Court File No.: T-1640-09

FEDERAL COURT

BETWEEN:

CANADIAN HUMAN RIGHTS COMMISSION

Applicant

-and-

RICHARD WARMAN, ATTORNEY GENERAL OF CANADA
and MARC LEMIRE

Respondents

WRITTEN REPRESENTATIONS OF THE PROPOSED INTERVENER, THE CANADIAN CIVIL LIBERTIES ASSOCIATION

PART I – NATURE OF MOTION

1. This is a motion for leave to intervene in this judicial review application by the Canadian Human Rights Commission (the "Commission"). The underlying application seeks judicial review of the decision of the Canadian Human Rights Tribunal ("Tribunal") dated September 2, 2009 ("Decision"). In the Decision, the Tribunal refused to apply section 13 and section 54(1) and (1.1) of the *CHRA* on the basis that they were unconstitutional.

2. At the heart of this application are legal questions concerning whether the operation of a statutory scheme properly forms part of the inquiry into the purpose and effect of legislation required for a proper constitutional analysis under section 1 of the *Charter*, and the appropriateness of severance as a remedy in the context of this case.

3. These legal questions engage the very core of public debate on the appropriate balance between freedom of expression and the public interest in fostering an inclusive and tolerant civil society, particularly as it relates to the "chilling" effect of state regulation on the marketplace of ideas.

PART II – CONCISE STATEMENT OF FACTS

Background to Application

4. The Decision arose from a complaint filed with the Commission by Richard Warman ("Warman") against Marc Lemire ("Lemire") under section 13 of the *Canadian Human Rights Act* ("*CHRA*"). Mr Warman alleged that Mr. Lemire had communicated, or caused to be communicated, hate messages contrary to section 13 of the *CHRA*.[1]

5. In the proceedings before the Tribunal, Lemire challenged the constitutionality of section 13 of the *CHRA*. Lemire further challenged the constitutionality of sections 54(1) and (1.1) which outline the remedial options available to the Tribunal where a breach of section 13 has been established.[2]

6. The Tribunal determined that Lemire had contravened section 13 of the *CHRA* when he posted an article titled "AIDS SECRETS: What the Government And Media Don't Want You To Know" on his website www.freedomsite.org.[3]

7. The Tribunal refused to apply sections 13, 54(1) and 54(1.1) on the basis that section 13, in conjunction with sections 54(1) and (1.1) of the *CHRA* impose restrictions which are not consistent with the exercise of freedom of expression

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[1] *Warman v. Lemire*, 2009 CHRT 26 ["*Warman*"], Motion Record of the Canadian Civil Liberties Association at Tab 4, para. 1
[2] *Warman, supra*, at para. 3
[3] *Warman, supra*, at para. 212

under section 2(b) of the *Canadian Charter of Rights and Freedoms* ("*Charter*"), and are not demonstrably justified under section 1 of the *Charter*.[4]

8. The Tribunal distinguished the Supreme Court of Canada's decision in *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892 ("*Taylor*") on the basis of an amendment to the *CHRA* which grants the Tribunal discretion to order a monetary penalty, up to $10,000, when a breach of section 13 is established. The amendment is found in sections 54(1) and (1.1).[5]

9. The decision in *Taylor* was largely premised on an interpretation of section 13 as exclusively remedial, preventative and conciliatory in nature. The Tribunal determined that the addition of a penalty provision shifted the nature of section 13 such that it no longer meets the minimal impairment test under section 1 of the *Charter*. The Tribunal also referred to evidence concerning Lemire's specific experience with the Commission, and overall conciliation rates in section 13 cases, to bolster its analysis.[6]

The Canadian Civil Liberties Association

10. The CCLA has long been concerned with the protection of civil liberties in Canada. It has a long history of intervention in judicial proceedings that raise civil liberties and human rights issues. The CCLA has frequently been granted leave to intervene in proceedings before Courts and tribunals.[7]

11. The CCLA has particular expertise relating to the specific issues that arise in this application. The CCLA has long been involved in initiatives relating specifically to freedom of expression. It advanced extensive submissions as an intervener in *Canadian Human Rights Commission v. Taylor* arguing that section

[4] *Warman, supra*, at para. 307
[5] *Warman, supra*, at para. 290
[6] *Warman, supra*, at para. 290
[7] Affidavit of Abigail Deshman, sworn March 3, 2010, ["Deshman Affidavit"], Motion Record of the Canadian Civil Liberties Association, Tab 2 at paras. 8-15

13 of the *CHRA*, as it then was, violated section 2(b) of the *Charter* and could not be saved by section 1. It also addressed the scope of free expression in the face of criminal sanctions in *R. v. Keegstra* and *R. Zundel.* [8]

12. The CCLA has regularly been granted leave to intervene in relation to matters involving the constitutionality of hate speech and the interaction between state regulation and free expression, most recently in *Stephen Boissoin and the Concerned Christian Coalition Inc. v. Darren Lund*, *Whatcott v. Saskatchewan (Human Rights Tribunal)* and *Owens v. Saskatchewan Human Rights Commission*. In addition, the CCLA has longstanding and broad-based expertise on freedom of expression matters. As such, the CCLA is uniquely positioned to offer assistance to the Court in this case.[9]

PART III – SUBMISSIONS

13. If granted leave to intervene in the application, the CCLA submissions will address two issues:

1) The manner in which individuals experience the effect of a statutory scheme is a proper consideration in the context of a section 1 analysis when examining a statute that, on its face, aims to operate in a conciliatory or remedial manner.

2) Severance is not an appropriate constitutional remedy in the circumstances of this case, and in freedom of expression cases more generally.

1. The experience and effect of a statutory scheme is a proper consideration in the context of an analysis under section 1 of the *Charter* when examining the government's claims that the statute is conciliatory or remedial in nature.

[8] Deshman Affidavit, at paras. 14 & 15
[9] Deshman Affidavit, at paras. 14 & 15

14. The analysis under section 1 of the *Charter* mandated by *R. v. Oakes* must be conducted with regard to the factual and social context of each case.[10]

15. For example in *Canadian (Human Rights Commission) v. Taylor*, when assessing the constitutionality of section 13 of the *CHRA*, the Supreme Court explicitly relied on the conciliatory, preventive, and remedial nature of the statutory scheme in finding that it was minimally impairing in the context of section 1:

> The aim of human rights legislation, and of s.13(1), is not to bring the full force of the state's power against a blameworthy individual for the purpose of imposing punishment. Instead, provisions found in human rights statutes generally operate in a less confrontational manner, allowing for a conciliatory settlement if possible and, where discrimination exists, gearing remedial responses more towards compensating the victim.[11]
>
> ...the purpose and impact of human rights codes is to prevent discriminatory effects rather than to stigmatize and punish those who discriminate.[12]

16. In the instant case, the Tribunal held that the inclusion of a penalty provision at section 54(1) fundamentally altered the nature of section 13 and, therefore, section 13 was no longer consistent with section 2(b) of the *Charter*.[13]

17. As a component of the constitutional analysis, the Tribunal considered evidence that respondents to section 13 complaints do not experience a conciliatory, preventative, and remedial process. Rather, the process is more prosecutorial in nature, with a focus on penalty and not prevention.[14]

18. For clarity, the Tribunal did not consider the specific experience of Mr. Lemire in the context of assessing whether the Commission was properly

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[10] *RJR MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at paras. 132 – 133; See also *Taylor, infra*, at pages 44-47
[11] *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892 ["*Taylor*"], page 29
[12] *Taylor, supra* at page 44
[13] *Warman, supra* at para. 307
[14] *Warman, supra* at paras. 260 & 280-287

interpreting its statutory mandate. That is, the constitutionality of the Commissions' actions in the particulars of this case were not at issue.[15] Rather, the Tribunal considered evidence as to the experience of section 13 respondents to inform its own review of the effect of the statutory scheme in the context of the minimal impairment test under section 1 of the *Charter.*

19. In the context of this case, the Tribunal's considerations addressed the heart of the Supreme Court's finding in *Taylor.* An exploration of how the functioning of the scheme is experienced by respondents is a necessary component of an assessment of the chilling effect of the legislative restriction, particularly as it relates to future speakers.

20. Looking behind the text of the provisions was also required to assess whether the monetary penalty was administrative or punitive in nature. An understanding of the manner in which respondents experience the statutory scheme is highly probative and may tip the balance towards a more punitive interpretation. Again, this understanding is crucial to the section 1 analysis.

21. Further, the CCLA will submit that context of this nature is an appropriate consideration for the purpose of section 1 analysis generally. The contextual approach forms a fundamental part of the proper inquiry into the nature of a statutory scheme's operation. An assessment of "chill" in a factual vacuum undermines the spirit and intent of the reasonable limit articulated in section 1.

22. More specifically, in freedom of expression cases, the CCLA will submit that this contextual inquiry is required.

2. Severance is not an appropriate constitutional remedy in the circumstances of this case, and in freedom of expression cases more generally.

[15] See the Reasons of Justice Wilson in *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69 ["*Osborne*"], at page 14; see also *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120.

23. The CCLA recognizes that section 52 of the *Constitution Act, 1982*[16] requires that the Tribunal refuse to apply any law inconsistent with the provisions of the Constitution, only to the extent of the inconsistency. However, the CCLA submits that in doing so, the Tribunal must be cognizant of the nature of the constitutional violation and the context of the specific legislation under consideration. [17]

24. The CCLA will submit that severance of punitive provisions is generally not an appropriate remedy to correct the unconstitutionality of legislation which seeks to limit the right to free expression.

25. Similar to reading down, severance attempts to distinguish between components of a statutory scheme that are meant to operate together, and divorce them for the purpose of remedying the constitutional defects.[18] In many respects, severance and reading down are analogous.[19]

26. The "chill" on freedom of expression caused by the operation of sections 13 and 54(1) of the *CHRA* is not remedied by carving off the penalty provisions and refusing to apply them on a case-by-case basis.

27. The Tribunal does not have jurisdiction to declare section 54(1) invalid.[20] Absent *stare decisis* in the context of Tribunal proceedings, the section can be resurrected and applied at any time.

28. The very existence of section 54(1) has coloured the underlying offence of hate messaging, making it more intrusive on free expression than originally envisioned by the Supreme Court in *Taylor*. The penalty provisions carry significant stigma, and by consequence, a "chilling effect" on free expression.

[16] The *Constitution Act 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11
[17] *Schachter v. Canada*, [1992] 2 S.C.R. 679 ["*Schachter*"], at para.1
[18] *Schachter, supra*, at pages 23 -25
[19] *Osborne, supra* at page 43
[20] *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5, at page 17

This "chill" on speech captured by the scope of section 13 is not rectified by simply refusing to apply the penalty in specific cases.

29. Even absent the application of section 54 in this case, the statutory scheme governing hate messaging is "riddled with infirmity" and fails to uphold the values of the *Charter*. In these circumstances, severance is not an appropriate remedy.[21]

30. Parliament clearly intended both section 13 and section 54 to operate together. This is explicit on the face of section 54:

> 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:...

31. Where an integral component of the scheme Parliament envisioned is not consistent with the *Charter,* it is up to Parliament to re-draft the legislation.[22]

32. The CCLA will submit that in the context of freedom of expression cases more generally, severance often serves to keep impugned statutory components "on the books" and thus contributes to an ongoing chill on free expression, undermining the attempt bring the statutory scheme on-side of the *Charter*.

<u>3. The CCLA ought to be granted leave to Intervene in this application</u>

33. This application engages public issues concerning state restriction of free expression.

34. As a national organization, representing a broad cross-section of civil society, whose mandate is to work towards the maintenance of a free and

[21] *Osborne, supra*, at page 46
[22] Please see *Osborne, supra* at page 46

democratic society, the CCLA is directly affected by the outcome of this application.[23]

35. The CCLA occupies a position distinct from the respondents to this application; the CCLA's interest in protecting freedom of expression is not correlated to any specific expression, but rather the right of all Canadians to express themselves in a manner free from unreasonable limits.[24]

36. The CCLA respectfully submits that it will assist the Court to hear representations concerning freedom of expression from an organization with expertise, which is not engaged in protecting a specific form of expression. The inclusion of the CCLA's distinct perspective will help to ensure that the Court hears from all sides of the debate.[25]

37. In summary, the CCLA meets the test for intervention as articulated by this Court in *C.U.P.E. v. Canadian Airlines International*, and the interests of justice are better served by the CCLA's inclusion in this application.[26]

PART IV – ORDER REQUESTED

38. The CCLA therefore respectfully requests that the motion be allowed, and that the Court order:

(a) that the CCLA be granted leave to file a memorandum of fact and law;

(b) that the CCLA be granted leave to present oral submissions in the application; and

[23] Deshman Affidavit, *supra* at paras. 8 & 9
[24] Deshman Affidavit, *supra* at para. 18
[25] Deshman Affidavit, *supra* at para. 6
[26] *C.U.P.E. v. Canadian Airlines International Ltd.*, [2000] F.C.J. No. 220, Motion Record of the Canadian Civil Liberties Association at Tab 5, para. 8; see also *Amnesty International Canada v. Canada (Minister of National Defense)*, 2008 FCA 257, Motion Record of the Canadian Civil Liberties Association at Tab 6, para. 2

(c) the CCLA does not seek costs, and asks that it not be liable for costs to any other party.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Date: March 3, 2010

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PART V – AUTHORITIES

1. *Warman v. Lemire*, 2009 CHRT 26
2. *RJR MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199
3. *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892
4. *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69
5. *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120
6. *Schachter v. Canada*, [1992] 2 S.C.R. 679
7. *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5
8. *C.U.P.E. v. Canadian Airlines International Ltd.*, [2000] F.C.J. No. 220
9. *Amnesty International Canada v. Canada (Minister of National Defense)*, 2008 FCA 257

53

APPENDIX A – STATUTORY AUTHORITIES

The *Constitution Act 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11

Guarantee of Rights and Freedoms

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Fundamental Freedoms

2. Everyone has the following fundamental freedoms:

(*a*) freedom of conscience and religion;
(*b*) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
(*c*) freedom of peaceful assembly; and
(*d*) freedom of association.

General

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.

Canadian Human Rights Act, H-6

Hate messages

13. (1) It is a discriminatory practice for a person or a group of persons acting in concert to communicate telephonically or to cause to be so communicated, repeatedly, in whole or in part by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament, any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination.

Interpretation

(2) For greater certainty, subsection (1) applies in respect of a matter that is communicated by means of a computer or a group of interconnected or related computers, including the Internet, or any similar means of communication, but does not apply in respect of a matter that is communicated in whole or in part by means of the facilities of a broadcasting undertaking.

Interpretation

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

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:

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

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

55

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:

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

(*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.

Idem

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

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

(*b*) requiring the expulsion of an occupant from any premises or accommodation, if that occupant obtained such premises or accommodation in good faith.

Doc. 749833_1