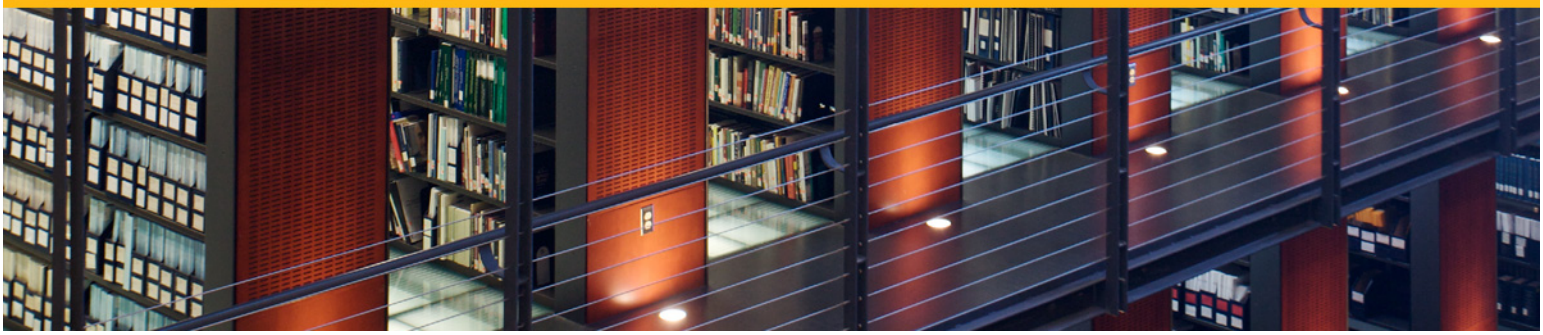
LIBRARY of PARLIAMENT
BIBLIOTHÈQUE du PARLEMENT

BACKGROUND PAPER



Canadian Anti-hate Laws and Freedom of Expression

Publication No. 2010-31-E
1 September 2010
Revised 27 March 2013

Julian Walker

Legal and Legislative Affairs Division
Parliamentary Information and Research Service

Canadian Anti-hate Laws and Freedom of Expression
(Background Paper)

HTML and PDF versions of this publication are available on IntraParl (the parliamentary intranet) and on the Parliament of Canada website.

In the electronic versions, a number of the endnote entries contain hyperlinks to referenced resources.

Ce document est également publié en français.

Library of Parliament ***Background Papers*** provide in-depth studies of policy issues. They feature historical background, current information and references, and many anticipate the emergence of the issues they examine. They are prepared by the Parliamentary Information and Research Service, which carries out research for and provides information and analysis to parliamentarians and Senate and House of Commons committees and parliamentary associations in an objective, impartial manner.

Publication No. 2010-31-E
Ottawa, Canada, Library of Parliament (2010)

CONTENTS

CANADIAN ANTI-HATE LAWS AND FREEDOM OF EXPRESSION*

1 INTRODUCTION

In Canada, various laws at the federal, provincial and territorial levels impose restrictions on the freedom of expression guaranteed by section 2(*b*) of the *Canadian Charter of Rights and Freedoms* (the Charter).[1] For instance, the *Criminal Code*[2] includes many such restrictions in offences such as defamatory libel, counselling suicide, perjury and fraud. Justice Antonio Lamer, former Chief Justice of the Supreme Court of Canada, has described these offences as falling under the following categories: "offences against the public order, offences related to falsehood, offences against the person and reputation, offences against the administration of law and justice, and offences related to public morals and disorderly conduct."[3]

Among the laws that have restricted freedom of expression are those referred to as anti-hate laws, for their purpose is to restrict the publication of messages intended to incite hatred towards members of particular groups. For example, section 13 of the *Canadian Human Rights Act* (CHRA)[4] makes it a discriminatory practice for anyone to communicate by telephone, by a telecommunication undertaking, or by a computer-based communication, including the Internet, any matter that is likely to expose anyone to hatred or contempt by reason of the fact that he or she is a member of a particular identifiable group. Sections 318 and 319 of the *Criminal Code* prohibit the promotion of genocide or the incitement of hatred in public. The Supreme Court of Canada has found these restrictions on the freedom of expression to be justifiable under the Charter and the reasonable limitations it permits on rights and freedoms in Canada's free and democratic society. The Court found that the harm caused by hate propaganda is not in keeping with the aspirations to freedom of expression or the values of equality and multiculturalism contained in sections 15 and 27 of the Charter.[5]

In recent years, a number of individuals and organizations have called for the reform of Canada's anti-hate laws. In particular, there have been calls for the repeal of section 13 of the CHRA (as well as any provincial counterparts), including a private member's bill (Bill C-304) introduced in the House of Commons in 2011.[6] There have also been calls for broader reforms to Canada's human rights institutions to change the manner in which they handle hate propaganda complaints. Some have urged that, if reforms are undertaken, Parliament maintain the jurisdiction of the Canadian Human Rights Commission (CHRC) and the Canadian Human Rights Tribunal (CHRT) to process and to hear cases of hate propaganda.

This paper provides information pertaining to section 13 of the CHRA and those related provisions in section 12, the anti-hate provisions of the *Criminal Code* and the constitutional guarantee of freedom of expression contained in the Charter. First, it reviews the nature of the human rights protections in the CHRA and in the Charter. It then reviews the jurisdiction of the CHRC and the CHRT. Finally, it provides a brief

analysis of anti-hate laws in Canada and the potential effects of certain proposed amendments to the CHRA.

2 HUMAN RIGHTS LAWS AND THE CHARTER

In the revision of 1982, human rights guarantees were entrenched in Canada's constitution by means of the *Canadian Charter of Rights and Freedoms*. The creation of the Charter did not, however, render statutory human rights codes unnecessary or diminish their importance. On the contrary, Canadian courts have since considered human rights codes to be quasi-constitutional, meaning that Canadian laws are generally read in such a manner as to be consistent with human rights legislation.[7]

2.1 HUMAN RIGHTS LEGISLATION

As "human rights" are not listed under the enumerated heads of power in sections 91 and 92 of the *Constitution Act, 1867* (which set out the division of powers between the federal and provincial governments), laws that address human rights concerns have been passed at the federal, provincial and territorial levels to respond to various matters within those jurisdictions.[8] Although there is some diversity among Canadian human rights laws, the principles and enforcement mechanisms are very similar. Each statute prohibits discrimination on specified grounds, such as race, sex, age or religion, and in the context of employment, accommodation and publicly available services. The system of human rights administration is complaint-based. Before any of the legislated procedures can commence, a complaint of discrimination is usually lodged with a human rights commission or council – either by a person who believes that he or she has been discriminated against, or by the commission itself on the basis of its own investigation.

The CHRA is the principal human rights statute in the federal sector.[9] It applies generally to federal government departments and agencies, Crown corporations, and federally regulated businesses[10] (an exception is section 13, which, as explained below, applies broadly to all persons in Canada). It prohibits an employer or service provider under federal jurisdiction from carrying out discriminatory practices based on certain prohibited grounds: race, national or ethnic origin, colour, religion, age, sex (including pregnancy and childbirth), sexual orientation, marital status, family status, mental or physical disability (including previous or present drug or alcohol dependence), and pardoned conviction.

If the CHRC receives a complaint under the CHRA and determines that the complaint is well-founded, the CHRC generally attempts to conciliate any disputes, differences or disagreements between the complainant and the respondent. Where conciliation fails, the CHRT may hear the case and decide to order a remedy or to dismiss the complaint. Unlike the courts, human rights tribunals are specialized bodies that have broad powers to fashion remedies to address the unique social problems underlying a complaint of discrimination. Where the complaint of a discriminatory practice is substantiated, the CHRT may order that a penalty be paid, that compensation be provided to an identified victim, that the practice cease, and that other remedial solutions or programs tailored to address the practice be carried

out. Decisions of both the CHRC and the CHRT are reviewable by the Federal Court of Canada. It may also be possible to appeal the Federal Court's decision to the Supreme Court of Canada.

2.2 THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*

The *Constitution Act, 1982* gives human rights and fundamental freedoms an enhanced legal status through the *Canadian Charter of Rights and Freedoms*, which, as a part of the Constitution, entrenches these rights within the supreme law of the country. Section 52(1) of the *Constitution Act, 1982* expressly states, "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." Consequently, all laws in Canada must comply with the Charter and will be interpreted by Canadian courts in a manner that is consistent with its supremacy.

Certain limitations, however, may be placed on Charter guarantees. First, the Charter applies only to relations between governments and the public. Section 32 of the Charter states that it applies to Parliament, provincial legislatures, and the federal and provincial governments. The Charter does not, therefore, generally apply to private actions of individuals or corporations. Second, section 1 of the Charter provides that all rights and freedoms guaranteed by the Charter are subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[11] This means that once an infringement of a Charter right has been established, the courts must decide whether the violation can be considered justified by the government responsible. This requires the courts to use a highly discretionary balancing test to weigh the policy interests of the government against the interests of an individual who is claiming that his or her Charter right has been violated. Under section 52 of the *Constitution Act, 1982*, as mentioned above, a law, or a part thereof, may be found to be unconstitutional and struck down;[12] alternatively, a person's Charter right may be justifiably limited by a law that has been found to be constitutional.

Individuals or groups whose Charter rights have been infringed may apply for a remedy under subsection 24(1), which provides that anyone whose rights or freedoms as guaranteed by the Charter have been infringed or denied may apply to a court of competent jurisdiction to obtain an appropriate remedy. Section 24 is extremely broad-ranging in permitting courts to award individualized forms of remedy that are "appropriate and just" in the circumstances. In contrast, although human rights tribunals generally have broad remedial powers, they are limited to making orders that are provided for in their governing legislation.

Given that the Charter applies to any federal, provincial or municipal law or regulation, as well as to any governmental activity, it applies to human rights legislation and in this way can affect individual or corporate conduct. There may also be overlap between the Charter and human rights legislation in cases where it can be shown that the practice at issue is an act of government that took place in the context of employment or the provision of services, facilities or accommodation. There is also a great deal of overlap between the anti-discrimination guarantees of

section 15 of the Charter and those of federal, provincial and territorial human rights legislation. Decisions rendered by the courts and tribunals in this area to date suggest that these provisions share the same underlying philosophy and have overlapping jurisdiction in many respects. Section 15 of the Charter guarantees the right to equality, and subsection 15(1) provides as follows:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

While the list of prohibited grounds of discrimination in section 15 is equivalent to that in most human rights legislation, the courts have interpreted the grounds set out in this section as also extending to other similar or analogous grounds.[13]

3 FREEDOM OF EXPRESSION IN CANADA

The freedoms of thought, belief, opinion and expression are protected as a fundamental constitutional guarantee in section 2(*b*) of the Charter. This section adds that these rights include "freedom of the press and other media of communication." As noted above, however, the freedoms contained in section 2(*b*), and in other Charter rights, may be subject to certain limitations. Freedom of speech is declared to be a human right and fundamental freedom in section 1(*d*) of the *Canadian Bill of Rights*,[14] along with freedom of religion and freedom of the press.

Federal and provincial laws have at times placed restrictions on the freedom of expression, whether as part of a law's intended purpose or as an indirect consequence. When, as mentioned above, these laws are challenged pursuant to the Charter in Canadian courts, judges must decide whether the laws may be upheld as being in accordance with the limitation clause in section 1 of the Charter. Justifying these restrictions on freedom of expression usually involves a balance of competing values. For example, films and television programs that deal with mature subject matter are often censored or restricted so that children are prevented from seeing part or all of them. Here, a balance is struck between the filmmaker's right to freedom of expression and the desire to protect a potentially vulnerable group of individuals from images that may be inappropriate for them or even harmful.

Much has been written by Canadian courts, legal experts and other interested individuals regarding the rationales for guaranteeing freedom of expression or for imposing restrictions on this freedom; the debate is constantly revived when new technologies or innovations produce new forms of expression that are then regulated by Canadian laws. In promoting the right to freedom of expression, some have argued that this right plays an important role as an "instrument of democratic government," an "instrument of truth," or an "instrument of personal fulfilment."[15]

Freedom of expression may be restricted in a number of ways and for a number of purposes by Canadian laws. As discussed below, the CHRA and the *Criminal Code* contain prohibitions against the publication of messages that promote hatred. Perjury, counselling suicide, and creating child pornography are all forms of

expression, but they have been limited through designation as criminal offences. Election surveys are prohibited from being published on an election day while polling stations are still open[16] – which limits the freedom of the press in Canada, but is intended to prevent voters from being unduly influenced by last-minute polls of voter intentions. As noted above, certain media, such as films, magazines or books, may be censored or their distribution may be restricted. The provincial and federal laws in Canada pertaining to defamation are another example of a limitation on free speech; these laws have been created to protect the reputations of other individuals. All of these examples demonstrate that freedom of expression in Canada is not absolute; rather, it can be limited to promote other values that are considered to be of greater social importance.

4 HATE PROMOTION OFFENCES IN THE *CRIMINAL CODE*

Hate propaganda provisions have existed in the *Criminal Code* since 1970.[17] They were added by Parliament in response to a series of events and developments in the 1960s when certain white supremacist and neo-Nazi groups, largely based in the United States, were active in Canada. These groups and individuals engaged mainly in anti-Semitic and anti-Black propagandizing. The hate propaganda provisions of the Code were essentially designed to target these activities.[18]

The hate promotion offences and related provisions can be found in sections 318–320.1 of the *Criminal Code*.[19] Under section 318, everyone who advocates or promotes genocide is guilty of an offence punishable by up to five years' imprisonment. The term "genocide" is defined to mean killing members of an identifiable group or deliberately inflicting on an identifiable group conditions of life calculated to bring about the group's physical destruction. Section 318(4) of the *Criminal Code* defines an "identifiable group" as any section of the public distinguished by colour, race, religion, ethnic origin or sexual orientation. No prosecution under this provision can be undertaken without the consent of the provincial Attorney General.

Under section 319(1) of the *Criminal Code*, everyone who, by communicating statements in a public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace is guilty of an indictable offence punishable by up to two years' imprisonment, or of a summary conviction offence.

Section 319(2) makes it an offence to communicate, except in private conversation, statements that wilfully promote hatred against an identifiable group. Section 319(7) defines "communicating" to include communicating by telephone, broadcasting or other audible or visible means.[20] "Public place" is defined to include any place to which the public has access as of right or by invitation, express or implied. "Statements" include words spoken or written or recorded electronically, electromagnetically or otherwise, and also include gestures, signs or other visible representations.

No prosecution under section 319(2) can be instituted without the consent of the provincial Attorney General. Any person charged under section 319(2) of the *Criminal Code* has available four special defences set out in section 319(3). These defences are:

1) that the communicated statements are true;
2) that an opinion or argument was expressed in good faith and either concerned a religious subject or was based on a belief in a religious text;
3) that the statements were relevant to a subject of public interest and were on reasonable grounds believed to be true; and
4) that the statements were meant to point out matters that produce feelings of hatred toward an identifiable group and were made in good faith for the purpose of their removal.

These special defences are not available to those charged under sections 318 and 319(1) of the Code.

Sections 320 and 320.1 of the *Criminal Code* provide that a judge may, on reasonable grounds, issue an order for the confiscation of hate propaganda in any form, including data on a computer system. Hate propaganda is defined in section 320(8) as any writing, sign or visible representation advocating or promoting genocide, or the communication of which would be an offence under section 319. By implication, this material has to target identifiable groups. It merely needs to be shown that the material is hate propaganda for it to be seized – it does not have to be shown to be dangerous. The consent of the provincial Attorney General is required before these seizure and confiscation provisions can be used.

5 FREEDOM OF EXPRESSION AND THE *CANADIAN HUMAN RIGHTS ACT*

The CHRA does not expressly set out rights in the manner of the Charter, nor does it create negative proscriptions in the manner of the *Criminal Code*. Rather, it simply states in section 13 and, to a lesser extent, in section 12 (as set out below) that certain conduct amounts to a "discriminatory practice," that such practices can be the subject of a complaint to the CHRC, and that anyone found to be engaging in, or to have engaged in, a discriminatory practice can be ordered to provide a remedy.

Since its adoption in 1977, the CHRA has stated that it is a discriminatory practice to use telephonic services for the promotion of hatred in Canada. When first adopted, this provision was intended for use against telephone hate message lines: neo-Nazi sympathizers were distributing phone numbers on public streets for telephone answering services that responded automatically with pre-recorded racist messages. The provision was used successfully by the CHRC and the CHRT to stop these hate message lines from operating throughout the 1980s and 1990s.[21] As the Internet became the favoured medium for hate promotion, the provision was also used effectively against offending websites and their operators.

As noted above, the mandate of the CHRC under the CHRA is, in brief, to investigate and try to settle complaints of discrimination in employment and in the provision of services within federal jurisdiction.[22] Thus, the CHRC and the CHRT focus on complaints of discrimination – not specifically on the fundamental freedoms outlined in section 2 of the Charter, at least in terms of their constitutional guarantees or

whether a law complies with the Charter; such matters are reserved for Canadian courts. For example, if religion arises in the context of a discrimination case before the CHRC, a person's right to practise the religion of his or her choice or to hold a religious belief will not be questioned. Rather, the question will be whether the person was discriminated against based on his or her religion or on an aspect of his or her religious belief or practice.[23]

5.1 SECTION 13 OF THE *CANADIAN HUMAN RIGHTS ACT*

Section 13 of the CHRA does not specifically prohibit hate messages; rather, it makes it a discriminatory practice to

> communicate telephonically or to cause to be so communicated … by means of the facilities of a telecommunication undertaking … 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.

Until the mid-1990s, this part of the CHRA was used against the dissemination of hate promotion messages by telephone services.[24] This changed in July 1996 when the CHRC received its first complaint against the use of an Internet website as a means of communicating hate promotion messages (largely containing Holocaust-denial material). (Section 13 is set out in full in Appendix A to this paper.)

In December 2001, section 13 was amended to clarify that Internet hate messages do come under the jurisdiction of the CHRC. This amendment was included as part of a package of anti-terrorism measures introduced after the 11 September 2001 terrorist incidents in the United States.[25] Subsection 13(2) now adds that subsection 13(1) applies to communications sent over 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." In other words, section 13 now applies to hate messages sent or made over the telephone or the Internet (or a related means of communication, not including broadcasting).

Section 13 does not apply to printed publications, unless a print article has been posted on an Internet site; then it may be subject to the jurisdiction of the CHRC. The Supreme Court of Canada has also emphasized that section 13 does not target expression that some may find offensive, but rather targets only the most extreme forms of expression of hatred and contempt.[26]

Section 13 is not designed to replace the *Criminal Code*, or to replace the jurisdiction of the courts with the jurisdiction of the CHRC and the CHRT. As noted by the CHRC, they are complementary systems, and not in competition with each other. The *Criminal Code* may be used to respond to the promoting of hatred in a public place or the advocating of genocide, and there is no limitation with regard to the specific mode of communication. The CHRA is limited to the repeated transmission of hate messages by means of a telecommunication undertaking or by means of a computer system. In contrast to the *Criminal Code* provisions described above, no specific defences are available to the respondent in a complaint under section 13 of

the CHRA. As well, the consent of the Attorney General is not required for such a complaint of discrimination to go forward – anyone may make such a complaint. Furthermore, there is no requirement that a complainant show evidence of specific intent or wilfulness on the part of the respondent.

5.1.1 Other Legislation Containing Similar Provisions

Different forms of hate speech are prohibited in a number of other federal statutes. For instance, section 8 of the *Broadcasting Distribution Regulations* prohibits the broadcasting of

> any abusive comment or abusive pictorial representation that, when taken in context, tends to or is likely to expose an individual or 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.[27]

Similar provisions are contained in other regulations under the *Broadcasting Act*.[28] Also, the *Customs Act* and *Customs Tariff*[29] prohibit the importation of hate propaganda.

Every legislature in Canada has passed a human rights law to prohibit or limit discriminatory activities.[30] With the exception of the Yukon's *Human Rights Act*, each of these laws contains a provision similar to section 12 of the CHRA that prohibits in some form the public display, broadcast or publication of messages that announce an intention to discriminate, or that incite others to discriminate, based on certain prohibited grounds.[31] The original purpose of these laws was to prohibit the types of signs that had been used in Canada by some stores or by businesses indicating that the members of certain racial or ethnic groups would not be served.[32] The Ontario Human Rights Commission notes that these laws "allow human rights agencies to use enforcement powers to deal with the publication of intent to deny housing, employment or services such as access to a restaurant or retail store because of an individual's race, religion or other enumerated ground."[33] The Alberta, British Columbia, Saskatchewan and the Northwest Territories laws also add a prohibition against the promotion of hatred or contempt. These prohibitions are broad, covering a range of message types, displays, publications and broadcasts. They differ from the prohibition in section 13 of the CHRA, which is limited to telecommunications by telephones and computers (and similar means of communication).

The anti-discrimination/anti-hate promotion provisions in the Alberta, Saskatchewan, Ontario, New Brunswick, Prince Edward Island and Newfoundland and Labrador human rights laws all explicitly state that there is "nothing" in them that should interfere with or restrict the right to free expression. Courts have emphasized that this reference to freedom of expression in the Alberta and Saskatchewan human rights laws requires that a balancing act be performed between the objective of eradicating discrimination and the need to protect free expression.[34]

The existing court and tribunal interpretations of Canada's anti-discrimination/anti-hate promotion provisions reveal that the provisions largely achieve similar purposes

despite using different language.[35] Though the facts may differ in the case law, an emphasis on examining the context of a message and the importance of freedom of expression has been fairly well established in the jurisprudence. Where the laws – and the interpretations of them – differ is in the types of messages and discriminatory practices that are affected; whether the laws address hatred and contempt; and whether the laws require that consideration be given to the intent of the message's author.

5.1.2 Constitutionality of Section 13

Section 13 has been the subject of challenges before the CHRT and in Canadian courts on the grounds that it infringes upon the freedom of expression guaranteed in section 2(*b*) of the Charter. The key Supreme Court of Canada decision concerning the constitutionality of section 13 of the CHRA is *Canada (Human Rights Commission) v. Taylor (Taylor)*.[36] This case involved John Ross Taylor and the Western Guard Party, which at the time were operating a hate promotion telephone message service. Although section 13 was found to be inconsistent with section 2(*b*) of the Charter, it was saved under section 1 as a reasonable limit in a free and democratic society. The fact that these provisions are found in a remedial human rights legislative context, rather than as part of the criminal law, did not adversely affect section 13's constitutional acceptability.

The Supreme Court concluded in *Taylor* that hate propaganda presents a serious threat to society and that "[i]n seeking to prevent the harms caused by hate propaganda, the objective behind s. 13(1) is obviously one of pressing and substantial importance sufficient to warrant some limitation upon the freedom of expression." The Court determined that hate propaganda contributes little to the aspirations enshrined in section 2(*b*) of the Charter such as the quest for truth, the protection of democracy, or individual fulfilment. Furthermore, the Court recognized that the values of equality and multiculturalism found in sections 15 and 27 of the Charter "magnify the weightiness of Parliament's objective in enacting s. 13(1)." In other words, respect for the dignity and equality of the individual, in particular as a member of a particular group, justifies the infringement on the freedom of expression. Similar reasoning was used in *R. v. Keegstra*, which examined the constitutionality of the limitation on free speech included in the *Criminal Code*, adding that "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."[37]

The most prominent CHRT decision with regard to hate speech on the Internet pertained to a site maintained by Ernst Zundel, a free-speech activist who has been charged on several occasions for disseminating anti-Semitic literature.[38] This decision clarified the applicability of section 13 to the Internet and reinforced its constitutionality. Parliament subsequently amended section 13 to clarify that it applies to Internet communications. The decision in the Zundel case has been followed and applied in subsequent Internet hate promotion decisions made by the CHRT.[39]

In 2009, the CHRT held in *Warman v. Lemire* that section 13, when viewed in conjunction with the types of remedial orders that can be imposed in relation to that section under section 54 of the CHRA, is an unreasonable infringement of section 2(*b*) of the Charter.[40] The CHRT considered the *Taylor* case, but determined that the penalty provisions in the CHRA,[41] which were added subsequent to that decision, changed the nature of the constitutional analysis involved.

In *Taylor*, the Supreme Court found, in part, that given the conciliatory nature of the human rights complaint process, section 13 minimally impaired free speech. By contrast, in *Warman v. Lemire*, the CHRT found that the conciliatory efforts outlined in the Act were not reflected in the process being used to address section 13 complaints. It also concluded that the introduction of penalty provisions could be seen as having a "chilling" effect on free speech.[42] These changes allowed the CHRT to reconsider the *Taylor* decision and conclude that the impairment of free speech under section 13 is no longer minimal, since the section "has become more penal in nature."[43] As the CHRT held that it did not have the power to declare section 13 to be constitutionally invalid, it simply did not apply it to this case, nor did it make any remedial orders.

The CHRC appealed to the Federal Court of Canada for judicial review of this decision.[44] In 2012, the Court held that the CHRT was correct to decline to apply the penalty provisions and declare that they are of no force or effect, but that it erred in failing to apply section 13. In keeping with the *Taylor* decision, the Court found that the benefits of section 13 outweigh any impact it has on freedom of expression. This case has been remitted to the CHRT for it to issue a declaration that Mr. Lemire's writing (which was the basis of the complaint) was in contravention of section 13 and to exercise its jurisdiction under paragraphs 54(1)(*a*) or 54(1)(*b*) of the Act to consider issuing a remedial order against him.

More recently, in *Saskatchewan (Human Rights Commission) v. Whatcott*,[45] the Supreme Court of Canada examined the constitutionality of section 14(*b*) of the *Saskatchewan Human Rights Code*, which is similar to section 13 of the CHRA in that it prohibits "any representation" (i.e., messages or other publications) that "exposes or tends to expose to hatred, ridicules, belittles or otherwise affronts the dignity of any person or class of persons on the basis of a prohibited ground."[46] The Court followed its previous decision in *Taylor* and upheld the prohibition against hatred as a reasonable limit on free expression. The Court reviewed the law concerning hate speech and the tests that should be applied by courts and tribunals in such cases. It emphasized how, due to its "tendency to silence the voice of its target group," hate speech can "distort or limit the robust and free exchange of ideas" and is therefore detrimental to the values underlying freedom of speech. However, as only speech of an "ardent and extreme" nature should be considered to meet the definition of "hatred," the Court held that the portion of the law pertaining to speech that is belittling or affronts the dignity of a person was unconstitutional and struck it from the legislation. Among its reasons, the Court concluded that expression of this type is not sufficiently egregious to justifiably limit freedom of expression.

5.1.3 Calls for Reform of Section 13

An increasing number of individual Canadians and organizations have been calling for the repeal of section 13. Others have called for a commitment to ensuring that the principles behind this provision remain intact, perhaps conceding that some amendments may be necessary. Given that this debate involves such sensitive topics as racism and freedom of speech, the discussions have often been heated. Supporters of the repeal or reform of section 13 include not only those who have appeared before the CHRT as defendants, but also academics, politicians, free-speech advocates and journalists.[47] In January 2008, Liberal Member of Parliament Keith Martin introduced an unsuccessful private member's motion calling on Parliament to repeal section 13.[48] It should be noted that even if section 13 were to be either repealed or amended, the *Criminal Code* provisions concerning hate propaganda would continue to operate as before: the Attorney General's consent would still be required, and any persons charged with hate promotion would face a criminal trial before they could be found guilty.

Those who advocate for the repeal of section 13 generally present two arguments. One is that criminal courts are better suited to the prosecution of hate crimes and hate propaganda. This view is perhaps based on the presumption that judges are better trained to handle cases involving Charter rights, or that criminal courts offer better protections for accused persons. The second argument is that all restrictions on freedom of expression should be minimized, if not completely removed. Those who hold the latter view would argue that the best response to a "bad" form of expression, such as hate speech, is either to ignore it or to respond with better arguments.

In contrast, a number of organizations have come forward to oppose the full repeal of section 13 (though not all necessarily oppose reform), arguing that it is vital to the protection of minority communities from the harms that can be caused by hate speech – harms such as the incitement to further hatred, incitement to violence and affronts to basic human dignity.[49]

As noted by the CHRC, while section 13 has "always been controversial," a particularly vigorous debate has been gathering momentum since 2007, when a complaint against a "mainstream news magazine" was filed, though it was later dismissed.[50] The CHRC is here referring to the case of *Canadian Islamic Congress (CIC) v. Rogers Communications*, in which the CIC filed a complaint pursuant to section 13 that an article written by Mark Steyn in the online edition of *Maclean's* magazine exposed members of the Muslim community to hatred and contempt.[51] The article discussed, through demographics, the argument that the "Western world" was at risk of being supplanted by the "Muslim world."[52] The CHRC

> 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*.[53]

The complaint was also dismissed by the Ontario Human Rights Commission for reasons of a lack of jurisdiction and by the British Columbia Human Rights Tribunal after a hearing. Referring to its own role, the CHRC stated that it had

> 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.[54]

In May 2009, McClelland & Stewart published *Shakedown: How Our Government is Undermining Democracy in the Name of Human Rights* by Ezra Levant, a journalist and lawyer who has written about his experiences responding to a complaint before the Alberta Human Rights Commission that he had incited hatred by republishing controversial cartoon images of the prophet Mohammed.[55] Levant's book has drawn considerable attention to the reform of section 13. Within a few months of its publication, it was on national best-seller lists.[56] It has received mixed reviews. Certain reviewers, including those from some of Canada's leading news publications, have praised it and see Levant as a champion of fundamental freedoms.[57] Others have criticized Levant's research methodology, claiming selective sourcing of information or biased presentation of findings (though not necessarily disagreeing with the general call for reform).[58]

Shakedown highlights what Levant sees as serious problems with human rights commissions, from their methodology to their ethics to their reasons for being in existence. He argues that the commissions were created to respond to past social contexts where discrimination was a problem in a way that it no longer is today. With respect to hate messages, he advocates removing all limitations on free speech and argues that the best way to deal with neo-Nazi hate propaganda is to ignore it. He sees human rights legislation that restricts free speech as an unnecessary intrusion on a fundamental right and is opposed to the current human rights institutional model in Canada.

5.1.4 Canadian Human Rights Commission Reports Regarding Section 13

The Canadian Human Rights Commission published two reports in 2008 and 2009 concerning section 13. The first, released in October 2008, was written by Richard Moon, a Canadian law professor, and is titled *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*.[59] The second, the CHRC's Special Report to Parliament concerning the debate over Section 13, titled *Freedom of Expression and Freedom from Hate in the Internet Age*, was released in June 2009.[60]

5.1.4.1 The Moon Report

Richard 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* received considerable media attention, largely due to its recommendation that section 13 should be repealed. The report included a number

of recommendations, including several targeting the "role of non-state actors in the prevention of expression that is hateful or discriminatory in character."[61]

The main recommendation of the Moon report 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." It further stated that:

> Hate speech should continue to be prohibited under the *Criminal Code* but this prohibition should be confined to expression that advocates, justifies or threatens violence. 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*.[62]

The Moon report also included recommendations for consideration should Parliament decide not to repeal section 13 of the CHRA. These recommendations were intended to modify section 13 "so that it more closely resembles a criminal restriction on hate speech." The recommendations include:

- changes to the language in order to clarify that the section prohibits only the most extreme instances of discriminatory expression that threaten, advocate or justify violence against the members of an identifiable group;
- the amendment of section 13(1) of the CHRA to include an intention requirement;
- 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; and
- the CHRC should 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, the CHRC would be responsible for bringing the case before the CHRT.[63]

One effect of these changes would be that individual complainants would no longer be central to the proceedings, as is currently the case. Moon anticipates this would allow the CHRC to decide whether cases might be likely to succeed before the CHRT at early stages of the investigation process.

5.1.4.2 The Canadian Human Rights Commission's Special Report to Parliament

The CHRC's Special Report to Parliament, *Freedom of Expression and Freedom from Hate in the Internet Age*, opens by stating that its purpose is to provide "a comprehensive analysis of a current debate," defined as: "what is the most effective way to prevent the harm caused by hate messages on the Internet, while respecting freedom of expression?"[64] The Special Report reviews the pertinent legal provisions of the *Criminal Code*, the CHRA, and even international law; it summarizes how the

CHRC system works to respond to hate messages on the Internet; it includes examples of the types of hate messages it has investigated and that have been heard by the CHRT; it provides commentary on the roles of civil society and government organizations in responding to hate messages; and it proposes its own recommendations for Parliament.

The CHRC has concluded that both the *Criminal Code* and the CHRA serve valid purposes in dealing with hate messages on the Internet. It therefore does not support a full repeal of section 13; however, it proposes a number of reforms. The recommendations ask that Parliament:

- add a statutory definition of "hatred" and "contempt" in accordance with that applied by the Supreme Court of Canada in *Taylor* (i.e., not restrict the definition of hate message to those expressions that advocate, justify or threaten violence – as proposed in the Moon report);
- allow for an award of costs in exceptional circumstances where the CHRT finds that a party has abused the Tribunal process;
- include a provision under section 41 of the *Canadian Human Rights Act* to allow the early dismissal of section 13 complaints when messages do not meet the narrow definition of hatred or contempt;
- repeal paragraph 54(1)(*c*), the provision that allows for the assessment of fines against those who violate section 13;
- review the requirement in the *Criminal Code* for consent of an Attorney General, which may be a possible barrier to prosecutions; and
- together with the appropriate bodies in provincial and territorial jurisdictions, consider the benefits of better coordination between Crown prosecutors and police services in their efforts to protect Canadians from hate propaganda.

The CHRC supports these recommendations by expressing the view that hatred, prejudice and discrimination are still significant problems in Canada, meriting continued regulation under the CHRA and the *Criminal Code*. More specifically, it asserts that all citizens have the right to be treated with equality, dignity and respect, and to be protected from the harm that can be caused by hate messages.

5.1.4.3 BILL C-304

Bill C-304, An Act to amend the Canadian Human Rights Act (protecting freedom), was introduced in the House of Commons by Member of Parliament Brian Storseth on 30 September 2011. At the time of writing, Bill C-304 has had its second reading in the Senate.

The primary purpose of the bill is the repeal of section 13, but the bill would also repeal or amend a number of provisions in the CHRA that are relevant to the enforcement of section 13, including subsection 54(1) of the CHRA, which limits the types of orders that can be made by the CHRT in section 13 cases and sets out what factors it should consider when doing so. As Mr. Storseth explained in an appearance before the House of Commons Standing Committee on Justice and

Human Rights during its April 2012 study of the bill, one of his concerns is with the phrase "any matter that is likely to expose a person or persons to hatred," found in section 13:

> What this really means is that the Canadian Human Rights Commission and the Canadian Human Rights Tribunal only have to feel that you were likely to have offended someone … [T]ruth is not a defence. Intent is not a defence. You no longer have the right to due process, the right to a speedy trial, or the right to an attorney. It is alarming that, until recently, the Human Rights Tribunal had a 100% conviction rate, with 90% of defendants failing to obtain legal advice, because they simply could not afford it. At the same time, the legal costs of the plaintiffs are fully covered … This is a clear depiction of censorship overstepping its bounds through an overzealous bureaucracy.[65]

Following its study, the Committee reported the bill back with minor amendments.[66] During the committee hearings, members of the opposition parties and several witnesses supported the retention of section 13. The Canadian Bar Association, which also advocated for the repeal of the penalties in section 54 due to their inconsistency "with the core remedial functions of human rights legislation," was among them.[67] B'nai Brith, however, who had actively campaigned for keeping section 13 in the past, supported its repeal. As Executive Vice President Frank Dimant informed the Committee:

> [Section 13] has been a tool for B'nai Brith Canada throughout its years in fighting hate speech. … [However,] as a progressive human rights organization, we recognize the misuse of this section and the hardships it has brought to individuals. Therefore, at this moment, we support the repeal of the section.
>
> We want to make it clear that we come with a heavy heart. … [R]epeal by itself, without putting into place other safeguards, will be a disservice to the Canadian population in fighting the kind of hate-mongers who exist here.[68]

5.2 SECTION 12 OF THE *CANADIAN HUMAN RIGHTS ACT*

Section 12 of the CHRA states that it is a prohibited discriminatory practice to "publish or display" "any notice, sign, symbol, emblem or other representation" that "expresses or implies discrimination or an intention to discriminate" or "incites or is calculated to incite others to discriminate" against an identifiable group. This provision is further circumscribed by adding that the discrimination expressed or implied must be "a discriminatory practice described in any of sections 5 to 11 or in section 14." In other words, section 12 does not create any new discriminatory practices per se; rather, it simply adds a prohibition of publishing or displaying any representation of an intention to discriminate or that incites others to discriminate in a manner already set out elsewhere in the Act. (The full text of section 12 appears in full in Appendix A to this paper.)

Section 12 is somewhat similar to section 13 in that subsection (*b*) pertains to representations that "incite" others to take certain discriminatory actions; in other words, these are representations that spread a message to convince others to undertake certain discriminatory actions. It is possible therefore to compare this aspect of subsection (*b*) with section 13's provisions regarding hate messages. If

section 12 were to be amended for reasons similar to those arguments made in favour of repealing section 13 (such as those made by Richard Moon and free-speech advocates), then subsection (*b*) would likely be the focus of any proposed amendment.

The Moon report notes that

> in those jurisdictions that do not have a section 13 equivalent in their code, the discriminatory sign provision has sometimes been interpreted broadly so that it extends to discriminatory speech that appears on signs, and in some provinces, that occurs in publications.[69]

Thus, in provincial legislation where no equivalent to section 13 exists, equivalents to section 12 have been used to similar ends.[70] The Moon report therefore adds: "If section 13 of the *CHRA* is repealed, it may also be necessary to amend or repeal section 12 so that it does not substitute for section 13."[71]

The Moon report provides no further explanation of how any amendments to section 12 should be made, and the CHRC's Special Report to Parliament makes no mention of section 12. Indeed, section 12 of the CHRA has not received the same attention from legal experts or commentators, the media, the courts or the CHRT as has section 13. Nonetheless, as section 12 is distinct in many ways from section 13, any proposal to repeal or amend this provision requires its own analysis. If section 12 were to be repealed, the discriminatory practices contained in sections 5 to 11 or in section 14 would still be prohibited by the Act. What would be lost is the clear intent of the law that publishing or displaying an intent to discriminate or inciting others to do so constitutes a discriminatory practice. However, if the original intention of this section were to be preserved (i.e., addressing situations where signs were posted in establishments setting out an intention to discriminate against members of certain identifiable groups), then section 12 would need to be amended rather than wholly repealed.

Lastly, in *Dreaver et al. v. Pankiw*,[72] the CHRT heard a complaint against a federal Member of Parliament who had distributed a series of printed brochures to his constituents that included statements regarding Aboriginal persons in the context of the criminal justice system and the operations of government. The complainants alleged that the distribution of the brochures constituted a discriminatory practice in the provision of public services on the ground of race, and that the statements in question expressed discrimination or incited others to discriminate. With regard to section 12, the CHRT found that statements made in a householder pamphlet that a Member of Parliament sent to his or her constituents were not a "representation" under the meaning of the section. The CHRT found that the word "representation" was intended to refer to an image, likeness or reproduction, and could not be interpreted to include statements or articles, such as those in the brochures. In other words, this particular form of published literature was not the type of "representation" that is set out in section 12 (and therefore the section was not applicable to that case). There do not appear to have been any other reported decisions based on complaints brought forward under section 12.

6 CONCLUSION

If Bill C-304 is passed into law, it will bring an end to the CHRC's and CHRT's current mandates to address hate messages on the Internet. Information provided by Statistics Canada demonstrating that in recent years there have been increases in police-reported hate crimes (despite a slight decrease in 2012)[73] is one indication that addressing the spread of hatred will continue to be a relevant issue in Canada. While the debate over how or whether to limit hate speech and protect vulnerable groups is unlikely to end soon, without section 13, the focus may shift to the effectiveness of the *Criminal Code* and provincial anti-discrimination/anti-hate promotion laws in dealing with these issues.

NOTES

* The former version of this publication carried the title *Section 13 of the* Canadian Human Rights Act*, Anti-hate Laws and Freedom of Expression*.

1. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.
2. *Criminal Code* [Code], R.S.C., 1985, c. C-46.
3. *Re ss. 193 and 195.1(1)(C) of the criminal code (Man.)*, [1990] 1 S.C.R. 1123, paras. 79–80. Justice Lamer noted 25 offences in the *Criminal Code* that place some kind of restriction on expression.
4. *Canadian Human Rights Act*, R.S.C., 1985, c. H-6.
5. *Canada (Human rights commission) v. Taylor*, [1990] 3 S.C.R. 892.
6. Bill C-304: An Act to amend the Canadian Human Rights Act (protecting freedom), 1st Session, 41st Parliament.
7. See also Nancy Holmes, *Human Rights Legislation and the Charter: A Comparative Guide*, Publication no. MR-102E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 18 September 1997.
8. Under section 92 of the *Constitution Act, 1867*, 30 & 31 Victoria, c. 3 (U.K.), provinces may pass laws under such heads of power as "Property and Civil Rights," "Shop" and other licences, and "Generally all Matters of a merely local or private Nature in the Province." These powers allow a province to pass human rights laws concerning all matters involved in the provision of services, employment and accommodation within the province. Such laws therefore govern, to name a few, provincially registered or incorporated businesses; landlords; provincial government officials, agencies or other organizations; employers; and service providers in general.

   Under section 91, federal laws may apply to the "Regulation of Trade and Commerce," or generally to promote "Peace, Order, and good Government." The jurisdiction of the *Canadian Human Rights Act* therefore covers employment, accommodation and services provided by the federal government and extends to federally regulated corporations and other persons or institutions under federal regulation.
9. Other laws relating to human rights matters, to a greater or lesser degree, include the *Employment Equity Act*, S.C. 1995, c. 44; and the *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24.

10. Federally regulated businesses include federal departments, agencies and Crown corporations; Canada Post; chartered banks; national airlines; interprovincial communications and telephone companies; interprovincial transportation companies; and other federally regulated industries, such as certain mining operations.

11. Section 1 of the *Canadian Charter of Rights and Freedoms* states: "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."

12. In some cases, the courts have given the government time to rectify any part of a law that is unconstitutional before the decision that a law is to be struck down takes effect.

13. See, for example, *Vriend v. Alberta*, [1998] 1 S.C.R. 493; and *Egan v. Canada*, [1995] 2 S.C.R. 513.

14. *Canadian Bill of Rights*, S.C. 1960, c. 44.

15. Peter Hogg, *Constitutional Law of Canada*, 5th ed., Thomson Carswell, Toronto, 2009, pp. 43-7 to 43-10.

16. *Canada Elections Act*, S.C. 2000, c. 9, s. 328.

17. There have been many proposals to amend the hate propaganda provisions since their inception, though Parliament has changed them only twice. It did so when it adopted the *Anti-terrorism Act*, S.C. 2001, c. 41, whose section 10 amended the Code by adding section 320.1, dealing with hate material found on computers and the seizure of such material. It also amended the hate propaganda provisions when it adopted *An Act to amend the Criminal Code (hate propaganda)*, S.C. 2004, c. 14, which expanded the definition of "identifiable group" to include any section of the public distinguished by sexual orientation.

18. For general background, see Philip Rosen, *Hate Propaganda*, Publication no. 85-6E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 24 January 2000. For a description of the events in the 1960s leading up to the adoption by Parliament of the hate propaganda provisions found in the Code, see William Kaplan, "Maxwell Cohen and the Report of the Special Committee on Hate Propaganda," in *Law, Policy*, *and International Justice: Essays in Honour of Maxwell Cohen*, ed. William Kaplan and Donald McRae, McGill-Queen's University Press, Montréal and Kingston, 1993.

19. In addition to these specific hate crimes, hate is an aggravating circumstance in sentencing any type of criminal offence (section 718.2(*a*)(i) of the Code).

20. Clause 7 of Bill C-46, An Act to amend the Criminal Code, the Competition Act and the Mutual Legal Assistance in Criminal Matters Act – introduced by the minister of Justice and Attorney General of Canada, the Honourable Robert Nicholson in the House of Commons in June 2009 – would have amended section 319(7) of the Code to state that "'communicating' means communicating by any means and includes making available." The term "communicating" would have been very broad and would have included all types of communication. Also, a person who made such communications available to others could have been charged under such a provision. An example of this type of communication is the re-publishing of an article in a magazine or the re-posting of hate messages on the Internet. Bill C-46 died on the *Order Paper*.

21. See, for example, *Smith and Lodge* v. *Western Guard Party* (Taylor J.R.) (1979), Canadian Human Rights Tribunal, T.D. 1/79.

22. The Canadian Human Rights Commission also has other duties mandated under the *Employment Equity Act*, S.C. 1995, c. 44. See Canadian Human Rights Commission,*About Us*..

23. At times, the CHRC or the CHRT must strike a balance between the needs of the service provider or employer and the needs of the service receiver or employee. For example, in employment matters, a bona fide occupational requirement *may* be a justification as a defence to an otherwise discriminatory practice. An example of such a requirement might be that an employee providing manual labour for an employer must be able to move freely without the use of aids. In such a case, an employer *may* be justified in not hiring a person who cannot perform the required manual tasks.

24. For more on the history of section 13, see Richard Moon, 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, Canadian Human Rights Commission, October 2008, pp. 3–19.

25. See Elisabeth Symons, "Bill C-36, Hate, the Internet, and Internet Service Providers," *Information and Technology: Recent Developments for Professionals*, Vol. 6, May 2002, pp. 10–11. More generally, see Jane Bailey, "Private Regulation and Public Policy: Toward Effective Restriction of Internet Hate Propaganda," *McGill Law Journal*, Vol. 49, 2004.

26. *Canada (Human Rights Commission) v. Taylor.*

27. Broadcasting Distribution Regulations, 1997, SOR/97-555.

28. *Broadcasting Act*, S.C. 1991, c. 11. See also *Radio Regulations, 1986*, SOR/86-982, s. 3; *Television Broadcasting Regulations, 1987*, SOR/87-49, s. 5; *Pay Television Regulations, 1990*, SOR/90-105, s. 3; and *Specialty Services Regulations, 1990*, SOR/90-106, s. 3.

29. *Customs Act*, S.C. 1985, c. 1 (2nd Supp.); and *Customs Tariff*, S.C. 1997, c. 36. See also *Customs Tariff – Schedule*, 1 January 2008.

30. For more information on this topic, see Luke McNamara, "Negotiating the contours of unlawful hate speech: regulation under provincial Human Rights Laws in Canada," *University of British Columbia Law Review*, Vol. 38, No. 1, 2005.

31. See British Columbia, *Human Rights Code*, R.S.B.C. 1996, c. 210, s. 7; *Alberta Human Rights Act*, R.S.A. 2000, c. A-25.5, s. 3; *Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1, s.14; Manitoba, *Human Rights Code*, C.C.S.M. c. H175, s. 18; Ontario, *Human Rights Code*, R.S.O. 1990, c. H.19, s.13; Quebec, *Charter of human rights and freedoms*, R.S.Q. c. C-12, ss. 10 and 11; New Brunswick, *Human Rights Act*, R.S.N.B. 1973, c. H-11, s. 6; Nova Scotia, *Human Rights Act*, R.S.N.S. 1989, c. 214, s. 7; Prince Edward Island, *Human Rights Act*, R.S.P.E.I. 1988, c. H-12, s. 12; Newfoundland and Labrador, *Human Rights Code*, R.S.N.L. 1990, c. H-14, s. 14; Nunavut, *Human Rights Act*, S. Nu. 2003, c. 12, s.14; and Northwest Territories, *Human Rights Act*, S.N.W.T. 2002, c. 18, s. 13.

32. See for example, *Ontario Racial Discrimination Act, 1944*, S.O. 1944, c. 51.

33. Ontario Human Rights Commission, *Submission to the Canadian Human Rights Commission concerning section 13 of the Canadian Human Rights Act and the regulation of hate speech on the internet*, January 2009.

34. *Boissoin v. Lund*, [2009] A.J. No. 1345 and *Whatcott v. Saskatchewan (Human Rights Tribunal)*, [2010] S.J. No. 108 (C.A.) [appeal allowed in part, *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11].

35. Examples of cases that have examined issues related to Canadian anti-discrimination/anti-hate promotion provisions include: *Saskatchewan (Human Rights Commission) v. Engineering Students' Society* (1989), 10 C.H.R.R. D/5636 (Saskatchewan C.A.); *Warren v. Manitoba Human Rights Commission* (1985), 6 C.H.R.R. D/2777 (Manitoba C.A.), as cited in *Whiteley v. Osprey Media Publishing*; *Owens v. Saskatchewan (Human Rights Commission)*, [2006] S.J. No. 221 (C.A.); *Saskatchewan (Human Rights Commission) v. Bell*, [1994] 5 W.W.R. 458 (Sask. C.A.); *Re: Kane* [2001] A.J. No. 915 (Q.B.); *Stacey v. Campbell et al.*, 2002 BCHRT 35; *Balcilek v. Kwantlen Polytechnic University*, [2009] B.C.H.R.T.D. No. 366); *Whiteley v. Osprey Media Publishing*, 2010 HRTO 2152 (Ontario Human Rights Tribunal); and *Recalma v. Orca Sand & Gravel LP*, 2010 BCHRT 335.

36. *Canada (Human Rights Commission) v. Taylor*.

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

38. *Sabina Citron et al. and Canadian Human Rights Commission and Ernst Zundel and Others*, Canadian Human Rights Tribunal, T.D. 1/02, 18 January 2002.

39. Recent cases include *Warman v. Winnicki*, [2006] F.C.J. No. 1092; *Canada (Human Rights Commission) v. Winnicki*, [2005] F.C.J. No. 1838; *Warman v. Tremaine*, [2008] F.C.J. No. 1265; and *Kulbashian v. Canada (Canadian Human Rights Commission)*, [2007] F.C.J. No. 475.

40. *Warman v. Lemire*, 2009 CHRT 26.

41. As described in section 2.1, "Human Rights Legislation," in this paper.

42. Note that section 54(1.1)(*b*) of the CHRA requires the CHRT to consider the intent of the person when deciding whether to require payment of a penalty. This was not required in *Taylor* because no such remedy was available.

43. See *Lemire*, para. 279.

44. *Canadian Human Rights Commission v. Richard Warman* et al., 2012 FC 1162 (Federal Court). All subsequent section 13 cases before the CHRT were adjourned pending the outcome: *Canadian Jewish Congress v. Henry Makow*, 2010 CHRT 13; *League for Human Rights of B'nai Brith, Abrams, Harry v. Topham, Arthur*, 2010 CHRT 14; and *Warman v. Kulbashian* et al., Tribunal File T869/1903 and Federal Court File T-572-06.

45. *Saskatchewan (Human Rights Commission) v. Whatcott*.

46. *Saskatchewan Human Rights Code*, subsection 14(1).

47. See, for example, United Nations General Assembly, Human Rights Council Working Group on the Universal Periodic Review, Fourth Session, *Summary Prepared by the Office of the High Commissioner for Human Rights, in Accordance with Paragraph 15 (C) of the Annex to Human Rights Council Resolution 5/1 – Canada*, Publication no. A/HRC/WG.6/4/CAN/3, 24 November 2008, para. 31 (PEN Canada); Canadian Association of Journalists, "CAJ urges changes to human rights laws," News release, 22 February 2008; Canadian Civil Liberties Association, *Submissions to Canadian Human Rights Commission re: The Moon Report*, 15 January 2009.

48. House of Commons, Motion M-446, *Notice Paper*, No. 41,2nd Session, 39th Parliament, 31 January 2008 (introduced by Keith Martin, MP, Esquimalt–Juan de Fuca).

49. See, for example, Canadian Jewish Congress, *Hate Speech* [accessed in September 2010; no longer available]; B'nai Brith, "B'nai Brith Canada gives mixed reviews to Moon Report on human rights commission mandate to fight hatred," News release, Toronto, 24 November 2008; and "Mixed reviews: Moon report on hate speech," *Jewish Tribune*, 25 November 2008. See also House of Commons, Standing Committee on Justice and Human Rights [JUST], Evidence, 1st Session, 41st Parliament, 24 April 2012, 1210 (Mark Toews, Canadian Bar Association).

50. Canadian Human Rights Commission, *Special Report to Parliament: Freedom of Expression and Freedom from Hate in the Internet Age*, June 2009.

51. Ibid. The decision was posted by *Maclean's*; see "Decision of the Commission: Canadian Islamic Congress v. Rogers Media Inc. (20071008)."

52. Mark Steyn, "The future belongs to Islam," *Maclean's*, 20 October 2006.

53. Canadian Human Rights Commission, *Special Report to Parliament* (2009), p. 31.

54. Ibid.

55. The introduction to this book is by the aforementioned Mark Steyn.

56. See, for example, *Maclean's*, 14 July 2009; *The Globe and Mail* [Toronto], 15 May 2009; and *Financial Post*, 18 April 2009.

57. See, for example, Mark Medley, "Book Review," *The National Post* [Toronto], 11 April 2009; Rex Murphy, "The right to offend the easily offended," *The Globe and Mail* [Toronto], 11 April 2009; Andrew Coyne, "Human rights racket," *Maclean's*, 2 April 2009.

58. Robert Meynell, "Book Review," *Quill & Quire*, May 2009; Franklin Bialystok, "The Nazi threat in the '60s in Canada was real," *The Ottawa Citizen*, 11 June 2009, p. A11; Mark J. Freiman, "Trial by Anecdote," *Literary Review of Canada*, 1 June 2009; James W. St. G. Walker, "Book Review," *Human Rights Quarterly*, Vol. 32, No. 1, February 2010, pp. 198–207.

59. Moon (2008).

60. Canadian Human Rights Commission, *Special Report to Parliament* (2009).

61. Moon (2008), p. 3; see also pp. 40–42.

62. Ibid., p. 2.

63. Ibid.

64. Canadian Human Rights Commission, *Special Report to Parliament* (2009), p. 1.

65. JUST (24 April 2012), 1105 (Brian Storseth, MP, Westlock–St. Paul).

66. JUST, *10th Report*, 1st Session, 41st Parliament, adopted by the Committee on 26 April 2012 and presented to the House on 27 April 2012. The Committee heard from Ezra Levant and Mark Steyn on 5 October 2009 and from Jennifer Lynch, Chief Commissioner of the Canadian Human Rights Commission, on 26 October 2009. See JUST, *Evidence*, 2nd Session, 40th Parliament, 5 October 2009; and JUST, *Evidence*, 2nd Session, 40th Parliament, 26 October 2009.

67. JUST (24 April 2012), 1210 (Mark Toews, Canadian Bar Association).

68. JUST, *Evidence*, 1st Session, 41st Parliament, 26 April 2012, 1105 (Frank Dimant, Executive Vice-President, B'nai Brith).

69. Moon (2008), p. 16. The author gives as an example *Rasheed v. Bramhill* (1981), 2 CHRR D/249 (Nova Scotia Board of Inquiry).

70. The Moon report also cites Luke McNamara's observation that when broadly interpreted, this provision limits "conduct similar in nature to that at which broader hate speech laws are directed." See Moon (2008).

71. Moon (2008), p. 46, note 64.

72. *Dreaver et al. v. Pankiw*, 2009 CHRT 8.

73. Statistics Canada, "Police-reported hate crimes," *The Daily*, 12 April 2012; Mia Dauvergne and Shannon Brennan, *Police-reported hate crime in Canada, 2009*, Statistics Canada, 7 June 2011; and Mia Dauvergne, *Police-reported hate crime in Canada, 2008*, Statistics Canada, 14 June 2010.

APPENDIX A – *CANADIAN HUMAN RIGHTS ACT* (R.S.C., 1985, C. H-6, AS AMENDED) SECTIONS 12–13

Publication of discriminatory notices, etc.

12. It is a discriminatory practice to publish or display before the public or to cause to be published or displayed before the public any notice, sign, symbol, emblem or other representation that

(*a*) expresses or implies discrimination or an intention to discriminate, or

(*b*) incites or is calculated to incite others to discriminate

if the discrimination expressed or implied, intended to be expressed or implied or incited or calculated to be incited would otherwise, if engaged in, be a discriminatory practice described in any of sections 5 to 11 or in section 14.

Hate messages

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 facilities of a telecommunication undertaking within the legislative authority of Parliament, any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination.

Interpretation

(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.

Interpretation

(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.

APPENDIX B – *CRIMINAL CODE* (R.S.C., 1985, C. C-46, AS AMENDED) SECTIONS 318–320.1

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.

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"

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

"identifiable group"

"identifiable group" has the same meaning as in section 318;

"public place"

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

"statements"

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

Warrant of seizure

320. (1) A judge who is satisfied by information on oath that there are reasonable grounds for believing that any publication, copies of which are kept for sale or distribution in premises within the jurisdiction of the court, is hate propaganda shall issue a warrant under his hand authorizing seizure of the copies.

Summons to occupier

(2) Within seven days of the issue of a warrant under subsection (1), the judge shall issue a summons to the occupier of the premises requiring him to appear before the court and show cause why the matter seized should not be forfeited to Her Majesty.

Owner and author may appear

(3) The owner and the author of the matter seized under subsection (1) and alleged to be hate propaganda may appear and be represented in the proceedings in order to oppose the making of an order for the forfeiture of the matter.

Order of forfeiture

(4) If the court is satisfied that the publication referred to in subsection (1) is hate propaganda, it shall make an order declaring the matter forfeited to Her Majesty in right of the province in which the proceedings take place, for disposal as the Attorney General may direct.

Disposal of matter

(5) If the court is not satisfied that the publication referred to in subsection (1) is hate propaganda, it shall order that the matter be restored to the person from whom it was seized forthwith after the time for final appeal has expired.

Appeal

(6) An appeal lies from an order made under subsection (4) or (5) by any person who appeared in the proceedings

(*a*) on any ground of appeal that involves a question of law alone,

(*b*) on any ground of appeal that involves a question of fact alone, or

(*c*) on any ground of appeal that involves a question of mixed law and fact,

as if it were an appeal against conviction or against a judgment or verdict of acquittal, as the case may be, on a question of law alone under Part XXI, and sections 673 to 696 apply with such modifications as the circumstances require.

Consent

(7) No proceeding under this section shall be instituted without the consent of the Attorney General.

Definitions

(8) In this section,

"court"

"court" means

(*a*) in the Province of Quebec, the Court of Quebec,

(*a.1*) in the Province of Ontario, the Superior Court of Justice,

(*b*) in the Provinces of New Brunswick, Manitoba, Saskatchewan and Alberta, the Court of Queen's Bench,

(*c*) in the Provinces of Prince Edward Island and Newfoundland, the Supreme Court, Trial Division,

(*c.1*) [Repealed, 1992, c. 51, s. 36]

(*d*) in the Provinces of Nova Scotia and British Columbia, in Yukon and in the Northwest Territories, the Supreme Court, and

(*e*) in Nunavut, the Nunavut Court of Justice;

“genocide”	“genocide” has the same meaning as in section 318;
“hate propaganda”	“hate propaganda” means any writing, sign or visible representation that advocates or promotes genocide or the communication of which by any person would constitute an offence under section 319;
“judge”	“judge” means a judge of a court.
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.