

**Canadian Human Rights
Tribunal**



**Tribunal canadien des
droits de la personne**

BETWEEN:

MARK SCHNELL

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

**MACHIAVELLI AND ASSOCIATES EMPRIZE INC.
and
JOHN MICKA**

Respondents

- and -

CANADIAN ASSOCIATION FOR FREE EXPRESSION INC.

Interested Party

REASONS FOR DECISION

MEMBER: J. Grant Sinclair

T.D. 11/02

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I. INTRODUCTION

[1] The complainant, Mark Schnell, is a 34-year-old gay man who resides in Vancouver, British Columbia. On April 29, 1999, Mr. Schnell filed a complaint with the Canadian Human Rights Commission against Machiavelli and Associates Emprize Inc. (“Machiavelli”). He alleged that Machiavelli discriminated against him based on his sexual orientation by communicating messages on a website at www.citizensresearchinst.com (“Website”), which are likely to expose homosexuals to hatred and contempt, in contravention of s. 13 of the *Canadian Human Rights Act*.

[2] On March 2, 2000, Mr. Schnell filed a second complaint against John Micka, alleging that Mr. Micka discriminated against him on the basis of his sexual orientation by communicating messages on the Website likely to expose homosexuals to hatred and contempt contrary to s. 13 of the *Act*. Mr. Schnell filed the complaint against Mr. Micka after he learned that Mr. Micka created and maintained the Website and was responsible for the content of its messages. Mr. Schnell filed his complaints because, in his view, the Website contained numerous statements equating homosexuality with pedophilia, bestiality and other repugnant behaviour.

[3] Subsequent to Mr. Schnell’s complaints, the Commission amended the complaints to include retaliation under s. 14.1 of the *Act*. After Mr. Schnell filed his complaints, he was identified on the Website which described him as a “gay man”. The allegation was that this was done to retaliate against him for making the complaints.

[4] At the outset of the hearing, the Commission withdrew the s. 14.1 retaliation complaint so the Tribunal considered only the alleged violation of s. 13(1) of the *Act* and its constitutionality.

[5] On March 19, 2001, the Canadian Association for Free Expression Inc. applied to the Tribunal for interested party status. According to its application, CAFE is an incorporated non-profit, educational organization, dedicated to promoting and maximizing the guarantees of freedom of speech, expression and

assembly under the *Canadian Charter of Rights and Freedoms*. The Tribunal granted CAFE interested party status, but limited its participation to the question of the constitutionality of s. 13(1) of the *Act*.

II. FACTS LEADING TO THE COMPLAINT OF MARK SCHNELL

[6] Mr. Schnell first learned of the Website on June 22/23, 1998, when a friend told him about the Website and gave him the address. He accessed the Website using a dial-up telephone modem. According to Mr. Schnell, at that time, the Website consisted of the main page and five other pages.

[7] The main page identified the Website as the Citizens Research Instrument and contained links to the other pages. The main page also had a counter, which recorded the number of visits to the Website. Mr. Schnell considered comments on some of the linked web pages to be derogatory of homosexual men and lesbian women, of equating homosexuality with pedophilia, bestiality and depicting homosexuals having an agenda to lure and abuse children.

[8] Mr. Schnell's initial reaction was one of shock and disgust that someone could make what he considered to be untrue comments about homosexual men and lesbian women. It was a concern to him because all his life he has experienced prejudice and derogatory comments and has been subjected to homophobia on a regular basis.

[9] Mr. Schnell did a domain name search for citizensresearchinst.com on June 27, 1998. The search results showed that it was registered on December 11, 1997 by Machiavelli & Associates Emprize Inc., 2906 Argo Place, Burnaby, British Columbia. Ken Fast was listed as both the billing contact and the administrative contact.

[10] Mr. Schnell also testified that between April 29, 1999 and March 2000, he visited the Website at least one hundred and fifty times and has continued to monitor the Website on a bi-weekly basis. Although he considers portions of the Website to be offensive, his explanation for doing so is to ascertain if there has been any additions to the Website.

III. CREATING THE WEBSITE

[11] Machiavelli, the registrant of the domain name citizensresearchinst.com, was incorporated under the *Company Act* of British Columbia on May 3, 1994. The Register of Members shows Joanne Barbara Vestvik as the only shareholder of Machiavelli, holding ten shares. She is the sole Director, and is the President and Secretary of the company. Ms. Vestvik's address as shown on the Register is 2906 Argo Place, Burnaby, British Columbia.

[12] Mr. Micka testified that Ms. Vestvik is his associate. 2906 Argo Place, Burnaby, is a residential condominium and he lives there from time to time. Mr. Micka also has an office at this address.

[13] According to Mr. Micka, he is solely responsible for the content of the Website. He writes the material and gives it to Ken Fast, who Mr. Micka said is the Webmaster for the Website. Mr. Fast designed the Website at the direction and with the approval of Mr. Micka, who has the final say as to the design and content of the Website and any additions or deletions that are made to it.

[14] Ken Fast, whose address is 2374 Lobban Road, Abbotsford, British Columbia, has an account with Rogers Cable. According to Mr. Micka, Mr. Fast used this cable service to upload the Website to Uniserve online.

[15] Uniserve is an Internet Service Provider located in Aldergrove, British Columbia. It provides dial-up connections to the Internet, e-mail services and web hosting services to business and residential customers. Uniserve is the Internet Service Provider that hosts the Website. According to invoices provided by Mr. Micka, Uniserve invoices Machiavelli for hosting the Website.

[16] Mr. Micka does not pay Ken Fast for his Webmaster services. He does pay a fee to Machiavelli for its services which is to reimburse Machiavelli for the costs charged by Uniserve for hosting the Website.

IV. A PERSON OR A GROUP OF PERSONS ACTING IN CONCERT?

[17] Mr. Micka readily admitted that he is responsible for the content of the Website. The evidence also shows that there are a number of actors involved in the Website scenario. They include Machiavelli, Mr. Micka, Mr. Fast and Ms. Vestvik, all of who were responsible, each in their own way, for putting the Website onto the Internet and making it available to anyone who, through one means or another, was able to access the Website. Machiavelli was the registrant of the domain name and engaged Uniserve to host the Website. Mr. Micka is the author of the content of the Website. Mr. Fast is the Webmaster for the Website. He designed it, uploaded it onto the Uniserve server and makes revisions, all in accordance with Mr. Micka's directions. Ms. Vestvik is the sole shareholder, director and officer of Machiavelli. She is the directing mind of Machiavelli and caused Machiavelli to take the actions it did.

A. Conclusion

[18] Section 13(1) talks about "... a person or a group of persons acting in concert ...". In my view, this phrase connotes persons acting inter-dependently to carry out certain plans or actions. On the basis of the above facts, I find that Mr. Micka, Machiavelli, Mr. Fast and Ms. Vestvik were a group of persons acting in concert.

[19] Mr. Fast and Ms. Vestvik are not named as respondents to the complaint. From the beginning of the hearing, Mr. Micka argued that Machiavelli is not properly named as a respondent and the complaint against it should be dismissed. Mr. Micka claims that he is the owner of the Website and as such only he should be the respondent to the complaint.

[20] I do not accept this argument. In my view, s. 13(1) does not require proof of ownership to attract liability. There need only be proof that Machiavelli is one of a group of persons acting in concert. And the evidence shows this to be the case.

[21] Nor should the complaint be dismissed against Machiavelli on the basis of s. 13(3) of the *Act*. For Machiavelli to be exempt under s. 13(3) as Mr. Micka has contended, it must own or operate the facilities of a telecommunications undertaking. Machiavelli had the opportunity at the hearing to offer evidence that it owns or operates a telecommunications undertaking. It did not do so. For this reason, I must reject Mr. Micka's argument relating to s. 13(3) of the *Act*.

V. THE STRUCTURE OF THE WEBSITE

[22] At the hearing all parties agreed that contents of the Website that were downloaded and marked as exhibit HR-4 would be the basis upon which the Website would be assessed for the purposes of s. 13(1). The main page of the Website reads:

WARNING!

This site contains material that is deemed offensive

by homosexual pedophiles and the Canadian Human Rights Commission / Tribunal.

[23] Pages two and three have a number of links to pages within the Website on various topics. Mr. Micka's design objective for the Website was to make it like a newspaper. The links on these pages access different "stories" throughout the Website.

[24] The content of the web pages comes from a variety of sources. These include articles reprinted from various newspapers, information from court records and other public documents, sometimes reproduced without comment, and sometimes with editorial comment written by Mr. Micka.

[25] Included in the links on page two, is a link to **View the Guestbook**. The first page of the Guestbook states:

Guestbook

**Thank you for visiting our pages. Vent your wrath Add to this guestbook we are keeping!
Stand Proud and do not be afraid to speak your mind this guestbook has no rules.**

If you are not a Pedophile

Please write your own thoughts.....

The way <thetruth@citizensresearchinst.com> everywhere, Global -

[26] The Guestbook contains a wide range of comments and opinions from numerous persons who have visited the Website, generally relating to the matter of homosexuality, some pro and some contra. In fact, the Guestbook takes up 20 pages. There are strong expressions of opinion against pedophilia, linking it to homosexuality, and equally strong opinions pointing out that pedophilia is also a heterosexual phenomenon. None of the comments in the Guestbook were written by Mr. Micka.

[27] The page following the Guestbook contains this:

Tell Your Associates About Our Site!

Your E-mail	
Your Friends E-mail	
Your Message	

| Send Mail ! |

[28] Mr. Micka's explanation for including this after the Guestbook is that he wanted other people to advertise the Website for him.

VI. THE OFFENDING WEB PAGES ACCORDING TO THE COMMISSION

[29] The Commission's position is that not all of the material on the Website offends s. 13(1) of the *Act*. More specifically, it is the material found on pages 31, 32, 35, 36, 37 and 41 of the Website ("Offending Pages"). Mr. Schnell agrees with this. These pages form part of exhibit HR-4.

[30] Page 31 is the link from page two of the Website, the link being **The truth about 'pedophilia okay in B.C.' (or Man/boy relations)**. Page 31 has a picture of Svend Robinson, the Member of Parliament for Burnaby, and his same-sex partner, Max Riveron, with the heading, "Gay MP's budget threat". On the same page are comments written by Mr. Micka:

In a perfect world Government pension benefits for same sex "couples" might be considered / In a perfect world there would not be any same sex "couples"

Citizens please try not to vomit while reading the story.

We present it to make you aware that you are losing control of your destiny.

When is enough - enough ? The queers do have an agenda and it's sick.

[See the Story](#)

[31] Page 32 is an article written by Adrienne Tanner, Staff Reporter and reproduced from the Vancouver Sun newspaper. Again, there is a picture of Svend Robinson and his partner. The gist of the article is about Svend Robinson's demands for pensions for same-sex couples and his intention to sue the federal government if pension reform is excluded from the upcoming budget.

[32] Under the picture of Mr. Robinson and Mr. Riveron, Mr. Micka has added the words, "**21 year age difference? Pedophilia?**"

[33] Page 35 is the link from **LIGHT LOAFERS** from page two. The content of page 35, written by Mr. Micka is as follows:

**Welcome to Beautiful British Columbia
Haven for n.d. peeyers, homosexuals and pedophiles-- The province most accepting of
an "alternate lifestyle", and Vancouver the city of "light in the loafers".**

[34] What then follows are excerpts from articles taken from a local newspaper:

In 1983 john michael lewis (an American who was wanted on sexual assault charges in California and Utah relating to young, teenage boys and fled to Vancouver in the mid-70s). pleaded guilty to three counts of gross indecency and three counts of buggery in Vancouver. During the investigation, police searched lewis' home and seized a pile of kiddie porn, including over 3,000 photographs involving boys.

Applications were made to extradite him to face the U.S. charges. lewis was ordered deported following his six-month sentence. lewis then appealed the order, and, following a secret 1985 hearing, the order was set aside. A judge then ordered all the seized material returned to lewis.

lewis promised the immigration appeal board he would deal with the U.S. charges and, on the merit of this promise, the appeal board allowed him to stay in Canada. lewis never honored the promise and fought off attempts by the U.S. government to get him back.

In the interim, lewis solidified his position in Vancouver society. He was even named to the Vancouver Centennial Commission. Despite his record in Canada and despite the outstanding charges in the United States, lewis was granted Canadian citizenship in a bizarre "in-camera" session.

lewis maintains his "alternate lifestyle" in Vancouver "home of the queers"

Mr. Micka then poses the following question:

QUESTION – are all homosexuals pedophiles or are all pedophiles homosexual?

ANSWER – YES

QUESTION – are all homosexual pedophiles school teachers?

ANSWER – NO! some are “men of the cloth”, scout leaders and coaches.

[35] According to Mr. Micka, he did not mean to say that all pedophiles are homosexuals or that all homosexuals are pedophiles. Rather, these questions and answers were designed to get attention. They are hyperbole. They are worded in such a way, he said, that anyone reading them would conclude that the author is having them on.

[36] Page 35 continues:

CITIZENS ALERT

**homosexuals have an agenda!
they are paving the way for legalized pedophilia**

WANT PROOF?

BECOME INFORMED

**INVESTIGATE and LEARN MORE ABOUT THE FOLLOWING PEDOPHILES AND
THEIR JUDGES**

**william bennest and Provincial Court Judge William Kitchen
martin gordon monds and Provincial Court Judge Jakob de Villiers**

**ian cocker and the B.C. Court of Appeal/Supreme Court of Canada
donald poslowsky and B.C. Supreme Court Justice Selwyn Romilly**

[37] Mr. Micka's explanation for these latter comments was that he believed that the sentences given by the Courts relating to those charged under the Criminal Code for sexual offences were too lenient. However, he does not ask those who visit the Website to accept his views. Rather, he is asking them to check and decide for themselves.

[38] Page 36 of the Website, also linked from **LIGHT LOAFERS**, reads as follows:

Fact - last June arbitrator Anthony Hickling ordered the Coquitlam Library Board to rehire a convicted pedophile because, at the time the convicted sex offender was hired, he had not been asked if he had a criminal record. Believe it or not.

Fact - pedophile robert saunders, convicted of assaulting a two year old was moved into a Prince George basement suite in a house where another two year old lived. Not until the youngster's grandmother went public, did provincial probation officers move him.

Fact – paul leroux, a former employee of the Canadian and B.C. Human Rights Commissions, was convicted in 1979 of molesting a boy in Inuvik. Not only did he receive a pardon but also entered public service again. Last June police charged leroux with 32 counts of sexual assault.

Fact – vernon logan was handed an absolute discharge by Provincial Court Judge Brian Saunderson after he had pleaded guilty to possession of child pornography. logan's discharge was upheld by B.C. Supreme Court Justice Kirsti Gill. Judge Saunderson even wrote logan's lawyer and offered him advice on how to conduct the defense.

Fact – Crown Counsel Chris Webber suggested that a conditional sentence would be appropriate for school teacher/principal william bennest.

Fact – disgraced school teacher/principal william bennest and Richard Dopson a registered psychologist who is/was co-chairman of the Family Court in Vancouver were instrumental in bringing you Vancouver's Gay Games in 1990.

Fact – in passing sentence, Judge Kitchen described school teacher/principal bennest as an exemplary citizen whose only "flaw" was his sexual interest in young children. The Judge went on to compare bennest's transgressions to the simple possession of marijuana.

Fact – in Vancouver, police charged only 13 men with attempting to procure sex from a minor between 1988 and September 1997. And only three of those charges resulted in convictions.

In contrast, Saskatchewan laid 15 charges and got one conviction in 1994 alone. Also in 1994, Quebec laid 57 charges and obtained 16 convictions. Furthermore, 13 of the 16 convicted men went to jail, some for up to two years, whereas two of the men convicted in Vancouver escaped a jail sentence altogether and the third was incarcerated for only a month.

OPINION – There appears to be judicial enclaves in Beautiful British Columbia where sex with children is deemed an “alternate lifestyle”.

CONCLUSION -- Despite constant denial, and the homosexual “community” does have an agenda. They want to regress our society back to ancient Greece, where men had “boy toys” and sheep were nervous.

[39] Page 37 of the Website is the link from **EVIL WEB** from page two, entitled, “**the Truth via the Instrument**”, compiled and written by Mr. Micka:

CONGRATULATIONS to the HONOURABLE JUSTICE TYSOE for upholding the decision of the Burnaby School Board, who after sufficient public outrage, decided to suspend william bennest without pay. SHAME on the B.C. Teachers’ Federation for passing a resolution to eliminate “heterosexism” in public schools.

HOORAY for the Surrey School Board for passing a resolution requiring that school administrators, teachers and counselors be informed “that resources from gay and lesbian groups such as GALE or their related resource lists are not approved for use or redistribution in the Surrey School District”.

DOUBLE SHAME on Regional Crown Austin Cullen, who in 1992 reversed the decision to prosecute dr john gossage on charges of sexual assault on a young girl, even though the “disclosure” was excellent from an evidentiary point of view. The family protested the media got involved, as did a lawyer Paul Jaffe, As a result, the attorney general’s ministry appointed a special “ad hoc” prosecutor to review the matter. Peter Leask, who later became the defense counsel to william bennest, got the appointment.

As a result of the investigation by Peter Leask no charges were ever laid.

The doctor applied for and received an “ex parte” order (given with only one side present), prohibiting the publication of his name and silencing the victim family. It took over a year to get that order lifted before dr. john gossage could be named. Once named, other complainants came out, until there were over 40 separate complaints.

TRIPLE SHAME on the College of Physicians and Surgeons who “convicted” gossage in

March '94 only of “unprofessional conduct” relating to an assault on the Mom of the young girl. His license was suspended for six months and he was fined. That’s all Folks. Yet, the college knew of complaints since at least 1988 after being advised in writing by an RCMP officer in Williams Lake. gossage is now practicing in Kamloops.

Remember former teacher/principal robert noyes? How could you forget? He has been granted unescorted day passes from his Montreal jail cell despite being certified a dangerous sexual offender.

[40] This page ends with Mr. Micka’s editorial comments:

WARNING the gay and lesbian “educators” of British Columbia (gale) live and practice a repugnant “lifestyle” into which they intend to lure and abuse our children.

QUESTION How far down the path of debauchery will you allow your society to travel and disintegrate? And what will you do to correct the path?

ANSWER Only you the Silent Majority will eventually decide, provided you take responsibility and action before we lose our dignity completely.

Mr. Micka testified that this is his opinion and he wrote it to draw attention to it. By writing this, he is asking people to visit the GALE Website and inform themselves whether homosexual teachers have an agenda.

[41] Page 41 of the Website:

We have had an overwhelming response to our questions and answers.

QUESTION – are all homosexuals pedophiles or are all pedophiles homosexual?

ANSWER – YES

QUESTION – are all homosexual pedophiles school teachers?

ANSWER – NO! some are “men of the cloth”, scout leaders and coaches.

THANK YOU FOR YOUR INTEREST AND CONCERN

The question should have been “are most homosexuals pedophiles or are most pedophiles homosexual?”

Clearly, there are heterosexual pedophiles such as bishop hubert o'conner whose sordid activities and repugnant behavior is well documented.

For reasons not clear to us, the conventional media refers to "men" such as hubert o'conner as sex offenders, even though they practice pedophilia.

**PEDOPHILIA PRACTICED BY HETEROSEXUALS AND / OR HOMOSEXUALS
IS EQUALLY ABHORRENT**

QUESTION – are all homosexuals pedophiles or are all pedophiles homosexuals?

ANSWER – NO! some pedophiles are heterosexual and should be forced to spend the rest of their time with homosexuals.

QUESTION – is robert noyes

1)a dangerous sex offender? 2)a pedophile? 3)a homosexual pedophile? 4)a heterosexual pedophile?

ANSWER – does it really matter? he currently enjoys free room and board while roaming the streets on unescorted day passes.

the truth is that all pedophiles/child abusers should be shot with a ball of their own shit.

[42] The remaining pages of the Website have a variety of content, some referencing homosexuality and others not. Those pages that do not reference homosexuality include such things as editorial comment on the operations of the Commission, on freedom of speech and the *Charter*. There is a summary of the Commission's investigation report and Mr. Micka's response, as well as answers to questions in writing put to Mr. Micka by a Vancouver reporter as to his position on the complaints. There also are excerpts, of twenty-four, one-liners including two or three references to the gay lifestyle, from a book on Vancouver written by a local radio host entitled, "You Know When You Are In Vancouver".

VII. WHY THE WEBSITE

A. The Evidence of John Micka

[43] Mr. Micka explained the genesis of the Website as follows. A few years ago, Mr. Micka heard that a local Vancouver resident, Terry Simpson, had objected to the powers of the Provincial Child Welfare Agency to remove children from their home into the care of the agency. She had established the Citizens Research Institute and used this as a vehicle to speak out against what she considered the excessive power of the agency. Mr. Micka supported her views and offered to provide a website for her use free of charge. Ms. Simpson declined his offer.

[44] Mr. Micka was spurred on by a local television news story about a Burnaby elementary school principal, William Bennest, who was convicted of possession of pornographic pictures of young boys, all under the age of 10. For this he received only a suspended sentence. A spokesperson for the B.C. Teachers Federation commented that Mr. Bennest had been employed as a teacher for twenty-five years but the Federation had no idea that he was this kind of man.

[45] Mr. Micka's evidence was that he had gone to high school with Billy Bennest and everybody knew "what he was about". Yet, he became an elementary school principal. Right then and there Mr. Micka decided to create an anti-pedophile site because, to use his words, "I was sick and tired of these pedophiles getting away. It was almost like I had a cause."

[46] According to Mr. Micka, his goal in creating the Website was to make the public aware of the ease with which pedophiles appear to manoeuvre, that they appear to have a safe haven in the judicial system. Mr. Micka is against pedophilia and the focus of the Website was to be anti-pedophile.

[47] Mr. Micka agreed that the Website contains repeated references to homosexual pedophiles, yet there are only two references to instances of the sexual abuse of young girls. Mr. Micka's explanation for the disproportionate number of references to homosexual men was because the available information was that the majority of pedophiles are homosexuals. Their actions involve men abusing boys.

VIII. IS THE MATERIAL ON THE WEBSITE LIKELY TO EXPOSE A PERSON OR PERSONS TO HATRED OR CONTEMPT BY REASON OF THE FACT THAT THAT PERSON OR PERSONS ARE IDENTIFIABLE ON THE BASIS OF A PROHIBITED GROUND OF DISCRIMINATION?

A. The Evidence of Dr. Barry Adam

[48] Dr. Barry Adam is a Professor in the Department of Sociology and Anthropology at the University of Windsor, Ontario and has been for 25 years. Dr. Adam received his B.A. (Hons.) in 1972 from Simon Fraser University in Sociology and Political Science and his M.A. and Ph.D. in Sociology from the University of Toronto in 1973 and 1977 respectively. He is currently a University Professor, which is an honorary, distinguished rank above that of full professor.

[49] Dr. Adam teaches primarily in areas relating to social theory. He is the Chair of the Graduate Program in Sociology and the Ph.D. program in Social Justice. The main subjects in these programs are sexuality, gay and lesbian studies and social movements. Social movements are the study of how and why people become organized into groups, and what are the socio-historic conditions that lead people to mobilize in groups, the kind of tactics they employ and why they disappear. The course in sexuality, gay and lesbian studies is multi-disciplinary and covers a wide range of social science research on gay and lesbian people, ranging from anthropological to historical to psychological to sociological studies.

[50] In his courses, Dr. Adam has focussed on the mechanisms by which groups in society come to be subordinated and how individuals in these groups cope with that subordination. Within that context, he has considered gay and lesbian communities as a primary example. The social theory that applies to other target groups, applies equally to gays and lesbians.

[51] Dr. Adam has a very lengthy and impressive resume. For the purpose of qualifying him as an expert, I will refer only to a few things among many that bear on his ability to give expert evidence in this

case. He has published a number of books and articles all of which are listed on his resume and will not be referenced here. His books include “The Survival of Domination”, which was published in 1977. It is a comparative analysis of the research literature on two African American and gay and lesbian persons and how they cope on an everyday basis with discrimination. In 1987, he published “The Rise of the Gay and Lesbian Movement”, which was selected as an outstanding book on the subject of intolerance by the Gustavus Myers Centre for the Study of Human Rights. This book is a general overview of the development of gay and lesbian movements in Europe, North America and the Third World. Dr. Adam co-edited “The Global Emergence of Gay and Lesbian Politics”, published in 1999. This is a compilation of a number of articles on gay and lesbian movements in 16 countries around the world.

[52] In addition to his book publications, Dr. Adam has written a number of articles in refereed academic journals. These include, “Theorizing homophobia” (1998), an overview and comparison of theorizing the sources of homophobia. The article considers theories from a wide range of disciplines, sociology, anthropology, history, and literatures, and the strengths and limitations of each of those theories. “The construction of a sociological homosexual in Canadian textbooks” (1996), focuses on the way in which gay and lesbian people are portrayed in introductory textbooks used in sociology courses. In particular, it looks at what kinds of topic areas they can be found in and where they are absent. “Structural foundations of the gay World” (1985), has as its inquiry, the socio-historical conditions in Western societies that have led to the development of gay and lesbian communities.

[53] Dr. Adam has also contributed chapters in published books, these include “Queer Theory”, in *The Fontana Dictionary of Modern Thought* which concentrates on masculinity and heterosexuality and the ways in which masculinity constructs itself in opposition to homosexuality. “Winning rights and freedoms in Canada” (1993), in *The Third Pink Book* is an overview of the social and legal conditions for gay and lesbian people in Canada, in a book surveying the status for gay and lesbian people around the world. In “Social inequality in Canada” in *Profiles of Canada* (1992), Dr. Adam analysed theories of social inequality in Canadian society.

[54] Dr. Adam is a member of a number of professional associations. He has delivered many papers to these associations in his area of specialization. He is on the editorial board and advisory board of various professional journals and is a peer reviewer for a number of refereed journals, including the Journal of the Canadian Lesbian and Gay Studies Association, the Journal of Homosexuality and the Canadian Review of Sociology and Anthropology.

[55] Dr. Adam has received a number of research grants from Health Canada, the Social Science and Humanities Research Council of Canada, the Ontario Ministry of Health to name a few. He is an adjudicator for assessing applications for research funding for the SSHRC.

[56] Dr. Adams has given expert evidence both before the courts and human rights tribunals involving issues of discrimination under human rights legislation and the *Charter*.

[57] I have considered in detail Dr. Adam's resume and the evidence that he gave at the hearing, both in chief and on cross-examination, as to his qualifications. I concluded that Dr. Adam is qualified to give expert opinion evidence both on discrimination against homosexuals in Canadian society and on the nature and role of messages that equate homosexuality with pedophilia and sexual predation.

[58] Dr. Adam described the social mechanisms of incitement to hatred. As a starting point he referred to two widely accepted historical examples of incitement to hatred, pre-World War II, European anti-Semitism and the "Jim Crow" period of American history, i.e. the period between the Civil War and the 1950's Civil Rights Movement in the United States. From these two classic examples, Dr. Adams suggested that it is possible to perceive a pattern whereby incitement to hatred occurs and this can be extended to gay and lesbian people.

[59] As a starting point, Dr. Adam suggested that humans tend to view themselves as angelic at one end of the spectrum, and animal-like at the other end. Angelic characteristics include reason, compassion, morality whereas animalistic characteristics are associated with the basic human instincts such as aggression, sexuality and lack of control. The social mechanisms that lead to incitement and violence against a target group involve a stripping away of the angelic characteristics and portraying the target group as having these base animal instincts.

[60] According to Dr. Adam, among the classic methods to generate hate against a target group is the language of sexual predation. In his evidence, Dr. Adam referenced the works of leading historians showing the dehumanization of Jews in association with animal characteristics, as sexual predators with overwhelming sexual passions that are out of control and which represent a threat to the larger population. Medieval anti-Semitism portrayed the Jewish male as having monstrous sexual powers, which transformed him into an ogre. The dehumanization of Jews in association with animal characteristics was a major factor in the incitement to hatred and violence against them.

[61] Racism also has been led by similar accusations of sexual predation. African Americans were said to be lacking in intelligence, compassion and morality, were associated with animality and sexual threats. Thus the lynching of African American men was justified on the basis that they were wild beasts with uncontrollable sexual passions and criminal natures. This perception become embodied in the American criminal justice system whereby African American men were much more frequently charged with and convicted of sexual offences. It was also a reason often used to oppose the gaining of civil rights for African Americans.

[62] Dr. Adam also pointed out in his evidence that gay men and lesbian women have similarly been the targets of accusations of sexual predation by hate propagandists. He provided as an example, the McCarthy era in the United States where many gays and lesbians were dismissed from their jobs in the

federal civil service incited through images of “homosexual orgies and palatial surroundings where these people worship at the fleshpots and cesspools of immoral sex demonstration”.

[63] In Dr. Adam’s opinion, a similar social mechanism also operates with respect to the denigration of gay men and lesbians. That is a tendency to dehumanize them by stripping away the characteristics that are associated with the higher faculties and identifying or equating homosexual people with the base animal instincts. Being gay or lesbian is all about sex. It is not about having relationships or having emotional feelings for someone of the same sex.

[64] Dr. Adam reviewed the messages on the Website and referred specifically to the Offending Pages. Within the context of the historical examples provided, his opinion was that these messages show a number of the classic earmarks of incitement to hatred. In these materials, there is the positive and persistent equation of same-sex orientation with pedophilia and the repeated imputation of uncontrolled sexual predation to gay men. He also extended his analysis to the references to bestiality on the Website. Bestiality, sex with animals, falls within the same strategy of identifying a target population with animality and combines the two ideas into one concept.

[65] According to Dr. Adam, this identification with animality has had serious consequences because it has given warrant to treat a sector of the population, gays and lesbians, as animal-like, to treat them the way animals might be treated and, therefore, not fully deserving of civil rights and full participation in a democratic society.

[66] This mechanism furthers the vulnerability of a target group with a number of the consequences such as a vulnerability to violence. Surveys done of the general population and of minority populations, including gays and lesbians, show higher rates of violence are reported in minority populations.

[67] This effect is becoming apparent in the schools where there are numerous examples of harassment of students who are seen to be weak, or males that are seen to be inadequately male or effeminate. Students, who may not be, but who are perceived to be gay are often targeted for harassment in schools.

[68] Youth suicide statistics demonstrate higher rate of suicide among youth who either are gay or who have been labelled as gay. Those who report having experienced continued harassment in school are more likely to have attempted suicide and to have attempted it more than once.

[69] Dr. Adam also gave evidence as to the effect these types of messages have had on the gay and lesbian population. In his opinion, the impact has varied historically. There are eras of relative tolerance, eras of systemic discrimination and sometimes periods of active campaigns of suppression. The effect is reflected psychologically in terms of suicide statistics relating to lesbians and gay men.

[70] The characterization of a target group as more animal-like, as requiring more social control, has led to differences in police practices, a denial of public services and more limited and different opportunities for quality of life and participation in the larger society. In times of systemic discrimination, this has been reflected in negative consequences for employment and accommodation for gays and lesbians; in laws, which have criminalized homosexual activities.

[71] Dr. Adam did not claim that the two classic examples of incitement to hatred were exhaustive. Another example of this social mechanism is the case of the Chinese in Canada at the turn of the century. Around 1906, in Vancouver, there were anti-Chinese riots. Handbills and newspapers were distributed showing images of Chinese men seducing and raping white women. Again, the association of a minority group with sexual predation.

[72] Nor did Dr. Adam assert that every campaign of persecution that has occurred involved accusations of sexual predation. There are some instances of persecution against some groups that don't involve sexual

predation. But there is, as Dr. Adam put it, a tool kit of mechanisms to which are used to incite hatred against a group. One of those tools is the charge of sexual predation.

[73] The question was put to Dr. Adam that if one is exposed to documented homosexual pedophilia, it might well evoke strong reactions that could contribute to directing hate towards the homosexual community. His response was that if one is exposed to documented heterosexual pedophilia, that should likewise evoke strong reactions of hatred towards all heterosexuals. But it does not. His point was that, rather than stereotyping homosexuals, the better approach would be a well-rounded communication about the lives of gay men and lesbians so that people could appreciate that pedophilia is as exceptional among them as it is among heterosexuals.

B. The Evidence of Jennifer Horgos

[74] Jennifer Horgos was called as a witness by the Commission. Ms. Horgos is the Program Coordinator for Youth Services at the Community Centre Serving and Supporting Lesbian, Gay, Transgendered, Bi-Sexual People and their Allies. She has a B.A. in Women's Studies, in History and Education and an M.A. in Curriculum Development. She specialized in sexuality education for her M.A. degree.

[75] The Centre was incorporated in December of 1984, its mission statement being to provide support to lesbian, gay, bi-sexual, transgendered people and to counter the effects of homophobia and transphobia through education and awareness raising. The Centre provides a safe place for people to call in or to visit in person to meet peers and to get information. The Centre also works with other agencies in the community and offers educational workshops on gay and lesbian issues and homophobia. It is funded through a variety of government sources and through fund raising. The Youth Services Program deals with the age group 13-25 and Ms. Horgos' responsibilities are to oversee and promote the program and network with other community agencies.

[76] Some of the issues Ms. Horgos deals with are bullying in schools, harassment of young people because people think that they are gay or lesbian or they have come out as gay or lesbian. Often, they may be harassed on a daily basis, and the Centre would provide support such as making sure they understand what their rights are, that they have a right to be safe at school and that teachers and other staff have a responsibility to ensure schools are safe for them. The Centre also provides information to other students who do not identify as gay or lesbian, but who are concerned about discrimination and want to know what they can do as individuals.

[77] Often young people come to the Centre because they have nowhere else to go for accurate, non-judgmental information about sexual orientation or gender identity. They face a barrage of negative stereotypes such as that all gay and lesbian people abuse children. They are fearful that they will never be accepted by anybody, that they will spend the rest of their lives alone.

[78] When Ms. Horgos reviewed the Website, her reaction was one of anger that anyone would assume that a person would harm children because of his/her sexual orientation. She was upset and frustrated because in her experience, these types of messages reinforce the negative feelings of young gay persons about themselves and impacts on their mental health. The number one request the Centre gets is for counselling young people who feel that they can not deal with these types of negative messages. A large number of her clients have reported suicidal feelings at times or have attempted suicide. Many of them have drug and alcohol problems.

[79] Ms. Horgos was extensively cross-examined on the question of homophobia and hate. On the basis of her knowledge and experience, she has concluded that one can be homophobic and not necessarily hate homosexuals. But the link is that people who say that they are homophobic and who commit hateful acts against gay or lesbian persons, use as their excuse their fear of homosexual people.

[80] Ms. Horgos' contacts with young people with whom she has worked with in school workshops and who identify as heterosexual, would say things like "we beat that guy up because we thought he was a fag, because we thought he was going to hit on us. We were really afraid he was going to come after us." They use that as their excuse for having committed an act of violence. In her view, homophobic fear becomes hate when it threatens either the physical or emotional safety of someone who is gay or lesbian. For example, young people who have not been physically assaulted, but do not feel comfortable or safe going back to school because they are constantly taunted for being gay or lesbian.

[81] Ms. Horgos testified that she reviewed the Website, but she did not become hateful. There is nothing on the Website that caused her to hate anyone. Rather her concern was that others reading the Website material may do harm to a gay or lesbian person. For example, Ms. Horgos referred to the comments on page 31 of the Website "In a perfect world Government pension benefits for same-sex couples might be considered/In a perfect world there would not be any same sex couples". This made her fearful. She wondered to what lengths a person who wrote or reads these comments would go to ensure that there are not any same-sex couples.

[82] Ms. Horgos agreed that if she had accessed the Website and read the first page containing "WARNING: This site contains material that is deemed offensive by homosexual pedophiles and the Canadian Human Rights Commission/Tribunal", she would not have continued to read on. This is because she is familiar with these types of messages and would know what was to follow. However, she is concerned that other people reading this Website may do harm to people who are gay or lesbian, because of the statements on this Website.

[83] Ms. Horgos was asked, on cross-examination, to give an example of a message that is likely to expose a person, any person, to hatred or contempt. She gave as an example the messages on the Website that associated homosexuality with pedophilia. It may also have an impact or effect on persons who may

not be gay or lesbian, but who believe the gay stereotype and cause harm to gay or lesbian persons because of that misinformation.

[84] In addition to the possibility of physical harm, for Ms. Horgos, the consequences for a gay or lesbian person reading negative materials about homosexuals are that they themselves feel shameful, they feel negatively about themselves, it takes away from their self-esteem. This can lead to self-destructive behaviour such as drug and alcohol use, getting into exploitive relationships, depression and suicide. These are some of the impacts that she has seen on the young people that she works with when they are exposed to negative or hateful messages.

C. Conclusion

[85] The meaning of the words, “hatred”, “contempt” and “expose”, have been considered in decisions of the Canadian Human Rights Tribunal, the Federal Court of Canada and the Supreme Court of Canada.

[86] In the first case dealing with s. 13(1) of the *Act*, *Taylor and the Western Guard Party v. Canadian Human Rights Commission and Attorney General of Canada*¹, the Human Rights Tribunal referred to the Oxford Dictionary as a source, defining “hatred” as:

active dislike, detestation, enmity, ill will, malevolence.

and “contempt” as:

the condition of being condemned or despised; dishonour or disgrace.

“Expose” is a more passive word as opposed to “incite” and indicates that an active effort or intent on the part of the communicator or a violent reaction by the recipient is not envisaged. Rather, expose means to

¹ (1979), T.D. 1/79

leave a person unprotected; to lay open to ridicule, censure or danger; creating the right conditions for hatred or contempt to flourish leaving the identifiable group open or vulnerable to ill feelings or hostility or putting them at risk to be hated.

[87] The Human Rights Tribunal in *Nealy v. Johnston*² when dealing with a complaint under s. 13(1) of the *Act* accepted these definitions and elaborated somewhat on “hatred and contempt”. In the Tribunal’s view, hatred involves feelings of extreme ill will towards another person or group of persons. To say that one hates another means that one finds no redeeming qualities in the latter. “Contempt” suggests looking down upon or treating as inferior the object of one’s feelings. This reflects the dictionary definition of despise, dishonour or disgrace. But, “hatred” is not co-extensive with “contempt”. Hatred in some instances may be the result of envy of superior qualities such as intelligence, wealth and power, which contempt, by definition, cannot be.

[88] The *Nealy* Tribunal also went on to say that the use of the word ‘likely’ in s. 13(1) means that it is not necessary to prove that the effect will be that those who hear the messages will direct hatred or contempt against others. Nor is it necessary to show that, in fact, anyone was so victimized.

[89] *Taylor* was appealed to the Supreme Court of Canada³, the main issue being the constitutionality of s. 13(1) of the *Act* relative to the s. 2(b) of the *Charter*. The Supreme Court, in concluding that s. 13(1) did not contravene the *Charter*, endorsed the *Taylor* and *Nealy* definitions of hatred and contempt. The Court concluded that s. 13(1) refers to unusually strong and deep-felt emotions of detestation, calumny and vilification.

[90] Moving now to a review of the Offending Pages, pages 31 and 32 are from the link on page 2, “The truth about pedophilia in B.C. (or Man/boy relations)”. There is nothing on these two pages that has

2 (1989), 10 C.H.R.R. D/6450.

3 [1990] 3 S.C.R. 892

anything to do with pedophilia. Page 31 has a picture of Svend Robinson, M.P. and his same-sex partner and information that Mr. Robinson has demanded pension benefits for same-sex couples. Mr. Micka's editorial comments are that "in a perfect world there would not be any same sex couples"; "citizens try not to vomit while reading the story"; "the queers do have an agenda and it's sick".

[91] Page 32 again has a picture of Svend Robinson and his partner and a newspaper article detailing his position on same-sex pension benefits. Under the picture is a comment pointing out the 21-year age difference between Robinson and his partner and asking the question, "pedophilia?"

[92] Page 35 refers to "Beautiful British Columbia, haven for n.d. peeyers, homosexuals and pedophiles - - the province most accepting of an 'alternate lifestyle'." It references the case of John Lewis, an American wanted on sexual assault charges relating to young boys in the United States, who fled to Vancouver.

[93] Mr. Micka's editorial comment is that "Lewis maintains his 'alternate lifestyle' in Vancouver, 'home of the queers'", associating alternative lifestyles with homosexuality and characterizing homosexuals as "queers".

[94] Then follows two questions: "are all homosexuals pedophiles or are all pedophiles homosexual? Answer – yes. Question: Are all homosexual pedophiles schoolteachers? Answer – No! Some are men of the cloth, scout leaders and coaches. Citizens alert, homosexuals have an agenda. they are paving the way for legalized pedophilia". Although Mr. Micka described these questions and answers as hyperbole and suggested that no one would take them seriously, I have a different view. These questions and answers establish a clear link between homosexuals and pedophilia. This is reinforced by the comment that homosexuals seek legalized pedophilia.

[95] Page 36 of the Website has a number of examples of persons charged and convicted of child pornography or pedophilia. The listing of these cases is not in itself problematic. But what is of

consequence are the editorial comments that “there appear to be judicial enclaves in Beautiful British Columbia where sex with children is deemed an alternate lifestyle. Conclusion - Despite constant denial, the homosexual ‘community’ does have an agenda. They want to regress our society back to ancient Greece where men had ‘boy toys’ and sheep were nervous.”

[96] These comments reiterate the notion that the homosexual lifestyle involves sex with children and again ties this lifestyle directly to the homosexual community. And it goes one step further, associating homosexuality with bestiality.

[97] Page 37 references four stories: the Court upheld suspension by the Burnaby School Board of high school principal, William Bennest for possession of child pornography; the failure to prosecute Dr. John Gossage on charges of sexual assault on a young girl; the resolution of the Surrey School Board restricting the distribution by GALE of its resources list in the Board’s schools. And, the fact that former teacher/principal Robert Noyes was granted unescorted day passes from a Montreal jail. These stories are followed by: “Warning the gay and lesbian ‘educators’ of British Columbia (gale) live and practice a repugnant ‘lifestyle’ into which they intend to lure and abuse our children. Question: how far down the path of debauchery will you allow your society to travel and disintegrate?”

[98] These stories refer to both cases of heterosexual and homosexual pedophilia. Yet the warnings target only gay and lesbian educators in B.C., equating them with debauchery and child abuse.

[99] The material on page 41 of the Website restates the question and answer from page 35 and points out that pedophilia practiced by heterosexuals and/or homosexuals is equally abhorrent. The question is then posed: “Are all homosexuals pedophiles or are all pedophiles homosexuals?” “Answer: No! Some pedophiles are heterosexuals and should be forced to spend the rest of their time with homosexuals.” To suggest that heterosexual pedophiles should spend the rest of their lives with homosexuals again links all homosexuals with pedophilia.

[100] Based on this review, it is my conclusion, that the Offending Pages are directed to and target the homosexual community. The Website is not so much anti-pedophile as it is anti-homosexual. Even so, the question remains whether the contents of the Offending Pages are likely to expose a person or persons to hatred or contempt who are identifiable on the basis of a prohibited ground of discrimination.

[101] The Offending Pages exhibit the classic mechanisms described by Dr. Adam historically used to generate hatred against a target group. The homosexual lifestyle is persistently equated with sexual predation. The messages attribute to gay men uncontrollable sexual passion and aggression. Homosexuals are not like normal people. Being homosexual is all about and only about sex. It is not about having relationships or having emotions for someone of the same sex.

[102] But I go beyond Dr. Adam's evidence to the definitions of "hatred" and "contempt" as accepted by the various Human Rights Tribunals and by the Supreme Court of Canada. If the test is whether an identifiable group, the homosexual community, is likely to be subjected to extreme ill will or detestation; will this group be viewed as having no redeeming qualities or be looked down upon because of these materials, then, in my opinion, the Offending Pages meet the tests.

[103] A summary of the comments on the Offending Pages makes it clear that this is so. "In a perfect world there would not be any same sex 'couples'." "Please try not to vomit while reading the story." "The queers do have an agenda and it's sick." "Citizens alert, homosexuals have an agenda! They are paving the way for legalized pedophilia." "Warning: the gay and lesbian 'educators' of British Columbia (gale) live and practice a repugnant 'lifestyle' into which they intend to lure and abuse our children." "The homosexual 'community' does have an agenda. They want to regress our society back to ancient Greece, where men had 'boy toys' and sheep were nervous."

[104] These comments speak of extreme ill will, detestation, enmity and contempt towards homosexuals. These comments do not admit of any redeeming qualities in gay men or lesbian women. In my opinion, the materials contained in the Offending Pages are likely to expose gay and lesbian persons to hatred and contempt.

IX. IS THE MATERIAL ON THE WEBSITE COMMUNICATED TELEPHONICALLY REPEATEDLY IN WHOLE OR IN PART BY MEANS OF A TELECOMMUNICATIONS UNDERTAKING WITHIN THE LEGISLATIVE AUTHORITY OF PARLIAMENT.

A. The Evidence of Jim Nylander

[105] The Commission called Jim Nylander as witness. Mr. Nylander has a B.Sc. in Computer Science and is a certified Information Systems Security Professional. Mr. Nylander has been employed as an Information Security Specialist with Telus Communications for over 19 years. His responsibilities at Telus are to conduct or assist investigations regarding access to the Internet, often pursuant to law enforcement warrants.

[106] Telus is a telecommunications undertaking within the legislative authority of Parliament and is regulated under the *Telecommunications Act*. It provides all aspects of telecommunications, including local, long distance, wireless phone service and Internet services and is part of the national telecommunications network in Canada which is owned by a collection of private and public corporations. According to Mr. Nylander, the Internet is a world-wide, inter-connected network of computers and communications networks, governed by certain agreed upon protocols which encompasses both the World Wide Web and e-mail.

[107] Mr. Nylander prepared three “Internet Connection Conceptual Diagrams” which he used to describe how a computer connects to the Internet. In particular, he explained two processes, a “dial-up connection” and an “ADSL connection”.

[108] Mr. Nylander’s diagrams showed a computer and a telephone located in a residence. Dealing first with a dial-up connection, the diagram shows a computer and a telephone connected through a splitter to the same external telephone line.

[109] The telephone network path followed by the telephone and the computer is the same. When you talk on a telephone, your voice is translated into electrical impulses which are transmitted over the telephone wires. When the computer is connected to the modem it converts digital impulses made by the computer to analog impulses, the same as voice and transmits them over the telephone wires.

[110] Whether it is voice or data, it travels through the telephone lines to the main distribution frame located in a central office/wire center of the telecommunications carrier. From the main frame, it goes into the line equipment. It is the line equipment that provides the dial tone on the telephone network. The voice and data impulses go from there into a voice switch which separates the voice from the data.

[111] The data would continue through the telephone lines until it connects to a series of modems at the Internet Service Provider. When the telephone number rings, the modem at the Internet Service Provider answers, and communicates with the computer modem at the residence where it all started. The connection to the Internet would occur at the point of the Internet Service Provider.

[112] Mr. Nylander also described the operation of an ADSL, Asymmetric Digital Subscriber Line connection. An ADSL connection also uses the same telephone network as a dial-up connection, but allows the use of the telephone and the computer at the same time.

[113] The ADSL Connection follows the same wires and the same path as a dial-up connection to the point of the main distribution frame. At that point, instead of following the voice and data path to the voice switch, it goes through a splitter shelf, which takes off the data portion of the call and routes the data through the data network to the modems located at the Internet Service Provider. As with a dial-up connection, it is at that point that the connection to the Internet would occur.

[114] Mr. Micka's evidence is that Mr. Fast did not use a dial-up connection or an ADSL connection to upload the Website onto the Uniserve server. Rather, Mr. Fast, a Rogers Cable subscriber, accessed Uniserve using a cable connection. Mr. Micka's point was that a cable connection does not use the telephone network so that he did not communicate "telephonically".

[115] Mr. Nylander did not provide any diagrammatic evidence to show how a computer using a cable modem connects to the Internet. However, his testimony was that at some point, using a cable connection to upload the Website to Uniserve, there would be a connection to the telephone network to access the Internet.

[116] Other evidence of Mr. Nylander and the evidence of Sasha Wilson, supports this conclusion. Mr. Nylander carried out what he referred to as a "www.dns411.com" search. This is a website that provides information on Internet addresses. His inquiry showed the numeric address for the Website to be 204.244.185.129. This converts to the alphabetic address, www.citizensresearchinst.com. The Internet protocol is that the numeric address always consists of four sets of numbers. Certain blocks of numerics are assigned to certain countries and to certain companies within these countries. Sub-blocks are then assigned to various Internet Service Providers.

[117] Mr. Nylander also did a "WHO IS" search, which confirmed the search information obtained by Mr. Schnell, namely, that Machiavelli was the registrant of the Website and that Ken Fast was the billing and administrative contact. This search also showed that the Internet protocol numeric block, 204.244.0.0 -- 204.244.255.255 was assigned to Wes Tel Communications (now RSL.Com), who sub-assigned the

numeric address block, 204.244.185.0 – 204.244.185.255 to Uniserve. This sub-block of numeric addresses includes 204.244.185.129, the numeric address for the Website.

[118] Sasha Wilson, the General Manager of Uniserve, testified that Uniserve is a dial-up Internet Service Provider and that Uniserve provides access to the Internet via a dial-up connection. It does so through telephone lines which it leases from RSL.Com (formerly WesTel) and from Telus. RSL.Com is a reseller and holds a licence under the *Telecommunications Act*.

[119] This evidence establishes that uploading the Website to Uniserve, which is a dial-up Internet Service Provider, involves the use of telephone lines. To access the Website through the Internet would also involve the use of the telephone network. Thus, in my opinion, *if* the Respondents are communicating materials or causing materials to be communicated, they are doing so, at least in part, telephonically and by means of the facilities of a federally regulated telecommunications undertaking, being Telus and RSL.Com.

[120] Mr. Micka did not stop there. He argued that by merely uploading the Website onto the Uniserve server, he did not “communicate or cause to be communicated ... any matter ...” He argued that for there to be communication, there must be more than just the passive existence of the Website on the Uniserve server. Connection is not communication. Nothing is being communicated unless and until someone accesses the Website. This can only occur if they are told about the Website or given the Website address by someone and that would not be Mr. Micka.

[121] I am not persuaded by Mr. Micka’s argument. The question that immediately comes to mind is why did he create the Website? The answer, as Mr. Micka put it, is that he was anxious to make a statement. After reading about the lenient treatment handed out to William Bennest, he wanted to make the public aware of the ease with which pedophiles seem to manoeuvre, especially in British Columbia. In fact, Mr. Micka recounted in his evidence that he was somewhat disappointed that a recent newspaper account of Mr. Schnell’s human rights complaints had not made specific reference to the Website address. He wanted

the newspaper to publish the Website address so that the public could inform themselves 100% rather than getting what he considered a slanted Human Rights Commission version.

[122] But even if that was his goal, Mr. Micka testified and argued that he did not “communicate” because he did not publicize the Website address or invite anyone to visit it, apart from a few friends. He took no positive steps beyond uploading the Website onto the Uniserve server. Mr. Micka took great pains through his cross-examination of Mr. Nylander to show that it is not possible to communicate the pages of a website. To demonstrate this, Mr. Micka had Mr. Nylander access the Website and send the main page of the Website using the web browser on the computer. Mr. Nylander agreed he could not do so. Mr. Micka, using this evidence, argued therefore that it is not possible to “communicate or cause to be communicated” the contents of a website using a web browser.

[123] But the evidence in this case shows that the operation of a website does not depend on the publication or knowledge of the website address. The proof is the Guestbook inviting people to give their comments and tell their associates about the Website. There are 19 pages of comments in the Guestbook from people around the world who have responded to this invitation. Obviously these commentators were able to access the Website without any publicity or prompting from Mr. Micka.

[124] That access to a website does not depend on knowing the web address was also made clear both from the evidence of Mr. Nylander and the evidence of Bernard Klatt, a witness called on behalf of CAFE. Mr. Klatt has worked with computer networks and Internet installations for most of his working career. He operates a computer value added, reseller business specializing in networks and Internet services and operated an Internet Service Provider business from 1995-1998.

[125] Mr. Klatt testified that there are many search engines available on the Internet. One of the best known is Google, an Internet search engine that automatically accumulates and discovers website content

and stores it on its server system for retrieval by people who do searches. In fact, Mr. Klatt, using the Google search engine, was able to find and access the Website.

[126] Similar evidence was given by Mr. Nylander. He testified that there are several ways to find or access a website. There are automated processes known as robots that search for websites and links on the Internet. These search robots would find web pages, analyze them, find any names or linkages on the web pages and record this information on a search engine. This is done externally to the website and the person who created the website would have no knowledge or control over this. A website may also be found and accessed is by way of links from one website to another website, which is catalogued in a search engine.

[127] In addition to the fact that Mr. Micka intended to communicate his ideas and opinions and did so, witness the Guestbook responses, I also rely on the decision of the Supreme Court in *Taylor* and the decisions of the Human Rights Tribunals in *Taylor, Nealy* and *Khaki v. Canadian Liberty Net*⁴. All three of these cases involved a telephone message service whereby any member of the public could dial a telephone number and listen to pre-recorded messages. The pre-recorded telephone messages were “passive” like the Website, in the sense that active participation by someone was necessary to access and listen to the pre-recorded telephone messages. I do not see how uploading a website onto the Uniserve server is any less a form of communicating than pre-recorded telephone messages. Just as the Tribunals and Supreme Court considered in *Taylor, Nealy*, and *Khaki* pre-recorded telephone messages to be a communication, I also consider that putting the Website onto Uniserve thereby making it Internet accessible, constitutes a communication.

[128] This conclusion is consistent with the principles of interpretation articulated many times by the Supreme Court that the *Canadian Human Rights Act* is to be given a large and liberal interpretation to avoid defeating the human rights protected by the *Act*. Protected rights must be interpreted broadly,

4 (1993) 22 C.H.R.R. D/347

defences and exceptions are to be applied narrowly. To accept Mr. Micka's argument which focuses on the receiver of the messages rather than the sender of the messages, would serve to defeat the objectives of the *Act*.

[129] Finally, there is use of the word "repeatedly" in s. 13(1). This suggests that s. 13(1) is aimed, not at private communications with friends, but rather a series of messages that form a larger-scale, public scheme for the dissemination of certain ideas or opinions, designed to gain converts from the public. In my opinion, the Website fits this description.

B. Conclusion

[130] I have thus concluded, for all of the above reasons, that the Respondents Machiavelli and John Micka have, with others, acted in concert to communicate telephonically or caused to be so communicated repeatedly, if not in whole at least in part, by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament, matters that are likely to expose a person or persons to hate or contempt by reason of the fact that the person or those persons are identifiable on basis of a prohibitive ground of discrimination, contrary to s. 13(1) of the *Act*.

X. THE CONSTITUTIONALITY OF SECTION 13(1) OF THE ACT

A. The Evidence of Bernard Klatt

[131] Bernard Klatt was the only witness called by CAFE. Mr. Klatt resides in Oliver, British Columbia, and is a Computer Network Consultant and former Internet Service Provider. Mr. Klatt was put forward as a fact witness to recount his experiences of how he came to be characterized as a hate monger and a supporter of website hate messages. The consequence of this was that he was shunned in his community and suffered economically.

[132] Mr. Klatt was the owner of Fairview Technology Center, which, at one time was an Internet Service Provider. Among the websites that Fairview hosted, were websites that were banned or suppressed in foreign countries or were considered to be controversial. Mr. Klatt said that he believes in freedom of expression and did not review the contents of these websites. He did not believe that Fairview should act as a censor of customer website content. The only condition that Fairview imposed was that the website had to be legal in Canada.

[133] Mr. Klatt's troubles began in the summer of 1996 when he received a telephone call and shortly after a letter from Sol Litman of the Simon Wiesenthal Centre in Toronto. Mr. Litman advised Mr. Klatt that certain of the websites that Fairview hosted had materials which Mr. Litman considered to be hate messages supporting white supremacist, anti-Semitic, holocaust denial and anti-visible minority immigration positions. Mr. Litman requested that Fairview stop hosting these websites. Mr. Klatt refused because of his view that he would not act on the basis of someone else's opinion.

[134] Things escalated from there. A number of local organizations cancelled their subscriptions to Fairview's ISP services. He was asked to remove links on the Fairview website to other local organizations. He had to resign from the local Rotary Club. He was forced to move his Internet equipment from the premises of a local business on very short notice and had difficulty relocating it. BCTel, the telecommunications carrier for Fairview's Internet service was pressured to terminate Fairview's contract.

[135] This matter was picked up by various newspapers and media coverage which suggested that the material on the websites reflected Mr. Klatt's beliefs. The town of Oliver was described as the hate capital of Canada and Mr. Klatt was asked by the Mayor of Oliver to discontinue hosting these websites.

[136] Mr. Klatt and Fairview's business activities were investigated by the Attorney General of British Columbia for a possible violation of s. 319 of the *Criminal Code*. The end result was that the criminal

investigation was suspended because of insufficient evidence to support a charge under this section. Mr. Klatt sold his Internet business to a local competitor in 1998. He testified that he never regained his standing in the community and he continued to be treated as an outsider.

[137] I have detailed this evidence because of CAFE's argument that the mere accusation of promoting hate messages, whether valid or not, can have a chilling effect and serious consequences on the alleged promoter, even through there have been no complaints filed under any human rights legislation or any charge brought under criminal legislation.

[138] But I have difficulty understanding the relevance of this evidence to the question of the constitutionality of s. 13(1) of the *Act*. Mr. Klatt was not the subject of a complaint under s. 13(1) or charged under s. 319 of the *Criminal Code*. The source of his problems appears to be the various actors who, in his account, objected to the content on some the websites which Fairview hosted and who caused others to take the actions they did. What is missing is evidence showing a nexus between s. 13(1) and Mr. Klatt's problems. Accordingly, I can not give any weight to his testimony as it relates to the constitutionality of s. 13(1).

B. Section 13(1) of the *Act* and Section 2(b) of the *Charter*

[139] CAFE's position was that s. 13(1) of the *Act* infringes the guarantee of freedom of expression in s. 2(b) of the *Charter*. The Commission does not dispute this, but argued that s. 13(1) is a reasonable limit on freedom of expression which can be justified under s. 1 of the *Charter*.

[140] The Commission sought to do so by reference to the Supreme Court of Canada decision in *Taylor* and in other Supreme Court, lower Court and Tribunal decisions. Other than *Taylor*, none of the authorities referred deal with the constitutionality of s. 13(1) of the *Act*. These cases dealt with the

constitutional validity of s. 319 of the *Criminal Code*, or provincial legislation relating to hate messages or legislation prohibiting certain types of advertising and so on.

[141] My task, however, is not to revisit the whole question of s. 13(1) of the *Act* and s. 1 of the *Charter*. It is much more circumscribed. I am bound by the majority decision of the Supreme Court in *Taylor* which decided that s. 13(1) of the *Act* has no constitutional frailties. Therefore, unless CAFE can distinguish the circumstances of this case from those in *Taylor*, I cannot question that finding.

[142] As the Commission has conceded that s. 13(1) contravenes s. 2(b) of the *Charter*, the focus shifts to the s. 1 analysis. I begin by summarizing the reasons of the Supreme Court majority applying the *Oakes* test under s. 1 of the *Charter*.

[143] The *Oakes* test has two aspects, the legitimacy of the objective of the legislation, and the proportionality of the legislation. To satisfy *Oakes*, the legislative objective of the legislation must relate to concerns which are pressing and substantial in a free and democratic society.

[144] In the view of the Supreme Court, the legislative objective underlying s. 13(1) of the *Act* can be discerned from s. 2 of the *Act*, its purpose section. Section 2 is directed to the promotion of equal opportunity unhindered by discriminatory practices. Parliament has proscribed those activities set out in s. 13(1) for the reason that the dissemination of hate messages has the result of eroding the tolerance and open-mindedness necessary to achieve equality in a multicultural society. This being so, the Court concluded that the objective underlying s. 13(1) is one of pressing and substantial importance sufficient to warrant some limitation upon the freedom of expression offered in s. 2(b) of the *Charter*.

[145] The Supreme Court then turned its attention to the question of proportionality, dealing first with the question of rational connection, i.e. whether there is a rational connection between the infringement of speech and the objective of the legislation. In this regard, the Court concluded that s. 13(1) in conjunction

with the remedial provisions of the *Act*, operates to restrict activities that significantly conflict with the goal of promoting equality and tolerance. Given the deleterious consequences of hate propaganda and the objective of s. 13(1), there can be no doubt that it is rationally connected to furthering the objective of Parliament.

[146] The Supreme Court went on to consider the next aspect of proportionality, minimal impairment, i.e. to satisfy the *Oakes test*, it must be demonstrated that the challenged legislation minimally impairs the *Charter* right in issue. In dealing with this question, the Court had to respond to three arguments. First, that the words “hatred and contempt” are vague and imprecise and do not define the scope of the limitation on freedom of expression. Second, s. 13(1) does not have an “intent” requirement. Third, there is no exemption for truthful statements in s. 13(1).

[147] The Supreme Court rejected all three arguments. As to the vagueness argument, the Court responded by pointing out that human rights is a fundamental law and should be given full recognition through a fair, large and liberal interpretation. In the Court’s view, the content of “hatred and contempt” is informed by Parliament’s objective in enacting legislation of protecting equality and dignity of all individuals by reducing the incidence of harm-causing expressions. Further, and having regard to the definitions given to these words in *Taylor* and *Nealy*, and the objective of the legislation, it was the Court’s opinion that there would be little danger that these words would be applied in a subjective or in an over-inclusive manner.

[148] As to a requirement that there should be an intent to discriminate in s. 13(1), the Supreme Court referred to a consistent line of legal authorities which have established that intent to discriminate is not a precondition under human rights legislation, which is designed to eradicate discrimination or remedy the situation where discrimination has occurred. The Court recognized, however, that individuals may be unaware of or may not have intended the consequences of their communications. Yet they may be caught by s. 13(1) and be subjected to condemnation.

[149] In response, the Supreme Court emphasized the conciliatory nature of the human rights process and the absence of criminal/punitive sanctions. Such legislation in its various stages, seeks to facilitate reform of the discriminatory situation without resort to harsh penalties or incarceration.

[150] First the complaint must first be investigated by the Commission giving the alleged transgressor the opportunity to make representations. The process also invites that person to discontinue the offending practice. If that does not occur, there then must be a determination by a Human Rights Tribunal that there has been a contravention of s. 13(1). Both the Commission's decision to refer and the Tribunal's decision are subject to judicial review. If a discriminatory practice is made out, the only order that a Tribunal can make is a cease and desist order. It is only after that order has been filed with the Federal Court and after being afforded the opportunity to appear at a show cause hearing and being found in a judicial hearing to have disobeyed the cease and desist order, that an offender can be penalized. The maximum penalty that was prescribed at the time of *Taylor* was a \$5,000 fine or one-year imprisonment.

[151] It is this combination of process and remedy that makes the impact of a lack of intent requirement less severe. The result of the application of s. 13(1) will be to stop the discrimination not stigmatize or punish those who discriminate. Within this framework, with the focus on effects and the conciliatory nature of the human rights process, the Supreme Court concluded that an intent requirement was not needed to sustain s. 13(1).

[152] Nor was the Supreme Court willing to accept the argument that s. 13(1) failed the minimal impairment test because it operated to suppress statements which may be truthful or perceived to be truthful. The Court could not find any reason as to why factually accurate statements that are used for no other purpose than to promote hatred against a minority group, should be protected under s. 2(b) of the *Charter*. Section 13(1) furthers a significant government objective and impinges on expression which has only tenuous links to the values underlying the freedom of expression guarantee.

C. Conclusion

[153] In my view, there are two circumstances in this case that were absent in the *Taylor* case. This case involves the use of the Internet, not pre-recorded telephone messages. Secondly, the *Act* has been amended since *Taylor* to provide remedies for a breach of s. 13(1) in addition to a cease and desist order. The Tribunal can now order special compensation to the victim of the discrimination to a maximum of \$20,000. The Tribunal may also impose a penalty of not more than \$10,000.

[154] CAFE argued that extending s. 13(1) to the Internet would severely restrict those with limited resources from effectively communicating their ideas and opinions. A similar argument was made in *Taylor*, that the telephone provides an inexpensive way for persons or organizations with limited resources, to communicate their ideas and information to a large proportion of the public. Section 13(1) may have the effect of depriving them from espousing their ideas.

[155] The Supreme Court dealt with this argument saying that the telephone is ideally suited for the effective dissemination of prejudicial beliefs. Section 13(1) is worded so as to diminish the use of the telephone to spread messages of intolerance and inequality. The messages must be part of a public effort, and not be merely a private discourse, for the dissemination of hate propaganda. Most importantly the messages must be found by a Tribunal to be of the kind that messages are likely to expose persons to hatred or contempt. Thus it would be a mistake to conclude that s. 13(1) suppresses messages that do not promote the harms caused by hate propaganda.

[156] If the telephone is ideally suited to spread prejudicial ideas, the Internet is even better positioned. It is a very public form of communication, inexpensive, easily accessed, and can communicate many messages simultaneously and instantaneously to a world-wide audience. The reasons of the Court apply with even greater force to the Internet.

[157] CAFE also relied on the reference by the Supreme Court to the reasoning in the *Nealy* decision where the Tribunal pointed out that the combination of the telephonic medium and the material is particularly insidious both because of the seemingly personal and private nature of the contact and the fact that there is no opportunity to question the views presented or offer a contrary opinion. CAFE's position was that Internet websites do offer this opportunity and pointed to the Guestbook on the Website as evidence. The evidence is lacking to convince me that the Guestbook can be generalized to all websites. Further, there is no guarantee that all comments or viewpoints submitted to a guestbook or chatline or whatever, will appear on the website which is under the control of the webmaster.

[158] Turning now to a consideration of the implications of the additional remedies, as noted earlier in this decision, the Supreme Court was influenced by the conciliatory nature of the *Act* and because the only remedy was a cease and desist order. The amendments to the *Act* now allow financial compensation and the imposition of a penalty. To this extent, the *Act* has moved somewhat away from the conciliatory and has introduced a very limited but punitive aspect to the process that did not exist at the time of *Taylor*.

[159] However, in my opinion, these amendments do not have the result of pushing s. 13(1) over the line to unconstitutionality. The cease and desist order remains the most effective means and is most closely aligned to achieve the objective of this legislative provision. The special compensation remedy carries with it an "intent requirement". It can only be ordered on a finding that the person who engaged in the discriminatory practice did so wilfully, i.e. with intent, or recklessly, i.e. without regard for the consequences of his/her actions. Similarly, before a Tribunal can impose a penalty, it must take into account the wilfulness and intent of the person who engaged in the discriminatory practice, any prior discriminatory practices, and the person's ability to pay. The Tribunal must consider the nature, circumstances, extent and the gravity of the discriminatory practice. Although the *Act* has shed a little bit of its conciliatory character, in my opinion, the effect has been ameliorated by the requirements to show intent in s. 54(1)(b) and (c) and by the other factors that the Tribunal must take into account.

[160] I have thus concluded that these two factors are not sufficient to distinguish this case from *Taylor* and that s. 13(1) of the *Act* constitutes a reasonable and demonstrably justifiable limit on freedom of expression under s. 1 of the *Charter*.

XI. ORDER

[161] The Commission requested that the Tribunal issue a cease and desist order under s. 54(1)(a) of the *Act*. Mr Schnell agreed with this. He also requested that he be awarded special compensation of \$20,000.00 under s. 54(1)(b) of the *Act* from each of the respondents, and also that each of the respondents pay a penalty of \$10,000.00 under s. 54(1)(c) of the *Act*.

[162] The Tribunal can only award special compensation under s. 54(1)(b) of the *Act* where the victim is specifically identified in the communication that constituted the discriminatory practice. In this case, the communication is the Offending Pages. Nowhere do I find mention of Mr. Schnell specifically in these pages. Therefore, I cannot award him any special compensation.

[163] As to the request for a penalty, in my opinion, s. 54(1)(c) of the *Act* is not to compensate the victim, but is designed more as an expression of society's opprobrium for the discriminator's conduct. Given its mandate under the *Act* to represent the public interest, it is more appropriate that the Commission request such an order. It chose not to do so. I am also reluctant to impose a penalty where there is little or no evidence relating to the factors that the Tribunal must take into account under s. 54(1)(c) of the *Act*.

[164] I order that the respondents John Micka, Machiavelli & Associates Emprize Inc., Joanne Vestvik and Ken Fast, the latter two whom I have found to be acting in concert with John Micka and Machiavelli, cease and desist the discriminatory practice of communicating telephonically or causing to be so communicated repeatedly, in whole or in part, by means of the facilities of a telecommunications undertaking

within the legislative authority of Parliament, matters of the type found in the Offending Pages of Exhibit HR-4 and found on the Website, www.citizensresearchinst.com, and in particular, those matters or messages that associate or equate homosexuality and the homosexual community with pedophilia, bestiality and the sexual predation of children and associate gay men and lesbian women with having an agenda to lure and sexually abuse children and having an agenda to legalize pedophilia.

A handwritten signature in black ink, appearing to read "J. Grant Sinclair". The signature is written in a cursive style with a large initial "J". Below the signature is a horizontal line.

J. Grant Sinclair

OTTAWA, Ontario
August 20, 2002

CANADIAN HUMAN RIGHTS TRIBUNAL

COUNSEL OF RECORD

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DECISION OF THE TRIBUNAL DATED: August 20, 2002

APPEARANCES:

Mark Schnell	On his own behalf
Angela Westmacott Joan Young	On behalf of the Canadian Human Rights Commission
John Micka Branislav Klco	On behalf of Machiavelli and Associates Emprize Inc. and John Micka
Paul Fromm	On behalf of the Canadian Association for Free Expression Inc.