THE DEMOCRACY FUND

Bill C-63 Brief

Mark A. Joseph, Litigation Director
Adam Blake-Gallipeau, Senior Litigation Counsel

Contributions from: Andrea MacLean, JSS Barristers

"Liberty is meaningless where the right to utter one's thoughts and opinions has ceased to exist. That, of all rights, is the dread of tyrants. It is the right which they first of all strike down. They know its power. Thrones, dominions, principalities, and powers, founded in injustice and wrong, are sure to tremble, if men are allowed to reason of righteousness, temperance, and of a judgment to come in their presence."

A Plea for Free Speech in Boston (1860)
Frederick Douglass

Table of Contents

Introduction

The Government of Canada has introduced Bill C-63,[1] known as the Online Harms Bill (the *Bill*), to regulate and suppress "harmful speech." The *Bill* requires social media companies to remove certain speech, failing which they will incur substantial fines. It re-introduces s.13 of the *Canadian Human Rights Act*[2] (the "*CHRA*"), allowing government censors to investigate and prosecute online speech. It empowers and incentivizes the public to anonymously inform on other citizens. It amends the *Criminal Code*[3] to criminalize conduct mostly covered by existing offences, and includes disproportionately severe penalties for speech crimes. Taken together, it will create a comprehensive system of online speech surveillance, and suppress public speech through fear of prosecution. If it passes, free speech in Canada will be eliminated.

This brief will outline the basics of the *Bill*. It will note existing offences under the *Criminal Code* encompassing the targeted conduct, and suggest that, to the extent that some amendments are appropriate (most importantly those dealing with child protection), these should be severed from the larger *Bill* and immediately brought forward as a discrete set of amendments to the *Criminal Code*.

The brief will argue that the *Bill* is a trojan horse: if passed, it will unleash an army of censors and citizen-informers on the Canadian public. It will create a vast bureaucracy tasked with surveillance and censorship of online speech in Canada. The *Bill* includes poorly-defined and ambiguous language that will expand to its interpretive limit. Finally, it will argue that, if enacted, the result will be over-regulation of speech by unaccountable bureaucrats, anonymous complaints and prosecutions, a diminution over time in the critical thinking skills of citizens and, eventually, the destruction of free speech in Canada.

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[1] Bill C-63, *An Act to enact the Online Harms Act, to amend the Criminal Code, the Canadian Human Rights Act and An Act respecting the mandatory reporting of Internet child pornography by persons who provide an Internet service and to make consequential and related amendments to other Acts*, 1st Sess, 44th Parl, 2024.
[2] *Canadian Human Rights Act*, R.S.C., 1985, c. H-6.
[3] *Criminal Code*, RSC , 1985, c. C-46.

Part 1 - Regulation of "Harmful Content" Mostly Covered by Existing Laws

The seven categories of harm the *Bill* identifies as subject to regulation by the Commission, include:

1) Non-consensual disclosure of intimate images ("NCDII")
2) Content that foments hatred;
3) Content that incites violent extremism or terrorism;
4) Child Sexual Abuse Material ("CSAM");
5) Content that incites violence;
6) Content used to bully a child; and,
7) Content that induces a child to harm themselves.

However, there are criminal laws that, for the most part, already respond to each of these categories, as described below.

NCDII

NCDII is already illegal under the *Criminal Code*, s.162.1.[4] In fact, the courts have held that secretly recording an inimate encounter and uploading the recording to social media will vitiate consent and, thus, constitute a sexual assault.[5]

Most platforms already have a notice & takedown regime for NCDII.[6] See X: X Takedown Inquiry; Facebook: Facebook Takedown Policy; Google: Google Removal Policy.

Google removes "non-consensual explicit imagery" if it infringes Google policies or where content removal is otherwise deemed appropriate.[7]

Content that Foments Hate

The public incitement of hatred is covered in s.319(1).[8] The wilful promotion of hatred is covered in s.319(2).[9] Genocide promotion already covered in s.318(1).[10]

However, the term "foment" does not appear in the English version of the *Criminal Code*. Accordingly, it will need judicial interpretation. Because the term has no jurisprudential exegesis, there will be uncertainty for some years until an appellate court rules on the issue, creating a binding legal precedent.

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[4] Ibid, s.162.1.
[5] *R. v. Rockburn*: Non-consensual filming of intimate act vitiates consent National Post, August 17, 2023.
[6] "Non-consensual Disclosure of Intimate Images (NCDII) Tort" Young, Hilary A.N. and Emily Laidlaw, Uniform Law Conference of Canada, August 2019, at para.10.
[7] Ibid at para.14.
[8] *Criminal Code*, *supra* note 3, s.319(1).
[9] Ibid, s.319(2). *Supra* note 3, s.318(1).
[10] *Supra* note 3, s.318(1).

Content that Incites Violent Extremism or Terrorism

The *Criminal Code* already prohibits participation in an activity of a terrorist group (under s.83.18) and counselling the commission of a terrorism offence (under s.83.221(1)).[11]

However, neither "extremism" nor the French term "extrémisme" appear in the *Criminal Code*. As with the term "foment," it will need judicial interpretation. Since "violent extremism" is distinct from terrorism, a meaning will be ascribed to it that excludes, and is different from, "terrorism." Arguably, this may capture books that are now taught in Canadian universities, including Marxist texts such as *Das Kapital*[12] and *The Poverty of Philosophy*.[13]

Since the term lacks jurisprudential interpretation, uncertainty will persist until an appellate court addresses the issue and creates a binding legal precedent. This will result in self-censorship by organizations and individuals as they seek to avoid legal jeopardy.

CSAM

CSAM is covered by s.163[14] of the *Criminal Code,* with seizure orders under s.162.[15] All major social media platforms have reporting mechanisms for CSAM. See: Instagram: Reporting Help Page; Facebook: Reporting Help Page; X: Reporting Illegal Content; TikTok: Reporting Illegal Content; YouTube: Reporting Illegal Content; Google: Reporting Illegal Content.

Content that Incites Violence

The act of threatening violence against a person or property is already captured by the *Criminal Code* under s.264.1(1).[16]
However, there are problems with the language in this section of the *Bill*. The proposed definition in s.2(1) reads: "content that incites violence means content that actively encourages a person to commit — or that actively threatens the commission of — an act of physical violence against a person or an act that causes property damage, and that, given the context in which it is communicated, could cause a person to commit an act that could cause:

(a) serious bodily harm to a person;
(b) a person's life to be endangered; or

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[11] *Supra* note 3, s.83.18 and s.83.221(1).
[12] Chicago. Marx, Karl. 1996. Das Kapital. Edited by Friedrich Engels. Washington, D.C., DC: Regnery Publishing: "Violence is the midwife of every old society pregnant with a new one."
[13] arx, Karl; Engels, Friedrich; Chattopadhyaya, V.; Dutt, C. P. (1955) "The poverty of philosophy". Foreign Languages Pub. House: "It is only in an order of things in which there are no more classes and class antagonisms that social evolutions will cease to be political revolutions. Till then, on the eve of every general reshuffling of society, the last word of social science will always be: "Combat or Death: bloody struggle or extinction. It is thus that the question is inexorably put."
[14] *Supra* note 3, s.163.
[15] *Supra* note 3, s.162 and 162.
[16] *Supra* note 3, s.264.1(1).

(c) serious interference with or serious disruption of an essential service, facility or system."

The inclusion of the word "encourages" is linguistically broader, and has been less subject to judicial explication, than the word "incite."[17] It can be read as "supporting," "stimulating" or "helping," which, given the multiple, legally undefined meanings of the term, would potentially capture a wide range of conduct. This will result in legal ambiguity and favour over-regulation.

In addition, the role of the modifier "actively" is problematic, since it is not clear how one would passively encourage a party to do something.

The double use of the word "could" in this section broadens the application of the offence by introducing two probabilistic, rather than definitive, causative elements. This will capture, and penalize, a much wider range of speech.

Content Used to Bully a Child

The Department of Justice already has a range of *Criminal Code* offences that the Crown can and does use to prosecute unlawful behaviour such as cyberbullying. These include:[18]

a) criminal harassment (s.264);
b) uttering threats (s.264.1);
c) intimidation (ss.423 (1);
d) mischief in relation to data (ss.430 (1.1)
e) unauthorized use of computer (s.342.1);
f) identity fraud (s.403);
g) extortion (s.346);
h) false messages, indecent or harassing telephone calls (s.372);
i) counselling suicide (s.241);
j) defamatory libel (s.298-301);
k) incitement of hatred (s.319); and,
l) child pornography offences (s.163.1).

Content that Induces a Child to Harm Themselves

As with Content Used to Bully a Child, above, the *Criminal Code* already contains offences that would cover much of this impugned conduct. In particular, s.241 makes it an offence to counsel suicide.[19]

Pursuant to s.2(1) of the *Bill*, "content that induces a child to harm themselves" means "content that advocates self-harm, disordered eating or dying by suicide or that counsels a person to commit or engage in any of those acts, and that, given the context in which it is communicated, could cause a child to inflict injury on themselves, to have an eating

[17] The term "encourages" occurs in only three minor sections in the *Criminal Code*: s.83(1) (Prize Fights), s.445.1 (Cruelty to Animals), s.467.111(Recruitment of members by a criminal organization).
[18] https://www.justice.gc.ca/eng/rp-pr/other-autre/cndii-cdncii/p4.html
[19] *Supra* note 3, s.241(1).

disorder."[20]

This section includes the phrases "advocates self-harm" and "advocates disordered eating" which may inadvertently encompass conduct such as name calling, teasing or social exclusion. Additionally, given the complex and multifaceted nature of eating disorders,[21] it is unclear how a prosecutor could prove beyond a reasonable doubt that content "could cause a child to have an eating disorder."

Discussion

To the extent that there are deficiencies in the *Criminal Code* respecting these issues, the amendments should, with revised and precise language, be passed. However, as demonstrated above, most of these amendments capture conduct that is already illegal under the Canadian law. The appropriate amendments - most importantly those dealing with child protection - should be severed from the larger *Bill* and immediately brought as a discrete set of amendments to the *Criminal Code,* since these are neither controversial nor objectionable from the perspective of civil liberties or moral theory.

Part 2 - RegulatIng "Harmful Content" on Social Media

Creation of Digital Safety Commission and a Digital Safety Office

Breadth and DelegatIon of Authority

The *Bill* creates a Digital Safety Commission ("the Commission")[22] with the authority to surveille and police speech and its transmission online, with the aim of removing "harmful content."

Under s.10, the Commission is composed of 3-5 full time members appointed by the Governor-in-Council.[23]

The Commission may hire employees and delegate certain powers to them.[24] The Commission may receive submissions from anyone in Canada respecting both harmful content that is accessible on a regulated service and the measures taken by the operator of a regulated service to comply with the operator's duties under this *Bill*.[25]

The Commission may hold hearings involving complaints over "harmful content" and conduct such hearings in private if it finds that doing so is in the public interest,[26] if a

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[20] The *Bill*, s.2(1).
[21] Eating Disorders - National Institute of Mental Health (NIMH)
[22] *Supra* note 1, s.10 and s.11.
[23] *Supra* note 1, s.12.
[24] *Supra* note 1, s.25(1).
[25] *Supra* note 1, s.78(1).
[26] *Supra* note 1, s.88(2)(a).

person's privacy interests militate in favour of private hearings,[27] if it would be in the national interest, including if there is a risk of injury to Canada's international relations, national defence or national security.[28]

The Commission may make its own rules respecting the Commission's procedures and practices.[29] It has the authority to summon and enforce the appearance of persons before the Commission and compel them to give oral or written evidence on oath, produce documents, take oaths, receive and accept any evidence or other information whether or not it would be admissible in a court of law, and decide any procedural or evidentiary question.[30]

The Commission can issue orders to compel an operator to comply with the legislation if it believes on reasonable grounds that an operator is non-compliant.[31]

The *Bill* requires social media operators to establish a process by which a user can flag content, notify a user of receipt of the flag and action, if any, that has been taken, and notify the poster of the flag.[32]

Inspectors

The Commission may designate any number of inspectors to ensure compliance with or prevent non-compliance with the law.[33]

Inspectors have significant powers: under s.91,[34] they may enter a non-dwelling house without a warrant, physically or remotely by means of telecommunication.

For the purpose of verifying compliance or preventing non-compliance of the legislation, an inspector may:

(a) examine any document or information that is found in the place, copy it in whole or in part and take it for examination or copying;
(b) examine any other thing that is found in the place and take it for examination;
(c) use or cause to be used any computer system at the place to examine any document or information that is found in the place;
(d) reproduce any document or information or cause it to be reproduced and take it for examination or copying; and,
(e) use or cause to be used any copying equipment or means of telecommunication at the place to make copies of or transmit any document or information.[35]

Although inspectors require a warrant to enter a dwelling-house under s.92(2), a court may grant a warrant on an ex parte basis if the inspector satisfies the court that it is necessary to enter the dwelling-house to verify compliance or prevent non-compliance with the legislation and whether there are reasonable grounds to believe that entry will be refused or that

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[27] *Supra* note 1, s.88(2)(d).
[28] *Supra* note 1, s.88(2)(c).
[29] *Supra* note 1, s.20(1).
[30] *Supra* note 1, s.86.
[31] *Supra* note 1, s.94(1).
[32] *Supra* note 1, s.59(1).
[33] *Supra*, note 1, s.90(1).
[34] *Supra* note 1, s.91.
[35] *Supra* note 1, s.91(4).

consent to enter cannot be obtained.[36]

Once obtained, a warrant may be executed using force if so authorized by the court and if the inspector is accompanied by a peace officer.[37]

An inspector may compel a person to provide any information or produce any document they consider relevant to ensure compliance or prevent non-compliance under the legislation.[38]

Powers

Orders made by the Commission may be made orders of the federal court.[39]

The Commission has broad powers to draft regulations and control its own internal functions.[40]

The Commission is not bound by any legal or technical rules of evidence. It must deal with all matters that come before it as informally and expeditiously as the circumstances and considerations of fairness and natural justice permit.[41]

Offences and Punishment

There are a number of offences under the *Bill*. For operators, these include:[42]

(a) Contravention of an order or undertaking of the Commission
(b) Contravention of a requirement imposed by the Commission under s.117 or 119(2)
(c) Obstruction or hindrance of the Commission, an inspector or person authorized to issue a notice of violence;
(d) The making of a false or misleading statement orally or in writing to the Commission, inspector or person authorized to issue a notice of violation.

On conviction by indictment, the penalty is a fine of not more than 8% of the operator's gross global revenue or $25 million, whichever is greater. For a summary conviction, the penalty is a fine of not more than 7% of the operator's gross global revenue or $20 million, whichever is greater.[43]

It is a violation to contravene the legislation or regulations.[44] Under s.101, the maximum penalty for a violation is not more than 6% of the gross global revenue of the person that is believed to have committed the violation or $10 million, whichever is greater.[45]

Penalties for offences for operators are up to the greater of 8% of gross global revenue or $25 million.

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[36] *Supra* note 1, s.92(2).
[37] *Supra* note 1, s.92(4).
[38] *Supra* note 1, s.93.
[39] *Supra* note 1, at s.95.
[40] *Supra* note 1, s.140(1).
[41] *Supra* note 1, s.87.
[42] *Supra* note 1, s.120(1).
[43] *Supra* note 1, s.120(2).
[44] *Supra* note 1 s.96(1).
[45] *Supra* note 1 s.101.

A penalty issued via a notice of violation or the Commission is considered a debt due to His Majesty in right of Canada and may be recovered in the Federal Court.[46] A debt may be certified in the Federal Court and has the same effect as a judgment of that Court for a debt of the amount set out in the certificate and all related registration costs.[47]

Digital Safety Office

A Digital Safety Office (the "DSO") is established under s.39 of Part 3.[48] The CEO is appointed on recommendation of the Minister of Canadian heritage or a member of the King's Privy Council,[49] and may hire any number of employees to staff the DSO[50] to whom they can delegate powers.[51] Five officials are appointed (not elected) for five years, and an unlimited number of additional members can be appointed to assist with tasks.

Discussion

The *Bill* requires operators of regulated services to provide users in Canada with the ability to inform on others for content the user deems to be "harmful."[52] By establishing the Digital Safety Office and Digital Safety Commission, the *Bill* creates a new bureaucracy to monitor online speech made anywhere in the world if it is published on a social media platform available in Canada. Furthermore, it enlists users in Canada to inform on their neighbours.

Under s.78(1), anyone in Canada may make a submission to the Commission regarding "harmful content" about speech appearing in Canada on a social media platform.[53] The speech act need not be originally posted from a Canadian IP address - it just needs to be available for viewing by online users in Canada. Submissions may be made anonymously.[54] Both corporate entities and individuals will be targeted by the Commission and informers.

The *Bill* establishes a notice-and-takedown regime for harmful content. However, there is no limit on the type of content that will be monitored and subject to scrutiny by employees of the Commission or by citizen informers. Since the Commission will regulate "any social media service," this captures any online platform where someone communicates to the public. This will allow comprehensive surveillance of the digital public square by authorities.

All speech acts on any topic - political, artistic, moral, educational, sexual, cultural - will be surveilled. There is no exception to posting "harmful content" for educational, artistic, satirical, parodic or comedic purposes. There are no exceptions for antiphrastic speech. Literature, poetry, religious texts and commentary on those subjects that contain putatively "harmful" speech, when published online, can and will be reported by social media users in Canada and removed by social media platforms or individuals fearing legal jeopardy.

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[46] *Supra* note 1 s.110(1).
[47] *Supra* note 1 s.112(2).
[48] *Supra*, note 1 s.39.
[49] *Supra* note 1, s.42.
[50] *Supra* note 1, s.52(1).
[51] *Supra* note 1, s.53.
[52] *Supra* note 1, s.59(1)(a).
[53] *Supra* note 1, s.78(1).
[54] *Supra* note 1, s.78(2), 78(3), 79(1).

The severe financial penalties incentivize social media companies to act cautiously rather than risk contravention: they are likely to err on the side of over-moderation.

Although only individuals or corporations with a presence in Canada will be subject to the jurisdiction of the Commission, speech originally published by someone outside of Canada that appears on a social media platform available in Canada will be subject to regulation under the *Bill* since it allows the Commission to compel social media operators to remove "harmful" content accessible to users in Canada regardless of its origin. This empowers the Commission to curate and restrict all digital information received by Canadians. No other entity in Canada has ever had these powers of surveillance in the history of the country, including press censorship powers granted under the *Defence of Canada Regulations* under the *War Measures Act* deployed during World War 2. These expansive powers granted under the *Bill* will result in amplification of the surveillance regime as more resources are needed to screen and resolve reports.

There is no requirement for informers to report in good faith. There are no repercussions for citizen-informers who falsely or frivolously report. In fact, there are potential benefits for filing a report against a social or political opponent, either singly or in a coordinated campaign, since a complaint may result in an investigation and/or a content removal, social stigma, stress and time spent opposing the bad faith report. (The evidence from Scotland after the introduction of a similar online harms bill demonstrates that the reporting mechanism is vulnerable to bad faith reports.[55]) This is exacerbated by the fact that a citizen-informer can make a complaint and remain anonymous.

As can be seen in other similar legal systems, the reporting mechanism will be used as a political weapon with reports made against politicians, government workers, and public officials in addition to private citizens.[56] Given that anyone in Canada may make a submission to the Commission, the reporting mechanism is open to abuse by foreign influence: foreign actors - either for themselves or by proxy - may interfere with social media posts by mass reporting speech.

Since the Digital Safety Commission is an administrative body, there is no direct democratic oversight of it. The appointment of commissioners is undertaken by the Governor in Council on advice from the Cabinet. There is no requirement or mechanism to achieve bi-partisan agreement on appointment. As such, the appointment of commissioners is a political decision and will, therefore, involve political bias. Any investigation, ruling or statement by the Commission can and will be criticized as politically-influenced.

A party with a grievance about the process or the outcome of a hearing has recourse only to internal appeals or upon judicial review to the courts, where the party will need to convince a court that the Commission's finding was either incorrect or unreasonable depending on the applicable standard for judicial review. Given the demands on judicial resources, it often takes years for a matter to be judicially reviewed by a court. Extensive delays will discourage parties from bringing grievances to courts. This will, in turn, result in over-regulation as improper rulings will set the standard for speech regulation.

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[55] The Guardian, April 7, 2024 "Police Spammed with Complaints"
[56] Ibid.

Additional Regulatory Burden

The *Bill* requires the regulated service to create a digital safety plan with a long list of deliverables, including an inventory of electronic data used in its creation.[57] However, as noted above, social media platforms have established notice & takedown regimes for most content covered in the *Bill*, including CSAM and NCDII. Moreover, internet service providers are required to report CSAM.[58] The *Bill* creates an additional regulatory burden that will discourage investment in Canada and, where applicable, result in increased fees to users as the costs of regulation are passed to them.

Part 3 - Hate Speech under the *CHRA*

Creation of Hate Speech Prosecutions under amendments to the *Canadian Human Rights Act*

Under the proposed amendments to the *Canadian Human Rights Act*,[59] the Canadian Human Rights Tribunal will regain the power - stripped from them due to past abuses - to regulate online communication. The amendments re-introduce s.13 to the *CHRA*:

s.13(1) It is a discriminatory practice to communicate or cause to be communicated hate speech by means of the Internet or any 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.[60]

This section also allows for retroactive prosecutions due to the addition of s.13(2):

Continuous communication: (2) For the purposes of subsection (1), a person communicates or causes to be communicated hate speech so long as the hate speech remains public and the person can remove or block access to it.[61]

Although, s.13(5) provides that s.13 does not apply to private communications, the phrase "private communications" is not defined in the *Bill* or in the *CHRA*.

Discrimination by Hate Speech

The definition of hate speech is taken from the *Whatcott* case from the Supreme Court of Canada.[62] In *Whatcott*, the Supreme Court revised the older definition of hate speech that existed under *Taylor*, namely, "hatred and contempt" that expresses unusually strong and

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[57] *Supra* note 1, s.62(1).
[58] *An Act respecting the mandatory reporting of Internet child pornography by persons who provide an Internet service,* S.C. 2011, c. 4.
[59] *Supra* note 2.
[60] *Supra* note 1, s.34.
[61] *Supra* note 1, s.34.
[62] S*askatchewan (Human Rights Commission) v. Whatcott*, [2013] S.C.J. No. 11, 276 C.R.R. (2d) 270 (S.C.C.) [hereinafter "*Whatcott*"].

deep-felt emotions of detestation, calumny and vilification.[63]

The Supreme Court in *Whatcott* stated that the term “hatred” is to be restricted to “detestation and vilification.” It connected the potential harm to the likely effects of the expression on its audience, entering into a determination as to whether a reasonable person would consider that the expression vilified a protected group such that it had the potential to lead to discrimination and other harmful effects.[64]

Discussion

The *CHRA*, the jurisprudence thereunder, the structure of the CHRT and CHRC are poorly designed to regulate speech, as will be seen in an examination of these features below.

The *Bill* incorporates the definition of hatred used in *Whatcott*, namely: “the emotion that involves detestation or vilification and that is stronger than disdain or dislike.”[65] This is said to “filter out expression which, while repugnant and offensive, does not incite the level of abhorrence, delegitimization and rejection that risks causing discrimination or other harmful effects.”[66]

However, the previous legal definition used different words: in *Taylor*, hatred was defined as: “unusually strong and deep-felt emotions of detestation, calumny and vilification" that are "ardent and extreme" in nature.”[67] It should be noted that, since *Whatcott*, the Supreme Court has held that the “detestation and vilification” standard is not comprehensive and that other types of hate speech may also be illegal - namely, where it forces certain persons to argue for their basic humanity or social standing, as a precondition to participating in the deliberative aspects of our democracy.[68]

Thus, there is no indication that the redefinition from *Whatcott* (and incorporation by reference into the *Bill*) will be more syllogistically stable than the past definition in *Taylor*.[69] Given the linguistic ambiguity and the shifting of definitions over time, it is possible, even likely, that the Supreme Court would revise the definition of hatred in the future. Thus, importing present jurisprudence does not provide legal certainty. In fact, the previous standard was presented as sufficiently delineated such that there would be no uncertainty via subjectivity. Chief Justice Dickson, in *Taylor*, 23 years before *Whattcott*, claimed:

“[A]s long as the Human Rights Tribunal continues to be well aware of the purpose of s. 13(1) and pays heed to the ardent and extreme nature of feeling described in the phrase "hatred or contempt," there is little danger that subjective opinion as to offensiveness will supplant the proper meaning of the section.”[70]

This assessment, of course, has been shown to be incorrect. Over time, the tribunal took

[63] *Canada (Human Rights Commission) v. Taylor*, 1990 CanLII 26 (SCC), [1990] 3 SCR 892.
[64] *Supra* note 62 at para.52.
[65] *Supra* note 62 at para.41.
[66] *Supra* note 62, at para.57.
[67] *Canada (Human Rights Commission) v. Taylor* [1990] 3 S.C.R. 892, 75 D.L.R. (4th) 577 at para.61
[68] *Ward v. Québec (Commission des droits de la personne et des droits de la jeunesse)*, 2021 SCC 43 (CanLII), at para. 63.
[69] *Taylor*, *supra* note 63.
[70] *Taylor, supra* note 63, at para.62.

jurisdiction over less obviously "hateful" speech, and, after a series of controversial incidents and overbroad hate speech investigations and rulings, Parliament revoked s.13 of the *CHRA*.

While this ambiguity persists, legal uncertainty will remain. This will have a chilling effect on speech since social media platforms and many regular Canadians of average financial means are risk averse.

In addition, the main criticism of s.13, as outlined by Professor Richard Moon in his review of hate speech prosecutions under the *CHRA*, remains: "a narrowly drawn ban on hate speech, that focuses on expression that supports or justifies violence, does not fit easily or simply into a human rights law that takes an expansive view of discrimination, emphasizes the effect of the action on the victim rather than the intention or misconduct of the actor, and employs a process that is designed to engage the parties and facilitate a non-adjudicative resolution of the "dispute" between them."[71]

Professor Moon properly noted that as result of this, regulation of speech by s.13 of the *CHRA* is always vulnerable to a more expansive interpretation, at least at the threshold stage when the commission must decide whether a complaint should be excluded as trivial prior to any investigation.[72]

Thus, when the repeal of s.13 was previously debated, he recommended that it be repealed so that the censorship of online hate speech is dealt with exclusively by the criminal law. As he then noted, free speech is compromised the moment the government begins an investigation and so informs the public that it is doing so: fear will compel citizens to avoid speech that might implicate them.[73]

Private Communication

Although the *Bill* amends s.13 such that, pursuant to s.13(5), s.13 does not apply to "private communications," the failure to define the phrase is problematic. Digital communication often involves more than 2 people, including group chats, multi-party emails, private messaging groups and private online forums. Since there exists ambiguity, some communications may be captured that might otherwise seem private. As a result, individuals and organizations in Canada will fear that their communications will form the basis of a complaint under the *CHRA*.

The Problem of Subjectivity

One of the main issues with regulating speech has been the problem of subjectivity: lacking a precise definition of harmful or hateful speech, an adjudicator may introduce their subjective views of the "hatefulness" of the speech. The Supreme Court has attempted to resolve the problem of subjectivity by structuring the legal analysis of illicit speech so that it

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[71] Richard Moon, The Attack on Human Rights Commissions and the Corruption of Public Discourse, 2010 73-1 *Saskatchewan Law Review* 93, 2010 CanLIIDocs 681 at p.94.
[72] Ibid, p.98.
[73] Ibid, p.38: "[A]ny time a hate speech complaint is investigated, the respondent's freedom of expression right is compromised, even if the complaint is dismissed by the HRC at the end of the investigation process."

is not the hatred that must be evaluated, but the effect it may have on a citizens, who, hearing the hateful speech, might engage in discriminatory behaviour:

"[Speech prohibitions] aim to eliminate the most extreme type of expression that has the potential to incite or inspire discriminatory treatment against protected groups on the basis of a prohibited ground. In applying hate prohibitions, courts must assess whether the impugned expression is likely to expose a protected group to hatred and potentially lead to the activity that the legislature seeks to eliminate."[74]

This approach is said to exclude merely offensive or hurtful expression from the ambit of the hate speech provision and respects the legislature's choice of a prohibition predicated on "hatred."[75]

The Court declared that linking the test for hate speech to the specific legislative objectives is key to minimizing both subjectivity and overbreadth.[76]

However, the adjudicator must still evaluate the ideas being expressed - but they now need to determine whether the tone, manner and effect of the speech potentially lead someone to discriminate against the targeted group, based on a "reasonable apprehension of harm." This relocates the problem of uncertainty from the merits of the speech to possible future effects of speech - which involves speculation about complex social dynamics. It then compounds the problem by requiring "common sense" rather than empirical proof of these possible future effects. This lowered threshold results in tenuous conclusions of harm and overbroad application of censorship.

Bias in Favour of Conviction

There remains the problem of bias in favour of conviction at the Canadian Human Rights Tribunal. Historically, it had a conviction rate of nearly 100%.[77] This demonstrates either a lack of independence by the CHRT or a disproportionately aggressive prosecution by the CHRC. In either case, it is indicative of a problem with the system of adjudication.

Intent vs. Effect

The CHRC is concerned with the effect of an act of discriminatory speech, rather than the intent.[78] This is because human rights law was designed to effect social change rather than correct criminal conduct. As a result of its broad focus on the negative social effect of possible discrimination, the CHRT will prosecute more speech acts than a criminal court. Moreover, a focus on the effects - rather than intent - captures speech that is ironic, satirical, euphemistic, comedic, antiquated but historically accurate or otherwise antiphrastic - prohibiting ostensibly hateful speech that is intended to be non-harmful but, when interpreted literally, might reasonably be said to have unintended effects that may cause some to discriminate against a targeted group. This would capture a substantial amount of literary and artistic speech, discouraging its publication and production. Over time, Canada would

[74] *Whatcott*, *supra* note 62, at para.47.
[75] *Whatcott, supra* note 62 at para.46.
[76] *Whatcott*, *supra* note 62 at para.47.
[77] *Supra* note 71 at p.101: "It is true that all s.13 complaints adjudicated by the CHRT have been upheld."
[78] *Taylor*, *supra* note 63.

become hostile to artistic expression that is even mildly transgressive or controversial.

Balance of Probabilities vs. Beyond a Reasonable Doubt

Unlike the criminal court standard of "proof beyond a reasonable doubt", the standard at the CHRC for guilt is "balance of probabilities," often said to be fifty percent plus one. This is easier to establish than demonstrating the non-existence of a reasonable doubt. As a result, more speech acts will be subject to prosecution under s.13 of the *CHRA* than under the *Criminal Code*.

Evidentiary Standards

The CHRT is not bound by rules of evidence that exist in a court of law. A tribunal may make its own rules of evidence.[79]

In contrast, the rules of evidence in criminal and civil courts are well understood, comprehensively elucidated and established by hundreds of years of jurisprudence. Strict evidentiary rules are necessary when property rights, monetary penalties and incarceration are at issue. The right to free speech is, arguably, just as or more significant than these mundane rights: allowing for a relaxed evidentiary ruleset is inconsistent with this hierarchy of significance.

Non-lawyers as Adjudicators

Although the Chair, Vice-chair and at least 2 other members of the tribunal must be members in good standing of the bar of a province or the Chambre des notaires du Québec no other panel members are required to be so legally qualified.[80]

The failure to require legal qualifications for all tribunal members leaves the regulation of online speech to those untrained in law and Charter jurisprudence. This may result in decisions that do not receive appropriate legal considerations, leading to confusing or deficient jurisprudence on speech rights.

Proof of Harm

As noted above, the Supreme Court of Canada has held that, in making a determination about whether speech should be prohibited under s.13, it is not the content of the speech, but the harmful effect the speech has on others that is necessary.[81] Additionally, it has held that the intent of the speaker is not relevant.[82]

The Court has held that this determination does not require proof of harm but a "reasonable apprehension of harm."[83] No causal link between the speech and harm is required. A court is permitted to simply use common sense and experience as proof of harm.[84]

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[79] *Supra* note 2, s.48.9(2).
[80] *Supra* note 2, s.48.1(3).
[81] *Whatcott*, *supra* note 62 at para. 52.
[82] *Whatcott, supra* note 62 at para. 127.
[83] *Whatcott*, *supra* note 62 at para. 132.
[84] *Whatcott, supra* note 62 at para. 132.

It has held that the “reasonable apprehension of harm test” should be applied in cases where “it has been suggested, though not proven, that the very nature of the expression in question undermines the position of groups or individuals as equal participants in society.[85]

This approach has been properly criticized in that establishing harm requires no expert evidence, standard evidence or evidence beyond a mere suggestion of harm in certain cases, thus increasing the likelihood of conviction.[86]

CHRT Not Bound by Precedent

The traditional view is that administrative tribunals are not bound by their previous decisions and may adopt any reasonable interpretation of its own legislation. This deference is said to be founded, in part, on the specialized knowledge possessed by tribunal members in their area of expertise.

However, it is not clear that tribunal members possess expertise in the application of the Charter to regulation of hateful online content. In fact, in *Whatcott*, the Supreme Court maintained that no expert knowledge is required for the determination of the existence of “hatred” under s.13. The Court held that it should be made using a “reasonable person” test,[87] where “[in] the course of this assessment, a judge or adjudicator is expected to put his or her personal views aside and to base the determination on what he or she perceives to be the rational views of an informed member of society, viewing the matter realistically and practically.”[88]

The requirement that lower courts follow precedents established by higher courts creates legal stability and consistency. The fact that administrative tribunals are not bound by precedent creates instability and enables accusations of bias, thus damaging the assumption of equality before the law. Since hate speech prosecutions are vulnerable to accusations of political motivation based on a favoured identity group, lack of binding precedent exacerbates the problem.

Lower Standard of Proof and Weaker Evidentiary Requirement

As stated above, at the tribunal level the standard of proof is a “balance of probabilities" rather than “beyond a reasonable doubt.”

In comparison to the evidence required at a criminal trial, the evidence required for a successful finding of hatred at the CHRT is less stringent. The application of this legal regime to the surveillance and policing of a vast swathe of online speech by the CHRC will manifest in a greater number of threatened and successful speech prosecutions.

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[85] *Whatcott, supra* note 62 at para. 133.
[86] Zwibe, Cara Faith, “Reconciling Rights: The Whatcott Case as Missed Opportunity”, Supreme Court Law Review, Vol. 63 Article 13, Osgoode Hall Law School, at p.19: “The Court’s strong emphasis on the effects of hate speech is paradoxically paired with a brief and shoddy approach to the evidence of those effects.”
[87] *Whatcott, supra* note 62, at para. 56.
[88] *Whatcott, supra* note 62, at para. 35.

CHRT Remedies are Broad

Under s.53(3), the CHRT may order a respondent to undertake one or more acts to remedy the discriminatory act. These are unlike the typical punitive or retributive regime in criminal law, and often require a respondent to substantially change a professional or business practice.

In addition, orders made under s.53 may be made orders of the Federal Court via s.57. Disobeying a court order may result in a criminal charge and, upon conviction, up to 2 years in jail.

Financial Penalties and Legal Costs to Defend

The penalties for contravention include a fine of $20,000 for an accused civilian and $50,000 for the government (Section 53.1). The magnitude of these financial penalties will deter people from posting comments that they fear could provoke someone to submit a complaint.

Even if the probability of a contravention is low, the legal costs to defend against a complaint at the CHRT are substantial. It is often financially prudent for a respondent to seek a settlement rather than retain counsel or risk a larger penalty.

Anonymous Complaints

The CHRC can deal with a complaint secretly, without disclosing to the respondent the identity of the victim, the identity of the complainant or the identity of any party who gives evidence or assists the CHRC.[89]

Anonymous reporting and secret testimony are antithetical to a democratic legal system: public access to legal hearings assures citizens that they will receive a fair trial. Proceeding in secrecy erodes confidence in the legal system. When this occurs in the context of free speech rights it undermines the foundation of democracy. Much like authoritarian regimes, it employs the fear of covert denunciation as a mechanism of social control.

Standard of Review for Tribunal Decisions

When a decision of the CHRT is appealed to the courts, it is reviewable on the "reasonableness" standard. That is, the decision need not be correct: it only needs to fall among a range of reasonable possible outcomes for it to be upheld. Conversely, if a Charter challenge is brought against a provision, it is reviewable on the standard of correctness. Because the standard of "reasonableness" is less stringent than the correctness standard, the result will be speech restrictions that are not strictly correct but nonetheless reasonable. This will have a chilling effect on speech, as citizens will be required to adhere to the vague "reasonable" restriction.

[89] *Supra* note 1, s.36(2).

Examples of Abuse of Powers

The concerns around the types of complaints to which the new s.13 may give rise, and the impact that this provision may have on free-speech, are not just speculation.

Prior to 2014, the *CHRA* had a "hate messages" provision under the previous s.13 that is similar to s.13 under the *Bill*. The old s.13 made it a discriminatory practice to communicate telephonically (interpreted by courts to include via the internet) hate messages against persons identifiable on prohibited grounds of discrimination.

Over time, government authorities applied s.13 to speech that seemed controversial rather than typically "hateful." This resulted in prosecutions which attracted public condemnation. The Harper government repealed s.13 shortly thereafter.

In 2007, the CHRC investigated Maclean's magazine under the previous s.13 after a complaint by the Canadian Islamic Congress. Maclean's was accused of publishing hatred by excerpting parts of Mark Steyn's book "America Alone" dealing with demographics, immigration and Islam.

Then, in 2008, the CHRC investigated Fr. Alphonse de Valk, a pro-life activist and priest. He was accused of publishing hatred by opposing same-sex marriage, quoting the Bible, the Catechism and various encyclicals.

Though the cases were eventually dismissed, Valk incurred $20,000 in legal fees. Although the exact legal fees incurred by Maclean's is unknown, it is undoubtedly higher than this amount.

In the past, complaints had been limited to groups such neo-Nazis and white supremacists. However, over time, the CHRT came to prosecute individuals espousing more mainstream views. The *Bill* contains no provision that would prevent such an expansion of censorship powers. In fact, given that it proposes to regulate all public speech on social media platforms available in Canada, it is a certainty that censorship powers would expand precipitously.

As with most laws, censorship and speech restrictions will be used inordinately and most harshly against racialized, marginalized and dissenting individuals: privileged individuals and powerful or politically favoured groups will inevitably avoid surveillance and punishment.

Part 4 - Amendments to the Criminal Code

Increased Penalties

The changes to the *Criminal Code* increase the penalties for several existing offences including:

a) Increasing the penalty associated with "advocating genocide" in s.318 from a maximum imprisonment of not more than five years to potential imprisonment for life (the "Genocide Punishment Increase");

b) Increasing the penalty associated with "public incitement of hatred"[90] in s.319(1)(a) from imprisonment for a term not exceeding two years to a term of not more than five years;

c) Increasing the penalty associated with "wilful promotion of hatred"[91] in s.319(2)(a) from imprisonment for a term not exceeding two years to a term of not more than five years; and,

d) Increasing the penalty associated with "wilful promotion of antisemitism"[92] in s.319(2)(a) from imprisonment for a term not exceeding two years to a term of not more than five years;

(collectively, the "Criminal Hate Speech Provisions").

The Genocide Punishment Increase puts that offence among the most serious criminal offences, such as manslaughter and aggravated sexual assault, which also carry potential life sentences.

There are other more serious crimes that have much lower maximum sentences: the sexual assault of a minor carries a maximum of 14 years; assault with a weapon carries a maximum sentence of 10 years.

New Offence

The proposed changes to the *Criminal Code* also include the addition of a new section (s.320.1001) entitled "Offence motivated by hatred" which creates a new stand-alone crime punishable by imprisonment for life.

It states:

> 320.1001 (1) Everyone who commits an offence under this Act or any other Act of Parliament, if the commission of the offence is motivated by hatred based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or gender identity or expression, is guilty of an indictable offence and liable to imprisonment for life.[93]

The new 'Offence Motivated by Hatred' expands the number and type of offences that can carry a life sentence. If a judge determines that hate is a motivator in any offence under the *Criminal Code*, this new provision can be added to an accused's charges and, in doing so, the severity of the penalties increases.

Further, the offender does not have to commit a *Criminal Code* offence to face life in prison. An offence committed under any act of Parliament, if deemed to be motivated by hate, can

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[90] Applies to: everyone who, by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace.
[91] Applies to: everyone who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group.
[92] Applies to: everyone who, by communicating statements, other than in private conversation, wilfully promotes antisemitism by condoning, denying or downplaying the Holocaust.
[93] The *Bill, supra* note 1 at s.15.

lead to the severest of punishments.

Anticipatory Crime

The amendments also allow a court to sanction an individual if a person fears, on reasonable grounds, that the individual will commit a "hate propaganda offence" or a "crime motivated by hatred" under s.319(1) to (2.1) or 320.1001, respectively.[94] These sanctions include an appearance before a court and entering into a recognizance to keep the peace and be of good behaviour for a period of not more than 12 months (or up to 2 years if there has been a previous conviction for hate speech).[95] If an individual refuses to enter into a recognizance, they can be jailed for up to 12 months.[96]

Under the conditions of the recognizance, the court can require that an individual:

(a) wear an electronic monitoring device, if the Attorney General makes that request;
(b) return to and remain at their place of residence at specified times;
(c) abstain from the consumption of drugs, except in accordance with a medical prescription, of alcohol or of any other intoxicating substance;
(d) provide, for the purpose of analysis, a sample of a bodily substance prescribed by regulations on demand or at regular intervals
(e) abstain from communicating, directly or indirectly, with any person identified in the recognizance.[97]

Discussion

While it is unlikely that the majority of individuals charged with "Offence Motivated by Hatred" will actually be sentenced to life in prison, as sentencing principles would apply to militate against such a sentence,[98] the threat of such extreme punishment could have a coercive effect on the decisions of an accused related to the defence of their case: the threat of being incarcerated for life may lead accused individuals to feel pressured into taking plea deals they might not otherwise take.

To the extent that the penalty of a life sentence for such low-level crimes would never be sought by the Crown or imposed by a court, there is no reason to include the provisions in the *Bill*.

In setting a higher sentence for hate speech advocating genocide, the government is arguably deeming that crime more serious than those other aforementioned criminal offences.

The severity of the Genocide Punishment Increase has raised concern from several individuals, including former Chief Justice of the Supreme Court of Canada), Beverley

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[94] *Supra* note 1, Coordinating Amendments 17, Criminal Code s.810.012(1).
[95] *Supra* note 1, Coordinating Amendments 17, s.810.012(2), (3) and (4).
[96] *Supra* note 1, Coordinating Amendments 17, s.810.012(5).
[97] *Supra* note 1, Coordinating Amendments 17, s.810.012(6).
[98] Subject to sentencing principles: (a) proportionate to the gravity of the offence and the degree of responsibility of the offender; (b) individualized so as to take into account the particular circumstances, background, and experiences of the offender; and (c) restrained such that it imposes the least restrictive sanction appropriate in the circumstances, with imprisonment used only when no other sanction is appropriate. The law on sentencing is governed by s. 718-718.2 of the *Criminal Code*.

McLachlin.[99]

Since potential offences include those under "any Act of Parliament," non-*Criminal Code* offences may qualify for a potential life sentence. For example, an individual who throws flyers containing hateful messages out of her vehicle while driving in a national park has committed an offence pursuant the *Canada National Parks Act* that is arguably "motivated by hatred." This individual could, in theory, be charged with an Offence Motivated by Hatred, and risk life in prison. Similarly, if someone were to spray-paint a swastika on a rock in Jasper contrary to that same *Act*, he could also face a life sentence.

The amendment to increase potential jail time for an offence motivated by hatred will give police and Crown counsel power to up-charge defendants if there is any evidence of "hatred." This is troubling considering that case law from criminal hate speech prosecutions can include marginal speech acts. For example, "hallmarks of hatred" have included disparaging comments on adultery or women taken from the Book of Exodus of the Hebrew Bible or from the German philosopher Arthur Schopenhauer, respectively.[100] Despite years of jurisprudence on the nature of hate speech under s.319, the courts have struggled to delineate a line between vilification/detestation and mere distasteful speech.

Moreover, the risk of a potential life sentence for an offence motivated by hatred increases the complexity of a criminal case and the demand for legal counsel's time and judicial resources. This amendment will turn minor offences with low sentencing guidelines - such as mischief or vandalism - into crimes that may result in potential life sentences.[101]

Finally the increased severity attached to penalties for charges involving hate motivation may affect immigrants by jeopardizing their immigration status.

Incorporation of *Keegstra* Definition

The *Bill* amends s.319(7)[102] of the *Criminal Code* defining "hatred" as the emotion that involves detestation or vilification and that is stronger than disdain or dislike. This tracks with the definition of hatred taken from *R. v. Keegstra*: "Noting the purpose of s. 319(2), in my opinion the term "hatred" connotes emotion of an intense and extreme nature that is clearly associated with vilification and detestation."[103] The *Bill* attempts to clarify that an offence is not motivated by hatred solely because it discredits, humiliates, hurts or offends the victim.[104] However, the language is imprecise and provides only an illusion of clarity: there is no analysis of the concept of hatred, simply a recitation of various linguistically similar words.

Since the decision to prosecute hate speech is an inherently political decision, any inconsistency in either the decision or judicial result will be criticized as political favouritism.

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[99] Public Policy Forum, "Beverley McLachlin on problems with the online harms bill" (March 6, 2024), online: Beverley McLachlin on problems with the online harms bill - Public Policy Forum
[100] *R. v. Sears*, 2019 ONCJ 104 (CanLII).
[101] CBC News, May 5, 2023: Youths charged with mischief in flag burning, Global News, July 25, 2023: Crosswalk vandalism investigated as hate crime.
[102] S.14(4): Subsection 319(7) of the Act is amended by adding the following in alphabetical order: Hatred means the emotion that involves detestation or vilification and that is stronger than disdain or dislike.
[103] *R. v. Keegstra*, 1990 CanLII 24 (SCC), [1990] 3 SCR 697.
[104] S.320.1001(3): For greater certainty, the commission of an offence under this Act or any other Act of Parliament is not, for the purposes of this section, motivated by hatred based on any of the factors mentioned in subsection (1) solely because it discredits, humiliates, hurts or offends the victim.

This will exacerbate, rather than assuage, inter-community relations.

Peace Bonds and Anticipatory Speech Crime

Peace bonds are, at present, available under s.810(1) of the *Criminal Code*. However, these are utilized where there is reasonable fear of intimate partner violence, violence to a child, dissemination of an intimate image or damage to property. Typically, a peace bond will be sought where there is evidence of a reasonable risk of harm to property or person. This type of harm is measurable and, therefore, more easily foreseeable. The extension of a peace bond to anticipated speech acts is novel both in jurisprudence and the harm it seeks to prevent. This will result in legal uncertainty and over-use.

No prior conviction on a hate crime is required for the imposition of a peace bond - simply a "reasonable belief" presented in an application that the Attorney-General authorizes and a judge approves.

Moreover, under the *Bill*, a peace bond may carry conditions that are intrusive and onerous, involving electronic monitoring, restrictions on communication and movement, and the provision of bodily substances. Where these might be justified in the case of possible harm to children or a domestic partner, the justification in the case of a possible "harmful speech act" is more tenuous. The accused would be forced to choose between imprisonment or a "recognizance to keep the peace" for up to a year (two years for anyone who had a previous conviction pursuant to the Hate Crimes Provisions) that may be accompanied by severe liberty-limiting conditions.

As a result, these factors will further erode free speech as citizens self-censor rather than risk restrictions and punishment.

Part 5 - Conclusion

The state frequently argues that if people hear hateful speech, they might be influenced to engage in some prohibited conduct. This position is both speculative and paternalistic. It has and should be rejected. As Justice Pomerance stated in *R. v. Veltman*, in ruling against a publication ban on hateful material:

"In essence, the Crown's argument is that the public cannot responsibly receive the information to be introduced at the trial. While not framed in these terms, it is akin to saying that the public must be protected from itself because it might use the information for an improper and/or harmful purpose. …In this case, the Crown is concerned that the public cannot be trusted to responsibly receive this information. There is a paternalistic quality to this approach. It is not for the court to dictate what the public should and should not receive for its own good. It is not my role as a judge to curate the marketplace of ideas."[105]

If the *Bill* becomes law, given the breadth and reach of digital social media, the government

[105] *R. v. Veltman*, 2023 ONSC 5063 (CanLII), at para.34.

will arrogate censorship powers to itself greater than those it assumed during World War 2.[106]

Censorship Does Not Reduce Social Conflict

There is little evidence of a correlation between censorship of hate speech and a reduction of social conflict. Censorship can marginally reduce overt public expression of hateful sentiments, but this does not reduce covert expression or change beliefs and attitudes. There is, rather, unambiguous evidence of a negative association in established democracies between freedom of expression and social conflict. From a recent comprehensive study on censorship and social conflict, the authors conclude that the "results are consistent with a stable and large role of extensive freedom of expression in reducing social conflict in modern democracies."[107]

The authors found that restrictions on free speech lead to more conflict, a consequence that to some extent may be driven by government misuse of speech restrictions.[108]

In some cases, a reluctance to speak on a controversial issue for fear of hate speech accusations can result in increased social conflict. Such was the case with mass sexual assaults of white underage girls in Britain by Muslim grooming gangs.[109]

Censorship Diminishes the Critical Thinking Skills of Canadians

Censoring ideas - even hateful ideas - erodes, marginally but noticeably, the foundations of liberal democracy, since it prevents engagement with arguments, and, thereby, diminishes the critical-thinking capacity of participants. For, if the beliefs expressed were correct, participants would have gained the benefit of exchanging their wrong beliefs for correct beliefs. If the beliefs expressed were wrong, participants would have gained the benefit of intellectual justification for their beliefs, without which they possess not knowledge, but dead dogma.[110]

Moreover, since the determination as to the effect of hate speech does not require proof of harm but a "reasonable apprehension of harm" using common sense,[111] Canadians are capable of evaluating the nature of speech for themselves and require no official censor. To the extent that expertise is required for this determination, Canadians can receive

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[106] "[The government] instituted a voluntary censorship system, one in which journalists could choose to submit their articles for vetting by censors, but were not obliged to do so. The country's journalists functioned under the tough rules laid out in the *Defence of Canada Regulations* of the *War Measures Act*. These regulations prohibited the publication of anything of value to the enemy that impaired morale or could cause a rift between Canada and its Allies." Bourrie, Mark. (2009). *Between friends: Censorship of Canada's media in World War.* [Doctoral Dissertation, University of Ottawa]. Dissertation Abstracts International, Volume: 71-05, Section: A, page: 1760.

[107] Bjørnskov, Christian and Mchangama, Jacob, Freedom of Expression and Social Conflict (September 21, 2023), IFN Working Paper No. 1473, p.17. Available at SSRN: https://ssrn.com/abstract=4578663 or http://dx.doi.org/10.2139/ssrn.4578663.

[108] Ibid, p.18.

[109] Dearden, Lizzie. (2022, February 6). Fight against grooming gangs hindered by fear of being branded racist, says official, *The Independent*.

[110] Chicago. Mill, John Stuart. 2002. On Liberty. Dover Thrift Editions. Mineola, NY: Dover Publications.

[111] *Whatcott*, supra note 62 at para.132.

relevant training as would any official censor. This should be considered as a civil duty and included in civics education.

Historically, the power to censor has been a weapon of authoritarian regimes. This power inevitably expands and eventually eliminates the civic process by which society adapts and progresses. There is no reason to believe this will not happen in Canada.

Government censorship is unlikely to perform as intended: it will not reduce social conflict. On the contrary: it is likely to exacerbate the problem of social conflict, weaponize the courts and the human rights tribunal for political purposes, and introduce fear into the online social environment. As disturbing as expressions of hateful attitudes on race, gender and sexuality may be, they are most effectively addressed through open dialogue and education.

About The Democracy Fund

Founded in 2021, The Democracy Fund (TDF) is a Canadian charity dedicated to constitutional rights, advancing education and relieving poverty.

TDF promotes constitutional rights through litigation and public education. TDF supports access to justice initiatives for Canadians whose civil liberties have been infringed upon by government lockdowns and other public policy responses to the pandemic. TDF has provided free legal counsel for over 2,500 low-income Canadians of every background.

TDF engages in the court of public opinion, sponsoring regular public events with leading figures from the world of ideas to discuss the state of civil liberties in Canada. TDF organizes an annual student journalism conference and encourages young Canadians to make journalism a career.

TDF promotes and has sponsored public intellectuals, including famed historian Conrad Black, respected ethics professor Dr. Julie Ponesse, and witty civil liberties cartoonist Bob Moran. Both Dr. Ponesse and Moran were “cancelled” for their viewpoints.

TDF accepts no government funds. It is an independent, nonpartisan charity registered with the Canada Revenue Agency. Its CRA charity number is 779176676 RR 0001.