

Saskatchewan Human Rights Commission v. William Whatcott

WHAT DOES THE SUPREME COURT OF CANADA'S DECISION MEAN TO YOU?

By Don Hutchinson

Background

The Evangelical Fellowship of Canada (EFC) was granted leave to intervene by the Supreme Court of Canada in the *Saskatchewan Human Rights Commission v. William Whatcott* case which was heard on October 12, 2011. The decision was issued on February 27, 2013. This case involves the expression of religious comment in public policy dialogue.

As part of a group called Christian Truth Activists, Mr. Whatcott distributed flyers to homes in Regina and Saskatoon in 2001 and 2002. The flyers contained vehement comments about the sexual practices of same-sex couples. They also shared Mr. Whatcott's views on morality, sexual behavior and public policy. They expressed his opposition to school children being taught about homosexuality and criticized homosexual behavior, as well as the advertising practices of a gay magazine.

Mr. Whatcott noted that the flyers prepared and distributed by him reflected his religious beliefs.

Some recipients of the flyers filed complaints and Mr. Whatcott was subject to legal proceedings before the Saskatchewan Human Rights Tribunal. The Tribunal found that he had contravened section 14(1)(b) of *The Saskatchewan Human Rights Code* as the material promoted "hatred against individuals because of their sexual orientation."

The EFC intervened in this case with a focus on proactively promoting the freedoms of pronouncement from the pulpit and participation in the public square; essential components of freedom of religion and Evangelical expression.

The Decision

The unanimous decision of the court was written by Justice Rothstein and is about 90 pages, double spaced in a 12 point font. It is a remarkably easy read for a court decision and highly recommended. You can find a pdf of the decision at <http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/12876/1/document.do>

Seven Supreme Court of Canada justices heard the case, however Justice Deschamps retired prior to the decision being finalized so it is the decision of six judges.

Following are the key points to note:

- A. All rights guaranteed under the *Canadian Charter of Rights and Freedoms* (the *Charter*) are subject to reasonable limitations per section 1 of the *Charter*:
 1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

- B. The court found that Mr. Whatcott's *Charter* s. 2(a) right to freedom of religion and s. 2(b) right to freedom of expression were infringed by s. 14(1)(b) of *The Saskatchewan Human Rights Code*:

14. (1) No person shall publish or display ... any representation ...
(b) that exposes or tends to expose to hatred, ridicules, belittle or otherwise affronts the dignity of any person or class of persons on the basis of a prohibited ground.

- C. The court then conducted an analysis of the infringements based on s. 1 of the Charter using a step-by-step application of a long accepted test for that purpose (those steps are outlined in the summary of the analysis that follows).

- D. FREEDOM OF EXPRESSION: The court found that the infringement of freedom of expression was justifiable in a free and democratic society using the s. 1 analysis:

- i. Is the objective for which the limit is imposed pressing and substantial?

- i.e. is the objective of sufficient importance to warrant overriding a constitutionally guaranteed right?
- The court answered this question "yes" noting at paragraph 71 that "Hate speech is, at its core, an effort to marginalize individuals based on their membership in a group. Using expression that exposes the group to hatred, hate speech seeks to delegitimize group members in the eyes of the majority, reducing their social standing and acceptance in society."

- ii. Proportionality (two sub-parts)

(a) Rational Connection, i.e. is the legislative measure employed proportionate to its objective? Is it rationally connected to the objective? Is it an effective measure?

- The court answered this sub-category of questions "yes" noting at paragraph 99 that "prohibiting representations that are objectively seen to expose groups to 'hatred' is rationally connected to the objective of eliminating discrimination and the other harmful effects of hatred. Prohibiting expression which 'ridicules, belittles or otherwise affronts the dignity of' protected groups is not rationally connected to reducing systematic discrimination against vulnerable groups. Those words unjustifiably infringe s. 2(b) of the Charter and are constitutionally invalid." For that reason, the court exercised its residual power to eliminate those words and modify s. 14 (1)(b) to read:

14. (1) No person shall publish or display ... any representation ...
(b) that exposes or tends to expose to hatred of any person or class of persons on the basis of a prohibited ground.

(b) Minimal Impairment, i.e. does this policy option minimally impair the Charter right in order to accomplish the objective? Or is there an alternative option that would be more reasonable in furthering the objective with lesser impairment?

- Reasonable Alternatives: The court explored allowing the marketplace of ideas to address the speech with counter speech or allowing criminal prohibitions to do so before concluding that no one approach was superior to another, therefore s. 14(1)(b) as amended by the court was a reasonable exercise of legislative power.
 - Overbreadth: The court explored whether s. 14(1)(b) was overreaching in the behaviour it captured and concluded the amended version was not.
 - Nature of Expression: The court concluded that s. 14(1)(b) promotes rather than impedes freedom of expression because the hate speech captured would be detrimental to the free exchange of ideas by silencing the target group.
 - Political Discourse: The court concluded that “framing the speech as arising in a ‘moral’ context or ‘within a public policy debate’ does not cleanse it of its harmful effect. Indeed, if one understands an effect of hate speech as curtailing the ability of the affected group to participate in the debate, relaxing the standard in the context of political debate is arguably more rather than less damaging to freedom of expression.” (at paragraph 116)
 - Sexual Orientation versus Sexual Behaviour: Perhaps the most disturbing component of the decision is the comments from paragraphs 121 to 124 because they cast a broad net in regard to the issue of differentiating between sexual orientation and sexual behaviour. The court accepted that such a differentiation may be made, but “where the conduct that is the target of the speech is a crucial aspect of the identity of the vulnerable group, attacks on this conduct stand as a proxy for attacks on the group itself. If expression targeting certain sexual behaviour is framed in such a way as to expose persons of an identifiable sexual orientation to what is objectively viewed as detestation and vilification, it cannot be said that such speech only targets the behaviour. It quite clearly targets the vulnerable group. Therefore, a prohibition is not overbroad for capturing expression of this nature.” (paragraph 124)
 - Intent, Proof, and Defences: The court found that the “preventive measures found in human rights legislation reasonably centre on effects, rather than intent” (paragraph 127) and that the legislature is entitled to prevent a reasonable apprehension of societal harm without requiring proof of actual harm. The court also found that where the objective standard of hate speech is met then truth of the content being a sincerely held belief is not a defence.
- iii. Whether the benefits outweigh the deleterious effects, i.e. an assessment of whether the importance of the legislative objective outweighs the negative effects of the provision that limits the *Charter* freedom/right in question.
- The court concluded that s. 14(1)(b) can provide guidance so that individuals “can continue expressing their opinions in a way that avoids falling within the

narrow scope of expression captured by the statutory prohibition. The protection of vulnerable groups from the harmful effects emanating from hate speech is of such importance as to justify the minimal infringement of expression that results from the restriction of materials of this kind.”

- E. FREEDOM OF RELIGION: In its analysis of the right to freedom of religion, the court noted at paragraph 154 that “the protection provided under s. 2(a) should extend broadly” with a *Charter* s. 1 analysis being the appropriate place to determine if legislative infringement is justifiable. “An infringement of s. 2(a) of the Charter will be established where: (1) the claimant sincerely holds a belief or practice that has a nexus with religion; and (2) the provision at issue interferes with the claimant’s ability to act in accordance with his or her religious beliefs.” (para. 155)

In Mr. Whatcott’s case, it was “his choice of expression” that was “caught by the hatred definition” (para. 156) and thus his right was infringed.

In conducting its s. 1 analysis (per the steps above) the court concluded the infringement was justifiable in a free and democratic society, noting the following significant points:

- “Preaching and the dissemination of religious beliefs is an important aspect of some religions.” (para. 159)
- “For the purposes of the application of s. 14(1)(b) of the Code, it does not matter whether the expression at issue is religiously motivated or not. If, viewed objectively, the publication involves representations that expose or are likely to expose the vulnerable group to detestation and vilification, then the religious expression is captured by the legislative prohibition. In other words, Mr. Whatcott and other are free to preach against same-sex activities, to urge censorship from the public school curriculum and to see to convert others to their point of view. Their freedom to express those views is unlimited, except by the narrow requirement that they not be conveyed through hate speech.” (para. 163)

- F. Following this analysis, the court applied the amended s. 14(1)(b) to the flyers in question, finding:

- At paragraph 174 “that the words and phrases in a publication cannot properly be assessed out of context. The expression must be considered as a whole, to determine the overall impact or effect of the publication. However, it is also legitimate to proceed with a closer scrutiny of those part of expression that draw nearer to the purview of s. (14)(1)(b) of the *Code*.” In this case the context included the “history of discrimination against those of same-sex orientation” and the “public policy debates about the appropriate content of public school curriculum” and “ongoing religious and public interest and debates about the morality of same-sex conduct.” (para. 169)
- “Genuine comments on sexual activity are not likely to fall into the purview of a prohibition against hate.”

- The two flyers that portrayed “the targeted group as a menace that could threaten the safety and well-being of others” and used “vilifying and derogatory representations to create a tone of hatred” were caught by the prohibition on hate speech.
- The two flyers that had Bible verses written on them and noted it should be illegal for of age men to advertise for underage sexual partners “who want to get sodomized” did not expose persons of same-sex orientation to detestation and vilification and were not caught by the prohibition.

G. RELIGIOUS COMMUNICATION: The court went on to note at paragraphs 197 to 199:

[197] With respect to the purported excerpt from the Bible, I would agree with the comments of Richards J.A., at para. 78 of *Owens*, that

. . . it is apparent that a human rights tribunal or court should exercise care in dealing with arguments to the effect that foundational religious writings violate the *Code*. While the courts cannot be drawn into the business of attempting to authoritatively interpret sacred texts such as the Bible, those texts will typically have characteristics which cannot be ignored if they are to be properly assessed in relation to s. 14(1)(b) of the *Code*.

[198] Richards J.A. found that objective observers would interpret excerpts of the Bible with an awareness that it contains more than one sort of message, some of which involve themes of love, tolerance and forgiveness. He also found that the meaning and relevance of the specific Bible passages cited in that case could be assessed in a variety of ways by different people.

[199] In my view, these comments apply with equal force to the biblical passage paraphrased in Flyers F and G that “[i]f you cause one of these little ones to stumble it would be better that a millstone was tied around your neck and you were cast into the sea”. Whether or not Mr. Whatcott meant this as a reference that homosexuals who seduced young boys should be killed, the biblical reference can also be interpreted as suggesting that anyone who harms Christians should be executed. The biblical passage, in and of itself, cannot be taken as inspiring detestation and vilification of homosexuals. While use of the Bible as a credible authority for a hateful proposition has been considered a hallmark of hatred, it would only be unusual circumstances and context that could transform a simple reading or publication of a religion’s holy text into what could objectively be viewed as hate speech.

Summary Thoughts

This decision offers prudent advice that wisdom be used in commenting on permissible or prohibited behaviours from a Biblical perspective to ensure that one is exercising religious freedom rather than seeking to marginalize the freedom of an identifiable group of people.

It took 10 years for this case to make its way through the system (and over 20 years since the last case on hate speech) so expect this to be the standard of the law for some time to come and plan accordingly.

Now that Saskatchewan’s hate speech provision has been upheld by the Supreme Court of Canada, expect those provinces and territories that do not currently have such a provision to enact one within the next 12 to 24 months.

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