

**CANADIAN HUMAN RIGHTS TRIBUNAL**

BETWEEN:

RICHARD WARMAN

COMPLAINANT

AND

CANADIAN HUMAN RIGHTS COMMISSION

COMMISSION

AND

MARC LEMIRE and THE FREEDOMSITE

RESPONDENTS

**NOTICE OF CONSTITUTIONAL QUESTION**

The applicant, Marc Lemire, intends to question the constitutional applicability, validity and effect of sections 13 and 54 (1), (1.1) of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, as amended (herein after referred to as the "CHRA").

The question is to be argued in a motion in writing filed with the Canadian Human Rights Tribunal on December 7, 2005.

The following are the material facts giving rise to the constitutional question: The Canadian Human Rights Commission requested the Canadian Human Rights Tribunal to appoint a panel to inquire into a complaint laid against Mr. Lemire under section 13 of the *Canadian Human Rights Act*. The complaint alleged that Mr. Lemire was

discriminating against various ethnic groups by placing hate messages on the Internet. Mr. Lemire is bringing a motion before the Tribunal for relief under sections 24(1) of the *Canadian Charter of Rights and Freedoms* and section 52 of the *Constitution Act, 1982*, and section 2 of the *Canadian Bill of Rights* on the grounds that sections 13 and 54(1), (1.1) of the *Canadian Human Rights Act* are a violation of sections 2 (a) and (b), 7, 26 and 31 of the *Charter*, not saved by section 1 thereof, and sections 1 (d) and (f) of the *Canadian Bill of Rights*.

The following is the legal basis for the constitutional question:

Section 13 of the CHRA was held to be in violation of the right to freedom of expression guaranteed under s. 2(b) of the *Canadian Charter of Rights and Freedoms* by the Supreme Court of Canada in *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892. The Court upheld the constitutionality of section 13, however, on the grounds that it was a reasonable limit on that freedom prescribed by law that was demonstrably justified in a free and democratic society pursuant to section 1 of the *Charter*.

The *Taylor* decision was based on an earlier legislative version of section 13 of the *CHRA* which limited the provision to the communication of hate messages using a telephone and limited penalties to a cease and desist order. The Act was amended in 1998, c.9, s.28 and 2001, c. 41, s. 88 to extend the application of section 13 to computer networks, including the Internet, and to introduce harsh financial penalty provisions in section 54 in addition to the previous cease and desist order provisions.

The applicant will be arguing that section 13 of the *CHRA* no longer meets the criteria in section 1 of the *Charter* regarding freedom of expression and cannot be saved thereunder. The provision is, in essence, one of criminal law but one which provides no procedural safeguards, no defence of truth, lack of intent, or the fact that the messages may be privileged, fair comment or made in private communications. It is made

applicable to the Internet, a medium far different from the taped voice messages on a telephone dealt with by the Supreme Court of Canada in the *Taylor* case.

Moreover, he will argue that the freedoms enjoyed by Canadians under the law in the 1950's cannot be destroyed using section 1 of the *Canadian Charter of Rights* as a justification; and, further, that such freedoms are preserved by virtue of the *Canadian Bill of Rights* and section 26 of the *Charter*. Parliament has no jurisdiction under the *Constitution Act, 1867*, to abrogate the right of citizens in a democracy to discuss matters of public policy and administration, be it social, economic or political. *Switzman v. Elbling*, [1957] S.C.R. 285, *Boucher v. The King*, [1951] S.C.R. 265 and *Reference re Alberta Statutes*, [1938] S.C.R. 100 will be relied upon.

Section 13 is not rationally connected to the legislative objective of promoting social harmony and individual dignity, since there can be no true social harmony between groups when truth is not the basis of this harmony.

There is no proportionality between the effect of the measures which limit the *Charter* right to freedom of speech and the legislative objective of section 13(1) of the Act. It is overbroad and fails to impair freedom of speech as little as possible, thereby having a severe chilling effect on legitimate expression on the Internet which includes newspapers, journals, magazines, videos, radio, audio, and discussion rooms. The definitions of \_hatred\_ and \_contempt\_ in practical effect are so vague as to include virtually any legitimate and verifiable criticism of the actions of an identifiable group.

Section 13 is a violation of the freedom of conscience because it denies the individual the right to speak the truth if that truth is deemed to expose identifiable groups to hatred or contempt. Where truth is no defence to charges under section 13(1) of the Act, there is no objective standard for judging what is \_hatred\_ or \_contempt\_.

Section 13 violates all rights to privacy as it applies to private communications.

The penalty provisions make clear that while section 13 masquerades as a remedial anti-discriminatory measure, it is in essence a criminal provision enforcing a moral code and inflicting punishment against the offender for violations against the State, not simply infringement of an individual's rights for which compensation might be paid.

The deleterious effects of section 13 of the Act on the right to freedom of expression and conscience far outweigh the benefits derived from the provision. Hatred and contempt against groups arises from everyday news events. Published in newspapers and broadcast facilities, these matters have the defences of truth, privilege and fair comment according to libel law.

Such further and other grounds as counsel may advise and the Tribunal allow.

Dated this 25<sup>th</sup> day of November, 2005.

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