Combatting Online Hate

(*Submission to the House of Commons Standing Committee on Justice and Human Rights By David Matas, Honorary Senior Legal Counsel to B'nai Brith Canada - May 2, 2019*)

Introduction

Canada needs principled, effective, general civil and criminal legal remedies for combating online hate. To be both principled and effective, any law standing against incitement to hatred has to balance the right to freedom of expression with the right to freedom from incitement to hatred and discrimination.

Putting too much weight on freedom of expression means that the law against incitement to hatred becomes unduly hampered. Putting too much weight on combating incitement to hatred means that the right to freedom of expression is unduly restricted.

In Canada, we have had the misfortune of getting this balance wrong both in the civil and criminal law. The criminal law today leans too heavily in the direction of freedom of expression, inhibiting our effort to combat hate speech. The civil law has leaned to heavily in the direction of combating incitement to hatred, so much so that its undue inhibition of freedom of expression led to its repeal. B'nai Brith Canada welcomes the fresh look that the Justice and Human Rights Committee is taking at these laws and the renewed chance to get the balance right.

The Criminal Code

There is a prohibition in the Criminal Code against incitement to hatred. It has some effect, but not as effective as it could be. There are two specific problems we would identify.

1. Consent of the Attorney General

One is the requirement of consent by the Attorney General. Generally, for crimes which are committed where consent of the Attorney General is not required, the prosecution will proceed if there is sufficient evidence to convict. Prosecutors have a discretion not to proceed even where the evidence could lead to a conviction. However, the exercise of that discretion is subject to pretty clear principles. For instance, prosecution may not proceed if the hardship to the accused would be disproportionate to the benefit society would gain.

Where consent of the Attorney General is required, that consent, from our perspective, in this area of the law, is often withheld arbitrarily because, even though a conviction would likely result and the prosecution recommends in favour of proceeding, the Attorney General nonetheless out of a belief in freedom of expression not consistent with the law, denies consent. That form of denial of consent weakens the law.

The remedy is not, though, to remove the requirement of consent of the Attorney General. If we did that, it would mean that private prosecutions would be possible. Anyone could prosecute anyone else for something said which the private prosecutor thought was hate speech. Arbitrary prosecutions are as harmful to human rights as arbitrary refusals to prosecute.

When the Crown prosecutes, it will not do so unless the prosecution believes it has evidence to establish guilt beyond a reasonable doubt. Private prosecutors need not impose on themselves any such restraint.

If private prosecution of hate speech were possible, private prosecutors could legally launch a prosecution merely because they disagreed with the accused. Such a prosecution would not succeed. But the very fact of prosecution could amount to harassment of the accused.

What we need is that the consent or denial of consent of the Attorney General be exercised according to principle. In British Columbia, the Crown Counsel Policy Manual provides that in almost all hate offences, the public interest applies in favour of prosecution.

Approvals for alternative measures should be given only if:
1. Identifiable individual victims are consulted and their wishes considered.
2. The offender has no history of related offences or violence.
3. The offender accepts responsibility for the act, and
4. The offence must not have been of such a serious nature as to threaten the safety of the community

Those are criteria which could be adopted for denial of consent. There needs to be at least something, rather than, as now, a vacuum where consent can be denied arbitrarily, without explanation.

The exercise of prosecutorial discretion is not subject to judicial review. The courts have reasoned that, if they either affirmed a decision to prosecute or overturned a decision not to prosecute, the decision might seem to be favouring the prosecution over the defense. To maintain an appearance of neutrality, they have declined to get involved at all in prosecutorial discretion.

The unavailability of judicial review for the exercise of prosecutorial discretion means that, if that exercise is to be governed by principle, the governance has to be undertaken by the prosecution itself. The grant or denial of consent by the Attorney General for hate speech crimes should be subject to clear public criteria. Reasons should be given for the grant or denial of consent and those reasons should explain why the criteria were or were not met.

2. Religious expression

The offence of incitement to hatred in the Criminal Code sets out as a defence statements which

> "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",[1]

This defence is arbitrary; it means that some people, those who use religion to preach hatred, are above the law; it means that victims of religious based hatred have no remedy.

Freedom of religion is a countervailing value to the right to freedom from incitement to hatred. In balancing off these two rights, the right to freedom from incitement to hatred must prevail. Incitement to hatred is integral to no religion. The defence of religious expression guts the offence of incitement to hatred.

There are, for instance, some optional Muslim prayers which are explicitly anti-Jewish. Incitement against Jews should be prosecutable whether it is made from a religious or secular dais. Religious expression should not be a defence to this form of incitement. The defence needs to be repealed.

[1] Section 319(3)(b)

3. A safe harbour provision

The Criminal Code now provides:

> "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]

This provision of the Code, even with modification, is not well suited to deal with hate on the internet, since the Code provision deals with material not yet communicated and anything on the internet is already communicated. Moreover, Code section 320(1) puts the initiative on the Court at first instance, rather than the owner or occupier of premises in which the offending material is kept for sale or distribution. For internet communication, primary responsibility should rest with the communicators, not the legal system.

In the US, there is a blanket safe harbour provision for hate on the internet. It provides that:

> "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[3]

That provision goes too far. It is a blanket immunity. There needs rather to be a defence of innocent dissemination. However, where dissemination ceases to be innocent, there should be internet provider liability for noxious content.[4]

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[2] Section 320(1)

[3] Section 230, Communications Decency Act 1996

[4] Peter Leonard, "Safe Harbors in Choppy Waters-Building a Sensible Approach to Liability of Internet Intermediaries in Australia" (2010) 3 Journal of International Media and

To able to rely on a defence on innocent dissemination, internet providers should
1) provide a complaints system which generates a response within a reasonable period of time, and
2) on notice, remove, or take reasonable steps to remove, hate speech from their services.

The Criminal Code hatred offences are offences for communicating hatred, not for advocating hatred. Internet service providers can be as guilty of these offences as any others engaged in the communication. They should not be liable for innocent communication. They should be liable for communication that is not innocent. It is this sort of liability rather than some variation of Criminal Code provision 320(1) which needs to be enacted.

The Canadian Human Rights Act

Right now, federally, the only general legal instrument for combating online hate speech is the Criminal Code. Restricting ourselves to use of the Criminal Code is too limiting, because the standard of proof is so high - proof beyond a reasonable doubt; the remedy is often inappropriate - criminal punishment; and the locus of enforcement is a general criminal system rather than an expert human rights system.

The former section 13 of the Canadian Human Rights Act got the balance wrong in the other direction between freedom of expression and freedom from incitement to hatred and discrimination. In our view, it was rightly repealed.

Entertainment Law 221

The repealed section 13 was substantively sound, but procedurally defective, leading to an undue limitation on freedom of expression. We need a re-enactment of section 13 with a re-equilibration of the balance, so that the use of the law is not, as section 13 had become, a vehicle for harassment of legitimate expression.

How do we avoid a situation where the easily offended can shut down legitimate expression? How do we prevent a situation where the perpetrator dons the clothing of victim and attempts to use the law to silence any criticism of his or her incitement on the ground that the criticism is itself incitement? Our answer here to these questions is a re-enactment of the substance of the former section 13 of the Canadian Human Rights Act, but with a set of procedural safeguards the former section did not have.

The procedural problems this submission identifies and the remedies proposed are general in nature, relating to all human rights complaints, and not specific to speech based issues. Nonetheless they assume particular significance when speech is being challenged.

1. Costs

One element of justice is equality of arms. Where human rights commissions interpose between the complainant and the target, complaints are cost free. However, the target may be put to great expense. The principle of equality of arms is not respected.

It is not quite the same with a criminal complaint because of the different criminal rules of evidence and standard of proof. Because in a criminal proceeding rules of evidence are strict and the standard of proof the prosecution must meet is high, a target of criminal investigation has a much lower threshold to cross to avoid proceedings than the target of a civil investigation.

Once a commission investigation begins, the target of a complaint is put to the effort and expense of exoneration. The maxim, innocent till proven guilty beyond a reasonable doubt, does not apply to civil proceedings.

Even in civil proceedings, the onus falls on the asserting party. Nonetheless, since any small matter can tip the balance of probabilities from one side to the other when the evidence on each side is otherwise evenly matched, the target of a civil complaint ignores a complaint at his or her peril.

Generally, in civil proceedings in superior courts, costs go with the cause. This is more than just a brake to frivolous proceedings. Costs are awarded against the losing side even where a motion to strike for no reasonable cause of action fails, even where the case has some merit, but not enough. The awarding of costs against the losing side serves to prevent litigation from being undertaken lightly. When a party knows that the financial loss from an unsuccessful case is substantial, the party will think twice before commencing or defending the proceedings.

The Canadian Human Rights Commission and Tribunal need to have the power to award costs. Where the Commission has assumed conduct of a case on the side of the complainant but then loses at the Tribunal level, the Tribunal should have the power to award costs not just against the complainant but also against the Commission.

2. Screening

Human rights commissions have been overwhelmed by complaints. Investigating and then conducting them have caused substantial delays. The response has been, in British Columbia, to abolish its commission and allow instead direct access of complainants to tribunals. In Ontario, the commission survived, but it has been taken off case work.

These reforms, while dealing with a substantial problem, have been misplaced. The screening and conduct functions of commissions need to be decoupled. Commissions should be screening complaints in every case. They should as well be able to have the power to take ownership of a case, its investigation and pursuit, in selected cases as they see fit.

Right now, there is this decoupling of screening and conduct of cases in the criminal law. Most crimes can proceed by way of private prosecution without any government consent. The assumption of conduct of prosecution by the Crown in these cases is a choice of the Crown but not a legal obligation. There are some offences for which the consent of the Attorney General is necessary. There are yet others where conduct by the Crown is required.

Incitement to hatred is a criminal offence for which consent is necessary. Once consent is given, the prosecution can be conducted either by the Crown or a private prosecutor.

Whether the requirement of consent by the state is necessary or advisable for a criminal prosecution for incitement to hatred, it is certainly advisable and may even be legally necessary, by Charter standards, for civil proceedings. For, once a proceeding is civil, the standard of proof is less. In a civil proceeding, proof on a balance of probabilities, rather than the criminal standard of proof beyond a reasonable doubt, is sufficient. The higher standard in criminal proceedings serves as its own brake on frivolous proceedings. A consent requirement for civil proceedings is necessary, at least in practice if not in law, to compensate for the lower standard of proof.

3. Election of forum

It is possible to pursue essentially the same complaint in several Canadian jurisdictions simultaneously. Each forum addresses the complaint as a matter of substance, without regard to the fact that the same complaint has been filed elsewhere.

Multiple frivolous complaints against the same respondent coupled with the powerlessness of the tribunals to award costs to the successful side accumulate injustice. Targets of frivolous complaints wrack up costs fighting off the same complaint in several forums at one and the same time.

The Canadian Human Rights Act provides that the Commission,

> "In addition to its duties ... with respect to complaints regarding discriminatory practices ... shall maintain close liaison with similar bodies or authorities in the provinces...to avoid conflicts respecting the handling of complaints in cases of overlapping jurisdiction;"[5]

Is this a power to refuse consideration of a complaint on the ground that the complaint in substance is already under consideration by a provincial jurisdiction? It would seem not. For one, the provision refers to the obligation to avoid conflicts as something different from the duties with respect to complaints. For another, the Commission, if it had such a power, could and should have dismissed past simultaneous complaints on this basis, but has not done so.

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[5] Section 27(1)(c)

The ability to make several complaints at once in different jurisdictions against the same target means that the complaint power can be used as a way of harassing the object of the complaint. That avenue of harassment needs to be cut off. Complainants should be required to choose one venue only. Once such a choice has been made, no other jurisdiction should have the power to entertain essentially the same complaint.

4. Parties

Human rights commissions have the power to add parties. But it is not clear that they have the power to remove parties. The federal Act gives the Chair of a tribunal power to add parties,[6] but not the power to remove parties.

Once a victim of a complaint, it seems always a victim of a complaint. The complaint itself can be dismissed on its merits. But where the subject matter of the complaint is meritorious but has been made against the wrong complainant, the complaint goes to its conclusion against the wrong complainant. The Canadian Human Rights Commission and Tribunal need the power to remove parties as well as to add them.

5. The right to know your accuser

It would seem basic to respect for human rights that a person should not be asked to answer anonymous accusations based on rumour. Then Canadian Privacy Commissioner John Grace in his testimony before the Standing Committee on Public Accounts, on December 12, 1989, stated that one of the rights conferred by the Privacy Act:

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[6] Section 48.9(2)(b)

> ". . .is to know what accusations against us are recorded in government files and who has made them. Whether such accusations are true and well intentioned, as some may be, or false and malicious, as other may be, it is fundamental to our notion of justice that accusations not be secret nor accusers faceless."[7]

Yet, there is nothing in the Human Rights Acts or Codes preventing the pursuit of anonymous complaints. A complaint can be based on rumour, and the source of the rumour need not be disclosed to the target of the complaint. That was indeed the case for a complaint against B'nai Brith Canada made to the Manitoba Commission on Human Rights.

Human rights legislation which allows for this manner of proceeding is defective, not itself respectful of human rights. The legislation should require that those who make an accusation be identified to the target of the complaint.

6. Disclosure

The legislation needs a general right of disclosure available to the target of the complaint. In a complaint against B'nai Brith Canada made to the Manitoba Human Rights Commission, the text of the comments which prompted the complaint were never disclosed to B'nai Brith.

At one point, the Commission informed B'nai Brith that the fact-finding component of the investigation had been completed and that the information obtained would be sent on to an expert for an opinion. B'nai Brith asked for the name of the expert and a copy of the information sent to the expert so that B'nai Brith could correct any inaccuracies and ensure that they fully responded to the complaint. The Commission never provided any of this information.

[7] Minutes of Proceedings and Evidence on the Standing Committee on Public Accounts, Issue No. 20 (12/12/89), at p. 10

The federal legislation treats disclosure in a peculiar fashion, stating all sorts of matters which should not be disclosed without stating anything about what should be disclosed.[8] The Canadian Human Rights Act specific prohibitions against disclosure are found in other federal legislation as exceptions to a general principle of disclosure. Here, there is no stated general principle of disclosure. There should be.

Conclusion

Striking a balance between the right to freedom of expression the right to freedom from incitement to hatred and discrimination requires remedies which are not so easy of access that they can become vehicles to harass legitimate expression. They also cannot be so difficult of access that they are effectively unworkable.

The previous section 13 of the Canadian Human Rights Act went too far in one direction, easy access which led to harassment of legitimate expression. We need to revive the substance of section 13 to have a civil tool to combat online hate speech. In doing so, we must try to avoid problems in the law of the sort which prompted the original repeal of this section.

The present Criminal Code goes too far in other direction. It catches some incitement to hatred but not enough. We need to make changes to enhance the effectiveness of this remedy.

The Government of Canada on July 8, 2005 signed the Council of Europe Additional Protocol to the Convention on Cybercrime. The protocol addresses the criminalization of acts of a racist and xenophobic nature committed through computer systems. Almost fourteen

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[8] Section 33(2)

years later, the Protocol has yet to be ratified. The reason may well be Canada's overly weak criminal law on incitement to hatred and the absence of a civil law addressed to online hate.

Generally, Canada should ratify treaties it signs. That is what signature means, an intent to ratify and comply with the treaty. It is more than time that Canada puts itself in a legal position to ratify this treaty.

It is easy enough to support respect for any human right where its opposition is a human rights violation. The task becomes more difficult where the opposition to respect for one human right is respect for another human right. In light of the prevalence and harm of online hate, the task in his area has become urgent. We welcome the fact that the Committee has taken it on.

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