Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Between:

Richard Warman

Complainant

- and -

Canadian Human Rights Commission

Commission

- and –

Marc Lemire

Respondent

- and -

Attorney General of Canada
Canadian Association for Free Expression
Canadian Free Speech League
Canadian Jewish Congress
Friends of Simon Wiesenthal Center for Holocaust Studies
League for Human Rights of B'nai Brith

Interested parties

Decision

Member: Athanasios D. Hadjis
Date: September 2, 2009
Citation: 2009 CHRT 26

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I. Introduction

[1] The Complainant, Richard Warman, claims that the Respondent, Marc Lemire, has repeatedly communicated, or caused to be communicated, hate messages over the Internet, in breach of s. 13 of the *Canadian Human Rights Act*. Mr. Warman alleges that these messages discriminate against persons or groups of persons on the basis of their religion, race, colour, national or ethnic origin, and sexual orientation, because the matter exposes Italians, Mexicans, Puerto Ricans, Haitians, francophones, Blacks, First Nation persons, East Asians, non-Whites, Jews, and homosexuals, to hatred or contempt, within the meaning of s. 13(1) of the *Act*.

[2] Mr. Lemire denies these allegations. He asserts that he did not communicate or cause to be communicated most of the impugned messages, and that, in any event, none of the messages are discriminatory.

[3] Furthermore, Mr. Lemire has made a motion to have s. 13 of the *Act*, and its related remedial provisions (s. 54(1) and s. 54(1.1)), declared inoperative under s. 24(1) and s. 52(1) of the *Canadian Charter of Rights and Freedoms*. He alleges that these provisions of the *Act* violate the freedoms of conscience and religion, as well as the freedoms of thought, belief, opinion, and expression, guaranteed by ss. 2(*a*) and 2(*b*) of the *Charter*. Mr. Lemire also claims that s. 13 violates the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice, which are guaranteed by s. 7 of the *Charter*. He argues that none of these contraventions can be justified under s. 1 of the *Charter*.

[4] Mr. Lemire additionally contends that s. 13 and ss. 54(1) and 54(1.1) of the *Act* similarly contravene ss. 1(*d*), 1(*f*), and 2 of the *Canadian Bill of Rights*.

[5] Apart from Mr. Warman, Mr. Lemire, and the Commission, a number of other parties participated at the hearing into this complaint. The Attorney General of Canada exercised his right, pursuant to s. 57 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, to participate and adduce evidence at the hearing, as well as to make submissions, in respect of the constitutional question.

In addition, the Canadian Association for Free Expression Inc. (CAFE), the Canadian Free Speech League (CFSL), along with a group comprised jointly of the League of Human Rights of B'Nai Brith Canada, the Canadian Jewish Congress (CJC), and the Friends of Simon Wiesenthal Center of Holocaust Studies were granted interested party status in the present case, solely with respect to the issue of the constitutionality of s. 13 and any related provisions of the *Act*.

[6] In the present decision, I will be reviewing s. 13, and its interpretation by the Tribunal and the courts, before proceeding to analyze the impugned material, where I ultimately determine that Mr. Lemire breached s. 13 in only one of the instances alleged against him. I then examine Mr. Lemire's challenge to the constitutionality of s. 13 and ss. 54(1) and 54(1.1) where I find that these provisions are inconsistent with s. 2(*b*) of the *Charter* and that the restrictions imposed on the freedom of thought, belief, opinion and expression are not a reasonable limit within the meaning of s. 1 of the *Charter*.

II. What constitutes a discriminatory practice under s. 13 of the A*ct*?

[7] Section 13 is found within the provisions that set out the proscribed discriminatory practices under the *Act*, and states as follows:

> Hate messages
>
> **13.** (1) It is a discriminatory practice for a person or a group of persons acting in concert to communicate telephonically or to cause to be so communicated, repeatedly, in whole or in part by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament, any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination.
>
> Interpretation
>
> (2) For greater certainty, subsection (1) applies in respect of a matter that is communicated by means of a computer or a group of interconnected or related computers, including the Internet, or any similar means of communication, but

does not apply in respect of a matter that is communicated in whole or in part by means of the facilities of a broadcasting undertaking.

Interpretation

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

Propagande haineuse

13. (1) Constitue un acte discriminatoire le fait, pour une personne ou un groupe de personnes agissant d'un commun accord, d'utiliser ou de faire utiliser un téléphone de façon répétée en recourant ou en faisant recourir aux services d'une entreprise de télécommunication relevant de la compétence du Parlement pour aborder ou faire aborder des questions susceptibles d'exposer à la haine ou au mépris des personnes appartenant à un groupe identifiable sur la base des critères énoncés à l'article 3.

Interprétation

(2) Il demeure entendu que le paragraphe (1) s'applique à l'utilisation d'un ordinateur, d'un ensemble d'ordinateurs connectés ou reliés les uns aux autres, notamment d'Internet, ou de tout autre moyen de communication semblable mais qu'il ne s'applique pas dans les cas où les services d'une entreprise de radiodiffusion sont utilisés.

Interprétation

(3) Pour l'application du présent article, le propriétaire ou exploitant d'une entreprise de télécommunication ne commet pas un acte discriminatoire du seul fait que des tiers ont utilisé ses installations pour aborder des questions visées au paragraphe (1).

Thus, in order to substantiate a complaint of discrimination under s. 13(1), it must be established that:

- A person or group of persons acting in concert
- communicated telephonically or caused to be so communicated, repeatedly, in whole or in part by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament,
- any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that the person or those persons are identifiable on the basis of a prohibited ground of discrimination.

Section 13(2) specifies that s. 13(1) applies to matter that is communicated by means of the Internet.

[8] How have the courts and the Tribunal construed the term "hatred or contempt"? In *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892 at 902, the Supreme Court framed the issue as relating to the dissemination of "hate propaganda", which the Court said denotes expression that is "intended or likely to circulate extreme feelings of opprobrium and enmity against a racial or religious group". The Court went on to quote with approval the interpretation given to the expression "hatred or contempt" by the Canadian Human Rights Tribunal, in *Nealy v. Johnson* (1989), 10 C.H.R.R. D/6450 at D/6469 (C.H.R.T.). The Tribunal had found that with the word "hatred", the focus is on a "set of emotions and feelings which involve extreme ill will towards another person or group of persons". The Tribunal added that to say one hates another means in effect that one finds no redeeming qualities in that person. The Tribunal noted, however, that the notion does not necessarily involve the "mental process of 'looking down' on another or others", for it is possible to hate someone who is superior to one in intelligence, wealth or power. Contempt is, by contrast, a term that suggests a mental process of "looking down" upon or treating as inferior the object of one's feelings.

[9] The Supreme Court in *Taylor*, at 928, emphasized that the reference to "hatred" in *Nealy* speaks of "extreme" ill-will and an emotion which allows for "no redeeming qualities" in the person at whom it is directed. The Court also noted that "contempt" appears to be viewed as similarly extreme. Thus, the Court concluded, s. 13(1) refers to "unusually strong and deep-felt emotions of detestation, calumny and vilification". The Court pointed out, at 929, that the Tribunal is expected to pay heed to the "ardent and extreme nature of feeling described in the phrase 'hatred or contempt'", and not allow "subjective opinion as to offensiveness" to supplant the proper meaning of the section. *Nealy* also underscored that the use of the term "likely to expose", in s. 13(1), means that it is not necessary to prove that the effect of the communication 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.

[10] Generally speaking, human rights complainants are required to first establish a *prima facie* case of discrimination (*Ont. Human Rights Comm. v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536 at para. 28 ("*O'Malley*")). A *prima facie* case, in this context, is one that covers the allegations made and that, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour, in the absence of an answer from the respondent. Once the *prima facie* case is established, the onus then shifts to the respondent to provide a reasonable explanation for the otherwise discriminatory behaviour. If the respondent does provide a reasonable explanation, the complainant has the burden of demonstrating that the explanation was pretextual and that the true motivation behind the respondent's actions was, in fact, discriminatory.

III. What is the alleged discriminatory material in the present case and does it constitute "hate messages" within the meaning of the *Act*?

[11] Mr. Warman's complaint makes reference only to material found on a website known as "Freedomsite.org". He alleges in the complaint that Mr. Lemire is the owner and webmaster of the website. The material referred to in the complaint consists mainly of postings on the website's message board, made by registered users of the site.

[12] At the hearing into the complaint, however, Mr. Warman and the Commission expanded the impugned matter to include material that was posted on websites called "JRBooksonline.com" and "Stormfront.org". They allege that Mr. Lemire was the registered owner of JRBooksonline.com and thus responsible for its content. With respect to Stormfront.org, they allege that Mr. Lemire posted messages on the website's message board that violated s. 13 of the *Act*.

[13] I will address each of these sets of impugned messages separately.

A. The "JRBooksonline.com" material

[14] As I just indicated, this material was not mentioned at all on the complaint form, which Mr. Warman filed on November 24, 2003. Mr. Lemire received notice of Mr. Warman's human rights complaint from the Commission, in late March 2004. Mr. Lemire's legal counsel (Barbara Kulaszka) replied to the Commission in writing, on April 23, 2004. She noted that all of the material mentioned in the complaint came from the Freedomsite website, and in all but one instance, from the website's message board. Ms. Kulaszka openly acknowledged that Mr. Lemire is the webmaster and owner of the Freedomsite website, adding that he had removed the entire message board from the main Freedomsite website months earlier, prior to receiving notification of Mr. Warman's human rights complaint. As a result, the message board was no longer available on the Internet. She added that her client, Mr. Lemire, had removed the one remaining article on the Freedomsite website referred to in the complaint more recently, after the complaint had been filed. Consequently, none of the material referred to in the complaint was available on the Internet any longer. She therefore expressed her hope that the parties could meet and settle the complaint.

[15] Thus, at this stage, the JRBooksonline.com material still did not form part of the complaint. When and how, then, did this material end up before the Tribunal? Hanya Rizk was the Commission employee assigned to investigate Mr. Warman's complaint. Ms. Rizk testified that on September 13, 2004, she received a telephone call from Mr. Warman. Her investigation into the complaint was still ongoing at the time. He informed her that he had come across the

JRBooksonline.com website, which he said was being operated by Mr. Lemire. Mr. Warman asked the Commission to include the material from the website as additional evidence against Mr. Lemire. According to a memo that Ms. Rizk wrote in her file after the call, Mr. Warman also asked the Commission to "hold off on informing" Mr. Lemire that the Commission knew of the website, "until the police take a good look at it". Mr. Warman sent Ms. Rizk documents in support of these new allegations, on October 20, 2004.

[16] Indeed, the Commission did not inform Mr. Lemire of this new "evidence" or ask him for his comments, prior to the issuance of the investigation report by Ms. Rizk, dated April 14, 2005. Ms. Rizk testified at the hearing that, in retrospect, she should have spoken to Mr. Lemire about these new allegations, before preparing her report. In her investigation report, Ms. Rizk included a section under the heading "Marc Lemire and www.JRBooksonline.com and www.Stormfront.org". She described some of the material that she viewed on the JRBooksonline website. She went on to say that the evidence "appears to support" Mr. Warman's allegations that the material contained "within Marc Lemire's website and *postings through other websites*" (emphasis added) would likely expose persons to hatred or contempt, based on the enumerated grounds of the *Act*. She therefore recommended that the Commission request the appointment of a Tribunal to inquire into the complaint. The use of the plural ("websites") suggests that Ms. Rizk considered the material found on JRBooksonline.com and Stormfront.org as also forming part of the complaint.

[17] After the complaint had been referred to the Tribunal, Mr. Warman and the Commission filed a Joint Statement of Particulars dated December 7, 2005, pursuant to the Tribunal's *Rules of Procedure*. They stated in their Joint Statement of Particulars that "on or about October 2004", Mr. Warman visited the JRBooksonline and Stormfront websites. They then went on to allege that Mr. Lemire communicated, or caused to be communicated, the "material *identified in the complaint* that was observed on the *websites* noted above" (emphasis added). In a subsequent disclosure statement to the Tribunal (October 2, 2006), Mr. Warman indicated that in terms of "hate messaging material", he was going to be relying on the "entirety of the contents of

JRBooksonline" and Mr. Lemire's posting on Stormfront.org, in addition to the Freedomsite material.

[18] Thus, although Mr. Warman had made no mention of JRBooksonline.com and stromfront.org in his complaint, by the time the case was progressing towards a hearing, the Commission and Mr. Warman had added this material to the evidence that they intended to bring forward against Mr. Lemire. No proceedings were taken before the Tribunal to have this material excluded. Accordingly, the Commission adduced evidence, at the hearing, of the JRBooksonline material that Mr. Warman claimed to have viewed in October 2004.

(i) Did the commission establish that Mr. Lemire communicated, or caused to be communicated, within the meaning of s. 13, the material found on the Jrbooksonline website?

[19] Mr. Warman testified that he began researching the JRBooksonline.com website after viewing a posting somewhere on the web by some unnamed person claiming that Mr. Lemire was the owner of that website. On October 11, 2004, Mr. Warman conducted what is known as a "who-is" search on a website called checkdomain.com. He explained in his testimony that a "who-is" search provides access to publicly available information in respect of any website's "registrant" and "administrative contact". Mr. Warman's search showed that the registrant and administrative contact for JRBooksonline.com was Marc Lemire. The email and street addresses shown for Mr. Lemire were identical to those that Mr. Lemire readily displayed on the Freedomsite website. Mr. Warman believed, therefore, that Mr. Lemire was the owner and operator of JRBooksonline.com, and he conveyed his findings to Ms. Rizk.

[20] As I already mentioned, Ms. Rizk did not notify Mr. Lemire of Mr. Warman's new allegations prior to including them in her investigation report of April 14, 2005. On April 25, 2005, Ms. Kulaszka responded to the Commission, with respect to the report. She expressed her surprise at learning that the investigator relied upon new material in the investigation report without having first given Mr. Lemire an opportunity to respond. Ms. Kulaszka followed up with another letter to the Commission on June 3, 2005, in which she explained that Mr. Lemire

was not the owner of JRBooksonline.com, that he had no knowledge of its content, and that he was not responsible for creating or editing any of the material on the website. Ms. Kulaszka elaborated that in December 2000, Mr. Lemire had assisted an individual, whom he had met in the United States, to register the JRBooksonline.com "domain name". Upon receiving the Commission's report, Mr. Lemire contacted the Internet Corporation for Assigned Names and Numbers (ICANN) to "correct" the "inaccurate who-is data" regarding the website. The who-is search now showed that someone named Jonathan Richardson of Orlando, Florida, was the registrant and administrative/technical contact for the website. Mr. Warman verified this new data and discovered, using an on-line map service and the US Postal Service web site, that the street address does not exist. The contact telephone numbers were clearly false (123-123-1234).

[21] The Commission and Mr. Warman submit that the October 2004 "who-is" domain search information constitutes *prima facie* evidence demonstrating that Mr. Lemire was the person or one of a group of persons responsible for the communication of the material posted on the JRBooksonline website. They also claim that no reasonable explanation has been given in answer to this evidence. I am not, however, persuaded by either of these contentions.

[22] To begin with, I do not find that the minimal evidence presented by Mr. Warman to link Mr. Lemire with JRBooksonline.com establishes *prima facie* that Mr. Lemire engaged in the discriminatory practice contemplated in s. 13. The mere fact that the "who-is" registry stated that Mr. Lemire was the registrant and administrative contact for the website does not demonstrate, even on a *prima facie* basis, that he was actually communicating or causing to be communicated the impugned material on the website. I note that an advisory comment that accompanied the "who-is" search results filed in evidence stated clearly that the data was being provided for informational purposes only, regarding "domain name registration records". The who-is registry explicitly stated that it did not guarantee the information's accuracy.

[23] These who-is search documents do not demonstrate that the registrant or administrative contact has control over the content of a website's material, in such a way that he or she could be deemed to be communicating it or causing it to be communicated.

[24] Where the Tribunal has in the past found someone to have communicated material within the meaning of s. 13 through a website under his or her control, these findings were never based solely on the product of a who-is search. (see, for instance, *Warman v. Kyburz*, 2003 CHRT 18 ("*Kyburz*") at paras. 7-8; *Warman v. Warman*, 2005 CHRT 36 ("*Eldon Warman No. 1*") at paras. 16-18; *Warman v. Kulbashian*, 2006 CHRT 11 ("*Kulbashian*") at paras. 65 and following).

[25] Mr. Lemire did admit, through his legal counsel, that he had participated in the creation of the website. Is there indication, however, of any further connection with the website? Mr. Warman did not present any additional evidence other than to suggest that Mr. Lemire must be the communicator given his alleged "lengthy overall involvement of the neo-Nazi movement". Mr. Warman also argued that the website's material is consistent with the hate messages found on the Freedomsite website, which Mr. Lemire readily admits owning and operating.

[26] It is arguable if I have any evidence before me actually documenting Mr. Lemire's "lengthy overall involvement" in the "neo-Nazi movement", but even if I had such evidence, and even if the Freedomsite website were shown to be "consistent" with JRBooksonline, I do not see how these factors would help establish *prima facie* that Mr. Lemire was the person responsible for the posting of the material on the JRBooksonline was Mr. Lemire. The Commission led evidence, derived from data compiled by the Simon Wiesenthal Centre, that between 1999 and 2006, the number of "hateful websites" on the Internet had ballooned from 1400 to over 6000, so Mr. Lemire would not have been alone, if he were to have been found to have posted material that was "consistent" with JRBooksonline.com. Furthermore, as I previously indicated, the Commission and Mr. Warman did not lead any evidence other than the who-is search result linking Mr. Lemire with the JRBooksonline.com website. There is no evidence of his name or other information identifying him appearing anywhere on the website, or of any clickable link to the Freedomsite website or Mr. Lemire's email address, for instance. There is no evidence, for that matter, of any reference to JRBooksonline.com appearing anywhere on the Freedomsite website either.

[27] I find that the evidence adduced by the Commission and Mr. Warman is not, to paraphrase *O'Malley*, complete and sufficient to justify a finding that Mr. Lemire is the operator of the JRBooksonline website, let alone that he communicated or caused to be communicated the matter found on that website. It has therefore not been established *prima facie* that Mr. Lemire committed the discriminatory practice contemplated in s. 13 with respect to the JRBooksonline website. However, even if a *prima facie* case had been established, I would find that Mr. Lemire has provided a reasonable explanation.

[28] Ms. Kulaszka explained in her letter of June 3, 2005, to the Commission, that in 2000, Mr. Lemire had helped someone, whom he had met in the United States, register the website's domain name, and that Mr. Lemire was not the website's owner, nor was he responsible for the material found thereon. Mr. Lemire opted not to testify at the hearing, so the only source for this explanation remains Ms. Kulaszka's letter. Mr. Warman argues that I should draw a negative inference from Mr. Lemire's choosing not to testify. His decision "undermines" his capacity to bring forward any legitimate defence. Mr. Warman called attention to my comments in *Warman v. Kulbashian*, 2006 CHRT 11 at 115, where I held that a Tribunal should not take stock of mere hints or innuendos that a respondent may toss in with his leading questions during the cross examination of other parties' witnesses.

[29] I disagree with Mr. Warman's submission. To begin with, a Tribunal can receive and accept any evidence and other information that it sees fit, whether by oath, affidavit, or otherwise, irrespective of whether the evidence would be admissible in a court of law (s. 50(3)(*c*) of the *Act*). The Tribunal would therefore not be prevented from considering Ms. Kulaszka's letter as evidence in this case. Moreover, Mr. Lemire has actually led evidence through his examination and cross examination of witnesses, to support his explanation. This is not an instance of mere "hints or innuendos". As was pointed out in *Chippewas of Kettle & Stony Point First Nation v. Shawkence*, 2005 FC 823 at paras. 38-46, there is no legal obligation on a decision-maker to draw an adverse inference from a failure to testify. Besides, these are not criminal proceedings. Nothing prevented Mr. Warman or the Commission from summoning Mr. Lemire to testify and answer questions regarding his involvement with JRBooksonline.com

if they believed his testimony would have enabled them to establish that Mr. Lemire's explanation is pretextual (see *Chippewas of Kettle & Stoney Point First Nation* at para 41). I therefore do not find sufficient cause to draw an adverse inference from Mr. Lemire's failure to testify.

[30] Other than the who-is report, there is no evidence demonstrating a link between the JRBooksonline website and Mr. Lemire. Mr. Warman admitted during cross-examination that he never conducted an electronic search on the JRBooksonline website for Mr. Lemire's name, while also acknowledging that he did not recall ever having seen Mr. Lemire's name mentioned anywhere during his examination of the website. This stands in stark contrast to the material regarding Mr. Lemire found on the Freedomsite and Stormfront websites. Mr. Lemire typically identifies his messages with his name in full, and his message board postings usually contain a photograph of himself, rather than a drawing, logo, or other image (avatar) used by most other contributors to message boards. The Freedomsite website contains numerous identified pictures of Mr. Lemire. There are frequent mentions of the street address for the Freedomsite website's operations where donations can be made to help maintain the website. Mr. Lemire also included that address in the Stormfront.org posting that constitutes one of the other impugned hate messages in this case. Mr. Lemire similarly includes his email address containing his full name, in his postings. He is not at all cryptic with respect to his identity. The Commission filed in evidence an on-line petition from a website that is unrelated to this complaint. Mr. Lemire signed the petition with his name in full and listed his email address as "webmaster@Freedomsite.org".

[31] It is thus evident that Mr. Lemire did not hide his identity or his association with the Freedomsite.org website, where all of the material alleged against him in Mr. Warman's signed complaint was found.

[32] On the other hand, there is no evidence before me of Mr. Lemire's name ever appearing on the JRBooksonline.com website. Mr. Warman testified that he personally did not see anything on the website that names Mr. Lemire or indicates that he owns the website.

Mr. Warman also stated that he made no attempt to click on the website's "contact" link to send a message to the website, which could have perhaps provided some clue as to who the website's owner, webmaster, or operator was.

(ii) Bernard Klatt's evidence regarding who-is searches and Jrbooksonline.com

[33] The only evidence that we are left with, therefore, linking Mr. Lemire to JRBooksonline.com, is the October 2004 who-is report containing the contact information for the website's registrant and administrative contact. Bernard Klatt was qualified as an expert witness with respect to the Internet and computers, including functions associated with being an Internet Service Provider (ISP). He testified that who-is searches only definitively indicate whether or not a website domain name is registered with the authoritative body that governs these registrations, ICANN. If the name has not been registered, it is available for someone else to register it. The remaining information that accompanies a domain name registration, however, does not prove who owns the website or uploads content to it, as suggested by the disclaimers that accompany who-is searches, which indicate that the information is provided "as is" without any guarantees as to its accuracy. Ms. Rizk testified that she was told, during her training at the Commission on the use of who-is searches to investigate complaints involving websites, that the results only indicate who *could* be the owner of the site. It was just one of the means to be used in determining the owner of a website.

[34] To demonstrate how unreliable this information can be, two who-is searches were entered into evidence containing information about the domain name registrations of two websites. The who-is searches indicated that Mr. Warman was the registrant of both of these websites. Mr. Warman testified that he had never heard of these websites before. Indeed, as Mr. Klatt explained in his testimony, he witnessed Mr. Lemire create both registrations. Thus, while the who-is searches were indicating that Mr. Warman was the registrant for the domain names of both websites, he was, in fact, not associated with any of them.

[35] Mr. Klatt also testified that he used a "trace route" utility to determine which ISP "hosts" the JRBooksonline.com website. This can be learned from the Internet Protocol (IP) address

(made up of a series of digits) that is assigned to any given website. He found that the JRBooksonline.com address was within the range of IP addresses held or "hosted" by a firm in Dallas, Texas. The IP address for Freedomsite.org does not fall within this range, and in fact, Ms. Rizk testified that when she ran a trace route utility with respect to the Freedomsite website, she discovered that it was being hosted by a firm in Denver, Colorado.

[36] In cross-examination, Mr. Warman acknowledged that Freedomsite.org had a different "look and feel" than the JRBooksonline.com website. The Freedomsite website was more "cluttered", and contained audio and video files, as well as an on-line store and a donation link, all of which were absent from JRBooksonline.com. Mr. Warman described the latter website as being a "fairly straightforward website". Mr. Klatt made a similar comparison as well. He noted that the respective visual presentations of both websites differed significantly. Freedomsite.org used "composted banner images" (where several images appear to be one), JAVA script (which enabled words to be highlighted as the user passed a mouse curser over them), a right hand column format, and a "cascading" style sheet (which controlled how the visual information was presented). In contrast, Mr. Klatt found the JRBooksonline.com website significantly more rudimentary or simple in terms of stylistic elements used in presenting information. It had a relatively long home page, indicating less sophistication, the graphic image positioning was simpler, and it contained large blocks of text on a single wallpaper background image for the whole web page.

[37] These distinctions suggest that the person responsible for the creation of JRBooksonline.com and the posting of its material is not the same as the person responsible for Freedomsite.org (i.e. Mr. Lemire, by his own admission).

[38] The expert evidence of Mr. Klatt was not contradicted by any other evidence led at the hearing. In fact, neither the Commission nor Mr. Warman called any expert in respect of the Internet or computers to testify. I found Mr. Klatt's testimony to be very credible. His answers were straightforward. He was frank in stating that he could not provide any information regarding areas in which he lacked any "in-depth knowledge", including the internal operations

of certain Internet Service Providers in respect of which he was questioned. Mr. Warman argued strenuously in his final argument, however, that I should completely ignore the evidence of Mr. Klatt, principally because of determinations made in previous Tribunal decisions and, in one instance, by the Federal Court. Mr. Warman alleges that these findings "strip Mr. Klatt of any remaining credibility" and should have "brought to an end his ability to testify as an objective witness".

[39] A Tribunal should not, however, refuse to assess the credibility of witnesses before it merely because their credibility was found wanting in another proceeding. As the Saskatchewan Court of Queen's Bench stated in *Huziak v. Andrychuk* (1977), 1 C.R. (3d) 132 (cited with approval in *Canada (Attorney General) v. Grover*, 2004 FC 704 at para. 44; *Grover v. National Research Council of Canada*, 2009 CHRT 1 at para. 103):

> The fact that a judge disbelieves a witness in one case does not necessarily mean that he will disbelieve the same witness if he appears in another case.…Each case stands alone.

[40] Besides, upon closer examination, it is clear that the prior decisions did not "strip" Mr. Klatt of any credibility. In *Citron v. Zündel* (2002), 41 C.H.R.R. D/274, Mr. Klatt testified as an expert in the field of telecommunications and the Internet. His evidence apparently centred on the issue in that case of whether communications by "telephony" encompassed Internet communications. That case had arisen prior to the amendments to the *Act* that explicitly extended the application of s. 13 to the Internet. Mr. Klatt's evidence was apparently contradicted by that of an expert witness called by the Commission. The Tribunal preferred the Commission witness's evidence over Mr. Klatt's, having found the latter to be an advocate for the respondent's proposition (i.e. that telephonic communications were limited to the transmission of voice or sound), as well as argumentative, evasive, and unable to answer elementary questions in his field. In contrast, Mr. Klatt did not display any of these attributes in his testimony before me. Moreover, as I already stated, his opinion evidence before me was not contradicted. It also related to an area of technical expertise that differed to some extent from the matters dealt with in *Citron*.

[41] Mr. Warman also referred me to the Tribunal decision in *Schnell v. Machiavelli*, (2002), 43 C.H.R.R. D/453, which sets out, according to Mr. Warman, Mr. Klatt's "business association with hate websites". This "association" was equally explored during Mr. Klatt's cross-examination before me on his qualifications as an expert. The excerpt from *Schnell*, quoted by Mr. Warman, explains that in the mid-1990's, Mr. Klatt had agreed to allow his ISP business to host certain websites that were controversial or banned in other countries, because he believed in freedom of expression (*Schnell* at para. 132). Certain groups (including the Simon Wiesenthal Centre) mobilized to prevent him from continuing to offer his services to these websites. Mr. Klatt ended up selling his business and claimed that he lost his standing within his community. This evidence was also led before me during Mr. Klatt's cross-examination and I have taken it into account in making my findings on his credibility.

[42] Mr. Warman also mistakenly asserted in his submissions that I had previously found Mr. Klatt's credibility lacking in *CRARR v. www.bcwhitepride.com*, 2007 CHRT 20. In fact, this was a preliminary ruling issued by another Tribunal member, Pierre Deschamps, who found Mr. Klatt to have been "evasive in his answers to his links and association with the white supremacy movement" (at para. 53), and in elaborating upon his relationship with the respondent in that case. Similar issues did not develop before me in the present case. Mr. Klatt was open and forthcoming in his evidence in chief and in cross examination, regarding his connections with any of the individuals about whom he was questioned, including CAFE's representative at the hearing (Paul Fromm) and Mr. Lemire. I did not find Mr. Klatt's responses evasive.

[43] Finally, Mr. Warman raised certain comments by the Federal Court in *Re: Zündel*, 2005 FC 295 at para. 41, where the Court stated:

> If, as Mr. Zündel claims, it is not a good idea to use websites to disseminate messages of racial hatred and incite violence in the pursuit of White Supremacist objectives and that it is not a good idea to post on the Internet a practical guide to Aryan revolution which included chapters on assassinations, terror bombings, sabotage and racial wars, then why would he qualify Bernard Klatt, the man responsible for posting this guide, as a gentle person, and maintain contact with Mr. Klatt over the years?

I do not see how these remarks are particularly helpful in assessing Mr. Klatt's credibility as an expert on the Internet and computers, in the present case.

[44] Moreover, the above excerpt is from a decision by the Federal Court determining the reasonableness of a security certificate issued by the Minister of Citizenship and Immigration and the Solicitor General of Canada (the Ministers) against Ernst Zündel, in 2003, pursuant to the *Immigration and Refugee Protection Act*, S.C., 2001, c. 27. The Court stated that "based on reliable evidence", which was provided *in camera*, it believed that Mr. Zündel maintained "close contacts" with Mr. Klatt, whose firm was providing Internet service to "at least 12 White supremacy and hate groups" (at para. 52). Mr. Klatt stated in his testimony before me that he had never been called to testify in the *Re: Zündel* proceedings and that he had not been contacted by any "investigative agency" in that matter. The Federal Court noted in its decision that the *in camera* evidence presented by the Ministers had not been shared with Mr. Zündel. In 2007, the Supreme Court of Canada found such proceedings unconstitutional, as having deprived those named in security certificates of fundamental justice as guaranteed under s. 7 of the *Charter* (*Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9). I do not think it appropriate, in the circumstances, to make any determinations on the credibility of a witness based on a decision arising from a process that the Supreme Court has since determined to be unconstitutional.

[45] Finally, an additional reason not to discount the expert evidence of Mr. Klatt is the fact that his testimony was (as I indicated earlier) corroborated in several instances by other witnesses, namely Ms. Rizk (the Commission investigator) and even Mr. Warman himself.

[46] I therefore reject Mr. Warman's submission that Mr. Klatt's evidence should not be considered.

(iii) Conclusions regarding JRBooksonline.com

[47] In sum, I find that there is insufficient evidence to establish, even on a *prima facie* basis, that Mr. Lemire or a group of persons that includes him, communicated or caused to be

communicated, the material found on JRBooksonline.com, within the meaning of s. 13. There is no evidence linking him to this website, other than a who-is search, the content of which is inherently unreliable. The evidence, even if believed, is insufficient to cover the allegations made. Besides, I find that a reasonable and non-pretextual explanation has been advanced to explain the presence of Mr. Lemire's name on the 2004 who-is search. I am therefore convinced that Mr. Lemire did not engage in the discriminatory practice alleged by Mr. Warman, with respect to JRBooksonline.com.

B. The Stormfront.org material

[48] According to Mr. Warman, Stormfront.org is a website that operates out of the United States. It contains a message board (sometimes referred to as a forum) where members who join the website can post messages. It would appear that anyone accessing Stormfront.org via the Internet can view the message board's contents. Mr. Warman claims that on February 9, 2004, Mr. Lemire posted a message on the Stormfront.org forum that, in Mr. Warman's opinion, constitutes a hate message within the meaning of the *Act*.

[49] Message boards are often organized into several categories (or "conferences".) and various levels of sub-categories, also known as topics of discussion or "threads". A user may create a new thread within an existing category. Stormfront.org contained a sub-category entitled "Stormfront Canada", which was found within an area of the forum designated as "Stormfront White Nationalist Community – International". The message at issue was filed under a new thread created under "Stormfront Canada", entitled "Canadian Immigrant Poem". The message consisted solely of a poem containing 18 stanzas. The printout of the message (as filed by the Commission) shows that three other persons added their comments to the thread after the poem was posted.

[50] The poem reads as follows:

Canadian Immigrant Poem

I cross ocean,
poor and broke,
Take bus,
see employment folk.

Nice man treat me
good in there,
Say I need to
see welfare.

Welfare say,
"You come no more,
We send cash
right to your door."

Welfare cheques,
they make you wealthy,
Medicare it keep
you healthy!

By and by,
I got plenty of money,
Thanks to you,
Canadian dummy.

Write to friends
in motherland,
Tell them 'come
fast as you can.'

They come in turbans
and Ford trucks,
I buy big house
with welfare bucks

They come here,
we live together,
More welfare cheques,
it gets better!

Fourteen families,
they moving in,
But neighbor's patience wearing thin.

Finally, white chap
moves away,
Now I buy his house,
and then I say,

"Find more aliens
for house to rent."
And in the yard
I put a tent.

Send for family
they just trash,
But they, too,
draw the welfare cash!

Everything is
very good,
And soon we
own the neighbourhood.

We have hobby - -
it's called breeding,
Welfare pay
for baby feeding.

Kids need dentist?
Wife need pills?
We get free!
We got no bills!

Canadian crazy!
He pay all year,
To keep welfare
running here.

We think Canada
damn good place!
Too damn good for
the white man race.

If they no like us,
they can scram,

Got lots of room in
Pakistan.

(i) Did Mr. Lemire communicate the impugned material by posting it on Stormfront.org?

[51] Mr. Warman testified that he accessed the Stormfront.org website by way of another website known as "the-cloak.com". For this reason, the term "the-cloak.com" precedes the Stormfront.org domain name at the bottom of the printout in evidence, where a webpage's address (or "universal resource locator" (URL)) normally appears. Mr. Klatt explained in his testimony that services such as the-cloak.com act as proxies through which a person can access another website. The proxy effectively acts as a third party on behalf of the person seeking access to the website. In this way, the person is able to hide his or her identity from the website being visited. According to Mr. Klatt, the content downloaded from websites visited by way of these proxies is probably unaltered in the process.

[52] The printout of the message containing the poem that was filed by the Commission shows the Stormfront.org logo at the top. Mr. Lemire entered into evidence, through his cross-examination of Mr. Warman, a fairly extensive number of excerpts from the Stormfront.org website. The genuineness of these excerpts is not in dispute. The logo and general appearance of these excerpts are identical to the Canadian Immigrant Poem message filed by the Commission, but for the domain name containing the "the-cloak.com" reference. I am satisfied that the printout filed by the Commission accurately reflects what would have appeared on the Stormfront.org website on February 9, 2004.

[53] How is Mr. Lemire linked to this message? On the Stormfront.org message board, the disclosed identity of persons who post a message is shown in the left margin. As appears from the excerpts of other Stormfront.org threads filed in evidence, most contributors to the forum use pseudonyms and provide some drawing or caricature as their own logo or avatar. This was not the case with the poem. The indicated identity of the person posting the poem is "Marc Lemire". A clear photo of Mr. Lemire dressed in a suit and tie is also included. The date when Mr. Lemire joined the Stormfront.org forum is shown (June 2002) as well as his location ("Toronto,

Canada"). At the end of the poem, there appears a reference to the Freedomsite.org website, along with links to a number of that site's web pages. The reader is encouraged to "visit the FREEDOM-SITE!". A contact address is given, which is identical to the Toronto street address that Mr. Lemire uses throughout the Freedomsite website.

[54] As I mentioned in my earlier discussion regarding the JRBooksonline.com material, the Stormfront.org posting was not mentioned in Mr. Warman's original complaint. In fact, this message was posted after the complaint was filed. Mr. Warman sent a copy of the message to Ms. Rizk on October 20, 2004, which is almost a year after he filed the complaint, and, consistent with Mr. Warman's request, Ms. Rizk did not mention the Stormfront.org message to Mr. Lemire before issuing her investigation report on April 14, 2005. Ms. Rizk testified, however, that when she tried to view the message herself on the Internet, during the course of the investigation, she could not find it. From her searches on the Stormfront website, she was only able to confirm that Mr. Lemire was a user of the Stormfront forum.

[55] Mr. Klatt testified that when he tried to find the poem in 2006, using the search function of the Stormfront website, which even indexes archived message posts, he was also unable to locate the impugned posting containing the poem.

[56] Mr. Lemire argues, therefore, that the Commission did not establish that he had in fact posted the poem. I do not agree. Mr. Warman testified that on February 9, 2004, he viewed the message (albeit by way of the-cloak.com's proxy service) and printed it out. The printout's appearance and the indicators in the message linking it to Mr. Lemire are entirely consistent with other messages that Mr. Lemire has posted on the Stormfront.org message board. Moreover, no evidence has been presented that would contradict such a finding. The evidence of Ms. Rizk and Mr. Klatt only demonstrates that the message containing the poem was not available on the Internet by the time Ms. Rizk began investigating it, having likely been removed by then. Mr. Klatt testified that message boards typically allowed users who had posted messages to delete them afterwards. Thus, the evidence is merely consistent with the possibility that the

message was removed after it was posted. It does not contradict Mr. Warman's evidence that he viewed the message in February 2004.

[57] I am, therefore, persuaded that Mr. Lemire did, in fact, post the Canadian Immigrant Poem on the Stormfront.org message board, such that it could be viewed via the Internet, at least on the day when Mr. Warman saw it (February 9, 2004). Consequently, I find that Mr. Lemire communicated, or caused to be communicated, the message via the Internet, within the meaning of s. 13 of the *Act*.

(ii) Is the impugned material likely to expose a person or persons to hatred or contempt by reason of the fact that they are identifiable on the basis of a prohibited ground?

[58] Mr. Warman testified that the message he took from the poem was that non-white immigrants, and perhaps specifically non-white immigrants from Pakistan, are presented as "denigrating stereotypical examples" of persons abusing the welfare system, who end up bringing their extended families to Canada and further drain the system. The word "trash" is used to describe the families of immigrants. These immigrants are shown as people who make a "hobby" of "breeding". They bring down property values in neighbourhoods where they end up "driving out" white residents. White Canadians are branded as fools who allow this to happen, and if they do not like the situation, they are exhorted to "get lost".

[59] The Commission argues that the poem develops a "gross caricature of Pakistani and other East Asian immigrants to Canada" that amounts to extreme ill will and utter contempt, and which exposes persons from these groups to hatred or contempt within the meaning of s. 13.

[60] Mr. Lemire counters, in response, that the poem is a "biting and satirical commentary on how immigrants are treated in Canada at the expense of the Canadian taxpayer". He submits that the poem constitutes "core political commentary regarding Canadian immigration policies". Mr. Klatt testified that through a search using the "Google" search engine, he was able to find the Canadian Immigrant Poem, posted presumably by persons other than Mr. Lemire, on at least 397 other websites including the "Discover Vancouver" and "Country Living, Country Skills"

websites. Mr. Lemire argues that this demonstrates that many Canadians find that the poem expresses something about Canada's immigration policies with which they agree - policies that are subject to criticism. I am not convinced, however, that merely because a text appears on numerous web pages, it necessarily reflects a commonly held view or that it does not constitute a hate message within the meaning of s. 13.

[61] Mr. Warman believes that the poem does, in fact, constitute a hate message. He claims that it bears some of the hallmarks of hate messages identified in the body of s. 13 jurisprudence over the years (see *Warman v. Kouba*, 2006 CHRT 50 ("*Kouba*"), at paras. 22-81, for a summary of these hallmarks). In particular, Mr. Warman contends that the poem treats immigrants as a powerful menace that will deprive white Canadians of their livelihood. This hallmark, however, is derived from decisions like *Citron*. The respondent in that case was found to have expounded theories of secret conspiracies by Jews designed to extort money and tremendous power and control on a global scale. The Tribunal found that the tone and extreme denigration and vilification of Jews found in the documents in evidence separated that material from material that might be permissible under the *Act*. I do not find a similar tone or an extreme denigration of person(s) to be present in the poem that was posted by Mr. Lemire on Stormfront.org.

[62] Mr. Warman submits that the poem also bears the hallmark of "highly inflammatory and derogatory language", which creates a tone of extreme hatred or contempt (*Kouba* at para. 67). He points to words such as "trash" and "breeding", as well as "dummies" (although that term appears to be ascribed to "white Canadians"). He also points to the suggestion in the poem that non-white immigrants defraud the welfare system and that they cannot speak English properly. These expressions are certainly provocative, as well as insulting, but they do not come close to the sort of extreme language that has been identified in s. 13 jurisprudence as being likely to expose persons to hatred or contempt. The poem does not contain any of the ugly racial and ethnic epithets that have so often been present in the material adduced in other s. 13 cases.

[63] The caricature of immigrants set out in the poem is gross and likely to offend. However, I am not persuaded that these remarks express "extreme ill-will" and emotions that allow for "no

redeeming qualities in the persons at whom they are directed", as contemplated by the Supreme Court in *Taylor*. The Court said that s. 13(1) refers only to unusually strong and deep-felt emotions of detestation, calumny and vilification, adding (at 929) that the Tribunal should pay heed to the "ardent and extreme nature of feeling" described in the phrase "hatred or contempt". In my view, these sorts of emotions are not expressed in the poem, nor is the poem likely to circulate "extreme feelings of opprobrium and enmity" against any identifiable persons.

[64] It is noteworthy that s. 13 does not proscribe matter that could expose persons to discriminatory practices. It is only matter that is likely to expose persons or a group of persons to hatred or contempt that attracts s. 13's attention. I find it instructive to contrast this provision, in this sense, with s. 12 of the *Act*, which makes it a discriminatory practice to publish or display any notice, sign, symbol, emblem or other representation that either expresses or implies discrimination or an intention to discriminate, or incites others to discriminate, within the meaning of ss. 5 to 11 and 14 of the *Act*:

> Publication of discriminatory notices, etc.
>
> **12.** It is a discriminatory practice to publish or display before the public or to cause to be published or displayed before the public any notice, sign, symbol, emblem or other representation that
>
> (*a*) expresses or implies discrimination or an intention to discriminate, or
>
> (*b*) incites or is calculated to incite others to discriminate
>
> if the discrimination expressed or implied, intended to be expressed or implied or incited or calculated to be incited would otherwise, if engaged in, be a discriminatory practice described in any of sections 5 to 11 or in section 14.

Divulgation de faits discriminatoires, etc.

12. Constitue un acte discriminatoire le fait de publier ou d'exposer en public, ou de faire publier ou exposer en public des affiches, des écriteaux, des insignes, des emblèmes, des symboles ou autres représentations qui, selon le cas :

a) expriment ou suggèrent des actes discriminatoires au sens des articles 5 à 11 ou de l'article 14 ou des intentions de commettre de tels actes;

b) en encouragent ou visent à en encourager l'accomplissement.

[65] Of course, s. 12 deals with a different means of communication than in the present case (public notices, signs, etc., rather than Internet messages), but if the poem were to be analyzed through the prism of s. 12, it may well be found to imply or incite discrimination against certain persons who immigrate or are seeking to immigrate to Canada, on the basis of their colour, race, or national/ethnic origin, within the meaning of ss. 5-11 and 14 of the *Act*. However, the discriminatory practice proscribed in s. 13 is different: only matter that is likely to expose these persons or groups of persons to *hatred or contempt* is contemplated. This threshold contrasts significantly from that of s. 12, a distinction that was also noted in the recent Tribunal decision of *Dreaver v. Pankiw*, 2009 CHRT 8 (judicial review to the FC pending) at paras. 41-3.

[66] For all of the above reasons, I find that the Stormfront.org poem's material is not likely to expose a person or persons to hatred or contempt by reason of the fact that they are identifiable on the basis of a prohibited ground. Consequently, the allegation that Mr. Lemire engaged in a discriminatory practice by posting the poem on the Stormfront.org message board has not been substantiated.

C. The Freedomsite.org material

[67] Mr. Warman testified that he visited the Freedomsite website and its message board, beginning as early as December 2002. He viewed material that he believed violated s. 13 of the *Act*, and decided to draft a human rights complaint, which he signed on November 23, 2003. Mr. Warman concluded that many of the offensive messages on the board had been posted by a

person named Craig Harrison. Consequently, Mr. Warman named both Mr. Lemire and Mr. Harrison as respondents in his complaint. The Commission decided some time later to proceed against each respondent separately. The case against Mr. Harrison was referred to the Tribunal in 2005, and a decision was issued on August 15, 2006, finding that Mr. Harrison's messages were in breach of s. 13 (*Warman v. Harrison*, 2006 CHRT 30).

[68] As I already indicated, Mr. Lemire has openly admitted his involvement with Freedomsite.org, from the moment when he first learned of Mr. Warman's complaint against him. Ms. Kulaszka acknowledged in her first letter to the Commission (April 23, 2004) that Mr. Lemire is the webmaster and owner of Freedomsite.org, which she described as a website "devoted primarily to the discussion of immigration policies…and the restriction of free speech in Canada". She added that the website was "a major alternative source for news and commentary" and that since it began operating in 1995, it had received over 10 million visits.

[69] Just like most websites, Freedomsite.org was divided into several sections. Links to these sections, of which there appear to have been 16, were found in a banner that ran in the margins of the website's pages. The titles of these sections included "Home", "Search", "Site Map", "Online Store", "Radio Freedom", "Columnists" (also entitled "Controversial Columnists"), "Activists", "Picture Library", "History", and "Message Board". The impugned material mentioned in Mr. Warman's complaint was all found either in the Message Board section or the Columnists section. No material from the other sections was put forward by Mr. Warman or the Commission as forming part of his s. 13 complaint.

(i) The Freedomsite message board

[70] The Freedomsite website's message board operated in a similar fashion as the board found on Stormfront.org, which I described earlier. Visitors to the Freedomsite website could click on the message board's link button in the margin and arrive at the message board's welcome page. However, visitors were not able to view the message board entries on the welcome page. They were instead, prompted to "log in" with their name and password. Only registered users were allowed to post as well as view messages on the board. Those who were

not registered users had two options available to them. They could click on a button to become "new users", i.e. to register and create a "personalized profile" account, or click on a second button marked "guest".

[71] Guests who entered the message board's "conferences" (i.e., the first level of categories under which messages could be posted) were told that they would be limited to "read-only access", meaning that they would only be allowed to read the messages, but not to post. Users who wanted to create an account were required to fill in various fields including a login name and a valid email address, to which the website would later send a password. The newly registered user could then log in by entering his or her user name as well as the password.

[72] Mr. Klatt testified that this requirement had a significant bearing on the message board's accessibility to Internet search engines such as Google. These search engines use "web crawlers" to index the content of the websites available on the Internet. When web crawlers come upon websites that require a user name or password, or a user-initiated action such as a mouse click on an icon (like Freedomsite's guest button), they do not attempt to log in. As a result, a search engine will not access the content in this type of web board and the message board's content would not have come up as a result in a typical Google-like Internet search.

[73] Once logged in, a registered user would arrive at another welcome page entitled "Freedom-site InterACTIVE". A list of the available conferences was presented in the left margin, with a plus symbol (+) next to each conference name. Clicking on the symbol would reveal the list of topics available under each conference. The welcome page set out some rules regarding participation:

> Our rules are simple:
>
> - Keep discussion civil.
> - Post only to appropriate conferences.
> - DO NOT advocate or suggest any activity which is illegal under Canadian law.
>
> If you have any complaints or to report issues please email:
>
> Freedom-Site Webboard Admin

[74] The words "Freedom-Site Webboard Admin" were a clickable link that brought up another webpage that allowed the user to contact the website's administrator (i.e., Mr. Lemire). Registered users could post their own messages at the end of existing threads or they could create new threads under a topic title that they would compose, in which they would post the first message.

[75] The message board postings alleged by Mr. Warman to constitute hate messages within the meaning of s. 13, can be broken down into several categories:

- messages posted by Mr. Harrison,
- messages posted by persons other than Mr. Lemire or Mr. Harrison, and
- messages posted by Mr. Lemire.

(a) Messages posted on the Freedomsite message board by Craig Harrison

[76] The parties do not dispute that Mr. Harrison posted messages on the Freedomsite message board under the pseudonyms "rump" and "realcanadianson" (see the Tribunal's findings in *Harrison*, at paras. 21-47).

[77] Mr. Harrison posted a total of 71 messages over nine days, between May 2002 and January 2003, clustered into three groups of days (May 13-21, 2002 (45 messages), November 13, 2002 (three messages), and January 19-21, 2003 (26 messages)). On some days, he posted quite prodigiously. For instance, on May 14, 2002, Mr. Harrison wrote 24 separate messages, all but four of which were each written under different topics in various conferences.

[78] Mr. Warman produced 31 of Mr. Harrison's 71 messages at the hearing, as evidence in support of his s. 13 complaint against Mr. Lemire. The Tribunal in *Harrison* explicitly referred to 22 of these messages in its decision. The Tribunal found that the messages were likely to expose a person or persons to hatred or contempt by reason of the fact that they are identifiable on the basis of a prohibited ground of discrimination (*Harrison* at paras. 55-66).

1. Did Mr. Lemire communicate Mr. Harrison's messages within the meaning of s. 13?

[79] There is no evidence that Mr. Lemire wrote or posted any of these messages. It is common ground that they were all posted by Mr. Harrison. Section 13(1) states, however, that a *group of persons* acting in concert to communicate messages within the meaning of the section, may also be found to have committed a discriminatory practice. Is there any evidence to support the allegation that when Mr. Harrison communicated matter or caused it to be communicated, he was acting in concert with Mr. Lemire?

[80] The Tribunal decision in *Taylor* (cited as *Smith v. Western Guard Party*, 1979 CanLII 1 (C.H.R.T.)) set out some of the criteria to determine when groups of persons are acting in concert for the purposes of s. 13. One of the respondents, the Western Guard Party, was found to constitute a group of persons acting in concert. The Tribunal noted that the party was composed of a group of persons who had organized themselves under a name, and who had adopted a letterhead and a logo. They had set up a bank account, acquired a post office box and telephone lines, and had secured a phone book listing, all in the party's name.

[81] There is no evidence of any of these elements in the present case, nor of any other link between the two men. In fact, Ms. Rizk testified to a conversation that she had with Mr. Harrison during her investigation of the complaint made against him. He told her that he did not know who owned or controlled Freedomsite.org and that he did not know who is responsible for posting or editing content on the website. As I mentioned earlier, the Commission decided, following its investigation, to split the complaint that Mr. Warman had originally filed against Mr. Harrison and Mr. Lemire jointly, and to deal with them separately.

[82] It has not been established, in my view, that Mr. Lemire and Mr. Harrison formed a group working in concert to communicate the latter's messages.

2. Did Mr. Lemire "cause" the impugned messages to be communicated within the meaning of s. 13?

[83] To answer this question, it is helpful to first determine if Mr. Lemire was even aware of the existence or presence of Mr. Harrison's messages on the Freedomsite message board.

a) Was Mr. Lemire aware of Mr. Harrison's messages?

[84] No evidence was introduced demonstrating that Mr. Lemire had ever actually seen Mr. Harrison's postings or otherwise had actual knowledge thereof prior to receiving a copy of Mr. Warman's human rights complaint in March 2004. Mr. Warman noted that Mr. Lemire had posted 212 messages on the board between 1999 and 2003, 87 of which were posted after Mr. Harrison had placed his first messages on the board in May 2002. Mr. Lemire's posts were widely dispersed under many different topics in several of the message board's conferences. In addition, Mr. Lemire only posted messages on 51 days, over the five years of the message board's existence (1999-2003).

[85] However, the evidence also shows that Mr. Lemire never posted messages on any of the threads in which Mr. Harrison had previously posted. Mr. Harrison had placed messages on two threads in which Mr. Lemire had posted a message previously, but in the first instance, Mr. Harrison's post was made three years after Mr. Lemire's and in the other, one year later.

[86] In fact, it was not uncommon for Mr. Harrison to make posts on threads where there had been no activity for some time (so-called "dead threads"). The exhibits filed by the Commission usually contained printouts of Mr. Harrison's message only, but in six of the seven excerpts where the thread's history is visible, Mr. Harrison's posts were made from four months to as many as three years following the immediately preceding message. All of the message printouts in evidence contain a figure at the top indicating the total number of messages in the thread and that particular message's order within the list. In 12 of Mr. Harrison's 31 posts, his message was the second of only two messages to be posted in the thread. No one else ever posted a message to these threads following Mr. Harrison's messages. The absence of any activity in these

threads, aside from Mr. Harrison's messages, suggests that the threads were of very little interest to other users of the message board, like Mr. Lemire, and that therefore, few of those users would have seen Mr. Harrison's messages.

[87] A copy of the message board's table of contents, which was printed out on November 11, 2003, shows that as of that date, there were 20 conferences available on the message board, containing at least 3162 messages. The exact number of threads found within the 20 conferences is not in evidence, but a table filed by the Commission shows that the 212 messages posted by Mr. Lemire on the message board between 1999 and 2003 were spread out over 198 different threads. Mr. Harrison posted a total of 71 messages on 69 different threads. As I just mentioned, only two of Mr. Harrison's messages were posted in any of the 198 threads where Mr. Lemire had previously participated. The message board excerpts in evidence suggest that the board's threads are typically short. As already indicated, many only contained two messages, and all but two of the remaining threads in evidence (including those where Mr. Harrison had not posted) contained eight or fewer messages in total.

[88] The Freedomsite website itself (i.e., the combination of all 16 sections including message board portion) appears to be quite large. The Commission produced the welcome page of the website's "History" section, which was printed out on January 28, 2007. The welcome page touts that, as of December 17, 2000, three years prior to the filing of the complaint, the Freedomsite website already contained 435 megabytes of online material consisting of 2,031 web pages, 2,005 graphics, and 143 audio/video files.

[89] Mr. Warman submits that Mr. Lemire can be presumed to have knowledge of the presence of Mr. Harrison's and others' alleged hate messages on the board, based on the names of the message board topics under which Mr. Lemire has posted. These include: "Does the Canadian Jewish Congress understand democracy?", "Origin of SARS – Chinese eating cats", "Anti-racism is a form of mental illness", "Immigration can kill you", "The Asian invasion", and "Question about the holohoax". However, the only evidence of Mr. Lemire posting messages to these threads consists of an index listing all the threads in which Mr. Lemire participated.

Mr. Warman did not produce the messages that Mr. Lemire actually wrote on these threads. Mr. Warman testified that he did not read all of Mr. Lemire's messages, but he read the message that Mr. Lemire posted on the "Immigration can kill you" thread. Yet, Mr. Warman did not allege that the message was discriminatory or in breach of s. 13, nor did he opt to enter it in evidence.

[90] What inference is Mr. Warman therefore asking me to make? Neither he nor the Commission asked me to conclude that these topic titles constitute hate messages within the meaning of s. 13. Just because someone posts on a thread bearing an arguably provocative title, should we assume that the person has viewed all of the other 3,000+ messages on the board? Even if these threads' titles are, as Mr. Warman testified, "problematic", for all we know, Mr. Lemire's messages on these threads were not in breach of s. 13.

[91] In the circumstances, I do not see how any of the above evidence enables me to infer that Mr. Lemire knew or was aware of Mr. Harrison's messages, even on a *prima facie* basis.

b) Is it necessary for Mr. Lemire to have known of Mr. Harrison's messages in order to support a finding that he caused their communication under s. 13?

[92] Mr. Warman and the Commission contend that the term "cause to be communicated" broadens the scope of s. 13 to extend to persons other than the individuals who execute the motions required to communicate the material (such as typing up a message and clicking on a computer screen icon to send it to the message board where it can be viewed by others). In particular, they argued that Mr. Lemire's involvement in the establishment and operation of the Freedomsite website and its message board means that he caused Mr. Harrison's messages to be communicated by providing him the vehicle through which he communicated them. Since Mr. Lemire had administrative control of the website, they contend, it is implicit that he caused the messages to be communicated, irrespective of whether he was aware of the material's presence on the website.

[93] Mr. Lemire counters that to be found liable for having caused a hate message to be communicated, a respondent must have knowledge of the matter being communicated and consent to its communication. Mr. Lemire points out that when s. 13 was first adopted as part of the *Act*, in 1978, the prevalent means by which hate messages were being communicated, and which s. 13 was intended to address, consisted of telephone messaging services, such as the one dealt with in *Taylor*. In that case, any member of the public was able to dial the telephone number of the service and listen to pre-recorded messages, which had been actually recorded by the respondent, John Ross Taylor, the "acknowledged leader" of the Western Guard Party (*Smith*, previously cited, at 2).

[94] The Tribunal that heard Mr. Taylor's case held that the methods adopted by the respondents to convey their messages were particularly insidious because, while a public means of communication was used, it was one that gave the listener the impression of direct, personal, almost private, contact with the speaker, and which did not provide any realistic means of questioning the information or views presented. The messages were not subject to any counter-argument within that particular communications context.

[95] The Supreme Court in *Taylor*, at 938, endorsed the Tribunal's comments, in determining whether s. 13(1) constitutes a reasonable limit on freedom of expression under s.1 of the *Charter*. The Court stated that it found the Tribunal's observations helpful in rebutting the contention that the private nature of telephone conversations makes it especially difficult to impose constitutionally valid limitations upon expressive telephonic activity. The Court held that those who repeatedly communicate messages likely to expose others to racial or religious hatred or contempt are seeking to gain converts to their position. The Court went on to state, at 939, that by focussing upon "repeated" telephonic messages, s. 13(1) directs its attention to public, large-scale schemes for the dissemination of hate propaganda, "the very type of phone use which most threatens the admirable aim underlying the [*Act*]".

[96] Mr. Lemire therefore submits that if, in order to find that a respondent has engaged in a discriminatory practice pursuant to s.13, it must be established that repeated messages were

made in the context of a public, large scale scheme for the dissemination of hate propaganda, then, at a minimum, complainants and/or the Commission must be required to establish that respondents are aware of the messages that form the basis of the discriminatory practice being alleged against them. How can someone who is not aware of the message be held accountable for its communication? In the telephone answering system used by the respondents in *Taylor*, there was no question that the communication of the messages included knowledge of, and consent to, the content of the messages being communicated.

[97] The Commission and Mr. Warman argue that it does not matter whether or not Mr. Lemire was aware of Mr. Harrison's posts, Mr. Lemire should have known that the nature of the Freedomsite was such that it would attract comments on its message board that would at least border on the limits of exposing people to hatred or contempt, based on grounds such as their race, national/ethnic origin, or religion. The message board was, according to Mr. Warman, "an integral part of Mr. Lemire's principal vehicle for hosting white supremacist and neo-Nazi material, his Freedomsite". Mr. Warman adds that this was not a website established "to discuss puppies or bicycles". As such, he caused Mr. Harrison's messages to be communicated.

[98] Printouts from the Freedomsite website's "online store" were filed in evidence. Some of the items up for sale included books with titles like "My Awakening: A Path to Racial Understanding", written by David Duke, a former Klu Klux Klan leader, as well as books by Ernst Zündel. These books' content, however, could not be viewed on the website and was not filed in evidence. Numerous items relating to the Heritage Front (which Mr. Warman described as a neo-Nazi group) were also available for sale. There are link buttons elsewhere on the website which apparently take the reader to the Heritage Front's website. The description next to the link button refers to the Heritage Front as Canada's largest racialist organization, having as its mandate "to preserve our heritage – in a militantly pro-white, militantly positive sense". There are also pictures of David Duke, Ernst Zündel, and material relating to the Heritage Front.

[99] The list of articles in the "Controversial Columnists" section of the website includes one entitled "Sikh power triumphs in B.C. race", and another with the heading "An Eye for an Eye

(Jewish revenge on Germans)". The website's "Text Library" section included articles like "Universities are outbidding each other for their "share" of blacks to meet government RACE QUOTAS", and another article regarding David Duke. In the website's "Picture Library", there can be found something entitled "Schindler's List exposed as a FICTIONAL ACCOUNT (…) Only when it comes to the 'Holocaust' (tm) can things become FACT by mere repetition". The content of these articles was not entered into evidence, however.

[100] The Freedomsite website's index also refers to the title of an article called "Scott Brokie – Christian Victim of Militant Homosexual Lobby and their Human Rights Commission Allies". Another article refers to the legal counsel of one of the interested parties in the present case: "Kurz of B'nai Brith wants calling Jews "parasites" and "swindlers" illegal". These articles were also not filed in evidence.

Other referenced articles include:

- "Asian illegals flooding West Coast".
- "Karrachi? Kabul? No George Hees' old riding – East End Toronto".
- "The Myths of Immigration (There are no differences between the races)".
- "Immigration can kill you – the health effects of Canada's mass immigration policy". (This last article was filed in evidence and is dealt with later in the decision).

[101] In effect, therefore, the Commission and Mr. Warman are suggesting that Mr. Lemire committed a discriminatory practice under s. 13 (i.e., caused hate messages to be communicated) because he set up a website that would naturally incite others, like Mr. Harrison, to engage in a discriminatory practice by posting messages on the website's message board that were **likely** to constitute hate messages. Do the words "cause to communicate" equate to "incitement"? Again, it is helpful to read s. 13(1) in the context of the immediately preceding provision of the *Act*. In

s.12, which I excerpt below for a second time in this decision, Parliament used very clear language to proscribe activity that incites others to discriminate:

> Publication of discriminatory notices, etc.
>
> **12.** It is a discriminatory practice to publish or display before the public or to cause to be published or displayed before the public any notice, sign, symbol, emblem or other representation that
>
> (*a*) expresses or implies discrimination or an intention to discriminate, or
>
> (*b*) **incites or is calculated to incite** others to discriminate
>
> if the discrimination expressed or implied, intended to be expressed or implied or incited or calculated to be incited would otherwise, if engaged in, be a discriminatory practice described in any of sections 5 to 11 or in section 14.
>
> Divulgation de faits discriminatoires, etc.
>
> **12.** Constitue un acte discriminatoire le fait de publier ou d'exposer en public, ou de faire publier ou exposer en public des affiches, des écriteaux, des insignes, des emblèmes, des symboles ou autres représentations qui, selon le cas :
>
> *a*) expriment ou suggèrent des actes discriminatoires au sens des articles 5 à 11 ou de l'article 14 ou des intentions de commettre de tels actes;
>
> *b*) en **encouragent ou visent à en encourager** l'accomplissement.

[102] The explicit use of the verb "incite" in s. 12 suggests a clear legislative intent to proscribe conduct that encourages or invites the occurrence of a discriminatory practice. While mindful that s. 12 relates to communications through a different medium than s. 13, it is instructive to see that Parliament did not forbid the incitement of hate message communication by Internet, in a similarly explicit fashion.

[103] If the term "cause to be communicated" does not encompass the incitement of hate message communication, what purpose does it serve? An example can be found in *Citron*. In

that case, Mr. Zündel did not post his writings directly on the Internet. He handwrote his articles and faxed them to a woman in California who typed them into a word processor and then posted them on a website. Thus, although Mr. Zündel did not directly send the messages out via the Internet, he **caused** them to be so communicated, by forwarding the material to his technical assistant and giving her instructions to post the material on the Internet. He had full knowledge of the messages and their content and actively pursued their communication by the means contemplated in s. 13. I note, however, that the *Citron* Tribunal also determined that Mr. Zündel controlled the website, providing an additional basis for the Tribunal's conclusion that he had caused the communication of the material.

[104] Another obvious example of how a person may cause matter to be communicated, within the meaning of s. 13, can be found in the facts regarding the *Taylor* case. Mr. Taylor had drafted and recorded messages on a telephone answering machine. Cards were then publicly distributed, and ads were placed in telephone books, encouraging people to dial up the answering machine's number and hear the messages. Mr. Taylor did not actually communicate the messages to callers by speaking to them directly over the phone nor did he dial their numbers to make the telephone connections. He **caused** the messages to be communicated to the callers through the use of the automated answering machine. The significant point is that the messages that he composed and recorded were **his**, and he obviously had full knowledge thereof. In the present case, as I have noted repeatedly, it has not been established that Mr. Lemire knew of the content or even the existence of Mr. Harrison's messages.

[105] The facts of this case also bring into question the proposition that Mr. Lemire's website would somehow only attract people who would likely post hate messages. There are numerous instances, just in the message board excerpts filed by the Commission, of messages being posted clearly opposing Mr. Harrison's views and comments. One message board user tells Mr. Harrison that he is "ignorant", another calls him a "jerk" and ridicules him as being a member of the Klu Klux Klan. Yet another contributor to the message board suggests that Mr. Harrison is a teenager who needs to grow up, while another calls him a "moron" and argues

that Asian immigration has been good for Canada's economy. One contributor warns Mr. Harrison that his comments could get him in "legal trouble".

[106] The evidence even suggests that people specifically opposed to Mr. Lemire and his views were posting messages to that effect on the message board. In the list of threads under which Mr. Lemire had posted, there was one entitled "Marc Lemire is gay, he likes to suck…". The content of the thread is not in evidence but, as argued by Ms. Kulaszka, the tone of the heading suggests that it was meant to be derogatory towards Mr. Lemire.

[107] Thus, while the Freedomsite website may have allegedly presented one perspective in its overall content, contributors to the message board were apparently able to express any view. This is not to say that there were no rules whatsoever with respect to posting on the message board. Users were advised, on the welcome page, to keep their discussions "civil" and not to advocate or suggest any activity that is illegal under Canadian law. It was pointed out that this advisory did not specifically warn users not to post hate messages, but that argument is, in my view, overly fastidious. The impression that any users participating on the message board would get would be that they should not contravene Canadian law, which presumably would include the *Canadian Human Rights Act*. The note also advised anyone who had any complaints or wanted to report any "issues", to email the message board's administrator (i.e., Mr. Lemire).

[108] The Commission's position is that this measure was insufficient. Message board operators, it is argued, must ensure that their forums "comply with the *Act*". But is this requirement contemplated in s. 13? Did Parliament intend that intermediaries such as message board operators be found liable under s. 13(1), merely for having failed to take measures to prevent hate messages from being posted? I note that s. 13(3) suggests that this was not Parliament's intention. The provision states that owners and operators of telecommunication undertakings cannot be found to have communicated or caused to be communicated hate messages by reason only that other persons used their facilities to transmit the hate messages. This should be read in the context of the prevailing communication technologies when the provision was enacted, in 1977. At the time, the only third party involved in the "telephonic"

communication of a message who could reasonably say that it was not aware of the message's content would have typically been telephone or telecommunication companies like Bell Canada. Section 13(2) specifically exempts "broadcast undertakings" from the provision's application as well.

[109] Technology has evolved enormously since then. Telecommunications by Internet travel through many types of carriers today. Users may connect to the Internet by telephone, cable, cellular network, satellite, etc. Whereas in the past the recipient of a message likely received it via the same type of carrier as the one on which it was sent (i.e., vocal transmissions sent over a telephone service provided by a third party telephone company), messages sent over the Internet may be conveyed and received in numerous ways (by exchanging email and instant messages, viewing ordinary Internet websites and blogs, participating in social networking services, and, of course, posting on message boards, to name but a few). Just as phone companies were, in the past, involved in the communication of purported hate messages merely as third parties who provided telecommunication services to the public, many of these services are today provided by a new group of third parties (ISPs, email services including those run by organizations like MSN (hotmail), Yahoo (Yahoo mail), or Google (gmail), websites like Facebook, Twitter, etc.). Should these entities be held liable under s. 13 for messages sent by way of their operations? Logically, they should benefit from the same protection afforded by s. 13(3), which originally seemed to extend only to undertakings like telephone or telegraph companies.

[110] It is beyond the scope of this inquiry, of course, to determine whether all of these various forms of communication available today constitute "telecommunication undertakings" within the meaning of s. 13(3), but in my view, the presence of s. 13(3) informs the meaning of s. 13(1), for the purpose of determining whether Mr. Lemire, as a message board operator, caused Mr. Harrison's messages to be communicated.

[111] The Commission argued that this interpretation would provide a "free pass" to persons who seek to communicate hate messages but who, in order to evade liability under s. 13, would set up mechanisms like message boards to have hate messages communicated. This concern is,

in my view, unwarranted, as it can be readily addressed by other means. The underlying objective of s. 13(3) is that telecommunication undertakings should not be held liable for discriminatory messages that are communicated by others through their facilities, and of which they are unaware. If a complainant or the Commission suspect that a communication undertaking is knowingly allowing these messages to be communicated, then the undertaking's complicity can be established simply by notifying it of the "problematic" messages and viewing its reaction. If the communication undertaking continues to allow the message to be communicated, then an argument could be developed that the undertaking is no longer ignorant as to the existence of the purported hate messages and yet, has continued to allow their communication. The undertaking could no longer be said to be communicating the message "by reason only" that someone else was using its facilities. The communication is now occurring with the knowledge, and consequently the tacit consent, of the undertaking.

[112] This approach would be somewhat analogous to the notice requirement in the law of defamation. In Ontario, for instance, the *Libel and Slander Act*, R.S.O. 1990, c. L-12, provides that no action for libel in a newspaper or a broadcast can lie unless the plaintiff gives notice to the defendant, within six weeks of the alleged libel coming to the plaintiff's knowledge, specifying the matter complained of (s. 5). Some recent decisions, coincidentally involving Mr. Warman, have suggested that the *L.S.A.*'s scope may not extend to Internet communications (*Warman v. Grosvenor* (2008), 92 O.R. (3d) 663 (S.C.J.); *Warman v. Fromm*, [2007] O.J. No. 4754 (S.C.J.)(Q.L.)), but the principle underlying the notice requirement is what remains instructive to the present discussion. As the Ontario Court of Appeal noted, in *Grosman v. CFTO T.V. Ltd.* (1982), 39 O.R. (2d) 498, the purpose of the notice is to call attention to publishers of the alleged libellous matter. They may then investigate, and if they deem it appropriate, publish a correction, retraction, or apology, which in turn may reduce the damages payable. The plaintiff may also benefit from a timely correction, retraction, or apology, which can often constitute a better remedy than damages.

[113] Message board operators can, in some sense, be compared to publishers. Just as writers or editors may compose and print material in a publication without the publisher necessarily

having actual knowledge of the content, so may a message board user post a message without the board operator's knowledge. Indeed, the extent of a message board operator's ignorance of messages posted by unknown users using pseudonyms may be even greater than a publisher's, whose writers and editors are likely to be its employees.

[114] The objectives mentioned in *Grossman* resonate in human rights law as well. The *Act* is remedial in nature. The Supreme Court in *Taylor* noted that the purpose and impact of s. 13 are to prevent the discriminatory effects of hate propaganda rather than to stigmatize and punish those who discriminate (at p. 933). The Court highlighted the conciliatory nature of human rights procedure and the absence of criminal sanctions, in finding that s. 13(1) was especially well-suited to encourage the reform of hate propaganda communicators. Providing message board operators with proper notice of presence of hate messages on their boards would thus constitute a productive means for preventing the continued dissemination of the hate propaganda. The potential damage to be caused by the propaganda would end earlier if the web messages were promptly removed.

[115] In the present case, Mr. Warman did not alert the Freedomsite's webmaster (Mr. Lemire) of the presence of Mr. Harrison's messages on the message board. In fact, Mr. Warman testified that he had been monitoring the Freedomsite website (including Mr. Harrison's messages) since at least December 2002 (i.e., 11 months prior to filing the complaints), yet he made no effort to contact Mr. Lemire to complain about the messages and ask for them to be removed. Mr. Warman states that he did not think any such attempt would be "productive". But Parliament's objective in enacting s. 13, as enunciated by the Supreme Court in *Taylor* at 924, is to reduce hate propaganda. This objective could easily have been met by sending a notice to the Freedomsite message board operator, which may have resulted in the removal of the hate messages. No such notice was given. As it turns out, Mr. Lemire took down his message board anyway and removed the other Freedomsite material mentioned in the complaint.

[116] The Commission maintained that in order to "comply with the *Act*", Mr. Lemire (and other message board operators) are required to take more measures than merely putting users on

notice of the message board's usage policies and posting a link to report abuses. The Tribunal in *Guille* mentioned, in fact, at para. 123, that a website operator could place controls on its site that prevent the communication of hate messages. The Tribunal did not elaborate on what these controls would consist of. Some of the witnesses in the present case made allusion to two sorts of "filters", those that a message board operator would put in place and those that would be installed by Internet users on their own computers.

[117] The evidence with respect to message board filters is insufficient for me to make any conclusive findings as to their efficacy. However, there was some indication in the evidence of a number of deficiencies associated with these filters.

[118] For instance, evidence was adduced demonstrating that filters installed on message boards that prevent the posting of messages containing certain key words may have the unintended consequence of filtering out messages that are not in any way likely to expose person(s) to hatred or contempt. An excerpt from a 2004 National Post article was produced, which reported that filters applied on the CBC's message board had generated an unexpected problem. The CBC had reportedly been filtering out any messages containing the words "Jew", "Jewish", and "Israel", after a number of anti-Semitic messages had been posted on the board. As a result, the CBC's auto-filtering system prevented the posting of messages that were favourable to Israel and not at all anti-Semitic, merely because they contained one of these words. Meanwhile, the system allowed posting of other messages, which contained words that in some usages could be clearly derogatory, such as the word "frogs", as an epithet for French Canadians. There was no evidence led explaining how the CBC may have ultimately dealt with this problem.

[119] The other sort of filter is installed by Internet users themselves. It consists of Internet Safety software, such as Cyberpatrol and NetNanny, which contains updated lists of websites where "harmful" content can be found. The software blocks the user's computer from accessing these websites. On one of the Freedomsite's web pages, there is a notice that the website is being "voluntarily 'patrolled'" by several of these safety software firms. The notice stated that

although the website did not consider itself to be "obscene", it had participated in this "patrol" in order to "protect free speech on the Internet". Mr. Klatt testified that this meant that these software firms had looked at all the content on Freedomsite.org and added it to one or more categories that these firms' products maintain as a "blocking" list. Parents who use the software, for instance, thus have the ability to block the Freedomsite website or the categories under which it has been filed.

[120] The Attorney General called Dr. Alexander Tsesis as a witness qualified to testify as an expert legal historian to address the long term effects of hate speech and to apply his analysis to the Internet. He testified that these types of commercial, user-based filters are an "inadequate means of blocking bigotry" because they "shed too wide a net". For example, when America On-Line's (AOL's) software tried to prevent people from accessing websites containing the word "breast", to thereby prevent visits to pornographic websites, it also blocked ones with information on breast cancer. Using similar word blocks regarding hate propaganda could also prevent researchers from reaching necessary historical and sociological information on the Internet. Students might be blocked from accessing sites containing derogatory terms but not aiming to degrade or pose any harm. I note that most of the Tribunal's decisions regarding s. 13 complaints excerpt some of the impugned material. Access to the Tribunal's website, where its decisions are posted, could potentially also be denied by these user-based filters.

[121] There was also some discussion in the evidence regarding the monitoring of message boards. In order for such a measure to be effective at preventing hate messages from ever getting posted, message board operators would have to watch every post made by users at all times, 24 hours a day, and make immediate decisions about the messages' conformity with s. 13. Dr. Karen Mock, whom the Commission called as an expert witness on the presence of hate on the Internet, stated that with respect to certain jokes posted on the Web, it may take an expert's opinion to determine whether the jokes "cross the line" and become likely to expose persons to hatred or contempt. As Mr. Klatt pointed out, having round-the-clock monitoring (by someone who has the expertise to make such decisions) may be viable for a large organization, but for the

countless smaller web forums in this country, the resources required to provide such a service could impose an excessive burden on them.

[122] In the present case, Mr. Lemire exercised a form of control over his message board. He openly advised message board users of the website's rules for permissible conduct, and established a simple reporting system that enabled guests and users to report any transgressions. This, in my view, was a reasonable control. Thus, if it was established that Mr. Lemire had ignored reports of inappropriate messages containing material that is likely to expose persons to hatred or contempt within s. 13's meaning, he could potentially have been found to have caused the messages' communication, of which he was now fully aware. There is no evidence, however, of Mr. Lemire having received any complaints regarding Mr. Harrison's messages (from Mr. Warman or anyone else), let alone of his having refused to address the problem.

c) What is the impact of other Tribunal decisions regarding the liability of website administrators?

[123] The Commission points out that the Tribunal has, in several of its decisions, held website administrators liable under s. 13 for hate messages found on their websites. I find, however, that the facts in these cases are distinguishable from the present case, and even if these distinctions are not significant, I do not consider myself bound by these findings, particularly given the evidence and arguments developed in the present case (see also *Jam Industries Ltd. V. Canada (Border Services Agency)*, 2007 FCA 210 at paras. 20-1).

[124] One of the decisions raised by the Commission is *Kulbashian*, previously cited, which I rendered in 2006. That case did not, however, involve a message board, as in the present case, but rather several websites that were found to be posting hate message material. I found that these websites were operated by a number of groups and were hosted by a firm run by one of the respondents. He was an active member of at least one of the groups, contributed articles to its website, and served as its editor. He helped build these websites through his webhosting firm. I therefore held that this involvement demonstrated that he was aware of the material posted.

There is no similar evidence with respect to Mr. Lemire and Mr. Harrison's messages in the present case.

[125] The impugned material in *Warman v. Wilkinson*, 2007 CHRT 27 (another decision rendered by me), consisted of messages posted on a message board entitled "The Canadian Nazi Party Forum". I determined that Mr. Wilkinson was the administrator of the forum and found that he had caused the impugned messages in that case to be communicated within the meaning of s. 13. However, I determined that Mr. Wilkinson posted many of the hate messages in the case, and had contributed to the discussion groups in which others had previously posted hate messages. I concluded that he must have viewed all of the impugned messages, yet he made no effort to remove them. In contrast, there is no evidence that Mr. Lemire posted any of the Harrison messages, nor that he participated in any of the threads after the messages were posted. It should be noted that Mr. Wilkinson did not appear at the hearing and the decision was thus rendered solely on the basis of evidence and submissions from the Commission and Mr. Warman.

[126] In the recent decision of *Warman v. Ouwendyk*, 2009 CHRT 10, the impugned material consisted principally of messages posted on the message board found on the website of a group called Northern Alliance. The respondent was a member and spokesperson of the group as well as the webmaster and administrator of the website. The Tribunal found that he had communicated or caused to be communicated the impugned messages. However, the Tribunal noted that there was "clear evidence" that he had posted some of the impugned material himself. There is no evidence, on the other hand, of Mr. Lemire posting any of the Harrison messages.

[127] In *Warman v. Western Canada for Us*, 2006 CHRT 52 ("*Western Canada for Us*"), there were two co-respondents, Glenn Bahr and Western Canada for Us (WCFU). The Tribunal found that the WCFU was a group of persons acting in concert, within the meaning of s. 13. Mr. Bahr was the leader and founder of the group. The impugned material in that case consisted of texts from a number of books, which could be read on the WCFU's website, as well as certain messages that had been posted on the website's message board. All but two of the postings

referred to in the decision were made by Mr. Bahr. The Tribunal held that the material constituted hate messages within the meaning of s. 13. The Tribunal also found that the WCFU was responsible for having communicated or caused to be communicated the impugned messages posted on the message board. The Tribunal said that the site was clearly designed to provoke discussion that was likely to be hateful in nature. Hateful messages were a likely or inevitable result. The Tribunal decided that WCFU's conduct as an owner or operator of telecommunication facilities was not "benign in its nature" and that accordingly, the defence contained in s. 13(3) had no application.

[128] That case can be distinguished from the present one. Mr. Bahr appears to have been the operating mind behind WCFU's activities. The hate message material in the case had, in all but two particular instances, been placed on the Internet by Mr. Bahr. Thus, there was no question of WCFU's and Mr. Bahr's awareness of the material's presence on the website. As I have already indicated, the same conclusion cannot be drawn with respect to Mr. Lemire.

[129] In *Warman v. Canadian Heritage Alliance*, 2008 CHRT 40, the co-respondent, Melissa Guille, was the administrator of the website in issue. The impugned material in that case consisted of articles that she had loaded on to the website, as well as messages posted on the message board by persons other than Ms. Guille. The Tribunal held her responsible for the material, as the administrator of the website over which she exercised "full control".

[130] I note, however, that, in contrast to Mr. Lemire and Freedomsite.org, Ms. Guille had posted messages on the threads where some of the impugned material had been found. Her messages were added after the impugned material had been posted. Ms. Guille also edited some of the articles that others had written and which she had placed on the website. Thus, the Tribunal apparently inferred that she was aware of all of the impugned material found on the website. There is no evidence, on the other hand, of Mr. Lemire having subsequently posted messages on any of the threads where Mr. Harrison had posted his messages.

[131] In sum, therefore, I do not consider the findings in these cases regarding the liability of message board operators particularly instructive in the present case.

d) Can the liability of message board users be "attributed" to message board operators as a form of "vicarious liability"?

[132] In her final submissions, Commission counsel drew the Tribunal's attention to the Supreme Court decision in *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84. The case involved a complaint that had been filed by an employee against her employer, alleging that her supervisor had sexually harassed her. The sole issue before the Court was whether the supervisor's actions could be "attributed" to the employer. The case arose prior to the amendments to the *Act* introducing a specific provision regarding harassment (s. 14) and the provision that acts or omissions committed by officers, directors, employees or agents of an employer are deemed to have been committed by the employer (s. 65).

[133] The Court found that the *Act* contemplates the imposition of liability on employers for all acts of their employees "in the course of their employment" (a reference to the wording of s. 7 of the *Act*). The Court pointed out that the remedial objectives of the *Act* would be "stultified" if remedies were not available against the employer.

[134] The Commission is seemingly arguing that an analogous conclusion can be drawn with respect to the conduct of message board operators, who should conduct their activities "in accordance with the law" and should remove hate message material that "inadvertently finds its way" on to the message board. Message board operators, the Commission submits, have a duty to prevent hate messages from ever being posted by others on their message boards.

[135] It is not, however, evident how that duty arises from any possible reading of the *Act* in its current form. As I have already indicated, once a message board operator learns of the existence of a hate message on its website, depending on the facts of a particular case, the operator could be deemed to have caused the communication of the message within the meaning of s. 13. But

when, as in the present case, there is no evidence of actual or inferred knowledge on the message board operator's part, I do not see how any liability can attach under the provision.

[136] I find it instructive to consider how Parliament ultimately addressed the question of attributing liability to employers. In 1983, Parliament amended the *Act* and adopted the above mentioned provision in s. 65 with respect to the liability of employers for the acts of their officers, directors, agents and employees (S.C. 1980-81-82-83, c. 143, s. 23). According to s. 65(2), employers could raise as a defence the fact that they did not consent to the act or omission in question, and exercised all due diligence to prevent its occurrence and to subsequently mitigate or avoid the effect thereof. Furthermore, the Federal Court has since stated that in order for such liability to attach upon an employer, fairness requires that the employee, whenever possible, notify the employer of the alleged offensive conduct (Canada *(Human Rights Commission) v. Canada (Armed Forces)*, [1999] 3 F.C. 653 (T.D.) ("*Franke*") at 670. In a similar vein, I do not see how liability for hate messages posted by anonymous or pseudonymous third parties should be "attributed" to a message board operator if it has not been established that he or she has notice or knowledge of these postings.

e) Conclusion regarding Mr. Harrison's messages

[137] To reiterate, I find that in order for Mr. Lemire to be found to have caused the communication of Mr. Harrison's messages, the Commission and Mr. Warman must establish that he had actual or constructive knowledge of the material. This knowledge cannot be simply inferred from the fact that the respondent was the message board's administrator, unless circumstances suggest otherwise or there is evidence that he or she was put on notice of the hate messages' existence. In the present case, there is no evidence, actual or inferred, demonstrating even on a *prima facie* basis that Mr. Lemire was aware of Mr. Harrison's messages or that Mr. Lemire had been notified thereof. The allegation that Mr. Lemire communicated Mr. Harrison's messages or caused them to be communicated, within the meaning of s. 13, has therefore not been established.

(b) Messages posted on the Freedomsite message board by persons other than Mr. Lemire or Mr. Harrison

[138] The second grouping of message board material that the Commission entered in evidence, which Mr. Warman highlighted during his testimony, consists of messages posted by persons other than Mr. Lemire or Mr. Harrison. They are summarized as follows:

- A message posted under the message board conference entitled "General Messages". It is the first message of a new thread called "Canadian Politics, a Lost Cause for Whites", and was posted on January 28, 2002. There were a total of six messages posted to this thread, four of which were made by Mr. Harrison. Mr. Warman alleges that the initial post, made by someone using the pseudonym "Renegade", contains hate messages within the meaning of s. 13. The message relates to the appointment at that time of a federal minister who was of Philippine origin. He is referred to as a "gook immigrant" and "gook invader". The message goes on to criticize the Liberal and opposition Alliance parties for being "anti-White". There is no evidence that Mr. Lemire posted any message to this thread and there is no evidence indicating that he was aware of its content.

- A message posted on a conference entitled "Immigration". It is the third message of a thread called "Info Wanted On Mountie With Turban", and was posted on February 5, 2001. There were a total of four messages in the thread. The topic apparently related to the wearing of turbans by RCMP members. The third message is written by someone using the name "Klankid", who criticizes the decision to change the "traditional uniform for some stupid immigrant paki numnuts!". The writer then urges everyone to "put the 'white' back into the great white north". There is no evidence that Mr. Lemire posted any message to this thread and there is no evidence indicating that he was aware of its content.

- A message posted on a conference entitled "Freedom-Site Canada". It is the fourth message on a thread called "Life is not only a racial question", and was posted on May 1, 2001. There were five messages in the thread. The initial message criticized the economic decisions of leaders like George W. Bush and urged the formation of a "new style of government". The fourth message was written by someone using the pseudonym "Deleted User", who writes that the Parti Quebecois, in trying to increase the number of French speaking immigrants, brought in "Haitian niggers" to save the French language. The writer claims that this has not served to preserve the language of Quebecers, but rather to "destroy the White Race". There is no evidence that Mr. Lemire posted any message to this thread and there is no evidence indicating that he was aware of its content.

- A message posted on a conference entitled "Religion". It is the second message on a thread called "ADL vs WCOTC", and was posted on December 4, 2002. There were only two messages on the thread, both of which were written by someone using the pseudonym "JDoe". The initial message of the thread is a copy of a newswire report regarding trademark litigation in the U.S., between a group called the Church of the Creator and another called the World Church of the Creator (WCOTC). An American court had ordered the WCOTC to cease using the phrase "Church of the Creator". In the thread's second message, JDoe posts what appears to be a statement from the WCOTC claiming that it will defy the court order. The statement says that the primary goal of the WCOTC's religion ("Creativity") is the survival, expansion, and advancement of the White race. The WCOTC's statement goes on to take the position that "should the Jewish Occupational Government [JOG] use force to violate its Constitutional rights … to distribute our White Man's Bible" and promote the practice of its religion, then it has every right to declare "them" as open criminals violating the Constitution". The statement adds that "they" are obviously the criminals and can be treated [by the WCOTC]as the "criminal dogs that they are and [the WCOTC will] take the law into [its] own hands", and that "we will then meet force with force… and it will then be open season on all Jews". Later on, the statement says, referring to the court's order that the WCOTC's bibles be confiscated, that "we cannot distribute our White Man's Bible if they have been consigned to the flames of the Jewish altar". Towards the end of the message, there is a statement, directed to "JOG", that the WCOTC will defend its right to free practice of its religion "by force if force is attempted against its adherents in furtherance of this unconstitutional order". There is no evidence that Mr. Lemire posted any message to this thread and there is no evidence indicating that he was aware of its content.

- Numerous messages posted on a conference called "Jokes and Trivia". The messages themselves were posted on several different threads within the conference, which were entitled "Black jokes", "More Black jokes", "Jewish Jokes", "Nordic goddess seeking her Aryan prince…", "niggers", "Strange Fruit 'Song of the South'", and "The Wet Back and the Spick". Each of these threads contained as few as one message or as many as six, but some of these messages were comprised of several so-called "jokes". The Commission and Mr. Warman contend that these "jokes" expose Blacks, Jews, Puerto Ricans and Aboriginal peoples to hatred and contempt based on their race, colour, religion and national or ethnic origin, as they are similar to the jokes that have been found to constitute messages within the meaning of s. 13, in the *Kulbashian* and *Harrison* cases. There is no evidence that Mr. Lemire posted any message found under the Jokes and Trivia conference and there is no evidence indicating that he was aware of the conference's content.

1. Did Mr. Lemire communicate these messages or cause them to be communicated?

[139] There is no evidence that any of these messages were posted by Mr. Lemire and, as I stated earlier, he can therefore not be held to have "communicated" them within the meaning of s. 13. Did he *cause* them to be communicated by virtue of his function as the website's administrator? It would have to be established that he was aware of the messages' content either by direct evidence or inference. In accordance with my earlier analysis, with respect to Mr. Harrison's posts, I similarly find that Mr. Lemire's actual or constructive knowledge of the material was not demonstrated and that therefore, the claim that he caused the messages to be communicated is not substantiated.

[140] Just as in the case of Mr. Harrison's messages, there is no evidence to indicate, even on a *prima facie* basis, that Mr. Lemire ever visited the threads in question at all, let alone after the impugned messages were posted. They are relatively short (one to six messages long), and the index filed by the Commission shows that Mr. Lemire never posted a single message in any of these threads. In fact, there is no evidence of Mr. Lemire posting in these threads or in the in the Jokes and Trivia conference. There is also no evidence of Mr. Warman ever notifying Mr. Lemire in any way of the presence of the impugned messages prior to the complaint being filed. By the time the Commission notified Mr. Lemire of the complaint, the entire message board had been removed from the website.

[141] The Commission filed in evidence a list of the message board's conferences, which was printed out in November 2003. In the printout, the Jokes and Trivia conference heading has apparently been clicked with the screen pointer to reveal the names of the threads available in the conference. These thread names include "Black Jokes", "Jewish Jokes", "Spook Jokes", "niggers", "The Wet Back and the Spick", and "Who let the blacks out". Mr. Warman argued that these thread names alone "both manifest overt bigotry themselves and also scream the probability that the postings contained under the headings will contain hate messages". Mr. Warman is again suggesting that it be inferred that Mr. Lemire at some point viewed these thread titles - if not the threads themselves. According to Mr. Warman, if Mr. Lemire saw the titles, he should have known that the messages within the threads were likely in breach of s. 13.

[142] I cannot make that inference in light of the circumstances that I already highlighted in the discussion regarding Mr. Harrison's posts. There is no evidence that Mr. Lemire ever posted in the Jokes and Trivia conference. There are thousands of messages posted on the message board. Mr. Lemire only posted on the message board on 51 separate days over the five year period of the website's existence. The website is large, containing many other sections beyond the message board. The evidence suggests that Mr. Lemire's main activity, as the website's administrator, was uploading material to these other sections, as they form the bulk of the website. This uploaded material includes the articles dealt with later in this decision.

[143] There is no evidence of Mr. Lemire ever having been alerted to the present impugned material's existence and its potential violation of s. 13. Had Mr. Warman wanted to establish that Mr. Lemire knowingly allowed the joke material to be communicated, for instance, all Mr. Warman had to do was alert the website administrator of the presumptive breach of s. 13. This may have resulted in the swift removal of the so-called jokes from the Internet or, failing which, established that Mr. Lemire knowingly continued to allow the material to be communicated via the Internet. Instead, the material remained on the Web for at least a year after Mr. Warman viewed it, while it potentially kept on being accessed by other Internet users from around the world.

[144] In order to demonstrate that Mr. Lemire caused these messages to be communicated, Mr. Warman and the Commission would have to establish, on a *prima facie* basis, that Mr. Lemire, at a minimum, was aware of the messages' existence or provide some evidence from which this knowledge could be inferred. They have not done so. The aspect of the complaint regarding the message board material that was posted by persons other than Mr. Lemire and Mr. Harrison has therefore not been established.

(c) Messages posted on the Freedomsite message board by Mr. Lemire

1. The Heritage Front press release regarding hearings on immigration reform

[145] On September 21, 1999, Mr. Lemire posted a copy of a press release that is dated March 2, 1998. The posting was made to a thread entitled "Media Release: Immigration Legislation Hearings", within the message board conference called "Heritage Front". The press release was apparently issued by the Heritage Front and included a copy of a letter that Wolfgang Droege, the Heritage Front's national director, had sent to the Legislative Review Committee on Immigration, which it seems was holding hearings in Toronto in March 1998, on immigration reform. Mr. Warman contends that portions of this letter contain material that constitutes hate messages within the meaning of s. 13.

[146] The letter in the press release proposes that there be a moratorium on immigration until the extent of support or disapproval of current immigration policies is established. A binding referendum is suggested as a means of gauging Canadians' opinions on the issue, but the letter stipulates that such a referendum should only be held once the government makes "full disclosure" of immigration's social and financial impacts, including crime statistics and "social welfare usage profiles". The letter argues that communities should be given the opportunity to "preserve their traditional character" and posits that there is no nation or society in the world where "diverse peoples or races" have successfully lived together. The letter goes on to state that the only countries who respect human rights are "majority white nations". It concludes that without a redirection in immigration policies, changes will be brought about in society that will be "irreversible".

[147] Mr. Warman claims that the letter bears one of the hallmarks of hate messages outlined in the *Kouba* case. Immigrants, he claims, are portrayed as a powerful menace that is depriving others of their livelihoods, safety, freedom of speech and general well-being. In particular, non-white immigration is presented as a concern due to questions of criminality and health, and as a threat to white Canadians' jobs and wages.

[148] I find, however, that similar to the poem that Mr. Lemire posted on Stormfront.org, the material here does not convey the unusually strong and deep-felt emotions of detestation calumny and vilification contemplated by the term "hatred or contempt" within the meaning of s. 13. Highly inflammatory or derogatory language including epithets is not used, nor are any of the other *Kouba* hallmarks identifiable in the text. The tone of the letter is relatively civil and while it presents a pessimistic view of peaceful coexistence of diverse peoples, it does not target any particular group or race.

[149] For these reasons, I find that the material is not likely to expose persons to hatred or contempt within the meaning of s. 13. The complaint, in this regard, has not been substantiated.

2. The Ian Macdonald article

[150] On February 13, 2001, Mr. Lemire began a thread on the Freedomsite message board, within the conference entitled "History and Historical Revisionism". He posted an article written by Ian V. Macdonald, who is identified as a former Canadian diplomat. Mr. Lemire does not appear to have added any comments to the article. He named the thread "IAN MACDONALD: Holocaust Statistics". The article purports to be a response to another article that had been published by the Associated Press (AP), apparently regarding efforts by the World Jewish Congress, headed by Edgar Bronfman, to obtain restitution of property seized from Jewish persons in Europe during World War II. The article states as follows (*sic* throughout):

> In the Associated Press article on yet another Bronfman "restitution" scam (Jan. 17, 2001) the following bald statement appears: "Hitler's forces…slaughtered six million Jews and five million others and enslaved 12 million to use as labour in Germany's war effort".
>
> Surely, 55 years after the end of the War, no legitimate purpose is served by attempting to perpetuate this vicious anti-German hate propanganda. It may even be illegal to do so, unless Germans are excluded from protection under the Human Rights legislation. In any event, the "six million" canard has long since been discredited, beginning with Winston Churchill's definitive "history of the Second World War" in which he pointedly omits any reference to execution "gas chambers", a subject with which he would have been well informed through British Intelligence and would have given prominent coverage, had they existed

Other, less fastidious, historians seeking to ingratiate themselves with potential benefactors, have chosen to give credence to the "gas chambers" story (or rather, stories, since "eye-witness" accounts differ radically) but until now no one has been able to produce a shred of forensic evidence that even one Jew died from gassing or any form of organized mega-killing. Had such taken place, obviously, as any crematorium operator or physicist can confirm, there would have been literally a mountain of evidence to attest to the fact, especially where only coal and wood were available for fuel and many thousands of victims "burned in pits" where combustion would not have been complete.

As for the "12 million slaves", there is similarly a lack of evidence to support the story. Very large numbers of non-Germans were employed in the German war effort but according to Prof. A. S. Millward (Edinburgh and Stanford Universities) the foremost authority on the subject and author of "The German Economy at War", the "foreign workers were not slaves. Nor for the most part were they prisoners". Most would have been motivated by the job opportunities and higher wages, then as now, and by opposition to communism.

The reference in the AP article to "five million others" is not clear. Certainly, millions died during and immediately after the war, a good proportion at the hands of our Glorious Russian Ally whose sickening barbarism in crushing ethnic Germans, Ukranians, Balts and other freedom-seeking minorities is unrivalled in modern European history. Stalin's chief executioner, ironically but not coincidentally, was Ilya Ehrenberg who, along with a good proportion of the bloodthirsty Commissars, was a Jew.

Not far behind in the killing stakes was Certified War Hero and Saviour of the British Empire Winston Churchill, mentor of Air Marshall "Bomber" Harris who, I regret to say as a former member of the RCAF, waged war on defenceless women and children, killing many hundreds of thousands, at the same time gleefully destroying a priceless legacy of European architectural treasures. The perversity of the uncivilized bombing offensive against civilian targets is accentuated by the fact that Germany offered Britain an honourable peace in 1940 and as a gesture of good faith permitted the evacuation of British troops at Dunkirk. In an unprecedented act of treachery, Warlord Churchill contemptuously rejected the peace offer, doomed Britain as a world power and set the stage for Stalin's ultimate conquest of Eastern Europe and for the post-war international turmoil which has shown no sign of abatement.

The Allied mega-killing of German civilians has been rationalized by anti-German historians as inevitable collateral damage or occasionally as an attempt to "demoralize" the enemy. RCAF and RAF aircrews who carried out the raids were not informed that the intention was to kill good Christian women and children and unquestioningly sacrificed their young lives and the happiness of their families to

> the diabolical bombing campaign. Near the War's end however, the truth began to emerge, RCAF Wing Commander Giff Gifford's crews, for example, being informed by their British briefing officer that "we have a real juicy one for you tonight, gentlemen. It's Dresden, and it's packed with rerfugees". The spectre of these desperate women and children fleeing Soviet butchery and rape only to die horribly at our hands in a genuine holocaust, haunted Gifford for the rest of his life. (This anecdote was contained in his testimony to the CBC "Valour and the the Horror" enquiry that took place shortly before he died).
>
> When the true history of the sinister origin and purposes of World War II emerges, if ever, it will show a very different picture from that of a struggle to "save civilization from Nazi tyranny". It will show that Germany was our natural ally, was the victim of a war contrived by a vengeful minority, that Godless, expansionist communism and avaricious Zionism were the true enemies of Mankind, that Western Civilization was the loser and the only winners, as in the case of virtually all wars, were the money-changers who, as Bronfman so brazenly demonstrates, continue to profit.
>
> Ian V. Macdonald, former Canadian diplomat

[151] Immediately following the message containing the Macdonald article, another person posted a message criticizing the article, and challenging the assertion that there is no forensic proof of the Holocaust.

[152] The Commission and Mr. Warman argue that the Macdonald article bears the hallmarks of hate messaging, as developed in the jurisprudence and described in *Kouba*, particularly in its portrayal of Jews as a powerful menace that is taking control of the major institutions in society and depriving others of their livelihoods, safety, freedom of speech and general well-being.

[153] The *Kouba* Tribunal had pointed to the findings in the *Citron* case as a leading example of this hallmark. The material there had as its primary theme the expression of doubt concerning the accuracy of the prevailing view regarding the treatment of Jews by Germans (*Citron* at para. 119). These challenges were accompanied by the assertion that Jews, individually and collectively, have deliberately promoted a false version of history in order to gain a personal benefit by way of reparations. The Commission and Mr. Warman contend that the Macdonald article makes similar assertions. They point to passages in the article in which it is claimed that

the Holocaust did not take place, that Jews were not the victims of mass-murder, and that the only victors of the war were the "money-changers" who continue to profit, with a direct reference to the person who has led the efforts seeking restitution. "Avaricious Zionism" is portrayed as an enemy of mankind. A vengeful minority (which may be a reference to Jewish persons, given the paragraph's context) is accused of having "contrived" the war. Jews are also associated with "bloodthirsty" Stalinist commissars.

[154] But there are some distinctions to be made between the *Citron* messages and the Macdonald article. The impugned material in the *Citron* material apparently consisted of a substantial portion of the entire website's content. The Tribunal described the documents in evidence as too voluminous and too extensive to set out in full or even attach as an appendix to the decision. The Macdonald article, on the other hand, is eight paragraphs long and deals not only with Jews and the Holocaust, but with the actions of the United Kingdom, the Soviet Union, and others as well.

[155] The *Citron* Tribunal noted that there was an "unrelenting questioning of the 'truth'" relating to the extent of persecution of Jews by Nazi Germany, in the material before it. There were also repeated references to the individual and collective benefits that the Jewish people and Israel have realized from their continued promotion of the "Holocaust story". In levelling these charges, Jews were branded as liars, swindlers, racketeers and extortionists. They were described, according to *Citron*, as criminals and parasites, acting on a global level to elevate their own power and wealth. Jewish people were "viciously targeted" in the Zündel website material on the basis of their religious and cultural associations. The Tribunal added that the documents carried "very specific assertions regarding the character and behaviour of Jews, none of it good". Jews were "vilified in the most rabid and extreme manner", permitting them no redeeming qualities. Thus, the *Citron* Tribunal was satisfied, at para. 140, that the test set out in *Nealy*, and approved by the Supreme Court in *Taylor*, was met. The *Citron* Tribunal concluded that the messages created an environment in which it was likely that Jews would be exposed to extreme emotions of detestation and vilification.

[156] While the Macdonald article reflects, in several of its lines, notions similar as those put forward in *Citron*, I do not believe that the message contains the same extreme and rabid vilification of Jewish people as was found by the Tribunal in the other decision. Although the text's dominant theme is its "historical discussion" about World War II, on the whole, it is not a diatribe solely against one particular group. It is a generalized attack against everyone from communists, Stalin, the United Kingdom, the Soviet Union, to even Winston Churchill and Air Marshall Harris, along with Zionists and Jews, all of whom are presented as parties who wrongfully mistreated Germans, both during and after the War.

[157] The article, of course, likely offends and hurts those who were personally affected by the War and Nazism, and by the Holocaust in particular. Dr. Mock testified about a letter written by Ernst Zündel, which had been published in the London Free Press in 1993, in which he dispassionately made many of the same assertions as Mr. Macdonald had made in his article, but in more detail (i.e. questioning the number of people who had died in the Holocaust and casting doubt on the accounts of what happened in Nazi concentration camps, with references to alleged studies that purportedly supported his position). There were no exhortations to take action nor any epithets or grotesque comparisons. Dr. Mock testified that as someone who knows what the hurt is of someone who has lost relatives, she was pained to read the Zündel letter. However, she acknowledged that the letter itself did not constitute hate.

[158] Dr. Mock's opinion is consistent with the Supreme Court's comments in *Taylor* that only messages expressing extreme ill-will and emotions, allowing for no redeeming qualities in the persons at whom they are being directed, can be considered hateful or contemptuous, within the meaning of s. 13. The messages must give rise to unusually strong and deep-felt emotions of detestation, calumny and vilification. The provision's objective of eradicating discrimination can thus be balanced with the need to protect free expression (*Taylor* at 930). This point was reiterated by the Tribunal in *Citron*, at paras. 153-4, which noted that although it might be hurtful to raise questions regarding the historical accuracy of events like the Holocaust, the standard for determining "the promotion of hatred or contempt" must be applied with care so that it remains "sensitive to free-speech interests".

[159] In my view, while the Macdonald article clearly displays resentment towards Jewish people, the statements therein do not satisfy the interpretation of s. 13 adopted by the Supreme Court in *Taylor*. Consequently, the complaint against Mr. Lemire with respect to his posting of this article on the Freedomsite message board has not been substantiated.

3. The Heritage Front press release regarding a *Toronto Star* article

[160] On February 22, 2001, Mr. Lemire created a new thread by posting a message within the conference entitled "Heritage Front". He named the thread "Toronto Star on HF [Heritage Front] Health Alert". He does not appear to have added any comments identified as his own to the message, which appears to be a press release.

[161] The release contains what is seemingly a complete copy of an article that appeared in the *Toronto Star* on February 21, 2001, regarding leaflets that the Heritage Front had been distributing outside a Hamilton hospital where a woman of Congolese origin was being treated for an illness that was possibly linked to the Ebola virus. The leaflets apparently called for a "community health alert" and warned that "immigration can kill you". The Star article went on to discuss demands by anti-racism activists that the city take measures to protect visible minorities and combat racism.

[162] The Heritage Front criticizes the *Star* article in the press release, referring to efforts by "rights maniacs" to have the municipality "waste more…tax dollars". The press release goes on to complain that none of the leaflet's text was quoted by the Star article except the opening line, and that "all the good parts…where we detail exactly how immigration *CAN* kill you is gone, and just referred to as 'white supremacist'". The press release then provides a web link where the leaflet can be viewed and urges readers to print it and distribute it.

[163] Mr. Warman wrote in his final submissions that this material, in suggesting that "non-white immigration can kill you", communicates the idea that nothing but banishment, segregation or eradication of this group of people (non-white immigrants) will save others

(presumably white Canadians) from the harm being done by this group, which *Kouba* identified as one of the hallmarks of hate messages emerging from s. 13 jurisprudence.

[164] While the phrase "Immigration can kill you" could be interpreted as suggesting that Canada should deny entry to certain groups, the expression would not, in my view, give rise to "unusually strong and deep-felt emotions of detestation, calumny and vilification", to which the Supreme Court referred in *Taylor*. The matter may foster xenophobia but I am not persuaded that it is likely to expose persons to hatred or contempt within the meaning of s. 13.

[165] Mr. Warman also appeared to suggest in his written submissions that this material constituted a call to engage in violent action against the targeted group, although I fail to see how. I suspect that this argument more likely relates to a message posted by Mr. Harrison in the same thread some 15 months later, which was filed in evidence along with the Heritage Front press release. I have already determined that Mr. Lemire is not accountable for Mr. Harrison's postings.

[166] I therefore find that the complaint regarding the Heritage Front press release has not been substantiated.

(d) The "Controversial Columnists" section of the Freedomsite website

[167] The Commission's evidence included three articles found in the Controversial Columnists section of the Freedomsite website. The articles appear to have been authored by individuals other than Mr. Lemire. However, in contrast to the message board, where users were able to directly post their messages themselves, this material could only be posted on the website by the Freedomsite webmaster, i.e. Mr. Lemire. An annotation at the end of each of the three articles asks, "Are you a Writer? Submit you [sic] pieces to be included on the Controversial Columnists Page! Just E-mail it to webmaster@Freedomsite.org".

[168] Mr. Lemire has admitted that he was the administrator/webmaster of the Freedomsite website. Furthermore, as I mentioned earlier, a copy of an on-line petition that Mr. Lemire had

"signed" was produced at the hearing. Mr. Lemire identified himself after his entry on the petition by name, along with the above noted email address.

[169] I am persuaded, on a *prima facie* basis, that each of these three articles could only have been posted with the involvement of Mr. Lemire, the website's administrator. Thus, it can reasonably be inferred that he was actually aware of the articles' content. Mr. Lemire did not provide any evidence to indicate or explain that he did not have any knowledge of the material. I am therefore satisfied that Mr. Lemire caused these articles to be communicated within the meaning of s. 13.

1. The Doug Collins Column

[170] This article, apparently written by an individual named Doug Collins, is entitled "Freedom is as Freedom Doesn't", and is dated April 4, 2001. Mr. Warman had not referred to this article in his complaint of November 24, 2003, against Mr. Lemire. The article was, however, mentioned in Ms. Rizk's Commission investigation report of April 14, 2005, under the heading "Other Material Found on the Website". Ms. Rizk wrote that she had visited the Freedomsite website in November 2004 and viewed the material. Mr. Warman testified that the article was disclosed to him "in conjunction with" the Commission's investigation report.

[171] Following the issuance of the investigation report, Ms. Kulaszka complained to the Commission, in her letter of April 25, 2005, that the investigator had "started hunting" for more material on her own initiative and included it in the report, without first informing Mr. Lemire of the new allegations or giving him a chance to respond. This material was ultimately included in the Commission's evidence at the hearing.

[172] Incidentally, it appears that Mr. Lemire removed the Collins column from the website after the Commission distributed its investigation report. Mr. Klatt testified that the Freedomsite website's log files showed that the file containing the article was no longer available after August 28, 2005. I have no evidence from the Commission or Mr. Warman to demonstrate that the article had not in fact been removed as of that date.

a) What is the impugned material found in the Collins column?

[173] The column states as follows [*sic* throughout]:

> FREEDOM IS AS FREEDOM DOESN'T
>
> Doug Collins
>
> The sinister attacks now taking place on freedom of speech in the Western world are applauded rather than condemned, thanks mainly to the media and lickspittle politicians. At the same time, everyone pays lip service to freedom. It is what Disraeli called "organized hypocrisy".
>
> There are two subjects that figure large on the "verboten" list: race and the holocaust. You are free to be "anti-racist", of course, and you are free back the official version of the holocaust. But if you believe that immigration can destroy your country, or that Jewish deaths number anything less than six million, take cover.
>
> Canada ranks high in the kingdom of such political correctness. Books frowned on by pressure groups like the Canadian Jewish Congress and B'Nai Brith are banned; Ernst Zundel and his lawyer are denied access to the Parliament buildings in Ottawa (by unanimous consent of our MPs!); and dissidents can be hauled before kangaroo courts called human rights tribunals for having "hurt the feelings" of Jews and immigrants.
>
> Hate laws are anti free-speech laws, Which is why they figure in our Criminal Code. And we now never see them criticized in the mainstream media, owing partly to increasing Jewish control. But they also reflect the spirit of the times.
>
> For a fascinating account of what is going on world-wide, read "Return to the Dark Ages," an article in the March issue of American Renaissance magazine (AR). In Germany, France, Spain, Switzerland, Poland, Austria and Lithuania the Jewish Holocaust has become the one historical event on which people can be compelled to agree, Prison, exile or massive fines face those who disagree.
>
> "Today in Europe," it states, "there are laws as bad as anything George Orwell could have imagined." Facts are irrelevant, and certain things may not be said whether they are true or false.… It is a tyranny of the left practised by the very people who professed shock at the tactics of Joe McCarthy.

Hundreds of people have fallen foul of that tyranny but, contrary to what happened when McCarthy was on the loose, their fate does not much interest our liberal watchdogs. On the contrary, such victims are usually denounced as Nazis, neo-Nazis, Fascists, "white supremacists", and so on.

A prime example is that of Germar Rudolf, a young German with a doctorate in chemistry who tested the "gas chambers" at Birkenau and concluded that they could not have been used for mass executions. He was dismissed from the prestigious Max Planck Institute and sentenced to 14 months in prison. He fled to England, where Jewish groups have sought his extradition to Germany, and is now seeking political asylum in the U.S. I recall that news items in the Conrad Black-owned Telegraph newspapers in London denounced him as a Nazi in hiding. With no shred of evidence.

Switzerland has become no better than Germany. It embraced "holocaust denial" censorship in 1995 and is now sending offenders to jail or forcing them into exile. According to AR, there have been 200 trials and 100 sentences in that country since then.

Juergan Graf, a highly qualified teacher who wrote a revisionist book, was sentenced to 15 months. His publisher got a year, even though the book was published before the law came into effect. As is the case in Germany, their lawyers could not defend them properly without themselves being prosecuted for "denial". Graf fled to Iran and is now lecturing in Iranian universities.

In France, Bridget Bardot has become a "hate criminal". Not for anything she said about the Jews, but because, as an animal lover, she opposes the ritual slaughter of sheep by French Muslims. She also complained that France is being invaded by an "overpopulation of foreigners".

Canada gets some attention in the article. We now have "a nearly 20-year tradition of censorship", with Ernst Zuendel being our "most famous thought criminal".

As most of us know, Zuendel has faced a long drawn-out human rights hearing involving Jewish complaints about a web site that bears his name but is run from the U.S. How's that for stretching things! But elasticity doesn't worry the chairman of the tribunal. Nor does the truth. As he has stated, "The truth is not an issue before us. The sole issue is whether such communications are LIKELY to expose a person or persons to hatred or contempt."

> Censorship is on the march in Europe and is licking at our own [U.S.] borders, states AR, and "the real shame is how so few people are willing to oppose this clampdown on freedom".
>
> Quite. They'd rather have another beer.

[174] A cartoon drawing is inserted within the text of the column as well. It depicts a man singing the national anthem in a baseball park. The accompanying caption portraying the lyrics being sung states, "Oh Canada-a-a- My Zionist dominated land…".

b) Is the matter likely to expose persons to hatred or contempt by reason of the fact that they are identifiable on the basis of a prohibited ground of discrimination?

[175] The Commission argues that the content of the Collins article and the manner in which the message is constructed are likely to expose Jews to hatred or contempt on the basis of their race, religion, or ethnic origin. The Commission claims that the material puts forward unsubstantiated assertions of Jewish control or influence, and characterizes racists and Holocaust deniers as "victims of liberal tyrants and Ernst Zündel as the victim of 'Jewish complaints'". The Commission contends that similar messages were referred to in *Citron* as "specific rhetorical strategies to target and degrade Jews", and that as in *Citron*, the tone and expression of the Collins article's message are so malevolent in the depiction of Jews that they constitute hate messages within the meaning of the *Act*. Mr. Warman, for his part, argued that Mr. Collins' references to human rights tribunals as "kangaroo courts" demonstrates a pattern of contempt for the laws that Canadians have set down to protect human rights. He added that Mr. Collins' defence of individuals like Ernst Zündel promotes the idea that Holocaust denial is somehow a legitimate interest.

[176] Mr. Lemire counters that this article constitutes "core political commentary" that denounces restrictions on his and others' freedom to express themselves, even with respect to the Holocaust. As I have already indicated, suggestions that the Holocaust did not take place or that statistics relating thereto have been exaggerated are extremely hurtful, but do not necessarily

expose those targeted by them to hatred or contempt, within the meaning of s. 13, particularly in the absence of any extreme vilification of Jews or others.

[177] Mr. Lemire adds that questioning the need for laws that restrict expression is not proscribed by s. 13 of the *Act*. Links between the Jewish community and human rights complaints regarding hate messages are accurate, argues Mr. Lemire. The *Citron* decision specified that the complainant had identified herself as a Jew. Mr. Warman referenced in his final submissions a British Columbia human rights case in which Mr. Collins was the respondent, *Abrams v. North Shore Free Press Ltd. (No. 3)* (1999), 33 C.H.R.R. D/435 (BCHRT). The tribunal referred to the complainant in that case as an active member of the Jewish community. Another complaint was also filed against Mr. Collins around the same time, by the CJC (*Canadian Jewish Congress v. North Shore Free Press Ltd. (No. 7)* (1997), 30 C.H.R.R. D/5 (BCHRT)).

[178] The Collins article, however, goes further than merely highlighting the involvement of members of the Jewish community in human rights cases. It alludes to an "increasing Jewish control" of mainstream media that restricts criticism of hate messaging laws. The cartoon drawing suggests that Canada is being dominated by "Zionists". Mr. Lemire produced excerpts from a number of dictionaries, which essentially define Zionism as a movement for the establishment and development of a Jewish Nation in what is now Israel. While that may be the formal definition of the term, given the context of the Collins article, it can reasonably be inferred that its usage in the cartoon drawing is a reference to or euphemism for the Jewish community in Canada.

[179] Taken as a whole, however, does the material found in the Collins article constitute a hate message within the meaning of the *Act*? Rather than constituting a "specific rhetorical strategy" targeting and degrading Jews, the article's overall theme consists of criticizing the application of human rights law and criminal law to "censor" persons communicating messages regarding topics such as the Holocaust and immigration. In order to properly determine whether this material constitutes a hate message within the meaning of s. 13, the Supreme Court's guidance in

the *Taylor* case must again be called upon. Does the material express unusually strong and deep-felt emotions of detestation, calumny and vilification? Is the material likely to expose Jews to "extreme" ill-will, which allows for them no redeeming qualities?

[180] On balance, I do not find that this material satisfies the *Taylor* criteria. In contrast to the material before the Tribunal in *Citron*, Jews are not "viciously targeted". They were not branded as liars, swindlers, racketeers and extortionists, or as criminals and parasites, acting on a global level to elevate their own power and wealth. The article does not include any calls for action (violent or otherwise) against them, nor does it contain any profanity or epithets. Unquestionably, the references to Jews in Mr. Collins' criticism of hate messaging laws are entirely gratuitous. His opinions could certainly have been expressed without raising negative stereotypes of Jewish control of mainstream media and public policy. The discourse is unnecessarily provocative. Nevertheless, the article does not express, and is not likely to generate, the extreme emotions contemplated by the Supreme Court in *Taylor*.

[181] Therefore, in answer to the specific submissions of the Commission with respect to the Collins column, I find that the article is not "so malevolent" in its depiction of Jews so as to constitute a hate message, within the meaning of the *Act*.

2. The "Ottawa is Dangerous" Article

[182] This article was apparently composed in January 2001, and was reproduced on the website under a broader title - "Vox Populi – The Voice of the People". Its author is shown only as "John of Vancouver". Just like the Collins column, this material was not mentioned in Mr. Warman's complaint but was brought up by Ms. Rizk in her investigation report as "other material". Mr. Klatt testified that the Freedomsite's weblog files also showed that the file containing this article was no longer available after August 28, 2005. This evidence was also not contradicted by the Commission or Mr. Warman.

[183] The article consists of remarks regarding the results of the 2000 federal election. The author is clearly disappointed that the Liberal Party won a majority, and is particularly upset with

the voting patterns outside of Western Canada. He questions how it is that the "English speaking citizens of Ontario can be so dim as to elect such an odious band of in-bred French jack-asses". He goes on to reason that Quebecers welcomed back the Liberals because the province is populated by "Frenchmen", adding, "Who knows why the French do anything?"

[184] The author then appears to conflate Quebecers with the citizens of France by writing that "the last time the French had any real success in politics was when they imported a Corsican bandit to help them harry the rest of Europe". Referring to the Allied Forces' liberation of France during World War II, the article states that but for the "English speaking countries of the world, the French would right now be guzzling schnapps instead of sipping wine and their children would be goose-stepping their way to school, and now they vote Liberal those ungrateful cheese-sniffers".

[185] The writer then turns his attention to Ontario, describing its election of 101 Liberal MPs as "inscrutable". He reasons sarcastically that Ontarians "enjoy" paying the GST and must think that health care delivery is "just fine" in their province. He adds that Ontarians must also enjoy the "multitudes of smiling immigrants they receive, especially from Haiti, China and Jamaica". He mentions that instances of tuberculosis had increased in Ontario, adding that "not surprisingly 90% of TB cases come from refugees and new immigrants living in the Toronto area". The article ends with further criticisms of the government of the day for its record on criminal justice and spending, and a conclusion that "Canada will just have to contend with the fact that Ontario won't vote for any leader unless he is a lawyer from Quebec".

a) Is the matter likely to expose persons to hatred or contempt by reason of the fact that they are identifiable on the basis of a prohibited ground of discrimination?

[186] Mr. Warman contends that the material in this column bears some of the hallmarks of hate messages mentioned in *Kouba*. Immigrants (and particularly those from the countries that were singled out) are treated as a powerful menace that is depriving others of their livelihood, safety, and general well-being. The article also blames them for the current problems in society. Mr. Warman appears to suggest in his submissions that "francophone members of the federal

Liberal government" are similarly blamed and are referred to with "highly inflammatory and derogatory language".

[187] While I agree that the terms used with respect to these MPs are unkind and mean-spirited, and that the writer's subsequent remarks send the message that the presence of these new immigrants in Canada is unwelcome, his remarks do not express the unusually strong and deep-felt emotions of detestation, calumny, and vilification contemplated by s. 13, as interpreted by the Supreme Court in *Taylor*. The tone of the article does not rise to the level of malevolence, hysteria or intemperance at which s. 13 is aimed. There is no call to action, and the few epithets used (e.g. "jack-asses" or "cheese sniffers") do not target specific groups or invoke historical injury. I find therefore that the complaint with respect to the *Vox Populi* article has not been substantiated.

3. The AIDS Secrets column

[188] This column is entitled "Aids Secrets: What the Government and the Media Don't Want You to Know", and ostensibly consists of the text of a speech given by Kevin Alfred Strom on July 10, 1993, on an American radio program. Mr. Warman viewed the article on the Freedomsite website and printed it out on November 15, 2003. He referred to the article in his complaint. Ms. Rizk wrote in her investigation report that she was able to access the *AIDS Secrets* column on the Freedomsite website in December 2003, but she added that the article appeared to have been subsequently removed. Mr. Klatt testified that the website's log files showed that the column had been removed from the Freedomsite website on April 9, 2004, which was a couple of weeks after Mr. Lemire had received a copy of Mr. Warman's complaint. This evidence was not contradicted and, in fact, Mr. Warman confirmed in his testimony that the article is no longer available on the website, though he did not know as of when.

a) What is the content of the impugned material in the AIDS Secrets article?

[189] The author begins his text by stating that what he is about to say is shocking and disturbing, and will make his audience worry for their loved ones. He goes on to say that there is

a "killer loose in the land" who "cuts down all whom he touches". He mentions in the first paragraph that if the "killer" touches you or your child, you will both die, adding that his victims "die a slow, horrible death" in agony, and that nothing can be done to save them. The author then reveals that the killer's name is the Human Immunodeficiency Virus (HIV).

The article continues:

> This killer emerged into our world over a decade ago, rising like an angel of death out of the oozing rivers of body fluids that spilled like fetid waterfalls into the streets of America from the sick and sleazy pleasure houses of the "liberated" homosexuals.

[190] The "medical establishment" and public health authorities are criticized for failing to take action to prevent the uninfected from coming into contact with HIV, but instead directing their efforts to protect the confidentiality of the infected. According to the article, the reason for their "betrayal" and "lies" is the "tremendous power of organized homosexuals" who are "greatly aided by the controlled media". In the eyes of the "powerful minority which controls the U.S. media", homosexuals are among the many "'oppressed minorities', criticism of which is forbidden, on pain of losing one's job or character assassination".

The article then goes on to state:

> Yes, the power of organized perversion is a factor in the suppression of the truth about AIDS. And it is certainly a fact that the darling deviants are a part of the media's push to destroy America. But there's more to it than that. If the uncensored truth about AIDS were released to the American public, it would have the potential of permanently derailing the plan to submerge America into a multicultural New World Order. It would have the potential of waking up the sleeping American people – and our masters in Washington, New York and Tel Aviv cannot allow that to happen.

[191] The text goes on to comment on the "lies" spread by government and the media, including the assertion that "safe sex" can prevent HIV transmission. A science journal editor is cited, who had apparently concluded that condoms are not effective in preventing the

transmission of body fluids. Another of the alleged lies was that America's blood supply was safe. With respect to this latter point, the author states:

> When some individuals at the FDA and the Centers for Disease Control suggested that blood bankers could eliminate 80% of the AIDS-infected blood by testing all donated blood for Hepatitis-B, with which 80% of homosexual males are infected due to their filthy practices, and rejecting all the blood that tested positive, the higher-ups at both agencies declined to make that a requirement. Tens of thousands were sentenced to death by that decision. Why? Because homosexuals don't want to be tested, they don't want to be identified, and they don't want their twisted sexual appetites restricted in even the slightest way. Homosexuals and powerful forces friendly to the homosexualization of America have successfully blocked this and many other common sense proposals to protect the rest of us from AIDS.

[192] The article explains how, in May 1985, a blood test for HIV infection was developed, but also notes that the test was unable to detect the virus for a period ranging from several weeks to up to three years following infection. This period was referred to as a "negative window". The article therefore suggests that those getting transfusions use their own blood or a designated HIV-free donor. The text also warns, however, that "factions of radical homosexuals have publicly threatened to purposely donate infected blood if certain of their demands are not met". This infected blood, it is argued, may not get screened out if it is tested during the negative window.

[193] The author of the article is also upset that persons working in occupations where they could easily pass the virus to others (such as dentists and physicians) are not required to notify anyone of their HIV-positive status. He writes:

> The AIDS virus is the only virus that has "civil rights". Innocents must die, so that the sick sex games of the pervert minority can continue. (…) The imposition of universal testing and quarantine where appropriate would end the anal fun, you see, and we can't – we simply can't have that. They – the infected – have all the rights. And we – the uninfected -- have none. A complete inversion of what the public health system is supposed to be all about!

[194] The article criticizes governments for having stopped "in their tracks" the progress of studies that would demonstrate that the virus can be transmitted, even through skin contact with all forms of bodily fluids, not just blood, whether moist or dry.

The column then purports to discuss "racial differences in AIDS Infection":

> So far, the hidden facts about this disease that I have pointed out are hidden at least partly at the behest of organized perversion, which is very powerful, and which has powerful friends in the controlled media and even in the White House. But I want you to realize that the liars of the media are lying not only to protect the so-called "human rights" of homosexuals. They are also lying to protect their one-world, multicultural agenda.

[195] The author goes on to claim that the "data for heterosexuals with AIDS" show that Blacks are "between 14 and 20 times more likely to be infected than are Whites", and that "even though Blacks account for only about 12% of the US population, they account for fully 90% of all AIDS infections" acquired through "heterosexual means". The article also cites a report from the American Journal of Public Health, which apparently had found that "42% of straight White Americans with AIDS got it by having sex with non-Whites". The author also refers to another study that purportedly found that 83% of heterosexual AIDS patients in the "very White country of Belgium" were Black African immigrants, and that most of the "White males with AIDS" had lived in or regularly travelled to Central Africa. It was asserted that 70% of this last group had had sex with Black women in Africa.

The author sums up this discussion by stating:

> Our young people need to be informed of these facts. These are real-life risks that they face in this sorry world that we have made for them. It is criminal, it is homicidal, to deny them these facts just because the conclusions one might draw from them are at variance with the multicultural, one-world agenda that the forces behind Liberalism are ramming down our throats. We must shout the truth about AIDS from the housetops.

[196] The last section of the speech's text is entitled "Protect yourself and your loved ones". The author provides his opinion on what can be done "to save your family and your country from this deadly epidemic":

> Avoid all contact with known homosexuals. If there is a known homosexual district in your area, do not go there. Avoid the "trendy", "fashionable" part of town, whenever possible. This is often where the highest percentage of homosexuals are to be found. Particularly avoid using public rest rooms or eating in restaurants in such areas.
>
> If you live in a rural area or small town that has preserved traditional American values, stay there. If you live in an area where such values have disappeared, where "Gay Pride" parades have replaced Independence Day parades and where the Third World invasion is in full swing, carefully consider your options. Moving into a racially, culturally, and medically healthier area should be considered.
>
> Carefully choose who you socially and professionally associate with. Even if you must sacrifice status or money to do it, it is wise to avoid repeated close contact with those in high-risk groups, including Blacks, Third World immigrants, homosexuals, and drug users. Do not allow your children to associate with individuals in these groups when it can be avoided. Plan your travels to skirt around areas where such groups form a high percentage of the population, even if it takes extra time and gasoline to do so. Remember, any body fluid can transmit the virus, and it is impossible to predict the occurrence of auto accidents, altercations, the need to use unsanitary toilet facilities, or emergencies in which you may be placed in a hospital environment in a highly infected zone, possibly right next to a terminal AIDS patient.

[197] The text concludes by advising, "What you must do above all, to stop the spread of this disease among our people is to participate as fully as you can in the educational effort represented by this radio program".

b) Is the matter likely to expose persons to hatred or contempt by reason of the fact that they are identifiable on the basis of a prohibited ground of discrimination?

[198] I accept the Commission's and Mr. Warman's submissions that the *AIDS Secrets* column is likely to expose homosexuals and blacks to hatred and contempt by reason of the fact that they

are identifiable on the basis of sexual orientation, colour and race, which are proscribed grounds of discrimination under s. 3 of the *Act*.

[199] The Commission and Mr. Warman point out that this material bears many of the hallmarks of hate messages within the meaning of s. 13, as identified in prior Tribunal and court decisions, and summarized in the *Kouba* decision. The material makes use of allegedly true stories and references to reputable sources in an attempt to encourage readers to accept, without question, gross generalizations and stereotypes about the targeted group, particularly of homosexuals as promiscuous and sexually deviant (*Kouba* at para. 30). The use of allegedly true stories to justify extremely negative conclusions about members of a targeted group is a powerful means of exposing them to hatred because it may seem to some readers that the conclusions are justified in light of the evidence provided by the stories and reports (*Kouba*, at para. 37).

[200] The article also portrays homosexuals and blacks as powerful societal menaces, who are depriving others (particularly our families and children) of their safety and well-being by, among other things, conspiring to prevent authorities and science from developing means to combat HIV (*Kouba*, at para. 24). Blame for one of the world's most important problems with life-threatening consequences, the spread of AIDS, is cast almost entirely on homosexuals and Blacks (*Kouba*, at para. 45). Homosexuals are presented as dangerous and immoral persons (Kouba, para. 49) who, motivated by a selfish desire to indulge their own sexual deviance and not have their blood donations tested, are responsible for the deaths of untold thousands of persons. It is alleged that some of them threatened to purposely donate infected blood to be transfused to others who are not infected.

[201] The material ultimately calls for the avoidance of any contact with "high risk groups", including Blacks, "Third World immigrants", and homosexuals, in order to "stop the spread of this disease among our people", presumably White heterosexuals. The message thus communicates the idea that the solution for "saving your family and your country from this deadly epidemic" is to segregate these groups from the White heterosexual population. As noted

in *Kouba* at para. 57, the Tribunal in *Nealy* found that such messages can encourage violence as a proactive means of defence against any who are enemies of the racial purity of white people.

[202] Furthermore, the text is infused with highly inflammatory and derogatory language (*Kouba* at para. 67). Homosexuals are branded as perverts and sexual deviants, from whose "sick and sleazy pleasure homes" HIV/AIDS rose, "like an angel of death out of the oozing rivers of body fluids that spilled like fetid waterfalls into the streets of America". Homosexuals are described as a "pervert minority" that engages in "sick sex games" and "filthy practices", and as having "twisted sexual appetites".

[203] Mr. Lemire contends that the *AIDS Secrets* article's assertions are based on true facts that were referenced therein. He produced copies of the reports and studies mentioned in the article, which for instance allude to statistics showing that the risk of AIDS is higher in American Blacks and Hispanics, and that the human immunodeficiency virus is "unusually stable" at room temperature, which "may explain the appearance of some AIDS cases in non-risk groups". Mr. Lemire also referred to the report of the Commission of Inquiry on the Blood System in Canada (Krever Commission), which found that 75% of persons with HIV/AIDS were homosexual or bisexual men, and which noted that the National Hemophilia Foundation had recommended that homosexual men be excluded from donating blood or plasma in certain circumstances. A document published by the Canadian Blood Services Agency indicates that the agency defers any male from donating blood if he has had sex with another male, even once, since 1977. The policy notes that HIV incidence is much higher in males who have had sex with other males, according to 2005 statistics compiled by the Public Health Agency of Canada.

[204] Mr. Lemire argued that the article written by Mr. Strom is a discussion of the threat HIV/AIDS posed to his readers, and was only meant to "generate discussion" based on the author's own personal research. Mr. Strom, it is argued, did not advocate any harm to those infected with HIV/AIDS, but rather for his readers to be safe and "avoid repeated close contact with those in high-risk groups".

[205] As I mentioned earlier in this decision, the Tribunal in *Citron* noted, at paras. 153-4, that debate about sensitive topics such as the Holocaust or, in the present instance, HIV/AIDS, can be entirely legitimate. Although it might be hurtful to some persons to raise questions regarding such topics, "the standard for determining the 'promotion of hatred or contempt' must be applied with care so that it remains sensitive to free speech interests" (*Citron* at para. 153). Where, however, the discussion denigrates or vilifies in an extreme way persons or groups of persons on the basis of a prohibited ground, the material ceases to be "permissible", within the meaning of s. 13 of the *Act*. It can no longer be considered to be "core political speech", as Mr. Lemire describes the *AIDS Secrets* article.

[206] Whether or not the views expressed in such impermissible material are based on "facts" is not determinative. As the Supreme Court indicated in *Taylor* at p. 935, the *Charter* does not mandate an exception for truthful statements in the context of s. 13 of the *Act*. It follows that if factually accurate statements are used in a way that is likely to expose persons or groups of persons to hatred or contempt on the basis of a prohibited ground, then they will nonetheless be in breach of s. 13.

[207] In my view, the material found in the *AIDS Secrets* article expresses unusually strong and deep-felt emotions of detestation and vilification towards homosexuals in particular. The article is rife with hyperbole and moral condemnation. Homosexuals, and Blacks to a lesser extent, are denigrated as purveyors of a "killer" that is on the loose, agonizingly destroying the lives of American children and adults alike. Extreme language is used to vilify them and their lifestyles. They are portrayed as a powerful force that is conspiring to bring harm to others. Rather than using the statistics and studies in a dispassionately scientific manner, the article adopts an alarmist, almost hysteric tone, which along the above mentioned characterizations, is likely to expose them to hatred or contempt.

c) Was the material communicated telephonically or caused 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, within the meaning of s. 13(1)?

[208] Section 13(2) provides that s. 13(1) applies to matter that is communicated by the Internet, which would consequently include messages communicated through the Freedomsite website. As I mentioned earlier in this decision, however, Ms. Rizk determined that the Freedomsite website was being hosted by a firm in Denver, Colorado, in the United States. Furthermore, Mr. Klatt's review of the website's logs suggested that over 84% of the persons who viewed the article (i.e., 799 persons) accessed it from the United States. Only just under 2% of its viewers (or eight persons) were from Canada. Mr. Lemire argued, therefore, that since the website was "located" in the U.S., and virtually all the viewers of the document were outside Canada, the communication could not have taken place "by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament".

[209] Mr. Lemire, however, is the admitted administrator/webmaster of the Freedomsite website, and I have already determined that he was responsible for having placed the Controversial Columnists material on the website, which includes the *AIDS Secrets* article. Through the course of the Tribunal's hearing process, it was made abundantly clear that Mr. Lemire resides in Canada, and his place of residence was taken into account in determining the hearing venue. The contact address provided on the website, where people could, for instance, send financial contributions to help keep the website in operation, was in Toronto. None of this evidence was contradicted.

[210] Thus, the preponderance of evidence demonstrates that Mr. Lemire was administering the Freedomsite website from Canada (which would include uploading material to the server), irrespective of whether the website may have physically been operating from a server in the United States. As the Tribunal in *Zündel* pointed out, at para. 110, although some part of a Canadian user's connection to the Internet routing may take place on extra territorial facilities, on the language used in s. 13(1), the matter need only be communicated "in whole or **in part**" by

means of the facilities of a Canadian federally regulated telecommunication undertaking. I therefore dismiss Mr. Lemire's submission in this regard.

[211] As for the question of whether the messages were communicated repeatedly, Mr. Warman testified that any member of the public using the Internet could access the controversial columnists section of the website. In these circumstances, I find that the messages can be considered to have been communicated repeatedly, within the meaning of s. 13 (see *Warman v. Winnicki*, 2005 FC 1493 at para. 32, *Kulbashian* at para. 62, *Warman v. Beaumont* 2007 CHRT 49 at paras. 51-7).

[212] For all the above reasons, I find that the *AIDS Secrets* article contains material that is likely to expose homosexuals and Blacks to hatred or contempt, and that Mr. Lemire communicated the matter within the meaning of s. 13 of the *Act*. The complaint in this respect has been substantiated.

IV. The Constitutional Issue

[213] Prior to the start of the hearing, Mr. Lemire filed a motion seeking to have ss. 13, 54(1) and 54(1.1) of the *Act* declared inoperative, on constitutional grounds. I ruled that the motion would be best dealt with after the hearing, with the benefit of a complete evidentiary record. The inclusion of the constitutional issue in this case attracted the involvement of the Attorney General of Canada as well as the five interested parties. Mr. Warman, however, decided not to make any submissions on the constitutional question.

[214] Mr. Lemire's motion was principally focussed on the violation of his freedom of expression guaranteed under s. 2(b) of the *Charter*, although he also made some reference to the freedom of conscience under s. 2(a) and the rights to life, liberty, and security of the person prescribed in s. 7 of the *Charter*. I will deal with each claim in turn.

A. Freedom of expression (s. 2(b) of the Charter)

[215] Mr. Lemire asserts that s. 13(1) of the *Act* is a violation of his freedom of expression. Both the Commission and the Attorney General concede that the content of the Internet postings relied upon by the Commission in the present case is protected expression under s. 2(*b*) of the *Charter*, that s. 2(*b*) is breached, and that the applicable analysis to be carried out concerns whether the infringement is justified under s. 1 of the *Charter*.

[216] This is not, of course, the first time that s. 13's validity under the *Charter* has been challenged. The majority in the 1990 Supreme Court decision in *Taylor* found that the provision places a reasonable limit on the freedom of belief, opinion and expression guaranteed by s. 2(*b*) of the *Charter*. In 1999, the Federal Court of Appeal, in *McAleer v. Canada (Canadian Human Rights Commission) (re Payzant)*, [1999] F.C.J. No. 1095, held that the *Taylor* finding applies equally to matter exposing persons to hatred or contempt on grounds other than those raised in *Taylor* (race and religion). The discriminatory ground in *McAleer* was sexual orientation.

[217] The Tribunal has, in two subsequent instances (*Citron* and *Schnell*), dealt with challenges by respondents to the provision's constitutionality. The challenges were dismissed in the two cases, both of which were decided in 2002. The Commission and the Attorney General submit that Mr. Lemire has failed to displace the findings in *Taylor* and the other above mentioned decisions.

[218] Since *Taylor*, there have been a number of significant changes to s. 13 and its remedial provisions set out in s. 54(1). Under the version of the *Act* examined by the *Taylor* decision, the Tribunal could only make an order referred to in s. 53(2)(*a*) of the *Act* after finding a s. 13 complaint substantiated. Thus, a person who engaged in this form of discriminatory practice could only be ordered to cease that practice (commonly referred to as a "cease and desist order") and take measures in consultation with the Commission to prevent the same or similar practice from occurring in the future. In 1998 (S.C. 1998, c. 9, s. 28), s. 54(1) was replaced with a provision stating that the Tribunal could not only issue a s. 53(2)(*a*) order, but it could now also order a respondent

- where the discrimination was wilful or reckless, to compensate a victim who was specifically identified in the hate message with special compensation of up to $20,000, pursuant to s. 53(3), and
- to pay a penalty of up to $10,000.

[219] In addition, s. 13 was amended in 2001 (S.C. 2001, c. 41, s. 88) to insert a paragraph (the current version of s. 13(2)) clarifying that the discriminatory practice set out in s. 13(1) applies to communications by means of a computer or group of interconnected or related computers, including the Internet.

[220] Consequently, Mr. Lemire submits that these post-*Taylor* amendments raise new grounds that justify a reconsideration of the constitutionality of the *Act*'s hate message provisions. He adds, furthermore, that some of the Supreme Court's findings in *Taylor*, particularly regarding the objectives of s. 13, were "fundamental errors" that would justify "striking down" the provision.

[221] While I am prepared to consider Mr. Lemire's submissions, I also share the Tribunal's view in *Schnell*, at para. 141, that it would be inappropriate to revisit the whole question of the justifiability of s. 13(1) of the *Act* under s. 1 of the *Charter*. I am bound by the majority decision of the Supreme Court in *Taylor*, which was also followed in *McAleer*. Thus, unless Mr. Lemire

is able to distinguish the circumstances of this case from those in *Taylor*, I cannot question the Court's findings in order to correct an alleged "fundamental error".

[222] As for the Tribunal findings in *Citron* and *Schnell*, I note that in the former case, the Tribunal concluded that the complaint pre-dated the amendments and that they consequently did not apply to those proceedings. Although the Tribunal made some comments regarding the impact of the amendments, these remarks were essentially *obiter dicta*. With respect to the *Schnell* case, although the amendments were applicable, the Tribunal cautioned that one of the key elements in the 1998 amendments, the possibility of imposing a penalty on the respondent, was not in issue in that case. Consequently, the Tribunal's comments regarding the impact of the new penalty provision on *Taylor*'s findings are also, in some sense, *obiter*. Besides, as I mentioned earlier, I am not in any event bound by the findings of other Tribunal decisions.

(i) The Supreme Court judgment in *Taylor*

[223] The Court in *Taylor* found that s. 13(1) infringes s. 2(*b*), which, as I just mentioned, was also conceded by the Commission and the Attorney General in the context of Mr. Lemire's communications in this case. The Court then turned its attention to whether this infringement is demonstrably justified under s. 1 of the *Charter*, applying the test set out in *R. v. Oakes*, [1986] 1 S.C.R. 103. Section 1 of the *Charter* states:

> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
>
> La Charte canadienne des droits et libertés garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.

[224] There are two aspects to the *Oakes* test. First, the objective to be served by the measures limiting the *Charter* right or freedom must be sufficiently important to warrant it being overridden. At a minimum, the objective must relate to concerns that are pressing and

substantial in a free and democratic society. Second, the party invoking s. 1 must show the measures to be reasonable and demonstrably justified. This involves a threefold proportionality test: the measures must be rationally connected to the objective, they should impair the right or freedom as minimally as possible, and there must be proportionality between the effects of the limiting measures and the objective – the more severe the deleterious effects of a measure, the more important the objective must be. The Supreme Court in *Taylor* determined that s. 13(1) satisfied both aspects of the *Oakes* test.

[225] While the burden of demonstrating that the *Oakes* test has been satisfied ordinarily rests on the shoulders of the person invoking s. 1, I am of the view that in this instance, given the Supreme Court's clear findings on the matter, Mr. Lemire must first persuade me that the evidence and the circumstances of this case are such that a distinction can be made from *Taylor*. If there is a basis for making such a distinction, it then will fall to the Commission, the Attorney General, and the interested parties who are invoking s. 1, to demonstrate that the Oakes test remains satisfied, despite these distinguishing factors.

(a) Does the objective of s. 13(1) continue to relate to concerns that are pressing and substantial in a free and democratic society (the first aspect of the *Oakes* test)?

[226] The Supreme Court in *Taylor* stated that the legislative objective of s. 13(1) could be gleaned from the *Act*'s purpose, set out in s. 2, as being the promotion of equal opportunity unhindered by discriminatory practices based on factors like race or religion, amongst others. Thus, Parliament has indicated that it views the messages contemplated in s. 13(1) as contrary to the furtherance of this equality.

[227] The Court added that Parliament's concern that the dissemination of hate propaganda is antithetical to the general aim of the *Act* is not misplaced. The Court referred to the findings, in 1966, by the Special Committee on Hate Propaganda in Canada (the "Cohen Committee"). The Cohen Committee had noted that individuals subjected to racial or religious hatred may suffer substantial psychological distress, the damaging consequences of which include loss of self-esteem, as well as feelings of anger and outrage, in addition to strong pressure to renounce

cultural differences that mark them as distinct. The Committee also observed that hate propaganda can operate to convince listeners, even if subtly, that members of certain racial or religious groups are inferior. The Court pointed out that the result may be an increase in acts of discrimination, including denial of equal opportunity in the provision of goods, services, and facilities, and even incidents of violence. The Court also referred to a number of other reports from the 1980's that echoed the Cohen Committee's conclusion that hate propaganda presents a serious threat to society.

[228] The Supreme Court concluded that messages of hate propaganda undermine the dignity and self-worth of target group members and, more generally, contribute to disharmonious relations among various racial, cultural and religious groups, which has the result of eroding the tolerance and open-mindedness that must flourish in a multicultural society that is committed to the idea of equality. Consequently, the Court found that the objective underlying s. 13(1) is one of pressing and substantial importance sufficient to warrant some limitation upon the freedom of expression guaranteed in s. 2(b) of the *Charter*.

[229] Mr. Lemire argues that the Supreme Court's finding was a "fundamental error". He claims that s. 13 is in substance a "reincarnation" of the old common law offence of seditious libel, namely, "a matter which is producing, or has a tendency to produce feelings of hatred and ill-will between different classes of His Majesty's subjects". However, s. 13 lacks the defences that were available to a person charged with this criminal offence and any of the associated procedural safeguards. Mr. Lemire contends that the Supreme Court in *Taylor* erred in looking at s. 2 of the *Act* to discover s. 13's objective. The Court should have instead looked at s. 13 itself to look for its purpose, which he submits was to prevent the types of communications and expressions dealt with as seditious libel in the past (see *R. v. Boucher*, [1951] S.C.R. 265).

[230] Mr. Lemire points out that the s. 13(2) amendment of 2001, which explicitly extended s. 13(1)'s scope to Internet messages, was enacted as part of the *Anti-terrorism Act*, S.C. 2001, c. 41, demonstrating thereby that s. 13 is part of the State's strategy to eradicate terrorism, and protect the political, social and economic security of Canada. It is therefore not a remedial

statute to prevent discrimination but rather has as its objective to control opposition to policies that may create ill-will between groups in society and lead to political opposition to government policies like multiculturalism and "Third World" immigration.

[231] In my view, this reference by Mr. Lemire to the manner in which the 2001 amendment to the *Act* was enacted does not present a change in circumstances that would justify my revisiting the Supreme Court's findings in *Taylor* regarding s. 13(1)'s objective. Mr. Lemire's comparisons to seditious libel and his interpretation of s. 13's objective were equally available prior to the amendment. The new statutory provision does not alter the situation that prevailed when *Taylor* was decided nor does it warrant a finding that the Supreme Court's conclusions regarding the provision's objectives should now be revisited.

[232] Besides, as the Attorney General pointed out, the parliamentary debates that preceded the enactment of the *Anti-terrorism Act* (Bill C-36) confirm that the purpose of the legislation, and in particular, the amendments to the *Canadian Human Rights Act*, was to strike an appropriate balance between individual rights, including the right to be free from discrimination, and the protection of society. On October 16, 2001, the Hon. Anne McLellan, who was then Minister of Justice and Attorney General of Canada, stated that the bill "reaffirms the equal right of every citizen of whatever religion, race or ethnic origin to enjoy the security, protections and liberties shared by all Canadians" (*House of Commons Debates*, No. 095 (October 16, 2001) at 6164 (Hon. Anne McLellan)). She also pointed out that the *Act* was being amended to "clarify" that communication of hate messages using new technology, such as the Internet, constitutes a discriminatory practice. The Minister noted that while such communication is already interpreted as being discriminatory, these amendments would add certainty and clarity to the law.

[233] The Minister's latter statement is, in fact, borne out by the actual text of s. 13(2), which is prefaced with the words: "For greater certainty…". Furthermore, notwithstanding the overall objectives of the *Anti-terrorism Act*, according to s. 42 of the *Interpretation* Act, R.S.C. c. I-21, an amending enactment, as far as consistent with the tenor thereof, shall be construed as part of the enactment that it amends. As the Court noted in *Taylor*, the purpose of the *Canadian Human*

Rights Act is the promotion of equal opportunity unhindered by discriminatory practices. I am thus not persuaded by Mr. Lemire's contention that s. 13's objective was altered as a result of the 2001 amendment.

[234] Mr. Lemire, however, brings up another area where he contends that new circumstances call into question the *Taylor* decision's conclusions regarding the first aspect of the *Oakes* test. He contends that the findings of the Cohen Committee referred to in *Taylor* have been shown to be inaccurate. Mr. Lemire tendered the evidence of Dr. Michael Persinger, a professor of psychology at Laurentian University, to challenge these findings. Dr. Persinger reviewed the part of the Cohen Committee's report written by Dr. Harry Kaufmann, PhD., relating to the psychological distress resulting in a loss of self-esteem and feelings of anger that individuals subject to racial or religious hatred may suffer.

[235] Dr. Persinger testified that Dr. Kaufmann's conclusions were out of date and based on inaccurate psychological theories. However, although Dr. Persinger referred to technological advances in neuroscience and neuropsychology that have enabled researchers to better understand how the brain works, most of his criticisms seemed to be directed to the methodology followed by Dr. Kaufmann in reaching his conclusions rather than on any scientific advances. In particular, Dr. Persinger criticized Dr. Kaufmann for having relied on correlational studies rather than direct experimental evidence, for having used terms like "self-esteem" and "psychological distress" (which Dr. Persinger described as over-inclusive, vague and meaningless), and for having ignored two important variables: the "frustrative aggression" experienced when someone has no opportunity to respond freely to hate propaganda and secondly, that persons display outrage and emotive behaviour when their beliefs ceased being rewarded by group consensus.

[236] In my view, Dr. Persinger's criticism could just as easily have also been levelled in 1990 when *Taylor* was decided. This attempt to revisit or reconsider the Court's findings with respect to the Cohen Committee's report is not grounded in either of the subsequent amendments to the hate messaging provisions of the *Act*, nor is the evidence persuasive that there has been some

sort of sweeping change in the applicable science to warrant my disregarding the findings of *Taylor* with respect to the first component of the *Oakes* s. 1 analysis.

[237] Besides, in my view, Mr. Lemire's submissions in this regard are based on a misinterpretation of the *Taylor* decision's analysis. The Court discerned the objective of s. 13(1) from s. 2 (the purpose provision) of the *Act* itself, not just the Cohen Committee's findings. Although the Court referred to the Committee's findings as providing some evidence justifying Parliament's desire to meet this objective, the Court similarly cited a number of other published reports in support of its conclusion. Mr. Lemire did not lead any evidence calling into question the validity of these reports.

[238] Furthermore, the Supreme Court also pointed out that the stance taken by the international community in protecting human rights was also very relevant in assessing the significance of a government objective. The Court referred to international instruments and jurisprudence as evidence that the international community's commitment to eradicate discrimination extends to the prohibition of the dissemination of ideas based on racial or religious superiority (*Taylor* at 919-20). This evidence, in the Court's opinion, emphasizes the "substantial weight which must be given the aim of preventing harms caused by hate propaganda".

[239] The Supreme Court also found that the values of equality and multiculturalism enshrined in ss. 15 and 27 of the *Charter* provided additional "weightiness" to Parliament's objective in enacting s. 13(1). The Court noted that these *Charter* provisions indicate that the guiding principles in undertaking the s. 1 inquiry include "respect and concern for the dignity and equality of the individual and a recognition that one's concept of self may in large part be a function of membership in a particular cultural group". The Court therefore concluded that as the harm flowing from hate propaganda works in opposition to these "linchpin" Charter principles, the importance of taking steps to limit its "pernicious effects" becomes manifest (*Taylor* at 920-1).

[240] It is thus evident that the Supreme Court's findings regarding Parliament's objective in enacting s. 13 were not based entirely on the Cohen Committee's report but were also founded on other considerations. Even if the Cohen Committee's findings are inaccurate, as Mr. Lemire alleges, it would still not give me cause to revisit the Supreme Court's determinations regarding this phase of the *Oakes* analysis.

(b) The second phase of the *Oakes* test - Whether the measure is proportionate to s. 13's objective

1. Is the measure rationally connected to the objective?

[241] In accordance with the analytical guidelines suggested in *Oakes*, the first step in analyzing whether the measure is proportionate to its objective, consists of determining whether a connection exists between the measure and the objective, so that the former cannot be said to be arbitrary, unfair or irrational (*Taylor* at 921).

[242] The Court in *Taylor* found that once it is accepted that hate propaganda produces effects deleterious to the guiding principles of s. 2 of the *Act*, there remains no question that s. 13(1) is rationally connected to the aim of restricting activities antithetical to the promotion of equality and tolerance in society. When conjoined with the remedial provisions of the *Act*, the Court stated, s. 13(1) operates to suppress hate propaganda and its harmful consequences, and hence is rationally connected to furthering the object of Parliament.

[243] I am not persuaded that circumstances have changed since *Taylor* to justify my reconsidering the Court's finding in this respect. The Court noted that the process of hearing a complaint made under s. 13(1) (and issuing a cease and desist order if the complaint is substantiated) reminds Canadians of our fundamental commitment to equality of opportunity and the eradication of racial and religious intolerance, i.e. the provision's pressing and substantial objective.

[244] This observation still remains valid despite the possibility for the Tribunal, since 1998, to order a respondent to pay a penalty and special compensation. The existence of these additional forms of redress does not impact on the Court's findings. These newer measures are also rationally connected to the objective of reducing the incidence of hate propaganda in Canada. The Court stated that the "conciliatory nature" of the human rights procedure and the absence of criminal sanctions make s. 13(1) especially well suited to encourage reform of the communicator of hate propaganda. However, the Court went on to note, at 924, that even the remedies found in criminal law are not "devoid of impact upon the rehabilitation of offenders", referring to s. 319(2) of the *Criminal Code*, the constitutional validity of which was also upheld by the Court, in *R. v. Keegstra*, [1990] 3 S.C.R. 697. It follows that the imposition of penalties and making of orders for special compensation against those found to have communicated hate messages within the meaning of s. 13, have a similar rational connection to the provision's objective.

[245] Mr. Lemire argued that the fact that s. 13's scope has been extended to the Internet demonstrates an absence of a rational connection between the provision and its objectives. In his view, s. 13's arbitrariness, unfairness, and irrationality are evident from the fact that while a given text may be found to constitute a hate message when communicated over the Internet, the same text may be freely available in a library or bookstore.

[246] I am not persuaded by this argument for a number of reasons. To begin with, I have no evidence with respect to the availability outside of the Internet of the sole message that I have found Mr. Lemire to have communicated within the meaning of s. 13 (the *AIDS Secrets* article). Furthermore, the communication of printed material that is likely to expose persons to hatred or contempt could still constitute a discriminatory practice under provincial legislation, as such communications would likely fall outside Parliament's constitutional authority. The premise of Mr. Lemire's argument may be unfounded. Finally, communication in print form may not necessarily be "repeated", within the meaning of s. 13(1). Communications through the Internet, on the other hand, have consistently been found to be repeated communications within the section's meaning. Thus, electronic communications over the Internet are not necessarily comparable to messages conveyed in print form through traditional means.

[247] Mr. Lemire has therefore not established the alleged "irrationality". In sum, I find that circumstances have not changed to justify revisiting *Taylor*'s finding of a rational connection between the measures in s. 13 and the objective.

2. Does s. 13 minimally impair the freedom of expression guaranteed by the Charter?

[248] The next aspect of the *Oakes* proportionality test consists of determining whether it has been demonstrated that the challenged legislation minimally impairs the *Charter* right or freedom. In addressing this question, the Supreme Court in *Taylor* considered three arguments. First, that the words "hatred and contempt" found in s. 13(1) are vague and imprecise, and do not define the scope of the limitation on freedom of expression. Second, that s. 13(1) does not have an "intent" requirement. Third, that there is no exemption for truthful statements. Mr. Lemire has raised the same arguments in the present case.

a) Are the words "hatred and contempt" vague and imprecise?

[249] The Court in *Taylor*, at 927, reiterated the "well-established" principle that the rights enumerated in human rights legislation should be given their full recognition and effect through a fair, large and liberal interpretation. However, this purposive definition cannot extend so far as to permit the limitation of a *Charter* right or freedom not otherwise justified under s. 1.

[250] In the Court's view, there is no conflict between providing a meaningful interpretation of s. 13(1) and protecting the freedom of expression so long as the interpretation of words like "hatred" and "contempt" is fully informed by an awareness that Parliament's objective is to protect the equality and dignity of all individuals by reducing the incidence of harm-causing expression. The Court added that such a perspective was employed in the definitions of "hate" and "contempt" adopted by the Tribunal in *Nealy*, which I dealt with extensively in the earlier portion of the present decision. The Court was of the view that these definitions were not "particularly expansive", adding that as long as the Tribunal continues to be well aware of the legislation's objective and pays heed to the ardent and extreme nature of feeling described in the

phrase "hatred or contempt", there would be little danger that subjective opinion as to offensiveness would supplant the proper meaning of the section.

[251] Mr. Lemire submits that the term "hatred or contempt" is meaningless, such that no person can know what expression might fall within s. 13. The Supreme Court in *Taylor* obviously disagreed with this interpretation, and Mr. Lemire did not demonstrate how the amendments to the *Act* since that judgment have affected the Court's findings. He pointed out that several of the experts who testified in the present case expressed differing personal opinions on the term's definition, but I am not persuaded that these views could call into question the explicit descriptions given in *Taylor*. Besides, *Taylor*'s conclusion that the term "hatred or contempt" is not vague, in the context of its constitutional analysis, is essentially a finding of law that cannot be challenged through the marshalling of new evidence.

[252] Moreover, the numerous Tribunal decisions since *Taylor* have, if anything, made an understanding of this term even clearer. In *Kouba*, the Tribunal grouped the jurisprudential findings and organized them into several categories based on shared characteristics or "hallmarks", which provide guidance to all concerned as to whether a given expression may potentially run afoul of s. 13(1). The dismissals of several of the allegations in the present decision may serve as an interpretative tool, as well. The courts have, furthermore, on several occasions upheld the Tribunal's assessment of whether the matter before it exposes persons to hatred or contempt within the meaning of s. 13(1) (see *Tremaine v. Warman*, 2008 FC 1032; *McAleer*, previously cited, affirming *McAleer* v. *Canada (Canadian Human Rights Commission) (re Payzant)*, [1996] 2 F.C. 345 (F.C.T.D.)). These judicial opinions, given their binding authority on subsequent Tribunal cases, provide additional certainty.

[253] I therefore find that Mr. Lemire has not displaced the findings in *Taylor* with respect to the alleged vagueness of the term "hatred or contempt".

b) Should s. 13 require proof of intent?

[254] In *Taylor*, the Supreme Court reiterated that intent to discriminate is not a precondition for a finding of discrimination under human rights legislation. To import a subjective intent requirement into human rights provisions, rather than allowing tribunals to focus solely on effects, would defeat the goal of eliminating systemic discrimination in our society, which is far more widespread than is intentional discrimination (*Taylor* at 931).

[255] The Court recognized, however, that to ignore intent in determining whether a discriminatory practice has taken place according to s. 13(1) increases the degree of restriction upon the constitutionally protected freedom of expression. This result would flow from the realization that an individual who is "open to condemnation and censure" because his or her words may have an unintended effect will be more likely to exercise caution via self-censorship.

[256] Nevertheless, the Court concluded that the minimal impairment requirement of *Oakes* was not transgressed by the absence of an intent requirement, pointing out that given the context of a human rights statute, in contrast to criminal provisions like s. 319 *Cr. C.*, the "chill" placed upon expression will ordinarily be less severe. A significant degree of stigma and punishment is attached to a criminal conviction, whereas the "extent of opprobrium" connected with a finding of discrimination is much diminished and the aim of remedial measures is more upon compensation and protection of the victim. The Court, quoting from its judgment in *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, 1987 1 S.C.R. 1114 at 1134, emphasized that the purpose of the *Act* is not to assign or to punish moral blameworthiness.

[257] The Supreme Court described its understanding of the human rights complaint process that was in place at the time, by excerpting a passage from the Federal Court of Appeal's decision in the case (quoted in *Taylor* at 909-10). Accordingly, it was explained that a complaint is not referred to the Tribunal unless the alleged transgressor has been informed of and afforded an opportunity to respond to the complaint and the evidence upon which the Commission intends to decide if a Tribunal is needed. Tribunal decisions are subject to judicial review. The only

order that could be made at the time was a cease and desist order. It was only after that order had been registered with the Federal Court and the offender was afforded the opportunity to appear before a show cause hearing and was found in a judicial proceeding to have continued to disobey the cease and desist order, that he or she could be penalized. The maximum penalty prescribed for such an individual, who is found to be in contempt of the order, was a $5,000 fine or a one year term of imprisonment.

[258] The Supreme Court reiterated, therefore, that the impact of s. 13(1) 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 a Tribunal order that has been registered with the Federal Court (*Taylor* at 935-6).

[259] Given this context, the Court found, at 933, that the absence of intent in s. 13(1) did not impinge so deleteriously upon the s. 2(*b*) freedom of expression so as to make intolerable the challenged provision's existence in a free and democratic society.

[260] Mr. Lemire contends that the Court's findings in this respect have been negated by the 1998 amendments to the *Act*, namely the inclusion of the penalty provision in s. 54. He argues that, as a result, penal consequences, stigma, and moral blameworthiness have been ascribed to s. 13, transforming the provision into a quasi-criminal offence. He also points to the evidence led in the present case demonstrating that the process in his and other s. 13 cases has not in fact been conciliatory, as the statutory framework would suggest. Thus, it is argued, s. 13 has ceased being used as a remedial provision and no longer possesses the "conciliatory" qualities upon which the Supreme Court based its finding that the provision was justified under s. 1 of the *Charter*. The amounts of the penalties ordered by the Tribunal since the inclusion of this provision in the *Act* have ranged from $1,000 to $7,500. The Commission and/or the complainant have sought a penalty in every case brought before the Tribunal since the first complaint subject to the amendments was decided in 2002, (i.e., the *Schnell* case).

[261] It is evident that the inclusion of the penalty provision impacts on *Taylor*'s findings with respect to the absence of intent. At that time, the only potential Tribunal order to which individual respondents could have been subject, following the Tribunal's inquiry into a complaint, was an order that they cease and desist the discriminatory practice of communicating hate messages, as well as an order that they take measures with the Commission to prevent the discriminatory practice's recurrence. To my knowledge, this latter remedy has never been ordered in a s. 13 case.

[262] The fact that the cease and desist order was the only available remedy was identified as characteristic of the conciliatory, preventative, and remedial nature of s. 13, upon which the Supreme Court based its determination that the provision minimally impacted on the freedom of expression. However, the state of affairs in this respect has significantly changed since then, with the inclusion of the penalty provision. The potential "chill" upon free expression may have consequently increased. As a result, the Court's findings regarding whether the absence of an intent condition transgresses the minimal impairment requirement can be revisited.

[263] What then is the impact of the penalty provision in s. 54(1)(*c*) on *Taylor*'s "intent" analysis, which forms part of the Court's minimal impairment analysis? The Tribunal considered some of the implications in the case of *Eldon Warman No. 1*, previously cited. In that decision, Tribunal member Paul Groarke expressed a number of concerns regarding the penalty of $10,000 (i.e., the maximum possible amount) that the Commission had sought to have imposed on the respondent in that case. The Tribunal wondered how s. 54(1)(*c*) "fits into the remedial scheme of the *Act*" (at paras. 63-4), noting that the penalty is "inherently punitive" and intended to deter those individuals who would attack the essential equality on which relations in society are based. Dr. Groarke pointed out that the penalty was of a magnitude that should not be minimized and that it is payable to the Receiver General of Canada, going into the government's general revenue fund, and not towards any compensatory measure such as an education or victims' fund.

[264] Another ground of concern for the Tribunal in that case related to the ordinary distribution of adjudicative duties in our system of justice (paras. 66-7). The punishment of individuals who commit moral wrongs is usually left to the criminal process, the institutional safeguards of which make it a better forum in which to pursue a penalty against an individual. Tribunal proceedings are civil in nature. Dr. Groarke remarked that the purpose of an inquiry is, as *Taylor* recognized, not to measure the moral blame that attaches to a respondent's actions, but rather to rectify discrimination. The task, therefore, of imposing a punishment and assessing a pecuniary penalty falls outside the normal ambit of the Tribunal's responsibilities under the *Act*. Furthermore, the burden in criminal courts is beyond a reasonable doubt, as opposed to a balance of probabilities. Thus, although a Tribunal could entertain some doubt as to the culpability of a respondent, it could still end up awarding the penalty under s. 54(1)(*c*).

[265] The Tribunal added that the normal institutional and procedural safeguards that exist in the criminal process are absent, including proof of intent and the strict application of the rules of evidence. Section 50(3)(*c*) of the *Act* provides that the Tribunal may receive evidence or information that it sees fit, whether or not it would be admissible in a court of law.

[266] After raising these concerns in his decision, Dr. Groarke sought additional submissions from the Commission and the complainant (the respondent in that case had opted not to attend the hearing). However, the Commission decided instead to abandon its request for a penalty and consequently, the Tribunal declared the matter closed (*Richard Warman v. Eldon Warman*, 2005 CHRT 43 ("*Eldon Warman No. 2*").

[267] In the present case, Mr. Warman has requested that a penalty of $7,500 be imposed on Mr. Lemire. The Commission, in its written submissions requested that Mr. Lemire be levied a penalty of an unspecified amount. During final oral submissions, Commission counsel refined this request, stating that the Commission was seeking the penalty because the JRBooksonline.com website continued to be available, whereas the Freedomsite.org message board material had been removed. In response to a question from the Tribunal, Commission

counsel further elaborated that the Commission was not seeking a penalty should the complaint against Mr. Lemire regarding the JRBooksonline.com material not be substantiated.

[268] I share the same concerns as those raised in *Eldon Warman No. 1*. The Supreme Court held in *Taylor* that despite not requiring any proof of intent to discriminate, s. 13(1) only minimally impairs freedom of expression principally because the *Act*'s purpose is to prevent discrimination (as well as compensating and protecting the victim), rather than punish moral blameworthiness. The considerations articulated by Dr. Groarke demonstrate that s. 13(1) has, since the 1998 amendments, lost the exclusively compensatory and preventative features that characterized it in the eyes of the majority in *Taylor*. Following the Court's reasoning, it can therefore no longer be concluded that the provision still minimally impairs the *Charter*-guaranteed freedom of expression.

[269] Mr. Lemire alluded to several other ways in which the penalty has altered s.13. He pointed out that amongst all of the prohibited discriminatory practices set out in ss. 5 to 14.1 of the *Act*, the hate messages provision stands out as the sole discriminatory practice for which a fine payable to the state can be imposed by the Tribunal. The only penal consequences that can arise with respect to the other discriminatory practices relate solely to contempt proceedings of Tribunal orders, which are taken before the Federal Court (as arose in the *Taylor* case), and not before the Tribunal.

[270] Mr. Lemire pointed out that the term "penalty", by definition, constitutes a "punishment for a breach of a law", and to punish means to "cause an offender to suffer for an offence [or] to inflict a penalty on as retribution or as a caution against future misconduct" (*The New Shorter Oxford English Dictionary*, 1993). Though none of the parties brought up the French rendering of s. 54(1)(*c*), I note that it refers to the imposition of a "financial sanction" or "*sanction pécuniaire*". The term "sanction" is defined as a repressive measure imposed by an authority for the failure to observe a law or regulation ("*mesure répressive infligée par une autorité pour ... l'inobservation d'un règlemen , d'une loi*") or a penalty to repress the failure to observe a law, regulation or duty ("*peine prévue pour réprimer l'inexécution d'une loi, d'un règlement, d'une*

obligation")(*Le Petit Larousse illustré 2007*) . In my view, both languages' terms are synonymous, as was undoubtedly Parliament's objective. However, even if the term "*sanction pécuniaire* " were somehow perceived as being broader, yet still encompassing the definition of the English word "penalty", then it strikes me that the English rendering should be preferred as being common to both versions or the narrower of the two (*R. v. Daoust*, 2004 SCC 6 at paras. 26-9.

[271] Accordingly, given all of the circumstances, Mr. Lemire argues that the penalty imposed by s. 54(1) of the *Act* results in a true penal consequence, which Justice Wilson described in *R. v. Wigglesworth*, [1987] 2 S.C.R. 541, at para. 24, as imprisonment or a fine which by its magnitude would appear to be imposed for the purpose of "redressing the wrong done to society at large".

[272] Society's interest in the imposition of the penalty in s. 54(1)(*c*) of the *Canadian Human Rights Act* was recognized by the Tribunal in *Schnell*, at para. 163. The Tribunal noted that the penalty is designed not to compensate a victim but rather to express "society's opprobrium for the discriminator's conduct". This observation was reiterated by the Tribunal in *Kyburz*, at paras. 93-4, which remarked that the inclusion of the penalty provision in the 1998 amendments to the *Act* represents a "significant departure from the traditional approach that damage awards in human rights cases were primarily remedial, not punitive".

[273] The Attorney General took issue with the interpretation Mr. Lemire had ascribed to the *Wigglesworth* case, arguing that he had confused the concept of "penal" measures with measures that, while burdensome to a respondent, are merely "administrative" rather than penal in nature. In *Martineau v. Canada (Minister of National Revenue – M.N.R.*, [2004] 3 S.C.R. 737, at para. 24, the Supreme Court stated that a sanction's objectives, purpose, and the process leading to its imposition must be examined in order to determine its nature. The Attorney General compared the penalty in s. 54(1)(*c*) of the *Act* with the provision at issue in *Martineau* (s. 124 of the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.)), pursuant to which the Minister of National Revenue had demanded payment of over $300,000 from an exporter for having made false

statements, a process known as "ascertained forfeiture". The Supreme Court concluded that this action was not intended to punish an offender in order to produce a deterrent effect and redress a wrong to society, but was rather a mechanism designed to ensure compliance with the *Customs Act*. It was consequently not penal in nature, notwithstanding the magnitude of the amount being claimed or its deterrent effect on others, which was necessary to maintain the viability of a system that depended on self-reporting by exporters. The Court ultimately held, therefore, that the person from whom the payment was being claimed was not being charged with an offence within the meaning of s. 11(*c*) of the *Charter* and could not benefit from its protection in that case.

[274] The Attorney General argued that similarly, irrespective of the magnitude of the sum that a s. 13 respondent may be required to pay under s. 54(1)(*c*) of the *Act*, and the provision's deterrent effect on others, it only gives rise to an "administrative penalty" that is meant to ensure compliance with the *Act*.

[275] This submission, however, fails to take into account a number of key distinctions between the two mechanisms. The Court in *Martineau* noted (at para. 45) that there is little in common with the ascertained forfeiture proceedings and penal proceedings. The worst that can happen if the person liable refuses to pay is that he or she risks being forced to do so by way of civil action. In the case of s. 54(1)(*c*), on the other hand, if a respondent refuses to comply with the Tribunal order to pay a penalty, he or she may be subject to contempt proceedings before the Federal Court, which may result in the respondent's imprisonment. Several s. 13 respondents have already been incarcerated for failing to comply with cease and desist orders (e.g. John Ross Taylor, Tomasz Winnicki). The *Martineau* decision also noted (at para. 52) that the *Customs Act* did not characterize the sum collected through the ascertained forfeiture mechanism as a "fine", but rather used the more "neutral expression 'amount of money'". Section 54(1)(*c*), in contrast, uses the much less "neutral" expression of "penalty", the definition of which I addressed earlier.

[276] It is also significant that the *Martineau* Court (at para. 62) distinguished the ascertained forfeiture mechanism from a fine by pointing out that the amount imposed is purely economic,

having been arrived at by a "simple mathematical calculation", rather than taking into account factors and principles governing sentencing that are more closely associated with penal measures. In stark contrast, the factors listed in s. 54(1.1) of the *Act*, are strikingly similar to those considered by courts of criminal or penal jurisdiction in determining the fine or penalty to be assessed against one who has been found guilty of an offence. Section 54(1.1)(*a*) refers to the "nature, circumstances, extent and gravity of the discriminatory practice", which are factors that a criminal court would also consider in respect of the offence committed by the accused (see by analogy, s. 718.1 *Cr.C.*). Section 54(1.1)(*b*) goes on to enumerate as factors, the wilfulness or recklessness of the respondent's discriminatory practice (see by analogy, s. 718.2(*a*)(i) *Cr.C.*), his or her prior discriminatory practices (see by analogy, s. 727 *Cr.C.*), and his or her ability to pay (see by analogy, s. 734(2) *Cr.C.*). These are all typical sentencing considerations. They are hardly factors that are "civil in nature", as the calculations regarding the ascertained forfeiture mechanism were described in *Martineau*. Moreover, these factors suggest that the penalty, rather than being merely aimed at establishing a deterrent to further misconduct, punishes the wrongdoer. Thus, the more severe the nature, extent or gravity of the hate message communicated, the greater the fine will likely be, irrespective of whether the fine will have a deterrent effect on the respondent or others.

[277] Finally, the Court in *Martineau* (at para. 65) also emphasized that the person who receives a written notice of claim, under the ascertained forfeiture mechanism, is not stigmatized by the process, whose purpose is "neither to punish the offender nor elicit societal condemnation". The mechanism bore "neither the appearance nor the distinctive characteristics of a sanction intended to 'redress a wrong done to society'". In my view, however, the penalty in s. 54(1)(*c*) bears those very characteristics. As the Tribunals in *Schnell* and *Kyburz* observed, this provision is an expression of "society's opprobrium" in respect of the respondent's behaviour. It is hard to imagine that those in receipt of such a condemnation would not be stigmatized by the process.

[278] I note also, in passing, that in both *Wigglesworth* and *Martineau*, individuals who had been subject to some administrative process (professional disciplinary proceedings in

Wigglesworth and the ascertained forfeiture proceedings in *Martineau*) argued that they were entitled to invoke s. 11 *Charter* rights. The Attorney General argued that the circumstances of Mr. Lemire's case do not entitle him to benefit from any s. 11 *Charter* rights, for which he had not, in any event, asserted a claim at any stage during the present proceedings.

[279] This question, however, is not what is relevant to the present discussion. The point is that, when assessed against the characteristics of the penalty provisions enumerated in these decisions, it is evident that s. 13(1) has become more penal in nature (irrespective of whether s. 11 *Charter* rights are necessarily triggered). The provision can no longer be considered exclusively remedial, preventative and conciliatory in nature, which was at the core of the Court's finding in *Taylor* that s. 13(1)'s limitation of freedom of expression is demonstrably justifiable in a free and democratic society, and thereby "saved" under s. 1 of the *Charter*.

[280] Counsel for the Attorney General argued that the penalty is found at the far end of the "continuum" in the human rights process, and thus will only be applied in cases that do not resolve themselves along the way. The penalty would be reserved for "hard core" respondents who are unwilling to "change their ways". As I elaborate below, the evidence in the present case suggests that s. 13 complaints proceed to hearing, and penalties are sought, even in instances where impugned material has long since ceased being communicated. More significantly, however, the *Act* does not include respondents' willingness to "change their ways" as a factor for the tribunal to consider in assessing the penalty (s. 54(1.1)).

[281] The Tribunal in *Schnell*, at para. 159, suggested that "although the *Act* has shed "a bit of its conciliatory character", the effect has been "ameliorated" by the requirements to show intent in s. 54(1)(*c*) and by the "other factors the Tribunal must take into account". This finding is not as obvious to me. Section 54(1.1)(*b*) lists the "wilfulness or intent of the person who engaged in the discriminatory practice" as but one of several factors mentioned therein, the evidence of which is assessed, it bears repeating, on the balance of probabilities. The Tribunal has ordered respondents to pay penalties where there has been no evidence before it regarding the person's

ability to pay. Does this imply that a Tribunal can similarly impose a penalty on a respondent in the absence of evidence regarding his or her actual intent? The answer is unclear.

[282] Moreover, what exactly constitutes the requisite intent? Does it encompass circumstances where the respondent wilfully communicates a message initially, but who by the time the complaint is filed or shortly thereafter, ceases to do so, as in the present case? Does s. 13 regain a "conciliatory character" merely because it has been established that the respondent intended to make the initial communication but has now ceased? What is the degree of wilfulness that is required of a respondent so as to conclude that the *Act* is "ameliorated" sufficiently to recoup its conciliatory character? These questions demonstrate how the penalty's inclusion has resulted in the erosion of s. 13's conciliatory nature.

[283] Mr. Lemire also contends that not only has the presence of the penalty provision altered the nature of s. 13(1), but that the manner in which s. 13(1) has been applied, particularly in the present case, evokes a process that has at times been anything but conciliatory. For instance, the Commission dealt with and referred Mr. Warman's complaint to the Tribunal even though the Freedomsite.org message board and most of the other impugned material mentioned in the complaint had been removed and were "off the air" before the complaint was even filed. The one remaining article was removed a few months later as well. The problem had thus already been eliminated, yet the complaint continued to be processed. In at least one other s. 13 case (*Western Canada for Us*, previously cited) a complaint was referred to the Tribunal involving material that was no longer available on the Internet prior to the filing of the complaint, and in *Wilkinson*, previously cited, the complaint was referred even though the website in question had been shut down before the respondent was served with the complaint.

[284] Mr. Lemire repeatedly asked formally through his legal counsel for an opportunity to mediate or conciliate a settlement to the complaint, to no avail. Mr. Warman testified that he refused to participate in any settlement discussions because the JRBooksonline.com website (which, as I mentioned earlier, had not even been mentioned in the human rights complaint) continued to be available on the Internet, and he was convinced that Mr. Lemire was responsible

for its content. Of course, Mr. Warman was not obliged to participate in a mediation session, but the Commission still had the authority to appoint a conciliator, pursuant to s. 47 of the *Act*.

[285] Evidence was led showing that only about 11% of the total number of all human rights complaints filed with the Commission, between 2002 and 2006, were not resolved and were ultimately referred to the Tribunal for inquiry. However, of the s. 13 complaints filed over a period that admittedly extends over a longer period of time (1997-2007), 68% were referred to the Tribunal for hearing. Only 4% were settled. In a document that the Commission posted on its website, entitled *Regarding Hate on the Internet and the Canadian Human Rights Commission – Questions and Answers*, the Commission wrote that while it generally offers to mediate complaints, "this is not generally done in the case of hate message complaints".

[286] Counsel for the Attorney General strenuously asserted that the Tribunal lacks the jurisdiction to sit in review of decisions taken by the Commission, a point with which I most assuredly agree. He argued, moreover, that any potential error committed by the administrative authorities to whom s. 13's application has been entrusted, cannot have any bearing in the analysis of the provision's constitutionality. The error is not a necessary effect of the impugned legislation.

[287] While it is true that a provision must be able to stand constitutionally on its own, the real and factual context in which it exists and is applied cannot be simply ignored. The Supreme Court in *Taylor* certainly did not do so. The majority was clearly of the view, and relied upon its perception, that many, if not all, of the conciliatory measures provided for in the *Act* would find their way into all s. 13 proceedings. Thus, the Court emphasized, at 917 and 935-6, that in contrast to criminal law, the provisions found in human rights statutes generally operate in a less confrontational manner, allowing for a conciliatory settlement if possible and, where discrimination exists, gearing remedial responses more towards compensating the victim. At page 924, the Court again noted that the conciliatory nature of the human rights procedure and the absence of criminal sanctions made s. 13(1) especially well-suited to encourage reform of the communicator of hate propaganda.

[288] The majority in *Taylor* did not articulate in detail its understanding of the procedure under the *Act*, but the dissenting judgment provides some insight in this respect. At page 963 of the decision, Justice McLachlin (as she then was) wrote that "supporters of the legislation" had argued that the process envisaged by the *Act* removed the danger that it would be used to catch conduct that went beyond its objectives. Thus, she wrote that the argument had been advanced that after the complaint is filed, "the Commission at this stage does not only investigate; it attempts to conciliate". She went on to state that "if the alleged offender is prepared to make concessions and amend his or her conduct, this is the end of the matter". If, on the other hand, the "alleged offender is adamant in resisting the law, a board of inquiry can be established to hold a hearing into the complaint", and that "given the public nature and the inconvenience of a hearing, many offenders chose to amend their conduct voluntarily".

[289] As I have pointed out several times in this decision, Mr. Lemire had not only "amended" his conduct by removing the impugned material, but sought conciliation and mediation as soon as he learned of the complaint against him. The process understood by the Supreme Court was not what Mr. Lemire experienced.

[290] In my view, it is clear that *Taylor*'s confidence that the human rights process under the *Act* merely serves to prevent discrimination and compensate victims hinged on the absence of any penal provision akin to the one now found at s. 54(1)(*c*), as well as on the belief that the process itself was not only structured, but actually functioned in as conciliatory a manner as possible. The evidence before me demonstrates that the situation is not as the Court contemplated in both respects. Thus, following the reasoning of Justice Dickson, at 933,one can no longer say that the absence of intent in s. 13(1) "raises no problem of minimal impairment" and "does not impinge so deleteriously upon the s. 2(*b*) freedom of expression so as to make intolerable" the provision's existence in a free and democratic society. On this basis, I find that the *Oakes* minimum impairment test has not been satisfied, and that s. 13(1) goes beyond what can be defended as a reasonable limit on free expression under s. 1 of the *Charter*.

c) Truth as a defence

[291] *Taylor* held, following the reasoning in *Keegstra*, that the *Charter* does not exempt an individual who intentionally employs factually accurate statements to communicate hate messages from contravening s. 13(1) of the *Act*. In his submissions, Mr. Lemire asserted that by not enabling respondents to present a defence of truth in their messages, s. 13 fails to meet the proportionality test applied under s. 1 of the *Charter*. Given my findings, in the immediately preceding section, that the minimal impairment test has not been satisfied, I need not address this argument.

3. Effects

[292] The third component to the threefold proportionality test of *Oakes* consists of assessing the proportionality between the effects of the limiting measure and the objective. The Court in *Taylor* concluded, at 939-40, that the effects of s. 13(1) upon the freedom of expression are not so deleterious as to make intolerable its existence in a free and democratic society. It was noted that s. 13(1) furthers a government objective of great significance and impinges upon expression that has only tenuous links with the rationale underlying the freedom of expression guarantee. However, the Court also went on to say that operating within the context of the procedural and remedial provisions of the *Act*, s. 13(1) played 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.

[293] As I have found above, this context has changed with the introduction of the penalty in s. 54(1)(*c*). Section 13(1) now plays a significant and more than "minimal" role in the imposition of both financial and moral sanctions.

[294] However, given my earlier findings regarding the minimum impairment test, it is not necessary to elaborate any further with respect to the "deleterious effects" analysis.

(c) Conclusions with respect to the claim of infringement on the freedom of expression

[295] For all the above reasons, I find that s. 13(1) infringes on Mr. Lemire's freedom of expression guaranteed under s. 2(*b*) of the *Charter*, and that this infringement is not demonstrably justified under s. 1 of the *Charter*.

B. Freedom of conscience and religion (s. 2(a) of the Charter)

[296] Mr. Lemire alleged in his constitutional motion that s. 13 also infringed on his freedom of conscience or religion, guaranteed under s. 2(*a*) of the Charter. I agree with the submissions of the Commission and the Attorney General, however, that Mr. Lemire has not demonstrated how the application of s. 13 to the impugned messages in the present case (and particularly the *Aids Secrets* article, which I held was the only hate message to have been communicated by him, within the meaning of s. 13), limits his or others' freedom of conscience or religion. There is no evidence that Mr. Lemire or anyone else made the postings at issue in this case as a matter of conscience or religious practice.

[297] Mr. Lemire's claim in this respect is therefore dismissed.

C. Life, liberty and the security of the person (s. 7 of the Charter)

[298] Mr. Lemire also argued in his motion that ss. 13 and 54 of the *Act* violate the guarantee to life, liberty and the security of the person, and the right not to be deprived thereof except in accordance with the principles of fundamental justice, guaranteed under s. 7 of the *Charter*. The arguments made in support of this submission are sketchy.

[299] In the motion itself, Mr. Lemire wrote that the fact that "a person could be imprisoned in Canada for refusing to follow an order that violates his conscience and truth is a violation of fundamental justice". He appeared to be alluding to the possibility that a s. 13 respondent may, if he or she ignores a Tribunal order, be subject to contempt proceedings before the Federal

Court, which could in turn order the person to be incarcerated for the contempt. These are not the facts of the present case, given that I am not making any order against him.

[300] In his final written submissions, Mr. Lemire wrote that the *Act* is being used "in ways that impinge on freedom of expression and the right to life, liberty and security of the person under section 7 of the *Charter*". The "ways" cited include the efforts made by some groups to file criminal charges against Ernst Zündel, demonstrations made by some groups against s. 13 respondents and their supporters, the "branding" of some of these people as "hatemongers", and even the acts of vandalism carried out on Mr. Lemire's car (the word "Nazi" was scratched into his car's hood).

[301] In *Blencoe v. British Columbia (Human Rights Commission)*, [2002] 2 S.C.R. 307, at para. 47, the Supreme Court observed that an analysis under s. 7 will not proceed if no interest relating to the respondent's life, liberty or security of the person is implicated. In the incidents mentioned by Mr. Lemire, the only one implicating him appears to be the vandalism against his car. I am not persuaded that this brings into question his life, liberty or security of the person. Besides, there is no explanation of how this incident or the other ones mentioned were the result of the impugned legislation or any "state action" (See *Blencoe* at paras. 58 and following).

[302] The CFSL, in its written final submissions, alluded to evidence that the Commission was exchanging information and otherwise cooperating with law enforcement agencies with respect to potential s. 13 respondents. Some of these agencies had obtained this information through the use of their search and seizure powers under the *Criminal Code*, including the contents of computer hard drives potentially containing personal material that was unrelated to the s. 13 complaint. The CFSL argued that this process, "fully sanctioned by the legislation, is a serious breach of Section 7, unsaved by Section 1 of the *Charter of Rights and Freedoms*". It described the process as creating a "police state" and as having "transferred those powers to a commission which is unrestricted by any judicial scrutiny by the Tribunal".

[303] These are again not the circumstances of the complaint against Mr. Lemire. There was no evidence or allegation of police involvement in the gathering of the s. 13 evidence against him. Mr. Warman viewed and downloaded the material himself. I do not see how Mr. Lemire's life, liberty or security is implicated.

[304] It has thus not been established that Mr. Lemire's s. 7 *Charter* rights were infringed, and his submissions in this respect are therefore dismissed.

D. *The* Canadian Bill of Rights

[305] In his motion, Mr. Lemire also submitted that s. 13 is a violation of the *Canadian Bill of Rights*, for the same reasons as given regarding the *Charter* argument, adding that "these reasons need not be repeated". None of Mr. Lemire's final submissions related to the *Bill of Rights*.

[306] Having addressed the *Charter* arguments elsewhere in this decision, and given that he did not make any additional submissions with respect to the *Bill of Rights*, I see no point in addressing this matter any further. Mr. Lemire's claim for relief under the *Bill of Rights* is dismissed.

V. Conclusion

[307] I have determined that Mr. Lemire contravened s. 13 of the *Act* in only one of the instances alleged by Mr. Warman, namely the *AIDS Secrets* article. However, I have also concluded that s. 13(1) in conjunction with ss. 54(1) and (1.1) are inconsistent with s. 2(*b*) of the *Charter*, which guarantees the freedom of thought, belief, opinion and expression. The restriction imposed by these provisions is not a reasonable limit within the meaning of s. 1 of the *Charter*. Since a formal declaration of invalidity is not a remedy available to the Tribunal (see *Cuddy Chicks Ltd. V. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5), I will simply refuse to apply these provisions for the purposes of the complaint against Mr. Lemire and I will not issue any remedial order against him (see *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54 at paras. 26-7).

Signed by

Athanasios D. Hadjis
Tribunal Member

Ottawa, Ontario
September 2, 2009

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1073/5405

Style of Cause: Richard Warman v. Marc Lemire

Decision of the Tribunal Dated: September 2, 2009

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February 5 to 9, 2007

Toronto, Ontario

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May 9 to 11, 2007

Ottawa, Ontario

June 25 to 27, 2007

Oakville, Ontario

March 5, 2008

Ottawa, Ontario

September 15 to 17, 2008

Oakville, Ontario

Appearances:

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