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Canadian Human Rights Tribunal
Tribunal canadien des droits de la personne

Reasons For Decision

BETWEEN:

SABINA CITRON

Complainants

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

ERNST ZÜNDEL

Respondent

- and -

LEAGUE FOR HUMAN RIGHTS OF B'NAI BRITH CANADA

CANADIAN HOLOCAUST REMEMBRANCE ASSOCIATION

SIMON WIESENTHAL CENTRE

CANADIAN JEWISH CONGRESS

CANADIAN ASSOCIATION FOR FREE EXPRESSION INC.

Interested Parties

REASONS FOR DECISION

T.D. 1/02 2002/01/18

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Reva Devins, Member

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(a) Analysis

[1] Access to the Internet has revolutionized global communication and has had a profound impact on modern society. With its promise of readily accessible information and the explosion in use of the Internet, serious concerns have been raised about the content found on many sites. The relationship of the Internet to existing regulatory frameworks, such as restrictions on the display of pornography, the protection of individual privacy, and the limits of permissible commerce are all the subject of significant legal debate and public controversy.

[2] As we begin to explore the legal limits of the use of the Internet for the mass distribution of information, fundamental issues are raised regarding the preservation of legitimate free speech interests. At the same time, the proliferation of alleged 'hate sites' on the World Wide Web has been particularly disturbing for the equality seeking community. This case, for the first time, raises squarely the application of the *Canadian Human Rights Act* to sites on the World Wide Web, and yet again exposes the constant tension between competing social interests.

[3] The complaints now before us seek to apply s. 13(1) of the *Canadian Human Rights Act* to communication via the Internet. It is alleged that by posting material to the Zundelsite, the Respondent, Ernst Zündel, caused repeated telephonic communication that was likely to expose Jews to hatred or contempt. We are therefore asked to determine whether it is a discriminatory practice to post material on a Website if the material is likely to expose a person to hatred or contempt. What limits, if any, are to be applied to repeated communication of hate messages via the Internet? Finally, if applied to the Internet, is this a permissible restriction on freedom of speech under the *Charter of Rights and Freedoms*?

I. THE COMPLAINTS

[4] On July 18, 1996, the Mayor's Committee On Community And Race Relations (the "Mayor's Committee") filed a complaint with the Canadian Human Rights

Commission (the "Commission") alleging that Ernst Zündel was placing messages on the World Wide Web that were likely to expose a person or persons to hatred or contempt, on the basis that those individuals were identifiable on the basis of a prohibited ground of discrimination, contrary to s. 13(1) of the Canadian Human Rights Act.

[5] The particulars of this complaint allege that from October 10, 1995 onward, Ernst Zündel offered a Homepage on the World Wide Web that repeatedly provided pamphlets and publications that were likely to expose persons of the Jewish faith and ethnic origin to hatred and contempt. Examples of these messages were cited in, and attached to the Complaint form and included the following publications: "Did Six Million Really Die", "66 Questions and Answers on the Holocaust", and "Jewish Soap" (1).

[6] Sabina Citron, who identifies herself as a Jew and survivor of the Holocaust, lodged a parallel complaint on September 25, 1996. In the particulars of her complaint, Ms. Citron alleges that she read similar information to that outlined in the complaint by the Mayor's Committee, and that she believes that these messages are likely to expose her and others to hatred and contempt. She further states that she downloaded these materials on August 14, 1996 from a Homepage called the "Zundelsite", which she asserts is offered by the Respondent, Ernst Zündel on the World Wide Web.

[7] The central thesis of both complaints is that the Respondent, Ernst Zündel, was engaged in a discriminatory practise when he caused to be communicated, via the World Wide Web and the Internet, material that was likely to expose Jews to hatred and contempt. It is alleged that, by posting material on the Zundelsite the Respondent has caused the repeated telephonic communication of hate messages.

II. PROCEDURAL BACKGROUND (2)

[8] The history of adjudication before the Canadian Human Rights Tribunal has demonstrated that complaints alleging the communication of 'hate messages' have invariably been the most vigorously defended, protracted and intensely emotional. This case proved to be no different. In the end, the inquiry into these complaints required 55 days of hearing, spanning over a number of years. There were constant evidentiary objections, and several motions to discontinue the proceedings for a variety of different reasons.

[9] Prior to setting out our reasons for decision on the merits of these complaints, we believe that it is necessary to review the procedural history of this hearing to provide the context for a number of our subsequent comments. The nature of the motions advanced and the emotions aroused in the course of the hearing ultimately affected the timing and orderly progression of this hearing.

[10] In particular, we must note that the Respondent did not participate in the submission of final argument on the merits of the case. He did provide written submissions on his constitutional motion challenging the validity of s. 13(1) of the Act, but we have been forced to turn to arguments raised at other times in order to extrapolate his defence on the merits. Obviously, there are certain constraints on our ability to anticipate the Respondent's arguments, however, we have tried to put forward all of the arguments initially advanced in the course of the hearing by Mr. Zündel's counsel prior to his withdrawal from the proceedings, as well as those issues that arise on the evidence before us.

[11] A chronology of the main procedural elements in this case is as follows:

a. The complaints were filed in July and September of 1996;

b. The matter was referred by the Commission to the Tribunal for a hearing on the merits on November 22, 1996;

c. The hearing was convened on May 26, 1997 before a three-member panel (3). The first three days of the hearing were reserved for arguments on a preliminary motion brought by the Respondent to have the matter adjourned; this motion was dismissed on May 27, 1997.

d. Intervener applications brought by the League for Human Rights of B'Nai Brith Canada, Canadian Holocaust Remembrance Association, and Simon Wiesenthal Center were heard on May 27, 1997, and allowed on June 19, 1997. The further application for intervener status brought by the Canadian Jewish Congress, and Canadian Association for Free Expression Inc. were allowed on October 14, 1997 and December 15, 1997, respectively. The application of Mr. Marc Lemire was denied.

e. The Commission opened its case on October 14, 1997, calling six witnesses, including three experts: one each in the fields of telecommunication and the Internet, discourse analysis, and historical anti-Semitism;

f. The Respondent opened his case on May 28, 1998, and called eight witnesses, including two experts, one in the field of telecommunications and the Internet, the other in the area of Holocaust Revisionism. Four other witnesses tendered as experts by the Respondent were not accepted as experts in the field in which they were being proposed (4);

g. Literally, from the day the hearing convened to the final days reserved for oral argument the Respondent brought a series of motions requesting that the hearing be adjourned or stayed:

1. Preliminary motion to stay on May 27, 1997;

2. October 14, 1997 motion to obtain information regarding Member's background;

3. April 8, 1998 motion to stay for institutional bias, based on Madam Justice McGillis' decision in *Bell* (#1);

4. June 10, 1998 motion alleging apprehended bias regarding Member Devins;

5. November 12, 1998 motion on institutional bias as a result of amendments to the *Canadian Human Rights Act*;

6. December 7, 1998, motion regarding resignation of Member Jain;

7. November 9, 2000 motion to adjourn pending the appeal of the Federal Court decision;

8. February 26, 2001 motion to stay as the issue was now alleged to be moot, on the grounds of counsel's assertion that Mr. Zündel had moved to the United States.

The Tribunal denied all of these motions, and proceeded in each instance to hear the evidence and argument on the merits of the complaints.

h. As the hearing progressed, many of the rulings made by the Tribunal were also reviewed in the Federal Court of Canada. On April 13, 1999, the Federal Court, Trial Division allowed the Respondent's motion alleging the apprehended bias of Member Devins. Although this decision was subsequently overturned by the Federal Court of Appeal on May 18, 2000, the hearing was adjourned for over 18 months;

i. On November 15, 2000 the Respondent brought a formal motion challenging the constitutionality of s. 13(1) of the Act. On November 9, 2000 the Respondent had requested that the constitutional motion be dealt with by affidavit evidence. After this request was denied, the Respondent's counsel D. Christie withdrew from the hearing. Counsel B. Kulazska did remain, and actively participated in the hearing on Mr. Zündel's behalf up to, but not including the presentation of final argument.

j. The Canadian Association for Free Expression Inc. called five witnesses on the Constitutional motion, Ms. Kulazska was present for the examination of these witnesses.

k. On December 7, 2000, at the conclusion of the presentation of evidence, the Tribunal established a schedule for final argument, with written submissions. The Respondent submitted written argument on the constitutional motion only.

l. Hearing dates were set for oral argument to begin February 26, 2001. At the commencement of oral argument, the Respondent brought a final motion to

dismiss the complaints as moot, this motion was dismissed. Thereafter, the Respondent did not participate in oral submissions.

III. ISSUES

[12] Despite their novelty and significance, the issues raised by these complaints are straightforward:

1. Is Mr. Zündel a proper Respondent? Did he communicate or cause to be communicated the material found on the Zundelsite?

2. Was the material on the Zundelsite communicated telephonically, repeatedly, in whole or in part by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament?

3. Are the materials contained on the Zundelsite likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination?

4. If s. 13 (1) applies to the Internet, does it violate s.2 (a), 2 (b), or s.7 of the *Canadian Charter of Rights and Freedoms*?

5. Remedy - is it appropriate to make an Order that might be of limited effect?

Canadian Human Rights Act

Section 2

The purpose of this Act is to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence for which a pardon has been granted.

Section 3(1)

For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for which a pardon has been granted.

Section 13(1)

Hate messages - It is a discriminatory practice for a person or a group of persons acting in concert to communicate telephonically or to cause to be so communicated, repeatedly, in whole or in part by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament, any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination.

VI. WAS THE MATERIAL ON THE ZUNDELSITE COMMUNICATED TELEPHONICALLY, REPEATEDLY, IN WHOLE OR IN PART BY MEANS OF THE FACILITIES OF A TELECOMMUNICATION UNDERTAKING WITHIN THE LEGISLATIVE AUTHORITY OF PARLIAMENT? [49] We have concluded that the Respondent controlled the Zundelsite, however, it remains to be determined whether s. 13(1) embraces the transmission of data via the Internet.

[50] The analysis of this issue can usefully be divided into three sub-issues:

1. Was the material communicated telephonically?

2. Was the communication, in whole or in part, by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament?

3. Was there repeated communication caused by the Respondent?

[51] Each of these sub-issues represents distinct constituent elements under s. 13, and therefore all of the above noted questions must be answered in the affirmative if the complaints are to be substantiated.

1. Was the Material Communicated Telephonically?

A. Expert Evidence: Ian Angus and Bernard Klatt

[52] The Tribunal heard from two expert witnesses qualified in the field of telecommunications and the Internet. Mr. Ian Angus, called by the Commission, has acquired expertise in this area over a 25-year career in the industry, most recently as an independent consultant. The Respondent called Mr. Bernard Klatt, who has worked in the computer industry since 1973, and owned and operated his own business as an Internet Service Provider between 1995 and 1998 (12).

[53] The Tribunal heard considerable evidence from these experts regarding the operation of the Internet, the role of the World Wide Web, and the relationship between the telephone or telecommunication network and the transmission of data via the Internet. Although there were substantial areas of disagreement in the evidence given by these two witnesses, there was also considerable agreement on certain features of the Internet, and the World Wide Web.

[54] The evidence of Mr. Angus and Mr. Klatt diverged largely around the meaning of "telephonic" and "telephony". Where Mr. Angus used the term "telephony" to embrace the transmission of a broad range of information including sound, data, video or graphic signals, Mr. Klatt used a more restrictive definition that embraced the transmission of sound only.

[55] There was no disagreement, however, on certain elementary features of current communication technology. The evidence that follows is an overview of some of the essential elements of the telephone or telecommunication network "> (13), the operation of the Internet, and the World Wide Web.

(i) Global Telecommunication

[56] At its most basic level, the telephone network simply provides a local, national and global set of connections that permits communication over a distance. Global telecommunication networks operate by an inter-connected system that allows communication links to be established throughout the system. Communication links can be established regardless of whether they are situated in different countries, or are operated by different companies. The physical components of the network are owned and operated by countless telephone companies (14). While the free flow of traffic over the entire network is essential to the success of the system, ownership remains local.

[57] The essential physical components of the telephone network are the circuits, switches, and communication terminals. The circuits provide the communication paths between different points in the telecommunication network. Historically, copper wire carried sound traffic or transmissions. More recent technological advancement has allowed the transmission of signals over optical fibres, or by way of wireless links, and the circuits have been adapted for other uses including the transmission of fax or Internet data (15). Conceptually, a circuit can be dedicated for full time use by a specific user, or may be shared by multiple users on a call-by-call basis. The same physical lines or circuits are used regardless of the kind of information transmitted, or whether the circuit is shared or dedicated.

[58] Switches are large computers set up at network hub points to control circuit-to-circuit connections. They set up, monitor and release the incoming connections and link them with the appropriate outgoing circuit. Communication terminals are the final or destination component that allows an individual to use the telephone network, and would include a telephone handset. Other examples of communication terminals include Telephone Devices for the Deaf (T.D.D.'s), computers, fax machines, modems, and voice mail and alarm systems. Increasingly, communication terminals are no longer single use devices, but are designed to perform multiple communication tasks, such as a computer with an integrated fax and voice mail system.

[59] A conventional telephone operates by converting sound into an electrical impulse that can then be transmitted along a circuit. Traditionally, the necessary

conversion of sound was in analog form, and a telephone handset would convert sound waves into an electrical image of sound by creating electrical waves that were analogous to the sound wave. Digital transmission, the transmission of a measurement of the wave in Digital Bits, has significant advantages in terms of the quality of transmission and cost and is increasingly the preferred mode of transmission. As a result, many telephone calls will be processed at least partially in digital form.

(ii) The Internet

[60] The Internet is a means of global communication that relies on a universal set of protocols or standards for the transmission of information. Two related sets of communication instructions, Transmission Control Protocol, (TCP) and Internet Protocol, (IP), govern how information will move through the system, defining addresses, routing systems, and all the regulation necessary to permit communication among users.

[61] When information is carried on the Internet en route to its designated destination, it is always organized and broken down into a number of different packets. Each packet is destined for the same location but can be routed separately, with reorganization into the original form once all, or most, of the packets have arrived. At each point of transmission, an independent decision is made that determines where the packet will be routed next. This method of transmission was originally designed to ensure that military communication was maintained despite the possible destruction of one or more transmission hubs. The system cannot accommodate advance directions to designate the precise routing for the entire transmission over the Internet. The sender and the receiver can control the routing of packets over a limited segment of the Internet, but cannot assign a pre-determined path for the entire course of transmission.

[62] Connection between Internet users who wish to communicate in one fashion or another, by way of e-mail, chat rooms, or web sites, inevitably follows a complex route. There is no direct connection between the two points seeking to communicate; there is instead a series of connections running through a succession of distinct components.

[63] The first step in this chain involves the establishment of a link with the Internet. The typical Internet user (16) will not have direct access to the Internet and will use a port of entry supplied by an Internet Service Provider (ISP). To connect through an ISP, a modem (17) must first convert the digital information from the user's computer into either analog or digital signals that can be relayed to the ISP. In the vast majority of cases, the modem will "dial up" the ISP, establish a connection through the local phone switch, and wait for the ISP to answer the call. If the ISP has an insufficient number of lines to accommodate their clients, a user, through their modem, may experience a "busy signal" and not be able to open up a connection with their ISP at the time requested.

[64] If all goes well, the ISP has an open line, and their modem will answer the call, set up a connection and convert the input back into a format that it can use for transmission over the Internet. There are alternative means of connecting to an ISP: coaxial cables, wireless or satellite connections, but they represent a very small proportion of connections. At the date of this hearing (18) , Mr. Angus estimated that roughly two to five percent of the market maintained a connection with their ISP through means other than the traditional telephone network. This is consistent with Mr. Klatt's experience when his company was an ISP. His was the only ISP in British Columbia to provide cable connection to residential clients, and no more than ten percent of his clients, a sub-set of the total ISP market in B.C., availed themselves of this opportunity.>

[65] Once a connection is established between a user's computer and their ISP, the ISP provides a further connection to the Internet itself. Inside the Internet, a further series of routings is required before the information arrives at its destination. These links are made by a series of high-speed connections on a pathway referred to as the Internet backbone, a global network of specialized equipment that directs traffic over the Internet. The existence of these multiple steps, using individual computers and switching equipment, is what makes it impossible for the sender or receivers to pre-determine the route of transmission of data over the Internet. At each link, the Internet backbone provider will route the digital packets of information to another point on its eventual journey to and from the sending or receiving ISP and end user.

[66] In Canada the network access points and the Internet all run over the same circuits or lines that are used for telephone activity. Like the commercial reality for users wishing to connect with their ISP, the overwhelming proportion of links between an ISP and the Internet backbone, or transmissions among Internet backbone providers use circuits that are, and were, a part of the global telephone network.

(iii) The World Wide Web

[67] The World Wide Web, (the "Web"), is a specific application that uses the Internet to send and display data, including text, graphics, audio and video. There are two active components on the Web: a server that stores and transmits information, and a client or browser that requests, receives and displays the information obtained from the server. A "web site" is a collection of computer files that are coded in a specific way (19) to allow information to be sent on request to a browser. The files are then displayed in a way consistent with the instructions provided by the creator of the web site. Every web site has a unique Uniform Resource Locator (URL), akin to their Internet address. Once connected to the Internet, the URL (20) is necessary to gain access to a given web site (21).

[68] One of the unique features of the World Wide Web is the ability to provide a link between one site or reference and another. A word, phrase, or graphic image can be used as an activation point to call up additional material. HTTP or hyper-

link access options are not confined to material or files within the host web site. A link can be provided to other sites designed and controlled by others. This permits a user of a given web site to make a selection from the menu of options available on their current page displayed from one web site, and request further text, graphics, or other information from within the site, or link to a new web site of interest.

[69] The Tribunal also heard evidence with respect to the capacity of an ISP to store or "cache" a commonly requested site so that it can immediately be routed to the customer requesting the site. This process of caching provides a significant advantage to the ISP who need not make repeated requests from a popular host site, using a caching system provides enormous efficiencies for an ISP. Typically, they will monitor the original site for modifications to provide the most current version.

[70] Websites can also be "mirrored", and an unrelated individual can post an exact replica of a particular site as a mirror site. Again, to remain current, these sites must be constantly updated. When the Zundelsite was the subject of legal proceedings in Germany, several mirror sites were established.

B. Analysis: Is Material Transmitted Via the Internet Communicated Telephonically?

[71] The position advanced by the Commission is that "communicate telephonically", as used in s. 13(1) of the CHRA, means to communicate by means of the telephone network. Using this definition, it is the facilities used for the communication that are determinative, not the ultimate device connecting an individual to the network.

[72] It was suggested that this definition was compelled by a broad, purposive interpretation of the Act. Moreover, it was argued that a more restrictive definition would not allow the Act to be adapted to keep pace with technological advancement.

[73] The Respondent, in the course of the hearing, submitted that telephonic communication applied to voice or sound transmission only. Dictionary definitions, the opinion of Mr. Klatt and related case law were submitted in support of this interpretation.

(i) Statutory Interpretation: Human Rights Legislation To Be Interpreted Purposively

[74] The starting point for any exercise in statutory interpretation is recognition of the prevailing rules that have been established for the interpretation of human rights legislation (22). The courts have consistently held that the Act must be interpreted purposively and "in a manner consistent with its overarching goals"

(23). The Act is thus to be given a large and liberal interpretation: protected rights must be interpreted broadly, while defences and exceptions are read narrowly.

[75] In *Canada (Human Rights Commission) v. Taylor* (24) the Supreme Court of Canada considered both the general purpose of the Act, and, more specifically, the harm addressed by s. 13(1). Writing for the majority, Dickson C.J. begins by reference to the general purpose of the Act set out in Section 2, and succinctly summarises the legislative intent as "the promotion of equal opportunity unhindered by discriminatory practises" (25). He then goes on to find that in enacting s. 13, Parliament has expressed the view that the repeated telephonic communication of "hate messages" is contrary to the furtherance of equality (26).

[76] A review of the report of the Special Committee on Hate Propaganda in Canada, also known as the Cohen Committee, led Dickson, C.J. to comment as follows:

The Cohen Committee noted that individuals subjected to racial or religious hatred may suffer substantial psychological distress, the damaging consequences including a loss of self-esteem, feelings of anger and outrage and strong pressure to renounce the cultural differences that mark them as distinct. This intensely painful reaction undoubtedly detracts from an individual's ability to, in the words of s. 2 of the *Act*, "make for himself or herself the life that he or she is able and wishes to have". As well, the Committee observed that hate propaganda can operate to convince listeners, even if subtly, that members of certain racial or religious groups are inferior. The result may be an increase in acts of discrimination… and even incidents of violence. (27)

[77] Dickson, C.J. continued by noting that since the release of the Cohen Report, several other studies had similarly found that hate propaganda poses a "serious threat to society" (28), and he concluded that:

…messages of hate propaganda undermine the dignity and self-worth of target groups members and, more generally, contribute to disharmonious relations among various racial, cultural and religious groups, as a result eroding tolerance and open-mindedness that must flourish in a multicultural society which is committed to the idea of equality. (29)

[78] Thus, when interpreting s. 13(1) of the Act, we must bear in mind that in enacting the *Canadian Human Rights Act*, Parliament has recognised the importance of advancing the goals of equality, and has legislated specific prohibitions to ensure respect for individual dignity and autonomy. Included as a discriminatory practise, is a specific ban on the repeated, telephonic communication of "hate messages" (30). The promotion of and likely exposure to hatred or contempt, on the basis of race, religion, sexual orientation or any of the other enumerated grounds must be viewed as antithetical to the aims of the Act.

[79] As set out by Dickson, C.J. in *Taylor* , the harm addressed by s. 13(1) has two components. First, the section is responsive to the potential impact of hate messages on those listening to them. The Act therefore, censures theincitement of hatred and the possible actions that might flow from the intense emotions of ill will towards others that is contemplated by s. 13(1) (31).

[80] Clearly, when messages are conveyed that arouse "unusually strong feelings and deep felt emotions of detestation, calumny and vilification" (32), they will inevitably undermine efforts to promote equality. Some listeners might act upon the message and engage in further acts of discrimination in a variety of different settings - employment, housing or the provision of other services normally available to the public. By definition, even the listener who does nothing is nonetheless likely to view the subject of the message with hatred or contempt. These negative emotions will in and of themselves represent a step backwards on the road to equality. Thus, although those who listen to "hate messages" may or maynot act on the emotions aroused by the communication in question, the communication creates a barrier to the advancement of social harmony and tolerance.

[81] The consequences of repeated, telephonic communication of hate messages has a second element: there is an independent harm that is visited upon those who are the subject of the communication. The message might produce fears that it will lead to actual abuse or discriminatory practises by those to whom the message is communicated. Equally important, there is an "intensely painful reaction" experienced by individuals subjected to the expression of hatred (33). The mere fact that they are singled out for recurring, public vilification can erode an individual's personal dignity and sense of self-worth. It is not unlike being victimised by the school bully. Even if the bully and his or her friends do not act on the schoolyard taunts, the victim nonetheless suffers the public humiliation, shame and fear that flow from the verbal attack.

(ii) Interpreting s. 13 in Light of the Harm Addressed

[82] If we are to be guided by a broad, purposive approach, we must interpret s. 13(1) in a manner that is most likely to promote the underlying objectives of the Act. We must be sensitive to the over arching principles embodied in the Act, and interpret "telephonic" to foster, not undermine, those objectives.

[83] Ultimately, the focus of the harm addressed by s. 13(1) is the communication of messages that are likely to expose others to hatred or contempt. Given the legislative authority of Parliament in enacting this legislation, prohibited communication is necessarily limited to telephonic communication, an area within the federal government's sphere of legislative competence.

[84] In interpreting s. 13(1) of the Act, we are of the view that 'telephonically' relates to the means by which a respondent effects the communication, and not simply the device used by the listener. It is the use of the telephone network as a

means of communicating hate messages that is paramount; the precise manner in which a recipient receives the message is incidental to the legislative objective. We would therefore interpret "to communicate telephonically" by focussing on the underlying mode or system of transmission.

[85] We are not persuaded that "telephonically" implies a limitation on the precise sensory format in which the communication is expressed, nor that it should be defined solely by reference to the particular device used for the communication. Whether a message is communicated aurally, by voice, or visually, by text, has no effect on its capacity to influence the listener, or humiliate the subject. Nor does the specific device used to effect the communication alter the harmful character of the message conveyed. A telephone handset is not uniquely effective in the communication of hate messages.

[86] In our view, moreover, the interpretation we have adopted is the only form of analysis that can readily take into account advances in technology, and keep pace with those developments. A static interpretation of s. 13(1), where telephonic communication is restricted to voice transmissions using a conventional telephone device, would dramatically reduce the effectiveness of the Act as an aid to the promotion of equality.

[87] Finally, an interpretation of "telephonically" that refers back to the underlying system of transmission also respects the legislative authority of the federal Parliament, and defines telephonic by reference to the limits of Parliament's constitutional authority. That an interpretation of "telephonic" should take notice of the limits imposed on the federal government by virtue of our constitutional division of powers, that is that the Act can only apply to matters over which the federal government has legislative authority, is further supported by the specific reference in s. 13(1) to communication "by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament". In our view, the interpretation that we have adopted is entirely consistent with a purposive approach to the legislation, and the need to confine the application of the Act to matters within the legislative competence of the federal Parliament.

[88] We are persuaded on the basis of the evidence and submissions made to us that to communicate via the Internet is to communicate telephonically for the purposes of s. 13(1) of the Act, and therefore that repeated communication of hate messages via the Internet is captured by a purposive interpretation of the Act.

(iii) The Internet Operates Over The Telephone Network

[89] The evidence before us inexorably leads us to the conclusion that the transmission of data or communication on the Internet operates over the telephone network. The structural components required for transmissions are those owned and operated by the telephone networks. These systems were originally designed for voice or sound communication, but over time have evolved into a transmission system for a variety of different signals, including the

communication of data, text or graphics. The current commercial reality in Canada is that most links between an individual user and their ISP, the ISP and the Internet backbone, and transmissions among Internet backbone providers, will all be by use of the telephone network.

[90] The Internet is an organized method of transferring files and information utilizing an elaborate process for communication among computers and other devices. Conceptually, it is a virtual not a physical thing. However, in order to apply the rules and effect actual communication, the Internet relies on existing networks for the transmission of data. Overwhelmingly, it is the physical components of the traditional telephone network that are used to provide connectivity between different points on the Internet (34). The circuits and switches used for Internet transmission are identical to those that comprise the original telephone network. Some transmission elements, in some instances may bypass the telephone network, but for all intents and purposes, it is the telephone network that carries Internet communication.

[91] The expanded capacity of the telephone network to allow communication beyond sound, does not, in our view alter the underlying structure that is used to effect the communication. Indeed, the steps required to effect an Internet or Web communication, are strikingly similar to those involved in traditional telephone communication. With the aid of a modem, a user dials up their ISP, a modem at the ISP will answer the call, and the information requested by the user will be transmitted over the Internet backbone to and from the requested Website. As we have already concluded, communication over the Internet inevitably uses the identical circuits, switches and related physical components used for conventional telephone activity.

[92] Although some of the communication links might be by way of alternative means of transmission, such as coaxial cable, satellite or wireless connections, we do not believe that that has any effect on whether the communication should be considered 'telephonic'. The protocols and standards that define the Internet make it impossible to designate a transmission route that entirely bypasses the telephone network. An essential characteristic of how the Internet operates involves the independent routing of individual packets over a series of connections; at each stage a new decision is made as to which route to take next. Since we have found that transmissions over the Internet backbone invariably operate over the telephone network, routing over the Internet backbone, which cannot be controlled, will thus always involve telephonic communication.

(iv) Telephonic Communication Not Restricted to Voice Communication

[93] Nor did the Respondent persuade us that to communicate "telephonically" is restricted to voice communication. In our view this is an unduly restrictive approach that is inconsistent with a purposive approach to statutory interpretation, fails to allow for advances in technology, and does not adequately address the preponderance of evidence in this case.

[94] Technological evolution has extended the limits of original telephony and blurred the lines of demarcation so that it is no longer accurate or always possible to restrict telephonic uses to the transmission of sound to and from a conventional telephone. Even at its most narrow construction, the modern reality of telephonic communication may not involve a "telephone" at all but may include electronic audio messages sent from one computer terminal to a voice mail system operated by another computer. Nor will it always consist of the transmission of sound, for example the use of Telephone Devices for the Deaf involves the display of text to permit the hearing-impaired to use a phone. We would be loath to accept a submission that leads to a construction of s.13 (1) that failed to take into account these modern realities.

[95] We are especially concerned about an unduly narrow interpretation of telephonic at a time of dramatic shifts in the use of different modes of communication. The pervasiveness of the Internet persuades us that this mode of communicating hate messages is most pernicious. All of the reasons suggested in *Taylor,* with respect to the effectiveness of the telephone as a means of arousing hatred apply with equal force to the Internet: a public means of communication is used, yet the listener enjoys direct, seemingly personal contact in relative privacy. (35)

[96] While a website can establish hyper links to other sites that express contrary views or arguments, as was indeed done on the Zundelsite, there was no evidence before us with respect to the likelihood that these links would be activated. Moreover, the hyper links do not have to be maintained, and would require the listener to take an active step in order to be presented with an alternative view. In any event, any information or argument presented on a linked site will undoubtedly be coloured by the material read on the first website. For all of these reasons, we do not feel that the presence of a hyper link provides a sufficient basis to distinguish traditional messages left on a pre-recorded answering device from messages left on an established Website.

[97] What does make the Internet a potentially more significant threat to the goals of the Act is the ease with which this material can be communicated, and the amount of information that can be conveyed. Search engines will respond to word or subject searches, and anyone who is interested can dial up the site at will. Once the Website is established, very little effort is required to send or receive the communication. Nor does the operation of the site depend on publication of a number or web address. Once at the site, significantly more information can be communicated than could have been left on a pre-recorded telephone message.

[98] We appreciate that the Supreme Court of Canada in *Taylor* focussed their analysis on the use of a telephone answering machine to deliver pre-recorded messages. There is nothing in that decision, however, that in our view restricts the application of s. 13 (1) to such devices. As we have already determined, the guiding principles outlined in the majority judgment in *Taylor* provide support for the conclusion that we have now reached regarding the issues of statutory

interpretation raised in this complaint. It still remains for us to address this conclusion within the context of the constitutional motion presented by the Respondent.

[99] Mr. Christie also advanced argumen ts during a preliminary motion to dismiss the complaints that relied upon a number of cases in which "telephonic" was distinguished from "electronic" (36). We did not deal with these arguments at the preliminary motion as we considered them premature; it is appropriate to deal with them now. In the taxation cases cited to us, the relevant statute distinguished between electronic data processing machines and electric telephone apparatus. Not surprisingly, the Court in both cases held that computerized business communication systems, modems, and other peripherals of computers were properly classified as electronics not telephones.

[100] On a purposive analysis these cases do not provide great assistance to us. The court had to determine what the appropriate level of taxation was for each device, based on a "tariff whose purpose was to distinguish between hundreds of technical items" (37). Different categories were established by express reference to the kind of device or equipment that was being considered. Given the purpose of that statute, it was necessary that the definition relate back to the kind of device at issue, not the manner of transmission. These cases do not alter our view that in interpreting s. 13(1) of the *Canadian Human Rights Act*, the relevant reference is to the communication of hate messages, and therefore it is the means of transmission, not the device per se that is relevant.

(v) Expert Evidence and Dictionary Definitions

[101] Mr. Christie also relied on dictionary definitions, and the expert evidence of Mr. Klatt to advance his position. We have already recounted the expert evidence and opinions provided by Mr. Klatt and Mr. Angus. These expert witnesses did not agree on a definition of "telephonic", the main point of divergence was whether telephonic communication extends beyond the transmission of sound to include the transmission of data. Both agreed that there is a specific application known as Internet telephony that allows users to take advantage of the Internet to conduct real time, audio communications. Telephone calls are placed via the Internet to allow the participants to bypass the operation of normal fees and charges. Neither witness, however, offered a shared or common definition of 'telephonic'.

[102] Mr. Angus defined telephonic broadly as the transmission at a distance of a wide range of signals including sound, data, video or graphic transmissions. Mr. Klatt on the other hand was adamant in his insistence that the accepted definition of telephony, and telephonic, was limited to the transmission of voice or other sound.

[103] Where the Tribunal must choose between conflicting evidence given by these two witnesses, we have no hesitation in concluding that Mr. Angus provided expert testimony that was more informative and reliable. The evidence of Mr.

Bernard Klatt was of very limited assistance to us. Mr. Klatt demonstrated an extremely shallow foundation of knowledge in his area of expertise during the course of his testimony. A series of dictionary definitions were put to him, many of which he acknowledged he had not seen before his preparation for this hearing. From the Tribunal's perspective, he seemed unable to provide much information independent of the written materials placed before him by Mr. Christie.

[104] During cross-examination, Mr. Klatt was frequently argumentative, evasive and unable to answer elementary questions in his field. Most troubling to the Tribunal was the extent to which this witness responded as an advocate for the Respondent and not as an objective, independent expert. Mr. Klatt's responses are replete with references to what "we are arguing", and similar allusions to his shared common cause with the Respondent.

[105] In contrast to the evidence offered by Mr. Klatt, the testimony of Mr. Angus was given in a manner that was thorough, direct and well considered. In light of the limitations noted in Mr. Klatt's evidence, the Tribunal prefers the evidence of Mr. Angus where the evidence of these experts conflicts.

[106] Notwithstanding our finding on the relative utility of the expert evidence, ultimately, the statutory meaning of 'telephonic' is an issue for this Tribunal to determine based on the evidence, the submissions of the parties, and the proper application of the governing legal principles. The opinion of an expert in telecommunications, or the dictionary definitions submitted to these experts can do no more than provide a technical definition. Considering the pace of technological change, the dictionary definitions provided by the parties really did little more than provide a glimpse through a rear view mirror of the state of communication technology. Given our task of interpreting 'telephonically' within the specific context of s. 13 (1) of the Act, we found the dictionary definitions offered in the course of this hearing to be of very limited utility. Although of some value, they are far from determinative.

[107] The approach that we have taken, emphasising a purposive approach to the interpretation of s. 13(1), is consistent with the comments of Justice Evans of the Federal Court, Trial Division in ">*Zündel v. Canada (Attorney General)*. Although Justice Evans was only determining whether there was a rational basis for the conclusion that telephonic communication could include Internet transmission, he did comment on the value of the dictionary definitions provided to him, and to us:

Dictionaries, no doubt, still have their place in assisting in the interpretation of statutory language, particularly in identifying the range of meanings that words are capable of bearing in the ordinary use of the English language. However, it is a place of diminishing importance, as courts have increasingly sought to attribute meaning to the text of legislation by placing more weight on the statutory context

in which the words are used, and the purposes underlying the legislative scheme. (38)

2) Is the Zundelsite Communicated in Whole or in Part by Means of the Facilities of a Telecommunication Undertaking Within the Legislative Authority of Parliament?

[108] We have already concluded that the Internet uses the telephone network to transmit data. On the evidence before us we are also satisfied that when the telephone network is used for Internet communication it is "by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament".

[109] In arriving at this conclusion, we have taken into account the possibility of Internet connections by alternative means, including cable, satellite, or wireless connections. In some geographic locations, it is arguably possible that the initial connections could be made without using the physical components of the telephone network, and that the connection point to the Internet backbone could be completed outside of Canada. In a highly theoretical sense it is conceivable that a user in Canada might be able to access the Zundelsite without using "the facilities of a telecommunication undertaking within the legislative authority of Parliament".

[110] The Respondent's expert acknowledged that this was offered as a theoretical possibility, and was unable to provide substantive details. Notwithstanding this hypothetical scenario, there was no evidence before us that this scenario has actually occurred, and on the evidence that we did receive, we would find this possibility to be remote in the extreme. The vast majority of Internet users in Canada access the Internet by conventional telephone 'dial up': they link up with their Internet Service Provider by phone line, the ISP uses the phone lines to link with the Internet backbone, and those links are virtually all made within Canada. Although there may be some part of the Canadian user's connection to the Internet routing that takes place on extra territorial facilities, we would note that on the language used in S. 13(1) the communication need only be communicated "in whole or in part" on a federally regulated telecommunication undertaking (39).

3) Was There Repeated Communication 'Caused' by the Respondent?

[111] We would note that the issue of whether or not the posting of material to the Zundelsite constituted "repeated" telephonic communication was not raised during the course of the hearing. There was considerable attention given to whether or not it was "telephonic" communication, but there seemed to be little dispute that there had been repeated communication.

[112] The requirement that there be repeated communication is a constituent element of s. 13 (1), and we find as a fact that there was repeated communication

of the material posted to the Zundelsite. We heard from a number of witnesses, including Mayor Barbara Hall, Ian Angus, and Carl Hamilton that they accessed the material in issue on the Zundelsite on a number of separate occasions.

[113] We would also observe that the very nature of the Internet makes 'repeated' communication inevitable and deliberate. The evidence regarding the World Wide Web establishes that it is a specific application designed to enable the transmission and display of text, graphics, audio or video files over the Internet. This technology was calculated to facilitate browsing and the repeated transmission of material posted on a chosen site. A key advantage of the Internet is that it provides an inexpensive means of mass distribution. We are thus satisfied that there was repeated communication from the Zundelsite.

[114] During examination in chief of the Respondent's expert, Mr. Bernard Klatt, it was suggested that the Website is passive, and the one who causes the communication is the user. That is, material may be posted to a site and available for transmission, however, it is the browser who requests the information and thereby 'causes' the communication.

[115] We see no difference between this description of causing to communicate and that which occurs when someone dials a telephone number and listens to a pre-recorded message. In both instances the message waits dormant until activated by the phone connection, however, it would strain the meaning of the Act to find that to "communicate telephonically or to cause to be so communicated" should focus on the receiver rather than the sender of the proscribed messages. As we have already concluded, the intent of s. 13(1) of the Act is to prevent the dissemination of hate messages. This objective can not be achieved with the construction advanced by the Respondent.

[116] In this case, the sole purpose of creating a Website and encoding with commonly understood protocols is so that it will be available for transmission and display by a user who requests it. In our view, this does not mean that the communication was "caused" by the user. The person or persons who design and control the Website are ultimately those who make available to others material to be communicated to them.

4. Finding

[117] Having considered all of the evidence and submissions of the parties, we find that, when it was transmitted via the Internet, the material on the Zundelsite was communicated telephonically, repeatedly, in whole or in part by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament.

VII. IS THE MATERIAL CONTAINED ON THE ZUNDELSITE LIKELY TO EXPOSE PERSONS TO HATRED OR CONTEMPT BY REASON OF THE FACT THAT THOSE

PERSONS ARE IDENTIFIABLE ON THE BASIS OF A PROHIBITED GROUND OF DISCRIMINATION?

1. Is the Material Likely to Expose a Person or Persons to Hatred or Contempt?

A. Evidence

(i) Documents

[118] The Commission submitted a compendium of documents that contained copies of the material downloaded from the Zundelsite (40). The documents were voluminous, and too extensive to set out in full or attach as an appendix. They do, however, form part of the record and can be easily summarised. The documents essentially fall into one of two categories: quasi scholarly articles questioning the factual accuracy of the holocaust (41), and direct communications in which Mr. Zündel or his followers express their personal opinions and set out their ongoing experiences as holocaust revisionists (42).

[119] Certain recurring themes were common to all of the documents. The primary theme relates to the events of the Second World War, and the expression of doubt concerning the accuracy of the prevailing view regarding the treatment of the Jews by the Germans. Accompanying these challenges is the assertion that Jews, individually and collectively, have deliberately promoted a false version of history in order to gain a personal benefit by way of reparations.

[120] Many of the documents, in particular the Power Letters and ZGrams found on the site, contain some relatively benign commentary on a wide variety of issues related to Mr. Zündel's day to day life. Inevitably, they also incorporate the themes referred to above. The following examples of the commentary communicated via the Zundelsite were taken from a number of different messages authored by Mr. Zündel:

a) To claim that World War II was fought by the Germans, as the Holocaust Promotion Lobby incessantly claims, just to kill off the Jews as a group, is a deliberately planned, systematic deception amounting to financial, political, emotional and spiritual extortion. The "Holocaust", first propagandized as a tragedy, has over time deteriorated into a racket cloaked in the tenets of a new temporal religion - … (43)

b) The German State is like a big insurance company who, without proper and forensic investigation, negligently and carelessly settled a claim about "Holocaust causalities" solely on the basis of perjured evidence of alleged "eye witnesses" and who accepted their cooked evidence, forged invoices and fudged proofs of losses. …

The problem is, very simply, that the German oligarchy and the Jewish/Zionist/Marxist racketeers who have conned the Germans, the Americans and, for that matter, the whole world with their Holocaust extortion scheme, are both dependent for their own survival on the non-exposure of this fraudulent, parasitic enterprise. (44)

c) The enemies of freedom, civilisation, culture and our race, so clearly and courageously identified by Germany's government from 1933-45, are still at war with us - all those of us, be they German, Canadian, American, Russian, British, French, Italian, etc. who defend and who want to protect Western civilisation from Judaization and mental and spiritual circumcision of all we hold dear. Our enemies are relentless in their destructive drive. They know what is at stake! (45)

d) The fact is that the Jewish Lobby - or the Israeli Lobby, as some like to call it - have long had a deliberate policy of lying to non- Jewish Americans. They lied to us about Hitler and about National Socialist Germany, because they wanted America to go to war with Hitler to destroy this threat to their schemes. They have lied to us about their own role in setting up the Communist conspiracy, which spread out of London and New York to Russia and from there to other countries until it engulfed half the earth and consumed tens of millions of human lives. And they have lied to us about a great number of other things, too - including their most infamous lie and the most lucrative and crooked scheme: the so-called "Holocaust". (46)

e) There is always that last straw that breaks the camel's back!

The pattern has been the same from the Weimar Republic, where Jewish elements had immense power, to various Bolshevik countries where they lost their near-total power because of their own excesses, to Clinton's grotesque and disproportionate Cabinet appointments, where Jews - who represent only 5% of the U.S. people, if you believe those fudged statistics which hide all those "Holocaust survivors" - make up 50% of the Clinton Cabinet and other appointments. By deduction this can only lead people to conclude that, with the exception of this small tribal group, the rest of American citizens are seen as incompetent or stupid and unworthy to hold Cabinet posts!

Do they like it? Of course not! My American friends tell me that America is seething with resentment! In Canada, the power of the tribe is more hidden and not as brazen. However, few who still think are fooled.

I predict that once again the tribe's near-total victory will end in near-global disaster for them. In the affairs of men, and in nature, NOTHING LASTS FOREVER. (47)

And, finally:

f) Until now, the "Holocaust" story and their stranglehold on the media in many parts of the world have made them immune, so far, from exposure - but now their defenses are crumbling, for every day brings to light more misdeeds, more con games, more insider trading, more lies and more cheating - and more crimes against the Germans, the Palestinians, the Lebanese, the Iraqis, and the hapless Russians during their Bolshevik reign of terror and destruction there.

The day of global reckoning is dawning. The Jewish Century is drawing to a close. The Age of Truth is waiting to be ushered in, we will be its ushers.

I thank you!

Ernst Zündel (48)

(ii) Commission Experts: Professors Prideaux and Schweitzer

[121] The Commission called two expert witnesses (49), Professors Prideaux and Schweitzer, to support their submission that this material was likely to expose Jews to hatred or contempt. In both cases the witnesses examined the documents found on the Zundelsite and analysed them from the perspective of their particular area of expertise. The representative passages quoted in the preceding section display many of the stereotypes and linguistic strategies discussed by the expert witnesses called by the Commission.

a) Professor Prideaux: Discourse Analysis

[122] Professor Gary Prideaux testified as an expert in the field of discourse analysis, a sub set of linguistics. In this discipline, written and oral texts are examined in order to identify the methods employed by the initiator and the recipient of the communication for processing and comprehending language. A specific text is interpreted, or given meaning, through the use of established linguistic principles of general application, and specific strategies used to shade the meaning of otherwise neutral references. An understanding of these general principles and rhetorical strategies, allows for the interpretation of text, and a determination of the likely impact of the communication.

[123] Dr. Prideaux outlined a number of specific ways in which meaning permeates an intended message and allows the recipient to make sense of what they have heard or read:

a) Specific techniques, such as generalization or the use of scare quotes, can inject an additional layer of content beyond the obvious;

b) The choice of vocabulary can reflect the author's view of a particular group or event;

c) The use of repetition may enhance the credibility of the author or persuade the audience of the veracity of a particular fact or assertion;

d) A particular group may be singled out or targeted;

e) Coding and the use of metaphor can establish a series of negative associations and interchangeable references or associations;

f) Inversion strategies where commonly held views are inverted, so that for example the traditional victim becomes the aggressor and the aggressor the victim;

g) Metonymy or extreme generalization ascribing negative characteristics to a broad range of behaviour or group of individuals based on an individual action or example.

[124] Based on these and other established principles of discourse analysis, Dr. Prideaux analysed the structure, content and likely effect of the documents found on the Zundelsite, and concluded that, in his opinion, they were likely to expose Jews to hatred and contempt. The documents revealed a repeated pattern of singling out Jews, and ascribing extremely negative characteristics to them as a group and as individuals. This witness provided numerous examples where different rhetorical strategies were employed to characterize Jews in a distinctly derogatory manner.

[125] A common strategy identified by this expert was the manner in which questions were raised regarding the existence or extent of the holocaust. Three quasi scholarly articles included in the materials, 'Jewish Soap', '66 Questions and Answers', and 'Did Six Million Really Die', were treated by Dr. Prideaux as 'framing documents' that provided a context and frame of reference for many of the other documents found on the site. In these texts, the authors lead the reader to question all aspects of the holocaust by raising doubts about some. The subtle message is that the "holocaust' itself is questionable, and in Professor Prideaux's view, the impact of raising these doubts would, at a minimum, be to vastly diminish the horror of these events.

[126] Dr. Prideaux described these texts as 'unabashedly polemical', where the authors used lurid and inflammatory terms that would not typically appear in conventional scholarship. There were no specific citations or references for factual, or historical references, and assertions were made that went beyond the logical extension of the material relied upon. Nonetheless, the academic tone of these documents lends an air of legitimacy to these documents and informs the context in which subsequent messages are communicated.

[127] Dr. Prideaux further testified to other specific examples (50) in the texts found on the Zundelsite that would expose Jews to hatred or contempt:

a. The use of epithets such as the 'Jewish', 'Holocaust', 'Zionist' or 'Marxist' Lobby;

b. The constant use of scare quotes to express doubts in regard to the "Holocaust" or "survivors";

c. Unsubstantiated assertions of Jewish control and influence;

d. Inversion strategies where those widely understood as the victims in Nazi Germany become the aggressors, and the aggressors become the victims;

e. Ascribing, or implying, negative attributes to all Jews upon reference to a single individual who it is asserted possesses those characteristics.

[128] Finally, Dr Prideaux expressed his opinion that the deleterious impact of the documents contained on the Zundelsite would be significant upon both the communication of a single document, and as a result of the cumulative effect of reading many or all of the documents on the site.

b) Professor Schweitzer: Historical Motifs in Anti-Semitism

[129] Professor Frederick Schweitzer, an historian at Manhattan College in New York City, was called as an expert in the field of anti-Semitism and Jewish-Christian relations. Dr. Schweitzer provided an historical overview of the themes in classical anti-Semitism, and testified to the history of violence against Jews and the relationship of these violent episodes to specific periods of historical anti-Semitism.

[130] Dr. Schweitzer discussed the many themes, and variations on themes, of anti-Semitism dating back to medieval times up to the modern period. Certain central motifs have appeared, and reappeared in more contemporary forms, which expressed very specific stereotypes:

a) the deicidal Jew, the murderer of Christ;

b) the Talmudic Jew, obligated by religion to harm, cheat, lie, and trick non Jews;

c) the criminal Jew;

d) the world domination Jew;

e) the Holocaust Jew.

[131] When Dr. Schweitzer examined the documents found on the Zundelsite, he concluded that they were 'virulently anti-Semitic', reflecting many of the classical

anti-Semitic motifs found throughout history. Specifically, the Tribunal was referred to the following examples taken from the Zundelsite material:

a) Jews are denounced as criminals, thugs, gangsters and racketeers;

b) Jews are repeatedly described as liars who have fabricated the biggest lie of all, the "Holocaust", in order to extort reparations and promote their personal interests;

c) Jews have, and seek, a disproportionate degree of power and control in the media and government;

d) Jews are responsible for the humiliation of the Germans;

e) Jews are parasites and pose a menace to the civilised world.

B. ANALYSIS

(i) Legal Test: s.13(1)

[132] Telephonic communication of hate messages is proscribed under the Act as a discriminatory practise if there is repeated communication of "any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination."

[133] We have already concluded that there has been repeated telephonic communication. The issue now under consideration is whether the material communicated is 'likely to expose' a person or group to hatred or contempt. The cases in which this section has been considered, and the plain language used in s. 13(1), make it clear that it need not be established that hatred or contempt will be, or has been aroused by the communication at issue. It must only be established on a balance of probabilities that a person or a group is likely to be exposed to these extreme emotions of hostility.

[134] For our purposes, it is sufficient if the communications at issue create conditions that allow hatred to flourish, leaving the identifiable group open or vulnerable to extreme ill will and hostility. We must determine whether members of a group are placed at risk of being hated, or being held in contempt by virtue of the messages communicated by the Respondent. (51)

(ii) Definition of 'Hatred' or 'Contempt'

[135] In *Taylor*, the Supreme Court of Canada cited with approval the definition of "hatred" and "contempt" provided by the Tribunal in *Nealy v. Johnson* (52):

With "hatred" the focus is a set of emotions and feelings which involve extreme ill will towards another person or group of persons. To say that one "hates" another means in effect that one finds no redeeming qualities in the latter. It is a term, however, which does not necessarily involve the mental process of "looking down" on another or others. It is quite possible to "hate" someone who one feels is superior to one in intelligence, wealth, or power. None of the synonyms used in the dictionary definition for "hatred" give any clues to the motivation for the ill will. "Contempt" is by contrast a term which suggests a mental process of "looking down" upon or treating as inferior the object of one's feelings.

[136] After referring to the Tribunal's interpretation of s. 13(1) of the Act, Chief Justice Dickson summarised the application of this section as pertaining to communication that was likely to arouse "unusually strong and deep-felt emotions of detestation, calumny or vilification" (53). Based on this definition, we must examine the material found on the Zundelsite to assess whether it is likely that an identifiable group will be subject to hatred, that is extreme ill will, detestation, enmity, or malevolence. Or, might the group be held in contempt, and looked down upon or treated as inferior.

(iii) Are These Materials Likely to Arouse "Unusually Strong Emotions of Detestation, Calumny or Malevolence"?

[137] We begin our analysis with a review of the material found on the Zundelsite, and the intertwining themes of its messages. The over arching theme found in these materials is an unrelenting questioning of the "truth" related to the extent of the persecution of Jews by Nazi Germany during the second World War. Virtually every aspect of the holocaust is challenged: the numbers of those who died, how and why they died, and the reliability of the accounts of witnesses, survivors, confessors and the perished. Aspersions are cast on the legitimacy of post war legal and historical analysis, and doubts are raised regarding the veracity of a myriad of details related to the experience of Jews at this time.

[138] A secondary theme, closely related to the first, is the assertion that the truth needs to be revealed, but that those who profit from the commonly held view of the holocaust have thwarted this goal. There are repeated references to the individual and collective benefits that the Jewish peoples and Israel have realised from their continued promotion of the 'holocaust story'.

[139] In levelling these charges, Jews are branded as liars, swindlers, racketeers and extortionists They are accused of wielding extraordinary power and control, all used only for their own advantage and to the great detriment of others. Jews are described as criminals and parasites, acting on a global level to elevate their own power and wealth. Jewish people are viciously targeted in the Zundelsite material on the basis of their religious and cultural associations.

[140] 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 Zundelsite, 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 Zundelsite 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 and disdain, or hatred, loathing and revulsion.

[141] The expert evidence of Drs. Prideaux and Schweitzer reinforces our view that the material found on the Zundelsite is likely to expose Jews to hatred or contempt. The evidence of Dr. Prideaux and the use of specific rhetorical strategies to target and degrade Jews support our own interpretation of the Zundelsite documents. Professor Prideaux provided a number of detailed examples to support his own expert opinion that the material found on the Zundelsite was likely to expose Jews to hatred and contempt. We also note the striking similarities between the references found in the Zundelsite material and the classical motifs of anti-Semitism described by Dr. Schweitzer. Although we have found the expert evidence to be helpful, ultimately, it is the language used in the documents themselves that persuades us that this material offends s. 13(1) of the Act. The tone and expression of these messages is so malevolent in its depiction of Jews, that we find them to be hate messages within the meaning of the Act.

[142] In arriving at our conclusion we have reviewed the Exhibits in HR-2 in their entirety. Undoubtedly there are considerable portions of the text found in the Zundelsite materials that, absent other references, would not be elevated to the extreme ill will contemplated by s. 13. However, when read together, as we believe it must be, we have no doubt that the messages communicated by the Zundelsite are likely to expose Jews to hatred and contempt. The echoes of hatred that reverberate throughout the site infect and taint virtually all of the documents put before us.

[143] At one stage of the proceedings, counsel for the Respondent suggested that if the documents found on the Zundelsite were likely to expose a person or group to hatred or contempt, it was not by reason that they were identifiable on the basis of a prohibited ground of discrimination, but rather, as a direct consequence of their own behaviour. That is, the Zundelsite only describes the "misbehaviour" of Jews, and any ill will that is aroused is solely as a result of what Jewish people have done, and is not by reason of the communication of those facts.

[144] The Tribunal dismissed this suggestion in an earlier ruling, and, this argument, in our view, merits very little attention. Once a person or group is identified, directly or indirectly, on the basis of a prohibited ground of discrimination, it is somewhat disingenuous, and contrary to the objectives of the

Act, to say that it is their behaviour and not their group membership that exposes them to hatred or contempt.

[145] In any event, the only evidence before us was that of Dr. Prideaux who testified that it was the communication, and the manner in which the messages were constructed, that would likely expose Jews to hatred and contempt. There was no contrary evidence on this point, nor is there any other decision or canon of construction that would support this argument. We would find that the communications in question are likely to expose a person or group of persons to hatred or contempt on the sole basis that they are identified by their religious affiliation and ancestry.

2. The Context in Which the Documents on the Zundelsite are Communicated: The Characterization of the Zundelsite as Part of an Ongoing Historical Debate.

[146] Throughout the hearing Mr. Christie led evidence and advanced arguments to establish that the material found on the Zundelsite was the healthy expression of one perspective in an ongoing historical debate. We were urged to regard this debate, and inform our decision, by the Charter values that accord the greatest value to the promotion and protection of free speech. We will deal in a subsequent part of this decision with the Respondent's Constitutional motion; however, we were also invited to apply s. 13(1) to the facts of this case in light of this submission.

[147] In aid of this argument (54), the Respondent called a series of fact witnesses (55), and an expert witness qualified to testify on the Revisionist community. Frank Schmidt, Christian Klein, Wolfgang Mueller and Karl Rupert, were all born in Germany and emigrated to Canada at various times both before and after the Second World War: Mr. Schmidt in 1933, Mr. Klein in 1955, Mr. Mueller in 1956, and Mr. Rupert in 1956. All of these individuals testified to their active participation in various German Canadian ethnic and cultural organisations. Mr. Rupert also testified to his experience as a Russian prisoner of war from 1945-1949.

[148] The general thrust of the evidence of these fact witnesses was the same: they described, from their perspective, the persecution of Germans and the negative stereotyping that Germans have suffered since the Second World War. People in both the German and 'revisionist' community are silenced by fear and so dare not question the conventional version of events. In particular, these witnesses felt humiliated and ostracized as a result of the commonly held beliefs regarding Germany's treatment of Jews during the Second World War.

[149] The expert evidence of Mark Weber is virtually identical to that of the 'fact' witnesses. Although tendered as an expert, Mr. Weber repeatedly stated that "he couldn't speak for the community" and was only offering his own perspective. In any event, his testimony was offered to adduce evidence of the context in which the 'revisionist' community operates.

[150] Revisionists define themselves and the field of holocaust revisionism by reference to their critique of conventional or official history. In Mr. Weber's view, revisionists play an important role in historical discourse. Their writing and research should be seen as part of a larger debate, and is to be credited with generating a mainstream historical response. In his view, revisionism is similar to any intellectual exchange and is merely at one end of a continuum of historical perspective.

[151] Mr. Weber further testified that many revisionists experience rejection, violence and social disapproval for expressing their views. He personally would never deny that Jews suffered during the Second World War; he does however doubt some aspects of what he regards as the official or conventional version of the holocaust. He would not describe Mr. Zündel as an historian but as a facilitator of discussion.

[152] Having considered this evidence, and the submissions of counsel during the course of the hearing, we cannot accept the suggestion that the material found on the Zundelsite is merely part of a legitimate debate, and is therefore immune from the normal application and interpretation of s. 13 (1) of the Act. Indeed, in our view, it begs the question to simply ask if this expression is part of a larger 'legitimate' debate. Legitimacy, in the context of s. 13 (1) of the Act, has been determined by Parliament as that which is not likely to expose individuals to hatred or contempt.

[153] In any event, even if we accept that there can be legitimate debate on this topic, we have focussed on the manner in which the Respondent has expressed his views and not the mere fact that he chooses to engage in this debate. Our conclusion is based on the way in which these doubts are expressed, and not on the fact that challenges are raised regarding the historical accuracy of these events. Although it might always be hurtful to raise these questions, we accept that the standard for determining the "promotion of hatred or contempt" must be applied with care so that it remains sensitive to free speech interests.

[154] If this truly were a neutrally worded, "academic" debate, our analysis might be quite different. The tone and extreme denigration of Jews, however, separates these documents from those that might be permissible. We have found that it is the linkage between the author's view of these events and the extreme vilification of Jews as a consequence: it is their denunciation as liars, racketeers, extortionists and frauds that is likely to expose them to hatred and contempt.

3. Finding

[155] Based on our review of the documents downloaded from the Zundelsite, and the expert evidence of Professors Prideaux and Schweitzer, we find that the material contained in Exhibit HR-2 is likely to expose a person or group of persons to hatred or contempt by reason of the fact that those persons are identifiable on the basis of a prohibited ground of discrimination.

VIII. CONSTITUTIONAL ISSUE

[156] Once again the constitutionality of s. 13(1) of the *Canadian Human Rights Act* emerges in the context of the facts in the case before us. The Respondent has placed it pointedly in issue in a motion under s. 52 of the *Constitution Act*, (1982) in which he seeks an order declaring s. 13(1) of the *Canadian Human Rights Act* unconstitutional by virtue of s. 2(b) of the *Charter*. The Respondent also seeks a declaratory order with respect to s. 13(1) based on a violation of s. 2(a) and s. 7 of the *Charter*.

[157] Constitutional protection of freedom of expression is a fundamental element of a democratic society. In a democracy, political speech may not be controlled except in circumstances where not to do so runs counter to core democratic values. As stated by Professor Hogg,

Perhaps the most powerful rationale for the constitutional protection of freedom of expression is its role as an instrument of democratic government. This rationale was well expressed by Rand J. in *Switzman v. Elbling*, [1957] when he said that parliamentary government was "ultimately government by the free public opinion of an open society" and that it demanded the condition of a virtually unobstructed access to the diffusion of ideas. (56)

A. The *Canadian Charter Of Rights and Freedoms*

[158] The *Charter of Rights and Freedoms* protects and guarantees the fundamental freedom of expression.

i) Section 2

[159] Everyone has the following fundamental freedoms:

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.

[160] The Supreme Court of Canada in recent years has once again affirmed the guaranteed right of all Canadians to freedom of expression as an important and essential attribute of a free and democratic society. In *Dagenais v. CBC* (57), Lamer C.J. quoted Cory J. in *Edmonton Journal v. Alberta (Attorney General,* [1989] 2 S.C.R. 1326, at pp. 1336-37,

It is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression. Indeed a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions. The concept of free and uninhibited speech permeates all

truly democratic societies and institutions. The vital importance of the concept cannot be overemphasized…The principle of freedom of speech and expression has been firmly accepted as a necessary feature of modern society. (58)

ii) Charter Right Breached

[161] There was little debate regarding the assertion that activities affected by s. 13(1) of the Act constitute "expression" covered by s. 2(b).

[162] In *Taylor* the majority dealt with the violation quite briefly, saying that the s. 2(b) guarantees are infringed if it can be shown that either the purpose of the impugned governmental regulation is to restrict expressive activity or the regulation has such an effect.

[163] As to the issue of the infringement of s. 2(b), Dickson, C.J. stated,

Applying the *Irwin Toy* approach to the facts of this appeal, I have no doubt that the activity described by s. 13(1) is protected by 2(b) of the *Charter*. Indeed, the point is conceded by the Respondent Commission. To begin with, it is self-evident that this activity conveys or attempts to convey a meaning, the medium in issue to my mind being susceptible to no other use. Indeed, I find it impossible to conceive of an instance where the "telephonic communication of matter" (to paraphrase the language of s. 13(1)) could not be said to involve a conveyance of meaning. The inescapable conclusion is that the activity affected by s. 13(1) constitutes "expression" as the term is envisioned by s. 2(b). (59)

[164] Therefore, the question then becomes, given that s. 13(1) offends the *Charter of Rights and Freedoms*, is the section saved by s. 1 of the *Charter*?

iii) Charter Section 1 - Onus of Proof

[165] As we have seen, the *Charter* guarantees certain enumerated civil rights as being so fundamental and important that they should be immune from interference from government. Indeed, s. 1 itself reiterates the guarantee of the rights and freedoms contained in the *Charter*.

The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms as set out in it, subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. (s. 1).

[166] Application of s. 1 of the *Charter* is a two-stage process. The first has already been addressed and we have concluded that the challenged law has the effect of abridging a guaranteed right (namely, s. 2(b) of the *Charter*).

[167] The second stage examines whether the limit is a reasonable one that can be demonstrably justified in a free and democratic society. In this consideration,

we are guided by the decision of the Supreme Court of Canada in *R. v. Oakes* (60) ("*Oakes*"), which provides the standard for what can be demonstrably justified in a free and democratic society. The onus of proving a permissible limitation on a *Charter* right rests upon the party seeking to uphold the limitation. The party seeking justification under s. 1 must bring it within the exceptional criteria stated in *Oakes*. The standard of proof is on the basis of a preponderance of probabilities.

Having regard to the fact that s. 1 is being invoked for the purpose of justifying a violation of the constitutional rights and freedoms the *Charter* was designed to protect, a very high degree of probability will be, in the words of Lord Denning, 'commensurate with the occasion'. Where evidence is required in order to prove the constituent elements of a s. 1 inquiry, and this will generally be the case, it should be cogent and persuasive and make clear to the court the consequences of imposing or not imposing the limit. (61)

[168] As to the criteria, the objective to be served by the limitation of a *Charter* right must be sufficiently important to warrant overriding a constitutionally protected right or freedom. The objective must relate to societal concerns that are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important. S. 13(1) must be rationally connected to its stated purpose. The measures must be fair and not arbitrary; the means should impair the right in question as little as possible; and there must be proportionality between the effects of the limiting measure and the objective. Finally, the objective must be measured against the severity of the deleterious effects of the measure.

[169] It is by the application of these principles that s. 13(1) is to be tested and that leads us to refer once again to s. 2, s. 3(1) and s. 13(1) of the *Canadian Human Rights Act*. These sections recognize the government's role in the protection of individual rights by the enactment of human rights legislation, and express society's commitment to human dignity and the guarantee of equality.

B. *Taylor*

[170] We return to *Taylor* as the logical beginning point for a discussion concerning the constitutionality of s.13 (1). In *Taylor* the Supreme Court of Canada addressed the issue of whether s.13(1) of the *Canadian Human Rights Act* was consistent with freedom of expression guaranteed by s.2(b) of the *Canadian Charter of Rights and Freedoms* and if not, was it a reasonable limit on that freedom within the meaning of s.1 of the *Charter*. It further examined whether the orders of the Tribunal were consistent with s. 2(b) and if not, did they constitute a reasonable limit on freedom within the meaning of s. 1 of the *Charter* ">.

(i) Facts

[171] The primary issue as defined by Dickson C. J. was whether s. 13(1) violated freedom of expression as guaranteed by s. 2(b) of the *Charter* insofar as it restricted the communication of certain telephone messages. Complaints had been lodged against John Ross Taylor, alleging that s. 13(1) was breached through telephonic communications that were likely to expose persons identifiable on the basis of race and religion to hatred or contempt.

[172] The telephonic communication at issue was a service through which a member of the public could dial a telephone number and listen to a pre-recorded message, which over time involved thirteen different messages. The Tribunal found that the messages were likely to expose a person or persons to hatred or contempt by reason of the fact that the persons were identifiable by race or religion and the Tribunal therefore issued a cease and desist order. There followed lengthy proceedings that ultimately led to the imposition of a fine on the Western Guard Party of $5,000.00, and a one-year sentence of imprisonment on Mr. Taylor for contempt.

[173] The interposition of the passage of the *Charter* formed the basis for a notice of motion challenging the constitutional validity of s. 13(1) of the *Canadian Human Rights Act* as contrary to freedom of expression.

(ii)The *Oakes* Test

[174] In the course of the analysis under s. 1 of the *Charter*, having concluded that the limit on a *Charter* right or freedom was "prescribed by law", the Court proceeded to apply the tests defined in *Oakes.* First, whether the objective of the challenged measure was sufficiently important to warrant limiting a *Charter* right and freedom, and second, the issue of proportionality, whether the impugned measure is well suited to carry out its objective, and whether the impact upon an entrenched right or freedom is not needlessly or unacceptably severe. (62)

[175] The analysis of the role of the *Charter* in relation to the *Canadian Human Rights Act* as remedial legislation involves a balancing of societal interests and values. *Taylor* recognized that the *Charter* has a role where individual liberties are threatened. The Court referred to the broad legislative intent of s. 13(1) by reference to s. 2 of the *Canadian Human Rights Act* and concluded that the purpose of the legislation is the promotion of equal opportunity,

…unhindered by discriminatory practices based on, inter alia, race or religion - which informs the objective of s. 13(1). In denoting the activity described in s. 13(1) as a discriminatory practice, parliament has indicated that it views repeated telephonic communications likely to expose individuals or groups to hatred or contempt by reason of their being identifiable on the basis of certain characteristics as contrary to the furtherance of equality. (63)

[176] As we have already discussed in our earlier comments on statutory interpretation, the Court relied upon the Cohen Committee report on hate

propaganda to conclude that individuals subjected to racial or religious hatred are prone to psychological distress causing loss of self-esteem and feelings of anger and outrage. (64) Ultimately, the Court concluded that hate messages "undermine the dignity and self-worth of target group members and, more generally, contribute to disharmonious relations … as a result eroding the tolerance and open-mindedness that must flourish in a multicultural society which is committed to the idea of equality." (65)

[177] The Court also directed its attention to the position taken in the international community in eradicating discrimination including the dissemination of ideas based on racial and religious superiority. This, the Court said, is relevant in reviewing the legislation under s. 1 of the *Charter*. (66) Thus, it was concluded that the objective of the challenged measure was sufficiently important to warrant limiting a *Charter* right or freedom.

[178] The Court then addressed the issue of proportionality, and the state's evidence that s. 13(1) of the Act was proportionate to a valid objective. This onus is met if: a connection exists between the measure and the objectives so that the former cannot be said to be arbitrary, unfair or irrational; the measure impairs the *Charter* right or freedom no more than necessary; and the effects of the measure are not so severe as to constitute an unacceptable abridgement of the right or freedom.

[179] These principles must be applied in the process of analysis under s. 1 of the *Charter*.

It is not enough to simply balance or reconcile those interests promoted by a government objective with abstract panegyrics to the value of open expression. Rather, a contextual approach to s. 1 demands an appreciation of the extent to which a restriction of the activity at issue on the facts of the particular case debilitates or compromises the principles underlying the broad guarantee of freedom of expression. (67)

[180] Dickson C.J. also referred to and adopted his conclusion in *Keegstra* that hate propaganda contributes little to the aspirations of Canadians and that limitations on hate propaganda focus on expression which "…strays some distance from the spirit of s. 2(b)". (68)

(iii) Rational Connection

[181] The Court then proceeded to address the *Oakes* proportionality inquiry in relation to the question of rational connection and concluded,

In my view, once it is accepted that hate propaganda produces effects deleterious to the guiding principles of s. 2 of the *Canadian Human Rights Act*, there remains no question that s. 13(1) is rationally connected to the aim of restricting activities antithetical to the promotion of equality and tolerance in society…In sum, when

conjoined with the remedial provisions of the *Canadian Human Rights Act*, s. 13(1) operates to suppress hate propaganda and its harmful consequences, and hence is rationally connected to furthering the object sought by Parliament. (69)

[182] Dickson C.J. referred to the argument advanced in *Keegstra* that the relevant provision of the *Criminal Code* was ineffectual in reducing the prevalence of hate propaganda in Canada and accordingly, was not rationally connected to Parliament's objective. In the context of human rights legislation, he concluded that substantiated complaints under s. 13(1), followed by a cease and desist order,

…reminds Canadians of our fundamental commitment to equality of opportunity and the eradication of racial and religious intolerance. (70)

(iv) Minimal Impairment

[183] Dealing with the second branch of the proportionality issue - minimal impairment, Dickson C.J. first referred to the statement of Lamer J. in *Insurance Corp. of British Columbia v. Heerspink*, [1982] 2 S.C.R. 145, at p. 158 that,

…a human rights code is not to be treated as another ordinary law of general application. It should be recognized for what it is, a fundamental law.

In my view, there is no conflict between providing a meaningful interpretation of s. 13(1) and protecting the s. 2(b) freedom of expression so long as the interpretation of the words "hatred" and "contempt" is fully informed by an awareness that Parliament's objective is to protect the equality and dignity of all individuals by reducing the incidence of harm-causing expression. Such a perspective was employed by the Human Rights Tribunal in *Nealy v. Johnson* (1989) 10 C.H.R.R. D/6450. (71)

[184] The Court then approved the approach taken in *Nealy*, which gave full force to the purpose of the *Canadian Human Rights Act* and Parliament's objective in relation to hatred. Hatred speaks of extreme ill will and emotion absent any redeeming qualities in the person at whom the expression is directed.

According to the reading of the Tribunal, s. 13(1) thus refers to unusually strong and deep-felt emotions of detestation, calumny and vilification, and I do not find this interpretation to be particularly expansive. (72)

[185] We have already concluded that showing that the offending statements are true is not a defence to a breach of s.13(1) of the *Canadian Human Rights Act*. Dickson C.J. discussed this issue in *Keegstra*, which involved the criminal offence of wilfully promoting hatred against an identifiable group (s. 319(2) of the *Criminal Code*). In *Keegstra*, he expressed the view that he was doubtful as to whether the *Charter*

…mandates that truthful statements communicated with an intention to promote hatred need be excepted from criminal condemnation. (73)

[186] Relying then on his reasoning in *Keegstra*, Dickson, C.J. in *Taylor* stated that

…I am of the view that the *Charter* does not mandate an exception for truthful statements in the context of s. 13(1) of the *Canadian Human Rights Act*. (74)

[187] Similarly, it seems to be settled law that evidence of intent is not required, and that the focus of human rights inquiries is on effects. (75) Dickson, C.J. found that ignoring intent does not run afoul of the proportionality test in *Oakes*.

Clearly an intention to expose others to hatred or contempt on the basis of race or religion is not required in s. 13(1). As I have just explained, however, s. 13(1) operates within the context of a Human Rights Statute. Accordingly, the importance of isolating effects (and hence ignoring intent) justifies this absence of a *mens rea* requirement. I also reiterate the point that the impact of the impugned section is less confrontational than would be the case with a criminal prohibition, the legislative framework encouraging a conciliatory settlement and forbidding the imposition of imprisonment unless an individual intentionally acts in a manner prohibited by an order registered with the Federal Court. (76)

[188] While acknowledging that the absence of intent may make s. 13(1) wider in scope than the criminal provision discussed in *Keegstra*, the distinction was found to be necessary in light of the important objective of eradicating systemic discrimination.

Moreover, intent is far from irrelevant when imposing incarcerating sanctions upon an individual by way of a contempt order, subjective awareness of the likely effect of one's messages being a necessary precondition for the issuance of such an order by the Federal Court. Though it is true that the absence of an intent requirement under s. 13(1) may make the section wider in scope than the criminal provision upheld in *Keegstra*, this particular distinction is made necessary by the important objective of the *Canadian Human Rights Act* of eradicating systemic discrimination. (77)

[189] The Court also addressed intent in the context of a contempt order that may be invoked for breach of an order of the Tribunal. The statute allows a Tribunal to make a cease and desist order consequent on a finding of a discriminatory practice. Dickson C.J. thus disposed of an argument based on the impact of a one-year term of imprisonment imposed on Mr. Taylor in the Federal Court for contempt:

In short, a term of imprisonment is only possible where the Respondent intentionally communicates messages which he or she knows have been found likely to cause harm described in s. 13(1), and I therefore cannot agree that the

possibility of a contempt order issuing against an individual unduly chills the freedom of expression. (78)

(v) Conclusion

[190] Dickson C.J. did not view the effects of s. 13(1) upon freedom of expression to be so deleterious as to make intolerable its existence in a free and democratic society.

Moreover, operating in the context of the procedural and remedial provisions of the *Canadian Human Rights Act*, s. 13(1) plays a minimal role in the imposition of moral, financial or incarcerating sanctions, the primary goal being to act directly for the benefit of those likely to be exposed to the harms caused by hate propaganda. It is therefore my opinion that the degree of limitation imposed upon freedom of expression by s. 13(1) is not unduly harsh and that the third requirement of the *Oakes* proportionality approach is satisfied. (79)

[191] Dickson C.J. concluded therefore that the government had demonstrated the proportionality of the provision and consequently that s. 13(1) was saved under s. 1 of the *Charter* as a reasonable limit in a free and democratic society.

[192] There are indeed limits to freedom of expression. The decision in *Taylor* recognizes that hate propaganda presents a serious threat to society.

C. *Dagenais*

[193] Since *Taylor*, the Supreme Court of Canada has again addressed the issue of freedom of expression, albeit in a different context. The *Dagenais* case involved the balancing of the *Charter* guarantee of freedom of expression and the right to a fair trial. A party seeking a publication ban under a common-law rule in order to avoid a real and serious risk to the fairness of a trial has the onus of proving that the ban is necessary and that it relates to an important objective that cannot otherwise be achieved through a reasonably available alternate measure. It also must be shown that the proposed ban is as limited as possible and further that the salutary effects are proportional to the deleterious effects of the ban. The two *Charter* values involved must be balanced, but neither takes precedence. Also, the efficacy of any ban must be part of the consideration when considering the necessity of such a remedy.

[194] On the way to its decision, the Court made no reference to *Taylor*, but did speak to *Charter* issues that bear on the matter before us.

[195] Lamer C.J., speaking for the majority, referred to the reasons of the Ontario Court of Appeal,

Dubin C.J.O. for the court noted that it was the common law courts that first recognized the importance of freedom of expression and the crucial role of the press in informing the public in a free and democratic society. (80)

[196] Emphasis once again is placed on the s. 2(b) guarantees.

Section 2(b) guarantees the right of all Canadians to "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication".

The importance of the s. 2(b) freedoms has been recognized by this Court on numerous occasions. (81)

[197] Reference was made to *Canadian Newspapers Co. v. Canada (Attorney General)*, [1988] 2 S.C.R. 122 at p. 129.

Freedom of the press is indeed an important and essential attribute of a free and democratic society, and measures which prohibit the media from publishing information deemed of interest obviously restrict that freedom. (82)

[198] Lamer C.J. also relied on the decision of McLachlin J. in *R. v. Zündel* (1992) 2 S.C.R. 731 at p. 752 in which she distilled the commentary and case law on the subject of freedom of expression, and stated that the interests protected by s. 2(b) are,

…truth, political or social participation, and self-fulfilment. (83)

[199] In *Dagenais*, Lamer C.J. struck down the common law rule governing publication bans which emphasize the right of a fair trial over the free expression interests of those affected by the ban, saying that the balance that rule struck was inconsistent with the principles of the *Charter,* in particular the equal status given to section 2(b) and 11(d) of the *Charter*.

[200] In discussing the efficacy of an order directing a publication ban, Lamer C.J. stated,

It should also be noted that recent technological advances have brought with them considerable difficulties for those who seek to enforce bans. The efficacy of bans has been reduced by the growth of interprovincial and international television and radio broadcasts available through cable television, satellite dishes and short wave radios. It has also been reduced by the advent of information exchanges available through computer networks. In this global electronic age, meaningfully restricting the flow of information is becoming increasingly difficult. Therefore, the actual effect of bans on jury impartiality is substantially diminishing. (84)

[201] This statement was made while discussing how efficacious a publication ban would be and whether alternative measures would be successful in controlling the risk of an unfair trial. Basically, what was at stake in this case was whether the salutary effects of the ban were outweighed by the negative impact on freedom of expression. The Court then proceeded to apply the *Oakes* analysis, in the course of which Lamer C.J. suggested some modification or restatement of that analysis. (85)

D. Motion - Section 52 of The *Constitution Act*, 1982

[202] In considering the constitutional issue, it therefore remains our responsibility to apply the principles set out in *Taylor* to the facts of this case in a manner that recognizes that *Taylor* held that s. 13(1) of the *Act* is a reasonable and justifiable limit on freedom of expression. *Taylor* unquestionably must inform our conclusion with respect to the constitutionality of s. 13(1), moreover, high deference must be given to the Court's decision with respect to the overall approach to the analysis involving the application of the principles to the facts of this case. It is not our place to re-examine issues that have been adjudicated upon by the Supreme Court of Canada and which serve as our guidance.

[203] We have already stated in these reasons that as a matter of statutory construction, s. 13(1) which embraces "telephonic communication" is to be construed in a manner that recognizes that technology is not static and is intended to embrace technological electronic advances that have evolved into what is now known as the Internet.

[204] We now move to a discussion of the specific points placed in issue by the Respondent. The Respondent seeks an order declaring s. 13(1) of the *Canadian Human Rights Act* inoperative by virtue of its violation of sections 2(b), 2(a) and 7 of the *Canadian Charter of Rights and Freedoms,* a violation that cannot be justified under s. 1. In essence, the Respondent asks us to distinguish *Taylor* on several grounds:

i. *Taylor* applied specifical ly to communications by way of recorded telephone messages and so has no application to communications on the Internet;

ii. No evidence was before the Court regarding the effect of s. 13(1) of the *Act*, or the allegation of "hate" on freedom of speech in Canada;

iii. By virtue of amendments to the *Canadian Human Rights Act* since 1990, s. 13(1) can no longer survive *Charter* scrutiny;

iv. *Taylor* did not deal with nor was an argument made before the Court in relation to s. 2(a) of the *Charter* and so this case raises for the first time an issue that s. 13(1) is an unconstitutional violation of freedom of conscience and religion.

(i) Application of *Taylor* to Internet

[205] It seems clear that the Court in *Taylor* was of the view that the impetus for the passage of s. 13(1) was the communication of hate on recorded telephone messages. While dealing with the specific wording of s. 13(1), the factual context considered by the Court was that of recorded telephone messages. Dickson C.J. in the opening paragraphs of his reasons said that the primary issue in the appeal was whether s. 13(1) violates freedom of expression insofar as it restricts the communication of certain "telephone messages". (86) Other references follow, all having to do with telephone communications or messages. (87)

[206] Thus it was on a particular set of facts, hate messages recorded on a telephone answering or message device, that the constitutional validity of s. 13(1) was tested.

a) Respondent's position

[207] The position advanced by the Respondent is best stated and understood by reference to *Charter* principles. Based on the application of those principles to the facts of this case, we were urged to conclude that the Commission had not discharged its burden of showing that the limit imposed by s. 13(1) was a reasonable one that was demonstrably justified in a free and democratic society. Extending the application of s.13(1) of the Act to the Internet was too broad and invasive. Essentially, what is contended is the conclusion reached by McLachlin J. (as she then was) in her dissent in *Taylor*,

I conclude that the benefits to be secured by s. 13(1) of the *Canadian Human Rights Act* fall short of outweighing the seriousness of the infringement which the section effects on freedom of expression. (88)

[208] Section 13(1) does not survive constitutional scrutiny, it is said, because the infringement of freedom of expression by s. 13 outweighs the benefits to be derived from it. The reasons of the majority in *Taylor* upholding constitutionality based on s. 1 are significantly tied to the narrow factual context of a telephone message device. When *Taylor* was decided the cyber world was not a reality and so, one would argue, the Internet, an international network of interconnected computers, is vastly different than the message device considered by the Supreme Court of Canada. The Internet allows anyone in the world to take advantage of a wide variety of communication and information retrieval methods, including "e-mail", "newsgroups", "chat rooms" and the "World Wide Web".

[209] We have already discussed the evidence of Mr. Angus and Mr. Klatt earlier in these reasons concerning the scope and function of the Internet. In *Reno v. American Civil Liberties Union*, (89) a decision of the Supreme Court of the United States, useful reference is made to the character and dimensions of the Internet and the diverse methods by which information can be communicated through this new and revolutionary medium. The opinion of the Court was delivered by Justice

Stevens who described the Internet as an international network of inter-connected computers which was an outgrowth of what began in 1969 as a military program called "ARPANET" designed to enable military personnel to communicate with one another even if some portions of the network were damaged by war. The Internet is,

…a unique and wholly new medium of world wide human communication". (90)

The Web is thus comparable from the reader's viewpoint, to both a vast library including millions of readily available and indexed publications and a sprawling mall offering goods and services. (91)

[210] In *Taylor* it was held that under the proportionality requirement, there must be a minimal impairment of freedom of expression and the effect of s. 13(1) must not be so deleterious as to make intolerable its existence in a free and democratic society. These tests, it is argued, are no longer met given the evidence of the impact of s. 13(1) on expression on the Internet. The foundation of Dickson C.J.'s reasoning in *Taylor* was that the chill upon open expression in the context of a human rights statute is less severe than that which is occasioned where criminal legislation is involved. The latter imparts a degree of stigma and punishment whereas in the case of human rights legislation, the aim is remedial with the emphasis more upon compensation and protection of the victim.

[211] The Respondent says that the remedial nature of the *Act* is underscored by the fact that there are no defences to a charge under s. 13(1). In light of this Tribunal's ruling that truth is no defence, evidence of the truth of the impugned statements is not admissible. The Respondent harkens back to Dr. Schweitzer's testimony that the materials on the Zundelsite were lethal anti-Semitism and that they replicated the motifs of historic anti-Semitism over a period of a thousand years. Dr. Schweitzer believed that the basis of anti-Semitism was utterly false, and that true statements are not capable of being anti-Semitic. The Respondent thus argued that it was illogical to disallow evidence of the truth of the impugned statements. The Respondent also referred to Dr. Schweitzer's evidence that in order to properly assess any statement about history, and to discern between hate propaganda and valid social or historical criticism, historians need to concern themselves with an investigation of the facts.

[212] The Respondent's written argument points out that written communications, both public and private, on a computer network in a corporation or organization, or large public or private news and information network, or e-mails between private individuals, whether video, audio, text, graphics, animation or voice communication, would now all come within the jurisdiction of the Human Rights Commission. The types of communications covered by s. 13(1) would be unlimited, so long as telecommunications facilities in Canada were used, and, in the Respondent's submission, the words "telephonically" and "un téléphone" [as found in the French version of s. 13(1)] would be written out of the statute.

[213] The Respondent sums up by suggesting that the decision of the Court in *Taylor* and the principles enunciated therein, when applied to the facts of this case would lead to a conclusion that s. 13(1) does not survive *Charter* scrutiny. The expanded universe of the Internet puts freshly into question, the application of the tests in *Oakes*. Finding that s. 13(1) applies to computer network communications has serious and perhaps unforeseen consequences.

b) Evidence on Motion

[214] The Respondent relies on the evidence called on the motion by the Intervener Canadian Association for Free Expression. As well, it was noted that the Commission called no evidence despite the onus placed on it under s. 1 of the *Charter*. (92) In these circumstances, the Commission having elected to call no evidence, our approach is to evaluate the evidence called on the motion by the Intervener and relied upon by the Respondent.

Mr. Grace

[215] Kevin Michael Grace, a professional journalist and a senior editor of Report News Magazine based in Vancouver, B.C. was qualified as an expert working journalist in print media. This witness made it clear that he had little use for human rights legislation or human rights tribunals. The chief focus of his evidence was the chilling effect on free expression in print media if s. 13(1) of the *Act* extended to the Internet.

[216] This witness described instances of a chilling effect on free expression when print media stories deal with issues of homosexuality, gender equity, and immigration or crime stories (as they might have to do with race). He provided as an example an instance when he was the editor and a story was published on residential schools that resulted in a complaint being made before the Alberta Human Rights Commission under an anti-hate clause. The objectionable part of the story suggested that for some Indians, the residential schools were not as bad as they were normally portrayed.

[217] He further testified that journalists are afraid of losing their livelihood, and that editors are fearful of the prospect of an accusation that they are anti-Semitic. In Grace's opinion, it would be advisable to take his magazine's website down rather than be exposed to complaints under s. 13(1) should it apply to the Internet. He believed that this would be crippling to his magazine because people were increasingly getting their news and opinion from the Internet. Almost every newspaper in Canada is available on the Internet. In terms of the free flow of information, the application of s.13 (1) to the Internet would isolate Canada from the rest of the world.

Mr. Klatt

[218] Bernard Klatt testified as a fact witness concerning his experience as an Internet service provider in Oliver, British Columbia and the accusation that he was a hate monger by virtue of the websites he hosted for his clients. Klatt, as well, was a co-owner with his wife of Fairview Technology Centre, offering Internet connection services. Klatt's ISP business over time was regularly described in the media as the 'largest site in Canada for white supremacist and holocaust denial material'. On July 25, 1996, Klatt was asked by the Director of the National Research Council of Canada to remove the link to the Dominion Radio Astrophysical Observatory from the Internet homepage. Klatt had included a link to the Observatory on Fairview's homepage as a public service to its subscribers. There were other instances where Fairview was associated with intolerance. Klatt stated that the effect on him was like a witch-hunt or shunning. There was also a suggestion from the RCMP that there was a risk of violence that received significant national and local media attention. In the result, Klatt was forced to end his ISP business in early 1998.

Mr. Gostic

[219] Ron Gostic testified as a fact witness regarding allegations of hatred made against him that he said affected his publishing business, the Canadian Intelligence Service. He was singled out and denounced in June of 1983 by David Peterson, the then leader of the Liberal party in Ontario as a producer of vicious hate literature. He was also investigated by the police for an edition of his publication commenting on "the *Keegstra* affair". In his evidence, he gave details of how he was treated by major media outlets and by the Saskatchewan Human Rights Commission with the characterization of his *Keegstra* article as anti-Semitic literature. These developments had a serious impact on his publishing activities and his family. It was difficult for him to address service groups and to rent halls, and the lectures that he gave attracted hostile crowds.

Mr. Leitch

[220] Ron Leitch, a retired lawyer called to the Bar of Ontario in 1953, became the national president of the Alliance for the Preservation of English in Canada (APEC), a position that he has held since 1986. APEC's position was that English-speaking people were discriminated against because of the passing of the *Official Languages Act* in 1968. Mr. Leitch described how his representations of the views of his organization were the subject of newspaper articles wherein he was accused of spreading hate literature. The Hate Literature Squad of the Toronto Police Department and the Ontario Provincial Police investigated him, although it appears that nothing came of that investigation. Mr. Leitch stated that it was demoralizing that one could not speak civilly about a government issue.

Mr. Droege

[221] Wolfgang Droege was the one witness who was the subject of complaints under s. 13(1) of the *Canadian Human Rights Act*. He offered no apologies for his

white supremacist views and has been active internationally in advancing those views. He has been associated with political groups in Germany, the Western Guard in Canada and the Ku-Klux Klan. He was sentenced to three years in prison for breaches of the *American Neutrality Act* arising from his involvement in an attempt to overthrow the Government of Dominica. In 1989, he started the Heritage Front, an organization dedicated to "white rights" whose goals were to be promoted through literature, meetings and the telephone hotline. As a result of the complaint against him under s. 13(1), he was labelled a hate monger and prevented from doing business and earning a living. Moreover, there were threats to his own personal safety.

[222] The evidence of these witnesses is relied on by the Respondent to buttress the position that if s. 13(1) of the *Act* is applied to computer networks, including the Internet, it would result in an unreasonable limitation on freedom of speech and conscience inconsistent with sections 2(a), 2(b) and 1 of the *Charter*.

[223] This evidence, it is said, tends to show that allegations of hate, anti-Semitism and racism are devastating to a person's standing within Canadian society and also devastating to the search for truth. Mr. Grace's testimony, it is argued, was a clear example of the severe chilling effect on freedom of expression that hate laws have engendered. In his case, he characterized what happened to him professionally as a personal death sentence, and opined that journalists are terrified of doing stories on any issue concerning identifiable groups knowing that if the story is unfavourable, they are likely to be labelled racist or anti-Semitic. The evidence of Mr. Klatt, it is argued, is a classic case of how the accusation of hate is used to destroy the reputation and livelihood of people who stand up for the principle of freedom of expression. The Respondent argued that Mr. Klatt's evidence shows that ordinary Canadians do not value freedom of speech and that the Klatt affair reveals that Canadian society has no defenders of the right to free speech and its importance to democracy. The sole organization that attempted to help Klatt was the Intervener Canadian Association for Free Expression Inc., and because it did so, it was smeared in the media as part of the "power right" which was "extremist".

c) Commission's Argument

[224] The Commission argued that the majority in *Taylor* held that s. 13(1) of the *Act* is a reasonable and justifiable limit on freedom of expression, and it is not open to this Tribunal to re-examine that issue. The different context presented by the Internet, from a technological point of view, does not alter the analysis justifying s. 13(1) under s. 1 of the *Charter.* Rather, it was suggested that those justifications are even stronger in the context of hate propaganda disseminated over the Internet. *Taylor* recognized that hate propaganda is antithetical to the general aim of the *Act,* and that the restriction contained within s. 13(1) was imposed on a type of speech which "strays some distance from the spirit of s. 2(b)" of the *Charter*. This purpose was seen as one of pressing and substantial importance in *Taylor*.

[225] The proportionality test in *Taylor*, the Commission asserts, remains valid in the context of the Internet. A rational connection exists between s. 13(1) and its valid purpose. The section impairs the Respondent's freedom of expression as minimally as possible. The majority's decision, that the effects of s. 13(1) on freedom of expression were not so deleterious as to make them intolerable, remains correct in the context of today's technology. The Commission contends that the evil of hate propaganda which s. 13(1) seeks to eliminate remains a pressing concern whether such messages are communicated via telephone, answering machine or via the Internet. In the context of new modes of communication, and the modern reality of the Internet, with its pervasive influence and accessibility, it is all the more crucial that the constitutional validity of s. 13(1) of the *Act* not be revisited or disturbed. The character of the Zundelsite as an interactive website or as a publishing website does not alter the analysis of s. 13(1) set out in *Taylor*.

d) Analysis and Conclusion

[226] Freedom of thought, belief, opinion and expression are enshrined in our Constitution. Freedom of the press and other media of communication are included in this protection. As we have seen our jurisprudence has consistently upheld the intrinsic value of freedom of expression as an essential element of a democratic society. The Commission's case acknowledges that the Zundelsite writings fall within "expression" from which it follows that s. 13(1) limits freedom of expression and can only be saved if it can be shown that such limitation is reasonable and demonstrably justified in a free and democratic society. The Commission has the onus of satisfying the exceptional criteria that justify the limitation under s. 1 of the *Charter*.

[227] We pause to refer again to *Oakes* and the words of Dickson C.J. addressing the standard of proof under s. 1, namely that the preponderance of probability test must be applied rigorously. The question before us, therefore, is, based on the facts of this case, what degree of probability is "commensurate with the occasion"? Is the evidence cogent and persuasive to prove the constituent elements of the s. 1 enquiry?

[228] We accept that it is not open to this Tribunal to re-examine an issue that has already been adjudicated upon by this country's highest Court, and that the principles to be applied in determining the constitutionality of s. 13(1) have been clearly defined. However, the application of those principles in *Taylor* was in the context of a specific set of facts, facts that were acknowledged by the Court to set the framework for their conclusion that s. 13(1) of the *Act* is a reasonable and justifiable limit on freedom of expression.

[229] There are, in our opinion, real differences between the facts in *Taylor* and the facts now before us. Moreover, there are potentially significant differences in the impact on freedom of expression based on these facts that require a fresh analysis and application of the principles discussed in *Taylor*. The Supreme Court

of Canada dealt with the telephone as a medium of communication, whereas here we are dealing with a relatively new, growing and pervasive medium of communication, the Internet. The benefits to be secured by application of s. 13(1) must continue to outweigh the seriousness of the infringement that the section imposes on freedom of expression when applied to the facts of this case.

[230] The Internet introduces a context that is different from the traditional use of the telephone. While we have found that as a matter of statutory interpretation, s. 13(1) embraces the concept of the Internet, can such an interpretation withstand Charter scrutiny? Although *Taylor* upheld the constitutionality of s. 13(1) in the context of hate propaganda disseminated through pre-recorded telephone answering machine messages, the issue raised by the Respondent is whether a restriction on hate propaganda disseminated over the Internet is similarly justified. The state of technology considered in *Taylor* has evolved, expanded and blossomed into a whole new phenomenon of communication within society.

[231] 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 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 a 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 for no redeeming qualities in the person at whom it is directed.

[232] 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 s. 2 of the *Act*. *Taylor* found that this purpose was one of pressing and substantial importance.

[233] 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*.

[234] We conclude therefore that while the Internet introduces a different context from the traditional use of the telephone, the first branch of 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. As the new phenomenon of the Internet evolves, perceived at the beginning, as one writer has put it, as being everywhere yet nowhere and as

free floating as a cloud, it has become apparent that it too is subject to the rule of law in diverse ways.

[235] We cannot read into *Taylor* an intention that the matter of pressing and substantial importance was to be confined narrowly to the facts in evidence in that case. We see no basis for such a restricted interpretation having in mind what the Court has said about the high purpose of the *Canadian Human Rights Act*.

[236] The second branch of the *Oakes* test requires that the means chosen by Parliament be proportional to its purpose. Section 13(1) must be rationally connected to its stated purpose. It must minimally impair the rights and freedoms of the Respondent, in this case freedom of expression. Finally, the salutary effects of s. 13(1) must be proportional to any deleterious effect on the Respondent's freedom of expression.

[237] In addressing this branch of the *Oakes* test, Dickson C.J. in *Taylor* referred to the context within which the proportionality analysis was to be carried out. There must be recognition that the suppression of hate propaganda does not severely abridge expression values. The prevention of harm caused by hate propaganda is promoted by s. 13(1) in prohibiting repeated telephonic communications of messages likely to expose individuals to hatred or contempt by reason of the fact that those individuals are identifiable on the basis of a prohibited ground of discrimination.

[238] There remains in our view, a rational connection between s. 13(1) and its valid purpose as found in *Taylor*, a conclusion that is unaffected by the particular facts of this case. As a society, our disapproval of hate messages does not depend narrowly on whether they are found on a telephone-answering device. Parliament has spoken. If the telephone is ideally suited to the effective transmission of prejudicial beliefs as part of a campaign to affect public beliefs and attitudes, how much more effective and ideally suited is the Internet to the efficient transmission of such detrimental beliefs. We see no basis for a distinction based on the facts of this case that would allow us, in a free and democratic society, to withdraw our commitment to protecting minority groups from the intolerance and psychological pain caused by the expression of hate propaganda.

[239] In view of the focussed purpose of s. 13(1) as an instrument of national policy and from the perspective of international commitments, it is, in our view, inappropriate to say that hate propaganda is licit because it has found expression through another medium, the Internet. Once it is accepted that hate propaganda is antithetical to *Charter* values, the means of expression, in our view, is not a controlling factor so long as it is within the constitutional jurisdiction of Parliament.

[240] Freedom of expression also continues to be impaired as minimally as possible by s. 13(1). The definition of "hatred", "contempt" and "likely to expose"

remains the same and has been found not to be overly broad. Since the focus of s. 13(1) is on "repeated" telephonic messages that are likely to expose persons to hatred or contempt, attention is directed to large scale, public schemes for the dissemination of hate propaganda. The structure of Internet communications makes it especially susceptible to this analysis. It is difficult for us to see why the Internet, with its pervasive influence and accessibility, should be available to spread messages that are likely to expose persons to hatred or contempt. One can conceive that this new medium of the Internet is a much more effective and well-suited vehicle for the dissemination of hate propaganda.

[241] So, we conclude therefore that s. 13(1) considered in the context of the facts of this case remains rationally connected to the purpose of the *Act*, minimally impairs the Respondent's freedom to communicate a type of speech which "strays some distance from the spirit of s. 2(b)", and the benefit continues to outweigh any deleterious effects on the Respondent's freedom of expression.

[242] In our view, the use of s. 13(1) of the *Act* to deal with hateful telephonic messages on the Internet remains a restriction on the Respondent's freedom of speech which is reasonable and justified in a free and democratic society.

(ii) Evidence of Chilling Effect on Expression

[243] Concerning the evidence tendered by the Canadian Association for Free Expression and relied on by the Respondent, the Respondent urges that such evidence was not before the Supreme Court in *Taylor* and should lead us to a different conclusion.

[244] This Tribunal cannot question the sufficiency of the evidence before the Court in *Taylor.* As LaForest J. has stated,

The admonition in *Oakes* and other cases to present evidence in *Charter* cases does not remove from the Courts the power, when it deems expedient, to take judicial notice of broad, social and economic facts and to take the necessary steps to inform itself about them.

…it is a constitution we are interpreting. It is undesirable that an act be found constitutional today and unconstitutional tomorrow simply on the basis of the particular evidence of broad, social and economic facts that happen to have been presented by counsel. (93)

[245] Nor does the evidence relied on alter our conclusion that the onus under s. 1 was met. Evidence was offered to demonstrate the "chilling effect" of s. 13(1) on freedom of expression. The witnesses testifying claimed to have suffered public scorn as a result of being labelled "hate-mongers". Only one witness, Mr. Droege, was subjected to complaints under human rights legislation. The 'chilling effect' noted by these witnesses was largely as a result of public condemnation of their views, not a fear that they might be the subject of human rights complaints. These

witnesses, each holding their own views, remained free to express those views, and indeed they continued to do so. Members of the public who criticize the views held by each of these witnesses were also exercising their *Charter* right of freedom of expression. We note in passing that none of these witnesses expressed any concern at the type of hate propaganda that we have found to be present in the Zündel documents. It bears repeating that the expression in those documents does nothing to advance the underlying values of freedom of expression.

[246] The evidence advanced by the Canadian Association for Free Expression, and relied on by the Respondent, did not persuade us that we should arrive at a different conclusion concerning the constitutionality of s. 13(1).

(iii) Amendments to the *Canadian Human Rights Act* Since 1990

[247] We now deal with Respondent's argument that by virtue of the post 1990 amendments to the *Canadian Human Rights Act*, s. 13(1) can no longer survive *Charter* scrutiny. Amendments to the *Act* in 1996 and 1998 are thus advanced as a basis for distinguishing *Taylor*.

[248] We deal first with the amendment of the *Act* dealing with penalties.

[249] In 1998 (S.C., 1998, c. 9, s. 28) section 54(1) of the *CHRA*, dealing with penalties for violation of section 13(1), was repealed and the following new provision enacted:

Orders relating to hate messages

54(1) If a member or panel finds that a complaint related to a discriminatory practice described in section 13 is substantiated, the member or panel may make only one or more of the following orders:

(a) an order containing terms referred to in paragraph 53(2)(a);

(b) an order under subsection 53(3) to compensate a victim specifically identified in the communication that constituted the discriminatory practice, and

(c) an order to pay a penalty of not more than ten thousand dollars.

Factors

(1.1) In deciding whether to order the person to pay the penalty, the member or panel shall take into account the following factors:

(b) the nature, circumstances, extent and gravity of the discriminatory practice; and

(c) the wilfulness or intent of the person who engaged in the discriminatory practice, any prior discriminatory practices that the person has engaged in and the person's ability to pay the penalty.

[250] At the time *Taylor* was decided s. 54(1) read as follows:

Limitation of order

54(1) Where a Tribunal finds that a complaint related to a discriminatory practice described in section 13 is substantiated, it may make only an order referred to in paragraph 53(2)(a).

[251] Section 53(2)(a) provided at that time:

53(2) If, at the conclusion of its inquiry, a Tribunal finds that the complaint to which the inquiry relates is substantiated, it may, subject to subsection (4) and section 54, make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in that order any of the following terms that it considers appropriate:

(a) that the person cease the discriminatory practice and, in order to prevent the same or a similar practice from occurring in the future, take measures, including

a. adoption of a special program, plan or arrangement referred to in subsection 16(1), or

b. the making of an application for approval and the implementing of a plan pursuant to section 17,

in consultation with the Commission on the general purposes of those measures.

[252] Currently, s. 53(3) allows for compensation of up to $20,000.00 where the tribunal finds that a Respondent is engaging or has wilfully or recklessly engaged in a discriminatory practice. The Respondent argues that these broadened remedies involve penal consequences and alter the approach to the constitutional issue. Dickson C.J., in his reasons in *Taylor,* did specifically refer to the absence of penal consequences upon the commission of a discriminatory act in aid of his conclusion on the constitutionality of s. 13(1). At that time, the Act only allowed a cease and desist order, whereas now a Tribunal can also compel a respondent to pay as much as $30,000.00 under s. 53(2) and s.54(1) as amended. As well, the Respondent relies on an amendment made in S.C. 1996 c.14 s.1 that broadens the categories of prohibited discrimination to include sexual orientation, and amendment in S.C. 1998 c.9 s.27 that establishes experience in and sensitivity to human rights as a qualification for appointment to the Canadian Human Rights Tribunal.

a) Analysis

[253] It is difficult to see how these amendments can affect our conclusion on the issue of constitutionality. The amendments provide no basis, in our opinion, for distinguishing *Taylor*, first, because the amendments cannot be interpreted as having retrospective application, and in any event, even if we are wrong in that conclusion, the amendments do not alter the integrity of the constitutional result in *Taylor.*

[254] On the first point, guidance is found in s. 43 of the *Interpretation Act.*

Where an enactment is repealed in whole or in part, the repeal does not …

(b) affect the previous operation of the enactment so repealed or anything duly done or suffered thereunder,

(c) affect any right, privilege, obligation or liability acquired, accrued, accruing or incurred under the enactment so repealed,

(d) affect any offence committed against or contravention of the provisions of the enactment so repealed, or any punishment, penalty or forfeiture incurred under the enactment so repealed,

(e) affect any investigation, legal proceeding or remedy in respect of any right, privilege, obligation or liability referred to in paragraph (c) or in respect of any punishment, penalty or forfeiture referred to in paragraph (d),

and an investigation, legal proceeding or remedy as described in paragraph (e) may be instituted, continued or enforced, and the punishment, penalty or forfeiture may be imposed as if the enactment had not been so repealed. [Emphasis added]. (94)

[255] The *Interpretation Act* applies to all acts of Parliament unless a contrary intent is found in the legislation (ss. 2 (2) and 3(1)). This matter was referred to the Tribunal on November 22, 1996, and this hearing began on May 26, 1997. The complaints originated in July and September of 1996. The conduct complained about similarly pre-dates the amendments. We conclude therefore that the amendments (including those providing for a penalty) do not apply to these proceedings.

[256] If this conclusion is in error, we remain of the opinion that the amendments in question cannot alter the authority of *Taylor* as it applies to this proceeding. The Court clearly distinguished a complaint under the *Canadian Human Rights Act* from an offence under the *Criminal Code.*

It is essential, however, to recognize that, as an instrument especially designed to prevent the spread of prejudice and to foster tolerance and equality in the community, the *Canadian Human Rights Act* is very different from the *Criminal Code.* The aim of human rights legislation, and of s.13(1) is not to bring the full force of the state's power against a blameworthy individual for the purpose of imposing punishment. Instead, provisions found in human rights statutes generally operate in a less confrontational manner, allowing for a conciliatory settlement if possible and, where discrimination exists, gearing remedial responses more towards compensation of the victim. (95)

[257] These amendments, in our view, do not alter the nature and critical purpose of s.13(1) of the *Act*. The *Act* remains remedial, not penal in nature. *Taylor* represented a balancing exercise between the objective of eradicating hateful discrimination and the need to protect freedom of expression. The strength of the decision in *Taylor* in recognizing Parliament's intention of eradicating discrimination convinces us that the amendments relied upon by the Respondent should not lead to a different conclusion concerning the constitutionality of s.13(1).

(iv) Freedom of Conscience and Religion

[258] The Respondent further argues that s. 13(1) of the *Canadian Human Rights Act* is a violation of the fundamental freedom of conscience and religion guaranteed under s. 2(a) of the *Charter* and that such violation is not justified under s. 1 of the *Charter*.

a) Analysis

[259] Section 2 of the *Charter* provides as follows:

Section 2 Everyone has the following fundamental freedoms:

(a) Freedom of conscience and religion

[260] This *Charter* right, like others, is subject to the limitation clause provided in s. 1 so that a limitation on freedom of conscience and religion is permissible if it is a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society.

[261] "Conscience" in s. 2(a) has been held to protect non-theocentric beliefs. In *R. v. Morgentaler* *(96)*, the Court struck down the abortion sections of the *Criminal Code*. Wilson J. concurred with the result, but expressed an opinion concerning the significance of the word "conscience".

It seems to me, therefore, that in a free and democratic society "freedom of conscience and religion" should be broadly construed to extend to

conscientiously-held beliefs, whether grounded in religion or in a secular morality. (97)

[262] In the leading case of *R. v. Big M Drug Mart Limited* (98), Dickson J., (as he then was), spoke to the meaning of freedom of conscience and religion.

The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination. (99)

[263] While freedom is rooted in respect for the inherent dignity of the human person, it is subject to limitations,

…as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others … (100)

[264] In *Ross v. School District No. 15* (101), the Court reviewed the findings of the Human Rights Board of Inquiry that ordered a School Board to remove a teacher from his teaching position and to terminate his employment by virtue of racist and discriminatory comments that he made against Jews during his off-duty time. This teacher communicated his anti-Semitic views in writings and statements, including four books or pamphlets, letters to local newspapers, and a local television interview. The Board of Inquiry found that the teacher's off-duty comments denigrated the faith and belief of Jews and that the School Board was in breach of s. 5(1) of the *Canadian Human Rights Act* in that it discriminated by failing to meaningfully discipline the teacher. On appeal, it was held that certain clauses in the Order of the Board of Inquiry infringed the teacher's freedom of expression and freedom of religion and could not be justified under s. 1.

[265] The Supreme Court of Canada restored the order of the Board of Inquiry holding that the Board was correct in finding that the teacher's continued employment constituted discrimination under s. 5(1) of the *Act* with respect to educational services available to the public. Concerning 2(a) and 2(b) of the *Charter*, the teacher's writings and statements were clearly protected under 2(b), and the Board's Order infringed the teacher's freedom of expression. The Order also infringed the teacher's freedom of religion, a freedom that ensures that every individual is free to hold and to manifest, without state interference, those beliefs and opinions dictated by their conscience. Assuming the sincerity of the beliefs and opinions, it was not open to the Court to question their validity.

[266] Dealing with freedom of religion, LaForest J., speaking for the Court, said,

The Respondent's expression in this case is of a religious nature. He, therefore, submits that his freedom of religion has also been infringed… (102)

In arguing that the order does infringe his freedom of religion, the Respondent submits that the *Act* is being used as a sword to punish individuals for expressing their discriminating religious beliefs. He maintains that "all of the invective and hyperbole about anti-semitism is really a smokescreen for imposing an officially sanctioned religious belief on society as a whole which is not the function of Courts or Human Rights Tribunals in a free society". In this case, the Respondent's freedom of religion is manifested in his writings, statements and publications. These, he argues, constitute "thoroughly honest religious statements" and adds that it is not the role of this Court to decide what any particular religion believes. (103)

I agree with his statement about the role of the Court. In *R. v. Jones*, (1986) 2 S.C.R. 284, I stated that, assuming the sincerity of an asserted religious belief, it was not open to the Court to question its validity. It was sufficient to trigger constitutional scrutiny if the effect of the impugned *Act* or provision interfered with an individual's religious activity or convictions. (104)

[267] In the result, LaForest J. concluded that the subject order infringed the Respondent's freedom of expression and freedom of religion and so resorted to an analysis of whether the infringement was justifiable under s. 1 of the *Charter*. That analysis proceeded in three contexts, the educational context, the employment context and the anti-Semitism context. In addressing the third of these contexts, the Court recognized that Human Rights Tribunals play a leading role in the development of the law of discrimination, and this required recognition of the sensitivities of the Human Rights Tribunals in this area. Having concluded that the expression sought to be protected under 2(b) was at best tenuously connected to freedom of expression values, the Court then proceeded to discuss freedom of religion.

In relation to freedom of religion, any religious belief that denigrates and defames the religious beliefs of others erodes the very basis of the guarantee in s. 2(a) - a basis that guarantees that every individual is free to hold and to manifest the beliefs dictated by one's conscience. The Respondent's religious views served to deny Jews respect for dignity and equality said to be among the fundamental guiding values of a Court undertaking a s. 1 analysis. Where the manifestations of an individual's right or freedom are incompatible with the very values sought to be upheld in the process of undertaking a s. 1 analysis, then, an attenuated level of s. 1 justification is appropriate. (105)

[268] The Court concluded that the employment of the Respondent contributed to an invidiously discriminatory or "poisoned" educational environment and so any resulting infringement of Respondent's freedom of expression or freedom of religion was a justifiable infringement.

[269] In the recent case of *Trinity Western University v. College of Teachers (British Columbia)* (106), the Court dealt with the potential conflict between religious freedoms and equality rights. Trinity Western University (T.W.U.), a

private church-sponsored institution in British Columbia, applied to the B.C. College of Teachers for accreditation for the Teacher Education Program. That program reflected T.W.U.'s desire to have their full program reflect its Christian world view. B.C.C.T. was concerned with a standard that forbids "practices that are basically condemned", including sexual sins and homosexual behaviour. B.C.C.T. declined accreditation on the basis of a finding of discrimination. The Court of Appeal found that B.C.C.T. had acted within its jurisdiction, but affirmed the trial Judge's decision that there was no reasonable foundation for B.C.C.T.'s finding of discrimination.

[270] The majority in the Supreme Court of Canada dismissed the appeal. The Court dealt with the reconciliation of the religious freedoms of individuals and the equality concerns of students in B.C's public school system.

[271] The Court referred to *Ross v. New Brunswick School District No. 15*,

Our Court accepted (in *Ross*) that teachers are a medium for the transmission of values. It is obvious that the pluralistic nature of society in the extent of diversity in Canada are important elements that must be understood by future teachers because they are the fabric of the society within which teachers operate and the reason why there is a need to respect and promote minority rights. The suitability for entrance into the profession of teaching must therefore take into account all features of the education program at T.W.U. (107)

[272] After dealing with the standard of review and the importance of equality in Canadian society as expressed by Cory J. for the majority in *Vriend v. Alberta*, [1998] 1 S.C.R. 493, the Court dealt with B.C.C.T.'s obligation to consider issues of religious freedom in the context of reconciling the religious freedoms of individuals attending the schools and the equality concerns of students in the public system.

In our opinion, this is a case where any potential conflict should be resolved through the proper delineation of the rights and values involved. In essence, properly defining the scope of the rights avoids a conflict in this case. Neither freedom of religion nor the guarantee against discrimination based on sexual orientation is absolute. As L'Heureux-Dube J. stated in *P.(D.) v. S.(C.), (1993) 4 S.C.R. 141*, at page 182 writing for the majority on this point;

As the Court has reiterated many times, freedom of religion, like any freedom, is not absolute. It is inherently limited by the rights and freedoms of others. Whereas parents are free to choose and practice the religion of their choice, such activities can and must be restricted when they are against the child's best interests, without thereby infringing the parents' freedom of religion'. (108)

[273] Again, relying on *Dagenais v. Canadian Broadcasting Corp* (109), the Court stated that the *Charter* must be read as a whole, so that one right is not privileged at the expense of another.

[274] In the result, the majority (L'Heureux-Dube J. dissenting) held that the appeal at its core involved a reconciliation of the religious freedoms of individuals wishing to attend T.W.U. with the equality concerns of students in B.C.'s public school system. Neither freedom of religion nor the guarantee against discrimination based on sexual orientation is absolute, and the proper place to draw the line was generally between belief and conduct. There was an absence of concrete evidence that training teachers at T.W.U. promotes discrimination in the public schools of B.C. and so the freedom of individuals to adhere to certain religious beliefs while at T.W.U. should be respected.

[275] In both *Ross* and *T.W.U.*, the *Charter* right of freedom of conscience and religion was found to be engaged. *Ross*, in particular, in a similar factual context, involved the removal of a teacher from his teaching position because of anti-Semitic materials authored by him. The Court held that the order of the Board of Inquiry infringed Ross' freedom of expression under s. 2(b) of the *Charter* and also infringed Ross' freedom of religion under s. 2(a). The Court assumed the sincerity of those beliefs and opinions and said that it was not open to the Court to question their validity. (110) On this basis, we must reject the Commission's submission that no limitation or infringement of the Respondent's freedom of conscience and religion as guaranteed by s. 2(a) of the *Charter* has occurred. We cannot accept the Commission's argument that the Respondent has not identified a belief that would come within the ambit of s. 2(a) of the *Charter*.

[276] What remains, therefore, is to decide whether such a limitation is reasonable and justified in a free and democratic society pursuant to s. 1 of the *Charter*. Does our conclusion reached in connection with the application of s. 1 to s. 2(b) of the *Charter* apply equally to s. 2(a)?

[277] Dickson J. in *Big M* made it clear that while the concept of freedom of religion involves the right to entertain religious beliefs free from compulsion or restraints, this right is to be protected "within reason" and is subject to limitations that are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.

[278] While we have concluded that s. 2(a) of the *Charter* is engaged, it is difficult to see how our conclusion with respect to the application of s. 1 can be any different from our conclusion with respect to the restriction of the Respondent's right to freedom of expression.

[279] The Respondent's submission is that an offence for words that does not allow one to tell the truth according to one's conscience is a violation of s. 2(a) of the *Charter*. In response, the Commission argues that the Respondent is entitled under the *Charter* to have beliefs in relation to the Holocaust and the Jewish community in general, and to hold those beliefs to be true. Neither freedom of conscience and religion nor freedom of expression, however, permits the Respondent to breach s. 13(1) of the *Canadian Human Rights Act*. That section, as we have seen, can restrict the speaking of "truth" when it is necessary to protect

the human dignity and self-worth of members of a designated group, such as, in this case, the Jewish community.

[280] Accordingly, we rely on the reasons in *Taylor* and *Ross* to conclude that the limit placed on Respondent's freedom of conscience and religion by s. 13(1) of the *Act* is reasonable and justified in a free and democratic society.

(v) Section 7 - *Charter*

[281] The Respondent also invokes s. 7 of the *Charter,* the protection of life, liberty and security of the person. Concerning section 7, Professor Hogg has stated:

Section 7 of the *Charter of Rights* provides as follows:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundament justice.

…The better view is that s. 7 confers only one right, namely, the right not to be deprived of life, liberty or security of the person except in accordance with the principles of fundamental justice. The cases generally assume that the single-right interpretation is the correct one, so that there is no breach of s. 7 unless there has been a failure to comply with the principles of fundamental justice. (111)

a) Analysis

[282] It follows that the Respondent must show that he has been deprived of his right to life, liberty or security of the person and that such deprivation has occurred in a manner inconsistent with the principles of fundamental justice. It is clear as well that the right to life, liberty and security of the person does not include property rights or a determination of rights and obligations respecting economic interests.

[283] The Respondent asserts that s. 13(1) of the Act is vague and thus violates principles of fundamental justice. In *R. v. Nova Scotia Pharmaceutical Society* (112), Gonthier J. stated,

A vague provision does not provide an adequate basis for legal debate, that is for reaching a conclusion as to its meaning by reasoned analysis applying legal criteria. It does not sufficiently delineate any area of risk, and thus can provide neither fair notice to the citizen nor a limitation of enforcement discretion. Such a provision is not intelligible, to use the terminology of previous decisions of this Court, and, therefore it fails to give sufficient indications that could fuel a legal debate. (113)

[284] Section 7 protects the liberty of the person that includes freedom from physical restraint. Arguments were advanced by the Respondent that amendments to the *Canadian Human Rights Act* carry with them imposition of a penalty that have the effect of depriving the Respondent of his right to liberty. We would note that we have already concluded that these amendments have no application to these proceedings. Nonetheless, we will deal with this issue assuming for the purposes of discussion that the amendments to the *Canadian Human Rights Act* do apply.

[285] Professor Hogg deals with laws that impose a penalty of imprisonment.

"Liberty" certainly includes freedom from physical restraint. Any law that imposes the penalty of imprisonment, whether the sentence is mandatory or discretionary, is by virtue of that penalty a deprivation of liberty, and must conform to the principles of fundamental justice. A law that imposes only the penalty of a fine is not a deprivation of liberty and need not conform to the principles of fundamental justice. As well as imprisonment, statutory duties to submit to fingerprinting, to produce documents, to give oral testimony and not to loiter in or near school grounds, playgrounds, public parks and bathing areas are all deprivations of liberty attracting the rules of fundamental justice. (114)

[286] A law that imposes a penalty or a fine does not deprive an individual of his or her liberty. Again, stated by Professor Hogg,

The Supreme Court of Canada has refused to extend liberty beyond freedom from physical restraint. (115)

[287] The sanctions provided for in the *Act* as it now stands do not include incarceration. The Tribunal is now empowered to make an order to compensate the victim or an order to pay a penalty of not more than $10,000.00. By law, the Tribunal was only permitted to make a cease and desist order, and that is the only order requested by the Commission. Based on this, no risk of physical restraint to the Respondent is posed and accordingly, there is no violation to the right to liberty.

[288] It is additionally argued that s. 13(1) of the *Act* deprives the Respondent of his right to "security of the person". It is difficult for us to see how s. 13(1) of the *Canadian Human Rights Act* impacts on the "security of the person".

[289] The majority in *R. v. Morgantaler* was of the opinion that the risk to health that was caused by the *Criminal Code's* restriction on abortion was a deprivation of security of the person. The question is raised therefore whether security of the person embraced a concept beyond health and safety. Even so, we fail to see in what manner the Respondent's "security of the person" is put at risk by the application of s. 13(1).

[290] Even if the Respondent could successfully show a deprivation of his right to life, liberty or security of the person, such deprivation would not be contrary to the principles of fundamental justice on the basis of vagueness. *Taylor* specifically dealt with the proper interpretation of hatred and contempt and the argument that s. 13(1) of the *Act* was vague. What was said in *Taylor* bears repetition here.

With "hatred" the focus is a set of emotions and feelings which involve extreme ill-will towards another person or group of persons. To say that one hates another means in effect that one finds no redeeming qualities in the latter "Contempt" is by contrast a term which suggests a mental process of "looking down" upon or treating as inferior the object of one's feelings. (116)

[291] Dickson C.J. concluded that s. 13(1) of the *Act* was capable of a definite interpretation and could not be faulted for vagueness.

[292] Thus again, even if the Respondent had shown a deprivation of his right to life, liberty and the security of the person, in our opinion, for the reasons discussed above, any limitation of s. 7 in this case is reasonable and justified in a free and democratic society pursuant to s. 1 of the *Charter*.

[293] Moreover, we fail to see and so refuse to give effect to Respondent's argument that an order under s. 13(1) of the *Act* in the circumstances of this case violates s. 1(d) and (f) and s. 2 of the *Canadian Bill of Rights*.

(vi) Conclusion

[294] Accordingly, the Respondent's motion under s. 52 of the *Constitution Act*, 1982 for an order declaring s. 13 of the *Canadian Human Rights Act* inoperative on the grounds set forth in the motion is hereby dismissed.

CANADIAN HUMAN RIGHTS TRIBUNAL

COUNSEL OF RECORD

TRIBUNAL FILE NO.: T460/1596

STYLE OF CAUSE: Sabina Citron and Toronto Mayor's Committee on Community and Race Relations v. Ernst Zündel

PLACE OF HEARING: Toronto, Ontario

May 26-27, 1997, October 14-17, 1997,

December 11-12, 1997, December 15-19, 1997,

April 7-8, 1998, May 11-15, 1998, June 2-4, 1998,

June 9-10, 1998, November 9-10, 1998,

November 12-13, 1998, December 7-10, 1998,

December 15-18, 1998, October 4-6, 2000,

November 8-10, 2000, November 27-28, 2000,

December 4-8, 2000, February 26-28, 2001

DECISION OF THE TRIBUNAL DATED: January 18, 2002

APPEARANCES:

Robert Armstrong and Wendy Matheson For Sabina Citron and the Canadian Holocaust Remembrance Association

Edward Earle For the Toronto Mayor's Committee on Community and Race Relations

Mark Freiman, Caroline Zayid and E ddie Taylor For the Canadian Human Rights Commission

Douglas H. Christie and Barbara Kulaszka For Ernst Zündel

Marvin Kurz For the League for Human Rights of B'Nai Brith Canada

John Rosen and Robyn Bell For the Simon Wiesenthal Centre

Seamus Woods, Joel Richler and Judy Chan For the Canadian Jewish Congress

Paul Fromm For the Canadian Association for Free Expression Inc.

1. Copies of the materials downloaded from the Zundelsite are contained in Exhibit HR-2.

2. We have included a record of motions and major rulings in this case at Appendix A. There were frequent objections during the course of the evidence that resulted in rulings too numerous to recount.

3. One of the original members of the Tribunal Panel, Professor Harish Jain, resigned on December 1, 1998.

4. Dr. Alexander Jacobs, ruling dated June 8/98; Dr. Robert Countess, ruling dated June 8/98; Dr. Robert Faurisson, ruling dated January 21/99; and Dr. Tony Martin, ruling dated November 9/00.

5. Exhibit HR-2, tab 14, p.2

6. Exhibit HR-2, tab 16, pp.2 - 3

7. Exhibit HR-2, tab 19, p.3

8. Exhibit HR-4

9. Exhibit R-9

10. Exhibit HR-2, tab 25, p.1 and 3

11. Exhibit R-20

12. We would note that Mr. Klatt's years as an ISP were marked with considerable controversy. His service was subjected to intense media coverage for hosting alleged 'hate' sites.

13. Mr. Klatt's functional definition of telephony necessarily restricted his use of "telephone network" solely to the transmission of signals related to sound. The electrical transmission of all other data, such as text, would, by his definition, use a telecommunication network. There is an Internet application that allows for the transmission of voice or sound in real time that is known as Internet Telephony. In Mr. Klatt's view, this is the only Internet application that can be properly described as 'telephonic'.

14. In Canada, the phone network is owned by the Stentor Alliance, a consortium of the country's largest telephone companies; a number of much smaller independent telephone companies; a number of specialized carriers that provide specific services such as satellite transmission or wireless connections; and inter exchange carriers, that provide long distance services.

15. Although Mr. Klatt acknowledged that the original telephone network was adapted to permit the transmission of information other than sound, as referred to in fn. 13, he would consider the network, when used for those other purposes, to no longer properly be referred to as a telephone network.

16. There may be minor differences in the precise method of connection to the Internet, however, where significant these are noted. We would note that during

the course of the hearing there were a number of occasions where a witness used a laptop computer to connect to the Internet. The description of that process largely conforms to the description that follows.

17. Although some users will have a digital phone connection, it would not use the precise method of organizing the digital information that a computer would. Consequently, a digital modem would still be required to make the necessary conversions.

18. Mr. Angus gave his evidence on December 12, 15, 16 and 17, of 1997.

19. The two methods of encoding information for use on the World Wide Web are: HTTP: Hyper Text Transmission Protocol, which manages the transmission of files, and HTML: Hyper Text Mark-up Language, which tells the Browser how to display the information.

20. A user can either type in the URL if known, or use a search engine to locate the URL's of sites of interest.

21. Some web sites do have restricted access and require a password to gain entry, however, there was no suggestion that this was relevant in this case.

22. See Ruth Sullivan, *Dreidger on the Construction of Statutes*, 3 rd ed. (Toronto: Butterworths, 1994), at pp.383-388.

23. *Canada (P.G.) v. Mossop*, [1993] S.C.R. 554, at p. 612.

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

25. *Taylor*, *per* Dickson C.J., at 918.

26. *Ibid,* at 918.

27. *Ibid*, at 918-919.

28. *Ibid*, at 919.

29. *Ibid,* at 919.

30. We use this term as the common reference for messages that, within the meaning of the Act are 'likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination'.

31. See pp. 46-47 *infra* for the applicable definition of the material covered by s. 13(1).

32. See *Taylor*, at p. 928.

33. *Taylor*, p. 918.

34. Mr. Klatt did agree with this description of the Internet, however he qualified his statement by repeating his view that when used by the Internet these components are not being used telephonically unless they are being used for Internet Telephony and voice transmission. We will deal subsequently with the weight to be given to this evidence.

35. *Taylor*, *supra, per* Dickson C.J., at p. 937.

36. *IBM Canada Ltd. v. Dep. M.N.R., Customs and Excise,* [1992] 1F.C. 663; *General Datacomm Ltd. v. Dep. M.N.R., Customs and Excise*, (1984) 7 C.E.R. 1.

37. *IBM Canada Ltd*. , *ibid*, at p. 683

38. *Zundel v. Canada (Attorney General*) (1999), 175 D.L.R. (4 th) 512, at p. 531, aff'd, (2000) 195 D.L.R. (4th) 394 (C.A.)

39. Khaki v. Canadian Liberty Net, 22 C.H.R.R. D/347 (1993)

40. Carl Hamilton, a computer operator contracted by the Commission, testified to downloading these documents on August 6, 7 and 8, 1996. He made a hard copy of all of the material listed on the Zundelsite's Table of Contents, he then identified the documents contained in HR-2 as some, but not all, of the documents downloaded from www.webcom.com/ezundel/INCORR.005/incorrect.html.

41. See Did Six Million Really Die?; 66 Questions and Answers; and Jewish Soap, Inside the Auschwitz Gas Chambers; Different Views on the Holocaust; The 'Liberation of the Camps'; Facts and Lies; and Auschwitz; Myths and Facts, Exhibit HR-2.

42. See the series of Power Letters and Zgrams found in HR-2.

43. Zgram dated December 9, 1996, p. 2 of 4

44. Power Letter, July 1995, Part A, p. 4 of 7.

45. Power Letter, September 1996, p. 1.

46. Zgram, April 26, 1997, p.2.

47. Power Letter, January 1997, Part B, pp. 5-6.

48. Power Letter, July 1996, Part B, p. 5.

49. 49 The Commission also called Ms Barbara Hall, the former Mayor of Toronto, and Mayor at the time that the Mayor's Committee On Community And Race Relations filed this complaint. Ms Hall testified to the mandate of the Committee and the circumstances surrounding the filing of this complaint. Ms Hall also testified that she personally reviewed some of the documents on the Zundelsite in their electronic form. In addition to Ms. Hall and the three experts referred to above, the Commission also called Mr. Carl Hamilton who was contracted by the Commission to download the documents contained in HR-2 from the Zundelsite. These documents were downloaded on August 6, 7 and 8 of 1996 from "> www.webcom.com/ezundel/INCORR.005/incorrect.html . Mr. Hamilton went to the Table of Contents and downloaded, and printed out a hard copy of all of the documents found at this site. Some, but not all, of those documents were reproduced at HR-2.

50. Many of these techniques are evident in the examples of Mr. Zündel's messages at pp. 39-41.

51. *Taylor, supra*, *per* Dickson C.J., at pp. 927-928.

52. *Nealy v. Johnson* (1989), 10 C.H.R.R. D/6450, at p. D/6469.

53. *Taylor*, *per* Dickson C.J., at p. 928.

54. Although the Respondent did not participate in final argument, Counsel did refer to the intended purpose of this evidence at the time that it was introduced.

55. Additionally, Ms. Dorothy Calder and Mr. Basil Samme testified to their personal view that Mr. Zundel was not taken seriously in the broader community, but that he should be permitted to express his views on the Holocaust without persecution. Initially, in seeking to introduce these witnesses, Mr. Christie suggested that he might seek to rely on this evidence to argue that Mr. Zundel's communications were not likely to expose anyone to hatred or contempt because Mr. Zundel was not taken seriously in the wider community. Other than the introduction of these witnesses, this issue was not pursued, and, on the basis of these fact witnesses' personal opinion we can not make the finding of fact necessary for this argument to succeed. In the result, we need not address this argument further.

56. Constitutional Law in Canada, Hogg 4th Ed., para 40.4

57. [1994] 3 S.C.R. 835

58. *Dagenais per* Lamer, p. 877

59. *Taylor per* Dickson C.J., p. 914

60. [1986] 1 S.C.R. 103

61. *Oakes per* Dickson C.J., para. 68

62. *Taylor per* Dickson C.J., p. 916

63. *Taylor per* Dickson C.J., p.918

64. *Taylor per* Dickson C.J., p. 918

65. *Taylor per* Dickson C.J., p. 919

66. *Taylor per* Dickson C.J., p. 919

67. *Taylor per* Dickson C.J., p. 922

68. *Taylor per* Dickson C.J., p. 922

69. *Taylor per* Dickson C.J., p. 923

70. *Taylor per* Dickson C.J., p. 924

71. *Taylor per* Dickson C.J., p. 927

72. *Taylor per* Dickson C.J., p. 928

73. *Taylor per* Dickson C.J., p. 935

74. *Taylor per* Dickson C.J., p. 935

75. see *Ontario Human Rights Commission and O'Malley v. Simpson-Sears Ltd.* [1985] 2 S.C.R. 536 at pp. 549-50; *Bhinder v. Canadian National Railway Co.,* [1985] 2 S.C.R. 561 at p. 586.

76. *Taylor per* Dickson C.J., pp. 935-936

77. *Taylor per* Dickson C.J., p. 939

78. *Taylor per* Dickson C.J., p. 934

79. *Taylor per* Dickson C.J., p. 940

80. *Dagenais supra per* Lamer, p. 855

81. *Dagenais supra per* Lamer, p. 876

82. *Dagenais supra per* Lamer, p. 876

83. *Dagenais supra per* Lamer, p. 877

84. *Dagenais per* Lamer, p. 886

85. We do not read the statement by the Chief Justice as fundamentally altering the *Oakes* analysis as applied in *Taylor*. None of the conclusions in *Taylor* are referred to or reflected upon.

86. *Taylor per* Dickson C.J., p. 912

87. *Taylor per* Dickson C.J., pp. 914, 936, 937, 938

88. *Taylor per* McLachlin, p. 969

89. 51 U.S. 844, 138 L.Ed. 2d 874

90. *Ibid. per* Stevens J., p. 5

91. *Ibid*. *per* Stevens J., p. 6. At issue in this case was the protection of minors from harmful material on the Internet pursuant to the *Communications Decency Act* of 1996. In the result, the provisions in the Act were held to abridge freedom of speech protected by the First Amendment.

92. *The issue is whether the Charter* issues should have been proven at first instance with appropriate evidence as any trial, hearing or adjudication. Professor Hogg writes, in order to satisfy the burden of proving justification under s.1, Dickson C.J. said that evidence would "generally" be required, although he added that "there may be cases where certain elements of the s. 1 analysis are obvious or self-evident. Professor Hogg also notes that *Charter* evidence is frequently received on appeal and in references before appellant bodies where the constitutional issue did not emerge at first instance or where there simply is no first instance record.

93. *R. v. Edwards Books and Art Ltd*., [1986], 2 S.C.R. 713 *per* LaForest, pp. 802, 803.

94. *Interpretation Act*, R.S.C. 1985, c. 1-21, s. 43

95. *Taylor per* Dickson C.J., p. 917

96. *(1988) 1 S.C.R. 30*

97. *Ibid. per* Wilson J., paras 249 and 251

98. *R. v. Big M. Drug Mart Limited*, (1985) 1 S.C.R. 295

99. *Per* Dickson C.J ., p.336

100. *Per* Dickson C.J., p.337

101. *Ross v. School District No. 15*, (1996) 1 S.C.R. 825

102. *Ibid. per* LaForest J., p. 867, para. 67

103. *Ibid. per* LaForest J., p. 867, para. 70

104. *Ibid. per* LaForest J., p. 868, para. 71

105. *Ibid. per* LaForest J., p. 878, para 94

106. *Trinity Western University v. College of Teachers (British Columbia)*, [2001] S.C.C. No. 32 (2001 S.C.C. 31)

107. *Ibid. per* Iacobucci and Bastarache J.J., para 13

108. *Ibid. per* Iacobucci and Bastarache J.J., para 29

109. *Supra*

110. The reasons of the Court do not, it seems, contain an analysis how the anti-semitic writings and statements made by Ross constituted matters of conscience and religious belief, but one must accept the conclusion of the Court in that regard.

111. *Constitutional Law of Canada* - Hogg, 4th Edition, para 44.2

112. *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606

113. *Ibid. per* Gonthier, pp. 639 to 640

114. *Ibid. per* Hogg, para 44.7

115. *Ibid. per* Hogg, para 44.7 and *Re: B.C. Motor Vehicle Act*, (1985) 2 S.C.R. 486

116. *Taylor, supra*, pp. 927 and 928