

**Submission to the Standing Committee on Justice and Human Rights**  
**Re: Online Hate**

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Dear Members of the Committee,

I am a human rights lawyer in Ottawa and have monitored the white supremacist and neo-Nazi movements in Canada for the past 30-years. Since 2000, I have used my personal time and resources to investigate, file complaints, and co-litigate 16 consecutive, successful cases under the former s. 13 of the Canadian Human Rights Act (CHRA) dealing with online hate. The vast majority of my complaints dealt with open calls for ethnic cleansing and genocide - none were based on what might be considered simply 'offensive' speech by any rational observer.

In reading this submission, I hope that you will bear in mind the words of the Supreme Court of Canada when they recognized that the Holocaust did not begin in the gas chambers, it began with words. Hate propaganda has a goal, and that goal is to demonize the target community - to isolate them, and ultimately to convince the audience to participate in discrimination and attacks against them, or to stand by and do nothing when others carry out that violence. The natural and intended violent result of hate propaganda can be seen historically and in the modern day whether in Nazi Germany, Rwanda, the former Yugoslavia, up to and including the Quebec City and Christchurch mosque attacks or multiple synagogue shootings.

In their unanimous 2013 decision in *Saskatchewan Human Rights Commission v Whatcott*<sup>1</sup> upholding the constitutionality of human rights law controls on hate speech, the Supreme Court noted that the risk of substantial harm from hate propaganda to the society as a whole was amplified by the advent of the Internet and its potential global reach.

By way of background, I note that Canada has signed numerous international legal agreements that require us to protect citizens from the dissemination of hate propaganda including the Universal Declaration of Human Rights (1948), the Convention on the Prevention and Punishment of the Crime of Genocide (1948), the International Covenant on Civil and Political Rights (1966), and the International Convention on the Elimination of All Forms of Racial Discrimination (1970) (relevant excerpts and URL links at Annex A).

Alarmed by a wave of hate group activity in the early 1960s, Parliament formed the Special Committee on Hate Propaganda in 1965 (the 'Cohen Committee' after Committee Chair and McGill Law Dean Maxwell Cohen). The Committee found that the danger of hate groups

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<sup>1</sup> *Saskatchewan (Human Rights Commission) v. Whatcott*, [2013] 1 SCR 467, 2013 SCC 11 (CanLII), <<http://canlii.ca/t/fw8x4>>

exceeded their small size and that their activities “constitute a clear and present danger to democratic societies.” Further with regard to the rights of victims:

“Canadians who are members of an identifiable group are entitled to carry on their lives as Canadians without being victimized by the deliberate, vicious promotion of hatred against them. In a democratic society, freedom of speech does not mean the right to vilify.”

Finally, the Committee members stated that Canada has not merely the right, but the duty to protect itself from the socially corrosive effects of hate propaganda.

Passed by Parliament in 1978, section 13 of the CHRA was essentially a good neighbour law - don't poison the communal well. Section 13 made it unlawful to spread hate messages through the telephone (originally) and subsequently the Internet that were likely to expose people to hatred or contempt on the basis of their race, religion, gender, disability, sexual orientation, etc.

I note as well that in 2009, the Canadian Human Rights Commission (CHRC) submitted a comprehensive Special Report to Parliament entitled “Freedom of Expression and Freedom from Hate in the Internet Age”<sup>2</sup> that reviewed the history of legal controls on hate propaganda, the actual state of the law as it then was (as opposed to invented attacks by those opposed to human rights generally), challenges and benefits of criminal and human rights law controls on hate speech, and provided cogent recommendations. I commend the CHRC Report to you highly so that the Committee does not use valuable time in reinventing the wheel.

### **Does the Criminal Code adequately control hate speech? The Real World experience:**

Included in the CHRC Report was a section dealing with the differences between the criminal law controls and human rights law controls on hate speech from an observation of the law. In contrast, I will speak directly of my personal experience in having filed criminal complaints in many of my cases given they dealt with online hate involving calls for genocide and the extreme hate that would be expected to fall within the Criminal Code prohibitions against advocating genocide (s. 318) or the wilful promotion of hatred (s. 319) (often combined with calls for violence).

In filing criminal complaints, I dealt with many different police forces in Canada and wish to highlight the following challenges I encountered:

- i. few police forces in Canada have dedicated hate crimes units and thus the built-in understanding of how it is that hate speech can constitute a crime versus more traditional crimes like break and enter or assault;

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<sup>2</sup> Freedom of Expression and Freedom From Hate in the Internet Age  
[http://publications.gc.ca/collections/collection\\_2009/ccdp-chrc/HR4-5-2009E.pdf](http://publications.gc.ca/collections/collection_2009/ccdp-chrc/HR4-5-2009E.pdf)

- ii. members of hate crimes units even when they exist are subject to frequent turnover where officers spend a few years ‘getting up to speed’ and understanding the work only to be transferred out to other units as the next step in their career progression;
- iii. there is a fear that people charged with criminal offences will become ‘martyrs’ and gain a larger platform for their views although I have never witnessed this to be the case and instead found the act of society opposing and holding them accountable for unlawful conduct is of far greater benefit; and,
- iv. there has been suggestion (such as in the CHRC Report) that Parliament reconsider the requirement under the Criminal Code for the provincial Attorney-General to approve charges for advocating genocide or the wilful promotion of hatred - I believe this fails to consider that these provisions of the criminal law as they stand have been found constitutional by the Supreme Court and that removing the requirement for the approval of a provincial Attorney-General would inevitably result in a new wave of constitutional challenges if this perceived check and balance were removed.

Despite having filed criminal complaints in the majority of my 16-cases, only three resulted in criminal charges being laid with one withdrawn by a Crown prosecutor who mistakenly thought a criminal charge and also a human rights complaint violated the bar against ‘double jeopardy’ (many criminal offences may also constitute civil law offences), one was quashed by a judge for undue delay, and only one resulted in a conviction.

I have previously noted that only those who have never actually tried to see hate mongers held responsible for breaches of the Criminal Code could ever suggest that the Criminal Code alone provides ample protection for the target communities and Canadian society as a whole.

### **Human Rights Law Controls on Hate Speech**

Human rights law controls on hate speech in Canada such as section 13 of the CHRA have always been narrowly interpreted to deal with only extreme forms of hate propaganda meeting the threshold for exposing the target groups to hatred or contempt.

The Supreme Court in their 1990 Taylor decision<sup>3</sup> upholding the constitutionality of s.13 of the CHRA defined hatred as an expression of extreme ill will including that the targets have no redeeming qualities and evoking feelings of detestation, enmity, and malevolence. Further, contempt was defined as treating the targets as dishonourable, disgraceful, or inferior.

I have often said that the scope for legitimate discussion about serious and controversial political and social issues of the day is miles-wide before you reach the kinds of calls for ethnic cleansing and genocide that were the genesis of my human rights complaints.

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<sup>3</sup> Canada (Human Rights Commission) v. Taylor, [1990] 3 SCR 892, 1990 CanLII 26 (SCC), <<http://canlii.ca/t/1fsp1>>

Further, in 2006, a Canadian Human Rights Tribunal decision in one of my cases (Warman v Kouba<sup>4</sup>) contained a concise summary of 11 ‘Hallmarks of Hate’ that had previously been used to distinguish unlawful hate speech from robust political discourse.

The Hallmarks of Hate include or allege that the target group is:

- i. powerful menace to society;
- ii. use of news reports/reputable sources to further negative stereotypes;
- iii. preys upon children, aged, the vulnerable, etc.;
- iv. responsible for the world’s problems;
- v. dangerous or violent by nature;
- vi. devoid of redeeming qualities and innately evil;
- vii. banishment, segregation, or eradication of group required;
- viii. de-humanized through association with or comparison with animals, vermin, etc.;
- ix. highly inflammatory language/rhetoric used to create tone of extreme hatred/contempt;
- x. trivialization/celebration of past persecution or tragedy involving target group; and,
- xi. calls to take violent action against the target group.

In the 2013 unanimous Supreme Court Whatcott decision noted at page 1 above, the Supreme Court confirmed that tribunals and courts have been appropriately and narrowly applying human rights law controls on hate speech with the Court endorsing the Hallmarks of Hate and citing four of my cases.

I believe that the most important end result of the 16 cases that I filed and successfully litigated was the issuance of permanent legal injunctions in each case requiring the individuals and groups involved to stop spreading hate propaganda online or face the possibility of contempt of court proceedings that could lead to fines or jail time. The inability to continue spreading hate propaganda online meant that a generation of white supremacist and neo-Nazi leadership were effectively sidelined and fractured the groups - none of which continued to exist for any period of time after the rulings.

### **The Current online reality**

Given the challenges of having criminal charges laid, let alone successfully prosecuted for online hate speech, the repeal of s. 13 of the CHRA in 2013 effectively removed the primary means that had been used to that point to attempt to control Internet-based hate propaganda.

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<sup>4</sup> Warman v. Kouba, 2006 CHRT 50 (CanLII), <<http://canlii.ca/t/1q60v>> at paragraphs 24-81.

The advent of US-based social media platforms such as Facebook, Twitter, and Youtube in Canada has taken place in what I believe is wrongly perceived by these corporations as being largely free of legal obligations to enforce terms of service prohibiting discrimination or harassment or address the issue of hate speech generally.

Instead, these companies have largely attempted to outsource the issue of identifying and dealing with hate propaganda onto their users suggesting that the ability of a user to report a post or video that the company may or may not do anything about washes the company's hands of any further responsibility. Indeed, given US-based interpretations of the First Amendment as permitting virtually uncontrolled hate speech, it may not be surprising that a 2017 expose by the UK Guardian newspaper revealed that Facebook not only would not address the problem of Holocaust denial on its platform generally, it would ignore domestic law making such content illegal in the countries where Facebook operates unless there was a serious threat of prosecution.<sup>5</sup>

In general, without action on the part of the federal government or the Canadian Human Rights Commission to address the problem of online hate, social media companies will continue to take what amounts to a hands off approach or intervention only in specific instances where the cost of inaction is too high from a public relations standpoint. I say this with confidence stemming from extensive reporting of hate activity to Facebook/Twitter/Youtube with limited long-term impact at best.

### **So is Canada really the Wild West when it comes to the ability to control online hate today?**

Despite the repeal of section 13 of the Canadian Human Rights Act in 2013, I draw the attention of the Committee to sections 5, 7, 12, and 14 of the Act that prohibit discrimination and harassment in the provision of a service to the public and against a company's own employees.

I believe that these provisions speak for themselves in terms of what the legal obligations of companies that wish to operate in Canada are (and Facebook, Twitter, and Google/Youtube all have Canadian incorporations). This is particularly the case given the Supreme Court's consistent decisions that human rights legislation has quasi-constitutional status that is to be given a large, purposive, and liberal interpretation to fulfil the ability of Canadians to have an equal opportunity to make for themselves the life they are able to without being faced by discriminatory practices.

It goes without saying that the federal government has a foundational responsibility to promote and uphold the rule of law and that the Canadian Human Rights Commission has a shared responsibility when it comes to the Canadian Human Rights Act given the duties assigned to them in s. 27 of the Act.<sup>6</sup>

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<sup>5</sup> <https://www.theguardian.com/news/2017/may/24/how-facebook-flouts-holocaust-denial-laws-except-where-it-fears-being-sued>

<sup>6</sup> <https://laws-lois.justice.gc.ca/eng/acts/h-6/page-3.html#h-257033>

Indeed, the Commission has the power under the Act to initiate a complaint on its own where there are reasonable grounds for believing that a person is or has engaged in a discriminatory practice.<sup>7</sup> In relation to section 13, the Commission used this power precisely once - in 1979 dealing with hate propaganda spread through a telephone answering machine by neo-Nazi John Ross Taylor.

The fact that the Commission never again self-initiated a complaint in relation to telephone or online hate in the 35-years that s. 13 existed from 1978-2013 is remarkable.

### **Could a website host/social media company be found liable for not removing online hate?**

Yes, absolutely - in fact they already have. In 2002 I filed a s. 13 human rights complaint for online hate against neo-Nazis James Scott Richardson, Alexan Kulbashian, as well as a website hosting company named Affordable Space run by Kulbashian and serving both mainstream and neo-Nazi clients.

Based on the evidence at the hearings, the Canadian Human Rights Tribunal found in their 2006 decision that Affordable Space knew of the hate propaganda that was present through client websites, caused that material to be communicated by providing its services, and was therefore legally liable for breaching the Canadian Human Rights Act:

[118] Given that Affordable Space.com provided the web services that enabled the Hate Messages to be disseminated over the Internet, it is my finding that Affordable Space.com caused the Hate Messages to be communicated, within the meaning of s. 13 of the Act... The complaint against Affordable Space.com has been substantiated.<sup>8</sup>

I think the same finding of legal liability for website hosting or social media companies is possible where they know of the dissemination of hate propaganda through their services and refuse to take or are negligent in not taking all necessary steps to remove it and ensure it does not re-appear. I believe that situation exists now and that social media companies are failing to provide their services to the Canadian public in a non-discriminatory and non-harassing manner.

It may be a conservative way of thinking, but it could be argued that attempting to use existing legal tools before moving to create new tools (such as the more recent European-style requirements for notice and take down of hate/violent/terrorism content by social media companies) would be more time and resource efficient. This argument would be particularly strengthened if it retained ongoing responsibility for ensuring legal compliance with billion-dollar, profit-seeking multinationals rather than offloading responsibility onto users or the public purse through a requirement for scarce policing resources involved in notice and takedown programs for example.

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<sup>7</sup> <https://laws-lois.justice.gc.ca/eng/acts/h-6/page-5.html#h-257147>

<sup>8</sup> Warman v. Kulbashian, 2006 CHRT 11 (CanLII), <<http://canlii.ca/t/1mxvf>>

## **The Digital Charter**

The Government of Canada has recently announced a Digital Charter<sup>9</sup> relating to the online world and broader digital environment. The Government of Canada has also just signed the Christchurch Call to Action<sup>10</sup> with governments and tech companies pledging to take action against online terrorist and violent extremist content in the wake of the New Zealand terrorist attack that left 51 dead.

As yet, however, it remains unclear to what extent these commitments will address online hate. While Point 9 of the Digital Charter refers to freedom from hate and violent extremism, I have as yet been unable to find further information on what that might entail in terms of concrete action other than the statement that “Canadians can expect that digital platforms will not foster or disseminate hate, violent extremism or criminal content.” Point 10 states that there will be “Strong Enforcement and Real Accountability” without elaboration beyond that “There will be clear, meaningful penalties for violations of the laws and regulations that support these principles.”

Similarly, the Christchurch Call to Action that Canada has signed speaks to reducing the presence of terrorist and violent extremist content online but does not directly address the hate propaganda that is the gasoline used to start such fires.

Further clarification on these points would be helpful to understand what is being proposed and what impact it may have in addressing online hate.

## **Closing**

It is my hope that the information contained in this submission may be of some assistance to the members of the committee in your study of online hate and I wish you every success in considering what existing or future avenues may be pursued to reduce the harm caused to our communities.

In the end, I think it bears remembering as well that criminal and human rights law controls on hate speech come into play when social norms have failed to prevent such conduct in the first place. Legal controls are important tools in the tool box to address hate propaganda but enduring solutions will only be found to incidents that arise when combined with ‘real world’ efforts such as education and community action to demonstrate that such conduct is unwelcome and unacceptable when it rears its ugly head.

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<sup>9</sup> Canada’s Digital Charter - [https://www.ic.gc.ca/eic/site/062.nsf/eng/h\\_00109.html](https://www.ic.gc.ca/eic/site/062.nsf/eng/h_00109.html)

<sup>10</sup> Christchurch Call - <https://www.christchurchcall.com/call.html>

## **Annex A**

### **The Universal Declaration of Human Rights (1948)**

[https://www.ohchr.org/EN/UDHR/Documents/UDHR\\_Translations/eng.pdf](https://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf)

Article 1. All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 7. All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

### **Convention on the Prevention and Punishment of the Crime of Genocide**

<https://www.ohchr.org/en/professionalinterest/pages/crimeofgenocide.aspx>

Article III - The following acts shall be punishable:

- (a) Genocide;
- (b) Conspiracy to commit genocide;
- (c) Direct and public incitement to commit genocide;
- (d) Attempt to commit genocide;
- (e) Complicity in genocide.

### **International Covenant on Civil and Political Rights (1966)**

<https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

Article 20 1. Any propaganda for war shall be prohibited by law.

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

### **International Convention on Elimination of All Forms of Racial Discrimination (1970)**

<https://www.ohchr.org/en/professionalinterest/pages/cerd.aspx>

Article 4: (summary) Parties condemn organizations and propaganda promoting racial supremacy and shall take measures to eradicate incitement to racial hatred or discrimination. Parties shall make it an offence to disseminate racist hate propaganda, incitement to racial discriminate, and racist violence or incitement to such violence. Parties shall declare such organizations to be illegal and participation in or financing of such activity to be illegal.



## **Annex B - Canadian Human Rights Act**

<https://laws-lois.justice.gc.ca/eng/acts/h-6/FullText.html>

### **Discriminatory Practices**

#### **Denial of good, service, facility or accommodation**

5 It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public

...

(b) to differentiate adversely in relation to any individual, on a prohibited ground of discrimination.

#### **Employment**

7 It is a discriminatory practice, directly or indirectly,

...

(b) in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination.

#### **Publication of discriminatory notices, etc.**

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

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

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

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

#### **Harassment**

14 (1) It is a discriminatory practice,

(a) in the provision of goods, services, facilities or accommodation customarily available to the general public,

...

(c) in matters related to employment, to harass an individual on a prohibited ground of discrimination.