herself, are

¹Evangelical Fellowship of Canada's Statement of Faith online: The Evangelical Fellowship of Canada <<http://www.evangelicalfellowship.ca/NetCommunity/Page.aspx?pid=265&srcid=382>>.

² See Proverbs 24:11,12; Ezekiel 33:1-9; Isaiah 55:6.

sinners³ and that many different behaviours constitute sin. Homosexual acts are one (and only one) such form of conduct identified in the Bible.

Evangelical Christians also hold that many heterosexual acts such as fornication, adultery, prostitution and use of pornography, and other non-sexual acts such as gossip, theft or lying, are also sin.⁴

14. Evangelical Christians believe that all human beings are created in the image of God and are therefore of inestimable value and deserving of care and concern.⁵ All human beings are sinners because they engage in sinful thoughts and behaviour, but all human beings are able to be redeemed from their sin through the sacrifice of Jesus Christ on the cross and the power of His resurrection.⁶ These principles are tied: the concept of sin and the ability to be redeemed into a holy lifestyle; and, Christians cannot promulgate their religious faith if their religious expression is unduly restricted.

Proposed Argument

15. If leave to intervene is granted, the EFC will make the following arguments outlined and summarized as follows:

- a. Section 2(b) of the *Canadian Charter of Rights and Freedoms*⁷ guarantees the right to freedom of expression for all Canadians;⁸
- b. Section 2(a) of the *Charter* guarantees the right to freedom of conscience and religion of all Canadians;⁹
- c. Individuals who hold and express varied sincere and exclusive beliefs

³ Romans 3:23-24.

⁴ Leviticus 18:1-26; Mark 10:19.

⁵ Genesis 1:26-30; Luke 10:29-37 (The Parable of the Good Samaritan); James 3:9-10; 1 John 4:20.

⁶ Titus 2:11-14; Ephesians 1:7-8; Psalm 130:7-8; John 3:16-17; Matthew 20:28; Luke 15:7; 1 John 1:9.

⁷ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c.11. [*Charter*].

⁸ Section 2(b) of the *Charter* reads:

“Everyone has the following fundamental freedoms:
[...] freedom of freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;”

⁹ Section 2(a) of the *Charter* reads:

“Everyone has the following fundamental freedoms:
(a) freedom of conscience and religion;”

(such as religious beliefs) can co-exist in the public sphere and, in fact, s.2(a) and s.2(b) are designed so that this will be so;

- d. Tolerance of competing worldviews and moral frameworks cannot be achieved, either practically or without violating the *Charter*, through the state silencing of select voices from the public discourse;
- e. Evangelical Christians sincerely believe that they are compelled to convey their Evangelical Christian faith and moral perspective, through acts and words, to the society in which they live;¹⁰
- f. It is possible – indeed, it is trite summary of a tenet of the Evangelical Christian faith – that one teach against sinful behaviour while loving the sinner, or otherwise stated, that one engage in a critical and moral analysis of certain actions without promoting hatred against an individual or community;
- g. A free and democratic society in which all members can participate and make their views known requires a high tolerance for free expression, especially on issues of morality and public policy;
- h. The interpretation of s. 14 of the *Saskatchewan Human Rights Code*¹¹ (the *Code*) adopted by the Tribunal and the lower court unnecessarily and severely limits and restricts the *Charter* rights of members of the Evangelical Christian community and specifically restricts their s. 2(a), 2(b), 15, and 27 *Charter* rights.

¹⁰ Proverbs 24:11-12; Matthew 5:13-16; Ezekiel 33:1-9; Psalm 78:2-8.

¹¹ *The Saskatchewan Human Rights Code* S.S. 1979, c. S-24.1 [*Code*]. Section 14 states:

Prohibitions against publications

14(1) No person shall publish or display, or cause or permit to be published or displayed, on any lands or premises or in a newspaper, through a television or radio broadcasting station or any other broadcasting device, or in any printed matter or publication or by means of any other medium that the person owns, controls, distributes or sells, any representation, including any notice, sign, symbol, emblem, article, statement or other representation:

[...]

(b) that exposes or tends to expose to hatred, ridicules, belittles or otherwise affronts the dignity of any person or class of persons on the basis of a prohibited ground.

(2) Nothing in subsection (1) restricts the right to freedom of expression under the law upon any subject.

- i. The limitations on free expression in s. 14 of the *Code* unduly infringe on and may result in a ban on the Biblically based moral perspectives of many Canadians from the public sphere and thus cannot be saved by section 1¹² of the *Charter*.¹³
- j. The ramifications of this decision may shape the Canadian landscape for decades to come. What Canada should look like and what parameters will limit our public discourse may be decided by this Court in this case. Will Canada become a society devoid of, or at least penalizing some public religious comment, or will it remain a truly pluralist society?

A- What is the extent of the state’s role in monitoring public policy dialogue?

16. World religion freedom experts Brian J. Grim and Roger Finke have noted:

When reviewing human rights throughout European history, Michael Horowitz described Jews as the “canaries in the coal mine”: nations persecuting Jews held less democratic commitment and were more likely to deny other freedoms as well. He later argued that vulnerable Christians are now the canaries, serving as a “litmus indicator of whether freedom exists not only for them – but for all others in their societies.” We expand the litmus test beyond a particular religious group to religious freedoms in general, and we agree that the violations of vulnerable religious liberties indicate potential threats to other liberties as well.¹⁴

In this instance, the threat is to the freedom of religious expression.

17. The EFC respectfully submits that the state’s power to monitor public policy debate should be limited. “The guarantee of free expression protects all

¹² Section 1 of the *Charter* reads:

“The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”

¹³ An Ipsos-Reid survey in 2003 found that 19% of the Canadian population were Evangelically aligned Christians in their beliefs, with 12% being Protestant Evangelical and 7% being “Catholic Evangelically aligned”. See Aileen Van Ginkel, “Evangelical Beliefs and Practices: A Summary of the 2003 Ipsos-Reid Survey Results,” *Church and Faith Trends* (Dec 2003): 1. This percentage says nothing of the numbers in other Christian groups or other religious groups.

¹⁴ Brian J. Grim & Roger Finke, *The Price of Freedom Denied* (New York: Cambridge University Press, 2011) at 202.

content of expression but may not protect some forms of expression, for example, violence and threats of violence.”¹⁵ The state *protects* the freedom of expression; it does not *grant* the freedom of expression. Fundamental freedoms are inherently the peoples’.

18. McLachlin J. (as she then was) explained in *Taylor* that the first two of three philosophical rationales for the justification of freedom of expression are “instrumental”. We should view freedom of expression “firstly as the means of promoting the ‘marketplace of ideas’ essential to a vibrant society, and secondly as being indispensable to the proper functioning of democratic government.”¹⁶ These rationales for fundamental freedoms preserve a healthy society. Freedom of expression and freedom of religion are also fundamental to the self-fulfillment and dignity of each individual.
19. The right to debate moral issues and issues of public policy is foundational in a true democracy. Any limitation of free expression is a limitation on democracy and undermines the worth of individuals. “Perhaps the most powerful rationale for the constitutional protection of freedom of expression is its role as an instrument of democratic government.”¹⁷
20. Where certain speech is found to be offensive by others, the primary remedy is not censorship by the state, but counter-speech by the citizen.

B- Does freedom of religion include the right to publish controversial or offensive views regarding the behaviour of others?

Religious Freedom

21. The freedom of religion necessarily includes the free expression of religion and of religious beliefs.¹⁸
22. This Court has stated that “[t]he protection of freedom of religion afforded by s. 2(a) of the *Charter* is broad and jealously guarded in our *Charter*

¹⁵ *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892 at para. 120 [*Taylor*].

¹⁶ *Ibid.*, at para. 116.

¹⁷ Peter W. Hogg, *Constitutional Law of Canada*, looseleaf, 5th ed. (Toronto: Carswell, 2007) vol. 2 at 43-7

¹⁸ *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295 at para. 94 [*Big M*].

jurisprudence”¹⁹ and that “human rights codes must be interpreted and applied in a manner that respects [this] broad protection granted to religious freedom”.²⁰

23. In *Big M Drug Mart* Justice Dickson (as he then was) found that our fundamental freedoms are founded on “respect for the inherent dignity and the inviolable rights of the human person.”²¹

24. This Court has confirmed the centrality of religious freedom in Canadian society, and its existence independent of positive law. In *Saumur v. Québec (City)*²² this Court declared religious freedom to be “an original and foundational component of Canadian society”.²³ The *Charter* guarantees the pre-existing rights and freedoms in Canada.²⁴

25. Decisions made subsequent to the enactment of the *Charter* underscore that the *Charter* protects these freedoms, and reinforce the importance of protecting religious expression.

26. When a Christian shares his personal religious beliefs and does not coerce compliance with religious views, then the state, by virtue of s. 2(a) of the *Charter*, must allow and even protect this dissemination of religious opinion.

Religious Engagement with the Public

27. Evangelical Christians hold that the Bible is the infallible and inspired Word of God²⁵ and sincerely believe that they are compelled to share the tenets of their Evangelical Christian Faith with the community by both acts and words.²⁶ This requires engaging in public dialogue, and sometimes debate,

¹⁹ *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698, at para. 53 [*Re Same-Sex Marriage*].

²⁰ *Ibid.*

²¹ *Big M*, *supra* note 18 at para. 94.

²² *Saumur v. Québec (City)* [1953] 2 S.C.R. 299 [*Saumur*].

²³ *Ibid.* at paras. 89, 96. See also *Syndicat Northcrest v. Amselem* [2004] 2 S.C.R. 551, [*Amselem*], at para. 40.

²⁴ Section 26 of the *Charter* reads:

“The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.”

²⁵ See *Statement of Faith*, *supra* note 1.

²⁶ Proverbs 24:11,12; Ezekiel 33:1-9; Isaiah 55:6.

- regarding a number of different issues.²⁷ Section 2(a) protects this engagement, even when some find these opinions offensive.
28. The freedoms of religion and expression are closely linked when dealing with the religiously informed and their engagement in public debate. Almost always, the religious citizen holds differing views from many others. Some hold that these views are increasingly a minority view in Canadian culture. The less mainstream these religious views may be, the more important it is to protect them against the silencing voices of the majority in accord with *Charter* values.
29. The EFC does not condone the words used by Mr. Whatcott. However, the principle remains: every individual in Canada should feel free to openly bring their religious convictions to bear on their opinions and on their engagement in public policy debate.²⁸

Coercion

30. In *Big M* Dickson C.J. noted the importance of freedom of religion in Canadian society, and specifically, the relationship between freedom and the absence of coercion.²⁹
31. To compel tolerance is to dispense with it and is, in effect, coercive. Every religion is, in essence, exclusive in its beliefs and its requirements of its followers. Compelling tolerance by state-mandated parameters to acceptable speech in public debate can only be accomplished by violating the freedom of

²⁷ A sampling of the cases which the EFC has intervened in provides an example of the broad range of issues that Evangelicals engage in: end of life issues (*Rodriguez v. British Columbia (Attorney General)*); care for the unborn (*Dobson v. Dobson*); mercy killing (*R. v. Latimer*); education (*Trinity Western University v. B.C. College of Teachers and Chamberlain v. Surrey School District No. 36*); reproductive technologies (*Reference Re Assisted Human Reproduction Act*); parental authority (*S.L., et al. v. Commission scolaire des Chenes, et al.*); not to mention the public policy initiatives on poverty, homelessness, international aid, child pornography, human trafficking, etc.

²⁸ See Gonthier's discussion on this point in *Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710 [*Chamberlain*], generally, and specifically at para. 135 where he states that "the essence of freedom of religion or conscience and...freedom of expression more generally" is violated "if a person is compelled by the state... to a course of action or inaction which he would not otherwise have chosen..."

²⁹ *Big M*, *supra* note 18 at para. 94.

religion and freedom of conscience of each religiously devout individual who wishes to bring their religious perspective to the public square.

32. Section 14 of the *Code* imposes a course of conduct onto the citizen body with direct commands to refrain from acting in certain ways on pain of sanction. This fits the definition of coercion as defined by this Court.³⁰
33. Religious (or non-religious) views inform morality claims and morality claims inform public policy decisions. Public policy decisions are ultimately made by government, which can only thrive if there is a robust dialogue within its citizenry. Public policy decisions will inevitably involve morality. However, if the state determines what a religion or what religiously (or non-religiously) informed individuals can or cannot do, it is in effect violating the principle against coercion, and eliminating the voices of an identifiable community from participation in the discussion.

Evangelical Christian Beliefs of Ethics and Morality

34. Ethics and morality are core components of the Christian faith. What might be referred to as the personal or individual morality or ethics of an Evangelical Christian is, in effect, determined by their Christian faith.

Effect on Religious Participation

35. Legislation that violates fundamental *Charter* rights of individuals such as the legislation in question cannot be considered to minimally impair the rights in question. Nor could it be found to have proportionality between the effects of the limiting measure and the objective of the legislation that is required to meet the *Oakes* test.
36. The effect Mr. Whatcott's prosecution has on the average religiously informed individual in Canada is the creation of a sense that religious perspectives on morality in Canada are impermissible, and could very well result in legal entanglement, with untold financial and reputational costs.

³⁰ See *Big M*, *supra* note 18 at para. 94; *Trinity Western University v. British Columbia Council of Teachers* [2001] 1 S.C.R. 772 [*Trinity Western*] at para. 28.

37. The matter before this Honourable Court is much broader than simply the topics Mr. Whatcott chose to address in his pamphlets. The issue of free religious expression is important; any Evangelical Christian Canadian may be adversely affected by the fear that they might be prosecuted for entertaining “such religious beliefs as a person chooses” or for declaring their “religious beliefs openly” or manifesting “religious belief by worship and practice or by teaching and dissemination”. These individuals would thus be “forced to act in a way that is contrary to his beliefs or conscience”. No longer would she or he enjoy the “right of every Canadian to work out for himself or herself what his or her religious obligations, if any, should be”. This possibility is in direct contradiction to the oft-quoted reflection on our free and democratic society of Justice Dickson in *Big M Drug Mart*.³¹

Concluding Thoughts on Religious Freedom

38. Following this Court’s reasoning in *Multani v. Commission scolaire Marguerite-Bourgeois*,³² *Young v. Young*,³³ and *Trinity Western University v. British Columbia College of Teachers*,³⁴ this Court should not conclude that religiously motivated participation of an individual in a public debate will harm the state’s interest in creating or maintaining a tolerant society.
39. The state, through the Saskatchewan Human Rights Commission, has failed to demonstrate that the overbroad prohibition of any publication that “exposes or tends to expose to hatred, ridicules, belittles or otherwise affronts the dignity of any person” is minimally impairing to freedom of conscience and religion, and the free religious expression guaranteed by both the *Charter* and this Court.
40. The EFC will argue that freedom of religion must include, by necessity, the freedom to publish, in print or speech, material that “declare[s] religious beliefs openly” or is “teaching and dissemination” that may be deemed

³¹ *Big M*, *supra* note 18 at para. 94.

³² *Multani v. Commission scolaire Marguerite-Bourgeois*, [2006] 1 S.C.R. 256.

³³ *Young v. Young*, [1993] 4 S.C.R. 3.

³⁴ *Trinity Western*, *supra* note 30.

offensive by some. Sacred texts such as the Bible or other religious texts contain many prohibitions against or criticisms of behaviour that may relate to the practices of identifiable groups, but for Christians all are couched in the context of love for one's neighbour.³⁵

41. The religious denunciation of certain behaviours cannot constitute hate speech or speech otherwise prohibited by the *Code*. Speech anchored in religious belief and expression should not be required to conform to drifting societal values. This would place an unreasonable restriction on freedom of religion.
42. Applying the principles enunciated above, the state has not demonstrated that denying religious participation in public dialogue where the participation might be offensive to some is a reasonable means to achieve tolerance. Such a broad infringement on the freedom of religious expression undermines the values of freedom, democracy and Christianity and is incompatible with Canadian goals of diversity and multiculturalism.
43. Although it is the EFC's position that the Appellants have not established any of the components set out in the second step of the *Oakes* test,³⁶ the EFC will, if granted intervener status, argue that s. 14(1)(b) of the *Code* and its *Charter* violations cannot, in law, meet the three components of the proportionality test as set out in *R. v. Oakes*. It is the EFC's intention to elaborate on the above-noted arguments in a manner which will establish that the approach to human rights legislation proposed by the Appellant violates the section 2(a) *Charter* rights of the religiously informed and is therefore not proportional to the purposes and intents of the *Code* and consequently, cannot be saved under section 1 of the *Charter*.

³⁵ Matthew 22:39 – “Love your neighbour as yourself.”

³⁶ *R. v. Oakes*, [1986] 1 S.C.R. 103 [*Oakes*].

C. Is it permissible to morally criticise sinful behaviour while respecting the person? Are Christians able to hate the sin and love the sinner” in accordance with their religious beliefs?

44. Evangelical Christianity calls for the imperatives of love for God and one’s neighbour as demonstrated in a religious faith that is integrated, active and holistic.³⁷ Evangelical Christians practice and manifest their faith not only through religious worship, prayer, and doctrinal teaching, but also through activities of social service, charitable work, social activism and through participation in public dialogue “for the good of their neighbour”, and for the benefit of their society,³⁸ all of which constitutes a manifestation and exercise of their religious beliefs and values.
45. For Evangelical Christians, social engagement within and outside one’s religious community is part of an outward expression of faith, obedience to and worship of God. The imperative to love goes beyond the confines of the church. The Christian is compelled to love their neighbour as himself. Jesus taught that the neighbour is anyone with whom a person comes into contact, and that love includes sharing the truth, as understood from Scripture, out of a genuine concern for the wellbeing of the neighbour.³⁹
46. The famous magician and atheist Penn Jillette, after being presented with a Bible by an audience member who admitted he was proselytizing, described how much he valued this man’s concern for him:

I don’t respect people who don’t proselytize, [who] believe that there is a heaven and hell and people could be going to hell (or not getting eternal life or whatever) and you think that, well it’s not really worth telling them this because it would make it socially awkward. And atheists who think that people should not proselytize – “Just leave me alone, keep your religion to yourself” ...How much do you have to hate

³⁷Matthew 22:36-40: “Teacher, which is the greatest commandment in the Law?” Jesus replied: “‘Love the Lord your God with all your heart and with all your soul and with all your mind.’ This is the first and greatest commandment. And the second is like it: ‘Love your neighbor as yourself.’ All the Law and the Prophets hang on these two commandments.” (NIV)

³⁸ Jeremiah 29:7.

³⁹ See the Parable of the Good Samaritan, Luke 10:29-37.

somebody to not proselytize? How much do you have to hate somebody to believe that everlasting life is possible and not tell them that?⁴⁰

47. It is not only possible to criticize certain behaviour without hating those exhibiting that behavior, but criticizing certain behavior is often an expression of love. Evangelical Christians hold the belief in redemption as foundational to our existence as a community. This is a context for interpretation of expression in which a distinction is made between acceptance and approval, agreement and tolerance. And there is always the Christian view of the possibility and the hope of redemption. All people are fallen. All people can be saved. Thus all people are accepted in their personhood, for their inestimable worth. However, not all activity is acceptable; thus, while accepting the person, the Christian is called by Christ to disapprove of certain actions.
48. Criticism can take place from a number of different perspectives and can be expressed in a number of different ways. By its very nature, criticism is often confrontational, even offensive at times.
49. An Evangelical Christian should be able to engage in discussions of a moral nature outside of his or her Christian community in the pluralist, free and democratic society in which they find themselves. Evangelicals have shown a high tolerance for comment, critique and even ridicule of their sincerely held beliefs. This is part of the cost of living in an open, democratic, free society.
50. To argue otherwise is to stand for the proposition that the religious Canadian's views on morality are only acceptable for expression in the public sphere when those views already accord with the current state of Canadian law. However, such a proposition is preposterous: can an Evangelical Christian rant against child pornography because it is, at the moment, illegal but should have held his tongue instead of advocating for inclusion of child

⁴⁰ As quoted by Ed Stetzer in "Proselytizing in a Multi-Faith World: Why Mutual Respect and Tolerance Requires Us to Witness for Christ" *Christianity Today* (April 2011) at page 25.

pornography in the *Criminal Code* prior to Parliament's decision to do so in 1993? Could a Christian argue for maintaining the definition of marriage prior to 2005 but after that time be constrained from adhering to a biblical understanding of marriage because of a change to Canada's law?

51. The religiously informed do comment on a broad range of moral issues: the protection and well-being of children; human trafficking; poverty and homelessness in Canada and abroad; and, the protection of vulnerable citizens at both ends of the age spectrum.
52. All of these issues have a moral element to them that benefits from the participation of all citizens, including Christian and other religious Canadians. "No one has a monopoly on truth, and our system is predicated on the faith that in the marketplace of ideas, the best solutions to public problems will rise to the top."⁴¹

D. What philosophy of society should the Court adopt when dealing with issues of religion, expression and human rights?

53. The notions of "non-religious" and "secular" are often misunderstood or misapplied. In *Chamberlain v. Surrey School District No. 36* this Court found that the common usage of "secular" to mean "non-religious" is erroneous.⁴²
54. Proponents of a theoretically non-religious form of secularism (which will be referred to as "non-inclusive secularism" to distinguish it from the "inclusive secularism" described by Gonthier J.) suggest that non-inclusive secularism ensures freedom of religion for every religious individual and group by recognizing an "equality" of all religions and denying the unique and exclusive claims of any religious belief. They posit that this non-inclusive secularism addresses the issue of not imperilling community living, referred to by Gonthier J.

⁴¹ *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at para. 668.

⁴² *Chamberlain*, *supra* note 28 at para 137 per Gonthier J. Concurred on this point: McLachlin C.J. for the majority at para. 3 and LeBel J. at paras. 208 and 209.

55. By purporting to eliminate any speech (religious or otherwise) that may be deemed offensive by some, the *Code* does not promote recognition of the dignity and equal rights of all citizens, further the public policy that all citizens are free and equal or discourage or eliminate discrimination.⁴³ Rather, if the approach proposed by the Appellant is accepted, the *Code* will limit public disagreement, and thereby impose a new philosophy of non-inclusive secularism. This undermines a pluralist and democratic society that is accepting of others and tolerant of beliefs and lifestyles with which one might disagree or disapprove. It rather creates a form of non-inclusive secularist indoctrination that imperils the very standard of community living it claims to protect.
56. Canada's development in the realms of policy and law, influenced heavily by a Judaeo-Christian tradition, has bred a vibrant, multicultural nation of acceptance of others' beliefs and, at least, tolerance when there has been disagreement with or disapproval of those beliefs. The idea that to achieve tolerance, the non-violent and peaceful views of a religious minority, even if offensive, must be censored and punished with a hefty fine is unjustified and legally unsupportable in a society that is constitutionally pluralist, multicultural and guarantees freedom of religion and conscience.⁴⁴
57. Gonthier J. summarized this point very well in *Chamberlain*, a point on which the majority concurred:⁴⁵

“language espousing “tolerance” ought not be employed as a cloak for the means of obliterating disagreement... Language appealing to “respect”, “tolerance”, “recognition” or “dignity”, however, must reflect a two-way street in the context of

⁴³ The objectives of the *Code*, *supra* note 11, are set out in section 3:

- (a) to promote recognition of the inherent dignity and the equal inalienable rights of all members of the human family; and
- (b) to further public policy in Saskatchewan that every person is free and equal in dignity and rights and to discourage and eliminate discrimination.

⁴⁴ In fact, this Court has described Canada as a “diverse and multicultural society, bound together by the values of accommodation, tolerance and respect for diversity.” *Chamberlain*, *supra* note 28 at para. 21.

⁴⁵ *Ibid.* at para. 3 and 208-9.

conflicting beliefs, as to do otherwise fails to appreciate and respect the dignity of each person involved in any disagreement, and runs the risk of escaping the collision of dignities by saying “pick one”. But this cannot be the answer. In my view, the relationship between s. 2 and s. 15 of the *Charter*, in a truly free society, must permit persons who respect the fundamental and inherent dignity of others and who do not discriminate, to still disagree with others and even disapprove of the conduct or beliefs of others. Otherwise, claims for “respect” or “recognition” or “tolerance”, where such language becomes a constitutionally mandated proxy for “acceptance”, tend to obliterate disagreement.”⁴⁶

58. In the case at bar, the issue is not how to balance a conflict between religious rights and equality rights. Rather, this case is an example of straight state violation of religious freedom and freedom of expression.⁴⁷

59. A pluralist society is one in which there are sharp disagreements on issues of morality and behaviour. This is a distinctly different society from the one promoted by the Appellants. The Appellants wish to change Canada from a pluralist society into a restrictive and homogeneous one – a society in which every view is held in equal respect without disagreement, and where any disagreement is marginalized or even prosecuted as “intolerant”.

60. Voltaire is often attributed as saying, “I disapprove of what you say, but I will defend to the death your right to say it.” This is a maxim of a truly free and democratic society, a society that embraces a plurality of ideas in the marketplace of ideas, where more than the State product is available for trade.

Order Sought

61. The EFC requests an order granting it leave to intervene in this appeal and to file a factum not to exceed 20 pages in length. The EFC also requests an order

⁴⁶ *Ibid.* at para. 134. Although Gonthier J was in dissent, McLachlin C.J. for the majority did not disagree with Gonthier’s statement.

⁴⁷ See also *Chamberlain*, *ibid.* at para. 132.

granting the right to make oral submissions of not more than 20 minutes in length.

62. The EFC makes no request for costs and requests that no costs be ordered against it.

DATED at Ottawa, Ontario this 28th day of April 2011.

SIGNED BY: _____

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NOTICE TO THE RESPONDENT TO THE MOTION: A respondent to the motion may serve and file a response to this motion within 10 days after service of the motion. If no response is filed within that time, the motion will be submitted for consideration to a judge or the Registrar, as the case may be.

If the motion is served and filed with the supporting documents of the application for leave to appeal, then the Respondent may serve and file the response to the motion together with the response to the application for leave.

(In the case of an originating motion, include a copy of the judgment and reasons for judgment appealed from and a copy of the certificate in Form 25B and, if applicable, the certificate in Form 25C.)

SOR/2006-203, s. 47, SOR/2011-74, s. 49.

ORIGINAL TO: **THE REGISTRAR OF THE
SUPREME COURT OF CANADA**
301 Wellington Street
Ottawa, Ontario K1A 0J1

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