

Speaking notes: How are human rights laws used to combat hate – panel discussion about some human rights hate speech decisions

Understanding the purpose of human rights protections is fundamental to understanding the provisions in human rights codes which limit speech. Human rights legislation contains aspirational language about how we wish to live together and relate to each other. *The Saskatchewan Human Rights Code* sets out its objectives as promoting the inherent dignity and equal inalienable rights of all members of the human family. The *Act* is designed to further the public policy goal of ensuring that each one of us is free and equal in dignity and rights. The Commission is obligated to work towards discouraging and eliminating discrimination.

Commissions across the country utilize a number of legislated strategies to achieve these goals, including public education, systemic advocacy, public consultations and the pursuit of complaints.

Complaints based on the limits against hate propaganda are the most controversial of responses. In Saskatchewan, section 14(1)(a) of the *Code* prohibits the communication by any medium of any statement or representation, which tends or likely tends, to infringe enjoyment of any right to which a person is entitled, if the limitation is based on a prohibited ground of discrimination. Similar provisions are contained in most human rights legislation in Canada. Publishing or posting discriminatory signs or statements which indicate an intention to discriminate in respect of an activity the Code covers is illegal.

More controversial, Saskatchewan's section 14(1)(b) of the *Code* prohibits communications "that exposes or tend 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." Similar provisions to section 14(1)(b) are found in human rights legislation in Alberta, B.C., the Northwest Territories and in federal legislation. These provisions have been at the center of controversy.

The Saskatchewan Court of Appeal has ruled on the current s. 14(1)(b) of the *Code* in three cases. In *Saskatchewan (Human Rights Commission) v. Bell* (1994) the Court determined that the standard of hatred, ridicule, belittlement or affront to dignity required would be that of "unusually strong and deep-felt emotions of detestation, calumny and vilification," based on the Supreme Court ruling in *Canada (Human Rights Commission) v. Taylor* (1990). The Court of Appeal in *Owens v. Saskatchewan (Human Rights Commission)* (2006) affirmed the analysis in *Bell* and held that s. 14(1)(b) is to be judged on an objective standard in order to be consistent with the *Charter of Rights and Freedoms*.

In February 2010, the Saskatchewan Court of Appeal overturned a Tribunal determination that William Whatcott violated section 14(1)(b) when he distributed flyers, at least two of which, expressed extreme anti-gay sentiment, *Whatcott v Saskatchewan*

(*Human Rights Tribunal*). The Court declined to find the section unconstitutional, stating that it was bound by *Taylor*. It held that the flyers, considered in the context of the public debate about homosexuality in schools, did not expose or tend to expose gay persons to hatred as the term has been defined by the Court. The *Whatcott* case will be heard by the Supreme Court of Canada this fall. Approximately 20 groups have been granted intervener status.

Because the contravention of s. 14(1)(b) requires the communication to objectively express strong feelings detestation, calumny and vilification, as judged by the reasonable person, the Saskatchewan Human Rights Commission has declined to accept complaints on the basis that there are no reasonable grounds to believe that a contravention of the legislation has occurred.

Soon after the 2006 *Owens* decision, the Saskatchewan Commission received many complaints about a student newspaper published at the University of Saskatchewan. The complaints were about a cartoon depicting Jesus performing sex on a pig. The cartoon appeared during the time the Danish cartoon controversy was prominent in the news. The Commission applied the Saskatchewan Court of Appeal's reasons in *Owens* which identified satirical cartoons as being outside the range of prohibited speech. This example is illustrative of the narrow scope of the limits on speech.

Controversy in Alberta

The flashpoint in Alberta was the Tribunal decision of *Lund v. Boissoin*, where Mr. Boissoin was found in contravention because of a letter to the editor published in the Red Deer Advocate. The letter entitled "Homosexual Agenda Wicked" was a call for action, "to stand together and take whatever steps are necessary to reverse the wickedness that our lethargy has authorized to spawn." Advocates, including Ezra Levant, ridiculed the decision of the Alberta Tribunal as well as the \$5,000 remedy against Mr. Boissoin. The Tribunal decision was set aside by the Court of Queen's Bench. The Court declined to follow the Saskatchewan 1994 *Bell* decision. It held that simply fostering discriminatory beliefs in another does not automatically make it likely that the individual might then act out those beliefs through prohibited discriminatory activity. The Court stated: "If the *Act* purported to simply restrain hate speech notwithstanding that no likelihood of discriminatory activity could be demonstrated then the legislation would be ultra vires. Hateful or contemptuous speech that may prompt or even add to existing prejudice against a class of persons is not prohibited *per se* by the *Act*. As earlier discussed, more is required: Absent some "concrete evidence" linking the message to discriminatory practices, only reasonable and appropriate inferences as to discriminatory effects may be drawn and relied upon when considering the "likely to expose" requirement."

Must there be a causal link between speech and discriminatory action to ground a complaint?

The requirement for a direct link between the prohibited communication and discriminatory action is not part of recent Saskatchewan jurisprudence. In *Whatcott*,

Smith J. notes that “it may be that we have come to acknowledge or assume that words that belittle, ridicule, affront the dignity or promote hatred of individuals may in themselves bring about the discriminatory activities otherwise prohibited by the *Code*”.

The Saskatchewan approach is more in keeping with *Taylor* which accepted that the purpose of hate propaganda is to convince others that persons with targeted personal characteristics are inferior, which may translate into an increase in discriminatory acts.

The argument for prohibiting hate extreme speech, is similar to the argument for banning pornography. The circulation of extreme messages against targeted groups leads to a society with greater tolerance for discriminatory action. The harm is not immediate but rather stems from a lessening of sensitivity about discriminatory conduct. Determining what is pornographic and what is not, is difficult. Similarly, determining what is hateful is difficult but that does not mean that there should be no prohibition. The trick is to arrive at a definition of hatred which will limit only speech is of limited value and causes significant harm.

Maclean’s Magazine Controversy

National attention was focused on the complaints filed against Maclean’s magazine, in British Columbia, Ontario and at the Canadian Human Rights Commission (CHRC). The challenged article was entitled “The Future Belongs to Islam” which is an excerpt of a book written by Mark Steyn. Ontario and the CHRC summarily dismissed the complaint, while the matter proceeded to a Tribunal hearing in British Columbia and was then dismissed. Maclean’s magazine did not seek a preliminary dismissal of the complaint as is permitted in British Columbia.

The CHRC found jurisdiction, but held the content of the Maclean’s article to not meet the standard of “unusually strong and deep-felt emotions of detestation, calumny and vilification,” as set out by the Supreme Court in *Taylor*, referred to above.

The Maclean’s article is an example of speech which offended many but was not contrary to human rights legislation. The outcry against Commissions for accepting the complaint legitimately noted the need for Commissions to adopt a protocol for assuming jurisdiction over over-lapping complaints. The criticism that Commissions were out of line for assessing the complaints was unfounded. The assessment of hate speech complaints is part of the mandate of Commissions with gate keeping functions.

Why did Saskatchewan appeal the decision in the Whatcott complaint?

My comments here are not original. I am summarizing what I believe are cogent reasons for the need for limits on hate speech. Hate speech causes real harm. Unfettered extreme speech targeting individuals and groups based on person characteristics limits the ability of targeted citizens to participate in society on an equal basis. As noted, by my co-presenter, Canada is a signatory to international instruments which prohibit speech

directed at inciting hatred or discrimination. National human rights legislation and international covenants require that we take action to limit hate speech.

Human rights legislation is remedial in nature. It focuses on the harm done rather than the intent of the person responsible for the communication. There is considerable value in the message conveyed by governments enacting limits on hate speech. Such a limit is important to the Commission's work in achieving equality goals.

Competing speech is an inadequate remedy for confronting hate speech because it requires that marginalized groups in society shoulder the burden of countering hate speech. Often, targeted groups lack the resources to fight back effectively.

There is no civil remedy for hate speech.

The "marketplace of ideas" does not operate to protect the interests of persons with limited power. One must have access to the media to compete in that market place.

Hate speech does not promote core democratic values. Only expression which erodes the values of equality, tolerance and dignity of the individual is limited. The limit imposed by section 14(1)(b) traps only expression which is at the margins of core values – speech aimed at silencing and limiting the potential of others does not contribute to democratic values.

Law Professor, Shannon Gilreath notes – Words do not operate in a vacuum but are plugged into a social context. The more marginalized the targeted group, the more vulnerable it is to the discriminatory attitudes fostered by hate speech.

For example, it is recognized that persons of Aboriginal ancestry in Saskatchewan frequently experience discrimination. Extreme speech, targeting Aboriginal persons, promotes the inequality of this group because many people hearing the hateful message are pre-disposed to accepting negative views about Aboriginal people. Permitting speech which degrades Aboriginal people increases the likelihood of discriminatory action.

Social science research and human rights commission investigations continue to find systemic inequalities in educational institutions, public services and workplace due to discriminatory beliefs. No group that is shamed and publicly humiliated will experience the equality guarantee as meaningful.

It is hoped that the *Whatcott* case will assist us to find the proper balance between making the equality guarantee a reality and permitting all persons to express their views freely without fear of sanction.

Thank you.

