Court Number: 201404G0249

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR TRIAL DIVISION (GENERAL)**

BETWEEN:

**ANDREW ABBASS**

Applicant

- and -

**THE ATTORNEY GENERAL OF CANADA AND THE ATTORNEY GENERAL OF NEWFOUNDLAND AND LABRADOR**

Respondents

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# RESPONDENT'S MEMORANDUM OF ARGUMENT

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**ANDREW ABBASS**

[redacted]

Applicant, on his own behalf

[redacted]

Counsel for the Attorney General of Canada

[redacted]

Counsel for the Attorney General of Newfoundland and Labrador

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## OVERVIEW

1. The application should be dismissed on the basis that the Applicant failed to advance a factual basis to ground his constitutional argument. The Applicant claims that the hate propaganda sections of the *Criminal Code* requiring the approval of the Attorney General before a proceeding is commenced, breach ss. 7 and 15 of the *Canadian Charter of Rights and Freedoms*. Even assuming that the facts upon which the Applicant relies were properly before the Court, they do not implicate the sections at issue and thus fail to substantiate a challenge of ss. 318(3), 319(6) and 320(7) of the *Criminal Code*. In any event, the Applicant lacks standing to bring the constitutional challenge since his rights are not impacted by the impugned provisions and he has failed to establish that public interest standing is warranted.

2. Aside from the preliminary issues impeding the application, the Applicant also failed to articulate how the impugned provisions breach s. 7 and 15 of the *Canadian Charter of Rights and Freedoms*. There is nothing unconstitutional about granting the Attorney General oversight to ensure that charges laid under the hate propaganda sections, which are open to misuse given their subjective nature, are only applied in appropriate cases. The constitutional challenge is without merit and should be dismissed.

## PART I - FACTS

3. The Applicant brought this application to challenge the constitutionality of ss. 318(3), 319(6) and 320(7) of the *Criminal Code*.[1] These provisions give the Attorney General the discretion to consent to proceedings commenced under the respective sections, which deal with the offence of advocating genocide, public incitement of hatred; and the issuance of warrants of seizure for hate propaganda material.

[1] *Criminal Code*, R.S.C., 1985, c. C-46 at ss. 318, 319 and 320.

4. The Applicant claims that the provisions breach s. 7 and 15 of the *Canadian Charter of Rights and Freedoms* ("Charter"). He seeks an order rescinding, repealing or revoking the impugned provisions, or amending them by adding "unless interested" at the end of each subsection.[2]

5. The Applicant has not advanced any affidavit evidence to establish a factual background for his constitutional challenge of ss. 318(3), 319(6) and 320(7) of the *Criminal Code*.

## PART II - ISSUE

6. Should the application be dismissed based on the lack of a factual foundation to ground a constitutional challenge of ss. 318(3), 319(6) and 320(7) of the *Criminal Code*?

7. Does the Applicant have standing to challenge the constitutionality of the impugned sections of the *Criminal Code*?

8. Do ss. 318(3), 319(6) and 320(7) breach ss. 7 and/or 15 of the Charter?

9. If so, is the infringement a reasonable limit as can be demonstrably justified in a free and democratic society under s. 1 of the Charter?

## PART III - LAW AND ARGUMENT

### No Factual Foundation for the Application

10. The Applicant has failed to advance a factual foundation to support his claim that ss. 318(3), 319(6) and 320(7) of the *Criminal Code* breach ss. 7 and/or 15 of the Charter. While he sets forth a factual background in his Memorandum of Argument, these facts are not supported by affidavit evidence or otherwise.[3] The application should be dismissed on this basis alone.

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[2] Applicant's Memorandum of Argument, at para 52, p. 11.
[3] Applicant's Memorandum of Argument, paras. 7-23, pp. 2-3.

11. Even assuming the Applicant had properly advanced the facts upon which he relies for this application, they are insufficient to substantiate a claim that ss. 318(3), 319(6) and 320(7) of the *Criminal Code* breach ss. 7 and/or 15 of the Charter. These subsections provide the Attorney General with the power to approve a charge under each of the respective sections. Here, there is no evidence to suggest that the Attorney General of Newfoundland and Labrador ("Attorney General")[4] was ever asked to approve a charge under any of the impugned sections.

12. What we are told in the Applicant's Memorandum of Argument is that the RCMP advised the Applicant that they would not be pursuing charges against the Prime Minister and the then Minister of Foreign Affairs, John Baird. There is no indication in the materials that the RCMP ever approached the Attorney General of seeking her consent to commence proceedings under the impugned sections. At most, the facts (which are not properly before the Court) tell us that the RCMP advised the Applicant that charges would not be laid on the basis that the impugned statements made by the Prime Minister were considered statements of governing policy.[5] There is no basis to conclude that the Attorney General had any role in the decision made by the RCMP not to pursue charges in the present case. Accordingly, there is no basis to conclude that ss. 318(3), 319(6) or 320(7) were even at issue.

13. The presentation of a solid factual foundation is essential to a proper consideration of Charter issues. In *MacKay v. Manitoba*, the Supreme Court held that "Charter decisions should not be made in a factual vacuum since to do so would trivialize the Charter and inevitably result in ill-considered opinions."[6] Further, the Supreme Court held that it is incumbent on a court to ensure that a proper factual foundation exists prior to measuring legislation against the provisions of the Charter.[7] It is

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[4] Attorney General is defined in section 2 of the *Criminal Code* as the Attorney General of the province in which the charges arise.

[5] Applicant's Memorandum of Argument, at para. 20, p. 3.

[6] *MacKay v. Manitoba*, [1989] 2 S.C.R. 357 at paras. 8 and 9; *Danson v. Attorney General of Ontario*, [1990] 2 S.C.R. 1086 at para. 29; *Brown v. Canada*, 2010 FCA 148 at paras. 6-8.

[7] *Danson v. Attorney General of Ontario*, [1990] 2 S.C.R. 1086 at paras. 26, 29, 31 and 33; *MacKay v. Manitoba*, [1989] 2 S.C.R. 357 at paras 8 and 9; *Brown v. Canada*, 2010 FCA 148 at paras. 6-8.

well established in the jurisprudence that it is not desirable to express an opinion on a question of law, where it is not necessary to do so in order to dispose of a case, especially when it is a constitutional question.[8]

14. Under the circumstances, this is not be an appropriate case to address the constitutional question raised by the Applicant even assuming the facts upon which he relies were properly before the Court. The application should be dismissed.

**No Standing**

15. This application should also be dismissed on the basis that the Applicant lacks standing to challenge the impugned provisions of the *Criminal Code*. His ss. 7 and/or 15 Charter rights are not impacted or prejudiced by the exercise of the Attorney General's authority to approve a charge under the hate propaganda sections. While the Applicant has expressed a general interest in the impact these provisions have on the administration of justice, he has not established that his rights are directly affected by the Attorney General's exercise of discretion to consent to the commencement of proceedings under ss. 318-320 of the *Criminal Code*.

16. The Applicant could only claim standing as of right if his interests were directly impacted by the exercise of the Attorney General's discretion under these provisions such as if he were the alleged victim of an offence described in the impugned sections or an accused charged under those provisions.[9] He is neither. As set forth in his written submissions, the Applicant brings this application in the public interest,[10] and accordingly, has no standing as of right.

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[8] *Philips v. Nova Scotia (Commission of Inquiry in the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97 at para 9; *Tremblay v. Daigle*, [1989] 2 S.C.R. 530 at para. 77; see also *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086 at para. 26.

[9] *604598 Saskatchewan Ltd v. Saskatchewan*, 1998 CanLII 12308 (SKCA) at paras. 14-27.

[10] Applicant's Memorandum of Argument, at para 31, p. 6.

17. While the Court has the discretion to grant public interest standing in appropriate cases in part to prevent the immunization of legislation from judicial oversight,[11] this is not such a case. The test to be applied when considering whether to grant public interest standing is as follows:

    (1) is there a serious issue raised as to the invalidity of legislation

    (2) does the Plaintiff have genuine interest in the validity of the impugned legislation?

    (3) is there another reasonable and effective way to bring the issue before the court?[12]

18. The first part of the test is not met. The application does not raise a serious issue regarding the invalidity of the legislation. There is nothing unconstitutional about granting discretion to the Attorney General to approve a proceeding under ss. 318-320 of the *Criminal Code*. In fact, the statutory scheme also gives the Attorney General the power to intervene and stay any criminal proceeding.[13]

19. Decisions to initiate or continue criminal proceedings are exercises of prosecutorial discretion that go to the core of the Attorney General's role in the criminal justice system as the chief law officer of the Crown.[14] It is the duty of the Attorney General to administer criminal justice and the prosecution of all offences under the *Criminal Code* independent of political pressures from government.[15] This is a fundamental tenant of the criminal justice system upheld by the Supreme Court on numerous occasions.[16] Accordingly, the Applicant's challenge to the discretion given to the Attorney General to consent to the commencement of

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[11] *Canadian Council of Churches v. Canada*, 1992 1 S.C.R. 236 at para. 36; *Canada v. Downtown Eastside Sex Workers United Against Violence Society*, [2012] 2 SCR 525 at paras. 33.

[12] *Canadian Council of Churches v. Canada*, 1992 1 S.C.R. 236 at paras. 31 and 37; *Canada v. Downtown Eastside Sex Workers United Against Violence Society*, [2012] 2 SCR 525 at para. 35.

[13] See ss. 579 and 579.1 of the *Criminal Code*.

[14] *Miazga v. Kvello Estate*, [2009] 3 SCR 339, at paras. 45-48; *Krieger v. Law Society of Alberta*, [2002] 3 SCR 372 at paras. 42-47; *Takefman c. Director of Criminal and Penal Prosecutions*, 2014 QCCS 226 (CanLII) at paras. 22-25.

[15] *Miazga v. Kvello Estate*, [2009] 3 SCR 339, at paras. 45-48; see also Department of Justice and Public Safety, Newfoundland and Labrador, Canada, "About the Department", at http://www.justice.gov.nl.ca. See also *Aubichon v. Saskatchewan*, 2010 SKQB 49(CanLII) at paras.14-20 and 29.

[16] *Miazga v. Kvello Estate*, [2009] 3 SCR 339, at paras. 46 and 47; *Krieger v. Law Society of Alberta*, [2002] 3 SCR 372 at para. 32; *R. v. Beare*, [1988] 2 SCR 387 at para. 51; see also *R. v. Anderson*, 2014 SCC 41 (CanLII) at paras. 46-51.

proceedings under the hate propaganda sections does not raise a serious issue.

20. With respect to the second part of the test, the Applicant has not established that he has a genuine interest in the impugned provisions of the *Criminal Code*. In the absence of an evidentiary record, there is no factual foundation upon which to establish the nature of the Applicant's interest. While he might have a genuine interest, this application could just as easily have been politically motivated to challenge the government's foreign policy on the middle east in a public forum. This would not be an appropriate purpose upon which to launch a constitutional challenge to the impugned provisions and could constitute an abuse of process.[17] That said, without a proper factual backdrop, there is no basis to conclude that the Applicant has a genuine issue in the impugned provisions of the *Criminal Code*.

21. The third part of the test for public interest standing is also not met. There is a more reasonable and effective way to bring this challenge before the Court. There is nothing to prevent an alleged victim of a hate crime from challenging the constitutionality of the Attorney General's exercise of discretion under the impugned sections. Likewise it is open to an individual accused of a crime or subject to a warrant under the hate propaganda provisions to challenge the constitutionality of the Attorney General's discretion in ss. 318-320 of the *Criminal Code*. Both situations would provide a proper factual context within which to consider the constitutional issue as opposed to having to address the issue in a factual void.

22. In fact, there have been judicial challenges to the Attorney General's exercise of discretion under the hate propaganda provisions, specifically s. 319(6). In *Chen v. Alberta*, the Applicants, who were the alleged victims of an offence under s. 319(2) sought judicial review of the Attorney General's decision not to consent to proceedings being commenced.[18] The Applicants also claimed that the Attorney General's failure to consent to proceedings being commenced was a breach of their

[17] See for example *Davidson v. British Columbia*, 2006 BCCA 447 (CanLII) at para. 16.
[18] *Chen v. Alberta*, 2007 ABQB 267 (CanLII).

s. 15 Charter rights. While concluding that the claim was not properly framed, the Court held that it was unlikely the Applicants would have been able to establish that they were treated any differently than any other citizen lodging such a complaint and thus that their s. 15 rights were breached.[19]

23. *R v. Mueller* provides another example. The accused in that case sought the issuance of a subpoena for the Attorney General so he could challenge the exercise of discretion to consent to the commencement of proceedings under s. 319(2) of the *Criminal Code*. In refusing to grant the subpoena, the Court noted that the existence of prosecutorial discretion does not offend the principles of fundamental justice as enshrined in the Charter. The Court relied on the Supreme Court findings in *R. v. Beare* for the proposition that prosecutorial discretion is an essential feature of the criminal justice system.[20]

24. As the test has not been met for the granting of public interest standing, the application should be dismissed.

**No Charter Breach**

25. Aside from the preliminary issues that justify dismissing this application, it should also fail on the merits, to the extent they can be examined based on the limited record before the Court.

26. At the outset, the Applicant failed to articulate how ss. 7 and 15 are infringed by the grant of discretion to the Attorney General to consent to the commencement of proceedings under ss. 318-320 of the *Criminal Code*. With respect to s. 7, he has not even identified what s. 7 right is impacted by the impugned provisions. Section 7 provides as follows:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.[21]

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[19] *Ibid.*, at paras. 25-27.
[20] *R. v. Mueller*, 2004 ABPC 200 (CanLII) at paras. 25-26; *R. v. Beare*, [1988] 2 SCR 387 at paras. 51-53.
[21] *Constitution Act, 1982 Part 1, Canadian Charter of Rights and Freedoms*, s. 7.

27. The s. 7 Charter analysis requires two steps. In order to trigger its operation, there must first be a finding that there has been a deprivation of the right to "life, liberty and security of the person" and secondly, that the deprivation is contrary to the principles of fundamental justice.[22] The Applicant has not articulated how the impugned provisions impact either the right to life, liberty or security of the person in order to allow a more fulsome response by the Respondent. That said, even were he able to establish that such a right was limited by the provisions at issue, which is not admitted but specifically denied, it would be in accordance with the principles of fundamental justice.[23]

28. The impugned provisions give the Attorney General discretion to determine whether a proceeding should be commenced. There is nothing inappropriate in giving oversight to the Attorney General to commence proceedings. The Attorney General also has the discretion to intervene in criminal proceedings and render a stay in appropriate cases, or to accept a guilty plea to a lesser charge, or to take control of a private prosecution; or to withdraw from a criminal proceeding altogether.[24] These are all exercises of prosecutorial discretion and entirely in line with his role as the chief law officer of the Crown responsible for the administration of justice.[25]

29. It is well established that exercises of prosecutorial discretion are not subject to judicial oversight subject only to the abuse of process doctrine.[26] Further, courts have repeatedly held that the exercise of prosecutorial discretion is an essential and fundamental element of our criminal justice system that does not offend the principles of fundamental justice.[27]

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[22] *R. v. Beare*, [1988] 2 SCR 387 at para. 28.
[23] *Ibid*, at para. 53.
[24] *Miazga v. Kvello Estate*, [2009] 3 SCR 339, at para. 45; *Krieger v. Law Society of Alberta*, [2002] 3 SCR 372 at para. 46.
[25] *Krieger v. Law Society of Alberta*, [2002] 3 SCR 372 at paras. 24-32.
[26] *Miazga v. Kvello Estate*, [2009] 3 SCR 339, at paras. 46 and 47; *Krieger v. Law Society of Alberta*, [2002] 3 SCR 372 at para. 32; *R. v. Anderson*, 2014 SCC 41 (CanLII) at paras. 46-51.
[27] *R. v. Beare*, 1998 CanLII 126(SCC) at para. 53; *R. v. Anderson*, 2014 SCC 41 (CanLII) at para. 37; *R. v. Mueller*, *supra*, at para. 26.

30. The fact the Attorney General is given the discretion to consent to the commencement of certain proceedings merely reflects the existence of special considerations warranting oversight from the outset. The hate propaganda provisions at issue are illustrative of this point. These provisions have a subjective nature making them open to misuse and potential abuse.

31. The provisions themselves were enacted in 1970 following the issuance of a report by the Special Committee on Hate Propaganda in Canada which recommended amendments to the *Criminal Code* to specifically address hate propaganda crimes.[28] During the debates that followed the introduction of the proposed hate propaganda sections, discussion took place in both the senate and parliament regarding the merits of including a section giving the Attorney General oversight.[29] The basis for the oversight was to avoid mischief in the laying of charges under these sections.[30] This is a reasonable objective that accords with the principles of fundamental justice.

32. As there is no evidence that the impugned provisions impinge on an individual's right to life, liberty or security of the person there is no basis to conclude that ss. 318(3), 319(6) and/or 320(7) breach s. 7 of the Charter.

33. The Applicant has also failed to properly articulate how the impugned provisions breach s. 15 of the Charter, which provides as follows:

> 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.[31]

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[28] See the cover page of the "Report to the Minister of Justice by the Special Committee on Hate Propaganda in Canada, 1966 and pp. 114-117 of the Report which address its recommendations.

[29] See excerpts from Senate, Proceedings of the Senate Committee on Legal and Constitutional Affairs, 28th Parl, 1st Sess (25 February 1969) at 39 and (4 March 1969) at 57. ; House of Commons, Standing Committee on Justice and Legal Affairs, 28th Parl, 2nd Sess, (10 February 1970) at 8:25 and 8:28 and (17 February 1970) at 9:27 and (24 February 1970) at 10:15 and 10:23 and (3 March 1970) at 12:62 -12:63.

[30] *Ibid.*

[31] *Constitution Act, 1982 Part 1, Canadian Charter of Rights and Freedoms*, s. 15.

34. There is no evidence to establish that in exercising discretion under the impugned provisions, the Attorney General treats individuals or groups differently based on the enumerated grounds.[32] Without any foundation for the assertion, which impedes the Respondent's ability to respond, the allegation should be dismissed. There is no merit to the assertion that ss. 318(3), 319(6) and 320(7) of the *Criminal Code* breach s. 15 of the *Charter*.

**Any Infringement of the Charter is Justifiable under Section 1**

35. To the extent there is a violation of either s. 7 or 15, which is not admitted but specifically denied, the infringement is justified under s. 1, which provides as follows:

> 1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.[33]

36. The purpose of providing discretion to the Attorney General to determine whether proceedings should be commenced under the hate propaganda sections is to prevent the misuse or abuse of the provisions. This is a ssufficiently important objective to override a constitutionally protected right. Additionally, the provision meets the proportionality test as set out in *R. v. Oakes*.[34] The means are rationally connected to the objectives and there is minimal impairment of rights. Further, there is proportionality between the effects and objectives of the provisions at issue.

**Conclusion**

37. The application should be dismissed on the basis that there is no factual foundation to ground the constitutional challenge of ss. 318-320 of the *Criminal Code*. Even were the facts relied upon by the Applicant properly before the Court, they are unable to support the intended challenge as there is no indication that the Attorney

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[32] See *Chen v. Alberta*, 2007 ABQB 267 (CanLII) at paras. 25-27.
[33] *Constitution Act, 1982 Part I, Canadian Charter of Rights and Freedoms*, s. 1.
[34] *R. v. Oakes*, [1986] S.C.R. 103 (CanLII) at para. 70.

General had any involvement the present case. The Applicant also lacks standing either as of right or public interest to proceed with the purported constitutional challenge. Finally, there is no basis on the record to conclude that the impugned sections breach s. 7 and or 15 of the Charter.

## PART IV – ORDER SOUGHT

38. The application should be dismissed with costs to the Respondent.

DATED at the City of Halifax in the Province of Nova Scotia, this 9th day of March, 2015.

Per: [redacted]

Counsel for Respondent

## PART V - LIST OF AUTHORITIES

### Legislation

| | |
|---|---|
| *Criminal Code*, R.S.C., 1985, c. C-46 at ss. 2, 318, 319 and 320, 579, 579.1 | 1 |
| *Canadian Charter of Rights and Freedoms,* ss. 1, 7 and 15 | 2 |

### Citations

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| *604598 Saskatchewan Ltd v. Saskatchewan*, 1998 CanLII 12308 (SKCA) | 3 |
| *Aubichon v. Saskatchewan*, 2010 SKQB 49(CanLII) | 4 |
| *Brown v. Canada*, 2010 FCA 148 | 5 |
| *Canada v. Downtown Eastside Sex Workers United Against Violence Society*, [2012] 2 SCR 525 | 6 |
| *Canadian Council of Churches v. Canada*, 1992 1 S.C.R. 236 | 7 |
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| *Davidson v. British Columbia,* 2006 BCCA 447 (CanLII) | 10 |
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| *MacKay v. Manitoba*, [1989] 2 S.C.R. 357 | 12 |
| *Miazga v. Kvello Estate*, [2009] 3 SCR 339 | 13 |
| *Philips v. Nova Scotia (Commission of Inquiry in the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97 | 14 |
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| *Tremblay v. Daigle*, [1989] 2 S.C.R. 530 | 20 |

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| "Report to the Minister of Justice by the Special Committee on Hate Propaganda in Canada", 1966, cover page and pp. 114-117. | 22 |
| Senate, Proceedings of the Senate Committee on Legal and Constitutional Affairs, 28th Parl, 1st Sess (25 February 1969) at 39 and (4 March 1969) at 57. | 23 |
| House of Commons, Standing Committee on Justice and Legal Affairs, 28th Parl, 2nd Sess, (10 February 1970) at 8:25 and 8:28 and (17 February 1970) at 9:27, 9:28 and (24 February 1970) at 10:15 and 10:23, 10:24 and (3 March 1970) at 12:62 -12:63. | 24 |