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

John Ross Taylor and the Western Guard Party *Appellants*

v.

Canadian Human Rights Commission
and the Attorney General of Canada
Respondents

and

The Attorney General for Ontario,
the Attorney General of Quebec,
the Attorney General of Manitoba,
the Canadian Jewish Congress,
the League for Human Rights of B'Nai Brith, Canada,
the Women's Legal Education and Action Fund,
the Canadian Holocaust Remembrance Association
and the Canadian Civil Liberties Association
Interveners

indexed as: canada (human rights commission) *v.* taylor

File No.: 20462.

1989: December 4; 1990: December 13.

Present: Dickson C.J.* and Wilson, La Forest, L'Heureux-Dubé, Sopinka, Gonthier and McLachlin JJ.

on appeal from the federal court of appeal

---

* Chief Justice at the time of hearing.

Constitutional law -- Charter of Rights -- Freedom of expression -- Hate messages -- Federal human rights legislation prohibiting telephonic messages likely to expose a person or a group to hatred or contempt -- Whether federal legislation infringes s. 2(b) of Canadian Charter of Rights and Freedoms -- If so, whether infringement justifiable under s. 1 of Charter -- Canadian Human Rights Act, S.C. 1976-77, c. 33, s. 13(1).

Constitutional law -- Charter of Rights -- Reasonable limits -- Federal human rights legislation prohibiting telephonic messages likely to expose a person or a group to hatred or contempt -- Whether federal legislation too vague to constitute a limit prescribed by law -- Canadian Charter of Rights and Freedoms, s. 1 -- Canadian Human Rights Act, S.C. 1976-77, c. 33, s. 13(1).

Administrative law -- Natural justice -- Apprehension of bias -- Waiver -- Human rights tribunal -- Appointment procedure -- Whether failure to raise bias at outset of proceedings amounting to waiver.

The appellants distributed cards inviting calls to a Toronto telephone number answered by recorded messages. The messages, while in part arguably innocuous, contained statements denigrating the Jewish race and religion. In 1979, complaints about these messages were lodged with the Canadian Human Rights Commission. The Commission established a tribunal which concluded that the messages constituted a discriminatory practice under s. 13(1) of the *Canadian Human Rights Act* and ordered the appellants to cease the practice. The section makes it a discriminatory practice to communicate telephonically any matter likely to expose a person or a group to hatred or contempt on the basis, *inter alia*, of race or religion. Pursuant to the Act, the cease and desist order was filed in the Federal Court. No proceedings were taken by the appellants to have the order set aside. In spite of the order, the appellants continued their messages and were found in contempt of the order. The Party was sentenced to a $5,000 fine

and T, the Party's leader, to one year of imprisonment. The sentence was suspended upon the condition that the appellants obey the Tribunal's cease and desist order. They did not and the suspension of sentence was vacated. The Party paid its fine and T served his sentence. In 1983, the Canadian Human Rights Commission filed a new application with the Federal Court, alleging that further messages were being transmitted and that these messages also breached the Tribunal's order. The Commission sought a new order of committal of T and a $5,000 fine against the Party. Relying on the *Canadian Charter of Rights and Freedoms*, the appellants argued that s. 13(1) of the Act violated s. 2(*b*) of the *Charter*, and that the Tribunal's order was of no effect. The Federal Court, Trial Division rejected the argument, confirmed the contempt, imposed the fine and made the commital order sought by the Commission. The appellants' appeal to the Federal Court of Appeal was dismissed. This appeal is to determine (1) whether s. 13(1) of the Act and the Tribunal's cease and desist order violate s. 2(*b*) of the *Charter*; and (2) whether the Tribunal's order is invalid because of bias. The allegation of bias, raised for the first time before the Federal Court of Appeal, arises from the fact that the Tribunal was appointed by the Commission, the latter being a body intimately connected with investigating and substantiating the complaint.

Held (La Forest, Sopinka and McLachlin JJ. dissenting in part): The appeal should be dismissed. Section 13(1) of the *Canadian Human Rights Act* is constitutional.

Per Dickson C.J. and Wilson, L'Heureux-Dubé and Gonthier JJ.: The activity described by s. 13(1) of the Act is protected by s. 2(*b*) of the *Charter*. Where an activity conveys or attempts to convey a meaning, through a non-violent form of expression, it has expressive content and thus falls within the scope of the word "expression" as found in the guarantee. The type of meaning conveyed is irrelevant. Section 2(*b*) protects all content of expression. In enacting

s. 13(1), Parliament sought to restrict expression by singling out for censure particular conveyances of meaning. Section 13(1), therefore, represents an infringement of s. 2(*b*).

Hate propaganda messages against identifiable groups, such as the ones dealt with by s. 13(1), do not fall within the ambit of a possible s. 2(*b*) exception concerning expression manifested in a violent form. This exception speaks only of physical forms of violence, and extends neither to analogous types of expression nor to mere threats of violence.

Section 13(1) of the Act, which is sufficiently precise to constitute a limit prescribed by law under s. 1 of the *Charter*, constitutes a reasonable limit upon freedom of expression. First, Parliament's objective of promoting equal opportunity unhindered by discriminatory practices, and thus of preventing the harm caused by hate propaganda, is of sufficient importance to warrant overriding a constitutional freedom. Hate propaganda presents a serious threat to society. It undermines the dignity and self-worth of target group members and, more generally, contributes to disharmonious relations among various racial, cultural and religious groups, as a result eroding the tolerance and open-mindedness that must flourish in a multicultural society which is committed to the idea of equality. The international commitment to eradicate hate propaganda and Canada's commitment to the values of equality and multiculturalism enshrined in ss. 15 and 27 of the *Charter* magnify the weightiness of Parliament's objective in enacting s. 13(1).

Second, s. 13(1) of the Act is proportionate to the government's objective. The section is rationally connected to the aim of restricting activities antithetical to the promotion of equality and tolerance in society. When conjoined with the remedial provisions of the Act, s. 13(1) operates to suppress hate propaganda and its harmful consequences. It also reminds Canadians of our fundamental commitment to equality of opportunity and the eradication of racial and

religious intolerance. The fact that the international community considers such laws to be an important weapon against racial and religious intolerance strongly suggests that s. 13(1) cannot be viewed as ineffectual.

The guarantee of freedom of expression is not unduly impaired by s. 13(1). The section is not overbroad or excessively vague. Its terms, in particular the phrase "hatred or contempt", are sufficiently precise and narrow to limit its impact to those expressive activities which are repugnant to Parliament's objective. The phrase "hatred or contempt" in the context of s. 13(1) refers only to unusually strong and deep-felt emotions of detestation, calumny and vilification and, as long as human rights tribunals continue to be well aware of the purpose of s. 13(1) and pay heed to the ardent and extreme nature of feeling described in that phrase, there is little danger that subjective opinion as to offensiveness will supplant the proper meaning of the section. The absence in the Act of an interpretative provision to protect freedom of expression does not create in s. 13(1) an overly wide scope, for both its purpose and the common law's traditional desire to protect expressive activity permit an interpretation solicitous of this important freedom. Further, the absence of an intent component in s. 13(1) raises no problem of minimal impairment when one considers that the objective of the section requires an emphasis upon discriminatory effects. As in other human rights legislation, an intent to discriminate is not a precondition of a finding of discrimination. To import a subjective intent requirement into human rights provisions, rather than allowing tribunals to focus solely upon effects, would defeat one of the primary goals of anti-discrimination statutes. As for the possibility that imprisonment will be imposed upon an individual by way of a contempt order, intent is far from irrelevant in this regard, subjective awareness of the likely effect of one's message being a necessary precondition for the issuance of such an order by the Federal Court. Furthermore, the fact that s. 13(1) provides no defences to the discriminatory practice it describes, and most especially does not contain an exemption for truthful statements, does not

give it a fatally broad scope. A restriction upon freedom of expression in the context of s. 13(1) is not excessive where it operates to suppress statements which are either truthful or intended to be truthful, as it is not necessary that truthful statements be used for such ends. Finally, by focusing upon "repeated" telephonic messages, s. 13(1) directs its attention to public, larger-scale schemes for the dissemination of hate propaganda, the very type of phone use which most threatens the aim underlying the Act.

The effects of s. 13(1) upon freedom of expression are not so deleterious as to make intolerable its existence in a free and democratic society. The section furthers a government objective of great significance and impinges upon expression exhibiting only tenuous links with the values underlying the freedom of expression guarantee. Hate propaganda contributes little to the aspirations of Canadians or Canada in the quest for truth, the promotion of individual self-development or the protection and fostering of a vibrant democracy where the participation of all individuals is accepted and encouraged. Moreover, operating in the context of the procedural and remedial provisions of the Act, s. 13(1) plays a minimal role in the imposition of moral, financial or incarceratory sanctions, the primary goal being to act directly for the benefit of those likely to be exposed to the harms caused by hate propaganda.

Assuming that the *Charter* applies to the Tribunal's cease and desist order, the latter does not unjustifiably infringe s. 2(*b*) of the *Charter*. Read in the context of the Tribunal's expansive reasons, the order was not too vague and obscure to enable the appellants to be held in contempt for failure to abide by its terms. The Tribunal's reasons are emphatically clear in describing the subject-matter found to constitute a discriminatory practice.

The failure of the appellants to raise the issue of bias in a timely fashion constituted a waiver of the right to challenge the jurisdiction of the Tribunal on that ground. Bias must be

alleged at the earliest practical opportunity. Here, the issue had not been raised until the hearing before the Federal Court of Appeal, almost eight years after the Tribunal's order was rendered. In any event, since the appellants did not challenge the legitimacy of the Tribunal order directly, they could not attack it collaterally in the contempt proceeding. The appellants are bound by the cease and desist order and must obey it while it remains in force, regardless of how flawed it may be.

Per La Forest, Sopinka and McLachlin JJ. (dissenting in part): Section 13(1) of the Act infringes the guarantee of freedom of expression in s. 2(*b*) of the *Charter*. Where, as in this case, an activity conveys or attempts to convey a meaning or message through a non-violent form of expression, this activity falls within the sphere of the conduct protected by s. 2(*b*). This section protects all content of expression irrespective of the meaning or message sought to be conveyed. In enacting s. 13(1), Parliament intended to control attempts to convey a meaning by restricting the content of expression. The section does not prohibit communication by telephone. Rather, it regulates the content of such communications. Section 13(1), therefore, imposes a limit on s. 2(*b*).

Section 13(1) of the Act is sufficiently precise to constitute a limit prescribed by law under s. 1 of the *Charter*. By using the same wording as is found in the common law in defamation cases, Parliament has provided an intelligible standard for the Tribunal to apply.

Section 13(1) of the Act does not constitute a reasonable limit upon freedom of expression. While the legislative objectives of preventing discrimination and of promoting social harmony and individual dignity are of sufficient importance in our multicultural society to warrant overriding a constitutional freedom, s. 13(1) fails to meet the proportionality test. The overbreadth of the section does not withstand constitutional scrutiny.

First, s. 13(1) of the Act is not carefully tailored to its aims and lacks a rational connection with its objectives. While it is well designed to minimize many of the undesirable aspects of curbing free expression and its approach to curbing hate propaganda is far more appropriate than the all or nothing approach inherent in criminalization of such expression, s. 13(1) is too broad and too invasive and catches more expressive conduct than can be justified by its objectives. The use of the words "hatred" and "contempt", which are vague, subjective and susceptible of a wide range of meanings, extends the scope of s. 13(1) to cover expression presenting little threat of fostering hatred or discrimination. The absence of any requirement of intent or foreseeability of the actual promotion of hatred or contempt further broadens the scope of s. 13(1). Without a proof of harm or actual discrimination, s. 13(1) could well reach speech which is in fact anti-discriminatory. Finally, while the chilling effect of human rights legislation is likely to be less significant than that of a criminal prohibition, the vagueness of the law may deter more conduct than can legitimately be targeted.

Second, s. 13(1) does not interfere as little as possible with freedom of expression. No serious attempt was made to strike an appropriate balance between furthering equality and safeguarding free expression. There is no provision in the Act which protects freedom of expression. Section 13(1) simply applies to all expression "likely to expose a person or persons to hatred or contempt". Moreover, the overbreadth of the section, the absence of defences, in particular an exemption for truthful statements, and the inclusion of private communications between consenting individuals within the scope of s. 13(1) illustrate the significance of the infringement of the rights of the individual effected by s. 13(1). The section seriously overshoots the mark and goes well beyond what can be defended as a reasonable limit on free speech justified by the need to combat discrimination against members of particular groups.

Third, the benefits to be secured by s. 13(1) of the Act fall short of outweighing the seriousness of the infringement which the section effects on freedom of expression. The limitation touches expression which may be relevant to social and political issues. Free expression on such matters has long been regarded as fundamental to the working of a free democracy and to the maintenance and preservation of our most fundamental freedoms. Such a limitation must be proportionate to the evil and sensitive to the need to preserve as much freedom of expression as may be compatible with suppressing that evil. Under s. 13(1), it is far from clear that the measure, broad as it is, is calculated to significantly diminish the evils of group discrimination.

The unconstitutionality of a law upon which a court order is based does not excuse a refusal to obey the order. Even an invalid court order must be followed until it is set aside by legal process. Since s. 13(1) of the Act is unconstitutional, it follows that the Tribunal's cease and desist order rendered pursuant to that section should be quashed. The effective date of the quashing of the order, however, must be the date that this judgment is issued. For the purposes of the contempt proceedings, the order must be considered to be valid until that date. Thus, the ultimate invalidity of the order was not a defence to the contempt citation and the appellants' convictions following the 1983 complaint must be affirmed. Since the wisdom or validity of the initial decree is a relevant consideration in determining the appropriate sanction, T's sentence should be reduced to three months' imprisonment.

Appellants' contention that the findings of the Human Rights Tribunal were flawed because of an apprehension of bias must be rejected. The appellants raised this issue several years after the initial hearing. By failing to raise the issue at the outset of the proceedings, the appellants must be deemed to have impliedly waived any right to allege bias.

Cases Cited

By Dickson C.J.

Applied: *R. v. Oakes*, [1986] 1 S.C.R. 103; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *R. v. Keegstra*, [1990] 3 S.C.R. 000; *In re Human Rights Tribunal and Atomic Energy of Canada Ltd.*, [1986] 1 F.C. 103; **distinguished**: *MacBain v. Lederman*, [1985] 1 F.C. 856; **referred to**: *R. v. Andrews*, [1990] 3 S.C.R. 000; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123; *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232; *Insurance Corp. of British Columbia v. Heerspink*, [1982] 2 S.C.R. 145; *Boucher v. The King*, [1951] S.C.R. 265; *R. v. Carrier* (1951), 104 C.C.C. 75; *Taylor and Western Guard Party v. Canada*, Communication No. 104/1981, Report of the Human Rights Committee, 38 U.N. GAOR, Supp. No. 40 (A/38/40) 231 (1983), decision reported in part (1983), 5 C.H.R.R. D/2097; *Nealy v. Johnston* (1989), 10 C.H.R.R. D/6450; *Rasheed v. Bramhill* (1980), 2 C.H.R.R. D/249; *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114; *Re Sheppard and Sheppard* (1976), 67 D.L.R. (3d) 592; *Canada Metal Co. v. Canadian Broadcasting Corp. (No. 2)* (1974), 4 O.R. (2d) 585; *Glimmerveen v. Netherlands*, Eur. Comm. H. R., Applications Nos. 8348/78 and 8406/78, October 11, 1979, D.R. 18, p. 187; *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536; *Bhinder v. Canadian National Railway Co.*, [1985] 2 S.C.R. 561.

By McLachlin J. (dissenting in part)

R. v. Keegstra, [1990] 3 S.C.R. 000; *R. v. Andrews*, [1990] 3 S.C.R. 000; *R. v. Oakes*, [1986] 1 S.C.R. 103; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *In re Human*

Rights Tribunal and Atomic Energy of Canada Ltd., [1986] 1 F.C. 103; *MacBain v. Lederman*, [1985] 1 F.C. 856; *R. v. Whyte*, [1988] 2 S.C.R. 3; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326; *Walker v. City of Birmingham*, 388 U.S. 307 (1967); *R. v. Garofoli*, [1990] 2 S.C.R. 1421.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 1, 2(*b*), 15, 24(1), 27.

Canadian Human Rights Act, S.C. 1976-77, c. 33, ss. 2 [rep. & sub. 1980-81-82-83, c. 111, s. 5 (Schedule IV, item 1); *idem*, c. 143, ss. 1, 28(3)], 13(1), 32 [am. *idem*, s. 15], 35(1), (2), 37, 39(1), 40(1), 41(1), (2) [am. *idem*, s. 20], 42, 43(1), (2).

Constitution Act, 1982, s. 52.

Criminal Code, R.S.C., 1985, c. C-46, s. 319(2), (3).

European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221 (1950).

Human Rights Act, S.N.S. 1969, c. 11, s. 12.

International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (1966), Art. 20.

International Convention on the Elimination of All Forms of Racial Discrimination, Can. T.S. 1970 No. 28, Art. 4.

Authors Cited

Canada. House of Commons. Special Committee on Participation of Visible Minorities in Canadian Society. *Equality Now!* Ottawa: Supply and Services, 1984.

Canada. Law Reform Commission. Working Paper 50. *Hate Propaganda*. Ottawa: The Commission, 1986.

Canada. Special Committee on Hate Propaganda in Canada. *Report of the Special Committee on Hate Propaganda in Canada*. Ottawa: Queen's Printer, 1966.

Canadian Bar Association. *Report of the Special Committee on Racial and Religious Hatred*. By Ken Norman, John D. McAlpine and Hymie Weinstein, 1984.

McAlpine, John D. *Report Arising Out of the Activities of the Ku Klux Klan in British Columbia*, 1981.

Sharpe, Robert J. *Injunctions and Specific Performance*. Toronto: Canada Law Books Ltd., 1983.

Shorter Oxford English Dictionary, 3rd ed. Oxford: Clarendon Press, 1987, "hatred".

APPEAL from a judgment of the Federal Court of Appeal, [1987] 3 F.C. 593, 37 D.L.R. (4th) 577, 29 C.R.R. 222, 78 N.R. 180, 9 C.H.R.R. D/4929, affirming a judgment of the Trial Division (1984), 6 C.H.R.R. D/2595. Appeal dismissed, La Forest, Sopinka and McLachlin JJ. dissenting in part.

Douglas H. Christie, for the appellants.

Russell G. Juriansz and *Paul B. Schabas*, for the respondent the Canadian Human Rights Commission.

D. Martin Low, Q.C., *Stephen B. Sharzer*, for the respondent the Attorney General of Canada.

No one appeared for the intervener the Attorney General for Ontario.

Jean Bouchard and *Marise Visocchi*, for the intervener the Attorney General of Quebec.

Aaron Berg and *Deborah Carlson*, for the intervener the Attorney General of Manitoba.

Neil Finkelstein, for the intervener the Canadian Jewish Congress.

David Matas, for the intervener the League for Human Rights of B'nai Brith, Canada.

Kathleen Mahoney and *Linda A. Taylor*, for the intervener the Women's Legal Education And Action Fund.

Michael A. Penny, for the intervener the Canadian Holocaust Remembrance Association.

Marc Rosenberg, for the intervener the Canadian Civil Liberties Association.

//*Dickson C.J.*//

The judgment of Dickson C.J. and Wilson, L'Heureux-Dubé and Gonthier JJ. was delivered by

DICKSON C.J. -- Section 13(1) of the *Canadian Human Rights Act*, S.C. 1976-1977, c. 33, provides that:

> **13.** (1) 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.

Prohibited grounds of discrimination are set out in s. 2 of the Act, and include (though are not restricted to) race, national or ethnic origin, colour and religion.

The primary issue in this appeal is whether s. 13(1), in so far as it restricts the communication of certain telephone messages, violates the "freedom of expression" as guaranteed by s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*. In addition, a similar challenge has been launched against a cease and desist order made by the Canadian Human Rights Tribunal pursuant to s. 13(1) and associated remedial provisions of the *Canadian Human Rights Act*. A minor question is also raised with respect to a reasonable apprehension of bias in the Tribunal, though not in the *Charter* context. Both constitutional issues concern the dissemination of "hate propaganda", a term which I use for convenience to denote expression intended or likely to circulate extreme feelings of opprobrium and enmity against a racial or religious group.

In this case, as in the companion appeals of *R. v. Keegstra*, [1990] 3 S.C.R. 000, and *R. v. Andrews*, [1990] 3 S.C.R. 000, a number of interveners were granted leave to file submissions and to present oral argument. The Attorneys General of Ontario, Quebec and Manitoba, the Canadian Holocaust Remembrance Association, the Canadian Jewish Congress, the League for Human Rights of B'nai Brith, Canada, and the Women's Legal Education and Action Fund have intervened in support of the impugned statutory provision and order. The Canadian Civil Liberties Association has intervened for the purpose of arguing that the provision and order are constitutionally invalid.

I. Facts

In 1979, the Human Rights Tribunal (hereinafter "the Tribunal") heard a number of complaints lodged under the *Canadian Human Rights Act* against the two appellants, Mr. John Ross Taylor and the Western Guard Party. The complaints, brought by the respondent Canadian Human Rights Commission (hereinafter "the Commission"), alleged that the

appellants had contravened the Act by engaging in a discriminatory practice as defined in s. 13(1), specifically, the telephonic communication of matter that is likely to expose persons identifiable on the basis of race and religion to hatred or contempt.

Evidence given at the hearing disclosed that the appellants had instituted a telephone message service in Toronto whereby any member of the public could dial a telephone number and listen to a pre-recorded message of approximately one minute in length. Over a two-year period beginning in mid-1977, thirteen different messages had been disseminated in this fashion, each one having been drafted and recorded by Mr. Taylor, the acknowledged leader of the Western Guard Party. After considering these communications in some detail, the Tribunal summarized the import of their message as follows:

> Although many of these messages are difficult to follow, there is a recurring theme. There is a conspiracy which controls and programmes Canadian society; it is difficult to find out the truth about this conspiracy because our books, our schools and our media are controlled by the conspirators. The conspirators cause unemployment and inflation; they weaken us by encouraging perversion, laziness, drug use and race mixing. They become enriched by stealing our property. They have founded communism which is responsible for many of our economic problems such as the postal strike; they continue to control communism and they use it in the furtherance of the conspiracy. The conspirators are Jews.

The telephone service which supplied the messages in question was financed from time to time by Mr. Taylor, his assistant Mr. Jack Prins or the Party. Though the service's number was not widely publicized by the appellants, they attempted to make it known by the distribution of cards among individuals and crowds and by slipping these cards under doorways. The cards bore only a maple leaf symbol and an admonition to dial the number. As well, the number was placed in the telephone book opposite a notation which read "White Power Message".

After examining the content of the appellants' messages and hearing evidence from a number of witnesses, the Tribunal held that the appellants had engaged in a discriminatory practice as defined by s. 13(1). This conclusion is clearly and pithily stated in the following segment of the Tribunal's decision:

> . . . Mr. Taylor and The Western Guard Party have communicated telephonically or have caused to be so communicated, repeatedly, messages in whole or in part by means of facilities of a telecommunications undertaking within the legislative authority of Parliament. Although some of the messages by themselves are somewhat innocuous, the matter for the most part that they have communicated, we believe, is likely to expose a person or persons to hatred or contempt by reason of the fact that the person [*sic*] is identifiable by race or religion. In particular, the messages identify specific individuals by name . . . and we believe that the remarks about those individuals have a likelihood of exposing them to hatred or contempt, merely on the basis that they are said to be Jewish. Moreover, we hold that the messages in question not only expose identified individuals but persons generally to hatred or contempt by reason of the fact that those persons are identifiable as Jews. We therefore find that the complaints are substantiated.

Having come to this conclusion, the Tribunal ordered the appellants to cease and desist their discriminatory practice, the order stating:

> We therefore order the Respondents to cease their discriminatory practice of using the telephone to communicate repeatedly the subject matter which has formed the contents of the tape-recorded messages referred to in the complaints.

This directive, along with the entire decision of the Tribunal, was filed with the Federal Court Registry and entered in the order and judgment book of the Federal Court of Canada, Trial Division as of August 23, 1979. As a result, under s. 43(1) of the *Canadian Human Rights Act* it could be enforced as a court order. No proceedings were taken to have the order set aside.

In spite of the Tribunal order, the appellants continued their messages and, following an application by the Commission on February 21, 1980, Dubé J. of the Federal Court, Trial

Division found them in contempt: (1980), 1 C.H.R.R. D/47. He imposed a $5,000 fine on the Western Guard Party and a one year sentence of imprisonment on Mr. Taylor, but suspended the contempt order (and its attendant penalties) on the condition that the appellants thereafter discontinue the discriminatory practice identified by the Tribunal. The messages did not stop, however, and on June 11, 1980, Walsh J., also of the Federal Court, Trial Division, vacated the suspension of his colleague's contempt order. Accordingly, the Party paid its fine and Mr. Taylor served his sentence, with remission, between October 17, 1981 and March 19, 1982.

Upon his release, Mr. Taylor and the Party resumed the telephone message service, and on May 12, 1983, the Commission filed a second application with the Federal Court. This application alleged that the appellants had breached the order of the Tribunal by taping four messages between the dates of June 22, 1982, and April 20, 1983, and again sought an order of committal against Mr. Taylor and the Party. Since the first order of committal, however, the *Charter* had come into effect, and the appellants thus relied upon the *Charter* in filing a notice of motion challenging the validity of s. 13(1) of the *Canadian Human Rights Act* as contrary to the freedom of expression.

Jerome A.C.J. of the Federal Court, Trial Division dealt with both the Commission's application for committal and the appellants' attempt to have s. 13(1) struck down as unconstitutional. On August 15, 1984, he made the committal order sought by the Commission and gave oral reasons dismissing the appellants' motion as to the constitutionality of s. 13(1). Written reasons on the *Charter* issue were released on December 20, 1984.

The appellants sought to overturn the decision of Jerome A.C.J. in the Federal Court of Appeal, but their appeal was dismissed by reasons dated April 22, 1987. It is from the ruling of the Federal Court of Appeal that they now appeal to this Court.

II. Statutory and *Charter* Provisions

The relevant statutory and *Charter* provisions are as follows:

Canadian Human Rights Act

2. The purpose of this Act is to extend the present laws in Canada to give effect, within the purview of matters coming within the legislative authority of the Parliament of Canada, to the principle that every individual should have an equal opportunity with other individuals to make for himself or herself the life that he or she is able and wishes to have, consistent with his or her duties and obligations as a member 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, marital status, family status, disability or conviction for an offence for which a pardon has been granted.

13. (1) 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.

Canadian Charter of Rights and Freedoms

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

2. Everyone has the following fundamental freedoms:

. . .

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

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular,

without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

III. Judgments

Federal Court, Trial Division

Jerome A.C.J. delivered his decision on the constitutional question orally on August 15, 1984. On December 20 of the same year he released brief written reasons for this disposition: (1984), 6 C.H.R.R. D/2595. In these reasons, he began by finding that s. 13(1) infringed the freedom of expression guaranteed in s. 2(*b*) of the *Charter*, and was thus left with the question as to whether such an infringement could be justified under s. 1. At the time of the judgment, *R. v. Oakes*, [1986] 1 S.C.R. 103, had not yet been decided, and in answering this question Jerome A.C.J. asked, "whether the sacrifice of the [s. 2(*b*)] right is in proportion to the objective of achieving the elimination of the evil under attack from the Canadian way of life" (p. D/2597).

Referring to s. 2 of the *Canadian Human Rights Act*, Jerome A.C.J. noted that the promotion of equal opportunity unhindered by racial discrimination was an object with which Parliament ought to concern itself, and felt it to be obvious that freedom of expression must give way to some restrictions in order to prevent the incitement of hatred or contempt upon racial grounds. As for the manner in which s. 13(1) restricted the s. 2(*b*) guarantee, Jerome A.C.J. saw the provision as reasonable, making special mention of the conciliatory nature of the human rights legislation. Especially pertinent to this conclusion was the fact that under the Act punishment

only occurs where a transgressor is recalcitrant, and in this respect he stated (at pp. D/2597-98):

> We are not dealing here with a prohibition on the right to speak or to communicate opinions. We have instead a declaration of that which is considered to be unacceptable use of the freedom of speech in Canadian society -- a "discriminatory practice." The [Human Rights Commission] is authorized to investigate complaints in the process of which the alleged transgressor is given the opportunity to make representations. Involvement in that process obviously invites the transgressor to discontinue the offending practice but if not, it may ultimately lead to an order to do so. Only upon continued refusal to comply with such an order is there the possibility of punishment.

After reviewing the history of complaints against the appellants and the various investigatory and procedural steps taken under the *Canadian Human Rights Act*, Jerome A.C.J. commented that the case at hand aptly demonstrated the restrained nature of s. 13(1), for only upon continued refusal to cease what was clearly a discriminatory practice did the appellants become subject to punishment. He thus concluded that the evil which s. 13(1) endeavours to combat -- communications which are likely to incite racial hatred -- is unacceptable in Canadian society and that any restriction upon the freedom of expression imposed by s. 13(1) is not out of proportion to the objective of suppressing such evil.

Federal Court of Appeal (*per* Mahoney J., Stone and Lacombe JJ. concurring)

The appellants relied upon a number of grounds of appeal before the Federal Court of Appeal, all of which were dismissed: [1987] 3 F.C. 593. It is only necessary, however, to recount those reasons of the appeal court which pertain to the arguments raised before this Court. Having thus restricted the discussion somewhat, I begin by reviewing the decision of the Court of Appeal regarding the crucial issue of the constitutionality of s. 13(1).

In addressing the *Charter* challenge to s. 13(1), Mahoney J. rejected the argument of the Attorney General of Canada that the section did not infringe s. 2(*b*); in his view, s. 13(1) represented a substantial and intentional limit upon freedom of expression. The constitutional validity of s. 13(1) thus depended upon the persuasiveness of the government's justificatory arguments under s. 1 of the *Charter*, and in examining the case for saving the impugned provision Mahoney J. adopted the approach suggested by this Court in *Oakes*.

Beginning with the requirement that the government objective be of sufficient importance to warrant overriding a constitutionally protected right or freedom, Mahoney J. noted that "the concern of any free and democratic society to avoid the vilification of individuals or groups by reason of their race and/or religion is self-evident" (p. 610). In his view, Canada was a multicultural country, and such multiculturalism represented a positive characteristic of its national persona. While racial and religious strife were not rampant in Canada, the great upheaval and damage caused by intolerance in certain other nations amply illustrated the potentially serious impact of prejudicial ideas. Mahoney J. thus concluded that "the avoidance of the propagation of hatred [on grounds of race or religion] is, in itself, properly a pressing and substantial concern of a free and democratic society" (p. 611).

As to proportionality, Mahoney J. stated that the rational connection of s. 13(1) to its object "could hardly be plainer" (p. 611), and found the limitation imposed upon s. 2(*b*) to be "tailored precisely to the specific practices of those who abuse their freedom by repeatedly communicating hate messages by telephone" (p. 611). Regarding the "effects" segment of the *Oakes* proportionality test, he considered the scheme of the *Canadian Human Rights Act* as a whole, and found that the impact of s. 13(1) upon the freedom of expression exemplified restraint rather than severity. In particular, he noted that (at pp. 611-12):

> The determination that a person or group has contravened subsection 13(1) is made by a Tribunal after a hearing which must be conducted according to the requirements of natural justice. A complaint cannot be referred to a Tribunal unless the alleged transgressor has been informed of and afforded an opportunity to respond to the complaint and the evidence upon which the Commission intends to decide if a Tribunal is needed. Unless the Tribunal itself consists of three members, an appeal lies to a three member Review Tribunal. Both are subject to judicial supervision in the conduct of their hearings and the final decision is subject to judicial review. The only order that can be made is a cease and desist order. It is only after that order has been filed in the Registry of this Court and after being afforded the opportunity to appear at a show cause hearing and being found in a judicial proceeding to have continued to disobey the cease and desist order that an offender can be penalized. The maximum penalty presently prescribed is a $5000 fine or one year imprisonment, not both.

Mahoney J. thus concluded that s. 13(1) of the *Canadian Human Rights Act* was justified under s. 1, stating that (at p. 612):

> On balance, the interest of a free and democratic society to avoid the repeated telephonic communication of messages of hate based on race or religion clearly outweighs its interest to tolerate the exercise in that fashion of their freedom of expression by persons so inclined.

As already noted, the Federal Court of Appeal considered not only the *Charter* challenge to s. 13(1), but also examined a number of other grounds of appeal. One such ground was that the order of the Tribunal was too vague and obscure to enable the appellants to be held in contempt for failure to abide by its terms. The basis of the appellants' argument lay largely in the contention that the order consisted only of the following sentence:

> We therefore order the Respondents to cease their discriminatory practice of using the telephone to communicate repeatedly the subject matter which has formed the contents of the tape-recorded messages referred to in the complaints.

It was posited that this single sentence provided no intelligible guidelines as to the nature of the communications prohibited.

Mahoney J. had no difficulty in dismissing this complaint, stating that the test of vagueness is whether the intention and import of the order is ascertainable to a person of average intelligence reading it in good faith. Reading the entire reasons of the Tribunal, and not just the paragraph cited by the appellants, he felt that there could be "no *bona fide* doubt that the subject matter enjoined was subject matter likely to expose Jews to hatred or contempt" (p. 601).

A final relevant issue canvassed by Mahoney J. concerned the question of bias. The appellants noted that the Tribunal issuing the impugned order had been appointed by the Commission, and submitted that as the Commission had not only initiated and investigated the complaint, but also had appeared before the Tribunal as a party, there existed a reasonable apprehension of bias in the Tribunal. While accepting that the appointment process existing at the time of the appellants' hearing would ordinarily create a reasonable apprehension of bias, Mahoney J. held that the failure of the appellants to raise the issue in a timely fashion constituted a waiver of the right to challenge the jurisdiction of the Tribunal on that ground. He felt it unnecessary to decide this point definitively, however, for even if the Tribunal was improperly constituted the proper recourse was to challenge the validity of the order, and not to treat the order as void. "The duty of a person bound by an order of a court", stated Mahoney J., "is to obey that order while it remains in force regardless of how flawed he may consider it or how flawed it may, in fact, be" (p. 601).

IV. Issues

The following constitutional questions were stated:

1. Is s. 13(1) of the *Canadian Human Rights Act*, S.C. 1976-77, c. 33, as amended, consistent with the freedom of thought, belief, opinion and expression guaranteed by s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*?

2. If s. 13(1) of the *Canadian Human Rights Act*, S.C. 1976-77, c. 33, as amended, is inconsistent with the freedom of thought, belief, opinion and expression guaranteed by s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*, is it a reasonable limit on that freedom within the meaning of s. 1 of the *Charter*?

3. Are the order of the Human Rights Tribunal of July 20, 1979, and the orders of the Federal Court, Trial Division of January 24 and August 15, 1984, subject to challenge under s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*, and, if so, are they consistent with the freedom of thought, belief, opinion and expression as guaranteed by s. 2(*b*)?

4. If the order of the Human Rights Tribunal of July 20, 1979, and the orders of the Federal Court, Trial Division of January 24 and August 15, 1984, are subject to challenge under s. 2(*b*) of the *Canadian Charter of Rights and Freedoms* and are inconsistent with the freedom of thought, belief, opinion and expression as guaranteed by s. 2(*b*), do they constitute a reasonable limit on that freedom within the meaning of s. 1 of the *Charter*?

A non-constitutional issue is also raised by the appellants, namely, whether a reasonable apprehension of bias can be attributed to the Tribunal. As noted in recounting the decision of the Federal Court of Appeal, the allegation of bias arises from the fact that the Tribunal was appointed by the Commission, the latter being a body intimately connected with investigating and substantiating the complaint.

V. Section 13(1) and the Freedom of Expression

Beginning with the constitutional issues raised by this appeal, the pivotal challenge is to s. 13(1), for a ruling that the section is unconstitutional will necessarily render invalid any order made to cease and desist telephonic communications. I will thus look first to the question of s. 13(1)'s validity under s. 2(*b*) of the *Charter*, an inquiry that can be divided into two parts: i) does the impugned provision infringe the constitutional guarantee of free expression; and

ii) if so, is it nonetheless justified as a reasonable limit in a free and democratic society under s. 1.

As a preliminary matter, I should point out that while s. 13(1) encompasses messages likely to expose persons to hatred or contempt on the basis of any ground of discrimination prohibited by the *Canadian Human Rights Act*, the courts below examined the constitutional validity of the section only in so far as it concerns the grounds of race and religion. Moreover, the effect of the *Charter* upon the suppression of expression dealing with other prohibited grounds was not raised by the parties or interveners in argument. For these reasons, the comments below speak solely to the question of whether the effect of s. 13(1) upon communications tending to expose persons to hatred or contempt on the bases of race or religion violates the *Charter*.

A. *Section 13(1): Infringement of Section 2(b)*

The initial step in determining whether s. 13(1) violates the *Charter* is to decide whether the sphere of the freedom entrenched in s. 2(*b*) extends to telephone communications likely to expose persons to hatred or contempt by reason of identification on the basis of race or religion. According to *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, an activity which conveys or attempts to convey a meaning is generally considered to have expressive content within the meaning of s. 2(*b*). The s. 2(*b*) guarantee is infringed if it can be shown that either: i) the purpose of the impugned government regulation is to restrict expressive activity; or ii) the regulation has such an effect, and the activity in question supports the principles and values upon which the freedom of expression is based.

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 s. 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*).

As for the *Irwin Toy* requirement that the purpose or effect of the impugned regulatory measure be to restrict expressive activity, it is clear that Parliament's aim in passing s. 13(1) is to constrain expression communicated by telephone, for the section operates to prohibit directly messages likely to expose certain persons or groups of persons to hatred or contempt. The desire of the government in enacting s. 13(1) being to restrict expression by singling out for censure particular conveyances of meaning, the second requirement of *Irwin Toy* is met, necessarily leading to the conclusion that s. 2(*b*) is infringed.

Though having decided that the freedom of expression is breached by s. 13(1), before moving on to the s. 1 analysis I should make brief reference to an argument emanating from several of the interveners in support of excluding hate propaganda entirely from the scope of s. 2(*b*). This argument posits that the expression prohibited by the section is the very antithesis of the values supporting the freedom of expression guarantee and therefore is not deserving of protection under s. 2(*b*). It should be manifest from my comments in *Keegstra*, however, that I cannot accept this argument. The approach taken in *Irwin Toy* depends upon a large and liberal interpretation of the s. 2(*b*) freedom, and the gravamen of this approach is the refusal to exclude certain expression because of content. As Lamer J. said in *Reference re ss. 193 and*

195.1(1)(c) of the Criminal Code (Man.), [1990] 1 S.C.R. 1123, on this point speaking for the entire Court, "s. 2(*b*) of the *Charter* protects all content of expression irrespective of the meaning or message sought to be conveyed" (p. 1181). Aside from those instances where only the effect (as opposed to the purpose) of government regulation impinges upon the conveyance of meaning, the more refined and searching analysis of the restricted expression is better done in the context of s. 1.

It is also suggested by certain interveners, however, that despite the reluctance of the Court to enter into a discussion of content in defining the scope of s. 2(*b*), *Irwin Toy* excludes violence and threats of violence from the ambit of the freedom of expression guarantee. As the communications prohibited by s. 13(1) are said to be analogous to these excluded forms of communication, we are urged to place them outside of the sphere of protected expression. For the reasons which I gave in *Keegstra*, however, the exception suggested in *Irwin Toy* speaks only of physical forms of violence, and extends neither to analogous types of expression nor to mere threats of violence. As the messages dealt with by s. 13(1) do not involve the direct application of physical violence, I cannot find that they fall within any exception that might exist under *Irwin Toy*.

B. *Section 13(1): Analysis Under Section 1 of the Charter*

Having determined that s. 13(1) infringes s. 2(*b*), the question becomes whether the provision can be justified under s. 1 of the *Charter*. As a prefatory matter, s. 1 requires that a limit on a *Charter* right or freedom be "prescribed by law". I have had the advantage of reading the reasons of McLachlin J., and share her view that s. 13(1) satisfies this requirement.

This preliminary conclusion regarding "prescribed by law" leaves unanswered the question of whether the impugned section is a reasonable limit demonstrably justified in a free and democratic society. According to *Oakes*, there are two aspects to this portion of the s. 1 inquiry. First, it is necessary to ask whether the objective of the challenged measure is sufficiently important to warrant limiting a *Charter* right or freedom. If this initial question is answered affirmatively, the second aspect of the inquiry arises, namely, that of proportionality. Speaking generally, the proportionality requirement is met where an impugned measure is well-suited to carry out the objective and its impact upon an entrenched right or freedom is not needlessly or unacceptably severe.

The purpose and methodology of the s. 1 analysis have been outlined in my reasons in *Keegstra* and the comments made there are equally applicable in this appeal. What is of utmost importance is a recognition that s. 1 both guarantees and limits *Charter* rights and freedoms by reference to principles fundamental in a free and democratic society. This analysis requires an approach sensitive to the context of a given case, it being necessary to explore the nature and scope of constitutionally entrenched human rights in light of the facts at hand.

In applying the *Oakes* approach to legislation restricting hate propaganda, a meaningful consideration of the principles central to a free and democratic society requires reference to the international community's acceptance of the need to protect minority groups from the intolerance and psychological pain caused by such expression. Such a consideration should also give full recognition to other provisions of the *Charter*, in particular ss. 15 and 27 (dealing with equality rights and multiculturalism). Finally, the nature of the association between the expression at stake in the appeal and the rationales underlying s. 2(*b*) will be instrumental in

assessing whether a particular legislative effort to eradicate hate propaganda is a reasonable limit justified in a free and democratic society.

The considerations just mentioned help to set the stage for a s. 1 review of both s. 13(1) of the *Canadian Human Rights Act* and, as seen in *Keegstra* and *Andrews*, s. 319(2) of the *Criminal Code*, R.S.C., 1985, c. C-46. 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 compensating the victim.

Having made some preliminary comments regarding the nature of the s. 1 analysis, it is possible to look more closely at the various components of the *Oakes* approach as they pertain to the facts of this appeal. The initial task is to identify and evaluate the objective behind s. 13(1), and it is to this aspect of the inquiry that I now turn.

(a) Objective

I believe that the broad legislative intent in implementing s. 13(1) can be gleaned directly from the statute in which it is found. The purpose of the *Canadian Human Rights Act* is stated as follows in s. 2:

> 2. The purpose of this Act is to extend the present laws in Canada to give effect, within the purview of matters coming within the legislative authority of the Parliament of Canada, to the principle that every individual should have an equal opportunity with other individuals to make for himself or herself the life that he or she is able and wishes to have, consistent with his or her duties and obligations as a member 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, marital status, family status, disability or conviction for an offence for which a pardon has been granted.

It is this purpose -- 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.

Parliament's concern that the dissemination of hate propaganda is antithetical to the general aim of the *Canadian Human Rights Act* is not misplaced. The serious harm caused by messages of hatred was identified by the Special Committee on Hate Propaganda in Canada, commonly known as the Cohen Committee, in 1966. 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 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 subtlely, that members of certain racial or religious groups are inferior. The result may be an increase in acts of discrimination, including the denial of equal opportunity in the provision of goods, services and facilities, and even incidents of violence.

Since the release of the *Report of the Special Committee on Hate Propaganda in Canada*, numerous other study groups have echoed the Cohen Committee's conclusion that hate propaganda presents a serious threat to society. Affirmation of the Committee's findings may be found in the 1981 *Report Arising Out of the Activities of the Ku Klux Klan in British Columbia* by John D. McAlpine, the 1984 report of the Special Committee on Participation of Visible Minorities in Canadian Society, entitled *Equality Now!*, the Canadian Bar Association's *Report of the Special Committee on Racial and Religious Hatred*, also released in 1984, and the 1986 Working Paper 50 of the Law Reform Commission of Canada, entitled *Hate Propaganda*. It can thus be concluded that messages of hate propaganda undermine the dignity and self-worth of target group members and, more generally, contribute to disharmonious relations among various racial, cultural and religious groups, as a result eroding the tolerance and open-mindedness that must flourish in a multicultural society which is committed to the idea of equality.

In seeking to prevent the harms caused by hate propaganda, the objective behind s. 13(1) is obviously one of pressing and substantial importance sufficient to warrant some limitation upon the freedom of expression. It is worth stressing, however, the heightened importance attached to this objective by reason of international human rights instruments to which Canada is a party and ss. 15 and 27 of the *Charter*.

The stance taken by the international community in protecting human rights is relevant in reviewing legislation under s. 1, and especially in assessing the significance of a government objective (*Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038). Both Article 4 of the *International Convention on the Elimination of All Forms of Racial Discrimination*, Can. T.S. 1970 No. 28, and Article 20 of the *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171 (1966), as well as the jurisprudence of the *European Convention for the Protection*

of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221 (1950) (see, e.g., *Glimmerveen v. Netherlands*, Eur. Comm. H. R., Applications Nos. 8348/78 and 8406/78, October 11, 1979, D.R. 18, p. 187) demonstrate that the commitment of the international community to eradicate discrimination extends to the prohibition of the dissemination of ideas based on racial or religious superiority.

Indeed, in 1983 a complaint to the United Nations Human Rights Committee by Mr. Taylor and the Western Guard Party alleging a violation of the freedom of expression guaranteed in the *International Covenant on Civil and Political Rights* was rejected on the ground that "the opinions which Mr. Taylor seeks to disseminate through the telephone system clearly constitute the advocacy of racial or religious hatred which Canada has an obligation under article 20(2) of the Covenant to prohibit": *Taylor and Western Guard Party v. Canada*, Communication No. 104/1981, Report of the Human Rights Committee, 38 U.N. GAOR, Supp. No. 40 (A/38/40) 231 (1983), para. 8(b), decision reported in part at (1983), 5 C.H.R.R. D/2097. This conclusion is indicative of the approach taken in the realm of international human rights, and thus emphasizes the substantial weight which must be given the aim of preventing the harms caused by hate propaganda.

That the values of equality and multiculturalism are enshrined in ss. 15 and 27 of the *Charter* further magnify the weightiness of Parliament's objective in enacting s. 13(1). These *Charter* provisions indicate that the guiding principles in undertaking the s. 1 inquiry include respect and concern for the dignity and equality of the individual and a recognition that one's concept of self may in large part be a function of membership in a particular cultural group. As the harm flowing from hate propaganda works in opposition to these linchpin *Charter* principles, the importance of taking steps to limit its pernicious effects becomes manifest.

(b) Proportionality

Having found Parliament's objective to be of sufficient importance to justify some limitation upon the freedom of expression, the next step in the s. 1 inquiry is to determine whether s. 13(1) of the *Canadian Human Rights Act* is proportionate to this valid objective. Adopting the analytical guidelines suggested in *Oakes*, an impugned measure is seen as proportionate only if the state shows that: i) a connection exists between the measure and objective so that the former cannot be said to be arbitrary, unfair or irrational; ii) the measure impairs the *Charter* right or freedom at stake no more than is necessary; and iii) the effects of the measure are not so severe as to represent an unacceptable abridgement of the right or freedom.

Before examining in earnest the proportionality of s. 13(1) to the parliamentary objective, it is important that something be said regarding both the values supporting the free expression guarantee and the nature of the expression at stake in this appeal. In the abstract, it is unarguable that freedom of expression is held especially dear in a free and democratic society, this *Charter* guarantee providing the bedrock for the discovery of truth and consensus in all facets of human life, though perhaps most especially in the political arena. Additionally, this freedom allows individuals to direct and shape their personal development, thereby promoting the respect for individual dignity and autonomy that is crucial to (among other things) a meaningful operation of the democratic process.

As is evident in *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232, however, and as I emphasize in *Keegstra*, in balancing interests within s. 1 one cannot ignore the setting in which the s. 2(*b*) freedom is raised. 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.

In *Keegstra*, I examined in considerable detail the degree to which the protection of hate propaganda is supported by general arguments for freedom of expression. The expressive activity put at risk by s. 13(1) of the *Canadian Human Rights Act* is not identical to that prohibited under the *Criminal Code*'s s. 319(2), yet for the most part the views put forth in *Keegstra* are applicable to this appeal, and I thus find it possible to adopt the conclusion reached there at p. 000:

> . . . I am of the opinion that hate propaganda contributes little to the aspirations of Canadians or Canada in either the quest for truth, the promotion of individual self-development or the protection and fostering of a vibrant democracy where the participation of all individuals is accepted and encouraged. While I cannot conclude that hate propaganda deserves only marginal protection under the s. 1 analysis, I can take cognizance of the fact that limitations upon hate propaganda are directed at a special category of expression which strays some distance from the spirit of s. 2(*b*), and hence conclude that "restrictions on expression of this kind might be easier to justify than other infringements of s. 2(*b*)" (*Royal College*, *supra*, at p. 247).

As I hope is evident from the above quotation, it is important to recognize that expressive activities advocating unpopular or discredited positions are not to be accorded reduced constitutional protection as a matter of routine: content-neutrality is still an influential part of free expression doctrine when weighing competing interests under s. 1 of the *Charter*. The unusually extreme extent to which the expression at stake in this appeal attacks the s. 2(*b*) rationale, however, requires that the proportionality analysis be carried out with the recognition that the suppression of hate propaganda does not severely abridge free expression values. Having thus annunciated the perspective with which I approach the balancing task in

this appeal, it is appropriate to examine in detail the various segments of the proportionality inquiry as set out in *Oakes*, beginning with the question of rational connection.

(i) *Rational Connection*

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. The section labels as discriminatory the transmission of messages likely to expose individuals to hatred or contempt by reason of their being identifiable on the basis of certain characteristics, including race and religion. Sections 41 and 42 of the Act allow the Human Rights Tribunal to issue a cease and desist order against an individual found to be engaging in this discriminatory practice, and this order can be enforced upon application to the Federal Court of Canada by the Commission (s. 43). 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.

In the *Keegstra* and *Andrews* appeals, it was suggested that in practice s. 319(2) of the *Criminal Code* was ineffectual (or even worse, played a malign role) in reducing the prevalence of hate propaganda in Canada and accordingly was not rationally connected to Parliament's objective. While such an argument is not expressly made in this appeal, it is implied in the appellants' contention that, just as Germany of the 1920s and 1930s was unable to curb human rights abuses through the use of anti-hate propaganda laws, so s. 13(1) will have no effect in reducing the level of hate propaganda (and its attendant harms) in Canadian society.

For reasons similar to those given in *Keegstra*, I am unable to accede to the view that the impugned legislative measure does not advance Parliament's aim of reducing the incidence of hate propaganda. The process of hearing a complaint made under s. 13(1) and, if the complaint is substantiated, issuing a cease and desist order reminds Canadians of our fundamental commitment to equality of opportunity and the eradication of racial and religious intolerance. In addition, although criminal law is not devoid of impact upon the rehabilitation of offenders, the conciliatory nature of the human rights procedure and the absence of criminal sanctions make s. 13(1) especially well suited to encourage reform of the communicator of hate propaganda.

Finally, as I stated in *Keegstra*, the failure of criminal laws to curb the prevalence of vicious racism in Germany was a function of many complex factors; that restrictions placed upon hate propaganda in themselves failed to prevent the Holocaust is hardly surprising. The usefulness of such restrictions in helping to create an environment conducive to the peaceful coexistence of diverse cultures cannot be refuted simply by citing the monumental horrors surrounding the treatment of Jews and other minorities under the Nazi regime. In combatting discrimination legislative efforts to suppress hate propaganda are but one available form of response, and the fact that the international community considers such laws to be an important weapon against racial and religious intolerance strongly suggests that s. 13(1) cannot be viewed as ineffectual.

Ordinarily the above discussion would be sufficient to conclude that a rational connection exists between s. 13(1) and a valid government objective. The intervener Canadian Civil Liberties Association (hereafter "CCLA") has suggested, however, that the words "hatred or contempt" used in s. 13(1) are inherently vague, and that without further definition the section cannot be said to provide a clear and precise indication as to the scope of the discriminatory practice. An associated complaint raised by the CCLA, again with regard to "rational

connection", concerns the absence of an intent requirement in s. 13(1), it being suggested that telephonic messages aimed at reducing discrimination might actually fall within the section's proscription. As an example, the CCLA cited its own method of detecting widespread discriminatory practices among employment agencies by using the telephone to pose as an employer seeking "whites only" for its business. It would surely be irrational, so the argument goes, to prohibit such activity where the information obtained thereby assists, rather than hinders, the objective of achieving equality of opportunity.

The arguments of the CCLA undoubtedly require a response, yet I feel it more appropriate to do so at the minimal impairment stage of the proportionality inquiry. Whether or not there is a rational connection between a particular statutory provision and a valid s. 1 objective does not necessitate a fastidious examination of each feature of the impugned measure. Of course, the various categories of the *Oakes* approach to proportionality are simply intended to provide an analytical framework. The rigid compartmentalization of these categories is illogical, for each involves the consideration of what we would generally term "proportionality", and no bright line separates one from the other. Nevertheless, in so far as consistency in method encourages clarity and accuracy of analysis, the examination of proportionality is furthered by the approach adopted in *Oakes*. As for the "rational connection" aspect of proportionality, the presence in an impugned measure of care of design and lack of arbitrariness -- the hallmarks of a rational connection -- allows the government to pass a sort of preliminary hurdle, and as long as the challenged provision can be said to further in a general way an important government aim it cannot be seen as irrational.

As I have stated above, s. 13(1) of the *Canadian Human Rights Act* promotes the ends sought by Parliament, and consequently evinces a rational connection to those ends. This conclusion does not settle the matter of proportionality, however, for a legislative measure may go some

way towards securing a pressing and substantial objective yet do so in a manner which limits a *Charter* right or freedom more than is necessary. It is for this reason that the *Oakes* approach requires a court to ensure that a challenged measure minimally impairs the right or freedom at stake, and to my mind the criticisms levelled at s. 13(1) by the CCLA are best addressed at this point in the proportionality inquiry. I therefore direct my attention to the question of minimal impairment.

(ii) *Minimal Impairment*

I find it helpful to address the question of whether s. 13(1) minimally impairs the freedom of expression by examining in turn the arguments marshalled by the appellants and the CCLA in support of striking down the section. One of the strongest of these arguments is the complaint that the phrase "hatred or contempt" used in s. 13(1) is overbroad and excessively vague. Specifically, it is said that the wide range of meanings available for both "hatred" and "contempt" extend the scope of the section to cover expression not causing the harm which Parliament seeks to prevent. Additionally, the appellants contend that the process of determining whether a particular communication is likely to expose persons to "hatred or contempt" is necessarily subjective, leaving open the possibility that in deciding whether a complaint is well-founded the Tribunal will fall into the error of censuring expression simply because it is felt to be offensive.

When considering the scope of the phrase "hatred or contempt", it is worthwhile mentioning that the nature of human rights legislation militates against an unduly narrow reading of s. 13(1). As was stated by Lamer J. in *Insurance Corp. of British Columbia v. Heerspink*, [1982] 2 S.C.R. 145, at p. 158, 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". I therefore do

not wish to transgress the well-established principle that the rights enumerated in such a code should be given their full recognition and effect through a fair, large and liberal interpretation. At the same time, however, the purposive definition to be given a human rights code cannot extend so far as to permit the limitation of a *Charter* right or freedom not otherwise justified under s. 1.

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. Johnston* (1989), 10 C.H.R.R. D/6450, the most recent decision regarding s. 13(1), where it was noted, at p. D/6469, that:

> In defining "hatred" the Tribunal [in *Taylor*] applied the definition in the *Oxford English Dictionary* (1971 ed.) which reads (at p. 28):
>
> > active dislike, detestation, enmity, ill-will, malevolence.
>
> The Tribunal drew on the same source for their definition of "contempt". It was characterized as
>
> > the condition of being condemned or despised; dishonour or disgrace.
>
> As there is no definition of "hatred" or "contempt" within the [*Canadian Human Rights Act*] it is necessary to rely on what might be described as common understandings of the meaning of these terms. Clearly these are terms which have a potentially emotive content and how they are related to particular factual contexts by different individuals will vary. There is nevertheless an important core of meaning in both, which the dictionary definitions capture. 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. This is captured by the dictionary definition relied on in *Taylor* . . . in the use of the terms "despised", "dishonour" or "disgrace". Although the person can be "hated" (i.e. actively disliked) and treated with "contempt" (i.e. looked down upon), the terms are not fully coextensive, because "hatred" is in some instances the product of envy of superior qualities, which "contempt" by definition cannot be. [Emphasis added.]

The approach taken in *Nealy* gives full force and recognition to the purpose of the *Canadian Human Rights Act* while remaining consistent with the *Charter*. The reference to "hatred" in the above quotation speaks of "extreme" ill-will and an emotion which allows for "no redeeming qualities" in the person at whom it is directed. "Contempt" appears to be viewed as similarly extreme, though is felt by the Tribunal to describe more appropriately circumstances where the object of one's feelings is looked down upon. 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. To the extent that the section may impose a slightly broader limit upon freedom of expression than does s. 319(2) of the *Criminal Code*, however, I am of the view that the conciliatory bent of a human rights statute renders such a limit more acceptable than would be the case with a criminal provision.

In sum, the language employed in s. 13(1) of the *Canadian Human Rights Act* extends only to that expression giving rise to the evil sought to be eradicated and provides a standard of conduct sufficiently precise to prevent the unacceptable chilling of expressive activity. Moreover, as long as the Human Rights Tribunal continues to be well aware of the purpose of s. 13(1) and pays heed to the ardent and extreme nature of feeling described in the phrase "hatred or contempt", there is little danger that subjective opinion as to offensiveness will supplant the proper meaning of the section.

Connected with the argument that the s. 2(*b*) guarantee is not sufficiently protected by the use of the words "hatred" and "contempt" in the *Canadian Human Rights Act* is the observation that nowhere in the statute is the scope of s. 13(1) tempered by an interpretative provision or exemption designed to protect the freedom of expression. This observation arises out of a comparison of the Act with human rights statutes in most other Canadian jurisdictions, the practice being to prohibit discriminatory notices, signs, symbols or messages, yet to follow such prohibition with an exemption stating, to use as an example the words of Nova Scotia's *Human Rights Act*, S.N.S. 1969, c. 11, s. 12, "Nothing in this Section shall be deemed to interfere with the free expression of opinion upon any subject in speech or in writing". As the norm is to include in human rights statutes an exemption emphasizing the importance of freedom of expression, the appellants forcefully argue that the absence of such a provision in the federal statute contributes to its being overbroad.

Though not wishing to disparage legislative efforts to bolster the guarantee of free expression, for several reasons I think it mistaken to place too great an emphasis upon the explicit protection of expressive activity in a human rights statute. First, though not necessarily damaging to the appellants' argument, it is worth noting that the Canadian, Quebec and Yukon Territory human rights statutes contain no such protective element, and that in any event the exemptions referred to by the appellants are found in provisions which appear to be radically different from s. 13(1). Second, having decided that there exists an objective in restricting hate propaganda of sufficient importance to warrant placing some limits upon the freedom of expression, it would be incongruous to require that s. 13(1) exempt all activity falling under the rubric of "expression".

Perhaps the so-called exemptions found in many human rights statutes are best seen as indicating to human rights tribunals the necessity of balancing the objective of eradicating

discrimination with the need to protect free expression (see, e.g., *Rasheed v. Bramhill* (1980), 2 C.H.R.R. D/249, at p. D/252). In any event, I do not think it in error to say that even in the absence of such an exemption an interpretation of s. 13(1) consistent with the minimal impairment of free speech is necessary. I say this with an eye to pre-*Charter* cases in which freedom of expression is discussed, these making it evident that an interpretative stance designed to prevent the undue infringement of freedom of expression is available to the courts (see, e.g., *Boucher v. The King*, [1951] S.C.R. 265; *R. v. Carrier* (1951), 104 C.C.C. 75 (Que. K.B.)). It is thus telling that in *Taylor* the Tribunal was appreciative of both the common law's predilection for interpretations guarding open expression and the guarantee of freedom of speech in s. 1(*d*) of the *Canadian Bill of Rights* in determining the scope of s. 13(1).

While words in s. 13(1) such as "hatred" and "contempt" can be read consistently with both the intent of Parliament to eradicate hate propaganda and a minimal impairment of s. 2(*b*) of the *Charter*, the appellants argue that no sympathetic interpretation can remedy the overbreadth created by reason of the section's lack of an intent requirement. The focus of s. 13(1) is solely upon likely effects, it being irrelevant whether an individual wishes to expose persons to hatred or contempt on the basis of their race or religion. This inconsequentiality of intent is said to impinge seriously and unnecessarily upon the freedom of expression, and indeed in my reasons in *Keegstra* particular emphasis is placed upon the stringent intent requirement in saving s. 319(2) of the *Criminal Code* under s. 1 of the *Charter*. The argument of the CCLA referred to above in discussing "rational connection" is thus revisited, the gist of this intervenor's submission being that individuals oblivious to the consequences of their communications, or even intending to reduce the incidence of discrimination, may be caught by s. 13(1).

An intent to discriminate is not a precondition of a finding of discrimination under human rights codes (*Ontario Human Rights Commission and O'Malley v. Simpsons-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). The preoccupation with effects, and not with intent, is readily explicable when one considers that systemic discrimination is much more widespread in our society than is intentional discrimination. To import a subjective intent requirement into human rights provisions, rather than allowing tribunals to focus solely upon effects, would thus defeat one of the primary goals of anti-discrimination statutes. At the same time, however, it cannot be denied that to ignore intent in determining whether a discriminatory practice has taken place according to s. 13(1) increases the degree of restriction upon the constitutionally protected freedom of expression. This result flows from the realization that an individual open to condemnation and censure because his or her words may have an unintended effect will be more likely to exercise caution via self-censorship.

The absence of an intent requirement in the *Canadian Human Rights Act* thus presents the Court with a conflict between the objective of eradicating the discriminatory effects of certain expressive activities and the need to keep to a minimum restrictions upon the freedom of expression. This conflict is perhaps best discussed under the "effects" segment of the *Oakes* proportionality test, for the question is not so much whether the objective of s. 13(1) can be accomplished in a less restrictive way as it is whether the sacrifice required in order to combat successfully discriminatory effects is so severe as to make the impact of s. 13(1) upon the freedom of expression unacceptable. Nevertheless, putting aside this categorizational point, it seems to me that the important Parliamentary objective behind s. 13(1) can only be achieved by ignoring intent, and therefore the minimal impairment requirement of the *Oakes* proportionality test is not transgressed.

In coming to this conclusion, I do not mean to say that the purpose of eradicating discrimination in all its forms can justify any degree of impairment upon the freedom of expression, but it is well to remember that the present appeal concerns an infringement of s. 2(*b*) in the context of a human rights statute. The chill placed upon open expression in such a context will ordinarily be less severe than that occasioned where criminal legislation is involved, for attached to a criminal conviction is a significant degree of stigma and punishment, whereas the extent of opprobrium connected with the finding of discrimination is much diminished and the aim of remedial measures is more upon compensation and protection of the victim. As was stated in *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114, at p. 1134, under a human rights regime,

> It is the [discriminatory] practice itself which is sought to be precluded. The purpose of the Act is not to punish wrongdoing but to prevent discrimination.
>
> The last point is an important one and it deserves to be underscored. There is no indication that the purpose of the *Canadian Human Rights Act* is to assign or to punish moral blameworthiness.

In sum, it is my opinion that the absence of an intent component in s. 13(1) raises no problem of minimal impairment when one considers that the objective of the section requires an emphasis upon discriminatory effects. Moreover, and this is where I am perhaps jumping ahead to the "effects" component of the proportionality test, the purpose and impact of human rights codes is to prevent discriminatory effects rather than to stigmatize and punish those who discriminate. Consequently, in this context the absence of intent in s. 13(1) does not impinge so deleteriously upon the s. 2(*b*) freedom of expression so as to make intolerable the challenged provision's existence in a free and democratic society.

It is said in response by the appellants, however, that a finding of discrimination may impact upon an individual very severely indeed, an excellent case in point being the one year term of imprisonment imposed upon Mr. Taylor in the Federal Court, Trial Division. While I would have difficulty defending human rights provisions from a s. 2(*b*) attack if they exposed a discriminator to imprisonment despite a lack of intent, it must be remembered that Mr. Taylor's jail sentence was the result of a contempt order. While a realistic view of the operation of s. 13(1) demands that the possibility of a contempt order be considered when reviewing the section under the *Charter*, I think it important to understand fully the circumstances under which such an order may be issued.

Under the *Canadian Human Rights Act*, a contempt order must be preceded by an order of the Tribunal to cease and desist what has been found to be a discriminatory practice. Such a directive from the Tribunal necessarily brings to a respondent's attention the fact that his or her messages are likely to have a harmful effect. Uncertainty or mistake as to the probable effect of these messages is thus dissipated, and consequently their continued promulgation will be accompanied by the knowledge that certain individuals or groups are likely to be exposed to hatred or contempt on the basis of race or religion. At this stage of the process, it cannot be argued that an individual is innocent or negligent as to the effects of his or her message, and hence the spectre of imprisonment absent intent is dispelled. Indeed, the risk that incarceration will follow the unknowing transmission of discriminatory messages is further reduced by the requirement that a contempt order be based upon a finding that an individual has wilfully engaged in action prohibited by a court order (*Re Sheppard and Sheppard* (1976), 67 D.L.R. (3d) 592 (Ont. C.A.), at pp. 595-96). 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 the 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.

Although I have found the absence of an intent requirement in s. 13(1) to be constitutionally acceptable, the section evinces yet another feature which is said to give it a fatally broad scope. In contrast to s. 319(2) of the *Criminal Code*, s. 13(1) provides no defences to the discriminatory practice it describes, and most especially does not contain an exemption for truthful statements. Accepting that the value of truth in all facets of life, including the political, is central to the s. 2(*b*) guarantee, the question becomes whether a restriction upon freedom of expression is excessive where it operates to suppress statements which are either truthful or perceived to be truthful.

In *Keegstra*, I dealt in considerable detail with hate propaganda and the defence of truth, though in relation to the criminal offence of wilfully promoting hatred against an identifiable group. It was not strictly necessary in that appeal to decide whether or not this defence was essential to the constitutional validity of the impugned criminal provision, but I nevertheless offered an opinion on the matter, stating (at p. 000):

> The way in which I have defined the s. 319(2) offence, in the context of the objective sought by society and the value of the prohibited expression, gives me some doubt as to whether the *Charter* mandates that truthful statements communicated with an intention to promote hatred need be excepted from criminal condemnation. Truth may be used for widely disparate ends, and I find it difficult to accept that circumstances exist where factually accurate statements can be used for no other purpose than to stir up hatred against a racial or religious group. It would seem to follow that there is no reason why the individual who intentionally employs such statements to achieve harmful ends must under the *Charter* be protected from criminal censure. [Emphasis in original.]

For the reasons given in the above quotation, 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*.

I am of course aware that my comments in *Keegstra* related to a provision where an individual could only be convicted upon proof that he or she intended to promote hatred, and that in *Keegstra* the presence of such an intention was specifically emphasized. 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. I thus have no qualms in finding the sentiments expressed in *Keegstra* to be equally applicable in this appeal.

A final submission made in furtherance of the view that s. 13(1) impairs the freedom of expression more than is necessary pertains to the nature of the medium targeted by the section. It is contended that, in restricting use of the telephone to disseminate hate propaganda, the provision suppresses expression in instances where the recipient of a communication will likely agree with the content of the message received. Where he or she does not agree with the import of the communication, contact can easily be ended by hanging-up the telephone. In this vein, the CCLA has argued that the *Canadian Human Rights Act* should apply only to use of the telephone to <u>harass</u> recipients. A related point is that s. 13(1) works to suppress private communications, demonstrating an extensive and serious intrusion upon the privacy of the individual. Finally, it is pointed out that the telephone provides an inexpensive way of communicating with large numbers of people, and that minority groups and civil rights proponents attempting to further legitimate causes may be foiled by s. 13(1) and hence

deprived of the medium best suited to relatively impoverished organizations seeking to spread new and perhaps valuable ideas.

I do not disagree with the view that telephone conversations are usually intended to be private; it is surely reasonable for people to expect that these communications will not be intercepted by third persons. Moreover, in determining in *Keegstra* that the criminal prohibition of hate propaganda in s. 319(2) of the *Criminal Code* is not constitutionally overbroad, I relied to an extent upon the fact that private communications were not affected. The connection between s. 2(*b*) and privacy is thus not to be rashly dismissed, and I am open to the view that justifications for abrogating the freedom of expression are less easily envisioned where expressive activity is not intended to be public, in large part because the harms which might arise from the dissemination of meaning are usually minimized when communication takes place in private, but perhaps also because the freedoms of conscience, thought and belief are particularly engaged in a private setting.

Simply to label telephone communications as "private", however, does not justify the conclusion that s. 13(1) is overbroad. As was noted by the CCLA, the telephone is a medium which allows numerous organizations to present information and views to a sizable proportion of the public, whether through active calling or the use of recorded messages. While conversations almost always take place on a one-to-one basis, the overall effect of phone campaigns is undeniably public, and the reasonable assumption to make is that these campaigns can have an effect upon the public's beliefs and attitudes. Indeed, in the recent case of *Nealy, supra*, expert evidence presented to the Human Rights Tribunal by Dr. René-Jean Ravault, who also appeared before the Tribunal in *Taylor*, suggests that the telephone is ideally suited to the effective transmission of prejudicial beliefs, and in this respect the Tribunal stated (at pp. D/6485-86):

> This brings us to the second and more specific contextual reason which justifies the compass of the provision and that is the medium through which the hate messages are communicated. We have earlier pointed to the important testimony of Dr. Ravault as to the attractions and advantages of telephone communication to racists and white supremacists in terms of connecting with and attempting to influence those in the community who are for one reason or another bewildered or disaffected by events and forces over which they feel they have no control. Dr. Ravault was also able to demonstrate how the authors of hate messages are able through subtle manipulation and juxtaposition of material to give a veneer of credibility to the content of the messages. The combination of the telephonic medium and the material is, we believe, particularly insidious, because, while a public means of communication is used, it is one which gives the listener the impression of direct, personal, almost private, contact by the speaker, provides no realistic means of questioning the information or views presented and is subject to no counter-argument within that particular communications context.

I agree with the Tribunal's comments regarding telephone communications and hate propaganda, and find its observations to be helpful in rebutting the contention that the private nature of telephone conversations makes especially difficult the imposition of constitutionally valid limitations upon expressive telephonic activity. Those who repeatedly communicate messages likely to expose others to racial or religious hatred or contempt are seeking to gain converts to their position. The evidence of the Cohen Committee, referred to extensively in *Keegstra*, and expert testimony given before the Tribunals in both *Taylor* and *Nealy*, suggest that hate propaganda often works insidiously to spread a message of intolerance and inequality, and that the telephone is particularly suited to this mode of communication.

Section 13(1) is worded so as to diminish phone use of the type I have just described, for in the context of s. 13(1) the term "repeated" must comport a requirement for something in the way of a series of messages. Moreover, because the Tribunal must be satisfied that the messages are likely to expose persons to hatred or contempt, it may be that even a series of personal calls (by which I mean communications with friends and acquaintances) espousing hate propaganda will not constitute a discriminatory practice within the definition of the section. I thus think it misleading to conflate the discussion to the point where all one sees is

the telephone's position as an apparatus oft-used for private communications, and hence mistakenly to conclude that s. 13(1) suppresses messages which do little to promote the harms caused by hate propaganda.

As the preceding discussion shows, the freedom of expression is not unnecessarily impaired by s. 13(1) of the *Canadian Human Rights Act*. The terms of the section, in particular the phrase "hatred or contempt", are sufficiently precise and narrow to limit its impact to those expressive activities which are repugnant to Parliament's objective of promoting equality and tolerance in society. That no special provision exists to emphasize the importance of minimally impairing the freedom of expression does not create in s. 13(1) an overly wide or loose scope, for both its purpose and the common law's traditional desire to protect expressive activity permit an interpretation solicitous of this important freedom.

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. 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. A similar point can be made regarding the lack of defences offered under the Act, though as I have noted it is quite conceivable that the full panoply of defences is not constitutionally required in even a criminal provision. Finally, by focusing upon "repeated" telephonic messages, s. 13(1) directs its attention to public, larger-scale schemes for the dissemination of hate propaganda, the very type of phone use which most threatens the admirable aim underlying the *Canadian Human Rights Act*.

(iii) *Effects*

It will be apparent from the preceding discussion that I do not view the effects of s. 13(1) upon the freedom of expression to be so deleterious as to make intolerable its existence in a free and democratic society. The section furthers a government objective of great significance and impinges upon expression exhibiting only tenuous links with the rationale underlying the freedom of expression guarantee. 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 the freedom of expression by s. 13(1) is not unduly harsh, and that the third requirement of the *Oakes* proportionality approach is satisfied.

C. *Section 13(1) and the Freedom of Expression: Conclusion Under Section 1 of the Charter*

Having found that the effects of s. 13(1) are acceptable in light of the important objective sought by Parliament, I conclude that the government has satisfactorily demonstrated the proportionality of the provision. Consequently, s. 13(1) is saved under s. 1 of the *Charter* as a limit reasonable in a free and democratic society. It only remains to ask after the constitutional validity of the Tribunal's cease and desist order and the non-constitutional issue of reasonable apprehension of bias, and it is to these matters that I now turn.

VI. The Tribunal's Order and the Freedom of Expression

Upon concluding that the appellants had participated in a discriminatory activity as described in s. 13(1), the Tribunal issued a cease and desist order which, as I have noted, took the following form:

> We therefore order the Respondents to cease their discriminatory practice of using the telephone to communicate repeatedly the subject matter which has formed the contents of the tape-recorded messages referred to in the complaints.

The appellants contend that, even if s. 13(1) of the *Canadian Human Rights Act* does not unjustifiably infringe s. 2(*b*) of the *Charter*, the order of the Tribunal is unconstitutional as violating the freedom of expression. By and large, the submissions of the appellants on this point echo those made with respect to s. 13(1). The only argument truly unique to the order is that in failing to identify the nature of the prohibited subject matter the directive of the Tribunal is unacceptably vague.

Assuming that the *Charter* applies to the Tribunal's order, it is my opinion that the appellants' argument must fail. The entire decision of the Tribunal, including the paragraph just quoted, has been entered in the Judgment and Order Book of the Federal Court, and it is only reasonable to read this paragraph in the context of the Tribunal's expansive reasons. These reasons are emphatically clear in describing the subject-matter found to constitute a discriminatory practice, namely, messages claiming the existence of a Jewish conspiracy seeking to undermine and destroy Canadian society, a conspiracy said to be responsible for most of the ills presently afflicting our nation and which must be defended against at all costs.

In the words of Mahoney J. in the Federal Court of Appeal, "[t]he appellants can have had no *bona fide* doubt that the subject matter enjoined was subject matter likely to expose Jews

to hatred or contempt" (p. 601). It is thus clear that the order of the Tribunal is constitutionally valid.

VII. Apprehension of Bias in the Tribunal

Even if s. 13(1) and the cease and desist order are constitutionally valid, as I have concluded, the appellants seek to evade the impact of the Federal Court's contempt order by arguing that the decision of the Tribunal is inoperative because of a reasonable apprehension of bias. This position relies upon the Federal Court of Appeal ruling in *MacBain v. Lederman*, [1985] 1 F.C. 856, which decided that ss. 39(1) and 39(5) of the *Canadian Human Rights Act* were of no effect to the extent that they permitted the Commission to appoint the very tribunal before which it appeared as a prosecuting party. The court in *MacBain* employed s. 2(*e*) of the *Canadian Bill of Rights*, which guarantees the right to a fair hearing in accordance with the principles of fundamental justice, to declare inoperative the challenged provisions of the Act in so far as they applied to the complaint against the appellant MacBain.

The Federal Court of Appeal rejected the appellants' argument, Mahoney J. relying upon *In re Human Rights Tribunal and Atomic Energy of Canada Ltd.*, [1986] 1 F.C. 103 (C.A.), where it was accepted that a respondent is taken to have waived s. 2(*e*)'s protection regarding a reasonable apprehension of bias unless such bias is alleged at the earliest practical opportunity. In the case at hand, the matter of bias had not been raised until the hearing before the Federal Court of Appeal in the spring of 1987, almost eight years after the Tribunal released its reasons. As over a period of many years the appellants had made no effort to raise allegations of reasonable apprehension of bias, Mahoney J. found their inaction to constitute waiver.

The narrow *ratio* of Mahoney J.'s reasons, however, hinged on the fact that the appellants had not sought to challenge the legitimacy of the Tribunal order directly, but rather had simply treated the order as void and attacked it collaterally in a contempt proceeding. Adopting the rationale of O'Leary J. in *Canada Metal Co. v. Canadian Broadcasting Corp. (No. 2)* (1974), 4 O.R. (2d) 585 (H.C.), at p. 613, he stated (at p. 601):

> The duty of a person bound by an order of a court is to obey that order while it remains in force regardless of how flawed he may consider it or how flawed it may, in fact, be. Public order demands that it be negated by due process of the law, not by disobedience.

As the appellants had neglected to attack the impugned order by due process of law, Mahoney J. concluded that the finding of contempt could not be challenged by alleging a reasonable apprehension of bias.

I am in complete accord with the reasoning of Mahoney J. in the Federal Court of Appeal, and therefore conclude that the appellants' submission regarding a reasonable apprehension of bias is without merit. As a postscript, however, I must emphasize that no arguments were presented regarding the applicability of *Charter* provisions, and in coming to the above conclusion I have not taken the possible effect of the *Charter* into account.

VIII. Disposition

Having concluded that neither s. 13(1) nor the cease and desist order of the Tribunal unjustifiably infringes s. 2(*b*) of the *Charter*, I would answer the constitutional questions as follows:

1. Is s. 13(1) of the *Canadian Human Rights Act*, S.C. 1976-77, c. 33, as amended, consistent with the freedom of thought, belief, opinion and expression guaranteed by s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*?

Answer: No.

2. If s. 13(1) of the *Canadian Human Rights Act*, S.C. 1976-77, c. 33, as amended, is inconsistent with the freedom of thought, belief, opinion and expression guaranteed by s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*, is it a reasonable limit on that freedom within the meaning of s. 1 of the *Charter*?

Answer: Yes.

3. Are the order of the Human Rights Tribunal of July 20, 1979, and the orders of the Federal Court, Trial Division of January 24 and August 15, 1984, subject to challenge under s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*, and, if so, are they consistent with the freedom of thought, belief, opinion and expression as guaranteed by s. 2(*b*)?

Answer: Assuming that the *Charter* applies, these orders infringe s. 2(*b*) of the *Charter*.

4. If the order of the Human Rights Tribunal of July 20, 1979, and the orders of the Federal Court, Trial Division of January 24 and August 15, 1984, are subject to challenge under s. 2(*b*) of the *Canadian Charter of Rights and Freedoms* and are inconsistent with the freedom of thought, belief, opinion and expression as guaranteed by s. 2(*b*), do they constitute a reasonable limit on that freedom within the meaning of s. 1 of the *Charter*?

Answer: Yes.

As for the non-constitutional issue regarding the reasonable apprehension of bias, I agree with the view of Mahoney J. in the Federal Court of Appeal that the order of the Tribunal cannot be attacked on this ground.

Consequent upon the above conclusions, I would dismiss the appeal with costs to the respondent Commission.

//*McLachlin*//

The reasons of La Forest, Sopinka and McLachlin JJ. were delivered by

MCLACHLIN J. (dissenting in part) -- This case challenges the constitutional validity of s. 13(1) of the *Canadian Human Rights Act*, S.C. 1976-77, c. 33, which prohibits the use of repeated telephonic communications where the communication is likely to expose a person or groups of persons to hatred or contempt.

The appellants were found by the Human Rights Tribunal to have violated the section in 1979, before the enactment of the *Canadian Charter of Rights and Freedoms*. The Tribunal ordered that the appellants cease and desist from such communications. Pursuant to the Act, the order of the Tribunal was filed as a Federal Court Order. The appellants continued to violate the order and were cited for contempt of the court order. After the *Charter* came into force, the appellants were again brought before the Court and again cited for contempt of the original order. It is this second citation for contempt which is challenged in the present case.

The appellants argue that s. 13(1) of the *Canadian Human Rights Act* and the order of the Tribunal violate s. 2(*b*) of the *Charter* and are invalid. They ask that the findings of contempt

against them be set aside on the ground that the Federal Court order, which they disobeyed, is without foundation and invalid.

Facts

Between 1977 and 1979 the appellants distributed cards inviting calls to a Toronto telephone number answered by recorded messages. The messages, while in part arguably innocuous, contained statements denigrating the Jewish race and religion. In 1979, complaints about these messages were lodged with the Canadian Human Rights Commission. The Commission established a tribunal which, following an investigation, concluded that the messages constituted a discriminatory practice under s. 13(1) of the *Canadian Human Rights Act* and ordered the appellants to cease the practice. The Tribunal wrote:

> We hold that Mr. Taylor and the Western Guard Party have communicated telephonically or have caused to be so communicated, repeatedly, messages in whole or in part by means of facilities of a telecommunication undertaking within the legislative authority of Parliament. Although some of the messages by themselves are somewhat innocuous, the matter for the most part that they have communicated, we believe, is likely to expose a person or persons to hatred or contempt by reason of the fact that the person is identifiable by race or religion. In particular, the messages identify specific individuals by name . . . and we believe that the remarks about those individuals have a likelihood of exposing them to hatred or contempt, merely on the basis that they are said to be Jewish. Moreover, we hold that the messages in question not only expose identified individuals but persons generally to hatred or contempt by reason of the fact that those persons are identifiable as Jews. We therefore find that the complaints are substantiated.

The cease and desist order of the Tribunal was filed in the Federal Court, pursuant to ss. 43(1) and 43(2) of the Act. The messages, however, continued. On February 21, 1980, Dubé J. found the appellants in contempt of the order: (1980), 1 C.H.R.R. D/47. The Party was sentenced to a $5,000 fine and Taylor, the Party's leader (who had recorded the tapes), was

sentenced to one-year's imprisonment. Dubé J. suspended the sentence upon the condition that the appellants obey the Tribunal's order.

The appellants continued to disobey the order. Accordingly, the Canadian Human Rights Commission applied to have the suspension lifted. On June 11, 1980, Walsh J. granted the application, and made an order lifting the suspension of the sentence. An order of committal against Taylor followed, notwithstanding that the appellants had instigated an appeal from the original order (dismissed by the Federal Court of Appeal, February 27, 1981). Taylor served his time in prison.

On May 12, 1983, the Canadian Human Rights Commission filed another application in the Federal Court, alleging that further messages were transmitted between June 22, 1982 and April 20, 1983 and that these messages also breached the Tribunal's original cease and desist order. The Commission sought a further order of committal of Taylor and a further $5,000 fine against the Party. In the meantime, the *Charter* had been adopted on April 17, 1982. Relying on the *Charter*, the appellants argued that s. 13(1) of the *Canadian Human Rights Act* violated s. 2(*b*), and that the order was of no effect. Jerome A.C.J. rejected this argument. An appeal to the Federal Court of Appeal was unsuccessful. Leave to appeal to this Court was granted December 3, 1987, [1987] 2 S.C.R. x.

Relevant Legislation

The *Canadian Human Rights Act* provides:

> **2.** The purpose of this Act is to extend the present laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament of Canada to the principle that every individual should have an equal opportunity with other

> individuals to make for himself or herself the life that he or she is able and wishes to have, consistent with his or her duties and obligations as a member 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, marital status, family status, disability or conviction for an offence for which pardon has been granted.
>
> **13.** (1) 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.

Section 13 is part of a comprehensive statutory scheme aimed at preventing repetitive discriminatory telephone communications. Any person or group of persons who believes that a person is engaging in discriminatory practices contravening s. 13(1) may lodge a complaint pursuant to s. 32. Alternatively, the Commission itself may instigate a complaint. After a complaint is filed, the Commission may appoint an investigator to investigate the complaint. At any stage after the filing of a complaint the Commission may appoint a human rights tribunal to inquire further into the complaint. If the tribunal finds that the complaint is substantiated, it may issue a cease and desist order. An order of the tribunal can be entered as an order of the Federal Court.

It will be noted that this scheme, unlike the *Criminal Code* provisions in question in *R. v. Andrews*, [1990] 3 S.C.R. 000, and in *R. v. Keegstra*, [1990] 3 S.C.R. 000 (delivered concurrently), does not without prior warning attach a penalty to expression. It is only after the Tribunal has declared that past conduct has violated s. 13, and after the order has been entered, that an individual faces a penalty for violating the section should he or she continue the impugned conduct.

The validity of the schemes established by the *Canadian Human Rights Act* must be determined in light of the following sections of the *Charter*:

> **1.** The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
>
> **2.** Everyone has the following fundamental freedoms:
>
> . . .
>
> (*b*) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
>
> **15.** (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> **24.** (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
>
> **27.** This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

Judgments Below

Federal Court, Trial Division

Jerome A.C.J. found that the appellants had disobeyed the Federal Court Order filed pursuant to the *Canadian Human Rights Act*: (1984), 6 C.H.R.R. D/2595. He expressed the

view that ss. 13(1), 32, 35(1) and (2), 39(1), 40(1), 41(1) and (2), and s. 43(1) and (2) of the Act constituted a reasonable restriction upon the appellants' right of freedom of speech guaranteed in the *Charter*. In so concluding, he applied the test of "whether the sacrifice of the right is in proportion to the objective of achieving the elimination of the evil under attack from the Canadian way of life" (p. D/2597). He then stated (at p. D/2598):

> It is appropriate that Parliament express the principle that communications which have as their purpose incitement of racial hatred are unacceptable in Canadian society. That is the evil which the relevant sections of the *Canadian Human Rights Act* endeavour to combat and for the reasons given, I am not persuaded that the resulting restriction upon freedom of speech is out of proportion to that objective. There is therefore no basis for finding that these legislative provisions exceed `reasonable limits . . . demonstrably justified in a free and democratic society'.

Federal Court of Appeal, [1987] 3 F.C. 593

The Federal Court of Appeal found that the trial judge was justified in concluding that the appellants' disobedience of the subsisting order of the Tribunal constituted contempt of court. In its view, regardless of how flawed the order might be, the appellants were bound to obey it so long as it remained in force. As Mahoney J. put it, "Public order demands that [the order] be negated by due process of the law, not by disobedience" (p. 601). Even if the order were invalid, that would offer no excuse for refusal to obey it.

Mahoney J. rejected the appellants' argument that the order of the Tribunal was too vague and obscure for them to be found in contempt of it, noting that the test of vagueness is "whether the intention is ascertainable or understandable to a person of average intelligence reading it in good faith" (p. 601). In his opinion, the appellants could have no *bona fide* doubt "that the subject matter enjoined was subject matter likely to expose Jews to hatred or contempt" (p. 601).

Nor was the Federal Court of Appeal persuaded that the appellants could not be held to have disobeyed the order for the reason that the messages in question told the truth. In this respect, Mahoney J. stated (at p. 604):

> No reasonable person, considering the messages as a whole, could conclude that their only purpose was to communicate truth; their purpose was plainly to communicate that which had been enjoined by the cease and desist order: a message likely to expose Jews to hatred or contempt.

On the constitutional question, the Court of Appeal was of the opinion that s. 13(1) of the *Canadian Human Rights Act* violates the guarantee of freedom of speech and must, if it is to survive, be justified under s. 1 of the *Charter* as a reasonable limit on the appellants' freedom of expression. After considering the criteria established by the Supreme Court of Canada in *R. v. Oakes*, [1986] 1 S.C.R. 103, for determining whether such a limit is reasonable, Mahoney J. observed that the determination must be made in the context of the freedom of expression of persons in Canada generally, rather than with reference to circumstances peculiar to the appellants. He went on to state that in making this determination, the court need not have evidence but may be taken to have a general knowledge of the history and values of Canadian society. In the result, he found that the impugned limitation is "tailored precisely to the specific practices of those who abuse their freedom by repeatedly communicating hate messages by telephone" (p. 611). He concluded that the legislation was saved by s. 1, given that "the interest of a free and democratic society to avoid the repeated telephonic communication of messages of hate based on race or religion clearly outweighs its interest to tolerate the exercise in that fashion of their freedom of expression by persons so inclined" (p. 612).

Issues

This case puts in issue the constitutionality of s. 13(1) of the *Canadian Human Rights Act* and the order of the Federal Court under the *Charter*. Additional questions are raised as to whether the Order of the Human Rights Tribunal is invalid because of bias, and whether if a court order is based on an invalid statutory provision it may still be the basis for contempt proceedings.

The following constitutional questions were stated by Dickson C.J.:

1. Is s. 13(1) of the *Canadian Human Rights Act*, S.C. 1976-77, c. 33, as amended, consistent with the freedom of thought, belief, opinion and expression guaranteed by s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*?

2. If s. 13(1) of the *Canadian Human Rights Act*, S.C. 1976-77, c. 33, as amended, is inconsistent with the freedom of thought, belief, opinion and expression guaranteed by s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*, is it a reasonable limit on that freedom within the meaning of s. 1 of the *Charter*?

3. Are the order of the Human Rights Tribunal of July 20, 1979, and the orders of the Federal Court, Trial Division of January 24 and August 15, 1984, subject to challenge under s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*, and, if so, are they consistent with the freedom of thought, belief, opinion and expression as guaranteed by s. 2(*b*)?

4. If the order of the Human Rights Tribunal of July 20, 1979, and the orders of the Federal Court, Trial Division of January 24 and August 15, 1984, are subject to challenge under s. 2(*b*) of the *Canadian Charter of Rights and Freedoms* and are inconsistent with the freedom of thought, belief, opinion and expression as guaranteed by s. 2(*b*), do they constitute a reasonable limit on that freedom within the meaning of s. 1 of the *Charter*?

The appellants raise the following additional issue:

5. Was the Human Rights Tribunal, appointed by the Canadian Human Rights Commission, hearing a complaint from the same commission, subject to a

reasonable apprehension of bias, and was that objection waived by an unrepresented accused prior to the *MacBain* case?

Analysis

I. *Background*

In my reasons in *Keegstra*, *supra*, I explored the historical and philosophical underpinnings of freedom of expression in Canada, as well as the approach to hate propaganda taken in this and other jurisdictions.

From an historical perspective, it is apparent that freedom of speech, at least in the political context, was recognized as a fundamental right possessing quasi-constitutional status even prior to the adoption of the *Charter*. The *Charter* affirmed and expanded the right of free expression, increasing its scope by extending the guarantee to a wide range of expression, and confirming its fundamental nature by entrenching it as a broad-ranging constitutional right.

From a philosophic perspective, freedom of expression may be justified on three broad rationales. The first two are "instrumental" in nature, viewing freedom of expression firstly as the means of promoting the "marketplace of ideas" essential to a vibrant society, and secondly as being indispensable to the proper functioning of democratic government. The third justification is that of self-actualization or self-fulfilment. Freedom of expression is viewed as an end in itself, a valuable measure of freedom to which each person is entitled in our society. This Court has affirmed all three rationales as supporting the guarantee of free expression embodied in s. 2(*b*) of the *Charter*.

The treatment of hate propaganda in other jurisdictions varies. In the United States, where freedom of expression is viewed as perhaps the most fundamental liberty, the validity of legislation restricting the promotion of hate and discrimination is seen as conflicting with free expression and to survive must meet onerous tests, such as a connection between the legislation and a clear and present danger to society. In international human rights law, the right of free expression is limited from the outset by the qualification that it must yield to reasonable measures prohibiting the promotion of hatred and discrimination against groups. On this approach, no conflict between freedom of expression and the limiting legislation arises; freedom of expression is readily cut back to accommodate laws against the promotion of hatred and discrimination. The Canadian *Charter* suggests an analysis closer to the American model than the international, in so far as it confers a broad and virtually unlimited right, which, in cases of conflict, must be weighed against countervailing values under s. 1 to determine if the state has established that the limitation of the right imposed by the anti-hate law is reasonable and justifiable in a free and democratic society.

II. *The Scope of Section 2(b) of the Charter*

The question posed is whether s. 13(1) of the *Canadian Human Rights Act* introduces a limit on freedom of expression as defined by s. 2(*b*) of the *Charter*.

In *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, the majority of this Court adopted a two-step analysis. Initially, it is necessary to determine whether or not the activity falls within the sphere of conduct protected by the guarantee. If the activity falls within the protected sphere of expressive conduct, then it is necessary to determine whether the purpose or effect of the government action was to restrict freedom of expression.

The majority in *Irwin Toy* distinguished between the content and form of expressive conduct alleged to fall within the ambit of s. 2(*b*). The guarantee of free expression protects all content of expression but may not protect some forms of expression, for example, violence and threats of violence.

Section 13(1) must be viewed as directed at limiting the content of expression. While the form of expression is specific (i.e., it only applies to the telephone), the Act is not prohibiting communication by telephone. Rather, it is only regulating the content of such communications. Therefore, the first step in *Irwin Toy* is clearly met.

The second question is whether the purpose or effect of the government action is to restrict freedom of expression. If the purpose is to restrict attempts to convey a meaning, a limitation by law of s. 2(*b*) is established and a s. 1 analysis is required to determine whether the law is inconsistent with the provisions of the Constitution. Generally speaking, "if the government has aimed to control attempts to convey a meaning either by directly restricting the content of expression or by restricting a form of expression tied to content, its purpose trenches upon the guarantee": *Irwin Toy, supra*, at p. 976. If this was not the government's purpose, the Court must move on to an analysis of the effects of the government action.

It is apparent that Parliament, in enacting s. 13(1) of the *Canadian Human Rights Act*, intended to control attempts to convey a meaning by restricting the content of expression. I conclude that the second step in the *Irwin Toy* test is met, and that s. 13(1) violates s. 2(*b*). This leaves the question of whether or not s. 13(1) is demonstrably justifiable under s. 1 of the *Charter*.

III. *Section 1 of the Charter*

Section 13(1) of the *Canadian Human Rights Act* violates the guarantee of freedom of expression in s. 2(*b*) of the *Charter*. The next question is whether the state has demonstrated that notwithstanding this violation, the law is reasonable and demonstrably justified in a free and democratic society. The fundamental issues at stake in answering this question are the same as in *Keegstra* and *Andrews*. The contest is between freedom of expression on the one hand, and the prevention of hate propagation and discrimination against particular groups in society on the other. However, there are important differences between the cases. The most significant is the means by which the promotion of hatred is to be curbed. In *Keegstra* and *Andrews*, the method at issue was the criminalization of wilful attempts to promote hatred against groups. In this case, the method is a prohibition in a human rights statute, coupled with the enforcement procedures set out in the statute.

Before examining the justifiability of the limitation on free expression effected by s. 13(1) of the Act, it is necessary to dispose of a preliminary argument which was raised in this case alone -- the argument that s. 13(1) is so broad and vague that it does not constitute a "limit prescribed by law" and hence cannot be saved under s. 1 of the *Charter*.

1. Limit Prescribed by Law

Before s. 1 can apply, the statute or section in question must be found to constitute a limit "prescribed by law".

The appellants submit that s. 13(1) is vitiated by vagueness which prevents the prospective law-abiding citizen from ascertaining the point at which his opinions may begin to expose a person or group to hatred in a prohibited manner. The meaning of the terms "hatred" and "contempt" is vague and uncertain, it is submitted. Moreover, the phrase "likely to expose"

requires neither real nor actual effect and is incapable of precise delineation. This is countered by the submission that s. 13(1) is no more vague than many laws and in any event, is sufficiently precise to constitute a limit prescribed by law under s. 1 of the *Charter*.

In *Irwin Toy*, this Court considered the issue of whether or not regulations governing commercial advertising directed at children were sufficiently precise to constitute legal prescriptions. The respondent argued that the test in the statute in question in *Irwin Toy* was vague because it left an inordinately wide discretion in the judge to determine whether a commercial advertisement was aimed at children. The majority, Dickson C.J. with Lamer and Wilson JJ., rejected this submission, at p. 983:

> Absolute precision in the law exists rarely, if at all. The question is whether the legislature has provided an intelligible standard according to which the judiciary must do its work. The task of interpreting how that standard applies in particular instances might always be characterized as having a discretionary element, because the standard can never specify all the instances in which it applies. On the other hand, where there is no intelligible standard and where the legislature has given a plenary discretion to do whatever seems best in a wide set of circumstances, there is no "limit prescribed by law".

In my view, s. 13(1) satisfies the test enunciated in *Irwin Toy*. By using the same wording as is found in the common law in defamation cases, Parliament has provided an intelligible standard for the Tribunal to apply. I conclude that the limits on speech set out in s. 13(1) are sufficiently precise to constitute a limit "prescribed by law".

That is not to say that the alleged vagueness of the standard set by the provision is irrelevant to the s. 1 analysis. For reasons discussed below, I am of the opinion that the difficulty in ascribing a constant and universal meaning to the terms used is a factor to be taken into account in assessing whether the law is "demonstrably justified in a free and democratic society". But I would be reluctant to circumvent the entire balancing analysis of the s. 1 test

by finding that the words used were so vague as not to constitute a "limit prescribed by law", unless the provision could truly be described as failing to offer an intelligible standard. That is not the case here.

It thus becomes necessary to determine if the limits imposed by s. 13(1) of the *Canadian Human Rights Act* are "reasonable" limits in a "free and democratic society".

2. "Reasonable Limit" in a "Free and Democratic Society"

The tests for determining whether an infringement on a constitutionally guaranteed right or freedom is reasonable and justified in a free and democratic society were established in *R. v. Oakes*, *supra*, and have been adhered to ever since. Two requirements must be satisfied. First, the objective which the limit is designed to serve must be of sufficient importance to warrant overriding a constitutionally protected right. Second, if such an objective is established, the party invoking s. 1 must show that the means chosen to attain the objective are reasonable and demonstrably justified in a free and democratic society. To conclude that the means chosen are reasonable and demonstrably justified, the Court must be satisfied of three things:

1. The measures designed to meet the legislative objective (in this case s. 13(1) of the *Canadian Human Rights Act*) must be rationally connected to the objective;

2. The means used should impair as little as possible the right or freedom in question; and

3. There must be proportionality between the effect of the measures which limit the *Charter* right or freedom and the legislative objective of the limit on those rights. This involves

balancing the invasion of rights guaranteed by the *Charter* against the objective to which the limitation of those rights is directed.

(a) *The Objective Section 13(1) of the Act*

In *Oakes*, Dickson C.J. stated that the first consideration in an analysis under s. 1 of the *Charter* is whether the objective of the infringing measure is of sufficient importance to warrant overriding a fundamental constitutional guarantee. The standard must be high to ensure that trivial objects do not win s. 1 protection -- indeed, the object which the impugned law is designed to effect must be of a pressing and substantial nature.

The legislative objective of the *Canadian Human Rights Act* is set out within s. 2 of the Act. Its purpose is:

> . . . to give effect . . . to the principle that every individual should have an equal opportunity with other individuals to make for himself or herself the life that he or she is able and wishes to have, consistent with his or her duties and obligations as a member 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, marital status, family status, disability or conviction for an offence for which a pardon has been granted.

Section 13(1) is specifically directed at telephonic communications which may encourage other discriminatory practices proscribed by the Act. As the respondent Canadian Human Rights Commission submits, s. 13(1) also has a special objective -- that of preventing the use of a federally regulated medium for the promotion of hatred or contempt against groups protected by the Act. The broad objective of s. 13(1) may be summarized thus: its purpose is to discourage discrimination against groups traditionally discriminated against -- discrimination calculated to result in loss of opportunity, loss of respect, and in extreme cases,

violence against persons who are members of those groups. More positively, s. 13(1) may be viewed as aimed at enhancing and protecting group cultural identity and hence furthering the multicultural heritage in Canada to which the *Charter* gives express recognition. It may also be viewed as making a statement about the kind of society we wish to live in. Section 13(1) seeks to achieve these broad purposes in the context of federally regulated telephone services. Viewed globally, the purposes of s. 13(1) may be summed up in the phrase I used in *Keegstra* -- to promote social harmony and individual dignity.

For the reasons I set out in *Keegstra*, I am satisfied that s. 13(1) of the *Canadian Human Rights Act* addresses matters of pressing and substantial concern. Its objectives are of sufficient importance that provided the means of achieving them are proportionate, they may be capable of overriding the right to freedom of expression guaranteed by s. 2(*b*) of the *Charter*. The real issue to be determined is whether or not s. 13(1) can meet the proportionality test.

(b) *Proportionality*

(i) General Considerations

As in *Keegstra* and *Andrews*, the real issue in this case is whether the means chosen to pursue the end of curbing discrimination are reasonable and proportionate to the limitation on freedom of expression. At this stage of the analysis the conflict between the freedom infringed -- freedom of expression -- and the countervailing values represented by the law -- s. 13(1) of the Act -- must be placed in the factual context of the case. The question is not whether the cause of curbing group discrimination is capable of outweighing freedom of speech; that question has been answered in considering the seriousness of the objective of the law. The

question is rather whether the particular infringement effected by s. 13(1) of the Act can be justified by the actual benefit which the legislation is calculated to bestow.

I have concluded that s. 13(1) of the Act cannot be upheld by reference to s. 1, as it cannot survive the proportionality inquiry. While the suppression of hate messages is an important and desirable objective, in my view s. 13(1) does not achieve that objective in a manner consistent with the proportionality test in *Oakes*. The broad and vague ambit of s. 13(1), unconditioned by any limitations of significance, has as its effect the unnecessary prohibition of a great deal of defensible speech and belies any suggestion of a serious effort to accommodate the important right of freedom of expression. Notwithstanding the sensitive and appropriate enforcement procedure established by the Act, the dimension of the overbreadth of the legislation is such that the tests established by this Court for the application of s. 1 cannot be met.

The general considerations adverted to in my reasons in *Keegstra* are equally relevant in this case. It is important to keep in mind that what is at issue is not Mr. Taylor's conduct, but the validity of s. 13(1) of the Act which may have ramifications going far beyond those raised by the facts of this particular case. It is also important to bear in mind the peculiar status of freedom of expression in maintaining our democratic system of government and all other rights and freedoms. Regard must also be had to the chilling factor likely to accompany restrictions on expression; often the effect of such restrictions extends far beyond those forms of expression targeted or challenged by legal process. Finally, in considering the reasonableness of the law, it is important to consider alternative ways of furthering its objective.

Against this background, I turn to the specific factors which must be considered in determining whether the benefit secured by the law outweighs the gravity of the infringement of rights which it effects.

(ii) Rational Connection

The first question is whether s. 13(1) is, in the words of Dickson C.J. in *R. v. Whyte*, [1988] 2 S.C.R. 3, at p. 20, "carefully designed to achieve the objective of the legislation, with a rational connection to the objective". In answering this question, it is relevant to consider not only the links between the legislation and its objective as Parliament saw them, but whether the practical effects of the legislation may run counter to the stated objective: see *Keegstra*.

Rational connection must be viewed, not only from the perspective of the intention of the legislators, but from the perspective of whether in fact the law is likely to accomplish its objectives. Latitude must be accorded to the legislators, but where it appears that the law is unlikely to achieve the ends or indeed, may have a contrary effect to the objectives by which it is sought to be justified, it cannot be said to be rationally connected to those objectives.

Rational connection may also be absent where the infringement effected by the law goes beyond what can be justified by the objectives of the legislation. Hence the insistence of Dickson C.J. that the law be closely tailored to its objectives. To the extent that the infringement cannot be justified on the ground that it furthers the objective, there is no rational connection between the measure and its object.

Section 13(1) of the *Canadian Human Rights Act* is said to fail the rational connection test on the ground that it is unlikely to have any effect on curbing discrimination and indeed may

have a contrary effect. Thus, the Canadian Civil Liberties Association argues that the section has no demonstrable effect on curbing discrimination and indeed may have the opposite effect by dignifying the ideas hatemongers put forward.

The case that s. 13(1), far from achieving its objectives, may have a contrary effect, is far less strong than in *Keegstra* and *Andrews*. The use of the human rights procedures for enforcement and the absence of the defence of truth may considerably lessen the danger of a counter-productive effect. And in so far as racial hatred and discrimination may be stirred up by telephone messages, the law may have a salutary effect, although the extent of this effect is made doubtful by the fact that only those who want to receive the messages will receive them.

It is the second basis upon which it is contended that s. 13(1) fails the rational connection test -- namely that it is not closely tailored to its objectives and hence infringes freedom of speech in unjustified and essentially irrational ways -- which creates the greatest concern in this case.

As in *Keegstra*, a strong case can be made that s. 13 catches much expression which presents little threat of fostering hatred of groups or discrimination, yet may fall within the traditional justifications for protecting speech. Indeed, the language of s. 13(1) is considerably broader than that used in s. 319(2) of the *Criminal Code*, R.S.C., 1985, c. C-46. "Hatred", which appears in both provisions, covers a range of emotion ranging from active dislike to enmity and ill-will: *Shorter Oxford English Dictionary* (3rd ed. 1987). "Contempt", signifying lack of respect, is even broader. Moreover, both terms are vague and subjective, capable of extension should the interpreter be so inclined. Where does dislike leave off and hatred or contempt begin? The use of these words in s. 13(1) opens the door to investigations and inquiries for

matters which have more to do with dislike than discrimination. The phrase does not assist in sending a clear and precise indication to members of society as to what the limits of impugned speech are. In short, by using such vague, emotive terms without definition, the state necessarily incurs the risk of catching within the ambit of the regulated area expression falling short of hatred.

The breadth of the section is further widened by the absence of any requirement of intent or foreseeability of the actual promotion of hatred or contempt. While this is consistent with the remedial as opposed to punitive focus of human rights legislation, it has the effect of extending the section's application. Any expression "likely to expose" persons to hatred or contempt on a prohibited head of discrimination is caught, regardless of whether the expression was intended or could be foreseen to have this effect. As a result, s. 13(1) may reach speech which is in fact anti-discriminatory. For example, the Canadian Civil Liberties Association says that its practice of posing on the telephone as employers desirous of hiring white-only employees has helped expose widespread discriminatory practices in employment, and is the only practical way of doing so. Such calls might well be caught by s. 13(1). Expression intended to expose discriminatory practices or demonstrate inequities in the system may equally be caught by s. 13(1). This overbreadth might be more excusable if s. 13(1) required proof of actual harm or discrimination. But in the absence of requirements for either intent or foreseeability of producing such an effect or production of the effect itself, the section is capable of catching conduct which clearly goes beyond the scope of its objects.

The supporters of the legislation respond to the problem of overbreadth by arguing that in practice, the process envisaged by the Act removes the danger that it will be used to catch conduct which is beyond its objectives. They point out that violation of s. 13(1) does not in itself lead to any penalty. It is merely the starting point in a process arguably calculated to

segregate justifiable expression from that which is not suitable for transmission by a public utility and which truly promotes detrimental hatred and contempt, and to thereafter effect, hopefully through voluntary means, the cessation of the offending conduct. The first step in this human rights process is the Commission's investigation. The Commission at this stage does not only investigate; it attempts to conciliate. If the alleged offender is prepared to make concessions and amend his or her conduct, this is the end of the matter. On the other hand, if the alleged offender is adamant in resisting the law, a board of inquiry can be established to hold a hearing of the complaint. Given the public nature and the inconvenience of a hearing, many offenders choose to amend their conduct voluntarily. The Commission and the Tribunal function relatively informally and can take into account the circumstances in which the statement is made and rule out messages whose content or purpose is in fact innocent. Even where voluntary compliance cannot be obtained and the messages are felt to be truly detrimental to human rights and values with the consequence that a hearing is held, the tribunal does not convict, but rather merely makes an order against further repetition of such messages. Only when a person deliberately violates such an order can he or she be convicted of contempt of court and face penal consequences. Even then, a judge may excuse the disobedience for good reason, contempt being to some extent a discretionary matter.

For establishing the necessary balance between promoting harmony and dignity on the one hand, and safeguarding freedom of expression on the other, the process of this Act is exemplary. It is well designed to minimize many of the undesirable aspects of curbing free expression. This approach to curbing hate propaganda is far more appropriate than the all or nothing approach inherent in criminalization of such expression. Coupled with a more narrowly-drafted prohibition, it might well withstand constitutional scrutiny. But the question at this point is whether the system is capable of curing the overbreadth of s. 13(1). I cannot conclude that it is. In my view, it is no answer to the absence of rational connection between

the broad sweep of legislation and its objectives, to say that in practice, Commissioners and members of tribunals may choose not to enforce the overbroad aspects of a provision. Rights and freedoms guaranteed by the *Charter* cannot be left to the administrative discretion of those employed by or retained by the state. This is not a case where constitutional problems are raised only if one presumes that administrative officials will exercise their discretion in a manner contrary to the *Charter*. Rather, the power to infringe the *Charter* is delegated explicitly or by necessary implication by the provision, and so it must stand or fall on its own terms: see Lamer J. in *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, at p. 1078.

Moreover, the chilling effect of leaving overbroad provisions "on the books" cannot be ignored. While the chilling effect of human rights legislation is likely to be less significant than that of a criminal prohibition, the vagueness of the law means it may well deter more conduct than can legitimately be targeted, given its objectives.

In the end result, I cannot avoid the conclusion s. 13(1) is capable of catching a broad range of expression beyond that which can be justifiably limited in pursuit of the objectives of preventing discrimination and maintaining social harmony and individual dignity. To the extent it catches such expression, it is not carefully tailored to its aims and lacks a rational connection with its objectives.

(iii) Minimum Impairment

The question at the second stage of the proportionality inquiry is whether s. 13(1) impairs the right of freedom of speech as little as possible. In considering this question, some degree of deference must be paid to Parliament. The fact that the Court might be able to conceive a

way the legislative goal could be accomplished with less intrusion on the right is not necessarily fatal, provided the legislative scheme, viewed as a whole, constitutes a measured and proportionate impairment on the right. The question must be whether the impairment is objectively reasonable given the objectives of the legislation, whether, to borrow the language of *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, a "serious effort" has been made to accommodate the right infringed "without undue damage to the scope and quality of the pause day objective" (p. 783).

As stated in *Edwards Books*, it would not be appropriate for this Court to conclude that the degree of impairment of a right is not "minimum" merely because it can conceive of an alternative way of legislating which seems to achieve the end desired with less impairment. On the other hand, where the measure seriously overreaches and unjustifiably infringes the right or freedom in question, the Court has no choice but to find the test not met.

I conclude that s. 13(1) does infringe freedom of speech seriously and ultimately unjustifiably.

The considerations relating to overbreadth discussed in the context of whether there exists a rational connection between s. 13(1) of the Act and its objectives are relevant here. Much expression may be caught which is unrelated to the aims of the section. This is exacerbated by the potential chilling effect on expression of the vague and emotive terms of the prohibition.

There may be good reasons to defer to legislative judgment on the appropriate balance between furthering equality and safeguarding free expression, particularly in the context of a human rights statute. The problem here, however, is that no serious attempt to strike such a

balance appears to have been made. The Act does not, as other human rights Codes do, admonish the tribunal to have regard to the speaker's freedom of expression in applying the provision. Nor does it contain even one of the various defences or exceptions included in s. 319(3) of the *Criminal Code*, and thought to be so significant in striking the balance by the Cohen Committee: *Report of the Special Committee on Hate Propaganda in Canada* (1966), at pp. 65-66. Rather, it simply applies to all expression "likely to expose a person or persons to hatred or contempt".

More specifically, one factor which increases the seriousness of the infringement on freedom of expression is the absence of the defence of truth. In defence of this omission, it can be argued that discrimination can be fostered even by true statements (e.g., handicapped people may encounter more difficulties on the job-site than persons without physical handicaps), and that making truth a defence merely provides a platform for hate-mongers to expound on their ideas. For these reasons, I would not wish to be taken as suggesting that a human rights prohibition on hate promotion which did not allow for the defence of truth, but was otherwise unobjectionable, could not survive constitutional scrutiny. At the same time, the value of seeking truth is one of the strongest justifications for freedom of expression. It is essential to the "marketplace of ideas" which is a condition of a free, vibrant society. It is equally central to the rationales of the working of democracy and self-fulfilment that underlie freedom of expression. Individuals in a free society assume that, whatever restriction it may be necessary to place on free speech, they will always have the right to say what is true. That right cannot lightly be restricted. Thus, the exclusion of the defence of truth from s. 13(1) cannot but seriously increase the degree of infringement of freedom of expression which the provision effects.

Another aspect of the overreaching nature of s. 13(1) is the fact that it allows the Commission to interfere with the strictly private communication of ideas. In this respect s. 13(1) again goes further than s. 319(2) of the *Criminal Code*. The benefit obtained from prohibiting private conversations between consenting individuals is arguably small, since only those who are already receptive to such messages are likely to be interested in receiving them. On the other hand, the invasion of privacy may be significant. Without suggesting that prohibition of offensive telephone calls could never be justified, the fact that private communications are banned cannot but enhance the significance of the infringement of the rights of the individual effected by s. 13(1) of the Act.

On the other side of the question, those supporting s. 13(1) point out that it is limited in that it applies to telephone communications only. This, however, does not explain why a less incursive provision, such as a prohibition against counselling discriminatory practices by telephone, might not suffice equally well. Moreover, the importance of the telephone as a medium of communication should not be underestimated. The telephone is perhaps the least expensive mode by which less advantaged groups or individuals can communicate their ideas and beliefs. Native groups, religious minorities and others who identify themselves by their colour, religion, or ethnic origin may find themselves inhibited by overbroad prohibitions on telephonic communication from using the telephone to express legitimate grievances against the perceived inequities imposed by the majority culture. If the aim of the *Charter* is to secure to all persons, regardless of economic means, a justifiable measure of free expression, then particular care should be taken in drafting legislation suppressing telephonic communication.

In conclusion, I am satisfied that s. 13(1) intrudes on the fundamental freedom of expression in ways that cannot, even with the greatest deference to Parliament, be justified by the objectives it seeks to promote. The effort made to accommodate the right of free expression

is insufficient. Section 13(1) catches speech which is neither intended nor calculated to foster discrimination. It catches speech which may be entirely accurate and truthful; speech which merely seeks to air legitimate group grievances; speech which merely exposes to ridicule; speech which merely communicates the information by telephone to a single person who has the power to hang up the phone if he or she does not like the message; private speech between consenting participants. In short, s. 13(1) seriously overshoots the mark, going beyond what can be defended as a reasonable limit on free speech justified by the need to combat discrimination against members of particular groups.

(iv) Importance of the Right Versus Benefit Conferred

I turn finally to the question of whether the deleterious effects of the infringement of freedom of expression represented by s. 13 outweigh the benefits to be derived from it. Applying the contextual approach set out by Wilson J. in *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, the nature and degree of the impairment must be balanced against the evils it is calculated to remedy.

The significance of the infringement of the right at issue in this case is most serious. The limitation touches expression which may be relevant to social and political issues. Free expression on such matters has long been regarded as fundamental to the working of a free democracy and to the maintenance and preservation of our most fundamental freedoms. The right to express oneself freely on such matters is not lightly to be trammelled; a limitation on such expression must be proportionate to the evil and sensitive to the need to preserve as much freedom of expression as may be compatible with suppressing that evil.

On the other side of the balance, it is not clear that the measure, broad as it is, is calculated to significantly diminish the evils of group discrimination. The goals of elimination of discrimination or promotion of social harmony may conceivably be advanced by suppression of some of the expression caught by s. 13(1), although this is not beyond conjecture. At the same time, much of the expression caught by s. 13(1) may bear no relation to these goals. In these circumstances, it is difficult to argue that the cost of the legislation in terms of infringement of the right to free expression is justified by the benefit it confers.

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.

(v) Conclusion on the Section 1 Analysis

Has the Crown established that the limit on freedom of expression effected by s. 13(1) of the *Canadian Human Rights Act* is reasonable and justifiable in a free and democratic society? I think not.

A free and democratic society places a high value on the right of free expression. Indeed, without free expression a free and democratic society cannot function, nor can the rights upon which that society is premised be long maintained. All such societies recognize that freedom of expression is not absolute. But they also recognize that where the expression in question goes to political and social issues, limitations must be proportionate to the harm which may flow from abusive expression and sensitive to the need not to trammel free expression more than is reasonably necessary.

There can be no doubt that the prevention of discrimination and the maintenance of social harmony and individual dignity are of the utmost importance in our multicultural society. Expression which threatens these values can properly be limited by Parliament and the legislatures. But the limit must be effected in a reasonable manner, proportionate to the evil and sensitive to the fundamental right of free expression. It is the breadth of the prohibition which creates the difficulty in this case. On all three criteria for proportionality laid down in *Oakes*, s. 13(1) of the Act emerges wanting.

IV. *Conclusion on the Charter Issues*

I conclude that s. 13(1) of the *Canadian Human Rights Act* infringes s. 2(*b*) of the *Charter*, and that the Crown has not discharged the burden on it of showing that the measure is reasonable and demonstrably justified in a free and democratic society. The section is too broad and too invasive; it overreaches its objectives and ultimately cannot be justified by them.

V. *Bias*

The appellants, relying on the Federal Court of Appeal decision in *MacBain v. Lederman*, [1985] 1 F.C. 856, argue that the findings of the Human Rights Tribunal were flawed because of an apprehension of bias. Pursuant to the scheme of the Act the Commission investigated, found that there was sufficient basis for proceeding, and prosecuted the complaint. The same Commission appointed the members of the Tribunal, which heard and decided the case. The appellants argue that this gives rise to an apprehension of bias, and as such they were not afforded a fair hearing in accordance with principles of fundamental justice.

In *MacBain* the same appointment procedure as that in question in the present case was challenged. The Federal Court of Appeal found that there was a reasonable apprehension of bias because there was a direct connection between the prosecutor of the case, the Canadian Human Rights Commission, and the decision-maker. That connection gave rise to a suspicion of influence or dependency. The court thus concluded that the applicant was not afforded a fair hearing in accordance with principles of fundamental justice, as guaranteed by s. 2(*e*) of the *Canadian Bill of Rights*.

The Canadian Human Rights Commission argues that *MacBain* was wrongly decided. They also argue that if the validity of the Tribunal's order is questionable due to an apprehension of bias, such defect merely makes the Federal Court order voidable and does not affect the contempt proceedings. The appropriate course would be for the appellants to move to have the order set aside.

Because the facts in the present case render the *MacBain* decision clearly distinguishable, it is not necessary for me to decide the validity of the principles set forth in *MacBain*. In *MacBain*, the issue of bias was raised at the outset of the process, as MacBain alleged bias even before the first meeting of the tribunal. Conversely, the appellants in this case raised the issue of bias several years after the initial hearing. By not raising the issue at the outset and by proceeding with the Tribunal hearings and contempt hearings without raising the issue, the appellants must be deemed to have waived any right to raise an issue of bias now.

I would adopt the reasons of MacGuigan J. in *Re Human Rights Tribunal and Atomic Energy of Canada Ltd.*, [1986] 1 F.C. 103 (C.A.). There, as here, the applicant failed to raise the allegation of bias at the commencement of the proceedings. MacGuigan J., distinguishing

MacBain, held, at p. 113, that the principle in *MacBain* was limited to situations where the applicants raise allegations of bias at the outset of the proceedings:

> . . . AECL's whole course of conduct before the Tribunal constituted an implied waiver of any assertion of a reasonable apprehension of bias on the part of the Tribunal. The only reasonable course of conduct for a party reasonably apprehensive of bias would be to allege a violation of natural justice at the earliest practicable opportunity. Here, AECL called witnesses, cross-examined the witnesses called by the Commission, made many submissions to the Tribunal, and took proceedings before both the Trial Division and this Court, all without challenge to the independence of the Commission. In short, it . . . impliedly . . . waived its right to object.

In the case at bar, no evidence was presented to prove that the bias issue was raised at any time prior to argument before the Federal Court of Appeal. There may be circumstances in which failure to raise bias from the outset does not amount to implied waiver (for example, where, as here, the party was unrepresented at the initial hearing). However, it is not necessary for the purpose of this case to delineate a precise time at which bias must be raised because I am satisfied on the facts of this case that the appellants did not raise the allegation at the "earliest practicable opportunity". I conclude that, like the applicant in *Re Human Rights Tribunal*, the appellants must be deemed to have impliedly waived any right to allege bias.

VI. *The Orders*

Having found s. 13(1) to be invalid, it is not necessary to consider whether the Tribunal's order itself offended s. 2(*b*) of the *Charter* by its overbreadth. This leaves for consideration the question of the effect of the unconstitutionality of s. 13(1) of the *Canadian Human Rights Act* on the contempt proceedings in the Federal Court.

We were presented with no authority for the proposition that the unconstitutionality of a law upon which a court order is based excuses a refusal to obey the order. Such a proposition appears not to have been advanced in Canada prior to this appeal. In the United States, where it has been advanced, it has been rejected. It has there been held that an individual can defend an established violation of an order only by showing (1) that the court was without *in personam* or subject-matter jurisdiction to issue the injunction, or (2) that the injunction was not only an unconstitutional prior restraint, but that its challengers had sought judicial review before disobeying it "and had been met with delay or frustration of their constitutional claims", threatening the timely exercise of First Amendment claims, or (3) that the order was "transparently invalid": *Walker v. City of Birmingham*, 388 U.S. 307 (1967). Without suggesting that Canadian law should go as far as American law in recognizing defences to breaches of court orders, it may be observed that none of the conditions alluded to in *Walker* are met in the case at bar.

Pre-*Charter* Canadian and common law authority also supports the proposition that even an invalid court order must be followed until it is set aside by legal process. The position at common law has been summarized as follows:

> It is well established that a contempt application is not answered by the assertion that the injunction was erroneously granted or even that it was void. The proper course is to move against the injunction or to appeal and the court will not permit the original order to be attacked collaterally in contempt proceedings. Again, however, courts have considered the wisdom or validity of the initial decree in determining the appropriate sanction.

See R. J. Sharpe, *Injunctions and Specific Performance* (1983), at p. 259, and cases cited therein.

On the other hand, it may be argued that imprisonment for disobedience of an order founded on a constitutionally invalid section should not occur in the normal course. On this view, a review of the contempt citation can be sought at the same time as the order is challenged, on the basis that while the order is technically valid until set aside, it would be unjust to maintain a conviction for contempt where the conduct consists in exercising one's constitutional rights as enunciated by the courts. During the interval while the constitutionality of the statute is under review, it would be appropriate to request that service of the sentence be deferred on terms, as is often done where criminal convictions are under appeal.

In my opinion, the 1979 order of the Tribunal, entered in the judgment and order book of the Federal Court in this case, continues to stand unaffected by the *Charter* violation until set aside. This result is as it should be. If people are free to ignore court orders because they believe that their foundation is unconstitutional, anarchy cannot be far behind. The citizens' safeguard is in seeking to have illegal orders set aside through the legal process, not in disobeying them.

In this case, the appellants ask both that the order be quashed as an unreasonable restraint on the appellants' freedom of expression, and that their convictions and sentences for violating the order be set aside. In my opinion, while this Court has the power to accede to these applications under s. 24(1) of the *Charter*, which permits it to fashion appropriate remedies for constitutional violations, the two requests must be treated independently.

Having found that the statutory provision on which the Tribunal's order was based is invalid, it follows that the order cannot continue to stand. I would therefore accede to the appellants' request that the Tribunal's order be quashed. However, the effective date of the quashing of the order must be the date that this judgment is issued. For the purposes of the contempt

proceedings, it must be considered to be valid until set aside by legal process. Thus, the ultimate invalidity of the order is no defence to the contempt citation.

The upholding of the conviction in this case must, however, be distinguished from a situation such as in *R. v. Garofoli*, [1990] 2 S.C.R. 1421, where evidence is held to have been unlawfully obtained notwithstanding that it was secured pursuant to an authorization that has not been set aside. The commission of the offence of contempt does not depend on the validity of the underlying law but on the existence of a court order made by a court having jurisdiction. I would therefore affirm the appellants' convictions.

That leaves only the sentences to consider. In the Federal Court, Trial Division, Jerome A.C.J. originally imposed sanctions of one year's imprisonment for the appellant, John Ross Taylor, and a fine of $5,000 for the appellant, The Western Guard Party. Applying the principle identified by Sharpe, op. cit., that the wisdom or validity of the initial decree is a relevant consideration in determining the appropriate sanction, I would vary the judgment below, and reduce the appellant John Ross Taylor's sentence to three months' imprisonment.

Conclusion

I conclude that s. 13(1) of the *Canadian Human Rights Act* violates the *Charter* and must fall under s. 52 of the *Constitution Act, 1982*. I would therefore allow the appeal in part.

I would quash the order made against the appellants by the Human Rights Tribunal on July 20, 1979 and entered into the judgment and order book of the Federal Court, Trial Division, as of August 23, 1979, but affirm the convictions registered against the appellants in the order of the Federal Court, Trial Division, of August 15, 1984. However, I would vary the sentence

imposed on the appellant, John Ross Taylor, by reducing it to three months' imprisonment. As success in this appeal has been mixed, I would make no order as to costs.

I would answer the constitutional questions raised as follows:

1. Is s. 13(1) of the *Canadian Human Rights Act*, S.C. 1976-77, c. 33, as amended, consistent with the freedom of thought, belief, opinion and expression guaranteed by s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*?

Answer: No.

2. If s. 13(1) of the *Canadian Human Rights Act*, S.C. 1976-77, c. 33, as amended, is inconsistent with the freedom of thought, belief, opinion and expression guaranteed by s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*, is it a reasonable limit on that freedom within the meaning of s. 1 of the *Charter*?

Answer: No.

3. Are the order of the Human Rights Tribunal of July 20, 1979, and the orders of the Federal Court, Trial Division of January 24 and August 15, 1984, subject to challenge under s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*, and, if so, are they consistent with the freedom of thought, belief, opinion and expression as guaranteed by s. 2(*b*)?

Answer: It is not necessary to address this issue.

4. If the order of the Human Rights Tribunal of July 20, 1979 and the orders of the Federal Court, Trial Division of January 24 and August 15, 1984, are subject to challenge under s. 2(*b*) of the *Canadian Charter of Rights and Freedoms* and are inconsistent with the freedom of thought, belief, opinion and expression as guaranteed by s. 2(*b*), do they constitute a reasonable limit on that freedom within the meaning of s. 1 of the *Charter*?

Answer: It is not necessary to address this issue.

Appeal dismissed, LA FOREST, SOPINKA *and* MCLACHLIN JJ. *dissenting in part.*

Solicitor for the appellants: Douglas H. Christie, Victoria.

Solicitors for the respondent the Canadian Human Rights Commission: Blake, Cassels & Graydon, Toronto.

Solicitor for the respondent the Attorney General of Canada: John C. Tait, Ottawa.

Solicitor for the intervener the Attorney General for Ontario: The Ministry of the Attorney General, Toronto.

Solicitors for the intervener the Attorney General of Quebec: Jean Bouchard, Marise Visocchi and Gilles Laporte, Ste-Foy.

Solicitor for the intervener the Attorney General of Manitoba: Gordon E. Pilkey, Winnipeg.

Solicitors for the intervener the Canadian Jewish Congress: Blake, Cassels & Graydon, Toronto.

Solicitors for the intervener the League for Human Rights of B'Nai Brith, Canada: David Matas, Winnipeg.

Solicitors for the Women's Legal Education and Action Fund: Kathleen Mahoney, Calgary; Code Hunter, Calgary.

Solicitors for the intervener the Canadian Holocaust Remembrance Association: Tory, Tory, DesLauriers & Binnington, Toronto.

Solicitors for the intervener the Canadian Civil Liberties Association: Greenspan, Rosenberg, Toronto.