



Women's Legal
Education and
Action Fund | Fonds d'action et
d'éducation juridiques
pour les femmes

SUBMISSION OF LEAF

**TO THE HOUSE OF COMMONS STANDING COMMITTEE
ON JUSTICE AND HUMAN RIGHTS**

**ON THE COMMITTEE'S REVIEW OF
S.13 OF THE *CANADIAN HUMAN RIGHTS ACT***

DECEMBER 18, 2009

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I. Introduction

The Women's Legal Education and Action Fund (LEAF) makes the following submission to the House of Commons Standing Committee on Justice and Human Rights (the "Committee") in support of the important equality protection contained in section 13 of the *Canadian Human Rights Act* (the "*CHRA*").¹ The targets of hate speech are often the most vulnerable and marginalized groups in society. The purpose and effect of section 13 of the *CHRA* protects the equality rights of those affected by hate speech and ensures their freedom of expression and full participation in Canadian society. The protections and remedies available to groups vulnerable to discriminatory hate speech are not found anywhere else in our legal system. The harm caused by hate speech affects the very fabric of our society. It is incumbent on us, as Canadians, particularly as we value equality, to ensure that we maintain the protections provided by section 13 of the *CHRA*.

LEAF's submission is that the prohibition of extreme hate speech under the *CHRA* is an important component of human rights protections in Canada and is consistent with sections 2(b), 7, 15, 25, 27 and 28 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*"), as well as Canada's obligations under international law. The harms of hate speech to marginalized and excluded groups, and to Canadian society overall, are significant. The limitation on speech under the *CHRA* is minimal.

LEAF urges the Committee in its report on section 13 of the *CHRA* to recognize the important role played by human rights protections in limiting and redressing hate speech,

¹ R.S.C. 1985, c. H-6

in protecting and promoting the equality rights of targeted groups, and, more broadly, in promoting a tolerant and diverse society which is respectful of human rights. The human rights framework offers access to justice for vulnerable groups subject to extreme hate speech and can respond to such claims constructively and creatively, particularly through education and non-punitive remedial measures.

II. LEAF's expertise

LEAF is a national not-for-profit organization dedicated to promoting substantive equality for women through legal action, research and public education. Central to LEAF's commitment to substantive equality is addressing the inequalities suffered by women who experience discrimination on multiple and intersecting grounds, such as on the basis of Aboriginal identity, poverty, disability, race, sexual orientation and religion. LEAF has intervened in over 150 cases on substantive equality since it was founded in 1985 and is a leading expert in the inequality and discrimination experienced by women in Canada. LEAF has intervened in numerous cases to advance the argument that claims of freedom of expression must be interpreted and understood from the equality rights perspective of victims of hate and other forms of discriminatory speech. As an intervener before the Supreme Court of Canada in *R. v. Keegstra*, [1990] 3 S.C.R. 697, [1990] S.C.J. No. 131 ("*Keegstra*") and *Canada (Canadian Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892, [1990] S.C.J. No. 129 ("*Taylor*"), LEAF argued that challenges to the regulation of hate speech engage constitutional equality rights as much as freedom of expression, since the willful promotion of group hatred constitutes a practice of inequality which fundamentally erodes the equality rights of members of the targeted group. LEAF has also made submissions on the role of equality and other *Charter* rights in interpreting and limiting freedom of expression in its interventions in: *Kane v. Alberta Report*, 2001 ABQB 570 ("*Re Kane*"), *Kane v. Church of Jesus Christ Christian-Aryan Nations*, (1992), 18 C.H.R.R. D/268 (Alta. Bd. of Inq.), 1992 CarswellAlta 928 ("*Aryan Nations*"), *R. v. Lewis*, 1996 Canlii 3559 (BCSC), *R. v. Spratt*; *R. v. Watson*, 2008 BCCA 340 (Canlii).

III. The context of inequality: the harms caused by hate speech

Hate messages cause harm to the individuals within vulnerable groups and to society at large. As stated by one of the leading writers on this issue, "The negative effects of hate messages are real and immediate for the victim."² This has been recognized by the Supreme Court of Canada in its foundational judgments dealing with hate speech.³ As noted by the Court, the derision, hostility and abuse encouraged by hate speech have a profound negative effect on the individual's sense of self-worth, dignity and acceptance.

² M.J. Matsuda, "Outsider Jurisprudence: Toward a Victim's Analysis of Hate Messages," in M.H. Freedman and E.M. Freedman, eds., *Group Defamation and Freedom of Speech* (Westport, Conn.: Greenwood Press, 1995), 87-120, page 91

³ *Keegstra*, *supra* paras. 61-63, 286; *Taylor*, *supra* paras. 40-41

Hate speech is linked to depression, fear and withdrawal from society.⁴ It constitutes a symbolic form of violence and reinforces, to the target group and the larger society, the outsider and minority status of the targeted group.⁵ The Supreme Court has also recognized that hate propaganda may produce an increase in acts of discrimination and incidents of violence.⁶ The harms of hate speech reach into the life chances and economic prospects for persons in the target groups.⁷

A second harmful effect noted by the Supreme Court is on society at large.⁸ Hate speech foments discord between cultural groups. At some level, it plants the idea that inferiority of racial or other protected groups may hold some truth.⁹ And, as stated by Chief Justice Dickson:¹⁰

Such consequences bear heavily in a nation that prides itself on tolerance and the fostering of human dignity through, among other things, respect for the many racial, religious and cultural groups in our society.

Hate speech also has a profound effect on the expression of target group members. Experts at the Board of Inquiry hearing under Alberta's human rights legislation in the *Aryan Nations* case¹¹ testified that hate messages silence the targeted people. The Supreme Court of Canada in its unanimous judgment in *Ross* recognized that the expression of the targeted group is chilled by hate speech.¹² Hate propaganda deprives members of the target group from fearless and open participation in society.¹³ Concern about freedom of expression must take into account the effect of hate speech on the expression of those who are targeted and marginalized.

IV. The reach of hate speech: the proliferation of hate speech on the Internet

LEAF submits that the Committee should give significant weight and consideration to the harms of hate speech, particularly having regard to the increasing prevalence of hate

⁴ R. Delgado and J. Stefancic, *Understanding Words that Wound* (Boulder: Westview Press, 2004), page 13-15

⁵ E. Faulkner, "Homophobic Hate Propaganda in Canada" (2006/07) *Journal of Hate Studies*, Vol. 5:63, 63-97, page 81, <http://guweb2.gonzaga.edu/againsthate/journal5/GHS107.pdf>

⁶ *Taylor*, *supra* para. 40. The increased risk of exposure to violence also engages the s.7 Charter rights of targeted groups.

⁷ R. Delgado and J. Stefancic, *Understanding Words that Wound*, *supra* page 15

⁸ *Keegstra*, *supra* para. 62

⁹ M.J. Matsuda, "Outsider Jurisprudence," *supra* page 91

¹⁰ *Keegstra*, *supra* para. 61

¹¹ *Aryan Nations*, *supra* para. 230

¹² *Ross v. New Brunswick School District No. 15*, 1996] 1 S.C.R. 825, [1996] S.C.J. No. 40, para. 91; see also N.K.S. Banks, "Could Mom be Wrong? The Hurt of Names and Words: Hate Propaganda and Freedom of Expression," (1999), 6 *MurUEJL* No. 2, <http://www.murdoch.edu.au/elaw/issues/v6n2/banks62nf.html>, para. 83

¹³ O.M. Fiss, *The Irony of Free Speech* (Cambridge: Harvard University Press, 1996), pages 16-18

speech through telecommunications and the Internet, where hate speech can be instantaneously disseminated to a potentially mass audience.

This increasing prevalence of hate propaganda was identified by the House of Commons Special Committee on Participation of Visible Minorities in Canadian Society 25 years ago in its 1984 report, entitled *Equality Now!*.¹⁴ The Internet has provided a platform for facilitating an even further increase. As described by the Canadian Human Rights Commission in its Special Report to Parliament, *Freedom of Expression and Freedom from Hate in the Internet Age* (“CHRC Special Report”).¹⁵

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

The Internet has become a popular forum among hate groups because of its ease, effectiveness, low cost, wide reach, and anonymity for the speaker.¹⁶

Hate speech on the Internet can be addressed only through the federal human rights legislation, since it is a federal matter. Section 13 of the *CHRA* is therefore an important educational and remedial method to address the harm carried out through this medium.

V. Prohibiting hate speech promotes equality, consistent with sections 15, 25, 27 and 28 of the Charter

Equality is a fundamentally important principle of Canadian law. A commitment to social justice and equality has been recognized as an underlying value of Canadian society, along with “respect for the inherent dignity of the human person, ... accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.”¹⁷ As noted by Chief Justice Beverly McLachlin, “respect for the inherent dignity and equality of human beings, tolerance of difference, and democratic freedoms are part of the social fabric of Canada, a shared identity within which we transcend our conflicting

¹⁴ *Keegstra*, *supra* para. 59

¹⁵ June 2009, http://www.chrc-ccdp.ca/pdf/srp_rsp_eng.pdf, page 30

¹⁶ R. Delgado and J. Stefancic, *Words that Wound*, *supra* page 125, referring to E. Phillips Marsh, “Purveyors of Hate on the Internet: Are We Ready for Hate Spam?” (2000) 17 Ga. St. U. L. Rev. 379, 387. See also, D. Matas, *Bloody Words: Hate and Free Speech* (Winnipeg: Bain & Cox, Publishers, 2000), page 149

¹⁷ *R. v. Oakes*, [1986] 1 S.C.R. 103 at 136

identities.”¹⁸ Put another way, equality is a foundational principle of Canadian law, “grounded in the belief that each member of society has equal moral worth”.¹⁹

Equality rights and values are recognized and protected in several sections of the *Charter*. Section 15 explicitly guarantees equality rights, and is intended “to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.”²⁰ As stated in *Vriend*, “in order to achieve equality the intrinsic worthiness and importance of every individual must be recognized regardless of the age, sex, colour, origins, or other characteristics of the person.”²¹ Further, “so soon as we say any enumerated or analogous group is less deserving and unworthy of equal protection and benefit of the law *all minorities and all of Canadian society* are demeaned.”²²

Equality rights are also recognized in sections 25, 27, 28 of the *Charter*, which ensure that other *Charter* rights and freedoms, such as freedom of expression, must be interpreted consistently with protections of Aboriginal rights, diversity and multiculturalism, and gender equality. In this sense, constitutional rights are relational. Individuals’ protected scope of freedom of expression must be interpreted in light of the harms that it might cause to vulnerable groups, and to Canadian society as a whole.²³ As discussed above, the harms of discrimination and inequality include prejudice, stereotyping, vulnerability, powerlessness, oppression, stigmatization, marginalization, devaluation, disadvantage, impacts on health and well being of targeted individuals, and risk of exposure to physical violence.²⁴

Restrictions on hate speech seek to protect the equality interests of vulnerable groups from these kinds of harms.²⁵ As Peter Hogg argues, the purpose of a ban on hate speech “is to promote the value of equality, because the effect of hate propaganda is to reinforce the malign attitudes towards minorities that are important barriers to the achievement of equality”.²⁶ This equality promoting purpose has been upheld as a pressing and substantial basis for limiting hate speech in cases such as *Keegstra*,²⁷ *Taylor*,²⁸ and *Ross*.²⁹

¹⁸ Remarks of the Right Honourable Beverley McLachlin, P.C., “Globalization, Identity and Citizenship” (October 26, 2004), available on-line: <http://www.scc-csc.gc.ca/court-cour/ju/spe-dis/bm04-10-26-eng.asp>

¹⁹ Patricia Hughes, “Recognizing Substantive Equality as a Foundational Constitutional Principle” (1999) 22 *Dalhousie L.J.* 5

²⁰ *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 at 529

²¹ *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at para. 67

²² *Vriend*, *ibid.* at para. 69 (emphasis added)

²³ Colleen Sheppard, “Constitutional Recognition of Diversity in Canada” (2006) 30 *Vt. L. Rev.* 463;

Jennifer Nedelsky, “Reconceiving Rights as Relationships” (1993) 1 *Review of Constitutional Studies* 1

²⁴ *Law*, *supra* at paras. 29, 42, 44, 47, 53, as consolidated in *Women’s Legal Education and Action Fund, Intervener Factum in Newfoundland (Treasury Board) v. NAPE* at para. 17, available on-line: <http://www.leaf.ca/legal/facta/2004-newfoundland.pdf#target>

²⁵ The particular harms of hate speech will be addressed in the next section.

²⁶ Peter Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 2009) at 1006

²⁷ *Keegstra*, *supra*

²⁸ *Taylor*, *supra*

²⁹ *Ross*, *supra*

The equality based rationale of section 13(1) of the *CHRA* was recognized by the Canadian Human Rights Commission in its *Special Report to Parliament*.³⁰ Section 13 protects against the discriminatory harms of hate speech, and should be maintained as an important and concrete means of promoting the equality rights of the groups protected under the section.

VI. The CHRA's prohibition of hate speech is consistent with Canada's international human rights obligations

In *Taylor*, the Supreme Court recognized that “a meaningful consideration of the principles central to a free and democratic society requires reference to the international community's acceptance of the need to protect minority groups from the intolerance and psychological pain” caused by hate speech.³¹ This recognition of international norms is also noted in the Canadian Human Rights Commission's *Special Report to Parliament*. As stated by the Commission, “[i]nternational human rights instruments carefully protect freedom of expression but also provide limits on the most extreme forms of speech.”³²

Canada is a signatory to several relevant international conventions that require state parties to prohibit hate speech. The *International Covenant on Civil and Political Rights (ICCPR)*, ratified by Canada in 1976, provides in Article 20(2) that “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”³³ Similarly, the *International Convention on the Elimination of All Forms of Racial Discrimination*, ratified by Canada in 1981, provides in Article 4 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.”³⁴ In *Keegstra*, Chief Justice Dickson recognized these documents as reflective of “the international commitment to eradicate hate propaganda.”³⁵ International law recognizes that measures against hate speech may take different forms.

Canada's human rights laws around hate speech have been considered at the international level. In *Taylor and Western Guard Party v. Canada*, the U.N. Human Rights Committee found that section 13 of the *Canadian Human Rights Act* did not violate the guarantee of freedom of expression in the *ICCPR*. Rather, “... the opinions which Mr. [Taylor] seeks to

³⁰ *CHRC Special Report to Parliament, supra* at 8

³¹ *Taylor, supra* at 916. See also *Keegstra, supra* at 749

³² Canadian Human Rights Commission, *Special Report to Parliament, supra* at 9

³³ *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171 (1966)

³⁴ *International Convention on the Elimination of All Forms of Racial Discrimination*, Can. T.S. 1970 No.

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³⁵ *Keegstra, supra* at 758

disseminate ... clearly constitute the advocacy of racial or religious hatred which Canada has an obligation under article 20(2) of the Covenant to prohibit.”³⁶

Other international instruments also demonstrate that the commitment of the international community to eradicate discrimination extends to the prohibition of discriminatory speech based on racial or religious superiority. For example, the *European Convention for the Protection of Human Rights and Fundamental Freedoms*³⁷ “has been interpreted by the European Commission of Human Rights so as to permit the prohibition of racist communications as a valid derogation from the protection of free expression.”³⁸ While not binding on Canada, these decisions are “of aid in illustrating the tenor of the international community's approach to hate propaganda and free expression.”³⁹

These international instruments and decisions support the argument that provisions dealing with hate speech such as those found in section 13(1) of the *Canadian Human Rights Act* are not only justified but are necessary in a free and democratic society.

VII. The Criminal Code is not enough: the importance of human rights legislation in prohibiting hate speech

Human rights legislation exists to ensure respect for the inherent dignity of all people in Canada. It does so by protecting Canadians against discrimination⁴⁰. Canada has honoured its commitments at international law by enacting human rights legislation in every province and territory as well as at the federal level. This means that persons who have been discriminated against in Canada either by other persons, employers, corporations or the government have a process available to them for filing human rights complaints and having those complaints heard before administrative tribunals.

Those who file human rights complaints are often the most vulnerable members of our society. As stated by Justice Sopinka, Supreme Court of Canada, “It [human rights legislation] is often the final refuge of the disadvantaged and the disenfranchised. As the last protection of the most vulnerable members of society, exceptions to such legislation should be narrowly construed.”⁴¹

To recognize the importance of such legislation, and in doing so, to confirm the fundamental value Canadians have for the dignity, worth and equal rights of all persons,

³⁶ Communication No. 104/1981, Report of the Human Rights Committee, 38 U.N. GAOR, Supp. No. 40 (A/38/40) 231 (1983) at para. 8(b), as cited in *Keegstra, supra* at 752-3

³⁷ 213 U.N.T.S. 221 (1950)

³⁸ *Keegstra, supra* at 753

³⁹ *Ibid.* at 754

⁴⁰ “The Code aims at the removal of discrimination. This is to state the obvious. Its main approach, however, is not to punish the discriminator, but rather to provide relief for the victims of discrimination. It is the result or the effect of the action complained of which is significant.” *Ontario (Human Rights Commission) and Teresa O’Malley v. Simpson-Sears Ltd.*, [1985] 2 S.C.R. 536

⁴¹ *Zurich Insurance Co. v. Ontario (Human Rights Commission)*, [1992] 2 S.C.R. 321

the Supreme Court of Canada has deemed human rights legislation to be quasi-constitutional. This means that it supersedes all other laws when conflict arises. The Court has stated:

When the subject matter of a law is said to be the comprehensive statement of the ‘human rights’ of the people living in that jurisdiction, then there is no doubt...that the people of that jurisdiction have through their legislature clearly indicated that they consider that law, and the values it endeavours to buttress and protect, are, save their constitutional laws, more important than all others.⁴²

By enacting human rights legislation, therefore, our government not only provides protection for those who are discriminated against, but also promotes the importance of equality for all. As is stated in section 2 of the *CHRA*, “The purpose of this Act is to give effect to the principle that every individual should have the right equal with others to make for themselves the lives that they are able and wish to have – free from discrimination.” In this way, by its very existence, the legislation sends the message to Canadians about what discrimination is and what values it protects. Canadians know that, for example, speech and other forms of expression such as hate propaganda which discriminate against them are not allowed. They can feel safe knowing human rights legislation in Canada prohibits expression that makes their equality impossible.

Opponents of the regulation of hate speech under human rights statutes often note that the *Criminal Code* also offers some protection to Canadians from hate propaganda. While the protections provided to Canadians through the *Criminal Code* are essential, there are significant differences in purpose between the protections provided by human rights legislation and those provided by the *Criminal Code*.

1. **Scope of protection:** The *Criminal Code* prohibits the wilful promotion of hatred against an “identifiable group.”⁴³ The identifiable group includes members of the public distinguished by colour, race, religion, ethnic origin or sexual orientation. The grounds protected in human rights codes are broader and include sex, disability, age, ancestry, marital status, family status and in some jurisdictions, gender identity and source of income.
2. **Focus on intent:** The focus of the *Criminal Code* is on punishing those who have knowingly committed illegal acts against the state. With respect to hate crimes, the *Code* requires intent by the accused. In human rights legislation, intent is not a requirement. The focus is on the **effects** of the expression on the complainant. Discrimination can be found whether the expression was intentional or not.
3. **Access to justice:** The *Criminal Code* describes the acts Canadians have deemed to be illegal as against the state. Charges of illegal behaviour must be laid by

⁴² *Insurance corporation of British Columbia v. Heerspink*, [1982] 2 S.C.R. 145

⁴³ S. 319(2) Criminal Code of Canada. The Code defines ‘identifiable group’ as “any section of the public distinguished by colour, race, religion, ethnic origin or sexual orientation.” R.S.C, 1985, c. C-46, s. 318, 2004, c. 14, s.1. Note that the grounds protected in human rights legislation include sex.

police officers or crown prosecutors and subsequent trials involve the use of strict evidentiary rules aimed at determining guilt. Human rights legislation describes acts against people and groups. Individuals can file complaints if they believe they have been discriminated against – they are not required to have an intermediary agent of the state determine whether complaints are legitimate. Human rights legislation therefore provides an important access to justice for vulnerable individuals and groups, who can initiate the protective mechanisms of the legislation without depending on the determination of the Attorney General. For victims of discriminatory hate speech, there are other important ways in which the human rights regime is more accessible. Complaints are filed with an expert human rights body structured to be welcoming and sensitive to the needs of protected groups. Under the *Criminal Code*, victims are required to contact the police and lay an information (a foreign and often alienating process which many Canadians are unaware is even available to them).

4. **Focus on punishment versus remediation:** In a criminal matter, the victim of an offence is not always heard from and does not receive compensation. The purpose of human rights legislation is educational and remedial: the aim is to educate the discriminator about the impact and deleterious effects of discrimination and to put the complainant back into the position she or he would have been in had the discriminatory act not occurred. Because of this, the scope of remedial measures available in human rights schemes is broad and allows for careful crafting – remedies can be designed to suit the particular facts of a case. For example, remedies can include cease and desist orders, financial compensation, training programs for respondents and apologies which are all the more important given the vulnerability and social situation of many complainants.⁴⁴ Failure to provide appropriate remedies to those who suffer from harm caused by hate speech can compound the harm and the effects of the discrimination.

As stated by Chief Justice Dickson in the *Taylor* case:

...the *Canadian Human Rights Act* is very different from the *Criminal Code*. The aim of human rights legislation, and of s. 13(1), is not to bring the full force of the state's power against a blameworthy individual for the purpose of imposing punishment. Instead, provisions found in human rights statutes generally operate in a less confrontational manner, allowing for a conciliatory settlement if possible and, where discrimination exists, gearing remedial responses more towards compensating the victim.⁴⁵

and further:

⁴⁴ “The legislative emphasis on prevention and elimination of undesirable conditions, rather than on fault, moral responsibility and punishment, argues for making the Act’s carefully crafted remedies effective.” *Robichaud v. Canada*, [1987] 2 S.C.R. 84

⁴⁵ *Taylor, supra*. See also *Keegstra, supra*

The process of hearing a complaint made under s. 13(1) and, if the complaint is substantiated, issuing a cease and desist order reminds Canadians of our fundamental commitment to equality of opportunity and the eradication of racial and religious intolerance. In addition, although criminal law is not devoid of impact upon the rehabilitation of offenders, the conciliatory nature of the human rights procedure and the absence of criminal sanctions make s. 13(1) especially well suited to encourage reform of the communicator of hate propaganda. While recognizing that discrimination weakens the fabric of our society, s. 13(1) itself is aimed at redressing the harm caused by discriminatory expressive acts against complainants.

Section 13 of the *CHRA* exists to protect vulnerable Canadians against hate speech that makes their equality impossible. It operates within a human rights framework that recognizes the importance of education and compensation – both essential elements for a society that respects the inherent dignity of its people.

VIII. The limitation on speech is narrow.

The expression limited by section 13 of the *CHRA* is narrowly defined. It is expression that is extreme and is directed at groups protected by human rights legislation. The extensive jurisprudence from the Supreme Court and from several human rights tribunals has defined the type of speech encompassed by the protection very carefully and very restrictively, so that the sections apply only to ardent and extreme messages against a protected group. The interpretation and application of this section of the *CHRA* and related sections in provincial human rights legislation ensure that both equality and expression rights under the *Charter* are respected.⁴⁶

The Supreme Court majority in *Taylor* adopted definitions of “hatred” and “contempt” involving extreme ill-will allowing for no redeeming qualities.⁴⁷ The Court of Queen’s Bench of Alberta in *Re Kane*, set out a detailed and careful methodology for the objective determination of whether the message was likely to expose the protected group to hatred or contempt. Justice Rooke set out a list of factors for consideration, summarizing them as involving consideration of:⁴⁸

- the message – content, tone, images conveyed, reinforcement of stereotypes, surrounding circumstances;
- the medium – credibility, circulation, context of the publication; and
- the audience – vulnerability of target group.

⁴⁶ *Taylor, supra; Re Kane, supra; Canadian Jewish Congress v. North Shore Free Press Ltd. (c.o.b. North Shore News)*, 1997] B.C.H.R.T.D. No. 23 (Iyer)

⁴⁷ *Taylor, supra* paras. 60-62

⁴⁸ *Re Kane, supra* para. 130

The Canadian Human Rights Tribunal has identified a list of hallmarks of hatred and contempt by which to analyze whether the message crosses the line.⁴⁹ They include:

- The "Powerful Menace" Hallmark: 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.
- The "Predator" Hallmark: the targeted group is portrayed as preying upon children, the aged, the vulnerable, etc.
- The "No Redeeming Qualities" Hallmark: the messages convey the idea that members of the targeted group are devoid of any redeeming qualities and are innately evil.
- The "Inflammatory Language" Hallmark: highly inflammatory and derogatory language is used in the messages to create a tone of extreme hatred and contempt.
- The "Call to Violent Action" Hallmark: calls to take violent action against the targeted group.

Accordingly, section 13 of the *CHRA* is intended to limit expression which is extreme in nature and which targets a protected group.⁵⁰

Hate speech is far from the core values in freedom of expression, as held in *Keegstra* and *Taylor*.⁵¹ Chief Justice Dickson said in *Keegstra*: “hate propaganda contributes little to the aspirations of Canadians or Canada in either the quest for truth, the promotion of individual self-development or the protection and fostering of a vibrant democracy where the participation of all individuals is accepted and encouraged.”

The protection afforded by section 13 of the *CHRA* is deeply rooted in equality concerns, and relates to expression that is far from the core values involved in freedom of expression.

IX. Affirming the importance of human rights protections: the “marketplace of ideas” will not protect the equality rights of targeted groups

⁴⁹ *Warman v. Northern Alliance*, 2009 CHRT 10, 2009 CarswellNat 581; patterns of hate speech based on sexual orientation are described by Dr. E. Faulkner, “Homophobic Hate Propaganda in Canada,” *supra*

⁵⁰ For example: *Payzant v. McAleer*, [1994] C.H.R.D. No. 4 (Norton, Chairman), judicial review dismissed [1996] 2 F.C. 345 (T.D.), [1996] F.C.J. No. 165, aff’d [1999] F.C.J. No. 1095 (Fed. C.A.), *Schnell v. Machiavelli & Associates Emprize Inc.* (2002), 43 C.H.R.R. D/453 (C.H.R.T.) (Sinclair, Member), 2002 CarswellNat 4396, *Warman v. Beaumont*, 2007 CHRT 49, 62 C.H.R.R. D/261, 2007 CarswellNat 5592, *Warman v. Northern Alliance*, 2009 CHRT 10, 2009 CarswellNat 581

⁵¹ *Taylor*, *supra* para. 49; *Keegstra*, *supra* para. 94

Critics of hate speech prohibitions in human rights legislation argue that the response to hate speech should be counter-speech, that the “marketplace of ideas” will take care of the problem, that discrimination and hate are so widespread that a legislative prohibition of hate propaganda is ineffective.⁵² LEAF submits that while it is of course important for individuals in the community to repudiate hate propaganda and to express the importance of equality and inclusion, we cannot leave only to individuals the response to such serious harm to equality. We must address such harm through a community-based response, expressed through legislation.

The B.C. Human Rights Tribunal in *North Shore News* noted that counter-speech has not been shown to be an equally effective remedy compared with legislation.⁵³ The B.C. Tribunal stated:

Counter-speech is an important and appropriate response to all kinds of offensive expression, but it does not provide a remedy for the harm to target group members of an increased risk of exposure to hate.

To suggest that hate speech may be countered with more speech denies the significant harm of hate propaganda, the difficulty in defeating its irrational claims, and the serious equality issues involved.⁵⁴ The targeted groups, vilified for who they are, look to legislatures to address the serious harm by serious methods.⁵⁵ And when the law provides no recourse to persons vilified by the hate messages, this is in effect a second injury to those persons.⁵⁶ For the reasons discussed above, the *Criminal Code* is not an adequate or sufficient legislative response.

Parliament protects the Canadian public in many areas involving expression, and does not leave the problem to counter-speech. An example is regulation of tobacco advertising.⁵⁷

The argument that the “marketplace of ideas” will produce the appropriate outcome has significant flaws in the context of hate propaganda. First, there is no truly free marketplace of ideas when there is unequal access to forums of speech.⁵⁸ As noted in *Aryan Nations* and in *Ross*,⁵⁹ discriminatory speech affects the target group by discouraging their freedom of expression. Further, the ideas that “triumph” in the marketplace may well put a target group at risk.⁶⁰

⁵² For example, R. Moon, “Report to the Canadian Human Rights Commission Concerning Section 13 of the *Canadian Human Rights Act* and the Regulation of Hate Speech on the Internet,” http://www.chrc-ccdp.ca/pdf/moon_report_en.pdf, page 32

⁵³ *Supra* paras. 223, 225

⁵⁴ N.K.S. Banks, “Could Mom be Wrong?” *supra* para. 93

⁵⁵ N.K.S. Banks, “Could Mom be Wrong?” *supra* para. 84

⁵⁶ M.J. Matsuda, “Outsider Jurisprudence,” *supra* at page 110

⁵⁷ *Canada (Attorney General) v. JTI Macdonald Corp.*, [2007] 2 S.C.R. 610

⁵⁸ E. Faulkner, “Homophobic Hate Propaganda in Canada,” *supra* page 65

⁵⁹ *Aryan Nations*, *supra* para. 230, *Ross*, *supra* para. 91

⁶⁰ S.J. Heyman, *Free Speech and Human Dignity* (New Haven: Yale University Press, 2008), pages 173-174

The argument that because discriminatory views are so widely held, they cannot be eradicated by censorship is also flawed. Such argument could be applied similarly against human rights legislation as a whole. But it is unthinkable to discard our human rights protections. Because discriminatory conduct occurs widely, this is all the more reason to affirm the necessity of the remedial and educational role of human rights legislation.

X. The recent decision of the Canadian Human Rights Tribunal in *Lemire* should not be taken as determinative.

The recent decision of the Canadian Human Rights Tribunal in *Warman v. Lemire* finding that section 13 of the *CHRA* is unconstitutional is now before the Federal Court on judicial review.⁶¹ The Tribunal's conclusion should not be taken as determinative. First, the Tribunal's decision must be considered within the context of the judgments of the Supreme Court of Canada and decisions by Courts across the country upholding the constitutionality of the regulation of hate speech under human rights regimes. Second, as will be discussed in greater detail below, the finding in *Lemire* was narrow, focusing particularly on the penalty provision.

Courts and tribunals in a number of jurisdictions across Canada have found that human rights legislation and tribunal remedies addressing hate messages are pressing and substantial, justified and constitutional. In addition to the judgments of the Supreme Court in *Taylor* (on section 13 of the *CHRA*), *Keegstra* (on the *Criminal Code* sections) and *Ross* (on an order under the New Brunswick *Human Rights Act*), referred to above, the following courts and tribunals have upheld hate speech prohibitions:

Canadian Human Rights Act: Payzant v. McAleer and Canadian Liberty Net,⁶² *Citron v. Zundel*,⁶³ *Schnell v. Machiavelli & Associates Emprize Inc.*⁶⁴

Saskatchewan: *Owens v. Saskatchewan Human Rights Commission*,⁶⁵ *Re Bell and Saskatchewan Human Rights Commission*,⁶⁶ *Whatcott v. Saskatchewan (Human Rights Tribunal)*⁶⁷

British Columbia: *Canadian Jewish Congress v. North Shore Free Press Ltd. (c.o.b. North Shore News)*.⁶⁸ See also: *Kempling v. British Columbia College of*

⁶¹ *Warman v. Lemire*, 2009 CHRT 26, [2009] C.H.R.D. No. 26 (Hadjis, Panel)

⁶² [1994] C.H.R.D. No. 4 (Norton, Chairman), judicial review dismissed [1996] 2 F.C. 345 (T.D.), [1996] F.C.J. No. 165 (*sub nom. McAleer v. Canada (Human Rights Commission)*), aff'd [1999] F.C.J. No. 1095 (C.A.), 175 D.L.R. (4th) 766

⁶³ [2002] C.H.R.D. No. 1 (CHRT, Pensa, Chairperson), 41 C.H.R.R. D/274, 2002 CarswellNat 4364

⁶⁴ [2002] C.H.R.D. No. 21 (Sinclair, Member), 2002 CarswellNat 4396

⁶⁵ [2006] S.J. No. 221 (C.A.)

⁶⁶ (1994), 114 D.L.R. (4th) 370 (Sask. C.A.)

⁶⁷ 2007 SKQB 450, [2007] S.J. No. 672, on appeal to the Saskatchewan Court of Appeal, decision reserved

⁶⁸ *Supra*

Teachers,⁶⁹ in which an order of the B.C. College of Teachers suspending Kempling's teaching certificate because of professional misconduct relating to an article and letters he wrote to a newspaper vilifying homosexuals was held to be demonstrably justified pursuant to s. 1 of the *Charter*.

Alberta: *Boisson v. Lund*⁷⁰

With respect to the decision of the Tribunal in *Lemire*, it must be noted that the Tribunal's concern focused on the introduction of a penalty provision since the judgment of the Supreme Court in *Taylor*. The penalty provision in the *CHRA*, section 54, is a separate, severable section.⁷¹ The Tribunal in *Lemire* did not consider the extensive jurisprudence from the Supreme Court of Canada on constitutional remedies – particularly where the law is substantially constitutional and peripherally problematic.⁷² Further, the Canadian Human Rights Commission has recommended repeal of the penalty section.⁷³

It should also be noted that the Tribunal in *Lemire* found that:

- The objective of s. 13 continues to be pressing and substantial.⁷⁴
- Section 13 continues to be rationally connected to that objective.⁷⁵
- The words “hatred” and “contempt” are not vague and imprecise.⁷⁶

LEAF submits that the Tribunal's concerns with respect to process issues can be and should be dealt with through judicial review by the Court under administrative law, not through an invalidation of compellingly important legislation.

XI. Procedural and other discrete concerns with section 13 of the CHRA can be separately addressed and resolved

The procedural concern referred to by the Tribunal in *Lemire* and some public criticisms as to costs and delay faced by respondents are process issues separate from the basic

⁶⁹ 2005 BCCA 327, 255 D.L.R. (4th) 169, [2005] B.C.J. No. 1288, leave to appeal to S.C.C. refused [2005] S.C.C.A. No. 381

⁷⁰ The constitutionality of section 3(1)(b) of the *Alberta Human Rights Act* R.S.A. 2000, c.A.25.5 was recently upheld by the Alberta Court of Queen's Bench in *Boissoin v. Lund*, 2009 ABQB 592. The Court's interpretation of that section restricted the circumstances in which contravention could be found under that statute, but distinguished the Alberta legislation from the Federal legislation (para. 56).

⁷¹ *Warman v. Warman*, 2005 CHRT 26 (Groarke, Member), 55 C.H.R.R. D/148, 2005 CarswellNat 6696, para. 50

⁷² *R. v. Sharpe*, [2001] 1 S.C.R. 45, [2001] S.C.J. No. 3, paras. 111-127 and referring to *Schachter v. Canada*, [1992] 2 S.C.R. 679

⁷³ CHRC *Special Report to Parliament*, *supra* page 37

⁷⁴ *Supra* paras. 226-240

⁷⁵ *Supra* paras. 241-247

⁷⁶ Paras. 249-253

promotion of equality and protection from discrimination contained in section 13. The process problems are matters of administrative law and organization, and can be solved. The Chair of the Canadian Human Rights Commission, in the Special Report to Parliament, has recommended, for example, that the federal legislation be amended to include a provision that allows for early dismissal of complaints when messages do not meet the narrow definition of hatred or contempt.⁷⁷

Some of the delays, which undoubtedly affect respondents, are the result of serious underfunding for human rights commissions. It is in the interests of all for commissions to have the staff and resources sufficient to deal with complaints quickly.

LEAF is not taking a position on the specific language currently in section 13 or on any proposals for change – either legislative change or administrative change. LEAF's submission is that Parliament should maintain the important and fundamental promotion of equality through prohibition within human rights legislation of hate speech against the protected groups.

⁷⁷ CHRC, *Special Report to Parliament*, page 36