Whatcott v. Saskatchewan Human Rights Commission

Canadian Journalists for Free Expression (CJFE) Board Editorial

ANY LIMITATIONS ON OUR FREEDOM TO SPEAK INVOLVE FUNDAMENTAL principles and excite debate; two subjects in particular are sure to rouse those passions. The first is whether and how the fundamental freedom of expression is to be balanced with the protection of racial and other groups from discriminatory or hateful speech. The second is the legitimacy of human rights tribunals to prohibit or punish the press or other media for the content they choose to publish.

Both of these important issues are currently before the Supreme Court of Canada in the case of Whatcott v. Saskatchewan Human Rights Commission. This is why the CJFE Board will seek leave to intervene and make arguments to the Court. We do this despite the fact that CJFE does not support Bill Whatcott, nor his views, which, as an organization dedicated to human rights, we find erroneous and disturbing. Nevertheless, his case presents free speech advocates with an important opportunity to clarify the strength of our protections.

Bill Whatcott is a Christian activist who claims a religious obligation to speak out about his perception of the "evils" of same-sex sexual relations and to oppose the teaching of these subjects in schools and universities. He acknowledged that he published flyers, which certainly contained extreme, polemical and confrontational messages, including statements claiming homosexuals are "perverted" and "sodomites," and alleging that the consequences of same-sex sexual relations are "disease, death, abuse and ultimately eternal judgment" and "early death and morbidity of many children." Complaints were made against Whatcott under Section 14(1)(b) of the *Saskatchewan Human Rights Code*, which broadly prohibits publication in any form of any material

> …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.

The complaints were heard by the Saskatchewan Human Rights Tribunal, which found that Whatcott's publications violated Section 14(1)(b). On his appeal, a single judge of the Court of Queen's Bench for Saskatchewan agreed. Both the Tribunal and the Court found that Whatcott's flyers met the current legal "test" for hate speech, which was laid down by the Supreme Court in 1990 in Canada (Human Rights Commission) v. Taylor. That case had established that as long as the speech in issue met that test, a human rights code provision would be justified in sanctioning and prohibiting it. As a result, the Tribunal and the Court of Queen's Bench held they did not need to consider further whether the application of Section 14(1)(b) to prohibit or sanction his conduct would infringe the constitutional guarantee of freedom of expression in Section 2(b) of the *Canadian Charter of Rights and Freedoms*.

However, on further appeal by Whatcott, a three-judge panel of the Court of Appeal for Saskatchewan, applying the very same legal test, came to the opposite conclusion. The Court of Appeal held that since Whatcott's publications did not meet the Taylor test, he had not infringed Section 14(1)(b) of the *Saskatchewan Code*. As a result, the Court of Appeal also did not need to consider whether Section 14(1)(b) is a valid limit on free expression.

I do not agree with what you have to say, but I'll defend to the death your right to say it.

— VOLTAIRE

This is not the first case to highlight the inconsistent results obtained when applying the Taylor test. Our review of the case law from various tribunals and courts since 1990 shows the decisions are fact-specific and unpredictable.

On its facts, Taylor itself was a comparatively straightforward case of hate speech. John Ross Taylor distributed cards advertising a telephone service that, when contacted, played recorded messages that were blatantly anti-Semitic. He did not claim any particular religious mission or purpose in doing so, nor did he seek to engage any broader discussion of public policy. The *Canadian Human Rights Code*, Section 13(1), was considerably narrower than the Saskatchewan provision, and simply prohibited publishing "any matter that is likely to expose a person or persons to hatred or contempt" by reason of race, religion or other ground of discrimination.

Nevertheless, the Supreme Court's decision was badly divided. A bare majority of four judges to three upheld the validity of the

PORTRAIT OF VOLTAIRE BY CATHERINE LUSURIER

provision, by reading into it a qualifying "test." The majority held that the free expression guarantee in Section 2(b) of the *Charter* would only be satisfied by requiring that, before anyone is found to have infringed the prohibition, their message must display

> …extreme ill-will and an emotion which allows for no "redeeming qualities" in the person to whom it is directed, … [or] unusually strong and deep-felt emotions of detestation, calumny and vilification.

This is the Taylor test that has produced such inconsistent and unpredictable results in the lower courts and tribunals, in Whatcott and other cases. Given the language of the test, this is hardly surprising. We suggest that the language in Taylor is inherently subjective and open to interpretation. What one person, tribunal member or judge considers "extreme" or "unusual" in any given context may be, and obviously is, very different from another. The vague and amorphous definition of prohibited speech has a chilling effect on the media and the public at large. Will a journalist reporting the facts of the debated communication be vulnerable to censorship or complaint? Is a parent, teacher or same-sex advocate liable merely because he or she tried to discuss, let alone protest, the message? Will the media's recital of the controversial campaign and its message—the news itself—constitute a publication of hate speech, and attract a complaint under the *Code*? And what of opinion writers, editorialists and columnists who want to explore the boundaries of the debate—will they risk being hauled before a tribunal? If the courts have not agreed on these rules, newsrooms cannot, either. The result, of course, is a chill on free expression, striking at the very heart of our ability—and need, in a democratic society—to explore controversial matters. After all, free speech requires little protection when there is broad consensus; it is precisely when there is dispute and controversy that strong protections are required. CJFE, for example, rejects and deplores Whatcott's misguided opinions about same-sex relations, but our freedom to do so is related to his freedom to speak,

The vague and amorphous definition of prohibited speech has a chilling effect on the media and the public at large.

however wrongly. The best response to offensive speech is not less speech but more speech. It is in this open arena that truth can triumph over ignorance.

The Whatcott case also illustrates other serious harms created by the vagueness of the Taylor test. For example, it seems fairly obvious that Section 14(1)(b) of the *Saskatchewan Human Rights Code* on its face is overly broad and invalid, even by the Taylor standard, to the extent that it purports to prohibit speech that is not hateful but nevertheless "ridicules, belittles or otherwise affronts the dignity of any person or class of persons." Yet, as noted above, neither the Tribunal and the Court of Queen's Bench that found the Taylor test was met, nor the Court of Appeal that found it was not, need to go on to consider the validity of these words in Section 14(1)(b). The Tribunal and the Court find Whatcott guilty of breaching the valid aspects of Section 14(1)(b), and the Court of Appeal finding the opposite, simply dismisses this particular complaint. So the words remain on the statute books, as supposedly valid

The best response to offensive speech is not less speech but more speech. It is in this open arena that truth can triumph over ignorance.

limits on the freedom of any of us to express ourselves, or to refute the messages of our opponents. Consider, for instance, the puzzling censorship required to avoid language that ridicules, belittles or "otherwise affronts the dignity" of anyone of any class. Again, the result surely is a potentially sweeping and unjustifiable stranglehold on legitimate, non-hateful speech.

At a more practical level, the fact that this type of complaint can be pursued privately, before a tribunal with the power to award costs and damages, creates even more problems. A large number of hate speech complaints across Canada have been pursued by a single individual. The appearance created is unfortunate: that a personal sensitivity, zeal or agenda, rather than the public interest, may be driving some of these prosecutions. This only further undermines the legitimacy of such a limit on the fundamental freedom of expression.

In our view, if the prohibition and prosecution of hate speech is ever legitimate, it can only be in the context of Section 319 and related provisions of the *Canadian Criminal Code*. In that context, the prosecution is carried in the public interest by an independent Crown counsel, with no potential secondary gain through an award of costs or damages. The person accused enjoys the presumption of innocence and other procedural safeguards appropriate to a public prosecution. The prosecution must prove criminal intent beyond a reasonable doubt. Altogether, this ensures the entire proceeding is focused on the alleged harm caused by the speech in issue to the broader public interest.

The Supreme Court's decision to grant leave to appeal in Whatcott offers a unique opportunity to make these important arguments before the Court. In deciding to seek leave to intervene, the CJFE Board will not address the various assertions of freedom of religion or morality that engage other parties. In our view, as interesting as those issues are, they are inherently matters open to differing views in an ongoing public debate. CJFE will focus only on the freedom of expression, and the effects of this legislation on reporting in the public interest.