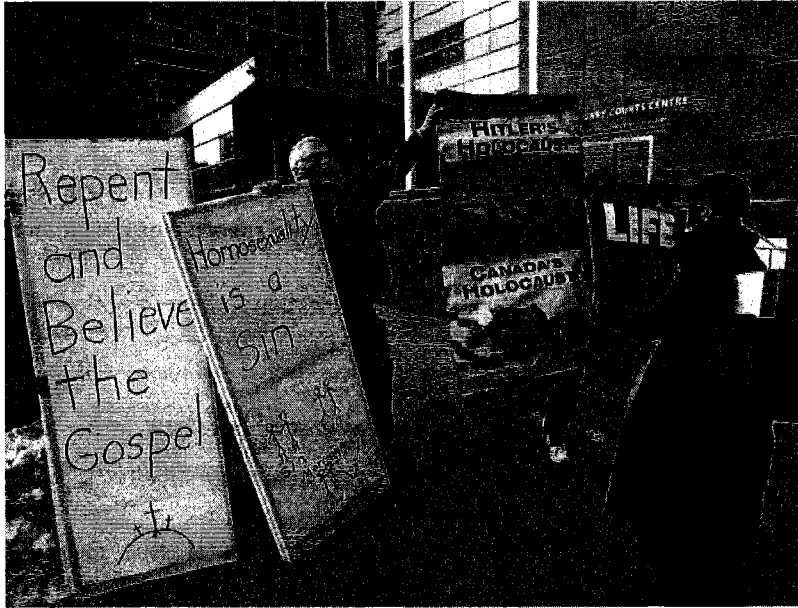


Supreme Court upholds Canada's hate speech laws in case involving anti-gay crusader

"I have to follow Christ first. What I have said is true. There's not a sentence that I retract, so likely future fliers will be more of the same." Whatcott



Canada's hate speech laws upheld by Supreme Court

Canada's human rights hate speech laws are a constitutionally valid limit on freedom of expression, the Supreme Court has unanimously ruled in a landmark judgment. The judgment in the case of William Whatcott of Saskatchewan reaffirms the Canadian approach to hate speech, that it can be limited by law to address the problem of hate speech, unlike the American approach, in which speech cannot be limited except in the most extreme circumstances.

In upholding a definition of hatred first crafted by the Supreme Court in 1991, the current justices ruled that the hate speech section of *Saskatchewan's Human Rights Code* addresses a pressing and substantial issue, and is proportional to its objective of "tackling causes of discriminatory activity to reduce the harmful effects and social costs of discrimination." The court struck out some strange language in the law, which bans speech that "*ridicules, belittles or otherwise affronts the dignity of*" identifiable groups — language that the Saskatchewan Human Rights Commission said was already ignored in practice.

But it upheld the controversial legal concept of speech that is "*likely to expose*" certain groups to hatred.

The Saskatchewan law, which is similar to others in Alberta, B.C., the Northwest Territories and federally, "appropriately balances the fundamental values underlying freedom of expression with competing Charter rights and other values essential to a free and democratic society, in this case a commitment to equality and respect for

group identity and the inherent dignity owed to all human beings," wrote Mr. Justice Marshall Rothstein for the court.

"Framing speech as arising in a moral context or within a public policy debate does not cleanse it of its harmful effect," the judges decided. The judges reinstated Mr. Whatcott's conviction by a hate speech tribunal in the case of two anti-gay fliers he distributed, but overturned it in the case of two others. As advice to future hate tribunals, the judges offered three main pieces of guidance.

First, these laws must be applied objectively, which is difficult in the case of subjective emotion, though not impossible, the judges ruled. The key is to focus on the effects of hate speech, not the intent of the speaker.

Second, hate must be understood to be the extreme manifestations of the emotion described by the words "detestation" and "vilification," but nothing less.

"This filters out expression which, while repugnant and offensive, does not incite the level of abhorrence, delegitimization and rejection that risks causing discrimination or other harmful effects," they wrote.

Third, tribunals must focus their analysis on the effect of the expression at issue, namely whether it is likely to expose the targeted person or group to hatred by others.

"The repugnancy of the ideas being expressed is not sufficient to justify restricting the expression, and whether or not the author of the expression intended to incite hatred or discriminatory treatment is irrelevant. The key is to determine the likely effect of the expression on its audience, keeping in mind the legislative objectives to reduce or eliminate discrimination," they decided.

"The difficulty of establishing causality and the seriousness of the harm to vulnerable groups justifies the imposition of preventive measures that do not require proof of actual harm," the judgement reads.

In an interview, Mr. Whatcott said he will continue his activism and pamphleting, knowing the price may be high.

A financial penalty of \$17,500 is to be reinstated against him, and disregarding a tribunal order to stop spreading hate speech can lead to contempt of court and jail.

"I'm certainly weighing this, because it's going to be at great personal cost to me," Mr. Whatcott said. "I have to follow Christ first. What I have said is true. There's not a sentence that I retract, so likely future fliers will be more of the same."

He contrasted "spurious" Holocaust denial, often a target of hate tribunals, with his "medical facts" about homosexuality.

"I think it's a dark day for freedom of religion, freedom of speech, and more profoundly for me, freedom to speak the truth. It's a very dark day for Canada," he said.

Mark Freiman, a former deputy Attorney-General of Ontario who argued at the Supreme Court on behalf of the Canadian Jewish Congress, said the ruling was a "reaffirmation" of principles first articulated by the Supreme Court 20 years ago, in the case of hate hotline operator John Ross Taylor.

Those principles — that it is constitutionally valid to limit a fundamental right, in this case limiting speech that exposes people to hatred based on their membership in a group — were often lost in the rancorous debate over hate speech law, he said.

"I think because the debate tends to focus on what group is being maligned, we sometimes don't actually think through what the implications are. That's why the court is always very careful to separate the principle from any political debate. What's involved is not a political debate, what's involved is an attack on people based on the fact that they are members of a group. It's not just stereotyping, but it's demonization," Mr. Freiman said.

Richard Moon, a University of Windsor constitutional law expert, said the court's focus on the objective effects of hate speech, rather than the subjective intent of the speaker, is problematic.

"I think it's still a problem not to talk about intent in this context," he said.

He said the most extreme forms of hate speech caught by these laws are described in terms of their objective effects on a target group, even though strict proof is not required. But the less extreme forms of speech that should be protected are described in subjective terms, like "offense" or "humiliation."

That avoids the "line-drawing problem," he said, and the ruling effectively "pretends that the line [between hate speech and free speech] can be drawn brightly by framing the harm of extreme and less extreme forms of speech in different terms... That just avoids the problem."

"Any decision maker [at a tribunal] has the same problem they always have," he said.

"The Supreme Court missed an excellent opportunity to rein in the power of various human rights commissions and tribunals to censor the expression of unpopular beliefs and opinions," said Chris Schafer, executive director of the Canadian Constitution Foundation, which intervened in the case.

Notable Cases

Charter Litigation

Saskatchewan Human Rights Commission v. Whatcott

On Wednesday, February 27, 2013, the Supreme Court of Canada released its decision in *Saskatchewan Human Rights Commission v. Whatcott*, a case dealing with the constitutionality of the hate speech provisions in the *Saskatchewan Human Rights Code*.

In 2001 and 2002, William Whatcott published and distributed four flyers which stated, among other things, that "homosexuals want to share their filth and propaganda with Saskatchewan's children", that "Sodomites are 430 times more likely to acquire Aids and 3 times more likely to sexually abuse children!"; that "If Saskatchewan's sodomites have their way, your school board will be celebrating buggery too!" and that "Our children will pay the price in disease, death, abuse...if we do not say no to the sodomite desire to socialize your children into accepting something that is clearly wrong."

Several individuals who had received the flyers at their homes filed human rights complaints. They maintained that the flyers promoted hatred against individuals based on sexual orientation contrary to s. 14(1)(b) of the *Code*. Section 14(1)(b) provided that no person shall publish or display any 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".

The Saskatchewan Human Rights Tribunal held that the flyers exposed homosexuals to hatred and ordered Whatcott to stop distributing them and to pay fines. Whatcott appealed to the Saskatchewan Court of Queen's Bench, which upheld the Tribunal's decision.

Whatcott appealed again and the Saskatchewan Court of Appeal overturned the decision, holding that the flyers did not expose or tend to expose gay persons to hatred.

The Saskatchewan Human Rights Commission then appealed the decision to the Supreme Court of Canada. The Court was asked to determine whether s. 14(1)(b) of the *Code* breached the guarantee of freedom of expression and freedom of religion under the *Canadian Charter of Rights and Freedoms* (a question the Court of Appeal did not address); if so, whether the violations could be justified under s. 1 of the *Charter*; and if so, whether the Tribunal's determination that the flyers breached the provision should have been upheld.

Egale's intervention

Egale Canada Inc. intervened in the proceedings before the Supreme Court. In keeping with its longstanding commitment to free speech, Egale did not take a position on the constitutionality of the hate speech provision, or whether Whatcott's flyers violated that provision.

Rather, Egale's submissions focused on its concern with a suggestion made by one of the judges of the Court of Appeal that a different constitutional standard might apply to publications that targeted individuals based on sexual orientation, rather than race or religion.

Egale asked the Supreme Court to reject any such approach, arguing that the hate speech provision of the *Code* was either constitutional or it was not. It could not be constitutional in respect to hate propaganda based on race or religion, but unconstitutional in respect to hate propaganda based on sexual orientation.

Egale was also concerned that the Court of Appeal had based its decision in part on a finding a distinction should be drawn between sexual activity and sexual orientation, and had suggested that speech focused on sexual "morality" was deserving of greater tolerance.

Egale urged the Supreme Court to reject the "conduct-identity" (love the sinner, hate the sin) distinction, pointing out that treating same sex

activity as a separate question of morality was itself a key element of the oppression suffered by gays, lesbians and bisexuals. Moreover, it was a false dichotomy that had consistently been rejected by the Supreme Court as well as by other courts and tribunals. Indeed, Egale argued, if the Court were to accept the distinction, it would eviscerate human rights protections based on sexual orientation:

The restrictive interpretation proposed by Whatcott would prohibit firing a person for "being" gay, but not for having sex with his male partner. It would permit a hotel operator to deny a room to a lesbian couple, arguing that the discrimination was based on the "conduct" of two women sharing a bed, as opposed to the sexual orientation of the women. A landlord could refuse to rent an apartment to a family headed by a gay couple, arguing that the discrimination was based on the "conduct" of the two men parenting a child and sharing a home, rather than on their sexual orientation. To avoid liability for a human rights violation, most anti-LGB discriminatory acts could easily be characterized as directed at some form of "conduct". Acceding to this argument would eviscerate human rights protections for LGBs.

The Supreme Court's decision

The Supreme Court upheld that part of s. 14(1)(b) that prohibits hate speech as a reasonable limit under s. 1 of the *Charter*, but struck down that part of the provision that prohibited speech that "ridicules, belittles or otherwise affronts the dignity" of a person as being too broad.

You can read the Supreme Court's decision [here](#).

Importantly, from Egale's point of view, the Supreme Court rejected any suggestion that some groups are less deserving of human rights protections than others. In particular, the Supreme Court rejected Whatcott's argument that his flyers did not contravene s. 14(1)(b) because they targeted sexual behaviour and not sexual orientation. The Court held:

Courts have thus recognized that there is a strong connection between sexual orientation and sexual conduct. Where the conduct that is the target of 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...

In considering whether Whatcott's flyers breached s. 14(1)(b), the Supreme Court explicitly rejected the Court of Appeal's conclusion that the flyers targeted only sexual activity and not sexual orientation:

...While the publications at issue may appear to engage in the debate about the morality of certain sexual behaviour, they are only aimed at that sexual activity when it is carried out by persons of a certain sexual orientation. They do not deal with the same sexual acts when carried out by heterosexual partners. For example, the word "sodomy" in the flyers is not used in relation to sexual acts in general, but only the sexual act as between men. This is clear by Mr. Whatcott's reference to "sodomites and lesbians" and "learning how wonderful it is for two men to sodomize each other".

Genuine comments on sexual activity are not likely to fall into the purview of a prohibition against hate. If Mr. Whatcott's message was that those who engage in sexual practices not leading to procreation should not be hired as teachers or that such practices should not be discussed as part of the school curriculum, his expression would not implicate an identifiable group. If, however, he chooses to direct his expression at sexual behaviour by those of a certain sexual orientation, his expression must be assessed against the hatred definition in the same manner as if his expression was targeted at those of a certain race or religion.

In the result, the Court concluded that two of the flyers breached the hate speech provision of the *Code*, by portraying gays and lesbians as carriers of disease, sex addicts, pedophiles and predators who would proselytize to vulnerable children and cause their premature death. The other two flyers, while offensive, did not demonstrate the level of hatred required by the prohibition.

