THE DECLINE OF PUBLIC DISCOURSE: THE ATTACK ON HUMAN RIGHTS COMMISSIONS

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ABSTRACT

During the last few years there has been a disinformation campaign against human rights commissions. While it is not surprising that Internet blogs post things about HRCs that are false and malicious, these claims have seeped into mainstream discourse. This paper sets out some of the claims made about the CHRC and describes how they are misleading or just plain false and it considers how these deceptive and invented claims have entered mainstream discourse. This will involve some general observations about the state of public discourse in Canada.

I. INTRODUCTION

In the fall of 2008 I wrote a report for the Canadian Human Rights Commission [CHRC] (Moon, 2008) in which I recommended the repeal of s. 13 of the *Canadian Human Rights Act [CHRA]* (RSC, 1985) – the provision that restricts Internet hate speech. As I was preparing the report, I became aware of what can only be described as a disinformation campaign against human rights commissions. I am sure it comes as no surprise to anyone that there are Internet blogs that post things about the CHRC that are false and malicious. The problem is that these claims have seeped into mainstream discourse – they have been taken up by members of Parliament, they have been adopted in editorials in the *National Post* and columns in the *Globe and Mail* and *Maclean's* magazine and in a host of other publications, and they have been repeated on radio and television current affairs programming. They have created in the larger public – or a significant element of the public – a "feeling" that there is a serious problem with human rights commissions, and in particular the Canadian Commission, that needs to be addressed.

There is a serious debate to be had about the regulation of hate speech by HRCs. But the debate is difficult and complex and there are many reasonable positions one can take on the issue. I do not agree with those who argue that the CHRC should be involved in the regulation of Internet hate speech, but I do not doubt their good faith in taking this position. The most vociferous and indeed the most media-amplified critics of the CHRC are not interested in this debate. It is easier, and it seems more effective, to exaggerate the case – to invent injustices, and engage in personal attacks. This approach has several related strategic advantages: (a) The case against the CHRC becomes clear-cut. All complexity is washed away. There are no longer competing interests or trade-offs that need to be addressed; (b) The attack on hate speech regulation, when based on the corruption and incompetence of the Commission, undermines the entire human rights commission process and not just the regulation of hate speech; (c) The attack on human rights commissions can be made without having to defend unpopular ideological positions. The regulation of hate speech can be attacked without having to rely explicitly on a libertarian free speech position – the claim that speech should never be

subject to limits. And a broader challenge to anti-discrimination law can be made without having to defend the view that the market is a just and efficient mechanism for the distribution of goods that should not be subject to any form of regulation; (d) And, of course, it appears that this style of attack (personal and extreme) gets attention and is an effective means of self-promotion.

Why this style of attack is effective I will consider in a moment. First, I want to look at two claims made by the critics, and repeated or recycled in the mainstream media. These are: (i) The CHRC has a 100% conviction rate for s.13 cases; and (ii) Human rights commissions or tribunals make decisions that are oppressive, even bizarre. I have elsewhere shown that the claim that the CHRC has engaged in corrupt behaviour is entirely without foundation. (Moon, 2010 pp.108-116)

The techniques used by the critics are sadly familiar. They include (a) identifying one or two commission or tribunal decisions which seem unreasonable in their outcome, and presenting them as if they are representative of the larger body of decisions; (b) when describing a particular case, highlighting certain facts or findings and omitting mention of others to give a misleading picture of the case; (c) relying on dubious sources and reporting their claims as if true and uncontested; (d) using terms in a way that is intended to mislead the audience, ie making a claim that with some strain on the language may be 'true' but which on an ordinary reading (the reading encouraged by the speaker) is false; (e) making blatantly false factual claims; and finally (f) engaging in personal attacks against those with opposing views, in order to undermine their credibility.

II. THE CHRC HAS A 100% CONVICTION RATE

Levant, Steyn, and others have frequently asserted that the CHRC has a 100% conviction rate. Here is how Levant put it in a National Post op-ed: "The CHRC already has a 100% conviction rate for censorship prosecutions – no one in 32 years has ever beat the rap. That's not hard to believe when you learn that truth, fair comment and honest belief are not legal defences in human rights hearings – the commissions operate more like kangaroo courts than real courts that way."(16 June 2009) Levant, in his book *Shakedown* (2009, p.146), asserts that "no one had ever beaten a hate speech accusation … at the Canadian Human Rights Commission." The claim has also been made in a *National Post* editorial: "The CHRC, too, has a frighteningly undemocratic 100% conviction rate on hate speech cases." (18 June 2009)

This claim is a little like Bill Clinton's statement: "I did not have sexual relations with that woman, Miss Lewinsky". It is intended to be misread. It is possible to interpret the 100% conviction rate claim as true, but in its 'true' meaning it is entirely uninteresting and in no way a criticism of the CHRC. The ordinary reading of the claim is that the CHRC has found that s.13 has been violated in every complaint it has received (every "accusation"). The impression given is that the issue is fully decided by the CHRC, that it both investigates and adjudicates complaints and that once a complaint is made – once a respondent is unwittingly drawn into the process – the outcome, "conviction", is inevitable. This was the claim made in a *Windsor Star* editorial: "… the problem is that the CHRC is essentially the investigator, prosecutor and judge of complaints of racism and hate speech". (18 July 2009)

To show how this claim is deceptive I need to say a little bit about the CHRC process and the relationship between the CHRC and CHRT. Under the *CHRA* an individual or group may file a complaint with the CHRC, if they have "reasonable grounds for believing that a person is engaging or has engaged in a discriminatory practice" contrary to the Act. The CHRC is bound to investigate any complaint that falls within its jurisdiction and is not excluded as trivial, frivolous, vexatious or made in bad faith. The investigation of a complaint must be conducted in accordance with the principles of procedural fairness. This requires that the respondent be informed of the complaint made against her or him and given the opportunity to respond to it. A report is prepared by the investigation officer, which is then submitted to the Commissioners. The Commissioners may ask the CHRT to institute an inquiry into the complaint, if they conclude that "having regard to all the circumstances of the complaint, an inquiry ... is warranted" or they "shall dismiss the complaint" if they conclude that an inquiry is not warranted. The CHRT is an entirely separate and independent body that adjudicates complaints under the *CHRA* that are referred to it by the CHRC. If the complaint is referred to the CHRT for adjudication, the CHRC may appear in order to represent the "public interest"; however carriage of the case lies with the complainant. The CHRC has appeared in all but one of the s.13 cases that have been decided by the CHRT. The CHRC does not adjudicate the complaint, and it does not determine the appropriate remedy. Instead it serves as a kind of filter for s.13 (and other *CHRA*) complaints.

Section 13 complaints represent a very small part of the CHRC's workload. Between January 2001 and September 2008 the CHRC received 73 section 13 complaints (about 2% of the total number of complaints received by the CHRC. This number includes only those complaints that were not excluded prior to investigation as trivial or vexatious). In the Fall of 2008, when these numbers were compiled, 58 of the 73 complaints received by the CHRC had been resolved: 32 (about half) were

dismissed after investigation by the CHRC and did not go to adjudication; 10 were resolved through mediation at the CHRT prior to adjudication; only 16 were adjudicated. The CHRT found a breach of s. 13 in 100% of the 16 cases that it adjudicated – less than 1/3 of the complaints that were received and investigated by the CHRC.

It is true that all s. 13 complaints adjudicated by the Tribunal have been upheld – at least until recently. The Tribunal then has a 100% conviction rate. ("Conviction" is not the right term since the standard remedy given by the Tribunal is a cease and desist order, but this is a relatively minor distortion.) It is also true that the CHRC was represented, and argued that s.13 had been breached, in all but one of the Tribunal adjudications. The CHRC has a 100% "conviction" rate as an advocate before the CHRT, but since so few s.13 complaints are sent to the CHRT that is not so remarkable. The CHRC dismissed approximately half of the investigated complaints because in its view the speech was not sufficiently extreme to breach s.13. Ironically the 100% "conviction" rate by the CHRT could be used to support the very different claim that the CHRC is filtering out too many s.13 complaints, preventing some complaints that might have succeeded at adjudication from even being considered by the Tribunal.

There are, of course, real and significant problems with the process that the CHRC is by law required to follow. These problems, however, are obscured by the misleading 100% conviction rate claim.

III. HUMAN RIGHTS COMMISSIONS MAKE BIZARRE DECISIONS:

In his book *Shakedown,* Levant describes a handful of human rights code cases, dealing with issues other than hate speech, in which a provincial tribunal makes a decision that seems patently unreasonable. According to Levant the "craziest" of all the human rights decisions is the judgment of the BC HRT in *Datt v. McDonald's*. (Datt, 2007) On the CBC's The Current, Levant said this about the case: "A woman didn't want to wash her hands and she sued McDonald's in human rights tribunal and won. She allegedly has this human right not to have to wash her hands at McDonald's." (28 April 2009) On smaller radio programs his claims become even stronger: "One day she said, 'I don't like to wash my hands so much' … Nothing was wrong, she just didn't want to wash her hands ... There was no name for this mystery illness … [It was decided by the HRT that] "she had the human right not to wash her hands … McDonald's was ordered never to enforce its hand-washing policy on people with this hand-washing problem again ... That's just gross."(CFRA, 25 April 2009) In a blog entry on the case Levant informs us that the Tribunal "invent[ed] a human right for a worker to go to the bathroom and then handle meat without washing her hands in between …". (15 April 2008) The impression one gets from Levant's account of the case is of a tribunal that is entirely out of touch with reality, and indifferent to important health and safety concerns.

Of course anyone who combs through the thousands of human rights cases that have been decided over the years, is bound to discover decisions that seem wrong or unfair. This would be the case with any decision-maker, including the courts. With that said, however, let me tell you what Levant leaves out of his account of this case. Ms. Datt had worked for Macdonald's for 23 years until she developed severe dermatitis as a consequence of her frequent hand washing. There seemed to be no dispute that frequent hand washing had caused her or contributed to her skin problems. The Tribunal noted that once it had been established that Ms Datt suffered from a disability, the burden shifted to McDonald's to establish that "her disability was not capable of being accommodated in the workplace without incurring undue hardship" . The Tribunal "accept[s] that the goal of preventing the contamination of food is why McDonald's established its hand-washing policy. This goal cannot be understated and it accords with common sense in the handling and preparation of food." (para.239) The problem, said the Tribunal, was that McDonald's did not seem to have considered in any serious way whether there were other tasks that Ms Datt might perform that would not involve the handling of food and require hand washing with the same frequency. The Tribunal concluded:

> I am at a loss to understand why McDonald's did not take more steps to try to accommodate Ms Datt, a 23-year committed employee. Ms. Datt was not entitled to a 'perfect' solution, but she was entitled to a fulsome consideration of her restrictions and how those restrictions intersected with the hand-washing policies and the jobs that were available. Without having done so, neither Ms Datt nor McDonald's was in a position to know what the outcome of a return to work, with accommodations, might have been. It may be that, at the end of the day, Ms Datt could not have been accommodated at McDonald's because she simply could not meet its hand-washing policies doing any job or combination of jobs, but based on the evidence before me, I find that McDonald's failed to take all the necessary steps to make this final determination". (para. 249)

You can disagree with the decision – although that may only be possible if you believe that employers have no duty to accommodate employees with disabilities -- but the result is not shocking in the way Levant suggests. If that is among the most egregious injustices that he is able to mine from the thousands of human rights decisions, then human rights bodies must be doing far better than I might have guessed.

IV. THE STATE OF PUBLIC DISCOURSE

I have, I hope, said enough to make my point. Many of the claims made by Levant, Steyn, and other critics of the CHRC are false or misleading. But how have these critics been able to make these false or deceptive claims go so far? Levant's claims are not just posted on his blog. They are in his book, which is published by a major Canadian publisher. They are repeated by him, often uncontradicted, in radio and television interviews. They are parroted by politicians and in newspaper editorials and columns. And, although this is more difficult to gauge, they appear to be taken up by Canadians, who watch or read the mainstream media.

The Internet has been the breeding ground for many of the false claims made about the CHRC. The audience for some of the blogs of Levant and other CHRC critics, while not insubstantial, is still relatively small and generally confined to like-minded individuals, who are receptive to the claims made. But when the content of these blogs passes into the mainstream media, not only does it reach a larger and more politically diverse audience, it acquires greater credibility.

Why have mainstream media outlets been willing to provide a platform for these false and misleading claims? There are several reasons for the media's failing. The most obvious is that media reporters and interviewers have limited time and resources, making it difficult for them to fact-check – to confirm or correct the claims made. And, of course, the more these claims are repeated in the media, the less it seems necessary to check their accuracy. But there are other more significant factors that seem to support non-critical reporting of these claims.

The first is the desire by most mainstream media outlets, in their role as reporter of news, to appear neutral or balanced in their reporting, particularly on matters of public controversy -- to avoid taking a position (or appearing to take a position) on a public issue. In seeking to avoid the appearance of bias, newspapers and broadcasters, at least in their news coverage, often present different positions without commenting on their merits. The problem is that the positions reported may not have any factual grounding or may be based on factual claims that are contested. If the media simply report the factual assertions of one side without ensuring that they are accurate, or if they report competing factual claims with no comment on the accuracy of the claims, then the audience will at worst be misled and at best be denied enough information to make a reasoned judgment. Levant appeared on at least three CBC national radio programs – *The Sunday Edition, Cross-Country Check-Up*, and the *Current*. Each program allowed him to repeat his false claims with little or no challenge and so gave them validation. When Levant asserts in an interview that the CHRC has a 100% conviction rate and is not challenged by the interviewer, the audience might reasonably assume that his claim is true.

When the media treats factual claims the same way it treats opinions, and simply channels them to the audience, how is the audience to know whether the claims made are true. The audience has no other meaningful access to the facts. Even when the audience hears competing versions of the facts how are they to decide between them, if the media does not arbitrate or even comment on these factual 'disputes'. Because there is often no common factual ground, it is left to the members of the audience simply to choose their position, based on 'gut instinct' or ideological predisposition. Not surprisingly individuals tend to adopt the factual claims that fit with the views they currently hold and to discount or reject those that do not. If I am already wary of 'big government' or resentful of 'political correctness', I will be more receptive to the claims of Levant. On the other hand, I am more likely to discount his claims, if I believe that government has a role in protecting minority groups from discrimination.

The second factor, contributing to the media's non-critical reporting of the false claims about the CHRC, is the increasing prominence of columnists, who engage in advocacy rather than analysis, and are concerned less with factual accuracy and more with simply provoking a reaction in their readers. Most mainstream print publications, although seeking to be impartial in their news reporting, publish opinion columns. Most of these columns offer a careful, factually grounded, analysis of current affairs, drawing on the knowledge and experience of the columnist. However, in recent years there has been a proliferation of columns, modeled on television commentary, that are designed to be provocative – to attract readers who strongly agree or disagree with the positions taken by the columnist. The authors of these advocacy columns are prepared to address a remarkably wide range of issues about which they have little or no background knowledge. Their object is advocacy rather than accuracy, and so they make simple and dramatic claims, often with little factual support. Indeed, they often seem to show the same indifference to factual

accuracy, as political spinners. Mark Steyn's column in Maclean's magazine is an obvious example. He seems to have no hesitation re-shaping the "facts" to fit the conclusion he wishes to reach. Rex Murphy, in the columns he has written for the Globe and Mail dealing with HRCs, has taken his information straight from Levant's blog. On one occasion Murphy wrote a column about how outrageous it was that the Chief Commissioner of the CHRC would lay a wreath at the war memorial in Ottawa, when she obviously had no grasp of the freedoms for which Canadian soldiers had fought. (14 Nov. 2008) Only two days earlier Levant had written about the very same thing, although in less grandiloquent terms. (12 Nov. 2008) Murphy has also repeated several of Levant's false claims, including the claim that the BC HRT has recognized a "right not to wash one's hands while working in a fast-food restaurant". (14 Nov. 2008) The emergence of this type of opinion column is part of the gradual reshaping of the print news media in the image of the entertainment-oriented current affairs programming that appears on television.

A third factor contributing to the problem of factual distortion is the tendency of the television (and increasingly radio and newspapers) to avoid complex analysis and to sensationalize issues. Television, as a visual medium, does better with spectacle, and with claims that are simple, direct and dramatic. (Postman, 1986) Television current affairs programming often focuses on extreme positions. Accusations of corruption, deceit, or patent injustice play much better on television than do more nuanced arguments or moderate or conciliatory positions. Issues are generally presented as if they have only two sides, each of which is simple, straightforward, and diametrically opposed to the other. Even when both sides of an issue are represented, they don't engage with each other, at least not in any way that might contribute to audience understanding, or to the discovery of common ground. The two sides generally make different factual assertions or assumptions. Because the competing positions are so far apart and rest on completely different versions of the facts, the audience cannot learn from each but must choose one over the other.

V. CONCLUSION

In the end the debate about human rights commissions, like so much public debate, involves no real engagement between competing positions, and no real opportunity for the audience to judge whether or not the current law is good policy. The complexity of the issue is avoided or suppressed. The merits of the case, either for or against hate speech regulation by HRCs, are lost in a sea of exaggerations and fabrications. It is left to the audience, if it is paying attention, to make a choice, not based on reasoned judgment, but on their existing views, on their ideological predispositions, either suspicion of government regulation or belief in the importance of human rights protection. While the critics of the CHRC have been successful in spreading their views, all they can hope for is a marginal win in a polarized debate. This is the most spin can accomplish. It will not advance democratic engagement or meaningful discussion of public policy, and it cannot bring about consensus or compromise or even respectful disagreement based on an awareness of the costs and benefits of the different responses. Spin encourages the fragmentation of the civic audience into insular ideological communities that are unable to engage with each other. (Hall Jamieson and Capella, 2008). The costs of spin are even more fundamental than this though. Spin degrades public discourse, so that we no longer expect to be told the truth and are no longer able to evaluate positions based on the accuracy of their claims or assumptions.

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NOTE

[1] Faculty of Law, University of Windsor. A longer version of this paper was published in the Saskatchewan Law Review (Moon, 2010).