


# Special Issue: Humour, Hate and Harm: Rethinking Dignity, Equality and Freedom of Expression in Ward v Quebec (Commission de droit de la personne et des droits de la jeunesse)

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# Introduction: About this Special Edition

### Author: Pearl Eliadis

The question of what constitutes hate speech and speech that offends human dignity is currently one of the most debated topics in the world right now. Freedom of expression and the right to receive opinions and information are fundamental parts of the international human rights framework and are reflected in the constitutions of nation states. This issue of the PKI Global Justice Journal invites readers to consider the decision of the Supreme Court of Canada in the decision in *Ward v Quebec (Commission de droit de la personne et des droits de la jeunesse)* 2021 SCC 43*)* ("*Ward"*) and its implications for how we use law to craft a public commons that is capable of negotiating the shape of public discourse at the intersection of liberty, equality and human dignity.

On October 29, 2021, the Supreme Court released its decision in *Ward v Quebec* (Commission de droit de la personne et des droits de la jeunesse*,* 2021 SCC 43*)* ("*Ward"*). The Court allowed the appeal, deciding in favour of Mr. Ward in a narrow 5-4 decision.

On November 25, 2022, the Max Bell School of Public Policy with the McGill Centre for Human Rights and Legal Pluralism organized a conference entitled Hate, Humour and Harm to explore the legal and policy dimensions of the *Ward* case.

This special issue explores the implications of the Court's decision based on Quebec and Canadian human rights law with respect to freedom of expression, hate speech, and the right to safeguard dignity in the context of equality rights claims. It also addresses the implications for international human rights law, and the impact on human rights commissions, as institutions with a statutory mandate to ensure the respect, protection, and fulfillment of human rights.

Comedian Mike Ward's "dark" comedy was explicitly designed to mock public figures whom he considered "sacred cows" in Quebec. One of the "sacred cows", Mr. Jérémy Gabriel, a child performer with a disability, had achieved a degree of fame as a singer. Mr. Gabriel suffers from Treacher Collins syndrome, which results in facial abnormalities and, in Mr. Gabriel's case, profound deafness. Mr. Ward's routine targeted Mr. Gabriel's appearance and his singing (Mr. Gabriel had had corrective surgery that allowed him to hear, speak and sing). The comedy routine also included "jokes" about Mr.

Gabriel refusing to die and being “unkillable”, as proven by the fact that Mr. Ward had tried to drown him. The comedy show and the recorded video enjoyed wide circulation. Mr. Gabriel claimed that he experienced social exclusion, distress and depression, as well as suicidal ideation following the routines.

A discrimination complaint was filed by Mr. Gabriel’s parents, both for their son and themselves. Quebec’s human rights commission brought the matter successfully to the Quebec Human Rights Tribunal. An appeal to the Quebec Court of Appeal was dismissed 2-1. The case went on to the Supreme Court of Canada.

The majority’s approach in *Ward* is almost entirely grounded in Quebec’s legal framework and especially Quebec’s *Charter of human rights and freedoms ("Quebec Charter")*. It would thus be understandable to dismiss the significance of *Ward* for the rest of Canada, largely reflecting the analysis of academic experts in Quebec who have, over the years, minutely parsed a statute that is (or was) quite distinct from other human rights laws in Canada. This special issue of the *PKI Global Justice Journal* encourages a different view: it re-convenes several of the key actors in that case and in the Canadian human rights conversation to explore the features of the new nexus of hate speech, harm and human rights in Quebec, and the consequences for Canadian and international human rights law and for our understanding of the relationship between democracy and human rights.

Freedom of expression interacts with other rights and freedoms in ways that are deeply contested and controversial in both law and public discourse. Freedom of expression is deployed as a legal tool in the culture wars, while minorities seek to deploy equality rights as a buttress against both speech-based discrimination and its more virulent variant, hate speech. While equality, freedom and dignity are cornerstones of the international human rights movement and feature prominently in the *Universal Declaration of Human Rights*, the majority and minority decisions in Ward reveal strikingly divergent world views on how they interact.

The majority’s classical liberal approach emphasized a post-Second World War vision of human rights grounded in a response to the extreme human rights violations associated with that global conflict ( 2021 SCC 43 para 58). The Court had difficulty with defining ”dignity” or in identifying a justiciable right beyond defamation proceedings or claims against hate speech. The Court demonstrated a strong preference for freedom of speech. The combination of these factors appears to have operated to severely circumscribe equality rights claims in circumstances where the claimant alleges verbal conduct and remarks as evidence of discrimination.

The minority, on the other hand, recognized the evolution of human rights standards and the consistent jurisprudence to the effect that human rights statutes must be given a large, liberal and purposive interpretation. This approach opens the door to the possibility that discriminatory speech can form the basis of an equality rights claim without having to reach the level of hate speech, let alone atrocity crimes. The minority also drew more extensively on international law, including the *Convention on the Rights of Persons with Disabilities* and the *Convention on the Rights of the Child*.

These divergent approaches and their implications for democracy are considered in commentary from, respectively, Me Julius Grey, Ad.E., who appeared before the Court for Mr. Ward, and Me Marie-Claude Landry, Ad.E., former Chief Commissioner of the Canadian Human Rights Commission who has been a key interlocutor in the federal debate on the role of hate speech and the importance of recognizing impacts on marginalized and vulnerable communities.

This series focuses less on the outcome of the case than on how the majority of the Court reached its decision. Reasonable jurists could have come to the same conclusion as the majority, without diminishing the protections offered by the Quebec *Charter.* The Supreme Court has said that the interpretation of human rights statutes is informed by a large, liberal, and generous (or purposive) approach, and this includes Quebec (*Quebec v Syndicat,* [1996] 3 SCR 211) . Nonetheless, the Court narrowed the scope of the Quebec *Charter* in cases where the right to safeguard dignity is claimed, apparently to make Quebec's statute conform with the more limited coverage available in other Canadian human rights statutes. It almost obliterated the right to safeguard dignity as a distinct human right in equality rights claims, except in extreme cases of hate speech. And it did so despite the clear wording to the contrary in the Quebec *Charter*, which is, or was, the only human rights statute in Canada that provided a justiciable human right to safeguard human dignity in an equality rights complaint. Me Stéphanie Fournier, who appeared for Quebec's Human Rights and Youth Rights Commission before the Supreme Court of Canada in the *Ward* case and Me Philippe-André Tessier, President of the Quebec Commission, discuss these arguments in their article in this series.

Another key dimension of the *Ward* case is that the Supreme Court conflated discriminatory comments and hate speech. It appears to be a requirement now that allegedly discriminatory comments (at least those that take place outside the usual spheres of activity like employment, housing and services) must meet the test for hate speech when the right to dignity is invoked in an equality rights claim. Indeed, as Fo Niemi, a contributor to this series and Executive Director of the Centre for Research-Action on Race Relations notes, there are early signs that the Quebec Human Rights Tribunal is using the *Ward* case to dismiss even cases that take place in social arenas like the provision of goods and services, that are normally covered by all human rights statutes in Canada.

This series also explores other issues, including the apparent strengthening of the role of intent in human rights claims and the broader implications for access to justice. Finally, while the Supreme Court's decision was clear that comedy routines or artistic expression in general do not benefit from special immunity, the majority, practically in the same breath, appears to have created a de facto albeit partial immunity by suggesting that sarcasm, irony and humour – powerful weapons in attacks on vulnerable minority groups – are to be given a partial pass.

We now have a Supreme Court decision that has explicitly lowered the level of protection in Quebec's human rights law to make it more uniform with other statutes in Canada, despite the clear wording of the statute suggesting a higher level of protection, resulting in a further weakening of Quebec's human rights system and arguably resulting in a violation of Article 5 of the *International Covenant on Civil and Political Rights*, issues that are addressed in Pearl Eliadis' article in this series.

Continually assessing Canada's performance in complying with the country's international human rights legal obligations requires us to pay close attention to developments at the national and provincial levels.  The decision in *Ward* reveals the impacts on the ground of decisions that may result in diminished equality for vulnerable and marginalized groups, and a sidelining of the safeguarding of human dignity as a justiciable right distinct from reputation, while reinforcing civil and political rights like freedom of expression. We invite you to explore this series to consider some of the dimensions of these important questions.

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# Was the *Ward* Case Correctly Decided?

## Author: Julius H. Grey, Lawyer

Image:  Cour D'Appel du Quebec stepsIn *Ward v Quebec (Commission des droits de la personne et des droits de la jeunesse)* (2021 SCC 43),  the Supreme Court had to reconcile two fundamental principles of public law: freedom of expression and freedom from discrimination based on prohibited grounds. The two are not contradictory, but if one defined discrimination so broadly as to include mere speech, a conflict between the principles could be perceived.

Mr. Ward was a well-known stand-up comedian known for his harsh, uninhibited humour.  In a series of sketches, he proposed to bring down the various “sacred cows” of Quebec’s society by mocking them. Jeremy Gabriel was a disabled child who launched an artistic career as a singer, mainly relying on his handicap. In Mr. Ward’s opinion, he became very successful and joined the ranks of “sacred cows” who were generally immune from criticism. For that reason, Mr. Ward proceeded to mock and imitate him with unflattering remarks about his singing and appearance. Mr. Gabriel and his parents convinced the Quebec Human Rights Commission that this was a case of discrimination based on handicap, which it could pursue before the Human Rights Tribunal.

The suit was successful before the Tribunal and the Court of Appeal in a split decision. Mr. Ward’s claims of freedom of expression and artistic freedom were denied as it was held that the type of mockery practiced by Mr. Ward was discriminatory. The Commission invoked Quebec’s *Charter of Human Rights and Freedoms*. Due to the wording of Quebec’s Charter, Mr. Gabriel had to show that he was deprived of another basic right through discrimination to succeed. It was found that he was deprived of his dignity. The Supreme Court weighed the arguments and came down five votes against four in favour of Mr. Ward.

It is submitted that the majority was correct, and its decision was the only possible one in a free country.

**Freedom of Expression**

Freedom of expression was not viewed as a right before the 17th century. Rather, it was a privilege granted and revoked by the sovereign. However, in the 17th century, John Milton and John Locke elevated it to the rank of a basic freedom possessed by all subjects. Subsequently, Voltaire and John Stuart Mill vigorously advocated for free speech. By the time Canada was established with a government “similar in principle to that of the United Kingdom,” it was generally accepted that freedom of expression was part and parcel of the fledgling state. How could one debate significant issues and bring about major change without the right to criticize society? Moreover, what is the utility of democracy if one can never change anything important?

Freedom of expression in Canada was never absolute. Parliamentary sovereignty was so entrenched that Parliament could practically abrogate it in the *War Measures Act*. Obscenity, advocacy of crime, threats, attacking reputation, and hate speech were all found to be exceptions at different times.

With time and especially after adopting the *Canadian Charter of Rights and Freedoms*, the courts formulated a broad, generous interpretation of freedom of expression as established in *Libman v Quebec (Attorney General)* (1997 CanLII 326 (SCC)). Obscenity was narrowly defined in *R. v Butler* ( 1992 CanLII 124 (SCC)), as was hate in *R. v Keegstra* (1990 CanLII 24 (SCC)). Freedom included the right to lie, as the court decided in *R. v Zundel* (1992 CanLII 75 (SCC)), and to say things that could hurt, humiliate or sadden people, as in the Ward case. It would be pointless to enshrine freedom to say conventional or uncontroversial things since they do not generally invite opprobrium.

The importance of protecting unpopular and even outrageous expressions can be seen by examining the evolution of our society. Sixty years ago, homosexuality and abortion were criminalized. A few years earlier, Quebecers could be ostracized and sometimes punished for serious criticism of the Catholic church or communism. Today, such conduct or speech is a protected right under our charters. In order to bring about such change, citizens must be free to propose it. Many leading cases, such as *Vriend v Alberta* (1998 CanLII 816 (SCC)) or *Carter v Canada (Attorney General)* (2015 SCC 5), would have shocked the public a few decades ago. Free expression was indispensable for such drastic change.

In today’s world, with conservative and “woke” groups attempting to limit freedom of expression, it is crucial to prohibit only the most extreme form of commentary. That is what the Supreme Court stipulated in *R. v Keegstra* and *Saskatchewan (Human Rights Commission) v Whatcott* (2013 SCC 11 ), where it maintained the prohibition of hate speech but only on the most restrictive definition of “hate.”

Of course, the Court clarified that private law remedies such as libel and breach of privacy were not abrogated. However, even in private law, *Grant v Torstar Corp.* (2009 SCC 61) illustrates the importance of freedom of expression in reducing the scope of damage suits. Further, in libel, unlike in discrimination, the state does not take up the cause of one of the protagonists. Instead, the Plaintiff must prove the lack of justification and the damages.

Had Mr. Ward picked on someone who had not put himself in the public sphere, there may well have been a strong case for a finding of breach of privacy. However, those who decide to become public figures cannot claim immunity from criticism based on privacy. This was Mr. Gabriel's case, which is why he relied on discrimination rather than privacy.

One more issue remains. Mr. Ward pleaded for a special right of artistic freedom more extensive than other forms of freedom of expression. He was unsuccessful in his claim as the Court found artistic freedom to be protected no more and no less than other core freedoms. However, it is clear that artistic freedom is protected as expression and that it is a central and not a peripheral issue. In the past, artists contributed significantly to social progress. Satire has been an important vehicle of change, and we can cite Jonathan Swift and Charles Dickens as examples. Mr. Ward's goal of bringing down the "sacred cows" is legitimate in this context and commendable. His show was funny and popular, making it potentially influential. The Supreme Court noted the role of humour and the fact that it is rarely subject to restriction, notably in the following passage:

> "... Humour, whether in good or in bad taste, rarely has [translation] "the spillover effect needed to give rise to an attitude of hatred and discrimination among third parties" (Rainville, at p. 68). It involves well?known methods such as [translation] "exaggeration, over?generalization, provocation and distortion of reality." The audience is able to identify these methods, when they are clear, and must be acknowledged to be discerning enough not to take everything said at face value. (*Ward v Quebec (Commission des droits de la personne et des droits de la jeunesse)*, 2021 SCC 43)."

Although this was not necessary for Mr. Ward's case, it is important to affirm that satire and other forms of art can be agents of change. It is sufficient to mention Tolstoy and Zola to illustrate this. One can like or dislike a work of art, but prohibition is deleterious for democracy.

It follows that the majority of the Supreme Court's reasoning was impeccable on the issue of protecting freedom of expression. Nevertheless, can the need to protect people from illegal discrimination modify this to any significant extent, as the Commission argued?

**Equality**

Equality is, as much as freedom of expression, a pillar of our political system. John Rawls made both liberty and equality central to his political philosophy. Even if he gave precedence to liberty in conflicts which cannot be resolved, he made it clear that, in a liberal democracy, both are indispensable.

Calls for equality have been heard throughout history, but the modern concept dates from the Enlightenment, particularly from the works of Thomas Hobbes, John Locke, Jean-Jacques Rousseau and Immanuel Kant. Before, societies were characteristically divided into classes with different rights and duties. Since the late 18th century, the notion of legal equality has been dominant. It has not been universally applied, with slavery in the United States constituting a particularly egregious

violation. Further, women's political equality was generally not recognized until the 20th century. However, most societies opted for at least a theoretical ideal of equality.

It soon became apparent that legal equality alone did not produce effective equality. Segregation in the United States and gender and racial inequality flourished in societies that claimed to be egalitarian. Even the radical gender equality adopted by Soviet Russia in 1918 proved ineffective without serious remedies to enforce it.

On the other hand, it also became clear that effective equality could not become total, uniform equality. People have different abilities, appearance and needs. Mystical attempts at radical equality, such as Maoism, invariably lead to repression much worse than discrimination and the destruction of the individual.

The challenge for egalitarians becomes the formulation of the limits of equality. Just as freedom of expression, it could not be absolute. But what does effective equality include? We refer to the 2016 Supreme Court of Canada decision in *British Columbia (Workers' Compensation Appeal Tribunal) v Fraser Health Authority* (2016 SCC 25).

The first and probably most important principle was the partial redistribution of goods and services through the tax system and the welfare state. However, this economic side of equality is outside this essay's scope as it was not part of *Ward* (2021 SCC 43).

The second aspect of equality is the extension of legal equality to include judicially enforceable protection against discrimination. Since equality cannot and should not be total, this involves defining the protected categories. Race, religion, gender and handicap are examples of generally accepted categories. In *Corbiere v Canada (Minister of Indian and Northern Affairs)* (1999 CanLII 687 (SCC)), the Supreme Court defined appropriate categories as personal characteristics which cannot easily be altered. Per *R.O.c Ministre de l'Emploi et de la Solidarité sociale* (2021 QCCA 1185), in some cases, this definition can prove contentious, but it was not the central question of *Ward* since handicap is generally accepted as a forbidden ground (*M.G. c Retraite Québec*, 2023 CanLII 69168) of discrimination (*Stadler v Director, St Boniface*, 2016 MBCA 37).

Ward turned on the definition of "discrimination". It was clear that if there was no discrimination, the court had no jurisdiction as this was not a private law case for damages but a public one where discrimination is a prerequisite for success. The court had to decide if mere words relating to Mr. Gabriel's handicap were sufficient violations of his dignity to be considered discriminatory. If they were not, damages were irrelevant.

There is no doubt that words can hurt and humiliate. However, if they are deemed discriminatory on a prohibited basis, no one could ever successfully challenge the present dominant beliefs on subjects linked to prohibited grounds of discrimination. What if someone disapproves of homosexuality or gender equality? What if one dislikes the tenets of a particular religion or disagrees with the principle of First Nation autonomy? Or, as in Ward, what if an artist wants to satirize the "sacred cows" of

society? Certainly, they must be able to use words to express their beliefs. The most important finding in Ward is that “no one has a right not to be offended.” A democracy requires vigorous debate, and a goody-goody obligation of niceness is incompatible with freedom. In her dissent in the Court of Appeal, which became the foundation of the Supreme Court decision, Justice Savard states at par 138:

> [138] [TRANSLATION] I would like to end by reproducing in extenso what Justice Bich wrote in obiter in *Diffusion Métromédia CMR inc. v. Bou Malhab* (a decision handed down by the Court prior to the *Whatcott* decision). Her words, transposed to people with disabilities, sum up the approach that I take here.
>
> [105] Of course, this is not to condone racist comments, or homophobic or sexist comments, or any comments aimed at attacking or disparaging a group on the basis of a ground of discrimination prohibited by section 15 of the *Canadian Charter of Rights and Freedoms* or section 10 of the *Charter of Human Rights and Freedoms*. On the one hand, it must be remembered that criminal law limits hate speech (which undermines the very values promoted by freedom of expression), and that defamation proceedings also remain [...] a legal means of condemnation. We must also take into account, among individuals, the restrictions resulting from the possibility of harassment, which can be verbal, within the meaning of section 10.1 of the Charter of Human Rights and Freedoms (which is not the subject of this article). But on the other hand, all these limits having been set, there can be no question of making section 15 of the *Canadian Charter of Rights and Freedoms* or sections 10 and 10.1 of the *Charter of Human Rights and Freedoms* the basis for a new form of blacklisting. In short, we can't act on our discriminatory beliefs, but we can still express them, without crossing a certain threshold. [Emphasis added.] (2019 QCCA 2042 ).

Discrimination, therefore, applies to the distribution of goods and services, not the expression of contrarian views, mockery or disapproval of accepted rules or laws. The exception of hate, narrowly defined, is justified by the fact that there can be demonstrable harm from it. Putting a chill on all expressions that might offend brings about more harm than good.

**Reconciliation of Freedom of Speech with Equality**

The interpretation of “discrimination” by the majority judgment in Ward makes it possible to reconcile the fundamental principles on which our society is based. On one hand, we vigorously combat discrimination in areas like employment, housing, education and criminal law. On the other, we tolerate expressions that fall short of hate, even if they oppose the essence of human rights or, as in the case of Mr. Ward, mock, distress, and humiliate a person.

It is always regrettable when innocent people are hurt. The solution is not to limit speech but to educate citizens to become more discerning and gentle. For instance, in the case of a show, people

should realize that humour is not funny unless it is mordant, but this does not make it true. Other forms of verbal criticism should also not be taken at face value. Curtailing debate will only exacerbate the anger and aggressiveness of our times.  We can also encourage those offended to reply and rebut. Civil remedies remain a possibility, but there, too, we must be careful not to limit free expression.

In recent decades, free expression has been considerably diminished. Most commentators agree with it in principle but do not apply it to any cause they consider important. We know how society likes to impose a *pensée unique* on controversial matters and how severely it punishes those refusing to conform. The *Ward* judgment is a welcomed first step in correcting such tendency.

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### About the Author:

Image of Julius H. GreyJulius H. Grey is one of Canada's leading constitutional lawyers and public intellectuals. A member of the Quebec Bar and a recipient of its highest honour, the Ad.E., M$^{e}$ Gray obtained his law degrees from McGill and Oxford, and is a senior partner at the Montreal-based law firm Grey, Casgrain. He has pleaded numerous influential cases before all levels of court, including the Supreme Court of Canada, and was previously an instructor at the Faculty of Law at McGill University and Université de Montréal.  M$^{e}$ Grey is a frequent commentator in the media, and a strong defender of freedom of speech and academic freedom, M$^{e}$ Grey represented Mike Ward before the Supreme of Canada.

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# Diminishing Human Rights Protections in the Wake of *Ward*

### Author: Pearl Eliadis

Image:  Microphone in purple lightA long line of caselaw in Canada from the early era of the *Canadian Charter of Rights and Freedoms* – notably the 1985 decision in *R v Big M Drug Mart* [1985] 1 SCR 295 to the 2020 decision of *Quebec (Attorney General) v 9147-0732 Québec Inc,* 2020 SCC 32 – has emphasized the need for a large, liberal, and purposive, or generous, interpretation of human rights statutes. The same principle applies in *Quebec (Quebec (Public Curator) v Syndicat national des employés de l'hôpital St-Ferdinand,* [1996] 3 SCR 211).

The Quebec *Charter* was designed as a "national" human rights statute and a bill of rights. The statute is unique in Canada because it does not limit human rights complaints to the usual social areas (such as employment, goods and services, and housing), although of course these social areas are protected in Quebec too. Conversely, in other parts of Canada, human rights laws like the Ontario

*Human Rights Code* and the *Canadian Human Rights Act* do restrict complaints to specific social areas.

Quebec's approach has been different. The first paragraph of s.10 of the *Quebec Charter* provides that equality rights protections also operate to protect the right to full and equal recognition and exercise of human rights and freedoms:

> **s. 10:** Every person has a right to full and equal recognition and exercise of his *human rights and freedoms,* without distinction, exclusion or preference based on race, colour, sex, gender identity or expression, pregnancy, sexual orientation, civil status, age except as provided by law, religion, political convictions, language, ethnic or national origin, social condition, a handicap or the use of any means to palliate a handicap. (Emphasis added.)

The expression "human rights and freedoms" is significant because it means s.10 can be invoked to protect, among other human rights and freedoms, freedom of expression (s. 3) and the right to safeguard dignity, honour, and reputation (s. 4), which are provided for in an earlier chapter of the Quebec *Charter*.

Given the large, liberal, and purposive, or generous, interpretation of human rights statutes, it would be expected that the courts would respect the plain wording of the statute and the expansive protections explicitly provided. This would mean interpreting them in a way as to give those protections their full effect.

The majority's opinion in in *Ward v Quebec (Commission des droits de la personne et des droits de la jeunesse)*, 2021 SCC 43 on the other hand, had the effect of "reading down" the Quebec *Charter*, *de facto* if not *de jure*. As a result, where the right to safeguard dignity is in conflict with freedom of expression in equality cases, the Court in *Ward* made it much more difficult for discriminatory comments to underpin equality claims (at least outside the traditional social areas of employment, services, housing and the like), despite the fact that the Quebec *Charter* explicitly provides for precisely this possibility. The majority in *Ward* justified its decision on the basis that the right to safeguard dignity is difficult to delineate and that, in any event, the appropriate recourse for a violation of the right to dignity is almost always a defamation lawsuit.

The majority appears to have reasoned that in the interests of uniformity, the Quebec *Charter* should be interpreted in a manner that is comparable to the (lesser) coverage, or protection, offered in other Canadian jurisdictions (para 68). It is understandable that a jurisdiction offering a less inclusive level of protection would be subject to a judicial decision creating, or reading in, that protection as was the case for example in *Vriend v Alberta*, [1998] 1 SCR 493, with respect to the protection of persons on the grounds of sexual orientation. However, it is extraordinary to see a majority of the Supreme Court of Canada marching in the other direction.

Article 5(1) of *the International Covenant on Civil and Political Rights* provides that:

> 1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.

The majority's decision in *Ward* thus became a race to the bottom rather than an aspiration to a higher level of protection of human rights.

**Undoing Dignity?**

The *Universal Declaration of Human Rights* places human dignity at the foundation of human rights law. In *Law v Canada (Minister of Employment and Immigration),* [1999] 1 SCR 497, 170 DLR (4th) 1 [*Law v. Canada*], the Supreme Court described dignity as concerned with the integrity and empowerment of individuals and groups, by addressing unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits (para 53).

While the majority in *Ward* recognized the significance of dignity, it effectively diminished its role and the ambit of its protection in the human right cases. First, the Court argued that s. 4 of the Quebec *Charter* does not protect *persons* but rather the *humanity of persons* (para 56). Second, the Court suggested that to avoid debasing the concept of dignity, we should look to the atrocities of the Second World War for "historical context" (para 57). Pointing to the level of atrocities of the Second World War as a benchmark for safeguarding dignity, as the majority suggested, creates an almost impossibly high bar. It also creates licence for the majority to verbally attack minority rights. The words of McLachlin J. (as she then was) in *R. v Zundel,* [1992] 2 S.C.R. 731 are relevant here: "the view of the majority has no need of constitutional protection" (para 753). To require that the legal test for hate speech (or speech approximating hate speech) becomes the threshold for actionable discrimination, effectively strips vulnerable minorities of their capacity to seek the protection of human rights law for forms of expression that create the very social exclusion and stereotypes that lie at the heart of discrimination law.

Finally, the Court said there is no right to dignity *per se,* but, rather a right to *safeguard dignity* (2021 SCC 43, at para 58). The Court also said that dignity-based claims will generally be justiciable through civil law principles in defamation proceedings rather than human rights complaints. The result is that the Court narrowed the meaning to be given to s.10 and altered, for all practical intents and purposes, the structure of the Quebec *Charter*.

This approach might be contrasted with the 2013 Quebec Court of Appeal decision in *Calego International Inc. c Commission des droits de la personne et des droits de la jeunesse,* 2013 QCCA 924*.* In *Calego,* the Quebec Court of Appeal held that a series of racist, derogatory comments made by an employer about Chinese employees constituted discrimination under ss. 4 and 10 of the Quebec *Charter*. Notably, *Calego* did not rely on the specific protections in the Quebec *Charter* related to the social area of employment, but was based on the right to safeguard dignity. The Court in *Ward*

appears to have acknowledged that the impugned speech in *Calego* constituted a violation of the right to dignity in an equality rights setting (para 49), while disagreeing with the idea that the harm caused by discriminatory speech should be assessed from the perspective of a reasonable person who is targeted by the speech (para 81).

Further confusing matters, the Court then referred to a 2013 Supreme Court case called *Saskatchewan (Human Rights Commission) v Whatcott,* 2013 SCC 11 in which the *Saskatchewan Human Rights Code's* restrictions on hate speech were upheld, while striking down the provision that prohibited speech that ridicules or belittles people or otherwise affronts their dignity (the Quebec *Charter* has no comparable provisions dealing with hate speech or publications, while the Saskatchewan *Code* lacks a specific protection on the safeguard of dignity as a justiciable right). The word "otherwise" is important because it connects dignity claims to speech that merely belittles or ridicules people. It does not provide for or address the existence of discriminatory comments. The majority of the Court in *Ward,* however*,* appears to have interpreted *Whatcott* to mean that few discriminatory speech acts will be actionable if they fall short of hate speech or speech that forces people to argue for their very humanity, despite the significant differences between the Quebec and Saskatchewan statutes.

**Conflating Hate Speech and Discriminatory Speech Acts**

The majority in *Ward* thus conflated discriminatory speech acts and hate speech in cases where the right to safeguard dignity underpins the complaint. In the future, only cases meeting the much higher standard of hate speech are likely to be considered discriminatory. In this respect, the Court was critical of previous caselaw in Quebec:

> … this question draws attention to a trend by the Commission and the Tribunal, in their decisions, to interpret their home statute, the Quebec *Charter*, as giving them jurisdiction over cases involving allegedly "discriminatory" comments made by individuals… With respect, we are of the view that this trend deviates from this Court's jurisprudence and reflects a misinterpretation of the provisions at issue in this case, particularly ss. 4 and 10 of the Quebec *Charter*…, including in a context where expression is allegedly "discriminatory". It leads to the suppression of expression whose content is perceived to be discriminatory and to significant monetary awards against the speakers (para 4).

Still, the Court acknowledged that the purpose of preventing hate speech is to prevent discrimination, but it was unable to see circumstances where discriminatory remarks could be actionable except in extreme cases like hate speech (2021 SCC 43, at para 73). This reasoning ignores the fact that discrimination law has used speech acts as evidence of, and part of, discrimination itself. In *Calego*, Mr. Justice Vézina rejected the employer's argument that discriminatory speech had to amount to hate speech in order to be considered discriminatory (paras 30ff and paras 110-111). He also noted that defamation and human rights complaints are not mutually exclusive (para 40). The majority of the judges of the Court of Appeal in *Calego* further noted that ss. 4 and 10 of the Quebec *Charter* should

be read together and that the protection of dignity is not the same thing as a right not to be offended, a frequent critique of restrictions on freedom of expression. The Court went on to emphasize that while a free society that values free speech must accept 'some excesses,' the speech acts in *Calego* were held nonetheless to be discriminatory (para 99).

The minority of the Court in *Ward,* on the other hand, argued that speech can cause harm without having to meet the very high standard of hate speech, and pointed out that there are several types of limits on freedom of expression that do not have to meet the standards of hate speech (para 157). They also observed that freedom of expression does not limit administrative decision?makers' ability to address harmful speech that is not hate speech (*Ward*, 2021 SCC 43; citing *Canadian Centre for Bio-Ethical Reform v Grande Prairie (City),* 2018 ABCA 154, at paras 70 and 114).

It is worth looking at these other jurisdictions with which the Supreme Court in *Ward* was seeking uniformity. There are examples in human rights law of speech that constitutes or incites discrimination that does not constitute hate speech, including discriminatory notices, signs and symbols and language that constitutes harassment, among others. In fact, there has already been a case involving comic routines and performances in British Columbia, where discriminatory comments were made against a patron in an open mic show in a restaurant ((*Ismail v. British Columbia (Human Rights Tribunal)*, 2013 BCSC 1079). The discriminatory nature of the comments was clearly part of – if not the main part of – the conduct that the complaint was based on, according to the BC Supreme Court ( 2013 BCSC 1079).

**Intent and Harm to the Victim**

Since 1985, the Supreme Court has said that the test of discrimination lies in its effect and not intent ( *Ont. Human Rights Comm. v Simpsons-Sears*, [1985] 2 SCR 536). The Court in *Whatcott* reiterated this point: the "key is to determine the likely effect of the expression on its audience keeping in mind the legislative objectives to reduce or eliminate discrimination." (para 58). The term "hatred" in legislative hate speech prohibitions should be applied objectively, to determine whether a reasonable person, in comparable contexts and circumstances, would view the expression as likely to expose a person or persons to the detestation and vilification that is required to amount to hate speech (paras 35 and 58). Intention may be relevant for decisions regarding punitive damages, but not for evidence of discrimination itself (see *Canada (Human Rights Commission) v Taylor* [1990] 3 S.C.R. 892, at 931-932; *Whatcott).*

Nonetheless, the majority of the Court in *Ward* was of the view that Mr. Ward's intent to attack "sacred cows" was sufficient to exonerate him, despite the fact that both his video and his show had specifically mentioned physical characteristics which were the result of a disability (paras 121-122). The comedy routine would have made no sense without reference to Mr. Gabriel's disability, at least based on any objective or reasonable person's assessment of the situation. In human rights law, the impugned behaviour may have both discriminatory and non-discriminatory dimensions. Both can coexist without being fatal to a discrimination claim. This was clearly the case in *Ward*, where the characterization of Mr. Gabriel as being a "sacred cow" was largely the result of his disability. As M$^{e}$

Fournier and M$^{e}$ Tessier observe in their article, the focus on a particular aspect of intent, may signal a reemergence of intent as a relevant factor in an area of law where, as noted earlier, the impacts should be the principal consideration. Even if intent does become relevant in cases like this one, the fact that Mr. Ward was seeking to attack so-called “sacred cows” is incoherent without understanding why he chose them in the first place.

**Social Harm, Humour and Hate**

In *Whatcott* and in the 1990 decisions in *Canada (Human Rights Commission) v Taylor* (paras 918-919) and *R. v Keegstra*, [1990] 3 SCR 697 (paras 746-748), the Supreme Court held that restrictions on hate speech are justified under s. 1 of the *Charter,* not only because of the emotional distress caused to members of vulnerable groups, but also because hate speech tends to propagate premises of inferiority that may gradually desensitize people and lay the groundwork for later, broad attacks.

Humour can be an especially effective vehicle for disseminating hateful messages.

While the majority of the Court in *Ward* declined to give impunity to comedians in matters of hate speech (para 90), it went on to say that humour, whether in good or in bad taste, will “rarely” give rise to an attitude of hatred and discrimination (para 89). The Court observed that “exaggeration, over? generalization, provocation and distortion of reality” usually allow audiences to identify these methods, and that they will be “discerning enough not to take everything said at face value” (para 89). According to the majority, only in exceptional cases will expression have enough motivating force to lead to discriminatory treatment. This assurance has considerably less persuasive effect, however, when juxtaposed with the minority’s observations:

> [216] In this case, Mr. Ward’s message about Mr. Gabriel, albeit one said in jest, was that he was disposable and that society would be better off without him. Unlike other “sacred cows” targeted by Mr. Ward, Jérémy Gabriel fell victim to a stark power imbalance here. The focus of the jokes was not only on Mr. Gabriel’s disability but was connected to harmful, dehumanizing notions associated with the worth of children with disabilities. In this way, the speech strayed far from “the quest for truth, the promotion of individual self? development or the protection and fostering of a vibrant democracy” said to underlie s. 2(b), and which will justify insulting humour in other contexts. The mere fact that it provoked laughter, or that the speech was delivered in performance, does not change Mr. Ward’s message. (References omitted) (para 216).

It is noteworthy that the impacts on people with disabilities and children were given scant attention by the majority, while the minority emphasised the role of Canada’s obligations under *Convention on the Rights of Persons with Disabilities* and the *Convention on the Rights of the Child.* In this respect, the minority noted not only the damage that bullying (which the minority observes Mr. Ward had indeed committed) can cause to a young person, but also that it is the “precise kind of harmful conduct Canada has a legal obligation to take appropriate measures to prevent under art. 19 of the United

Nations *Convention on the Rights of the Child*" (para 197). The minority further noted the need for "child?specific non?discrimination clauses" which are the direct result of the special considerations for children and their vulnerability (2021 SCC 43, at para 198) and that the obligation to root out discriminatory bullying is:

> …amplified by art. 23 of the CRC which states that a child with a disability "should enjoy a full and decent life, in conditions which ensure dignity, promote self?reliance and facilitate the child's active participation in the community" and obliges Canada to pursue the "maximum inclusion in society" of disabled children… Canada has also ratified the United Nations Convention on the Rights of Persons with Disabilities [which] requires that states guarantee persons with disabilities equal and effective legal protection against discrimination on all grounds, to ensure full and equal enjoyment of all human rights and fundamental freedoms by children with disabilities and to take appropriate measures to protect persons with disabilities from exploitation, violence and abuse (arts. 5, 7 and 16) ( para 198).

**Impacts on Canada's Human Rights Systems**

The practical impact of the Ward case has been an erosion of the role and reach of Quebec's human rights system. In Speaking out on Human Rights: Debating Canada's Human Rights System, I documented the steady decline of the jurisdictional competence of the Commission and the Tribunal in Quebec, as a result of multiple administrative and judicial factors, and the resulting reduction in the number of cases that are being brought before the Tribunal. Sébastien Sénécal and Christian Brunelle (as he then was), among others, have noted the lack of deference to the Tribunal as a specialized judicial decision-maker. It is noteworthy that in 2022, the Quebec Human Rights Tribunal received only 42 cases during the entire year. The *Ward* case has further reduced the role of the Commission in terms of the types of cases it can hear. The practical impacts of *Ward* have been striking. The Quebec Commission was forced to drop dozens of cases that were under investigation. According to Le Devoir , by December 2022, only a year after the *Ward* decision was rendered, the Commission already had to close 194 cases related to discriminatory comments, thus negatively impacting access to justice for litigants who would otherwise have access to the human rights system – many of whom now are forced to take the costly route of going to the courts in defamation proceedings.

Significantly, in an amendment tucked quietly into Bill 96, the omnibus bill on language law and the reinforcement of the French language, the Quebec government modified the Quebec *Charter* to clarify that *all* human rights and freedoms must be put in the balance when assessing proper limits based on fundamental values. No new cases have tested the impact of this amendment as yet, but the ground appears to be prepared for a new test case to revisit many of the more troubling aspects present in *Ward*.

**Conclusion**

Concerns about the overreach of equality law and corresponding negative impacts on freedom of expression are legitimate concerns that require both the courts' careful attention and the protection of fundamental freedoms. However, there are cases where discriminatory conduct may take place through verbal conduct such as speech, and where the conduct attacks a person on the basis of stereotypes that diminish their right to equality. This includes the right to equality in the safeguard of dignity.

Verbal conduct such as bullying, and vituperative and degrading comments that diminish equality based on stereotypes need not rise to the level of hate speech and should properly be the subject of human rights legislation. Critics are right to point out that comments that merely offend, or belittle their targets are unlikely to attain the level of scrutiny that should be brought to bear in discrimination cases. But this argument is misleading because, of course, "being offended" has never been a criterion for either discrimination or hate speech. Obviously, anyone who is the subject of either type of speech is offended, but that is not, and has never been, the legal criterion.

Discriminatory statements and hate speech are not the same thing. Given the recent changes to the Quebec *Charter* that were introduced through Bill 96, mentioned above, and the likelihood of a new appointment to the Supreme Court of Canada in the near future, serious consideration should be given to revisiting the question of discriminatory remarks in Quebec through litigation in a case capable of clarifying the law.

Finally, the broader issue of the deep damage that has been done to the Quebec human rights system over the years through the steady erosion of its capacity to receive and adjudicate complaints is part of a broader structural issue that goes well beyond the *Ward* case, but it is also one that requires careful thought and consideration of reform in this province so that our human rights systems are both functional and accessible.

**Citation:** Pearl Eliadis, "Diminishing Human Rights Protections in the Wake of Ward" *in Humour, Hate and Harm: Rethinking Dignity, Equality and Freedom of Expression after Ward v Quebec (Commission de droit de la personne et des droits de la jeunesse): a Special Issue of the PKI Global Justice Journal* (2023) 8 PKI Global Justice Journal 8.

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Image of Pearl Eliadis

Pearl Eliadis is a human rights lawyer based in Montréal and Associate Professor (professional) at the Max Bell School of Public Policy. A member of the Quebec and Ontario bar associations, Pearl has worked in Canada, and internationally, and successfully led complex, global human rights and governance projects for multilateral agencies, including the UN. She also teaches at the Faculty of Law, McGill University and she is a Full Member of the McGill Centre for Human Rights and Legal Pluralism. Her monograph Speaking Out on Human Rights: Debating Canada's Human Rights System, won the Huguenot Society of Canada Award for freedom of expression and conscience in 2014 and in 2017 she was named a Human Rights Changemaker by Equitas. She currently serves as a member of the Court Challenges Program, based at the University

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# Dignity, Equality and Freedom of Speech or Can Words Be Discriminatory?

## Authors : M$^{e}$ Philippe-André Tessier & M$^{e}$ Stéphanie Fournier

Image of scales of justiceThe Supreme Court ruling in *Ward v. Québec (Commission des droits de la personne et des droits de la jeunesse)* (2021 SCC 43) has repercussions reaching far beyond the stand-up comedy show where it all began. The highest Court reframed the law regarding discriminatory remarks and repositioned notions of freedom of expression, the right to the safeguard of one's dignity, and the right to equality in the legal arena. In our view and with respect, the principles put forward by the majority undermine the very essence of the right to equality under the *Charter*.

In a split decision (5 to 4), the Supreme Court rejected the legal framework that had guided Quebec courts in matters of discriminatory remarks since the Quebec Court of Appeal's 2013 decision in *Calego International inc. c. Commission des droits de la personne et des droits de la jeunesse* (2013 QCCA 924) where the Court of Appeal had asserted that the safeguard of dignity required that discriminatory remarks must exceed a certain threshold of gravity. In doing so, it set out a new approach based on novel concepts with respect to the protection against discrimination. These new elements considerably increase the plaintiff's burden of proof and have forced the Commission to refocus its handling of complaints and review its approach to investigations where discriminatory comments infringe dignity rights.

In *Ward*, the Supreme Court of Canada established a two-step test for resolving a conflict between the right to freedom and the right to the safeguard of dignity. In addition to the usual framework for analysing discrimination, this test requires that:

1. 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.
2. A reasonable person would view the expression, considered in its context, as likely to lead to discriminatory treatment of the targeted person.

However, a closer look leads us to conclude that the approach now imposed by the Court seems to weaken protection against discrimination. In this article, we will attempt to demonstrate that the new legal framework represents a setback for the right to equality. And when the foundation of equality is weakened, society as a whole loses out.

**Understanding the Unique Scope of Protection of the Right to Equality Offered by the Quebec *Charter***

The equality standard enshrined in s. 10 of the Quebec *Charter* of human rights and freedoms ("Quebec *Charter"*) must be distinguished from all the other forms of protection against discrimination because of its unique scope as compared to human rights statutes in other Canadian jurisdictions. In addition to the usual sectors of activity or social areas set out in ss. 11 to 19 (such as work, goods and services ordinarily offered to the public, contracts, and access to public places), the right to equality also applies to the recognition and exercise of all the rights proclaimed by the Quebec *Charter*, namely fundamental freedoms and rights, such as freedom of expression (s 3) and the right to the safeguard of dignity, honour and reputation (s. 4 Quebec *Charter).* Nonetheless, once this requirement is met, the right to equality should operate with an autonomous scope and legal force that is distinct from the particular right with which it is combined. For this reason, the right to the safeguard of a person's dignity in s. 4 of the Quebec *Charter*, which is the legal basis of the *Ward* case, should be understood as entirely distinct from *the right to the preservation of dignity in full equality,* which is the result of combining ss. 4 and 10 of the Quebec *Charter*.

However, in *Ward,* the Court made no such distinction and ignored the autonomous scope of the right to equality. The majority said, "*that the conflict is not between the right to equality and freedom of expression but rather between the complainant's right to the safeguard of his dignity and the defendant's right to freedom of expression*" (para 43). In doing so, the Court considerably weakened the right to equality, denying the existence of this right distinct from the other right to which it is attached.

The Court's approach in *Ward* may be contrasted with the 2015 *Quebec v. Bombardier Inc.* (2015 SCC 39) case where the Supreme Court wrote that the right to equality does not require proof of a "double violation" (*i.e*., the infringement of a right such as freedom of speech in addition to proof of discrimination). In the Court's opinion, such a requirement would have rendered the right to equality redundant (para 54).

With respect, the issue in the *Ward* case should not have been about whether Jérémy Gabriel's right to dignity was violated, but rather whether his right to equality was "impaired or nullified" in the recognition or exercise of the right to the safeguard of his dignity (*Commission des droits de la personne et des droits de la jeunesse (DeBellefeuille) c. Ville de Longueuil*, (2020 QCTDP 21, paras 151-152). This was not the approach taken by the Court. Instead of applying the framework of the right to equality, it required proof of an infringement of the safeguard of Jérémy's dignity as part of the burden of proof in a discrimination case (paras 40, 42).

The Court also relied on the first paragraph of s. 9.1 of the Quebec *Charter* to require the demonstration of an infringement of the right to the safeguard of one's dignity. At the time of the *Ward* case, the section read as follows:

> S 9.1. In exercising his *fundamental freedoms and rights*, a person shall maintain a proper regard for democratic values, public order and the general well?being of the citizens of Québec. (emphasis added)

The Court pointed out that s. 9.1 provides the legal framework for limiting or restricting the scope of *fundamental rights*, *i.e.,* the rights set out in ss. 1- 9 of the Quebec *Charter*. It therefore did not apply to the right to equality. It was on this premise that the majority concluded that the rights that were really in conflict and needed to be reconciled in a dispute were freedom of expression and the right to protection of one's dignity are engaged (paras 79, 80).

After the decision was rendered in October 2021, the legislator amended s. 9.1 of the Quebec *Charter*, the first paragraph of which now reads as follows:

> S 9.1. In exercising his *human rights and freedoms*, a person shall maintain a proper regard for democratic values, State laicity, the importance given to the protection of French, public order and the general well-being of the citizens of Québec. (emphasis added)

It remains to be seen if the new wording is compatible with the reasoning proposed by the majority since the *Charter's* limiting provision now applies to all the rights set out in Part I, which include the right to equal recognition and exercise of rights and freedoms. As a result, s. 9.1of the Quebec *Charter* now extends to fundamental rights (ss 1-9), as well as the right to equality (ss 10-19), political rights ( ss. 21-22), judicial rights (ss 23-38) and economic and social rights (ss. 39-48).

**Restrictive Interpretation and Liberal Reading of S. 4 of the Quebec *Charter***

The Quebec *Charter* differs from other human rights legislation in the country because it is the only one that enshrines a right to dignity. Unlike other legislative instruments, dignity is recognized as a substantive right and not just as a fundamental value underlying all other rights and freedoms. Section 4 reads as follows: “Every person has a right to the safeguard of his dignity, honour and reputation.”

In 1996, the Supreme Court interpreted and defined the scope of the notion of “dignity” enshrined in section 4 of the Quebec *Charter* (*Quebec v Syndicat,* [1996] 3 SCR 211, at paras 99-108). It adopted a broad, liberal and generous interpretation of this concept, recognizing two meanings. The first is an internal meaning, referring to the respect and esteem that a person owes to oneself (self-respect). The second refers to the humanity of every being, which holds that a human being must be treated as an end in himself or herself. “It is in these two senses, which could be characterized as internal and external, that we must understand "dignity" within the meaning of the *Charter*, *which itself makes no distinction* (emphasis added) ([1996] 3 SCR 211, at para 101).

In *Ward*, however, the Court adopted a narrower definition of dignity. With no explanation, it disregarded the internal meaning of dignity that refers to self-respect, which would have applied

precisely in this case.

This restrictive interpretation of s. 4 appears to have been based on a strict grammatical analysis of its wording, which is not an appropriate method of interpretation for constitutional and quasi-constitutional statutes. It is a well-established principle that the rights set out in the Quebec *Charter* call for a broad and generous interpretation (see also *Québec (Commission des droits de la personne et des droits de la jeunesse) c Montréal (Ville)*; *Québec (Commission des droits de la personne et des droits de la jeunesse) c Boisbriand (Ville)*, 2000 CSC 27 at para 30. The Court's approach is even more difficult to explain given that the Court itself insisted on a liberal reading while at the same time asserting that s. 4 of the Quebec *Charter* and section 14 of the *Saskatchewan Human Rights Code,*[1] as it read before the SCC invalidated it in part in *Saskatchewan (Human Rights Commission) v. Whatcott* (1 SCR 267), protect similar rights and interests.

**Are We Witnessing the Introduction of an "Intent Test" in the Burden of Proof to Establish *Prima Facie* Discrimination?**

In its reasons, the majority upheld the trial judge's finding of facts that Mike Ward did not choose Jérémy Gabriel because of his handicap, but rather because he was a public personality who attracted public sympathy and seemed to be untouchable. By emphasizing Mr. Ward's motives (Jérémy Gabriel's notoriety) rather than the nature of his jokes (ridiculing his disability) and their effect or impact on Mr. Gabriel, the judges concluded that the reason for targeting him was not discriminatory ( 2021 SCC 43, at paras 91, 97, 100). Therefore, the intention behind Mr. Ward's decision to mock Jérémy Gabriel has become more important than the effect of his words on the victim.

Such reasoning is a cause for concern and might represent a major setback in the protection of the right to equality. Since the Supreme Court of Canada's seminal decision in *Ontario Human Rights Commission v. Simpson-Sears* ([1985] 2 SCR 5360) the intent to discriminate has been rejected consistently as a relevant factor in construing human rights legislation aimed at eliminating discrimination. Rather, such laws were understood to be aimed at addressing the result or effect of the alleged discriminatory conduct, not the intent behind it.

In cases of adverse effect discrimination, this principle is fundamental. This is why a rule or policy adopted by an employer or a service provider that applies equally to all may nevertheless be discriminatory if it affects a person differently than others, based on a protected ground. The lack of intention to discriminate is not a criterion to determine whether the rule is discriminatory.

*No right not to be offended and no compensation for emotional harm.*

The Court in *Ward* mentions on several occasions that, in our democratic society, there is no right not to be offended. It points out that:

> …the applicable test must not be focused either on the repugnant or offensive nature of the expression or on the emotional harm caused to the person. Otherwise, it would amount to

censoring expression because of its content or its impact on a person, regardless of its discriminatory effects (at para 82).

The applicable test regarding discriminatory effects referred to by the Court takes two forms. On the one hand, it asks whether the words in question are likely to incite others to detest the victim's humanity on the basis of a prohibited ground of discrimination (which is the test for hate speech). Secondly, it seeks to determine if the expression, considered in its context, is likely to lead to discriminatory treatment.

The Court further decided that to obtain compensation, the victim of discriminatory remarks must demonstrate, by a preponderance of evidence, that the remarks would likely culminate in further discrimination. It is this hypothetical discriminatory treatment resulting from the remarks that the Court seems intent on preventing. In other words, it doesn't matter if you say what you think, as long as nobody acts on it.

In arriving at this conclusion, the Court considerably increased the plaintiff's burden of proof by requiring proof of a social prejudice (i.e. hypothetical social and discriminatory effects of the impugned remarks) a concept that does not exist in the Quebec *Charter*.

Moreover, the Court does not explain the distinction between emotional harm that cannot be compensated and the right to be compensated for the moral prejudice resulting from a discriminatory attack on one's dignity.

The Court's approach fails to recognize that offensive language can have serious consequences and harmful effects because of embedded stereotypical beliefs about historically disadvantaged people who continue to experience discrimination and racism to this day (see *Hansman v. Neufeld*, 2023 SCC 14, para 84-89; see also *British Columbia Teachers' Association v Neufeld*, 2023 BCSC 1460 at para 54). Remarks can damage self-esteem by spreading the idea that the humanity of the people at whom they are directed are not valued members of society. These experiences can leave deep scars and create feelings of fear and exclusion, in stark contrast to the spirit of the Quebec *Charter*. Racist, homophobic, transphobic, sexist, and ageist remarks can affect people's sense of belonging to society and their sense of personal safety.

*Can Words Be Discriminatory?*

In a 2017 case, the Supreme Court seemed to give a positive answer to this question *(British Columbia Human Rights Tribunal v. Schrenk*, 2017 SCC 62). This ruling involved a worker, Mr. Schrenk, who made racist and homophobic comments about a co-worker. Both men were working on the same site although employed by two different entities. The victim filed a complaint before the British Columbia Human Rights Tribunal against Mr. Schrenk, alleging employment discrimination based on religion, place of origin and sexual orientation. The latter protested and argued that since he was not the employer or in a position of authority, his conduct and remarks could not be tantamount to discrimination regarding employment under the *British Columbia Human Rights Code*.

Right from the outset, the Supreme Court concludes that the impugned remarks amounted to discrimination:

> [1] This case is about the scope of the prohibition against discrimination "regarding employment" under s. 13(1)(b) of the *British Columbia Human Rights Code* (…)The crux of Mr. Schrenk's argument is simple: as he was not in a position of economic authority over Mr. Sheikhzadeh-Mashgoul — he was neither his employer nor his superior in the workplace — his conduct, however egregious, could not be considered discrimination "regarding employment" within the meaning of the *Code*.
>
> [2] At issue, then, is the question of whether discrimination "regarding employment" can ever be perpetrated by someone other than the complainant's employer or superior in the workplace. *To be clear, the issue is not whether Mr. Schrenk's alleged conduct would amount to discrimination; no one disputes this. Rather, the question in this appeal is whether such discrimination was "regarding employment*".
>
> [3] *I conclude that it was*. (emphasis added) (2017 SCC 62)

The issue at stake in this dispute was not whether the remarks were discriminatory but whether the case fell within the scope of s. 13(1)(b) of the *British Columbia Human Rights Code* that confers protection against employment-related discrimination.

As mentioned previously, in other legislation in Canada, the protection against discrimination is limited to certain areas or sectors of activity, such as employment. The scope of protection of the right to equality is not as broad and extensive as the one offered by the Quebec *Charter*. Nonetheless, the Supreme Court adopted a broad interpretation of the terms "regarding employment" to include remarks made by a third party to the employment relationship but uttered in the workplace.

More importantly, the Supreme Court concluded that the remarks were discriminatory without referring to freedom of speech and without requiring the demonstration of a discriminatory effect or of social harm. It would have been helpful if the Court had explained why it did not adopt the same approach in the *Ward* ruling.

**Closing Remarks**

Now, more than ever, we must look to the origin and intent of the Quebec *Charter* to understand the full impact of this Supreme Court decision. We must remember the important role of human dignity in shaping rights and freedoms in Quebec. The intent of the *Charter* was announced in a 1974 statement accompanying the bill that led to its creation. It solemnly declared fundamental human rights and freedoms so that they could be guaranteed by the collective will, be better protected against any violation, govern relations between people in accordance with human dignity, and determine the intrinsic rights and freedoms in a manner that would ensure the development of every human being.

**Citation:** Philippe-André Tessier and Stéphanie Fournier, "Dignity, Equality and Freedom of Speech or Can Words Be Discriminatory?" *in Humour, Hate and Harm: Rethinking Dignity, Equality and Freedom of Expression after Ward v Quebec (Commission de droit de la personne et des droits de la jeunesse): a Special Issue of the PKI Global Justice Journal* (2023) 8 PKI Global Justice Journal 8.

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Maître Stéphanie Fournier serves as legal counsel for Quebec's Human Rights and Youth Rights Commission, the Commission des droits de la personne et des droits de la jeunesse. She has had the opportunity to represent the Commission before the courts, including the Court of Appeal and the Supreme Court of Canada, where she represented the Commisison in the *Ward v Quebec* case. Maître Fournier lectures regularly on equality law and has published articles on various aspects of protection against discrimination. She teaches human rights law at the École du Barreau (Quebec' Bar Association School). Previously, she practiced law with the Aboriginal and Constitutional Law Directorate of the Quebec Department of Justice. Maître Fournier clerked at the Quebec Court of Appeal for the Honourable Justice André Forget and the Honourable Justice Pierre J. Dalphond.

Image of Philippe-André Tessier**Philippe-André Tessier**:
Mr. Philippe-André Tessier was appointed President of the Quebec Human Rights and Youth Rights Commission by the National Assembly on February 28, 2019. He also held the role of Vice-President in charge of the Charter mandate since December 2017. Prior to his appointment, Mr. Tessier was Practice Group Leader of Robinson Sheppard Shapiro's Labour Law Group, acting both as a lawyer and as a Certified Industrial Relations Counsellor. A graduate of Université de Montréal, he is a member of the Québec Bar and a member of Ordre des conseillers en ressources humaines et relations industrielles agréés du Québec (Quebec order of chartered human resources and industrial relations advisors). He is also a certified director of the Collège des administrateurs de société.

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# The Impact of *Ward:* Concerns About Backtracking in the Fight Against Hate in Quebec

### Author: Fo Niemi

Image: Microphone in blurred backgroundIt is accepted by many pundits, legal professionals and human rights advocates in Canada, including in Quebec that the Supreme Court's decision in *Ward v. Quebec*, 2021 SCC 43 is a major victory for free speech over equality rights and the right to safeguard dignity. However, for those who are vulnerable to discrimination because of factors such as race, gender, disability, sexual orientation and religion, there is little to celebrate.

The legal and social impacts of this decision on the national battle against hate and discrimination are both profound and profoundly detrimental at the personal and community levels, with ramifications for safety, dignity and liberty. The Center for Research-Action on Race Relations (CRARR) is a Montreal-based independent, non-profit, civil rights organization that was founded in 1983. It promotes racial equality and combats racism in Canada, supporting victims of discrimination based on race, religion, ethnic or national origin, citizenship status and related characteristics. Since 2000, CRARR has represented and assisted more than 1,000 persons in different cities before administrative and common law tribunals, regulatory bodies and statutory human rights agencies. CRARR has witnessed the impacts of the *Ward* decision first hand, with respect to the progressive development of the law and the implications for minorities seeking support.

**Overview of the Ward decision**

In a narrow 5-4 decision in 2021, the Court ruled on jokes made by professional comedian Mike Ward as part of a public comedy routine. The routine belittled Jérémy Gabriel, a well-known young performer with disabilities, however, did not constitute a discriminatory violation of Gabriel's right to the safeguard of his dignity ( para 113).

In my view, the Court has constitutionally and socially legitimized verbal conduct, such as jokes, slurs and other statements, that denigrate members of minority groups who are protected by human rights legislation.

Reversing the Quebec Human Rights Tribunal's earlier decision in favour of Gabriel, as well as that of the Quebec Court of Appeal, the Supreme Court of Canada concluded that Mr. Ward had ridiculed Mr. Gabriel due to his fame, not his disability. Consequently, the case was not characterized as one of discrimination, but rather of defamation, over which the Quebec Human Rights Tribunal has no jurisdiction under Quebec's *Charter of Human Rights and Freedoms* ("the Charter") (para 113).

The Court laid out two new foundations for the right to safeguard one's dignity, a unique feature found of s. 4 of the Charter which, as others in this series have noted, is not found in any other human rights laws in Canada. Due to Mr. Ward's professional activities as a comedian, the Court elevated the notion of freedom of expression, characterizing dignity as a lofty concept that is for all humanity and not for particular people:

> To be contrary to s. 4 of the *Quebec Charter*, conduct must therefore reach a high level of gravity that does not trivialize the concept of dignity. Such conduct cannot be assessed in a purely subjective manner; an objective analysis is required instead, because dignity is aimed at protecting not a particular person or even a class of persons, but humanity in general (para 57).

To this effect, said the Court, to a reasonable person:

> making fun of a person's physical characteristics may be repugnant; it most certainly is when the person in question is a young person with a disability who contributes with determination to society. But expression of this kind does not, simply by being repugnant, incite others to detest or vilify the humanity of the person targeted." (Emphasis added) (at para 109).

In addition to this first test involving the incitement to detest or vilify a person's humanity, the Court laid out a second test whereby 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." (para 48).

The *Ward* decision had immediate repercussions on discrimination cases within the Quebec human rights system, and on those who need the support of that system. The following examples illustrate some of the consequences for victims of discriminatory remarks who have come to CRARR for support.

**The "*Ward* Effect"**

***Rojas v. Mongrain***

In *Rojas v. Mongrain,* 2021 QCTDP 45, Mr. Walter Rojas, a naturalized Latin-American Canadian was visiting Montreal from Newfoundland and Labrador in 2019. He was denied access to an Airbnb service in Lasalle, a Montreal borough, due to his late arrival. The resulting dispute with the host involved the Respondent host hitting Rojas' arm as if to chase him away, while suggesting that he did not like being hit by a woman, and threatening to report him to immigration authorities to have him expelled from Canada.

The right to equal treatment with respect to a services was at the heart of the complaint filed by CRARR on Rojas' behalf with the Commission. The complaint was based on ethnic or national origin in commercial services, and the right to the safeguard of his dignity. The Commission upheld the complaint in the spring of 2021 and recommended $5,000 in moral damages and $1,000 in punitive damages. However, the Commission declined to represent Rojas before the Human Rights Tribunal (an increasingly common practice in Quebec), forcing him to to go alone and at his own expense.

In December 2021, the Human Rights Tribunal dismissed his case, on the basis of *Ward.* Tribunal Member Luc Huppé ruled that first, Mr. Rojas did not meet the evidentiary burden of proving that his ethnic or national origin was a factor in the denial of Airbnb services. As for the discriminatory statements, Justice Huppé noted that "in accordance with the criteria retained by the Supreme Court of Canada in *Ward*, the emotional prejudice – well understandable as experienced by Mr. Rojas due to the offensive remarks by Ms. Mongrain – is not sufficient in the circumstances to form the basis of a claim under ss. 4 and 10 of the Charter.

Mr. Justice Huppé recognized that the Tribunal's decision came on the heels of the *Ward* decision rendered two months earlier, but after the Commission's investigation, and of course after Mr. Rojas' complaint being filed. In applying the two tests established by the Supreme Court, Justice Huppé concluded that the Respondent's words made in her private exchange with Mr. Rojas did not fall within the category of "exceptional cases" or constitute an "incitement to detest or vilify the latter's humanity", as required by the Supreme Court's test – which now requires discriminatory remarks to rise to the level of hate speech.

Justice Huppé further added that the Respondent's offensive words did not lead third parties to impose a discriminatory treatment on Mr. Rojas; rather, they were thoughtless words which reflected a lack of open-mindedness towards immigrants. To the Tribunal, there was a low, if not non-existent, risk that such private remarks could produce discriminatory effects on Mr. Rojas. Mr. Justice Huppé was of the view that since Mr. Rojas had become a Canadian citizen since 2008, the offensive remarks should not have been of real concern to him (para. 25).

Mr. Rojas spent more than two years going through the human rights process. In the end, he was told that a denial of service combined with threats of deportation – an indirect reference to national and ethnic origin – was not a discriminatory attack on his rights to equality or dignity. The case is significant in part because it was possible to consider limiting the damage created by the *Ward* decision by reasoning that the Supreme Court was only creating those restrictions in the context of a direct conflict between the right to freedom of expression and to the safeguard of human dignity outside of the traditional social areas of protection, such as goods and services. What is surprising about this case is that the courts appeared to be extending the rationale of the Supreme Court in *Ward* , even to these traditional areas of protection and equality rights law. The implications of this approach potentially have an impact at the national level.

**An institutional withdrawal from action at the Commission**

A few months later, the *Ward* effect led the Quebec Human Rights and Youth Rights Commission to issue, in a press release dated April 19, 2022, its position concerning its jurisdiction to investigate complaints involving "discriminatory remarks" and s. 4 and s. 10 (the non-discrimination provision) of the Quebec *Charter*. According to its new position;

> ...comments that target a discriminatory ground (e.g., national or ethnic origin, language, sexual orientation, disability or religion) must also lead to discriminatory treatment in the exercise of one of the rights set out in sections 10 to 19 of the *Charter*, that is, cause prejudice beyond the right to dignity of the individual or to incite others to discriminate on similar grounds. Thus, cases of discrimination, profiling or harassment in employment, housing, public services or legal acts will remain admissible.

In other words, complaints that feature stand-alone "discriminatory remarks", such as slurs, jokes and other such statements, will no longer be within the jurisdiction of the Commission and will be either

refused at the outset or closed, which the Commission did in December 2022 closing almost 200 cases.

In the same press release, the Commission committed itself to “continue its work of raising awareness to combat prejudice that leads to discrimination and exclusion by conducting campaigns that address racism and stereotypes that undermine the right to dignity.”

Concerns were immediately raised by organizations – including CRARR – that are serving communities most vulnerable to hate crimes and hate incidents. Community-based organizations working with equality seeking groups recognize the inextricable connection between words and concrete acts. Communities that are characterized by race, religion, gender or gender identity, sexual orientation, religion and ethnic or national origin, that often experience hate-based verbal and physical actions of physical and psychological violence, have apprehensions about the Commission’s refusal of accepting complaints involving “discriminatory remarks”.

This concern comes because the refusal can be seen as part of a gradual retreat from the agency’s statutory mandate to protect them from discrimination and hate-based violations of rights guaranteed by the Charter as a whole. It remains important to keep a distinction between discrimination and hate: discriminatory remarks may not rise to the level of hate speech, but may nonetheless form a basis for finding of discrimination, or at least that was the case until *Ward*.

With respect to hate speech, in September 2019, the Commission released a 330-page research report concerning incidents that involve xenophobic and Islamophobic dimensions. In it, the Commission reiterated its recommendation for a comprehensive Quebec policy against hate incidents. Hate incidents are defined as including words such as racist insults and threats (page 36).

Since the *Ward* decision, the Commission’s concrete actions to combat and prevent hate incidents through investigation and litigation before the Tribunal appear to have been significantly curtailed, while its public education activities on hate, as promised in the April 2022 announcement related to *Ward*, are difficult to quantify.

Community concern about backtracking on discriminatory comments and hate incidents was reinforced by a decision released by the Commission in July 2023 (Note: the Commission’s decisions are released to the parties only and are therefore not made public). It involved a complaint filed by CRARR on behalf of two Arab parents and their young child in Repentigny, Québec following a 2019 incident when the family was threatened and insulted by their neighbor’s father in front of their home.

The basis of the complaint was related to a family gathering with friends, where the neighbor’s father, who had had a previous conflict with the complainants, came over and threatened to report the child to youth protection services (the child was playing soccer with his uncle in the front yard at the time). When the child’s mother intervened, the man yelled at the child’s mother and father that they were not needed in Quebec and that they should go back where they came from.

The man’s aggressive tone and demeanor, which were witnessed by other guests, led the parents to call the police, who arrived and told the man to keep away. The child was traumatized by the incident. Fearful for their safety, the family did not use the front yard for many days after the incident, while the mother had to seek counselling.

Although the complaint alleged violations of the family’s right to equality without discrimination or harassment based on ethnic or national origin, right to the security of the person and the right to the safeguard of their dignity, the Commission dismissed the case relying on *Ward*. The neighbor’s “explanation” was that he had actually meant that the family was not wanted in the neighborhood. More disturbingly, the Commission concluded that the single incident, despite its long-lasting effects on the victims, did not constitute harassment.

As for the allegation of discriminatory violation of the right to physical and psychological security of the child and his parents, the Commission inexplicably removed this aspect from the investigation and ignored it in its final recommendations. CRARR had asked that the complainants’ right to security be retained as an element of the complaint and that the police officers present at the scene be contacted for supporting evidence. This was never done.

This latest decision by the Commission illustrates the perverse, albeit unintended, consequences of the Supreme Court’s decision in *Ward* and the highly questionable manner in which *Ward* is applied by public authorities. There is a certain validity to the concern that the net result of *Ward*, and a less liberal interpretation of it, points towards a trivialization of hate incidents, lesser protection for members of vulnerable Charter protected groups from hate and discrimination, and poorer access to justice for victims of hate words and deeds in Quebec.

This is particularly critical for some groups who are more targeted by hate than others, such as racialized and religious minorities, and Indigenous and LGBTQ+ communities.

Whether *Ward* can lead to a proliferation of hate incidents involving hateful and discriminatory slurs, jokes, and other remarks in Quebec – in a climate where hate incidents in Canada appear to be rising – the challenges for policymakers, law enforcement agencies, and human rights organizations thus, are increasing as victims who are already reluctant to report such acts, may now feel even less encouraged to report cases of discrimination and hate.

**Citation:** Fo Niemi, "The Impact of Ward: Concerns About Backtracking in the Fight Against Hate in Quebec" *in Humour, Hate and Harm: Rethinking Dignity, Equality and Freedom of Expression Ward v Quebec (Commission de droit de la personne et des droits de la jeunesse): a Special Issue of the PKI Global Justice Journal* (2023) 8 PKI Global Justice Journal 8.

## About the Author:

Image of Fo NiemiFo Niemi is Executive Director of the Center for Research-Action on Race Relations, a Montréal-based non-profit that actively engages, since 1983, in public education, training and assistance for victims of racial and other forms of discrimination. He previously served as Commissioner with the Quebec Human Rights Commission (1991-2003) and he chaired the Commission's historic public hearings in 1993 on discrimination and violence against gays and lesbians that led to major changes on access to health and social services; justice; hate crimes, and civil unions in the province of Quebec. He has also written articles in policy journals and newspapers on race relations and equity issues in Canadian media.

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# Freedom of Expression, Human Dignity and the Rise of Hate Speech

## Author: Marie-Claude Landry

Image:  Female hands holding human right placard

In the wake of the *Ward v. Quebec* (2021 SCC 43) ruling by the Supreme Court of Canada, the intricate balance between freedom of expression and preserving human dignity has been thrust to the forefront.

As a lawyer who deeply respects the Court's decisions, and as a human rights advocate who most recently served as the Chief Commissioner of the Canadian Human Rights Commission, Canada's national human rights institution, I continue to grapple with the implications of this ruling.

**Unpacking the *Ward* Decision**

On October 29, 2021, the Supreme Court of Canada issued a long-awaited verdict regarding a discrimination case that had been initially heard by the Quebec Human Rights Tribunal. The case revolved around Mike Ward, a Quebec comedian, and Jeremy Gabriel, a child musician with physical disabilities caused by Treacher Collins syndrome.

Between September 2010 and March 2013, Ward included a bit in his comedy set in which he mocked and degraded Mr. Gabriel because of his condition, calling him "the kid with a sub-woofer on his head," and recounting his (fictional) attempt to kill Mr. Gabriel by drowning him at a water park. Ward also made a video, posted on his website, in which he made disparaging comments about Mr. Gabriel. Videos of Ward's routine, and written accounts of the so-called "jokes" were widely circulated.

Mr. Gabriel suffered psychological impacts due to Ward's statements. He experienced social exclusion, distress and depression, as well as suicidal ideation. Following the incident, Mr. Gabriel's parents filed a human rights complaint on the basis that Ward's comments violated the protections

guaranteed to citizens by Quebec's *Charter of human rights and freedoms*, including the right to safeguard individual dignity. While the Tribunal had ruled that Ward's comedic mockery of Gabriel constituted discrimination, the Supreme Court majority in *Ward v. Quebec* concluded that the conditions for discrimination were not met, and that the "right to dignity" guaranteed in Quebec's *Charter of human rights and freedoms* must be tempered by the constitutional protection of freedom of expression, even though the victim in this case was a child with a disability. In fact, the majority indicated that Mr. Gabriel should have sued for defamation instead.

The Supreme Court's decision invites contemplation, not only for the messages it conveys, but also for the profound societal and legal consequences it triggers. The *Ward* decision notably challenges the boundaries between human dignity and freedom of expression, and calls into question the viability of human rights protections. Before Ward, victims of discriminatory speech could seek recourse through a human rights complaint citing protections guaranteed by Quebec's *Charter of human rights and freedoms*. After Ward, Quebec's human rights commission (*la Commission des droits de la personne et des droits de la jeunesse*) acknowledged having to dismiss dozens of complaints because they simply do not meet the new standard established by the Supreme Court of Canada.

**Freedom of Expression and Human Dignity: A Delicate Equation**

The right to freedom of expression is a cornerstone of democratic societies, for a diverse society thrives on the exchange of ideas and perspectives. This right extends to all individuals, ensuring that diverse voices are welcomed and heard, and that individuals have the space to voice opinions, challenge norms and engage in pen discourse.

However, it is crucial to recognize that the essence of this right to freedom of expression can only flourish when it is balanced with the responsibility to respect the rights of others. As my colleague and I explained in an opinion piece we published in the Ottawa Citizen to mark International Human Rights Day in 2021, "individual rights and freedoms can only flourish when we also protect the well-being of society as a whole." Without this understanding, rights such as the right to freedom of expression can be weaponized to attack the rights of others, such as the right to human dignity. When one's expression perpetuates fear, intimidation, and silence in others, the foundational principles of free discourse are compromised.

This also holds true in an artistic setting; an artist cannot receive a higher level of protection due to their right to free speech than other people. Nevertheless, the majority of the Court ruled that Ward's comments were permissible, as they did not meet the threshold for hate.

As a human rights advocate, I find it extremely challenging to concede that the comments made at Mr. Gabriel's expense were not "hateful." Indeed, "hate speech" transcends mere emotional discomfort; its impacts extend to the erosion of human dignity, the reinforcement of stereotypes, and the incitement of violence. Protecting individuals from hate speech is not about fostering an environment devoid of disagreement. Instead, it is about fostering a society truly built on freedom of expression; one in which

ideas flow freely and individuals feel empowered to contribute without hesitation, secure in the knowledge that their participation will not be met with hostility or discrimination. Hence, my central concern with the *Ward* decision arises from the diminished appreciation of human dignity, the now-elevated threshold for hate, and the consequential impacts of these outcomes for victims seeking recourse through human rights protection mechanisms.

**Dwindling Human Dignity and Real Consequences**

All forms of expression that incite hatred or give rise to violence and discrimination carry direct risks for individuals and the democracies in which we live. As human rights lawyer David Matas points out in his book, *Bloody Words: Hate and Free Speech*, “The Holocaust did not start with the gas chambers. It started with hate speech. It started with dehumanizing language. It started with stereotyping, with intolerance, and with discrimination. It started with politicians and leaders using rhetoric that portrayed certain groups as less than human.”[1]

This is not to suggest that the words spoken by Mr. Ward are in any way comparable to the words that triggered one of the gravest historical tragedies. Rather, it is meant to illustrate that the *Ward* decision is a crucible for understanding the intricate dynamics among human dignity, freedom of expression and the realm of hate speech. Publicly degrading and ridiculing people initiates a causal chain that culminates in harmful actions with real consequences. Young Mr. Gabriel, for example, suffered immense harm to his development, identity, and dignity due to hateful comments directed at him by Ward. As Matas pointed out, history cautions us — hate, whether subtle or brazen, sows the seeds of discord and devastation. The decision in *Ward* therefore compels us to deconstruct the Court’s message, explore its consequences, and identify what is truly at stake.

**Navigating Gaps in Legal Protections Against Hate in the Current Era**

The *Ward* decision prompts a fundamental debate, forcing us to reconcile freedom of expression and human dignity. Its implications extend beyond Quebec’s borders, with far-reaching legal consequences that transcend jurisdictions, threatening federal initiatives to combat online hate. Amid the complexities involved in trying to regulate speech, we must address the gaps in legal protections against hate speech. The rapid evolution of technology has enabled hate to propagate, minimizing its gravity and undermining human dignity, while gaps in legal protections are allowing hate to go unchecked.

Today, at the nexus of human existence and technology, we face the redefinition of public discourse. The boundaries of public speech have shifted and are continuing to shift, blurring the distinction between offense, harm and hate. The proliferation of hate speech, once relegated to the fringes, has permeated our mainstream conversations, posing a grave challenge to human rights, democratic stability and national security. Its normalization corrodes the foundations of societal trust and amplifies divisions.

**Ramifications for Access to Justice**

One consequence of the *Ward* decision is the creation of a barrier obstructing access to justice for specific marginalized individuals and groups. What recourse remains for victims who fail to meet the elevated “standard” established by the Supreme Court in *Ward*? The Court argued that pursuing a defamation suit is a viable solution. Is this really the case? Although technically available, it is far from easy to access; the burden of proof rests not on a distinct characteristic outlined in the law, but rather on the veracity or falsity of the statements and their underlying motives—a fundamentally different approach than that of human rights protection mechanisms.

Moreover, civil remedies come with a significant price tag, rendering them accessible predominantly to affluent plaintiffs. Under the prevailing framework, social class and wealth become key markers on the path to justice. Additionally, it is acknowledged that social status often intersects with the communities we are a part of.

Consequently, what alternatives are left if the more rapid, supportive, straightforward, and user-friendly human rights protection mechanisms like human rights commissions and tribunals become inaccessible to those who require them most? When individuals targeted by such remarks encounter substantial obstacles in securing justice, and when access to protective mechanisms is limited, it is inevitable that confidence in institutions will further erode. This erosion compounds an existing crisis of confidence in public institutions.

**Collective Responsibility**

Canada’s commitment to safeguarding children and individuals with disabilities from exploitation and violence is underscored by its ratification of the *United Nations Convention on the Rights of the Child* and the *Convention on the Rights of Persons with Disabilities*. This commitment requires collective introspection and action.

In a time when populism pervades public dialogue, courage is needed to confront the insidious presence and proliferation of hate. Our collective action should be guided by the essence of freedom of expression—nurturing diverse perspectives while safeguarding human dignity. A society’s strength lies in embracing its diversity, encouraging participation, and upholding the right to expression for all, irrespective of power dynamics.

The *Ward* decision challenges us to ask: Does the essence of freedom of expression not lie in providing everyone the opportunity to express opinions, seek truth, and embrace diverse viewpoints? Has this freedom transformed into a justification for abuse, to the detriment of human dignity? A comprehensive, collaborative strategy is essential to counter this alarming trend. The heart of the matter is preserving the equilibrium between freedom of expression, human dignity, and the fight against hate. The responsibility to combat hate transcends organizations—it is a societal obligation.

**Embracing Unity through Empathy**

To conclude, allow me to share a poem by Sa'adi—a 13th century Persian poet whose work can be found in the United Nations:

"All human beings are members of one frame,
Since all, at first, from the same essence came.
When time afflicts a limb with pain,
The other limbs cannot at rest remain.
If thou feel not for other's misery,
A human being is no name for thee."

This poem encapsulates my reflection by emphasizing the interconnectedness of humanity and the importance of empathy and compassion. It conveys the idea that the suffering of one person affects the well-being of others, highlighting the unity of all people as a single entity.

I believe this message is timeless and resonates across cultures and generations. Indeed, it reminds us that indifference to human suffering defies our very humanity.

[1] David Matas, *Bloody Words: Hate and Free Speech* (Winnipeg: Bain & Cox, 2000).

**Citation:** Marie-Claude Landry, "Freedom of Expression, Human Dignity and the Rise of Hate Speech" *in Humour, Hate and Harm: Rethinking Dignity, Equality and Freedom of Expression Ward v Quebec (Commission de droit de la personne et des droits de la jeunesse): a Special Issue of the PKI Global Justice Journal* (2023) 8 PKI Global Justice Journal 8.

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Image of Marie-Claude Landry

Marie-Claude Landry, Ad. E., is an emeritus lawyer, a Senior Strategic Consultant and Public Speaker in Quebec. Between 2015 and 2022, she served as Chief Commissioner and Chief Executive Officer of the Canadian Human Rights Commission. Her lifelong advocacy for human rights, including the rights of women, people with disabilities, Indigenous peoples, 2SLGBTQIA+ people, Black and other racialized people, people living in poverty, prisoners and many more, have earned her numerous distinctions. Previously, she was a senior partner in a private law firm, and also served on the disciplinary tribunal for federal correctional institutions in the Quebec Region.