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

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# MEMORANDUM OF FACT AND LAW
## of the Respondent Marc Lemire

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Barbara Kulaszka,

Counsel for the Respondent

## Part I – Statement of Fact

1. The application arises out of a complaint laid by the respondent Richard Warman against the respondent Marc Lemire on November 24, 2003, alleging that Lemire was violating section 13 of the Canadian Human Rights Act (hereinafter referred to as the "CHRA") by communicating "hate messages" on his website("the Freedomsite") and message board. The material referred to in the complaint consisted mainly of postings on the website's message board, made by registered users of the site. [*Decision, at para. 1, 2, 11*] Warman sought a cease and desist order and a penalty of $7,500.00 against Lemire. [*Decision, para. 267*]

2. Warman had been monitoring the Freedomsite for at least a year, but he made no effort to contact Lemire to complain about the messages and ask for them to be removed even though the website and message board had clear links to report abuses and the usage policy forbade any postings contrary to Canadian law. [*Decision, para. 115. 116, 140, 143*]

3. Lemire received notice of the complaint in March of 2004, after he had already removed the message board from the website. After being notified of the complaint, he voluntarily removed the only other matter complained about, an article entitled "AIDS Secrets", in an effort to settle the matter. [*Decision, at para. 14, 188*]

4. The CHRC investigator, Hannya Rizk, testified that Warman informed her in October of 2004 that he had come across another website, jrbooksonline, which he alleged Lemire operated. He asked her not to tell Lemire about it until the police could take "a good look

at it." She acceded to this request but admitted in testimony before the Tribunal that she should have told Lemire about the new allegations against him. [*Decision, para. 15, Exhibit R-1.pdf, p. 249*]

5. The CHRC did not contact Lemire again for over a year when it sent him the Investigator's Report on April 15, 2005 which recommended that the matter be sent to a Tribunal. The report included and relied upon, not only the Freedomsite website and message board, but also the website, jrbooksonline, and a further posting allegedly made by Lemire on another website. [*Decision, para. 15, 16; Exhibit R-1.pdf, p. 2-2;, Exhibit R-3.pdf p. 45-52*]

6. Repeated requests by Lemire's counsel for conciliation or settlement or mediation were ignored by the CHRC and/or refused by Warman even though the additional material complained of on the Freedomsite was voluntarily removed, when Lemire received the Investigator's Report. [*Decision, para. 172, 182, 283, 284, 289*]

7. The Tribunal dismissed all complaints against Lemire except for the one article posted on the Freedomsite entitled "AIDS Secrets." Neither party has requested a review of the decision on the merits.

8. Lemire challenged the constitutionality of s. 13(1) and 54(1)(1.1) before the Tribunal, arguing *inter alia*, that the provisions violated s. 2(b) of the *Charter*. In doing so, he asked the Tribunal to revisit the decision of the Supreme Court of Canada ("SCC") in *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892 which held that s. 13(1), as it then was, was a violation of s. 2(b) of the *Charter* but nevertheless was constitutional as a reasonable limit within the meaning of s. 1.

9. Five expert witnesses were called on the constitutional issue: Lemire called Bernard Klatt, a former ISP operator, Dr. Michael Persinger, a psychologist and behavioral neuroscientist from Laurentien University and Dr. Donald Downs, a professor of history from the University of Wisconsin. The Attorney General of Canada called Dr. Alexander Tsesis from the Chicago-Kent School of Law. The CHRC called Dr. Karen Mock, formerly of the League for Human Rights of B'nai Brith Canada. The witnesses entered expert reports into evidence as well as giving extensive testimony at the hearing. [*Exhibits, HR-7.pdf p. 3-15 (Dr. Mock); AGC-1.pdf p. 3-12 (Dr. Tsesis); R-2, pdf p. 1-12 (B. Klatt); R-5.pdf p. 50-58 (Dr. Persinger); R-9.pdf p. 13-38 (Dr. Downs)*]

10. The CHRC and Attorney General of Canada conceded at the Tribunal hearing that s. 13(1) infringed s. 2(b) of the *Charter*. [*Decision, para. 223*] The issue before the Tribunal therefore centered on whether the legislation, as amended since the *Taylor* case, still met the requirements of s. 1 of the *Charter*. Those amendments included the extension of s. 13(1) to computer networks, including the Internet, as well as telephone answering machines and the addition of special compensation and penalty provisions to the possible orders which could be made when a complaint was substantiated.

11. The Tribunal held that before reconsidering the findings in *Taylor* under s. 1 of the *Charter*, Lemire was required to show that the evidence and circumstances of his case were such that a distinction could be made from *Taylor*. [*Decision, para. 221, 225*]

12. The Tribunal held that no reconsideration of the *Taylor* s. 1 findings could be justified on the following matters:

(a) The objective of s. 13(1) continued to relate to concerns that were pressing and substantial [the first aspect of the *Oakes* test] and the expert evidence Lemire called at the hearing, namely, Dr. Michael Persinger, did not displace this finding by the SCC [*Decision, paras. 226-240*];

(b) Section 13(1) remained rationally connected to its pressing objective even though it had been extended to the Internet and even though powers to order special compensation and penalties had been added to the available remedies. [*Decision, paras. 241-247*]

(c) The finding in *Taylor* that the words "hatred and contempt" were not vague or imprecise was a finding of law that could not be challenged through the marshalling of new evidence. The testimony of the experts called at the hearing did not call into question the explicit descriptions given in *Taylor* of the ardent and extreme expression necessary to be caught by the provision. [*Decision, para. 248-253*]

13. The Tribunal held, however, that the amendments to the legislation in 1998, adding a penalty provision to the remedies available in s. 54 (to a maximum of $10,000), was a significant change from the state of affairs which existed at the time *Taylor* was decided and therefore justified a reconsideration of the arguments relating to intent. [*Decision, para.254- 282*]

14. The Tribunal held that section 13(1) could no longer be considered exclusively remedial, preventative and conciliatory in nature which was at the core of *Taylor's* finding that the absence of intent to discriminate did not so deleteriously impinge o s. 2(b) rights so as to make intolerable the provision's limitation on freedom of expression. As such, it no longer met the *Oakes* minimum impairment test under s. 1 of the *Charter*.

15. The Tribunal based its decision on two grounds:

    a. The penalty provision in s. 54(1)(c) of the *CHRA* made s. 13 more penal in nature such that it could no longer be considered exclusively remedial, preventative and conciliatory;

b. The manner in which s. 13(1) has been applied evoked a process that had been anything but conciliatory. In this case, the CHRC dealt with and referred the complaint to the Tribunal even though the Freedomsite message board and most of the other material complained of had been removed. This had occurred in other cases as well. Repeated requests by Lemire's counsel for an opportunity to mediate or conciliate a settlement were refused even though the CHRC had the authority to appoint a conciliator under s. 47 of the *CHRA*. Statistics led in evidence showed that only 4% of s. 13(1) cases were settled over a ten year period, while almost the opposite was true for general complaints under the Act. The CHRC itself published material on its website stating that while it generally offered to mediate complaints, it did not do so generally in the case of hate message complaints. [*Decision, paras. 283-286*] The Tribunal held that it was entitled to examine the real and factual context in which s. 13(1) existed and was applied in determining whether it remained a reasonable limit under s. 1 of the *Charter*. [*Decision, para. 287-290*]

16. Given the Tribunal's finding on the absence of intent requirement, it declined to address Lemire's further arguments regarding the absence of truth as a defence. [*Decision, para. 291*]

17. The Tribunal further held that the findings regarding the introduction of a penalty meant that s. 13(1) now played a significant and more than minimal role in the imposition of both financial and moral sanctions. It held that given its previous findings, however, it was not necessary to elaborate any further with respect to the deleterious effects analysis under s. 1 of the *Charter*. [*Decision, para. 292-294*]

18. The Tribunal held that s. 13(1) infringed on Lemire's freedom of expression under s. 2(b) of the *Charter* and that this infringement was not demonstrably justified under s. 1 of the Charter and that this finding also applied to s. 54(1) and (1.1). The Tribunal therefore refused to apply those provisions for the purposes of the complaint. [*Decision, para. 295, 307*]

19. In this judicial review, the CHRC has conceded that the Tribunal did not err in refusing to apply the penalty clauses, namely, s. 54(1)(c) and (1.1) on constitutional grounds. [*Applicant's Record, Memorandum of Fact and Law, para. 1*]

## Part II – Statement of Points in Issue

20. The points in issue in this judicial review are the following:

    a. Did the Tribunal err in examining the real and factual context in which s. 13(1) existed and was applied in determining whether it remained a reasonable limit under s. 1 of the *Charter*?
    b. Is the severance of the penalty provision in s. 54(1)(c) and (1.1) justified in law, and if so, does such severance "save" the constitutionality of s. 13(1) under s. 1 of the *Charter*?
    c. Is the violation of s. 2(b) by s. 13(1) and s. 54 (1) and (1.1) justified under s. 1 of the *Charter* as a reasonable limitation in a free and democratic society given its extension to computer networks including the Internet?

**Part III – Submissions**

21. It is submitted that the Tribunal reached the proper decision, namely, that s. 13(1) and s. 54 (1) and (1.1) are an unconstitutional infringement of the right to freedom of expression under s. 2(b) of the *Charter*. It is further submitted that there were substantial other grounds that it could have relied upon to reach the same decision. These will be reviewed below.

22. The contention by the CHRC that *Eldridge* v. *British Columbia (Attorney General)* [1997] 3 S.C.R. 624 applies to this case is unfounded. In *Eldridge*, the legislation itself was found on its face not to violate the *Charter*. Therefore, no s. 1 analysis was even necessary. This is not true in the case of s. 13(1) which was found in *Taylor* to be a violation of s. 2(b) of the *Charter* .

23. The real issue is whether on the s. 1 analysis, the Tribunal was entitled to look at what it termed "*the real and factual context in which s. 13 existed"*. It is submitted that the SCC has made it clear in a lengthy line of cases that a contextual analysis is essential in any analysis under s. 1 of the *Charter*. It has held that the *Oakes* test under s. 1 must be applied flexibly, having regard to the factual and social context of each case. In *RJR-MacDonald Inc. v. Canada (Attorney General),* [1995] 3 S.C.R. 199 the SCC held:

> **133** That the s. 1 analysis takes into account the context in which the particular law is situate should hardly surprise us. *The s. 1 inquiry is by its very nature a fact-specific inquiry*. In determining whether the objective of the law is sufficiently important to be capable of overriding a guaranteed right, the court must examine the actual objective of the law. In determining proportionality, it must determine the actual connection between the objective and what the law will in fact achieve; the actual degree to which it impairs the right; and *whether the actual benefit which the law is calculated to achieve outweighs the actual seriousness of the limitation of the right.*

> *In short, s. 1 is an exercise based on the facts of the law at issue and the proof offered of its justification, not on abstractions*. [para. 133] [*Authorities, Tab 9]*

24. The SCC further held that the impact of the infringement on constitutional rights in a s. 1 analysis must often be assessed by reference to a broad review of social, economic and political factors in addition to scientific facts. [para. 141, *RJR-MacDonald. supra*]

25. The Tribunal had before it the statistics published by the CHRC itself in its Annual Reports or pursuant to Access to Information requests which showed beyond doubt that s. 13(1) is not used in a remedial fashion. In the 30 year history of the provision, not one respondent before a Tribunal has ever had a complaint dismissed on the merits prior to Lemire. The rate of settlement prior to being sent to a Tribunal or while before a Tribunal is the exact opposite of those for all other complaints made under the *CHRA*. The CHRC has appeared at and carried every s. 13 case since its inception on the grounds that cases under section 13 are of such significant public interest, analogous to a Crown prosecution. The only respondents ever jailed for contempt of Tribunal orders are respondents in s. 13 complaints. [*Exhibit R-19.pdf p. 1-136; Sch. A, Charts.pdf*]

26. The CHRC handling of the Lemire complaint showcased the prosecutorial methods used: it sent the complaint to the Tribunal even though the material in the original complaint was either already off the website or immediately removed by Lemire after receiving notice of the complaint; instead, both Warman and the CHRC added new material to the complaint without any notice to Lemire except in the Investigator's Report; repeated requests by Lemire's counsel for mediation, conciliation or settlement negotiations were ignored or refused; the CHRC carried the case, calling Warman as a witness.

27. Other evidence before the Tribunal amply supported its finding on this ground, particularly the CHRC's relationship with police and the types of investigative techniques it used in s. 13(1) cases. Internal documents showed that the CHRC regularly communicated with police forces about respondents, exchanged information and obtained evidence from police that had been seized in raids pursuant to warrants under the *Criminal Code*. Evidence obtained from police included Crown briefs setting out the most personal information about respondents, telephone record searches, Witness Statements, information obtained from the CPIC (Canadian Police Information Centre) system, motor vehicle databases, police surveillance of meetings and rallies, personal contacts with police by respondents on other matters, information obtained in executing search warrants including CDs of personal hard drives seized by police and the police forensic analysis of such hard drives. Police officers have been important witnesses in s. 13 hearings such as *Warman v. Kouba* [2006] CHRT 50 at para. 88, 89, 95-98; *Warman v.Bahr* [2006] CHRT 52 at para. 46-60; *Warman v. Kulbashian and Richardson*, [2006] CHRT 11 at para. 74-90] where police evidence was used to establish the identities of anonymous posters on the Internet. [*Sch. A, Vol. 26, p. 5932-5937; also see Sch. A, Exhibit R-22.pdf p.73-230, 238-248 for documents showing a continuing and close relationship between the CHRC and various police services*]

28. Under s. 8(2)(f) of the *Privacy Act*, S.C., c. P-21, agreements with provinces can be made authorizing access to personal information collected by the Federal government. Evidence showed that such an agreement had been signed with Manitoba. This means Canadians subject to a s. 13 complaint may have any information they provide to the

CHRC sent to police forces across the country without their knowledge or consent or any warnings whatsoever. [*Sch. A, Exhibit R-23.pdf p. 39]*

29. Section 13 investigators have been trained in computer investigative techniques given by the Canadian Police College. They have attempted to obtain information from s. 13 respondents using false identities and posing as racists. There were attempts by investigators to "chat" with Lemire using the anonymous name "Jadewarr" with respect to a complaint he had laid with the CHRC and it was admitted that his answer could have been used to dismiss his complaint as vexatious. [*Vol. 25, p. 5546-5550; Vol. 26, p. 5700, 5724-5725, 5744-5747;* ]

30. In this case, Warman laid criminal complaints against Lemire and Craig Harrison after laying the section 13 complaint. Police contacted the CHRC to get copies of evidence but didn't follow up after being requested to put it in writing. This was not disclosed to Lemire for over three years, nor was there any notice that what he provided to the CHRC might be handed over to police. [*Vol. 4, p. 616; Vol. 20, p. 4473-4477; Exhibit R-1.pdf p. 34; Exhibit R-17.pdf p. 341-342*]

31. Even Tribunals have not seen s. 13(1) in a remedial way. The cease and desist orders, meant to be remedial, have been described in decisions as having important "*symbolic*" value as a "*public denunciation*" of the respondent's actions. This imports the moral condemnation and stigma which *Taylor* believed was absent from human rights legislation. [*Warman v.Tremaine*, para. 148; *Citron v. Zundel*, para. 300; *Warman v. Kyburz*, para. 82; *Authorities, Tabs 15, 5 and 14*].

32. Prof. Richard Moon, commissioned by the CHRC to study s. 13(1), recommended its repeal so that censorship of hate speech is dealt with exclusively by criminal law. He found that hate speech did not fit easily in human rights legislation which takes an expansive view of discrimination and seeks to advance the goals of social equality. [*Authorities, Tab 8*]

33. Under s. 50(2) the *CHRA* which provides that *"[i]n 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,"* the Tribunal is empowered to determine the constitutionality of s. 13(1) and penalty/compensation provisions when a complaint under that section is before it. Since it is conceded that s. 13(1) is a violation of the *Charter*, the constitutional issue before the Tribunal was whether it could still be upheld as a reasonable limit under s. 1. The Tribunal was entitled on a s. 1 analysis to examine the context and effect of the law and it did so.

***Severance of the Penalty Provision:***

34. The CHRC argues that by severing the penalty provision, which it now concedes is unconstitutional, s. 13(1) can be rendered again a reasonable limit on s. 2(b) rights.

35. The SCC held in *Schachter v. Canada* [1992] 2 S.C.R. 679 that there is *"no easy formula by which a court may decide whether severance or reading in is appropriate in a given case"* [para. 77] and that

> *Severance...will be warranted only in the clearest of cases, that is, where each of the following criteria is met: A. The legislative objective is obvious, or it is revealed through*

*the evidence offered pursuant to the failed s. 1 argument, and severance or reading in would further that objective, or constitute a lesser interference with that objective than would striking down; B. The choice of means used by the legislature to further that objective is not so unequivocal that severance/reading in would constitute an unacceptable intrusion into the legislative domain...*[third element is irrelevant to this case." [para. 85]

36. The legislative summery of Bill S-5 [which added the amendments] stated the penalty and special compensation were *"a response to the rising incidence of* ***hate crimes*** *around the world. The government believes that* ***stronger measures are needed to deter individuals and organisations from establishing hate lines****. It hopes to accomplish this by allowing victims of such lines to apply for compensation and subjecting offenders to financial penalty*."[*Authorities, Tab 4*]

37. It must be assumed that Parliament knew the state of the law regarding s. 13(1) when it passed the amendment in 1998. *Taylor* had specifically upheld s. 13 in 1990 on the grounds that it was contained in the conciliatory and remedial context of a human rights statute whose purpose was not to punish and stigmatize but to stop discriminatory conduct.

38. The 1998 amendments reflect the fact that Parliament deemed the importance of the objective to be served by stopping hate was such that penal sanctions were deemed necessary. It described the objective as the stopping of "hate crimes".

39. The penalty and special compensation clauses cannot be severed because they reflect the intent and objective of Parliament to chill, punish and deter expression as set out in s. 13(1). They are the pith and substance of what Parliament wanted to attain in the legislative scheme around s. 13.

40. The Tribunal was correct in finding that s. 13 and 54 were no longer a reasonable limit on freedom of expression and was correct not to use the doctrine of severance.

41. It is submitted that apart from the grounds upon which it made its decision, the Tribunal had ample other grounds for refusing to apply s. 13(1) and s. 54(1) and (1.1) on the evidence before it and that its decision was correct.

***Extension of s. 13(1) from Telephone tape messages to the Internet***

42. One of the primary factors which *Taylor* took into consideration in upholding s. 13(1), as it then was, was the medium of the telephone. Dickson C.J. held that the combination of the telephone and hate material was particularly insidious because it was *"one which gives the listener the impression of direct, personal, almost private, contact by the speaker, provides no realistic means of questioning the information or views presented and is subject to no counter-argument within that particular communications context."* [*para. 78-80*]

43. Dickson C.J. adopted the findings of the Tribunal in *Nealy v. Johnston*, [1989] T.D. 10/89 where expert evidence by a communications professor, Rene Jean Ravault, established that the medium by which a communication is made is a fundamental aspect of its effect on the listener. This testimony was summarized by the *Nealy* Tribunal as follows:

> "The medium used to convey the message is the first part of the methodology [in determining whether the message would expose a group to hatred], in this case the medium being first the newspaper advertising the messages and then the telephone over which the messages were relayed. In the view of the witness the fact that the listener must take a positive step to access the message by placing a phone call to the number published in the paper makes the message more personal and direct. Unlike radio or television broadcasts which may command less attention, taped telephone messages are likely to be listened to more carefully." [*Nealy*, Authorities, Tab 7, p. 14]

44. Dr. Renault had given similar expert testimony before the Tribunal in the *Taylor* case which was accepted by it and summarized in its decision:

> The Medium that is Used to Transmit the Communication: There is a difference between the effect of words spoken over the radio and words spoken over the telephone. The latter is more personalized and the degree of concentration is stronger. A tape recorded message, however, is not as effective as the exchange which takes place in a telephone conversation. [*Smith v. Taylor, Authorities, Tab 10,* p. 15]

45. The communications context is therefore essential in the analysis of s. 13(1) under s. 1 of the *Charter*. The amendments in 2001 which extended it to computer networks and the Internet were such a fundamental change in that context that this Court is not only justified but required to revisit the question of whether s. 13(1) is still a reasonable limit on freedom of expression under s. 1 of the *Charter*.

***Internet is interactive, dynamic and democratizing***

46. There is no doubt that the medium of the Internet is a democratizing medium which allows public discourse by people who previously had no means to participate meaningfully in public debates or issues.

47. It provides every means of questioning information and of counter arguing, the two vital factors missing in the telephone message context as noted by the majority judgement in *Taylor*. Canadians can put up websites, write comments on message boards or comment boxes, write essays which can be distributed on websites or sent out by email or text messaging. Message boards and blogs give visitors the immediate ability to respond to other messages with equal prominence as the original posting.

48. The types of expression found on the Internet include audio and video content, government documents and information, academic and other journals, newspapers, wire services and magazines, voice over Internet (VoIP), blogs, message boards or discussion boards, and real time data such as current stock market quotes, social interaction networks such as Twitter and Facebook.

49. Because of this radically changed communications context, the analysis in *Taylor* regarding the medium of the telephone is now utterly outdated in the determination under s. 1 of whether s. 13(1) is a reasonable limit on freedom of expression. The questions must be asked: how does s. 13(1) affect freedom of expression in a medium which is interactive and participatory and which contains the store of knowledge of humanity? Does the harm caused by hate propaganda recognized by *Taylor* still exist in such a communications context? The following are factors which must be considered:

***Internet provides means of remediating hate propaganda***
***through education and counterargument***

50. The Internet gives the free opportunity to respond and full opportunity for the educative functions of the CHRC and any other group which wishes to rebut what they consider to be "hate." Dr. Karen Mock repeatedly testified that education was an essential aspect of fighting hateful views. [*See Vol. 12, p. 88-92, 241; Exh. HR-7, pdf. p. 13*] In speeches given by CHRC officials in the early 1990's, it recognized that th*e "real key to combating hate propaganda is education."* [*see speeches at Exh. R-17.pdf p. 189, 196, 203*] The CHRC recognized that the Internet was an *"excellent vehicle for fighting hate propaganda and promoting human rights values."* [*Ex. R-17.pdf p. 188, 195*]

***Section 13(1) now applies to the media and the press***

51. Newspapers, radio and TV stations and magazines are published on the Internet so that any limitation on freedom of expression on the Internet includes limitations on freedom of the media and the press, something which was not an issue with telephone answering machines and their approximately one minute messages. Use of the full powers available under the legislation, particularly against the press, is an unacceptable violation of section 2 (b) of the *Charter*, given that there are no defences of intent, fair comment on matters of public interest, and truth.

52. In the recent case of *Grant v. Torstar Corp.* [2009] S.C.J. No. 61 the SCC reiterated the principles contained in the major trilogy of cases affirming the importance freedom of expression and freedom of the press. It held:

> 42. Freedom of expression and respect for vigorous debate on matters of public interest have long been seen as fundamental to Canadian democracy. Many years before the Charter this Court, in the Reference re Alberta Statutes, [1938] S.C.R. 100, per Duff C.J., suggested that the Canadian Constitution contained an implied right of free expression on political matters. That principle, affirmed in cases like Saumur v. City of Quebec, [1953] 2 S.C.R. 299, and Switzman v. Elbling, [1957] S.C.R. 285, has stood the test of time.
>
> 43. In 1982, the Charter, through s. 2(b), confirmed and expanded constitutional protection for free expression, specifically extending it to the press: "Everyone has ... freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication". [*Authorities, Tab 6*]

53. By failing to provide the basic defences of fair comment, responsible journalism, truth and lack of intent to s. 13(1), in a communications context where the press and media publish daily, the provision is no longer a reasonable limit on freedom of expression including that of the press. The article “AIDs Secrets”, found to contravene s. 13(1) in

this case was a discussion of matters of public interest on AIDS which should not have been subject to censorship.

***Internet Service Providers are not common carriers***

54. One of the most insidious impacts on freedom of expression arises from the fact that access to the Internet is provided by private businesses, called Internet Service Providers or ISP's, which do not have common carrier status in Canadian law.

55. When section 13 was limited to messages communicated by telephone, access to the messages could not be terminated simply by pressuring the telephone company to disconnect the telephone service.

56. Section 36 of the *Telecommunications Act 1993*, c. 38 provides:

> 36. Except where the Commission approves otherwise, a Canadian carrier shall not control the content or influence the meaning or purpose of telecommunications carried by it for the public. [Authorities, Tab 3]

57. Section 13(1) was enacted at the request of Ontario's Attorney General who had initially attempted to shut down John Ross Taylor's telephone messages by pressuring Bell Canada to disconnect his telephone service. [*Ex R-17.pdf p. 397-408*] Bell Canada had refused, citing its common carrier status under its act of incorporation and the prohibition on censoring the content of its customer's communications. The common carrier status relied upon by Bell Canada remains intact today under section 36 of the *Telecommunications Act*.

58. Once s. 13(1) was enacted, the common carrier status of telephone companies forced those wishing to shut down telephone hotlines to complain to the CHRC and undergo the procedure set out in the statute which included a public hearing and an opportunity for the respondent to make submissions and tender evidence.

59. This situation no longer exists with the extension of s. 13(1) to computer communications, including the Internet. As ISPs do not have any common carrier protection, they were quickly targeted by the CHRC and by NGOs to remove customers' material unilaterally. [*Exh. HR-2.pdf p. 11-36 for accounts of actions taken against Internet Service Provider (ISP) FTCNet and Bernard Klatt*]

60. Beginning in 1994, the CHRC began writing to and meeting with ISPs regarding how to "deal with" the posting of material that might contravene s. 13. The CHRC has continued this pressure on ISPs and expanded it to include foreign websites having no relation to Canada and over which they have no jurisdiction. Letters written to foreign websites and ISPs ask them to take "appropriate" action. [*Exh R-17.pdf p. 241-249*]

61. All contacts with ISPs are made under the authority of section 27(h) of the *CHRA* as part of the "persuasive part" of its mandate. A senior CHRC policy analyst, Harvey Goldberg, testified that he believed it was appropriate for the CHRC to seek to censor material before a Tribunal hearing was held. [*Vol. 23, p. 5080*; *Vol. 24, p. 5342-5345]*

62. Goldberg testified the CHRC wanted to work "proactively" using the powers under s. 27(h) and that meant hate messages being dealt with before the problem reached the stage of a complaint being laid. The goal of the CHRC meeting with ISPs was to persuade them to set up systems to avoid complaints and avoid the CHRT. This included the use of

filters by ISPs, acceptable use policies and complaints procedure models having the goal of avoiding litigation. *[Vol. 25, p. 5350-5351, 5345-5346, 5454-5455; 5466-5467; internal memos/emails at Exhibit R-17. Pdf p. 23-41][Authorities, Tab 1, s. 27 of CHRA]*

63. The CHRC expected ISPs to know what material constituted hate under section 13 or to consult their legal departments. [*Vol. 25, p. 5463-5464*]

64. The guarantee to freedom of speech has been gravely damaged by the extension of s. 13 to the Internet. Without the protection of common carrier status, ISPs are extremely vulnerable to complaints under s. 13 unless they quickly remove material upon complaint. If they do not remove the material, ISPs have found themselves named in complaints under s. 13 for material which they played no part in writing or posting but which simply appear on websites they host as part of their business.

65. A complaint against the ISP, AOL Canada, was dismissed because it took "appropriate" actions: it removed the messages, changed its acceptable use policies, put keyword filters on and simplified the process for an individual to complain. The filter prevented certain language from being posted. The changes in the user policies made it clear that violators would be cut off from their AOL account in the event of a violation. *[Vol. 21, 4694-4699; see also p. 4762-4774; Exh. R-3, pdf. p. 8-21 for further example.]*

66. But Dr. Tsesis, for the Attorney General, testified that such filters cast "too wide a net" as a means of blocking content, for instance, because the banning of such words as "breast" blocked not only pornography but also sites with information on breast cancer. The CBC had attempted to block anti-Semitic sites by banning the word "Jew" etc., but thereby also banned messages favourable to Israel that were not anti-Semitic. [*Decision, paras.*

*117-120; Exh. R-2. Pdf, p. 123-125*] By forcing ISPs subject to a complaint to install filters, the CHRC is causing, behind closed doors, extreme damage to freedom of expression. As stated by the Tribunal, "*Using similar word blocks regarding hate propaganda could also prevent researchers from reaching necessary historical and sociological information on the Internet."* [*Decision, para. 120*]

67. Influential ethnic organizations such as the Canadian Jewish Congress have lobbied the CHRC to partner with Canadian police services to "*analyze foreign-based website to make a determination as to whether a particular site would, if it or its owner was located in Canada, be deemed sufficiently problematic to be referred to tribunal. Such a determination could then be passed to Canadian Internet Service Providers who would then block access." [Exhibit R-22.pdf p. 170]*

68. Although the CHRC refused this offer, it shows how vulnerable ISPs are to those who are determined to censor material on the Internet using section 13(1) as a backdoor to censorship.

69. The effect of s.13(1) is devastating because ISPs cannot and will not resist pressure on them to remove websites alleged to be hate. ISPs do not have the expertise or interest to determine what "hate" under s. 13 is and what is not. They will simply remove the material if it is causing trouble for the business. [*see: Exhibit R-1.pdf p. 152 and Vol. 7, pp. 1293-1294 for Warman testimony on using corporate pressures. See also: Warman v. Winnicki,[2006] CHRT 20 at para 27, Warman v. Kyburz, [2003] CHRT 18 at para. 13, 35*; Authorities, Tabs 16, 14]]

***The failure to provide truth a defence***

70. The extension of s. 13(1) to the Internet justifies revisiting the finding in *Taylor* that the failure to provide truth as a defence was irrelevant to the proportionality test under s. 1. Dickson C.J. held that he found it difficult to accept that circumstances existed where factually accurate statements could be used for no other purpose than to stir up hatred against a racial or religious group. [para. 74]

71. The communications context of telephone answering machines meant that the messages subject to the provision were pre-recorded voice tapes of about one minute in length. [*see: Smith, supra, p. 2*] The communications context of the Internet includes limitless material from books and journals, historical documents, newspapers and TV programs.

72. The subjection of the full spectrum of knowledge to s. 13(1), where there are no defences, especially that of truth, is an extraordinary violation of traditional notions of freedom of expression. It is not a reasonable limit on s. 2(b) rights in the communications context of the Internet.

73. Before the Tribunal, all three expert witnesses who testified on the issue of whether truth should be caught by s. 13 testified that truth was an essential element in determining whether or not material was hate.

74. Dr. Mock's testimony showed that truth is an essential element in deciding whether expression was, as she defined it, hatred or contempt. She also testified that it was possible for someone to experience hate or contempt when hearing truthful statements. *[Vol. 15, p. 3286]* She agreed with the proposition that to make the distinction between

criticism and contempt, one had to decide whether what was being said was factually true or not. *[Vol. 15, p. 3145]*

75. She testified that in determining how far a person was allowed to go in criticizing a group before it became contempt, one of the factors to be examined was whether it was "lies that are being promoted." [*Vol. 15, p. 3141*] She testified that it would be appropriate in a section 13(1) hearing to give the respondent the opportunity to attempt to prove the truth of the premises upon which a respondent had based his expression. [*Vol. 15, p. 3146-3147*] It was the "constant repetition of half truths, lies, exaggerations, stereotypes, etc." that created a climate where people were dehumanized. *[Vol. 11, p. 2173]*

76. Dr. Tsesis, the expert called by the Attorney General of Canada, testified that the assessment of truth or falsity of a statement would be a "critical part" of the assessment of the nature of an expression and its effect. He testified: "I think it would only be logical for a court to inquire into its truth." *[Vol. 16, p. 3546]* He said that a person should be allowed to prove that a statement was true, even though it exposed an identifiable group to hatred. *[Vol. 16, p. 3533-3534]*

77. Dr. Downs testified: "Truth the often inconvenient...offence alone can't be grounds for censorship unless we want to end up not being able to discover new truths." *[Vol. 17, p. 3759]* He also quoted Deborah Lipstadt, who opposed laws against Holocaust denial, on the grounds that it harmed the truth-seeking process. By placing Holocaust denial into the hands of the state for punitive enforcement it was taking it out of the truth determination process. *[Vol. 17, p. 3762-3764; Exhibit R-4.pdf p. 1]*

78. It is respectfully submitted that this testimony by the government's own witnesses shows that truth is an essential part of determining whether in fact words complained of are "hate" or expose to "hate." By failing to provide this important defence, s. 13(1) fails to meet the proportionality test of section 1 of the *Charter*.

***Subjectivity and vagueness of "hate"***

79. It is submitted that the Tribunal erred in holding that the meaning of "hate" is a question of law in the face of expert testimony establishing how subjective the meaning of "hate" actually is.

80. The evidence of Dr. Persinger established that "hate" was simply a label that people applied to aversive experiences. In neuropsychological studies, "hate" was not a term that was used. The term used is "aversive stimuli." *[Vol. 14, p. 2884]* It is the culture that defines aversive stimuli. Stress is influenced by how the person perceives it, the label the society gives it and how they are reinforced for it. Problems arose when the individual did not have the tools and strategies that allowed them to adapt and respond. *[Vol. 14, p. 2884-2885; p. 2895-2896]*

81. Dr. Mock testified that the services of an expert would be required in identifying "hate" in fine cases and that anyone publishing would especially want to consult his lawyer.[*Decision, para. 121*]

82. People being held liable under s. 13(1), however, are not publishing houses or newspapers with legal departments and editorial control. The Internet is peopled by

ordinary individuals. Any word that requires the services of an expert and a lawyer sitting by the computer is not a definable word.

83. The meaningless of the word "hate" is shown by the almost limitless types of communications alleged before Tribunals to be "hate". They include jokes, books, essays, historical commentary, message board postings, cartoons and poems. The range of articles in the Lemire complaint alone shows that no one can predict what could be caught by the legislation.

***Does hate propaganda cause the harm alleged***

84. In *Taylor,* the SCC held that people subjected to racial or religious hatred may suffer substantial psychological distress. [para. 37, 41, 42] It did not in fact have any expert evidence before it on this issue but presumed this type of harm could be caused by hate propaganda and that the objective of the legislation was therefore a reasonable limit on freedom of expression. As stated in *RJR-MacDonald*:

> [155] The causal relationship between the infringement of rights and the benefit sought may sometimes be proved by scientific evidence showing that as a matter of repeated observation, one affects the other. Where, however, legislation is directed at changing human behaviour, as in the case of the Tobacco Products Control Act, *the causal relationship may not be scientifically measurable. In such cases, this Court has been prepared to find a causal connection between the infringement and benefit sought on the basis of reason or logic, without insisting on direct proof of a relationship between the infringing measure and the legislative objective*: R. v. Keegstra, [1990] 3 S.C.R. 697, at pp. 768 and 777; R. v. Butler, [1992] 1 S.C.R. 452, at p. 503.

85. It is submitted that this Court is justified in revisiting the issue of harm given the extension of s. 13(1) to an electronic, dynamic medium of communication which is fundamentally different from pre-recorded telephone messages. What harm resulted from

a taped voice recording cannot be presumed to be the same in a dynamic and interactive medium such as the Internet where people can easily rebut and respond to what they perceive to be hate and where opposing viewpoints are abundant.

86. Dr. Persinger testified that he had read that part of the report of the Cohen Committee written by Harry Kaufmann, PhD. which asserted that individuals subjected to racial or religious hatred may suffer substantial psychological distress resulting in a loss of self-esteem and feelings of anger. He testified that Kaufmann's conclusions were out of date and based on social psychological theories which, in large part, had now been shown to be inaccurate. *[Vol. 14, p. 2796--2898]*

87. Persinger wrote in his expert report that there was *no direct experimental evidence that listening to verbal behaviour that directly or indirectly identified that experient diminished to any significant extent the self-esteem of a person.* The studies cited by Kaufmann were not experimental studies but correlational studies. Correlational studies meant that there were two variables and they were related. It did not mean cause and effect. In these correlational studies, even the strength of the effects was extremely small. *[Vol. 14, p. 2899-2901; Expert report filed as Exhibit R-5.pdf p. 50-58]*

88. The term "psychological distress" used by Kaufmann, and quoted by the majority in *Taylor*, was so vague that it was meaningless. Kaufmann's conclusion that hate propaganda produced feelings of anger and outrage in people ignored two critical controlling variables: firstly, that frustrative aggression occurred when there was no opportunity to respond freely and secondly, when behaviour (including beliefs) that had

been rewarded by group consensus was no longer rewarded, it was followed by outrage and emotive behaviour. *[Vol. 14, p. 2882; Exhibit R-5.pdf]*

89. Persinger's evidence established that the conclusions regarding the harm alleged to result from hate propaganda have never been proven in cause and effect studies. In the correlational studies cited by both Kaufmann and Dr. Mock, the effect was so small as to be meaningless. *[Vol. 14, p. 2899-2904]*

90. Dr. Mock relied on anecdotal examples to prove harm which would not be addressed by s. 13– i.e. - post-911 focus groups of Muslims who stated their identity was being affected by things they were reading in newspapers and by slurs and name-calling at school and the supermarket. *[Vol. 12, p. 2410-2414]* The rationality of hate laws must be put in question when the CHRC's own expert repeatedly pointed out that people suffer the alleged harm of hate every day in their lives simply by going to the supermarket or reading newspapers.

91. One of the studies cited by Dr. Mock, however, the *Bryant-Davis* study, contained statements on the state of research in this area which are highly relevant to the issue of harm caused by hate propaganda. These showed that *few researchers conceptualized racist incidents as forms of trauma* and therefore there are few studies examining racist incidents as such. Further, the *Diagnostic and Statistical Manual of Mental Disorders* of the American Psychiatric Association (4th ed., 2000) limited the definition of trauma to incidents that are physical in nature, such as serious injury, rape, and assault, but excludes verbal abuse, emotional abuse and social alienation, such as nonphysical racist incidents. [*Exhibit HR-7.pdf p. 52-53*]

92. The study made several important comments about how people respond to racist incidents"

*"While **not all persons who experience racist incidents will be traumatized**, some persons develop posttrauma symptoms in response to racist incidents." [p. 47]*

*"**No universal, so-called cut and dried responses to psychological traumas exist. Even acknowledged traumas such as child sexual abuse may produce sequelae of varying toxicity in survivors."** [p. 48]*

*"**Individual differences in personality, resilience, coping style, unique personal experiences, strength of ethnic self-identification, family closeness, etc. may buffer or mediate responses to psychologically toxic events**." [p. 49]*

*"We have observed that some survivors of racism report **feeling empowered** by their experiences." [p. 49]*

93. The Bryant-Davis paper shows that the response of people to what is termed "hate" will be highly individualized. Dr. Mock agreed that individual differences in personality and coping styles had the effect of mediating responses to psychologically toxic events. She stated that there was no study of the percentage of people fitting into any of those categories. *[Vol. 15, p. 3237*] She agreed that the paper recognized that an individual's strength of ethnic self-identification was a very important variable in how someone would react to material as being hate or not. *[Vol. 13, p. 2686-2687]*An example of this was Dr. Mock's own reaction to a letter by Ernst Zundel published in a London newspaper, which hurt her very much, yet she admitted it was not hate and others would not be hurt by it. [*Decision, para. 157*]

94. The use of censorship to stop psychological harm is a blunt instrument that does not meet any valid objective in the face of such evidence. Indeed, the law causes the opposite result because *it appeals to those who are most ethnically or group identified and*

*therefore leads to division, not harmony as each strongly self-identified group starts using complaints to assert its interests*.

95. Dr. Mock admitted that there was no study, being a controlled experiment, that showed hate and extremism on the Internet led individuals and groups to commit violent acts or hateful acts. *[Vol. 15, 3253-3254]* This was an important admission because it was one of the reasons given in *Taylor* for holding that s. 13(1) was justified.

96. The second study relied upon by Dr. Mock was "Hate Speech: Asian American Students' Justice Judgments and Psychological Responses" by Boeckmann and Liew (2002) which found that participants in the study who highly identified with their Asian American social identity would punish Asian-targeted hate speech more severely than those who had a low identification with an Asian American identity. [*Exhibit HR-7.pdf p. 27-45*]

97. Dr. Persinger testified that the Boeckmann study was a correlational study, not an experimental study. The effect of the hate scenario on the students was very small, and would be the kind of change that would be comparable to having a fight with a spouse. *[Vol. 14, p. 2903-2904]*

98. It is submitted that the non-use of s. 13 by minority groups in Canada shows that no meaningful harm is being addressed by it. After the complaint against Taylor, *there were no complaints under the legislation for 10 years*. In the thirty year history of the legislation, there have only been 100 complaints. Of these, almost 30% had insufficient evidence to be dealt with by the CHRC or were withdrawn. Even this small number does not represent grievances by members of minority groups since it has been inflated by the serial complaints of Warman, a white male. [*Exhibit R-16.pdf; Charts, pdf*]

99. Of all complaints filed with the CHRC, s. 13(1) complaints have been and remain an extremely small percentage. In the years 2002-2006, section 13 complaints comprised only 1% of all the complaints filed. [*Charts, pdf, p.1*]

100. In other words, Canada has a general population that deals well with expression, values the right to expression and does not experience the harm that is said to justify s. 13(1). Canadians overwhelmingly prefer open debate, not censorship. [*Exh. R-23, pdf p. 276-288*]

101. It is respectfully submitted that it can no longer be presumed, as in *Taylor* and *Keegstra*, that the objective of preventing the harms caused by hate propaganda is one of pressing and substantial importance sufficient to warrant a limitation upon freedom of expression. The onus is on the state to prove the limit is justifiable. It has failed.

102. It is submitted that s. 13(1) and its penalty and special compensation provisions no longer meet the test of reasonable limit on freedom of expression under s. 1 of the *Charter* for all the reasons set out above. As stated by the SCC:

> **[129]** The bottom line is this. While remaining sensitive to the social and political context of the impugned law and allowing for difficulties of proof inherent in that context, the courts must nevertheless insist that before the state can override constitutional rights, *there be a reasoned demonstration of the good which the law may achieve in relation to the seriousness of the infringement*. It is the task of the courts to maintain this bottom line if the rights conferred by our constitution are to have force and meaning. [*RJR -MacDonald, emphasis added*]

103. There has been no reasoned demonstration of the good which s. 13(1) may achieve in relation to the extraordinary seriousness of the infringement of freedom of expression and the press given its extension to the Internet. The tests set out in *Oakes*

have not been met as the means chosen to implement the objective were neither reasonable nor proportionate.

**Part IV – Order requested**

104. The respondent requests that the Court make the following orders:

*(a)* A declaration that sections 13(1) and 54 (1) and (1.1) of the *Canadian Human Rights Act* are a violation of subsections 2 ((b) of the *Canadian Charter of Rights and Freedoms* , are not saved by section 1 thereof, and as such, are of no force or effect pursuant to sections 24 (1) and 52(1) of the *Constitution Act*, 1982;

(b) An order dismissing this judicial review application;

(c) Costs;

(d) Such further and other order as this Honourable Court may deem just.

DATED this 15th day of February, 2010.

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Barbara Kulaszka

Lawyer for the respondent Marc Lemire

## *Part V – Authorities*

**Case Law:**

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

*Citron v. Zundel*, [2002] T.D. 1/02

*Grant v. Torstar Corp.* [2009] S.C.J. No. 61

*Nealy v. Johnston*, [1989] T.D. 10/89

*RJR-MacDonald Inc. v. Canada (Attorney General),* [1995] 3 S.C.R. 199

*Smith v. Taylor et al*. [1979] 1/79

*Warman v. Bahr* [2006] CHRT 5

*Warman v. Kouba* [2006] CHRT 50

*Warman v. Kulbashian and Richardson*, [2006] CHRT 11

*Warman v. Kyburz*, [2003] CHRT 18

*Warman v. Tremaine*, [2007] CHRT 2

*Warman v. Winnicki*, [2006] CHRT 20

**Statutes:**

*Canadian Human Rights Act*, R.S.C. 1976-1977, c. 33, ss. 13, 27 and 54

*Privacy Act*, S.C., c. P-1, s. 8

*Telecommunications Act 1993*, c. 38, s. 36