LITIGATING HATE ON THE INTERNET

A vexing conundrum confronts anyone contemplating using the law to combat hate propaganda. This arises from the inevitable tension between the positive intended result of denouncing racism and intolerance and the negative potential by-product of providing a platform and publicity for retrograde and unacceptable views. This tension is all the more troubling in light of serious questions as to the effectiveness of such proceedings, either in terms of deterrence or in terms of actually suppressing the hateful communications, even when such proceedings are "successful."

By the time proceedings were initiated against Ernst Zundel under section 13 of the *Canadian Human Rights Act*[1], Zundel had for well over a decade been consciously attempting to exploit this conundrum in the various court proceedings in which he had previously been called to answer for his hate-mongering. Zundel called his method the "Zundel Jujitsu." This involved treating the proceedings as a media circus and trying to turn the tables on his accusers by attacking the honesty and good faith of the complainants, while himself posing alternately as the real victim and as the noble champion for freedom of expression.

It was therefore clear from the outset of the Human Rights Tribunal proceedings that Zundel would once again attempt to use the process to his advantage for publicity purposes, while steering it to what he saw as a no-lose outcome in which he would emerge either victorious or as a martyr.

The case didn't quite turn out as Zundel had hoped and my purpose today is to talk a little bit about how and why that happened. I think this might be a useful exercise because institutional memories can sometimes be a bit short and it would be a shame to lose the benefit of the experiences and lessons learned in that case. I think it might be useful as well, because I believe that the *Zundel* case illustrates some of the continuing strengths of section 13 as a weapon against hate propaganda on the Internet. I also want to talk about the case because, frankly, it is full of good stories and interesting anecdotes and it would be a shame to lose those as well.

In the *Zundel* case, at least, it is empirically clear that the Act proved extremely effective. Rather than face what he came to see as the inevitable outcome of the hearing in which the Canadian Human Rights Tribunal would order him to close down his Internet hate site, the so-called *Zundelsite*, Zundel chose to flee the jurisdiction and take refuge in the state of Tennessee. As some of the contemporaneous postings on the *Zundelsite* made clear, Zundel correctly perceived that the Tribunal's order to cease and desist from posting hateful material could be enforced by way of contempt proceedings, which would inevitably mean that, if he were to stay in Canada, he would be cut off from what he regarded as his most important tool for propaganda and for recruitment.

So the *Act* was immediately successful in that it was decisive in ridding Canada of one of the world's most notorious hate-mongers. That's an important development in its own right.

As things turned out – and the result is simply too perfect to allow it to be accepted as a mere coincidence – Zundel's plan to keep both his posture as a leading racist and the Internet tool by which he preserved and promoted hate was defeated by the backwash from 9/11, as he was deported from the United States, ironically not

MARK FREIMAN
Mark Freiman is the honorary legal counsel for the Canadian Jewish Congress Ontario Region and the former Deputy Attorney General for Ontario.

for his hate-mongering, but because he had overstayed his visitor's visa. The consequence of this infraction was that Zundel was shipped back to Canada, where he spent some two years, mostly in solitary confinement, fighting to be afforded the benefit of the refugee process that he had so bitterly denounced from the pulpit of his *Zundelsite*. To compound the irony, the fate he was attempting to avoid was expulsion to his native Germany. That fight ended badly as well. Zundel was duly returned to Germany, and on arrival he was arrested for violations of German,anti-hate laws. He currently, once again, finds himself in solitary confinement in the German prison system as he launches a myriad of hitherto unsuccessful pre-trial initiatives, no doubt dreaming of the chance to demonstrate the Zundel Jujitsu in the German context.

For the bulk of the time that I have available to me, I would like to discuss section 13 from the perspective and experience of the *Zundel* proceedings.

If I had more time, I think I would spend it all discussing some of the anecdotes and telling some of the stories that have not had any wide circulation due to the intentionally low profile that was adopted in the case in order to defeat the Zundel Jujitsu. The stories are both wonderful in their own right and illustrative as well of important points about the vindication of human rights. Since my time is not unlimited, I can only tell a few of these stories.

There is, for instance, the great scene at the opening of the hearings in which Zundel and his lawyer – the notorious Doug Christie – showed up in bullet-proof vests, apparently intending to illustrate how they were the literal and not just figurative targets of what they characterized as the enemies of free speech and historical truth. The actual result was simply to make both men look unhealthy, overweight and out of shape, while hindering their movements and causing them both to sweat profusely. This symbolic gesture was not repeated after the first day, and at least Mr. Christie looked less portly and less unhealthy for the rest of the hearings.

Then there was the week during which Mr. Zundel donned a yarmulke for the proceedings. Mr. Christie explained that one of the Commission's witnesses had defined Jewishness as a matter of self-identification. Zundel, he continued, had thereafter decided that he would self-identify as being Jewish so that he could benefit from what Mr. Christie described as the legal monopoly under Canadian law that only allowed criticism of Jews by other Jews. No one reacted to this act of guerrilla theatre. The press was not there to report on it, and Ernst Zundel was left looking like an uncomfortable guest at a bar mitzvah, wearing ill-fitting headgear that made it impossible to take him seriously.

There are also wonderful stories to be told about some of Zundel's witnesses. There was, for instance, the hate-mongering Internet service provider, stammering on cross-examination that he didn't recognize that the picture on his website under the title "Our Hero" was that of Adolf Hitler.

Then there was the academic poseur, being dragged through his bloated CV by Bob Armstrong (now a Court of Appeal judge) until he finally admitted that his claim to have been a "visiting professor" at Johns Hopkins University really meant that he was a faculty member at the notorious Bob Jones University, and while visiting Baltimore he had obtained a library card allowing him to read books from the Johns Hopkins University collection.

One of the key incidents in the proceedings was foreshadowed on that first day when Zundel, trussed in his bullet-proof vest, waddled down to the front of the rather grand courtroom in which the hearings commenced, accompanied by a strikingly attractive young woman of about half his years who seemed clearly smitten by the small, round man escorting her. I'll come back to the pivotal role played by this lady when I discuss section 13 in detail.

Before I leave my anecdotes and stories, however, I want to make clear that there were not simply moments of low comedy – like one of Zundel's nationalist witnesses agreeing on cross-examination that if someone questioned the historicity of his sufferings as a child in war-torn Germany, he would find such denial hateful, hurtful and harmful. There were also very moving moments. And I am thinking, for instance, of the testimony of the Commission's expert witness on anti-Semitism – a quiet, dignified professor of history from a Jesuit College in New York, who himself was born in Nazi Germany and who related to the Tribunal his own childhood experience of being forced into the Hitler Youth and of the horrendous ideology that was drummed into those children. The balance of his testimony consisted of his chilling narrative of the history of anti-Semitic hate propaganda and its literally murderous consequences. The hearing reached, I think, its emotional zenith as this

elderly, rather frail gentleman stared down and eventually silenced Doug Christie.

If one consequence of the choice made in these proceedings to fly under the radar was that these sorts of stories from the hearings have not received any of the publicity that they doubtless deserved, another – perhaps more serious – consequence is that the Tribunal's decision[2] itself is relatively unknown and, sadly, largely unread. That is a great pity. I commend the decision to you for its articulate, well reasoned exposition of section 13 and how it applies to hate-mongering websites, of which the *Zundelsite* is a textbook paradigm.

For the rest of the time that I have remaining, I want to turn to section 13 of the Act itself and to engage in a very brief "explication de texte."

Section 13(1) provides:

> 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 the 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.[3]

For all of its unwieldy language, it seems to me that section 13(1) is well grounded conceptually and in technical legal terms. It also, in my view, describes an appropriate balance among competing social and constitutional goals. It is as well, I believe, capable of being used quite effectively as a weapon against hate propaganda.

Let me go through each part of section 13(1).

1. "It is a discriminatory practice"

This is the heart of section 13(1).

Let me come back in a few moments to the implications of dealing with hate propaganda as a discriminatory practice rather than as a crime.

2. "For a person or group of persons acting in concert"

These words make it clear that the target for remediation in the subsection is the person or group of persons who communicate, not the messages.

In my view, this focus is not only appropriate, it is inevitable. It is simply not possible to shut down the Internet or to make even its most offensive or dangerous messages and communications inaccessible. Anyone with a rudimentary knowledge of how the Internet and its search engines work can, with relatively minimal effort, access all manner of stomach turning content. It has proven impossible to erect effective barriers against child pornography or against instructions on how to build bombs and how to manufacture anthrax, let alone against hate propaganda messages.

So you can't, as a practical matter, completely suppress hateful messages. You can, however, deal with a person or group of persons who spread such messages, and, in my view, section 13 allows Canadian society to deal with such persons quite effectively. At the very least, section 13(1) allows Canadian society to prevent persons present in Canada from using hate propaganda as a recruiting tool.

Hate propaganda is most effective when it is used by a galvanizing, charismatic figure for recruitment purposes. The *Zundelsite* was potentially effective precisely because it focused on Ernst Zundel and gave a face and a profile to otherwise abstract concepts.

As Zundel's own personal history illustrates, section 13 makes hate-mongers choose between severing their ties with hate propaganda and leaving the country.

3. "To communicate or to cause to communicate"

In my view, this is potentially the most difficult issue for proof at a Tribunal proceeding. Who runs the website? Who is it that is communicating or causing to communicate?

Zundel claimed that the *Zundelsite* was merely a tribute to him and was in fact run out of California by one Ingrid Rimland, a long-time acolyte who, as fate would have it, would eventually become the third Mrs. Zundel. But that was for the future. At the time of the hearing, Zundel simply argued that the Tribunal was dealing with the wrong respondent and in fact trying to suppress free speech in the United States.

How could the Commission demonstrate that in fact it was Ernst Zundel who was the one who was communicating or causing communication? We had some ideas, but as it happens, events overtook us and this never proved to be the problem it might have.

The reason was that very attractive young woman who accompanied the bullet-proof Mr. Zundel on the first day of the hearing. This was Irene Zundel, a rather eccentric but exceedingly intelligent young American woman who had met Ernst Zundel via the Internet and had just married him. Not only was Irene very smart but she really knew how to bear a grudge.

Ernst, it seems, proved impervious in his personal life to conventional morality. Even as he was entering the first days of his marriage with Irene, he was apparently also engaged in something more than intellectual intercourse with Ingrid Rimland. Shortly after the commencement of proceedings, Irene apparently discovered Ernst's little peccadillo and was not amused.

Irene's own testimony was preceded by a stunning miscalculation by Zundel and his legal team, in which they sought to impeach her credibility by reading into the record the contents of a number of letters that passed between Irene and Ingrid. I'm not sure I know what followed after Irene's letter of condolence to Ingrid on the occasion of the publication of Ingrid's picture in the flyleaf of Ingrid's *magnum opus* about the travails of displaced Germans from the "Eastern Reich." In this letter, Irene advises Ingrid to hire a good medical malpractice lawyer and go after the plastic surgeon who so brutally butchered Ingrid's face as evidenced by the photograph. I am not sure anyone else knows what happened afterwards, either, because everyone was laughing too hard. The cross-examination itself didn't go much better as Irene practiced her own version of the Zundel Jujitsu on the much feared Doug Christie, turning the tables on her would-be tormenter with such gems as "Doug, you were never so mean to me when I was cooking Sunday dinner for you."

Irene did not take at all kindly to her husband's apparent infidelity and, in her testimony, she delivered detailed evidence as to Ernst Zundel's personal control over the website and all its contents.

But even without an Irene, the issue of control may not be that difficult in proceedings under section 13(1) because of the close association between effective hate propaganda and charismatic hate-mongers. Most hate-mongers glory in their websites rather than seeking to disavow ownership.

I now return to the text of section 13(1).

4. "Communicate telephonically, repeatedly"

First: the issue of "telephonically". We spent a good deal of time at the hearing on expert testimony to demonstrate how communication over the Internet is in fact "telephonic communication" or, as Doug Christie put it, that "the Internet was a telephone." Functionally, that is an absolutely correct assertion. At present, however, section 13(2) saves the Commission the trouble of leading all that evidence, by specifying that telephonic communication includes the Internet.[4]

Second: the use of the work "repeatedly." This makes it clear that the subsection is not intended to cover a private conversation or single act of communication over the Internet. That is to say, section 13(1) focuses on the propagandistic, direct or indirect recruiting nature of the communications in question. It is not meant to stop someone from holding a view or conveying it in the course of a single Internet conversation or e-mail.

5. "Using in whole or in part a Canadian telecommunication undertaking within the legislative authority of Parliament."

The first thing to note is that this means that the subsection does not apply to Canadian broadcast undertakings, a jurisdictional point that is made explicit by subsection 3 of section 13.[5]

The evident purpose of these words is to establish constitutional jurisdiction over the communication of hateful messages. In other words, section 13(1) is properly within the legislative jurisdiction of Parliament by virtue of its application to a telecommunication undertaking which the courts have determined is part of the federal jurisdiction under the "peace order and good government" clause of s.91 of the *Constitution Act*.[6]

These words also bring us back to the Canadian context of the provision. We are dealing with hate propaganda in Canada using public media of communication. It is proper for Parliament to regulate the use of Canadian public telecommunication facilities.

6. "Messages likely to expose hatred and contempt"

These words define the nature of the discrimination that is addressed by section 13(1). It is interesting that the words describe exactly the same standard as is applicable to defamatory words in the common law tort of defamation.

Setting out this standard effectively addresses the issue of the nature of the harm caused by hateful communications. In this connection, it is notable that the issue of the "harm" caused by prohibited types of communication has become quite a contentious academic issue. F. W. Sumner, in his recent book The Hateful and The Obscene,[7] argues strenuously that Canadian laws against hate propaganda, like laws against pornography, are unjustifiable because they do not address any real "harm" as liberal democracies understand that term.

In my view, the language chosen in section 13(1), "likely to expose to hatred and contempt," is particularly appropriate because it points out that hate propaganda causes harm in the same way that defamation causes harm. The law of defamation is based on implicit propositions that (1) words can cause harm, and (2) the speaker of such words is responsible for the harm those words cause.

What is the harm caused by hate propaganda? In my view, hate propaganda causes harm by taking away from people their good name, much as defamation takes away an individual's good name. In the case of hate propaganda, this means taking away their right to be treated on their own merits rather than as embodiments of negative group stereotypes. Hate propaganda also causes harm by exposing people to hatred, ridicule and contempt and, most importantly, to fear.

These are not abstract harms; these are tangible harms.

7. "By reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination"

And here we come to the actual essence of section 13 and to the important ways in which hate propaganda under the Act differs from hate propaganda under the *Criminal Code*[8] and from defamation at common law.

Section 13 states that hatred directed at persons by virtue of their membership in a group that is identified on the basis of prohibited grounds of discrimination such as race, religion, ethnicity, gender or sexual orientation is never justified and, equally important, is *never* true.

That is the short answer to why "truth" is not a defence under Section 13, a principle set out by the Supreme Court of Canada in the *Taylor*[9] case and the principle which consistently infuriated and befuddled Zundel and his defence team.

The reason that truth is not a defence is that the Act simply posits that such generalized hatred by definition cannot be true.

As a practical matter, this principle is extremely useful in dealing with the Zundel Jujitsu. Allow a defence of truth and inevitably the "truth" of hateful speech becomes the focus. It is that focus that in effect puts the victim of hate propaganda on trial and under siege in cross-examination, rather than focusing on the perpetrator and the damage the perpetrator's words do. Eliminate the defence of "truth" and the focus is no longer on so-called political speech or the "market place of ideas" but on the real consequences of hate.

But is this a proper statement of values? Or to put the question into "Lawyerish": Does this statement represent a proper balance between the constitutional value of equality and the constitutional value of freedom of expression?

In my view, it is a proper balance and it is this balance that defines the difference between defamation and hate propaganda.

Individuals may well be deserving of hatred and contempt, but that is based always on what they, as individuals, do. That's why defamation needs a defence of truth. If the allegations against an individual are in fact true, that individual may well be deserving of hatred in contempt no matter what that person's race, religion, creed, gender or sexual orientation. The defamatory words are, therefore, in the language of the law of defamation, "justified."

But hate propaganda assigns blame for real or imagined misdeeds, not to individuals but to one or more identifiable groups that individuals may belong to.

If individuals can be deserving of hatred and contempt simply because they are identified as members of one of those groups, then discrimination is not simply permitted. It would appear mandatory as a means of protecting society from such groups.

In my view, that is how discrimination turns first to persecution and eventually to genocide. This again leads, in my view, to a choice that all societies have to make in terms of their own fundamental values. The values that underlie hate propaganda are simply inconsistent with the value of equality.

The real issue depends on first principles. I do believe that Canadian society has made the choice by entrenching equality in the *Canadian Charter of Rights*,[10] and this appears to be the only possible choice in a free and democratic society.

For that reason, I don't believe that this is an issue of a clash of rights, equality on the one hand and the market place of ideas that underlies free speech on the other. The currency offered in hate speech is counterfeit and worthless in the market place of ideas in a democracy based on equality.

Section 13 is based on those principles. It is not perfect because perfection is not possible in these matters. But it does seem to me to be a pretty decent tool for dealing with an unfortunately age-old, pernicious problem as it embodies itself in cutting-edge technology.

Endnotes

1 *Canadian Human Rights Act*, R.S. 1985, c. H-6, ("the Act").

2 *Citron and Toronto Mayor's Committee v. Zundel*, 2002 CanLII 23557 (C.H.R.T.).

3 *Ibid*., section 13.

4 Section 13(2) reads:

> (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, or any similar means of communication, but does not apply in respect of a matter that is communicated in whole or in part by means of the facilities of a broadcasting undertaking.

5 Section 13(3) reads:

> (3) For the purposes of this section, no owner or operator of a telecommunication undertaking communicates or causes to be communicated any matter described in subsection (1) by reason only that the facilities of a telecommunication undertaking owned or operated by that person are used by other persons for the transmission of that matter.

6 *The Constitution Act*, 1867 (U.K.), 30 + 31 Victoria, c. 3.

7 L.W. Sumner , *The Hateful And the Obscene: Studies In the Limits Of Free Expression*, (Toronto: University of Toronto Press, 2004).

8 *Criminal Code*, R.S. 1985, c. C-46.

9 *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892.

10 *Canadian Charter of Rights and Freedoms*, Part I of *The Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (U.K.), 1982, c. 11