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

APPLICATION UNDER section 18.1(3) of the *Federal Court Act*

MEMORANDUM OF FACT AND LAW

of the

CANADIAN HUMAN RIGHTS COMMISSION

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Overview

1. Two discrete issues arise in this application. First, it is submitted that the Canadian Human Rights Tribunal (the "Tribunal") erred when it examined the manner by which the Canadian Human Rights Commission (the "Commission") exercised its statutory mandate, since the Commission's activities are irrelevant to any examination of the constitutional validity of sections 13, 54(1) and 54(1.1) of the *CHRA*. Second, it is submitted that 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*. In this regard, the Commission takes no issue

with the Tribunal's refusal to apply the penalty clauses at sections 54(1)(c) and (1.1) of the *CHRA* on constitutional grounds.

Part I: Concise Statement of Fact

2. This application is made by the Commission under section 18.1(3) of the *Federal Courts Act* for judicial review of the decision of the Tribunal dated September 2, 2009 (the "Decision").

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

Decision, at paragraph 1, Applicant's Record, Tab 2

4. Mr. Lemire challenged the constitutionality of section 13 of the *CHRA*, as well as sections 54(1) and (1.1) under which the Tribunal has the discretion to order remedies for breaches of section 13.

Decision, at paragraphs 2 and 3, Applicant's Record, Tab 2

5. The Tribunal determined that Mr. Lemire 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.

Decision, at paragraph 212, Applicant's Record, Tab 2

6. That article is described at paragraphs 188 to 197 of the Decision. The following are excerpts from the article dealing with homosexuality:

> ... This killer emerged into our world over a decade ago, rising like an angel of death out of the oozing rivers of body fluids that spilled like fetid waterfalls into the streets of America from the sick and sleazy pleasure houses of the "liberated" homosexuals. ...
>
> ... When some individuals at the FDA and the Centers for Disease Control suggested that blood bankers could eliminate 80% of the AIDS-infected blood by testing all donated blood for Hepatitis-B, with which 80% of homosexual males are infected due to their filthy practices, and rejecting all the blood that tested positive, the higher-ups at both agencies declined to make that a requirement. Tens of thousands were sentenced to death by that decision. Why? Because homosexuals don't want to be tested, they don't want to be identified, and they don't want their twisted sexual appetites restricted in even the slightest way. Homosexuals and powerful forces friendly to the homosexualization of America have successfully blocked this and many other common sense proposals to protect the rest of us from AIDS. ...
>
> ... The AIDS virus is the only virus that has "civil rights". Innocents must die, so that the sick sex games of the pervert minority can continue. ... The imposition of universal testing and quarantine where appropriate would end the anal fun, you see, and we can't - we simply can't have that. ...
>
> Decision, at paragraphs 189-93, Applicant's Record, Tab 2

7. The following are excerpted from the conclusion of the article:

> What can you do to save your family and your country from this deadly epidemic? There's a lot you can do.
>
> Avoid all contact with known homosexuals. If there is a known homosexual district in your area, do not go there. Avoid the "trendy", "fashionable" part of town, whenever possible. This is often where the highest percentage of homosexuals are to be found. Particularly avoid using public rest rooms or eating in restaurants in such areas.
>
> If you live in a rural area or small town that has preserved traditional American values, stay there. If you live in an area where such values have disappeared, where "Gay Pride" parades have replaced

> Independence Day parades and where the Third World invasion is in full swing, carefully consider your options. Moving into a racially, culturally, and medically healthier area should be considered.
>
> Carefully choose who you socially and professionally associate with. Even if you must sacrifice status or money to do it, it is wise to avoid repeated close contact with those in high-risk groups, including Blacks, Third World immigrants, homosexuals, and drug users. Do not allow your children to associate with individuals in these groups when it can be avoided. Plan your travels to skirt around areas where such groups form a high percentage of the population, even if it takes extra time and gasoline to do so. ...
>
> Decision, at paragraphs 196-7, Applicant's Record, Tab 2

8. Notwithstanding its finding that Mr. Lemire had contravened section 13 of the *CHRA*, the Tribunal refused to apply sections 13, 54(1) and (1.1) of the *CHRA* to the complaint on the basis that section 13(1) of the *CHRA* in conjunction with sections 54(1) and (1.1) impose restrictions which are inconsistent with the exercise of free expression under section 2(*b*) of the *Canadian Charter of Rights and Freedoms ("Charter")*, and not demonstrably justified under section 1 of the *Charter*.

> Decision, at paragraphs 295, 307, Applicant's Record, Tab 2

9. The Tribunal sought to distinguish the Supreme Court of Canada's decision in *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892 ("*Taylor*") as follows:

   (a) The Tribunal found that the Supreme Court of Canada's decision in *Taylor* was premised on the absence of a penalty provision. It found that, as a result of the addition of the penalty provisions at sections 54(1)(c) and (1.1), section 13 of the *CHRA* was no longer exclusively remedial, preventative and conciliatory in nature and no longer met the minimal impairment test under section 1 of the *Charter*;

Decision, at paragraphs 279, 290, 293, Applicant's Record, Tab 2

(b) The Tribunal found that the Supreme Court of Canada's decision in *Taylor* was premised on the Court's belief that the Commission's process was structured and functioned in as "conciliatory a manner as possible". The Tribunal found this premise to be false, on the basis that:

i. the Commission referred the complaint against Mr. Lemire to the Tribunal though most of the impugned material had been removed from the internet[1];

Decision, at paragraph 283, Applicant's Record, Tab 2

ii. the Commission had previously referred two other section 13 cases to the Tribunal though the impugned material had been removed from the internet;

Decision, at paragraph 283, Applicant's Record, Tab 2

iii. the Commission did not accede to Mr. Lemire's requests to appoint a conciliator in circumstances where the complainant declined to participate in settlement discussions; and

Decision, at paragraph 284, Applicant's Record, Tab 2

[1] The Tribunal was referring here to the impugned material posted on Mr. Lemire's website "freedomsite.org". The complaint also dealt with materials posted on other websites. In the case of the postings on "jrbooksonline.com", the Tribunal found there to be insufficient evidence to establish a prima facie case that Mr. Lemire communicated or caused to be communicated, the impugned material. In the case of the postings on "stormfront.org", the Tribunal found that the impugned material was not likely to expose a person or persons to hatred or contempt within the meaning of section 13 o f the *CHRA*.

iv. the Commission reports a lower settlement rate for section 13 complaints than for other types of complaints and had posted on its website that it does not generally offer to mediate section 13 complaints.

Decision, at paragraph 285, Applicant's Record, Tab 2

Part II: Statement of the Points in Issue

10. The following points are in issue in the application:

(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*.

Part III: Concise Statement of Submissions

First Issue: Commission's Activities Cannot Invalidate Statute

11. Legislation will not be found to be unconstitutional unless the source of the *Charter* violation is the legislation itself. Thus, the activities of the Commission when it administers section 13 of the *CHRA* cannot render sections 13, 54(1) and 54(1.1) of the *CHRA* unconstitutional, and are irrelevant to any examination of the constitutional validity of sections 13, 54(1) and 54(1.1) of the *CHRA* .

> *Thomson v. Alberta (Transportation and Safety Board)* (2003), 232 D.L.R. (4th) 237 (Alta. C.A.), leave to appeal to SCC ref'd., [2003] SCCA No. 510 (S.C.C) at paragraph 44, Applicant's Brief of Authorities, Tab 2;
>
> *Eldridge v. British Columbia (Attorney General)* [1997] 3 S.C.R. 624 (S.C.C.) at paragraph 20, Applicant's Brief of Authorities, Tab 3.

12. If the Commission were to exercise its statutory mandate in a manner inconsistent with the *Charter,* the only available constitutional remedy would be one that is fashioned under section 24(1) of the *Charter.* No part of the *CHRA* would be invalidated. As Paperny J.A. of the Alberta Court of Appeal stated in *Thomson v. Alberta (Transportation and Safety Board)*:

> An infringement of the *Charter* by the actions of a delegated decision-maker in applying the legislation, as distinct from the legislation itself, does not render the legislation invalid. In *Little Sisters*, for example, Binnie J. for the majority found, at paragraph 125, that the differential treatment based on sexual orientation was not a necessary effect of the Customs legislation but was a differentiation made at the administrative level in the implementation of the legislation. The source of the *Charter* violation of s. 15, therefore, was not the legislation itself.
>
> *Supra*, at paragraph 48; citing *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, Applicant's Brief of Authorities, Tab 4;

Constitution Act, 1982, Section 24(1), Applicant's Statutory Brief of Authorities, Tab 2B;

Constitution Act, 1982, Section 52, Applicant's Statutory Brief of Authorities, Tab 2C.

13. Further, the Tribunal may only consider questions regarding the *Charter* that arise in the course of a matter properly before the Tribunal and within the jurisdiction of the Tribunal.

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

Nova Scotia (Workers' Compensation Board) v. Martin, [2003] S.C.J. No. 54, at paragraph 45, Applicant's Brief of Authorities, Tab 4

See also: Tranchemontagne v. Ontario, [2006] S.C.J. No. 14, at paragraph 24, Applicant's Brief of Authorities, Tab 5

14. The manner by which the Commission fulfils its statutory mandate, including the extent to which its process is conciliatory, was not an issue properly before the Tribunal and ought not to have been considered by the Tribunal.

15. As acknowledged by the Tribunal, "the Tribunal lacks the jurisdiction to sit in review of decisions taken by the Commission". It is submitted that the Tribunal erred when it considered and made findings concerning the manner in which the Commission applied section 13 of the *CHRA*.

Decision, at paragraph 286, Applicant's Record, Tab 2

16. The Tribunal's jurisdiction is defined and limited by sections 50 to 54 of the *CHRA*. Under section 50(1) of the *CHRA*, it must "inquire into the complaint" when a complaint is

referred to it by the Commission under section 49(1) of the *CHRA*. Having done so, it may make an appropriate award if the complaint is substantiated, or dismiss the complaint if the complaint is not substantiated.

> *Canadian Human Rights Act*, R.S.C, 1985, c. H-6, Sections 49 to 54, Applicant's Statutory Brief of Authorities, Tabs 5D to 5I;
>
> *Bell v. Canada (Canadian Human Rights Commission); Cooper v. Canada (Canadian Human Rights Commission)*, [1996], 3 S.C.R. 854, at paragraph 50, Applicant's Brief of Authorities, Tab 6.

17. The Tribunal has no jurisdiction to inquire into the Commission's exercise of its discretion under section 44(3) of the *CHRA* to dismiss a complaint or refer it to the Tribunal for an inquiry, nor to inquire into its exercise of discretion under section 47 of the *CHRA* with respect to the appointment of a conciliator. Those functions are reserved to the Commission under the *CHRA*.

> *Canadian Human Rights Act, 1985, supra*, Sections 44(3), Applicant's Statutory Brief of Authorities, Tab 5B;
>
> *Canadian Human Rights Act, 1985, supra*, Sections 47, Applicant's Statutory Brief of Authorities, Tab 5C.

18. Actions taken and decisions made within the Commission's statutory mandate may be challenged only by means of an application for judicial review in the Federal Court. Proceedings before the Tribunal cannot be used to collaterally attack administrative decisions by the Commission which have not been subjected to judicial review.

> *Baker v. Canada (Minister of Citizenship)*, [1999], S.C.J. No. 39, Applicant's Brief of Authorities, Tab 7;
>
> *Sam Lévy et Associés Inc. v. Mayrand*, 2005 FC 702 at paragraph 169, aff'd by FCA, 2006 FCA 205, Leave to appeal to the S.C.C. ref'd [2006] C.S.C.R. no. 317, Applicant's Brief of Authorities, Tab 8

Prentice v. Canada, 2005 FCA 395 at paragraphs 32-33, Leave to appeal to the S.C.C. ref'd [2006] C.S.C.R. no. 26, Applicant's Brief of Authorities, Tab 9

19. Therefore, any question as to whether the Commission's process is sufficiently conciliatory to meet the requirements of the *Charter* is outside the Tribunal's jurisdiction. It is submitted that the Tribunal's findings in that regard ought to be set aside.

Second Issue: Constitutional Remedy

20. It is submitted that the Tribunal erred when it refused to apply section 13 and sections 54(1) and (1.1) of the *CHRA* in their entirety when the constitutional concern could be remedied by severing and refusing to apply sections 54(1)(c) and (1.1) of the *CHRA* ("the penalty clauses").

The Legislative Provisions

21. The wording of section 13(1) of the *CHRA* has remained unchanged since the Supreme Court of Canada upheld its constitutionality in *Taylor*:

> **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.
>
> *Canadian Human Rights Act, 1985, supra*, Sections 44(3), Applicant's Statutory Brief of Authorities, Tab 5B;
>
> *Canadian Human Rights Act, supra*, Sections 47, Applicant's Statutory Brief of Authorities, Tab 5C.

22. At the time that *Taylor* was decided, the remedial powers of the Tribunal in a section 13 case were set out in sections 41(2)(a) and 42(1) of the *CHRA*. These remedial provisions

allowed the Tribunal to order that a person cease a discriminatory practice, and take measures to prevent its recurrence:

> **42.** (1) Where a Tribunal finds that a complaint related to a discriminatory practice described in section 13 is substantiated, it may make only an order referred to in paragraph 41(2)(a).
>
> **41.** (2) If, at the conclusion of its inquiry, a Tribunal finds that the complaint to which the inquiry relates is substantiated ... it may make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in such order any of the following terms that it considers appropriate:
>
> (a) that such person cease such discriminatory practice and, in consultation with the Commission on the general purposes thereof, take measures, including adoption of a special program, plan or arrangement referred to in subsection 15(1), to prevent the same or a similar practice occurring in the future.
>
> *Canadian Human Rights Act*, R.S.C., 1976-1977, c.33, Applicant's Statutory Brief of Authorities, Tab 3.

23. In 1998, eight years after the *Taylor* decision, Parliament amended the *CHRA*. Among other things, Parliament enacted new provisions conferring three kinds of remedial powers on the Tribunal in section 13 cases.

> *An Act to amend the Canada Evidence Act and the Criminal Code in respect of persons with disabilities, to amend the Canadian Human Rights Act in respect of persons with disabilities and other matters, and to make consequential amendments to other Acts*, S.C. 1998, c. 9, section 28, Applicant's Statutory Brief of Authorities, Tab 4.

24. First, the new section 54(1)(a) empowers the Tribunal to make an order containing terms referred to in section 53(2)(a). Section 53(2)(a), which was enacted prior to and independently from the 1998 amendments, generally allows the Tribunal to order that a person cease a discriminatory practice, and take measures to redress the practice or prevent

its recurrence. These provisions effectively continue the remedial powers that had previously existed under the old sections 41 and 42 of the *CHRA*, and were upheld by the Supreme Court of Canada in *Taylor*:

> **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*);
>
> **53.** (2) If at the conclusion of the inquiry the member or panel finds that the complaint is substantiated, the member or panel may ... 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;
>
> *Canadian Human Rights Act, 1985, supra*, Section 54, Applicant's Statutory Brief of Authorities, Tab 5I;
>
> *Canadian Human Rights Act, supra*, Section 53, Applicant's Statutory Brief of Authorities, Tab 5H.

25. Second, the new section 54(1)(b) authorizes the Tribunal to make an order under section 53(3) providing financial compensation to a victim specifically identified in a discriminatory communication. Section 53(3), which was enacted prior to and independently of the 1998 amendments, generally allows the Tribunal to award financial

compensation to a victim of discrimination where a respondent has willfully or recklessly engaged in the discriminatory practice. Section 54(1)(b) was new in 1998 and had no precursors at the time of *Taylor*:

> **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:
>
> (*b*) an order under subsection 53(3) to compensate a victim specifically identified in the communication that constituted the discriminatory practice;
>
> **53.** (3) In addition to any order under subsection (2), the 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 willfully or recklessly.

Canadian Human Rights Act, 1985, supra, Section 54, Applicant's Statutory Brief of Authorities, Tab 5I;

Canadian Human Rights Act, supra, Section 53, Applicant's Statutory Brief of Authorities, Tab 5H.

26. Third, the new sections 54(1)(c) and 54(1.1) empower the Tribunal to order a person who has contravened section 13(1) to pay a penalty of not more than $10,000, taking into account certain prescribed factors. These provisions, set out below, were new in 1998 and had no precursors at the time of *Taylor*:

> **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:
>
> (*c*) an order to pay a penalty of not more than ten thousand dollars.
>
> (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.
>
> *Canadian Human Rights Act, 1985, supra*, Section 54, Applicant's Statutory Brief of Authorities, Tab 5I;
>
> *Canadian Human Rights Act, supra*, Section 53, Applicant's Statutory Brief of Authorities, Tab 5H.

The Tribunal Erred in Failing to Sever Sections 54(1)(c) and 54(1.1)

27. The Tribunal had the jurisdiction to consider the constitutionality of any provision of the *CHRA* that it was called upon to apply in the present case. In this case, the Tribunal properly considered sections 13, 54(1) and (1.1) of the *CHRA*. Since the Tribunal cannot make a declaration of constitutional invalidity, its remedial authority is limited to declining to apply any statutory provisions found to be unconstitutional. The Tribunal remains obliged to apply all provisions of the *CHRA* except those found to be unconstitutional.

> *Eldridge v. British Columbia (Attorney General), supra*, at paragraph 20, Applicant's Brief of Authorities, Tab 3

28. The Commission takes no issue with the Tribunal's refusal to apply the penalty clauses. However, the Commission submits that the penalty clauses should have been severed, leaving section 13(1) and the balance of section 54 in place.

29. Under the doctrine of severance, "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". Moreover, "[t]o refuse to sever the

offending part, and therefore declare inoperative parts of a legislative enactment which do not themselves violate the Constitution, is surely the more difficult course to justify".

> *Schachter v. Canada*, [1992] 2 S.C.R. 679, at p. 696, Applicant's Brief of Authorities, Tab 10

30. At the heart of the matter 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.
>
> *Schachter v. Canada*, *supra*, at p. 696, Applicant's Brief of Authorities, Tab 10, at p. 696, citing *Attorney-General for Alberta v. Attorney-General for Canada*, at p. 518, [1947] A.C. 503 (P.C.), at p. 518, Applicant's Brief of Authorities, Tab 11

31. It is submitted that the Tribunal erred when it held that the adoption of the penalty clauses, subsequent to the Supreme Court of Canada's decision in *Taylor,* had the effect of making sections 13(1) and 54(1)(a)&(b) of the *CHRA* unconstitutional. Those sections are not inextricably bound up with the penalty clauses so as to compromise their independent survival.

32. In the absence of penalty clauses such as those adopted post-*Taylor* as sections 54(1)(c) and (1.1) of the *CHRA*, the Supreme Court of Canada held that the restrictions imposed by section 13 of the *CHRA* constitute justifiable limits on expression in a free and democratic society. While this provision restricts non-violent attempts to convey meaning, and is therefore contrary to section 2(b) of the *Charter*, it is nevertheless justifiable because:

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

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

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

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

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

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

> *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892 (S.C.C.), Applicant's Brief of Authorities, Tab 1

33. Section 54(1)(a) of the *CHRA* empowers the Tribunal to apply section 53(2)(a). Section 53(2)(a) authorizes the Tribunal to order a respondent to cease engaging in a discriminatory

practice. In *Taylor*, the Supreme Court of Canada held that a finding of liability under section 13(1) of the CHRA, coupled with a cease and desist order under the precursors of sections 54(1)(a) and 53(2)(a), was constitutional. There is nothing to distinguish the Supreme Court's finding in *Taylor* in the circumstances of the present case. It is therefore submitted that the Tribunal erred when it refused to apply sections 13(1), 54(1)(a) and 53(2)(a) of the *CHRA*.

> *Canada (Human Rights Commission) v. Taylor*, *supra*, Applicant's Brief of Authorities, Tab 1

34. Section 54(1)(b) of the *CHRA* empowers the Tribunal to order financial compensation to a hate speech victim under subsection 53(3) of the *CHRA*. This remedial power was not discussed in *Taylor*, as it was not made applicable to section 13 cases until 1998. However, the Commission submits that the reasoning from *Taylor* leads to a conclusion that awards of financial compensation under section 54(1)(b) are constitutional. In this regard, it must be remembered that in upholding the impugned legislation in *Taylor*, the Supreme Court of Canada found it persuasive that human rights remedies do not aim to punish, but instead focus upon compensating and protecting the victim. The remedial power in section 54(1)(b) fits squarely within this principle, and can therefore be distinguished and separated from the penalty clauses.

> *Canada (Human Rights Commission) v. Taylor*, *supra*, at paras. 37 and 69 (S.C.C.), Applicant's Brief of Authorities, Tab 1

35. It must also be stressed that the Tribunal's decision makes no specific reference whatsoever to section 54(1)(b) of the *CHRA*, and instead focuses its entire legislative analysis on the addition of the penalty clauses. With respect, it cannot have been proper for the Tribunal to

refuse to apply section 54(1)(b) on constitutional grounds without first engaging in a thorough analysis of its meaning and import. In the circumstances, the Tribunal erred in refusing to apply sections 13(1), 54(1)(b) and 53(3) of the *CHRA*.

Conclusion

36. The Tribunal acknowledged that it was bound by the decision of the majority of the Supreme Court of Canada in *Taylor*. It correctly held that the Supreme Court of Canada's findings cannot be questioned by the Tribunal in the absence of distinguishing circumstances. The only material distinguishing circumstances discussed by the Tribunal pertaining to the *CHRA* were the addition of the penalty clauses. The appropriate remedy would have been to sever and refuse to apply the penalty clauses.

Decision, at paragraph 221, Applicant's Record, Tab 2

37. Having concluded that Mr. Lemire contravened section 13 of the *CHRA* by posting an article titled "AIDS SECRETS: What The Government And Media Don't Want You To Know" on the internet, the Tribunal was obliged to turn its mind to sections 54(1)(a)&(b) of the *CHRA*, and determine whether one or more of the remedial orders described therein ought to be made in the circumstances. It is submitted that the matter ought to be remitted to the Tribunal for that purpose.

Part IV: Concise Statement of Order Sought

38. The applicant makes application for:

(a) a declaration that the Tribunal erred in law when it refused to apply section 13 of the *Canadian Human Rights Act*;

(b) a declaration that the Tribunal erred when it refused to exercise its discretion under subsection 54(1)(a) and/or (b) of the *Canadian Human Rights Act*;

(c) an order setting aside the Tribunal's conclusions to the extent they are inconsistent with the declarations sought herein;

(d) an order referring the matter back to the Tribunal for determination with respect to the remedy, in accordance with the directions of this Honourable Court; and

(e) such further and other relief as may be requested by the applicant and deemed appropriate by the Honourable Court.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

January 22, 2010

M. Blight per: F. P.

S. Margot Blight
BORDEN LADNER GERVAIS LLP
Lawyers for Canadian Human Rights Commission

Part V: Authorities

Statutes

1. *Federal Courts Act,* R.S.C. 1985, c.F-7, section 18.1;

2. *The Constitution Act, 1982*, sections 1-2, 24(1), 52(1);

3. *Canadian Human Rights Act*, R.S.C. 1976-1977, c.33, sections 1-2, 12-13;

4. *An Act to Amend the Canada Evidence Act and the Criminal Code in respect of persons with disabilities, to amend the Canadian Human Rights Act in respect of persons with disabilities and other matters and to make consequential amendments to other Acts*, R.S.C. 1998, c.9, sections 28-30;

5. *Canadian Human Rights Act*, R.S.C. 1985, c.H-6, sections 13, 44, 47(1), 49(1), 50, 51, 52, 53, 54;

6. *An Act to Amend the Criminal Code, the Official Secrets Act, the Canada Evidence Act, the Proceeds of Crime (Money Laundering) Act and other Acts and to enact measures respecting the registration of charities in order to combat terrorism*, R.S.C. 2001, c.41, sections 88-90.

Case Law

1. *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892 (S.C.C.)

2. *Thomson v. Alberta (Transportation and Safety Board)* (2003), 232 D.L.R. (4th) 237 (Alta. C.A.), leave to appeal to SCC rev'd., [2003] SCCA No. 510 (S.C.C.)

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

4. *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, [2003] S.C.J No. 54 (S.C.C.)

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6. *Bell v. Canada (Canadian Human Rights Commission); Cooper v. Canada (Canadian Human Rights Commission)*, [1996], 3 S.C.R. 854 (S.C.C.)

7. *Baker v. Canada (Minister of Citizenship)*, [1999], S.C.J. No. 39 (S.C.C.)

8. *Sam Lévy et Associés Inc. v. Mayrand*, 2005 FC 702 (F.C), aff'd by FCA, 2006 FCA 205 (F.C.A.), Leave to appeal to the S.C.C. ref'd [2006] C.S.C.R. no. 317 (S.C.C.)

9. *Prentice v. Canada*, 2005 FCA 395, Leave to appeal to the S.C.C. ref'd [2006] C.S.C.R. no. 26 (S.C.C.)

10. *Schachter v. Canada,* [1992] 2 S.C.R. 679

11. *Attorney-General for Alberta v. Attorney-General for Canada*, [1947] A.C. 503