

2013

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Citation Information

Zwibel, Cara Faith. "Reconciling Rights: The Whatcott Case as Missed Opportunity." *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 63. (2013).

DOI: <https://doi.org/10.60082/2563-8505.1272>

<https://digitalcommons.osgoode.yorku.ca/sclr/vol63/iss1/13>

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Reconciling Rights: The *Whatcott* Case as Missed Opportunity

Cara Faith Zwibel*

“We often miss opportunity because it’s dressed in overalls and looks like work.”

— Thomas A. Edison

I. A MISSED OPPORTUNITY

The Supreme Court of Canada’s recent consideration of the hate speech provisions¹ in the *Saskatchewan Human Rights Code*² was an opportunity to grapple with several fundamental rights and freedoms that frequently come into conflict. The case — *Saskatchewan (Human Rights Commission) v. Whatcott*³ — grew out of what some might consider minor incidents of flyer distribution in some Saskatchewan neighbourhoods. Like most cases considered by the Court, however, it has implications that extend well beyond the interests of the parties to the appeal and may have ripple effects in a number of different areas.

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¹ While I will refer to the relevant provisions of human rights statutes as “hate speech provisions” throughout this paper, they should be distinguished from the *Criminal Code*’s prohibition on the wilful promotion of hatred, as set out in s. 319(2): R.S.C. 1985, c. C-46. While the definition of hatred and the standard the courts use to assess expression against this definition is the same, there are significant differences. For example, no proceeding under s. 319(2) of the *Criminal Code* may be commenced without the consent of the Attorney General; see also *Criminal Code*, s. 319(6). In addition, there is a *mens rea* or intent requirement associated with the *Criminal Code* section, and defences are available. The human rights provisions do not have an intent requirement, are driven by individual complaints, and there are no defences since the focus is on the impact of the expression, rather than its purpose or intended consequences. In addition, the *Criminal Code* and human rights provisions allow for different types of penalties/remedies.

² S.S. 1979, c. S-24.1 [hereinafter “*Saskatchewan Human Rights Code*”].

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

The *Whatcott* case created an opportunity to examine the foundations of freedom of expression, as well as what constitutional protection of the right means for Canadian society. At the same time, *Whatcott* provided the Court with a chance to look at our ongoing struggle to achieve equality and eradicate discrimination, and at the tools that some Canadian jurisdictions have chosen to accomplish these goals. Finally, the case allowed the Court to examine one of its own important precedents and consider whether reasoning that was rooted in a different time could be maintained in light of the evolution of the law and social realities. Put briefly, *Whatcott* was about much more than whether a single individual, with strongly held religious objections to homosexual behaviour, could distribute literature to some Saskatchewan homes.

In this article, I argue that *Whatcott* represents a missed opportunity to delve into the difficult process of reconciling competing rights and freedoms and address the efficacy of the hate speech provisions. While I critique both the outcome of the case and the Court's reasoning, it is the latter that will be the focus of this discussion. Regardless of one's view on the constitutionality or effectiveness of hate speech provisions, the Court's reasons for decision simply fail to adequately address the important issues the case raises. This failure led the Court to ignore both Canada's historical and practical experience with hate speech provisions in human rights statutes, and the future implications of the decision to continue down this path.

I will begin by placing *Whatcott* in historical context and reviewing the Supreme Court of Canada's first consideration of a hate speech provision in human rights legislation: *Canada (Human Rights Commission) v. Taylor*.⁴ I will then briefly survey some of the jurisprudence coming from Canadian jurisdictions with similar provisions and review a few of the changes that have occurred by way of legislative amendment and judicial consideration. I will also briefly touch on the thoughtful review of the federal hate speech provision undertaken by Richard Moon in 2008, at the request of the Canadian Human Rights Commission ("CHRC") and some of the debates and controversy that led to that review.

The bulk of this article will be dedicated to analyzing the *Whatcott* decision itself. I will argue that the Court failed to give adequate consideration to whether hate speech provisions in human rights codes are well suited to achieving the goals or objectives they are designed to

⁴ [1990] S.C.J. No. 129, [1990] 3 S.C.R. 892 (S.C.C.) [hereinafter "*Taylor*"].

achieve and that, in so doing, the Court missed an opportunity to address some core issues. First, the Court avoided addressing the subjectivity concern that has been at the heart of most critiques of hate speech laws. Careful consideration of the experience with human rights provisions and with its own decision in *Taylor* over the last two decades would have illustrated the impact that the necessarily vague and subjective understanding of hatred has had on the robust protection of freedom of expression. Second, the Court missed an opportunity to elaborate on the kinds of harms that hate speech laws are designed to prevent and closely consider how effectively these laws operate in practice. The courts have given hatred a narrow construction in order to safeguard freedom of expression, but in so doing they have failed to examine how effective such a definition is in achieving the legislature's goal — namely, preventing discrimination. While the use of inflammatory and hateful language may be easier for a court to identify as hate speech, these forms of expression may also be less likely to incite hatred than subtler, but perhaps more insidious, messages. I will argue that, at best, the Supreme Court of Canada's reasoning on these issues is incomplete and convoluted, and that the Court missed a rare opportunity to examine how to reconcile freedom of expression, freedom of religion and equality when they come into conflict. I conclude by positing that the outcome in *Whatcott* (including Mr. Whatcott's behaviour following the decision), highlights the limits of what the law can achieve when it comes to difficult social problems like racism, homophobia and discrimination more broadly.

II. HUMAN RIGHTS CODES AND HATE SPEECH: SOME HISTORY

Although every Canadian jurisdiction has enacted a human rights code to address discrimination in a variety of forums, not all have opted to address hateful expression. Such provisions are found in the human rights codes of Saskatchewan,⁵ Alberta,⁶ British Columbia⁷ and the Northwest Territories,⁸ as well as in the federal *Canadian Human Rights Act*.⁹ While there are minor variations in the wording of some of the

⁵ *Saskatchewan Human Rights Code*, *supra*, note 2, s. 14(1)(b).

⁶ *Alberta Human Rights Act*, R.S.A. 2000, c. A-25.5, s. 3(1)(b).

⁷ *Human Rights Code*, R.S.B.C. 1996, c. 210, s. 7(1)(b).

⁸ *Human Rights Act*, S.N.W.T. 2002, c. 18, s. 13(1)(c).

⁹ *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, s. 13 [hereinafter "CHRA" or the "Act"].

provisions, each is directed at forms of expression that expose or are likely to expose a person or group of persons to hatred or contempt on the basis of a prohibited ground of discrimination.

1. The *Taylor* Standard

The Supreme Court first considered the federal hate speech provision in *Canada (Human Rights Commission) v. Taylor*.¹⁰ The *Taylor* decision was rendered on the same day as *R. v. Keegstra*,¹¹ which addressed the constitutionality of the *Criminal Code* prohibition on hate speech. In both cases, a seven-judge panel of the Court split 4-3 in upholding the constitutionality of the provisions.

The *Taylor* case concerned the distribution of cards that invited recipients to call a telephone number. The number was answered by recorded messages that, according to the Court, denigrated the Jewish race and religion.¹² Taylor argued that section 13(1) of the CHRA¹³ violated section 2(b), the Charter's¹⁴ guarantee of freedom of expression, in a manner that could not be reasonably justified in a free and democratic society. The *Taylor* Court was unanimous in finding that the prohibition in section 13(1) of the CHRA violated section 2(b), and rejected the notion that the offensive content of messages could be sufficient reason to deny protection under section 2(b). Both the majority and dissent were also convinced that Parliament's objective of promoting equality and prohibiting discriminatory practices were pressing and substantial goals.

¹⁰ *Taylor*, *supra*, note 4.

¹¹ [1990] S.C.J. No. 131, [1990] 3 S.C.R. 697 (S.C.C.).

¹² The complaints against Mr. Taylor and the Western Guard Party were initially brought to the Canadian Human Rights Tribunal ("CHRT") in 1979, prior to the enactment of the *Canadian Charter of Rights and Freedoms*, *infra*, note 14. The Tribunal found a contravention of s. 13(1) of the CHRA and made a cease and desist order that was filed with the Federal Court and could be enforced as a court order. Taylor and his party continued to engage in the practices and eventually Taylor had to serve a year in prison for contempt, while the Party was responsible for paying a \$5,000 fine. Even after serving time in jail, Mr. Taylor and the Party resumed the telephone service. When the CHRC once again sought to enforce the Tribunal's Order, the Charter had come into effect.

¹³ Section 13(1) states:

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.

¹⁴ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"].

The judges parted ways, however, in assessing the proportionality of section 13(1) in light of these goals. Chief Justice Dickson, writing for the majority, held that the phrase “hatred and contempt” could be interpreted in a way that was sufficiently precise and narrow to be proportional to the legislative objective. To make this finding, Dickson C.J.C. confined the definition of “hatred and contempt” to “unusually strong and deep-felt emotions of detestation, calumny and vilification”.¹⁵

On the other hand, McLachlin J. (as she then was), writing for the dissent, found the “broad and vague ambit”¹⁶ of the provision troubling and ultimately fatal to the section’s constitutionality. Justice McLachlin held that the provision was not rationally connected to its objective because it went further than necessary to achieve it. In contrast to the majority, she found that the breadth of the provision made it difficult to determine where mere dislike ends and hatred begins. In her words “[T]he phrase does not assist in sending a clear and precise indication to members of society as to what the limits of impugned speech are.”¹⁷ While McLachlin J. characterized the process envisaged by the Act as “exemplary”¹⁸ in terms of its balancing of freedom of expression and discrimination interests, she nevertheless concluded that it effectively delegated the power to infringe the Charter and that the chilling effect of the section’s breadth could not be ignored. Justice McLachlin also noted the absence of any defences to violations of section 13(1) under the Act. She acknowledged that this was consistent with the legislation’s remedial focus, but concluded that this factor also served to broaden the section’s application and further contributed to its failure to meet the rational connection test under section 1 of the Charter.¹⁹ In balancing the importance of freedom of expression as against the benefit sought to be gained (*i.e.*, the elimination or reduction of discrimination), McLachlin J. characterized the infringement as “most serious” since it touched on “expression which may be relevant to social and political issues”.²⁰ Significantly, she also questioned some of the concerns raised about the damage caused by hate speech, noting that the ability of the prohibition to deal effectively with discrimination was not clear-cut. As a result,

¹⁵ *Taylor, supra*, note 4, at 928.

¹⁶ *Id.*, at 959.

¹⁷ *Id.*, at 962.

¹⁸ *Id.*, at 964.

¹⁹ As laid out in *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103 (S.C.C.) [hereinafter “*Oakes*”].

²⁰ *Taylor, supra*, note 4, at 968.

McLachlin J. concluded that the benefits of the provision were not worth its substantial costs.

The dissent in the *Taylor* case puts forth both classic freedom of speech arguments with a more targeted look at the mechanism chosen by Parliament in the CHRA and how it could, and did, operate. At the heart of the dissent is a concern about the breadth of the prohibition, its subjective nature, and its ability to address the harm at which it is aimed. In my view, these are the same issues that needed to be addressed in the *Whatcott* case, particularly in light of the experience with hate speech provisions in the more than 20 years since *Taylor*.

2. Developments Post-*Taylor*

Even though the tribunals tasked with interpreting and applying hate speech provisions have, in general, made use of the *Taylor* definition, they have also recognized the need for more specific tools to help weed out speech that is simply offensive and ensure that they only capture the extreme and unusual species of expression known as “hatred”. Attempts have been made by tribunals and courts to particularize the meaning of this term and render it more concrete. Thus, in *Warman v. Kouba*²¹ a member of the CHRT reviewed the jurisprudence under the Act’s hate speech provision and developed a number of “hallmarks of hatred” to help differentiate hate speech from other offensive commentary. These hallmarks include:

- (1) portraying the targeted group as a “powerful menace”;
- (2) the use of true stories to make negative generalizations about the group;
- (3) portraying the group as preying on children, the aged or other vulnerable persons;
- (4) blaming the group for current problems;
- (5) portraying them as violent or dangerous by nature;
- (6) conveying the idea that the members of the group have no redeeming qualities and are simply evil;

²¹ [2006] C.H.R.D. No. 50, 2006 CHRT 50 (Can. H.R.T.) [hereinafter “*Kouba*”].

- (7) communicating the idea that the banishment, segregation or eradication of the group is necessary to save others from harm;
- (8) dehumanizing the group by comparisons to animals, vermin, excrement and other noxious substances;
- (9) using highly inflammatory and derogatory language to create a tone of extreme hatred and contempt;
- (10) trivializing or celebrating past persecution or tragedy involving group members; and
- (11) calling for violent action against the group.²²

It is not necessary to have all of these hallmarks of hatred in order to run afoul of the law, and the list is not intended to be exhaustive, but it did prove useful for tribunal members struggling with the inherent subjectivity of hatred. The list also helps to demonstrate the truly extreme nature of the expression that these provisions aim to capture.

Hate speech cases can make a big splash in the media and are frequently the subject of controversy, but they actually represent a very small proportion of what human rights tribunals do. Between 2001 and 2008, the hate speech complaints made to the federal Commission represented about 2 per cent of the total complaints received.²³ Of this 2 per cent (representing 73 complaints), only 16 were actually adjudicated by the Tribunal and in each one the Tribunal determined that there had been a violation of section 13.²⁴ Figures showing the proportion of hate speech complaints that were referred to a provincial tribunal are not easily accessible, but it suffices to say that hate speech cases are not at all representative of the work typically done by human rights tribunals. Moreover, at least at the federal level, a large number of the cases that ultimately resulted in hearings before the Canadian Human Rights Tribunal were brought by a single individual complainant. The individual, Richard Warman, is a former investigator for the Canadian Human Rights Commission, although he initiated most of his complaints after he

²² *Id.*, at paras. 24-77.

²³ These figures are taken from 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* (Ottawa: Canadian Human Rights Commission, 2008), at 12 [hereinafter "Moon Report"]. The Moon Report is discussed further below.

²⁴ *Id.* At the time that the Moon Report was published, 34 of the 73 complaints were sent to the CHRT and 10 were resolved before adjudication; eight of the complaints that were sent to the CHRT were awaiting conciliation or adjudication.

left that position. Mr. Warman sought out hateful expression on the Internet and participated in online discussion forums on these sites to assess how to best proceed with a complaint. The cases he initiated are not representative of what Parliament likely had in mind when the provision was enacted and there is little evidence that vulnerable groups have seen section 13 as a vital tool in their struggle for equality.

Despite the small number of cases that have been the subject of adjudication, there has been some heated debate and discussion in the academic literature and the mainstream media about the role of human rights commissions in hate speech cases.²⁵ The debate came to the fore when some mainstream publications were the subject of complaints to commissions and, in the case of *Maclean's* magazine, a hearing before the B.C. Human Rights Tribunal.²⁶ Some commentators, including Ezra Levant and Mark Steyn (who were both subjects of complaints), mounted campaigns that were deeply critical of the CHRC and the restriction of freedom of expression by human rights tribunals more generally.

Perhaps as a result of the criticisms, in 2008 the Canadian Human Rights Commission asked law professor Richard Moon to report on mechanisms to address hate messages, particularly those on the Internet. Professor Moon's report is a thorough discussion on some of the tensions inherent in the interpretation of section 13. In particular, he points out that while the Tribunal is generally charged with addressing discrimination and giving a large and liberal interpretation to the CHRA, protection of freedom of expression requires a narrow understanding of what constitutes hatred for the purposes of section 13. Professor Moon recommended repealing section 13 and included a variety of other recommendations to address the issue of hateful messages in the event the provision was not repealed.²⁷

The statutory language used by section 13 of the CHRA to describe the *types* of messages prohibited has not changed since *Taylor*. However, that provision was amended in 2001 to make explicit that it applied to

²⁵ For a helpful discussion on why human rights commissions and, in particular, the CHRC, have received increased attention in recent years, particularly with respect to hate speech provisions, see R. Moon, "The Attack on Human Rights Commissions and the Corruption of Public Discourse" (2011) 73 Sask. L.J. 93 [hereinafter "Moon, 'The Attack'"].

²⁶ See *Elmasry v. Roger's Publishing*, [2008] B.C.H.R.T.D. No. 378, 64 C.H.R.R. D/509 (B.C.H.R.T.). The process in B.C. is different in that, in general, all complaints go directly to the tribunal without a human rights commission performing a screening function.

²⁷ The Moon Report also noted that there was widespread misunderstanding about the complaint process under the CHRA. Professor Moon subsequently addressed many of these misconceptions in Moon, "The Attack", *supra*, note 25.

hate messages on the Internet.²⁸ Since this clarification was made, the provision has frequently been applied to websites where the predominant messages are hateful diatribes against a wide variety of groups protected by the Act. The accessibility of the Internet in Canadian society and the ability to quickly transmit messages repeatedly via social networks has only served to intensify debate about hate speech laws, particularly since Canada has no jurisdiction to regulate or attempt to shut down websites that are hosted in other countries, but available to Canadian readers.

In the Fall of 2011, a Private Member's Bill was introduced proposing section 13's repeal. Shortly before this paper went to press, the bill was passed and received Royal Assent.²⁹ This means that there will no longer be a hate speech provision in the CHRA, although its counterparts in several provincial jurisdictions (including the Saskatchewan provision at issue in *Whatcott*) do remain in place.

III. THE *WHATCOTT* DECISION

1. Facts and Judicial History

The *Whatcott* case was heard in October of 2011 by a seven-judge panel of the Court.³⁰ It took the Court until late February of 2013 (16 months) to render a decision and, by that time, one of the panel members, Deschamps J., had retired. As a result, the case represents the views of only two-thirds of the Supreme Court bench.³¹

The case arose out of four flyers distributed in Regina and Saskatoon by Mr. Whatcott on behalf of a group known as the Christian Truth

²⁸ Section 13(2) of the CHRA states: "For greater certainty, subsection (1) applies in respect of a matter that is communicated by means of a computer or a group of interconnected or related computers, including the Internet, or any similar means of communication, but does not apply in respect of a matter that is communicated in whole or in part by means of the facilities of a broadcasting undertaking."

²⁹ Bill C-304, *An Act to amend the Canadian Human Rights Act (Protecting Freedom)*, 1st Sess., 41st Parl., 2011 [hereinafter "Bill C-304"]. This Bill received Royal Assent on June 26, 2013 but does not come into force until June 26, 2014.

³⁰ At the time that the appeal was heard, Binnie and Charron JJ. had retired, but Moldaver and Karakatsanis JJ. were not appointed until a few days after the hearing.

³¹ In light of the six-judge panel, it seems likely that a unanimous decision was considered important in this case. It is particularly interesting that McLachlin C.J.C., the author of strong dissents in both *Taylor* and *Keegstra*, neither dissented in *Whatcott* to reiterate the concerns expressed in earlier decisions, nor wrote the decision to explain whether her views had changed or she felt bound by precedent.

Activists.³² Two of the flyers were identical and consisted of a reprint of a page of classified ads with the addition of handwritten comments. The other two flyers, entitled “Keep Homosexuality out of Saskatoon’s Public Schools!” and “Sodomites in our Public Schools” dealt with the topics of homosexuality in public schools, and included biblical references and quotes as well as calls for individuals to contact their school authorities on the subject of the “corruption” of school children with “sodomite propaganda”. Four individuals who had received the flyers at home lodged complaints with the Human Rights Commission alleging a violation of section 14 of the *Saskatchewan Human Rights Code* (“SHRC” or “Saskatchewan Code”) and the matter proceeded before the Saskatchewan Human Rights Tribunal. The Tribunal found a violation of the section and held that section 14(1)(b) was a reasonable limitation on section 2(b) of the Charter. Mr. Whatcott was ordered to pay compensation to the complainants, and he and his group were prohibited from distributing the flyers and any similar materials.

On appeal, the Saskatchewan Court of Queen’s Bench upheld the Tribunal’s decision. The Saskatchewan Court of Appeal, however, disagreed and concluded that the material distributed by Mr. Whatcott did not violate section 14 of the Code. In two separate judgments, members of the Court of Appeal found that the moral context of the expression at issue needed to be taken account and one judge put significant emphasis on the idea that the flyers took issue with sexual conduct and not with individuals. While the Court of Appeal did uphold the constitutionality of the hate speech provision in the Saskatchewan Code, the Court’s reasons show a concern about the breadth of the provision and its potential to unduly limit freedom of expression.

The Saskatchewan Human Rights Commission appealed to the Supreme Court of Canada and Mr. Whatcott made a motion to state constitutional questions with respect to the constitutionality of Saskatchewan’s hate speech provision. Following years of debate and discussion about the effectiveness of hate speech provisions at the federal level, as well as a Saskatchewan Court of Appeal decision that seriously questioned how to address religious beliefs that might be expressed in offensive or even hateful terms, the stage was set for a thorough look at how the hate speech regime was operating. The Court was given an opportunity to reconsider the constitutionality of hate speech laws

³² The full text of all four of the flyers is included in an appendix to the Supreme Court’s decision.

enshrined in human rights statutes in light of over two decades of experience.

2. The Court's Unanimous Decision

The unanimous Supreme Court judgment, written by Rothstein J., upheld the constitutionality of section 14(1)(b) of the Saskatchewan Code.³³ The decision recognized that, although the wording of the Saskatchewan provision does not precisely mirror the federal provision, the *Taylor* definition of “hatred” has generally been the one applied in cases under Saskatchewan’s Code.³⁴ Indeed, the Saskatchewan Court of Appeal had already effectively read out the portion of the Code that would allow a finding that ridiculing, belittling or otherwise affronting the dignity of a person or class of persons on the basis of a prohibited ground constituted a violation.³⁵ The Court rejected the idea that the *Taylor* definition of hatred is necessarily subjective and overly broad. According to the Court, *Taylor* provides a workable definition as long as it is interpreted with three key rules in mind:

- (1) There must be an objective component to the proper interpretation of hatred, thus making the relevant question whether a reasonable person, aware of the context and circumstances of the case, would view the expression as exposing the protected group to hatred.
- (2) Only the most extreme forms of expression are caught by the term “hatred”.
- (3) The focus in cases under this provision must be on the effect of the expression at issue rather than the offensiveness of the content on its own.³⁶

³³ That section states:

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 ... 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.

³⁴ *Whatcott*, *supra*, note 3, at para. 87.

³⁵ *Owens v. Saskatchewan (Human Rights Commission)*, [2006] S.J. No. 221, 279 Sask. R. 161 (Sask. C.A.) [hereinafter “*Owens*”].

³⁶ *Whatcott*, *supra*, note 3, at paras. 56-58.

The Court accepted that section 14(1)(b) of the Saskatchewan Code violated section 2(b) of the Charter, but concluded that when interpreted in this manner, it is a reasonable limit on freedom of expression. As in *Taylor*, the Court's section 1 analysis accepted that the legislature had a pressing and substantial objective in seeking to curb hateful expression, but the Court arguably reframed that objective slightly in *Whatcott*. The *Taylor* majority talked about two types of harms occasioned by hate speech: the injury done to the feelings and self-esteem of the discrete groups being targeted, and the possibility that hateful messages might operate to convince others that those groups are inferior. In *Whatcott* the Court seems to shift away from the former type of harm, focusing much more on the harm that hate speech may do to society as a whole. Justice Rothstein held that the provision is about more than protecting individuals from humiliation and/or hurt feelings. Rather, he held that hate speech provisions in human rights statutes "aim to eliminate the most extreme type of expression that has the potential to incite or inspire discriminatory treatment against protected groups on the basis of a prohibited ground".³⁷

The goal of hate speech legislation, according to the Court, is to prevent discriminatory treatment. The judgment goes to great lengths to make the point that the focus should be on the likely effects of the expression rather than "the nature of the ideas expressed".³⁸ The judgment even states explicitly that the section does not protect vulnerable groups against expression that debates the merits of reducing their rights, simply expression that might expose them to hatred in the context of such a debate. According to Rothstein J., the section "does not target the ideas, but their mode of expression in public and the effect that this mode of expression may have".³⁹ In addition, the Court states that the assessment of whether a particular instance of expression amounts to hatred is a case-specific inquiry which will depend on context and circumstance.

As had already been done by the Saskatchewan Court of Appeal in *Owens*,⁴⁰ the Supreme Court read out that part of section 14(1)(b) which, in its view, did not rise to the level of extreme hatred. The Court determined that the portion of the provision that refers to expression that "ridicules, belittles or otherwise affronts the dignity of" protected groups

³⁷ *Id.*, at para. 48.

³⁸ *Id.*, at para. 49.

³⁹ *Id.*, at paras. 51-52.

⁴⁰ *Supra*, note 35.

would capture too much. As a result, Rothstein J. held that this part of the provision was not rationally connected to the legislature's goal of addressing systemic discrimination.

In terms of assessing whether section 14(1)(b) is a minimal impairment of freedom of expression, the Court acknowledged that there may be a variety of ways to achieve the legislature's goals, but found that the one chosen in this case was reasonable. The Court considered several of the arguments made by those who argue that the section is overly broad, in particular the concern that there is no intent requirement, there is no requirement for proof of harm, and the section does not provide for any defences (including the defence of truth). It dismissed each of these in turn with a rather brief and perfunctory analysis.⁴¹

Since Mr. Whatcott argued that the views he expressed in his flyers were rooted in his religious beliefs, the Court also had to consider the claim that section 14(1)(b) of the Saskatchewan Code infringes freedom of religion. The Court held that a violation of section 2(a) was established but that, for reasons substantially similar to those with respect to section 2(b), the infringement was justified under section 1.⁴²

Finally, having found that the section withstood constitutional scrutiny, the Court applied it to the facts. The Court concluded that two of Mr. Whatcott's flyers (those relating to homosexuality and the public school system) did promote hatred under the section, while two others did not. Notwithstanding that the Tribunal and courts below had all effectively applied the same standard in assessing whether there was a violation of the Saskatchewan Code, the Supreme Court of Canada's conclusion on the issue was different than the one reached by any of the prior decision-makers.

Conspicuously absent from the decision is a comment by McLachlin C.J.C. about her dissent in *Taylor* and what allowed her to sign on to the unanimous judgment in *Whatcott*, notwithstanding the views she had expressed years earlier. It is unclear whether the Chief Justice simply decided that she had to follow *stare decisis* and that there was nothing significant to distinguish *Taylor* from *Whatcott*, or whether her views had simply changed.

⁴¹ *Whatcott*, *supra*, note 3, at paras. 25-44.

⁴² *Id.*, at paras. 152-164.

IV. DISSECTING THE *WHATCOTT* DECISION

In many ways the *Whatcott* case provided the Court with an opportunity to carefully and thoughtfully consider its approach to freedom of expression, freedom of religion, and equality rights and the role that these fundamental rights have in modern Canadian society. It is evident that hate speech is far from the most important freedom of expression issue in Canada. As discussed earlier, complaints under hate speech provisions of human rights codes are not particularly common and it is even less common for matters to actually proceed to a hearing before a tribunal. The *Criminal Code* prohibition on hate speech, while still on the books, has fallen into disuse. Nevertheless, hate speech laws are in many ways a useful litmus test for assessing how freedom of expression is protected in our society. The real question before the Court in *Whatcott* was how well the hate speech provision in Saskatchewan's Code "fit" with the objective of trying to reduce or eliminate discriminatory treatment.

Since *Taylor*, the Court's approach to freedom of expression has evolved in a number of respects, most notably in the realm of the common law of defamation, which has seen a recalibration of the balance between protection of reputation and freedom of expression.⁴³ In *Grant* and *Cusson*, the Court created a new defence to defamation for responsible communication on matters of public interest. Whereas the Court in these cases demonstrated a willingness to modernize the law of defamation in light of contemporary developments,⁴⁴ the Court in *Whatcott* retreated to the safety of precedent and avoided a serious reconsideration of the hate speech provisions. The Court had the opportunity to consider over 20 years of jurisprudence in this area, as well as a comprehensive report on Internet hate speech prepared by Professor Moon and academic critiques and commentaries addressing many sides of the issue. It also had the chance to consider the revolution in communications technology that has taken place since *Taylor* and that has, in many respects, democratized expression. The Internet creates both increased opportunities for the spread of hateful messages along with a concomitant increase in the

⁴³ See, e.g., *Grant v. Torstar Corp.*, [2009] S.C.J. No. 61, [2009] 3 S.C.R. 640 (S.C.C.) [hereinafter "*Grant*"] and *Quan v. Cusson*, [2009] S.C.J. No. 62, [2009] 3 S.C.R. 712 (S.C.C.) [hereinafter "*Cusson*"].

⁴⁴ Along similar lines, the Court in *Crookes v. Newton*, [2011] S.C.J. No. 47, [2011] 3 S.C.R. 269 (S.C.C.) also took a contemporary approach to considering whether an online hyperlink constituted publication for the purposes of the common law of defamation.

ability of individuals to respond to and counter such messages. Although *Whatcott* is a case about “old-fashioned” expression (*i.e.*, hard-copy print media), it is both surprising and disappointing that the Court chose not to seize the opportunity to undertake a thorough examination of so many of the important issues to which it gives rise.

1. Avoiding the Subjectivity Problem

On the surface, Rothstein J.’s judgment did attempt to recognize and address the criticisms of the *Taylor* definition of “hatred”. He noted that the critiques fall into two main categories of subjectivity and overbreadth. Significantly, these are primarily the same issues raised by McLachlin J.’s dissent in *Taylor*. However, as explored further below, while *Taylor* attempted to address those issues as they existed at the time, the discussion by the Court in *Whatcott* is evasive and unhelpful in remedying some of the problems with the application of hate speech provisions that were apparent after nearly a quarter-century of experience.

Justice Rothstein noted that one common concern about hate speech provisions is that hatred is an emotion and is thus necessarily and inherently subjective. On an intuitive level, this is something that we all know to be true. Hatred is something we feel in our gut; it is strong and often irrational, but it is nothing if not personal. Surely our Supreme Court Justices know this as well. Nevertheless, we are told in the *Whatcott* judgment that this can be fixed, if only we place our focus on the right things, namely the “proper meaning” of the words chosen by the legislature and by applying the provision in light of its objectives.⁴⁵

This suggestion that subjectivity can be avoided or significantly mitigated by focusing on these issues ignores the reality that, despite applying the objective *Taylor* standard, tribunals and courts have frequently come to opposing conclusions on whether particular statements meet the definition of hatred. In many of the cases that have been adjudicated by a tribunal but then appealed to another level, there has been disagreement about whether the expression being challenged ran afoul of the legislation.⁴⁶

⁴⁵ *Whatcott*, *supra*, note 3, at para. 38.

⁴⁶ See, *e.g.*, *Lund v. Boissin*, 2007 AHRC 11, affd [2009] A.J. No. 1345, 17 Alta. L.R. (5th) 256 (Alta. Q.B.), affd [2012] A.J. No. 1036, 69 Alta. L.R. (5th) 272 (Alta. C.A.), where a Human Rights Panel of Alberta found that an op-ed published in a newspaper violated Alberta’s hate speech provision. On appeal, the Court of Queen’s Bench of Alberta and Alberta Court of Appeal

Indeed, in *Whatcott* itself the Tribunal that first heard the complaint found that all of the flyers Mr. Whatcott distributed violated section 14(1)(b). The Saskatchewan Court of Queen's Bench agreed, but the Court of Appeal disagreed and held that none of the flyers breached the Act. Finally, the Supreme Court of Canada found that two flyers violated the law, while two others did not. Each of these decision-makers applied the same "objective" definition of hatred in arriving at a decision, yet each came to different conclusions. This kind of back and forth is expected and even welcome in certain areas of the law as courts seek to give precision to open-ended terms and statutory language. In freedom of expression cases, however, this kind of uncertainty is deeply troubling. Combined with the failure to account for over 20 years of new developments, it raises a realistic concern that there will be a chilling effect on some expression that was not intended to be caught by the legislation. It is one thing to place restrictions on what can and cannot be said when the subjects of these restrictions understand the limits. It is quite another to risk discouraging political and social debates by invoking a standard that even great legal minds are unable to consistently decipher.

Thus, the Court largely ignored the prior experience with the application of the *Taylor* definition and the uncertainty that it can breed when it urged us to consider the "proper meaning of the words chosen by the legislature". The *Taylor* definition of hatred as "unusually strong and deep-felt emotions of detestation, calumny and vilification" certainly makes plain that hate speech is extreme, but it does so by replacing "hatred" with other equally subjective terms, at least one of which — detestation — is simply a synonym for hatred. Synonyms can sometimes be helpful in distilling the true essence of a term, but the synonyms from *Taylor*, used over and over again in hate speech jurisprudence, obviously did not have a particularly clarifying effect. The Court in *Whatcott* did not provide any assistance or guidance in this regard, and in a particularly unhelpful portion of the judgment determined that the term "calumny" was no longer helpful in light of its "general disuse". In fact, the Court's explanation of why this term should be removed may actually further muddy the waters by suggesting that the emotions represented by

disagreed and found no violation. Similarly, in *Owens v. Saskatchewan (Human Rights Commission)*, *supra*, note 35, a Board of Inquiry found a violation of the Saskatchewan Code and this decision was upheld by the Court of Queen's Bench: [2002] S.J. No. 732, 228 Sask. R. 148 (Sask. Q.B.). The Saskatchewan Court of Appeal reversed.

the term “calumny” are neither necessary nor sufficient to find expression hateful.⁴⁷

The Court also ignored some of the experience since *Taylor* when it failed to consider the chilling impact that might be occasioned even if human rights tribunals interpret hate speech provisions appropriately. This was one of the concerns highlighted by the Moon Report and it relates to the investigation process undertaken by human rights commissions as they decide which complaints will ultimately be referred to a tribunal. Individuals may be the subject of complaints to the Commission for expression that is controversial, but does not rise to the level of hate speech under *Taylor*. While they are being investigated, they may very well hesitate to speak out on issues of importance to them for fear of further complaints. A similar impact may be felt on others with similar views. Although the Court did not acknowledge it, inconsistent court and tribunal decisions, combined with the vague definition of hatred, creates a chill that threatens our constitutionally protected freedom of expression.

2. Evading the Harm Problem

Justice Rothstein suggested that we can also help mitigate the subjectivity of “hatred” if we apply the provision in light of its legislative objectives. Hate speech is said to be problematic because of the harm that it causes, not only to those whom it targets, but to society as a whole. As mentioned above, the Court in *Whatcott* placed particular emphasis on the societal harm that hate speech may cause and significantly less emphasis on the more personal effects on those whom it targets. In my view, however, the decision contains two fundamental flaws in the manner in which it addresses the question of harm. First, the approach to evidence of harm is sloppy. This is unfortunate because of the precedent it sets for future cases. Second, the Court fails to grapple with the true nature of the harm that is of concern to the legislature (and the Court) and address whether and how the hate speech provision at issue in *Whatcott* actually responds to this type of harm.

⁴⁷ *Whatcott*, *supra*, note 3, at para. 42.

(a) *The Evidence of Harm*

The first concern about the evidentiary standard is not specific to *Whatcott* or even to hate speech cases generally. Rather, the concern that there is little concrete evidence of the harm that expression actually causes arises in many freedom of expression cases.⁴⁸ There is conflicting social science evidence on the issue of whether or how hate speech contributes to discrimination, pornography to patriarchy and violence against women, and depictions of violence to a more violent society. It is difficult, if not impossible, to isolate expression as the sole or even a major contributing cause of some of society's biggest problems. Notwithstanding the conflicting evidence, few people would take issue with the notion that hate speech does do at least some harm to at least some people. It is hard to read material that compares your ethnic group to vermin or describes you as "sub-human" without being hurt. One need not be the target of the hateful expression to feel truly offended, disturbed and disgusted by these kinds of messages.

The discussion of harm in *Whatcott* does recognize, at least to a certain extent, that the Court is not really requiring evidence of any harm at all in many cases where freedom of expression is implicated. Justice Rothstein points out that the "reasonable apprehension of harm" standard has been used in a variety of freedom of expression contexts where the nature of the expression at issue is said to result in harm but where a causal link cannot truly be proven. The Court is aware of the many critiques of this approach and does attempt to respond. For the Court, however, requiring a clear causal link between expression and harm "ignores the particularly insidious nature of hate speech. *The end goal of hate speech is to shift the environment from one where harm against vulnerable people is not tolerated to one where hate speech has created a place where this is either accepted or a blind eye is turned.*"⁴⁹

With respect to the Court, this explanation is inadequate. The Court's strong emphasis on the *effects* of hate speech is paradoxically paired with a brief and shoddy approach to the evidence of those effects. Indeed, the Court's reliance on evidence to support the notion that hateful messages translate into discriminatory actions is summed up briefly as follows: "As was clear from *Taylor*, and reaffirmed through the evidence

⁴⁸ For a helpful discussion of this issue, see, e.g., J. Cameron, "A Reflection on Section 2(b)'s Quixotic Journey, 1982-2012" (2012) 58 S.C.L.R. (2d) 163.

⁴⁹ *Whatcott*, *supra*, note 3, at paras. 130-131 (emphasis added).

submitted by interveners in this appeal, the discriminatory effects of hate speech are part of the everyday knowledge and experience of Canadians.”⁵⁰ There is no discussion of what this evidence was — whether it involved testimonies from individuals, expert reports, social science research. If the Court is taking judicial notice of harm, this should be made explicit. If there is evidence that goes to establishing a reasonable apprehension of harm, it should be outlined and referenced. In fact, the Court refers to the “evidence submitted by interveners” even though interveners are not permitted to adduce evidence. Perhaps this refers to secondary sources cited in argument, but this is not made plain. Even if we are willing to accept a lower evidentiary standard in hate speech cases, the Court’s *laissez-faire* approach to the evidence in *Whatcott* sets a troubling precedent for all cases where the Court has supported a more deferential approach to legislatures.

(b) The Type of Harm

The second flaw in the Court’s approach to harm is that the decision fails to really address the nature of the harm targeted by the legislation and engage with whether or not it is truly responsive to this type of harm. In my view, the hateful and disturbing expression caught by the *Taylor* standard appeals to a particular, and narrow, audience. It is so extreme that those most susceptible to it are those who already share the views being expressed. The type of expression that is much more likely to “shift the environment” in the manner envisioned by Rothstein J. is much tamer than the kind of expression that contains many of the “hallmarks of hatred”. There is a strong argument that the shifting of attitudes is more likely to be effected by subtle expressions of disapproval or concern about a group than by explicit, hateful diatribes directed at them. Contrary to the Court’s assertions that expression that “ridicules and belittles” a group is not rationally connected to the legislature’s goals, it is the cartoon that pokes fun at cultural stereotypes or the op-ed on the “dangers” of immigration from developing countries that may have the most significant impact on stereotyping and discrimination in everyday life. As the majority recognized in *Taylor*, “systemic discrimination is much more widespread in our society than is intentional discrimination”.⁵¹

⁵⁰ *Id.*, at para. 135.

⁵¹ *Taylor*, *supra*, note 4, at 931.

The more subtle forms of discriminatory speech are the analogue to systemic discrimination. True hate speech, like intentional discrimination, is much less widespread and may be ultimately less subversive in its effects.

Professor Moon's Report argues that protecting vulnerable individuals from discrimination requires a liberal interpretive approach to human rights provisions so that substantive equality can be achieved and so that systemic discrimination can be tackled. At the same time, robust protection for freedom of expression mandates a narrow definition of "hatred" so that only the most extreme forms of expression are caught by the provision. Some might contend that this simply means the provisions do not go far enough, and that we should either try to capture all of it or at least settle for capturing the worst of it to help mitigate or avoid *some* of the harms caused by this type of expression. My contention is different. I suggest that the messages that are excluded from the strict interpretation of hate speech provisions are far more likely to impinge upon the rights of vulnerable groups than what is included. This contradiction is highlighted when the Court explains that it is not the offensive ideas that the provision prohibits, simply the mode of expression and the effect that it *may* have.⁵²

The Court's failure to examine this issue in detail is troubling in light of its repeated reminders that it is not the content of the expression that the provision is concerned with, but primarily its effect. One of the rationales underlying the Court's decision is the notion that hate speech seeks to "silence" those it targets and therefore undermines the purposes of freedom of expression. This argument is stated in conclusory terms and is not, in my view, convincing.⁵³ The most extreme forms of speech caught by the Court's interpretation — and containing the hallmarks of hatred — are not the kinds of speech most individuals generally take seriously. The idea that minority groups are regularly forced to argue for their own basic humanity gives far too much credit to those who espouse hatred and insufficient credit to those who abhor it and who regularly seek to promote equality and curb discrimination. It also devalues the role of counter-speech as a powerful weapon against hate speech and

⁵² *Whatcott*, *supra*, note 3, at para. 51 (emphasis added).

⁵³ The Court states at para. 75: "[A] particularly insidious aspect of hate speech is that it acts to cut off any path of reply by the group under attack. It does this not only by attempting to marginalize the group so that their reply will be ignored: it also forces the group to argue for their basic humanity or social standing, as a precondition to participating in the deliberative aspects of our democracy."

ignores the reality that it is not only targeted minorities who speak out for their rights; many others also speak out in support.⁵⁴

3. A Missed Opportunity to Reconcile Rights

A final problem with the Court's unanimous decision in *Whatcott* is that it fails to attempt to reconcile the competing rights at issue in the case. The Court finds that hate speech "is at some distance from the spirit of s. 2(b) because it does little to promote, and can in fact impede, the values underlying freedom of expression".⁵⁵ As a result of this lowered status, there is hardly a need to reconcile freedom of expression with the right to equality and the rigorous standards that should be applied to constitutional violations are eroded. The finding that the value of the speech is a relevant factor in assessing claims of rights violations also sends us down a dangerous path. In particular, while the Court has always affirmed a broad ambit for the expression that is protected by section 2(b) and left justifications to section 1, the lack of rigour in the Court's justification analysis in *Whatcott* suggests that this is not how things are operating in practice. Given the reality that prohibiting hate speech arguably has a very minimal impact on improving the rights of minority groups and/or eradicating discrimination, this approach is disappointing.

V. MOVING FORWARD: THE NEXT 20 YEARS AND SEIZING OPPORTUNITIES

I have argued that the Supreme Court in *Whatcott* missed an important opportunity to reconcile competing rights, address the critiques of the *Taylor* standard, and consider the experience with over 20 years of human rights adjudication on the question of hate speech. In my view, the Court did not do the hard work required to really address the subjectivity problem that has plagued those deciding hate speech cases since *Taylor*. The Court also put significant emphasis on the harmful effects of

⁵⁴ For some recent examples of powerful counter-speech in the United States, see Noah Michelson & Carol Hartsell, "Westboro Equality House: Aaron Jackson Paints Rainbow Home Across from Anti-Gay Church", *Huffington Post* (March 19, 2013), online: <http://www.huffingtonpost.com/2013/03/19/westboro-equality-house-aaron-jackson-rainbow_n_2906337.html> and John Masson, "Anti-gay Kansas church spurs First Amendment talk" (August 16, 2012), online: University of Michigan Law School <http://www.law.umich.edu/newsandinfo/features/Pages/westboro_niehoff.aspx>.

⁵⁵ *Whatcott*, *supra*, note 3, at para. 114.

hate speech but then avoided the question of the evidentiary standard required to establish harm and evaded a thorough exploration of the type of harm being addressed. It is not easy to adequately reconcile the competing interests of freedom of expression, freedom of religion and equality, so the Court evaded the issue by labelling hate speech a form of expression that is less valuable and thus less worthy of protection. Taking this easy way out deprived us of a thoughtful discussion on how to approach the problem of hate speech and the goal of achieving equality. It also sidestepped the difficult questions surrounding how to address situations when sincerely held religious beliefs may be the source of discriminatory expression and/or treatment directed at certain groups.

It remains to be seen what the next 20 years has in store for hate speech laws. While the *Whatcott* decision was rendered in 2013, the flyers at the centre of the case were circulated in 2001 and 2002. Today, hate messages can be spread around the world via micro-blogging sites and social networks. Mr. Whatcott himself is now on Twitter and, notwithstanding the Supreme Court's judgment, he continues to spread his messages, perhaps to an even wider audience. The Court's decision is certainly not the last word on hate speech, but it may be the last judicial word for at least a few years. Those who share the view that hate speech laws are bad policy may need to look for other means of eliminating them. As mentioned above, in September 2011, a Private Member's Bill repealing the CHRA's hate speech provision was proposed in the House of Commons.⁵⁶ Despite debate and strong expressions of concern from a number of Members of Parliament and Senators, the bill ultimately passed. In my view, repealing section 13, and other provisions like it, is good public policy. Although intended to protect vulnerable minorities, cases under hate speech provisions use up the valuable and scarce resources of human rights commissions and tribunals which should be used to directly combat discrimination and engage in counter-speech when hateful messages are spread around. Further, pursuing a hate speech complaint before a tribunal and subsequent reviewing courts has a perverse effect on the spread of hateful messages. While Mr. Whatcott began with distributing flyers in Saskatoon and Regina, he received national attention not only for his case but also for the messages that lay at its core. His flyers are appended to a Supreme Court of Canada judgment and thus readily available for everyone to read.

⁵⁶ Bill C-304, *supra*, note 29.

Pursuing Mr. Whatcott under Saskatchewan's Code made him a martyr for freedom of expression and his loss at the Supreme Court only further emboldened him. This is not good for freedom of expression and it is not good for equality. The Supreme Court missed an opportunity to address this issue, but there will be other opportunities that will, hopefully, be seized. The real concern arising out of *Whatcott* is the impact that its analysis may have in other freedom of expression cases.

The conflict between freedom of expression and the fight for equality is likely to continue, if not intensify, and the Court must give due consideration to how these constitutionally protected rights can be reconciled and promoted. A number of cases have come up in recent years where Canadian courts are asked to protect religious freedom at the expense of the equality rights of the LGBTQ community. In other cases the courts are asked to stop discrimination in a manner that arguably infringes freedom of religion. Although these cases are often about more than religious expression, the analysis in *Whatcott* may prove to be persuasive in these cases as well. The Court's harm analysis — or its failure to truly analyze the question of harm — is part of a disturbing trend. Moreover, the outcome in *Whatcott* and the upholding of the hate speech provision in the Saskatchewan Code should not make us complacent about the protection of minorities and the goal of achieving substantive equality for disadvantaged groups. Even if we accept the Court's conclusion that these laws do help weed out discrimination, there is much work to be done. Those who advocate for freedom of expression also have a responsibility to speak out against hateful expression and counter it. This approach, which requires direct action by individuals and allows for flexibility to address a variety of modes of communication, may ultimately prove more effective than any piece of legislation in silencing or, at least, isolating, those who preach hate.

