WHATCOTT: THE REDACTION OF THE *TAYLOR* DISSENT

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I. INTRODUCTION

In its 2013 *Saskatchewan v. Whatcott*[1] decision, the Supreme Court of Canada unanimously upheld the constitutionality of the hate speech prohibition contained in section 14(1)(b) of *The Saskatchewan Human Rights Code*.[2] The impugned provision makes it illegal to publish printed material that exposes or tends to expose any person or class of persons to hatred on the basis of a prohibited ground of discrimination. After undergoing a *Charter*[3] analysis, the Supreme Court held that section 14(1)(b) of the *Code* infringes sections 2(b) freedom of expression and 2(a) freedom of conscience and religion, but that these infringements are demonstrably justified under section 1. The Supreme Court has again shown itself unwilling to defend a broadly construed constitutional right to freedom of expression. In the end, what is surprising about the *Whatcott* decision is not the result, but that the result is unanimous.

II. PROCEDURAL HISTORY

In 2001 and 2002, William Whatcott, a self-proclaimed anti-gay activist, produced and distributed a variety of offensive flyers in Regina and Saskatoon. The flyers contained his opinions regarding homosexuality. Four recipients of Whatcott's flyers filed complaints with the Saskatchewan Human Rights Tribunal (Tribunal) alleging that the flyers promoted hatred against individuals on the basis of their sexual orientation.

The Tribunal held that four of Whatcott's flyers contravened section 14(1)(b) of the *Code*. Section 14(1) reads:

> 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:
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> (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.

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1 *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11, [2013] 1 SCR 467 [*Whatcott*].

2 SS 1979, c S-24.1 [*Code*].

3 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

In 2007, the Saskatchewan Court of Queen's Bench affirmed the Tribunal's decision.[4] In 2010, the Saskatchewan Court of Appeal allowed the appeal concluding that none of Whatcott's flyers satisfied the high legal standard set for "hatred" by the Supreme Court's jurisprudence and that Whatcott therefore had not violated section 14(1)(b).[5] The constitutional arguments advanced by Whatcott were not successful in any of these decisions.

III. THE 1990 *TAYLOR* DECISION

Both Saskatchewan courts recognized they were bound by the Supreme Court of Canada's seminal *Canada v. Taylor* decision.[6] The Saskatchewan Court of Appeal held that Whatcott's flyers failed to satisfy the definition of "hatred" as set out in *Taylor*.

Taylor concerned the constitutionality of the hate speech prohibition in section 13(1) of the *Canadian Human Rights Act*.[7] In that decision, the Supreme Court found that section 13(1) is aimed only at expression involving feelings of an "ardent and extreme nature"[8] and "unusually strong and deep-felt emotions of detestation, calumny and vilification."[9]

John Ross Taylor publically distributed cards inviting calls to a phone number that was answered by a recorded message. The Canadian Human Rights Commission (CHRC) received complaints about the anti-Semitic content in the message. The CHRC held that the messages were discriminatory under section 13(1) and ordered Taylor to cease the practice. Taylor challenged the constitutionality of section 13(1), arguing that it violated his freedom of expression.

Section 13(1) was repealed in 2013,[10] but in 1990 it read:

> It is a discriminatory practice for a person or a group of persons acting in concert to communicate telephonically or to cause to be so communicated, repeatedly, in whole or in part by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament, any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination.[11]

On appeal to the Supreme Court of Canada, four of the seven justices upheld section 13(1). In the years following, the *Taylor* decision was severely criticized — fueled in no small part by the dissenting opinion of Justice McLachlin (as she was then).

In her reasons, Justice McLachlin canvassed many of the problems with hate speech prohibitions as contained in human rights legislation. For instance, there are problems of subjectivity as the word "hatred" is an ambiguous, emotionally charged term indicating a psychological state and it is capable of a wide range of meanings amongst different people.[12]

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4 *Whatcott v Saskatchewan (Human Rights Tribunal)*, 2007 SKQB 450, 306 Sask R 186.
5 *Whatcott v Saskatchewan (Human Rights Tribunal)*, 2010 SKCA 26, 317 DLR (4th) 69.
6 *Canada (Human Rights Commission) v Taylor*, [1990] 3 SCR 892 [*Taylor*].
7 RSC 1985, c H-6 [*CHRA*].
8 *Taylor*, *supra* note 6 at 929.
9 *Ibid* at 928.
10 Bill C-304, *An Act to amend the Canadian Human Rights Act (protecting freedom)*, 1st Sess, 41st Parl, 2013 (as passed by the House of Commons 13 June 2005).
11 *CHRA*, *supra* note 7.
12 *Taylor*, *supra* note 6 at 961-62.

Lacking any definition in the statute and arguably incapable of sufficiently precise definition, it inevitably functions as a proxy for the personal and political views of the judiciary.

Also, since the hate speech prohibition in section 13(1) lacks any intent or harm requirement, it is entirely possible that someone could be punished under this provision for acts that were never intended to be discriminatory and that did not cause any harm or actual discrimination. According to Justice McLachlin, the provision's inherent subjectivity and overbreadth make it impossible to know beforehand whether any particular expression is illegal or not. And as a result, the prohibition produces a chilling effect on the free expression of ideas.

In the years following *Taylor*, Justice McLachlin's dissent seemed to be winning broad support. For instance, in December 2007, *Maclean*'s magazine and author Mark Steyn were the subjects of human rights complaints by Mohamed Elmasry of the Canadian Islamic Conference before the Canadian, Ontario, and British Columbia Human Rights Tribunals for publishing 18 allegedly "Islamophobic" articles.[13] Between 2006 and 2008, Ezra Levant was the subject of an Alberta human rights complaint made by Syed Soharwardy of the Islamic Supreme Council of Canada because Levant published the infamous Jyllands-Posten cartoons of Muhammed in his Western Standard magazine.[14] None of these complaints were successful, but both Steyn and Levant became out-spoken critics of hate speech prohibitions as contained in human rights legislation with Levant publishing a book on the topic.[15]

In 2008, Professor Richard Moon of the University of Windsor's Faculty of Law released a report[16] commissioned by the CHRC on section 13 recommending that the hate speech prohibition be repealed and that, "[w]e must develop ways other than censorship to respond to expression that stereotypes and defames the members of an identifiable group and to hold institutions such as the media accountable when they engage in these forms of discriminatory expression."[17]

In 2009, the Canadian Human Rights Tribunal refused to apply section 13 of the *Canadian Human Rights Act* against Mark Lemire for discriminatory comments allegedly made by a third party on a website administered by Lemire. The Tribunal held that section 13 is an unjustifiable violation of freedom of expression because it permits the government to

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13 *Elmasry and Babib v Roger's Publishing and MacQueen*, 2008 BCHRT 378. Elmasry's complaint with the Canadian Human Rights Commission was dismissed ("Rights commission dismisses complaint against Maclean's" *CBC News* (28 June 2008), online: CBC News Canada <http://www.cbc.ca/news/canada/rigts-commission-dismisses-complaint-against-macleans-s-1.7669643>) and the Ontario Human Rights Commission (OHRC) decided not to proceed with the Ontario Complaint ("Commission statement concerning issues raised by complaints against Maclean's Magazine" (9 April 2008), online: OHRC <http://www.ohrc.on.ca/en/news_centre/commission-statement-concerning-issues-raised-complaints-against-macleans-magazine>).

14 Graeme Morton, "Muslim leader drops Ezra Levant cartoon complaint" *Canwest News Service* (12 February 2008), online: National Post <http://www.nationalpost.com/news/canada/story.html?id=303895>).

15 Ezra Levant, *Shakedown* (Toronto: McClelland and Stewart Ltd, 2009).

16 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" (1 October 2008), online: Social Science Research Network <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1865282>.

17 *Ibid* at 1.

penalize individuals with large monetary fines for merely saying something offensive or unpopular.[18]

Over this same period of time, the work of various Canadian civil liberties organizations, like the British Columbia Civil Liberty Association (BCCLA), the Canadian Civil Liberties Association (CCLA), and the Canadian Constitution Foundation (CCF), brought the censorship of Canada's various hate speech provisions as contained in human rights legislation under public scrutiny. For instance, in a 1998 position paper of the BCCLA titled "Freedom of Expression in Public Spaces," Murray Mollard and Andrew Irvine wrote:

> Freedom of expression is not simply an abstract principle. It is a fundamental part of any democratic society. It is also the best weapon we have to combat hateful expression. It is more effective than censorship. If, as a society, we choose to abandon it, we become something less than a democracy. Tolerating speech with which we disagree is thus not only the surest way to minimize the effects of hatred, it is also the surest way we have of supporting democracy itself.[19]

Similarily in 2008, Alan Borovoy, the founder of the CCLA was quoted in the *Edmonton Journal* as saying, "[g]roups that bash gays, women or religious organizations may be repugnant, but democracies must allow them to speak freely."[20] In the same year a report published by the CCF argued:

> Laws and policies which restrict freedom of expression have a dangerous "chilling effect" which leads to self-censorship among citizens. A restriction on speech affects not only those caught and prosecuted, but also those who may refrain from saying what they would like to because of the fear that they will be caught. Thus, restrictions on freedom of expression inhibit worthy minority groups and individuals from saying what they desire to say, for fear that they might be prosecuted.[21]

This author was highly critical of the *Taylor* decision's treatment of freedom of expression:

> Subsection 13(1) is too great an interference with freedom of expression, because its intended benefit pales in comparison to the harm it produces. The free expression of ideas, especially those that are unpopular, is of foundational importance in "a free and democratic society."… Freedom of expression is a fundamental human right that is necessary for "a free and democratic society" because it protects individuals from the tyrannies of the state and the majority.[22]

Each of these aforementioned examples provided advocates for liberty and limited government the hope that the *Whatcott* appeal would give the Supreme Court an opportunity to reconsider the constitutional issues previously decided in *Taylor*.

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18 *Warman v Lemire*, 2009 CHRT 26. This decision was overturned and the constitutionality of section 13 upheld on appeal to the Federal Court (*Warman v Lemire*, 2012 FC 1162, 68 CHRR D/205) and to the Federal Court of Appeal (*Warman v Lemine*, 2014 FCA 18, [2014] FCJ no 108 (QL)).

19 Murray Mollard & Andrew Irvine, "Freedom of Expression in Public Spaces," online: British Columbia Civil Liberties Association <http:// bccla.org/our_work/freedom-of-expression-in-public-spaces/>.

20 Edmonton Journal, "Defence of free speech must be absolute" *Edmonton Journal* (28 October 2008), online: Canada.com <http://www.canada.com/edmontonjournal/news/cityplus/story.html?id=449e1994-5d1d-4808-abca-aa7b1f096f66>.

21 John Carpay & Desmond Burton-Williams, "The Right to Offend: a Canadian Constitutional Principle," online: Canadian Constitution Foundation <http://theccf.ca/wp-content/uploads/2013/07/The-Right-to-Offend.pdf>>.

22 Karen Selick & Derek From, "The Charter at 30: Charter Jurisprudence that Went off the Rails" (19 March 2012), online: C2C Journal <http://www.c2cjournal.ca>.

IV. *WHATCOTT*: A RESTATEMENT OF *TAYLOR*

When its decision was released on 27 February 2013, the Supreme Court of Canada held that two of Whatcott's impugned flyers contravened section 14(1)(b) of the *Code*, but that the other two did not. What came as a complete surprise for advocates of liberty and limited government was that, instead of issuing a highly divided decision, like the *Taylor* Court, the Supreme Court unanimously upheld the constitutionality of section 14(1)(b) of the *Code* finding only that portion which reads "ridicules, belittles or otherwise affronts the dignity" as unconstitutional.[23] In reaching this conclusion, the Supreme Court held that section 14(1)(b) infringed Whatcott's *Charter* rights to freedom of expression[24] and freedom of religion,[25] but that these infringements were justified under section 1.[26]

Of the four flyers at issue, the Supreme Court found that the Tribunal's decision that the first two flyers exposed or tended to expose gays to hatred reasonable. Among other things, those two flyers contained Whatcott's assertions that gay and lesbian teachers use "dirty language to describe lesbian sex and sodomy to their teenage audience,"[27] and that "sodomites are 430 times more likely to acquire Aids and 3 times more likely to sexually abuse children."[28]

The Supreme Court found that the remaining two flyers did not satisfy the legal definition of hatred. These flyers contained photocopies of personal ads and Whatcott's handwriting that read, "Saskatchewan's largest gay magazine allows ads for men seeking boys!; If 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."

Writing for the unanimous Supreme Court of Canada, Justice Rothstein said, "in my view the *Taylor* definition of 'hatred', with some modifications, provides a workable approach to interpreting the word 'hatred' as it is used in prohibitions of hate speech."[29]

In his subsequent discussion, Justice Rothstein made three main prescriptions to ensure that section 14(1)(b) of the *Code* operated within the limits placed on all legislation by the *Charter*. First, "hatred" must be assessed objectively, not subjectively. The courts must pose the question whether "when considered objectively by a reasonable person aware of the relevant context and circumstances, the speech in question would be understood as exposing or tending to expose members of the target group to hatred."[30] During the course of an assessment, the adjudicator is to place his or her personal views aside.[31] Shifting the analysis away from the speaker's intent allegedly helps to answer the criticism that "hatred" is an unworkable as a legal test on account of its irremediable subjectivity.

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23 *Whatcott*, *supra* note 1 at paras 99-100.
24 *Ibid* at para 63.
25 *Ibid* at para 156.
26 *Ibid* at paras 151, 164.
27 *Ibid* at para 182.
28 *Ibid* at para 183.
29 *Ibid* at para 55.
30 *Ibid* at para 35. See also para 56.
31 *Ibid* at para 35.

Second, "hatred" must be restricted to only those extreme manifestations of emotion described by the words "detestation" and "vilification."[32] Expression that exposes vulnerable groups to detestation and vilification must be far more than merely discrediting, humiliating, or offending. It must vilify and seek to abuse, denigrate, or delegitimize a protected group or person as lawless, dangerous, or unacceptable.[33] In the Supreme Court's opinion, this standard will yet permit offensive and repugnant speech provided that it does not incite the high level of abhorrence necessary to satisfy the definition of "hatred."[34] Building on this definition, human rights legislation should not be considered to aim at the elimination of the emotion of hatred from human experience. Instead, it aims to eliminate extreme forms of expression that have the potential to inspire the illegal discriminatory treatment of protected groups.[35]

Third, adjudicators should focus on the effect of the expression, that is, whether the impugned expression is likely to expose a protected group to hatred. The repugnancy of the ideas expressed and the intent of the individual(s) expressing those ideas are not sufficient on their own.[36] It is the mode of public expression and the effect that this mode of expression may have — not the ideas themselves — that must concern adjudicators.[37] And this is where the correct objective test must be applied: "*would a reasonable person consider the expression vilifying a protected group [or individual as having] … the potential to lead to discrimination*?"[38]

Applying this to Whatcott, the Supreme Court found in two short paragraphs that section 14(1)(b) of the *Code* infringed Whatcott's rights to freedom of expression and freedom of religion. Nearly all the remaining analysis in the decision centered on how these infringements are justified under section 1 of the *Charter*. In the end, the Supreme Court held that the Saskatchewan government's objective in enacting a hate speech prohibition was pressing and substantial[39] and proportional,[40] thereby satisfying the *Oakes* test.[41]

In dealing with the criticism that the impugned prohibition requires no intent to discriminate, Justice Rothstein offered no new analysis and merely quoted a portion of the *Taylor* decision before dismissing the criticism in two sentences: "The preventative measures found in human rights legislation reasonably centre on effects, rather than intent. I see no reason to depart from this approach."[42]

Regarding the criticism that the *Code* requires no proof of actual harm, Justice Rothstein held that establishing a causal link between an expressive statement and any resulting hatred

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32 The *Taylor* decision also included "calumny" along with "detestation" and "vilification," but this is now unnecessary (*Whatcott*, *ibid* at para 42).
33 *Whatcott*, *ibid* at para 41.
34 *Ibid* at para 57.
35 *Ibid* at para 48.
36 *Ibid* at para 58.
37 *Ibid* at para 51.
38 *Ibid* at para 52 [emphasis added].
39 *Ibid* at paras 69-77.
40 *Ibid* at paras 78-151.
41 *R v Oakes*, [1986] 1 SCR 103 [*Oakes*].
42 *Whatcott*, *supra* note 1 at para 127.

suffered is too onerous a burden for a complainant to bear, and as such, preventative measures — like prohibiting speech deemed hateful without proof of harm are justified.[43]

Finally, regarding the criticism that the Saskatchewan legislature has provided no defences, including that the content of any impugned expression is true, to individuals accused of publishing hate materials, Justice Rothstein said:

> Critics find the absence of a defence of truth of particular concern, given that seeking truth is one of the strongest justifications for freedom of expression. They argue that the right to speak the truth should not be lightly restricted, and that any restriction should be seen as a serious infringement.
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> I agree with the argument that the quest for truth is an essential component of the "market of ideas" which is, itself, central to a strong democracy. The search for truth is also an important part of self-fulfillment. However, I do not think it is inconsistent with these views to find that not all truthful statements must be free from restriction.[44]

Justice Rothstein then dismissed this criticism since "even truthful statements may be expressed in language or context that exposes a vulnerable group to hatred."[45]

V. *WHATCOTT*: THE REDACTION OF THE *TAYLOR* DISSENT

In striking contrast with the 1990 *Taylor* decision, the 2013 *Whatcott* decision is unanimous and monolithic — there is no dissent. The Supreme Court of Canada has closed ranks and will no longer broach alternatives. This means that Chief Justice McLachlin's *Taylor* dissent has effectively been redacted. The problems canvassed in *Taylor* have not been satisfactorily resolved in *Whatcott*; all the Supreme Court provides is its undivided assertion that the prohibition is constitutional when applied in a manner complying with the three prescriptions discussed above. Does this imply that there never was a problem? Most importantly, what has happened in the intervening 23 years to change Chief Justice McLachlin's mind?

It was not always this way. Freedom of expression and free speech both have long been recognized in Canadian law prior to 1982 and were not created by the *Charter*. Before she became Chief Justice, Justice McLachlin said in *R. v. Keegstra* that "freedom of speech is a fundamental Canadian value,"[46] and "[f]reedom of speech and the press had acquired quasi-constitutional status well before the adoption of the *Charter* in 1982.… The enactment of s. 2(*b*) of the *Charter* represented both the continuity of these traditions, and a new flourishing of the importance of freedom of expression in Canadian society."[47] Justice McLachlin went on to again affirm that, "[f]reedom of expression was not invented by the *Charter of Rights and Freedoms*."[48]

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43 *Ibid* at para 130.
44 *Ibid* at paras 139-40.
45 *Ibid* at para 141.
46 [1990] 3 SCR 697 at 809.
47 *Ibid* at 808, 810.
48 *Ibid* at 810, citing A Wayne MacKay, "Freedom of Expression: Is It All Just Talk" (1989) 68 Can Bar Rev 713 at 714.

Justice McIntyre shared Justice McLachlin's view. In *RWDSU v. Dolphin Delivery Ltd.*,[49] Justice McIntyre indicated the fundamental importance of freedom of expression for our democratic institutions:

> Freedom of expression is not, however, a creature of the *Charter*. It is one of the fundamental concepts that has formed the basis for the historical development of the political, social and educational institutions of western society. Representative democracy, as we know it today, which is in great part the product of free expression and discussion of varying ideas, depends upon its maintenance and protection.[50]

In other words, the continued existence and flourishing of our free society is dependent upon the right of each individual to freely express his or her ideas without fear of reprisal. And regardless of how difficult the Supreme Court says it is to satisfy the legal definition of "hatred," the threat posed by Canada's various hate speech prohibitions, of which Saskatchewan's section 14(1)(b) is an example, does have a chilling effect on freedom of expression.

There is a simple and ironic fact that cannot be overlooked in all of this: If Whatcott is on a hate campaign, Saskatchewan's hate speech prohibition has provided him with a powerful means to disseminate his views. Each judicial decision has reproduced and circulated his materials and broadened his public exposure. Had no complaint been made about Whatcott's flyers in 2001 and 2002, they would have faded into obscurity and Whatcott likely would not have received national media coverage. At this stage it is entirely likely that Whatcott will be elevated to the status of folk-hero by those who share his prejudices. Instead of facing a legal prosecution lending credence to the appearance of martyrdom, Whatcott should have been ignored or debated. After all, it is best not to silence bigots by the application of force; let them speak, freely. As the old proverb says, even a fool who keeps silent is considered wise.

There is a second irony. It has not been long since homosexuality was considered repugnant to the majority of Canadians, which resulted in the marginalization of homosexuals within our society. This has changed in part because of the recognition by our governments and courts that freedom of expression without fear of legal reprisal is a fundamental human right. Permitting the free expression of what was once considered repugnant has resulted in greater freedom and legal rights for gay individuals. Thus, to protect a broadly construed individual right to freedom of expression is to preserve the very conditions that made the current more tolerant state of affairs possible.

The Supreme Court has shown itself unwilling to defend a broadly construed constitutional right to freedom of expression as desired by advocates of liberty and limited government from across the political spectrum.

Section 13 of the *Canadian Human Rights Act* was repealed in 2013 in the months following the *Whatcott* decision.[51] Saskatchewan's prohibition remains on the books.

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49 [1986] 2 SCR 573.
50 *Ibid* at 583.
51 *Supra* note 10.