

***FREEDOM OF EXPRESSION AND  
HUMAN RIGHTS LEGISLATION:  
A CRITICAL ANALYSIS OF S.2 OF  
THE MANITOBA HUMAN RIGHTS ACT\****

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The purpose of this article is to examine s.2 of *The Human Rights Act of Manitoba* in light of "freedom of expression" concerns. Though particular reference is made to the Manitoba provision, it is hoped that this study will be of interest to readers in other jurisdictions as well. It must be noted that human rights legislation in other provinces and at the federal level contain related provisions (though they vary as to breadth and scope).

S.2 of *The Human Rights Act*<sup>1</sup> reads:

2(1) No person shall

(a) publish, display, transmit or broadcast, or cause to be published, displayed, transmitted or broadcast; or

(b) permit to be published, displayed, broadcast or transmitted to the public, on lands or premises, in a newspaper, through television or radio or telephone, or by means of any other medium which he owns or controls; any notice, sign, symbol, emblem or other representation

(c) indicating discrimination or intention to discriminate against a person; or

(d) exposing or tending to expose a person to hatred; because of the race, nationality, religion, colour, sex, marital status, physical or mental handicap, age, source of income, family status, ethnic or national origin of that person.

2(2) Nothing in subsection (1) shall be deemed to interfere with the free expression of opinion upon any subject.

2(3) Subsection (1) does not apply to the display of a notice, sign, symbol, emblem or other representation displayed to identify facilities customarily used by one sex.

This section has not yet been the subject of any case before a board of adjudication or court in Manitoba. However, the interpretation and application of analogous provisions in other provincial and federal human rights legislation, as well as an examination of the wording of this section itself, raise serious questions concerning the compatibility of this section with complete freedom of expression. The reasons for decision in three cases, *Singer v. Iwasyk and Pennywise Foods Ltd.*<sup>2</sup>, *Rasheed v. Bramhill*<sup>3</sup>, and *McKinlay v. Cranfield and Dial Agencies*<sup>4</sup>, particularly illustrate the danger that such a section can pose for that basic liberty.

After discussing the above three cases in some detail, and summarizing several other cases dealing with similar legislative provisions or related topics, I will analyze s.2 and suggest some possible amendments which might reduce or eliminate this problem.

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1. S.M. 1974, c.65 (c. H175).

2. Saskatchewan Human Rights Commission, unreported, Nov. 5, 1976 (hereinafter referred to as *Singer*).

3. (1980), 2 C.H.R.R. D/249 (Nova Scotia, Board of Inquiry, Chairman W.H. Charles). (hereinafter referred to as *Rasheed*).

4. (1980) 1 C.H.R.R. D/246 (Saskatchewan Board of Inquiry, Chairperson B.P. Halstead). (hereinafter referred to as *McKinlay*).

### Part I

The case of *Singer v. Iwasyk and Pennywise Foods Ltd.*<sup>5</sup> dealt with a complaint under s.4 (1) of the Saskatchewan *Fair Accommodation Practices Act*.<sup>6</sup> That subsection read:

4(1) No person shall:

- (a) publish or display or cause to be published or displayed; or
- (b) permit to be published or displayed on any lands or premises or in a newspaper, through a radio broadcasting station or by means of any other medium that he owns or controls; any notice, sign, symbol, emblem or other representation indicating discrimination or an intention to discriminate against any person or any class of persons for any purpose because of the race, religion, religious creed, colour, sex, nationality, ancestry or place of origin of that person or class of persons.

The respondents operated a restaurant known as "Sambo's Pepperpot" on their land. In an effort to promote this restaurant, a sign with a comical caricature of a black person and the name "Sambo's Pepperpot" was erected on the premises. In addition, advertising material "including matchbooks and automobile stickers, depicted the same caricature in association with the words 'Jez Aint None Better'".

Dr. Douglas Daniels, an anthropologist and an expert on racial stereotyping, testified regarding the significance of the "Sambo" caricature. In his view, it represented an unfavourable attitude towards Blacks which originated in the American South during the period of slavery, but which was still widespread in much of North American society. It depicted Blacks as loyal, but servile, lazy, comical, dishonest and immature. Other witnesses included a native Indian woman and her husband, who believed that it offended and harmed non-whites generally. The complainant, a white person, felt "that the caricature demeaned and belittled black people and made him feel ashamed as a member of white society."<sup>8</sup>

The Commission held that the respondents were in violation of the *Fair Accommodation Practices Act* by using that caricature and name under the circumstances. It specifically held that the case did not indicate an "intention to discriminate". Rather it was decided that their use of the "Sambo" caricature indicated "discrimination". The Commission stated (at 4):

The Commission feels it is proper to ask the following question: 'Would the representation of blacks as childish, funny, emasculated, inferior, as described by the witnesses, indicate discrimination?'

To put it another way, it is not only a question of whether a black person would feel humiliated or insulted by this representation, but the question of whether or not such a person's rights to equal employment opportunities and even to non-discriminatory treatment in housing and public accommodation would be affected.

It seems to us that to ask the question is to answer it. If a stereotypical image of a certain class of persons as incompetent, childish and funny is allowed to be displayed, the opportunities of members of the class for responsible jobs and to obtain rights on an equal footing with the majority class grouping are endangered.

5. *Supra* n. 2.

6. R.S.S. 1965, c. 379, s.4(1). (That Act was repealed by the Saskatchewan *Human Rights Code*, S.S. 1979, c. S-24.1).

7. *Supra* n. 2, at 1.

8. *Supra* n. 2, at 4.

The effect of such a caricature is to reinforce prejudice against the blacks and as a consequence to prolong the existence of hangovers of prejudice against non-white minority groups in Canada. It also promotes a negative image about blacks.

After referring to several principles of statutory interpretation as applied to the legislation in question, the Commission discussed the difference in meaning between "indicating discrimination" and "indicating an intention to discriminate". It stated (at 5-6):

The separation in Section 4(1) between displays or representations (a) 'indicating discrimination' and (b) 'indicating an intention to discriminate', must be taken into account in assigning sensible meanings to (a) and (b) respectively. A representation indicating an intention to discriminate would be one such as 'Blacks Will Not Be Served Here' or 'No Blacks Allowed' or 'Whites Only'. Such representations make it clear that the property owner, landlord, restaurateur, or whatever, who displayed the words, intended to discriminate against blacks and warned blacks of this intention.

On the other hand, a poster, drawing, cartoon or other similar representation, in words or otherwise, depicting blacks as inferior to white persons, would disclose a discriminatory predilection, belief or attitude and thereby indicate discrimination against blacks but would not necessarily indicate an intention to discriminate.

After quoting several definitions of discrimination, the Commission stated: (at 6) "The phrase 'indicating discrimination' therefore can be interpreted as: 'being a fairly certain sign or symptom of the according of differential treatment of two or more subjects or persons.'"

After noting the existence of identical or similar provisions in all the other provinces and the absence of reported cases covering them, the Commission commented (at 7) that it "could have taken the position that this part of the Section is too weak and uncertain and therefore unenforceable." However, referring to the "remedial" nature of the legislation and its goal of insuring "non-discriminatory treatment", the Commission decided to:

Adopt a liberal interpretation in order to fulfill the legislative objectives as set forth in Section 7 (a) of the Saskatchewan *Human Rights Commission Act*<sup>9</sup> namely to: '(a) forward the principle that every person is free and equal in dignity and rights without regard to race ...'<sup>10</sup>

The Commission continued (at 7):

We are convinced that the representation of black or brown 'Sambo', used as in the advertisements of Pennywise Foods Ltd., offends and affronts the dignity and the right not to be so offended, of minority persons, especially of black or brown persons, as individuals and as a class.

Admitting that the respondents "did not intend to discriminate", the Commission (at 9) nevertheless stated that:

They did display a sign and published representations which indicated discrimination against black or brown persons as a class, and the display and publication were for purposes of profit associated with a restaurant or eating establishment, being a place in Saskatchewan to which the public is customarily admitted.

The Commission ordered the respondents to remove the offending name and caricature from the sign, and prohibited respondents from using them in connection with the restaurant in question or any other business covered by the Act.

9. S.S. 1972, c. 108 (That Act was also repealed by the Saskatchewan *Human Rights Code*).

10. *Supra* n. 2, at 7.

An analysis of the Saskatchewan Human Rights Commission's reasons in the *Singer* case provides an excellent illustration of why such a section constitutes a serious danger to freedom of expression. Perhaps if it had been appealed to the court on its *merits*<sup>11</sup>, it would have been held wrongly decided. Perhaps if it were cited as a precedent before a court in Manitoba or elsewhere, it would not be followed (although it *was* followed by a Nova Scotia Board of Inquiry<sup>12</sup> and a subsequent Saskatchewan Board of Inquiry.<sup>13</sup>) A similar case might well be decided differently today in light of the provision in the *Canadian Charter of Rights and Freedoms*<sup>14</sup> protecting freedom of expression.

However, if that decision is a correct interpretation of the statute, appropriate legislative amendment is needed in order to accommodate free expression. If the case was erroneously decided, it reflects a source of uncertainty in the law. Such uncertainty can have an undue "deterrent" or "chilling" effect on individuals wishing to exercise their communicative rights, and calls for legislative clarification.

I must emphasize that it is not the *result* of the *Singer* case that I am criticizing, but much of the *reasoning* leading to it. It may well be a case of the "right result" having been reached for the "wrong reasons". For example, had evidence been provided (or maybe even "official notice" taken of the likelihood) that Blacks would have felt unwelcome, or been deterred from coming to the particular restaurant, a finding that the name, sign, and other materials "indicated discrimination" may well have been warranted. Similarly, in a case where such were erected and distributed with the *intention* of discouraging such persons from coming (and this was expressly found *not* to be the situation in this case) an application of the words "an intention to discriminate" may well have been in order.

Perhaps if such a sign and name were shown to cause serious feelings of humiliation, embarrassment, mental anguish or discomfort among Black patrons (or prospective patrons being deterred from coming in order to avoid such humiliation) it might well be legitimate to hold that such circumstances *constitute discrimination in the provision of an "accommodation, service, or facility."*<sup>15</sup> There have been cases which have held or suggested that, at least

11. In *Iwasyk and Pennywise Foods Ltd. v. The Saskatchewan Human Rights Commission*, [1977] 6 WWR 699, the Saskatchewan Court of Queen's Bench quashed the Commission's decision on the basis of "natural justice" issues. However, the Court of Appeal reversed the Queen's Bench judgment and restored the Commission's decision ([1978] 5 WWR 499). Neither Court decision dealt with the merits of the case.
12. *Supra* n. 3.
13. *Supra* n. 4.
14. S. 2 of the *Charter* reads:
  - Everyone has the following fundamental freedoms:
    - (a) freedom of conscience and religion;
    - (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
    - (c) freedom of peaceful assembly; and
    - (d) freedom of association.
15. *Quere*-whether such circumstances could have been held to "deprive...abridge or restrict a customer's or prospective customer's enjoyment of any right...under this Act" in a proceeding involving s.3 or s.7 of the Act then in force? At any rate, such circumstances may well be within current terminology employed in Human Rights Legislation. For example, the *Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1, s.12(1) reads:
  - No person...shall:
    - (a) deny to any person or class of persons the accommodation, services or facilities...
    - (b) discriminate against any person or class of persons with respect to the accommodation, services or facilities...
 Similarly, s.3(1) of *The Human Rights Act*, S.M. 1974, c. 65 (c. H175) reads:
  - No person shall
    - (a) deny to any person or class of persons any accommodation, service, facility, goods, right, licence or privilege available to the public or a section of the public...
    - (b) discriminate against any person or class of persons with respect to any accommodation...

under certain circumstances, *insulting commentary* and/or abuse based on "prohibited" classifications constituted or could constitute discrimination in *employment*. Such, it was argued, could be considered "terms or conditions" of employment, or could create a discriminatory "working environment" or "working conditions" even in the absence of more "tangible" factors, such as dismissal, pay differential, etc. Psychological and emotional damage, as well as affront to dignity, were expressly recognized as factors in determining whether or not prohibited discrimination existed.<sup>16</sup> Similar reasoning may well be applicable to treatment of patrons or potential patrons in "accommodations, services and facilities" covered by human rights legislation.<sup>17</sup>

16. See e.g., *Dhillon v. F.W. Woolworth Company Ltd.* (1982), 3 C.H.R.R. D/743 (Ont. Bd. of Inq., Chairman P.A. Cumming). That case concerned s.4(1)(g) of the Ontario *Human Rights Code*, R.S.O. 1970, c. 318, as amended. The decision stated (at D/760):

Verbal racial harassment, through name-calling, in itself is in my view prohibited conduct under the *Code*. The atmosphere of the workplace is a term or condition of employment just as much as more visible terms or conditions, such as hours of work or rate of pay. The words "term or condition of employment" are broad enough to include the emotional and psychological circumstances in the workplace. There is a duty on an employer to take reasonable steps to eradicate this form of discrimination, and if the employer does not, he is liable under the *Code*.

The chairman referred (at D/760 - D/761) to *Cherie Bell v. Ernest Ladas* (1980), 1 C.H.R.R. D/155, a case where the Board of Inquiry, Chairman O.B. Shime, held sexual harassment to be prohibited discriminatory conduct in the workplace, with the following quotation:

"The forms of prohibited conduct that, in my view are discriminatory run the gamut from overt gender based activity, such as coerced intercourse, to unsolicited physical contact to persistent propositions to more subtle conduct such as gender based insults and taunting, which may reasonably be perceived to create a negative psychological and emotional work environment. There is no reason why the law, which reaches into the workplace so as to protect the work environment from physical or chemical pollution or extremes of temperature, ought not to protect employees as well from negative psychological and mental effects where adverse and gender directed conduct emanating from a management hierarchy may reasonably be construed to be a condition of employment."

After holding that racial slurs would be subject to similar reasoning, the Chairman (at D/761) cited two cases for the qualification that an "isolated" racial slur in itself might not reach the level of prohibited conduct.

It is to be noted that the Chairman in *Cherie Bell v. Ernest Ladas* at D/156 went on to caution:

Again, the *Code* ought not to be seen or perceived as inhibiting free speech. If sex cannot be discussed between supervisor and employee, neither can other values such as race, colour or creed which are contained in the *Code*, be discussed. Thus, differences of opinion by an employee where sexual matters are discussed may not involve a violation of the *Code*. It is only when the language or words may be reasonably construed to form a condition of employment that the *Code* provides a remedy. Thus, the frequent and persistent taunting of an employee by a supervisor because of his or her colour is discriminatory activity under the *Code* and, similarly, the frequent and persistent taunting of an employee because of his or her sex is discriminatory activity under the *Code*.

I suggest that great caution ought to be applied by a Board or a Court before it finds insults or comments *per se* to be discrimination in employment (or other areas covered by the *Act*). Some of the reasons found in the cases, though having certain validity, raise serious concerns. They ought to be applied and relied on only with care and ought not to be overextended.

Other than in the most extreme circumstances, to refer to slurs or insults as a "term or condition of employment" is, perhaps, a misapplication of that concept. The danger of such conduct occurring, regrettably, could perhaps more accurately be described as part of the "human condition" generally. Such encounters are not necessarily "produced" or "caused" by an employer or other persons in control, they are a risk inherent in social contact. There certainly is a "human right" to be free from substantive decisions made against one on a prohibited ground, and of certain kinds of substantive action being taken on such grounds. However, there is no "human right" to stifle every social or interpersonal annoyance and displeasure caused by others.

The decisions refer to the law's power to enter the workplace to "protect the work environment from physical and chemical pollution or extremes of temperature" and compares this to the power to enter the workplace to combat the human conduct referred to. With respect, this analogy is not completely accurate, and if followed to its logical conclusion, is quite dangerous. Chemical pollutants, (as many physical aspects of the workplace) are artificially created phenomena quite suitable to be controlled by regulation and engineering. Much of the human conduct in question is regrettably, an attribute of human nature. When the law goes too far to "regulate" or "control" the "human environment" or "interpersonal relationships" individual freedom is put at severe risk. "Social engineering" can be quite dangerous when it is used too freely as a basis to prohibit certain forms of conduct. Talk of "human pollution" is reminiscent of authoritarian or totalitarian societies where everything seen as deviating from the officially accepted "truth" or "correct" lifestyle is susceptible to sanctions.

It should be noted that the *Human Rights Code*, S.O. 1981, c. 53 (which was not in force at the time of the *Dhillon* decision) provides (*inter alia*) the right to freedom from "harassment" on prohibited grounds in employment and accommodations (see sections 2, 4, and 6).

Section 9(f) defines "harassment" as follows: "'Harassment' means engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome." However, there are dangers in the inclusion of "comment" in the definition of "harassment", perhaps exceeding those in cases which interpret "discrimination" to include verbal abuse.

17. The Rhode Island Human Rights Commission relied on the extreme offensiveness of the name "Sambo's" and the fact that it deterred potential Black customers, *inter alia*, to conclude that the use of that name violated the *Rhode Island Public Accommodations Act*, *Urban League of Rhode Island, Inc. v. Sambo's of Rhode Island, Inc.* (appeal pending), cited in the dissenting judgment of Keith, J. in *Sambo's Restaurant, Inc. v. The City of Ann Arbour*, (1981), 663 F. 2d 686 (6th Cir.) at 697 and 703.

The danger to free expression which the *Singer* decision involves comes from defining "indicating discrimination" to include the *expression of the undesirable idea or concept* (the negative "stereotype" concerning Black people) *itself*.<sup>18</sup> Such a definition seems to hold the *communication of certain attitudes and thought patterns* by the particular methods to be unlawful. Although the Commission specifically acknowledged the commercial nature of the sign in question (at 7), the broad words used suggest that the result would have been the same *irrespective* of the commercial aspect. (Indeed this case has been followed in two subsequent cases which did not involve business names or advertisements.<sup>19</sup>)

I sympathize with the Commission's desire to combat the prevalence and influence of such unfortunate and dangerous ideas. Yet by *prohibiting* a particular expression in an attempt to eradicate unwanted ideas or attitudes, the law is attempting "thought control". This compromises the individual's freedom of expression, and is itself more appropriate for authoritarian or totalitarian systems than for a society which promotes individual freedom.

Although it has often been maintained that freedom of expression is not absolute, can the same not be said of any other fundamental value or right, including *equality or equal treatment*? Indeed much, (if not most) suppression of expression throughout history was the result of attempts to protect "fundamental" values, (profoundly believed to be "absolute") from challenge. It would be especially tragic if freedom of expression were substantially impaired in an effort to protect *equality*, which is not merely a fundamental *value*, but also ranks (with freedom of expression) as a fundamental and co-existent *human right*. And it would be particularly ironic if the censorial function at one time (or currently, in other places) fulfilled by institutions such as the Court of Star Chamber, the Inquisition, official censors, the military or sometimes the clergy, were taken over (even in part) by a body known as a Human Rights Commission.

Of course, it could be argued that such stereotypes go beyond the expression of an idea and amount to group defamation. This issue will be dealt with later in the article. Here, it is sufficient to say that "group defamation" is a concept not generally recognized at common law<sup>20</sup>, and that the Saskatchewan statute, on its face, did not purport to create such offense or tort.<sup>21</sup> Although the decision itself didn't expressly refer to the concept of defamation, much of its reasoning is analogous to that of an American case upholding the constitu-

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18. See, *Collin v. Smith* (1978), 447 F. Supp. 676 (N.D., Illinois, E.D. Ct.) *aff'd* (1978), 578 F. 2d 1197 (7th Cir.); *cert. den. Smith v. Collins* (1978), 99 S. Ct. 291 where it was emphasized that proscribing communication because of the *idea expressed* violated the 1st Amendment protection of "freedom of speech". In that case, a Skokie Village ordinance prohibiting "the dissemination of any materials...which promotes and incites hatred against persons by reason of their race, national origin, or religion, and is intended to do so;" and the denial of a parade permit to the National Socialist Party of America on the basis, *inter alia*, of this ordinance, were held unconstitutional violations of freedom of speech.
19. *Supra* n. 3, and *supra* n. 4.
20. See, the *Report of the Special Committee on Hate Propaganda in Canada*, Queen's Printer, 1966, at 42-43.
21. Compare this with statutory provisions which do appear to be specifically enacted with "group defamation" or related problems in mind, e.g.: Saskatchewan *Human Rights Code*, S.S. 1979, c. S-24.1, s.14; *The Defamation Act*, R.S.M. 1970, c. D20, s.19; *The Human Rights Act*, S.M. 1974, c. 65, s. 2(1)(d) (c. H175); *Canadian Human Rights Act*, S.C. 1977, c. 33, s. 13; *Criminal Code of Canada*, R.S.C. 1970, C-34, s. 281.2.

tionality of "group defamation" legislation<sup>22</sup>, and indicated a similar concern. However, reading these concerns into the legislation to the extent of extending the nature and scope of the conduct prohibited may well have been unwarranted. Though I agree that as a general rule a "liberal" interpretation is appropriate for human rights legislation, there are limits and exceptions to this approach. Perhaps when such "liberal interpretation" would impair freedom of expression, a more cautious approach to construction is in order.

The Commission's concern over the adverse effects the reinforcement of such stereotypes may have on the achievement of equal opportunity for Blacks is not only proper, but reflects the reason for the Commission's existence. I certainly do not deny the legitimacy of the fear that such beliefs might motivate some individuals to violate the provisions of anti-discrimination legislation, and might dissuade others from taking positive steps or co-operating with efforts to achieve equality. Yet nothing in the communications involved in the *Singer* case could be deemed to be *advocating* such violations. And certainly nothing in the case reached the level of "advocacy of the use of force or law violation...directed to inciting or producing imminent lawless action and...likely to incite or produce such action",<sup>23</sup> which are the only circumstances (at least according to the United States Supreme Court) under which even *advocacy of illegal activity* can be proscribed without unconstitutionally violating freedom of expression.<sup>24</sup>

The possibility that some unlawful or undesired activity may incidentally or indirectly result from the expression of ideas has often been recognized a danger inherent in a free society, yet the possibility is perhaps less dangerous than the suppression of such ideas by law.<sup>25</sup> The danger that the vital public policy of attaining equal opportunity reflected in human rights legislation

22. In *Beauharnais v. The People of the State of Illinois* (1952), 72 S. Ct. 725 at 728 the U.S. Supreme Court upheld provisions of the Illinois Criminal Code making it "unlawful for any person...to...exhibit in any public place...any lithograph...which...portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed, or religion which said publication or exhibition exposes the citizens of any race, color, creed, or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots". Franfurter, J., speaking for the majority in a 5-4 decision, rejecting a "free speech" challenge to this "group libel" law, stated:

It would, however, be arrogant dogmatism, quite outside the scope of our authority...for us to deny that the Illinois Legislature may warrantably believe that a man's job and his educational opportunities and the dignity accorded him may depend as much on the reputation of the racial and religious group to which he willy-nilly belongs, as on his own merits. This being so, we are precluded from saying that speech concededly punishable when immediately directed at individuals cannot be outlawed if directed at groups with whose position and esteem in society, the individual may be inextricably involved. (emphasis added).

However, the "continued vitality" of *Beauharnais* has been questioned. See, *Sambo's Restaurants, Inc. v. The City of Ann Arbor*, *supra* n. 17, at n. 7, at 694. But see, *New York v. Ferber*, (1982), 102 S. Ct. 3348 at 3358.

23. *Brandenburg v. Ohio* (1969), 89 S. Ct. 1827 at 1829. It is to be noted that in *Brandenburg*, (at 1828) the statute held unconstitutional prohibited "advocating...the duty, necessity or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform" and "voluntarily assembling with any...group...formed to teach or advocate the doctrines of criminal syndicalism". The defendant whose conviction was reversed by the Supreme Court was a Ku Klux Klan leader, and the circumstances leading to the charges involved a K. K. K. rally where scurrilous racial attacks and at least references to violence were uttered.

24. It is yet to be seen to what extent Canadian courts will rely on U.S. jurisprudence regarding freedom of expression in interpreting s. 2 of the *Canadian Charter of Rights and Freedoms*. Query: To what extent will Canadian courts apply s. 1 of the *Charter* to limit the freedoms protected in s. 2? How will this compare to the limits which the American courts "read into" the 1st Amendment? S. 1 of the *Charter* reads: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".

25. See, *Collin v. Smith*, *supra* n. 18, 447 F. Supp. 676 at 688.

might not be affected cannot per se justify such suppression.<sup>26</sup>

Although the dangers posed by these racist ideas cannot be lightly dismissed, neither can it be assumed that they will be believed or acted upon by all or most of the people exposed to them. Undoubtedly there are members of society who have tendencies to such attitudes which can be activated by such materials. There are undoubtedly others who are subject to influence by the more blatant type of "hate propaganda"<sup>27</sup> as well as by materials like those in the *Singer* case. However, persons and groups exist in the community whose views are completely opposite. Many of them are dedicated to advancing equality of opportunity. Hopefully, such individuals and groups will speak out. Despite the cynicism of many commentators and the (often valid) skepticism towards people's "rationality"<sup>28</sup>, there are individuals capable of critical analysis. Some persons, though on their own unlikely to perceive the fault in such ideas, may well be able to recognize these errors upon having them pointed out. Is it not possible that representation of racist stereotypes, repulsive though they may be, might sometimes alert an individual to his or her own (possibly unconscious) prejudices, and perhaps even lead to reconsideration or examination of those attitudes? It is not beyond possibility that advocates of equality may use caricatures and communications like the ones in this case to confront members of the public with prejudices they may possess, and to encourage them to analyze and re-think their attitudes. Perhaps it is unduly optimistic or even naive to believe that such exchange of ideas will substantially neutralize the potential for damage of "stereotypical" expression. Yet certainly these are factors which must be considered and balanced with the dangers referred to in the *Singer* decision before coming to the conclusion that legal sanctions against such expression are a necessary or even acceptable solution.

26. See, *Collin v. Smith*, *supra* n. 18, (1978), 447 F. Supp 676 at 698, where the District Court rejected the argument that "the ordinance may be supported because advocacy of racial hatred within Skokie would disrupt the village's efforts to achieve racial integration, and, in particular, disrupt its public housing program". Distinguishing a case upholding the ban on certain real estate practices where "speech was inextricably tied up with some form of action" the Court emphasized that *speech alone* was involved here. It stated then: "The mere fact that plaintiff's speech may delay the implementation of one of Skokie's policies does not justify restricting it. Opposition to government policy is a primary purpose of free speech and public housing programs, however beneficial they may be, have no talismanic immunity from public criticism and debate." (emphasis added). The Court of Appeal, *supra* n. 18, at 1205, affirming this reasoning, commented: "That the effective emphasis of First Amendment rights may undercut a given government's policy on some issues is indeed one of the purposes of those rights. No distinction is constitutionally admissible that turns on the intrinsic justice of one of those policies." (emphasis added).

27. Such as the kind dealt with in the case of *Canadian Human Rights Commission et al. v. John Ross Taylor et al.* (Canadian Human Rights Act Tribunal, unreported, July 20, 1979) (hereinafter referred to as *Commission v. Taylor*), *infra*, n. 100. See also, the *Report of the Special Committee on Hate Propaganda in Canada*, *supra* n. 20. It must be noted, however, that the material referred in the above authorities could be classified as "hard core hate propaganda" and was of the type one associates with "dedicated hatemongers" such as the Western Guard Party, the Nazis, and the Klu Klux Klan. Many of these deliberately stir up hatred by appealing to emotions and despair, exploiting national crises, and making the most severe allegations against persons and groups.

However, there are undoubtedly those personality types who could be influenced by the less "blatant" materials such as the caricature involved in the *Singer* case (*supra* n. 2), as well. In this case, there was no intention to incite hatred against or offend Blacks. Yet perhaps unintentional "low key" or "subtle" messages could pose dangers not present in "hard core" or more obvious "hate propaganda". The latter can often be clearly recognized as such and would summarily be dismissed by many individuals. However the material in this case could escape the ready recognition and rejection that sometimes might be the fate of more extreme "hate literature", and the lack of verbal articulation could cause it to escape analysis. Possibly it could unconsciously influence or reinforce a person's attitude.

However, though there may be special dangers in such "subtle" materials, the dangers to freedom involved in the suppression of them would be correspondingly greater than those involved in suppressing "hard core" hate literature. To effectively ban such "subtle" material the censorial probe would have to be much deeper and more wide-ranging. Not only could considerably more material be deemed illegal, but the "deterrent" or "chilling" effect on others whose proposed communication might well be legal would be more far reaching and pronounced (as would the uncertainty of and about the law).

Notwithstanding the dangers inherent in either type of material, (and the defects in the human personality which exacerbate these dangers), I suggest that proscribing these materials is *not* the ideal solution, and that all reasonable methods short of such interference with individual liberty be attempted or at least considered in an effort to combat the influence of such materials.

28. See comments in authorities referred to *supra* n. 27.



Furthermore, one must not forget the other strategies available to the Human Rights Commissions themselves in their fight for equality. Such bodies have ample power to use education, persuasion and other communication to promote equality and repudiate "stereotypical" ideas.<sup>29</sup> Also, the relevant legislation provides remedies against those persons who commit the prohibited discriminatory *actions* concerning the regulated areas.

To the extent that the Commission in the *Singer* case was concerned with the expression or reinforcement of *undesired ideas, concepts and attitudes per se*, as well as the tendency of these ideas to encourage disobedience to the antidiscrimination legislation (though the case cannot accurately be described as one involving *advocacy* of such action), I suggest that the Commission's reasoning in this regard was inconsistent with complete protection of freedom of expression. Indeed, I suggest that the approach of Stewart, J. in the United States Supreme Court<sup>30</sup>, in deciding that a state couldn't constitutionally censor a film because of the unpalatable *idea* that it expressed (the acceptability of adultery under certain circumstances), is appropriate here.<sup>31</sup> Stewart, J. stated:

What New York has done, therefore, is to prevent the exhibition of a motion picture because that picture advocates an idea - that adultery under certain circumstances may be proper behavior. Yet the First Amendment's basic guarantee is of freedom to advocate ideas. The state, quite simply, has thus struck at the very heart of constitutionally protected liberty.

It is contended that the State's action was justified because the motion picture attractively portrays a relationship which is contrary to the moral standards, the religious precepts, and the legal code of its citizenry. This argument misconceives what it is that the constitution protects. Its guarantee is not confined to the expression of ideas that are conventional or shared by a majority. It protects advocacy of opinion that adultery may sometimes be proper, no less than the advocacy of the socialism or the single tax. And in the realm of ideas it protects expression which is eloquent no less than that which is unconvincing.

Advocacy of conduct proscribed by law is not, as Mr. Justice Brandeis long ago pointed out, a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on. *Whitney vs. People of the State of California*, 274 U.S. 357 at 376; 47S.Ct. 641 at 648, 71LEd 1095 (concurring opinion). "Among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgement of the rights of free speech. . . ." <sup>32</sup> (Emphasis added)

It should be noted that s.4(2) of the *Fair Accommodation Practices Act*, which read "Nothing in subsection (1) shall be construed as restricting the right to freedom of speech under the law, upon any subject," was not mentioned in the Commission's judgement. Undoubtedly, the spreading of the *ideas* in question was not the purpose of the use of the name and caricature. It was strictly a commercially motivated decision. The Commission (at 7) noted

29. See e.g., the Saskatchewan Human Rights Commission Act, S.S. 1972, c. 108, s. 7 which was in force at the time of the decision. Now see the Saskatchewan Human Rights Code, S.S. 1979, c. S-24.1, s. 25. See also, *The Human Rights Act*, S.M. 1974, c. 65, s. 13 (c. H175).

30. *Kingsley International Picture Corporation v. Regents of the University of the State of New York* (1959), 79 S. Ct. 1362.

31. Though the difference between adultery and racial discrimination is readily apparent, one must remember that many people view the values of family and sexual morality every bit as "absolute" as others view racial equality; and that many "moralists" consider adultery every bit as socially harmful as dedicated "egalitarians" consider racial discriminations. (And in both cases, the "relevant authorities" have sought, with complete good faith, to use the power of the law to stifle ideas which challenge these respective values.)

32. *Supra* n. 30, at 1365-6.

the lack of "discriminatory intent" and the commercial nature of the communication.<sup>33</sup>

The Commission's holding (at 7) that the representation involved "*offends and affronts the dignity and the right not to be so offended of minority persons, especially of black or brown persons, as individuals and as a class*" (emphasis added) raises some very difficult problems. I certainly do not challenge the proposition that "equality in dignity", irrespective of race etc., is and must remain a fundamental policy of the law. I realize that racial insults are undesirable and ought not to be encouraged. However, I question whether there is a legally recognized right not to be offended or insulted *per se*. Furthermore, I question whether the law should even attempt to create or enforce such a right, or whether it is even appropriate that such matters as insults, injury to feelings, or humiliation be *per se* elevated to the level of a *legally cognizable wrong*.<sup>34</sup> As I have already mentioned, such factors may perhaps legitimately be considered in a case such as this one, to the extent that they pertain to the services, accommodation or facility in question. However, if "offensive" or "insulting" expression (even on a racial basis) *without more* were to be rendered unlawful, I suggest that the law would be dangerously overextending itself.<sup>35</sup>

To a substantial degree, considering offensive or insulting communications *per se* to be unlawful could violate freedom of expression, or at least present a serious danger to freedom of expression.<sup>36</sup> Some *opinions, concepts or ideologies* may themselves be inherently offensive to some persons or groups, and it may well be impossible to express these without the offending or insulting effects.<sup>37</sup> (In such cases, no amount of care in the terminology or

33. It is interesting to consider what would happen in a similar case today if the concept of "commercial speech" would be raised in defence. American jurisprudence now recognizes that "commercial speech" enjoys 1st Amendment protection, though on a more limited basis than other forms of speech. See e.g., *Virginia State Board of Pharmacy v. Virginia Citizens' Consumer Council, Inc.* (1976), 96 Ct. 1817; *Central Hudson Gas and Electric Corporation v. Public Service Commission of New York* (1980), 100 S. Ct. 2443. Of particular relevance here is *Sambo's Restaurant Inc. v. The City of Ann Arbor*, *supra* n. 17, at 694-695, where applying the "commercial speech" principle, the Court upheld the plaintiff's right to use the name "Sambo's" as part of their trade name and on their signs, absent evidence of harm to "the City's policy of racial harmony and equality". See also, *Sambo's of Ohio, Inc. v. City Council of the City of Toledo* (1979), 446 F. Supp. 177 (N.D., Ohio, W.D. Dt. Ct.).
34. I do not question that these factors can be legitimate "grounds for damages" or "aggravating circumstances" *once there has been a recognized violation of the law* — e.g. defamation, trespass to the person, discrimination. I can further see that where *certain relationships otherwise covered by law* (e.g. employer/employee, provider/consumer of services) exist such conduct can sometimes constitute, or be factors in, prohibited discrimination. Of course, there are provisions in the *Criminal Code* where these or related matters may be ingredients in the crime or factors motivating the prohibition. However, injury to feelings *alone* does not seem to be the gist of the offense or the main concern of the prohibition. For example, though "using insulting language" can be *one* of the means of "causing a disturbance" in certain circumstances, under s. 171; it seems that the *public peace* rather than a person's *private feelings* is the main interest sought to be protected. Similarly, the "hate propaganda" provisions of s.281.2 (2) seem primarily concerned with preventing *public hatred* against the groups, rather than protecting members of the groups from *subjective* injury to feelings.
35. In *Collin v. Smith*, *supra* n. 18, (1978), 578 F.2d 1197 at 1205-1207, the Court of Appeal rejects the possibility of "psychic trauma" to resident holocaust survivors and other Jewish residents on seeing Nazi uniforms and swastikas as a basis for upholding the ordinance. It refers to the tort of "intentional infliction of severe emotional distress" but declines to decide whether a person suffering trauma as a result of the march could succeed in such action, or whether such success would be consistent with the 1st Amendment. It must be noted, however, that none of the cases cited in *Collin* relating to this tort held offensiveness or insult *alone* to be tortious. The one cited case dealing with "racial slurs", *Contreras v. Crown Zellerbach Corporation* (1977), 565 P. 2d. 1173 (S. Ct. Washington) involved an employment situation, while the repeated racial slurs was only one of several factors in this action for "outrage".
36. Offensiveness *per se* has generally not been recognized under 1st Amendment decisions as justifying restrictions on speech. This is not to say that "offensive" communication is protected under all circumstances, however. Circumstances where offensiveness could be a factor in determining whether expression can be controlled might include cases where "privacy interests" a "captive audience" or "fighting words" are involved. For reference to leading cases concerning these concepts, and discussion of these issues as they apply to racist materials, see *Collin v. Smith*, *supra* n. 18. See also, *Sambo's Restaurant, Inc. v. The City of Ann Arbor*, *supra* n. 17.
37. See, *Collin v. Smith*, *supra* n. 18, 447 F. Supp. 676 at 691.

manner of expression could prevent the offending. It is the substance, not the style of the message which would be offensive). However, even when the offensive nature primarily results from particular terminology, vocabulary or style, rendering such unlawful could be dangerous. As the case of *Cohen v. California*<sup>38</sup> emphasized, style is often entitled to free speech protection. As that case aptly stated, freedom of speech not only protects “cognitive” ideas, but expression of emotions as well.<sup>39</sup> As has often been seen, such expressions have frequently been found offensive.

Although some ideas or manners of expression could be deemed offensive on an “objective” basis, where a communicator could easily foresee such consequences; there are other expressions to which a particular individual or group could take offense quite subjectively and unexpectedly. Often, offensive consequences would not be known until “after the fact”. That offensiveness could be a source of legal liability may serve to deter people from expressing their views on controversial matters relating to “prohibited categories” of discrimination. And these categories cover many issues of public importance and concern.

It must not be forgotten that art, cinema, drama, music, humour and satire are also entitled to “free expression” protection.<sup>40</sup> Even in non-ethnic and non-racial matters, an author or artist often finds to his chagrin that he has offended many persons or groups (including those he wished to please). When racial, ethnic or religious factors are involved, the risk is that much greater, and in a “multicultural” society<sup>41</sup> much art, etc. would involve such subjects.

It is true that in the *Singer* case, artistic freedom was not even an issue. Given the tragic history of racial discrimination and stereotyping against Blacks, and the historical association of the name “Sambo” with such stereotyping<sup>42</sup>, many Black persons could quite reasonably be expected to be deeply offended by the name and caricature in issue. However, these facts do not detract from the dangers to free expression inherent in recognizing or creating a *principle* which would recognize a legal right to freedom from being insulted, or legal culpability for violating such right.

Independently of the “free expression” issues as such, the degree to which the law ought to be involved, if at all, with protecting persons or groups from insult, humiliation or injured feelings is a very serious question. Should such matters not be largely beyond the scope or purview of the law? Can the law deal with every aspect of social concern or human behaviour? Are all social ills susceptible of legal solution without creating an unduly controlled or

38. (1971), 91 S. Ct. 1780 at 1787-1788.

39. *Id.*, at 1788.

40. See, *Joseph Burstyn, Inc. v. Wilson* (1952), 72 S. Ct. 777 at 780-781 (motion pictures); and *Schacht v. United States* (1970), 90 S. Ct. 1555 at 1558-1559 (theatrical performance).

41. The *Canadian Charter of Rights and Freedoms*, s. 27, reads: “This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians”. Quere — What effect, if any, s.27 of the *Charter* would have on these issues? It could be cited in support of the need to protect the “harmony” between the various cultural groups by restricting communications “offensive” to such groups. However, it could also be cited in support of the widest expression in cultural matters. This involves not only full expression of one’s own culture, but full examination, study and commentary on all cultures. Fear of legal liability for “offensive” expression in these matters can inhibit or deter candor in such commentary. Viewed from this perspective, such restrictions on “offensive” communications could be *inconsistent* with the goals of s.27.

42. For an interesting discussion of these historical and social facts concerning the name “Sambo” and its impact on members of the Black community, see the dissenting judgement of Keith, J. in *Sambo’s Restaurant, Inc. v. City of Ann Arbor*, *supra* n. 17.

authoritarian society and without destroying or compromising individual liberty? There are certain risks inherent in society that cannot realistically be avoided. Perhaps exposure to offensive speech, attitude or expression is one of them. When such conduct involves race or similar factors, undoubtedly the social implications are greater. But even here, there may be less intrusive solutions than the use of coercive measures. For example, to counteract such problems, human rights commissions can conduct educational and conciliation programs. In this area, "moral persuasion" might well be more appropriate than compulsion.

Perhaps *proscribing expression* for the reasons considered in the Commission's decision is *counter-productive*. There may be a danger that such proceedings could create resentment, both in the respondent and in much of the community. That resentment might be against the "protected" group, the Human Rights Commission, and human rights legislation in general. Many people still value free expression and independence of action, and resent what they see as undue government intrusion in their lives. Such proceedings might elevate a respondent into a "hero" or "martyr". Furthermore, the evils or unfairness of the stereotypes might be lost on much of the public while the issues of "government intervention" vs. "free expression" would be uppermost in their minds. This is not to suggest that public opinion should determine the extent to which Human Rights legislation is to be enforced, or the extent to which discriminatory *actions* are to be prohibited. However, substantial community support or at least acceptance of such legislation is necessary for its optimal effectiveness, and the proscription of purely *expressive* matters might seriously compromise such support or acceptance.

Under certain circumstances, could such type of proceeding not detract from the seriousness with which human rights legislation ought to be taken, and endanger the credibility of the Commission? To members of a minority group which is the victim of racial slurs and stereotyping such matters can understandably be of the gravest concern. Members of the "majority" community particularly knowledgeable of or sensitive to racial issues appreciate the effects that genuine racial slurs or stereotypical thought patterns could have on minority group members. Perhaps such a proceeding could "raise the consciousness" of certain other people to these problems. But to yet others, could such complaints not appear too petty, trivial or ridiculous to warrant legal intervention? Could the valid goal of public enlightenment in this area not be more effectively achieved by using the educational powers of the Commission, while avoiding the risks involved in such censorial activities?

Further, is there not a danger that interpreting or applying human rights legislation to proscribe expression disparaging of particular groups could *perpetuate* (or even create) certain stereotypes? When such proceedings are initiated (whether by members of the offended group or by others) could it not lead to such group members being seen as vindictive, militant, fanatical *or indifferent to the rights of others*? Such proceedings might reinforce stereotypes that may exist that certain groups are weak, helpless, or unable to cope with adversity. Chances are that such proceedings might deter some members of the public from providing equal opportunity for protected groups, either by creating or reinforcing the negative stereotype referred to, or by

causing fear that *dealing with* such persons could lead to a high risk of being accused of a human rights violation.

One must question whether or not the Commission was correct in applying strict liability (ie. disregarding the question of intention) in the *Singer* case. It is true that there is a substantial amount of authority for holding that, in certain cases at any rate, *discriminatory intention* is not necessary to constitute a violation. Indeed, to the extent this decision was based on the fact of its being a commercial establishment available to the public, and to the extent to which it can be justified on the grounds that the name and sign substantially deterred Black people from patronizing the restaurant, or even substantially interfered with their enjoyment or use of the facility on equal terms, the application of strict liability may well be justified. However, if the strict liability was applied on the basis of the *ideas* expressed, their consequences, and the "affront" factors per se, this was, I suggest, an especially inappropriate occasion for its application. As I have already stated, holding any expression unlawful on the basis of the idea or concept expressed, on the basis of undesirable indirect results, or on the basis of "offensiveness" is dangerous to freedom of expression. Holding such expression to constitute a violation of the Act without discriminatory intention greatly exacerbates the danger.

The case of *Rasheed v. Bramhill*<sup>43</sup> involved a complaint that:

Mr. Barry Bramhill, by publishing and distributing buttons...with the photograph of a Black person and containing the words 'I'm a Big Mouth Cape Bretoner - So Kiss Me' did discriminate against or indicate an intention to discriminate against members of the Black community because of their race and/or colour in violation of s.12.1 of the Nova Scotia Human Rights Act.<sup>44</sup>

S.12 of the Nova Scotia *Human Rights Act*<sup>45</sup> reads:

12(1) No person shall publish, display or broadcast, or permit to be published, displayed or broadcast on lands or premises, or in a newspaper or through a radio or television broadcasting station or by means of any other medium, any notice, sign symbol, implement or other representation indicating discrimination or an intention to discriminate against any person or class of persons for any purpose.

(2) Nothing in this section shall be deemed to interfere with the free expression of opinion upon any subject in speech or in writing.

The button in question was produced as a reaction to a comment made in the Legislature by the Attorney General of Nova Scotia. He stated: "The trouble is there are too many people in Cape Breton like that, with a big mouth and no mind".<sup>45a</sup> The respondent, Bramhill, who decided to produce the button for financial gain, consulted a professional designer regarding his idea. The designer found the picture of a Black woman singer in a trade magazine and incorporated it into the design of the button. The completed design was accepted by Bramhill. Neither party had any racial motives in choosing the specific picture. In fact, Bramhill "did not think the picture would be interpreted as being a Black woman"<sup>46</sup> and the Board expressly found (at D/252)

43. *Supra* n. 3.

44. *Supra*, n. 3, at D/249.

45. S.N.S. 1969, c. 11.

45a. *Supra* n. 3, at D/249-D/250.

46. *Supra* n. 3, at D/250.

that "...the evidence clearly shows that Mr. Bramhill did not have an intention to discriminate against Black persons by distributing the button..." The buttons were displayed attached to a card containing the words "Stick it to Nova Scotia's Attorney General Howard Howe"<sup>47</sup> and a quotation of the Attorney General's remarks in question.

The Board stated (at D/249-D/250):

At the hearing, testimony was provided by many members of the Black community, clearly stating that the uniform reaction of Blacks to the button was one of anger, shock, disgust, outrage and indignation. All felt that the button portrayed a negative image of a Black person as being loud-mouthed and with few brains. Concern was expressed for the effect upon Black youth and the fact that the button would reinforce existing feelings of inferiority. Dr. Hill, presently a Human Rights consultant and former Chairman of the Ontario Human Rights Commission for nine years from 1962 to 1971, expressed the view that the button had the effect of promoting latent discrimination, as well as active discrimination. In his opinion, the button could have an effect upon opportunities for employment.

The Board of Inquiry upheld the complaint, deciding that "although Mr. Bramhill did not intend to discriminate, he did distribute a symbol in the form of a button which indicated discrimination against Black persons as a class and by so doing, he was in violation of Section 12(1) of *The Human Rights Act*."<sup>48</sup>

After citing various definitions and explanations of "discrimination", most of which emphasize harmful consequences and/or injury to dignity, and noting the emphasis on "human dignity" in the preamble to the Act, the Chairman stated (at D/250):

The Respondent argues that offensiveness or bad taste is not sufficient and that the button in the case before us, does not draw unwarranted or invidious distinctions between Blacks or anyone else. I cannot agree. Using the definition cited by the Respondent, an invidious distinction means one that is "likely to draw discontent or animosity, of an unpleasant or objectionable nature, hateful, obnoxious, causing harm or resentment" (Webster's Third New International Dictionary). The button, in combination with card, conveys the idea that Black persons in general or female Black persons in particular are loud and stupid. The button thus emphasizes a distinguishing characteristic of a negative type. Taken in the historical context of the Black as a racial minority, it goes beyond bad taste and mere offensiveness. Such a statement might, for example, very well tend to activate latent prejudice and indirectly affect employment opportunities for Blacks.

The Board followed the Saskatchewan Human Rights Commission decision in the *Singer* case. In spite of some difference in the respective legislation, it did not distinguish the Saskatchewan case. Referring to the preamble to the Nova Scotia *Human Rights Act* and to s. 8(5) of the Nova Scotia *Interpretation Act*,<sup>48a</sup> it held (at D/251) that: "...the Nova Scotia Commission is under the same obligation to give the statute a liberal interpretation so as to give effect to the policy of the Legislature."

After holding the "balance of probabilities" to be the appropriate standard of proof, the Chairman continued (at D/251): "In my opinion, the button in question, by depicting Blacks as inferior, indicates discrimination against

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47. *Supra* n. 3, at D/252.

48. *Supra* n. 3, at D/252.

48a. R.S.N.S. 1967, c. 151.

them by making an invidious distinction that not only has an adverse effect on the dignity of Blacks as a group, but may conceivably also affect their employment opportunities.’

It was argued for the Respondent (at D/251) that intention was required, “pointing out that pursuant to Section 29 of the *Act*, a person can be charged with an offence for violating the provisions of the *Act*.” The Board rejected this contention stating (at D/251):

On this point, however, I agree with the Court of Appeal in the *Rocca*<sup>49</sup> case, that the weight of authority appears to hold that an intention to discriminate is not necessary in order for there to be a violation of the Human Rights Legislation. (See re *Attorney-General for Alberta and Gares*, 1976, 67/D.L.R. (3rd) 653 at 694 and *Singh v. Security and Investigation Services Ltd.*, May 31, 1977, Board of Inquiry, Ontario; and *Colfer v. Ottawa Board of Commissioners of Police*, 1979, Board of Inquiry, Ontario; and the judgement of Dixon, J. in *Gay Alliance Towards Equality v. Vancouver Sun*; *B.C. Human Rights Commission v. Vancouver Sun*, 1979, 27 N.R. 117, where he appears to take an objective approach to the question of intention.

The Board rejected the Respondent’s constitutional arguments based on “freedom of speech” in the following terms (at D/251-D/252):

It was also argued on behalf on the Respondent that Section 12(1) is beyond the legislative competence of the Provincial Legislature to the extent that it affects freedom of speech. Reference was made to the opinion of Professor Hunter, who in turn made reference to the New Brunswick Board of Inquiry decision in *Levesque and Tardif v. The Daily Gleaner and Donald F. Smith*. The Board of Inquiry in this case held that the Human Rights Commission did not have the power to regulate the press in the sense of prohibiting the publication of a letter to the editor which made disparaging remarks about Francophones. It should be noted that the Board did not specifically hold Section 12 to be *ultra vires* the Provincial Legislature and that the case did deal with freedom of the press and not freedom of speech. There have been no cases in which Section 12 or its equivalent, have been held to be *ultra vires* apart from the indirect remarks in the Board of Inquiry case. Provincial Legislation in the form of Defamation Acts, has been in effect for some time and thus to some extent, regulates freedom of speech and the press.

Neither freedom of speech nor freedom of the press represent absolute freedoms. As Mr. Justice Dixon [sic] stated in the *Gay Alliance* case:

‘There is an important distinction to be made between legislation designed to control the editorial content of the newspaper and legislation designed to control discriminatory practices in the offering of commercial services to the public.’

In the *Alberta Press* case, Chief Justice Duff suggested a test for determining the extent of provincial regulation when he declared:

‘Some degree of regulation of newspapers, everybody would concede to the provinces. Indeed there is a very wide field in which the provinces undoubtedly are invested with legislative authority over newspapers; but the limit in our opinion, is reached when the legislation affects such a curtailment of the exercise of the right of public discussion as substantially to interfere with the workings of the parliamentary institutions of Canada.’

In a similar vein, Chief Justice Rinfret in *Boucher v. The King*, 1951 Supreme Court Reports, 265-271, pointed out that although freedom of expression is important, it does have its limitations: ‘...to interpret freedom as license, is a dangerous fallacy. Obviously, pure criticism or expression of opinion, however severe or extreme, is, I might almost say, to be invited. But, as was said elsewhere, ‘there must be a point where restriction on individual freedom of expression is justified and required on the grounds of reason, or on the grounds of the democratic process and the necessities of the present situation.’ It should not

be...that persons subject to Canadian jurisdiction, can insist on their alleged unrestricted right to say what they please and when they please, utterly irrespective of the evil results which are often inevitable.<sup>50</sup>

The decision continued (at D/252):

Can it be said that Mr. Bramhill, who manufactured and distributed the button in question in order to make a commercial gain or even those who bought the button in question, to refute the statements made by the Attorney-General about Cape Bretoners, have had the right to freedom of expression curtailed to such an extent that Canadian Parliamentary Institutions have been severely interfered with? In particular cases, the right of free speech may have to give way to other human rights, such as the right not to be discriminated against, so that although the law infringes the right to freedom of speech, it does not inviolate [sic] it and it is, therefore not unconstitutional.

Freedom of speech is neither a Federal nor a Provincial matter exclusively; whether a law is *ultra vires* or not, must be determined by its pith and substance. The pith and substance of the Human Rights Legislation, including Section 12, is Property and Civil Rights (*A-G-Canada v. Dupont* [1978] 2S.C.R. 770 at 798).

The Board also declined to apply the statutory "free expression" provision in s.12(2). The Board stated (at D/252):

Section 12(2) should not be read as imposing an absolute limit upon Section 12(1) but rather, in the context of a right of expression that is not absolute and which must, in some other circumstances, give way or be curtailed in order to make other rights effective. It could be interpreted as a declaration that the Provincial Legislature did not intend, by virtue of Section 12(1) to go beyond what is necessary in order to prevent discriminatory signs, symbols, etc.

After finding the respondent to have violated s.12(1), the Board of Inquiry ordered (at D/252) that he:

- (1) Prepare and submit to the Human Rights Commission a letter of apology with an assurance respecting his future willingness to comply with the terms of the Act, and
- (2) Return to the Commission, existing buttons in the possession of Mr. Bramhill, so that they be destroyed.

Many of the comments I made pertaining to *Singer* also apply to *Rasheed*, which followed the former case. In particular, I refer to the dangers to free expression in proscribing communication because of the repulsive idea expressed (i.e. the racist stereotype), the possible danger to equal opportunity and compliance with the law, and the "affront to dignity". However, there are factors in the *Rasheed* case which could have led the Board to distinguish it from the *Singer* case. Its declining to do so further illustrates the danger to free expression posed by the kind of legislative provision being discussed. As well, questions of law dealt with only in *Rasheed* are open to question.

Unlike the *Singer* case, the picture and words in the *Rasheed* case, in light of all the circumstances, were not necessarily of a racially pejorative nature. According to the testimony in the *Singer* case, the name "Sambo" itself has come to have a racially offensive connotation in light of its history and the social circumstances in the U.S.A.<sup>51</sup> Furthermore, a *caricature* was used, in conjunction with a style of speech "stereotypically" attributed to Black people.

50. *Supra* n. 3. at D/251-D/252.

51. See also, *Urban League of Rhode Island, Inc. v. Sambo's of Rhode Island, Inc., and Sambo's Restaurant, Inc. v. Ann Arbour*, both at *supra* n. 17, for further discussion of the background and effects concerning the name "Sambo's".



In *Rasheed*, however, a photograph of an existing person was used. Granted, this photograph, along with the words on the button and the Attorney-General's quotation on the card, could perhaps reasonably have been open to the interpretation given by the Board. But in light of the particular controversy in question, a completely non-racial message could also reasonably have been inferred from the button. Just as the Commission in *Singer* construed the name "Sambo" in light of social history, and the Board in *Rasheed* referred (at D/250) to "the historical content of the Black as a racial minority", the Board could also have given more weight to the *current* context of the *political controversy which inspired the button*.<sup>52</sup>

Because a picture of a member of a visible minority is used, is it reasonable to conclude that it reflects on the entire group? Had a picture of a White person been used, there likely would have been no trouble.<sup>53</sup> It is interesting to speculate on what would have happened if there had been no trade magazine readily available, and it would have been necessary to advertise for and hire a model or other person to be photographed. If the person who first responded to the advertisement had been Black, and had been hired, would the respondent have been in this difficulty because he *didn't* discriminate? Does this mean that in Nova Scotia (or wherever this precedent may be followed), if a producer wants to depict a racially neutral situation involving a person to be involved in a potentially humiliating or insulting situation, or in circumstances portraying crime or other dishonourable conduct, that producer must only hire whites for the particular role?<sup>54</sup>

I suggest that the Board could very well have distinguished the *Singer* decision on the basis of the "commercial nature" of the communication there, i.e. a trade name and the advertisement for a business. Instead, he appears to

52. However, perhaps I am being unfair to the Board in criticizing what is a finding of *fact*. I have not seen the transcript of evidence; and I have no particular knowledge of the social conditions in Nova Scotia. The only factual background I have of this case is the reasons for decision of the learned Chairman as they are reported in the Canadian Human Rights Reporter. If there was a high degree of racial tension in Nova Scotia or Cape Breton at the time, or if there were any racial connotations in the Attorney-General's remarks, or if there are any other local factors which may have influenced the findings or the decision, they are not apparent in the Report. And it is (generally) only the statements of *fact* and *law* that are included in the *reasons for decision* which can be used in *evaluating a case as a precedent*.
53. Unless, of course the white person had also been a woman. Then would some feminist group or individual have objected that this portrays a negative stereotype of women as "loud and stupid" or that reference to "kiss me" somehow manages to represent women as being merely "sex objects"? This hypothetical may seem fanciful and it would be very surprising if any Board would uphold such a complaint, if it would ever get to inquiry stage. However, the concern that some individuals and/or groups seem to show with media presentation of women do not leave such scenarios beyond possibility. Certainly one cannot fault individuals or groups struggling for equality of opportunity for being concerned with negative images and beliefs held about categories of people. However, the danger of loss of perspective and the confusing of the innocuous with more dangerous material ought to be guarded against. And it could be especially unfortunate when people and organizations with otherwise "impeccable records" of service in advancing human rights causes tend to adopt an attitude of "if you don't like it — ban it". And when legislative provisions exist and are interpreted so as to put that attitude into practice purportedly in the *name of Human Rights*, a dangerous situation may well be in existence.
54. What would happen if a theatre or film company wanted to produce a "crime" story, or if the police or an insurance company wanted to produce a documentary film on security or crime prevention and needed an actor to portray a murderer, robber or rapist? If a qualified actor who sought the role happened to be Black, would the director have to say "I am sorry sir, but we cannot portray a Black person in a compromising situation. Therefore, I must deny you the role because of your race, in order to protect the dignity and image of Blacks generally, and to assist in the struggle for equality of opportunity?" Not only would this raise serious social and policy questions, but it may well require an amendment to provide an exception to the ban against racial discriminations when race is a bona fide factor in the choice of an actor, model or person in a similar role. Note that the English *Race Relations Act 1976*, c. 74, s. 5 provides for such exceptions. However, further discussion of such possible exception is beyond the scope of this article.

attach significance to the profit motive of the respondent, though also recognizing the purpose of the button's buyers to refute the Attorney-General's statements. If he believed that the commercial aspect of the manufacture and sale of the buttons reduced the degree of free speech protection to which the Respondent was entitled, and considered them on the same level as the name and sign in the *Singer* case, I suggest that he was in error. Here, the message was not commercial in nature. It was not merely part of, in furtherance of, or incidental to a business transaction, such as in the case with commercial advertisements and the use of trade names. The message, the criticism or satirizing of a Minister for his statements in the Legislature, was clearly political. The fact that the buttons were prepared for commercial sale ought not lower the "free expression" protection available to them.<sup>55</sup>

In discussing *Singer*, I suggested that in cases involving expression of ideas, it is particularly inappropriate to impose liability where there is no discriminatory intent.<sup>56</sup> Those remarks apply *à fortiori* to the *Rasheed* case. Here, the remarks were primarily political in nature, they were intended to satirize comments made by a Minister in the Legislature. Furthermore, if a racially pejorative message *could* reasonably be read into the buttons in question, this is certainly not a *necessary* interpretation of it, in light of the surrounding circumstances. A primarily "political" message without any racial overtones could also be read from that communication, just as reasonably. At worst, the message is ambiguous. It is *especially* dangerous to apply "strict liability" where the objectionable nature of the message is at most, unclear. And the political circumstances involved underline this danger. Besides the infringement of free expression inherent in the rendering culpable of a message itself, applying "strict liability" can substantially increase the "chilling" or "deterrent" effect.

The learned Chairman in *Rasheed* cites the *Gay Alliance*<sup>57</sup> case in support of his decision. With respect, it is difficult to see how that case can be so applied. Even the "objective approach" taken by Dickson, J., dissenting, in that case seems to refer to determining the meaning of "reasonable cause" in the pertinent legislation<sup>58</sup>, and to negating the possibility that an "honest" bias against a particular group can be a defence.<sup>59</sup> It does not seem to refer to the

55. As Brennan, J. in *New York Times v. Sullivan* (1964), 84 S. Ct. 710 at 718-719 points out, the "commercial" factor in the sale of newspapers, books, and the receipt of payment by newspapers for publishing "editorial" (as distinguished from commercial) advertisements do not detract from the 1st Amendment protection available to them.

56. It is to be noted that the Ontario Board of Inquiry decisions relied on in support of strict liability — *Singh v. Security Investment Services Ltd.* (Ont. Bd. of Inq., unreported, May 31, 1977) and *Colfer v. Ottawa Board of Commissioners of Police* (Ont. Bd. of Inq., unreported, 1979) were *disapproved* by the Court in *Re Ontario Human Rights Commission et al. and Simpson-Sears Ltd* (1982), 133 D.L.R. (3d) 611 at 622 (Ont. H.C.J.); *aff'd Ontario Human Rights Commission and Theresa O'Malley (Vincent) v. Simpson-Sears Limited.* (1982), 138 D.L.R. (3d) 132 (Ont. C.A.), in which leave to appeal to the SCC has been granted. I am not basing my argument on these Court decisions, nor am I denying that strict liability may sometimes be appropriate in human rights cases. It is the application of that concept to cases concerning *expression* which I challenge.

57. *Gay Alliance Toward Equality v. Vancouver Sun*, [1979] 4 WWR. 118 (S.C.C.).

58. *Ibid.* at 139.

59. *Id.* at 148-149.

issue of whether, where a ground of discrimination is clearly prohibited, the respondent's discriminatory intent or lack thereof is relevant.<sup>60</sup>

The Chairman cites Dickson, J.'s dissenting opinion in support of the Board's restrictive approach to freedom of speech and of the press.<sup>61</sup> However, if the *Gay Alliance* case is relevant at all, Martland J's opinion for the majority would seem to support the Respondent's position in *Rasheed*. It is the *content* of the Respondent's button which was the basis of the complaint. Martland J. stated:

Section 3 of the Act does not purport to dictate the nature and scope of a service which must be offered to the public. In the case of a newspaper, the nature and scope of the service which it offers, including advertising service, is determined by the newspaper itself. What s.3 does is to provide that a service which is offered to the public is to be available to all persons seeking the use of it, and the newspaper cannot deny the service which it offers to any particular member of the public unless reasonable cause exists for so doing.<sup>62</sup>

Martland, J. specifically stated that it was the "content of the advertisement itself", not the traits of the person submitting it, which were the reasons for refusing to publish it.<sup>63</sup> He emphasized (at 123-126) that refusing to publish an advertisement with which it disagreed came within the "editorial" freedom of the newspaper, which was part of "freedom of the press".

The majority decision in the *Gay Alliance* case *declined* to interpret or apply the relevant legislation so as to interfere with freedom of the press. Although the Court didn't express itself in these terms, could this be an example of judicial reluctance to interpret a statute in a manner interfering with common law freedoms, unless such interference is compelled by the express words or necessary implication of the statute? As has often been pointed out, a "narrow" interpretation of human rights legislation is (generally) not desirable or appropriate. However, in the exceptional cases where "liberal" or "wide" interpretation of such legislation would unduly compromise freedom of expression, perhaps the more "cautious" approach to statutory interpretation is still valid.

Without wishing to deal at length with the constitutional opinions expressed by the Board in *Rasheed*, I believe that several comments are in order. The Board doesn't seem to have considered whether or not attempting to suppress

60. It is true that Laskin, C.J.C. in his dissent (*Id.*, at 132) states: "Intent is not, however, an issue under s.3 of the *Human Rights Code*". However, he was there concerned with whether the Court of Appeal erred in reversing the Board of Inquiry's decision that reasonable cause for refusing the advertisement did not exist, and whether that Court paid undue attention to the terminology employed by the Board. This could not be construed as a ruling that lack of discriminatory intent could never be a defence under human rights legislation, irrespective of the wording or subject matter of the provision in question. See, comments of Ontario Court of Appeal in *Ontario Human Rights Commission v. Simpson-Sears Limited* (*supra* n. 56 at 135), concerning the *Gay Alliance* case.

61. *Supra* n. 3, at D/251.

Here, he quotes Dickson, J., as saying "There is an important distinction to be made between legislation designed to control the editorial content of a newspaper and legislation designed to control discriminatory practices in the offering of commercial services to the public" (*supra* n. 57, at 145)". In the *Rasheed* case (*supra* n. 3), though the buttons are not newspapers, it is their *content* or *message* which is being challenged. This message was initiated by the *respondent* himself in consultation with the designer. Unlike the *Gay Alliance* case (*supra* n. 57), there is no element of "commercial service" being impugned (as such). Any element of such "commercial service to the public" in Bramhill's activities only involved the *sale* of buttons to members of the public. No refusal to sell on the basis of race was even alleged; nor was discrimination in service the basis of complaint. It is the message itself which is in issue. If Dickson, J.'s distinction above quoted is relevant to this case at all, it would seem to help the respondent's position more than the complainant's.

62. *Supra* n. 57, at 126.

63. *Supra* n. 57, at 125-126.

communications because of the *message* may trench on criminal law power and be *ultra vires* the province on that ground.<sup>64</sup> It is true that the statute provided for remedies “civil in nature” (as well as penal provisions which weren’t invoked here). However, here the remedy was prohibitive in nature, the destruction of the communicative material, which was in effect the silencing of a form of communication. And although the remedy in this case wasn’t as severe as all of those available under *An Act to protect the Province against Communistic Propaganda*<sup>65</sup> ruled *ultra vires* in *Switzman v. Elbling*<sup>66</sup>, destruction of communicative material was one of the possible consequences of violation of that latter Act.<sup>67</sup> Furthermore, the Board’s decision in *Rasheed* construed s. 12 to prohibit the expression of the *undesired idea itself*<sup>68</sup> by the methods in question, just as *An Act to protect the Province against Communistic Propaganda*<sup>69</sup> sought to suppress the expression of certain ideas.<sup>70</sup>

The “pith and substance” of much of the legislation in question is undoubtedly aimed at “property and civil rights”. To the extent that it refers to signs or symbols *directly facilitating discrimination otherwise prohibited by the Act, such as discrimination in employment, service and housing*.<sup>71</sup> s. 12 is likely within that category as well. However, to the extent that it is aimed at banning “stereotypical” or “offensive” ideas *per se*, that designation may be inaccurate.<sup>72</sup>

*Attorney-General of Canada v. Dupond*<sup>73</sup> certainly cannot be read as authority that the “pith and substance” of s. 12 of the *Nova Scotia Human Rights Act*<sup>74</sup> (as interpreted and applied by the learned Chairman in *Rasheed*) is “property and civil rights”. In that case Beetz, J. states:

I cannot see anything in the ordinance which interferes with freedom of religion, of the press, or of speech, or which imposes religious observances, in such a way as to bring the matter within the criminal law power of Parliament. The ordinance prohibits the holding of *all* assemblies, parades or gatherings for a time period of 30 days, *irrespective of religion, ideology or political views*. It does so for the reasons given in the reports of the Director ...*the reasons have nothing to do with those for which provincial enactments were invalidated, in the Saumur, Birks and Spitzman cases*<sup>75</sup> [emphasis after “30 days” added]

The learned Chairman in *Rasheed* read s. 12 as prohibiting a certain message because of its “stereotypical” *ideas*. Is this any less a prohibition on the basis of *thought or opinion* than the prohibition against *communism* dealt with in *Switzman v. Elbling*?<sup>76</sup>

64. See, W. Tamopolsky, *Discrimination and the Law in Canada* (1982), at 335-338.

65. R.S.Q. 1941. c. 52.

66. [1957] S.C.R. 285.

67. R.S.Q. 1941. c. 52. s. 14, cited at [1957] S.C.R. 285 at 311.

68. See, W. Tamopolsky, *op. cit.*, n. 64.

69. R.S.Q. 1941. c. 52.

70. *Switzman v. Elbling*, *supra* n. 66.

71. See, W. Tamopolsky, *op. cit.*, n. 64.

72. *Ibid.*

73. [1978] 2 S.C.R. 770; (1978), 84 D.L.R. (3d) 420.

74. *Human Rights Act*, S.N.S. 1969. c. 11.

75. *Supra* n. 73. (1978), 84 D.L.R. (3d) 420 at 437-438 (S.C.C.).

76. *Supra* n. 66.

Perhaps the learned Chairman underestimated the relevance of the buttons in question to "Canadian Parliamentary Institutions". As I mentioned previously, the fact that manufacture and sale of buttons were for profit does not reduce the expression to "commercial speech". The message was not commercial in nature; it was *political*. What could be more central to free speech re "Parliamentary Institutions" than the right to thoroughly criticize a minister for remarks he made in the legislature? The fact that satire is the style or buttons are the medium utilized do not detract from the "political" nature of the message.

Section 12(2) of the Nova Scotia *Human Rights Act* reads:

12(2) Nothing in this section shall be deemed to interfere with the free expression of opinion upon any subject in speech or in writing.

I suggest that the Board did not give the consideration or effect to this provision that it was due, and construed it in a way that seems to render it almost meaningless. Here the Board used s.12(1) to limit or narrow the scope of s.12(2), though it was probably intended that s.12(2) should limit s.12(1). Section 12(2) could have at least been applied so as to hold that the concept of "discrimination" does not include the expression of ideas as such, especially where there is a political basis for the message, and the racial aspect is ambiguous or incidental.

Though arguing that free speech is not "absolute", the Board seemed to give it little or no substantive weight at all. Could the Board not just as easily have questioned the "absolute" nature of the right to be free from discrimination (especially if "discrimination" is defined as broadly as it was in this case?) and held that this latter right must "give way" at least somewhat to accommodate free expression? This position seems not only to give free speech a less than absolute status, it seems to place it on a very low priority. If this interpretation of the provision is sustainable or correct, it further underlines the danger of the kind of legislative provision in question.

*McKinlay v. Cranfield and Dial Agencies*<sup>77</sup> involved a complaint under s.14(1) of the Saskatchewan *Human Rights Code*.<sup>78</sup> Section 14 of that *Code* reads:

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 he owns, controls, distributes, or sells, any notice, sign, symbol, emblem, or other representation tending or likely to tend to deprive, abridge or otherwise restrict the enjoyment by any person or class or persons of any right to which he is or they are entitled under law, or which exposes or tends to expose, to hatred, ridicules, belittles, or otherwise affronts the dignity of any person, any class of persons or a group of persons because of their race, creed, religion, colour, sex, marital status, physical disability, age, nationality, ancestry or place or origin.

(2) Nothing in subsection (1) restricts the right to freedom of speech under the law upon any subject.

77. *Supra* n. 4.

78. S.S. 1979, c. S-24.1. (hereinafter referred to as the Saskatchewan *Code*)

The complaint involved a letter which was written by the Respondent Cranfield and which was displayed to the public in a window of the Respondent Dial Agencies' business premises. The letter was a protest to Premier Blakeney concerning what Cranfield considered unsatisfactory service from the Department of Social Services. It alleged that he requested the Department to "appoint a trustee to receive the rental money" and pay the rent of a social assistance recipient who was a tenant of the agency and was in arrears in her rental payment, and that the Department denied his request. The letter continued (at D/247):

On the day the recipient was to receive her cheque, I phoned again and was told that the cheque had been mailed to the house. I immediately went to the house and found what I expected. The house had just been vacated that morning. It was left very dirty and the plumbing was left plugged up. I returned to the office and phoned the Minister. He was out and his assistant answered the phone. After explaining the circumstances to her, she had the audacity to ask why anyone should believe me, despite the fact that I was the only one who knew what was going on. *After talking to this person I would highly recommend the government of this province hire the handicapped, the situation could only improve if they hired mentally retarded too. Or is this being done already?* [emphasis added]

The Complainant noticed the letter when she was at a bus stop near the building. She suffered from epilepsy<sup>79</sup>, and her employment involved advancing the interests of physically handicapped people. She alleged that the last two sentences of the quoted paragraph "...ridicules, belittles or otherwise affronts my dignity because of my physical disability."<sup>80</sup> She testified that "in her opinion, the letter equated physical disability with incompetency. She felt that the letter was sarcastic in its tone and tended to perpetuate the stereotype or myth that the physically handicapped cannot do a good job. She said that in her experience the physically disabled had difficulty in obtaining satisfactory employment and that statements like those contained in the letter affected the attitude of the public with respect to employing persons with a physical disability. She considered the sentences complained of an attack on her own dignity and self respect and that of all handicapped persons."<sup>81</sup>

The Respondent Cranfield was general manager of the Respondent Dial Agencies. He testified:

... [T]hat he had absolutely no intention of ridiculing or belittling the abilities of the physically disabled. He stated that it was his honest belief that the handicapped could do a good job and in his opinion would do an infinitely better job than that being done by present employees of the Department of Social Services."<sup>82</sup>

Three physically handicapped tenants of Dials Agencies also testified for the Respondents. They stated that they were not offended by the letter in question, and that they were well treated by Cranfield.

The Board of Inquiry held that the Respondents violated s.14(1) of the Saskatchewan Code. After stating (at D/247) that "It is not disputed that the

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79. A condition included in the definition of "physical disability" in s. 2(n) of the Code.

80. *Supra* n. 4, at D/246.

81. *Supra* n. 4, at D/247.

82. *Supra* n. 4, at D/247.

letter constituted a notice or other representation as set forth in Section 14(2)", the Board dealt with the question of "whether the last two sentences in the paragraph of the letter...ridiculed, belittled or otherwise affronted the dignity of any person or class of persons because of his or their physical disability."

Though finding that Cranfield "did not intend his statements to be interpreted as being disparaging comments about the physically disabled," and attributing that result to "careless drafting of the letter" the Board did not exonerate the Respondents. The Board reasoned (at D/247) that:

[I]t appears clear that this is not the type of offence in which intention is relevant: *Singh v. Security and Investigations Ltd.*<sup>83</sup> (Ontario Human Rights Board of Inquiry, May 31, 1977); *Mechiporenko v. Hickman Tyre Hardware Co. Ltd.* (British Columbia Human Rights Code Board of Inquiry, Sept 12, 1975); *Sing v. Iwasyk & Pennywise Foods Ltd.* (Saskatchewan Human Rights Commission Inquiry Decision, October, 1976). It is the effect, not the intention, that is to be considered.

The Board also considered the issue of what persons would have to construe the communications as derogatory of the protected classes before a violation could be deemed to occur. The Board seemed to adopt an objective test. It did not consider the reaction of the witnesses, who knew Cranfield and were familiar with his favourable attitude and conduct to handicapped persons, as determinative. Neither did it judge the message by its effect on the "more sensitively attuned" perceptions of such statements by a handicapped person deeply involved with promoting the interests of such people. The Board decided (at D/247) that:

... [T]he test ought not be the effect on Ms. McKinlay, the individual complainant, but rather whether the representation complained of would be considered by the average 'reasonable' person to 'ridicule, belittle or otherwise affront the dignity' of Ms. McKinlay or other physically disabled persons.

The Board's decision did not refer to s.14(2) or consider whether "free speech" could be a defence.

The Board (at D/247) ordered the Respondents to delete the two offending sentences "from any copy of the letter...that is displayed or published on any lands or premises, or in any publication or medium, owned or controlled by either Dial Agencies or D.D. Cranfield."

The legal correctness of the reasoning in *McKinlay* is not as readily challengeable as that in *Singer* and *Rasheed*. The express wording of s. 14(1) of the Saskatchewan *Human Rights Code*<sup>84</sup> seems to include within its scope the proscription of communication<sup>85</sup> because of these impugned *ideas* and *insulting effects*.<sup>86</sup> And it would seem that the adverse effect on equal opportunity would be one of the evils which it is the purpose of such legislation to eliminate.

83. But *Singh* was judicially disapproved, see *supra* n. 56.

84. S.S. 1979, c. S-24.1.

85. Possible defenses under s. 14 (2) which reads "Nothing in subsection (1) restricts the right of freedom of expression under the law upon any subject": or on constitutional grounds do not appear to have been considered by the Board.

86. Of course, the appropriateness of dispensing with the need for discriminatory intention may well be open to question for reasons similar to those which I discussed in *Singer*, *supra* n. 2 and *Rasheed*, *supra* n. 3.

Nevertheless, the facts and reasoning of this case provide excellent evidence of the danger inherent in this type of provision, and the policy issues I raised discussing *Singer* and *Rasheed* apply with equal, if not greater force here. In this case, an individual wrote a letter of complaint to the Premier concerning what he deemed to be incompetent government service. He displayed the letter to the public from the business premises of the firm which he managed. If any type of activity would seem to be within "freedom of expression" this certainly would be it. However, *incidentally* to this main purpose of criticizing government services, he made unfortunate and offensive reference to handicapped persons. Undoubtedly, it would have been better had he shown greater consideration, or been more careful in drafting the letter. However, when a judicial, quasi-judicial, administrative or other public body can decide such expression to be unlawful and order its writer to delete it, free expression is in serious trouble. Perhaps there is little (or no) "social value" to the impugned remarks; or even some possibility of harm coming from them. Notwithstanding the relative lack of merit of the particular comments in question, the *principle and practice of official control of expression is per se objectionable*. And it must not be forgotten that the existence and enforcement of such provisions can deter individuals from expressing their views in certain cases, even if such views would be beyond reproach.<sup>87</sup> Such legislation might motivate some people to exercise greater care, and lead to a reduction of "slurs" of the kind in question. However, the deterrence to expression generally, and the fear of legal action concerning discussion of certain subjects in particular, might well outweigh any benefit from such legislation, and the harmful effects of such "slurs". It must be remembered that many areas of vital social concern, which are legitimate topics for public discussion, could involve categories referred to in the Saskatchewan *Code* and similar legislation.

I must re-emphasize that I can appreciate and support the aims of such provisions and decisions to promote equal opportunity, and to encourage compliance with the "letter and spirit" of human rights legislation. I recognize the need to overcome stereotypical thinking and prejudice. But, as has often been pointed out, educational and persuasive means, by human rights commissions, and other official agencies, private groups and concerned private citizens are more appropriate methods towards achieving these goals in a democratic society. Legal sanctions should be provided only for unlawful actions, e.g. *denials of and discriminatory treatment concerning jobs and other benefits on prohibited grounds, or direct incitement* to such unlawful conduct.

87. See the famous remarks of Brennan, J., in *Speiser v. Randall* (1958), 78 S. Ct. 1332 at 1342: "The vice of the present procedure is that, where particular speech falls close to the line separating the lawful and the unlawful, the possibility of mistaken factfinding — inherent in all litigation — will create the danger that the legitimate utterance will be penalized. The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens...In practical operation, therefore, this procedural device must necessarily produce a result which the State could not command directly. It can only result in a deterrence of speech which the Constitution makes free." [emphasis added].

*Speiser* invalidated the procedural aspects of the impugned legislation (i.e. requiring an applicant for a tax exemption to establish that he didn't "advocate the overthrow of the Government...by force or violence..."). However, much of its reasoning is also applicable when *substantive* restrictions on expression are involved. The need to justify, explain or defend one's expression before an official body (or the possibility of this need occurring), and the *uncertainty* whether or not his expression would be found legal can often deter someone from expressing views *conceivably* within a legislative prohibition.



Although respect for the dignity of all individuals and groups is certainly highly desirable and to be encouraged, these are particularly inappropriate values to be enforced through legal sanctions. These are matters largely related to attitudes, interpersonal and intergroup relationships, and even personal characteristics such as consideration, politeness, and fairmindedness. In such matters, excessive legal or state coercion could result in the creation of an unduly controlled society, and can unacceptably limit individual freedom.

It must be considered whether legislative provisions and decisions such as those in issue here are *counterproductive* to the goals they purport to advance. Can proceedings such as these not sometimes contribute to, rather than reduce, "stereotypical" thinking? If many members of society see the handicapped (or women, or members of any protected group) as unduly sensitive, helpless, demanding of "special" treatment, or unable to cope with the realities of life, chances are that such *proceedings themselves* may *reinforce* these stereotypes, and even negate or prejudice achievements made in other cases and endeavours.

Many persons in the community undoubtedly do not give these matters much thought. Others may entertain various misconceptions, or "stereotypical" thoughts about the handicapped, but are without malice, and are capable of changing their views. Such people may well react with the greatest of admiration and respect for a handicapped person who, upon being denied a job, went to the Human Rights Commission, challenged the discrimination, and attempted to establish through his own testimony, medical evidence, and analysis of the job requirements that despite his handicap, he is fully qualified for the position in question. However, the same individuals might look at a complaint or proceeding such as the one in *McKinlay* with amusement, disgust, contempt, or even resentment, and possibly would harden rather than modify negative attitudes they may have had toward the handicapped. There might be other people who would ordinarily comply with human rights legislation, or even endeavour to actively co-operate in assisting handicapped persons (such as by undertaking "affirmative action" programs in employment or in housing). However, upon reading about a case like the one in point, these same people might actually become frightened out of hiring or otherwise having anything to do with the handicapped, being led to fear that being involved with them would pose to high a risk of trouble.

One must also consider how a person similar to the Respondent in *McKinlay* would have reacted had the complainant (or an organization acting on behalf of the handicapped), rather than complaining to the Commission, simply written or spoken to him, pointing out the harmful effects of his comments and requesting that he *voluntarily* delete such statements. Or had s. 14 *not* been law, but the Commission had requested him to *voluntarily* delete the offending statements, while making it clear that he could not be forced to act and that the decision would be his? Chances are that such a person (if he was as considerate as the defence witnesses described the Respondent) may well have voluntarily complied. However, upon finding the *legality* of his writing and displaying a letter to the Premier challenged, can one be surprised or blame him if he chose to fight the issue, as an act of defiance or on principle?

The aims of legislation, commissions and boards in promoting respect towards and recognition of the dignity of members of "protected" groups are

to be commended and encouraged. But is genuine respect always the result of coercion? And do resentment and fear often lead to genuinely positive attitudes towards a particular group or person?

These factors must be weighed against the dangers seen in permitting the communication in question, before concluding that the interference with individual freedom inherent in banning these communications is really necessary or beneficial in the battle against discrimination.<sup>87a</sup>

87a. Since the completion of this article, *Ukrainian Canadian Professional & Business Association of Vancouver v. Konyk et al.* (B.C. Bd. of Inq., unreported, Oct. 27, 1982) was decided.

In that case, the use and display of the trade name "Hunky Bill" in connection with respondents' restaurant business was alleged to violate s.2 and s.3 of the *Human Rights Code*, R.S.B.C. 1979, c. 186.

The Chairman stated (at 5):

The material part of section 2...reads:

2(1) No person shall publish or display before the public, or cause to be published or displayed before the public, a notice, sign, symbol, emblem or other representation indicating discrimination or an intention to discriminate against a person or class of persons in any manner prohibited by this act.

The material part...[of s.3] reads:

(3) No person shall...

(b) Discriminate against a person or class of persons with respect to any...service or facility customarily available to the public, unless reasonable cause exists for the denial or discrimination. ... [Emphasis added]

There was much evidence that the word "hunky" was an "ethnophaulism" (at 12) or "ethnic slur"; that it deeply offended many Ukrainians, portrayed an unfavourable image concerning them, and encouraged discrimination. However, the respondent, himself Ukrainian "disclaims any intention on his part to discriminate against his own people" (at 16). He, and other witnesses (including some from his own ethnic background) testified that they found the word complimentary or innocuous, and that many Ukrainians patronized the establishments in question (at 16-17).

The learned Chairman, dismissing the complaints, stated (inter alia) (at 18-20):

4. In my view, Section 2...does not create a quasi offence in itself. There is a breach of Section 2 only when a person publishes or displays before the public, a sign or other representation indicating discrimination or an intention to discriminate in a manner that is prohibited by Sections 3 to 9 of the *Human Rights Code*.

5. Section 2 only prohibits signs that indicate discrimination or intent to discriminate in the manner prohibited by the *Human Rights Code* itself. Therefore, Section 2 must be read in light of Sections 3 to 9.

6. To hold otherwise, would be to render nugatory the very words of s.2, which require that the mode of discrimination, by definition, must be "in any manner prohibited by the *Human Rights Code*."

Section 2 does not cover all signs indicating discrimination or an intention to discriminate. It only covers those signs dealing with that discrimination which is expressly prohibited by the *Human Rights Code*. Section 2 itself, does not define discrimination.

7. Accordingly I cannot find that s.2 creates an offence in itself as alleged by the Applicants. However, if I am wrong in my conclusion on Section 2, I find on the evidence that there has not been a publication or display which indicates 'discrimination or intention to discriminate' contrary to the *Human Rights Code*.

8. Presuming that I am correct in law in my conclusion that Section 2 of the *Human Rights Code* does not stand by itself, but has to be read in conjunction with the other Sections and specifically, Section 3, and only creates an offence if it is so read, then I have to examine whether or not the public display of the sign in connection with the restaurant and food services constitutes discrimination.

9. The evidence is that while the vast majority of Canadian/Ukrainian background might find the name offensive, nevertheless they are free to use the restaurant and indeed, many do.

10. There is no doubt in my mind that the use of the term "hunky" or any other that offends deeply held feelings, is to be discouraged.

11. That is not to say that such terms either are or should be prohibited by law. To attempt to do so, would be to choke freedom in the name of liberty....

Rejecting the argument that the offensiveness and perceived racial affront of the word "hunky" would force many Ukrainians to refuse to patronize the restaurant, the Chairman stated (at 21):

3. I find that such a situation may well constitute discrimination in a subjective sense, but it does not follow from that that it necessarily constitutes discrimination in an objective legal sense. It certainly does not constitute discrimination of the type that is covered by the *Human Rights Code*.

4. To put it simply, the *Human Rights Code* does not prohibit the use of words which offend other persons. Rather, it prohibits the use of words which objectively discriminate against persons or a class of persons, contrary to Section 3 to 9, inclusive, of the *Human Rights Code*.

After several comments concerning the meaning of "discrimination" which the legislation seeks to eliminate the Chairman remarked (at 22): "9. Unlawful discrimination requires a consequence. It must result in a difference of treatment undertaken in a manner prohibited by the *Human Rights Code*. To discriminate in a vacuum, without a detrimental consequence or result, is not unlawful."

He held (at 22-23):

As I have said, I find that when the *Human Rights Code* speaks of discrimination it means objective discrimination. The fact that one or 600,000 may subjectively find a name offensive, is not necessarily determinative. The test is an objective one. Can it reasonably be said that the name complained of is not only pejorative, but also discriminatory on the basis of the evidence before me. I find that the use of the name "Hunky Bill" by the Respondents is not discriminatory, nor does it violate the *Human Rights Code*.

The Chairman distinguished the cases of *Singer* (supra n.2) and *Rasheed* (supra n.3) both on the facts and on the major differences in the relevant legislation.

It should be noted that several expert witnesses suggested the banning of stereotypical or racially offensive material (including much classical literature).

In response, Mr. Owen-Flood emphasized the dangers to freedom that such proscription would involve, and questioned the appropriateness of legislation as a means of reducing prejudice (see e.g. at 12-15 & 19-21).

*Levesque and Tardiff v. The Daily Gleaner and Smith*<sup>88</sup> dealt with complaints against a newspaper and the author of two letters to the editor which it published. The author severely criticized the New Brunswick government's policy regarding bilingualism, and the Quebec government's unilingualism policy. His letter contained extremely inflammatory, insolent and derogatory comments concerning the French community. Complaints alleging violations of the New Brunswick *Human Rights Act*<sup>89</sup>, s.6(1), were brought by two Fredericton residents.

S.6(1) of the *Act* reads:

No person shall (a) publish, display or cause to be published or displayed, or (b) permit to be published or displayed on lands or premises, in a newspaper, through a television or radio broadcasting station, or by means of any other medium that he owns or controls, any notice, sign, symbol, emblem or other representation, indicating discrimination or an intention to discriminate against any person or class of persons for any purpose because of race, colour, religion, national origin, ancestry, place of origin, age, marital status, or sex.

S.6(2) reads:

Nothing in the section interferes with, restricts, or prohibits the free expression of opinion upon any subject by speech or in writing.

The Board of Inquiry held that it lacked jurisdiction to recommend action against the respondents in this case.<sup>90</sup> The Board stated (at 2-3):

The Human Rights Act of New Brunswick does not make provisions for the situation that has arisen here. Mr. Levesque and Mr. Tardiff were not personally discriminated against by the *Daily Gleaner* or by Mr. Smith...

The words 'person or class of persons' are the problem. Section 2(i) of the Act defines person as: "'person' in addition to the extended meaning given by the Interpretation Act includes an employment agency, an employers' organization and a trade union;' and section 38(7) of the Interpretation Act states: "'person' or 'party' includes a corporation, partnership or society and the heirs, executors, administrators or other legal representative of a person.'

The opinion continued (at 3):

The Human Rights Act by defining the word 'person' in this way does not provide the machinery to deal with a complaint by one or two people on behalf of a large group of people with the same ethnic background. The first question is then what jurisdiction does the Board of Inquiry have in this matter?

After discussing the nature of the Board in the scheme of enforcement of the Act, and questions concerning the extent and limits of its power, it returns to the complaint in question. It continues (at 6):

The Board find that the kind of discrimination alleged by Mr. Levesque and Mr. Tardiff in their complaints on behalf of the French community, is not a matter which falls within the scope of the New Brunswick Human Rights Act. Therefore, with regard to the respondents, the *Daily Gleaner* and Mr. Donald F. Smith, the Board of Inquiry does not have the power to recommend a course of action that could be taken against them in their capacity as individual respondents.

88. New Brunswick Board of Inquiry, unreported, September 10, 1974 (hereinafter referred to as *Lévesque*).

89. R.S.N.B. 1973, c. H-11.

90. It is to be noted that under the New Brunswick *Human Rights Act*, if the Board of Inquiry finds a complaint proved, it can only recommend a remedy to the Human Rights Commission. See, s.20(4) and *supra* n. 88, at 3-6. The power to order a remedy belongs to the Human Rights Commission. (See, s. 21).

Deciding (at 6-7) that it “does have jurisdiction and power, under s.20(4) of the *Act* to recommend a general course of action that the Human Rights Commission could take in the future with regard to complaints of a similar nature if they arise”, the Board went on to discuss some wider issues which the case raised.

Citing *Re Alberta Statutes*<sup>91</sup>, the Chairman stated: “Freedom of the press and freedom of speech are areas of the law which generally fall within the jurisdiction of the federal Parliament.”<sup>92</sup>

He continued (at 7-8):

Freedom of speech is a basic freedom in this country and as counsel for Mr. Smith argued, ‘All we have, at most is a bigoted opinion of one person and that opinion, I hope, he is now entitled to and that as long as we have our own individual civil liberties and our own civil freedom in this country, I hope he will always be entitled to just as bigoted opinion as he might want to have.’ Bigotry and mere ill-will as products of controversy are protected in Canada because freedom of speech is one of our basic freedoms.

After quoting Rand, J. in the *Boucher* case<sup>93</sup> in support of free expression, the Chairman continues (at 8): “Freedom of the press is similarly protected in Canada by the federal Parliament, but there are limitations. The press is governed by laws on sedition, blasphemy, obscenity, censorship and defamation”.

He suggested examining the “group libel” provision of *The Defamation Act*<sup>94</sup> of Manitoba though acknowledging<sup>95</sup> the possible constitutional problems involved.<sup>96</sup>

Referring to the priority of “conciliation and settlement” in the New Brunswick *Human Rights Act*, and the Commission’s “lack of power to issue an order in this matter”, the Board suggests that the Commission “should use its good offices to persuade the parties involved to reach a settlement.”<sup>97</sup>

The Chairman stated (at 10-11):

We do have freedom of speech in this country but it is a freedom with a responsibility attached to it. The Letters to the Editor section of a newspaper is designed to allow the public freedom to express their opinion on the subject of their choice. It is not designed to be used to drive a decisive [sic] wedge between the different groups that make up a community. Freedom of expression is important but it does have limitations.

He quotes Rinfret, C.J.C.<sup>98</sup> in support of these limitations.<sup>99</sup>

The opinion concludes as follows (at 11-12):

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91. [1938] S.C.R. 100.

92. *Supra* n. 88, at 7.

93. *Boucher v. The King*, [1951] S.C.R. 265, at 288.

94. R.S.M. 1970, c. D20, s. 19.

95. *Supra* n. 88.

96. *Supra* n. 88, at 8-9 citing *Courchene v. Marlborough Hotel Co. Ltd.* (1971), 20 D.L.R. (3d) 109 (Man. Q.B.), (per Tritschler, C.J.)

97. *Supra* n. 88, at 9-10.

98. *Supra* n. 93 at 277 (dissenting opinion).

99. *Supra* n. 88 at 10-11.

In summary, because the regulation of the press is an area of the law within the federal sphere of control and because of section 6 (2) of the Human Rights Act, the Human Rights Commission, as established by the provincial legislature, does not have the power to regulate the press. Still, newspapers do not have a special privilege that allows them to print what they like and the Human Rights Commission is in a position to point out to the media in question the responsibility it has regarding the community and more specifically the people living in the community that the particular media serves.

*Canadian Human Rights Commission et al. v. The Western Guard Party and John Ross Taylor*<sup>100</sup> concerned complaints "that the Respondents had engaged in a discriminatory practice by communication, telephonically, repeatedly...matter that is likely to expose persons identifiable on the basis of race and religion to hatred and contempt"<sup>101</sup> contrary to s.13(1) of the Canadian *Human Rights Act*.<sup>102</sup> S.13(1) reads:

13(1) 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.

The subject matter of the complaint was a series of thirteen recorded telephone messages from 1977 to 1979, which persons in Toronto could hear by phoning a given number. The number was made available to the public on a card "bearing only a maple leaf symbol and the words 'Dial 967-7777' and by a notation in the telephone book which reads 'White Power Message..967-7777'".<sup>103</sup>

The tenor of many of the individual messages and of the series as a whole was racist in general and anti-Semitic in particular. The respondents used direct statements as well as innuendo and implied arguments to communicate their material. They also relied on what Professor René Jean-Revault (a communications and media expert who analyzed the messages and testified for the Commission) referred to as "subliminal persuasion".<sup>104</sup> "Circular logic" and emotionalism were also heavily utilized in these messages.<sup>105</sup>

The messages contained defamatory references to prominent Canadian individuals, both Jewish and non-Jewish, to advance their argument. Among the ideas the respondents sought to advance were the evils of mixing races; the desirability of deporting American Blacks to Africa; a communist-Jewish connection; the claim that reports of the Nazi holocaust were a hoax; the assertion that non-white employees and government immigration policies were responsible for a serious decline in Toronto's health care system; the opinion that Jews should be denied entry into the professions or public service" and that they "are unfit to do anything that requires them to take an oath;"<sup>106</sup> and the belief that "violent action should be taken against them."<sup>107</sup>

100. *Commission v. Taylor, supra n. 27.*

101. *Supra n. 27, at 1-2.*

102. S.C. 1976-77, c. 33.

103. *Commission v. Taylor, supra n. 27, at 3.*

104. *Commission v. Taylor, supra n. 27, at 21.*

105. *Commission v. Taylor, supra n. 27, at 32.*

106. *Commission v. Taylor, supra n. 27, at 38.*

The Tribunal summed up the substance of the impugned messages as follows (at 38):

Although many of the messages are difficult to follow, there is a recurring theme. There is a conspiracy which controls and programmes Canadian society; it is difficult to find out the truth about this conspiracy because our books, our schools and our media are controlled by the conspirators. The conspirators cause unemployment and inflation, they weaken us by encouraging perversion, laziness, drug use and race mixing. They become enriched by stealing our property. They have founded communism which is responsible for many of our economic problems such as the postal strike; they continue to control communism and they use it in furtherance of the conspiracy. The conspirators are Jews.

The Tribunal recognized the dilemma this section posed when confronted with the "freedom of speech" issue. However, it decided that free speech, not being "absolute" must yield here to other values. It stated:

At first glance, it would seem anomalous that the Canadian Human Rights Commission, which by its name would appear to be in favour of fundamental freedoms, is one of the Complainants arguing for the restriction of the Respondents' general freedom of speech. Nevertheless, Parliament has obviously ordained that certain kinds of speech have to be curtailed in the public good because the potential for harm outweighs the value to society in the guarantee of unrestricted freedom of speech.<sup>108</sup>

The Tribunal is not unmindful of the tradition of free speech which has been a cornerstone of our society and which is enshrined in s. 1(d) of the Canadian Bill of Rights...Freedom of speech, however, is not presently unrestricted in the country and has never been so regarded. The common law preceding the enactment of the Bill of Rights never permitted unbridled freedom of speech....<sup>109</sup>

Even subsequent to the enactment of the Canadian Bill of Rights, the courts have held that 'freedom of speech' as that expression is used in s. 1(d) of the Canadian Bill of Rights does not provide Canadian citizenry with an unrestricted license to say what they want, when they want...<sup>110</sup>

After citing several relevant cases, the Tribunal continued (at 6-7):

Accordingly, one must take cognizance of the various restrictions which the law has imposed on any general right of freedom of speech. The Criminal Code proscribes seditious libel (ss.60-62), blasphemous libel (s.260), criminal defamatory libel against individuals (s.261); causing disturbances (s.171); the communication of false messages with intent to injure or alarm a person (s.330), the mailing of obscene matter (s.164).

The decision then referred to the civil liability for damages which the law imposes for defamation. Observing that this tort applied only to individual, but not to *group* defamation, the Tribunal notes that: "Parliament, however, has made criminal certain kinds of speech which advocates genocide or promotes hatred of groups"<sup>111</sup> and quotes from the relevant sections (s.281.1 and s.281.2) of the *Criminal Code*.

After noting (at 108) statutory and regulatory provisions

107. *Commission v. Taylor, supra* n. 27, at 38.

108. *Commission v. Taylor, supra* n. 27, at 2.

109. *Commission v. Taylor, supra* n. 27, at 4-5.

110. *Commission v. Taylor, supra* n. 27, at 6.

111. *Commission v. Taylor, supra* n. 27, at 7-8.

[W]hich curtails freedom of speech to some extent by administratively preventing the use of certain federal facilities for the transmission of matter or material which is considered obscene, indecent, immoral or scurrilous (s.7 of the Post Office Act) or broadcasting over radio or television any abusive comment on any race or religion (Regulations made under the Broadcasting Act, SOR/64-69, SOR/64-249, SOR/64-50)...

and the administrative sanction provided for violation, the Tribunal continued (at 8-9):

In addition, we now have section 13(1) of the Canadian Human Rights Act. Parliament therefore moved in the direction of denying an individual or group use of a federal system or federally regulated system of transmitting information for purposes of conveying hate or exposing individuals to hatred or contempt. It appears to be the policy of Parliament that these communication systems are not available to assist individuals who are intent upon weakening the fundamental beliefs maintained within the Canadian society and which are best expressed in s.2 of the Canadian Human Rights Act as follows:

'The purpose of the Act is to extend the present laws in Canada to give effect within the purview of matter coming within the legislative authority of the Parliament of Canada to the following principles:

- (a) every individual should have an equal opportunity with other individuals to make for himself or herself the life that he or she is able and wishes to have, consistent with his or her duties and obligations, as a member of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, or marital status or conviction for an offence for which a pardon has been granted, or by discriminatory employment practices based on physical handicap...

These values are considered paramount and so worthy of preservation that it necessarily involves encroachment upon the desire of certain individuals within our society to say and do things which would deny equality of opportunity to others.

After stating that "since World War II, these principles have attained universal recognition"<sup>112</sup>, the Tribunal cited the "International Convention of the Elimination of All Forms of Racial Discrimination as passed by the United Nations General Assembly" and the "International Covenant on Civil and Political Rights".<sup>113</sup> The Tribunal noted that (at 11): "These principles have been accepted by Canada and referred to Canada's Report to the United Nations on the implementation of Article 5 of the International Covenant on Civil and Political Rights."

The Tribunal concludes its discussion of the "freedom of speech" issue in the following words (at 12): "Accordingly, it is Canadian policy that individuals under the guise of freedom of speech and freedom of action cannot say things or take steps or incite or advocate the destruction of freedom which all of us enjoy."

Numerous legal issues were dealt with concerning the interpretation and application of s.13(1) of the *Canadian Human Rights Act*.

"The fundamental issue", according to the Tribunal, "is whether the subject matter of the messages 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."<sup>114</sup> The decision continues:

112. *Commission v. Taylor, supra n. 27, at 9.*

113. *Commission v. Taylor, supra n. 27, at 9-10.*

114. *Commission v. Taylor, supra n. 27, at 27.*

Although other minority groups are mentioned in the various tapes, the one particular identifiable group that is prominent is Jews, and it would appear clear that discrimination against them on that basis alone comes within the proscribed grounds of discrimination within the meaning of s.3 of the Act which reads:

'For all purposes of this Act, race, national or ethnic origin, colour, religion, age, sex, marital status, conviction for which a pardon has been granted and, in matters related to employment, physical handicap are prohibited grounds of discrimination.'<sup>115</sup>

The Tribunal continued (at 28):

Parliament has decreed that the likelihood of exposure of a person or persons to hatred or contempt on these bases alone, is an unacceptable act. The Special Committee on Hate Propaganda in Canada would have gone so far as to make group defamation a criminal offence and recommended legislation prohibiting the making of oral or written statements or any kind of representations which promote hatred or contempt against any identifiable group. The Committee concluded (at 24) of its Report that such legislation would set out

'as a solemn public judgement that the holding up of an identifiable group to hatred or contempt is inherently likely to dispose the rest of the public to violence against the members of these groups and inherently likely to expose them to loss of respect among their fellow man'. 'Hatred' is defined in the Oxford English Dictionary (1971 Edition) as: 'active dislike, detestation, enmity, ill will, malvolence', and 'contempt' is defined as: 'the condition of being condemned or despised; dishonour; disgrace'.

The possible consequences of being held up to hatred and contempt are susceptibility to violence and loss of respect.

The Tribunal further elaborated (at 29):

'Expose' is an unusual word to find in legislation designed to control hate propaganda. More frequently, as in the Broadcasting Act Regulation, Post Office Act Provisions and in the various related sections of the Criminal Code, the reference is to matter which is abusive, or offensive or to statements which serve to incite or promote hatred.

'Incite' means to stir up; 'promote' means to support actively. 'Expose' is a more passive word, which seems to indicate that an active effort or intent on the part of the communicator or a violent reaction on the part of the recipient are not envisaged. To expose to hatred also indicates a more subtle and indirect type of communication than vulgar abuse or overtly offensive language. 'Expose' means to leave a person or thing unprotected; to leave without shelter or defense; to lay open (to danger, ridicule, censure, etc). In other words, if one is creating the right conditions for hatred to flourish, leaving the identifiable group open or vulnerable to ill-feelings or hostility, if one is putting them at risk of being hated, in a situation where hatred or contempt are inevitable, one then falls within the compass of s.13(1) of the Human Rights Act.

After further discussion of the messages in question, the Tribunal states (at 133):

The messages, we believe, are designed to incite hatred or contempt for Jews. What other rationale can there be for the dissemination of such vile material? But that does not end the inquiry. The intention of the communicator is not determinant of the issue of whether the content of the message is likely to expose Jews to hatred or contempt. As Judge McMahon said in *R. v. Buzzanga and Durocher* (Dec. 23, 1977, Unreported)<sup>116</sup> at p. 13:

115. *Commission v. Taylor*, *supra* n. 27, at 27.

116. However, the Ontario Court of Appeal *reversed* McMahon, J.'s decision. The Court in *R. v. Buzzanga and Durocher* (1979), 25 O.R. (2d) 705 (Ont. C.A.) specifically held that *intention to promote hatred* was an ingredient of the offence described in s. 281.2 (2) of the *Criminal Code*, and that a conviction could not be justified absent such intention. The defendants were therefore held entitled to a new trial.



'the meaning of a message resides in the receiver, based on his own conceptions, as opposed to the initial intention of the sender.' We are concerned with neither the sender's intentions nor the actual effect upon listeners of the expression of opinion but rather the *likely* impact of such expression of opinion and the feelings that may be generated against the victims of the propaganda.

### The Tribunal continues (at 33-36):

It must now be determined whether the messages in fact are likely to expose the individuals referred to in the messages and Jews as a whole to hatred or contempt. There has been much sociological research relating to the individual's susceptibility to persuasive communication and the type of individuals who are most influenced by such messages. As mentioned earlier in these reasons, some sociologists say that there is a correlation between an individual's feeling of social inadequacy and low self-esteem and his susceptibility to this type of message; overly hostile individuals may be influenced by hate literature to the extent that such individuals already agree with their contents; frustration in employment and social relationships generally may make an individual more receptive to hate literature.

In interpreting s. 13 of the Canadian Human Rights Act, however, one must be concerned with the possible susceptibilities of those individuals who may dial the phone number in question. They may have learned of the number from the cards distributed by the Respondents which provide no clue of the type of message that they will hear. It may well be that by deciding to dial this phone number they already have a preconceived notion of the type of message that they will hear. If an individual comes upon this phone number in the telephone book where it is described as 'White Power Message' or learns of it by reading it on a spray painted hoarding, usually associated with some racial epithet, one could conclude that the particular caller already possesses feelings of hate and contempt for minority groups. Those feelings may be confirmed and inflamed further, however, by messages which have an authoritative flavour to them. But in any event, the personality makeup and preconceived feelings of the *actual* caller are not in issue in the interpretation of s. 13. The question is whether the matter communicated 'is likely to expose a person or persons to hatred or contempt.' It may be that certain individuals find the message so laughable or repulsive that it is the sender of the message who is exposed to hate and contempt. On the other hand, it is reasonable to conclude that there is a likelihood that some individuals may well harbour feelings of hatred and contempt for the minority groups singled out in the messages after listening to them. As is stated in the Report of the Special Committee on Hate Propaganda (at 200):

'...[T]he frequently encountered assumption that a person is either all bigot or all liberal, and therefore either totally receptive to hate propaganda or not at all, is a fallacious one. Rather, differences in attitudes, personality and persuasability form a continuum with a great mass of individuals lying between the extremes that we label as liberal or bigot. The issue of great or social concern is the reaction of the great mass of people who are neither extreme bigots nor devoted liberals, whose attitudes run the gamut from mild ethnocentrism through indifference to moderate liberalism. It is their greater or lesser acceptance or at least acquiescence which poses the potential threat to a democratic system of government, and the freedom of its citizens. Our concern then is not what makes one an authoritarian bigot, but rather, what determines the degree of acceptance to persuasion attempts.'

Each type of message should be considered in its entirety in determining whether it has the effect proscribed by s. 13(1) of the Canadian Human Rights Act. *R. v. Buzzanga and Durocher* supra, was a prosecution under s. 281.2 of the Criminal Code and in considering whether the message in question willfully promoted hatred against the French Canadian Public in Essex County in Ontario, Judge J.P. McMahon examined the message as a whole. He said (at 11):

'It is the view of the court that the handbill cannot and should not be dissected and considered paragraph by paragraph. It was distributed as one complete, indivisible communication and its cumulative effect is what must be determined.'<sup>117</sup>

117. Though the Ontario Court of Appeal reversed the trial judgment on other grounds (*supra* n. 116), the higher court agreed that 'the meaning of the document is to be gathered from its entirety, and the construction that would be placed upon it by the average persons into whose hands it fell.' 25 O.R. (2d) 705 at 725.

We think that this is a sensible approach and have adopted it.

The Tribunal comments (at 36): "...it is hard to believe that a rational individual in 1979 would take these incoherent meanderings seriously. But are individuals any more rational than those Germans affected by the comparable rantings of Adolph Hitler and his supporters?" It then cites testimony (at 36-39) both of expert witnesses and two Holocaust survivors to compare these messages to those of the German Nazis.

After referring to respondent Taylor's "attempting to establish the truth" of his allegations against the Jews, the Tribunal states (at 39):

Strange as it may sound, the establishment of truth is not in issue in this case. Unlike the statutory defences set out in s.281.2(3) of the Criminal Code which makes truth a defense to a criminal prosecution for public incitement of hatred against any group distinguished by colour, race, religion or ethnic origin, no equivalent defense is available in the Canadian Human Rights Act. Parliament has deemed that the use of the telephone for this kind of discriminatory message is so fundamentally wrong, that no justification for the communication can avail the Respondents. The sole issue then is whether the telephonic communication of the Respondents are likely to expose a person or persons to hatred or contempt.

The Tribunal continued (at 39-40):

Our initial reaction to this material was that it was crudely written and repugnant, not credible, and perhaps not dangerously harmful. But we have moved to a position of concern as we have considered this matter and the evidence adduced. Our feeling is in accord with Judge McMahon who said of the hate tract that he considered in the Buzzanga<sup>118</sup> case (at 13):

'I am satisfied that the vast majority of the residents of this country would view the contents of the document with distaste if not outright revulsion. However, there is that certain segment in every community whose views would be reinforced and increased by the message.'

We share the same distrust of the rationality of mankind expressed by the Special Committee on Hate Propaganda in Canada at p. 8 of its Report:

'In a number of ways, we are less confident in the 20th Century that critical faculties of individuals will be brought to bear on the speech and writing which is directed at them. In the 18th and 19th Centuries, there was a widespread belief that man was a rational creature, and that if his mind was trained and liberated from superstition by education, he would always distinguish truth from falsehood, good from evil. So Milton, who said "let truth and falsehood grapple: whoever knew truth put to the worse in a free and open encounter."'

'We cannot share this faith today in such a simple form. While holding that over the long run, the human mind is repelled by blatant falsehood and seeks the good, it is too often true in the short run, that emotion displaces reason and individuals perversely reject the demonstrations of truth put before them and forsake the good they know. The successes of modern advertising, the triumph of imprudent propaganda such as Hitler's, have qualified sharply our own belief in the rationality of man. We know that under strain and pressure in times of irritation and frustration, the individual is swayed and even swept away by hysterical, emotional appeals. We act irresponsibly if we ignore the way in which emotion can drive reason from the field.'

Diatribes like the ones before us eventually gave rise to the most extreme form of hatred and contempt for Jews in Germany in the 1930's and 1940's. We need no other crucible for us to be satisfied that the themes of the Respondent's telephone utterances, which bear a marked resemblance to the propaganda of Goebels and Hitler, are likely to expose the Jews to hatred or contempt.

118. The *Buzzanga* case, *supra* n. 116, was reversed by the Court of Appeal on other grounds.

The Tribunal held (at 41): "...with respect to s. 13, we believe that on the balance of probabilities, which is the burden of proof upon the Complainants, all of the essential ingredients have been met."

After finding (at 42) "that the complaints are substantiated", the Tribunal ordered the Respondents to cease this "discriminatory practice"; the only remedy which a Tribunal can award under the *Canadian Human Rights Act*.<sup>119</sup> in the event of a violation of s. 13(1).<sup>120</sup>

The issue of whether offensive communication concerning a religion could constitute "discrimination" under s. 10, or a "notice, symbol or sign involving discrimination" under s. 11 of Québec's *Charter of Human Rights and Freedoms*<sup>121</sup> was one of the issues raised in a case before the Québec courts.<sup>122</sup> To the limited extent that such particular issue was decided, it was held the communication in question was not in violation of those sections.

*Jeunes Canadiens Pur Une Civilisation Chrétienne et autre c. La Fondation du Théâtre du Nouveau-Monde*,<sup>123</sup> involved a request for an interlocutory injunction restraining the production of a stage play, and the printing and distribution of its text. The play was alleged to be highly offensive to the Roman Catholic Church and its members; as well as, *inter alia*, "obscene", "seditious", "sacrilegious" and "blasphemous".<sup>124</sup>

The Superior Court dismissed the proceeding at a preliminary stage. It was ruled inadmissible because of the petition lacked the "sufficient interest", required by s. 55 of the *Code of Civil Procedure*<sup>124a</sup>, to have status to sue. Though s. 49 of the Quebec *Charter* (in combination with s. 1053 of the *Civil Code*) implies the availability of an injunction for a victim of a violation of the *Charter*<sup>125</sup>, s. 49 was held not to alter the rules requiring *personal interest* as a prerequisite to bringing an action. The Court further held that *mere membership in an offended group* did not give an individual the required interest, at least in the absence of damage *particular to the plaintiff*. The Court relied on cases denying a cause of action for "group defamation".<sup>126</sup>

The Court of Appeal upheld the decision of the Superior Court. Bernier, J. (Montgomery, and Monnet, J.J. concurring) agreed with the trial judgement that the plaintiffs lacked the "sufficient interest" needed to seek the relevant remedies.

Monet, J., is the only judge who directly dealt with the issue of whether s. 10 or s. 11 of the Quebec *Charter* were violated. S. 10 reads:

119. S. 42 (1).

120. In *Canadian Human Rights Commission v. John Ross Taylor and the Western Guard Party* (1980), 1 C.H.R.R. D/47. Dubé, J. of the Federal Court of Canada, Trial Division, found the respondents guilty of contempt of court for disobeying the Tribunal's order. See, W. Tarnopolsky, *op. cit.* n. 64 at 340 for an account of subsequent developments in this matter.

121. *Charter of Human Rights and Freedoms*, L.Q. 1975, c. 6.

122. *Jeunes Canadiens Pour Une Civilisation Chrétienne et autres c. La Fondation du Théâtre du Nouveau-Monde*, [1979] C.S. 181: *aff'd* [1979] C.A. 491 (hereinafter referred to as *Jeunes Canadiens*).

123. *Supra* n. 122.

124. *Supra* n. 122, [1979] C.S. 181 at 182.

124a. R.S.Q. 1977, c. C-25.

125. *Supra* n. 122, [1979] C.S. 181 at 183-184.

126. *Supra* n. 122, [1979] C.S. 181 at 184-185.

Every person has a right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on...religion....

Discrimination exists where such a distinction, exclusion or preference has the effect of nullifying or impairing such right.

S.11 reads:

No one may distribute, publish, or publicly exhibit a notice, symbol or sign involving discrimination, or authorize anyone to do so.

The express discussion of these sections in *Monet, J.*'s separate concurring judgement was quite brief. He merely commented that counsel's answers to his questioning on the subject during the hearing failed to convince him of the existence of discrimination.<sup>127</sup> He quoted with approval<sup>128</sup> the words from *Rand, J.*'s judgement in *Boucher v. The King*<sup>129</sup> concerning the importance of freedom of speech (though recognizing that the *Boucher* case dealt with a different issue, i.e. sedition).

*Boucher v. The King*<sup>130</sup> involved charges of "publishing a seditious libel" under the *Criminal Code* of Canada. In this case, the accused was himself a member of a minority religious group (the Jehovah's Witnesses). He distributed, in Quebec a pamphlet published in Toronto by the "Watchtower Bible and Tract Society". This pamphlet employed very powerful language, and was very critical of the Witnesses' treatment by the Roman Catholic majority in Quebec. It alleged, *inter alia*, serious persecution of the defendant's religion, and that the Quebec courts were under the undue influence of the Roman Catholic clergy.

The relevant sections of the *Criminal Code* then read:

133. (1). Seditious words are words expressive of a seditious intention.
- (2). A seditious libel is a libel expressive of a seditious intention.
- (3). A seditious conspiracy is an agreement between two or more persons to carry into execution a seditious intention.
- (4). Without limiting the generality of the meaning of the expression 'seditious intention' everyone shall be presumed to have a seditious intention who publishes, or circulates any writing, printing or document in which it is advocated, or who teaches or advocates the use, without the authority of law, of force, as a means of accomplishing any governmental change within Canada.
- 133A. No one shall be deemed to have a seditious intention only because he intends in good faith -
  - (a) to show that His Majesty has been misled or mistaken in his measures; or
  - (b) to point out errors or defects in the government or constitution of the United Kingdom, or of any part of it, or of Canada or of any province thereof, or in either House of Parliament of the United Kingdom or of Canada or in any legislature, or in the administration of justice or to excite His Majesty's subjects to attempt to procure by lawful means, the alteration of any matter in the state; or
  - (c) to point out, in order to their removal, matters which are producing or have a tendency to produce feelings of hatred and ill-will between different classes of His Majesty's subjects.<sup>131</sup>

127. *Supra* n. 122, [1979] C.A. 491 at 496.

128. *Supra* n. 122, [1979] C.A. 491 at 496.

129. *Supra* n. 93, at 288.

130. *Supra* n. 93.

131. *Supra* n. 93, at 278.

Among the issues dealt with by the Supreme Court of Canada was the meaning of "seditious intention" (as this apparently was not dealt with completely by s.133(4). It was argued that an intention "(1) to bring into hatred or contempt, or to excite disaffection against...the administration of justice...or (4) to raise discontent or disaffection amongst His Majesty's subjects; or (5) to promote feelings of ill-will and hostility between different classes of such subjects"<sup>132</sup> could constitute seditious intention, even without the intention or likelihood of causing unlawful action. This contention was rejected by a majority of that court.

As to the latter two categories of intention, Rand, J. stated:

There is no modern authority which holds that the mere effect of tending to create discontent or disaffection among His Majesty's subjects or ill-will or hostility between groups of them, but not tending to issue in illegal conduct, constitutes the crime, and this for obvious reasons. Freedom in thought and speech and disagreement in ideas and beliefs on every conceivable subject, are of the essence of our life. The clash of critical discussion on political, social and religious subjects has too deeply become the stuff of daily experience to suggest that mere ill-will as a product of controversy can strike down the latter *illegality*. A superficial examination of the word shows its insufficiency: what is the degree necessary to criminality? Can it ever, as mere subjective condition, be so? Controversial fury is aroused constantly by differences in abstract conceptions; heresy in some fields is again a mortal sin; there can be fanatical puritanism in ideas as well as in morals; but our compact of free society accepts and absorbs these differences and they are exercised at large within the framework of freedom and order on broader and deeper uniformities as bases of social stability. Similarly in discontent, affection and hostility: as subjective incidents of controversy, they and the ideas which arouse them are part of our living which ultimately serve in stimulation, in the clarification of thought and, as we believe, in the search for the constitution and truth of things generally.<sup>133</sup>

Cartwright, J. stated (at 332):

A great portion of the able argument addressed to us was directed to the question whether the document was, on its face, capable of supporting the inference that it was intended to promote feelings of ill-will and hostility between different classes of His Majesty's subjects and if so whether such an intention, without more, is a seditious one.

Undoubtedly several text writers of high authority do give as one of several definitions of a seditious intention, the definition referred to above.

The obvious objection to accepting this as a sufficient definition, unless where we are bound by authority to do so, is that such acceptance would very seriously curtail the liberty of the press and of individuals to engage in discussion of any controversial topic. It is not easy to debate a question of public interest upon which strong and conflicting views are entertained without the probability of stirring up, to a greater or lesser degree, feelings of ill-will and hostility between the groups in disagreement.<sup>134</sup>

Only Rinfret, C.J., in a dissenting opinion, felt that "intention to promote feelings of hatred and ill-will between different classes..." could *per se* constitute a seditious intention.<sup>135</sup>

As to freedom of expression, he commented (at 279):

132. *Supra* n. 93, at 287.

133. *Supra* n. 93, at 288.

134. *Supra* n. 93, at 332-333.

135. However, Cartwright, Fauteaux and Taschereau, J.J., although concurring as to promotion of "feelings of ill will and hostilities between different class of His Majesty's subjects" not *per se* constituting seditious; dissented as to "hatred or contempt...against the administration of justice". *Supra* n. 93, at 344.

I would not like to part this appeal, however, without stating that to interpret freedom of expression as a dangerous fallacy. Obviously pure criticism, or expression of opinion, however severe or extreme, is, I might almost say, to be invited. But, as was said elsewhere, 'there must be a point where restrictions on individual freedom of expression is justified and required on the grounds of reason, or on the ground of the democratic process and the necessities of the present situation.' It should not be understood from this Court—the Court of last resort in criminal matters in Canada—that persons subject to Canadian jurisdiction 'can insist on their alleged unrestricted right to say what they please and when they please, utterly irrespective of the evil results which are often inevitable.' It might well be said in such a case, in the words of Milton, 'License they mean when they cry liberty', or as expressed by Mr. Edouard Herriot, 'La liberté doit trouver sa limite dans l'autorité légale'.

*R. v. Buzzanga and Durocher*<sup>136</sup> dealt with charges of "willfully promoting hatred against an identifiable group, namely the French Canadian public in Essex County by communicating statements...contained in copies of a handbill...contrary to s. 281.2(2) of the *Criminal Code*."<sup>137</sup>

136. *Supra* n. 116.

137. The sections of the *Criminal Code*, concerning "hate propaganda" and related matters read as follows:

- 281.1(1) Every one who advocates or promotes genocide is guilty of an indictable offence and is liable to imprisonment for five years.
- (2) In this section "genocide" means any of the following acts committed with intent to destroy in whole or in part any identifiable group, namely:
- (a) killing members of the group, or
  - (b) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction.
- (3) No proceeding for an offence under this section shall be instituted without the consent of the Attorney General.
- (4) In this section, "identifiable group" means any section of the public distinguished by colour, race, religion or ethnic origin.
- 281.2 (1) Every one who, by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace, is guilty of
- (a) an indictable offence and is liable to imprisonment for two years; or
  - (b) an offence punishable on summary conviction.
- (2) Every one who, by communicating statements, other than in private conversation, willfully promotes hatred against any identifiable group is guilty of
- (a) an indictable offence and is liable to imprisonment for two years; or
  - (b) an offence punishable on summary conviction.
- (3) No person shall be convicted of an offence under subsection (2)
- (a) if he establishes that the statements communicated were true;
  - (b) if, in good faith, he expressed or attempted to establish by argument an opinion upon a religious subject;
  - (c) if the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds he believed them to be true; or
  - (d) if, in good faith, he intended to point out for the purpose of removal, matters producing or tending to produce feelings of hatred towards an identifiable group in Canada.
- (4) Where a person is convicted of an offence under section 281.1 or subsection (1) or (2) of this section, anything by means of or in relation to which the offence was committed, upon such conviction may, in addition to any other punishment imposed, be ordered by the presiding magistrate or judge to be forfeited to Her Majesty in right of the province in which that person is convicted, for disposal as the Attorney-General may direct.
- (5) Subsections 181(6) and (7) apply *mutatis mutandis* to section 281.1 or subsection (1) or (2) of this section.
- (6) No proceeding for an offence under subsection (2) shall be instituted without the consent of the Attorney-General.
- (7) In this section
- "communicating" includes communicating by telephone, broadcasting or other audible or visible means;
  - "identifiable group" has the same meaning as it has in section 281.1;
  - "public place" includes any place to which the public have access as of right or by invitation, express or implied;
  - "statements" includes words spoken or written or recorded electronically or electromagnetically or otherwise, and gestures, signs or other visible representations.
- 281.3 (1) A judge who is satisfied by information upon oath that there are reasonable grounds for believing that any publication, copies of which are kept for sale or distribution in premises within the jurisdiction of the court, is hate propaganda, shall issue a warrant under his hand authorizing the seizure of the copies.
- (2) Within seven days of the issue of the warrant, the judge shall issue a summons to the occupier of the premises requiring him to appear before the court and show cause why the matter seized should not be forfeited to Her Majesty.
  - (3) The owner and the author of the matter seized and alleged to be hate propaganda may appear and be represented in the proceeding in order to oppose the making of an order for the forfeiture of such matter.
  - (4) If the court is satisfied that the publication is hate propaganda, it shall make an order declaring the matter forfeited to Her Majesty in right of the province in which the proceedings take place, for disposal as the Attorney General may direct.
  - (5) If the court is not satisfied that the publication is hate propaganda, it shall order that the matter be restored to the person from whom it was seized forthwith after the time for final appeal has expired.
  - (6) An appeal lies from an order made under subsection (4) or (5)...
  - (7) No proceeding under this section shall be instituted without the consent of the Attorney-General.
  - (8) In this section...

"genocide" has the same meaning as it has in section 281.1;

"hate propaganda" means any writing, sign or visible representation that advocates or promotes genocide or the communication of which by any person would constitute an offence under section 281.2.

The accused were actively involved with a Francophone organization which was lobbying to have a French high school built by the Essex County Board of Education. There had been considerable controversy over the proposed school, with emotional statements on both sides being expressed. Eventually, a handbill was written and distributed by the accused. This handbill contained highly inflammatory material, which was construed as referring to the entire Francophone community of Essex County.

At their trial, the accused testified that they *did not intend to promote hatred against the Francophone community*. They claimed that they intended for it to appear that the handbill was written by opponents of the French school, and that it actually reflected statements previously made by their adversaries. Their purposes were, they claimed, to expose anti-Francophone prejudice and to create pressure leading to the school's construction.<sup>138</sup> They were convicted by a County Court Judge and appealed to the Ontario Court of Appeal.

The Court of Appeal held, in effect, that a *specific intention to promote hatred* was an ingredient of the offense. It held that the trial judge "failed to give appropriate consideration to their (the defendants') evidence on the issue of intent, and in the circumstances his failure so to do constituted self-misdirection",<sup>139</sup> entitling the accused to a new trial.<sup>140</sup>

*Courchene v. Marlborough Hotel*<sup>141</sup> dealt with an injunction action brought under the "group libel" provisions of *The Defamation Act*.<sup>142</sup>

A memorandum,<sup>143</sup> requiring the staff to refuse accommodations to Indians and Metis, was prepared and distributed to staff members by Mr. Tuk, the "manager of the front office" of the defendant Hotel. He did this without any authority from his superiors and the memorandum was repudiated and ordered withdrawn by the hotel's president as soon as it came to his attention. The memorandum was never acted upon; the policy and practices of the hotel had previously been, and continued to be, to receive guests in a completely *nondiscriminatory manner*. Though the president endeavoured to destroy all copies of the memorandum, another employee, without authority, gave a copy to her boyfriend, who gave it to the Manitoba Indian Brotherhood.

The plaintiff, who was president of the Manitoba Indian Brotherhood, sued for an injunction under *The Defamation Act* and *The Human Rights Act*.<sup>144</sup>

138. *Supra* n. 116, at 711-712.

139. *Supra* n. 116, at 724.

140. The Court of Appeal also discussed the extent to which s. 281.2(3)(d) could be a defence. The Court also discussed the construction of the impugned document, *supra* n. 117.

141. (1971), 20 D.L.R. (3d) 109 (Man. Q.B., Tritschler, C.J.); *aff'd* (1971), 22 D.L.R. (3d) 157 (Man. C.A.).

142. *The Defamation Act*, R.S.M. 1970, c. D20, s. 19.

143. The memorandum stated: "As we are having innumerable problems with the Indians and the Metis, coming into the Hotel, we will from now on refuse accommodation to any and all of them". *Supra* n. 141, (1971) 22 D.L.R. (3d) 157 at 159. As well, it purported (falsely) to reflect senior management's policy, and instructed staff how to "diplomatically" carry out this discriminatory order.

144. *The Human Rights Act*, S.M. 1974, c. 65 (c. H 175). The appropriate provisions in *The Human Rights Act* referred to denial or discrimination in "accommodations; services or facilities....".

The appropriate provisions of *The Defamation Act* then read:

19 (1) The publication of a libel against a race or religious creed likely to expose persons belonging to the race or professing the religious creed, to hatred, contempt or ridicule, and tending to raise unrest or disorder among the people, entitles a person belonging to the race, or professing the religious creed, to sue for an injunction to prevent the continuation and circulation of the libel and the Court of Queen's Bench may entertain the action.

(2) The action may be taken against the person responsible for the authorship, publication, or circulation, of the libel.

(3) The word 'publication' used in this section means any words legibly marked upon any substance or any object signifying the matter otherwise than by words, exhibited in public or caused to be seen,<sup>145</sup> or shown or circulated or delivered with a view to its being seen by any person.

Tritschler, C.J.Q.B., dismissed the actions. He held that the derogatory *statement* concerning Indians only referred to those "coming into the Hotel" and that the evidence established its truth. "What is true cannot be defamatory".<sup>146</sup> He rejected the assertion that it referred to all Indians, or that the memorandum contained innuendo defamatory of all Indians.

He further held that "the occasion was one of qualified privilege" and cited Tuk's limited communication of the memorandum, the fact that Tuk and the staff members were acting in the course of their duties, and the lack of malice.<sup>147</sup> He ruled that the "qualified privilege" defense was *not* destroyed by "wide publication", finding *inter alia* that any "republication" by employees outside the hotel were completely unauthorized and "well outside the scope of employment".<sup>148</sup>

Tritschler, C.J.Q.B. concluded his remarks on the defamation issue as follows: "I find that the memorandum was not a libel against a race, and that the defendants are entitled to a verdict on the merits, even assuming s. 19 of the Act to be valid legislation. I am, however, of the opinion that the section is *ultra vires*, dealing, as it does, with what is in essence criminal libel. Matters 'tending to raise unrest or disorder among the people' are for Parliament which has occupied the field in the Criminal Code s. 267B [enacted 1969-70, c. 39, s. 1; later R.S.C. 1970, 1st Supp. c. 11, s.281.2, proclaimed in force July 15, 1971]."<sup>149</sup>

"Had a libel been published and s. 19 found *intra vires*, the sole remedy would have been injunction 'to prevent the continuation and circulation of the libel'. As the memorandum was withdrawn and had become a dead letter within hours of its being published and before the action was brought, an injunction would not have been required or granted."

Tritschler, C.J.Q.B. also dismissed the allegations of a breach of *The Human Rights Act*. He found that the memorandum was unauthorized, did not represent the corporate defendant's policy or practice, was repudiated by the

145. *Supra* n. 141, at 114-115 (Man. Q.B.).

146. *Supra* n. 141, at 112 (Man. Q.B.).

147. *Supra* n. 141, at 112-113 (Man. Q.B.).

148. *Supra* n. 141, at 114 (Man. Q.B.).

149. *Supra* n. 141, at 115 (Man. Q.B.).



president as soon as it came to his attention, and was never acted upon. He further found that the evidence did not establish specific discriminatory denials of accomodation as were alleged by the plaintiff.

The Manitoba Court of Appeal dismissed the plaintiff's appeal. Hall, J.A. (with whom Mr. Monnin, J.A. concurred) stated: "There are other grounds upon which the appeal fails, but I am content to rest my disposition of it by affirming that the memorandum was not a libel and that no policy of racial discrimination has ever existed at the hotel".<sup>150</sup>

Freedman, C.J.M. wrote a separate opinion. He agreed with the result that the appeal should be dismissed. In particular, he agreed that Tritschler, C.J.Q.B. was correct in finding that the memorandum did not represent hotel policy, and that the hotel did not practice discrimination, and that the case against it under *The Human Rights Act* had not been established. He also agreed that an injunction under *The Defamation Act* was unnecessary as "the memorandum had been withdrawn before being acted upon and that it had quickly become a dead letter".<sup>151</sup>

Considering Tritschler, C.J.Q.B.'s constitutional opinion "obiter", and noting the impossibility of deciding the issue absent the required notice to the provincial and federal Attorneys General, he stated "we must proceed on the assumption that the legislation is valid until otherwise determined".<sup>152</sup>

Dissenting on this issue, he held that "the memorandum is defamatory on its face"<sup>153</sup> and "defamatory of Indians as a class".<sup>154</sup> Rejecting the argument that it was "limited in its scope" to those entering the hotel, he stated that, "[o]n its face it clearly was aimed at *all* Indians and Metis."; he also disagreed with the trial judge's finding of truth, and questioned the appropriateness of the "qualified privilege" defence under the particular circumstances.<sup>155</sup>

## Part II

As can be seen from an analysis of the reasons for decision in cases from other provinces, the prohibition of the *subject matter* referred to in s.2(1)(c) and (d) *The Human Rights Act* of Manitoba could substantially endanger freedom of expression. But this danger is further exacerbated by the wide scope of activities, facilities and situations referred to in s.2(1)(a) and (b) as leading to potential liability.

The words in s.2(1)(a) could have far reaching consequences. Would this, for example, extend to booksellers and libraries displaying books for sale and borrowing? Would the section apply irrespective of whether or not they knew of the nature of the material?<sup>156</sup> Would it apply if the nature of the material was

150. *Supra* n. 141, at 163 (Man. C.A.).

151. *Supra* n. 141, at 162 (Man. C.A.).

152. *Supra* n. 141, at 161 (Man. C.A.).

153. *Supra* n. 141, at 160 (Man. C.A.).

154. *Supra* n. 141, at 162 (Man. C.A.).

155. *Supra* n. 141, at 162 (Man. C.A.).

156. In *Smith v. People of the State of California* (1959), 80 S. Ct. 215; *reh. den.* 80 S. Ct. 399, the U.S. Supreme Court ruled that an ordinance imposing "strict liability" on a bookseller for possession of obscene material without "scienter" concerning its obscenity was an unconstitutional violation of freedom of expression. The Court acknowledged that obscenity was not even within the 1st Amendment protection of free speech. However, it emphasized that the "self-censorship" which booksellers would practice as a result of "strict liability" would endanger dissemination of constitutionally protected material as well.

such that it was *potentially* within the section, but its status could not be determined with any reasonable degree of certainty absent a judicial or quasi-judicial decision? In either case this could lead to much controversial literature being deprived of a forum. Perhaps private booksellers<sup>157</sup> (and possibly even public and academic libraries) might practice "self-censorship" in doubtful cases, in order to avoid possible liability.<sup>158</sup>

Would this section apply to material *prima facie* within it, but published or displayed for *bona fide* educational or historical purposes? If a university (or other) library had copies of Hitler's *Mein Kampf* or the infamous anti-Semitic forgery *Protocols of the Elders of Zion*, which could be needed for political science, historical or sociological study or research, would it be in violation of this section?<sup>159</sup> If a university library, museum, or society held a display or symposium on racism, the history of Nazi Germany, or the use of the media for propaganda purposes, and displayed such materials, would it be acting illegally? What if they showed Nazi art or artifacts, or showed a Nazi propaganda film? What if such organizations sought to display war propaganda from any countries where such material relied on racial or national epithets or attempts to stir up hatred?

It is interesting to consider the extent to which radio and television programming could be covered by this section.<sup>160</sup> Taken literally, this section might cover remarks made during a speech, interview or panel discussion. Would this render the speaker, interviewer, or station liable? This section is open to an interpretation which would render a station liable for interviewing or giving air time to a known racist (such as a Western Guard Party, Ku Klux Klan or Nazi leader) even though its purpose was to give *all* views an opportunity to be heard,<sup>161</sup> or to expose to the public an evil existing in the

157. This section could put booksellers and librarians under more severe restrictions than the law of defamation imposes and there perhaps the restrictions are too great. P. Lewis (ed.) *Gatley on Libel and Slander*, (8th ed. 1981) at 111-112, states that a person such as a bookseller who "has only taken a subordinate part in disseminating [defamatory material]...will not be liable if he succeeds in showing — (i) that he did not know that the book or paper contained the libel complained of; and (ii) that he did not know that the book or paper was of a character likely to contain a libel; and (iii) that such want of knowledge was not due to any negligence on his part".

Williams, *The Law of Defamation in Canada*, (1976) at 126 suggests that "[a] library may be required to read novels in its collection" though he recognizes that this might be "an unreasonably heavy burden given the size of modern library collections". He continues, however, that "[l]ibraries have not been required to read scholarly works before circulating them".

Perhaps the law of defamation is unduly restrictive in not granting booksellers and libraries *complete* immunity from defamation for materials they circulate; at least where the defamatory nature of the material is not clear. The danger to free expression is even greater in a provision such as s. 2. Perhaps an advisable reform of the law would be where it is deemed necessary to retain liability (civil, criminal, or administrative) for written material (in any area of the law), to limit liability to the *authors* of, and those persons *exercising editorial powers concerning*, the impugned material. This would remove certain pressures on booksellers and libraries to practice "self-censorship" and could therefore increase the "forum" available for controversial communication.

158. Of course, it is not *certain* that "notice, sign, symbol, emblem, or other representation" would include books. However, the likelihood that it would seems fairly high. The uncertainty itself could create a "deterrent" effect. Even if books are not included, bookstores and libraries often deal with or display works of art or photographs, records or films which might be even more likely to be held within this section. Similar problems of undue "self-censorship" could also apply to art galleries and museums.

159. See, W. Tamopolsky's discussion on the problems of bona fide academic use of *Mein Kampf* and its relation to s. 281.3 of the *Criminal Code*. W. Tamopolsky, *The Canadian Bill of Rights*, (2nd rev. ed., 1975) at 192.

160. These are in addition to the questions concerning the extent to which broadcasting can be constitutionally dealt with by provincial legislation. Perhaps this section could constitutionally apply to an advertiser or other person who uses radio or television as a means of communicating his message, but whether it could be used to impose liability upon the broadcasting network is another question. Or is the control of broadcasting exclusively under federal jurisdiction? See, *Attorney General of Quebec v. Kellogg's Co. of Canada Ltd.* (1978), 83 DLR (3rd) 314 (SCC). See also, W. Tamopolsky, *Discrimination and the Law*, 1981 at 71 and 337.

161. See, *Red Lion Broadcasting Co. v. FCC* (1969), 89 S.Ct. 1794 for a discussion on the extent to which an *affirmative duty* to give all views an opportunity for a hearing, can be imposed on a licenced radio station. See also, *Anti-Defamation League of B'nai B'rith, Pacific Southwest Regional Office v. Federal Communications Commission* (1968), 403 F.2d 169 (D.C. Circ.); *cert. den.* 89 S.Ct. 1190 for discussion on whether the right and possibly the duty to give all views such opportunity for hearing extended to racist and anti-Semitic material.

community. Similarly, giving such person coverage in a news or documentary program, or showing a film of a prohibited sign for the purpose of exposing a violation at a particular location, could conceivably be within the sweep of this section.<sup>162</sup>

Some of the situations referred to above (and similar types of situations) may well be beyond the intended scope of this section. It is, of course, possible that a Board or court might well decline to interpret the section in such a wide and sweeping manner. However, given the tendency in many human rights cases to impose liability without discriminatory intention or motive, and to construe proscriptions broadly and defences or exceptions narrowly,<sup>163</sup> the danger of such wide interpretation remains. At any rate, the possibility of such wide interpretation, and the uncertainty of the law, could well have a deterrent effect on persons whose purposes and plans are legitimate, but could conceivably come within the prohibitions of this section.<sup>164</sup>

I suggest that if it is deemed necessary to retain s.2 (or parts of it) in the *Act*, amendments be enacted which would narrow its scope and protect some of the legitimate interests referred to.

Perhaps an amendment ought to expressly make some form of *discriminatory intention or motive of the respondent* a prerequisite to liability under this section.

Possibly bookstores, educational institutions, libraries, museums, art galleries and similar institutions ought to be *expressly exempt from liability under this section* for the display or dissemination of works which they neither authored nor had editorial power over.<sup>165</sup>

Special exemptions for *bona fide educational, historical, cultural, journalistic and similar activities* which could *prima facie* come within the scope of this section may also be in order.

I must emphasize, however, that the main threat to free expression could well come from the substantive prohibitions of communication involved in

162. Although s. 2(2) could possibly be successfully raised as a defence, it is not at all certain that this subsection would succeed, or that it provides adequate protection for free expression. This will be discussed at greater length later in this article.

163. "It is generally recognized that human rights legislation is remedial and intended to be liberally interpreted to achieve the intended policy of the legislator. The converse is also true. That is, that exceptions under such statutes are to be narrowly construed": *Bhinder v. Canadian National Railways* (1981), 2 C.H.R.R. D/546 at D/562 (Canadian Human Rights Act Tribunal). Of course, such approach to interpretation is quite legitimate in many (perhaps most) types of human rights cases, but I suggest *not* in those cases where it would jeopardize freedom of expression.

164. This section and particularly s.2(1)(a) could well be considered as "overbroad". In American jurisprudence, the concept of "overbreadth" applies where a statute is of such wide scope that, although it includes matters which can constitutionally be proscribed, it can also be interpreted as banning "expressive activity" protected by the 1st Amendment. Recognizing the "chilling effect" such legislation could have on the exercise of free expression, American courts sometimes nullify such legislation completely rather than merely interpreting it narrowly or reviewing its particular application. (See, *83 Harvard Law Review* 844, at 844-865).

Of course, it is not known to what extent, (if at all) Canadian courts will adopt this concept in applying the *Canadian Charter of Rights and Freedoms*. Whether or not "overbreadth" will be accepted as a basis to nullify legislation, the dangers to free expression posed by such legislation are apparent. In the U.S., even when courts decline to nullify legislation on this basis, the problem with unduly wide legislation is often acknowledged. Reluctance to intrude on what they consider the legislative prerogative often motivates such refusal. Irrespective of whether or not the "overbreadth" principle will be judicially adopted in Canada, legislators ought to be careful not to impose any wider restrictions on expressions or any greater uncertainty in legislation than is necessary.

165. This exemption, of course, ought only apply to displaying works in the *bona fide* conduct of the institution's business or activities. It should not be acceptable for an art gallery, for example to display an "art work" of a clearly racist nature on the main door in a manner intended and likely to indicate to members of a racial group that they would not be welcome.

some of the terminology of s.2(1)(c) and s.2(1)(d). These matters would be discussed in greater depth below.

Perhaps s.2(1)(b), by creating liability for *permitting* such conduct in all these circumstances, is even more unfair, dangerous and intrusive than s.2(1)(a). If read widely, this could impose liability even where the owner does not occupy the premises, such as when he leased it to a tenant. It could also impose liability on an owner or occupier in control of premises for certain purposes, but who delegates certain responsibilities to an independent contractor, or who leases the property on a temporary basis. To impose liability in such circumstances could create an undue hardship for such persons. Furthermore, it could lead an owner or person in control of property to practice censorship, discrimination, or even invasion of privacy concerning persons with whom he must deal in connection with the property.

Many landowners rent out halls to various groups for holding of meetings and similar activities. If a landowner rented a hall to a group, and at the meeting they displayed or distributed material referred to in this section, would he be liable? Would he be liable whether or not he had advance knowledge or gave consent? Such liability could deter a landowner from renting premises to groups if he thinks there is a mere possibility that some of the group's activities could fall within this section's proscriptions, even though in reality their activities would be quite legal. This could have the effect of denying controversial groups a forum to express their views.<sup>166</sup>

It is interesting to consider if and to what extent s.2(1)(b) could be construed to impose liability on landlords for activities of their tenants, guests, or lodgers. Could it be deemed to interfere with other rights such categories of persons might otherwise enjoy at law? Could it encourage landlords to violate these rights?

Could the provision be construed to render owners of shopping centres, stores, and other privately owned places of public resort liable for certain communicative activities of members of the public who come on their premises, such as picketing, pamphleteering, etc. ? If so, is there not a danger that such landowners would discriminate among ideas that they allowed to be disseminated on that property, or even endeavour as far as possible to ban such activities completely?

Many public or quasi-public bodies, such as municipalities (or corporations connected with municipalities), school divisions or universities often make their premises available to groups for meetings, speakers and conferences. If this section could render them liable for activities of groups using their facilities, it could encourage such authorities to deny facilities to certain

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166. Quere whether such denial would constitute a denial of such facilities without "reasonable cause" contrary to s.3 of the *Act* if it turned out the landowner's fears were unfounded? Though *Gay Alliance Toward Equality v. Vancouver Sun*, *supra* n. 57 upheld a newspaper's right to reject an *advertisement* because of editorial disagreement with its views; the issue of "editorial freedom" is not involved in the rental of halls. A statute which could leave a person in jeopardy of violating one section if he guesses one way, or another section if he guessed another way, is hardly an example of certainty or fairness in the law.

groups because of their views, thereby denying certain members of the public an otherwise available forum.<sup>167</sup>

Could s.2(1)(b) be construed to render a university or other educational institution liable if the "expressive" activities of students, faculty members, guest speakers or other persons or groups on its property happened to violate this section? Would this encourage administrators to censor, restrict or ban speakers invited by student groups, meetings and rallies, pamphleteering, picketing, and distribution of literature? If so, this would have a most unfortunate effect on the atmosphere of intellectual freedom one has come to expect in the academic community.<sup>168</sup>

The above are just some of the many possible ways in which injustice or unnecessary suppression could result if s.2(1)(b) were interpreted and applied literally. At any rate, there are many persons exercising public or private authority who are prepared to prohibit controversial communication or activity whenever possible. A provision such as s.2(1)(b) can only exacerbate these "censorial" tendencies where they exist, and create them in other instances.

I suggest that *liability for merely "permitting" such activities be removed from the Act*, even if it is deemed necessary to retain some or all of the substantive prohibitions in s.2. Liability in such circumstances *should be limited to the acts a person actually commits or causes to be committed*. If, however, some liability under this section is deemed necessary merely for "permitting" such infractions, *it should be restricted to cases where a person would ordinarily be vicariously liable for the action of his servants or agents, and should not apply under the expanded circumstances envisaged in this provision*.

In light of the wide interpretation given to the expression "indicating discrimination" in the *Singer* and *Rasheed* cases, and for reasons which I expressed in my comments concerning those cases, I suggest that s.2(1)(c) as currently worded<sup>169</sup> endangers freedom of expression, and that amendments are needed.

167. See *National Socialist White Peoples Party v. Ringers* (1973) 473 F. 2nd 1010 (4th Circ.). Here the Court held that when a school board rents its premises to outside users, it provides a "public forum" which cannot be denied to a group because of its views. In this case, the 1st Amendment rights of free expression was held to entitle a "racist and anti-Semitic" political party to the use of school premises, notwithstanding their views and their restrictive membership policies. The concept that a "public forum" cannot be denied to individuals or groups merely because of their unpalatable view seems reasonably well developed in American constitutional law. Though it is not yet certain the extent to which American constitutional jurisprudence will be applied in interpreting the "free expression" provisions of s. 2 of the *Canadian Charter of Rights and Freedoms*, it is hoped that this section will be given a reasonably wide interpretation. In addition it is certainly hoped that s. 32 of the *Charter* would be applied widely enough so that public bodies created by and subordinate to provincial legislatures, such as municipalities, school boards and public universities will be held to be subject to the *Charter*.

168. See, for example *Healey v. James* (1972), 92 S. Ct. 2338 where the U.S. Supreme Court held that a state college could not deny a student group "official recognition" and the right to use campus facilities merely because the group's views are repugnant to the administration. This case also deals with several other important 1st Amendment issues pertaining to the academic community.

169. Of course, it is by no means certain that the term "indicating discrimination" would receive such construction in Manitoba. Manitoba's section is not identically worded. For example, it makes no reference to "class of persons" or "for any purpose" as do the relevant Saskatchewan and Nova Scotia sections. This could be construed as intending a narrower scope than Saskatchewan and Nova Scotia; however it is not particularly likely that this difference in terminology would be given this or any other significance. A board or court might show sufficient concern for free expression so as to read this section more narrowly. However, it is just as likely that the Saskatchewan and Nova Scotia cases would be followed. The mere possibility of such a wide application ought to be eliminated, and the law should be clarified. Uncertainty in such areas of the law can needlessly deter the exercise of free expression.

It must be made clear that the *unfavourable ideas or concepts per se* are not within the scope of this section's prohibition;<sup>170</sup> but that to be proscribed, the communication must be *part of, or directly facilitate discriminatory actions otherwise prohibited by this Act*.

Perhaps the words in (c) "*discrimination or*" ought to be removed completely. Perhaps words ought to be added after "intention to discriminate" to make it clear that the paragraph *only prohibits articulating intention to practice discriminatory activity already prohibited in other sections of the Act*.<sup>171</sup>

Perhaps wording *analogous to s.6(2) or (3) should be adopted and applied to other areas of discrimination prohibited by the Act*<sup>172</sup> in lieu of the current wording of s.2(1).

Possibly s.2(1) could be *repealed completely and replaced with something akin to Section 12 of the Canadian Human Rights Act*.<sup>173</sup> That section reads:

"It is a discriminatory practice to publish or display before the public or to cause to be published or displayed before the public any notice, sign, symbol, emblem or other representation that (a) expresses or implies discrimination or an intention to discriminate, or (b) incites or is calculated to incite others to discriminate if the discrimination expressed or implied, intended to be expressed or implied or incited or calculated to be incited would otherwise, if engaged in, be a discriminatory practice described in any of section 5 to 11."<sup>174</sup>

Though I would not recommend adopting the *exact* terminology of s. 12 of the Canadian *Human Rights Act*,<sup>175</sup> it has advantages over s.2(1) of *The Human Rights Act*<sup>176</sup> of Manitoba and it could serve as a basic framework for amend-

170. Of course, it must be made clear that signs, etc. which indicate the fact that discrimination, (or intention to discriminate) exists in situations outside of the control of the respondent do *not* come within this prohibition. Although it is not likely (and indeed would make a mockery of the Act), it is conceivably possible that picketing premises where discrimination is practised while carrying signs stating the fact of discrimination there *could* be construed as "displaying...signs...indicating discrimination" even though the purpose of the picketers would be to protest such discrimination. Any amendments must make such unjust application or construction of the law *impossible*.

171. A sign on the premises saying that Blacks would be denied admission, or an advertisement saying that Jews need not apply for a particular job are examples of what would be covered by such terminology. Perhaps such types of clear statements of intentions to disobey the law are the only kinds of expression that can safely be prohibited if freedom of expression is to be *completely* respected.

172. S.6(2) reads: "No employer shall publish, display, circulate or broadcast or cause or permit to be published, displayed, circulated or broadcast any words, symbol, or other representation that indicate directly or indirectly that race, nationality, religion, colour, sex, age, marital status, physical or mental handicap, ethnic or national origin, or political belief or family status, is or may be a limitation, specification or preference for a position of employment".

S.6(3) reads: "No person shall publish, display, circulate, or broadcast or cause or permit to be published, displayed, circulated or broadcast any advertisement for a position of employment for or on behalf of an employer.

(a) that contains any words, symbol or other representation; or

(b) that is under classifications or heading: indicating directly or indirectly that race, nationality, religion, colour, sex, age, marital status, physical or mental handicap, ethnic or national origin, or political belief or family status is or may be a limitation, specification or preference for the position of employment".

Here again however there might be difficulties. Reference to "permit" might cause problems similar to those referred to in the discussion of s.2(1)(b), and prohibitions in s.6(2) of material that "indicates...indirectly" that such grounds might be considered could be construed to include expressions of *opinions* referred to earlier by an employer, even if they are not directly included in an advertisement or notice for employment, (e.g.) if a "company newsletter" contains an editorial critical of a particular group. Furthermore, the words "publish, display, circulate or broadcast" might pose some of the problems of "legitimate" or "innocent" publications or display referred to in my comments regarding s.2(1)(a). Some of the "safeguards" referred there might have to be adopted even if wording analogous to s.6(2) or (3) were adopted in lieu of current wording.

173. S.C. 1976-77, c. 33, s.12.

174. Ss. 5 to 11 refer to such matters as denials or differentiation in facilities, residential accommodations, employment, employee organizations, pay, etc.

175. S.C. 1976-77, c. 33, s.12.

176. S.M. 1974, c. 65, s. 2(1) (c. H175).

ment. It at least would make clear that the proscribed communication must have *some direct connection with activity otherwise prohibited by the Act*, rather than being merely *articulative of repulsive ideas*.<sup>177</sup>

However, some of the wording of s. 12<sup>178</sup> could still leave some problems. Reference to "implied" could be too open-ended. It might leave too much power in the hands of a board or court to read such intention where it doesn't exist, or to condemn the expression of a stereotypical idea on the ground that a person would construe it as indicating an intention to discriminate.

Furthermore, reference to "calculated to incite" could lead to reasoning similar to that expressed in *Singer* and *Rasheed* that perpetuating a stereotype can have the effect of leading to discrimination. If "incitement" is to be prohibited without unduly compromising free expression, it must be made clear that it, is only *direct, intentional incitement* that is within the prohibition.

Perhaps the wording of s. 12(1) of the *new Ontario Human Rights Code (Human Rights Code, 1981)* ought to be considered. It reads as if it was drafted specifically to remove some of the difficulties referred to in this article.

S. 12 of that *Code* reads:

12-(1) A right under Part I is infringed by a person who publishes or displays before the public or causes the publication or display before the public of any notice, sign, symbol, emblem, or other similar representation that indicates the intention of the person to infringe a right under Part I, or that is intended by the person to incite the infringement of a right under Part I.

12-(2) Subsection (1) shall not interfere with freedom of expression of opinion.

Any terminology employed must make it clearly understood that only communication which is *part of or directly facilitates unlawful discriminatory activity that is otherwise prohibited by the Act*, or which *directly and intentionally incites* such unlawful activity are within the scope of the prohibition. Perhaps it ought to be *specifically* enacted that *discriminatory intention or motive of the respondent* is necessary to create liability under such a section.

Perhaps none of the possible terminology suggested above is completely satisfactory. However, some legislative changes are advisable to insure that "indicating discrimination"<sup>179</sup> isn't given as broad an interpretation as that given to those words in the *Singer* and *Rasheed* cases.

177. See, *Pittsburgh Press Company v. Pittsburgh Commission on Human Relations et. al.* (1973), 93A S. Ct. 2553 at 2560-2561 where a 5 to 4 majority of the U.S. Supreme Court upheld a prohibition against a newspaper publishing "help wanted" advertisement under "male and female" headings over a 1st Amendment challenge. The Court reasoned that communications indicating an intention to enter an illegal transactions (such as sexually discriminatory hiring) was not protected by that Amendment. As well, although proscribing ideas because they might lead to unlawful acts of discriminations poses serious "freedom of expression" problems, prohibiting intentional incitement to imminent unlawful activity does not create these problems. See also, *Brandenburg v. Ohio* (1969), 89A S. Ct. 1827.

178. Using the words "publish or display" could still leave some problems concerning "innocent" or "legitimate" publications or display which I referred to while discussing s.2(1)(a). Perhaps some of the "safeguards" referred to there, such as those concerning intention, or certain exemptions from a literal application of the wording would be needed even if s. 12 of the Canadian *Human Rights Act* were to be adopted. Query whether an interpretation referred to in n.170 would also be possible under "expresses or implies discrimination." Such unjust interpretations or applications must be made impossible by any legislative changes which might be adopted.

179. W. Tamopolsky, *supra* n. 160, at 330 states: "It should be noted that some Acts, such as that of British Columbia, are probably more restricted, in scope in that the 'discriminations' or 'intentions to discriminate' is qualified by the phrase in 'any manner prohibited by this Act' (s.2)". This is another formula which could possibly alleviate some of the problems with s.2(1)(c) of the *Human Rights Act* of Manitoba as it is now worded. See, *U.C.P. & B. Assoc. v. Konyk, supra* n. 87a.

I suggest that the reference in s.2(1)(d) to "exposing or tending to expose a person to hatred"<sup>180</sup> be repealed completely. This paragraph could pose as great or even a greater danger to freedom of expression than s.2(1)(c).

The provision in question is narrower in scope than s.14(1) of the Saskatchewan *Human Rights Code* dealt with in *McKinlay*.<sup>181</sup> Perhaps *McKinlay* would have been decided differently under the Manitoba statute. However the perceived dangers referred to in *McKinlay* as well as in *Singer* and *Rasheed* (though the latter two cases dealt with "indicating discrimination") were probably factors in enacting s.2(1)(d) of the Manitoba Legislation and would likely be considered in its interpretation. As I argued in my earlier comments concerning those cases, it is doubtful whether these considerations, legitimate as they are, justify the suppression of communication *on the basis of its ideas*.

Furthermore, if the fairly wide scope of the concept of "likely to expose...to hatred or contempt" as articulated in *Commission v. Taylor* would be followed in interpreting "exposing or tending to expose...to hatred" in s.2(1)(d) of *The Human Rights Act*, the restrictive scope of the latter provision could be far reaching indeed. I certainly do not question the conclusion that the material dealt with in *Commission v. Taylor* is well within the concept, however narrowly or widely it could be defined. However, the definition in that case could cover substantially more material than the kind in issue there.<sup>182</sup>

It must be remembered that some of the most important public issues (of local, national or international interest) could involve categories referred to in this section. Strong emotions, regrettably including hatred, often accompany or

180. Though reference here (as in s.2(1)(c)) is to "a person" rather than "a person or persons" as written in s. 13 of the Canadian *Human Rights Act*, or "any person, any class of persons or groups of persons..." as in s. 14(1) of the Saskatchewan *Human Rights Code*, it is not certain or even likely that it would lead to any narrower construction than the other two statutes. It is conceivable that it could be construed as applying only to singling out a particular individual and referring to him in a derogatory manner because of such factor(s). (Even the narrower construction could pose dangers to free expression). However it is at least just as likely to be construed as applying to a group generally. If hatred is created against a group, any individual member could also suffer hatred because of his *membership* in that group. Furthermore, *The Interpretation Act*, R.S.M. 1970, c. 180, s.20(1) reads: "In an enactment... (i) words in the singular include the plural, and words in the plural include the singular".

181. *Supra* n. 4.

182. I do not wish to come to a conclusion as to whether s. 13 of the Canadian *Human Rights Act* is a needed legislative provision. However, I recognize that there may be issues involving "electronic" (and perhaps other "technological") forms of communication that do not apply to ordinary speech, books, newspapers, pamphlets, and signs, etc. These forms could include radio and television (as well as perhaps communication involving computers, and possibly even cinema and recordings under certain circumstances). Even here, however, restrictions because of the message could be dangerous, and if any restrictions are needed, they primarily would involve the methods of communication. When means of communication rely on technological and psychological knowledge to render the message less susceptible to rational analysis, and compromise "the critical faculties of individuals" the problems referred to in *Commission v. Taylor*, *supra* n. 27, and the *Report of the Special Committee on Hate Propaganda*, *supra* n. 27, could become especially serious, and justify legislative intervention which would otherwise be inappropriate. Perhaps in exceptional cases, stricter control could be based on the messages conveyed by these "technological" methods. For example, if some of the messages referred to in *Commission v. Taylor*, *supra* n. 27, were to be conveyed by motion picture or television (utilizing the "expertise" available to Goebbels' "ministry of propaganda" as well as the more recent developments in psychology and mass communications), the problems referred to would be greatly multiplied and might require more stringent solutions. Perhaps recognition ought to be taken of the psychological and social implications involved in applying modern technology and psychological knowledge in a deliberate attempt to spread hatred. See, *Red Lion Broadcasting Company v. FCC*, *supra* n. 163 and *FCC v. Pacific Foundation* (1978), 98 S. Ct. 3026 on broadcasting generally. However, even here caution must be exercised to avoid any more restraint on expression than is clearly necessary. I must emphasize that I am *not* suggesting that all "racists" should be "banned from the airwaves". See, *Anti-Defamation League of B'nai B'rith v. FCC*, *supra* n. 163. Donna Greschner in her article "Still Kept In Her Place: Sex Stereotypes in Television Commercials and the Law" (1980), 1 C.H.R.R. at C/21, recommends regulation to combat the "sexual stereotyping" so prevalent in television advertising. One can, of course, strongly question whether such issues rise to the social gravity of the deliberate purveying of racial and religious hatred, or whether it is appropriate for a government agency to dictate to advertisers or any communicators what *perceptions of social conditions* they ought to portray, or what *social values* they ought to promote. However, the special circumstances concerning television advertising at least pose legitimate questions whether "content" regulation is justified in matters involving "sexism" (or racism) or other areas of concern to human rights legislation.



result from discussing these issues. I do not dispute that ideally, one should exercise a certain amount of caution in discussing these sensitive issues; avoiding unnecessarily inflammatory language, emphasizing rational argument, and attempting to attain at least some knowledge about what one is discussing. But attempting to enforce these ideals with legal sanctions is inconsistent with free society.<sup>183</sup> Sometimes even the most calm, rational or knowledgeable discussion or communication of such issues can result in some "hatred" based on the proscribed categories.

Even if a less expansive interpretation were given by a Manitoba Board or Court, and a respondent ultimately exonerated, the mere initiation of the proceedings would have detrimental effects on the person.

The adverse effects of defending a legal proceeding, including financial expense, time, energy and worry have often been acknowledged. Of course, some risk of forcing people to defend against unfounded legal action is inherent to society. However, to subject one to this burden solely for expressing ideas itself compromises freedom of expression and should only be possible when clearly necessary. One must not forget the "chilling" or deterrent effect the mere possibility of legal proceedings could have on people even contemplating discussion concerning such controversial issues.

This section seems to leave the respondent with less protection than that available to someone charged under s.281.2(2) of the *Criminal Code*.<sup>184</sup> There, at least, the specific intention to promote hatred is an ingredient of the offense.<sup>185</sup> Also, s.281.2(3) provides certain defences, though their adequacy is open to serious question in light of "free expression" considerations.

Though there is possibly much overlap, s.2(1)(d) of *The Human Rights Act* of Manitoba seems to include material even beyond what is covered in s.19 of *The Defamation Act*.<sup>186</sup> However, though the statute is silent in that point, subject to s.2(2), it seems doubtful whether the defences of truth, fair comment, or qualified privilege, which normally are available in a defamation action,<sup>187</sup> are available to a respondent under s.2(1)(d) of *The Human Rights*

183. Can the style of a person's expression, the thought process involved in reaching his substantive conclusion, or the "adequacy of preparation" he undertook before entering the "public debate" be officially evaluated by the state for the purpose of determining the legality of his communications with less intrusion on free expression than such "official evaluations" of the substance of communication itself? Can a free society limit complete freedom of expression only to an elite of the "calmest" most "rational" and most "knowledgeable" of its members? Or is any person entitled to "call things as he sees them" on any subject, irrespective of whether his perspective is wide or limited? See *infra*, n. 191. Harlan, J.'s comments in *Cohen v. California* (1971), 91 A S. Ct. 1780 at 1788-1789.

184. See *supra* n. 137. for text of s. 281.2 and related provisions. Many of the issues discussed and cases cited in this article also raise serious doubts concerning the constitutionality and the wisdom of these *Criminal Code* provisions, especially s.281.2(2). Indeed, the argument concerning the "deterrent" or "chilling" effects applies *a fortiori* to these criminal sanctions. However, further discussions of the *Criminal Code* provisions are beyond the scope of this work.

185. See *R v. Buzanga and Durocher*, *supra* n. 116.

186. R.S.M. 1970, c. D20, s. 19.

187. And which seems available to a defendant in an action under s.19 (1) of *The Defamation Act*. See *Courchene v. Marlborough Hotel*, *supra* n. 141.

*Act of Manitoba*. A strong "freedom of expression" argument<sup>188</sup> can be made against s. 19(1) of *The Defamation Act*. This would apply *à fortiori* to s. 2(1)(d) of *The Human Rights Act*.

It is true that s. 2(2) of the *Human Rights Act* of Manitoba reads: "Nothing in subsection (1) shall be deemed to interfere with free expression of opinion on any subject". However, it is doubtful that the current wording is satisfactory to provide adequate protection for free expression.<sup>189</sup>

It is true that in *Levesque and Tardiff v. The Daily Gleaner* and *Smith*, the board of inquiry seemed to rely on s. 6(2) of the New Brunswick *Human Rights Act* (which reads: "Nothing in this section interferes with, restricts, or prohibits the free expression of opinion upon any subject by speech or in writing") in holding that the Commission lacked "the power to regulate the press". However, it is difficult to evaluate the extent to which this provision was relied on in the decision, which involved other questions of interpretation and jurisdiction as well.

In *Rasheed*, however, the Board construed s. 12(2) of the Nova Scotia *Human Rights Act* (which reads: "Nothing in this section shall be deemed to interfere with the free expression of opinion upon any subject in speech or in writing") in a manner as to render it almost meaningless.

Although it is unlikely that a board or court would make such an interpretation, the danger exists that s. 2(2) of *The Human Rights Act* of Manitoba could be construed as *derogating from free expression*, rather than derogating from

188. One can certainly appreciate the powerful arguments favouring some legal sanctions against "group defamation". Though not expressed in terms of "defamation", the potential for harm to minorities by racially derogatory communication was eloquently stated in *Singer*, *supra* n. 2, and *Rasheed*, *supra* n. 3.

The Tribunal's judgement in *Commission v. Taylor*, *supra* n. 27, and the *Report of the Special Committee on Hate Propaganda*, *supra* n. 27, go beyond these concerns. Though not going so far as to claim an immediate peril to the lives and physical safety of minority group members in Canada, they recognize the danger that such materials may inspire violence against them. They point to Nazi Germany as an extreme example of the danger connected with such ideas.

The irrational reaction of certain individuals, and the potential influence on many others, especially in times of tension, are further recognized. The *Special Committee* report further emphasizes the educational value of such laws.

See *Beauharnais v. Illinois*, *supra* n. 22, where Frankfurter, J. recognizes the danger of intergroup tensions as well as the harmful effect on individual minority group members engendered by group defamation.

However, the dangers to freedom of expression inherent in the concept of "group defamation" must not be forgotten. "Group defamation" laws may pose a substantially greater threat to freedom of expression than "individual" defamation laws. Unlike individual defamation, the "truth" or "falseness" of group defamation may be difficult or impossible to determine in a court of law. *New York Times v. Sullivan* (1964), 84 S.Ct. 710 and *Garrison v. State of Louisiana* (1964), 85 S.Ct. 209 point out the need to provide certain "protection" or privilege for false factual statements (as well as opinions) concerning public officials in order to avoid deterring discussion on public issues. This reasoning could apply *à fortiori* to statements or opinions concerning groups. Many of the most important public issues of local, national, and international concern involve factors such as race, religion, and other categories referred to in human rights legislation. Frank discussion of such factors are often essential to full debate concerning these issues. The "deterrent" or "chilling" effect on such discussion the concept of "group defamation" can create has often been recognized.

For further development of these and related arguments, see *Collin v. Smith*, *supra*, n. 18; *Anti-Defamation League of B'nai B'rith v. FCC*, *supra* n. 161; and the dissenting opinions in *Beauharnais v. Illinois*, *supra* n. 22.

189. Quere whether any wording can provide adequate protection for free expression vis-a-vis the provision in question.

*W. Tamopolsky*, *supra* n. 64 at 338, after analyzing the constitutionality of provisions such as s. 2(1) solely from a "provincial/federal jurisdiction" point of view without reference to the *Charter* states:

Thus, one has to conclude that although these prohibitions of discriminatory messages are *intra vires* the provinces, the exemption provisions are probably superfluous. On the one hand, whether these messages indicate discrimination or an intention to discriminate, prohibition of them is a valid restriction on speech and expression and therefore cannot be said to infringe either of those freedoms. On the other hand, if the prohibition were to touch the essence of free speech, free press or free expression, in the sense that it is not related to discrimination and those matters covered by provincial Human Rights Acts, then it is *ultra vires* the provincial legislatures. In either case, the exemption provision is superfluous, unless it is intended merely as an indication to Human Rights Commissions that it is necessary to balance, on the one hand, the importance and the seriousness of the communication and, on the other hand, its effect on discrimination against those groups protected by the legislation.

s.2(1) in order to protect free expression. On the wording, a board or court could conceivably respond to a "free expression" challenge by saying simply that s.2(1) *per se* does not constitute a violation or interference with free expression. Such interpretation would obviously defeat the purpose of the subsection, and is highly unlikely to be adopted. If construed in such a way as to narrow the constitutional meaning of free expression, the subsection thus construed would itself probably be unconstitutional. However, all doubts on this vital issue must be removed. If the questioned provisions in s.2(1) are retained in whole or in part, at least s.2(2) should be amended to make it clear that *free expression is paramount and to be strongly protected*, and that subsection (1) ought to be given a narrow meaning so as not to conflict with free expression.

At any rate, the wording of s.2(2) may well be unduly narrow. Would it be construed to protect statements of *fact* (true or erroneous) as well as opinion *per se*? Surely factual statements are entitled to protection. As *New York Times v. Sullivan*<sup>190</sup> pointed out: "[E]rroneous statement is inevitable in free debate, and...it must be protected if the freedoms of expression are to have 'the breathing space' that they 'need...to survive'." Would s.2(2) as now worded be construed to protect artistic endeavours (e.g. music, theatre, motion pictures, dance, photography, sculpture, paintings, etc.)? Surely these are entitled to protection. In a "multicultural society" protection for such forms of expression is especially important. Various groups, quite rightly, practice and display their own traditional arts, culture and lifestyle. Ethnic or religious customs have often been the theme of some of the most important artistic works. Sometimes these involve the artist's own group, often that of others. Often these are favourably received by the groups they purport to portray; on occasion the opposite is true. (Even when such factors are not involved, artistic endeavours often result in less than appreciative reactions from their "subjects"). Is an artist to be at risk of proceedings under this Act, or even perceive himself to be at risk, whenever he undertakes to do controversial work on an ethnic or religious theme? Hopefully a board or court would be slow indeed in finding such endeavours to be within the prohibition of Section 2. But the mere possibility that such matters could be held unlawful, or that such proceedings could even be initiated itself poses danger.

Would s.2(2) only protect clearly articulated "cognitive" expression? Expression of *emotion and feelings* have gained recognition as entitled to protection, as well as "opinion" *per se*.<sup>191</sup> Often the line may be hard to draw

190. *Supra* n. 188, at 721.

191. In *Cohen v. California*, *supra* n. 183, at 1788, Harlan, J. states:

Additionally, we cannot overlook the fact, because it is well illustrated by the episode involved here, that much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution while solicitous of the cognitive content of individual speech has little or no regard for that emotive function, which practically speaking may often be the more important element of the overall message sought to be communicated. Indeed, as Mr. Justice Frankfurter has said: "One of the prerogatives of American citizenship is the right to criticize public men and measures — and that means not only informed and responsible criticism, but the freedom to speak foolishly and without moderation". *Baumgartner v. United States* [(1944),] 322 U.S. 665...[at] 673-674. 64 S.Ct. 1240...[at] 1245, 88 L.Ed. 1525. . . .

Finally, and in the same vein, we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views. We have been able, as noted above, to discern little social benefit that might result from running the risk of opening the door to such grave results". (Emphasis added).

In this case, the U.S. Supreme Court reversed a "disturbing the peace...by offensive conduct" conviction which resulted from the defendant's wearing a jacket bearing the words "Fuck the Draft".

between “opinion” and “emotion”. Many attempts to communicate involve a combination of such factors. It is interesting to consider when a board or court would perceive an “opinion” in a communication so as to bring it within s.2(2). Decisions such as *Singer*, *Rasheed* and *McKinlay* seem ready enough to read “messages” or “ideas” of a negative nature in communications so as to bring them within the prohibitions of related legislation, even where these negative messages may not even have been intended. Would they be so ready to read an “opinion” into a communication so as to bring it within the *protection* of s.2(2)?

As can be seen, s.2 of *The Human Rights Act* of Manitoba was designed to ameliorate several serious community problems and to promote several vital social values. In some respects, the approach taken seems satisfactory. However, it must be questioned whether all of these goals are amenable to a coercive solution. As has been noted, some of the solutions seem to conflict with another vital and fundamental social value, freedom of expression. It is hoped that appropriate amendments will be enacted so as to remove the unnecessary threats to that latter value that appear inherent in the section as currently worded.