

NOTES

Ward v. Quebec: The Supreme Court of Canada Supports a “Duty to Tolerate”

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I. OVERVIEW

Outspoken Quebec comedian Mike Ward found his fame performing brazen comedy routines regularly featuring crude insults towards numerous fellow members of the Quebec artistic community, some of whom were not at all amused.¹ This case concerns a series of jokes Ward performed about a young disabled singer, Jeremy Gabriel.² Gabriel was born with Treacher Collins syndrome, resulting in malformations of the head and the inability to hear, the latter of which was restored to eighty to ninety percent functionality by a bone-anchored hearing implant Gabriel received when he was 6 years old.³ The implant allowed Gabriel to learn how to speak, and more importantly how to sing.⁴ Gabriel quickly became a nationally recognized singer, performing on television, releasing an album, and notably performing for both Pope Benedict XVI and Quebec native, Celine Dion.⁵

From September 2010 to March 2013, Ward performed a routine titled *The Untouchables*, in which he took aim at members of the Quebec artistic community he saw as so called “sacred cows,” individuals that

1. *See* Ward v. Quebec, 2021 SCC 43, ¶ 11 (Can.).
 2. *See id.* ¶ 8.
 3. *See id.* ¶ 9.
 4. *See id.*
 5. *See id.*

could not safely be made fun of due to their supposed protected status, one of whom was young Gabriel.⁶

During this routine, and in a video Ward released on his website, Ward made several disparaging remarks concerning Gabriel's physical appearance, referring to him as "ugly" and as having a "subwoofer on his head," as well as his singing abilities, remarking that "[h]e's really bad, he sings badly, he's off-key".⁷ Additionally, Ward commented on the fact that Gabriel lived longer than Ward thought possible, remarking that "I tried to drown him . . . couldn't do it, couldn't do it, he's unkillable."⁸ Ward sold around 135,000 tickets to shows featuring this routine and sold around 7,500 copies of videos containing these remarks.⁹ Gabriel, a minor at the time, stated that his school peers took inspiration from Ward's comments in their bullying of him.¹⁰ Gabriel and his parents viewed the jokes Ward made as a form of discrimination, and, in 2012, they filed a complaint with the Human Rights and Youth Rights Commission (Commission).¹¹ Ward defended himself by claiming that his jokes were a protected form of his freedom of expression, a sentiment the Commission did not echo, as they determined that Gabriel's complaint met the basis for discrimination, subsequently referring the complaint to the Human Rights Tribunal (Tribunal).¹²

The Tribunal analyzed the jokes within the meaning of discrimination under the *Quebec Charter*, through which it was determined that, by opening Gabriel up to harassment and mockery based on his disability, Ward had infringed upon his "right to the safeguard of his dignity in a discriminatory manner."¹³ The Tribunal also found Ward's freedom of expression defense un-persuasive, instead concluding that Ward's jokes and comments exceeded the limits of what a reasonable person could be expected to tolerate in the name of freedom of expression and that the discrimination Gabriel experienced was unjustified.¹⁴ Ward

6. *Id.* ¶ 12.

7. *Id.* ¶¶ 12, 13, 123.

8. *Id.* ¶ 123.

9. *Id.* ¶ 124.

10. *See id.* ¶ 14.

11. *See id.* ¶ 15.

12. *See id.* ¶¶ 1, 14.

13. *Id.* ¶ 16.

14. *See id.* ¶ 17. The Tribunal determined that Ward's jokes subjected Gabriel to differential treatment in order to attain laughs from his viewers (distinction) and that the comments were made about Gabriel's disability, but the Tribunal conceded that Gabriel was not chosen *because of* his disability (prohibited ground) and that Ward's comments reached the necessary level of seriousness (effect of nullifying or impairing).

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was ordered by the Tribunal to pay Gabriel \$25,000 in moral damages and \$10,000 in punitive damages, a decision Ward appealed.¹⁵ The Quebec Court of Appeals majority agreed with the Tribunal's conclusions.¹⁶

The case then moved on to the Supreme Court of Canada, which did not agree with the decisions made by both the Tribunal and the Court of Appeals.¹⁷ The Court agreed with the Tribunal that Ward's focus on Gabriel during his act did amount to a distinction, however, the Court pointed out that Gabriel was chosen because of his fame, not for his handicap, meaning the distinction was not made on a protected ground.¹⁸ The Court also concluded that a reasonable person would not view Ward's comments as being likely to incite others to vilify him, or likely to result in discriminatory treatment, stating that the comments "exploited rightly or wrongly a feeling of discomfort in order to entertain, but they did little more than."¹⁹ The Supreme Court of Canada *held* that, because Gabriel was chosen for his fame and not for his handicap, and because a reasonable person would not view Ward's comments as being likely to incite others to vilify him or lead to discriminatory treatment, Ward's jokes did not amount to discrimination.²⁰ *Ward v. Quebec*, Docket No. 39041, 2021 SCC 43 at ¶ 114, Decision, Supreme Court of Canada, October 29, 2021.

II. BACKGROUND

A. *Discrimination under the Quebec Charter*

The *Quebec Charter* (Charter), officially titled the Charter of Human Rights and Freedoms, is a bill of rights which recognizes that all human beings are equal in worth and dignity and which seeks to eliminate discrimination by ensuring the equal protection of all people's individual freedoms and rights.²¹ These protected freedoms are quite expansive and

15. *Id.*

16. *Id.* ¶¶ 18-21. However, Justice Savard dissented, arguing that the Tribunal was misinterpreting Ward's jokes as instances of discrimination instead of defamation. Savard also pointed out that merely making someone the topic of a comedy routine does not amount to a distinction, and, furthermore, that merely making references to a prohibited ground that characterizes a person (here, Ward's jokes about Gabriel's disability), does not satisfy the first two elements of discrimination.

17. *See id.* ¶ 114.

18. *Id.* ¶ 97.

19. *Id.* ¶ 112.

20. *Id.* ¶ 114.

21. *Quebec v. Montreal*, 2000 SCC 27, [2000] 1 S.C.R. 665, ¶ 34 (Can.).

are articulated in Section 3 of the Charter, which begins “every person is the possessor of fundamental freedoms,” including the freedom to have your own opinions and the freedom to express yourself.²² These enumerated freedoms are complemented by Section 4, which states that “every person has a right to the safeguard of his dignity, honour, and reputation,” and are kept in check by Section 9.1, which requires that when exercising these freedoms, people take into account the public order, democratic values, and the “general well-being of the citizens of Quebec.”²³ Section 9.1 goes on to state that the scope of these freedoms and their exercise may be regulated by law.²⁴ The Charter further ensures that all Quebec citizens enjoy these human rights equally by explicitly stating in Section 10 that every person has a right to these freedoms regardless of a number of protected characteristics, including “a handicap or the use of any means to palliate a handicap.”²⁵ Section 10 goes on to state that discrimination exists “where such a distinction, exclusion, or preference has the effect of nullifying or impairing such right.”²⁶

To succeed on a discrimination claim and thus receive the protections stipulated in Section 10 of the Charter, the plaintiff must satisfy a burden of proof consisting of three elements established in *Quebec v. Bombardier Inc.*²⁷ The first element requires the plaintiff to show a distinction, exclusion, or preference that amounts to “a decision, a measure[,] or conduct [that] affects [him or her] differently from others to whom it may apply.”²⁸ Second, the plaintiff must show that one of the protected characteristics enumerated in Section 10 was a factor in the differential treatment under review.²⁹ Third, and finally, the plaintiff must show that the differential treatment hinders the “full and equal exercise or recognition of a freedom or right guaranteed by the *Quebec Charter*.”³⁰

As previously mentioned, Section 9.1 serves as a check on the fundamental freedoms enumerated in section three, a move meant to balance the absoluteness of these freedoms with the lives of other

22. See Charter of Human Rights and Freedoms, C.Q.L.R 1975, pt. 1, c. 1, s. 3 (Que.) [hereinafter Charter].

23. See *id.* §§ 4, 9.1.

24. See *id.* § 9.1.

25. See *id.* ch. 1.1, § 10.

26. *Id.*

27. *Quebec v. Bombardier Inc.*, 2015 SCC 39, [2015] 2 S.C.R. 789 (Can.).

28. *Id.* ¶ 42 (quoting Ontario Human Rights Commission v. Simpsons-Sears Ltd., [1985] 2 S.C.R. 536, 551).

29. *Id.* ¶¶ 52, 56.

30. *Id.* ¶ 53.

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citizens.³¹ This sentiment is reflected in the Charter’s preamble, 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.”³² The Court in *Bruker v. Marcovitz* described this balancing well by stating that any assertion of a right must be “reconciled with countervailing rights, values, and harm.”³³ In terms of discrimination claims, this section comes into play when the claim is based on an infringement of dignity relating to a protected ground listed in section ten and where the defendant asserts one of the aforementioned rights from Section 3 as their defense.³⁴ This necessary reconciliation enables Section 9.1 to effectively determine the scope of the freedom under which the alleged violation of Section 10 is based.³⁵ Meaning, whenever it is claimed that a distinction has been made under Section 10 that has the effect of impairing a right under Section 3, the impairment of this right must be examined in light of Section 9.1.³⁶ For example, should it be determined that Section 9.1 gives the right exercised by the defendant precedent over the right the plaintiff claims the defendant violated in combination with Section 10, then there is no discrimination.³⁷ Without the balancing established in *Devine*, plaintiffs could circumvent the reasonable limits on the freedom invoked in support of Section 10 by giving that freedom an unlimited scope.³⁸

B. Conflict Between the Right to the Safeguard of Dignity and the Right to Freedom of Expression

The Supreme Court has acknowledged human dignity as a fundamental value that underlies the Canadian Charter, but the Charter goes even further, stating that everyone has a right to safeguard this dignity.³⁹ Courts have found Section 4 to have been infringed in a wide range of contexts, from an individual suspected of theft being beaten, tortured, and threatened with death by the police, to a blind man being

31. See *Bruker v. Marcovitz*, 2007 SCC 54, [2007] 3 S.C.R. 607, ¶ 77 (Can.).

32. See Charter, *supra* note 22, at pmb1.

33. See *Bruker*, *supra* note 31.

34. See *Devine v. Quebec*, [1988] 2 S.C.R. 790, 793 (Can.).

35. See *id.* ¶ 818.

36. See *id.* 817-19.

37. See *id.*

38. See *id.*

39. See *Health Services and Support—Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391, ¶ 81 (Can.); Charter, *supra* note 22, at § 4.

denied access to a nightclub dance floor with his guide dog.⁴⁰ Freedom of expression also flows with human dignity, as equality requires people be free to speak their mind and express their opinions without fear.⁴¹ More specifically, the purpose of this freedom is 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.”⁴² This freedom is meant to protect unpopular speech, too, as the “freedom of expression does not truly begin until it gives rise to a duty to tolerate what other people say.”⁴³ However, limits on this freedom of expression are justified when there is a serious reason to fear that the expression will result in harm that is sufficiently specific and which cannot be prevented by the discernment and critical judgement of the audience.⁴⁴

The question of how exactly to balance these two concepts was answered by the Court in *Saskatchewan (Human Rights Commission) v. Whatcott*.⁴⁵ In the context of defining “hatred,” the Court described prohibited forms of expression as “the most extreme type of expression that has the potential to incite or inspire discriminatory treatment against protected groups on the basis of a protected ground.”⁴⁶ This description did not include “hurt feelings, humiliation or offensiveness,” as the statute’s goal was to prevent discriminatory effects, not to “censor ideas” or “compel anyone to think ‘correctly.’”⁴⁷ This had the effect of making irrelevant the words expressed and the intent of the author who expressed those words, as the analysis under this theory was only concerned with the socially harmful effects that the words may have had.⁴⁸ Using these ideas, the Court fashioned a test to determine whether an expression amounts to discriminatory hate speech, which begins by asking 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

40. Gauthier v. Beaumont, [1998] 2 S.C.R. 3, ¶ 90 (Can.); Commission des droits de la personne et des droits de la jeunesse c. 9185-2152 Québec inc. (Radio Lounge Brossard), 2015 CanLII 500-09-023466-139, ¶ 86 (Can. Que., QCCA).

41. See Charter, *supra* note 22, at pmb1.

42. See *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, 968 (Can.).

43. *R. v. Zundel*, [1992] 2 S.C.R. 731, 753 (Can.); Ward SCC 43, ¶ 60.

44. See *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11, [2013] 1 S.C.R. 467, ¶¶ 129-35 (Can.).

45. *Id.*

46. *Id.* ¶ 48.

47. *Id.* ¶¶ 51, 54, 58.

48. See *id.* ¶¶ 49, 52, 56-59.

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ground of discrimination.”⁴⁹ Next, it must be considered whether the expression, considered in its context, has the potential to lead to “discriminatory treatment of the targeted group to which the person or class of persons belonged.”⁵⁰ In the context of a conflict between the right to the safeguard of dignity and the right to freedom of expression, if the expressions under review amount to discriminatory hate speech under the *Whatcott* test, then the right to the safeguard of dignity takes precedent over the right to freedom of expression.⁵¹

This standard is more stringent than that which had been established in *Calego International inc. v. Commission des droits de la personne et des droits de la jeunesse*, a case concerning racist remarks a supervisor laid upon a group of his Asian employees.⁵² Under this standard, speech based on an enumerated ground will violate Sections 4 and 10 of the Charter 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.”⁵³ This supposed reasonable person would appreciate the need for freedom of expression to exist in an equitable society, and would therefore be expected to tolerate a certain level of hateful speech.⁵⁴ Even though this standard is meant to be objective, it must still consider the characteristics of the plaintiff and the context in which the comments were made.⁵⁵

C. Jurisdiction over Discrimination Claim

The Human Rights Tribunal of Quebec is competent to hear a wide range of cases that arise from complaints concerning a violation of human rights, from the exploitation of the elderly to the equal access to employment in a public body.⁵⁶ The Tribunal is limited to complaints of discrimination based on the practices laid out from Section 10 to Section 19, meaning that the Tribunal can only hear claims involving expressions or comments if they amount to discrimination within the meaning of

49. *Id.* ¶ 178.

50. *Id.* ¶ 191.

51. *See* Charter, *supra* note 22, at pmb1.; *Whatcott* SCC 11 at 6.

52. *Calego International Inc. vs. Commission des droits de la personne et des droits de la jeunesse*, 2013 CanLII 500-09-021664-115, ¶ 9 (Can. Que., QCCA).

53. *Ward v. Quebec*, (2021) S.C.C 43, ¶ 163 (Can.).

54. *See id.*

55. *See id.* ¶ 164.

56. *See* Charter of Human Rights and Freedoms, C.Q.L.R 1975, pt. 2, c. 2, s. 71(1)-(7) (Que.).

Section 10 of the Charter.⁵⁷ As such, claims that merely amount to defamation or other civil liability actions are not allowed to be heard by the Tribunal.⁵⁸

III. COURT'S DECISION

In the noted case, the Supreme Court of Canada relied heavily on the three-pronged test for establishing discrimination created in *Bombardier* and on the analysis developed through the *Whatcott* decision, which established that for a statement to be truly discriminatory it must have the potential to cause the target serious harm.⁵⁹ The Court conceded that Ward's focus on Gabriel during his comedy routine did in fact amount to a distinction.⁶⁰ The Court then determined that Ward chose to feature Gabriel in his comedy routine based on his fame rather than his disability, meaning the distinction was not made based on a protected ground.⁶¹ The Court then applied the *Whatcott* test to Gabriel's remarks, first determining that a reasonable person who has viewed Ward's routine would not perceive those remarks as likely to incite others to vilify him or to detest his humanity on the basis of his disability.⁶² The Court then concluded that a reasonable person aware of the context would not perceive Ward's comments as being likely to lead to discriminatory treatment of Gabriel.⁶³ In light of these determinations, the Court determined that the comments Ward made during his routine did not amount to discrimination.⁶⁴

The Court initially addressed the first element of discrimination in its analysis, which states that the plaintiff must prove they have been the subject of "differential treatment."⁶⁵ Ward's comedy routine, *The Untouchables*, along with the videos of this performance, featured the comedian ridiculing several prominent members of the Quebec art community, including Gabriel.⁶⁶ The Court agreed with the Tribunal's

57. *See id.*

58. *Id.*

59. Ward v. Quebec, (2021) S.C.C 43, ¶ 61 (Can.).

60. *Id.* ¶ 94.

61. *Id.* ¶ 100.

62. *Id.* ¶ 108.

63. *Id.* ¶ 110.

64. *Id.* ¶ 113.

65. *Id.* ¶ 92.

66. *Id.* ¶ 12.

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conclusion that Gabriel's exposure to this mockery amounted to a distinction.⁶⁷

The Court then addressed the second element of discrimination, which requires there to be a connection between the complained-of distinction and a prohibited ground of discrimination, as set forth by Section 10 of the Charter.⁶⁸ The Tribunal earlier determined that Ward chose to include Gabriel in his comedy routine not because of his disability, but because he was a public personality in Quebec who elicited a great deal of public sympathy.⁶⁹ The Court concluded that the Tribunal had erred in their analysis of this distinction, wrongly concluding that there was a distinction based on a prohibited ground merely because Ward's comments referenced Gabriel's disability.⁷⁰ As fame is not a protected ground under Section 10, this distinction was not actually made under a prohibited ground of discrimination, meaning that the Tribunal did not even have the jurisdiction to hear the case in the beginning.⁷¹ As a result, the Court concluded that the Tribunal should have found that the second element of discrimination had not been met.⁷²

The Court lastly addressed the third element of discrimination, which requires establishing whether differential treatment impaired Gabriel's right to full and equal recognition of his right to the safeguard of his dignity.⁷³ This determination requires balancing Gabriel's right to safeguard his dignity with Ward's right to his freedom of expression, a determination that can be made using the aforementioned two-pronged *Whatcott* test.⁷⁴ This test requires the context of the comments to be taken into account.⁷⁵ These comments were made by a notoriously brazen comedian at a comedy show meant for an audience willing to hear Gabriel's shameless brand of humor.⁷⁶ The comments were made within a comedy routine in which Ward ridiculed numerous other members of the Quebec artistic community, especially for their physical appearances.⁷⁷ In this context, the Court conceded that Ward made some nasty remarks, but given that they were made as part of a comedy routine,

67. *Id.* ¶¶ 146, 147.

68. *Id.* ¶¶ 36, 151.

69. *Id.* ¶ 97.

70. *Id.* ¶ 99.

71. *Id.* ¶ 100.

72. *Id.* ¶ 101.

73. *Id.* ¶ 103.

74. *Id.* ¶ 104.

75. *Id.* ¶ 105.

76. *Id.* ¶ 12.

77. *Id.*

they could not be taken at face value, and remarked that expressions of this kind do not, simply by being repugnant, incite others to detest or vilify Gabriel's humanity, therefore failing the first requirement of the test.⁷⁸

In analyzing the second prong of this test, the potential effects of Ward's comments on Gabriel's life must be taken into account.⁷⁹ The Tribunal and Gabriel both found that Ward's comments inspired Gabriel's classmates to tease and bully him, an assertion the Court stated overlooks the fact that just because something occurs following a person's conduct, it is not necessarily a result of that conduct.⁸⁰ In this context, it is foreseeable that jokes made by a famous comedian will have repercussions outside of their initial delivery, but this does not mean that those repercussions can be attributed to the comedian; they still must be determined objectively.⁸¹ After an objective analysis, the Court concluded that these comments were made by a comedian known for his crude humor, involved exaggeration, and they "exploited, rightly or wrongly, a feeling of discomfort in order to entertain, but they did little more than that."⁸² As such, the Court found that these comments were not likely to lead to any discriminatory treatment of Gabriel, therefore failing the second requirement of the test.⁸³

As the remarks underlying Gabriel's discrimination claim failed the Whatcott test, Gabriel's right to safeguard his dignity had not been infringed, as these remarks were not truly discriminatory.⁸⁴ Due to the preceding conclusions, the Court concluded that Ward's comments did not amount to discrimination, that they were instead merely cruel jokes.⁸⁵ Accordingly, the Court set aside the earlier judgements from the Tribunal and the Court of Appeals.⁸⁶

Justices Abella and Kasirer dissented, with Karkatsanis and Martin concurring.⁸⁷ The dissent took the view that the majority had allowed Ward's discriminatory conduct toward a disabled child to be wrapped in a "protective cloak of speech" and viewed the case not as one of artistic freedom, but one concerning the right of marginalized individuals to be

78. *Id.* ¶ 109.

79. *Id.* ¶ 110.

80. *Id.* ¶ 111.

81. *Id.*

82. *Id.* ¶ 112.

83. *Id.*

84. *See id.* ¶ 113.

85. *Id.*

86. *Id.* ¶ 113.

87. *Id.* ¶ 114.

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free from vilification and marginalization.⁸⁸ In analyzing the comments, the dissenting justices agreed with the majority on their findings concerning the first element of the discrimination analysis, finding that Ward’s focus on Gabriel during his comedy routine did indeed amount to a distinction.⁸⁹ However, concerning the second element, the dissenters concluded that Gabriel’s fame and his disability were perpetually linked, noting that “Ward targeted aspects of Mr. Gabriel’s public personality which were inextricable from his disability,” a view that allowed them to find that the second element of discrimination had been met.⁹⁰ The dissenters also rejected the majority’s use and endorsement of *Whatcott*, instead utilizing the less stringent and more objective standard of discrimination established in *Calego*.⁹¹ The dissenters concluded that the widespread nature of the comments, their dehumanizing content, and the fact that they were targeted at a vulnerable disabled child, would lead the disabled child to question his “self-respect and self-worth” and likely cause severe harm to his dignity.⁹² From these determinations, the dissenters concluded that Ward’s comments did amount to discrimination.⁹³

IV. ANALYSIS

The decisions made by the Supreme Court in this judgement will have wide ranging effects on the ability of future discrimination claims concerning offensive statements to actually be considered discrimination. These effects are partially the result of the Court’s modification of the third prong of the burden of proof for discrimination under *Bombardier*.⁹⁴ In the context of offensive speech possibly amounting to discrimination, the modification calls for a plaintiff’s right to safeguard his dignity to be balanced with the defendant’s freedom of expression.⁹⁵ This balancing act will serve as an effective check on discrimination claims that should be easily overruled by the defendant’s freedom of expression.

These effects are largely the result of the Court’s decision to take the test established in *Whatcott* and use it to assess the alleged discriminatory statements at issue in this case, a move which will now become the

88. *Id.* ¶ 116-117.

89. *Id.* ¶ 144.

90. *Id.* ¶ 148.

91. *Id.* ¶ 159.

92. *Id.* ¶¶ 174-176.

93. *Id.* ¶ 218.

94. *See* Quebec v. Bombardier Inc., 2015 SCC 39, [2015] 2 SCR 789, ¶¶ 53-54 (Can.).

95. *See id.* ¶ 45.

standard for these types of cases.⁹⁶ As this new standard only focuses on the potential effects of the remarks, the psychological harm to the plaintiff and the offensive nature of the words will not be considered.⁹⁷ This will have the effect of greatly limiting what expressions will actually be considered discrimination. For example, in *Jaid v. Étheir*, Étheir called Jied's customer service line, and, after learning of his Middle Eastern origin, the line operator barraged him with racist remarks concerning his former nationality, even associating him with terrorism.⁹⁸ The plaintiff was subjected to a stream of racist insults over the phone and, under *Calego*, which took into consideration the harmful nature of the remarks and the personal effects it had on the plaintiff, the Tribunal found that the defendant's remarks had amounted to discrimination.⁹⁹ However, under *Whatcott*, Jaid's personal experience would not be taken into account, only the potential effects that could result from these remarks.¹⁰⁰ As the comments were made over the phone and only heard by the plaintiff it would likely be determined that these remarks would not lead others to vilify his humanity and lead to discrimination.¹⁰¹ Therefore, even though Jaid's claim passed the *Calego* test, it would not amount to discrimination under the new test.¹⁰² This higher standard will strengthen people's right to free speech, including protections for insults, and ensure that only comments that lead to serious harm are considered discrimination worthy of compensation, not including comments that merely hurt someone's feelings or elicit a feeling of disgust.

These Court decisions seek to curtail the instances of offensive expressions that can be considered discrimination, an initiative that can be seen as both championing free speech and promoting hate speech. On one hand, a higher standard for comments to amount to discrimination would allow for people to speak more freely, without fear of being misunderstood and subsequently taken to court. On the other hand, this higher standard may allow for prejudicial comments to flow free, as proving they amount to discrimination is now much more difficult. This catch-22 is illustrated well by the Court's support, but not adoption, of a "duty to tolerate" that results from freedom of expression.¹⁰³ The idea is

96. *See id.* ¶ 84.

97. *See id.*

98. *See Jied v. Étheir*, 2019 Q.C.T.D.P. 26, ¶ 12 (Can.).

99. *See id.* ¶ 40.

100. *See id.* ¶ 84.

101. *See id.*

102. *See id.*

103. *See id.* ¶ 60.

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that for there to be a free exchange of thoughts, ideas, and speech, people have a duty to tolerate expressions they do not agree with and may even find offensive.¹⁰⁴ However, this duty to tolerate could be seen to imply that there also exists a freedom to offend. The combination of these two concepts could result in a renaissance of free speech, where ideas and opinions are free flowing and open to support, indifference, or rejection. They could also lead to a tyranny of the majority interpretation of free speech, where the marginalized and those considered “others“ are openly denigrated, with their tormentors confident that their freedom to offend protects them from repercussions.

V. CONCLUSION

The Court’s decision in this case was appropriate considering Gabriel’s status as a public persona and Ward’s status as a professional comedian, a profession which implies that everything he says is meant to be taken in jest. To curtail what a professional comedian is able to say about a fellow celebrity would act as too great an infringement on Ward’s right to speak freely. However, had Ward’s jokes about Gabriel directly inspired the viewers to attack Gabriel in the street or treat him like a second-class citizen, then Gabriel’s right to safeguard his dignity would have overruled Ward’s right to freedom of expression.

Additionally, the standard that the Court adopted for the assessment of expressions as possible discrimination is far too stringent. The test places too much value on the possible effects of the comments, and too little value on the emotional or psychological effects the target may experience as a result of the remarks. For example, according to the *Whatcott* test, someone could aggressively insult another person due to their race, sexual orientation, or national origin, and as long as these comments were not likely to cause others to do the same, i.e., if no one else heard them, these comments would not amount to discrimination. In the past decade there has erupted a fight between those who call out and denounce hateful speech, and those who wish to be able to speak more freely in everyday life, a fight usually falling on political lines. Even though these decisions are meant to safeguard freedom of expression in the legal system, this extreme standard and the Court’s support of a “duty to tolerate“ could reinvigorate some of the hateful speech that has become taboo in the past two decades. It could again become acceptable to be openly homophobic or against people belonging to certain backgrounds.

104. *See id.*

As society continues to become even more politically and socially divided, the Court's decision in this case could become crucial in determining how people in Canada and beyond are allowed to express themselves.

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