CANADA'S HATE PROPAGANDA LAWS — A CRITIQUE

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Canada's anti-racial hatred propaganda laws are founded on the assumption that attitudes and expressions of racial hatred are confined to the domain of marginal extremists. The law assumes also that the main societal harm flowing from hate propaganda is the direct psychological injury inflicted on its targets and the threat to public order. This paper challenges those assumptions contending that racial hatred has long been promoted officially in Canada and, today, when managed at the appropriate level, serves the corporate interests that dominate the contemporary political agenda. One of the current effects of a managed level of racial hate propaganda is to consolidate a social climate that is hostile to the dismantling of systemic discrimination, which, although official public policy, is largely opposed by the corporate agenda.

On the basis of such alternative assumptions, the paper recommends that the law focus not only on the extremist purveyors of hate propaganda but on those private corporations and public authorities who condone it by failing to exercise their power to stop it. Two areas of existing law should be applied to such authorities, the criminal law of aiding and abetting and the duties under human rights legislation not to discriminate in the provision of public services.

La législation canadienne sanctionnant la propagande de haine raciale est fondée sur la supposition que les attitudes et les expressions reflétant la haine raciale sont l'apanage d'extrémistes marginaux. La législation suppose aussi que le principal préjudice que la propagande haineuse cause à la société est le dommage psychologique direct subi par ses groupes cibles et la menace d'atteinte à l'ordre public. Dans cet article, l'auteur remet en question ces suppositions et soutient que la haine raciale est encouragée officiellement au Canada depuis longtemps, et qu'aujourd'hui, lorsqu'elle est bien dosée, elle sert les intérêts des entreprises capitalistes qui dominent le programme politique contemporain. Un des effets actuels d'un bon dosage de propagande de haine raciale est de consolider un climat social qui est hostile au démantèlement de la discrimination systémique, démantèlement auquel s'opposent les entreprises capitalistes en général, malgré le fait qu'il soit la politique officielle.

Compte tenu de ces différentes suppositions, l'auteur recommande que la législation sanctionne non seulement les extrémistes qui produisent de la propagande haineuse, mais aussi les sociétés privées et les organismes publics qui la favorisent en refusant d'exercer le pouvoir dont ils disposent pour la faire cesser. Deux domaines du droit existant devraient s'appliquer à ces organismes, le droit criminel relatif à la complicité et la législation sur les droits de la personne qui prévoit un devoir de ne pas faire de la discrimination dans la prestation des services publics.

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I. INTRODUCTION

Canada is signatory to the *United Nations Convention on the Elimination of All Forms of Racial Discrimination*,[1] in which Canada undertakes to take state action to end racial discrimination in access to employment, housing, education and other social benefits and to control the dissemination of racial and religious hate propaganda through legal sanctions. Canada has tackled discrimination issues through federal and provincial human rights and employment equity legislation,[2] while hate propaganda is the subject of both the *Criminal Code*[3] and human rights statutes.

In this paper, I contend that the effectiveness of both the hate propaganda and the anti-discrimination legislation is impaired by the defective analysis upon which the hate propaganda legislation is based. The paper offers an alternative analysis and recommendations for change in Canada's hate laws for the more effective fulfilment of its international obligations. I suggest that such recommendations will be resisted because the corporate agenda that currently dominates Canadian policy appears to be served by the levels of hate propaganda and discrimination that prevail in Canadian society. However, the alternative analysis of hate propaganda will make it easier for human rights advocates to challenge the racism condoned and promoted by the corporate agenda.

II. ALTERNATIVE ANALYSES OF HATE PROPAGANDA

A. *The Traditional Analyses*

The dominant view of racial hate propaganda in Canada appears to be that it is firmly rooted in the anti-social conduct of extremist groups marginal to Canadian society. Such was the analysis of the Cohen Committee,[4] whose report, with minor changes, was the basis of the 1970 amendments to the *Criminal Code* incorporating sanctions for the promotion of genocide and racial hatred.[5] The Committee concluded that:

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[1] *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, 660 U.N.T.S. 212 (signed by Canada 24 August 1966, entered into force 4 January 1969, ratified by Canada 14 October 1970).

[2] The federal jurisdiction has employment equity legislation aimed at bringing the representation of protected groups, which include aboriginal peoples and "visible minorities", in the work forces of employers covered into line with the representation of such groups in the labour force. See *Employment Equity Act*, R.S.C. 1985 (2d Supp.), c.23. The *Act* has been criticized as too narrow in scope and too weak in enforcement. See Special Committee on the Review of the Employment Equity Act, *A Matter of Fairness* (Ottawa: Queen's Printer, 1992) (Chair A. Redway). Ontario too has an employment equity act. See Bill 79, *An Act to Provide for Employment Equity for Aboriginal People, People with Disabilities, Members of Racial Minorities and Women*, 3rd session, 35th Legislature, Ontario, 1993.

[3] *Criminal Code*, R.S.C. 1985, c. C-46.

[4] Special Committee on Hate Propaganda, *Report* (Ottawa: Queen's Printer, 1966) (Chair: M. Cohen).

[5] *Supra* note 3 at ss. 318-20.

> However odious the behaviour of these groups and however offensive the materials they distribute, the Committee believes that none of the organizations represent today a really effective political or propaganda force and that, in any case, very few individuals as such are involved.[6]

However, the Committee considered it would be unwise to ignore such individuals, because, although few in number, they represented a *potential* danger that could not be measured in statistics alone. The potential danger lay in the Committee's belief that racial and religious prejudice was sufficiently widespread in Canadian society to be fertile soil for the growth of racial hatred under certain economic or political conditions.[7] While it recognized the prevalence of racial "prejudice" in society, the Cohen Committee appears to have distinguished this from racial "hatred". It saw the task of the criminal law as one of limiting the public expression of racial "hatred" by the extremist minority in order to prevent its spread beyond such a minority.

Many opponents of the criminalisation of hate propaganda also saw racial hatred in the domain of marginal, extremist individuals and groups but considered its spreading to the mainstream of Canadian society too low a risk to warrant intrusion by the criminal law. For example, Arthurs contended that hate literature was no more than a "residual and putrid puddle" and that the Canadian public could and should be trusted to "rigorously resist attempts to indoctrinate it in attitudes of hatred".[8]

Professor Arthurs' view was echoed recently by Kierans J. of the Alberta Court of Appeal in his judgment in *R.* v. *Keegstra*.[9] In ruling unconstitutional s. 319(2) of the *Criminal Code*, Justice Kierans was of the opinion that the spread of racial hatred was not a serious risk in Canada because it was the activity of a tiny minority of individuals, whose message, even if heard by the mainstream of Canadian society, would be resoundingly rejected.[10]

While differing about the appropriate role of the criminal law, the two camps appear to share the same view of the type of harm potentially flowing from the public expression of racial hatred. The *Cohen Report* cited the risk of four consequences as justification for legislation to control racial hate propaganda: (a) civil disorder due to victim reaction; (b) breakdown of traditional values of individual worth and dignity; (c) damage to victims' reputations; and (d) psychological stress suffered by victims.[11]

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[6] *Supra* note 4 at 14.

[7] M.R. MacGuigan, a member of the Cohen Committee, cited studies by H. Sohn (see A. Bruner, "'Prejudice makes Toronto fertile soil for race riot': Human Rights Man's Warning" *Toronto Daily Star* (11 November 1966) 1 and 4) and J. Anderson (see "Study finds racial, religious bias in Metro youth" *Toronto Daily Star* (11 May 1967) 1) as evidence of wide-spread racial prejudice. See M.R. MacGuigan, "Proposed Anti-Hate Legislation: Bill S-5 and the Cohen Report" (1967) 15 Chitty's L.J. 302 at 304.

[8] H.W. Arthurs, Submission to the Senate Standing Committee on Legal and Constitutional Affairs on Bill S-21 (1969) at 5-6. See also H.W. Arthurs, "Hate Propaganda - an Argument against Attempts to stop it by Legislation" (1970) 18 Chitty's L.J. 1.

[9] *R.* v. *Keegstra* (1988), 87 A.R. 177, [1988] 5 W.W.R. 211 [hereinafter *Keegstra* cited to W.W.R.].

[10] *Ibid.* at 215.

[11] *Supra* note 4 at 24.

This approach is echoed in the human rights case of *Attis* v. *New Brunswick Board of School Trustees Dist. No. 15*,[12] in which a New Brunswick Board of Inquiry considered a complaint that the respondent school board had discriminated against the Jewish complainant by failing to take disciplinary action against a teacher who published anti-Jewish propaganda. Myron Gochnauer observes that, while the tribunal found for the complainant, it concerned itself only with the provable harm caused directly to the complainant by the expressions of anti-Semitism.[13]

Gochnauer's criticism of the tribunal's analysis is that it ignored the historic and cultural context of the expression of anti-Semitic hatred as an ideological underpinning of a system of social inequality and domination enforced through violence and hatred.[14]

The approaches of the Cohen Committee, the *Attis* tribunal and, *a fortiori*, Arthurs and Kierans J. share the defect that the potential social harm attributable to the expression of racial hatred consists only of civil disorder or the psychological or reputational harm to identifiable individual targets of the racial hatred. As Gochnauer observes, such an approach fails to take account of the cultural and historic context of racial hatred and its role in supporting, in Canada, a system of inequality and domination.[15]

It is submitted that such a failure reflects an analysis of racial hatred and has led to a set of legal responses that fail to address an important dimension of individual and social harm caused by the public expression of racial hatred hitherto ignored by legal policy in Canada.

B. *An Alternative Analysis*

A flaw in the traditional analysis is the portrayal of racial hatred in Canada as essentially the aberrant conduct of extremists that either threatens public order or inflicts psychological or reputational harm on identifiable individuals in the target groups. Such an analysis ignores the evidence that, from its colonial roots, Canada's economic and cultural development has rested on the ideological underpinnings and the official promotion of racism and racial hatred. The traditional analysis ignores the role that racial hatred and its official promotion have played in the establishment and maintenance of a social system of domination and inequality.

B. Rolston illustrates the central ideological role of the expression of racial hatred in the maintenance of feudal and colonial capitalist power structures.[16] With respect to the former, the author notes the importance of racial hatred to the interests of dominant

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[12] *Attis* v. *Board of Education of District 15* (1991) (*sub nom. Attis* v. *New Brunswick School District No. 15*), 15 C.H.R.R. D/339; (H.R. Board of Inquiry), 121 N.B.R. (2d) 1, rev'd in part (*sub nom. Ross* v. *Moncton Board of School Trustees, Dist. No. 15*) (1991), 86 D.L.R. (4th) 749, 121 N.B.R. (2d) 361 (Q.B.) [hereinafter *Attis* cited to N.B.R.].

[13] M. Gochnauer, "Of Liberty and Social Practices: the Case of Malcolm Ross" (1992) 41 U.N.B.L.J. 317.

[14] *Ibid.* at 321.

[15] Also lacking in analysis of the historic and cultural context of racial hatred and oppression in Canada is Law Reform Commission of Canada, *Hate Propaganda* (Working Paper 50) (Ottawa: Law Reform Commission, 1986). The authors of that Paper favour criminal sanctions for the public expression of racial hatred but a restricted use of the criminal law.

[16] B. Rolston, "The training ground: Ireland, conquest and decolonization" (1993) 34 Race and Class 13.

feudal classes in England, noting the twelfth century account of Ireland by Gerald of Wales,[17] in which the Irish were described as "lazy, idolatrous, treacherous, blasphemous, incestuous, cannabalistic and ignorant of Christian beliefs". Such account of the Irish served the purpose of "justifying" King Henry II's invasion of Ireland.[18]

Rolston notes that the racial hatred expressed within Gerald of Wales' account of Ireland, and the racial hatred of the Irish fomented by it over several centuries, were employed to great effect by the Elizabethans and subsequent generations to justify the violent conquest and "plantation" of Ireland in the interest of colonial capitalism. The Irish were portrayed by their Elizabethan invaders as a lower order of humanity who lived like beasts, were devoid of all law and all good order and were brutish in their customs. Rolston contends that

> '[s]uch assertions gave licence to the systematic devastation of the Irish, which, besides other things, included the routine burning of crops and villages, the regular killing of women and children and the cutting off of heads as well as the willingness to pay bounties for them'. English soldiers believed that in dealing with the native Irish population they were absolved from all normal ethical constraints.[19]

Similar "official" expressions of racial hatred were central to the activities of the European traders and colonisers and the resulting destruction of aboriginal societies throughout the world and the trading and enslavement of black people. Although not all accounts of indigenous peoples were negative, most of them made references such as "savages", "cannibals" and "brutish".[20]

In Canada, it is clear that the dispossession of aboriginal peoples from their lands[21] was facilitated by the negative images of aboriginal peoples and their cultures fomented by official expressions of racial hatred. The spread of racial hatred of aboriginal peoples was institutionalised in the operation of church boarding schools, at which aboriginal children, removed from their parents, were instructed in the "inferiority" of their race and cultures.[22]

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[17] G. Cambrensis, *The History and Topography of Ireland*, trans. J. O'Meara (Great Britain: Dolmen Press, 1982).

[18] *Supra* note 16 at 16.

[19] *Supra* note 16 at 17.

[20] For a collection of sixteenth century European travellers' reports, see R. Hakluyt, *Voyages and Discoveries*, ed. by J. Beeching (Harmondsworth: Penguin Books, 1972). Edmund Barker described the inhabitants of the Cape of Good Hope as "black savages very brutish" (*ibid.* at 361). Seventeenth century travellers described them as "'beasts in the skins of men'" and "as beings halfway between man and ape"; see M.E. Novak, "The Wild Man Comes to Tea" in E. Dudley and M.E. Novak, eds., *The Wild Man Within: An Image in Western Thought from the Renaissance to Romanticism* (Pittsburgh: University of Pittsburgh Press, 1972) 183 at 188.

[21] See Manitoba, Public Inquiry into the Administration of Justice and Aboriginal People, *Report: The Justice System and Aboriginal People*, vol. 1 (Winnipeg: Queen's Printer, 1991) (Commissioners: A.C. Hamilton & C.M. Sinclair).

[22] Some of the best writing on the history of aboriginal peoples in Canada is found in Thomas Berger's work. See T. Berger, "The Fourth World: The Worldwide Movement for Native Rights" in Ruth Thompson, ed., *The Rights of Indigenous people in International Law: Workshop*

W. Peter Ward speaks of the mid-nineteenth century on Canada's west coast, where a "luxuriant anti-Orientalism flourished".[23] The author notes that, until the 1940s, British Columbian white society feared and disliked the Asian minority in the community and made its feelings abundantly clear in thought, word and deed.[24] The most prominent campaigners against Chinese, Japanese and East Indian immigrants were provincial legislators, apparently seeking to curry public favour for themselves.[25] For example, all naturalised and Canadian-born Asiatics were stripped of the franchise in British Columbia.[26]

Official racism against Oriental Canadians was not confined to governments of British Columbia. In February 1942, the federal cabinet ordered the expulsion of 22,000 Japanese Canadians residing within one hundred miles of the Pacific coast. That order marked the beginning of a process that saw Canada's Japanese minority uprooted from their homes, confined in detention camps, stripped of their property and forcibly dispersed across Canada or shipped to a starving Japan.[27] Such abuse did not begin in 1942 but, in Sunahara's words:

> were the culmination of a long history of discrimination resulting from Canadian social norms that cast Asians in the role of second-class citizens. Stripped of their political rights, Asians had traditionally been politically castrated targets for the rhetoric of B.C. politicians seeking scape-goats for the province's ills. The war only provided an ideal atmosphere for the seeds of repression to flourish.[28]

The legacy of such official racism and racial hatred is alive in Canada today. The Royal Commission on the wrongful prosecution and conviction of Donald Marshall for murder concluded that the fact that Marshall was aboriginal was an important element in the abuse of process.[29]

Report (Saskatoon: University of Saskatchewan Native Law Centre, 1986) 1, and T.R. Berger, *A Long and Terrible Shadow: White Values, Native Rights in the Americas 1492-1992*, (Vancouver: Douglas & McIntyre, 1991).

[23] W.P. Ward, *White Canada Forever* (Montreal: McGill-Queen's University Press, 1978) at 3.

[24] *Ibid.* at 167.

[25] *Ibid.* at 54-55.

[26] The Japanese lost the franchise in 1895 and the East Indians in 1907. See *An Act to amend the "Provincial Voters' Act"*, S.B.C. 1985, c. 20, s. 3; *An Act to consolidate and amend the law relating to Electors and Elections in Municipalities*, S.B.C. 1896, c. 38, s. 7; *An Act to amend the "Provincial Elections Act"*, S.B.C. 1907, c. 16; and *An Act to consolidate and amend the law relating to Electors and Elections in Municipalities*, S.B.C. 1908, c. 14. The Chinese were denied the franchise earlier in the nineteenth century.

[27] A.G. Sunahara, *The Politics of Racism: The Uprooting of Japanese Canadians During the Second World War* (Toronto: James Lorimer & Co., 1981) at 1. For other accounts and sociological and psychological analysis of the pre-war and wartime treatment of Japanese Canadians, see F.E. La Violette, *The Canadian Japanese and World War II* (Toronto: University of Toronto Press, 1948) and C.H. Young, H.R. Reid & W.A. Carrothers, *The Japanese Canadians*, ed. by H.A. Innis (Toronto: University of Toronto Press, 1938).

[28] Sunahara, *ibid.* at 161.

[29] Nova Scotia, *Royal Commission on the Donald Marshall, Jr., Prosecution: Report* (Halifax: McCurdy's Printing and Typesetting, December, 1989) (Chair: T.A. Hickman).

The Manitoba judicial inquiry into the deaths of Helen Betty Osborne and John Joseph Harper and the justice system and aboriginal people[30] found unacceptable levels of racism and racial hatred against aboriginal people within the justice system. Dr. Neil McDonald, who conducted cross-cultural training for recruits and senior officers of the Winnipeg Police Department, testified to the Commission that members of the August 1988 recruit class, for example, "made very strong negative racist statements about Aboriginal people". The witness testified that he had heard such sentiments frequently, though not with the same measure of aggression.[31] McDonald testified further from his experience as a cross-cultural educator:

> 'I think racist and prejudiced attitudes are fairly prevalent in society at large. And...certainly... Aboriginal Peoples are the most widely and wildly stereotyped in our society'.[32]

The Commission found a high incidence of racism and expression of racial hatred in the Winnipeg Police Department and recommended, *inter alia*, that part of the entrance requirements for the Department "consist of attitudinal testing regarding issues such as race and racism in order to reduce the possibility of recruiting bigoted or racist officers".[33]

Official racism is also apparent in the contemporary French/English language issue. Bill 101 in Quebec, requiring commercial signs to be in French, has stirred anglophone/ francophone tensions in that province and beyond. A number of local authorities outside Quebec "retaliated" by declaring the locality 'English speaking'. In view of such official acts of racism, it is scarcely surprising that a number of anglophone "extremists" burned the flag of Quebec.

The historic and contemporary evidence of racism and the expression of racial hatred in Canada does not support the orthodox view of such phenomena embodied in the Cohen Report and judicial and tribunal decisions on the matter of hate propaganda. Contrary to the assertions of such sources, racial hatred appears to be traditional and endemic in Canadian society, not peripheral to it. In Sunahara's words, "the tolerance we know is historically only a thin and recently applied veneer on Canadian society".[34]

This challenges the orthodox assumptions that extremist groups are a minimal threat to Canadian society because their message will be offensive to, and rejected by, mainstream Canadian society. If the average Canadian has already internalised attitudes of racial hatred, fed historically with a steady diet of official racism and racial hatred, extremist messages have a rather more receptive audience than the orthodox view would have us believe.[35] The threat to public order and to target groups is, accordingly, heightened.

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[30] Manitoba, Public Inquiry into the Administration of Justice and Aboriginal People, *Report: The Deaths of Helen Betty Osborne and John Joseph Harper*, vol. 2 (Winnipeg: Queen's Printer, 1991) (Commissioners: A.C. Hamilton & C.M. Sinclair).

[31] *Ibid.* at 103.

[32] *Ibid.* at 110.

[33] *Ibid.* at 111.

[34] Sunahara, *supra* note 27 at xi.

[35] The Cohen Committee did acknowledge pervasive racial "prejudice" in Canada but saw only a **potential** danger of the spread of racial hatred in times of less political and economic stability. See *supra* note 4 at 14, 24.

The alternative analysis also challenges the orthodox assumption that the scope of potential harm flowing from public expressions of racial hatred is confined to threats to public order and direct assaults on victims' reputations and psychological well-being. While these are important issues, the evidence of pervasive racism and racial hatred in Canadian society highlights another dimension of the harm caused by hate propaganda. In line with its international treaty obligations, Canada's federal and provincial jurisdictions have enacted laws and social programs purportedly designed to eliminate systemic racial discrimination in employment, education, housing and access to other social benefits. Such an objective is of sufficient priority to warrant entrenchment in the *Canadian Charter of Rights and Freedoms*.[36]

It is commonplace that the success of legislation aimed at social change depends on a broad measure of public acceptance of its objectives and the success of human rights and employment equity statutes is no exception. Such acceptance is substantially more difficult when the mainstream population, already disposed to racist attitudes, is subject to not only the expression of racial hatred by extremists, but its apparent condonation by certain public authorities and institutions.

The alternative analysis of racial hate propaganda challenges the traditional analysis on two counts. First, although the organized public expression of racial hatred appears to be confined to a relatively small number of extremists, attitudes of racial hatred have existed and been officially promoted and condoned throughout Canadian history as ideological support for the racial oppression and discrimination inherent in colonial capitalism. Accordingly, the susceptibility of mainstream society to the hate messages of extremist groups appears to be rather greater than that believed in the orthodox analysis.

Secondly, the pervasive, rather than peripheral character of attitudes of racial hatred in Canadian society extends the dimension of the social harm caused by the public expression of racial hatred. Official public policy seeks to eliminate systemic racial discrimination in access to social benefits by means of a variety of laws and public programs. The entrenchment of aboriginal, multicultural, language, and racial equality rights in the *Charter* signifies the importance of anti-discrimination policies for Canadian society. The success of such policies depends on a level of public acceptance that is compromised by the dissemination of racial hatred to an audience largely predisposed to such attitudes. Acknowledgement of the role of racial hatred in frustrating the public policy goals of eliminating systemic racial discrimination means that the law must do more than prevent the spread of racial hatred to previously "uncontaminated" individuals. The law must actively support the implementation of human rights policy.

III. Recommended Changes in the Law

The public expression of racial hatred is subject to three branches of Canadian law: the *Criminal Code*, provincial and federal human rights statutes, and the civil law of defamation. In view of the virtual absence of civil remedy for an individual member of

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[36] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11 [hereinafter *Charter*].

a defamed group against promoters of hatred against that group,[37] discussion is confined to criminal and human rights law.[38]

A. *Criminal Law*

The *Criminal Code* bans advocating or promoting genocide against an identifiable group.[39] The criminal law also prohibits communicating in a public place statements which incite hatred against an identifiable group where the incitement is likely to lead to a breach of the peace.[40] It is also a crime for a person wilfully to promote hatred against an identifiable group by making statements, other than in a private conversation.[41] An identifiable group is any section of the public distinguished by colour, race, religion or ethnic origin. The last of these provisions has proved most controversial and is the focus of this paper.

In the case of *Keegstra*,[42] the Supreme Court of Canada upheld the constitutionality of s. 319(2), overturning the decision of the Alberta Court of Appeal. The majority held that, although the provision was a limitation of freedom of expression, such limitation was justifiable under s. 1 of the *Charter*.

In upholding s. 319(2), Dickson C.J. placed weight on the safeguards to defendants built into s. 319(2). The promotion of hatred must be "wilful", which means that it must be proved beyond reasonable doubt that the defendant promoted hatred with intent to do so or with subjective recklessness to its promotion. Further safeguards noted by the majority are the requirement of the Attorney General's consent to prosecute and the following four defences available:[43]

> (a) the defendant establishes the statements were true;
> (b) the defendant, in good faith, expressed, or attempted to establish by argument an opinion on a religious subject;
> (c) the statements were relevant to a subject of public interest, discussion was for public benefit and the defendant, on reasonable grounds believed them to be true;
> (d) the defendant intended, in good faith, to point out matters producing or tending to produce feelings of hatred, for the purpose of removing such feelings.

The majority also placed weight on the importance of controlling public expressions of racial hatred for the advancement of the important societal goals (entrenched in the

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[37] English authority is *Knupffer* v. *London Express Newspaper Ltd.*, [1944] A.C. 116, [1944 1 All E.R. 495 (H.L.). Canadian authority is represented by two Quebec cases, *Ortenberg* v. *Plamondon* (1915), 24 B.R. 69, 385, and *Germain* v. *Ryan* (1918), 53 C.S. 543. For a discussion, see S.S. Cohen, "Hate Propaganda - The Amendments to the Criminal Code" (1971) 17 McGill L.J. 740 at 741-53.

[38] There may be an argument for extending civil remedies to members of defamed groups. See the group remedy available under *The Defamation Act*, R.S.M. 1987, c. D20.

[39] *Supra* note 3 at s. 318.

[40] *Ibid.* at s. 319(1).

[41] *Ibid.* at s. 319(2).

[42] *R.* v. *Keegstra*, [1990] 3 S.C.R. 697, [1991] 2 W.W.R. 1 [hereinafter *Keegstra* cited to S.C.R.].

[43] *Supra* note 3 at s. 319(3)(a)-(d).

Charter) of aboriginal rights, cultural diversity, language rights and freedom from racial and religious discrimination. The majority noted that freedom of expression is not an absolute value and must be weighed against competing values such as those outlined above.

The importance of the *Keegstra* case lies not only in the Supreme Court's upholding the constitutionality of the hate propaganda law but in the judicial recognition that the expression of racial hatred may undermine the achievement of constitutionally protected rights and freedoms. For example, as the Chief Justice observed,[44] the constitutional right to cultural diversity may be undermined by hate propaganda if the victim seeks to become culturally invisible. Likewise, the constitutional right to racial equality may be infringed by racial hate propaganda.

The Chief Justice's approach is appropriate because it recognizes that freedom of expression is not an end in itself but a means of advancing equal respect for persons within the community. As Richards contends,[45] the right to conscience and the right to expression are necessary to the treatment of persons with equal respect within society. However, the treatment of persons with equal respect may be impaired by certain actions, including certain forms of expression. Defamation is an example of expression that derogates the fundamental value of equal respect for persons and such expression is unlawful in Canada.[46] Accordingly, equal respect for persons is the core value to be served by Canada's constitution and laws and freedom of expression is to be protected to the extent that it serves such value.

If a victim or potential victim of the public expression of racial hatred seeks to protect herself by shedding her cultural identity and jumping into the melting pot of the majority culture, her cultural freedom is denied. In such a case, the freedom of expression of the purveyor of hatred has infringed, not served, the fundamental value of equal respect for persons.

If a workplace climate condones the expression of racial hatred and causes a trade union member, out of fear, to refrain from trying to persuade his union to negotiate employment equity protection in a collective agreement, the underlying goal of the *Charter* right to freedom from systemic racial discrimination has been undermined.[47] Indeed, to the extent that the worker has been silenced by the intimidation of expressions of racial hatred, *his* freedom of expression has been abridged by the purveyors of hatred, who ironically seek to defend their conduct by appeal to freedom of expression.[48]

The majority decision of the Supreme Court in *Keegstra* recognizes that while freedom of expression is of great importance to the treatment of persons with equal

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[44] *Supra* note 42 at 755-58.

[45] D.A. Richards, *Toleration and the Constitution* (New York: Oxford University Press, 1986) at 71ff and 165ff.

[46] The development of the law of negligent misstatement in Canada arose out of judicial recognition of the potentially damaging force of words. See *Hedley Byrne & Co. Ltd.* v. *Heller & Partners Ltd.*, [1964] A.C. 465, [1963] 2 All E.R. 575 (H.L.); and *Haig* v. *Bamford et al.* (1976), [1977] 1 S.C.R. 466, [1976] 3 W.W.R. 331, rev'g [1974] 6 W.W.R. 236, 53 D.L.R. (3d) 85 (Sask. C.A.), rev'g [1972] 6 W.W.R. 557, 32 D.L.R. (3d) 66 (Sask. Q.B.).

[47] *Supra* note 36 at s. 15(1).

[48] *Supra* note 42. At trial in *R.* v. *Keegstra* (1984), [1988] 87 A.R. 200, [1985] 19 C.C.C. (3d) 254 (Q.B.), Quigley J. noted the potential impact of the expression of racial hatred on the freedom of expression of its targets.

respect, other freedoms and rights are crucial to the promotion of such value. The *Charter* recognizes a number of them, including language, aboriginal, multicultural and non-discrimination rights. The majority in *Keegstra* dismissed the notion that freedom of expression operates as a trump card over other rights and freedoms. Now, freedom of expression must be weighed against other rights and freedoms to determine how law and public policy best serves the value of equal respect for persons.

A weakness of the criminal law in controlling the public expression of racial hatred is that hitherto, enforcement has been directed to the actual perpetrators of the offensive statements. This approach ignores the role of those who promote racial hatred by condoning its expression by extremist groups and individuals. The *Criminal Code* already makes provision to deal with those who condone criminal conduct in s. 21(1), which states:

> Every one is party to an offence who
> (a) actually commits it;
> (b) does or omits to do anything for the purpose of aiding any person to commit it; or
> (c) abets any person in committing it.

Normally, an accessory is party to a crime only if he or she undertakes some positive act but, as Smith and Hogan[49] observe, "where...[a person] has a right to control the actions of another and he deliberately refrains from exercising it, his inactivity may be a positive encouragement to the other to perform an illegal act, and, therefore, an aiding and abetting". The Canadian courts have recognized this principle. In *R.* v. *Halmo*,[50] the owner of a motor vehicle allowed his chauffeur to drive his car while intoxicated and was convicted of aiding and abetting the offences of reckless and dangerous driving. Mere presence in a car driven by a drunk driver is not sufficient to amount to aiding and abetting but it is well established in Canadian law that if the passenger has authority over the car or the right to control the driver, she may be liable as an accessory for failing to exercise that control.[51]

In *R.* v. *Nixon*,[52] the British Columbia Court of Appeal upheld the conviction of a police officer who was present at an assault of a person in police custody but who took no action to prevent the assault. Legg J.A. stated:

> [W]here the accused had a duty to prevent the commission of an offence, or *where he was in a position to have control* over the acts of the offender and failed to prevent the commission of the offence, he will be guilty as an aider and abettor. A person becomes a party under s. 21(1)(b) if he fails to act for the purpose of aiding in the commission of the offence. Where there is duty to act, and the accused does not act, it is open to the court to infer that the purpose of the failure to act was to aid in the commission of the offence. [Emphasis added]

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[49] J.C. Smith & B. Hogan, *Criminal Law*, 5th ed. (London: Butterworths, 1983) at 125.

[50] *R.* v. *Halmo*, (1941) O.R. 99 (C.A.).

[51] See also *R.* v. *Kulbacki* (1965), [1966] 1 C.C.C. 167 at 170, [1966] 47 C.R. 233 (Man. C.A.). English authority is similar; see *R.* v. *Russell*, (1933) V.L.R. 59, 39 Argus L.R. 76.

[52] *R.* v. *Nixon* (1990), 47 B.C.L.R. (2d) 222 at 241, [1990] 6 W.W.R. 253 (C.A.), leave to appeal denied (1991), 52 B.C.L.R. (2d) xxxviii, [1991] 1 W.W.R. lxxiv (S.C.C.).

Justice Legg approved the approach of Ritchie J.A. in *R.* v. *Coyne*[53] that the duty imposed by law may be imposed by statute or by the common law.[54] It is also established law that while intention is a requirement of aiding and abetting, criminal motive is not. Accordingly, a person may aid and abet a crime even if he regrets the act or is horrified by it.[55]

The criminal law of aiding and abetting could have been applied to the action (or inaction) of the New Brunswick School Trustees District #15 with respect to the hate propaganda of its teacher Malcolm Ross. While the matter was eventually dealt with under the *New Brunswick Human Rights Act* in *Attis* v. *New Brunswick School District #15*,[56] the evidence accepted by the Board of Inquiry in that case suggests that both Ross and the School Board ought to have been prosecuted for breach of s. 319(2) of the *Criminal Code*.[57]

All the legal requirements were present to prosecute the Board. It had a legal duty under the *School Act* to protect the welfare of the children and a duty under the *Human Rights Act* to provide an educational environment free from racial discrimination or harassment. The Board of Inquiry accepted the evidence that Ross's extreme expressions of hatred were followed by anti-Semitic harassment of Jewish children by other children at the school. As Ross's employer, the School Board had the power to control him, including the right to dismiss or otherwise discipline him. The evidence was that the Board chose to take no action for close to a decade and, when it finally did act, did so in an ineffectual manner. The Board of Inquiry took the view that the Board's long period of inaction amounted to condonation and encouragement of Ross's expression of racial hatred.[58] It is submitted that this was a case appropriate for the prosecution of both Ross and the School Board.

The Manitoba Report of the Aboriginal Justice Inquiry provides another example of circumstances appropriate for prosecuting the aiding and abetting of public expression of racial hatred. The Commission found strong evidence of racism and expressions of racial hatred against aboriginal people, within the Winnipeg Police Department.[59] Witnesses testified to police officers' expressions of derogatory racist remarks against Indians during the course of their duties following the shooting of an aboriginal person, John Joseph Harper. A journalist quoted a Winnipeg police officer as saying: "'[t]he natives drink and they get in trouble. Blaming the police for their troubles is like an alcoholic blaming the liquor store for being open late'".[60] The journalist also testified to

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[53] *R.* v. *Coyne* (1958), 124 C.C.C. 176 (N.B.S.C.).

[54] In *Nixon*, the accused was under a statutory duty to protect persons in his custody and care. In *R.* v. *Popen* (1981), 60 C.C.C. (2d) 232 (Ont. C.A.), the Ontario Court of Appeal recognized the common law duty of parents to protect their children and their liability under the *Criminal Code* for failure to act to protect the child against injuries inflicted by the other parent.

[55] See *D.D.P. for Northern Ireland* v. *Lynch*, [1975] A.C. 653 at 678, [1975] 2 W.L.R. 641 at 653 (H.L.).

[56] *Supra* note 12.

[57] Prosecution requires the consent of the Attorney General (*supra* note 3 at s.319(6)). This consent was not obtained in respect of Ross and was not sought in respect of the School Board.

[58] *Supra* note 12; the substantive findings of the Board of Inquiry were upheld by the Court of Queen's Bench.

[59] *Supra* note 30 "The Death of Helen Betty Osborne" at 89-96.

the Inquiry of a joke that made the rounds of the Public Safety Building in Winnipeg after the shooting of Harper by Winnipeg Police. To the question "'[h]ow do you wink at an Indian?'...[t]he answer was a pantomimed pull of a trigger'".[61]

The Commission said of the Winnipeg Chief of Police, "Chief Stephen's readiness to disregard racism is disturbing". Noting a lack of concern and action by the Chief on the incidence of racism within his department, the Commission stated: "[a] chief of police and his senior staff must set an example to their department. They must actively let their officers know that racism will not be tolerated and that positive racial attitudes are expected from everyone on the force".[62] The Commission concluded that "there was no evidence that [the] Chief [of Police]...set such an example".[63]

I submit that the evidence heard by the Commission revealed not only racist attitudes but public expressions of racial hatred against Indians by police officers.[64] There is evidence, too, that such expressions of racial hatred were condoned by high ranking officers who had the authority to take disciplinary measures but did not do so.[65]

The foregoing examples suggest that the focus of the criminal law with respect to the public expression of racial hatred should be on not only its perpetrators but those who have authority or control over the perpetrators and aid and abet the crime by condoning it. The law on aiding and abetting is already in place and, as noted above, has been applied in Canada to those who condone a crime by failing to exercise their authority to prevent it.

The benefit of the suggested approach is that it promises to be a rather more efficient use of resources than the prosecution of the perpetrators. If a school board of trustees is potentially liable criminally for condoning the dissemination of racial hatred by its employees, it is more likely to implement hiring, training, discipline and other personnel policies designed to reduce the incidence of the expression of racial hatred. Where the relevant authority is an employer, its power to discipline can extend to the expression of racial hatred beyond the workplace if such activity impairs the efficient functioning of the employer's operations, in a broad sense.[66] Indeed, employers are quite familiar with control of their employees' freedom of expression through their powers of discipline for such workplace "offences" as insubordination, whistleblowing and breach of confidentiality.

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[60] *Ibid.* "The Death of J.J. Harper" at 95.

[61] *Ibid.* at 96.

[62] *Ibid.* at 97.

[63] *Ibid.*

[64] See *Menghani* v. *Canada (Employment and Immigration Commission)* (1992), 17 C.H.R.R. D/236 (C.H.R.T.) [hereinafter *Menghani*]. *Menghani* stands as authority for the "public" nature of the activities of public authorities and their employees. This approach was approved by the Supreme Court of Canada in *University of British Columbia* v. *Berg*, [1993] 2 S.C.R. 353, 102 D.L.R. (4th) 665 [hereinafter *Berg* cited to S.C.R.].

[65] Another example of racial harassment condoned by an employer is evident in the case *Pitawanakwat* v. *Canada (Secretary of State)* (1992), 93 C.L.L.C. 16,073 (C.H.R.T.). The employer's liability under the *Canadian Human Rights Act* was due, in part, to its failure to act to deal with the complainant's allegations of verbal racial harassment.

[66] See *Fraser* v. *Public Service Staff Relations Board*, [1985] 455, [1986] 63 N.R. 161 for judicial endorsement of the power of an employer to dismiss an employee for publicly expressing his or her opinion about the employer, the Government of Canada.

The approach proposed above is familiar to the criminal law. The sale of alcohol to minors is controlled not only by imposing criminal sanctions on consumers but on those who sell liquor to minors.[67] For various regulatory offences, an organization is criminally liable for the acts of its employees. The rationale is that legal control of the activity is likely to be more efficient if sanctions are imposed on those in a position to control the activity.

It is frequently argued that the criminal law is not suitable for the control of expressions of racial hatred and that if control is necessary, it should be done through human rights legislation.[68] There are a number of problems with this argument. First, there is no reason why racial hatred cannot be dealt with by both the criminal and human rights law. Indeed, the legitimacy and importance of the proscriptions of human rights law in the public mind may be enhanced by the criminalization of the conduct. Most criminal offences against the person and property give rise to potential liability under both criminal and civil law. The motorist who drives recklessly into another vehicle will find herself both criminally and civilly liable. Public authorities may find their activity subject to scrutiny by criminal, civil and administrative law.

The argument for enforcing the criminal law against those who aid and abet the dissemination of racial hatred is, first, that the public harm flowing from such expression is well established. As Richards puts it,[69]

> Persons, who can robustly endure deprivation of such general goods as wealth or even health, experience a suicidal despair in the degradation of self worked by an unjust social contempt for their reputational integrity. For them, such an insult may mean the death of what is most intimately personal, most meaningful in their ambitions for their lives.

As noted above, a further element of social harm flowing from expressions of racial hatred is its effect in galvanising resistance to the constitutionally protected aboriginal, multicultural, language and non-discrimination rights and freedoms. If we are to respond to Dworkin's invitation to take rights seriously,[70] we must direct all the resources of the law to upholding them. By directing the criminal law to those who use their authority to condone the expression of racial hatred, we acknowledge that such condonation is an important element in the perpetuation of the social evils of the expression of racial hatred and other forms of racial discrimination.

Expressions of racial hatred are also a threat to public order. While Canada has avoided the racial violence of Bosnia or the genocide of East Timor, Cambodia or against the Kurds in Iraq, the multi-racial character of Canada's population requires great vigilance in avoiding racial provocation. The large demonstration of black Canadians in Toronto following the acquittal of Los Angeles police officers charged with beating Rodney King was provoked, in part, by a sense of grievance among black Canadians

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[67] *Liquor Control Act*, R.S.A. 1980, c. L-17.

[68] See *e.g.* "Hate Propaganda - an Argument against Attempts to stop it by Legislation", *supra* note 8.

[69] *Supra* note 45 at 197. The range of suicides related to loss of personal standing is discussed by J. Baechler, *Suicides*, trans. B. Cooper (New York: Basic Books, 1979).

[70] R.M. Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1977).

about the harassment and lack of respect shown to them by police and other members of the community.

Another important reason for asserting the criminality of aiding and abetting the expression of racial hatred is the declaratory function of the criminal law. The criminal law defines not only that conduct considered substantially harmful to individual or public interests, it also defines conduct that is "without fault from condemnation as criminal".[71] It is submitted that the social harm risked by the expression of racial hatred warrants public condemnation of both its perpetration and its condonation by those authorities with the power and, frequently, the duty to prevent it. Indeed, the failure to condemn such conduct as criminal serves to condone it, notwithstanding the evidence that it causes significant individual and social harm.

Those who view the criminalization of public expressions of racial hatred as a threat to free speech place insufficient weight on the harm done by such conduct in an essentially racist society. Furthermore, in their anxiety to avoid encroaching on the free speech of hatemongers, they appear to forget that hate propaganda itself restricts the free speech of its targets.

B. *Human Rights Legislation*

While human rights protection is primarily within provincial jurisdiction, the *Canadian Human Rights Act* has exclusive jurisdiction with respect to the communication of racial hatred by means of telephone systems falling under federal authority.[72] In *League for Human Rights B'Nai Brith Canada (Midwest Region)* v. *Manitoba Knights of the Ku Klux Klan and Harcus*,[73] the tribunal found the respondents in breach of s. 13 for communicating a recorded message over the Manitoba telephone system likely to expose others to hatred or contempt on the basis of their race, colour or national or ethnic origin.

The *Act* does not define "hatred" or "contempt" and the Tribunal followed the approach in *Canadian Human Rights Commission et al.* v. *The Western Guard Party and John Ross Taylor*[74] where "hatred" was ascribed the meaning in the Oxford English Dictionary:[75] "active dislike; detestation; enmity; ill-will; malevolence". The Tribunal found "contempt" to mean "the condition of being condemned or despised; dishonour; disgrace";[76] "a feeling that a person...is beneath consideration or worthless, or deserving scorn or extreme reproach".[77] Arguably, the inclusion of "contempt" extends the impugned expression.

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[71] See American Law Institute, *Model Penal Code* (Proposed Official Draft) (Philadelphia: American Law Institute, 1962) at § 1.02(1)(c). See also *supra* note 49 at 3.

[72] *Canadian Human Rights Act*, S.C. 1976-1977, c. 33, s. 13.

[73] *League for Human Rights B'Nai Brith Canada (Midwest Region)* v. *Manitoba Knights of the KuKlux Klan and Harcus* (1993), 18 C.H.R.R. D/406 (C.H.R.T.) [hereinafter *Harcus*].

[74] This case was first decided by a human rights tribunal in 1979. The constitutionality of s. 13 was upheld by the Supreme Court of Canada in 1990 [*Canada (Human Rights Comm.)* v. *Taylor* (1990), 13 C.H.R.R. D/435 (S.C.C.)]. S. 13 was also applied successfully in *Nealy* v. *Johnston* (1989), 10 C.H.R.R. D/6450 (C.H.R.T.). For a useful chronology of *Taylor, Keegstra*, and other cases, see P. Rosen, *Hate Propaganda* (Ottawa: Supply and Services, 1985) at 16-21.

[75] *Oxford English Dictionary* 28 (5th ed. 1971).

[76] *Supra* note 73 at D/413.

The Tribunal in *Harcus* noted that the *Act* requires only that a respondent "expose" a person to hatred or contempt on racial grounds and held that this was a more passive word than "incite". This is important because the recorded messages did not directly attack non-whites but "organizations, programs and periodicals" said to be teaching "humanistic social equality and mongrelization...of the races".[78] The Tribunal found that implicit in the attacks on such organizations was language that would tend to "expose" non-white peoples to racial hatred or contempt.[79] The impugned messages included:

> [I]t is obligatory upon the negro race and upon all other coloured races in Canada to recognize that they are living in the land of the white race by courtesy of the white race and the white race cannot and will not be expected to surrender to any other race...the control of its vital and fundamental government affairs.
>
> Today we are faced with a massive flood of a third world immigration wave in which its (sic) taken unfair entry priority over whites who wish to enter and contribute to this nation and who can better culturally assimilate towards our society's way of life.[80]

A shortcoming of the federal *Act* is the limited remedies available to tribunals. While other forms of discrimination permit a tribunal to award compensation for injury to feelings,[81] the remedy for breach of s. 13 is confined to a cease and desist order.[82] It is submitted that in cases such as *Harcus*, it would be appropriate to order the payment of compensation to such groups as B'nai B'rith and the Manitoba Coalition against Racism and Apartheid, who were complainants in the case and are dedicated to combatting racial discrimination and the dissemination of racial hatred. While such groups themselves may not suffer direct injury as a result of racial hatred, their work on behalf of the targets of racial hatred and their standing as complainants in human rights cases makes them appropriate recipients of compensation for the unidentified victims of the expression of racial hatred.[83]

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[77] *The Concise Oxford Dictionary of Current English* 248 (8th ed. 1990).

[78] *Supra* note 73 at D/414.

[79] *Ibid.* at D/415.

[80] *Ibid.*

[81] *Supra* note 72 at s. 41(3).

[82] In principle, a tribunal could order such a respondent to undertake a special plan aimed at preventing, reducing or eliminating disadvantage to groups protected by the *Act*. See *e.g.* the hiring quota imposed upon the respondent in *Canadian National Railway Co.* v. *Canada (Canadian Human Rights Commission) (sub nom. Action Travail des Femmes* v. *Canadian National Railway)*, [1987] 1 S.C.R. 1114, 76 N.R. 161, aff'g (1984), 5 C.H.R.R. D/2327 [hereinafter *Action Travail*]. It is difficult to contemplate what sort of remedy might have been possible in the *Harcus* case.

[83] In the case of *Attis, supra* note 12, the Board of Inquiry joined as a party the Canadian Jewish Congress because of the contribution that organization could make to the proceedings. The payment of compensation to a representative organization on behalf of unidentified victims of racial discrimination has a precedent in Canada. See *Doucette* v. *Aberdeen*, (1980) 1 C.H.R.R. D/13 (N.S. Bd. of Inquiry). The Board of Inquiry was convinced that the respondent had discri-

Freedom from expressions of racial hatred is also built into provincial and federal human rights legislation throughout Canada in the provision of goods and services, accommodation and in matters of employment. While the respective statutes differ in some details, the protection appears to be fairly similar.

As an example, the *Canadian Human Rights Act* prohibits "harassment" in the provision of goods, services, commercial and residential accommodation and in matters of employment, on any of the grounds protected by the *Act*, including race, national and ethnic origin, colour and religion.[84] Each jurisdiction prohibits harassment on a protected ground, either explicitly, as in the federal *Act*, or implicitly, as a form of less favourable treatment.[85] "Harassment" includes insulting, annoying or vexatious comments about a person's race, etc., that may reasonably be perceived to create a negative psychological or emotional environment.[86] While harassment clearly embraces the expression of racial hatred, it protects persons against comments that would not necessarily incite racial hatred against anyone.

It is well established under human rights law that liability for harassment falls not only on its actual perpetrators but can fall on those with the legal power to control the perpetrators. In *Robichaud* v. *Canada (Treasury Board)*,[87] the Supreme Court of Canada held that employers are liable for acts of harassment committed by employees in the course of their employment, unless the employer can demonstrate that it took reasonable steps to prevent the conduct. Such steps include establishing effective anti-harassment policies, guidelines and supervision, providing supervisory training, and disciplining employees for breach of the rules.

Responsibility for racial harassment in the work place is not confined to employers. It is established that where a labour union represents employees, it may share responsibility for negotiated work rules or practices that have a discriminatory impact on one of the protected grounds.[88] The responsibility of unions goes beyond formal collective bargaining. Typically, union constitutions and by-laws give the membership power to expel members for various offences, including conduct detrimental to the union. Collective bargaining and human rights legislation impose duties on unions not to discriminate against any person on a prohibited ground.

It is submitted that unions must take reasonable steps to ensure that their members do not engage in racial harassment at work or in the conduct of union business, and must use their disciplinary powers to deter members from engaging

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minated not only against the complainant in the letting of hotel accommodation but against other unidentified Mic Mac Indians; the tribunal awarded $100 compensation to the complainant and $200 to the Whycocomagh Band Council for its general purposes. The tribunal noted that the Band Council worked for the welfare of Mic Mac Indians.

[84] *Supra* note 72, s. 13.1.

[85] See *e.g. Hong* v. *The Video Station* (1987), 9 C.H.R.R. D/4441 (B.C. Human Rights Council).

[86] See *e.g. Ontario Human Rights Code*, S.O. 1981, c. 53 (as amended) s. 9(f).

[87] *Robichaud* v. *Canada (Treasury Board)*, [1987] 2 S.C.R. 84, 87 C.L.L.C. 16, 286.

[88] *Re British Columbia Telephone Co. and T.W.U.* (1990) 15 L.A.C. (4th) 146 at 152 (D.R. Munroe, K. Davis, R. Coleman).

in such conduct. Where a union shop provision is in a collective agreement, expulsion from union membership may lead to termination of one's employment.[89]

Issues of racial harassment go beyond the workplace. In *Attis,*[90] the New Brunswick Court of Appeal confirmed that a school board provided services customarily available to the general public. This meant that the school authority had a duty to take reasonable steps to provide parents with an education environment for their children free of racial or religious harassment. The Board of Inquiry ordered the school board to dismiss a teacher whose out-of-school, anti-Semitic writings were found to have contributed to a poisoned environment for Jewish children within the school.

The case *Menghani* v. *Canada (Employment and Immigration Commission)*[91] illustrates the broad construction given to the "provision of services customarily available to the public". The complainant, the sponsor of an applicant for permanent residence status in Canada, was held to be the recipient of public services and protected by the *Canadian Human Rights Act.* The Tribunal held that all government services are customarily available to the public, even though eligibility for such a service may be subject to qualifications or restrictions.

The Tribunal followed the approach of Linden J. of the Federal Court in the case of *Rosin* v. *Canada (Canadian Forces):*[92]

> In order for a service or facility to be publicly available, it is not required that all the members of the public have access to it. It is enough for a segment of the public to be able to avail themselves of the service or facility. Requiring that certain qualifications or conditions be met does not rob an activity of its public character. The cases have shown that "public" means "that which is not private", leaving outside the scope of the legislation very few activities indeed.

Accordingly, any service offered by a government is a service that is "customarily available" to the public because, by its nature, government only has public relationships with persons.[93]

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[89] The Canadian Union of Public Employees has developed a program to educate their officers and stewards in race and ethnic relations in the work place.

[90] *Attis, supra* note 12.

[91] *Menghani, supra* note 64.

[92] *Rosin* v. *Canada (Canadian Forces)* (1990), [1991] C.C.E.L. 179 at 185, (*sub nom. Canada (Attorney General)* v. *Rosin*) 91 C.L.L.C. 16, 239, aff'g (1989), 10 C.H.R.R. D/6236 (C.H.R.T.).

[93] This argument is advanced by D. Greschner in "Why *Chambers* is Wrong: A Purposive Interpretation of 'Offered to the Public'" (1988) 52 Sask. L.R. 161 at 183. In *Berg, supra* note 64, the Supreme Court of Canada endorsed the liberal and purposive interpretation of services provided to the "public" by government or other bodies exercising powers conferred by statute. Lamer C.J.C. (at 356) stated: "In determining which activities of an institution are coverd by the [Human Rights] Act, one must take a principled approach which looks to the relationship created between the service or facility provider and the...user by the particular service or facility. Some services or facilities will create public relationships between the institution and the users, while

It is submitted that the duties of government bodies to refrain from racial harassment and other forms of unlawful discrimination extend beyond the avoidance of direct harassment of the clients with whom they deal directly. For example, a taxi licensing authority is clearly not at liberty racially to harass applicants for licences. However, what if applicants or recipients of a licence from the authority themselves engage in racial harassment against other taxi licensees, operators or users? Would the licensing authority be in breach of human rights legislation if it declined to investigate complaints of such harassment or refused to use its authority to suspend or deny an application for licences of those engaging in such harassment? I submit that such authorities are required by human rights legislation to use their powers, with due regard for the procedural requirements of both natural justice and the statute conferring their powers, to prevent racial harassment and other forms of discrimination on the part of the segment of the public that comes under its statutory supervision or control.

Another example of such government or quasi-government function is the licensing of businesses under the *Licensing of Trades and Businesses Act*.[94] Under s. 9(3)(b) of the *Act*, the Director may cancel a licence "if it is in the public interest to do so". Similar powers are available to a host of other licensing authorities, including the Board under the *Liquor Control Act*.[95] In the case of professional workers, the power to license, admit to or expel from membership, provide accreditation, etc. is frequently conferred by statute on a statutory professional body. For example, membership of the legal profession in Canada is controlled by an association created by the relevant provincial statute.[96] The governing body is empowered to discipline members by reprimands, fines and expulsion for misconduct.

All such government and quasi-governmental bodies provide services customarily available to the public, including the discipline and expulsion of licensees or members for misconduct.[97] It is submitted that the duty of such bodies under human rights legislation require the exercise of such supervisory and disciplinary powers where licensees or members are delinquent in their own duties under human rights legislation.

This is important in these days of fiscal restraint by governments. Human rights commissions, generally strapped for resources, may find it expedient to direct their educational activities and, where these fail, their complaints, to the host of licensing and regulatory bodies. Such bodies are mandated by statute to provide services to the public and, unless the statute expressly states otherwise, the provision of such

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others may establish only private relationships. Under the relational approach, the 'public' may turn out to contain a very large or a very small number of people". In *Berg*, the University's selective admissions process was held to be covered by the *Human Rights Act* because it applied to its own (albeit restricted) "public".

[94] *Licensing of Trades and Businesses Act*, R.S.A. 1980, c. L-13.

[95] *Supra* note 67.

[96] See *e.g.* the *Legal Profession Act*, S.A. 1990, c. L-9.1, ss. 47-83, specifying powers and procedures for expulsion or other discipline.

[97] The *Municipal Government Act*, R.S.A. 1980, c. M-26 gives local authorities power to license public accommodation, amusement centres, etc.

services must be in accordance with human rights legislation. Human rights commissions may find it more efficient to control racial harassment (and other forms of discrimination) by using their scarce resources to educate and require such public bodies to use their regulatory powers in furtherance of the objectives of human rights legislation.[98]

A serious defect in the human rights legislation of each Canadian jurisdiction lies in the limited scope of remedies available to boards of inquiry who find breaches of the legislation. This is illustrated in *Attis*, where the Court of Queen's Bench upheld the finding of discrimination against the school board but quashed a number of the remedial orders as *ultra vires*.

It is submitted that the inadequacy of remedies for systemic discrimination reflects, in part, the faulty analysis of the expression of racial hatred by the judiciary and legislators. When human rights legislation burgeoned in Canada in the 1960s and 1970s, the concept of racial (and other) discrimination was of intentional, deviant conduct perpetrated by identifiable individuals against identifiable individuals. This was reflected not only in the conduct deemed to be unlawful[99] but in the remedies available to adjudicative tribunals. From the lessons of *Griggs* v. *Duke Power Corp.*,[100] the Canadian courts and human rights tribunals developed the legal concept of indirect or systemic discrimination to expand the scope of unlawful conduct. In some cases, legislators responded by expressly incorporating systemic discrimination in their human rights statutes, while in other jurisdictions, the broad judicial interpretation sufficed.[101]

With one notable exception, the same measure of innovation did not go into the fashioning of remedies appropriate to deal with the newly-found concept of adverse-impact discrimination. The exception was the case *Action Travail des Femmes* v. *Canadian National Railway*[102] where the Supreme Court of Canada upheld the human rights tribunal's order that the respondent implement a hiring quota of women in non-traditional occupations, in which the representation of women in the Company was well below the national average. The *Canadian Human Rights Act*[103] empowers a tribunal to order a respondent to cease discrimination and take measures to prevent similar future practices. The Federal Court of Appeal set aside the order for a quota on grounds that it was not a preventive measure but designed to remedy past discrimination.

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[98] In some jurisdictions, a board of inquiry has broad powers to join a party to an inquiry. See *e.g. An Act to Amend the Human Rights Act*, S.N.B. 1985, c. 30, s. 20(4.1)(d).

[99] Early authorities such as *Mitchell* v. *O'Brien* (June 14, 1968), (Ont.H.R.C.) [unreported] *Ryan* v. *Chief of Police, Town of North Sydney* (December 1975) (N.S.H.R.C.) [unreported] limited unlawful discrimination to intentional acts of differentiation on the basis of race.

[100] *Griggs* v. *Duke Power Company* 28 L.Ed. (2d) 158 (U.S. 1971).

[101] For example, s. 10 of the *Ontario Human Rights Code* (*supra* note 84) was amended to include unintended "constructive" discrimination; in contrast, the *Alberta Individual's Rights Protection Act*, R.S.A. 1980, c. I-2, leaves the term "discriminate" undefined; the Supreme Court of Canada has ruled the term to include systemic discrimination.

[102] *Supra* note 82.

The Supreme Court of Canada reversed this decision, holding the quota to be preventive of future discrimination. The Court reasoned that the quota would prevent future discrimination by allowing the systemically-excluded group to prove their ability on the job and lay to rest the attitudinal problem of stereotyping that would tend to continue to exclude them but for the quota. The Court also saw preventive value in the quota as creating a "critical mass" of female employees sufficient to eliminate the problems of tokenism, marginalization and harassment that typically face small numbers of individuals from systemically-excluded minorities. The Court also saw prevention of future discrimination because the quota would reduce the impact of disguised intentional discrimination against female workers.

While the Supreme Court's decision in *Action Travail* represented an innovative approach to systemic remedies under human rights legislation, its impact on other human rights decisions seems to have been limited. This was predicted by R. Juriansz[104] who noted that Chief Justice Dickson was at pains to emphasize the special facts of the *Action Travail* case. It is also unclear the extent to which the language of provincial human rights statutes would permit a tribunal to order respondents to take measures to prevent future systemic discrimination. The human rights statutes of Alberta, British Columbia, Newfoundland, Prince Edward Island, Quebec and Yukon appear to confine tribunals to remedies for individuals identified in the complaint. For example, Alberta's *Individual Rights Protection Act* empowers a board of inquiry to order a respondent to "refrain in future from committing the same or any similar contravention".[105] Unlike the *Canadian Human Rights Act*, the Alberta *Act* makes no reference to systemic remedies and it is unlikely that the remedial power of Alberta tribunals extends to quotas or other affirmative action measures. Certainly, no Alberta Board of Inquiry has sought to impose such a remedy.

In contrast, the legislation of Manitoba, Ontario, Nova Scotia and Saskatchewan and, arguably, New Brunswick empowers tribunals to impose systemic remedies of the sort provided in the *Action Travail* case. However, the grudging endorsement of such power in the Supreme Court's judgment in that case suggests that the judiciary remains reluctant to impose systemic remedies beyond what is required to remedy the discrimination against identifiable individuals.

Legislative and judicial discomfiture at systemic remedies is further illustrated in the racial hatred case of *Attis*.[106] The complaint was made against the School Board that it condoned the dissemination of hatred against Jews by one of its teachers. No doubt aware of the systemic nature of the issue, the board of inquiry used its power to join as a party to the inquiry (at the request of the School Board) the provincial Department of Education.[107] The Department made no objection to

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[103] *Supra* note 72 at s. 41(2).

[104] R.G. Juriansz, "Recent Developments in Canadian Law: Anti-Discrimination Law, Part II" (1987) 19 Ottawa L. Rev. 667 at 684.

[105] *Individual's Rights Protection Act*, *supra* note 98 at s. 31(1)(b)(ii).

[106] *Supra* note 12.

[107] *Supra* note 98.

such designation. Finding the School Board in breach of the *Human Rights Act*, the tribunal ordered the Department of Education to take certain initiatives to improve and monitor race relations within the provincial school system. However, the *Act* empowers a tribunal to make an order of compliance with the *Act* only to a party found in violation of the *Act*.[108] The mere fact that a party is joined by the tribunal as a party to proceedings does not entitle a tribunal to order the party to comply with the *Act*.

The Court of Queen's Bench quashed the tribunal's order to the Department of Education. While one sympathizes with the policy basis of Gochnauer's criticism of the Court's judgment,[109] the appropriate target of criticism is the legislature for failing to enact clear powers and procedures that permit what the *Attis* tribunal attempted to do. Such proceedings would require due process for the party so joined, a requirement clearly absent in the *Attis* case.

The *Attis* case highlights the need for flexible remedial powers when power is allocated to and shared by different statutory authorities. The complainant in *Attis* properly directed his complaint against the School Trustees because they were the cause of, and had the power to remedy, the direct harm to the complainant. However, the statutory allocation of powers between the Trustees and the Department of Education prevented the tribunal from effecting the necessary systemic remedies to prevent similar discrimination in future. Such remedies were within the exclusive authority of the Department of Education and the remedial powers and the procedures of the *Human Rights Act* were inadequate to give effect to systemic remedies.

It is recommended that the human rights legislation of each Canadian jurisdiction grant remedial and procedural powers to boards of inquiry that will enable them to apply systemic remedies where legal authority is distributed among different agencies, even if one or more of such authorities was not a party to the original complaint. Naturally, if such an authority were subsequently joined to a complaint, it would be accorded the appropriate standards of due process.[110]

Gochnauer's criticism of the Court of Queen's Bench is more telling with respect to its quashing of the tribunal's order to the School Trustees to dismiss Mr. Ross from any non-teaching position found for him if he persisted in publishing his anti-Semitic writings. The Court found the restriction to be in breach of Ross's freedom of religion and expression under s. 2(a) and (b) of the *Charter* and not justifiable under s. 1 of the *Charter*. The latter finding contrasts with the Court's opinion on the tribunal's order to the Trustees to fire Ross from his teaching position. Evidently, the Court saw the danger of the expression of racial hatred by a teacher as warranting the limitation of freedom of expression while identical communications

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[108] *Supra* note 98 at s. 20(6.2).

[109] *Supra* note 13.

[110] In *Attis*, the difficulty encountered in enforcing the tribunal's order to the Department of Education could have been avoided if the Human Rights Commission had advised the complainant to join the Department of Education as a party to the complaint. It is well settled that government departments provide services available to the public. *Supra* note 64.

by a non-teaching employee of the School Board were viewed as insufficiently harmful to society.

I suggest that the Court displayed the flawed analysis of racial hatred inherent in the orthodox view discussed in the first section of this paper. Creaghan J. offers little argument but appears to endorse the starting point of the orthodoxy that the average Canadian is non-racist and can be relied upon to dismiss hate propaganda except in unusual circumstances. In this case, the Court accepted the evidence that children were susceptible to the hate propaganda of the authority figure of a school teacher, even when such expression was made outside the classroom. However, the Court saw no such danger when propaganda was spread by a non-teaching employee of the School Board.

As contended above, there is ample evidence of attitudes of racism and racial hatred throughout Canadian society. The danger of hate propaganda lies not in creating attitudes of racial hatred where none exist but in its creating an environment in which existing attitudes are articulated, legitimized, perpetuated and escalated. The social harm flowing from the perpetuation of attitudes of racial hatred is not merely the risk of escalation into expressions and acts of racial hatred but the perpetuation of barriers to the dismantling of systemic racial discrimination that is the goal of official public policy in Canada and more specifically of the *New Brunswick Human Rights Act*. Confined by the orthodox analysis, Creaghan J. misjudged the potential adverse impact of hate propaganda. Indeed, his judgment arguably gives some legitimacy to any hate propaganda that Ross might disseminate as a non-teaching employee of the Board.

It has been argued in this section that human rights legislation in Canada has the potential for more effective control of hate propaganda and other forms of racial harassment by requiring government and quasi-governmental authorities to meet their statutory human rights obligations in the provision of services to the public. If in the exercise of their statutory licensing, supervisory, regulatory or fiscal powers, such bodies condone the expression of racial hatred or harassment (or other discrimination), they are liable under human rights legislation. By focussing its educational programs and complaint procedures on such authorities, human rights commissions can tap into systems of supervision and sanctions that promise to be rather more effective than direct action by human rights commissions and boards of inquiry against the actual perpetrators of racial hatred and harassment.

IV. Barriers to Change

It is official public policy in Canada that full participation in society and access to its opportunities and benefits should not depend on such factors as race, colour and ethnic or national origin. It has been argued above that the public expression of racial hatred and other verbal harassment undermines the law and programs that give effect to such policy. It has been argued, too, that the legal control of racial hatred would be more effective if existing criminal and human rights law were applied to persons and authorities that condone the expression of racial hatred by failing to exercise their control or influence over the perpetrators.

Notwithstanding the practical challenges of such an approach, a significant barrier to the implementation of such a proposal resides in the agenda of corporate capitalism, which dominates public policy in Canada.[111] I suggest that the true aim of public policy in Canada is not the elimination of the public expression of racial hatred but its management at a level that serves the perceived interests of corporate capitalism.

Earlier in this paper, we discussed the historic role of officially fomented or condoned racial hatred in advancing the interests of feudal and colonial-capitalist elites. Such influence is apparent in contemporary corporate-capitalist societies yet with the contradictions noted by R. Miles.[112] Capital accumulation in the global economy of contemporary corporate capitalism appears to require transnational labour mobility and the destruction of traditional societies in order to obtain access to raw materials, natural resources, cheap labour and markets. Armed aggression plays a key role in facilitating access to the foregoing and taxpayers must be persuaded to support corporate interests through vast military expenditures. Modern corporate capitalism also appears to require double-digit levels of unemployment throughout the global economy.

Some of the requirements of corporate capitalism require a measure of racial harmony and peaceful co-existence. Canada's economic development has depended on immigration and a quality of race relations sufficient to support efficient production. Accordingly, the corporate agenda is served by law and policy geared to containing the expression of racial hatred to a level that does not threaten public order, stable government and productive employment relations. The recommendations of the Cohen Committee[113] serve well the corporate agenda of maintaining public order.

Yet, paradoxically, the interests of contemporary corporate capitalism appear to be served by some measure of racial hatred provided it is not too great a threat to public order and efficient production. In Canada, aboriginal land claims and resistance to such programs as the Quebec Hydro James Bay project threaten those who define the interests of corporate capitalism in Canada. The existing level of racial hatred against aboriginal peoples in Canada, fertilized by its ongoing public expression, serves to relegate the importance of "aboriginal interests" in the public mind to the benefit of opposing corporate interests. Logging and mining interests are other corporate interests that benefit from the low esteem in which aboriginal people and their interests are held. The expression of racial hatred helps to perpetuate such low esteem.

Similar racial hatred supports corporate interests outside Canada where the destruction of rain forests and other natural habitats are rendered politically more palatable by the low regard that white societies have for the non-white populations that bear the brunt of environmental devastation.

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[111] The power of the corporate agenda is illustrated by the relative ease with which the GST was introduced and with which the Free Trade Agreement and NAFTA were ratified by Canada in the face of strenuous public opposition. Also, corporate interests have been successful in resisting effective employment equity legislation in Canada. The federal *Employment Equity Act* (*supra* note 2) has insufficient teeth and scope to be of any relevance. See *A Matter of Fairness*, *supra* note 2.

[112] R. Miles, *Racism* (London: Routledge, 1989) at 121-31. The author observes that, while the needs of capitalism are served by the "racialisation" of the population, racism and racial hatred do not flow automatically from capitalist productive relations.

[113] *Supra* note 4.

When corporate interests demand military intervention in Central America or the Middle East such aggression and the vast expenditures of taxpayers' money are "justified" by an appeal to racism and xenophobia that appears to have been present throughout recorded history.

Finally, on the domestic front, corporate capitalism appears to require double-digit levels of unemployment and high levels of job insecurity. When politicians can blame excessive levels of immigration for the failings of corporate capitalism, public scrutiny is diverted from the inherent defects of corporate capitalism and its political agenda. Part of that agenda is the depression of wages and it is conventional wisdom among Canada's corporate elite that affirmative action programs add to the wage bill and should be resisted. The ability to use immigrants as scapegoats for Canada's economic ills is greatly enhanced by a strategic stirring of the pot of racial hatred, a ploy used to great effect by British Columbia politicians against Canadians of Asian descent,[114] and recently by Diane Mirosh, M.L.A., when she was the provincial Minister responsible for the Alberta Human Rights Commission.

As Miles reminds us, there is a contradiction in the interests of corporate capitalism with respect to race relations and the public expression of racial hatred.[115] Furthermore, while such interests loom large in the determination of Canadian public policy, they are by no means the sole interest represented. While a dominant force in the determination of public policy, corporate interests operate in the context of a pluralist society and must negotiate such policies with other interest groups.

An example of this is the impact that feminist groups have had in challenging the patriarchy that has for so long served corporate interests in Canada and subjected women to high levels of domestic and other violence at the hands of men, economic dependence on men, discrimination in the entry to and rewards of the workplace, and levels of poverty much higher those of men.[116] Recently, political pressure by women's groups induced Parliament to amend the criminal law to render it substantially more difficult for a man accused of raping a woman to introduce evidence of the women's prior sexual activity. The so-called "rape shield" law was testimony to the ability of traditionally weaker pressure groups to influence public policy.

However, as Michael Smith observes,[117] the subsequent striking down of the "rape shield" law as unconstitutional illustrates the power that vested interests have to protect such interests under the guise of impartial interpretation of the law. The author notes that the majority of the Supreme Court took no heed of the traditionally inferior position of women in Canadian society and their experience of violence at the hands of men. This oversight enabled the majority to weigh the competing interests of the accused and the victim without reference to the social reality of women. Smith argues that the resulting decision, deduced rationally from legal rules and principles, was an example of the ideological manipulation of legal discourse to produce a result favourable to the dominant group while accepted as legitimate by the disadvantaged group.

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[114] See *supra* note 27 for accounts of the official scapegoating of Oriental Canadians.

[115] Miles, *supra* note 110.

[116] See *e.g.* C.M. Hill, "Women in the Canadian Economy" in R. Laxer, ed., *(Canada) Ltd.: The Political Economy of Dependency* (Toronto: McClelland and Stewart, 1973) 84.

[117] M.D. Smith, "Language, Law and Social Power: *Seaboyer; Gayme* v. *R.* and A Critical Theory of Ideology" (1993) U.T.Fac.L.Rev. 118.

The "rape shield" case illustrates the task facing human rights advocates who seek effective legal control of the public expression of racial hatred. While corporate interests are served by a measure of control of racial hatred, much of the corporate agenda appears to be served by a "manageable" level of racial hatred and racism in Canada. In negotiating the "manageable" level of officially sanctioned racial hatred in Canada, human rights advocates must be prepared to do battle with vested interests just as women's groups had to do in the enactment and the subsequent judicial striking down of the "rape shield" law.

Those seeking effective legal control of the expression of racial hatred and the related racial discrimination in Canada have to contend with the ideological devices and rhetoric of freedom of expression and religion just as women faced the rhetoric of the protection of the accused's right to due process in the "rape shield" case. In each case, those opposed to change in the power relations ignore the historic oppression of the groups seeking greater legal protection. Nevertheless, in each case, there is evidence of some judicial understanding that the law must begin to acknowledge Catherine McKinnon's recognition that individual acts of oppression express broader social practices.[118] In the "rape shield" case, the minority opinion of L'Hereux-Dubé J. demonstrated a judicial awareness of the historic context of the oppression of women at the hands of men. In the *Keegstra* case, Chief Justice Dickson appeared to recognize the endemic and longstanding character of racial hatred in Canada and the importance of the various *Charter* rights and freedoms that are designed to remedy some of the current social inequality and oppression attributable to such endemic racism. However, such views are far from firmly entrenched in the judiciary and human rights advocates must continually advance analyses of racism and sexism that recognize the traditional systems of racial and sexual oppression in Canada. They must recognize, too, that the exclusive focus of the law on extreme acts of violence or oppression may divert the law from challenging the acts of systemic oppression.

Those who perceive that they benefit from the status quo are typically reluctant to allow the law to scrutinize their own contribution to the systemic oppression. It is such reluctance that will be the main obstacle to the application of existing criminal and human rights law to those who have the power to resist the expression of racial hatred but, instead, condone it. It is rather more comfortable for such persons to direct the law to the activities of a few extremists. Then the law can be seen to act on individual acts of oppression without changing the oppressive system itself or threatening those who benefit from the status quo. This is the barrier and the suggested analysis is just one of the ways of challenging it.

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[118] C.A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Cambridge, Massachusetts: Harvard University Press, 1987).