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Submissions on Section 13 of the *Canadian Human Rights Act*

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Executive Summary

1. The Durham Community Legal Clinic ("DCLC") was founded in 1985. The vast majority of DCLC's funding comes from Legal Aid Ontario ("LAO"). Beyond legal services such as housing law, social benefits, employment law, WSIB, and human rights, DCLC also is actively involved in public legal education, advocacy and law reform initiatives. In accordance with DCLC's focus on law reform, DCLC has reviewed the Report of the Standing Committee on Justice and Human Rights regarding "Taking Action to End Online Hate,"[1] and provides the comments within in regard to this legislative review.
2. DCLC strongly affirms and believes in the importance of expression in a free and democratic society. Towards those ends, the goals of expression within a free and democratic society are worth highlighting. Although hate speech receives some protection under the law, it is inconsistent with the goals of a free and democratic society to refrain entirely from any regulation of expression.
3. While the worst cases of hate speech may be encapsulated within provisions within the *Criminal Code*,[2] resorting exclusively to the criminalization of hate speech as the only legal approach does not promote expression or the goals of a free and democratic society. There is a greater likelihood of improper chill from utilizing criminal provisions towards expression,

[1] Anthony Housefather, "Taking Action to End Online Hate," Report on the Standing Committee on Justice and Human Rights, House of Commons, 42nd Parliament, 1st Session, June 2019, available at: <https://www.ourcommons.ca/Content/Committee/421/JUST/Reports/RP10581008/justrp29/justrp29-e.pdf>.
[2] RSC 1985, c C-46 (the "*Criminal Code*").

and a failure by the state to demonstrate the appropriate boundaries of public discourse. Instead, the re-introduction of civil mechanisms, such as through the human rights regime, allows for greater nuance within the legal system to properly reflect the complexities of hate speech, and to do so without resulting in the criminalization of offenders.

4. The current state of the law with regards to alleviating the proliferation of online hatred is flawed from an access to justice perspective, as the repeal of Section 13 of the *Canadian Human Rights Act*[3] under Bill C-304 in 2013[4] has left a hole in the available remedies for addressing such hate.

5. The importance of dealing with this issue is more pertinent than ever, as the social and economic fallout from the COVID-19 pandemic is fueling an increase in online hatred, and groups related to the involuntary celibate ("incel") movement as well as far-right extremism are proliferating online.[5] Section 13 of the *CHRA* should be reinstated, albeit with some modifications. This is justified in light of Canada's ongoing international human rights obligations, as currently understood, and the jurisprudence that has developed since its repeal.

[3] RSC 1985, c H-6 (the "*CHRA*").
[4] *An Act to amend the Canadian Human Rights Act (protecting freedom)*, SC 2013, c 37.
[5] Elizabeth Thompson, Facebook Partners with Ontario university on 'global network' to counter rise in online hate, CBC, July 28th, 2020, available at: <https://www.cbc.ca/news/politics/facebook-hate-online-extremism-1.5664832>.

Part 1 - Introduction

6. The Internet, and social media in particular, have become essential parts of our everyday lives. However, the ubiquity of the Internet has also meant that it has become a popular place to spread hatred. The ability to hide "behind a veil of anonymity," easy access to an audience, and easy access to hate content, have all contributed to the rise of hate speech online.[7]
7. The rise in hate speech online has had devastating consequences, including outbreaks of violence. These very visible examples of hatred are themselves adequate calls for legislative attention. However, the vast majority of hatred, discrimination, and exclusion in Canada often occurs in much more subtle ways, including in schools, the workplace, and in neighbourhoods.[12] It is therefore never recorded, reported, or captured in any meaningful way, making it imperative that effective mechanisms to stop the spread of hate speech online are put in place in Canada.
8. Social media platforms are another tool since Section 13's repeal that have increasingly been used to disseminate hateful or discriminatory speech. Some, such as Facebook, have partnered with universities such as Ontario Tech in Durham Region, to create a "Global Network Against Hate" in order to spot "…emerging trends in online extremism" and to work on "developing

[7] Housefather, *supra* note 1 at 7.
[12] Karen Mock, "Addressing Hate Crime in Ontario," Hate Crimes Community Working Group, Final Report of the Hate Crimes Community Working Group to the Attorney General and the Minister of Community Safety and Correctional Services, 2006, at 64, 86, available at: <https://collections.ola.org/mon/15000/268875.pdf>.

strategies, policies, and tools to counter them."[13] These educational and private sector initiatives hold enormous potential, but still require an adequate and functional legislative framework to curb the growth of this type of hate speech online.

9. Although the Internet has in many ways become the primary vehicle for expression for many Canadians, it has also become the primary tool for the dissemination of contempt, hatred and discrimination. This is a trend that is mirrored around the world, but requires some analysis within the context of Canadian legislation and the current issues currently facing Canadian society.

10. These submissions will focus on the moral and legal basis for reinstating Section 13, especially in light of the contemporary challenges in Canada, and the goals of fostering greater inclusion and participation in society. They provide some context for civil provisions by providing the backdrop of hate speech protections generally, explaining the circumstances behind the repeal of Section 13, and provide an overview as to why it should be reinstated.

Part 2: Current and Historic Legal Mechanisms

Current Criminal Law Provisions

11. The *Criminal Code* addresses hate speech generally in Section 318(1), which states,

> Every person who advocates or promotes genocide is guilty of an indictable offence and liable to imprisonment for a term of not more than five years imprisonment.

[13] *Ibid.*

The section further defines key terms of this provision under Section 318(2) as follows,

> …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.

12. The most relevant section of the *Criminal Code* with regards to online hate speech fall under Section 319(1), which provides that,

> 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) sets out that it is an offence to communicate statements,

> …other than in private conversation, that wilfully promote hatred against identifiable groups.

Ensuring that hate speech can still occur in private contexts ensures that the state remains out of the regulation of other important freedoms as much as possible, such as the freedom of religion and conscience. The goals of these provisions are preventing the expression of these sentiments publicly, given the accompanying risk of these beliefs spreading, or more importantly, people acting on them.

13. Importantly, no proceeding under these provisions of the *Criminal Code* can be instituted without the permission of the Attorney General.[14] This provides an important gatekeeping function, but also ensures they are not abused. This requirement can also create a political imperative for use of these provisions, which runs the risk of politicization of hate speech, and

[14] *Criminal Code* at s. 319(6).

may result in certain vulnerable or marginalized groups who do not enjoy political sympathy of the day from receiving these types of protections.

14. The term "identifiable group" means "any section of the public distinguished by colour, race, religion, national or ethnic origin, age, sex, sexual orientation, gender identity or expression, or mental or physical disability."[15] These terms roughly correspond to the terminology used in provincial and federal human rights legislation, demonstrating that the protection of these historically vulnerable and marginalized groups serves some of the same purposes.

15. A person charged under section 319(2) can raise four defences in section 319(3) as follows:

> 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.

These defences are broadly construed to allow for a great deal of latitude in terms of the interpretation of public interest or public benefit, as well as reasonable grounds for a belief of truth. The intent or mental element of these provisions are crucial given their criminal nature.

16. A person will only be found guilty of wilful promotion of hatred where the Crown demonstrates beyond a reasonable doubt that some or all of the statements made were actually made, and promoted hatred towards an identifiable group.[16] Making this determination requires

[15] *Ibid* at s. 319(7).
[16] *R. v. Krymowski*, 2005 SCC 7 (CanLII), [2005] 1 SCR 101.

consideration of the totality of the evidence, including the terminology and history of the group in question, the place or location of the statement, actions and context of the speech, any accompanying symbols or banners, and other indicia of race or ethnicity.[17] The minimum mental requirement is wilful blindness, and not mere recklessness, and should require a subjective realization of the likely results of the action and deliberately avoiding actual knowledge while engaging or pursuing the activity.[18]

17. Advocating genocide requires the most intense forms of dislike, but not any proof that the communication caused hatred or violence.[19] The Crown must prove a conscious purpose to promote hatred against an identifiable group, or foreseeability that the promotion of hatred was certain to result.[20]

18. The high threshold for hate speech under the *Criminal Code* ensures maximal protection of expression rights, avoids criminalizing speech, and utilizes punitive sanctions only in the worst cases of hate speech. However, the objectives of these provisions have still been described by the Supreme Court of Canada as follows,[21]

> In my opinion, it would be impossible to deny that Parliament's objective in enacting s. 319(2) is of the utmost importance. 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 in Canada has decided to suppress the wilful promotion of hatred against identifiable groups. The nature of Parliament's objective is supported not only by the work of numerous study groups, but also by our collective

[17] *Ibid* at para 19. See also, *Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, [2005] 2 SCR 100 at para 106 ["*Mugesara*"]; *R. v. Ahenakew*, 2008 SKCA 4 (CanLII) at para 21.
[18] *R. v. Harding*, 2001 CanLII 21272 (ON CA) at para 63.
[19] *Mugesara*, *supra* note 17.
[20] *Regina v. Buzzanga and Durocher*, 1979 CanLII 1927 (ON CA).
[21] *R. v. Keegstra*, 1990 CanLII 24 (SCC), [1990] 3 SCR 697 at 758 ["*Keegstra*"].

> historical knowledge of the potentially catastrophic effects of the promotion of hatred (Jones, supra, per La Forest J., at pp. 299-300). Additionally, the international commitment to eradicate hate propaganda and the stress placed upon equality and multiculturalism in the Charter strongly buttress the importance of this objective. I consequently find that the first part of the test under s. 1 of the Charter is easily satisfied and that a powerfully convincing legislative objective exists such as to justify some limit on freedom of expression. [emphasis added]

19. Where these goals are not accomplished, or are only accomplished in part, it becomes incumbent on Parliament to utilize alternative mechanisms or tools to do so.

Shortcomings with the Current Approach under the Criminal Code

20. While the Code offers some legal remedy with regards to hate speech, it is far from a panacea for several reasons. In his submissions to the Standing Committee on Justice and Human Rights, Richard Warman points out some of the challenges of relying on the Code to deal with hate crimes/speech. For example, Warman highlights the fact that few police forces in Canada have focused hate crimes units, and they therefore lack the foundational knowledge underpinning how hate speech can form the elements of a crime, as opposed to a crime such as petty theft.[22]

21. Warman also indicated that staff in hate crimes units often spend time becoming familiar with hate crime work, only to be transferred to another unit as they build their careers.[23] This type of frequent turnover contributes to a lack of institutional knowledge within law enforcement regarding hate crimes.

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[22] Richard Warman, "Submission to the Standing Committee on Justice and Human Rights Re: Online Hate," at 3, available at:<,https://www.ourcommons.ca/Content/Committee/421/JUST/Brief/BR10534714/br-external/WarmanRichard-e.pdf.>

[23] *Ibid* at p.3

22. The lack of specialized hate crimes units in most police departments also result in the investigation of hate charges being carried out by police officers lacking specialized training in this area of law.[24]

23. Police and Crown prosecutors are the ones with the power to investigate and prosecute violations of the Code's hate provisions, which creates additional limitations.[25] Many communities who are the primary targets of hate crimes and online hate speech are not reflected in the staffing demographics of law enforcement or the Crown office, and may not have the best relationships with the police. As a result, victims of hate crimes are unlikely to report the crime.

24. Shalini Konaur, Executive Director of the South Asian Legal Clinic of Ontario, notes in the Report,[26]

> It can be reasonably difficult for racialized persons who have experienced being targeted by the police… to then have to seek assistance from members of that same force.

Statistics Canada has estimated that two out of three victims do not report hate crimes.[27] However, there is currently no other recourse for victims of hate crimes, other than reporting it to the police. This lack of alternatives, particularly for civil remedies, accentuates the feelings of alienation and marginalization for those persons unwilling to report to the police.

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[24] Freedom of Expression and Freedom from Hate in the Internet Age, Canadian Human Rights Commission (June 2009), at 25, available at: <http://publications.gc.ca/collection_2009/ccdp-chrc/HR4-5-2009E.pdf>
[25] *Ibid.*
[26] Housefather, *supra* note 1 at 19.
[27] *Ibid.*

25. The conspicuous absence of racialized Canadians from the discourse around hate speech online, especially in academic commentary, judicial decisions, and legislative reform, significantly informs perspectives on the options and alternatives available to the public. To date, this contextualization has not been provided adequate attention or weight in considerations surrounding legislative reform.

26. The punitive nature of the *Criminal Code* means there is an inherent focus on blameworthiness of alleged offenders. Consequently, the standard of proof in criminal matters is that of proof beyond a reasonable doubt. This is the highest standard of proof required in law reflecting the severity of a criminal conviction. On the other hand, human rights law only requires proof on a balance of probabilities, and the purpose is not to assign or to punish moral blameworthiness, as moral blame is too limited a concept to effectively deal with discrimination. The Supreme Court of Canada explained the reason for the different approach in human rights in *CN v. Canada (Canadian Human Rights Commission)*,[30]

> No doubt, some people who discriminate do so out of wilful ignorance or animus…There can be no doubt that Canadian human rights legislation is now typically drafted to avoid reference to intention… The rejection of a necessity to prove intent and the unequivocal adoption of the idea of "adverse effect discrimination" by the courts is the result of a commitment to the purposive interpretation of human rights legislation.

27. Many instances of hate speech will clearly not be caught by the law if the only standard of proof that applies is that of proof beyond a reasonable doubt. The lack of specialized

[30] 1987 CanLII 109 (SCC), [1987] 1 SCR 1114 at 1134-1137. See also, *Insurance Corporation of British Columbia v. Heerspink*, 1982 CanLII 27 (SCC), [1982] 2 SCR 145 at 158; *Ontario Human Rights Commission v. Simpsons-Sears Ltd.*, 1985 CanLII 18 (SCC), [1985] 2 S.C.R. 536 at 546-547; *Canadian Odeon Theatres Ltd. v. Saskatchewan Human Rights Commission*, 1985 CanLII 183 (SK CA), [1985] 3 W.W.R. 717 at 735.

knowledge and a high evidentiary threshold are borne out in hate speech statistics captured between 1994-95 and 2006-07. During that period, there were only 44 cases of criminal hate speech, resulting in 11 convictions. Furthermore, there were only two Section 319 convictions, relating to hate on the Internet.[31] The concerns about over-criminalizing or state restriction of expression through the *Criminal Code* simply is not substantiated by these statistics, but they also reflect the inability of the criminal law to capture what we know is occurring in society generally, with the rise of online hatred.

28. Furthermore, the severe consequences that result from utilization of the criminal justice system to combat hate speech, including incarceration and potential stigma through denunciation, is not required in every situation. Remedies flowing from human rights legislation, which are inherently remedial in nature, may be better suited in situations where the intent of the alleged offender is unclear.[32] The goal of human rights legislation is not to look at the intent of an offender, but rather to examine the effect of a behaviour or conduct.

29. Some academic commentary suggests that limitations on be solely dealt with by the *Criminal Code*, and that the bans on expression should be narrowly defined as extreme hate expression that "advocates, justifies, or threatens violence" against identifiable groups, on the basis that doing otherwise would require considerable state intervention given the extensiveness of

[31] Housefather, *supra* note 1 at 26.
[32] *Ibid* at 32.

discriminatory discourse in society.[33] DCLC disagrees with this position for several reasons, including for reasons set out by the Ontario Human Rights Commission ("OHRC"). The OHRC points out that other crimes can have elements of human rights, such as when a violent crime involves allegations of sexual harassment. The OHRC also points out that much of the opposition to the use of human rights to address discriminatory speech is attributable to widespread and inaccurate understandings of how human rights systems work in Canada. Human rights systems have the ability to employ a far wider range of tools to address discrimination and to help promote inclusion, including numerous conciliatory and reconciliatory mechanisms.[34]

Civil Remedy: Section 13, History and Criticisms

30. Section 13 was first included during the initial enactment of the *CHRA* in 1977, to deal with telephone hate messages. The primary concern appears to be that these private communications would not be caught by s. 319(2) of the *Criminal Code*.[35]

[33] 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, available at: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1865282>. Note the complete absence of views or perspectives from racialized populations in Canada in this report, or consideration of the type of barriers they face from their own perspectives in the consideration of the recommendations proposed.
[34] 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 prepared by Richard Moon October 2008," January 2009, available at: <http://www.ohrc.on.ca/en/submission-canadian-human-rights-commission-concerning-section-13-canadian-human-rights-act-and>.
[35] Moon, *supra* note 33 at 5.

31. The *CHRA* was further amended in 1996 to add sexual orientation,[36] and in 2017 to add gender identity or expression.[37] In this way, the legislation has ensured that it properly reflects the societal context, contemporary issues, and pressing challenges of the day, and is reflective of human rights norms.

32. Prior to its repeal in 2013, Section 13 of the *CHRA* read:

> 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.

Eventually, subsection 13(2) was enacted in 2001 to include the Internet and other similar means of communication, shortly before the Canadian Human Rights Tribunal (CHRT) released its decision in *Zundel*.[39]

33. The 2001 amendment was made in response to emerging concerns regarding hate speech on the Internet. The CHRT in *Zundel* stated,

> [1] Access to the Internet has revolutionized global communication and has had a profound impact on modern society. With its promise of readily accessible information and the explosion in use of the Internet, serious concerns have been raised about the content found on many sites. The relationship of the Internet to existing regulatory frameworks, such as restrictions on the display of pornography, the protection of individual privacy, and the limits of permissible commerce are all the subject of significant legal debate and public controversy.

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[36] Bill C-33, *An Act to amend the Canadian Human Rights Act*, was enacted following the Supreme Court of Canada's decision in *Egan v. Canada*, 1995 CanLII 98 (SCC), [1995] 2 SCR 513, finding sexual orientation to be an analogous ground under s. 15 of the *Charter*, pursuant to the framework in *Andrews v. Law Society of British Columbia*, 1989 CanLII 2 (SCC), [1989] 1 SCR 143.
[37] *An Act to amend the Canadian Human Rights Act and the Criminal Code*, SC 2017, c 13.
[39] *Ibid* at 6. *Citron and Toronto Mayor's Committee v. Zundel, Canadian Human Rights Tribunal*, TD 1/02 ["*Zundel*"], available at: <https://decisions.chrt-tcdp.gc.ca/chrt-tcdp/decisions/en/item/6496/index.do?r=AAAAAQANc2FiaW5hIGNpdHJvbgE>. See also, *R. v. Zundel,* 1987 CanLII 121 (ON CA); 1987 CanLII 121 (ON CA); 1992 CanLII 75 (SCC), [1992] 2 SCR 731 ["*Zundel SCC*"].

> [2] As we begin to explore the legal limits of the use of the Internet for the mass distribution of information, fundamental issues are raised regarding the preservation of legitimate free speech interests. At the same time, the proliferation of alleged 'hate sites' on the World Wide Web has been particularly disturbing for the equality seeking community. This case, for the first time, raises squarely the application of the *Canadian Human Rights Act* to sites on the World Wide Web, and yet again exposes the constant tension between competing social interests.

Although the CHRT interpreted the existing provisions of Section 13 to apply to the Internet, the amendment explicitly adding language referring to the Internet was initiated by Parliament to clarify this, and presumably in light of the same challenges and competing social interests described by the CHRT. The complete repeal of this entire section places Canada back, not just before the 2001 amendments, but the very creation of the *CHRA* in 1977.

34. The issues around the initial creation of Section 13, private communications over telephones, and the modified Section 13(2), were in essence the same, namely,[41]

> …how do we differentiate "private" from "public" communications; what is the significance of the medium through which messages are communicated; are some mediums more ideally suited to the effective transmission of prejudicial beliefs than others; and what steps (if any) should we take to regulate content?

The controversies that lead to the provision's repeal were not those of expression rights, but rather who was entitled to such rights. The *CHRA* itself recognizes that many marginalized populations may not utilized human rights mechanisms, even when they exist, as a very result of their marginalization.

35. The Commission has the power under s. 40(3) the *CHRA* to initiate its own investigation into a discriminatory practice. This power has only been used once for Section 13, in 1979 with John Ross Taylor, a Nazi sympathizer who handed out cards with a number that would play a

[41] Jennifer Tunnicliffe, "Debating Hate Speech Regulations in Canada: A History," Active History, Feb. 19, 2020, available at: <https://activehistory.ca/2020/02/debating-hate-speech-regulations-in-canada-a-history>.

pre-recorded racist message. The CHRT determined the actions to be contrary to the *CHRA*, ordering it to be shut down. On appeal, the Supreme Court of Canada concluded that Section 13 did infringe on s. 2(b) freedom of expression, but it was a reasonable limit that targeted the most extreme forms of expression, rather than expression that was simply offensive,[42]

> For reasons similar to those given in *Keegstra*, I am unable to accede to the view that the impugned legislative measure does not advance Parliament's aim of reducing the incidence of hate propaganda. The process of hearing a complaint made under s. 13(1) and, if the complaint is substantiated, issuing a cease and desist order reminds Canadians of our fundamental commitment to equality of opportunity and the eradication of racial and religious intolerance. In addition, although criminal law is not devoid of impact upon the rehabilitation of offenders, the conciliatory nature of the human rights procedure and the absence of criminal sanctions make s. 13(1) especially well suited to encourage reform of the communicator of hate propaganda.
> [emphasis added]

The Court therefore affirmed the use of human rights specifically for addressing the substantial harm from discriminatory speech, alleviating the pain suffered by marginalized groups, and providing some limits to expression even in the context of human rights.

36. Section 13 of the *CHRA* was also reviewed by the Federal Court of Appeal in 2014 in *Lemire v. Canada (Human Rights Commission)*,[47] where the CHRT upheld a complaint about a discriminatory message disseminated over the Internet, but declined to grant a remedy on the basis that it could not be justified under s. 1 of the *Charter* as a minimal impairment of expression. On judicial review, the Federal Court upheld the CHRT's decision, finding the penalty provisions of no force or effect.

[42] *Canada (Human Rights Commission) v. Taylor*, 1990 CanLII 26 (SCC), [1990] 3 SCR 892 at 924 ["*Taylor*"].
[47] 2009 CHRT 26 (CanLII); 2012 FC 1162 (CanLII); 2014 FCA 18 (CanLII) ["*Lemire*"].

37. The Federal Court of Appeal in *Lemire* had the benefit of the SCC's new decision in *Saskatchewan (Human Rights Commission) v. Whatcott* in 2013,[48] which upheld the constitutionality of a similar penalty provision under the *Saskatchewan Human Rights Code*[49] as a reasonable limitation on the freedom of expression. The Federal Court of Appeal set aside the Federal Court's order finding the penalty provisions to be of no force and effect, stating,

> [98] When viewed in the context of the CHRA's remedial scheme, the imposition of a penalty under paragraph 54(1)(c) and subsection 54(1.1) carries no more of a moral stigma than a finding that an individual has wilfully or recklessly engaged in the communication of hate speech, and by virtue of paragraph 54(1)(b) is required to compensate specifically identified individuals.
>
> …
>
> [104] In short, even though the financial liability imposed under paragraph 54(1)(c) and subsection 54(1.1) may not be based on a loss to individual victims, they are not penal in nature. Rather, they represent a reasonable means of imposing financial accountability for the damage caused by the vilification of targeted groups and of deterring the communication of hate speech in order to decrease discrimination against them.

38. The Supreme Court's decision in *Whatcott* emphasized at paras 70-82 that the primary purpose of human rights protections against hate speech are to protect the societal standing of vulnerable groups and preventing discrimination against them. At paras 204-205, the Court upheld the compensatory damages under this scheme, and explained the purposes of this form of relief as follows,

> [149] It was argued before this Court that the imposition of fines or the requirement to pay compensation to the victims of hate speech has a detrimental, chilling effect on expression that outweighs the benefits of reducing "potential harm". As in tort law, an award of damages made pursuant to the *Code* is characterized as compensatory, not punitive, and is directed at compensating the victim. However, the circumstances in which a compensation award will be merited should be rare and will often involve repeat litigants who refuse to participate in a conciliatory approach.

[48] 2013 SCC 11 ["*Whatcott*"].
[49] SS 1979, c S-24.1.

39. Despite the wide-reaching effects of these decisions, they were not the backdrop or the motivation behind the repeal of s. 13 of the *CHRA*. The impetus for this came from an entirely different line of cases.

Politicization of Section 13

40. In 2008, Section 13 was invoked in the high-profile case of *Canadian Islamic Congress v. Rogers Media Inc.*[50] The complaint was about a front-page article in Maclean's magazine, which was an excerpt from Mark Steyn's book, "America Alone."[51]

41. Although this effectively invoked a version of the "white replacement theory" that today would likely be recognized as containing the hallmarks or indicia of discrimination or hatred,[52] the Commission dismissed the complaint and concluded,

[50] Decision of the Commission (20071008), available at: <http://www.omarha-redeye.com/wp-content/uploads/2020/08/Decision-of-the-Commission-20071008.pdf>.
[51] Mark Steyn, "The future belongs to Islam," Maclean's, Oct. 20, 2006, available at: <https://www.macleans.ca/culture/the-future-belongs-to-islam/>.
[52] Also known as "replacement theory," or the "Great Replacement." See, for example, Rosa Schwartzburg, "The 'white replacement theory' motivates alt-right killers the world over," The Guardian, Aug. 5, 2019, available at: <https://www.theguardian.com/commentisfree/2019/aug/05/great-replacement-theory-alt-right-killers-el-paso>; Nellie Bowles, "'Replacement Theory,' a Racist, Sexist Doctrine, Spreads in Far-Right Circles," The New York Times, March 18, 2019, available at: <https://www.nytimes.com/2019/03/18/technology/replacement-theory.html>; Thomas Chatterton Williams, "The French Origins of "You Will Not Replace Us"", The New Yorker, Nov. 27, 2017, available at: <https://www.newyorker.com/magazine/2017/12/04/the-french-origins-of-you-will-not-replace-us>; Luke Darby, "How the "White Replacement" Conspiracy Theory Spread Around the Globe," GQ, June 21, 2019, available at: <https://www.gq.com/story/white-replacement-conspiracy-theory>; Jennifer Rubin, "A guide to the ugly ideology we're up against, and how politicians like Trump spread it," The Washington Post, Aug. 12, 2019, available at: <https://www.washingtonpost.com/opinions/2019/08/12/guide-ugly-ideology-were-up-against-how-politicians-like-trump-spread-it/>; Jacob Davey and Julia Ebner, "We Analyzed How the "Great Replacement" and Far Right Ideas Spread Online. The Trends Reveal Deep Concerns," Time, July 18, 2019, available at: <https://time.com/5627494/we-analyzed-how-the-great-replacement-and-far-right-ideas-spread-online-the-trends-reveal-deep-concerns/>; Melissa Rossi, "'Great Replacement' ideology is spreading hate in U.S. and across the globe," Yahoo News, June 30, 2019, available at: <https://ca.news.yahoo.com/great-replacement-ideology-is-spreading-hate-in-us-and-across-the-globe-140000230.html>; John Feffer, "The 'Great Replacement' Is a Genocidal

> The Steyn article discusses changing global demographics and other factors that the author describes as contributing to an eventual ascendancy of Muslims in the "developed world", a prospect that the author fears for various reasons referred to in the article. The writing is polemical, colourful and emphatic, and was obviously calculated to excite discussion and even offend certain readers, Muslim and non-Muslim alike.
>
> Overall, however, the views expressed in the Steyn article, when considered as a whole and in context, are not of an extreme nature as defined by the Supreme Court in the Taylor decision. Considering the purpose and scope of section 13(1), and taking into account that an interpretation of s. 13(1) must be consistent with the minimal impairment of free speech, there is no reasonable basis in the evidence to warrant the appointment of a Tribunal.

42. Despite this outcome, the use of Section 13 for the first time by a new marginalized group in this way, to combat what was otherwise perceived and justified as mainstream political discourse, drew considerable criticism and ire. For example, the Canadian Civil Liberties Association (CCLA) relied on the case in their intervener memorandum before the Supreme Court of Canada in *Whatcott* to oppose the use of human rights to address hate speech.[53]
43. The movement to repeal Section 13, though grounded in the Maclean's case, was really motivated by parallel complaints against Ezra Levant, a lawyer and journalist, for publishing

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Playbook," The Nation, Oct. 22, 2019, available at: <https://www.thenation.com/article/archive/white-supremacist-great-replacement>.
The dispersion of this ideology, especially over social media, took a significant upturn many years later, from 2012 onwards; Jacob Davey and Julia Ebner, "The Violent Consequences of Mainstreamed Extremism," Institute for Strategic Dialogue, July 2019, available at: <https://www.isdglobal.org/wp-content/uploads/2019/07/The-Great-Replacement-The-Violent-Consequences-of-Mainstreamed-Extremism-by-ISD.pdf>.
[53] Canadian Civil Liberties Association, "Memorandum of Argument of the Intervener," *Saskatchewan (Human Rights Commission) v. Whatcott*, Aug. 5, 2011, at para 10, available at: <http://aspercentre.ca/wp-content/uploads/2017/06/Whatcott-Final-Factum-SCC.pdf>.

arguably anti-Islamic cartoons.[54] Although these complaints were ultimately withdrawn[55] or dismissed,[56] Levant initiated a nation-wide campaign to repeal human rights tribunals generally, and Section 13 of the *CHRA* specifically. This campaign spiralled into multiple defamation claims by other lawyers that were successful against him,[57] and a complaint to the Law Society of Alberta,[58] before he ultimately was allowed to voluntary withdraw from the law society.[59]

44. The one thing Levant was successful in was convincing the government of the time to introduce Bill C-304 to repeal Section 13.[60] The way that he did this was by mobilizing followers on blogs and social media, largely by characterizing the complaints against him as a threat to Canadian values. This community has been described as an "ecosystem of e-hate," which

[54] Dax D'Orazio, "The Demise of Section 13 of the Canadian Human Rights Act: Reappraising the 'Battle for Free Speech'," 2015, available at: <https://curve.carleton.ca/system/files/etd/8a57d182-8eaa-4024-a2ec-a90bab50fa44/etd_pdf/775518b19f1afab6292dd767efcb14d8/dorazio-thedemiseofsection13ofthecanadianhumanrights.pdf>.
[55] Syed Soharwardy, "Why I'm withdrawing my human rights complaint against Ezra Levant," The Globe and Mail, Feb. 15, 2008, available at: <https://www.theglobeandmail.com/news/national/why-im-withdrawing-my-human-rights-complaint-against-ezra-levant/article18444701/>.
[56] CBC Arts, "Human rights panel dismisses complaint against Ezra Levant," Aug. 7, 2008, available at: <https://www.cbc.ca/news/entertainment/human-rights-panel-dismisses-complaint-against-ezra-levant-1.747538>.
[57] *Vigna v. Levant*, 2010 ONSC 6308 (CanLII); 2011 ONSC 629 (CanLII); *Awan v. Levant*, 2014 ONSC 6890 (CanLII); 2015 ONSC 2209 (CanLII); 2016 ONCA 970 (CanLII); 2017 CanLII 35113 (leave to SCC ref'd).
[58] *Warman v Law Society of Alberta*, 2015 ABQB 230 (CanLII); 2015 ABCA 368 (CanLII).
[59] Postmedia News, "Ezra Levant wins right to quit Law Society of Alberta and have complaints annulled," National Post, Mar. 2, 2016, available at: <https://nationalpost.com/news/canada/ezra-levant-wins-right-to-quit-law-society-of-alberta-and-have-complaints-annulled>.
[60] *An Act to amend the Canadian Human Rights Act (protecting freedom)*, SC 2013, c 37.

allows racist views to become more palatable when it is framed in the context of the preservation of a civilization, rather than an explicit denigration of a minority.[61]

45. The values behind Section 13 were not contrary to Canadian values when it was used to protect other vulnerable minorities. The values behind Section 13 were not even contrary to Canadian values when the human rights complaints against Levant and Steyn were dismissed. The became unacceptable only because the same legal system was now being used by other minorities in the Canadian population. This approach is not only objectionable, but contrary to the rule of law. Despite this, the legislature voted for the repeal, albeit along strongly partisan lines.[62]

Part 3 – Reinstating Section 13

46. The controversy around Section 13 had largely detrimental effects in society, deeply polarizing many Canadians on both sides of the issue, with some marginalized populations becoming further marginalized. General concerns of human rights skepticism were raised, even from those who had previously utilized and lauded the use of Section 13. The repeal could even be

[61] D'Orazio, *supra* note 52 at 40.
[62] Lauren Scharfstein, "Internet Hate Speech on the Rise; Canada's Legal Protections on the Decline: The Need for Civil Hate Speech Legislation," Saskatchewan Law Review, Nov. 23, 2017, available at: <https://sasklawreview.ca/comment/internet-hate-speech-on-the-rise-canadas-legal-protections-on-the-decline-the-need-for-civil-hate-speech-legislation.php>.

described as an inevitable backlash, which often occurs when minorities utilize human rights regimes. Faisal Bhaba states,[63]

> Legal victory can create tangible feelings of power shifting, for those on both sides. For members of minority groups, a legal victory can be an exhilarating vindication amid a general climate of racial animus and societal complicity that rarely affirms those members' lived experiences with inequality. It can also galvanize social and political action through coalition building and solidarity. Rights claimants experience a sense of power when they reconstruct the images before the law, from stereotype to truth. A successful human rights decision… can do that.
> But the value of rights vindication must be assessed in the overall context of social and political conditions. The theory of backlash suggests that strong legal victory will come with political consequences that can be regressive for the broader social justice goal. While democracy welcomes spirited public debate, human rights are, at their core, counter-majoritarian and are often at risk of being perceived as "anti-democratic". This can make the tension between what rights protection requires and what liberal-democratic institutions are prepared to do particularly acute.
> [emphasis added]

47. Because of the inherently unpopular nature of some aspects of human rights protections, it rests on responsible government to take necessary action to ensure the appropriate mechanisms are in place to protect vulnerable minorities, even if these measures are politically unpopular. The more that an enforcement mechanism of a right might affect those in power, the more likely it is to create resistance by those in power.[64]

International Human Rights Considerations

48. Moral authority to implement unpopular but justifiable human rights mechanisms may be obtained through Canada's international obligations to prohibit racial or religious hatred,

[63] Faisal Bhaba, "'Islands of Empowerment': Anti-Discrimination Law and the Question of Racial Emancipation," Windsor Yearbook of Access to Justice, 2013, at 83, available at: <https://wyaj.uwindsor.ca/index.php/wyaj/article/view/4412>.
[64] *Ibid* at 79.

especially where it is likely to create an incitement to violence, discrimination and hostility, a position supported by the OHRC.[65] This authority may be particularly necessary where a human rights measure enjoys significant political opposition.

49. The importance of Canada respecting and implementing international human rights law has been particularly highlighted by the Supreme Court of Canada in recent decisions.[66] The reception of international law may occur through judicial notice of conventional and customary international law, incorporation by common law, legislative implementation, and the interpretive presumption of conformity.[67] Given the historic case law around Section 13, legislative implementation of international human rights through its reinstatement should occur with a presumption of conformity to international human rights treaties, and within the context of the specific issues currently faced in Canada.

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[65] OHRC, *supra* note 33.
[66] *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5 (CanLII) at paras 1-2.
[67] Gib van Ert, "The Reception of International Law in Canada: Three Ways We Might Go Wrong," Canada in International Law at 150 and Beyond, Centre for International Governance Innovation, January 2018, available at: <https://www.cigionline.org/sites/default/files/documents/Reflections%20Series%20Paper%20no.2web.pdf>. Canada cannot then be accurately described as a wholly dualist system, which has been the historic approach in Canada; Hon. Raynell Andreychuk, "Promises to Keep: Implementing Canada's Human Rights Obligations," Report of the Standing Senate Committee on Human Rights, December 2001, available at: <https://sencanada.ca/Content/SEN/Committee/371/huma/rep/rep02dec01-e.htm>. See also, Gib van Ert, "Dubious Dualism: The Reception of International Law in Canada," Valparaiso Law Review, 2010, available at: < https://core.ac.uk/download/pdf/144550391.pdf>.

50. The *International Covenant on Civil and Political Rights*,[68] which was adopted by the General Assembly on December 16, 1966 and acceded to by Canada on May 19, 1976, states in Article 20(2),

> Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

The ICCPR also contains several protections in Article 19 related to holding opinions without interference, and the right to freedom of expression, but recognized certain restrictions are necessary to respect the rights of others.

51. On April 23, 2009, a policy document called "The Camden Principles on Freedom of Expression and Equality" was released at the Durban Review Conference in Geneva. The intent of this policy document was to strike a balance on the rights to freedom of expression and equality.[69] The document proposed civil restrictions on the freedom of expression below the threshold imposed in criminal contexts as described in Article 20(2) of the ICCPR, whereby incitement to hatred is not the only form of incitement.

52. The Camden Principles also recognized an "incitement to discrimination, hostility, or violence," which would curtail expression rights in civil contexts, in a manner consistent with international human rights obligations, as long as proportionality relating to restrictions

[68] *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, Can TS 1976 No 47 (entered into force 23 March 1976) ["ICCPR"].
[69] IFEX, "ARTICLE 19 launches the Camden Principles on Freedom of Expression and Equality," April 24, 2009, available at: <https://ifex.org/article-19-launches-the-camden-principles-on-freedom-of-expression-and-equality/>.

remain. Drawing on Australian, Canadian, and international human rights jurisprudence, they propose a 3-part test:[70]

> First, the interference must be provided for by law. This requirement is fulfilled only where the law is accessible and "formulated with sufficient precision to enable the citizen to regulate his conduct."
> Second, the interference must pursue a legitimate aim. The list of aims in the various international treaties is exclusive in the sense that no other aims are considered to be legitimate as grounds for restricting freedom of expression.
> Third, the restriction must be necessary in a democratic society or meet a pressing social need. The word "necessary" means that there must be a "pressing social need" for the restriction. The reasons given by the State to justify the restriction must be "relevant and sufficient" and the restriction must be proportionate to the aim pursued.

A civil remedy for discriminatory speech under human rights legislation can achieve this balance, and the jurisprudence in Canada demonstrates this is the case.

53. The *International Convention on the Elimination of All Forms of Racial Discrimination*,[71] which was adopted by the United Nations General Assembly on December 21, 1965, and ratified by on October 14, 1970, states in Article 4 that all state parties must condemn ideas or theories of racial superiority, create legal offences for the dissemination of theories of ethnic or racial superiority, and prohibit organizations and propaganda activity that promote or incite racial discrimination. These principles are subject to disparate interpretations as to whether this requires hate speech legislation, and the extent to which they should apply, largely informed by domestic constitutional law.[72]

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[70] Article 19, "Towards an interpretation of article 20 of the ICCPR: Thresholds for the prohibition of incitement to hatred," Global Campaign for Free Expression, Feb. 8-9, 2010, at 8-9, 19, available at: <https://www.ohchr.org/Documents/Issues/Expression/ICCPR/Vienna/CRP7Callamard.pdf>.
[71] *International Convention on the Elimination of All Forms of Racial Discrimination*, UN Doc. CERD/C/CAN/19-20 (8 June 2011) ["ICERD"]
[72] Maya K. Watson, "The United States' Hollow Commitment to Eradicating Global Racial Discrimination," American Bar Association, Jan. 6, 2020, available at:

54. The Government of Canada indicated in 2010 in its "Evaluation of Canada's Action Plan Against Racism,"[73]

> There is evidence to suggest that minorities are experiencing racism and discrimination and recent data show that groups most at risk of being victimized by hate and bias activity are racial/ethnic minorities and religious minorities. Evidence also suggests that Aboriginal people, visible minorities and immigrants are particularly vulnerable to unemployment, underemployment, lower incomes and social segregation.

The increasingly diverse nature of Canadian society and the existence of racism is described in this report as requiring further initiatives to combat racism and discrimination.[74]

55. Although Countering Internet-Based Hate Crimes (CIBHC) was contemplated and funded in Canada through the Department of Justice under Canada's Action Plan Against Racism (CAPAR), this was never implemented.[75] CAPAR was a five-year plan launched by the Government of Canada in 2005, with the goal of ensuring full and active participation of all Canadians was ensured, regardless of background, race or ethnicity.

56. Additional protections against racism can be found under Article 5 of ICERD, which also promotes freedom of thought, conscience, religion, opinion, and expression, but also emphasizes the need "to prohibit and to eliminate racial discrimination in all its forms," and the right of equality before the law, for the entire list of enumerated rights, which include numerous aspects related to the full participation of racial minorities in society. These

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<https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/black-to-the-future-part-ii/the-united-states--hollow-commitment-to-eradicating-global-racia/>.

[73] Citizenship and Immigration Canada, "Evaluation of Canada's Action Plan Against Racism," Research and Evaluation Division, December 20201, at iv-v, available at: <https://www.canada.ca/content/dam/ircc/migration/ircc/english/pdf/research-stats/er201103_01e_capar.pdf>.

[74] *Ibid* at 31.

[75] *Ibid* at 6.

provisions may be far more effective in justifying a civil hate speech provision under human rights legislation in Canada, especially when considering intersectional elements of race with gender and religion.[76]

Funding Challenges Around Implementation of Human Rights

57. The ICERD remains one of the main mechanisms and basis in Canada for combatting and fighting racism.[77] One of the primary ways the federal government achieves this is through block transfers through the Canada Social Transfer (CST), which is used to provide contribution funding to the provinces for legal aid, and greatly facilitates access to justice for vulnerable groups.[78]

58. Since the inception of legal aid in Canada in 1972, the Federal government has had a role in ensuring that provinces are able to properly meet the legal needs of the most poor and vulnerable members of society.[79] Regulations under the Canada Assistance Plan (CAP) were changed in 1980 to include civil legal aid, allowing for Department of National Health and Welfare to support provincial civil legal aid expenditures. Although this support has obviously increased since 1973, it faced considerable cuts in 1995 when the CAP was absorbed into the

[76] Nazila Ghanea, "The Concept of Racist Hate Speech and its Evolution over time," United Nations Committee on the Elimination of Racial Discrimination, Aug. 28, 2012, available at: <https://www.ohchr.org/Documents/HRBodies/CERD/Discussions/Racisthatespeech/NazilaGhanea.pdf>.
[77] Government of Canada, "International Convention on the Elimination of All Forms of Racial Discrimination," Human Rights Program, Department of Canadian Heritage, 2011, available at: <https://www.canada.ca/content/dam/pch/documents/services/canada-united-nations-system/reports-united-nations-treaties/conv_intnl_elim_discrim-intnl_conv_elim_discrim-eng.pdf>.
[78] *Ibid* at 19-20, 67.
[79] *Ibid* at 19.

Canada Health and Social Transfer program, placing much of the burden of legal aid on the provinces.[80]

59. Legal Aid Ontario (LAO), which currently funds community legal clinics (CLCs) such as the DCLC, currently obtains approximately 20% of its revenue from the Law Foundation of Ontario (LFO). The major source of LFO revenue is the interest on trust accounts, which is dependent on the interest rates and balances in this account. Due to measures during the pandemic, such as the Bank of Canada cutting the interest rate by 50 basis points, LFO is expecting to face a deficit of up to $70 million.[81]

60. The clinic sector has particularly had a challenging time, following the 30% cut to LAO last year, which cost approximately $14.5 million. The current LFO deficit is expected to have devastating consequences on the clinics, including DCLC, if immediate action is not undertaken.[82]

61. The federal government was successful in providing one-time additional $25.7 million in legal aid funding to LAO in August 2019, to meet the provincial deficits. The provincial government

[80] Ab Currie, "Legal Aid Expenditures Over Time in Canada: A Complex Story," Canadian Forum on Civil Justice, Oct. 2, 2019, available at: http://www.slaw.ca/2019/10/02/legal-aid-expenditures-over-time-in-canada-a-complex-story/. See also, Department of Justice, "Legal Aid in Canada, 2017-18," 2019, available at: https://www.justice.gc.ca/eng/rp-pr/jr/aid-aide/1718/1718.pdf.

[81] Anita Balakrishnan, "More funding needed for legal aid amidst pandemic, letters say," Law Times, June 1, 2020, available at: https://www.lawtimesnews.com/practice-areas/immigration/more-funding-needed-for-legal-aid-amidst-pandemic-letters-say/330116.

[82] Alyshah Hasham, "Legal Aid Ontario facing up to $70 million funding drop amid COVID-19 'perfect storm'", July 13, 2020, available at: <https://www.thestar.com/news/canada/2020/07/13/legal-aid-ontario-facing-up-to-70-million-funding-drop-amid-covid-19-perfect-storm.html>.

in Ontario is calling on the federal government to again take responsibility for the pressing needs facing Ontarians, and to assist the LFO through additional funding to LAO, earmarked for use in community legal clinics, so that they can be spent locally to assist local needs. A failure to do so ensures that important national strategies, such as combatting racism and eliminating the spread of hatred, will not be properly achieved.

Potential Reforms to *CHRA*

62. In June 2009, the CHRC tabled a Special Report to Parliament, which recommended that Section 13 be retained, but amended to better define the words "hatred" and "contempt" based on the decision in *Taylor*, and to allow for an early dismissal of complaints that do not satisfy these definitions.[83] The report recommended that the CHRT be provided the ability to award

[83] Jennifer Lynch, "Freedom of Expression and Freedom from Hate in the Internet Age," June 2009, available at: <http://publications.gc.ca/collections/collection_2009/ccdp-chrc/HR4-5-2009E.pdf>.
This report was largely prepared in response to the Moon report, *supra* note 33, a comprehensive study commissioned by the CHRC on how to best address hate messages on the Internet which recommended that Section 13 of the *CHRA* be repealed, largely based on the discourse that had emerged in light of Levant's campaign. The CHRC apparently took the position that this position went too far.

costs if a party has abused the process,[84] and to repeal the fines penalties in the provision.[85]

The Special Report stated,[86]

> 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.

The jurisprudence since this Special Report, and the earlier commentary on Section 13, appears to make many of these reforms unnecessary. Although greater precision around terminology should be incorporated into Section 13, the use of fines and costs in a civil scheme also provide appropriate balancing of various considerations. However, to the extent that a more cautious approach towards reinstatement of Section 13 is desired, this Special Report provides a foundation that was summarily dismissed at the time by Parliament, and largely ignored in the decade that followed.

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[84] The use of costs in provincial human rights regimes varies across the country, and have proven controversial; Gérard V. La Forest, "Canadian Human Rights Act Review," June 2000, at 7, available at: <http://www.socialrightscura.ca/documents/legal/discrimination/Promoting%20Equality.pdf>. While they may be effective in deterring spurious complaints, they can also act as a barrier or disincentive for marginalized populations in seeking human rights remedies. For more, see, Omar Ha-Redeye, "Heated Wax Case Reveals Bare Motives of Animus," Slaw, Oct. 27, 2019, available at: <http://www.slaw.ca/2019/10/27/heated-wax-case-reveals-bare-motives-of-animus/>, discussing *Yaniv v. Various Waxing Salons (No. 2)*, 2019 BCHRT 222 (CanLII).

[85] The Federal Court of Appeal in *Lemire* disagreed at paras 76-78 that the fine provisions constituted a penal sanction, citing *United States Steel Corporation v. Canada (Attorney General)*, 2011 FCA 176 (CanLII) at paras 47-49; *Canada v. Guindon*, 2013 FCA 153 (CanLII) at paras 46-47; *R. v. Wigglesworth*, 1987 CanLII 41 (SCC), [1987] 2 SCR 541 at 560; and *Martineau v. M.N.R.*, 2004 SCC 81 (CanLII), [2004] 3 SCR 737.

[86] Lynch, *supra* note 80 at 2.

Part 4 - Conclusions

63. Parliament properly recognized the growing threat of discriminatory speech online during the early days of the Internet. This mechanism was effectively used in numerous instances, and was upheld as constitutional in several cases. The repeal of Section 13 occurred not because of a judicial case flagging troubling or unconstitutional elements of it, but due to the political lobbying of a respondent in several human rights complaints, notably none of which were actually successful.

64. The campaign to repeal Section 13 itself illustrated the power imbalances present in the marketplace of ideas, the ability of disinformation to obscure the truth, and the inability of marginalized populations to effectively engage the legal system or government.[87] This campaign can be described as "backlash discourse," but this is a common phenomenon when human rights protections are actually employed effectively. In this case, the backlash was deliberate and strategic.[88]

65. Subjecting the human rights regime in Canada to this type of political interference and pressure, and doing so explicitly in response to pressure from majoritarian forces, runs contrary to the principles of democracy, the rule of law, and Canadian values.[89] The popularity of a

[87] D'Orazio, *supra* note 52 at 73-78, 81; Omar Ha-Redeye, "The fight against online hatred," The Lawyers Weekly, Oct. 28, 2011, available at: <https://www.scribd.com/document/70151973/The-Fight-Against-Online-Hatred>.
[88] *Ibid* at 78, 81; Bhaba, *supra* note 61.
[89] *R. v. Big M Drug Mart Ltd.*, 1985 CanLII 69 (SCC), [1985] 1 SCR 295 at para 96. See also, *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12 (CanLII), [2015] 1 SCR 613 at para 58; *Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31 (CanLII), [2001] 1 SCR 772 at para 28;

particular ideology or expression does not enhance or bolster its value in Canadian society.[90] This concept is particularly important in the context of the Internet, where even harmful or destructive ideas have greater potential for proliferation.

66. Contrary to the discourse around Section 13, maintaining a civil provision against hateful or discriminatory speech actually provides a more meaningful and robust experience of s. 2(b) expression rights. This would be consistent with the Canadian understanding of expression in a free and democratic society.[91] The principles stated in *Taylor* demonstrate that the simple remedy of finding a breach of human rights has the potential to remind the Canadian public of our commitment to equality and opportunity, specifically as it relates to racial and religious discrimination.

67. Modifications to Section 13 can certainly be made, especially in regard to the Camden Principles. Greater precision may be provided in particular around the terminology of hatred" and "contempt," but the statutory scheme should remain flexible enough to allow a tribunal to assess these terms in the social context of the time, such as the spread of "white replacement theory" in Canada. Identification of a pressing social need can be readily gleaned from contemporary social science information about online hate speech.

Mouvement laïque québécois v. Saguenay (City), 2015 SCC 16 (CanLII), [2015] 2 SCR 3 at para 68; *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32 (CanLII), [2018] 2 SCR 293 at para 256.

[90] *Keegstra*, *supra* note 21 at para 78; *Zundel SCC, supra* note 36 at 753.

[91] *R. v. Lucas*, 1998 CanLII 815 (SCC), [1998] 1 S.C.R. 439, 123 C.C.C. (3d) 97 at para 34; *Edmonton Journal v. Alberta (Attorney General)* 1989 CanLII 20 (SCC), [1989] 2 S.C.R. 1326, 64 D.L.R. (4th) 577, at 1355-56.

68. The problem of online hate speech has only become worse in recent years. Marketing company Cision documented a 600% increase in the amount of hate speech on social media between November 2015 and November 2016 in Canada.[92] Earlier this year, a study conducted by the Institute for Strategic Dialogue found that Canadians were highly active on white supremacy online forums, and frequently engaged in anti-Muslim and anti-Semitic rhetoric online.[93] In 2019, Professor Barbara Perry, an expert on hate crime who is located in Durham Region, reported that there are, at minimum, 130 active far-right extremist groups across Canada, a 30% increase from 2015.[94]

69. This rise in hate speech online has had devastating consequences for the targeted groups. Extremist movements have been linked to deadly incidents that include the Quebec City mosque shooting in 2017, and the Toronto van attack in 2018.[95] Less readily discernable is the effect that this type of ideology has in more subtle ways, in schools, the workplace, and in neighbourhoods. These effects are impossible to fully measure but are equally important to achieve the goals of inclusion that are stated in our constitution and human rights instruments.

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[92] "Online hate speech in Canada is up 600 percent. What can be done?", *Maclean's,* November 2nd, 2017, available at: <https://www.macleans.ca/politics/online-hate-speech-in-canada-is-up-600-percent-what-can-be-done/>
[93] Jacob Davey, Mackenzie Hart, and Cécile Guerin, "An Online Environmental Scan of Right-wing Extremism in Canada" (2020) at 5, online (PDF): *Institute for Strategic Dialogue* <https://www.isdglobal.org/wp-content/uploads/2020/06/An-Online-Environmental-Scan-of-Right-wing-Extremism-in-Canada-ISD.pdf>
[94] Jacky Habib, "Documenting Hate: Far-right extremist groups and hate crime rates are growing in Canada", July 13th, 2019 *CBC, available at:* <https://www.cbc.ca/passionateeye/features/right-wing-extremist-groups-and-hate-crimes-are-growing-in-canada>
[95] Thomas Daigle, "Canadians among most active in online right-wing extremism, research finds", June 19th, 2020, *CBC News,* available at: <https://www.cbc.ca/news/technology/canadian-right-wing-extremism-online-1.5617710>

70. Canada has a moral and legal obligation to maintain its international human rights obligations, and to do so within the social context of contemporary human rights challenges. These obligations clearly extend to some responsibility to address hateful speech online. Forcing the state to rely exclusively on punitive criminal law sanctions to do so does not foster better expression and has the potential for greater chill and inappropriate state involvement. The complete absence of civil provisions to address online hatred should be a concern for every Canadian.[96]

[96] Scharfstein, *supra* note 60.