Combating Online Hate: Yes, Your Tweet Could Be Considered Hate Speech

How can the law balance the need to tackle hate speech with the need to protect free expression? Bill C-36 raises this question. Tabled by the federal government on June 23, 2021, Bill C-36 proposes amendments to the *Criminal Code*, the *Youth Criminal Justice Act*, and the *Canadian Human Rights Act* to protect Canadians from hate speech in an online environment.[1] With social media integrated into many aspects of our daily lives, this proposed legislation is important to create and protect safe online spaces.[2] While hate speech is likely not considered a valuable form of expression by most of us, it is protected by section 2(b) of the *Charter of Rights and Freedoms*, which guarantees individuals' freedom of expression. This means that the proposed amendments in Bill C-36 will likely infringe section 2(b). But this does not, by itself, mean that the law cannot stand. On the contrary, under section 1 of the *Charter*, if the violation can be demonstrably justified as a reasonable limit on free expression, it will be constitutional.

While Bill C-36 is not law yet, it does raise important questions about hate speech as a protected form of expression, and about how this form of expression can justifiably be infringed upon. To address these questions, this article first examines the federal government's proposed amendments in Bill C-36. Second, it discusses whether hate speech is a protected form of expression under section 2(b) of the *Charter*. And finally, it assesses whether Bill C-36's proposed amendments may potentially be justified under section 1 of the *Charter*.

Second Time's the Charm? Bill C-36 Proposes to Revive Previously Repealed Human Rights Legislation

Bill C-36 is not yet law, but is currently in the early stages of the legislative process. This means that Bill C-36 can still be amended during its second reading or can die on the order paper if Parliament is dissolved. Among other things, the Bill seeks to define "hatred" in section 319 of the *Criminal Code*, which sets out the offence for public incitement of hatred.[3] This definition relies on and echoes the Supreme Court of Canada's decision in *Saskatchewan (Human Rights Commission) v Whatcott*.[4] The Bill also defines the dissemination of online hate speech as a discriminatory practice in the *Canadian Human Rights Act* and gives victims of hate speech access to new remedies.[5] This amendment also uses the language of the Supreme Court in *Whatcott*.

In addition to this Bill, the Government of Canada plans to create a regulatory framework that will work towards combating harmful online content.[6] This framework would establish rules for social media platforms to guide them in addressing harmful content such as hate speech.[7]

The *Criminal Code* Amendment Clears Up the Meaning of "Hatred"

As previously mentioned, Bill C-36 proposes to add a definition for "hatred" in section 319 of the *Criminal Code*. "Hatred" would be defined as "the emotion that involves detestation or vilification and that is stronger than dislike or disdain."[8] This language echoes the Supreme Court's interpretation of "hatred" in *Whatcott*, where the Court noted that "'hatred'… is to be interpreted as being restricted to those extreme manifestations of emotion described by the words 'detestation' and 'vilification'."[9] This wording is important as it limits the application of section 319 of the *Criminal Code* to a very small category of expression. In other words, it prevents section 319 from applying to expression that is "repugnant and offensive" but does not rise to the "level of abhorrence, delegitimization and rejection that risks causing discrimination or other harmful effects."[10] By limiting the application of this law to only the most extreme and harmful speech, Bill C-36 attempts to ensure that section 319 of the *Criminal Code* infringes individuals' freedom of expression as little as possible.[11]

The *Canadian Human Rights Act* Amendment Revives a Previously Repealed Law

Bill C-36 also revives section 13 of the *Canadian Human Rights Act*, which was repealed by Parliament in 2013 in response to claims that it was overly restrictive of free speech.[12] The "old" section 13 established that it was a "discriminatory practice … to communicate telephonically … any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person … [is] identifiable on the basis of a prohibited ground of discrimination."[13] There was fear at the time that this provision would place a "chill on speech that is controversial but not necessarily hateful."[14] While these claims were not adjudicated by the courts before the law's repeal, it is likely that section 13 infringed section 2(b) of the *Charter*. However, whether the "old" section 13 would have been saved by section 1 of the *Charter* — which allows governments to place reasonable limits on *Charter* rights — is uncertain.

Bill C-36 proposes to add a new and revised version of section 13 to the *Canadian Human Rights Act*. This new provision makes it a discriminatory practice to communicate "hate speech by means of the Internet or other means of telecommunication in a context in which the hate speech is likely to foment *detestation* or *vilification* of an individual or group of individuals on the basis of a prohibited ground of discrimination."[15] Like the *Criminal Code* amendments, this provision echoes the wording of the Supreme Court in *Whatcott*. As such, section 13 would likely be limited to a very narrow segment of expression that goes beyond being merely offensive or repugnant, as it distinguishes expression that directs "dislike or disdain, or that discredits, humiliates, hurts or offends" from "the extreme nature of hate speech captured by the proposed amendments."[16]

The amendments to the *Canadian Human Rights Act* would apply to public communications on the Internet by individuals in places such as social media platforms, personal websites, and in mass emails.[17] If an individual is targeted by a post that elicits hate speech, they would be able to file a hate speech complaint with the Canadian Human Rights Commission.[18] While the Department of Justice asserts that the provision is "carefully

defined to target only an extreme and marginal type of expression,"[19] if it becomes law, it will likely be scrutinized by free-speech advocates as a potentially unjustified and hence unconstitutional violation of the freedom of expression.

Hate Speech: Is It Protected Under the *Charter*?

In its attempts to limit hate speech, does Bill C-36 engage the *Charter*'s guarantee of free expression? To answer this question, a useful starting point is the Supreme Court of Canada's judgment in *R v Keegstra*. In that case, the Court was tasked with determining whether "the coverage of s. 2(b) extend[s] to the public and wilful promotion of hatred against an identifiable group."[20] To determine if a form of expression is protected, the Court found it necessary to consider the values that underlie the freedom of expression as they "define the ambit of s. 2(b)" and provide context on how "competing interests might co-exist with the freedom under s. 1 of the *Charter*."[21] In particular, the Court identified three values that fuel free expression: (1) truth seeking, (2) participating in "social and political decision-making," and (3) "individual self-fulfillment."[22] It is not enough to consider these values in isolation, the Court said. Rather, these values must be considered "within the textual framework of the *Charter*."[23]

Although hate speech does not promote the values that underlie the freedom of expression, the Supreme Court of Canada in *Keegstra* decided that hate speech is "expression" within the framework of the *Charter*. In arriving at this decision, the Court noted that the word "expression" includes any activity that "conveys or attempts to convey a meaning,"[24] provided it is not "communicated in a physically violent form."[25] Since "[c]ommunications which wilfully promote hatred against an identifiable group without doubt convey a meaning,"[26] the Court held that hate speech is protected expression under section 2(b) of the *Charter.* This means that it is highly likely that government action that seeks to restrict hate speech will result in a section 2(b) infringement.

How does the precedent set in *Keegstra* apply to the amendments proposed by Bill C-36? While it is not certain until a court rules on the matter, it is likely that section 2(b) will be infringed if the new section 13(1) is added into the *Canadian Human Rights Act*. This provision aims to prevent the dissemination of hate speech, which is protected expression under section 2(b) of the *Charter*. However, the analysis does not end here. This potential infringement may yet be justified under section 1 of the *Charter*.

Preventing Hate Is Likely a Justified Infringement on Free Expression

Some commentators were concerned that the "old" section 13 of the *Canadian Human Rights Act* would allow "too many frivolous cases to proceed against citizens, when the *Criminal Code* already covers hate speech that could generate harm against an individual or group."[27] This ultimately led to its repeal through a private member's bill tabled in the House of Commons in June 2013. As Bill C-36 is still in early stages of the legislative process, it is hard to know if it will eventually become law or, if it does, whether it will eventually be reviewed by the courts. If it does end up before the courts, several potential arguments for and against the justification of section 13 may be addressed.

Arguments Supporting Justification

Arguments in favour of section 13 would likely turn on its ability to pass the minimal impairment and final balancing stages of the *Oakes* test, which is the test that is used by the courts to determine if a violation of a *Charter* right is justified. At this stage of the analysis, courts will consider the links between the infringed expression and section 2(b) values. Justification is more likely if the impugned expression deviates from the values underlying free expression. In this regard, three arguments in support of justifying a potential infringement of section 2 (b) are especially relevant.

First, Bill C-36's proposed "new" section 13 has some important differences compared to the "old" version. The new version uses the language of the Supreme Court in *Whatcott* (detestation and vilification), which has been interpreted to only capture a small segment of expression.[28] As such, section 13 may well be found to be minimally impairing as it does not capture more expression than necessary.

Second, since the repeal of the "old" section 13, internet usage and the dissemination of online hate has increased significantly.[29] For example, a 2020 study showed that over 6,600 online platforms were used to spread "white supremacist, misogynistic or other extremist views."[30] In this sense, the problem of online hate has clearly increased dramatically, which may make it more likely for the new section 13 to pass the final balancing stage of the *Oakes* test, when the importance of the government's objective is weighed against the extent of the rights violation.

Finally, establishing the promotion of hate speech as a form of discrimination in the *Canadian Human Rights Act* gives victims a way to hold others accountable for their online hate speech.[31] The importance of providing a remedy to victims may also be a factor that is considered in the final balancing stage of the *Oakes* test.

Arguments Against Justification

In response to the federal government's introduction of Bill C-36, the Canadian Constitution Foundation ("CCF") issued a statement that provides some arguments against section 13 being a justifiable infringement on free expression.[32] First, the CCF suggests that the proposed definition for hate speech is "a vague and subjective standard."[33] A vague law can implicate the section 1 analysis at two stages.[34] In brief: a law may be so vague as to not "constitute a 'limit prescribed by law' under s. 1"[35] or may result in an argument of overbreadth at the minimal impairment stage of the *Oakes* test.[36] Second, the CCF is concerned that the proposed section 13 will deter and prevent Canadians' from debating unsettled subjects.[37] This argument may also arise at the minimal impairment stage, as it suggests that too much expression may be captured by the law. Finally, the CCF takes issue with the idea that a tribunal, which is formed by members that are not democratically elected, would have control over free expression.[38]

Conclusion: Wait and See

Since the repeal of the "old" section 13 in June 2013, the use of the internet in many aspects of our daily lives has increased. At the same time, the spread of online hate has also increased. Bill C-36 seeks to address these issues by providing a new legal definition of "hatred" and establishing the spread of online hate as a form of discrimination. If Bill C-36 is passed into law, the constitutionality of its amendments is uncertain and will remain uncertain until the courts have an opportunity to weigh in on the matter. It is likely that an infringement on section 2(b) of the *Charter* will be found, because hate speech receives *Charter* protection as a form of expression that conveys meaning. However, while section 2(b) grants constitutional protection to a broad range of expression, restrictions on expression may nonetheless be justified under section 1 of the *Charter*. Given how closely Bill C-36's proposed amendments follow section 2(b) jurisprudence, the "new" section 13 would likely be justified under section 1 of the *Charter*. This, however, will remain uncertain unless the courts weigh in on the matter.

For the time being, we will have to wait and see if Bill C-36 is passed into law.

[1] *Criminal Code*, RSC 1985, c C-46; *Youth Criminal Justice Act*, SC 2002, c1; *Canadian Human Rights Act*, RSC 1985, c H-6 .

[2] "Government of Canada takes action to protect Canadians against hate speech and hate crimes" (23 June 2021), online: *Government of Canada* <www.canada.ca/en/department-justice/news/2021/06/government-of-canada-takes-action-to-protect-canadians-against-hate-speech-and-hate-crimes.html> [Department of Justice Canada News Release].

[3] *Ibid*.

[4] *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11 .

[5] Department of Justice Canada News Release, *supra* note 2.

[6] *Ibid*.

[7] *Ibid*.

[8] Bill C-36, *An Act to amend the Criminal Code and the Canadian Human Rights Act and to make related amendments to another Act (hate propaganda, hate crimes and hate speech*, 2nd Sess, 43 Parl, 2021 (first reading 23 June 2021), online: <http://www.parl.ca/DocumentViewer/en/43-2/bill/C-36/first-reading> [Bill C-36].

[9] *Whatcott*, *supra* note 4 at para 57.

[10] *Ibid*.

[11] See eg *Whatcott*, *supra* note 4; See also *R v Keegstra*, [1990] 3 SCR 697, 1990 CanLII 24 .

[12] Joel Webe, "Hate speech no longer part of Canada's Human Rights Act" (27 June 2013),

online: *National Post* <https://nationalpost.com/news/politics/hate-speech-no-longer-part-of-canadas-human-rights-act>.

[13] *CHRA*, *supra* note 1 at s 13(1), as repealed by *An Act to amend the Canadian Human Rights Act (protecting freedom)*, SC 2013, c 37.

[14] Webe, *supra* note 12.

[15] Bill C-36, *supra* note 8 [emphasis added].

[16] "Combatting hate speech and hate crimes: Proposed legislative changes to the *Canadian Human Rights Act* and the *Criminal Code*" (last modified 23 June 2021), online: *Government of Canada* <www.justice.gc.ca/eng/csj-sjc/pl/chshc-lcdch/index.html> [Proposed Legislative Changes].

[17] *Ibid.*

[18] *Ibid.*

[19] *Ibid.*

[20] *Keegstra*, *supra* note 11 at 725.

[21] *Ibid* at 726.

[22] *Ibid* at 728.

[23] *Ibid.*

[24] *Ibid* at 729.

[25] *Ibid.*

[26] *Ibid* at 730.

[27] Yosie Saint-Cyr, "Section 13 of the Canadian Human Rights Act Repealed!?" (14 June 2012), online: *Slaw* <www.slaw.ca/2012/06/14/section-13-of-the-canadian-human-rights-act-repealed/>.

[28] *Whatcott*, *supra* note 4 at para 57.

[29] Department of Justice Canada News Release, *supra* note 2.

[30] *Ibid*.

[31] *Ibid*.

[32] The CCF, "Canadian Constitution Foundation statement on 'Online Harms' bill" (23 June 2021), online: *Canadian Constitution Foundation*

<https://www.theccf.ca/canadian-constitution-foundation-statement-on-online-harms-bill>.

[33] *Ibid*.

[34] See *R v Nova Scotia Pharmaceutical Society*, [1992] 2 SCR 606, 1992 CanLII 72 .

[35] *Ibid* at 630.

[36] *Ibid* at 627.

[37] The CCF, *supra* note 32.

[38] *Ibid*.