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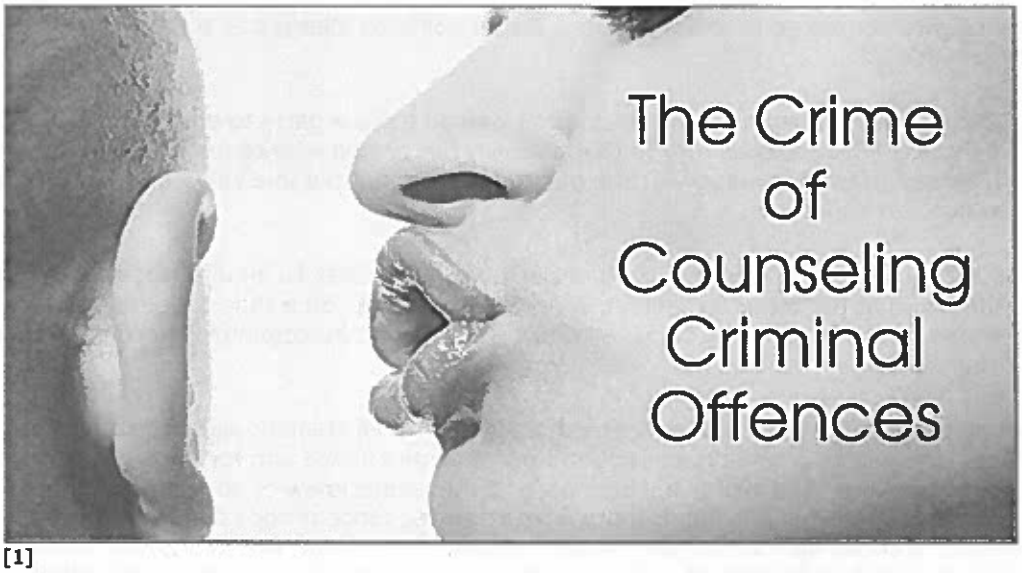
The Crime of Counseling Criminal Offences

Posted By Peter Bowal On September 5, 2014 @ 12:21 pm In 39-1: Looking at Criminal Law | Comments Disabled



[1]

> ... some may argue that the publication of Shakespeare's *Henry VI*, with its famous phrase "let's kill all the lawyers", should be subject to state scrutiny!
> – *R. v. Hamilton, 2005 SCC 47* [2]

Introduction

A few years ago, a University of Calgary professor suggested on national television that someone should kill Julian Assange, the founder of Wikileaks. In a CBC interview [3], the professor stated:

> I think Assange should be assassinated actually, I think Obama should put out a contract and use a drone or something ... I wouldn't be unhappy if Assange disappeared.

This comment, however flip at the time, caused a public uproar. It reverberated internationally, lit up blogs and was even raised in the House of Commons. It led to complaints filed with the police demanding the professor be charged for incitement to murder under section 464 of the *Criminal Code*. We do not take joking about killing someone lightly.

Two days after the broadcast, the professor made a public apology for his remark [4]:

> It was a thoughtless, glib remark about a serious subject ... I never seriously intended to advocate or propose the assassination of Mr. Assange. But I do think what he's doing is very malicious and harmful to diplomacy and endangering people's lives and I think it should be stopped.

The Crime of Counseling Criminal Offences

While the word "incite" is commonly used, the *Criminal Code* prefers the more neutral term, "counsel." Deemed party status puts the inciter on the same criminal standing as the perpetrator of the offence. The inciter is liable to conviction for the same offence and for the same punishment as the perpetrator.The *Code [section 22(3)]* [5] defines "counsel" as to include "procure, solicit or incite," so it could also encompass other related actions.

For Offences Actually Committed

If the offence counseled is committed, the inciter could be charged as a *party* to the offence under section 22:

> 22 (1) Where a person counsels another person to be a party to an offence and that other person is afterwards a party to that offence, the person who counseled is a party to that offence, notwithstanding that the offence was committed in a way different from that which was counseled.
>
> (2) Every one who counsels another person to be a party to an offence is a party to every offence that the other commits in consequence of the counseling that the person who counseled knew or ought to have known was likely to be committed in consequence of the counseling.

Deemed party status puts the inciter on the same criminal standing as the perpetrator of the offence. The inciter is liable to conviction for the same offence and for the same punishment as the perpetrator. The inciter will be a party if the inciter knew or should have known that the other person was likely to commit that crime in consequence of the counseling. It does not matter if the crime was committed in a different way from what was counseled. For one to be deemed a party to a crime that was committed, presumably there must be pre-determination that all legal elements of the crime were met.

"Offence" is not defined in the *Code* but section 464 refers to indictable offences (serious) and summary conviction offences (less serious). The last category includes most federal, municipal and regulatory offences so this crime might extend to counseling commission of relatively minor offences.

For Offences Never Committed

Counseling to commit crimes is set out in section 464 of the *Criminal Code* [6]:

> Except where other expressly provided by law, the following provisions apply in respect of persons who counsel other persons to commit offences, namely,
>
> (a) every one who counsels another person to commit and indictable offence is, if the offence is not committed, guilty of an indictable offence and liable to the same punishment to which a person who attempts to commit that offence is liable; and
>
> (b) every one who counsels another person to commit an offence punishable on summary conviction is, if the offence is not committed, guilty of an offence punishable on summary conviction.

This crime is filed under the category of "attempts, conspiracies and accessories" in the *Criminal Code* and deals only with an offence "that is not committed." The British Columbia Supreme Court said in 2005:

> ... the offence is complete the moment a person persuades another person to commit an indictable offence ... those who encourage the commission of crimes are criminally responsible for their conduct by way of secondary liability. (*R. v. Markovitch and Dashney,*

2005 BCSC 1513 [7])

In order for any political or other speech to constitute incitement, the statements must "actively promote, advocate, or encourage the commission of the offence." The Supreme Court of Canada said the counseling must actively and willfully seek to persuade others to commit the crime. The statements must be made with the view to incite the crime, even if it does not take place, so that there is a clear encouragement and a high likelihood of action. The inciter must understand what he is doing and have a culpable mental state. (Mugesera v. Canada (Minister of Citizenship and Immigration), 2005 SCC 40 (CanLII) [8])

Proof of the inciter's intent (*mens rea*) is complicated. Several judicial decisions say a "dual" intent is required: that the inciter had both the intention to persuade one to commit the offence as well as intent for the actual offence to be committed (R. v. Janeteas, 2003 CanLII 57385 (ON CA) [9], and R. v. Hamilton, 2005 SCC 47 (CanLII) [2]). In *R. v. Hamilton*, the accused had sent out "teaser" emails to entice more than 300 people to buy online packages of information on how to create credit cards and explosives at home. Hamilton claimed he did not know the contents of the information packages. He was acquitted of counseling four serious offences, namely: making explosive substances with intent, acting with intent to cause an explosion, breaking and entering, and fraud. The Supreme Court of Canada said the counseling must actively and willfully seek to persuade others to commit the crime. To require the Crown to prove this beyond a reasonable doubt means that there will be few charges and convictions.

What About Our Constitutional Right to Freedom of Expression?

Under the *Canadian Charter of Rights and Freedoms* section 2(b) everyone has the fundamental freedom of expression. Criminalizing speech restricts such expression. The public policy objective of restraining counseling of crime is the minimization of crime. That is socially desirable, given the definition and effects of crime itself. On the face of it, section 464 violates section 2(b) of the *Charter*. But can counseling crime be saved by section 1 of the *Charter*? This section seeks to balance these rights and freedoms with the public interest ("the rights and freedoms set out in the [*Charter*] are subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society"). Thus, freedom of expression has been constitutionally limited by legislation regulating pornography, hate, copyright, advertising, libel and slander.

The case of R. v. Keegstra, [1990] 3 SCR 697 [10] serves as a good illustration. The Alberta social studies teacher was convicted of wilful promotion of hatred against an identifiable group with his anti-Semitic teaching. Keegstra challenged the constitutionality of the crime. He argued for protection on the grounds of truth, good faith and relevance, and that he was a mere "harmless eccentric." The Supreme Court of Canada said the *Charter* is fundamentally meant to protect basic values and works in the mutual benefit of all Canadians. Thus, hate crimes are a valid constitutional restraint upon freedom of expression.

There has been no case yet testing the constitutionality of the counseling crime provision. Criminalizing any speech is a severe measure on the part of any government. The definitions of "counseling" and "offence" may have to be further refined. When that case comes, the *Oakes* test will apply:

1. What is the pressing and substantial public policy objective sought to be achieved by the counseling crime provision?
2. Is there a rational connection between criminalizing that speech and achieving such public policy objective? and
3. Does the counseling crime provision impair freedom of expression as little as possible to achieve that objective?

The American Position

The crime of counseling crimes would not be constitutional under the American First Amendment, which is far more protective of free speech than its Canadian equivalent. While counseling a crime is reprehensible, it is constitutional. Even calls to assassinate the President are not criminal. One has to incite *imminent* violence and be a palpably serious threat for such speech to be outside the protection of the First Amendment. That is why one may target abortion doctors identifying their names, addresses and photos in conjunction with suggestive rhetoric and yet not be prosecuted for a crime.

Conclusion

Our criminal law takes counselling crimes very seriously because some people can be easily influenced. Some counseling comments, like our professor's may be attempts at humour or hyperbole. If it was lightly made as a joke, others might not get the joke. What if, as in our professor's case, the passing counselling comment was made on national television, or perhaps the Internet?

Before anyone is charged with counseling a crime, Crown Prosecutors will consider whether a reasonable likelihood of conviction exists. The courts have set a very high bar to prove intent, which means prosecutions and convictions will be rare.

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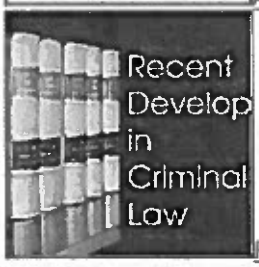

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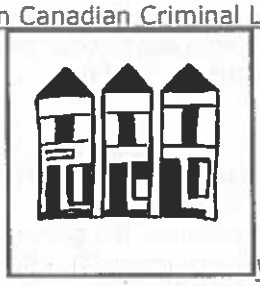
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[1] Image: **http://www.lawnow.org/wp-content/uploads/2014/09/391CrimeOfCounseling.jpg**

[2] R. v. Hamilton, 2005 SCC 47: **http://canlii.ca/t/1l86s**

[3] CBC interview: **https://www.youtube.com/watch?v=5wLYy7ETO34**

[4] public apology for his remark: **http://www.cbc.ca/news/politics/flanagan-regrets-wikileaks-assassination-remark-1.877548**

[5] Code [section 22(3)]: **http://www.canlii.org/canlii-dynamic/en/ca/laws/stat/rsc-1985-c-c-46/latest/rsc-1985-c-c-46.html#Parties_to_Offences__119061**

[6] section 464 of the *Criminal Code*: **http://www.canlii.org/canlii-dynamic/en/ca/laws/stat/rsc-1985-c-c-46/latest/rsc-1985-c-c-46.html#sec464**

[7] R. v. Markovitch and Dashney, 2005 BCSC 1513: **http://canlii.ca/t/1lvwt**

[8] Mugesera v. Canada (Minister of Citizenship and Immigration), 2005 SCC 40 (CanLII): **http://canlii.ca/t/1l249**

[9] R. v. Janeteas, 2003 CanLII 57385 (ON CA): **http://canlii.ca/t/1v8js**

[10] R. v. Keegstra, [1990] 3 SCR 697: **http://canlii.ca/t/1fsr1**