
HATE SPEECH, EQUALITY, AND THE STATE OF CANADIAN LAW

*Kathleen Mahoney**

INTRODUCTION

I am delighted to participate in this publication of conference proceedings. I am sure that despite the differing views we may hold on the topic of hate speech and the way we should think about it with respect to free speech values, the fact that we are involved in this debate tells me that we are united in the struggle against hate, racism, xenophobia, and related forms of intolerance.

Democracies like Canada and the United States are being challenged by the culture of hate much differently and more seriously today than in the past. Today, racism, religious hatred, homophobia, sexism, and ethnic hatred are globalized, fed by all forms of hate propaganda. The globalization of hatred includes the additional feature of terrorist activity—recruitment efforts, the expansion of target groups, and the specific targeting of human rights defenders who oppose their goals.¹ So, in addition to the more familiar promotion of private and localized hatred and violence against certain groups, the challenge of dealing with hate propaganda has become an international one. Easily accessed sources of communication now can broadcast virulent, and even lethal, hate speech promoting discrimination against, denial of, or assault upon members of certain groups regardless of where they live. The hate speech moves from promoting hatred against individuals who are members of certain groups in a certain place to singling out these groups for differential and discriminatory

* Kathleen Mahoney is a highly distinguished Professor in the Faculty of Law at the University of Calgary. She delivered the keynote address in 2008 at the first-annual Fall Symposium of the Wake Forest Law Review, *Equality-Based Perspectives on the Free-Speech Norm: 21st Century Considerations*.

1. An example of this in Canada is the targeting of lawyer Richard Warman by neo-Nazi and other hate groups for his campaign against hate speech on the Internet. He has taken numerous cases before the Canadian Human Rights Commission against various hate groups and succeeded in many. See *Warman v. Canadian Heritage Alliance*, [2008] C.H.R.T. 40 (Can.) (providing a list of cases). An American neo-Nazi was recently indicted over death threats made to Mr. Warman. See Stewart Bell, *U.S. Neo-Nazi Indicted for Web Threats; Canadian Targeted*, NAT'L POST (Can.), Dec. 12, 2008, at A6.

treatment everywhere. In its most virulent form, it singles out certain groups for existential or genocidal assault.

An example of the universal scope of hatred is the increasing, generalized stereotyping and scapegoating of foreigners in all countries—be they migrants, refugees, or illegal aliens. Amongst extremists, there is an increased willingness to use violence against them.

Hand in hand with the globalization of hatred is a proliferation of hate speech on the Internet. The use of the Internet to incite violent crime and promote hatred has increased exponentially in the past fifteen years. In 1995, for example, there was only one internet site promoting hatred against specific groups; in 2005, it is estimated that there were more than 5000.² Since 9/11, the connection between hate propaganda, incitement, the Internet, and terrorism has been better understood than in the past. State-sanctioned hate propaganda has become common in parts of the world, especially the Middle East and parts of Africa, but also in the West. Such propaganda contributes even more to the formation of a culture of hate than when it is promoted by nongovernmental organizations (NGOs) or individuals in the private domain. State-sponsored hatred finds expression systemically in the media, schools, and other national and international institutions such as religious organizations and international political bodies like the United Nations. An example of this was the World Conference against Racism, Racial Discrimination, Xenophobia, and Related Intolerance, held in Durban, South Africa in 2001. The *NGO Monitor* reported that the NGO Forum at the conference, held under the auspices of the U.N. with the full participation of most of its member states, “was the most virulent source of anti-Semitism and attacks against Israel and the Western democracies.”³ It noted an April 2008 statement signed by over 100 NGOs that said, “Observers were shocked by violations of procedure in the preparatory and drafting processes, the racist treatment including violence, exclusion, and intimidation against Jewish participants, and the misuse of human rights terminology in the document related to the Israeli-Palestinian conflict.”⁴ Following the conference, the U.N. Human Rights Commissioner at the time, Mary Robinson:

2. Richard C. Owens, Remarks at B'nai Brith Canada's Third International Symposium: Hate on the Internet 1 (Sept. 12, 2006), available at http://www.media-awareness.ca/english/issues/upload/speech_hate_law_owens_2006_09.pdf.

3. *Durban Review PrepCom: Will NGOs Lead a Repeat of the 2001 Catastrophe?*, NGO MONITOR, Oct. 23, 2008, http://www.ngo-monitor.org/article/durban_review_prepcom_will_ngos_lead_a_repeat_of_the_catastrophe_.

4. *Id.*

denounced the “hateful, even racist” anti-Semitic atmosphere in the NGO Forum, refusing to endorse the final declaration, which demonized Israel through terms such as “apartheid,” “ethnic cleansing,” “racist crimes” and “acts of genocide,” and calling for “a policy of complete and total isolation of Israel as an apartheid state . . . the imposition of mandatory and comprehensive sanctions and embargoes.”⁵

The atmosphere being created by this form of “official” vilification is reminiscent of the 1930s campaign against Jewish people conducted by the Nazi regime in Western Europe, the 1990s campaign against Bosnian Muslims in the former Yugoslavia by Serbians, and the mass murders of Tutsis and moderate Hutus in the Rwanda genocide by the majority Hutus.

It was thought that one of the enduring lessons of those events was the understanding that an ideology of hate, the teaching of contempt, and the demonizing of the “other” is where genocide begins.⁶ Irwin Cotler paraphrased the Supreme Court of Canada’s decision in *Regina v. Andrews*, one of its three leading simultaneously decided cases on hate speech, by saying, “the Holocaust did not begin in the gas chambers. It began with words.”⁷ The Court found undeniable the “chilling facts of history”⁸ displaying racism’s “catastrophic effects.”⁹ However, one must question whether or not any lessons have been learned from the past as the dissemination of cyber-hate, the expansion of target groups, and the corresponding rise in hate crimes continue unabated.

There are different points of view about the best ways of protecting human rights, and the topic of hate propaganda brings them into stark relief. This Article canvases the options in light of recent developments and debates in Canada, examining the question as to whether more or less regulation and restriction is the best approach to dealing with the harms of hate speech, and whether there are some alternative ways of looking at the problem.

5. *Id.*

6. See Irwin Cotler, *Hate Speech, Equality, and Harm Under the Charter: Towards a Jurisprudence of Human Dignity for a “Free and Democratic Society,”* in THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS 20-1, 20-13 to -18 (Gérald-A. Beaudoin & Errol Mendes eds., 3d ed. 1996).

7. Professor Irwin Cotler, Canadian Member of Parliament, Keynote Address at the International Holocaust Remembrance Day: Remembering the Holocaust: Lessons for Our Time (Jan. 27, 2009) (paraphrasing *R. v. Andrews*, [1990] 3 S.C.R. 870, 881 (Can.)), available at [http://www.unog.ch/80256EDD006B8954/\(httpAssets\)/34475F4B9D8A3C80C1257273003F8A9F/\\$file/Irwin+Cotler.pdf](http://www.unog.ch/80256EDD006B8954/(httpAssets)/34475F4B9D8A3C80C1257273003F8A9F/$file/Irwin+Cotler.pdf).

8. *R. v. Andrews*, [1990] 3 S.C.R. 870, 883 (Can.).

9. *R. v. Keegstra*, [1990] 3 S.C.R. 697, 699 (Can.).

I. THE INTERNATIONAL LEGAL CONTEXT

Under international law, Canada is obligated to protect the freedom of expression of its citizens but also to protect its citizens from exposure to hate speech. These obligations came about as a result of the “barbarous acts” of World War II, which motivated the international community to come together under the auspices of the United Nations to protect human rights through international cooperation.¹⁰ The objective of the organization was to ensure that never again would there be such widespread violations of human rights as occurred during the Holocaust.¹¹ Since that time, five major human rights documents have been ratified containing specific limitations on hate speech,¹² and three others contain general limitations on speech.¹³

While the Universal Declaration of Human Rights¹⁴ (UDHR) contains a general limitation clause on rights, the International Convention on Civil and Political Rights¹⁵ (ICCPR) expressly speaks about hate propaganda, saying that states are required to prohibit “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.”¹⁶ One of the clearest and strongest statements requiring limits on hate speech is in the Convention on the Elimination of all Forms of Racial Discrimination¹⁷ (CERD), which says that signatories to the Convention must “adopt immediate and positive measures to eradicate all incitement to, or acts of, such discrimination . . . [by declaring] punishable by law all dissemination of ideas based on

10. These are words used in the preamble to the Universal Declaration of Human Rights. Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) [hereinafter UDHR].

11. America.gov, United Nations’ Beginnings, Purpose, Structure Profiled, <http://www.america.gov/st/washfile-english/2005/August/20050824162913adynned4.766482e-02.html> (last visited Apr. 2, 2009).

12. UDHR, *supra* note 10; International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; International Convention on the Elimination of all Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195 [hereinafter CERD]; Convention on the Prevention and Punishment of the Crime of Genocide, *opened for signature* Dec. 9, 1948, 78 U.N.T.S. 277; Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

13. Conference on Security and Co-operation in Europe: Final Act, Aug. 1, 1975, 14 I.L.M. 1292; Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123; Organization of African Unity, Banjul Charter on Human and Peoples’ Rights, *opened for signature* June 27, 1951, 21 I.L.M. 58.

14. UDHR, *supra* note 10, at 77.

15. ICCPR, *supra* note 12.

16. *Id.* at art. 20.

17. CERD, *supra* note 12.

racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts.”¹⁸

In the opinion of the U.N. Human Rights Committee, “these required prohibitions are fully compatible with the right of freedom of expression as contained in article 19 [of the ICCPR], the exercise of which carries with it special duties and responsibilities.”¹⁹

“Canada is a signatory to the *Special Protocol*, which enables an individual to bring a complaint to the Human Rights Committee that a state party has breached its obligations under the *ICCPR*.”²⁰ Canada has also signed the *Additional Protocol to the Convention on Cybercrime* (a Convention of the Council of Europe) that calls for “the criminalisation of acts of a racist [or] xenophobic nature committed through computer systems.”²¹

Now, sixty-four years later, the lessons of World War II and the aspirations of the human rights instruments are seemingly ignored. The hate-motivated killing on racial, ethnic, and religious grounds has continued—against Cambodians, Bosnians, Hutus, Tutsis, Sudanese, and the list goes on. This is not only occurring within a culture of hate, it is occurring within a culture of impunity and acquiescence, which has only encouraged more extensive and more egregious violations.

The promotion of hatred is not only globalized, it is multifaceted. It is like a virus, systematically spreading through all major aspects of life—politics, religion, and culture.

In the political realm, hate speech promotes the denial of or assault upon a group’s right as a people to self-determination, attacking whatever is the core of their self-definition at any moment in time. A common form of this kind of speech is the denial to a people of their past, especially when that past includes violations of their fundamental freedoms. Holocaust denial fits into this category.

Religious hate speech characterizes one religion as the treacherous enemy of another, and thus promotes its destruction on the theory of “it’s either us or them.” This often leads to assaults

18. *Id.* at art. 4.

19. U.N. Human Rights Comm., *General Comment No. 11: Prohibition of Propaganda for War and Inciting National, Racial or Religious Hatred (Article 20)*, para. 2, U.N. Doc. CCPR/C/21/Add.2 (July 29, 1983).

20. RICHARD MOON, REPORT TO THE CANADIAN HUMAN RIGHTS COMMISSION CONCERNING SECTION 13 OF THE *CANADIAN HUMAN RIGHTS ACT* AND THE REGULATION OF HATE SPEECH ON THE INTERNET 19 (2008) (referring to the Optional Protocol to the International Covenant on Civil and Political Rights, opened for signature Dec. 19, 1966, 999 U.N.T.S. 302), available at http://www.chrc-ccdp.ca/pdf/moon_report_en.pdf.

21. Council of Europe, *Additional Protocol to the Convention on Cybercrime*, opened for signature Jan. 28, 2003, Europ. T.S. No. 189, available at <http://conventions.coe.int/Treaty/EN/Treaties/Html/189.htm>.

upon and desecration of religious places of worship, cemeteries, and identifiable members of a particular religion.

Cultural vilification of particular groups can be much more subtle than other forms of hate speech. It includes the promotion of negative stereotypes in the media and forms of entertainment, in innuendo, and in the otherwise legitimate and enjoyable art forms of music, poetry, and literature. As Eli Wiesel famously said in reference to the Holocaust, “[c]old blooded murder and culture did not exclude each other. If the Holocaust proved anything it is that a person can both love poems and kill children.”²²

Economic vilification singles out a particular group and promotes discrimination against its members with respect to housing, jobs, and services. New forms go much farther, advocating that extraterritorial restrictive covenants be used against corporations that do business in countries where the dominant group is the target of their hatred, or even conditioning trade on the basis of the religion, ethnicity, or race of the employees of the trading partner. All of these forms of transmitting hatred are thriving in the world today, some state sponsored.

The most dangerous form of hate speech is existential or genocidal hate speech. Recent examples of how the pathology of this form of hate speech works are evident from Central Asia, to Central America, to Africa, and Europe. In Rwanda, hate speech, largely based on ethnic differences, directed at the Tutsi population by government officials, radio broadcasters, religious figures, and politicians, escalated into the genocide that resulted in the deaths of over 800,000 people.

The campaign of state-orchestrated incitement to religious and ethnic hatred in the former Yugoslavia against Bosnian Muslims resulted in a catastrophic ethnic cleansing, as well as other human rights atrocities and crimes. The Armenian killing fields, the European Holocaust, and mass killings from Cambodia to Rwanda and Burundi all succeeded because, over time, a culture of hate was created through the use of hate propaganda in various media forms, and specific peoples were targeted for death as a result. While it would be an oversimplification and an exaggeration to say that these atrocities are solely attributable to hate speech, it nevertheless always plays an essential role in genocide.

This Article attempts to discuss contemporary hate speech issues within the Canadian context and examine some of the arguments that are being made with respect to the fate of hate speech protections for vulnerable minorities.

22. Cotler, *supra* note 7.

II. THE CURRENT CANADIAN DEBATE

Since the late 1960s, Canada has had both federal and provincial laws that impose controls on hate speech. The provisions of Canada's Criminal Code²³ are the most powerful, prohibiting the advocacy or promotion of genocide, the incitement of hatred against an identifiable group when this incitement is likely to lead to a breach of the peace, and the willful promotion of hatred against an identifiable group.²⁴ To be convicted under any of these offences, the accused must be shown to have committed the relevant act and to have done so either intentionally or with knowledge or awareness of the nature of his or her actions. The penalty upon conviction may be a fine or a term of imprisonment.²⁵ The Criminal Code also includes a section that enables a court to order the seizure or erasure of material that it determines to be "hate propaganda."²⁶

The Canadian Human Rights Act²⁷ (CHRA), by contrast, differs from the Criminal Code in many respects. First and most importantly, under the CHRA, the purpose of human rights limitations on hate speech is not to condemn and punish the person who committed a hate propaganda offence. Its main purpose is to prevent or rectify discriminatory practices or to compensate the victims of discrimination for the harm they have suffered. In contrast to the Criminal Code requirements, no intention of exposing others to hatred is required in order for a violation of the law to be found. This is because the focus of human rights laws is on the effect of the act on the victim and not the intention with which it was performed.

The human rights codes of Alberta, British Columbia, the Northwest Territories, and Saskatchewan²⁸ include provisions similar to the CHRA, with some minor variations, including provisions that prohibit signs, notices, and other representations that are likely to expose the members of an identifiable group to hatred or contempt.²⁹

23. R.S.C., ch. C 46 (1985) (Can.).

24. *Id.* §§ 318–319.

25. *Id.* §§ 318(1), 319(1)(a), 319(2)(a).

26. Sections 184.2, 319(4), and 320 of the Criminal Code authorize the interception, seizure, and forfeiture of hate materials by agents of the state. All of these provisions are related to the offences defined in sections 318(1), 319(1), and 319(2).

27. R.S.C., ch. H 6 (1985) (Can.).

28. Alberta, under section 3 of the Human Rights, Citizenship and Multiculturalism Act, R.S.A., ch. H 14 (2000); British Columbia, under section 7 of the Human Rights Code, R.S.B.C., ch. 210 (1996); the Northwest Territories, under section 13 of the Consolidation of Human Rights Act, R.O.N.W.T., ch. 18 (2002); Saskatchewan, under section 14 of the Saskatchewan Human Rights Code, S.S., ch. S 24.1 (1979).

29. For example, section 7 of the B.C. Human Rights Code provides that:

Finally, there are a number of federal statutes and regulations that prohibit hate speech as part of a larger regulatory system. For example, the Broadcasting Distribution Regulations³⁰ prohibit the broadcasting of “any abusive comment or abusive pictorial representation that, when taken in context, tends to or is likely to expose an individual or group or class of individuals to hatred or contempt on the basis of race, national origin, color, religion, sex, sexual orientation, age or mental or physical disability.”³¹ All of these laws are discussed in more detail below.

The Supreme Court of Canada has so far upheld all of the federal and provincial hate speech laws under the Canadian Charter of Rights and Freedoms,³² with one exception.³³ The Court has been consistent in finding that, properly understood, controls on hate speech can not only coexist with free speech requirements and values in free and democratic societies, they can enhance those values.³⁴

Hate speech is recognized as a human rights issue by both legislatures and courts, which have made it clear that while free speech is integral to safeguarding the functioning of a free and

(1) A person must not publish, issue or display, or cause to be published, issued or displayed, any statement, publication, notice, sign, symbol, emblem or other representation that

.....

(b) is likely to expose a person or a group [or class] of persons to hatred or contempt because of the race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age of that person or that group or class of persons.

Section 14 of the Saskatchewan Human Rights Code is potentially broader in its scope since it extends not simply to material that exposes, or tends to expose, the individual to hatred but also to material that “ridicules, belittles, or otherwise affronts the dignity of [the] person.” However, the section only applies to communication in the form of a “notice, sign, symbol, emblem, article, statement or other representation.”

MOON, *supra* note 20, at 15–16 (quoting R.S.B.C. ch. 210, § 7 (1996); S.S., ch. S 24.1, § 14. (1979)).

30. Broadcasting Distribution Regulations SOR/1997-555 (Can.); *see also* Radio Regulations, SOR/1986-982, § 3(b) (Can.); Television Broadcasting Regulations SOR/1987-48, § 5(1)(b) (Can.).

31. SOR/1997-555, § 8(1)(b).

32. Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, ch. 11 (U.K.).

33. *See R. v. Zundel*, [1992] 2 S.C.R. 731, 743 (Can.), where the Supreme Court narrowly struck down an ancient criminal provision forbidding the spreading of false news. The Court held that the impugned provision was vague and did not display an identifiable purpose. *Id.*

34. *See Mugesera v. Canada (Minister of Citizenship & Immigration)*, [2005] 2 S.C.R. 100, 155–56 (Can.); *Canada (Human Rights Comm’n) v. Taylor*, [1990] 3 S.C.R. 892, 916–19 (Can.); *R. v. Keegstra*, [1990] 3 S.C.R. 697, 754–60, 764, 787 (Can.).

democratic society, indiscriminate and irresponsible use of the right as a weapon to promote hatred, assault the weak, and undermine or destroy the rights of others can be controlled or limited as long as constitutional requirements are met. The Supreme Court of Canada's most recent opportunity to comment on the importance of limiting hate speech was in *Mugesera v. Canada*,³⁵ which was held up as an illustration of the dangers of unrestricted hate speech. In that case, the Court found the unfettered dissemination of hate speech through the media in Rwanda to be a cause of the genocide in that country.³⁶ The Court highlighted the culpability of the defendant, who had made a speech that described Tutsis as "cockroaches" that needed to be "exterminated."³⁷ The Court stated:

Mr. Mugesera was aware of the attack occurring against Tutsi and moderate Hutu. Furthermore, a man of his education, status and prominence on the local political scene would necessarily have known that a speech vilifying and encouraging acts of violence against the target group would have the effect of furthering the attack.³⁸

The Court went so far as to say that Mr. Mugesera's hate speech was a crime against humanity.³⁹

Hate speech laws in Canada were recently updated and expanded to include sexual orientation under their protective ambit and to prohibit hate speech transmitted through the Internet.⁴⁰ The former was accomplished through the jurisprudence developed by the courts in other areas of sexual minority rights, thereby elevating their status and lending credibility to the need for their increased protection. At the same time, gay and lesbian communities mounted very effective lobbying efforts to expand hate speech laws.

The prohibition of hate speech on the Internet came about largely in response to the increasing volume of Internet hate messages as well as concern for national security as a result of terrorist attacks in the United States on 9/11 and elsewhere. The expanded hate speech laws were welcomed by antidiscrimination advocates and those worried about national security but were opposed by anticensorship civil liberties advocates and some far-right religious groups with the result that the debate on freedom of speech and the appropriate limitations to be placed on it has been

35. See *Mugesera*, [2005] 2 S.C.R. at 155–57.

36. *Id.* at 140. The *Mugesera* case involved an appeal of a deportation order where, in order for the Crown to succeed, there had to be proof of the commission of a criminal offence.

37. *Id.* at 129–33.

38. *Id.* at 166.

39. *Id.* at 167.

40. Criminal Code, R.S.C., ch. C 46, §§ 318–319 (1985) (Can.); 2004 S.C., ch. 14, §§ 1–2 (Can.).

re-ignited in Canada⁴¹ with new alignments and coalitions on both sides.

Sexual minorities, traditionally on the anticensorship side of the debate, have in large measure shifted their position to the antidiscrimination side as their equality rights become increasingly recognized by the courts and lawmaking bodies.⁴² One of the landmark decisions prompting the shift in attitude was *Vriend v. Alberta*,⁴³ in which the Supreme Court read-in protection of sexual orientation to Alberta's underinclusive human rights legislation. Another significant decision was *M. v. H.*,⁴⁴ in which the Court extended spousal support to same-sex couples. These two cases, among others such as those legalizing same-sex marriage and the passage of the Civil Marriage Act,⁴⁵ provided the impetus, authority, and political legitimacy sufficient for legislators to extend the protection of the Criminal Code hate speech provisions to sexual minorities.

Another motivating factor for sexual minorities to rely increasingly on speech limitations has been the exponential increase in the ability of the disseminators of cyber-hate to silence members of vulnerable minorities, effectively knocking them out of the competition in the marketplace of ideas.⁴⁶ One example was the forced closure of a bulletin board set up to honor Matthew Shepard, a university student in the United States who was tortured and left to die because he was gay.⁴⁷ The memorial bulletin board was inundated with so many hate messages that expressions of sympathy and support by gay activists and mourners were overwhelmed. The attack was so effective that the supporters of Matthew Shepard requested that the bulletin board be taken down.⁴⁸

Also lining up against anticensorship bloggers and some media outlets have been Muslim organizations, which not only argue in

41. See MOON, *supra* note 20, at 1.

42. Recent advances in jurisprudence interpreting the Canadian Charter of Rights and Freedoms, particularly the inclusion of sexual orientation as an analogous prohibited ground for discrimination under section 15, have prompted sexual minorities to pursue a much stronger antidiscrimination agenda.

43. *Vriend v. Alberta*, [1998] 1 S.C.R. 493, 498 (Can.).

44. *M. v. H.*, [1999] 2 S.C.R. 3, 26 (Can.).

45. 2005 S.C., ch. 33 (Can.).

46. For a discussion, see Jonathan Cohen, *More Censorship or Less Discrimination? Sexual Orientation Hate Propaganda in Multiple Perspectives*, 46 MCGILL L.J. 69 (2000); Chris Gosnell, *Hate Speech on the Internet: A Question of Context*, 23 QUEEN'S L.J. 369 (1998); Marie-France Major, *Sexual-Orientation Hate Propaganda: Time to Regroup*, 11 CAN. J.L. & SOC'Y 221 (1996).

47. Cohen, *supra* note 46, at 71.

48. *Id.*

favor of hate speech laws, but want to resurrect antiblasphemy laws to limit speech that they find offensive to their religious beliefs.⁴⁹ They object to the expression of anti-Muslim messages, especially exemplified by the infamous anti-Muslim cartoons from Denmark depicting the Prophet Muhammad as a terrorist, which were republished in Canada by free speech enthusiasts seeking to test the limits of their speech freedoms.⁵⁰ Some Muslim groups filed complaints with human rights commissions, maintaining that publishing the cartoons amounted to hate speech as defined by human rights legislation,⁵¹ while others argued that antiblasphemy laws⁵² should be enforced to prevent publication of such depictions.⁵³

49. The antiblasphemy law has not been used to prosecute anyone in Canada for more than seventy years, and it is widely agreed that the law would not survive a constitutional challenge.

50. Keith Bonnell, *Defiant Levant Republishes Cartoons; Complaint from Muslims Sparks Rights Hearing*, NAT'L POST (Toronto), Jan. 12, 2008, at A6.

51. Complaints were filed by Muslim organizations in the human rights commissions of British Columbia, Ontario, and Canada against *Maclean's* magazine. Only one went to a hearing as they were either dismissed or found to be without jurisdiction to hear the complaint. *Human Rights Campaign Against Maclean's Dismissed*, CTV NEWS (Can.), June 28, 2008, http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20080628/steyn_commission_080628/20080628?hub=CTVNewsAt11. The complaint to the Alberta Human Rights Commission about the republication of the anti-Islamic cartoons was dismissed in August 2008. Paul Lungen, *Human Rights Complaint Dismissal Spurs More Debate*, CAN. JEWISH NEWS, Aug. 20, 2008, http://www.cjnews.com/index.php?option=com_content&task=view&id=15181&Itemid=86.

52. Section 296 of the Canadian Criminal Code deals with "blasphemous libel" as part of offences against the person and reputation as follows:

(1) Every one who publishes a blasphemous libel is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

(2) It is a question of fact whether or not any matter that is published is a blasphemous libel.

(3) No person shall be convicted of an offence under this section for expressing in good faith and in decent language, or attempting to establish by argument used in good faith and conveyed in decent language, an opinion on a religious subject.

R.S.C., ch. C 46, § 296 (1985).

53. The last case prosecuted under section 296 for blasphemous libel was *R. v. Rahard*, [1935] 65 C.C.C. 344 (Que. S.C.), where the Rev. Victor Rahard of the Anglican Church was found guilty of blaspheming the Roman Catholic Church. The Crown adopted the test put forward in the earlier unreported case of *R. v. Sterry*:

The question is, is the language used calculated and intended to insult the feelings and the deepest religious convictions of the great majority of the persons amongst whom we live? If so, they are not to be tolerated We must not do things that are outrageous to the general feeling of propriety among the persons amongst whom we live.

ROBERT MARTIN & G. STUART ADAM, A SOURCEBOOK OF CANADIAN MEDIA LAW 425-33 (1994) (quoting *R. v. Sterry*, [1926] 48 C.C.C. 1n, 22 (Ont. C.A.)). See

Adding to the controversy, Canadian Muslims seeking to invoke antiblasphemy laws have found support at the United Nations. In 2008, a key committee at the U.N. passed a resolution supportive of an international instrument that would promote antiblasphemy laws for member states.⁵⁴ In the days leading up to the vote, members cited the 2005 publication of the same Danish cartoons that touched off riots through the Muslim world.⁵⁵ The nonbinding resolution,⁵⁶ *Combating Defamation of Religions*, passed 85-50 with 42 abstentions in a U.N. General Assembly committee and is expected to be entered into the international record within a year.⁵⁷ The resolution's sponsors say it is "aimed at preventing violence against worshippers regardless of religion."⁵⁸ It calls attention to "the need to combat defamation of religions, and incitement to religious hatred in general, by strategizing and harmonizing actions at the local, national[,] regional[,] and international levels."⁵⁹ "Passage of the resolution is part of a 10-year action plan . . . launched in 2005 to ensure 'renaissance' of the 'Muslim Ummah' or community."⁶⁰

The anticensorship advocates argue that the publication of the cartoons was a form of freedom of expression and that their constitutionally protected free speech rights permit them to publish whatever they like, without restriction.⁶¹ Controversial right-wing

generally Jeremy Patrick, Note, *Not Dead, Just Sleeping: Canada's Prohibition on Blasphemous Libel as a Case Study in Obsolete Legislation*, 41 U.B.C. L. REV. 193 (2008).

54. Steven Edwards, *UN AntiBlasphemy Measures Have Sinister Goals, Observers Say*, CANWEST NEWS SERV., Nov. 24, 2008, available at <http://www2.canada.com/theprovince/news/story.html?id=9b8e3a6d-795d-440f-a5de-6ff6e78c78d5>.

55. *Id.*

Resolution 62/145, which was adopted in 2007, says it "notes with deep concern the intensification of the campaign of defamation of religions and the ethnic and religious profiling of Muslim minorities in the aftermath of 11 September 2001." It "stresses the need to effectively combat defamation of all religions and incitement to religious hatred, against Islam and Muslims in particular."

Jennifer Lawinski, *U.N. AntiBlasphemy Resolution Curtails Free Speech, Critics Say*, FOX NEWS.COM, Oct. 6, 2008, <http://www.foxnews.com/story/0,2933,432502,00.html>.

56. "While the current resolution is nonbinding, Pakistan's Ambassador Masood Khan reminded the UN Human Rights Council this year that the [fifty-seven-state Organization of Islamic Conference (OIC)] ultimately seeks a binding convention on the issue." Edwards, *supra* note 54.

57. *Id.*

58. *Id.*

59. *Id.* (quoting the 2008 draft of the resolution).

60. *Id.*

61. Keith Bonnell, *Commentator Defends Publishing Controversial Muslim Cartoons*, CANWEST NEWS SERV., Jan. 13, 2008, available at <http://www.canadiangrassroots.ca/articles.inc.php?command=show&ID=12323>.

Canadian publisher Ezra Levant stated after his human rights hearing on the matter, “I have maximum rights of free speech . . . I have the right to publish this for the most offensive reason, for the most unreasonable reasons.”⁶²

Fundamentalist Christian organizations are weighing into the debate with respect to both hate speech and antiblasphemy laws. Formerly in the procensorship (especially with respect to pornography), antiblasphemy camp, they have partially switched sides as a result of what they perceive to be religious aggression by Muslims and legitimating of homosexuality by liberal politicians and judges. They see antiblasphemy laws as potentially having a “chilling effect’ on Christian work and outreach around the world.”⁶³ They believe such laws would create a slippery slope “because everything that purports to criticize Islam will be considered ‘blasphemy.’ Anything that promotes another religious viewpoint, like Christianity, [they fear, will also be] considered blasphemy.”⁶⁴ They say such laws “really become the ultimate weapon against free religious speech around the world.”⁶⁵

There is little doubt that Canada’s antiquated antiblasphemy law would be struck down on a constitutional challenge because it is antithetical to the approach that has been taken by the Canadian Supreme Court when balancing freedom of speech and minority rights. The Court and the legislation make a clear distinction between granting rights to an “idea” and defending the right of people not to be discriminated against.⁶⁶ As a result, Canada opposes the U.N. resolution (as do all western democracies), taking the position that laws should be used to protect the rights of religious adherents, including people belonging to religious minorities and people who choose to change their religion or not to practice religion at all, rather than the religions themselves. The Court’s free speech jurisprudence under the Canadian Charter of Rights and Freedoms makes it clear that the balancing required is between the constitutional equality rights of the individual or group attacked and the freedom of speech of the speaker.⁶⁷ The fact that

62. *Id.*

63. Posting of Barry Duke to The Freethinker, <http://freethinker.co.uk/2008/10/11/christians-wake-up-to-the-dangers-of-un-antiblasphemy-resolution> (Oct. 11, 2008) [hereinafter Posting of Barry Duke] (quoting Carol Moeller, President and CEO of Open Doors).

64. *Id.*; see also Edwards, *supra* note 54 (quoting Bennett Graham, International Program Director for the religious-litigation strike force Becket Fund, as saying the resolution “provides international cover for domestic antiblasphemy laws, and there are a number of people who are in prison today because they have been accused of committing blasphemy”).

65. Posting of Barry Duke, *supra* note 63.

66. Edwards, *supra* note 54 (quoting Catherine Loubier, spokeswoman for Foreign Affairs Minister Lawrence Cannon).

67. See *supra* notes 32–34 and accompanying text.

some states have abused laws against defamation or contempt of religions to prosecute and imprison journalists, bloggers, academics, students, and peaceful political dissidents⁶⁸ shows the danger inherent in giving rights to an ideology.

With respect to the expansion of the scope of hate propaganda laws to include sexual orientation and the Internet, fundamentalist Christians say they fear that the protection of sexual minorities from hate speech will threaten religious freedom and their rights to preach antihomosexual sermons and encourage antihomosexual activities.⁶⁹ Another of their fears continues to be that hate speech laws that protect sexual minorities could be used to criminalize the Bible as a form of hate speech.

Recent case law in Saskatchewan addresses this concern. The case of *Owens v. Saskatchewan Human Rights Commission*⁷⁰ was an appeal of a decision of the Saskatchewan Human Rights Board of Inquiry⁷¹ that ruled that a newspaper ad with references to Biblical passages exposed gay men to hatred. The advertisement, placed by Regina resident Hugh Owens in the Saskatoon Star Phoenix, featured an icon of two stick figures holding hands. The figures are covered by a red circle and slash and are accompanied by four references to the Bible. The Board said the slashed figures alone were not enough to communicate hatred, but it found that the addition of the Biblical references was more dangerous.⁷² One biblical reference from Leviticus was cited, which says a man who "lies with a man" must be put to death.⁷³ The Board said, "[i]t is obvious that certain of the Biblical quotations suggest more dire consequences and there can be no question that the advertisement can objectively be seen as exposing homosexuals to hatred or ridicule."⁷⁴ The Board ordered both the newspaper and Mr. Owens to pay the three claimants \$1500 each.⁷⁵

The Court of Queens Bench upheld the Board's ruling, finding that although the religious references did not amount to hate speech on their own, when combined with the diagram they did. The court quoted the Board with approval:

The use of the circle and the slash combined with the passages of the Bible make the meaning of the advertisement unmistakable. It is clear that the advertisement is intended to

68. See Lawinski, *supra* note 55.

69. These fears were addressed in the religious exemption in the Criminal Code amendments. See *infra* note 89 and accompanying text.

70. [2002] 228 Sask. R. 148 (Sask. Q.B.).

71. *Hellquist v. Owens*, [2001] 40 C.H.R.R. D/197 (Can.).

72. *Id.* at para. 26.

73. *Leviticus* 20:13.

74. *Hellquist*, [2001] 40 C.H.R.R. at para. 28.

75. *Id.* at para. 34 (referring to Canadian dollars).

make the group depicted appear to be inferior or not wanted at best. When combined with the Biblical quotations, the advertisement may result in a much stronger meaning.⁷⁶

The court concluded:

When the use of the circle and slash is combined with the passages of the Bible, it exposes homosexuals to detestation, vilification and disgrace. In other words, the Biblical passage which suggest[s] that if a man lies with a man they must be put to death exposes homosexuals to hatred.

This decision was appealed to Saskatchewan's Court of Appeal—the province's highest court.⁷⁷ It ruled that the ad did not violate the human rights code.⁷⁸ Justice Richards, writing for the majority, said that the ad was “bluntly presented and doubtless upsetting to many.”⁷⁹ However, the court stated that the appellant had the constitutional right to express publicly what it determined were his sincerely held religious beliefs.⁸⁰ At the same time, the Court of Appeal made the point that although the advertisement in question fell outside the scope of the Saskatchewan Human Rights Code, “the Bible passages referred to by Mr. Owens, or any other sacred text, [cannot] serve as a license for acting unlawfully against gays and lesbians.”⁸¹ The Court emphasized that “[t]he entire community can and should expect that all of [the] legislative provisions will be actively engaged to protect the dignity, rights and the security of gay men, lesbians, bi-sexual and trans-identified persons.”⁸²

It is evident that fundamentalist religious groups use the free speech issue for a broader purpose than to ensure they have the freedom to express their moral views. Hans C. Clausen, an American widely cited on religious, antihomosexual websites, criticizes Canadian judges for favoring equality rights over free speech and religious liberty. His main premise is that:

[t]he goal of these laws [proscribing criticism of homosexuality] is much grander than preventing discrimination against homosexuals; rather, the objective is seemingly to promote the social acceptance of gay and lesbian lifestyles. . . . [A]chieving the social equality of homosexuals—conceived in sweeping

76. *Owens v. Sask. Human Rights Comm'n*, [2002] 228 Sask. R. 148 (Sask. Q.B.), paras. 9, 21 (Can.).

77. *Owens v. Sask. Human Rights Comm'n*, [2006] 279 Sask. R. 161 (Sask. Ct. App.).

78. *Id.* at para. 88.

79. *Id.* at para. 86.

80. *Id.* at paras. 42–44, 80.

81. *Id.* at para. 87.

82. *Id.*

terms—has, in many Western countries, outstripped legal protections for speech and religious freedoms.⁸³

Through his words Clausen goes further than merely questioning the appropriateness of limitations on freedom of expression and religion. He uses the vehicles of free speech and religious rights to call into question the rights of sexual minorities to enjoy all aspects of social equality. The implication of his position is that members of sexual minorities should be relegated to the status of second-class citizens, not entitled to equal protection and deserving of unequal treatment, whether or not the expression involves religion.

This very issue was confronted in the Alberta case of *Vriend v. Alberta*.⁸⁴ Commenting on the exclusion of protection for sexual orientation in the Individual's Rights Protection Act,⁸⁵ the Supreme Court of Canada held:

[The] exclusion, deliberately chosen in the face of clear findings that discrimination on the ground of sexual orientation does exist in society, sends a strong and sinister message. The very fact that sexual orientation is excluded from the IRPA, which is the Government's primary statement of policy against discrimination, certainly suggest[s] that discrimination on the ground of sexual orientation is not as serious or as deserving of condemnation as other forms of discrimination. It could well be said that it is tantamount to condoning or even encouraging discrimination against lesbians and gay men. Thus this exclusion clearly gives rise to an effect which constitutes discrimination.

The exclusion sends a message to all Albertans that it is permissible, and perhaps even acceptable, to discriminate against individuals on the basis of their sexual orientation. The effect of that message on gays and lesbians is one whose significance cannot be underestimated. As a practical matter, it tells them that they have no protection from discrimination on the basis of their sexual orientation. Deprived of any legal redress they must accept and live in constant fear of discrimination. These are burdens that are not imposed on heterosexuals.⁸⁶

83. Hans C. Clausen, Note, *The "Privilege of Speech" in a "Pleasantly Authoritarian Country": How Canada's Judiciary Allowed Laws Proscribing Discourse Critical of Homosexuality to Trump Free Speech and Religious Liberty*, 38 VAND. J. TRANSNAT'L L. 443, 443 (2005).

84. *Vriend v. Alberta*, [1998] S.C.R. 493, 548–49 (Can.).

85. Individual's Rights Protection Act, R.S.A., ch. I 2 (1980), amended by 1985 S.A., ch. 33 and 1990 S.A., ch. 23 (Can.).

86. *Vriend*, [1998] S.C.R. at 550–51.

This fundamental question as to whether or not equality rights and protection from discrimination should even exist for sexual minorities should not be disguised or legitimized by the religious freedom debate. To take another example—if those opposed to Muslim teachers and students wearing *hijab* to public schools⁸⁷ were to use the separation of church and state argument to argue as well that Muslim women do not deserve workplace equality because they are not Christian, the discrimination would be clear.⁸⁸

The religious exemption included in the Criminal Code amendments on hate speech to protect the expression of good-faith religious opinion⁸⁹ and the Saskatchewan Court of Appeal's decision in the *Owens* case make it clear that the religious exemption exists for the narrow reason of protecting the expression of sincerely held moral beliefs, not for wholesale discrimination against sexual minorities. In the cases filed by Muslim organizations, on the other hand, the human rights commissions made it clear that they would not be used to assuage mere insult or to settle scores.⁹⁰

As a result of the religious freedom controversy, however, including the outrage on both sides regarding the republication of the anti-Muslim cartoons and challenges to anti-Muslim rants in a national magazine, the Canadian Human Rights Commission undertook a comprehensive review of its human rights hate speech

87. There have been numerous incidents in various parts of the world (including the U.K., Spain, Turkey, France, Singapore, and Ireland) where states have argued that wearing *hijab* violated the principle of the separation of church and state, and young women and girls were expelled from schools because of wearing *hijab*. In Quebec in the mid-1990s, high school students were being expelled for wearing *hijab*. Eventually, the Quebec Human Rights Commission decided the *hijab*-expulsions issue by ruling that Quebec schools could not stop students from wearing religious attire.

88. Banning *hijab* in workplaces, as called for by the Quebec Council on the Status of Women, would have broad discriminatory effects.

The *hijab*-ban, if implemented, besides curtailing right to religious practice, will leave Muslim women who choose to wear the head scarf unemployable in Quebec's public and para-public sectors.

. . . If implemented, the ban will lead to institutionalized discrimination against Quebec's Muslim women by barring them from working in government sectors. This runs in direct contravention to the Quebec Charter of Human Rights and Freedoms which prohibits employment discrimination against women.

Press Release, Council on American-Islamic Relations, CAIR-CAN: Proposed Hijab-Ban Discriminates Against Quebec Women (Oct. 7, 2007), available at <http://www.cair.com/ArticleDetails.aspx?mid1=777&&ArticleID=23333&&name=n&&currPage=26>.

89. The exemption reads: "No person shall be convicted of an offence under subsection (2) . . . if, in good faith, the person expressed or attempted to establish by an argument an opinion on a religious subject or an opinion based on a belief in a religious text." R.S.C., ch. C 46, § 319(3) (1985) (Can.).

90. See discussion *supra* note 51.

legislation.⁹¹ The resulting Report, prepared for the Commission on statutory and policy changes to the Internet hate speech law, recommended that section 13 be repealed and that the regulation of only the most serious forms of hate speech—threats and advocacy of violence—be left to the criminal law.⁹²

The Report's anticensorship position is close to the American absolutist view—i.e., that there is no place for human rights legislation that limits speech and that criminal laws should be used only for speech of the "shouting fire in a crowded theatre" variety. The author of the Report provided scant justification for suggesting that the long line of authority upholding the human rights hate speech provisions as reasonable and constitutional be overturned. No analysis or evidence was provided with respect to any "chilling" effect or "slippery slopes." Neither was there any discussion about the proven harms in relation to the value of hate speech, about the effect of the provisions on promoting civility or creating a culture of respect for diversity and social cohesion instead of a culture of hate, or about the message that hate speech laws send about Canadian values of equality and nondiscrimination. The author of the Report thinks adequate protection for vulnerable and marginalized victims of hate propaganda will come from the audiences' rational capacity to disregard hateful messages—a view neither history nor the present state of the world supports.

The human rights community argues that, although it is important for human rights legislation to be carefully applied against free speech interests, it would be an overreaction to respond to calls for radical change in Canadian law because of the loud protestations of a few self-interested, free speech absolutists and

91. Professor Richard Moon was charged with the responsibility of examining section 13 of the Canadian Human Rights Act and providing recommendations with respect to the role of the Commission and the regulation of hate speech. See MOON, *supra* note 20. The section became a flashpoint for controversy after the Canadian Islamic Congress complained to the Canadian Human Rights Commission about *Maclean's* magazine's refusal to publish a contrary view, written by law students, to a number of articles in the magazine that the students believed to be discriminatory and dangerous expression. Around the same time, another controversial right-wing commentator used his website to republish the cartoons of the Prophet Muhammad for which he was brought before the Alberta Tribunal. Both incidents became the focus of an organized attack against section 13 and human rights commissions by the media, civil libertarians, and extreme right-wing groups, even though all of the cases were eventually dismissed or withdrawn. One commission responded by criticizing media coverage that promoted "societal intolerance towards Muslim, Arab and South Asian Canadians." Press Release, Ont. Human Rights Comm'n, Comm'n Statement Concerning Issues Raised by Complaints Against *Maclean's* Magazine (Apr. 9, 2008), available at <http://www.ohrc.on.ca/en/resources/news/statement>.

92. MOON, *supra* note 20, at 42. At the present time, no action has been taken on the recommendations.

other extremists who wish to promote hatred with impunity. Repealing section 13 without more would be a retrograde step akin to “throwing out the baby with the bathwater” and compromise the equality rights of all vulnerable groups.⁹³ It is curious that the viability of section 13 is now questioned even though, notwithstanding the high-profile disputes, the system worked as it should have.⁹⁴ The repeal of section 13 would also leave a gap in the overall civil approach to combating Internet hate speech. The Commission will prepare its own recommendations for Parliament in mid-2009.

III. THE CANADIAN HATE SPEECH LAWS AND REGULATIONS

At the high or most serious end of the scale of legal restrictions on hate speech in Canada is the Criminal Code.⁹⁵ Hate propaganda is criminalized, which prohibits, inter alia, the willful promotion of hatred and contempt against identifiable groups in a public place as follows:

319(2) Every one who, by communicating statements, other than in private conversation, willfully 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 . . . 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 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

93. See Press Release, Can. Jewish Cong., Can. Jewish Cong. Rejects Moon Report's Call to Repeal s. 13 of the Can. Human Rights Act (Nov. 24, 2008), available at <http://www.cjc.ca/p/template.php?action=news&story=990>.

94. See discussion *supra* note 51.

95. R.S.C., ch. C 46 (1985).

(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.⁹⁶

The Criminal Code also prohibits advocacy of genocide and incitement to violence.⁹⁷

“Other relevant Criminal Code sections include section 320 and section 320.1, which provide for the seizure of hate propaganda that is published or the erasure of hate propaganda from a computer system.”⁹⁸

320(1) Warrant of seizure: A judge who is satisfied by information on oath that there are reasonable grounds for believing that any publication, copies of which are kept for sale or distribution in premises within the jurisdiction of the court, is hate propaganda shall issue a warrant under his hand authorizing seizure of the copies.

(2) Summons to occupier: Within seven days of the issue of a warrant under subsection (1), the judge shall issue a summons to the occupier of the premises requiring him to appear before the court and show cause why the matter seized should not be forfeited to Her Majesty.

(3) Owner and author may appear: The owner and the author of the matter seized under subsection (1) and alleged to be hate propaganda may appear and be represented in the proceedings in order to oppose the making of an order for the forfeiture of the matter.

(4) Order of forfeiture: If the court is satisfied that the publication referred to in subsection (1) is hate propaganda, it shall make an order declaring the matter forfeited to Her Majesty in right of the province in which the proceedings take place, for disposal as the Attorney General may direct.

(5) Disposal of matter: If the court is not satisfied that the publication referred to in subsection (1) is hate propaganda, it shall order that the matter be restored to the person from whom it was seized forthwith after the time for final appeal has expired.⁹⁹

320.1(1) Warrant of seizure: If a judge is satisfied by information on oath that there are reasonable grounds for

96. *Id.* § 319(2)–(3).

97. *See id.* §§ 318(1), 319(1).

98. MOON, *supra* note 20, at 14.

99. R.S.C., ch. C 46, § 320 (1985) (Can.).

believing that there is material that is hate propaganda within the meaning of subsection 320(8) or data within the meaning of subsection 342.1(2) that makes hate propaganda available, that is stored on and made available to the public through a computer system within the meaning of subsection 342.1(2) that is within the jurisdiction of the court, the judge may order the custodian of the computer system to

- (a) give an electronic copy of the material to the court;
- (b) ensure that the material is no longer stored on and made available through the computer system; and
- (c) provide the information necessary to identify and locate the person who posted the material.¹⁰⁰

Under section 320.1, a judge may order the removal of hate propaganda from the Internet, whether or not a prosecution is pursued under section 319. The issuance of an order under section 320.1(1) does not depend on a determination that the author of the posting or controller of the website “willfully” promoted hatred. Indeed, under this section an Internet Service Provider could be ordered to take down a site, even though the identity of the author of the hate speech could not be determined.¹⁰¹

Other legislative provisions incorporate the definitions and offences in the Criminal Code. The Canada Post Corporation Act¹⁰² authorizes the minister responsible for the Canada Post Corporation to deny mail privileges if there are reasonable grounds for believing that an offence is being committed, including a hate propaganda offence.¹⁰³ The Customs Tariff¹⁰⁴ prohibits the importation into Canada of hate propaganda within the meaning of the Criminal Code,¹⁰⁵ and the Broadcasting Act¹⁰⁶ incorporates the Criminal Code provisions against hate speech by requiring broadcasters to “encourage . . . development of Canadian expression by providing . . . programming that reflects Canadian . . . values” and to abide by the Criminal Code.¹⁰⁷

Non-criminal provisions against hate speech are found in the federal Canadian Human Rights Act¹⁰⁸ (CHRA) and human rights

100. *Id.* § 320.1.

101. MOON, *supra* note 20, at 15.

102. R.S.C., ch. C 10 (1985).

103. *Id.* § 43.

104. R.S.C., ch. 41 (1985 3d Supp.) (Can.).

105. *Id.* § 114.

106. 1991 S.C., ch. 11 (Can.).

107. *Id.* § 3(1)(d)(ii).

108. R.S.C., ch. H 6, §§ 53–54 (1985) (Can.).

legislation in all provincial jurisdictions.¹⁰⁹ The CHRA empowers the Canadian Human Rights Commission to deal with complaints regarding the communication of hate messages by telephone or on the Internet. Section 13 is expressly concerned with equality and discrimination as opposed to punishment and deterrence. It reads as follows:

13.(1) Hate Messages: 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.

(2) Interpretation: 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.

(3) Interpretation: 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.¹¹⁰

In addition, section 3(1) of the CHRA defines “the prohibited grounds of discrimination [as] race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for which a pardon has been granted.”¹¹¹

Section 13 was first included in the CHRA in 1977. At that time, the section was designed to be a balanced attempt to curb extremist campaigns of hate against Jews and African Canadians using repeated recorded messages over the telephone.¹¹² After 9/11, the section was amended to include use of the Internet to promote

109. See, e.g., *supra* note 28 and accompanying text.

110. Canadian Human Rights Act, R.S.C., ch. H 6, § 13 (1985).

111. *Id.* § 3(1).

112. The requirement of repetition in section 13(1) indicates that the section is directed not at private communication, but rather at material intended for wider, public circulation. This reasoning was affirmed in *Warman v. Bahr*, [2006] C.H.R.T. 52, para. 25 (Can.).

hatred, linking hate with terrorism for the first time. It was recognized that if the telephone was ideally suited to spread prejudicial ideas, the Internet is even better positioned. The fact that it is a very public form of communication, inexpensive, easily accessed, and can deliver many messages simultaneously to a worldwide audience makes it a far more effective mechanism through which to spread hatred.¹¹³

The principal remedy available to the [Canadian Human Rights Tribunal (CHRT)], following a determination that section 13 has been breached, is an order “that the person cease the discriminatory practice and take measures . . . to prevent the same or a similar practice from occurring in [the] future. . . .” The CHRT may also order the person to pay an amount not exceeding \$20,000 “to a victim specifically identified in the communication that constituted the discriminatory practice.” Finally the CHRT may order the person to pay a penalty of not more than \$10,000; however, in deciding whether to order payment of a penalty, the CHRT must take into account “(a) the nature, circumstances, extent and gravity of the discriminatory practice; and (b) the willfulness or intent of the person who engaged in the discriminatory practice, any prior discriminatory practices that the person has engaged in and the person’s ability to pay the penalty.” Section 57 of the *CHRA* provides that for the purposes of enforcement a tribunal order may be made an order of the Federal Court. The consequence of this is that a breach of the CHRT’s order constitutes a contempt of court and is punishable by fine or imprisonment.¹¹⁴

In announcing the amendment in a press release, the government invoked the values of equality and protection of diversity, stating:

These necessary measures target people and activities that pose a threat to the security and well being of Canadians. This is a struggle against terrorism, and not against any one community, group or faith. Diversity is one of Canada’s greatest strengths, and the Government of Canada is taking steps to protect it. Measures will be included in the bill to address the root causes of hatred and to ensure Canadian values of equality, tolerance and fairness are affirmed in the wake of the September 11 attacks.¹¹⁵

113. *Schnell v. Machiavelli & Assoc. Emprize*, [2002] 43 C.H.R.R. D/453 at para. 156 (Can.). In this case, the respondents were found to have spread hatred of homosexuals through the use of the Internet.

114. MOON, *supra* note 20, at 5.

115. CAN. HUMAN RIGHTS COMM’N, QUESTIONS AND ANSWERS ABOUT SECTION 13, at 2 (2008), http://www.chrc-ccdp.ca/pdf/qa_section13.pdf.

Adding the Internet to the scope of the hate speech laws creates challenges of jurisdictional enforcement and technological feasibility. Determined hate mongers will easily circumvent these laws through manipulation of Internet sites because material can be generated anywhere in the world, posted anonymously, and redirected quickly. However, the understanding of lawmakers is that, notwithstanding the difficulties of enforcement, the law must send out a strong message of condemnation, both reinforcing the values underlying the hate speech laws that minority communities have the right not to be subjected to intimidation and deterring individuals who would promote hate. Even if some, perhaps even most, hate speech is unpreventable, "we ought to prevent those [instances] that we can."¹¹⁶

Prior to the 9/11 amendments, both the criminal law provisions and the federal human rights provisions were constitutionally challenged together in the cases of *Regina v. Keegstra*¹¹⁷ and the *Canadian Human Rights Commission v. Taylor*.¹¹⁸ They were the first cases on free speech to be brought under the Charter of Rights and Freedoms, which had come into force in 1982.

The relevant provisions of the Charter protect a variety of rights from government interference, including through legislation. These rights include freedom of conscience and religion, freedom of expression, and the right to equality. The relevant sections read as follows:

2. Everyone has the following fundamental freedoms:

- a) freedom of conscience and religion;
- b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
- c) freedom of peaceful assembly; and
- d) freedom of association.

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,

116. MOON, *supra* note 20, at 27.

117. *R. v. Keegstra*, [1990] 3 S.C.R. 697 (Can.).

118. *Canada (Human Rights Comm'n) v. Taylor*, [1990] 3 S.C.R. 892 (Can.). In *Taylor*, the Court divided four-three over the issue of whether or not the limit on speech was justified under section 1, with the majority holding that it was.

religion, sex, age or mental or physical disability.¹¹⁹

These rights and freedoms are subject to the limits contained in section 1 of the Charter, as interpreted in keeping with section 27:

1. 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.

27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.¹²⁰

In the *Keegstra* case, Mr. Keegstra, a high school teacher in Eckville, Alberta, was charged with unlawfully promoting hatred against an identifiable group under section 319(2) of the Criminal Code.¹²¹ The charges originated from Keegstra's anti-Semitic statements to his students, which attributed various evil qualities to Jews. He described Jews to his students as "treacherous," "subversive," "sadistic," "money-loving," "power hungry," and "child killers."¹²²

According to Mr. Keegstra, Jews "created the Holocaust to gain sympathy" and, in contrast to the open and honest Christians, were said to be deceptive, secretive and inherently evil. Mr. Keegstra expected his students to reproduce his teachings in class and on exams. If they failed to do so, their marks suffered.¹²³

When charged, Keegstra argued that section 319(2) violated his right to freedom of expression guaranteed under section 2 of the Canadian Charter of Rights and Freedoms.

In the *Taylor* case, John Ross Taylor set up a scheme whereby members of the public were invited to dial a telephone number where they would hear a short prerecorded hate message.¹²⁴ Taylor's

phone line was the subject of the first section 13 complaint[s] and the first case heard by the CHRT. Mr. Taylor and his organization were found by the CHRT to have breached section 13, and a cease and desist order was issued against them. Mr. Taylor nevertheless continued to operate the hate

119. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11., §§ 2, 15 (U.K.).

120. *Id.* §§ 1, 27.

121. *Keegstra*, [1990] 3 S.C.R. at para. 2.

122. *Id.* at para. 3.

123. *Id.*

124. *Canada (Human Rights Comm'n) v. Taylor*, [1990] 3 S.C.R. 892, para. 5 (Can.).

line. Following an application by the CHRC to the Federal Court, he was found in contempt of court and sentenced to one year in prison. His sentence was suspended on the condition that he discontinue his discriminatory activities. He did not and, as a consequence, the sentence was enforced against him. Following his release from prison, Mr. Taylor re-established the phone line. The CHRC again commenced contempt proceedings against him. However, the *Canadian Charter of Rights and Freedoms* came into force in 1982, shortly before the second contempt proceeding. Mr. Taylor argued at that proceeding that section 13 was unconstitutional because it violated section 2(b) of the *Charter of Rights*, the freedom of expression right, and could not be justified under section 1, the limitations provision.¹²⁵

The constitutional issue was heard together with the *Keegstra* case and finally resolved by the Supreme Court of Canada, which in separate majority decisions held that neither section 319(2) of the Criminal Code nor section 13 of the CHRA were unconstitutional, as they were saved by section 1 of the Charter.¹²⁶

The Court examined the argument that such laws impinge too far on freedom of expression and the argument that such speech left unchecked will do grave harm to individuals as well as to society. It decided to uphold both the criminal and the human rights laws as constitutional. In explaining how freedom of speech guarantees can coexist with laws that limit it, the Chief Justice at the time, Brian Dickson, said, “[o]ne must be careful not to accept blindly that the suppression of expression must always and unremittingly detract from values central to freedom of expression.”¹²⁷

The Court in the *Keegstra* case found that while any legislated restriction of speech amounts to an infringement of the free speech guarantee, infringements could be justified if they meet the proportionality requirements under section 1. The reason for infringing a Charter right must be pressing and substantial, the infringement cannot be arbitrary or irrational, and it must be as minimal as possible.¹²⁸ In discussing the proportionality of the provision, the Court said the legislation was narrowly tailored to prohibit public, larger-scale schemes for the dissemination of hate propaganda.¹²⁹ The requirement to prove intent to promote hatred, as well as the defenses of truth and good-faith public-interest commentary, limited the reach of the hate speech sections

125. MOON, *supra* note 20, at 5–6 (citations omitted). A fine of \$5,000 was imposed on the Western Guard, the organization under which Mr. Taylor placed the ads. *Id.* at 43 n.6.

126. *Taylor*, [1990] 3 S.C.R. at para. 84.

127. *Keegstra*, [1990] 3 S.C.R. at para. 96.

128. *R. v. Oakes*, [1986] 1 S.C.R. 103, paras. 73–74 (Can.).

129. *Keegstra*, [1990] 3 S.C.R. at paras. 25, 63–67.

sufficiently to pass the constitutional requirements.

The equality provisions of the Charter were a relevant consideration in the section 1 calculus. The Court used these provisions to inform its assessment of the appropriate balance between free speech protections and the purpose of section 15, which is:

to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons, enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.¹³⁰

By invoking section 15, the *Keegstra* Court made the clear point that Charter rights cannot be read in isolation from one another, but instead, under the admonition of section 27, must “be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.”¹³¹

More recently, the Supreme Court in *Mugesera v. Canada*¹³²

described the elements of the section 319(2) offence of willfully promoting hatred. [The Court said t]he term “promotes” means to actively support or instigate and not simply to encourage. The term “hatred” connotes “emotion of an intense and extreme nature that is clearly associated with vilification and detestation.” According to the Court, “[o]nly the most intense forms of dislike fall within the ambit of this offence.” Proof that the communication caused actual hatred is not required. The law’s purpose is to prevent the risk of serious harm caused by hate propaganda. In determining whether the speech conveyed hatred, the [context must be considered, including] the audience and the social and historical context of the speech. . . . The Court in *Keegstra* indicated that when determining whether the accused intended to promote hatred, “the trier will usually make an inference as to the necessary *mens rea* based upon the statements made.”¹³³

With the human rights legislation, the Court said that it did not matter if there was no intent to communicate hate messages, because human rights legislation is more concerned with the effects

130. *Law v. Canada (Minister of Employment & Immigration)*, [1999] 1 S.C.R. 497, para. 51 (Can.).

131. Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11, § 27 (U.K.).

132. *Mugesera v. Canada (Minister of Citizenship & Immigration)*, [2005] 2 S.C.R. 100 (Can.).

133. MOON, *supra* note 20, at 14 (citations omitted) (quoting *Mugesera*, [2005] 2 S.C.R. at para. 101 (quoting *Keegstra*, [1990] 3 S.C.R. at para. 122) and *Keegstra*, [1990] 3 S.C.R. at para. 122).

of acts than the intent behind them.¹³⁴ The Court recognized that a discriminatory act is just as hurtful whether it is intended or not. The Court likewise held that the defense of truth does not apply to a human rights offence, because, in this context, a truthful statement can be just as damaging as an untruthful one.

In 1983, the U.N. Human Rights Committee, under the jurisdiction of the International Convention on Civil and Political Rights, affirmed the Supreme Court's decision when it

dismissed a complaint brought by John Ross Taylor and the Western Guard that their freedom of expression guaranteed in the [ICCPR] had been breached by the application of section 13 of the [CHRA]. The Human Rights Committee observed that: "the opinions which Mr. Taylor seeks to disseminate through the telephone system clearly constitute the advocacy of racial or religious hatred which Canada has an obligation under article 20(2) of the Covenant to prohibit."¹³⁵

In cases subsequent to the 9/11 amendments, the constitutionality of Canadian hate speech laws have been upheld, relying on the basic reasoning in *Keegstra* and *Taylor*. In the section 1 analysis, it is apparent that the decisions are even stronger because of the recognition that the proliferation of hate sites over the Internet increases the harm it causes to targeted groups. In a recent constitutional challenge to section 13, the Canadian Human Rights Tribunal held: "The pervasiveness of the Internet persuades us that this mode of communicating hate messages is most pernicious. . . . [A] public means of communication is used, yet the listener enjoys direct, seemingly personal contact in relative privacy."¹³⁶

CONCLUSION

The recent free speech controversy in Canada has resulted in a passionate polarization of opinion. At one extreme are free speech

134. *Mugesera*, [2005] 2 S.C.R. at para. 123.

135. MOON, *supra* note 20, at 19 (quoting Report of the Human Rights Comm., 38 U.N. GAOR, Supp. No. 40 (A/38/40) 231 (1983) at para. 8(b)).

136. *Citron & Toronto Mayor's Comm. v. Zündel*, [2002] C.H.R.T. T.D. 1/02 at para. 95 (Can.), available at http://www.chrt-tcdp.gc.ca/tribunal/index_e.asp. In *Warman v. Winnicki*, the Tribunal similarly noted:

The Respondent called for the forced expulsion of non-Caucasian people, he threatened violent action against the targets of his hatred and enthusiastically supported a "racial holy war" in which all non-Caucasian people will be destroyed. He made use of exceedingly gruesome photographic imagery to draw in his readers and to communicate his messages of hate all the more powerfully.

[2006] C.H.R.T. 20, para. 208 (Can.), available at http://www.chrt-tcdp.gc.ca/tribunal/index_e.asp.

advocates who argue for the freedom to say, print, or videotape anything they want without restriction. On the other extreme, there are those who would like to prevent anyone from saying anything that criticizes or insults their fundamental beliefs. Striking a balance between these two points of view is like standing at the peak of two slippery slopes. On one side, any restriction of speech is seen as removing safeguards that keep us from sliding towards group think, tyranny, and despotism. On the other, unrestricted speech promoting hatred is seen as removing safeguards that prevent us from sliding toward a place where cruelty, violence, and even genocide could be inflicted on the disadvantaged, marginalized, or despised.

Where legislative provisions protective of equality rights may be rewritten or repealed at the altar of free speech, as is presently being threatened, it is necessary to bring the Charter into the debate to ensure the fundamental values of the state are the lens through which the laws and fundamental freedoms are evaluated.

Hate propaganda laws, both criminal and civil, derive support from section 15 equality rights in the Charter. As the hate speech laws affect the right to expression, also a Charter right, a way must be found to ensure that the two fundamental rights can coexist and not collide. Neither freedom of expression nor equality claims should ever be invisible, relegated to the background, or allocated a lower place. There is no hierarchy of rights in the Charter.

It must be remembered, when seeking this balance between the two sets of rights, that hate speech is a practice of inequality. The law's response to it must be tested against the standard of equality found in the Charter. The resulting limitations are the vehicle through which coexistence can be achieved. A nondiscriminatory understanding of the limits on expression must be found that avoids privileging certain cultural and racial perspectives in setting the objective tests. Giving meaning to coexisting rights is an important challenge that, if met, will go a long way to resolving the hate speech controversy. The Charter provides some doctrinal space to resolve it.

It could be argued that a coexistence of rights could help to create a culture of respect where the opportunity for freedom of expression is equally enjoyed by all. When seen from this perspective, restrictions on hate speech, rather than infringing on the speech rights, actually facilitate free speech by protecting voices and by decontaminating social discourse infused with blatant and harmful untruths.

In the *Keegstra* case, Justice Dickson recognized that not only can expression be used to the detriment of our search for the truth, it can also undermine rationality in an unregulated marketplace of ideas and promote forms of intolerance and prejudice. Such uses destroy the marketplace of ideas. Thus, legal restrictions of hate

speech are not and should not be understood as limitations on freedom. They represent a refined understanding of what freedom is. The marketplace of ideas is a limited response to the search for truth. The challenge is to find the best way of responding.

Justice Dickson believed that the fostering of tolerant attitudes among Canadians is best achieved through a combination of diverse measures. He said that dealing with the harm done through hate propaganda may require that especially stringent responses be taken to suppress and prohibit a modicum of expressive activity when deterrence and condemnation is necessary. But he also said having both the criminal and civil means of redress is justified in a free and democratic society because it gives the state some leeway in its use of the law depending on the circumstances which may require a less severe response.

Justice Dickson's analysis is consistent with Canada's international obligations with respect to hate speech and racial, ethnic, and religious equality, although the international human rights regime has yet to recognize the equality rights of sexual minorities. The challenge is to find adequate legal protection that will work, pass constitutional muster, and also provide a framework for a broader commitment to respect.

Irwin Cotler argues that a more nuanced project is required. He says a culture of respect must be developed to replace the "culture of hate – inspired [sic] by and anchored in a set of foundational principles [found in] international human rights jurisprudence . . . and domesticated in [Canadian law]."¹³⁷ Over the past twenty-five years, the Canadian Supreme Court has passed judgment on many hate speech cases. In doing so, it has provided a unique set of legal principles and precedents, informed by human rights, comparative law norms and experiences, as well as a comprehensive appreciation of international law and constitutional law.

Cotler sees these principles as at least a starting point for a discussion about the creation of a culture of respect. The principles include:

- Respect for the inherent dignity and worth of the human person;
- Respect for the equal dignity and worth of all persons;
- Respect for the underlying values of a free and

137. Professor Irwin Cotler, Canadian Member of Parliament, Keynote Address at the Stockholm International Forum (Jan. 29, 2001), *available at* <http://www.manskligarattigheter.gov.se/stockholmforum/2001/page1219.html>.

democratic society targeted by [hate] speech;

- [Respect for the underlying values of freedom of speech];
- Respect for the right of minorit[y groups] to [be protected] against [hate speech];
- Recognition of the substantial harm . . . caused to the individual and group[s who are the] targets of hate speech, as well as to society as a whole;
- [Respect for and f]idelity to . . . international treaties—such as the International Convention on Elimination of All Forms of Racial Discrimination—which have removed . . . hate speech from the ambit of protected speech;
- Respect for our multicultural heritage and the fragility of our multicultural democracy; and,
- The need for an ethic and ethos of tolerance and diversity that respects the vision and voice of “the other.”¹³⁸

But a culture of respect will not be achieved through simply limiting certain forms of hate speech. Apathy, silence, and indifference must also be addressed if a culture of respect is to replace the culture of hate. The “success” of crimes of genocide perpetrated around the world has been assisted not only by the creation of a culture of hate through hate propaganda, but also as a result of the indifference and silence of those who could have intervened to help. All forms of hate propaganda are legitimized when there is silence—in the academy, parliaments, amongst public intellectuals, doctors, lawyers, other elites, and in the human rights movement.

Many excuses are offered, not the least of which is the desire to remain “neutral,” as was the excuse of the United Nations in the preventable Rwanda genocide. But as has been pointed out by many others, “neutrality in the face of evil—whether of individuals or states—is acquiescence in, if not complicity with, evil itself.”¹³⁹

A culture of respect requires an insistence on accountability for hate crimes. Accountability means bringing human rights violators to justice. But as David Matas points out, “[p]unishing mass murderers, protecting refugees, protesting [mass] violations, all

138. *Id.*

139. *Id.*

come too late for [the] many victims [of religious, racial, or ethnic hatred].”¹⁴⁰

Had the international community stepped in and blocked the airwaves in Rwanda during the lead up to the mass killings directed over the radio, how many lives could have been saved? In a genocide carried out mainly by civilians, and where the machinery of death was machetes, clubs, and knives, mass communications were essential in order to direct and enflame the actions of the killers. But the world stood by and permitted the hate propaganda to go unchecked until it was too late.

So accountability must also include deterring future violations, protecting potential victims, and safeguarding international peace and security. Justice should prevent harm, not require it. It is logically irrational to assert that there should be unlimited liberty of either action or speech. We restrict freedom of action all the time through the criminal laws because of potential harms that could be caused. The harms of hate speech are no less serious and no less demonstrable. The need for a state to apply hate speech laws with firmness, consistency, and wisdom is essential if the norms of behavior we wish to promote in society are to be encouraged. We cannot erase hatred from the world, but we can condemn it and criminalize it. Of all the actions that can be taken to prevent atrocities before they happen, I believe there is none more important than prohibiting the worst forms of hate speech.

140. DAVID MATAS, BLOODY WORDS: HATE AND FREE SPEECH 11 (2000).