TRIBUNAL NUMBERS T1073/5405 and T1074/5505

**CANADIAN HUMAN RIGHTS TRIBUNAL**

BETWEEN:

RICHARD WARMAN

COMPLAINANT

AND

CANADIAN HUMAN RIGHTS COMMISSION

COMMISSION

AND

MARC LEMIRE and THE FREEDOMSITE

RESPONDENTS

# Constitutional Challenge of Section 13 and 54 of the *Canadian Human Rights Act*

**I. THE FACTS:**

1. This is a motion under subsections 24(1) and 52(1) of the Constitution Act, 1982 for an order declaring section 13 and 54(1), (1.1) of the *Canadian Human Rights Act* (hereinafter referred to as "the Act" inoperative by virtue of its violation of paragraphs 2(a) and (b) and 7 of the *Canadian Charter of Rights and Freedoms,* which violation cannot be justified under section 1 thereof.

2. It is a further motion for an order declaring the above-noted provisions to be inoperative by virtue of their violation of paragraphs 1(d) and (f) and section 2 of the *Canadian Bill of Rights*.

3. These constitutional issues are raised by the respondent Marc Lemire, the respondent in a complaint under section 13 of the Act, which alleges that he has conveyed hate messages exposing various ethnic groups to hatred and contempt on the Internet.

**II. THE LAW**:

**(A) History of Court Challenges to Constitutionality of Section 13(1):**

4. The constitutionality of section 13(1) was upheld by the Supreme Court of Canada in 1990 in the case of *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892 (hereinafter referred to as "Taylor"). The court held that although the provision violated the guarantee to freedom of expression under section 2(b) of the Charter, the violation was justified under section 1 thereof.

> **Canada (Human Rights Commission) v. Taylor, [1990] 3 S.C.R. 892 (Authorities, page 24)**

**(B) Amendments to *Canadian Human Rights Act* since 1990:**

**(i) Amendments to Section 13:**

5. In 1990, when the *Taylor* case was decided, subsections 13(1) and (2) read as follows:

> 13(1) It is a discriminatory practice for a person or a group of persons actng in concert to communicate telephonically or to cause to be so communicated, repeatedly, in whole or in part by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament, any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination.
>
> (2) Subsection (1) does not apply in respect of any matter that is communicated in whole or in part by means of the facilities of a broadcasting undertaking.

6. Subsection 13(2) was amended in 2001 in the *Anti-terrorism Act*, S.C. 2001, c. 41 (Bill C-36), in s. 88 as follows:

> 88. Subsection 13(2) of the Canadian Human Rights Act is replaced by the following:
>
> 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.

**(ii) Amendments to Section 54**

7. When considered by the Supreme Court in 1990, section 54(1) read as follows:

> *Limitation of order*
> 54 (1) Where a Tribunal finds that a complaint related to a discriminatory practice described in section 13 is substantiated, it may make only an order referred to in paragraph 53(2)(a)."

8. Section 53(2)(a) provided at that time:

> "53(2) If, at the conclusion of its inquiry, a Tribunal finds that the complaint to which the inquiry relates is substantiated, it may, subject to subsection (4) and section 54, make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in that order any of the following terms that it considers appropriate:
>
> (a) that the person cease the discriminatory practice and, in order to prevent the same or a similar practice from occurring in the future, take measures, including
> (i) adoption of a special program, plan or arrangement referred to in subsection 16(1), or
> (ii) the making of an application for approval and the implementing of a plan pursuant to section 17,
> in consultation with the Commission on the general purposes of those measures."

9. In 1998 (S.C., 1998, c. 9, s. 28), section 54(1) of the Act was repealed and the following new provision enacted:

> *"Orders relating to hate messages*
> 54(1) If a member or panel finds that a complaint related to a discriminatory practice described in section 13 is substantiated, the member or panel may make only one or more of the following orders:
> (a) an order containing terms referred to in paragraph 53(2)(a);
> (b) an order under subsection 53(3) to compensate a victim specifically identified in the communication that constituted the discriminatory practice, and
> (c) an order to pay a penalty of not more than ten thousand dollars.

*Factors*
(1.1) In deciding whether to order the person to pay the penalty, the member or panel shall take into account the following factors:
(a) the nature, circumstances, extent and gravity of the discriminatory practice; and
(b) the willfulness or intent of the person who engaged in the discriminatory practice, any prior discriminatory practices that the person has engaged in and the person's ability to pay the penalty."

10. Section 53(3) authorizes an order against the respondent to pay compensation not exceeding twenty thousand dollars to the victim as the Tribunal may determine "if the member or panel finds that the person is engaging or has engaged in the discriminatory practice wilfully or recklessly."

**Canadiam Human Rights Act, 1996 Consolidation,(Authorities, p. 6)**
**Canadian Human Rights Act, 2002 Consolidation (Authorities, p. 10)**
**Charter of Rights and Freedoms (Authorities, p. 1)**
**Canadian Bill of Rights (Authorities, p. 3)**

## III ARGUMENT

11. Section 13(1) of the Act is a violation of the right to freedom of expression guaranteed by s. 2(b) of the *Charter*. The only issue is whether this violation can be justified under s. 1 of the *Charter*.

12. It is submitted that s. 13(1) is also a violation of the guarantee to freedom of conscience and religion in s. 2(a) of the *Charter*, a matter not argued in *Taylor*, which cannot be justified under s. 1.

### *Objective of Section 13*

13. In *Taylor*, the Court held that the first consideration in an analysis under s. 1 of the Charter was whether the objective of the infringing measure was of sufficient importance to warrant overriding a fundamental constitutional guarantee. It held that the broad legislative intent in implementing s. 13 was the promotion of equal opportunity unhindered by discriminatory practices and that these objectives were of sufficient importance that they were capable of overriding the right to freedom of expression guaranteed by section 2(b) of the Charter.

14. In arriving at this conclusion, Dickson C.J., speaking for the majority opinion, looked to s. 2 of the Act, which described the purpose of the statute as being the promotion of equal opportunity. Dickson, C.J. held that s. 13 was aimed at preventing communications that contributed **"to disharmonious relations among various racial, cultural and religious groups,** as a result eroding the tolerance and open-mindedness that must flourish in a multicultural society which is committed to the idea of equality." (Emphases added)

***Taylor*** **(Authorities, p. 26)**

15. It is submitted that this finding was a fundamental error and that the objective of s. 13 was not equality but, in essence, the silencing of expression and opinion on any matter which might raise controversy between racial, ethnic, or religious groups.

16. Section 13 is in substance a reincarnation of the old common law offence of seditious libel, namely, **"a matter which is producing, or has a tendency to produce feelings of hatred and ill-will between different classes of His Majesty's subjects."**

17. The provision is in stark contrast to the rest of the Act. All other activities defined as discriminatory practices relate to the provision of goods, services, facilities or accommodations (ss. 5, 14), the provision of commercial premises or residential accommodation (ss. 6, 14), hiring and employment practices (ss. 7,8,9,10,11, 12,14), and retaliation against a complainant under the Act. These provisions relate to the ability of a person to survive in society, to eat, to find a place to live, to find employment and a means of making a living. The retaliation provision is an attempt to protect those seeking a remedy under the statute.

18. Section 13, however, does not relate to these fundamental means of surviving and earning a living in Canadian society. It is an attempt to enact, in a different, updated and more acceptable guise, the offence of seditious libel, but without the defences available to a person charged with that criminal offence and without any of the procedural safeguards..

19. The major case in Canada on seditious libel is that of *R. v. Boucher* [1951] S.C.R. 265, which reviewed the history of seditious libel. In that case a member of the Jehovah's Witnesses had published a pamphlet in Quebec alleging that the police and judicial system in Quebec had persecuted members of the Jehovah's Witnesses at the behest of the Catholic Church and its priests.

***R. v. Boucher*** **[1951] S.C.R. 265 (Authorities, p. 30)**

20. One of the major issues to be resolved in *Boucher* was whether or not incitement to violence was a necessary ingredient, and whether that part of the definition which states that an intention "to promote feelings of ill-will and hostility between different classes of His Majesty's subjects" taken literally and by itself, was sufficient to constitute the

offence. The Court reviewed cases which involved this allegation, mainly against accused in Ireland charged with conspiring to promote feelings of ill-will and hostility towards the English.

21. Rand J. held that the promotion of feelings of ill-will and hostility between different classes of subjects was not enough to constitute seditious intention. He (with the majority) held:

> "There is no modern authority which holds that the mere effect of tending to create discontent or disaffection among His Majesty's subjects or ill-will or hostility between groups of them, but not tending to issue in illegal conduct, constitutes the crime, and this for obvious reasons. Freedom in thought and speech and disagreement in ideas and beliefs, on every conceivable subject are of the essence of our life. The clash of critical discussion on political, social and religious subjects has too deeply become the stuff of daily experience to suggest that mere ill-will as a product of controversy can strike down the latter with illegality. A superficial examination of the word shows its insufficiency: what is the degree necessary to crminality? Can it ever, as mere subjective condition, be so? Controversial fury is aroused constatnly by differences in abstract conceptions; heresy in some fields is again a mortal sin; there can be fanatical puritianism in ideas as well as in mortals; but our compact of free society accepts and absorbs these differences and they are exercised at large within the framework of freedom and order on broader and deeper uniformities as bases of social stability. Similarly in discontent, affection and hostility: as subjective incidents of controversy, they and the ideas which arouse them are part of our living which ultimately serve us in stimulation, in the clarification of thought and as we believe, in the search for the constitution and truth of things generally."
>
> ***Boucher*** **(Authorities, p. 44 )**

22. Cartwright J. held that any definition of seditious intention to mean the promotion of "feelings of ill-will and hostility between different classes of such subjects" held great concerns. He stated:

> "The obvious objection to accepting this as a sufficient definition, unless we are bound by authority to do so, is that such acceptance would very seriously curtail the liberty of the press and of individuals to engage in discussion of any controversial topic. It is not easy to debate a question of public interest upon which strong and conflicting views are entertained without the probability of

> stirring up, to a greater or less degree, feelings of ill-will and hostility between the groups in disagreement.
>
> The reasons of my brother Kellock bring me to the conclusion that the definition quoted above ought not to e accepted without qualification, and that before a writing can be held to disclose a seditious intention by reason of being calculated to promote feelings of ill-will and hostility between different classes of His Majesty's subjects it must further appear that the intended, or natural and probable, consequence of such promotion of ill-will and hostility is to produce disturbance of or resistance, to the authority of lawfully constituted government."
>
> ***Boucher*** **(Authorities, p. 72 )**

23. The accused in *Boucher* was acquitted and his conviction set aside..

24. In *Taylor*, the Supreme Court looked to s. 2 of the Act to discover the objective of section 13. It is submitted that this was a fundamental error and that it should have looked to section 13 itself to look for its purpose. The purpose clearly was to prevent the very type of communications and expressions dealt with in the *Boucher* case.

25. It is common sense, as recognized in *Boucher*, that one cannot discuss many matters of public interest, without intense feelings being generated concerning such things as race and religion. Criticism of Israel, for instance, is now condemned as being hatred of Jews. Opposition to same-sex marriage is condemned as hatred of homosexuals. Questioning by Germans as to what really happened in concentration camps in Germany to Jews is condemned as hatred of Jews.

26. The purpose of section 13 was elucidated in 2001 when the government amended section 13 in the *Anti-terrorism Act*, S.C. 2001, c. 41 (Bill C-36), in s. 88 by extending its reach to communication using a computer or a group of interconnected or related computers, including the Internet.

27. The preamble of the *Anti-terrorism Act* states:

> WHEREAS Canadians and people everywhere are entitled to live their lives in peace, freedom and security;
>
> WHEREAS acts of terrorism constitute a substantial threat to both domestic and international peace and security;

WHEREAS acts of terrorism threaten Canada's political institutions, the stability of the economy and the general welfare of the nation;

WHEREAS the challenge of eradicating terrorism, with its sophisticated and trans-border nature, requires enhanced international cooperation and a strengthening of Canada's capacity to suppress, investigate and incapacitate terrorist activity;

WHEREAS Canada must act in concert with other nations in combating terrorism, including fully implementing United Nations and other international instruments relating to terrorism;

WHEREAS the Parliament of Canada, recognizing that terrorism is a matter of national concern that affects the security of the nation, is committed to taking comprehensive measures to protect Canadians against terrorist activity while continuing to respect and promote the values reflected in, and the rights and freedoms guaranteed by, the Canadian Charter of Rights and Freedoms;

AND WHEREAS these comprehensive measures must include legislation to prevent and suppress the financing, preparation, facilitation and commission of acts of terrorism, as well as to protect the political, social and economic security of Canada and Canada's relations with its allies;

NOW, THEREFORE, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows..."

**Anti-terrorism Act, 2001, c. 41 (Authorities, p. 18)**

28. The preamble to the *Anti-terrorism Act* indicates that s. 13 is part of the State's strategy to eradicate terrorism, to protect Canadians against terrorist activity and to protect the political, social and economic security of Canada. It is not a "remedial" provision to prevent discrimination. It is a security measure, just as seditious libel is, and it is submitted that its true objective was always to control opposition to policies which might create ill-will between groups in society, and might lead to political opposition to government policies such as multiculturalism and mass Third World immigration.

29. The linking of s. 13 to terrorism, through the *Anti-terrorism Act*, indicates the extreme approbation which attaches to a respondent in proceedings against him, in which he has no defences of intent, truth, fair comment, or proof of actual disturbance being created by the expression or speech.

**Summary**:

30. It is submitted that the objective of controlling communications likely to lead to strong emotions of detestation against a group, without evidence that the intended, or natural and probable, consequence of such promotion of ill-will and contempt is to produce disturbance of or resistance, to the authority of lawfully constituted government is NOT a matter of such overriding importance that it should override the right of citizens in a democracy to freedom of expression, thought, belief, opinion and the press and conscience. *Boucher, supra*, set out the reasons why this is so in the 1950's, when Canada did not have a *Charter of Rights*.

31. One this basis alone, the provision should be struck down as a violation of paragraphs 2(a) and (b) of the *Charter*.

*Proportionality:*

32. In addition and in the alternative, the respondent submits that sections 13 and 54 do not use proportionate means to achieve the goal of preventing communications exposing a group to hatred or contempt, such that members thereof cannot participate in society.

33. It was held by the majority in *Taylor* that proportionality was achieved only if the State showed that (1) a connection existed between the measure and objective so that the former could not be said to be arbitrary, unfair or irrational; (2) the measure impaired the Charter right or freedom at stake no more than was necessary; and (3) the effects of the measure were not so severe as to represent an unacceptable abridgment of the right or freedom. **(*Taylor*, Authorities, p. 27)**

***Connection between measure and objective***

34. It is submitted that the over-riding objective of the *Canadian Human Rights Act* is to prevent persons from being denied shelter, food and employment on the basis of such things as race and religion. A person indeed cannot participate fully in society if he is black and is refused service in restaurants because he is black or if he cannot rent an apartment because he is black.

35. If a black person hears discussion, however, that too many blacks commit crimes or that too many black families are dysfunctional with no father, he may be angry and have hurt feelings. He may feel he has been exposed to feelings of contempt, ill-will and hostility. But he is entitled to join the discussion and to counter what has been said about blacks. He is participating in democratic society by doing so. IF he was silenced because he was black and was not allowed to participate in any such discussion, then he would have been discriminated against and would not be participating fully in society. Ernst Zundel, a member of the German ethnic minority, was so silenced regarding discussions of whether Germans committed mass atrocities against Jews during World War II before a panel of this Tribunal.

36. It is submitted that there is a vital difference between actions, such as refusing a black person a seat in a restaurant, and speech. Whereas the first action deals with the ability of an individual to live and obtain services, the second deals with ideas, policies, implications for society, implications for education, and other public policy matters which are the core of democratic functioning.

37. The decision in *Taylor*, having made no differentiation between speech and actions, violated the core principles of a democratic society, by sanctioning the silencing of matters of public interest and public concern. A democracy is a form of government in which power resides in the people. And the people can only discuss and decide matters using their thoughts and expressing their beliefs and opinions.

38. Section 13(1) is unfair and irrational, because it is impossible not to be subjective in deciding what is hatred and contempt. These are human emotions. Do humans have a right to express emotions? Who has the right to decide what emotions have been expressed and what their effect is?

39. Why is law dealing with emotions? Law is the regulation of human action. Laws such as defamation deal with the accuracy of human speech and the effects on reputation in the community. But laws such as hate laws deal at an even lower and irrational level, with raw human emotion. At this level, there can be no objectivity and no true control and no true law, dispensed fairly, equally, evenly and objectively. Application of the law will always be arbitrary and will depend on the political tone of the day. All of these factors, elucidated so well in *Boucher*, indicate why s. 13 is unfair, pernicious and irrational.

**Impairment of Freedom of Speech and Conscience and Effects Thereon**:

40 There is no provision which could impair free speech and conscience more than s. 13, except the death penalty.

41. There are no defences to s. 13 as do exist with the criminal offences of hate propaganda, seditious libel, blasphemous libel, and defamatory libel and the civil action of defamation. The criminal provisions are set out in the **Authorities, pp. 87-90.**

42. The fact that the silencing is done by an administrative tribunal rather than criminal courts in fact makes the silencing even more pernicious and damaging.
43. The following factors indicate that the impact and effect of s. 13 on the Charter rights is so damaging that the provision cannot be saved under s. 1 of the Charter:

44. Before this Tribunal, evidence is admissible which would not be admissible in a court of law. A person may be found to be practicing discrimination on the basis of hearsay and silenced.

45. The standard of proof is not the strict one of beyond reasonable doubt but only the civil standard of probabilities.

46. Under the criminal hate propaganda laws, the consent of the Attorney General of the relevant province is required, thus keeping strong control on who can and cannot be prosecuted. Under human rights law, no such control exists. Any person can lay a complaint whether or not he is the victim of the alleged discriminatory practice. While the Commission has a large discretion to dismiss a complaint, where truth and intent are not factors in a complaint under s. 13, it is clear that many matters can be complained of which would not be caught if such standard defences were available. An angry black person, writing about slavery, for instance, could easily be the subject of a complaint under s. 13 for hatred against whites. **The fact that so far Canadians have not used the provision in this manner does not mean it will not be so used in the future**. The intent of the person or group of persons and whether the matter is true or not will be irrelevant. An example is the essay by the film-maker Michael Moore which appears on the Canadian website of the group Anti-Racist Action (antiracistaction.ca) where Moore writes:

> "No black guy ever built or used a bomb designed to wipe out hordes of innocent people, whether in Oklahoma City, Columbine or Hiroshima. No, friends, it's always the white guy. Let's go to the tote board:
> · Who gave us the black plague? A white guy.
> · Who invented PBC, PVC, PBB, and a host of chemicals that are killing us? White guys.
> · Who has started every war America has been in? White men.
> · Who invented the punchcard ballot? A white man.
> · Whose idea was it to pollute the world with the internal combustion engine? Whitey, that's who.
> · The Holocaust? That guy really gave white people a bad name.
> · The genocide of Native Americans? White man.
> · Slavery? Whitey!
> · US companies laid off more than 700,000 people in 2001. Who ordered the lay-offs? White CEOs.
> You name the problem, the disease, the human suffering, or the abject misery visited upon millions, and I'll bet you 10 bucks I can put a white face on it faster than you can name the members of 'Nsync."
>
> **"White Frights", M. Moore (Authorities, p. 119)**

47. The human rights law has a declaratory "educative" effect, and is meant to be so, with the Commission having a mandate to "educate" persons about discrimination. Because of s. 13 this includes speech and necessarily the ideas and beliefs which the Commission finds abhorrent. An example is the belief that six million Jews did not die in World War II pursuant to an extermination program. This deals with interpretation of historical

evidence that in a democratic society should always be open to investigation. But the Tribunal in the Citron v. Zundel case found such a belief to be hate. Yet, writings on the so-called Holocaust are without doubt likely to expose Germans to hatred and contempt. In sharp contrast, the criminal law is not meant to educate but to punish and protect society. The chilling effect of human rights legislation is therefore much more serious as it permeates all aspects of culture and society, making it "politically incorrect" to question certain events or criticize certain groups, such as homosexuals. The Attorneys General of provinces and Crown Attorneys do not "educate" people about what are acceptable thoughts and opinions and beliefs and what will not be tolerated by the government. But the Canadian Human Rights Commission does. In a letter to the London Free Press from Robert W. Ward, Secretary General of the Commission, which it reproduces on its website, the Commission stated its position:

> "The Commission is aware that the very nature of the Internet, with service providers often located outside Canadian borders, makes it difficult to enforce the Act's provisions regarding hate messages. In order to move away from a case by case approach, the Commission is in the process of establishing a comprehensive, multi-faceted and proactive strategy to deal with hate on the Internet, which includes, but is not limited to, complaints. Proactive actions could include working with Internet service providers to discourage hate sites, developing public information activities, compiling special reports to Parliament with clear recommendations, working with other organizations and encouraging people to contact service providers and advocacy groups when they are made aware of such sites."

**CHRC Letter to London Free Press (Authorities, p. 91)**

48. The Commission's policy is set out in such documents on its website as "Proactive Initiatives - A Watch on Hate - FAQ Regarding Hate on the Internet and the Canadian Human Rights Commission." In this document, the Commission sets out its policies of working proactively with police, federal and provincial agencies, ISPs, and NGOs that "represent the interests of people who are often the targets of hate."

**CHRC "Proactive Initiatives" (Authorities, p. 93)**

49. The Commission is deciding what is "hate" and what is not and is working to use its considerable power and influence to pressure Internet Service Providers (ISPs) to drop websites it dislikes, and to use informers and advocacy groups to pressure ISPs to drop websites. It uses this same power to "educate" people that if they do not follow the "party line" about historical events or the proper "group think" about social issues regarding homosexuality, disability or race that they too will get the "Zundel treatment."

50. For Germans the message is clear: don't even think about challenging the official record of World War II. The allegations of atrocities may make Canadians hate Germans, but that is acceptable hate. It is the Orwellian "good think."

51. The Commission is fully empowered to enforce acceptable thinking under s. 27 of the CHRA which provides:

> 27. (1) In addition to its duties under Part III with respect to complaints regarding discriminatory practices, the Commission is generally responsible for the administration of this Part and Parts I and III and
>
> (a) **shall develop and conduct information programs to foster public understanding of this Act and of the role and activities of the Commission thereunder and to foster public recognition of the principle described in section 2**;
>
> .....
> (c) **shall maintain close liaison with similar bodies or authorities in the provinces in order to foster common policies and practices and to avoid conflicts respecting the handling of complaints in cases of overlapping jurisdiction**;
>
> .....
> (h) **shall, so far as is practical and consistent with the application of Part III, try by persuasion, publicity or any other means that it considers appropriate to discourage and reduce discriminatory practices referred to in sections 5 to 14.1.**
>
> **CHRA section 27 (Authorities, p. 12-13)**

52. It is submitted that the very power of the Commission to use any means necessary to enforce only certain beliefs, opinions or thinking makes section 13 an extraordinarily dangerous provision since its effects are not only on the respondent to a complaint but on an entire society which is subject to the enforced "persuasion" and "publicity" of the Commission on what are and are not acceptable opinions, beliefs and expression. It is the Commission which will have the power to decide what "exposes" a person to "hatred and contempt", two extremely abstract concepts depending on who is doing the speaking and what he believes.

53. It is submitted that the very power of the Commission to work and network with similarly minded groups to enforce the chosen "correct views" magnifies the chill on freedom of expression extraordinarily.

54. The positions of the Commission on unacceptable opinion are not lost on persons or groups attempting to avoid prosecution under the legislation with its attendant cost, stigma, and potential loss of employment or business. While a complainant under the legislation is provided complete protection in employment and freedom from retaliation or harassment, the respondent is provided with no such protection. Most Canadians will voluntarily self-censor to conform to the opinions and positions of the Commission in order to avoid such potentially devastating effects on their lives. This effect is magnified by the fact that computer networks and the Internet now fall under the jurisdiction of the Commission as will be discussed below.

55. Lack of intent to discriminate is not a defence. Dickson C.J. held in Taylor that the purpose of human rights codes was to prevent discriminatory effects rather than to stigmatize and punish those who discriminate. He also held that the objective of section 13 required an emphasis upon discriminatory effects since the objective could only be achieved by ignoring intent. **A large reason for his reasoning was that the chill placed upon open expression in such a context will ordinarily be less severe than that occasioned where criminal legislation is involved.** Dickson C.J.'s entire judgment was premised on his statement that "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 indivudal 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."

***Taylor* (Authorities, p. 25)**

56. Dickson C.J. held in *Taylor* that "The chill upon open expression in such a context [of a human rights statue] will ordinarily be less severe than that occasioned where criminal legislation is involved, for attached to a criminal conviction is a significant degree of stigma and punishment, whereas the extent of opprobrium connected with the finding of discrimination is much diminished and the aim of remedial measures is more upon compensation and protection of the victim. As was stated in Canadian National Railway Co. v. Canada (Canadian Human Rights Commission), [1987] 1 S.C.R. 1114, at p. 1134, under a human rights regime: "It is the [discriminatory] practice itself which is sought to be precluded. The purpose of the Act is not to punish wrongdoing but to prevent discrimination. **The last point is an important one and it deserves to be underscored**. **There is no indication that the purpose of the Canadian Human Rights Act is to assign or to punish moral blameworthiness**."

***Taylor* (Authorities, p. 29a; Other references to criminal law by Dickson, C.J., at p. 28)**

57. It is respectfully submitted that whatever merit these arguments had in 1990 are negated by the amendment to the penalty provisions for section 13 enacted in 1998, c. 9, s. 28 and the expansion of application to computer networks in 2001.

58. This amendment brought fundamental change to the effects of section 13.

59. The Tribunal, when finding against a respondent in a section 13 complaint, is restricted to making orders set out in section 54. Section 13 has its own special penalties, set apart from all other discriminatory practices in the Act. This fact shows that the objective of section 13 was always something different from the rest of the discriminatory practices, otherwise, it would not have needed its own special orders.

60. When all other discriminatory practices are found to be substantiated under the Act, the Tribunal is empowered under section 53 to make certain orders. These are:

(a) That the person cease the discrminatory practice; s. 53(2)(a)
(b) That the person take measures to redress the practice or to prevent the same or similar practice from occurring in the future; s. 53(2)(a)
(c) That the person make available to the victim of the practice, the denied right; s. 53(2) (b)
(d) That the person "compensate the victim" for expenses and loss of wages resulting from the discrimination; s. 53(2)(c)
(e) That the person "compensate the victim" for additional costs of obtaining alternative goods or services, etc., incurred as a result of the discrimination; s. 53(2) (d)
(f) That the person "compensate the victim", up to $20,000, for any pain and suffering experienced by the victim as a result of the discrimination; s. 53 (2)(e)
(g) That the person pay further "compensation" to the victim up to $20,000 if the person practicing discrimination did so "wilfully or recklessly." (S. 53(3) of the Act)

**Canadian Human Rights Act (Authorities, p. 15)**

61. For any discriminatory practice other than section 13, there is no jurisdiction in the Tribunal to make any monetary order against a person except in compensation for the discriminatory practice. There are no penalty provisions even though a person may have been denied accommodation or food because of his race or religion.

62. But under section 13, the Tribunal has been given the jurisdiction to make an order, not only for compensation to the victim for acting "wilfully or recklessly" pursuant to s. 53(3) of the Act, but to make an order for "a penalty", i.e., a "punishment, esp.a fine, for a breach of the law" ("Canadian Oxford Dictionary", Oxford University Press: 1998), up to $10,000. In making this order, the Tribunal must look at the "nature, circumstances, extent and gravity of [the thought, opinion, belief, expression] and "the wilfulness or intent" of the person, "any prior discriminatory practices" that the person has engaged in, and his

ability to pay the penalty. Should a respondent be unable to pay the penalty, he can be cited for contempt and imprisoned.

63. To "punish" means "cause (an offender) to suffer for an offence" Canadian Oxford Dictionary, *supra*).

**"Penalty", Canadian Oxford Dictionary (Authorities, p. 85)**
**"Punish", Canadian Oxford Dictionary (Authorities, p. 86)**

64. The requirement to look at the respondent's intent, his wilfulness, the gravity and nature of the speech and "any priors" is distinctly criminal and penal in nature, having nothing to do with preventing the effects of discrimination.

65. Punishment imports stigma and moral blameworthiness into the human rights context, which according to Dickson, C.J. was strictly about the prevention of disciminatory acts, not their punishment and the stigmatization of the respondent in such proceedings. When the *Taylor* case was decided, the only order which could be made was a cease and desist order.

66. There is a further implication to this, given the findings in the *Taylor* case that once an order is made under s. 13, and all appeals are lost, the respondent cannot further challenge the contempt order on the grounds that he has continued to make statements in furtherance of his duty to his conscience or because he believes it is the truth and will further the public interest and so on. Instead, pursuant to Rule 472 of the *Federal Court Rules,1998*, he becomes liable to up to five years imprisonment. He can be fined, and ordered to do or refrain from doing any act. This process can be repeated for years if the person is one who believes deeply in what he is saying and is willing to continue to "speak truth to power", from his point of view.

**Rule 472, *Federal Court Rules, 1998* (Authorities, p. 23)**

67. While the liability to go to prison is indirect, in that an order of contempt is required, the fact that a person cannot again raise the truth of his statements or his intent or that his statements are a matter of religion and conscience, means that the imprisonment is a direct result of continuing to make statements which he in good conscience believes he must make. Thus, imprisonment is being used to enforce beliefs, opinions, and ideologies through the use of s. 13. The case of Catholic Bishop Frederick Henry is a case in point. Bishop Henry issued a pastoral letter stating Catholic teaching regarding homosexuality. As a result, a human rights complaint was laid against him in Alberta for hate against homosexuals. He has repeated his statements, being the teachings of the Catholic Church for which human rights complaints were laid, no doubt because he believes in good conscience that as a bishop of the Church it is his duty to do so. Like John Ross Taylor, he may end up in jail for years if the Alberta Tribunal finds him guilty.

**"Calgary bishop stands firm despite persecution," Catholic World News, May 3, 2005 (Authorities, p. 128)**

68. Because of this legal structure, it is submitted that s. 13 and 54 violate the guarantee in s. 7 of the *Charter* the "Everyone has th right to life, liberty ad security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." That a person could be imprisoned in Canada for refusing to follow an order that violates his conscience and truth is a violation of fundamental justice.

69. Truth is not a defence under section 13. Nor is fair comment, both of which are defences to defamatory words in civil actions. While the majority decision in *Taylor* paid homage to the importance of truth as a core value in Canadian society, the decision to uphold a law banning speech where truth is no defence indicated clearly that the true core value given effect to by the court was control of opinion in Canada on matters which might raise controversy regarding race, ethnicity, religion, etc.

70. *Taylor* is a judgment which bespeaks the malaise of modern times, a loss of faith in God, in conscience, in truth; and ultimately, in man himself. Judge Learned Hand stated in 1944:

> "Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it…." (Hand, The Spirit of Liberty, 3d ed., enl., ed. Irving Dilliard, p. 190 (1960))

71. It is submitted that truth is indeed the core value which must always take precedence over all other values. It is fundamental to the democratic form of government and it is the most basic right of all humans, to search for the truth, to share beliefs with others, to exchange ideas and opinions, to attempt always to get to the root of all things and find the truth.

72. The search for truth is the basis of freedom of conscience and religion. These are the freedoms recognized in the Charter, paragraph 2(a). The decision in *Taylor* violates both of these freedoms by denying the right of a man to speak the truth as he sees it and the truth which he may feel duty-bound to express. An example of this is a belief that homosexuality is a moral abomination which threatens the basis of society, is a dangerous and unhealthy sexual practice and threatens the safety of children. Homosexuals can and have filed human rights complaints against people for such statements, including the Catholic Bishop in Calgary, Frederick Henry.

73. The word "conscience" is defined in the Canadian Oxford Dictionary (Oxford University Press Canada 1998) as "a moral sense of right and wrong esp. as felt by a person and affecting behaviour."

**"Conscience", *Canadian Oxford Dictionary* (Authorities, p. 84)**

74. An offence for words which does not allow one to tell the truth according to one's conscience is a violation of paragraph 2(a) of the *Charter*. An offence for words which one speaks with an intent to tell the truth, even though it may expose a group to hatred and contempt, is a violation of paragraph 2(a) of the *Charter*. It is a violation of the very basis of Canada's constitution which recognizes a moral basis to its law in the preamble to the *Charter of Rights*.

75. The extension of s. 13 to the Internet brings whole new considerations to the effects of the provision on freedom of the press and media which did not exist in 1990 when the legislation was limited to taped telephone messages. The legislation covers the communication of video, audio, text, graphics, animation or voice.

76. The Internet is used by Canadians extensively for communicating via emails and for searching for news and information. For the year 2000, a survey of this use was made by Statistics Canada and is set out in its report, "Changing our ways" Why and how Canadians use the Internet" **(Authorities, p. 103 )** A further chart by Statistics Canada indicates that as of 2003 almost 96% of Canadians used email to communicate, over 55% use the Internet to view news. Some 89% use it for general browsing. **(Authorities, p. 117)**

77. Almost all newspapers and magazines and other publishing concerns now are present on the Internet on news sites. This includes the Globe and Mail, the National Post, The Toronto Star and almost all medium and small newspapers, down to community presses. Radio and TV stations also have websites where their programs are often available and archived.

78. This situation did not exist in 1990 when *Taylor* was decided. At that time, the provision was aimed at taped telephone messages which a person would listen to after dialing the number. The amount and scope of the expressive activity now covered by s. 13 is mind-boggling, amounting to billions of pages of information, and megabytes of video and radio streams. In addition, voice communications are now being made using the Internet like a telephone. Emails are used by almost every person in Canada to communicate for business and personal purposes. All is subject to the monitoring of the Canadian Human Rights Commission, to search for "hate" and "contempt", without any defences and no protection or regard for the privacy of Canadians.

79. The anomaly now exists that such publications as the print version of a newspaper have defences available which the online version of the same article does not. A recent example is the article in the National Post, "Where are the female Einsteins?" by Charles Murray which was published on November 22 , 2005. The article argues that there are innate differences between groups, such as males and females. This could be seen as exposing females to hatred and contempt since these terms are so subjective. Under the criminal hate propaganda law, the author and the newspaper have the defences set out in s. 319 for the print version. No such defences are available once the article is put on the

Internet, as it was on the site of the American Enterprise Institute. Will the National Post and the author be subject to a complaint laid under s. 13 in this event, even if the article was not posted on the site of the newspaper itself? Is the article hate? Will discussion of such matters be targeted by the Commission or a determined complainant? These questions show how dangerous s. 13 has become given its extension to the Internet with this one small example.

**"Where are the female Einsteins?" (Authorities, p. 131)**

80. The Internet is fast replacing print versions of many publications because of cost and reach of audience. This situation gives the Canadian Human Rights Commission an astounding reach to stifle opinion simply by letting it be known through its "educative" functions what it will and will not tolerate.

81. Such media as newspapers have been very protected from prosecution under laws such as defamatory libel, hate propaganda, blasphemous libel, and seditious libel, by defences which have due regard to the interests of society in freedom of opinion and the media.

**Criminal Code, (Authorities, p. 87 )**

82. No such protection applies to s. 13 of the Act. Newspapers, magazines, online radio and TV are fully vulnerable to a single, determined complainant such as the complainant herein who can make multiple complainants, and who does not need even to be a member of the protected group. **It makes the press vulnerable to the Commission itself, which has enthusiastically become an advocate for one version of the historical record regarding treatment of the Jews during World War II, and may become a determined advocate of other historical and social and political viewpoints. Much of its work can be done behind the scenes, pressuring newspapers and ISPs out of the sight of the public who will not realize the extensive censorhsip which is occurring as a result**.

83. While this type of power is compatible with a totalitarian society, it is not one which is compatible with a free democracy.

84. The telephone, found to be such a dangerous instrument in *Taylor*, did not involve multi-million dollar media conglomerates as does the Internet which is used by newspapers and other large corporations to publish news and articles that many might find hateful. The poverty-stricken John Ross Taylor, who used a simple taped message, will no longer be the type targeted in the future by complaints.

85. The extension of s. 13 to private computer networks as well as the Internet is a gross violation of privacy of all Canadians. Repeated emails sent to a number of people on a network would fall within the provision even though the emails would be considered by the sender as a private communication. Even a single email could be caught if the email

was forwarded by the receiver to other persons, thereby resulting in the email being "repeatedly"sent.

86. Voice communications are now available over the Internet. These conversations are subject to s. 13 with no rights to privacy.

87. Corporate and business computer systems are covered by the Act and subject to the extensive search and seizure provisions of the Act.

88. An impact and effect which allows the State to punish private communications over private computer networks is an unjustifiable violation of freedom of speech and conscience under s. 1 of the Charter.

**Canadian Bill of Rights**

89. It is submitted that section 13 of the Act is a violation of the *Canadian Bill of Rights*, which guarantees freedom of speech and freedom of the press for the reasons given above regarding the *Charter*. These reasons need not be repeated.

90. The *Canadian Bill of Rights* contains no limiting clause as that found in s. 1 of the Charter of Rights. In its preamble, it affirmed that freedom was founded upon respect for moral and spiritual values. It is a profound moral value to speak the truth and to express one's conscientious beliefs.

91. Even men who did not want to fight in the middle of world wars, were allowed to register as conscientious objectors. Yet, the government would have this Tribunal believe that the mere voicing of conscience by an individual, where no intent or incitement to disorder or violence is present, is enough to deprive him of freedom of speech and conscience, if his voicing is deemed to be "hate", an emotion which, like love, is more in the eye of the beholder than anywhere else.

## IV - ORDERS REQUESTED:

92. The respondent therefore requests the following orders:

> 1. an order that sections 13 (1), (2), (3) and 54 (1), (1.1) of the *Canadian Human Rights Act* are a violation of subsections 2 (a) and (b) and section 7 of the *Canadian Charter of Rights and Freedoms* , are not saved by section 1 thereof, and as such, is of no force or effect pursuant to sections 24 (1) and 52(1) of the *Constitution Act, 1982*;

2. an order that section 13 and 54(1), (1.1) of the *Canadian Human Rights Act* is a violation of subsections 1 (d) and (f) and section 2 of the *Canadian Bill of Rights* and is thereby rendered inoperative;

3. an order dismissing the complaints with costs.

DATED this 6th day of December, 2005.

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