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Hate Speech and the Reasonable Supreme Court of Canada

Mark J. Freiman*

I. HATE SPEECH AND THE REASONABLE SUPREME COURT OF CANADA

In 1990, in *Taylor*,¹ a case involving allegedly anti-Semitic recorded messages, a divided Supreme Court of Canada decided by a majority of 4-3 that section 13.1 of the *Canadian Human Rights Act*,² which prohibits “telephonic” communication of messages likely to expose individuals to “hatred and contempt” on the basis of a prohibited category of discrimination, was constitutionally valid despite its impact on expressive freedom. In the fall of 2011, the Supreme Court of Canada heard the *Whatcott*³ case, involving four pamphlets allegedly promoting hatred on the basis of sexual orientation. In its decision released in February 2013, a unanimous Court revisited the conclusions in *Taylor* in the context of section 14 of the *Saskatchewan Human Rights Code*,⁴ reaffirmed the constitutionality of anti-hate human rights legislation, but narrowed the range for the proper scope for such legislation such that it applies only to publication and distribution of material that tends to expose individuals to “hatred” rather than “hatred and contempt” on the basis of a prohibited ground of discrimination.

* Mark J. Freiman practices law at Lerner LLP in Toronto. He holds a Ph.D. from Stanford University and an LL.B. from the University of Toronto. During the *Whatcott* proceedings, he acted as counsel to one of the interveners supporting the constitutionality of anti-hate legislation.

¹ *Canada (Human Rights Commission) v. Taylor*, [1990] S.C.J. No. 129, [1990] 3 S.C.R. 892 (S.C.C.) [hereinafter “*Taylor*”].

² R.S.C. 1985, c. H-6.

³ *Saskatchewan (Human Rights Commission) v. Whatcott*, [2013] S.C.J. No. 11, 276 C.R.R. (2d) 270 (S.C.C.) [hereinafter “*Whatcott*”].

⁴ S.S. 1979, c. S-24.1.

As is often the case with sequels, if you did not like the original, you are unlikely to be satisfied with the reprise. Indeed, in some ways, *Whatcott* seems destined to disappoint. Dealing with a topic that often elicits passionate rhetoric, the Supreme Court of Canada delivered a decision that is short on memorable quotes but long on pragmatism and restraint. Although philosophers have weighed in on both sides of the debate over hate speech,⁵ *Whatcott* is not a philosophic manifesto. The pragmatism and compromise that suffuse *Whatcott* may not endear it to those looking for a bold affirmation of philosophic principle or a vindication of a particular political theory. Indeed, to some, the pragmatism of the Court will appear as a “lost opportunity”,⁶ as a failure to change course and endorse a more absolute view of expressive freedom or to conduct a more searching and demanding review of legislation that limits this right. That is a political/philosophic criticism, whose validity rests on the validity of the assumptions upon which it rests, assumptions that at the end of the day may not be capable of proof or disproof because they, in turn, depend on values and beliefs that by definition are not amenable to proof. Rather than pursue this line of debate, which the Court itself does not address, this paper will attempt to deal with the judgment in its own terms. From that perspective, the Court’s pragmatism and deference do not emerge as political/philosophic failings but rather as a consistent and justifiable perspective on the Court’s own role and that of other institutions where the issue of regulation of expressive freedom arises.⁷ This approach, which is notable for its ability to attract unanimity in an area that had previously fractured the Court, also clarifies the Court’s view of the appropriate analytic tools it will bring to bear in the exercise of its role in this area.

⁵ See, e.g., L.W. Sumner, *The Hateful and the Obscene* (Toronto: University of Toronto Press, 2004) [hereinafter “Sumner”]; J. Waldron, *The Harm in Hate Speech* (Cambridge, MA: Harvard University Press, 2012) [hereinafter “Waldron”].

⁶ See, e.g., the essay by Cara Faith Zwibel in this volume.

⁷ The discussion in this paper will focus on expressive freedom under s. 2(b) of the *Canadian Charter of Rights and Freedoms* (see *infra*, note 8). Although the decision also deals with freedom of religion and conscience under s. 2(a) of the Charter, there is little that is new in its treatment of s. 2(a), which largely turns on the Court’s observation in *Ross v. New Brunswick School District No. 15*, [1996] S.C.J. No. 40, [1996] 1 S.C.R. 825, at para. 94 (S.C.C.), that “where the manifestations of an individual right or freedom are incompatible with the very value sought to be upheld in the process of undertaking s. 1 analysis, then an attenuated level of s. 1 justification is appropriate”. The same principle underlines the Court’s s. 1 analysis with respect to expressive freedom.

1. Reasonableness

One potentially helpful way to understand the nature and implications of the Court's pragmatic approach is to look at the uses in the decision of that quintessentially pragmatic concept, "reasonableness".

Reasonableness makes its first appearance in *Whatcott* in the very first paragraph of the decision, which reminds us that all *Canadian Charter of Rights and Freedoms*⁸ guarantees are subject to *reasonable limits*. The issue in Charter litigation is not whether the legislature may limit expressive freedom, but rather whether a specific limitation is *reasonable*. That reasonableness is in turn established by means of the familiar *Oakes* test.⁹ Briefly summarized, in order to qualify as "reasonable," a limit must:

- (1) address a pressing and substantial objective (*i.e.*, address a real *harm*);
- (2) be rationally connected to its goal (*i.e.*, be potentially effective);
- (3) minimally impair the Charter right (*i.e.*, not be *overbroad* in application); and
- (4) be proportional in impact (*i.e.*, its benefits must outweigh the social costs of limiting the Charter right).

Although the Court does not undertake its analysis in these explicit terms, based on the various objections and challenges raised by Mr. Whatcott and the interveners supporting him, the questions the *Oakes* test suggest must be answered with reference to section 14 of the Saskatchewan Code include:

- (1) Can speech that falls short of inciting violence be objectively dangerous? (pressing objective)
- (2) Does section 14 identify objectively harmful speech? (effectiveness)
- (3) Is section 14 overbroad, by sweeping in material that is not dangerous or that makes a contribution to political and religious debate? (minimal impairment)
- (4) Is any benefit from section 14 outweighed by the chilling effect it will have on legitimate debate? (proportionality)

⁸ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K), 1982, c. 11 [hereinafter "Charter"].

⁹ *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103 (S.C.C.).

What is notable about this list of questions is that they depend, to a large extent, on issues of what needs to be proved and to what standard:

- (1) What does the state need to prove and by what standard in order to establish that hate speech causes harm?
- (2) Can hate speech be consistently and objectively defined and can that definition be applied objectively by an adjudicator?
- (3) Can section 14 be applied in a way that does not sweep in types of expression that should not be prohibited?
- (4) What does the State have to prove and on what standard, in terms of the respective costs and benefits of section 14?

Reasonableness (or *the reasonable person*) appears as the appropriate definitional standard or jurisprudential test at three important points in *Whatcott*, as part of the Court's response to questions implicitly raised by the *Oakes* test:

- (1) In the section dealing with the possibility of a definition of the term *hate*, that is neither subjective nor overbroad the touchstone for whether a given communication tends to create *hate* in this redefined formulation is the *reasonable person*.
- (2) In the section dealing with the harm caused by hate speech,¹⁰ the standard for the legislature to prove such harm is identified as "a reasonable apprehension of harm" based on matters familiar to Canadians through their everyday knowledge and experience.
- (3) On the issue of "minimal impairment", the Court affirms that the operative question is whether the legislation is within a "range of reasonable alternatives available to the legislature."

Although, as noted earlier, notions of pragmatism, common sense and deference associated with the concept of reasonableness may seem out of place in the usually superheated atmosphere that surrounds the topic of regulating hate speech, it will be argued that in each instance the Court's recourse to the standard of reasonableness can be seen as a principled and appropriate approach to the issue of regulating hate

¹⁰ This issue of the nature of the harm in hate speech, or whether hate speech causes any harm at all, is central to both Sumner, *supra*, note 5 and Waldron, *supra*, note 5.

speech and to the proper respective roles of the courts and of the legislature in responding to the issue.

A test based on reasonableness also appears in a fourth location, dealing with the appropriate standard for appellate review of Tribunal decisions as to whether impugned materials do in fact constitute “hate”. The appropriateness of that recourse to a deferential standard of reasonableness will be dealt with separately, where it will be suggested that this last use of the reasonableness standard, which might otherwise seem an unremarkable reference to settled law, is in fact questionable for decisions implicating expressive freedom and one that threatens to undermine the integrity of the constitutional analysis in the parts of the decision that precede it.

II. THE MEANING OF “HATE”

The structure of the judgment in *Whatcott* has an impact on the unfolding of its legal analysis. Because the jurisprudence on expressive freedom has established that virtually any expressive act is *prima facie* protected by the section 2(b) Charter guarantee,¹¹ the analysis in an expressive freedom case should logically shift immediately to the multi-stage *Oakes* test in order to determine whether the specific infringement in issue is “demonstrably justifiable in a free and democratic society.”

Whatcott does not follow this template. Instead it begins with a preliminary exercise in statutory interpretation, focused on the definition of “hate”, which the decision identifies as the key issue in its revisiting of the conclusion reached in *Taylor*. The organizing structure for this section consists of a consideration of the definition of hate articulated in the majority judgment in *Taylor*, in light of the criticism of that judgment, ostensibly by Mr. Whatcott and the interveners on his side. In fact, those criticisms, namely that the definition is “subjective” and “overbroad”, are also the criticisms levelled against the majority judgment by the dissent in *Taylor*.¹² Either way, they are highly relevant

¹¹ *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] S.C.J. No. 36, [1989] 1 S.C.R. 927 (S.C.C.).

¹² One way of understanding this unusual structure is as an attempt at a compromise that might be a factor in securing a unanimous decision and avoiding the sort of fractures that marked the judgments in the 1990 “Hate Speech Trilogy”. In addition to *Taylor*, the Supreme Court of Canada also affirmed, by a majority of 4-3 the constitutionality of the *Criminal Code*, R.S.C. 1985, c. C-46 provisions dealing with hate speech, in *R. v. Keegstra*, [1990] S.C.J. No. 131, [1990] 3 S.C.R. 697 (S.C.C.) and *R. v. Andrews*, [1990] S.C.J. No. 130, [1990] 3 S.C.R. 870 (S.C.C.).

in resolving the issues of effectiveness, minimal impairment and proportionality under the *Oakes* test.

1. Subjectivity and Overbreadth

In *Taylor*, Dickson C.J.C., writing for the majority defined “hatred and contempt” as “unusually strong and deep felt emotions of detestation, calumny and vilification”.¹³ It is this definition that the dissent in *Taylor* criticized as subjective and overbroad.

In general, an allegation of subjectivity amounts to a criticism that the definition of what is being prohibited is too vague and too imprecise to allow for a consistent application of the prohibition or to give a person fair warning of whether a given action is in fact prohibited. In the result, with reference to alleged hate speech, it is stated that the adjudicator ends up deciding whether something is “hate” based ultimately on his or her subjective views as to what is “hateful” about the content of the communication.

The allegation of overbreadth essentially maintains that a particular definition (or, depending on one’s assumptions, any definition) of “hate” will inevitably catch communication that deserves to be protected as harmless, as a contribution to a legitimate debate, or as an expression of personal autonomy.

Although they are presented — and to some extent discussed — as two separate categories, the objections based on subjectivity and on overbreadth are clearly linked and are perhaps best understood as aspects of the more familiar polemical allegation that the entire project of regulating hate speech amounts to an attempt to censor unpopular ideas.

The basis of the alleged censorship is said to be in the censor’s (or in the state’s) evaluation of the merits of the ideas being expressed, and hence the charge of subjectivity. The effect of that exercise is said to be a limitation on the range of arguably relevant ideas available to be debated, and hence the allegation of overbreadth. In effect, the overbreadth is seen as an inevitable result of the alleged inherently subjective nature of the assessment.

Rather than to pursue these allegations through the thickets of political and philosophic theory that are their natural habitat, a judgment in *Whatcott* adopts a two-fold approach.

¹³ *Taylor*, *supra*, note 1, at 928.

On the one hand, there is a re-examination of the *Taylor* definition itself. The apparent purpose of this re-examination is to ensure that only the most extreme forms of expression are captured. On the other hand, and much more interestingly, the judgment finesses the entire argument by denying its major premise, namely that prohibiting hate speech is an exercise of censorship based on content.

2. Tightening the Definition

Section 14(b) of the *Saskatchewan Human Rights Code* ostensibly prohibits publication or display of material “that exposes or tends to expose to hatred, ridicule or belittles or otherwise affronts the dignity of any person or class of persons on the basis of a prohibited ground”.¹⁴

Long before *Whatcott*, the jurisprudence in Saskatchewan had read down this provision to make it applicable only to “hatred and contempt”¹⁵ as defined in *Taylor*. *Whatcott* takes this process one step further, effectively deleting “contempt” from a constitutionally valid limitation on expressive freedom. Where the *Taylor* definition encompassed “unusually strong and deep felt emotions of detestation, calumny and vilification”, *Whatcott* removes the notion of “calumny”, which it finds unnecessary to accomplish legitimate goals of protecting vulnerable groups from hate speech.

The specific theory behind this ruling appears linked to the Court’s insistence that the harm in hate speech consists of its effect on third parties outside the group being targeted.¹⁶ According to the Court, the harm in hate speech is that it incites people to hate vulnerable groups. The Court appears to be saying that any effect of hate speech on those vulnerable groups themselves, especially in terms of any offence they may feel, is merely a “derivative effect”.¹⁷ On the other hand, it should be noted that the Court does cite with apparent approval the statement by Dickson C.J.C. in *Keegstra* that among the damaging consequences of hate propaganda are the “grave psychological and social consequences to

¹⁴ *Saskatchewan Human Rights Code*, *supra*, note 4.

¹⁵ The term “contempt” does not appear in the Saskatchewan legislation. It had, before *Whatcott*, been included in what was prohibited by virtue of the *Taylor* standard, which specifies “hatred and contempt”.

¹⁶ *Whatcott*, *supra*, note 3, para. 42.

¹⁷ *Id.*, at para. 82.

individual members of the targeted group from the humiliation and degradation” caused by hate speech.¹⁸

Be all that as it may, the practical effect of tightening the definition of “hate” by excluding the effects of the communication on its targets and by restricting its ambit to producing extreme emotions of detestation and vilification beyond mere “contempt” is clear. The narrower the definition of hate, the less chance that it will sweep in communications that should be protected and thus the less chance that the application of the definition will be overbroad.

3. Focus on “Effect” Rather Than on “Content”

The more noteworthy response to objections of subjectivity and overbreadth in *Whatcott*, is its treatment of the implicit allegation of censorship based on content. The response is simply to deny the allegation:

A separate ... conceptual challenge that impedes the proper application of hate speech prohibitions is a mistaken propensity to focus on the nature of the ideas expressed, rather than on the likely effects of the expression. The repugnant content of expression may sidetrack litigants from the proper focus of the analysis.

... A blanket prohibition on the communication of repugnant ideas would offend the core of freedom of expression and could not be viewed as a minimal impairment of that right.

The distinction between the expression of repugnant ideas and expression which exposes groups to hatred is crucial to understanding the proper application of hate speech prohibitions. Hate speech legislation is not aimed at discouraging repugnant or offensive ideas. It does not, for example, prohibit expression which debates the merits of reducing the rights of vulnerable groups in society. It only restricts the use of expression exposing them to hatred as a part of that debate. It does not target the ideas, but their mode of expression in public and the effect that this mode of expression may have.¹⁹

This passage is intended to focus analytic attention away from the intellectual merits or demerits of the ideas and onto the *effect* of hate

¹⁸ *Id.*, at para. 73.

¹⁹ *Id.*, at paras. 49-51.

speech and then to identify the *manner of expression* as the means by which this *effect* is produced.

This formulation is to some extent no doubt an invocation of the familiar concept that human rights legislation is concerned with *effects* rather than with intentions,²⁰ but there is much more to this point. The effect in this case is the production of hatred. It is not the transmission of offensive or prohibited ideas. Crucially, the way that hatred is produced is through the mode and manner in which the communication is transmitted, rather than simply its intellectual content.

This notion of focusing on the mode of expression and the effects of that mode in producing hatred, rather than on the ideas being communicated, echoes Waldron's observation that much hate speech regulation "permits the racist [the homophobe] and the Islamophobe to speak, to mount challenges they want to mount: they just have to take care with the *mode* and *manner* in which their challenge is captured".²¹

Waldron's point and the point in *Whatcott* is not to call for good manners in political argument. It is to draw attention to the fact that hate is not simply produced by ideas but also by the manner in which any such ideas are communicated.

Another possible way of understanding this concept, though not one pursued in the judgment itself, is perhaps to focus on the notion of *affect* in addition to *effect*.

Communication takes place on many levels. While almost any communication can probably be broken down into a logical syllogism (whether valid or not) much of our expressive — and persuasive — activity takes place at the level of emotion. Persuasive meaning is usually produced not solely, or even primarily, on the basis of intellectual content, but also by an appeal to emotion. To cite a homely analogy, if the goal is to evoke revolutionary ardour, having members of an audience listen to a four-hour speech detailing the deficiencies of the status quo is likely to be less effective than having them hear — or even better, having them sing — the *Marseillaise*, whose persuasive force has little to do with the intellectual content of its lyrics.

Hate is an emotion, not an idea. The right to be free from hatred intersects with the right to be protected from discrimination. As set out among other places in article 7 of the Universal Declaration of Human

²⁰ *Ontario (Human Rights Commission) v. Simpsons-Sears*, [1985] S.C.J. No. 74, [1985] 2 S.C.R. 536 (S.C.C.).

²¹ Waldron, *supra*, note 5, at 199.

Rights, it is a right to be “free from discrimination and from *incitement to discrimination*”.²² The mode of this incitement is the creation of hate. While a broad range, especially of political expression, may contain both intellectual and emotive content, what separates hate speech from other types of political communication, is that it is pitched to an emotion that is intrinsically dangerous.

4. The Reasonable Person

The idea that the focus of anti-hate legislation is on its incitement of discrimination through the creation of the objectively dangerous emotion of hate, brings the argument back to the notion of subjectivity and its corollary of overbreadth.

If what is being prohibited is not the communication of ideas but the incitement of hatred, then the test for what constitutes such incitement cannot be based simply on the intellectual content of that communication. It must focus instead on the affect that the communication produces.

Does the fact that this affect — the emotion of hatred — is, like all emotions, inherently subjective in the way it is experienced, mean that a definition that focuses on the production of this affect is also inherently subjective? The response in *Whatcott* involves invoking the notion of *reasonableness* in the form of the *reasonable person test* as the objective standard for assessing whether a given communication has as its probable effect the incitement of the emotion of hatred.²³ Saying that a “reasonable person” (a concept that includes the notion of a person aware of the relevant cultural and historic context) is able to identify communications that are likely to expose their targets to detestation and vilification may indeed resemble the observation articulated by Justice Potter Stewart, that despite the difficulties in defining hard core pornography, “I know it when I see it.”²⁴ In this case, the observation may be totally accurate. The stirring up of the extreme emotion of hatred involves considerations of mode and manner that may be easier to decode than to define.

²² *Universal Declaration of Human Rights*, GA Res. 217 (III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948).

²³ *Whatcott*, *supra*, note 3, at para. 52.

²⁴ *Jacobellis v. Ohio*, 378 U.S. 184 (1964).

III. THE “HARM IN HATE SPEECH”

Having narrowed the definition of hate to remove notions of contempt, calumny, offensiveness and assaults on dignity, *Whatcott* then turns to a more structured consideration of the constitutionality of this modified definition through the lens of the *Oakes* test. Here too, *reasonableness* as the appropriate standard or test plays an important role.

Reasonableness is central to the Court’s analysis of the harm in hate speech. Specifying the harm in hate speech is clearly relevant to several steps in the *Oakes* test. From the initial step of assessing whether the “harm” that the legislation is aimed at countering is a pressing and substantial one, through consideration of whether the means chosen are effective in countering the harm, down to a balancing of whether the benefits achieved in responding to the harm are capable of justifying the corresponding limitation that the means chosen impose on the constitutional right, it is necessary to be able to specify precisely what, if anything, is the *harm* produced by hate speech.

1. Proof of Harm

The answer to the crucial question of what sort of “harm” is necessary to justify an infringement on individual liberties depends largely on the assumptions one brings to the table, notably how one defines the seemingly straightforward concept of *harm*. If one adopts the “harm principle” as articulated by John Stuart Mill in his famous essay *On Liberty*, then hate speech falling short of incitement to violence will be seen as causing no “harm” capable of justifying a limitation on the expressive freedom.²⁵ On the other hand, if one assumes that all members of society have an inherent right to human dignity, equal treatment and social inclusion or if one assumes that hate speech has effects on members of the targeted group that can be analogized to the effects of defamation, then the delegitimizing effects of hate speech will be seen as clear instances of harm capable of justifying the limitation of such speech.²⁶

The Court did dip its metaphorical toe into these philosophic waters in *R. v. Malmo-Levine*,²⁷ appearing to reject the proposition that the “harm principle” as articulated by John Stuart Mill (and adopted by many critics

²⁵ Sumner, *supra*, note 5.

²⁶ Waldron, *supra*, note 5.

²⁷ [2003] S.C.J. No. 79, [2003] 3 S.C.R. 571 (S.C.C.).

of anti-hate legislation) is a proper yardstick for assessing constitutionality, but does not take up the opportunity to extend the discussion in the present case. It does, however, consider the issue of the proof of such harm.

Given that the issue of what, if anything, constitutes the harm in hate speech appears to rest on philosophical assumptions that are difficult, if not impossible, to test empirically, the question of what, if anything, needs to be proved in order to demonstrate a harm sufficient to justify limiting expressive freedom and on what basis that proof may be made, becomes central to the whole section 1 analysis. One of the central aspects of the critique of anti-hate legislation on the basis of overbreadth is the assertion that in the absence of *proof* of objective harm, such legislation is inherently overbroad since the demonstrable damage to expressive freedom cannot be balanced against a mere risk of harm.²⁸

The Court's response does not step back to consider philosophic first principles, but rather relies on common sense. Citing *Thomson Newspapers Co.*,²⁹ the Court rejects any requirement for scientific proof as unrealistic. Instead, it reaffirms a "reasonable apprehension of harm" test as the appropriate standard in cases where "it has been suggested though not proven that the very nature of the expression in question undermines the position of groups or individuals as equal participants in society".³⁰

The Court then sets out with approval, *Thomson's* vindication of common sense as central to section 1 considerations:

While courts should not use common sense as a cover for unfounded or controversial assumptions, it may be appropriately employed in judicial reasoning where the possibility of harm is within the everyday knowledge and experience of Canadians, or where factual determination and value judgments overlap. Canadians presume that expressions which degrade individuals based on their gender, ethnicity, or other personal factors may lead to harm being visited upon them because this is within most people's everyday experience ... Common sense reflects common understandings. In these cases dealing with pornography and hate speech, common understandings were accepted by the Court because they are widely accepted by Canadians as facts,

²⁸ R. Moon, *The Constitutional Protection of Freedom of Expression* (Toronto: University of Toronto Press, 2000), at 37 [hereinafter "Moon"].

²⁹ *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] S.C.J. No. 44, [1998] 1 S.C.R. 877 (S.C.C.) [hereinafter "*Thomson*"].

³⁰ *Id.*, at para. 115.

and because they are integrally related to our values, which are the bedrock of any s. 1 justification.³¹

Common sense here plays much the same role as the *reasonable person test* played in identifying whether a given communication had the effect of producing hate. Rather than debate philosophic first principles, the Court simply refers to the majority judgment in *Taylor*, to conclude that the “societal impact” of hate propaganda consists of its effect of “laying the groundwork for later, broad attacks on vulnerable groups” ranging from discrimination, to ostracism, deportation, violence and, in the most extreme cases, genocide.³² As for the question of the proof of such harm, the Court simply notes that these effects “are part of the everyday knowledge and experience of Canadians”.³³ As a consequence the Court reaffirms that the legislature is entitled to enact anti-hate speech legislation based on a “reasonable apprehension of harm”.

Given the potentially calamitous consequences, the decision appears to be saying that it is unreasonable to await objective confirmation that the “groundwork” being laid has had its anticipated results.

As with the *reasonable person test* for whether the effect of a communication is to produce hate, this reliance on the common sense conclusion that hatred has discriminatory effects as sufficient proof of the harm in hate speech will not likely satisfy critics of the decision, but the Court is surely correct in recognizing that in this instance as well empirical proof is impossible. The demand for such proof is tantamount to pre-ordaining a finding of unconstitutionality and, contrary to the Court’s existing jurisprudence, to making the guarantee of expressive freedom virtually absolute.

2. A Range of Reasonable Alternatives Available to the Legislature

The Court recognizes that the effect of the “reasonable apprehension of harm” test is to afford the legislature a “margin of appreciation” in deciding its legislative objectives.³⁴ It also recognizes that the deference implicit in this approach has been the subject of criticism.³⁵

³¹ *Whatcott*, *supra*, note 3, at para. 133, citing *Thomson*, *id.*, at para. 116.

³² *Whatcott*, *id.*, at para. 74.

³³ *Id.*, para. 135.

³⁴ *Id.*, at para. 134.

³⁵ *Id.*, at para. 130.

A similar margin of appreciation is afforded in the Court's overall consideration of the "minimal impairment" step of the *Oakes* test. Here, too, the criterion invoked is reasonableness. In assessing, as required by the *Oakes* test, whether the legislative approach adopted represents a minimal impairment of expressive freedom, the Court rejects the idea that a measure does not minimally impair expressive freedom because it may "be possible to imagine a solution that impairs the right at stake less than the solution Parliament has adopted".³⁶ Instead, the Court insists that, "[p]rovided the option chosen is one within a range of reasonable supportable alternatives, the minimal impairment test will be met".³⁷

Here too, it is to be expected that the Court will also be criticized for being overly deferential to the legislature, especially, in this case, in light of the breadth of the range of "reasonable alternatives" that the Court acknowledges.³⁸

Mr. Whatcott and the interveners who supported him had argued that whatever harms there were in hate speech, they could be adequately countered by other means that did not infringe as seriously, or at all, on expressive freedom. They maintained that on this basis the solution adopted in the *Saskatchewan Human Rights Code* could not pass the minimal impairment test. Among the suggestions made were that the harms of hate speech could be properly regulated through the "Hate Propaganda" sections of the *Criminal Code*,³⁹ which they argued contain better protections for expressive freedom by requiring, among other things, proof of intent, and by providing for defences such as truthfulness. Others argued that the legislative regulation of hate speech is inherently ineffective and counterproductive since ideas cannot be defeated by suppressing them. On that basis, they argued that the "marketplace of ideas" (*i.e.*, free and unfettered debate) was not only the best protection for expressive freedom, but also the best mechanism for defeating "bad ideas".

Each of these suggestions is not without issues.

The *Criminal Code* provisions are focused on the person communicating the message and on punishment of those actions. They are not primarily focused on the messages themselves and on their

³⁶ *Id.*, at para. 101, citing *Canada (Attorney General) v. JTI-Macdonald Corp.*, [2007] S.C.J. No. 30, [2007] 2 S.C.R. 610 (S.C.C.).

³⁷ *Whatcott, id.*, at para. 101.

³⁸ See, *e.g.*, Moon, *supra*, note 28, at 37, which criticizes the Hate Speech Trilogy on precisely this basis.

³⁹ R.S.C. 1985, c. C-46.

discriminatory, or worse, social consequences. While the burden of proof, the standard of proof and the need to prove intent are all appropriate in a *Criminal Code* context, different considerations apply when the goal is combating the consequences of hate through non-penal means. The requirement of proof of intent, alone, would defeat the focus on the effects of discrimination.

As for the marketplace of ideas, it is questionable whether the analogy to classical 19th-century liberal economic theory is at all an apt one, or indeed whether that theory, which opposes any form of regulation beyond the “invisible hand of the market” retains even much persuasive force in the context of the current far from unregulated economy. If there is any parallel with the marketplace for goods, then it will also be necessary to recognize the existence of “market failure” in the intellectual marketplace. Even if it could be stated that in the long run “good” ideas prevail over “bad” ideas through intellectual competition, it would be important to note that such consequences would be no more simultaneous than they are in the economic marketplace. Just as in the economic marketplace bankruptcies and cyclical depressions are the regulators where no other regulators exist, so in the marketplace of ideas “bad ideas” like slavery, anti-Semitism, homophobia and xenophobia have taken a distressingly long time and have inflicted severe suffering on the way to being eventually defeated by “good ideas”, with the process still far from complete.

Although the Court briefly notes the fact that the effectiveness of the proposed “less restrictive alternatives” is capable of being questioned, it ends by concluding that each of them is also a “reasonable” approach to regulating hate speech. Notably, however, even though regulation subject to more safeguards or even no regulation at all are both deemed reasonable alternatives, that does not render anti-hate speech legislation, such as section 14 of the *Saskatchewan Human Rights Code*, unconstitutional by virtue of its greater incursion on expression freedom.

This is clearly a very deferential approach to an area of legislative initiative which in the U.S. constitutional jurisprudence is subject to the strictest of scrutiny.

On the other hand, such deference is also capable of justification. The conclusion that even after one has defined “hate” in an appropriately narrow fashion, there is a very broad range of reasonable responses that a legislature could take to dealing with hate speech, at the end of the day amounts to a conclusion that the issue is fundamentally a political one. Different potential resolutions that may be proposed will inevitably

reflect the values and assumptions of those who propose them. The ardour of the views held by proponents of one side or another in the debate and the sincerity of their belief as to the danger in respectively regulating or not regulating hate speech, are just as reasonably seen as support for the appropriateness of the Court's approach as they are as a basis for criticism. Where a number of views are plausible and none is unconstitutional, the Court's proper role arguably does not extend to deciding which of these views is the wisest. Indeed, the political process, which includes the continuous possibility of repeal or re-enactment, may justifiably be seen as an appropriate safety valve for a resolution of the competing moral and philosophic assumptions in issue.

IV. REVIEW ON THE BASIS OF REASONABLENESS

The final area in which the Court invokes the notion of reasonableness as a standard or test is in the area of implementation, specifically on the issue of the standard of review for tribunal decisions on the substantive question of whether given communications actually do constitute hate speech.

In this area, the reliance on reasonableness is potentially more troubling and less defensible than are the Court's previous invocations of variants of that notion.

Although the Court does not appear to recognize the potential problem, the issue is once again subjectivity. The diversity of the conclusions by the Tribunal, the Court of Appeal and the Supreme Court of Canada does not in itself necessarily raise this issue.

The Tribunal at first instance found that all four pamphlets infringed the *Saskatchewan Human Rights Code's* prohibition of hate speech. The Court of Appeal found that none of the four violated section 14 because it viewed them as contributions to a political/religious debate. The Supreme Court of Canada decision concluded that two of the pamphlets violated section 14 and two did not. On an analytic basis, the final outcome in the Supreme Court of Canada can easily be justified as an implementation of the modified definition set out earlier in the decision. From that perspective, the Tribunal decision can be seen as faulty because it adopted too lax a definition of hate, while the decisions in the Court of Appeal were faulty because they incorrectly focused on the pamphlets as "ideas" rather than on their effect in creating hate.

The discussion, however, should not end there.

As part of its review of the decisions below, the Court deals with the standard of review applicable to such a review. In line with the current human rights jurisprudence, the Court finds that the issue of constitutionality, being a question of law outside the expertise of the Tribunal, must be decided on the basis of standard of correctness. However, on the substantive issue of whether, on the basis of a constitutionally correct definition of hate, the pamphlets in question did violate section 14, the Court found that proper standard of review was the deferential standard of “reasonableness”.⁴⁰

This may be one bridge to reasonableness too far.

In order for a standard of deference to apply to a decision and for the question to be, not whether the decision is correct but whether it is “reasonable”, it must be possible to imagine more than one “reasonable” conclusion capable of being reached on the facts in issue. It must be possible — to adopt the formulation in the leading case of *Dunsmuir*⁴¹ — to conceive of a “reasonable range of acceptable conclusions” as to whether section 14 of the *Saskatchewan Human Rights Code* has been violated by a specific communication. It is difficult to see how there could be such a range. If there were a range of reasonable responses, then the reasonable person test would not be an objective one, but a subjective one based on the specific and individual views of the decision-maker. The criticism of subjectivity would consequently be made out.

It would accordingly appear that only one possible reasonable conclusion is possible in any given case and that, notwithstanding *Dunsmuir*, only a standard of review of correctness is justifiable.

In this connection, it is notable that one of the protections for expressive freedoms with regard to section 14 that the Court in *Whatcott* cites with approval is the fact that the Saskatchewan legislature has moved the adjudication of section 14 complaints away from lay Tribunal members and entrusted it to the judiciary. The standard of review applicable to judges in a court of law is correctness. It would be ironic if the consequence of having hate speech complaints adjudicated by an administrative Tribunal would be to lower the standard of review.

The Court dismisses with little comment the submissions advanced by Mr. Whatcott and some of the interveners that supported him that the

⁴⁰ *Whatcott*, *supra*, note 3, at para. 167.

⁴¹ *Dunsmuir v. New Brunswick*, [2008] S.C.J. No. 9, [2008] 1 S.C.R. 190 (S.C.C.).

process and procedures of Human Rights Tribunals are inapt for decisions about hate speech.⁴²

In light of the apparent incongruity of applying the *Dunsmuir* standard of review to decisions about hate speech, it is perhaps to be hoped that any legislature considering whether to enact, modify or repeal anti-hate legislation will take a closer look, not only at the importance of specifying correctness as the applicable standard for appellate review, but also at the issue of the suitability of a wider range of the usual administrative law processes and procedures to such adjudication, in order to ensure fairness in the handling of this delicate and constitutionally sensitive area.

⁴² *Whatcott*, *supra*, note 3, at para. 168.