

SPECIAL REPORT TO PARLIAMENT

*FREEDOM OF EXPRESSION
AND FREEDOM FROM HATE
IN THE INTERNET AGE*

June 2009



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CANADIAN
HUMAN RIGHTS
COMMISSION

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CANADIENNE DES
DROITS DE LA PERSONNE

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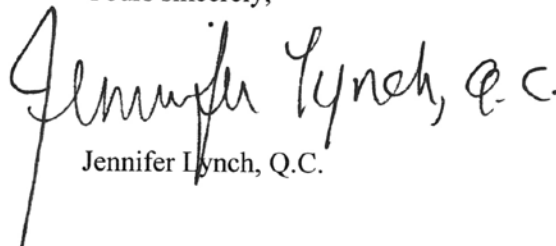
June 2009

The Honourable Noël A. Kinsella
Speaker of the Senate
The Senate
Ottawa, Ontario K1A 0A4

Dear Mr. Speaker:

Pursuant to section 61(2) of the *Canadian Human Rights Act*, I have the honour of transmitting to you for tabling in the Senate, our Special Report to Parliament: *Freedom of Expression and Freedom from Hate in the Internet Age*.

Yours sincerely,



Jennifer Lynch, Q.C.

Encl.

c.c.: Mr. Paul Bélisle
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Canada



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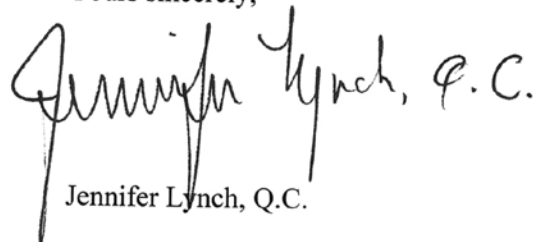
June 2009

The Honourable Peter Milliken, M.P.
Speaker of the House of Commons
House of Commons
Ottawa, Ontario K1A 0A6

Dear Mr. Speaker:

Pursuant to section 61(2) of the *Canadian Human Rights Act*, I have the honour of transmitting to you for tabling in the House of Commons, our Special Report to Parliament: *Freedom of Expression and Freedom from Hate in the Internet Age*.

Yours sincerely,



Jennifer Lynch, Q.C.

Encl.

c.c.: Ms. Audrey O'Brien
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The Canadian Human Rights Commission presents this Special Report to Parliament by its authority under section 61(2) of the *Canadian Human Rights Act* (CHRA). The purpose of the Report is to provide a comprehensive analysis of a current debate: what is the most effective way to prevent the harm caused by hate messages on the Internet, while respecting freedom of expression?

Freedom of expression is a fundamental right of Canadian democracy. So too is the right of all citizens to be treated with equality, dignity and respect, and to be protected from the harm that can be caused by hate messages. In Canada, for matters under federal jurisdiction, there are two main legal mechanisms for doing this — the *Criminal Code of Canada* and the CHRA.

Section 13 of the CHRA prohibits the repeated electronic transmission of messages that are likely to expose an individual or a group of individuals to hatred or contempt based on a prohibited ground of discrimination. Section 13 has always been controversial, but particularly so since it was amended in 2001 to include hate on the Internet.

The debate

The Internet is a remarkably valuable, powerful and potentially dangerous medium. It defies international borders and conventional concepts related to the creation and ownership of content. Users can readily post and instantly disseminate content to virtual communities worldwide. Regrettably, the Internet is also used to disseminate hate messages and other potentially harmful content.

The core matter at issue is what legal mechanisms should be used to deal with extreme forms of hateful expression that fall under federal jurisdiction. Some have argued that this should be dealt with solely under the *Criminal Code* and that the Commission's mandate under section 13 should be ended. Others favour maintenance of the current dual approach that allows for human rights law or the criminal law to be applied depending on the circumstances. With either scenario, people speak about the need to correct shortcomings.

No hierarchy of rights

Freedom of expression is a fundamental right in Canada enshrined in the *Canadian Charter of Rights and Freedoms*. However, no right is absolute. The modern concept of rights is that of a matrix with different rights and freedoms mutually reinforcing each other to build a strong

and durable human rights system. There is no hierarchy of rights with some rights of more importance than others.

Words and ideas have power. That power, while overwhelmingly positive, can also be used to undermine democracy, freedom and equality. It is for this reason that Canada, and many other nations, have enacted laws to limit forms of extreme hateful expression that have very minimal value in the free exchange of ideas, but do great harm to our fellow citizens.

Both the *Criminal Code* and the CHRA have been challenged before the Supreme Court of Canada as being inconsistent with the Charter's guarantee of freedom of expression. The Court determined that, while the laws did impinge on freedom of expression, the limitations imposed were necessary and justified in order to ensure the preservation of other Charter values such as equality and multiculturalism. Further, the Supreme Court decisions defined the type of extreme expression targeted by these two laws very narrowly. In the case of section 13, it specified that "hatred" and "contempt," the operative words in the section, refer only to "*unusually strong and deep-felt emotions of detestation, calumny and vilification . . .*" which are "*ardent and extreme*" in nature.

The CHRA does not regulate offensive speech, nor should it. While civility is to be desired, in the rough and tumble of democratic debate, offence will be given and feelings will be hurt. However, freedom of expression is not a licence to hate.

Narrow limits on extreme speech have long been accepted by many democratic states. Moreover, such limits are consistent with international human rights law that gives equal place to freedom of expression with the right of all citizens to live in dignity and equality.

The Commission's analysis

The *Criminal Code* and the CHRA address the issue of hateful expression in different ways. The *Criminal Code* is punitive. Conviction can result in imprisonment. Consequently, the burden of proof is the criminal standard of beyond a reasonable doubt.

The CHRA, as a human rights law, is remedial in nature. The objective of the law is to remedy the situation — in this case the removal of the hateful messages — and not to punish the respondents. The burden of proof is a balance of probabilities.

Professor Richard Moon, a legal expert on freedom of expression, was engaged by the Commission to provide his advice and analysis on how to proceed as part of the Commission's overall review of section 13. His primary recommendation was to repeal section 13 and leave the prosecution of extreme speech to the *Criminal Code*.

The Commission has considered Professor Moon’s recommendations and the submissions made to the Commission by various organizations and members of the public. The Commission has concluded that both the *Criminal Code* and the CHRA, each with its own purpose, are effective in dealing with hate messages on the Internet.

The Commission is also proposing improvements to the CHRA to address shortcomings that were identified through its consultations:

- add a statutory definition of “hatred” and “contempt” in accordance with that applied by the Supreme Court of Canada in *Canada v. Taylor, 1990*;
- allow for an award of costs in exceptional circumstances where the Tribunal finds that a party has abused the Tribunal process;
- include a provision under section 41 to allow the early dismissal of section 13 complaints when messages do not meet the narrow definition of hatred or contempt; and
- repeal the provision that allows for the assessment of fines against those who violate section 13.

Further, the Commission makes observations with respect to improving the effectiveness of the *Criminal Code*, including that:

- the requirement for consent of an Attorney General be reviewed as a possible barrier to prosecutions; and
- jurisdictions consider the benefits of better coordination between Crown prosecutors and police services in their efforts to protect Canadians from hate propaganda.

Section 13 cannot be viewed in isolation. Hate on the Internet is part of a broader pattern of hatred, prejudice and discrimination in Canada. While Canada is one of the most tolerant of nations, discrimination continues to exist. All levels of government, civil society, telecommunication companies, and many other stakeholders have roles to play.

Navigating the conflict and finding an appropriate balance between the right to freedom of expression and the right to live free from discrimination and free from harm caused by hate messages is vital to Canada’s continued growth as a diverse, inclusive and progressive nation that values equality for all. The Commission’s Special Report, which is based on consultation and expert opinion, is intended to inform the public and Parliamentary debate on this important issue.



Freedom of expression is a fundamental right of Canadian democracy. So too is the right of all citizens to be treated with equality, dignity and respect, and to be protected from the harm that can be caused by hate messages. Finding the appropriate balance between these rights is a challenge for all democratic societies.

Section 13 of the CHRA prohibits the repeated electronic transmission of messages that are likely to expose an individual or a group of individuals to hatred or contempt based on a prohibited ground of discrimination.¹ Section 13 has always been controversial. A particularly vigorous debate has arisen since 2007 when a complaint against a mainstream news magazine was filed (In June 2008, the Commission dismissed the complaint).

The core matter at issue is what legal mechanisms should be used to deal with extreme forms of hateful expression that fall under federal jurisdiction. Some have argued that this should be dealt with solely under the *Criminal Code* and that the Commission's mandate under section 13 should be ended. Others favour maintenance of the current dual approach that allows for human rights law or the criminal law to be applied depending on the circumstances. With either scenario, people speak about the need to correct shortcomings.

This Special Report to Parliament analyzes the current situation and provides advice to Parliament on options for the future. By tabling this Report, the Commission aims to further the public interest by ensuring that discussions are well informed and grounded in fact. The Commission recognizes that public discussions play an important role in ensuring that legislation and policies continue to be effective.²

¹ Under the CHRA, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability, or conviction for which a pardon has been granted.

² The Commission is tabling this Report in Parliament pursuant to section 61(2) of the CHRA: The Commission may, at any time, prepare and submit to Parliament a special report referring to and commenting on any matter within the scope of its powers, duties and functions if, in its opinion, the matter is of such urgency or importance that a report on it should not be deferred until the time provided for submission of its next annual report under subsection (1).

In June 2008, Chief Commissioner, Jennifer Lynch, Q.C., announced that the Commission would be conducting a comprehensive policy review of section 13. In announcing the review, the Chief Commissioner stated:

As human rights bodies, we must recognize, adapt and respond to change. Our progress is measured by our ability to be an effective influence within our rapidly-changing society.

[...]

The Commission is dedicated to ensuring that the Canadian Human Rights Act remains effective. Legislation must evolve — when necessary — to respond [to] and reflect changes in our society . . .

The first phase of the review was the development of an independent report by Professor Richard Moon, an expert on freedom of expression and member of the Law Faculty, University of Windsor. Professor Moon's terms of reference asked him to conduct legal and policy research and analysis, and then to make recommendations on the most appropriate mechanisms for addressing hate messages, particularly those on the Internet. Emphasis was to be given to section 13 of the CHRA and the role of the Commission.

The Commission released Professor Moon's *Report to the Canadian Human Rights Commission Concerning Section 13 of the Canadian Human Rights Act and the Regulation of Hate Speech on the Internet* in November 2008. The public was invited to submit comments on the Report. The Commission, in the preparation of this Special Report, has considered the public's comments and Professor Moon's recommendations. For a summary of Professor Moon's recommendations, please see Annex A.



A Matrix of Rights

Without freedom of expression, democracy and individual autonomy would be imperilled, and the media, literature and the arts would wither. This instrumental right makes other rights possible.

Freedom of expression is enshrined in section 2(b) of the *Canadian Charter of Rights and Freedoms*:

Everyone has the following fundamental freedoms:

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication...

The Commission recognizes the vital importance of freedom of expression and its obligation to protect it. Parliament, the courts, and human rights commissions and tribunals have been scrupulous in ensuring that freedom of expression is protected and preserved.

As important as it is, freedom of expression is not absolute. Indeed, no right is absolute. The 1993 *United Nations Vienna Declaration* put it this way:

All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.³

Freedom, equality and dignity for all citizens of the world are the underlying goals of all human rights. That is why the *Universal Declaration of Human Rights*, the foundational document of human rights in the modern era, states at the outset that:

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

³ *Vienna Declaration and Programme of Action*, as adopted by the World Conference on Human Rights on June 25, 1993.

The modern conception of rights is that of a matrix with different rights and freedoms mutually reinforcing each other to build a strong and durable human rights system.

There is no hierarchy of rights⁴ with some rights of more importance than others. They work together toward a common purpose.

Human rights sometimes conflict. When they do, it is up to legislators and courts to find the appropriate balance that best ensures the human rights and freedoms of all citizens. This principle is incorporated in section 1 of the *Canadian Charter of Rights and Freedoms*:

The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The Power of Words

Words and ideas have power. That power, while overwhelmingly positive, can also be used to undermine democracy and freedom. One classic argument in favour of unrestricted freedom of expression posits that in the battle of ideas, good ideas will inevitably win out over bad ideas. While good ideas gain sway over bad ideas most of the time, history tells us that this is not always the case.

Hateful words have the power to harm. They can isolate and marginalize our fellow citizens, not because of what people have said or done, but solely because of their personal characteristics, such as ethnicity, religion, race, or sexual orientation. The targets of hateful words are seldom the powerful and secure. More often than not, hate is directed at people who, because of a history of discrimination, intolerance and prejudice, are already vulnerable. Hate messages compound the insecurities that many already feel, undermining feelings of self-worth and community.

Hate on the Internet

The wonder of the Internet has been tarnished by hundreds of Web sites that spew hate. Using the Net, hatemongers can now reach into the room of any child who has a home computer. Their sites are often deceptive. Many attempt to disguise their message under a veneer of respectability. They use manipulation and lies to make their ideas sound almost reasonable.

From the website of Teaching Tolerance, a project of the Southern Poverty Law Centre:
www.tolerance.org

⁴ In the 1993 *Dagenais* case, the Supreme Court acknowledged this principle in relation to the Charter: “A hierarchical approach to rights, which places some over others, must be avoided, both when interpreting the Charter and when developing the common law. When the protected rights of two individuals come into conflict, . . . Charter principles require a balance to be achieved that fully respects the importance of both sets of rights.” *Dagenais v. CBC*, 1994 CanLII 39 (S.C.C.)

Equality

In the debate about freedom of expression and freedom from hate, Canada's commitment to equality lies at the centre. Just as section 2(b) of the Charter is central to our understanding of who we are as Canadians, so too is section 15, which guarantees equality before and under the law, and section 27, which requires that the Charter be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

In the Supreme Court decision in *Taylor*,⁵ Chief Justice Brian Dickson concluded:

*Hate propaganda presents a serious threat to society. It undermines the dignity and self-worth of target group members and, more generally, contributes to disharmonious relations among various racial, cultural and religious groups, as a result eroding the tolerance and open-mindedness that must flourish in a multicultural society which is committed to the idea of equality.*⁶

By demeaning the “dignity and self-worth of target groups,” extreme hateful expression denies the members of these groups equality before their fellow citizens and the law. In the *Keegstra* decision, the Supreme Court accepted the proposition “...that the public and wilful promotion of group hatred is properly understood as a practice of inequality...”⁷

When the Supreme Court upheld the constitutionality of section 13 in 1990, it did so, in part, because it concluded that extreme hateful expression added little to fundamental Canadian values that are essential to democracy.

*That the values of equality and multiculturalism are enshrined in ss. 15 and 27 of the Charter further magnify the weightiness of Parliament's objective in enacting s. 13(1). These Charter provisions indicate that the guiding principles in undertaking the s. 1 inquiry include respect and concern for the dignity and equality of the individual and a recognition that one's concept of self may in large part be a function of membership in a particular cultural group. As the harm flowing from hate propaganda works in opposition to these linchpin Charter principles, the importance of taking steps to limit its pernicious effects becomes manifest.*⁸

*I am of the opinion that hate propaganda contributes little to the aspirations of Canadians or Canada in the quest for truth, the promotion of individual self-development or the protection and fostering of a vibrant democracy where the participation of all individuals is accepted and encouraged.*⁹

⁵ *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892

⁶ *Taylor*

⁷ *R. v. Keegstra*, [1990] 3 S.C.R. 697

^{8,9} *Taylor*

International Law

International human rights instruments carefully protect freedom of expression but also provide limits on the most extreme forms of speech. Article 19 of the *Universal Declaration of Human Rights* states that:

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

The Declaration also affirms, however, that the exercise of any right must be done in a manner consistent with the protection of other rights. This is specified in article 29(2) of the Declaration:

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 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.

Article 19, paragraph 2, of the *International Covenant on Civil and Political Rights (ICCPR)*¹⁰ builds on the principles of the Declaration by stating:

Everyone shall have the right to freedom of expression; this right 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.

And paragraph 3 of the same article also provides that:

The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) For respect of the rights or reputations of others;*
- (b) For the protection of national security or of public order (ordre public), or of public health or morals.*

¹⁰ Canada ratified the ICCPR in 1976 and the *International Convention on the Elimination of All Forms of Racial Discrimination* in 1981. In both cases Canada did not enter any reservations with regard to the provisions noted above.

Finally, article 20 the Covenant makes it mandatory for all states parties to enact legal provisions to protect citizens from the incitement to hatred and discrimination:

20(2) Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.¹¹

Article 4 of the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD) also specifically requires states to take active measures to combat racial hatred and discrimination.

States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination . . .

In furthering these international obligations, most western democracies place some legal limits on hate speech.

¹¹ In 1983, John Ross Taylor brought a complaint to the United Nations Human Rights Committee, the body that monitors the implementation of ICCPR, alleging that section 13 was contrary to the article 19 guarantee of freedom of expression. The Committee concluded that section 13, consistent with article 19, prohibits the type of expression targeted by article 20(2): “...*the opinions which Mr. Taylor seeks to disseminate through the telephone system clearly constitute the advocacy of racial or religious hatred which Canada has an obligation under article 20(2) of the Covenant to prohibit.*” *Taylor and Western Guard Party v. Canada*, Communication No. 104/1981, Report of the Human Rights Committee, 38 U.N. GAOR, Supp. No. 40 (A/38/40) 231 (1983)



Parliament has included provisions both in the *Criminal Code* and in the CHRA to protect those targeted by hatred. Each statute has a different focus and scope, and each possesses inherent challenges in effectively responding to hate. This section provides the factual, contextual and historical background of the current system.

The Criminal Code

The 1966 report of the Special Committee on Hate Propaganda in Canada (known as the Cohen Committee for its distinguished Chair, law dean Maxwell Cohen) laid the groundwork for the enactment of Canada's legal regime for dealing with the promotion of hatred. The Committee concluded that while the problem of hate propaganda had not reached alarming proportions, it was an issue requiring public action:

Canadians who are members of any identifiable group in Canada are entitled to carry on their lives as Canadians without being victimized by the deliberate, vicious promotion of hatred against them.

In a democratic society, freedom of speech does not mean the right to vilify. The number of organizations involved and the numbers of persons hurt is no test of the issue: the arithmetic of a free society will not be satisfied with over-simplified statistics demonstrating that few are casting stones and not many are receiving hurts.

What matters is that incipient malevolence and violence, all of which are inherent in 'hate' activity, deserves national attention. However small the actors may be in number, the individuals and groups promoting hate in Canada constitute 'a clear and present danger' to the functioning of a democratic society...

The Canadian community has a duty, not merely the right, to protect itself from the corrosive effects of propaganda that tends to undermine the confidence that various groups in a multicultural society must have in each other.¹²

¹² *Report to the Minister of Justice of the Special Committee on Hate Propaganda in Canada 1966.*

The Cohen Committee report resulted in the 1970 amendments to the *Criminal Code* that deal with the promotion and incitement to genocide and hatred, as well as the distribution of hate propaganda:

- Section 318 prohibits advocating or promoting genocide against an “identifiable group,” that is, any section of the public distinguished by colour, race, religion, ethnic origin or sexual orientation;
- Section 319(1) prohibits inciting hatred against an “identifiable group” by communicating in a public place, statements that are likely to lead to a breach of the peace;
- Section 319(2) prohibits communicating statements, other than in private conversation, that wilfully promote hatred against an “identifiable group;”
- Section 320.1 allows for a judge, on application, to issue a warrant of seizure to confiscate materials believed to constitute hate propaganda or to order the shutting down of a website believed to contain such materials.

Please refer to Annex B for the full text of these sections.

Advocating or promoting genocide (s. 318) is an indictable offence punishable by a maximum of five years’ imprisonment. Inciting or wilfully promoting hatred (s. 319) are dual procedure offences, punishable by two years of imprisonment on indictment and up to six months of imprisonment and/or up to a \$2,000 fine when proceeded with by way of summary conviction.

**Other laws
dealing with hate**

The Criminal Code and CHRA provisions are two of a number of federal laws dealing with hate propaganda and hate motivated activities. These include:

- *Customs Act prohibitions on the importation of hate propaganda;*
- *Canada Post regulations on the use of the mail to communicate hate propaganda; and*
- *Canadian Radio-television and Telecommunications Commission regulations on abusive language.*

CHRA Section 13

In the late 1970s, Parliament began to consider proposals to enact a federal human rights act. During these discussions, concerns were raised regarding the inadequacy of the *Criminal Code* in dealing with a new manifestation of hate propaganda.

The immediate cause for concern was the hate campaign being waged by John Ross Taylor in Toronto. Mr. Taylor, an unrepentant Nazi sympathizer, handed out cards on street corners inviting passers-by to call a phone number to hear a pre-recorded message. Typical of the noxious messages posted (and later found to contravene section 13) was the following:

*Where large groups of different races mix in all phases of daily contact, race mixing or miscegenation is inevitable. Compared to race mixing an Atomic War with near total destruction is preferable as race mixing is permanent destruction of the higher values of each race whereas Atomic War will leave a remnant however small that can rebuild but a race mixed society is forever doomed.*¹³

In response to the concerns raised regarding Taylor, Parliament enacted section 13. Since then, the only substantive change to the section was the 2001 amendment included in the *Anti-terrorism Act* following the tragic events of 9/11. The amendment clarified that section 13 covered hate on the Internet as well as the telephonic communication of hate messages, which was its original purpose.¹⁴ The section reads as follows:

13(1) 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 activities 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.

13(2) For greater certainty, subsection (1) applies in respect of a matter that is communicated by means of a computer or a group of interconnected or related computers, including the Internet, or any similar means of communication, but does not apply in respect of a matter that is communicated in whole or in part by means of the facilities of a broadcasting undertaking.

¹³ *Smith and Lodge v. Western Guard Party (Taylor J.R.)*, Canadian Human Rights Tribunal

¹⁴ This amendment was included in Bill C-36, the *Anti-terrorism Act*, given Royal Assent on December 18, 2001.

13(3) For the purposes of this section, no owner or operator of a telecommunication undertaking communicates or causes to be communicated any matter described in subsection (1) by reason only that the facilities of a telecommunication undertaking owned or operated by that person are used by other persons for the transmission of that matter.

The Commission's unique jurisdiction

The Commission has jurisdiction only with regard to matters that come under federal jurisdiction as enumerated in section 91 of the *Constitution Act (1867)*. It was possible for Parliament to enact section 13 because telecommunications, including the telephone system and the Internet, are federally regulated.

Some provinces have human rights provisions prohibiting the publication of hate messages by means that come under provincial jurisdiction, such as the publication of newspapers. The respective provincial commissions and tribunals deal with complaints regarding these provisions.

Some commentators refer to “section 13” when referring to any legislation dealing with hate messages. This is inaccurate and misleading. The provincial and federal commissions, and their respective laws, are independent of each other.

Section 13 Jurisprudence

The Canadian courts, including the Supreme Court, have ruled that section 13 was enacted for a valid reason and is constitutionally sound. The courts have recognized that the protection of freedom of expression under the Charter — like its protection under international human rights law — is subject to reasonable limits in order to protect individuals and groups from being exposed to hate messages.

The first complaint heard by the Canadian Human Rights Tribunal dealt with the message quoted above and other similar messages recorded and made available by John Ross Taylor. The Tribunal found that the respondents had contravened the CHRA and ordered that they shut down the telephone line.¹⁵ By the time the case reached the Supreme Court, the *Canadian Charter of Rights and Freedoms* had been enacted. In his appeal to the Supreme Court, Taylor alleged that section 13 denied him freedom of expression as guaranteed by section 2(b) of the Charter.

¹⁵ *Smith and Lodge v. Western Guard Party (Taylor J.R.)*

The Court ruled¹⁶ that although section 13 infringed freedom of expression, this infringement could be justified under section 1 of the Charter, which provides that the rights in the Charter are subject “to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”¹⁷

The Court went on to emphasize that the section targeted only the most extreme forms of expression and not those that might be considered merely offensive:

*In sum, the language employed in s. 13(1) of the Canadian Human Rights Act extends only to that expression giving rise to the evil sought to be eradicated and provides a standard of conduct sufficiently precise to prevent the unacceptable chilling of expressive activity. Moreover, as long as the Human Rights Tribunal continues to be well aware of the purpose of s. 13(1) and pays heed to the ardent and extreme nature of feeling described in the phrase “hatred or contempt,” there is little danger that subjective opinion as to offensiveness will supplant the proper meaning of the section.*¹⁸

The definitions of “hatred” and “contempt” adopted by the Supreme Court highlight the extreme nature of the types of messages targeted by section 13.

*With “**hatred**” the focus is a set of emotions and feelings which involve extreme ill will towards another person or group of persons. To say that one “hates” another means in effect that one finds no redeeming qualities in the latter . . .*

*“**Contempt**” is . . . a term which suggests a mental process of “looking down” upon or treating as inferior the object of one’s feelings. This is captured by the dictionary definition relied on in Taylor . . . in the use of the terms “despised,” “dishonour” or “disgrace.” ...¹⁹*

The Supreme Court also stated that “hatred or contempt” in the context of s. 13(1) refers only to “unusually strong and deep-felt emotions of detestation, calumny and vilification” that are “ardent and extreme”²⁰ in nature.

The Court interpreted Parliament’s purpose as limiting only the most extreme edges of expression and leaving unhindered other forms of expression. The Court further determined that, not only was such a narrow limitation consistent with the Charter, but that it was necessary to ensure the well-being of Canadian society.

¹⁶ *Taylor*

¹⁷ While all seven judges agreed that it was constitutionally permissible to impose restrictions on free speech in the interests of combating intolerance, three of the seven were of the view that section 13 was too vague to accomplish this goal and, consequently, might inadvertently capture non-objectionable speech in its ambit. They, therefore, would have struck down the law.

^{18, 19, 20} *Taylor*

All decisions of the Commission and the Tribunal on whether a particular message constitutes hatred or contempt under section 13 are determined by rigorously applying the rationale and definitions delineated by the Supreme Court in *Taylor*. This is sometimes referred to as the “Taylor Test.”

The American approach

The First Amendment to the Constitution of the United States guarantees freedom of speech.

Jurisprudence of the United States’ courts, including the Supreme Court, severely restricts any limitation on speech, including hate speech or propaganda. Under American law, only so called “fighting words;” that is expression that conveys a specific and imminent threat of violence, are regulated.

As exemplified by the Keegstra and Taylor cases, the Supreme Court of Canada has taken a different approach. An article written by Mr. Justice Russell Juriansz, Ontario Court of Appeal, examines the U.S. approach to hate speech compared with that adopted by other countries, including Canada. Justice Juriansz concludes:

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 growing global consensus, which observes that careful restrictions of some forms of speech are both desirable and necessary.

Russell Juriansz, “Combating Hate and Preserving Free Speech: Where is the Line? In *Hate on the Net, Canadian Issues*, Spring 2006.

Criminal Code Jurisprudence

The Supreme Court rendered its decision in the *Keegstra*²¹ case on the same day in 1990 as the *Taylor* decision. This decision dealt with the constitutionality of the *Criminal Code* provisions dealing with the wilful promotion of hatred.

Keegstra was a high school teacher who taught that there was a worldwide Jewish conspiracy. He described Jews to his pupils as “treacherous,” “subversive,” “sadistic,” “money-loving” and “power hungry,” and called them “child killers.” He taught that Jewish people seek to destroy Christianity and are responsible for anarchy, chaos, wars and revolution. He was charged and convicted for the wilful promotion of hatred under section 319(2) of the *Criminal Code*.

²¹ Keegstra

Like Taylor, Keegstra sought to have his conviction overturned on the grounds that section 319(2) was an impermissible infringement of his right to freedom of expression under section 2(b) of the Charter. Using reasoning very similar to that in *Taylor*, albeit in a criminal context, the Supreme Court found that although section 319(2) did impinge on section 2(b), it was a reasonable limitation under section 1:

Section 319(2) of the Code constitutes a reasonable limit upon freedom of expression. Parliament's objective of preventing the harm caused by hate propaganda is of sufficient importance to warrant overriding a constitutional freedom. Parliament has recognized the substantial harm that can flow from hate propaganda and, in trying to prevent the pain suffered by target group members and to reduce racial, ethnic and religious tension and perhaps even violence in Canada, has decided to suppress the wilful promotion of hatred against identifiable groups. Parliament's objective is supported not only by the work of numerous study groups, but also by our collective historical knowledge of the potentially catastrophic effects of the promotion of hatred. Additionally, the international commitment to eradicate hate propaganda and Canada's commitment to the values of equality and multiculturalism in ss. 15 and 27 of the Charter strongly buttress the importance of this objective.²²

²² Keegstra



Process under the CHRA

The Commission and the Tribunal are two of many administrative decision makers established to deal with legal and regulatory matters. Administrative boards and tribunals are a key component of the legal system in western democracies and are backed by a century-old body of law and jurisprudence. As the Supreme Court has noted: “*In Canada [administrative tribunals] are a way of life. Boards and the functions they fulfill are legion.*”²³

The Commission and the Tribunal, like their provincial counterparts, were created to provide an alternative to the courts for the resolution of human rights complaints by providing a less litigious and more remedial approach to dispute resolution. As articulated in its purpose clause, the CHRA is aimed at promoting and protecting equality and dignity:

Section 2: Purpose

*The purpose of this Act is to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle 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.*** (emphasis added)

Role of the Canadian Human Rights Commission

One of the primary roles of the Commission is to act as a screening body. It is mandated to receive complaints, analyze them, and determine if they should be dismissed or referred to the Tribunal. It is the Tribunal, and not the Commission, that determines the merits of a case following consideration of the relevant evidence at a hearing.

Anyone who believes that there has been a violation of the CHRA may file a complaint with the Commission.²⁴

²³ *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)* (1992) S.C.R. 623

²⁴ For information on how complaints are filed see the Dispute Resolution section of the Commission's website at: www.chrc-ccdp.gc.ca

The Commission's process generally involves three steps. At any stage in the process described below, mediation is offered in order to allow the parties to resolve their dispute.

Step 1: Decision on whether to deal with a complaint

The first step is to decide whether the Commission should 'deal with' the complaint.

A decision not to deal with a complaint means that the Commission has determined that an investigation is not needed because:

- the complainant has not tried resolving the complaint through a grievance or other procedure;
- the complaint is outside the jurisdiction of the Commission;
- the complaint is trivial, frivolous, vexatious or made in bad faith; or
- the complaint has not been filed within the time limits specified in the CHRA.²⁵

If the Commission decides that it will not deal with a case, it takes no further action except to advise the parties.

If none of these conditions applies, the Commission is bound by statute and jurisprudence to deal with the complaint.

Step 2: Investigation

If the complaint proceeds, the Commission assigns an investigator to look into it. The investigator carries out a thorough and objective investigation of the complaint, including interviewing relevant persons and inviting submissions from the respondent and the complainant.

Based on the investigation, the investigator drafts a report. Copies are sent to the complainant and the respondent, who are again invited to make written submissions.

Step 3: Consideration by the Commission

Commissioners²⁶ considering a case are given a copy of the complaint, the investigation report and any submissions made by the parties. No hearings are held. Based on the information

²⁵Usually the complaint must be filed within one year of the alleged discrimination.

²⁶The Commission currently consists of the Chief Commissioner and Deputy Chief Commissioner, who are both full-time appointees, and four part-time commissioners. Commissioners are appointed by the Governor in Council for fixed terms and may be removed only by a vote of Parliament.

before it, the law and the jurisprudence, the Commission then decides whether to:

- refer the complaint to conciliation;
- dismiss it; or
- refer it to the Tribunal.²⁷

Approximately 13.5 percent of all complaints on all grounds are referred to the Tribunal. Of those referred, about 60 percent are resolved through pre-hearing mediation conducted by the Tribunal. This means that around five in every hundred complaints proceed to a full hearing.

Role of the Canadian Human Rights Tribunal

The Tribunal was created to hold hearings on complaints referred to it by the Commission.

Although the Tribunal and the Commission are often referred to as one agency, this is incorrect. The Tribunal is a separate and independent agency with no financial, administrative or other connections with the Commission.

When a complaint is referred to the Tribunal for a hearing, the only document the Tribunal has before it is the original complaint form. In this way, the Tribunal is not influenced, or bound, by the findings of the Commission's investigation. In fact, unless one of the parties enters the investigation report as evidence, the Tribunal is not aware of the contents of the investigation report.²⁸ This helps ensure that the Tribunal is completely unbiased in its decision making.

The Tribunal's role

The main function of the Canadian Human Rights Tribunal is adjudicative. It conducts formal hearings into complaints that have been referred to it by the Commission. It has many of the powers of a court. It is empowered to find facts, to interpret and apply the law to the facts before it, and to award appropriate remedies. Moreover, its hearings have much the same structure as a formal trial before a court. The parties before the Tribunal lead evidence, call and cross-examine witnesses, and make submissions on how the law should be applied to the facts. The Tribunal is not involved in crafting policy, nor does it undertake its own independent investigations of complaints: the investigative and policy-making functions have deliberately been assigned by the legislature to a different body, the Commission.

Supreme Court of Canada, Bell Canada v. Canadian Telephone Employees Association, 2003 SCC 36 (CanLII) at para 23

²⁷ The Act provides that the Commission will refer a case to the Tribunal when in its opinion "...having regard to all the circumstances of the complaint, an inquiry into the complaint is warranted,..." Section 44(3)(a)(l)

²⁸ In all cases, a Commission decision to refer a complaint to the Tribunal is based on a determination that further inquiry into the matter is warranted by means of a Tribunal hearing. The Commission makes no findings on the merits of the case.

The complainant and the respondent appear before the Tribunal to present their arguments. Each party is entitled to request the production of relevant documents from the other party and the Commission. They can call witnesses and experts, examine them, and cross-examine those of the other side.

The Commission may also participate as a party before the Tribunal. When it does so, the Commission does not represent the complainant, but rather makes submissions in the public interest.²⁹

The members of the Tribunal are appointed by the Governor in Council. A requirement of all Tribunal members is that they have “...*experience, expertise and interest in, and sensitivity to, human rights.*”³⁰

Although not required by the CHRA, the Tribunal also offers mediation services to resolve complaints before a formal hearing is held. After hearing from all parties, the Tribunal renders a decision based on the evidence, the legislation and jurisprudence. If the Tribunal finds that section 13 has been violated, it may order the respondent to:

- cease any activities contrary to section 13 and desist from communicating hate on the Internet (a cease and desist order);
- compensate a victim specifically identified on the website up to \$20,000 if the actions of the respondent have been wilful or reckless (special compensation); and
- pay a penalty of not more than \$10,000.³¹

The Tribunal does not have the power to require respondents to apologize for their discriminatory behaviour.

The Tribunal does not have the power to imprison respondents. However, under the CHRA, orders of the Tribunal have the same force as an order of the Federal Court. Therefore, respondents who fail to comply with a Tribunal order can be brought before the Federal Court for contempt of court proceedings. In such cases, the Federal Court has the power of

²⁹ Section 51 of the CHRA states: *In appearing at a hearing, presenting evidence and making representations, the Commission shall adopt such position as, in its opinion, is in the public interest having regard to the nature of the complaint.*

³⁰ Section 48.1(2), CHRA

³¹ Section 54(1.1) states: *In deciding whether to order the person to pay the penalty, the member or panel shall take into account the following factors:*

- (a) *the nature, circumstances, extent and gravity of the discriminatory practice; and*
- (b) *the wilfulness or intent of the person who engaged in the discriminatory practice, any prior discriminatory practices that the person has engaged in and the person’s ability to pay the penalty.*

imprisonment. All Canadian superior courts have similar powers with regard to contempt of court.

In the 31-year history of the Commission, three respondents, including one since 2001, have been imprisoned by the Federal Court for contempt relating to their refusal to comply with a Tribunal order in a section 13 case.³² Contempt proceedings have nothing to do with the original case; rather they are intended to protect the rule of law. If orders of duly constituted tribunals and courts are not enforced, the administration of justice is brought into disrepute and with it our democratic values and our commitment to the rule of law.

The CHRA does not allow for the awarding of costs incurred by respondents at the Commission or Tribunal stage. The main reason for this is the concern that the possibility of cost awards might discourage already vulnerable victims of discrimination from filing complaints.

Safeguards to Ensure Fairness in Decision Making of the Commission and the Tribunal

The decision making processes of the Commission and the Tribunal have many safeguards inherent to administrative and quasi-judicial bodies. The Commission's and the Tribunal's decision making processes must be:

- procedurally fair;³³
- correct in law; and
- have a reasonable basis in fact.

At the Tribunal, additional rules apply to ensure that hearings are conducted appropriately. Parties at the Tribunal are entitled to:

- be given notification of the hearing;
- receive disclosure of arguments and evidence in a timely and efficient manner;
- bring preliminary and interlocutory motions;

³² A finding of contempt of court requires the demonstration beyond a reasonable doubt, that the person obligated to obey the order had knowledge of the order, that the order was sufficiently clear, and that the order has been breached.

³³ This means that the parties to a complaint must be informed of the case against them, and be afforded a fair opportunity of answering it to ensure they are accorded a meaningful opportunity to be heard by an impartial decision maker.

-
- adduce evidence;
 - cross-examine witnesses; and
 - be accorded ample opportunity to be heard through oral submissions.

These protections, which are grounded in the principles of administrative law, ensure that Commission and Tribunal decisions follow an accepted, rigorous and transparent process. This is illustrated in the recent decision of the Federal Court in *Tremaine v. Warman and the CHRC*, where the Respondent brought an application to the Court for a review of the Tribunal’s decision. The Court carefully examined the Tribunal’s approach to a complaint brought under section 13 of the CHRA:

[16] The Tribunal examined each element of a proscribed discrimination under s.13 of the Act and carefully applied the facts to the law. . .The Tribunal provided a detailed analysis of the meanings of “hatred” and “contempt” and carefully examined evidence of Mr. Tremaine’s numerous postings. The Tribunal noted the extreme and violent nature of the postings and concluded that it would offer readers reason to hate and to be suspicious of minorities. It must also be noted that the Tribunal was careful to balance Mr. Tremaine’s freedom of expression right with the equality rights of all individuals in reaching this decision. Ultimately, the Tribunal correctly applied the evidence to the relevant factors in determining the s.13 violation. The decision was not unreasonable.³⁴

Judicial review

All decisions of the Commission and the Tribunal are subject to judicial review by the Federal Court of Canada and, with leave, to the Supreme Court of Canada, on application by either party to a complaint. This ensures that parties to a complaint that are dissatisfied with a decision of the Commission or the Tribunal have a means to have these decisions reviewed by a court.

Section 13 Case Data

The Commission and the Tribunal have consistently applied the reasoning in the *Taylor* decision in the determination of section 13 complaints. In his independent review, Professor Moon confirmed that the complaints referred to the Tribunal by the Commission were limited to “... the most extreme and hateful forms of discriminatory expression.”

³⁴ *Tremaine v. Warman*, paragraph 16

The impugned hate messages that have been considered by the Tribunal cannot, by any objective standard, be classified as merely offensive and controversial. They are hateful and extreme, and the Tribunal has found them to be so. Selected excerpts of these decisions can be found in Annex C.

The careful approach dictated by the courts is borne out by the data on the handling of section 13 complaints since hate on the Internet was included under the Commission's jurisdiction in 2001:

- 72 complaints have been filed and accepted under section 13:
 - 66 complaints have been closed; and
 - 6 complaints are still under investigation or pending a hearing and/or decision of the Tribunal.
- 74% (49) of complaints filed under section 13 were closed without the matter proceeding to Tribunal.
- 26% (17) of complaints filed under section 13 went on to the Tribunal for a final determination.

Closed Complaints: Section 13*				
2001 to Present				
Did not proceed to the Tribunal**	Settlements approved***	Upheld by the Tribunal	Dismissed by the Tribunal	Total
38	11	16	1	66
57.5%	16%	24%	1.5%	100%

* A closed complaint is any complaint where the Commission has made a final decision on the disposition of the complaint.

**Includes: dismissed, withdrawn, no further proceedings (e.g., situation addressed by a private settlement between the parties), and not to deal with pursuant to section 41.

***Includes: settlements during investigation and at the Tribunal.

Remedies Awarded by the Tribunal

- Cease and desist orders: In the 17 complaints decided since 2001, the Tribunal has issued a cease and desist order with regard to 16.
- Special compensation awards: In four cases, special compensation ranging from \$1,000 to \$15,000 was awarded to individuals identified on websites.
- Penalties assessed: In 12 cases the Tribunal has assessed penalties against the respondents ranging from \$1,000 to \$8,000.

Process under the *Criminal Code*

Allegations of violations of the *Criminal Code* hate provisions are investigated by police services and prosecuted by provincial Crown prosecutors.³⁵ Some local police services have developed specialized units to deal with hate crimes. In most places, however, the investigation of hate charges is carried out by police officers who do not have specialized training in this area of the law.³⁶ The police submit the results of their investigation to the Crown prosecutors. The prosecutors can decide not to proceed if they determine that there is no reasonable prospect of conviction.

In most criminal cases, the discretion to prosecute lays solely with the Crown prosecutor. However, sections 318 and 319 of the *Criminal Code* require an additional step: the Attorney General of the province or territory involved must give consent before prosecution can proceed.³⁷ If the Attorney General gives consent, a criminal trial is begun. Decisions of the trial court are subject to appeal to the relevant appeal courts, and ultimately to the Supreme Court of Canada.

The purpose of the *Criminal Code* is punitive. The focus is on the blameworthiness of the accused.³⁸ As such, the standard of proof in a criminal proceeding is proof beyond a reasonable doubt. The Crown must prove beyond a reasonable doubt that not only did the criminal act take place (*actus reus*), but that it was accompanied by criminal intent (*mens rea*). This is the highest standard of proof known to law and it reflects the seriousness of a criminal conviction.

By contrast, the standard of proof in most other areas of law, including human rights and constitutional law, is proof on a balance of probabilities, which is to say proof that it is more likely than not that an event occurred.

³⁵ As the administration of criminal law is primarily a provincial/territorial matter, the federal Attorney General and federal prosecutors have no role in the prosecution of charges under the *Criminal Code*.

³⁶ Ontario has 58 municipal police services plus the Ontario Provincial Police. Of these, only 12 have one or more police officers who are specialized in investigating hate. Their roles are chiefly to educate their colleagues in how to recognize hate groups' insignia, or that some activity might have a component of hate to it. The Ontario group of 12 does not collect statistics; however we were advised by one hate crime specialist from a 'top 5' police service that in his 2.5 years serving in that capacity, he had forwarded only 6 cases to the Crown for review, and none of them had received the Crown's approval to be sent to the Attorney General for consent.

³⁷ Some other *Criminal Code* provisions that require consent are war crimes, crimes against humanity and abduction of a child where no custody order has been granted.

³⁸ The Cohen Committee indicated that the criminalization of an activity is the highest condemnation that society can bring with respect to that activity. The Committee stated: "*No civil statute can create a moral standard equivalent to that of criminal law.*" The criminalization of hate propaganda properly reflects this condemnation.

Charges and prosecutions under the *Criminal Code* provisions that deal with hate are relatively rare. In the most recent period for which data are available, 1994–95 to 2006–07, there were 44 cases that resulted in 11 convictions.

There have been two convictions of an individual under section 319 in relation to posting hate on the Internet.³⁹

<i>Criminal Code</i> Cases 1994–95 to 2006–07						
	Cases⁴⁰	Convicted	Acquitted	Stay/ withdrawn	Other decision	Conviction rate
Section 318	2	1	0	0	1	50%
Section 319	42	10	0	27	5	24%

Source: *Adult Criminal Court Survey*, Canadian Centre for Justice Statistics, Statistics Canada, 2009

Differences between the *Criminal Code* and the CHRA

When Parliament enacted section 13, it did so as an alternative to the *Criminal Code* provisions dealing with hate that had been enacted several years earlier. It was intended that section 13 be parallel and complementary to the *Criminal Code* and not in competition with it. As noted above, it is also important to emphasize the differences in the breadth of jurisdiction of the two laws. The *Criminal Code* deals with promoting hatred in a public place or advocating genocide. The specific mode of communication is not limited. On the other hand, the Commission’s jurisdiction under the CHRA is limited to the repeated transmission of hate messages by means of a telecommunication undertaking regulated by Parliament.

³⁹ In September 2006, Reni Santana-Reis (formerly known as Reinhard Gustav Mueller) was sentenced to 16 months in jail in an Alberta court. In February 2008, Keith Francis William Noble, 32, was sentenced in B.C. Supreme Court in Prince George to six months in jail and three years’ probation.

⁴⁰ A “case” may involve one or more charges against an accused.

In the *Taylor* and *Keegstra* cases, the Supreme Court emphasized both the differences between the two laws as well as how they complement each other.

In *Taylor*, the Chief Justice noted:

... It is essential... to recognize that, as an instrument especially designed to prevent the spread of prejudice and to foster tolerance and equality... the Canadian Human Rights Act is very different from the Criminal Code. The aim of human rights legislation, and of s. 13(1), is not to bring the full force of the state's power against a blameworthy individual for the purpose of imposing punishment. Instead, provisions found in human rights statutes generally operate in a less confrontational manner, allowing for a conciliatory settlement if possible and, where discrimination exists, gearing remedial responses more towards compensating the victim.⁴¹

In the *Keegstra* decision, Madame Justice Beverley McLachlin expanded on the differences between the two approaches by noting the severe consequences of a criminal proceeding compared to the important but different consequences arising out of a human rights proceeding.

The seriousness of the imprisonment which may follow conviction requires no comment. Moreover, the chilling effect of prohibitions on expression is at its most severe where they are effected by means of the criminal law. It is this branch of the law more than any other which the ordinary, law-abiding citizen seeks to avoid.

[...]

Finally, it can be argued that greater precision is required in the criminal law than, for example, in human rights legislation because of the different character of the two types of proceedings. The consequences of alleging a violation of s. 319(2) of the Criminal Code are direct and serious in the extreme. Under the human rights process a tribunal has considerable discretion in determining what messages or conduct should be banned and by its order may indicate more precisely their exact nature, all of which occurs before any consequences inure to the alleged violator.⁴²

The following table illustrates the major differences between the *Criminal Code* and the CHRA with regard to the promotion of hatred. It illustrates how the two systems were designed to accommodate different but complementary purposes.

⁴¹ *Taylor*

⁴² *Keegstra*

Key Differences between the Criminal Code and the CHRA		
	Criminal Code	CHRA
Objective	Punitive: focuses on the intent of the perpetrator.	Remedial: focuses on the effect of discrimination and on providing protection and compensation to the victim of discrimination.
Offence/ Discriminatory Practice	The <i>Criminal Code</i> provisions prohibit advocating or promoting genocide, publicly inciting hatred when it is likely to lead to a breach of the peace, or wilfully promoting hatred against an identifiable group.	Section 13 prohibits hate messages that are communicated telephonically or by means of the Internet, and that are likely to expose a person or persons to hatred or contempt based on a prohibited ground of discrimination.
Parties	The parties to the proceeding are the Crown, and the accused.	Parties to the proceeding are the complainant and the respondent. The Commission may appear in the public interest but does not represent the complainant.
Carriage of the case	The Crown prosecutes the case before a judge. Unless the Crown drops the charges, or there is a plea bargain, the case always goes to a trial.	The Commission does not “prosecute”; nor does it represent the complainant against the respondent. Rather, the Commission is a screening body for the Tribunal and once a matter is referred to Tribunal, the Commission may choose to participate in the hearing as a representative of the public interest. In 74% of hate messages cases, the complaint does not proceed to the Tribunal.
Initiation of proceedings	Police investigate allegations and provincial Crown prosecutors prosecute the cases. A charge requires the consent of the Attorney General.	A complaint under section 13 of the CHRA can be <u>filed</u> by anyone who has reasonable grounds to believe that there has been a breach of section 13. However, a complaint can only proceed to a hearing before the Tribunal if the Commission refers the case.
Hearing	Any <i>Criminal Code</i> charge is heard in a court of law.	A complaint under the CHRA is heard by an administrative tribunal, after having exhausted all other opportunities for resolution or mediation. The process, as with all administrative procedures, though structured and abiding by the rules of natural justice, is less formal and does not require retaining the services of a lawyer.

Standard of proof	Beyond a reasonable doubt.	Balance of probabilities.
Penalty/Remedy	The accused may be sentenced to a fine or a term of imprisonment.	The respondent may be ordered to cease and desist the discriminatory practice. No financial compensation is awarded unless a victim is specifically identified in the hate message and there is evidence of wilful and reckless behaviour (up to a maximum of \$20,000). In addition, a penalty can be imposed up to \$10,000, to be paid to the Receiver General. In such cases, factors such as intent, gravity of the actions and the ability of the person to pay are to be considered.

The Canadian Model

As in Canada, many western democracies have criminal laws dealing with the promotion of hatred. Governmental and civil society programs and activities that promote inter-group understanding and aim to reduce intolerance, prejudice and discrimination often accompany these laws.

Canada appears to be unique in that the CHRA provides a non-criminal law approach to deal specifically with the electronic transmission of hate messages in a multi-faceted and flexible manner. Professor Jane Bailey, of the Law Faculty at the University of Ottawa, has noted that the Canadian approach is seen as a model for how to deal with hate on the Internet:

Section 13 places Canada at the forefront of democratic nations in addressing hate propaganda by treating it as a practice of inequality, a mechanism for perpetuating myths, stereotypes and calls for violence that are fundamentally inconsistent with the goal of ensuring that all of us are able to reach our potential and live the life of our own choosing regardless of personal characteristics such as race, religion and sexual identity.⁴³

⁴³ "Democracy suffers when equality is threatened" Jane Bailey, *Ottawa Citizen*, December 11, 2008. pg. A.15



The Internet is a powerful tool for building communities of like-minded individuals. It was not surprising, therefore, that hate-mongers quickly adapted to it. Where once people handed out hate literature on a street corner, now they can hand it out on the electronic corners of the Internet.

Before the coming of the Internet, Mr. Ernst Zundel, operating from Toronto, was recognized as one of the most prolific publishers of hate propaganda in the world. Mr. Zundel quickly adapted to the Internet and by the mid-1990s had established the Zundelsite. The electronic super highway had made the telephone answering machine obsolete.

Those opposed to Mr. Zundel's activities soon considered whether section 13 might be an effective way to deal with the new Internet form of hate messages just as it had been used earlier to deal with Mr. Taylor's hate line. At the time, most personal Internet connections were made via a telephone line. Consequently, it was argued that the Internet was a form of repeated telephonic communication and therefore subject to the CHRA's hate message provision.

In January 2002, the Tribunal ruled that section 13 covered the Internet and that the material posted by Mr. Zundel⁴⁴ was hate within the meaning of section 13. The Tribunal ordered him to cease and desist from distributing the prohibited messages.⁴⁵ Just prior to the Tribunal rendering its decision, in December 2001, Parliament amended the CHRA to specify that section 13 included messages transmitted via the Internet.⁴⁶ This brought section 13 into the Internet age.

The 2001 amendment was a logical extension of the law to deal with evolving technology. However, it must be acknowledged that the Internet is very different from a telephone answering machine. This reality has had a significant impact on both how section 13 is applied and how it is perceived.

⁴⁴ Mr. Zundel moved to the United States before the Tribunal decision could be enforced. However, subsequently he was deported back to Canada as a result of an immigration violation. Canada in turn deported him to his country of citizenship, Germany, after it was determined that his presence in Canada constituted a risk to the security of Canada. He is currently serving a prison term in Germany resulting from a conviction under German law that makes it a criminal offence to deny the Holocaust.

⁴⁵ *Citron v. Zundel*, Canadian Human Rights Tribunal (2002)

⁴⁶ This amendment followed a recommendation from the *Canadian Human Rights Act Review Panel*, chaired by former Supreme Court Justice Gerard La Forest.

By its nature, a telephone answering machine is easy to find. It is a physical thing that can be unplugged. Its owner can be readily identified. There are likely to be few “hate lines” operating at any one time.

The Internet, however, is borderless and ever changing. Material posted on a website originating in Canada can quickly be mirrored on other websites around the world. A website hosted today in Canada can be moved outside Canadian jurisdiction tomorrow.

The Internet has enabled the convergence of many types of expression. Blogs, websites, TV, radio, newspapers, magazines, books and music are all now readily available via the Internet. At relatively low cost, anyone can become a publisher, a broadcaster and a maker of opinion — a participant in the new electronic town square.

Convergence has widened the ambit of section 13. Where once the section targeted a specific and discrete type of activity, it now encompasses more. Printed material is a good example. Section 13 does not apply to printed publications. However, if a print article is placed on the Internet it then becomes subject to the Commission’s jurisdiction.

The inclusion of the Internet under section 13 has resulted in a recent case relating to mainstream media — *Canadian Islamic Congress (CIC) v. Rogers Communications*. The CIC filed a complaint alleging that an article written by Mark Steyn, and which appeared in the online edition of *Maclean’s* magazine, exposed members of the Muslim community to hatred and contempt pursuant to section 13. The Commission dealt with the case as required by law and determined that, although some aspects of the article in question were strongly worded, polemical, colourful and calculated to excite discussion, they did not meet the threshold of hate and contempt as determined by the Supreme Court in *Taylor*. The Commission dismissed the complaint and concluded that a hearing by the Tribunal was not warranted.⁴⁷ The Commission fulfilled its legislative mandate in receiving, processing and making a decision on the complaint; however, the mere fact that the Commission accepted the complaint in the first place subjected the Commission to criticism by many who misunderstood the Commission’s role.

Some have argued that exposing mainstream media organizations to possible Commission complaints is inconsistent with Canada’s commitment to freedom of the press that is expressly protected in section 2(b) of the Charter as a vital aspect of freedom of expression. However, as is clear from the preceding discussion, freedom of the press is not an absolute value and cannot be exercised in isolation from other rights and freedoms. The rule of law applies to all.

⁴⁷The same complaint was also dismissed by the Ontario Human Rights Commission for lack of jurisdiction and by the British Columbia Human Rights Tribunal after a hearing.



Two alternatives have been suggested for the future:

- Complete reliance on the *Criminal Code* to deal with hateful expression. This was Professor Moon's main recommendation.
- Continuation of the dual approach with both the CHRA and the *Criminal Code* being applied as appropriate.

These two broad alternatives have been the main focus of public debate, editorial comment and submissions made to the Commission. With regard to both, useful suggestions have been made for legislative amendments and administrative improvements to ensure greater effectiveness.

The Commission has concluded that the dual approach, although certainly not perfect, has worked well and can continue to do so in the future.

RECOMMENDATION I

It is recommended that both the *Criminal Code of Canada* and the *Canadian Human Rights Act* continue to contain provisions to deal with hate on the Internet.

The dual approach ensures that there are two distinct tools that can be used to deal with hate on the Internet:

- First, the criminal law, to deal with situations where the person posting hate does so with criminal intent and therefore is deserving of punishment by way of fines or incarceration. The *Criminal Code* is the most severe mechanism that can be used to deal with any problem in society. Its necessity is undeniable. However, the prosecution, incarceration and stigma that can flow from the criminal justice system are not necessary to deal with every situation.
- Second, human rights law, to deal with situations where the intent of the person posting the messages may not be as clear, but where the extreme nature of the hate messages and their impact warrant an order that the messages be removed irrespective of the moral blameworthiness of the person posting them.

The Commission is mindful of the changing nature of hate activity, especially with regard to hate on the Internet. The Commission is also aware of the criticism by some of how the Commission deals with section 13 cases. Both the *Criminal Code* and the CHRA could be amended to better deal with current realities. This section reviews the Commission's observations and recommendations.

Recommended Changes to Section 13

In the submissions made to the Commission and in the broad public debate, constructive suggestions have been made on how section 13 might be amended to ensure its continued effectiveness in dealing with extreme hate messages.

Following is a discussion of some of the key issues raised and the Commission's recommendation on how to proceed.

Definitions of hatred and contempt

The CHRA does not include definitions of "hatred" or "contempt." It has been argued that this vagueness has resulted in the filing and investigation of unfounded claims under section 13.

As discussed previously, the Supreme Court has adopted a restrictive definition of these terms that limits the application of section 13 to the most extreme forms of hate messages. However, this information is not readily available to individuals reading the CHRA. To be effective, legislation should be clear on its face. The CHRA should be amended to clearly state that section 13 applies only to ardent and extreme messages suggesting a given race, sex, religion or other protected group is devoid of any redeeming qualities as human beings.

In providing his second option (retention of section 13), Professor Moon recommends that the Act be amended to include a definition of hate that is the same as the one he proposes for the *Criminal Code*, that is, requiring a direct link to violence. In the Commission's view, the requirement for a link to violence would risk imposing an overly narrow scope to both the CHRA and the *Criminal Code* (see discussion under "Observations Regarding the *Criminal Code* — Definition of Hatred").

RECOMMENDATION 2

It is recommended that the *Canadian Human Rights Act* be amended to provide a statutory definition of "hatred" and "contempt" in accordance with the definition applied by the Supreme Court of Canada in *Taylor*.

Pending possible amendments, the Commission intends to issue a plain language policy or guideline detailing how the Commission interprets and applies the operative words in section 13 in the screening of complaints.

The lack of a requirement to prove intent

Concerns have been raised that the lack of an intent provision in section 13 may result in complaints against people who had no intention of promoting hatred and, in some cases, may have been trying to combat it. In the Commission's view, this concern has been overstated. For example, it has been argued that someone writing an academic article on Holocaust denial that includes examples of Holocaust denial writings could be subject to a complaint. While intent is not a factor in human rights law, the context of an alleged hateful message is always relevant. The Commission routinely considers the context of an alleged hate message; a complaint such as that described here would be dismissed.

Awarding of costs

Concerns have been expressed that there is an undue financial burden on respondents when complaints are filed against them. Even if a complaint is dismissed, respondents must bear their own costs. The CHRA does not allow for the awarding of costs.

At the Commission level, neither respondents nor complainants are required to have legal counsel to represent them. The process is simple. The CHRA requires the Commission to designate investigators to investigate each complaint with which it deals. The investigation process comprises an exchange of documents, and interviews with witnesses and parties. When the investigation is completed, the parties are informed of the findings. Parties can make written submissions. The investigation report and any submissions in the case file are given to Commissioners for a decision. The decision is based entirely on documentary evidence; no hearings are held and the Commission can make no finding of liability.

At the Tribunal, many parties feel a need for legal representation although there is no statutory requirement for it. As with many administrative tribunals and courts, unrepresented litigants are provided guidance by the Tribunal to ensure their cases are properly presented.

The 2000 report of the *Canadian Human Rights Act Review Panel*, chaired by retired Supreme Court Justice Gérard La Forest, considered the issue of the awarding of costs and recommended that costs be awarded, but only in special situations where there has been misconduct by a party:

We considered the issue of whether the Act should specifically empower the Tribunal to award costs. We do not think that costs of legal proceedings are generally appropriate in human rights cases under the Act.

*However, we do think that costs should be awarded against a party that has intentionally delayed the hearing of a case or is guilty of misconduct in the proceedings.*⁴⁸

The Commission agrees with this recommendation.

RECOMMENDATION 3

It is recommended that the *Canadian Human Rights Act* be amended to allow for an award of costs in exceptional circumstances where the Tribunal finds that a party has abused the Tribunal process.

Potential chilling effect and the complaints-handling process

Professor Moon and others raise the concern that the mere filing of a complaint, even if it is ultimately dismissed, can have a chilling effect on freedom of expression; that is, that people may refrain from posting something on the Internet out of concern that someone might file a complaint. Whether such a chill actually exists cannot be proven. Nonetheless, the Commission does recognize that there is potential for a “chill” scenario to arise.⁴⁹

The potential for a chilling effect may be heightened by a lack of understanding of the Commission’s screening role and the remedial focus of the Tribunal. An example is the often-quoted description of the human rights process as a “prosecution” and its outcome as a “conviction.” The use of these inaccurate words contributes to the misperception that the human rights process is quasi-criminal. The Commission has a responsibility to better inform the public about its role and processes.

In addition, the time taken to complete the screening function can contribute to a sense of chill. With the need for due process, and with modern approaches that encourage opportunities for dialogue and settlement, it can take several months or longer to process a complaint. This is typical for all cases brought to administrative tribunals or courts.

The Commission’s new triage process ensures that all complaints, including those under section 13, are dealt with as expeditiously as possible by identifying immediately the most appropriate mechanism to deal with the complaint (summary dismissal under

⁴⁸ *Promoting Equality: A New Vision, Final Report of the Canadian Human Rights Act Review Panel*, 2000, page 71

⁴⁹ This potential is less in a human rights complaint than in a criminal prosecution: “... *the chilling effect of prohibitions on expression is at its most severe where they are effected by means of the criminal law. It is this branch of the law more than any other which the ordinary, law-abiding citizen seeks to avoid.*” *Keegstra* Per Justice McLachlin

section 41, mediation, investigation, etc.). Overall improvements in the case-handling system have reduced to nine months the average time for the Commission to deal with complaints. Many complaints are often processed more quickly, some in a matter of weeks.

Complaints filed under section 13 generally do not require the same degree of investigation as other complaints, although identifying the source of an Internet message can be difficult and may cause delays. Most often, the main issue to be determined is whether the messages constitute hatred or contempt as defined in *Taylor* (Taylor Test). This is usually apparent on its face from a review of the messages. Section 13 cases can therefore be processed in a more expedited manner than other complaints.

Sections 41 and 44 of the CHRA allow the Commission to dismiss or refuse to deal with certain complaints at an early stage without investigation. However, there is no clear provision under section 41 to dismiss section 13 complaints that do not meet the narrow definition in *Taylor*. If the CHRA is amended by adding the statutory definition of hatred and contempt, as proposed in Recommendation 2, it would be clear that the Commission can quickly dismiss complaints that do not meet this definition, as these would fall outside the Commission's jurisdiction under section 41(1)(c). Alternatively, since it is important to minimize any chilling effect on freedom of expression, it may be in the public interest for the Commission to have an explicit provision under section 41 to dismiss complaints that do not meet the Taylor Test.

RECOMMENDATION 4

It is recommended that section 41 of the *Canadian Human Rights Act* be amended to include a provision that allows the early dismissal of section 13 complaints when messages do not meet the narrow definition of hatred or contempt.

Carriage of cases

Professor Moon recommends that the Commission be given the exclusive authority to initiate and pursue hate message complaints, meaning that the right of individuals to file hate message complaints would be removed, as would the burden on complainants to pursue and prove the complaint.

The Commission already has the power to file complaints on its own initiative. In fact, the Commission and other parties initiated the *Taylor* complaint. Although this power has not been exercised in recent years, the Commission would exercise it when circumstances require.

On balance, the Commission supports the right of individuals to file complaints under section 13.

Filing of complaints in more than one jurisdiction

The filing of the same substantive complaint in more than one jurisdiction, sometimes referred to as “forum shopping,” is an extremely rare occurrence. This type of overlapping of complaints is inherent in a federal system such as ours in Canada where there are 14 jurisdictions dealing with human rights complaints (10 provincial, 3 territorial and 1 federal).

The Commission agrees that it is not productive or fair for a respondent to be required to respond to the same substantive complaint in different jurisdictions.

Section 27(1)(c) of the CHRA already provides that the Commission:

... shall maintain close liaison with similar bodies or authorities in the provinces in order to foster common policies and practices and to avoid conflicts respecting the handling of complaints in cases of overlapping jurisdiction;

Pursuant to this mandate, the Commission has initiated discussions with our counterpart provincial and territorial agencies through our collective organization, the Canadian Association of Statutory Human Rights Agencies. The purpose of this initiative is to work toward avoiding duplication of proceedings in the future.

Penalties

Section 54(1) of the CHRA allows for fines of up to \$10,000 being assessed against those who violate section 13. Since 2001, the Tribunal has ordered the payment of penalties in 11 cases. There are no other fine provisions for discriminatory practices in the CHRA. This is because human rights law is intended to be remedial and not punitive. Some respondents have challenged the penalty provision as being inconsistent with the purpose of human rights law. The Commission agrees that the provision does not fit easily within the human rights system and that it should be removed.

RECOMMENDATION 5

It is recommended that the penalty provision in section 54(1)(c) of the *Canadian Human Rights Act* be repealed.

Observations Regarding the *Criminal Code*

The effective functioning of the *Criminal Code* is essential to the dual-track approach recommended in this report. Professor Moon and others have suggested ways the *Criminal Code* might be changed to make it more effective. The *Criminal Code* falls outside the Commission's jurisdiction, hence, the Commission will not make specific recommendations for change. However, since the *Criminal Code*'s hate provisions impact on human rights, the Commission offers observations on some of the important issues.

Requirement to prove intent beyond a reasonable doubt

The requirement for proof beyond a reasonable doubt is a basic principle in criminal law. The requirement is particularly difficult in prosecuting charges under the hate provisions of the *Criminal Code*.

For example, in the recent case of *Her Majesty the Queen v. David Ahenakew*,⁵⁰ the Court found that although the accused had made public statements about Jewish people that were “*revolting, disgusting, and untrue*,” he could not be convicted because it was not proven beyond a reasonable doubt that he intended to promote hatred against Jews.

The difficulty in proving intent may explain why so few cases have been prosecuted and even fewer have resulted in convictions.

On the other hand, intent is not relevant in the human rights law context where the focus is on the messages themselves and their impact on their targets. Pairing the CHRA with the *Criminal Code* allows the flexibility to deal with cases where intent does not exist or cannot be proven beyond a reasonable doubt.

The definition of hatred

Professor Moon recommends narrowing the meaning of “hatred” in the *Criminal Code*. The report states that hate speech “... *should be confined to expression that advocates, justifies or threatens violence*.”⁵¹

In the *Keegstra* decision, as in *Taylor*, the Supreme Court adopted a narrow definition of hatred:

... in my opinion the term “hatred” connotes emotion of an intense and extreme nature that is clearly associated with vilification and detestation ...

⁵⁰ Saskatchewan Provincial Court, February 23, 2009

⁵¹ Moon Report

Hatred is not a word of casual connotation. To promote hatred is to instil detestation, enmity, ill-will and malevolence in another. Clearly an expression must go a long way before it qualifies within the definition in [s. 319(2)]. (Quoting Andrews)

Hatred is predicated on destruction, and hatred against identifiable groups therefore thrives on insensitivity, bigotry and destruction of both the target group and of the values of our society. Hatred in this sense is a most extreme emotion that belies reason; an emotion that, if exercised against members of an identifiable group, implies that those individuals are to be despised, scorned, denied respect and made subject to ill-treatment on the basis of group affiliation.⁵²

The new definition proposed by Professor Moon is narrower than the current Supreme Court definition, as it would apply only to messages that have a clear link to violence. How this narrower definition might have applied to the *Keegstra* case is instructive. As noted previously, Keegstra taught his students that a vile, demonic Jewish conspiracy was ruling the world. However, the Court found that Mr. Keegstra did not threaten or intend to provoke violence against Jews. Under the proposed narrower definition, Keegstra may not have been convicted.

The Commission is concerned that narrowing the definition to the extent proposed by Professor Moon would unduly limit the possibility of prosecuting very extreme forms of expression such as those of Mr. Keegstra.

Requirement for the Attorney General's consent

The requirement for the consent of an Attorney General was likely included in the law as a safeguard against frivolous prosecutions. However, some police and Crown prosecutors are concerned that this requirement unduly hampers prosecutions. Professor Moon also expressed concerns in this regard.

Professor Moon recommends that this matter be considered further and that if it appears that the consent requirement is a barrier to the prosecution of serious hate propaganda cases, the *Criminal Code* be amended to remove this requirement. The Commission concurs with this approach.

⁵² *Keegstra*

Removing the truth defence

Under the *Criminal Code*, the offence of hate propaganda includes a defence of truth. Professor Moon recommends the removal of this defence on the basis that a hate message suggesting that a given race, sex or religion is devoid of any redeeming qualities as human beings can never be true and therefore the justice system should not give hate-mongers a platform to make this argument in a criminal trial. In this, Professor Moon agrees with Mark Freiman, former Deputy Attorney General of Ontario, who explained why the propagation of hatred against an entire group could never be true:

Individuals may well be deserving of hatred or contempt, but that is always based on what they, as individuals, do. That's why defamation needs a defence of truth. If the allegations against an individual are in fact true, that individual may well be deserving of hatred or contempt no matter what that person's race, religion, creed, gender or sexual orientation. The defamatory words are therefore, in the language of the law of defamation, "justified."

*But hate propaganda assigns blame for real or imagined misdeeds, **not to individuals but to one or more identifiable groups that individuals may belong to.** (emphasis added)⁵³*

As this issue has resurfaced since the original drafting of the legislation, Parliament may wish to include considerations about the defence of truth in its deliberations.

Coordination of police and Crown prosecutors

Professor Moon makes recommendations as to the manner in which provincial police and Crown prosecutors could coordinate their efforts to protect Canadians from hate propaganda. Relatively few jurisdictions have special police hate crime units and/or Crown prosecutors with specialized knowledge in this area of the law. Where they do exist, particularly in British Columbia, they have been beneficial.⁵⁴ Professor Moon also recommends more frequent use of section 320 of the *Criminal Code* that allows the issuance of an order to remove hate propaganda material from a computer.

The Commission commends these ideas for consideration by the appropriate jurisdiction.

⁵³ Mark Freiman article, "Litigating Hate on the Internet", in *Hate on the Net*, Canadian Issues, Spring 2006.

⁵⁴ Myron Claridge article: *The Criminal Code and Hate: A Criminal Law Approach to Combating Hate*, in *Hate on the Net*, Canadian Issues, Spring 2006



Whichever approach Parliament adopts, its impact will be more successful if implemented as part of a comprehensive strategy to deal with the complex issue of hate-motivated activities.

Civil society and government have a responsibility to ensure that Canadians are given the full measure of the dignity and respect to which they are entitled without having to be subject to electronic messages that expose them to hatred or contempt based on their race, sexual orientation or other grounds. If the proper response to bad speech is good speech, it is appropriate for government and society to encourage opportunities for those aggrieved by alleged bad speech to have an opportunity to challenge such speech and to call organizations and individuals to account for their actions.

There are already several mechanisms that allow citizens to call to account individuals and organizations for what they write or broadcast. These can be built upon and strengthened. Other such mechanisms may be needed to deal with the electronic media.

Press Councils

Many Canadian newspapers belong to voluntary press councils.⁵⁵ Press councils provide a means for readers to have complaints about unfair conduct and ethics in journalism adjudicated. Usually press councils consist of representatives of the press, including working journalists and editors, and citizen members representing the reading public. If a press council upholds a complaint, it can only require that the newspaper in question publish the council's findings.

The Senate Standing Committee on Transport and Communications conducted an extensive study on the news media in Canada. In its *Final Report on the Canadian News Media* (June 2006), the Committee supported the role of strong voluntary press councils:

Press councils are an important element of Canada's news and information system and they can make a significant contribution to the quality of journalism in Canada.

⁵⁵ For information on the work of a press council, consult the website of the Ontario Press Council at: <http://www.ontpress.com/index.asp>

There is no equivalent to press councils to deal with complaints about material posted solely on the Internet. However, at least one council, the Quebec Press Council, has stated that its code of ethics applies to journalists publishing online.⁵⁶

Press councils are a form of voluntary self-regulation by the media. The Commission commends the use of voluntary press councils by the appropriate bodies.

Broadcasting

The Canadian Broadcast Standards Council (CBSC) is an independent, non-governmental organization created by the Canadian Association of Broadcasters (CAB) to administer standards established by its members, Canada's private broadcasters.⁵⁷

The CBSC adjudicates complaints from viewers to determine whether broadcasters are in compliance with the CAB *Code of Ethics* that states:

*Recognizing that every person has the right to full and equal recognition and to enjoy certain fundamental rights and freedoms, broadcasters shall ensure that their programming contains no abusive or unduly discriminatory material or comment which is based on matters of race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status or physical or mental disability.*⁵⁸

The Canadian Radio-television Telecommunications Commission (CRTC) also has responsibilities with regard to the contents of radio and television broadcasts.⁵⁹ Section 5 of the *Television Broadcasting Regulations 1987*⁶⁰ provides that:

A licensee shall not broadcast

(b) Any abusive comment or abusive pictorial representation that, when taken in context, tends to or is likely to expose an individual or a group or class of individuals to hatred or contempt on the basis of race, national or ethnic origin, colour, religion, sex, sexual orientation, age or mental or physical disability;

Identical regulations apply to radio and specialty TV channels.

⁵⁶ *Rights and Responsibilities of the Press*, Third Edition, 2003, Conseil de presse du Québec, p. 9

⁵⁷ The CBC is not a member of the CBSC or the CAB. However, the CBC's Office of the Ombudsman does deal with complaints from the public.

⁵⁸ Canadian Association of Broadcasters' Code of Ethics, Administered by the Canadian Broadcast Standards Council (revised June 2002), clause 2

⁵⁹ In *Broadcasting Public Notice CRTC 1999-84*, issued in 1999, the CRTC determined that it would not exercise control over the content of the Internet, including offensive and illegal content. The CRTC found that such content could be more effectively dealt with under existing legal provisions such as the *Criminal Code* and the CHRA.

⁶⁰ *Television Broadcasting Regulations 1987, SOR/87-49*

The CRTC adjudicates complaints alleging violations of section 5 and can order broadcasters to take corrective measures. In extreme cases, the CRTC can revoke or alter the licence of a broadcaster for a violation of the regulations.

Internet Service Providers

Internet service providers (ISPs) have an important self-regulatory role in dealing with prejudicial or hateful speech on the Internet. ISP industry representatives, such as the Canadian Association of Internet Providers (CAIP) have long promoted measures to ensure that the Internet is a safe place for their customers to learn and be entertained. For example, CAIP was instrumental in developing measures to assist the police in dealing with child pornography on the Internet.

ISPs have acceptable use policies (AUPs) as part of their terms and conditions of use. Individuals who violate an AUP may have service suspended or terminated. Part of Bell Internet Services AUP reads:

You are prohibited from using the Service for activities that include, but are not limited to:

Uploading or downloading, transmitting, posting, publishing, disseminating, receiving, retrieving, storing or otherwise reproducing, distributing or providing access to information, software, files or other material which are . . . defamatory, obscene, child pornography or hate literature; . . .

ISPs routinely provide an email address for reports of abusive or inappropriate use of their services. They investigate reports and take action, as they deem appropriate. These types of self-regulatory efforts are to be commended.

Hotlines for the reporting of illegal content on the Internet have been successfully implemented in many countries. The International Association of Internet Hotlines (INHOPE) was founded in 1999 under the European Council's Safer Internet Action Plan. Hotlines from more than 30 countries are members of INHOPE. The experience of these hotlines could be studied in the development of an appropriate self-regulatory model for Canada.

The federal Department of Justice has conducted research and carried out consultation on how a hotline for Internet hate might be established in Canada. This is a valuable initiative.⁶¹

⁶¹ Department of Justice Component of *Canada's Action Plan Against Racism Formative Evaluation*, Evaluation Division, Justice Canada, June 2008 <http://www.justice.gc.ca/eng/pi/eval/rep-rap/08/capar-paccr/capar.pdf>

National Strategy Against Racism

Vulnerable communities are increasingly concerned about the underlying prejudices and hatred that are still too common in Canadian society. Federal, provincial, territorial and municipal governments have undertaken important initiatives to promote tolerance and understanding between Canadians and to combat hatred and prejudice, but more needs to be done.

In 2005, the Government of Canada announced *A Canada for All: Canada's Action Plan Against Racism*.⁶² This five-year, \$56-million program, is aimed at giving Canadians tools to combat intolerance. The Plan's objective is eloquently stated in its opening paragraph:

A society free from racism. More than a matter of principle, this is Canada's vision. It brings together people of all backgrounds — ethnic, racial, and religious — to build a society where one's heritage is a source of pride and inspiration.

Building a society free from racism is an ongoing endeavour and an ongoing priority of all levels of government and civil society.

Strategy to Promote Safe, Wise and Responsible Internet Use

In 2002, when Internet use in Canada was rapidly expanding, the government adopted *The Canadian Strategy to Promote Safe, Wise and Responsible Internet Use*. The Strategy acknowledged that “legislation alone will not solve the problem” and that there was a need to involve a broad spectrum of Canadians in addressing the issue. The Strategy sets out five key priorities:

- supporting initiatives that educate and empower users;
- promoting effective industry self-regulation;
- strengthening the enforcement of laws in cyberspace;
- implementing hotlines and complaint-reporting systems; and
- fostering consultations between the public and private sectors, and their counterparts in other countries.

⁶² *A Canada for All: Canada's Action Plan Against Racism*, Department of Canadian Heritage, 2005 <http://dsp-psd.pwgsc.gc.ca/Collection/CH34-7-2005E.pdf>

Although the Strategy resulted in some positive developments, it has not been actively promoted in recent years. The Commission encourages the Government to consider a specific strategy to deal with illegal content on the Internet, especially the promotion of hatred. *The Safer Internet Program* of the European Commission is a worthy example of a co-ordinated approach to illegal content on the Internet.⁶³

⁶³ *Safer Internet Program* of the European Commission http://ec.europa.eu/information_society/activities/sip/index_en.htm



Promoting and protecting human rights are integral to a progressive society. The vigorous public debate over how to best address hate messages on the Internet is a positive and important democratic exercise.

Our free, diverse and inclusive society is a great source of pride for Canadians. For many, it defines our national identity. The freedom to express ideas and opinions is both the cornerstone of democracy and of human rights.

As an open and welcoming country, Canada is known the world over for its commitment to equality, dignity and freedom for all. We have made great strides in fighting discrimination and prejudice. The work is not done; discrimination remains a reality in Canada, and human rights commissions and tribunals have a key role to play in safeguarding equality and in protecting and promoting the human rights that are fundamental to Canadian society.

Canada, like many countries worldwide, has recognized that rights are interdependent; that no one right is supreme to any other; and that there are circumstances in which freedom of expression should be limited.

As Canada and the world witness unparalleled technological acceleration, the complexity of existing social issues — and the emergence of new and unforeseen issues — will continue to challenge our legislators.

Finding a way to navigate the conflict to achieve an appropriate balance between the right to freedom of expression and the right to live free from discrimination, is the responsibility of Parliament and of its institutions such as the Canadian Human Rights Commission, the Canadian Human Rights Tribunal, and the Courts. The solution is vital to Canada's continued growth as a diverse, inclusive and progressive nation that values equality for all.

In this Special Report to Parliament, the Commission has provided an analysis of the issues around hate on the Internet and recommends that:

1. both the *Criminal Code of Canada* and the *Canadian Human Rights Act* continue to contain provisions to deal with hate on the Internet;
2. the *Canadian Human Rights Act* be amended to provide a statutory definition of “hatred” and “contempt” in accordance with the definition applied by the Supreme Court of Canada in *Taylor*;

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3. the *Canadian Human Rights Act* be amended to allow for an award of costs in exceptional circumstances where the Tribunal finds that a party has abused the Tribunal process;
 4. section 41 of the *Canadian Human Rights Act* be amended to include a provision that allows the dismissal of section 13 complaints when messages do not meet the narrow definition of hatred or contempt; and
 5. the penalty provision in section 54(1)(c) of the *Canadian Human Rights Act* be repealed.



Moon Report: Summary of Recommendations

Excerpted from: *Report to the Canadian Human Rights Commission Concerning Section 13 of the Canadian Human Rights Act and the Regulation of Hate Speech on the Internet*, by Professor Richard Moon, page 1

The use of censorship by the government should be confined to a narrow category of extreme expression — that which threatens, advocates or justifies violence against the members of an identifiable group, even if the violence that is supported or threatened is not imminent. The failure to ban the extreme or radical edge of discriminatory expression carries too many risks, particularly when it circulates within the racist subculture that subsists on the Internet. Less extreme forms of discriminatory expression, although harmful, cannot simply be censored out of public discourse. Any attempt to exclude from public discourse speech that stereotypes or defames the members of an identifiable group would require extraordinary intervention by the state and would dramatically compromise the public commitment to freedom of expression. Because these less extreme forms of discriminatory expression are so commonplace, it is impossible to establish clear and effective rules for their identification and exclusion. But because they are so pervasive, it is also vital that they be addressed or confronted. We must develop ways other than censorship to respond to expression that stereotypes and defames the members of an identifiable group and to hold institutions such as the media accountable when they engage in these forms of discriminatory expression.

This understanding of the purpose of hate speech law, as the protection of the members of identifiable groups from the risk of violence generated by hate speech, is narrower than the more familiar justification which emphasizes the protection of the individual's dignity and his/her right to equal respect within the community. It may, however, offer a better account of the actual practice of hate speech law in Canada, which focuses on the most extreme and hateful instances of expression. The few section 13 cases that have been sent by the CHRC to the Tribunal and in which the Tribunal has found a breach of the section have almost all involved expression that is so extreme and hateful that it may be seen as advocating or justifying violence against the members of an identifiable group. However, a narrowly drawn ban on hate speech that focuses on expression that is tied to violence does not fit easily or simply into a human rights law that takes an expansive view of discrimination, emphasizes the effect of the action on the victim rather than the intention or misconduct of the actor and employs a process that is designed to engage the parties and facilitate a non-adjudicative resolution of the “dispute” between them.

My recommendations, which are developed in sections 4 and 5 of the report, may be divided into three parts:

1. The first recommendation is 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 Code² but this prohibition should be confined to expression that advocates, justifies or threatens violence. In the fight against hate on the Internet, police and prosecutors should make greater use of section 320.1 of the *Criminal Code*, which gives a judge power to order an Internet service provider (ISP) to remove “hate propaganda” from its system. Each province should establish a provincial “Hate Crime Team,” composed of both police and Crown law officers with experience in the area, to deal with the investigation and prosecution of hate crimes including hate speech under the *Criminal Code*.

2. The second part of my recommendations concerns changes that should be made to section 13 of the CHRA if it is not repealed. These changes would reshape section 13 so that it more closely resembles a criminal restriction on hate speech. They include: (i) changes to the language of section 13(1) to make clear that the section prohibits only the most extreme instances of discriminatory expression, and more particularly expression that threatens, advocates or justifies violence against the members of an identifiable group; (ii) the amendment of section 13(1) to include an intention requirement; and (iii) the amendment of the CHRA to establish a distinct process for the investigation of section 13 complaints by the CHRC. Under the amended process, the CHRC would receive inquiries and information from individuals or community groups but would no longer investigate and assess formal complaints from private parties. Instead, the CHRC would have the exclusive right to initiate an investigation in section 13 cases. If, following an investigation, the CHRC recommends that the case be sent to the CHRT for adjudication, the Commission would have carriage of the case before the Tribunal. This would remove the significant burden that under the existing system falls on the complainant. It would also enable the CHRC to dismiss (decide not to pursue) a “complaint” earlier in the process when it finds that the communication at issue does not breach the section 13(1) standard and the complaint is unlikely to succeed at the CHRT.

3. The third set of recommendations concerns the role of non-state actors in the prevention of expression that is hateful or discriminatory in character. First, the major Internet service providers (ISPs) should consider the creation of a hate speech complaint line and an advisory body, composed of individuals with expertise in hate speech law, that would give its opinion as to whether a particular website hosted by an ISP has violated section 13 of the CHRA or the “hate propaganda” provisions of the *Criminal Code*. If this body were to decide that the complaint is well-founded, the ISP would then shut down the site on the basis of its user agreement with customers. Second, newspapers and news magazines should seek to revitalize the provincial/regional press councils (which in some provinces or regions have become nearly moribund) and ensure that identifiable groups in the community are able to pursue complaints that they have been unfairly represented in the mainstream print

media. If this does not happen, consideration should be given to the statutory creation of a national press council with compulsory membership. This national press council would have the authority to determine whether a newspaper or magazine has breached professional standards and to order the particular newspaper or magazine to publish the press council's decision. A newspaper is not simply a private participant in public discourse; it is an important part of the public sphere, where discussion about the affairs of the community takes place. As such it carries a responsibility to portray fairly and without discrimination the different groups that make up the Canadian community.



Criminal Code Provisions Dealing with Hate

Hate Propaganda

Advocating genocide

318(1) Every one who advocates or promotes genocide is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

Definition of “genocide”

(2) In this section, “genocide” means any of the following acts committed with intent to destroy in whole or in part any identifiable group, namely,

(a) killing members of the group; or

(b) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction.

Consent

(3) No proceeding for an offence under this section shall be instituted without the consent of the Attorney General.

Definition of “identifiable group”

(4) In this section, “identifiable group” means any section of the public distinguished by colour, race, religion, ethnic origin or sexual orientation.

R.S., 1985, c. C-46, s. 318; 2004, c. 14, s. 1.

Public incitement of hatred

319(1) Every one who, 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 is guilty of

(a) an indictable offence and is liable to imprisonment for a term not exceeding two years;

or

(b) an offence punishable on summary conviction.

Wilful promotion of hatred

(2) Every one who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of

(a) an indictable offence and is liable to imprisonment for a term not exceeding two years;
or

(b) an offence punishable on summary conviction.

Defences

(3) No person shall be convicted of an offence under subsection (2)

(a) if he establishes that the statements communicated were true;

(b) if, in good faith, the person expressed or attempted to establish by an argument an opinion on a religious subject or an opinion based on a belief in a religious text;

(c) 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

(d) if, in good faith, he intended to point out, for the purpose of removal, matters producing or tending to produce feelings of hatred toward an identifiable group in Canada.

Forfeiture

(4) Where a person is convicted of an offence under section 318 or subsection (1) or (2) of this section, anything by means of or in relation to which the offence was committed, on such conviction, may, in addition to any other punishment imposed, be ordered by the presiding provincial court judge or judge to be forfeited to Her Majesty in right of the province in which that person is convicted, for disposal as the Attorney General may direct.

Exemption from seizure of communication facilities

(5) Subsections 199(6) and (7) apply with such modifications as the circumstances require to section 318 or subsection (1) or (2) of this section.

Consent

(6) No proceeding for an offence under subsection (2) shall be instituted without the consent of the Attorney General.

Definitions

(7) In this section,

“communicating”
«*communiquer* »

“communicating” includes communicating by telephone, broadcasting or other audible or visible means;

“identifiable group”
«*groupe identifiable* »

“identifiable group” has the same meaning as in section 318;

“public place”
«*endroit public* »

“public place” includes any place to which the public have access as of right or by invitation, express or implied;

“statements”
«*déclarations* »

“statements” includes words spoken or written or recorded electronically or electro-magnetically or otherwise, and gestures, signs or other visible representations.

R.S., 1985, c. C-46, s. 319; R.S., 1985, c. 27 (1st Supp.), s. 203; 2004, c. 14, s. 2.

Warrant of seizure

320.1(1) If a judge is satisfied by information on oath that there are reasonable grounds for believing that there is material that is hate propaganda within the meaning of subsection 320(8) or data within the meaning of subsection 342.1(2) that makes hate propaganda available, that is stored on and made available to the public through a computer system within the meaning of subsection 342.1(2) that is within the jurisdiction of the court, the judge may order the custodian of the computer system to:

- (a) give an electronic copy of the material to the court;
- (b) ensure that the material is no longer stored on and made available through the computer system; and
- (c) provide the information necessary to identify and locate the person who posted the material.

Notice to person who posted the material

(2) Within a reasonable time after receiving the information referred to in paragraph (1)(c), the judge shall cause notice to be given to the person who posted the material, giving that person the opportunity to appear and be represented before the court and show cause why the material should not be deleted. If the person cannot be identified or located or does not reside in Canada, the judge may order the custodian of the computer system to post the text of the notice at the location where the material was previously stored and made available, until the time set for the appearance.

Person who posted the material may appear

(3) The person who posted the material may appear and be represented in the proceedings in order to oppose the making of an order under subsection (5).

Non-appearance

(4) If the person who posted the material does not appear for the proceedings, the court may proceed ex parte to hear and determine the proceedings in the absence of the person as fully and effectually as if the person had appeared.

Order

(5) If the court is satisfied, on a balance of probabilities, that the material is available to the public and is hate propaganda within the meaning of subsection 320(8) or data within the meaning of subsection 342.1(2) that makes hate propaganda available, it may order the custodian of the computer system to delete the material.

Destruction of copy

(6) When the court makes the order for the deletion of the material, it may order the destruction of the electronic copy in the court's possession.

Return of material

(7) If the court is not satisfied that the material is available to the public and is hate propaganda within the meaning of subsection 320(8) or data within the meaning of subsection 342.1(2) that makes hate propaganda available, the court shall order that the electronic copy be returned to the custodian and terminate the order under paragraph (1)(b).

Other provisions to apply

(8) Subsections 320(6) to (8) apply, with any modifications that the circumstances require, to this section.

When order takes effect

(9) No order made under subsections (5) to (7) takes effect until the time for final appeal has expired.

2001, c. 41, s. 10.



Excerpts from Tribunal Decisions

The quotations below are examples of online hate messages that were found to breach Section 13 of the *Canadian Human Rights Act*.

Warning: The language used in these examples will disturb and upset some readers.

Case Name:	<i>Citron and Toronto Mayor's Committee v. Zundel</i>
Case Number:	D.T. 1/02
Date:	January 18, 2002

The fact is that the Jewish Lobby — or the Israeli Lobby, as some like to call it — have long had a deliberate policy of lying to non-Jewish Americans. They lied to us about Hitler and about National Socialist Germany, because they wanted America to go to war with Hitler to destroy this threat to their schemes. They have lied to us about their own role in setting up the Communist conspiracy, which spread out of London and New York to Russia and from there to other countries until it engulfed half the earth and consumed tens of millions of human lives. And they have lied to us about a great number of other things, too — including their most infamous lie and the most lucrative and crooked scheme: the so-called “Holocaust.”

Case Name:	<i>Center for Research-Action on Race Relations v. B.C. Whitepride</i>
Case Number:	2008 CHRC I
Date:	January 9, 2008

Quotation from Tribunal decision:

[32] This leads to the thesis of the article's third segment, Euthanasia and Race, which asserts that “severely retarded and brain damaged” do not qualify as “net contributors to society, but [are] a tragic drain” on their families and society as a whole. Advocates for the disabled are criticized for equating rights of “even the most severely retarded person with those of the cognitive elite.” Such disabled persons should be euthanized, it is argued, and this in turn will have an impact on the “racial issue” because white couples who are “enslaved” by severely

disabled children are less likely to have more white children. The article condemns the fact that “contemporary abortion laws allow the premeditated murder [of] a potentially healthy productive White foetus,” while it is illegal and punishable by life sentence “to kill a severely retarded or brain damaged person who needs constant care at taxpayers’ expense for the duration of their pointless lives.” In addition, the article posits that if the funds currently “misappropriated” to care for the severely disabled were spent providing “tax breaks to large families,” White people would be encouraged to have more, healthy children. In making its points on this issue, the article refers to the “severely” disabled as “parasites,” “incognizant primates,” and “genetic throwbacks.”

Case Name:	<i>Warman v. Harrison</i>
Case Number:	2006 CHRT 30
Date:	August 15, 2006

“no we should not be on the hook for them .it was a good idea at the time [Referring to residential schools] and most indians were for it .i wish my ancestors had killed them all so they wouldn’t be whinning today.”

“i saw a film clip on the holohoax were a kid and his mother were separated in the camps! imagine how more worse the world would be if hitler hadnt fried all those jews! i wish i could have been in charge of the gas chambers!”

“i call on all my white brothers to rise up and kill non whites because god gave Canada to the white man.”

“i told you the only good french man is a dead french man.”

“the indian heathens should all be killed says i. a message from gods chosen one.”

“if you are not white than you are not allowed in halton hills. If you come here god has told me to kill you.”

“god says rise up and kill all whites who date blacks.”

“GOD says tot take your guns to jane and finch (nigger town) and open fire on the heathens .you will have 20 virgins waiting for you in the after life.”

“if i ever see any niggers or chinks dealing in my town[i represent g-town] i will kill them and anybody who dares testify.”

“it’s okay to not like someone because they look different. no matter what the french scum in Ottawa say. GO BACK TO FRANCE NOBODY CONSIDERS YOU CANADIANS ANYWAY.”

(sic throughout)

Case Name:	<i>Warman v. Winnicki</i>
Case Number:	2006 CHRT 20
Date:	April 13, 2006

“What those idiots are actually saying is that North York and Scarborough are infested with lazy, savage and totally worthless negroids and other muds of unidentified kind. It took my family less than a year to become productive members of the Canadian society. How long does it take for a 3rd world shit-skin to become a productive member of a white society? That’s right, forever. ... For every one of those shit-skin businessmen, whose businesses are infected with white tax dollars, there are thousands of worthless sub-human scum.”