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Study of Online Hate

A brief to the

House of Commons Standing Committee

on Justice and Human Rights

from the

British Columbia Teachers' Federation

May 2019



President



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Introduction

The British Columbia Teachers' Federation ("BCTF") appreciates the invitation to the public to make submissions to the Standing Committee on Justice and Human Rights with respect to its study on online hate, particularly how potential amendments to the *Canadian Human Rights Act*¹ or other legislation could help stem the propaganda of hateful acts and the enticement of hatred through racism, misogyny, antisemitism, Islamophobia, transphobia, or homophobia in online platforms.

The BCTF respectfully submits that online hate is a significant issue in our society. Technology has an increasing presence in our everyday lives. As our reliance on technology has continued to increase, so has the ability to easily post, disseminate, and locate information about others.

Background and Expertise of the BCTF

The BCTF is a trade union and the certified bargaining agent for over 45,000 teachers and associated professionals employed by public school boards in British Columbia. The BCTF is a social justice union that advocates for social change and access to educational opportunities. It has a long-standing role of advocating for the rights of equity-seeking groups, including addressing racism, sexism, ableism, transphobia, and homophobia in classrooms and in society at large. The BCTF has long advocated for the rights of the Lesbian, Gay, Bi-Sexual, Transgender and Questioning ("LGBTQ") community, including its LGBTQ members and LGBTQ students. While anyone can be the target of hate speech, members of the LGBTQ community have been particularly targeted by online attacks in recent years—and these attacks have not just targeted adults but also children and youth.

The BCTF intervened in a recent case before the British Columbia Human Rights Tribunal, *Oger v. Whatcott* (No. 7),² which was a complaint brought by a transgender candidate for a provincial election against an individual who published a flyer attacking the complainant solely due to the fact that she identifies as transgender. The Human Rights Tribunal found the flyer to be

¹ RSC 1985, c H-6 (the "*Act*").

² 2019 BCHRT 58.

discriminatory and the effect of the flyer exposed the complainant to hatred and contempt, contrary to section 7 of the *Human Rights Code*.³ The Tribunal in this case relied on provisions in the *Human Rights Code* regarding hate speech. This case is a prime example of the importance of having hate speech provisions included in human rights statutes.

Suggestions for Improvement

Inclusion of Hate Speech Provisions in the *Canadian Human Rights Act*⁴

When section 13 of the *Act* was repealed in 2013, this removed the only provision in the *Act* that specifically addressed hate spread through telecommunications, including the internet. Although s. 12 addresses publication of any “notice, sign, symbol, emblem or representation”, the case law has not addressed whether this provision encompasses notices posted on the internet.

While the *Criminal Code* includes provisions that prohibit the incitement of hatred against identifiable groups, the promotion of genocide and the distribution of hate propaganda, not all hate speech meets the level of criminal conduct. Hate speech that does not meet the high standard required for it to be considered criminal conduct, should still be addressed through the protections offered under the *Act*. Furthermore, in the criminal context the individual/group who is the target of hate speech does not get to choose whether criminal charges are pursued against the perpetrators; that is up to law enforcement agencies and/or the Crown. This leaves many victims of online hate powerless to address the discriminatory conduct in any meaningful way.

The purpose of hate speech provisions in human rights legislation is to “protect the equality and dignity of all individuals by reducing the incidence of harm-causing expression”.⁵ The aim is to “eliminate the most extreme type of expression that has the potential to incite or inspire discriminatory treatment against protected groups on the basis of a prohibited ground”.⁶

³ RSBC 1996, c 2010.

⁴ RSC 1985, c H-6 (the “*Act*”).

⁵ Taylor p. 927 as cited in *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11, [2013] 1 SCR 467. [“*Whatcott 2013*”] at para 47.

⁶ *Whatcott 2013* at para 48.

Including a prohibition on hate speech should flow from the same core concepts of protecting equality in dignity and rights that underlie the rest of the *Act*.

When considering the purpose of the *Act*, we should be cognizant of the fact that substantive equality is not only a fundamental concept in the Canadian understanding of equality, but also a fundamental concept of our democracy. Both the *Act* and the *Canadian Charter of Rights and Freedoms*⁷ seek to ensure substantive equality for Canadians. In the *Law Society of British Columbia v. Trinity Western University*, the Supreme Court of Canada reiterated that:

Substantive equality demands more than just the availability of options and opportunities – it prevents “the violation of essential human dignity and freedom” and “eliminate[s] any possibility of a person being treated in substance as ‘less worthy’ than others”.⁸

These concepts are fundamental to our democratic society. In *Miron v. Trudel*, Justice McLachlin (as she then was) considered the importance of recognizing the wrongs that amount to discrimination and wrote “... In the course of the past century, free and democratic societies throughout the world have recognized that the elimination of such discrimination is essential, not only to achieving the kind of society to which we aspire, but to democracy itself”.⁹

The purposes of the *Act* are not just about addressing individual harm in a particular case. The purposes are broader than that. This has also been recognized with respect to identifying the different types of harm that flow from discriminatory expression. The Supreme Court of Canada has differentiated between societal harm and individual harm resulting from discriminatory expression.¹⁰

The Supreme Court of Canada has explained that “when hate speech pertains to a vulnerable group, the concern is that it will perpetuate historical prejudice, disadvantage and stereotyping, and result in social disharmony as well as harm to the rights of the vulnerable group”.¹¹ Societal harm that flows from hate speech must be assessed as objectively as possible. The test is not based on the feelings of the publisher or the victim. Instead, the focus must be on the likely effect

⁷ *Canadian Charter of Rights and Freedoms*, s 8, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 (the “*Charter*”).

⁸ 2018 SCC 32, [2018] 2 S.C.R. 293, at para 95.

⁹ *Miron v. Trudel*, [1995] 2 S.C.R. 418 at para 146.

¹⁰ *Whatcott 2013* at paras 79-84; *R v. Keegstra et al*, [1990] 3 SCR 697 (“*Keegstra*”) at para 60 - 63.

¹¹ *Whatcott 2013* at para 79.

of the hate speech and how those who are not part of the group may reconsider the social standing of the group. It is the need to protect the societal standing of “vulnerable groups that is the objective of legislation restricting hate speech”.¹²

Furthermore, in *Keegstra*, the Supreme Court analyzed two substantial types of harm caused by hate propaganda: “harm done to the members of the target group”¹³ and “influence upon society at large”.¹⁴ With respect to harm to the individual, the Court noted the effects of hate propaganda on a person’s sense of human dignity and held:

The derision, hostility and abuse encouraged by hate propaganda therefore have a severely negative impact on the individual’s sense of self-worth and acceptance. This impact may cause target group members to take drastic measures in reaction, perhaps avoiding activities which bring them into contact with non-group members or adopting attitudes and postures directed towards blending in with the majority. Such consequences bear heavily in a nation that prides itself on tolerance and the fostering of human dignity through, among other things, respect for the many racial, religious and cultural groups in our society.¹⁵

With respect to harm to society at large, the Court cautioned:

... the alteration of views held by the recipients of hate propaganda may occur subtly, and is not always attendant upon conscious acceptance of the communicated ideas. Even if the message of hate propaganda is outwardly rejected, there is evidence that its premise of racial or religious inferiority may persist in a recipient’s mind as an idea that holds some truth, an incipient effect not to be entirely discounted...¹⁶

This guidance from the Supreme Court was more recently reiterated in *Whatcott 2013*.

We respectfully submit that the Standing Committee should consider who the targets or recipients of hateful expression are and the lack of other meaningful remedies to address hate speech posted online. We recommend that the *Act* be amended to specifically include provisions regarding hate speech and propaganda, including information published online.

¹² *Whatcott 2013* at para 82.

¹³ *Keegstra* at paras 60 – 61.

¹⁴ *Keegstra* at paras 62 – 63.

¹⁵ *Keegstra* at para 61.

¹⁶ *Keegstra* at para 62.

Jurisdiction Issues

The *Act* applies to federal government departments and agencies, Crown corporations and federally regulated businesses, while provincial human rights legislation applies to all other matters.

The BCTF takes the position that provincial human rights tribunals have the jurisdiction to deal with online publications when the substance of the complaint arises from a matter that is exclusively under provincial jurisdiction. However, there are some cases from the Canadian Human Rights Tribunal and the British Columbia Human Rights Tribunal that have determined that communication over the internet is under federal jurisdiction.¹⁷ We note that these cases were decided prior to the repeal of section 13 of the *Act*.

With the uncertainty that arises due to case law, there may be complainants who wish to file a human rights complaint but feel compelled to file in two forums because some of the hate speech is posted online. To illustrate the problem, consider this example. An individual who is transgender has experienced discrimination in the form of hate speech by a co-worker in a provincially regulated sector. The discriminatory conduct has arisen through verbal comments, flyers passed around at work and online, through social media platforms, and on an online blog. The individual wishing to file a complaint against the perpetrator of the discrimination may face a jurisdictional argument from the respondent with respect to the different modes through which the publications were disseminated. Requiring an individual to bifurcate a complaint is an unnecessary drain of resources for all involved, including the complainant, the respondent, and the tribunals themselves. It does not make sense for two tribunals to address the same complaint, the only difference being how the hate speech was communicated, online versus print.

As we assert above, the repeal of section 13 of the *Act* has left a gap in the legislation for victims of hate speech wishing to pursue complaints against the perpetrators. With at least one provincial human rights tribunal declining jurisdiction to deal with matters in a few reported decisions because the issue arose over the internet, this creates a fundamental problem.

¹⁷ See for example: *Warman v. Kulbashian*, 2006 CHRT 11 at paras. 46-50; *Elmasry and Habib v. Roger's Publishing and MacQueen (No. 4)*, 2008 BCHRT 378; *Fossum v. Society of Notaries*, 2009 BCHRT 392.

The internet has become increasingly more prevalent in the lives of Canadians over the past decade. It no longer makes sense to distinguish hateful communications based on where they are published. The mere fact that something is posted online should not mean the matter falls exclusively within federal jurisdiction. The BCTF strongly recommends the *Human Rights Act* be amended to address this jurisdictional issue that arises with online communication and include recognition that, at least, online communications which are tied to a provincially regulated sector can be addressed by a provincial tribunal. For example, as noted above, there should not be any uncertainty that communication tied to a provincially regulated workplace, including online publication, can be included in a complaint to a provincial tribunal.

International Obligations

Canadian human rights legislation should be consistent with Canada's international law obligations and be presumed to provide at least as great a level of protection for individuals from discrimination and hate.¹⁸ International law can provide importance guidance, as has been explained by the Supreme Court of Canada, because: "Generally speaking, the international human rights obligations taken on by Canada reflect the values and principles of a free and democratic society, and those values and principles that underlie the Charter itself".¹⁹

Examples of the respect for equality and recognition of reasonable limits that may need to be placed on freedom of expression in a democratic society are reflected in numerous international human rights instruments, including the *Universal Declaration of Human Rights* ("UDHR"), the *International Covenant on Civil and Political Rights* ("ICCPR"), and the *International Convention on the Elimination of All Forms of Racial Discrimination* ("CERD").

The UDHR declares in Article 1 that "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a

¹⁸ *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391 [*Health Services*] at paras. 69-70.

¹⁹ *Keegstra* at para 66.

spirit of brotherhood”.²⁰ While the *UDHR* recognizes freedom of expression,²¹ it also recognizes that the rights and freedoms set out in the *UDHR* are subject to “such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and meeting the just requirements of morality, public order and the general welfare in a democratic society”.²² In other words, freedom of expression cannot be used as an unlimited excuse to violate the rights of others.

Canada is a signatory to the *ICCPR*, which Canada ratified in 1976. Article 19 of the *ICCPR* protects freedom of expression and specifies that certain restrictions on expression may be necessary, “For respect for the rights or reputations of others”.²³ Article 20 also requires state parties to prohibit certain types of discriminatory expression, indicating that “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law”.²⁴

Canada is also a signatory to *CERD*, which Canada ratified in 1970. *CERD* specifically requires state parties to declare it an offence to disseminate “ideas based on racial superiority of hatred, incitement to racial discrimination”.²⁵ Although *CERD* is focused on addressing racial discrimination, the clear direction to state parties to address discriminatory expression reflects the importance of this concept in international law more generally.

²⁰ UN General Assembly. “*Universal Declaration of Human Rights*,” 217 (III) A (Paris, 1948) https://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf [accessed December 13, 2018] (“*UDHR*”) at Article 1.

²¹ *UDHR* at Article 19.

²² *UDHR* at Article 29(2).

²³ UN General Assembly. “*International Covenant on Civil and Political Rights*,” *Treaty Series* 999 (1966): 171 https://treaties.un.org/doc/Treaties/1976/03/19760323%2006-17%20AM/Ch_IV_04.pdf [accessed December 13, 2018] (“*ICCPR*”) at Article 19(3)(a).

²⁴ *ICCPR* at Article 20(2).

²⁵ UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, United Nations, *Treaty Series*, vol. 660, p. 195, available at: <https://www.refworld.org/docid/3ae6b3940.html> [accessed 13 December 2018] at Article 4(a). See also UN Committee on the Elimination of Racial Discrimination (CERD), *General recommendation No. 35: Combating racist hate speech*, 26 September 2013, CERD/C/GC/35, available at: <https://www.refworld.org/docid/53f457db4.html> [accessed 13 December 2018].

These international provisions demonstrate that “the prohibition of hate-promoting expression is considered to be not only compatible with a signatory nation’s guarantee of human rights, but is as well an obligatory aspect of this guarantee”.²⁶

Conclusion

While hate speech has always been present in our society, the ability for hateful comments and conduct to spread to a large volume of people instantaneously has drastic consequences for the recipients of such comments and/or conduct. With the increasing reliance on online communication for all aspects of our lives, it is critical to update the law to reflect this and protect Canadians who may be subject to online hate.

The BCTF strongly recommends the specific inclusion of hate speech provisions in the *Canadian Human Rights Act*. The BCTF also strongly recommends a mechanism for provinces to address complaints when the matter arises out of a context that is provincially regulated, aside from the fact that the hate speech originated online.

All of which is respectfully submitted.

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²⁶ *Keegstra* at para 72.