THE FREEDOM TO PROMOTE HATE: WHAT WE LEARNED FROM JIM KEEGSTRA AND MALCOLM ROSS

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In a liberal democracy such as Canada, constitutional protection for the right to free speech, press and expression provides citizens with the power to begin the process of changing things in society which they do not like. But there is also an element in society, consisting largely of sociopathic malcontents, who have taken it upon themselves to manipulate the privileges of these freedoms to abrogate the rights of recognizable communities in a pluralistic society. To what extent this philistine element should be tolerated is a question that gnaws continuously at the conscience of every good civil libertarian.

Those fundamental freedoms found in s. 2(b) of the *Charter of Rights and Freedoms*[1] allow Canadians to vent frustration against certain authorities without fear of physical, judicial or other discriminatory reprisals. The rights to free association, speech, expression and the press were largely taken for granted before 1982. Practitioners were obliged then to entrust Parliament with the responsibility to refrain from making laws that would limit these freedoms.

Since the mid-1970s, Canadians in several provinces have been faced with a small number of orators, publishers and demagogues who have grabbed much more than their allotted 15 minutes of fame in expounding beliefs and ideology which have as their main purpose the promotion of hate against an identifiable group in our multicultural society. Their speeches, pamphlets and books have a limited audience, but the ends they espouse affect everyone in any open society.

While hate propaganda has remained a small cottage industry mostly dependent on imported scripts from the United States and abroad, not even the most established of democracies can ignore its objectives. It promotes conflict in a society where we have tried for over a century to maintain harmony within a multicultural context based on egalitarian social values. Yet limiting free speech or expression in any way is like drawing a double-edged sword which can inflict painful wounds on those one does not wish to challenge. Our continuously evolving social values are constantly engaged in a struggle to overcome the more ugly aspects of our instinctive libertarian values, such as those fostering the right of free expression with no strings attached.

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[1]Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c.11, [hereinafter *Charter*.]

Two school teachers from opposite ends of the country have run up large legal bills in their attempt to have our libertarian values prevail. Jim Keegstra and Malcolm Ross have interpreted the *Charter* as allowing them to publish and distribute material which promotes the theory of a Zionist conspiracy intent on world domination. Their books also deny that one of the most catastrophic genocide campaigns in world history ever occurred (a campaign, ironically, fuelled by venal hatred against a religious minority in Europe).

Our courts have concluded, with good reason, that historical revisionism which purports to deny the existence of a European Holocaust exists for the purposes of inciting hatred against Jews. What they have yet to decide is whether the distribution of this literature contravenes ss. 318 to 320 of our *Criminal Code*.[2] More specifically, they have yet to agree whether these sections of the *Criminal Code* are inconsistent with ss. 2(a) and 2(b) of the *Charter*, not to mention s. 13 of the *Canadian Human Rights Act*[3] and related provincial acts. Nor have they yet arrived at an adequate definition of the word "wilfully" in s. 281(2) of the *Criminal Code* as it pertains to information exchanged in a public forum intended to whip up racial, cultural or religious animosity.

No matter how odious and offensive a person's views might seem, we doubt there is a judge or commissioner alive who really wants to accept the burden of knowingly curtailing someone else's constitutional right to speak freely. Media coverage of both the Ross inquiry and the Keegstra trial has failed miserably in most cases to explain the societal ramifications that could surface in the event of a spate of hate literature convictions. It has mostly focused attention on a battle of good (the oppressed minority group) against evil (the accused hatemonger). In many cases, special interest groups claiming to represent the struggles of both good and evil play a large rôle in commenting on the trials and hearings, yet they hardly contribute much to the dispensation of justice and fairness. They have a vested interest in the outcome of such trials and aren't about to concede their involvments are anything less than completely disinterested. And who can argue with them in the theatre of the absurd which often prevails in simplistic confrontations associated with good and evil?

Having made a conscious (and wise) decision to grant equal protection under the law in s. 15 of the *Charter*, our national legislators have also committed themselves to ridding society of elements that could infringe upon that protection. Publishers and authors who wish to disguise their views of racial, religious or cultural superiority of one group over another as scholarly inquiry pose a special threat. Usually, their work is not riddled with the vulgar rhetoric and imagery we

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

[3]R.S.C. 1985, c. H-6.

have come to associate with traditional hatemongering tribes like the Ku Klux Klan. Often, books such as Ross' *Spectre of Power*[4] are quite well written and no more lacking in scholarly reference than a mediocre study of salmon mating habits. Yet it is this very type of hate promotion that most threatens the protection granted in s. 15 because it comes from people like Ross and Keegstra who were respected members of their community charged with educating children.

In the final analysis, our rights to free speech and expression are constrained by s. 1 of the *Charter*: "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." While it is obviously reasonable to outlaw cross-burnings as an expression of one's view of racial equality, literature and classroom lectures are not what we consider to be traditional venues for promoting hatred.

Hard core proponents of free speech emanating from the John Stuart Mill school of political philosophy are quick to point out that any conviction handed down under ss. 318 to 320 and 281(2) of the *Criminal Code* would allow the courts to begin to define "reasonable limits." The well-documented growth of the political correctness movement on Canadian university campuses has led to the deployment of descriptive nouns like "racist," "sexist" and "fascist" in a very liberal manner. This type of behaviour in a tolerant society may not be conducive to cultural understanding, but no matter how unpleasant, it does not have the full effect or penalty of a criminal conviction.

However, the number of convictions handed out by the courts and human rights tribunals are very few, and many of those have been appealed successfully to appellate courts. The cases of Jim Keegstra and Malcolm Ross illustrate well the limp-wristed impact of current legislation in curbing the promotion of hate against identifiable groups.

Our justice system does not allow lawmakers to legislate tolerance. The former Soviet Union experimented with this type of inter-cultural policy but its former member-states are faced with more conflict now, especially in the former Central Asian republics, than at any other time in their history. Politicians and judges have only one option, and that is to penalize intolerance in a precise and enforceable manner, especially when it is being bred in a controlled and institutionalized environment like a high school classroom.

The drawn-out New Brunswick Human Rights Commission inquiry into the conduct of Moncton teacher Malcolm Ross indicates that freedom of expression is not in danger of being eroded by the courts. The inquiry found as facts that various people had complained to School Board No. 15, which had employed Mr.

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[4](Moncton: Stronghold, 1987).

Ross since 1978, that his views on Judaism bred hatred against members of that faith. The accusations themselves were never precise enough to charge Mr. Ross with promoting hate, even following publication of two of his books, *Web of Deceit* in 1978, and *Spectre of Power* in 1987.

The inquiry was first established in 1988 but could not even begin hearings until 1991 because of constant challenges to the jurisdiction of the inquiry by Ross and the defendant. The views of Ross would be examined under s. 5(1) of the *New Brunswick Human Rights Act*,[5] since successive Attorneys General in the province did not see grounds to prosecute Ross under the *Criminal Code* provisions for promoting hate.

By using human rights legislation rather than the *Criminal Code* to seek redress, the complainant may have actually found a more effective road to articulate his case. The various *Charter* arguments which inevitably challenge hate prosecutions under the *Criminal Code* suggest that human rights statutes are a more appropriate venue for discussing hate-related activities. As well, inquiries such as the one struck in the *Ross* case could not in any way be considered witch hunts. Counsel for the complainant went to great lengths to establish *mens rea*, which is essential to proving that Ross was "wilfully" promoting hatred against an identifiable group.

Inquiry Chair Brian Bruce submitted an excellent level-headed decision on 28 August 1991. It should be required reading for anyone interested in the intricacies of human rights law. In his decision, Bruce explained that the role of human rights inquiry into the complainant's charges gave him no choice but to define the legislation in the broadest possible terms:

> The courts in support of the general objectives of human rights legislation have given the various specific provisions within the legislation a broad rather than narrow application.[6]

He went on to cite Justice McIntyre in the Supreme Court of Canada decision *Ontario Human Rights Commission & Theresa O'Malley* v. *Simpson-Sears* in his description of the purpose of human rights legislation:

> Legislation of this type is of a special nature, not quite constitutional but certainly more than the ordinary – and it is for the courts to seek out its purpose and give it effect.[7]

In an interesting twist, the party against which the complaint was made was

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

[6]*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) at 30.

[7][1985] 2 S.C.R. 536 at 547.

not Malcolm Ross as one would expect, but School Board No. 15, which had been accused of providing a forum for Mr. Ross to spread his thoughts on the Jewish faith, despite numerous complaints lodged against him.

In the rural central Alberta town of Eckville, teacher Jim Keegstra was charged with promoting hate in his classroom during a long career as a social studies teacher. In comparison to the Ross case, there was ample evidence that Keegstra had spoken of Jews in the most uncomplimentary of terms possible. However, his conviction under the hate promotion clauses of the *Criminal Code* was never conclusive until last year when the Supreme Court of Canada, by a margin of 4-3, decided that the Code did not place unnecessary limits on freedom of expression.[8]

The minority ruling in the case is also central to understanding the trade-offs between freedom of expression and reasonable limits. As Justice McLachlin wrote in her dissent:

> The evil of hate propaganda is beyond doubt[9]... The danger here is not so much that the legislation will deter those bent on promoting hatred... The danger is rather that the legislation may have a chilling effect on legitimate activities important to our society by subjecting innocent persons to constraints born out of a fear of the criminal process.[10]

If we can learn anything from the *Ross* and *Keegstra* cases, it is that Attorneys-General and Crown prosecutors are in no hurry to use the *Criminal Code* to stop the promotion of hate. As already noted, Ross spread his message free of harassment outside of the classroom for fully 16 years. Even after evidence mounted against him, the New Brunswick Attorney General chose not to permit a prosecution under the *Criminal Code*.

When the Alberta Court of Appeal struck down the original verdict in *R.* v. *Keegstra*,[11] the Alberta Attorney-General was reluctant to appeal the case further and only did so after mounting pressure from groups and individuals affected by Keegstra's bile. One could argue that their presence in the debate constituted a highly emotional voice in what should have remained a rational legal question. However, it would have been surprising if these groups had not taken part in the campaign to bring the *Keegstra* case to the Supreme Court in view of the previous conviction.

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

[9]*Ibid.* at 222.

[10]*Ibid.* at 258.

[11]*R.* v. *Keegsta* (1988), 60 Alta L.R. (2d) 1 (C.A.).

This does not excuse the fact that penal law, by its very nature, can be coercive and unnerving in its application to regulate rights. Therefore, restraint should remain a cornerstone of criminal law. Despite the legal challenges mounted by Keegstra and Ross, it is yet to be proven that their *Charter* rights were infringed by the *Criminal Code* or the *New Brunswick Human Rights Act* respectively.

The provision requiring the consent of a provincial Attorney-General before charges can be laid under ss. 318 to 320 and 281 of the *Criminal Code* has been quite an effective safeguard in protecting accused hate promoters from legal harassment.[12] In fact, it has been convincingly argued that this provision could be seen as an obstacle to justice for minority groups seeking an end to discrimination under s. 15 of the *Charter*.

It thus seems that society's work in building tolerance through the legal system should be directed primarily through human rights legislation with its emphasis on public inquiry rather than the *Criminal Code*. Our experiment in this regard in the case of Malcolm Ross shows us that human rights statutes do not necessarily legislate tolerance, but instead help combat the attitudes which support discrimination.[13]

The most important challenge before civil libertarians and all societal groups is to recognize that rights are never absolute. Rights are given strength through the law, and therefore can be regulated through law in reasonable circumstances as prescribed in s. 1 of the *Charter*.[14] Furthermore, the will must exist within the legal and political systems to recognize that Canada's multicultural heritage is protected as a fundamental component of our constitution. Wilful attempts to undermine this basic fact should be scrutinized by some form of legal instrument. This does not necessarily mean that prosecution under the *Criminal Code* is imminent, but that freedom of expression cannot simply exist without a system of redress for those groups who feel besieged by the hatemonger's message.

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[12]*Working Paper 50: Hate Propaganda*, Law Reform Commission of Canada, 1986 at 38.

[13]*Ibid.* at 39.

[14]P. Rosen, *Hate Propaganda*, Library of Parliament, Current Issue Review, revised ed. 12 April 1990 at 10.