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THE PROTECTION OF FREEDOM OF EXPRESSION IS NOT JUST THE RESPONSIBILITY OF THE COURTS

It has often been said that the price of freedom is eternal vigilance. In *Saskatchewan Human Rights Commission v. Whatcott*, 2013 SCC 11, the Supreme Court of Canada made it very clear vigilance is the responsibility of both the courts and the legislatures.

In the *Whatcott* appeal, the Supreme Court reviewed the following provisions found in Section 14 of the Saskatchewan Human Rights Code ("Code"):

> Prohibitions against publications
>
> 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:
>
> (a) tending or likely to tend to deprive, abridge or otherwise restrict the enjoyment by any person or class of persons, on the basis of a prohibited ground, of any right to which that person or class of persons is entitled under law; or
>
> (b) that exposes or tends to expose to hatred, ridicules, belittles or otherwise affronts the dignity of any person or class of persons on the basis of a prohibited ground.
>
> (2) Nothing in subsection (1) restricts the right to freedom of expression under the law upon any subject.

The first thing to note about section 14 is subsection 14(2). That subsection requires a decision maker to apply the limitations in subsection 14(1) in a manner that does not restrict "the right to freedom of expression under the law upon any subject." Justice Rothstein, on behalf of a unanimous Supreme Court, wrote that "the Saskatchewan legislature recognized the importance of freedom of expression through its enactment of s.14(2) of the Code." At paragraph 110. In the process of pursuing the pressing and substantial objective of reducing hatred, the legislature expressly provided that it would not sacrifice freedom of expression in pursuing that goal.

The second thing to note about Section 14 is that it purports to prohibit a statement that "ridicules, belittles or otherwise affronts the dignity of any person or class of persons." Justice Rothstein wasted little time in striking down those words as limiting freedom of expression in a manner that is not justified in a free and democratic society:

> Expression criticizing or creating humour at the expense of others can be derogatory to the extent of being repugnant. Representations belittling a minority groups or attacking its dignity through jokes, ridicule or insults may be hurtful and offensive. However … offensive ideas are not sufficient to ground a justification for infringing on freedom of expression.

At paragraph 90. See also paragraph 164.

Finally, it is important to note that section 14 is a legislative response to the problem of discrimination. Hatred is only addressed because it may lead to discrimination against an identifiable group protected by the Code. Furthermore, thoughts, belief and opinion are not limited. The only limitation in section 14(1)(b) of the Code is on a "representation … that exposes or tends to expose to hatred." Justice Rothstein went to great length to make it clear that he did not read this section of the Code to limit "genuine comments" on sexual activity. See paragraph 177.

Justice Rothstein ultimately found that some of Mr. Whatcott's publications promoted hatred and some did not. At paragraphs 193 and 194.

The most important part of Justice Rothstein's decision is found in the middle of his reasons, at paragraphs 101 to 106. In those paragraphs, Justice Rothstein applied the minimal impairment test to the impugned section of the Code. In so doing, he first recognized that "[i]t is the role of the legislature to choose among competing policy options." At paragraph 101.

Justice Rothstein identified three alternatives for the legislative bodies in Canada as they pursue the goal of eradicating discrimination caused by hate speech:

> 1. No regulation, leaving the issue to be addressed through the "marketplace of ideas";
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> 2. Criminal Code prohibition applicable to only the most harmful of hate speech activities;
>
> 3. Civil regulation through human rights laws focussed on the effect of hate speech activities, with no consideration of the intent or the nature of the speech.

See paragraphs 102 through 105.

Justice Rothstein ultimately concluded that no alternative was superior to another from a Charter perspective:

> Having canvassed the proposed alternatives to the civil remedy, I cannot say that any one represents such a superior approach as to render the others unreasonable.

At paragraph 106. He also said this about leaving the issue unregulated:

> I do not say that the marketplace of ideas may not be a reasonable alternative, and where a legislature is so minded, it will not enact hate speech legislation.

At paragraph 104.

The Supreme Court of Canada has placed the policy decision regarding freedom of expression and hate speech firmly in the hands of legislators. Law makers must decide for themselves how to best achieve the joint goals of preserving freedom of expression and freedom from discrimination. In particular, the Supreme Court of Canada has expressly approved the following approaches:

1. no legislation – the "marketplace of ideas";
2. criminal law prohibitions;
3. human rights regulations.

None are pronounced superior and all are approved as not unreasonable in a free and democratic society.

The House of Commons has decided to leave the issue to the "marketplace of ideas", except where the hate speech rises to the level of a crime under the Criminal Code. The Senate is expected to vote on the question later in 2013. Justice Rothstein has written a decision that should lead Senators to follow their own mind on the best way to address the issue of hate speech in Canadian society. According to Justice Rothstein, regardless of what they are "minded" to do, the Senator's decision will be "within the range of reasonable alternatives that" are "available to" a "legislature". At paragraph 106.