

# House of Commons votes to repeal “hate messages” section of the Canadian Human Rights Act

In June 2012, the House of Commons passed [Bill C-304](#), which would amend the *Canadian Human Rights Act*[\[1\]](#) by repealing section 13 of the *Act*. Section 13 makes it a “discriminatory practice” to communicate hate messages by telephone or on the Internet.[\[2\]](#) Sponsored by Brian Storseth, Conservative MP for Westlake St. Paul in Alberta, the private member’s bill was sent to the Senate on June 7, 2012.[\[3\]](#) The bill provoked thoughtful debate in the House of Commons. Though it passed in a [free vote](#), government support for the amendment - and opposition resistance - were near-unanimous. The Senate may debate and vote on Bill C-304 by the end of 2012.[\[4\]](#)

Mr. Storseth [says](#) that Bill C-304 will help protect and enhance freedom of expression. He argues that section 13 of the *Canadian Human Rights Act* impedes freedom of expression under section 2(b) of the *Canadian Charter of Rights and Freedoms*. He points to serious doubts about the constitutionality of section 13. For example, law professor Richard Moon wrote a report in 2008 that concluded the [Criminal Code](#) was sufficient to address hate speech. The report recommended the repeal of section 13.[\[5\]](#) Storseth also mentions a 2009 case that found section 13 unconstitutional; he seems to mean the Canadian Human Rights Tribunal’s decision in *Warman v Lemire*.[\[6\]](#)

## Responses to Bill C-308

Irwin Cotler, Liberal MP and former Minister of Justice, [takes issue](#) with Bill C-304: “the premise underlying the bill, while well intentioned, is misinformed and misleading.” He says that the bill misunderstands freedom of speech as an absolute right, ignoring important limitations on freedom of expression. Cotler sees hate speech as outside the scope of freedom of expression because it results in harm to individuals or an identifiable group. He says that this harm-based rationale, which the Supreme Court recognizes, supports restricting hate propaganda to protect equality.[\[7\]](#)

Mark Toews, on behalf of the Canadian Bar Association (CBA), says he [supports](#) the retention of section 13. Like Irwin Cotler, he argues that freedom of expression is not absolute and is limited by other *Charter* rights such as the right to equality under section 15. Toews worries that without section 13, the *Criminal Code* would be the only tool left to deal with discrimination. The *Criminal Code* requires a higher burden of proof. Toews sees this as problematic because it could lead to acquittals of hate speech “crimes,” allowing hateful messages to “proliferate and spread unchecked in Canada and beyond its borders.”[\[8\]](#)

Mark Freiman, lawyer and Past President of the Canadian Jewish Congress, takes a similar

view. He says the *Criminal Code* “is not an adequate substitute or an adequate basis on which to protect society from ... dangers.”<sup>[9]</sup> He emphasizes that section 13 protects society from the consequences of hate messages, whereas criminal law focuses on wrongful acts of the messenger.

### **What about *Warman v Lemire*?**

It is interesting that Storseth alludes to the *Warman* case in justifying the repeal of section 13, as the ruling in the case is contentious. In *Warman*, Marc Lemire was the webmaster and owner of websites containing discriminatory messages. He was accused of promoting hate speech over the Internet.<sup>[10]</sup> The Canadian Human Rights Tribunal ruled that section 13 infringed freedom of expression and could not be saved under [section 1](#) of the *Charter*.<sup>[11]</sup>

Ranjan Agarwal, a Toronto lawyer who specializes in constitutional law, [argues](#) that the Tribunal’s ruling in *Warman* is logically inconsistent.<sup>[12]</sup> Agarwal explains that *Warman* is complicated by [Canada v Taylor](#), a 1990 Supreme Court of Canada decision, which ruled that an earlier version of section 13 was constitutional.<sup>[13]</sup> Moreover, the *Warman* case is still before the courts: the Federal Court of Canada heard the case in December 2011 but had not issued a decision at the time the Commons considered Bill C-304.<sup>[14]</sup>

### **What’s next?**

Bill C-304 coincides with major cases that are making their way through Canadian appeal courts. Section 13 of the *Canadian Human Rights Act* is not the only source of tension between freedom of expression, equality, and hate messages. Provincial legislation prohibiting hate messages is at the heart of recent cases such as *Boissoin v Lund* and *Whatcott v Saskatchewan*.<sup>[15]</sup>

The Alberta Court of Appeal has yet to render judgment on *Boissoin*, though the case was heard in December 2011. The case involves a church minister who wrote an allegedly hateful letter to the *Red Deer Advocate* expressing his views on homosexuality. Similarly, the Supreme Court of Canada has yet to render judgment in *Whatcott*, which was heard in October 2011. The case involves an activist who distributed flyers in his campaign against homosexuals and abortion.<sup>>[16]</sup>

While both of these cases challenge the constitutionality of hate speech provisions in provincial human rights laws, the basic *Charter* tension between freedom of expression and equality is the same as in *Warman* and section 13. This delicate issue is winding through courts and legislatures in different jurisdictions, with different facts and different legal details to address. The timing is unpredictable, and the constitutional issues may get more complicated before they get clearer.

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[1] RSC 1985, C H-6.

[2] Bill C-304, [An Act to amend the Canadian Human Rights Act \(protecting freedom\)](#), 1st Sess, 41st Parl, 2012, cl 2 (as passed by the House of Commons 6 June 2012).

[3] [Private Member's Bill C-304](#), online: Parliament of Canada.

[4] Jason Fekete, "MPs vote to drop some hate-speech sections of Human Rights Act" *Ottawa Citizen* (7 June 2012).

[5] Richard Moon, "Report to the Canadian Human Rights Commission Concerning Section 13 of the Canadian Human Rights Act and the Regulation of Hate Speech on the Internet" (October 2008) at 31;

[Criminal Code](#), RSC 1985, C C-46 s 318-320; Chris Younker, "[The Canadian Human Rights Act and Freedom of Speech: On Parliament's To-Do List?](#)" *Centre for Constitutional Studies* (19 June 2009).

[6] *Warman v Lemire*, 2009 CHRT 26 ; *House of Commons Debates*, 41st Parl, 1st Sess, No 51 (22 November 2011) at [1830-1840](#).

[7] *House of Commons Debates*, 41st Parl, 1st Sess, No 51 (22 November 2011) at [1900-1905](#).

[8] House of Commons, Standing Committee on Justice and Human Rights, *An Act to amend the Canadian Human Rights Act (protecting freedom)*, Meeting 31 (24 April 2012) at [1900-1905](#).

[9] *Ibid* at [1215](#).

[10] *Warman* at paras 11-12.

[11] *Ibid* at para 295.

[12] Ranjan Agarwal, "[The Politics of Hate Speech: A Case Comment on Warman v Lemire](#)" (2010) 19 *Constitutional Forum* 65.

[13] [Canada \(Human Rights Commission\) v Taylor](#), [1990] 3 SCR 892.

[14] Canadian Civil Liberties Association, News Release, "CCLA Intervenes at Federal Court in *Warman v Lemire*" (13 December 2011).

[15] *Boissoin v Lund*, 2009 ABQB 592; [Whatcott v Saskatchewan \(Human Rights Tribunal\)](#), 2010 SKCA 26.

[16] Canadian Civil Liberties Association, News Release, "September 2011 e-bulletin" (2 September 2011).