



SUPREME COURT OF CANADA

CITATION: Ward v. Quebec
(Commission des droits de la
personne et des droits de la
jeunesse), 2021 SCC 43

APPEAL HEARD: February 15,
2021

JUDGMENT RENDERED:
October 29, 2021

DOCKET: 39041

BETWEEN:

Mike Ward
Appellant

and

Commission des droits de la personne et des droits de la jeunesse
Respondent

- and -

**Sylvie Gabriel, Jérémy Gabriel, Association des professionnels de l'industrie
de l'humour, International Commission of Jurists (Canada), Canadian Civil
Liberties Association, Canadian Constitutional Foundation and League for
Human Rights of B'Nai Brith Canada**
Interveners

OFFICIAL ENGLISH TRANSLATION: Reasons of Wagner C.J. and Côté J.

CORAM: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe,
Martin and Kasirer JJ.

JOINT REASONS FOR JUDGMENT: Wagner C.J. and Côté J. (Moldaver, Brown and Rowe JJ.
concurring)

(paras. 1 to 114)

JOINT DISSENTING Abella and Kasirer JJ. (Karakatsanis and Martin JJ.
REASONS: concurring)

(paras. 115 to 224)

NOTE: This document is subject to editorial revision before its reproduction in final form in the *Canada Supreme Court Reports*.

Mike Ward

Appellant

v.

Commission des droits de la personne et des droits de la jeunesse

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2021 SCC 43

File No.: 39041.

2021: February 15; 2021: October 29.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Human rights — Right to safeguard of dignity — Right to equal recognition and exercise of human rights and freedoms — Freedom of expression — Discrimination claim brought on behalf of public figure with disability against professional comedian who mocked some of his physical characteristics — Scope of jurisdiction of Commission des droits de la personne et des droits de la jeunesse and Human Rights Tribunal with respect to discrimination — Legal framework that applies to discrimination claim based on expression where there is conflict between right to safeguard of dignity and freedom of expression — Charter of human rights and freedoms, CQLR, c. C-12, ss. 3, 4, 9.1, 10.

From September 2010 to March 2013, W, a professional comedian, gave a show that included a routine in which he mocked certain figures in Quebec’s artistic community, including G, a public figure with a disability. W also made a video, posted on his website, in which he made disparaging comments about G. In both his video and his show, W mocked some of G’s physical characteristics. At the time of the events alleged against W, G was a minor and a student in secondary school, and he had an artistic career as a singer.

G’s parents filed a complaint with the Commission des droits de la personne et des droits de la jeunesse, which then asked the Human Rights Tribunal to find that W had interfered with G’s right to full and equal recognition of his right to the safeguard of his dignity, contrary to ss. 4 and 10 of the *Quebec Charter*. The Tribunal found that all the elements of discrimination under the *Quebec Charter* had been

established. In particular, W had made comments concerning G's disability, although he had not chosen G because of his disability, but rather because he was a public figure. The Tribunal rejected W's defence based on freedom of expression, protected by s. 3 of the *Quebec Charter*, and found that his comments exceeded the limits of what a reasonable person can tolerate in the name of freedom of expression. The Tribunal therefore held that the discrimination suffered by G was not justified. W was ordered to pay moral and punitive damages to G. A majority of the Court of Appeal dismissed W's appeal. In the majority's view, the Tribunal could conclude that there was discrimination and that W's comments were not justified by freedom of expression. The dissenting judge concluded instead that W's comments did not constitute discriminatory speech.

Held (Abella, Karakatsanis, Martin and Kasirer JJ. dissenting): The appeal should be allowed.

Per Wagner C.J. and Moldaver, Côté, Brown and Rowe JJ.: The elements of a discrimination claim under the *Quebec Charter* have not been established. A discrimination claim is not, and must not become, an action in defamation. The two are governed by different considerations and have different purposes. A discrimination claim must be limited to expression whose effects are truly discriminatory. The Tribunal has no power to decide actions in defamation or other civil liability actions, since its jurisdiction is limited to complaints of discrimination or exploitation based on ss. 10 to 19 and 48 of the *Quebec Charter*. In this case, G was made subject to a

distinction by being targeted by W's comments. However, in light of the Tribunal's finding that W did not choose G because of his disability but rather because he was a public figure, the distinction was not based on a prohibited ground. Moreover, even if there had been differential treatment based on a prohibited ground, G's right to full and equal recognition of his right to the safeguard of his dignity was not impaired.

A plaintiff claiming the protection of s. 10 of the *Quebec Charter*, which provides for a right to equality in the recognition and exercise of the other rights and freedoms guaranteed by the *Quebec Charter*, must satisfy a burden of proof that has three elements. First, the plaintiff must prove a distinction, exclusion or preference, that is, a decision, a measure or conduct that affects them differently from others to whom it may apply. Second, the plaintiff must establish that one of the characteristics expressly protected in s. 10 was a factor in the differential treatment complained of. Third, the plaintiff must show that the differential treatment impairs the full and equal exercise or recognition of a freedom or right guaranteed by the *Quebec Charter*. It is only where these three elements are established that the burden of justifying the discrimination then falls on the defendant. Hurtful expression relating to a ground listed in s. 10 of the *Quebec Charter* and harm suffered are insufficient to constitute discrimination and thus to be within the Tribunal's jurisdiction where the social effects of discrimination, such as the perpetuation of prejudice or disadvantage, are absent.

In addition, s. 9.1 of the *Quebec Charter* determines the scope of the fundamental right on which the alleged infringement of s. 10 is based. In a context

where a discrimination claim is based on a right guaranteed by any of ss. 1 to 9 and where the defendant also asserts a right set out in those provisions, the respective scope of the rights being asserted must be determined in light of s. 9.1. Because s. 9.1 does not apply to s. 10, this balancing exercise must be undertaken in analyzing the third element of discrimination. The right relied on by the defendant is not a defence, but a limit to the scope of the right invoked by the plaintiff. Before it can be found that there has been discrimination in the recognition or exercise of a right provided for in any of ss. 1 to 9, the protection of that right must be called for in light of the democratic values, public order and general well-being of the citizens of Quebec referred to in s. 9.1. There is no discrimination if, in a particular context, s. 9.1 gives the right exercised by the defendant precedence over the right invoked by the plaintiff in combination with s. 10.

Where the claim brought requires a determination, in light of s. 9.1, of the respective scope of the right to the safeguard of dignity guaranteed by s. 4 and the freedom of expression protected by s. 3, the analysis of the third element of discrimination involves interpreting these rights so that both are exercised with a proper regard for democratic values, public order and the general well-being of the citizens of Quebec.

The right to the safeguard of dignity set out in s. 4 of the *Quebec Charter* permits a person to claim protection from the denial of their worth as a human being. It protects the humanity of every person in its most fundamental attributes. 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. Where a person is stripped of their humanity by being subjected to treatment that debases, subjugates, objectifies, humiliates or degrades them, there is no question that their dignity is violated. In this sense, the right to the safeguard of dignity is a shield against this type of interference that does no less than outrage the conscience of society.

The exercise of freedom of expression, for its part, presupposes, at the same time that it fosters, society's tolerance of expression that is unpopular, offensive or repugnant. Limits on freedom of expression are justified where, in a given context, there are serious reasons to fear harm that is sufficiently specific and cannot be prevented by the discernment and critical judgment of the audience, or where freedom of expression is used to disseminate expression that forces certain persons to argue for their basic humanity or social standing as a precondition to participating in the deliberative aspects of democracy. These limits also apply in an artistic context. Freedom of expression cannot give an artist a level of protection higher than that of other persons.

The principles arising from *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11, [2013] 1 S.C.R. 467, are indispensable to the required analysis of the legal framework that applies to a discrimination claim under the *Quebec Charter* in a context involving freedom of expression. In that case, the Court considered whether

the prohibition against hate speech in s. 14(1)(b) of *The Saskatchewan Human Rights Code* was constitutional under s. 2(b) of the *Canadian Charter of Rights and Freedoms*. The Court limited the prohibition created by the provision in question to expression that could inspire extreme feelings of detestation likely to affect the vulnerable group's acceptance within society and that also had enough motivating force to lead to the type of discriminatory treatment the legislature was seeking to address. The Court declined to limit freedom of expression in order to confer protection from emotional harm.

The test for resolving a conflict between the right to freedom of expression and the right to the safeguard of dignity, in the context of the *Quebec Charter*, requires that it be determined, first, whether a reasonable person, aware of the relevant context and circumstances, would view the expression targeting an individual or group as inciting others to vilify them or to detest their humanity on the basis of a prohibited ground of discrimination. Hate speech within the meaning of *Whatcott* is therefore prohibited, as is expression that has the same effects on personal dignity without meeting the definition of hatred given in that case. Second, it must be shown that a reasonable person would view the expression, considered in its context, as likely to lead to discriminatory treatment of the person targeted, that is, to jeopardize the social acceptance of the individual or group. The analysis is focused on the likely effects of the expression on third parties, that is, the discriminatory treatment likely to result from it, and not on the emotional harm suffered by the person alleging discrimination. The mode of expression and the effect of the mode of expression are determinative.

In this case, G was made subject to a distinction by being exposed to mockery in W's comedy show and videos. However, in light of the Tribunal's finding that W did not choose G because of his disability but rather because he was a public figure, the distinction was not based on a prohibited ground. Moreover, the comments made by W meet neither of the two requirements of the test established to resolve the conflict between the fundamental rights invoked by the parties. The first requirement of the test is not met: a reasonable person aware of the relevant circumstances would not view W's comments about G as inciting others to vilify him or to detest his humanity on the basis of a prohibited ground of discrimination. His comments, considered in their context, cannot be taken at face value. The second requirement of the test is also not met: a reasonable person could not view the comments made by W, considered in their context, as likely to lead to discriminatory treatment of G. The impugned comments exploited, rightly or wrongly, a feeling of discomfort in order to entertain, but they did little more than that. The Commission therefore does not meet the requirements for succeeding under ss. 4 and 10 of the *Quebec Charter*.

Per Abella, Karakatsanis, Martin and Kasirer JJ. (dissenting): The appeal should be dismissed. This case is about the rights of vulnerable and marginalized individuals, particularly children with disabilities, to be free from public humiliation, cruelty, vilification and bullying that singles them out on the basis of their disability and the devastating harm to their dignity that results. The issue is whether the child with disabilities lost protection from discrimination and the right to be free from public humiliation and bullying just because he is well known.

W's jokes about G, who was between 10 and 13 years old, were pejorative slurs based on his disability. W referred to G as the "ugly singing kid" and he mocked him as unable to close his mouth and as having a "sub-woofer" on his head in describing a hearing aid device. His jokes about drowning G drew on pernicious stereotypes about persons with disabilities as objects of pity and as burdens on society who are disposable. W performed his stand-up routine 230 times to a combined audience of over 100,000 people, and sold over 7,500 DVD copies of it. His video clips remained accessible to all on his website for a year, and were made available on other platforms without W's authorization. Each time the jokes were repeated, so too was the harm to G. W's comments were so widespread that G could not ignore them. Neither could his classmates. W's jokes followed him to school where other children repeated the insults and magnified the mockery. This was a direct consequence of W, a well-known figure in Quebec, distributing his routines about G widely. This must be considered as a factor in the determination of whether W's comments were likely to cause serious harm to a reasonable person in his circumstances. W's comments caused G anguish and prompted him to isolate himself from his peer group and even to contemplate suicide. The language used by W about G's disability, both in live performances and on the internet, constituted a discriminatory interference with his right to dignity, honour and reputation.

At issue in this case is s. 10 of the *Quebec Charter*, which protects the equal exercise of other individual rights and freedoms, including the right to the safeguard of one's dignity. This provision serves to protect individuals from

discriminatory speech so harmful that a reasonable person in their circumstances would refuse to tolerate it. To determine whether speech constitutes discrimination, the same framework as the one used for other claims of discrimination under s. 10 of the *Quebec Charter* applies. In this case, the impairment of the equal exercise of the right to dignity meets the threshold of sufficient seriousness through the widely disseminated taunting of a child with a disability that plays on dehumanizing notions associated with his disability. This impairment to the equal exercise of the right to dignity is not justified by W's freedom of expression. W's remarks result in a violation of the equal exercise of the right to the safeguard of dignity enshrined in the *Quebec Charter*.

The framework or test for claims of discrimination under s. 10 of the *Quebec Charter* was confirmed by the Court in *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39, [2015] 2 S.C.R. 789. The approach to discrimination under the *Quebec Charter*, which is in keeping with the Court's application of the test for discrimination across the country, is to consider, at the first step, whether a case of *prima facie* discrimination is made out, and, at the second step, to determine if the conduct is justified.

At the first step, the complainant must show that the exercise of one of the rights and freedoms guaranteed by the *Quebec Charter*, other than equality, was affected in a discriminatory way. The complainant's burden is limited to showing prejudice and its connection to a prohibited ground of discrimination. The complainant

does not have to show that that right or freedom was independently violated. There will be a distinction based on a prohibited ground whenever a complainant carries a burden that others do not, by reason of an enumerated personal characteristic. The use of an overtly discriminatory slur constitutes a distinction, exclusion, or preference based on an enumerated ground, while comments which are not overt slurs may constitute discrimination depending on how a person in the marginalized group at issue would understand them. Uniform treatment which fails to accommodate differences may also constitute a prohibited distinction. Whether there is a distinction on a ground listed in s. 10 in a particular case is a question of mixed fact and law that is owed deference on appeal.

If the complainant can show *prima facie* discrimination on a balance of probabilities, the defendant is entitled to present a defence or a justification. At this second step, the burden of proof shifts to the defendant to justify his or her decision or conduct on the basis of the exemptions provided for in the applicable human rights legislation or those developed by the courts.

As neither the *Canadian Charter* nor the *Quebec Charter* make hate speech the threshold at which discriminatory comments can be actionable, there is no constitutional bar to legal recourse in circumstances involving speech that can cause individual harm without being hateful. This is the case, for example, with harassment, defamation, and the *Quebec Charter's* s. 4 right to the safeguard of one's dignity, honour and reputation. Section 10 of the *Quebec Charter* also places a *prima facie* limit

on s. 2(b) of the *Canadian Charter* by prohibiting speech that prevents the equal exercise of the right to the safeguard of dignity, honour and reputation.

The legislative purpose underlying s. 10 is inherently tied to the other individual human rights and freedoms guaranteed by the *Quebec Charter*. It goes beyond preventing harm on a group scale and the perpetuation of discriminatory attitudes in the public at large. Its proper interpretation cannot be understood in reference to principles governing the constitutionality of a different provision with a different objective, such as the provision at issue in *Whatcott*, a case that concerns hate speech. *Whatcott* is not the proper standard to decide the present appeal. It is well recognized that speech can cause individual harm without being hateful. Nor does freedom of expression limit the ability of administrative decision-makers to address harmful speech that is not hate speech.

Section 10 should continue to be interpreted in a way that allows for this individual harm to be addressed, in keeping with the standard set out by the Quebec Court of Appeal in *Calego International inc. v. Commission des droits de la personne et des droits de la jeunesse*, 2013 QCCA 924, [2013] R.J.D.T. 517. The appropriate threshold for discriminatory speech under the *Quebec Charter* was set out in *Calego*. The determination of whether speech undermines the equal exercise of the right to dignity is an objective one, not subjectively determined, but it is one that takes into account the circumstances of the complainant. Only comments which are a particularly contemptuous affront to their racial, ethnic or other identity and one that has grave

consequences will constitute discrimination. This is a fact specific and highly contextual inquiry. Based on *Calego*, speech based on an enumerated ground will violate the s. 10 guarantee of equality in the exercise of the s. 4 right to the safeguard of one's dignity when it constitutes such a contemptuous affront to the individual's identity that it would have serious consequences for the reasonable person in that individual's circumstances. The reasonable person would be aware of the importance of freedom of expression in a democratic society, and would therefore be expected to tolerate hurtful speech, even related to protected grounds, that does not rise to a high level of gravity. While the assessment of whether speech impairs dignity is objective, it must account for the particular characteristics of the plaintiff and it must consider all of the context in which the remarks are made.

When a claim involves a discriminatory interference with the exercise of the rights and freedoms outlined in the *Quebec Charter*, s. 10 is engaged and the Human Rights Tribunal has jurisdiction to hear the claim. While there is resemblance between a s. 10 claim based on equal exercise of dignity and a claim of defamation, because s. 4 of the *Quebec Charter* is implicated in both, a claim for defamation does not necessarily engage the distinct right to dignity and it is not based on the plaintiff's membership in a particular group. The grounds of defamation and discrimination each address related but distinct violations.

The rights set out in ss. 1 to 9 of the *Quebec Charter* may be recognized as justifications to *prima facie* discrimination. Generally, conflicts between individual

Quebec Charter rights are resolved under s. 9.1, which requires consideration of democratic values, public order and the general well-being of the citizens of Quebec in balancing rights. Ensuring a proportionate balance between the rights of individuals under the *Quebec Charter* involves a consideration of the specific rights at issue, the values that underpin them and the circumstances of the particular case. Because of s. 9.1, the right to freedom of expression protected by s. 3, like the s. 4 right, may not be exercised in a way that is disproportionately harmful or abusive. Only by properly balancing the complainant's right to the safeguard of his dignity and the defendant's freedom of expression can the scope of the s. 10 right to the equal exercise of the right to the safeguard of dignity be appreciated. The s. 9.1 balancing thereby ties back to the standard expressed in *Calego*, which is attuned to the value of free expression in society.

In determining whether there is a proportionate public interest justifying an exercise of freedom of expression which violates another person's *Quebec Charter* rights, courts must consider all of the values concerned. With well-known personalities, as with anyone else, courts must consider all the competing interests at stake, the harm caused and whether there is an actual identifiable public interest permitting the impugned expression. Artistic expression, like any other expression, may cross a boundary when its effect is to disproportionately harm others.

There is disagreement with the majority that the Tribunal was wrong to find a distinction on an enumerated ground, or that it committed a palpable and

overriding error in doing so. The Tribunal concluded, rightly, that both W's widely disseminated video clips and his stand-up special subjected G to a distinction based on his disability. W targeted aspects of G's public personality which were inextricable from his disability, which made him stand apart from the other public figures that W mocked as "sacred cows".

The existence of *prima facie* discrimination depends on whether this distinction had the effect of impairing G's right to free and equal recognition of the s. 4 right to the safeguard of his dignity, as a fundamental right under s. 10 of the *Quebec Charter*. The applicable standard that W's speech had to meet to constitute an actionable violation of this prohibition on discrimination is whether W's comments were likely to cause serious harm to a reasonable person in G's circumstances. On the modified objective standard that the Tribunal should have applied, there are unique aspects of this case that constitute facts sufficient to conclude that the Commission met its burden and that *prima facie* discrimination was made out. When W began performing his show in which he joked about drowning him, G was 13. In his stand-up routine, W remarked that he defended G from criticism only until he found out that he was not dying, at which point he took it upon himself to drown him. W's jokes implied that society would be better off if G were dead and invoked archaic attitudes advocating for the exclusion and segregation of children with disabilities. W preyed on G's disability and the way it manifests itself in order to make his audience laugh, portraying the child as a subject of ridicule rather than as an individual deserving of respect. These are clearly the types of comments which lead a disabled child to question his

self-respect and self-worth, violating s. 10 of the *Quebec Charter* and causing severe dignitary harm.

This conclusion shifts the onus to W to justify his *prima facie* discriminatory speech. He attempts to do so by invoking his right to freedom of expression under s. 3 of the *Quebec Charter* and s. 2(b) of the *Canadian Charter* as a defence. However, W's justifications that he did not intend to discriminate, that he was treating G like any other celebrity, and that his artistic licence as a comedian gave him a right to mock a disabled child have no basis in law. The Court's jurisprudence confirms that it is the impact of the conduct that matters, not the intention: it is immaterial whether W intended to mock G because he has a disability, whether W was joking or being serious, or whether G was skewered in the same way as other celebrities. The Court's jurisprudence also rejects the proposition that it is acceptable to discriminate if it results from treating likes alike. It also rejects the proposition that freedom of expression includes the right to discriminate. The jurisprudence also confirms the principle that the dignity of public figures is not necessarily subservient to the right to express harmful remarks. There is no reason to depart from that jurisprudence.

W's remarks cannot be justified in the circumstances and they result in a violation of the equal exercise of the right to the safeguard of dignity enshrined in the *Quebec Charter*. W's exercise of his expressive rights under s. 3 of the *Quebec Charter* are completely disproportionate when compared to the s. 4 harm suffered by G. A

reasonable person in G's circumstances, even one attuned to the importance placed on freedom of expression, including artistic expression and satire, would not be expected to bear the speech at issue in this case. The Tribunal was entitled to grant punitive damages and there is no reason to overturn or modify them. Punitive damages here serve not only a denunciatory purpose, but serve to deter people like W from profiting from the intentional interference with the *Charter* rights of others and treating compensation for this harm as merely the cost of doing business.

Cases Cited

By Wagner C.J. and Côté J.

Applied: *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39, [2015] 2 S.C.R. 789; *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65; **followed:** *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11, [2013] 1 S.C.R. 467; *Devine v. Quebec (Attorney General)*, [1988] 2 S.C.R. 790; **considered:** *Calego International inc. v. Commission des droits de la personne et des droits de la jeunesse*, 2013 QCCA 924, [2013] R.J.D.T. 517; **referred to:** *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Aubry v. Éditions Vice-Versa inc.*, [1998] 1 S.C.R. 591; *Béliveau St-Jacques v. Fédération des employées et employés de services publics inc.*, [1996] 2 S.C.R. 345; *Prud'homme v. Prud'homme*, 2002 SCC 85, [2002] 4 S.C.R. 663; *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3; *Commission des droits de la personne et des droits de la jeunesse v.*

Filion, 2004 CanLII 468; *Tchanderli-Braham v. Bériault*, 2018 QCTDP 4; *Jied v. Éthier*, 2019 QCTDP 26; *Mirouh v. Gaudreault*, 2021 QCTDP 10; *Ayotte v. Tremblay*, 2021 QCTDP 13; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City)*, 2000 SCC 27, [2000] 1 S.C.R. 665; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Maksteel Québec Inc.*, 2003 SCC 68, [2003] 3 S.C.R. 228; *Ontario Human Rights Commission v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536; *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712; *Bruker v. Marcovitz*, 2007 SCC 54, [2007] 3 S.C.R. 607; *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391; *Quebec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand*, [1996] 3 S.C.R. 211; *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483; *Cinar Corporation v. Robinson*, 2013 SCC 73, [2013] 3 S.C.R. 1168; *Gauthier v. Beaumont*, [1998] 2 S.C.R. 3; *Fortier v. Québec (Procureure générale)*, 2015 QCCA 1426; *Commission des droits de la personne et des droits de la jeunesse v. 9185-2152 Québec inc. (Radio Lounge Brossard)*, 2015 QCCA 577; *Genex Communications inc. v. Association québécoise de l'industrie du disque, du spectacle et de la vidéo*, 2009 QCCA 2201, [2009] R.J.Q. 2743; *Solomon v. Québec (Procureur général)*, 2008 QCCA 1832, [2008] R.J.Q. 2127; *Procureur général du Canada v. Manoukian*, 2020 QCCA 1486, 70 C.C.L.T. (4th) 182; *J.L. v. S.B.*, [2000] R.R.A. 665; *Bourdeau v. Hamel*, 2013 QCCS 752; *Hébert v. Giguère*, [2003] R.J.Q. 89; *Commission des droits de la personne et des droits de la jeunesse v. 9113-0831 Québec inc. (Bronzage Évasion au soleil du monde)*, 2007 QCTDP 18, [2007] R.J.D.T. 1289; *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497; *Irwin Toy Ltd. v. Quebec*

(Attorney General), [1989] 1 S.C.R. 927; *R. v. Zundel*, [1992] 2 S.C.R. 731; *Montréal (Ville de) v. Cabaret Sex Appeal inc.*, [1994] R.J.Q. 2133; *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130; *Bou Malhab v. Diffusion Métromédia CMR inc.*, 2011 SCC 9, [2011] 1 S.C.R. 214; *R. v. Keegstra*, [1990] 3 S.C.R. 697; *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892; *R. v. Butler*, [1992] 1 S.C.R. 452; *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 S.C.R. 1120; *R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45; *Brodie, Dansky and Rubin v. The Queen*, [1962] S.C.R. 681; *WIC Radio Ltd. v. Simpson*, 2008 SCC 40, [2008] 2 S.C.R. 420; *Trudeau v. AD4 Distribution Canada inc.*, 2014 QCCA 1740; *Hydro-Québec v. Matta*, 2020 SCC 37.

By Abella and Kasirer JJ. (dissenting)

Calego International inc. v. Commission des droits de la personne et des droits de la jeunesse, 2013 QCCA 924, [2013] R.J.D.T. 517; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39, [2015] 2 S.C.R. 789; *Velk v. McGill University*, 2011 QCCA 578, 89 C.C.P.B. 175; *Quebec (Commission des droits de la personne) v. St-Jean-Sur-Richelieu, Commission scolaire* (1994), 117 D.L.R. (4th) 67; *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3; *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4, [2007] 1 S.C.R. 161; *Moore v. British Columbia (Education)*, 2012 SCC 61, [2012] 3 S.C.R. 360;

British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights), [1999] 3 S.C.R. 868; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City)*, 2000 SCC 27, [2000] 1 S.C.R. 665; *Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252; *Desroches v. Commission des droits de la personne*, [1997] R.J.Q. 1540; *Commission des droits de la personne et des droits de la jeunesse v. Remorquage Sud-Ouest (9148-7314 Québec inc.)*, 2010 QCTDP 12; *St-Éloi v. Rivard*, 2018 QCTDP 2; *Commission des droits de la personne et des droits de la jeunesse v. Camirand*, 2008 QCTDP 11; *Commission des droits de la personne et des droits de la jeunesse v. Paradis*, 2016 QCTDP 17; *Commission des droits de la personne et des droits de la jeunesse v. Quenneville*, 2019 QCTDP 18; *De Gaston v. Wojcik*, 2012 QCTDP 20; *Commission des droits de la personne et des droits de la jeunesse v. Brisson*, 2009 QCTDP 3; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624; *Commission scolaire régionale de Chambly v. Bergevin*, [1994] 2 S.C.R. 525; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143; *Dennis v. United States*, 339 U.S. 162 (1950); *Withler v. Canada (Attorney General)*, 2011 SCC 12, [2011] 1 S.C.R. 396; *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3; *Ontario Human Rights Commission v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536; *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11, [2013] 1 S.C.R. 467; *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892; *Canadian Broadcasting Corp. v. Canada (Attorney General)*, 2011 SCC 2, [2011] 1 S.C.R. 19; *Commission des droits de la personne et des droits de la jeunesse v. Sfiridis*, 2002 QCTDP 42 (CanLII); *McCoy v. McCoy*, 2014 QCCS 286; *Bou Malhab v. Diffusion Métromédia CMR inc.*,

2011 SCC 9, [2011] 1 S.C.R. 214; *British Columbia Human Rights Tribunal v. Schrenk*, 2017 SCC 62, [2017] 2 S.C.R. 795; *Canadian Centre for Bio-Ethical Reform v. Grande Prairie (City)*, 2018 ABCA 154, 67 Alta. L.R. (6th) 230; *Commission des droits de la personne et des droits de la jeunesse v. Chamberland*, 2013 QCTDP 37; *Yapi v. Moustafa*, 2021 QCTDP 9; *Ferdia v. 9142-7963 Québec inc.*, 2021 QCTDP 2; *Quebec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand*, [1996] 3 S.C.R. 211; *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483; *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497; *Gauthier v. Beaumont*, [1998] 2 S.C.R. 3; *Cinar Corporation v. Robinson*, 2013 SCC 73, [2013] 3 S.C.R. 1168; *Procureur général du Canada v. Manoukian*, 2020 QCCA 1486, 70 C.C.L.T. (4th) 182; *Béliveau St-Jacques v. Fédération des employées et employés de services publics inc.*, [1996] 2 S.C.R. 345; *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4, [2004] 1 S.C.R. 76; *R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45; *R. v. D.B.*, 2008 SCC 25, [2008] 2 S.C.R. 3; *A.B. v. Bragg Communications Inc.*, 2012 SCC 46, [2012] 2 S.C.R. 567; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Communauté urbaine de Montréal*, 2004 SCC 30, [2004] 1 S.C.R. 789; *de Montigny v. Brossard (Succession)*, 2010 SCC 51, [2010] 3 S.C.R. 64; *Derbal v. Tchassao*, 2021 QCTDP 11; *Commission des droits de la personne et des droits de la jeunesse v. Ville de Longueuil*, 2020 QCTDP 21; *Laroche v. Lamothe*, 2018 QCCA 1726; *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712; *Devine v. Quebec (Attorney General)*, [1988] 2 S.C.R. 790; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *Bruker v. Marcovitz*, 2007 SCC 54, [2007] 3 S.C.R. 607; *Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 S.C.R.

551; *Aubry v. Éditions Vice-Versa inc.*, [1998] 1 S.C.R. 591; *R. v. Keegstra*, [1990] 3 S.C.R. 697; *R. v. Lucas*, [1998] 1 S.C.R. 439; *Gilles E. Néron Communication Marketing Inc. v. Chambre des notaires du Québec*, 2004 SCC 53, [2004] 3 S.C.R. 95; *Prud'homme v. Prud'homme*, 2002 SCC 85, [2002] 4 S.C.R. 663; *WIC Radio Ltd. v. Simpson*, 2008 SCC 40, [2008] 2 S.C.R. 420; *R. v. Butler*, [1992] 1 S.C.R. 452; *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199; *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640; *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877; *Groia v. Law Society of Upper Canada*, 2018 SCC 27, [2018] 1 S.C.R. 772; *Pardy v. Earle*, 2013 BCSC 1079, 52 B.C.L.R. (5th) 295; *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130; *Campbell v. MGN Ltd.*, [2004] UKHL 22, [2004] 2 A.C. 457; *HRH the Duchess of Sussex v. Associated Newspapers Ltd.*, [2021] EWHC 273 (Ch.), [2021] 4 W.L.R. 35; *Von Hannover v. Germany*, No. 59320/00, ECHR 2004-VI; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Southwind v. Canada*, 2021 SCC 28; *Richard v. Time Inc.*, 2012 SCC 8, [2012] 1 S.C.R. 265.

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APPEAL from a judgment of the Quebec Court of Appeal (Savard, Roy and Cotnam JJ.A.), 2019 QCCA 2042, 62 C.C.L.T. (4th) 230, [2019] AZ-51648647, [2019] J.Q. n° 10380 (QL), 2019 CarswellQue 10278 (WL Can.), setting aside in part a decision of the Quebec Human Rights Tribunal, 2016 QCTDP 18, 35 C.C.L.T. (4th) 258, 84 C.H.R.R. D/155, [2016] AZ-51307297, [2016] Q.H.R.T.J. No. 18 (QL), 2016

CarswellQue 13003 (WL Can.). Appeal allowed, Abella, Karakatsanis, Martin and Kasirer JJ. dissenting.

Julius H. Grey and *Geneviève Grey*, for the appellant.

Stéphanie Fournier and *Lysiane Clément-Major*, for the respondent.

Stéphane Harvey, for the interveners *Sylvie Gabriel* and *Jérémy Gabriel*.

Walid Hijazi, for the intervener Association des professionnels de l'industrie de l'humour.

Guy Régimbald, for the intervener the International Commission of Jurists (Canada).

Christopher D. Bredt, for the intervener the Canadian Civil Liberties Association.

Annamaria Enenajor, for the intervener the Canadian Constitutional Foundation.

David Matas, for the intervener the League for Human Rights of B'nai Brith Canada.

English version of the judgment of Wagner C.J. and Moldaver, Côté, Brown and Rowe JJ. delivered by

THE CHIEF JUSTICE AND CÔTÉ J. —

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I. <u>Introduction</u>	

[1] This appeal concerns the legal framework that applies to a discrimination claim involving a public figure’s right to the safeguard of his dignity, on the one hand, and a professional comedian’s freedom of expression, on the other. It invites us, incidentally, to clarify the scope of the jurisdiction of the Commission des droits de la personne et des droits de la jeunesse (“Commission”) and the Human Rights Tribunal (“Tribunal”) with respect to discrimination claims based on the *Charter of human rights and freedoms*, CQLR, c. C-12 (“*Charter*” or “*Quebec Charter*”).

[2] Very often, discrimination complaints are made in the context of employment, housing, or goods and services available to the public. In this case, the complaint that gave rise to the appeal is quite different, as it concerns a professional comedian, the appellant, Mike Ward, who mocked a public figure with a disability, Jérémy Gabriel.

[3] However, the complaint underlying this appeal led not to an action in *defamation* based on the comments made by Mr. Ward, but rather to a *discrimination*

claim based on those comments. Could the Tribunal conclude that the *discrimination* complaint was well-founded? In our view, the answer must be no, because the elements of a discrimination claim under the *Quebec Charter* were not established.

[4] It is important to begin by noting that 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, either in private or in public. 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*, which guarantee, respectively, the right to the safeguard of dignity and the equal recognition and exercise of human rights and freedoms, 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.

[5] It must be recognized at the outset that the *Quebec Charter*, which elevates freedom of expression to a fundamental freedom, was not enacted to encourage censorship. It follows that expression in the nature of rude remarks made by individuals does not in itself constitute discrimination under that statute. But this does not mean that the *Quebec Charter* can never apply to expression of this kind in very specific circumstances. In this appeal, we therefore wish to clarify the legal framework that applies to a discrimination claim in a context involving freedom of expression.

[6] Briefly stated, a complainant must, in order to succeed, establish all the elements of discrimination, as required by s. 10 of the *Quebec Charter*. The complainant must show (1) a distinction, exclusion or preference; (2) based on one of the grounds listed in the first paragraph of s. 10; (3) that has the effect of impairing the right to full and equal recognition and exercise of a human right or freedom (*Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39, [2015] 2 S.C.R. 789, at para. 35). At this last step, the scope of the fundamental right on which the alleged infringement is based must be determined in light of s. 9.1. Where the right to the safeguard of dignity is in conflict with freedom of expression, the complainant must first show that the expression incites others to vilify them or to detest their humanity on the basis of a prohibited ground of discrimination. The complainant must then establish that the expression, considered in its context, is likely to result in discriminatory treatment of them.

[7] In this case, we are of the opinion that the elements of a discrimination claim under the *Quebec Charter* have not been established. We would therefore allow the appeal.

II. Background

[8] The appeal is between Mr. Ward and the Commission, which is acting here for the benefit of Mr. Gabriel. In the proceedings below, the Commission also acted on

behalf of Mr. Gabriel's parents, Sylvie Gabriel and Steeve Lavoie. We note that Mr. Gabriel and Ms. Gabriel are interveners in this appeal.

[9] At the time of the events alleged against Mr. Ward, Mr. Gabriel was a minor and a student in secondary school, and he had an artistic career as a singer. The circumstances in which Mr. Gabriel began that career, at the age of 8 and with his parents' support, are commendable. He was born with Treacher Collins syndrome, which caused certain malformations of the head as well as profound deafness. When he was 6 years old, he received a bone-anchored hearing aid that made it possible for him to hear 80 to 90 percent of sounds. Thanks to that hearing aid, he learned to speak and to sing.

[10] The first two years of his career, 2005 and 2006, were highlighted by several events that received media coverage (e.g., performance of the national anthem at a sporting event, an invitation to sing for Céline Dion, and a musical performance in Rome in the presence of Pope Benedict XVI). He carried on with his career by taking part in a number of television shows, the production of a documentary about Treacher Collins syndrome that was broadcast in France, the release of an album and then his autobiography, and concerts. As a result of his fame, Mr. Gabriel became a patient ambassador for Shriners Hospitals in 2012. He travelled in Canada and the United States and volunteered to participate in shows and fundraisers.

[11] Mr. Ward, for his part, is a professional comedian and a graduate of the École nationale de l'humour whose career began in 1993. His performances, for which

he has won many awards, are, he says, in the style of dark comedy, a comedy genre in which shocking subjects or social taboos are [TRANSLATION] “tackled”.

[12] From September 2010 to March 2013, Mr. Ward gave a show called *Mike Ward s'eXpose*, the main theme of which was tolerance and the fact that [TRANSLATION] “we are all the same”. Around 135,000 tickets were sold. This litigation centres on one of the routines in that show, called [TRANSLATION] *The Untouchables*. In that routine, Mr. Ward mocked certain figures in Quebec’s artistic community whom he described as “sacred cows” that could not be made fun of for various reasons, whether because of their wealth or their influence, or because “they are seen as weak” (examination-in-chief of Mr. Ward, A.R., vol. III, at p. 146, excerpts quoted in C.A. reasons, at paras. 75, 14 and 168). Mr. Gabriel was one of the public figures referred to in the routine.

[13] In addition to that show, Mr. Ward made several videos on topical subjects that were posted on his website. The videos were about a number of public figures. One of them was posted in connection with the release of Mr. Gabriel’s autobiography. In that video, Mr. Ward made disparaging comments about Mr. Gabriel’s physical appearance.

[14] The evidence shows that students attending the same secondary school as Mr. Gabriel drew inspiration from some of the comments in that video to make fun of him. The evidence also shows that, at the time, Mr. Gabriel was already the subject of tasteless jokes by people who drew a connection between his performance for Pope

Benedict XVI or his meeting with Cardinal Ouellet and pedophilia, well before Mr. Ward made his comments about him.

[15] In 2012, Mr. Gabriel's parents filed a complaint with the Commission, on their own behalf and on behalf of Mr. Gabriel, sometime after the broadcast of a television interview with Mr. Ward that included an excerpt from the routine called *The Untouchables* concerning their son. The Commission concluded that there was a basis for discrimination and referred the complaint to the Tribunal.

III. Procedural History

A. *Human Rights Tribunal, 2016 QCTDP 18, 35 C.C.L.T. (4th) 258 (Judge Hughes presiding)*

[16] The Tribunal considered the three elements of discrimination within the meaning of the *Charter*, namely: (1) a distinction (2) based on a prohibited ground (3) that has the effect of nullifying or impairing the equal recognition or exercise of a human right or freedom. First, Mr. Ward had subjected Mr. Gabriel to differential treatment by making comments about him in order to make his audience laugh. Second, Mr. Ward had made comments concerning Mr. Gabriel's disability, although he had not chosen Mr. Gabriel because of his disability. Third, Mr. Ward's derogatory comments attained the degree of seriousness required by *Calego International inc. v. Commission des droits de la personne et des droits de la jeunesse*, 2013 QCCA 924, [2013] R.J.D.T. 517. The Tribunal therefore concluded that by exposing Mr. Gabriel

to mockery because of his disability, Mr. Ward had infringed Mr. Gabriel's right to the safeguard of his dignity in a discriminatory manner.

[17] Having found that all the elements of discrimination had been established, the Tribunal considered Mr. Ward's "defence" based on freedom of expression. In its view, Mr. Ward's comments exceeded the limits of what a reasonable person can tolerate in the name of freedom of expression. The Tribunal therefore held that the discrimination suffered by Mr. Gabriel was not justified. Mr. Ward was ordered to pay \$25,000 in moral damages and \$10,000 in punitive damages. He then appealed that judgment.

B. *Quebec Court of Appeal, 2019 QCCA 2042, 62 C.C.L.T. (4th) 230*

(1) Majority Reasons (Roy and Cotnam JJ.A.)

[18] The appeal was dismissed by the majority, Justices Claudine Roy and Geneviève Cotnam, who noted that the standard of review applicable in an appeal from a decision rendered by the Tribunal is reasonableness.¹ First, they pointed out that Mr. Ward had chosen Mr. Gabriel both because of his fame and because of his disability and that the impugned comments had been directed specifically at the physical characteristics associated with that disability. In their view, the Tribunal could reasonably find that there was a distinction based on a prohibited ground. The

¹ This standard of review was modified by *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, which was released a few weeks after the Court of Appeal's decision. We will refer to that case in Part VI of these reasons.

Tribunal's finding on the third element of discrimination was also upheld on the basis that, even in a pluralistic society, a reasonable person targeted by Mr. Ward's comments would have had their dignity impaired in a discriminatory manner.

[19] The majority then analyzed the "defence" raised by Mr. Ward. In their opinion, the Tribunal had accurately applied the approach outlined by this Court in *Bombardier* by treating freedom of expression as a means of justifying expression that is *prima facie* discriminatory. They also adopted the test set out in *Calego*, which involves determining whether a reasonable person accustomed to a pluralistic society in which freedom of expression is valued and some immoderate language is accepted would regard the affront suffered as particularly contemptuous and fraught with consequences for them. In the majority's view, the Tribunal could reasonably conclude that Mr. Ward's comments were not justified by freedom of expression. The majority declined, in *obiter*, to recognize that comedy performances have a special status when it comes to freedom of expression.

(2) Dissenting Reasons (Savard J.A.)

[20] In dissent, Justice Manon Savard (as she then was) began by pointing out the only legal issue raised in the case:

[TRANSLATION] The issue raised by the appeal is of an entirely different nature. It concerns the analytical framework to be adopted by the Human Rights Tribunal ("Tribunal") when it has to decide a complaint of *discrimination* resulting from expression, and nothing else, based on a ground prohibited under section 10 of the *Charter of human rights and*

freedoms. The issue also requires a review, within that framework, of the appropriate balance between the right to dignity and freedom of expression. Beyond the impugned expression, which was in the style — by definition shocking and trenchant — of the type of humour used by the appellant, did he *discriminate* against the impleaded parties? And I stress that I am saying *discriminate* and not defame, because the Tribunal has no jurisdiction in the latter case. [Emphasis in original; footnote omitted; para. 7.]

[21] In the view of Savard J.A., who would have allowed Mr. Ward's appeal, the Tribunal had erred by excluding any comparative and contextual analysis in finding differential treatment. The fact that a person is targeted by name in a comedy show is not enough to establish a distinction within the meaning of s. 10 of the *Quebec Charter*. Savard J.A. also found that references to a prohibited ground that characterizes a person cannot on their own satisfy the first two elements of discrimination. In her opinion, the Tribunal had also erred by considering interference with the right to the safeguard of dignity in isolation; it should have considered freedom of expression not as a defence that could justify discriminatory conduct, but as a limit to the scope of that right pursuant to s. 9.1 of the *Quebec Charter*. That provision, she found, requires a balancing of freedom of expression and the right to the safeguard of dignity. Relying on the principles set out in *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11, [2013] 1 S.C.R. 467, Savard J.A. concluded that Mr. Ward's comments did not constitute discriminatory speech and that the Tribunal had therefore erred in finding otherwise.

IV. Issue

[22] The only issue is that of the legal framework that applies to a discrimination claim under the *Quebec Charter*, in a context involving freedom of expression, in order to determine whether, in this case, Mr. Ward interfered with Mr. Gabriel's right to the safeguard of his dignity and thereby in fact discriminated against him. Before dealing with that issue, we think it will be helpful to say a few words about the applicable standard of review and to note the distinction that must be drawn with respect to jurisdiction over, on the one hand, an action in defamation and, on the other, a discrimination claim in the context of the *Quebec Charter*.

V. Relevant Provisions of the *Quebec Charter*

[23] The provisions of the *Quebec Charter* at issue in this appeal, as they read at the relevant time, are as follows:

CHAPTER I

FUNDAMENTAL FREEDOMS AND RIGHTS

...

3. Every person is the possessor of the fundamental freedoms, including freedom of conscience, freedom of religion, freedom of opinion, freedom of expression, freedom of peaceful assembly and freedom of association.

4. Every person has a right to the safeguard of his dignity, honour and reputation.

...

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.

In this respect, the scope of the freedoms and rights, and limits to their exercise, may be fixed by law.

CHAPTER I.1

RIGHT TO EQUAL RECOGNITION AND EXERCISE OF RIGHTS AND FREEDOMS

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, 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.

Discrimination exists where such a distinction, exclusion or preference has the effect of nullifying or impairing such right.

VI. Applicable Standard of Review

[24] As stated above, the Court of Appeal found that reasonableness was the standard of review that applied in this case. However, the applicable standard of review was modified by *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, which was released a few weeks after the Court of Appeal's judgment. According to *Vavilov*, the presumption that reasonableness is the applicable standard of review for an administrative decision will be rebutted where the legislature has provided for "a statutory appeal mechanism from an administrative decision maker to a court, thereby signalling the application of appellate standards" (para. 33).

[25] Here, ss. 132 and 133 of the *Quebec Charter* state that the Tribunal's decisions may be appealed to the Quebec Court of Appeal. Because there is a statutory appeal mechanism, appellate standards apply rather than the reasonableness standard

(*Vavilov*, at para. 37; see *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235).

The applicable standard is correctness for questions of law and palpable and overriding error for questions of mixed fact and law.

VII. Jurisdiction Over Defamation and Discrimination

[26] Any action for compensation for the moral or material prejudice resulting from an infringement of a right guaranteed by the *Quebec Charter* is subject to the ordinary rules of civil liability (*Aubry v. Éditions Vice-Versa inc.*, [1998] 1 S.C.R. 591, at para. 49; *Béliveau St-Jacques v. Fédération des employées et employés de services publics inc.*, [1996] 2 S.C.R. 345, at para. 122). An action in defamation, whose purpose is to remedy the consequences of wrongful interference with reputation, is no exception to this principle. Although it encompasses the right of every person to the safeguard of their reputation set out in s. 4 of the *Charter*, it still requires proof of the coexistence of fault, injury and a causal connection between the two (*Prud'homme v. Prud'homme*, 2002 SCC 85, [2002] 4 S.C.R. 663, at para. 32).

[27] In this regard, it is important to be clear that the comments made by Mr. Ward about Mr. Gabriel did not lead to an action in defamation, but rather to a discrimination claim. This distinction is important because the Tribunal has no power to decide actions in defamation or other civil liability actions, since its jurisdiction is limited to complaints of discrimination or exploitation based on ss. 10 to 19 and 48 of the *Quebec Charter* (ss. 111, 80 and 71(1) of the *Quebec Charter*; *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3, at para. 40). The

Tribunal can hear disputes involving expression like the comments made in this case only if the expression may constitute discrimination within the meaning of s. 10 of the *Charter*.

[28] The *Quebec Charter* gives the Tribunal direct, albeit limited, jurisdiction over certain types of expression, insofar as it prohibits discriminatory harassment and advertising (ss. 10.1 and 11). However, this limited direct jurisdiction has been extended indirectly in recent decades as a result of a line of decisions generously interpreting both of the two main provisions at issue, that is, the provision setting out the right to equal recognition and exercise of rights and freedoms (s. 10 of the *Quebec Charter*) and that setting out the right of every person to the safeguard of their dignity, honour and reputation (s. 4). According to that line of decisions, hurtful expression relating to a ground listed in s. 10 of the *Quebec Charter* constitutes discrimination and may be within the Tribunal's jurisdiction, even if the harm suffered is relative and the social effects of discrimination, such as the perpetuation of prejudice or disadvantage, are absent (see, e.g., *Commission des droits de la personne et des droits de la jeunesse v. Fillion*, 2004 CanLII 468 (Que. H.R.T.); *Tchanderli-Braham v. Bériault*, 2018 QCTDP 4; *Jied v. Éthier*, 2019 QCTDP 26; *Mirouh v. Gaudreault*, 2021 QCTDP 10; *Ayotte v. Tremblay*, 2021 QCTDP 13).

[29] In addition to being based solely on the content of expression and not on its discriminatory effects, that line of decisions, which includes the Tribunal's judgment, dispenses with any fair balancing of freedom of expression and protection

of the right to the safeguard of dignity. It therefore creates a second avenue of recourse for discrimination, parallel to an action in defamation, to compel a person to answer for the harm caused by their words, with a much less onerous burden of proof on the complainant, who is in fact not required to bring their own proceedings if the Commission agrees to act on their behalf.

[30] In our view, that line of decisions raises serious concerns in light of our precedents on freedom of expression. A *discrimination* claim is not, and must not become, an action in *defamation*. The two are governed by different considerations and have different purposes. A discrimination claim must be limited to expression whose effects are truly discriminatory. Our analysis below reflects this perspective in clarifying the legal framework that applies to a discrimination claim based on ss. 4 and 10 of the *Quebec Charter* in a context where forms of verbal expression are in issue, drawing from the principles established in *Whatcott*, with the necessary modifications.

VIII. Analysis

A. *Preliminary Remarks*

[31] Mr. Ward essentially argues that the Tribunal and the majority of the Court of Appeal erred in identifying and applying the legal framework for s. 10 of the *Quebec Charter*. He submits that the elements of discrimination cannot be examined in isolation without considering freedom of expression, which limits the right to the safeguard of dignity. He argues that Mr. Gabriel's right to equality was not infringed.

The Commission, for its part, submits that Mr. Ward's "humorous" comments interfered with Mr. Gabriel's right to equal recognition of the right to the safeguard of his dignity and that the interference is not justified by freedom of expression. The Court of Appeal and the Tribunal dealt with the rights to the safeguard of dignity, honour and reputation more or less interchangeably. In this Court, the Commission relies mainly on the concept of dignity. We will do the same.

[32] We will begin by discussing the elements of discrimination and the limit imposed by s. 9.1 of the *Quebec Charter* on the right being asserted. We will then consider the conflict between the right to the safeguard of dignity and freedom of expression, and we will indicate how such a conflict is to be resolved in analyzing the third element of a discrimination claim based on expression. Finally, we will apply the s. 10 legal framework to the facts of this case.

B. *Elements of Discrimination Under the Quebec Charter*

[33] The objectives of the *Quebec Charter* are set out in its preamble as it read at the time:

WHEREAS every human being possesses intrinsic rights and freedoms designed to ensure his protection and development;

Whereas all human beings are equal in worth and dignity, and are entitled to equal protection of the law;

Whereas respect for the dignity of human beings, equality of women and men, and recognition of their rights and freedoms constitute the foundation of justice, liberty and peace;

Whereas the rights and freedoms of the human person are inseparable from the rights and freedoms of others and from the common well-being;

Whereas it is expedient to solemnly declare the fundamental human rights and freedoms in a Charter, so that they may be guaranteed by the collective will and better protected against any violation

[34] Recognizing that all human beings are equal in worth and dignity, the *Quebec Charter* seeks to eliminate discrimination by ensuring equal protection of everyone's fundamental freedoms and rights (*Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City)*, 2000 SCC 27, [2000] 1 S.C.R. 665 (“*CDPDJ v. Montréal*”), at para. 34; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Maksteel Québec Inc.*, 2003 SCC 68, [2003] 3 S.C.R. 228, at para. 35).

[35] Unlike the *Canadian Charter of Rights and Freedoms* (“*Canadian Charter*”), the *Quebec Charter* does not protect equality *per se*. The right to equality set out in s. 10 is protected only in the recognition and exercise of the other rights and freedoms guaranteed by the *Quebec Charter* (*Bombardier*, at para. 53). In this sense, s. 10 does not establish an independent right to equality but rather strengthens the protection of those other rights and freedoms (P. Carignan, “L'égalité dans le droit: une méthode d'approche appliquée à l'article 10 de la Charte des droits et libertés de la personne” (1987), 21 *R.J.T.* 491, at pp. 526-27). On the other hand, the *Quebec Charter* has a much broader scope than the *Canadian Charter*, because it binds not only the state but also all natural and legal persons situated in Quebec (ss. 54 and 55 of the *Quebec Charter*; D. Proulx, “Droit à l'égalité”, in *JurisClasseur Québec — Collection*

droit public — Droit constitutionnel (loose-leaf), vol. 2, by S. Beaulac and J.-F. Gaudreault-DesBiens, eds., fasc. 9, at Nos. 85-86).

[36] A plaintiff claiming the protection of s. 10 must satisfy a burden of proof that has three elements. First, the plaintiff must prove a “distinction, exclusion or preference” (*Quebec Charter*, s. 10), that is, “a decision, a measure or conduct [that] ‘affects [him or her] differently from others to whom it may apply’” (*Bombardier*, at para. 42, quoting *Ontario Human Rights Commission v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536, at p. 551). Second, the plaintiff must establish that one of the characteristics expressly protected in s. 10 was a factor in the differential treatment complained of (*Bombardier*, at paras. 52 and 56). Third, the plaintiff must show that the differential treatment impairs the full and equal exercise or recognition of a freedom or right guaranteed by the *Quebec Charter* (*Bombardier*, at para. 53). Where these three elements are established, the burden of justifying the discrimination falls on the defendant.

[37] No right is absolute, however. Section 9.1 of the *Charter* determines the scope of the fundamental right on which the alleged infringement of s. 10 is based (*Devine v. Quebec (Attorney General)*, [1988] 2 S.C.R. 790, at p. 818). Section 9.1 read as follows at the relevant time:

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.

In this respect, the scope of the freedoms and rights, and limits to their exercise, may be fixed by law.

[38] The first paragraph of this section “suggest[s] the manner in which the scope of the fundamental freedoms and rights [guaranteed by the *Quebec Charter*] is to be interpreted” (*Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, at p. 770). The purpose of this provision is [TRANSLATION] “to temper the absoluteness of the freedoms and rights set out in ss. 1 through 9 . . . by imposing limits . . . on the holders of those rights and freedoms in relation to other citizens” (*Bruker v. Marcovitz*, 2007 SCC 54, [2007] 3 S.C.R. 607, at para. 77, quoting *Journal des débats: Commissions parlementaires*, 3rd Sess., 32nd Leg., December 16, 1982, at p. B-11609). It echoes the preamble to the *Charter*, which states that “the rights and freedoms of the human person are inseparable from the rights and freedoms of others and from the common well-being”. Any assertion of a right must therefore be “reconciled with countervailing rights, values, and harm” (*Bruker*, at para. 77).

[39] However, s. 10, which is in a different chapter than ss. 1 to 9.1 of the *Charter*, remains outside the scope of s. 9.1 (*Ford*, at p. 781; *Devine*, at p. 818).

[40] In a context where a discrimination claim is based on a right guaranteed by any of ss. 1 to 9 and where the defendant also asserts a right set out in those provisions, the respective scope of the rights being asserted must be determined in light of s. 9.1. This balancing exercise must be undertaken as part of the analysis of the elements of discrimination. In this regard, we agree with Savard J.A.: the right relied on by the

defendant is not a defence, but a limit to the scope of the right invoked by the plaintiff. Before it can be found that there has been discrimination in the recognition or exercise of a right provided for in any of ss. 1 to 9, the protection of that right must be called for in light of the “democratic values, public order and the general well-being of the citizens of Québec” referred to in s. 9.1, as it read at the relevant time. There is no discrimination if, in a particular context, s. 9.1 gives the right exercised by the defendant precedence over the right invoked by the plaintiff in combination with s. 10. This is why the elements of discrimination cannot be analyzed in isolation. To do so would make it possible to circumvent the reasonable limits on the right invoked in support of s. 10 by giving that right an unlimited scope. Such an approach was rejected in *Devine* (p. 818).

[41] In that case, the Court had to determine, among other things, whether certain provisions of the *Charter of the French Language*, R.S.Q., c. C-11, infringed freedom of expression (s. 3) in a manner that was discriminatory within the meaning of s. 10 of the *Quebec Charter*. After establishing that there was a distinction based on a prohibited ground (at p. 817), the Court considered the interaction between ss. 10 and 9.1 of the *Quebec Charter*:

Does this distinction have the effect of nullifying or impairing the right to full and equal recognition and exercise of a human right or freedom recognized by the *Quebec Charter*? As in *Ford*, the human right or freedom in issue in this case is freedom of expression guaranteed by s. 3 of the *Quebec Charter*. In *Ford* it was found that the right guaranteed by s. 3 extended to protect the freedom to express oneself in the language of one’s choice; in this case, however, we have found that s. 3 does not extend to guarantee a right to express oneself exclusively in one’s own language.

This result was reached by operation of s. 9.1, which does not limit the application of s. 10 but does limit the application of s. 3. Dean François Chevette, in his article discussing the operation of s. 9.1, “La disposition limitative de la Charte des droits et libertés de la personne: le dit et le non-dit” (1987), 21 *R.J.T.* 461, at p. 470, has clarified the relationship among ss. 1 through 9, 9.1 and 10 to the same effect:

[TRANSLATION] One final, delicate question remains. By guaranteeing the equal recognition and exercise of rights and freedoms — in particular the rights and freedoms enshrined in ss. 1 to 9 — is s. 10 of the Charter itself subject to s. 9.1, especially given that the latter section is arguably incorporated by reference into ss. 1 to 9? In my view, the answer to this question should be no. Doubtless the rights and freedoms protected under ss. 1 to 9 can ultimately be limited by virtue of s. 9.1 — this despite the guarantee of their full and equal exercise provided by s. 10. But the limiting clause does not apply to the principle of equality itself. To conclude otherwise would be to broaden the well-defined scope of s. 9.1.

While it is true that s. 9.1 does not apply to the principle of equality enshrined in s. 10, it does apply to the guarantee of free expression enshrined in s. 3. Whenever it is alleged that a distinction on a ground prohibited by s. 10 has the effect of impairing or nullifying a right under s. 3, the scope of s. 3 must still be determined in light of s. 9.1. Where, as here, s. 9.1 operates to limit the scope of freedom of expression guaranteed under s. 3, s. 10 cannot be invoked to circumvent those reasonable limits and to substitute an absolute guarantee of free expression. On the other hand, having specified the scope of free expression, s. 9.1 cannot be invoked to justify a limit upon equal recognition and exercise of the right guaranteed by s. 3. Here, sections 52 and 57 do create a distinction based on language of use but do not have the effect of impairing or nullifying rights guaranteed under s. 3. They thus conform to the Quebec *Charter*. [Emphasis added; pp. 817-19.]

[42] Although *Devine* did not involve a conflict between two fundamental rights, we are of the view that the principles it establishes regarding the interaction between ss. 9.1 and 10 can be transposed to this case. Because s. 9.1 does not apply to s. 10, the scope of the right being asserted, in light of s. 9.1, must be determined in analyzing the third element of discrimination. Therefore, at this third step, the plaintiff

must show that the distinction based on a prohibited ground has the effect of impairing the recognition or exercise of the fundamental right being asserted. To do so, the plaintiff will have to show that the protection of that right is called for in light of s. 9.1.

[43] In the present case, as Savard J.A. correctly noted, 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. An approach of this kind is consistent with the structure of the *Quebec Charter* and the principles laid down by this Court in *Devine*.

[44] Where a discrimination claim is based on a freedom or right guaranteed by any of ss. 1 to 9, the plaintiff must therefore prove on a balance of probabilities:

1. A "distinction, exclusion or preference";
2. based on one of the grounds listed in s. 10;
3. that has the effect of nullifying or impairing the equal recognition or exercise of a right whose protection is called for in light of s. 9.1 in the context in which it is invoked.

Proof of these elements establishes, on the face of it, that there is discrimination. In some situations, such as in matters of employment, the *Quebec Charter* creates specific

defences for the defendant. In such a case, it will fall to the defendant to justify their decision, action or conduct that is *prima facie* discriminatory (*Bombardier*, at para. 37).

[45] The applicable legal framework having been outlined, nothing further needs to be said about the first two elements of the plaintiff's burden, as their application remains consistent with the approach proposed in *Bombardier*. However, it is necessary to clarify the analysis of the third element of discrimination where the claim brought requires, as it does here, a determination of the respective scope of the right to the safeguard of dignity and freedom of expression in light of s. 9.1.

C. *Third Element of Discrimination in the Context of a Conflict Between the Right to the Safeguard of Dignity and Freedom of Expression*

[46] The *Quebec Charter* does not establish any hierarchy between the right to the safeguard of dignity, guaranteed by s. 4, and the freedom of expression protected by s. 3. When these rights are in conflict, the proper approach is to interpret them so that both are exercised with "a proper regard for democratic values, public order and the general well-being of the citizens of Quebec" (*Ford*, at p. 770).

[47] We will start by looking at these rights separately. We will then consider *Whatcott*, in which the Court found that limits on freedom of expression may be justified in a free and democratic society in order to prevent the discriminatory effects of hate speech. Lastly, we will emphasize the relevance of that case in describing the test that must be applied in analyzing the third element of discrimination in order to

resolve a conflict between ss. 3 and 4 of the *Quebec Charter*. This test is meant to be applied in a context where the plaintiff argues that the defendant's expression had the effect of impairing the recognition of the plaintiff's right to the safeguard of their dignity. It does not apply in any other context.

(1) Right to the Safeguard of Dignity

[48] This Court has recognized that “[h]uman dignity . . . [is] among the values that underlie the [Canadian] Charter” (*Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391, at para. 81). However, the *Quebec Charter* goes further, because human dignity is not only a fundamental value in that statute, but also a right the safeguard of which is specifically protected (*Quebec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand*, [1996] 3 S.C.R. 211, at para. 100). Section 4 of the *Quebec Charter* sets out the right of every person “to the safeguard of his dignity”. But as several authors agree, behind this eloquent turn of phrase is a right whose scope is particularly difficult to identify (see, e.g., D. Goubau, with the collaboration of A.-M. Savard, *Le droit des personnes physiques* (6th ed. 2019), at No. 180; J. Torres-Ceyte and M. Lacroix, “Impression(s), la dignité”, in B. Lefebvre and B. Moore, eds., *Les grandes valeurs* (2019), 19, at pp. 27-28; C. Brunelle, “La dignité dans la Charte des droits et libertés de la personne: de l’ubiquité à l’ambiguïté d’une notion fondamentale”, in *La Charte québécoise: origines, enjeux et perspectives*, [2006] *R. du B.* (numéro thématique) 143, at pp. 172-74). Once the concept of dignity

leaves the realm of values and moves into the realm of legal norms, many difficulties arise in its application (A. Gajda, “The Trouble with Dignity”, in A. T. Kenyon, ed., *Comparative Defamation and Privacy Law* (2016), 246, at pp. 258-61; see also *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483, at paras. 21-22). For the purposes of this appeal, these difficulties can be overcome without adopting a fixed definition of this concept. It will suffice to clarify the scope of this “right to the safeguard of . . . dignity”.

[49] Courts have found interference with the right to the safeguard of dignity in a wide variety of contexts. For example, they have found an infringement of s. 4 of the *Quebec Charter* in the following cases: patients with an intellectual disability were deprived of hygiene care by hospital centre staff taking part in an illegal strike (*St-Ferdinand*, at paras. 108-9); an illustrator’s copyright was seriously infringed (*Cinar Corporation v. Robinson*, 2013 SCC 73, [2013] 3 S.C.R. 1168, at paras. 116-17); an individual suspected of theft was beaten, tortured and threatened with death by police officers (*Gauthier v. Beaumont*, [1998] 2 S.C.R. 3, at para. 90); a senior civil servant was denied access to an official residence following his publicized firing based on sexual harassment allegations before a real investigation had been completed (*Fortier v. Québec (Procureure générale)*, 2015 QCCA 1426, at para. 120 (CanLII)); a visually impaired man was denied access to a discotheque dance floor with his guide dog (*Commission des droits de la personne et des droits de la jeunesse v. 9185-2152 Québec inc. (Radio Lounge Brossard)*, 2015 QCCA 577, at para. 86 (CanLII)); workers of Chinese origin were forced to listen to their employer’s racist admonishments (*Calego*, at paras. 55-56 and 105); a senior executive was the target of

sexist and offensive remarks by the host of a shock jock radio show (*Genex Communications inc. v. Association québécoise de l'industrie du disque, du spectacle et de la vidéo*, 2009 QCCA 2201, [2009] R.J.Q. 2743, at para. 92); a couple was arrested and charged with criminal offences on the basis of falsified police reports (*Solomon v. Québec (Procureur général)*, 2008 QCCA 1832, [2008] R.J.Q. 2127, at paras. 167, 179 and 191; see also, along the same lines, *Procureur général du Canada v. Manoukian*, 2020 QCCA 1486, 70 C.C.L.T. (4th) 182, at paras. 139 and 144); intimate photographs were sent to third parties without authorization (*J.L. v. S.B.*, [2000] R.R.A. 665 (Que. Sup. Ct.), at para. 21).

[50] In addition to these very diverse cases, there is a long line of decisions in which disrespect is readily regarded as an infringement of s. 4 as long as it is of some seriousness (see, e.g., *Cinar*, at para. 116; *Bourdeau v. Hamel*, 2013 QCCS 752, at para. 197 (CanLII); *Hébert v. Giguère*, [2003] R.J.Q. 89 (Sup. Ct.), at paras. 155 and 159; *Commission des droits de la personne et des droits de la jeunesse v. 9113-0831 Québec inc. (Bronzage Évasion au soleil du monde)*, 2007 QCTDP 18, [2007] R.J.D.T. 1289, at para. 42). After completing their own analysis of the cases on s. 4, Professors Goubau and Savard make the following observation:

[TRANSLATION] In reality, interference with dignity is raised on its own only very exceptionally. Claims for compensation for interference with dignity are almost always made as part of an action based on interference with another fundamental right, whether it be the right to reputation, the right to respect for one's private life, the right to equality, the right to physical inviolability, etc. Courts will find interference with dignity where the interference with another fundamental right is particularly serious. In this sense, interference with dignity appears to be a threshold of seriousness

for the infringement of another right. Defamatory statements must therefore reach a certain level of seriousness in order to constitute interference with personal dignity in addition to interference with reputation. As a result, the concept of dignity is generally invoked as a modality of the other fundamental rights rather than as an independent right. This may seem surprising, but in reality it is simply a reflection of the fact that the legal concept of dignity is difficult to define with precision. [No. 180]

[51] This commentary clearly illustrates the confusion surrounding the right to the safeguard of dignity. In our view, treating this right as a mere modality of the other fundamental rights trivializes the very terms of s. 4. The scope of one fundamental right cannot be determined on the basis of the degree to which some other fundamental right is infringed. The right to the safeguard of dignity should not be invoked to protect an interest that is already fully secured by another fundamental right, because that other fundamental right is itself grounded in dignity (M. Fabre-Magnan, “La dignité en Droit: un axiome” (2007), 58 *R.I.E.J.* 1, at pp. 18-19). This lack of coherence in the application of s. 4 causes at least two significant problems in relation to the issue before us here.

[52] First, the uncertain scope of this provision makes any balancing of rights under s. 9.1 difficult. Second, the combination of ss. 4 and 10 tends to change the nature of the norm of equality provided for in the *Quebec Charter* — and to extend the jurisdiction of the Commission and the Tribunal well beyond what the legislature intended. Indeed, some authors have noted that the juxtaposition of the two provisions greatly broadens the scope of the norm of equality (Proulx, at No. 121; A. Morin, *Le droit à l'égalité au Canada* (2nd ed. 2012), at p. 186).

[53] In our view, this results not from the structure of the *Quebec Charter*, but from a misinterpretation of the right to the safeguard of dignity, the imprecise nature of which is regarded as having the effect of lessening the plaintiff's burden of proof in a discrimination action (see Morin, at p. 185). That reasoning makes an infringement of the right to equal recognition of the right to the safeguard of dignity easier to establish given the fact that dignity is always more or less affected when equality is denied, as the norm of equality flows from dignity (*Law v. Canada (Minister of Employment and Immigration)*), [1999] 1 S.C.R. 497, at paras. 51-54).

[54] In our opinion, such an approach amounts to circumventing the legislature's intention and making s. 10 of the *Quebec Charter* a vehicle for the protection of equality *per se* comparable to that of the *Canadian Charter*. The difference, however, is that the *Quebec Charter* is much broader in scope than the *Canadian Charter* and other human rights statutes: it does not apply only to dealings with the state or to certain areas of activity, but extends to *all* relationships between individuals. As we wrote in *Bombardier*, “[t]he [*Quebec*] *Charter*, unlike the *Canadian Charter*, does not protect the right to equality *per se*; this right is protected only in the exercise of the other rights and freedoms guaranteed by the [*Quebec*] *Charter*” (para. 53). An interpretation of s. 4 that overlooks this significant limitation must be rejected. The right to the safeguard of dignity is not — and must not become — incantatory [TRANSLATION] “boilerplate” (Torres-Ceyte and Lacroix, at p. 28, quoting A. Popovici, “La renonciation à un droit de la personnalité”, in *Thirtieth Anniversary Conference, 1975-2005: Cross-Examining Private Law* (2008), 99, at p. 107).

[55] In our view, the interpretation of this provision must be refocused on its purpose by considering its wording and context.

[56] In *St-Ferdinand*, this Court found that the right to the safeguard of dignity relates specifically to human dignity and protects against “interferences with the fundamental attributes of a human being which violate the respect to which every person is entitled simply because he or she is a human being and the respect that a person owes to himself or herself” (para. 105). In other words, s. 4 does not protect every person as such, but protects the *humanity* of every person in its most fundamental attributes. It is therefore the concept of humanity that is at the centre of the right to the safeguard of dignity. Indeed, this is demonstrated by the preamble to the *Quebec Charter*, on which the Court relied in *St-Ferdinand*. Inspired by the *Universal Declaration of Human Rights*, G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948), the preamble provides that “all human beings are equal in worth and dignity” and that “respect for the dignity of human beings” is one of the “foundation[s] of justice, liberty and peace”. In this context, dignity is the quality inherent in every human being [TRANSLATION] “the recognition of which in a sense defines civilization, and the disregard of which, barbarism” (T. De Koninck, *De la dignité humaine* (2002), at p. 16; see also R. Dworkin, *Justice for Hedgehogs* (2011), at p. 112).

[57] In fact, the emergence in law of the concept of dignity, and the meaning of this concept, were shaped by the very specific historical context of the atrocities committed in the 20th century, particularly during the Second World War

(C. McCrudden, “Human Dignity and Judicial Interpretation of Human Rights” (2008), 19 *E.J.I.L.* 655, at pp. 664-71; Brunelle, at pp. 145-46). To be contrary to s. 4 of the *Quebec Charter*, conduct must reach a high level of gravity that does not trivialize this very meaningful concept. Such conduct cannot be assessed in a purely subjective manner. An objective analysis is required, because dignity [TRANSLATION] “is aimed at protecting not a particular person or even a class of persons, but humanity in general” (Fabre-Magnan, at p. 21).

[58] What s. 4 confers is not a right *to dignity* but, more precisely, a right *to the safeguard* of dignity. The connotation and meaning of the words chosen by the legislature in this section are much stronger than those of “respect for the dignity” in the preamble to the *Quebec Charter*. The term “safeguard” refers to a form of defence or protection against a peril, whereas the term “respect” reflects the concept of regard or deference (see “*sauvegarde*” and “*respect*” in *Dictionnaire de l’Académie française* (9th ed. (online)); É. Littré, *Dictionnaire de la langue française* (1958), vol. 6, at pp. 1432-35 and 1940; *Le Grand Robert de la langue française* (electronic version)). Unlike, for example, s. 5, which confers a right *to respect* for one’s private life, s. 4 does not permit a person to claim respect for their dignity, but only the *safeguarding* of their dignity, that is, protection from the denial of their worth as a human being. Where a person is stripped of their humanity by being subjected to treatment that debases, subjugates, objectifies, humiliates or degrades them, there is no question that their dignity is violated. In this sense, the right to the safeguard of dignity is a shield against this type of interference that does no less than outrage the conscience of society.

(2) Freedom of Expression

[59] Like the right to the safeguard of dignity, freedom of expression flows from the concept of human dignity (D. Grimm, “Freedom of Speech and Human Dignity”, in A. Stone and F. Schauer, eds., *The Oxford Handbook of Freedom of Speech* (2021), 106, at p. 111; J. Waldron, *The Harm in Hate Speech* (2012), at p. 139; R. Dworkin, “Foreword”, in I. Hare and J. Weinstein, eds., *Extreme Speech and Democracy* (2009), v, at pp. vii-viii). The *Quebec Charter* recognizes that all human beings are equal in worth and dignity; this equality would be hollow if some people were silenced because of their opinions. The purpose of protecting freedom of expression is therefore to “ensure that everyone can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream” (*Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at p. 968).

[60] As McLachlin J. (as she then was) wrote in *R. v. Zundel*, [1992] 2 S.C.R. 731, “[t]he view of the majority has no need of constitutional protection” (p. 753). In fact, the exercise of freedom of expression presupposes, at the same time that it fosters, society’s tolerance of expression that is unpopular, offensive or repugnant (*Irwin Toy*, at pp. 969-71; *Montréal (Ville de) v. Cabaret Sex Appeal inc.*, [1994] R.J.Q. 2133 (C.A.)). Freedom to express harmless opinions that reflect a consensus is not freedom (R. Moon, “What happens when the assumptions underlying our commitment to free speech no longer hold?” (2019), 28:1 *Const. Forum* 1, at p. 4). This is why freedom of

expression does not truly begin until it gives rise to a duty to tolerate what other people say (L. C. Bollinger, *The Tolerant Society* (1986); Dworkin (2009), at p. vii). It thus ensures the development of a democratic, open and pluralistic society. Understood in this sense, “a person’s right to free expression is protected not in order to protect him, but in order to protect a public good, a benefit which respect for the right of free expression brings to all those who live in the society in which it is respected, even those who have no personal interest in their own freedom” (J. Raz, “Free Expression and Personal Identification” (1991), 11 *Oxford J. Leg. Stud.* 303, at p. 305).

[61] Limits on freedom of expression are justified where, in a given context, there are serious reasons to fear harm that is sufficiently specific and cannot be prevented by the discernment and critical judgment of the audience (*Whatcott*, at paras. 129-35; Moon, at pp. 1-2 and 4).

[62] For example, the law of defamation rests on the idea that “[f]alse allegations can so very quickly and completely destroy a good reputation. A reputation tarnished by libel can seldom regain its former lustre” (*Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at para. 108; see also *Bou Malhab v. Diffusion Métromédia CMR inc.*, 2011 SCC 9, [2011] 1 S.C.R. 214, at para. 18). Similarly, the prohibition against hate speech is justified not only because it causes emotional distress to the members of a vulnerable group, but also because it propagates, within social discourse, premises of inferiority that may gradually desensitize the majority and lay the groundwork for later, broad attacks (*R. v. Keegstra*, [1990] 3 S.C.R. 697, at

pp. 746-48; *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892, at pp. 918-19; *Whatcott*, at para. 74). Similar social harm justifies the prohibition against exposing to public view certain types of obscene material that portrays degrading and dehumanizing depictions of sex as being normal, acceptable and even desirable, insofar as such material predisposes those exposed to it to sexually violent behaviour incompatible with the proper functioning of society (*R. v. Butler*, [1992] 1 S.C.R. 452, at pp. 493-97 and 501-2; *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 S.C.R. 1120, at paras. 59-60; see, to the same effect, *R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45, at paras. 34 and 88-92). In contrast, the prohibition against publishing false news was held to be unconstitutional because it was based on a very vague definition of the social harm to be addressed, a definition that made it far too broad (*Zundel*, at pp. 769-75).

[63] In our view, limits on freedom of expression are also justified where it is used to disseminate expression that, even if it does not fully meet the definition of hatred set out in *Whatcott*, nonetheless forces certain persons “to argue for their basic humanity or social standing, as a precondition to participating in the deliberative aspects of our democracy” (*Whatcott*, at para. 75; see also *Keegstra*, at p. 765). As Professor Waldron writes:

[A] person [must be able] to walk down the street without fear of insult or humiliation, to find the shops and exchanges open to him, and to proceed with an implicit assurance of being able to interact with others without being treated as a pariah. [p. 220]

Freedom of expression would not benefit society as a whole if it prevented a person or class of persons from truly participating in the political process and the ordinary activities of society just like everyone else.

[64] It is understood that these limits also apply in an artistic context. This Court has already recognized, in *Butler*, that artistic expression rests at the heart of the values underlying freedom of expression (p. 486). However, the Court has declined to make artistic expression a category in its own right with a status superior to that of general freedom of expression (*Aubry*, at para. 55). There is no reason to reverse that position. The artistic context of an expressive activity is and will always be relevant, as this Court's decisions clearly demonstrate. Ever since *Brodie, Dansky and Rubin v. The Queen*, [1962] S.C.R. 681, which concerned the censorship of *Lady Chatterley's Lover*, a novel by D. H. Lawrence, this Court has been very reluctant to hinder the development of arts and literature (see, e.g., *Butler*, at p. 486; *Little Sisters*, at paras. 195-96, per Iacobucci J., dissenting on another point). In our view, however, freedom of expression cannot give an artist — to the extent that a person can be described as such — a level of protection higher than that of other persons.

(3) Approach Adopted in *Whatcott*

[65] In *Whatcott*, this Court considered whether the prohibition against hate speech in s. 14(1)(b) of *The Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1, was constitutional under s. 2(b) of the *Canadian Charter*. As part of that exercise, the Court had to “balance the fundamental values underlying freedom of expression . . .

with . . . a commitment to equality and respect for group identity and the inherent dignity owed to all human beings” (*Whatcott*, at para. 66).

[66] In our view, the differences between *The Saskatchewan Human Rights Code* and the *Quebec Charter* in no way diminish the importance of the principles enunciated in *Whatcott* in deciding the issue raised in this case. For the sake of clarity, we reproduce the relevant provisions of *The Saskatchewan Human Rights Code* here:

3 The objects of this Act are:

(a) to promote recognition of the inherent dignity and the equal inalienable rights of all members of the human family; and

(b) to further public policy in Saskatchewan that every person is free and equal in dignity and rights and to discourage and eliminate discrimination.

. . .

5 Every person . . . shall, under the law, enjoy the right to freedom of expression through all means of communication, including . . . any . . . broadcasting device.

. . .

14 (1) No person shall publish or display . . . any representation . . . :

. . .

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

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

[67] Unlike the *Quebec Charter*, *The Saskatchewan Human Rights Code* did not confer a positive right to the “safeguard of . . . dignity, honour and reputation”. Section 14(1)(b) of *The Saskatchewan Human Rights Code* nonetheless protected rights and interests similar to those guaranteed by ss. 4 and 10 of the *Quebec Charter* (*Whatcott*, at paras. 66 and 70). Indeed, the verbs “ridicule”, “belittle” and “affront the dignity” refer to actions that negate a person’s reputation, honour and dignity.

[68] This Court’s jurisprudence also establishes “that mere differences in terminology do not support a conclusion that there are fundamental differences in the objectives of human rights statutes” and that the *Quebec Charter* should therefore be interpreted “in light of the Canadian Charter and other human rights legislation” (*CDPDJ v. Montréal*, at paras. 46-47 (emphasis added)). It follows that, as long as this is not contrary to the usual rules of interpretation, symmetry in the interpretation of the various instruments that protect human rights and freedoms is desirable.

[69] The fact that *The Saskatchewan Human Rights Code* ensures respect for human dignity by limiting freedom of expression rather than by guaranteeing two concurrent positive rights, as the *Quebec Charter* does, is a difference in means rather than in purpose.

[70] Moreover, while it is true that *Whatcott* concerned the constitutionality of a provision under s. 1 of the *Canadian Charter* rather than a conflict between two rights under s. 9.1 of the *Quebec Charter*, the fact remains that these two provisions are not unrelated to each other (*Ford*, at pp. 769-70). Both are intended to circumscribe the

scope of rights and freedoms based on the requirements of a free and democratic society. Finally, given that the *Quebec Charter* must conform to constitutional norms, it should not, as far as possible, be interpreted in a manner inconsistent with the provisions of the *Canadian Charter*, which, it should be noted, guarantees freedom of expression but not a positive right to the safeguard of dignity (*CDPDJ v. Montréal*, at para. 42).

[71] With respect, we are of the view that the Tribunal and the majority of the Court of Appeal erred in excluding *Whatcott* from their reasoning (Tribunal reasons, at paras. 127 and 129; C.A. reasons, at paras. 210-11). In our opinion, *Whatcott* merits special attention because the principles arising from it are indispensable to the analysis required in this case.

[72] Mr. Whatcott had distributed flyers vilifying homosexuals to members of the public. The complainants, who had received the flyers at their homes, argued that the material promoted hatred against individuals because of their sexual orientation — a prohibited ground recognized by the Saskatchewan statute. When proceedings were brought against Mr. Whatcott before the province’s Human Rights Tribunal under s. 14(1)(b) of *The Saskatchewan Human Rights Code*, he challenged the constitutionality of that provision on the basis that it infringed s. 2(b) of the *Canadian Charter* and was not justified under s. 1.

[73] Writing for the Court in that case, Rothstein J. began by determining the scope of s. 14(1)(b) by defining the concept of “hatred”. In his view, minimizing

subjectivity and overbreadth required prohibiting only expression that was likely to cause the harm the legislature was seeking to address, that is, “the most extreme type of expression that has the potential to incite or inspire discriminatory treatment against protected groups on the basis of a prohibited ground” (para. 48). This category did not include “hurt feelings, humiliation or offensiveness” (para. 47). The objective of s. 14(1)(b) was to prevent discriminatory effects (at para. 54), not to “discourag[e] repugnant or offensive ideas” or to “censor ideas or to compel anyone to think ‘correctly’” (paras. 51 and 58). The intent of the author of the expression was therefore irrelevant, as was the content or nature of the ideas expressed (paras. 49 and 58). The analysis had to be focused on the “mode of expression [of those ideas] in public and the effect that this mode of expression may have” (para. 51). Even if repugnant and offensive, expression that did not incite abhorrence, delegitimization or rejection did not risk causing socially harmful effects such as discrimination; it was therefore not likely to expose anyone to “hatred” within the meaning of s. 14(1)(b) of *The Saskatchewan Human Rights Code* (para. 57). Determining whether expression met that definition required an objective assessment based on the reasonable person standard (paras. 52, 56 and 59).

[74] Having established the scope of s. 14(1)(b), Rothstein J. then turned to the constitutional aspect. Given that hate speech may lay the groundwork for later attacks on the members of a vulnerable group, attacks that may involve discrimination and violence, he had no difficulty in determining that its suppression is a pressing and substantial objective (para. 77). He noted that, to satisfy the rational connection

requirement, the hate speech to be suppressed must “rise to a level beyond merely impugning individuals: it must seek to marginalize the group by affecting its social status and acceptance in the eyes of the majority” (para. 80 (emphasis added)). However, “protecting the emotions of an individual group member is not rationally connected to the overall purpose of reducing discrimination” (para. 82). This was why, in his view, the prohibition against any representation that “ridicules”, “belittles” or “affronts . . . dignity” was not justified under s. 1 of the *Canadian Charter*. These words refer to “expression which is derogatory and insensitive, such as representations criticizing or making fun of protected groups on the basis of their commonly shared characteristics and practices, or on stereotypes” (para. 89). A democratic society concerned about preserving freedom of expression must make space for that kind of discourse given that it typically does not lead to the systemic discrimination against vulnerable groups that the legislature was seeking to eradicate (paras. 89-92 and 109). Finding that the words “ridicules, belittles or otherwise affronts the dignity of” could be severed from s. 14(1)(b) without contravening the legislative intent, Rothstein J. determined that that part of s. 14(1)(b) was unconstitutional (paras. 93-95 and 99). However, he was of the view that the remainder of s. 14(1)(b) was justified under s. 1 of the *Canadian Charter*.

[75] He found that the prohibition in s. 14(1)(b) applied if, first, the expression met the definition of hatred under that provision. This would be the case if “a reasonable person, aware of the relevant context and circumstances, would view the representations as exposing or likely to expose a person or class of persons to

detestation or vilification on the basis of a prohibited ground of discrimination” (para. 178). But this could not be sufficient, as the assessment also had to take the legislature’s objectives into account (*ibid.*). It was therefore necessary to consider, second, whether the expression, “when viewed objectively and in its context, has the potential to lead to discriminatory treatment of the targeted group” to which the person or class of persons belonged (para. 191).

[76] Having set out the applicable test, Rothstein J. stated that it was reasonable to conclude that two of the four flyers at issue in the case were contrary to s. 14(1)(b).² He found that, first, those flyers met the definition of hatred because they relied on a respected source — the Bible — to lend credibility to pejorative generalizations and to depict homosexuals as subhuman and as carriers of disease, sex addicts, pedophiles and predators who would proselytize vulnerable children and cause their premature death (paras. 187-90). Second, the flyers expressly called for the rejection of homosexuality and the discriminatory treatment of homosexuals (paras. 191-92). However, Rothstein J. found that it was not reasonable to draw the same conclusion about the other two flyers. As offensive as they were, those flyers, viewed objectively, did not meet the definition of hatred (paras. 194-201). It was therefore unnecessary to determine whether they were likely to lead to discriminatory treatment of homosexuals.

[77] In short, the Court limited the prohibition created by s. 14(1)(b) to expression that could inspire extreme feelings of detestation likely to affect the

² *Vavilov*, decided a few years after *Whatcott*, modified the standards of review that apply in a context in which there is a statutory right of appeal from an administrative tribunal’s decision.

vulnerable group's acceptance within society and that also had enough motivating force to lead to the type of discriminatory treatment the legislature was seeking to address. The Court declined to limit freedom of expression in order to confer protection from emotional harm. Professor Rainville aptly summarizes the nature of the social harm that justified limiting freedom of expression in *Whatcott*:

[TRANSLATION] Canadian law protects the *victim's social standing* while forgoing protection of the victim's *emotional serenity*. Offensive words are tolerated, whereas expression that is likely to lead to discrimination, ostracism or violence against [individuals] is prohibited.

The harm that may, in this context, justify departing from freedom of expression therefore has two characteristics: the apprehended harm is meant to be collective and social in nature. . . .

The prohibited harm is therefore social and not mental, collective and not individual. [Emphasis in original.]

(La répression de l'art et l'art de la répression: La profanation de la religion à l'épreuve des mutations du droit pénal au sujet du blasphème et de la protection des identités religieuses (2019), at p. 61)

[78] With these principles established, we must now determine how they apply in the context of the *Quebec Charter*.

(4) Test That Applies Where There is a Conflict Between the Right to the Safeguard of Dignity and the Right to Freedom of Expression

[79] After establishing a distinction based on a prohibited ground, the plaintiff must show as well that the distinction has the effect of impairing the full and equal recognition of the right to the safeguard of their dignity. The protection of that right

must also be called for in light of s. 9.1. Otherwise, the application will fail. As Savard J.A. properly pointed out, it is at this stage that a conflict between the plaintiff's right to the safeguard of their dignity and the defendant's freedom of expression should be resolved (C.A. reasons, at paras. 94-99).

[80] In this process, it is important to avoid giving s. 4 a scope so broad that it would neutralize freedom of expression, or so vague that it would be inconsistent with the principles laid down by this Court in *Taylor* and *Whatcott*. Finally, although this is not determinative in our analysis, we note that an infringement of s. 10 may lead not only to a civil action, but also to penal proceedings under s. 134(1) of the *Quebec Charter*. If it were necessary to find one, this would be an additional reason to clarify the applicable test.

[81] In *Calego*, to which both the majority and the dissenting judge referred in their reasons, Morissette J.A. proposed that a conflict between dignity and freedom of expression be resolved as follows:

[TRANSLATION] . . . we must be guided first and foremost by an objective test in interpreting section 4. The touchstone for the concepts of dignity and honour is an abstract standard. It is the perception of a reasonable person who, when a discriminatory remark is made about them, as here, tempers their reaction because they are familiar with the customs of a pluralistic society in which freedom of expression is valued and some immoderate language in the exercise of that other fundamental right is accepted. In other words, here we tolerate a frankness that is not the norm everywhere else. This consideration must be reflected in the analysis of the concepts of dignity and honour. Therefore, a reasonable person will not regard their "right to the safeguard of his dignity [or] honour" as having been infringed in a manner contrary to s. 10 of the *CHRF* unless there has been a particularly contemptuous affront to their racial, ethnic or other

identity and one that has grave consequences for them. Finally, in such matters, the maxim *de minimis non curat lex* should always be borne in mind. [Emphasis in original; text in brackets in original; para. 99.]

[82] In our view, the perception of a reasonable person targeted by the same words must be excluded. That approach results in a shift toward protecting a right not to be offended, which has no place in a democratic society (Dworkin (2009), at p. viii; see also *Whatcott*, at paras. 50 and 90). 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. An approach of this kind has been rejected by this Court (*Whatcott*, at paras. 50-51, 58 and 82).

[83] The test for resolving a conflict between the right to freedom of expression and the right to the safeguard of dignity requires rather that it be determined, first, whether a reasonable person, aware of the relevant context and circumstances, would view the expression targeting an individual or group as inciting others to vilify them or to detest their humanity on the basis of a prohibited ground of discrimination. This first criterion is more in keeping with the requirements of the *Canadian Charter* as formulated in *Whatcott*. Hate speech within the meaning of *Whatcott* is therefore prohibited, as is expression that has the same effects on personal dignity without meeting the definition of hatred given in that case.

[84] Second, it must be shown that a reasonable person would view the expression, considered in its context, as likely to lead to discriminatory treatment of

the person targeted. This second criterion takes the objectives of the *Quebec Charter* into account (*Whatcott*, at paras. 178 and 191). The purpose of s. 10 is to eliminate discrimination in the *recognition* and exercise of human rights and freedoms. The recognition of a right implies “the social acceptance of a general duty to respect . . . it” (*Ontario Human Rights Commission*, at p. 554). Discrimination within the meaning of the *Quebec Charter* therefore involves differential treatment that affects an individual’s social acceptance. As a result, only expression that, considered in its context, is likely to jeopardize the social acceptance of the individual or group is discriminatory (*Whatcott*, at paras. 178 and 191). The analysis is focused not on the content of the expression as such, but on its likely effects on third parties, that is, the discriminatory treatment likely to result from it (*Whatcott*, at paras. 54, 58 and 82).

[85] In this regard, the mode of expression and the effect of the mode of expression are determinative. Expression that stirs up extreme and intrinsically dangerous emotions like hatred in an audience clearly does not have the same impact as expression that is calm and rational. This does not mean, of course, that speech that purports to be scientific or rational is incapable of arousing the contempt of the majority for the humanity of vulnerable groups. But in general, expression that appeals to an audience’s reason or to emotions free of any real motivating force will be unlikely to lead to discriminatory treatment of the targeted individual or group.

[86] Before we proceed with our analysis, a few observations must be made about expression that occurs in private. The application of the *Quebec Charter*, unlike

the legislation at issue in *Whatcott*, is not limited to expression that is broadcast or published. It is not impossible that expression that occurs in private will be discriminatory under the *Quebec Charter*, in exceptional cases. First, the expression must, in the eyes of the reasonable person, be likely to incite vilification or detestation of the humanity of the person targeted. Second, a reasonable person must conclude that the expression, considered in its context, would likely have led third parties, if they had been present, to discriminate against the individual targeted. At the risk of repeating ourselves, the analysis must be focused on the likely discriminatory effects of the expression, not on the emotional harm suffered by the person alleging discrimination.

[87] These principles having been outlined, their application to expression that is humorous in nature calls for two remarks.

[88] First, expression that attacks or ridicules people may inspire feelings of disdain or superiority in relation to them, but it generally does not encourage the denial of their humanity or their marginalization in the eyes of the majority (*Whatcott*, at paras. 89-91). It is true that ridicule, if pushed to the limit, could cross this line, but it will do so only in extreme and unusual circumstances.

[89] Second, 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” (C.A. reasons, at para. 129, per Savard J.A.). 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 (see, by analogy, *Bou Malhab*, at para. 74; S. Martin, “Rira bien qui rira le dernier: la caricature confrontée au droit à l’image” (2004), 16 *C.P.I.* 611, at pp. 621-22). This is all the more true where the expression comes from a person publicly known for their particular type of humour (see, by analogy, *Bou Malhab*, at para. 89) or where it targets a public figure whose fame exposes them to such commentary (see, by analogy, *WIC Radio Ltd. v. Simpson*, 2008 SCC 40, [2008] 2 S.C.R. 420, at para. 48; *Trudeau v. AD4 Distribution Canada inc.*, 2014 QCCA 1740, at paras. 21-22 (CanLII)). Other than in exceptional cases, it would be surprising if expression in such circumstances had enough motivating force to lead to discriminatory treatment.

[90] These clarifications must not be interpreted as resulting in a form of impunity for comedians or as diminishing the protection given by the law to public figures. There is less of a risk that expression will lead to discrimination where it involves supposedly humorous comments that are made by a well-known comedian or that concern a person known to the public. And in the absence of a sufficiently serious risk, the claim must fail.

D. *Application to This Case*

[91] In summary, we are of the view that Mr. Gabriel was made subject to a distinction by being targeted by Mr. Ward’s comments. However, in light of the Tribunal’s finding that Mr. Ward [TRANSLATION] “did not choose Jérémy because of

his handicap” but rather “because he was a public personality” (Tribunal reasons, at para. 86), it must be concluded that the distinction was not based on a prohibited ground. This conclusion on its own is sufficient to dispose of the appeal. Nonetheless, we believe that it will be helpful to analyze discrimination in its entirety in light of the particular context of this case.

(1) A Distinction, Exclusion or Preference

[92] As the Court stated in *Bombardier*, “[t]he first element of discrimination is not problematic” (para. 42). The plaintiff must prove “differential treatment, that is, that a decision, a measure or conduct ‘affects [him or her] differently from others to whom it may apply’” (*ibid.*, quoting *Ontario Human Rights Commission*, at p. 551).

[93] Mr. Ward is a professional comedian who says that he uses dark humour. In the routine in his show called *The Untouchables* and in his comedy videos, he held several public figures up to ridicule. Mr. Gabriel was one of them.

[94] The Tribunal found that Mr. Gabriel had been subjected to differential treatment by being exposed to mockery in Mr. Ward’s comedy show and videos (Tribunal reasons, at para. 81). In our view, no intervention is warranted with respect to this finding of fact in the absence of a palpable and overriding error (*Vavilov*, at para. 37; *Hydro-Québec v. Matta*, 2020 SCC 37, at para. 33).

[95] That being said, a distinction alone cannot suffice. The distinction in question must have been based on a prohibited ground, which is the second element of discrimination.

(2) Based on a Prohibited Ground

[96] The Tribunal, referring to *Bombardier*, correctly identified the applicable test for the second element of discrimination. Under that test, “the plaintiff has the burden of showing that there is a *connection* between a prohibited ground of discrimination and the distinction, exclusion or preference of which he or she complains or, in other words, that the ground in question was a *factor* in the distinction, exclusion or preference” (*Bombardier*, at para. 52 (emphasis in original)). In other words, “for a particular decision or action to be considered discriminatory, the prohibited ground need only have contributed to it” (*Bombardier*, at para. 48).

[97] The Tribunal’s conclusion on this point is contradictory. First, it found, [TRANSLATION] “[i]n light of the evidence as a whole”, that Mr. Ward “did not choose [Mr. Gabriel as a target] because of his handicap”, but rather “because he was a public personality who attracted public sympathy and seemed to be ‘untouchable’” (para. 86). The distinction identified at first by the Tribunal was therefore not based on a prohibited ground. Its analysis should have ended there.

[98] In our view, the Tribunal erred when it continued its analysis by focusing on Mr. Ward’s actual *comments* to determine whether they were related to

Mr. Gabriel's disability, despite its finding that [TRANSLATION] "[Mr.] Ward's decision to make jokes about [Mr. Gabriel] was not in itself discriminatory" (para. 87 (emphasis added)).

[99] The Tribunal's reasoning essentially involved finding that there was a distinction based on a prohibited ground because the comments referred to such a ground. But the mere mention of a prohibited ground cannot in itself establish that that ground was a factor in the differential treatment. It may of course be an indication that this was the case, but it is certainly not sufficient evidence. If it were otherwise, there would no longer be any need to prove that the ground contributed to the differential treatment. As this Court stated in *Bombardier*, "although the nature of the evidence that is presented may vary from case to case, the 'legal test' does not change. What can vary are the circumstances that might make it possible to meet the requirements of the various elements of the analysis, and the courts must adopt an approach that takes the context into account" (para. 69).

[100] In light of its finding that Mr. Gabriel had been targeted by Mr. Ward's comments because of his fame and not because of his disability, the Tribunal had no choice but to conclude that the second element of discrimination had not been established. In disregarding its own finding of fact, the Tribunal overlooked the specific nature of the claim before it. It confined itself to the message and the harm, and it conducted its analysis as it would in an action for defamation, where the plaintiff is not

required to prove either differential treatment or a connection to a prohibited ground of discrimination.

[101] Moreover, and with respect, the majority of the Court of Appeal ignored the Tribunal's first finding of fact and erroneously substituted their own analysis by concluding that [TRANSLATION] "Mr. Ward chose Mr. Gabriel both because of his fame and because of his disability" (C.A. reasons, at para. 168).

[102] That being said, even if we were to adopt the Tribunal's position or that of the majority of the Court of Appeal, the outcome of this appeal would not be affected in view of the conclusion we reach on the third element of discrimination.

(3) Impairing the Recognition of the Right to the Safeguard of Dignity

[103] The last element of discrimination requires establishing whether the differential treatment based on a prohibited ground impairs Mr. Gabriel's right to full and equal recognition of his right to the safeguard of his dignity. This step must begin with a determination of whether the protection of Mr. Gabriel's right to the safeguard of his dignity is called for in light of s. 9.1 of the *Charter*. For this purpose, this right must be balanced against Mr. Ward's right to freedom of expression.

[104] The conflict between the fundamental rights invoked by the parties can be resolved by applying the test out above. It must first be asked whether a reasonable person, aware of the relevant context and circumstances, would view the expression

targeting Mr. Gabriel as inciting others to vilify him or to detest his humanity on the basis of a prohibited ground of discrimination. It must then be asked whether this reasonable person would view the expression, considered in its context, as likely to lead to discriminatory treatment of Mr. Gabriel. In our opinion, the comments made by Mr. Ward meet neither of these two requirements.

[105] In her dissent, Savard J.A. properly emphasized the importance of considering expression in its context (C.A. reasons, at paras. 128-29). The context here is that of a dark comedy show meant for an audience that had paid to hear this kind of talk. In his show, Mr. Ward said that it had become impossible in Quebec to mock people without risking legal proceedings. He said that he wanted to take risks and poke fun at the “untouchables”, that is, people whom Quebecers like and who are successful and powerful. After mocking the physical appearance of many public figures, Mr. Ward came to Mr. Gabriel, whom he described to his audience as a young person with a loudspeaker on his head. Alluding to the complaints of those who did not really appreciate Mr. Gabriel’s artistic talent, he said that he had defended Mr. Gabriel’s right to live out his dream, believing that he was about to die. Mr. Ward added that, because Mr. Gabriel had not died, he had tried to drown him but had not succeeded. In ending the routine, he said that he had discovered from searches that Mr. Gabriel’s illness was being ugly.

[106] As for the video, it was made in connection with the release of Mr. Gabriel’s autobiography in 2008, two years after the launch of the show in issue.

The comedian made the video available on his professional website for about a year. It consisted of a photograph of the young Mr. Gabriel in which only the eyes and mouth moved. Using a disguised voice, Mr. Ward made his target speak in the first person. In the video, Mr. Gabriel was presented as a young person with a loudspeaker on his head and a mouth that did not close all the way.

[107] Mr. Gabriel's testimony spoke volumes about the pain caused to him by those hurtful words, which date back to a time when he was still a young teenager. There is certainly nothing uplifting in the fact that a popular, well-known comedian used his platform to make fun of a young man with a disability. Be that as it may, the question here is not whether Mr. Ward's comments were in good or in bad taste; rather, a legal framework must be applied to comments that were made in a specific context. That legal framework is focused on the likely discriminatory effects of the comments, not on the emotional harm suffered by the person targeted.

[108] In our view, a reasonable person aware of the relevant circumstances would not view Mr. Ward's comments about Mr. Gabriel as inciting others to vilify him or to detest his humanity on the basis of a prohibited ground of discrimination. His comments, considered in their context, cannot be taken at face value. Although Mr. Ward said some nasty and disgraceful things about Mr. Gabriel's disability, his comments did not incite the audience to treat Mr. Gabriel as subhuman.

[109] In both his video and his show, Mr. Ward mocked some of Mr. Gabriel's physical characteristics. 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 (*Whatcott*, at paras. 90-91). The first requirement of the test is therefore not met, and the analysis could end here.

[110] That being said, even if we had found that the comments incited others to vilify Mr. Gabriel or to detest his humanity on the basis of a prohibited ground, the analysis of the second requirement of the test set out in this decision would also have led to the denial of his claim. A reasonable person could not view the comments made by Mr. Ward, considered in their context, as likely to lead to discriminatory treatment of Mr. Gabriel.

[111] At first instance, the Tribunal found that Mr. Gabriel's classmates [TRANSLATION] "were inspired by [Mr.] Ward's comments" to make fun of him (para. 114 (emphasis added)). That evidence is relevant only insofar as it tells us something about the likely effect of the comments. It must be remembered that the test is objective. It should therefore be kept in mind that something that occurs following a person's conduct is not necessarily a result of that conduct. Thus, the fact that people are inspired by certain comments does not mean that this is a likely effect of those comments. Of course, it is foreseeable that comments made by a well-known comedian will have repercussions outside their initial context, but this does not mean that those repercussions can necessarily be attributed to the comedian. It must still be determined

whether, viewed objectively, the comments encouraged such repercussions. In our view, this is not the case here.

[112] The impugned comments involved open provocation and systematic exaggeration — methods that increased their derisory effect. They were made by a career comedian known for this type of humour. They exploited, rightly or wrongly, a feeling of discomfort in order to entertain, but they did little more than that. As a result, the comments made in the video and the show, considered in their context, were not likely to have a spillover effect that could lead to discriminatory treatment of Mr. Gabriel.

[113] Accordingly, the Commission did not meet the requirements for succeeding under ss. 4 and 10 of the *Quebec Charter*. But this conclusion does not mean that Mr. Gabriel was without recourse following these events. Other recourses were available. For example, though we express no opinion on the chances of success of these alternative recourses, Mr. Gabriel could have invoked the protection against harassment provided for in s. 10.1 of the *Charter* because of the fact that he had been bullied. He could also have brought an action in defamation. However, neither the Commission nor the Tribunal has jurisdiction over defamation. The combination of the norm of equality in the *Quebec Charter* and the right to the safeguard of dignity cannot confer such jurisdiction on them indirectly.

IX. Disposition

[114] The appeal is allowed without costs. The judgments of the Tribunal and the Court of Appeal are set aside as they relate to Mr. Gabriel.

The reasons of Abella, Karakatsanis, Martin and Kasirer JJ. were delivered by

ABELLA AND KASIRER JJ. —

[115] This is an appeal about discriminatory speech that targets a disabled child. It involves a comedian relying on his artistic licence to skewer public figures, and a child with a physical disability who became known as a singer. The issue is whether the child with disabilities lost protection from discrimination and the right to be free from public humiliation and bullying just because he is well known.

[116] This country has spent generations working towards creating a society that values human rights and protects individuals from harm caused by their differences of race, religion, disability, colour, or sexual orientation, among other grounds. We would never tolerate humiliating or dehumanizing conduct towards children with disabilities; there is no principled basis for tolerating words that have the same abusive effect. Wrapping such discriminatory conduct in the protective cloak of speech does not make it any less intolerable when that speech amounts to wilful emotional abuse of a disabled child.

[117] Legislatures and the courts have consistently taken action to prevent and compensate for the serious harm that can be caused by speech. This is not, therefore, primarily a case about artistic freedom. It is a case about the rights of vulnerable and marginalized individuals, particularly children with disabilities, to be free from public humiliation, cruelty, vilification and bullying that singles them out on the basis of their disability and the devastating harm to their dignity that results. Unsurprisingly, given the tenor of the jokes and his young age, the impact on the child here was severe. He was ostracized from his peer group and experienced suicidal thoughts.

[118] At issue in this case is s. 10 of the *Charter of Human Rights and Freedoms*, CQLR, c. C-12 (“Quebec Charter”), which protects the equal exercise of other individual rights and freedoms, including the right to the safeguard of one’s dignity. In our view, this provision serves to protect individuals from discriminatory speech so harmful that a reasonable person in their circumstances would refuse to tolerate it. Section 10 should continue to be interpreted in a way that allows for this individual harm to be addressed, in keeping with the standard set out by the Court of Appeal in *Calego International inc. v. Commission des droits de la personne et des droits de la jeunesse*, 2013 QCCA 924, [2013] R.J.D.T. 517.

[119] For the reasons that follow, we would dismiss the appeal. The central question is whether the impairment of the equal exercise of the right to dignity is sufficiently serious, or whether it is justified by the comedian’s freedom of expression. In the circumstances of this case, the widely disseminated taunting of a 10 to

13 year-old disabled child that plays on dehumanizing notions associated with his disability clearly meets this threshold.

Background

[120] The complainant Jérémy Gabriel was born in 1996 with Treacher Collins syndrome. The syndrome causes deformities to the ears, head and palate and, in Mr. Gabriel's case, deafness. When he turned 6, Jérémy Gabriel was fitted with an osteo-integrated hearing aid which allowed him, for the first time, to hear between 80 and 90 percent of sounds. The hearing aid enabled him to learn how to speak. He also developed a passion for singing. In 2005, at the age of 8, he had his first public appearance as a singer on a television show called *Donnez au suivant*. He subsequently became well known. Between 2005 and 2008, when he was 8 to 11 years old, Jérémy Gabriel performed widely, including with Céline Dion and for the Pope. He also appeared on a number of television programs broadcast both provincially and nationally and sang the national anthem at a Montreal Canadiens game.

[121] Mike Ward is a comedian who has been performing stand-up comedy since the 1990s. By his own account, he has performed in thousands of shows and some of this material is accessible to a wider audience on the internet. From 2010 to 2013, Mr. Ward performed in a show called *Mike Ward s'expose*. In it, he targeted celebrities whom he brands as "sacred cows".

[122] In 2007, when he was 10 years old, Jérémy Gabriel released an autobiography detailing his career and his experience living with Treacher Collins syndrome. Shortly afterwards, Mr. Ward posted a number of video clips on his website mocking Jérémy Gabriel. In these clips, Mr. Ward mocked Jérémy Gabriel's disability, including through imitation, and made the following comments:

[TRANSLATION] So now I'm takin' the opportunity, y'know, to put out the goods while I'm still young, y'know, because I mean later, y'know, when I'm 40, I won't be able to make records any more, y'know. I mean ugly guy who sings, y'know, there's already Gregory Charles, so he's got like a monopoly on the market.

And well, y'know, I didn't want to say that, but it's because I can't control what comes out because my mouth doesn't close all the way, look . . .

But that's an operation I would have liked to get, but apparently I'd rather sink all my money in the sports car my mother bought, so now I'm stuck with this little speaker on my head, a mouth that won't shut and a pretty average book, thank you very much. [Emphasis added.]

(A.R., vol. III, at p. 194 (transcribed from attached CD))

[123] In his *Mike Ward s'eXpose* show, Mr. Ward made the following remarks about Jérémy Gabriel, who was between 13 and 16 years old at the time:

[TRANSLATION] She impresses me, Céline, because she sang for the Pope. The only other Quebec kid to sing for the Pope? Little Jérémy?

You remember little Jérémy, y'know, the kid with the subwoofer on his head?

When little Jérémy came, everyone complained except me, I was the only one who defended him. Y'know when he came, he sang for the Pope, people said, "He's really bad, he's off-key, he sings badly". I defended

him, I said, “He’s dying, let him live out his dream, he’s living out a dream. His dream was to sing off-key in front of the Pope”.

Then after he sang for the Canadiens, people complained again, “He sings badly. He’s off-key, he’s no good”. Christ, he’s living out a dream, let him live out his dream.

[He] sang for Céline, again with the “He really sucks, he’s off-key, he sings badly”. Christ, he’s dying, let him live out his dream. I defended him . . . Except now . . . five years later . . . he’s still not dead!

Idiot that I am, I defended him like an idiot, and he doesn’t die.

I saw him with his mother at a Club Piscine. I tried to drown him . . . couldn’t do it, couldn’t do it, he’s unkillable.

I went online to see what his illness was. You know what’s wrong with him? He’s ugly!

(A.R., vol. III, at pp. 260-61 (reproduced as transcribed))

[124] Approximately 135,000 tickets were sold to these performances and 7,500 DVD copies of the performances were also sold. A recorded version of the show was also available on Mr. Ward’s website to which the wider public had access.

[125] Jérémy Gabriel learned of Mr. Ward’s videos in 2010 when he was 13 years old and had just begun high school. At school, students tormented him, repeating the jokes that Mr. Ward had made during his routine and circulated online. The impact on Mr. Gabriel during this formative stage of his life was substantial. He questioned whether his life had any value, felt lost, isolated and experienced repeated suicidal thoughts.

[126] In 2012, Mr. Ward was interviewed on a TV show called *Les francs-tireurs*. He discussed the jokes he made about Jérémy Gabriel, explaining that pushing boundaries and going too far lay at the heart of his comedy. In response to the interviewer's questions, Mr. Ward acknowledged the view that his jokes were not just in poor taste but amounted to bullying a child with a disability:

[TRANSLATION]

Interviewer: OK. And in your show, you say he's ugly.

Mr. Ward: Yes.

Interviewer: Is it his fault if he's ugly?

Mr. Ward: No.

Interviewer: How is that funny?

Mr. Ward: I don't know, but it's . . . it's . . . I don't know. It's . . . But the way my joke is put together, I find it funny. And people laugh and then I judge people for laughing over it, laughing at it . . .

Interviewer: If you make fun of Jérémy, who won't you make fun of?

. . .

Interviewer: Because I come back to that, Mike, he's ill, not his fault. Can you give him a break?

Mr. Ward: But you see, that's one of the jokes that when I said I have a line, that I'm always on the line, there I'm on the wrong side of the line, but I don't know, fuck, it's a problem I have. I . . . it makes me laugh.

. . .

Interviewer: You took part in a video against bullying where you said how bad bullying is. Listen, what you're doing with Jérémy, I think it's a form of bullying to bash him all over the province in front of hundreds, in front of thousands of people. How is it not bullying?

Mr. Ward: I don't know. I don't know. It's a good point. I hear you and, y'know, let's say, if you were talking, let's say I'm in my living room, you're talking to someone and you say that, I'm gonna be like Christ he's totally right. Y'know, the other guy's a fucking jackass to talk about a child with a disability that way . . . [Emphasis added.]

(A.R., vol. III, at p. 196 (transcribed from attached CD))

[127] This interview prompted Jérémy Gabriel and his parents to file a complaint with the Commission des droits de la personne et des droits de la jeunesse ("Commission"). They alleged that Mr. Ward's comments were a discriminatory interference with their right to dignity, honour and reputation under ss. 4 and 10 of the Quebec *Charter*.

[128] The Commission concluded that Mr. Ward's comments and videos were discrimination under the Quebec *Charter* and brought the claim before the Human Rights Tribunal ("Tribunal") on behalf of Jérémy Gabriel and his parents.

[129] The Tribunal (Hughes J.C.Q. presiding with the assistance of assessors M^e Claudine Ouellet and M^e Mélanie Samson) held that *prima facie* discrimination was made out based on the test from the Quebec jurisprudence (2016 QCTDP 18, 35 C.C.L.T. (4th) 258). It found that Mr. Gabriel had been singled out based on his disability in a way that violated his right to equality. The Tribunal cited the devastating effects Mr. Ward's comments had on his sense of self-worth, the fact that he was bullied in school, felt distant from his friends and family and that he had suicidal thoughts.

[130] At the justification stage of the analysis, the Tribunal concluded that freedom of expression could not serve as a defence in this case because Mr. Ward's jokes did not raise an issue of public importance and strayed from the core values of protected speech. As such, the impairment of the equal exercise of Mr. Gabriel's right to dignity, honour and reputation was unjustified.

[131] Mr. Ward was ordered to pay Mr. Gabriel \$35,000 in moral and punitive damages as well as \$7,000 to his mother.

[132] At the Court of Appeal, the majority, applying the same test from the Quebec jurisprudence as the Tribunal, agreed that Mr. Gabriel's right to the equal exercise of his right to dignity, honour and reputation was violated and that freedom of expression could not justify Mr. Ward's conduct (2019 QCCA 2042, 62 C.C.L.T. (4th) 230). It therefore upheld the damages award in favour of Mr. Gabriel, but overturned the award in favour of his mother because it concluded that none of her rights were violated.

[133] The dissenting judge found that it was unreasonable for the Tribunal to hold that Mr. Gabriel suffered a distinction based on his disability, concluding instead that he was targeted not because he has a disability, but because he was a public personality. She added that caricaturing someone based on their disability cannot give rise to a claim under ss. 4 and 10 because it is a question of defamation, not of discrimination. Since the Tribunal does not have jurisdiction over defamation, it had no jurisdiction over the claim. Moreover, she concluded that the Tribunal erred in

seeing freedom of expression as part of the justificatory analysis, rather than as an internal limit on the right to dignity. She would have allowed the appeal by dismissing the claims brought in the name of both Mr. Gabriel and his mother.

Analysis

[134] We see no reason to depart from this Court's jurisprudence confirming that it is the impact of the conduct that matters, not the intention, rejecting the proposition that it is acceptable to discriminate if it results from treating likes alike, and that freedom of expression includes the right to discriminate. Mr. Ward's justifications that he did not intend to discriminate, that he was treating J r my Gabriel like any other celebrity, and that his artistic licence as a comedian gave him a right to mock a disabled child have, as a result, no basis in law.

[135] The claim is that the language used by Mr. Ward about Mr. Gabriel's disability, both in live performances and on the internet, constituted a discriminatory interference with his right to dignity, honour and reputation. The claim is based on a combination of ss. 4 and 10 of the Quebec *Charter*. Section 4 protects the right to the safeguard of one's dignity, along with honour and reputation, as a fundamental right. Section 10 is the Quebec *Charter's* equality provision. It protects against discriminatory interferences with any of the rights or freedoms set out in the Quebec

Charter.³ Together, ss. 4 and 10 protect the right to the full and equal safeguard of dignity, honour and reputation. These sections provide:

4. Every person has a right to the safeguard of his dignity, honour and reputation.

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.

Discrimination exists where such a distinction, exclusion or preference has the effect of nullifying or impairing such right.

[136] Under the Quebec *Charter*, fundamental freedoms and rights, including s. 4, are circumscribed and balanced through an application of s. 9.1 which provided at the relevant time:

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.

In this respect, the scope of the freedoms and rights, and limits to their exercise, may be fixed by law.

[137] To determine whether speech constitutes discrimination, the same framework as the one used for other claims of discrimination under s. 10 applies. It was most recently confirmed by this Court in *Quebec (Commission des droits de la*

³ This includes not only the “Fundamental Freedoms and Rights” set out in ss. 1 to 9, but also the “Political Rights” set out in ss. 21 and 22, the “Judicial Rights” set out in ss. 23 to 38 and the “Economic and Social Rights” set out in ss. 39 to 48.

personne et des droits de la jeunesse) v. *Bombardier Inc. (Bombardier Aerospace Training Center)*, [2015] 2 S.C.R. 789. A unanimous Court held that the approach to discrimination under the Quebec *Charter* was to consider first whether a case of *prima facie* discrimination was made out, and then to determine if the conduct was justified (paras. 36-37).

[138] The test set out in *Bombardier* for whether there is *prima facie* discrimination requires claimants to show, on a balance of probabilities, that they have been subject to a “distinction, exclusion or preference” based on one of the grounds enumerated in s. 10 (para. 35). They must show that this distinction “affects the full and equal exercise of a right or freedom guaranteed to him or her by the [Quebec] *Charter*” (para. 53). As the Court explained, at para. 54:

This means that the right to non-discrimination cannot serve as a basis for an application on its own and that it must necessarily be attached to another human right or freedom recognized by law. However, this requirement should not be confused with the independent scope of the right to equality; the [Quebec] *Charter* does not require a “double violation” (right to equality and, for example, freedom of religion), which would make s. 10 redundant. [Citations omitted.]

[139] That means that for a claim to succeed under s. 10, the equality provision, the complainant must show that the exercise of one of the rights and freedoms guaranteed by the Quebec Charter other than equality was affected in a discriminatory way but without having to show that that right or freedom was independently violated (*Velk v. McGill University*, 2011 QCCA 578, 89 C.C.P.B. 175, at para. 42; *Quebec (Commission des droits de la personne) v. St-Jean-sur-Richelieu, Commission scolaire*

(1994), 117 D.L.R. (4th) 67 (Que. C.A.), at pp. 90-91; see also David Robitaille, “Non-indépendance et autonomie de la norme d’égalité québécoise: Des concepts ‘fondateurs’ qui méritent d’être mieux connus” (2004), 35 *R.D.U.S.* 103, at pp. 111-13; Christian Brunelle, “Pour une restructuration de la *Charte québécoise?*”, in *Mélanges en l’honneur de Jacques-Yvan Morin*, [2015] *R.Q.D.I.* (hors-série) 199, at p. 213).

[140] If the complainant can show *prima facie* discrimination on a balance of probabilities, the defendant is entitled to “present a defence of justification, which he or she must then establish” (*Bombardier*, at para. 58). At this stage, the burden of proof shifts to the defendant to “justify his or her decision or conduct on the basis of the exemptions provided for in the applicable human rights legislation or those developed by the courts” (para. 37).

[141] As *Bombardier* itself states, this approach is in keeping with this Court’s application of the test for discrimination across the country and in line with the Court “favour[ing] a consistent interpretation of the various provincial human rights statutes unless a legislature intends otherwise” (para. 31; see, e.g., *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3, at para. 2; *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l’Hôpital général de Montréal*, [2007] 1 S.C.R. 161, at para. 44, per Abella J., concurring; *Moore v. British Columbia (Education)*, [2012] 3 S.C.R. 360; *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868, at para. 20).

[142] We note the disagreement below about where the balancing mandated by s. 9.1 of the Quebec *Charter* should take place in the structure of the *Bombardier* test. The dissenting judge at the Court of Appeal insisted that the Tribunal was wrong not to undertake this balancing in determining whether there had been *prima facie* discrimination (para. 99), while the majority concluded that the balance was best conducted at the justification step (para. 194). Where, as here, the considerations on both sides of the balance have been fully canvassed by the parties, the extent to which the balancing is undertaken at the first step where the Commission has the persuasive burden of proof or at the second step where that burden is on a defendant will generally be immaterial to the outcome. That is precisely the case here with Mr. Ward.

[143] To determine whether there has been *prima facie* discrimination in the case before us, the first step is to determine whether Mr. Ward subjected Mr. Gabriel to a distinction based on his disability. If so, the question becomes whether the distinction had the effect of impairing the right to full recognition or exercise of a right under the Quebec *Charter*.

[144] Whether there is a distinction on a ground listed in s. 10 in a particular case is a question of mixed fact and law that is owed deference on appeal. There is no reason to interfere with the Tribunal's conclusion that this first element of *prima facie* discrimination was made out on the record.

[145] The Commission's burden "is limited to showing prejudice and its connection to a prohibited ground of discrimination" (*Quebec (Commission des droits*

de la personne et des droits de la jeunesse) v. *Montréal (City)*, [2000] 1 S.C.R. 665 (“*Boisbriand*”), at para. 65). This means that the Commission does not have to show that Mr. Ward intended to single out Mr. Gabriel based on his disability, or that the distinction was based exclusively, or even primarily, on his disability. There must only be a connection between the distinction and the ground (*Bombardier*, at paras. 41 and 45-47). As this Court said in *Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252, for a distinction to be based on an enumerated ground, “[i]t is sufficient that ascribing to an individual a group characteristic is one factor in the treatment of that individual” (p. 1288 (emphasis added); see also *Desroches v. Commission des droits de la personne*, [1997] R.J.Q. 1540 (C.A.)).

[146] The Tribunal has repeatedly held that the use of an overtly discriminatory slur constitutes a “distinction, exclusion or preference” based on an enumerated ground (see, e.g., *Commission des droits de la personne et des droits de la jeunesse v. Remorquage Sud-Ouest (9148-7314 Québec inc.)*, 2010 QCTDP 12; *St-Éloi v. Rivard*, 2018 QCTDP 2). But it has also held that comments which are not overt slurs may constitute discrimination depending on how a person in the marginalized group at issue would understand them (see generally *Commission des droits de la personne et des droits de la jeunesse v. Camirand*, 2008 QCTDP 11, at para. 39 (CanLII); *Commission des droits de la personne et des droits de la jeunesse v. Paradis*, 2016 QCTDP 17, at para. 149 (CanLII); *Commission des droits de la personne et des droits de la jeunesse v. Quenneville*, 2019 QCTDP 18; *De Gaston v. Wojcik*, 2012 QCTDP 20; *Commission*

des droits de la personne et des droits de la jeunesse v. Brisson, 2009 QCTDP 3, at para. 42 (CanLII).

[147] Mr. Ward’s jokes about Mr. Gabriel were self-evidently pejorative slurs based on his disability. Mr. Ward referred to Jérémy Gabriel as the [TRANSLATION] “ugly singing kid” and he mocked him as unable to close his mouth (Tribunal reasons, at para. 21) and as having a “sub-woofer” on his head in describing a hearing aid device (para. 18). His jokes about drowning Mr. Gabriel drew on pernicious stereotypes about persons with disabilities as objects of pity and as burdens on society who are disposable (*Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, at para. 56). Scholars have observed this, in particular in respect of mistreatment of children with disabilities (see, e.g., Susanne Commend, “*Au secours des petits infirmes*”: *Les enfants handicapés physiques au Québec entre charité et exclusion, 1920-1990*, doctoral thesis (2018), at p. 87).

[148] Mr. Ward argued that Mr. Gabriel was not singled out because he was a child with a disability but because he was a celebrity. This ignores the fundamental truth in this case: Mr. Ward targeted aspects of Mr. Gabriel’s public personality which were inextricable from his disability. As such, he stood apart from the other public figures that Mr. Ward mocked as “sacred cows”. These realities cannot be artificially severed to immunize Mr. Ward’s comments from human rights scrutiny. This is why the Tribunal concluded, rightly, that both Mr. Ward’s widely disseminated video clips, available day or night to anyone with an internet connection, and his stand-up special

subjected Mr. Gabriel to a distinction based on his disability. They either explicitly mocked his physical characteristics which stem from his disability, or related to aspects of his public personality which are inextricably linked to his disability (Tribunal reasons, at para. 82).

[149] With respect, the notion that Mr. Ward's comments cannot constitute a distinction based on his disability because Mr. Gabriel was treated like any other celebrity reflects a discredited conception of discrimination. In *Commission scolaire régionale de Chambly v. Bergevin*, [1994] 2 S.C.R. 525, at p. 540, this Court confirmed that under s. 10 of the Quebec *Charter*, as in discrimination law across Canada, uniform treatment which fails to accommodate differences may constitute a prohibited distinction. As McIntyre J. explained in *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, "there is no greater inequality than the equal treatment of unequals" (p. 164, quoting *Dennis v. United States*, 339 U.S. 162 (1950), at p. 184) and so, to avoid such inequity, "the main consideration" for courts hearing discrimination claims should be "the impact . . . on the individual . . . concerned" (p. 165). As such, there will be a distinction based on a prohibited ground whenever a claimant "carries a burden that others do not, by reason of [an enumerated] personal characteristic" (*Withler v. Canada (Attorney General)*, [2011] 1 S.C.R. 396, at para. 62; see also *Boisbriand*, at para. 65; *Mouvement laïque québécois v. Saguenay (City)*, [2015] 2 S.C.R. 3, at para. 120).

[150] At this stage of the analysis, it is immaterial whether Mr. Ward intended to mock Mr. Gabriel because he has a disability, whether Mr. Ward was joking or being serious, or whether Mr. Gabriel was skewered in the same way as other celebrities. The issue is not Mr. Ward's stated intention not to discriminate against Mr. Gabriel (*Ontario Human Rights Commission v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536). The issue is the *impact* of Mr. Ward's comments on this child with a disability. In the circumstances we disagree, with respect, that the Tribunal was wrong to find a distinction on an enumerated ground, much less that it committed a palpable and overriding error.

[151] The existence of *prima facie* discrimination therefore depends on whether this distinction had the effect of impairing Mr. Gabriel's right to free and equal recognition of the s. 4 right under s. 10 of the Quebec *Charter*. The parties and the judges below disagree on the applicable standard that Mr. Ward's speech had to meet to constitute an actionable violation of this prohibition on discrimination.

[152] Mr. Ward relies on this Court's decision in *Saskatchewan (Human Rights Commission) v. Whatcott*, [2013] 1 S.C.R. 467, for the proposition that the guarantee of freedom of expression in the *Canadian Charter of Rights and Freedoms* ("Canadian *Charter*") means that speech that impairs the right to equality can only be actionable if it amounts to something akin to hate speech. This approach, adopted by the dissenting judge in the Court of Appeal in this case, was explicitly rejected by the Court of Appeal in *Calego*.

[153] In *Whatcott*, this Court considered the constitutionality of a statutory prohibition against publishing or displaying any representation “that exposes or tends to expose to hatred, ridicules, belittles or otherwise affronts the dignity of any person or class of persons on the basis of a prohibited ground”, conceded to be a *prima facie* breach of s. 2(b) of the Canadian *Charter* (paras. 12 and 62). The objective of the provision was defined as “reducing the harmful effects and social costs of discrimination by tackling certain causes of discriminatory activity” (para. 71). The Court held that while prohibiting representations that are objectively seen to expose protected groups to hatred was rationally connected to this objective, prohibiting expression which “ridicules, belittles or otherwise affronts the dignity of” those protected groups was not, and those words were severed from the provision (para. 99).

[154] *Whatcott* concerns a brand of harmful speech — hate speech — that is prohibited because it gives rise to social harm to a marginalized group as opposed to individual harm. This Court in *Whatcott*, referring to its earlier decision in *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892, defined “hatred” in this context in reference to whether an informed reasonable person would “view the expression as likely to expose a person or persons to detestation and vilification on the basis of a prohibited ground of discrimination” (para. 59).

[155] This is not a case of hate speech as that term is used in *Whatcott* and *Taylor*. Neither the Tribunal nor the majority of the Court of Appeal considered whether Mr. Ward’s expression amounted to hate speech.

[156] Like the provision in *Whatcott*, s. 10 places a *prima facie* limit on s. 2(b) of the Canadian *Charter* by prohibiting speech that prevents the equal exercise of the right to the safeguard of dignity, honour and reputation (see generally *Canadian Broadcasting Corp. v. Canada (Attorney General)*, [2011] 1 S.C.R. 19, at para. 38). But the legislative purpose underlying s. 10 is broader than the *Whatcott* provision and, accordingly, the prohibition on speech can be broader than hate speech while remaining rationally connected to that purpose. Because s. 10 guarantees the equal exercise of all “human rights and freedoms”, including the right to the safeguard of dignity, honour and reputation, the purpose of the provision goes beyond preventing harm on a group scale and the perpetuation of discriminatory attitudes in the public at large. Section 10 is inherently tied to the other individual human rights and freedoms guaranteed by the Quebec *Charter* (Robitaille, at p. 108). The provision considered in *Whatcott* was, by contrast, uniquely aimed at preventing societal, as opposed to individual, harm by addressing “certain causes of discriminatory activity” (paras. 71 and 79-84). By its very terms, it targeted only expression that was published or displayed “such as through newspapers or other printed matter, or through television or radio broadcasting” (*Whatcott*, at para. 83), whereas s. 10 evidences no similarly restricted scope. The proper interpretation of s. 10 cannot be understood in reference to principles governing the constitutionality of a different provision with a different objective.

[157] It is well recognized that speech can cause individual harm without being hateful, and there is no constitutional bar to legal recourse in such circumstances where the limit on freedom of expression is aimed at different objectives

(Jean-Louis Baudouin, Patrice Deslauriers and Benoît Moore, *La responsabilité civile* (9th ed. 2020), vol. 1, at Nos. 1-291, 1-296, 1-600 and 1-603). This is the case, for example, with harassment (Quebec *Charter*, s. 10.1; see, e.g., *Commission des droits de la personne et des droits de la jeunesse v. Sfiridis*, 2002 QCTDP 42 (CanLII); *Janzen*; *McCoy v. McCoy*, 2014 QCCS 286), defamation (art. 1457 *Civil Code of Québec* (“C.C.Q.”) and Quebec *Charter*, s. 4; see also *Bou Malhab v. Diffusion Métromédia CMR inc.*, [2011] 1 S.C.R. 214, at paras. 48-49), and circumstances like those in *British Columbia Human Rights Tribunal v. Schrenk*, [2017] 2 S.C.R. 795, where employees were subjected to various discriminatory slurs. Nor does freedom of expression limit the ability of administrative decision-makers to address harmful speech that is not hate speech (see, e.g., *Canadian Centre for Bio-Ethical Reform v. Grande Prairie (City)*, 2018 ABCA 154, 67 Alta. L.R. (6th) 230, at paras. 70 and 114).

[158] Neither the Canadian *Charter* nor the Quebec *Charter*, therefore, make hate speech the threshold at which discriminatory comments can be actionable. In this sense, *Whatcott* is not the proper standard to decide the present appeal.

[159] Instead, the appropriate threshold for discriminatory speech under the Quebec *Charter* was set out in the Court of Appeal’s decision in *Calego*, where an employer called all of his Asian employees into a meeting and berated them for being dirty because they were Chinese (para. 11). The court unanimously upheld the Tribunal’s ruling that the employer’s comments were a discriminatory interference

with each of the individual employees' right to dignity, making them actionable under ss. 4 and 10 of the Quebec Charter (paras. 55-56, 104-5 and 118).

[160] Two judges wrote concurring reasons in *Calego*, and the third judge on the panel subscribed to both. In his reasons, Morissette J.A. explained that the determination of whether speech undermines the equal exercise of the right to dignity is an objective one, not subjectively determined, but it is one that takes into account the circumstances of the complainant (paras. 99-102). Only comments which are [TRANSLATION] “a particularly contemptuous affront to their racial, ethnic or other identity and one that has grave consequences” will constitute discrimination (para. 99). This is a fact-specific and highly contextual inquiry. Because the complainants in that case were vulnerable and on the job site, forced to listen and suffer silently as they were targeted because of their membership in an ethnic group, it was clear that they suffered discrimination (paras. 104-5).

[161] Vézina J.A. agreed that insulting comments based on a prohibited ground can constitute s. 10 discrimination. This will be the case where the comments are [TRANSLATION] “interference that is truly serious”, and he noted that the “threshold is high” (para. 50). Referring to the tribunal judge's finding that the employees were shaken and suffered psychological damage because of the employer's comments, he was of the view that the speech in question violated their right to the equal exercise of the right to dignity (paras. 54-56).

[162] *Calego* was based on a significant body of jurisprudence from the Tribunal holding that comments based on a ground enumerated in s. 10 of the Quebec *Charter* which impair the equal exercise of someone's right to the safeguard of their dignity are actionable discrimination (see, e.g., *Commission des droits de la personne et des droits de la jeunesse v. Chamberland*, 2013 QCTDP 37; *De Gaston*).

[163] Following *Calego*, speech based on an enumerated ground will violate the s. 10 guarantee of equality in the exercise of the s. 4 right to the safeguard of one's dignity when it constitutes such a contemptuous affront to the individual's identity that it would have serious consequences for the reasonable person in that individual's circumstances. The reasonable person would be aware of the importance of freedom of expression in a democratic society, and would therefore be expected to tolerate hurtful speech, even related to protected grounds, that does not rise to a high level of gravity (*Calego*, at para. 99; see also *Yapi v. Moustafa*, 2021 QCTDP 9, at para. 37 (CanLII); *Ferdia v. 9142-7963 Québec inc.*, 2021 QCTDP 2, at para. 28 (CanLII)).

[164] As Morissette J.A. explained in *Calego*, at para. 102, while the assessment of whether speech impairs dignity is objective, it must account for the particular characteristics of the plaintiff and it must consider all of the context in which the remarks are made:

[TRANSLATION] The applicable test is therefore first and foremost an objective one. That being said, the impact must be assessed in the specific context in which someone claims to be a victim of discrimination. To this extent, the abstractness of the test (reflected in the concept of the objectively reasonable person) is attenuated and the test moves closer to

the particular situation of the individual claiming to be a victim of discrimination.

[165] *Calego* also makes the manner in which the impugned comments were delivered relevant to the assessment of whether speech impairs the equal exercise of the right to the safeguard of one's dignity. In that case, the fact that the employees were a [TRANSLATION] "'captive' audience" who had no choice but to listen to the speaker made it more likely that the comments would cause them harm to dignity (para. 103).

[166] In this case, the Tribunal found that Mr. Ward's speech constituted discrimination because it impaired Mr. Gabriel's equal exercise of his rights to the safeguard of his dignity and honour (at para. 102) as well as his reputation (para. 116). In *Calego*, Morissette J.A. noted explicitly that these concepts are distinct and sought to distinguish, in particular, the notion of dignity from honour and reputation. He emphasized, at para. 101, that dignity in this context was squarely focused on the respect owed to individuals by virtue of their status as human beings and was not necessarily tied to the perspective of others in society:

[TRANSLATION] Moreover, the concepts of dignity, honour and reputation cannot be reduced to one and the same thing. I am inclined to think that the last two connote, though perhaps to different degrees, the idea of a third party's view of the alleged victim of the interference. This is not the case, it seems to me, of the first concept, because dignity is the respect to which a person is entitled as a human being and subject of law.

In our view, it is not necessary to consider honour and reputation in this case. Even when dignity alone is considered, it remains clear that s. 10 has been breached and the Tribunal's award of damages should stand.

[167] Dignity is [TRANSLATION] “the pre-eminent value of every human being recognized as a person in their own right, regardless of their individual characteristics and their social affiliations” (Dominique Goubau, with the collaboration of Anne-Marie Savard, *Le droit des personnes physiques* (6th ed. 2019), at No. 177, quoting Jean-Guy Belley, “La protection de la dignité humaine dans le pluralisme juridique contemporain” (2010), 8 *C.R.D.F.* 117, at p. 119).

[168] The right to the safeguard of one's dignity is a stand-alone right under the Quebec Charter. The Court explored s. 4 dignity in *Quebec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand*, [1996] 3 S.C.R. 211, where the issue was whether employees of an elder care hospital who walked out on their patients violated the patients' rights. L'Heureux-Dubé J. defined the right to the safeguard of dignity as a prohibition on “interferences with the fundamental attributes of a human being which violate the respect to which every person is entitled simply because he or she is a human being” (para. 105; see also Marie Annik Grégoire, “Le parcours tumultueux des propos injurieux en droit québécois depuis 2009: l'arrêt *Génex Communications inc. c. Association québécoise de l'industrie du disque, du spectacle et de la vidéo (ADISQ)* est-il toujours pertinent?” (2016), 57 *C. de D.* 3).

[169] In the broader Canadian context, this Court has recognized dignity as the lodestar of the Canadian *Charter* and all of the rights it enshrines (*R. v. Kapp*, [2008] 2 S.C.R. 483, at para. 21). In *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, it defined dignity as being concerned with the integrity and empowerment of individuals and groups: “Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits” (para. 53). Enhancing dignity means, according to the Court in *Law*, making place for all individuals and groups in society.

[170] More specifically, the right to the safeguard of one’s dignity under s. 4 of the Quebec *Charter* aims to ensure that every person is treated with the basic level of respect to which everyone is entitled by virtue of their humanity (*Hôpital St-Ferdinand*, at para. 105; see also *Gauthier v. Beaumont*, [1998] 2 S.C.R. 3, at para. 90; *Cinar Corporation v. Robinson*, [2013] 3 S.C.R. 1168, at para. 116; *Procureur général du Canada v. Manoukian*, 2020 QCCA 1486, 70 C.C.L.T. (4th) 182, at para. 136). This right, like the rest of the Quebec *Charter*, must be given “a liberal, contextual and purposive interpretation” (*Bombardier*, at para. 31; see also *Béliveau St-Jacques v. Fédération des employées et employés de services publics inc.*, [1996] 2 S.C.R. 345, at para. 116; *Hôpital St-Ferdinand*, at para. 105). Dignity was included in the Quebec *Charter* alongside the right to safeguard one’s honour and reputation, reflecting jurisprudence that did not fall strictly under either of the two more specific concepts (Christian Brunelle, “La dignité dans la *Charte des droits et libertés de la personne*: de l’ubiquité à l’ambiguïté d’une notion fondamentale”, in *La Charte québécoise*:

origines, enjeux et perspectives, [2006] *R. du B.* (numéro thématique) 143, at pp. 162-65). Its inclusion ensures that broader notions of dignity can be protected without the need for an exhaustive list of each of its manifestations (Brunelle (2006), at pp. 171-72).

[171] Turning to the case before us, the question is whether Mr. Ward impaired the equal exercise of Mr. Gabriel's right to the safeguard of his dignity. While the Tribunal correctly identified *Calego* as the controlling authority, in our respectful view it fell into error by focusing on the purely subjective effects on Mr. Gabriel, rather than a reasonable person in his circumstances (Tribunal reasons, at paras. 99 and 102). This is an extricable legal error that justifies intervention on appeal. Nevertheless, even on the modified objective standard that should have been applied, there are unique aspects of this case that militate towards a finding of impairment.

[172] The manner in which the comments were delivered, and in particular their broad dissemination, is clearly relevant to the analysis. Mr. Ward performed his stand-up routine 230 times to a combined audience of over 100,000 people, and sold over 7,500 DVD copies of it. His video clips remained accessible to all on his website for a year, and were made available on other platforms without Mr. Ward's authorization. Each time the jokes were repeated, so too was the harm to Mr. Gabriel. Mr. Ward's comments were so widespread that Jérémy Gabriel could not ignore them. Neither could his classmates. Mr. Ward's jokes followed him to school where other children repeated the insults and magnified the mockery. This was a direct consequence

of Mr. Ward, a well-known figure in Quebec, distributing his routines about Jérémy Gabriel widely. This must be considered as a factor in the determination of whether Mr. Ward's comments were likely to cause serious harm to a reasonable person in his circumstances. The fact that there was no escape for Mr. Gabriel in this case from the impugned speech is similar to *Calego* where it was significant for the Court of Appeal that the complainants had no choice but to listen to the discriminatory speech that targeted them individually (para. 103).

[173] Mr. Ward's comments must also be understood in conjunction with the fact that when they were made, Jérémy Gabriel was at times a child and at other times a teenager. He was 10 years old when he released his autobiography in 2007; according to a finding of the Tribunal (at para. 21) shortly afterwards Mr. Ward released the video clips mocking Jérémy Gabriel's appearance and his disability on his website. When Mr. Ward began performing his show *Mike Ward s'expose* in which he joked about drowning him, Jérémy Gabriel was 13 (Tribunal reasons, paras. 18-19).

[174] This Court explained in *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76, that any workable approach to discrimination claims brought by children must incorporate the "viewpoint of the child, which will often include a sense of relative disempowerment and vulnerability" (para. 53). And, in *R. v. Sharpe*, [2001] 1 S.C.R. 45, at para. 169, L'Heureux-Dubé, Gonthier and Bastarache JJ. noted that children's "physical, mental, and emotional immaturity" make them "one of the most vulnerable groups in society" (see also *R. v.*

D.B., [2008] 2 S.C.R. 3, at para. 43; *A.B. v. Bragg Communications Inc.*, [2012] 2 S.C.R. 567, at para. 17). Childhood and early adolescence is a formative stage of life during which time an individual's desire to belong can of course be deeply felt. A reasonable young person in Jérémy Gabriel's shoes would be particularly susceptible to the harms associated with dehumanizing comments.

[175] In his stand-up routine, Mr. Ward remarked that he defended Mr. Gabriel from criticism only until he found out that he was not dying, at which point he took it upon himself to drown him. This implies that it would be too burdensome for society to accept Jérémy Gabriel in the mainstream permanently and that ultimately society would be better off if he were dead. Mr. Ward's joke invokes archaic attitudes advocating for the exclusion and segregation of children with disabilities (Commend, at p. 87; Daniel Ducharme and Karina Montminy, *L'accommodement des étudiants et étudiantes en situation de handicap dans les établissements d'enseignement collégial* (2012), at p. 10).

[176] Mr. Ward preyed on Jérémy Gabriel's disability and the way it manifests itself in order to make his audience laugh, portraying the child as a subject of ridicule rather than as an individual deserving of respect (see Brunelle (2006), at p. 152). These are clearly the types of comments which could lead a disabled child to question his "self-respect and self-worth" (*Law*, at para. 53), violating s. 10 of the Quebec *Charter* and causing severe dignitary harm.

[177] Although the assessment of whether speech impairs the equal exercise of the s. 4 right is an objective one, it is important to note that the Tribunal found that Mr. Ward's comments caused Mr. Gabriel anguish and prompted him to isolate himself from his peer group and even to contemplate suicide (para. 155). The Tribunal noted that Mr. Gabriel often wondered whether his disability made him less valuable than others.

[178] Given the particular vulnerability of a child in Jérémy Gabriel's circumstances, the broad dissemination of Mr. Ward's comments and the cruelty of the implication that he was a disposable or burdensome human being, this case presents unique circumstances that suggest the right to equal exercise of dignity was impaired. In our view, these facts are sufficient to conclude that the Commission has met its burden and that *prima facie* discrimination was made out.

[179] It is true that, if Mr. Gabriel's right to reputation has been violated, he could have brought a civil suit for defamation. But the Commission brought a claim in discrimination on his behalf instead, as it was entitled to do. A claim for defamation under Quebec law is one which seeks recourse for a breach of the right to the safeguard of *reputation* based on the general rules of civil liability (art. 1457 *C.C.Q.*) and s. 4 of the Quebec *Charter* (*Bou Malhab*, at paras. 22-23 and 27). Such a claim does not necessarily engage the distinct right to dignity and it is not based on the plaintiff's membership in a particular group (Baudouin, Deslauriers and Moore, at No. 1-297; see also *Bou Malhab*, at para. 27). As Morissette J.A. was careful to point out in *Calego*,

dignity relates to an individual's sense of self and whether they feel that their intrinsic value has been respected, but reputation relates to how others perceive the complainant (para. 101). Saying that Mr. Gabriel's only recourse was a civil remedy to repair harm to his reputation would be to ignore that the claim we are asked to consider here is focused on the right to equal exercise of the s. 4 right to safeguard, among other things, his dignity, which is plainly a claim of a different nature.

[180] While the *Civil Code of Québec* must be read in harmony with the Quebec *Charter* (preliminary provision of the *C.C.Q.*), this is not to say that human rights protections are to be somehow systematically read down in the name of conformity with civil liability (see Mélanie Samson and Louise Langevin, "Revisiting Québec's *Jus Commune* in the Era of the Human Rights Charters" (2015), 63 *Am. J. Comp. L.* 719, at p. 742). The jurisprudence of this Court calls for "flexibility and imagination" in remedying the infringement of human rights, and warns against losing sight of the fact that the Quebec *Charter* may require "intervention that is in no way related to the law of civil liability" (*Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Communauté urbaine de Montréal*, [2004] 1 S.C.R. 789, at para. 26; *Bombardier*, at para. 104; see also *de Montigny v. Brossard (Succession)*, [2010] 3 S.C.R. 64, at para. 44). An approach that wholly equates compensation for unlawful interference with rights and freedoms under s. 49 of the Quebec *Charter* with civil liability would unduly limit the remedial power of the scheme (Samson and Langevin, at pp. 727-28).

[181] When the claim involves, as it does here, a discriminatory interference with exercise of the rights or freedoms outlined in the Quebec *Charter*, s. 10 is engaged and the Human Rights Tribunal has jurisdiction to hear the claim. Section 71 of the Quebec *Charter* provides that the Commission may make an investigation into any situation “which appears to the commission to be . . . a case of discrimination within the meaning of sections 10 to 19”. And, s. 80 of the Quebec *Charter* provides that “the commission may apply to a tribunal to obtain, where consistent with the public interest, any appropriate measure against the person at fault or to demand, in favour of the victim, any measure of redress it considers appropriate at that time”. Finally, s. 111 of the Quebec *Charter* grants the Tribunal jurisdiction over “any application submitted under section 80”. The Tribunal is therefore competent to hear a claim arising from s. 10 of the Quebec *Charter* and it correctly identified this as the basis of its jurisdiction over this claim (see also *Mouvement laïque*, at paras. 40, 58 and 63).

[182] There is undoubtedly resemblance between a s. 10 claim based on equal exercise of dignity and a claim in defamation, because s. 4 of the Quebec *Charter* is implicated in both (see, e.g., *Calego*, at para. 40). A defamation claim will succeed if the interference with reputation violates “the objective standard of conduct of a reasonable person” (*Bou Malhab*, at para. 24), whereas a s. 10 equality claim based on the right to dignity will succeed if the interference with the equal exercise of that right meets a certain threshold appreciated from the perspective of a reasonable person in the complainant’s circumstances (*Calego*, at para. 102; see also *Derbal v. Tchassao*, 2021 QCTDP 11, at para. 38 (CanLII); *St-Jean-Sur-Richelieu, Commission scolaire*, at

pp. 90-91; *Commission des droits de la personne et des droits de la jeunesse v. Ville de Longueuil*, 2020 QCTDP 21, at paras. 127-29 (CanLII)). It goes without saying that the very nature of s. 10 focuses the analysis on discrimination on the basis of a protected ground. Accordingly, language could be defamatory but not discriminatory because it is not based on a ground enumerated in s. 10. Similarly, if the equal exercise of the right to dignity alone is impaired and there is no impact on reputation, speech could be discriminatory without being defamatory. Each ground addresses related but distinct violations.

[183] This conclusion shifts the onus to Mr. Ward to justify his *prima facie* discriminatory speech. He attempts to do so by invoking his right to freedom of expression under s. 3 of the Quebec *Charter* and s. 2(b) of the Canadian *Charter* as a defence to the Commission's claim. Section 3 provides:

3. Every person is the possessor of the fundamental freedoms, including freedom of conscience, freedom of religion, freedom of opinion, freedom of expression, freedom of peaceful assembly and freedom of association.

Section 2(b) provides:

2 Everyone has the following fundamental freedoms:

...

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

[184] Professor Daniel Proulx explains why the rights set out in ss. 1 to 9 may themselves be recognized as justifications to *prima facie* discrimination, citing the Quebec *Charter*'s preamble which explains that "the rights and freedoms of the human person are inseparable from the rights and freedoms of others and from the common well-being":

[TRANSLATION] However crucial it may be to respect for human dignity, the right to equality is not superior in principle to the other rights or freedoms in Canada. . . . It follows that an alleged discriminator can always argue as a defence, on condition of proving this, that their *prima facie* discriminatory decision or policy is justified by their duty to respect the other rights or freedoms guaranteed in the Charter. This is why the right to respect for one's private life (s. 5), the right to security (s. 1) and the right to property (s. 6) may, in appropriate circumstances, all constitute valid reasons for establishing rules that are *a priori* discriminatory.

("Droit à l'égalité", in *JurisClasseur Québec — Collection droit public — Droit constitutionnel* (loose-leaf), vol. 2, by Stéphane Beaulac and Jean-François Gaudreault-DesBiens, eds., fasc. 9, at No. 151; see also *Laroche v. Lamothe*, 2018 QCCA 1726.)

[185] Generally, conflicts between individual Quebec *Charter* rights are resolved under s. 9.1, which is reproduced here for convenience as it stated:

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.

In this respect, the scope of the freedoms and rights, and limits to their exercise, may be fixed by law.

[186] In *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, and *Devine v. Quebec (Attorney General)*, [1988] 2 S.C.R. 790, this Court explained that s. 9.1 of the

Quebec *Charter* does not apply to s. 10's guarantee of equality. Both of these cases concerned claims brought under the Quebec *Charter* alleging that different provisions of a statute limiting the use of English in commercial activity violated the right to freedom of expression under s. 3 and constituted discrimination under s. 10 of the Quebec *Charter*.

[187] The Court held in *Devine* that any claim based solely on s. 3 could not succeed because the infringement of the applicant's right to freedom of expression was justified under s. 9.1. The fact that s. 9.1 did not apply to s. 10, however, did not allow the complainants to circumvent the State's justification, making equality rights absolute. The Court explained that s. 9.1 applied indirectly to s. 10 by limiting the scope of the underlying right to freedom of expression:

While it is true that s. 9.1 does not apply to the principle of equality enshrined in s. 10, it does apply to the guarantee of free expression enshrined in s. 3. Whenever it is alleged that a distinction on a ground prohibited by s. 10 has the effect of impairing or nullifying a right under s. 3, the scope of s. 3 must still be determined in light of s. 9.1. Where, as here, s. 9.1 operates to limit the scope of freedom of expression guaranteed under s. 3, s. 10 cannot be invoked to circumvent those reasonable limits and to substitute an absolute guarantee of free expression. On the other hand, having specified the scope of free expression, s. 9.1 cannot be invoked to justify a limit upon equal recognition and exercise of the right guaranteed by s. 3. [p. 818]

As Professor David Robitaille explained in interpreting these cases: [TRANSLATION]
“Because in fact equal treatment can be claimed only in relation to the recognition or exercise of freedom of expression, the result is that a limit justified under section 9.1

on the very recognition or exercise of that freedom will logically prevent the right to non-discrimination from being asserted” (p. 117).

[188] As the language of s. 9.1 itself mandates, this Court must consider “democratic values, public order and the general well-being of the citizens of Québec” in balancing these rights. Here, that requires a consideration of Mr. Gabriel’s right to the safeguard of his dignity and Mr. Ward’s freedom of expression. Only by properly balancing these rights can we appreciate the scope of the s. 10 right to the equal exercise of the former right. In this way, the s. 9.1 balancing ties back to the standard expressed in *Calego* and the manner in which the balance was struck in that case. The standard is informed by the perspective of the reasonable subject of the speech in the circumstances of the victim, a standard that is attuned to the value of free expression in society (para. 99). The arguments Mr. Ward raises as justification on the basis of his freedom of speech can be understood as arguments about whether the *Calego* standard has been met in this case.

[189] Before engaging in any proportionality analysis under s. 9.1, however, we must establish to what extent Mr. Ward’s right to freedom of expression has been engaged. This Court has consistently given a broad interpretation to freedom of expression, explaining that “content neutrality is the governing principle” (Peter W. Hogg and Wade K. Wright, *Constitutional Law of Canada* (5th ed. Supp.), at s. 43:11). In *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, the

Court explained the breadth of the constitutional protection for freedom of expression as follows:

Freedom of expression was entrenched in our Constitution and is guaranteed in the Quebec *Charter* so as to ensure that everyone can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream. Such protection is, in the words of both the Canadian and Quebec Charters, “fundamental” because in a free, pluralistic and democratic society we prize a diversity of ideas and opinions for their inherent value both to the community and to the individual. [p. 968]

Given this breadth, it is clear that Mr. Ward’s expressive freedoms would be curtailed by the remedy sought by the Commission.

[190] But the analysis does not end here. Freedom of expression is not absolute. Because of s. 9.1 of the Quebec *Charter*, this right, like the s. 4 right underlying Mr. Gabriel’s s. 10 claim, may not be exercised in a way that is disproportionately harmful or abusive (Jean-François Gaudreault-DesBiens and Charles-Maxime Panaccio, “The asymmetrical distinctness of the *Charter of Human Rights and Freedoms* in the post-*Chaoulli* era”, in *La Charte québécoise: origines, enjeux et perspectives*, [2006] *R. du B.* (numéro thématique) 217, at p. 244; see also *Calego*). Ensuring a proportionate balance between the rights of individuals under the Quebec *Charter* involves a consideration of the specific rights at issue, the values that underpin them and the circumstances of the particular case (*Bruker v. Marcovitz*, [2007] 3 S.C.R. 607, at paras. 76-78, referring to *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551, at para. 154, per Bastarache J., dissenting; *Aubry v. Éditions Vice-Versa inc.*, [1998] 1

S.C.R. 591, at paras. 56-65; see also Jena McGill, “‘Now it’s My Rights Versus Yours’: Equality in Tension with Religious Freedoms” (2016), 53 *Alta. L. Rev.* 583, at pp. 588-90; Errol P. Mendes, “Reaching Equilibrium between Conflicting Rights”, in Shaheen Azmi, Lorne Foster and Lesley Jacobs, eds., *Balancing Competing Human Rights Claims in a Diverse Society: Institutions, Policy, Principles* (2012), 241, at pp. 242-43).

[191] On Mr. Gabriel’s side of the balance is the severity of the personal consequences a reasonable person in his position would have suffered because of Mr. Ward’s speech as well as this Court’s consistent recognition that certain forms of discriminatory speech may cause serious individual and societal harms which justify limits on expressive freedom. In *R. v. Keegstra*, [1990] 3 S.C.R. 697, this Court recognized that “the emotional damage caused by words may be of grave psychological and social consequence” (p. 746). Relatedly, this Court concluded in *R. v. Lucas*, [1998] 1 S.C.R. 439, that the criminal prohibition on defamatory libel recognized “the innate dignity of the individual and the integral link between reputation and the fruitful participation of an individual in Canadian society” (para. 48). The provisions were upheld despite the limit on freedom of expression, with Cory J. explaining that “[i]t would trivialize and demean the magnificent panoply of rights guaranteed by the *Charter* if a significant value was attached to the deliberate recounting of defamatory lies that are likely to expose a person to hatred, ridicule or contempt” (para. 93).

[192] Freedom of expression has also been restricted in order to safeguard one's reputation, a right which, alongside dignity and honour, is enshrined in s. 4 of the Quebec Charter (*Gilles E. Néron Communication Marketing Inc. v. Chambre des notaires du Québec*, [2004] 3 S.C.R. 95, at para. 52; *Prud'homme v. Prud'homme*, [2002] 4 S.C.R. 663, at para. 43; *Bou Malhab*, at para. 17).

[193] A child in Jérémy Gabriel's circumstances would have suffered significant harm as a result of Mr. Ward's speech. Because of Mr. Ward's jokes and the dissemination of his material over the internet, Mr. Gabriel felt [TRANSLATION] "lost, fragile and isolated" (Tribunal reasons, at para. 27), developed suicidal ideation and sought the help of a psychologist. For two years he lost his passion for singing and even his desire to "exist" (*ibid.*, at para. 25). Mr. Gabriel testified that he was "humiliated" and felt "belittled" (*ibid.*, at para. 102). In particular, he testified that Mr. Ward's jokes about drowning him made him believe that his "life was worth less . . . because [he is] disabled" (*ibid.*, at para. 25). Significantly, Mr. Gabriel's classmates repeated many of the jokes from Mr. Ward's stand-up special and video clips reproduced on the internet. Mr. Gabriel explained that the jokes followed him for at least two years, causing catastrophic harm to his self-esteem.

[194] These types of harm to a person's right to dignity mirror those caused by bullying, an issue which disproportionately affects young, vulnerable people and which has been addressed by legislation in various provinces and in this Court's jurisprudence (Jane Bailey, "'Sexualized Online Bullying' Through an Equality Lens: Missed

Opportunity in *AB v. Bragg?*” (2014), 59 *McGill L.J.* 709, at pp. 725-26; Donn Short, “*Don’t Be So Gay!*”: *Queers, Bullying, and Making Schools Safe* (2013); *An Act to prevent and stop bullying and violence in schools*, S.Q. 2012, c. 19 (“Bill 56”); *The Public Schools Amendment Act (Reporting Bullying and Other Harm)*, S.M. 2011, c. 18; *Accepting Schools Act, 2012*, S.O. 2012, c. 5; *An Act to Amend the Alberta Bill of Rights to Protect Our Children*, S.A. 2015, c. 1; *An Act to Amend the Education Act*, S.N.B. 2012, c. 21; see also *Intimate Images and Cyber-protection Act*, S.N.S. 2017, c. 7). Bullying and exclusion has been identified as having a pervasive negative impact on children with disabilities in particular (Canadian Human Rights Commission, *Left Out: Challenges faced by persons with disabilities in Canada’s schools* (2017), at p. 6).

[195] In *Bragg*, this Court considered the validity of a publication ban in a case involving a young person who sought to uncover the identity of someone who posted photos and “unflattering” sexually explicit comments about her online (para. 1). The Court developed a definition of bullying and held that because of the risk it poses to the psychological well-being of young people, its prevention could justify limits on the press’ freedom of expression. The definition of bullying was taken from the Report of the Nova Scotia Task Force on Bullying and Cyberbullying, chaired by Professor A. Wayne MacKay:

. . . behaviour that is intended to cause, or should be known to cause, fear, intimidation, humiliation, distress or other forms of harm to another person’s body, feelings, self-esteem, reputation or property. Bullying can be direct or indirect, and can take place by written, verbal, physical or electronic means, or any other form of expression.

(Respectful and Responsible Relationships: There's No App for That: The Report of the Nova Scotia Task Force on Bullying and Cyberbullying (2012), at pp. 42-43)

We note that a similar definition was incorporated into Quebec law by Bill 56, which amended the *Education Act*, R.S.Q., c. I-13.3, s. 13, to define bullying as “any repeated direct or indirect behaviour, comment, act or gesture, whether deliberate or not, including in cyberspace, which occurs in a context where there is a power imbalance between the persons concerned and which causes distress and injures, hurts, oppresses, intimidates or ostracizes” (Bill 56, s. 2). The Court in *Bragg* then referred to the harmful consequences of bullying as “‘extensive’, including loss of self-esteem, anxiety, fear and school drop-outs” (para. 21, quoting Task Force on Bullying and Cyberbullying, at p. 4) and explained that these harms may be magnified by the internet which allows the content to “spread widely, quickly — and anonymously” (para. 22). Other harms identified by the Court include increased rates of attempted suicide amongst young people who have been bullied (para. 21). The Court concluded that the dangers of bullying were so well documented and serious that it could infer that bullying caused “objective harm” (para. 16).

[196] In a 2012 interview, Mr. Ward himself acknowledged the view that his comments constituted bullying. As we have explained, because of the content of Mr. Ward’s material, its broad dissemination and Jérémy Gabriel’s vulnerability as a disabled child, Mr. Ward’s comments were very likely to cause “fear, intimidation, humiliation [or] distress”. Mr. Ward’s “comedy” did in fact cause those very harms.

Because of their broad dissemination, these harms were magnified when Jérémy Gabriel's classmates repeated Mr. Ward's jokes, teasing him and mocking him repeatedly at school. Not only did Mr. Ward himself directly bully Jérémy Gabriel, he also inspired others to repeat his mockery and further bully him. Given that our society takes active steps to challenge bullying between children, it seems consistent that the bullying of a child by an adult, including through the broad dissemination of harmful material on the internet, can in some circumstances be actionable.

[197] The significance of the damage bullying can cause to a young person and the importance of minimizing it cannot be understated. 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*, Can. T.S. 1992 No. 3 ("CRC"),⁴ including those which protect children from emotional violence such as "[p]sychological bullying and hazing by adults or other children" (United Nations, Committee on the Rights of the Child, *General comment No. 13 (2011): The right of the child to freedom from all forms of violence*, U.N. Doc. CRC/C/GC/13, April 18, 2011, at para. 21; see also Carmen Lavallée, "La Convention internationale relative aux droits de l'enfant et son application au Canada" (1996), 48 *R.I.D.C.* 605, at p. 612). Moreover, art. 2 of the *CRC* imposes an obligation on states to ensure that *CRC* rights will be exercised free from discrimination. The need for child-specific non-discrimination clauses stems from the "special status and needs" of children and their "*vulnerability vis-à-vis . . . other individuals*" (Samantha Besson and Eleonor

⁴ Quebec has also declared itself to be bound by the *CRC* (Décret 1676-91, (1992) 124 G.O. II, 51).

Kleber, “Article 2. The Right to Non-Discrimination”, in John Tobin, ed., *The UN Convention on the Rights of the Child: A Commentary* (2019), 41, at pp. 48-49 (emphasis in original)).

[198] The importance of this 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 (Wouter Vandenhole, Gamze Erdem Türkelli and Sara Lembrechts, *Children’s Rights: A Commentary on the Convention on the Rights of the Child and its Protocols* (2019), at p. 249). Canada has also ratified the United Nations *Convention on the Rights of Persons with Disabilities*, Can. T.S. 2010 No. 8.⁵ This convention 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).

[199] In sum, for the purposes of proportionality under s. 9.1, the Commission advances considerable emotional harms caused to Mr. Gabriel, as well as a number of

⁵ Quebec has also declared itself to be bound by the convention (Décret 179-2010, (2010) 142 G.O. II, 1196).

domestic and international authorities recognizing the importance of addressing such harms.

[200] Mr. Ward invokes the importance of stand-up comedy and satire as an “acclaimed art form” that is “often mordant, crude and even cruel” and argues that there is some heightened public interest in mocking Mr. Gabriel because he is famous.

[201] It is of course true that art, and in particular satire, plays an important social role. Binnie J. explained in *WIC Radio Ltd. v. Simpson*, [2008] 2 S.C.R. 420, at para. 48: “. . . the law must accommodate commentators such as the satirist or the cartoonist Their function is not so much to advance public debate as it is to exercise a democratic right to poke fun at those who huff and puff in the public arena”. In *R. v. Butler*, [1992] 1 S.C.R. 452, Sopinka J. affirmed that “[a]rtistic expression rests at the heart of freedom of expression values and any doubt in this regard must be resolved in favour of freedom of expression” (p. 486; see also *Sharpe*, at paras. 60-61). The Court has also repeatedly noted that “artistic self-fulfillment” is a fundamental element of freedom of expression on par with “spiritual . . . self-fulfilment” and “participat[ion] in the political process” (*Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232, at p. 247, citing *Irwin Toy*, at p. 976; see also *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 107).

[202] Nonetheless, while the importance of artistic expression may weigh in the balance of a particular case, this Court has refused to recognize it as a distinct class of expression deserving of privileged protection. In *Aubry*, L’Heureux-Dubé and

Bastarache J.J., for the majority, reasoned that because “[a]n artist can assert his or her right to freedom of expression under the same conditions as any other person”, it is “unnecessary to create a special category to take freedom of artistic expression into account. . . . Nor is there any justification for giving [artistic expression] a status superior to that of general freedom of expression” (para. 55). They added that “[t]he argument that the public has an interest in seeing any work of art cannot be accepted, especially because an artist’s right to publish his or her work, no more than other forms of freedom of expression, is not absolute” (para. 62).

[203] As the Court explained in *Aubry*, in determining whether there is a proportionate public interest justifying an exercise of freedom of expression which violates another person’s Quebec *Charter* rights, courts must consider all of the “values concerned” (para. 62). The values underlying freedom of expression are linked to “seeking the truth in diverse fields of inquiry, and to our capacity for self-expression and individual realization” (*Grant v. Torstar Corp.*, [2009] 3 S.C.R. 640, at para. 1; see also *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877, at paras. 91-94; *Groia v. Law Society of Upper Canada*, [2018] 1 S.C.R. 772, at para. 117; *RJR-MacDonald Inc.*, at paras. 72-73).

[204] Following *Aubry*, it is clear that an artist cannot simply invoke the artistic nature of their work to avoid scrutiny and justify the violation of the rights of others. Artistic expression, like any other expression, may cross a boundary when its effect is to disproportionately harm others.

[205] Similar reasoning was applied in *Pardy v. Earle*, 2013 BCSC 1079, 52 B.C.L.R. (5th) 295. In that case, a master of ceremonies at a comedy show directed homophobic and sexist slurs toward the claimant. The claimant filed a complaint of discrimination on the grounds of her sexual orientation and gender. The Human Rights Tribunal allowed her claim because she had been humiliated on the basis of a prohibited ground in a way that caused injury to her dignity and self-respect. The Supreme Court of British Columbia upheld the Tribunal’s judgment explaining that “[w]hile comments made by comedians, artists and emcees are entitled to protection under s. 2(b) of the [Canadian] *Charter*, there is no absolute protection for comments that might otherwise amount to discrimination under human rights legislation” and that although “comedy clubs are places where performers push boundaries and sometimes try to generate outrage[, i]t does not follow that comedy clubs are zones of absolute immunity from human rights legislation” (paras. 327 and 337).

[206] Mr. Ward, therefore, cannot rely on the simple assertion that his comedy is art, he must point to why the harm to his expressive rights is such that the speech in this case should not be considered to be discrimination.

[207] Mr. Ward justifies his speech as being a useful contribution on a matter of public interest because in satirizing Mr. Gabriel, he is calling attention to the public’s “uncritical reverence” for certain “sacred cows” in Quebec society. He adds that Mr. Gabriel’s place “in the public domain” inevitably opens him up to criticism.

[208] A similar argument was advanced in *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, where this Court was asked to modify the test for defamation of public officials to provide greater scope for freedom of expression. Cory J. acknowledged that the freedom “to criticize the operation of institutions and the conduct of [public officials]” (para. 101) is of central importance in a democratic society. He noted, however, that defamatory comments threaten reputation, which is “closely related to the innate worthiness and dignity of the individual” (para. 107; see also para. 120), and concluded that importing a heightened standard in cases involving public figures would unjustly leave them without a remedy (paras. 120 and 137-40).

[209] And in *Grant*, McLachlin C.J. recognized “the innate dignity of the individual” (para. 58, quoting *Lucas*, at para. 48), and explained that public figures did not, by virtue of their renown, lose the ability to vindicate their interest in protecting their reputation. Of particular relevance for our case, she held that “[p]eople who enter public life cannot reasonably expect to be immune from criticism, some of it harsh and undeserved. But nor does participation in public life amount to open season on reputation” (para. 58 (emphasis added)). She went on to say, at para. 105:

Public interest may be a function of the prominence of the person referred to in the communication, but mere curiosity or prurient interest is not enough. Some segment of the public must have a genuine stake in knowing about the matter published.

[210] These principles are reflected in jurisprudence from jurisdictions outside Canada. Courts in the United Kingdom, for example, have also rejected the notion that

the rights of public figures must systematically yield to freedom of expression. The House of Lords held that the press could not publish details relating to a famous model's drug rehabilitation, violating her right to privacy, simply because her status as a public personality made her life a matter of public interest (*Campbell v. MGN Ltd.*, [2004] UKHL 22, [2004] 2 A.C. 457, at para. 120). In *HRH the Duchess of Sussex v. Associated Newspapers Ltd.*, [2021] EWHC 273 (Ch.), [2021] 4 W.L.R. 35, a case concerning the media's decision to publish private correspondence of a member of the Royal Family, the High Court of Justice (Chancery Division) rejected the "crude common law principle . . . that those who seek favourable publicity somehow waive their rights" (para. 101).

[211] Similarly, in the landmark case of *Von Hannover v. Germany*, No. 59320/00, ECHR 2004-VI, the European Court of Human Rights rejected the notion that Monaco's Princess Caroline von Hannover had lost the ability to protect her right to privacy and prevent the republication of photos taken of her by paparazzi. Her status as a "figure of contemporary society" did not subjugate her right to privacy to the press' freedom of expression (para. 75). To diminish the protections available to Princess Caroline on the basis that she was a public figure would undermine the goal of the *Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 U.N.T.S. 221, to guarantee rights for *all*.

[212] This jurisprudence confirms, then, the principle reflected in domestic sources that the dignity of public figures is not necessarily subservient to the right to express harmful remarks.

[213] In addition, the notion that people somehow waive their right to be free from discrimination because they have entered the public square risks undermining the very purpose of the Quebec *Charter*, which protects *everyone* from discrimination, regardless of race, religion, disability, sexual orientation, gender identity or any other designated ground. Marginalized groups are already underrepresented in the public sphere. Permitting discriminatory attacks on them simply because they have become famous imposes further barriers to their meaningful participation in public life and implies that they must choose between fame and human rights protections.

[214] With well-known personalities, as with anyone else, courts must consider all the competing interests at stake, the harm caused and whether there is an actual identifiable public interest permitting the impugned expression.

[215] This takes us back to Mr. Ward and his submission that his criticism of Mr. Gabriel must be equated with the public interest. We accept, of course, that there is value in the performance of comedy and in criticizing those in power in society. But in the circumstances of this case, condoning the humiliation and dehumanization of a child, let alone one with a disability, would fly in the face of the very idea of the public interest.

[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) (*Taylor*, at p. 922, quoting *Keegstra*, at p. 766), 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.

[217] In our view, therefore, Mr. Ward's remarks cannot be justified in the circumstances and they result in a violation of the equal exercise of the right to the safeguard of dignity enshrined in the Quebec *Charter*. It is certainly true that the reasonable person in Mr. Gabriel's circumstances, as Morissette J.A. observes, must temper their reaction in that they are understood to be familiar with the customs and practices in a pluralistic society in which freedom of expression is a plain value and where some excesses of language, even hurtful language, are tolerated as a necessary inconvenience associated with ordinary social interaction (*Calego*, at paras. 99-102). But this is not an instance of what Morissette J.A. describes as falling under the rubric of *de minimis non curat lex*. Mr. Ward's speech was only peripherally connected to the core values underlying freedom of expression and he has not identified any other substantial public interest that would justify them. Mr. Ward's exercise of his

expressive rights under s. 3 of the Quebec *Charter* are therefore completely disproportionate when compared to the s. 4 harm suffered by Mr. Gabriel.

[218] A reasonable person in Mr. Gabriel's circumstances, even one attuned to the importance placed on freedom of expression, including artistic expression and satire, would not be expected to bear the speech at issue in this case (*Calego*, at para. 99). This is especially so given the circumstances considered above: Jérémy Gabriel was a child at the relevant time, the jokes were disseminated broadly to a wide swath of the public over the internet and they played on harmful dehumanizing attitudes towards children with disabilities. Were the facts different, for example, if Mr. Gabriel had not been a child, if the jokes had not been as broadly disseminated such that Mr. Gabriel could have found refuge from their harmful impact, or if the jokes themselves had not tied directly into the most repugnant attitudes concerning the place of children with disabilities in our society, the high threshold set out in *Calego* may not have been breached. But on these facts, Mr. Ward has failed to justify his *prima facie* discriminatory conduct and the Tribunal was right to find that a s. 10 violation was made out here.

[219] The final issue on appeal is whether the punitive damages award made by the Tribunal and upheld by the Court of Appeal was appropriate. Under s. 49 of the Quebec *Charter*:

49. Any unlawful interference with any right or freedom recognized by this Charter entitles the victim to obtain the cessation of such

interference and compensation for the moral or material prejudice resulting therefrom.

In case of unlawful and intentional interference, the tribunal may, in addition, condemn the person guilty of it to punitive damages.

[220] The question is whether the Tribunal erred in finding that Mr. Ward's comments about Mr. Gabriel constituted such an unlawful and intentional interference with the equal exercise of his right to dignity.

[221] The generally applicable standards of review identified in *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, apply to compensation awards (see *Southwind v. Canada*, 2021 SCC 28, at para. 85). An appellate court should not interfere with the award unless it amounts to a palpable and overriding error or it is tainted by an extricable legal error (*Housen*, at para. 36; *Richard v. Time Inc.*, [2012] 1 S.C.R. 265, at paras. 189-90).

[222] The Tribunal in this case found that Mr. Ward could not have been unaware of the consequences of his jokes about Mr. Gabriel (para. 163). The Tribunal was entitled to infer from this that Mr. Ward knew his discriminatory comments were hurtful. It was a logical, direct and unavoidable consequence of Mr. Ward's comments that Mr. Gabriel would suffer devastating impacts. As a well-known and influential stand-up comic, Mr. Ward could not ignore that denigrating a child on the basis of his disability would impair the equal exercise of his right to the safeguard of his dignity.

[223] That harm materialized. The Tribunal was therefore entitled to grant punitive damages and there is no reason to overturn or modify them. Punitive damages here serve not only a denunciatory purpose, but serve to deter people like Mr. Ward from profiting from the intentional interference with the Quebec *Charter* rights of others and treating compensation for this harm as merely the cost of doing business (Sébastien Grammond, “Un nouveau départ pour les dommages-intérêts punitifs” (2012), 42 *R.G.D.* 105, at p. 120). The preventive impact of such denunciation and deterrence “benefits society as a whole” (*de Montigny*, at para. 52; see also Mélanie Samson, “Les dommages punitifs en droit québécois: tradition, évolution et . . . révolution?” (2012), 42 *R.D.U.S.* 159, at pp. 186-87).

[224] We would dismiss the appeal with costs.

Appeal allowed without costs, ABELLA, KARAKATSANIS, MARTIN and KASIRER JJ. dissenting.

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