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Canada's "Schauprozess" —Show Trials

Free Speech and Canadian Human Rights Commissions

By Barry Cooper

About the Author

Barry Cooper, a fourth generation Albertan, was educated at Shawnigan Lake School, the University of British Columbia and Duke University (PhD, 1969). He taught at Bishop's University, McGill, and York University before coming to the University of Calgary in 1981. His teaching and research has tried to bring the insights of Western political philosophers to bear on contemporary issues, from the place of technology and the media in Canada, to the debate over the constitutional status of Quebec and Alberta, to current military and security policy. Cooper has published over 25 books and nearly 150 articles and papers that reflect the dual focus of his work; most recently he wrote *It's the Regime, Stupid! A Report from the Cowboy West on Why Stephen Harper Matters* (2009) and *Beginning the Quest: Law and Politics in the Early Work of Eric Voegelin* (2009). He publishes a regular column in the *Calgary Herald* and other CanWest Global papers.

Cooper has lectured extensively in Europe, the United States, India, Australia and China. He has received numerous on-going research grants from public and private Canadian and American granting agencies. In addition he has received two major awards, the Konrad Adenauer Award from the Alexander von Humboldt-Stiftung, and a Killam Research Fellowship.

He is a Fellow of the Royal Society of Canada, the Institute for Health Economics, the Canadian Defence and Foreign Affairs Institute, and the Centre for Military and Strategic Studies at the University of Calgary, and is a member of the Pennask Lake Fishing and Game Club, and the Philadelphia Society.

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FRONTIER CENTRE
FOR PUBLIC POLICY
www.fcpp.org

MB: 203-2727 Portage Avenue,
Winnipeg, Manitoba Canada R3J 0R2
Tel: 204 957-1567 Fax: 204 957-1570

SK: 2353 McIntyre Street,
Regina, Saskatchewan Canada S4P 2S3
Tel: 306 352-2915 Fax: 306 352-2938

AB: Ste. 1280–300, 5th Avenue SW
Calgary, Alberta Canada T2P 3C4
Tel: 403 230-2435

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An earlier version of this paper was presented at the Claremont Institute/APSA panel on free speech in Canada and the US, Toronto, September 3, 2009

By Barry Cooper

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Executive Summary

- In early September of this year, the American Political Science Association (APSA), the largest and most important professional association of political scientists in the world, met in Toronto—for the first time outside the US.
- Having been alerted a year earlier that Canadian Human Rights Commissions (HRCs) might be in a legal position to charge APSA members with "hate speech" for reporting controversial research, and perceiving this possibility as a threat to academic analysis of contentious public policy, the APSA and affiliated groups devoted four panel discussions to the Canadian experience with these bodies.
- The argument made in this paper is that HRC tribunals are essentially show trials not judicially respectable procedures, particularly those conducted under s. 13 of the *Canadian Human Rights Act,* which deals with "hate speech" or, more accurately, with hurt feelings.
- Moreover, HRCs are administrative organs, which is to say, bureaucratic organizations, and so susceptible to all the internal incentives for bureaucratic growth available to other parts of the Canadian state, both in Ottawa and provincially.
- As a consequence they have grown, and with growth comes confidence and moral certainty. What is interesting in this process is not the conventional smugness characteristic of superior bureaucrats, but the equal confidence of their critics for whom they are emperors without clothes and worthy if not of hatred then of ridicule. Perhaps this genuine threat to free expression posed by Canadian HRCs will be laughed into oblivion.

"The argument made in this paper is that HRC tribunals are essentially show trials not judicially respectable procedures..."

Canada: The "DEW line" on freedom of speech issues

Marshall McLuhan famously remarked during the 60s that art is the DEW line—the Distant Early Warning line—of modern society. Less famously, he said that Canada is the DEW line of America. When he said it, the real DEW line, a string of radar stations from Alaska to Greenland, was still part of Canadians' collective memory. Back then, the RCAF provided first echelon interceptors tasked with shooting down Soviet bombers coming across the pole. And they would do the job with nuclear armed missiles. Our contributions to continental defence in recent years have become, unfortunately, much more modest, rather like our defence of free speech enshrined in s. 2 of the *Charter.*

There are a few areas of public policy, however, where Canada can still provide a distant early warning to America. The most obvious recent example is "Canadian-style" healthcare proposed by the Obama administration and some members of Congress. Having experienced both healthcare systems, I can say that ours will certainly teach Americans patience owing to our world-class wait-times. And patience, after all, is a virtue.

The second area where Canada excels and America lags is in the whole area of hate crimes and especially hate speech and, perhaps more importantly, hate thought. The House Judiciary Committee, for only the second time in its history, considered the *Local Law Enforcement Hate Crimes Prevention Act,* last spring. The object of this particular bill is to add gender identity and sexual orientation to protected classes against whom "hate crimes" need to be made a federal offence. I am sufficiently old fashioned in my understanding of American Constitutional law to think that the equal protection clause of the Fourteenth Amendment meant *equal* protection. I might add that our "hate speech" laws seem to contravene the First Amendment, so if Americans follow the Canadian way they will have to do something about that as well. As for our "hate thought" initiatives, these are still in the formative stage though the bureaucratic spadework has been completed. So far as the First Amendment to the US Constitution goes, vigilant "hate speech" investigators have indicated that equivalent constitutional safeguards in Canada are a hindrance to their duties and that "free speech" is an alien notion that they are free to ignore.

Because it is an American import, I am not going to say much about political correctness beyond mentioning a couple of examples. First, anti-abortion student clubs and activities have been banned at the Universities of Guelph, York, and Calgary. At Queen's University in Kingston, Ontario, "intergroup dialogue facilitators" were hired by the university administration to intervene in students' conversations in dining halls and direct them in approved directions.

> ***"Hate speech" investigators have indicated that ... "free speech" is an alien notion that they are free to ignore.***

At Carleton, in Ottawa, student councilors decided that cystic fibrosis was a "white male disease" and so should not receive charitable support from the Students' Union.[1] I think universities in this country have assimilated "American-style" political correctness pretty well.

About a year ago a number of members of the American Political Science Association (APSA) petitioned the executive of that organization, cautioning them against holding the annual meetings in Canada. The Toronto meetings were, in fact, the first time the APSA has ever met outside the United States. Many of the signatories were Canadian ex-pats teaching in the US and were well informed about Canada's Human Rights Commissions (HRCs). Their reasoning was that Canada's Human Rights Commissions were a threat to academic freedom because quite often the APSA is a venue for making public controversial research. Some Canadians, they said, might find this speech hateful and offensive and bring the speaker before a Human Rights Commission.

Truth to tell, there was also an element of mischievous internal politics involved insofar as many of the signatories found it offensive that the APSA had refused to hold any meetings in the future in New Orleans until the state of Louisiana changed their marriage laws. If some members of the APSA wanted to boycott New Orleans because they objected to the refusal of the state to legalize same-sex marriages, which were not a threat to academic freedom, others, they reasoned might protest the Canadian HRCs, which were a threat to academic freedom.

> ***To say that HRCs are a threat to freedom of expression in this country is an understatement.***

Such was the rationale of the petition. The Claremont Institute, which is an "affiliate group" in the Association, found this controversy worthy of discussion and asked me to take part. By my count there were three other panels on freedom of speech, political correctness, and Canadian Human Rights Commissions. Even if they dismissed the petition of the disgruntled members, the APSA executive thought the question deserved serious attention. The Canadian Political Science Association, so far as I know, has not seen fit to give the Canadian HRCs similar scrutiny.

One of the other participants on this panel was Clifford Orwin, a colleague and, indeed, a friend of mine at the University of Toronto. He published an op-ed piece in *The Globe and Mail* last August that argued that the APSA had nothing to fear in holding the meetings in his town. I was not convinced that the threat posed by the Canadian HRCs was "a load of bupkes" as Cliff alleged. In fact, I had not encountered this term of Yiddish provenance previously but was told that it had to do with goats (meaning nothing, or zilch).[2] So, I provided the following analysis of our Human Rights Commissions. To say that HRCs are a threat to freedom of expression in this country is an understatement. Since we were meeting in Toronto, it would be analogous to saying that Leafs fans are sometimes disappointed.

I should also say that I have been an "expert witness" in one HRC tribunal where a lawyer for the Alberta Attorney General's office asked me to compare a letter to the editor of the *Red Deer Advocate* with *Mein Kampf.* I obliged and he asked me no further questions. It was,

to say the least, unusual for the attorney general's office to show an interest in the proceedings of a human rights tribunal. The president, akin to a judge in a real court, was attentive to his needs and requests. She was a divorce lawyer from Lethbridge, Alberta, a former minor official in the governing Conservative Party organization, and a political appointee.

Because proceedings before Human Rights Tribunals in Canada often involve what to commonsense are unusual complaints, we often do not take them seriously. For example, in Vancouver, a man who changed teams and became a woman thought she had a right to work at a rape-relief centre. Those who ran the place disagreed and she petitioned the BC HRC and *won.* A recruit at RCMP Depot in Regina complained to the Saskatchewan HRC of having been shouted at by a drill sergeant and won a cool hundred grand. There is clearly a lesson here for the US Marines should America follow our lead. Back in BC another woman won the right not to wash her hands before preparing Big Macs and Quarter Pounders under the Golden Arches.[3] A final example, again from BC, involved a stand-up comedian, Guy Earle, at a rather sleazy after-hours club. After being heckled by a couple of drunken, necking lesbians, who also threw water at him, he made a joke at their expense. They complained and—you guessed the outcome. The BC HRC is now a focus group for testing jokes. In this context we should recall that Solzhenitsyn went to the Gulag for joking about Stalin's moustache. Such real-life examples bring to mind the remark of 1st Century Roman poet Juvenal: "in times like these it is difficult to avoid writing satire."

Welcome to Canada's "Schauprozess"—Show Trials

So let us move beyond the satirical anecdote and quit picking on BC. First, HRCs are kangaroo courts. To be more scholarly, they are what Germans called a *Schauprozess,* show trial, whose actual operations are akin to the *Volksgerichtshof,* people's court, of an earlier day in German justice. There is no presumption of innocence. There is no right to face or cross-examine one's accuser. There are no procedural safeguards with respect to exculpatory evidence, illegally obtained evidence, entrapment, hearsay, and self-incrimination. Human-rights investigators do not need warrants to search your premises. Third-party accusations are permitted, including those that originate with the government (I will say more about this). Multiple- rather than mere double-jeopardy is not only possible but commonplace. There is no requirement for a speedy resolution and, unlike hate crimes prosecuted under s. 319 (3) of the *Criminal Code,* there is no defence of truth-telling and no definition of "hate speech." And finally, unlike the defendant,

> ***There are no procedural safeguards with respect to exculpatory evidence, illegally obtained evidence, entrapment, hearsay, and self-incrimination.***

the complainant bears no costs and is immune from any counter-suit aimed at recovering costs that might be brought in a real court on grounds that the HRC complaint was frivolous and vexatious. You will also be pleased to learn that the human rights tribunals had, until September 2, 2009, a 100% record of conviction, better even than that of North Korea.[4] So far as the Canadian Human Rights Commission (CHRC) is concerned, they say that their record of success is simply evidence of the "superlative job" they are doing during the screening stage.[5] Given the rather odd decisions that various HRCs have rendered, the usefulness of the screening process generally speaking seems to me to be highly questionable. And as for the high-profile examples involving Mark Steyn and Ezra Levant, who were willing to fight back against their Islamist tormentors backed by the state, it is cold comfort to say, as HRC apologists have done, that the HRC actions should never have taken place. The problem is that they did, and at great cost to the "respondents," as the accused are called.[6]

All of this is possible because of the wording of s. 13 (1) of the *Canadian Human Rights Act (CHRA).* It reads in part:

> It is a discriminatory practice … to communicate … any matter that is likely to expose a person or persons to hatred and contempt by reason of the fact that person or those persons are identifiable on the basis of a prohibited ground of discrimination.

The prohibited grounds include: race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability, and conviction for which a pardon has been granted. The targeted *method* of communication, as other subsections make clear, are the Internet and the telephone. Notice as well that the substantive target is bad words, not bad actions or deeds, and behind the words, as we shall see, bad thoughts.

Let us begin with the most obvious operative term, *likely.* It is important because, rather like post modern reader-response theories of interpretation, likelihood depends on whether or not an individual *actually* feels that he or she is hated or held in contempt. If they do, this feeling becomes legally visible when they fill out a complaint, which can be done online in about five minutes. As several commentators have observed, we are dealing here not with genuine civil rights or genuine discrimination but with hurt feelings of some members of some groups.[7] As Ezra Levant put it, the CHRC is less concerned with hate crime than with a whole new category of offences, "emotion crime."[8] Moreover, this "crime," being dependent on the response of someone else is entirely hypothetical, which is to say it is a "pre-crime," to borrow another term from Levant.[9]

The logic of the CHRC position is clear enough: people's feelings can be hurt by offensive speech and rude remarks—think of the drunken lesbians who became the

> ***"The human rights tribunals had, until September 2, 2009, a 100% record of conviction, better even than that of North Korea."***

butt of Guy Earle's sharp wit. Of course, thin-skinned people can go to a real court to file a real lawsuit for defamation or slander. But they have to hire their own lawyers first. As noted: not so with HRC complainants. For example, Ezra Levant published—or rather, re-published without comment as part of a news story—the famous Danish cartoons of the Prophet Muhammad, PBUH, in his magazine, the *Western Standard.* The basis for the human rights complaint by Syed Sohawardy was a dozen suras in the Holy Koran that required "respect and obedience" for him. Maybe so in Saudi Arabia; but such respect and obedience was not even considered to be required in Canada until the Alberta HRC got involved. The Levant proceeding was eventually dismissed, chiefly because Levant posted his defence and his criticism of the Alberta HRC and of Mr. Sohawardy on YouTube. That is, embarrassing publicity and ridicule, not constitutional guarantees got him off. Even so, it cost him over 800 days of his life, and about a hundred thousand dollars; it cost the Alberta taxpayers half a million to support the complainant, who then just walked away when he was ridiculed.[10] In Levant's words, the process was the punishment.

The ease with which Islamists and other sensitive people can launch such a proceeding is clear. From the perspective of the HRCs, however, there are far too *few* complainants around. Barbara Hall, Chair of the Ontario HRC, observed "for a province as large and diverse as Ontario to have 2500 formal complaints a year, that, that's a very low level."[11] If there were not enough volunteers, the answer was obvious: drum up a little business.

This is a venerable bureaucratic tactic in Canada that goes by the name of "social animation." Not enough demand for French poetry readings in rural Saskatchewan?

> ***If there were not enough volunteers, the answer was obvious: drum up a little business... (aka) social animation.***

Deploy a few *animateurs* from the Office of the Secretary of State for Bilingualism and explain to these stubble-jumping rubes why they need to petition Ottawa to provide this "service."[12] Not enough human rights complaints? Then send a few human rights "investigators" undercover. Have them join a neo-Nazi website, for example, and post a few anti-Semitic or anti-gay remarks. Then, when some unsuspecting skinhead posts an equally offensive response, you've got grounds for a complaint that a quondam investigator can then bring as a complaint in his spare time.

This practice came to light for the first time in March of 2008 in a particularly unsavoury case, *Warman and the CHRC v. Lemire.*[13] The defendant, Marc Lemire, identified by Jonathan Kay in the *National Post* as a "hatemonger" is himself not particularly interesting, although his supporters, no doubt much to the chagrin of the CHRC, are now calling him a "human rights activist." Not so Richard Warman. He was a CHRC employee between 2002 and 2004 and specialized in s. 13 investigations and complaints. At the time of the proceedings against Lemire he was employed by the CHRC and accepted (tax-free) monetary awards from CHRC rulings for his hurt feelings as a complainant. In a sense, Warman is a professional complainant conducting what Mark Steyn called a "sordid racket."[14] What is interesting about this case is that it was the first time the CHRC was examined on its procedures.

> ***(Dean Steacy, CHRC investigator) had no explanation for ... logging in to Free Dominion prior to receiving a citizen's complaint... he logged in ... not because of a complaint but "because there was the potential for a complaint to come in."***

Warman, who in his complainant career has filed over twenty-five s. 13 motions, far more than anyone else, brought his typical "hate speech" complaint against Lemire in 2007. At the initial tribunal hearing in May 2007, Lemire sought to cross-examine two CHRC employees, Hannya Rizk and Dean Steacy. The CHRC employees gave evidence in chief and were cross-examined by counsel in camera because the CHRC said they were in danger and did not want their faces exposed. Lemire appealed to Federal Court but a few weeks before the scheduled appearance before that body the CHRC disclosed the information Lemire sought thus making the action moot. The presiding chair of the Tribunal mildly rebuked the CHRC, noted the changed circumstances, declared the CHRC employees were not in danger, and reversed his order.[15] The chairperson welcomed everyone back to the tribunal hearing on March 25, 2008, to testify in public and on the record.

The first witness, Alain Monfette, director of the Bell Canada Law Enforcement Support Team, testified that a specified Internet address belonged to Nelly Hechne, a 26-year old Ottawa woman who lived a few blocks from the CHRC offices (5639-49). Following an examination of Hannya Rizk concerning the investigative techniques used by CHRC investigators to identify the sources or authors of Internet postings, Dean Steacy was called to the stand. On his own initiative he admitted to joining (among other similar sites) "Stormfront," a white supremacist neo-Nazi website, in 2005, using the ID "Jadewarr," which, he said, was a short form of "Jade Warrior," a comic book superhero investigator Steacy had admired in his youth. He had no idea who Nelly Hechne was (5706, 5746). Other CHRC investigators also used the Jadewarr ID and Steacy said it "belonged to the Commission," not him (5750). Jadewarr had hacked Hechne's account and logged in to Stormfront on several occasions.

As noted, the standard procedure of HRCs is to respond to complaints. Steacy, however, testified to joining another website, "Free Dominion," prior to receiving any citizen's complaint about it (5768-71; 5807-8). At first he testified he had no explanation for the discrepancy between his logging in to Free Dominion prior to receiving a citizen's complaint. He then testified he logged in to Free Dominion, using Jadewarr, not because of a complaint but "because there was the potential for a complaint to come in." How did he know? Because of *inquiries* by people about filing a complaint. And who were they?

Mr. Steacy: I refuse to answer.

The Chairperson: You refuse to answer?

Mr. Steacy: I'm not telling. They weren't complaints.

The Chairperson: You refuse to answer?

Mr. Steacy: I'm refusing to answer the question. (5808-9)

After that bit of drama, the Chair was satisfied that Steacy (Jadewarr) logged in to Free Dominion without any complaint. Then Steacy testified his action was "part of the complaint *process*" (5814), namely "a *potential* complaint" (5815). Of course, there could be no criteria to determine who a "potential complainant" was or what a "potential complain" might be. The entire category is notional.

A few pages later the following exchange took place between Barbara Kulaszka, Lemire's lawyer, and Steacy:

> **Ms. Kulaszka:** Are there any guidelines for investigators about what kinds of posts they can make using aliases?
>
> **Mr. Steacy:** No. (5827)

Kulaszka then drew out the implications, chief among them is that the CHRC had no regulations to prevent their investigators or any other employees from joining a neo-Nazi or similar group to instigate offences that then they could deal with in their allegedly legitimate role as investigators. To be clear: we are not talking about spies or moles here, that is, agents who infiltrate a hostile target organization in order to discover what they are up to. We are talking about *agents provocateurs.*[16] The CHRC lawyer, Margot Blight, objected to Kulaszka's line of questioning, and Lemire's lawyer explained:

> **Ms. Kulaszka:** What the thrust of my questioning was basically are investigators posting on Stormfront, or any other message board.
>
> **The Chairperson:** Mm-hmm.
>
> **Ms. Kulaszka:** Because anybody can post anything on these message boards and the entire case practically against my client is a message board, anybody can go on there and put anything they want on. And then the problem arises, it turns out they are doing this.
>
> **The Chairperson:** Okay.
>
> **Ms. Kulaszka:** Numerous investigators are doing this, no one is keeping track of who is who, how do they know what they're doing? How do they know who to investigate, who not to investigate? They could be investigating a State, an Estate, [who] turns out to be a policeman from Edmonton. How come there was no investigation of Estate, he certainly put up enough racist information.
>
> **The Chairperson:** This is argument that you're giving me right now; isn't it? All those components of the argument you've just made, I have more than enough evidence on it.
>
> **Ms. Kulaszka:** And, so I'm asking him basically how is he keeping track of who's who on Stormfront and these other message boards, how does he know who they are?

The question, as lawyers say, answers itself.

Doug Christie, lawyer for the Canadian Free Speech League, made matters even more clear:

> **Mr. Christie:** … The appropriate line of inquiry is to determine if those who are posting under pseudonyms, somehow registered, who else is so they know they're not investigating other investigators …. Are these people conducting an inquiry that's other than of postings they and their other investigators have made, which would be a demonstration of how absurd this legislation can become if they can use these tactics. (5831-32)

At the conclusion of her questioning of Steacy, Kulaszka asked whether investigators "have some sort of exemption" from complaints under section 13 for things they're posting on message boards. And Steacy replied that "there's not an exemption for anybody."

Just so the implication is explicit: this means that an HRC investigator who posted hate speech on a website such as Stormfront might be investigated by another HRC investigator and brought before an HRC Tribunal without the second HRC investigator knowing that the first was an agent provocateur. That is "social animation" with a vengeance.

In a column for the *National Post* called "A Disaster for Canada's Human Rights Commission,"[17] Jonathan Kay wrote:

> The impression that emerges is an overstaffed shop in which unionized desk jockeys sit around 'investigating' obscure websites in search of some scrap of actionable hatred. When they don't find anything, they log on and try stirring things up themselves...

The "disaster" for the CHRC turned out to be even greater than Kay indicated because of what the CHRC investigators actually posted on the Stormfront website. According to these posts, Jews were "scum," gays were a "cancer," and white cops should be loyal to "their race."

Moreover, since Steacy/Jadewarr had hacked Nelly Hechne's wifi connection there was no direct way to link Jadewarr's postings to CHRC computers—at least not until Alain Monfette of Bell Canada gave his testimony. The purpose of the hacking and the Steacy/Jadewarr posts regarding Jews, gays, and white cops, it bears repeating, was to goad Lemire into making an inculpatory reply which would enable the CHRC to charge him with "hate speech."

Pathological bureaucrats and free speech as an "American" concept

And then, for connoisseurs of the pathological behaviour of bureaucrats, things got interesting. In June of 2008, a few months after the Steacy testimony, Jennifer Lynch, Chief Commissioner of the CHRC, announced that she had commissioned a report from University of Windsor law professor Richard Moon to examine s. 13 and the regulation of hate speech on the telephone and on the Internet. She praised the work of her investigators and of other commission members, and declared "I'm a free speecher. I'm also a human rightster."

That *also* was significant: most Canadians are of the view that free speech is a "human right" with the meaning of the *Act.* It turns out that we were wrong.[18] This is what CRC investigator Steacy had to say on the matter of free speech at the original Lepine tribunal:

> **Ms. Kulaszka:** Mr. Steacy, you were talking before about context and how important it is when you do your investigation. What value do you give freedom of speech when you investigate one of these complaints?

> **Mr. Steacy:** Freedom of speech is an American concept, so I don't give it any value.
>
> **Ms. Kulaszka:** Okay. That was a clear answer.
>
> **Mr. Steacy:** It's not my job to give value to an American concept. (4793-4).

According to Steacy, s. 2 (b) of the *Charter,* which deals with "freedom of expression" did not include free speech.

In late November, 2008, Richard Moon's report to the CHRC was submitted.[19] His chief recommendation was to repeal s. 13 and rely on s. 319 (3) of the *Criminal Code* to deal with "hate crimes." This was not what Commissioner Lynch had wanted and so, on June 11, 2009, she took the unusual response of issuing a memo to Parliament.[20] The CHRC rejected Moon's recommendation that the *Criminal Code* was preferable to the *CHRA* because of the procedural safeguards it contained for the accused, including a *mens rea* requirement. This provision in the *Criminal Code* was explicitly rejected because HRCs "deal with situations where the intent of the person posting the messages may not be clear" (32). Of course, this is a problem for criminal prosecutors as well. The point, however, is that *mens rea* protects the defendant against false or unsustainable accusations. In fact, the real reason for the rejection of *mens rea* by the CHRC is that they are concerned not with the intent of the respondent but the hurt feelings of the complainant. This is why, when the CHRC called upon Parliament in this memo to provide a definition of "hatred and contempt," they insisted that no *mens rea* provision be part of it.

On the multiple jeopardy issue, which permits the same complaint to be filed in several jurisdictions, and requires

> ***(Moon's) recommendation, was to repeal s.13 and rely on s.319 (3) of the* Criminal Code *to deal with "hate crimes." This was not what Commissioner Lynch had wanted...***

the defendant to respond in each of them, the CHRC said they have "initiated discussions" with provincial and territorial commissions "to work toward avoiding duplication of proceedings in the future." To those wise in the ways of bureaucratic obfuscation, the meaning was clear enough: we will *talk* to our colleagues, but don't expect us to *do* anything. And, of course the defence of truth, allowed by the *Criminal Code,* must still be excluded.

Four days after the CHRC published its response to the Moon Report, the Chief Commissioner, Jennifer Lynch, addressed the annual conference of the Canadian Association of Statutory Human Rights Agencies.[21] In light of the developments that took place over the next four weeks, this speech was the beginning of a concerted effort by the CHRC to engage with the media and with Canadian public opinion. Whether concerned with damage control or persuasion of the media and public of the usefulness of the CHRC, which is to say, PR and propaganda, the results could not have entirely satisfied Ms. Lynch.

"The major concern" of the CHRC, she said, is "the need to strengthen the overall human rights system and *ensure the public understands what we do.*" Unnamed "detractors" were undermining the HRCs in Canada. She mentioned (but did not defend) the complaint against *Maclean's* over excerpts from Mark Steyn's book, *America Alone,* which hurt the feelings of

> ***Ms. Lynch said she "welcomed debate"... then criticized Russ Hiebert, MP, (Cons. South Surrey-White Rock-Cloverdale) who had undertaken a study of the CHRC...***

some Canadian Islamists. The fact that the most "hurtful" excerpts were quotations from other Islamists illustrates (at least to common sense) the untenability of section 13 (1) of the *CHRA.* But let us leave that question for the moment.

A week after her remarks to the convention of HRCs, Ms. Lynch gave an interview to Joseph Brean of the *National Post.*[22] Lynch said she "welcomed debate" but it needs to be "informed" and take place "in the right forum," namely Parliament and its committees. She then criticized Russ Hiebert, MP, (Cons. South Surrey-White Rock-Cloverdale) who had undertaken a study of the CHRC for just such a Parliamentary committee. Unfortunately, according to Lynch, he relied on the wrong facts, sources, and authorities.

Two weeks later Hiebert responded that the CHRC was "ethically challenged."[23] Hiebert mentioned that CHRC investigator Steacy and former investigator Warman both "regularly posted neo-Nazi diatribes under assumed names on neo-Nazi websites. Further, uncontradicted expert evidence presented before the hearing [i.e. the CHRC Tribunal] demonstrated that investigator Steacy illegitimately used an unsuspecting private citizen's wireless Internet service to post his offensive comments." All of these allegations were present in, or could easily be confirmed on the basis of, Steacy's testimony as quoted above.

The next day Ms. Lynch replied in the *National Post,* denying the allegation that "a commission employee illegitimately used the Internet connection of a third party" and pointed to an unnamed RCMP "expert" and the Privacy Commissioner of Canada to back her up. "Nor did Commission investigators post hateful messages on the Internet." As a result, she said, "I am proud of the work of the commission and of the contribution we make every day to the promotion and protection of equality in Canada."[24] Now, she did not actually name anyone and, technically, if she had Warman in mind, he was an ex-employee. Such a distinction could not, however, excuse Steacy.

The following day Lynch continued her media blitz, this time in the pages of *The Globe and Mail.*[25] After a formular defence of the *CHRA,* including the "controversial" s. 13, which was excused or justified by its noble intentions, Lynch then criticized some (still unnamed) people in light of her own novel theory of rights. These persons subscribe to the misguided view that, on occasion, rights can conflict and specifically that freedom of expression can conflict with "the right of all citizens to be protected from the harm that can be caused by hate messages." This "right of protection from harm," which seems to have been conjured from Lynch's brain, does not conflict with the right of free speech, which, she said, is constitutionally guaranteed. "In fact there is no hierarchy of rights with some having greater importance than others. They work together toward a common purpose."

In the context of this comforting view of the harmony of all rights, both constitutionally guaranteed and those such as the right not to have your feelings hurt, which are not yet so guaranteed, "human rights commissions and tribunals provide access to the justice system and remedies

for those *who believe* they are the victims of discrimination. As is the case with all administrative law bodies, they ensure that all parties are protected by the rules of natural justice, and that frivolous complaints are efficiently disposed (emphasis supplied)."

Unfortunately, these misinformed and misguided critics, whoever they may be, espouse what she called, "a new agenda" and they are manipulating "information and activities around rights cases" to further it. That agenda, very simply, is that HRCs "no longer serve a useful purpose." In fact, in Lynch's view, although "we have come a long way," nevertheless "we cannot afford to relax our vigilance or declare victory. Together, we must ensure that those who are the most vulnerable in our society are not further marginalized." In service of this objective, the commission "welcomes" the debate between "freedom of expression and hate messages."

HRCs boycott parliamentary accountability

Three days later, in the pages of the *National Post,* Ezra Levant rose to her challenge, or invitation, and continued the debate.[26] In his response, Levant highlighted several significant facts ignored or somehow overlooked by Jennifer Lynch. The first was that Lynch herself had refused to appear before a parliamentary committee, by her account the "right forum" for "informed debate." Instead she sent her deputy, who proved incapable of answering a number of informed questions from Hiebert—who, according to Lynch, had his facts wrong. The kindest thing one could say is that by ducking out of appearing before the committee Lynch missed a golden opportunity to set Hiebert right.

Perhaps more important were Ms. Lynch's own factual errors. To begin with, in her speech to CHRCs, Lynch was wrong regarding the hacking of Nelly Hechne's email account and wrong about the RCMP investigation of this act. The Mounties ceased their investigation when the evidence led to a US Internet server. To proceed further they would have had to use the Mutual Legal Assistance Treaty (MLAT). And MLAT requests are complex, expensive, and time-consuming. No doubt the RCMP made a cost-benefit decision.

A second point is: "By sheer numbers," Levant said, "the Canadian Human Rights Commission has more Nazi members than the tiny Canadian Nazi Party did when it briefly existed in the 1960s." If this were not bad enough, the real scandal is that "instead of recognizing the problem and fixing it, Lynch is trying to cover it up."

The next day, Lynch fired back: "Both the RCMP and the Privacy Commissioner have conducted a thorough investigation of this alleged 'hacking' of a private citizen's account and have both determined that no further proceedings are warranted. The Canadian Human Rights Commission considers this matter closed."[27] She did allow that "in investigating hate messages complaints, the commission has logged on to websites to view their contents and obtain evidence." Moreover, "in some investigations postings were made" but "never … hateful or derogatory messages."

> **Fire. Them. All.**
> ***Warman and Steacy and unnamed others...***

And, of course, the CHRC would not "condone such a practice if it occurred." So it is "simply irresponsible" to suggest that CHRC employees "carrying out their legislated mandate," namely "investigation of neo-Nazi websites," among other things, could ever be equated with "'active' membership."

Lynch's remarks are either intentionally misleading (and she *is,* after all, a lawyer) or simply disingenuous. To begin with, you do not log *on* to Stormfront; you simply visit the website. On the other hand, *members* of Stormfront log *in,* which is what her employees did, and they did so to participate in the camaraderie of the site. They were not merely observers, spies, or moles; as noted, they were active participants and *provocateurs.*

Second, to claim that the Privacy Commissioner had conducted a "thorough investigation" of the hacking of Nellie Hechne's account is highly misleading. The purpose of the Privacy Commissioner's investigation "was to examine whether the CHRC improperly collected, used, disclosed, or retained personal information about the complainant during the course of its investigations, in contravention of sections 4 to 8 of the *Privacy Act.*"[28] That is, the Privacy Commissioner was tasked with discovering not *whether* the CHRC hacked Hechne's account, but whether, *while* hacking the account CHRC employees kept any of her personal information. Moreover, the "investigation" by the Privacy Commissioner took the form of a discussion with CHRC staff. The Privacy Commissioner did not interview Hechne nor the Bell Canada security director, Alain Monfette, whose testimony (at pp. 5645-6) was, indeed, "uncontested" as Hiebert said. And, of course, the CHRC investigators had no interest in Hechne's personal information; all they wanted was access to her Internet address in order to post on Stormfront while covering their CHRC tracks.

Two days after Lynch's reply, Ezra Levant responded.[29] The CHRC may consider the Nellie Hechne matter closed, he said, but the RCMP simply considered it "unsolved." Moreover, he added, "the CHRC is the only suspect." But, he went on, "the most amazing thing in her statement is that CHRC staff has never written 'hateful or derogatory' comments. CHRC investigators have admitted under oath to writing on Nazi websites that Jews are 'scum,' gays are a 'cancer,' and white police should be loyal to 'their race,' to list just a sample. Is she saying that those comments are not derogatory? And does she really think that such bigotry is part of her 'legislated mandate'? Fire. Them. All."

Warman and Steacy and unnamed others deserved to be fired for joining and participating in a Nazi website. Jennifer Lynch should be fired because, although she did not run the CHRC when her "investigators" joined up with the Nazis, she could have fired them when she found out. But she didn't. So now when she protects them, she is responsible for their actions.

In this "debate," which wound down for the balance of the summer, there is no question that Ezra Levant and the CHRC critics raised issues for which Lynch and the CHRC have no reasoned response. Matters did not remain that way because, during the course of the APSA meetings, Athanasios D. Hadjis handed down a decision on September 2, 2009, on the Lemire-Warman case that destroyed the perfect conviction record of the CHRC under s. 13 (1) of the CHRA. Some parts of Hadjis' decision are of

minimal importance—that Lemire was not responsible for what other people posted on his message board, for example. The interesting part however was not just that, with respect to most of Warman's complaints, that Lemire's postings or alleged postings did not meet the s. 13 criteria (he was found guilty on one of Warman's complaints). The argument, which has generally been misconstrued in press accounts, is that the circumstances under which the constitutionality of the *CHRA* was upheld in 1990 have changed as a consequence of amendments to the *Act.*

In what is generally referred to as the *Taylor* case, the Supreme Court of Canada allowed that "hate propaganda" is intended to circulate "extreme feelings of opprobrium and enmity against a racial or religious group" and explicitly stated it was not a matter of "subjective opinion as to offensiveness," which is to say, hurt feelings.[30] Lemire argued through his lawyer that changes to s. 13 since *Taylor* had changed its applicability. Hadjis said that, of course, his decision "cannot question the Court's findings in order to correct an alleged 'fundamental error'" to be found in *Taylor,* as stated by Lemire.[31]

He did consider, however, that the relevant amendments to the *CHRA* passed as part of the *Antiterrorism Act* (SC 2001, c.41), meant that the CHRA, according to Lemire, was no longer "a remedial statute to prevent discrimination but rather has as its objective to control opposition to policies that may create ill-will between groups in society and lead to political opposition to government policies like multiculturalism and 'Third World' immigration " [230]. Hadjis rejected this rather sensible, if surprising interpretation by Lemire.

On the other hand, he agreed with Lemire that the inclusion of penalty provisions in s. 54 (1)(c) of the *CHRA* transformed s. 13

> ***... "hate propoganda" ... was not a matter of "subjective opinion as to offensiveness," which is to say, hurt feelings.***

from the original remedial and conciliatory statute upon which the Supreme Court of Canada ruled in *Taylor.* Originally HRCs could only order a convicted respondent to "cease and desist" in his hateful communications; the addition of monetary penalties turned the *CHRA* into a "quasi-criminal" statute [260]. Moreover, the effects of this amendment were "anything but conciliatory" [283]. Not only do penalties tend to harden positions, because Warman "refused to participate in any settlement decisions" it was clear that the complainant was not interested in conciliation [284]. Incidentally, Warman made no submission on the constitutional question regarding the legality of s. 13 (1) [213].

Accordingly, the issue for Hadjis was not whether a constitutionally subordinate HRC tribunal could overturn a Supreme Court of Canada judicial decision, which it cannot do, but whether the Court's decision in *Taylor* could still be applied to the now substantially altered *CHRA* that had effectively removed the "less confrontational" procedures of the administrative tribunal, as compared to criminal proceedings under s. 319 (3) of the *Criminal Code.* That the tribunal was not in any sense less confrontational was not Lemire's experience [289]. On the contrary, the situation experienced by Lemire "is not what the Court contemplated" so that s. 13 (1) "goes beyond what can be defended as a reasonable limit on free expression under s. 1 of the *Charter*" [290].

In one sense Levant was correct to call his op-ed responding to the decision "It's a

Great Day for Freedom of speech," but that does not mean Canadians have seen the last of HRCs. To begin with, Hadjis' decision is bound to be appealed. As Pearl Eliadis, a human rights lawyer and defender of s. 13 said. Hadjis "just got it wrong."[33] And as Warman said, Lemire's website "was a hate website and it attracted hate."[34] Even before the Hadjis ruling, the spokespersons for the CHRC were in no mood to be conciliatory. Indeed, if anything characterizes the CHRC side of the debate it is whiney petulance—which is something they share with their clients.

Jennifer Lynch and the fantasy of "reverse chill"

In her speech to the several human rights commissions, Lynch complained that her "detractors" were undermining the HRCs in Canada and were discrediting the processes, professionalism, and staff of the HRCs. Much of this discrediting "was inaccurate, unfair, and at times scary." Unfortunately she did not provide any details or examples so the rest of us are in the dark about what frightens the Chief Commissioner.

She did, however, make the following observation; "Ironically, those who are claiming that human rights commission's jurisdiction over hate speech is 'chilling' to freedom of expression, have successfully created their own reverse chill." Reverse chill? Like the right not to have hurt feelings, "reverse chill" seems to be another artifact of Lynch's imagination. Perhaps she has in mind a violation of the right to chill legally vested in Canada's HRCs.

Similarly, in her June interview with Joseph Brean, after declaring how she "welcomed debate," Lynch complained: "Please, please, look. We have experienced sixteen months of invective hurled at us, and at any time when anybody has tried to speak up and correct misinformation, gross distortions, caricaturizations, then the very next day there's been some full-frontal assault through the blogs, through mainstream media."[35] Debates, like litigation and HRC investigations, are adversarial, which therefore run the risk of hurt feelings.

At the same time as the CHRC complains about the terrible unfairness of their critics they also show their own bureaucratically aggressive side. In the same interview with Brean, after mentioning the "full frontal assault" Lynch continued: "I have a file. I'm sure I have 1200, certainly several hundred of these things." Left unspoken was an implicit threat: and I know who you are and I'm going to do something about it. Or as she actually said, "I'm a public servant … and I'm not going to sit by. Others are afraid to speak out because they know they are going to be attacked. But if you Google my name today, you'll see how I've been attacked." This is true. As of September 9, 2009, you will be directed to over 12,000 Canadian hits. You will also see *why* she has been, if not attacked, then certainly criticized.

A similarly aggressive response was provided by Ian Fine. In a question and answer session before the annual convention of the Canadian Association of Journalists in 2008, the senior counsel for the CHRC was asked what the Commission added to the provisions already present in the *Criminal Code.* His answer: there is "no room in our

society for hate" so "there can't be enough laws to deal with the issue."[36]

When Ezra Levant raised the obvious objection, that hate was a human emotion that Fine thought should be regulated by a government organ, Fine replied that he "understood" the position that Levant was upholding, but Parliament had passed a law and his job was to enforce it. He was, so to speak, just following orders.

A final example of how, notwithstanding its limited legal mandate, the HRC leadership is seeking to expand their agenda and increase the number of hate laws, as Fine put it, is provided by Barbara Hall, Chief Commissioner of the Ontario Human Rights Commission. She wishes to amend the OHRC mandate so that a "hate incident" can be either an action or an omission. As Mark Steyn put it, "the act of not acting in an insufficiently non-hateful way can itself be hateful."[37]

It is probably fair to say that Canadian democracy is not in peril because of anti-Semites and white supremacists, so another question asked at the journalists' meeting of Ian Fine remains: what do the HRCs do that the *Criminal Code* does not? Senior leadership at the CHRC has said on many occasions, as Fine did on this occasion, how strongly their "teams" feel about the good work they are doing and how proud the leadership is of the teams.

But that does not really answer the question as was pointed out to him twice. A sense of doing good always elevates the more mundane notion that little more than the self-preservation of ambitious and well-paid bureaucrats is involved. I do not wish to suggest that the preservation, and indeed the growth of, bureaucracy is innocent or even neutral. It is not, and I have recently argued at length why bureaucracy in Canada is a threat to liberty in *It's the Regime, Stupid!*[38]

> ***"HRC members really do think they are in the business of controlling human emotions..."***

The malign effects of bureaucracy, including the HRCs of Canada, direct us to consider their own self-understanding. This is an important consideration and for a political scientist perhaps the decisive one. HRC members really do think they are in the business of controlling human emotions in general and extinguishing hatred in particular. To quote the CHRC response to the Moon Report: "Promoting and protecting human rights are integral to a progressive society."[39] To use the more precise language of Eric Voegelin, HRCs have constituted a "second reality" that justifies their actions, makes their personnel feel good about themselves, and provides the benign face of tyranny to their victims.[40] Properly to understand their objective of extinguishing hatred—"real hatred" as Ian Fine helpfully said—they might consider renaming themselves the Ministry of Love.

To summarize: the ideological fantasy of a progressive society, or a society without hate, requires the vigorous prosecution of thought crimes under s. 13, and the words that such crimes engender. Whatever else the HRCs of Canada may be, concern for this bureaucratic malignancy is not a load of bupkes.

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For more see

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