Canada's Use of Criminal and Human Rights Legislation to Control Hate Propaganda†

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I. INTRODUCTION

THE 1960S WAS AN IMPORTANT decade for Canadian social policy regarding its multicultural heritage. First, Canada signed the United Nations *International Convention on the Elimination of All Forms of Racial Discrimination*[1] and created legislation prohibiting racial discrimination in employment, housing, education and other social benefits.[2] Second, Canada changed its *Immigration Act* so that it no longer openly discriminated against non-white immigrants.[3] In the past, preference had been given to immigrants from Britain and Northern and Western Europe, while limiting immigration from Southern Europe, Asia and Central America.[4] Third, pursuant to its international agreements, Canada enacted federal and provincial human rights and employment equity legislation and amended the *Criminal Code of Canada*[5] to control hate propaganda.[6]

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1 *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, 660 U.N.T.S. 212 (signed by Canada 24 August 1966, entered into force 4 January 1969, ratified by Canada 14 October 1970).

2 I. B. McKenna, "Canada's Hate Propaganda Laws—A Critique" (1994) Ottawa L. Rev. 159 at 161.

3 *Immigration Act*, S.C. 1995, c.15.

4 M. I. Alladin, *Racism in Canadian Schools* (Toronto: Harcourt Brace & Company, 1996) at 9.

5 *Criminal Code*, R.S.C. 1985, c.C-46, s.1 [hereinafter *Criminal Code*].

However, have these legislative attempts to combat hate propaganda been successful? This paper examines Canadian legislation that strives to control hate propaganda, and its application by the courts. Specifically, the various *Criminal Code* provisions will be discussed, as well as recent Human Rights Legislation. The advantages and disadvantages of both legislative schemes will be analysed, and further this paper will discuss whether both schemes are needed.

II. HATE PROPAGANDA AND ITS EFFECTS

RACISM OCCURS WHERE ONE racial or ethnic group considers itself to be superior to another and, as a result, believes that any unequal treatment of the inferior group is justified. A typical component of racist ideology is to make any social or economic inequality seem natural or right. Tied into racism is discrimination. Discrimination is the actual unequal treatment of individuals because of their ethnic, religious, or cultural membership.[7]

Discrimination serves to:

> [u]ndermine the dignity and self-worth of target group members and, more generally, contribute to disharmonious relations among various racial, cultural and religious groups, as a result eroding the tolerance and open-mindedness that must flourish in a multicultural society which is committed to the idea of equality.[8]

A significant tool used by those who discriminate is hate propaganda. One group in Canada which has traditionally been discriminated against is the Jewish people. The Supreme Court has recognised that both historically and in the present they are subject to significant and persistent discrimination.[9] , A number of hate propaganda charges under both criminal law and human rights legislation have emerged in reaction to anti-Semitic speech and expression.[10] Expert evidence in the *Canadian Jewish Congress* v. *North Shore Free Press Ltd. (No. 7)*case indicate that anti-Semitism, like all forms of racism, is cyclical in nature.[11] It is never truly eliminated, but rather has peak periods and low periods. Therefore, while anti-semitism is not as obvious today as it was 50 years

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7 *Alladin*, *supra* note 4 at 12.

8 *Canada (Human Rights Commission)* v. *Taylor*, [1990] 3 S.C.R. 892 at 919 [hereinafter *Taylor*].

9 *Ross* v. *New Brunswick District No. 15*, [1996] 1 S.C.R. 827 at 875 [hereinafter *Ross*].

10 This is the position of the Supreme Court of Canada in its most recent decisions on hate speech: *Keegstra*, *infra* note 30; *Taylor*, *supra* note 8; *Andrews*, *infra* note 61; *Zundel*, *infra* note 44; and, *Ross*, *supra* note 9.

11 (1997), 30 C.H.R.R. D/3 at D21 [hereinafter *CJC*].

ago, it remains prevalent, though today it is more subtle.[12] Much of the recent anti-Semitism in Canada centres around the Holocaust during World War II.[13]

Professor Barney Sneiderman, in his article "Holocaust Bashing: The Profaning of History," divides anti-Semitic propaganda about the Holocaust into three categories.[14] The first is Holocaust denial. As its name implies, this refers to material stating that the Holocaust is a myth and did not happen.[15] Second is material which attempts to revitalise anti-Semitism. Here, authors seek to place the Holocaust into an historical context, comparing it to other historical examples of genocide.[16] The purpose of this perspective is to attempt to minimise the global community's horror regarding the Holocaust and reduce public sympathy for the Jewish people.[17] The third category of propaganda relating to the Jews and the Holocaust is material that trivialises it. This category relates to those individuals who compare their own situations with that of the Jews and the Holocaust in order to prove their own victimisation. Professor Sneiderman provides examples including American politicians stating that the effects of their opponent's social programs are "worse than Hitler"[18] or animal rights advocates who claim the Holocaust is nothing compared to the systematic mass killing of chickens.[19]

It is undeniable that all three categories of Holocaust Bashing exist in Canada. However, it is the second and third types of anti-Semitic expression which are the most predominant in Canadian society. These subtle forms of racism are much more acceptable than Holocaust denial. Worse, it is often the more subtle forms of racist propaganda, rather than blatant denial, that influences the public.[20] The question for us as a society is where to draw the line. At what point does a comment change from being freedom of expression to an expression of racism? And what sorts of propaganda will we as a society tolerate before legislative means are applied to stop and punish these propagandists?

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12 CJC, *supra* note 11.

13 B. Sneiderman, "Holocaust Bashing: The Profaning of History" (1999) 26(3) Man. L.J. at 321.

14 *Sneiderman, ibid.* at 319.

15 *Ibid.* at 321.

16 There are numerous examples of mass murders on the basis of race or religion throughout history. These include the killings by Pol Pot in Cambodia, Stalin's mass murders in Russia, and the destruction of the indigenous peoples of the Americas. Most recent examples of race or religious motivated killings include murders in Rwanda and Bosnia. [*Ibid.*]

17 *Ibid.* at 326.

18 *Ibid.* at 330.

19 *Ibid.* at 331.

20 [1999] B.C.H.R.T.D. No. 5 at 28 [hereinafter *Abrams*].

III. LEGISLATIVE SCHEMES TO STOP HATE PROPAGANDA

CANADA, THROUGH LEGISLATIVE ENACTMENTS, has endeavoured to control racist propaganda and racial discrimination, primarily via the *Canadian Charter of Rights and Freedoms*.[21] There are three sections of the *Charter* which justify the enacting of restrictions on hate propaganda. First, s. 27 states that the *Charter* "shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians." Second, s. 2(a) guarantees the freedom of religion for all individuals. Third, s. 15(1) states that:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

However, the *Charter* has become a double edged sword. While these sections have been used to protect Canada's minorities from hate propaganda, those who produce hate propaganda have also relied on the *Charter*'s guarantee of freedom of expression to defend their writings.[22]

Freedom of expression has been held by the Supreme Court of Canada to encompass several core values including "the search for political, artistic and scientific truth, the protection of individual autonomy and self-development and the promotion of public participation in the democratic process."[23] Because of the importance of the freedom of expression, the Supreme Court has defined it absolutely. All of the other sections are defined using a purposive approach, confining them to a specific definition.[24] As a result, the Supreme Court of Canada has arguably created a hierarchy of *Charter* rights, where freedom of expression is the most powerful.[25] In fact, in numerous cases the Court has refused to read s. 2(b) relative to the other rights in the *Charter*, namely equality, multiculturalism and the freedom of religion.[26] The Supreme Court has also refused

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[21] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11 [hereinafter *the Charter*].

[22] S. S. Anand, "Beyond *Keegstra*: The Constitutionality of the Wilful Promotion of Hatred Revisited" (1998) 9 N.J.C.L. 117 at 118.

[23] *Taylor*, *supra* note 8 at 876.

[24] *Abrams*, *supra* note 20 at 121.

[25] L. Weinrib, "Hate Promotion in a Free and Democratic Society: *R. v. Keegstra*" (1991) 36 McGill L.J. 1416 at 1424.

[26] B. P. Elman, "Combatting Racist Speech: The Canadian Experience" (1994) 32(4) Alta. L.R. 623 at 628.

to modify the freedom of expression in light of international anti-discrimination and anti-hate instruments to which Canada is a party.[27]

The leading case on the *Charter*'s right of freedom of expression is *Irwin Toy Ltd.* v. *Quebec (A.G.)*.[28] This case, and others, have established that all meaning or content is protected under s. 2(b). This is to ensure that everyone has the opportunity to express themselves regardless of how unpopular or distasteful the content.[29] The Court's rationale is that "[i]f the guarantee of free expression is to be meaningful, it must protect expression which challenges even the basic conceptions about our society."[30]

There is only one type of expression not covered by s. 2(b), that of violent expression.[31] However, in *R.* v. *Keegstra*, the Supreme Court would not characterise hate propaganda as violent expression because physical harm is not imminent upon its utterance.[32] As a result, hate propaganda is protected by the *Charter*. To create any legislative tools to control this form of expression, the legislative mechanism must comply with the *Charter* and fall within the s. 1 justification. However, it was held by the majority in *Keegstra* that hate propaganda poorly represents the values protected by the guarantee of freedom of expression.[33] This was confirmed by the Court in *Ross*, where hate propaganda was held to "attack the truthfulness, integrity, dignity and motives of Jewish persons."[34] As a result, the Court has been more liberal in allowing freedom of expression to be limited when the expression is hate propaganda.

Section 1 of the *Charter* allows laws to infringe on Charter rights so long as it is "demonstrably justifiable in a free and democratic society." In *R.* v. *Oakes*,[35] the Supreme Court of Canada held that in order to justify a violation of the *Charter*, the legislation must satisfy the following provisions. First, it must relate to a pressing and substantial government objective. Second, the legislation must be rationally connected to this objective. Third, the legislation must impair the *Charter* right being violated as little as possible. Fourth, there must be a balance between the legislative objective and the extent the right is being violated.[36]

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27 *Abrams*, *supra* note 20 at 119. For example, the UN *International Convention on the Elimination of All Forms of Racial Discrimination*, *supra*, note 1.

28 (1989), 58 D.L.R. (4th) 577 (S.C.C.) [herinafter *Irwin Toy*].

29 *Abrams*, *supra* note 20 at 122.

30 [1990] 3 S.C.R. 697 [hereinafter *Keegstra*].

31 *Abrams*, *supra* note 20 at 131.

32 *Ibid.* at 119.

33 *Keegstra*, *supra* note 30 at 787.

34 *Taylor*, *supra* note 8 at 765.

35 *R.* v. *Oakes* (1986), 26 D.L.R. (4th) 200 [hereinafter *Oakes*].

36 *Abrams*, *supra* note 20 at 134.

Therefore, freedom of expression can be circumvented or at least curtailed, if the legislation can pass the *Oakes* test. These four provisions also include an analysis of the freedom of expression relative to the other *Charter* sections protecting the right to equality, freedom of religion and Canada's multi-cultural heritage.

IV. CANADA'S EFFECTIVENESS AT CONTROLLING HATE PROPAGANDA

UNFORTUNATELY, IT HAS PROVEN very difficult to legislate against hate propaganda in Canada. This is largely due to the need to conform to the *Charter*.

A. The *Criminal Code*

Canada's criminal offences regarding hate propaganda try to strike a delicate balance between restricting hateful expression and not significantly restricting freedom of expression. However, this has proven to be a difficult task. In fact, recently the justification for the continuation of hate law crimes has come into question. As some critics state, "the criminal law process is long, expensive, and, most importantly, unpredictable. It should not be casually invoked."[37] A criminal conviction could also inhibit an individual's ability to obtain employment and make it difficult to travel outside of Canada. It could even lead to the deportation of non-Canadian citizens from Canada.[38] Critics also question the necessity of hate crimes when adequate schemes exist under Human Rights Tribunals.[39] In the past decade, there has been a decrease in the number of charges laid using the *Criminal Code*, while there has been an increase in the use of Human Rights Tribunals.[40]

Those who support the continuation of hate law crimes argue that they serve an important symbolic value. The *Criminal Code* is the most severe and expensive mechanism the government can use and is an effective tool to enforce values of paramount importance.[41] As one commentator has observed,

> if we believe that equality, the protection of minorities, and the preservation of multiculturalism are important to Canadian society, we must be prepared to support these values with criminal sanctions if necessary.[42]

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37 *Elman*, *supra* note 25 at 643.

38 *Abrams*, *supra* note 19 at 142.

39 See the dissenting judgment in *Keegstra*, *supra* note 30.

40 S. S. Anand. *Expressions of Racial Hatred and Criminal Law: Proposals for Reform* (1997) 40 Crim. L. Q. 215 at 215.

41 *Abrams*, *supra* note 19 at 145.

42 *Elman*, *supra* note 26 at 643.

The focus of criminal law is on the intent of the speaker and the content of the expression. There is no need to prove any damage has occurred. Criminal law exists simply to punish individuals for wrongs committed in the past.[43] There are several sections of the *Criminal Code* which apply to hate propaganda. The most controversial are s. 181 which forbids the spreading of false news, and s. 319(2) which makes it unlawful to wilfully promote hatred.

Other sections of the *Criminal Code* are relevant to hate propaganda, but very few criminal charges have been laid under them—s. 318 makes it a crime to advocate genocide and s. 319(1) forbids the public incitement of hatred. Further, there are special search and seizure powers relating to hate propaganda in s. 320.

B. Section 181

The leading case on the *Criminal Code* s. 181 is *R. v. Zundel*.[44] Section 181 applies to "[e]very one who wilfully publishes a statement ... that he knows is false and that causes or is likely to cause injury or mischief to a public interest."[45] Zundel was charged under this section because he had published a 32 page pamphlet titled *Did Six Million Really Die?* adding his own forward and afterword. The pamphlet denied that the Holocaust ever happened, stating that the entire event is a work of fiction to further the aims of an international Jewish conspiracy.[46] Specifically the pamphlet contained what Zundel believed was:

> [i]rrefutable evidence that the allegation that 6 million Jews died during the Second World War, as a direct result of official German policy of extermination, is utterly unfounded and was only a figment of post-war propaganda.[47]

Further, Zundel's pamphlet alleged that the Jewish people and the state of Israel obtained significant benefit from the international sympathy generated from the propaganda.

The majority of the Supreme Court of Canada found the *Criminal Code* section to be in violation of s 2(b) of the *Charter* protecting the freedom of expression and could not be justified under s. 1. While s. 181 failed the *Oakes* test on several grounds, a significant factor was the ambiguity in the wording of the section. It applied to "any" false news and never defined "mischief," "injury," or "public interest." As a result, the Supreme Court of Canada feared that it could be liberally interpreted to apply to a broad range of publications.[48] As a result,

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[43] *Abrams*, *supra* note 20 at 145.

[44] *R. v. Zundel* [1992] 2 S.C.R. 731 [hereinafter *Zundel*].

[45] *Ibid.* at 747.

[46] *Ibid.* at 744.

[47] *Ibid.* at 734.

[48] *Elman*, *supra* note 26 at 638.

the section could limit a large spectrum of speech, including expression which would have value.[49] The dissent in *Zundel* argued that the right to freedom of speech does not include the fostering of deliberate lies.[50]

It should be noted that Zundel was not charged under s. 319(2) of the *Criminal Code* because the Attorney-General of Ontario refused to do so. The Government feared they could not get a conviction under that provision. It was the Holocaust Remembrance Association that initially commenced the charge under s. 181 as a private prosecution.[51]

C. Section 319(2) of the *Criminal Code*

Section 319(2), which prohibits the wilful promotion of hatred, was also found to violate the freedom of expression provision in the *Charter*.[52] However, the majority of the Supreme Court of Canada in *Keegstra* held it to be justified under s. 1. Mr. Keegstra was a school teacher who incorporated his hate propaganda into the classroom. For 12 years he taught that the Holocaust did not happen. He vilified the Jews, describing them as "treacherous," "subversive," "sadistic," "money-loving," "power hungry," and "child killers."[53] He alleged that the Jewish people had "secret societies, and conspiracies, all of which were offered as historical fact and not as matter of religious belief."[54] Further, Keegstra taught that the Jewish people were responsible for most of the worlds calamities including depressions, anarchy, chaos, war and revolutions. Most importantly, Keegstra evaluated his students based on their ability to reproduce his anti-Semitic views.[55] Note that while the maximum sentence under s. 319(2) is two years in jail; Keegstra only received a fine of $3,000.00 following his second trial.[56]

Both the majority and the minority of the Supreme Court found s. 319(2) to have a pressing and substantial objective to protect targeted groups and the promotion of societal cohesiveness. The area where the Court split was on the issue of minimal impairment. While the dissent felt the *Criminal Code* was not needed because of current Human Rights legislation, the majority did not believe it appropriate to limit the government to one scheme.

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[49] *Zundel*, *supra* note 44 at 774.

[50] *Elman*, *supra* note 26 at 636.

[51] *Elman*, *supra* note 26 at 643.

[52] *Keegstra*, *supra* note 30 at 697.

[53] *Ibid.*

[54] *Ibid.* at 618.

[55] *Ibid.* at 714.

[56] *Abrams*, *supra* note 20 at 143.

The reason s. 319(2) was justifiable in a free and democratic society while s. 181 failed was because of the limited scope of s. 319(2). First, s. 319(2) only prohibits, specifically, "the wilful promotion of hate against an identifiable group." The majority in *Keegstra* defined "wilful" as the intent to encourage hatred or foresee the promotion of hatred while attempting another purpose. The level of intent necessarily must be more than simply negligent or reckless.[57] "Promotion" was defined by the Court as foreseeing, as a direct result of the expression, an increase in the hatred towards the group.[58] The level of hatred needed was that of an "intense and extreme nature that is clearly associated with vilification and detestation."[59] "Identifiable group" was also defined in the *Criminal Code* at s. 318(4) as "any section of the public distinguished by colour, race, religion or ethnic origin." This section specifically excludes private conversation from its jurisdiction.[60]

A second factor limiting the scope of s. 319(2) are its defences enumerated in s. 319(3). Charges under subsection (2) do not apply if:

> (*a*) the statements are true;
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> (*b*) the accused was not making a religious argument in good faith;
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> (*c*) statements are of a subject of public interest and were made for the public benefit and the accused had reasonable grounds to believe them to be true;
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> (*d*) the accused was, in good faith, attempting to point out, for the purpose of removal, matters producing or tending to produce feelings of hatred.

A third factor is the requirement of s. 319(6) for the consent of the Attorney General before any charges can be laid. As a result of the limited scope of s. 319(2) plus the limitations in ss. 319(3) and 319(6), the Court felt there were enough safeguards limiting the application of s. 319(2).

A second Supreme Court decision on s. 319(2) is *R. v. Andrews*[61] which was released at the same time as *Keegstra*. In *Andrews* the accused belonged to a white nationalist political organisation called the Nationalist Party of Canada. Andrews was the party leader and Smith was party secretary. The party, in its bi-monthly publication, wrote several racist statements including *nigger go home, Hoax on the Holocaust, Israel stinks, and Hitler was right. Communism is Jewish.* The material also argued that

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[57] *Keegstra, supra* note 30 at 775.

[58] *Ibid.* at 777.

[59] *Ibid.* at 777.

[60] *Ibid.* at 772.

[61] *R. v. Andrews*, [1990] 3 S.C.R. 870 [hereinafter *Andrews*].

> ... God bestowed his greatest gifts only on the White people; that if it were God's plan to create one 'coffee-coloured race of humanity' it would have been created from Genesis'; and that therefore all those who urge a homogeneous 'racemixed planet' are, in fact, working against God's will.

The publication also denied the existence of the Holocaust, stated that minority immigrants are committing violent crimes, and advocated for the separation of races.[62] Overall, the material was held to be "malodorous, malicious and evil" by the Ontario Court of Appeal, thus satisfying the hate requirement in the *Criminal Code*. At trial, Andrews was sentenced to 12 months incarceration and Smith to seven months. However, these sentences were reduced by the Court of Appeal to three months and one month respectively. The majority of the Supreme Court found s. 319(2) to violate the *Charter*'s guarantee of freedom of expression, but to be justified in a free and democratic society, for the same reasons as in *Keegstra*.

Since *Keegstra* and *Andrews* there have been two other criminal cases applying s. 319(2), but they have not been heard by the Supreme Court of Canada. The first is *R. v. Safadi*.[63] Safadi was found to have sent 45 letters to churches or religious groups, police and government agencies. These letters referred to Christianity in the "most obscene and disgusting language." Further, all letters were intentionally marked so that the reader would think they came from a Jewish source. They all carried the Star of David as well as slogans such as "Long live Israel." The trial judge held that the purpose of the letters were to promote "detestation, enmity, ill-will and malevolence towards Jews." This was held to be sufficient to meet the demands of s. 319(2). The decision was confirmed on appeal.

The second criminal case to apply s. 319(2) was *R. v. Harding*.[64] Harding published two pamphlets and recorded two telephone messages which were found to wilfully promote hatred towards the Muslim community in Canada. His material was found to target all Muslims, containing "alarming and false allegations about the adherents of Islam calculated to arouse fear and hatred of them in all non-Muslim people."[65] The content described Muslims as being a dangerous people capable of cruel acts and violent terrorism, that they are intolerant of other faiths especially the Jewish and Christian people, and that it is the desire of the Muslim people to take over Canada. The material was held to be sufficiently hostile to fall within the definition of "hate." The Court would not allow Harding to rely on any of the defences in s. 319(3) because it was

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[62] *Andrews, ibid.* at 874.

[63] (1994), 121 Nfld. & P.E.I.R. 260 (P.E.I. C.A.) [hereinafter *Safadi*].

[64] (1998), 45 O.R. (3d) 207 (Prov. Div.) [hereinafter *Harding*].

[65] *Safadi, supra* note 63 at 4.

found that he had no reasonable basis to his beliefs. In fact, Harding admitted at trial that he did not believe any of the content of the messages.

It should be noted that in Harding only one of the two telephone messages was held as sufficiently negative to be characterised as hateful. While the second message was found to still be "highly offensive and distasteful," there was reasonable doubt if it breached the requirements of s. 319(2). The trial court in Harding also stated that it was possible to infer the intent to promote hatred simply through analysing the content of the message. However, this argument has yet to be heard by the Supreme Court.

D. Does Criminal Law Control Holocaust Bashing?

Returning then to Professor Sneiderman's classification of Holocaust bashing, which of these forms would be in violation of the *Criminal Code*? For a conviction to be successful, the Crown must prove beyond a reasonable doubt the intent of the individual to wilfully promote hatred. Unfortunately, there is little case-law since *Keegstra* to fully comprehend the scope of the law. It is certain that expressions which trivialise or relativise the Holocaust would not be of sufficient hatred to trigger the provisions of the *Criminal Code*. Further, these individuals could also rely on the defence of s. 319(3)(c) that they had a reasonable belief in the truth of their statements and that they were made for the public benefit on a subject of public interest. For those who would publish material denying the Holocaust, it is possible that the defence of s. 319(3)(c) would fail because of an absence of reasonable grounds to believe the information. However, for the charge to succeed, there would have to be a significant degree of vilification towards the Jewish people and proof of the intent to promote this hatred. Overall, it is only extreme cases of anti-Semitism that would trigger the *Criminal Code*. It is not enough for the expression to be distasteful. It must be of a sufficient degree of hatred to be a prohibited act.[66]

V. HUMAN RIGHTS LEGISLATION

HUMAN RIGHTS, AS ENFORCED by human rights legislation are "those fundamental rights to which every man or woman ... is entitled merely by virtue of having been born a human being."[67] Instead of focusing on the punishment of individuals for their actions, human rights legislation aims to promote equal opportunity by eliminating racial discrimination.[68] Human rights legislation recognises that many individuals within our society have deep-seeded, historic prejudices against others who they perceive as different because of their race or re-

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[66] *Keegstra*, *supra* note 30 at 778.

[67] *Elman*, *supra* note 26 at 644.

[68] *Ibid.*

ligion. However, the purpose behind the legislation is to modify the behaviour of individuals by preventing discriminatory actions against vulnerable groups. The legislation is not as concerned with the presence of hatred, rather, it limits the outward manifestation of hatred.[69] Human rights legislation is not as adversarial as the civil or criminal courts. As a result, settlements are more often achieved. If no settlement can be reached, then the remedies provided by human rights tribunals focus on victim compensation.[70]

There are many situations where a Human Rights Tribunal is a more appropriate forum than criminal courts to control hate propaganda. Primarily, it is much harder to get a criminal conviction than a Human Rights Tribunal conviction because a criminal charge has the potential for incarceration.[71] *McAleer* v. *Canada (Canadian Human Rights Commission)* is a good example of this.[72] Criminal trials use the standard of proof beyond a reasonable doubt, and the onerous rules of evidence make prosecution difficult and costly. In contrast, human rights legislation require only the civil standard of proof of a balance of probabilities and can apply their own rules of evidence. The evidentiary rules used by administrative tribunals are always more liberal than those of the *Criminal Code*.[73] Further, the *Criminal Code* has made hate laws specific intent offences, which require the accused to have a *mens rea* the intent to discriminate against a specific person or group. In contrast, human rights legislation is concerned with the broader effect of the statement, including effects not intended but caused by the act.[74] Neither the *Criminal Code* nor the human rights legislation require proof of actual harm.

However, human rights legislation has many limitations. First, most human rights legislation is designed to apply only to matters of housing, education, employment and access to public facilities. It is not designed to regulate speech in general, because that would be deemed *ultra vires* by infringing upon the Federal Government's exclusive jurisdiction over criminal law.[75] While this concern has not yet been heard by the Supreme Court of Canada, Alberta human rights legislation regulating speech was upheld by the Alberta Board of Inquiry in *Kane* v. *Church of Jesus Christ Christian-Aryan Nations (No. 3)*.[76] Here it was stated that

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[69] See CJC *supra* note 11 at 57.

[70] *Ibid.* at 85.

[71] *Abrams*, *supra* note 20 at 148.

[72] *McAleer* v. *Canada (Canadian Human Rights Commission)*, [1996] 2. F. C. 345 (Fed T.D.). See *Anand*, *infra* note 84 for more examples.

[73] *Abrams*, *supra* note 20 at 147.

[74] *Ibid.*

[75] *Ibid.* at 144.

[76] (1992), 18 C.H.R.R. D/268 (Alta. Bd. of Inquiry) [hereinafter *Aryan Nations*].

"by reinforcing prejudice or promoting latent discrimination, such expression endangered the rights of the targeted groups to obtain equal opportunities in employment, housing and public accommodation."[77] It has also been upheld by the British Columbia Human Rights Tribunal in CJC which concluded that human rights prohibitions on "... 'political' speech by restricting expression that is likely to expose a person or group to hatred or contempt ..." does not infringe on federal jurisdiction.[78]

Second, administrative tribunals do not guarantee the same protections as civil or criminal trials. There is no right, or even an option, to trial by jury. There are no compulsory examinations for discovery nor pre-trial discovery of documents. However, it can be argued that this process is compensated for by the investigation process carried out by tribunals. In administrative tribunals parties do not have a right to appeal but can obtain a judicial review. Administrative agencies also are not bound by their own precedent.[79]

A. Administrative Caselaw

It is as difficult to determine the effect of expression upon a victimised group, as it is to determine how much the *Human Rights Code*[80] decreases the victimisation of vulnerable groups.[81] At any rate, there have been several recent cases heard by administrative tribunals on the issue of hate propaganda.

In 1990, the Supreme Court released the decision of *Canada (Human Rights Commission)* v. *Taylor*[82] at the same time as its decisions in *Keegstra* and *Andrews*. Taylor was charged under s. 13(1) of the Canadian *Human Rights Act*[83] for operating a telephone service which had pre-recorded anti-Semitic messages. The messages alleged a Jewish conspiracy that has control of the media and schools, which causes everything from unemployment, laziness, and drug use to promoting Communism and causing postal strikes.[84]

Section 13(1) prohibits individuals from "communicat[ing] telephonically any matter likely to expose a person or a group to hatred or contempt on the basis, *inter alia*, of race or religion." The majority of the Supreme Court found that s. 13(1) violated the freedom of expression guarantee in the *Charter* but

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77 *Abrams*, *supra* note 20 at 144.

78 CJC, *supra* note 11 at 31.

79 *Abrams*, *supra* note 20 at 150.

80 *Human Rights Act*, S.C. 1976–77, c. 33; reprinted R.S.C. 1985, c. H6.

81 CJC, *supra* note 11 at 106.

82 *Ross*, *supra* note 9.

83 *Human Rights Act*, *supra* note 80 at sections 2 and 5.

84 *Ross*, *supra* note 9 at 904.

was justified under a s. 1 analysis. The remedy given was a cease and desist order, with the threat of fine and/or imprisonment for violation of the order.

A second case of a teacher making racist speech was before the Supreme Court in *Ross* v. *New Brunswick School District No. 15*.[85] Although Ross was making racist remarks on television and in published works, he never brought his views into the classroom. Ross's publications included allegations that "Jews are heading a 'great Satanic movement' against Christians with a view to destroy the Christian faith and civilisation."[86] The publications also encouraged others to condemn the Jewish people. A Board of Inquiry found that Ross' public statements denigrated the faith and belief of Jews, and were contrary to s. 5(1) of the *New Brunswick Human Rights Act*. Section 5(1) states:

> No person shall ... discriminate against any person or class of persons with respect to any accommodation, services or facilities available to the public because of race, or religion ...[87]

Ross' public expressions were held by a Board of Inquiry, and affirmed by the Supreme Court, to create a poisoned "educational environment at the school and created an environment in which Jewish students were forced to confront racist sentiment."[88] Further, the Board reasoned that Ross' public opinions would likely encourage anti-Jewish sentiment among his students.[89] The Board of Inquiry also found the School Board violated the New Brunswick *Human Rights Act* by not sufficiently disciplining Ross. This view was also affirmed by the Supreme Court of Canada.

The Supreme Court in *Ross* further affirmed several of the remedies put forward by the Board of Inquiry that had been rejected by the New Brunswick Court of Appeal. The Supreme Court allowed the Board to order Ross to:

> (a) take an 18 month leave of absence without pay;
>
> (b) be appointed to a non-teaching position if one became available within 18 months; and,
>
> (c) terminate Ross' employment should a non-teaching position not become available or should Ross reject the position.

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[85] *Taylor, supra* note 8.

[86] *Ibid.* at 863.

[87] *Human Rights Act*, R.S.N.B. 1973, c. H11, s. 5(1) [rep. & sub. 1985, c. 30, s. 7; am. 1992, c. 30, s. 5(a)].

[88] *Taylor, supra* note 8 at 852.

[89] *Abrams, supra* note 20 at 126.

The Supreme Court would not affirm the Board's remedy terminating Ross' employment should he further publish any anti-Semitic literature in the future. The court felt this remedy to be an excessively severe limit on his freedom of expression.

There have been no human rights cases since *Taylor* and *Ross* to reach the Supreme Court on the issue of hate propaganda. However, there have been several cases heard by the lower courts. The Federal Courtheard the case of *Canada (Human Rights Commission)* v. *Canadian Liberty Net*.[90] An injunction was ordered against Canadian Liberty Net using section 13 of the *Canadian Human Rights Act* because they had racist telephone messages. These messages included statements from Janice Long, wife of Aryan Nations Leader Terry Long, Ernest Zundel[91] and the Heritage Front. The messages denied the existence of the Holocaust and assertions that immigrants who are visible minorities are importing crimes and problems into Canada.[92] The messages suggested that through violence these problems could be remedied. The Human Rights Tribunal and the Federal Trial Court granted the injunction on the basis that the phone messages were "... likely to expose persons to hatred or contempt by reason of the fact those persons are identified on the basis of race, national or ethnic origin, colour or religion."[93] While this case was heard by the Supreme Court, the appeal was only on the question of the Federal Court's jurisdiction to order the injunction.

Most recently, two cases have emerged out of the British Columbia Human Rights Tribunal, involving the same respondent, the North Shore Free Press. The case of *Canadian Jewish Congress* v. *North Shore Free Press Ltd*[94] involved a complaint about an article in a community paper written by Doug Collins which allegedly exposed Jewish persons to hatred or contempt in violation of the s. 7(1)(b) of the B.C. *Human Rights Act*.[95]

Section 7(1)(b) is divided into a two-part objective test. The first part of the test is established if the "communication itself expresses hatred or contempt of a person or group on the basis of one or more of the listed grounds." The feelings of hatred or contempt must be felt to the extreme, as taken from the Supreme Court of Canada in *Taylor*, to the point where "unusually strong and deep-felt emotions of detestation, calumny and vilification" are felt towards the identifiable group.[96] The second part of the test determines if the communication is

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[90] [1998] 1 S.C.R. 626 [hereinafter *CLN*].

[91] See *Zundel*, *supra* note 44.

[92] *Human Rights Act*, *supra* note 86 at 634.

[93] *Ibid.* at 634.

[94] *CJC*, *supra* note 11.

[95] *Human Rights Act*, R.S.B.C . 1979, c. 186.

[96] *Ross*, *supra* note 9 at 928.

likely to "make it more acceptable for others to manifest hatred or contempt against the person or the group concerned." The tribunal found the news articles to be anti-Semitic, relating in "grossly inaccurate terms the extent of the victimisation in the Holocaust." Even though the article was "offensive, harmful and mean-spirited," the tribunal did not find that it was sufficiently full of 'hatred or contempt' to violate the *Human Rights Code*.[97]

The second case from B.C., *Abrams* v. *North Shore Free Press Ltd*,[98] involved four articles written by Collins, including the article in CJC. Expert evidence was lead that Collins did not directly deny the Holocaust, but indirectly put forward his anti-Semitic views by trivialising and rationalising it. The articles were found to portray the Jews as "powerful, vindictive, and hypocritical,"[99] thereby exploiting several of the most virulent anti-Semitic themes.[100] Individually the articles were not found to violate the British Columbia *Human Rights Code* because they did not meet the extreme threshold of hate or contempt. But when considered collectively, the repeated anti-Semitic themes in Collins articles were held to satisfy the requirements of s.7(1)(b). The remedies granted in *Abrams* were an order to stop any future publications of hate propaganda and a fine of $2,000.00 to compensate the complainant for injury to dignity and feelings of self respect. Finally, the North Shore Free Press was ordered to publish a summary of the decision within one of its next three regular issues.

B. Does Administrative Law Control Holocaust Bashing?

Which one of Professor Sneiderman's classifications of Holocaust bashingwould violate human rights legislation? Of course, it is easier to obtain a conviction in an administrative tribunal because of the lower standard of proof and less onerous rules of evidence. Most importantly, Human Rights convictions are much easier to achieve because there is no requirement to prove the intent to promote hatred. However, it is likely that any subtle form of Holocaust trivialisation or relativisation would not merit analysis from a Human Rights Tribunal. Similar to the *Criminal Code*, the tone of the message is truly the key factor. Denying the Holocaust does not necessarily discriminate against Jewish people by the definition of Canada's *Human Rights Code*. The common elements of human rights legislation are: i) a message of detestation sufficient to be hateful and ii) the message motivates others to hate the identifiable group. Further, these elements must be met in a form of expression that falls under the jurisdiction of the *Human Rights Code*. The Canadian *Human Rights Code* prohibits these expressions on phone-messages, and provincial *Human Rights Codes* pro-

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[97] CJC, *supra* note 11 at 113-117.

[98] *Abrams*, *supra* note 20.

[99] *Ibid.* at 22.

[100] *Ibid.* at 26.

hibit the expressions in the context of providing housing, education, employment and access to public facilities. Thus, while human rights convictions are easier to obtain, they only apply to a limited scope of activity.

VI. Why Criminal Laws and Human Rights Legislation Should Co-Exist

ARGUABLY THE MOST EFFICIENT WAY to control hate propaganda is to have the two schemes co-exist. This would allow their different emphases to apply to the broadest range of cases. The *Criminal Code* punishes past wrongs, acting retroactively, restricting individual rights and liberties in order to protect society as a whole.[101] In contrast, human rights legislation operates in a pro-active manner, influencing future actions of parties.[102] Human rights legislation increases the rights of individuals and increases their freedoms.[103]

Another reason is that parties often fear they lack the evidence needed to ensure a criminal conviction. Alternatively, an acquittal may wrongfully be seen as validating the hate message put forward by the accused.[104] As a result, having a second option in a Human Rights Tribunal, which has lower requirements for a conviction, is a convenient alternative.

A third reason why the two schemes should co-exist is the difference in the remedies provided by each. Charges emerging out of criminal law show society's distaste for the past act. Remedies include incarceration, fines, probation and other criminal dispositions. In contrast, administrative tribunals can be much more flexible in their remedies, finding specific, creative solutions to the problems brought before them.[105] Not only can tribunals order the accused to stop publishing hate propaganda, they can require the accused to ameliorate the effect of the hate propaganda. Administrative tribunals can also award costs.[106]

Examples of the differences in the remedies between the two tribunals can be seen in *Keegstra* and *Ross*, two cases where school teachers were making anti-Semitic comments. Although Keegstra was found guilty and fined under criminal law, he could go back and resume his teaching job the next day. It was only within the discretion of the school board to determine whether or not to terminate his employment. In contrast, Ross was also a teacher whose anti-Semitic remarks were made outside the classroom. Nevertheless, the Human Rights

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[101] CJC, *supra* note 11 at 36.

[102] *Abrams*, *supra* note 20 at 146.

[103] CJC, *supra* note 11 at 36.

[104] *Abrams*, *supra* note 20 at 147.

[105] *Ibid.* at 127.

[106] CJC, *supra* note 11 at 20.

Tribunal found him guilty of inciting hate and made a remedial order that Ross could no longer teach in a classroom.[107]

VII. CONCLUSION

IN BOTH THE *CRIMINAL CODE* and human rights legislation, Canada has enacted rules for society limiting freedom of speech in order to protect identifiable groups from hate propaganda. While all of these legislative enactments were found to violate the *Charter's* guarantee of freedom of expression, all but one were held by the Supreme Court of Canada to be justifiable in a free and democratic society. This is because Canada recognises the need to balance the right of an individual to express oneself with the needs of a democratic society to protect its vulnerable groups.

The Jewish community has historically been subject to hate propaganda. An analysis of the case-law from both the *Criminal Code* and human rights legislation, shows the tone of the message, more than the content, determines the ability to find a violation. Both the *Criminal Code* and human rights legislation have very high thresholds in their definition of "hate." Only those expressions which vilify and detest the identifiable group are sufficient to merit a charge under these legislative schemes. In order to achieve the desired balance between protection of vulnerable groups and free speech, the Supreme Court of Canada has ruled that distasteful speech is not sufficient. As a result, on its face Holocaust bashing on its own is not prohibited. It is the hateful tone of the message, and how it has been disseminated to the public, that will determine if it is a prohibited act.

In the case where the hate propaganda could reasonably be considered hateful and have the effect of victimising identifiable groups, the appropriate scheme must be selected. The *Criminal Code* is designed to punish previous acts with fines and imprisonment. It is also society's most severe statement showing its detestation of certain conduct. However, *Criminal Code* convictions are difficult to obtain, because the crime must be proven beyond a reasonable doubt, including the intent to promote hate to the public. In contrast, administrative tribunals have less onerous standards of proof and evidentiary requirements. Further, their remedies are very flexible and can be customised to minimise the effect of the victimisation. These remedies include injunctions against further propaganda, forcing a teacher out of the classroom, or ordering a newspaper to publish a summary of the Human Rights Tribunal's decision. Since the *Criminal Code* and human rights legislation apply to different situations and have different strengths and weaknesses, they are both useful tools against the dissemination of hate. Considering the creative solutions available to Human Rights Tri-

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[107] *Abrams*, *supra* note 20 at 146.

bunals, however, their utilisation ought to become more prevalent in dealing with hate propaganda.