Case Comment
Saskatchewan (Human Rights Commission) v Whatcott, 2013 SCC 11

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In *Saskatchewan (Human Rights Commission) v. Whatcott*,[1] the Supreme Court of Canada ruled on the constitutionality and interpretation of section 14(1)(b) of *The Saskatchewan Human Rights Code*,[2] and revisited the issue of the use of human rights legislation to combat "hate speech". Section 14(1)(b) reads:

> No person shall publish or display...any representation, including any notice, sign, symbol, emblem, article or other 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.[3]

Although holding that the provision infringed subsections 2(a) and (b) of the *Canadian Charter of Rights and Freedoms*, it upheld it in part as a "reasonable limit" under section 1 of the Charter. It ruled that the expression "exposes or tends to expose to hatred" valid. However, it held that the expression "ridicules, belittles or otherwise affronts the dignity" was not "rationally connected" to the purpose of the legislation and did not "minimally impair" the rights to freedom of religion and expression.

The case involved four flyers which William Whatcott published and distributed for religious reasons. Four homosexual complainants alleged a violation of section 14 of *The Saskatchewan*

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1 2013 SCC 11, 355 DLR (4th) 383 [*Whatcott* SCC].

2 SS 1979, c S-24.1.

3 *Ibid*, s 14(1)(b).

Human Rights Code. The Saskatchewan Human Rights Tribunal upheld the complaints, holding "that the flyers constituted publications that contravened section 14 of *The Saskatchewan Human Rights Code*... as they exposed persons to hatred and ridicule on the basis of their sexual orientation".[4] It issued an order prohibiting Mr. Whatcott from distributing the flyers or any similar materials promoting hatred against any individuals because of their sexual orientation[5] and ordered Whatcott to pay compensation to the complainants. The Saskatchewan Court of Queen's Bench upheld that decision, but the Saskatchewan Court of Appeal reversed the decisions and exonerated Whatcott. It decided on the basis of interpretation and application of the legislation, but upheld its constitutionality. The Saskatchewan Human Rights Commission was granted leave to appeal to the Supreme Court, which also granted Whatcott's motion to decide on the provision's constitutionality. The Supreme Court reinstated the Tribunal's finding and remedy concerning two flyers, but affirmed the Court of Appeal's decision concerning the other two.[6]

I respectfully regret that the Court did not strike down the impugned provision in its entirety and overrule its previous decision of *Canada (Human Rights Commission) v Taylor*.[7]

For reasons which I explained in an earlier article, "A Proposed Hate Communication Restriction and Freedom of Expression Protection Act: A Possible Compromise to a Continuing Controversy,[8] (available HERE), I believe that all current Canadian "hate speech" legislation (at the federal,

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4 *Whatcott* SCC, *supra* note 1 at para 3.

5 *Ibid* at para 11.

6 *Whatcott* SCC, *supra* note 1, rev'g *Whatcott v Saskatchewan Human Rights Tribunal*, 2010 SKCA 26, (2010), 317 DLR (4th) 69; rev'g *Whatcott v Saskatchewan Human Rights Tribunal*, 2007 SKQB 450, (2007), 306 Sask R 186.

7 [1990] 3 SCR 892, 75 DLR (4th) 577 [*Taylor*].

8 Edward H Lipsett "A Proposed Hate Communication Restriction and Freedom of Expression Protection Act: A Possible Compromise to a Continuing Controversy" (2009) Vol 6 Underneath the Golden Boy 21.

provincial and territorial level) should be abrogated and replaced with a narrower, more precisely drafted federal statute.

Nothing in the Court's decision precludes or discourages legislative reform on this subject. Indeed, its ruling on section 1 justification relies largely on judicial deference to legislative discretion in such matters.[9]

Much has already been said about this judgment in particular and the issue of "hate speech' laws in general. I do not wish to repeat such commentary. However, I have a few brief remarks about some of the points raised in this decision (some of which undoubtedly overlaps with comments already made by others).

I acknowledge that the Court actually did offer some significant protection for freedom of expression.

The judgment maintains that the ideas per se cannot be banned,[10] that various groups and practices pertaining to them can be criticized,[11] and that the rights that they enjoy can be challenged.[12] Indeed it emphasizes that the legislation "does not target the ideas, but their mode of expression in public and the effect that this mode of expression may have",[13] and that "[t]he prohibition of hate speech is not designed to censor ideas or to compel anyone to think 'correctly'".[14] Furthermore, the Court makes it clear that hurt feelings, insult and offensiveness are not legitimate reasons to restrict expression.[15] In theory, it could be said that this decision largely reduces, or even eliminates "political correctness" as a permissible basis to restrict expression.

However, in reality, this judgment did not remove the uncertainty, and hence the "chilling effect" inherent in this type of legislation. The new definition of "hatred", and the "hallmarks" or indicia that the Court mentioned as possible tests

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9 *Whatcott SCC, supra* note 1 at paras 101-106.

10 *Ibid* at para 58.

11 *Ibid* at paras 89-90, 119.

12 *Ibid* at para 51.

13 *Ibid.*

14 *Ibid* at para 58.

15 *Ibid* at para 85-90, 109.

for the applicability of such provisions do not make it possible to foresee with any confidence whether or not planned communications would be within or outside the law in all cases. Despite the Court's sincere and valiant effort to clarify the concepts in question and offer reliable guidance to communicators, I respectfully suggest that they did not succeed. I doubt that it is even possible to attain such goals with the "hate speech" legislation as currently drafted.

The Court stated: "This Court's approach in *Keegstra* and *Taylor*, with some modification, sets out an acceptable method of determining how to balance the competing rights and interests at play".[16] Regrettably, the Court seems to over-estimate the significance of this modification, and many of the well recognized problems associated with the earlier cases remain.

After analyzing the *Taylor* judgment and the criticism of it and noting subsequent developments, the Court reiterates "three main prescriptions" for applying the legislation.[17] It states "[f]irst, courts are to apply the hate speech prohibitions objectively...".[18] It emphasized that "[s]econd, the legislative term 'hatred' or 'hatred and contempt' is to be interpreted as being restricted to those extreme manifestations of the emotions described by the words 'detestation' and 'vilification'...".[19] The Court continues its analysis:

> Third, tribunals must focus their analysis on the effect of the expression at issue. Is the expression likely to expose the targeted group to hatred by others? The repugnancy of the ideas being expressed is not, in itself, sufficient to justify restricting the expression. The prohibition of hate speech is not designed to censor ideas or to compel anyone to think 'correctly'. Similarly, it is irrelevant whether the author of the expression intended to incite hatred or discriminatory treatment or other harmful conduct towards the protected group. The key is to determine the likely effect of the expression on its audience,

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16 *Ibid* at para 6.

17 *Ibid* at para 55.

18 *Ibid* at para 56 [emphasis in original].

19 *Ibid* at para 57.

> keeping in mind the legislative objective to reduce or eliminate discrimination.[20]

The Court then stated its modified approach:

> In light of these three principles, where the term 'hatred' is used in the context of a prohibition of expression in human rights legislation, it should be applied objectively to determine whether a reasonable person, aware of the context and circumstances, 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".[21]

Undoubtedly this judgment provides lower courts and tribunals with valuable guidance which could substantially lower the risk of their making findings that would be unduly intrusive of freedom of expression. However, having to defend a case before a court or tribunal (or even before a "screening body" where such exists) can cause an (ultimately exonerated) person severe expense, hardship, inconvenience and stress, and the complaint itself would constitute a serious interference with his freedom of expression. Furthermore, the remaining uncertainty as to whether or not the legislation would apply to material a citizen is considering publishing could still create a significant "chilling effect". Even if this judgment gives "professional communicators" (e.g. academics, journalists, lawyers, politicians, clergy, etc.) sufficient guidance in choosing a "mode of expression" in most cases, that is not necessarily true in all cases.

However, the uncertainty problem is especially acute for ordinary citizens. One can sympathize with the argument made on Whatcott's behalf "that freedom of expression does not restrict public debate to articulate elites…".[22] It must be emphasized that freedom of expression is not just a privilege for an elite of the "articulate" or the "enlightened". It is a fundamental freedom available to everyone. Mercifully, most people do not have the beliefs and the zeal that would lead them to publishing material that could risk being categorized as "exposing to hatred" as defined in the judgment. However, such zealots who do not have

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20 *Ibid* at para 58.

21 *Ibid* at para 59.

22 *Ibid* at para 144.

sophisticated communicative skills should not be required either to seek the advice of a lawyer or professional editor, risk running afoul of the law, or "just shut up" every time they wish to produce or distribute a pamphlet, write a letter to the editor, or post a blog.

The judgment refers to various factors which it refers to as the "hallmarks of hate" as follows:

> In the years following *Taylor*, there has been considerable human rights jurisprudence and academic commentary about what constitutes hate speech. The types of expression and devices used to expose groups to hatred were summarized as the 'hallmarks of hate' ... Hate speech often vilifies the targeted group by blaming its members for the current problems in society, alleging that they are a "powerful menace"; that they are carrying out secret conspiracies to gain global control; or plotting to destroy western civilization. Hate speech also further delegitimizes the targeted group by suggesting its members are illegal or unlawful, such as by labeling them 'liars, cheats, criminals and thugs, a 'parasitic race' or pure evil'.
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> Exposure to hatred can also result from expression that equates the targeted group with groups traditionally reviled in society, such as child abusers, pedophiles, or 'deviant criminals who prey on children'). One of the most extreme forms of vilification is to dehumanize a protected group by describing its members as animals or sub-human. References to groups as 'horrible creatures who ought not be allowed to live'; 'incognizant primates', 'genetically inferior and 'lesser beasts,; or 'subhuman filth' are examples of dehumanizing expression that call into question whether group members qualify as human beings.
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> As these examples illustrate, courts have been guided by the Taylor definition of hatred and have generally identified only extreme and egregious examples of delegitimizing expression as hate speech. This approach excludes merely offensive and hurtful expression from the ambit of the provisions and respects the legislature's choice of a prohibition predicated on 'hatred'.[23]

To a large degree, listing these "hallmarks" does help to clarify where lawful speech ends and the prohibition against "hate speech" comes into play. However, this is not completely the case, as some of these "hallmarks" could include expression on or near the "borderline" and their listing by the Court does not remove the uncertainty in such cases. Furthermore, in some cases, mentioning these "hallmarks" as criteria for prohibited speech

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[23] *Whatcott* SCC, *supra* note 1 at paras 44-46 [citations omitted].

seems to contradict its ruling that the ideas per se are not to be banned.

For example, a commentator's beliefs concerning the relationship of a group to social problems, or on the power balance within society are often based on his interpretation of or inference from current events (or his perception thereof). That these perceptions may be false or exaggerated, or these interpretations or inferences may be biased, fallacious, or indeed bordering on the "paranoid" does not detract from the fact that the commentator is attempting (however misguidedly) to participate in the discussion on issues of public concern.

Another "hallmark" the use of which could lead to uncertainty or even the censoring (or at least interfering with) ideas is "...delegitimizes the target group by suggesting its members are illegal or unlawful...".[24] The relationship of various groups to the justice system is a very controversial, high profile area of public concern and debate. It includes issues of overrepresentation of various groups in prisons and suggested remedies, racial profiling, and alleged racism in the police and the courts. Statistics sometimes do show disproportionately high rates of imprisonment or crime among certain groups. It is certainly regrettable and unfair when the criminal actions of some group members are extrapolated to the entire group, or when historical or current factors beyond the control of the group which lead or contribute to such crime are ignored. However, as all perspectives on an issue must be allowed to be expressed for public debate to be complete, it seems inappropriate that people with negative views about a group could be deterred by the uncertainty over the legal status of their planned comments. Having such views deemed a "hallmark of hate" could lead to persons with views favourable or sympathetic to the group in question having unfettered editorial choice while their opponents are being constrained in their "mode of expression". This operates to "license one side of a debate to fight freestyle, while requiring the other to follow the Marquis of Queensbury rules".[25]

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[24] *Whatcott* SCC, *supra* note 1 at para 44.

[25] Scalia, J in *RAV v St. Paul, Minnesota*, 505 US 377 (1992) at 392 (That case

Although I do not wish to respond to all of the Court's reasoning concerning justification, one theme (or concern) seems, with respect, to be particularly exaggerated. The Court repeatedly emphasizes that hate speech impairs the target group's and its members' ability to express their own ideas and to respond to adverse comments.[26]

These comments seem to overlook (or downplay the significance of) the fact that members of or representatives of various protected groups do express their viewpoints on various issues and respond to critical speech quite effectively. This was the case in Canada before we had "hate speech" or even human rights legislation, and continues to be the case. Indeed, as can be seen from this and other cases, much speech criticized as "hate speech" is in response to or rebuttal of speech by or in favour of the "protected" groups. Allowing or even encouraging speech by or supportive of "protected" groups while prohibiting certain forms of speech against such groups unfairly favours one side of the debate against the other (or at least appears to do so), and violates the principle of "viewpoint neutrality" . Again, it allows the proponents of some viewpoints to "fight freestyle" while requiring others to observe "the Marquis of Queensbury Rules". Rather than enhancing the participation or credibility of the "protected" group, this real or perceived unfairness might actually create a "backlash" against them that could be more harmful to them than the impugned speech.

If at one time "protected groups" were disadvantaged in the "marketplace of ideas" vis-a –vis their "extremist "opponents , this is no longer the case in the Canadian social and political environment of today. Many (perhaps most) demographic groups have effective organizations dedicated to protecting their interests. Such organizations often have excellent communicative skills, and their messages usually do have significant access to the media, the general public and the government. Many members of the "protected" groups have attained success in politics, the media

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ruled a St. Paul hate-related ordinance unconstitutional on First Amendment grounds).

[26] See *Whatcott SCC*, *supra* note 1 at paras 75, 76,104, 114 and 117.

and other high profile endeavours. Additionally, government bodies such as human rights commissions, as well as groups in civil society dedicated to promoting human rights and social justice in general are able to and often do conduct successful educational and public relations activities to encourage respect for the "protected" groups, thus complementing their voices.

On the other hand, it is often the defendants or respondents in "hate speech" cases that are "marginalized", weak, poorly organized, or operate in isolation. They usually lack significant credibility or influence. Indeed, it could be argued that they are the ones that are "vulnerable" to unnecessary suffering and inconvenience brought about by "the long arm of the law" in such matters. Ironically, proceeding against them could enhance their significance, or even their credibility and influence to a level that they could not attain on their own.

Quoting Dickson CJC in *Keegstra*,[27] the Court states that "....hate speech contributes little to the ... quest for truth...".[28] At paragraph 114, the Court reiterates this idea "As noted by Dickson CJC in *Keegstra*, expression can be used to the detriment of the search for truth...".[29]

In two important respects, however, the Court seems to underestimate the contribution of hate speech to the "quest for truth". I am certainly not challenging its remarks that

> [a]s Dickson CJC stated in *Keegstra*, there is "very little chance that statements intended to promote hatred against an identifiable group are true, or that their vision of society will lead to a better world.[30]

However, the publication of the impugned speech certainly contributes to the ascertainment of the truth about the hatemonger himself. By publishing these statements, the hatemonger reveals his actual attitude about the group in question, his true agenda, and often his personality and character. Forcing him to "sanitize" his material could lead a communicator

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27 *R v Keegstra*, [1990] 3 SCR 697, (1990), 114 AR 81.

28 *Whatcott* SCC, *supra* note 1 at para 104.

29 *Ibid* at para 114.

30 *Ibid* at para 141.

to speak in "codes" or to otherwise camouflage his real message. This would be especially unfortunate if a speaker were seeking public office or other position of influence. Additionally, requiring a speaker to adopt a veneer of rationality or respectability might actually make him and his message more credible than if he came across to most observers as "ranting and raving".

Furthermore, the publication and open dissemination of "hate speech" contributes to the revelation of truth about the current condition of society. Many people hold prejudicial views of one or more groups protected by "hate speech" legislation, whether they articulate such views publicly or not. They are sometimes prepared to act on such views (by means such as discrimination, or in rare cases violence) whether or not they admit this publicly. Often such prejudices are caused or nurtured by factors that couldn't be reached by law (barring a completely totalitarian society) such as family transmission of attitudes, private conversations, or the perceptions and inferences a person draws on one's own. Open expression of such views at least helps to alert society, public policy makers and the target groups themselves about such attitudes, and could at least lead to attempts to formulate remedial measures. As often pointed out, suppression of "hate speech" could lead to such attitudes being kept (and spread) "underground" or being held unchallenged by the prejudiced persons themselves. Undoubtedly most people in society are aware that such attitudes exist irrespective of whether or not they come across public displays of "hate speech". However, confrontation by such materials can magnify their awareness of and bring about an appreciation of the severity of the problem that otherwise might escape an observer and society.

It is somewhat surprising that the Court downplayed the significance of the payment of compensation as a possible remedy in assessing the "deleterious effects" of the provision.[31] It must be noted that at the time *Taylor* was decided, the only remedy available for a breach of section 13 of *the Canadian Human Rights*

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[31] *Whatcott* SCC, *supra* note 1 at paras 147-150.

Act[32] was a cessation order (and an order for preventive measures).[33] The Court stated "...the circumstances in which a compensation award will be merited should be rare and will often involve repeat litigants who refuse to participate in a conciliatory approach",[34] and refers to "the mediation option".[35] However, even when conciliation or mediation is available or undertaken, a respondent may not be convinced of the illegality of his publication, but the threat of a compensation order should he lose at trial can create a further "chilling effect". If the remedy was limited to a "cease and desist order", a respondent could at least have the legality of his impugned communication authoritatively decided without risking further sanction.

Although the Court appropriately held that the standard of review of "correctness" applies to the Tribunal's decision on the constitutionality of the statute,[36] it applied the more deferential standard of review of "reasonableness" to the Tribunal's interpretation and application of the statute.[37] For reasons which I expressed in another case comment,[38] (article available HERE), I

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32 RSC 1985, c H-6.

33 The "remedy" provision for a breach of s 13, (subsection 54(1) of the *Canadian Human Rights Act*) was expanded by SC 1998, c 9, s 28 to include compensation "for a victim specifically identified in the communication that constituted the discriminatory practice" s 54(1)(b) and "an order to pay a penalty of not more than ten thousand dollars" s 54(1)(c). However, the "penalty" provision at s 54 (1)(c) was ruled unconstitutional by the Federal Court in *Canada (Human Rights Commission) v Warman,* 2012 FC 1162, (2012), 267 CRR (2d) 111 (Mosley J), although section 13 itself was upheld. Section 13 of the *Canadian Human Rights Act* was repealed by *An Act to Amend the Canadian Human Rights Act (protecting freedom),* SC 2013, c 37, s 2. The latter act comes into force "... one year after the day it receives royal assent", s 6. It received royal assent on June 26, 2013.

34 *Whatcott* SCC, *supra* note 1 at para 149.

35 *Ibid* at para 150.

36 *Whatcott* SCC, *supra* note 1 at para 61.

37 *Ibid* at paras 166-168.

38 Edward H Lipsett, "Reduced Standard of Review Inappropriate: A Case Comment on CHRC v. Canada", *The Court*, February 9th, 2012, online: The Court <http://www.thecourt.ca/2012/02/09/reduced-standard-of-review-inappro priate-a-case-comment-on-chrc-v-canada>.

believe it is unfortunate that the Supreme Court reduced the standard of review from "correctness" to "reasonableness" for questions of law in judicial review of human rights tribunal decisions. It is especially unfortunate for this lower standard to apply where the interpretation and application of a statute infringes a person's constitutional rights. If it is deemed necessary to infringe one's freedom of religion and expression, the individual ought to be able to have the correctness of the infringement decided by the courts.

My main concern with this decision is that it upheld the constitutionality of certain "hate speech" legislation as currently written. Though it attempted to interpret such provisions in a narrow enough manner that would give everyone adequate notice of whether one's planned communication is legal or illegal, The Court was faced with an impossible task. Relying on precedents which one can argue give governments an inordinately subdued onus of justification, it rejected many persuasive arguments against such legislation. However, it never was the purpose of the Charter to make the legislators' task easier or to spare them from making controversial decisions. I respectfully suggest that the time is right to review all "hate speech" legislation in Canada with an eye to reform.[39]

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[39] As noted *supra* note 33, section 13 of the *Canadian Human Rights Act* has been repealed by an Act that will come into force on June 26, 2014. On the other hand, Bill C-279, *An Act to Amend the Canadian Human Rights Act and the Criminal Code (Gender Identity),* 1st Sess, 41st Parl, 2013, would amend s 318(4) of the *Criminal Code* to add gender identity as an identifiable group, *inter alia*. This private members bill has passed third reading in the House of Commons, and second reading in the Senate. I agree in principle with the repeal of s 13 of the *Canadian Human Rights Act*, but I do not think that the *Criminal Code* hate speech provisions in their current form should be expanded. I do not believe that a piecemeal approach to amending our hate speech laws is appropriate. Rather, I believe that a thorough study of this topic (co-ordinated between the federal, provincial, and territorial governments) should be undertaken with a view to enacting a precisely and narrowly drafted new federal statute which would replace all existing legislation on the subject.