

# A Proposed Hate Communication Restriction and Freedom of Expression Protection Act: A Possible Compromise to a Continuing Controversy

---

EDWARD H. LIPSETT, B.A., LL.B.

As has been widely observed, the “hate speech” provisions in various federal and provincial laws unduly fetter freedom of expression on matters of public interest and may well be counter-productive to the legitimate goals which they pursue. *The Criminal Code*<sup>1</sup> provisions, as they entail criminal convictions and possible imprisonment, are obviously the harshest. However, s. 319(2) dealing with “wilfully promoting hatred” has a strict *mens rea* (intention) requirement, and s. 319(3) provides several defences. The “kinder and gentler” human rights provisions, contained in s. 13 of the *Canadian Human Rights Act*<sup>2</sup> and various provincial (and territorial) human rights laws, do not require intention as a prerequisite to liability, and lack the defences referred to in s. 319(3) of the *Criminal Code*. Therefore, their “censorial sweep” is far wider and can cover or threaten materials far less extreme or dangerous than that covered by the *Criminal Code*, and pose an arguably greater threat to freedom of expression.

Yet international law requires Canada to prohibit certain forms of “hate speech,” and there may be some materials that are so harmful or dangerous that they need to be restrained. Most of these materials would not involve the impugned ideas alone: rather, the ideas in conjunction with other factors (such as incitement to unlawful actions or the methods, circumstances or likely consequences of their expression). This paper, after conducting a brief overview and general critique of the current legislative and jurisprudential scheme, offers some ideas for reform in this area of the law. I am respectfully suggesting the abolition of all current laws in this area at the federal and provincial levels and their replacement with a single, comprehensive federal statute. Hopefully, this new statute would prohibit the most harmful or dangerous “hate” materials, while respecting freedom of expression to the greatest extent possible.

---

<sup>1</sup> R.S.C. 1985, c. C-46.

<sup>2</sup> R.S., 1985, c. H-6

## PART I

The debate over the extent freedom of expression can legitimately be restricted in order to protect equality and social harmony continues. In 1990, the Supreme Court of Canada, by a 4-3 majority, upheld the “wilfull promotion of hatred against any identifiable group” provision in s. 319(2) of the *Criminal Code*<sup>3</sup> in *R. v. Keegstra*.<sup>4</sup> That provision, through a definition in s. 318(4), then only covered “colour, race, religion or ethnic origin.” While acknowledging its interference with freedom of expression under s. 2(b) of the *Canadian Charter of Rights and Freedoms*<sup>5</sup>, the Court held that it was a “reasonable limit” under s. 1. In so holding, it emphasized the importance of protecting the constitutionally and internationally protected values of equality and multiculturalism and our obligations to prohibit certain forms of hate messages under Article 20(2) of the *International Covenant on Civil and Political Rights*<sup>6</sup> and Article 4 of the *Convention on the Elimination of All Forms of Racial Discrimination*.<sup>7</sup> It relied on the strict *mens rea* requirement derived from the word “wilfull”, its attempts to narrow the concept of “hatred”, and the defences in s. 319(3)—particularly those of “religious opinion” in (b) and “reasonable belief” in (c)<sup>8</sup>—to uphold the proportionality of the legislation.

On the same day, that Court also upheld, by a 4–3 majority, s. 13 of the *Canadian Human Rights Act*<sup>9</sup> (to the extent that it dealt with *race* or *religion*, the other “prohibited grounds of discrimination” were not dealt with in that decision) in *Canadian Human Rights Commission v. Taylor*.<sup>10</sup> Section 13(1) reads:

---

<sup>3</sup> Section 319(2) of the *Criminal Code* reads: “Everyone 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 a term not exceeding two years; or (b) an offence punishable on summary conviction.”

<sup>4</sup> [1990] 3 S.C.R. 697.

<sup>5</sup> Charter of Rights and Freedoms, Part I of the Constitution Act, 1982 schedule B [*Charter*].

<sup>6</sup> *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S.171.

<sup>7</sup> *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, 660 U.N.T.S. 195.

<sup>8</sup> Section 319(3)(b) then read “if, in good faith, he expressed or attempted to establish by argument an opinion on a religious subject.”

Section 319(3)(c) reads: “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;”

<sup>9</sup> *Canadian Human Rights Act*, R.S., 1985, c. H-6.

<sup>10</sup> [1990] 3 S.C.R. 892.

It is a discriminatory practice ... to communicate telephonically or to cause to be so communicated, repeatedly...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.

Unlike s. 319(2) of the *Criminal Code*, this provision does not contain a *mens rea* requirement. Being a human rights provision rather than a criminal provision, the *effect* of the material was ruled sufficient to engender liability; *intention* was deemed to be irrelevant. Furthermore, no “defences” akin to those in s. 319(3) of the *Criminal Code* are found in this provision. However, the restriction on freedom of expression was held to be proportional largely on the basis of the limited remedy then available for a violation of the section. At that time, the only sanction that a tribunal could impose was in effect a *cease and desist order*. Payment of compensation, available for other breaches of this Act, did not apply here. A respondent could not be liable to a fine or imprisonment unless he disobeyed such order. Disobedience would be deemed contempt of the Federal Court of Canada.

Other *Criminal Code* “hate speech” related provisions whose constitutionality have not been ruled on by the Supreme Court of Canada are s. 318, prohibiting “advocating or promoting genocide”, s. 319(1) prohibiting inciting hatred in a public place “where such incitement is likely to lead to a breach of the peace”, s. 320 dealing with the seizure and forfeiture of “hate propaganda”, and s. 320.1 dealing with the deletion of “hate propaganda” from computer systems.<sup>11</sup> The Supreme Court, however, ruled the “false news” provisions of the *Criminal Code*, s. 181 to be unconstitutional<sup>12</sup> in a case involving a Holocaust denier. Other relevant provisions whose constitutionality have not been ruled on by the Supreme Court are provisions of the *Customs Tariff*<sup>3</sup> prohibiting importing “hate propaganda” into Canada<sup>14</sup> and the various regulations concerning radio and television prohibiting “abusive comment...likely to expose hatred or contempt...”<sup>15</sup>

---

<sup>11</sup> Note also s. 718.2(a)(i) of the *Criminal Code* which makes “bias, prejudice or hate...” as a motivation for a crime “aggravating circumstances” concerning sentence. This is a “hate crime” rather than a “hate speech” provision, and the Supreme Court of Canada has not yet ruled on its constitutionality. For an American case which upheld a scheme of “sentence enhancement” for “hate crimes” see *Wisconsin v. Mitchell* 113 S. Ct 2194 (1993).

<sup>12</sup> *R. v. Zundel* [1992] 2 S.C.R. 731.

<sup>13</sup> S.C. 1997, c. 36.

<sup>14</sup> Section 136(1) Tariff Item 9899.00.00(b).

<sup>15</sup> *Radio Regulations* 1986, S.O.R./86-982, s. 3(b) and s. 3(i); *Television Broadcasting Regulations* 1987, S.O.R./87-49, s. 5(i)(b) and s. 5(1.1); *Pay Television Regulations* 1990, S.O.R./90-105, s. 3(2)(b) and s. 3(3); *Specialty Services Regulations* 1990, S.O.R. 90-106, s. 3; *Broadcasting Distribution Regulations*, S.O.R. 97/555, s. 8(1)(b) and s. 8(2).

Even beyond these federal provisions, several provinces have legislation which expressly, or as interpreted, prohibits “hate” speech or “discriminatory” speech and similar materials.<sup>16</sup> Many of these are contained in provincial human rights legislation. Some, like s. 7(1) of the British Columbia *Human Rights Code*<sup>17</sup> and s. 3(1) of the Alberta *Human Rights, Citizenship and Multiculturalism Act*<sup>18</sup> prohibit “...any statement, publication, notice, sign, symbol, emblem or representation that (a) indicates discrimination or an intention to discriminate...or (b) is likely to expose a person or a class of persons to hatred or contempt because of...” named grounds. Section 14(1) of the *Saskatchewan Human Rights Code*<sup>19</sup> prohibits “any representation, including any notice, sign, symbol, emblem, article, statement or other representation (a) tending...to deprive, abridge or otherwise restrict the enjoyment by any person or class of persons of any right...or (b) that exposes...to hatred, ridicules, belittles, or otherwise affronts the dignity of any person or class of persons because of...” named grounds. Other provincial legislation, though without an

<sup>16</sup> I have criticized such approaches in earlier publications: Edward H. Lipsett “Freedom of Expression and Human Rights Legislation: A Critical Analysis of s. 2 of the Manitoba Human Rights Act (1983) 12 Man. L.J. 285; Edward H. Lipsett “Comments on the Proposed Manitoba Code of Human Rights” (1985) 14 Man. L.J. 475 at pp. 483-491.

For a more current treatment of such legislation and cases, which takes a viewpoint opposite to mine, see Luke M. McNamara, *Negotiating the Contours of Unlawful Hate Speech: Regulation under Provincial Human Rights Law in Canada* (2005), 38 U.B.C. Law Review 1.

For a continuously updated summary and discussion of this area of the law see Tarnopolsky and Pentney *Discrimination and the Law in Canada Including Equality Rights Under the Charter*, revised edition, volume 3, Chapter 10 “Notices, Signs, Symbols, Advertisements and Messages.”

Additionally, many human rights legislative provisions and cases are available on-line through websites collected at <[www.cdp-hrc.uottawa.ca](http://www.cdp-hrc.uottawa.ca)>.

Also, most of these cases are reported in the Canadian Human Rights Reporter, C.H.R.R.

<sup>17</sup> R.S.B.C. 1996, c. 210. For a detailed analysis of the interpretation and constitutionality of s. 7(1)(b) see *Canadian Jewish Congress v. North Shore Free Press Ltd (No.7)*, 30 C.H.R.R. D/5 (B.C. Human Rights Tribunal, Nitya Iyer, Nov. 4, 1997); Also see: *Abrams v. North Shore Free Press (No. 3)* (1999), 33 C.H.R.R. D/435 (B.C. Human Rights Tribunal, Tom W. Patch, Feb. 2, 1999).

An important recent decision under this section is *Elmasry and Habib v. Roger's Publishing and MacQueen (No. 4)*, 2008 BCHRT 378 (British Columbia Human Rights Tribunal, October 18, 2008).

<[http://www.bchrt.bc.ca/decisions/2008/pdf/oct/378\\_Elmasry\\_and\\_Habib\\_v\\_Rogers\\_Publishing\\_and\\_MacQueen\\_\(No.4\)\\_2008\\_BCHRT\\_378.pdf](http://www.bchrt.bc.ca/decisions/2008/pdf/oct/378_Elmasry_and_Habib_v_Rogers_Publishing_and_MacQueen_(No.4)_2008_BCHRT_378.pdf)>

After reviewing earlier decisions under this section and decisions under related legislation in other jurisdictions, the Tribunal in this case modified its earlier interpretation of this provision.

<sup>18</sup> R.S.A. 2000, c. H-14.

<sup>19</sup> S.S. 1979, c. S-24.1.

ostensible “hate” provision, use the phrase “indicates discrimination or an intention to discriminate”. The term “indicates discrimination” has been interpreted as applying beyond communications intended to announce or facilitate discrimination at a particular location (which are covered by the term “an intention to discriminate”). The term “indicates discrimination” has been held to cover communications 1) because of the negative *ideas* about the group in question the material was judged to convey and 2) the risks and harms such material was believed to cause.<sup>20</sup>

These provincial human rights provisions are substantially wider in scope than s. 319(2) of the *Criminal Code*, and wider as to the methods and media of communication than s. 13 of the *Canadian Human Rights Act* and the regulations concerning radio and television. Furthermore, *intention* was held not to be necessary to create liability; being human rights legislation, emphasis was on the *effects* of the communication. Additionally, defences such as those found in s. 319(3) of the *Criminal Code* are not found in these provisions.<sup>21</sup>

Of course, some human rights provisions dealing with notices and signs have been more narrowly and precisely drafted to avoid wide interference with freedom of expression. These provisions attempt to only target communication which directly facilitates or attempts to bring about discriminatory actions otherwise prohibited by human rights legislation. For example, Manitoba,<sup>22</sup> besides prohibiting discriminatory advertising in s. 14(3) of the *Human Rights Code*,<sup>23</sup> prohibits in s. 18 of that *Code*:

[A]ny sign, symbol, notice or statement that (a) discriminates or indicates intention to discriminate in respect of an activity or undertaking to which the *Code* applies, or (b) incites, advocates or counsels discrimination in respect of an activity or undertaking to

---

<sup>20</sup> For summaries and analyses of cases dealing with these provisions see *Lipsett, McNamara, and Tarnopolsky and Pentney*, *supra* note 10.

<sup>21</sup> The effect of the absence of such defences might be somewhat ameliorated by interpretation and application of these provisions in a manner that is alive to freedom of expression concerns. For example, the Tribunal in *Elmasry* (*supra* note 11) specifically stated, “Although, on its face, s.7(1)(b) does not include any specific defences, factors such as whether the statement or publication is true or is part of a larger political debate are also contextual considerations that are relevant to determining whether, objectively, a publication is more likely to expose a person or group to hatred or contempt. These issues are most appropriately considered in assessing the relevant context and circumstances in which a publication is made.” (para. 85)

Some, but not all of these provisions contain a caveat purporting to protect freedom of expression. However, it is doubtful whether they add any additional protection other than that provided by constitutional law (either the *Charter* or division of powers). Indeed, *Tarnopolsky and Pentney*, *supra* note 10 at pp. 10-33, refer to them as “probably superfluous.”

<sup>22</sup> Which used to have an “indicating discrimination” and “hatred” provisions in its Human Rights Act, see discussion in *Lipsett, Freedom of Expression*, *supra* note 10.

<sup>23</sup> S.M. 1987-88, c. 45, C.C.S.M. c. H175.

which the *Code* applies; unless *bona fide* and reasonable cause exists for the discrimination.

Even s. 18(b), as worded, could raise “freedom of expression” problems unless it is interpreted very narrowly. It should apply only to the intentional incitement of imminent and *clearly* unlawful actions by private bodies.<sup>24</sup> Obviously, it must not be used to prohibit advocacy of amendment or even repeal of human rights legislation or the discussion of public policy, even when the discussion suggests policies that could prove to be discriminatory. Even in discussing acts concerning private bodies, not all “incitement”, “advocacy” or “counselling” can legitimately be prohibited, as in many cases it would not be clear whether the proposed course of action would even be discriminatory, and if so whether “*bona fide* and reasonable cause exists for the discrimination” until after a final and definitive legal ruling about the specific conduct at issue has been given.<sup>25</sup> Human rights legislation deals with some of the most controversial issues in society, and discussion concerning them must not be prohibited by too wide an interpretation of the concepts of advocacy, counselling, or even incitement.<sup>26</sup>

---

<sup>24</sup> See *Brandenburg v. Ohio* (1969), 89 S.Ct. 1827, at p. 1829, where the United States Supreme Court held that only “advocacy of the use of force or law violation...directed to the inciting or producing imminent lawless action and...likely to produce such action” can be constitutionally proscribed. In *R. v. Sharpe* [2001] 1 S.C.R. 45, the Supreme Court of Canada emphasized that the reference to “advocates” or “counsels” in the legislation concerning child pornography can only refer to attempting to *bring about* or “actively inducing or encouraging” the illegal actions in question; it does not refer to an attempt to bring about a change in the law or a description or discussion of such activity (pp. 83-84).

<sup>25</sup> This issue was raised in several presentations to the legislative committee considering the Code. For example, “Second Session, Thirty-Third Legislature of the Legislative Assembly of Manitoba—Standing Committee on Privileges and Elections”, Volume XXXV, No. 2—7:00 p.m., Thursday, 9 July 1987, Mr. Nick Ternette, on behalf of the Urban Resource Centre at p. 32, and Mr. Harry Peters, on behalf of the Manitoba Association for Rights and Liberties, at p. 35.

I regret I did not recognize this issue in my articles (supra note 10) when I endorsed prohibition of “incitement” (1983) at pp. 330-331 and (1985) at pp. 485-486.

<sup>26</sup> The danger of too-wide an interpretation of the concept of “incitement” and related terminology is illustrated by the case of *Pankiw v. Canada (Human Rights Commission)*, [2007] 4 F.C.R. (Federal Court of Canada, Lemieux, J.) [*Pankiw*], which upheld the “preliminary jurisdictional ruling of the Canadian Human Rights Tribunal in *Dreaver v. Pankiw* (2005) 55 C.H.R.R. 165. That case involved a complaint alleging that Dr. Pankiw (then a Member of Parliament) in October, 2003 “distributed a householder containing discriminatory comments about Aboriginal peoples contravening sections 5, 12, and 14 of the *Canadian Human Rights Act*.” *Pankiw* at para. 3, p. 2. A “householder” is an “informational brochure” that an MP is entitled to distribute to his constituents up to four times a year and is “printed and paid for under the auspices of the House of Commons” para. 2 at p. 2.

Other explicit statutory provisions found in human rights legislation, or concepts articulated in interpretation of such legislation, deal with “harassment” and “hostile environment” in the course of the activities it regulates. These provisions or concepts sometimes include expressive or communicative abuse. For example, the definition of prohibited “harassment” in s. 19 of the Manitoba *Human Rights Code*<sup>27</sup> includes s. 19(2)(a) “a course of abusive and unwelcome conduct or comment made on the basis of any characteristic referred to in subsection 9(2)... .” *Janzen v. Platy Enterprises Ltd.*<sup>28</sup> held harassment to be a prohibited form of discrimination even where it is not specifically mentioned in the legislation. To the extent that such prohibitions are narrowly drafted and construed to cover only repeated personal abuse of employees or users on the basis of the prohibited grounds during such activities, they are legitimate and their effect on freedom of expression is minimal.

However, there are dangers that such provisions and concepts can be abused or overzealously enforced with the intention or effect that communicative freedoms are impaired beyond the circumstances referred to

---

The preliminary jurisdictional ruling of the Tribunal and the Court’s decision upheld the Tribunal’s jurisdiction over the complaint. They rejected arguments that the Tribunal lacked jurisdiction on the basis ... *inter alia* of Parliamentary privilege. However, they did not rule on the merits of the complaint. At this point, therefore, we do not know whether *political* commentary concerning Aboriginals in a publication would even be covered by sections 5, 12, or 14.

Section 5 deals with discrimination “in the provision of goods, services, facilities or accommodation customarily available to the general public”; section 14 prohibits “harassment” in the areas regulated by the Act, and s. 12 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 sections 5 to 11, or in section 14.”

The fact that such a claim could even be brought under these sections illustrates the need for care in interpreting and drafting (or possibly amending) such legislation to avoid overbreadth in interference with expression.

Note that Lemieux J.’s decision was affirmed by *Dreaver v. Pankiw* [2007] F.C.J. No. 1633; 2007 FCA 386. Application for leave to appeal was dismissed by the Supreme Court of Canada 26 June 2008 < [http://scc.lexum.umontreal.ca/en/news\\_release/2008/08-06-26.3/08-06-26.3.html](http://scc.lexum.umontreal.ca/en/news_release/2008/08-06-26.3/08-06-26.3.html) >.

<sup>27</sup> *Supra* note 17.

<sup>28</sup> [1989] 1 S.C.R. 1252.

above<sup>29</sup>. For example, in *Findlay v. Mike's Smoke and Gifts (#4)*,<sup>30</sup> an attempt was made to apply the concept of “hostile environment for women” to have the display and sale of “adult magazines” in a convenience store held to be discrimination “with respect to services, goods and facilities.” The complaint was dismissed on procedural grounds without deciding the merits. I do not deny that there are circumstances where the use of communicative materials, such as pornography, can legitimately be deemed a form of harassment, such as when they are directly thrust on an unwilling recipient. However, the concepts of “harassment” and “hostile environment” must *not* be tools which enable individuals, groups, or official agencies to censor or veto literature, art, discussions, conversations, or other forms of expression because of their (perceived) offensiveness, “political incorrectness” or their ideas or viewpoints.

The concept of “hostile environment” was substantially expanded in the case of *Ross v. New Brunswick School Division #15*.<sup>31</sup> In that case, the Supreme Court of Canada upheld a Board of Inquiry’s finding that a school board created a “poisoned educational environment” for Jewish students by failing to remove a teacher from his teaching position for his *off-duty* anti-Semitic expression. It is to be noted that this decision was based on s. 5 of the New Brunswick *Human Rights Act*<sup>32</sup> which prohibited discrimination “with respect to any accommodation, services, or facilities available to the public” rather than any legislation dealing with “hate messages”, or which *explicitly* referred to “harassment” or “hostile environment”.

The Board of Inquiry ordered the school division to remove Ross from his *teaching* position, to offer him alternative employment under certain circumstances, and to terminate him from his alternative position should he

---

<sup>29</sup> It is of interest that the first Canadian decision holding that sexual harassment constituted sex discrimination cautioned against applying the concept to interfere with freedom of expression. In *Cherie Bell v. Ernest Ladas* (1980) 1 C.H.R.R. D/155, Ontario Board of Inquiry Chairman O.B. Shime stated at para. 1391 at p. D/156:

“Again, the *Code* ought not to be seen or perceived as prohibiting 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 reasonably be construed as forming 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.*”

<sup>30</sup> 21 C.H.R.R. D/19 (Ont. Board of Inquiry, Interim Decision, October 22, 1993).

<sup>31</sup> [1996] 1 S.C.R. 825.

<sup>32</sup> *New Brunswick Human Rights Act*, 1985, c.30, s.1.



continue his impugned expression. The Supreme Court upheld the order concerning his removal from teaching and the offer of alternative employment, holding that any limits on his rights under s. 2(a) or s. 2(b) of the *Charter* were justified under s. 1. However, it held that the Board's further order to remove Ross from his *non-teaching* position in the event of such continuation "does not minimally impair" these freedoms and is not justified under s.1.

Although I certainly appreciate the concerns leading to this decision, I respectfully find it somewhat disturbing for at least two reasons. First, this decision used human rights legislation to impose *an obligation or duty* on an employer to assume or exercise jurisdiction over an employee's *off-duty* expression. This could set a very dangerous and far-reaching precedent, given that groups protected, and grounds covered, by human rights legislation are central to some of the most contentious issues and profound debates in society. Second, this decision imposes (or at least recognizes) a duty on a teacher to be a "medium" for the transmission of the school system's "values, beliefs and knowledge" off-duty as well as in class.<sup>33</sup> This obligation can severely limit a teacher's expressive freedom under circumstances, and for reasons, well beyond those of concern to this case.<sup>34</sup>

---

<sup>33</sup> *Ibid* at p. 857.

<sup>34</sup> The court itself seems to realize this danger when it states at p. 858: "I do not wish to be understood as advocating an approach that subjects the entire lives of teachers to inordinate scrutiny on the basis of more onerous moral standards of behaviour. This would lead to a substantial invasion of privacy rights and fundamental freedoms of teachers." With the greatest of respect to the Court, this "substantial invasion" may be impossible to avoid as long as the duty of transmission of values is incumbent upon teachers. Perhaps the time has come to alter educational law and policy so as to relieve teachers of the duty to transmit the school's "values, beliefs and knowledge" while off-duty and to limit school boards' jurisdiction over the private lives of teachers. Indeed, any actual or perceived mandate given the school system to "transmit values" may well be archaic and in need of abrogation. It is clear that society is profoundly divided as to which values it should embrace, how to interpret and apply these values, and how to reconcile competing values. Given the recognized need for "impartiality" and neutrality of the school system, it might be appropriate to "*take care that information included in the curriculum is conveyed in an objective, critical and pluralistic manner*" rather than maintain attempts at "indoctrination" or values transmission.

The last quotation is taken from the European Court of Human Rights. The passage is from a judgment given in an entirely different context from the case dealt with here. The case was Eur. Court H.R. *Case of Kjeldsen, Busk Madsen and Pedersen*, judgment of 17 December 1976, Series A, No.23. That case decided that the Danish system of sex education in the public elementary schools did not violate Article 2 of Protocol No.1 of the *European Convention on Human Rights* (or more properly the *Convention for the Protection of Human Rights and Fundamental Freedoms*). That Article reads: "No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions."

Whether or not Ross could legitimately have been removed from his teaching position for “just cause” under education legislation,<sup>35</sup> or the extent to which a teacher (or any employee) can legitimately be disciplined for off-duty conduct is beyond the scope of this article. But it must be noted that this precedent has been followed in decisions upholding a thirty day suspension imposed on a teacher and guidance counsellor (Kempling) by the British Columbia College of Teachers<sup>36</sup> and a letter of reprimand imposed on him by his school district<sup>37</sup> for his off-duty public comments critical of homosexuality which were held to be “discriminatory” against homosexuals.

Unlike in *Ross*, there was no individual student or parent complaining of a “hostile environment” in the *Kempling* case. One can appreciate arguments on his behalf that it is inappropriate to penalize him for expressing his *bona fide* views on a deeply contentious moral and social issue. However, Kempling’s comments emphasized his professional status as a teacher and guidance counsellor. Indeed, he went so far as to declare in a newspaper statement “Sexual orientation can be changed, and the success rate for those who seek help is high. My hope is that students who are confused over their sexual orientation will come to see me. It could save their life.”<sup>38</sup> Only on that narrow basis can I agree with the propriety of the disciplinary actions against Kempling and the correctness of the *result* of the judgments upholding them.

However, dangers to freedom of expression are inherent in this line of cases. Penalizing teachers’ expression because it could lead to adverse emotional effects on students, or to the lack of public “confidence” in the school system, subjects

The entire passage reads:

“The second sentence of Article 2 implies on the other hand that the State, in fulfilling the functions assumed by it in regard to education and teaching, must take care that information or knowledge included in the curriculum is conveyed in an objective, critical, and pluralistic manner. The state is forbidden to pursue an aim of indoctrination that might be considered as not respecting parents’ religious and philosophical convictions. That is the limit that must not be exceeded.” (at p. 26)

<sup>35</sup> I am certainly not questioning the right or duty of school boards to take appropriate actions against a teacher who uses the *classroom* as a forum to spread hatred or otherwise abuses the position while *on duty*. See for example *Keegstra v. Board of Education of Lacombe No.14* (1983), 25 Alta L.R. (2d) 370 (Board of Reference, McFadyen J.) which upheld Keegstra’s dismissal under the *School Act* on ordinary educational and employment grounds without reference to the *Criminal Code* or human rights legislation.

<sup>36</sup> *Kempling v. The British Columbia College of Teachers*, 2004 B.C.S.C. 133; [2004] 7 W.W.R. 749; aff’d 2005 B.C.C.A. 327; 255 D.L.R. (4<sup>th</sup>) 169, [2005] 10 W.W.R. 275; leave to appeal dismissed *Kempling v. British Columbia College of Teachers*, [2005] S.C.C.A. No. 381.

<sup>37</sup> *Kempling v. Quesnel School District No. 28 and Curr*, [2005] B.C.H.R.T.D. No. 514 (B.C. Human Rights Tribunal, November 14, 2005) from <www.bchrt.bc.ca>.

<sup>38</sup> *Kempling v. British Columbia College of Teachers*, 2005 B.C.C.A. 327, para. 44 at p. 11.

the teachers' rights to a degree of subjectivity or deference to public opinion or pressure. The greatest danger to freedom of expression, however, is in expanding the *concept* of discrimination to include negative *viewpoints* rather than restricting that concept to negative *actions or decisions*. This is true whether it is done in educational (or other) disciplinary decisions, in human rights cases expanding the definitions of "discrimination" or "harassment" in interpreting legislation, or in legislation which *expressly targets* expression on the basis of ideas.

A particular irony involved in this case is that until fairly recently, a teacher or counsellor would almost certainly have faced severe sanctions for public speech *in favour* of homosexuality, or because he was gay. We now have come to realize that such a situation would be wrong, and our legal system now quite properly protects against such injustice. However, is it any more just for a person to be penalized for taking an *opposite* position, even absent direct discrimination against or harassment of a student by such person? It must be recalled that much of the communication that is now criticized (and sometimes penalized) as "extremist", "bigoted", "discriminatory", or "politically incorrect" was (throughout most of history and in most societies) considered "mainstream". Indeed, the proponents of concepts such as "equality" or "human rights" that are now officially endorsed were often themselves dissidents and were sometimes considered "extremists" and subject to severe penalties or even persecution. Often such progressives relied on constitutional or other protections of freedom of expression and related concepts for much of the protection they had or progress they made.

This is certainly not to suggest that we reverse our human rights progress or revert to the behaviour or norms of less enlightened times. However, neither should we attempt to "freeze" our current norms, principles, and values in time. We must not assume that our current generation, culture, society, or authorities (or indeed any generation, culture, society, or authorities) can be absolutely certain of the correctness of accepted ideas,<sup>39</sup>—or even of the "direction" a society would like to move. Therefore it seems unsafe and inappropriate to penalize those who would challenge these ideas or would move us in a different direction (even if some would call that direction "backward"). Humanity develops and evolves gradually, over the course of the generations and centuries. Freedom of expression helps to ensure that the ideas and institutions that

---

<sup>39</sup> At any rate, as can be seen, there is not (and probably cannot be) unanimity as to what ideas should be 'accepted'—either in our Canadian society or in the world at large. History has amply demonstrated the danger, folly, and tragedy involved in any attempt to coerce or artificially create such unanimity.

develop and evolve are subject to constant scrutiny, analysis, debate, and evaluation - and indeed facilitates human development itself.

The fact that some human rights principles and values have attained constitutionally and internationally protected status ought not to insulate or immunize them from challenge or criticism. Even if their importance and vulnerability entitles them to some additional measure of protection, attempting to insulate them from challenge or criticism contravenes “the essence” of a “free and democratic society.” It must be remembered that *all* principles, values, philosophies, concepts, and ideas are subject to question, criticism, and challenge. This is necessary not only as an attribute of a “free and democratic society” but in order to ensure human development and progress.

Neither the *Charter* nor any part of our Constitution contains anything like Article 17 of the *European Convention on Human Rights* or Article 5(1) of the *International Covenant on Civil and Political Rights*. Article 17 of the *European Convention* reads,

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.<sup>40</sup>

Article 5(1) of the *International Covenant* reads:

Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present *Covenant*.

To the extent that such provisions prevent the relevant Convention or Covenant from protecting violent interference with the protected rights, or the incitement to such violence, they are to be welcomed. However, to the extent to which they deny protection to *peaceful* attempts to challenge or repeal these rights (including speech or political movements deemed to be extremist) they seem, with respect, somewhat problematic.

It is true that the *Charter* and other parts of the Constitution limit the extent to which ordinary legislation can interfere with certain rights and

---

<sup>40</sup> There is European jurisprudence which ruled that Article 17 prevents Article 10 (“freedom of expression”) from protecting hate communication. See for example *Ivanov v. Russia*, Application no. 35222/04 (European Court of Human Rights, First Section, Admissibility Decision, February 20, 2007) from <<http://cmiskp.echr.coe.int/tkp197/portal.asp?sessioId=117298312skin=ludoc=en2action=request>>.

freedoms.<sup>41</sup> These constitutional provisions are “entrenched” to the extent that federal *and* provincial legislative action is needed to amend them. Furthermore, as has been seen, our courts have used s.1 of the *Charter* to limit certain of our “fundamental freedoms” to protect “equality rights.” Yet nothing in the Constitution is immune from amendment or repeal. It could be argued that our entire constitutional system presumes that any change to, or within it, is at least theoretically possible and within the realm of legitimate contemplation and debate. Indeed, according to the Supreme Court (as articulated in the *Secession Reference*)<sup>42</sup> and to Parliament (as acknowledged in the *Clarity Act*)<sup>43</sup> the continued existence of Canada in its current composition (or its “territorial integrity” to use international legal terminology) is subject to legitimate challenge and debate (provided that proper procedures are followed).

Important as the egalitarian values are in our social, moral, legal, and constitutional “scheme of things” (and to international law and politics), they must not be allowed to “trump” the legitimate rights of their peaceful challengers or evade the ongoing dynamics of human and social development.

In Quebec, in cases such as *Quebec (Commission des droits de la personne et droits de la jeunesse) c. Fillion*,<sup>44</sup> racist, verbal abuse was held to violate s. 4 and s. 10 of the *Quebec Charter of Human Rights and Freedoms*<sup>45</sup>—even in disputes between neighbours or other circumstances where the defendant was not an employer or person responsible for the provision of “regulated” services or facilities. Regrettable though such incidents may be, it is doubtful whether isolated or sporadic incidents of such personal abuse warrant legal intervention.<sup>46</sup>

---

<sup>41</sup> However, s. 33 of the *Charter*—the ‘notwithstanding clause’—allows Parliament and provincial legislatures to avoid some of the restrictions on their power.

<sup>42</sup> *Reference re Secession of Quebec* [1998] 2 S.C.R. 217.

<sup>43</sup> S.C. 2000, c. 26.

<sup>44</sup> 2004 CanLII 468 (Q.C.T.D.P.) 2004-02-04 (from [www.canlii.org](http://www.canlii.org)).

<sup>45</sup> R.S.Q. c. C-12. Section 4 reads “Every person has a right to the safeguard of his dignity, honour and reputation.” Section 10 reads:

“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 race, colour, sex, pregnancy, sexual orientation, civil status, age, except as provide by law, religion, political conviction, language, ethnic or national origin, social condition, a handicap or the use of any means to palliate a handicap.

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

<sup>46</sup> Notwithstanding the eloquent call for rendering such conduct tortious in articles such as Richard Delgado’s *Words that Wound: A Tort Action for Racial Insults, Epithets and Name-Calling* 17 Harv. C.R.-C.L.L. Rev. 133 (1982). Although not believing that isolated or sporadic conduct of that nature should be recognized as a legally cognizable wrong, as mentioned earlier,

The more the law or the state attempt to control or sanction unpleasant manifestations of human personality, the more authoritarian our society risks becoming.

There are several other statutory provisions aimed at hate-related expression. In British Columbia, the *Civil Rights Protection Act*<sup>47</sup> prohibits at s. 1

[A]ny conduct or communication by a person that has as its purpose interference with the civil rights of a person or class of persons by promoting (a) hatred or contempt of a person or class of persons, or (b) the superiority or inferiority of a person or class of persons in comparison with others on the basis of race, colour, religion, ethnic origin or place of origin.

At s. 2, such “prohibited act” is rendered a tort. In s. 5 it is rendered an offence that, if committed by an individual, is punishable under s. 5(1) “by a fine of not more than \$2 000 or to imprisonment for not more than six months or to both.”

It is yet to be decided whether the expression of the impugned idea *alone* is covered by the prohibition or if it must be *in conjunction* with actual or attempted action, or incitement to unlawful action. To the extent that the expression has to be directly connected with some (otherwise) unlawful action that “interferes with the civil rights”—or has to have as its “purpose” the bringing about of such action—this provision may be less restrictive of freedom of expression and easier to justify than some of the other provisions referred to (such as s. 7(1) of the British Columbia *Human Rights Code*). Furthermore, the *Civil Rights Protection Act* has been ruled<sup>48</sup> to have an intention requirement.<sup>49</sup> Indeed the Court emphasized that “the law must be restrained...” in order to protect “the exploration of ideas” and “academic freedom.”<sup>50</sup> However, to the extent that the expression of the ideas alone is covered (or that their mere expression could be considered the necessary “interference” or could be deemed

---

I accept the need to include repeated verbal abuse as an aspect of *harassment* prohibited in activities regulated by human rights legislation. Furthermore, as I will discuss when dealing with s. 11 of my proposed legislation, *infra*, I can acknowledge that *persistent and unwelcome* communication of ‘hate speech’ to a particular individual, even outside of situations regulated by human rights legislation might be rendered unlawful as expressing hatred “under circumstances which involve the invasion of privacy of any individual.”

<sup>47</sup> R.S.B.C. 1996, c. 49.

<sup>48</sup> *Maughan v. University of British Columbia*, 2008 BCSC 14 (CanLii) 2008-01-04 (Supreme Court of British Columbia, Cullen J.) January 4, 2008 from www.canlii.org.

<sup>49</sup> *Ibid* at paras. 332–347 at pp.121-127.

<sup>50</sup> *Ibid* at paras. 493–494 at p.173.

to contain the necessary “purpose”), this formulation could be more intrusive of freedom of expression than some provisions earlier referred to.

Although the reference in s. 1(b) to “the superiority or inferiority of a person or class of persons in comparison with others” is consistent with Article 4(a) of the *International Convention on the Elimination of all Forms of Racial Discrimination*,<sup>51</sup> this targets a particular *ideological perspective*, and therefore violates one of the most important aspects of freedom of expression, “the neutrality principle”. The “neutrality principle” asserts that no idea is beyond freedom of expression protection, and includes the concept of “viewpoint neutrality.” “Viewpoint neutrality” means that, even in circumstances where it is legitimate to regulate expression, regulation must not be done on the basis of the viewpoint expressed.<sup>52</sup>

I certainly acknowledge the revulsion and fear that concepts of racial superiority or inferiority engender, and how such ideas have led, or contributed, to tragic abuses. Yet prohibiting the expression of such ideas creates serious problems of its own. Discomforting though it may be, race is central to many controversies within the scientific and academic disciplines, as well as within society at large. If scientists, academics, authors, publishers, or institutions were

---

<sup>51</sup> Article 4(a) of that Convention requires “State Parties” to “declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of person of another colour or ethnic origin ...”.

<sup>52</sup> These concepts have been developed under American First Amendment jurisprudence and are summarized by Rodney A. Smolla, *Smolla and Nimmer on Freedoms of Speech: A Treatise on the First Amendment*, (Matthew Bender & Co., Inc., 1994) at pp. 3-84 to 3-86 (headings and footnotes omitted) as follows:

“The ‘neutrality principle’ embraces a cluster of precepts that require government to avoid favouritism in the marketplace of ideas.

Mere opposition to an idea is never enough, standing alone, to justify the abridgment of speech. ‘If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.’

Government may not ‘pick and choose’ among ideas but must always be ‘viewpoint neutral’. Modern First Amendment cases establish a *per se* rule making the punishment of speech flatly unconstitutional if the penalty is based on the offensiveness or the undesirability of the viewpoint expressed. All ideas are created equal in the eyes of the First Amendment—even those ideas that are universally condemned and run counter to constitutional principles. ‘Under the First Amendment’, the Supreme Court has stated ‘there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the consciences of judges and juries but on the competition of other ideas. While the First Amendment as a whole is not absolute, the prohibition against view point discrimination is a pocket of absolutism in which the Supreme Court has tolerated no abridgements.’

put at risk of prosecution or legal action (or threats thereof), scientific or academic work could be imperilled or chilled. Could a work such as Richard Herstein's and Charles Murray's *"The Bell Curve: Intelligence and Class Structure in American Life"* conceivably come within such provisions since it argues that genetics is a causative factor in statistical differences in intelligence test-scores between various races? Although he was never prosecuted or subjected to formal proceedings, University of Western Ontario Professor J. Phillippe Rushton (who has done research and published works concerning racial differences) has been investigated and subjected to complaints under the *Criminal Code* "hate" provision and Ontario human rights legislation.<sup>53</sup> As well, pressure (which has not proved successful) has been applied to have him removed from his university position.

I wish to emphasize that (having no expertise in the biological or social sciences whatsoever) I have no opinion as to the scientific merit or lack thereof of the works of such authors. Furthermore, I can appreciate some of the discomfort this line of work arouses. However, we must note that such works are subject to rigorous (and often severe) scrutiny, challenge, and criticism within the scientific community as well as by the general public. Such ongoing debate that occurs when norms of freedom of expression in general and academic freedom in particular are respected at least reduce the risk that such authors will have undue influence or that their theories will gain uncritical acceptance. Additionally, it must be remembered that academic and scientific works are subject to professional standards and discipline. These standards include honesty, good faith, competence, and observing proper methodology. However, the enforcement of such standards are best left to the disciplinary mechanism of the relevant academic or scientific institutions applying appropriate professional criteria (and following fair procedures), rather than to the "justice system" applying far-reaching and sometimes draconian laws. Furthermore, such discipline should *not* be based on the controversial nature of the views expressed, external or internal pressure, or what "side" of an issue the academic or scientist "comes down on." Academic and professional integrity rather than ideological partisanship or "political correctness" should be the guiding factors.

In society, factors such as race, ethnicity and religion (and other grounds included in human rights legislation) are at the centre of some of the most profound political, social, and moral issues and debates. Additionally, they at least appear to be connected to many life situations one personally encounters. Legislation prohibiting expression promoting "the superiority or inferiority ..." as

---

<sup>53</sup> Stefan Braun, *Democracy Off Balance: Freedom of Expression and Hate Propaganda Laws in Canada* (University of Toronto Press, 2004) p. 125.



worded in s. 1(b), as well as the more familiar formulation “hatred or contempt” found in s. 1(a), or similar terminology in other legislation and cases referred to could be used in an attempt to stifle or silence many viewpoints or arguments concerning such debates, issues, or situations.

In many cases, expression or commentary that could lead to liability (or at least to proceedings or threats thereof) under such provisions reflect the communicator’s *perspective on reality*. He observes or hears about members of a group behaving in a manner perceived as inappropriate and imputes that behaviour to the entire group. Similarly, a commentator can learn about high profile terrorist acts committed by members of (and purportedly in the name of) a group and blame the entire group, while ignoring the fact that the overwhelming majority of that group’s members were not involved or even sympathetic with such acts. Statistics sometimes show disproportionately high rates of imprisonment or crime, or disproportionately low rates of occupational or academic success among various groups. Some commentators use such statistics to draw negative inferences on the entire group, while failing to appreciate historic or current factors largely beyond the control of members of the group which contribute to such situations. On the other hand, some commentators find fault with a high rate of achievement and success among members of a group or its perceived political, social, or economic influence, sometimes attributing this to a “conspiracy” or alleging the group to be “too powerful”.

Of course, such “perspectives on reality” are regrettably narrow in scope, overly simplistic, and divisive. They are often reflective of long standing individual and social prejudice, and indeed are sometimes bordering on the “paranoid.” Yet they are usually sincerely believed in by their proponents, and often constitute their inferences from, interpretations of, or “spin,” on facts that (at least in some cases) actually do exist. Furthermore, freedom of expression is not merely a “privilege” reserved for an elite of the most “enlightened” or broadminded individuals in society. It is a “fundamental freedom” available for everyone.

Penalizing a segment of society for expressing views that have fallen into official (and much social) disfavour not only is unfair; it is itself divisive and probably counterproductive. In many cases, such proceedings exacerbate, rather than alleviate, inter-group tension and resentment. Such proceedings may even reinforce, rather than refute, negative stereotypes and ideas in the minds of many members of the public. If someone viewed a group as so weak or helpless as to need the state or justice system to bolster its reputation on one hand, or so vindictive and powerful as to be able to get the state or justice system to wreak vengeance on and silence its opponents, on the other hand, such proceeding may well *corroborate* those opinions in his or her mind.

Much of the expression that could be caught or threatened by such legislation could be in reaction or opposition to, or “grassroots backlash” against statements, policies, positions, and demands expressed by members of (or organizations perceived as representative of) various protected groups, or policies or actions adopted by governments in the perceived interest of or deference to such groups. Whether wise or unwise, justified or unjustified, such demands, policies, and actions are themselves often highly controversial, divisive and indeed polarizing. Although some of the opposition may be well-reasoned or measured in tone, other reaction or “backlash” may be distasteful, misguided, or even “extremist.” Yet “backlash,” though often unpleasant, is an unavoidable aspect of a “free and democratic society” and as long as it is expressed peacefully, its expression must not be prohibited. We have to remember that if a subject or issue is important enough to be on the “public agenda,” all perspectives on that subject must be allowed to be articulated for “open debate” to be free and meaningful.

Another provincial legislative provision intended to restrain “hate” material is s. 19 of the Manitoba *Defamation Act*.<sup>54</sup> Section 19(1) reads:

The publication of a libel against a race, religious creed or sexual orientation likely to expose persons belonging to the race, professing the religious creed or having the sexual orientation to hatred, contempt or ridicule, and tending to raise unrest or disorder among the people, entitles a person belonging to the race, professing the religious creed, or having the sexual orientation 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.

When it was originally passed in 1934, it only referred to “race” and “religious creed.” However, it was expanded by the *Charter Compliance Act*.<sup>55</sup> That Act, however, was an “omnibus” bill amending 56 statutes, which were seen as discriminating against homosexuals, or as failing to provide them with sufficient protection. Many of them dealt with family law and related issues, and these were the matters that received almost all of the public scrutiny.<sup>56</sup> I was the only person who opposed that amendment to the *Defamation Act* at committee stage.<sup>57</sup>

My reasons for opposition included the arguments that it could be seen as an attempt to silence a particular viewpoint on a contentious social issue, given its inclusion among family related matters pertaining to sexual orientation.

---

<sup>54</sup> R.S.M. 1987, c. D20, C.C.S.M., c. D20.

<sup>55</sup> S.M. 2002, c. 24, s. 17.

<sup>56</sup> See Christine McLeod, “*The Charter Compliance Act*” (2004) 3 *Underneath the Golden Boy* at 39.

<sup>57</sup> Legislative Assembly of Manitoba, Standing Committee on Law Amendments. Wednesday, July 24, 2002. < [http://www.gov.mb.ca/legislature/hansard/3rd-37th/la\\_09/la\\_09.html](http://www.gov.mb.ca/legislature/hansard/3rd-37th/la_09/la_09.html) >.

Furthermore, I questioned the appropriateness of legislation expanding restrictions on expression in a bill where such expansion would be “insulated” from public scrutiny by the high-profile issues dealt with in some of the other provisions.

This provision has apparently only led to two cases. The first, *Tobias v. Whittaker*<sup>58</sup> was not defended on its merits, as the statement of claim was dismissed on a procedural point. The second, *Courchene v. Marlborough Hotel*<sup>59</sup> dealt with a memorandum from a clerk advising against renting rooms to Indians, that was repudiated before it could be acted upon. Tritchler, C.J. Q.B. in *obiter dictum* suggested that this provision was *ultra vires* the provincial legislature as it dealt with criminal law.<sup>60</sup>

In some respects, this provision might be less intrusive on freedom of expression than most “hate” provisions in Canadian federal and provincial legislation. The remedy is limited to injunction; damages cannot be awarded, and there is no fine or imprisonment (unless the injunction is disobeyed, which would constitute contempt of court). Furthermore, the phrase “tending to raise unrest or disorder among the people” could be construed as limiting the provision to circumstances where the libel created imminent danger of violence, so that the section does not prohibit the impugned ideas alone. This point has not been decided, however, and such a benign interpretation is by no means certain. This somewhat archaic terminology is reminiscent of a time when sedition laws were deemed necessary to prevent “the people” from being led into unlawful or rebellious conduct.<sup>61</sup>

Although “hate” legislation is often seen and justified as prohibiting “group defamation,” it is questionable whether defamation is really the appropriate paradigm or concept to deal with group hatred. Defamation litigation is more suitable for (and usually deals with) specific factual allegations of which the truth or falsity is (to a greater or lesser degree) readily demonstrable by the evidence,

---

<sup>58</sup> Manitoba Court of King’s Bench, Feb. 13, 1935, unreported cite in McNamara, *supra* note 10 at p. 2, note 7 at p. 36.

<sup>59</sup> 20 D.L.R. (3d) 109 (Man., Tritchler C.J.Q.B., 1971); affirmed 22 D.L.R. (3<sup>rd</sup>) 157 (Man. C.A., 1971)

<sup>60</sup> *Ibid* at p. 115. The Court of Appeal did not decide this issue.

<sup>61</sup> Interestingly, in *Boucher v. The King* [1951] S.C.R. 265, the Supreme Court of Canada held, *inter alia*, that the intention “to promote feelings of ill-will and hostility between different classes of such [His Majesty’s] subjects” without the intention of causing unlawful action did not constitute “seditious intention” which was necessary for conviction of “publishing a seditious libel” under the *Criminal Code*.

or “matters patent to the senses.”<sup>62</sup> Sometimes “hate” material does fall into that category. However, much or most material amenable to charges of being “hate-related” can involve “complex social and historical facts”<sup>63</sup> as well as broad scientific, political, moral, or religious issues.

To the extent evidence can be helpful in resolving such issues; the evidence is often expert evidence. Expert evidence is often highly controversial, and the best expert evidence might not even be available to the parties in a particular case, at least on an equal basis. Furthermore, the developments in the disciplines which form the basis of the expert evidence (and indeed form the basis of many of our social and scientific beliefs and policies) occur over the long-term, indeed over decades, and sometimes generations and centuries. Evidence needed to present a case (or even in development of a discipline) may not even be available, known, or in existence under timely circumstances. Documents needed for historical research or forensic evidence, for example, may be “classified” for a long period, under the control of uncooperative governments, or perhaps destroyed.<sup>64</sup> It is especially unfair to subject someone to legal

<sup>62</sup> To borrow a phrase from McLachlin, J., (as she then was) speaking for the majority in *R. v. Zundel*, [1992] 2 S.C.R. 731 at p. 748.

<sup>63</sup> *McLachlin, Ibid* at 757. She was actually discussing the “false news” provision of the *Criminal Code* rather than legislation specifically targeting “hate speech” or “group defamation.” However the problems are equally applicable to such types of legislation.

<sup>64</sup> It is relatively easy to prove the tragic historical reality of the Holocaust and the falsity of its denial largely because the Third Reich was thoroughly defeated, Germany was occupied, and all the relevant documentary evidence created by the Nazis themselves was retrieved. Such factors are among those cited to support the prohibition of Holocaust denial, either as an independent crime, or as a form of hate propaganda against the Jewish people. For arguments supporting such prohibition and discussing the issue, see David Matas, *Bloody Words: Hate and Free Speech*, (Bain and Cox Publishers, Winnipeg, 2000), Chapter 5, Holocaust Denial, pp. 58-66.

However, I respectfully suggest that such prohibition would be unwise for several reasons. It could lead sceptics, despite all the evidence, to question the credibility of genuine Holocaust research and writing on the assumption that their conclusions were coerced or preordained, opposite viewpoints not being allowed. It might in the future deter even *bona fide* researchers from dealing with Holocaust related topics if they believed that they could not freely “follow the evidence wherever it might lead” or that potential conclusions might get them into trouble with the law. It could lead to “backlash” and inter-group tensions, both generally and among groups that have also suffered grievous persecution, but the existence or extent of which might not be as clearly provable as the Holocaust. Perhaps, most importantly, it can be seen as a precedent and lead to demands for prohibition of denial of other controverted or disputed historical facts, expanding the interference with expressive and intellectual freedom.

We can look to French experience as an illustration of the last point. In 1990, the French legislature enacted “...the so-called ‘Gayssot Act’, which amends the law on the Freedom of the Press of 1881 by adding an article...[which]...makes it an offence to contest the existence of the category of crimes against humanity as defined in the London Charter of 8 August 1945, on the basis of which Nazi leaders were tried and convicted by the International Military

sanctions over alleged falsehood if the “truth” or “falsity” of the material may not be determined in a suitable time frame for litigation, in the course of the parties’ lifetime or perhaps ever.

Furthermore (as mentioned earlier), *some* of the material perceived as exposing the targeted group to hatred is based on (raw) facts or statistics that actually do exist. The injustice of “hate” materials based on these facts lies not in the exposition of the facts *per se*, but in the attribution of negative acts or attributes of several members of the group to the whole group, failing to appreciate the historical or social factors leading to these facts, or the unfounded interpretation of, inference from, or “spin,” on these facts. If an action under s. 19(1) was brought on the basis of materials containing these facts, and the exposition of the facts was the gist of the claim, the defendant might prevail on the defence of “truth.” If the interpretation, inference or “spin” were the gist of the claim, and if the defendant could prove the bare facts true, he might prevail on the defence of “fair comment” if the opinions (however far-fetched) could be honestly held. Either way, the victory would corroborate the impugned views among those capable of believing them. Even should the defendant lose, the trial itself would further publicize his views, and the proceedings themselves might reinforce the views in those capable of believing them. Under either scenario, the bringing of a suit under this section could prove to be a “no-win situation” for the offended group and for the pursuit of equality.

Not only has human rights legislation been applied to restrict freedom of expression in the name of equality, it has been applied to *require* expression and even to penalize its refusal in certain circumstances. In *Hudler v. London (City)*,<sup>65</sup> the mayor and City of London were held to have “discriminated ... with respect to services on the basis of sexual orientation ...” in refusing to proclaim Pride Week at the request of an organization dedicated to supporting homosexuals. The remedy included an order that the City make the requested proclamation and a statement in recognition of “the lesbian and gay and bisexual communities” as well as \$10 000 damages against the mayor and city, jointly and severally.

The Board questioned the applicability of s. 2(b) of the *Charter* to this interpretation of “services” in the *Human Rights Code* but held at any rate it

---

Tribunal at Nuremberg in 1945-1946.” *Faurisson v. France*, 18 H.R.L.J. 40 (U.N. Human Rights Committee, 8 November 1996) at para. 2.3 p. 40.

That led to the demand, and introduction, into the French legislature a bill that would prohibit the denial of the Turkish genocide against the Armenians during World War I. This has led to diplomatic protests from Turkey, which has always denied that the deaths of the Armenians amounted to genocide (<http://www.cbc.ca/world/story/2006/10/12/french-bill.html>).

<sup>65</sup> 31 C.H.R.R. D/500 (Ontario Board of Inquiry, Mary Anne McKellar, October 7, 1997).

would be protected by s. 1. It relied largely on the governmental nature of the mayor's and city's activities.<sup>66</sup> Though recognizing the *prima facie* infringement of s. 2(b) in the remedy of ordering the proclamation, the Board held it justified by s. 1.<sup>67</sup>

Other cases dealing with proclamations include *Rainbow Committee of Terrace v. City of Terrace*,<sup>68</sup> *Hughson v. Kelowna (City)*,<sup>69</sup> *Hill v. Woodside*,<sup>70</sup> and *Oliver v. Hamilton (City) No. 2*.<sup>71</sup> In all these cases the failure to issue the requested proclamation was held to be discriminatory, although there were differences as to the precise issues dealt with, the reasoning in the judgments, or the remedies awarded.

Although I acknowledge the argument that a mayor acts in an official (rather than personal) capacity when issuing proclamations, what the mayor says or does can be perceived as reflecting personal beliefs, and can affect or be influenced by conscience. Whether or not a city as a corporate entity is even entitled to *Charter* rights, being a governmental body, its statements can be seen as reflecting the views of its councillors, officials, or citizens in general and it does possess legal personality. Even though the proclamation was ruled a "service", the complainants were not denied a public forum in which they could present their message on their own, or in any way impeded in their ability to express their own views. The respondents were in reality only refusing to *endorse or approve* the complainants' viewpoint or to express them as their own (or at least to appear to do so). I can appreciate that the complainants may well have benefited from the proclamation in question, and could legitimately feel offended by or fear that harm might result from the refusal.

However, the decisions sometimes recognized the sincerity of the beliefs of the mayor or councillors in question, either as to the moral disagreements with the message of the proclamation itself, or that the proclamation would be counter-productive given the backlash it would produce. With the greatest respect, I do not believe that, on balance, the cause of equality, or the public interest, is well served by forcing public officials or public bodies to perform what (in effect) is an act of hypocrisy.

---

<sup>66</sup> *Ibid.* at paras. 64–74 at pp. D/509 and D/510.

<sup>67</sup> *Ibid.* at paras. 83–86 at pp. D/511 and D/512.

<sup>68</sup> (2002) 43 C.H.R.R. D/413 (BC Human Rights Tribunal, Ana R. Mohammed, July 25, 2002).

<sup>69</sup> (2002) 37 C.H.R.R. D/122 (BC Human Rights Tribunal, Carol Roberts, March 21, 2000).

<sup>70</sup> 33 C.H.R.R. D/349 (NB Board of Inquiry, Brian D. Bruce, Sept. 17, October 8, 1998).

<sup>71</sup> 24 C.H.R.R. D/298 (Ont. Board of Inquiry, Elizabeth Beckett, March 6, 1995).

Interestingly (perhaps ironically), a pre-*Charter* case seemed more sensitive to expressive freedoms than some of the post-*Charter* cases referred to. In *Gay Alliance Toward Equality v. Vancouver Sun*,<sup>72</sup> a majority of the Supreme Court of Canada held the refusal of a newspaper to publish an advertisement by a gay organization because of its content not to be an unlawful denial or discrimination in the provision of a service. The advertisement solicited subscriptions to the organization's newspaper the *Gay Tide*.

Although sexual orientation wasn't named as a prohibited ground of discrimination under the British Columbia *Human Rights Code* then in force, denial or discrimination in "any accommodation, service or facility customarily available to the public" was prohibited "unless reasonable cause exists for such denial or discrimination." A Board of Inquiry held that such provision applied to newspaper advertising and that the newspaper "did not have reasonable cause" for the refusal.

Relying largely on "editorial control and judgment" over a newspaper's content as "one of the essential ingredients of freedom of the press,"<sup>73</sup> Martland, J. for the majority held,<sup>74</sup>

In my opinion the service which is customarily available to the public in the case of a newspaper which accepts advertising is a service subject to the right of the newspaper to control the content of such advertising. In the present case, the Sun had adopted a position on the controversial subject of homosexuality. It did not wish to accept an advertisement seeking subscriptions to a publication which propagates the views of the Alliance. Such refusal was not based on any personal characteristic of the person seeking to place the advertisement, but upon the content of the advertisement itself.

Another case that could be seen as involving compelled expression was *Brillinger v. Brockie*.<sup>75</sup> However, it focused on freedom of conscience and religion under s. 2(a) of the *Charter*, and freedom of expression under s. 2(b) was not even raised. A commercial printer was held liable under ss. 1, 9, and 12 of the Ontario *Human Rights Code* for refusing to print letterheads, envelopes, and business cards for a homosexual organization. Brockie, who was president and "directing mind" of Imaging Excellence Inc:

[H]olds a sincere religious belief based on the Book of Leviticus, Ch.18, v.22 and Ch.20, v.13 that homosexual conduct is sinful and in furtherance of that belief he must not assist

---

<sup>72</sup> [1979] 2 S.C.R. 435.

<sup>73</sup> *Ibid.* at pp. 453–455.

<sup>74</sup> *Ibid.* at pp. 455–456.

<sup>75</sup> *Brillinger v. Brockie (No.2)*, (1999), 37 C.H.R.R. D/12 (Ont. Board of Inquiry, Heather M. MacNaughton, Sept. 29, 1999); *Brillinger v. Brockie (No.3)* 37 C.H.R.R. D/15 (Feb. 24, 2000), varied *Ontario Human Rights Commission v. Brockie*, 222 D.L.R. (4<sup>th</sup>) 174 (Ont., Div. Ct., 2002).

in the dissemination of information intended to spread the acceptance of a gay or lesbian (homosexual) lifestyle. Mr. Brockie draws a distinction between acting for customers who are homosexual and acting in furtherance of a homosexual lifestyle.<sup>76</sup>

As a remedy, the Board ordered “Brockie and Imaging Excellence to provide the printing services that they provide to others, to lesbians and gays and to organizations in existence for their benefit” and to pay \$5 000 damages.<sup>77</sup>

On judicial review, the Divisional Court held that the order was correct to the extent it “was directed to the activity which gives rise to the offensive conduct, namely the provision of printing services for ordinary materials such as letterheads, envelopes and business cards.” It went on to acknowledge, “However, the order would also extend to other materials such as brochures or posters with editorial content espousing causes or activities clearly repugnant to the fundamental religious tenets of the printer.”<sup>78</sup> The Court concluded:

In the result, we are of the opinion that the impact of the Board’s order could be so broad as to extend beyond what is reasonably necessary to assure the rights of Mr. Brillinger and his organization to freedom from discrimination but may require Mr. Brockie to provide services which could strike at the core elements of his religious belief and conscience.

In order to balance the conflicting rights, we would add to the Board’s Order ‘Provided that the order shall not require Mr. Brockie or Imaging Excellence to print material of a nature which could reasonably be considered to be in direct conflict with the core elements of his religious belief or creed.’

We affirm the Board’s Order in all other respects.<sup>79</sup>

The Court did not decide the Appellants’ challenge to “the constitutional validity of the Code because it allows no defence based on *bona fide* reasons” to the “accommodations, services, and facilities” provisions. It held “the Appellants have led no evidence to provide a factual matrix necessary to challenge an otherwise apparently valid statute... .”<sup>80</sup> As the alteration to the Board’s Order only dealt with the remedy provided rather than the liability under the Code, this case cannot be seen as addressing the issue as to whether or not there can be a “constitutional exemption” from a valid legislative provision. As mentioned earlier, it left completely untouched any possible “freedom of expression” issues. It is true that a commercial printer generally does not exercise editorial control of the content of the material as a newspaper or publisher does, and does not purport to “proclaim” anything in the printer’s name. Therefore, as the “message” of the work is generally not attributed to the printer, any freedom of

<sup>76</sup> 222 D.L.R. (4<sup>th</sup>) para 3 at pp. 178-179.

<sup>77</sup> 37 C.H.R.R. at p. D/20.

<sup>78</sup> 222 D.L.R. (4<sup>th</sup>) para 48-49 at p. 190.

<sup>79</sup> 222 D.L.R. (4<sup>th</sup>) at para 57-59 at p. 192.

<sup>80</sup> 222 D.L.R. (4<sup>th</sup>) p. 187.



expression issue would be somewhat attenuated as compared with the cases previously mentioned. However, in some cases a commercial printer could face civil or criminal liability for his work. Furthermore, even though the “message” is usually not attributed to the individual or corporate printer, the individual concerned may have ideological or other qualms about the message outside the realm of s. 2(a), or even being involved with its dissemination, so that a “freedom of expression” argument would not necessarily be specious or without merit.

The tendency of “hate-related” legislative provisions to expand must be noted. The expanded scope of the legislation included the grounds covered, the media included, and the remedies provided. For example, the definition of “identifiable group” in s. 318(4) of the *Criminal Code* (which also applies to s. 319) was amended to include sexual orientation<sup>81</sup> Note also the expansion of s. 19(1) of the Manitoba *Defamation Act*<sup>82</sup> to include sexual orientation. One must recall that at the time of the Supreme Court decision in *Taylor*,<sup>83</sup> s. 54(1) of the *Canadian Human Rights Act* stated: “When a tribunal finds that a complaint related to a discriminatory practice described in s. 13 is substantiated, it may make only an order referred to in paragraph 53(2)(a).” Section 53(2)(a) refers to a cessation order (and an order for preventive measures). However, s. 54 was amended by replacing subsection (1) and adding (1.1).<sup>84</sup> These provisions now read:

54(1) If a member or panel find that a complaint related to a discriminatory practice described in s.13 is substantiated, the member or panel may make only one or more of the following orders:

- (a) an order containing terms referred to in paragraph 53(2)(a);
- (b) an order under subsection 53(3) to compensate a victim specifically identified in the communication that constituted the discriminatory practice;<sup>85</sup> and
- (c) an order to pay a penalty of not more than ten thousand dollars

---

<sup>81</sup> By S.C. 2004, c.14, s.1.

<sup>82</sup> *The Defamation Act*, C.C.S.M. c.D20.

<sup>83</sup> *Supra* note 4.

<sup>84</sup> By S.C. 1998, c.9, s.28.

<sup>85</sup> S. 53(3) reads:

“In addition to an order under subsection (2) the member or panel may order the person to pay such compensation not exceeding twenty thousand dollars to the victim as the member or panel may determine if the member or panel finds that the person is engaging in or has engaged in the discriminatory practice willfully or recklessly.”

(1.1) in deciding whether to order the person to pay the penalty, the member or panel shall take into account the following factors:

- (a) the nature, circumstances, extent and gravity of the discriminatory practice; and
- (b) the willfulness or intent of the person who engaged in the discriminatory practice, any prior discriminatory practices that the person has engaged in and the person's ability to pay the penalty.

Furthermore, s. 13(2) which originally read, "Subsection (1) does not apply in respect of any matter that is communicated in whole or in part by means of the facilities of a broadcasting undertaking" was replaced by s.88 of the *Anti-Terrorism Act*.<sup>86</sup> Section 13(2) now reads:

For greater certainty, subsection (1) applies in respect of a matter that is communicated by means of a computer or a group of interconnected or related computers, including the Internet, or any similar means of communication, but does not apply in respect of a matter that is communicated in whole or in part by means of the facilities of a broadcasting undertaking.

In Manitoba, the Human Rights Commission is calling for an amendment to the *Human Rights Code* "to add a prohibition on the publication or display of messages which are likely to expose a person or group to hatred or contempt on the basis of a protected characteristic" based on "the model used in British Columbia."<sup>87</sup> This is despite the fact that Manitoba did have a "hatred" provision in the previous *Human Rights Act*<sup>88</sup> which the Manitoba Legislative Assembly decided not to continue when enacting the current *Human Rights Code*<sup>89</sup> in 1987.

It is understandable enough that a body given a mandate, and dedicated, to promoting equality and combating discrimination would seek to restrict expression it perceives as inimical to its vital goals. However, even the noblest "ends" do not justify every conceivable "means" to achieve them. Even our most important public bodies (and the very principles and ideologies on which they are based) are amenable to peaceful challenge and dissent.

---

<sup>86</sup> S.C. 2001, c. 41.

<sup>87</sup> "The Rights Connections" by Janet Baldwin – Chairperson; *M.H.R. Connections* Published by the Manitoba Human Rights Commission, volume 6, number 1, January 2006. <[www.gov.mb.ca/hrc/english/publications/newsletter/bulletin\\_6\\_01.pdf](http://www.gov.mb.ca/hrc/english/publications/newsletter/bulletin_6_01.pdf)>.

<sup>88</sup> Which I criticize in *Lipsett*, *supra* note 10.

<sup>89</sup> *Supra* note 17.

Furthermore, a provision such as the one referred to above might not be all that necessary or beneficial towards the goal of promoting equality;<sup>90</sup> it may even prove to be counterproductive. I would respectfully suggest that the prohibition in question *not* be enacted.

I respectfully acknowledge that I am not a supporter of attempts to prohibit “hate speech” *per se*. I am largely in agreement with the dissenting judgments of McLachlan J. (as she then was) in *R. v. Keegstra*<sup>91</sup> and *Canadian Human Rights Commission v. Taylor*<sup>92</sup> and with much of the reasoning in the American cases of *R.A.V. v. St. Paul, Minnesota*<sup>93</sup> and *Virginia v. Black*.<sup>94</sup> I agree that criminal prosecution is the harshest method of dealing with such expression. However, I believe that the “human rights” approach as it has been applied in both the terms and interpretation of various legislative provisions at both the federal and provincial levels pose a substantially greater threat to freedom of expression than the *Criminal Code* provision upheld in *Keegstra*.

The human rights approach (in terms, and as interpreted) is substantially wider in scope than s. 319(2) of the *Criminal Code*. Furthermore, as effects rather than intention are emphasized, they lack a *mens rea* requirement. Additionally, the defences provided by s. 319(3) are not found in such provisions. These factors render human rights “hate-provisions” capable of covering substantially more communication than the clearly extremist materials targeted by the *Criminal Code*.<sup>95</sup> They can cover or threaten vigorous (albeit offensively-expressed) dissent from “mainstream” or “officially endorsed”

---

<sup>90</sup> The *coercive* powers of the human rights legislation and its enforcement agencies should be restricted to combating discriminatory *actions*. However, there are *persuasive* methods available to human rights commissions (as well as other public bodies, private organizations, and citizens) which are more suitable to the goals of influencing attitudes and opinions. For example, s. 4 of the *Human Rights Code* expressly mandates the Commission to “promote the principle” of equality and to undertake “educational programs.” Indeed the Manitoba Human Rights Commission has an ambitious and successful educational and outreach strategy. For the limited circumstances where prohibiting “hate” related expression might be needed or appropriate, I am respectfully suggesting new legislation in Part II of this article.

<sup>91</sup> *Supra* note 2 at pp. 796-868.

<sup>92</sup> *Supra* note 4 at pp. 944-976.

<sup>93</sup> 112 S. Ct. 2538 (1992).

<sup>94</sup> 123 S. Ct. 1536 (2003).

<sup>95</sup> This is not to deny that many (perhaps most) of the cases dealt with under s. 13(1) of the *Canadian Human Rights Act* and some of the material targeted under provincial legislation (e.g. *Kane v. Church of Jesus Christ Christian Aryan Nations (No.3)*, 18 C.H.R.R. D/268 (Alta. Board of Inquiry, February 28, 1992) are indeed “extremist”—however one may wish to define that term. Some of that material may well be appropriate for prohibition under the new legislation which I am proposing. That does not detract from the substantially more far-reaching potential scope of the “human rights” approach.

principles and values. They can cover or threaten “grass-roots backlash” in reaction to statements, positions, and policies expressed by members of various “protected” groups or adopted by governments in the perceived interests of such groups. They can cover or threaten the *perceptions of reality* of many members of the public, even if such perceptions are regrettably narrow or unfair. As mentioned earlier, the peaceful expression of such dissent, “backlash,” and perceptions must be allowed to be articulated for discussion on public issues to be complete, meaningful, and open.

This is not to deny that some of the defences in s. 319(3) of the *Criminal Code*<sup>96</sup> can be problematic in their own right. It has been recognized that there is difficulty in adjudicating the truth or falsity of “complex social and historical facts” that are not “patent to the senses.”<sup>97</sup> It has also been recognized that it is difficult to adjudicate the defendant’s belief in the truth or falsity of these facts. Furthermore, the issue whether or not there are “reasonable grounds” to believe a statement to be true could largely be a difficult “value judgment” in itself. If it is judged on an “objective” or “mainstream” basis, it fails to meet one of the most important purposes of freedom of expression, to protect dissidents from enforced conformity by holders of “mainstream” opinions. If it is judged on a “subjective” basis (or by giving undue weight to the opinion of an “extremist”) the legislation could be rendered largely ineffective.

The existence of the defences could render the more “sophisticated” or “professional” hate-mongers largely immune from the law. It is possible for such racists or other bigots to draft their messages to appear as “legitimate” arguments on political, social, scientific, religious, or moral matters so that they could come within the apparent scope of the defences (or at least not to show sufficient evidence of the *mens rea* component of s. 319(2)). (It is not inconceivable that at trial, such a defendant could rely on *negative statistics that do exist* about a group to convince a judge or jury that he at least had some “reasonable grounds” to support an honest belief in his impugned views. An acquittal on such basis could be of far greater propaganda value than the original communications on

---

<sup>96</sup> Section 319(3) reads:

“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, the person expressed or attempted to establish by an argument an opinion on a religious subject or an opinion based on a belief in a religious text; (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 toward an identifiable group in Canada.”

<sup>97</sup> See McLachlin, J’s comments concerning s. 181 of the *Criminal Code* in *R. v. Zundel*, *supra* note 59 at pp. 747-759.

which the charges were based.) It seems that such “sophisticated” hate-mongers or extremists could pose a greater threat to egalitarian values or social harmony than one who clearly articulates his repulsive views and motives, or whose utterances come across to most observers as “ranting and raving”.

Yet to omit such defences (as the human rights provisions referred to have done), or to give them an unduly narrow interpretation or application could further exacerbate the interference with freedom of expression to a clearly intolerable level. However, even with the absence of the defences and with the unlikelihood of a defendant or respondent prevailing in judgment, these provisions could still prove counterproductive to the goals they were designed to promote. A well-publicized trial or hearing could bring the offending messages to thousands (perhaps millions) of people who otherwise might not have heard them. As pointed out earlier, many people prone to believing such “hate” messages could see the proceedings as corroborating or reinforcing, rather than negating, the messages - irrespective of outcome. Such proceedings could make the defendants or respondents appear as martyrs, and make the offended groups, complainants, prosecutors, commissions, courts, or tribunals appear as persecutors. Furthermore, the divisiveness and polarization created by these proceedings and by the legislative provisions in question could do more harm to social harmony than the impugned communications.

As already pointed out, existing “special” legislative provisions attempting to tackle the issue of “hate speech” contain their own specific problems as well as the problems generally inherent in such legislation. The reference in the *B.C. Civil Rights Protection Act*<sup>98</sup> to “the superiority or inferiority of a person or class of persons...” targets a *particular ideological perspective*, so is especially inimical to the “neutrality principle.” Although s. 19(1) of the Manitoba *Defamation Act*<sup>99</sup>’s archaic qualifying factor “and tending to raise unrest or disorder among the people” might limit this provision to circumstances where there is a likelihood of imminent violence, this is by no means certain. More importantly, as I elaborated earlier, I doubt that defamation is even the appropriate paradigm or concept to deal with group hatred.

Whatever the problems that may be seen with attempts to prohibit or control “hate speech,” it is unlikely that the Canadian legal system is going to abandon them in the reasonably foreseeable future. Many of our legislators seem genuinely convinced of the need for such provisions, and others would find it too daunting a task politically to try to abolish them completely. Our courts seem to share this conviction—or at least seem prepared to show considerable deference

---

<sup>98</sup> *Supra* note 40.

<sup>99</sup> *Supra* note 81.

to the legislative decisions in this area. Furthermore, Canada has ratified two international treaties which require us to have some prohibitions on “hate speech.”<sup>100</sup>

Article 20 of the International Covenant on Civil and Political Rights reads:

1. Any propaganda for war shall be prohibited by law.
2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination reads:

State Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in Article 5 of this Convention, *inter alia*:

shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;

shall declare illegal organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;

shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

Therefore, I am respectfully proposing a compromise solution to this issue. I would suggest the enactment of a new *federal* statute to replace (and repeal) all current federal legislation and regulations in this area (in particular sections 318 to 320.1 of the *Criminal Code*, s.13 of the *Canadian Human Rights Act*<sup>101</sup> and the relevant provisions in the various broadcasting regulations.<sup>102</sup> Furthermore, *if* this is possible from a “division of powers” perspective, this new legislation would

<sup>100</sup> In Canadian constitutional law, ratifying treaties is a prerogative of the Crown. Though a treaty doesn’t have the direct force of law in Canadian domestic law unless it is incorporated by legislation, Canadian courts interpret statutes consistently with our treaty obligations where possible, and treaties are used in interpreting *Charter* provisions and in evaluating limits on *Charter* rights under s. 1. Moreover, a treaty ratified by the Crown binds Canada *in international law to fulfill its terms*, whether the treaty is incorporated by legislation or not. Two recent works on the subject of the role of international human rights law in Canada are: Mark Freeman and Gibran VanErt *International Human Rights Law*, Irwin Law Inc., 2004; and William A. Schabas and Stephane Beaulac, *International Human Rights and Canadian Law*, 3rd ed., Thompson Carswell, 2007.

<sup>101</sup> R.S.C. 1985, c. H-6.

<sup>102</sup> *Supra* note 9.

*expressly and clearly*<sup>103</sup> state its intention to “occupy the field” in its entirety, so as to render all relevant provincial (and territorial) legislation in this area “inoperative” through the “paramountcy doctrine”.<sup>104</sup>

The proposed new federal law could state (possibly in a preamble, the substantive provisions, or both) that it is the intention of Parliament to deal with the problem in a single, exhaustive, and exclusive law. It could state that because of the national and international ramifications of the problem, it should be dealt with at the national level. It could emphasize the need for clarity and uniformity in this matter. It could also acknowledge the danger that too wide legislation or interpretation or a multiplicity of laws in this area could pose an undue restriction on freedom of expression. It could state its intention and purpose to prevent this danger and to protect freedom of expression to the greatest extent possible.<sup>105</sup>

Whether through the “occupies the field” doctrine or through the “frustration of the purpose of the federal law” concept, valid federal legislation might be able to render related provincial legislation “inoperative” through the “paramountcy” doctrine. There are several theories on which the proposed federal legislation could be *intra vires* Parliament. Some of it would clearly be within the *criminal law* power. It also could be within the “peace, order and good government” power because of the national and international scope of the problem. Possibly the provisions on intention to “oust” related provincial law

---

<sup>103</sup> See *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3 [Canadian Western Bank], para. 74, at p. 53. Also see *British Columbia (AG) v. LaFarge Canada Inc.*, [2007] 2 S.C.R. 86, para. 84, at pp. 133–134; *Law Society of British Columbia v. Mangat* [2001] 3 S.C.R. 113; *Rothman Benson & Hedges Inc. v. Sask* [2005] 1 S.C.R. 188 and *O’Grady v. Sparling* [1960] S.C.R. 804. See discussion at Hogg, *Constitutional Law of Canada*, 5<sup>th</sup> ed., at pp. 16–4 and 16–5.

<sup>104</sup> Even if the “occupied the field” doctrine has been definitively repudiated, it still might be possible for federal legislation to render valid provincial legislation “inoperative” through the “paramountcy doctrine” if it could be established “...that to apply the provincial law would frustrate the purpose of the federal law” *Canadian Western Bank Ibid* at 93 at para. 75, pp. 53–54, *British Columbia (Attorney General) v. La Farge Canada Inc.*, *supra* note 93, para. 84, pp.133–134.

<sup>105</sup> Of course, I am not suggesting that it is possible or appropriate that the new federal legislation oust all provincial legislation or its application where expression related to discrimination is involved. *Narrowly drafted and interpreted* provincial provisions concerning discriminatory advertising, expression *directly* facilitating discrimination, and harassment in activities regulated by provincial human rights law must remain operative. Furthermore, it is doubtful whether federal legislation can or should interfere with the professional disciplinary or employment status of teachers (or other occupational situations under provincial jurisdiction) even if, as pointed out, some actions in this area can be problematic from a freedom of expression perspective. However, provincial legislation (and its interpretation) targeting “hate speech” or negative ideas *per se* can legitimately be rendered inoperative by the proposed federal law.

could be deemed “incidental” to the substantive prohibitions in the new law and also within the previous heads of power.

Additionally, it could be argued that the tendency to be overly restrictive of freedom of expression, purportedly in the name of equality, could also be seen as a national or international problem. Therefore, the need for more balance in this area, and to protect freedom of expression as much as possible, could be seen as an issue of “national dimension”: being further reason to bring “peace, order and good government” into play.

Also, it still might be possible to argue that the *protection* of freedom of expression, at least to the extent that it involves political speech, is within the power of Parliament. One recalls the *obiter dictum* of Duff, C.J. in *Reference re Alberta Legislation*<sup>106</sup> when he refers to “the right of the free public discussion of public affairs” and asserts that “the Parliament of Canada has the authority to legislate for the protection of this right.”

In the event that it is impossible for Parliament to render the related provincial provisions inoperative, I still suggest that Parliament enact this new legislation to replace the current federal “hate speech” laws. I would also suggest a co-ordinated federal-provincial (and territorial) approach in this area, and that the provinces and territories with “hate speech” legislation<sup>107</sup> repeal those provisions, and the provinces and territories without them refrain from enacting them, so that this new federal law would be the only law in Canada dealing with the subject.<sup>108</sup>

It is intended that the proposed legislation not target the disagreeable ideas, viewpoints, attitudes, or emotions *alone*. It is only when their expression is “coupled with” *incitement* to unlawful actions, the *method or circumstances* of their expression are particularly harmful or dangerous, or the likely *consequences* of their expression are particularly severe, that I envisage the terms or application of this law. Such approach would respect the “neutrality principle” to

<sup>106</sup> [1938] S.C.R. 100 at pp. 133-134.

<sup>107</sup> Of course, it is possible that such type of legislation is *ultra vires* the provinces in whole or in part. Although this line of argument by Milliken, J., in *Saskatchewan Human Rights Commission v. The Engineering Students' Society et. al* (1986), 7 C.H.R.R. D/3443 (Sask. QB) at p. D/3447 was *rejected* by the Saskatchewan Court of Appeal (as was the “paramountcy” argument) at *Human Rights Commission (Sask.) v. Engineering Students' Society, University of Saskatchewan* (1989) 72 Sask. R. 161 (Sask. CA) at pp. 190–198, the issue has not been decided by the Supreme Court of Canada. Further discussions of the “division of powers” issue can be found in the literature referred to in note 10 (and in some of the cases included in those works) but is beyond the scope of this article.

<sup>108</sup> The federal government might wish to consider a constitutional reference to the Supreme Court of this proposed new act, as well as of all the federal and provincial “hate material” provisions—the constitutionality of which have not been determined by that Court.



the extent reasonably possible (although of course it would be compromised to some extent by having the methods, circumstances or likely consequences of the impugned expression “*tied in*” with their substantive content). Under this scheme, the “defences” such as those found in s. 319(3) of the *Criminal Code* would be unnecessary, as the truth or falsity, reasonableness or unreasonableness of the communication, or belief or disbelief of the speaker concerning them would be irrelevant. Such a scheme would remove from the law the reality or perception of “thought control” on the one hand and of putting the protected group “on trial” on the other hand.

Such a scheme would be based on Article 20, paragraph 2 of the *International Covenant on Civil and Political Rights* to a large degree.<sup>109</sup> This scheme would require the presence of the distinct ingredients of “advocacy of hatred” and *incitement to the unlawful actions*<sup>110</sup> (or, in some cases, certain *methods, circumstances or likely consequences* rather than “incitement”) for the expression to be prohibited. This scheme would of course omit any reference to paragraph 1 of Article 20 (“propaganda for war”). Additionally, the new scheme would deliberately omit any reference to “ideas based on racial superiority or hatred” as a literal reading of Article 4(a) of the *International Convention on the Elimination of All Forms of Racial Discrimination* would seem to require.<sup>111</sup>

---

<sup>109</sup> That paragraph reads: “Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”

<sup>110</sup> I acknowledge that this interpretation of Article 20, paragraph 2 of the Covenant is narrower than much (perhaps the mainstream) opinion in the international community. It is possible to regard the “advocacy” of hatred as incitement *per se*, or to regard “hostility” as the negative *attitude* rather than the prohibited actions (see “*Report of the United Nations High Commissioner for Human Rights on the incitement of racial and religious hatred and the promotion of tolerance*” A/HRC/2/6 20 September 2006 Human Rights Council Second Session Agenda Item 2, <<http://daccessdds.un.org/doc/UNDOC/GEN/G06/139/97/PDF/G0613997.pdf?OpenElement>>, paras. 36–41 at 11–12 where uncertainty concerning the meaning of the relevant terminology is discussed.

Furthermore, this interpretation and scheme would give freedom of expression greater protection and the duty to ban “hate speech” a narrower scope than much international jurisprudence. Note that in cases where Canadian hate-mongers complained that the sanctions against them violated Article 19 of the ICCPR (freedom of expression), their complaints were rejected at least in part on the basis of Article 20 (see *Taylor v. Canada* (1983) 4 HRLJ 193 (UN Human Rights Committee, April 6, 1983) and *Ross v. Canada*, CCPR/C/70/D/736/1997 (UN Human Rights Committee, 10 October, 2000) <<http://www1.umn.edu/humanrts/undocs/736-1997.html>> at para. 11.5.

<sup>111</sup> Again I acknowledge that the new scheme, by this omission and by *retreating* from the ban on impugned ideas that exist in some of our current legislation, would undoubtedly earn us additional displeasure from the Committee on the Elimination of Racial Discrimination. (See for example that Committee’s expression of concern over Canada’s refusal to ban racist *organizations* “Concluding Observations of the Committee on the Elimination of Racial

The proposed law would only sparingly involve criminal sanctions. There would be only two circumstances where the proscribed conduct would automatically be deemed criminal. The “direct and public incitement of genocide” would be an offence. This would replace s. 318(1) of the *Criminal Code*. It would also be an offence to “publicly advocate, promote or express hatred” against any identifiable group with the intention to cause violence or with the knowledge that such advocacy, promotion or expression is substantially likely to cause imminent violence. This would replace s. 319(1) of the *Criminal Code*. There would *not* be an offence of “willfully promoting hatred” so that the offence now contained in s. 319(2) of the *Criminal Code* would disappear from the law.

To replace s. 319(2) of the *Criminal Code*, s. 13 of the *Canadian Human Rights Act* (and ideally all other federal and provincial and territorial “hate speech” provisions), the new legislation would create a number of “*unlawful acts*” which would be based on the “hate” related content of the impugned material *in conjunction* with factors such as incitement, the method or circumstances of the expression, or the likely consequences of the expression. Unlike with the offences, the only remedy or sanction available in a proceeding for these unlawful acts would be a declaration of their unlawfulness, and a cease and desist order against continuing or repeating them. However, *continuing or repeating* such acts after the declaration and cease and desist order would be an offence subject to the normal criminal sanctions.

This scheme was “inspired” by s. 13 of the *Canadian Human Rights Act* and its remedial provisions *as originally* enacted, although of course there are major differences.<sup>112</sup> The term “discriminatory practice” would not be used for such

---

Discrimination: Canada A/57/18 paras. 315–343 Concluding Observations and Comments, 2002, from  
 <[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/f4b63c02a6cc5e33c1256c690034a465?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/f4b63c02a6cc5e33c1256c690034a465?Opendocument)>. It is to be noted that the Committee takes a stringent view of State Parties’ obligations under Article 4. The reports of the various state parties to the UN treaty monitoring committees and the committees’ concluding observations (as well as the jurisprudence of the committees that receive individual complaints) are available online through: [www.unhchr.ch](http://www.unhchr.ch) or [www.ohchr.org](http://www.ohchr.org) or <http://tb.ohchr.org/default.aspx> or connected websites.

<sup>112</sup> In my “Submission to the Canadian Human Rights Act Review Panel” (unpublished, November 1999), I suggested that this replacement scheme would be accomplished through expanding s. 13 of the *Canadian Human Rights Act*. I suggested the possibility of either providing some defences analogous to s. 319(3) of the *Criminal Code* or limiting the prohibition to where the “hate speech” was coupled with the deleterious method, circumstances, or likely consequences.

I now repudiate my suggestion that the Canadian Human Rights Act should be involved, and I have decided that a scheme based on expression *plus* these additional deleterious factors would

matters. As pointed out, expanding the *concept* of discrimination to include expression of ideas, rather than only actions or decisions is a phenomenon which is a significant part of the problem. Furthermore, I suggest that the new law should be enforced by the federal Attorney General (as this is a federal statute outside the *Criminal Code*) and the superior courts of the various provinces and territories, rather than by the Canadian Human Rights Commission and the Canadian Human Rights Tribunal. There is no doubt that the Commission and Tribunal are composed of people of the highest integrity, competence, and dedication who make excellent contributions to the promotion of equality and the development of human rights jurisprudence in Canada. However, given the specific mandate of the Canadian Human Rights Act institutions to promote equality and combat discrimination, there might be a danger (at least a perception) of “ideological bias” in dealing with communications which are seen as posing a challenge to that mandate. Perhaps the Attorney General, who is responsible for all aspects of the legal system (within his jurisdiction) and the regular superior courts, which are accustomed to balancing all conflicting rights and obligations, might be (perceived) as more “*objective*” in balancing the factors motivating these proceedings and the need to protect freedom of expression to the extent reasonably possible.

In Part II of this paper, it is my intention to set out (in very rough, tentative, and sometimes incomplete form) some of the provisions of the proposed law which I would recommend for consideration. Any discussion or explanation of these proposed provisions will be contained in the footnotes. I wish to emphasize that I am certainly not suggesting that the proposed legislation is suitable for enactment in the form appearing below. For one thing, legislative drafting is not within my expertise (as may become apparent). More importantly, nothing in this article should be seen as a firm or final conviction on my part (or necessarily my final work on this subject). The purpose of this study is to note some of the perceived problems with the current state of the law in this area, acknowledge the profound controversy and debate concerning these matters, and to offer for consideration some ideas which might form the basis for a “compromise” solution to this problem. Even should these proposals not prove to be appropriate or feasible, it is to be hoped that they would lead to further study and thought which might eventually lead to a more suitable alternative to the current legislative and jurisprudential scheme.

---

be better than the paradigm based on the ideas alone subject to the defences. Although this article therefore supersedes my suggestions concerning “hate messages” in that submission, I relied largely on that submission as a basis or outline on which to develop some of the ideas expressed in this article, and borrowed some of the terminology from that submission.

## PART II

### An Act to Restrict Certain Forms of Hate Communication while Protecting Freedom of Expression to the Greatest Extent Possible

#### Preamble

WHEREAS racism, religious intolerance, and other forms of group-based hatred and prejudice are problems of international and national concern; and

WHEREAS Canada is a party to two international treaties requiring the prohibition of certain forms of hate communication; and

WHEREAS certain forms of hate speech are perceived as presenting a danger to the equality rights and the security of members of the targeted groups; and

WHEREAS several statutory (and regulatory) provisions dealing (expressly or as interpreted) with hate-related, prejudicial, or similar communications have been enacted at the federal, provincial and territorial levels; and

WHEREAS some of the provisions or cases decided under them seem to be unduly restrictive of freedom of expression; and

WHEREAS freedom of expression is an internationally and constitutionally protected right; and

WHEREAS overzealous or over-broad restrictions of communication in this area unnecessarily imperil freedom of expression and are possibly ineffective in or counterproductive to the goals they seek to accomplish; and

WHEREAS limitations on expression should respect the freedom to express ideas and viewpoints to the extent reasonably possible, and should be clearly focused to deal with the methods, circumstances, or likely consequences of the impugned expression rather than the disagreeable ideas *per se*; and

WHEREAS the international and national scope of the problem and the need to devise solutions with the least possible impairment of freedom of expression render it desirable to legislate in this area in clear, comprehensive, and exclusive legislation at the federal level; and

WHEREAS it is desirable that such federal legislation occupies the field in this subject matter and renders related provincial and territorial legislative provisions inoperative.

#### **Short Title**

1 This Act may be cited as the *Hate Communication Restriction and Freedom of Expression Protection Act*.

## Exclusivity

2 (1) This Act shall be the only law in Canada dealing with the subject of hate communication.

2 (2) Sections 318, 319, 320 and 320.1 of the *Criminal Code* and Section 13 of the *Canadian Human Rights Act* are hereby repealed.<sup>113</sup>

2 (3) Any provincial or territorial legislation dealing with this subject shall be deemed inoperative.

2 (4) For greater certainty, this section shall not affect:

(a) Any law prohibiting discriminatory actions on certain grounds, advertisements or other communications directly facilitating such actions, or harassment of any individual on prohibited grounds;<sup>114</sup> or

(b) Any law not directed at hate communication where the situations covered by that law correspond with the situations covered in this Act.<sup>115</sup>

---

<sup>113</sup> The various regulations dealing with “abusive comment ... likely to expose in hatred or contempt ...” in radio and television”, *supra* note 9, enacted pursuant to the *Broadcasting Act*, should also be repealed, whether through legislation or regulation.

<sup>114</sup> This clause is inserted out of an abundance of caution to prevent unintentionally ousting or impairing human rights legislation or its remedies under certain circumstances. For example, sometimes “hate speech” is used in communicating the discriminatory decision. Similarly, human rights legislation must remain free to deal with advertisements stating that members of a particular group need not apply, or signs at a business premises saying that members of a particular group are prohibited from entering. Additionally, narrowly drafted and applied prohibitions against harassment of an individual, even when verbal abuse is involved, must remain operative. However the use of the phrase “of any individual” is deliberate. If this “exclusivity” section renders an unduly wide interpretation of the concept of “harassment” or “hostile environment” (such as that sought in *Finley v. Mike’s Smoke and Gifts (#4)*, *supra* note 24) impossible, then it would be within its intended purpose.

<sup>115</sup> This clause is also inserted out of an abundance of caution. There might be legislation or common law principles providing a remedy for an individual victim greater than that provided for in this Act. For example, s. 11 makes it an “unlawful act to advocate, promote, or express hatred against any identifiable group under circumstances which involve the invasion of privacy of any individual.” Some of the circumstances envisaged in that section might also give rise to a civil cause of action such as violation of privacy, nuisance, or trespass. As this Act does not provide for an award of damages, care must be taken to avoid preventing the individual victim from seeking that remedy in a civil action. Furthermore, some of the conduct prohibited in this Act might legitimately give rise to administrative sanctions under educational or other professional legislation. For example, s. 13 prohibits promoting hatred “with the specific intention to instil such hatred in children or adolescents.” We wouldn’t want this Act to prevent the application of provincial legislation to have a teacher behaving in such manner fired or deprived of his teaching license. These are just some examples where this Act might overlap with other more “general” law (be it provincial or federal, civil or criminal)—the operation of which ought not to be precluded by this Act. In criminal matters, of course, the rules against “double jeopardy” and “multiple punishment” would have to apply.

## Definitions

3 In this Act

3(1) “Identifiable group” means any section of the public distinguished by race, nationality, national or ethnic origin, colour, religion, sex, age, mental or physical disability, or sexual orientation.<sup>116</sup>

3(2)(a) “Incites” means intentionally urges another to engage imminently in clearly unlawful conduct in circumstances under which there is a substantial likelihood of imminently causing such conduct.<sup>117</sup>

(b) For greater certainty, “incites” does not include attempting to bring about change in the law or discussion concerning public policy.<sup>118</sup>

<sup>116</sup> Though borrowing the terminology of, and based on, s. 318(4) of the *Criminal Code*, this definition expands the included grounds. “Nationality” is being added to the list as an attempt at greater compliance with Article 20, paragraph (2) of the *International Covenant on Civil and Political Rights* which refers to “national, racial or religious hatred” (emphasis added). Of course “race, national or ethnic origin, colour, religion, sex, age, mental or physical disability” are expressly mentioned in s. 15 of the *Canadian Charter of Rights and Freedoms* and sexual orientation has been ruled an analogous ground by the Supreme Court of Canada. Other grounds ruled analogous by the Supreme Court, such as marital status and residence off of a reserve, have not been included; neither have several other prohibited grounds of discrimination mentioned in the *Canadian Human Rights Act* or provincial or territorial human rights legislation. Although persons protected by those other grounds are entitled to protection from discrimination, they perhaps do not appear to be as readily identifiable on a group basis so as to be amenable to group-based hatred. A strong argument can perhaps be made that this Act should only include grounds which we are required to include by the *International Covenant on Civil and Political Rights* or the *Convention on the Elimination of All Forms of Racial Discrimination*. However, as this legislation is intended to pre-empt all other “hate” legislation in Canada, such a proposal would probably be a non-starter politically. Furthermore, the more limited and clearly defined scope of this Act (as compared with many of the provisions it is intended to replace) would reduce the interference with freedom of expression to a more acceptable level.

<sup>117</sup> Paragraph (a) with the exception of the words “intentionally” and “clearly unlawful” is borrowed from U.S.C. § 1093 (3) enacted by the *Genocide Convention Implementation Act of 1987 (the Proxmire Act)*, Pub. L 100-606, 102 Stat. 3045 (1988). The term “intentionally” is added out of an abundance of caution to ensure that the concept of incitement only covers expression that is used with the *specific intention* to bring about the proscribed conduct. It is *not* the purpose of its use in this Act to cover a “rant” or “rhetorical flourish” without purpose or thought of consequence, or even *recklessness* concerning consequences. See *R v. Hamilton* [2005] 2 S.C.R. 432, dealing with the mental element of the related concept of *counselling*. A majority held that a form of *recklessness* would be sufficient.

<sup>118</sup> If *incites* in this Act were only to apply to incitement to genocide as is the case with the *Proxmire Act*, perhaps the addition of the words “clearly unlawful” in clause (a) and the proviso in clause (b) would be unnecessary. Indeed, it could be argued that the proviso in (b) is inappropriate for incitement to genocide, given that genocide is criminal according to international law (irrespective of the state of national law) and that genocide is often carried out in pursuit of public policy.

3 (3) “Violence” means unlawful death or physical injury to any person or unlawful destruction of, or damage to, any property.

### **Inciting Genocide**

4 (1) Everyone who directly and publicly incites genocide is guilty of an indictable offence and is liable to imprisonment for a term not exceeding fourteen years

4 (2) In this section “genocide” means any of the following acts, committed with the intent to destroy in whole or in part, a national, ethnical, racial, or religious group, as such

- (a) Killing members of the group;
- (b) Causing serious bodily harm to members of the group; or

---

However, s. 7(1) prohibits inciting violence, *discrimination*, and *hostility*. Although the definition of violence is clear and narrow enough, *discrimination* and *hostility* (as defined in s. 7(2) and (3)) could be quite far-reaching. Surely it must be legitimate to freely discuss what forms of discrimination the law should or shouldn’t prohibit, and what policies to pursue—even if some of them might eventually prove to be discriminatory, illegal under national or international law, or unconstitutional.

Although the definition of *hostility* would include some acts deemed criminal by the norms of international law that have been incorporated into Canadian domestic law (see for example the *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24), some of those provisions are quite far-reaching and occasionally somewhat vague (for example, *persecution*). To prohibit merely discussing whether (or to what extent) they should or should not be prohibited seems somewhat excessive. Thus, I believe that if *incitement* is to be prohibited in this Act (especially in matters other than incitement to genocide), this proviso protecting seeking change to the law and policy discussions is necessary.

Of course, there is judicial authority and academic literature suggesting that incitement (and even hate speech) constitute the international crime of persecution, at least under extreme circumstances. However, the extent to which such expression can amount to persecution is beyond the scope of this paper. For a discussion of this or related issues, see *Mugesera v. Canada* [2005] 2 S.C.R. 100; William A Schabas “*Hate Speech in Rwanda: The Road to Genocide*” (2001-01) 46 McGill Law Journal 141; and Wibke Kristin Timmermann “*Incitement, Instigation, Hate Speech and War Propaganda in International Law*”

<[http://www.adh-geneva.ch/teaching/pdf/henry-dunant/2006/wibke\\_timmermann.pdf](http://www.adh-geneva.ch/teaching/pdf/henry-dunant/2006/wibke_timmermann.pdf)> and the cases cited therein.

Also see *Nahimana et al. v. The Prosecutor*, Case No. ICRT-99-52-A (Appeal Chamber, 28 November 2007 <<http://69.94.11.53/default.htm>>). In this case, the Appeal Chamber of the International Criminal Tribunal for Rwanda discusses the concept of “direct and public incitement to commit genocide” in depth at paras. 677–727, pp. 215–232.

The issues of if and when “hate speech,” that falls short of such incitement, can amount to “persecution” are dealt with at paras. 972–988 at pp 307–314; Partly Dissenting Opinion of Judge Fausto Pocar at para. 2, pp 349–350; Partly Dissenting Opinion of Judge Shahabuddeen at paras. 7–64, pp 352–368; and Partly Dissenting Opinion of Judge Meron at paras. 3–21, pp 375–381.

(c) Deliberately inflicting on the group conditions of life intended to bring about its physical destruction.<sup>119</sup>

---

<sup>119</sup> There are some significant differences between this section and s. 318 of the *Criminal Code* (which it would replace). This is for several reasons. One is to have the provision correspond more closely, though not completely with, Article II and III(c) of the *Convention on the Prevention and Punishment of the Crime of Genocide* (hereafter the “*Genocide Convention*”). Another is to have the provision more narrowly and precisely drafted to prevent unnecessary interference with freedom of expression.

The substantive provisions of s. 318 of the *Criminal Code* read:

“(1) Everyone who advocates or promotes genocide is guilty of an indictable offence and liable to imprisonment for a term not exceeding 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. (4) In this section, “identifiable group” means any section of the public distinguished by colour, race, religion, ethnic origin or sexual orientation.”

Article II of the *Genocide Convention* reads:

“In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended to prevent births within the group; (e) forcibly transferring children of the group to another group.”

Article III of the *Genocide Convention* reads: “The Following shall be punishable: (a) genocide; (b) conspiracy to commit genocide; (c) direct and public incitement to commit genocide; (d) attempting to commit genocide; (e) complicity in genocide.”

The terminology of this proposed section *directly and publicly incites* genocide is closer to Article III than *advocates or promotes genocide* and (at least with the proposed definition of *incites*) is narrower and more precise. Similarly, *sexual orientation* (and several of the other identifiable groups referred to in proposed s. 3 and covered in the rest of the proposed Act’s provisions) is omitted from this section, and the description of the groups referred to in this section is identical to that of Article II of the *Genocide Convention*.

The definition of *genocide* in this section adds “causing serious bodily harm to members of the group.” As this is clear enough, there is no compelling reason to omit it, as 318(2) of the *Criminal Code* did. However, this still falls short of Article II(c) of the *Genocide Convention* by omitting *mental harm*. Because of the potential vagueness and far-reaching applications of the term *mental harm*, it is not included here.

Proposed clause 2(c) departs from s. 318(2)(b) of the *Criminal Code* and Article II(c) of the *Genocide Convention* in using the word *intended* rather than *calculated*. This is to prevent possible overbreadth and uncertainty as the word *calculated* is not limited in its potential meaning to intended. It could also mean, for example, “fitted, suited, apt or likely” (see definitions in *Words and Phrases Judicially Defined in Canadian Courts and Tribunals*, volume 2, Thompson Canada Ltd., 1993, at p. 2–5).



## Hate Expressions with Intention or Knowledge Concerning Violence

5 Everyone who publicly advocates, promotes, or expresses hatred against any identifiable group,

(a) With the intention to cause violence; or

---

This section, like s. 318 of the *Criminal Code* omits reference to acts referred to in Article II clauses (d) and (e) of the *Genocide Convention*. This is necessary to avoid criminalizing discussion in areas that could be potentially far-reaching and uncertain in scope.

It might be argued that this section is unnecessary as s. 4(1.1) of the *Crimes Against Humanity and War Crimes Act*, *supra* note 108, provides “Every person who...counsels in relation to an offence referred to in subsection (1) is guilty of an indictable offence.” Section 4(1)(a) prohibits “genocide”—which, incidentally, is defined in s. 4(3) in a wider and less precise manner than in Article II of the *Genocide Convention* or in Article 6 of the *Rome Statute*, which is included in the Schedule of *The Crimes Against Humanity and War Crimes Act*. (Article 6 of the *Rome Statute* follows the definition in Article II of the *Genocide Convention*).

However, the Supreme Court in *Mugesera v. Canada*, *supra* note 108 at pp. 151–152 held that counselling in *former s. 7 (3.77)* of the *Criminal Code*, only referred to counselling as an act that was actually carried out. Despite the differences in wording of the two provisions, there is no great reason to believe that the current provision would be interpreted any differently in that regard. Therefore, if incitement of genocide is to be made a specific offence in the absence of it actually being carried out, this proposed section is probably necessary.

It is to be further noted that s. 464 of the *Criminal Code* provides

“Except where otherwise expressly provided by law, the following provisions apply in respect of persons who counsel another person to commit offences, namely, (a) everyone who counsels other persons to commit an indictable offence is, if the offence is not committed, guilty of an indictable offence and liable to the same punishment to which a person who attempts to commit that offence is liable.”

Section 463 of the *Criminal Code* provides that “except where otherwise expressly provided by law” any attempt to commit an indictable offence that is punishable by imprisonment for life “is liable to imprisonment for a term not exceeding fourteen years” (s. 4(2) of the *Crimes Against Humanity and War Crimes Act* provides for life imprisonment for genocide). Section 22(3) of the *Criminal Code* provides “for the purposes of this Act ‘counsel’ includes procure, solicit or incite.” So again, one can argue that incitement to genocide is already prohibited, through the operation of these provisions in the *Criminal Code* and the *Crimes Against Humanity and War Crimes Act* and that the proposed new section is strictly speaking, unnecessary. However, it is desirable that a statute comprehensively dealing with hate-related communications expressly, clearly, and directly prohibit inciting genocide, the most severe kind of hate communication. Furthermore, the definition of “genocide” in this proposed new provision is more precise (albeit narrower) than in the *Crimes Against Humanity and War Crimes Act*.

The maximum penalty under s. 318 of the *Criminal Code* is five years imprisonment. This proposed section increases the maximum penalty to fourteen years. It would be inappropriate for the most serious kind of incitement (“direct and public”) of the most serious offence (genocide) to carry a lighter sentence than ordinary forms of “counselling” or “incitement” for offences that are less serious. Furthermore, the narrow and precise definition of “incites” with perhaps a stricter *mens rea* requirement than applicable in s. 318 prevent the increased sentence from having a disproportionate impact on freedom of expression.

(b) (i) In circumstances under which there is a substantial likelihood that such advocacy, promotion, or expression will cause imminent violence against the person or property of members of the identifiable group or communal property of the group; and

(ii) With knowledge of such circumstances and likelihood;

is guilty of an indictable offence and is liable to imprisonment for a term not exceeding five years.<sup>120</sup>

---

<sup>120</sup> It is intended that this provision replace s. 319 of the *Criminal Code*. This is largely based on s. 319(1), but it is intended to be more precise than that subsection. Section 319(1) reads:

“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 a term not exceeding two years; or (b) an offence punishable on summary conviction.”

I respectfully suggest that (besides incitement to genocide referred to earlier) this is as far as the law should go in making hate communication automatically liable to criminal sanctions. I am not proposing a provision based on s. 319(2). However, I am suggesting a series of *unlawful acts* that are to be criminally punishable *only after* a Court declares them to be unlawful and issues a cease and desist order and the defendant continues to repeat such acts after the Court’s declaration and order.

The term “publicly” is used rather than “in any public place” so that the place where the expression is made is irrelevant, as long as it is intended to reach the public. Therefore, methods such as broadcasting, writing articles or books, posting material on the Internet and other methods of mass communication will be covered.

The term “advocates, promotes or expresses” hatred is used instead of the term “by communicating statements” and the terms “incites” or “willfully promotes” found in s. 319(1) and s. 319(2) respectively. The word *advocates* is used because of its use in Article 20(2) of the *International Covenant on Civil and Political Rights*. The terms *promotes* and *expresses* are used rather than the term *willfully promotes* as the specific intention to promote hatred will not be regarded as an ingredient of the offence as is the case for s. 319(2). The *mens rea* requirement for this section (beyond the intended communication of the impugned material with knowledge of its meaning) will be the *intention to cause violence* referred to in (a) or the *knowledge of the circumstances and likely violence* referred to in b(ii).

It is interesting to note that the Saskatchewan Court of Appeal recognized the difference between the mere “expression of hatred” and the “promotion of hatred” in *R. v. Ahenakew*, [2008] 2 W.W.R. 68 at para. 45–49 pp. 81–83. As this proposed new offence will include the intention to cause violence or the knowledge of its likelihood, adding *expresses* to the prohibition should not unduly interfere with the freedom of expression.

Throughout the proposed Act, the word *incites* is only used to refer to intentionally *urging action* as explained in the definition in s. 3(2); and the words *advocates* and *promotes* will only refer to the *hatred* rather than *actions*, unlike s. 318 of the *Criminal Code*.

*Violence* is the intended or likely consequence prohibited by the section rather than the wider and more vague term *breach of the peace*.

If a defendant *intends* to cause violence, I suggest it is legitimate to punish him—regardless of whom the intended victim of the violence may be. However, the limitation of likely violence to the identifiable group in (b) is necessary to prevent a “heckler’s veto” over expression (i.e.

## Continuing or Repeating an Unlawful Act

6(1) Everyone who continues or repeats an unlawful act after

- (a) The Court has found that he has committed the act in question, and
- (b) The Court has declared the act to be an unlawful act and issued a cease and desist order to him against continuing or repeating the act;

is guilty of an indictable offence and is liable to imprisonment for a term not exceeding two years.

6.(2) In this section “unlawful act” means an act referred to in sections 7 to 15.<sup>121</sup>

## Advocacy of Hatred Coupled with Incitement to Unlawful Actions

7.(1) It is an unlawful act to publicly advocate, promote or express hatred against any identifiable group while inciting violence, discrimination, or hostility against that group or its members.<sup>122</sup>

---

prevention of expression by disruption or by the threat of unlawful violence or retaliation). For example, if a defendant receives threats from members of the identifiable group or others to kill or injure him if he proceeds or continues with the expression, and he chooses to take the risk, he will not be liable under the section. There may be rare emergency situations where it is necessary to prevent hate speech likely to cause *any* violence, even against the speaker, but that is to be dealt with in the unlawful act in s. 9 dealing with a “hate-related emergency situation”.

The proposed maximum penalty is being raised from the two years in s. 319(1) to five years imprisonment. I suggest that this is justified here because of the more blameworthy intention requirement in (a) or the more clearly dangerous circumstances and knowledge thereof in (b).

The option of proceeding by summary conviction is being removed in order that proceedings under the Act will be dealt with *exclusively* in a superior Court. This should not be unduly harsh since there is no minimum penalty attached and the trial judge will retain the option of granting an absolute or conditional discharge should the circumstances warrant.

<sup>121</sup> As mentioned earlier, while this provision is inspired by s. 13 of the *Canadian Human Rights Act* and its related remedial provisions (as originally enacted), it is substantially different. It is central to the proposed compromise scheme in that it removes from *immediate* criminalization all but the most clearly harmful or dangerous expression. It retains a kinder and gentler method for dealing with other material that is arguably in need of prohibition. The lack of immediate criminalization and the limited remedy could reduce (if not eliminate) any chilling effect on material which may or may not come within the prohibition. Furthermore, the *knowledge* of its prohibited nature caused by the declaration and cease and desist order could make punishment justifiable even in cases where the unlawful act has a reduced *mens rea* requirement (or has eliminated *mens rea* as an ingredient completely) See discussion of this issue in *Canadian Human Rights Commission v. Taylor, supra* note 4.

<sup>122</sup> This section is based on Article 20, para. 2 of the *International Covenant on Civil and Political Rights*, but departs from it in certain matters. For ease of reference I repeat that paragraph which reads:

“any advocacy of national, racial or religious hatred that constitutes incitement to

7.(2) In this section “discrimination” means discrimination which is clearly and unequivocally prohibited throughout Canada, by the *Canadian Human Rights Act*, or by corresponding provisions in provincial or territorial legislation in force in all the provinces and territories.<sup>123</sup>

---

discrimination, hostility or violence shall be prohibited by law.”

The term *publicly* is added to avoid the reach of this aspect of the law to private communications.

The term “while inciting” is used rather than “that constitutes incitement” to make it clear that for the advocacy, promotion, or expression of hatred to come within this provision it must be *coupled* with incitement to the unlawful activity, and to avoid the interpretation that advocating hatred *per se* constitutes incitement. It is to be recalled that “incites” is defined fairly narrowly and precisely in proposed s. 3(2).

It is to be noted that I am not recommending a prohibition “on any propaganda for war” as is required by a literal reading of article 20(1) of that Covenant. It is doubtful whether a meaningful and workable ban of “propaganda for war” can be drafted that wouldn’t unduly interfere with or chill discussion of public policy or international affairs. At any rate, such a prohibition is unlikely to “fly” politically.

I am also not recommending a prohibition based on a literal reading of Article 4(a) of the *International Convention of the Elimination of All Forms of Racial Discrimination*. This provision (as well as others of the proposed Act) might partially fulfill our obligations under that Article. Hate speech that also constitutes incitement to violence or discrimination, or that poses an exceptional risk of violence, is covered. However, as discussed earlier, expressly referring to “ideas based on racial superiority or hatred” could unduly interfere with or chill discussion of scientific, social, or other matters of public importance, and would be in clear violation of the “neutrality principle.”

Article 13, paragraph 5 of the *American Convention on Human Rights* contains a more narrowly drafted prohibition, but covers somewhat more grounds than Article 20, of the ICCPR. It reads:

“Any propaganda for war and any advocacy of national, racial or religious hatred that constitutes incitement to lawless violence or to any other similar actions against any person, or group of persons on any grounds including those of race, color, religion, language or national origin shall be considered as offences punishable by law.”

<sup>123</sup> “Discrimination” is deliberately defined in this manner for several reasons. The *Canadian Human Rights Act* only covers entities or activities under federal jurisdiction, which is a relatively small portion of regulated activities in Canada in which discrimination is prohibited. However, it seems inappropriate for federal legislation to ban incitement to discrimination that is only unlawful in parts of, but not all, of Canada.

It is to be noted that this terminology, in conjunction with s. 2(3), might render inoperative the *incitement* and related provisions in some provincial human rights legislation. However, that might not be such a terrible lacuna in the law. The prohibitions against discrimination itself and clearly ancillary communications would remain operative. Perhaps a separate ban on *incitement* is only appropriate concerning *violent* actions (or where it is coupled with hate provisions as in this provision).

The term “clearly and unequivocally prohibited” in the definition of “discrimination” is to avoid prohibiting or chilling the incitement or discussion of activities which may ultimately be judged discriminatory, but where the issue is uncertain. This may be redundant in view of the

7.(3) In this section “hostility” means any hostile conduct which is clearly and unequivocally unlawful throughout Canada.<sup>124</sup>

### Calling for Violence

8.(1) It is an unlawful act to publicly advocate, promote, or express hatred against any identifiable group

(a) While using language or rhetoric which calls for, or strongly appears to call for, violence against that group or its members, and

(b) Such advocacy, promotion, or expression is substantially likely to cause such violence.<sup>125</sup>

8.(2) For greater certainty, no one shall be deemed to come within clause (1)(a) solely for

(a) Quoting, citing, referring to or discussing any religious text;<sup>126</sup> or

---

reference to “clearly unlawful conduct” in the definition of “incites” in s. 3(2)(a), but is added out of an abundance of caution.

<sup>124</sup> There are several reasons for this definition of hostility. It is intended that only the incitement of hostile *actions* are prohibited, and to avoid interpreting hostility as the negative *attitude*. The term “clearly and unequivocally unlawful throughout Canada” includes criminal activity other than that covered by violence (which is defined in relatively clear terms in s. 3(3)), as well as conduct that is clearly recognized as unlawful in civil and regulatory law in all jurisdictions in Canada. Although there might be some danger of overbreadth and vagueness in this aspect of the prohibition, this is somewhat ameliorated by the term “clearly and unequivocally” here as well as the term “clearly unlawful conduct” in the definition of “incites” in s. 3(2)(a). Furthermore, no *penalty* would result from such incitement unless it is continued or repeated after it has been declared unlawful and a cease and desist order issued. This inclusion of these additional matters is necessary to give meaning to the concept of *hostility* beyond that involved in *discrimination* and *violence* while restricting it to hostile *actions* rather than merely hostile *attitudes*.

<sup>125</sup> The purpose of this section is to cover cases where the material “calls for violence” against the group (see for example, *Richard Warman v. Peter Kouba*, 2006 CHRT 50, Canadian Human Rights Tribunal, Karen A Jensen, November 22, 2006, unreported, at paras. 76–81 at pp. 19–21, <[http://www.chrt-tcdp.gc.ca/search/files/t1071\\_5205er22nov06.pdf](http://www.chrt-tcdp.gc.ca/search/files/t1071_5205er22nov06.pdf)>), or appears to do so. The material must also pose a substantial danger of causing such violence. This section would apply even if the communication stops short of incitement, lacks the specific intention to cause violence or knowledge of its likelihood, and the feared violence may not be perceived to be imminent. Under these circumstances, though freedom of expression concerns militate against *immediate* criminalization of the perpetrator, the declaration of the unlawfulness of the material and the cease and desist order would justify criminal penalties against the person who continues or repeats this practice. Besides compensating for the lack of *mens rea* requirement, the need for a declaration and cease and desist order as a prerequisite to punishment would ameliorate any vagueness or uncertainty problems that might exist in the terminology used here.

<sup>126</sup> The *caveat* in clause 2(a) is motivated largely by *Owens v. Saskatchewan (Human Rights Commission)* (2006) 267 D.L.R. (4<sup>th</sup>) 733 (Sask. CA, 2006); reversing 45 C.H.R.R. D/272

(Sask. QB); which affirmed (2001) 40 C.H.R.R. D/197 (Board of Inquiry) and the controversy surrounding that case. Mr. Hugh Owens, for religious reasons, published an advertisement in the *Saskatoon Sun Phoenix* in response to an advertisement “announcing an upcoming gay pride week.” (267 D.L.R. (4<sup>th</sup>) at p. 739.

His “...advertisement consisted of the citation of four Bible passages: Romans 1:26, Leviticus 18:22, Leviticus 20:13, 1 Corinthians 6:9–10, set out prominently in bold type. They were accompanied by a reference in smaller print to the New International version of the Bible. The citations were followed by an equal sign and by two stickmen holding hands. A circle with a line running diagonally from the two o’clock to the eight o’clock position (the ‘not permitted’ symbol) was superimposed on the stickmen. The following words appeared in small print at the bottom of the advertisement: ‘this message can be purchased in bumper sticker form. Please call [telephone number]’” (267 D.L.R. (4<sup>th</sup>) p. 739.

Romans 1:26, after referring to homosexual behaviour and numerous other sins, ends with the passage “Although they know God’s righteous decree, that those who do such things deserve death, they not only continue to do these very things but also approve of those who practice them.” Leviticus 18:22 reads: “Do not lie with a man as one lies with a woman, that is detestable.” Leviticus 20:13 reads: “If a man lies with a man as one lies with a woman, both of them have done what is detestable. They must be put to death; their blood will be on their own heads.” 1 Corinthians 6:9 lists “homosexual offenders” among other sinners whom it asserts “will not inherit the kingdom of God.” These Biblical passages from the New International Version of the Bible were quoted at 267 D.L.R. (4<sup>th</sup>) par [7] at pp. 739-740.

A complaint against Owens under s. 14(1) of the *Saskatchewan Human Rights Code* was filed by three gay men. A Board of Inquiry held that Owens breached s. 14(1) of the Code in that the complainants “were exposed to hatred, ridicule and their dignity was affronted on the basis of their sexual orientation” and “made an order prohibiting Mr. Owens from further publishing or displaying the bumper stickers featured in the advertisement and directed him to pay damages of \$1,500 to each of the complainants.” 267 D.L.R. at para. 16–19 at pp. 742-743. That decision was upheld by the Court of Queen’s Bench. The Saskatchewan Court of Appeal, however, reversed the judgement of the Court of Queen’s Bench and exonerated Mr. Owens of violating s. 14(1)(b).

The Court of Appeal, while not ruling out the possibility that religious texts could ever be used in a manner that “offended the *Code*” and while cautioning against courts being “drawn into the business of attempting to authoritatively interpret sacred texts such as the Bible”, analyzed the context in which the impugned texts were used. In particular, it dealt with the passages in context of the entire Bible, the varying views of the Biblical passages in “contemporary society” and the distinction sometimes made between homosexual *behaviour* and homosexuals themselves. The Court of Appeal rejected the Board of Inquiry’s and the Queen’s Bench’s interpretation of these passages as equivalent to a “plain assertion made in contemporary times to the effect that homosexuality is evil and homosexuals should be killed.” 267 D.L.R. (4<sup>th</sup>) at para. 77–83 at pp. 758-761.

It is to be noted that this case was a major source of concern among those who opposed Bill C-250, which amended s. 318(4) of the *Criminal Code* to include “sexual orientation” in the definition of “identifiable group” protected by the “hate speech” provisions. See, for example, the presentation of Mr. Bruce Clemenger, Director, National Affairs, the Evangelical Fellowship of Canada to a *Parliamentary Committee* studying that Bill (37<sup>th</sup> Parliament, 2<sup>nd</sup> Session *Standing Committee on Justice and Human Rights*, Meeting No. 45 - Tuesday, 13 May 2003.

Found at

- (b) Proposing, suggesting or discussing any legislative measures or measures of public policy;<sup>127</sup> or
- (c) Both of the above.<sup>128</sup>

## Hate-Related Emergency Situations

9.(1) It is an unlawful act to publicly advocate, promote, or express hatred against any identifiable group in a hate-related emergency situation.

9.(2) In this section “hate-related emergency situation” means

- (a) A situation where rioting, widespread violence or other widespread criminal activity is occurring and is being substantially caused by such advocacy, promotion, or expression; or
- (b) A situation described in (a) is substantially likely to occur imminently.<sup>129</sup>

---

<<http://cmte.parl.gc.ca/Content/HOC/committee/372/just/evidence/ev916645/justev45-e.htm#Int-545384>>).

Bill C-250 was amended to provide some protection for religious texts. The amended Bill amended s. 319(3)(b) of the *Criminal Code*, the “religious belief” defence to a charge of wilfully promoting hatred under s. 319(2). Section 319(3)(b) had previously read: “if, in good faith, he expressed or attempted to establish by an argument an opinion on a religious subject.”

Section 319(3)(b) now reads: “if, in good faith, the person expressed or attempted to establish by an argument an opinion on a religious subject or an opinion based on a belief in a religious text.”

<sup>127</sup> Although the *caveat* in clause 2(b) might seem inappropriate to some observers, I respectfully suggest that it is at least worth considering. On the one hand, it could legitimately be argued that legislative measures and public policy that would authorize violent measures against “identifiable groups” so clearly violate our constitutional norms and international law that even suggesting them cannot be tolerated, and that it could even amount to “persecution” under extreme circumstances. On the other hand, it could equally legitimately be argued that in a constitutional democracy, the protection against regrettable suggestions materializing lies in counter argument, the democratic process, and (if needed) judicial remedies. Furthermore, it might be easier to counter extremists with a political agenda if they clearly articulated their true position than if they “camouflaged” their messages to comply with legislation.

<sup>128</sup> The *caveat* in clause 2(c) refers to cases where both religious texts and suggestions for violent legislation or policy measures are found in the same material, in particular where the proposed measures are based on or motivated by religious texts (or interpretations thereof).

It must be noted that the *caveats* in subsection (2) would not necessarily immunize impugned materials from clause 1(a) merely because religious texts, legislative or policy suggestions, or both are found in them. If the materials would otherwise come within that provision, or if the religious text and/or legislative or policy suggestions in *conjunction* with other aspects of the communication would bring the material within clause 1(a), that clause would cover them. The *caveat* is included only to prevent these “protected” kinds of expression from being *per se* within the prohibition.

<sup>129</sup> Because of the level or quantity of the actual or likely criminal activity resulting from the

## Intimidating Methods

10.(1) It is an unlawful act to advocate, promote, or express hatred against any identifiable group while using intimidating methods.

10.(2) In this section “intimidating methods” means methods that, because of their nature or history, or the context of their use, are likely to have an intimidating effect on members of the identifiable group and include:

- (a) Communicating express or implied threats of violence;
- (b) Displaying real or simulated weapons or means of execution;
- (c) Parading or demonstrating in paramilitary uniforms, Nazi uniforms, or Ku Klux Klan regalia;
- (d) Use of a burning cross; or
- (e) Methods of similar intensity and severity.<sup>130</sup>

advocacy, promotion or expression, this section does not contain any intention or knowledge requirement concerning such situations. Neither does it contain any requirement for *incitement*, or an actual or apparent *call* for violence or other criminal activity. Furthermore, this section would apply irrespective of whether or not the victims or potential victims would be members of the identifiable group.

It is suggested that the severity of the situation—and the fact that there is no penalty until declaration, order, and continuation or repetition occurs—renders this limitation on freedom of expression acceptable even in the absence of the ingredients that would otherwise be required.

<sup>130</sup> Undoubtedly, a freedom of expression purist or absolutist would find this section problematic, as it targets some forms of expressive conduct or symbolic speech that have received constitutional protection under the First Amendment. For example, in *R.A.V. v. St. Paul, Minnesota*, 112 S. Ct. 2538 (1992) and *Virginia v. Black*, 123 S. Ct. 1536 (2003), the U.S. Supreme Court has held that a cross-burning to express a *political or ideological viewpoint* is protected, although the latter case held that burning a cross with the *specific intention* to intimidate can be banned. This section, however, refers to the “intimidating effects” of such methods on members of the identifiable group and deliberately omits the need for intention to intimidate.

*Collin v. Smith*, 578 F.2d. 1197 (1978) (US Court of Appeal 7<sup>th</sup> Circuit), certiorari denied, 99 S. Ct. 291 struck down, *inter alia* a ban on “hate” marches using paramilitary uniforms. However, the Supreme Court of Canada in *Keegstra*, *supra* note 2, refused to be bound by First Amendment cases such as *Collin v. Smith* (see pp. 738-744) and upheld the constitutionality of s. 319(2) of the *Criminal Code*. If banning “hate speech” *per se* is constitutionally permissible, *à fortiori* banning a particular method of “hate speech” is constitutional, especially if the idea *alone* is not the targeted ingredient.

As should be clear by now, the purpose of this paper is not to achieve doctrinal purity or to satisfy jurisprudential absolutism. Rather, my aim is to work towards a *reasonable and pragmatic compromise* to the contentious issue of freedom of expression versus control of hate speech. Viewpoint neutrality—the concept that even when certain methods or circumstances can lead to restrictions on expression, this must not be done on the basis of disagreement with the viewpoint expressed—is an important factor in the debate. Yet, it can and should be compromised to a certain extent. It can be argued that no viewpoint, idea, or attitude ought to



## Invasion of Privacy

11.(1) It is an unlawful act to advocate, promote, or express hatred against any identifiable group under circumstances which involve the invasion of privacy of any individual.

11.(2) Circumstances which involve the invasion of privacy of any individual include:

---

be completely banned. Additionally, there may be certain actions or forms of expression that shouldn't normally be banned. However, I suggest that under certain circumstances, particular kinds of messages *in conjunction with* particular activity or methods of communication can legitimately be prohibited or restricted. The circumstances envisaged in this section are, in my opinion, such a situation.

It is suggested that the need for declaration, an order, and disobedience as prerequisites to punishment adequately compensates for the absence of specific intention to intimidate or any vagueness or uncertainty that might be found in some of the terminology in this section.

At any rate, clause 2(a) is clear enough. In clause 2(b), "real or simulated weapons" is clear enough, and "simulated methods of execution" refers to the repulsive practice of erecting actual or miniature nooses in the presence of members of the Black community (which is sometimes done by racists) and similar practices.

Clause 2(c) might seem somewhat more problematic. Paramilitary uniforms aren't always used for hate-related purposes, and, as pointed out, their use even for that purpose has received First Amendment protection. However, their use during the expression of hatred can have the potential to cause especially frightening or traumatic effects on members of an identifiable group or to raise community tensions to an especially high level. It therefore seems appropriate to prohibit such a combination.

Clause 2(d) recalls a Canadian case involving the use of a burning cross, *inter alia*, which took a different approach from *R.A.V. v. St. Paul, Minnesota*, and *Virginia v. Black*. In *Kane v. Church of Jesus Christ Christian Aryan Nations (No. 3)*, 18 C.H.R.R. D/268 (Alta. Board of Inquiry, Feb. 28, 1992) the Board held that the display of "KKK White Power" signs, a Swastika, and a burning cross at an "Aryan Fest" held on private property violated the provisions of the *Individual's Rights Protection Act*, R.S.A. 1980, c. 1-2, s. 2. The section prohibited the public display of "any notice, sign, symbol, emblem, or other representation indicating discrimination or an intention to discriminate..." The judgment relied on the history and the *intimidating effects* of such materials, among other reasons. Although I have criticized the breadth of the wording and some of the wide-ranging interpretations of such legislation, I find it more difficult to criticize the *results* of this decision. Narrower legislation focusing on the *intimidating methods of expressing hatred* such as those involved in this case are appropriate.

Clause 2(e) is intended to cover methods similar to those referred to in the *Kane* case, such as the use of Swastikas or similarly recognized hate symbols or regalia similar to those referred to in clause 2(c) under certain circumstances. One cannot foresee all the potential circumstances where a section such as this might be needed so the omnibus clause in 2(e) is provided. The wording is deliberately chosen to restrict its use to the most serious cases, and to avoid prohibiting methods or substance of communications merely because they are politically incorrect, offensive, unpopular, or controversial. Again, any problem with potential uncertainty or vagueness of this clause is ameliorated by the scheme requiring declaration, order, and disobedience as prerequisite to any penalty being imposed.

- (a) Publicly naming or displaying the image of any individual except when necessary for the discussion of any matter of public interest;
- (b) Publicly revealing the personal information of any individual;
- (c) Harassing any individual by persistently contacting or communicating with such individual when such contact or communication is unwelcome and unjustified in the circumstances;
- (d) Demonstrating, picketing, displaying any material, shouting, or otherwise visibly or audibly communicating at or in the immediate vicinity of a private residence without the invitation or consent of the occupier of the residence;

11.(3) In this section, “personal information” includes the address, telephone number, facsimile number, e-mail address, social security number, credit card information, or other personal and confidential information which facilitates the contact with or compromising the identity or security of such individual.<sup>131</sup>

---

<sup>131</sup> Clause 2(a) and (b) are necessary because hate communications are not always restricted to *generalities* about the identifiable group but often target individuals who are members of (or seen as sympathetic to) that group.

Clause 2(a) is drafted primarily to protect private citizens who play no significant role in public affairs from being mentioned in hate material. It might be impractical and unduly restrictive of freedom of expression to prevent the mention or discussion of public figures, even when tied in with the expression of hatred.

Clause 2(b), as clarified by subsection (3), is not limited to the protection of private citizens, but includes any individuals whom the hate-mongers may wish to harm by publishing such information. The wording is deliberately used to avoid restricting information which could be relevant, however tenuously, to matters of public interest.

Clause 2(c) is designed to cover harassing situations outside of the regulated activities usually covered by harassment provisions of human rights legislation. It is also designed to avoid including single or isolated instances of racial or similar slurs or insults, regrettable though they may be. The qualification “and is unjustified in the circumstances” is added to avoid censoring unpalatable materials directed to persons who have a duty or need to receive communications from members of the public, such as public officials.

Clause 2(d) is designed to offer potential targets of hate speech protection from being subject to it in the privacy of their own home. Unlike the ordinance upheld by the U.S. Supreme Court in *Frisby v. Schultz*, 108 S. Ct. 2495 (1988), which prohibited “picketing before or about the residence or dwelling of any individual”, this provision is not *content neutral* and is certainly not *viewpoint neutral*. However, as with other provisions in this proposed statute, the departure from a pure or absolute standard of *content neutrality* and *viewpoint neutrality* seems a legitimate compromise. The traumatic effect of hate speech on identifiable groups and their members have often been recognized. Canadian courts are more prepared than their American counterparts to protect these groups and their members from this effect. My main criticism of some of the Canadian jurisprudence and legislation in this area has been with their interference with the *intellectual and political freedom* inherent in stifling certain ideas, however repulsive or dangerous they may be. A restriction such as the one envisaged here still leaves individual and collective means of thinking, developing, exploring, and communicating *ideas* relatively

## Undermining The Critical Faculties Of Individuals

12.(1) It is an unlawful act to advocate, promote, or express hatred against any identifiable group by intentionally or knowingly undermining the critical faculties of individuals<sup>132</sup> through:

- (a) The use of games involving videos, computers or similar devices,<sup>133</sup> or

---

unhampered.

It is to be noted that some of the behaviour prohibited in this section might overlap with that referred to in s. 10 and may already be prohibited in other areas of the law. There may be other forms of behaviour accompanying “hate speech” having as great an impact on privacy as those mentioned in this section and also ought to be prohibited. On the other hand, perhaps greater safeguards are needed in this section to protect freedom of expression. I emphasize again that this does not purport to be a perfectly drafted statute. Further thought about what should or should not be prohibited, the need to protect against legislative overreaching, and appropriate mechanisms and terminology are obviously needed.

<sup>132</sup> The term “the critical faculties of individuals” is borrowed from the *Report of the Special Committee on Hate Propaganda in Canada*, Queen’s Printer, 1966, at p. 8. Of course, that Report envisaged situations beyond those referred to in this section, and recommended the legislation on which sections 318 and 319 of the *Criminal Code* are based. However, the Report took special note of “the successes of modern advertising”, “radio, television, motion pictures” along with “the pervasiveness of print” and “the impact of speech as associated with colour, music and spectacle on the feelings of great multitudes of people” (p. 8) Its authors were keenly aware of the impact of applying scientific knowledge to mass communication. Any problems in that regard have been greatly exacerbated by the developments of communication technology since then.

The idea for this section is largely inspired by three factors:

- 1) the attempt to zero in on a particular *method* of communication—as was originally done by s.13 of the Canadian Human Rights Act;
- 2) the comments in the Tribunal’s original decision concerning the psychological and social impact of certain communicative methods in *Canadian Human Rights Commission et al v. The Western Guard Party and Taylor* (The Canadian Human Rights Act Human Rights Tribunal, 1979) <[http://www.chrt\\_tcdp.gc.ca/search/files/t001\\_01979de\\_07\\_20.pdf](http://www.chrt_tcdp.gc.ca/search/files/t001_01979de_07_20.pdf)>; and
- 3) the jurisprudence and literature suggesting that certain specialized media or methods of communication can give rise to restrictions or regulation not appropriate to ordinary means of expression.

<sup>133</sup> This is not to suggest that video games are beyond freedom of expression protection. Indeed, there are several American cases clearly indicating that such means of communication are protected under the First Amendment (see for example, *Entertainment Software Association v. Blagojevich*, 469 F.2d 641 (U.S.C.A., Seventh Circuit, 2006)). Furthermore, I am certainly not suggesting that all hate messages using computers or the internet should be banned, as subsection 13(2) of the *Canadian Human Rights Act*—as amended by the *Anti-Terrorism Act*, S.C. 2000, c. 41, s. 88—has done.

I would doubt (speaking as a person without any expertise in psychology or mass communication whatsoever) that purely text on-line communications (especially lengthy articles purporting to be historical, political, or ideological) would have any greater impact on the critical faculties of an individual reader than the same material read from hard copy.

(b) The use of audio, visual, or other sensual methods that create or produce subliminal messages;<sup>134</sup> or

(c) Other deliberate abuse of physical or social scientific technology;<sup>135</sup>

12.(2) In this section “subliminal” means taking place below the threshold of sensory perception or outside the range of conscious awareness.<sup>136</sup>

The type of material that would be included within clause 1(a) is the most virulent type of hate material using the format of such games. Banning such materials would not interfere with the serious exploration and analysis of ideas, which freedom of expression is largely meant to protect. Such methods might indeed impair critical analysis and would be inimical to that basic purpose of freedom of expression.

<sup>134</sup> Of course, to avoid an unduly wide interference with communication, the term “subliminal” has to be precisely and narrowly defined. The use of that term by the communications expert witness in *Canadian Human Rights Commission v. Taylor* (1979), *Supra* note 122, and referred to in the reasons for decision at pp. 21–24 seems to be somewhat expansive and certainly beyond the definition which I recommend in subsection (2).

<sup>135</sup> At this point, I regret that I cannot be more specific as to where this provision would apply and I acknowledge that greater care in drafting this clause would be appropriate. Furthermore, great caution would be necessary in interpreting and applying this provision.

Certain forms of technological communication have been held amenable to special regulation (for example, *FC.C. v. Pacifica Foundation*, 98 S. Ct. 3026 (1978), dealing with broadcasting). It is possible that this clause could be used against hate communications that utilize the special effects of media such as radio, television, or cinema to overwhelm or compromise one’s critical faculties. Perhaps even recordings and music could come under this provision under certain circumstances. Regrettably, there is a genre of racist and hate-based rock music, although I concede that I am not aware whether or not its composers, performers, or producers have the technological expertise or sophistication that is envisaged here.

I wish to emphasize that I am not suggesting that all materials that could be deemed hate communications should be banned from radio and television and other technological forms of mass communication. Again, speaking *without* social scientific expertise, I would doubt that a simple lecture, speech, or discussion that is broadcast (without special effects) and could be construed as hate-related would have significantly greater impact on the critical faculties of an individual listener or viewer than if that same lecture, speech, or discussion were delivered and observed in an ordinary hall or auditorium and not broadcast.

If this section (and the other sections of the proposed Act) could be used against communications using radio and television under the circumstances referred to, it seems that provisions dealing with hate communication in these media in the regulations referred to at *supra* note 9, would no longer be needed.

Such provisions, which could lead to a loss of a broadcasting license or a fine (see *Broadcasting Act*, S.C. 1991, c. 11, s. 9, s. 24, and s. 32), could present some of the problems concerning vagueness, overbreadth, and interference with communicating ideas connected with other “hate” legislation. For example, s. 5(1) of the *Television Broadcasting Regulations 1987*, S.O.R./87-49 reads: “a licensee shall not broadcast... (b) any abusive comment or abusive pictorial representation that, when taken in context, tends to or is likely to expose an individual or a group or class of individuals to hatred or contempt on the basis of...” named grounds. As mentioned earlier, it is probably better that the entire area of hate communications be dealt with comprehensively in a single Act.

12.(3) In a proceeding under this section, an act shall not be held to contravene clause 12(1)(b) or (c) unless the nature of the impugned method of communication and its effect on the critical faculties of individuals is clearly and unequivocally established by expert evidence.<sup>137</sup>

### **Children or Adolescents**

13.(1) It is an unlawful act to advocate, promote, or express hatred against any identifiable group with the specific intention to instil such hatred in children or adolescents by:<sup>138</sup>

(a) Using materials or methods of communications which are specifically designed to influence children or adolescents;<sup>139</sup> or

(b) Directly approaching children or adolescents; or

(c) Sponsoring, organizing, or participating in an event, series of events, or association specifically designed to instil such hatred in children or adolescents;<sup>140</sup> or

(d) Abusing a position of authority or trust over children or adolescents if such position is of a public or publicly-regulated nature<sup>141</sup>.

---

<sup>136</sup> This definition is taken from *Mosley's Medical Nursing, and Allied Health Dictionary*, 6<sup>th</sup> ed., at p. 1647. Perhaps a better definition than this one ought to be drafted. However, care is needed lest too-loose a definition or application of this concept leads to unnecessary restriction on expression.

<sup>137</sup> Although the nature (if not necessarily the effect) of materials included under clause 12(1)(a) would be self-evident, that would often not be the case with materials referred to in (b) or (c). To avoid suppression of materials merely on the basis of subjective reactions or understandable revulsion of viewers or listeners, or on a popular interpretation of technical concepts, expert evidence should be required before an act could be found unlawful under these provisions.

As expert evidence in the social sciences is sometimes speculative and/or ideologically driven, some degree of certainty or consensus in this type of evidence should be required before expression is prohibited in these circumstances.

<sup>138</sup> This section is drafted only to cover those hate-mongers who deliberately *target* children or adolescents as the recipients of their messages, not material communicated "at large" but which might incidentally reach people in that category. Even here, caution is necessary to avoid overreaching, especially where family life and privacy, religion or legitimate youth activities, and associational interests might be at risk. Greater care and precision might be needed in the actual drafting of legislation based on this section.

<sup>139</sup> Some of the methods, materials, or activities envisaged here might overlap with some of those envisaged by s. 12.

<sup>140</sup> See note 129 above.

<sup>141</sup> The scenario that comes most readily to mind is that of a teacher such as *Keegstra*. The term "*public or publicly regulated nature*" is used so that private as well as public schools are covered, as they are also subject to a degree of public regulation. Positions other than teachers could be covered, including law enforcement officers, licensed professionals, or regulated

13.(2) In this section “children or adolescents” means people under the age of eighteen years.

13.(3) For greater certainty, nothing in this section shall apply to:

- (a) Private communication within a family home or setting or family-arranged care not available to the public or a section of the public;<sup>142</sup>
- (b) *Bona fide* communication made by a member of the clergy, religious official, or other participant during a *bona fide* religious activity;<sup>143</sup> or
- (c) *Bona fide* communication of the viewpoint or policy of an association that was not established for the purpose prohibited by subsection (1) or clause 1(c).<sup>144</sup>

facilities offering a service to the public (such as day care centres). Depending on the extent of their regulation by government or public authorities, coaches or officials in private athletic teams or leagues might also be covered—as might professional or volunteer youth leaders in other circumstances.

Education and some of the other situations envisaged here are under provincial jurisdiction. The double aspect doctrine might allow this proposed federal legislation to apply to such situations—if it can come within a federal head of power. This provision, coupled with the provisions in s. 2(3) rendering provincial hate laws inoperative, would not prevent appropriate provincial employment or disciplinary sanctions against the abuser as well, as s. 2(4)(b) specifically protects the application of more “general” laws where situations covered by them correspond with situations covered by this Act.

<sup>142</sup> Although family or home related indoctrination of children into hatred can be among the most nefarious situations where such communication occurs, the law simply cannot reach that far without creating an unduly authoritarian or even totalitarian society.

This exception includes not only communications made by family members themselves, or communications made in a home, but also those made by persons outside the family (such as when they are visiting with the family at home or in another location).

The “family-arranged care” mentioned here includes situations where care is provided by a friend, neighbour, or babysitter, but does not include a commercial care-giving company that makes its services available to the public.

<sup>143</sup> Of course it could be argued that some of the most dangerous hate promotion, including that directed at youth, can be carried out by extremist religious leaders. However, this exception seems necessary to protect freedom of religion and to prevent undue interference by secular authorities into religious affairs. Indeed, an argument can be made that the qualifications that the communication or activity must be “*bona fide*” gives secular authorities undue power to evaluate religious expression or activity.

<sup>144</sup> This is meant to protect organizations that, though established or operated for legitimate purposes may express messages that members of an identifiable group could find objectionable. For example, the Boy Scouts of America teach that homosexual conduct is immoral. It might be possible for religiously, ethnically, or culturally based organizations to be overzealous in expounding their perspectives in controversial matters at the apparent expense of other groups. Though such groups would probably not be caught by this section—given the “specific intention” requirements in subsection (1) and the “specifically designed” requirement in clause 1(c)—this provision is added out of an abundance of caution. This should help to reduce the

13.(4) No proceedings under this section shall be brought against a person under the age of eighteen years.

### **Severe Outrage on a Massive and Unavoidable Scale**

14.(1) It is an unlawful act to display hate materials under circumstances where

- (a) Such display is likely to cause severe psychological trauma, severe emotional distress, or severe outrage on a massive and unavoidable scale;<sup>145</sup> and

---

risk of an inappropriate finding of a violation of this section, of an inappropriate initiation or threat of proceedings, and of an unnecessary “chilling effect” concerning legitimate expression or association that might prove controversial.

<sup>145</sup> See *Collin v. Smith*, 578 F.3d. 1197 at pp. 1205–1206 and Richard Delgado “*Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*” 17 Harv. C.R.-C.L.L. Rev. 133 (1982) for a discussion of whether the concepts of trauma, severe emotional distress, or outrage could be applied to racist or similar expression. Of course, *Collin v. Smith* declined to decide whether or not a traumatized Holocaust survivor could successfully sue a Nazi leader in tort or if such suit would survive First Amendment scrutiny, and ruled the various Skokie “hate” ordinances in question unconstitutional on First Amendment grounds.

Furthermore, I do *not* agree with Delgado that verbal racial insults should be made a tort, although, if persistent, they might be within the “unlawful act” concerning hate expression involving “*invasion of privacy*” referred to in s. 11. I acknowledge the legitimacy of having repeated verbal abuse being considered as a form of harassment prohibited by human rights legislation.

Although the severe psychological effect of hate speech has been among the reasons the Supreme Court of Canada upheld certain “hate” provisions (see *Keegstra*, *supra* note 2 and *Taylor*, *supra* note 4), I respectfully disagree that those reasons (powerful though they may be) are sufficient to justify a general ban on “hate speech”. Furthermore, I stand by the arguments I made in *Lipsett (1983)* (*supra* note 10 at 12 Man. L.J. 185 at pp. 294–296 and pp. 306–309) that insult, offensiveness, or “affront to dignity” *per se* are not sufficient grounds to prohibit expression.

Interestingly, in upholding the constitutionality of s. 300 of the *Criminal Code* (prohibiting publishing “a defamatory libel that he knows is false”) and the definition of defamatory libel in s. 298(1) (“...matter published...that is likely to injure the reputation of any person...or that is designed to insult the person”), the Supreme Court of Canada in *R. v. Lucas* [1998] 1 S.C.R. 439 distinguished between “mere insults” and “grave insults”. Cory, J., for the majority, stated that “I agree that the provision would be overly intrusive if it were to be construed so that mere insults should constitute a criminal offence.” (p. 474) However, considering *inter alia* the French version “destinée à outrager”, the Court held, “[w]hen s. 298 is read in the context of the aim of the section and the French text is taken into account it becomes apparent that the phrase ‘or that is designed to insult the person’ should be read as requiring proof of a grave insult. Thus, the inclusion of insults in the definition of defamatory libel is minimally impairing.” (pp. 475-476)

However, the circumstances which I envisage for this section involve materials and circumstances far more severe than mere insults, grave insults, simple offensiveness, or an

(b) Such display is unnecessary for the expression of any ideas or for any other legitimate purpose.<sup>146</sup>

14.(2) In this section “hate materials” are materials which advocate, promote, or express hatred against any identifiable group.

### Calling for Boycott

15.(1) It is an unlawful act to publicly advocate, promote, or express hatred against any identifiable group while calling for a boycott against such group or its members;

15.(2) In this section “calling for” includes:

(a) Urging the initiation or commencement of a boycott irrespective of whether or not the boycott materializes;

(b) Urging the continuation or participation in a boycott that has commenced;

(c) Pressuring people to participate in a boycott by methods such as picketing, threats of retaliation, or recording and revelation of the names of participants or non-participants.

15.(3) In this section “boycott” includes

(a) Refusing to conduct business with or to maintain a business, professional, or academic relationship with members of such group;

(b) Refusing to conduct business with or to maintain a business, professional, or academic relationship with an enterprise or institution

---

affront to dignity against any individual or group *without more*. Furthermore, this provision is substantially narrower in scope than the general prohibition against hate speech or materials “indicating discrimination” as that term has been interpreted in the cases which I criticized in the article referred to in Lipsett 1983, *supra* note 10.

The types of materials that I have in mind for this section includes extraordinarily large and widely visible billboards, or neon or other electrical signs of that nature that light up the night and are visible from a great distance. I am *not* referring to ordinary methods of communication—such as books, articles, newspapers, pamphlets, letters, signs, buttons, or placards. Perhaps a provision such as this is unnecessary or unworkable, or in need of major redrafting. However, I am suggesting considering such a provision out of an abundance of caution to avoid any lacuna in the law that might be created by the elimination of general “hate” provisions and of wide-ranging provisions dealing with signs “indicating discrimination.”

<sup>146</sup> Clause (1)(b) may actually be redundant as it is hard to see how such materials could be necessary for expression of ideas. Indeed such methods of communication may be inimical to rational consideration and analysis of ideas, and could resemble (or even overlap) material or circumstances referred to in section 10 or 12. The clause is only added as a precaution against over-broad interpretation or overzealous application of this section.



because of the connection, involvement, or association of members of such group with the enterprise or institution;

(c) Refusing to conduct business with or to maintain a business, professional, or academic relationship with any individual, enterprise, or institution because of the association of such individual, enterprise, or institution with members of such group;

(d) Refusing to fulfill one's business, professional, or employment obligations:

(i) To members of such group; or

(ii) In relation to any function, business, goods, or services because of the connection of such function, business, goods, or services to members of such group.

15.(4) Nothing in this section shall prevent the criticism of, or discussion concerning, the actions or policies of any country, government, or group; or calling for, suggesting, or discussing any governmental policy or action.<sup>147</sup>

---

<sup>147</sup> At first glance, this suggestion might seem strange in an article largely intended to protect freedom of expression. At least in certain circumstances, boycotts (including some of the pressure tactics referred to in clause 15(2)(c)) have been held to be within First Amendment protection. In *NAACP v. Clairborne Hardware*, 102 S. Ct. 3409 (1982), the protected boycott had racial elements—it was a boycott of *white* merchants intended to bring about civil rights reforms. However, far from promoting hatred or discrimination, its purpose was “designed to force governmental and economic changes and to effectuate rights guaranteed by the Constitution itself.” (p. 3426)

This proposed section does not prohibit all boycotts, or even all political boycotts, but merely prohibits calling for boycotts *in conjunction with* advocating, promoting, or expressing hatred against identifiable groups. As I argued earlier, even though certain ideas taken *alone* shouldn't be banned, and certain methods of communication and/or actions ought ordinarily to be permissible, the particular message *coupled* with particular actions or methods of communication might create a high enough degree or risk of harm as to justify prohibiting or restricting them *when they are carried out together*.

Additionally, as sympathetic as one might be to the American Black civil rights movement (or other civil rights or progressive movements that have utilized methods such as boycotts), there are aspects of the *NAACP v. Clairborne Hardware* judgment itself that one can find troubling. The Court held:

“In addition, names of boycott violators were read aloud at meetings of the First Baptist Church and published in a local newspaper. Petitioners admittedly sought to persuade others to join the boycott through social pressure and the ‘threat’ of social ostracism. Speech does not lose its protected character, simply because it may embarrass others or coerce them into action...” (pp. 3423-3424).

It further held that “There is nothing unlawful in standing outside a store and recording names.” (p. 3432) Though citing another case where privacy arguments were rejected (at p. 3424), I respectfully suggest that the Court was unduly dismissive of the privacy interests of a person (especially a private citizen) in not having personal activity deliberately monitored,

## CONCLUSION

I have attempted to set out, in a very rough and tentative form, a framework for the substantive and remedial provisions of a new, comprehensive, and exclusive law that would replace all existing “hate speech” laws in Canada. I have not attempted to draft the procedural provisions, although, as I mentioned, proceedings would be brought by the federal Attorney General<sup>148</sup> and would be tried in the provincial or territorial superior courts. Of course, a complete appeal would have to be available from a conviction or a finding that an unlawful act was committed, and an appeal “on a question of law alone” would have to be available from an acquittal or finding that an unlawful act was not committed. It would seem that, in order to prevent interference with freedom of expression in unclear or uncertain cases, the Crown should have to prove the allegations, (including all the ingredients) *beyond reasonable doubt* in proceedings to find “an unlawful act” as well as in criminal proceedings.

recorded, and publicized. Worthwhile though the purpose of the boycott was, ends do not always justify the means. Furthermore, I doubt whether coercive speech ought to receive the same degree of protection as purely persuasive, ideological, or political speech.

There may be cases other than those envisaged either in *NAACP v. Clairborne Hardware* or this proposed section where boycotts are so unfairly discriminatory or interfere with freedom of expression to such a degree that legal restrictions against their organizers or enforcers may be appropriate. A boycott against academics or other *individuals* (or even institutions) because of disagreement with their country’s policies does not seem just. Boycotting a business because of its owner’s political beliefs or actions, or boycotting a bookstore because it carries the works of a particular author, seem to be cases where certain forms of private acts can be almost as detrimental to freedom of expression as certain forms of government action. Such cases are *not* covered by this proposed section, and are beyond the scope of this article.

Boycotts have a long history in the persecution of, and discrimination against, minority groups and their members. It is such scenarios that this section is intended to protect against. Although it would be an inappropriate interference with individual liberty (as well as largely unworkable) for the law to dictate to a private consumer whom to deal with or to question him/her in this matter—*organizers, public instigators and enforcers* are another matter. I would ordinarily be reluctant to call for limitations on the right to encourage otherwise lawful actions. As previously argued, banning hate speech *per se* seems to be unduly restrictive. However, I suggest that a prohibition against hate speech *in conjunction with* a call for identifiable group-based boycotts seems like a reasonable aspect of a broader compromise solution.

It must be emphasized that the advocacy, promotion, or expression of hatred against the identifiable group is the *sine qua non* for this section to be applicable. Other forms of boycotts, including politically motivated boycotts, are not intended to be covered by this section. As a precaution, subsection (4) is included to guard against inappropriate application of this section, although better drafting of that subsection and indeed of the entire section may be needed for effective protection of freedom of expression.

<sup>148</sup> A provision similar to s. 318(3) of the *Criminal Code* should be included and state “no proceedings under this Act shall be instituted without the consent of the Attorney General of Canada.”

I have not used the word “publishes” or “broadcasts” in any of these provisions, nor have I generally dealt with the issue of when (or if) a person should be prohibited from publishing or broadcasting or otherwise facilitating the communication of material other than his/her own. More thought on this matter may be desirable. However, care must be taken to avoid penalizing publishers or broadcasters or other persons who do not share the intention of the original communicator or knowledge of the content of the material. Furthermore, it is necessary to avoid penalizing or restricting the publishing, broadcasting, or reporting of the “hate” materials of others when this is done for legitimate purposes, such as to expose hate-mongers to the public or to discuss the problem.<sup>149</sup>

Neither have I dealt with the issue of whether any *in rem* proceedings are necessary to replace s. 320 of the *Criminal Code*, or if any materials of the nature referred to would still have to be excluded from Canada under the Customs Tariff. However, if still needed, *in rem* proceedings would have to be quite rare, as the evil targeted in this proposed Act is (at least in most cases) not the material *per se*, but the material *in conjunction* with the additional circumstances referred to. Even the most virulent “hate” materials might be needed for *bona fide* research, educational, and journalistic purposes, and indeed have become part of “general knowledge.”<sup>150</sup> Not having any expertise in computer science or technology whatsoever, I am not even attempting to offer an opinion as to what, if any, provisions are needed to replace s.320.1 of the *Criminal Code* concerning deletion of material from computer systems.

It might be worth considering whether an accused who is acquitted, or a respondent who has been found not to have committed an “unlawful act”, should be entitled to recover costs from the Crown. It seems unfair that a person should suffer an onerous financial burden simply for doing what is found to have been within a person’s constitutional rights. Furthermore, the prospect of facing this burden could pose an additional “chilling” factor on those whose contemplated expression could well prove legitimate. It could even be argued that an accused or respondent in all cases brought under this Act should be entitled to have counsel provided at public expense. This would not only avoid preventing or deterring such a person from presenting a complete and effective defence, it would help reduce the risk of setting an unduly repressive precedent and would assist in the clarification of the law and the development of the jurisprudence in this area. If society believes that it needs legislation that limits a

---

<sup>149</sup> See *Jersild v. Denmark* (1994) 19 E.H.R.R. 1 (European Court of Human Rights).

<sup>150</sup> See *Braun*, *supra* note 46 at p. 111 concerning the dilemma of whether or not a bookstore should carry *Mein Kampf*.

constitutional right such as freedom of expression, it should take all reasonable steps to ensure that it is not unnecessarily or inappropriately applied.

I must reiterate that I do not believe that freedom of expression is absolute and that I respect and appreciate the powerful arguments favouring prohibitions against “hate speech”. However, it seems that the current legislative and jurisprudential scheme in Canadian federal (and much provincial) law goes unnecessarily far in attempting to deal with the problem. In some circumstances it may be counterproductive to its legitimate goals. I have attempted to identify from Canadian legislation and cases, comparative and international jurisprudence, literature, and indeed general knowledge, some of the circumstances which seem to require some sort of legislative response. It is my wish to develop legislation that would cover these circumstances without having the far-reaching effect on expression described earlier. I do not know if I have even come close to achieving an appropriate balance, but I hope that this attempt at least encourages further thought in this area that might lead to that goal.