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Chair

Mr. Ed Fast

Standing Committee on Justice and Human Rights

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● (1535)

[*English*]

The Chair (Mr. Ed Fast (Abbotsford, CPC)): I call the meeting to order.

This is meeting number 43 of the Standing Committee on Justice and Human Rights. Today is Monday, October 26, 2009.

You have before you the agenda. Today we're continuing our study on the Canadian Human Rights Act, more specifically section 13 of that act.

We have two panels of witnesses today, each one hour. During the first hour we have with us Jennifer Lynch, chair of the Canadian Human Rights Commission. We also have Philippe Dufresne with us. Welcome.

During the second hour we will have with us Bernie Farber and Mark Freiman, from the Canadian Jewish Congress, as well as Professor Richard Moon.

As a reminder to everyone in this room, please turn off your cell phones or put them on vibrate so we don't have disturbances. As well, take any telephone conversations outside the room.

Ms. Lynch, why don't you begin? I believe it has been agreed you'll have up to 15 minutes to present, and then we'll open the floor to questions.

[*Translation*]

Ms. Jennifer Lynch (Chief Commisioner, Canadian Human Rights Commission): Thank you, Mr. Chair and honourable members of the committee.

I am pleased to have received the invitation of the committee to contribute to your review of the Canadian Human Rights Commission and the application and interpretation of section 13 of the Canadian Human Rights Act. I would like to introduce my colleague Philippe Dufresne, Senior Counsel at the Commission.

[*English*]

The challenges of ensuring the right to freedom of expression and the right to equality and dignity are not new. The most recent debate has focused on the role of section 13 of the Canadian Human Rights Act and has engaged many Canadians for well over a year.

From the outset, the commission's responsibility has been to lead and inform the debate by providing a comprehensive and balanced analysis of this obviously complex issue. Our appearance before this committee today is an important step in our efforts to fulfill this responsibility.

Parliamentarians adopted the Canadian Charter of Rights and Freedoms and the Canadian Human Rights Act to recognize the equal status of every individual in Canada. Parliament's vision for Canada created the framework for the most open, inclusive, and culturally diverse country in the world. Our commitment to equality and dignity has shaped our personal and collective identities. It has contributed to our progress and prosperity. It is part of what makes us Canadian.

This approach to creating a harmonious society is not ours alone. For over 60 years the Universal Declaration of Human Rights has united the world in recognizing that all human beings are born free and equal in dignity and rights. In 1977 the Canadian Human Rights Commission was mandated by Parliament to champion these fundamental values.

Today our act still brings a powerful vision to Canada, brilliantly articulated in section 2 of our act, which states: “The purpose of this Act is to...give effect...to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have”—free from discrimination. This is what inspires me.

The commission provides access to justice so that the most vulnerable may have their voices heard. Thousands upon thousands of complaints have been resolved.

[*Translation*]

For some people, their quality of life has improved. Here are some examples. Persons with disabilities now have greater access to daily activities. For example, public transportation is now more accessible, bank machines provide audible output, and television broadcasts include closed captioning. Over 700,000 Aboriginal persons now have full protection under our act. Every worker now has the right to be free from harassment in the workplace – whether sexual, racial, or religious. Mothers can raise their families without fear of losing their jobs.

In spite of Canadians’ collective human rights accomplishments, forms of discrimination will continue to exist.

[*English*]

This one area, in particular, requires continued vigilance. Canadians are still the targets of egregious acts of discrimination.

Hate propaganda, sadly, is alive and well. Hateful expression aimed at groups of people continues to pose a threat to the harmony of our communities and undermines equality. Equality is guaranteed in the Canadian Charter of Rights and Freedoms. It is therefore ironic that some point to the same charter as providing an absolute right to freedom of expression. No right is absolute. When rights are in conflict, legislators must find a way to balance those rights.

This debate has already been decided, in part. There are limits on freedom of expression. Canada's libel laws are one example. Canada has agreed, by signing and ratifying international treaties, to place limits on freedom of expression where that expression is hateful. In the 1970s Parliament created the Canadian approach to regulating hate messages in the Criminal Code and with section 13 of the Canadian Human Rights Act. In 2001 Parliament amended the act to include hate messages on the Internet.

The commission has narrowly applied the law in accordance with a Supreme Court of Canada ruling and other jurisprudence. For a message to be prohibited by section 13 as hate, it must involve, and I quote, “extreme ill will”, “unusually strong and deep-felt emotions of detestation, calumny and vilification” that are “ardent and extreme in nature”.

A prominent complaint filed with the Canadian commission in 2007 is a prime example of how the commission has properly applied the law. The complaint was brought against Rogers Communications, owner of *Maclean's* magazine, by complainants who believed that some content in the magazine constituted hate messaging. The Canadian Human Rights Commission dismissed the complaint, citing that the impugned content did not meet the narrow definition of hate. Let me quote from our decision:

> The writing is polemical, colourful and emphatic, and was obviously calculated to excite discussion and even offend certain readers, Muslim and non-Muslim alike. Overall, however, the views expressed...when considered as a whole and in context, are not of an extreme nature as defined by the Supreme Court in the *Taylor* decision.

This is the only complaint we have ever received from the mainstream media, and we dismissed it. This clearly demonstrates that the commission does not regulate offensive speech. Any other suggestion is false.

We have witnessed public discourse at its best and at its worst. At its best, the debate has focused on improving Canada's approach to balancing rights. Among examples of the worst is testimony heard by this committee earlier this month. This committee has heard unsubstantiated allegations. Simply put, these are baseless. This committee has also heard the commission and its employees described as “dress-up Nazis, psychologically disturbed, rogue, and brutal” and compared to Saddam Hussein. This does nothing to advance society's thinking on hateful expression.

Specifically—and it must be stated clearly—unsubstantiated personal attacks aimed at commission investigators Dean Steacy and Sandra Kozak are irresponsible, hurtful, and above all, untrue.

I am proud of my staff. The people who work for the commission are dedicated to promoting and protecting equality rights. We have the public interest firmly in our minds and know that we sit in the position between competing sides in every complaint. We will continue to do Parliament's will without fear or favour.

● (1540)

[*Translation*]

It was with this dedication that the Commission set out to provide Parliament with a complete and balanced analysis of the issue of hate on the Internet.

This past June, following a year-long study, the Commission presented this analysis in the form of a Special Report to Parliament entitled "Freedom of Expression and Freedom from Hate in the Internet Age".

This process began with an independent review of section 13 by Professor Richard Moon of the University of Windsor, a legal expert on freedom of expression. Following Professor Moon’s submission, the Commission released his findings and sought feedback from stakeholders.

After concluding all of our research and consultations, the Canadian Human Rights Commission came to the conclusion that an administrative remedy for hate messages remains a vital component of Canada’s human rights system.

Some have posed the question: Are the Criminal Code and the Canadian Human Rights Act provisions against hate messages both necessary? In our view, the answer is yes.

The two laws address the issue of hateful expression in different ways. The Criminal Code seeks to punish the offender, while the Canadian Human Rights Act seeks to remove the hateful messages.

[*English*]

It is our considered opinion that section 13 of our act provides a needed flexibility in the legal tools available to deal with hateful expression. The Criminal Code, because of its punitive nature, the need to prove intent, and the strict standard of proof, is not effective for every case. Section 13 of the Canadian Human Rights Act provides an alternative where the goal is remedial; it focuses on the message, not the individual.

Our special report to Parliament recommends amendments to section 13 and provides observations concerning the Criminal Code that will improve Canada's ability to remove hate messages.

Make no mistake: hate messages strike at the core of equality. They are the root of intolerance, and at the extreme are the impetus for violence. As Canadians, we cannot waver in our commitment to protecting each and every individual's right to equality and dignity.

● (1545)

[*Translation*]

I look forward to answering your questions.

[*English*]

The Chair: Thank you very much.

I'll open the floor to questions, beginning with Mr. Murphy for seven minutes.

As a reminder to members, this meeting is being televised.

Mr. Brian Murphy (Moncton—Riverview—Dieppe, Lib.): Thank you, Mr. Chair.

Thank you, Madam Lynch and Mr. Dufresne.

We heard the evidence of Mr. Levant the last time we dealt with this matter, and an awful lot of ground was covered. A lot of it was evidentiary and procedural. I would not call it without merit in terms of allegations, but in terms of proof I have no idea—and we have seven minutes.

So I think we need to have a broader discussion about the need—or not—for section 13. We need to have a broad debate on whether there is need to curtail freedom of expression of hate on the Internet. That is the discussion we must have as parliamentarians.

In a curious case of convergence, Mr. Levant seemed to argue that there might be room under the Criminal Code or a revamped human rights regime to protect people from violence that comes from hate. The convergence is with no less a figure than the President of the United States, President Obama. According to what we heard previously, he may be considering moving the United States toward human rights protections that are triggered by acts based on hate that go toward physical harm—violence, if you like.

What we have does not cover that at all. There is coverage for violence or threats of violence, but it's quite a bit short of that. It allows protection for hate, as defined by Justice Dickson in the Taylor case. The valid point is whether the words “extreme ill will” and “calumny”—I challenge anybody in the room to figure out what that actually means—are extreme in nature. We know what it means in essence, but are we not really left with Justice Dickson's words? Justice La Forest from New Brunswick put it very well in his review that we should leave judges to determine what hate crimes are and what hatred is.

But are we stuck with those words? Is there a chance that we need a new reference on the issue because those are older words from a court that was composed differently? When I see the Minister of Justice's legislative assistant in the room, I know that the composition of the Supreme Court is now probably going to become like an American process. We're going to try to figure out what person thinks the way we want about these issues, as a government per se. So it's a very important determination.

Do you think we should go toward what may be intended in the United States? Do you think we should stick with what we have? Do you think we need clarification of what Justice Dickson's words mean today?

Ms. Jennifer Lynch: Let met state initially that the Canadian Human Rights Commission exists to protect individuals from discrimination and to ensure that equality and dignity are available to every individual. This mandate flows from international law, from the Charter of Rights and Freedoms, and of course, as you've mentioned, from our section 13. Our role is to promote access to justice and ensure that we are an effective part of the administrative legal system and that we are fair and accessible. Hate messages strike at the core of equality and can cause serious harm to society and to individuals by exposing them to discrimination and in extreme cases to violence.

Part of your question relates to the definition of hate, and you're quite right that what we, and the tribunal and the Federal Court, have been doing is relying on the definition provided by the Taylor decision in 1990. That definition makes it very clear that only the most extreme forms of ill will can be found to be hate messaging.

In terms of the application, we're comfortable with how it has been applied. I think the statistics speak for themselves. Since 2001 there have been some 70 complaints brought to the commission on the basis of hate messaging, and something in the area of 22% of these have been found by the tribunal to be hate messages.

Moving a little deeper into the statistics, there have been some 19 cases heard by the tribunal, of which 16 have been found to be hate. A very recent case that dealt with two found that the expression had been hateful but also found that the section would not be applied because of the penalty provision. The final case is one where none of the parties attended the hearing, so the hearing was dismissed.

What we learned from this is that the Canadian Human Rights Commission has been exacting in applying the definition of only the most extreme and ardent forms of expression. The Canadian Human Rights Commission does not regulate offensive speech. No Canadian need be concerned that if they use offensive speech it will be considered prohibited under the Canadian Human Rights Act.

In our special report we have recommended that there be an amendment to section 13 to include a definition of hate that reflects the tried and trued definition that came from the Taylor decision in 1990. It's not that the Canadian Human Rights Commission or the tribunal needs this definition; however, we do realize that it's always desirable when a person can read an act and understand what it means and not develop an unbased fear that it might apply to them in certain circumstances. So it's because of our concern that our legislation be clear to the layperson that we recommend the narrow definition be put in our statute.

● (1550)

The Chair: Thank you.

We'll move on to Monsieur Ménard for seven minutes.

[*Translation*]

Mr. Serge Ménard (Marc-Aurèle-Fortin, BQ): Thank you.

I admit that although I am very familiar with the Quebec system, where the Human Rights Tribunal and the Commission make decisions, have powers to intervene, and initiate arbitration and forms of mediation, which generally produce reasonably good results, I had never realized how important your Commission is. It seemed to me that discrimination was covered by provincial legislation. Now, a court has found that section 13 is unconstitutional. I imagine that decision has been appealed. What stage has that process reached? I am talking about *Warman v. Lemire*.

● (1555)

[*English*]

Ms. Jennifer Lynch: The commission has applied for judicial review of the decision based on two grounds. Part of the tribunal's finding was based on the fact that cases related to section 13 are not as often subject to settlement by mediation as other types of cases. This would be understandable. The ground of appeal relates to the fact that, in our submission, a statute can't be rendered unconstitutional by how an administrative agency that is part of that statute processes cases, and whether or not they're found to be mediate-able.

[*Translation*]

Mr. Serge Ménard: That is not really what I wanted to know. I want to know where the case is in the courts. Is it still under appeal? Has the appeal come before the Ontario Superior Court?

[*English*]

Ms. Jennifer Lynch: The case of Warman v. Lemire was decided by the Canadian Human Rights Tribunal. The tribunal is an independent tribunal. The Canadian Human Rights Commission is a screening body. In the part of our work in which we process complaints, we are a screening body. We either dismiss the complaint or send it to the tribunal, where it will be heard. The case was heard by the tribunal some months ago, and the decision came out a few weeks ago. The commission has applied for judicial review on two grounds. So that's where it stands, and the review will go to the Federal Court.

[*Translation*]

Mr. Serge Ménard: Right. For the moment, it is before the Federal Court, at the trial level.

[*English*]

Ms. Jennifer Lynch: Yes.

[*Translation*]

Mr. Serge Ménard: So it has not yet come before the Court of Appeal.

How do you feel about the decision you are challenging?

[*English*]

Ms. Jennifer Lynch: At all times, we process cases based on our policies and procedures, and of course our responsibilities. These relate to our engagement as an administrative agency within the whole quasi-judicial framework. We do not have many open cases. I believe right now we have one case that is before the commission, and we will be presenting the public interest before the tribunal. In any hate case, we will not be seeking a penalty. That is how we'll be dealing with these cases.

The second point of the appeal relates to the fact that, in our submission, the penalty provision could have simply not been applied, and the act itself could have been applied without the penalty provision.

[*Translation*]

Mr. Serge Ménard: In his report, Mr. Moon came out in favour of repealing section 13, but he said that if we did not go so far as to repeal it, he suggested that certain reforms be made.

Do you prefer to repeal it, or make the reforms he suggested? Do you think the reforms suggested would be good and could remedy the flaws identified by the people proposing that the section be repealed?

[*English*]

Ms. Jennifer Lynch: In June of this year we filed our special report to Parliament. All members have been given copies of this report, and we did bring some additional copies. In the report we do analyze, of course, Professor Moon's recommendations and we also went through another process where we had other consultations as well and did our own research.

Our recommendation is that section 13 not be repealed. In short, our recommendation is closer to Professor Moon's second option that you mentioned. Professor Moon, who happily is here to give evidence in the next hour and will be able to more specifically address his own recommendations, did suggest that there be a definition of hate put in the statute. The definition that he suggests is one that relates to advocating, inciting, or justifying violence. In the opinion of the commission, and as more specifically described in our special report, we don't feel that the definition should be as narrow as that. We feel that the definition should be along the lines of the Taylor case.

Professor Moon makes other observations and recommendations related to the processes that the Canadian Human Rights Commission might undergo. For example, he recommends that the commission be in effect the only complainant, that individuals should not have the responsibility to bring forward a complaint.

Our conclusion is that we should not take away that right from individual complainants. In the Canadian Human Rights Act there is a section that provides that the commission can bring its own complaint, and in fact that's what we did in the Taylor case in 1990. We find that those provisions still work well.

There are other slight distinctions, but overall I must say that Professor Moon's work greatly assisted the commission. It was thoughtful and well reasoned, and as I said, significant parts of his recommendations are reflected in our report.

● (1600)

The Chair: Thank you.

We're looking forward to hearing Professor Moon shortly.

We're going to move on to Mr. Comartin for seven minutes.

Mr. Joe Comartin (Windsor—Tecumseh, NDP): Thank you, Mr. Chair.

Thank you, Ms. Lynch, for being here.

When Mr. Levant and Mr. Steyn were here, there were some very serious allegations made in the course of that hearing and out in the public even prior to that. Have either you or somebody within the commission done an analysis of those allegations, those accusations against in particular Mr. Steacy, and Mr. Warman, when he was still an employee? Has an analysis been done, an investigation been done by the commission?

Ms. Jennifer Lynch: As I was mentioning, we play a fundamental role in providing access to the administration of justice for individuals, and in order to do that, of course, we must be part of very clear processes that are fair, equitable, and transparent.

A key point I'd like to make with you is that the employees of the commission do adhere to the strongest ethical values and codes of ethics, and have not erred from those codes of ethics or ethical values.

You refer to certain assertions that we have heard here at the committee, and of course have been part of what I would call a storm or blizzard of confusion, of misinformation that unfortunately some are taking as facts. Understandably, as chief commissioner, I have of course looked into the matter just to reassure myself, as I can reassure you here today, that Canadians can have pride in all of the employees of the Canadian Human Rights Commission and the way we carry out our complex mandate.

Mr. Joe Comartin: Ms. Lynch, let me stop you. That's not an answer to my question. Did you conduct a detailed investigation into those allegations?

Ms. Jennifer Lynch: We have conducted detailed investigations internally, and the Royal Canadian Mounted Police and the Privacy Commission also did. These two latter bodies have found that the allegations were unsubstantiated and they have closed their files. I will be filing a book of documents with the clerk that clearly shows that.

In terms of our own internal investigations, I can clearly state that there has been no breach of any law or any ethic by any employee of the Canadian Human Rights Commission in investigating or processing section 13 hate cases.

● (1605)

Mr. Joe Comartin: Has any civil action been taken against Mr. Levant or Mr. Steyn because of these accusations that they've made?

Ms. Jennifer Lynch: We are public servants who are working to do our job, and I'd like to put this into perspective. The processing of complaints is less than 50% of what we do. The Canadian Human Rights Commission is also promoting the equality of Canadians, with a very broad mandate. With a lot of interesting, important, and exciting work, we are leaders and catalysts in advancing equality in Canada and in fact internationally. These kinds of assertions that we've been hearing are very unfortunate, unfair, and untrue.

Mr. Joe Comartin: They're also libelous and slanderous, if in fact they're not accurate.

Ms. Jennifer Lynch: Recent law has determined that the commission as an organization cannot bring a libel action or a defamation action. With respect, it's expecting a lot of individuals who are doing their everyday work as dedicated public servants to take on for themselves a civil liability action. Treasury Board has a guideline that they will not, under any circumstances, support the legal costs of plaintiffs, and they will only consider it for defence work.

Mr. Joe Comartin: So if somebody were to start an action against those two individuals, they would be entirely on their own as far as assuming legal costs is concerned.

Ms. Jennifer Lynch: Entirely on their own.

Of course we have tried to put the record straight, and we do welcome this forum as our opportunity to have the important debate that needs to be held, and that is, how do we balance two freedoms, if you will, or two rights? These two rights are the freedom of expression, which is a fundamental right for Canadians protected and guaranteed by the charter, and the freedom from discrimination, which is a fundamental right for Canadians protected in the charter and the Canadian Human Rights Act.

Mr. Joe Comartin: How much time do I have, Mr. Chair?

The Chair: You have less than a minute.

Mr. Joe Comartin: Just one quick question. In terms of the review that you did and the report that you brought forward, did you do an analysis of other countries, other jurisdictions similar to ours—England, Australia, New Zealand, parts of the U.S—where similar types of legislation have been passed, and what the experience has been with it?

Ms. Jennifer Lynch: There are more than 150 countries that have signed and ratified the various international conventions that require freedom from hate or hateful expression, or its equivalent, and many of these countries, of course, have created legislation accordingly. Canada is one of the very few that has a specific regulation against hate on the Internet. It's a fairly new phenomenon. Australia, while it doesn't have it in its legislation, has a case that has recently clarified that Australia's own provisions do take into account hate on the Internet. We have made some comments in our special report and we have done an internal analysis of a number of countries. I could give you more specific information or provide it to you afterwards if you'd like.

● (1610)

The Chair: Thank you.

Mr. Joe Comartin: Perhaps you could provide it to the committee clerk, please.

Ms. Jennifer Lynch: I'd be pleased to do that.

The Chair: Thank you.

We'll move on to Mr. Rathgeber. You have seven minutes.

Mr. Brent Rathgeber (Edmonton—St. Albert, CPC): Thank you, Mr. Chair.

Thank you, Ms. Lynch, for your attendance here this afternoon.

I am very confused and concerned about a couple of answers you gave to my friend, Mr. Comartin. You stated that the allegations made against you—and not only in this forum, where the witnesses would have enjoyed some sort of privilege, but also outside this forum.... You have repeated it many times. In fact, one person wrote an entire book dedicated to the subject.

You called them untrue, unsubstantiated, and baseless. My friend Mr. Comartin suggested to you that if that were in fact the case, it would also make them libellous. I agree with his legal analysis. Your answer as to why there will not be any defamation suit filed is that it is because of the cost of prosecuting that litigation. It would be borne by the individuals. It wouldn't be borne by Treasury Board.

Complainants in section 13 complaints cases—section 13 of the Canadian Human Rights Act—don't have that disadvantage, do they? The investigation is done by the commission. If a complaint is filed, and if an inquiry is launched, they don't have to hire legal counsel, do they?

Ms. Jennifer Lynch: Happily, in cases of discrimination, Canada has a process that is less formal than the courts, which gives individuals the opportunity to come forward when they're extremely vulnerable. And of course section 13 cases are considered to be discriminatory.

Mr. Brent Rathgeber: I'm going to cut you off right there.

The respondents, even in these unsuccessful inquiries, do not have access to any legal defence fund and are put to their own resources to defend a section 13 inquiry and investigation, are they not?

Ms. Jennifer Lynch: Our processes are informal, and they're paper-based, with some interviews, which are usually done by telephone. No individual needs to retain counsel during the screening process at the commission level.

Mr. Brent Rathgeber: If they do retain counsel, and if the inquiry, or for lack of a better term the prosecution—and I use that word loosely—is unsuccessful, that person is entitled to costs neither from the commission nor from the complainant. Is that true?

Ms. Jennifer Lynch: Currently there is no provision to provide for costs to either party. We have recommended in our special report that in exceptional circumstances the tribunal be able to award costs at the tribunal level.

Mr. Brent Rathgeber: You talked about the highest ethical standards, which your employees conform to. Is that published somewhere in your guidelines? Would I find it on the Human Rights Commission website? Is there a code of ethics?

Ms. Jennifer Lynch: Pardon me?

Mr. Brent Rathgeber: Is there a code of ethics for employees of the Canadian Human Rights Commission?

Ms. Jennifer Lynch: We subscribe to the public service values and ethics, of course. Our various professionals would have separate ethical codes of their own—for example, our lawyers, as members of the bar, as members of the law societies, and that sort of thing—to which they subscribe.

Mr. Brent Rathgeber: I'm going to talk about the allegation against one specific employee of yours. It is Mr. Steacy. The suggestion has been made that he posted on a neo-Nazi website, called Stormfront, and that not only did he post anti-Semitic data, he posted under a false name: jadewarr. Bell Canada, as you know, filed an affidavit indicating that the pseudonym was that of a private citizen.

I know that the Privacy Commissioner has launched an inquiry. But I'm curious to know whether that type of conduct, in your view, Ms. Lynch, would fall under the strongest adherence to professional codes of conduct and ethics.

Ms. Jennifer Lynch: The commission and its staff did no such thing. The allegations you are repeating are not true. They did not happen. The event did not happen. The book of documents I will be filing with the clerk will clarify that for you. I can clearly state that it did not happen.

If I could just explain, we have a statutory requirement to investigate hate on the Internet. Police officers who are part of the drug squad must go where the drug operators are and perhaps interact with them. That doesn't make them drug traders or whatever. In our case, we need to go online to identify whether there's Canadian jurisdiction and to determine whether the content is hateful.

● (1615)

Mr. Brent Rathgeber: Ms. Lynch, Mr. Steacy said in the transcripts of Warman and the Human Rights Commission v. Lemire, "I didn't post under that. The only pseudonym that I posted under in Stormfront is jadewarr."

He said that he did it.

Ms. Jennifer Lynch: Mr. Steacy did use the pseudonym jadewarr, and the documents that we are filing with the clerk will show that he did, and he made one single posting on the Internet. When you read it, you will see that it has clearly nothing to do with hateful expression. He also engaged in a trail of e-mails, using that same pseudonym, and we're filing that with the clerk as well. The exchanges are very bland and have nothing to do with hateful, or even offensive, language.

Mr. Brent Rathgeber: What about the fact that jadewarr is the registered domain name of a private citizen?

Ms. Jennifer Lynch: With the greatest of respect, sir, jadewarr is not the registered domain name of a private citizen. What I believe you're referring to is another untrue allegation, which we are again filing documentation to show has no basis in fact.

Mr. Brent Rathgeber: I look forward to that filed documentation.

How am I doing for time?

The Chair: You have about 15 seconds left.

Mr. Brent Rathgeber: That will be it. Thank you.

The Chair: We'll move on to the next round. I believe it's Ms. Jennings. You have five minutes.

Hon. Marlene Jennings (Notre-Dame-de-Grâce—Lachine, Lib.): Thank you, Chair.

Thank you so much for your presentation. I as well look forward to the document file that you'll be tabling that shows these allegations that have been made are clearly unwarranted and baseless.

I do have a couple of questions. One of them is with regard to two of your recommendations.

On the one hand, you recommend that there be a clear definition of hate and *haine et mépris*, and that definition should follow the judgment, the use of the terms or the definition of the terms by the Supreme Court of Canada in the Taylor case. Then you as well say that if that happens, the commission should be given a power it does not currently have, which is to be able to dismiss a complaint at its reception based on lack of jurisdiction, because in fact what is being alleged does not meet the definition of hate.

I think that's very interesting. I'll go further and ask why would the commission not ask for specific power so that after it has investigated a complaint and deems that that complaint warrants a decision made by the tribunal...why would the commission not be the only party and actually prosecute, so to speak?

We see in other areas of administrative law where a body has the exclusive right to receive a complaint, to investigate a complaint, and if it deems that the complaint warrants—there is sufficient evidence for there to be a hearing on it—it goes before a separate tribunal, but it's the investigative body, the commission, that acts as the party to the case and actually prosecutes the alleged offender before the tribunal. Why would the commission not have asked for those kinds of powers?

How am I doing on time? Is my question too long?

The Chair: Go ahead.

Hon. Marlene Jennings: Clearly, in the case of Bell Canada v. Canadian Telephone Employees Association, the Supreme Court of Canada stated that

[*Translation*]

> The Tribunal is not involved in crafting policy, nor does it undertake its own independent investigations of complaints: the investigative and policy-making functions have deliberately been assigned by the legislature to a different body, the Commission.

[*English*]

So I see there appears to be a disconnect. On the one hand the commission investigates the complaint, but when the complaint goes before the tribunal, from what you've said, the commission is not a party to it. It *may* be, and you have been in one case, but that's it. That, to me, appears to be a disconnect.

● (1620)

Ms. Jennifer Lynch: Thank you very much, Madam Jennings.

To begin with, the act does provide us with the power to initiate a complaint, and we can do that. We have not frequently done it, and we are certainly considering doing it more, based on the encouragement of Professor Moon in his report. We already do have that power.

We don't see a need to take away an individual's right to lay a complaint. That's also there. So there are the two possible streams for getting the case to the tribunal. Our act also does provide that we are to represent the public interest, and we do so before the tribunal. In fact, in the first decade of the commission's existence, in every case of any kind of complaint that went to the tribunal, the commission represented the public interest, but for a number of reasons we no longer do that.

In the vast majority of hate expression cases, we have done that. So we have done that in more than one.

Hon. Marlene Jennings: Okay, thank you.

Ms. Jennifer Lynch: The legislation, in our view, works well. It could be clarified. It's effective, but we are concerned about the layperson, and clearly the layperson does not understand the meaning of hate, because no Canadian need fear that merely offensive expression will be prohibited.

Hon. Marlene Jennings: It's precisely because in part, when you say the ordinary Canadian need not fear, I think the commission should be looking seriously at amendments to the legislation so that, on the issue of hate complaints, an ordinary citizen would bring the complaint to the commission and the commission would investigate. But if the commission found grounds for an actual hearing on it before the tribunal, precisely because it's then of public interest, it should be the commission that is party to that complaint and not the alleged victim, because then we would be putting the entire burden on that individual.

The Chair: Ms. Jennings, we'll leave that as your comment on the record.

You may want to answer that or expand on it later on, but we'll move on to Mr. Lemay now for five minutes.

[*Translation*]

Mr. Marc Lemay (Abitibi—Témiscamingue, BQ): Thank you, Mr. Chair.

Thank you, Ms. Lynch.

I am trying to understand, because we have to be careful before we amend a section of an act. I have read the Moon report. Actually, Mr. Moon will probably provide an explanation on this point.

In subsection 13(1), we read, and I quote:

> ... 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.

Then subsection 3(1) reads as follows:

> 3. (1) For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for which a pardon has been granted.

I think it would be difficult to amend section 13 as it now reads, because it is protected. We have section 318 of the Criminal Code, against genocide, but there is also subsection 319(1) of the Criminal Code, which provides:

> 319. (1) Every one who, by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace is guilty of ...

As well, the courts have held that a public place could be a something on a computer and available on the Internet, because it is public.

I don't understand why section 13 needs to be amended at this time, let alone repealed. What isn't working, since we have section 2 of the Charter and section 319 of the Code?

● (1625)

[*English*]

Ms. Jennifer Lynch: One important point to remember is that section 13 cases represent fewer than 2% of the complaints that come to the Canadian Human Rights Commission. Within that small number, just one case has become prominent and caused the current debate about the balancing of freedom of expression and freedom from discrimination based on hate messages. In response to that concern, we undertook an in-depth analysis and had the benefit of the thinking of Professor Moon, an expert you'll hear from in a few minutes, other consultations, and our own research. We came to the conclusion that the section will be better understood if it's amended and that our processes could be improved by giving us the opportunity to dismiss unfounded cases early.

One thing many don't understand is that we have a statutory obligation to formally investigate every complaint once it's within our jurisdiction. And with hate message cases, since we're looking at the most vile expression, it can be fairly obvious very early whether it meets the test. So if it is Parliament's will to do so, our recommendation would be to give us that statutory option, which will put an end to perhaps three-quarters of these complaints before an investigation. And that is a benefit to Canadians, who will more clearly understand their law. I hope it responds to Mr. Rathgeber's point as well, because it would give the commission the opportunity to dismiss the case early. We just do not have that statutory opportunity right now. We must investigate.

The Chair: Thank you.

[*Translation*]

Mr. Marc Lemay: At present, that's clear.

Thank you.

[*English*]

The Chair: We have time for one last question, Ms. Lynch.

Mr. Woodworth.

Mr. Stephen Woodworth (Kitchener Centre, CPC): Thank you very much, Ms. Lynch, for attending.

I want you to know that my concern is with the principles involved, not with the particular personalities. I'm also grateful to hear the suggestions that surface from time to time from you regarding potential reform and amendment.

I want to begin with your comment that ordinary Canadians do not have to fear. I'd like you to adjust your mindset just a bit, because when I go door to door and I hear about this issue, as I have, I don't regard it as Canadians expressing fear to me. However, I do regard it as Canadians expressing to me a very fierce affection for freedom of expression, and I'm sure you would agree that's a good thing. You correctly put your finger on the issue before us, which is how to balance the limitation of freedom of expression with other concerns.

The difficulty I'm having is that while we may say that the Human Rights Code is not a penal statute or punitive in nature, in fact the consequences of findings under the code are quite punitive at times, ranging at the present time from fines to compensation to lifetime bans on expression. I come from that approach. And having been involved in the judicial system for almost thirty years, I know it makes mistakes, even though we have all kinds of safeguards to protect accused persons: we have a right to counsel, we have rules against hearsay, we have high burdens of proof on prosecutors, we have provisions that are quite tightly defined, we have legal aid, and even with all those safeguards the judicial system makes mistakes.

I think what causes my constituents concern is that their freedom of expression doesn't have those safeguards before the tribunal. It doesn't have those safeguards when it comes to the commission deciding who will be prosecuted or who will not and who will be aided.

For example, when you say that costs should be awarded only in exceptional circumstances, I say to myself, if my right to freedom of expression has been unjustly challenged and I succeed in affirming it, why shouldn't I have costs in every case? Do you think we could make recommendations that would safeguard freedom of expression and the interests of freedom of expression in the tribunal and the commission processes?

Thank you.

● (1630)

Ms. Jennifer Lynch: Finding the balance between a Canadian's right to equality and the right to freedom of expression is a fundamental issue. We get our direction from the statute, the charter, and to a certain extent from international law. This balancing was achieved when the Supreme Court of Canada made its interpretation of “hate” in the Taylor case. We are an administrative agency, and the language of prosecution doesn't apply to us. We are a screening body. We receive a complaint, screen it, and send some to the tribunal.

Similarly, the tribunal isn't prosecuting, either. The tribunal is a quasi-judicial agency and is less formal than the courts. The system is part of a network, a large expanse of federal agencies and tribunals. They adhere to the rules of procedural fairness and natural justice and have processes that are meant to encourage a less formal approach, where lawyers are not necessary.

Returning to freedom of expression, it is protected in our statute. We can see that by the statistics I've given you and by the fact that the only expression that is limited is expression of the most extreme and vile nature. If I may say something that could confuse Canadians, section 2 of the Charter of Rights and Freedoms protects freedom of expression, while section 15 provides equality and freedom from discrimination. Section 1 says that this is subject to such limits as are reasonably justified in a free and democratic society.

As we balance rights, there will come a time when there may need to be a limit on one and not on the other. That is what the Taylor case has done—it has protected and drawn the line.

Mr. Stephen Woodworth: I'm afraid you've missed the point of my question.

The Chair: Unfortunately, we're at the end of the time.

Mr. Stephen Woodworth: It's the process.

The Chair: Ms. Lynch and Mr. Dufresne, thank you for attending. The time was much too short, and I think we may have to have you back.

I'm going to ask that the next panel of witnesses assemble quickly so that we can get as much as testimony as we can.

We'll suspend for five minutes.

● _____ (Pause) _____ ●

● (1635)

The Chair: We'll reconvene the meeting.

This is the 43rd meeting of the Standing Committee on Justice and Human Rights. This is our second panel today. We have with us Professor Richard Moon, whose name came up in the previous panel. We welcome you here. We also we have Bernie Farber and Mark Freiman representing the Canadian Jewish Congress. Welcome to both of you.

Perhaps we'll start with Professor Moon.

Professor Richard Moon (University of Windsor, Faculty of Law, As an Individual): Thank you, and thank you for inviting me.

I'm quite certain I won't take ten minutes, but it's always easy to underestimate these things.

In a report I wrote for the commission, which was released last fall, I recommended repeal of section 13 of the Canadian Human Rights Act, so that the commission and the Canadian Human Rights Tribunal would no longer deal with hate speech, and in particular with hate speech on the Internet. I argued that hate speech should continue to be prohibited under the Criminal Code.

I took the position that state censorship of hate speech should be confined to a narrow category of extreme expression, that which threatens, advocates, or justifies violence against the members of an identifiable group. In my view, the failure to ban the extreme or radical edge of prejudiced speech carries too many risks, particularly when it circulates within the racist subculture that subsists on the Internet. Because the Internet audience is highly fragmented, it is easy for a particular website to operate at the margins and avoid critical public scrutiny. Hate speech on the Internet is often directed at the members of a relatively insular racist subculture. When directed at such an audience, extreme speech may reinforce and extend racist views and encourage extreme action.

At the same time, less extreme forms of discriminatory expression, although harmful, cannot simply be censored out of public discourse. Any attempt to exclude from public discourse speech that stereotypes or defames the members of an identifiable group would require extraordinary intervention by the state and would dramatically compromise the public commitment to freedom of expression. Because these less-extreme forms of discriminatory expression are so commonplace, it is impossible to establish clear and effective rules for their identification and exclusion. Because they are so pervasive, it is vital that they be addressed or confronted, rather than censored. We must develop ways, other than censorship, to respond to expression that stereotypes and defames the members of an identifiable group.

Finally, I argued that a narrowly drawn ban on hate speech that focuses on expression that is tied to violence does not fit easily or simply into a human rights law that takes an expansive view of discrimination, emphasizes the effect of the action on the victim rather than the intention or misconduct of the actor, and employs a process that is designed to engage the parties and facilitate a non-adjudicative resolution of the "dispute" between them.

The main problem is that free speech interests are affected every time an investigation occurs. Even if the commission dismisses the complaint, the investigation engages the parties and takes eight to ten months to conclude. Because the commission is required to investigate a complaint, unless it is trivial, vexatious, frivolous, or made in bad faith, it is bound to investigate some complaints that are unlikely to proceed to adjudication. As well, because section 13 is located in a law that seeks to advance the goal of social equality through education and conciliation, the commission may be inclined to err on the side of inclusion when deciding whether a complaint should be rejected prior to investigation on the grounds that it is trivial. Human rights commissions may be reluctant to exclude a complaint prior to investigation on the grounds that it is trivial, because such a finding may be seen as downplaying the genuine feelings of hurt or injury experienced by minority group members and will preclude the possibility of a facilitated resolution of the “dispute” between them.

● (1640)

In the report I also raised questions about the appropriateness of relying on private citizens to initiate and pursue section 13 complaints. There are a variety of reasons this is problematic, although the main one is simply that it puts too much of a burden on the private complainant. Hate speech is most often directed at a receptive, or at least interested, audience and is only known to the complainant because she or he has looked for it or stumbled across it. The complainant carries responsibility for the complaint throughout the process, at both the investigation and adjudication stages. In addition to the burden of time and money that a complainant must bear, particularly if the complaint proceeds to adjudication before the tribunal, some complainants have been subjected to threats of violence. We should not expect complainants to bear such a burden.

Searching neo-Nazi or white supremacist websites for hate speech and engaging with individuals on those sites to determine their identity involves ethical challenges that should not be dealt with by private citizens. Hate speech harms the group and the community. It is a public wrong. The state, not private citizens, should be responsible for the enforcement of the law.

There is a serious debate to be had about the regulation of hate speech by human rights commissions, but the debate is difficult and complex and there are many reasonable positions one can take on the issue. I do not agree with those who argue that the commission should be involved in the regulation of Internet hate speech, but I do not doubt their good faith in taking this position. Unfortunately, the most vociferous and indeed the most media-amplified critics of the commission are not interested in this debate. It is easier and it seems more effective to invent injustices and engage in personal attacks.

In a written submission that I believe you have already received, I describe three claims that have been made about human rights commissions and demonstrate how they are either misleading or false. The claims are that the commission has a 100% conviction rate, that commission section 13 investigators have made racist postings on white supremacist websites, and in more general terms, that human rights commissions routinely make, and I quote, “crazy” decisions, the craziest of all being the case involving McDonald's. I'm happy to address these claims during the question period, although I think it would be better if that time were spent discussing the real problems with section 13 and the current process.

In my view, section 13 should be repealed. But whatever this committee decides, it is important that its decision be based on an assessment of the real costs and benefits of the different policy options. The unfair attacks on human rights commissions obscure the real issues and impede serious debate.

Thank you.

● (1645)

The Chair: Thank you very much.

We'll move on to Mr. Farber.

I think what we'll do is have the two together. You have ten minutes, but if you want to take less, we will have more time for questions.

Mr. Bernie M. Farber (Chief Executive Officer, Canadian Jewish Congress): We have ten minutes together? I will take two minutes.

First I want to thank you for inviting us to testify before this committee. The Canadian Jewish Congress has for the last 90 years represented the broadest cross-section of Canadian Jewry. We work to foster a Canada where Jews, as part of the multicultural fabric of this country, live and contribute to an environment of opportunity and mutual respect. We advocate on behalf of Canadian Jewry to advance those objectives, and we work in partnership with other Jewish federations and other ethnic communities across Canada.

In the Jewish tradition, we believe that the tongue has such awesome power that in fact it requires two gatekeepers, the teeth and the lips. It is recognized that words have meaning and that evil words can have, indeed, evil consequences. It is in this light that we welcome the opportunity to present our views this afternoon.

I would like to introduce our national president, Mark Freiman, of the Canadian Jewish Congress. He is an eminent legalist. He is recognized as an expert on constitutional law and human rights legislation. He has just completed acting as special counsel on the Air India disaster, and most pertinent to this particular committee, Mark Freiman was special counsel to the Canadian Human Rights Commission on the Ernst Zundel case, which was in fact the first successful proceeding under section 13 dealing with hate on the Internet.

I'd like to pass the rest of our time to Mr. Freiman in order for him to present the views of the Canadian Jewish Congress.

Mr. Mark Freiman (President, Canadian Jewish Congress): Thank you. I won't comment on that hyperbolic introduction.

Let me start by giving you the overall perspective of the Canadian Jewish Congress on the matters before us. The Canadian Jewish Congress believes that section 13 is an important resource in protecting vulnerable communities from the harm caused by hate propaganda. It believes that section 13 is constitutionally appropriate in a free and democratic society, because it deals only with dangerous and harmful speech and is not concerned simply with offensive speech. It deals with dangerous and harmful speech in a way that minimally impairs the ability of Canadians to debate freely important social and political issues, including the ability to take strong and controversial positions.

The Canadian Jewish Congress believes that the Criminal Code, and especially section 319, which criminalizes some aspects of hate propaganda and incitement to violence, is not an adequate substitute for subsection 13(1) of the Canadian Human Rights Act. It also believes that it is not advisable to restrict hate or the definition of hate to advocating violence. That having been said, the Canadian Jewish Congress does not believe that the regime under subsection 13(1) of the Human Rights Act is without issues or problems. It believes that subsection 13(1) and the way it is administered could be significantly improved, so as among other things to weed out frivolous complaints at an early stage, to speed up the process, to better protect the legitimate interests of respondents.

Let me just add a few words of specification to that general framework.

First of all, it is important for us to remember the context. Subsection 13(1) does not deal with speech in the abstract. It does not deal with all written, let alone with all oral, communication. It deals with a single medium of communication, namely the Canadian telecommunications system, notably the Internet and computer-generated telephone messages, what today we call “robot calls.” The regulation of telecommunications is not unfamiliar. On the broadcasting side, the CRTC engages in regulation on the basis of content on a daily basis. The regulation of speech outside of the telecommunications context is also not unfamiliar, as some would portray it as being. The regulation of speech is not confined in our society to prohibiting someone from yelling “fire” in a crowded theatre.

Let me just remind the committee of some interesting examples. We have the law of defamation, which regulates the content of speech, attaches penalties to speech. We have the principle of contempt of court, which regulates speech dealing with the justice system. We have regulation of advertisements addressed to children. We have regulation of advertisements of dangerous products like tobacco and alcohol. We have regulation of the strictest sort dealing with pornography, and most importantly, child pornography, including merely cartoon or even verbal representations. The key in every case is that this regulation is geared to preventing harm and saving society from danger.

Is hate speech dangerous? To ask the question is to answer it. History provides the clearest examples of the mortal dangers—that is, dangerous to life—that hate speech can carry. Study Nazi propaganda in the 1930s. Study the Cambodian propaganda in the 1970s. Study anti-Tutsi propaganda in Rwanda of the 1990s. Study the racist propaganda in the former Yugoslavia in the 1990s. You will get the answer.

● (1650)

Does subsection 13(1) of the Canadian Human Rights Act target only dangerous speech, or is it aimed at politically incorrect speech? Ms. Lynch gave you the legal definition of “hate”, and I'm not going to go over it. In my submission to this committee, subsection 13(1) targets dangerous speech. It targets speech that demonizes individuals on the basis of their affiliation with a group. It is doubly dangerous. It is discriminatory because it says people are bad or worthless on the basis of the group they belong to, not on the basis of what they do. And it is doubly bad, because as the definition Mr. Justice Brian Dickson gave for this, it portrays those groups as lacking any redeeming merit.

In my submission, demonization is the key, not incitement to violence, because demonization is the necessary precursor in every case for subsequent violence. If a society wishes to protect itself against the horrors of genocide or violence against individuals based on their minority affiliation, it can't start with the incitement of violence; it must start with the demonization, the denial of any redeeming merit.

Is the Criminal Code an adequate substitute or an adequate basis to protect society from these sorts of dangerous speech? In my submission, it is not. The target of criminal prosecution is the wrongdoer, and appropriately, we set the highest sorts of standards in order to prevent the horror of an unjust conviction and penalization.

The focus of the Human Rights Act is the message itself, not the wrongdoer. Its purpose is to protect society from the baleful consequences of those most dangerous messages. That is an appropriate focus, and it is a focus that allows a procedure that falls somewhat on the other side of the high standards of the criminal law.

Is violence the proper key? I've already said that although incitement of violence is in every case the spur to acts of genocide, destruction, and acts of violence against minorities, it's too late in the process. It is the demonization that precedes it that has to be addressed.

Is the focus of the Canadian Human Rights Act too dangerous and too subjective? In my respectful submission, it is not. Mr. Justice Dickson's definition is very precise, and it aims only at the most dangerous and extreme sorts of speech.

The second point, enforcement of that high standard, is guaranteed by a system of judicial review, up to and including the Supreme Court of Canada if necessary, to ensure that standard is adhered to.

Finally, does that mean the section is perfect? It is not perfect. The Canadian Jewish Congress believes there is great merit in expanding the gatekeeper function of the Canadian Human Rights Commission to allow it to dismiss complaints early on. The Canadian Jewish Congress believes there is great merit in levelling the playing field so there is an opportunity, where people are enmeshed in the proceedings and incur large expenses, for them to be compensated if the case should turn out to be groundless.

We also believe in the need for more specialization within the commission.

Those are my remarks.

● (1655)

The Chair: Thank you very much.

We'll now move to questions.

Mr. Murphy, seven minutes.

Mr. Brian Murphy: Thank you.

I want to thank the witnesses for their testimony.

I want to get right to Mr. Freiman's and Mr. Farber's comments, which we all agree with, that words can do harm.

Mr. Freiman, you wrote a review of the book *Shakedown*.

Mr. Mark Freiman: Yes.

Mr. Brian Murphy: It was published—not in *Maclean's*. In that article you gave some credence to some of his arguments on procedure, on investigations. I said before that I don't want to spend time talking about evidentiary issues. But the premise....

I think why Mr. Levant is compelling is that he becomes a bit of a poster boy for the idea that “Look, I'm a member of a minority, but I can defend myself. These are different times. We are a more complex society. The atrocities we know happened in times past cannot happen again, because we're in a flourishing democratic society.” Who wouldn't argue that Ezra Levant could defend himself verbally? Of course he can.

I'm asking both you and Mr. Farber if Mr. Levant is naive in this concept. Was it all that long ago that in the demonization of groups, people like Mr. Levant were not protected, no matter how brilliant they were?

Finally, to make it fit into the modern-day world, would a legislative framework like section 13, or any sort of tool that a government in Rwanda or Bosnia might have had before the demonization took place, prevent wide-scale genocide?

● (1700)

Mr. Mark Freiman: Let me start with the last first. Of course it wouldn't have. If there were other social forces tending toward it, then no well-meaning legislation could have prevented that.

On the other hand, if you look at Europe in the 1930s, there is a very good case to be made that the consistent and incessant demonization of the Jewish people led to a moral anesthesia among the population of a number of countries that allowed otherwise intelligent westernized people to stand by and to look aside as the most horrid acts were perpetrated by a very resolute racist regime.

Mr. Brian Murphy: Then is Mr. Levant naive?

Mr. Mark Freiman: Mr. Levant is naive. Mr. Levant believes that the advances in equality in the 1950s and the 1960s are the end of history and no prejudice is now possible, no discrimination is now possible. He is sadly mistaken.

Mr. Brian Murphy: Mr. Freiman, I hope you have your freedom of speech insurance all paid up after that comment.

Mr. Mark Freiman: Absolute privilege, Mr. Murphy.

Mr. Brian Murphy: Well, if you dare say it outside. Mr. Levant is a lawyer.

What I would say in seriousness, however, is there is this clash of rights then, isn't there, between the ultimate unfettered freedom of speech on one end.... And that's not even the characterization that was put to us; there is no unfettered right. There are the laws of libel, slander, defamation. There are the Criminal Code provisions. And then there is this right that an individual has to be protected from demonization.

Where's the balance as it's struck now? With the improvements that you've suggested, would it be struck with accepting the report from Madam Lynch's commission?

Mr. Mark Freiman: I think the improvements would help the balance.

I would just like to comment that in our constitutional system, freedom of expression always takes place at the balancing level. Our courts have decided that everything that expresses meaning is in fact expression for purposes of paragraph 2(b). There's been a lot of discussion, because that means lap dancing is expression. It means that pornography is expression. In the United States they don't do that. They decide what is expression and what isn't expression, give absolute protection to what is expression, and give no protection to what isn't.

What we say is yes, you now have expressive freedom. But let's look at section 1. How far can you take that expressive freedom before it becomes harmful? That is the balance that we do. It's a balance that we have some of the finest minds in the Supreme Court of Canada to help supervise. I do believe the changes and the improvements would help to maintain proper balance.

Mr. Bernie M. Farber: I would like to add one small piece to this. I don't want us to forget that it was only 60 to 65 years ago that one of the worst mass genocides in modern history took place—the murder of six million Jewish men, women, and children. There are people alive today who still suffer because of that. The thought that there are people out there who would continue to promote these kinds of hateful acts is incredible to me. Two or three days ago, only ten miles from this very chamber, at the Jewish Memorial Gardens in Ottawa, there was an invasion of our sacred burial space. Swastikas and horrible racist and anti-Semitic terms were scrawled on Jewish headstones. This was on the same weekend that I was coming to Ottawa to attend an unveiling of one of my family members. The impact that this had on our community, I can't even begin to tell you. Is this something that we want to allow to continue to happen? It is this balance that we have to consider, and I would like you to keep this in mind.

I have pictures of this desecration, and I'll pass them along, with the permission of the chair.

● (1705)

The Chair: The clerk will pick up the pictures from you.

Thank you.

Monsieur Lemay.

[*Translation*]

Mr. Marc Lemay: Thank you, Mr. Chair.

I have listened carefully to the remarks made by Mr. Moon and by Mr. Freiman and Mr. Farber. Thank you for being here, too.

If I understand correctly, Mr. Freiman, and correct me if I am wrong, you do not see any point in repealing section 13. However, you say that it needs to be clarified. That is the subject I would most like to hear your thoughts on, because at the moment section 13 seems fairly clear to me, in light of the Supreme Court's decision in Taylor, which reiterated what the Human Rights Tribunal said in *Nealy v. Johnston*. We also have section 319 of the Criminal Code, which seems to provide parameters.

I am wondering, and I would like to hear your thoughts on this. Perhaps Mr. Moon could also give his opinion. How do you think section 13 could be clarified, since it seems to be fairly clear at this point?

[*English*]

Mr. Mark Freiman: I think I can correct the misimpression. I agree with you that subsection 13(1) is clear as it stands. It does not need clarification. If it were to be clarified, the only clarification I could see would be using the exact words that Justice Dickson used in the Taylor case to explain what hatred means. The improvements I was speaking about are administrative improvements.

[*Translation*]

Mr. Marc Lemay: Excuse me, Mr. Freiman. Do you really think it is necessary to include what Justice Dickson said in section 13? That is a precedent. There maybe isn't any need to include it.

[*English*]

Mr. Mark Freiman: I agree that it's not necessary. If someone wanted to put it there, it would not bother me, but it would be very inelegant as legislative drafting. The improvements that are necessary are procedural and administrative in nature. They would give the commission more of a gatekeeper function. They would allow it to dismiss, without investigation, complaints that are clearly frivolous and without merit. This would liberate the commission from a large portion of its workload and would allow it to concentrate on cases of true merit. It would liberate respondents, both emotionally and financially, from the burden of having to deal with frivolous complaints. I believe there is room for specialization. A specialist tribunal could be created to deal with section 13 complaints within the human rights tribunal, just as in the Federal Court they have created specialist tribunals to deal with matters of national security. This would be helpful. Encouraging staff at the commission level, both investigators and counsel, to stay in their job for a while rather than to rotate out would be extremely helpful, because of the sensitivity to task and the amount of training that is necessary. Those are the kinds of improvements that I had in mind.

● (1710)

[*Translation*]

Mr. Marc Lemay: Mr. Moon, do you share my opinion, which now also seems to be Mr. Freiman's opinion?

[*English*]

Prof. Richard Moon: As you may know, in my report, as an alternative, I recommended a series of amendments to section 13, the process related to it. In my view, however, none of those is adequate to correct what I think is the more basic problem with the overall system, and I hold on to the view that the more appropriate response is repeal of section 13.

Certainly the changes that I think might improve section 13—again, without in my mind being adequate—include things that would cause it to more closely resemble a criminal procedure, including an intention requirement. I have enormous difficulty with the absence of any sort of intention requirement, given the extreme character of the expression it's focused on, and at the same time we have no way and no decision-maker who purports to measure the actual impact of the expression at issue. In the end, the focus is on the character of the expression, and you'll find the decision-makers invariably attribute an intention, understand it as carrying an intention over some time, which is in no way surprising, given the extreme character.

What I do agree with is that at the very end of the process, if you look at the decisions that have been reached by the tribunal in which they have found a breach of section 13, we are talking about extreme expression, I don't think there's any question. It is really everything else that occurs prior to that end point that, for me, is the difficulty.

[*Translation*]

Mr. Marc Lemay: Right, thank you.

[*English*]

The Chair: Thank you.

We'll move on to Mr. Comartin. You have seven minutes.

Mr. Joe Comartin: Thank you, Chair.

Thank you, gentlemen, for being here.

Professor Moon, as well as the overview that you've given us today, I understand you've also prepared a much lengthier article for one of the Saskatchewan law schools. When will that be published?

Prof. Richard Moon: In the spring. Last spring they invited me to do their annual lecture on either an issue of religious freedom or on human rights, and I opted to write on that issue.

Mr. Joe Comartin: I understand. That article still hasn't been published. Is there any way this committee can see that before it's published?

Prof. Richard Moon: I can ask the editorial board. I don't see why they would have any objection.

You have, I understand, an abridged version of that, which was the lecture I actually presented last week. The coincidence of these two events is entirely that, a coincidence. Interestingly enough, it became rather public, to my surprise, after I was asked for a hard copy at the end of the public lecture, and I discovered that it circulated more broadly than I anticipated. In any event, I decided that it seemed appropriate to submit that to the justice committee, and I've done that, so I don't know whether you have that in front of you or not.

Mr. Joe Comartin: Professor Moon, the point that Mr. Freiman raised, which is where my orientation is as well.... There are two parts to this. How do you respond to how we deal with that expression that demonizes a particular group, and do you see any way it can be done by amending the Criminal Code, if we're not going to do it under the Human Rights Act?

Prof. Richard Moon: The view I took in my report is that we really ought to focus only on the most extreme forms of expression, and I sought to tie it to the idea of violence. In fact, I don't support the idea that it's necessary to demonstrate that violence ensues from the speech itself, but to signal the extremity of the speech at issue so that one could understand it is so extreme in character that it could be seen as supporting or justifying violence against a group. As a consequence, I might even say that in practice, if you look at the decisions of the Canadian Human Rights Tribunal, I'm not sure—and I realize I'd better slow down here—that the standard applied in those cases is different in any noticeable way from what would be applied by a criminal court in applying section 319.

Mr. Joe Comartin: Certainly if you're going to introduce intent into it, that would be a significant shift.

Prof. Richard Moon: Again, my view is that in practice I'm not certain that in any of the cases in which the tribunal found a breach of section 13 the result would have been different had there been an intent requirement. In fact, if you read those judgments, the language of intent often figures into the description of the speech and the wrong that occurs.

● (1715)

Mr. Joe Comartin: Mr. Freiman, do you agree with that?

Mr. Mark Freiman: No, I don't, unfortunately.

First let me say that I have the highest respect for Professor Moon. These sorts of exchanges I think are profitable exchanges, as opposed to the kind of debate and overheated rhetoric that sometimes characterizes these discussions. I think intention actually is a dangerous precondition if we are focusing not on the wrongdoer. If we want to punish a wrongdoer, then intention is an absolute prerequisite, but if we are focused on the speech itself, then searching for intention is a side trip that isn't profitable. What will inevitably happen is legal maxims like “a person is taken to intend the inevitable consequences of their acts”, which really leaves out intention from the requirement.

And it's the same thing with violence. What Professor Moon is saying is not all that different from what experts on anti-Semitism and other forms of extreme genocidal hatred say. The precursor is the dehumanization and demonization of the target group to the point where the audience says, “If that's true, then these people have no right to be around here”. It doesn't have to be a direct incitement to violence. The demonization is an indirect incitement to violence, so again importing that as a necessary prerequisite is just a side trip, because you will find it by necessary implication, in any event. You'll never be able to prove objectively the presence of a subjective state of mind or intention on the part of the wrongdoer and you will never be able to point to the direct incitement to violence in the most vile sorts of propaganda. It is all implicit.

Mr. Joe Comartin: One more area, Professor Moon, I want you to comment on—

Prof. Richard Moon: Let me comment on that.

Mr. Joe Comartin: Do both of these. Comment on that, but also comment on Mr. Freiman's point about specialization within the tribunal, if you would, because I don't think you addressed that in any of your recommendations. If you did, I missed it.

Prof. Richard Moon: I don't. If truth be told, I wrote this report focusing on the role of the commission rather than the tribunal, and as I understand it, there is a degree of specialization within the commission itself.

One of the difficulties—this is a practical difficulty, I can imagine—is that the number of tribunal adjudications under section 13 is very small. It is the practice of many courts, of course, in which certain judges who have experience and knowledge in a particular area are generally assigned particular cases that arise, so it certainly would make sense to do something of that nature, I would think.

Very quickly, I would just like to draw the committee's attention to a particular provision of the Criminal Code that is under-utilized, and that is—I hope I've got the number right—section 320.1. It is a provision that enables an application to be made that can lead to the taking down of web material, the erasure of computer-based material, without a determination of who is responsible for it and without a determination that there was any wrongful intention, if it's determined that the material is sufficiently hateful in character that it would breach subsection 319.(2). Now, it's not used very often, and there may be some practical issues around it that I'm not aware of, but it does seem to me to be a valuable alternative option.

The Chair: Thank you.

We'll move on to Mr. Rathgeber, for seven minutes.

Mr. Brent Rathgeber: Thank you, Mr. Chair.

Thank you to all the witnesses for your attendance here today and for your very interesting presentations.

First of all, at the beginning I must say, Mr. Farber and Mr. Freiman, that I find it reprehensible if anybody defaces a Jewish headstone, or any headstone, for that matter. I represent a portion of Edmonton. A couple of synagogues in my city have been defaced not dissimilarly to the images on the photos that have been circulated. I find that reprehensible. But it begs the question: what protection was in section 13 of the human rights code for protecting your members, your faith, against that very, very reprehensible act?

● (1720)

Mr. Mark Freiman: Let me start. Mr. Farber's a far greater expert than I in these matters.

The first thing that subsection 13(1) does is it acts as an official denunciation, on behalf of the Canadian public, of this sort of communication. That denunciation may strike some members of this committee as being superfluous, but in these days it may not be. The fact of an official statement that this is beyond the realm of reasonable communication—this is not a debate, this has crossed over the line—is extraordinarily important. It's also important as an assistance to impressionable people to understand that what's going on here is beyond the realm of all reasonable debate.

Would taking down these websites prevent that sort of desecration? It's not clear to me whether it would or it wouldn't. It seems intuitively to be correct that the less the Internet becomes a forum—at least locally—for this sort of incitement, the better, and the more likely it is that people will be respectful. I'm not sure that it is a sufficient protection, but it certainly is an extraordinarily helpful sort of protection.

Mr. Brent Rathgeber: Clearly, in this example it wasn't sufficient protection, or any protection.

Mr. Mark Freiman: What we're talking about is influencing the nature of the debate.

Mr. Brent Rathgeber: I understand that.

Mr. Farber, very briefly, please.

Mr. Bernie M. Farber: If I could just add one small point, the pictures that you saw were clearly a criminal act, in my view. It wouldn't have been covered under section 13. But I would like to just propose to you that had we used civil procedures as an example of how to deal with hateful messages, perhaps—nobody really knows—the use of the law itself would have a salutary effect.

We don't live in a perfect society. There will always be those racists and crumb-bums out there who will perpetrate these kinds of acts. My goal is educative. My goal is to use civil procedure in a way to help people learn, specifically young people, well before it comes to a point where we have to worry about swastikas being drawn on headstones of Jewish graves.

Mr. Brent Rathgeber: Thank you.

My specific problem with section 13 are the words “is likely to expose”, and the sort of predictive element that is quite explicit in the drafting of that section. I listened to you very carefully, Mr. Freiman, use the words “dehumanizatio” and “demonizatio”. I guess the problem that I still have is with respect to who gets to decide what is demonizing and what is dehumanizing. It's a very subjective test. I just make that as a point.

My question is for Professor Moon. I must say, when I read your report over the summer I thought it was well researched and well thought out, and I certainly agree with your conclusions.

I believe, with respect to this incident on the weekend with the headstones, certainly the Criminal Code has prohibitions on vandalism, mischief, and trespassing. So I agree with your ultimate conclusion that the Criminal Code is the best place to deal with all of these issues. But I'm curious, if you believe that we're going to leave this matter to the Criminal Code, if it's also going to require an amendment to section 319. When I look at subsection 319(2), it provides a number of defences, but not promoting or agitating or supporting violence is not a defence to a charge under section 319.

Prof. Richard Moon: Certainly one of the things I do want to say to this committee is that if section 13 were repealed and we were to rely on the Criminal Code, I think it would be important to look at the Criminal Code and how it operated. There are a variety of issues, and I mentioned several of them in the course of the report.

Again, I think that the practice of the courts and how, under the guidance of the Keegstra decision of the Supreme Court of Canada, the hate promotion section has been interpreted is actually quite narrow. Although one can look at the language and perhaps be concerned about it, it may be that it is already the sort of test I would be looking for. I'm not a draftsperson. I would personally be more comfortable with language that sought to really signal just how extreme the speech we want to focus on is in character.

There are a number of other concerns. One of them really has to do with the role of the provincial attorneys general. As you may know, before a prosecution can be brought under the hate promotion provision, it's necessary to obtain the consent of the attorney general. I don't think there's anything wrong with that—far from it; it may in fact be a useful filter process of some kind. But concern has been expressed that some attorneys general in the past have not wanted to give their consent under any circumstance. I think we don't know a lot about that. Certainly I think I would be troubled if that became a way of simply nullifying the law itself.

● (1725)

Mr. Brent Rathgeber: Do I have any time left?

The Chair: No. I'm sorry about that.

With your permission, what I'm going to do, because we have five minutes left, is extend by another five, if that's all right. That gives us ten minutes, but with a one-minute question and one-minute answer for every party represented here. Is that acceptable?

All right, we'll move forward on that basis.

Ms. Jennings, you have one minute and a one-minute response.

Hon. Marlene Jennings: Thank you.

You were here when I suggested to Chief Commissioner Lynch that in addition to the recommendations that her commission has proposed, we should be looking at the possibility that the commission actually have carriage of the case before the tribunal and be the only party that would have carriage of it. I'd be interested to hear what your views are on that.

And I simply want to say that I do not agree with my colleague Mr. Rathgeber that the definition of demonization and dehumanization is subjective. I believe sufficient studies have been done over numerous decades that have provided very clear, objective criteria to determine whether or not there's a pattern of demonization and dehumanization of an identifiable group.

Prof. Richard Moon: With regard to the first part of your question, in my report, as part of my alternative set of recommendations, I did in fact propose that the commission have carriage, not just at the tribunal but at a much earlier stage, to take some of the burden off private complainants.

Mr. Mark Freiman: Let me respond to the second part, because I didn't get a chance to respond before.

I agree that it is not subjective. The problem is that the words “likely to expose” seem to invite a predictive judgment on the part of the tribunal. But it's no different from the definition in defamation cases, which I sometimes do in my day job. A defamatory statement is one that exposes a person to hatred or contempt, and between “exposes” and “likely to expose” there's really no semantic difference. That's why Justice Dickson specified what is meant by exposing to hatred and contempt; it is demonization.

The Chair: Thank you.

We'll move on to Monsieur Lemay for one minute and one minute.

[*Translation*]

Mr. Marc Lemay: No, I have all the answers I need and I am thinking, Mr. Chair.

[*English*]

The Chair: Thank you.

Mr. Comartin.

Mr. Joe Comartin: I want to go back to the individuals who are appointed to the tribunal, with regard to developing a perhaps stronger body of law.

Has either one of the delegations looked at the possibility of having clearer criteria for the skills that people should have who are appointed to the tribunal?

I know that you may appear in front of them again, Mr. Freiman, and you may not want to answer the question.

Mr. Mark Freiman: No, this have been a hobby horse of mine from the days when I was Deputy Attorney General of Ontario.

Surely it would be advisable to have explicit criteria, but that's really administrative law reform writ large. If there could be a tighter control over the criteria for appointment, I don't see that it would harm anything, and it would probably benefit a great deal.

I wouldn't hold my breath.

The Chair: Thank you.

We'll move on to Mr. Hiebert for one minute and a one-minute response.

Mr. Russ Hiebert (South Surrey—White Rock—Cloverdale, CPC): Thank you, Mr. Chair.

Professor Moon, I note that Alan Borovoy of the Canadian Civil Liberties Association has made the same recommendation you have to repeal section 13, for slightly different reasons. Not only does he say that it stifles free expression; he also believes it's too vague, too wide, that there's no defense of truth, and that there are other consequences or sanctions that can occur when people make offensive speech. I haven't heard you comment on those aspects of it, and I was wondering whether you could.

The second part of my question is brief. The commission is proposing that respondents have the right to recover their legal costs in exceptional cases. I don't understand why that wouldn't be the case in all cases when the tribunal has found someone to be innocent. Comment on that as well, if you could.

● (1730)

Prof. Richard Moon: All in one minute?

An hon. member: Take your time.

Prof. Richard Moon: I'll work backwards.

I suppose that, because my principal recommendation was the repeal of section 13 and I had a limited time in which to write this, I did not give significant consideration to cost. Certainly, as part of my alternative recommendations, though, if the commission took carriage of the tribunal case, it would seem to me to make much more sense that there be some support provided for the defence of any respondent who was subject to a complaint. I would frame it in those terms.

In terms of Mr. Borovoy's concern, I do believe that at the front of the process the language of section 13 appears vague, but I think the reality is that through judicial interpretation.... There are limits to the ability of a body, any body, to provide a clear definition to what counts as hate speech that ought to be prohibited or regulated, but I think it has been significantly narrowed through judicial interpretation.

With that said, my problem is not so much with the language as with the location of a prohibition of this kind within a process and with its being given over to a body that's responsible for regulating discrimination more broadly. Of course, we have moved over time to increasingly broad understanding of discrimination, away from discrimination as an intentional phenomenon to ideas of constructive and of effects discrimination, in which it makes a lot of sense to sit parties together and to help them understand that perhaps practices they hadn't thoroughly thought through might have certain negative impacts on others. All that makes perfect sense. At the same time, when speaking about the hate speech elements, we have sought to narrow the scope dramatically in order to ensure that we remain committed to free speech.

So my concern is that a body that's principally concerned with regulating discrimination, broadly understood, is given authority to deal with hate speech narrowly understood. There's a tension that operates that leads to at least the investigation of complaints that in the end will almost certainly not go to tribunal and not succeed at tribunal, but in which the process of investigating is itself a burden placed upon parties. That's the concern I have: it has to do with the process beginning in the first place.

The Chair: Thank you.

Professor, thank you for your testimony.

Mr. Farber and Mr. Freiman, your testimony has been helpful, and it will help us as we prepare a report. Thank you.

We're adjourned.

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