HATE MESSAGE COMPLAINTS AND HUMAN RIGHTS TRIBUNAL HEARINGS

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Since its inception, the Canadian Human Rights Commission has received complaints of alleged discrimination involving the communication of hate messages. The complaints have mainly involved allegations of discrimination on the basis of race and religion, specifically against Jews or persons of other non-Christian faiths, and against blacks or other non-white persons. There have also been complaints of hate messages attacking individuals based on their sexual orientation. Based on the Commission's investigation of these complaints, many of them have subsequently been the subject of a full inquiry before the Canadian Human Rights Tribunal, and the Commission has appeared as party.

Complaints involving hate messages, and the Tribunal hearings into such complaints, differ in many respects from other cases involving allegations of discriminatory conduct under the *Canadian Human Rights Act (CHRA)*. This is due, in part, to the nature of the discriminatory behaviour, which gives rise to complaints under section 13 of the *Canadian Human Rights Act* and the approaches respondents have taken in defending these complaints.

This paper will provide an overview of the prohibition against communicating hate found in section 13 of the CHRA, and how the courts have affirmed the importance of combating hate in Canada notwithstanding limitations on freedom of expression. As will be noted herein, the Commission has identified combating hate propaganda, in particular hate on the Internet, as a priority issue. The paper will also describe the unique nature of Tribunal hearings dealing with hate message complaints and will consider, from the Commission's perspective, the challenges currently being encountered at these hearings.

Hate messages and the *Canadian Human Rights Act*

Communicating hate messages is prohibited by section 13 of the *Canadian Human Rights Act,* which states:

> 13. (1) It is a discriminatory practice for a person or a group of persons acting in concert...to communicate telephonically..., repeatedly,...any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination.
>
> (2) 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....

As interpreted by the courts, messages are likely to expose persons to "hatred" when they portray a person or a group of persons as having no redeeming qualities and involve emotions and feelings of extreme ill will toward others. Such messages are likely to expose persons to "contempt" where they portray persons as being inferior.[1]

The most recent case of *Warman v. Winnicki* (decision not yet rendered) provides an example of the extreme nature of hate messages. Mr. Justice DeMontigny of the Federal Court, in his decision to grant an injunction in that case, described the

nature of some of the hate messages that were in issue:

> There are several messages in Mr. Winnicki's postings that discriminate against persons of the Jewish faith, and are in fact threatening. He states that Jewish people hate European beauty and nobility and are murderers. He uses large letters to print part of his messages, thus conveying an impression of anger in his communication. His messages reinforce the myth that persons of the Jewish faith control the government and all of our important institutions. His messages also insinuate that Jews have a disproportionate degree of power and control in the media that Jews pose a menace to the civilized world by allowing blacks to be here. He repeatedly states that Jewish groups and individuals aim to destroy European culture, values and freedoms. The choice of vocabulary, in and of itself, is quite offensive and leaves no doubt as to the author's belief that people of Jewish religion have no redeeming value and are a threat to Western civilization. In summary, the themes that permeate the impugned messages are the same as those found in most anti-Semitic propaganda: Jews are criminals, thugs and liars; and they seek a disproportionate degree of power and control in the media and government; they are a menace to the Aryan race.
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> Having looked at these messages in their entirety and in context, I have no doubt that they are likely to expose persons of the Jewish faith to hatred or contempt, as these concepts have been defined in *Nealy*, *supra*, and approved in Taylor, supra. And the same can be said of the messages which target persons of the black race. They are undoubtedly as vile as one can imagine and are not only discriminatory but threatening to the victims they target.[2]

Until the 1990s, hate messages were communicated by way of pamphlets asking people to call a telephone hotline number where they could listen to pre-recorded telephone "White Power" messages. The first complaint involving this type of hate message was filed in the late 1970s against the Western Guard Party and John Ross Taylor, and it proceeded to a hearing before the Canadian Human Rights Tribunal. The Tribunal found that the respondents had breached section 13 of the CHRA and in its decision noted the intent of Parliament and the some of the reasoning behind limiting freedom of speech:

> Parliament has therefore moved in the direction of denying an individual or group use of a federal system or a federally regulated system of transmitting information for purposes of conveying hate or exposing individuals to hatred or contempt. *It appears to be the policy of Parliament that these communication systems are not available to assist individuals who are intent upon weakening the fundamental beliefs maintained within Canadian society* and which are best expressed in s.2 of the *Canadian Human Rights Act* as follows:
> "The purpose of this Act is to extend the present laws in Canada to give effect, within the purview of matters coming within the legislative authority of the Parliament of Canada to the following principles:
> (a) every individual should have an equal opportunity with other individuals to make for himself or herself the life that he or she is able and wishes to have, consistent with his or her duties and obligations as a member 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 or marital status, or conviction for an offence for which a pardon has been granted or by discriminatory employment practices based on physical handicap..."
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> These values are considered paramount and so worthy of preservation that it necessarily involves encroachment upon the desire of certain individuals within our society to say and do things which would deny equality of opportunity to others.[3] [Emphasis added]

The Tribunal also observed that these principles have attained universal recognition in international treaties and other instruments.

Amongst these is the International Convention on the Elimination of All Forms of Racial Discrimination as passed by the General Assembly of the United Nations, Article 4 of which provides:

> 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....[4] [Emphasis added]

With the advent of the Canadian Charter of Rights and Freedoms (the Charter), the constitutionality of section 13 was eventually challenged all the way to the Supreme Court of Canada on the basis that it breached the guarantee of freedom of expression contained in section 2 of the Charter.

Sections 1 and 2 of the Charter state as follows:

2. 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 Supreme Court of Canada, as well as the Tribunal, recognized the importance of freedom of expression in our society and weighed this right against the harm caused by hate messages. The Supreme Court looked at the purpose of the *Canadian Human Rights Act* and then looked at the harm caused by hate messages, noting:

"Parliament's concern that the dissemination of hate propaganda is antithetical to the general aim of the *Canadian Human Rights Act* is not misplaced. The serious harm caused by messages of hatred was identified by the Special Committee on Hate Propaganda in Canada, commonly known as the Cohen Committee, in 1966. The Cohen Committee noted that individuals subjected to racial or religious hatred may suffer substantial psychological distress, the damaging consequences including a loss of self-esteem, feelings of anger and outrage and strong pressure to renounce cultural differences that mark them as distinct. This intensely painful reaction undoubtedly detracts from an individual's ability to, in the words of s. 2 of the Act, 'make for himself or herself the life that he or she is able and wishes to have.' *As well, the Committee observed that hate propaganda can operate to convince listeners, even if subtly, that members of certain racial or religious groups are inferior.* The result may be an increase in acts of discrimination, including the denial of equal opportunity in the provision of goods, services, facilities, and even incidents of violence."[5] [Emphasis added]

The Cohen Committee Report, cited by the Supreme Court in *Taylor*, referred to Hitler's propaganda as an example of how people can be influenced by propaganda:

> 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 god 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.[6]

While freedom of expression ideally allows individuals to seek truth, hate propaganda, as the Supreme Court observed, "contributes little to the aspirations of Canadians or Canada in either the quest for truth, the promotion of individual self-development or the protection and fostering of a vibrant democracy where the participation of all individuals is accepted and encouraged."[7]

Although many equate democracy with freedom of expression, limiting the communication of hate does not necessarily run counter to the principles of a free and democratic society.[8] The *Canadian Charter of Rights and Freedoms* is founded on fundamental democratic principles, of which freedom of expression is but one. Other equally important values are also enshrined in our constitution, such as the right to equality and the values of multiculturalism found in sections 15 and 27 of the Charter, which state:

> 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
> 27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

In *Taylor*, the Supreme Court, in upholding a limit on freedom of expression as it relates to hate messages, referred to other democratic values, including "...respect and concern for the dignity and equality of the individual and a recognition that one's concept of self may in large part be a function of membership in a particular cultural group." The Court stated that "as the harm flowing from hate propaganda works in opposition to these linchpin Charter principles, the importance of taking steps to limit its pernicious effects becomes manifest."[9]

With the advent of the Internet, messages that were once communicated through telephone hotlines are now communicated on the World Wide Web. Hate propaganda can now reach millions of people. As stated by the Court of Appeal for Ontario, communication via the Internet is " instantaneous, seamless, interactive, blunt, borderless and far-reaching. It is also impersonal, and the anonymous nature of such communications may itself create a greater risk that the defamatory remarks are believed"[10]

By virtue of section 13 of the *Canadian Human Rights Act*, the Canadian Human Rights Commission has the authority to deal with complaints of hate messages. Given the purpose of the CHRA to promote equality of opportunity and to protect individuals from discrimination based on factors such as their religion, their race, their colour or their sexual orientation, it is clear that the prevention of hate messages and the harm caused to victims is of considerable importance. The Commission has identified hate on the Internet as a priority issue and can contribute greatly to the fight against hate in our society through its unique statutory authority. In the Commission's view, it is in the public interest that the Commission continue to deal with these complaints as a priority.

Human Rights Tribunal hearings dealing with hate messages

Most of the hate messages that have been the subject of recent complaints to the Commission contain themes that are very similar to those that were first heard before the Canadian Human Rights Tribunal in the late 1970s, in that they involve hatred of or contempt for persons who are Jewish or belong to other non-Christian religions, and persons who are black or are otherwise classified as non-white. Many of the respondents believe in "white supremacy" and wish to share their ideology with others. As the current Winnicki case demonstrates, there is no indication that the level of acrimony from these types of respondents against historically disadvantaged groups is subsiding.

The nature of the hearings dealing with hate messages and the approach taken by respondents at these hearings differentiate these types of complaints from others filed under the CHRA. Most complaints filed with the Commission deal with alleged discrimination in employment, and often involve situations where the acts of discrimination by the employer were unintentional.[11] In hate message hearings, by contrast, the communication of discriminatory messages has been deliberate: respondents hold deep-rooted beliefs of racial and/or religious superiority and blame historically disadvantaged groups a range of social problems. These factors make for a very highly charged and emotional hearing when all parties are present.

There are several challenges presented by the respondents' approaches to these hearings. Respondents in hate cases have often not appeared or have attempted to evade service.[12] When respondents have appeared at the hearings, they often have not given evidence under oath and have often sought procedural motions, thereby delaying and challenging the process at every turn. While cross-examination is hardly pleasant under any circumstances, respondents in hate message hearings have sought to create a particularly difficult experience for complainants and other Commission witnesses by subjecting them to intense and lengthy cross-examinations with a view to damaging their credibility.

As the Tribunal stated in the first case dealing with hate on the Internet:

> The history of adjudication before the Canadian Human Rights Tribunal has demonstrated that complaints alleging the communication of "hate messages"

have invariably been the most vigorously defended, protracted and intensely emotional. This case proved to be no different. In the end, the inquiry into these complaints required 55 days of hearing, spanning over a number of years. There were constant evidentiary objections, and several motions to discontinue the proceedings for a variety of different reasons.[13]

In one case, almost one year after the lengthy 13-day hearing had ended, and before a decision was rendered by the Tribunal, one of the respondents brought six motions (which were sequentially filed) before the Tribunal seeking to reopen issues or bring new issues to the Tribunal's attention. All six motions were dismissed by the Tribunal, with the Tribunal member noting that "...I would view any attempt to re-argue the case at this time as unfair and an abuse of process."[14]

In addition, complainants have been disparaged on white supremacist websites by respondents after having filed human rights complaints. In *Kyburz*, for example, the Tribunal noted:

> Mr. Kyburz began including regular references to Mr. Warman, who he identified by name, in his postings on the Patriots on Guard website as a result of Mr. Warman's efforts to shut down the site. The reference to Mr. Warman are noteworthy for their degree of vitriol, motivated, at least in part, by Mr. Kyburz' perception that Mr. Warman was himself Jewish. This reflects a recurring pattern in Mr. Kyburz's web postings: as soon as anyone disagrees with his views, that person immediately becomes part of the worldwide Jewish conspiracy.
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> Mr. Warman testified that he was not Jewish. In our view, the fact that Mr. Warman was not himself Jewish does not detract in any way from the viciousness of the attacks launched against him by Mr. Kyburz. These attacks were clearly motivated, at least in part, by Mr. Kyburz's perception that Mr. Warman was Jewish. Based upon this belief, Mr. Kyburz ascribed very negative character traits, as well as criminal behaviour, to Mr. Warman. Mr. Warman, quite understandably, found this conduct to be very hurtful. In our view, Mr. Warman is a victim of the discriminatory practice.[15]

Respondents have also retaliated against complainants who have filed hate message complaints.

In *Kyburz*, the Tribunal, in upholding a retaliation complaint, described the conduct of the respondents:

> While Mr. Kyburz had included references to Mr. Warman in his web postings even before Mr. Warman filed his human rights complaint, as a result of Mr. Warman's efforts to shut down the Patriots on Guard website, both the content and the frequency of the comments changed after the complaint was filed with the Canadian Human Rights Commission. Not only are the references to Mr. Warman more frequent – they also became more vitriolic. Many messages make direct reference to Mr. Warman's complaint to the Commission or to the Commission investigation process. As noted, other messages include threats to harm Mr. Warman in various ways. It is clear that the filing of Mr. Warman's complaint was a significant factor in the escalation of Mr. Kyburz's campaign against Mr. Warman.[16]

Recent Tribunal hearings dealing with hate messages have proven to be particularly difficult for the complainant as well as other Commission witnesses. A substantial portion of the court time spent at the last two Tribunal hearings was spent attacking the credibility of the complainant and other witnesses:

> *Warman v. Kulbashian et al* (decision not yet rendered) – The respondents chose not to give evidence and most of the hearing time was spent cross-examining the Commission witnesses. There was a great degree of animosity aimed at the Commission's police witness, who had dealt with the respondents in a criminal matter, and also aimed at the Complainant, who is known to many white supremacist groups as someone who seeks to fight hate propaganda. Some of the six motions filed a year after the hearing had ended attempted to continue to attack the credibility of the police witness, in particular by seeking to deposit into the record evidence

that did not come properly before the Tribunal at hearing. The Tribunal ruled this tactic to be "objectionable".

Warman v. Winnicki (decision not yet rendered) – Most of the hearing time was spent cross-examining the complainant in detail on issues such as his social and cultural sensitivities and his past anti-hate activities, effectively turning the proceedings into a hearing about the complainant's actions as opposed to those of the respondent. The complainant was seeking damages for pain and suffering, which allowed the respondent to raise the issue of credibility, even though this would not have otherwise been relevant.[17]

The Commission's primary objective in hate message hearings is to prevent the continuing discrimination caused by the dissemination of hate messages and to protect those who are the targets of hate speech from the harm caused by these messages. Accordingly, the Commission has always requested that the Tribunal order the respondents to cease and desist this discriminatory practice. Furthermore, the Commission has, over the years, made several applications to the Federal Court for injunctions prohibiting the respondents from communicating hate messages until such time as a decision is rendered by a tribunal.[18] In some cases, respondents have nonetheless ignored Tribunal orders or Federal Court injunction orders to cease communicating hate. This behaviour has resulted in findings of contempt of court, jail time and fines being levied against those found to have communicated hate messages or are alleged to have done so.[19]

Conclusion

There are a number of advantages to using the CHRA as a mechanism for combating hate. Unlike criminal proceedings, the standard of proof is one based on a balance of probabilities as opposed to proof beyond a reasonable doubt. Additionally, the quasi-constitutional nature of human rights legislation requires that the Tribunal interpret the CHRA using a broad and purposive approach in order to prevent discrimination. Administrative tribunal hearings are also relatively accessible to ordinary citizens; individuals do not have to be represented by counsel and the Tribunal makes efforts to assist parties during the proceedings.

Notwithstanding this, as the above discussion has demonstrated, the particular nature of hate message Tribunal hearings presents certain drawbacks. Hearings may have the impact of re-victimizing complainants who have been the targets of hate messages, a particularly unfortunate consequence given the CHRA's aim of protecting the victims of discrimination. Further more, such hearings, if not properly controlled, risk being transformed into inquiries focused on the complainant's behaviour rather than that of the respondents. These factors may serve as a disincentive to future filing of hate message complaints. Lastly, the actions of some respondents seeking to avoid the application of the CHRA, such as filing vexatious motions and conducting irrelevant and lengthy cross-examination of witnesses, result in an abuse of process that constitutes a drain on scarce Tribunal and Commission resources.

These challenges recall the relationship between freedom of expression and combating hate considered earlier in this paper. The values surrounding freedom of expression – including acceptance of diversity and encouraging participation of all individuals in a democratic society – are in fact precluded rather than promoted by allowing the propagation of messages suggesting that certain groups are inherently inferior, are not welcome in our communities, or indeed should not exist. The Commission, the Tribunal and the courts must remain vigilant so as to ensure that hate message hearings remain an effective tool for realizing the values fundamental to Canadian society and that the goals of non-discrimination contained in the CHRA do not become obscured.

Endnotes

1 *In Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892 this test from the Tribunal in *Nealy v. Johnston* (1989), 10 C.H.R.R. D/6450 at D/6469 was cited with approval.

2 *Canadian Human Rights Commission v. Winnicki*, 2005 F.C. 1493 at paras 40 & 41

3 *Smith et al v. Western Guard Party* T.D. 1/79, pp. 9-10

4 International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, 660 U.N.T.S. 212 (entered in to force 4 January 1969), Art. 4

5 *Taylor*, supra note 1 at paras 40 & 41

6 Report of the Special Committee on Hate Propaganda in Canada, Ottawa: Queen's Printer

[7] *Taylor, supra* note 1 at para 49

[8] See Jane Bailey, "Private Regulation and Public Policy: Toward Effective Restriction of Internet Hate Propaganda" (2003) 49 McGill L.J. 59 at 69

[9] *Taylor, supra* note 1 at para 45

[10] *Barrick Gold Corporation v. Lopehandia et al.*, (2004) 71 O.R. (3d) 416, a case of defamation via the Internet, at para. 31.

[11] *See Ontario Human Rights Commission v. Simpsons-Sears* [1985] 2 SCR 536 at 546

[12] There have been approximately 12 hearings before the CHRT dealing with hate messages. In approximately half of those the respondents did not appear at the hearing and most who did appear did not give evidence. In the cases of *Warman v. Kyburz* 2003 CHRT 18 and *Warman v. Warman* 2005 CHRT 36, the respondents attempted to evade the service of Tribunal documents by sending them back with a message that they refused to accept the authority of the courts and other legal institutions. This is explained by their adherence to the beliefs of the de-tax movement, which believes that the only legitimate source of political power is local and that the taxes imposed by government are unlawful. The websites which were the subject of the hearings in these cases communicate the beliefs of this de-tax movement which also includes virulent anti-Semitic themes.

[13] *Citron v. Zundel* T.D. 1/02, 2002/01/18 at para 8

[14] *Warman v. Kulbashian et al*, 2006 CHRT 04

[15] *Kyburz*, supra note 12 at paras 89 & 90

[16] *Kyburz,* supra note 13, para 76

[17] Section 14.1 of the CHRA prohibits a person from retaliating against someone for filing or intending to file a human rights complaint. A remedy for a breach of section 14.1 includes an award for pain and suffering. See *Kyburz*, supra note 16.

[18] See for example *Winnicki* supra note 2.

[19] See *Canada v. Taylor* (1980), 1 C.H.R.R. D/47, *Canada (CHRC) v. Heritage Front* [1994] 3 F.C. 710, Canada v. Canadian Liberty Net [1992] 3 F.C. 155