RETHINKING CANADIAN JUSTICE: HATE MUST NOT DEFINE DEMOCRACY

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Introduction

The Human Rights Inquiry in New Brunswick investigating the complaint of businessperson and parent David Attis against the Moncton School Board,[1] the employer of Malcolm Ross, provides yet another context for analyzing a whole series of complex issues important not only in terms of Canadian jurisprudence, but also in terms of our fundamental definitions of Canadian society. While there is a wide range of serious ethical and legal questions raised by *Ross* and similar cases (the role of the teacher, the meaning of academic freedom, the nature of education, the issue of responsibility for educational equality to name just a few), the most controversial debate centres around the issue of freedom of expression.

Although the complaint was launched against the Moncton School Board and not against Malcolm Ross, this did not deter counsel from arguing their cases to a significant degree based on Malcolm Ross' right to freedom of expression.[2] In this way, arguments presented at the New Brunswick Human Rights Inquiry and subsequent Judicial Review[3] were similar to those raised in cases such as the *Keegstra*[4] and *Zundel*[5] cases. Defining the parameters of freedom of expression has potentially enormous impact on our conception of Canadian society and has clearly generated the most debate. While the manner in which the various cases were heard differs in important ways – the *Ross* case under Human Rights provisions, the *Zundel* case under false news legislation in the *Criminal Code*[6] and the *Keegstra* case under anti-hate legislation in the *Criminal Code* – and thus have differing legislative consequences, there is an important similarity in terms of their societal consequences. It is these broader societal consequences that I wish to address and leave to my colleagues with legal training the more specific legislative implications. Particularly, I suggest that those who argue for virtually limitless freedom of speech have misinterpreted both the moral and legal intent of freedom

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[1]*Attis* v. *Board of Education of District 15* (1991), 121 N.B.R. (2d) 1, (*sub nom. Attis* v. *New Brunswick School District No. 15*) 15 C.H.R.R. D/339 (Human Rights Board of Inquiry).

[2]*Canadian Charter of Rights and Freedoms*, s. 2, being Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

[3]*Attis* v. *Board of Education District 15* (1991), 121 N.B.R. (2d) 361 (Q.B.).

[4]*R.* v. *Keegstra* (1990), 1 C.R. (4th) 129 (S.C.C.).

[5]*R.* v. *Zundel* (1987), 58 O.R. (2d) 129, 35 D.L.R. (4th) 338 (C.A.).

[6]R.S.C. 1985, c. C-46.

of expression guarantees.

The New Brunswick Human Rights Inquiry investigating the *Ross* case had considerable latitude. It is interesting, therefore, that Chair Brian Bruce, ruling that the District 15 School Board had discriminated against the Complainant contrary to subs. 5(1) of the *Human Rights Act*,[7] imposed several remedies. While these remedies involve proactive direction to the Department of Education with respect to provincial action, it is the remedies directed at the School Board which were most contentious. These include placing Malcolm Ross on immediate leave of absence without pay for a period of eighteen months, appointing him to a non-teaching position, if, within that period one became available for which he was qualified, and terminating his employment at the end of the eighteen-month leave of absence if a non-teaching position were not found. Finally, Bruce ordered that the School Board terminate Malcolm Ross' employment immediately if, at any time during the leave of absence or, during his employment in a non-teaching position he were to continue his publication or write for the purpose of publication anything that mentions a Jewish or Zionist conspiracy or attacks followers of the Jewish religion. Subsequent to this decision, a Judicial Review conducted by Justice Paul S. Creaghan, upheld the dismissal of Malcolm Ross from a teaching position, but removed both clause 2(d), the prohibition on his writings, and those remedies directed at the Department of Education.

This decision on Judicial Review suggests that there are two important implications of the Ross Inquiry. The first concerns the appropriate conduct for a teacher both within and outside the classroom; the Court in its decision has indicated that Ross' conduct is inappropriate for a teacher. The second, and by far more contentious issue, has to do with the right of any individual to express his or her views no matter how unacceptable these views may be. The former is clearly the easier of the two and, although there are some dissenters, the majority of opinion concedes that a teacher's conduct both within and outside the classroom should be subject to greater scrutiny. Even civil libertarians acknowledge "that certain expressions outside the classroom could render teachers unworthy recipients of trust for teaching, guidance, and evaluation." [8] With respect to the second issue, the definition of freedom of speech, I suggest that the failure of the Attorneys-General of New Brunswick to prosecute Malcolm Ross under the anti-hate provisions of the *Criminal Code* and the reversal of the Court on the banning of Ross' publications, undermines basic Canadian principles of justice and equality.

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[7]R.S.N.B. 1973, c. H-11.

[8]A. Borovoy, Letter to the Editor, *The Globe and Mail* (30 March 1989).

The Arguments Concerning Freedom of Expression

Opposition to controls on freedom of expression centres around a number of key issues. While these issues are integrally intertwined, for analytic purposes it is useful to consider each in turn.

1) The Preservation of Democracy

At its most basic, it is argued that legislation which prohibits speech behaviour violates our basic rights of freedom of expression. Freedom of expression is argued in terms of the guarantees in the *Charter*. For proponents of its centrality, freedom of expression is referred to as "the lifeblood of the democratic system" and "the vehicle through which the quest for truth may be pursued."[9]

As an abstract principle, there are few who would deny that freedom of expression is a central tenet of democratic society. However, while, at first glance freedom of expression should not contradict the right to equal treatment of everyone, recent events in Canada suggest that this is, indeed, the case. When most Canadians conceive of the idea of democracy, they conceive of both individual freedom *and* of equality. Too broad a definition of freedom of expression, in fact, may contradict one of the basic tenets of Canadian society:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical desirability.[10]

This principle of equality is so central that its inclusion in the *Charter* was seen as essential by many minority groups and by women. It seems difficult to understand how those who argue for freedom of expression, even the right to vilify or defame, can frame these arguments in terms of democratic principles without recognizing that this distorted definition of 'democracy' creates a society which denies members of the groups so vilified basic rights of equality. Is this not essentially contrary to Canadian notions of democracy?

It is not only individual equality that is guaranteed in the *Charter*, however, but also the equality of ethnic and racial groups. Canadian society so prides itself on the promotion of multiculturalism, that we have entrenched this in s. 27 of the *Charter*: "This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians."

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[9]A. Borovoy, "Freedom of Expression: Some Recurring Impediments" in R. Abella & M.L. Rothman, eds, *Justice Beyond Orwell*, (Montreal: Yvon Blais, 1985) at 125-160.

[10]*Charter*, s. 15(1).

While freedom of expression is one of the rights that is protected in the *Charter*, it is clear that the rights so guaranteed are not absolute but are subject "only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Given the struggles of Canadians to include ss. 15(1) and 27 in the *Charter*, it is clear that these principles are regarded as fundamental to the Canadian definition of equality and, as such, are reasonable limits on freedom of expression prescribed by law as can be demonstrably justified in a free and democratic society. Hate propaganda as found in the writings of Malcolm Ross cannot hide behind *Charter* rights. Indeed, the argument can be made that the *Charter prohibits* such virulent hate. As Quigley J. of the Alberta Court of Queen's Bench wrote on the pre-trial application of James Keegstra to have s. 319(2) of the *Criminal Code* declared unconstitutional:

> In my view, the wilful promotion of hatred under circumstances which fall within [s. 319(2)] of the *Criminal Code* ... negates or limits the rights and freedoms of such target groups, and in particular denies them the right to the equal protection and benefit of the law without discrimination. Under these circumstances, it is my opinion that [s. 319(2)] of the *Code* cannot rationally be considered to be an infringement which limits "freedom of expression," but on the contrary is a safeguard which promotes it.[11]

The judgment confirms that hate propaganda in its promotion of racist ideas, denies the inherent equality of all persons, and as such is antithetical to the Canadian concept of democracy.

Allowing Malcolm Ross' virulent hate propaganda to be published and distributed unchecked condones blatant discrimination against Jews, and violates the integrity of our multicultural and multiracial society. "Freedom becomes a fetish where bitter unfreedoms are inflicted upon innocent and vulnerable others."[12]

2) The Search for Truth

Unbridled free expression is argued in terms of its necessity for the advancement of knowledge and the discovery of truth. It is through the 'marketplace of ideas' that new truths can be developed.[13]

While there is some validity in this argument, to argue that hate propaganda is an essential part of the exploration of ideas would, I suggest, elevate it to a position with which most Canadians would have grave reservations. To define the right of those who espouse hate propaganda in terms of the discovery of 'truth'

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[11]*R.* v. *Keegstra*(1984), 19 C.C.C. (3d) 254 at 268 (Alta Q.B.).

[12]P.D. Lawlor, *Group Defamation*, submission to the Attorney General of Ontario, March 1984 at 7.

[13]See especially J.S. Mill, *On Liberty* (New York: Liberal Arts Press, 1956).

seems antithetical to our quest for truth and "strikes more and more deeply at the personal and social values we cherish and hold fundamental to the society."[14] How can truth be advanced when those who speak seek to vilify and defame others? As Chief Justice Brian Dickson wrote in the *Keegstra* judgment:

> There is very little chance that statements intended to promote hatred against an identifiable group are true, or that their vision will lead to a better world. To portray such statements as crucial to the truth and the betterment of the political and social milieu is therefore misguided.[15]

Can we define the pursuit of truth in terms that strike at our fundamental beliefs in equality? Can we sacrifice our moral commitment to create in Canadian society a society in which all individuals enjoy equality? To defend the writings of Malcolm Ross as the pursuit of truth pollutes this noble ideal and corrodes its foundation, causing truth, one of our central pillars of justice, to crumble.

3) The Camel's Nose in the Tent

Similarly phrased as the slippery slope, or the problem of drawing the line, this argument suggests that it is impossible to draw a line that would not infringe on the kind of speech that we want to protect. This argument is closely related to the search for truth argument in that presumably the speech we wish to protect is necessary to advance ideas and to promote discourse. Since this argument is a central tenet of those who oppose anti-hate legislation, it should not be taken lightly. Nevertheless, the argument is usually wrapped in language that goes far beyond the issue of line drawing and needs to be disentangled from the more general line-drawing argument.

The guarantee of freedom of expression for hatemongers is regarded as essential for the good of society as a whole. Thus, even speech which vilifies and degrades must be tolerated in order to assure that speech which promotes the good of society is not excluded. Therefore, the issue is not just the problem of drawing lines but rather that the protection of speech, even hate speech, is regarded as a fundamental part of our society. The *abuse* of the right of freedom of expression is not seen as distinct for the right itself, and so the protection of the former is regarded as necessary for a free and democratic society. However, as Bollinger argues:

> ... one can intuit some sense that the protection of this speech contains some deeper significance for us than that of incapacity to draw lines. There is the suggestion that we should be proud of this result, not just accepting of life's

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[14]L.C. Bollinger, *The Tolerant Society* (Oxford: Clarendon Press, 1986) at 9.

[15]*Supra*, note 4 at 184.

imperfections or even just glad that acceptance protects us.[16]

Separating the line-drawing argument from the language in which it is couched, allows us to recognize that this is a recurrent concern in our justice system. In a democratic society a degree of uncertainty in the processes of justice is inevitable. Indeed, if there were not uncertainty then the entire judicial process as developed in Canada could be substantially streamlined. We accept, and in fact, encourage judicial interpretation of our laws. The only way to eliminate line drawing as an issue is avoidance altogether. It is certain that those who suggest that legislation against hatemongers should not exist because of their concern for line-drawing, would not extend this line-drawing argument to all criminal and civil law as this would make it impossible to develop a democratic legal system.

> The choice we face is not between a legal system without the uncertainty of language and one with it. The problem we face is not how much uncertainty a given legal rule will introduce into our law but when we will choose to live with that uncertainty and when we will not.[17]

Those who oppose restrictions on speech argue that the issue of line-drawing is far more critical when considering freedom of expression because it is such a dominant principle of Canadian democracy. With specific reference to the anti-hate legislation, this position argues that it is impossible to articulate a prohibition which is precise enough to curb racist propaganda without:

> catching in the same net a lot of other material that it would be clearly unconscionable for a democratic society to suppress. ... How does a blunt instrument like the criminal law distinguish between destructive hatred and constructive tension?[18]

In order to buttress this argument, examples of cases in which the anti-hate law was used erroneously are given. Perhaps the most commonly cited example is the conviction of two French-Canadian nationalists who had distributed anti-French material in order to create pro-French sympathy. Their conviction was reversed on appeal by the Ontario Court of Appeal.[19] Similarly, a number of questionable investigations based on the anti-hate legislation, none of which resulted in charges being laid, are cited.[20]

It is important to stress that the Buzzanga and Durocher conviction was overturned and that all the questionable investigations referred to by Borovoy, in fact, did not result in any charges being laid. In virtually all cases one would have

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[16]*Supra*, note 13 at 35.

[17]*Ibid.* at 36-37.

[18]A. Borovoy, *When Freedoms Collide* (Toronto: Lester & Orpen Denys, 1988) at 42.

[19]*R.* v. *Buzzanga* (1979), 25 O.R. (2d) 705, 101 D.L.R. (3d) 488 (C.A.).

[20]See especially A. Borovoy, supra, note 17 at 42-43.

to conclude that little or no harm was done to the principle of freedom of speech. One must ask whether Buzzanga's and Durocher's conviction at first instance was a consequence of the anti-hate legislation itself or of a gross misunderstanding on the part of the prosecutors. The fact that the conviction was subsequently reversed gives weight to the latter interpretation. If we threw out every law in which charges were inappropriately brought against an individual, then we would have to resign ourselves to live in anarchy. While recognizing that *misuse* of anti-hate legislation potentially threatens one of the basic principles of a democratic society, freedom of expression, the risks seem grossly overstated.

It is ironic that while civil libertarians express concern that anti-hate legislation casts too broad a net, at the same time, Attorneys-General of various provinces are unwilling to lay charges under the anti-hate legislation. The reticence of the Attorney-General of Alberta to lay charges against James Keegstra and the refusal of two Attorneys-General in New Brunswick on several occasions to lay charges against Malcolm Ross, suggests that the fear that the effect of the law may be too broad, is empirically unjustified. In fact, many critics of the legislation note how difficult it is to lay charges not only because of the numerous defences in the law and the need to prove "wilfulness" but also because, unlike most other legislation, charges can only be brought with the consent of the Attorney-General. This latter safeguard, while cumbersome and frustrating, ensures that trivial or inappropriate charges will not be made.

4) The Question of Harm

The argument against restrictions on speech suggests that the harm done by words is not in any way similar to the harm done by deeds and that we should work for the elimination of *acts* of discrimination. This argument displays both an insensitivity to the tremendous hurt that words can inflict on individuals and to the harmful consequences to society as a whole. The creation and dissemination of discriminatory attitudes and practices causes this harm not only to the specific target group but also to the society generally. As Irwin Cotler notes:

> This exercise, then, in the debasement and degradation of the human person – and the target group of which he or she is a member – is prejudicial to the very dignity and self-worth of the individual person, the very self-government and democratic process that is the very rationale and justification for freedom of expression itself: and that is why I say that there is no inherent contradiction in freedom from certain forms of expression on the one hand and the freedom of expression itself on the other.[21]

Hateful speech which vilifies its victims has many harms. It can affect the self-esteem of the victim. Its threat creates fear among members of the target

[21] I. Cotler, "Hate Literature" in *Justice Beyond Orwell*, *supra*, note 9 at 121.

groups. It can persuade others to believe this vilification and hence think less of the victims. These effects interact as we view ourselves through the eyes of others. The harm, however, goes beyond the personal level to the societal level. Our response (or nonresponse) to hate propaganda serves to create a definition of who we are as a society. As Eugene Kaellis argues:

> Ignoring the Holocaust or attempting to trivialize it doesn't affect its victims. They can never be brought back and their world has died with them. It does, however, degrade us by diminishing our sensitivity to evil or the potential for evil in all of us, stealing our opportunity for growth, and reducing the promise, not of our perfection, but our perfectibility.
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> In that case we are numbered among the victims.[22]

Those who oppose regulations against hate propaganda argue that the harm is restricted because there are few advocates of hate propaganda and hence the risks of anti-hate legislation are incurred "in order to nail a minuscule group of pathetic peripheral creeps whose constituencies could not fill a telephone booth."[23] The response to hatemongering, according to civil libertarian Alan Borovoy, should be limited to raising:

> political hell whenever racist utterances emanate from people of authority or social standing ... . As for the more peripheral racists, I think our response should generally be indirect. We should continue to strengthen our laws against racially discriminatory behaviour – in jobs, housing, public accommodations, etc.[24]

Unfortunately there are many examples that indicate that racist speech is not the sole purview of a few of society's outcasts. It is reported, in fact, that Canada ranks second in the production of anti-Semitic propaganda (after West Germany). Stanley Barrett and Philip Rosen provide us with ample evidence of the extent of racial groups and activities in Canada.[25]

The objective of hatemongers is to eliminate those they so vilify from society. Since they are prohibited by law from acts of genocide, they focus their attack on

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[22]Letter to the Editor, *The Moncton Times-Transcript* (Oct 29, 1988).

[23]A. Borovoy, *supra*, note 9 at 142.

[24]*Ibid.* at 144.

[25]One can identify at least two waves of racist activities in Canada since the 1960s. In the mid 1960s anti-Jewish and anti-Black hate propaganda was widespread in Canada, especially in Quebec and Ontario. Neo-Nazi and white supremacist groups from the United States were active in Canada. Since the mid-1970s there has been a second wave of racist groups. These include the Edmund Burke Society, Nationalist Party of Canada, the Western Guard, the Ku Klux Klan and Aryan Nations groups. Hate propaganda in Canada is in the form of leaflets and pamphlets, video cassette and computer hook-ups and telephone calls, as well as historical revisionist writings. See S. Barrett, *Is God a Racist? The Right Wing in Canada* (Toronto: University of Toronto Press, 1987) and P. Rosen, *Hate Propaganda*, Library of Parliament, Current Issue Review, revised ed. 12 April 1990 for a detailed account of these developments.

attempts to make these individuals so socially repugnant that they will be social outcasts. While the limits of their influence is an empirical question, there is no doubt that these statements not only harm the target group, but also attack our sense of justice. Maxwell Cohen in his report on hate propaganda in Canada stated that the "potential psychological and social damage of hate propaganda, both to a desensitized majority and sensitive minority target groups is incalculable."[26]

Will the criminal prosecution of hatemongers eliminate the harm? No one is so naive to suggest that prosecuting racist activity will eradicate racism, but it will clarify who we are as a society and what we value – a society that regards equality for all as fundamental and is willing to protect all its citizens against the harm of hate. Anti-hate legislation will not heal centuries of ethnocentric white-Anglo-Saxon bias. However, it not only protects individuals and individual groups, but also defines who and what we are and articulates our concept of justice and moral integrity. "What is at stake is inherent human dignity, wherein, if all our citizens are not accorded the treatment of equals, the centre falls apart."[27] If we allow these values to be compromised by our tolerance of hate propaganda then we undermine the basic norms which have defined Canadian society. To use the cloak of freedom to deny the rights of others and to destroy their dignity, is an abuse of the freedom and must be understood not only as contrary to the *Charter* but also contrary to the requirements of a just and democratic society. As a society if we allow hate propaganda to continue unchecked we are greatly diminished.

5) The Problem of State Control

This argument claims that we should not grant to state officials a greater level of rationality and intelligence than we allow ourselves as citizens.[28] With respect to restricting hate propaganda, this position contends that the state will use its own biases and prejudices in defining what is hate and what is not, and that state officials are no more rational nor honest than the run-of-the-mill citizen in a democracy. There is probably no one that would argue that state officials are necessarily any more honest or rational than the citizenry. Nevertheless, it is not the state, acting alone, that has made the commitment to equality of the individual and of ethnic and racial groups but the citizens themselves. As Bollinger effectively argues:

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[26]M. Cohen, *Report to the Minister of Justice of the Special Committee on Hate Propaganda in Canada* (Ottawa: Queen's Printer, 1966) at 59.

[27]*Supra*, note 11 at 1.

[28]T. Heinrichs, "Free Speech and the Zundel Trial" (1988) 95:2 Queen's Quarterly at 837-54.

> But if the people themselves, acting after full and open discussion, decide *in accordance with democratic procedures* that some speech will no longer be tolerated then it is not 'the government' that is depriving 'us,' the citizens, of our freedom to choose, but *we* as citizens deciding what the rules of conduct within the community will be.[29]

Conclusions

It is imperative to recognize that the opposition to the position for virtually unlimited freedom of expression stems from our deep concern over the serious consequences of racial intolerance. To argue that speech that promotes racial hatred should be curtailed by law is not to stand in the way of freedom, but to work toward the elimination of all forms of racism in Canadian society. Speech as abused by hatemongers is a weapon of intolerance. Allowing this intolerance to go unchecked is to strike at the very heart of a free and democratic society.

> Freedom of expression is based on, and expresses, the principle of tolerance. If we value freedom of expression we cannot attach very much, if any, value to the promotion of intolerance. Intolerance, and particularly hatred, are ideas which cannot stand on an equal footing with the other competitors in the marketplace.[30]

It is erroneous to think that our belief in freedom of speech collides with our belief in ethnic and racial dignity.[31] This imagery suggests that these values are antithetical to each other while in fact they serve to complement each other, each helping to define the boundaries of the other. We do not abandon one when we assert the centrality of the other. Both are important in our definition of democracy. Our commitment to both individual and ethnic and racial equality, our recognition of the real harm that hatemongering inflicts, the need to provide individuals and groups freedom *from* expression, and our vision of a multicultural and multiracial Canada, make it imperative that we eliminate this form of racism. If we are committed to equality for all our citizens then the prosecution of hatemongers is not only constitutionally justified but ethically necessary. The refusal of the Attorneys-General of New Brunswick to prosecute Malcolm Ross under s. 281.2 of the *Criminal Code*, and the Court's quashing of the ban on Malcolm Ross' writing, suggest that the individual 'rights' of hatemongers take precedence over the collective rights of groups to equality. Defending the speech of Malcolm Ross in no way ennobles us. It is, rather, antithetical to our commitment to a multicultural society and debasing and denigrating to the principles of equality that we as Canadians have defined as essential in our quest for justice.

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[29] *Supra*, note 13 at 50, emphasis in original.

[30] A. Fish, "Hate Promotion and Freedom of Expression: Truth and Consequences" (1989) 2:2 Canadian Journal of Law and Jurisprudence at 123.

[31] *Supra*, note 17 at 3.