

“Purging” Facebook of Threats and Hate Speech: Is this Constitutional?

Introduction

Two women in Manitoba have been charged with uttering threats and public incitement of hatred for their Facebook comments, posted in response to the vandalism of one woman’s car.^[1] The women blamed the vandalism on on-reserve “Indians” and agreed to perform a “purge” involving Budweiser and shotguns.

But don’t we have free speech in Canada? Isn’t freedom of expression in the *Charter of Rights and Freedoms*? How can these criminal charges be constitutional?

Section 2(b) - Freedom of Expression

The *Charter of Rights and Freedoms* protects freedom of expression, including speech, in section 2(b):

2. Everyone has the following fundamental freedoms:

b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.^[2]

Expression includes “any activity or communication that conveys or attempts to convey meaning.”^[3] Expression may take many forms - speech, writing, gestures and painting for example.

Like all *Charter* rights, freedom of expression is not absolute. Limits on rights, as acceptable in a “free and democratic society,” are allowed.^[4] When there is an infringement of a right, the court uses a test, as developed in the case of *R v Oakes* (1986), to decide if the infringement is justified.^[5] For example, in the 2009 case of *Alberta v Hutterian Brethren of Wilson Colony*, the Supreme Court decided that it was justifiable to infringe the freedom of religion of the Hutterian Brethren by requiring them to have their photographs taken for a driver’s licence, which was against their religion. According to the Court, this was because photos on driver’s licenses had important purposes, such as identification.

Uttering threats

The offence of uttering threats occurs when a person, “in any manner, knowingly utters, conveys or causes any person to receive a threat (a) to cause death or bodily harm to any person; (b) to burn, destroy or damage real or personal property; or (c) to kill, poison or injure an animal or bird that is the property of any person.”^[6]

Section 2(b) of the *Charter* does not protect all forms of expression - violence as a form of expression is not protected, [7] nor are threats of violence.[8] The government is not infringing on one's right to free expression when they make it illegal to punch someone, even if that individual did it to "express" their anger.

Threats of violence are treated in the same way as physical violence because both undermine the rule of law.[9] Violence and threats of violence undermine the freedom of others to act and express themselves as they choose.[10]

Threats of violence are not protected expression. The fact that uttering threats is prohibited by the *Criminal Code* is not a violation of the *Charter* right to freedom of expression.

Public Incitement of Hatred

The offence of public incitement of hatred occurs when a person, "by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace." [11] This is different than the charge of uttering threats because the offender who publicly incites hatred is not actually making a threat; they are conveying messages that could encourage others to engage in disruptive behaviour.

Section 2(b) of the *Charter* protects the content of all expression, even if it is distasteful or unpopular.[12] In order to determine whether the offence of public incitement of hatred is a justifiable infringement on freedom of expression, the first step is to determine what harm the offence seeks to mitigate.[13] Hate speech harms the sense of dignity and self-worth of a target group and can have a persuasive impact on gullible people. It can cause social tensions and harmful behaviour by encouraging others or inciting others to hatred and violence.[14]

Criminalizing the public incitement of hatred is an infringement on the right of people to express themselves freely, but this infringement has been found to be justified because of the profoundly negative effects that public incitement of hatred has on society. The government is justified in making it a criminal offence and it is therefore, constitutional.

Conclusion

The *Constitution* protects freedom of expression in Canada, but it does not protect violence, uttering threats of violence, or public incitement of hatred.

The women in Manitoba who have been charged with uttering threats and public incitement of hatred on Facebook can argue that they did not actually make a threat, that they did not make comments against an identifiable group, that their comments will not incite hatred, or that their comments were not really public. Those will be difficult arguments to make but they are free to make them.

What they cannot argue is that their freedom of expression, as protected in the *Charter of Rights and Freedoms*, gives them the right to expression that leads to violence and hatred

against an identifiable group of people. The *Constitution* of Canada, and specifically the *Charter of Rights and Freedoms*, does not protect that type of expression.

[1] “2 women charged with uttering threats over ‘shoot a Indian’ posts,” CBC News (31 July 2018), <https://www.cbc.ca/news/canada/manitoba/flin-flon-denare-beach-rcmp-charges-1.4768782?cmp=rss>, online: <

[2] *Canadian Charter of Rights and Freedoms*, s 2(b), Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [Charter].

[3] *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 SCR 877, 159 DLR (4th) 385; *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927, 58 DLR (4th) 577.

[4] *Charter*, *supra* note 2 s 1.

[5] *R v Oakes*, [1986] 1 SCR 103, 26 DLR (4th) 200.

[6] *Criminal Code*, RCC 1985, c-C-46, s 264.1(1).

[7] *R v Keegstra*, [1990] 3 SCR 697, 61 CCC (3d) 1 ; *R v Zundel*, [1992] 2 SCR 731, 75 CCC (3d) 449 ; *Irwin Toy*, *supra* note 3.

[8] *RWDSU v Dolphin Delivery Ltd*, [1986] 2 SCR 573 at 588, 33 DLR (4th) 174; *Greater Vancouver Transportation Authority v Canadian Federation of Students - British Columbia Component*, 2009 SCC 31 at para 28, [2009] 2 SCR 295; *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at paras 107-108, [2002] 1 SCR 3, *R v Khawaja*, 2012 SCC 69 at para 70, [2012] 3 SCR 555 .

[9] *Khawaja*, *supra* note 8 at para 70.

[10] *Khawaja*, *supra* note 8 at para 70.

[11] *Criminal Code*, *supra* note 6 s 319(1).

[12] *Irwin Toy*, *supra* note 3 at para 42.

[13] *Keegstra*, *supra* note 7 at 744.

[14] *Keegstra*, *supra* note 7 at 746-749.