Court File No: 33676

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE SASKATCHEWAN COURT OF APPEAL)

BETWEEN:

SASKATCHEWAN HUMAN RIGHTS COMMISSION

Appellant

AND:

WILLIAM WHATCOTT

Respondent

AND:

ATTORNEY GENERAL FOR SASKATCHEWAN, ATTORNEY GENERAL FOR ALBERTA, CANADIAN JOURNALISTS FOR FREE EXPRESSION, ALBERTA HUMAN RIGHTS COMMISSION, EGALE CANADA INC., THE ONTARIO HUMAN RIGHTS COMMISSION, THE CANADIAN HUMAN RIGHTS COMMISSION, THE UNITED CHURCH OF CANADA, THE UNITARIAN CONGREGATION OF SASKATOON AND CANADIAN UNITARIAN COUNCIL, THE WOMEN'S LEGAL EDUCATION AND ACTION FUND, THE CANADIAN BAR ASSOCIATION, THE NORTHWEST TERRITORIES HUMAN RIGHTS COMMISSION AND YUKON HUMAN RIGHTS COMMISSION, THE CHRISTIAN LEGAL FELLOWSHIP, THE LEAGUE FOR HUMAN RIGHTS OF B'NAI BRITH CANADA, THE EVANGELICAL FELLOWSHIP OF CANADA, THE CANADIAN CIVIL LIBERTIES ASSOCIATION, THE CANADIAN CONSTITUTION FOUNDATION, THE ASSEMBLY OF FIRST NATIONS, THE FEDERATION OF SASKATCHEWAN INDIAN NATIONS AND THE MÉTIS NATION-SASKATCHEWAN, THE CATHOLIC CIVIL RIGHTS LEAGUE AND FAITH AND FREEDOM ALLIANCE, THE AFRICAN CANADIAN LEGAL CLINIC and the CANADIAN JEWISH CONGRESS

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PART I - OVERVIEW

1. Canadian Journalists for Free Expression ("CJFE") is an organization supported by Canadian journalists and other advocates for free expression, whose core purpose is to defend the rights of journalists and contribute to the development of media freedom throughout the world. CJFE recognizes, however, that these rights are not confined to journalists, and strongly supports and defends the broader objectives of free expression in Canada and abroad.

2. CJFE intervenes in this appeal to make submissions regarding the constitutionality and interpretation of s. 14(1)(b) of the *Saskatchewan Human Rights Code* ("the *Code*"). This broad *prima facie* ban on certain types of expression has a major impact on the daily work of journalists in Saskatchewan and on free expression generally.

3. CJFE accepts the legitimate objectives of the *Code*, and specifically recognizes and supports the equality rights of the LGBT community. However, the marginal benefits that those important interests may obtain from provisions such as s. 14(1)(b) can never outweigh or justify the severe deleterious effects that they inevitably and indisputably have on the s. 2(b) rights of Canadians, and particularly on journalists seeking to report on religious and other perspectives on the important public debate about what is taught in public schools. This provision simply cannot meet the proportionality test set out in *Oakes*[1], and must be struck down.

PART II - CJFE'S POSITION ON THE QUESTIONS IN ISSUE

4. CJFE submits that s. 14(1)(b) infringes s. 2(b) of the *Charter*, in a manner that cannot be justified under s. 1. The broad *prima facie* ban contained in s. 14(1)(b) stifles legitimate expression. Its "chilling" effects are disproportionate to any legitimate objectives or benefits.

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[1] *R. v. Oakes*, [1986] 1 SCR 103 ("*Oakes*") [CJFE BofA, Tab 1]

5. The very broad wording of s. 14(1)(b) has had to be narrowed by the Saskatchewan courts, in an effort to sustain its validity, by "reading into" it the test set out by the majority of this Court in *Taylor*.[2] However, the cases applying *Taylor* under similar provisions in human rights legislation across Canada all demonstrate that the *Taylor* test is unworkable, and routinely produces inconsistent and unpredictable results. Moreover, despite *Taylor*, and decisions such as those of the Saskatchewan Court of Appeal in *Bell*[3] and *Owens*[4], s. 14(1)(b) still remains unamended on the statute books, on its face imposing a broad ban on s. 2(b) protected speech. As a result, both the application of s. 14(1)(b) and its express wording contribute to its "chilling" effects and to its unjustifiable infringement of the rights protected by s. 2(b) of the *Charter*.

6. CJFE will not directly address the stated questions regarding s. 2(a) of the *Charter* or the so-called "balance of rights" between religious freedom and the equality rights of the LGBT community. CJFE submits that both of these competing rights and values are best protected by encouraging a full and public debate, consistent with the freedom of expression and of the press under s. 2(b). This avoids any legal diminution or truncation of any of the rights in issue.

PART III - STATEMENT OF ARGUMENT

7. Although CJFE's arguments focus on the last stage of the proportionality test set out in *Oakes*, that stage involves a broad assessment of all of the factors considered in the analysis under s. 1 of the *Charter*. As McLachlin C.J. noted in *Hutterian Brethren*, this final stage "allows for a broader assessment of whether the benefits of the impugned law are worth the cost of the rights limitation" because it "takes full account of the severity of the deleterious effects of

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[2] *Canadian Human Right Commission v. Taylor*, [1990] 3 SCR 892 ("*Taylor*") [CJFE BofA, Tab 3]
[3] *Saskatchewan (Human Rights Commission) v. Bell*, [1994] SJ No 380 (CA) ("*Bell*") [CJFE BofA, Tab 6]
[4] *Owens v. Saskatchewan (Human Rights Commission)*, 2006 SKCA 41 ("*Owens*") [CJFE BofA, Tab 5]

a measure on individuals or groups."[5] CJFE submits that any salutary objectives and effects of s. 14(1)(b) do not outweigh its deleterious impact on the rights protected by s. 2(b),[6] because of:

a. the importance of the free expression rights protected by s. 2(b) of the *Charter*;
b. the "chilling effect" of the provision on public debate and media reporting; and
c. the unworkable application and/or inconsistent results of the provision.

A. The Importance of the Rights Protected by s. 2(b) of the *Charter*

8. This Court's case law confirming the importance of rights protected under s. 2(b) must be the lodestar for any analysis of whether s. 14(1)(b) of the *Code* can meet the proportionality analysis under the *Oakes* test. As McLachlin J. (as she then was) cautioned in *Keegstra*[7] and in *Taylor*[8], the focus should <u>not</u> be on the impugned statements or publications in issue, but rather on the constitutional validity of s. 14(1)(b) in light of s. 2(b)'s guarantees.

9. The deleterious effects of a limitation of *Charter* rights, and particularly a limitation of rights under s.2(b), require the Court to consider the impact on values, such as liberty, human dignity, autonomy, and the enhancement of democracy.[9] As McLachlin J. stated in *Keegstra*:

> "The right to fully and openly express one's views on social and political issues is fundamental to our democracy and hence to all the other rights and freedoms guaranteed by the *Charter*. Without free expression, the vigourous debate on policies and values that underlies participatory government is lacking. Without free expression, rights may be trammelled with no recourse in the court of public opinion. Some restrictions on free expression may be necessary and justified and entirely compatible with a free and democratic society. But restrictions which touch the critical core of social and political debate require particularly close consideration because of the dangers inherent in state censorship of such debate."[10]

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[5] *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at paras 76, 77 ("*Hutterian Brethren*") [CJFE BofA, Tab 2]
[6] *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 SCR 835 at paras 93-95 ("*Dagenais*") [CJFE BofA, Tab 9]
[7] *R. v. Keegstra*, [1990] 3 SCR 697 at 849 ("*Keegstra*") [CJFE BofA, Tab 4]
[8] *Taylor* at 959
[9] *Hutterian Brethren* at para 88
[10] *Keegstra* at 849

10. Cory J., writing for the majority in *Edmonton Journal v. Alberta*, similarly stated:

> "It is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression. Indeed a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions. The concept of free and uninhibited speech permeates all truly democratic societies and institutions. The vital importance of the concept cannot be over-emphasized. [...] It seems that the rights enshrined in s. 2(b) should therefore only be restricted in the clearest of circumstances."[11]

11. The rationales for the primacy accorded to the rights protected by s. 2(b) of the *Charter* were recently unanimously re-affirmed by this Court in its decision in *Grant v. Torstar Corp.*:

> "The guarantee of free expression in s. 2(b) of the Charter has three core rationales, or purposes: (1) democratic discourse; (2) truth-finding; and (3) self-fulfillment. These purposes inform the content of s. 2(b) and assist in determining what limits on free expression can be justified under s. 1. *First and foremost*, free expression is essential to the proper functioning of democratic governance. [...] *Second*, the free exchange of ideas is an 'essential precondition of the search for truth'. This rationale, sometimes known as the 'marketplace of ideas', extends beyond the political domain to any area of debate where truth is sought through the exchange of information and ideas. Information is disseminated and propositions debated. In the course of debate, misconceptions and errors are exposed. What withstands testing emerges as truth. *Third*, free expression has intrinsic value as an aspect of self-realization for both speakers and listeners. [...] '[T]he diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated in an essentially tolerant, indeed welcoming, environment not only for the sake of those who convey a meaning, but also for the sake of those to whom it is conveyed'."[12]

The Court concluded that "media reporting on matters of public interest engages the first and second rationales of the freedom of expression guarantee in the *Charter*."[13]

12. In light of the recognized importance of rights protected by s. 2(b), their infringement must be weighed heavily in the balance against any salutary objectives or effects of s. 14(1)(b).

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[11] *Edmonton Journal v. Alberta*, [1989] 2 SCR 1326 at 1336-1337 [CJFE BofA, Tab 8]
[12] *Grant v. Torstar Corp.*, 2009 SCC 61 at paras 47-50 (internal citations omitted) ("*Grant*") [CJFE BofA, Tab 7]
[13] *Grant* at para 57

B. The "Chilling Effect" of s. 14(1)(b) of the *Code*

13. Section 14(1)(b) imposes a ban on expression in sweepingly broad terms:

> "No person shall publish or display, or cause or permit to be published or displayed, on any lands or premises or in a newspaper, through a television or radio broadcasting station or any other broadcasting device, or in any printed matter or publication or by means of any other medium that the person owns, controls, distributes or sells, any representation, including any notice, sign, symbol, emblem, article, statement or other 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."

14. This language expressly prohibits the publication of news reports by the press and other media of the types of messages in issue in this case. Clearly, journalists in Saskatchewan are not only subject to the *Code*, but are expressly targeted by this provision. There is nothing in s. 14(2) of the *Code*, which the Appellant and some interveners suggest "limits" the impact of s. 14(1)(b) on "freedom of expression" generally, that expressly exempts media reporting, even where (as in this case) the messages are communicated on matters of broader public interest and debate. How these provisions are applied in cases involving the media has never been addressed by any court or tribunal. The broad, express prohibition against reporting stands unqualified.

15. On its face, s. 14(1)(b) is not limited to "hate speech", but rather includes speech that merely "ridicules, belittles or otherwise affronts the dignity of any person or class of persons" on a prohibited ground. As noted in para. 56 of the Appellant's factum, "an intent to discriminate is not a precondition to a finding of discrimination" under s. 14(1)(b). The offence is publication.

16. As a result, publishing the impugned messages and statements of the Respondent, as part of a media coverage of this case, could be the subject of a complaint of breach of s. 14(1)(b) of the *Code*. Reporting on the Respondent's controversial campaign and its message -- the news

itself – is prohibited under the *Code*. Opinion writers, editorialists, and columnists who want to explore the boundaries of the debate will also risk being subjected to complaints under s. 14(1)(b). The various news articles filed in support of CJFE's motion for leave to intervene in this appeal[14] could all result in the journalists and news organizations who wrote or published them being investigated and prosecuted under the *Code*, alongside the Respondent.

17. Such application of the *Code* to journalists and the media seems absurd, at best. Yet, that is the natural, inevitable, and indeed, the intended consequence of the broad ban in s. 14(1)(b). This is precisely what McLachlin J. warned against in *Keegstra*:

> "[L]imitations on expression tend to have an effect on expression other than that which is their target. [...] Unless the limitation is drafted with great precision, there will always be doubt about whether a particular form of expression offends the prohibition. There will always be limitations inherent in the use of language, but that must not discourage the pursuit of the greatest drafting precision possible. The result of a failure to do so may be to deter not only the expression which the prohibition was aimed at, but legitimate expression.
>
> [...]
>
> The more vague the language of the prohibition, the greater the danger that right-minded citizens may curtail the range of their expression against the possibility that they may run afoul of the law. [...] Given the vagueness of the prohibition of expression [...], one may ask how speakers are to know when their speech may be seen as encroaching on the forbidden area. [...] Novelists may steer clear of controversial characterizations of ethnic characteristics [...]. Scientists may well think twice before researching and publishing results of research suggesting difference between ethnic or racial groups. [...] [I]t is not entirely speculative to suppose that even political debate on crucial issues such as immigration, educational language rights, foreign ownership and trade may be tempered. These matters go to the heart of the traditional justifications for protecting freedom of expression."[15]

18. Similarly, in her dissent in *Taylor* regarding the broadly-worded provision under the *Canadian Human Rights Code* (akin to s. 14(1)(b) of the *Code*), McLachlin J. wrote:

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[14] Some of the articles attached as Exhibit "A" to the Affidavit are reproduced as Schedule "A" to this factum.
[15] *Keegstra* at 850, 859-860

> "The broad and vague ambit of s. 13(1), unconditioned by any limitations of significance, has as its effect the unnecessary prohibition of a great deal of defensible speech and belies any suggestion of a serious effort to accommodate the important right of freedom of expression. [...] [T]he overbreadth of the legislation is such that the tests established by this Court for the application of s. 1 cannot be met.
>
> [...] Regard must be had to the chilling factor likely to accompany restrictions on expression; often the effect of such restrictions extends far beyond those forms of expression targeted or challenged [...]."[16]

19. Given the broad prohibition in s. 14(1)(b), and the absence of administrative or judicial guidance on its application even to reportage by journalists and the media, the chilling effect of the provision cannot be understated. The fact that certain journalists and news organizations reported on this case and published the impugned messages of the Respondent despite that prohibition attests to their commitment to the public interest. In order to subject the statements and issues in this case to scrutiny in the 'marketplace of ideas', these journalists and news organizations have placed themselves at risk of being subjected to complaints under s. 14(1)(b).

20. However, their commitment should not found an argument supporting its validity. It requires no stretch of the imagination to consider that there may be other journalists who are or have been deterred from reporting on such issues by the threat of investigation and prosecution. Journalists, news commentators, and media organizations have been targets of human rights complaints.[17] For every journalist who takes the risk of reporting on these public interest issues, there may well be others who are not prepared to take the chance of running afoul of the law.[18]

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[16] *Taylor* at 959

[17] *Canadian Jewish Congress v. North Shore Free Press Ltd.*, [1997] BCHRTD No 23 [CJFE BofA, Tab 12]; *Elmasry v. Roger's Publishing Ltd.*, 2008 BCHRT 378 [CJFE BofA, Tab 11]; *Boissoin v. Lund*, 2009 ABQB 592 [CJFE BofA, Tab 10]; Richard Moon, *Report to the Canadian Human Rights Commission Concerning Section 13 of the Canadian Human Rights Act and the Regulation of Hate Speech on the Internet* (October 2008) at 27 [CJFE BofA, Tab 13].

[18] *Keegstra* at 850, 863-864

C. Even as "Read Down", s. 14(1)(b) of the *Code* is Unworkable

21. The Saskatchewan Court of Appeal has recognized that s. 14(1)(b) of the *Code* "goes beyond prohibiting material exposing to hatred." It also prohibits material which "ridicules, belittles or otherwise affronts the dignity" of any group.[19] However, the Court of Appeal in *Bell*, and subsequently in *Owens*, did not sever and strike these words from s. 14(1)(b), but rather held that they extend "only to communications of that sort which involve extreme feelings and strong emotions of detestation, calumny and vilification" in accordance with the *Taylor* test. With respect, this interpretation of s. 14(1)(b) is not discernable from any words used by the Legislature. Rather, it "reads in" a qualifier that is simply inconsistent with the words used.

22. This interpretation of s. 14(1)(b), although technically conforming with this Court's decision in *Taylor*, extends the concept of "hate speech" to include such a wide variety of language and emotion, and of such a subjective nature, as to make it impossible to ensure that only those whose conduct is calculated to dissolve the bonds of society are sanctioned.[20] By equating "hatred" with "extreme ill-will and an emotion which allows for no redeeming qualities in the person at whom it is directed,"[21] the majority in *Taylor* sought to circumscribe the application of this type of provision. However, the experience in this case and prior human rights case law has shown that the *Taylor* standard has failed to completely resolve the fundamental issues that it was supposed to address, or to mitigate the deleterious effects it foresaw.

23. The results at each level of adjudication in this case, all nominally based on the *Taylor* test, highlight the unworkability of the test, and the inconsistent results that it produces. Furthermore, as shown in the summary of cases at Schedule "B" to this factum, the application

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[19] *Bell* at para 30
[20] *Keegstra* at 855-856
[21] *Taylor* at 928

of the *Taylor* test under similar provisions of other human rights codes continues to be plagued by a high degree of subjectivity. "Hatred" is proven by inferences which are more likely to be drawn whenever the speech is unpopular.[22] Put simply, what one person, tribunal member, or judge considers "extreme" or "unusual" in any given context may be, and obviously is, very different. It is telling, for example, that the majority of hate speech complaints under the similar provision under the *Canadian Human Rights Code* have been brought by the same individual.

24. In addition, the variety of types of speech that are caught by s. 14(1)(b) and similar human rights provisions, interpreted in accordance with *Taylor*, remains very wide. Despite being "read down" to meet the *Taylor* standard, s. 14(1)(b) and its equivalents in other human rights legislation still constitute an overbroad ban on expression that disproportionately impacts the important rights and freedoms guaranteed under s. 2(b) of the *Charter*.

25. It is submitted that no amount of "reading down" or interpretation of s. 14(1)(b) of the *Code* or similar provisions can avoid their inherent breadth, subjectivity, and variability in application to the wide range of speech that they intend to regulate, or the resulting breaches of s. 2(b) of the *Charter*. The fundamental problem is that the legitimate legislative "space" they wish to cover is already occupied by the hate speech provisions of the *Criminal Code*. Those provisions establish the benchmark protections, including: the presumption of innocence, the element of intent, the requirement of proof beyond a reasonable doubt, the availability of certain enumerated defences and other procedural rights afforded to an accused, carriage of the prosecution by an independent Crown counsel, and the absence of potential secondary gain by a complainant through an award of costs or damages. Compared to those benchmarks, the impugned provisions under the *Code* and other human rights legislation cannot be considered

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[22] *Keegstra* at 856

carefully tailored to avoid the deleterious effects on the important rights protected under s. 2(b).

26. CJFE submits that s. 14(1)(b) of the *Code* must be struck down, not "read down". It unjustifiably infringes s. 2(b) of the *Charter*. If the Legislature wishes to continue to promote the admittedly laudable objectives of the *Code*, it must draft and enact a more narrowly crafted provision that appropriately recognizes the importance of the rights under s. 2(b).

PART IV - SUBMISSIONS ON COSTS

27. CJFE does not seek its costs of intervening in this appeal.

PART V - ORDER REQUESTED

28. CJFE takes no position on the outcome of this appeal.

29. CJFE is the only intervener that has conducted the analysis of constitutionality from the perspective of journalists and media. Its submissions on this appeal are unique and useful. CJFE respectfully requests leave to present oral argument of no more than 15 minutes at the hearing.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 2nd day of August, 2011.

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Canadian Journalists for Free Expression

PART VI - TABLE OF AUTHORITIES

PART VII - STATUTES/REGULATIONS/RULES

Canadian Charter of Rights and Freedoms

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;

Saskatchewan Human Rights Code, s. 14(1)(b)

14(1) No person shall publish or display, or cause or permit to be published or displayed, on any lands or premises or in a newspaper, through a television or radio broadcasting station or any other broadcasting device, or in any printed matter or publication or by means of any other medium that the person owns, controls, distributes or sells, any representation, including any notice, sign, symbol, emblem, article, statement 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.

Police investigating Christian activist for hate crimes

Last Updated: Wednesday, June 8, 2005 | 12:52 PM ET
CBC News
Back to accessibility links

Beginning of Story Content

Two thousand leaflets attacking gays and lesbians have put a Christian activist in western Canada under investigation by Edmonton police for hate crimes.

The flyers by Bill Whatcott of Regina refer to gay marriage as "sodomite marriage" and use graphic language to describe the alleged sex practices of homosexuals.

The handouts also used derogatory terms to describe federal Defence Minister Bill Graham.

Whatcott stuffed his pamphlets into mailboxes in the riding of Deputy Prime Minister Anne McLellan, and some recipients complained to police.

"The material is offensive and it's an affront on the basic tenets of our society, which is about multiculturalism, tolerance and peaceful co-existence," Const. Steve Camp, of the Edmonton police hate crimes unit, said.

The Pride Centre of Edmonton said it would take the case to the Alberta Human Rights and Citizenship Commission if no criminal charges arise from the police investigation.

Whatcott has led protests across Saskatchewan and Alberta against abortion and gays.

He says he was a gay prostitute until age 18 to pay for a drug habit, then became leader of a small group called the Christian Truth Activists.

Last month, the Saskatchewan Human Rights Tribunal fined Whatcott $17,500 for handing out similar material.

But he has refused to pay the fine, calling the tribunal a "kangaroo court."

Whatcott doesn't sidestep responsibility – he prints his name and telephone number on his material – and he says he's had at least 50 angry callers.

But he says he won't stop because he has a right to free speech.

He told opponents: "Tough, you live in a democracy."

End of Story Content

Back to accessibility links

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End of Story Social Media

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Whatcott appeals human rights ruling; [Final Edition]

Heather Polischuk. **Star - Phoenix**. Saskatoon, Sask.: Nov 10, 2006. pg. A.9

Abstract (Summary)

Whatcott was ordered to pay the money to four people after they complained about anti-gay leaflets he stuffed into their mailboxes in Regina and Saskatoon in 2001 and 2002. The ruling followed a 2005 hearing by the Saskatchewan Human Rights Tribunal, in which it was decided Whatcott showed a clear pattern or practice of disregard for protected rights.

Whatcott appealed that decision, an appeal that was heard on Thursday at Regina Court of Queen's Bench by Justice Fred Kovach. Whatcott not only argued he did nothing wrong by distributing the pamphlets, he added his own rights of religion and speech had been trampled on.

Full Text (452 words)

REGINA -- Clutching a copy of the Bible, an outspoken critic of homosexuality proclaimed he would never pay the $17,500 as ordered by the Saskatchewan Human Rights Tribunal last year -- even if he fails in overturning that decision.

"That's what that order from the Saskatchewan Human Rights Tribunal ordered me to do, is give money to homosexual activists who I fundamentally disagree with," he said outside of court on Thursday. "So, no, I'm continuing to put out flyers and I won't be paying any fine."

Whatcott was ordered to pay the money to four people after they complained about anti-gay leaflets he stuffed into their mailboxes in Regina and Saskatoon in 2001 and 2002. The ruling followed a 2005 hearing by the Saskatchewan Human Rights Tribunal, in which it was decided Whatcott showed a clear pattern or practice of disregard for protected rights.

But Whatcott appealed that decision, an appeal that was heard on Thursday at Regina Court of Queen's Bench by Justice Fred Kovach. Whatcott not only argued he did nothing wrong by distributing the pamphlets, he added his own rights of religion and speech had been trampled on.

Kovach reserved decision in the case.

In court, Whatcott's lawyer, Thomas Schuck, argued his client was following his religious morals when he distributed pamphlets against homosexuality being condoned or taught in a school setting.

Schuck said it puts "a chill on free speech" if members of society have to constantly worry what they say may put them at odds with the human rights commission.

Janice Gingell, lawyer for the Saskatchewan Human Rights Commission, viewed the situation differently.

"The flyers that Mr. Whatcott had distributed, essentially being critical in an extreme way about gays and homosexuals and sexual orientation in general, crossed the line in terms of contravention of the Human Rights Code," she said outside of court. "Sexual orientation is a protected category under the code and you are not allowed to say things that will cause other people to feel hatred or ridicule or belittlement towards members of those protected categories."

Whatcott said the line should be drawn only if what he says about homosexuality is proven false and slanderous.

Gingell said that while Whatcott does have "constitutional protections to express opinions and to practise his religion in whichever way he chooses," he can't say whatever he likes.

"(Where) the line needs to be drawn, and I think the Supreme Court has been clear about that, is when those views become so extreme that they degrade other people, because they too have the right to be treated with dignity and respect," she said.

In the meantime, Whatcott said he intended to distribute about 3,500 more flyers in Regina on Thursday.

Indexing (document details)

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Saskatchewan anti-gay crusader loses human rights appeal; [Final Edition]

Edmonton Journal. Edmonton, Alta.: Dec 15, 2007. pg. A.6

Abstract (Summary)

Bill Whatcott's appeal was dismissed by Queen's Bench Justice Fred Kovach.

"I'm very happy with the ruling," said Nathan Seckinger, executive director of Gays Bisexuals Lesbians University of Regina Centre for Sexuality and Gender Diversity.

Full Text (163 words)

REGINA - An anti-gay activist has lost his appeal of a human rights tribunal ruling which found he promoted hatred by distributing flyers that called homosexuals pedophiles and child molesters.

Bill Whatcott's appeal was dismissed by Queen's Bench Justice Fred Kovach.

In a 2005 ruling, the human rights tribunal found Whatcott had contravened the Human Rights Code.

He distributed flyers in Regina and Saskatoon in 2001 and 2002 railing against information about homosexuality that was being taught in the Saskatoon public school system and at the University of Saskatchewan.

The tribunal also fined Whatcott $17,500 and ordered that he pay the money to the four complainants.

Justice Kovach upheld the original ruling.

"I'm very happy with the ruling," said Nathan Seckinger, executive director of Gays Bisexuals Lesbians University of Regina Centre for Sexuality and Gender Diversity.

Whatcott released a statement Friday expressing disappointment with the decision. He also indicated he intends to appeal to the Saskatchewan Court of Appeal.

Credit: CanWest News Service

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THE GLOBE AND MAIL

Site owner pledges to fight hate-speech complaint

DAVID GEORGE-COSH
Globe and Mail Update
Published Wednesday, Jul. 25, 2007 9:04AM EDT
Last updated Friday, Apr. 03, 2009 10:11AM EDT

The owner of a Kingston, Ont.-based right-wing website says she will fight back against a Canadian Human Rights Commission complaint she received last week that alleges the site contributed to allowing a well-known anti-gay activist to disseminate Muslim hate literature on the Internet.

Connie Wilkins, owner and operator of Freedominion.ca, vows to defend against accusations that one of her members, anti-gay and anti-abortion activist Bill Whatcott, has been spreading hate messages on her site, arguing that she is within her freedom-of-speech rights to allow such commentary to be published.

"Basically, the accusation is that we're a hate site, which couldn't be further from the truth," Ms. Wilkins said in an interview. She has already raised almost $3,000 through donations on her website for legal fees.

In a complaint filed with the CHRC in June, 2006, Montreal resident Marie-Line Gentes says she found discriminatory messages that specifically targeted Muslims, some of which she said would constitute hate literature, after visiting the website between April and May of 2006.

Although Ms. Gentes could not be reached for comment, she said in the complaint that, "even though I am not Muslim myself and I do believe in freedom of speech ... I believe that these messages are threatening for Muslims who live in Canada, contribute to racial tensions and can exacerbate discrimination and hostility towards Muslims."

The CHRC acknowledged a complaint has been filed against Freedominion, but declined to provide any further comment.

In one of the posts that Ms. Gentes cites as discriminatory, Mr. Whatcott writes, "I can't figure out why the homosexuals I ran into are on the side of the Muslims. After all Muslims who practise Sharia law tend to advocate beheading homosexuals." Mr. Whatcott also included links to a flyer he distributed within the Edmonton, Regina and Saskatoon regions last summer that condemned the Prophet Mohammed as a "man of violence " and included pictures of a beheaded Indonesian child.

"[Mr. Whatcott] is over the top in the way he expresses himself, but we have lots of members on our site who are lawyers and they keep a close eye on the site and they let us know if somebody

posted something that would break the law.

"If someone says something that is over the top, it's better to allow them to say it and have everybody else ... discredit them and use logic ... than to just delete it," Ms. Wilkins said.

Freedominion, a conservative discussion forum that boasts a membership of more than 8,000 users and over one million message posts, is no stranger to controversy. In January, 2006, a user had to resign as campaign manager for Conservative MP Peter Goldring after a series of posts calling for Alberta separation.

Mr. Whatcott is also accustomed to the public eye. His lawyer Thomas Schuck said Mr. Whatcott currently has two appeals with the Saskatchewan Human Rights Tribunal outstanding regarding the distribution of anti-gay leaflets between December, 2001, and April, 2002, and a protest in front of Planned Parenthood offices in Regina.

He has also filed a civil suit against the Prince Albert Police Department for malicious prosecution that is scheduled for September.

"For all the people who are offended, I challenge to call them on the factuality of my flyer where it is hateful. ... It's something that needs to be said," Mr. Whatcott said in an interview. He is also running in the Edmonton mayoral race on an anti-gay and anti-abortion platform.

University of Ottawa law professor Michael Geist says the owners of the site can still be held responsible for the content that other users post on its forum.

"There is the possibility, but not the certainty, of liability for those who host content that violates the law [in Canada]," Mr. Geist said.

Politicians, not courts, at fault for assault on free speech

John Carpay. **Calgary Herald.** Calgary, Alta.: Sep 27, 2008. pg. A.25

Abstract (Summary)

Any subject that might involve race, gender, sexual orientation, age, or religion (eg. immigration, same-sex marriage, Islamist terrorism) is now clouded by the spirit of fear because saying something "discriminatory" may well land you in hot water with human rights commissions.

Full Text (836 words)

Should Bill Whatcott be required to pay $17,500 to four individuals who were offended by the flyers he distributed? In 2001 and 2002, Whatcott distributed flyers articulating his opposition to teaching homosexuality in Saskatoon's public schools. In making his case that this would harm children, he said "Sodomites" were trying to spread their "filth" and "perversion." The Saskatchewan Court of Appeal must rule on whether the contents of Whatcott's flyers are "extreme" enough to justify this $17,500 human rights tribunal ruling. The court's job is not easy because extremism, like beauty, is in the eye of the beholder and the meaning of "extremism" changes with time. Forty years ago, sodomy was a Criminal Code offence and same-sex marriage would have been an "extreme" proposal. Today, same-sex marriage is legal and it would be considered "extreme" to re-criminalize sodomy. What qualifies as "extreme" depends entirely on the subjective perception of the viewer or listener.

In a Regina courtroom last Friday, the lawyer for the Saskatchewan Human Rights Commission repeatedly asserted that the content of the flyers was "extreme" and "hateful." She also admitted citizens opposed to teaching school children about homosexuality do have the right to speak out and can even use "strong" language to do so, but not "extreme" or "hateful" language. She spoke as though the difference between "strong" and "extreme" is obvious; as though Canadians are unanimous in where they draw the line. But as this court case and others demonstrate, Canadians draw the line in many different places. Which begs the question: why should the government take sides in public policy debates by prosecuting those who advocate politically incorrect views? As long as the expression is peaceful, why not let Canadians listen to all views (even "extreme" ones) and make up their own minds on matters of politics, religion and morality? Canada's human rights laws continue to put courts in the difficult position of having to decide if expression is sufficiently "extreme" or "hateful" to justify the government's prosecution of Canadians who express politically incorrect views. In similar fashion, Canadians are put in the impossible position of having to predict with accuracy whether their social, political, moral or religious commentary will be considered "extreme" or "hateful" by human rights bureaucrats. Since most Canadians can't afford to spend tens of thousands of dollars defending themselves against human rights prosecutions, and since most citizens are not capable of handling the stress of a prosecution that can drag on for years, and since most people would be horrified to see themselves publicly branded as "bigoted" or "hateful" by the process, people do what appears wise under the circumstances: they censor their own speech. Any subject that might involve race, gender, sexual orientation, age, or religion (eg. immigration, same-sex marriage, Islamist terrorism) is now clouded by the spirit of fear because saying something "discriminatory" may well land you in hot water with human rights commissions.

This problem is not unique to Saskatchewan. In Alberta, Ed Stelmach's government refuses to alter the human rights legislation that saw Roman Catholic Bishop Fred Henry prosecuted for articulating his church's opposition to same-sex marriage. The same legislation has enabled the prosecution of Rev. Stephen Boissoin for writing a letter to the editor of the Red Deer Advocate criticizing the political agenda of gay rights activists. Boissoin has been ordered by the Alberta Human Rights Commission to pay $5,000 to a man whose feelings were hurt by the letter, to write a letter of apology and to forever refrain from saying anything "disparaging" about homosexuals. The commission's order is unclear as to whether Boissoin can still participate in public policy debates about issues like same-sex marriage, or

preach his religion's teachings on sexuality.

Our civilization's tradition of freedom of speech dates back centuries and has facilitated artistic, literary, religious, philosophical and political achievements. But human rights legislation has a chilling effect on free speech and this chilling effect undermines the very foundations of democracy, which depends on open discussion, vigorous debate and the marketplace of ideas. The chilling effect also undermines the quest for truth, which requires that every notion and idea be open to challenge.

In Taylor v. Canadian Human Rights Tribunal, the Supreme Court of Canada ruled these restrictions on freedom of expression do not violate the Charter. And like the lawyer for the Saskatchewan Human Rights Commission in court last Friday, the Supreme Court in Taylor also stressed the importance of robust, vigorous, uninhibited free speech. But this position contradicts itself. When citizens can be prosecuted for speech human rights bureaucrats deem "extreme," it effectively puts an end to vigorous and robust debate.

However, the courts are not at fault here. Premier Stelmach can change Alberta's human rights legislation and restore freedom of speech to this province. The winner of this federal election can do the same for Canada.

John Carpay is Executive Director of the Canadian Constitution Foundation, which intervened before the Saskatchewan Court of Appeal in Whatcott v. Saskatchewan Human Rights Tribunal.

Credit: John Carpay; Calgary Herald

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Databases selected: Canadian Newsstand

There's no monopoly on truth

John Carpay. **National Post**. Don Mills, Ont.: Sep 2, 2008. pg. A.16

Abstract (Summary)

In addition to freedom of expression, the Whatcott appeal also concerns freedom of religion, which the Supreme Court has defined as "the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination."

Full Text (762 words)

Should a man be forced to pay $17,500 to four individuals who felt offended by the flyers he distributed?

The Saskatchewan Court of Appeal will answer this question when it considers the appeal of William Whatcott this September.

In 2001 and 2002, Mr. Whatcott peacefully distributed flyers in Regina and Saskatoon. His flyers expressed opposition to teaching children in public schools about homosexuality, and also expressed, in polemical language, his religious objections to homosexual behaviour and the gay lifestyle. Some of the flyers were photocopies of a page from the gay magazine Perceptions, which included a personal classified ad stating "searching for boys/men for penpals, friendship, exchanging video, pics ...Your age, look & nationality is not so relevant." On the photocopied page, Mr. Whatcott wrote: "Saskatchewan's largest gay magazine allows ads for men seeking boys!"

In response to complaints from four individuals whose feelings were hurt by the flyers, Mr. Whatcott was prosecuted under Saskatchewan's human rights law, ordered to pay $17,500 to the complainants and ordered to refrain from distributing the same or similar flyers.

Like the human rights complaints against Maclean's magazine for having published excerpts from Mark Steyn's book America Alone, this case pits Canadians' historic right to freedom of expression against human rights legislation that attempts to prevent hurt feelings.

The Canadian tradition of tolerance for polemical speech, even if considered hateful or extreme in its context, predates the Charter. In 1951 the Supreme Court of Canada acquitted a Jehovah's Witness of seditious libel for distributing a pamphlet entitled Quebec's Burning Hate for God and Christ and Freedom Is the Shame of All Canada, which contained extremely offensive statements about Quebec society, the clergy and the courts. Even if some listeners perceive it as hateful, polemical speech plays a crucial role in public debate.

In R. vs. Zundel and other cases, the Supreme Court of Canada has made it very clear that the purpose of freedom of expression is to protect minority beliefs that the majority regard as wrong or false or offensive, and to prevent the majority's perception of "truth" or "public interest" from smothering the minority's perception. In Edmonton Journal vs. Alberta, the Supreme Court of Canada declared that "it is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression. Indeed a democracy cannot exist without that freedom to express new ideas and to put forward opinions ... The concept of free and uninhibited speech permeates all truly democratic societies and institutions." In Reference re Secession of Quebec, the Supreme Court declared that nobody has a monopoly on truth, and that our democracy is predicated on faith in the marketplace of ideas: The best solutions to public problems will rise to the top.

In addition to freedom of expression, the Whatcott appeal also concerns freedom of religion, which the Supreme

Court has defined as "the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination."

Religious teachings against adultery, fornication, common-law relationships and homosexual behaviour run afoul of human rights codes because some listeners can easily perceive the teachings as "discriminatory" or "hateful" on the basis of marital status, family status and sexual orientation. The Whatcott appeal highlights the direct conflict between religious freedom and restrictions on "discriminatory" speech in human rights legislation.

When a man is ordered to pay $17,500 to people offended by flyers that he peacefully distributed, it sends a chilling message to all citizens: "Be very, very careful about what you say, and when in doubt, remain silent. Avoid the risk of a human rights prosecution that publicly brands you as 'hateful' or 'bigoted,' and avoid the risk of paying a hefty fine, and incurring massive legal bills." This chilling effect on citizens freely expressing themselves undermines the quest for truth, the marketplace of ideas and democracy itself.

Canadian courts will continue to be asked to balance the constitutional rights of religious freedom and freedom of expression with a new legislative "right" to be free from hurt feelings. This conflict will end only when politicians, courts and the Canadian public recognize that a right to offend through free speech cannot be reconciled with a right to be "free from" offence caused by another citizen's peaceful expression. - John Carpay is executive director of the Canadian Constitution Foundation, which is intervening in the Whatcott appeal before the Saskatchewan Court of Appeal.

Credit: John Carpay; National Post

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Databases selected: Canadian Newsstand

Whatcott carries on

Barb Pacholik. **Leader Post**. Regina, Sask.: Sep 20, 2008. pg. A.8

Abstract (Summary)

The long-running war over words has evolved into a battle on religious freedom and freedom of expression, with the Canadian Civil Liberties Association (CCLA) and Canadian Constitution Foundation intervening in a bid to have that section of the code declared unconstitutional or at least limited in scope.

Full Text (621 words)

As the Saskatchewan Court of Appeal wrestles with whether or not a Christian activist abused his free speech rights with flyers attacking teaching schoolchildren about homosexuality, he was poised to deliver more of the same.

"I'm doing a thousand flyers in Saskatoon this afternoon, and I've got 1,500 flyers going into Calgary next week," Bill Whatcott said Friday after the province's top court reserved decision in his latest appeal.

Formerly of Regina and now residing in Edmonton, Whatcott's newest leaflet criticizes homosexual adoption.

Despite repeat visits to the courts and human rights tribunals for his outspoken criticism of homosexuality and abortion, Whatcott's not changing his message.

"The human rights tribunals have been completely irrelevant in my view ... other than I criticize them," he said.

Whatcott's flyers prompted Guy Taylor and three others who received the material in Regina and Saskatoon in 2001 and 2002 to file human rights complaints.

Outside of court, Taylor told reporters how he returned home from a positive experience at a gay and lesbian conference to discover the flyer at his Saskatoon apartment complex.

"I came home to the stark reality that this is what gay and lesbian people face every day of their lives. Should we have to put up with that? Should we have to put up with being called 'filth?' Should I have to be referred to as a 'Sodomite?'" he asked. "It makes me feel less of a person."

Taylor complained in hopes of getting society to determine "is this OK or not? What are the limits of free speech? Is this fair comment?" Taylor conceded Whatcott has a right to his opinion, but said his flyers used extreme and inflammatory language.

A human rights tribunal ruling in 2005 found the flyers violated the Saskatchewan Human Rights Code, which prohibits publishing or displaying material that promotes hatred on the basis of sexual orientation.

Whatcott was ordered to pay $17,500 to compensate the four complainants.

The tribunal's decision was subsequently upheld by Court of Queen's Justice Fred Kovach -- prompting Whatcott's latest appeal.

The long-running war over words has evolved into a battle on religious freedom and freedom of expression, with the Canadian Civil Liberties Association (CCLA) and Canadian Constitution Foundation intervening in a bid to have that section of the code declared unconstitutional or at least limited in scope.

CCLA lawyer Andrew Lokan said the association doesn't share Whatcott's views, but defends his right to express

them.

The Saskatchewan Human Rights Association insists there are limits on free speech, and Whatcott went too far.

After hearing from all sides for three hours, Justices Nicholas Sherstobitoff, Gene Anne Smith and Darla Hunter reserved decision, but at least two of the judges admitted they had difficulty seeing how Whatcott's flyers incited hatred.

"Where is the line?" asked Hunter, who noted dramatic language is used to capture people's attention. "Often, free speech is offensive."

Smith said what's taught in schools should be open to public debate.

"Suppose someone thinks it's immoral -- they have a right to say so," she added.

But human rights commission lawyer Janice Gingell called the language used by Whatcott "hateful," and argued it was a call to action based on discrimination.

Whatcott's lawyer, Thomas Schuck, accused the commission of trying to "let the homosexual out of the closet, and closet the Christians." He said Whatcott was expressing his opinion and based the contents of his flyers, in part, on ads in a gay magazine and on Biblical text. He argued reasoned discussion about laws ought to be possible without "thought police" moving in to "chill" free speech.

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HAVE YOUR SAY: Is it not what he said but how Whatcott said it that matters?

Credit: Barb Pacholik; Leader-Post

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Back to Supreme Court to hear appeal over anti-gay leaflets

Supreme Court to hear appeal over anti-gay leaflets

October 28, 2010

OTTAWA—The Supreme Court of Canada will hear an appeal against a man who distributed anti-gay pamphlets in Saskatoon and Regina almost a decade ago.

Bill Whatcott was found in 2005 to have violated the Saskatchewan human-rights code and was ordered to pay $17,500 to four individuals after he placed his leaflets in their mailboxes.

The flyers spoke out against teaching about gays in schools.

Whatcott appealed the tribunal finding, saying it placed a chill on free speech.

The provincial court of appeal sided with him last February, saying the leaflets might have been crude and offensive, but they didn't promote hatred or step over the boundary of free expression.

The Saskatchewan Human Rights Tribunal appealed that ruling and the Supreme Court says it will hear the case.

National Post

Full Comment / Canada

Karen Selick: Supreme Court can still choose to defend free speech

National Post Nov 3, 2010 – 7:29 AM ET | Last Updated: Nov 3, 2010 7:47 AM ET

By Karen Selick

The Supreme Court of Canada has agreed to reconsider 20-year-old jurisprudence that limits free speech. The case under appeal is The Saskatchewan Human Rights Commission v. William Whatcott.

Back in 2001 and 2002, Whatcott, a social conservative activist, distributed flyers in Regina and Saskatoon bearing headings such as "Keep Homosexuality out of Saskatoon's Public Schools" and "Sodomites in our Public Schools."

He was hauled before the Saskatchewan Human Rights Commission for having "exposed to hatred, ridiculed, belittled or affronted the dignity" of gays and lesbians, and was ordered to pay compensation totaling $17,500 to four complainants. That decision was upheld on its first appeal to the Saskatchewan Court of Queen's Bench in 2007. But in February, 2010, three members of the Saskatchewan Court of Appeal overturned it.

While the Court of Appeal's decision was a victory, of sorts, for free speech, the court had to twist itself into contortions to reach it. On any objective reading of Whatcott's flyers, he did ridicule and belittle gays — and he probably even exposed them to hatred. What rankles free-speechers is the more fundamental question: Why should this be against the law? After all, don't we have a Charter of Rights that guarantees freedom of thought, belief, opinion and expression?

But the Court of Appeal declined to strike down the offending portions of the Saskatchewan Human Rights Code as inconsistent with the Charter. The problem lay in the fact that in 1990, the Supreme Court of Canada had considered similar human rights legislation and had decided that those censorship provisions were permissible despite the Charter's free-expression guarantee.

That case, known as Taylor, attempted to set some guidelines or standards as to when censorship laws designed to deter "hate speech" would be acceptable. Hatred or contempt, wrote then-chief justice Dickson, "refers only to unusually strong and deep-felt emotions of detestation, calumny and vilification."

Then, with inexplicable confidence in the niceness of the universe, justice Dickson opined that so long as human rights tribunals paid heed to the extreme degree of hatred necessary to justify censorship, there would be "little danger that subjective opinion as to offensiveness" would trump free speech.

But events over the last few years have demonstrated that the danger characterized by justice Dickson in 1990 as "little" is anything but. Accusations of anti-Muslim hate-mongering have been levelled against *Maclean's* magazine for Mark Steyn's commentary on immigration policy; and against *Western Standard* magazine and its publisher Ezra Levant merely for printing the notorious "Mohammed cartoons" as part of its news coverage.

Even B'nai Brith, a Jewish organization known for supporting the anti-hate provisions of human rights legislation, has been hit with a complaint.

While the complaints against *Maclean's* and Levant ultimately were dismissed, the accused parties had to spend hundreds of thousands of dollars upholding their innocence — money they'll never get back. Worse yet is the chilling impact those prosecutions have had on less stalwart souls than Steyn and Levant. The risk of being put through such an ordeal, even if one is ultimately vindicated, undoubtedly has diverted many a commentator into less hazardous topics of discussion.

Even the history of the Whatcott decision itself demonstrates how subjective justice Dickson's test is. Of those who have sat in

judgment on Mr. Whatcott's comments to date, two have said he violated the law while three have said he didn't. That's hardly a demonstration that the standards are crystal clear.

Justice Dickson's confidence in the discretion of human rights tribunals now appear to have been hopelessly misplaced.

The Whatcott appeal presents an opportunity for the Supreme Court to reconsider its Taylor decision with the benefit of 20/20 hindsight. It's encouraging to note that the Taylor rationale itself just squeaked by in a four-to-three decision in 1990. The only judge on that seven-member Taylor panel who remains on the bench today is Beverley McLachlin, now the Chief Justice. In 1990, she was one of the three-member dissenting team who said that the human rights law then under consideration was not "reasonable and justifiable in a free and democratic society."

It will be interesting to see whether her opinion remains the same, and whether she can now persuade a majority of her colleagues.

National Post

Karen Selick is the litigation director of the Canadian Constitution Foundation, which intervened in favour of freedom of expression at the Saskatchewan Court of Appeal.

Posted in: **Canada, Full Comment, Policy, Social Issues** Tags: **Ezra Levant, Free Speech, Hate Speech, Homosexuality, Human Rights Tribunal, Maclean's, Western Standard, William Whatcott**

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Anti-gay activist to challenge Sask. Human Rights Code

The Canadian Press: Friday, January 7, 2011

A passerby pauses as Bill Whatcott, facing at left, protests homosexuality and abortion before a court appearance in Calgary, March 27, 2009. On Friday the Supreme Court of Canada said Whatcott can challenge the constitutionality of the Saskatchewan Human Rights Code.

Photo Credit: Ted Jacob, Calgary Herald

REGINA, Sask. - The Supreme Court of Canada says a man who distributed anti-gay pamphlets can challenge the constitutionality of the Saskatchewan Human Rights Code.

Bill Whatcott is questioning part of the code that allows the commission to charge people with hate speech.

Whatcott's lawyer, Tom Schuck, says what has been the traditional Christian message on appropriate sexual conduct has morphed into being characterized as hate speech. Human rights commissions should remain neutral on such moral issues, he suggests.

"The problem that I have and many others in the Christian community (have), is that this law is being used to charge Christians - Christians who have a different view as to what is right and wrong on sexual behaviour and in particular same-sex sexual behaviour," Schuck said Friday in a phone interview from his office in Weyburn, Sask.

"The argument is that our Constitution, the Charter of Rights and Freedoms, gives all Canadians the freedom of speech, freedom of press, freedom of religion. And the utilization of human rights commissions to stop someone from saying that same-sex sexual activity is wrong infringes on all three of those charter rights."

In 2005, Whatcott was found to have violated the Saskatchewan code when he put pamphlets in mailboxes objecting to teaching about same-sex relationships in Saskatoon public schools. The flyers referred to homosexual men as sodomites and pedophiles, called same-sex relationships "filthy" and urged people to lobby government to prevent homosexuals from working as teachers.

Whatcott appealed the finding. He said it placed a chill on free speech.

Last February, the provincial Court of Appeal sided with him. The court ruled the leaflets may have been crude and offensive, but said they didn't promote hatred or step over the boundary of free expression.

The Saskatchewan Human Rights Commission appealed that decision to the Supreme Court of Canada, which said last fall that it would consider the commission's arguments. That appeal is tentatively set to be heard in October.

Schuck said he's confident the Appeal Court decision will stand, but "we felt it would be prudent to challenge the validity of the law."

The case could have widespread ramifications across the country, he added.

"Because every province has got a human rights commission that charges people with hate, if it's invalid in Saskatchewan it'll be invalid everywhere."

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Teen arrested after using handgun to rob Saskatoon business
Teen uses handgun to rob cash from a Saskatoon business.

SCHEDULE "B"

The following is a summary of case law (mostly decisions by human rights tribunals) considering and applying the test for hate speech articulated by the majority in *CHRC v. Taylor*, [1990] 3 S.C.R. 892, namely that the impugned expression display on its face "extreme ill-will and an emotion which allows for no 'redeeming qualities' in the person to whom it is directed, ... [or] unusually strong and deep-felt emotions of detestation, calumny and vilification".

Decisions by the Canadian (Federal) Human Rights Tribunal

In *Warman v. Lemire*, 2009 CHRT 26, the impugned messages were posted on various websites. The Tribunal found that "The Canadian Immigrant Poem" set out a caricature of immigrants that was gross and likely to offend, but was not persuaded that it expressed "extreme ill-will" as contemplated in *Taylor*. The same conclusions were reached with respect to two press releases by the Heritage Front – one titled "Toronto Star on HF Health Alert", which warned that "immigration can kill you"; and the other titled "Immigration Legislation Hearings", which proposed a moratorium on immigration and a binding referendum on Canada's current immigration policies, and argued that the only countries who respect human rights are "majority white nations" and that, without a redirection in immigration policies, changes will be brought about in Canadian society that will be "irreversible". While an article by Ian MacDonald was found to have "clearly displayed resentment towards Jewish people", it was also found to not satisfy the *Taylor* test. An article titled "Freedom is as Freedom Doesn't", a criticism of hate speech laws containing "gratuitous" references to Jews, and another titled "Ottawa is Dangerous", a criticism of the results of the 2000 federal election containing epithets such as "in-bred French jack-asses" and "cheese sniffers", also did not meet the *Taylor* standard.

The only complaint that was found to be substantiated in this proceeding was the one related to an article titled "AIDS Secrets", which branded homosexuals as perverts and sexual deviants who engaged in "filthy practices" and "sick sex games" and from whose "sick and sleazy pleasure homes" HIV/AIDS rose. The Tribunal concluded that this article expressed unusually strong and deep-felt emotions of detestation and vilification towards homosexuals. The application for judicial review of this decision, which also found that s. 13(1) of the *Canadian Human Rights Act* unconstitutional, is currently pending before the Federal Court.

In *Warman v. Northern Alliance*, 2009 CHRT 10, the impugned messages targeted Jews ("dishonest", "money hungry"); Muslims ("dirty", "violent", "dangerous"); Arabs, Blacks, Aboriginals, Roma, Chinese, and East Indians ("ignorant", "inferior"); gays and lesbians ("deviant criminals who prey on children"), and persons with mental and physical disabilities ("horrible creatures who ought not be allowed to live"). The Tribunal concluded that the messages fell within the meaning of the definition of "hatred" and "contempt". It referred with approval to the analysis in *Warman v. Kouba*, 2006 CHRT 50, in which another CHRT Member set out the following "hallmarks" from the jurisprudence of the kind of messages that are more likely than not to expose members of the targeted group to hatred or contempt:

- **The "Powerful Menace" Hallmark**: the portrayal of the targeted group as a powerful menace that is taking control of the major institutions in society and depriving others of their livelihoods, safety, freedom of speech and general well-being
- **The "True Story" Hallmark**: the use of "true stories", reports, and references from purportedly reputable sources to make negative generalizations about the targeted group
- **The "Predator" Hallmark**: the portrayal of the group as preying upon the vulnerable
- **The "Cause of Society's Problems" Hallmark**
- **The "Dangerous or Violent by Nature" Hallmark**
- **The "No Redeeming Qualities" Hallmark**: the messages convey the idea that members of the targeted group are devoid of any redeeming qualities and are innately evil
- **The "Banishment" Hallmark**: communication of the idea that nothing but banishment, segregation or eradication of the group will save others from harm caused by the group
- **The "Sub-human" Hallmark**: the targeted group is de-humanized through comparisons to and associations with animals, vermin, excrement, and other noxious substances
- **The "Inflammatory Language" Hallmark**: highly inflammatory and derogatory language is used in the messages to create a tone of extreme hatred and contempt
- **The "Trivializing or Celebration of Past Tragedy" Hallmark**: the messages trivialize or celebrate past persecution or tragedy involving members of the targeted group
- **The "Call to Violent Action" Hallmark**: calls to take violent action against the group

Warman v. Kouba involved a complaint about various messages about Aboriginals, Blacks, and homosexuals that had been posted by the respondent on two websites' discussion forums. In the result, the Tribunal found that the impugned messages bore many of the above-listed hallmarks, including advocating the exile or segregation of members of the targeted groups and exhorting readers to "take action" to stop the "evil menace" created by these people.

In *Center for Research-Action on Race Relations v. www.bcwhitepride.com*, 2008 CHRT 1, the impugned messages asserted that Blacks have "a significantly lower level of intelligence than Whites or Asians" and referred to them as the "cognitive underclass"; people with disabilities were branded as "parasites", "incognizant primates", "genetically inferior", and "lesser beasts" that must be "culled from the herd". There were calls to "take back our country", fight for "the white man's land" and free it from the "Oriental grasp and greed", and "overthrow this insipid power" (referring to Jewish "control" of mass media). The Tribunal concluded that the messages on the website were likely to expose members of the targeted groups to hatred or contempt.

In *Warman v. Beaumont*, 2007 CHRT 49, the Tribunal found that many of the 25+ impugned messages posted by the respondent contained highly inflammatory and derogatory language ("nigger" and its derivatives, "faggots", "chinks", "chugs"), subjected members of the target groups to ridicule and hostility, and insinuated that these persons were devoid of any redeeming qualities, thereby likely exposing them to hatred or contempt within the meaning of *Taylor*.

In *Warman v. Wilkinson*, 2007 CHRT 27, the impugned messages posted on the website of the Canadian Nazi Party bore one or more of the above-listed hallmarks of hate speech in that they trivialized and celebrated the Holocaust, called for "getting rid of" minority groups and the "death of all Jews and Niggers", and urged government to "rise up and kill" all Arabs, African, Indian, Asian, or any other "not white person in the world". The Tribunal concluded that these messages were likely to expose members of the targeted groups to hatred or contempt.

In *Warman v. Winnicki*, 2006 CHRT 20, the Tribunal concluded that the impugned messages were likely to expose Jews, Blacks, and other non-Caucasians to hatred and contempt because the messages portrayed the targeted groups as sub-human filth, conveyed the idea that members of these groups are dangerous and evil, exhorted others to adopt these views, and sought to justify, motivate, and legitimize violent action against members of the targeted groups.

In *Warman v. Tremaine*, 2007 CHRT 2, the impugned messages were principally directed at Blacks (who were portrayed as violent, criminal, and stupid) and Jews (who were characterized as a parasitic race, pure evil, vermin, liars, and criminals). The Tribunal concluded that the messages conveyed extreme ill-will to the point of violence towards the targeted groups and that nothing in the messages allowed for any redeeming qualities for members of those groups. An application for judicial review (2008 FC 1032) was dismissed by the Federal Court.

In *Warman v. Kyburz*, 2003 CHRT 18, the Tribunal found that the impugned messages posted on the website of "Patriots on Guard" told readers that Jews are innately devious, treacherous, murderous; the terms used to describe Jews included "sub-human", "scum", "vermin", and "low-lives". Accordingly, the messages were likely to expose Jews to both hatred and contempt.

In *Citron v. Zundel*, [2002] CHRD No 1, the impugned material from the "Zundelsite" contained repeated references to the benefits obtained by Jews and Israel from their "continued promotion of the Holocaust story". The Tribunal held that these materials branded Jews as liars, swindlers, racketeers, and extortionists. While there were "considerable portions" of the materials that would not be elevated to "extreme ill-will", the Tribunal concluded that, when read together, the messages were likely to expose Jews to hatred and contempt, stating: "The echoes of hatred that reverberate throughout the site infect and taint virtually all of the documents put before us."

In *Schnell v. Machiavelli*, [2002] CHRD No 21, the impugned materials from the "Citizen Research" website persistently equated homosexuality with sexual predation, attributed to gay men uncontrollable sexual passion and aggression, and exhibited the "classic mechanisms" historically used to generate hatred against a target group ("In a perfect world there would not be any same sex 'couples'"; "Please try not to vomit while reading this story"; "The queers have an agenda and it's sick"; "Citizens alert, homosexuals have an agenda! They are paving the way for legalized pedophilia", etc.). The Tribunal found that these materials did not admit of any redeeming qualities in homosexuals and were likely to expose them to hatred and contempt.

In *Chilliwack Anti-Racism Project Society v. Scott*, [1996] CHRD No. 6, the impugned messages from a telephone hotline identified Jews as "God's enemies" and "the Devil's children"; there were also suggestions that immigration from "non-white nations" was responsible for crime in Canadian society, as well as references to "mud people", which the Tribunal held was a disparaging term for "people of colour". The Tribunal concluded that the impugned messages were likely to expose Jews, people of colour, and immigrants to hatred and contempt.

In *Payzant v. McAleer*, [1994] CHRD No 4, the impugned message began with a defence of freedom of speech, arguing that a purported "newsletter for child molesters" should not be banned, "but that child molesters, homo or otherwise, should be executed". It then suggested that the purported "Celt practice" of trampling "queers" into a peat bog would "not be such a bad idea". The Tribunal upheld the complaint, finding that the portion of the message expressing disgust for child molestation and pedophilia was used as a "priming process" to evoke hatred or contempt against "queers". An application for judicial review was dismissed: [1996] 2 F.C. 345.

In *Khaki v. Canadian Liberty Net*, [1993] CHRD No 17, the impugned messages targeted "non-white" immigrants ("swarms of wretched refuge that have washed ashore and who bring the very problems they sought to escape") and Jews ("manipulators and destroyers of our culture and society"). The Tribunal concluded that these messages conveyed extreme ill-will towards Jews and immigrants and were likely to expose these persons to hatred or contempt.

In *Manitoba Coalition Against Racism and Apartheid v. Manitoba Knights of the Ku Klux Klan*, [1992] CHRD No 15, the Tribunal held that various telephone hotline messages targeting "non-whites", Aboriginals, Blacks, and homosexuals were likely to expose members of these groups to hatred or contempt. The Tribunal did not review the contents of these messages in detail.

Decisions from Saskatchewan

SHRC v. Bell, [1994] SJ no 380 (Sask. C.A.), rev'g. [1991] SJ no 620 (Sask. Q.B.), was a judgment on appeal with respect to the constitutionality of the same provision of the *Saskatchewan Human Rights Code* that is at issue in the present case (in the result, the legislation was held to be valid). The underlying complaint related to the display and sale of stickers which depicted caricatures of ethnic minorities superimposed with a circle and slash. The Court stated:

> The stickers, by their use of strong images, rather than words, appeal to emotion as much as to reason and their purpose and effect is unmistakeable: they expose or tend to expose those groups represented by the images to all of the things which constitute hatred as here defined. They do this by showing the groups depicted to the viewer as being different from the other members of society in a malevolent way, attributing to them undesirable characteristics such as dangerousness, untrustworthiness, lack of cleanliness, lack of emotion, inferior intelligence, dishonesty and deceit. **This conclusion comes not only from the evidence of the witnesses, but from the visceral as well as rational effect on the viewer.** And all of this is reinforced and driven home by the circle and slash superimposed over the image, the universal symbol for forbidden, not allowed or not wanted. This use of the symbol is insidious. **Although the symbol, as used, is**

> **ambiguous, it is, nevertheless, a very powerful one: it may be interpreted as advocating anything from mere disapproval of the presence of those depicted to genocide of them.** Often this symbol is a direction not to enter or a prohibition against doing some act with attendant consequences including, from time to time, harm to the one who enters or does the act. **The effect of the stickers on any individual viewer must necessarily be in part subjective. But even if there are some viewers who would not see the stickers as actually exposing to hatred, they certainly tend to do so.**
>
> The stickers also belittle, ridicule and affront the dignity of the groups in question and their members within the ordinary dictionary meaning of those words. The circle and slash is a universal symbol meaning not wanted or forbidden. That, combined with the derogatory caricatures emphasizing undesirable or unflattering traits makes their meaning unmistakeable. They belittle in the sense that they make the groups depicted and their members appear inferior to other groups or their members in our society. They ridicule in the sense that they make fun of them in a mocking, deriding and demeaning way. They affront the dignity of the groups and their members in the sense that they openly insult their inherent human worth, and thus diminish, or deprive them of, the respect due them as equal members of our society. That is the sense of the evidence from the witnesses, and is obvious to any dispassionate viewer of the stickers.

The Court of Appeal held that the complaint in *Bell* was justified, but this result was distinguished in *Owens v. SHRC*, 2006 SKCA 41, rev'g. 2002 SKQB 506 (Sherstobitoff J.A. was on the panel in both appeals). In *Owens*, the impugned material was a newspaper advertisement depicting two stick figures holding hands, also superimposed with a circle and slash, and accompanied by Bible passages disapproving of homosexuality. The Court analyzed the passages in the context of the whole Bible and from a "contemporary perspective" and concluded: "despite its strong language, the Bible text referred to in the advertisement cannot be seen from an objective perspective as involving feeling and emotions that are as categorical or as loaded with the sort of emotion canvassed in *Bell* [...]. At least in the context at issue here, the Bible passages must be seen in a different light than a plain assertion made in contemporary times to the effect that 'Homosexuality is evil and homosexuals should be killed.' [...] Given the benign design of the stickmen and the somewhat ambiguous meaning of the not permitted symbol, I do not believe that the [quoted Bible passages] transform[] the advertisement as a whole into a message which meets the *Bell* standard. [...] Although bluntly presented and doubtless upsetting to many, the essential message conveyed by the advertisement is not one which involves the ardent emotions and strong sense of detestation, calumny and vilification required by *Bell*."

Decisions from Alberta

In *Re Kane*, 2001 ABQB (an application on stated questions regarding the interpretation of the *Alberta Human Rights, Citizenship and Multiculturalism Act*), Rooke J. held as follows:

> [130] The definitions of "contempt" and "hatred", for the purposes of human rights legislation, have been settled by a majority of the Supreme Court of Canada in *Taylor*. Those definitions dictate that different considerations apply to each of those terms. The definition of "likely to expose" should focus on the

> impact of the communication on the target group, specifically, whether the communication makes it more likely than not that the target group will be exposed to hatred and contempt. Any test applied to determine whether a representation "is likely to expose a person or class of persons to hatred or contempt" must be highly contextual and responsive to the legislation. Further, such a test should be viewed as an analytical framework rather than as a template. In applying such a framework the Panel should draw from the various factors and considerations used in other cases, including, but not limited to:
>
> - the message - content, tone, images conveyed, reinforcement of stereotypes, surround[ing] circumstances;
> - the medium - credibility, circulation, context of the publication; and
> - the audience - vulnerability of [the] target group.

In *Boissoin v. Lund*, 2009 ABQB 592, Wilson J. allowed an appeal from a decision by the Alberta Human Rights Panel with respect to a complaint about a letter to the editor that was published in the Red Deer Advocate (the most widely circulated newspaper in central Alberta). He held that impugned speech "must be directly linked to areas of prohibited discriminatory practices" (i.e., in the provision of goods, services, employment, etc.) to be in breach of the relevant legislation. The Panel erred because it failed to identify individuals or groups who might potentially undertake prohibited discriminatory activity and there was no evidence that discriminatory practices were likely to occur as a result of the letter. In *obiter dicta*, Wilson J. stated that the appellant could not claim some "super-added right by riding the newspaper's constitutional coattails simply because of the latter's involvement" in the publication.

Decisions by the B.C. Human Rights Tribunal

In *Canadian Jewish Congress v. North Shore Free Press Ltd.*, [1997] BCHRTD No 23, the Tribunal interpreted s. 7(1)(b) of the B.C. *Human Rights Code* as embodying the same meaning as s. 13(1) of the *Canadian Human Rights Act*. The Tribunal found that the article at issue was anti-Semitic, but was not satisfied that it captured in its tone and entire context the degree of calumny, detestation, or vilification signified by "hatred or contempt", and thereby concluded that the complaint under s. 7(1)(b) was not justified. However, the Tribunal also stated, in somewhat confusing *obiter dicta*, that the second step of the test was met, in that the article was "likely to make it more acceptable for others to express hatred or contempt" against Jews.

In *Elmasry v. Roger's Publishing Ltd.*, 2008 BCHRT 378, the Tribunal held that the Mark Steyn's article in Maclean's titled "Why the Future Belongs to Islam" expressed strong, polemical, and at times, glib opinions about Muslims, but that it was essentially an expression of opinions on political issues that are legitimate subjects for public discussion. It was held that the article did not rise to the required level of detestation, calumny, and vilification.