Ending government censorship in Canada

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Is government censorship in Canada finally coming to an end? Signs are hopeful, but much work remains. There's no rest for the wicked, and so the just had better not ease up, either.

Early this past September, Athanasios Hadjis, the Member of the Canadian Human Rights Tribunal (CHRT) who heard the complaint *Warman v. Lemire* (the Member is the presiding official, the judge-like figure who makes the decision in the case), agreed that Marc Lemire had, indeed, on his website contravened section 13 of the Canadian Human Rights Act, the section that prohibits posting material likely to expose members of certain groups to hatred or contempt. And yet Member Hadjis dismissed the complaint.

Member Hadjis dismissed the complaint despite agreeing that Mr Lemire had spoken hatefully because, he said, section 13 is unconstitutional. Section 13 is, Member Hadjis declared, an unreasonable limitation on freedom of expression as guaranteed in the Canadian Charter of Rights and Freedoms.

As welcome as Member Hadjis's opinion was, it was and remains the opinion merely of a tribunal official, an opinion without any legal force beyond the case at hand. Other tribunal members presiding over section 13 cases are free to ignore it and the Canadian Human Rights Commission is free to continue pursuing complaints of hate speech. No defender of freedom of expression can have thought that with the decision in *Lemire* even a single battle had been won.

About a week and a half ago, just before the filing deadline, the Canadian Human Rights Commission (CHRC) appealed the decision in *Lemire*. The CHRC would like both that Mr Lemire be found by the CHRT to have spoken hatefully and that section 13 be affirmed constitutional.

The CHRC can make a good case. Member Hadjis's reasoning was far from compelling.

What Hadjis actually determined is that section 13, the censorship provision of the act, is inconsistent with section 54, the penalty or compensation provision of the act. The two sections are inconsistent given that the act and the CHRC are supposed to be concerned with resolving conflicts and finding remedies, not with punishment. As Hadjis noted, section 54 was not part of the act back in 1990, when, in the *Taylor* case, the Supreme Court of Canada narrowly decided that section 13 is constitutional. Moreover,

in its *Taylor* decision the court had insisted on the importance of punishment being no part of the CHRC's mandate.

Hadjis also expressed worries about how *Lemire* was pursued by the CHRC and the complainant. Some tactics, he wrote, were questionable, some procedures unfair. It appears that though the case could have been resolved before coming to the tribunal, neither the commission nor the complainant was keen to see it settled.

All that Hadjis said might be true. But clearly it does not follow either from the inconsistency of section 13 with section 54 or from the bad conduct of a party to the case that section 13 is unconstitutional. Member Hadjis would have been on firmer ground had he simply refused to apply section 54 penalties against Mr Lemire. That is what the CHRC will argue in its appeal.

In fact, the CHRC itself had recommended in a report last summer that parliament remove from the CHRT the power to punish those who contravene section 13. The CHRC wants the tribunal in hate speech complaints to have no more than the authority to issue orders to cease and desist.

What the wicked are up to was made clear enough in that summer report to parliament. With the appeal by the CHRC in *Warman v. Lemire*, all doubt is gone. The wicked want to save their prerogative to suppress, censor, and punish expression, and they think they can save it by proposing a few reforms. They want new, better laws, and they pledge to clean up their ways. They want censorship with a human face (at least for now).

And that is why the just must continue to work hard. Opponents of section 13 have long and rightly decried its vagueness, its breadth, and the subjective nature of its application. Critics of human rights commissions have long and rightly decried their arbitrariness and lack of procedural fairness. As of this summer, the CHRC is, officially, in agreement with these opponents and critics. Opponents and critics are now being invited to help in the search for better ways for government agencies to police expression. We must refuse this invitation.

Improved censorship is still censorship, improved censorship will no more serve the interests of society's marginal or vulnerable than the old censorship did, improved censorship will still be the enemy of discussion, candour, and autonomy, improved censorship will still be the friend of identity politics and the cult of victimization.

The matter might again find its way to the Supreme Court of Canada. Given the history of section 13 and the use of it by the CHRC, it's doubtful that even improved censorship would impress enough justices this time. But that is not something for which we should wait. The important forum is our parliament. Canadians must present to their elected representatives the case for making Canada a free and open society. The justice committee of the House of Commons began meetings on 5 October to consider section 13. The wicked are eager to embrace revisions and reforms. In response, we must press our members of parliament to delete the section entirely and put the censors out of business for good.

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