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Canada Update: A Case Involving Limitations on Free Speech; the Articling Problem and Proposed Solution; A Summary of Legislative and Upcoming Regulatory Changes: Hydrofracking, Wiretapping, and Self-Defense

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CANADA UPDATE: A CASE INVOLVING LIMITATIONS ON FREE SPEECH; THE ARTICLING PROBLEM AND PROPOSED SOLUTION; A SUMMARY OF LEGISLATIVE AND UPCOMING REGULATORY CHANGES: HYDROFRACKING, WIRETAPPING, AND SELF-DEFENSE

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THIS article begins with a brief summary and analysis of a recent decision by the Supreme Court of Canada. The case involved the constitutionality of a statute prohibiting hate speech. Next, this article takes a look at an increasing problem that recent law graduates face: securing an articling position. Then, three recently proposed changes to legislation and regulation are given a brief overview.

I. SASKATCHEWAN (HUMAN RIGHTS COMMISSION) V. WHATCOTT: A SUMMARY AND ANALYSIS OF THE LIMITATIONS ON FREE SPEECH

In February of 2013, the Supreme Court of Canada rendered an opinion that addressed the limits of free speech. Saskatchewan passed a statute that prohibited, in pertinent part, any person to "publish or display, or cause or permit to be published or displayed . . . any 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."[1] The only questions before the Court were: whether the statute was constitutional and, if so, whether the application of the statute was correct.[2] Like so many questions of constitutional law, the

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1. Saskatchewan (Human Rights Commission) v. Whatcott, 2013 SCC 11, para. 12 (Can.).
2. *Id.* para. 5.

issue was not whether this violated the defendant's right of expression or free speech, but whether the limitation was reasonable.

A. Facts

The case began when Mr. Whatcott distributed four different kinds of flyers. All of the flyers shared a similar theme, which centered on condemning homosexuality and arguing to keep homosexuals away from public schools and children.[3] The Saskatchewan Human Rights Tribunal found the defendant in violation of this statute and fined him $17,500.[4]

The framework the Court relied on in analyzing this statute is found in *Canada (Human Rights Commission) v. Taylor*, a case from 1990.[5] While this case involved the limits that may be placed on the freedom of speech as well as the freedom of religion, this paper will primarily address the portions concerning free speech; the analysis is similar for both questions.

1. The Definition of "Hatred"

One of key factors in determining the constitutionality of this statute is the meaning of the word "hatred." While this could be considered a vague or undeterminable standard, there must be some point of reference for the definition and Canadian jurisprudence has not had much difficulty coming up with an objective test.

Since 1990, when *Taylor* was decided, there have been a number of cases interpreting the word "hatred" as it appears in human rights legislation. These cases have interpreted the definition of "hatred," as set out by *Taylor*, to be something more than a "merely offensive or hurtful expression."[6] Generally, only "extreme and egregious" statements have been categorized as hate speech. Indeed, the purpose of the legislation making hate speech a punishable offense is not to end hatred, but to end extreme types of expression that have "a potential to incite or inspire discriminatory treatment against protected groups on the basis of a prohibited ground."[7] The focus of the inquiry is on whether the speech in question would be the precipitating factor in the discrimination or harm of those to whom the speech is directed.[8] Only if the answer is yes should the speech be considered hate speech. Now that the limitation is defined, the question of whether this limitation is constitutional can be addressed.

B. The Constitutional Standard of Review

1. The Pressing and Substantial Need Analysis

To justify the limiting of this right, the first question the Court asks is

3. *Id.* app. B.
4. *Id.* para. 11.
5. *Id.* paras. 20-46.
6. *Id.* para. 46.
7. *Id.* para. 48.
8. *See id.* paras. 54, 58.

whether the need is pressing and substantial.[9] Often some amount of deference is given to the legislature in responding to this question.[10] But here, where the right involved is enumerated, the Court closely scrutinized this statute to ensure it was indeed rational connected to a pressing and substantial need.[11] When viewed through the lens of the preceding paragraph, with an understanding of what "hatred" is interpreted to mean, this answer should be clear. If what the Court is talking about is words that are so egregious that they act as a catalyst for attacks ranging from discrimination to genocide, then the need probably is pressing and substantial. This is not a matter of hurting someone's feelings, but rather a question of whether the very real possibility of causing another physical or economic harm justifies limiting another person's freedom of expression.

In this case, the Court also explains that when hate speech has the effect of cutting off a particular group from participating in the political process this is also an injury that justifies limiting free expression.[12] While this may not appear as devastating as physical injury, the reality is that when this occurs the ostracized group has effectively been stripped of its fundamental right to free speech. And it seems rather disingenuous to argue that one's fundamental rights should not be limited in circumstances where, if left unbridled, it would trample on the fundamental rights of another.

2. The Proportionality Analysis

The next question, proportionality, involves three parts: (1) whether the means are rationally connected to the end, (2) whether the limit causes minimal impairment of the right, and (3) whether the benefit of the statute outweighs the limitation.

The Court concluded that while there is a rational basis for prohibiting speech that could reasonable cause harm to another, there is no rational basis for prohibiting speech that "ridicules, belittles or otherwise affronts the dignity of any person or class of persons."[13] Accordingly, the Court struck this language from the statute and held it was unconstitutional.

Then the Court, in a very detailed analysis, examined whether the statute was minimally invasive.[14] While there is not room here to discuss each point, the conclusion was simple: after the portion the Court struck as unconstitutional was removed, what remained was a minimally invasive way to attack the problem of speech that could effectuate actual harm on another.[15]

The last portion of the proportionality analysis is whether the benefit

9. *Id.* paras. 68-69.
10. *Id.* para. 78.
11. *Id.* paras. 79-100.
12. *Id.* para. 75.
13. *Id.* paras. 12, 99.
14. *Id.* paras. 101-146.
15. *Id.* paras. 145-146.

outweighs the effect this statute has on limiting freedom of expression.[16] Here the main question is whether this will have a chilling effect on the freedom of expression.[17] The Court held that the benefit did outweigh the detriment. If the enforcement of the statute was not so tapered, perhaps the Court may have been more hesitant in making this determination. But if one is found in violation, there is no possibility of jail, the instances of fines are rare, there are no punitive damages allowed, and there are mechanisms in place to allow for mediation and settlement.

C. The Ruling

The Court partially affirmed the findings of the Saskatchewan Human Rights Tribunal, but the approach the Court took was markedly different from the Tribunal's approach. The Court followed the framework of *Taylor* and really only took issue with the flyers that objectively met this definition of hate speech.

The flyers that the Court determined were in violation of the statute did more than simply preach against homosexuality; they did more than say homosexuality should be illegal. The flyers that the Court took issue with portrayed homosexuals as an inferior untrustworthy pedophiliac menace bent on the corruption and exploitation of children.

D. Conclusion

Unfortunately, the line between free speech and hate speech is still somewhat blurred. This confusion is the direct result of the Court's definition of hate speech. Because it is defined as speech that could be reasonably considered to harm another, there is an inherently subjective component to making this determination. Without any evidence of actual harm, the test can never be truly objective.

Perhaps the Court believed that these flyers would clearly cause harm. That here, the homosexuals in this area faced an uphill battle as a result of some of these flyers. Had the defendant merely preached that homosexuality was morally wrong, such action would probably not have risen to the level of hate speech. But, because the defendant's flyers were rooted in notions that all homosexuals are pedophiles and all homosexuals seek to corrupt children, the Court thought that his speech did rise to a level where, from an objective point of view, it could reasonably lead to the discrimination and harm of another person.

Unquestionably, the genocides that took place over history—that still take place in some parts of the world today—are built on a foundation of hateful rhetoric that can be traced directly from the harmful act back to the inciting statements. And while the Court took great care to explain that statements which lead to this result are objectively different from statements that merely cause hurt feelings, perhaps the test for making

16. *Id.* para. 147.
17. *Id.* para. 149.

this determination should be more precisely defined to prevent an unreasonable limitation from being placed on free speech.

II. ONTARIO'S ARTICLING PROBLEM AND THE LAW SOCIETY OF UPPER CANADA'S PROPOSED SOLUTION

Since the global recession began, lawyers all over the world have had to deal with a more limited job market. In Canada, specifically Ontario, the two-tiered system of legal education may be effectively translating this limited job market into a barrier to licensure. This section will first outline the history and structure of legal education, examine the solution adopted by the Law Society of Upper Canada, and conclude by considering the implications of this proposal and the alternatives.

A. LEGAL EDUCATION: LAW SCHOOL AND THE ARTICLING REQUIREMENT

The current model for legal education in Ontario emerged in 1957.[18] It was a compromise to end several years of conflict between the Law Society of Upper Canada and the Ontario professoriate.[19] The conflict was fueled by competing views on how legal education should be modeled.[20] On one side the thought was that law schools should teach legal theory in an academic manner, that they should be teaching students under a system of liberal education. On the other, the Law Society advocated for a model focused on the occupational aspects of being a lawyer and teaching students what was practically necessary to actually practice law.

The compromise of 1957 split legal education into two parts; law schools were free to regulate their own curriculum, and the Law Society had the power to admit students into its articling program and Bar Admission Course.[21] Both components were necessary to be admitted into practice, and both law school and an articling position remain as requirements to be admitted to practice. The effect of dividing legal education into two components created an environment during law school largely premised on academics, where students are primarily taught legal theory rather than the practice of law. The post-graduate articling program is a ten-month period where the recent graduate is, in theory, trained and mentored in the practice of law.[22]

Since 2008, there has been an increasing shortage of articling posi-

18. H.W. ARTHURS, THE TREE OF KNOWLEDEGE/THE AXE OF POWER: GERALD LE DAIN AND THE TRANSFORMATION OF CANADIAN LEGAL EDUCATION, Osgoode CLPE Research Paper 25/2012, at 3.
19. *Id.*
20. *Id.* at 7.
21. *Id.* at 3.
22. *Articling Program: What You Need to Know*, L. SOC'Y OF UPPER CAN. (May 2012), http://www.lsuc.on.ca/ArticlingNeedtoKnowInfo/.

tions.[23] This is partly due to the nature of the arrangement; a student applies to articling principles that have been approved by the Law Society and hopefully finds a spot.[24] Then for ten months the graduate is under the supervision of an articling principle, a practicing attorney that is basically a volunteer.[25] The positions are generally paid, and can sometimes lead to permanent employment.

B. The Growing Shortage of Articling Positions and the Law Society's Response

Of the graduates in 2008, about 5.8 percent were unable to be placed in articling positions.[26] This percentage has been steadily rising; by 2012, the number of graduates unable to be placed was about 15 percent.[27] In May 2011, the Law Society began responding to this by establishing an Articling Task Force to investigate and recommend a solution.[28]

On October 25, 2012, the task force presented its report.[29] On November 22, 2012, the Convocation approved a pilot program that offers an alternative to articling.[30] The program, referred to as the "pathways pilot program," is a Law Practice Program that offers an alternative to articling.[31] This alternative is to be established and conducted by a third-party provider.[32]

The Practice Program will primarily consist of two parts. The first part is a "simulated experimental component" that will last for about four months.[33] The curriculum of this first part is still undetermined. The Law Society has called for proposals by providers that are due on May 31, 2013.[34] The decisions on what curriculum to choose and whether to have a single or multiple number of providers will presumably be made shortly after these are received; the pilot program is scheduled to start in the 2014-15 licensing year.[35]

The second part of this program is a work placement requirement that should last for about four months.[36] The work placement is basically an

23. *Articling Task Force Final Report*, L. Soc'y of Upper Can. (Oct. 25, 2012), http://www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147489848, at 2.
24. *Articling Program: What You Need to Know*, *supra* note 22.
25. *The Articling Task Force Consultation Report, for the Record*, L. Soc'y of Upper Can. (Dec. 22, 2011), http://www.lsuc.on.ca/with.aspx?id=2147486425&langtype=1033.
26. *Articling Task Force Final Report*, *supra* note 23, at 13.
27. *Id.*
28. *Id.* at 2.
29. *Articling Task Force*, L. Soc'y of Upper Can., http://www.lsuc.on.ca/articling-task-force/ (last visited May 20, 2013).
30. *Id.*
31. *Pathways to Lawyer Licensing*, L. Soc'y of Upper Can., http://www.lsuc.on.ca/with.aspx?id=2147491507 (last visited May 20, 2013).
32. *Articling Task Force Final Report*, *supra* note 23, at 55.
33. *Articling Task Force Final Report*, *supra* note 23, at 57.
34. *Law Society Calls for Proposals for New Law Practice Program*, L. Soc'y of Upper Can., http://www.lsuc.on.ca/LPP/ (last visited May 20, 2013).
35. *Id.*
36. *Articling Task Force Final Report*, *supra* note 23, at 57.

internship, which may be unpaid, that will allow the graduates access to positions not traditional available as articling placements; these include sole or small practice firms and nonprofit venues.[37]

C. Other Alternatives to Address the Shortage of Articling Positions and the Crux of the Problem

There is clearly a problem occurring, as the articling bottleneck indicates, but the question remaining is: whether the shortage of articling positions indicates a problem with the current articling requirement, or whether this is merely a symptom of a much larger issue. While the proposed alternative to articling may be a solution to the shortage of articling positions, it very well may cause other problems. The articling requirement has for several decades remained mostly unchanged, what has changed is the job market and the way legal services are being offered.

One thing that has changed, that may be a significant factor in causing a shortage of articling positions, is the gradual increase in students being admitted to law school. In 1997, there were 1,091 first year students registered in Ontario's law schools.[38] By 2010, this number rose to 1,405.[39] When viewed in this light, the problem may not be with the articling requirement, but merely a problem of supply and demand. By removing the articling bottleneck there may simply be an increase in the number of lawyers who cannot find permanent employment.

Also, there is already a movement towards national regulation of law schools, and if this continues perhaps the articling requirement will be pushed back into the law schools, appearing as a broadening of the already existent clinic programs.[40] While this would remove the bottleneck, it would likely do little more.

The only real solution is a combination of fewer students being admitted to law schools, lawyers retiring at the once traditional retirement age, and continued economic growth. These are all much larger problems and some of them may not have an easy solution. But fixing the shortage of articling positions is unlikely to make things much easier for recent graduates. The shortage of articling positions is likely only a symptom of these larger causes, and while treating the cause is almost always more difficult than treating a symptom, it is also the only way to fix the problem.

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37. *Articling Task Force Final Report*, *supra* note 23, at 57-58.

38. *Law School Application Statistics*, Ontario Universities' Application Centre, http://www.ouac.on.ca/statistics/law-school-application-statistics/ (last visited May 20, 2013).

39. *Id.*

40. *National Requirement for Approving Canadian Common Law Degree Programs*, Federation of L. Soc' of Can., http://www.flsc.ca/en/national-requirement-for-approving-canadian-common-law-degree-programs/ (last visited May 20, 2013).

III. LEGISLATION AND REGULATION UPDATE: POSSIBLE CHANGES TO HYDRAULIC FRACTURING REQUIREMENTS IN ALBERTA; AN AMENDED WIRETAPPING LAW; THE CITIZEN'S ARREST AND SELF DEFENCE ACT

A. ENERGY RESOURCES CONSERVATION BOARD'S DRAFT HYDRAULIC FRACTURING DIRECTIVE

On December 6, 2012, the Energy Resources Conservation Board released draft regulations affecting hydraulic fracturing and requested feedback on the proposed changes.[41] These new regulations were prompted by a well blowout that was caused by hydraulic fracturing and occurred early in 2012.[42]

If made, the proposed changes would increase the minimum distance that fracturing operations can occur to water wells, non-saline aquifers, the bedrock surface, and offset wells.[43] These proposed regulations also include requirements to increase well integrity and prevent interwell communication.[44] There is also a notification requirement, whereby the operator would be required to notify the ERCB a minimum of five days prior to commencing hydraulic fracturing pumping operations.[45]

B. THE RESPONSE TO *R. V. TSE*: CANADA'S AMENDED WIRETAPPING LAW

Last year the Supreme Court of Canada declared an emergency wiretap statute unconstitutional.[46] The Court suspended enforcement of this decision for one year, so Parliament would have an opportunity to redraft the law.[47] The new bill received Royal Assent on March 27, 2013.[48]

The current law now requires that the person whose communications were intercepted must be notified within ninety days; this deadline may only be extended by a judge.[49] The new law also requires annual reports on the use of these wiretaps be made available to the public and restricts the laws use to police officers; previously the law applied to the much broader category of "peace officers."[50]

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41. *ERCB Bulletin 2013-02*, ERCB (Jan. 8, 2013), http://www.ercb.ca/bulletins/Bulletin-2013-02.pdf.
42. David Both & A.W. (Sandy) Carpenter, *Blowout Caused by Fracking Leads to New Regulations*, FASKEN MARTINEAU (Dec. 19, 2012), http://www.lexology.com/library/detail.aspx?g=1242a5a0-3765-4061-81a2-ace96283c95d.
43. ERCB Draft Directive: Hydraulic Fracturing, ERCB, (December 2012), http://www.ercb.ca/directives/Draft_Directive_Hydraulic_Fracturing.pdf, at 4-7.
44. *Id.* at 2-5.
45. *Id.* at 8.
46. R. v. Tse, [2012] 1 S.C.R. 531, para. 103 (Can.).
47. *Id.* para 102.
48. News Release, Dep't of Justice Can., Legislation Responding to Supreme Court Decision in *R v. Tse* Receives Royal Assent (Mar 27, 2013), http://www.justice.gc.ca/eng/news-nouv/nr-cp/2013/doc_32871.html.
49. Bill C-55, Response to the Supreme Court of Canada Decision in R. v. Tse Act, § 6, (Assented to, Mar. 27, 2013).
50. *Id.* §§ 4-5; News Release, *supra* note 48.

C. CANADA'S CITIZEN'S ARREST AND SELF DEFENCE ACT

On March 11, 2013, the Citizen's Arrest and Self Defence Act came into force.[51] First, it should be noted that a citizen's arrest is only permitted as a response to a property related crime, such as shoplifting or carjacking.[52] The new law makes two important changes. Previously, a citizen's arrest could only be made if the person actually caught the criminal in the act.[53] Now a citizen's arrest can be made within a reasonable time after the person committed the crime if it would not be feasible for the police to do so; the arrested individual must still be promptly delivered to the police.[54] Second, this new law simplifies the standard for self-defense. The new standard only requires a person to act reasonably under the circumstances.[55] The law contains a non-exhaustive list of factors that the court should consider when determining whether the person's belief and response were reasonable.[56]

51. News Release, Dep't of Justice Can., Backgrounder: Citizen's Power of Arrest and Self-Defence and Defence of Property, http://www.justice.gc.ca/eng/news-nouv/nr-cp/2013/doc_32865.html (last modified Mar. 11, 2013).
52. Citizen's Arrest and Self-defence Act, S.C. 2012, c. 9, § 3 (Can.).
53. News Release, *supra* note 51.
54. Citizen's Arrest and Self-defence Act, S.C. 2012, c. 9, § 3 (Can.).
55. Citizen's Arrest and Self-defence Act, S.C. 2012, c. 9, § 2 (Can.).
56. *Id.*