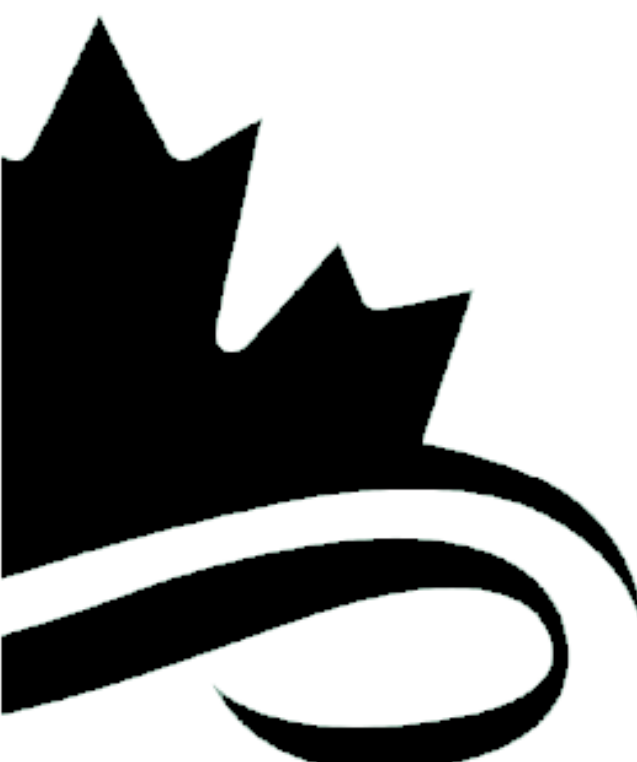




**Canadian Human
Rights Commission**

**Commission canadienne
des droits de la personne**



**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**

Prepared by: Richard Moon

October 2008

The opinions expressed in this report are those of the author
and do not necessarily reflect the views of
the Canadian Human Rights Commission.

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et la réglementation de la propagande haineuse sur Internet*

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Concerning Section 13 of the *Canadian Human Rights Act*
and the Regulation of Hate Speech on the Internet**

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1. Introduction

(a) The Scope of the Report

In June of this year I was asked by the Canadian Human Rights Commission (CHRC) to consider, and to make recommendations concerning, “the most appropriate mechanisms to address hate messages and more particularly those on the Internet, with specific emphasis on the role of section 13 of the *CHRA* [*Canadian Human Rights Act*] and the role of the Commission.”¹ I was asked to “take into consideration: existing statutory/regulatory mechanisms; whether they are appropriate and/or in any manner, require further precision; the mandates of human rights commissions and tribunals, as well as other government institutions presently engaged in addressing hate messages on the Internet; whether other governmental or non-governmental organizations might have a role to play and if so, what that role might be; Canadian human rights principles, including but not limited to, those contained in the *Canadian Human Rights Act* and the *Canadian Charter of Rights and Freedoms*; Canada’s international human rights obligations; and comparable international mechanisms.” I was asked to provide a final report to the Commission on or before October 17, 2008.

In formulating my recommendations I have drawn on academic, public policy and popular writing dealing with Internet hate speech and human rights code regulation. I have also benefited from discussions with individuals and organizations representing different interests and offering a wide range of perspectives. I also received a number of solicited and unsolicited submissions, which I read with care and which in general I found to be thoughtful and helpful. Time and resource constraints, however, made it impractical for me to consult more broadly within the community. These constraints also prevented me from straying very far beyond an examination of the legal regulation of hate speech. While I have made several recommendations concerning the role of non-state actors in the fight against hate speech, time has prevented me from developing these recommendations as fully as I would have liked.

(b) Summary of Recommendations

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

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

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

1. The first recommendation is that section 13 of the *CHRA* be repealed, so that the CHRC and the Canadian Human Rights Tribunal (CHRT) no longer deal with hate speech, and in particular hate speech on the Internet. Hate speech should continue to be prohibited under the *Criminal Code*² but this prohibition should be confined to expression that advocates, justifies or threatens violence. In the fight against hate on the Internet, police and prosecutors should make greater use of section 320.1 of the *Criminal Code*, which gives a judge power to order an Internet service provider (ISP) to remove "hate propaganda" from its system. Each province should establish a provincial "Hate Crime Team," composed of both police and Crown law officers with experience in the area, to deal with the investigation and prosecution of hate crimes including hate speech under the *Criminal Code*.

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

3. The third set of recommendations concerns the role of non-state actors in the prevention of expression that is hateful or discriminatory in character. First, the major Internet service providers (ISPs) should consider the creation of a hate speech complaint line and an advisory body, composed of individuals with expertise in hate speech law, that would give its opinion as to whether a particular website hosted by an ISP has violated section 13 of the *CHRA* or the “hate propaganda” provisions of the *Criminal Code*. If this body were to decide that the complaint is well-founded, the ISP would then shut down the site on the basis of its user agreement with customers. Second, newspapers and news magazines should seek to revitalize the provincial/regional press councils (which in some provinces or regions have become nearly moribund) and ensure that identifiable groups in the community are able to pursue complaints that they have been unfairly represented in the mainstream print media. If this does not happen, consideration should be given to the statutory creation of a national press council with compulsory membership. This national press council would have the authority to determine whether a newspaper or magazine has breached professional standards and to order the particular newspaper or magazine to publish the press council’s decision. A newspaper is not simply a private participant in public discourse; it is an important part of the public sphere, where discussion about the affairs of the community takes place. As such it carries a responsibility to portray fairly and without discrimination the different groups that make up the Canadian community.

2. Canadian Hate Speech Law

(a) An Overview of Canadian Hate Speech Law

Hate speech in Canada is currently restricted or regulated by both federal and provincial laws. The *Criminal Code* of Canada prohibits the advocacy or promotion of genocide, the incitement of hatred against an identifiable group, when this incitement is likely to lead to a breach of the peace, and the wilful promotion of hatred against an identifiable group. Investigations into allegations of hate speech under the *Criminal Code* are conducted by the police. If an individual is charged with one of these offences, his or her trial will be conducted in a court of law. To be convicted under any of these offences, the accused must be shown to have committed the relevant act and to have done so either intentionally or with knowledge or awareness of the nature of her/his actions. If found by the court to have committed the offence, he or she may be sentenced to a fine or a term of imprisonment. The *Criminal Code* also includes a section that enables a court to order the seizure or erasure of material that the court determines to be “hate propaganda.”

In contrast, the ban on hate speech in section 13 of the *CHRA* (which applies to telephonic or Internet communication that is likely to expose the members of an identifiable group to hatred or contempt) is administered by the CHRC. If the CHRC receives a complaint that falls within the general scope of the *CHRA* and is not trivial, frivolous, vexatious or made in bad faith it will investigate the complaint to determine whether it should be referred to the CHRT for adjudication. The CHRC may try to facilitate a non-adjudicative resolution of the complaint. The purpose of section 13 and the other provisions of the *CHRA* is to prevent or

rectify discriminatory practices or to compensate the victims of discrimination for the harm they have suffered. The purpose is not to condemn and punish the person who committed the discriminatory act. In contrast to the criminal ban on hate speech, an individual may be found to have breached section 13 even though she/he did not intend to expose others to hatred or realize that his/her communication might have this effect. The focus is on the effect of the act and not the intention with which it was performed. The ordinary remedy against an individual who is found by the CHRT to have breached the section is an order that she/he cease her/his discriminatory practices.

The human rights codes of British Columbia, Alberta, Saskatchewan and the Northwest Territories include a provision similar to section 13 of the *CHRA*, which prohibits signs, notices and other representations that are likely to expose the members of an identifiable group to hatred or contempt. There is some minor variation in the scope of these different provincial and territorial laws.

A number of federal statutes or regulations prohibit hate speech as part of a larger regulatory scheme dealing with a particular form or system of communication. For example, 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 origin, colour, religion, sex, sexual orientation, age or mental or physical disability”³

(b) Section 13 of the Canadian Human Rights Act

(i) The Text of Section 13

Section 13 of the *CHRA* provides as follows:

(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 person or those persons are identifiable on the basis of a prohibited ground of discrimination.

(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.

(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.

Section 3(1) provides that “the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for which a pardon has been granted.”

The principal remedy available to the CHRT, following a determination that section 13 has been breached, is an order “that the person cease the discriminatory practice and take measures ... to prevent the same or a similar practice from occurring in future...” The CHRT may also order the person to pay an amount not exceeding \$20,000 “to a victim specifically identified in the communication that constituted the discriminatory practice.” Finally the CHRT may order the person to pay a penalty of not more than \$10,000; however, in deciding whether to order payment of a penalty, the CHRT must take into account “(a) the nature, circumstances, extent and gravity of the discriminatory practice; and (b) the wilfulness or intent of the person who engaged in the discriminatory practice, any prior discriminatory practices that the person has engaged in and the person’s ability to pay the penalty.”⁴ Section 57 of the *CHRA* provides that for the purposes of enforcement a tribunal order may be made an order of the Federal Court. The consequence of this is that a breach of the CHRT’s order constitutes a contempt of court and is punishable by fine or imprisonment.

Section 12 of the *Act* is not immediately relevant to the issues addressed in this report, but it may become more important if section 13 is repealed. Section 12 provides as follows:⁵

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.

(ii) The History of Section 13

Section 13 was included in the *CHRA* at the time of its enactment in 1977 to deal with recorded telephone hate messages. At the time, hate lines were seen as an emerging problem. There was a concern that because they operate as a series of one-on-one “private” communications, hate lines might not be caught by 319(2) of the *Criminal Code*, which by its terms does not apply to “private” conversations.

More particularly the impetus for the inclusion of section 13 was a hate line operated in Toronto by the Western Guard and its leader, John Ross Taylor. Members of the public who dialled a telephone number that had been publicized by the Western Guard would hear a short pre-recorded hate message. The Western Guard phone line was the subject of the first section 13

complaint and the first case heard by the CHRT. Mr. Taylor and his organization were found by the CHRT to have breached section 13, and a cease and desist order was issued against them. Mr. Taylor nevertheless continued to operate the hate line. Following an application by the CHRC to the Federal Court, he was found in contempt of court and sentenced to one year in prison.⁶ His sentence was suspended on the condition that he discontinue his discriminatory activities. He did not and, as a consequence, the sentence was enforced against him. Following his release from prison, Mr. Taylor re-established the phone line. The CHRC again commenced contempt proceedings against him. However, the *Canadian Charter of Rights and Freedoms*⁷ came into force in 1982, shortly before the second contempt proceeding. Mr. Taylor argued at that proceeding that section 13 was unconstitutional because it violated section 2(b) of the *Charter of Rights*, the freedom of expression right, and could not be justified under section 1, the limitations provision. The constitutional issue was finally resolved by the Supreme Court of Canada, which in a majority decision held that section 13 did not breach the *Charter*.⁸ In section 3 of this report, I will say more about the Supreme Court of Canada's judgment in this case.⁹

Several other section 13 cases followed the *Taylor* decision. Of particular significance was a complaint brought in 1996 against Ernst Zundel that raised the issue of whether section 13 applied to hate messages on the Internet. It was alleged that Mr. Zundel, then a Canadian resident, oversaw the operation of a US-based website, the Zundel site, that promoted hatred against Jews. At the time of the Zundel complaint, section 13 prohibited hate messages that were communicated "telephonically" by "means of the facilities of a telecommunication undertaking within the legislative authority of Parliament" but did not specifically apply to the Internet. The CHRT, however, held that section 13 applied to the Internet because it operated through the telephone system.¹⁰ According to the Tribunal the term "telephonically" should not be understood as limiting the application of the section to "the precise sensory format" or to "the particular device used for the communication."¹¹ The CHRT also held that the site included content that was contrary to section 13 and that Zundel was responsible for its operation. In 2001, shortly before the CHRT rendered its judgment in *Zundel*, the federal government amended section 13, adding subsection (2) above, which specifically provided that the section applied to hate speech on the Internet.

(iii) The Interpretation of the Scope of Section 13

The *CHRA* prohibits several different forms of discrimination, including discrimination in employment and in the provision of goods and services. But while the ban on these other forms of discrimination has been interpreted broadly by the courts and the CHRT, the scope of the section 13 ban has been more narrowly defined. The reasons for this, which I will explore later in the report, are both practical and principled. A broad ban on discriminatory speech cannot be consistently enforced and would significantly undermine freedom of expression interests.

In *CHRC v. Taylor*, a majority of the Supreme Court of Canada, in a judgment written by Chief Justice Dickson, held that section 13 of the *CHRA* breached section 2(b) of the *Charter*, the freedom of expression provision, but was a "reasonable" and "demonstrably justified" limit under section 1. In defining the scope of section 13, and more particularly the terms "hatred" and

“contempt,” the Chief Justice drew on the CHRT decision of *Nealy v. Johnston*,¹² which he quoted in his judgment:

With “hatred” the focus is a set of emotions and feelings which involve extreme ill will towards another person or group of persons. To say that one “hates” another means in effect that one finds no redeeming qualities in the latter. It is a term, however, which does not necessarily involve the mental process of “looking down” on another or others. It is quite possible to “hate” someone who one feels is superior to one in intelligence, wealth or power. None of the synonyms used in the dictionary definition for “hatred” give any clues to the motivation for the ill will. “Contempt” is by contrast a term which suggests a mental process of “looking down” upon or treating as inferior the object of one’s feelings. This is captured by the dictionary definition relied on in *Taylor* [the CHRT decision] ... in the use of the terms “despised,” “dishonour” or “disgrace”. Although the person can be “hated” (i.e. actively disliked) and treated with “contempt” (i.e. looked down upon), the terms are not fully coextensive, because “hatred” is in some instances the product of envy of superior qualities, which “contempt” by definition cannot be.¹³

According to Dickson CJ, this interpretation of section 13, which focuses on “unusually strong and deep-felt emotions of detestation, calumny and vilification” is not “particularly expansive.” Dickson CJ, however, noted that “the nature of human rights legislation militates against an unduly narrow reading of section 13(1)” and indicated that he had no “wish to transgress the well-established principle that the rights enumerated in such a code should be given their full recognition and effect through a fair, large and liberal interpretation.” Even though “the section may impose a slightly broader limit upon freedom of expression than does section 319(2) [the hate promotion provision] of the *Criminal Code* [...] the conciliatory bent of a human rights statute renders such a limit more acceptable than would be the case with a criminal provision.” In his view, “as long as the Human Rights Tribunal continues to be well aware of the purpose of section 13(1) and pays heed to the ardent and extreme nature of the feeling described in the phrase ‘hatred or contempt,’ there is little danger that subjective opinion as to offensiveness will supplant the proper meaning of the section.”

In her dissenting judgment Madame Justice McLachlin argued that the “absence of any requirement of intent or foreseeability of the actual promotion of hatred or contempt,” while “consistent with the remedial ... focus of human rights legislation,” broadened the scope of the section so that it included communication that ought not to be prohibited. In response to this argument, that section 13 is overly broad in its scope because it lacks an intention requirement, Chief Justice Dickson observed that the focus of the section “is solely upon likely effects, it being irrelevant whether an individual wishes to expose persons to hatred or contempt on the basis of their race or religion.”¹⁴ According to Dickson CJ:

The preoccupation with effects, and not with intent is readily explicable when one considers that systemic discrimination is much more widespread in our society than is intentional discrimination. To import a subjective intent requirement into human rights provisions, rather than allowing tribunals to focus solely upon effects, would thus defeat

one of the primary goals of anti-discrimination statutes. At the same time, however, it cannot be denied that to ignore intent in determining whether a discriminatory practice has taken place according to s. 13(1) increases the degree of restriction upon the constitutionally protected freedom of expression. This result flows from the realization that an individual open to condemnation and censure because his or her words may have an unintended effect will be more likely to exercise caution via self-censorship.

It is important to remember, wrote Dickson CJ, that, in contrast to criminal law, the purpose of human rights legislation is to “compensate and protect” the victim rather than “stigmatize or punish” the person who has discriminated against her/him.

In section 3 of the report I will examine more closely the Supreme Court of Canada’s attempt in the *Taylor* decision to define the scope of section 13 so that it fits with the broader purposes of anti-discrimination law but is also consistent with the public commitment to freedom of expression. I will argue that a ban on hate speech that is narrowly drawn to minimize interference with freedom of expression does not sit easily within a human rights law that defines discrimination broadly and is oriented towards reconciliation and compensation.¹⁵

The *Taylor* decision remains the touchstone for both the CHRC and the CHRT when applying section 13. In *Warman v. Kouba*¹⁶ the CHRT identified certain “hallmarks of hate,” factors the Tribunal considered relevant in deciding whether the expression meets the *Taylor* test for breach of section 13. The CHRT drew its list of “hallmarks” from “the growing body of section 13 jurisprudence.” According to the Tribunal:

The hallmarks or attributes of hate messages are what distinguishes them from legitimate speech that is not subject to sanction under section 13 of the *Act*. All of these attributes involve an attack on the inherent self-worth and dignity of the members of the targeted group.¹⁷

The list was composed of the following attributes: “(a) The targeted group is portrayed as a powerful menace that is taking control of the major institutions in society and depriving others of their livelihoods, safety, freedom of speech and general well-being”; “(b) The messages use ‘true stories’, news reports, pictures and references from purportedly reputable sources to make negative generalization about the targeted group”; “(c) The targeted group is portrayed as preying upon children, the aged, the vulnerable, etc.”; “(d) The targeted group is blamed for the current problems in society and the world”; “(e) The targeted group is portrayed as dangerous or violent by nature”; “(f) The messages convey the idea that members of the targeted group are devoid of any redeeming qualities and are innately evil”; “(g) The messages communicate the idea that nothing but the banishment, segregation or eradication of this group of people will save others from the harm being done by this group”; “(h) The targeted group is de-humanized through comparisons to and associations with animals, vermin, excrement, and other noxious substances”; “(i) Highly inflammatory and derogatory language is used in the messages to create a tone of extreme hatred and contempt”; “(j) The messages trivialize or celebrate past persecution or tragedy involving members of the targeted group”; and (k) the messages contain

“Calls to take violent action against the targeted group”. This list, said the Tribunal, “is by no means exhaustive,” but it may “provide a useful context” for the determination of whether the “material is more likely than not to expose members of the targeted group to hatred or contempt.”¹⁸

Section 13 is breached only if an individual or group communicates its hate message “repeatedly.” The requirement, standard in hate speech laws, that the communication be public is adapted to a technology that involves one-on-one interaction. Each time a phone message is played, it is heard by a single individual and so may be described as a “private” communication; however, as Chief Justice Dickson in *Taylor* observed, “[w]hile conversations almost always take place on a one-to-one basis, the overall effect of phone campaigns is undeniably public, and the reasonable assumption to make is that these campaigns can have an effect upon the public’s beliefs and attitudes.” The requirement that the message be made “repeatedly” leads to a distinction between private phone calls, which are not banned even though they may involve the expression of hateful views, and recorded hate message phone lines on which “repeated one-on-one communication adds up to mass communication.”¹⁹ In the *Zundel* case, the CHRT held that hate messages posted on a website were communicated “repeatedly.” The Tribunal found that a website posting, much like a recorded phone message, “waits dormant” until activated by the caller or browser.²⁰ The CHRT noted that the Internet facilitates “the repeated transmission of material on a chosen site” and offers “an inexpensive means of mass communication.” However, communication on the Internet takes many different forms, which are more or less controlled or accessible. The CHRT has addressed the issue of the private character of different forms of Internet communication on a case-by-case basis. Provided the communication is not widely accessible (i.e., that access is restricted to a small group), it may be regarded as “private” or, in the terms of section 13, as not made “repeatedly.”²¹

(iv) The CHRC and the Section 13 Complaint Process

The CHRC consists of a Chief Commissioner, a Deputy Chief Commissioner and three to six other members who are appointed by the Governor in Council (s. 26(1) *CHRA*). The Chief Commissioner and the Deputy Chief Commissioner are full-time members of the Commission, while the other members may be appointed as either full-time or part-time members (s. 26(2)). Each full-time member of the Commission may be appointed for a term not exceeding seven years, and each part-time member may be appointed for a term not exceeding three years (s. 26(3)), although a member may be reappointed (s. 26(5)). The members of the Commission hold office during good behaviour and may only be removed by the Governor in Council on address of the Senate and House of Commons (s. 26(4)). The Commission may appoint “officers and employees as are necessary for the proper conduct” of its work (s. 32(1)).

The Commission is empowered to carry out research and educational programs related to the *CHRA*’s general purpose, which is:

to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that all individuals should have an

opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence for which a pardon has been granted. (s. 2)

However, the principal function of the CHRC is the processing and investigating of complaints of discrimination. The *CHRA* prohibits different forms of discrimination, including discrimination in the “provision of goods, services, facilities or accommodation customarily available to the general public” (s. 5), discrimination in the provision of commercial premises and residential accommodation (s. 6), discrimination in employment (s. 7), and, of course, discrimination in the form of telephonic communication “that is likely to expose a person or persons to hatred or contempt” (s. 13).

The process established under the Act is essentially the same regardless of the particular form of the alleged discrimination. Section 40 of the *CHRA* provides that “any individual or group of individuals having reasonable grounds for believing that a person is engaging or has engaged in a discriminatory practice may file with the Commission a complaint in a form acceptable to the Commission.” The CHRC may also initiate a complaint “where it has reasonable grounds for believing that a person is engaging or has engaged in a discriminatory practice.” The CHRC considers on a case-to-case basis whether conciliation is appropriate. In contrast to other discrimination complaints, conciliation tends to play only a minor role in section 13 cases because the expression that is the subject of the complaint is often extreme in character, and because the parties ordinarily have no relationship prior to the complaint. In exceptional circumstances the CHRC has facilitated a non-adjudicative resolution of the complaint – most often an agreement by the respondent to remove the material that is the subject of the complaint from the website. Specialized “teams” oversee the processing and investigation of the different forms of discrimination. The investigation of section 13 complaints is overseen by a multidisciplinary Anti-Hate Team that specializes in hate speech complaints.

The first section 13 complaint, which was against John Ross Taylor and the Western Guard, was initiated by the Commission. Since that first complaint, however, the CHRC has declined to exercise its power to initiate section 13 complaints and has relied instead on community organizations and interested individuals to take the initiative. Inquiries, or potential complaints, from members of the public or community organizations are referred to an early resolution analyst or adviser, who provides advice about the process and the Commission’s jurisdiction to the person or group making the inquiry. Only a small number of the inquiries received by the CHRC result in formal complaints. If the individual or group wishes to proceed with a section 13 complaint, the early resolution adviser will provide them with a complaint kit, which includes a form on which they are to provide basic information about the communication that is alleged to be in breach of section 13. The complaint must be “accepted” by the CHRC if it is submitted in the proper form. The early resolution adviser, with the assistance of the members of the Anti-Hate Team, will review the completed complaint form to ensure that the complaint

falls within the jurisdiction of the CHRC – and in particular that it meets the requirements set out in section 40(5), which deals with geographical jurisdiction, and section 41, which provides as follows:

- (1) Subject to section 40, the Commission shall deal with any complaint filed with it unless in respect of that complaint it appears to the Commission that
 - (a) the alleged victim of the discriminatory practice to which the complaint relates ought to exhaust grievance or review procedures otherwise reasonably available;
 - (b) the complaint is one that could more appropriately be dealt with, initially or completely, according to a procedure provided for under an Act of Parliament other than this Act;
 - (c) the complaint is beyond the jurisdiction of the Commission;
 - (d) the complaint is trivial, frivolous, vexatious or made in bad faith; or
 - (e) the complaint is based on acts or omissions the last of which occurred more than one year, or such longer period of time as the Commission considers appropriate in the circumstances, before receipt of the complaint.

Following receipt or “acceptance,” the CHRC may determine that the complaint is excluded on one of the grounds set out in either section 40 or 41 of the Act. If the complaint is excluded on one of these grounds, it will be returned to the complainant with “a written notice of its decision ... setting out the reason for its decision” (s. 42(1)). If, on the other hand, the complaint is not excluded, it must be processed by the CHRC. An investigator or human rights officer who specializes in hate speech complaints will be assigned to the case and the respondent will be notified that a complaint against him or her is being considered by the CHRC. The investigation officer will then gather information. In the case of a complaint about hate on the Internet, she/he will confirm that the material appeared on the site and will seek to confirm or discover the identity of the individual responsible for the alleged hate speech. In pursuing the investigation, the investigator may apply to the Federal Court for a warrant enabling him/her to enter and search premises and to require production of relevant documents. During the course of the investigation, the investigator will also invite submissions from the respondent and a response to those submissions from the complainant.

Once the investigator has collected the necessary information, she/he will draft an investigation report setting out the particulars of the complaint and the conclusions reached, which will then be reviewed by the Anti-Hate Team. The investigation report will address the following questions: whether the material that is the subject of the complaint was observed on the Internet; whether the communication of the material has taken place, at least in part, in Canada; whether the respondent communicated or caused to be communicated the material which forms the basis of the complaint; and whether the material is likely to expose a person or persons to hatred or contempt because of membership in an identifiable group. In determining this last issue, the investigator relies on the test set out in the Supreme Court of Canada in the *Taylor* case and on the “hallmarks of hate” identified by the CHRT. The parties will be provided with a copy of the report and invited to make written submissions. Once these submissions are received, each party will be invited to comment on the submissions of the other. The final report,

along with the parties' comments, will be submitted to the Commissioners (or a Commissioner who has been designated to receive the report). The Commissioners may ask the CHRT to institute an inquiry into the complaint, if they conclude that "having regard to all the circumstances of the complaint, an inquiry ... is warranted" or they "shall dismiss the complaint" if they conclude that an inquiry is not warranted. The Commission will notify the parties of its decision. The time it takes from when the complaint is first received by the CHRC until the Commission makes its decision either to dismiss the complaint or to send it on to the CHRT for an "inquiry" or adjudication is seldom more, and often much less, than a year.

On receipt of a case from the CHRC, the chairperson of the CHRT "[s]hall institute an inquiry by assigning a member of the Tribunal to inquire into the complaint" (s. 49(2)). The chairperson may assign a panel of three members in complex cases. All complaints sent to the CHRT are subject to mandatory mediation, prior to adjudication. At the adjudication the complainant and respondent may appear in person or be represented by counsel. The Tribunal may also permit "any other interested party" to appear and make recommendations. The CHRC is not required to appear at the adjudication but may do so "to represent the public interest." To this point the CHRC has been represented by counsel in all but one of the section 13 cases that have come before the Tribunal. At the Tribunal, the burden of proof lies with the complainant and the standard of factual proof is "on a balance of probabilities," the ordinary civil standard. Proceedings at the Tribunal are reasonably formal, but, as is the case with most tribunals, the procedural rules, including rules of evidence, are less strictly applied than in criminal cases. Section 48.9(1) provides that "Proceedings before the Tribunal shall be conducted as informally and expeditiously as the requirements of natural justice and the rules of procedure allow."

Section 13 complaints represent a very small part of the CHRC's workload. Between January 2001 and September 2008 the CHRC received 73 section 13 complaints (about 2% of the total number of complaints received by the CHRC). Of these, 32 were closed or dismissed by the CHRC and 34 were sent to the CHRT for adjudication. (When these numbers were compiled in September 2008, 2 of the 73 complaints were under investigation by the CHRC and 5 were awaiting decision by the CHRC.) Of the 34 complaints that were sent to the CHRT, 10 were resolved prior to adjudication. In September 2008, 8 of the complaints forwarded to the CHRT were awaiting conciliation/adjudication. In the remaining 16 cases the CHRT found that section 13 had been breached and imposed a cease and desist order. In several of these cases the Tribunal also imposed monetary penalties. Since 2001 the CHRT has issued approximately 137 decisions on all grounds of discrimination under the *CHRA*.

In preparing this report I repeatedly came across shocking misdescriptions of the CHRC's process. These misdescriptions appeared not only on marginal websites but also and all too often in the mainstream media. This was a reminder that there are commentators who will say anything to support their larger agenda and have no particular interest in being accurate.

(c) The Criminal Code Hate Speech Provisions

The criminal provisions dealing with hate speech, including sections 318 and 319, were added to the *Criminal Code* in 1970, following the recommendations of the *Report of the Special Committee on Hate Propaganda in Canada* (the Cohen Committee).²²

Section 318 prohibits the advocacy or promotion of genocide:

- (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.
- (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.

Section 319 of the Criminal Code bans the incitement of hatred and the wilful promotion of hatred. The section provides as follows:

- (1) Every one 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
 - (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or
 - (b) an offence punishable on summary conviction.
- (2) Every one who, by communicating statements, other than in private conversation, wilfully promotes hatred against an 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.

Section 319(3) of the *Code* provides a number of defences to the charge of wilfully promoting hatred:

- 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, he expressed or attempted to establish by argument an opinion on a religious subject;
 - (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 towards an identifiable group in Canada.

Subsection (7) provides definitions and clarifications of some of the important terms in the section. In particular “communicating” is said to include communicating “by telephone, broadcasting or other audible or visible means”; “identifiable group” means any section of the public identified by colour, race, religion, ethnic origin or sexual orientation; “public place” includes “any place to which the public have access as of right or by invitation, express or implied”; and finally, “statements” is broadly defined to include “words spoken or written or recorded electronically or electro-magnetically or otherwise” as well as “gestures, signs or other visible representations.” Significantly, no prosecution may be brought under section 319(2) without the consent of the Attorney General of the particular province.

The Supreme Court of Canada in *Mugesera v. Canada*²³ described the elements of the section 319(2) offence of wilfully promoting hatred. The term “promotes,” said the Court, means to actively support or instigate and not simply to encourage. The term “hatred” connotes “emotion of an intense and extreme nature that is clearly associated with vilification and detestation.”²⁴ According to the Court, “[o]nly the most intense forms of dislike fall within the ambit of this offence.”²⁵ Proof that the communication caused actual hatred is not required. The law’s purpose is to prevent the risk of serious harm caused by hate propaganda. In determining whether the speech conveyed hatred, the court must take into account the audience and the social and historical context of the speech. In *R. v. Buzzanga and Durocher*²⁶ the Ontario Court of Appeal held that an individual would be found to have breached section 319(2) only if he/she had as a conscious purpose the promotion of hatred against the identifiable group, or if he/she foresaw that the promotion of hatred against that group was certain to result from her/his communication. The individual “must desire that the message stir up hatred.”²⁷ The Court in *Keegstra* indicated that when determining whether the accused intended to promote hatred, “the trier will usually make an inference as to the necessary *mens rea* based upon the statements made.”²⁸

Other relevant *Criminal Code* sections include section 320 and section 320.1, which provide for the seizure of hate propaganda that is published or the erasure of hate propaganda from a computer system:

[S. 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. (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. (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. (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. 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.[...]

[S. 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.²⁹

Under section 320.1 a judge may order the removal of hate propaganda from the Internet, whether or not a prosecution is pursued under section 319. The issuance of an order under section 320.1(1) does not depend on a determination that the author of the posting or controller of the website “wilfully” promoted hatred. Indeed, under this section an ISP could be ordered to take down a site, even though the identity of the author of the hate speech cannot be determined.

Relatively few prosecutions have been brought under section 319, and there have been even fewer convictions. Between 1994 and 2004 there were 93 prosecutions under section 319. Thirty-two convictions were entered and of these 27 resulted in prison sentences and 5 in conditional sentences.³⁰ It is not clear whether the number of prosecutions is small because the police do not pursue hate promotion claims or because provincial Attorneys General are reluctant to give their consent to prosecution. There is certainly a perception in some provinces that the consent requirement is a barrier to prosecution – and has the effect of discouraging police investigations of hate speech on the Internet and elsewhere. It appears that section 320.1 has been invoked on only one occasion.³¹

In *R. v. Keegstra*, which was decided at the same time as *Taylor*, the Supreme Court of Canada held that the *Criminal Code* ban on the wilful promotion of hatred did not breach the Charter. The Court’s judgment is described in more detail in section 3 of this report.

(d) Provincial and Territorial Human Rights Codes

The human rights laws of Alberta, British Columbia, Saskatchewan, and the Northwest Territories each include a provision similar to section 13.³² For example, section 7 of the BC *Human Rights Code* provides that:

A person may not publish issue or display or cause to be published, issued or displayed any statement, publication, notice, sign, symbol, emblem or other representation that [...]

(b) is likely to expose a person or a group of persons to hatred or contempt because of the race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age of that person or that group or class of persons.

Section 14 of the Saskatchewan *Human Rights Code* is potentially broader in its scope since it extends not simply to material that exposes, or tends to expose, the individual to hatred but also to material that “ridicules, belittles, or otherwise affronts the dignity of” the person. However, the section only applies to communication in the form of a “notice, sign, symbol, emblem or other representation.”

Guided by the Supreme Court of Canada’s judgment in *Taylor*, the human rights tribunal in each of these provinces or territories has interpreted the relevant code section narrowly as a ban on extreme expression that is hateful or contemptuous in character. The BC Human Rights Tribunal has developed a two-part test for determining whether the expression is caught by section 7:

First, does the communication itself express hatred or contempt of a person or group on the basis of one or more of the listed grounds? Would a reasonable person understand this message as expressing hatred or contempt in the context of the expression? Second, assessed in this context, is the likely effect of the communication to make it more acceptable for others to manifest hatred or contempt against the person or group concerned? Would a reasonable person consider it likely to increase the risk of exposure of target group members to hatred or contempt? ³³

In *Saskatchewan Human Rights Commission v. Bell*³⁴ the Saskatchewan Court of Appeal held that section 14 of the Saskatchewan code was breached when a respondent published or displayed a representation which in either purpose or effect “exposed or tended to expose to hatred, belittled, ridiculed or otherwise affronted the dignity of the racial or religious groups depicted therein; and caused or tended to cause others to engage in a discriminatory practice against those persons or groups of persons ...” [emphasis added].

All provincial and territorial human rights laws, except for that in the Yukon Territory, include a provision similar to section 12 of the *CHRA*, which states that it is unlawful to display any notice, sign, symbol, emblem, or other representation that indicates discrimination or an intention to discriminate against an identifiable group. When this provision was first enacted in Ontario,³⁵ its purpose was to prohibit signs in store windows that indicated that the members of certain racial or ethnic groups would not be served. However, 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.³⁶ As Luke McNamara has observed, when broadly interpreted, this provision limits “conduct similar in nature to that at which broader hate speech laws are directed.”³⁷

(e) The Canadian Charter of Rights and Freedoms

The *Canadian Charter of Rights and Freedoms* protects a variety of rights from government interference, including legislation. These rights include freedom of conscience and religion, freedom of expression and the right to equality:

s.2 Everyone has the following fundamental freedoms:

- a) freedom of conscience and religion;
 - b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
 - c) freedom of peaceful assembly; and
 - d) freedom of association.
- [...]

15. (1) 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.

The rights and freedoms in the *Charter* are subject to limits that are “prescribed by law” and are “reasonable” and “demonstrably justified in a free and democratic society.” The *Charter* also contains interpretive provisions such as section 27, which provides that:

This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

As noted above, the Supreme Court of Canada in separate judgments ruled that section 13 of the *CHRA* and section 319(2) of the *Criminal Code* are compatible with the *Charter*. In each case the Court found that the law breached section 2(b), freedom of expression, but was a justified limit under section 1.

(f) International Treaties

Under international law Canada is obligated to protect the freedom of expression of its citizens but also to protect its citizens from exposure to hate speech. Article 19 of the *Universal Declaration of Human Rights* provides that:

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

Similarly, Article 19 of the *International Covenant on Civil and Political Rights (ICCPR)* provides that:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

At the same time, however, section 19 of the *ICCPR* provides that expression may be restricted for certain reasons:

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights or reputations of others;
 - (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

Article 20 of the *ICCPR* obligates states to prohibit “advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.” According to the United Nations Human Rights Committee (General Comment 11), there is no conflict between Articles 19 and 20 of the *ICCPR*:

Article 20 of the Covenant states that any propaganda for war and any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law. In the opinion of the Committee, these required prohibitions are fully compatible with the right of freedom of expression as contained in article 19, the exercise of which carries with it special duties and responsibilities. The prohibition under paragraph 1 extends to all forms of propaganda threatening or resulting in an act of aggression or breach of the peace contrary to the Charter of the United Nations, while paragraph 2 is directed against any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, whether such propaganda or advocacy has aims which are internal or external to the State concerned. The provisions of article 20, paragraph 1, do not prohibit advocacy of the sovereign right of self-defence or the right of peoples to self-determination and independence in accordance with the Charter of the United Nations. For article 20 to become fully effective there ought to be a law making it clear that propaganda and advocacy as described therein are contrary to public policy and providing for an appropriate sanction in case of violation. The Committee, therefore, believes that States parties which have not yet done so should take the measures necessary to fulfil the obligations contained in article 20, and should themselves refrain from any such propaganda or advocacy.

Canada is a signatory to the *Special Protocol*, which enables an individual to bring a complaint to the Human Rights Committee that a state party has breached its obligations under the *ICCPR*. In 1983 the Human Rights Committee dismissed a complaint brought by John Ross Taylor and the Western Guard that their freedom of expression guaranteed in the *ICCPR* had been breached by the application of section 13 of the *CHRA*. The Human Rights Committee observed that:

[...] the opinions which Mr. Taylor seeks to disseminate through the telephone system clearly constitute the advocacy of racial or religious hatred which Canada has an obligation under article 20(2) of the Covenant to prohibit.

Article 4 of the *International Convention on the Elimination of All Forms of Racial Discrimination* (which was ratified by Canada in 1970) requires that:

States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the *Universal Declaration of Human Rights* and the rights expressly set forth in article 5 of this Convention, inter alia:

- a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;
- b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;
- c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

Canada has also signed the Additional Protocol to the Convention on Cybercrime (a Convention of the Council of Europe) that calls for the criminalization of acts of a racist or xenophobic nature committed through computer systems.

3. Freedom of Expression and the Regulation of Hate Speech

The debate about section 13 of the *CHRA* is at root a debate about whether or to what extent the legal restriction of hate speech can be reconciled with our political and constitutional commitment to freedom of expression. The issue is often framed in more general terms as a contest between, on the one hand, the right to equality, advanced by hate speech laws, and on

the other, the freedom of the individual to express her/himself. Framed in this abstract way, the issue appears intractable. A resolution is possible, however, once we recognize the limited potential of hate speech regulation to advance equality and the limited value of hate speech.

(a) Equality, Human Rights and Hate Speech

The purpose of the *CHRA*, as set out in section 2, is to advance “the principle that all individuals should have an opportunity equal to other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices....” More particularly, the object of human rights legislation is “to remove discrimination.”³⁸ The focus of the law is on the effect or impact of a particular act or practice rather than on the intention of the actor. The purpose “is not to punish the discriminator, but rather to provide relief for the victims of discrimination.”³⁹ The appropriate response to effects or systemic discrimination is education, conciliation, and compensation. In the words of Howe and Johnson: “In dealing with rights abusers, commissions were not to punish but to reform, by bringing the parties together in recognition of the importance of human rights and the need to rectify past misdeeds.”⁴⁰

Section 13 of the *CHRA* restricts hate speech as a form of discrimination. According to the CHRT: “The purpose of section 13 is to remove hate messages from the public discourse and to promote equality, tolerance and the dignity of the person.”⁴¹ Hate messages are said to be harmful “in two significant ways”: “First they undermine the dignity and self-worth of target group members and, secondly, they erode the tolerance and open-mindedness that must flourish in a multi-cultural society that is committed to the idea of equality.”⁴² The object of the section 13 ban is to protect the members of identifiable groups from the impact of discriminatory expression. A finding that section 13 has been breached is based on the effect or character of the communication and not on the intention of the communicator. The remedies for breach of section 13 are compensatory rather than punitive – a cease and desist order and monetary compensation (although, as noted above, a fine may be imposed in exceptional circumstances).

(b) Freedom of Expression

Freedom of expression protects the individual’s freedom to communicate with others. The right of the individual is to participate in an activity that is deeply social in character, that involves socially created languages and the use of community resources. There are many arguments for protecting freedom of expression, but all seem to focus on one, or a combination of, three values: truth, democracy, and individual autonomy. Freedom of expression should be protected because it contributes to the public’s recognition of truth or to the growth of public knowledge; or because it is necessary to the operation of a democratic form of government; or because it is vital to individual self realization or is an important

aspect of individual autonomy. According to the Supreme Court of Canada, a commitment to freedom of expression, which extends protection to political, artistic, scientific and intimate expression, must rest on the contribution that freedom of expression makes to all three values.⁴³

Each of the established accounts of the value of freedom of expression rests on a recognition that individual autonomy or agency is deeply social in its creation and expression. We become individuals capable of thought and judgment, we flourish as rational and feeling persons, when we join in conversation with others and participate in the life of the community. The social emergence of human agency and individual identity can be expressed in the language of truth/knowledge, individual self-realization/autonomy, or democratic self-government. Each account of the value of freedom of expression represents a particular perspective on, or dimension of, the constitution of individual agency in community life.

Recognition that individual agency and identity emerge in communicative interaction is crucial to understanding not only the value of expression but also its potential for harm. Our dependence on expression means that words can sometimes be harmful. Expression can cause fear, it can harass, it can mislead, and it can undermine self-esteem. The inclusion of section 1 in the *Charter of Rights and Freedoms* is an acknowledgement that even basic rights, such as freedom of expression, may be limited when their exercise causes harm to the public interest or the rights of others.

Freedom of expression is a moral or political right that is constitutionally protected in Canada. However, the proper scope and limits of the freedom should not be debated exclusively in legal or constitutional terms and should not simply be left to the courts for resolution. A determination by the courts that a particular law is consistent with the Charter should not terminate public debate about its wisdom as public policy, including whether it pays adequate respect to important rights and interests such as freedom of expression. In the discussion that follows I refer to judicial decisions about the constitutionality of hate speech laws, but I do not consider that these decisions resolve the public debate about section 13 and other forms of hate speech law or that the issue should be understood simply in terms of the proper scope and limits of the constitutional right to freedom of expression.

(c) Judicial Review of Hate Speech Laws

As noted earlier, the Supreme Court of Canada in a split decision ruled that section 13 of the *CHRA* is consistent with the Charter. In reaching its decision in *CHRC v. Taylor*,⁴⁴ the Court drew heavily on its analysis in the companion case of *R. v. Keegstra*,⁴⁵ which affirmed the constitutionality of the *Criminal Code* prohibition on the “wilful promotion of hatred.” And so I will briefly outline the Court’s judgment in *Keegstra* before examining the *Taylor* judgment.

James Keegstra was a teacher in the high school in Eckville, Alberta. For almost 10 years he taught his students about an all-encompassing conspiracy on the part of Jews to undermine Christianity and control the world. He told his students that Jews were “treacherous,” “subversive,” “sadistic,” “money-loving,” “power hungry” and “child killers.” He used the teacher’s punishment and reward powers to ensure that his students parroted his ideas. Students who did not adopt, or acquiesce in, his views did poorly in his class. When Mr. Keegstra’s teaching finally became a public issue, he was dismissed from his position. A year later he was charged under section 319(2) of the *Criminal Code* with wilfully promoting hatred.

Keegstra challenged the constitutionality of section 319(2), arguing that it violated his freedom of expression under the *Charter of Rights and Freedoms*. Chief Justice Dickson, writing for the majority of the Supreme Court of Canada, accepted that section 319(2) of the *Criminal Code* restricted expression, so that the provision violated freedom of expression under section 2(b) of the *Charter*. However, he found that the restriction was justified under section 1, the *Charter*’s limitation provision, because it limited “a special category of expression which strays some distance from the spirit of section 2(b),” advanced the important goal of preventing the spread of racist ideas and advanced this goal rationally and with minimal impairment to the freedom. Madame Justice McLachlin, in her dissenting judgment, agreed that preventing the spread of hateful ideas was an important end but did not accept that the criminal prohibition advanced this end effectively and at minimal cost to freedom of expression.

At the outset of his section 1 analysis, Chief Justice Dickson described the harms caused by hate promotion. He referred first to the emotional or psychological injury experienced by the target group. “It is indisputable,” he said, “that the emotional damage caused by words may be of grave psychological and social consequence.” The “derision, hostility and abuse encouraged by hate propaganda ... have a severely negative impact” on an individual target group member because her/his “sense of human dignity and belonging to the community at large is closely linked to the concern and respect accorded to the groups to which he or she belongs.” Because an individual’s identity is partly constituted by her/his association and interaction with others, she/he experiences attacks on the group(s) to which she/he belongs personally and sometimes very deeply. The second injury or harm identified by Dickson CJ is the harm that hate speech has upon “society at large.” If members of the larger community are persuaded by the message of hate speech, they may engage in acts of violence and discrimination, causing “serious discord” in the community. Dickson CJ quoted from the report of the Cohen Committee, which found that “individuals can be persuaded to believe almost anything if the information or ideas are communicated using the right technique and in the proper circumstances.... It is thus not inconceivable that the active dissemination of hate propaganda can attract individuals to its cause.” According to Chief Justice Dickson the state is justified in restricting the extreme expression of hate-mongers such as James Keegstra because this expression may lead (cause) others to hate the members of the targeted group and to act towards them in a violent or discriminatory way or because these views may be internalized by group members, damaging their self-esteem. He accepted

that there is a causal link between expression and the spread of hate because he was sceptical about the role of rational agency in the communicative process, at least in certain circumstances. We should not, said Chief Justice Dickson, “overplay the view that rationality will overcome all falsehoods in the unregulated marketplace of ideas.”

Dickson CJ accepted that the hate promotion provision restricts only a narrow category of expression. Merely unpopular or unconventional communications are not caught by the ban. Hatred, he observed, is an emotion that is “intense and extreme” in character: “To promote hatred is to instil detestation, enmity, ill-will and malevolence in another.” He also noted that the restriction applies only when an individual “*wilfully* promotes hatred.” The speaker must intend to promote hatred or he/she must recognize that the promotion of hatred is the likely consequence of her/his expression. This mental element, said Dickson CJ, ensures that only the most extreme statements will be caught by the Code provision. The accused must “have subjectively desired the promotion of hatred or have foreseen such a consequence as certain to result from the communication.” Dickson CJ acknowledged that the causal link between a particular act of expression and the generation of hatred in the community is difficult to establish. It is enough, he said, that the speaker knows or is aware that his or her expression creates a substantial risk that hatred will be spread or that acts of violence will increase. The hate-monger must intend or foresee “as substantially certain, a direct and active stimulation of hatred against an identifiable group.”

In *Taylor*, Chief Justice Dickson, again writing for the majority, followed a similar line of reasoning in upholding section 13 of the *CHRA*.⁴⁶ Dickson CJ adopted an interpretation of section 13 that was not “particularly expansive” and was confined to a relatively narrow category of extreme expression. At the same time, he acknowledged that “the nature of human rights legislation militates against an unduly narrow reading of section 13(1)”. Section 13, in contrast to the *Criminal Code* provision considered in the *Keegstra* decision, did not require proof of an intention to spread hatred. As Chief Justice Dickson observed, the focus of the section “is solely upon likely effects, it being irrelevant whether an individual wishes to expose persons to hatred or contempt on the basis of their race or religion.” Dickson CJ held that the absence of an intention requirement did not undermine the constitutionality of section 13 because the purpose of human rights legislation is to “compensate and protect” the victim rather than “stigmatize or punish” the person who has discriminated. Even though “the section may impose a slightly broader limit upon freedom of expression than does section 319(2) [the hate speech provision] of the *Criminal Code* ... the conciliatory bent of a human rights statute renders such a limit more acceptable than would be the case with a criminal provision.”⁴⁷

There are two difficulties with the Court’s attempt to reconcile the regulation of hate speech with the right to freedom of expression. The first is the claim that there is a causal link between the expression of hateful views and the spread of hatred in the community. The second is the claim or assumption that it is possible to isolate a narrow category of extreme or hateful speech that reinforces, or contributes to, hatred in the community.

In the *Keegstra* and *Taylor* judgments, the majority of the Supreme Court of Canada was prepared to treat hate speech as responsible for the spread of hatred and for increases in racist violence because they were sceptical that the audience would always exercise rational judgment when it considered racist claims. The concern was that those who hear racist views may come to view the target group differently and act towards its members in a discriminatory or violent way. Hate speech damages the group's position in the community because it changes or reinforces the way that members of the dominant group think about the target group and its members. This was the view taken by the Cohen Committee in its report recommending the criminalization of hate promotion:

[W]e are less confident in the 20th century that the critical faculties of individuals will be brought to bear on the speech and writing which is directed at them.... While holding that over the long run, the human mind is repelled by blatant falsehood and seeks the good, it is too often true, in the short run, that emotion displaces reason and individuals perversely reject the demonstrations of truth put before them and forsake the good they know. The successes of modern advertising, the triumph of impudent propaganda such as Hitler's, have qualified sharply our belief in the rationality of man. We know that under strain and pressure in times of irritation and frustration, the individual is swayed and even swept away by hysterical, emotional appeals. We act irresponsibly if we ignore the way in which emotion can drive reason from the field.

The readiness with which millions can be reached with messages of every kind is a changed circumstance of importance. Radio, television, motion pictures, the pervasiveness of print are new elements in the 20th century which the classic supporters of free speech never had to reckon with [...]

Those who urged a century ago that men should be allowed to express themselves with utter freedom even though the heavens fall did so with great confidence that they would not fall. That degree of confidence is not open to us today. We know that, as well as individual interests, there are social interests to be protected, and these are not always protected by unrestricted individual freedom. The triumphs of Fascism in Italy, and National Socialism in Germany through audaciously false propaganda have shown how fragile tolerant liberal societies can be in certain circumstances. They have also shown us the large element of irrationality in human nature which makes people vulnerable to propaganda in times of stress and strain.⁴⁸

If some individuals are persuaded of certain views, which they then act on, we might say that the expression has "caused" the action. However, under most accounts of freedom of expression, the state is not justified in restricting expression simply because it causes harm in this way, by persuading its audience. The listener and not the speaker is responsible for the judgments she/he makes and the actions she/he takes. The familiar freedom of expression position is that ideas cannot be censored simply because we fear that members of the community may find them persuasive or that an individual's self-understanding or self-esteem may be negatively affected. It is often said that we should respond to racist claims not with censorship, but by offering competing views that make the case for equal respect or by

creating more avenues for marginalized groups to express themselves. Faith in human reason underlies most accounts of freedom of expression and cannot simply be cut out and discarded from the analysis. The implications of downplaying this faith in reason are enormous. Upon what is our commitment to freedom of expression based, if not on a belief in human reason and its power to recognize truth? What restrictions on expression are not acceptable once we have lost faith in human reason? If we are unwilling to trust, or give space to, individual judgment and public reason, then the question of censorship will turn simply on whether the particular expression conveys a good or bad message or whether we think that public acceptance of the message will have good or bad consequences. But this amounts to a rejection of freedom of expression as a political/constitutional principle. A commitment to freedom of expression means protecting expression for reasons more basic than our agreement with its message, for reasons independent of its content.⁴⁹

The other difficulty with the Court's approach is its attempt to isolate a narrow category of extreme expression for restriction. It is difficult to see how a particular instance of bigoted or hateful expression, however extreme, "silences" the members of a target group (damages their self-esteem so that they withdraw from public discourse) or leads others to hate them or discriminate against them. The spread of hatred in the community is a systemic problem. No one instance of expression leads to hatred or silencing, but a wide range of discriminatory representations (some extreme and some more temperate and even commonplace) may contribute to hateful attitudes and discriminatory actions in the community or to the marginalization of an identifiable group. It is difficult to imagine that the bizarre views of Keegstra would be taken seriously by anyone who was not already deeply mired in irrational hatred or prejudice or who was not limited in his or her capacity for reasoned thought, or who was not in a subordinate or vulnerable position in relation to the speaker. But if the problem is systemic, then there is no way to isolate a narrow category of extreme or hateful expression that "causes" or leads to hatred, discrimination and silencing. The choice seems to be to restrict nothing or everything.

In the *Taylor* decision there is an obvious tension between the Court's affirmation of the larger purposes of human rights law and its narrow definition of the scope of section 13. The Court said that the purpose of section 13, as part of a human rights law, is "to prevent the spread of prejudice and to foster tolerance and equality in the community." To advance this purpose, it might be necessary to ban any expression that encourages a negative view of the group or undermines its position in society – that defames or stereotypes the members of the group. However, the courts, and the CHRT, have limited the scope of section 13 to the most extreme and hateful forms of discriminatory expression. This has been necessary because a broader restriction on group defamation would involve a significant intervention into the conduct of public discourse and would severely compromise freedom of expression in the community. In section 4 of this report, I will argue that the section 13 ban cannot be confined to extreme or hateful expression, if its purpose is to prohibit speech that negatively affects the dignity or status of the members of an identifiable group. The purpose of a narrow hate speech ban must be less ambitious.

(d) Hate Speech on the Internet

The Internet offers a low-cost way to communicate with a potentially large audience. It enables individuals and groups with common interests to connect and interact with one another, even if they are geographically remote. It is also an effective way to reach young people, who may spend a significant amount of time online and who may either look for or stumble across particular websites. Individuals can access material on the Internet easily and without personal risk.⁵⁰ These attributes have made the Internet a key source of information for members of the public and an important communication vehicle for individuals who do not have the resources to reach an audience through the traditional media. The Internet has, because of these characteristics, been described as a democratic medium – and an important alternative to the mainstream media. These characteristics have also made the Internet the preferred medium for hate promoters.⁵¹ Moreover, because the Internet audience is highly fragmented, it is easy for a particular website to operate at the margins and avoid critical public scrutiny. While most Internet websites are public in the sense that they are generally accessible, the audience for a particular site is often self-selecting and sympathetic and sometimes quite small. Thus these sites can be an effective means for individuals and groups who hold hateful views to encourage others to adopt more extreme views or to take violent action.

If the purpose of hate speech law is to prevent the circulation of discriminatory views or the defamation of identifiable groups, then the size of the audience for a particular communication may be an important factor in the decision whether or not to censor. The larger the audience, the greater the potential for harm. However, if the purpose is instead to prevent the advocacy or threat of violence, then audience size is less important. Indeed, smaller hate sites (or those that are less easily accessed such as chat rooms) that link like-minded individuals are able to encourage a sense of intimacy and identity and to operate below the radar. These sites ought to be of particular concern because they may be more effective in promoting extreme views and encouraging others to take radical action. Hate mongers can use these sites to attract new recruits or encourage violent action, without exposing themselves to a broad and potentially critical audience. This is why some effort and expense is required to investigate hate on the Internet. Its complex public and private character makes the Internet a potent vehicle for the reinforcement of hateful views and the advocacy of violence.

Internet content is notoriously difficult to regulate because material can be posted anonymously and redirected quickly and because it can be generated anywhere in the world. As long as hate speech remains substantially unregulated in the United States, it will be accessible to Canadians on the Internet. Indeed, it is sometimes argued that there should not be a law prohibiting hate on the Internet, for the simple reason that it will be ineffective.⁵² This argument, I think, rests on a mistaken or unrealistic understanding of the purpose and scope of hate speech law. I will argue in section 4 of the report that hate speech regulation should target the threat, advocacy or justification of violence. Every instance of hate speech – every threat and every incitement – is harmful in itself and ought to be prohibited. Even if

we are unable to prevent some, perhaps even most, instances of hate speech, we ought to prevent those that we can. I might add that a threat of violence or a call to violence will seem less abstract, and more immediate, when it comes from an individual or group within the same geographic area or political jurisdiction as those who are targeted. Moreover, a prohibition on extremist speech, even if it cannot prevent all such speech, represents an important affirmation to minority communities of their right not to be subjected to intimidation.⁵³

The mainstream media are subject to non-legal or market constraints that ordinarily prevent them from engaging in the extreme expression that is the subject of hate speech laws – although not necessarily expression that stereotypes or defames the members of an identifiable group. These constraints include a reliance on advertising revenue and the need to attract a large audience. Section 13 of the *CHRA* applies to the mainstream print media in a roundabout way because most mainstream publications are reproduced on the Internet. Even if this was not anticipated at the time section 13(2) was enacted, there is no principled basis for excluding mainstream publications (that are reproduced on the Internet) from the application of section 13. The application of section 13 to the mainstream press might not be a concern since these publications do not generally engage in hate speech. Nevertheless, a newspaper may be the subject of a complaint that it has unfairly depicted or described the members of an identifiable group. Unless the complaint is trivial, vexatious, frivolous or made in bad faith (and this may not be a straightforward determination, given the courts' generous description of the purpose of section 13) it must be investigated by the CHRC. As I will discuss in section 5 of this report, every time a complaint is investigated by the CHRC, even if it is ultimately dismissed, the freedom of expression interests of the respondent are compromised.

4. Refocusing Hate Speech Law

(a) Focusing on Extreme or Hateful Expression

Expression that stereotypes or defames the members of an identifiable group is offensive, insulting and harmful to the group's members. Nevertheless, censorship of this expression is not a viable option. Because discriminatory views or assumptions are so widely held and circulate generally in society, they cannot be eradicated through censorship. Any attempt to exclude all racial or other prejudice from public discourse would require extraordinary intervention by the state. Because discriminatory speech is so commonplace, it is impossible to establish clear and effective rules for its identification and exclusion. Because discriminatory attitudes and assumptions are so pervasive, it is vital that they be confronted rather than censored. They are often spread or reinforced without a clear intent by the speaker or conscious acceptance by the audience. The only effective response, then, is to expose the prejudiced character of commonplace assumptions and bring it to clearer, and hopefully more critical, consciousness. We must develop ways other than censorship to respond to expression that stereotypes and defames the members of an identifiable group and to hold institutions, such as the media, accountable when they advance such views.

The goal of ending prejudice in the community cannot be accomplished through censorship. The purpose of hate speech law must be more narrowly defined as the protection of the members of an identifiable group from the risk of violence that results from expression that threatens, advocates or justifies violence. While it is unrealistic to imagine that more familiar forms of discriminatory expression can be censored out of public discourse, the failure to ban the extreme or radical edge of prejudiced speech – that which threatens, justifies or advocates violence – carries too many risks, particularly when it is directed at the members of a racist subculture or occurs in a context in which there is little opportunity for response. This narrower purpose offers a better account of the actual practice of hate speech law in Canada, which focuses on the most extreme and hateful instances of expression. The small number of section 13 cases that have been sent by the CHRC to the Tribunal, and in which the Tribunal has found a breach of the section, have all (or almost all) involved expression that is so extreme and hateful that it may be seen as advocating violence against the members of an identifiable group.

This understanding of hate speech law has several advantages. First, as noted, it may provide a rationale for the narrow focus on extreme expression that has been adopted by the CHRC and the CHRT. Second, it offers a more practical standard for drawing the line between prohibited hate speech and other forms of discriminatory expression. While the line will sometimes be difficult to draw (for reasons discussed later in this section of the report), it is possible to identify factors that characterize extreme hate speech, such as the “hallmarks of hate” (or at least in combination), and to make a reasoned judgment about whether a particular instance of speech is, or amounts to, a call for violence. In contrast, it is impossible to know where, or even how, to draw a line separating group defamation from ordinary public discourse, given the pervasiveness of racial and other forms of prejudice. Third, it provides a clearer justification for limiting freedom of expression: to prevent the risk of violence against the members of an identifiable group. Understood in this way, the ban on hate speech may be seen as an extension of the criminal law prohibition on the advocacy and threat of violence.

(i) Threats

Threats of violence against an identifiable group, even if there is little prospect that they will be carried out, contribute to a climate of fear and insecurity. A march with swastikas and SS uniforms in a Jewish neighbourhood is experienced as threatening because it evokes the history of Nazi persecution of Jews.⁵⁴ Even if this threat does not seem realistic or immediate to an outside observer, it must be viewed from the perspective of the target group member, who experiences it as part of a continuing practice of violence against his or her group. Even if the members of the target group know that the threat cannot be carried out (although it is not clear why they would feel confident about this), it is so closely linked to a larger practice of violent oppression that it is bound to cause significant anxiety.

(ii) Advocacy

In *On Liberty* J.S. Mill thought that the authorities would be justified in preventing a fiery speech given near the home of a corn merchant to a crowd of farmers angry about crop prices.⁵⁵

When speech calling for violence occurs under conditions that limit the audience's ability to make a reasoned and independent judgment, the speaker may be seen as responsible for, or as a participant in, any violence that occurs. Criminal restrictions on advocacy or incitement to violence generally apply only to speech that is clearly and closely tied to ensuing violence. Indeed, the prohibition against incitement of hatred against an identifiable group, in section 319(1) of the *Criminal Code*, is breached only when "the incitement is likely to lead to a breach of the peace." The likelihood of the peace being breached will depend on the character of the expression but also on the context in which it occurs.⁵⁶ Similarly, the United States Supreme Court in *Brandenburg v. Ohio* held that the First Amendment of the US *Bill of Rights* forbids the government to restrict the advocacy of violence "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."⁵⁷

A commitment to freedom of expression means that we cannot hold the speaker responsible for the actions her/his audience may take in response to her/his speech. This position, however, depends on two things: first, that the listener is in a position to make an independent judgment and, second, that the state is in a position to prevent the actions of the listener and hold her/him accountable. The state is justified in prohibiting the advocacy of violence in circumstances in which the audience is likely to respond immediately by taking violent action. But what about calls for violence against an identifiable group that are in the circumstances unlikely to lead immediately to violence? Should we take the risk that speech that calls for violence will not encourage or lead someone at some point in the future to take violent action?⁵⁸

The extreme speech that is caught by section 13 of the *CHRA* plays to fears and frustrations (e.g., of moral decay or terrorism) and draws on the social background of prejudice and stereotyping. The audience may be uncritical of this speech because it provides a channel for fear and resentment and because it resonates with widely shared assumptions. Significantly, extremist speech is often directed at the members of a relatively insular racist subculture. When directed at such an audience, extremist speech may reinforce and extend bigoted views without being exposed to public criticism. While most members of the community will dismiss the extreme claims of hate-mongers like Keegstra and Taylor as bizarre and irrational, some individuals, already weighed down by prejudice or susceptible to manipulation or already part of an extremist subculture, will see in these claims a plausible account of their social and economic difficulties and a justification for violent action. The call to violence may be either explicit or implicit. Any individual who accepts these views would also have to conclude that violent action was necessary.⁵⁹ The advocacy of violence may be a concern because, in the words of the Cohen Committee, "in times of stress such 'hate' could mushroom into a real and monstrous threat to our way of life"⁶⁰ or more likely because it may encourage "isolated" acts of violence against members of an identifiable group, acts such as "gay-bashing." Hate crimes occur frequently. They are committed most often not by organized groups but by individuals who have immersed themselves in the extremist subculture that operates principally on the Internet.

A narrowly drawn ban that prohibits speech that threatens, advocates or justifies violence against the members of an identifiable group may be seen as inadequate by those who are

concerned about the persistence of prejudice and inequality in the community. This narrow ban will not prevent the circulation in the community of unfair depictions and false or misleading claims.⁶¹ It is arguable that more moderate or mainstream forms of discriminatory speech are more harmful because their audience is larger and their discriminatory message more insidious (for example the claim or assumption that there are genetically based differences in intelligence between “racial” groups). Indeed, once we recognize that extreme speech has an impact only because it builds on more common stereotypes and assumptions, it may be argued that less extreme forms of speech should be treated as part of the problem, as contributing to discrimination and violence. Yet, as earlier argued, any attempt to exclude all prejudiced expression from public discourse would require extraordinary intervention by the state and would dramatically compromise the public commitment to freedom of expression. At the same time, a “laissez-faire” approach to discriminatory speech fails the groups that are victimized and implicates the larger society in that victimization, because communicative power is inequitably distributed in society. If “more speech” rather than censorship is the only viable response to mainstream forms of discriminatory expression, then we must ensure that there are effective opportunities to respond to this expression and that institutions with significant communicative power are held accountable when they defame or stereotype identifiable groups. I will return to this in section 5.

A court or tribunal must decide whether the speech at issue is so extreme in content and tone that it can be understood as justifying or advocating violence. However, the line between speech that advocates or justifies violence and less extreme forms of discriminatory speech will sometimes be difficult to draw. A decision-maker may find it easier to see a violent purpose behind speech that is directed at a group that has in recent history been the target of an organized campaign of violence. Because phrases such as “the solution to the Jewish problem” or symbols such as the swastika evoke the Holocaust, it is easy to attribute a violent purpose to the individual who employs them. Because the act of burning a cross evokes the violent oppression of blacks in North America, it is easily understood as a call to violence. Yet in the case of harsh, vitriolic statements made about other identifiable groups that do not have the same recent history of organized violent persecution, it may be harder to discern a violent purpose.

A different line-drawing issue is raised by hate speech that targets a religious group. Because religious commitment is deeply rooted and shapes the individual’s world view and because it represents a significant connection with others, the individual may experience attacks on her or his belief system or faith community very deeply and personally. At the same time, religious adherence involves a belief in, or commitment to, the rightness of certain values or the truth of a particular conception of the supernatural and its connection to the natural world, even if that truth cannot be finally and fully proved and must to some degree be accepted on faith. Moreover, religious values often have public implications. Most religions have something to say about how we should act towards others and the kind of community we should work to create. For these reasons, religious beliefs or values cannot be insulated from debate and criticism, even that which is harsh and uncivil. The criticism of religious belief cannot be restricted without undermining our commitment to freedom of expression.⁶² To count as hate speech against a religious group, the communication must target the members of the group, attribute to them

certain dangerous or undesirable traits, and call on others to take violent action against them. However, the line between an attack on the group, which may sometimes amount to hate speech, and an attack on their beliefs, which cannot be restricted, may not always be easy to draw.⁶³

(b) The Repeal of Section 13 and Reliance on the Criminal Code Hate Speech Provisions

The principal recommendation of this report is that section 13 be repealed so that the censorship of Internet hate speech is dealt with exclusively by the criminal law.⁶⁴ A narrowly drawn ban on hate speech that focuses on expression that is tied to violence does not fit easily or simply into a human rights law that takes an expansive view of discrimination and seeks to advance the goal of social equality through education and conciliation. For reasons discussed in the next part of this section, the process established in the *CHRA* for receiving and investigating complaints of discrimination is poorly suited to section 13 complaints.⁶⁵ More generally, there is a tension between the general purpose or ethos of the *CHRA* and the narrow definition of hate speech adopted by the CHRT and, with some refinement, supported in this report.

As an alternative to the repeal of section 13, I have set out in the next section of the report a series of changes to section 13. The effect of these changes (most notably the inclusion of an intention requirement and the amendment of the process to reduce or remove the role of the complainant) would be to reshape section 13 so that it more closely resembles the *Criminal Code* ban on the wilful promotion of hatred.

The restriction of hate speech that threatens, advocates or justifies violence is appropriately dealt with under the criminal law. In the words of the Cohen Committee, “No civil statute can create a moral standard equivalent to that of criminal law.”⁶⁶ Hate speech is a serious matter that should be investigated by the police and prosecuted in the courts and should carry a significant penalty. There are, of course, some potential drawbacks to an exclusive reliance on the *Criminal Code* hate speech provisions. These include the higher burden of proof, the requirement that the Attorney General of the particular province consent to prosecution and the lack of experience on the part of police and prosecutors in pursuing hate speech cases.

Conviction under the *Criminal Code* requires proof according to the more onerous standard of “beyond a reasonable doubt” rather than “on a balance of probabilities,” the civil standard that is applied in section 13 cases. However, there are several reasons why this may not be a significant hurdle. First, this difference in standard of proof is significant only when the facts are in dispute. In most hate speech cases the principal issue is whether or not the communication is sufficiently hateful in tone and content that it may be seen as promoting hatred in the community. It must also be demonstrated that the individual “wilfully” promoted hatred, but this factual issue is ordinarily determined on the basis of the communication’s content and context. Second, whether it is made under section 319(2) of the *Criminal Code* or section 13 of the *CHRA*, an allegation that an individual has engaged in hate speech is a serious matter. It may be appropriate that the standard of proof be higher when deciding whether an individual has committed such an act. Third, the less demanding civil standard of proof applies to hearings under sections 320 and 320.1, the *in rem* provisions dealing with hate propaganda. Perhaps more

significantly, these provisions do not require any proof of intention. Section 320.1 of the *Criminal Code* enables the authorities to shut down an Internet hate site without having to establish that the individual responsible for the site intended to promote hatred. Indeed, an order may be issued under the section, even if it cannot be determined who is in control of the site. A judge will order the deletion of material from a computer system if she/he determines on a balance of probabilities that the material promotes hatred. Section 320.1 provides:

- (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.

Myron Claridge, formerly of the BC Hate Crime Team, offers the following description of the section 320.1 procedure:

The new section 320.1 provides a procedure for the police to go before a superior court judge with information on oath providing reasonable grounds to believe that there is hate propaganda available on a computer system within the jurisdiction. ... [I]t is a procedure that has as its aim to remove the material from public distribution. It is not a criminal charge against an individual but a hearing to determine if the material is hate propaganda. If it is, the court orders its deletion. The section can serve both the public and the telecommunications industry in identifying what is hate propaganda giving the latter a legal basis for the removal and also in removing hate propaganda.⁶⁷

It appears that this section has been used on only one occasion.⁶⁸ Nevertheless, it would seem to offer a useful alternative to section 319(2) of the *Code* in cases in which the identity of the hate promoter is difficult to determine and the object is simply to shut down the hate site quickly. If police and prosecutors are prepared to make greater use of section 320.1 of the *Code*, it could become an important mechanism for dealing with Internet hate speech.

Another possible drawback to reliance on section 319(2) is the requirement that the provincial Attorney General consent to prosecution. This requirement was included in the *Criminal Code* presumably as a means of preventing frivolous or vexatious private prosecutions. The consent requirement may serve a useful filtering function. However, concern has been expressed that, at least in some provinces, consent has been refused not because the Attorney General decided that the case was weak but because she/he did not regard hate speech as a significant problem or was concerned that the hate-monger might use the prosecution to

publicize his or her views. While consent to prosecution under section 319(2) should only be given when the case has a substantial likelihood of success, it should not be withheld for political reasons, and certainly not as a way of nullifying the law. At present there seems to be little information about when and why consent to prosecution is given or refused by the provincial Attorneys General. I would recommend that this matter be the subject of study. If it appears that the consent requirement is a barrier to the prosecution of serious hate speech cases, then section 319 should be amended to remove this requirement. The Crown, of course, may take carriage of any private prosecution and stay the proceedings if it believes that continuation of the prosecution is not in the public interest. In this way the Crown would retain the ability to prevent frivolous or vexatious proceedings under section 319(2).⁶⁹

The final difficulty relates to the experience and initiative of the police in investigating hate speech cases. While a number of police forces have established hate crimes units, the police in smaller communities have little experience investigating hate speech complaints and are often reluctant to put resources into such investigations. I would propose that each province do what has been done in British Columbia and 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*. The effectiveness of the *Criminal Code* provisions dealing with the promotion of hatred would be significantly enhanced by the establishment in each province of such a unit.⁷⁰

As noted earlier, the scope of section 319(2) of the *Criminal Code* (the prohibition on the wilful promotion of hatred) has been narrowly defined by the courts. However, neither the language of the section nor the reasoning of the courts ties the section's application explicitly to the threat, advocacy or justification of violence. There remains some risk, then, that the section may be applied to a broader category of expression, although this does not seem to have been a problem in practice. The defences available under section 319(7) to a charge of hate promotion are for the most part redundant; however, for the reasons set out below in the discussion of proposed changes to section 13 of the CHRA, I think the 'truth defence' should be removed.

There have been very few cases brought under section 319(2). To what extent this is because of the onerous standards for criminal conviction or the consent requirement is difficult to know. But before we regard this as an indication of the inadequacy of the criminal response to hate speech, we should recall that the number of section 13 hate speech cases that proceed to the CHRT is also very small.

(c) The Amendment of Section 13

In this section I have proposed a series of changes to the language of section 13 and to the section 13 complaint process. These changes are offered as an alternative to repeal. They are meant to refine and reinforce the narrow interpretation of the scope of section 13 adopted by the courts and the CHRT and to ensure that the CHRC process for investigating section 13 complaints is conducted in a way that minimizes interference with freedom of expression interests. If implemented, their effect would be to reshape section 13 so that it more closely resembles a criminal restriction on hate speech.

(i) The Scope of Section 13

(a) Narrowing the Scope of Section 13

The CHRC and the CHRT have interpreted section 13 as a ban on expression that is hateful in content and tone. Yet there is a perception that the scope of section 13 is broader than this – that it extends to offensive speech or speech that injures a group’s social standing. This perception stems from two things. First, it is encouraged by the language of section 13, which is open to a broader reading than that adopted by the courts and the CHRT, and by the general purpose and overall character of the *CHRA*. Because section 13 is located in a law that is broadly concerned with the advancement of social equality, it is always open to an interpretation that extends its application to more commonplace forms of discriminatory expression. Second, the CHRC investigative process contributes to this perception of section 13 because complaints that have little likelihood of succeeding at adjudication must nevertheless be accepted and even investigated by the CHRC. (I will examine the investigative process in part ii of this section of the report.)

In its current form section 13 provides as follows:

(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 person or those persons are identifiable on the basis of a prohibited ground of discrimination.[...]

The phrase “likely to expose a person or persons to hatred or contempt” is borrowed from the common law of defamation. Its inclusion in section 13 suggests that the section was intended to be a ban on group defamation. The courts and the CHRT, however, have interpreted the ban more narrowly. They assume that only extreme or hateful expression is likely to generate hate or contempt in the community. But it is difficult to prove the impact of expression on the attitudes and actions of its audience. And, as I argued above in section 3, a wide range of discriminatory representations may contribute to hateful attitudes and discriminatory actions in the community. Less extreme, more commonplace instances of discriminatory speech may provide the groundwork necessary for the spread of hateful attitudes and so might be caught by section 13 on an ordinary reading of its terms.

The language of section 13 should be amended to strengthen its focus on extreme expression. The reference to “contempt” should be dropped from the section and the term “hatred” should be linked to the threat, justification or advocacy of violence against the members of an identifiable group. The reference in section 13 to the likely impact of the expression should also be dropped. This component of the test suggests that communication should be restricted only when the spread of hatred (or the occurrence of violence) is a possible or likely consequence. But as noted earlier, the consequences of hate speech are unpredictable. As a

result, the phrase has been used in judicial and tribunal decisions simply to support an interpretation of section 13 that limits its scope to extreme expression. Speech that threatens, justifies or advocates violence against an identifiable group should be proscribed whether or not violence is an immediate or likely consequence. The section 13 test should focus on the content of the communication – on its extreme character. The threat, justification or advocacy of violence may be either explicit or implicit in the communication. Both the tone and content of the communication should be taken into account when determining whether it is sufficiently extreme to breach section 13.

(b) An Intention Requirement

Section 13 should also be amended to include an intention requirement. A requirement that the communicator intended to threaten, advocate or justify violent action against the members of an identifiable group, or recognized that her or his communication would reasonably be understood by its audience as threatening, advocating or justifying violence, would reinforce the section's focus on extreme expression. The relevant intention would relate to her/his conduct (i.e., his/her expression), and not to the possibility or likelihood that violence would result from her/his expression. Whether the individual intended to threaten, advocate or justify violence would be determined by examining her/his words – whether they are extreme in tone, whether they invoke established or historical practices of violence and whether they are characterized by certain of the “hallmarks of hate.” In all of the cases in which the CHRT has found a breach of section 13, the expression was so extreme that it is difficult to imagine that the inclusion of an intention requirement would have led to a different result. In many of these cases the call for violence was explicit.⁷¹ Intention, however, may be more difficult to prove in cases where the alleged hate speech is linked to the respondent's website or has been posted by a visitor to the site. It is possible in these cases that the respondent would not have full knowledge of the content of the material. However, if she/he is “wilfully blind” or “reckless” to the presence of this material, she/he ought to be liable under the section.

The activity banned by section 13 is very different from the other forms of discrimination covered by the *CHRA*. Despite the familiar claim that human rights codes are about harmful effects rather than wrongful intentions, the courts and the CHRT have not attempted to measure the effects of hate speech. In determining whether the communication at issue breaches section 13, the CHRT looks not at its actual impact but instead at the content and tone of the communication – its hateful or contemptuous character.⁷² It is difficult to describe the wrong to which section 13 is a response without referring to the meaning or intention of the communicator. Indeed, the language of intention frequently appears in the section 13 decisions of the CHRT. The communication is prohibited because it is intended to spread hatred and encourage violence and we are unwilling to take the risk that it might be effective.

An intention requirement may also be appropriate given the serious nature of the hate speech offence. It is often said that the *CHRA*, like other human rights codes, is not intended to punish wrongdoing. It is concerned instead with protecting individuals from discrimination or with compensating those who have been injured by acts of discrimination. It focuses on the effects of the action (communication) rather than the intention behind it. But while the courts

and the CHRT have interpreted the scope of the other forms of discrimination broadly to include “effects” or “constructive” discrimination, they have adopted a narrow reading of the scope of section 13 and limited it to expression that is hateful in character. The section may not be punitive in form, but a finding that it has been breached will be understood in the community as a declaration that the respondent is a hate-monger and, if the section is reformulated in the way I have proposed, an advocate of violence. Moreover, because a ban on hate speech has a significant impact on freedom of expression interests, it should apply only when the speaker understands the hateful nature of her or his communication.

(c) A Truth Defence

It has been argued that section 13 should also include a truth defence similar to that available to the charge of “wilful promotion of hatred” under the *Criminal Code*. The inclusion of such a defence would allow the respondent to argue that his or her communication, even if hateful, is true and so does not breach the section. The Cohen Committee thought it “necessary to provide the unqualified defence of truth in order adequately to protect all legitimate dialogue from legal restraints” since “there will almost always, if not always, be a public benefit to be derived from true statements about groups.”⁷³

When confronted with the argument that section 13 is unconstitutional because it does not provide a truth defence, Chief Justice Dickson in *Taylor* responded that “the *Charter* does not mandate an exception for truthful statements in the context of section 13(1).” In reaching this conclusion, he relied on a statement he had made in *Keegstra*:

In *Keegstra*, I dealt in considerable detail with hate propaganda and the defence of truth, though in relation to the criminal offence of wilfully promoting hatred against an identifiable group. It was not strictly necessary in that appeal to decide whether or not this defence was essential to the constitutional validity of the impugned criminal provision, but I nevertheless offered an opinion on the matter, stating [...]

The way in which I have defined the s. 319(2) offence, in the context of the objective sought by society and the value of the prohibited expression, gives me some doubt as to whether the *Charter* mandates that truthful statements communicated with an intention to promote hatred need be excepted from criminal condemnation. Truth may be used for widely disparate ends, and I find it difficult to accept that circumstances exist where factually accurate statements can be used for no other purpose than to stir up hatred against a racial or religious group. It would seem to follow that there is no reason why the individual who intentionally employs such statements to achieve harmful ends must under the *Charter* be protected from criminal censure. [Emphasis in original.]⁷⁴

His response, in effect, is that it is beside the point whether the claim is true, because it is intended to promote hatred – or, in the case of expression caught by section 13, it has the effect of spreading hatred.⁷⁵

I would offer a different response to the argument that section 13 should include a truth defence. In my view, a truth defence is not required because hate speech is necessarily untrue. Hate speech makes the claim that the members of an identifiable group share a dangerous or undesirable trait – that they are by nature violent or corrupt or dishonest – and must be stopped by violent means if necessary. Our commitment to equality entails a rejection of any view that the members of a racial or other identifiable group are inherently inferior or dangerous. The point is well-made by Mark Freiman:

Individuals may well be deserving of hatred and contempt, but that is based always on what they, as individuals, do. That's why defamation needs a defence of truth. If the allegations against an individual are in fact true, that individual may be deserving of hatred.[...] But hate propaganda assigns blame for real or imagined misdeeds, not to individuals but to one or more identifiable groups that individuals may belong to.⁷⁶

On its own the claim that six million did not die in the Holocaust is not hate speech. It is untrue and it is hurtful. What may be hateful, however, is the claim that often accompanies or underlies Holocaust denial – that the Holocaust was fabricated by the Jews as part of their “grand plan”.

The problem with adding a truth defence is not simply that it will be redundant. A truth defence will enable a respondent in a section 13 case to repeat her or his odious claims and make them the subject of legal contest. The focus of the case will shift to historical, sociological or psychological claims that are simply window dressing for more basic assertions about the dangerous or dishonest nature of the members of certain groups. While these claims will ultimately be repudiated by the tribunal, during the hearing they will be presented as debatable interpretations of events and actions.

(ii) The CHRC Complaint Process

The *CHRA* establishes a general framework for the processing and investigation of discrimination complaints, including section 13 complaints. This process is designed to engage the parties and encourage them to resolve their dispute without resort to adjudication before the CHRT. It is a process that reflects the *CHRA*'s general orientation towards education and reconciliation and its broad, effects-based conception of discrimination. It is, however, ill-suited to the processing of hate speech complaints. I will focus on two problems that arise with the current process.

First, under the current system the CHRC is bound to investigate any complaint that is not excluded as trivial, frivolous, vexatious or made in bad faith or otherwise falls outside the CHRC's jurisdiction. The investigation of a complaint that meets this relatively low threshold must be conducted in accordance with the principles of procedural fairness. This requires that the respondent be informed of the complaint made against her or him and given the opportunity to respond to it. The complainant must also be given the opportunity to reply to the respondent's submissions. Both the complainant and the respondent must again be

given the opportunity to comment on the investigator's report prior to any decision made by the CHRC. The investigation process is unavoidably time-consuming.⁷⁷ The problem with this is that complaints that have little likelihood of succeeding at the tribunal stage must nevertheless be investigated by the CHRC. Any time a hate speech complaint is investigated, the respondent's freedom of expression right is compromised, even if the complaint is dismissed by the CHRC at the end of the investigation process. In addition, the operation of section 13 may have what is sometimes called a "chilling effect" on freedom of expression. An individual may be reluctant to publish material that should not and probably would not be caught by section 13 because she or he fears becoming entangled in the section 13 process.⁷⁸

The second problem with the current system is the significant burden it places on the complainant. Hate speech is most often directed at a receptive, or at least interested, audience and is only known to the complainant because she or he has looked for it or stumbled across it. Moreover, hate speech necessarily targets a group rather than an individual. Even if in some cases a particular individual is referred to in the attack, she/he is used by the hate-monger simply to illustrate a claim that is being made about the entire group.⁷⁹ The complainant makes the section 13 complaint on behalf of the group or society in general. She/he may not even be a member of the group targeted by the speech but has simply taken the initiative to bring a complaint. It is not accidental, then, that particular individuals have played a leading role in the initiation of complaints. According to Andrea Slane, "those few individuals who have filed section 13 complaints and have gone through the process can be considered activists in the area of online hate, since a high degree of personal commitment is required to see a complaint through to its conclusion."⁸⁰ Without the initiative of these individuals, section 13 might have no operation at all. The complainant carries responsibility for the complaint throughout the process, at both the investigation and adjudication stages. While the CHRC has the legislative authority to initiate complaints under section 13, it has generally not acted on this. The CHRC is not required to appear at the CHRT adjudication, but may do so as representative of the public interest (and as noted in section 2 of this report, the CHRC has to this point appeared in all but one of the section 13 adjudications). In addition to the burden of time and money that a complainant must bear, particularly if the complaint proceeds to adjudication before the CHRT, a complainant may be subjected to threats of violence. Because the communication that is caught by section 13 is so extreme in character, the respondents in serious cases are themselves often extreme and irrational in their behaviour. It is not surprising then that some complainants have been subjected to death threats. We should not expect complainants to bear such a burden. Hate speech harms the group and the community. It is a public wrong. The state, not private citizens, should be responsible for the enforcement of the law.

I would recommend that the *CHRA* be amended so that the CHRC process for dealing with section 13 "complaints" would cease to be "complainant driven." An individual (or group) may bring to the attention of the CHRC a website or posting that she/he believes breaches section 13, but her/his role should end at that point. Once this information or allegation is received by the CHRC, responsibility for the investigation and assessment of the allegation, and, if the case is sent to the Tribunal for adjudication, carriage of the case,

should lie entirely with the CHRC, acting in the public interest. While the CHRC should consider carefully allegations that section 13 has been breached, it should have the power to dispose of a “complaint,” even one that is not excluded on the grounds that it is trivial, frivolous, vexatious or made in bad faith, without obtaining the input of (and exchange between) the parties, if it believes that the case is unlikely to succeed before the CHRT.

I should add that this modification of the CHRC’s role strengthens the argument that (at least in the case of section 13 complaints) the Commission should be designated as an investigative body under the *Privacy Act* and its regulations.⁸¹ The *Privacy Act* requires that federal departments and agencies respect the privacy rights of Canadians by limiting the disclosure of personal information. The Act also gives individuals the right to access information relating to them that has been collected by a government department or agency. However, under section 22 of the Act, an investigative body may refuse to disclose personal information gathered in the course of an investigation, without having to demonstrate that injury may result from the disclosure.⁸² If the CHRC were designated an investigative body, it would no longer be required to release personal information gathered during its investigation – at least in advance of a recommendation or determination – and would no longer be subjected to a delay technique employed by some respondents.⁸³

This transformation of the CHRC’s role in processing or investigating section 13 “complaints” would have two important advantages. First, it would allow the CHRC to deal more quickly with claims that do not appear to breach section 13 and are unlikely to succeed at the adjudicative stage. This in turn would reduce the negative impact of section 13, and the complaint process, on the freedom of expression interests of respondents and the general public. Second, this change in the process would reduce or remove the burden on private citizens and community organizations, who would no longer carry significant responsibility for the enforcement of section 13 and the removal of hate speech from the Internet. The principal disadvantage of this change would be to put greater demands on the CHRC and its limited resources.

I am not recommending that the CHRC play a greater role in monitoring hate speech on the Internet, since this would require a considerable increase in resources and would involve the CHRC in a police-like role that it is not designed to perform. The CHRC should instead take action on the basis of information provided by individuals and community organizations. The Commission would, of course, still have to confirm the information provided and gather additional information to determine whether there is a substantial case. Provided the process is well-publicized, the CHRC phone line or e-mail address would serve as a “tip line” – a place where individuals could pass on information about hate speech sites. At the moment the burden placed on complainants almost certainly has the effect of limiting the number of complaints made to the CHRC. If the role of the complainant were simply to inform the CHRC of a possible breach of section 13, and it then fell to the CHRC to investigate and assess the complaint, the number of investigated cases might rise significantly. The CHRC’s workload may also be greater because it would play a larger role in substantiating these “complaints” or claims. It is worth noting, however, that under the

current system, the CHRC already investigates all complaints that are not excluded under section 41 and either confirms or supplements the information presented by the complainant. Moreover, the CHRC, to this point, has appeared in all but one of the CHRT adjudications. If the CHRC were to become the “complainant” in every section 13 case that comes before the CHRT, then the case for some form of legal assistance to respondents would become stronger. The principal remedy for breach of section 13 should continue to be a cease and desist order. While an order of compensation may no longer be appropriate, the CHRT should continue to have the power to impose fines.

At present the complaint process relies heavily on the initiative of individuals and groups. The changes to the process I have proposed would put a greater burden on the CHRC. However, if hate speech on the Internet is so harmful that it ought to be banned, then we should be prepared to devote the resources needed to enforce its ban.

5. The Role of Non-State Actors in the Prevention of Hate Speech

An effective community response to the problem of hate speech must involve non-state actors and must include alternatives to censorship. However, the short time frame within which I have been asked to prepare this report has prevented me from exploring in any detail non-legal responses to hate speech on the Internet. In this section I will briefly outline two ways in which non-state actors may play a role in the fight against hate speech. I have not addressed education, even though I recognize that it must remain the most important defence against the spread of hatred.

(a) Internet Service Providers

Internet service providers, as common carriers, are exempted from the application of section 13.⁸⁴ Section 13(3) provides:

(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.

Most ISPs, however, require their subscribers to adhere to an acceptable use policy (AUP) that establishes standards for online behaviour. AUPs often provide that the ISP may take action, including termination of service, if a subscriber posts offensive or illegal content.⁸⁵ Nevertheless ISPs have often been reluctant to take action against hate sites hosted on their systems without a court or tribunal order. This is in sharp contrast to their response to child pornography, which the ISPs have been willing to remove at the request of the police, without any adjudicative decision.⁸⁶ The claim is made that child pornography is different because it is easier to identify than hate speech and because it is unlawful in Canada

not only to post child pornography on the web but also to access it. I suspect, however, that the ISPs are more willing to intervene in the case of child pornography because the public's revulsion to this material is so strong.

Unilateral action by a common carrier to censor material is not something to be encouraged (and, I should add, is not something in which ISPs wish to engage). At the same time, it seems regrettable that hate speech sites may remain in operation until a determination is made by either a court or a tribunal. Both the criminal and *CHRA* processes are onerous and time consuming. The problem of hate sites remaining active pending an adjudicative decision may be alleviated to some extent if the CHRC investigation process is expedited and if the CHRC routinely applies for an interim injunction against a site prior to adjudication by the CHRT.⁸⁷ Section 320.1 of the *Criminal Code*, which has so far been under-utilized, may also provide a way to shut down sites more quickly.

The challenge is to define a role for ISPs in the prevention of unlawful hate speech that enables them to take quick and effective action but does not put them in the position of making (or give them the power to make) discretionary censorship decisions. A possible solution to this dilemma is the establishment of an advisory body that, while created by the ISPs, operates at arm's length and gives its opinion as to whether a particular website or posting on a site hosted by an ISP breaches either section 13 of the *CHRA* or section 319(2) of the *Criminal Code*. This body might be composed of retired judges or lawyers with relevant knowledge and experience. When an ISP receives a complaint that does not appear to be frivolous, it would refer the complaint to this advisory body for its opinion. If the body finds that the complaint is well-founded, and that the site includes material that breaches either section 13 or section 319(2), the ISP would then shut down the site, based on its user agreement. This process will only be effective if the ISPs establish and publicize a joint complaint line. Initially the process should be confined to hate speech that is hosted by a Canadian ISP. The use of this process to block hate speech that originates outside Canada is an issue that should be studied once the process is in operation.⁸⁸

(b) Press Councils

Because hate speech laws focus on extreme speech, they leave untouched expression that employs stereotypes, or makes misleading or unfair claims, about the members of an identifiable group. This speech may be insulting and offensive to minority communities and may affect their position or treatment within the larger community. It may also provide the foundation for more extreme "hate speech," particularly when it appears in the mainstream media. The familiar refrain of those who oppose the censorship of hate speech or group defamation is that the answer to bad speech should be "more speech" – hate speech should be answered, not censored. But if we are serious about the "more speech" answer, then we must think about the real opportunities individuals and groups have to participate in public discourse and respond to speech that is unfair and discriminatory. I heard from several groups that they did not wish to censor speech of this kind. Instead what they wanted was an avenue for complaint, and an opportunity to respond, when unfair and discriminatory claims

were made, particularly in the mainstream media. Groups within the community should have a real opportunity to respond to expression that is not so extreme that it violates criminal or human rights laws but may nevertheless affect their position within the larger community.

To advance this end, all major print publications should belong to a provincial or regional press council that has the authority to receive a complaint that the publication has depicted an identifiable group in an unfair or discriminatory manner and, if it decides that the complaint is well-founded, to order the publication to print its decision.⁸⁹ A decision by the council that its code of conduct has been breached results not in censorship but in “more speech” – the publication of a statement that the newspaper breached the code and, more particularly in this context, that it published material that unfairly represented the members of an identifiable group.

If the major publications in the country are not all willing to join a press council, then the establishment of a national press council with statutory authority and compulsory membership should once again be given serious consideration. A newspaper is not simply a private participant in public discourse; it is an important part of the public sphere where discussion about the affairs of the community takes place. As such, it carries a responsibility not to defame or stereotype identifiable groups within the Canadian community.⁹⁰

6. Conclusion

I have taken the position in this report that the censorship of hate speech should be limited to speech that explicitly or implicitly threatens, justifies or advocates violence against the members of an identifiable group. However, the prohibition of this narrow category of extreme expression fits awkwardly in a human rights law that is concerned with the eradication of discrimination through education and conciliation. It is for this reason that my principal recommendation is that section 13 of the *CHRA* be repealed. The *Criminal Code* hate speech provisions, and in particular section 319(2) and section 320.1, offer an effective response to hate speech while respecting the public and constitutional commitment to freedom of expression. If section 13 is retained, however, I have proposed a series of amendments to the scope of the section, and the related complaint process, which are intended to make the hate speech ban fairer and more efficient. Censorship of expression that stereotypes or defames the members of an identifiable group is not a practical option and so we must, as a community, develop other ways to respond to this expression.

Endnotes

1. *Canadian Human Rights Act*, R.S., 1985, c.H-6.
2. *Criminal Code*, R.S., 1985, c.C-46.
3. *Broadcasting Distribution Regulations*, 1997 SOR/ 97-555. See also the *Radio Regulations*, 1986 SOR/ 86-982 section 3 and the *Television Broadcasting Regulations*, 1987 SOR/87-48 s. 5.
4. The power to impose a penalty was added in 1998. At the same time the compensation limit was increased from \$5,000 to \$20,000.
5. See below in part (d) of this section of the report for references to similar provisions in the provincial human rights codes.
6. A fine of \$5,000 was imposed on the Western Guard.
7. Part 1 of the *Constitution Act, 1982*; Schedule B of the *Canada Act, 1982* (UK), 1982, c.11.
8. *Canada v. Taylor*, [1990] 3 SCR 892. The Court divided on the issue 4/3 with Madame Justice McLachlin (as she then was) writing a dissenting judgment.
9. The CHRT, at the time of the writing of this report, in the case of *Warman v. Lemire* is considering whether section 13, because of recent amendments, is no longer compatible with the *Canadian Charter of Rights and Freedoms*.
10. *Citron v. Zundel*, TD 1/02 (2002).
11. *Citron v. Zundel supra* note 10 at para 85: “Whether a message is communicated aurally, by voice, or visually, by text, has no effect on its capacity to influence the listener, or humiliate the subject. Nor does the specific device used to effect the communication alter the harmful character of the message conveyed. A telephone handset is not uniquely effective in the communication of hate messages.”
12. *Nealy v. Johnston* (1985), 10 CHRR D/6450.
13. *Canada v. Taylor, supra* note 8. (The electronic version of the judgment does not include paragraph numbers.)
14. See also *Warman v. Kalbashian*, 2006 CHRT 11 at para. 59: “[T]he language of section 13 is clear, in that it is the effect of messages that has attracted the attention of Parliament. The question to be asked is not whether the conveyor of the message intended to communicate hate or contempt, but whether the message itself is likely to expose persons belonging to the identifiable groups to hatred or contempt.”
15. In taking this position I am disagreeing with Madame Justice McLachlin in *Taylor, supra* note 8: “For establishing the necessary balance between promoting harmony and dignity on the one hand, and safeguarding freedom of expression on the other, the process of this Act is exemplary. It is well designed to minimize many of the undesirable aspects of curbing free expression. This approach to curbing hate propaganda is far more appropriate than the all or nothing approach inherent in criminalization of such expression. Coupled with a more narrowly-drafted prohibition, it might well withstand constitutional scrutiny.”
16. *Warman v. Kouba*, 2006 CHRT 50.
17. *Warman v. Kouba, supra* note 16 at para. 82.

18. *Warman v. Kouba*, *supra* note 16 at para. 22.
19. Andrea Slane, “Hate Speech, Public Communication and Emerging Communications Technologies,” in *Canadian Issues: Hate on the Internet*, ACS, Spring 2006, at p. 119.
20. *Citron v. Zundel*, *supra* note 10 at para.115.
21. See for example *Warman v. Bahr*, 2006 CHRT 52 at para. 25: “the requirement of repetition in s. 13(1) suggests that the section is directed not at private communication, but rather at material intended for wider, public circulation.”
22. *Report to the Minister of Justice of the Special Committee on Hate Propaganda in Canada*, (Cohen Committee). Queen’s Printer, Ottawa, 1966.
23. *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 SCR 100.
24. Quoting *R. v. Keegstra*, [1990] 3 S.C.R. 697. (The electronic version of the judgment does not include paragraph numbers.)
25. *Mugesera v. Canada*, *supra* note 23 at para. 104.
26. *R. v. Buzzanga and Durocher* (1979), 49 C.C.C. (2d) 369 (Ont. C.A.) at pp. 384-85, cited with approval in *R. v. Keegstra*, *supra* note 24.
27. *Mugesera v. Canada*, *supra* note 23 at para. 104.
28. *R. v. Keegstra*, *supra* note 24.
29. Section 320(8) defines hate propaganda in the following way: “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.”
30. CERD, *Consideration of Reports, Comments and Information Submitted by State Parties under Article 9 of the Convention, Seventeenth and Eighteenth Periodic Reports of Canada*, 2008.
31. Andrea Slane, “Combatting Hate on the Internet: Current Canadian Efforts and the Recommendations of Non-Governmental Organizations to Improve on Them,” Working Paper for the Dept. of Justice Canada, Dec. 2007 at p. 44.
32. Saskatchewan under section 14 of the *Saskatchewan Human Rights Code*, R.S.S., 1979, c. S-24.1; Alberta under section 2 of the *Human Rights, Citizenship and Multiculturalism Act*, R.S.A., 2000, c. H-14; British Columbia under section 7 of the of the *Human Rights Code*, R.S.B.C., 1996, c. 210; Northwest Territories under section 13 of the *Consolidation of Human Rights Act*, R.S.N.W.T., 2002, c. 18.
33. See *Canadian Jewish Congress v. North Shore Press Ltd.*, [1997] BCHRTD No.23 and *Abrams v. North Shore Press*, [1999] BCHRTD No.5.
34. *Saskatchewan Human Rights Commission v. Bell* (1992), 88 D.L.R. (4th) 71. See also *Owens v. Sask. (HRC)*, [2006] S.J. No. 221 (Sask. C.A.) and in Alberta see *Kane (Re)*, [2001] A.J. No. 915 (Alta Q.B.).
35. *Ontario Racial Discrimination Act*, R.S.O., 1944, c.51.
36. See for example *Rasheed v. Bramhill* (1981), 2 CHRR D/249 (NS Bd of Inquiry).

37. Luke McNamara, “Negotiating the Contours of Unlawful Hate Speech: Regulation Under Provincial Human Rights Laws in Canada,” (2005) 38 UBC L. Rev. 1 at para. 12.

38. *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84 at para. 8.

39. *Robichaud v. Canada*, *supra* note 38 at para. 8. See also *Ont. Human Rights Comm. v. Simpsons-Sears*, [1985] 2 S.C.R. 536 at para. 12: “It is the result or the effect of the action complained of which is significant. If it does, in fact, cause discrimination; if its effect is to impose on one person or group of persons obligations, penalties, or restrictive conditions not imposed on other members of the community, it is discriminatory.”

40. R. Brian Howe and David Johnson, *Restraining Equality: Human Rights Commissions in Canada* (U of T Press: Toronto, 2000) at p. 44. And at p. 45: “Through the process of ‘truth finding’, commissions sought to bring the contending parties together not as adversaries but as interrelated actors who need to understand one another, in accordance with the principles enshrined in human rights legislation.”

41. *Warman v. Tremaine*, 2007 CHRT 2 at para. 107.

42. *Warman v. Winnicki*, 2006 CHRT 20 at para. 50.

43. McLachlin J. in *R. v. Keegstra*, *supra* note 24 at p. 806.

44. *Canada v. Taylor*, *supra* note 8.

45. *R. v. Keegstra*, *supra* note 24.

46. The judgment was described earlier in section 2 of this report.

47. Madame Justice McLachlin in her dissenting judgment in *Canada v. Taylor*, *supra* note 8 thought that the purpose of section 13 of *CHRA* was sufficient to justify a restriction on freedom of expression but that the scope of the ban was too broadly defined: “While the suppression of hate messages is an important and desirable objective, in my view s. 13(1) does not achieve that objective in a manner consistent with the proportionality test in *Oakes*. The broad and vague ambit of s. 13(1), unconditioned by any limitations of significance, has as its effect the unnecessary prohibition of a great deal of defensible speech and belies any suggestion of a serious effort to accommodate the important right of freedom of expression. Notwithstanding the sensitive and appropriate enforcement procedure established by the Act, the dimension of the overbreadth of the legislation is such that the tests established by this Court for the application of s. 1 cannot be met.”

48. The Cohen Committee *supra* note 22 at pp. 8-9.

49. The emphasis in the *Keegstra* judgment on risk rather than cause, and the “stimulation” or “circulation” of hateful feelings rather than the creation of hatred, suggests some recognition that expression does not cause harm in a simple and predictable way. The impact of expression is unpredictable and creates only a risk of harm because it depends on the reaction of audience members, who bring a wide range of attitudes and assumptions to their assessment of the claims made.

50. Andrea Slane, “Combating Hate on the Internet,” *supra* note 31 at p. 2.

51. Jane Bailey, “Private Regulation and Public Policy: Toward Effective Restriction of Internet Hate Propaganda”, (2004) 49 McGill L.J. 59 at para. 1.

52. See for example *Citron v. Zundel*, *supra* note 10 at para. 296.

53. *Citron v. Zundel*, *supra* note 10 at para. 300: “Any remedy awarded by this, or any Tribunal, will inevitably serve a number of purposes; prevention and elimination of discriminatory practises is only one of the outcomes

flowing from an Order issued as a consequence of these proceedings. There is also a significant symbolic value in the public denunciation of the actions that are the subject of this complaint. Similarly, there is the potential educative and ultimately larger preventative benefit that can be achieved by open discussion of the principles enunciated in this or any Tribunal decision.”

54. This is what occurred in the US case of *Collin v. Smith*, 587 F.2d 1197 (7th Cir. 1978). However, the court in that case struck down the by-law restricting the march, on the grounds that it breached the First Amendment right to free speech. Similarly, a burning cross planted in front of the home of the first black family to move into a previously all-white neighbourhood is experienced as threatening because it evokes the history of Klan violence against blacks. But see *RAV v. City of St Paul*, 505 US 377 (1992) and *Virginia v. Black*, 538 US 343 (2003).

55. J.S. Mill, *On Liberty*, (Penguin: London, 1982 [1859]) at p. 119: “[E]ven opinions lose their immunity when the circumstances in which they are expressed are such as to constitute their expression a positive instigation to some mischievous act. An opinion that corn dealers are starvers of the poor, or that private property is robbery, ought to be unmolested when simply circulated through the press, but may justly incur punishment when delivered orally to an excited mob assembled before the house of a corn dealer, or when handed about the same mob in the form of a placard.”

56. *Mugesera v. Canada*, *supra* note 23 at para. 106: “[T]he crime of incitement to hatred requires the trier of fact to consider the speech objectively but with regard for the circumstances in which the speech was given, the manner and tone used, and the persons to whom the message was addressed.”

57. *Brandenburg v. Ohio*, 395 US 444 (1969) at p. 447.

58. The Cohen Committee, *supra* note 22 at p. 63 writing about the law prior to the enactment of section 319 of the *Criminal Code* said: “the gap in the law today derives from the fact that it does not penalize the initiating party who *incites* to hatred and contempt with a likelihood of violence, whether or not intended, and whether or not violence takes place.”

59. A quick read through the decisions of the CHRT yields many examples of explicit calls for violence against identifiable groups. See for example *Warman v. Harrison*, 2006 CHRT 30 at para. 52: “I call on all my white brothers to rise up and kill non whites because god gave Canada to the white man” or “GOD says tot take your guns to jane and finch (nigger town) and open fire on the heathens. You will have 20 virgins waiting for you in the after life.” (sic)

60. The Cohen Committee, *supra* note 22 at p. 24. The obvious example being the rise of Nazism in Germany.

61. There may also be concern that the hate monger need only tone down his or her rhetoric to avoid running afoul of the law.

62. I note that while section 29B of the UK *Racial and Religious Hatred Act, 2006* prohibits an individual from making threats to stir up religious hatred, section 29J provides that: “Nothing in this Part shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or any other belief system or the beliefs or practices of its adherents, or proselytisation or urging adherents of a different religion or belief system to cease practicing their religion or belief system.”

63. Article 2 of the *Additional Protocol to the Convention on Cybercrime*, Council of Europe, Strasbourg, 28.I, 2003 protects from the advocacy, promotion, or incitement of hatred, discrimination or violence “any individual or group of individuals, based on race, colour, descent or national or ethnic origin, as well as religion if used as a pretext for any of these factors” [emphasis added].

64. 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.

65. In this I am disagreeing with Madame Justice McLachlin, who in *Taylor*, *supra* note 8 and 47 described the CHRA section 13 process as “sensitive and appropriate.”

66. The Cohen Committee, *supra* note 22 at p. 64.

67. Myron Claridge, “A Criminal Law Approach to Combating Hate,” in *Canadian Issues: Hate on the Internet*, ACS, Spring 2006 at p. 97.

68. Andrea Slane “Combatting Hate on the Internet,” *supra* note 31 at p. 44.

69. But see Craig S. MacMillan, Myron G. Claridge and Rick McKenna, *Criminal Proceedings as a Response to Hate: The British Columbia Experience*, (2002) 45 Crim. L.Q. 419 at p. 446 fn 53: “We recognize that the Attorney General has the authority to take over any prosecution in which consent is not a condition for instituting proceedings. However, given the challenges posed by technological developments relating to hate propaganda (eg the Internet) and the committed views held by some advocates in this area, not to mention the emotionally charged context in which these incidents can unfold, it is our view that the potential for unsustainable private informations being sworn and pursued is more of a concern here than it is in other areas of activity that are likely to result in private prosecutions.”

70. Andrea Slane, “Combatting Hate on the Internet,” *supra* note 31 at p. 6-7 discusses the BC unit:

The British Columbia Hate Crime Team (“BC Team”) not only has designated officers but also has a designated Crown counsel assigned to the BC Team. The BC Team as a whole is made up of representatives from the Ministry of the Attorney General and Minister Responsible for Multiculturalism, such as the Criminal Justice Branch, Settlement and Multiculturalism Branch, Ministry of Public Safety, Solicitor General (represented by the Police Services Branch), as well as the RCMP and municipal police forces.

The BC Team has strong community connections. These connections both derive from its partner in the Multiculturalism Branch of the provincial government and from the mandate carried out by its full time officers during the first few years of its existence, which mainly involved community liaison and training of other law enforcement officers in how to deal with hate crime. Police officers assigned to the BC Team now also investigate and assist in investigations of hate crimes, including Internet-based hate ... The BC Team is known throughout the province as a resource for law enforcement, offering both training in hate crime investigation and prosecution, offering assistance in investigations, or conducting investigations directly, and offering the services of the designated Crown Counsel. ... The BC Team also runs a telephone hotline through which to report hate crime in the province, or to receive information or referrals...

See also Myron Claridge, “A Criminal Law Approach to Combating Hate,” *supra* note 67 at p. 93.

71. Monette Maillet, “Hate Message Complaints and Human Rights Tribunal Hearings,” in *Canadian Issues: Hate on the Internet*, ACS, Spring 2006 at p. 81: “Most complaints filed with the Commission deal with alleged discrimination in employment, and often involve situations where acts of discrimination by the employer were unintended. In hate message hearings, by contrast, the communication of discriminatory messages has been deliberate: respondents hold deep-rooted beliefs of racial and/or religious superiority and blame historically disadvantaged groups for a range of social problems. These factors make for a very highly charged and emotional hearing when all parties are present.”

72. *Warman v. Tremaine*, *supra* note 41 at para. 114: “the most persuasive evidence” of the likelihood of exposure to harm is the language used in the messages; and at para. 110: section 13 applies in cases “where there is no proven or provable actual discriminatory effect”. See also *Warman v. Bahr*, *supra* note 21 at para. 28: “it is not necessary for the complainant to lead evidence that a person was actually moved to hatred or contempt by the communication of the material.”

73. The Cohen Committee, *supra* note 22 at p. 65.

74. *Canada v. Taylor*, *supra* note 8.

75. There is an obvious problem in applying this reasoning to section 13, which does not have an intention requirement.

76. Mark Freiman, "Litigating Hate on the Internet," in *Canadian Issues: Hate on the Internet*, Association for Canadian Studies, Spring 2006 at p. 70.

77. Delay is sometimes also due to the difficulty in determining or confirming the identity of the person responsible for the website or posting.

78. With that said, it appears that some respondents have welcomed the publicity resulting from the complaints made against them.

79. Andrea Slane, "Combating Hate on the Internet," *supra* note 31 at p. 38, "[Among the groups consulted] [t]he general feeling is that individual complainants make sense for the other forms of discrimination which are personal in nature, but does not make sense in relation to hate propaganda in which individuals are not specifically targeted." See also Luke McNamara, *Regulating Racism: Racial Vilification Law in Australia*, (Sydney Institute of Criminology: Sydney, 2002) at pp. 56-7: "... whereas in discrimination cases there is commonly some sort of existing, and more or less direct, relationship between the parties (for example, employer/employee, service provider/customer) in the context in which discrimination occurs, there is frequently no such relationship in vilification cases; indeed, the parties are often total strangers and the respondent's conduct is, in the majority of cases, not directed personally at the complainant, but at an ethnic or racial group to which the complainant belongs."

80. Andrea Slane, "Combating Hate on the Internet," *supra* note 31 at p.18.

81. *Privacy Act*, R.S., 1985, c.P-21.

82. *Privacy Act*, s. 22(1) "The head of a government institution may refuse to disclose any personal information requested under subsection 12(1) (a) that was obtained or prepared by any government institution, or part of any government institution, that is an investigative body specified in the regulations in the course of lawful investigations pertaining to ... (ii) the enforcement of any law of Canada or a province ... if the information came into existence less than twenty years prior to the request; (b) the disclosure of which could reasonably be expected to be injurious to the enforcement of any law of Canada or a province or the conduct of lawful investigations, including, without restricting the generality of the foregoing, any such information (I) relating to the existence or nature of a particular investigation, (ii) that would reveal the identity of a confidential source of information, or (iii) that was obtained or prepared in the course of an investigation"

83. It has also been suggested that ISPs might be more willing to share information concerning the identity of hate site operators if this information could not be accessed by members of the public. However, it seems likely that the ISPs would continue to insist on a court order before releasing such information.

84. But see *Warman v. Kalbashian*, *supra* note 14 in which the CHRT held that a small ISP breached section 13 because it specialized in providing space for hate sites and was not simply a conduit.

85. For a discussion of these policies see Jane Bailey, "Private Regulation and Public Policy," *supra* note 51 at para. 49.

86. This is known as Project Cleanfeed, which involves a tips-line, cybertip.ca, operated by the Canadian Centre for Child Protection.

87. See for example *CHRC v. Winnicki*, [2005] F.C. 1493, in which the CHRC applied for and obtained an

interlocutory injunction ordering an ISP to remove material hosted by it in advance of the CHRT hearing on the merits of the case.

88. Section 36 of the *Telecommunications Act*, 1993 c.38 provides that “Except where the Commission [the CRTC] approves otherwise, a Canadian carrier should not control the content or influence the meaning or purpose of telecommunications carried by it for the public.” Andrea Slane, “Combating Hate on the Internet,” *supra* note 31 at p. 9 notes that this section “has been interpreted by the large ISPs who are carriers to be a bar to their voluntary blocking or otherwise interfering with the content not hosted on their facilities, unless explicitly approved by the Canadian Radio-Television and telecommunications Commission (CRTC) or compelled by court order.” This, of course, has not precluded the ISPs from blocking child pornography under Project Cleanfeed.

89. See note 3 for the legislative standards applied to broadcasters.

90. I have not explored the possibility of a right of reply in this report – but would not rule it out. I would note, however, that it is difficult to define the parameters of such a right, particularly in the case of group defamation, which affects the members of the group rather than a particular individual.