Tribunal No. T1073/5405

CANADIAN HUMAN RIGHTS TRIBUNAL

BETWEEN:

RICHARD WARMAN

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

MARC LEMIRE

Respondent

- and -

ATTORNEY GENERAL OF CANADA
CANADIAN ASSOCIATION FOR FREE EXPRESSION INC.
CANADIAN FREE SPEECH LEAGUE
LEAGUE OF HUMAN RIGHTS OF B'NAI BRITH CANADA
CANADIAN JEWISH CONGRESS
FRIENDS OF THE SIMON WIESENTHAL CENTER FOR HOLOCAUST STUDIES

Interested Parties

SUBMISSIONS OF THE ATTORNEY GENERAL OF CANADA
(Notice of Constitutional Question)

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SUBMISSIONS OF THE ATTORNEY GENERAL OF CANADA
(Notice of Constitutional Question)

A. Overview

1. The central legal issue raised in the Notice of Constitutional Question is settled law. Marc Lemire has not advanced any new grounds that would justify a reconsideration of the issue by the Canadian Human Rights Tribunal (the "Tribunal").

2. Section 13 of the *Canadian Human Rights Act* (*CHRA*) prohibits only a very narrow range of speech, specifically expressions of "unusually strong and deep-felt emotions of detestation, calumny and vilification".[1] There is little or no truth value in hate propaganda to attract the protection of the *Charter*.

3. In *Taylor*,[2] the Supreme Court of Canada ruled that s. 13 of the *CHRA* is constitutionally sound. The constitutionality of this provision is not altered by its application to the Internet. Even before the statutory amendment, the Tribunal and the Courts recognized that this provision has always applied to the Internet.[3] The enactment of s. 13(2) of the *CHRA* in 2001 served only to codify existing common law.

4. Mr. Lemire has failed to demonstrate that s. 13 is contrary to any other constitutional provision that was not considered by the Supreme Court in *Taylor*. Nor has Mr. Lemire demonstrated that ss. 54(1) or 54(1.1) of the *CHRA* infringe any constitutional right or freedom. In particular, Mr.

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[1] *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892; 75 D.L.R. (4th) 577

[2] *Ibid.*

[3] *Zundel v. Canada (Attorney General)*, [1999] 4 FC 289

Lemire has failed to demonstrate that any of the prescribed remedies are penal in nature and attract the protection of ss. 7 or 11(d) of the *Charter*.

5. The *Bill of Rights* does not provide any additional support for Mr. Lemire's position. Pertinent sections of the *Bill of Rights* that might be relied upon by Mr. Lemire are already expressed through the *Charter*.

6. Mr. Lemire has also attempted to attack the manner in which the Commission investigates and discharges its mandate under other provisions of the *CHRA* that were not named in his motion. The Tribunal does not have the jurisdiction to review the Commission's activities in these areas, and cannot make a constitutional declaration in relation to them. In the alternative, even if Mr. Lemire were able to demonstrate infringement of the *Charter* by the actions of the Commission in applying the *CHRA*, this would not render the legislation invalid.

B. Background

7. Mr. Lemire has filed a Notice of Constitutional Question in which he challenges the constitutional validity, applicability or operability of ss. 13, 54(1) and 54(1.1) of the *CHRA*.

8. Mr. Lemire alleges that these sections are contrary to ss. 2(a), 2(b) and 7 of the *Canadian Charter of Human Rights and Freedoms* (the "*Charter*"), and sections 1(d), 1(e) and 2 of the *Canadian Bill of Rights*.

9. Subsection 13(1) of the *CHRA* prohibits the dissemination of hate propaganda by telephone or via a telecommunications medium. Subsection 13(2), which was enacted in 2001 as part of the *Anti-terrorism Act*'s amendment of numerous statutes, confirms that this prohibition

applies to Internet communications.[4] Subsection 13(3) states that the owner or operator of the telecommunications medium is not responsible for communications disseminated by others solely because of ownership or operation.[5]

10. Subection 54(1) of the *CHRA* empowers the Tribunal to impose certain remedies in the event of a well-founded complaint under s. 13. Paragraph 54(1)(a) authorizes the Tribunal to issue a cease-and-desist order, and to require the adoption of a plan of special measures to prevent recurrence. Paragraph 54(1)(b) permits the Tribunal to award damages not exceeding $20,000 to a complainant where wilfulness or recklessness is proven.[6] Paragraph 54(1)(c) permits the imposition of a penalty not exceeding $10,000.[7]

11. Subsection 54(1.1) of the *CHRA* states that the determination of whether a penalty should be paid must be based on (i) the nature, circumstances, extent and gravity of the occurrence; and (ii) wilfulness and intent, any prior discrimination by the same person, and ability to pay.[8]

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[4] At the time of second reading of Bill C-36, the then Minister of Justice and Attorney General stated: "... the *Canadian Human Rights Act* will be amended to clarify that communication of hate messages using new technology, such as the Internet, constitutes a discriminatory practice. While such communication is already interpreted to be discriminatory, these amendments will add certainty and clarity to the law." (Exhibit A-1, Tab 5: The Honourable Anne McLellan, Edited Hansard No. 95, 37th Parliament, 1st Session, Tuesday, October 16, 2001 at 1015)

[5] Section 13, *Canadian Human Rights Act*, R.S., 1985, c. H-6

[6] This paragraph was added to the legislation in 1998 as a means of dealing with more powerful technologies of dissemination such as the Internet.

[7] Section 54(1), *Canadian Human Rights Act*, R.S., 1985, c. H-6

[8] Section 54(1.1), *Canadian Human Rights Act*, R.S., 1985, c. H-6

C. Jurisdiction of the Tribunal

(i) Scope of the Proceedings

12. The Tribunal is a statutory body and has only the powers explicitly conferred upon it by the *CHRA*, together with those additional powers that are incidental to or inherent in the exercise of its statutory jurisdiction.

13. Subsection 50(1) of the *Canadian Human Rights Act* ("*CHRA*") provides that "the [Tribunal] member or panel shall inquire into the complaint ..."[9] [emphasis added].

14. In *Bell v. Canada (Canadian Human Rights Commission); Cooper v. Canada (Canadian Human Rights Commission)*,[10] the Supreme Court of Canada held that:

> The main function of the Canadian Human Rights Tribunal is adjudicative. It conducts hearings into complaints that have been referred to it by the Commission ... The Tribunal is not involved in crafting policy, nor does it undertake its own independent investigations of complaints: the investigative and policy-making functions have deliberately been assigned by the legislature to a different body, the Commission.

15. The Tribunal has no jurisdiction, constitutional or otherwise, to review the Commission's investigative activities. The Tribunal can only review the complaint referred to it under s. 49(1) of the *CHRA*. Pursuant to ss. 53 and 54 of the *CHRA*, the Tribunal has a very limited jurisdiction, which is to inquire into the complaint and to make an appropriate award if the complaint is substantiated, or to dismiss the complaint if the Tribunal finds that the complaint is not substantiated.

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[9] Section 50(1), *Canadian Human Rights Act*, R.S., 1985, c. H-6

[10] (1996), 3 S.C.R. 854

16. Neither does the Tribunal have any jurisdiction to inquire into the manner in which the Commission investigates complaints or discharges its mandate under s. 27(1) of the *CHRA*, in particular its power to engage in liaisons with similar bodies and authorities to foster common policies and practices under s. 27(1)(c), its power to consider recommendations, suggestions and requests concerning human rights from any source under s. 27(1)(e) and its ability to use whatever means it considers appropriate to discourage discriminatory practices under s. 27(1)(h). [11]

17. While Mr. Lemire has sought to explore these areas in the presentation of his case before the Tribunal, s. 27(1) has not been challenged in his constitutional motion, and would not be a proper subject for adjudication by the Tribunal in any case.

18. Decisions and actions of the Commission may be challenged only by means of an application for judicial review in the Federal Court.[12] The Federal Court of Appeal has ruled that other proceedings cannot be used to collaterally attack an administrative decision which has not been subjected to judicial review.[13]

19. The Tribunal's jurisdiction is therefore limited to the complaint made by Mr. Warman, not the manner in which the complaint, or any other matter, may have been investigated by the Commission.[14] The Tribunal has no power

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[11] Subsection 27(1), *Canadian Human Rights Act*, R.S., 1985, c. H-6

[12] *Baker v. Canada (Minister of Citizenship)*, (1999), 174 D.L.R. (4th) 193, *Sam Lévy et Associés Inc. v. Mayrand*, 2005 FC 702 at para 169, aff'd by FCA, 2006 FCA 205, leave to appeal to the S.C.C. ref'd [2006] C.S.C.R. no. 317

[13] *Prentice v. Canada*, 2005 FCA 395, [2005] F.C.J. No. 1954 at paras 32-33, leave to appeal to the S.C.C. ref'd [2006] C.S.C.R. no. 26

[14] *Hum v. Canada (Royal Canadian Mounted Police)*, (1986) C.H.R.D. No. 10, T.D. 10/86

to review a decision by the Commission to refer a complaint, nor to review the Commission's activities in general.[15]

(ii) Scope of Tribunal's Power to Decide Constitutional Questions

20. The Tribunal has the power to determine the validity and constitutionality of any provision of its enabling legislation that it must apply in order to adjudicate a particular complaint that has been referred to it by the Commission. However, the Tribunal has no jurisdiction to make general declarations of constitutional invalidity.

21. While the Tribunal's general power to consider questions of law includes questions regarding the *Charter*, it is subject to limitations, as the Supreme Court of Canada held in *Nova Scotia v. Martin*:[16]

> [...] the constitutional remedies available to administrative tribunals are limited and do not include general declarations of invalidity. A determination by a tribunal that a provision of its enabling statute is invalid pursuant to the *Charter* is not binding on future decision makers, within or outside the tribunal's administrative scheme. Only by obtaining a formal declaration of invalidity by a court can a litigant establish the general invalidity of a legislative provision for all future cases. Therefore, allowing administrative tribunals to decide *Charter* issues does not undermine the role of the courts as final arbiters of constitutionality in Canada.

22. The Supreme Court continued (at para. 45):

> As stated above, administrative bodies that do have that power [to decide questions of law] may presumptively go beyond the bounds of their enabling statute and decide issues of common law or statutory interpretation that arise in the course of a case properly before them, subject to judicial review on the appropriate standard. [Emphasis added.]

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[15] *Canada (Attorney-General) v. Beaulieu*, (1993) 103 D.L.R. (4th) 217

[16] [2003] 2 S.C.R. 504, 2003 SCC 54 at para. 31

23. The Supreme Court recently confirmed this principle in *Tranchemontagne v. Ontario*:[17]

> I must emphasize that the presumptive power to look beyond a tribunal's enabling statute is triggered simply where a tribunal (with the authority to decide questions of law) is confronted with "issues . . . that arise in the course of a case properly before" it. This can be contrasted with the power to subject a statutory provision to *Charter* scrutiny, which will only be found where the tribunal has jurisdiction to decide questions of law *relating to that specific provision*: see *Martin*, at para. 3.

24. The Tribunal's general power to consider questions of law, including questions regarding the *Charter*, is limited to a consideration of the *CHRA* in the context of the particular complaint made by Mr. Warman against Mr. Lemire. It does not enable the Tribunal to consider the constitutional implications of the manner in which the Commission may apply ss. 13, 54(1) or 54(1.1) of the *CHRA* in circumstances that are unrelated to the present complaint against Mr. Lemire.

25. The Tribunal is therefore considering only the constitutionality of the application of sections 13, 54(1), and 54(1.1) in the circumstances of this case, and not in the broader sense.

26. More generally, the Tribunal has no jurisdiction to review the constitutionality of the manner in which the Commission discharges its mandate. Accordingly, s. 27(1) of the *CHRA* is not one of the provisions of its enabling legislation that the Tribunal has authority to interpret or apply.

27. A determination by a tribunal that a provision of its enabling statute is invalid pursuant to the *Charter* is not binding on future decision-makers, within or outside the tribunal's administrative scheme. Only by obtaining a

[17] 2006 SCC 14 at para. 24

formal declaration of invalidity by a court can a litigant establish the general invalidity of a legislative provision for all future cases. [18]

28. Furthermore, even if Mr. Lemire were able to demonstrate infringement of the *Charter* by the actions of the Commission in applying the *CHRA*, this would not render the legislation invalid. As Paperny J.A. of the Alberta Court of Appeal stated in *Thomson v. Alberta (Transportation and Safety Board)*:[19]

> An infringement of the *Charter* by the actions of a delegated decision-maker in applying the legislation, as distinct from the legislation itself, does not render the legislation invalid. In *Little Sisters*, for example, Binnie J. for the majority found, at para. 125, that the differential treatment based on sexual orientation was not a necessary effect of the Customs legislation but was a differentiation made at the administrative level in the implementation of the legislation. The source of the *Charter* violation of s. 15, therefore, was not the legislation itself.

29. It is therefore submitted that a wide-ranging investigation into the investigative and other practices of the Commission, even if it were within the mandate of the Tribunal (which it is not), is not relevant to the Tribunal's determination of whether ss. 13, 54(1) and 54(1.1) of the *CHRA* are in themselves unconstitutional.

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[18] *Nova Scotia (Workers' Compensation Board) v. Martin, supra,* at para 3; *Canada (Attorney General) v. Sam Lévy et Associés Inc.*, 2005 FC 171, paras 8 and 23

[19] (2003), 232 D.L.R. (4th) 237 (Alta. C.A.) at para. 48; leave to appeal to SCC ref'd., [2003] SCCA No. 510 (QL), Docket No. 29974, April 22, 2004; citing *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69

D. Sections 13(1) and (2) of the CHRA are constitutionally valid

(i) Subsections 13(1) and (2) constitute a reasonable limit on s. 2(b) Charter rights (freedom of expression)

30. Mr. Lemire argues that subsection 13(1) of the *CHRA* is contrary to s. 2(b) of the *Charter* because it may deny persons the right to speak the truth if so doing would expose identifiable groups to hatred or contempt. This argument was disposed of by the Supreme Court of Canada in *Taylor*, *supra*.

31. Mr. Lemire's position appears to be that subsection 13(2), which only confirms the Tribunal's previous ruling that dissemination of hate propaganda via the Internet communications is prohibited, transforms s. 13 from a constitutional provision into an unconstitutional one.

32. New and evolving technologies that facilitate communication do not alter the essential character of the communication, nor the reasons for prohibiting certain kinds of communication. In *Taylor*, Dickson CJ concluded that telephone messages were public, and the Internet is even more so.

33. This Tribunal has previously ruled that s. 13(1) of the *CHRA* remains valid even when applied to the propagation of hate through websites on the Internet.[20] It is submitted that the constitutional conclusions reached in *Taylor*, *supra*, continue to apply with even greater force to restrictions on hate propaganda expressed via the Internet.

34. The Federal Court has noted that the use of the Internet to disseminate hate speech in fact intensifies its effects and increases the ability to

[20] *Citron v. Zundel*, [2002] 41 C.H.R.R. D/274 T.D.1/02 (CHRT), [2002] C.H.R.D No. 1; *Schnell v. Machiavelli and Associates Emprize Inc. and John Micka*, [2002] C.H.R.D. No. 21 T.D. 11/02 (CHRT); *Warman v. Kyburz*, 2003 CHRT 18.

replicate such speech.[21] The Federal Court did not hesitate to apply s. 13 of the *CHRA* to the Internet, even before this was confirmed by Parliament.[22] The Tribunal has ruled that the capacity to view a web page multiple times satisfies the requirement of "repeatedly" causing hate to be communicated under s. 13.[23]

35. The Internet has been widely recognized as a potent tool for spreading opinions and is now used extensively by hate groups for recruitment, indoctrination and the promotion of race wars. Studies suggest that between 1995 and 1999, the number of electronic hate sites rose from approximately 50 to 800.[24] Recent estimates put the current number of such sites at 6,000.[25]

36. The Commission's expert, Dr. Karen Mock, testified that the Internet has made hate speech accessible to people who otherwise would never have come into contact with it.[26]

37. Mr. Lemire complains that the prohibition against disseminating hatred via the Internet is not accompanied by the defences of truth and fair comment that are available to the traditional news media in torts ranging from defamation to seditious libel.[27] This argument is misleading. The defences of truth and fair comment remain available to torts such as defamation and seditious libel, regardless of the medium in which they occur. However, none of the traditional media can avail themselves of

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[21] *Canada (Human Rights Commission) v. Winnicki*, 2005 FC 1493, [2005] F.C.J. No. 1838

[22] *Zundel, supra*

[23] *Warman v. Tremaine*, 2007 CHRT 2 at para 119

[24] Exhibit AGC-1, Tab 1: Expert Report of Dr. Alexander Tsesis, May 12, 2006, p. 8

[25] Reference to statistics collected by the Simon Wiesenthal Centre in the testimony of Dr. Karen Mock – see "Summary of Testimony – Dr. Karen Mock" at para 10b.

[26] "Summary of Testimony – Dr. Karen Mock", at para 10a

[27] Respondent's Statement of Particulars, para. 41

these defences in cases of alleged hate propaganda, whether the communication appears in print, on television or on a website.

38. As the Federal Court has explained, defences that may be available in tort actions are not available in cases of hate propaganda because the prohibition on discrimination is concerned with adverse effects, not with intent.[28]

39. Similar reasoning was applied by the Supreme Court of Canada in *Taylor*:

> ... I am of the view that the *Charter* does not mandate an exception for truthful statements in the context of s. 13(1) of the *Canadian Human Rights Act*.
>
> ... Clearly, an intention to expose others to hatred or contempt on the basis of race or religion is not required in s. 13(1). As I have just explained, however, s. 13(1) operates within the context of a human rights statute. Accordingly, the importance of isolating effects (and hence ignoring intent) justifies this absence of a *mens rea* requirement. I also reiterate the point that the impact of the impugned section is less confrontational than would be the case with a criminal prohibition, the legislative framework encouraging a conciliatory settlement and forbidding the imposition of imprisonment unless an individual intentionally acts in a manner prohibited by an order registered with the Federal Court. ...[29]

40. The nature of the remedies that may be imposed under s. 54 have also informed the Supreme Court's analysis of why truth is not a defence to a complaint under s. 13 of the *CHRA*. As will be explained in greater detail below, the two strongest remedies under s. 54 include an intent requirement, and are therefore consistent with the constitutional

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[28] *Canada (Human Rights Commission) v. Winnicki, supra*, at para 33

[29] *Taylor, supra*

requirements set forth in *Taylor*. The remaining framework is based on the constitutionally-sanctioned adverse effects approach.[30]

41. The test in s. 13 of the *CHRA* is whether the speech is "likely to expose" targeted groups to the harmful effects of discrimination. The Tribunal has found that the standard to be met is one of reasonableness, based on an analysis of language, tone and presentation of the speech.[31]

42. The Supreme Court of Canada held in *Taylor*[32] that the restrictions imposed by s. 13 of the *CHRA* constitute justifiable limits on expression in a free and democratic society. While this provision restricts non-violent attempts to convey meaning, and is therefore contrary to s. 2(b) of the *Charter*, it is nevertheless justifiable because:

(a) hate propaganda lies far from the core values of the search for truth, democratic participation and self-fulfillment which underlie freedom of expression, making the restriction more easily justifiable;

(b) the *CHRA* provisions serve pressing and substantial objectives described in s. 2 of the *CHRA*, underscored by other *Charter* values such as equality, dignity and multiculturalism, as well as Canada's international human rights obligations;

(c) preventing the dissemination of hate propaganda is rationally connected to the objectives, in that censure of the restricted expression fosters the protection of the target group members and promotes equality, diversity and multiculturalism in Canadian society;

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[30] *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624

[31] *Warman v. Winnicki*, 2006 CHRT 20

[32] *Taylor, supra*

(d) the *CHRA* provisions are tailored to restrict the dissemination of expression that is carefully defined, and that is public rather than private in nature;

(e) the Supreme Court of Canada has established a high threshold for a finding of hatred and contempt;[33] and

(f) the salutary effects of the *CHRA* provisions on equality, multiculturalism and the protection of target group members outweigh their deleterious impact on expression.

43. Pursuant to the test in *R. v. Oakes*, limitations on rights protected by the *Charter* are justifiable where they serve a pressing and substantial objective, are rationally connected to that objective, are the least restrictive means of fulfilling it, and have salutary effects which outweigh any deleterious effects.[34]

Pressing and Substantial Objective

44. The pressing and substantial objectives served by restrictions on hate propaganda were articulated by the Supreme Court of Canada in *Taylor,* as well as in *Keegstra*. The damage inflicted on human dignity by hate propaganda discourages members of target groups from interacting with those outside their group and undermines Canada's commitment to equality and multiculturalism.[35] The Supreme Court of Canada has ruled

[33] *Taylor, supra*

[34] *R. v. Oakes*, [1986] 1 S.C.R. 103; *Dagenais v. Canadian Broadcasting Corporation*, [1994] 3 S.C.R. 835

[35] *R. v. Keegstra*, [1990] 3 S.C.R. 697, [1991] 2 W.W.R. 1

that protection of human dignity is part of the foundation for equality rights under the *Charter*.[36]

45. Dickson CJ discussed in *Keegstra* why some restrictions on expression, and not only actions, are necessary. He referred to the sense of "humiliation and degradation" experienced by the target groups of hate propaganda, and how it inflicts severe damage on their sense of belonging to the community.[37]

46. Dr. Donald Downs, an expect called on behalf of Mr. Lemire, has personally chronicled this effect. In his book *Nazis in Skokie*, he observed that the survivors' reaction went far beyond mere upset, and "triggered fears of violence and trauma based on the vulnerability of survivors to symbolic reminders of past persecution".[38]

47. The use of symbols and degrading words that have historically been employed to threaten or harass a targeted group is a key component of hate speech. Hate speech uses such devices as a trigger to invoke a long stream of intimidating associations while protecting its authors from the charge of making so-called "explicit" threats. Dr. Downs characterized such speech as "verbally assaultive" and posited that its targets were entitled to a "counter-right" to free speech: "the right to basic security against the intentional infliction of emotional trauma."[39] He confirmed in his testimony that he has not resiled from this position, despite changes in some of his other views.[40]

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[36] *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497

[37] *Keegstra*, *supra.*

[38] Exhibit AGC-2, Tab 4: Excerpts from Downs, Donald Alexander, *Nazis in Skokie: Freedom, Community and the First Amendment,* (Indiana: Notre Dame Press, 1985), pp. 84-85

[39] *Ibid.*, pp. 1-2

[40] "Summary of Testimony – Dr. Donald Downs" at paras 19 and 33

48. Dr. Alexander Tsesis, an expert called on behalf of the Attorney General of Canada, testified that hate speech against minority groups leads to all manner of discriminatory conduct that prevents them from using their talents, and harms the public interest by not allowing them to participate fully in the life of a democracy.[41]

49. The harmful impact of hate speech is not limited to the apprehension of possible violence or disenfranchisement. Studies as recent as 2002 have demonstrated a correlation[42] between incidents of hate speech and detrimental psychological effects in members of minority groups.[43] Contrary to the testimony of Dr. Downs, these studies have clearly demonstrated that hate speech does not have to be targeted at a specific member of a group in order to have detrimental effects.[44]

50. Dr. Mock noted that there is evidence suggesting that hate-based incidents have a deeper trauma impact on their victims than regular incidents of insult or injury. She testified that the resulting traumatic stress interferes with a person's ability to make sense of the world and to function in it.[45]

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[41] "Summary of Testimony – Dr. Alexander Tsesis" at para. 10

[42] As confirmed by all expert witnesses who testified about this, correlative studies are widely used and accepted in this area of study, because of the ethical and practical barriers to conducting experimental studies of certain societal phenomena.

[43] Exhibit HR-7, Tab 7: Boeckmann, Robert J. and Liew, Jeffrey, "Hate Speech: Asian American Students' Justice Judgments and Psychological Responses", *Journal of Social Issues,* Vol. 58, No. 2, 2002, pp. 363-381; Bryant-Davis, Thema, and Ocampo, Carlota, "Racist Incident-Based Trauma", *The Counseling Psychologist*, Vol. 33, No. 4, July 2005, pp. 479-500 at p. 484; Boeckmann, Robert and Turpin-Petrosino, Carolyn, "Understanding the Harm of Hate Crime", *Journal of Social Issues*, Vol. 58, No., 2, 2002, pp. 207-225 at p. 221

[44] Exhibit HR-7, Tab 7: Boeckmann, Robert J. and Liew, Jeffrey, "Hate Speech: Asian American Students' Justice Judgments and Psychological Responses", *Journal of Social Issues,* Vol. 58, No. 2, 2002, pp. 363-381, at p. 377; Bryant-Davis, Thema, and Ocampo, Carlota, "Racist Incident-Based Trauma", *The Counseling Psychologist*, Vo. 33, No. 4, July 2005, pp. 479-500 at pp. 490-491

[45] "Summary of Testimony – Dr. Karen Mock" at paras. 23-32

51. Dr. Michael Persinger, a neuroscientist called on behalf of Mr. Lemire, disagreed with this analysis but admitted that he has not conducted any research into the effects of hate speech on brain functioning. Nor has he studied the literature.[46] Dr. Persinger did posit from general principles that human beings experience "frustrative aggression" when their creativity and ability to express themselves is fettered.[47] However, this principle also supports the conclusion that hate speech acts as a kind of fetter, engendering fear and intimidation amongst minority groups to the point where they feel threatened and cease to express themselves fully. This is a primary reason why hate speech has long been understood to be harmful.

52. Contrary to Dr. Persinger's contention, Dr. Tsesis has considered the proposition that tolerance of hate speech is a necessary outlet for self-expression, and has concluded that this is based on a false premise:

> Bigotry is not cathartic. To the contrary, it is inflammatory. The longer a group goes unopposed in communicating its aggressive hatred of minorities, the more it becomes habituated in defamatory statements and unjust acts. Social attitudes are entrenched in negative images about outgroups and popular dialogue incorporates stereotypes into puns and expletives. Once individuals perceive members of identifiable groups as legitimate targets of aggression, their personal dislikes are reinforced by negative social attitudes and rationalizations. When definitions and stereotypes are culturally established and personally internalized through oft repeated fallacies about outgroup characteristics, they facilitate arbitrary stratification and behaviors, prolonging their vitality and passing their malignant venom to succeeding generations.[48]

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[46] "Summary of Testimony – Dr. Michael Persinger" at para 3

[47] "Summary of Testimony – Dr. Michael Persinger" at para 12

[48] Exhibit AGC-1, Tab 4: Tsesis, Dr. Alexander. "Hate in Cyberspace: Regulating Hate Speech on the Internet". 38 San Diego L. Rev. 817 at 854

53. The harmful effects of hate speech are not limited to the targeted group, but extend to the wider community as well. Dickson CJ recognized this in *Keegstra*:

> A second harmful effect of hate propaganda which is of pressing and substantial concern is its influence upon society at large. The Cohen Committee noted that individuals can be persuaded to believe "almost anything" (p. 30) if information or ideas are communicated using the right technique and in the proper circumstances (at p. 8):
>
> > ... we are less confident in the 20th century that the critical faculties of individuals will be brought to bear on the speech and writing which is directed at them. In the 18th and 19th centuries, there was a widespread belief that man was a rational creature, and that if his mind was trained and liberated from superstition by education, he would always distinguish truth from falsehood, good from evil. So Milton, who said "let truth and falsehood grapple: who ever knew truth put to the worse in a free and open encounter".
>
> We cannot share this faith today in such a simple form. While holding that over the long run, the human mind is repelled by blatant falsehood and seeks the good, it is too often true, in the short run, that emotion displaces reason and individuals perversely reject the demonstrations of truth put before them and forsake the good they know. The successes of modern advertising, the triumphs of impudent propaganda such as Hitler's, have qualified sharply our belief in the rationality of man. We know that under strain and pressure in times of irritation and frustration, the individual is swayed and even swept away by hysterical, emotional appeals. We act irresponsibly if we ignore the way in which emotion can drive reason from the field.[49]

54. This conclusion is consistent with the findings of the Cohen Report, which has been widely cited by the Tribunal and Canadian courts at all levels. Dr. Mock testified that, in light of the growing body of literature in this area,

[49] *Keegstra, supra*

the Cohen Report is even more relevant today than at the time it was written.[50]

55. Dr. Mock added that the Internet has in fact increased the opportunities to inflict trauma and disrupt the community by means of hate speech, because of the ease with which it can be disseminated and the potential for a broader audience.[51] It is particularly effective in recruiting young people because of its multimedia format and its nature as an alternate cyber-world in which the participants do not experience immediate feedback or consequences from hate speech.[52]

56. The Cohen Report states that the psychological limits of human beings ought to be taken into account when formulating laws affecting freedom of speech:

> ... issues relating to freedom of expression are not all open to the simple solutions that would have been applied to them a hundred years ago. Those who urged a century ago that men should be allowed to express themselves with utter freedom even though the heavens fell did so with great confidence that they would not fall. That degree of confidence is not open to us today. We know that, as well as individual interests, there are social interests to be protected, and these are not always protected by unrestricted individual freedom. The triumphs of Fascism in Italy, and National Socialism in Germany through audaciously false propaganda have shown us how fragile tolerant, liberal societies can be in certain circumstances. They have also shown us the large element of irrationality in human nature which makes people vulnerable to propaganda in times of stress and strain. Both experience and the

[50] "Summary of Testimony – Dr. Karen Mock" at paras 39-40

[51] "Summary of Testimony – Dr. Karen Mock" at para 39

[52] "Summary of Testimony – Dr. Karen Mock" at paras 34 and 36

> changing circumstances of the age require us to look with great care at abuses of freedom of expression.[53]

57. More recent commentaries have also noted the phenomenon of wider social harm resulting from hate speech, including those quoted in *Taylor,* such as the 1981 McAlpine Report, the 1984 report of the Special Committee on Participation of Visible Minorities in Canadian Society, the Canadian Bar Association's 1984 Report of the Special Committee on Racial and Religious Hatred and the 1986 Working Paper 50 of the Law Reform Commission of Canada, entitled "Hate Propaganda".[54] This issue continues to be examined by numerous social psychologists, who have arrived at similar conclusions in recent years.[55]

58. Dr. Tsesis has developed an extensive critique of Oliver Wendell Holmes' notion of the "marketplace of ideas," and reaches similar conclusions:

> Beyond the theoretical difficulties of Holmes' marketplace of ideas it is simply untrue that the dissemination of vitriol defuses racism, sexism, or anti-Semitism. Experience disproves the notion that falsehood is always vanquished by truth. To the contrary, history teems with examples of times when lies, distortions, and propaganda empowered groups like the Nazis to repress speech and perpetrate mass persecutions ... Even when both true and false beliefs are available, persons often cling to the false to retain power. In spite of the availability in the United States of literature

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[53] Cohen Report, p. 9, cited by Cory JA (as he then was) in dissent in *The Queen v. Andrews and Smith* (unreported), and by the Tribunal in *Nealy v. Johnston*, [1989] C.H.R.D. No. 10 T.D. 10/89 [hereinafter the "Cohen Report"]

[54] *Taylor, supra,* at para 41

[55] Exhibit HR-7, Tab 7: Boeckmann, Robert J. and Liew, Jeffrey, "Hate Speech: Asian American Students' Justice Judgments and Psychological Responses", *Journal of Social Issues,* Vol. 58, No. 2, 2002, pp. 363-381; Bryant-Davis, Thema, and Ocampo, Carlota, "Racist Incident-Based Trauma", *The Counseling Psychologist,* Vo. 33, No. 4, July 2005, pp. 479-500; Boeckmann, Robert and Turpin-Petrosino, Carolyn, "Understanding the Harm of Hate Crime", *Journal of Social Issues*, Vol. 58, No., 2, 2002, pp. 207-225

against slavery, that institution did not end through rational discourse but through a bloody civil war.[56]

59. Dr. Tsesis has observed that the implicit threat in hate speech may take time to develop to the point of action but is not any less concrete as a result.[57] Indeed, he regards hate propaganda as an essential component in rationalizing harmful action against minority groups as being justified.[58] He points out that this is why governments around the world have taken steps to prevent this type of harm using anti-hate speech laws.[59]

60. As Dr. Tsesis testified, there are numerous historical examples of the connections between the social acceptance of extensive hate propaganda and violent long-term effects. These include:

(a) The persecution of Jews and other minorities in Nazi Germany;

(b) The enslavement of Blacks in the American South before the Civil War;

(c) The expulsion of Native Americans from their lands and the misappropriation of their property;

(d) The current enslavement of Blacks in Mauritania; and

(e) Several violent incidents in the United States linked to hate speech.[60]

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[56] Exhibit AGC-1, Tab 4: Tsesis, Dr. Alexander. "Hate in Cyberspace: Regulating Hate Speech on the Internet". 38 San Diego L. Rev. 817 at 848

[57] Exhibit AGC-1, Tab 1: Expert report of Dr. Alexander Tsesis, May 12, 2006, pp. 3-4

[58] *Ibid.*, pp. 3-4

[59] "Summary of Testimony – Dr. Alexander Tsesis" at para 4

[60] Exhibit AGC-1, Tab 1: Expert Report of Dr. Alexander Tsesis, May 12, 2006, p. 3

61. While other factors contribute to the rise of these conditions, hate speech inevitably accompanies them.[61] Hate speech plays the crucial role of conditioning people to accept dehumanization of some groups to the extent that would-be perpetrators of violent or coercive acts against them do not encounter effective resistance. Dr. Tsesis noted as an example that black people would not have been the main victims of slavery in the antebellum American south without the support of extensive mass mythology about their alleged inferior qualities.[62]

62. From a historical perspective, hate speech has been a key tool for channelling societal difficulties, and the blame for them, towards minority groups.[63] Dr. Tsesis cites Nazi Germany as the leading example, where hyperinflation and the aftermath of the Versailles Treaty created general troubles for which a charismatic leader was able to divert blame onto a minority group.[64] Hitler drew on a long history of German anti-Semitism to foment a mass delusion that Jews were responsible for bad times, and as a result a Holocaust could be perpetrated against them without general opposition.

63. Social psychologists, including Dr. Mock, have observed that the law has a role to play in priming supportive attitudes towards minorities and ensuring that the boundaries of what is acceptable are taken seriously by the population in general.[65] She has also noted that the proliferation of

[61] "Summary of Testimony – Dr. Alexander Tsesis" at paras 5-8

[62] "Summary of Testimony – Dr. Alexander Tsesis" at para 6

[63] "Summary of Testimony – Dr. Alexander Tsesis" at paras 5-9

[64] "Summary of Testimony – Dr. Alexander Tsesis" at para 9

[65] Boeckmann, Robert and Turpin-Petrosino, Carolyn, "Understanding the Harm of Hate Crime", *Journal of Social Issues*, Vol. 58, No. 2, 2002, pp. 207-225 at p. 212; "Summary of Testimony – Dr. Karen Mock" at paras 12-13, 14a, 15, 20, and 38

stereotypes and hatred against various groups can facilitate violence by leading to desensitization.[66]

64. Laws against hate speech have the short-term effect of protecting the rights of minorities to participate in Canadian society, and the long-term effect of ensuring that any unforeseen economic and social conditions are not used as weapons against them.

65. Moreover, hate speech is unconnected with the values sought to be protected by the *Charter*. In *R. v. Oakes*, the Supreme Court ruled that any limits to *Charter* rights must be consistent with the values of a free and democratic society, which include:

> ... respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of groups in society.[67]

66. The Supreme Court has also made it clear that it does not endorse the absolutist analysis of the United States when it comes to free expression. Professor Jane Bailey of the University of Ottawa cites the dictum of Dickson CJ in *Keegstra* on this point:

> Where s. 1 operates to accentuate a uniquely Canadian vision of a free and democratic society, however, we must not hesitate to depart from the path taken by the United States. Far from requiring a less solicitous protection of *Charter* rights and freedoms, such independence of vision protects these rights and freedoms in a different way...[I]n my view the international commitment to eradicate hate propaganda and, most importantly, the special role given equality and multiculturalism in the Canadian Constitution necessitate a departure from the view, reasonably prevalent in

[66] "Summary of Testimony – Dr. Karen Mock" at para 38

[67] *Oakes, supra,* at p. 136

> America at present, that the suppression of hate propaganda is incompatible with the guarantee of free expression.[68]

67. In any case, there is little or no truth value in hate propaganda to attract the protection of the *Charter*, thereby making the restriction easier to justify. The Supreme Court of Canada has recognized the importance of reputation to human dignity and *Charter* values, and has noted how false allegations can destroy a person's sense of worth and value.[69] Hate speech bears scant relationship to the truth, and does not require the same protections as ordinary speech. Dr. Downs, drawing an analogy with pornography, has also argued that certain forms of intimidating speech are unworthy of protection.[70]

68. There is also, as noted in *Keegstra*, a broad international consensus that the restriction of hate propaganda serves a pressing and substantial objective. Canada's laws against hate propaganda, in addition to meeting this country's constitutional obligations, also fulfill international human rights obligations under the *International Convention on the Elimination of All Forms of Racial Discrimination*[71] and the *International Covenant on Civil and Political Rights.*[72] They are consistent with, and serve to complement, the laws of other signatory countries that have taken appropriate steps to restrict the dissemination of hate propaganda.

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[68] Exhibit AGC-1, Tab 13: *Keegstra, supra* at 743, as cited by Bailey, Jane, in "Private Regulation and Public Policy: Toward Effective Restriction of Internet Hate Propaganda", (2003) 49 McGill L.J. 59 at 75

[69] *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 at paras 108 and 120

[70] Exhibit AGC-2, Tab 4: Excerpts from Downs, Donald Alexander, *Nazis in Skokie: Freedom, Community and the First Amendment*, (Indiana: Notre Dame Press, 1985), p. 165

[71] *International Convention the Elimination of All Forms of Racial Discrimination*, 4 January 1969, 660 U.N.T.S. 212 (signed by Canada 24 August 1966 and ratified 14 October 1970).

[72] *International Covenant on Civil and Political Rights*, 23 March 1976, 999 U.N.T.S. 172.

Rational Connection

69. In its recent decision in *R. v. Bryan*, the Supreme Court of Canada held that the rational connection stage of the test requires the Attorney General to "show a causal connection between the infringement and the benefit sought on the basis of reason or logic". Such a connection is "often a difficult matter to establish by evidence, and the Supreme Court of Canada has not always insisted on direct proof of the causal relationship".[73]

70. There is a longstanding consensus in the democracies of the West that regulation of hate propaganda and the prevention of harm are rationally connected, for the reasons outlined above.[74] This consensus is reflected in the *International Convention on the Elimination of All Forms of Racial Discrimination*[75], which states that any advocacy of national, racial or religious hatred which constitutes incitement to discrimination shall be prohibited by law.[76]

71. As noted above, Canada is a signatory to this Convention, and its laws regarding hate speech are generally seen as part of the Western mainstream on this issue, as Dr. Tsesis testified in the proceedings.[77]

72. Other signatory countries have also taken strong steps to restrict the dissemination of hate propaganda, and these laws are recognized by their neighbours.

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[73] *R. v. Bryan*, 2007 SCC 12, [2007] S.C.J. No. 12 at para. 39; P. W. Hogg, *Constitutional Law of Canada* (loose-leaf ed.), vol. 2, at p. 35-31, cited with approval in *Thomson Newspapers*, at para. 39.

[74] Exhibit AGC-1, Tab 1: Expert report of Dr. Alexander Tsesis, May 12, 2006, p. 4

[75] *International Convention the Elimination of All Forms of Racial Discrimination*, *supra*

[76] *Ibid.*, Article 20.2

[77] "Summary of Testimony – Dr. Alexander Tsesis" at para 19

73. A leading example is France, where it is a criminal offence, punishable by significant monetary fines, to display Nazi emblems.[78] The French government issued an order against a Yahoo! hosted site where such memorabilia was being sold which required not only that Yahoo! France cease to link to it, but also that the U.S.-based parent company Yahoo! block access to the site by all users it could identify as French.

74. Yahoo! challenged this ruling in the 9th Circuit Court of Appeals in the United States, where, despite its traditionally broad interpretation of freedom of expression, the panel declined to intervene.[79]

75. Germany grants freedom of expression rights in its Basic Laws but also has criminal laws to prevent the distribution or supply of any writings that incite race hatred or describe cruel or inhuman acts of violence in a way that glorifies them, minimizes them, or represents them in manner offending human dignity.[80]

76. In Britain, it is prohibited to publish written materials or give speeches that are "likely" to stir up racial hatred. Britain's *Public Order Act* also criminalizes the use of threatening, abusive or insulting language or behaviour based on colour, race, nationality, or ethnic or national origins.[81]

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[78] Section R645-1 of the French Penal Code

[79] The U.S. Court of Appeals found that there was no basis for resisting the application of the French order to Yahoo!, since it had voluntarily complied with most of the French measures, its compliance had been recognized as sufficient by the French authorities, and threatened fines had not been levied. The Court also noted that there would be a First Amendment constitutional argument only if blocking French users interfered with the rights of Americans to access the Internet, which was not the case at the time of adjudication. A majority of the Court stated that the litigants were asking it to rule on "broad First Amendment protection for speech and speech-related activities on the Internet that might violate the laws or offend the sensibilities of other countries", and declined to do so. (See *Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme and L'Union des Etudiants Juifs de France*, 433 F. 3d 1199 (U.S. Court of Appeals, 9th Circuit))

[80] Exhibit AGC-1, Tab 1: Expert witness report of Dr. Alexander Tsesis, May 12, 2006, p. 5

[81] *Ibid.*, p. 6

77. The Scandinavian countries have all made hate propaganda a criminal offence as well. Denmark and Finland both impose either a fine or imprisonment for such behaviour. The Swedish Penal Code provides for a mandatory minimum two-year term for hate propaganda, and the Norwegian Penal Code allows prosecution of hate statements on a negligence standard even where they are not disseminated to the public.[82]

78. Other countries with strong criminal laws against hate propaganda include Switzerland, Israel and Hungary.[83]

79. Canada's Supreme Court has upheld the rationale of both civil and criminal prohibitions on the spread of hate propaganda in *Taylor* and *Keegstra*. In the criminal context, Dickson CJ stated:

> ... the position that there is no strong and evident connection between the criminalization of hate propaganda and its suppression is unconvincing.
>
> [...]
>
> The many, many Canadians who belong to identifiable groups surely gain a great deal of comfort from the knowledge that the hate-monger is criminally prosecuted and his or her ideas rejected. Equally, the community as a whole is reminded of the importance of diversity and multiculturalism in Canada; the value of equality and the worth and dignity of each human person being particularly emphasized.[84]

80. Dickson CJ examined the question of whether hate propaganda laws had failed to protect Jewish people in Germany during the 1930s, and found the evidence for this proposition unconvincing.[85]

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[82] *Ibid.*, pp. 6-7

[83] *Ibid.*, p. 7

[84] *Keegstra, supra*

[85] *Ibid.*

81. The non-criminal prohibition in the *CHRA*, which provides for comparatively less severe consequences, is rationally connected to the objective of eliminating discrimination, specifically of promoting "equal opportunity unhindered by discriminatory practices".[86]

82. The *CHRA*'s provisions demonstrate to Canada's diverse population that the propagation of hatred towards them will not be tolerated. As Dr. Mock testified, such laws send a strong message that hatred of minorities is not acceptable in our society.[87] The provisions are less concerned with punishing the perpetrator than with protecting the victim.

83. However, the provisions of the *CHRA* also act as a deterrent to the perpetrator by making it clear that the dissemination of hate speech is not a state-sanctioned activity and that those who endorse it put their own interests at risk.

84. The civil penalties in the *CHRA* are part of a layered scheme of statutory protection which addresses most instances of hate propaganda in a non-criminal manner, and only after some degree of advance warning, along with opportunities for conciliation and mediation.[88] Only the most serious and repetitive instances with clear intent trigger the *Criminal Code* prohibitions, with corresponding legal protections.

85. Dickson CJ stated in *Taylor* that s. 13 of the *CHRA* promotes the ends sought by Parliament in passing this Act as a whole, and therefore evinces a rational connection to those ends.[89]

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[86] *Taylor, supra*, at para 39

[87] "Summary of Testimony – Dr. Karen Mock" at para 11

[88] *Taylor, supra*, per McLachlin J. (as she then was), dissenting

[89] *Taylor, supra*

86. In addition, reason or logic alone are sometimes sufficient to establish the causal link under this branch of the *Oakes* test.[90] It is rational to conclude that the proliferation of hate propaganda aimed at Canada's minorities is an abuse of free speech that the state should curtail in a manner appropriate to protecting those minorities.

87. In *Keegstra*, the Supreme Court found that the harm done through hate propaganda was serious enough to justify a more restrictive legislative approach than just countering discrimination with education:

> Though the fostering of tolerant attitudes among Canadians will be best achieved through a combination of diverse measures, the harm done through hate propaganda may require that especially stringent responses be taken to suppress and prohibit a modicum of expressive activity.[91]

88. In response to the argument that the Internet is too vast and uncontrollable to be amenable to regulation, it is submitted that this is tantamount to arguing that because it is impossible to detect and stop all drug dealers, the state is constitutionally prohibited from taking action against those it can detect.

89. In *R. v. Bryan*,[92] Fish J. observed that while modern communications technology may diminish the effectiveness of restrictions on speech, a legislative restriction may nevertheless curb widespread dissemination of the prohibited information and thus contribute materially to Parliament's objective.

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[90] *R. v. Sharpe*, [2001] 1 S.C.R. 45, (2001), 194 D.L.R. (4th) 1; *R. v. Butler*, [1992] 1 S.C.R. 452, (1992), 89 D.L.R. (4th) 449; *Harper v. Canada (Attorney General)*, [2004] 1 S.C.R. 827, (2004), 239 D.L.R. (4th) 193

[91] *Keegstra, supra,* at para 131

[92] *R. v. Bryan*, *supra*, para. 79.

90. Even if it is not possible to eliminate all Internet hate speech through Canadian law, this does not mean that it should not be regulated. As Dr. Tsesis testified, the *Yahoo!* case in France demonstrates that effective control can be exercised to stop a significant proportion of hate speech within sovereign borders if required.[93]

Minimal Impairment

91. The activity prohibited by s. 13 of the *CHRA* is carefully defined and anchored to the prohibited grounds of discrimination in s. 3 of the *CHRA*.

92. In concluding that s. 13 of the *CHRA* minimally impairs freedom of expression, Dickson CJ in *Taylor* examined the language chosen by Parliament and determined that it provides a standard of conduct that is sufficiently precise. He added:

> Moreover, as long as the Human Rights Tribunal continues to be well aware of the purpose of s. 13(1) and pays heed to the ardent and extreme nature of feeling described in the phrase "hatred or contempt", there is little danger that subjective opinion as to offensiveness will supplant the proper meaning of the section.[94]

93. The Supreme Court has indicated that the risk of violating s. 2(b) of the *Charter* in a hate propaganda case is more likely to arise when the communications comprise private thoughts or beliefs.[95] The activity targeted by s. 13 of the CHRA is public rather than private in nature. For example, Mr. Lemire's "Freedomsite" is a public web site accessible to anyone. Although some aspects of the site, such as its mailing list, are only open to those who register, anyone can do so by providing or purporting to provide the information requested.

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[93] "Summary of Testimony – Dr. Alexander Tsesis" at para. 20

[94] *Taylor, supra*

[95] *Sharpe, supra*, at para 26

94. Mr. Lemire himself asks the Tribunal to recognize how widespread and influential a medium the Internet has become, noting that it is "fast replacing print versions of many publications because of cost and reach of audience."[96] Postings on the Internet are conspicuously public, and Dr. Downs testified that in the United States the courts have recognized the Internet as a "classic public forum."[97] The Tribunal has found that web site postings are part of the public domain, whether or not one has to register to post.[98]

95. Reliance on private incentives is not sufficient to address the government's task of protecting *Charter* rights.[99] As Professor Bailey has noted, the use of such techniques as filtering and zoning may mitigate some individual psychological harm, but "fails to address the key social harms of concern in the context of hate propaganda: the threat to social harmony and equality posed by widespread adoption of hate propaganda's message."[100] She observes that the market has "an unimpressive record in correcting discrimination based on personal characteristics such as race, gender and sexual identity", since its focus is on meeting the mass tastes of consumers.[101]

96. Legal means for controlling the propagation of hate speech on the Internet are much less restrictive than technological means. Commercial filtering devices that block Internet access are usually based on key words and are overinclusive in their reach, obstructing both pornography and information

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[96] Respondent's Statement of Particulars at para 80

[97] "Summary of Testimony – Dr. Donald Downs" at para 54

[98] *Warman v. Tremaine*, *supra*, at para 124

[99] Exhibit AGC-1, Tab 1: Expert report of Dr. Alexander Tsesis, May 12, 2006 pp. 8-9

[100] Exhibit AGC-1, Tab 13: Bailey, Jane, "Private Regulation and Public Policy: Toward Effective Restriction of Internet Hate Propaganda", (2003) 49 McGill L.J. 59 at 80 and 83

[101] *Ibid.* at 95

sites about breast cancer, for example.[102] They are not capable of executing contextual judgments about content, and in any case the proliferation of web sites makes it a "daunting" task", as observed by Professor Bailey, to keep filter labels current.[103]

97. Commercial technological filters are mainly marketed to corporations controlling employee access, and to parents of young children. They are therefore also underinclusive as a means of restricting access to hate speech, since unbounded access is widely available elsewhere. Other technologies such as zoning, screen out users on the basis of declared age, demographics or location, but do not work perfectly.[104]

98. The implementation of acceptable use policies by Internet Service Providers (ISPs), often used to stave off liability, can play a useful role, but is not sufficient to contain the harm in and of itself. Many ISPs draft such guidelines for maximum flexibility, and do not provide any positive rights to have them enforced.[105]

99. The scheme under the *CHRA*, which operates to deal with most problems before the *Criminal Code* provisions are engaged, is less onerous than the measures adopted by many other democratic countries that value freedom of expression. It is a nuanced scheme that meets the constitutional requirements of minimal impairment while still giving effect to Canada's national values and international obligations.

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[102] Exhibit AGC-1, Tab 1: Expert report of Dr. Alexander Tsesis, May 12, 2006, pp. 8-9

[103] Exhibit AGC-1, Tab 13: Bailey, Jane, "Private Regulation and Public Policy: Toward Effective Restriction of Internet Hate Propaganda", (2003) 49 McGill L.J. 59 at 81-82

[104] *Ibid.* at 83-84

[105] *Ibid.* at 84-87

100. The Commission has a practice of encouraging voluntary mediation early in the process of a complaint. If this is not successful, a conciliator may be appointed under s. 47 of the *CHRA* to give the parties another opportunity to resolve their differences. The Commission makes extensive use of dispute resolution and gives the parties every opportunity to avoid an imposed remedy.[106]

Proportionate Effects

101. The Supreme Court found in *Taylor* that the salutary effects of s. 13(1) far outweigh its deleterious effects. Dickson CJ 's analysis was as follows:

> ... I do not view the effects of s. 13(1) upon the freedom of expression to be so deleterious as to make intolerable its existence in a free and democratic society. The section furthers a government objective of great significance and impinges upon expression exhibiting only tenuous links with the rationale underlying the freedom of expression guarantee. Moreover, operating in the context of the procedural and remedial provisions of the *Canadian Human Rights Act*, s. 13(1) plays a minimal role in the imposition of moral, financial or incarcerating sanctions, the primary goal being to act directly for the benefit of those likely to be exposed to the harms caused by hate propaganda.[107]

102. Mr. Lemire has argued that messages posted on the Internet are legally distinguishable from the telephonic messages prohibited in *Taylor*. However the Supreme Court's description of the older method of communication in *Taylor* applies equally to the newer one: "a medium

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[106] *Canadian Human Rights Act*, R.S., 1985, c. H-6, section 47, and "Mediation and Human Rights Complaints", http://www.chrc-ccdp.ca/publications/mediation-en.asp, "Conciliation and Human Rights Complaints", http://www.chrc-ccdp.ca/publications/conciliation-en.asp, "Other Redress Procedures", http://www.chrc-ccdp.ca/publications/procedures-en.asp

[107] *Taylor, supra*

which allows numerous organizations to present information and views to a sizeable proportion of the public".[108]

103. The invention of a new medium for public communications does not change the underlying rationale and balancing entailed in Parliament's choice to prohibit hate speech as harmful. And, as will be discussed in more detail below, the remedies legislated under s. 54 of the *CHRA* to deal with such speech are neither new nor punitive in nature.

(ii) Subsections 13(1) and (2) of the CHRA constitute a reasonable limit on s. 2(a) Charter rights (freedom of conscience and religion)

104. In *Citron v. Zundel*,[109] the Tribunal held that s. 13(1) of the *CHRA* constitutes a reasonable limit on the freedom of religion and conscience guaranteed by s. 2(a) of the *Charter*, and is therefore justified under s. 1. The Tribunal based its ruling on the Supreme Court of Canada's decisions in *Taylor*,[110] *Ross*,[111] *Trinity Western*[112] and *Big M Drug Mart*.[113]

105. The Tribunal noted that s. 2(a) of the *Charter* refers to both freedom of conscience and freedom of religion. Conscience has been defined as "personal morality which is not founded in religion" or "conscientious beliefs which are not religiously motivated".[114]

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[108] *Ibid.* at para 78

[109] *Citron v. Zundel*, *supra*

[110] *Taylor*, *supra*

[111] *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825

[112] *Trinity Western University v. College of Teachers (British Columbia)*, [2001] S.C.C. No. 32, 2001 S.C.C. 31, [2001] 1 S.C.J. No. 32

[113] *R. v. Big M Drug Mart Limited*, (1985) 1 S.C.R. 295

[114] *R. v. Morgentaler*, [1988] 1 S.C.R. 30 at p. 178

106. It is submitted that such beliefs need to be analogous to religion in their sophistication and coherence in order to meet this definition. Mr. Lemire has failed to demonstrate that the expression of hatred towards identifiable minority groups derives from any basis of conscience or a coherent belief system.

107. Freedom of religion was defined in *Big M Drug Mart* as:

> ... the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal and the right to manifest religious belief by worship and practice or by teaching and dissemination.[115]

108. However, as the Supreme Court found in *Ross*, this freedom is restricted by the "right of others to hold and manifest beliefs and opinions of their own, and to be free from injury from the exercise of the freedom of religion of others."[116]

109. Hate speech infringes upon these rights. Propaganda against different religions and cultural groups encroaches on the freedom of Canada's diverse peoples to entertain their own beliefs, declare them openly "without fear of hindrance or reprisal" and to manifest them in practice. Hate speech, by its very nature, intimidates minority groups and causes them to fear the manifestation of their religious and cultural beliefs in a society where they should be accorded dignity and freedom.

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[115] *Big M, supra,* at p. 336

[116] *Ross, supra* at para 72

110. Dr. Tsesis refers to the role of religious dogma in upholding slavery as an expression of the natural order as a factor contributing to its persistence in pre-Civil War America.[117] He also notes that similar religious beliefs support present-day slavery in Mauritania.[118] The perception of Jews as the killers of Christ was historically at the root of much anti-Semitism.[119]

111. Subsection 2(a) is intended to protect individual beliefs and conscience, not to sanction forcing such beliefs on others as a means of keeping them in a socially subordinate position. In *Citron v. Zundel*, the Tribunal cited Dickson CJ's finding that s. 2(a) rights are rooted in fundamental human dignity but may be limited "to protect public safety, order, health, or morals or the fundamental rights and freedoms of others ..."[120]

112. This is consistent with the Supreme Court's discussion in *Trinity Western* of a distinction between the private sphere of belief and the public sphere of action.[121] In any case, Mr. Lemire has again not shown that there is any coherent religious basis for expressions of hatred towards minority groups.

113. The Tribunal in *Citron v. Zundel* characterized s. 13 of the *CHRA* as protecting "the human dignity and self-worth of members of a designated group, such as, in this case, the Jewish community". The Tribunal therefore concluded that s. 13 of the CHRA constitutes a reasonable limit on the rights and freedoms provided by s. 2(a) of the *Charter*.[122]

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[117] Exhibit AGC-1, Tab 1: Expert report of Dr. Alexander Tsesis, May 12, 2006, p. 2

[118] *Ibid.*, p. 3

[119] "Summary of Evidence – Alexander Tsesis" at para 14

[120] *Big M, supra,* at p. 336

[121] *Trinity Western University, supra* at paras 36-37

[122] *Citron v. Zundel, supra*

114. Section 13 is also consistent with the stated purpose of the *CHRA*, which is to promote equality of opportunity and accommodation of the needs of diverse individuals consistent with their duties and obligations as members of society.[123]

115. Decisions of the Tribunal and the Courts have often cited the report of the Special Committee on Hate Propaganda in Canada ("the Cohen Report") to explain why prohibitions on hate propaganda are justified. [124] It is submitted that these reasons apply with equal force to reasonable limits on the exercise of s. 2(a) *Charter* rights:

> Canadians who are members of any identifiable group in Canada are entitled to carry on their lives as Canadians without being victimized by the deliberate, vicious promotion of hatred against them. In a democratic society, freedom of speech does not mean the right to vilify. The number of organizations involved and the numbers of persons hurt is no test of the issue: the arithmetic of a free society will not be satisfied with oversimplified statistics demonstrating that few are casting stones and not many are receiving hurts. What matters is that incipient malevolence and violence, all of which are inherent in "hate" activity, deserves national attention.[125]

116. Dr. Downs has commented on the importance of counter-principles to free speech on which democratic society is based, such as equality and the "right to be protected against unjustified intimidation."[126] Dr. Downs has criticized the Supreme Court of the United States for not recognizing that "on a macro level, the *general tone* of society can affect the mind", and can lead to incivility and the "breakdown of community protection."[127]

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[123] Section 2, *Canadian Human Rights Act*, R.S., 1985, c. H-6

[124] *Nealy v. Johnston*, [1989] C.H.R.D. No. 10 T.D. 10/89

[125] Cohen Report, *supra*, pp. 28-29

[126] Exhibit AGC-2, Tab 4: Excerpts from Downs, Donald Alexander, *Nazis in Skokie: Freedom, Community and the First Amendment*, (Indiana: Notre Dame Press, 1985), p. 120

[127] *Ibid.*, p. 91

117. Dr. Tsesis has similarly noted that all rights have corresponding natural limits:

> ... abstract uncertainties about potential evils should not constrain legislators from passing laws narrowly designed to curb expressions whose only object is to endanger the lives, professions, properties and civil liberties of the less powerful. [128]

(iii) Sections 13(1) and (2) of the CHRA do not violate section 7 of the Charter

118. Section 13 of the *CHRA* does not contravene the rights guaranteed by s. 7 of the *Charter* to life, liberty or security of the person, and not to be deprived thereof except in accordance with the principles of fundamental justice.

119. As noted by the Tribunal, the argument that s. 13(1) of the *CHRA* is unconstitutionally vague was disposed of by the Supreme Court in *Taylor*, and cannot be used to assert a violation of the principles of fundamental justice.[129]

120. The Supreme Court has explained why the terms "hatred" and "contempt" (described by Mr. Lemire as "extremely abstract"[130]) are in fact sufficiently explicit, and the Tribunal has adopted this explanation:

> With "hatred" the focus is a set of emotions and feelings which involve extreme ill-will towards another person or group of persons. To say that one hates another means in effect that one finds no redeeming qualities in the latter. "Contempt" is by contrast a term

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[128] Exhibit AGC-1, Tab 4: Tsesis, Dr. Alexander. "Hate In Cyberspace: Regulating Hate Speech on the Internet". 38 San Diego L. Rev. 817 at 869

[129] *Citron v. Zundel, supra*

[130] Respondent's Statement of Particulars at para 52

> which suggests a mental process of "looking down" upon or treating as inferior the object of one's feelings.[131]

121. Both the Tribunal and the Courts have had no difficulty in successfully applying these definitions in numerous cases since *Taylor* – in fact, Mr. Lemire himself has provided an itemized list of 24 Tribunal decisions in which s. 13 was successfully applied between 1992 and 2006.[132]

122. More fundamentally, it is submitted that a hearing into a human rights complaint is not a proceeding which engages a respondent's rights under s. 7 of the *Charter.*[133] Mr. Lemire's concerns about his individual reputation do not constitute the kind of self-standing right protected under the s. 7 security interest,[134] nor does his desire to run an Internet site meet the description of a fundamental personal choice protected by the s. 7 liberty interest. As the Supreme Court noted in *Blencoe*, "personal autonomy is not synonymous with unconstrained freedom."[135]

E. Subsections 54(1) and (1.1) of the CHRA do not violate the *Charter*

123. Mr. Lemire has not presented a clear analysis in support of his contention that ss. 54(1) and 54(1.1) of the *CHRA* contravene the *Charter*. His arguments are directed towards s. 7 and the principles of fundamental justice, which are informed by sections 8 to 12 of the *Charter.*[136]

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[131] *Taylor, supra,* pp. 927-928, also *Citron v. Zundel, supra*

[132] Exhibit R-16 (Updated): "Summary of Tribunal Decisions on s. 13 Cases" and Exhibit BB-1, Tab 1

[133] *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, 2000 SCC 44

[134] *Ibid.* at para 80

[135] *Ibid.* at para 54

[136] *Reference re Motor Vehicle Act (British Columbia) s. 94(2)*, [1985] 2 S.C.R. 486 at paras 26-27

124. Under these provisions, s. 11 would appear to be the most applicable to the general tenor of the arguments advanced by Mr. Lemire. Section 11 outlines the procedural rights of those charged with a criminal offence.

125. The Supreme Court of Canada has found that if a proceeding does not relate to an offence, and is administrative rather than penal in nature, s. 11 does not apply.[137] The nature of the act giving rise to the proceedings is not a relevant consideration.[138]

126. Relevant elements to consider are the objectives and purpose of the penalty, the process leading to it and whether it can result in a "true penal consequence".[139]

127. Paragraph 54(1)(a) merely empowers the Tribunal to apply paragraph 53(2)(a) of the *CHRA*, a provision which has not been challenged in this proceeding. Paragraph 53(2)(a) authorizes the Tribunal to order a respondent to cease engaging in a discriminatory practice.

128. Similarly, paragraph 54(1)(b) empowers the Tribunal to order compensation under s. 53(3) of the *CHRA*, another provision which has not been challenged in this proceeding. Subsection 53(3) of the *CHRA* provides that where the Tribunal finds that a person is found to have engaged in a discriminatory practice either wilfully or recklessly, it can order them to pay extra financial compensation to the complainant.

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[137] *R. v. Wigglesworth*, (1987) 45 D.L.R. (4th) 235, at para 21; *Martineau v. Canada (Minister of National Revenue)*, [2004] 3 S.C.R. 737 at para 23

[138] *Martineau, supra*, at para 30

[139] *Martineau, supra*, at para 24

129. A provision of this kind has been part of the *CHRA* since its inception in 1977, and was in the *CHRA* at the time *Taylor* was decided in 1990.[140] Indeed, the older provisions of this kind were more stringent than the current s. 53(3) – they permitted an order of extra compensation where the complainant had "suffered in respect of feelings or self-respect as a result of the practice" as well.[141] Viewed in context, it is clear that these successive provisions were intended to achieve the remedial aim of making the complainant whole again.

130. With respect to the administrative penalty provided in s. 54(1)(c) of the *CHRA*, and the criteria described in s. 54(1.1), it is submitted that these provisions are constitutionally valid because:

(a) the administrative penalties are part of a broader regulatory regime that is within federal jurisdiction;

(b) the conduct to which the administrative penalty applies is not criminal in nature; and

(c) the administrative penalty is not punitive, but:

(i) is intended to ensure compliance with the preventative and remedial purposes of the *CHRA*;

(ii) can be the subject of mediation and conciliation throughout the human rights complaint process; and

(iii) must be tailored to the respondent's ability to pay, and cannot in any event exceed half the amount that may

[140] *Canadian Human Rights Act*, R.S. 1985, Ch. H-6, as amended, s. 53; R.S. 1985, Ch. H-6, (unamended), s. 53; S.C. 1976-77, c. 33, s. 41 (repealed)

[141] *Ibid.*

be ordered as compensation for pain and suffering under the *CHRA*.

131. The *CHRA*'s remedies have been described as "essentially civil" in nature because they are directed to redressing socially undesirable conditions regardless of the reasons for their existence. Discrimination law is effects-based, not intent-based.[142] This is because "moral blame is too limited a concept to deal effectively with the problem of discrimination."[143]

132. Parliament has not enacted a punitive scheme within the framework of the *CHRA*. Instead, it has created a series of measures to address discrimination and to ensure that it does not recur. The Supreme Court has noted that because of the importance of the rights protected by the *CHRA*, the remedies must be "effective" in achieving the objective of providing relief to complainants[144] and must be enforceable by law.[145]

133. Remedies of this nature arise from what the Supreme Court has described as "proceedings of an administrative nature instituted for the protection of the public", to which it has stated s. 11 is not applicable.[146]

134. The Tribunal has specifically considered s. 54(1) remedies and has not found any constitutional defect. The Tribunal has also found that the remedies provided in ss. 54(1)(b) and (c) do not push s. 13(1) over the line

[142] *Robichaud v. Canada (Treasury Board)*, [1987] S.C.J. No. 47 at paras 9, 10; *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536

[143] *C.N.R. v. Canada (Human Rights Commission)*, [1987] S.C.J. No. 42, at para 27

[144] *Robichaud, supra*, at para 13

[145] *CNR, supra* at para 24

[146] *Wigglesworth, supra*, at para 23

into unconstitutionality because any potentially onerous elements are balanced by the inclusion of an intent requirement.[147]

135. Before the remedies provided in ss. 54(1)(b) and (c) can be imposed, there must be a finding of wilfulness or recklessness, in addition to the one already required under s. 53(3). The Tribunal must also consider any prior discriminatory practices, the respondent's ability to pay, and the nature, circumstances, extent and gravity of the discriminatory practice.

136. This is consistent with the *CHRA*'s aim of breaking the cycle of systemic discrimination. As the Supreme Court has observed:

> ... in attempting to combat systemic discrimination, it is essential to look to the past patterns of discrimination and to destroy those patterns in order to prevent the same kind of discrimination in the future.[148]

137. The penalty cannot, at its highest, exceed half the amount that may be ordered as compensation for pain and suffering under the *CHRA*, and wilfulness or recklessness must be proved to trigger the application of this amount.

138. This remedial scheme is not new. The Tribunal has had the power to award special compensation where discrimination is wilful or reckless for thirty years now.[149]

139. The aim of these remedies is to ensure ongoing compliance with the *CHRA* and protection of the public. They are not a punishment, but rather

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[147] *Schnell v. Machiavelli, supra*

[148] *C.N.R., supra* at para 44

[149] *Canadian Human Rights Act*, R.S. 1985, H-6, s. 53(3), R.S. 1985, H-6, s. 53(3) (unamended); S.C. 1976-77, c. 33, s. 41(3) (repealed)

intended to assist in the effective enforcement of the protection of human rights.

140. The remedies also do not result in a true penal consequence. Mr. Lemire has suggested that a penalty of 'indirect imprisonment' results from s. 54 of the *CHRA*. Mr. Lemire appears to be referring to s. 57 of the *CHRA*, which he has not challenged. Section 57 permits an order of the Commission to be made enforceable by the Federal Court.

141. Mr. Lemire alleges that since violation of a Court order may result in a finding of contempt of court under Rule 472 of the *Federal Courts Rules*, this converts s. 54 into an unconstitutional restriction of liberty. However, the contempt provisions of the *Federal Courts Rules* are not at issue in these proceedings, nor are they relevant to s. 54 of the *CHRA*. Contempt findings are entirely within the discretion of individual judges, and do not constitute a direct or inevitable penalty under the *CHRA*.

142. In any event, the Supreme Court has disposed of this argument in *Taylor*. The Court noted that a contempt order must be preceded by an order of the Tribunal to cease and desist a discriminatory practice, and observed:

> Such a directive from the Tribunal necessarily brings to a respondent's attention the fact that his or her messages are likely to have a harmful effect. Uncertainty or mistake as to the probable effect of these messages is thus dissipated, and consequently their continued promulgation will be accompanied by the knowledge that certain individuals or groups are likely to be exposed to hatred or contempt on the basis of race or religion. At this stage of the process, it cannot be argued that an individual is innocent or negligent as to the effects of his or her message, and hence the spectre of imprisonment absent intent is dispelled [...] I therefore cannot agree that the possibility of a contempt order issuing against an individual unduly chills the freedom of expression.[150]

[150] *Taylor, supra*

143. Accordingly, s. 11 of the *Charter* does not apply to the remedies in s. 54(1) and 54(1.1) of the *CHRA*. Moreover, the Tribunal has already examined whether s. 54(1) violates s. 7 of the *Charter*, and has found that the *Charter* is not engaged.[151] A deprivation of liberty under s. 7 would normally require physical restraint, in accordance with the Supreme Court's findings in *Re BC Motor Vehicle Act*.[152] While it is theoretically possible to engage s. 7 without physical restraint, it is very unlikely that it would occur in this particular context.[153] The Tribunal has observed that a penalty or fine does not meet this definition of a liberty deprivation.[154]

144. It is submitted that the remedies which result from an application of s. 13(1) of the *CHRA* do not violate any constitutional principles.

F. The Respondents' arguments are an abuse of process

145. The arguments raised by the respondent have been repeatedly adjudicated in multiple *fora* and found to be invalid. For example, the question of whether s. 13 violates the *Charter* has been addressed by the Supreme Court in *Taylor, supra*, and by the Tribunal in *Citron v. Zundel, supra* (ss. 2 and 7 of the *Charter*), *Nealy v. Johnston*, *supra* (s. 2(a) of the *Charter*), and *Schnell v. Machiavelli*, *supra* (s. 2(b) of the *Charter*). In two of these cases, the application of s. 13 to the Internet was specifically examined. Section 13 of the *CHRA* has been consistently and repeatedly found to be constitutionally sound.

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[151] *Citron v. Zundel, supra*

[152] *Ibid.*

[153] *Blencoe, supra*

[154] *Ibid.*

146. While the precise conditions for issue estoppel may not be met in this case, Mr. Lemire is certainly violating the spirit of the doctrine as described by the Supreme Court:

> An issue, once decided, should not generally be re-litigated to the benefit of the losing party and the harassment of the winner.[155]

147. Issue estoppel occurs when the same question has been previously decided, the judicial decision that answered it is final, and the parties to the judicial decision or their privies are the same.[156]

148. It is submitted that the first two conditions of the test are met in this case. With regard to the third, the parties may be described as having mutual interests. Mutuality is defined on a case-by-case basis, as the Ontario Court of Appeal has noted:

> It would seem that the law in this area is continuing to evolve [...] The rules and categories are supple and take shape in light of the exigencies of the case. The absence of mutuality does not invariably preclude giving preclusive effect to a prior determination.[157]

149. In this case, the parties are closely connected with those involved in the previous proceedings involving the constitutionality of s. 13. Mr. Lemire sought and was denied status as an intervenor in *Citron v. Zundel*[158], and has been found by the Federal Court to be a near associate of Mr. Zundel.

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[155] *Danyluk v. Ainsworth Technologies Inc.*, [2001] S.C.J. No. 46, 2001 SCC 44

[156] *Danyluk, supra*

[157] *Franco v. White*, (2001) 53 O.R. (3d) 391 at para 45

[158] *Citron v. Zundel, supra*

In fact, Mr. Lemire is one of three previous s. 13 litigants[159] found by the Federal Court to be connected to Mr. Zundel's activities.

150. Mr. Paul Fromm of the Canadian Association for Free Expression, an intervenor in this case, has testified about his previous interventions to support constitutional attacks in *Citron v. Zundel, supra* and *Schnell v. Machiavelli, supra*.[160] He also gave testimony about his representation of various s. 13 litigants, including Glen Bahr and Western Canada For Us, Terry Tremaine, Jessica Beaumont, B.C. White Pride and the Canadian Heritage Alliance.[161]

151. In the course of his multiple appearances before the Tribunal, Mr. Fromm, who is not a lawyer, has put forward arguments on free speech and the public vs. private sphere in *Warman v. Tremaine*.[162] These arguments are also being raised in the current case, despite their dismissal in other s. 13 cases. Another of Mr. Fromm's clients, Glenn Bahr, is on record as intending to mount a constitutional challenge of s. 13 as well,[163] and Mr. Fromm testified that the only reason he did not do so was because of the cost of procuring an expert.[164]

152. Mr. Douglas Christie of the Canadian Free Speech League, an intervenor in this case, has also represented many former s. 13 litigants, including John Ross Taylor, Canadian Liberty Net and Tony McAleer, Ernst Zundel,

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[159] The others are Tony McAleer (*Payzant v. Tony McAleer, Canadian Liberty Net and Harry Vaccaro*, [1994] C.H.R.D. No. 4, (1994), 26 C.H.R.R. 271) and Terry Long (*Nealy v. Johnston, supra*, another constitutional challenge of s. 13), as identified in *Re Zundel*, 2005 FC 295, at para 29

[160] Transcript of Paul Fromm, March 1/07, p. 4229, Lines 11-25, p. 4239, Lines 2-21, p. 4240, Lines 22-25, p. 4241, Lines 1-5

[161] Transcript of Paul Fromm, March 1/07, p. 4235, Lines 2-25, p. 4241, Lines 6-9, p. 4262, Lines 13-16

[162] *Warman v. Tremaine, supra*, at paras 101 and 123

[163] *Warman v. Bahr*, 2006 CHRT 15, at paras 2-4 and 8

[164] Transcript of Paul Fromm, March 1/07, p. 4256, Lines 1-25 and p. 4257, Lines 1-14

Machiavelli and Associates Emprize[165], James Keegstra[166] and Malcolm Ross.[167] The *Taylor* case is the leading authority on the constitutionality of s. 13, yet Mr. Christie raised the same constitutional issues in *Citron v. Zundel, supra* and *Schnell v. Machiavelli, supra* and continued to advance similar arguments in *Payzant v. McAleer*[168] and *Khaki v. Peterson.*[169]

153. The repetition of the same rejected arguments about the same legislative provision results in much public expenditure in relation to an issue that has previously been adjudicated by the Courts and the Tribunal. Section 13 of the *CHRA* has repeatedly been found to comply with the Constitution.

154. Much of Mr. Lemire's argument is that the settled law on this subject should be reconsidered. It is submitted that he has submitted no new evidence or legal analysis to substantiate his position. Re-litigating decided issues in this manner amounts to an abuse of process.

[165] Transcript of Paul Fromm, March 1/07, p. 4218, Lines 9-21, p. 4221, Lines 17-25, p. 4222, Lines 1-25, p. 4223, Lines 1-25, p. 4224, Lines 1-25, p. 4225, Lines 1-25, p. 4226, Lines 1-25

[166] *Keegstra, supra*

[167] *Ross, supra*

[168] *Payzant v. McAleer*, supra

[169] *Khaki v. Canadian Liberty Net*, T.D. 17/93, [1993] C.H.R.D. No. 17

G. Nature of Order Sought

155. The Attorney General of Canada seeks an order dismissing the Respondent's motion for a declaration that ss. 13, 51(1) and 54(1.1) are inconsistent with the *Canadian Charter of Rights and Freedoms*.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Ottawa, May 9, 2008

Alysia Davies PER
Simon Fothergill

Alysia Davies
Alysia Davies