

CANADIAN HUMAN RIGHTS TRIBUNAL

BETWEEN:

RICHARD WARMAN

Complainant

-and-

CANADIAN HUMAN RIGHTS COMMISSION

Commission

-and-

MARC LEMIRE

Respondent

-and-

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CANADIAN FREE SPEECH LEAGUE
LEAGUE OF HUMAN RIGHTS OF B'NAI BRITH CANADA
CANADIAN JEWISH CONGRESS
FRIENDS OF THE SIMON WIESENTHAL CENTER FOR HOLOCAUST STUDIES
Interested Parties

**SUBMISSIONS OF THE LEAGUE OF HUMAN RIGHTS OF B'NAI BRITH CANADA,
CANADIAN JEWISH CONGRESS AND FRIENDS OF THE SIMON WIESENTHAL
CENTER FOR HOLOCAUST STUDIES
(Notice of Constitutional Question)**

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A. INTRODUCTION

1. These are the joint submissions of the League of Human Rights of B'nai Brith Canada, the Canadian Jewish Congress, and the Friends of the Simon Wiesenthal Center for Holocaust Studies (the "Interested Parties"), who were granted leave to intervene by this Tribunal on February 23, 2006.

Overview of the Position of the Interested Parties

2. The Interested Parties represent members of the Jewish community. The Jewish community is, and has been historically, deeply harmed by intolerance and hate. That history offers the Interested Parties a unique perspective to comment on the harm that can be caused by group vilification. Unfortunately, many communities experience bigotry and hate in the modern world. The challenged legislation protects similarly targeted vulnerable groups from such harm and allows Canada's multicultural society to flourish. Hate propaganda does nothing to advance freedom of expression. The Respondent's constitutional challenge is regressive and should be dismissed.
3. The Supreme Court of Canada ruled in *Taylor*¹, a case in which the Interested Parties were also interveners, that section 13 of the *Canadian Human Rights Act*² constitutes a reasonable limit on section 2 of the *Canadian Charter of Rights and Freedoms*³ that can be demonstrably justified in a free and democratic society. The Court also found that section 13 does not contravene section 7 of the *Charter*. This Tribunal is bound by those findings, which are determinative of the very constitutional question under consideration before the Tribunal.
4. This Tribunal itself has ruled – prior to the enactment of section 13(2) – that the findings of the Supreme Court in *Taylor* extend “with even greater force” to the Internet.⁴ It would be an absurdity if they did not. The Internet is a ubiquitous and potentially insidious tool for the propagation of hate. The harm caused by hate speech on the

¹ *Canada (Human Rights Commission) v. Taylor*, S.C.J. No. 129 [*Taylor*].

² R.S. 1985, c. H-6 [*CHRA*].

³ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11 [*Charter*].

⁴ *Citron v. Zundel*, [2002] C.H.R.D. No. 1 [*Zundel*], *Schnell v. Machiavelli and Associates Emprize Inc.*, [2002] C.H.R.D. No. 21 [*Schnell*], *McAleer v. Canada (Human Rights Commission)*, [1996] 2 F.C. 345 (T.D.) [*McAleer*].

Internet is potentially greater than that caused by hate speech transmitted through media such as phone lines or print because the Internet creates “absolute and immediate worldwide ubiquity and accessibility.”⁵ The Internet is instantly accessible, difficult to monitor and control, and constantly developing. For this very reason, it is the modern medium of choice for spreading hate.

5. The amendments to section 54(1) and 54(1.1) of the CHRA are of small difference to their predecessor administrative penalty provisions. They continue to be an effective tool in meeting Parliament’s objectives with minimal impairment of the Respondent’s rights and freedoms.
6. The Interested Parties have undertaken not to repeat the submissions of other parties to these proceedings. They do, however, support and adopt the thorough submissions of the Attorney General of Canada on the constitutional issue.

B. HATE SPEECH TARGETING VULNERABLE GROUPS

7. The deleterious impact of hate propaganda on all vulnerable Canadians is of paramount concern to the Interested Parties. It is not offensive, objectionable, obnoxious, or demeaning speech that is sought to be curbed as a constitutional infringement. The right to push the boundaries of dissent is vitally important in a free and democratic society and the Interested Parties fully endorse that principle. The hate speech properly targeted by s.13 is of the most virulent and poisoned kind of speech. It is devoid of any redeeming social value. It only causes enduring harm to its victims and to Canadian society. Hate speech takes away an individual’s right to be treated and judged on his or her own merits. Instead, the individual is judged on negative group stereotypes. Blame for real or imagined misdeeds is assigned not to the actions of individuals, but to one or more identifiable groups to which individuals may belong. Hate resembles no other crime

⁵ See *Barrick Gold v. Lopehandia*, note 28 *infra*, at para. 35.

because it reaches beyond the immediate victim or the victim's own community, and causes damage to society itself.⁶

8. There is also a very clear connection between the spread of hate speech and physical violence to vulnerable groups. Alexander Tsesis, in his Expert Report, stated that "[t]he spread of denigrating ideas has historically been essential for gaining support for such injustices as the slaughter of Tutsis, genocide against Jews, slavery of blacks and aboriginal removal."⁷ Dr. Tsesis does not claim that hate speech is the sole cause of these historical injustices. However, he quotes from Gordon Allport, one of the foremost authorities on the psychology of prejudice, who describes their relationship with the following aphorism: "Although most barking (antilocution) does not lead to biting, yet there is never a bite without previous barking."⁸

9. In *Mugesera v. Canada (Minister of Immigration)*⁹, the Supreme Court of Canada highlighted the connection between hate speech and violence in Rwanda. In commenting on the culpability of the purveyor of a speech that described Tutsis as "cockroaches" to be "exterminated", the court stated:

Mr. Mugesera was aware of the attack occurring against Tutsi and moderate Hutu. Furthermore, a man of his education, status, and prominence on the local political scene would necessarily have known that a speech vilifying and encouraging acts of violence against the target group would have the effect of furthering the attack.¹⁰

10. The court went so far as to find that Mr. Mugesera's hate speech, which violated the Criminal Code's hate propaganda sections, was a crime against humanity.¹¹

11. The harm caused by hate speech was recognized by the Supreme Court of Canada. In *Taylor*, the Court found that hate propaganda undermines the dignity and self-worth of target group members and, more generally, contributes to disharmonious relations among various racial, cultural and religious groups. This in turn erodes the tolerance and open-

⁶ Testimony of Dr. Karen Mock, *Canadian Human Rights Hearing Transcript*, February 20-21, 2007, at 2322-2323.

⁷ Alexander Tsesis Expert Report, May 12, 2006 at 1.

⁸ *Ibid.* at 4.

⁹ [2005] 2 S.C.R. 100

¹⁰ *Ibid.* at para. 177.

¹¹ *Ibid.* at paras. 178 – 179.

mindfulness that must flourish in a multicultural society like Canada, which is committed to the idea of equality.¹² These findings led the court to conclude that the objective of section 13 was sufficiently pressing and substantial to warrant limitations on freedom of expression.¹³

12. Significant harm results from the propagation of hate, both to the identifiable groups that are victimized and to society at large. As the Commission's expert, Dr. Mock, testified, the Jewish community is particularly targeted by hate on the Internet.¹⁴
13. Anti-Semitic hate speech is something with which this Tribunal is familiar. In *Zundel*, this Tribunal described the hateful and dehumanizing anti-Semitic speech that was transmitted over the Internet as follows:

“The messages conveyed in these documents carry very specific assertions regarding the character and behaviour of Jews – none of it good. Jews are vilified in the most rabid and extreme manner, permitting, in our view, of “no redeeming qualities”. Given our reading of the material communicated via the Zundel site, we are satisfied that the test set out in Nealy, and approved in Taylor, has been met. In our judgment, these messages create an environment in which it is likely that Jews will be exposed to extreme emotions of detestation and vilification. Based on our view that the Zundel site materials characterize Jews as ‘liars, cheats, criminals and thugs’ who have deliberately engaged in a monumental fraud designed to extort funds, we regard it as highly likely that readers of these materials will, at a minimum, hold Jews in very low regard, viewing them either with contempt, scorn or disdain, or hatred, loathing and revulsion.”¹⁵

14. Dr. Mock testified that the promotion of hatred strikes at the heart of an individual's personal identity and the psychological impact of this trauma usually lasts for the rest of a person's life.¹⁶ That trauma can include symptoms of post-traumatic stress disorder, intense fear and destabilization, altered behaviour, as well as unwillingness to go outside

¹² *Supra* note 1 at 41.

¹³ *Ibid.* at 42.

¹⁴ *Supra* note 6 at 2425.

¹⁵ *Zundel*, *supra* note 4 at 140.

¹⁶ *Supra* note 6 at 2322.

or attend work.¹⁷ Victims of hate propaganda can experience the same feelings of loss, shame, depression, and other psychological difficulties that are experienced by victims of violence¹⁸. The Jewish community is regrettably all too familiar historically with these consequences of hate speech.

15. Many other vulnerable groups are the targets of hate speech. For example, Dr. Tsesis compiled a short list in his report of historical instances of hate speech and their consequences, including blacks in the ante-bellum American South, native Americans, and contemporary black slavery in Mauritania¹⁹.

C. HATE SPEECH IS INTERNATIONALLY CONDEMNED

16. Hate speech has been condemned and criminalized by international entities and democratic jurisdictions around the world. Canada ratified the United Nations *Convention on the Elimination of All forms of Racial Discrimination* on November 15, 1970, Article 4 of which requires all parties to “declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred” and “incitement to racial discrimination”. Over 170 countries have signed on to that treaty.²⁰
17. Germany, like Canada, guarantees in its Basic Law the right to “freely express and disseminate ideas in speech and writing”, and asserts broadly that “[t]here shall be no censorship.”²¹ Yet, the Basic Law itself recognizes that freedom of expression can be abused, and declares it to be forfeited when used “to combat the free democratic basic order.”²² Speech or writings that incite to “race hatred” are criminalized, and German courts have found that these laws apply to internet speech as well, and even to foreigners whose websites can be accessed in Germany.²³ Dr. Tsesis, in his Expert Report,

¹⁷ *Ibid.* at 2394 – 2395, citing the report of Bryant-Davis and Ocampo.

¹⁸ *Ibid.* at 2419 – 2420.

¹⁹ *Supra* note 7 at 2-3.

²⁰ See “Status of Ratifications of Principal International Human Rights Treaties”, online at <http://www.unhchr.ch/pdf/report.pdf>

²¹ Basic Law, Article 5.

²² *Ibid.*, Article 18.

²³ Australian Frederick Toben, a Holocaust denier, was prosecuted in Germany in 2001 for his website, the Adelaide Institute.

describes the hate speech laws and jurisprudential developments of other countries, including France, Great Britain, Denmark, Sweden, Norway, Finland, Switzerland, Israel, and Hungary, all of which are understood not to conflict with their basic commitments to free speech.²⁴

D. HATE SPEECH AND THE INTERNET

18. Section 13(2) codifies the finding of this Tribunal in *Zundel*, that section 13(1) of the CHRA is valid when applied to the propagation of hate through the Internet. In *Zundel*, this Tribunal stated:

In proceeding with this analysis it is important to begin with the proposition that s. 13(1) aims at controlling messages that are likely to expose individuals to hatred and contempt, within a realm that is open to Parliament that is open to Parliament to control, that is, facilities of a telecommunication undertaking. The *Canadian Human Rights Act*, at its foundation, assumes that individuals are equal, that groups are equal, and that mere membership in a religious, ethnic, or racial group does not carry with it any positive or negative characteristics and should not be the basis for generalized prejudice hatred or contempt. As we have seen, *Taylor* speaks of hatred and contempt by reference to *Nealey*, which spoke of extreme emotions, extreme dislike, ill will and emotion that allows no redeeming qualities in the person at whom it is directed.

The purpose of s.13(1) remains unchanged. Parliament's intent as expressed in s.13(1) recognized that hate propaganda is contrary to the high purpose expressed in section 2 of the Act. *Taylor* found that this purpose was one of pressing and substantial importance.

In our opinion, changes in technology that alter and expand the means of telephonic communication cannot diminish the importance of the purpose found in s.13(1) to prevent messages of hatred and contempt directed at identifiable groups that undermine the dignity and self-worth of those individuals. The Internet, as a technology, is capable of purveying and transmitting the same kind of hate messages restrained under s.13(1) in Taylor.

We conclude therefore that while the Internet introduces a different context from the traditional use of the telephone, the first branch of

²⁴ *Supra* note 7 at 4 – 8.

the Oakes test is satisfied. Parliament's intent to prevent serious harms caused by hate propaganda remains a matter of pressing and substantial importance and this is so whether such messages are borne through the medium described in Taylor or through the Internet.²⁵ [emphasis added]

19. As this Tribunal went on to note in *Schnell*, the Internet is a particularly dangerous and insidious method of communicating hate propaganda. As this Tribunal stated there:

If the telephone is ideally suited to spread prejudicial ideas, the Internet is even better positioned. It is a very public forum of communication, inexpensive, easily accessed, and can communicate many messages simultaneously and instantaneously to a world-wide audience. The reasons of the Court [in Taylor] apply with even greater force to the Internet.[emphasis added].²⁶

20. In *Barrick Gold Corp. v. Lopehandia*²⁷, in the context of a defamation claim, the Ontario Court of Appeal echoed prior findings of this Tribunal. As Justice Blair stated:

“...Internet defamation is distinguished from its less pervasive cousins, in terms of its potential to damage the reputation of individuals and corporations, by the features described above, especially its interactive nature, its potential for being taken at face value, and its absolute and immediate worldwide ubiquity and accessibility.”²⁸ [emphasis added]

21. The evidence before this Tribunal shows that the Internet is flourishing as a forum for hate speech. As Professor Tsesis stated:

Regulation is particularly important in the Internet setting where many hate groups have found an effective outlet for spreading intolerant speech. Both the advocates of democracy and racist groups have realized the Internet's utility for spreading opinions. Hate groups find the Internet a fertile ground for recruitment and indoctrination. They are a growing presence of the Internet. A 1995 study, developed by the Simon Wiesenthal Center, found that there were about fifty hate groups with electronic bulletin boards.
[...]

²⁵ *Zundel*, *supra* note 4 at paras. 232-234.

²⁶ *Schnell*, *supra* note 4 at para. 156.

²⁷ *Barrick Gold Corp. v. Lopehandia* (2004), 71 O.R. (3d) 416, [2004] O.J. No. 2329 (C.A.) [*Barrick* cited to O.J.].

²⁸ *Ibid.* at para. 35.

Legal means are the least restrictive means available for prohibiting the use of speech that is internationally recognized to be harmful.²⁹ [emphasis added]

22. Dr. Mock also testified that the number of hate sites has increased exponentially in the last several years.³⁰ Her report cites studies by the Media Awareness Network showing that a quarter of young Canadian Internet users report having received hateful messages.³¹
23. The proliferation of hate speech on the Internet is accompanied by several forms of individual and societal harm, many of which were identified by Dr. Mock in her testimony. They include increased potential for social violence³² and the tremendous violation and vulnerability experienced by groups exposed to hate speech over the Internet.³³
24. Dr. Mock opined that from a psychological point of view, hate laws have three beneficial purposes. First, because of the deleterious effects of hate, these laws send the message that promoting hatred and contempt will not be tolerated. Second, they create a deterrent that prevents the promotion of hatred that can lead to murder and genocide. Third, they send a message that regardless of Canadians' immutable characteristics, they will be protected and allowed to develop in full self esteem.³⁴
25. The challenged provisions are necessary to protect society from the modern ubiquitous and instantaneous scourge that constitutes Internet hate speech. This Tribunal should affirm prior findings of the Supreme Court and of this Tribunal, that hate speech is antithetical to the general aim of the CHRA. The Respondent's constitutional challenge should be dismissed.

²⁹ *Supra* note 7 at 8.

³⁰ *Supra* note 6 at 2310.

³¹ Dr. Karen Mock Expert Report, February 2007, at 9.

³² *Supra* note 6 at 2310.

³³ *Ibid.* at 2384.

³⁴ *Ibid.* at 2769 – 2770.

E. ENFORCEMENT

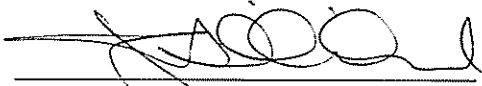
26. The manner the law is enforced does not change the constitutionality of the impugned provisions. Even if this Tribunal finds that the Commission acted inappropriately, this does not change the constitutional validity of sections 13, 54(1) and 54(1.1).


F. NATURE OF ORDER SOUGHT


27. The Interested Parties seek an order dismissing the constitutional challenge brought on behalf of the Respondent, Marc Lemire.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Toronto, August 28, 2008


per. Marvin Kurz


per. Joel Richler


per. Steven Skurka