The Hate Speech Debate: The Supreme Court, the Federal Government, and the Need for Civil Hate Speech Provisions

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I. INTRODUCTION

In a free and democratic society, great value is placed on the freedom to express oneself. This freedom is regarded as enabling the discovery of truth, as an instrument to achieve personal fulfillment and as a vital characteristic of a democratic society. The freedom to exchange ideas, express religious beliefs and speak out against government action is fundamental to permit citizens to be active participants in a healthy and vibrant democracy. The enumeration of section 2(b) of the *Canadian Charter of Rights and Freedoms*[1] embodies Canada's recognition of the fundamental importance of the right to freely express oneself.

Although constitutionally entrenched as a fundamental freedom under the *Charter*, the right to freely express oneself is not absolute. All *Charter* rights

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1 *Canadian Charter of Rights and Freedom*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

enjoyed by Canadian citizens are subject to the reasonable limitations that can be demonstrably justified in a free and democratic society as set out in section 1 of the *Charter*. Freedom of expression is no exception. Canada's federal and provincial governments, the Supreme Court of Canada, and courts across the nation have continually recognized justifiable limitations on the freedom of expression enumerated under s. 2(b) of the *Charter*.[2] One such limitation, and the focus of this paper, is the restriction on the public dissemination of hate.

The attempt to establish a constitutional balance between the right to freely express oneself and the protection of vulnerable groups from hateful speech has been a subject of great debate in Canada. The Supreme Court of Canada has addressed the issue in the context of the *Criminal Code*[3] and in the context of civil human rights legislation.[4] In 1990, the Supreme Court made its first pronouncement on the constitutionality of civil hate speech restrictions in *Canada (Human Rights Commission) v Taylor*.[5] In *Taylor*, a narrow majority of the Supreme Court declared Canada's federal civil human rights provision which restricted the public expression of hate as a justifiable limitation on freedom of expression. After two decades of criticism and condemnation from opponents of the majority's decision in *Taylor*, the Supreme Court revisited the matter in *Saskatchewan (Human Rights Commission) v Whatcott*,[6] in which Saskatchewan's provincial civil human rights provision restricting the public dissemination of hate was challenged as an unconstitutional limitation on freedom of expression. In its unanimous decision, the Supreme Court in *Whatcott* upheld and bolstered the Court's precedent from *Taylor,* declaring that Saskatchewan's civil restriction on hateful speech represented a justifiable limitation on free speech in Canada's free and democratic society.

The Court's unanimous decision in *Whacott* should have dispelled any doubts that may have been lingering since *Taylor* regarding the constitutionality of civil hate speech legislation and whether it imposes a

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2 For example, pornography, violence, threat of violence.

3 RSC 1985 c C-46. See *R v Keegstra*, [1990] 3 SCR 697; *R v Andrews*, [1990] 3 SCR 870; and *R v Krymoski,* 2005 SCC 7, [2005] 1 SCR 101.

4 *Canada (Human Rights Commission) v Taylor*, [1990] 3 SCR 892, 75 DLR (4th) 577 [*Taylor*]; *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11, [2013] 1 SCR 467 [*Whatcott*].

5 *Ibid.*

6 *Ibid.*

justifiable limit on freedom of expression. However, despite the Supreme Court's decisive message in *Whatcott*, the federal government under Stephen Harper's direction, passed legislation to abolish Canada's only federal civil hate speech provision in the name of unfettered free speech. A swift four months after the release of the *Whatcott* decision, Bill C-304 received royal assent and section 13 of the Canadian Human Rights Act ("CHRA") [7] was repealed, resulting in a legislative gap for Canada's monitoring of the dissemination of hate on the most widely utilized and most readily accessible public medium in today's society: the internet.[8]

This paper will argue that the government's repeal of section 13 from the CHRA and the reasoning used to advance its removal is contradictory to the Supreme Court's constitutional analyses of civil hate speech legislation in both *Taylo*r and *Whatcott*, a factor which significantly undermines the legitimacy of its removal. The paper further seeks to highlight how the removal of section 13 from the CHRA has created a legislative gap as it relates to Canada's effective monitoring of hate dissemination in the in the era of the internet.

Part I of the paper discusses the Supreme Court's decision in *Taylor* and outlines the Court's precedent regarding the constitutionality of civil hate speech legislation. Part II discusses the Court's subsequent decision in

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7 RSC 1985, c H-6, ("CHRA"). Prior to repeal, s 13 of the CHRA read as follows:

> 13(1) It is a discriminatory practice for a person or a group of persons acting in concert to communicate telephonically or to cause to be so communicated, repeatedly, in whole or in part by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament, any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination.
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> (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.
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> (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.

8 Charles Gillis, "Section 13: How the Battle for free speech was won", *Maclean's* (19 June 2012), online: <http://www.macleans.ca/news/canada/five-years-two-tribunals-a-raft-of-secret-hearings-a-supreme-court-challenge-how-the-battle-for-free-speech-was-won>.

Whatcott, including the Court's endorsement and elaboration of *Taylor* and the important contribution *Whatcott* made to the debate concerning the societal value of restricting freedom of expression in the name of curtailing the public dissemination of hate in Canadian society. Part III discusses the federal government's removal of section 13 from the CHRA, highlighting how the reasoning advanced for the repeal of section 13 in both the House of Commons and the Senate contradicts the Supreme Court's jurisprudence, and discusses the current legislative gap in Canada.

II. PART I: CANADA (HUMAN RIGHTS COMMISSION) V TAYLOR

A. Background Facts

In 1979, the Canadian Human Rights Tribunal (the "Tribunal") heard a number of complaints alleging the Western Guard Party ("WGP") and its leader, Mr. Taylor, had contravened section 13 of the CHRA for repeatedly communicating hateful matters about members of the Jewish religion via telephone. [9] The WGP had established a telephone service in Toronto in which members of the public were invited to call a telephone number and listen to a pre-recorded message promoting anti-Semitism. The Tribunal concluded that Mr. Taylor and the WGP had contravened section 13 of the CHRA and ordered Mr. Taylor and the WGP to stop their discriminatory practice.[10] Despite the order, Mr. Taylor and the WGP continued their messaging service leading to the Canadian Human Rights Commission filing a cease and desist order to the Federal Court in 1983.[11] At the time of the hearing before the Federal Court, the *Charter* was newly in effect. Mr. Taylor used section 2(b) of the *Charter* to argue that section 13 of the CHRA was invalid legislation as it unconstitutionally restricted his right to freedom of expression.[12] The question made its way before the Supreme Court of Canada in 1989.

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9 At the time of *Taylor*, s 13 did not include the current s 13(2) as outlined in *supra*, note 6, incorporating the interpretation of the internet. This provision was added in 2002.

10 *Taylor*, *supra* note 4 at 904.

11 *Ibid* at 905.

12 *Ibid* at 906.

With the newly enacted *Charter*, the Supreme Court was tasked with determining whether section 13 of the CHRA infringed Mr. Taylor's section 2(b) *Charter* right to freedom of expression, and if so, whether the infringement was justifiable in a free and democratic society. The seven justices unanimously agreed that section 13 infringed section 2(b) of the *Charter*, however, the justices divided 4-3 on whether s. 13 represented a justifiable limitation and could be saved under s. 1 of the *Charter.* The majority of the Court, led by Chief Justice Dickson, held section 13 to be a reasonable limitation on freedom of expression as justified in Canada's free and democratic society.

B. Section 13: A Justifiable Limitation

Writing for the majority, Dickson CJ. explained how *Charter* rights often conflict with one another. Dickson CJ. explained how courts and legislatures must look to the principles that are central to a free and democratic society in order to discern the appropriate balance that is to be struck when *Charter* rights are in competition with one another.[13]

One such principle declared by Dickson CJ. to be of central importance to a free and democratic society is the protection of minority groups from the intolerance and psychological pain caused by expressions of hate.[14] Chief Justice Dickson declared the presence of hate propaganda to pose a serious threat to Canadian society and stated the protection of vulnerable groups from hate speech to be of fundamental importance in Canadian society.[15] Dickson CJ. wrote: "[H]ate propaganda can operate to convince listeners, even if subtlety, that members of a certain racial or religious groups are inferior" which can result in overtly discriminatory acts, including acts of violence.[16] Dickson CJ. further stated:

> ... [M]essages of hate propaganda undermine the dignity and self-worth of target group members and, more generally, contribute to disharmonious relations among various racial, cultural and religious groups, as a result eroding the tolerance and open-mindedness that must flourish in a multicultural society which is committed to the idea of equality.[17]

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13 *Ibid* at 916.

14 *Ibid*.

15 *Ibid* at 919.

16 *Ibid*.

17 *Ibid*.

All members of the Supreme Court agreed that section 13 of the CHRA was enacted in order to address and protect Canadian citizens and Canadian society from the detrimental effects associated with the public dissemination of hate. Both the majority and the minority decisions declared the objectives of section 13 to be of a pressing and substantial importance. The majority pronounced the objective of section 13 to be the promotion of equal opportunity and tolerance in society by targeting discriminatory practices; including the harm caused by hate propaganda.[18] The minority's decision, writing by Justice McLachlin (as she was then), enunciated that the objective of section 13 was the promotion of social harmony and individual dignity through the discouragement of discrimination.[19] Justice McLachlin stated the underlying objectives of section 13 reflect the kind of society in which Canadians wish to live.[20]

Both factions of the Court acknowledged the fundamental importance of freedom of expression in a free and democratic society, however, as Dickson CJ. explained, hate speech is a form of expression which contributes little to – and in fact, deviates from – the core values underpinning freedom of expression.[21] Chief Justice Dickson cited *R v Keegstra*[22] for the proposition that legislation such as section 13 of the CHRA, limits a "special category of expression which strays some distance from the spirit of section 2(b)."[23] Such restrictions are held to be more easily justifiable under the section 1 analysis as these forms of expression do not curtail the fundamental values underlying freedom of expression.[24]

The majority found section 13 not overbroad or excessively vague in language. Dickson CJ. explained how the phrase "hatred or contempt" used in the provision refers only to the "unusually strong and deep-felt emotions of detestation, calumny and vilification" and explained that so long as human rights tribunals and courts recognize the extreme nature of the feelings required to meet this test for hatred or contempt as articulated under section

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18 *Ibid*.

19 *Ibid*.

20 *Ibid* at 958.

21 *Ibid* at 923.

22 [1990] 3 SCR 000, *supra* note 3.

23 *Taylor*, *supra* note 4 at 923.

24 *Ibid*

13, there remained little risk of an overbroad or subjective application of the provision.[25]

The dissenting judges disagreed, viewing section 13 as vague and overbroad due to the use of the words "hatred and contempt". The dissenting justices reasoned that without an intent requirement or the availability of defences, such as those required and available under the *Criminal Code*,[26] section 13 could not pass the proportionality aspect of the *Oakes* test under section 1 of the *Charter*. Without an intent requirement, the dissenting judges held that section 13 was not "rationally connected" to its objective and was overbroad in its application because it restricted speech that was not intended to discriminate.[27]

In addressing the dissenting justices' concern regarding the lack of intent requirement, Dickson CJ. explained how the absence of an intent requirement is an essential feature of section 13 for it enables the provision to fulfill its purpose. Dickson CJ states:

> 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.[28]

Dickson CJ. stressed that section 13 is a provision under civil human rights legislation, not criminal legislation, and the "intent to discriminate is not a precondition of a finding of discrimination under human rights codes".[29] He explained the importance of taking into consideration the civil nature of section 13 upon determining whether the provision passes the section 1 analysis because the purposes and the consequences of civil human rights legislation are distinguished from those of hate speech legislation under the *Criminal Code*.[30]

Contrary to the criminal sanctions available under the *Criminal Code*, the purpose of civil human rights legislation is not to stigmatize and punish those who discriminate. Civil human rights legislation is concerned with the

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25 *Ibid* at 928-29

26 See s 319(2) of the *Criminal Code*.

27 *Ibid* at 966-67.

28 *Ibid* at 931.

29 *Ibid* at 895.

30 *Ibid.*

prevention of discriminatory conduct. Its fundamental purpose is the protection of the victim.[31] Due to the fact that systemic discrimination is more widespread than is intentional discrimination, importing a subjective intent requirement would contradict the primary goals of human rights anti-discrimination statutes, explained Dickson CJ.[32] On this basis, the majority in *Taylor* not only determined that the lack of intent requirement under section 13 of the CHRA did not render the legislation unconstitutional, but further explained that the lack of intent requirement represented the only way in which the pressing and substantial objectives underlying section. 13 could be fulfilled.[33]

C. The *Taylor* Precedent

In *Taylor*, the majority of the Supreme Court articulated the real threat hate speech can pose to Canadian society. The majority determined that section 13 and civil hate speech legislation is an important mechanism to protect Canada's tolerant, respectful and multicultural society from the harms associated with the public dissemination of hate. Although section 13 was found to infringe the right to freedom of expression, the majority held that the provision was saved under section 1 of the Charter.

The Supreme Court's decision in *Taylor* represents three significant developments in Canada's constitutional jurisprudence. First, the decision represents the Supreme Court's declaration of the pressing and substantial importance of civil hate speech legislation to promote equality and prohibit discriminatory practices in Canadian society.[34] Second, the majority established the "threshold" for the words "hatred" and "contempt" as used in hate speech legislation, namely that it is restricted to the extreme and unusually strong and deep-felt emotions of detestation, calumny and vilification. Lastly, the majority confirmed that civil hate speech legislation must focus on the effects of the hateful speech, rather than on the intent of the declarant, in order to fulfill the legislations objective of curtailing societal discrimination.

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31 *Ibid* at 933; see *Canadian National Railway Co v Canada (Canadian Human Rights Commission* [1987] 1 SCR 1114, [1987] SCJ No 42.

32 *Ibid* at 931.

33 *Ibid*.

34 Note, both the majority and the dissenting justices agreed on this point.

D. Post-*Taylor*

The dissent of McLachlin, La Forest, and Sopinka JJ. left the door open for further scrutiny and uncertainty as to the social-validity and constitutional status of civil hate speech legislation in Canada. As stated by David Arnot, the Chief Commissioner of the Saskatchewan Human Rights Commission, the dissent in *Taylor* "gave hope to those wanting Canada to adopt the American approach to hate speech, which is virtually unfettered free speech".[35] It was not until two decades later, in 2011, that the Supreme Court revisited the constitutional debate over civil hate speech legislation and freedom of expression. The catalyst for this review was a case from Saskatchewan entitled *Saskatchewan (Human Rights Commission) v Whatcott*.

III. PART II: SASKATCHEWAN (HUMAN RIGHTS COMMISSION) V WHATCOTT

A. Background Facts

Whatcott began as a human rights complaint before the Saskatchewan Human Rights Commission (the "Commission"). Four individuals filed complaints concerning Mr. Whatcott's distribution of four flyers in Saskatoon and Regina. The complainants alleged that the flyers distributed by Mr. Whatcott targeted homosexuals and promoted hatred on the basis of sexual orientation in contravention of section 14 of *The Saskatchewan Human Rights Code* (the "SHRC").[36] A Tribunal was appointed to hear the complaints. The

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35 Dave Arnot, "Hate Speech: The Supreme Court of Canada's 2013 Decisive Decision" (Speech delivered at Breaking the Silence 16th Annual Conference, 23 March 2013) [unpublished].

36 SS 1979, c S-24.1. Section 14 of the SHRC at the time of the hearing read as follows:

> 14(1) No person shall publish or display, or cause or permit to be published or displayed, on any lands or premises or in a newspaper, through a television or radio broadcasting station or any other broadcasting device, or in any printed matter or publication or by means of any other medium that the person owns, controls, distributes or sells, any representation, including any notice, sign, symbol, emblem, article, statement or other representation:
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> (a) tending or likely to tend to deprive, abridge or otherwise restrict the enjoyment by any person or class of persons, on the basis of a prohibited ground, of any right to which that person or class of persons is entitled under law; or
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> (b) that exposes or tends to expose to hatred, ridicules, belittles or otherwise affronts the dignity of any person or class of persons on the basis of a prohibited ground.

Tribunal held the flyers contravened section 14(1)(b) of the SHRC as they exposed persons in the homosexual community to hatred and ridicule on the bases of their sexual orientation. The Tribunal further held that section 14(1)(b) of the SHRC was a reasonable restriction on Mr. Whatcott's rights to freedom of religion and expression guaranteed by sections 2(a) and (b) of the *Charter*.[37]

Mr. Whatcott appealed the Tribunal's decision to the Saskatchewan Court of Queen's Bench. In dismissing Mr. Whatcott's appeal, Justice Kovach used Dickson CJ.'s definition of "hatred and contempt" from *Taylor* and concluded that the flyers met the *Taylor* standard of inciting "strong feelings and strong emotions of detestation, calumny and vilification".[38] Mr. Whatcott appealed this decision to the Court of Appeal. The Court of Appeal accepted that the provision was constitutional but held that the flyers did not contravene section 14(1)(b) of the SHRC as they did not reach the threshold of "hatred and contempt" as prescribed in *Taylor*. According to the Court of Appeal, the flyers were a part of the "ongoing debate about teaching homosexuality in public schools"[39] and speech used to debate the morality of an individual's behavior attracted a higher degree of tolerance.[40]

The Commission applied for and was granted leave to appeal to the Supreme Court of Canada. For the first time since *Taylor*, the Supreme Court was tasked with reviewing and articulating the constitutional balance that must be struck between the fundamental right to freely express oneself and the protection of minorities from hate. The bulk of the Supreme Court's "heavy lifting" in this regard is found in its section 1 *Charter* analysis.

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(2) Nothing in subsection (1) restricts the right to freedom of expression under the law upon any subject.

37 *Whatcott*, supra note 4 at para 10. This paper will only address the s. 2(b) *Charter* argument. For reference, the Supreme Court ultimately concluded that s 14(1)(b) infringed Mr. Whatcott's s 2(a) right, but held the infringement was demonstrably justified in a free and democratic society and s. 14 was therefore saved under s 1.

38 *Ibid* at para 13.

39 *Ibid* at para 17-18.

40 *Ibid* at para 18.

B. The Section 1 Analysis: Hate Speech Undermines Freedom of Expression

In undergoing its section 1 *Charter* analysis, the Court reiterated that no *Charter* right is absolute. The Court discussed the fundamental importance of balancing competing rights. The Court explained that hate speech legislation is an example of the competing *Charter* rights of freedom of expression and freedom of equality.[41] In order to determine whether section 14(1)(b) of the SHRC struck a constitutionally appropriate balance, the Court underwent an analysis of the objectives underlying section 14(1)(b) of the SHRC.

The Court concluded the objective of section 14(1)(b) of the SHRC, like other legislation restricting hate speech, is the protection of vulnerable groups in society.[42] The Court unanimously declared this legislation to be of pressing and substantial importance in Canadian society.[43] The Court then proceeded to balance the value of the legislation against the restrictions it imposes on freedom of expression.

The Court indicated the fundamental importance of freedom of expression in Canada, declaring it to be "central to our democracy" for encouraging the fundamental exchange of opposing ideas and allowing for participation in public discourse.[44] Although the right to freely express oneself is fundamental to democracy, the Court explained how hateful expression is contradictory to the fundamental objectives underlying freedom of expression. The Court upheld and elaborated on the precedent in *Taylor* in saying that that although hate speech legislation restricts expression, it restricts only a narrow form of expression: a form of expression that is distant from the fundamental values underlying freedom of expression under section 2(b) of the *Charter*.[45]

The Court unanimously declared that hate speech does little to promote, and in fact impedes, the values underlying freedom of expression.[46] The Court explained that hate speech impedes a targeted group's ability to find self-fulfillment, it does not promote the idealized free and open exchange of ideas,

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41 *Ibid* at para 66.

42 *Ibid* at 82.

43 *Ibid.*

44 *Ibid* at para 64.

45 *Ibid* at para 114.

46 *Ibid* at para 114.

and it places serious barriers on people's full participation in democracy.[47] Justice Rothstein, writing for the Court, examined how individuals targeted by discriminatory hate speech are forced to first defend their rightful position and legitimacy in society before being able to effectively contribute to, or participate in, the public discourse. Justice Rothstein explained how hate speech can effectively shut down public dialogue and stifle public discourse:[48]

> ...[E]xpression can be used to the detriment of the search for truth. As earlier discussed, hate speech can also distort or limit the robust and free exchange of ideas by its tendency to silence the voice of its target group. It can achieve the self-fulfillment of the publisher, but often at the expense of that of the victim.[49]

In conclusion, the Supreme Court declared "speech that has the effect of shutting down public debate cannot dodge prohibition on the basis that it promotes debate."[50]

The fact that hate speech undermines the values underpinning freedom of expression was an important consideration for the Court in their analysis of whether section 14(1)(b) was a justifiable restriction on Mr. Whatcott's section 2(b) *Charter* right. Following the precedent set by Dickson CJ. (as he was then) in *Taylor,* the Court held the infringement on freedom of expression found under section 14(1)(b) of the SHRC was more easily justifiable because it limited "only an extreme and marginal type of expression which contributes little to the values underlying freedom of expression".[51]

In determining whether section 14(1)(b) passed the proportionality analysis under the section 1 *Oakes* test, the Court revised the wording of section . 14(1)(b) of the SHRC to more accurately reflect its purpose by removing the words "ridicules, belittles or otherwise affronts the dignity of". With the removal of these words, the provision was held to be rationally connected to its objectives and not overbroad in its application. The Supreme Court held that section 14(1)(b) prohibited only the type of expression that rose to the standard of hatred capable of impacting the societal standing of a social group and therefore, the restriction was proportionately related to its objective.[52]

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47 *Ibid* at para 113-14.

48 *Ibid* at para 75

49 *Ibid* at para 114.

50 *Ibid* at para 117.

51 *Ibid* at para 120.

52 The Supreme Court recognized that the words "ridicules, belittles or otherwise affronts the

The Supreme Court held that section 14(1)(b) of the SHRC represented a minimal restriction on freedom of expression. The Court explained that even with hate speech legislation such as section 14(1)(b) of the SHRC, people are still free to publicly debate matters of social policy and morality, including speaking out against the rights or characteristics of vulnerable groups. The Court explained that the presence of section 14(1)(b) imposed only a minimal restriction of the manner in which people can speak on such matters, namely that they must not do so in a manner that objectively exposes a group in society to hatred.[53] The Court highlighted how a citizen's right to express oneself remains unlimited, "except by the discrete and narrow requirement that [it] not be conveyed through hate speech".[54]

C. Clarifying the Law & Addressing the Criticism from *Taylor*

In undergoing their constitutional analysis of section 14(1)(b) the Court decided to consider whether, "in light of the criticisms", the *Taylor* precedent regarding the constitutional approach to civil hate speech legislation remained valid, or whether it should be rejected or modified.[55] The criticisms tend to fall into two general categories, relating to either the subjectivity or the overbreadth of civil hate speech legislation.[56] The criticisms concerning subjectivity stem from the *Taylor* definition of "hatred" and "contempt", arguing the definition is too vague and subjective. Critics argue the subjectivity of these words leads to arbitrary and inconsistent decisions resulting in the restriction of expression that is not tied to the legislative objectives of hate speech provisions.[57] The overbreadth criticisms are that: (1) hate speech provisions have a "chilling effect" on public debate and matters of social policy; (2) the lack of intent requirement focuses on the effects rather than actual harm; and (3) the lack of defences available render the provisions overreaching

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dignity of," hadn't been used by the Commission since the decision in *Owens v Human Rights Commission (Sask)*, 2002 SKQB 506, 267 DLR (4th) 733 but sought to have the words officially struck from the provision.

53 *Ibid* at para 145.

54 *Ibid* at para 97.

55 *Ibid* at para 20.

56 *Ibid*.

57 *Ibid*.

by capturing more expression than is intended or necessary.[58] The Supreme Court's address to each of these criticisms in *Whatcott* are summarized below.

1. The Subjectivity Criticism

The Court understood there to be an element of subjectivity in the hate speech analysis but stated that the precedent set in *Taylor* fundamentally imposes an objective analysis. The Court explained that the *Taylor* definition of hatred requires a tribunal or court applying the civil hate speech provisions to ask: "whether a reasonable person, aware of the context and circumstances, would view the expression as likely to expose a person or persons to hatred or contempt".[59] The Court rejected the argument that the words "hatred" and "contempt" were too subjective in nature to be capable of an objective analysis. The Court explained how the words "hatred" and "contempt" embody an important core meaning that can be objectively understood. In citing Dickson CJ. in *Taylor,* Rothstein J. stated: ""hatred" involves detestation, extreme ill-will and the failure to find any redeeming qualities in the target of the expression. "Contempt" involves looking down on someone or treating them as inferior".[60] As was established in *Taylor,* these words refer to the unusually strong and deep-felt emotions of detestation and vilification.[61] Therefore, hate speech legislation captures only the type of expression that is objectively understood as being of an unusual and extreme nature.[62]

While the Court held that the words "hatred" and "contempt" were not so subjective, the Court felt that the term "calumny" in the *Taylor* definition did not represent the level of unusual and extreme expression required to meet the definition of hatred and contempt.[63] The Court removed the term "calumny" from the analysis, and in doing so, the Court upheld the *Taylor* definition of "hatred" and "contempt" as restricting only the extreme and unusual type of expression that are rationally connected to the legislation's objective.

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58 *Ibid* at para 28.

59 *Ibid* at para 59.

60 *Ibid.*

61 *Taylor, supra* note 4 at 928.

62 *Whatcott, supra* note 4 at para 40.

63 *Ibid* at para 42.

2. The Overbreadth Criticisms

i. The "Chilling Effect" of Hate Speech

The Supreme Court addressed the criticism that civil hate speech provisions have a "chilling effect" on public debate, issues of moral conduct and matters of social policy, and that they do not give legislative priority to freedom of expression. In rejecting the validity of these criticisms, the Supreme Court discussed the Court of Appeal's decision in *Whatcott*. The Court of Appeal for Saskatchewan held that Mr. Whatcott's expression arose in the context of the "public policy debate" concerning whether homosexuality should be discussed as part of the public-school system. The Court of Appeal declared that this type of public policy and moral expression merits a higher threshold of tolerance.[64] The Supreme Court criticized the Court of Appeal's decision in this regard, stating that merely labelling expression as part of the "public discussion on policy or moral issues" does not end the inquiry as to whether the expression constitutes hate speech.[65] The Supreme Court explained that "history demonstrates that some of the most damaging hate rhetoric can be characterized as "moral," "political," or "public policy" discourse."[66] The Supreme Court explained how hate speech standards are not relaxed simply because the expression is made on a matter under political debate.[67] In this regard, the Supreme Court emphasized the societal importance of hate speech provisions to ensure the public dissemination of hate is not promoted under the guise of the "public policy debate". The Court explained that civil hate speech legislation does not "chill" the public debate – it simply ensures that the debate is not conveyed through the type of expression that is objectively understood as being so unusual and extreme in nature so as to rise to the threshold of deep-felt emotions of detestation and vilification.

ii. Lack of Intent, Proof of Harm, and Defences

In dismissing the need for an intent requirement, the Supreme Court cited Dickson CJ. in *Taylor* declaring that an intent to discriminate or to expose a group to hatred is not required under civil hate speech legislation.[68] The Court

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64 *Ibid* at para 115.

65 *Ibid* at para 117.

66 *Ibid* at para 116.

67 *Ibid*.

68 *Ibid* at para 126.

agreed with Dickson CJ. that the proper focus of civil hate speech provisions must be on the effects rather than the intention of the declarant. The focus on effects is sustained because systemic discrimination is more widespread than intentional discrimination. The Court opined there was no reason to depart from the precedent that intent to discriminate is not a condition precedent under civil human rights legislation.[69]

The Supreme Court also held the "proof of harm" requirement to violate the purpose of the civil hate speech legislation. The Court explained that the purpose of hateful speech is not the infliction of physical harm on its victim. Its purpose is "to shift the environment from one where harm against vulnerable groups is not tolerated to one where hate speech has created a place where [harm] is either accepted or a blind eye is turned".[70] The Court held that imposing a proof of harm requirement would hinder the purpose of civil hate speech legislation, which is to curtail the negative effects associated with hate speech, as these effects are usually not visible on the surface.[71]

The Supreme Court addressed the argument that section 14(1)(b) of the SHRC should provide a "truth defence". The Court concluded that given the purpose of civil hate speech legislation, it is irrelevant whether the public declarations of hate are true.[72] The Court also rejected the requirement for a defence of sincerely held belief, stating that such a defence would impose a subjective inquiry into the view of the declarant which is irrelevant in the objective application of the definition of "hatred".[73] The Court felt that providing a defence of sincerely held belief would "gut the prohibition of effectiveness".[74]

In addressing both the subjectivity and overbreadth criticisms arising from *Taylor*, the Supreme Court clarified and delineated the approach to civil hate speech legislation. The Supreme Court unanimously held that *Taylor* remained the valid approach to interpreting and applying civil hate speech provisions.

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69 *Ibid* at para 127.

70 *Ibid* at para 131.

71 *Ibid* at para 129.

72 *Ibid* at para 138-41.

73 *Ibid* at para 143.

74 *Ibid*.

H. The *Whatcott* Precedent

Whatcott provided the Supreme Court its first opportunity to review the status of civil hate speech legislation in Canada since *Taylor*. After deliberating for nearly seventeen months, the Supreme Court unanimously affirmed the majority's decision in *Taylor* and solidified that civil hate speech legislation was both constitutionally valid and fundamentally important in Canadian society. The Supreme Court's decision in *Whatcott* is a declaration of the societal importance of limiting freedom of expression in the name of protecting vulnerable groups from hateful discrimination.

Throughout its decision, the Supreme Court continually emphasized the fundamental importance of civil hate speech legislation and declared that its legislative framework properly reflected and advanced its critical objective of protecting citizens from the harms caused by hate speech. The Supreme Court explained how hate speech causes two categories of harm: first, hate speech causes members of the targeted group to suffer serious psychological and social consequences from the humiliation and the degradation caused by hate propaganda, and second, hate speech has the capacity to subtly and unconsciously alter society's opinions about the inferiority of a targeted group, which in turn, has the power to produce disastrous consequences.[75] The Court explained how hate speech has the capacity to delegitimize certain members of society in the eyes of the majority, effectively reducing their social standing and acceptance within society.[76] The Court illustrates how hate speech acts as a means of labeling a group and its members as inferior, subhuman, or lawless, and explains that when certain members of society are deemed to be inferior, it is easier for the majority to deny the group their equal rights or their equal status in society.[77] The Court proclaimed that "words matter". [78]

Writing for the Court, Rothstein J. cited historical events as evidence of the harm hate speech can cause. He referenced Hitler's ethnic cleansing of the Jewish people in Nazi Germany and the experiences of fascism in Italy. He explained that the disastrous effects caused by hate speech are not simply historical events, but the threat of hate speech remains active and alive

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75 *Ibid* at para 73.

76 *Ibid* at para 71.

77 *Ibid* at para 74.

78 *Ibid* at para 119.

throughout the world today, especially in the era of the Internet. At paragraph 72 of the *Whacott* decision, Rothstein J states:

> Almost 50 years later, I cannot say that those examples have proven to be isolated and unrepeated at our current point in history. One need only look to the former Yugoslavia, Cambodia, Rwanda, Darfur, or Uganda to see more recent examples of attempted cleansing or genocide on the basis of religion, ethnicity or sexual orientation. In terms of the effects of disseminating hateful messages, there is today the added impact of the Internet.[79]

Rothstein J. emphasized how history has shown that hate speech can act as a stepping stone for later, broader attacks on vulnerable groups in society who are deemed to be inferior.[80] Rothstein J. states: "these attacks can range from discrimination, to ostracism, segregation, deportation, violence and, in the most extreme cases, to genocide".[81]

Furthermore, *Whatcott* provides valuable guidance on how legislatures and courts can modify existing legislation in order to establish the appropriate constitutional balance between competing *Charter* rights. The modifications and clarifications the Court made to the *Taylor* definition of "hatred" and the amendments to the wording of section 14(1)(b) of the SHRC, exemplifies how small alterations can be made to civil hate speech legislation in order to ameliorate its operation within a constitutional framework. The Supreme Court in *Whatcott* demonstrated how striking the appropriate balance may require compromises. However, despite these compromises, the Supreme Court's message was clear: the protection of vulnerable groups from discrimination cannot be overshadowed in the name of unfettered speech.

IV. PART III: THE REPEAL OF SECTION 13

A. Background Facts

Before the *Whatcott* decision was released, and despite the knowledge that the highest court in the country was reviewing the constitutionality of Saskatchewan's civil hate speech provision, a Conservative Member of Parliament ("MP") within the Harper Government presented a private

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79 *Ibid* at para 72.

80 *Ibid* at para 74.

81 *Ibid*.

member's bill before the House of Commons calling for the repeal of Canada's only federal civil hate speech provision.

On September 30, 2011, Brian Storseth, presented Bill C-304, entitled: "An Act to amend the Canadian Human Rights Act (protecting freedom)" to the House of Commons. Bill C-304 advocated for the repeal of section 13 from the CHRA.[82] Bill C-304 received royal assent on June 26, 2013.

The timeline of the passage of Bill C-304, and how it relates to the *Whatcott* appeal, is noteworthy in that it highlights how the government advanced its own agenda as it relates to the proper balance to be struck between freedom of expression and hate speech legislation without awaiting the Supreme Court's pronouncement on the same issue.

The Saskatchewan Human Rights Commission filed for leave to appeal *Whatcott* to the Supreme Court of Canada on April 23, 2010.[83] The Supreme Court granted leave to appeal on October 28, 2010, and the appeal was set to be heard on October 12, 2011.[84] Bill C-304 was introduced in the House of Commons for first reading on September 30, 2011. The Bill underwent three readings before passing on June 6, 2012. During this time, the Supreme Court was deliberating its decision in *Whatcott*. The Bill went before the Senate from June 6, 2012, to June 26, 2013. During this time, on February 27, 2013, the Supreme Court released its unanimous decision declaring the constitutional validity of section 14(1)(b) of the SHRC and discussing the societal importance of civil hate speech legislation. Despite the release of the decisive decision from the highest court in the country, the Senate passed Bill C-304 and the bill received royal assent on June 26, 2013, repealing Canada's only federal civil hate speech provision.

The timeline highlights how the government and the highest court in the country were simultaneously undergoing constitutional analyses, assessing the proper balance to be struck between freedom of expression and protection from public dissemination of hate. It is interesting that at the end of their respective analyses, the two factions came to opposite conclusions. On the one hand, the Supreme Court affirmed that freedom of expression is not an absolute right and declared the fundamental importance of balancing freedom of expression alongside the need for protecting vulnerable groups from hateful speech. In comparison, the Conservative majority in both the House of

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82 House of Commons Debates, 41st Parl, 1st Sess, No 24 (30 September 2011).

83 *Saskatchewan (Human Rights Commission) v Whatcott*, [2010] SCCA No. 155.

84 *Ibid.*

Commons and the Senate, promoted unfettered free speech and effectively declared the superiority of freedom of expression over the protection of vulnerable groups in Canada. In doing so, the Conservative majority in the House of Commons and the Senate blatantly contradicted the Supreme Court's jurisprudence in *Taylor* and *Whatcott* and effectively discarded the legal analysis of the highest court as irrelevant to the debate of the proper balance that must be struck between competing *Charter* rights.

B. The Debate in the House of Commons

Mr. Storseth introduced Bill C-304 into the House of Commons on September 30, 2011, with these words of introduction:

> Freedom of speech is the freedom that all other freedoms are built on. It cannot be restrained to the politically correct. The best way to fight bigotry is to ensure that we protect and enhance our fundamental freedoms in this great country of ours. That is why I ask all members in this House to support this bill that protects the fundamental building block of democracy: freedom of speech. God bless.[85]

On November 22, 2011, when Bill C-304 was read in the House for a second time, the *Whatcott* appeal had been argued before the Supreme Court and the Court had reserved its decision. At the bill's second reading, Mr. Storseth addressed Parliament again and declared that section 13 of the CHRA "eats away" at the fundamental freedom of speech.[86] According to Mr. Storseth, section 13 was unable to distinguish between "real hate speech" and that which he referred to as "hurt speech".[87] Mr. Storseth stated that if someone offends another and is investigated under section 13 of the CHRA, truth is "no longer" a defence and the "person would no longer have the right to due process, the right to a speedy trial, or even the right to a lawyer to defend himself or herself".[88] Mr. Storseth stated section 13 represented a non-justifiable limitation on freedom of expression under a section 1 *Charter* analysis, declaring it to be a "loosely written, highly subjective, vague law". Mr. Storseth proclaimed it to be an abomination to allow this sort of law to override the fundamental right of freedom of expression in Canada's free and democratic society.[89]

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85 House of Commons Debates, 41st Parl, 1st Sess, No 24 (30 September 2011) at 1205.

86 House of Commons Debates, 41st Parl, 1st Sess, No 24 (22 November 2011) at 1830.

87 *Ibid.*

88 *Ibid.*

89 *Ibid* at 1835.

In his speech, Mr. Storseth put it to his fellow MPs that the objectives of section 13 of the CHRA (being the protection of individuals and identifiable groups from harm), is best left to the exclusive jurisdiction of the *Criminal Code*. According to Mr. Storseth, if a vulnerable individual in society feels as if they are being discriminated against through hate propaganda, their best avenue for recourse is to bring an action under the *Criminal Code* and have criminal charges laid. In Mr. Storseth's view, the *Criminal Code* is best suited to deal with these circumstances as the *Criminal Code* will ensure no frivolous claims are brought forward because the Attorney General must first approve all claims and because the *Criminal Code* provides the defendant with the proper defences.[90] Mr. Storseth told his fellow MP's that with the repeal of section 13 individuals would "still have recourse through both the civil and criminal justice system." [91] However, after making this statement, Mr. Storseth referenced only sections 318 to 320 of the *Criminal Code* as available legislative recourse and gave no explanation as to what alternative civil route was available following the repeal of section 13 from the CHRA.[92]

After Mr. Storseth's introduction at the second reading of Bill C-304, the floor was open for discussion. When the Liberal MP Irwin Cotler addressed the House of Commons, he explained how Mr. Storseth's perspective and the purpose behind Bill C-304 were misguided in light of the Supreme Court's jurisprudence on the constitutionality of section 13 and the importance of civil hate speech legislation in Canadian society

> ... [T]he premise underlying the bill, while well intentioned, is misinformed and misleading. It seems to suggest that freedom of speech is an absolute right, but it does not admit to any limitation, ignoring that all free and democratic societies have recognized certain limitations on freedom of expression.

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90 *Ibid* at 1835-1840.

91 *Ibid* at 1835.

92 Mr. Storseth may have been referring to the provincial human right codes, however, he made no mention of these and as mentioned earlier, no provincial human rights codes provide the protection from hate speech transmitted on the internet or the telephone. Mr. Storseth may have been referring to the possibility of a potential civil action in tort for defamation, however, and most notably, the tort of defamation is not a civil remedy which acts as a replacement to civil human rights legislation. Human rights legislation has a unique focus for it provides recourse to identifiable groups threatened or harmed by hate speech. The elements of the offence required to bring an action for defamation differ from civil hate speech legislation under human rights codes. It is notable that Mr. Storseth did not mention defamation nor any other civil remedy in any of his addresses to the House. His discussion discussed only the availability and use of the *Criminal Code*.

> ...
> [P]rovisions against hate speech partake in this genre of limitations to protect the rights of individuals and minorities against group vilifying speech, to protect against those discriminatory hate practices that reduce the standing and status of individuals and groups in society thereby constituting an inequality, and this may surprise the member who sponsored the bill, to protect the very values underlying free speech itself.[93]

In support of his position, Mr. Cotler cited the Supreme Court's decisions in *Keegstra* and *Taylor*. He explained to the House that in *Taylor*, the Supreme Court declared the importance and the constitutionality of section 13 of the CHRA, proclaiming the provision to be a reasonable and justifiable limitation on freedom of expression. Mr. Cotler reminded his fellow MPs how the Supreme Court had declared hate speech to be a form of expression that directly contradicts the values underlying freedom of expression.

Mr. Cotler declared the objective of Bill C-304, being to permit the public expression of hate speech, to constitute "an assault on that bedrock principle of freedom of expression".[94] Mr. Cotler discussed how the Supreme Court has explained that one right cannot supersede the other. He stated: "Hate speech is an equality issue as well as a free speech issue".[95] Mr. Cotler explained how the Supreme Court has recognized the real harm caused by hate speech and highlighted how the highest court in the nation has supported the sanction of hate propaganda and the limit on expression in the name of protecting targeted groups from hate:

> As the [Supreme] [C]ourt put it, the concern resulting from racism and hate mongering is not simply the product of its offensiveness, but from the very real harm it causes.[96]

Mr. Cotler recognized Mr. Storseth's concerns regarding the effectiveness and the application of section 13, however, he was adamant that a complete repeal of section 13 was not the appropriate remedy to address these concerns. Mr. Cotler urged the government to consider a list of possible reforms and amendments to s. 13 in order to address the concerns. Mr. Cotler proclaimed that the solution was not "through repeal of the legislation whose constitutional validity has been upheld by the Supreme Court, but to address

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93 *Ibid* at 1900.

94 *Ibid*.

95 *Ibid*.

96 *Ibid*.

the concerns and to offer proposals to modify the regime that is now in place"[97].

Mr. Cotler astutely reminded his fellow MPs that at that very moment they were discussing the repeal of section 13 of the CHRA, the Supreme Court was reviewing the constitutionality of a similar hate speech provisions under the SHRC. Mr. Cotler felt that the discussion surrounding the repeal of section 13 was "premature," and urged the House to wait for the "guidance from this nation's highest court on the scope and ambit of freedom of expression."[98] After conceding that his call for delay would be disregarded, as the Conservatives had a clear eagerness to pass the bill, Mr. Cotler implored the House to recognize that even without awaiting the Supreme Court's ruling in *Whatcott*, they had before them more than enough guidance from the Supreme Court on the importance and constitutionality of section 13 to dispose of the bill at that moment.[99] Mr. Cotler stated:

> In closing, we should be awaiting the Supreme Court decision before debating this. Nonetheless, given the Supreme Court decisions that we do have, the debate we should be having tonight should be regarding how we might reform and structure the human rights commissions to protect freedom of expression while protecting vulnerable individuals and minorities from hate and group vilifying speech rather than committing ourselves to abolishing the entire regime because it has produced results which can be addressed through positive reforms, as I have indicated this evening, which would address the member's concerns.[100]

The debate in the House was tabled until Parliament met on February 14, 2012. On February 15, 2012, Parliament voted to have Bill C-304 referred to the Standing Committee on Justice and Human Rights. After reviewing the findings of the Committee, Mr. Storseth made a motion to have Bill C-304 read for a third time. At the third reading on May 30, 2012, Bill C-304 was passionately resisted by both Liberal and New Democratic Party MPs, including another plea by Mt. Cotler, in which he stated:

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97 *Ibid* at 1905. It is notable that the Supreme Court similarly addressed issues such as this in *Whatcott* and provided a sort of "constitutional compromise" in reaching its decision.

98 *Ibid.*

99 *Ibid.*

100 *Ibid.*

> The arguments of some in this place in support of a repeal, frankly, have made a mockery of our constitutional law, arguments regarding free speech and, indeed, the related jurisprudence, in particular Supreme Court jurisprudence.[101]

The discussion in the House of Commons was then closed due to "time constraints" and Bill C-304 was put to a vote. The House of Common was divided and the vote was deferred until June 6, 2012. At 9:35pm on June 6, 2012, during a quiet nighttime sitting of the House of Commons, Bill C-304 was passed by a vote of 153-136.[102] The passing of the bill was met by applause and handshakes for Mr. Storseth from fellow Conservative MPs as the bill was strongly supported by both the Justice Minister at the time, Rob Nicholson, and Prime Minister Stephen Harper.[103] Bill C-304 was then passed to the Senate for review.

C. The Debate in the Senate

On June 27, 2012, Conservative Senator Doug Finely introduced Bill C-304 to the Senate. In introducing the bill, Senator Finely echoed Mr. Storseth's approach to civil hate speech legislation. Senator Finley declared freedom of expression to be the foundational right to which all other rights depend and declared section 13 be an unconstitutional restriction on freedom of expression.[104] Mr. Finley supported and encouraged Mr. Storseth's position that all hate speech issues should be and are more adequately dealt with under the *Criminal Code*.

Senator Finley stated that section 13 should be abolished because it censors speech that is merely offensive. According to Senator Finley:

> If you find an idea stupid, it is your right to ignore it. If you find a joke offensive, it is your right to disregard it. Even statements one might find intolerable or heinously out of line with reality deserve the opportunity to be heard and ignored.[105]

According to Senator Finley, the most powerful tool to protect against the harms of a bad or hateful idea is not protective legislation, but the community's rejection of it. He states that in a "marketplace of free ideas, better ideas will

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101 House of Commons Debates, 41st Parl, 1st Sess, No 24 (30 May 2012) at 1840.

102 Gillis, *supra* note 8.

103 *Ibid*.

104 Debates of the Senate, 41st Parl, 1st Sess, No 24 (27 June 2012) at 1530.

105 *Ibid* at 1540.

prosper and gain traction; the poorer ideas will be left by the wayside".[106] Senator Finley declared there to be no use for section 13 of the CHRA in Canadian society and encouraged his fellow Senators to support its repeal.

Once the floor was open for debate, Liberal Senator Jim Munson, responded to Senator Finley's arguments. Senator Munson opposed the repeal of section 13, stating the passage of Bill C-304 in the House of Commons revealed how Canadians were failing in the "lessons of history":[107]

> We were supposed to have learned three indelible lessons from the concentration camps of Europe. First, indifference is injustice's incubator. Second, it's not just what you stand for, it's what you stand up for. And third, we must never forget how the world looks to those who are vulnerable.[108]

Senator Munson proclaimed that the passage of Bill C-304 and the arguments used to support its passage. represent Canada's failure to grasp the important lessons from our world history. He stated that the passage of Bill C-304 would show that Canada has still not learned the importance of taking positive action to prevent the abuses in the first instance, instead letting them flourish into discrimination, violence, and even genocide.[109]

Senator Munson countered Senator Finley's belief that the "poor ideas" expressed in society "fall by the wayside", stating that the prevalence of hate speech in Canadian society today evidences that "poor ideas" do not simply fall by the wayside. Senator Munson referenced the realms of widely accessible websites of white supremacist groups, misogynists, and homophobes as evidence that hate speech is alive and well in Canada and that "poor ideas" are very much a reality.[110]

Senator Munson also addressed the argument advanced by proponents of Bill C-304 that the *Criminal Code* is the best mechanism to monitor hate speech in Canada. He identified how the anti-hate provisions under the *Criminal Code* seek to catch only the most extreme cases of hate speech and therefore require a much higher burden of proof, resulting in very few convictions.[111] In contrast, civil hate speech legislation seeks to address the less extreme forms of

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106 *Ibid* at 1550.

107 Debates of the Senate, 41st Parl, 1st Sess, No 24 (23 October 2012) at 1510.

108 *Ibid* at 1500.

109 *Ibid* at 1510.

110 *Ibid.*

111 *Ibid* at 1500. For example, the *Criminal Code* anti-hate provisions have a specific *actus reus* component and prohibit only the "wilful promotion" of hatred and discrimination.

hate speech. He explains how the civil and criminal provisions work together and are a "necessary complement to one another".[112] He urged his fellow Senators to regard section 13 of the CHRA as one tool in Canada's toolbox to combat intolerance and discriminatory and to promote respect among Canadians.

Senator Munson pointed out how Senator Finley and the other supporters of Bill C-304 were failing to recognize the constitutional requirement of balancing competing *Charter* rights. Senator Munson explained to his fellow Senators that the advocates for the repeal focused their arguments solely on the supremacy of freedom of speech but ignored any discussion on the topic of the threat caused by hate speech.[113] Senator Munson reminded his fellow Senators of the Supreme Court's decision in *Taylor*. He explained how in *Taylor* the Court explicitly told politicians that section 13 of the CHRA represents the appropriate balance between the competing *Charter* rights of freedom of expression and equality. He explained how in *Taylor*, the Supreme Court declared section 13 a constitutional limitation on the right to freedom of expression.[114]

Senator Munson referenced Irwin Cotler's address in the House and stated that the supporters of Bill C-304 are building their argument on a "distorted concept of freedom of expression" for they speak of freedom of expression as though it is an absolute right, even though it is not.[115] Senator Munson reminded his fellow Senators that with all rights, there comes responsibilities.[116] While Canadian citizens are fortunate to have the right to freely express themselves, they have a corresponding responsibility not to do so in a way that has the potential to harm their fellow citizens. Senator Munson cited the Cohen Committee's statement in 1965 that "in a democratic society, freedom of speech does not mean the right to vilify".[117]

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112 *Ibid.*

113 *Ibid* at 1510.

114 *Ibid.*

115 *Ibid.*

116 *Ibid.*

117 *Ibid.* The Cohen Committee, formally titled the "Special Committee on Hate Propaganda in Canada" was a special federal committee established by Canada's minister of justice in 1965 to study and report upon the problems related to hate propaganda in Canada. The Cohen Committee and their special report is continually referenced and cited for its findings on the presence of hate propaganda in Canada and the serious harms associated

Senator Munson too recognized the shortcomings and frailties associated with the application and use of section 13 of the CHRA, but like Mr. Cotler, he strongly encouraged Senators to oppose abolishment and focus on modifying the provision. Senator Munson specifically opposed the complete abolishment of section 13 given the predominant usage and continued rise of the internet as a means to disseminate hate speech. Senator Munson cited the 2011 study conducted by the League for Human Rights of B'nai Brith Canada to show that hate speech was alive and well on the internet in Canada today.[118] The study showed how the internet is acting as the primary medium to spread hate messages. The internet has become the preferred medium of hate promoters because one can easily and affordably reach a vast audience, or a specific audience, relatively easily and without much personal risk.[119] Senator Munson recognized that given the continued rise of the internet and other telecommunication options, the need for section 13 in the CHRA has never been more critical. Senator Munson closed his address to the Senate with the following statement:

> Honourable senators, today it is my duty, along with others, to stand up for the most vulnerable people in our society, but I am comfortable nonetheless to not be among those who will soon likely be patting themselves on the back and congratulating one another for getting the job done. Eventually, honourable senators, there will come a time when complicity in the passage of this bill will be recognized for what it really is: a source of national regret and shame.[120]

The Supreme Court's unanimous decision in *Whatcot* was released while Bill C-304 was under second reading in the Senate. Many Senators referenced and directly cited the *Whatcott* decision in support of their opposition to Bill C-304, including Senator Lillian Eva Dyck. With reference to *Taylor* and *Whactott*, Senator Dyck countered the arguments advanced by the advocates of Bill C-304. Senator Dyck addressed the advocates' argument that section 13 is unconstitutional because it restricts speech that simply causes "hurt feelings".[121] Senator Dyck explained that the Supreme Court has continually declared that the type of expression section 13 and other civil hate speech provisions prohibit is not offensive speech that "hurts" feelings, but censors

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with the presence of hate speech in society.

118 *Ibid.*

119 *Ibid.*

120 *Ibid* at 1520.

121 Debates of the Senate, 41st Parl, 1st Sess, No 24 (26 March 2013) at 1800.

only the forms of expressions that expose its target group to the extreme feelings of detestation and vilification which risk provoking discriminatory activities against that group.

Next, Senator Dyck addressed the argument that section 13 unconstitutionally interferes with the right to freedom of expression under the *Charter*. Senator Dyck reminded her fellow Senators that, just like every other right under the *Charter*, freedom of expression is not absolute and is subject to reasonable and justifiable limits.[122] In citing Dickson CJ.'s decision in *Taylor* and Rothstein J.'s decision in *Whacott*, Senator Dyck explained that the Supreme Court has not only declared section 13 to be a constitutional limitation on freedom of expression, but has also declared that its limitation promotes the underlying purposes of freedom of expression. She cited *Taylor* and *Whacott* and explained how "[h]ate messages directed to an identifiable group discredits or undermines their credibility. Their voices are not heard to the same extent. They are disadvantaged simply because of who they are".[123]

Senator Dyck addressed the advocates' third argument that the *Criminal Code* provides all the necessary legal protections against hate speech in Canadian society. Senator Dyck discussed how the civil and criminal provisions serve different purposes and how both are necessary to effectively counter the harms caused by hate speech. She explained how section 13 is as a preventative law, not a punitive law, and how the civil legislation seeks to restrict the conduct that falls short of criminal behavior, but still has the capacity to harm vulnerable groups.[124] In closing, Senator Dyck encouraged her fellow Senators to realize they had a duty to retain legislation that protects the vulnerable from repeated messages of hate and explained how the passage of Bill C-304 flew in the face of this duty.[125]

The leader of the opposition in the Senate, Senator James Cowan read s. 13 of the CHRA aloud and then addressed the Senate as follows:

> The Supreme Court of Canada has had occasion to consider these words several times. It is important to note that the court has repeatedly upheld the constitutionality of these words under the Charter of Rights and Freedoms. Most recently, just a few months ago, the court issued a decision dealing with a Saskatchewan law, the wording of which was very close to that of section 13. The court took the opportunity to revisit

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122 *Ibid.*

123 *Ibid.*

124 *Ibid* at 1810.

125 *Ibid.*

> its earlier decision on section 13. It explicitly upheld the constitutionality of the words found in section 13.
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> This was not a split decision, honourable senators. It was unanimous. Just to be clear, the decision was rendered by Justice Rothstein, who was, in case it is relevant to anyone, appointed by the current government.[126]

Senator Cowan discussed the fundamental power words bear and the harm they can cause, even in Canadian society, when unregulated. He explained how the atrocities of the Holocaust and Rwanda were committed by "ordinary people" and committed by "neighbor against neighbor".[127] He explained how "ordinary, educated people, raised in some of the most civilized nations of the world" become capable of committing such atrocities because the power words have to persuade.[128] He said words have the capacity to convince us that others are not like us, that they are not worthy of the same rights and values, and that they are inferior, "so inferior that they need not even be seen as human":[129]

> Words are powerful instruments, honourable senators… words can explain, they can persuade, and they can dissuade. They do not merely crystallize thought and understanding; they are the very stuff of thought and understanding.
> Ask any student of human atrocity, and they will tell you that it began with words. My eminent colleague in the other place, Irwin Cotler, often reminds us that the Holocaust did not begin in the gas chambers, it began with words.[130]

In recognizing the extreme power words yield, Senator Cowan exclaimed the critical importance of legislation such as section 13 that "stop[s] hate speech early and, indeed, at a stage when it might still be possible to educate the speaker and the potential audience away from hatred to the values we share and cherish as Canadians."[131] Senator Cowan explicitly stated that the repeal of section 13, leaving the regulation of hate messages to the high standard established under the *Criminal Code*, will lead to Canadians being

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126 Debates of the Senate, 41st Parl, 1st Sess, No 24 (26 June 2013) at 1400.

127 *Ibid.*

128 *Ibid.*

129 *Ibid.*

130 *Ibid.*

131 *Ibid.*

"subjected to a plethora or hateful messages and communications, and a corresponding loss of civility, tolerance and respect in Canadian society".[132]

D. The Discrepancy between the approach of the Supreme Court and Conservative Government

The arguments and reasoning advanced and relied upon by Mr. Storseth, Senator Finley, and the other Conservative MPs and Senators that supported the repeal of section 13 of the CHRA blatantly contradict the Supreme Court's jurisprudence on the constitutionality of civil hate speech legislation.

First and foremost, section 13 does not represent an unconstitutional limitation on freedom of expression. The majority of the Supreme Court specifically upheld section 13 of the CHRA as a constitutional limitation on section 2(b) of the Charter in *Taylor*. Thirteen years later in *Whatcott*, the Supreme Court had the opportunity to alter the Court's precedent from *Taylor*. Instead, the Court released a rare unanimous decision in this area of the law and upheld the *Taylor* precedent, confirming the Court's earlier constitutional analysis of section 13.

Second, freedom of expression is not the "cornerstone" freedom upon which all other rights and freedoms rely. Although the right to freely express oneself is fundamental in a free and democratic society, no right is superior to any other. In a free and democratic country such as Canada, with a *Charter of Rights and Freedoms*, it is inevitable that freedoms and rights will compete with one another at times. The Supreme Court and courts across the nation have clearly articulated that no right under the *Charter* is absolute. When *Charter* rights are in conflict with one another, courts and legislators alike must approach these conflicts carefully and logically with a critical understanding and desire to strike the appropriate balance between the competing rights. The approach taken by the proponents of Bill C-304 for the removal of section 13 of the CHRA was far from careful or logical. No attempt was made to balance the competing *Charter* rights – instead freedom of expression was unapologetically placed at the forefront of the debate. The approach ignored legal precedent, historical lessons and the current data as it relates to the rise of hate speech in Canada.

The world is seeing a rise in populist and extremist movements as our world is becoming more polarized by ideology. Stemming from this, the platform is being set for an increase in the public dissemination of hate, with

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[132] *Ibid* at 1410.

the internet as its primary platform for facilitating such hate. Studies show hate speech is more prevalent in Canada today, and throughout the world, because of the internet's ability to allow anyone to communicate to a vast audience (or a specific audience) quickly and from a concealed place in their home where they can remain anonymous, minimizing their risk. Author and educator Elisa Hategan provided the following warning of the threat of internet hate:

> As Facebook and other social media outlets constantly work to defend themselves against interminable security breaches, data leaks or Russian hackers, they have failed to notice the most frightening virus ever to hit their platforms: Online hate. Encoded with hyper polarization and intolerance, this is arguably the most devastating virus to hit the internet, because instead of merely infecting hardware or taking a computer hostage, it worms through impressionable minds and alters perceptions of reality. It's an open-source virus – anyone can add maliciousness to the malware, weaving in coded words like "globalists," brackets that indicate (((Jews))), or numbers that stand in place for words, like 88 for "Heil Hitler."Worse yet, there are no effective programs to inoculate against the speedy and vicious damage caused to those who become infected and their communities.[133]

North America is not immune to the threat of internet hate as evidence by the Quebec City mosque shooting in 2017 and the Pittsburgh synagogue shooting in 2018. Both events are prime examples of the influence the internet has on the public dissemination of hate and how it can lead to disastrous consequences. As the Supreme Court identified in *Taylor* and *Whatcott*, history has shown us how hate speech often acts as the steppingstone for broader and more serious attacks on vulnerable groups in society who are deemed to be inferior by hateful public rhetoric. This threat is only on the rise in the age of the internet and, with the repeal of s. 13 of the CHRA, the reality is Canada is underprepared to address this threat.

The proponents for the repeal of section 13 reasoned that the civil hate speech legislation was unnecessary because the effects and consequences of hate speech are best dealt with through the provisions contained in the *Criminal Code*. In both *Taylor* and *Whatcott*, the Supreme Court discussed the unique and important approach of civil hate speech legislation and how it justifiably differs from the approach of criminal hate speech legislation. Criminal legislation is meant to catch only the most severe and serious forms

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[133] Elisa Hategan, "Online hate is an infectious virus—and it should be addressed like real-life violence" (Macleans), November 1, 2018: https://www.macleans.ca/opinion/online-hate-is-an-infectious-virus-and-it-should-be-addressed-like-real-life-violence/.

of conduct in society. The stigma associated with, and the consequences of, a criminal conviction are so serious as to merit a very narrow application of the criminal law. The provisions of the Criminal Code are not be lightly invoked, and therefore constitutionally require a high evidentiary threshold. This is why there has only been only a handful of successful convictions under the criminal hate speech provisions since its inception into the *Criminal Code* in 1970.

In *R v Keegstra*[134], the Supreme Court discussed the importance of having both civil and criminal hate speech provisions because they complement one another. The Court explained how civil hate speech provisions under human rights codes have lower constitutionality threshold requirements than hate speech provisions under the *Criminal Code*, as a criminal proceeding is of a more serious nature than proceedings under hate propaganda provisions under civil human rights legislation, therefore:

> ... greater precision is required in the criminal law than, for example, in human rights legislation because of the different character of the two types of proceedings. The consequences of alleging a violation of s. 319(2) of the *Criminal Code* are direct and serious in the extreme.[135]

In *Keegstra*, the majority of the Supreme Court stated that in order to effectively curtail the harms caused by hate speech, Canada must have both civil and criminal hate-restricting legislation. Writing for the majority, Dickson CJ. proclaimed that the "fostering of tolerant attitudes among Canadians will be best achieved through a combination of diverse measures".[136] He explained that the more confrontational approach of the criminal law is best suited for the "recalcitrant hate-monger," whereas the remedial approach of civil human rights legislation is the more preferable approach in less severe circumstances.[137] Dickson C.J. stated: "It is important, in my opinion, not to hold any illusions about the ability of this one provision to rid our society of hate propaganda and its associated harms."[138] This notion was supported in the Supreme Court's decisions in *Taylor* and *Whatcott* in which the Court endorsed the remedial approach of civil hate speech legislation and its focus on the effects

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134 *Supra* note 3

135 *Ibid* at 862.

136 *Ibid* at 785.

137 *Ibid*.

138 *Ibid* at 784.

of hate speech on society, rather than on the intent of the individual conveying the message.

Despite this clear Supreme Court jurisprudence, the proponents of Bill C-304 advocated for the removal of the only federal civil hate speech provision in Canada's human rights legislation, stating the criminal law was best suited to address the harms associated with hate speech.

The blatant contradictions to the Supreme Court's jurisprudence evidenced in the arguments of the proponents of Bill C-304 were noted by many Liberal and NDP members of government, including but not limited to MP Irwin Cotler and Senators Cowan, Munson and Dyck. Unfortunately, despite the valid opposition of these individuals, among others in government, the power of party lines ruled the day and Bill C-304 passed easily due to the Conservative majority in both the House of Commons and the Senate.

During a quiet nighttime sitting of the House of Commons on June 6, 2012, Parliament passed Bill C-304 by a vote of 153 – 136. Then, on June 26, 2013, the Senate passed the bill by a vote of 49-32. Of the 153 MPs in the House of Commons that voted to pass Bill C-304, 152 were Conservatives.[139] Of the 136 MPs that voted "no" to Bill C-304, each and every vote was cast by a Liberal, New Democrat, Bloc Quebecois or Green Party MP. Not a single Conservative MP sitting in the House of Commons in the 41st Parliament opposed the passing of Bill C-304. The power of party affiliation was no less prominent in the Senate. All 49 Senators who voted to pass Bill C-304 were Conservative and 45 of the 49 were appointed by Stephen Harper. While three Conservative Senators opposed the bill, they were not appointed by Stephen Harper.[140] The remaining 29 Senators who voted to oppose Bill C-304 were Liberal-appointed Senators.[141]

V. THE LEGISLATIVE GAP

Prior to the passage of Bill C-304, section 13 of the CHRA represented Canada's only piece of civil legislation which protected Canadians from the dissemination of hate speech transmitted on the internet. Although every

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139 Scott Simms, was the only Liberal supporter of Bill C-304.

140 They were appointed by Prime Minister Brian Mulroney and Prime Minister Paul Martin.

141 Parliament of Canada, vote No 269, 41st Parliament 1st Session (6 June 2012), online: https://www.ourcommons.ca/Members/en/votes/41/1/269

Canadian jurisdiction has enacted a human rights code, only Saskatchewan,[142] Alberta,[143] British Columbia,[144] and the Northwest Territories[145] have enacted hate speech provisions into their respective human rights codes. Furthermore, none of these provincial hate speech provisions provide for the protection from hate speech transmitted on the internet.[146]

The passage of Bill C-304 has resulted in leaving the most popular, effective, and widely accessible mechanism to publicly communicate hate essentially unregulated in Canada. The repeal of section 13 from the CHRA created a legislative gap as it relates to Canada's protection of vulnerable groups from hate speech transmitted on the internet. Without section 13 in the CHRA, Canadians are left without a remedy to challenge hate messages communicated online unless the high evidentiary burden required to secure a conviction under section 319(2) of the *Criminal Code* is satisfied. Furthermore, the *Criminal Code* now remains the only mechanism available to Canadian citizens to redress the dissemination of hate speech conveyed through any medium if they live in Manitoba, Quebec, Ontario, New Brunswick, Newfoundland, Nova Scotia, Prince Edward Island, Yukon, or Nunavut (the provinces without hate speech legislation enacted in their provincial codes).

As discussed above, the narrow purpose of the criminal hate speech provisions and the high evidentiary burden associated therewith is indicative of why leaving the legislative protection against hate speech solely in the hands of the criminal law fails to provide sufficient safeguards from the threats associated with hate speech. The Supreme Court's jurisprudence is indicative of the necessity of ensuring Canada has both civil and criminal mechanisms in place to protect Canadian's from the real harm the public dissemination of hate can cause to those most vulnerable in our society. Without civil hate speech provisions, Canada is under-equipped to deal with the rising threat of the internet and the public dissemination of hate thereon.

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142 SHRC supra note 35, s 14(1)(b)

143 *Alberta Human Rights Act,* RSA 2000 A-25.5, s 3(1)(b).

144 *Human Rights Code*, RSBC 1996 c 210, s 7(1)(b).

145 *Human Rights Act*, SNWT 2002 c 18, s 13(1)(c).

146 Given the interprovincial nature of the internet and telecommunications, it is understandable that only s. 13 of the CHRA dealt with hate speech transmitted on the internet as the federal government has the exclusive jurisdiction to legislate on matters of an interprovincial nature, as per *City of Toronto v Bell Telephone* Co., [1905] AC 52, [1904] JCJ No 2.

VI. RECENT DEVELOPMENTS

The legislative gap caused by the repeal of section 13 from the CHRA has not gone unnoticed by Canadians. While some free speech advocates have reveled in the passage of Bill C-304, many have advocated for the reinstatement of s. 13, or a similar provision, to the CHRA. For example, the Saskatchewan Human Rights Commission has worked tireless to promote the reinstatement of a federal civil hate speech provision since its removal in 2013, and more recently, the Center for Israel and Jewish Affairs and the Evangelical Fellowship of Canada publicly called upon federal officials to address the sharp rise of reported hate crimes in Canada, with a specific focus on combatting online hate. [147]

In March of 2019, the Liberal Federal Government responded to these calls to action, directing the House of Commons Standing Committee on Justice and Human Rights (the "Committee") to undertake a study of online hate. In response to the evidence and data collected, the Committee released a report in June 2019, [148] outlining its main concerns and nine recommendations to "prevent all forms of hatred motivated by race, national or ethnic origin, colour, religion, age, sex, sexual orientation, gender identity or expression, marital status, family status, genetic characteristics, and disability". Recommendation number 7 of the Committee is entitled "Providing a Civil Remedy" and specifically advocates for the reinstatement of s. 13 of the CHRA, or the implementation of "a provision analogous to the previous section 13 … which accounts for the prevalence of hatred on social media."

The Committee specifically references the Supreme Court's decision in *Whatcott* in the first passage of Chapter 1 of the Report, setting the tone for the Report with the following passage:

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[147] Centre for Israel and Jewish Affairs, Press Release: CIJA Urges Action in Response to Spike in Antisemitic Hate Crimes, 29 November 2018, https://cija.ca/press-release-cija-urges-action-in-response-to-spike-in-antisemitic-hate-crimes/; The Evangelical Fellowship of Canada, Calling Parliament to address online hate: Letter to the Minister of Justice, 4 February 2019, https://www.evangelicalfellowship.ca/Communications/Outgoing-letters/February-2019/Calling-Parliament-to-address-online-hate-Letter.

[148] House of Commons, Standing Committee on Justice and Human Rights, *Taking Action to End Online Hate: Report of the Standing Committee on Justice and Human Rights* (June 2019) (Chair: Anthony HouseFather). The report can be accessed here: https://www.ourcommons.ca/Content/Committee/421/JUST/Reports/RP10581008/justrp29/justrp29-e.pdf.

CHAPTER 1—CONTEXT OF THE STUDY

> Hate speech is not only used to justify restrictions or attacks on the rights of protected
> groups on prohibited grounds ... hate propaganda opposes the targeted group's ability
> to find self-fulfillment by articulating their thoughts and ideas. It impacts on that group's
> ability to respond to the substantive ideas under debate, thereby placing a serious
> barrier to their full participation in our democracy. Indeed, a particularly insidious aspect
> of hate speech is that it acts to cut off any path of reply by the group under attack. It
> does this not only by attempting to marginalize the group so that their reply will be
> ignored: it also forces the group to argue for their basic humanity or social standing, as a
> precondition to participating in the deliberative aspects of our democracy.
>
> *Saskatchewan (Human Rights Commission) v Whatcott*, [2013] 1 SCR 467

Chapter 1 of the Report goes on to state how imperative it is to ensure governments around the world act to effectively address both online and offline acts of hatred. The Committee highlights the delicate balance these government responses demand, stating that they "must strike the right balance between protected rights and freedoms". The Committee specifically emphasizes that none of the recommendations in its Report derogate from an individual's constitutional right to freedom of expression protected under section 2(b) of the *Charter*.[149]

Much of the Report and recommendations contained therein reflect the Supreme Court's jurisprudence from *Taylor* and *Whatcott*, as well as the discussions of the Liberal and NDP MPs and Senators in the House of Commons and the Senate while debating Bill C-304. In its Report, the Committee acknowledges that "hate-based" and "hate-fuelled" discrimination is on the rise throughout the world, including Canada, and that the internet has become the most frequent and chosen medium to advance this hate-based

[149] *Ibid* at 5- 6.

discrimination.[150] Section 6.2 of the Report is wholly dedicated to the debate of whether civil human rights legislation should be utilized to combat online hate and whether a section 13 equivalent is needed in Canada. On that issue, the Committee concluded as follows:

> Recommendation 7—Providing a Civil Remedy
>
> That the Government of Canada develop a working group comprised of relevant stakeholders to establish a civil remedy for those who assert that their human rights have been violated under the Canadian Human Rights Act, irrespective of whether that violation happens online, in person, or in traditional print format. This remedy could take the form of reinstating the former section 13 of the Canadian Human Rights Act, or implementing a provision analogous to the previous section 13 within the Canadian Human Rights Act, which accounts for the prevalence of hatred on social media.[151]

The NDP, in its Supplementary Report (the "NDP's Report"), supports the Committees recommendation to reinstate a civil hate speech provision to monitor and prosecute online hate speech. The NDP's Report recognizes that since section 13 was repealed in 2013, "Canada has lacked the necessary legislation to penalize those who promote online hate" and advocates for the reinstatement of an updated version of section 13 to the CHRA to protect minorities in Canada from the real harms associated with hate speech. [152]

Despite the recommendations of the Committee, no advancement has been made on the legislative reinstatement of section 13 (or an equivalent thereof) Whether this inaction can be attributed to the recent Federal Election, or whether it is a lack of political will, is unknown. What is clear however, is that there is now a body of recently-accumulated evidence , collected by the federal government, which supports the reinstatement of a federal civil hate speech provision.

VII. CONCLUSION

In Canada, governments and courts face a difficult challenge in establishing the appropriate balance between the competing rights and freedoms under the *Charter*, but this challenge is vital to ensuring a just and respectful society. The Supreme Court of Canada has declared on numerous

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[150] *Ibid* at 7
[151] *Ibid* at 41
[152] *Ibid* at 59

occasions that no *Charter* right is absolute, no right is superior to another, and every right is subject to the justifiable limitations as enumerated under section 1 of the *Charter*. Despite the Supreme Court's clear jurisprudence and the presence of section 1 of the *Charter*, advocates for unfettered free speech suggest there is no constitutionally justifiable limitation on freedom of expression.

Historically in Canada, governments and courts have recognized hate speech legislation to be a justifiable limitation on freedom of expression. Historically, the federal government has mandated a legislative restriction on freedom of expression in the name of restricting hate speech under section 13 of the CHRA. In *Taylor*, the Supreme Court of Canada upheld this provision as being a constitutional limitation on the freedom of expression because it reflects the just and respectful society Canadians seek to be a part of. In 2013, the Supreme Court's unanimous decision in *Whatcott* upheld the important precedent set in *Taylor* and reminded governments and Canadian citizens that there are boundaries and limits on freedom of expression. The Supreme Court's decisions in *Taylor* and *Whatcott* represent the message from the Supreme Court's of the importance of providing legislation that restricts the kind of expression that holds no legitimate value in a free and democratic society.

Notwithstanding the Supreme Court's clear jurisprudence, the federal government under Stephen Harper's leadership removed section 13 from the CHRA. There is a clear disconnect between the message conveyed by the Supreme Court regarding the type of society Canadians seek to establish, and the federal government's repeal of section 13 from the CHRA. The Supreme Court's jurisprudence reflects the just and democratic society Canada is recognized as having, as it advocates for the civil protection of vulnerable members of society. The Conservative Government's removal of section 13 from the CHRA and its reasoning to support the removal, make a mockery of Canada's historical approach to balancing competing *Charter* rights, including freedom of expression.

The Supreme Court's analysis in both *Taylor* and *Whatcott* exemplifies the proper balance that must be struck between the competing *Charter* rights of freedom of expression and equality rights. In stark contrast, the government's removal of section 13 of the CHRA represents a disregard for the fundamental practice of balancing competing *Charter* rights. The government's removal of the important civil protections against hate speech indicates that the right to freely express oneself is superior to the protection of vulnerable groups from

the harms associated with hate speech. It is the Supreme Court's jurisprudence, not the legislative action of the government that truly reflects the values fundamental in Canadian society.

Many astute and perceptive MPs and Senators were alive to this fundamental notion and championed its importance in Ottawa. Unfortunately, party affiliation and the desire to take a more American approach to unfettered free speech resulted in one of the most vital federal civil human rights provisions being abolished. The absence of section 13 of the CHRA should be of concern to each and every Canadian citizen, for it is only when all Canadian citizens feel secure and respected within society that Canada can flourish and advance as a vibrant democracy.