



# CANADIAN CONSTITUTION FOUNDATION

CHARITABLE NUMBER: 86617 6654 RR0001 • WWW.CANADIANCONSTITUTIONFOUNDATION.CA  
235-3545-32 AVE. N.E., SUITE 641, CALGARY, ALBERTA, T1Y 6M6 • PHONE: (403) 592-1731 • FAX: (403) 592-1459

May 1, 2008

**BY FAX AND EMAIL**

Ms. Carol Ann Hartung  
Registrar  
Canadian Human Rights Tribunal  
160 Elgin Street, 11th Floor  
Ottawa, Ontario K1A 1J4  
FAX: (613) 995-3484  
EMAIL: CarolAnn.Hartung@chrt-tcdp.gc.ca

Dear Ms. Hartung:

**Re: Canadian Constitution Foundation – Request for Intervenor Status  
T1073/5405 and T1074/5505 – Constitutional Challenge to Section 13 and 54 of the  
Canadian Human Rights Act**

We write to request an order, pursuant to Rule 8 of the *Canadian Human Rights Tribunal Rules of Procedure*, granting intervenor status in respect of the application brought by Marc Lemire in the above noted matter in accordance with the Canadian Human Rights Tribunal *Rules and Procedures*. We understand that other intervenors have not yet filed their written factums. We are in a position to meet the deadline, and file our factum at the same time as other intervenors. Accordingly, no party would be prejudiced by granting intervenor status to our Foundation.

**The Foundation and its Expertise**

The Foundation is a citizen-based organization with supporters across Canada. The Foundation was established as a non-profit corporation by way of Letters Patent issued in April 2002 under the *Canada Corporations Act*. The Foundation is governed by a board of directors which includes lawyers, a law professor, and other professionals. Our Advisory Board includes Eugene Meehan, Q.C. and other prominent Canadians. The Foundation has been actively involved in

supporting public interest litigation being conducted by such distinguished counsel as William McIntyre, Q.C., and D.M.H. Goldie, Q.C.

The Foundation is a registered charitable organization. The Foundation's objects, as set out in its Letters Patent, are:

- (a) to advance the education of the public concerning human and civil rights and concerning the significance and enforcement of the Constitution of Canada, including the Canadian Charter of Rights and Freedoms;
- (b) to establish a resource centre with ties throughout Canada to provide research, education and legal expertise concerning human and civil rights; and
- (c) to promote human and civil rights through the sponsoring of selective litigation and, in particular, to secure enforcement of the Constitution of Canada and the Canadian Charter of Rights and Freedoms set out therein.

The Foundation is a credible, trustworthy and objective organization that has expertise and a unique perspective on the application of the Canadian Constitution and the ideals expressed therein, including its essential characteristic: that the Constitution of Canada is the supreme law of Canada, and any law, government measure or common law principle that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

As a citizen-based organization dedicated to the advancement of the Canadian Constitution, the Foundation has a strong interest in this application pertaining to the *Charter's* Section 2(b). As a result of the Foundation's mandate and ongoing work to promote adherence to the Canadian Constitution as an essential component of the rule of law, the Foundation has developed a unique

expertise with respect to the application of the constitution *per se*, without reference to any specific interest of a given litigant.

### **Submissions to be made by the Foundation**

This challenge directly involves important constitutional principles, including jurisdiction and the clarity of legislation. Understanding these issues and acting within their prescribe boundaries allows for governance without unnecessarily intruding into the rights of citizens. The resolution of these issues allows government to be effective in what it does by establishing clarity of purpose while eliminating dueling and competing public activities and actors. Generally speaking this leads to efficiency in government while securing the liberty of Canadians.

The Foundation will argue that Section 13 of the *Canadian Human Rights Act* mirrors Section 319 of the *Criminal Code of Canada* and thereby places the Tribunal in the unintended position of acting as law enforcement and the court as they relate to criminal matters. Enforcement of Section 13 of the *Canadian Human Rights Act* by the Tribunal has the effect of finding one liable for an indictable offence minus the indictment, as the ability to lay an indictment falls only within the jurisdiction of the Crown. This instance of jurisdictional trespass by the Tribunal leaves law enforcement and the courts confused as to where their respective jurisdictions lie. The application of Section 13 also has the effect of leaving the public in a state of ambiguity with respect to the criminal status of persons charged under it.

The Foundation will argue that the wording of Section 13 as it relates to "persons being exposed to racial hatred" as a result of speech is not only vague, but difficult if not impossible to apply unless the trier decides to speculate as to the issues of cause and effect. The offense dealt with by Section 13 of the *Canadian Human Rights Act* is identical to an indictable offense as described in the *Criminal Code of Canada*. The standard of proof as prescribed in criminal law is

very high in keeping with the stigma effect of a criminal conviction. By contrast the standard of proof for the Tribunal is far lower, yet the effect of being found to be a "bigot", as a finding of Section 13 liability does, would inevitably follow.

The Foundation will argue that the Tribunal has not been authorized to usurp the criminal law powers of the state, and that laws that are vague ought to be declared void for being such, in keeping with established precedent.

The Foundation will take the position that, to the extent that any limitations placed on freedom of expression by Section 13 of the *Canadian Human Rights Act* infringes upon constitutional rights, and that due to the aforementioned flaws in its application as well as its composition, the infringement cannot be justified under Section 1 of the *Charter*.

#### **The Interest of the Foundation in These Proceedings**

The Foundation has a legitimate interest in the issues raised by this application. As stated above, the impugned statute allows the Tribunal to act in a manner that violates the constitutional rights of Canadians, and to do so with sweeping powers and dubious authority.

The Foundation is gravely concerned that arguments advanced by Richard Warman, if adopted by this Tribunal, will result in the Canadian Human Rights Commission having the ability to violate the Constitution with impunity and without consequence. The Foundation submits that remedies to the aims sought by Section 13 of the *Canadian Human Rights Act* already exist in the *Criminal Code of Canada* and can be derived from the realm of public debate, where it constitutionally belongs.

**The Foundation's Unique Perspective**

Our Foundation brings a unique perspective and approach to the issues raised in this application, and has a broader interest in these proceedings than the specific interests being pursued by the respondent. We will not duplicate the submissions of Mr. Warman, Mr. Lemire or of the other intervenors.

The Foundation is not clouded by personal, social or political agendas in its understanding of the Canadian Constitution. Rather, it brings clarity of purpose to any constitutional debate by promoting the ideals expressed in the Constitution itself without reference to extraneous considerations.

Yours truly,



Desmond P. Burton-Williams  
Counsel  
Canadian Constitution Foundation

Cc: Marc Lemire  
Richard Warman  
Simon Fothergill/Alysia Davies (For the Attorney General of Canada)  
Barbara Kulaszka (For Marc Lemire)  
Paul Fromm (For the Canadian Association for Free Expression)  
Douglas Christie (For the Canadian Free Speech League)  
Joel Richler (Canadian Jewish Congress)  
Steven Skurka (For the Friends of Simon Wiesenthal Center for Holocaust Studies)  
Marvin Kurz (For the League for Human Rights of B'nai Brith)