Court File No. A-456-12

FEDERAL COURT OF APPEAL

BETWEEN:

MARC LEMIRE

Appellant

- and -

CANADIAN HUMAN RIGHTS COMMISSION
RICHARD WARMAN
ATTORNEY GENERAL OF CANADA

Respondents

- and -

AFRICAN CANADIAN LEGAL CLINIC
CANADIAN CIVIL LIBERTIES ASSOCIATION
CANADIAN ASSOCIATION FOR FREE EXPRESSION

Interveners

MEMORANDUM OF FACT AND LAW OF THE INTERVENER AFRICAN CANADIAN LEGAL CLINIC

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PART I – STATEMENT OF FACT

1. The African Canadian Legal Clinic (hereinafter referred to as the "ACLC"), is a not-for-profit organization established in 1994 expressly to address anti-Black racism and other kinds of systemic and institutional discrimination through the use of test case litigation, advocacy, law reform and public education. The link between the ACLC's mandate and this case is clear. Hate speech, whether it incites violence or not, is a manifestation of racist attitudes and beliefs which can have a far-reaching impact on the targeted community.

2. By reason of both the people the ACLC represents and the mandate that the ACLC seeks to further, the ACLC has a direct stake in ensuring that the courts recognize the full extent of racial discrimination against African Canadians in society and that this informs the analysis of whether sections 13 and 54(1) and (1.1) of the *Canadian Human Rights Act*, R.S.C. 1985, c.H-6 ("*CHRA*") unjustifiably limit section 2(b) of the Canadian *Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (hereinafter the "*Charter*"). The ACLC is concerned that the outcome of this appeal will have significant implications for the capacity of the law to protect the African Canadian community from the harmful effects of non-violent hate speech.

3. The African Canadian community is frequently the target of the type of hate speech contemplated by section 13 of the *CHRA*. In this respect, the most recent bi-annual Statistics Canada publication on hate crime reports that since 2006, hate crimes motivated by race or ethnicity are the most common of all incidents, and that African Canadians were the most commonly targeted racial group in 2010 (the most recent year for which statistics have been reported).

> Cara Dowden and Shannon Brennan, *Police-reported hate crime in Canada, 2010* (Statistics Canada, April 2012), online: <http://www.statcan.gc.ca/pub/85-002-x/2012001/article/11635-eng.pdf> at 11-12.

4. In all of the following cases, the respondents were found to be in violation of section 13 for disseminating anti-Black hate speech in addition to hate messages aimed at other minority groups: *Warman v. Winnicki,* 2006 CHRT 20 [*Winnicki*]; *Warman v. Tremaine,* 2007 CHRT 2 [*Tremaine*]; *Warman v. Harrison,* 2006 CHRT 30 [*Harrison*]; *Warman v. Guille,* 2008 CHRT 40 [*Guille*]; *Warman v. Wilkinson,* 2007 CHRT 27 [*Wilkinson*]; *Warman v. Kouba,*

2006 CHRT 50 [*Kouba*]; *Warman v. Western Canada for US*, 2006 CHRT 52 [*Bahr*]; *Warman v. Beaumont*, 2007 CHRT 49 [*Beaumont*]; *Warman v. Kulbashian*, 2006 CHRT 11 [*Kulbashian*]; *Warman v. Northern Alliance*, 2009 CHRT 10 [*Northern Alliance*]; and *Centre for Research-Action on Race Relations v. www.bcwhitepride.com*, 2008 CHRT 1 [*CRARR*].

5. Indeed, the article at the centre of this appeal – *AIDS Secrets* – contains significant anti-Black content. Ultimately, the Canadian Human Rights Tribunal ("CHRT") opted not to apply section 13 on constitutional grounds, but did find that "[…] the *AIDS Secrets* article contains material that is likely to expose homosexuals and Blacks to hatred or contempt, and that Mr. Lemire communicated the matter within the meaning of s.13 of the *Act.*"

   Warman v. Lemire, 2006 CHRT 26 [*Lemire*] at paras. 196 and 212.

6. The CHRT member in *Lemire* set out excerpts from the *AIDS Secrets* article that denigrate and vilify Blacks:

   > The author goes on to claim that the "data for heterosexuals with AIDS" show that Blacks are "between 14 and 20 times more likely to be infected than are Whites", and that "even though Blacks account for only about 12% of the US population, they account for fully 90% of all AIDS infections" acquired through "heterosexual means". The article also cites a report from the American Journal of Public Health, which apparently had found that "42% of straight White Americans with AIDS got it by having sex with non-Whites". The author also refers to another study that purportedly found that 83% of heterosexual AIDS patients in the "very White country of Belgium" were Black African immigrants, and that most of the "White males with AIDS" had lived in or regularly travelled to Central Africa. It was asserted that 70% of this last group had had sex with Black women in Africa. …

   Lemire, *supra* at para. 195.

7. Canadian courts and human rights tribunals are united in recognizing the harm that hate speech causes to targeted groups and to broader society. As the Supreme Court recently affirmed in *Saskatchewan (Human Rights Commission) v. Whatcott*, "the discriminatory effects of hate speech are part of the everyday knowledge and experience of Canadians."

   2013 SCC 11 [*Whatcott*] at paras. 74 and 135.

8. In addition to the foregoing, the ACLC relies upon the Concise Statement of Fact as set out in Part I of the Respondent Canadian Human Rights Commission's Revised Memorandum of Fact and Law filed in this appeal.

PART II – STATEMENT OF ISSUES

9. The Appellant Lemire has raised questions regarding the constitutional validity of sections 13 and 54(1) and (1.1) of the *CHRA* and in particular asserts that the learned Federal Court judge erred in his analysis of whether these sections of the *CHRA* unjustifiably limit section 2(b) of the *Charter*. The Appellant Lemire further asserts that the learned Federal Court judge erred in failing to declare section 13 of the *CHRA* to be of no force or effect.

10. The points at issue in this appeal have been fundamentally affected by the Supreme Court of Canada's 28 February 2013 decision in *Whatcott, supra*. While the ACLC previously took the position that subsections 54(1)(c) and (1.1) of the *CHRA* are punitive and therefore an unjustifiable limit on freedom of expression, in light of the SCC's findings and reasons in *Whatcott* it is now the ACLC's position that these subsections in combination with section 13 are in fact a reasonable limit on freedom of expression and ought to be upheld in this appeal.

11. The ACLC respectfully submits that the Tribunal and Federal Court erred in finding that the penalty provisions in subsections 54(1)(c) and 54(1.1) of the *CHRA* cannot be upheld as reasonable limitations on freedom of expression pursuant to section 1 of the *Charter*. In light of the significant societal harm caused by hate speech, Parliament made a reasonable choice when it added a monetary penalty as a discretionary remedy that can be awarded by the CHRT for violations of section 13.

PART III – SUBMISSIONS

A) Human Rights Remedies Must Address the Societal Harm Caused by Hate Speech

i. *Overview*

12. The objective of the *CHRA* is to confer rights on all individuals to ensure that they enjoy equal participation in Canadian society, and the values of equality and multiculturalism

enshrined in sections 15 and 27 of the *Charter* are values that informed the creation of section 13.

Canada (Human Rights Commission) v. Taylor, [1993] 3 S.C.R. 892 at 916-920 [*Taylor*].

13. The objective of section 13 is to reduce the harmful effects and social costs of discrimination. Parliament must be "accorded considerable deference" when deciding how to combat the harmful social effects of hate speech. The question is whether "Parliament has chosen one of several reasonable alternatives".

Whatcott, *supra* at paras. 71 and 78.

14. At second reading of Bill C-25 in the House of Commons, the Honourable Ron Basford, then Minister of Justice (Liberal) stated with respect to section 13 of the proposed new *CHRA*,

> These measures dealing with telephone hate messages are designed to provide an effective supplement to the provisions of the Criminal Code to combat the calculating traffickers in hate whose foul activities subvert the confidence of racial minorities in the protection that they are entitled to feel under the law.
>
> *House of Commons Debates (Hansard)*, 30th Parliament, 2nd Session (11 February 1977) at 1420.

15. Unlike the *Criminal Code* prohibition on the promotion of hatred, section 13 of the *CHRA* does not require proof of intent, nor does it provide for defences. The Supreme Court in *Whatcott* held that, for the purpose of hate speech prohibitions in human rights legislation, "it is irrelevant whether the author of the expression intended to incite hatred or discriminatory treatment or other harmful conduct towards the protected group." Further, the Court noted that even truthful statements may rise to the level of hate speech if expressed in a manner that exposes a vulnerable group to hatred.

Whatcott, *supra* at paras. 58 and 141.

16. Subsections 54(1) and (1.1) were added to the *CHRA* by Bill S-5 which was introduced in the Senate in 1997 and passed by the House of Commons in 1998. All political parties supported the amendments. At second reading in the House of Commons, MP Paul Forseth (Reform Party) stated with respect to the proposed penalty provisions:

> Under section 54 of the act a tribunal is currently restricted to use cease and desist orders where it finds that a complaint has been substantiated. Clause 28 would expand the order-making powers of tribunals in these cases. It would allow tribunals to compensate victims specifically identified in the discriminatory communication up to a maximum of $20,000 where the discriminatory practice was found to be or to have been engaged in wilfully or recklessly. The tribunal could also order the communicator to pay a penalty of up to $10,000. In considering whether to order a penalty payment the tribunal would be required to consider such factors as the nature and gravity of the practice and the wilfulness or the intent of the communicator. This would not be used lightly.
>
> Clause 28 is a response to the rising incidence of hate crimes around the world. There seems to be a need to deter individuals and organizations from establishing hate telephone lines. Victims of such lines can apply for compensation and offenders can be subjected to a financial penalty to accomplish this deterrence. … The idea seems to be that the anti-discrimination system created by the Canadian Human Rights Act would be better suited than criminal courts to deal with these types of cases.
>
> *House of Commons Debates (Hansard),* 36th Parliament, 1st Session (11 February 1998) at 1525, 1540 and 1545.

17. In none of the debates, at either second or third reading, was any issue raised about the efficacy of section 13 of the *CHRA* or the potential for the new penalty provisions to limit freedom of expression, other than to acknowledge (as noted above) the need to deter individuals from disseminating hate messages. Rather the discussion focused on the objective of stronger substantive protections and more effective remedial options within the human rights regime.

ii. *Canada's International Obligations to Protect African Canadians from the Harmful Effects of Discriminatory Hate Speech*

18. The Supreme Court in *Taylor* and *Whatcott* explicitly recognized that every *Charter* analysis must be undertaken with a view to Canada's international commitments. In *Whatcott* the Court stated that "[t]he balancing of competing *Charter* rights should also take into account Canada's international obligations with respect to international law treaty commitments … . Those commitments reflect an international recognition that certain types of expression may be limited in furtherance of other fundamental values … ."

> *Taylor, supra* at 916 and 919-920.
>
> *Whatcott, supra* at para. 67.

19. Canada is a signatory to, and bound by, the *International Convention on the Elimination of All Forms of Racial Discrimination* ("*CERD*"). The preamble of *CERD* recognizes that "all human beings are equal before the law and are entitled to equal protection of the law against any discrimination and against any incitement to discrimination".

    21 December 1965, 660 U.N.T.S. 195 (entry into force 4 January 1969, ratified by Canada 14 October 1970).

20. *CERD* provides that "[e]ach State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization." In compliance with this fundamental obligation as a signatory to *CERD*, Canada has undertaken to assure effective protection and remedies against any acts of racial discrimination, as well as the right to seek just and adequate reparation for any damage suffered as a result of such discrimination.

    CERD, supra Articles 2(1)(d) and 6.

21. Article 4 of *CERD* with respect to hate speech requires that,

    States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights … inter alia:

    (a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as any acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin …

    See also Article 22 of the *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171 (entry into force 23 March 1976, acceded to by Canada 19 May 1976) which provides "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."

22. On 17 March 1993 the United Nations Committee on the Elimination of Racial Discrimination ("Committee") adopted General Recommendation No. 15 on *Organized violence based on ethnic origin (Art. 4).* The Committee affirmed the importance of Article 4 as "central to the struggle against racial discrimination," recalled that the provisions of

Article 4 are of a mandatory character, opined that the prohibition of the dissemination of all ideas based upon racial superiority or hatred is compatible with the right to freedom of opinion and expression, and affirmed that Article 4 requires states to penalize, *inter alia*, the dissemination of ideas based upon racial superiority or hatred. The Committee recently held a 'Thematic Discussion on Racist Hate Speech' in August 2012, which included the topic of racist hate speech and freedom of opinion and expression, out of which a further General Recommendation will likely be adopted.

CERD/C/GC/15, contained in UN Doc. A/48/18 (15 September 1993) at paras. 1 to 4.

23. Further, the Committee in its General Recommendation No. 34 (September 2011) on *Racial Discrimination against People of African Descent* recommends that State Parties to *CERD* "take measures to prevent any dissemination of ideas of racial superiority and inferiority" and "take strict measures against any incitement to discrimination or violence against people of African descent including through the Internet and related facilities of similar nature."

CERD/C/GC/34 (3 October 2011) at paras. 27 and 29.

24. The Committee specifically addressed Canada's compliance with *CERD* in its most recent concluding observations on Canada's periodic reports (April 2012) and expressed its concern with respect to Canada's compliance with its obligations in Article 4 of *CERD*. The Committee recommended that Canada "amend or adopt relevant legislation" to ensure compliance with Article 4.

CERD/C/CAN/CO/19-20 (4 April 2012) at para. 13.

25. In summary, the legislative history of section 54 and Canada's international obligations are important aspects of the contextual approach that should inform this Court's analysis under section 1 of the *Charter*. To interpret the *Charter* as requiring the removal of the penalty provision from section 54 of the *CHRA* would run counter to the consensus expressed in Parliament with the passage of Bill S-5, that expanded remedial discretion is required in order to meet the objectives of the *CHRA* and fulfill Canada's international obligations.

iii. *The Supreme Court's Decision in* Whatcott

26. As the Supreme Court confirmed in *Whatcott*, "[t]he protection of vulnerable groups from the harmful effects emanating from hate speech is of such importance as to justify the minimal infringement of expression that results from the restriction of materials of this kind."

    Whatcott, supra at para. 148.

27. The ACLC submits that any doubts about the constitutional validity of subsection 54(1)(c) should be put to rest by the Supreme Court of Canada's ruling in *Whatcott*. The Court emphasized that hate speech causes societal harms through the marginalization of groups, noting that "delegitimization reduces the target group's credibility, social standing and acceptance within society and is a key aspect of the social harm caused by hate speech." Moreover, the Court emphasized the importance of deference to Parliament's choice of reasonable alternatives to address these societal harms.

    Whatcott, supra at paras. 43 and 78.

28. At the time the complaints were filed in the *Whatcott* case, subsection 31.4(b) of the *Saskatchewan Human Rights Code* permitted the Human Rights Tribunal (and now permits the Court of Queen's Bench) to make an order requiring a person found to have contravened the *Code*, including the prohibition on the publication of hateful representations in section 14, to pay compensation up to a maximum of $10,000 to any complainant injured by the violation, if the contravention was wilful or reckless, or if the contravention caused a complainant to suffer "with respect to feeling, dignity or self-respect".

    Saskatchewan Human Rights Code, SS 1979, c. S-24.1 [*Code*].

29. In *Whatcott*, four complainants had received flyers distributed by Mr. Whatcott to their homes. The complainants were not named in the flyers nor were they targeted as recipients. The flyers were widely distributed. The Saskatchewan Human Rights Tribunal ("Tribunal") ordered Mr. Whatcott to pay a sum of $17,500 ($2,500 to the first complainant, and $5,000 to each of the other three complainants), as compensation for the complainants' loss of dignity and self-respect and hurt feelings.

Wallace v. Whatcott, (2005) 52 CHRR D/264 (Sask HRT) at paras 64, 67 and 69-70 [*Whatcott 1*].

30. On appeal, the Supreme Court of Canada found that the flyers received by two of the complainants constituted hate speech. For those two complainants, Guy Taylor and James Komar, Justice Rothstein upheld the Tribunal's compensation awards of $2,500 and $5,000 respectively.

Whatcott, supra at para. 205.

31. Justice Rothstein noted that the Tribunal "awarded compensation based on the harm caused by the receipt of the flyers by the individuals". The evidence of harm relied on by the Tribunal consisted of Mr. Taylor's testimony that he was hurt and offended by the flyer he received and the evidence of an expert witness on the general impact that homophobia and discrimination, including Whatcott's flyers, have on members of the gay and lesbian community. In Mr. Komar's case, the expert evidence was the only evidence of harm before the Tribunal. In other words, the legislative scheme upheld by the Supreme Court of Canada in *Whatcott* enables an adjudicator to award compensation of up to $10,000 to any complainant who is a member of a community harmed by hate speech.

Whatcott 1, supra at paras 15-27 (summary of evidence of Gens Hellquist), 62-64 (evidence of harm to Mr. Taylor) and 68-69 (evidence of harm to Mr. Komar).

Whatcott, supra at para. 204.

32. Justice Rothstein commented on the penalty provision of the *Code* in his discussion of the proportionate effects stage of the *Oakes* test. Mr. Whatcott argued that imposing financial liability on those found to have published hate speech has a chilling effect on freedom of expression that outweighs the benefits of reducing the harms of hate speech. Justice Rothstein rejected this submission as follows:

> As in tort law, an award of damages made pursuant to the *Code* is characterized as compensatory, not punitive, and is directed at compensating the victim. However, the circumstances in which a compensation award will be merited should be rare and will often involve repeat litigants who refuse to participate in a conciliatory approach.

> The Attorney General for Saskatchewan pointed out amendments that were made to the *Code* in 2000 (S.S. 2000, c. 26) to strengthen its civil nature. Those amendments eliminated any possibility for imprisonment for a breach of the *Code*, strengthened the mediation and settlement aspects of the *Code* and gave the Chief Commissioner the duty to screen cases before they proceed. Contravening a substantive provision of the *Code* is no longer an offence, and will not result in the imposition of any fines, unless imposed for contempt of an order. Amendments brought since the tribunal hearing in this case (S.S. 2011, c. 17) again strengthen the mediation option and screening of cases, and provide that new complaints will be heard by the Court of Queen's Bench, rather than the Tribunal. These amendments render unpersuasive the argument that paying fines and compensation are an effect that outweighs the benefits of s. 14(1)(b).
>
> *Whatcott, supra* at paras. 149-150.

33. From the point of view of their impact on freedom of expression, and their capacity to deter the public wrongs caused by hate speech, the remedial provisions in subsection 54(1) of the *CHRA* and sections 31.3 and 31.4 of the *Code* upheld in *Whatcott* are comparable:

- Cease and desist orders: Both give adjudicators discretion to issue cease and desist orders (s.31.3(a) of the *Code* and s.54(1)(a) of the *CHRA*).
- Compensatory orders: Both give adjudicators discretion to make awards of compensation to complainants (s.31.4 of the *Code* and s.54(1)(b) of the *CHRA*). The *Code* permits awards of up to $10,000 to any injured complainant if the contravention of the prohibition on hate speech was wilful or reckless or if it resulted in an injury to the complainant's feelings, dignity or self-respect, even if the complainant was not directly named or targeted. The *CHRA* permits larger compensatory awards to a smaller group of complainants. It gives discretion to the CHRT to award up to $20,000 to compensate a victim if the contravention was wilful or reckless and the complainant was "specifically identified in the communication that constituted the discriminatory practice". If Whatcott's flyers found by the Supreme Court to be hate speech were posted on the internet, the CHRT could not issue any compensatory orders pursuant to subsection 54(1)(b) of the *CHRA*, as the flyers do not specifically identify anyone.
- Financial penalties: Subsection 54(1)(c) of the *CHRA* gives the CHRT the discretion to order the payment of a penalty of up to $10,000 for violations of section 13; the *Code* does not make provision for financial penalties.
- Imprisonment: Neither the *CHRA* nor the *Code* makes a contravention of the hate speech prohibition an offence punishable by a term of imprisonment.

34. To summarize, the remedial provisions of the *CHRA* and the *Code* take the same approach to cease and desist orders (available) and imprisonment (unavailable). They differ on the respective roles they give to compensatory orders and financial penalties. While the *Code*

permits compensatory orders to be made to any complainants who are members of groups targeted by hate speech, but makes no provision for financial penalties, the *CHRA* permits compensatory orders to be made only to complainants specifically identified in wilfully or recklessly communicated hate speech, and also permits the CHRT to order financial penalties. The ACLC respectfully submits that these financial penalties are a reasonable means of addressing the societal harm caused by hate speech where there is no specifically identified victim.

B) Subsections 54(1) and (1.1) Are Reasonable Remedies in Extreme Cases

35. Complaints of violation of section 13 of the *CHRA* can be made by members of the public who are not members of the groups targeted by the communications at issue. Section 40(1) of the *CHRA* provides that complaints may be filed by "any individual or group of individuals having reasonable grounds for believing that a person is engaging or has engaged in a discriminatory practice". Subsection 40(5)(b) makes clear that one of the circumstances in which Parliament intended non-victims to be able to file complaints pursuant to subsection 40(1) is when communications violate section 13 but "no particular individual is identifiable as the victim".

36. Like the *AIDS Secrets* article at issue in this case, most of the communications that have been the subject of section 13 complaints express white supremacist views that target Blacks and other non-white groups as a whole without identifying any particular individual. As a result, awards of special compensation pursuant to subsection 54(1)(b) are rare. The Canadian Human Rights Commission found that the CHRT has issued awards of special compensation in a quarter (4 of 16) of the rulings finding a violation of section 13. Indeed, if it were not for the targeting of Richard Warman for special vitriol by white supremacists, subsection 54(1)(b) compensation orders would not be a significant element of the section 13 case law.

> Canadian Human Rights Commission, *Special Report to Parliament: Freedom of Expression and Freedom from Hate in the Internet Age* (June 2009) at 24 [*CHRC Special Report*].
>
> No special compensation order made pursuant to s.54(1)(b): *Schnell v. Machiavelli and Associates Emprize Inc.*, [2002] CHRD No. 21, 43 CHRR D/453; *Warman v Eldon Warman*, 2005 CHRT 36 [*Eldon Warman*]; *Winnicki, supra*; *Harrison, supra*; *Kouba,*

supra; *Bahr, supra*; *Tremaine, supra*; *Wilkinson, supra*; *CRARR, supra*; *Guille, supra*; *Northern Alliance, supra*.

Special compensation order made pursuant to s.54(1)(b): *Warman v Kyburz*, 2003 CHRT 18 ($15,000 awarded to Mr. Warman); *Kulbashian, supra* ($5,000 awarded to Mr. Warman); *Beaumont, supra* ($3,000 awarded to Mr. Warman).

37. Since the preconditions for awards of special compensation are rarely present in section 13 cases, the CHRT relies more heavily on the other remedies in section 54. The CHRT has issued cease and desist orders in every case finding a violation of section 13. Prior to the ruling in *Lemire, supra*, the CHRT had exercised its discretion to order the payment of penalties pursuant to subsection 54(1)(c) in three-quarters (12 of 16) of the cases finding violations of section 13. This is not surprising, since section 13 complaints that proceed to the CHRT are limited to "the most extreme and hateful forms of discriminatory expression." In fact, 49 of 66 section 13 complaints have not proceeded to the CHRT, but have been dismissed, withdrawn or settled. The average amount of the penalty ordered for violations of section 13 has been roughly $4,000. If the ruling of the Federal Court in this case is upheld, and the power to award penalties pursuant to subsection 54(1)(c) is removed from the CHRT, then the *CHRA* will provide no means of holding violators of section 13 financially accountable for the broader societal harm caused by hate speech that does not target identified individuals.

CHRC Special Report, supra at 23-24.

Penalties ordered pursuant to s.54(1)(c): *Kyburz, supra* at para. 101 ($7,500); *Kulbashian, supra* at paras. 150-156 ($1,000, $1,000, $3,000 and $3,000 against four respondents); *Winnicki, supra* at para. 211 ($6,000); *Harrison, supra* at para. 80 ($1,000); *Kouba, supra* at para. 144 ($7,500); *Bahr, supra* at para. 96 ($5,000 and $5,000 against two respondents); *Tremaine, supra* at para. 168 ($4,000); *Wilkinson, supra* at para. 72 ($4,000); *Beaumont, supra* at para. 104 ($1,500); *CRARR, supra* at para. 91 ($6,000).

No penalty ordered pursuant to s.54(1)(c): *Schnell, supra* at para. 163; *Eldon Warman, supra* at para. 84; *Guille, supra* at para. 185; *Northern Alliance, supra* at para. 64.

38. CHRT members have expressed divergent opinions on the constitutionality of the subsection 54(1)(c) penalty provision. The adjudicator in the current proceeding, and in *Eldon Warman, supra*, expressed doubts about the constitutionality of introducing penalties that move beyond

"the conciliatory, preventative, and remedial nature of s. 13" emphasized by the Supreme Court of Canada in its section 1 analysis in *Taylor*.

Lemire, supra at para. 262.

Eldon Warman, supra at paras. 50-70.

39. Other members have affirmed the constitutional validity of the penalty provision in subsection 54(1)(c). For example, in *Schnell*, the adjudicator concluded that Parliament's expansion of section 54 remedial powers did not alter the conclusion reached by the Supreme Court of Canada in *Taylor* that section 13 imposed reasonable limits on freedom of expression. CHRT Chair J. Grant Sinclair wrote as follows:

> …in my opinion, these amendments do not have the result of pushing s. 13(1) over the line to unconstitutionality. The cease and desist order remains the most effective means and is most closely aligned to achieve the objective of this legislative provision. The special compensation remedy carries with it an "intent requirement". It can only be ordered on a finding that the person who engaged in the discriminatory practise did so wilfully, i.e. with intent, or recklessly, i.e. without regard for the consequences of his/her actions. Similarly, before a Tribunal can impose a penalty, it must take into account the wilfulness and intent of the person who engaged in the discriminatory practice, any prior discriminatory practices, and the person's ability to pay. The Tribunal must consider the nature, circumstances, extent and the gravity of the discriminatory practice. Although the Act has shed a little bit of its conciliatory character, in my opinion, the effect has been ameliorated by the requirements to show intent in s. 54(1)(b) and (c) and by the other factors that the Tribunal must take into account.
>
> *Schnell*, *supra* at para. 159.

40. When Bill S-5 was under consideration by the Standing Committee on Justice and Human Rights in 1998, Chief Commissioner Michelle Falardeau-Ramsay spoke in support of the amendments on behalf of the Canadian Human Rights Commission:

> Since the main purpose of human rights law is to redress acts of discrimination, to make the victim whole, so to speak, a $20,000 maximum would more accurately reflect the actual pain and suffering that is caused in many cases. We also believe the higher award limit could make respondents take their responsibilities under the act more seriously and would indicate the importance that Parliament places on deterring discrimination.
>
> Similarly, we support the provisions of the bill that strengthen section 13 of the act, dealing with the dissemination of hate propaganda. Under the existing act, the only action

> a tribunal can take in these cases is to order the respondent to stop distributing the messages. No penalty can be imposed on respondents, and there is no redress for individuals who have been specifically named in hate messages. The amendments would give section 13 more teeth and could serve as a deterrent for those who are considering using telephone lines or the Internet to incite hatred.
>
> Canada, House of Commons, Standing Committee on Justice and Human Rights, Minutes of Evidence (17 March 1998) at 0910.

41. The differing opinions expressed by the CHRT members in *Schnell* and *Lemire* reflect uncertainty created in the wake of the *Taylor* ruling by Chief Justice Dickson's emphasis in his section 1 analysis on the conciliatory, compensatory and remedial features of the *CHRA*. The majority opinion in *Taylor* does not state explicitly that imposing penalties for violations of section 13 would be unconstitutional. To read an implicit limitation along those lines into the Chief Justice's section 1 analysis is to confuse reasonableness with necessity.

42. The section 1 discussion in *Taylor* explains why Parliament had made a reasonable choice. Parliament must be given the flexibility to choose remedial options from among the range of reasonable alternatives that will be effective in combating hate speech in accordance with Canada's international obligations. As long as the conciliatory and compensatory features of the *CHRA* continue to predominate, the addition of subsection 54(1)(c) is not incompatible with the majority's reasoning in *Taylor* or with the Court's decision in *Whatcott*. The ACLC respectfully submits that the views of the CHRT expressed in *Schnell* are therefore to be preferred over the views expressed in *Lemire*.

C) Conclusion

43. Parliament made a reasonable choice to include a penalty provision in section 54 of the *CHRA* as a means of imposing financial accountability on violators of section 13 for the harms they have caused to society. As described above, the Supreme Court in *Whatcott* upheld provisions of the Saskatchewan *Code* that expose violators of its hate speech prohibition to greater financial liability than does section 54 of the *CHRA*.

44. The CHRT's power to award financial penalties pursuant to subsection 54(1)(c) is discretionary. Parliament has set out factors in subsection 54(1.1) that structure the exercise of that discretion, including the gravity and wilfulness of the discriminatory practice, any

prior violations, and the violator's ability to pay. These factors have been interpreted by the CHRT as justifying imposition of penalties for the most egregious forms of hate speech that are intentionally or wilfully communicated, especially by repeat offenders who have the ability to pay. If concerns exist about financial penalties potentially imposing unreasonable restrictions on freedom of expression, they should not be directed at the statutory discretion itself, but rather at unreasonable exercises of discretion by the CHRT in particular cases.

45. As recognized by Parliament when introducing this legislation, race-based hate is a persistent and pervasive problem in Canadian society that cannot be solved by one means alone. The eradication of hate requires a multi-pronged approach which includes both criminal and civil modes of recourse. Section 13 of the *CHRA* and its corresponding remedial provisions are an important component of this 'anti-hate toolkit' with a purpose and function that are distinct and separate from the hate propaganda section of the *Criminal Code.* It is in the best interest of the African Canadian community that section 13 of the *CHRA* be preserved as a whole, including subsections 54(1) and (1.1), in order to effectively address the significant societal harm caused by racist hate speech.

PART IV – ORDER SOUGHT

46. In light of the foregoing, the ACLC respectfully submits that this Court ought to find that sections 13 and subsections 54(1)(c) and (1.1) of the *CHRA* are reasonable limits on freedom of expression in a free and democratic society.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, at Toronto this 10th day of May, 2013.

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PART V – LIST OF AUTHORITIES

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Court File No. A-456-12

FEDERAL COURT OF APPEAL

BETWEEN:

MARC LEMIRE

Appellant

- and -

CANADIAN HUMAN RIGHTS COMMISSION
ATTORNEY GENERAL OF CANADA
and RICHARD WARMAN

Respondents

- and -

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Interveners

MEMORANDUM OF FACT AND LAW OF THE INTERVENER AFRICAN CANADIAN LEGAL CLINIC

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