

‘Reasonable limits on the expression of hatred’: Mark Steyn and the Canadian Human Rights Commissions

Matthew Omolesky

I.

On 20 October 2006, the website of the Canadian weekly current affairs magazine *Maclean’s* featured an article entitled ‘The future belongs to Islam,’ excerpted from the conservative polemicist Mark Steyn’s book *America Alone: The End of the World as We Know It*. [1] This provocative opinion piece presented a vision of European ‘demographic decline; the unsustainability of the social democratic state; and civilisational exhaustion,’ all of which paved the way for the continent’s ‘remorseless transformation into Eurabia.’ [2] Since ‘the salient feature of Europe, Canada, Japan and Russia is that they’re running out of babies,’ Steyn contended, ‘Europe has age and welfare,’ but ‘Islam has youth and will.’ [3] The article ended ominously, with a quotation from the Norwegian imam Mullah Krekar, who had recently told the Oslo newspaper *Dagbladet*: ‘We’re the ones who will change you [Europeans]. Just look at the development within Europe, where the number of Muslims is expanding like mosquitoes. Every Western woman in the EU is producing an average of 1.4 children. Every Muslim woman in the same countries is producing 3.5 children... Our way of thinking will prove more powerful than yours.’ [4] One question of Steyn’s, concerning this allegedly existential demographic and geopolitical threat, was meant to linger: ‘How does the state react?’ Ironically, it would be how the state reacted to Steyn – rather than immigration – that would take centre stage.

One key non-state reaction to Steyn’s article was that of Mohamed Elmasry, president of the Canadian Islamic Congress (CIC), who eventually submitted complaints against *Maclean’s* and its editor, Kenneth Whyte, to the human rights commissions of British Columbia and Ontario, as well as the federal Canadian Human Rights Commission. A CIC press release described ‘The future belongs to Islam’ and other similar articles by Steyn as ‘flagrantly Islamophobic’ works that could subject ‘Canadian Muslims to hatred and contempt,’ while the organisation’s legal counsel Faisal Joseph lamented, ‘In Canada, we have 750,000 law-abiding Muslims. When you read that article, it sounds to some people [like] there’s an attack from the ‘Muslim’ world against the ‘non-Muslim’ world. We take real issue with that type of

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characterisation and the implications of it.’ [5] The magazine’s relatively measured response was that ‘the piece was a commentary on important global political issues’ and ‘not in any sense Islamophobic.’ [6] Steyn, less measured, viewed the complaints procedure as a backdoor attempt at censorship. The cover of the paperback edition of *America Alone* would feature the label ‘Soon to Be Banned in Canada,’ [7] and Steyn would opine that in modern Canada even the cliché ‘You’re entitled to your opinions’ had become ‘obsolescent.’ [8] In a letter to *Maclean’s*, the Canadian Human Rights Commission’s Chief Commissioner Jennifer Lynch soon shot back, ‘History has shown us that hateful words sometimes lead to hurtful actions that undermine freedom and have led to unspeakable crimes. That is why Canada and most other democracies have enacted legislation to place reasonable limits on the expression of hatred.’ [9] The origin, climax, and denouement of this controversy are by no means merely of parochial interest for Canadians. The issue of whether, as Commissioner Lynch argued in the affirmative, it is ‘justifiable to restrict expression to prevent exposing citizens to hatred’ [10] is a matter of immense gravity in this young but tumultuous century.

Anglo-Saxon jurisprudence has long recognised the fundamental importance of ‘Miltonic freedom’ – described by the British scholar Stephen Sedley as ‘the freedom to utter criticism or heresy without fear of suppression or reprisal from those who may be angered or embarrassed by it’ [11] – in fostering a robust marketplace of ideas. It was this marketplace of public opinion that the American Judge Learned Hand described in his 1943 opinion *U.S. v. Associated Press*, wherein he addressed the presupposition that ‘right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection.’ [12] ‘To many, this is, and always will be, folly,’ Hand acknowledged, ‘but we have staked upon it our all.’ [13] Those in common law countries often take such an attitude for granted, and are frequently shocked by any deviation therefrom, but there are nevertheless profound consequences that result from expansive notions of freedom of speech.

It is not just in the realm of municipal law that the tension between freedom of expression and freedom from the invidious effects of hateful speech are increasingly important; international human rights jurists must simultaneously grapple with the matter. This is, after all, an era in which cartoons lampooning the prophet Mohammed published in the Danish *Morgenavisen Jyllands-Posten* can spark deadly riots from the Levant to Central Asia; in which *Newsweek* reports of (ultimately unfounded) allegations of Koranic desecration at Guantánamo Bay

can adversely impact international relations; and in which the symbolic relocation of a Soviet war memorial in Tallinn can serve to destabilise an entire region of Europe. Given the information revolution of the late twentieth and early twenty-first centuries, the power of words and symbols may never have been greater. For this reason, western democracies are increasingly, as Commissioner Lynch correctly noted, 'enact[ing] legislation to place reasonable limits' on certain kinds of speech. At the international level, to take but one example, the UN Human Rights Council on March 29, 2008 passed (thirty-two to zero, with fifteen abstentions) a resolution calling for the body's free speech expert to police negative comments on Islam so as to, in the words of Egypt's Ambassador Sameh Shoukry, forestall 'some of the worst practices that incite racial and religious hatred.' [14] One of the many hostile western reactions to this vote was that of Canada, whose representative complained that in such a system 'Instead of promoting freedom of expression the Special Rapporteur would be policing its exercise.' [15] Yet Canada's very own national and provincial human rights commissions provide their own policing of free expression, albeit in an adversarial context; the objection to the Special Rapporteur's potential new role was essentially procedural, not philosophical. Similar European objections, given the broad hate speech legislation enacted there, present similar contradictions.

One should not, however, automatically mistake this for a twenty-first century issue of first impression or the internal contradictions of various western approaches as merely the product of decadent modern sensibilities. In the year 1811, for example, Chief Justice James Kent of the Supreme Court of New York, author of the revered *Commentaries on American Law*, was willing to cast 'Miltonic freedom' aside in his opinion in *People v. Ruggles*. Faced with a blasphemer who had uttered 'false, feigned, scandalous, malicious, wicked' words, [16] Justice Kent took it for granted that the 'free, equal, and undisturbed, enjoyment of religious opinion, whatever it may be, and free and decent discussions on any religious subject, is granted and secured.' [17] Still, 'to revile, with malicious and blasphemous contempt, the religion professed by almost the whole community, is an abuse of that right,' [18] and Justice Kent did not stop with this majoritarian analysis. He continued: 'Nor are we bound, by any expressions in the constitution, as some have strangely supposed, either not to punish at all, or to punish indiscriminately the like attacks upon the religion of *Mahomet* or of the grand *Lama*.' [19] (Interestingly, such a solicitous opinion was written at the height of the depredations of the Barbary corsairs). It was concluded, '*the liberty of conscience hereby granted*, shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace and safety of this state.' [20] Justice Kent, at least, thought it clear how the

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state should react to hate speech, though most of his American judicial successors would come to vociferously disagree.

As evidenced by the *Ruggles* case, the dilemma presented by the Mark Steyn-related Canadian human rights commission procedures is an age-old one. The right to express oneself, and the right to be free from the consequences of incitement to ethnic or religious hatred, is often at odds. In such tenebrous scenarios, Adam Smith held in his *Theory of Moral Sentiments* (1759), it is not enough to rely on solely 'the soft power of humanity' for solutions, but rather 'reason, principle, conscience, the inhabitant of the breast, the man within, the great judge and arbiter of our conduct.' [21] As both sides in the *Maclean's* dispute appeal to such devices, it is incumbent on the analyst to tread carefully and conscientiously. Section II below will begin generally, addressing broad trends in freedom of expression and its limitation in an international and comparative perspective. Section III is concerned with the origin and current nature of the human rights commissions in Canada, thereby setting the stage for a specific treatment of the Mark Steyn cases (Section IV) and a final consideration of their implications (Section V). Admittedly, the global picture of governmental efforts to ensure both freedom of speech and freedom from incitement of hatred resembles Horace's 'sick man's dream,' 'shaped so that neither foot nor head can be assigned to a single shape.' [22] That being the case, a consideration of the *Maclean's* controversy and its broader implications is as good a place as any to attempt to make sense of this confounding legal, political, and moral landscape.

II.

In July 1789, shortly after the storming of the Bastille prison, the French National Assembly set up various constitutional committees to prepare a draft of the *Déclaration des droits de l'Homme et du citoyen* (Declaration of the Rights of Man and Citizen). In light of excessive 'bickering over first principles' [23] during the 20 August discussion over twenty-four proposed articles, the deputies would, one week later, vote to table further debate and provisionally adopt those seventeen articles which had already been approved. This document, although 'stunning in its sweep and simplicity,' [24] was nevertheless a compromise between two ideologically distinct camps, one composed of more ardent revolutionaries, the other adhering to monarchist, Anglophile, and pragmatic principles. The Comte de la Blache belonged to the latter party and, concerned about the legitimacy and workability of the revolutionary cause, stated that 'Nothing is more dangerous than

to give people ideas of an indeterminate liberty while leaving to one side an account of their obligations and duties.' [25] Try as revolutionary leaders like the Marquis de Lafayette might to follow the American example of 'indeterminate liberty,' La Blache opposed such a project, later adding, 'We should not forget that the French are not a people who have just emerged from the depths of the woods to form an original association.' [26] History weighed the pragmatists down, forcing them in the direction of balancing rights and duties, not emulating American individualistic idealism.

Thus the finalised version of the *Déclaration*, as it relates to the relevant matter of freedom of speech, provided in soaring language that '*Nul ne doit être inquiété pour ses opinions* (No one shall be disquieted on account of his opinions)' (Article 10), and that '*La libre communication des pensées et des opinions est un des droits les plus précieux de l'homme; tout citoyen peut donc parler, écrire, imprimer librement* (The free communication of ideas and opinions is one of the most precious of the rights of man; each citizen may, then, speak, write, and print with freedom)' (Article 11). Yet the pragmatists and monarchiens introduced limiting clauses to each right. Article 10 allows opinions '*pourvu que leur manifestation ne trouble pas l'ordre public établi par la loi* (provided their manifestation does not disturb the public order established by the law);' Article 11 allows for individuals to freely communicate '*sauf à répondre de l'abus de cette liberté dans les cas déterminés par la loi* (but [they] shall be responsible for abuses of this freedom as shall be determined by the law).' These limitations distinguished the *Déclaration* from its counterpart across the Atlantic, the Bill of Rights, which came into effect two years later and which provided simply that 'Congress shall make no law...abridging the freedom of speech, or of the press' without any explicit reservations on the part of the state as to the *ordre public*. This French Revolutionary primacy of 'public order,' together with the notion of 'responsibility for abuses of this freedom [of speech],' would have resonance for centuries to come.

When the United Nations adopted the Universal Declaration of Human Rights (UDHR) in 1948, it looked to the French Revolutionary *Déclaration* for inspiration; indeed 'the echo between the two documents is unmistakable.' [27] Article 19 of the UDHR provides that 'Everyone shall have the right to freedom of expression; this right shall include freedom to...impart information and ideas of all kinds, regardless of frontiers,' but later (in Article 29) introduces the caveat that 'In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due

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recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.’ More generally, the UDHR declares, ‘All are entitled to equal protection... against any incitement to...discrimination’ (Article 7).

The International Covenant on Civil and Political Rights (ICCPR), a United Nations treaty (itself based in large part on the UDHR) that came into effect in 1976, includes similar language. Article 19 of the ICCPR lays out ‘the right to hold opinions without interference’ and ‘the right to freedom of expression’ (the latter of which ‘shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.’) The ICCPR is more explicit in its mention of ‘duties’ and ‘responsibilities,’ thereby allowing ‘certain restrictions’ for ‘respect of the rights or reputations of others’ and ‘the protection of national security or of public order (*ordre public*), or of public health or morals’ (Article 19). Article 20 adds: ‘Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.’ With respect to this last provision, the jurist Manfred Nowak has acknowledged that ‘the legal formulation...is not entirely clear,’ but what the delegates likely envisioned was the prevention of ‘public incitement of racial hatred and violence within a State or against other States and peoples.’ [28] Additionally, the Convention on the Elimination of All Forms of Racial Discrimination (which entered into force in 1969) requires through Article 4 that state parties ‘declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin.’ This last treaty, it has been noted, ‘Unlike the more universal human rights instruments... lists freedom of expression in a cursory fashion, seemingly as an afterthought.’ [29]

At the regional level, the European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted under the aegis of the Council of Europe in 1950) in its Article 10 guarantees a ‘right to freedom of expression’ which includes the ‘freedom to hold opinions and to receive and impart information and ideas without interference by public authority,’ but lays out more explicit caveats, allowing for

formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security,

territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Summa summarum, the legacy of the pragmatist drafters of the *Déclaration des droits de l'Homme et du citoyen* – with their careful balancing of ‘the most precious rights of man’ with the necessities of *ordre public*, and the emphasis on responsibility for the consequences of an ‘abuse of freedom’ – is clearly evident in today’s international human rights framework as it relates to freedom of speech. That the French Revolution itself descended into Terror, described by Deputy Jean Lambert Tallien in 1794 as ‘a disturbance of all ideas,’ ‘an overthrow of all affections,’ and ‘a veritable disorganisation of the soul,’ [30] wherein thousands of *citoyens* were indeed ‘disquieted on account of [their] opinions,’ is an issue of only tangential relevance here. What matters is the subsequent widespread international acceptance of the normative assumptions of the *Déclaration’s* drafters, particularly in light of the post-World War Two reaction to the enormities of the Holocaust and concerns about the rise of neo-Fascism in Europe. It is now necessary to plumb the legal depths further to see how the conflicting principles of free expression and suppression of invidious hatred are applied at the domestic level, and how these applications are in turn viewed by domestic and international courts.

Numerous western democracies have enacted statutes aimed at controlling expression rising to the level of hate speech. Dominic McGoldrick and Thérèse O’Donnell have pointed out that

Germany and Israel, among other countries, ban the Nazi Party and its descendants, as well as prohibiting other political parties whose programs include racial hatred, racial separation, and racial superiority...Canada, Germany, and France, along with others [including Austria, Belgium, Lithuania, Spain, and Switzerland] permit sanctions against those who would deny the existence of the Holocaust...France imposes fines with some frequency on public utterances espousing the racial or religious inferiority of some groups...The Netherlands outlaws public insults based on race, religion, or sexual preference. [31]

McGoldrick and O’Donnell continue, noting that Commonwealth and common law countries like

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South Africa, New Zealand, Australia, Canada, and the United Kingdom... follow the mandates of Article 20(2) of the International Covenant on Civil and Political Rights, and Articles 4(a) and 4(b) of the Convention on the Elimination of all Forms of Racial Discrimination, by making it a crime to engage in the incitement of racial, religious, or ethnic hatred or hostility. [32]

It was inevitable that these wide-ranging and potentially overbroad laws would be challenged by those running afoul of them; courts would have to determine whether punishments for those engaging in allegedly hostile speech fell within the governments' margin of appreciation.

One such landmark case, which appeared in the European Court of Human Rights, was *Jersild v. Denmark*, dealing with a Danish penal statute that was argued to have impinged on the free expression provisions of the European Convention on Civil Rights' Article 10. [33] In 1985 Jens Olaf Jersild, a journalist who had interviewed three youths with openly racist views about Danes of African descent, found himself subject to a statute requiring fine or imprisonment for 'Any person who, publicly or with the intention of disseminating it to a wide circle ('videre kreds') of people, makes a statement, or other communication, threatening, insulting or degrading a group of persons on account of their race, colour, national or ethnic origin or belief shall be liable to a fine or to simple detention or to imprisonment for a term not exceeding two years.' [34] (The youths themselves were duly convicted.) Jersild's challenge to the conviction failed in the Danish appellate court in 1988 and in front of the Supreme Court in 1989; the European Commission on Human Rights then referred the case to the European Court of Human Rights, which rendered judgment in 1994. The Danish government had 'contended that the applicant had edited the... [news] item in a sensationalist rather than informative manner and that its news or information value was minimal,' [35] but the Court, analysing Article 10, disagreed. The role of the Court in these scenarios is to 'look at the interference complained of in the light of the case as a whole and determine whether the reasons adduced by the national authorities to justify it are relevant and sufficient and whether the means employed were proportionate to the legitimate aim pursued.' [36] In this case, the Court found, Jersild's 'conviction and sentence were not sufficient to establish convincingly that the interference thereby occasioned with the enjoyment of his right to freedom of expression was "necessary in a democratic society"; in particular the means employed were disproportionate to the aim of protecting "the reputation or rights of others."' [37] Given that any 'punishment of a journalist for assisting in the dissemination of statements made by another person

in an interview would seriously hamper the contribution of the press to discussion of matters of public interest,' Jersild's conviction constituted a breach of Article 10. [38] Though of course not directly relevant to the Steyn cases before the various human rights commissions in Canada, the European principle of journalistic freedom to disseminate information from third parties is noteworthy, since some of Steyn's more incendiary passages (e.g. the infamous 'number of Muslims is expanding like mosquitoes' comment) are in fact quotations from various sources. It should also be added that Jersild was not without dissenting opinions. Judges Ryssdal, Bernhardt, Spielmann, and Loizou produced a joint dissent insisting that 'media too can be obliged to take a clear stand in the area of racial discrimination and hatred' [39] and that the 'protection of racial minorities cannot have less weight than the right to impart information.' [40] Another dissent, authored by Judges Gölcüklü, Russo, and Valticos, stood for the proposition that the hate speech by the three young men in the aired interview had 'to be counterbalanced' by a responsible journalist. [41]

Given the rise in neo-Nazism in Western Europe, it was likewise inevitable that free speech issues should arise in the area of specific state prohibition of Holocaust denial. The stand-out case in this area remains *Faurisson v. France*, a 1996 Human Rights Committee opinion that addresses France's 'Gayssot Act,' which 'makes it an offence to contest the existence of the category of crimes against humanity as defined in the London Charter of 8 August 1945, on the basis of which Nazi leaders were tried and convicted by the International Military Tribunal at Nuremberg in 1945-46.' [42] Robert Faurisson, a former professor and Holocaust denier, faced private criminal action in France, with the ensuing judgment upheld in the French Court of Appeal and Court of Cassation. He filed a communication to the Human Rights Committee alleging a violation of the ICCPR (specifically Article 19, though he actually failed to invoke any provision in the communication). The Committee, without much trepidation, found that 'the restriction served the respect of the Jewish community to live free from fear of an atmosphere of anti-Semitism,' [43] 'was intended to serve the struggle against racism and anti-Semitism,' [44] and thus Faurisson's conviction 'did not encroach upon his right to hold and express an opinion in general, rather the court convicted Mr. Faurisson for having violated the rights and reputation of others.' [45] Whereas the European Court of Human Rights was willing to view Jersild's actions as done in good faith, Faurisson was no doubt seen as having unclean hands, and the Gayssot Act was as applicable to him as the Danish hate speech law was to the three racist youths Jersild interviewed.

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In the context of offenses against religious sensibilities, the case of *Suszkind v. Israel* offers another look at the balancing approach of courts to issues of speech and incitement (though it involves municipal, not international, law). In 1997, the Israeli activist Tatyana Suszkind entered Hebron, carrying with her posters not unlike ‘Danish cartoons’ *avant-la-lettre* (depicting a pig wearing a Muslim head-dress with the Arabic and English caption ‘Mohammed’); she was detained by Israeli police and eventually convicted under Section 173 of the Israeli Penal Code for ‘attempting to hurt religious feelings.’ [46] The conviction was upheld in the Israeli Supreme Court a year later, on the grounds that, as Amnon Reichman put it, ‘it is difficult to see how distribution of such posters in Hebron, given the social context of occupation, would not lead to riots,’ and thus ‘the state can properly treat Suszkin’s actions as an attempt to violate order and peace of the kind that should not be protected by the constitutional order.’ [47] In a straightforward balancing act between individual interests and the *ordre public*, the latter of which was viewed through the prism of social context, the Supreme Court saw itself as determining ‘the outer limits of judicial (and statutory) tolerance to offensive speech’ in Israel. [48]

Cases like *Jersild*, *Faurisson*, and *Suszkin*, though unrelated to the Steyn cases in Canada, illustrate many of the normative justifications for restrictions of incitement to hatred, as well as international attempts to define the outer boundary of acceptable speech. Dealing as they do with the journalistic context (*Jersild*), the application of a statute clearly designed to prevent a specific social harm (*Faurisson*), and the effects of religious insensitivity on public order (*Suszkind*), these cases arguably speak to a broad international trend of balancing the importance of good faith journalism’s requirement of freedom of expression with the potential for socio-political destabilisation created by hate speech. This is an essentially utilitarian approach, involving something not unlike the ‘felicific calculus’ adopted by the British philosophers Jeremy Bentham and William Paley, wherein civil liberty represents ‘the not being restrained by any law, but what conduces in a greater degree to the public welfare’ [49] (in this case, obviating threats to public order).

On the other end of the western democratic free speech spectrum is the United States, where convictions like those in *Faurisson* and *Suszkind* would almost certainly have been quashed. There is thus ‘a gap in systems that presumably are both committed to basic democratic principles.’ [50] The United States, on the other side of that gap, has consistently safeguarded its First Amendment when signing treaties, most notably when ratifying the ICCPR in 1992 with a reservation

to Article 20 stating that it 'does not authorise or require legislation or other action by the United States that would restrict the right to free speech and association protected by the Constitution and laws of the United States.' Although freedom of speech and of the press in America is occasionally (as anywhere) a matter of intense controversy, some overall principles can be delineated.

Given the above outlined international approach to hate speech legislation, it is clear that the 'United States is an exception with its doctrine that speech may not be prohibited, regardless of its offensiveness, unless there is a clear and present danger that it will incite imminent unlawful action.' [51] With few exceptions, [52] the United States Supreme Court has in recent years, to quote Ronald Krotoszynski,

embraced both marketplace [of ideas] metaphor and the notion that political speech is a special concern of the First Amendment. Its decisions also have recognised that the First Amendment protects individual autonomy, even when individuals or corporations elect to exercise that autonomy in ways inconsistent with the best interests of the community (or, for that matter, their own best interests). [53]

Even enactments as seemingly innocuous as university discriminatory harassment policies have been struck down by certain American courts, on the grounds that those institutions could not 'proscribe speech simply because it was found to be offensive, even gravely so, by large numbers of people,' [54] and that it was inappropriate to 'entrust guardianship of the First Amendment to the tender mercies of [the university's] discriminatory harassment/affirmative action enforcer.' [55] In the famous 1977 Skokie controversy, a predominantly Jewish Illinois town's attempts to prevent a National Socialist Party of America demonstration were found to be unconstitutional, [56] a result that would of course be vanishingly unlikely in Europe. This general attitude stems from a concern about governmental ability to control political discourse, and the potential temptation to 'use the law to outlaw all dissent or the expression of minority opinion,' a decidedly 'Orwellian perspective' that 'dominates US thinking about the First Amendment.' [57]

Critics of American First Amendment jurisprudence have predictably asserted that 'the U.S. political system incorporates more than adequate restraints on the power of government and less than adequate attention to the moral project of racial and material equality.' [58] Other international approaches may very well have the inverse deficiencies. What is important at this juncture, rather than to advance

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any value judgment, is to recognise the distinct bifurcation in approaches to hate speech between western Europe and Israel on the one hand and the United States on the other, a bifurcation that has been inevitable since the days of the French Revolutionary *Déclaration*, when Comte de la Blache deemed it ‘dangerous...to give people ideas of an indeterminate liberty,’ and eschewed the American constitutional example (excepting Justice Kent, whose *Ruggles* opinion carries little or no weight today). It is now possible to turn to Canada (occupying as it does that liminal space between the United States and Europe, and between common law and civil law), its overall human rights regime, its efforts to restrict hate speech, and then specifically the Mark Steyn cases.

III.

Canada has been described as ‘one of the most distinctive rights cultures in the world,’ [59] one which partakes of a common law heritage shared with the United States, yet which also has developed a jurisprudential approach to freedom of expression that ‘represents a marked – and quite intentional – break from the free speech tradition of the U.S. Supreme Court.’ [60] In the following discussion of the relatively expansive (at least in relation to the United States) restrictions of hate speech in Canada, it is important to keep in mind the country’s so-called ‘four foundational constitutional principles’ described in the landmark 1998 Canadian Supreme Court case *Reference re Secession of Quebec*: ‘federalism, democracy, constitutionalism and the rule of law, and respect for minority rights.’ These are ‘defining principles [that] function in symbiosis,’ and ‘[n]o single principle can be defined in isolation from the others, nor does any one principle trump or exclude the operation of any other.’ [61] The last of these constitutional pillars, ‘respect for minority rights,’ grows out of the ongoing Canadian ‘modern multicultural experiment’ [62] wherein government action ‘designed to advance other social objectives, such as equality and cultural pluralism’ [63] may take precedence over free speech concerns.

It is impossible to understand Canada’s jurisprudence in this field without at least a brief consideration of the legal historical context. Over the course of the twentieth century, Ross Lambertson has observed, the rise of various civil liberties and egalitarian rights groups in Canada effectuated a shift in public discourse from ‘British liberties’ to broader notions of ‘human rights,’ [64] leading to a by now familiar arrangement. The Canadian Charter of Rights and Freedoms (1982), ensures that everyone possesses ‘freedom of thought, belief, opinion and expression,

including freedom of the press and other media of communication' (Section 2), but such fundamental rights are subject to 'reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society' (Section 1). Balancing between individual rights and social interests is thus built in to the constitutional framework. Section 2 has been interpreted broadly by the Supreme Court, most notably in *Dolphin Delivery*, wherein Justice William Rogers McIntyre insisted that freedom of expression 'is one of the fundamental concepts that has formed the basis of the political, social, and educational institutions of western society,' and that representative democracy 'depends upon its maintenance and protection.' [65] Nonetheless, three years later Chief Justice Brian Dickson penned a majority opinion in *Irwin Toy*, which, while acknowledging that free speech is 'little less vital to man's mind and spirit than breathing is to his physical existence,' [66] featured a passage regarding Canada's free speech principles worth quoting at length:

(1) seeking and attaining the truth is an inherently good activity; (2) participation in social and political decision-making is to be fostered and encouraged; and (3) the diversity in forms of individual self-fulfilment and human flourishing ought to be cultivated in an essentially tolerant, indeed welcoming, environment not only for the sake of those who convey a meaning, but also for the sake of those to whom it is conveyed. In showing that the effect of the government's action was to restrict her free expression, a plaintiff must demonstrate that her activity promotes at least one of these principles. [67]

(In a dissent, Justice McIntyre was content to rely on the rather American principle that 'freedom of expression, whether political, religious, artistic or commercial, should not be suppressed except in cases where urgent and compelling reasons exist and then only to the extent and for the time necessary for the protection of the community.') [68] Yet Chief Justice Dickson's reference to a 'tolerant, indeed welcoming, environment' is buttressed by the foundational minority rights pillar and its 'symbiotic' relationship with the constitutionalist pillar. Thus, as Ronald Krotoszynski notes, 'As the social cost of a right increase, the willingness of judges strictly to enforce that right decreases.' [69] Hence the increased potential for restriction of speech in Canada, despite free speech's recognised importance.

This judicial-political social balancing mindset is a product of the wellspring of Canadian history, and the infamous 'Padlock Law' is a standard starting point for any discussion of Canadian speech restrictions. In March of 1937, the Quebecois

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Premier Maurice Duplessis cooperated with the provincial legislature to produce a law entitled 'An Act to Protect the Province against Communistic Propaganda,' commonly known as the 'Padlock Law.' This Act declared it 'illegal for any person, who possesses or occupies a house within the Province, to use it or allow any person to make use of it to propagate communism by any means whatsoever,' and allowed the authorities to 'order the closing of the house for any purpose whatsoever for a period of not more than one year,' something which, in the words of Eugene Forsey, was in fact 'contrary to every principle of British justice' in its inversion of the presumption of innocence. [70] A cabinet minister under Duplessis even went so far as to argue for the Act's application to 'the many who are communists without knowing it.' [71] Initial legal challenges to the Act were unavailing, and the Second World War intervened, prompting the federal government, through the War Measures Act of 1940, to clamp down further on communist groups; the 'Padlock Law' would not be declared unconstitutional until 1957. [72]

The legacy of the 'Padlock Law,' and subsequent concerns about the overall state of civil liberties in Canada, did not necessarily lead to a more American approach to freedom of expression like the one Justice McIntyre would later argue for in *Irwin Toy*. There occurred merely a changing of tack. Thus in 'recent years, Canada Customs has seized books such as Salman Rushdie's *The Satanic Verses* and Marguerite Duras' *The Man Sitting in the Corridor*,' and in the case of a controversial murder trial even 'stopp[ed] American newspapers with articles on the trial at the border' (while universities and internet service providers deleted Usenet newsgroups discussing the story). [73] It was inevitable that such an approach would be challenged, and in a case not unlike France's *Faurisson*, the Supreme Court of Canada was faced with an appeal from a conviction of a Holocaust denier in the 1990 case *R. v. Keegstra*.

James Keegstra, a blatantly anti-Semitic Alberta schoolteacher, had been prosecuted and convicted under Section 319(2) of the Criminal Code, which provided sanctions for 'promoting hatred against an identifiable group.' Section 319(3) disallowed conviction if the defendant 'establishes that the statements communicated were true,' if the defendant 'in good faith...expressed or attempted to establish by argument an opinion on a religious subject,' if 'the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds he believed them to be true,' or if 'in good faith, he intended to point out, for the purpose of removal, matters producing or tending to produce feelings of hatred towards an identifiable group in Canada.' The Alberta Court of Appeals overruled Keegstra's conviction on free speech grounds, and the

Supreme Court agreed, inasmuch as Section 319(2) represented an abrogation of the rights ensured by Section 2(b) of the Charter. Yet Chief Justice Dickson, in his majority opinion, still found that Section 319(2) was a valid enactment, since the law was rationally related to a pressing governmental concern and only minimally impaired (without disproportionate burden) freedom of speech. [74] Although the potential for harm from Keegstra's speech was basically conjectural, Chief Justice Dickson was content to rely on the proposition that 'the international commitment to eradicate hate propaganda and, most importantly, the special role given equality and multiculturalism in the Canadian Constitution necessitate a departure from the view, reasonably prevalent in America at present, that the suppression of hate propaganda is incompatible with the guarantee of free expression.' [75] It was a further benefit that the

many, many Canadians who belong to identifiable groups surely gain a great deal of comfort from the knowledge that the hate-monger is criminally prosecuted and his or her ideas rejected. Equally, the community as a whole is reminded of the importance of diversity and multiculturalism in Canada, the value of equality and the worth and dignity of each human person being particularly emphasised. [76]

The same values that informed the *Irwin Toy* and *Keegstra* decisions were present back in 1977, when the Canadian federal government passed the Canadian Human Rights Act, a piece of legislation aimed at ensuring

that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence for which a pardon has been granted (Canadian Human Rights Act, Section 2).

The Canadian Human Rights Act established a Canadian Human Rights Commission to investigate claims of discrimination (Section 26), as well as a Canadian Human Rights Tribunal, a quasi-judicial body independent from the Commission (Section 48). The Act applies to federally regulated activities, but all territorial and provincial jurisdictions possess similar laws and similar rights

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commissions. Moreover, all Canadian ‘governments, and all mainstream parties of both left and right, profess their fidelity to the concepts of justice, fairness, and equality which animate such legislation and provide commissions with their guiding principles,’ and ‘a host of interest groups – ranging from ethnic and minority groups, through religious and civil liberties groups, to groups representing women, the disabled, and aboriginals – have all proclaimed a special “stake” in such legislation.’ [77]

Though the Human Rights Act has encountered some opposition from the political left and right for being either overly individualistic or collectivist in nature, and from business interests for the ‘scope and manner’ of the anti-discrimination legislation, [78] the most controversial aspect of the Act has proven to be Section 13, concerning ‘hate messages.’ Section 13(1) declares that

It is a discriminatory practice for a person or a group of persons acting in concert to communicate telephonically or to cause to be so communicated, repeatedly, in whole or in part by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament, any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination.

The drafting of Section 13, with its emphasis on telephonic communication, reveals its age. The Canadian Human Rights Commission and Tribunal struggled to apply the statute to the internet age in *Citron v. Zündel*, wherein the Toronto Mayor’s Committee on Community and Race Relations spearheaded a complaint against the respondent, Ernst Zündel, whose anti-Semitic internet page (‘Zundelsite’) was alleged to have been ‘likely to expose persons of the Jewish faith and ethnic origin to hatred and contempt.’ [79] Whether this was indeed a telephonic communication represented a key question for the Tribunal; further complicating matters was the fact that Zündel ‘hired an American citizen to establish and operate the Zundelsite from California’ and ‘wrote anti-Semitic material in Canada and then faxed the material to his employee in California for posting on the U.S. website.’ [80] As for the latter consideration, the Tribunal relied on the fact that the respondent had repeatedly addressed ‘all Canadian Lawyers and Media Representatives’ and referred to ‘the repressive Canadian government that penalises free expression,’ [81] thereby leading the Tribunal ‘irresistibly to the conclusion that the Respondent exercised a significant measure of control over the website’ from his base in Canada. [82]

Zündel's belief that 'In the United States what I do is legal and I believe what I do in Canada is legal' was unavailing. [83]

A more basic question remained, in the form of the precise nature of telephonic communication. Expert witnesses disagreed on some matters. 'Where Mr. Angus used the term "telephony" to embrace the transmission of a broad range of information including sound, data, video or graphic signals, Mr. Klatt used a more restrictive definition that embraced the transmission of sound only.' [84] Nonetheless, in 'Canada the network access points and the Internet all run over the same circuits or lines that are used for telephone activity.' [85] After noting that human rights legislation should be interpreted purposively – 'in a manner consistent with its overarching goals' [86] – the Tribunal concluded that it was

not persuaded that 'telephonically' implies a limitation on the precise sensory format in which the communication is expressed, nor that it should be defined solely by reference to the particular device used for the communication. Whether a message is communicated aurally, by voice, or visually, by text, has no effect on its capacity to influence the listener, or humiliate the subject. Nor does the specific device used to effect the communication alter the harmful character of the message conveyed. A telephone handset is not uniquely effective in the communication of hate messages. [87]

The final consideration for the Tribunal was whether the respondent's speech was likely to expose the targeted group to 'hatred and contempt' (the language in Section 13). Applying a test from the Supreme Court case *Canada (Human Rights Commission) v. Taylor* (whether the alleged hate speech was likely to arouse 'unusually strong and deep-felt emotions of detestation, calumny or vilification'), [88] the Tribunal considered whether, as a consequence of the speech in question, 'an identifiable group will be subject to hatred, that is extreme ill will, detestation, enmity, or malevolence. Or, might the group be held in contempt, and looked down upon or treated as inferior.' [89] Ultimately, the Tribunal concluded, there existed no basis 'to withdraw our commitment to protecting minority groups from the intolerance and psychological pain caused by the expression of hate propaganda,' [90] and ordered Zündel to cease communicating messages like those 'found on the Zundelsite, or any other messages of a substantially similar form or content that are likely to expose a person or persons to hatred or contempt by reason of the fact that that person or persons are identifiable on the basis of a prohibited ground of discrimination.' [91] This expansion of Section 13 to the internet was not without

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controversy. Margo Langford, a board member of the Canadian Association of Internet Providers, was immediately sceptical of the ability of Canadian internet providers to silence ‘Zundelsiet.’ ‘It’s not on our servers. Clearly you can’t stop one computer from talking to another computer, one telephone caller from speaking to another caller, and that’s what the Internet is.’ [92] Others insisted that ‘Curbing the internet is like trying to nail Jello.’ [93] In *Zündel*, the Tribunal acknowledged the ideological tensions and technological practicalities, but was nevertheless satisfied, adding: ‘There is also a significant symbolic value in the public denunciation of the actions that are the subject of this complaint. Similarly, there is the potential educative and ultimately larger preventative benefit that can be achieved by open discussion of the principles enunciated in this or any Tribunal decision.’ [94] Thus, Melissa Waters has observed, the Tribunal was ‘quite cognisant of the potential power of its decisions not only in translating existing Canadian norms on hate speech to new contexts, but in serving a larger symbolic and educative purpose,’ viewing ‘its role not only as a transnational representative or defender of domestic speech norms, but also as a transnational advocate or champion of domestic norms.’ [95] Observers have long noted the ‘role of Canada’s government (especially its own human rights commission) in helping to diffuse NHRCs [national human rights commissions] abroad.’ [96] Canada’s ‘marked – and quite intentional – break from the free speech tradition’ of the United States, and its pursuit of a ‘distinctive rights culture,’ is therefore a matter of some international importance.

With these wide-ranging intentions, the Canadian Human Rights Commission was liable to overreach, and overreach it did, albeit with the goals of combating hate speech. In March of 2008, during a hearing regarding a Section 13 complaint against Marc Lemire (proprietor of an allegedly racist website), the Commission’s hate speech investigator, Dean Steacy, admitted to the Canadian Human Rights Tribunal that he ‘used pseudonym e-mail addresses to access neo-Nazi and other far-right websites.’ [97] Lemire’s lawyer, Barbara Kulaszka, suggested that Steacy’s pseudonymous messages might be used to ‘entrap or entice’ others into posting incriminating messages, and complained that it ‘was entirely possible that the commission might investigate a webmaster like Mr. Lemire for allowing a posting by a police officer posing as a racist.’ [98] Disastrously, Steacy went on to say that ‘Freedom of speech is an American concept, so I don’t give it any value,’ leading Jonathan Kay of the *National Post* to chide the investigator, writing ‘I guess Section 2 has been excised from his copy of the Canadian Charter of Rights.’ [99] These embarrassing revelations and slips of the tongue helped to release pent up hostility against Canada’s human rights regime as it relates to freedom of expression (despite

the overall political ‘profession of fidelity’ to its overall principles). Perhaps such antagonism had merely gone to ground.

After all, during a 1986 administrative strengthening of Ontario’s provincial human rights Commission, critics like Claire Hoy claimed that the new Code contained provisions ‘which would have made Mussolini smile,’ while the daily newspaper *The Globe and Mail* opined that the revision was ‘intrusive, misguided and unsettling document, giving human rights officials an unjustified amount of power to investigate complaints and to regulate the private domain,’ and the Ontario Commission’s former counsel Ian Hunter criticised the ‘essentially theological nature’ and ‘utopian vision’ of human rights legislation and campaigners respectively, as well as the ‘cost in human freedom which our relentless pursuit of equality exacts.’ [100] These criticisms are, as R. Brian Howe put it, rooted in the ‘conservative liberal ethic,’ and represent ‘forces for restraint.’ [101] The Mark Steyn-driven controversies of 2008 would again bring this divisive issue to the fore, as Canadian human rights commissions and tribunals grappled with the age-old speech-incitement balancing act, and the larger public considered whether it was irresponsible journalism, or Canada’s human rights codes, that represented the thin edge of a wedge between Canadians and their civil liberties.

IV.

In December 2007, the Canadian Islamic Congress (CIC) initiated human rights complaints against *Maclean’s* magazine, seeking remedies from the Canadian Human Rights Commission, Ontario Human Rights Commission, and British Columbia Human Rights Commission. Nine months earlier, the CIC had failed to convince *Maclean’s* to run a full-length article ‘rebuttal’ of Mark Steyn’s article ‘The future belongs to Islam,’ ostensibly leading to official legal action. At the time, lead counsel for the CIC, Faisal Joseph, told the press the ‘kinds of mistruths [in “The future belongs to Islam”] can cause a backlash... [and] deepen divisions between Muslims and non-Muslims.’ [102] A CIC ‘Statement of Concern,’ written by five law students at Osgoode Hall (Khurram Awan, Muneza Skeikh, Naseem Mithoowani, Ali Ahmed, and Daniel Simard), made the case to the public that Steyn’s article represented incitement to Islamophobic hatred. In its ‘Statement,’ the CIC alleged that Steyn had been engaging in the following eight activities:

- (1) promoting Islamophobia and fear of Muslims;
- (2) representing Muslims as violent people who are prone to engage in violence and are incapable of

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living peacefully in their host societies; (3) casting suspicion on Muslims at large as potential terrorists, extremists, and radicals; (4) representing the presence and growth of Muslims in Western societies as a threat to the Western values of democracy, freedom, and human rights; (5) attempting to import a racist discourse and language into mainstream discourse in Canadian society; (6) attacking multiculturalism and religious freedoms; (7) attacking laws that provide protection to identifiable communities from the type of discriminatory journalism that Macleans [sic] is engaging in; (8) condemning any and all efforts by politicians, law enforcement, media and other institutions to reach out to Muslim communities and to exercise sensitivity. [103]

Steyn's succinct response: 'So the CIC doesn't like my argument? Fine. Argue against it, but don't try to criminalise debate. That's the way they do things in Sudan and Saudi Arabia, not Canada.' [104] (Note that Steyn's use of the word 'criminalise' was more for effect than accuracy; it must be remembered the proceedings were not strictly speaking criminal in nature.)

The complaint to the Ontario Human Rights Commission can be dealt with succinctly, as it never made it before the Tribunal. Ontario's Human Rights Code (the same piece of legislation so reviled Hoy, Hunter, and Howe) has its own version of Section 13(1), but with key differences: 'A right under Part I is infringed by a person who publishes or displays before the public or causes the publication or display before the public of any *notice, sign, symbol, emblem, or other similar representation* that indicates the intention of the person to infringe a right under Part I or that is intended by the person to incite the infringement of a right under Part I [emphasis added].' Any plain reading of this statute would exclude an opinion article, on-line or in print. Stretching from 'telecommunication' to the internet is possible, but 'The future belongs to Islam' cannot be said to constitute a representation similar to a placard. Thus the Ontario Commission acknowledged on April 9, 2008 that 'the Code, which prohibits displaying or publishing a notice, sign, symbol, emblem or other similar representation with the intent to infringe human rights or to incite others to do so, cannot be interpreted to include the content of the magazine article in issue.' [105] As to a claim made in the alternative by the CIC, arguing for Commission jurisdiction on the grounds that the lack of rebuttal space violated Section 1 of the Code ('Every person has a right to equal treatment with respect to services, goods and facilities'), the Commission found that 'the content of the magazine and the *Macleans*' refusal to provide the

complainants with space in the magazine for a rebuttal, are not goods or services within the meaning of the Code.’ [106]

Not content to let the matter rest there, however, the Commission attached to its decision a further consideration of ‘racism and Islamaphobia in the media’ and the matter of ‘freedom of expression and human rights.’ The Commission took issue with the *Maclean’s* alleged portrayal of ‘Muslims as all sharing the same negative characteristics, including being a threat to “the West,” thus perpetuating and promoting ‘prejudice towards Muslims and others.’ [107] Concluding that ‘with rights come responsibilities,’ the Commission lamented the current state of Canadian hate speech laws, noting that

The different approaches in various human rights statutes across Canada can send a confusing message and give rise to inconsistencies, depending on where a complaint is filed. For example, it is possible to initiate complaints about a magazine article in more than one province and, if the article appears on the internet, with the Canadian Human Rights Commission. It is also unclear what matters trigger the application of the hate law provisions of the Criminal Code. Clearly more debate on this issue is required in Canada. A comprehensive approach to the issue should be one of the goals. [108]

Hamstrung by the text of Ontario’s Section 13, the Commission nonetheless felt that ‘it should also be possible to challenge any institution that contributes to the dissemination of destructive, xenophobic opinions.’ [109] This castigation was some small comfort to the CIC complainants; Faisal Joseph professed to be ‘delighted’ with the decision, and claimed victory on the grounds that ‘we thought this would be an excellent way to demonstrate the gaping hole in human rights legislation in Ontario, and the [Commission] has done exactly that.’ [110] When the *Maclean’s* editorial team subsequently wrote, ‘Human rights commissions are undermining the fundamental Charter rights of all Canadians,’ the Ontario Commission’s Chief Commissioner Barbara Hall, invoking Canada’s symbiotic constitutional pillars, responded: ‘No single right is any more or less important than another. And the enjoyment of one depends on the enjoyment of the other. This means if you want to stand up and defend the right to freedom of expression then you must be willing to do the same for the right to freedom from discrimination.’ [111] Typically dismissive, Steyn quipped: ‘Even though they don’t have the guts to hear the case, they might as well find us guilty. Ingenious!’ [112] The Ontario Commission’s

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approach, which split the difference by simultaneously rejecting and applauding the CIC's complaint, did little to settle the issue in the public sphere.

The next decision was to come from the federal Canadian Human Rights Commission, where as we have seen Section 13 could be applied to telecommunications (as of 2001 including internet communications) 'likely to expose a person or persons to hatred or contempt.' In theory the complaint stood a better chance in the federal arena than it had in the Ontario provincial one, since Steyn's article clearly did not fall within the latter's statutory purview. Yet on June 25, 2008 the Canadian Human Rights Commission likewise rejected the CIC complaint without referring it to the Tribunal. In its decision with respect to *Canadian Islamic Congress v. Rogers Media Inc.*, the Commission considered Canadian Supreme Court precedent, such as the aforementioned *Taylor* case, which set the standard for 'hate propaganda' as that which was 'likely to circulate extreme feelings of opprobrium and enmity against a racial or religious group.' [113] A more recent Canadian Human Rights Tribunal case, *Warman v. Kouba* (2006), further refined the test, laying out 'hallmarks' of 'material likely to expose persons to hatred and contempt,' but the Commission distinguished Kouba from the Steyn complaint, since the former was found to have 'use[d] racist epithets and slurs to create a tone of profound denigration and disgust... [and] advocate[d] the exile and segregation of members of the targeted groups.' [114] The Steyn article, on the other hand,

discusses changing global demographics and other factors that the author describes as contributing to an eventual ascendancy of Muslims in the 'developed world,' a prospect that the author fears for various reasons referred to in the article. The writing is polemical, colourful and emphatic, and was obviously calculated to excite discussion and even offend certain readers, Muslim and non-Muslim alike. [115]

For this reason, the Commission found that the article was 'not of an extreme nature,' and, in order to 'be consistent with the [principle of] minimal impairment of free speech,' [116] the complaint was dismissed, not with a bang but a whimper.

Commentators aligned with the CIC, like Haroon Siddiqui, bemoaned the 'media's mostly one-sided discourse on the case of *Maclean's* before the federal, as well as the Ontario and British Columbia, human rights commissions,' [117] but public opinion was mainly on the side of Steyn, who received support from groups not ordinarily ideologically sympathetic to the conservative pundit. The

writers association PEN Canada had issued a statement in February 2008 calling ‘on the federal and provincial governments to change human rights commission legislation to ensure commissions can no longer be used to attempt to restrict freedom of expression in Canada,’ citing the Steyn complaints as well as an earlier Alberta complaint against the journalist Ezra Levant, whose *Western Standard magazine* published the infamous Danish cartoons. [118] Levant himself poked fun at the fact that ‘one single activist – a lawyer named Richard Warman, who used to work at the commission himself – has filed 26 complaints, nearly 50 percent of all complaints under that commission’s “hate messages” section.’ [119] Meanwhile, Alan Borovoy, general counsel for the Canadian Civil Liberties Association, advocated the removal of ‘those [hate speech] sections from the B.C., federal, Alberta and Saskatchewan legislation so they would all desist from attempting to censor the content of print material,’ though he admitted that ‘The Commissions were established to use state coercion against discriminatory deeds, and also to use social persuasion with respect to discriminatory words.’ [120] As early as January 30, 2008, the Liberal MP Keith Martin had introduced a government bill (M-446) ‘That, in the opinion of the House, subsection 13(1) of the Canadian Human Rights Act should be deleted from the Act.’ [121]

Tensions mounted in anticipation of the decision of the British Columbia Human Rights Tribunal, where the complaints had proceeded farther than in Ontario or Ottawa (owing mainly to the fact that, as of March 31, 2008, it is a direct-access tribunal with its own screening process). Hearings had been held in front of the BC Tribunal in early June. Faisal Joseph, arguing for the CIC, had implored the quasi-judicial body: ‘You are the only opportunity to right a terrible wrong to a clearly identifiable group numbering hundreds of thousands in this great country, and tens of thousands in the beautiful province of British Columbia. You are the only thing between racist, hateful, contemptuous Islamophobic and irresponsible journalism, and law-abiding Canadian citizens.’ [122] The Steyn article, Joseph maintained, portrayed Canadian Muslims as ‘a violent people,’ and the photograph accompanying the article (depicting two young Muslim women) ‘could have been the picture of a horror cult movie.’ [123] *Maclean’s*, basically contemptuous of the proceedings, declined to call any witnesses.

On October 10, the Tribunal issued its decision in *Elmasry and Habib v. Roger’s Publishing and MacQueen*. [124] The relevant statute, another provincial variant of Section 13, was British Columbia Human Rights Code (1996) Section 7(b) (‘Discriminatory publication’), which states that ‘A person must not publish, issue

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or display, or cause to be published, issued or displayed, any statement, publication, notice, sign, symbol, emblem or other representation that...is likely to expose a person or a group or class of persons to hatred or contempt.' The Tribunal began by acknowledging that it was 'engaged in balancing two important and potentially competing rights,' namely the 'constitutionally protected right to live in a society that is free from discrimination, and the constitutionally protected right to freedom of speech.' [125] Section 2 of the Charter's free speech guarantees were to be balanced against Section 27's guarantee that the 'Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.' Jurisdictional concerns were waived away; though 'Section 92(10) [of the Constitutional Act, 1867] gives the federal parliament, and therefore the federal human rights system, jurisdiction over interprovincial or international modes of communication,' and thus not the internet, the print publication could still be considered by the BC Tribunal. [126] The intervening BC and Canadian Civil Liberties Associations and the Canadian Association of Journalists argued that there was no stand-alone protection against hate speech in British Columbia, and that Section 7(1)(b) 'should be interpreted as extending only to publications which otherwise relate to one of the areas of activity for which protection is provided in the *Code*' (e.g. employment or services), [127] but this contention was rejected due to both the clear wording and purposive interpretation of the Code. [128]

The Tribunal's consideration of the CIC's hate speech complaints again relied on the *Taylor* definitions, the application of which resulted in a two-part test:

a publication must both express hatred or contempt in and of itself, and also make it more acceptable for others to manifest hatred or contempt against the target person or group. Thus, a communication which is not itself hateful or contemptuous, but which has the effect of increasing the risk of exposing the target group to hatred or contempt, does not contravene s. 7(1) (b). [129]

Context was critical, and the Tribunal looked at six factors: 'the vulnerability of the target group; the degree to which the publication on its face contains hateful words or reinforces existing stereotypes; the content and tone of the message; the social and historical background for the publication; the credibility likely to be accorded the publication; and how the publication is presented.' Ultimately, it was concluded, whatever alleged 'historical, religious and factual inaccuracies' were present in the article, the complainants had not succeeded in 'linking the inaccuracies in the Article to the probability that it would expose Muslims in B.C.

to the level of ‘unusually strong feelings and deeply felt emotions of detestation, calumny and vilification’ required by *Taylor*.’ [130] In fact, ‘The Article, with all its inaccuracies and hyperbole, has resulted in political debate which, in our view, s. 7(1)(b) was never intended to suppress...as the evidence in this case amply demonstrates, the debate has not been suppressed and the concerns about the impact of hate speech silencing a minority have not been borne out.’ [131] This last evidentiary shortcoming was enough to put the matter to rest. The final CIC complaint had been dismissed.

The wrangling over the CIC complaints against *Maclean’s* had been entirely unpleasant; the Tribunal’s decision detailed the tense meetings between the complainants and respondents concerning CIC demands for magazine space for a rebuttal, or in the alternative a \$10,000 donation to a race-relation foundation (*Maclean’s* editor-in-chief, Kenneth Whyte, responded that he would rather ‘go bankrupt’). [132] The aftermath was no better. Steyn feigned disappointment: ‘The only reason to go through all this nonsense is to get to the stage where you can appeal it to a real court, and if necessary up to the Supreme Court.’ Faisal Joseph feigned delight: ‘Our objective of exposing *Maclean’s* and Mark Steyn for their falsehoods, and misrepresentation and stereotyping of Muslims has been achieved.’ [133] The National President of the CIC, Mohamed Elmasry, was not as Panglossian, telling a journalist that the ‘three commissions made the wrong decisions because of inappropriate pressure by media and politicians’ and that ‘The first point that I did learn from this exercise is that Islamophobia is alive and well in Canada, in the media and also in politics.’ [134] A Steynian response to Elmasry would no doubt be that freedom of political expression is likewise alive and well, and as such the Canadian human rights commissions felt constrained merely to censure, rather than censor, *Maclean’s* and its star commentator.

Public outcry about this issue led to the commissioning of law professor Richard Moon of the University of Windsor to prepare a report on Section 13 for the Canadian Human Rights Commission. The so-called Moon Report, released in November 2008, made a surprising recommendation: ‘that section 13 of the *CHRA* be repealed, so that the CHRC and the Canadian Human Rights Tribunal (CHRT) no longer deal with hate speech, and in particular hate speech on the Internet. Hate speech should continue to be prohibited under the *Criminal Code* but this prohibition should be confined to expression that advocates, justifies or threatens violence.’ [135] In the alternative, Moon continued, Section 13(1) should be amended ‘to make clear that the section prohibits only the most extreme instances

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of discriminatory expression, and more particularly expression that threatens, advocates or justifies violence against the members of an identifiable group.’ [136] As a sop to those concerned about rolling back protection against incitement to ethnic or religious hatred, Moon urged that internet service providers create a ‘hate speech complaint line’ and associated ‘advisory body’ that could shut down the site [137] (though how this would deal with hate speech on a page like ‘Zundelsite,’ hosted as it was in a foreign country, is unclear). Furthermore, newspapers and news magazines should, Moon wrote, ‘seek to revitalise the provincial/regional press councils... [to] ensure that identifiable groups in the community are able to pursue complaints’ or else face a new ‘national press council’ that could determine ‘whether a newspaper or magazine has breached professional standards’ and then could order the offender to ‘publish the press council’s decision.’ [138] should be added that press councils themselves are far from uncontroversial. In October 2008 a columnist for the *Irish Independent* newspaper, Kevin Myers, was found by the Irish Press Council to have authored an article (opposing ‘sanctimonious’ aid to Africa) that was ‘likely to cause grave offence;’ Myers responded by attacking the ‘infantile banality’ of the ‘gibbering dogma’ of ‘political correctness.’ [139] Newspapers and their staffs may well prefer to shy away from establishing a similar press council oversight system.

All in all, the Moon report represented a distinct change in tone from a 2006 Canadian Human Rights Commission publication, ‘Hate on the Net,’ which crowed: ‘It seems fair to say that the American view is becoming a minority one in the world. Canada is part of what appears to be a growing global consensus, which observes that careful restrictions of some forms of speech are both desirable and necessary.’ [140] The Mark Steyn cases, despite never making it beyond the quasi-judicial human rights commissions and tribunals, have prompted an institutional reconsideration of just where the line should be drawn with respect to those ‘careful restrictions.’ Professor Moon’s proposed Section 13 rewrite, which suggests the American ‘clear and present danger’ standard, has not quite brought down the wide arch of the ‘growing global consensus’ [141] concerning objectionable speech, but it nonetheless represents a development of the first magnitude.

V.

Legal approaches to ‘hate speech’ in the western world vary greatly, from the relatively restrictive French model (typified by the June 2008 fining of Brigitte Bardot for criticising the slaughter of animals for the Muslim festival of Eid al-

Adha, thus ‘inciting racial hatred’) [142] to the liberal American approach, which generally affords political speech the highest level of First Amendment protection, thereby closely adhering to the marketplace of ideas vision of John Milton, who exhorted his countrymen in *Areopagitica* (1644): ‘Let her [Truth] and Falshood [sic] grapple; who ever knew Truth put to the wors [sic] in a free and open encounter?’ [143] (Hence the notion of ‘Miltonic freedom.’) As Canada, through its national and provincial human rights commissions, shifted towards the former approach, the latter came under fire. ‘This notion,’ Ontario Court of Appeal Justice Russell Juriansz wrote in the aforementioned ‘Hate on the Net’ Commission publication, ‘is based on the view that human beings are rational creatures, who can distinguish truth from falsehood.’ [144] Yet, Justice Juriansz continued, ‘Some might argue that history since proves both [US Supreme Court Justice Oliver Wendell] Holmes and Milton wrong. To them, the success of the Joseph Goebbels’ Nazi propaganda machine proves that people will not always choose truth over falsehood, that truth will not always triumph, and that we cannot trust the free “marketplace of ideas” to ensure our security and the continued civility of our society.’ [145] Citing the 1966 Cohen Committee Report (which concerned the tightening up of Canada’s hate speech criminal code provisions), Juriansz concluded that ‘individuals can be persuaded to believe “almost anything” so long as the information or ideas are communicated in the proper circumstances and using the right technique.’ [146] Edmund Burke’s 1790 propositions that ‘We are afraid to put men to live and trade each on his own private stock of reason, because we suspect that this stock in each man is small’ and that ‘Prejudice is of ready application in an emergency’ [147] come to mind, though Canadian conservatives, who tend to view the great British Whig as their ‘ideological touchstone,’ [148] would no doubt dispute Burke’s connection with the likes of Juriansz and Commissioner Lynch.

Of course, the Canadian Supreme Court is on record that free speech is ‘little less vital to man’s mind and spirit than breathing is to his physical existence.’ The freedom to express oneself, and thereby pursue autonomy and self-determination, is in itself a critical human rights issue. One should never lose sight of the immense burden state interference with journalism has on those directly affected. Charles Churchill, colleague of the great eighteenth century civil libertarian John Wilkes, described the effect of government censorship as follows:

Those few, those very few, who are not afraid to take a lover of his country by the hand, congratulate me on being alive and at liberty – They advise circumspection – for, they do not know – they cannot tell – but – the times

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– Liberty is precious – fines – imprisonment – pillory – not indeed that they themselves – but – then in truth – God only knows...letters which used to breathe the genuine spirit of *old English liberty*, are become insipid, tame, and languid. Caution hath got the better of public virtue, and discretion is substituted in the place of true wisdom. [149]

This is not necessarily to imply that ‘The future belongs to Islam’ represents the definition of ‘public virtue,’ but the chilling effect of the threat of continuous adversarial human rights tribunal appearances is real, and carries with it the potential of turning Canadian journalism ‘insipid, tame, and languid,’ cautious, and discrete.

The 2008 Moon Report, and its generally positive public reception, as well as the Section 13 legislation introduced by MP Keith Martin, indicate the possibility of backtracking (at least at the Canadian federal level) towards a concrete harm analysis of hate speech, centered around whether the complained-of expression ‘advocates, justifies or threatens violence.’ Furthermore, Professor Moon’s desire to revitalise press councils looks more like the Irish model than the French. Despite CIC counsel Faisal Joseph’s positive spin after the British Columbia Human Rights Tribunal dismissal, it is the Moon Report that represents the real fruit of the year-long quasi-judicial Steyn cases. In practice, it seems that the hate speech line has been drawn in Canada somewhere between the likes of James Keegstra and Ernst Zündel (who resemble France’s Holocaust-denying Faurisson) on one side and the likes of Mark Steyn, Brigitte Bardot, and Kevin Myers (who were engaged in political speech, however provocative) on the other. This does not discount the possibility of future complaints (well-intentioned or otherwise), but the move towards reforming Section 13 point to a way forward.

In the end, the *Maclean’s* controversy speaks to a very real ‘free and open encounter’ the likes of which John Milton proposed, not only between ‘Truth’ and ‘Falshood,’ and not only between the advocates of freedom of expression and advocates of religious tolerance, but between competing systems of free speech jurisprudence that have existed for centuries. One notes with interest the renewal of this debate in the form of a recent Dutch Labor Party position paper urging that ‘instead of reflexively offering tolerance with the expectation that things would work out in the long run,’ the Dutch government should be ‘bringing our values into confrontation with people who think otherwise,’ [150] indicating that there are still policymakers on the left as well as the right who would prefer open ideological encounters, even at the potential expense of *ordre public*. (Of course, the ongoing

Dutch prosecution of Geert Wilders, the Dutch MP and director of *Fitna*, proves that the enforced-tolerance approach still predominates in many jurisdictions.) This ideological encounter has been occurring in Canada for decades, with the ‘modern multicultural experiment’ operating alongside an understanding that, as the Canadian human rights scholar Ross Lambertson has written,

no society or political rulers should assume infallibility, and opposition to their received values and the status quo should be regarded as a sort of gift – arguments swimming against the tide may contain at least a portion of truths previously hidden to most of us, they may inspire, through debate, higher truths previously invisible to us, and they at least will ensure that we cleave to our opinions for intelligent reasons, rather than simply holding them as dead dogma. [151]

In light of the Steyn cases and the ensuing Moon report, though Canada will doubtless remain a ‘distinctive rights culture’ with respect to speech as in other areas, one should not be overly hasty in declaring a ‘global consensus’ as to just what constitutes a ‘reasonable limit on the expression of hatred.’ There is still room for considerable ‘play in the joints’ (as jurists often put it) in either system, and proponents of wide-ranging limitations on speech in the name of tolerance may well come to find ‘insipid, tame, and languid’ opinion insufficient in increasingly trying times.

Matthew Omoleky is presently a researcher at The Ohio State University’s Moritz College of Law and a *chercheur* for the *Laboratoire Européen d’Anticipation Politique*. Formerly a researcher-in-residence at the *Inštitut za Civilizacijo in Kulturo* in Ljubljana, Slovenia, he has written for print and on-line publications including *Europe 2020*, *The New Times* (Kigali, Rwanda), and the *Whitehead Journal of Diplomacy*.

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Notes

- [1] Steyn 2006. The article subsequently appeared the *Macleans*' October 23 print edition.
- [2] Ibid.
- [3] Ibid.
- [4] Ibid.
- [5] Lunau 2007.
- [6] Ibid.
- [7] Steyn 2008a.
- [8] Steyn 2008b.
- [9] Lynch 2008.
- [10] Ibid.
- [11] Sedley 1998, p. 24.
- [12] *U.S. v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943), aff'd, 326 U.S. 1 (1945).

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- [13] Ibid.
- [14] See *Associated Press*, 'Arabs Battle West Over Free Speech at the UN' (April 1, 2008).
- [15] Walton 2008.
- [16] Namely, that '*Jesus Christ* was a bastard, and his mother must be a whore.'
- [17] *People v. Ruggles*, 8 Johns. R. 290 (N.Y. 1811).
- [18] Ibid.
- [19] Ibid.
- [20] Ibid.
- [21] Smith 1976, p. 137.
- [22] *Ars Poetica*, lines 7-9 ('*uelut aegri somnia, uanae fingentur species, ut nec pes nec caput uni eddatur formae.*')
- [23] Schama 1989, p. 442.
- [24] Hunt 2007, p. 16.
- [25] Schama 1989, p. 443.
- [26] Ibid.
- [27] Hunt 2007, p. 17.
- [28] Nowak 1993, p. 365.
- [29] Fogo-Schensul 1997, p. 258.
- [30] Quoted Lajer-Burcharth 1999, p. 16.
- [31] McGoldrick and O'Donnell 1997, p. 457.
- [32] Ibid.
- [33] *Jersild v. Denmark*, Ser. A, No. 298-A (1994).
- [34] Article 266 (b) of the Danish Penal Code.
- [35] *Jersild v. Denmark*, Ser. A. No. 298-A (1994), par. 29.
- [36] Ibid., par. 31.
- [37] Ibid., par. 37.
- [38] Ibid., par. 35.
- [39] *Jersild v. Denmark*, Joint Dissenting Opinion of Judges Ryssdal, Bernhardt, Spielmann, and Loizou, § 4.
- [40] Ibid., par. 5.
- [41] *Jersild v. Denmark*, Joint Dissenting Opinion of Judges Gölcüklü, Russo, and Valticos.
- [42] *Faurisson v. France*, Views of Committee, November 8, 1996, UN Doc. A/52/40 (1999), Vo. II, at 84.
- [43] Ibid., par. 9.6.
- [44] Ibid., par. 9.7.
- [45] Ibid., par. 9.5.
- [46] Reichman 2007, pp. 79-80. See also *Suszkind v. Israel*, IsrSC 52(3) 289 (1998).
- [47] Ibid., pp. 122-3.

- [48] *Ibid.*, p. 124.
- [49] Paley 1819, pp. 392-93.
- [50] Reichman 2007, p. 81.
- [51] Sadurski 1999, p. 180.
- [52] The Supreme Court, in *Beauharnais v. Illinois*, 343 U.S. 250 (1952), upheld a statute prohibiting 'libel of a creed or racial group,' but recent cases have, according to the appellate judge Frank Easterbrook, 'so washed away the foundations of *Beauharnais* that it could not be considered authoritative.' See *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 331 n. 3 (7th Cir. 1985).
- [53] Krotoszynski 2006, p. 23.
- [54] *Doe v. University of Michigan*, 721 F. Supp. 852, 863 (E.D. Mich. 1989).
- [55] *Dambrot v. Central Michigan University*, 839 F. Supp. 477, 482 n.7 (E.D. Mich. 1993).
- [56] *National Socialist Party of America v. Village of Skokie*, 432 U.S. 43, 44 (1977).
- [57] Barendt 1998, p. 30.
- [58] Bird 2000, p. 414.
- [59] Michael Ignatieff, quoted in Lambertson 2005, p. 3.
- [60] Krotoszynski 2006, p. 26.
- [61] *Reference re Secession of Quebec*, 2 S.C.R. 217, par. 49 (1998).
- [62] Lambertson 2005, p. 6.
- [63] Krotoszynski 2006, p. 26.
- [64] Lambertson 2005, p. 16.
- [65] *RWDSU v. Dolphin Delivery Ltd*, 2 S.C.R. 573 (1986), par. 12.
- [66] *Irwin Toy Ltd. v. Quebec (Attorney General)*, 1 S.C.R. 927, 968-9 (1989) (internal citation omitted).
- [67] *Ibid.* at 976.
- [68] *Ibid.* at 1009.
- [69] Krotoszynski 2006, p. 37.
- [70] Lambertson 2005, p. 45.
- [71] Fogo-Schensul 1997, p. 265.
- [72] Lambertson 2005, p. 67.
- [73] Fogo-Schensul 1997, p. 265.
- [74] For more analysis, see Krotoszynski 2006, p. 54.
- [75] *R. v. Keegstra*, 3 S.C.R. 697, 743 (1990).
- [76] *Ibid.* at 769.
- [77] Johnson and Howe 1997, p. 2.
- [78] *Ibid.*, p. 3.
- [79] *Citron v. Zündel*, 41 C.H.R.R. D/274, par. 5.
- [80] Waters 2005, p. 536.
- [81] *Citron v. Zündel*, pars. 19, 20.

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- [82] Ibid., par. 41.
- [83] Bueckert 1996.
- [84] *Citron v. Zündel*, par. 54.
- [85] Ibid., par. 66.
- [86] Ibid., par. 74.
- [87] Ibid., par. 85.
- [88] *Canada (Human Rights Commission) v. Taylor*, 3 S.C.R. 892, 928 (1990).
- [89] *Citron v. Zündel*, par. 136.
- [90] Ibid., par. 238.
- [91] Ibid., par. 303.
- [92] Bueckert 1996.
- [93] Fogo-Schensul 1997, p. 267.
- [94] *Citron v. Zündel*, par. 300.
- [95] Waters 2005, p. 538.
- [96] Cardenas 2003, p. 778.
- [97] Butler 2008.
- [98] Ibid.
- [99] Kay 2008.
- [100] Quoted in Howe 1991, p. 799.
- [101] Ibid.
- [102] O'Brien 2007.
- [103] See Canadian Islamic Congress, 'Macleans [sic] Magazine: A Case study of Media-Propagated Islamophobia,' www.canadianislamiccongress.com/ar/Report_on_Macleans_Journalism.pdf.
- [104] O'Brien 2007.
- [105] See Ontario Human Rights Commission, 'Commission Statement Concerning Issues Raised by Complaints Against *Maclean's* Magazine' (April 9, 2008).
- [106] Ibid.
- [107] Ibid.
- [108] Ibid.
- [109] Ibid.
- [110] Brean 2008a.
- [111] Hall 2008.
- [112] Brean 2008a.
- [113] Canadian Human Rights Commission, Decision of the Commission, to *Canadian Islamic Congress v. Rogers Media Inc.* (June 25, 2008), p. 3.
- [114] Ibid.
- [115] Ibid., p. 4.
- [116] Ibid., p. 5.

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- [117] Siddiqui 2008.
- [118] See PEN Canada, 'PEN Canada calls for changes to human rights commission legislation,' Press Release (February 4, 2008), p. 1.
- [119] Levant 2007.
- [120] Brean 2008a.
- [121] See Canadian Parliament, Notice Paper No. 41, Private Member' Notices of Motions (January 31, 2008).
- [122] Hutchinson 2008.
- [123] Ibid.
- [124] *Elmasry and Habib v. Roger's Publishing and MacQueen*, 2008 BCHRT 378 (2008).
- [125] Ibid., par. 7.
- [126] Ibid., pars. 47, 50.
- [127] Ibid., par. 54.
- [128] Ibid., par. 61.
- [129] Ibid., par. 75.
- [130] Ibid., par. 140.
- [131] Ibid., par. 159.
- [132] Ibid., par. 104.
- [133] Brean 2008b.
- [134] Brean 2008c.
- [135] Moon 2008, p. 2.
- [136] Ibid.
- [137] Ibid., p. 3.
- [138] Ibid.
- [139] Myers 2008.
- [140] Juriansz 2006, p. 22.
- [141] It can also be added that any notion of a global consensus in these matters is immediately suspect, given the way that, say, the European Court of Human Rights operates. As Colin Warbrick notes, 'the European Court relies on what the States are doing – the creation of a European consensus – as an indication of how the Convention should be interpreted.' Yet, if the principle of 'diversity becomes a more predominant value than equality in Europe, the Court will find it even harder to detect a European consensus to underpin its judgments.' See Warbrick 1998, p. 195. The state of play is thus necessarily more fluid than Canadian commissioners would seem to have it.
- [142] *BBC News*, 'Bardot fined over racial hatred' (June 3, 2008).
- [143] Milton 1898, pp. 51-52.
- [144] Juriansz 2006, p. 19.
- [145] Ibid., p. 20.
- [146] Ibid.
- [147] Burke 1791, pp. 129-30.

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[148] Lambertson 2005, p. 23.

[149] Quoted in Cash 2006, p. 90.

[150] Vinocur 2008.

[152] Lambertson 2005, p. 385.