THE REGULATION OF HATE SPEECH UNDER THE *CANADIAN HUMAN RIGHTS ACT*

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ABSTRACT

This paper summarizes the recommendations made in the report I prepared for the Canadian Human Rights Commission concerning s.13 of the CHRA. In the report I recommended the repeal of the section so that the CHRC and the Canadian Human Rights Tribunal would no longer deal with hate speech, and in particular hate speech on the Internet. I took the position that state censorship of hate speech should be confined to a narrow category of extreme expression – that which explicitly or implicitly threatens, advocates or justifies violence against the members of an identifiable group, even if the violence advocated is not imminent – and that the restriction of this narrow category of expression should be dealt with under the Criminal Code rather than the CHRA.

I. INTRODUCTION

In June of 2008 I was asked by the Canadian Human Rights Commission [CHRC] to write a report about the regulation of hate speech on the Internet, focusing specifically on section 13 of the *Canadian Human Rights Act [CHRA].* Section 13 prohibits the repeated communication on the phone system or the Internet of any matter "that is likely to expose a person or persons to hatred or contempt by reason of the fact that person or those persons are identifiable on the basis of a prohibited ground of discrimination" – such as race, gender and religion.

I was asked to do this at a time when the CHRC was coming under significant scrutiny. There are, I think, two reasons for this increased scrutiny of the CHRC. First, the CHRC (and other Human Rights Commissions [HRCs]) have in recent years received and investigated complaints about speech that is not so far removed in content and tone from widely-held views -- notably, speech that links Muslims to violence, and anti-gay speech that rests on established religious views. Until recently, virtually all of the complaints received by the CHRC concerned postings on neo-Nazi or white-supremacist websites. Second, the CHRC, as well as several of the provincial Human Rights Commissions (HRCs), have received complaints against mainstream publications (or at least their Internet versions), including *Maclean's* magazine and smaller publications such as the *Western Standard* and *Catholic Insight*.

I submitted my report to the CHRC in late October 2008. (Moon, 2008) In the report, I recommended the repeal of s.13 of the *CHRA* so that the CHRC and the Canadian Human Rights Tribunal (CHRT) would no longer deal with hate speech, and in particular hate speech on the Internet. I argued that hate speech should continue to be prohibited under the *Criminal Code*. I took the position that state censorship of hate speech should be confined to a narrow category of extreme expression – that which threatens, advocates or justifies violence against the members of an identifiable group, even if the violence advocated is not imminent – and that the

restriction of this narrow category of expression should be dealt with under the *Criminal Code* rather than the *CHRA*. My recommendation rested on three claims.

II. THE RESTRICTION OF EXTREME EXPRESSION

The first claim is that the failure to ban the extreme or radical edge of prejudiced speech carries too many risks, particularly when it circulates within the racist subculture that subsists on the Internet. The familiar freedom of expression position is that ideas cannot be censored simply because we fear that members of the community may find them persuasive or that an individual's self-understanding or self-esteem may be negatively affected. It is often said that we should respond to racist claims not with censorship, but instead by offering competing views that make the case for equal respect or by creating more avenues for marginalized groups to express themselves. Faith in human reason underlies most accounts of freedom of expression and cannot simply be cut out and discarded from the analysis. Yet, we know that in some times and places reason does not always operate. Hate speech on the Internet is often directed at the members of a relatively insular racist subculture. When directed at such an audience, extreme speech may reinforce and extend bigoted views without being exposed to public criticism. Individuals, already weighed down by prejudice or susceptible to manipulation or already part of an extremist subculture, will see in these claims a plausible account of their social and economic marginalization and a justification for radical action. Because the Internet audience is highly fragmented, it is easy for a particular website to operate at the margins and avoid critical public scrutiny. While most Internet websites are public in the sense that they are generally accessible, the audience for a particular site is often self-selecting and sometimes quite small. Smaller hate sites (or those that are less easily accessed such as chat rooms) that link like-minded individuals are able to encourage a sense of intimacy and identity and to operate below the radar. Thus these sites can be an effective means for individuals and groups, who hold hateful views, to encourage others to adopt more extreme views or to take violent action. It may be then that the failure to ban the extreme or radical edge of prejudiced speech – that which threatens, justifies or advocates violence – carries too many risks, particularly when it is directed at the members of a racist subculture or occurs in a context in which there is little opportunity for response. The advocacy of violence may be a concern because, in the words of the Cohen Committee, "in times of stress such 'hate' could mushroom into a real and monstrous threat to our way of life" (Cohen Commission, 1966 p. 24) or more likely because it may encourage "isolated" acts of violence against members of an identifiable group, acts such as 'gay-bashing'. Hate crimes are committed most often not by organized groups but by individuals who have immersed themselves in the extremist subculture that operates principally on the Internet.

III. LESS EXTREME SPEECH

The second claim is that less extreme forms of discriminatory expression, although harmful, cannot simply be censored out of public discourse. Any attempt to exclude from public discourse, speech that stereotypes or defames the members of an identifiable group would require extraordinary intervention by the state and would dramatically compromise the public commitment to freedom of expression. Because these less extreme forms of discriminatory expression are so commonplace, it is impossible to establish clear and effective rules for their identification and exclusion. Because they are so pervasive, it is vital that they be addressed or confronted rather than censored. We must develop ways other than censorship to respond to expression that stereotypes and defames the members of an identifiable group and to hold institutions such as the media accountable when they engage in these forms of discriminatory expression.

IV. THE HUMAN RIGHTS PROCESS

The third claim is that a narrowly drawn ban on hate speech that focuses on expression that is tied to violence does not fit easily or simply into a human rights law that takes an expansive view of discrimination, emphasizes the effect of the action on the victim rather than the intention or misconduct of the actor, and employs a process that is designed to engage the parties and facilitate a non-adjudicative resolution of the "dispute" between them.

The language of s.13 is potentially quite broad in its scope. The section prohibits "the repeated" communication on the phone system or the Internet of any matter "that is likely to expose a person or persons to hatred or contempt by reason of the fact that person or those persons are identifiable on the basis of a prohibited ground of discrimination". However, the courts and the tribunal have interpreted the provision narrowly. According to Chief Justice Dickson, writing for the majority of the Supreme Court of Canada in *Canada v. Taylor*, (Taylor, 1990) the words "hatred or contempt" in the context of s. 13(1) refer only to "unusually strong and deep-felt emotions of detestation, calumny and vilification" that are "ardent and extreme" in nature:

> In sum, the language employed in s. 13(1) of the *Canadian Human Rights Act* extends only to that expression giving rise to the evil sought to be eradicated and provides a standard of conduct sufficiently precise to prevent the unacceptable chilling of expressive activity. Moreover, as long as the Human Rights Tribunal continues to be well aware of the purpose of s. 13(1) and pays heed to the ardent and extreme nature of feeling described in the phrase "hatred or contempt," *there is little danger that subjective opinion as to offensiveness will supplant the proper meaning of the section.* [emphasis added]

In the report, I argued that the absence of an intention requirement is a problem, because it leaves the door open to a broader or more discretionary application of s.13. In the *Taylor* case the Supreme Court of Canada did not consider the absence in s.13 of an intention requirement (that the respondent intended to spread hatred or knew that his speech was likely to do so) to be fatal to the provision's constitutionality. Dickson C.J. held that the absence of an intention requirement did not undermine the constitutionality of section 13 because the purpose of human rights legislation is to "compensate and protect" the victim rather than "stigmatize or punish" the person who has discriminated. According to Dickson C.J., even though "the section may impose a slightly broader limit upon freedom of expression than does section 319(2) [the hate speech provision] of the *Criminal Code*... the conciliatory bent of a human rights statute renders such a limit more acceptable than would be the case with a criminal provision." Yet, despite the familiar claim that human rights codes are about harmful effects rather than wrongful intentions, the CHRC and the CHRT have not attempted to measure the effects of hate speech. It is, in fact, difficult to prove the impact of expression on the attitudes and actions of audience members, who may understand and react to the communication in many different ways. A wide range of discriminatory representations may contribute to hateful attitudes and discriminatory actions in the community. Indeed, less extreme, more commonplace, instances of discriminatory speech may provide the groundwork necessary for the spread of hateful attitudes and so might be caught by section 13 on an ordinary reading of its terms. In determining whether the communication at issue breaches section 13, the CHRT looks not at its actual impact, but instead at the extreme content and hateful tone of the communication. It is difficult to describe the wrong to which section 13 is a response without referring to the meaning or intention of the communicator. Not surprisingly, the language of intention frequently appears in the section 13 decisions of the CHRT.

Even though the scope of the prohibition has been narrowly defined by the CHRC and the CHRT, there are at least two significant problems with the current process. (It is worth noting that the small number of section 13 cases that have been sent by the CHRC to the Tribunal, and in which the Tribunal has found a breach of the section, have all (or almost all) involved expression that is so extreme and hateful that it may be seen as advocating violence against the members of an identifiable group.) The first problem is that free speech interests are affected every time an investigation occurs – particularly since the investigation engages the parties and takes 8 to 10 months to conclude. This is a problem because the CHRC is required to investigate a complaint unless it is trivial, vexatious, frivolous or made in bad faith. The CHRC therefore is bound to investigate some complaints that are unlikely to proceed to adjudication. Human rights commissions may be reluctant to exclude a complaint prior to investigation on the grounds that it is trivial, because such a finding may be seen as downplaying the genuine feelings of hurt or injury experienced by minority group members and will preclude the possibility of a facilitated resolution of the 'dispute'. Because s.13 is located in a law that seeks to advance the goal of social equality through education and conciliation, the CHRC may be inclined to err on the side of inclusion when deciding whether a complaint should be rejected prior to investigation on the grounds that it is trivial.

The second problem is the burden that the process puts on private complainants. Hate speech is most often directed at a receptive, or at least interested, audience and is only known to the complainant because she or he has looked for it or stumbled across it. Hate speech necessarily targets a group rather than an individual. The complainant makes the section 13 complaint on behalf of the group or society in general. She/he may not even be a member of the group targeted by the speech but has simply taken the initiative to bring a complaint. It is not accidental, then, that particular individuals have played a leading role in the initiation of complaints. Without the initiative of these individuals, section 13 might have no operation at all. The complainant carries responsibility for the complaint throughout the process, at both the investigation and adjudication stages. (While the CHRC has the legislative authority to initiate complaints under section 13, it has generally not acted on this. The CHRC is not required to appear at the CHRT adjudication, but may do so as representative of the public interest.) In addition to the burden of time

and money that a complainant must bear, particularly if the complaint proceeds to adjudication before the CHRT, a complainant may be subjected to threats of violence. We should not expect complainants to bear such a burden. Moreover, searching neo-Nazi websites for hate speech, and engaging with individuals on those sites to determine their identity, involves ethical challenges that should not be dealt with by private citizens. Hate speech harms the group and the community. It is a public wrong. The state, not private citizens, should be responsible for the enforcement of the law.

V. CHANGES TO S.13

In the report I also suggested changes that should be made to section 13 of the *CHRA*, if it is not repealed. These changes would reshape section 13 so that it more closely resembles a criminal restriction on hate speech. They include: (i) changes to the language of section 13(1) to make clear that the section prohibits only the most extreme instances of discriminatory expression, and more particularly, expression that explicitly or implicitly threatens, advocates or justifies violence against the members of an identifiable group; (ii) the amendment of section 13(1) to include an intention requirement; and (iii) the amendment of the *CHRA* to establish a distinct process for the investigation of section 13 complaints by the CHRC. Under the amended process, the CHRC would receive inquiries and information from individuals or community groups but would have the exclusive right to initiate an investigation in section 13 cases. A third set of recommendations addressed the role of non-state actors, most notably the print media, in the prevention of expression that is hateful or discriminatory in character.

The CHRC, in a report to Parliament in June 2009 (CHRC, 2009), responded to the recommendations in my report. The CHRC called for a continuation of the "dual approach" to the regulation of hate speech "with both the *CHRA* and the *Criminal Code* being applied as appropriate". According to the CHRC, human rights laws are the appropriate mechanism "to deal with situations where the intent of the person posting the messages may not be as clear, but where the extreme nature of the hate messages and their impact" justify their removal even when there is no "moral blameworthiness" on the part of the person posting them. The main difficulty I have with the CHRC's argument (that human rights code regulation is necessary to deal with hate speech that is not improperly motivated) is that it seems to assume that less extreme instances of "hate speech" will be caught by s.13. Yet the CHRC also argues that s.13 does not unduly restrict freedom of expression because it catches only the most extreme and hateful forms of discriminatory expression.

VI. PRESS COUNCILS

Because hate speech laws focus on extreme speech, they leave untouched expression that employs stereotypes, or makes misleading or unfair claims, about the members of an identifiable group. Yet, a "laissez-faire" approach to discriminatory speech fails the groups that are victimized and implicates the larger society in that victimization, because communicative power is inequitably distributed. This speech may be insulting and offensive to minority communities and may affect their position or treatment within the larger community. It may also provide the foundation for more extreme "hate speech", particularly when it appears in the mainstream media. The familiar refrain of those who oppose the censorship of hate speech or group defamation is that the answer to bad speech should be "more speech" – hate speech should be answered, not censored. But if we are serious about the "more speech" answer, then we must think about the real opportunities individuals and groups have to participate in public discourse and respond to speech that is unfair and discriminatory. Groups within the community should have a meaningful opportunity to respond to expression that is not so extreme that it violates criminal or human rights laws but may nevertheless affect their position within the larger community.

To advance this end, I argued that all major print publications should belong to a provincial or regional press council that has the authority to receive a complaint that the publication has depicted an identifiable group in an unfair or discriminatory manner and, if it decides that the complaint is well-founded, to order the publication to print its decision. A decision by the council that its code of conduct has been breached results not in censorship but in "more speech" – the publication of a statement that the newspaper breached the code and, more particularly in this context, that it published material that unfairly represented the members of an identifiable group. I also suggested that if the major publications in the country are not all willing to join a press council, then the establishment of a national press council with statutory authority and compulsory membership should once again be given serious consideration. A newspaper is not simply a private participant in public discourse; it is an important part of the public sphere where discussion about the affairs of the community takes place. As such, it carries a responsibility not to defame or stereotype identifiable groups within the Canadian community.

VII. BALANCING RIGHTS

Hate speech regulation is often said to involve the balancing of competing values or rights – the right to

freedom of expression versus the right to equality. The assumption is that an increase or gain in one of these values involves a decrease or loss in the other. The issue then is how much weight should be given to each value. Yet it is not clear that equality and free expression trade off in this simple way. It is true that when discriminatory views are expressed more widely in the community, the members of the target group may feel less secure, and others in the community may feel more comfortable engaging in acts of discrimination. However, an egalitarian society will not be achieved simply because the state has successfully banned the public expression of prejudice (an impossible task, in any event). Prejudiced views, although impeded, will survive in private life and so must be addressed. But more importantly, a social commitment to equality that will stand against the winds of change must rest on a judgment that all persons are deserving of basic respect and on a conscious rejection of prejudiced views. As I have already argued, it may sometimes be necessary to censor speech. When speech is extreme and occurs in a context in which it is unlikely to be examined critically, we should not take the risk that it may effectively encourage its audience to take extreme action. This is not the same, however, as attempting to expunge all instances of prejudiced expression from public discourse in order to advance a broad-based commitment to equality.

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