

# The Canadian Human Rights Act & Freedom of Speech: On Parliament's To-Do List?

The Canadian Human Rights Commission (CHRC) recently commented on proposals to amend the [Canadian Human Rights Act](#)<sup>[1]</sup> (CHRA) from law professor Richard Moon.<sup>[2]</sup> In his report, Moon called for the elimination of section 13 of the CHRA, which regulates the use of hate speech on the Internet.<sup>[3]</sup> While section 319 of the [Criminal Code](#) already criminalizes hate speech,<sup>[4]</sup> the CHRA provision allows for an alternative route to resolution, less onerous than going through the courts.

Critics have objected to the wider definition of hate speech under the CHRA, and are concerned that the Canadian Human Rights Tribunal may be poorly suited to tackle such a complicated and nuanced issue.<sup>[5]</sup> Additionally, there is the concern that imposing regulations under section 13 may infringe on the right to free speech under section 2(b) of the [Canadian Charter of Rights and Freedoms](#).<sup>[6]</sup>

## The Moon Recommendations and the CHRA's Response

Professor Moon made three main recommendations to the CHRC.

- The first recommendation was that section 13 of the CHRA be repealed entirely, leaving the prohibition of hate speech solely in the domain of the *Criminal Code* and the court system.<sup>[7]</sup>
- The second suggestion was that if section 13 was to be retained, it should be modified to bring it more in line with the corresponding provisions of the *Criminal Code*.<sup>[8]</sup> This modification would involve: (1) narrowing the scope of prohibited expression to include only the “most extreme instances of discriminatory expression,” (2) requiring an *intention* to incite hatred provision, as mandated under criminal law, and (3) eliminating the process by which individuals instigate complaints – instead leaving this task to non-governmental organizations and the Commission itself.<sup>[9]</sup>
- Moon's third recommendation was that Internet service providers self-police websites they host, shutting down sites that promote hatred.<sup>[10]</sup>

The CHRC then submitted its own special report to Parliament in June, 2009, entitled *Freedom of Expression and Freedom from Hate in the Internet Age*.<sup>[11]</sup> The CHRC rejected Moon's proposal to remove regulation of hate speech on the Internet from the

Commission's purview.[\[12\]](#) The Commission compromised on Moon's second suggestion, agreeing with his recommendation to adjust the definition of hate speech under the *Canadian Human Rights Act* to bring it in line with the Supreme Court of Canada's interpretation of the *Criminal Code*. However, the CHRC rejected the idea of requiring proof of *intent* to incite hatred, along with the discriminatory words themselves, as part of the definition for hate speech.[\[13\]](#)

### **The *Maclean's* Controversy and Continuing Issues**

Controversy arose in 2007 over the Canadian Human Rights Tribunal (the body responsible for conducting full hearings in alleged human rights cases) and its regulation of free speech. The Canadian Islamic Congress made a complaint against Rogers Digital Media Publishing for a feature in *Maclean's* magazine that reproduced an excerpt from a politically charged book *America Alone: The End of the World as We Know It*. The excerpt discussed the implications of the spread of Islam for the western world.[\[14\]](#)

Although the complaint was ultimately dismissed as meritless,[\[15\]](#) many Canadians, including the Canadian Civil Liberties Association and "almost every newspaper editorial board in Canada," were concerned that the broader definition of hate speech and wider scope for filing claims under section 13 of the CHRA could be used by special interest groups to stifle legitimate political debate.[\[16\]](#)

The *Maclean's* case highlights some shortcomings of the Commission-Tribunal process. As the CHRC's report acknowledges, it takes an average of nine months for the Commission to address a complaint - that is, to decide whether to pass the matter on to the Tribunal for a full hearing.[\[17\]](#) By contrast, in criminal prosecutions the Crown attorney has to get the permission of the district attorney before a matter can proceed to court.[\[18\]](#) The CHRC recognizes that it needs to improve its ability to weed out meritless cases early on.

Another area of weakness in the various human rights commissions is that separate commissions end up dealing with the same complaint. For example, the Canadian Islamic Congress filed its complaint against Rogers with the federal, B.C. and Ontario commissions.[\[19\]](#) Although the complaints were dismissed and the article was assessed as being designed to provoke, but not to promote hatred, Rogers was still saddled with the cost of dealing with three separate commission investigations.[\[20\]](#) It is striking that the complaint was handled differently by each of the three commissions: whereas Ontario decided not to consider the complaint for lack of jurisdiction and the federal commission considered the complaint before dismissing it, the B.C. commission sent it to the B.C. Human Rights Tribunal for a full hearing where it was ultimately dismissed.[\[21\]](#)

### **What Happens Next?**

Regardless of the form of prohibition - through a human rights act or under the *Criminal Code* - critics such as Professor Moon and Ezra Levant are concerned with the potential "chilling" effect on free speech.[\[22\]](#)

[Section 1](#) of the *Charter* recognizes that rights do not exist in a vacuum, and that often rights are interdependent and sometimes need to be limited, though only to the extent that they can be justified in a free and democratic society.

The high-profile *Maclean's* controversy has revived public debate over the balance between free expression and regulating hate propaganda. The Canadian Human Rights Commission solicited Professor Moon's proposals and prepared a detailed response. The Chief Commissioner of the CHRC, Jennifer Lynch, is calling for a "balanced" debate and "informed discussion."[\[23\]](#) The time seems ripe for Parliament to debate reforms to the *Canadian Human Rights Act*.

### **Further Reading:**

Daina Young, "[Provision Barring Human Rights Complaints is Constitutional](#)," *Centre for Constitutional Studies* (20 June 2007).

Alexandra Bailey, "[Federal Human Rights Legislation Now Applies to Reserves](#)," *Centre for Constitutional Studies* (27 May 2008).

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[\[1\]](#) *Canadian Human Rights Act*, R.S.C. 1985, c. H-6.

[\[2\]](#) Brian Laghi, "Rights Commission Rejects Calls to Stop Investigating Online Hate," *The Globe and Mail* (10 June 2009).

[\[3\]](#) Richard Moon, *Report to the Human Rights Commission Concerning Section 13 of the Canadian Human Rights Acts and the Regulation of Hate Speech on the Internet* Canadian Human Rights Commission (October 2008).

[\[4\]](#) *Criminal Code*, R.S.C. 1985, c. C-46 s. 319.

[\[5\]](#) *Supra* note 2.

[\[6\]](#) *Ibid.*

[\[7\]](#) *Supra* note 3 at 42.

[\[8\]](#) *Ibid.* at 33.

[\[9\]](#) *Ibid.* at 34-35.

[\[10\]](#) *Ibid.* at 41.

[\[11\]](#) *Special Report to Parliament: Freedom of Expression and Freedom From Hate in the Internet Age*, Canadian Human Rights Commission (June 2009) at 49.

[\[12\]](#) *Ibid.* at 2-3.

[\[13\]](#) *Ibid.* at 33-34.

[\[14\]](#) Kate Lunau, "Canadian Islamic Congress launches human rights complaint against *Maclean's*," *Maclean's* (30 November 2007).

[\[15\]](#) *Canadian Islamic Congress (CIC) v. Rogers Communications (20071008)* Canadian Human Rights Commission (25 June 2008).

[16] Joseph Brean, "[Canadians 'misinformed' on hate speech](#)," *National Post* (22 June 2009).

[17] *Supra* note 11 at 36.

[18] *Ibid.* at 39.

[19] *Ibid.* at 31.

[20] *Ibid.*

[21] *Ibid.*; [Elmasry and Habib v. Roger's Publishing and MacQueen \(No. 4\)](#), 2008 BCHRT 378.

[22] Ezra Levant, "Hate-speech (IV)" *National Post* (letter to the editor, 26 June 2009); *supra* note 3 at 38.

[23] Jennifer Lynch, "The Federal Human Rights System: Modern Approaches, Modern Challenges" (speech, 15 June 2009).