

A Review of the *Taylor* Case USING HUMAN RIGHTS LEGISLATION TO CURB RACIST SPEECH

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In a companion case to the decision rendered by the Court in *Keegstra*, the *Canadian Human Rights Act* (CHRA) provisions regarding hate messages were also tested against the *Charter's* guarantee of freedom of expression. Section 13(1) of the federal statute prohibited communications repeatedly made over the telephone "that is likely to expose a person or persons to *hatred or contempt*" by reason that they belong to certain identifiable groups. At stake in *Taylor and the Western Guard Party v. Canada (Human Rights Commission)* was this provision contained in an otherwise ordinary statutory human rights regime. The impugned provision, however, only vaguely paralleled the racist incitement prohibitions contained in the *Criminal Code* and which were at issue in *Keegstra*.¹

Taylor had been using the telephone to transmit recorded messages of the most vile nature on behalf of the Western Guard Party, promoting hatred primarily against Jews. Taylor repeatedly ignored a human rights tribunal order that he cease and desist the telephone messages and Federal Court orders citing him for contempt of the tribunal's order. Taylor eventually served a one year prison term for his contempt. In 1983, the Commission moved to cite Taylor and the Western Guard Party for contempt again as they continued to breach the original cease and desist order. In the interim, however, the *Charter* had been proclaimed in force. Taylor and the Western Guard Party challenged the fresh application on the basis that it unreasonably infringed their freedom of expression.

The panel of the Supreme Court agreed, as they did in *Keegstra*, that speech promoting hatred against certain groups fell within the scope of expression protected under section 2(b). The majority of the Court, as they had done in *Keegstra*, upheld the legislation as a reasonable limitation on free expression, particularly given the important objective of promoting equality of groups and dignity of the person. The dissenting minority, as in *Keegstra*, found the prohibitions to be an unreasonable limitation. While the reasons of both the majority and minority closely parallel their decisions in *Keegstra*, there are important differences between the two pieces of legislation in issue. What follows is a summary of those relevant distinctions and the manner in which the Justices handled them.

THE STATUTORY SCHEME

An important component in the reasoning of the Court was the fact that a statutory human rights regime was at issue in *Taylor*. Unlike the *Criminal Code* prohibitions against racist incitement, the CHRA was designed to facilitate the accommodation of minority groups in Canadian society and outlaw certain discriminatory practices. The prohibition against

racist speech communicated over the telephone could be seen as an important component of a larger scheme aimed at preventing serious indignities based upon irrelevant characteristics.

Unlike the aim of the criminal process, which is designed to prosecute, convict, and then sentence, the aim of a statutory human rights code is the cessation of the racist activity and conciliation of the final outcome. It is false to equate, therefore, a human rights regime with the more strict procedures associated with the criminal process. This distinction was summarized by Chief Justice Dickson, writing for the majority, as follows:

The aim of human rights legislation; and of s.13(1), is not to bring the full force of the state's power against a blameworthy individual for the purpose of imposing punishment. Instead, provisions found in human rights statutes generally operate in a less confrontational manner, allowing for conciliatory settlement if possible and, where discrimination exists, gearing remedial responses more towards compensating the victim.

The majority rightly characterized human rights laws in this way but they, too, analogized falsely; they failed to distinguish between the traditional subject of those laws and the particular subject of the law at issue in *Taylor*. Human rights statutes are aimed primarily at prohibiting certain discriminatory *practices* normally associated with conducting business in the public marketplace. Such matters as discriminatory practices in employment, accommodation, or admission to facilities normally open to the public, are some of the activities regulated by human rights codes. Such codes are not ordinarily directed at expression unconnected to an intention to engage in a discriminatory practice under the code.² Unlike the usual human rights complainant, who usually has suffered financial loss or suffered the indignity of a discriminatory practice, here there is no "victim" who is seeking a conciliatory solution or compensation. Dickson C.J. was wrong, therefore, to characterize the law as the type of "practice... which is [usually] sought to be precluded" by a human rights code.³

THE LACK OF AN INTENT REQUIREMENT

Unlike the *Criminal Code* prohibitions against racist incitement, the CHRA does not require the Commission to prove a discriminatory intent on the part of the respondent. The *Code* provision at issue in *Keegstra* required proof of "wilful" intent, (and even this provision has been the subject of calls for repeal in order to make criminal conviction easier⁴). But human rights codes, as discussed above, are not designed with a view to conviction and, therefore, do not generally require the exacting

standards of the criminal process. More importantly, one of the more pervasive forms of discrimination is systemic in nature; actions which result in unintentional discrimination. For example, height requirements or mandatory uniforms might have the effect generally of excluding particular groups from certain jobs. The result or effect of the impugned act is critical, not the mind of the discriminating actor. To quote Chief Justice Dickson again, "the purpose and impact of human rights codes is to prevent discriminatory effects rather than to stigmatize and punish those who discriminate."

Justice Dickson also refuted the "intent" requirement by noting that a term of imprisonment was not a great possibility in most cases. It would be available, as it was in this case, only if the offender had intentionally breached a tribunal's order. Even in the event of a hearing into a complaint of intentional hatred or contempt, imprisonment could not be the penalty imposed. But, in my view, the fact that imprisonment is an unlikely event, except for the most resistant of respondents such as Taylor, should not be sufficient to mollify concerns about the impact such a provision can have on free expression.

The Canadian Civil Liberties Association (CCLA), an intervenor in all of the hate propaganda cases before the Supreme Court, argued that the provisions were broad enough to catch in their net some of the Association's own activities, such as their successful tactic of posing over the telephone as a prospective employer seeking to hire "whites only" through employment agencies. Making such discriminatory requests over the telephone surely could fall within the scope of the CHRA's prohibitions. Despite the well-intentioned nature of the telephone calls — to expose discriminatory hiring practices — the CCLA and its agents could reasonably be the subject of a human rights complaint. One could imagine a more solicitous civil rights organization not wanting to appear to be running afoul of such a law. The minority of the Court accepted the CCLA's contention that their work could be so caught.

THE LACK OF STATUTORY DEFENCES

Unlike the *Criminal Code* provisions, the CHRA provides no statutory defences. In the *Code*, truthful statements, good faith statements on a religious subject, or good faith statements designed to remove conditions creating racial hatred, are among some of the defences available to an accused. As no such exceptions exist in the CHRA, groups such as the CCLA could be caught by the prohibition. In addition, the CHRA had no free expression exemption, as do most human rights codes which address discriminatory notices, signs or symbols.⁵

A freedom of expression exemption would have, of course, defeated the very purpose of the telephone hate message provision. This bespeaks the extraordinary nature of the human rights law in question. The majority of the Court also found a detailed statutory scheme of defences to be unnecessary. Given the conciliatory objectives of the CHRA, the absence of such

defences was more acceptable than would be the case if they were absent from the *Code*. Even then, as Dickson C.J. wrote in *Keegstra* and reiterated here, the *Charter* does not necessarily mandate that the defence of truth be available to the charge of promoting hatred. He wrote in *Keegstra* that he found "it difficult to accept that the circumstances exist where factually accurate statements can be used for no other purpose than to stir up hatred against a racial or religious group".⁶

Of the defences available under the *Code*, there has been some dispute over whether communications by an aboriginal chief accusing white Canadians of stealing aboriginal land might be caught by the criminal prohibition against racist incitement.⁷ There would be less doubt about the applicability of the CHRA in such circumstances. A telephone campaign by a first nation person or group promoting such ideas (a greater likelihood after the British Columbia Supreme Court decision in the Giktsan-Wet'suwet'en case)⁸ might well be caught in the CHRA net. Again, the majority of the Court might have been a little too naive about such prospects.

THE INCLUSION OF PRIVATE COMMUNICATIONS

Unlike the *Code* prohibitions at issue in *Keegstra*, which outlaw the promotion of hatred "otherwise than in private conversation", the provisions in the CHRA concerned wholly private telephone discussions. The problem of inflicting hate speech on unsuspecting and unwilling listeners does not arise, as it does in the case of more public forms of hate mongering. One who chose to call the Western Guard Party line would ordinarily be seen as having assumed the risk of being insulted, degraded, and vilified. One who decided not to hear the message any further, could simply hang up the telephone.

The Human Rights Commission, in argument, and the majority in their reasons, sought to break down this public/private distinction. It was argued that telephone campaigns can take on a very public role. Indeed, as was the case here, telephone messages can be designed to change minds and influence public opinion. Moreover, section 13(1) requires that the respondent have used the telephone "repeatedly" in order to make these communications. The requirement of repetition makes clear the public nature of this otherwise private act.

THE VAGUENESS OF BOTH HATRED AND CONTEMPT

One of the more difficult matters for the Court concerned the definitional scope of the CHRA prohibition. Section 13(1) concerned communications that are likely to expose certain identifiable groups to "hatred or contempt". Compounding the problems of intruding into private communications without any specific defences, are two equally vague concepts: hatred and contempt.

As in *Keegstra*, the majority found the word hatred to be certain enough to meet section 1 scrutiny. The Court adopted

here the definition of section 13(1) described by the human rights tribunal in *Nealy v. Johnston*.⁹ Under the CHRA scheme, "hatred" refers to "extreme" ill-will and an emotion which allows for 'no redeeming qualities' in the person at whom it is directed". This was to be contrasted with "contempt", which is "similarly extreme", but describes circumstances "where the object of one's feelings is looked down upon". The section "thus refers to unusually strong and deep-felt emotions of detestation, calumny and vilification". Dickson C.J. did "not find this interpretation to be particularly expansive" for the section "extends only to that expression giving rise to the evil sought to be eradicated and provides a standard of conduct sufficiently precise to prevent the unacceptable chilling of expressive activity."

The CCLA, in their submission, provided examples of the kinds of expression which have been, or could have been, the subject of investigation under Canada's hate laws. Such items that have been held up at the Canadian border, under customs regulations paralleling the *Criminal Code* provisions, included a documentary film regarding Nelson Mandela (which was alleged to have promoted hatred against white South Africans) and Salman Rushdie's *Satanic Verses* (which was alleged to have promoted hatred against Muslims). Add to the formula the notion of "contempt", even in its strongest form, and there is a great danger of overbreadth and chilling effect on free expression, notwithstanding the fact that the provisions are found in a human rights statute. The minority of the Court agreed and found that the section "opens the door to investigations which have more to do with dislike than discrimination." On this basis, the minority found that the section failed the proportionality part of the *Oakes* test; the section was not closely tailored to its objective and unnecessarily infringed freedom of expression.

McLachlin J., however, was encouraging about the prospects of using the process available in human rights instruments to curb hate propaganda. She wrote:

For establishing the necessary balance between promoting harmony and dignity on the one hand, and safeguarding freedom of expression on the other, the process of this Act is exemplary. It is well designed to minimize many of the undesirable aspects of curbing free expression. This approach to curbing hate propaganda is far more appropriate than the all or nothing approach inherent in the criminalization of such expression. Coupled with a more narrowly-drafted prohibition, it might well withstand constitutional scrutiny.

This important signal to our legislators should not necessarily go unheeded. Legitimate concerns about the section's overbreadth have been raised by the three dissenting Justices. Notwithstanding the government's success in this case, it would be entirely appropriate for it to reconsider the scope of the terms of section 13(1).

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1. *Criminal Code*, R.S., c. C-34, s.319.
2. An exceptions to this, in addition to the CHRA, can be found in the Saskatchewan Human Rights Code, S.S. 1979, c. S-24.1, s. 14.
3. From *Canadian National Railway Co v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114 at 1134, quoted approvingly by Dickson C.J..
4. See Canada, House of Commons, *Equality Now* (Ottawa: Queen's Printer, 1984) at 70.
5. See, for example, the *Alberta Individual Rights Protection Act*, R.S.A., c.I-2, s.2(2).
6. *R. v. Keegstra*, [1991] 2 W.W.R. 1 at 68.
7. See Law Reform Commission of Canada, *Hate Propaganda* (Working Paper 50) (Ottawa: Law Reform Commission of Canada, 1986) at 9, fn.31 and A. Alan Borovoy, *When Freedoms Collide: The Case for Our Civil Liberties* (Lester & Orpen Dennys, 1988) at 46 and 325.
8. *Delgamuukw v. British Columbia*, [1991] B.C.J. No. 525.
9. (1989), 10 CHRR D/6450 at D/6469.

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