



Bill C-304 Backgrounder

October 17, 2011

Canadian Human Rights Act (CHRA)

Section 13 states:

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.

(2) For greater certainty, subsection (1) applies in respect of a matter that is communicated by means of a computer or a group of interconnected or related computers, including the Internet, or any similar means of communication, but does not apply in respect of a matter that is communicated in whole or in part by means of the facilities of a broadcasting undertaking.

(3) For the purpose 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 this matter.

Background:

The Canadian Human Rights Act was passed in 1977 under the Trudeau government. Section 13 was included as a result of recorded hate messages being dispersed in Toronto.

Historical parliamentary actions and comments demonstrate that there is a long history of dissatisfaction with Section 13 of the Canadian Human Rights Act. There have been a number of attempts to repeal this Section, but to no avail. In 1999, the Honourable Anne McLellan issued an independent panel to review the CHRA, as the Act had not been reviewed since it was passed in 1977. This panel was asked to directly review the need to prohibit hate messages on the internet. The outcome of the overarching review of the CHRA was the inclusion of Section 13 (2), prohibiting the communication of hate messages through the internet. The inclusion of Section 13(2) was largely in response to the events of 9/11.

In 2008, the Canadian Human Rights Commission (CHRC) commissioned Dr. Robert Moon to provide an evaluation of Section 13 of the CHRA. Moon recommended repealing Section 13 or, at a minimum, amending Section 13 to more closely resemble a criminal restriction on hate speech. In 2009, the CHRC followed with a Special Report to Parliament, dismissing Moon's recommendation to repeal section 13. The CHRC did, however, agree with Moon's

recommendation to adjust the definition of hate speech on the CHRA, but rejected the inclusion of the requirement for proof of intent to incite hatred.

The CHRA included a number of suggested amendments for Section 13 in their Special Report to Parliament. These included:

- Add a statutory definition of “hatred” and “contempt”;
- Allow for an award of cost in exceptional circumstances where the Tribunal finds that a party has abused the Tribunal process;
- Include a provision under Section 41 of the CHRA to allow the early dismissal of Section 13 complaints when messages do not meet the narrow definition of hatred and contempt;
- Repeal subsection 54(1)(c), the provision that allows for the assessment of fines against those who violate section 13;
- Review the requirement in the Criminal Code for consent of an Attorney General, which may be a possible barrier to prosecutions; and
- Together with the appropriate bodies in provincial and territorial jurisdictions, consider the benefits of better coordination between Crown prosecutors and police services in their efforts to protect Canadians from hate propaganda.

None of these recommended amendments have been implemented to date.

Arguments for the Repealing of Section 13 in the Canadian Human Rights Act

- Section 13 of the CHRA conflicts with Section 2(b) of the Charter of Human Rights and Freedoms:
 - It is widely acknowledged that Section 13 of the CHRA conflicts with Section 2(b) of the Charter of Human Rights and Freedoms, which states:
 - 2. Everyone has the following fundamental freedoms: ...*
 - (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communications*
- The conflict of Section 13 in the CHRA with the Charter has been recognized by the Human Rights Tribunal:
 - Previous cases have disregarded the above mentioned conflict under the provision provided in Section 1 of the Charter of Rights and Freedoms, which states:
 - 1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.*
 - However, this provision leaves the CHRA to define “such reasonable limits,” which is not clearly outlined in Section 13 and is highly subjective.
 - This viewpoint was supported by the Human Rights Tribunal (HRT) in September of 2009 when they ruled that Section 13’s hate speech provision was unconstitutional and could not be saved by Section 1 of the Charter of Rights and Freedoms (paragraph 102 of the HRT’s ruling in the case of Warman v. Levine).

- What constitutes hatred or contempt is not clearly defined:
 - The wording in the CHRA is highly subjective as to what constitutes an act of hatred or contempt, as it merely identifies “any matter that is *likely* to expose a person or persons to hatred or contempt...” Liberal MP Keith Martin was previously recorded as rightly stating that this phrase is “a hole you can drive a Mack truck through.”
- The original purpose and intent of Section 13 has been lost:
 - The Supreme Court of Canada has also indicated that Section 13 does not target expression that some may find offensive, but rather targets only the most extreme forms of expression of hatred and contempt.
 - This is not in congruence with how Section 13 has been implemented, as there is no firm definition of what constitutes hatred and contempt under the CHRA.
- The original purpose and intent is covered under the Criminal Code of Canada:
 - The Criminal Code has provided hate propaganda provisions which covers the above mentioned purpose since 1970 and can be found in sections 318-320.1.
 - In particular, section 319 of the Criminal Code indicates the following:
 - 319.(1) Everyone who communicates statements in a public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace is guilty of:*
 - (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or*
 - (b) an offence punishable on summary conviction.*
- Truth and intent are not taken into account under Section 13:
 - Section 13 does not provide the same provisions that the Criminal Code does (Section 319(3)), in that S.13 of the CHRA does not take into account whether statements made are based on truth nor does it require evidence of intent or wilfulness on the part of the respondent.