

Where does legitimate religious expression end and hate speech begin?

By Kathleen Mahoney

Alan Hunsberger, a Wildrose candidate who ran for election for the provincial legislature in Alberta, believes the Edmonton Public School Board's policy of adopting anti-bullying policies to protect gay and lesbian students is wrong. He says that to adopt such policies is "godless, wicked and profane." He says that homosexuals "will suffer the rest of eternity in a lake of fire, hell, a place of eternal suffering." He went on to write that others shouldn't accept homosexuals for the way they are because "accepting people the way they are is cruel and not loving." For the full text of his statement see, <http://daveberta.ca/2012/04/allan-hunsperger-wildrose-candidate>

Even though Hunsberger's views were widely publicized across Canada, political leaders and other candidates running for election, with few exceptions, have been silent in the face of these homophobic expressions of hatred against the gay and lesbian population of the province. The Wildrose party leader, Danielle Smith, went so far as to say Hunsberger's statements are a legitimate form of religious expression. This is consistent with the Wildrose platform which says that the Alberta Human Rights Commission should be disbanded because of its "politically correct" record in trying to protect homosexuals from religious hate propaganda. The relevant parts of the platform are at <http://www.wildrose.ca/policy/justice-policing-human-rights/>

Should we be concerned? Is this really a freedom of speech issue? Or is it something else?

Hunsberger's statements raise the same issue that is before the Supreme Court of Canada in the *Whatcott v Saskatchewan (Human Rights Commission)*, 2010 SKCA 26 case and before courts and legislatures in many other countries. The issue is the same everywhere - are such religiously motivated statements legitimate forms of expression or are they illegitimate forms of hate speech?

An analysis of hate speech shows it is more than mere words; it is a process. It involves at least three steps: first, singling out a targeted group on the basis of their immutable characteristics; second, targeting them for differential and discriminatory treatment; and third, furthering their social definition in society as inferior, unequal, and rightly disadvantaged, not deserving equal treatment or legal protection because of their group identification. Acts to enforce its messages often follow, from the denial of employment, services or accommodation to terrorizing, bullying, beatings and murder. In its most virulent forms, hate speech singles out certain groups for existential or genocidal elimination.

For example, on January 27, 2011, Jeffery Gettleman, a reporter for the New York

Times reported that the Ugandan Parliament, with the encouragement of North American homophobic evangelicals, sponsored an Anti-Homosexuality Bill requiring the death penalty for homosexuals. The leading gay activist in the country who led the opposition to the Bill was murdered and Ugandan newspapers, encouraged by the acts of the politicians, published lists of the names of alleged gays and lesbians with blaring headlines such as “Hang Them!” and “Homo Terror!” Many lost their jobs, were threatened, beaten, and some raped. See *Ugandan Who Spoke up for Gays is Beaten to Death*

<http://www.nytimes.com/2011/01/28/world/africa/28uganda.html>

After an international outcry the Bill was pulled last May but was reintroduced in February 2012, once again calling for the death penalty for anyone caught more than once engaging in homosexual acts. The Bill also proposes to criminalize public discussion of homosexuality and would penalize an individual who knowingly rents property to a homosexual. See <http://www.nytimes.com/2011/10/26/world/africa/anti-gay-bill-is-revived-in-uganda>. Nigeria has a similar Bill awaiting passage, while many other African countries are moving to criminalize homosexuality using the religious justification to do so.

Adrian Phoon, writing for The Age, Sydney Australia, (“*The Role of U.S. Evangelicals in Uganda’s “Kill the Gays” Bill*,” The Age, January 12, 2012) reiterates that it is American evangelicals who have promoted the Uganda legislation and the theory that underlies it, which is that homosexuality as a satanic global conspiracy bent on destroying society’s foundations. This is eerily similar to the views expressed in Hunsberger’s blog cited above and akin to the “Jewish octopus” in classic anti-Semitic narratives. Phoon points out that when the Ugandan anti-gay activists speak about homosexuality, they cite materials by Scott Lively and Paul Cameron, two of the fiercest American opponents of gay rights who engage in the same hate rhetoric as Hunsberger.

What confuses people about the competing rights debate is that hate speech discrimination most often takes the form of words and symbols which leads to the argument that it must be tolerated because it is a form of expression. But just as sexual harassment is not considered “speech,” the regulation of hate discrimination should not be considered as such either. The Supreme Court of Canada said this in *Janzen v Platy Enterprises Ltd.* [1989] 1SCR 1252, when it described how sexual harassment consisting solely of words and can poison the work environment, do serious harm and be prohibited. It is not protected speech. To legitimize hate speech discrimination because it may convey a “religious” message misses the point that the uttering of hate speech is an act, an injury, and a consequence in itself, just as sexual harassment in the form of words is.

Another way to understand hate speech is to understand that it combines content and form. Sexual orientation, or other identity provides the content. Promoting

hatred of certain groups is its form. When the Supreme Court of Canada said that: "The Holocaust did not begin in the gas chambers. It began with words." they were saying that hate speech is a practice of racism that cannot hide behind the principle of free speech.

More recently, the Supreme Court of Canada in *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 SCR 100 found the unfettered dissemination of hate speech in Rwanda was a cause of the genocide that resulted in the massacre of 800,000 people. The Court said Mugesera's hate speech was much more than speech – they said it amounted to a crime against humanity.

Since the late 1960's, Canada has taken a dual approach addressing hate discrimination in both criminal and civil law. The *Canadian Human Rights Act*, RSC 1985, c H-6, and the *Canadian Criminal Code*, RSC 1985, c C-46, differ substantially. The purpose of human rights legislation is to prevent or rectify discriminatory practices and to compensate victims for harm caused to them by hate speech, whereas the *Criminal Code* is designed to punish and deter hate speech crimes. The provincial human rights codes of British Columbia, Alberta, Saskatchewan, and the Northwest Territories include similar provisions to the *Canadian Human Rights Act*.

So far, the Supreme Court of Canada has upheld all of the federal and provincial hate laws under the *Canadian Charter of Rights and Freedoms* (Part I, *Constitution Act*, 1982),

Both leading Canadian cases, *R v Keegstra*, 1990 3 SCR 697 and the *Canadian Human Rights Commission v Taylor*, 1990 3 SCR 892, originated in Alberta. Both dealt with hate discrimination on the basis of race and ethnicity justified on religious grounds. One was a criminal case, the other a human rights case.

In *Keegstra*, a high school teacher in Eckville, Alberta, was charged with unlawfully promoting hatred against an identifiable group under section 319(2) of the *Criminal Code*. The criminal charges originated from Keegstra's anti-Semitic statements to his students, which attributed various evil qualities to Jews. Mr. Keegstra expected his students to reproduce his teachings in class and on exams. If they failed to do so, their marks suffered. Keegstra argued that section 319 (2) violated his right to freedom of expression guaranteed under section 2 of the *Charter*.

In *Taylor*, the respondent was charged with committing discriminatory acts by spreading racial hatred through his recorded messages on a telephone line. He argued that section 13 of the *Canadian Human Rights Act* was unconstitutional because it violated his Charter rights to freedom of expression to promote the religious views of the Christian Aryan Church. Both cases were heard together. The Court held that neither sections 319(2) nor section 13 was unconstitutional.

In spite of these landmark cases, courts in Alberta and Saskatchewan seem to be looking for ways to get around them, especially when hatred towards gays and lesbians is

involved. Three cases deserve mention for this trend, the *Owens v. Saskatchewan (Human Rights Commission)*, 2006 SKCA 41, case, the *Boissoin v Lund*, 2010 ABQB 123 case and the *Whatcott* case (*supra*), a Saskatchewan case presently before the Supreme Court of Canada.

In *Owens* a newspaper ad appeared in the *Saskatoon Star Phoenix*, with two stick figures holding hands covered by a red circle and slash with a biblical reference from Leviticus, stating that a man who “lies with a man” must be put to death. The Court of Queens Bench found the ad to expose homosexuals to hatred when it stated:

“There can be no question that the advertisement can objectively be seen as exposing homosexuals to hatred or ridicule. When the use of the circle and slash is combined with the passages of the Bible, it exposes homosexuals to detestation, vilification and disgrace”

This decision was appealed to Saskatchewan’s Court of Appeal and was overturned. The Court found that because Owens was expressing his sincerely held religious beliefs, there was no violation of the *Saskatchewan Human Rights Code*, SS 1979, c S-24.1.

Evidently, the Saskatchewan Court of Appeal believes the Trojan horse of religious freedom trumps equality rights of some (homosexuals), but not others (racial and ethnic minorities). In both the *Keegstra* and *Taylor* leading cases, the hate speech was about sincerely held religious beliefs about racial purity and Judaism, but the highest Court was not prepared to give it extra constitutional weight just because it masqueraded as religious belief.

Singling out sexual minorities for less protection was dealt with head on by the Supreme Court of Canada in the case of *Vriend v Alberta*, [1998] 1 SCR 493. Commenting on the deliberate exclusion of sexual minorities by the Alberta legislature in the *Individual Rights Protection Act*, RSA 1980, c I-2, the Supreme Court said:

[The] exclusion, deliberately chosen in the face of clear findings that discrimination on the ground of sexual orientation does exist in society, sends a strong and sinister message.... It could well be said that it is tantamount to condoning or even encouraging discrimination against lesbians and gay men. Thus this exclusion clearly gives rise to an effect that constitutes discrimination. The exclusion sends a message to all Albertans that it is permissible, and perhaps even acceptable, to discriminate against individuals on the basis of their sexual orientation.

The Queen’s Bench judge in the *Lund* case seems to have overlooked this direction from our highest Court. There, the respondent wrote a letter to the editor in the local Red Deer newspaper declaring “war” on homosexuals and called on people to rise up and act against them, accusing them of preying on

children, spreading disease, being mentally ill, conspiring against society, being wicked and dangerous, and having an agenda and a homosexual machine to take over decent people with good morals.

Justice Earl Wilson held that the hate speech did not offend the Alberta hate speech legislation. In reasoning unsupported by law or by the legislation, the judge held that in order to offend the legislation, the writer of the hate speech must be shown to have *intended* to contribute to discriminatory practices through the hate message and that readers would likely engage in discriminatory practices because of it.

The decision is troubling because it begs the question about the purpose of human rights legislation generally and flies in the face of prior decisions that clearly stated neither intent nor motivation to discriminate need be proven by the complainant. It is difficult to conceive of a scenario that could result in a successful prosecution in the future with these new requirements. Disadvantaged minorities, especially homosexuals, will be at the mercy of hate mongers who will now be able to engage in their discriminatory activities with impunity and cause serious harms as a result.

The *Whatcott* decision of the Saskatchewan Court of Appeal took a similar approach to limiting the protection of sexual minorities from hate discrimination compared to other minorities. The case involved four pamphlets placed in mailboxes at people's homes under the name of Christian Truth Activists. The pamphlets condemned homosexual behavior in extremely hateful terms. The respondent claimed the pamphlets were an exercise of his religious freedom and further made the argument that pamphlets were not hate speech because his target was the behavior of homosexuals, not their sexual orientation.

The Saskatchewan Court of Appeal agreed, accepting the bizarre argument that "sexual orientation," can be restrictively interpreted to exclude sexual conduct. The appeal court went further, expressly distinguishing *Whatcott* from the *Taylor* and *Keegstra* cases because the hate in *Whatcott* was directed at sexual minorities instead of racial or religious minorities.

This dangerous precedent seriously limits the protection of sexual minorities under the *Saskatchewan Human Rights Code* and ultimately the *Charter*. Creating a hierarchy of grounds in human rights legislation, giving greater protection to some and not to others, is both contrary to the *Charter* equality guarantees as well as the legislative purpose of the *Code*.

This judicial thinking is reminiscent of pre-*Charter* cases that differentiated pregnant women from non-pregnant women, saying it was all right to discriminate on the basis of pregnancy but not all right to discriminate on the basis of sex. See *Bliss v Canada (Attorney General)* [1979] 1 SCR 183 subsequently expressly overturned by *Brooks v Safeway Canada* [1989] 1 SCR 1219

The logical inconsistencies in the three decisions described above along with their

disregard of established precedent could support the conclusion that the decision-makers approved ends-based reasoning rather than reasoning based on established legal principles – not unlike politicians who appeal to the politics of hatred to gain power for themselves. In the Wildrose Platform, the party is on record as promising to disband the Alberta Human Rights Commission because of its stance against homophobic hate speech proselytized by religious extremists, stating, “ Over the last 20 years, the Human Rights Commissions in Alberta have probably been the single worst offender of Rights: i.e. freedom of speech; politically correct activists have used them to punish religious and right-wing social commentators.” See the platform at <http://www.wildrose.ca/policy/justice-policing-human-rights/>

Such an approach is not only dangerous to the equality and security of homosexuals, it risks undermining the legitimacy of the court system itself and the legitimacy of human rights.

When politicians as part of a political campaign, can gain comfort from the Courts to boldly and publically express hatred of a singled out disadvantaged minority while advocating the removal of the only legal protection they have against hate discrimination all Canadians should be very concerned. This selective treatment of homosexuals is frighteningly reminiscent of the state persecution and demonization of Jews prior to the Holocaust.