Ward v. Québec: Supreme Court narrowly rejects discriminatory speech

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On October 29, 2021, the Supreme Court of Canada rendered its much awaited decision in Ward v. Québec (Commission des droits de la personne et des droits de la *jeunesse)*, 2021 SCC 43. At issue in the appeal was whether Quebec's Human Rights Tribunal (the Tribunal) erred in holding that the appellant comedian discriminated against the respondent, a child singer in Québec with physical disadvantages, when the appellant mocked the respondent as part of his comedy routine. In a 5-4 decision, the majority of the Supreme Court decided that the elements of discrimination were not satisfied in this case and that the "right to dignity" protected by Québec's Charter of *Human Rights and Freedoms* (Québec Charter) has to be aligned with the constitutional protection of freedom of expression.

The authors (along with Professor Cameron, Professor Emerita of Osgoode Hall Law School) were counsel for the intervener, Canadian Civil Liberties Association, before the Supreme Court in the appeal. Articling students Tory Brown and Brianne Taylor provided invaluable assistance with the appeal.

Background

The appellant Mike Ward, a stand-up comedian, had a routine in which he mocked certain figures in Québec's community, who he referred to as the "sacred cows" that could not be made fun of for various reasons. This included the respondent, Jeremy Gabriel. Gabriel was born with Treacher Collins syndrome, which caused certain malformations of the head as well as profound deafness. At the age of 6, he received a bone-anchoring hearing aid and subsequently learned to speak and sing. He went on to become a public figure in Québec, performing the national anthem at a sporting event and performing for Céline Dion and for the Pope in Rome as a child singer. In addition to the stand up comedy routine, Ward also made a video, posted on his website, in which he made disparaging comments about Gabriel. In both his video and his stand up routine, Ward mocked some of Gabriel's physical disadvantages.

In view of Ward's conduct, Gabriel's parents filed a complaint with the Human Rights Commission. The Commission concluded that there was a basis for a finding of discrimination and referred the complaint to the Tribunal, alleging that Ward had interfered with Gabriel's right "to the safeguard of his dignity" and thereby discriminated

against him under ss. 4 and 10 of the Québec Charter. The “right to safeguard dignity” appears to be a unique element of the Québec Charter and is typically not found in other provincial or federal human rights codes.

The Tribunal found that all the elements of discrimination under the Québec Charter had been established on the basis of a breach of Gabriel’s right to dignity. The Tribunal rejected Ward’s defence based on freedom of expression and concluded that his comments exceeded the bounds of protected free speech. On appeal, a majority of the Court of Appeal dismissed Ward’s appeal, finding that the Tribunal could reasonably conclude that there was discrimination and that Ward’s comments were not protected speech under section 3 of the Québec Charter.

Supreme Court ’s decision

The Supreme Court of Canada allowed the appeal by a narrow margin of 5-4.

Writing for the majority, Chief Justice Wagner and Justice Côté, who were joined by Justices Moldaver, Brown, and Rowe, found as a threshold issue that the elements of a discrimination claim under the Québec Charter had not been established. Hurtful expression relating to a prohibited ground in the Québec Charter and harm suffered thereto are insufficient to constitute discrimination. Critically, the Tribunal had made a finding of fact that Ward did not select Gabriel as one of the subjects of his routine on the basis of his disability, and therefore the majority found no link between the distinction and a prohibited ground. The majority was of the view that Gabriel’s complaint might more appropriately be brought as a defamation claim, over which the Tribunal has no authority.

The majority also held that even if there had been differential treatment based on a prohibited ground, Gabriel’s right to the safeguard of his dignity was not impaired. Agreeing with Savard J.A. who dissented in the Court of Appeal, the majority held that freedom of expression should not be treated as a defence to be proven by the respondent once a claim for discrimination has been established. Rather, where two rights protected under the Québec Charter are in apparent conflict – here the right to safeguard one’s dignity in s. 4 and freedom of expression in s. 3 – the two rights must be considered together to determine the scope of the protected rights.

The majority found that the right to safeguard one’s dignity has to be analyzed “objectively.” The Court indicated that infringement of this right must meet a high threshold: where a person is stripped of their humanity by being subjected to treatment that debases, subjugates, objectifies, humiliates or degrades them, such that there is no question that their dignity is violated.

At the same time, the majority stressed that the exercise of freedom of expression presupposes and also fosters society’s tolerance of expression that is unpopular, offensive or repugnant. As such, the majority outlined a test for reconciling the right to safeguard dignity with freedom of expression:

- first, whether a reasonable person, aware of the relevant context and circumstances, would view the expression targeting an individual or group as

inciting others to vilify them or to detest their humanity on the basis of a prohibited ground of discrimination; and,
- second, it must be shown that a reasonable person would view the expression, considered in its context, as likely to lead to discriminatory treatment of the person targeted, that is, to jeopardize the social acceptance of the individual or group.

In this case, the majority found that neither requirement was met. A reasonable person aware of the relevant circumstances would not view Ward's comments about Gabriel as inciting others to vilify him or to detest his humanity on the basis of a prohibited ground of discrimination. A reasonable person also would not view the comments made by Ward, considered in their context, as likely to lead to discriminatory treatment of Gabriel.

The minority decision – penned by Justices Abella and Kasirer, and joined by Justices Karakatsanis and Martin – held that Ward's comments were discriminatory and in breach of the Québec Charter. In particular, the minority decision emphasized the effects of Ward's comments directed at a youth with disability and the need for the law to discourage such conduct.

Takeaways

This appeal raised difficult issues of expression, applicable both to s. 3 of the Québec Charter and s. 2(b) of the *Canadian Charter of Rights and Freedoms* (Charter). As is often the case, the appeal required the Court to decide what are the justifiable limits on speech that most Canadians would find unsavoury and repugnant. In this context, a few elements of the decision are particularly noteworthy.

First, the majority relied on but modified the test established by the court's previous decision in *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11. The majority endorsed the reasoning in *Whatcott*, which established in detail when offensive speech crosses into hate speech such that the latter can be censured. The majority, however, also held that "[h]ate speech within the meaning of *Whatcott* is therefore prohibited, as is expression that has the same effects on personal dignity without meeting the definition of hatred given in that case." It remains to be seen what in the future may be found to fall into the latter category.

Second, this appeal marks a second 5-4 decision from the Supreme Court in a span of weeks considering section 2(b) of the *Charter*. In the first decided appeal in *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34, the Court grappled with the issue of whether the province of Ontario reducing the number of councillors during a municipal election was contrary to s. 2(b) of the *Charter*. Curiously, the four judges constituting the minority in that case are the same four judges constituting the minority in the *Ward* appeal, illustrating the fact-specific nature of section 2(b) cases. Equally important is that in the *City of Toronto* case the majority appeared to signal that an analysis of positive and negative rights is now a component of section 2(b) analysis. While this was not at issue in the *Ward* appeal, the Court made no mention of such rights in this case. This implies that positive and negative rights analysis may not be necessary in every section 2(b) case.

Finally, this appeal will have an influence on how human rights tribunals interpret their jurisdiction. The majority sharply rebuked the Tribunal for a line of decisions that the majority saw as straying beyond the Tribunal's jurisdiction over discrimination into what should properly be claims for defamation. This rebuke could have significant repercussions for future claims over speech in the growing and nebulous world of internet bullying and offensive remarks in virtual platforms.

If you have any questions or would like to learn more regarding this decision, please reach out to members of our Appellate Advocacy or Public Law groups or any of the contacts listed below.

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