Federal Court  Cour fédérale

**Date: 20121002**

**Docket: T-1640-09**

**Citation: 2012 FC 1162**

**Ottawa, Ontario, October 2, 2012**

**PRESENT: The Honourable Mr. Justice Mosley**

**BETWEEN:**

**CANADIAN HUMAN RIGHTS COMMISSION**

**Applicant**

**and**

**RICHARD WARMAN,
THE ATTORNEY GENERAL OF CANADA
and MARC LEMIRE**

**Respondents**

**BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, CANADIAN CIVIL LIBERTIES ASSOCIATION, CANADIAN ASSOCIATION FOR FREE EXPRESSION INC., CANADIAN FREE SPEECH LEAGUE, AFRICAN CANADIAN LEGAL CLINIC, LEAGUE FOR HUMAN RIGHTS OF B'NAI BRITH CANADA, CANADIAN JEWISH CONGRESS and FRIENDS OF SIMON WIESENTHAL CENTRE FOR HOLOCAUST STUDIES**

**Intervenors**

**REASONS FOR JUDGMENT AND JUDGMENT**

**OVERVIEW:**

[1] This is an application for judicial review of a decision of the Canadian Human Rights Tribunal brought by the Canadian Human Rights Commission under s.18.1 of the *Federal Courts Act*, RSC, 1985, c F-7.

[2] In the September 9, 2009 decision, the Tribunal determined that the respondent Marc Lemire contravened s.13 of the *Canadian Human Rights Act*, RSC, 1985, c H-6 (hereafter "the CHRA" or "the Act" by posting an article on a website. The Tribunal declined to issue any remedial order against Mr. Lemire on the ground that the restrictions imposed by s 13(1) and ss 54(1) and (1.1) of the Act are inconsistent with s 2(b) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*] and do not constitute a reasonable limit within the meaning of s 1 of the *Charter*.

[3] The Commission seeks declarations that the Tribunal erred in law in refusing to apply s 13(1) and in declining to exercise its discretion under subsections 54(1)(a) and/or (b) of the Act; and seeks orders to set aside the Tribunal's conclusions to the extent that they are inconsistent with the declarations sought and to refer the matter back to the Tribunal for a determination with respect to the remedy.

[4] In these proceedings, Mr. Lemire served a notice of constitutional question on the Attorney General of Canada and the Attorneys General of each province in accordance with s 57 of the *Federal Courts Act.* The notice requests a declaration that ss 13(1) and 54(1) and (1.1) of the CHRA are of no force or effect pursuant to ss 24(1) [*sic*] and 52(1) of the *Constitution Act*, 1982, being schedule B to the *Canada Act* 1982 (UK), 1982, c 11 [*Constitution Act*].

[5] The constitutionality of s 13(1) of the CHRA was confirmed by a majority of the Supreme Court of Canada in *Canada (Human Rights Commission) v Taylor*, [1990] 3 SCR 892 [*Taylor*]. This Court is bound by that decision unless there are grounds to distinguish the present case from

the precedental authority of that decision. Barring such grounds, the Court must follow *Taylor.* In doing so, the Court may set out such reasons that indicate that the precedent may be problematic in the present environment. It is for the Supreme Court itself to determine whether *Taylor* is to be overturned: *Canada v. Craig*, 2012 SCC 43 at paragraph 21. That question is presently before the Supreme Court in an appeal from the decision of the Saskatchewan Court of Appeal in *Whatcott v. Saskatchewan Human Rights Tribunal*, 2010 SKCA 26, leave granted October 28, 2010, [2010] SCCA no 155 (QL), 2010 CanLII 62501 (SCC). In *Whatcott*, the constitutional questions stated address whether s 14(1)(b) of the *Saskatchewan Human Rights Code*, SS 1979, c S-24.1 infringes s 2(a) of the *Charter* and, if so, whether it is saved under s 1 of the Canadian Charter of Rights and Freedoms. While the issues in that matter concern provincial legislation, they are analogous to the matters raised in this case and the Saskatchewan Court of Appeal considered itself bound by *Taylor*.

[6] I take notice of the legislative fact that Bill C-304, entitled *An Act to amend the Canadian Human Rights Act (protecting freedom)*, received third reading in the House of Commons on June 6, 2012. Among other things, the effect of the Bill would be to repeal s 13. Under the terms of the Bill's coming into force clause, the Act would be effective one year after receiving Royal Assent. At the time of writing the Bill remained under consideration in the Senate. This is of relevance in these proceedings only to a limited extent that I will discuss below.

[7] For the reasons that follow, I find that the Tribunal was correct to decline to apply ss 54(1)(c) and (1.1) of the Act and declare that they are of no force or effect. However, I find that the Tribunal erred in failing to apply s 13 and paragraphs 54(1)(a) and (b) of the Act. Consequently, the application by the Commission is granted and the matter is remitted to the Tribunal to issue a

declaration that the article posted by Mr. Lemire was in contravention of s 13 and to exercise its jurisdiction under paragraphs 54(1)(a) or (b) of the Act to consider the issuance of a remedial order against Mr. Lemire.

**BACKGROUND**

[8] On November 24, 2003 the respondent Richard Warman filed a complaint with the Commission alleging that Mr. Lemire had communicated or caused to be communicated hate messages over the Internet in breach of s 13 of the CHRA. He alleged that these messages discriminated against persons or groups of persons on the basis of their religion, race, color, national or ethnic origin and sexual orientation, because the matter exposed them to hatred or contempt.

[9] Initially the complaint cited the content of messages posted on the website "Freedomsite.org" and alleged that Mr. Lemire was the owner and webmaster of that site. The complaint also named one Craig Harrison as a respondent. Mr. Harrison was alleged to have posted a large number of messages on the site in 2002 and 2003. The allegations against Mr. Harrison were referred to the Tribunal separately and a decision was issued by the Tribunal on August 15, 2006 finding that his messages were in breach of s 13: *Warman v Harrison*, 2006 CHRT 30.

[10] Mr. Lemire received notice of Mr. Warman's November 24, 2003 complaint from the Commission in late March 2004. In responding to the Commission, through his counsel, on April 23, 2004, Mr. Lemire acknowledged that he was the webmaster and owner of the Freedomsite.org website and stated that he had removed the message board from the site prior to receiving

notification of Mr. Warman's complaint. The message board, operated from 1999-2003, was a forum for discussions at the website. Visitors could access the content as "guests". Only registered users were allowed to post messages on the board. An article on the Freedomsite.org website referred to in the complaint was removed after the complaint had been filed.

[11] Subsequent to the filing of the complaint, additional allegedly offending material was also found by Mr. Warman on the websites “JRBooksonline.com” and “Stormfront.org” and referred to the Commission investigator in September 2004. This material was included in the investigation report recommending referral to the Tribunal in April 2005 as being linked to Mr. Lemire. In a Joint Statement of Particulars dated December 7, 2005 Mr. Warman and the Commission alleged that Mr. Lemire communicated, or caused to be communicated, material observed on these websites in October 2004.

[12] At the hearing, Mr. Lemire denied the allegations in part on the ground that he had not communicated or caused to be communicated most of the impugned messages. In particular, while he acknowledged, through counsel, having participated in the creation of JRBooksonline.com, he denied having knowledge of or being responsible for any of the content of that website. With regard to material on Stormfront.org, Mr. Lemire argued that the Commission had not established that he had posted the messages and, in the alternative, that it was not discriminatory.

[13] Mr. Lemire brought a motion to have s 13 and the related remedial provisions in ss 54(1) & (1.1) of the Act found to be in breach of ss 2(a) and (b) and s 7 and not saved by s 1 of the *Charter*. He also cited the *Canadian Bill of Rights*, SC 1960 c 44. The Attorney General of Canada exercised

his right under s 57 of the *Federal Courts Act* to participate and to adduce evidence at the hearing in respect of the constitutional questions. Several additional interested parties were granted status to participate.

[14] Extensive evidentiary hearings were conducted by the Tribunal between January 29, 2007 and March 25, 2008. Submissions were presented in September 2008. The Tribunal rendered its decision on September 2, 2009: *Warman v Lemire*, 2009 CHRT 26 [the decision].

[15] On this application, motions for intervenor status were granted for the African Canadian Legal Clinic (hereafter the"ACLC"), League for Human Rights of the B'nai Brith ("B'nai Brith") , Canadian Jewish Congress ("CJC"), Friends of Simon Wiesenthal Center for Holocaust Studies ("SWC"), Canadian Association for Free Expression ("CAFE"), Canadian Free Speech League ("CFSL"), Canadian Civil Liberties Association ("CCLA"), and British Columbia Civil Liberties Association ("BCCLA"). The respondent Attorney General of Canada and the intervenor CJC took no part in the argument of this application. The position of B'nai Brith and SWC was jointly presented.

**CONSTITUTIONAL AND LEGISLATIVE FRAMEWORK**

[16] Sections 24(1) and 52(1) of the *Constitution Act* read as follows:

| | |
|---|---|
| Enforcement of guaranteed rights and freedoms | Recours en cas d'atteinte aux droits et libertés |
| 24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, | 24. (1) Toute personne, victime de violation ou de négation des droits ou libertés |

| | |
|---|---|
| have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances. | qui lui sont garantis par la présente charte, peut s'adresser à un tribunal compétent pour obtenir la réparation que le tribunal estime convenable et juste eu égard aux circonstances. |
| Primacy of Constitution of Canada | Primauté de la Constitution du Canada |
| 52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect. | 52. (1) La Constitution du Canada est la loi suprême du Canada; elle rend inopérantes les dispositions incompatibles de toute autre règle de droit. |

[17] The wording of s 13(1) of the CHRA has remained unchanged since the Supreme Court upheld the constitutionality of the predecessor enactment in *Taylor*;

| | |
|---|---|
| Hate messages | Propagande haineuse |
| 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 | 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 |

| | |
|---|---|
| person or those persons are identifiable on the basis of a prohibited ground of discrimination. | identifiable sur la base des critères énoncés à l'article 3. |

[18] When *Taylor* was decided, the remedial powers of the Tribunal were set out in sections 53 and 54 of the CHRA. Section 53 authorized the Tribunal to order that a person cease a discriminatory practice and take measures to prevent its recurrence (at s 53(2)(a)), make available to the victim the rights that had been denied (at s 53(2)(b)), compensate the victim for wages lost and expenses (at s 53(2)(c)), and compensate the victim for the costs and expenses of obtaining alternatives (at s 53(2)(d)). In addition, s 53(3) permitted the Tribunal, if the person had engaged in the discriminatory practice willfully or recklessly or the victim had suffered, to order compensation not exceeding $5,000 to be paid. Section 53(4) authorized the Tribunal to order that premises and facilities be adapted to accommodate disabilities if reasonable. Section 54 allowed the Tribunal to make only the orders listed in s 53 and prohibited orders firing or evicting employees or tenants in good faith.

[19] In 1998, Parliament enacted amendments to the Act, which, with the prior legislation, had the effect of conferring additional remedial powers on the Tribunal: SC 1998, c 9, ss 27-28. A new s 53(2)(e) allowed the Tribunal to order compensation to victims in an amount not exceeding $20,000 for their pain and suffering. The amount which could be ordered paid under s 53(3) was raised from $5,000 to $20,000 and 53(4) was added, permitting the compensation order to include interest. As well, a new s 54(1)(b) empowered the Tribunal to order, in addition to the remedial measures which were in place at the time *Taylor* was decided, compensation not exceeding $10,000

for a victim specifically identified in the communication that constituted a discriminatory practice; and a new s 54(1)(c) provided for a penalty of not more than $10,000.

[20] Section 54(1.1), also added in 1998, set out the factors that the member or panel must take into account in deciding whether to order the person to pay the penalty at s 54(1)(c), such as the nature of the discriminatory practice, the intent of the person who engaged in the practice, any prior history, and ability to pay.

[21] In 2001, Parliament further enacted, at s 13(2), that for greater certainty, discriminatory practices included communications via computers or the internet: *Anti-terrorism Act*, SC 2001, c 41, s 88 [*Anti-terrorism Act*].

[22] The relevant provisions of the CHRA as they read now are as follows:

| Purpose | Objet |
|---|---|
| 2. The purpose of this Act is to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory | 2. La présente loi a pour objet de compléter la législation canadienne en donnant effet, dans le champ de compétence du Parlement du Canada, au principe suivant : le droit de tous les individus, dans la mesure compatible avec leurs devoirs et obligations au sein de la société, à l'égalité des chances d'épanouissement et à la prise de mesures visant à la satisfaction de leurs besoins, indépendamment des considérations fondées sur la race, l'origine nationale ou ethnique, la couleur, la |

practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.

religion, l'âge, le sexe, l'orientation sexuelle, l'état matrimonial, la situation de famille, la déficience ou l'état de personne graciée.

Prohibited grounds of discrimination

Motifs de distinction illicite

3. (1) For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.

3. (1) Pour l'application de la présente loi, les motifs de distinction illicite sont ceux qui sont fondés sur la race, l'origine nationale ou ethnique, la couleur, la religion, l'âge, le sexe, l'orientation sexuelle, l'état matrimonial, la situation de famille, l'état de personne graciée ou la déficience.

Idem

Idem

(2) Where the ground of discrimination is pregnancy or child-birth, the discrimination shall be deemed to be on the ground of sex.

(2) Une distinction fondée sur la grossesse ou l'accouchement est réputée être fondée sur le sexe.

Hate messages

Propagande haineuse

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

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

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.

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.

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.

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.

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.

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).

Report

44. (1) An investigator shall, as soon as possible after the conclusion of an investigation, submit to the Commission a report of the findings of the investigation.

Rapport

44. (1) L'enquêteur présente son rapport à la Commission le plus tôt possible après la fin de l'enquête.

Action on receipt of report

(2) If, on receipt of a report referred to in subsection (1), the Commission is satisfied

(*a*) that the complainant ought to exhaust grievance or review procedures otherwise reasonably available, or

(*b*) that the complaint could more appropriately be dealt with, initially or completely, by means of a procedure provided for under an Act of Parliament other than this Act, shall refer the complainant to the appropriate authority.

Suite à donner au rapport

(2) La Commission renvoie le plaignant à l'autorité compétente dans les cas où, sur réception du rapport, elle est convaincue, selon le cas :

*a*) que le plaignant devrait épuiser les recours internes ou les procédures d'appel ou de règlement des griefs qui lui sont normalement ouverts;

*b*) que la plainte pourrait avantageusement être instruite, dans un premier temps ou à toutes les étapes, selon des procédures prévues par une autre loi fédérale.

Idem

(3) On receipt of a report referred to in subsection (1), the Commission

(*a*) may request the Chairperson of the

Idem

(3) Sur réception du rapport d'enquête prévu au paragraphe (1), la Commission :

*a*) peut demander au président du Tribunal

Tribunal to institute an inquiry under section 49 into the complaint to which the report relates if the Commission is satisfied

de désigner, en application de l'article 49, un membre pour instruire la plainte visée par le rapport, si elle est convaincue :

(i) that, having regard to all the circumstances of the complaint, an inquiry into the complaint is warranted, and

(i) d'une part, que, compte tenu des circonstances relatives à la plainte, l'examen de celle-ci est justifié,

(ii) that the complaint to which the report relates should not be referred pursuant to subsection (2) or dismissed on any ground mentioned in paragraphs 41(*c*) to (*e*); or

(ii) d'autre part, qu'il n'y a pas lieu de renvoyer la plainte en application du paragraphe (2) ni de la rejeter aux termes des alinéas 41*c*) à *e*);

(*b*) shall dismiss the complaint to which the report relates if it is satisfied

*b*) rejette la plainte, si elle est convaincue :

(i) that, having regard to all the circumstances of the complaint, an inquiry into the complaint is not warranted, or

(i) soit que, compte tenu des circonstances relatives à la plainte, l'examen de celle-ci n'est pas justifié,

(ii) that the complaint should be dismissed on any ground mentioned in paragraphs 41(*c*) to (*e*).

(ii) soit que la plainte doit être rejetée pour l'un des motifs énoncés aux alinéas 41*c*) à *e*).

Appointment of conciliator

47. (1) Subject to subsection (2), the Commission may, on the filing of a complaint, or if the complaint has not been

(*a*) settled in the course of investigation by an investigator,

(*b*) referred or dismissed under subsection 44(2) or (3) or paragraph 45(2)(*a*) or 46(2)(*a*), or

(*c*) settled after receipt by the parties of the notice referred to in subsection 44(4),

Nomination du conciliateur

47. (1) Sous réserve du paragraphe (2), la Commission peut charger un conciliateur d'en arriver à un règlement de la plainte, soit dès le dépôt de celle-ci, soit ultérieurement dans l'un des cas suivants :

*a*) l'enquête ne mène pas à un règlement;

*b*) la plainte n'est pas renvoyée ni rejetée en vertu des paragraphes 44(2) ou (3) ou des alinéas 45(2)*a*) ou 46(2)*a*);

*c*) la plainte n'est pas réglée après réception par les parties de l'avis prévu au paragraphe 44(4).

Conduct of inquiry

50. (1) After due notice to the Commission, the complainant, the person against whom the complaint was made and, at the discretion of the member or panel conducting the inquiry, any other interested party, the member or panel shall inquire into the complaint and shall give all parties to whom notice has been given a full and ample opportunity, in person or through counsel, to appear at the inquiry, present evidence and make representations.

Fonctions

50. (1) Le membre instructeur, après avis conforme à la Commission, aux parties et, à son appréciation, à tout intéressé, instruit la plainte pour laquelle il a été désigné; il donne à ceux-ci la possibilité pleine et entière de comparaître et de présenter, en personne ou par l'intermédiaire d'un avocat, des éléments de preuve ainsi que leurs observations.

Power to determine questions of law or fact

(2) In the course of hearing and determining any matter under inquiry, the member or panel may decide all questions of law or fact necessary to determining the matter.

Questions de droit et de fait

(2) Il tranche les questions de droit et les questions de fait dans les affaires dont il est saisi en vertu de la présente partie.

Additional powers

(3) In relation to a hearing of the inquiry, the member or panel may

(*a*) in the same manner and to the same extent as a superior court of record, summon and enforce the attendance of witnesses and compel them to give oral or written evidence on oath and to produce any documents and things that the member or panel considers necessary for the full hearing and consideration of the complaint;

(*b*) administer oaths;

(*c*) subject to subsections (4) and (5), receive and accept any evidence and other information, whether on oath or by affidavit or otherwise, that the member or panel sees fit, whether or not that evidence or information

Pouvoirs

(3) Pour la tenue de ses audiences, le membre instructeur a le pouvoir :

*a*) d'assigner et de contraindre les témoins à comparaître, à déposer verbalement ou par écrit sous la foi du serment et à produire les pièces qu'il juge indispensables à l'examen complet de la plainte, au même titre qu'une cour supérieure d'archives;

*b*) de faire prêter serment;

*c*) de recevoir, sous réserve des paragraphes (4) et (5), des éléments de preuve ou des renseignements par déclaration verbale ou écrite sous serment ou par tout autre moyen qu'il estime indiqué, indépendamment de leur admissibilité

is or would be admissible in a court of law;

(*d*) lengthen or shorten any time limit established by the rules of procedure; and

(*e*) decide any procedural or evidentiary question arising during the hearing.

devant un tribunal judiciaire;

*d*) de modifier les délais prévus par les règles de pratique;

*e*) de trancher toute question de procédure ou de preuve.

Limitation in relation to evidence

(4) The member or panel may not admit or accept as evidence anything that would be inadmissible in a court by reason of any privilege under the law of evidence.

Restriction

(4) Il ne peut admettre en preuve les éléments qui, dans le droit de la preuve, sont confidentiels devant les tribunaux judiciaires.

Conciliators as witnesses

(5) A conciliator appointed to settle the complaint is not a competent or compellable witness at the hearing.

Le conciliateur n’est ni compétent ni contraignable

(5) Le conciliateur n’est un témoin ni compétent ni contraignable à l’instruction.

Witness fees

(6) Any person summoned to attend the hearing is entitled in the discretion of the member or panel to receive the same fees and allowances as those paid to persons summoned to attend before the Federal Court.

Frais des témoins

(6) Les témoins assignés à comparaître en vertu du présent article peuvent, à l’appréciation du membre instructeur, recevoir les frais et indemnités accordés aux témoins assignés devant la Cour fédérale.

Duty of Commission on appearing

51. In appearing at a hearing, presenting evidence and making representations, the Commission shall adopt such position as, in its opinion, is in the public interest having regard to the nature of the complaint.

Obligations de la Commission

51. En comparaissant devant le membre instructeur et en présentant ses éléments de preuve et ses observations, la Commission adopte l'attitude la plus proche, à son avis, de l'intérêt public, compte tenu de la nature de la plainte.

Hearing in public subject to confidentiality order

52. (1) An inquiry shall be conducted in public, but the member or panel conducting the inquiry may, on application, take any measures and make any order that the member or panel considers necessary to ensure the confidentiality of the inquiry if the member or panel is satisfied, during the inquiry or as a result of the inquiry being conducted in public, that

Instruction en principe publique

52. (1) L'instruction est publique, mais le membre instructeur peut, sur demande en ce sens, prendre toute mesure ou rendre toute ordonnance pour assurer la confidentialité de l'instruction s'il est convaincu que, selon le cas :

(*a*) there is a real and substantial risk that matters involving public security will be disclosed;

*a*) il y a un risque sérieux de divulgation de questions touchant la sécurité publique;

(*b*) there is a real and substantial risk to the fairness of the inquiry such that the need to prevent disclosure outweighs the societal interest that the inquiry be conducted in public;

*b*) il y a un risque sérieux d'atteinte au droit à une instruction équitable de sorte que la nécessité d'empêcher la divulgation de renseignements l'emporte sur l'intérêt qu'a la société à ce que l'instruction soit publique;

(*c*) there is a real and substantial risk that the disclosure of personal or other matters will cause undue hardship to the persons involved such that the need to prevent disclosure outweighs the societal interest that the inquiry be conducted in public; or

*c*) il y a un risque sérieux de divulgation de questions personnelles ou autres de sorte que la nécessité d'empêcher leur divulgation dans l'intérêt des personnes concernées ou dans l'intérêt public l'emporte sur l'intérêt qu'a la société à ce que l'instruction soit publique;

(*d*) there is a serious possibility that the life, liberty or security of a person will be endangered.

*d*) il y a une sérieuse possibilité que la vie, la liberté ou la sécurité d'une personne puisse être mise en danger par la publicité des débats.

Confidentiality of application

(2) If the member or panel considers it appropriate, the member or panel may take any measures and make any order that the member or panel considers necessary to ensure the confidentiality of a hearing held in respect of an application under subsection (1).

Confidentialité

(2) Le membre instructeur peut, s'il l'estime indiqué, prendre toute mesure ou rendre toute ordonnance qu'il juge nécessaire pour assurer la confidentialité de la demande visée au paragraphe (1).

Complaint dismissed

53. (1) At the conclusion of an inquiry, the member or panel conducting the inquiry shall dismiss the complaint if the member or panel finds that the complaint is not substantiated.

Rejet de la plainte

53. (1) À l'issue de l'instruction, le membre instructeur rejette la plainte qu'il juge non fondée.

Complaint substantiated

(2) If at the conclusion of the inquiry the member or panel finds that the complaint is substantiated, the member or panel may, subject to section 54, make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in the order any of the following terms that the member or panel considers appropriate:

(*a*) that the person cease the discriminatory practice and take measures, in consultation with the Commission on the general purposes of the measures, to redress the practice or to prevent the same or a similar practice from occurring in future, including

(i) the adoption of a special program, plan or arrangement referred to in subsection 16(1), or

(ii) making an application for approval and implementing a plan under section 17;

(*b*) that the person make available to the victim of the discriminatory practice,

Plainte jugée fondée

(2) À l'issue de l'instruction, le membre instructeur qui juge la plainte fondée, peut, sous réserve de l'article 54, ordonner, selon les circonstances, à la personne trouvée coupable d'un acte discriminatoire :

*a*) de mettre fin à l'acte et de prendre, en consultation avec la Commission relativement à leurs objectifs généraux, des mesures de redressement ou des mesures destinées à prévenir des actes semblables, notamment :

(i) d'adopter un programme, un plan ou un arrangement visés au paragraphe 16(1),

(ii) de présenter une demande d'approbation et de mettre en oeuvre un programme prévus à l'article 17;

*b*) d'accorder à la victime, dès que les circonstances le permettent, les droits,

on the first reasonable occasion, the rights, opportunities or privileges that are being or were denied the victim as a result of the practice;

chances ou avantages dont l'acte l'a privée;

(*c*) that the person compensate the victim for any or all of the wages that the victim was deprived of and for any expenses incurred by the victim as a result of the discriminatory practice;

*c*) d'indemniser la victime de la totalité, ou de la fraction des pertes de salaire et des dépenses entraînées par l'acte;

(*d*) that the person compensate the victim for any or all additional costs of obtaining alternativegoods, services, facilities or accommodation and for any expenses incurred by the victim as a result of the discriminatory practice; and

*d*) d'indemniser la victime de la totalité, ou de la fraction des frais supplémentaires occasionnés par le recours à d'autres biens, services, installations ou moyens d'hébergement, et des dépenses entraînées par l'acte;

(*e*) that the person compensate the victim, by an amount not exceeding twenty thousand dollars, for any pain and suffering that the victim experienced as a result of the discriminatory practice.

*e*) d'indemniser jusqu'à concurrence de 20 000 $ la victime qui a souffert un préjudice moral.

Special compensation

(3) In addition to any order under subsection (2), the

Indemnité spéciale

(3) Outre les pouvoirs que lui confère le paragraphe (2),

member or panel may order the person to pay such compensation not exceeding twenty thousand dollars to the victim as the member or panel may determine if the member or panel finds that the person is engaging or has engaged in the discriminatory practice wilfully or recklessly.

le membre instructeur peut ordonner à l'auteur d'un acte discriminatoire de payer à la victime une indemnité maximale de 20 000 $, s'il en vient à la conclusion que l'acte a été délibéré ou inconsidéré.

Interest

4) Subject to the rules made under section 48.9, an order to pay compensation under this section may include an award of interest at a rate and for a period that the member or panel considers appropriate.

Intérêts

(4) Sous réserve des règles visées à l'article 48.9, le membre instructeur peut accorder des intérêts sur l'indemnité au taux et pour la période qu'il estime justifiés.

Orders relating to hate messages

54. (1) If a member or panel finds that a complaint related to a discriminatory practice described in section 13 is substantiated, the member or panel may make only one or more of the following orders:

Cas de propagande haineuse

54. (1) Le membre instructeur qui juge fondée une plainte tombant sous le coup de l'article 13 peut rendre :

(*a*) an order containing terms referred to in paragraph 53(2)(*a*);

*a*) l'ordonnance prévue à l'alinéa 53(2)*a*);

(*b*) an order under subsection 53(3) to compensate a victim specifically identified in the communication that constituted the discriminatory practice; and

*b*) l'ordonnance prévue au paragraphe 53(3) — avec ou sans intérêts — pour indemniser la victime identifiée dans la communication constituant l'acte discriminatoire;

(*c*) an order to pay a penalty of not more than ten thousand dollars.

*c*) une ordonnance imposant une sanction pécuniaire d'au plus 10 000 $.

Factors

(1.1) In deciding whether to order the person to pay the penalty, the member or panel shall take into account the following factors:

Facteurs

(1.1) Il tient compte, avant d'imposer la sanction pécuniaire visée à l'alinéa (1)*c*) :

(*a*) the nature, circumstances, extent and gravity of the discriminatory practice; and

*a*) de la nature et de la gravité de l'acte discriminatoire ainsi que des circonstances l'entourant;

(*b*) the wilfulness or intent of the person who engaged in the discriminatory practice, any prior discriminatory practices that the person has engaged in and the person's ability to pay the penalty.

*b*) de la nature délibérée de l'acte, des antécédents discriminatoires de son auteur et de sa capacité de payer.

Idem

(2) No order under subsection 53(2) may contain a term

Idem

(2) L'ordonnance prévue au paragraphe 53(2) ne peut exiger :

(*a*) requiring the removal of an individual from a position if that individual accepted employment in that position in good faith; or

*a*) le retrait d'un employé d'un poste qu'il a accepté de bonne foi;

| | |
|---|---|
| (*b*) requiring the expulsion of an occupant from any premises or accommodation, if that occupant obtained such premises or accommodation in good faith. | *b*) l'expulsion de l'occupant de bonne foi de locaux, moyens d'hébergement ou logements. |

**DECISION UNDER REVIEW:**

[23] In the decision, the Tribunal found that the evidence did not establish that Mr. Lemire had actual or constructive knowledge of the content of Mr. Harrison's posts on the Freedomsite.org message board notwithstanding Lemire's role as administrator of the host website. Similarly, there was no evidence to establish a *prima facie* case that Mr. Lemire was aware of posts submitted by persons other than Mr. Harrison that could constitute hate messages. These were posted on "threads" or strings of messages that Lemire did not directly control or regularly visit. Mr. Lemire thus did not "communicate or cause to communicate" these messages within the meaning of s 13 of the Act.

[24] With regards to JRBooksonline.com, the Tribunal found that there was "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" (at para 47 of the decision). Mr. Warman had alleged that the website was controlled by Mr. Lemire. The Tribunal found that the evidence

showed that while Mr. Lemire had assisted with the registration of the domain at the outset, a third party was the webmaster and the owner of that website and that there was no evidence that Mr. Lemire visited the site or controlled its content.

[25] Regarding a poem Mr. Lemire had posted on the website Stormfront.org, the Tribunal found that the content did not amount to hate speech as defined by the Supreme Court in *Taylor*. A number of other articles posted by Mr. Lemire or of which he evidently had actual or constructive knowledge, which were posted on his site, Freedomsite.org, were also found to not amount to hate speech as they fell short of expressing the required level of detestation, calumny and vilification to meet the test.

[26] Lemire had control over the posting of articles in a section of the Freedomsite.org site which published the work of authors described as "Controversial Columnists". Any member of the public could access that section of the website. One of the articles posted there by Lemire was entitled "AIDS Secrets". The Tribunal found that the article contained material that is likely to expose homosexuals and blacks to hatred or contempt (at para 198 of the decision), and that Mr. Lemire repeatedly communicated the matter within the meaning of s 13 (at para 212 of the decision). The complaint was thus substantiated in respect of that one item. Mr. Lemire has not sought judicial review of that finding.

[27] Turning to the issue of the constitutionality of s 13 of the Act, the Tribunal noted that the question had been determined by the Supreme Court in *Taylor*. While the Supreme Court had found that s 13(1) infringed *Charter* s 2(b), it was satisfied that the enactment satisfied both aspects of the

test for justification under *Charter* s 1: *R v Oakes*, [1986] 1 SCR 103 (a sufficiently important objective and a proportional measure to achieve it).

[28] The Tribunal considered that it could revisit the question of s 1 justification since the s 13 regime had been modified by Parliament since *Taylor*. As such, the Tribunal found that *Taylor* was distinguishable from the case at hand. The scheme of the Act had been changed from "an exclusively remedial, preventive and conciliatory" regime (para 262 of the decision) at the time of *Taylor* to one that was quasi-penal (para 279 of the decision). In the Tribunal's view, this stemmed largely from the amendments to the Act in 1998 mentioned at para 19 above, which authorized the Tribunal, in addition to issuing a cease and desist order and ordering that the victim be compensated up to the amount of now $20,000, to order the defendant to pay a penalty of up to $10, 000 dollars having considered certain specified factors (the new s 54(1)(c) of 1998).

[29] The Tribunal found that the Commission's practice of referring s 13 complaints contributed to its finding that the nature of the scheme had changed since it was considered in *Taylor* (para 283 of the decision). The Tribunal expressed five concerns: first that the Commission referred this complaint to the tribunal even though most of the impugned material had already been removed from the Internet; second that the Commission had referred other complaints to the Tribunal under s 13 in similar circumstances; third that it had declined the respondent's request that a mediator or conciliator be appointed; fourth that the Commission showed a low settlement rate for s 13 complaints; and fifth that the Commission did not generally offer to mediate s 13 complaints.

[30] Based on the legislative changes and concerns about the Commission's practices, the tribunal concluded that it was not bound by *Taylor* as it considered that the majority decision in that case had been premised on the assumption that the Commission's procedures functioned in a conciliatory manner as intended by the statute. At paragraph 290 of the decision, the tribunal stated:

> 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 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*.

[31] The combined effect of the legislative changes and of the Commission's practices in administering the revised statute compelled the conclusion, in the Tribunal's view, that s 13 in conjunction with ss 54(1)(c) and (1.1) no longer minimally impaired the right to freedom of speech and could not be saved under s 1 of the *Charter*. In arriving at this conclusion the Tribunal did not find that the compensation provisions in ss 53(3) and 54(1)(b),, the cease and desist order power in ss 54(1)(a), or the other remedial measures in s 53 were constitutionally unsound but focused exclusively on ss 54(1)(c) and 54(1.1).

[32] As noted at para 21 above, s 13 had been further amended in 2001 to insert the current version of s 13(2) which provides, for greater certainty, that the definition of discriminatory

practices set out in s 13(1) applies to communications by means of a computer or group of interconnected or related computers, including the Internet. The impact of the Internet on communications contributed to the Tribunal's *Charter* s 1 analysis but it did not rely on this amendment to reach its invalidity finding.

[33] Mr. Lemire had also alleged that s 13 infringed on his freedom of conscience or religion, as guaranteed under s 2(a) of the *Charter*. The Tribunal found that there was no evidence that the messages in question had been made as a matter of conscience or religious practice. Arguments that ss 13 and 54 of the Act violated Mr. Lemire's s 7 *Charter* rights were held to be inadequate to support a constitutional remedy. The Tribunal found that the incidents cited by Mr. Lemire in support of these arguments did not bring his life, liberty or security of the person into question as required by the Supreme Court in *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 SCR 307 at para 47. Evidence that the Commission cooperated with law enforcement agencies on some occasions was found to have no bearing on the circumstances of Mr. Lemire's case.

[34] Mr. Lemire argued in addition that the Supreme Court's findings in *Taylor* were based on fundamental factual and evidentiary errors. The Tribunal did not find it appropriate to revisit every aspect of the Supreme Court's *Charter* analysis, noting at paragraph 221 of the decision that it remained bound by most of the findings in *Taylor* and by *McAleer v Canada (Canadian Human Rights Commission*) (1999), 175 DLR (4th) 766 [*McAleer*]. In *McAleer*, the Federal Court of Appeal had applied the *Taylor* findings to matters exposing persons to hatred or contempt on grounds other than those raised in *Taylor* (race and religion) such as sexual orientation, as in the case of the "AIDS Secrets" article.

[35] Mr. Lemire contended that the manner in which the 2001 amendment to s 13(2), specifying that it applied to computers and the internet, was adopted, as part of the *Anti-terrorism Act*, demonstrated that s 13 is not a remedial statute to prevent discrimination but rather has as its objective to control opposition to government policies such as multiculturalism. The Tribunal, citing the legislative history of the amendment, found that this did not represent a change in circumstances that would justify revisiting the Supreme Court's findings in *Taylor* regarding s 13(1)'s objective (para 231 of the decision). The amendment was adopted to clarify what was already the interpretation of the section, that it applied to the communication of hate messages using new technology.

[36] The Tribunal acknowledged that a formal declaration of invalidity was not a remedy available to it: *Cuddy Chicks Ltd v Ontario (Labour Relations Board)*, [1991] 2 SCR 5. Citing *Nova Scotia (Workers' Compensation Board) v Martin*, 2003 SCC 54, [2003] 2 SCR 504 [*Martin*] at paras 26-7, the Tribunal refused to apply s.13 and ss 54(1) and (1.1) to issue a remedial order against Mr. Lemire for his breach of the Act.

[37] While not expressly stated in the Tribunal's decision, the authority to decline to apply the statute was exercised under s 52 (1) of the *Constitution Act*, 1982 (see *Martin*, at para 28). Mr. Lemire had also sought a remedy under s 24(1) of the *Charter* before the Tribunal, as he does before this Court, but has not articulated how s 24(1) might apply or what remedy the Tribunal or the Court might fashion under that section for the alleged breach of his *Charter* rights.

**ISSUES:**

[38] The Commission, supported by the respondent Richard Warman and the intervenors the ACLC, B'nai Brith and the SWC, frames the issues on the present application in the following terms:

> a. whether the Tribunal erred in law when it found that the manner by which the Commission exercises its statutory mandate could render sections 13 and 54(1)(a) & (b) of the CHRA unconstitutional; and
>
> b. whether the Tribunal erred when it refused to apply section 13 and section 54(1) and (1.1) of the CHRA in their entirety when the constitutional concern could be remedied by refusing to apply sections 54(1)(c) and (1.1) of the CHRA.

[39] The Commission submits that it seeks to preserve the core of the scheme established in 1977 and applied in the modern context to Internet based communications. The Commission does not contest the Tribunal's ruling with respect to the penalty provisions and, in its oral submissions, indicated that it has not taken the position since the Tribunal's decision in this matter that the penalty provisions should be applied in other proceedings. It argues that the only constitutional remedy that should have flowed from the Tribunal's findings is that the penalty provisions ought to be read out of the statute, applying the doctrine of severance.

[40] The Commission contends that the Tribunal erred in not issuing a declaration that the publication of the article "AIDS Secrets" constituted a breach of s 13 and in failing to exercise the Tribunal's jurisdiction to consider whether a remedy ought to be granted under s 54(1)(a) – the authority to issue a cease and desist order – or 54(1)(b) – the compensation provision. The Commission does not contend that the Tribunal was obliged to make an order under either of these

provisions but argues that the Tribunal was bound to make the s 13(1) declaration and consider these remedies. It seeks to have the matter remitted to the Tribunal for these purposes.

[41] In oral argument, the Commission pointed out that there is no formal application before the Court for judicial review of the Tribunal's finding that Mr. Lemire contravened s 13(1). A request for a declaration of constitutional invalidity is contained in the Notice of Constitutional Question which was served in May 2011. The Commission takes the position that the only issues properly before me in this proceeding are those set out in its Notice of Application. If the respondent Lemire is successful in defending the application, the Commission argues, the only remedy available to the Court under s.18.1 of the *Federal Courts Act* is to dismiss the application,.

[42] Mr. Lemire, supported by the intervenors CFSL, CAFE, the CCLA and the BCCLA, calls for a broader consideration of the constitutionality of the hate speech regime governed by s 13 of the Act. They strenuously object to the scope of this application being restricted to the issues framed in the Commission's Notice of Application. As the Tribunal found in Mr. Lemire's favour on his constitutional motion, they argue, he had no basis in law to seek judicial review of that decision. Since this Court has the authority to make a general declaration of constitutional invalidity he should not be restrained from seeking such relief through the vehicle of the application brought by the Commission.

[43] As noted by Justice Anne Mactavish in *Air Canada Pilots Association v Kelly* 2011 FC 120 at paragraphs 481-489, the power of this Court to grant declaratory relief is predicated upon a finding that the Tribunal in question erred in one of the ways identified in section 18.1(4) of the

*Federal Courts Act*. In that case, Justice Mactavish found that the Tribunal had not erred in its determination of *Charter* invalidity. Consequently, she held, the remedial powers conferred on the Court by subsection 18.1(3) of the *Federal Courts Act* were not engaged. The proper remedy in those circumstances was to dismiss the applications for judicial review insofar as they related to the *Charter* issue. Assuming, without deciding, that a general declaration of invalidity could ever be granted to a responding party on an application for judicial review, she declined to grant such a remedy. The responding parties had not given notice to the Attorneys General that they would be seeking such a remedy and the request, in that case, was found to be a collateral attack on the Tribunal's remedial decision.

[44] Here it has been clear from the outset that the respondent Lemire and the intervenors who support his position have been seeking a general declaration of invalidity and they have given proper notice of the question to the Attorneys General. While the matter is not without some doubt, I am satisfied that if I were to dismiss the application for judicial review and uphold the Tribunal's decision I could exercise the jurisdiction to issue a general declaration of invalidity with respect to s 13 and ss 54(1) and (1.1). Similarly, I am confident that I can uphold the Tribunal's decision in part and remit that portion where I conclude the Tribunal fell into error.

[45] I see no reason to address the other arguments by Mr. Lemire and the CFSL respecting ss 2(a) and 7 of the *Charter,* which the Tribunal did not accept. Those arguments and the Tribunal's findings are secondary to the main controversy between the parties in respect of s 13 of the Act and s 2(b) of the *Charter.* They were not supported by the evidence received by the Tribunal and are not

properly before the Court on this application. In general, I agree with the Tribunal's disposition of those arguments.

[46] In my view, the issues raised by the parties and intervenors in these proceedings that the Court must address are as follows:

> 1. Was it appropriate for the Tribunal to consider the manner by which the Commission exercises its statutory mandate in determining whether to apply s13 of the Act?
>
> 2. Do ss 13, 54(1) and (1.1) of the Act violate s 2(b) of the *Charter* and if so, are they saved by s 1 of the *Charter*?
>
> 3. What is the appropriate remedy, if ss 13, 54(1) and (1.1) of the Act, read together, are found to be unconstitutional? Is severance available?

**ANALYSIS:**

*Standard of Review;*

[47] As a result of *R. v. Conway*, 2010 SCC 22, [2010] 1 SCR 765 at para 81, the tests for determining the constitutional issues that may be decided by administrative tribunals have been merged. What is to be determined post-*Conway* is whether the tribunal has the authority to decide questions of law. The Tribunal is a specialized body that has the statutory authority to determine questions of law (s 50(2) of the Act) and is therefore competent to consider and apply the *Charter* and *Charter* remedies when resolving the matters properly before it.

[48] In so far as the issues before the Court relate to constitutional matters, the Tribunal's findings are reviewable on a standard of correctness: *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 58. "Such questions, as well as other constitutional issues, are necessarily subject to a correctness review because of the unique role of s. 96 courts as interpreters of the Constitution: *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504, 2003 SCC 54". This applies equally to courts established under s 101 of the Constitution in respect of matters falling within their jurisdiction. This Court, therefore, owes no deference to the Tribunal with respect to its determination of the constitutional questions.

[49] Questions which require the Tribunal to interpret a provision in its own enabling legislation in relation to an issue falling within its core function and expertise will presumptively attract a reasonableness standard of review, and will only attract a correctness standard in limited circumstances: see *Smith v Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 SCR 160 at para 28; *Celgene Corp v Canada (AG)*, 2011 SCC 1, [2011] 1 SCR 3 at para 34, and *Canada (Canadian Human Rights Commission) v Canada (AG)*, 2011 SCC 53, [2011] 3 SCR 471 at para 24.

[50] The Tribunal's findings of fact as to the subject-matter of the complaint referred to it for determination are to be accorded deference and are reviewable on a standard of reasonableness. Subsection 18.1(4)(d) of the *Federal Courts Act* provides that the Court can intervene only if it considers that the board "based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it": see *Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, [2005] 2 SCR 100 at paragraph 38. There was no serious attempt made in these proceedings to challenge the Tribunal's finding that the article

"AIDS Secrets" contravened s 13(1) and it will not be necessary for me to review the evidence in support of that finding.

*In determining whether to apply s 13 of the Act, was it appropriate for the Tribunal to consider the manner in which the Commission exercises its statutory mandate?*

[51] The constitutional basis for allowing Canadians to assert their *Charter* rights in the most accessible form available and without the need for bifurcated proceedings between superior courts and administrative tribunals is beyond dispute. The denial of early access to remedies when early or immediate access is clearly needed or when delay itself is a perpetuation of a Charter violation is in effect a denial of an appropriate and just remedy, as Lamer J pointed out in his dissent to *Mills v The Queen*, [1986] 1 SCR 863 at para 54. And as stated by the Supreme Court in *Conway* at paragraph 79:

> [79] Over two decades of jurisprudence has confirmed the practical advantages and constitutional basis for allowing Canadians to assert their *Charter* rights in the most accessible forum available, without the need for bifurcated proceedings between superior courts and administrative tribunals (*Douglas College*, at pp. 603-4; *Weber*, at para. 60; *Cooper*, at para. 70; *Martin*, at para. 29). The denial of early access to remedies is a denial of an appropriate and just remedy, as Lamer J. pointed out in *Mills*, at p. 891. And a scheme that favours bifurcating claims is inconsistent with the well-established principle that an administrative tribunal is to decide all matters, including constitutional questions, whose essential factual character falls within the tribunal's specialized statutory jurisdiction (*Weber*; *Regina Police Assn.*; *Quebec (Commission des droits de la personne et des droits de la jeunesse)*; *Quebec (Human Rights Tribunal)*; *Vaughan*; *Okwuobi*. See also *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 49.).

[52] In the present case, the Tribunal has the authority to receive systemic evidence as to how s 13 is administered and the effects of the legislation but it has no jurisdiction to review the actions of the Commission. There is nothing in ss 50-54 of the Act, which define the Tribunal's powers in conducting an inquiry, to give it such authority. See, in this respect, *Cooper v Canada (Human Rights Commission)*, [1996] 3 SCR 854 at para 50. The controversy between the parties is over the nature and extent of the Tribunal's review of the Commission's actions in this case.

[53] It is, therefore, clear that the Tribunal had the authority and duty to receive systemic evidence as to how s 13 is administered and the effects of the legislation in determining the constitutional motion brought before it. The Tribunal's view of this responsibility is set out at paragraphs 286 to 290 of its decision. While it acknowledged that the position advanced by the Attorney General that it had no jurisdiction to sit in review of the decisions taken by the Commission was correct, it considered that the real and factual context in which the enactment exists and is applied could not be ignored.

[54] However, the Tribunal can only consider *Charter* issues that arise in the course of a matter within the jurisdiction of the Tribunal: *Martin* at para 45; *Tranchemontagne v Ontario (Director, Disability Support Program)*, 2006 SCC 14, [2006] 1 SCR 513 at para 24. The question is whether the remedy in question is one that the legislature intended would fit within the statutory framework of the particular tribunal; *Conway* at paragraph 82..

[55] The CHRA establishes two distinct institutions, each of which has a particular role as described by the statute. It sets out a complete mechanism for dealing with human rights

complaints. Central to this mechanism is the Commission. Under the scheme of the Act, the Commission is the body empowered to accept, manage and process complaints of discriminatory practices. The Tribunal has no statutory mandate under the Act with respect to its administration, except as set out in s 50 which provides that "it shall inquire into the complaint" when a request is made by the Commission that it do so. These factors suggest that the legislature did not intend that the Tribunal would have the authority to find the Act inoperative based on the manner in which the statute was administered.

[56] In particular, the Tribunal has no jurisdiction over the exercise of the Commission's discretion under CHRA s 44(3) (rejecting or referring a complaint) and s 47 (appointing a conciliator). The proper way to challenge a Commission decision in respect of such matters is through judicial review by the Federal Court.

[57] In exercising its authority, the Tribunal cannot collaterally question a Commission decision that is within the statutory authority of that body. This is properly left to judicial review: *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at p 853 (QL and WL para 53); *Sam Lévy et Associés Inc c Mayrand*, 2005 FC 702, aff'd by 2006 FCA 205, leave to appeal to the SCC ref'd, [2006] CSCR no 317 (QL), at para 169; and *Canada v Prentice*, 2005 FCA 395, leave to appeal to SCC ref'd [2006] CSCR no 26 (QL), at paras 32-33.

[58] The concern that the Commission referred this complaint to the Tribunal even though most of the impugned material had been moved from the Internet is, in effect a comment on the Commission's decision to request that the Tribunal hold an inquiry. That is outside the tribunal's

mandate. The Tribunal compounded the error when it commented on other complaints that had been referred to it in similar circumstances and remarked on the low settlement rate for s 13 complaints and on the fact that the Commission did not generally offer to mediate such matters Those questions were not before the Tribunal for inquiry.

[59] The Member took a critical view of the manner in which the Commission's investigation was conducted and factored that into his conclusion that the scheme was constitutionally flawed. The Member considered that the Commission should have made additional efforts to communicate with Mr. Lemire and questioned that the Commission proceeded with the complaint when Mr. Lemire had taken down the message board and deleted the post found to constitute a hate message from his website prior to the proceedings.

[60] In this instance, the Member accepted Mr. Lemire's contention that the complainant and the Commission declined to mediate or conciliate a settlement to the complaint. This is not borne out by the record of the Tribunal proceedings. Repeated efforts were made to engage Mr. Lemire in mediating or negotiating a settlement of the complaint. However, they were conditional on Lemire's acceptance of a cease and desist order, which he refused to accept.

[61] The Member's analysis that this complaint had not been handled in a sufficiently conciliatory and remedial fashion does not reflect the record. The Member declined to receive information pertaining to the settlement efforts on the ground that such information was privileged. However, he allowed Mr. Lemire to repeatedly question Mr Warman and Commission staff as to why the complaint had not been withdrawn following removal of the "AIDS Secrets" article. The

proceedings were adjourned on at least one occasion, February 1, 2007, to allow such discussions to take place.

[62] Absent a cease and desist order there was nothing to prevent the strategic removal of material in violation of the Act and reposting of it as soon as the complaint had been withdrawn. Mr. Lemire argued on this application that had he done so the complaint could be filed again. "Relaying a one page complaint doesn't seem to be too much of a hassle" as his counsel put it in oral argument. I disagree. Bad faith of this nature would render the process essentially meaningless and ineffective and is hardly consistent with the objectives of the legislation.

[62] As was noted by counsel for the Attorney General of Canada before the Tribunal, the hearing went beyond the scope of the Tribunal's mandate to determine the factual and legal issues and became an inquiry into the manner in which the complainant and the Commission conducted themselves in relation to the complaint. The Tribunal stepped over the line of its proper role – adjudication of the complaint – and assumed the role the Court would have upon an application for judicial review of the actions or decisions of the Commission.

[63] Section 13 cases, while few in number, tend to be among the most intractable handled by the Commission due to the nature of hate speech. They do not lend themselves easily to mediation or conciliation. See for example Richard Moon, *Report to the Canadian Human Rights Commission Concerning Section 13 of the Canadian Human Rights Act and the Regulation of Hate Speech on the Internet* (October 2008), online: Canadian Human Rights Commission http://www.chrc-ccdp.ca/publications/report_moon_rapport/toc_tdm-eng.aspx [*Moon Report*] at p.10: "In

contrast to other discrimination complaints, conciliation tends to play only a minor role in section 13 cases because the expression that is the subject of the complaint is often extreme in character, and because the parties ordinarily have no relationship prior to the complaint." See also Lawrence McNamara, "Tackling Racial Hatred: Conciliation, Reconciliation and Football" (2000) 6(2) Austl J H R 5 at pp 24-25; and Philip Bryden and William Black, "Mediation as a Tool for Resolving Human Rights Disputes: Evaluation of the BC Human Rights Commission's Early Mediation Project" (2004) 37 UBC L Rev 73. These cases represent a small part of the workload for both the Commission and the Tribunal. The Commission's *Annual Report 2006* (Ottawa: Public Works and Government Services Canada, 2006), online: http://www.chrc-ccdp.gc.ca/pdf/ar_2006_ra_en.pdf [*2006 Report*] at pp 7, 24 shows that between 2002 and 2006 the Commission received 57 s 13 allegations of which 55 were complaints of hate messages on the internet. Twenty-nine of the 55 complaints were sent to the Tribunal. In all the Commission dealt with 6,003 allegations of all types during the years 2002-2006 (*2006 Report* at p 7), 591 of which were referred to the Tribunal (*2006 Report* at p 21). Section 13 complaints represented only 1% to 2 % of the total number of complaints dealt with by the Commission.

[64] While the Tribunal Member clearly understood the difficulties presented by such proceedings, it was unreasonable of him to expect that this matter could have been resolved by conciliation or that the Commission and Mr. Warman would abandon the complaint when Lemire removed the one article found to communicate hate for which Lemire was found to be directly responsible. Decisions were required from the Tribunal on the nature of the content found on Lemire's site and on the extent of his involvement with the other websites.

[65] The Member directly linked his finding that Mr. Lemire had "amended his conduct by removing the impugned material as soon as he learned of the complaint against him" to his conclusion that the process Lemire experienced was not what the Supreme Court understood in *Taylor*. However, the fundamental structure of the human rights process under the Act has not changed since *Taylor*. Referring a complaint to conciliation is and was but one of the many routes that the Commission may pursue to resolve a complaint. The structure on which the Supreme Court based its decision and upon which the Tribunal sought to distinguish *Taylor* has not changed. What changed, as the Tribunal properly found, were the remedies.

[66] As counsel for the Commission pointed out in argument, the practical difficulties that may arise when the Tribunal strays outside of its mandate, as experienced in this case, were foreshadowed by the following comment of Mr. Justice Lamer in concurring reasons in *Cooper*, above, at paragraph 65:

> I would add a practical note of caution with respect to a tribunal's jurisdiction to consider Charter arguments. First, as already noted, a tribunal does not have any special expertise except in the area of factual determinations in the human rights context. Second, any efficiencies that are *prima facie* gained by avoiding the court system will be lost when the inevitable judicial review proceeding is brought in the Federal Court. Third, the unfettered ability of a tribunal to accept any evidence it sees fit is well suited to a human rights complaint determination but is inappropriate when addressing the constitutionality of a legislative provision. Finally, and perhaps most decisively, the added complexity, cost, and time that would be involved when a tribunal is to hear a constitutional question would erode to a large degree the primary goal sought in creating the tribunals, i.e., the efficient and timely adjudication of human rights complaints.

[67] The hearings before the Tribunal in this matter took more than 18 months to complete. Many of the hearing days were expended on evidence relating to the Commission's investigation

and treatment of s 13 cases despite repeated objections. Another year was required to produce the decision. The "inevitable judicial review proceeding" followed. As forecast by Chief Justice Lamer in *Cooper*, the added complexity, cost and time involved in hearing this matter eroded any pretence of an efficient and timely adjudication of the complaint.

[68] The Tribunal erred in focusing its attention on the Commission's administration of the statute in this case, a subject beyond its mandate and the scope of its authority.

[69] I will turn now to the constitutional question. As the Commission submits, s 13 of the Act may be found to be unconstitutional only if the legislation itself is the source of the *Charter* violation. Administration of the statute by the Commission cannot, in itself, render the statute unconstitutional: *Eldridge v British Columbia (AG)*, [1997] 3 SCR 624 at para 20 [*Eldridge*]; and *Thomson v Alberta (Transportation and Safety Board)*, 2003 ABCA 256, leave to appeal to SCC ref'd, [2003] SCCA No 510 (QL) at para 44 [*Thomson*].

[70] If the Commission has performed its statutory mandate in a manner inconsistent with the *Charter*, s 24(1) is the appropriate provision of the *Charter* upon which to grant a remedy, not s 52(1): *Eldridge* at para 20; *Thomson* at para 44; and *Little Sisters Book and Art Emporium v Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 SCR 1120 at para 133. Section 24 remedies which do not involve striking down the legislation would include such things as a stay of proceedings, the exclusion of evidence in the particular matter or the referral back to the administrative decision-maker with appropriate directions as to how the matter ought to be decided. Those are all remedies which the Court could grant on judicial review.

*Do ss 13, 54(1) and (1.1) of the CHRA violate s 2(b) of the Charter and, if so, are they saved by s 1 of the Charter?*

[71] I start from the proposition, as did the Tribunal, that *Taylor* remains binding unless persuaded that it is no longer precedental authority due to changed factual and legal circumstances since it was decided. Mr. Lemire, the CCLA, the BCCLA and the CFSL argue that the inclusion of a penalty provision in the s 13 regime is sufficient to distinguish this case from *Taylor*. Alternatively, they contend that the extension of the regime to the Internet is an alternate ground on which to uphold the Tribunal's decision, notwithstanding that the Tribunal did not rely on that ground: *Perka v. The Queen*, [1984] 2 SCR 232 at page 240:

> In both civil and criminal matters it is open to a respondent to advance any argument to sustain the judgment below, and he is not limited to appellants' points of law. A party cannot, however, raise an entirely new argument which has not been raised below and in relation to which it might have been necessary to adduce evidence at trial.

[72] The Commission, Mr. Warman, B'nai Brith and the ACLC submit that *Taylor* is still applicable to the modified s 13 regime. They accept that ss 54(1)(c) & (1.1) of the CHRA (the penalty provisions) can not be justified under s 1 of the *Charter* but contend that this constitutional infirmity is not sufficient to strike down the s 13 regime as a whole.

[73] The arguments raised by the parties who urge the Court to distinguish *Taylor* are, in essence, that the regime has become too punitive – this is the argument adopted by the Tribunal – and that the Internet has considerably broadened the application of s.13 – this argument was not accepted by the Tribunal. As a result, they contend, s 13 now fails the minimal impairment test and/or the proportionality of the effects test of s 1 of the *Charter*.

[74] It is trite law that a court cannot assess the constitutionality of a provision in a factual vacuum: *MacKay v Manitoba*, [1989] 2 SCR 357 at paras 8-9; and *Martin* at para 30. The courts must look at the social context and the legislative facts that surround the impugned legislation: *RJR-MacDonald Inc v Canada (AG)*, [1995] 3 SCR 199 [*RJR-MacDonald*], at paras 129 and 132-133; *Rocket v Royal College of Dental Surgeons of Ontario*, [1990] 2 SCR 232, [1990] SCJ No 65 (QL) at para 28 ; and *Re Upper Churchill Water Rights Reversion Act*, [1984] 1 SCR 297 at p 318. In this case, some of the legislative effects of s 13 can only be "measured" through the actions of the Commission to which the CHRA gives substantial discretionary power and important responsibilities.

[75] As stated in *Canadian Egg Marketing Agency v Richardson*, [1998] 3 SCR 157 at para 97 the effects of the legislation have to be considered because: "It is possible that those effects might, over time, acquire such significance as to become the dominant feature of the legislation, thereby displacing the original purpose." And at para 98 the Court stated:

> There are two types of effect which must be examined in order to properly categorize the dominant feature of the legislative scheme: legal effect, and practical effect (*Morgentaler*, *supra*, at pp. 482-88). The legal effect has been described as "how the legislation as a whole affects the rights and liabilities of those subject to its terms, and is determined from the terms of the legislation itself" (*Morgentaler*, at p. 482). […] the second type of effect mentioned in *Morgentaler*, *supra*, at p. 483, [. . .] is the "actual or predicted practical effect of the legislation in operation".

[76] The *Oakes* test requires an analysis of the factual and contextual background of the impugned legislation. Where the statute itself does not carry any infringing effects but the complaint is with administrative actions, as in *Little Sisters*, the legislation in question should be upheld. In this context, in determining whether the statute is unconstitutional, the actions of the CHRC are relevant

to the extent that the Act authorizes the Commission to act unconstitutionally. Absent such a finding, the proper means to obtain a remedy would have been to seek judicial review of the Commission's actions: *Eldridge* at para 20; *Thomson* at para 44 and *Sam Lévy et Associés Inc* at para 169.

*a) Freedom of Expression*

[77] It is important to recall at the outset of this analysis that even hate speech is protected under s 2(b) of the *Charter*: *Taylor* at para 30. As indicated in *Irwin Toy Ltd v Quebec (AG)*, [1989] 1 SCR 927, [1989] SCJ No 36 (QL) [*Irwin Toy*], s 2(b) covers nearly any form of expression except physical violence, which hate speech is not: *Taylor*, at para 32; and *R v Keegstra*, [1990] 3 SCR 697 [1990] SCJ No 131 (QL) at para 37. In determining if s 2(b) applies we must not look at the content of the expression: *Keegstra*, at paras 30 and 32. The content and value of the expression are only relevant at the s 1 justification stage: *Taylor*, at para 31.

*b) Objective and Context of s 13*

[78] Most of the interested parties agree that the objectives of s 13, the suppression of hate speech and the promotion of equality, are pressing and substantial. Only Mr. Lemire and the CFSL appear to take issue with that proposition. Neither, in my view, have submitted any valid argument as to why the objective of s 13 is not pressing and substantial and why this Court should depart from *Taylor* on that point.

[79] Lemire and the intervenors in support of his position contend that the Internet has resulted in a radical change in communications and provides a means to instantly counter hate speech that was not available when *Taylor* was decided. Educating and counter-arguing through the Internet is a more effective means to counter hate speech than to prohibit and infringe freedom of expression, they argue, while the effect of s 13 is to censure legitimate debate in the search for truth. In their view, the meaning of the term "hate" is subjective and vague and inaccessible to the public who post messages on the Internet.

[80] Lemire further questions the legitimacy of the finding in *Taylor*, that hate speech can cause substantial pyschological stress, arguing that the Supreme Court relied not on expert evidence, such as he presented to the Tribunal, but on extrinsic research, to reach that conclusion.

[81] On the question of the objective, Chief Justice Dickson stated in *Taylor*, at para 42:

> [42] In seeking to prevent the harms caused by hate propaganda, the objective behind s. 13(1) is obviously one of pressing and substantial importance sufficient to warrant some limitation upon the freedom of expression. It is worth stressing, however, the heightened importance attached to this objective by reason of international human rights instruments to which Canada is a party and ss. 15 and 27 of the *Charter*.

[82] In arriving at this conclusion, the Chief Justice looked at the purpose of the CHRA, found in s 2 of the CHRA, the legislative history and the evidence of harm caused by hate speech (*Taylor*, at paras 39-41). He also indicated that the objective was compatible with international law as well as other *Charter* values, equality and multiculturalism (at paras 43-45):

> [43] The stance taken by the international community in protecting human rights is relevant in reviewing legislation under s. 1, and especially in assessing the significance of a government objective (*Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038).

> Both Article 4 of the *International Convention on the Elimination of All Forms of Racial Discrimination*, Can. T.S. 1970 No. 28, and Article 20 of the *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171 (1966), as well as the jurisprudence of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 U.N.T.S. 221 (1950) (see, e.g., *Glimmerveen v. Netherlands*, Eur. Comm. H. R., Applications Nos. 8348/78 and 8406/78, October 11, 1979,D.R. 18, p. 187) demonstrate that the commitment of the international community to eradicate discrimination extends to the prohibition of the dissemination of ideas based on racial or religious superiority.
>
> [44] Indeed, in 1983 a complaint to the United Nations Human Rights Committee by Mr. Taylor and the Western Guard Party alleging a violation of the freedom of expression guaranteed in the *International Covenant on Civil and Political Rights* was rejected on the ground that "the opinions which Mr. Taylor seeks to disseminate through the telephone system clearly constitute the advocacy of racial or religious hatred which Canada has an obligation under article 20(2) of the Covenant to prohibit": *Taylor and Western Guard Party v. Canada*, Communication No. 104/1981, Report of the Human Rights Committee, 38 U.N. GAOR, Supp. No. 40 (A/38/40) 231 (1983), para. 8(b), decision reported in part at (1983), 5 C.H.R.R.D/2097. This conclusion is indicative of the approach taken in the realm of international human rights, and thus emphasizes the substantial weight which must be given the aim of preventing the harms caused by hate propaganda.
>
> [45] That the values of equality and multiculturalism are enshrined in ss. 15 and 27 of the Charter further magnify the weightiness of Parliament's objective in enacting s. 13(1). 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. 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.

[83] Chief Justice Dickson arrived at the same conclusion in *Keegstra* at paras 58 to 80. He stated at para 80:

> [80] In my opinion, it would be impossible to deny that Parliament's objective in enacting s. 319(2) is of the utmost importance. Parliament has recognized the substantial harm that can flow from hate propaganda, and in trying to prevent the pain suffered by target group members and to reduce racial, ethnic and religious tension in Canada has decided to suppress the willful promotion of hatred against identifiable groups. The nature of Parliament's objective is supported not only by the work of numerous study groups, but also by our collective historical knowledge of the potentially catastrophic effects of the promotion of hatred (*Jones*, supra, per La Forest J., at pp. 299-300). Additionally, the international commitment to eradicate hate propaganda and the stress placed upon equality and multiculturalism in the *Charter* strongly buttress the importance of this objective. I consequently find that the first part of the test under s. 1 of the *Charter* is easily satisfied and that a powerfully convincing legislative objective exists such as to justify some limit on freedom of expression.

[84] These international commitments have not changed and remain valid: *Moon Report* at pp 17-19; and Canadian Human Rights Commission, *Freedom of Expression and Freedom from Hate in the Internet Age* (Ottawa: Special Report to Parliament, 2009) [*CHRC Special Report*] at pp 9-10. The jurisprudence of the Tribunal on the topic is quite extensive: see *Citron v Zundel* (18 January 2002), TD 1/02, online: CHRT http://www.chrt-tcdp.gc.ca/aspinc/search/vhtml-eng.asp?doid=252&lg=_e&isruling=0&arch=true [*Citron*], at paras 174-180; and *Schnell v Machiavelli and Associates Emprize Inc* (20 August 2002), TD 11/02, online: http://www.chrt-tcdp.gc.ca/aspinc/search/vhtml-eng.asp?doid=285&lg=_e&isruling=0&arch=true [*Schnell*], at para 144. As B'nai Brith has submitted, a number of recent studies and reports confirm that the dangers of hate propaganda remain substantial today. This is supported by the *CHRC Special Report*, at Part I. The danger of hate speech was also recognized by the Supreme Court in *Mugesera v Canada (Minister of Citizenship and Immigration)*, [2005] 2 SCR 100, 2005 SCC 40 [*Mugesera*], in the context of inciting crimes against humanity.

[85] In this case, the Tribunal agreed that the suppression of hate speech remains a valid objective. The Tribunal heard the opinion evidence presented by Mr. Lemire and reached the conclusion that there was insufficient evidence to revisit the findings of *Taylor* on this point (see the decision at paras 226-240). On a question such as this, which involves a mixed question of fact and law, the Court owes deference to the Tribunal: *RJR-MacDonald*, at para 151.

[86] Until recently, it was clear that Parliament continued to support the objective of s 13 as evidenced by the amendments to give the regime stronger remedies. The mandate to promote equality and seek resolution of human rights conflicts through the administration of s 13 was given to the CHRC. As noted above, the House of Commons has recently supported a private member's bill to repeal the section, the effect of which would be to leave the suppression of hate speech to criminal prosecution. This is part of the social and political context of the legislation that must be considered when applying the *Oakes* test: *Ross v New Brunswick School District No 15*, [1996] 1 SCR 825 [*Ross*], at para 78; *Rocket*, at para 28; *RJR-MacDonald* at paras 62-63.

[87] Notwithstanding the recent legislative effort to repeal s 13, I have no difficulty concluding that the objective of the enactment continues to be substantial and pressing.

*c) Rational Connection*

[88] Mr. Lemire submits in support of his position that there is no rational connection between the objective and the means used to achieve the objective. The Tribunal was not persuaded that the extension of the scope of s 13 to the Internet demonstrated the absence of a rational connection

between the provision and its objectives, as was argued, because the same material may be freely available in a library or bookstore.

[89] On this application, Mr. Lemire and the intervenors supporting his position make two points; the first concerning the lack of evidence of harm was dealt with above . The second is the lack of evidence that s 13 has had a positive effect on diminishing hate speech on the Internet. They argue that s 13 has no effect on hate speech originating in other countries and posted by their nationals (see the *Moon Report* at pp 26-27) as it has no extraterritorial application.

[90] The Tribunal found that there was no evidence with respect to the availability outside of the Internet of the message which Mr. Lemire was found to have communicated within the meaning of s 13. Dissemination of printed material likely to expose persons to hatred or contempt could constitute a discriminatory practice under provincial legislation. Communication through the Internet is also consistently been found to be repeated communications within s. 13's meaning. Such communications, the Tribunal wrote, are not necessarily comparable to messages conveyed in print form through traditional means.

[91] In discussing the question of the rational connection between Parliament's objective in enacting s 13 and the means chosen, Chief Justice Dickson had the following to say in *Taylor*, at paras 51, 53-54:

> [51] In my view, once it is accepted that hate propaganda produces effects deleterious to the guiding principles of s. 2 of the *Canadian Human Rights 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. The section labels as discriminatory the transmission of messages likely to expose

> individuals to hatred or contempt by reason of their being identifiable on the basis of certain characteristics, including race and religion. Sections 41 and 42 of the Act [now s 54] allow the Human Rights Tribunal to issue a cease and desist order against an individual found to be engaging in this discriminatory practice, and this order can be enforced upon application to the Federal Court of Canada by the Commission (s. 43). In sum, when conjoined with the remedial provisions of the *Canadian Human Rights Act*, s. 13(1) operates to suppress hate propaganda and its harmful consequences, and hence is rationally connected to furthering the object sought by Parliament.
> . . .
>
> [53] … In addition, although criminal law is not devoid of impact upon the rehabilitation of offenders, 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.
>
> [54] … In combating discrimination legislative efforts to suppress hate propaganda are but one available form of response, and the fact that the international community considers such laws to be an important weapon against racial and religious intolerance strongly suggests that s. 13(1) cannot be viewed as ineffectual.

[92] In comparison with the recorded telephone messages in *Taylor*, the websites in question here are very different mediums of communication. Where Mr. Taylor went out into the community and passed out pieces of paper urging people to call a number for a message, the website Lemire controlled is but one of many in the Internet universe that requires some effort to find and access the content. However, at most it would require either the entry of the site uniform resource locator ("URL") in the browser address bar or a few key words in a web search engine. This is the modern equivalent of Mr. Taylor's little pieces of paper bearing the telephone number. The communications are available to any member of the public who has access to a computer and an internet service provider account. In this instance, the Tribunal found, Mr. Lemire advertised the Freedomsite.org website on Stormfront.org and invited visitors.

[93] I acknowledge the force of the argument that callers to Taylor's recorded message received just one perspective whereas to-day, multiple perspectives are available on the Internet . It is true that there are opportunities to contest and refute that were not available in listening to a recorded message. Is that reason enough to distinguish the Internet environment from that considered by the Supreme Court in *Taylor*? I don't think so. While it may be possible in some instances to respond to information presented or offer counterarguments that is not always the case.

[94] Apart from the technology, there is little to choose between *Taylor's* callers and like-minded individuals looking for confirmation of their views on a white supremacist web site. And the suggestion that they are open to countervailing views can not be taken seriously.

[95] The Internet has made it considerably easier to access hate speech than the strategies employed by Mr. Taylor: *Canadian Human Rights Commission v Winnicki* 2005 FC 1493 at para 32. It has also made it more difficult to restrain such activities: *Moon Report* at pp 26-27; Yaman Akdeniz, "Governing Racist Content on the Internet: National and International Responses" (2007) 56 UNBLJ 103. The Internet is an inexpensive means of mass distribution of ideas, recruitment of followers and promotion of intolerance. It also permits a degree of anonymity to people who might not publicly express hateful ideas if they were being held accountable for them.

[96] As indicated by Chief Justice Dickson in *Keegstra*, at para 129, there are many ways to regulate hate speech, and Parliament is entitled to use more than one approach to reach its goal.

> [129] … It is important, in my opinion, not to hold any illusions about the ability of this one provision [s. 319(2) of the *Criminal Code*] to rid our society of hate propaganda and its associated harms. Indeed, to become overly complacent, forgetting that there are a

> great many ways in which to address the problem of racial and religious intolerance, could be dangerous. Obviously, a variety of measures need be employed in the quest to achieve such lofty and important goals.

**[97]** The Tribunal has previously held that the Internet facilitates hate speech and thus s 13 should apply with greater force to that medium: *Schnell*, at para 156; see also Chris Gosnell, "Hate Speech on the Internet: A Question of Context" (1997-1998) 23 Queen's LJ 369. The Ontario Court of Appeal has expressed a similar view with regards to defamation on the Internet: *Black v Breeden*, 2010 ONCA 547 at para 65; and *Barrick Gold v Lopehandia*, 239 DLR (4th) 577, [2004] OJ No 2329 (QL) at paras 29-35.

[98] As found by the Tribunal at para 231 of the decision, the conclusion in *Taylor* on rational connection to the legislative objective still applies. I am of the same view.

*d) Minimal Impairment*

[99] This is the stage of the analysis at which the Tribunal found that s 13 was no longer justified. The Tribunal held that the monetary penalty of s 54(1)(c) of the CHRA no longer minimally impaired s 2(b) of the *Charter*. The Tribunal based this finding on the ground that one of the reasons for minimal impairment in *Taylor* was the conciliatory nature of the Act. The Member found that this was no longer true based on the administration of the Act by the Commission and based on what he considered to be the "now penal nature" of the Act.

[100] The concept of minimal impairment requires that Parliament choose the least restrictive means that can actually create results to meet the objective of the legislation: *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 SCR 567 at para 53; *Keegstra* at para Ql 130 / WL 135; and Peter Hogg, *Constitutional Law of Canada*, 5th ed, loose-leaf (Toronto: Carswell, 2007) [Hogg] at pp 38-36 to 38-43. The legislative history of s 13 indicates that Parliament concluded that cease and desist orders were no longer sufficient to meet the objective of the legislation. The Tribunal has commented on the inadequacy of such orders: *Citron*, at para 298. Parliament has to choose between imperfect alternatives and Courts owe some deference to the legislative choice: *Ross* at para 88; and *Canada (Attorney General) v JTI-Macdonald Corp*, [2007] 2 SCR 610, 2007 SCC 30 [*JTI-Macdonald Corp*], at para 41. This is especially true when the impugned legislation, like the CHRA, seeks to protect vulnerable groups: *Ross* at para 86; *Irwin Toy* at para 79; *R v Edwards Books and Art Ltd*, [1986] 2 SCR 713 [*Edwards Books*] at para 141; and Robert J Sharpe and Kent Roach, *The Charter of Rights and Freedoms*, 4th ed (Toronto: Irwin Law, 2009) [Sharpe & Roach] at pp 81-82.

[101] In *Citron* at para 294 and in *Schnell* at para 160, the Tribunal upheld the constitutionality of s 13 with the penalty provision. In this matter, the Tribunal distinguished those rulings on the basis that at the time they were decided, data on the activities of the Commission was not available to be considered. Since, as I have earlier discussed, it was not open to the Tribunal to review the manner in which the Commission conducts its investigations, this can not justify arriving at a different conclusion than in the prior Tribunal decisions and in *Taylor*.

[102] The Tribunal found at paragraphs 287 to 290 of its decision that the majority in *Taylor*:

> [287] …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…
>
> [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. …

[103] Unlike the Tribunal, I find no support in *Taylor* for the proposition that the majority was "clearly of the view …that many, if not all, of the conciliatory measures provided for in the Act would find their way into all s 13 proceedings", that [t]he process understood by the Supreme Court was not what Mr. Lemire experienced" or that "…the situation is not as the Court contemplated in both respects…" There is no evidence either in *Taylor* or in the Tribunal decision of what the Commission's actual pre-referral practices were when *Taylor* was decided and how, or whether they have changed. The Tribunal's view of the Supreme Court's understanding of the process is based entirely upon comments in the dissenting decision of Justice McLachlin, as she then was.

[104] Moreover, the Tribunal appears to have interpreted *Taylor* as meaning that the only justification for s 13 was that it was solely conciliatory and remedial. However, this is not the case. Chief Justice Dickson indicated that the minimal impairment test was met because s 13 was *less* penal and more conciliatory than criminal law.

[105] The only non-remedial aspects of the regime are the penalty provisions adopted in 1998.

[106] It is true that the majority recognized that human rights legislation generally operates in a less confrontational manner in contrast with criminal procedure and that the opportunities for a conciliatory settlement made s 13 especially well-suited to encourage reform of the communicator of hate propaganda. But the majority's description of its understanding of the human rights complaint process that was in place at the time, as set out in paragraph 20 of *Taylor*, was based on the discussion by the Federal Court of Appeal, in the decision appealed from, which focused on how the Commission process met the requirements of natural justice such as notice, disclosure, the opportunity to be heard and access to judicial review. The Tribunal read into the majority's reasons an emphasis on conciliation that, in my respectful view, is not there.

[107] Nonetheless, I agree with the Tribunal that the addition of the penalty provision has fundamentally altered the nature of the s 13 process and brought it uncomfortably close to the state's ultimate control measure, criminal prosecution, with which it was favourably compared by the Court in *Taylor*.

[108] I note here that the discussion of the penalty provision in this matter has been somewhat artificial. When it was clear that Mr. Lemire would not be held accountable for the JRBooksonline.com content, the Commission abandoned its request for a financial penalty. The greater concern for Lemire, as the record makes clear, was always the possibility of a "cease and desist" order.

[109] As discussed by the Tribunal, the financial penalty which could be imposed under s 54(1)(c) may have true penal consequences as described in *R v Wigglesworth*, [1987] 2 SCR 541 at para 24 – either 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". The maximum amount is not insignificant and failure to pay it could result in contempt proceedings in this Court with a possible sanction of imprisonment until the contempt was purged.

[110] The penalty in this instance is distinguishable from that discussed in *Martineau v Canada (Minister of National Revenue)*, [2004] 3 SCR 737 at paras 36 and 45. In that case, the Court found that a demand for an "ascertained forfeiture" of $315,458.00 under the Customs Act, RSC 1985, c 1 (2d Supp) was not intended to punish an offender in order to produce a deterrent effect and redress a wrong to society but rather to be a mechanism to ensure compliance with the statute. The amount was determined through a mathematical calculation based on the value of the property involved that had been falsely declared.

[111] I note that in its written submissions to the tribunal, the Attorney General took the position that the penalty provisions were constitutionally valid because they were part of a broader regulatory scheme within federal jurisdiction; the conduct to which they were addressed is not criminal in nature; and the administrative penalty was not punitive but had other objects to ensure compliance with the preventative and remedial provisions of the Act. The Attorney General argued further that the penalties could be the subject of mediation and conciliation and must be tailored to the respondent's ability to pay.

[112] In my view, the penalty is inherently punitive. Like a fine, it goes into the general revenue fund and not towards any compensatory measure such as an education or victim's fund. In *Schnell*, at paragraph 163, the Tribunal noted that s 54(1)(c) was designed to express "society's opprobrium for the discriminator's conduct." That view of the purpose of the penalty is enhanced by the factors set out in s. 54(1.1) which are similar to those which a criminal court would consider in determining the fine to be imposed on someone found guilty of an offence. Included is the wilfulness or recklessness of the respondent's discriminatory practice, his or her prior discriminatory practices and his or her ability to pay.

[113] I agree with the Tribunal that these are all reasons to support a finding that the s 13 regime with these aspects can no longer be considered exclusively remedial. I part company with the Tribunal on its conclusion that this applies to the regime as a whole. As discussed below, I am satisfied that with severance of the problematic aspects, the regime can be preserved.

[114] Mr. Lemire and certain of the intervenors also contend that the concept of hate is too vague, that the application of s 13 to the Internet has made the scope of the provision too broad, and that the lack of a defence of truth and the lack of an intent requirement in s 13 makes the provision too harsh.

[115] On the issue of intent, Chief Justice Dickson stated in *Taylor*, at paras 67-68 and 70:

> [67] An intent to discriminate is not a precondition of a finding of discrimination under human rights codes (*Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536, at pp. 549-50; *Bhinder v. Canadian National Railway Co.*, [1985] 2 S.C.R. 561, at p. 586). The preoccupation with effects, and not with intent, is readily explicable when one considers that

> systemic discrimination is much more widespread in our society than is intentional discrimination. To import a subjective intent requirement into human rights provisions, rather than allowing tribunals to focus solely upon effects, would thus defeat one of the primary goals of anti-discrimination statutes. At the same time, however, it cannot be denied 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 flows from the realization that an individual 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.
>
> [68] The absence of an intent requirement in the *Canadian Human Rights Act* thus presents the Court with a conflict between the objective of eradicating the discriminatory effects of certain expressive activities and the need to keep to a minimum restrictions upon the freedom of expression. This conflict is perhaps best discussed under the "effects" segment of the Oakes proportionality test, for the question is not so much whether the objective of s. 13(1) can be accomplished in a less restrictive way as it is whether the sacrifice required in order to combat successfully discriminatory effects is so severe as to make the impact of s. 13(1) upon the freedom of expression unacceptable. Nevertheless, putting aside this categorizational point, it seems to me that the important Parliamentary objective behind s. 13(1) can only be achieved by ignoring intent, and therefore the minimal impairment requirement of the Oakes proportionality test is not transgressed.
>
> [70] In sum, it is my opinion that the absence of an intent component in s. 13(1) raises no problem of minimal impairment when one considers that the objective of the section requires an emphasis upon discriminatory effects. Moreover, and this is where I am perhaps jumping ahead to the "effects" component of the proportionality test, the purpose and impact of human rights codes is to prevent discriminatory effects rather than to stigmatize and punish those who discriminate. Consequently, in this context the absence of intent in s. 13(1) does 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.

[116] I see no reason to depart from the holding in *Taylor* that intent is not appropriate in non-criminal human rights schemes. Discrimination, even if committed unintentionally, remains

discrimination. Adding an intent requirement would render s 13 ineffectual as it would make the provision nearly as difficult to establish as the criminal provision. Evidence of animus or the lack thereof may, however, assist the Tribunal to determine the appropriate remedy under s 54 of the CHRA.

[117] With respect to the question of whether the lack of a defence of truth was fatal, Chief Justice Dickson had these comments in *Taylor*, at paras 73-74:

> [73] Although I have found the absence of an intent requirement in s. 13(1) to be constitutionally acceptable, the section evinces yet another feature which is said to give it a fatally broad scope. In contrast to s. 319(2) of the *Criminal Code*, s. 13(1) provides no defences to the discriminatory practice it describes, and most especially does not contain an exemption for truthful statements. Accepting that the value of truth in all facets of life, including the political, is central to the s. 2(*b*) guarantee, the question becomes whether a restriction upon freedom of expression is excessive where it operates to suppress statements which are either truthful or perceived to be truthful.
>
> [74] In *Keegstra*, I dealt in considerable detail with hate propaganda and the defence of truth, though in relation to the criminal offence of wilfully promoting hatred against an identifiable group. It was not strictly necessary in that appeal to decide whether or not this defence was essential to the constitutional validity of the impugned criminal provision, but I nevertheless offered an opinion on the matter, stating (at p. 781):
>
> > The way in which I have defined the s. 319(2) offence, in the context of the objective sought by society and the value of the prohibited expression, gives me some doubt as to whether the *Charter* mandates that truthful statements communicated with an intention to promote hatred need be excepted from criminal condemnation. Truth may be used for widely disparate ends, and I find it difficult to accept that circumstances exist where factually accurate statements can be used for no other purpose than to stir up hatred against a racial or religious group. It would seem to follow that there is no reason why the individual who intentionally employs such

> statements to achieve harmful ends must under the *Charter* be protected from criminal censure.

[118] The parties have raised no new arguments with regards to those two points and I cannot see how this Court could depart from the above-cited reasoning of Chief Justice Dickson in *Taylor*. A statement, even if in essence technically true, may still constitute hate speech in certain contexts and cause harm. As I discuss below, controversial issues may be addressed without promoting hatred.

[119] It is true that the application of s 13 to Internet communications has significantly broadened its scope. However, this has not necessarily resulted in greater impairment of the protected freedom. The reasoning in *Taylor*, in this respect, did not directly address the scope of the communication covered by s 13 but its effect on free speech. Apart from the penalty provision, which is addressed below, the effects remain the same.

[120] I would note here that the application of s 13 to the Internet is not, in my view, dependent on the 2001 amendment which was, as it states, enacted "for greater certainty". Section 13 as it read before the enactment of that amendment was broad enough to encompass Internet based telecommunications. This does not appear to have been questioned in these proceedings and the Tribunal did not rely on the 2001 amendment in reaching its conclusion. It did place great weight on the changing nature of the communications environment since *Taylor*, as did the parties supporting the Tribunal's decision.

[121] On the point of vagueness, raised by Mr. Lemire and the CFSL, the argument was rejected by the Supreme Court and the Tribunal. *Taylor* has created a very restrictive definition of what

constitutes hate speech. This limits the application of s 13 and makes the infringement on freedom of expression minimal. *Taylor*, at para 81:

> [81] As the preceding discussion shows, the freedom of expression is not unnecessarily impaired by s. 13(1) of the *Canadian Human Rights Act*. The terms of the section, in particular the phrase "hatred or contempt", are sufficiently precise and narrow to limit its impact to those expressive activities which are repugnant to Parliament's objective of promoting equality and tolerance in society. That no special provision exists to emphasize the importance of minimally impairing the freedom of expression does not create in s. 13(1) an overly wide or loose scope, for both its purpose and the common law's traditional desire to protect expressive activity permit an interpretation solicitous of this important freedom.

[122] Concerns about the possibility of an extension of s 13 to the traditional media, raised by the BCCLA, are diminished by the very narrow definition of what constitutes hate approved in *Taylor*. In *Elmasry v Roger's Publishing Ltd* 2008 BCHRT 378 [*Elmasry*], for example, the complaint was dismissed on that ground.

[123] The cases of *Whatcott* and *Owens v Saskatchewan (Human Rights Commission)* 2006 SKCA 41 [*Owens*] in Saskatchewan, *Boissoin v Lund*, 2009 ABQB 592 [*Lund*] in Alberta and *Elmasry* in British Columbia show that the restricted definition of hate does serve as an effective limit on the broadness of hate speech legislation. On this point, the Saskatchewan Court of Appeal had this to say in *Whatcott*, at paras 73-74:

> [73] Some of the words and phrases taken in isolation are demeaning. It is not enough that particular words or phrases may be considered to meet the standard established in *Taylor* for "hatred" of calumny, detestation and vilification. It is doubtful if any of the words and phrases isolated by the Tribunal or the Queen's Bench judge would, standing alone, meet the test set out in *Taylor* for hatred, i.e., detestation, calumny and vilification. Moreover, when examined in the context of a debate about the actions of the Saskatoon School Board, the entire flyer would not be seen by a

> reasonable person as communicating the level of emotion required to expose persons on the basis of their sexual orientation to a level of hatred within the meaning of that term as prescribed in *Bell*.
>
> [74] To use the derogatory form of a word is not by itself hatred. Many in Canadian society would find it offensive, may refrain from using such a word and not associate with persons who use the word. In balancing the right of freedom of expression against the limitation contained in s. 14(1)(b) of the *Code*, one must not seize on a word or phrase in isolation and censor persons who use the offensive form of a word or phrase in a publication. There, of course, will be circumstances in which a word or phrase in another context, or without any context, may well breach s. 14(1)(b) of the *Code*. This does not give a license to use such words or phrases, but neither is it obviously hatred within the meaning of s. 14(1)(b) of the *Code*.

[124] The Tribunal has itself provided more precise guidelines as to what constitutes hate speech: see *Warman v Kouba*, 2006 CHRT 50 at paras 24-81. These are:

> (a) The targeted group is portrayed 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;
> (b) The messages use "true stories", news reports, pictures and references from purportedly reputable sources to make negative generalizations about the targeted group;
> (c) The targeted group is portrayed as preying upon children, the aged, the vulnerable, etc.;
> (d) The targeted group is blamed for the current problems in society and the world;
> (e) The targeted group is portrayed as dangerous or violent by nature;
> (f) The messages convey the idea that members of the targeted group are devoid of any redeeming qualities and are innately evil;
> (g) The messages communicate the idea that nothing but the banishment, segregation or eradication of this group of people will save others from the harm being done by this group;
> (h) The targeted group is de-humanized through comparisons to and associations with animals, vermin, excrement, and other noxious substances;
> (i) Highly inflammatory and derogatory language is used in the messages to create a tone of extreme hatred and contempt;
> (j) The messages trivialize or celebrate past persecution or tragedy involving members of the targeted group; and
> (k) The messages contain calls to take violent action against the targeted group.

[125] These “hallmarks” of hate speech can not be characterized as vague and imprecise. They were applied in the present case to exclude many of the messages that formed part of the complaint. In the result, only one article met the stringent test: the “AIDS Secrets” article. It is thus possible to

discuss controversial topics without infringing s 13 and causing harm to vulnerable groups. Simply put, there are ways to convey expression that is respectful of others and not hateful. This is in accord with the values of s 2(b) of the *Charter* and the free exercise of democratic institutions.

*e) Proportionality of Effects*

[126] Chief Justice Dickson discussed this element of the s 1 *Charter* analysis in *Taylor*, at para 83:

> [83] It will be apparent from the preceding discussion that I do not view the effects of s. 13(1) upon the freedom of expression to be so deleterious as to make intolerable its existence in a free and democratic society. The section furthers a government objective of great significance and impinges upon expression exhibiting only tenuous links with the rationale underlying the freedom of expression guarantee. Moreover, operating in the context of the procedural and remedial provisions of the *Canadian Human Rights Act*, s. 13(1) plays a minimal role in the imposition of moral, financial or incarcerating sanctions, the primary goal being to act directly for the benefit of those likely to be exposed to the harms caused by hate propaganda. It is therefore my opinion that the degree of limitation imposed upon the freedom of expression by s. 13(1) is not unduly harsh, and that the third requirement of the *Oakes* proportionality approach is satisfied.

[127] He also noted in *Keegstra* at paras 135-136 in relation to the criminal prohibition, that the expressive activity at which it was aimed is "only tenuously connected with the values underlying the guarantee of freedom of speech". Further, few concerns he stated "can be as central to the concept of a free and democratic society as the dissipation of racism and the especially strong value that Canadian society attaches to this goal must never be forgotten in assessing the effects of an impugned legislative measure."

[128] Hate speech has little value and s 13 minimally impairs freedom of expression. Considering the deference this court owes to Parliament, considering the minimal value hate speech possesses and considering the context and the objective of the Act, I find that the minimal harm caused by s 13 to freedom of expression is far outweighed by the benefit it provides to vulnerable groups and to the promotion of equality.

[129] I conclude, therefore, that s 13 and s 54 of the Act are justifiable in a free and democratic society and that the Tribunal erred in declining to apply the legislation .

*What is the appropriate remedy if ss 13(1) 54(1) and (1.1) of the CHRA, read together, are found to be unconstitutional?*

[130] As indicated above, and in light of my finding that the penalty provisions in ss 54(1)(c) and (1.1) cannot withstand constitutional scrutiny, the appropriate remedy to apply is severance. Severance would minimally intrude in the legislative domain, respect the objective of the legislation, and respect the values of the *Charter*.

[131] The doctrine of severance was explained by the Supreme Court in *Schachter v Canada* [1992] 2 SCR 679, [1992] SCJ No 68 (QL) [*Schachter*] at paras 26, 31:

> [26] The flexibility of the language of s. 52 is not a new development in Canadian constitutional law. The courts have always struck down laws only to the extent of the inconsistency using the doctrine of severance or "reading down". Severance is used by the courts so as to interfere with the laws adopted by the legislature as little as possible. Generally speaking, when only a part of a statute or provision violates the Constitution, it is common sense that only the offending portion should be declared to be of no force or effect, and the rest should be spared.

> …
>
> [31] Therefore, the doctrine of severance requires that a court define carefully the extent of the inconsistency between the statute in question and the requirements of the Constitution, and then declare inoperative (a) the inconsistent portion, and (b) such part of the remainder of which it cannot be safely assumed that the legislature would have enacted it without the inconsistent portion.

[131] See also Gerald A Beaudouin and Pierre Thibault, *La Constitution du Canada*, 3rd ed (Montréal: Wilson & Lafleur, 2004) at pp 862-864; Henri Brun, Guy Tremblay and Eugénie Brouillet, *Droit Constitutionnel*, 5th ed (Cowansville (QC): Éditions Yvon Blais, 2008) at pp 1004-1005; Sharpe & Roach at pp 390-391; and Hogg at pp 40-12 to 40-15.

[132] The classic test for severance was set out in *Attorney General for Alberta v Attorney General for Canada*, [1947] AC 503 at p 518, [1947] JCJ No 5 (QL), at para 16:

> The real question is whether what remains is so inextricably bound up with the part declared invalid that what remains cannot independently survive or, as it has sometimes been put, whether on a fair review of the whole matter it can be assumed that the legislature would have enacted what survives without enacting the part that is *ultra vires* at all.

[133] At paragraph 72 of *Schachter* Chief Justice Lamer observed:

> It is sensible to consider the significance of the remaining portion when asking whether it is safe to assume that the legislature would have enacted the remaining portion. If the remaining portion is very significant, or of a long standing nature, it strengthens the assumption that it would have been enacted without the impermissible

> portion…The significance of the remaining portion may be enhanced where the Constitution specifically encourages that sort of provision.

[134] Applying the doctrine of severance requires that the Court carefully define the extent of the inconsistency between the statute in question and the requirements of the Constitution. In this case, s 54(1)(c) & (1.1) of the CHRA can readily be severed from s 13(1). These provisions were not part of the statute when it was considered in *Taylor*. The offending parts are not inextricably bound up with that part of the legislation held to be valid in *Taylor*. The remaining portion of the legislation is very significant and of a long-standing nature. It may safely be assumed that the legislator would have enacted s 13 without a penalty provision as it had done so at the time of its initial adoption in 1977.

[135] This is not a case in which the Tribunal found that the section could not be administered in a way that is consistent with the Supreme Court's findings in *Taylor* as the section read prior to the 1998 amendments. Although the Tribunal expressed concerns as to the evidence that it had heard with respect to the administration of the statute in this and other cases in recent years, its conclusion turned primarily on the penalty provisions. The Tribunal did not express any view on the question of severance.

[136] For that reason, I do not accept the arguments advanced in these proceedings that the penalty provisions are so integrated with s 13 that they can no longer be severed. The Tribunal's concerns with respect to the lack of a conciliatory approach by the Commission were not an inevitable consequence of the law or an effect of the law itself.

[137] Severance of the problematic sections and preservation of the core of the s. 13 regime would be in accord with the objective of the CHRA (see s 2 of the CHRA; *Taylor* at para 39; and *Ontario Human Rights Commission v Simpsons-Sears*, [1985] 2 SCR 536 at para 12). It is also compatible with the view of the Supreme Court and the Ontario Court of Appeal that a just remedy must take into consideration other *Charter* values and human rights conferred on vulnerable groups: *Haig v Canada* (1992) 94 DLR (4th) 1 (ON CA) at para 22; and *Edwards Books* at para 136.

**CONCLUSION:**

[138] I find that the Tribunal erred in refusing to apply s 13 and to exercise its discretion under paragraphs 54(1)(a) and/or (b) of the Act to determine a remedy. Since it found the publication of the article "AIDS Secrets" to be in breach of s 13 the adjudicator should have issued a declaration to that effect and should have proceeded to consider ordering a remedy under ss 54(1)(a) and (b).

[139] Having found that ss 54(1)(c) & (1.1) did not survive constitutional scrutiny, the appropriate remedy for the Tribunal to have applied would have been to sever those provisions from s 13. The Tribunal erred in failing to consider whether s 13 remained constitutionally viable if it declined to apply the penalty provisions. The adjudicator erred in adopting an all or nothing approach to the constitutional remedy. The balance of s 13 could stand without applying the later enacted punitive provisions.

[140] The application for judicial review is, therefore, granted and the matter is remitted to the Tribunal to determine a remedy for the breach of s 13 under s.54(1)(a) or (b). The request for a declaration that s 13 is no longer of any force or effect is denied.

**COSTS:**

[141] The applicant made no request for costs in its Notice of Application and Memorandum of Fact and Law. For that reason, despite its success on this application, none will be awarded.

[142] Mr. Warman requested his costs during his oral submissions but not in his Memorandum of Fact and Law. While his record was prepared by counsel, he represented himself on the hearing of this application. He shall have his costs for the preparation of his record and any out of pocket expenses incurred in preparing for the hearing.

## JUDGMENT

**THIS COURT'S JUDGMENT is that**:

1. The application for judicial review is granted and the matter is remitted to the Tribunal to;

    a. issue a declaration that the publication of the article "AIDS Secrets" by the respondent Marc Lemire constituted a breach of s 13 of the *Canadian Human Rights Act* ; and

    b. for determination of whether a remedy for the breach is to be imposed under ss 13 and 54(1)(a) and (b) of the Act;

2. It is declared that ss 54 (1) (c) and 54 (1.1) of the *Canadian Human Rights Act* are of no force or effect pursuant to s 52 (1) of *The Constitution Act, 1982, being schedule B to the Canada Act 1982 (U.K.), 1982, c. 11,1982*;

3. The respondent Richard Warman is awarded costs for the preparation of his record and his out of pocket disbursements for attendance at the hearing against the respondent Marc Lemire.

"Richard G. Mosley"

Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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|---|---|
| **DOCKET:** | T-1640-09 |
| **STYLE OF CAUSE:** | CANADIAN HUMAN RIGHTS COMMISSION<br><br>and<br><br>RICHARD WARMAN, THE ATTORNEY GENERAL OF CANADA and MARC LEMIRE<br><br>and<br><br>BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, CANADIAN CIVIL LIBERTIES ASSOCIATION, CANADIAN ASSOCIATION FOR FREE EXPRESSION INC., CANADIAN FREE SPEECH LEAGUE, AFRICAN CANADIAN LEGAL CLINIC, LEAGUE FOR HUMAN RIGHTS OF B'NAI BRITH CANADA, CANADIAN JEWISH CONGRESS and FRIENDS OF SIMON WIESENTHAL CENTRE FOR HOLOCAUST STUDIES |
| **PLACE OF HEARING:** | Toronto, Ontario |
| **DATE OF HEARING:** | December 13, 2011 |
| **REASONS FOR JUDGMENT AND JUDGMENT:** | MOSLEY J. |
| **DATED:** | October 2, 2012 |

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