Combating Hate and Preserving Free Speech:

WHERE IS THE LINE?

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Introduction

This paper will discuss the following topic: "Combating hate and preserving free speech: Where is the line?" In particular, it will consider this topic in the context of section 13 of the Canadian Human Rights Act, which states:

> It is a discriminatory practice for a person or a group of persons acting in concert to communicate telephonically or to cause to be so communicated, repeatedly, in whole or in part by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament, any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination.

Because of this provision's focus on telephonic communication, this question becomes seemingly more interesting and important with the rise in global communication, especially in the context of the Internet.

General discussion about free speech

Any discussion of a restriction to the freedom of speech, such as that found in section 13, should begin by recognizing the crucial value of free speech in a democratic society. Since 1982, that value has been constitutionally protected by way of section 2(b) of the *Canadian Charter of Rights and Freedoms,*[2] which states:

> Everyone has the following fundamental freedoms:
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

The tradition and protection of free speech in Canada, of course, predates its guarantee in the Charter. It first achieved a measure of constitutional protection by the Supreme Court of Canada in *Reference re: Alberta Legislation,*[3] more commonly known as the Alberta press case.

That case considered the constitutionality of the 1937 *Accurate News and Information Act*,[4] which gave the Alberta government power over how newspapers reported about the attempted introduction of social credit in that province.

There was nothing in Canada's constitution at that time, *the British North America Act*,[5] that prevented the Province from passing such legislation. Nevertheless, the Supreme Court of Canada found that it was unconstitutional. The Court reasoned that:

> Under the constitution established by the British North America Act, legislative power for Canada is vested in one Parliament… That statute contemplates a parliament working under the influence of public opinion and public discussion…
> The right of public discussion is, of course, subject to legal restrictions; those based upon considerations of decency and public order, and others conceived for the protection of various private and public interests…
> Even within its legal limits, it is liable to abuse and grave abuse, and such

> abuse is constantly exemplified before our eyes; but it is axiomatic that the practice of the right of free public discussion of public affairs, notwithstanding its incidental mischiefs, *is the breath of life for parliamentary institutions*.[6]

The connection between freedom of expression and democracy is evident. It is through the discussion of issues and ideas that we achieve political consensus. We indicate that consensus about desirable political policy through the casting of a vote on Election Day.

But the value of free speech to a democracy comes not only through benefit to the community. It also makes possible the ability for the individual to become active in the political process – to participate in and to shape the issues that are discussed.

The ability and need to express oneself is an important characteristic of human beings. Justice Thurgood Marshall of the United States Supreme Court perhaps said it best when considering the constitutional guarantee of freedom of speech under the First Amendment to the United States constitution:

> The First Amendment serves not only the needs of the polity but also those of the human spirit – the spirit that demands self-expression. Such expression is an integral part of the development of ideas and a sense of identity. To suppress expression is to reject the basic human desire for recognition and affront the individual's worth and dignity.[7]

One should not be surprised that I quote an American judge, because most all discussion about free speech naturally resorts to American jurisprudence. The United States, more than any other country, values and protects the freedom of speech.

Although some would remind us of the period of McCarthyism and the fact that Communist literature in the United States was banned, the Americans certainly do have a robust constitutional protection of expression, and their jurisprudence is replete with ringing and quotable phrases of reverence to free speech.

Perhaps one of the great contributions to discussions about free speech is the dissent of Justice Oliver Wendell Holmes in the Supreme Court of the United States' decision in *Abrams v. United States*.[8] The case concerned five men who were convicted of inciting resistance to the war effort and curtailing the production of essential war material. They had thrown leaflets from a building during the First World War, the first of which was signed "Revolutionists" and denounced the sending of American troops to Russia. The second leaflet, written in Yiddish, denounced the War and American efforts to impede the Russian Revolution. The men were sentenced to 20 years' imprisonment.

On appeal, a majority of the Court affirmed the lower court judgment. In his dissenting opinion, Holmes J. would have allowed the appeal because of his conclusions on free speech. He explained that we all, even caring and responsible citizens of a good and decent society, have an urge to censor what we perceive as evil and threatening to our order, security and civility:

> Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result, with all your heart, you naturally express your wishes in law and sweep away all opposition.[9]
>
> Holmes J. then went on to express one of the most often cited rationales for free speech:
>
> [T]he best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.[10]

This is the celebrated metaphor of the "marketplace of ideas," which postulates that free speech is necessary because it is the "marketplace of ideas" that generates what the truth really is. The American commitment, that a society where ideas are freely expressed is better than the one where ideas are controlled, has been likened to its commitment that free economic markets are superior to state-regulated economies.

Along a similar line of reasoning, John Milton had much earlier written, in his *Areopagitica* (1644): "Let [Truth] and Falsehood grapple; who ever knew truth put to the worse, in a free and open encounter." This notion is based on the view that human beings are rational creatures, who can distinguish truth from falsehood.

Some might argue that history since proves both Holmes and Milton wrong. To them, the success of the Joseph Goebbels' Nazi propaganda machine proves that people will not always

choose truth over falsehood, that truth will not always triumph, and that we cannot trust the free "marketplace of ideas" to ensure our security and the continued civility of our society.

Indeed, this position was recognized by in the *Report of the Special Committee on Hate Propaganda in Canada*,[11] more commonly known as the Cohen Committee Report. That report, however, which recommended the enactment of the hate propaganda provisions of the Canadian *Criminal Code*,[12] took the view that individuals can be persuaded to believe "almost anything" so long as the information or ideas are communicated in the proper circumstances and using the right technique:

> [W]e are less confident in the 20th century that the critical faculties of individuals will be brought to bear on the speech and writing which is directed at them. In the 18th and 19th centuries, there was a widespread belief that man was a rational creature, and that if his mind was trained and liberated from superstition by education, he would always distinguish truth from falsehood, good from evil. So Milton, who said "let truth and falsehood grapple; who ever knew truth put to the worse in a free and open encounter."
>
> We cannot share this faith today in such a simple form. While holding that over the long run, the human mind is repelled by blatant falsehood and seeks the good, it is too often true, in the short run, that emotion displaces reason and individuals perversely reject the demonstrations of truth put before them and forsake the good they know. The successes of modern advertising, the triumphs of impudent propaganda such as Hitler's, have qualified sharply our belief in the rationality of man. We know that under strain and pressure in times of irritation and frustration, the individual is swayed and even swept away by hysterical, emotional appeals. We act irresponsibly if we can ignore the way in which emotion can drive reason from the field.[13]

The debate continues, because others might suggest that Nazi Germany was not a free "marketplace of ideas" but rather a regime that practiced strict censorship. In support of this suggestion is the infamous 1933 Berlin "Bücherverbrennung" (Burning of the Books), during which 20,000 books were burned on the state allegation that they conflicted with Nazi ideology. The Nazis did not tolerate any competing thought or expression, and so those who take this view say that Nazi falsehood did not win over truth in a fair and open encounter.

An exercise in "line drawing" – an exercise in perspective

As a result, it seems fair to suggest that there are different places to draw the line between preserving free speech on the one hand and combating hate propaganda on the other. Thus, one could adopt a variety of different perspectives in trying to answer this question.

With particular respect to section 13 of the *Canadian Human Rights Act,* there is first the perspective of the words in that provision. Without going into too much detail at this point, the words of section 13 (namely, "likely to expose a person or persons to hatred or contempt") are capable of a rather broad interpretation. Understood broadly, section 13 could apply to much social and political comment. As an example, many Canadians have expressed themselves quite forcefully on both sides of controversial debates, such as the issues of equal marriage, abortion and the status of women within some religious communities. Some might allege that such expressions (on either side) have exposed them to hatred or contempt.

I would suggest, however, that the line cannot be drawn through an isolated consideration of the words of section 13. Ultimately, the line must be drawn according to the supreme law of Canada, the Charter, and how the Supreme Court of Canada has interpreted and applied section 13 to that law. It is only through an understanding of that exercise that one can anticipate future application.

To the extent that any line drawing can actually take place, I suggest that this is the answer to the question posed at the beginning of this paper. Before discussing the Canadian experience on this point, however, it is useful to consider some alternative perspectives that have been adopted in the world.

The American approach

Having briefly discussed the American approach to free speech, it makes sense to begin just south of our border. In the United States,

freedom of speech is staunchly protected by the courts under the First Amendment to their constitution, which, in part, reads:

> Congress shall make no law… abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

This protection applies with equal force to each State as a result of section 1 of the Fourteenth Amendment, which, in part, reads:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.

In the context of hate speech or expression, the decisions of the Supreme Court of the United States in *R.A.V. v. City of St. Paul, Minnesota*[14] and *Virginia v. Black*[15] serve as the current state of the law. At issue in the *R.A.V.* case was whether the First Amendment was violated by the following municipal ordinance: Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others *on the basis of race, color, creed, religion or gender,* commits disorderly conduct and shall be guilty of a misdemeanor.[16]

After considering the history of jurisprudence on the limited exceptions to the constitutional freedom of speech, Scalia J. (for a majority of the Court) concluded that the municipal ordinance was an impermissible violation of the First Amendment. This is because it regulated content:

> What we have here… [is a prohibition of] messages of "bias-motivated" hatred and in particular, as applied to this case, messages "based on virulent notions of racial supremacy."… St. Paul's brief asserts that a general… law would not meet the city's needs because only a content-specific measure can communicate to minority groups that the "group hatred" aspect of such speech "is not condoned by the majority."… *The point of the First Amendment is that majority preferences must be expressed in some fashion other than silencing speech on the basis of its content.*[18]

In the final words of his opinion, Scalia J. stated:

> Let there be no mistake about our belief that burning a cross in someone's front yard is reprehensible. But St. Paul has sufficient means at its disposal to prevent such behaviour without adding the First Amendment to the fire.

It is because of such a broad and protective approach to the First Amendment that the American courts have allowed forms of expression that other countries might not allow. In *R.A.V.*, for example, the effect of the decision was to allow the burning of a cross on the yard of the first black family to move into an all-white neighbourhood. A further example is found in the decision of the Federal Court of Appeals (7th Circuit) in *Collin v. Smith*,[19] where the Court concluded that the First Amendment protected a neo-Nazi parade that was planned to take place through a predominantly Jewish neighbourhood.

As for verbal utterances, the case of *Brandenburg v. Ohio*[20] serves as a good example of the type of speech that has been allowed under the First Amendment. There, a Cincinnati television station was invited to attend and record a Ku Klux Klan rally, portions of which were later broadcast on television. The court concluded that "derogatory statements" were repeatedly made about Jews and African Americans, with the images of burning crosses and weapons in the background. Examples of those statements include: "This is what we're going to do to the niggers"; "Bury the niggers"; "Send the Jews back to Israel"; and "We intend to do our part." The following statement was also made with respect to the United States government: "We're not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken." The Supreme Court of the United States concluded that the First Amendment does not permit a State to criminalize these statements or advocacy of the use of force, because it is not directed to producing "*imminent* lawless action" [emphasis added].

The Supreme Court has yet to consider a case considering the dissemination of hate over the Internet. It has, however, concluded that there is no reason upon which to qualify the application of the First Amendment to the Internet context.[21]

The case of *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*[22] indicates some of the difficult jurisdictional problems that are

posed by the Internet. In that case, the court was faced with the question of whether to enforce an order that had been granted by a court in France.

The French court ordered Yahoo!, an American-based Internet service provider, to do a number of things with respect to its auction website, including: the elimination of French citizens' access to any Nazi objects for sale on the auction website, and the elimination of French citizens' access to web pages on Yahoo.com that display passages from *Mein Kampf*. This was because, in France, the criminal law prohibits the sale or display of Nazi-related materials.

In the American courts, Yahoo! sought a declaration that the order was neither recognizable nor enforceable under the laws of the United States. The United States District Court granted this declaration because it concluded that enforcement of the order would violate First Amendment rights.

On appeal, a majority of the Federal Court of Appeals overturned this decision. Ferguson J.A. concluded that the District Court did not have jurisdiction to award the declaration, because the French parties had not yet come to the American courts to enforce their legal rights. He declined to comment on whether, upon the happening of this event, the courts could enforce the French order.

A global consensus?

It seems fair to say that the American view is becoming a minority one in the world. Canada is part of what appears to be a growing global consensus, which observes that careful restrictions of some forms of speech are both desirable and necessary.

The best indicators of global consensus are, of course, the international treaties and the number of countries that have ratified them and implemented their obligations.

A good example is the *International Covenant on Civil and Political Rights*,[23] of which Article 20 states, in part:

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

In its report to the United Nations, Canada indicated that the enactment of Section 13 of the C*anadian Human Rights Act* was part of its implementation of this covenant.[24] Canada also made no reservations to its ratification.

When, however, the United States of America ratified the covenant, it did so by making a number of reservations, including:

> (1) That article 20 does not authorize or require legislation or other action by the United States that would restrict the right of free speech and association protected by the Constitution and laws of the United States.

A further example is the *International Convention on the Elimination of All Forms of Racial Discrimination*,[25] of which Article 4 states:

> States 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:
> (a) 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;
> (b) Shall declare illegal and prohibit 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;
> (c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

Based on a general survey of these treaties, it would seem that more and more countries are enacting domestic legislation to implement

measures consistent with these covenants.

The British approach

Before considering the Canadian experience, it is useful to consider one further context in the world, namely because of recent legislation that was passed by the Parliament of the United Kingdom.

As the *Public Order Act 1986*[26] currently stands, it is an offence if any of the following are intended to or are likely to stir up racial hatred:

- the use of words or behaviour or display of written material;
- publishing or distributing written material; the public performance of a play;
- distributing, showing or playing a recording;
- broadcasting or including a programme in a programme service.[27]

At present, the *Public Order Act 1986* only encompasses "racial hatred," which is defined in section 17 as: "[H]atred against a group of persons in Great Britain defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins."

Since 1998 and the passage of the *Human Rights Act 1998*,[28] the courts are required to interpret and apply the *Public Order Act 1986* with particular regard to the importance of the freedom of expression guaranteed by the *European Convention on Human Rights*.[29] Of particular importance is Article 10 of the Convention, which states:

> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Prosecutions under these provisions of the *Public Order Act 1986* have been quite rare, "with only 44 convictions between 1986 and the end of 2004."[30] None of those prosecutions have been published in the conventional caselaw reporters.

On June 9, 2005, the *Racial and Religious Hatred Bill*[31] was introduced to the House of Commons. In part, the Bill extends the protection offered by the *Public Order Act 1986* to the stirring up of hatred against persons on religious grounds. On July 11, 2005, just four days after the terrorist attacks on London's public transit system, the Bill was passed by the House of Commons and delivered to the House of Lords for its consideration.

During the committee stage of the House of Lords, the Committee expressed strong concern about the impact of the Bill on freedom of expression. As a result, the Committee voted in favour of adding the following clause to the Bill:

> **Protection of freedom of expression**
> Nothing in this Part shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents or a different religion or belief system to cease practising their religion or belief system.

The House of Lords approved this amendment, along with additional amendments that would: treat the religious hatred offences differently than the racial hatred offences; make only intentional behaviour a religious hatred offence; and remove the words "abusive and insulting" from the religious hatred offence, such that only "threatening" behaviour and speech would be caught.

As a result of such amendments, the Bill was sent back to the House of Commons for approval. On January 31 of this year (2006), the Bill was passed with all four amendments by just one vote.[32] Just prior to the vote on this matter, the Parliamentary Under-Secretary of State for the Home Department expressed concern that pas-

sage of the Bill with the amendments "would considerably reduce the scope of the Bill, to the extent that, in our view, it would be virtually impossible to bring a successful prosecution."[33]

The Canadian approach

With that more global context in mind, it is now possible to consider the Canadian experience on this issue. To begin, there are many ways in which Canada accepts limitations to the freedom of expression.

An easy example to think of is the use of publication bans to protect the integrity of criminal trials. An interesting example of a publication ban occurred when the testimony of certain witnesses before the Gomery Commission (who were facing criminal charges) was subject to publication bans. At the time, some pointed out that the information that the media were prohibited from communicating was relevant to democracy and could well affect election results.

The publication bans were eventually lifted, but some might suggest that this only happened after they proved ineffective; the information had become widely available from American websites.

Also in the criminal context, the banning of publication of information that might identify juveniles charged with crimes or sexual assault victims is a matter of routine in Canada.

There are even circumstances where it is justifiable to restrict core political expression. In *Harper v. Canada (Attorney General)*,[34] for example, a majority of the Supreme Court of Canada concluded that limits to third-party election advertising expenses violated section 2(b), but in a manner justified by section 1. To that majority, it was compelling to foster equality of public discourse and respect for the electoral process. The limitations prevent those who have access to significant financial resources from dominating the electoral discourse to the detriment of others.

Thus section 13 of the *Canadian Human Rights Act* is about one of many ways in which free expression is restricted in Canada. In the very first decision of the Canadian Human Rights Tribunal that considered section 13, *Canadian Human Rights Commission v. Taylor*,[35] the Tribunal noted that, in enacting section 13:

> Parliament has obviously ordained that certain kinds of speech have to be curtailed in the public good because the potential for harm outweighs the value to society in the guarantee of unrestricted freedom of speech.[36]

The Tribunal went on to state that section 13 reflects a policy of the Canadian government that:

> [I]ndividuals under the guise of freedom of speech and freedom of action cannot say things to take steps or incite or advocate the destruction of freedoms which all of us enjoy.[37]

The Canadian Human Rights Commission has the statutory duty to administer and enforce section 13. The difficulty is to balance the fundamental freedom of expression with the rights of others to live free of discrimination.

As noted earlier in the paper, I suggest that the balance is drawn in the manner articulated by the Charter and its interpretation and application by the Supreme Court of Canada.

To begin, I will briefly review the Charter's guarantee of freedom of expression.

Freedom of expression under the Charter

As earlier noted, section 2(b) of the Charter states:

> Everyone has the following fundamental freedoms:
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

The scope of the freedom is quite extensive. In general, the state cannot regulate the content or meaning of expression. It can, however, regulate the method or location of expression in limited circumstances. The Supreme Court of Canada recently summarized the scope of section 2(b) as follows:

> The fact that [a] message may not, in the view of some, have been particularly valuable or may even have been offensive does not deprive it of s. 2(b) protection. Expressive activity is not excluded from the scope of the guarantee because of its particular message. Subject to objections on the ground of method or location, as discussed below, all expressive activity is presumptively protected by s. 2(b)…
> Expressive activity may fall outside the scope of s. 2(b) protection because of how or where it is delivered. While all expressive content is worthy of protection… the *method or location* of the expression may not be. For instance, this

> Court has found that violent expression is not protected by the *Canadian Charter*… Violence is not excluded because of the message it conveys (no matter how hateful) but rather because the method by which the message is conveyed is not consonant with *Charter* protection.[38]

This exclusion from protection arose out of the recognition that violence, in and of itself, can be expressive. Despite such expressive content, the expression of content by way of a violent act is not protected under the constitutional freedom of expression.

The broad protection of the freedom of expression is not absolute. Freedom of expression is subject to reasonable limitations under section 1 of the Charter, which states:

> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Given the broad protection of expression under section 2(b), it is under section 1 that the challenging work most often takes place. The actual application of section 1 will be discussed in more detail below in the context of challenges made to the constitutional validity of expression-regulating statutes. It is thus useful to briefly mention those factors that a court will consider during a section 1 analysis.

Generally speaking, a law that violates a provision of the Charter will only be saved under section 1 if it "represents a substantial purpose, advances the purpose rationally, impairs the freedom no more than necessary, and is proportionate to the impairment of the freedom."[39] More particular to freedom of expression:

> While the court has defined the scope of the freedom under section 2(b) broadly so that it protects all non-violent forms of expression, when assessing limits under section 1 the court distinguishes between core and marginal forms of expression, identifying different instances of expression as more or less valuable and more or less vulnerable to restriction. Political expression, for example, is considered core expression. As such it can be restricted only for the most substantial and compelling reasons. In contrast, pornography and advertising are seen as marginal forms of expression because they are less directly linked to the values underlying freedom of expression.[40]

Thus, for example, a law that prohibits the spreading of false statements "likely to injure or cause mischief to any public interest" is not a justifiable limit to the freedom of expression. Even though such speech may lie at the marginal end of value, this type of restriction is too broad for the purposes of the section 1 proportionality assessment.[41] It is very different, however, when considering a law that prohibits "academic" debate in a manner which is likely to expose a targeted or identifiable group to hatred and contempt. This type of restriction is sufficiently tailored and in relation to a sufficiently pressing objective for the purposes of section 1.[42]

With that background in mind, it is now possible to consider the Charter's interaction with statutes that restrict the freedom of expression in the context of hate or hate propaganda. Before considering section 13 of the *Canadian Human Rights Act,* however, it is useful to briefly consider the application of the Charter to other methods by which Parliament has sought to prevent the dissemination of hate.

Criminal Code

There used to be a provision in the *Criminal Code*, one that was inherited from the English common law, which provided:

> Every one who wilfully publishes a statement, tale or news that he knows is false and causes or is likely to cause injury or mischief to a public interest is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

In the case of *R. v. Zundel*,[43] a majority of the Supreme Court of Canada struck down this provision (section 181 of the *Criminal Code*). In that case, Mr. Zundel had been convicted under section 181 for publishing a pamphlet entitled "Did Six Million Really Die?" The pamphlet questioned whether it had been established that six million Jews were killed before and during World War II, and further suggested that the Holocaust was a myth perpetrated by a worldwide Jewish conspiracy.

In her majority decision of the Supreme

Court of Canada, McLachlin J. concluded that section 181 violated section 2(b) of the Charter. The headnote of that decision nicely summarizes her approach to the freedom of expression:

> Section 2(*b*) of the Charter protects the right of a minority to express its view, however unpopular it may be. All communications which convey or attempt to convey meaning are protected by s. 2(*b*), unless the physical form by which the communication is made (for example, a violent act) excludes protection. The content of the communication is irrelevant. The purpose of the guarantee is to permit free expression to the end of promoting truth, political or social participation, and self-fulfilment. That purpose extends to the protection of minority beliefs which the majority regards as wrong or false.

With respect to section 1 of the Charter, McLachlin J. concluded that the violation of freedom of expression could not be justified. She concluded that Parliament had identified no social problem, much less a problem of substantial and pressing concern. In history, the objective behind section 181 was to prevent slanderous statements against the nobility and preserve political harmony. It goes beyond the history of section 181 to suggest that its objective is to combat hate propaganda or racism.

She noted that, if the goal of protecting the public from harm could constitute a "pressing and substantial" objective, virtually any law would meet the first part of the section 1 test. Instead, "[j]ustification under s. 1 requires more than the general goal of protection from harm common to all criminal legislation; it requires a specific purpose so pressing and substantial as to be capable of overriding the Charter's guarantees."[44]

Even if this objective was sufficient, McLachlin J. concluded that section 181 did not satisfy the proportionality analysis under section 1, because it was broader and more invasive than necessary to achieve the objective.

She also noted that other provisions in the *Criminal Code*, such as section 319, deal with hate propaganda more fairly and more effectively. That section states, in part:

> (1) Every one who, by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace is guilty of
> (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or
> (b) an offence punishable on summary conviction.
> (2) Every one who, by communicating statements, other than in private conversation, wilfully 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.
> (3) No person shall be convicted of an offence under subsection (2)
> (a) if he establishes that the statements communicated were true;
> (b) if, in good faith, the person expressed or attempted to establish by an argument or 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.

"Identifiable group" is defined as "any section of the public distinguished by colour, race, religion, ethnic origin or sexual orientation."[45]

A majority of the Supreme Court of Canada upheld section 319 as constitutional in the case of *R. v. Keegstra*.[46] In that case, Mr. Keegstra (a high school teacher) was charged under section 319(2) with wilfully promoting hatred against an identifiable group by communicating anti-Semitic statements to his students. Mr. Keegstra taught his anti-Semitic beliefs to his students and expected them to reproduce such teachings in class and on exams.

The Supreme Court of Canada unanimously concluded that section 319(2) violated Mr. Keegstra's freedom of expression because it restricted the expression of meaning and content. A majority of the Court, however, concluded that

this restriction was justified under section 1. They noted that, in creating this offence, Parliament was aware of the substantial harm that can flow from hate propaganda, and it decided to suppress the wilful promotion of such hatred against identifiable groups. The offence is not overly broad or vague, because the offence contains limits to ensure that it will capture only those types of expression that are hostile to Parliament's objective. The requirement of "hatred" reduces the scope of the offence to only the most severe and deeply felt form of opprobrium. The offence also contains the word "wilfully," thus adding a stringent mental element to the commission of the offence. Further, the exclusion of private communications, the need for the promotion of hatred to focus upon an identifiable group, and the inclusion of the defences in section 319(3) all support the conclusion that the offence constitutes a justifiable limitation to the freedom of expression.

A recent reiteration of this approach can be found in the decision of the Saskatchewan Provincial Court in *R. v. Ahenakew.*[47] In that case, Mr. Ahenakew was charged under section 319(2) with making comments to a reporter that wilfully promoted hatred against people of the Jewish faith. In particular, Mr. Ahenakew said to a reporter that Jewish people were a "disease," and that this was why Hitler "fried six million of those guys," In response to these statements, Irwin J. said:

> When one hears the audiotape, the fury and passion in the delivery of these statements, the court is convinced beyond a reasonable doubt that the sole purpose and intent in making these statements was to wilfully promote hatred against people of the Jewish faith within the meaning of section 319(2) of the Act. To equate a definable group of people to a disease is to dehumanize them, to deny them the basic respect and dignity that all human beings are entitled to and that it is justified to kill or to use the more offensive word, "fried", is clearly to subject them to being despised and subject to ill treatment even in the extreme such as was demonstrated by the Holocaust.[48]

In reaching his decision to convict, Irwin J. said the following with respect to the interaction of section 319(2) of the *Criminal Code* with section 2(b) of the *Charter*:

> The Supreme Court of Canada's decision in the case of *R. v. Keegstra* grappled with establishing a balance between an individual's Charter right to the protection of freedom of thought, opinion and expression and the right of members of an identifiable group not to be the victim of hate propaganda. They held that the propagation of hate causes harm, which runs directly contrary to the values central to a free and democratic society, and Parliament, in restricting the promotion of hatred, was seeking to support the notion of mutual respect necessary in a nation which respects the equality of all persons.
>
> Under Canadian law, a person is free to think what they like, say what they like whether it is true or untrue, mean, vicious or disrespectful, subject only to the laws of defamation and the prohibition against promoting hate against an identifiable group. Simply because a judge hearing a charge under section 319(2) dislikes, or finds offensive or completely untrue, statements of an accused, does not make the utterances of those statements a criminal offence. It is only when those statements are intended to promote hatred against an identifiable group will the court find that a criminal offence has been committed.[49]

Canadian Human Rights Act

Looking now to section 13 of the *Canadian Human Rights Act,* it is first useful to repeat the language of that provision:

> It is a discriminatory practice for a person or a group of persons acting in concert to communicate telephonically or to cause to be so communicated, repeatedly, in whole or in part by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament, any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination.

At first glance, one might think it odd that a human rights commission – an organization

devoted to protecting individual rights – should be charged with restricting an individual's freedom of expression. One must keep in mind, however, that the main purpose of human rights legislation is to protect individuals from discrimination. Section 2 of the *Canadian Human Rights Act* states:

> *The purpose of this Act* is to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, *to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their* needs *accommodated*, consistent with their duties and obligations as members of society, *without being hindered in or prevented from doing so by discriminatory practices* based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence for which a pardon has been granted [emphasis added].

In earlier days, human rights commissions were concerned with the posting of signs indicating, for example, that only whites would be admitted or that no Jews would be allowed. It seems clear that the prohibition of such signs (or job advertisements expressing similar sentiments) was the proper work of human rights commissions, despite the fact it restricted free expression.

The recognition that the fundamental purpose of human rights legislation is to protect individuals from discrimination is the key to understanding the leading decision of the Supreme Court of Canada on section 13 and the freedom of expression.

That case, *Canada (Human Rights Commission) v. Taylor*,[50] began before the Canadian Human Rights Tribunal in 1979.[51]

A Nazi sympathizer, John Ross Taylor, and his neo-Nazi organization, the Western Guard Party, made available recorded telephone messages denigrating Jewish and non-white people. The number was listed in the telephone directory under "White Power Message," and they also distributed cards to the public advertising the telephone number.

The Canadian Human Rights Tribunal concluded that this was a discriminatory practice in violation of section 13(1). Given that this was its first decision on section 13, the Tribunal extensively reviewed the parameters of the section in the context of its overall objectives. In considering the meaning of the phrase "likely to expose a person or persons to hatred and contempt," the Tribunal noted that similar words are used in the law of defamation. At para. 7, the Tribunal stated:

> There is also a well-established body of law relating to defamation in Canada which may make a person liable for damages for the publication of words containing an *untrue imputation* against the reputation of another. It has been held that an imputation which *tends to expose an individual to hatred, contempt* or ridicule is defamatory of him… *Members of an ethnic or racial group cannot resort to the law of defamation* for civil redress in respect of statements which defame a group as a whole without singling out particular individuals [emphasis added].

On its face, the standard set out in section 13(1) of "likely to expose a person or persons to hatred or contempt" is quite similar to that found in the law of defamation. In contrast to defamation, however, the wording of section 13(1) makes clear that it can be relied upon by groups.[52] Further, and also in contrast to the law of defamation, the Tribunal went on to conclude that truth is not a defence to section 13(1):

> Strange as it may sound, the establishment of truth is not in issue in this case… Parliament has deemed that the use of the telephone for this kind of discriminatory message is so fundamentally wrong, that no justification for the communication can avail the Respondents. The sole issue then is whether the telephonic communications of the Respondents are likely to expose a person or persons to hatred or contempt.[53]

The Tribunal also considered the requisite characteristics of the audience of the messages. It raised the question of "Who it is to do the hating?" People who already hate, or those who did not hate before but are induced or incited to hatred because of the communication? And do these questions refer to a small group already predisposed to hating? The reasonable person? The right-thinking person? Or everyone? Under

the law of defamation, the standard is generally set as follows:

> Simply speaking, does the publication have the tendency to lower the reputation of the plaintiff in the estimation of the community, or at least that portion of the community whose standards of opinion the court is willing to recognize, or what is commonly, if unfortunately, referred to as "right-thinking" members of society?[54]

After reviewing social scientific literature and evidence about the effect of hate propaganda on different individuals, the Tribunal concluded:

> In interpreting s. 13 of the *Canadian Human Rights Act,* however, one must be concerned with the possible susceptibilities of those individuals who may dial the phone number in question… The question is whether the matter communicated "is likely to expose a person or persons to hatred or contempt." It may be that certain individuals find the message so laughable or repulsive that it is the sender of the message who is exposed to hate and contempt. On the other hand, it is reasonable to conclude that there is a likelihood that some individuals may well harbour feelings of hatred and contempt for the minorities groups singled out in the messages after listening to them.
>
> Upon listening to the tapes and reading the messages, it is hard to believe that a rational individual in 1979 would take these incoherent meanderings seriously. But are individuals any more rational than those Germans affected by the comparable rantings of Adolph Hitler and his supporters?
>
> Diatribes like the ones before us eventually gave rise to the most extreme form of hatred and contempt for Jews in Germany in the 1930s and 1940s. We need no other crucible for us to be satisfied that the themes of the Respondent's telephone utterances, which bear a marked resemblance to the propaganda of Goebbels and Hitler, are likely to expose Jews to hatred or contempt.[55]

Once the case reached the Supreme Court of Canada, the primary issue was whether section 13(1) infringed the constitutional guarantee of freedom of expression. A majority of the Court concluded that, although section 13(1) did infringe s. 2(b) of the Charter, it was demonstrably justified under section 1.

In the decision of the majority, however, Dickson C.J.C. narrowed the application of the decision to just two of the prohibited grounds of discrimination:

> [T]he courts below examined the constitutional validity of the section only in so far as it concerns the grounds of race and religion. Moreover, the effect of the Charter upon the suppression of expression dealing with other prohibited grounds was not raised by the parties or interveners in argument. *For these reasons, the comments below speak solely to the question of whether the effect of s. 13(1) upon communications tending to expose persons to hatred or contempt on the bases of race or religion violates the Charter.*[56]

The Court heard and released its decision in *R. v. Keegstra* on the same days as it heard and released its decision in *Taylor*. Unlike *Keegstra*, however, *Taylor* was not concerned with the criminal law but with human rights legislation, the purpose of which is not to punish those who violate the law, but to protect individuals from discrimination. Dickson C.J.C. made note of this distinction:

> In applying the [section 1] approach to legislation restricting hate propaganda, a meaningful consideration of the principles central to a free and democratic society requires reference to *the international community's acceptance of the need to protect minority groups from the intolerance and psychological pain caused by such expression*. Such a consideration should also give full recognition to other provisions of the Charter, in particular ss. 15 and 27 (dealing with equality rights and multiculturalism)…
>
> It is essential, however, to recognize that, *as an instrument especially designed to prevent the spread of prejudice and to foster tolerance and equality in the community*, the *Canadian Human Rights Act* is very different from the *Criminal Code*. The aim of human rights legislation, and of s. 13(1), is not to bring the full force of the state's power against a blameworthy individual for the purpose

> of imposing punishment. Instead, provisions found in human rights statutes generally operate in a less confrontational manner, allowing for a conciliatory settlement if possible and, where discrimination exists, gearing remedial responses more towards compensating the victim.[57]

It was necessary to keep this distinction in mind when conducting the section 1 analysis.

In conducting that analysis, Dickson C.J.C. first concluded that the objective of promoting equal opportunity and preventing the harm caused by hate propaganda is of sufficient importance to override a constitutional freedom. In so concluding, he particularly referred to the Cohen Committee Report and its discussion on the substantial psychological effects that may result from being subject to racial or religious hatred.

From there, Dickson C.J.C. examined the proportionality factor, considering first the requirement for a rational connection between the constitutionally valid objective and the impugned law. At this stage of the analysis, he again made reference to the unique nature of the human rights regime:

> The process of hearing a complaint made under s. 13(1) and, if the complaint is substantiated, issuing a cease and desist order reminds Canadians of our fundamental commitment to equality of opportunity and the eradication of racial and religious intolerance. In addition, although criminal law is not devoid of impact upon the rehabilitation of offenders, the conciliatory nature of the human rights procedure and the absence of criminal sanctions make s. 13(1) especially well suited to encourage reform of the communicator of hate propaganda.[58]

Dickson C.J.C. further noted that "the fact that the international community considers such laws to be an important weapon against racial and religious intolerance strongly suggests that s. 13(1) cannot be viewed as ineffectual."[59] Thus, he concluded that s. 13(1) is rationally connected to Parliament's objective.

In considering whether s. 13(1) minimally impairs the freedom of expression, Dickson C.J.C. concluded that the provision is not overbroad or excessively vague, and that (similar to *Keegstra*) the phrase "hatred or contempt" refers only "to unusually strong and deep-felt emotions of detestation, calumny and vilification."[60] He went on to write:

> To the extent that this section may impose a slightly broader limit upon freedom of expression than does s. 319(2) of the *Criminal Code*, however, I am of the view that the conciliatory bent of a human rights statute renders such a limit more acceptable than would be the case with a criminal provision.[61]

Dickson C.J.C. noted the absence of an intent component to s. 13(1) (in contrast to the *Criminal Code* provisions on hate propaganda), but concluded that "the important Parliamentary objective behind s. 13(1) can only be achieved by ignoring intent, and therefore the minimal impairment requirement of the *Oakes* proportionality test is not transgressed."[62] Keeping that in mind,

> the chill placed upon open expression in such a context will ordinarily be less severe than that occasioned where criminal legislation is involved, for attached to a criminal conviction is a significant degree of stigma and punishment, whereas the extent of opprobrium connected with the finding of discrimination is much diminished and the aid of remedial measures is more upon compensation and protection of the victim.[63]

With respect to the possibility that imprisonment may be imposed by way of a contempt order (for failing to adhere to an order of the Tribunal), Dickson C.J.C. concluded that "subjective awareness of the likely effect of one's messages" would be a "necessary precondition for the issuance of such an order by the Federal Court."[64] This is because a contempt order would be preceded by an order of the Tribunal to cease and desist the discriminatory practice. As a result, it could not be argued that the individual is innocent about the effect of his or her message, because the Tribunal has already concluded (and informed the individual) that the messages are likely to have a harmful effect. Further, a finding of contempt by the Federal Court would need to be based upon an intentional disregard of the cease-and-desist order.

Dickson C.J.C. concluded his "minimal impairment" analysis by considering the absence

of a defence to a discriminatory practice under s. 13(1), even and especially for truthful statements. It will be remembered that, in *Keegstra*, the presence of defences in the *Criminal Code* provisions was discussed during the section 1 analysis. In *Taylor*, however, Dickson C.J.C. seemingly clarified that the Charter does not require an exception for truthful statements. In so doing, he quoted the following from his decision in *Keegstra*:

> The way in which I have defined the s. 319(2) offence, in the context of the objective sought by society and the value of the prohibited expression, gives me some doubt as to whether the Charter mandates that truthful statements communicated *with an intention to promote hatred* need be excepted from criminal condemnation. Truth may be used for widely disparate ends, and I find it difficult to accept that circumstances exist where factually accurate statements can be used for no other purpose than to stir up hatred against a racial or religious group. It would seem to follow that there is no reason why the individual who intentionally employs such statements to achieve harmful ends must *under the Charter* be protected from criminal censure.[65]

Focusing again on the significance of the government objective and the harms caused by hate propaganda, Dickson C.J.C. concluded that the effects of s. 13(1) upon the freedom of expression are not "so deleterious as to make intolerable its existence in a free and democratic society."[66] In his words:

> The section furthers a government objective of great significance and impinges upon expression exhibiting only tenuous links with the rationale underlying the freedom of expression guarantee. Moreover, operating in the context of the procedural and remedial provisions of the *Canadian Human Rights Act*, s. 13(1) plays a minimal role in the imposition of moral, financial or incarcerating sanctions, the primary goal being to act directly for the benefit of those likely to be exposed to the harms caused by hate propaganda.[67]

The balance

Especially in Dickson C.J.C.'s discussion on minimal impairment, the Supreme Court of Canada appears to have been quite concerned that the words of section 13(1) were capable of being given an extremely broad interpretation. It concluded that section 13(1) was constitutional, but simultaneously narrowed its potential scope to ensure its constitutional application. The majority of the Court drew a connection between its finding that section 13(1) was constitutional and the way in which it must be administered.

Of particular relevance to this point is the following statement by Dickson C.J.C.:

> 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 and contempt", there is little danger that subjective opinion as to offensiveness will supplant the proper meaning of the section.*[68]

It might seem, from this statement, that it is this manner of interpretation (and only this manner) that may (constitutionally) be applied by the Tribunal. This is consistent with what I said earlier, namely that the balance between freedom of expression and the protection against hate is dictated by the supreme law of Canada (the Charter) and its interpretation and application by the Supreme Court of Canada. If the Tribunal effects a less stringent application of section 13(1) in the course of a decision, that decision may become vulnerable to review by the courts as potentially violative of the freedom of expression.

Section 13(1) and the Internet

In Taylor, Dickson C.J.C. made a further observation with the apparent attempt to narrow the application of section 13. He specifically made note of the statutory requirement that the communication be made repeatedly via the telephone network. These comments appear to have been made to alleviate the concern that section 13 might address communications made during private telephone conversations. Dickson C.J.C. wrote:

> Simply to label telephone communications as "private", however, does not justify the conclusion that s. 13(1) is overbroad… While conversations almost always take place on a one-to-one basis, the overall effect of phone campaigns is undeniably public, and the reasonable assumption to make is that these campaigns can have an effect upon the public's beliefs and attitudes…
>
> I agree with the Tribunal's comments regarding telephone communications and hate propaganda, and find its observations to be helpful in rebutting the contention that the private nature of telephone conversations makes especially difficult the imposition of constitutionally valid limitations upon expressive telephone activity. Those who repeatedly communicate messages likely to expose others to racial or religious hatred or contempt are seeking to gain converts to their position…
>
> Section 13(1) is worded so as to diminish phone use of the type I have just described, for in the context of s. 13(1) *the word "repeated" must comport a requirement for something in the way of a series of messages.*[69]

This raises the interesting question of how one might apply section 13(1) to the Internet. Does one look at the number of hits a website receives? Or does the universal availability of every single website automatically constitute "repeated" for the purposes of section 13(1)?

In 1997, hearings began before the Canadian Human Rights Tribunal in the matter of *Citron v. Zundel*,[70] after a complaint was filed against Mr. Zundel for placing anti-Semitic messages on a website named the *Zundelsite*. The complainants sought to have section 13(1) apply in a novel fashion to communications sent and received over the Internet.

By the time the Tribunal released its decision in January 2002, section 13(2) had been amended to address this very situation as follows:

> 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…

The Tribunal was bound, however, to apply the law as it stood at the time of Mr. Zundel's alleged discriminatory practices.

It first had to consider whether the *Zundelsite* was under Mr. Zundel's control at the times material to the complaint. In the opinion of the Tribunal, s. 13(1) of the *Canadian Human Rights Act* does not require proof of legal ownership of the website. Rather, control is the driving feature, requiring a finding that Mr. Zundel, acting either alone or with others, communicated or caused to be communicated the offending material on the *Zundelsite*. After reviewing the evidence, the Tribunal concluded as follows:

> A reading of those documents [from the website], the manner in which they are formatted, and their wording, leads us irresistibly to the conclusion that [Mr. Zundel] exercised a significant measure of control over the website.[71]

The Tribunal then considered whether, for the purposes of section 13(1), the material on the *Zundelsite* was communicated telephonically, repeatedly, in whole or in part by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament.

In order to answer this question in the context of the Internet, the Tribunal first considered whether the material was communicated "telephonically." After reviewing evidence on the technical and operative nature of both telephonics and the Internet, and after discussing the proper interpretive approach to the *Canadian Human Rights Act*, the Tribunal concluded that

> to communicate via the Internet is to communicate telephonically for the purposes of s. 13(1) of the Act, and therefore that repeated communication of hate messages via the Internet is captured by a purposive interpretation of the Act.[72]

The Tribunal further concluded that the material was communicated by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament, because connections in Canada to the Internet "backbone" were (at that time) most often made through the federally regulated telecommunication undertaking.

As for whether there was "repeated communication" for the purposes of section 13(1), the Tribunal observed:

> that the very nature of the Internet makes 'repeated' communication inevitable and deliberate. The evidence regarding the World Wide Web establishes that it is a specific application designed to enable the transmission and display of text, graphics, audio or video files over the Internet. This technology was calculated to facilitate browsing and the repeated transmission of material posted on a chosen site. A key advantage of the Internet is that it provides an inexpensive means of mass distribution. We are thus satisfied that there was repeated communication from the *Zundelsite*.[73]

Despite all these conclusions in the context of the Internet, the Tribunal still had to be satisfied that the material contained on the *Zundelsite* was likely to expose persons to hatred or contempt by reason of the fact that those persons are identifiable on the basis of a prohibited ground of discrimination. In so finding, the Tribunal stated:

> [T]hese messages create an environment in which it is likely that Jews will be exposed to extreme emotions of detestation and vilification. Based on our view that the Zundelsite materials characterize Jews as 'liars, cheats, criminals and thugs' who have deliberately engaged in a monumental fraud designed to extort funds, we regard it as highly likely that readers of these materials will, at a minimum, hold Jews in very low regard, viewing them either with contempt, scorn and disdain, or hatred, loathing and revulsion.[74]

The Tribunal rejected Mr. Zundel's claim that section 13(1) unjustifiably violates section 2(b) of the Charter for the same reasons provided by the Supreme Court of Canada in the *Taylor* decision.

The Tribunal ordered that Mr. Zundel (and any other individuals acting in concert with him) cease his discriminatory practice of communicating prohibited messages on the *Zundelsite* or any other federal communication undertaking.

In the wake of *Citron v. Zundel*, the Federal Court of Canada recently awarded an interlocutory injunction restraining an individual from continuing to post alleged hate messages over the Internet until the Tribunal can make a final determination on the matter.[75] Although the Federal Court has awarded similar injunctions in the past, this is the first example of one being awarded in the context of the Internet. The first paragraph of the decision of de Montigny J. is telling of the continued awareness of the fine balance discussed throughout this paper:

> This motion, made on behalf of the Canadian Human Rights Commission, is most interesting in its object as it raises especially difficult issues going to the heart of our democratic values and, more particularly, to the difficult reconciliation between freedom of expression on the one hand, and equality rights as well as the inherent dignity of all human beings on the other hand. While the courts, including the Supreme Court of Canada, have had to deal with these issues on a number of occasions, the particular context in which these values clash and the remedy being sought in the present case bring us into uncharted territory.

Concluding remarks

The purpose of this paper has been to provide an answer to the difficult question posed at the beginning: Combating hate and preserving free speech: Where is the line?

In the particular context of section 13, I have suggested that the balance can only be drawn according to the Charter and its interpretation and application by the Supreme Court of Canada. This primarily occurs in the context of section 1 of the Charter, because of the broad interpretation of the freedom of expression at the section 2(b) stage of analysis.

The question of "where to draw the line" appears to become even more interesting and challenging in the context of the Internet and an increase in global communication. As a result of the difficult jurisdictional questions posed by the Internet, some may question the effectiveness of imposing a cease-and-desist order like the one ordered in *Citron v. Zundel*. In the wake of that order, Canadians can likely access similar forms of expression over the Internet.

In response to that question, others might wish to point out the more symbolic effect of enforcement under the *Canadian Human Rights Act*: that it sends a message about its overall purpose to protect individuals against discrimination. This appears to have been, at least, the perspective of Dickson C.J.C. in *Taylor*:

> In the *Keegstra* and *Andrews* appeals, it was suggested that in practice s. 319(2)

> of the *Criminal Code* was ineffectual (or even worse, played a malign role) in reducing the prevalence of hate propaganda in Canada and accordingly was not rationally connected to Parliament's objective. While such an argument is not expressly made in this appeal, it is implied in the appellants' contention that, just as Germany of the 1920s and 1930s was unable to curb human rights abuses through the use of anti-hate propaganda laws, so s. 13(1) will have no effect in reducing the level of hate propaganda (and its attendant harms) in Canadian society.
>
> For reasons similar to those given in *Keegstra*, I am unable to accede to the view that the impugned legislative measure does not advance Parliament's aim of reducing the incidence of hate propaganda. The process of hearing a complaint made under s. 13(1) and, if the complaint is substantiated, issuing a cease and desist order reminds Canadians of our fundamental commitment to equality of opportunity and the eradication of racial and religious intolerance.[76]

Notes

* I wish to recognize the assistance of my law clerk, Scott Campbell, in preparing this paper.

1 R.S.C. 1985, c. H-6, as am.

2 Part I of the *Constitution Act*, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11.

3 [1938] S.C.R. 100.

4 S.A. 1937 (3d Sess.).

5 (U.K.), 30 & 31 Vict., c. 3.

6 *Supra* note 3 at 132-133 [emphasis added].

7 *Procunier v. Martinez*, 416 U.S. 396 at 427 (1974).

8 250 U.S. 616 (1919).

9 *Ibid*. at 630.

10 *Ibid*.

11 Ottawa: Queen's Printer, 1966.

12 R.S.C. 1985, c. C-46, as am.

13 *Supra* note 12 at 8.

14 505 U.S. 377 (1992).

15 538 U.S. 343 (2003).

16 St. Paul Bias-Motivated Crime Ordinance, St. Paul, Minn., Legis. Code § 292.02 (1990) [emphasis added].

17 *Supra* note 15 at 392 [emphasis added].

18 *Ibid*. at 396.

19 578 F.2d. 1197 (1978).

20 395 U.S. 444 (1969).

21 *Reno v. A.C.L.U.*, 521 U.S. 844 (1997).

22 169 F. Supp. 2d 1181 (N.D. Cal. 2001), rev'd 379 F.3d 1120 (2004).

23 U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force 23 March 1976.

24 See e.g. *Canadian Human Rights Commission v. Taylor*, TD 1/79 at para.11, discussed *infra*.

25 U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195, entered into force 4 January 1969.

26 1986, c. 64, as am.

27 *Ibid*., ss. 18-22.

28 1998, c. 42, ss. 3 & 12.

29 Council of Europe, E.T.S. No. 5 (Rome, 1950).

30 U.K., H.C. Library, "The Racial and Religious Hatred Bill: Bill 11 of 2005-2006," Research Paper 05/48 (16 June 2005) at 20, citing the Joint Committee on Human Rights, Eighth Report, 2 March 2005, HL 60/HC 388 2004-05.

31 Bill 11 2005-2006.

32 U.K., H.C., *Parliamentary Debates*, vol. 442, part no. 102, col. 239-245 (31 January 2006).

33 *Ibid*. at col. 189-190 (Paul Goggins).

34 [2004] 1 S.C.R. 827.

35 *Supra* note 27.

36 *Ibid*. at para. 2.

37 *Ibid*. at para. 12.

38 *Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62 at paras. 58 & 60 [emphasis in original].

39 R. Moon, *The Constitutional Protection of Freedom of Expression* (Toronto: University of Toronto Press, 2000) at 35, summarizing the decision of the Supreme Court of Canada in *R. v. Oakes,* [1986] 1 S.C.R. 103.

40 *Ibid*.

41 *R. v. Zundel*, [1992] 2 S.C.R. 731.

42 See e.g. *Citron v. Zundel,* [2002] C.H.R.D. No. 1 (Canadian Human Rights Tribunal), discussed *infra*.

43 *Supra* note 52.

44 *Ibid*. at 762.

45 *Criminal Code*, s. 318(4).

46 [1990] 3 S.C.R. 697.

47 [2005] S.J. No. 429.

48 *Ibid*. at para. 21.

49 *Ibid*. at paras. 4 & 6.

50 [1990] 3 S.C.R. 892.

51 *Supra* note 27.

52 See c.f. *The Defamation Act*, C.C.S.M. c. D20, s. 19(1) (Manitoba), which states: "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."

[53] *Supra* note 27 at para. 39.

[54] R.E. Brown, *Defamation Law: A Primer* (Toronto: Thomson Carswell, 2003) at 24.

[55] *Supra* note 27 at paras. 34, 36 & 40.

[56] *Supra* note 61 at 913 [emphasis added].

[57] *Ibid*. at 916-917 [emphasis added].

[58] *Ibid*. at 924.

[59] *Ibid*.

[60] *Ibid*. at 928.

[61] *Ibid*.

[62] *Ibid*. at 932.

[63] *Ibid*.

[64] *Ibid*. at 939.

[65] *Ibid*. at 935, quoting from *Keegstra*, *supra* note 57 at 781 [emphasis in original].

[66] *Ibid*.

[67] *Ibid*. at 939-940.

[68] *Ibid.* at 928-929 [emphasis added].

[69] *Ibid*. at 937-938 [emphasis added].

[70] *Supra* note 53.

[71] *Ibid*. at para. 41.

[72] *Ibid*. at para. 88.

[73] *Ibid*. at para. 115.

[74] *Ibid*. at para. 140.

[75] *Canadian Human Rights Commission v. Winnicki*, 2005 FC 1493.

[76] *Supra* note 61 at 923-924.