



Women's Legal
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pour les femmes

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LEAF (Women's Legal Education and Action Fund)

Submission to the House of Commons Standing Committee on Justice and Human Rights

Respecting the Committee's Study of Online Hate

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1. Introduction

The Women's Legal Education and Action Fund ("LEAF") makes the following submission to the House of Commons Standing Committee on Justice and Human Rights ("the Committee") in support of reinstating the important equality protection contained in the repealed s. 13 of the *Canadian Human Rights Act*¹ ("CHRA") (the text is in the Appendix to this submission) and in support of creating a regulatory framework to address the wider dimensions of hate online. The targets of hate speech are often the most vulnerable and marginalized groups in society. The purpose and effect of s. 13 of the CHRA was to protect the equality rights of those affected by hate speech and to ensure their freedom of expression and full participation in Canadian society.

LEAF's submission is that the prohibition of hate speech under the CHRA was an important component of human rights protections in Canada and is consistent with various sections of the *Canadian Charter of Rights and Freedoms* (the "Charter"),² including ss. 2(b), 7, 15, 25, 27 and 28, as well as Canada's obligations under international law. The harms of hate speech to marginalized and excluded groups, and to Canadian society overall, are significant. The limitation on speech under human rights legislation is minimal, and effectively enables freedom of expression for those silenced by hate. Hate speech provisions in human rights legislation are essential for women's access to justice. It is incumbent on us, as Canadians, particularly as we value equality, to ensure that we reinstate the protections previously provided by s. 13 of the CHRA.

In addition, LEAF submits that to achieve the worthy goal of stemming the propagation of hateful acts and the enticement of hatred through racism, sexism, antisemitism, Islamophobia, or homophobia in online platforms, it is essential to create a regulatory framework holding to account the private businesses that own and control social media platforms. The nature of social media is vastly different from the static publications considered previously when contemplating hate. Social media platforms are a critical space for individuals to participate in public discourse. Currently, there is no remedial recourse available except through the hate propaganda provisions in the *Criminal Code*.³ Such a regulatory framework should include robust monitoring and enforcement mechanisms to ensure that online platforms, including international online companies operating in Canada, comply with Canadian law.

Criminal and human rights legislation addressing hate speech address a narrow aspect of a growing problem of online hate generally, and hatred expressed towards women, specifically. Cyber misogyny has been defined as "a form of harm; either directly in the form of psychological, professional, reputation, or, in some cases, physical harm; or indirectly, in the sense that it makes the internet a less equal, less safe, or less inclusive space for women and girls."⁴ Twenty-three percent of women reported experiencing cyber misogyny in a study that spanned eight countries in three continents.⁵ The volume of cyber misogyny online has direct effects on women specifically targeted, other women exposed to it, and to individuals who are in turn radicalized by it. The proliferation of online hate has a chilling effect on women's participation in civic life, as well as effects on their physical, emotional, and financial well-being. Elimination of this profound harm requires a more proactive approach than that provided by an individual complaint framework.

2. The harms of hate are expanding and proliferating online.

The nature of hate speech and its harms have been recognized by the Supreme Court of Canada and by various courts and tribunals in relation to the *Criminal Code* and human rights legislation. The decisions have so far dealt with hate speech in printed materials or on websites. There is a need now to address and to institute regulatory measures concerning the expanding and proliferating forms of hate online.

The Supreme Court in *R v Keegstra*⁶ (“*Keegstra*”), *Canada (Human Rights Commission) v Taylor*⁷ (“*Taylor*”), and most recently in *Saskatchewan (Human Rights Commission) v Whatcott*⁸ (“*Whatcott*”), and courts and tribunals since *Whatcott*, have described the harmful effects of hate speech on targeted individuals, on targeted groups, and on society at large. The harm to individuals includes serious psychological and social consequences from the humiliation and degradation caused by hate propaganda, the Supreme Court noted in *Whatcott*,⁹ referring to *Keegstra*. A recent decision from the B.C. Human Rights Tribunal notes that the derision, hostility and abuse encouraged by hate speech have a profound negative effect on the individual’s sense of self-worth, dignity, and acceptance.¹⁰

The harm to targeted groups was described by Rothstein J. in *Whatcott*:¹¹

Hate speech lays the groundwork for later broad attacks on vulnerable groups. These attacks can range from discrimination, to ostracism, segregation, deportation, violence, and in the most extreme cases, to genocide: see *Taylor* and *Keegstra*.

Such harms were identified by the Ontario Court of Justice in its recent decision in *R v Sears*¹². Hate speech is so potent because it resonates with and reinforces deeply rooted racist, sexist, and homophobic narratives and stereotypes in society. The reinforcement of negative stereotypes leads to denial of opportunities. The Supreme Court of Canada acknowledged this in *Taylor*, writing that hate propaganda can convince listeners, even if subtly, that members of certain groups are inferior.¹³ “The result may be an increase in acts of discrimination, including the denial of equal opportunity in the provision of goods, services and facilities, and even incidents of violence.”¹⁴

The harmful effects on society at large were noted in *Keegstra* and *Whatcott* as increasing discord and affecting a subtle and unconscious alteration of views concerning the inferiority of the targeted group.¹⁵ Delegitimizing and marginalization of a targeted group in the political context is central to the recent decision from the B.C. Human Rights Tribunal in *Oger*.¹⁶ The Tribunal found that the flyer distributed by *Whatcott* in the midst of an election conveyed a message that a transgender person is inherently unworthy of holding public office, and the overall effect of the flyer was to inhibit the ability of transgender people to “find self-fulfillment by articulating their thoughts and ideas” and to participate meaningfully in the democratic process.¹⁷

The Court in *Whatcott* went on to note the impact of hate speech on the freedom of expression of the targeted groups. Justice Rothstein noted the observation of then Chief Justice Dickson in *Keegstra* that hate propaganda opposes the targeted group’s ability to find self-fulfillment by articulating their thoughts and ideas.¹⁸

The proliferation of hate speech on the Internet was recognized in *Whatcott*.¹⁹ The Internet has become a popular forum among hate groups because of its ease, effectiveness, low cost, wide reach, and anonymity for the speaker. A number of cases brought before the Canadian Human Rights Tribunal under the former s. 13 of the *CHRA* have included Internet-based hate speech targeting women, including racialized women, Indigenous women, African-Canadian women, Muslim women, and lesbians.²⁰

The profound escalation of the propagation of hatred on the internet is an internationally recognized issue, as is the need to develop approaches cognizant of the exponential distribution power of the internet and the cumulative harms of exposure to repetitive hate. Increasingly, it is recognized that some online content that may not be illegal, or fall afoul of hate speech prohibitions, can cause serious harm to identifiable groups.²¹ The effects of online hate are profound at both the individual level and societal level. The act of digitalization dramatically increases the harms caused by the hate whether through the direct harm experienced by the individual, the collateral harm experienced by members of the individual's group, or by radicalizing others towards engaging in dehumanizing, hateful activities.

Additionally, the online platforms available have expanded significantly, thereby also expanding avenues for hate and harm significantly beyond the media of print or websites considered in jurisprudence so far. Technology has created new means of engaging in violence against women and girls and misogyny, generally. One study broke that abuse down into these categories: flaming and trolling, harassment, physical threats, sexual harassment, inciting others to abuse, sexual threats, defamation, stalking, electronic sabotage, and impersonation.²² The Special Rapporteur adds to this by including doxxing (the publication of confidential identifying information including addresses), image-based sexual violence (including the non-consensual creation of intimate photographs, or the public distribution of intimate photographs regardless of whether they were initially shared consensually), and "sextortion" (blackmail through threats of releasing intimate images, videos, text messages, etc.)²³

Cyber misogyny perpetuates stereotypes against women, which act as barriers to equality for women in all areas of their lives. In this way, the propagation of hatred serves as a tool of patriarchal society, perpetuating systemic discrimination against women, with all the consequent outcomes of systemic discrimination including the feminization of poverty, lack of opportunities, and exposure to violence. The UN has explicitly recognized the principle that "human rights protected offline should also be protected online."²⁴ The Special Rapporteur states, "Technology has transformed many forms of gender-based violence into something that can be perpetrated across distance, without physical contact and beyond borders through the use of anonymous profiles to amplify the harm to victims."²⁵ Many studies have noted that cyber misogyny is particularly pronounced when directed against women advocating for women's equality, further amplifying the suppressive effects on the participation by women in democracy. Technology is changing the landscape for women's safety from violence and women's equality rights. While

men's abuse, control, and sexual exploitation of women is not new, technology is providing men with new, very dangerous ways to commit these acts.

The vast majorities of adults use the Internet. As referenced above, studies show that a quarter of all women experience abuse online. More focused studies that include the usage rates show 93% of women identifying as feminists experience cyber misogyny more than once a year, with the frequency of abuse escalating with the number of hours spent online.²⁶ Amnesty's "Troll Patrol" project found that an abusive tweet is sent to a woman on twitter every 30 seconds, including threats of murder, rape, and the use of misogynistic slurs.²⁷ This abuse is in turn amplified if a woman is also a member of another identifiable group typically protected by criminal and human rights legislation.

Some 76% of women who experience cyber misogyny make changes to the way they use platforms, including 32% of women who stop posting on certain issues that trigger abuse. A free press is crucial to a healthy democracy, yet 20% of women and racialized journalists have refused assignments because they are disproportionately targeted for hate, while others reported changing the tenor of their stories.²⁸ The economic impact to women who leave their professions is a consequence of cyber misogyny, and it represents a direct attack on women's visibility and participation in public life.²⁹

A relationship has been found between the rate of abuse and its impact on targeted women. For example, 64% of women who reported frequent abuse (occurring most weeks) found the most recent incident, "really traumatic, I keep thinking about it" as opposed to women who received abuse less than once a month, who were 77% likely to "get over it" or "shrug it off."³⁰ The psychological effects of online abuse have been measured, with 61% of women who had experienced it reporting lower self-esteem, 55% reporting feelings of stress or panic attacks, 63% reporting that their sleep had been adversely affected, and 56% reporting that they had been unable to concentrate.³¹

Social media platforms are increasingly the locus of civic discussion, replacing the public square, and reshaping society. Increasingly, Canadians use the Internet to run businesses or promote their careers. Evidence is clear that not only are women harmed in these spaces, some women's voices are silenced. This is incompatible with Canada's commitments to dignity and human rights. Cyber misogyny directly impacts women's economic participation, freedom of expression, and inclusion in public discourse.

The problem of online harassment is particularly severe for women. Amnesty International documents:

Female journalists and bloggers throughout the globe are being inundated with threats of murder, rape, physical violence and graphic imagery via email, commenting sections and across all social media.... Male journalists are also targeted with online abuse, however, the severity, in terms of both sheer amount and content of abuse, including sexist and misogynistic vitriol, is much more extreme for female journalists.³²

This demonstrates that online hate has a particular impact on women, and any law reform initiatives in this area must be specifically attentive to women's rights and gender equality.

It is clear that gender-based hate speech causes significant harm to women. It undermines women's emotional and psychological wellbeing and it increases women's fear, which impacts their free participation in society. It causes psychological harm and trauma. It denies women freedom of expression and civic participation. It promotes violence against women, which risks increasing incidents of sexual and physical violence against women. Further, it perpetuates stereotypes against women, which act as barriers to equality for women in all areas of their life. In light of these harms, the proliferation of online hate requires robust government response.

3. A diversity of mechanisms to address the harms of hate speech and other forms of online hate is needed. Section 13 of the CHRA should be restored. A regulatory mechanism to address the wide scope of forms of online hate should be implemented.

It is appropriate for a range of options for society to be available to respond to hate speech and other forms of online hate. LEAF submits that (a) the equivalent of s. 13 should be restored to the *CHRA*, and (b) a regulatory mechanism to address other forms of online hate should be implemented.

(a) Section 13 of the CHRA should be restored.

Prior to the repeal of s. 13 of the *CHRA*, there were two statutory vehicles by which to address online hate messaging: the federal human rights legislation and the *Criminal Code*. Since the repeal, only the *Criminal Code* has been available as a statutory means to address the harm inflicted by online hate messages. The repeal of s. 13 of the *CHRA* removed the only civil avenue to address internet-based hate speech and its discriminatory effects.³³ Further, the repeal occurred after the Supreme Court of Canada had confirmed in *Whatcott* the important objective and the constitutionality of limiting hate speech through human rights legislation.³⁴ LEAF submits that addressing hate speech through human rights legislation (and other measures) is important for women's access to justice and for accomplishing the objective of preventing discrimination. LEAF therefore submits that the equivalent of s. 13 should be restored to the *CHRA*.

Human rights provisions have a different purpose from the *Criminal Code*. Human rights legislation focuses on reparation and is educative and corrective rather than punitive.³⁵ This is described by Chief Justice Dickson in *Taylor*.³⁶ Further, the requirements of proof for the *Criminal Code* hate propaganda provisions are more onerous. In human rights legislation, claimants do not have to prove intent. The focus of the analysis is on the effects of the speech. As noted by then Chief Justice Dickson in *Taylor*, referred to in *Whatcott*,³⁷ the focus of the preventive measures in human rights legislation is on effects because systemic discrimination is much more widespread than intentional discrimination.

Hate speech provisions in human rights legislation are essential for women's access to justice. Access to justice is more limited under the *Criminal Code* as compared with human rights legislation. The consent of the Attorney General is required for a proceeding to be instituted in

relation to a charge of wilful promotion of hatred under s. 319(2) of the *Criminal Code*.³⁸ Further, the human rights structure is more accessible. Complaints are filed with an expert human rights body structured to be welcoming and sensitive to the needs of protected groups. Under the *Criminal Code*, victims are required to contact the police and lay an information, a foreign and often alienating process of which many Canadians are unaware is even available to them.

It is well-recognized that discrimination can be accomplished through words, with a clear example being the poisoning of work environments through sexual harassment.³⁹ Addressing such discrimination is the core work of human rights law. Statutory provisions addressing hate speech therefore fit logically within the range of anti-discrimination measures included in human rights statutes.

(b) A regulatory mechanism to address the wide scope of forms of online hate should be implemented.

As noted above, technology has created new means of engaging in violence against women and girls and misogyny, generally. Some of these matters are incorporated into existing laws, or could be incorporated in a complaint through a restored s. 13 of the *CHRA*. Others are more amorphous and require new vehicles.

It is important to note that unlike a criminal prosecution or a typical human rights complaint where the identity of the defendant or respondent is clear, such may not be the case with respect to any of the forms of cyber misogyny. What is clear, is that these documented harms are occurring on privately owned social media platforms, subject to codes of conduct and enforcement mechanisms that currently do not include governmental guidance to ensure compliance with human rights obligations. Recent studies have shown that more than half of all social media identities in some recent years have been anonymous “bots” posing as people.⁴⁰ State actors and other groups use social media platforms as a means of directing democratic electoral results through polarizing society, often through the propagation of hate material.⁴¹ For example, the prolific social media platform Facebook identified and removed 2.8 billion fake accounts in the one year period ending November 2018. The company has recognized the malevolent intent of some bot accounts and their effect on elections world-wide. The company’s vice president for public policy, Richard Allan, recently declined to give journalists specific details about Facebook’s attempts to protect elections but noted that, “as much as we can, we will be aiming to protect all elections around the world.”⁴² In other words, there often is no means of identifying the individual or entity responsible for online hate, but what is clear is that it is present on privately owned and regulated social media platform. The platforms may have arbitrary enforcement mechanisms inconsistent with human rights.

It is additionally clear that social media platforms are profit-making entities and that those profits are driven by user engagement. User engagement in turn is driven by algorithms. In other words, “social media have gone from being the natural infrastructure for sharing collective grievances and coordinating civic engagement, to being a computational tool for social control, manipulated by canny political consultants, and available to politicians in democracies and dictatorships

alike.”⁴³ Using the model of digital advertising, groups seeking to subvert democracy can manipulate public opinion by weaponizing online hate. Unlike an encounter with physical hate propaganda, interacting with hate propaganda online greatly increases the likelihood of seeing more pieces of hate propaganda. The cumulative effect of continually seeing hate propaganda normalizes it, further dehumanizing the members of target groups in the eyes of the readers. Many social media users do not know that algorithms control the content they see, further normalizing any hate content that does appear.⁴⁴

Such normalization can have profound and negative consequences, including mass murder rooted in misogyny. In 2018, 10 people were killed in Toronto by man pledging allegiance to the “Incel Rebellion.” This so-called rebellion is fueled by misogynistic resentment at participants’ perceived involuntary celibacy due to the withholding of sexual activity by women generally. The attacker in this instance cited in his social media postings another “incel” who killed 6 and wounded 14 in California in 2014, including a specific attack on a sorority house. The California man also posted his misogynistic views online, and cited as inspiration the perpetrator of the 1989 Montreal Massacre.⁴⁵ While the 1989 attack pre-dates social media, celebration of the perpetrator does not, with direct and observable consequences evident in these two recent mass killings.

Given the profound consequences of online hate and the lack of transparency from social media platforms regarding their self-regulation, combined with the profit model of algorithm-driven traffic, it is necessary for external regulation to ensure the safety and human rights of all members of Canadian society.

External regulation is contemplated in the Report of the Special Rapporteur,⁴⁶ the UK White Paper⁴⁷ and in the work of the Computational Research Project.⁴⁸ Regulation of content with concomitant responsibility at the corporate level exists at least to some degree in the EU,⁴⁹ in Germany,⁵⁰ and in Australia.⁵¹ It is important to note that the very technology that makes the Internet valuable to advertisers and propagandists is also adaptable for monitoring purposes. Some efforts at curtailing discriminatory material currently employed by social media platforms involve manual efforts by human annotators. This is a Sisyphean task when faced with bots in the billions and subject to subjective interpretations by individual monitors. Technological solutions have been suggested by many researchers in the field, an example of which involves recurrent neural network (RNN) classifiers, which may be a more efficient and effective way of addressing the issue.⁵²

We also encourage this committee to recognize that image-based sexual abuse, including non-consensual distribution of intimate images or “deep-fakes” – the imposition of women’s faces onto pornographic videos or photos – is a form of gender-based violence that is rooted in sexism and misogyny and promotes sexism and violence against women. In initiating law reform on online hate, the Committee must be attentive to the role the Internet plays in the proliferation of image-based sexual violence and the close proximity of this kind of gender-based oppression to other forms of online hate.

4. The importance of a societal response: the marketplace of ideas will not protect vulnerable groups.

A societal statement through human rights legislation and regulatory mechanisms repudiating messages of hate is an important affirmation of equality and an educational tool. A response through the law to hate expression is a statement that members of protected groups “are valued members of our polity.”⁵³ The argument that the marketplace of ideas will provide the necessary balance to resolve the harm is unpersuasive – particularly in the internet age. Parliament protects the Canadian public in many areas involving expression and does not leave the problem to counter-speech. An example is regulation of tobacco advertising.⁵⁴ Hate expression distorts the marketplace by muting or devaluing the expression of the targeted groups.⁵⁵ There is no certainty that the marketplace will result in truth.⁵⁶ And “[e]ven if tolerance will eventually rise to the top, the harms victims experience while waiting for justice to burgeon are too heavy a price to pay ...”⁵⁷ The Court in *Whatcott* noted the observation of then Chief Justice Dickson in *Keegstra* that “the state should not be the sole arbiter of truth, but neither should we overplay the view that rationality will overcome all falsehoods in the unregulated marketplace of ideas.”⁵⁸

Prohibiting hate speech through human rights legislation (and through the *Criminal Code*) and providing a regulatory mechanism promote equality. Equality is a fundamental value essential to a free and democratic society which must be balanced with freedom of expression when considering hate speech limitations in human rights law.⁵⁹ The equality promoting purpose has been upheld as a pressing and substantial basis for limiting hate speech in *Keegstra*, *Taylor*, and *Ross*. Equality rights and values are recognized and protected in several sections of the *Charter*. Section 15 explicitly guarantees equality rights. Equality rights are also recognized in ss. 25, 27, 28 of the *Charter*, which ensure that other *Charter* rights and freedoms, such as freedom of expression, must be interpreted consistently with protections of Indigenous rights, diversity and multiculturalism, and gender equality. In this sense, constitutional rights are relational. Individuals’ protected scope of freedom of expression must be interpreted in light of the harms that it might cause to vulnerable groups, and to Canadian society as a whole.

Prohibiting hate speech through legislation and regulatory mechanisms gives effect to Canada’s international commitments. The Supreme Court in *Whatcott* noted that the balancing of *Charter* rights should also take into account Canada’s international treaty law commitments, noting that those commitments reflect an international recognition that certain types of expression may be limited in furtherance of other fundamental values.⁶⁰ Canada is a signatory to several relevant international conventions that require state parties to prohibit hate speech (see the Appendix for the text):

- *International Covenant on Civil and Political Rights*, ratified by Canada in 1976, Article 20(2).⁶¹
- *International Convention on the Elimination of All Forms of Racial Discrimination*, ratified by Canada in 1981, Article 4.⁶²
- United Nations *Declaration on the Rights of Indigenous Peoples*,⁶³ endorsed by Canada in 2010, Article 8(2)(e).

In *Keegstra*, Chief Justice Dickson recognized these documents as reflective of “the international commitment to eradicate hate propaganda.”⁶⁴

See also:

- *Convention on the Elimination of all Forms of Discrimination Against Women*,⁶⁵ ratified by Canada 10 Dec. 1981, Articles 2, 3, 5(a), and 7.
- *Declaration on the Elimination of Violence Against Women*,⁶⁶ Article 1.
- *Beijing Declaration and Platform for Action*,⁶⁷ Articles 23, 24, 29 of the Declaration.

5. Recommendations

In summary, LEAF submits that:

- The equivalent of s. 13 should be restored to the *CHRA*.
- A regulatory mechanism to address the wide scope of forms of online hate should be implemented.

6. About LEAF

LEAF is a national, non-profit organization founded in April 1985 to advance the equality rights of women and girls in Canada as guaranteed by the *Charter*. To this end, LEAF intervenes in litigation and engages in law reform and public education. LEAF is the only national organization that exists to advance the equality rights of women and girls under the law.

As a result of its breadth of experience with litigation, law reform and public education, LEAF has considerable expertise in articulating how laws and policies advance or undermine substantive equality for women and girls, including and often especially those who confront discrimination on multiple and intersecting grounds like sex, gender, marital or family status, race, sexual orientation, disability, Indigenous ancestry, and socio-economic status. LEAF has expertise in examining the material conditions of women’s lives and how those conditions impact women’s equality, safety, and human dignity.

LEAF has particular expertise in the impact of hate speech and other forms of hate crimes on women’s rights. As an intervener before the Supreme Court of Canada in *Keegstra*, *Taylor*, and *Whatcott*, LEAF argued that challenges to the regulation of hate speech engage constitutional equality rights as much as freedom of expression, since the wilful promotion of group hatred constitutes a practice of inequality which fundamentally erodes the equality rights of members of the targeted group. Through these interventions, including working with committees consisting of national experts, LEAF has developed particular expertise in the relationship between misogynist and sexist hate speech and women’s equality rights.

All of which is respectfully submitted,

Women’s Legal Education and Action Fund

APPENDIX

The former s. 13 of the *Canadian Human Rights Act*

RSC 1985, c. H-6. Section 13 of the *CHRA* was repealed through *An Act to amend the Canadian Human Rights Act (protecting freedom)*, S.C. 2013, c. 37.

Hate messages

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

Interpretation

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

Interpretation

(3) For the purposes of this section, no owner or operator of a telecommunication undertaking communicates or causes to be communicated any matter described in subsection (1) by reason only that the facilities of a telecommunication undertaking owned or operated by that person are used by other persons for the transmission of that matter.

R.S., 1985, c. H-6, s. 13; 2001, c. 41, s. 88.

Canadian Charter of Rights and Freedoms

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Rights and freedoms in Canada

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

2. Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion;

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

...

Life, liberty and security of person

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

...

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

...

Aboriginal rights and freedoms not affected by Charter

25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

- (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
- (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

...

27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

Rights guaranteed equally to both sexes

28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

...

International Covenant on Civil and Political Rights

999 UNTS 171 (1966)

Article 20

1. Any propaganda for war shall be prohibited by law.
2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

International Convention on Elimination of All Forms of Racial Discrimination

Can.TS 1970 No. 28

Article 4

States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, inter alia:

- (a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;
- (b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;
- (c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

United Nations Declaration on the Rights of Indigenous Peoples

GA Res 61/295 (endorsed by Canada on November 12, 2010).

Article 8

...

2. States shall provide effective mechanisms for prevention of, and redress for:

...

- (e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.

Convention on the Elimination of all Forms of Discrimination against Women

1249 UNTS 13 (1981)

Article 2

States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

- (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;
- (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;

- (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;
- (d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;
- (e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;
- (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;
- (g) To repeal all national penal provisions which constitute discrimination against women.

Article 3

States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

...

Article 5

States Parties shall take all appropriate measures:

- (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women;

...

Article 7

States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right:

- (a) To vote in all elections and public referenda and to be eligible for election to all publicly elected bodies;
- (b) To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government;
- (c) To participate in non-governmental organizations and associations concerned with the public and political life of the country.

Beijing Declaration and Platform for Action

United Nations, *Beijing Declaration and Platform of Action*, adopted at the Fourth World Conference on Women, 27 October 1995, Endorsed by GA Resolution 50/203, 22 December 1995 (Articles of the Declaration)

23. Ensure the full enjoyment by women and the girl child of all human rights and fundamental freedoms and take effective action against violations of these rights and freedoms;

24. Take all necessary measures to eliminate all forms of discrimination against women and the girl child and remove all obstacles to gender equality and the advancement and empowerment of women;

...

29. Prevent and eliminate all forms of violence against women and girls;

¹ RSC 1985, c. H-6. Section 13 of the *CHRA* was repealed through *An Act to amend the Canadian Human Rights Act (protecting freedom)*, S.C. 2013, c. 37.

² *Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.)*, 1982, c. 11.

³ *Criminal Code*, R.S.C. 1985, c. C-46 (“the *Criminal Code*”).

⁴ D. Ging and E. Siapera, “Special Issue on Online Misogyny: Introduction” (2018) Vol. 8, No. 4, *Feminist Media Studies* at 516.

⁵ “Amnesty reveals alarming impact of online abuse against women” 2017 Nov. 20, amnesty.org.

⁶ [1990] 3 SCR 697, 1990 CanLII 24 (SCC).

⁷ [1990] 3 SCR 892, 1990 CanLII 26 (SCC).

⁸ [2013] 1 SCR 467, 2013 SCC 11 (CanLII).

⁹ *Ibid*, at para. 73.

¹⁰ *Oger v Whatcott (No. 7)*, 2019 BCHRT 58 (CanLII) (“*Oger*”), at para. 143.

¹¹ *Supra* note 8, at para. 74.

¹² 2019 ONCJ 104 (CanLII), at para. 9.

¹³ *Taylor*, *supra* note 7 at 918-919.

¹⁴ *Ibid*.

¹⁵ *Whatcott*, *supra* note 8, para. 73; *Keegstra*, *supra* note 6, at 746-47; see also *Oger*, *supra* note 10, at para. 143.

¹⁶ *Supra* note 10, at paras. 66-71.

¹⁷ *Oger*, *supra* note 10, at paras. 165-167.

¹⁸ *Whatcott*, *supra* note 8, at para. 75; see also paras. 114, 117.

¹⁹ *Ibid* note 8, at para. 72; see also *Lemire v Canada (Human Rights Commission)*, 2014 FCA 18 (CanLII), at paras. 61-62, *R v Topham*, 2017 BCSC 259 (CanLII), paras. 56-57, and *R v Topham*, 2017 BCSC 551 (CanLII).

²⁰ *Warman v Western Canada for Us*, 2006 CHRT 52 (CanLII) at para 19; *Warman v Guille*, 2008 CHRT 40 (CanLII) at paras 83,119; *Warman v Kouba*, 2006 CHRT 50 (CanLII) at para 47; *Warman v Beaumont*, 2007 CHRT 49 (CanLII) at paras 16, 18; *Schnell v Machiavelli Emprize Inc.*, 2002 CanLII 1887 (CHRT) at para 40.

²¹ *Online Harms White Paper*, CP-57 (London: HMSO, April 2019).

²² Lewis, R, Rowe, M., and Wiper, C., “Online Abuse of Feminists as an Emerging Form of Violence Against Women and Girls” (2017) 57 *Brit. J. Criminol* at 1470.

²³ United Nations, Human Rights Council, *Report of the Special Rapporteur on violence against women, its causes and consequences on online violence against women and girls from a human rights perspective*, A/HRC/38/47, at 11.

²⁴ Human Rights Council resolution 32/13.

²⁵ UNHRC, *supra* note 23 at 9.

²⁶ Lewis, et al., *supra* note 22 at 1470.

²⁷ Amnesty International, “Troll Patrol Findings: Using Crowdsourcing, Data Science & Machine Learning to Measure Violence and Abuse against Women on Twitter” (December 2018), online: <https://decoders.amnesty.org/projects/troll-patrol/findings>.

²⁸ Ging and Siapera, *supra* note 4 at 520.

²⁹ UNHRC, *supra* note 23 at 8

³⁰ Lewis, et al., *supra* note 22 at 1474.

³¹ Amnesty, *supra* note 5.

³² Amnesty International, “Triggers of Violence and Abuse Against Women on Twitter” in *Toxic Twitter – Triggers of Violence and Abuse Against Women on Twitter* (December 2018) online: <https://www.amnesty.org/en/latest/research/2018/03/online-violence-against-women-chapter-2/#topanchor>.

³³ L. Scharfstein, "Internet Hate Speech on the Rise; Canada's Legal Protections on the Decline: The Need for Civil Hate Speech Legislation," Sask. Law Review, November 2017, <http://sasklawreview.ca/comment/internet-hate-speech-on-the-rise-canadas-legal-protections-on-the-decline-the-need-for-civil-hate-speech-legislation.php>.

³⁴ *Ibid.*

³⁵ Canadian Bar Association, "Hate Speech under the Canadian Human Rights Act," Ottawa, 2010, page 4; *Keegstra*, per McLachlin J. (as she then was), pages 861-862.

³⁶ *Taylor*, *supra* note 7, at 917: "It is essential, however, to recognize that, as an instrument especially designed to prevent the spread of prejudice and to foster tolerance and equality in the community, the *Canadian Human Rights Act* is very different from the *Criminal Code*. The aim of human rights legislation, and of s. 13(1), is not to bring the full force of the state's power against a blameworthy individual for the purpose of imposing punishment. Instead, provisions found in human rights statutes generally operate in a less confrontational manner, allowing for a conciliatory settlement if possible and, where discrimination exists, gearing remedial responses more towards compensating the victim."

And further at 924, "... The process of hearing a complaint made under s. 13(1) and, if the complaint is substantiated, issuing a cease and desist order reminds Canadians of our fundamental commitment to equality of opportunity and the eradication of racial and religious intolerance. In addition, although criminal law is not devoid of impact upon the rehabilitation of offenders, the conciliatory nature of the human rights procedure and the absence of criminal sanctions make s. 13(1) especially well suited to encourage reform of the communicator of hate propaganda. While recognizing that discrimination weakens the fabric of our society, s. 13(1) itself is aimed at redressing the harm caused by discriminatory expressive acts against complainants."

³⁷ *Whatcott*, *supra* note 8, at para. 126.

³⁸ Section 319(6) of the *Criminal Code*.

³⁹ *Janzen v Platy Enterprises Ltd.*, [1989] 1 SCR 1252.

⁴⁰ Max Read, "How Much of the Internet is Fake? Turns Out, a Lot of It, Actually." *New York Magazine*, 26 Dec. 2018, <http://nymag.com/intelligencer/amp/2018/12/how-much-of-the-internet-is-fake>.

⁴¹ Philip Howard, et al., "The IRA, Social Media and Political Polarization in the United States, 2012-2018." *Computation Propaganda Research Project*, Oxford Internet Institute December, 2018.

⁴² Emma Graham-Harrison, "Inside Facebook's war room: the battle to protect EU elections." *The Guardian* 5 May 2019 <https://amp.theguardian.com/technology/2019/may/05/facebook-admits-huge-scale-of-fake-news-and-election-interference>.

⁴³ Howard, et al. *supra* note 44 at 40.

⁴⁴ White Paper, *supra* note 21 at 23.

⁴⁵ Zack Beauchamp, "Incel, the misogynist ideology that inspired the deadly Toronto attack, explained." *Vox*, 25 April 2018 <https://www.vox.com/world/2018/4/25/17277496/incel-toronto-attack-alek-minassian>.

⁴⁶ UNHRC, *supra* note 23.

⁴⁷ White Paper, *supra* note 21.

⁴⁸ Howard, et al., *supra* note 44.

⁴⁹ *General Data Protection Regulation (EU) 2016/670*

⁵⁰ *Network Enforcement Act*, BR-Drs. 536/17 2017.

⁵¹ *The Criminal Code Amendment (Sharing of Abhorrent Violent Material) Act 2019* No.38.

⁵² Gregory Pitsilis, Heri Ramampiaro, and Helge Langseth, "Detecting Offensive Language in Tweets Using Deep Learning." *Computing Research Repository (CoRR)*, abs/1801.04433, 2018.

⁵³ M.J. Matsuda, "Public Response to Racist Speech: Considering the Victim's Story," in MJ Matsuda et al., *Words That Wound: Critical Race Theory, Assaultive Speech and the First Amendment* (Boulder: Westview Press, 1993), at pages 18, 25, 49; *Vriend v Alberta*, [1998] 1 SCR 493, at paras. 100-101.

⁵⁴ *Canada (Attorney General) v JTI Macdonald Corp.*, [2007] 2 SCR 610.

⁵⁵ The silencing of targeted groups by hate expression is discussed in *Whatcott*.

⁵⁶ *Keegstra*, *supra* note 6, at pages 762-63.

⁵⁷ A. Tsesis, *Destructive Messages: How Hate Speech Paves the Way for Harmful Social Movements* (New York: New York University Press, 2002), at page 137.

⁵⁸ *Whatcott*, *supra* note 8, at para. 104.

⁵⁹ As noted in *Whatcott*, *supra* note 8, at para. 66.

⁶⁰ *Ibid*, at para. 67.

⁶¹ 999 UNTS 171 (1966).

⁶² Can.TS 1970 No. 28.

⁶³ GA Res 61/295 (endorsed by Canada on November 12, 2010).

⁶⁴ *Keegstra*, *supra* note 6, at page 754.

⁶⁵ 1249 UNTS 13 (1981).

⁶⁶ A/RES/48/104 (1993).

⁶⁷ United Nations, *Beijing Declaration and Platform of Action*, adopted at the Fourth World Conference on Women, 27 October 1995, Endorsed by GA Resolution 50/203, 22 December 1995.