T. D. 10/ 89 Decision Rendered on July 25, 1989

THE CANADIAN HUMAN RIGHTS ACT (S. C. 1976- 77, C. 33 as amended)

HUMAN RIGHTS TRIBUNAL

BETWEEN:

ROBERT NEALY, CARMEN W. WALLACE, KEN WASSERMAN, DEBORAH R. GLASER Complainants - and

RANDY JOHNSTON, TERRY LONG, CHURCH OF JESUS CHRIST CHRISTIAN- ARYAN NATIONS Respondents - AND

DAVID GOLDBERG, Complainant - and

CHURCH OF JESUS CHRIST CHRISTIAN- ARYAN NATIONS Respondent

TRIBUNAL:

JOHN McLAREN, NORMAN FETTERLY and BRENDA GASH

DECISION OF THE TRIBUNAL

APPEARANCES:

CHERYL CRANE, RENE DUVAL, Esq. Counsel for the Canadian Human Rights Commission.

D. MATAS, Esq. Counsel for K. Wasserman, D. Glaser and D. Goldberg.

DATES OF HEARING: October 26, 27, and 28, 1988 and November 17 and 18, 1988

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A. The Complaint

This complaint is brought by five individuals under section 13( 1) of the Canadian Human Rights Act. The complainants are Mr. Robert Nealy of Edmonton, Alberta, Mr. Carmen Wallace of Blackfalds, Alberta, Ms. Deborah Glaser and Mr. Kenneth Wasserman of Edmonton, Alberta and Mr. David Goldberg of Toronto. Ms. Glaser, Mr. Wasserman and Mr. Goldberg are employees or members of B'Nai Brith, Canada.

Section 13( 1) of the Canadian Human Rights Act provides 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 3( 1) of the same Act sets out the prohibited grounds of discrimination. They comprise "race, national or ethnic origin, colour, religion, age, sex, marital status, family status, disability and conviction for which a pardon has been granted".

The substance of the complaints of four of the complainants in their final and amended form is identical, except for the dates of messages forming the focus of the complaints and the identity of the groups mentioned in the messages and the prohibited grounds of discrimination alleged. The amended complaint of Mr. Nealy, dated January 27th, 1988 reads

I allege that Randy Johnston, Terry Long and the Church of Jesus Christ Christian - Aryan Nations have acted in concert to communicate telephonically or have caused to be so communicated, on a number of occasions during the period February 16- 23, 1987 and in particular on February 20, 1987, and continue to do so, by means of the facilities of Alberta Government Telephones, a telecommunication undertaking that is within the authority of Parliament, a recorded telephone message that is likely to expose persons to hatred or contempt by reason of the fact that those persons are Vietnamese, Tamils, Sikhs and are identifiable on the basis of race, colour, national or ethnic origin and religion, contrary to section 13( 1) of the Canadian Human Rights Act.

> 2 The complaint of Mr. Wallace refers to messages heard on February 20, February 24 and March 12, 1987. The messages in the joint complaint of Ms. Glaser and Mr. Wasserman were dated February 20 and 24 and March 12, 1987 and January 21, 1988. In these two complaints Jews were included with the three ethnic groups mentioned specifically in Mr. Nealy's complaint. In the complaint of Ms. Glazer and Mr. Wasserman religion is omitted as a ground of discrimination.

Mr. Goldberg's complaint which was dated March 13, 1987 differed from the other three in that it was not amended and was made only against the Church of Jesus Christ Christian- Aryan Nations (hereinafter referred to as "the

Church"), not against Terry Long and Randy Johnston. It made reference to taped messages covering a period between February 6 and March 12, 1987.

B. The Respondents The three respondents named in all but Mr. Goldberg's complaint are Terry Long, Randy Johnston and the Church. None of these respondents chose to appear at the hearing of the complaints by the tribunal. The tribunal officer, Ms. Gwen Zappa, filed as exhibits on behalf of the Canadian Human Rights Tribunal a series of letters sent by the secretariat to the Church, Mr. Long and Mr. Johnston. The first two letters, dated May 5, 1988, which were sent by regular mail contained information about the appointment of this tribunal and of the hearing and enquired of the respondents' plans concerning representation at the hearing (Exhibits T- 2 and T- 3) . In the case of Terry Long and the Church the letter was sent care of P. O. Box 464, Caroline, Alberta. The letter to Randy Johnston was directed to his address at 5111- 49th Street, Apt. 1, Red Deer, Alberta. When responses to these communications were not received a follow

up letter with a copy of the original was sent out by double registered mail to each respondent requesting an answer (Exhibits T- 3 and T- 4). These were dated June 20, 1988. The notice to Terry Long and the Church had been refused (Exhibit T- 5), although further registered letters to Long and the Church relating to notification of the hearing, procedures for the filing of documents and notice of venue, dated August 16 and 26, had been received and signed for, by Mrs. Long, Terry Long's wife. (Exhibits T- 9, T- 11) . The pink A. R. card used by the Post Office for recording delivery had been signed in the case of the letter of June 20 to Mr. Johnston, indicating receipt. However, the signature is illegible. A subsequent letter to him, dated August 16, relating to procedures, had been returned, as Johnston had moved in the interim without leaving a forwarding address (Exhibit T- 8). Receipt of a later letter, dated August 26, which had been sent care of the postal address of the Church had been acknowledged by Terry Long (Exhibits T- 10 and T- 12).

> 3 Raminder Singh, a Human Rights Officer with the Alberta regional office of the Canadian Human Rights Commission, gave evidence that he had interviewed Randy Johnston on November 9, 1987 in Red Deer, Alberta. The evidence he gave was based on notes which he had taken at that time (Exhibit C- 35). Johnston was advised by Mr. Singh that there had been complaints about the telephonic messages put out by the Church. On that occasion Johnston had admitted narrating these messages since February 20, 1987 and that the telephone for the messages had been leased in his name. Johnston was advised by Mr. Singh that his name would be probably be included in any formal complaint, as he had confirmed his narration of the messages and the leasing of the telephone number.

Both Mr. Duval for the Canadian Human Rights Commission and Mr. David Matas representing Deborah Glaser, Ken Wasserman and David Goldberg argued that in view of the fact that the respondents had been duly notified under the Act of the proceedings and all the relevant details and had chosen not to appear, the tribunal was entitled to hear and dispose of the complaints in their absence. Both counsel noted press reports in the Edmonton Sun and the Edmonton Journal, October 25, 1988 of an interview with Mr. Long in which he stated that he planned to boycott the tribunal. Mr. Matas argued that, while Mr. Johnston seems to have changed his address during the period when attempts were made to contact him, he cannot have been unaware of what was happening because of the publicity surrounding the case. He also pointed out

that neither the complainants nor counsel wanted to call Messrs Long and Johnston as witnesses and suggested that it would be inadvisable for the tribunal to compel the attendance of the two men against their will. Mr. Duval drew the attention of the tribunal to the decision in Rodney Rommann v Sea- West Holdings Ltd. (1984), 5 C. H. R. R. D- 2312 in which the Chairman, Professor Frank Jones, after satisfying himself that the respondent had been notified and had chosen not to appear, proceeded without him.

Based on the evidence submitted to it the tribunal determined that under the terms of section 40( 1) of the CHRA which does not require personal service adequate notice had been given to the three respondents. Moreover, following the Rommann decision, the tribunal decided that it should proceed without the respondents. In tune with the procedure adopted in that hearing an adjournment was taken to ensure that there had been no last minute change of heart on the part of Mr. Long, Mr. Johnston or the Church. None made an appearance.

> 4 C. The Issues In determining whether the respondents are to be found liable under section 13 (1) of the CHRA a number of issues have to be addressed:

(1) Did the respondents "communicate telephonically or ... cause to be communicated repeatedly" the alleged messages?

(2) Were the communications relayed "in whole or part by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament"?

(3) Was the matter communicated in the messages "likely to expose a person or person to hatred and contempt" on the grounds of race, colour and national or ethnic origin or religion?

(4) Finally, if they were, does section 13( 1) offend the Charter of Rights and Freedoms and especially the right to freedom of expression under section 2( b)? If it does, is it saved by section 1 of the Charter?

1. Did the Respondents Communicate Telephonically or Cause to be Communicated the Alleged Messages?

Each of the complainants gave evidence that they had heard a number of telephoned messages put out by the Church of Jesus Christ Christian - Aryan Nations during the early part of 1987 and in the case of Ms. Glazer in January, 1988. In each case it had come to their notice that the Church had advertised a phone number which interested parties could dial in order to hear messages put out by the Church. Both Mr. Wallace and Mr. Wasserman indicated in evidence that they had learned of the phone messages through reading a classified ad in the Red Deer Advocate under the name of the Church. Mr. Richard Sadick who is employed by the paper as its advertising manager confirmed in his evidence that such an ad had indeed been taken out by a Randall Johnston, Box 464, Caroline, Alberta, in the name of the Church for inclusion in the personal column of the paper and which ad ran from February 16, 1987 up to at least May 26, of that same year. He identified a copy of the ad which read simply:

CHURCH of Jesus Christ Christian- Aryan Nations recorded

messages- 343- 0216.( Exhibit C- 7) In some instances when calls were made by complainants to the number advertised the messages were taped. Mr. Wallace taped the seven messages which he heard when he dialled, using a telephone answering machine on his business line. Mr. Goldberg who for most of 1987 was the Regional Director for B’nai Brith Canada and the League of Human Rights for Alberta and Saskatchewan also made arrangements for messages to be taped. A total of ten had been recorded. These had

> 5 been consolidated into a master tape copies of which had been sent to both the Canadian Human Rights Commission and B’nai Brith, Canada.

In addition to the recordings made by complainants the staff of the Canadian Human Rights Commission Regional Office in Edmonton had phoned the number advertised over a period running from February 1987 to February 1988 and taped the messages heard. Mr. Marius

Begieneman, the Regional Director for the Canadian Human Rights Commission for Alberta and the North West Territories gave evidence that a total of nine tapes had been made under his supervision. A tenth had been recorded by Raminder Singh in Mr. Begieneman's absence.

The tribunal had the opportunity of either listening to the tapes or reading the transcripts made in the Edmonton Office of the Canadian Human Rights Commission or both, in each case satisfying itself that there had been no tampering with the tapes in question and that the transcript was a reasonably faithful reflection of what was said on the tape. Some words and phrases were inaudible or difficult to make out. In the case of each message presented to the tribunal the person reading the message made clear that it was put out in the name of the "Aryan Nations" and encouraged listeners to write for more information to Box 464, Caroline, Alberta. The tribunal listened to a total of twenty one (21) different messages. The last of the tapes in time was recorded on February 15, 1988 (Exhibit C- 37). The message states clearly that this is the last of the series of taped messages, which had been started on February 16, 1987. According to the tape, the program of messages had been initiated as the result of the annual meeting of the Church in December, 1986, because it was felt that this was the only way in which its beliefs could be communicated to the public without distortion. In Raminder Singh's account of his meeting with Randy Johnston, he indicated that the latter had told him that he, Johnston, picked up the message each Sunday and that they were changed each week. Based on the wording of the advertisement in the Red Deer Advocate, the references in the tapes and transcripts and the account of Randy Johnston's statements there is no doubt in the minds of members of the tribunal that telephonic messages were put out under the name of the Church of Jesus Christ Christian - Aryan Nations repeatedly between February, 1987 and February, 1988.

We now move to consider the respondents and their relationship to the telephonic messages. Section 13( 1) provides that "[ i] t is a discriminatory practice for a person or group of persons acting in concert" to communicate the offending matter. It is thus important to determine the connection, if any, between Terry Long and Randy Johnston and the tapes and in particular whether they both had a role in the production, the presentation and the dissemination

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6 of the telephonic messages. The status and organization of the Church also needs to be considered to determine whether it has been correctly named as a respondent. Is is merely the alter ego of Terry Long, or does it constitute "a group of persons acting in concert" for purposes of the section?

Evidence of the involvement of Terry Long with the Church derives from a number of sources. Mr. Duval introduced evidence from the Postmistress of Caroline, Alberta, Mrs. Bette Nelson. She testified that Mr. Long, whom she identified from a photograph in the Edmonton Sun, October 25, 1988 (Exhibit C- 22) has a P. O. Box number in his name to which mail addressed to him personally and to members of his family is delivered. The box number is 464, Caroline, Alberta. Mail for the Church is addressed to the same box number and accordingly is delivered in the same way. Both mail for the Long family and the Church is picked up by Terry Long or his wife. Mrs. Nelson's recollection was that mail for the Church had been coming in for three or four years.

That the Church and Terry Long are closely linked is also evident from the statements in the press attributed to Mr. Long. Features on Long and the Church from the Edmonton Journal, the Calgary Herald and the Toronto Sun were introduced into evidence (C- 64, C- 72 and C- 65) all of which featured interviews with Long in which he asserted his role as the leader of the Church in Alberta. The most telling evidence, however, is the copy of a letter and press release produced by Mr. Alan Shefman, the National Director of the League for Human Rights and B'nai Brith, Canada (Exhibit C- 63). The letter dated November 14, 1984 is from Pastor R. G. Butler of Aryan Nation Headquarters, Hayden Lake, Idaho and written on the letter head of Aryan Nations, Church of Jesus Christ Christian. It hails Terry Long as "an officer leader in the army of the King of Kings". At the foot of the letter is reference to an enclosure described as "Leadership Certificate for Church of Jesus Christ Christian Aryan Nations". The press release signed by Terry Long on Aryan Nations letterhead with his postal address opens

Aryan Nations Church of Jesus Christ Christian headquartered at Hayden Lake, Idaho, is pleased to announce the appointment of Terry Long of Caroline, Alberta as new Aryan Nations leader for the province of Alberta.

The evidence linking Terry Long to the Church and both to the messages is supported by the statements which Raminder Singh indicated were made to him when he interviewed Randy Johnston on November 9, 1987. According to Mr. Singh Johnston said that he had been approached- by Terry Long to narrate and record messages from the Aryan Nations group. Johnston, claiming that he had never written any of the

> 7 messages himself, admitted that he received a new message in his mail box every week, that the message was changed every Sunday, that Terry Long bought the tape recorder which played the messages and that they could be accessed by phoning his, Johnston's, number, 343- 0216.

With regard to the participation of Randy Johnston in disseminating the messages, he admitted in his interview with Raminder Singh on November 9, 1987 that he had been reading the Aryan Nation messages and had done so at the request of Terry Long and one other person because they "had

liked his broadcast voice". Mr. Singh's notes also revealed that Johnston had said that there were "some things" in the messages which he received from Terry Long which he "refused" to read out. When pressed on this he suggested that he had engaged in some editing, although he added that he usually sought Long's approval for the changes. Mr. Sadick, the advertising manager for the Red Deer Advocate, produced a series of invoices covering a period from midFebruary to early April, 1987 which show that the ads for the phone messages were placed by Randy Johnson (Exhibits C- 52 to C- 54). Evidence by an official of the Alberta Government Telephone Company made it clear that the phone number which appeared in the ad in the personal column of the paper was registered in the name of Randy Johnston (Exhibit C- 56).

The tribunal is satisfied that there exists strong circumstantial evidence linking both Terry Long and Randy Johnston with the messages. The messages are put out under the name of the Aryan Nations Church which uses the same postal address as Terry Long. The press release put out by the latter indicates that he has been recognized by the leader of the Church in the United States as

the pastor of the Church in Alberta and, based on Randy Johnston's reported admissions, seems have been the guiding force in making available and planning and organizing the dissemination of the messages.

Randy Johnston is connected to the messages by his placing of the ad inviting calls on behalf of the Church and by the use of a phone number in the ad registered in his name. Given the terms of section 13 which talks of "to communicate telephonically or to cause to be communicated" these circumstances by themselves would warrant a finding that Johnston was implicated, that a prima facie case had been made out against him . The connection is strengthened by Johnston's reported admission to Raminder Singh that he actually narrated the messages, that he had some input in changing their content and took responsibility for arranging their dissemination. Singh's reports of the comments of Randy Johnston also suggest that he and Terry Long worked together in translating written messages into telephonic format with Long providing the inspiration, material and

> 8 resources and Johnston the medium and mechanics of communication. All of the evidence relating to how the messages were produced and much of that as to how they were communicated came to the Tribunal, secondhand, through the comments of Randy Johnston as reported by Raminder Singh, the investigator for the Human Rights Commission. We have noted above that Singh could not identify the voice on the tapes as being that of Johnston. The Tribunal has considered the question of whether it is legitimate to rely on a combination of what is ostensibly hearsay evidence and circumstantial evidence in linking Johnston and Long, with the taped messages.

J. Sopinka and S. Lederman in The Law of Evidence in Civil Cases (Toronto: Butterworths & Co., 1974) make the following comment on the rule which generally excludes hearsay evidence

The major criterion for the admissibility of evidence is relevance. The Courts, however, will not entertain all evidence which logically can be classified as relevant to the matters in issues. The law has placed restrictions on the reception of certain probative evidence which passes on inherently untrustworthy quality. An exclusionary rule was thus developed by the Courts to

bar hearsay evidence because of doubt and suspicion of the accuracy of such evidence. (p. 39)

There is no problem with relying on the reported statements of Randy Johnston as to his own involvement in making and communicating the taped messages. These statements fall within a recognized exception to the hearsay rule. The general proposition both in civil and criminal cases is that any relevant statement made by a party is evidence against himself. Sopinka and Lederman under the heading "Admissions of a Party" put the exception to the rule in this way

Traditionally, out of Court assertions made by a party to the proceedings have been regarded as admissible at the instance of the opposite party as an exception to the hearsay rule ...( p. 139)

The learned authors go on to suggest that admissions of this nature do not even constitute exceptions to the hearsay rule, because the mischief which the hearsay rule was designed to prevent is non- existent.

This exception to the hearsay rule does not extend to statements against others. It would not be therefore good evidence against Terry Long. The tribunal is satisfied that the circumstantial evidence set out above is sufficent to

> 9 link Mr. Long to the messages. However, if that conclusion is not warranted, we are of the view that we are entitled to accord weight to what is strictly speaking hearsay evidence.

It is clear that statutory tribunals, though bound by the rules of natural justice, are not typically bound by the strict rules of evidence which govern the proceedings of courts of law.

We are assisted in this matter by the applicable legislation. Section 40 (3) (c) of the Canadian Human Rights Act specifically addresses the issue

40( 3) In relation to a hearing under this Part, a Tribunal may (c) receive and accept such evidence and other information, whether on oath or by affidavit or otherwise, as the Tribunal sees fit, whether or not such evidence or information is or would be admissible in a court of law.

The legitimacy of relaxing the rules of evidence has been recognized in earlier decisions of human rights tribunals. In Julius Israeli v. Canadian Human Rights Commission and Public Service Commission (1983), 4 C. H. R. R. D/ 1616 the Chairman, Professor William Tetley, was faced with the issue of whether he should accept "similar fact" evidence led by the complainant. The admissibility of this form of evidence. has to be handled with care because of possibility of undue prejudice to the respondent and of collusion between witnesses. The Chairman allowed in such evidence in the case before him, as non- prejudicial and unlikely to encourage collusion, because of a concern to allow the benefit of any doubt to the complainant in establishing his case. In doing so he commented briefly on the rationale for the relaxation of the rules of evidence before administrative tribunals

In administrative tribunals, the rules of evidence are usually relaxed. This is because administrative tribunals are striving

towards goals that are different from those of a court of law, in particular, administrative tribunals are more consciously involved in the formulation of policy than are courts. ... The present CHR Tribunal is in fact an administrative tribunal and this was another factor in admitting the similar fact evidence. (p. D/ 1618)

Professor Tetley noted specifically that authority for relaxation of the rules of evidence was allowed for in section 40( 3)( c), of the CHRA.

In a decision of a Board of Inquiry established under the British Columbia Human Rights Code, Zarankin v. Johnstone

> 10 (1984), 5 C. H. R. R. D/ 2274 which dealt with a complaint of sexual harassment, the Board (Professor Lynn Smith) was faced with the question of whether to admit hearsay evidence. The B. C. legislation contained a provision similar to section 40( 3)( a) of the CHRA. Professor Smith, while recognizing that there were valid reasons for excluding hearsay evidence in certain

contexts, for the reasons similar to those suggested above by Sopinka and Lederman, and that a Board should not "simply disregard the rules of evidence as developed by the common law over the centuries", allowed in such evidence on behalf of the respondent. She did so because the latter was not represented by counsel and may not have been aware of the possibility of calling as a witness the individual whose comments were the subject of the hearsay evidence.

Both Professors Tetley and Smith made it clear that the test of whether such evidence is admissible is its relevance to a material issue, and that, if admitted, must be weighed carefully along with other evidence adduced so that its probative value can be tested. Both also recognized that there are circumstances which warrant the introduction of evidence which might well be excluded in court proceedings. We are of the opinion that the hearsay evidence in this case is highly relevant to a material issue, i. e. the question of whether Terry Long was involved in communicating or encouraging the communication of telephone messages which, it is alleged, were likely to expose members of minority racial, national, ethnic or religious groups to hatred or contempt. Moreover, we believe that the circumstances of these proceedings are such that it is legitimate to base inferences adverse to Long on the hearsay evidence adduced. Terry Long did not attend the proceedings or in any way attempt to refute the allegations of the complainants or the evidence led by the Commission. An unfavourable inference can be drawn by this conduct on his part as he could have been present to hear the allegations and evidence and to refute them. Long's failure to attend and give evidence and to submit himself to cross examination permits the Tribunal to draw an inference that the evidence may, indeed, have been detrimental to him. As Sopinka and Lederman, supra, state

[F] ailure on the part of a defendant to testify .... once a prima facie case has been made out against the defendant, may be the subject of an adverse inference. (p. 537)

The learned authors also note An unfavourable inference can also be drawn when a party litigant does not testify or fails to call a witness, who would have knowledge of the facts, and who might have given important supporting

> 11 evidence if the case of the litigant had been sound. (p. 145) Given the absence of the respondents who, as we have found, were duly notified of this hearing, the complainants and the Commission have been forced to rely on a combination of circumstantial and hearsay evidence in establishing a link between Long and the messages, this tribunal is satisfied that, for the reasons given, the hearsay evidence led is of probative value. It was given by an investigator for the Commission, using notes made contemporaneously with the comments reported, who we find to be a thoroughly reliable witness. We accept Mr. Singh's evidence of his conversation with Randy Johnston as a credible account of the comments made by the latter which implicated Terry Long in arranging for the production, advertising and dissemination of the taped messages. That evidence effectively corroborates the circumstantial evidence led by the complainants and the commission.

The civil burden of proof which requires that there be preponderance of evidence on a balance of probabilities is the burden now accepted as appropriate in human rights hearings (see Balbir Basi v. Canadian National Railway (1988), 9 C. H. R. R. D/ 5029; Corrigan v. Pacific Western Airlines (1988), 9 C. H. R. R. D/ 4993. Applying that burden, the tribunal finds that the

necessary connection has been established by the complainants and the Commission between the telephonic messages and the respondents, Terry Long and Randy Johnston, in terms of section 13( 1) of the CHRA in producing and disseminating the matter complained of.

The Church was also named as a respondent. Its status therefore has to be considered. There was no evidence led that the Church has been incorporated and thus has any formal legal status, and no information was produced as to the character and size of its membership in Alberta, let alone in Canada. Direct evidence was introduced through the tapes and transcripts to the effect that the telephoned messages were communicated under its name. Moreover, the last of the taped messages put out in the middle of February, 1988( Exhibit C- 37) reveals that "the regular chapter of the Church of Jesus Christ Christian Aryan Nation" held an annual meeting in December, 1986 at which the production and dissemination of telephone tape messages was approved. This suggests that the body of the Church comprises more than just the person of Mr. Long. That the organization includes a number of individuals is supported also by the terms of the letter, dated November 14, 1984, sent by Pastor Richard Butler to Terry Long which recognizes him as a leader in the Church, and the press release which describes him "new Aryan Nations leader for the Province of Alberta" (Exhibit C- 63).

> 12 Although evidence is lacking on the exact status, character and size of the Church in Alberta, the tribunal did hear extensive evidence, drawn largely from United States sources, on the roots, philosophy and activities of the movement which it represents. Mr. Alan Shefman, the National Director of the League for Human Rights of B'Nai Brith, Canada testified on the Church of Jesus Christ, Christian - Aryan Nations and its place within the identification church movement in North America. Because of his position and his concern about hate organizations, especially those with an anti- semitic credo, Mr. Shefman has studied extensively these organizations, their

composition and the objectives which they espouse. In this he has been assisted by the extensive documentation compiled and published by the AntiDefamation League, the sister organization of the League of Human Rights in the United States. He was able to share with us samples of the material generated both by the Church in the United States and its Albertan offshoot. The general outlines of his evidence on the identification church movement is supported by the work of Dr. Stanley Barrett in his recent book on the ultra- right wing in Canada, Is God a Racist? The Right Wing in Canada (Toronto: University of Toronto Press, 1987).

The identification church movement to which the Church of Jesus Christ, Christian - Aryan Nations belongs has its roots in the Anglo- Israel movement which sprang up first in Britain and then the United States in the late 19th century. The fundamental belief of this movement was that the British, their north European cousins and the Caucasian population of the United States are the descendants of the lost tribes of Israel who after the Babylonian captivity made their way through the Caucasus into Europe from the Near East. These people, so it is claimed, are the "true" Israel. The two remaining tribes, those of Judah, it is asserted, returned to their ancestral homes where they became bastardized by intermarriage and the adoption of alien customs, in the process losing their racial purity. The descendants of the latter are the Jews, the usurpers of Israel. In Mr. Shefman's opinion it was and is central to this theory that the Jews are a race and, as such, have lost any claim to being the chosen people of God. The disavowal or disinheritance

of the Jews which these beliefs involve is sealed by the argument that Christ was not a Jew, but came from among the ten lost tribes.

This racial interpretation of history was one which underwent something of a revival after World War II, when open espousal of anti- Semitism and the eugenic racism of the Nazis was considered impolitic. The revival spawned a number of independent and scattered identification churches which all espoused to one degree or another the racist theories outlined above. out of one of these churches in California

> 13 came Richard Butler, the founder and pastor of the Church of Jesus Christ, Christian - Aryan Nations. The church which was originally set up in California was moved by Butler to Hayden Lake, Idaho in 1973. Although the identification movement is fragmented, a phenomenon which Mr. Shefman attributed to the existence of too many individuals who want to be leaders, the various churches and their secular offshoots do communicate with each other and come together to discuss common problems and strategy. The compound at Hayden Lake plays host each summer to a meeting of such groups. It is through these contacts that relations have been cemented with and common cause made with earlier racist organizations such as the Ku Klux Klan and with various right wing political groups which advocate Naziism.

Among the visitors to Hayden Lake conclaves have been a number of Canadians, including John Ross Taylor, the leader of the Ontario- based Western Guard Party and Terry Long, the leader and pastor of the Church of Jesus Christ Christian in Alberta. Mr. Shefman produced the copy of letter dated November 14, 1984 under the letter head of the Aryan Nations, Hayden Lake, Idaho and signed by Richard Butler receiving Terry Long "into the ranks as an officer leader in the army of the King of Kings" (Exhibit C- 63). In the attached press release put out by Terry Long on behalf of the Church in Alberta there is a paragraph which sets out the beliefs of the Church.

Aryan Nations is an Identity Christian movement which believes that northern European peoples comprised of [sic] Anglo- Saxon, Celtic, Germanic, Basque, Nordic, Slavic and Lombard peoples are the lost tribes of Israel having migrated to their present locations following the two great dispersions of biblical Israel in 720 and 585 B. C. Adequate documentation is available to prove that Communism is Jewish in origin and is presently controlled by the Jewish elite. Since Jew- Communists in their own publications advocate the take- over and annihilation of Western Christian civilization through the extermination of the white race, Aryan Nations in accordance with God's seventh commandment advocates and works for the racial purity of true Israel.

The racist character of the beliefs of the Church of Jesus Christ Christian and others on the extreme right are developed by Dr. Barrett in his book, Is God a Racist? (1987).

The more extreme members of the right wing want nothing less than a totally white society. They contend that blacks and whites can never live together in harmony, that inter- racial marriage is

> 14 more dangerous to civilization than the atomic bomb, and that the time will come when the world will erupt into a gigantic race war, where one's battle dress will be the colour of one's skin. Nor are they favourably disposed towards Jews. As it is sometimes said, racists want blacks

in their place but want Jews to stop existing. Blacks are considered despicable but too feeble minded to pose a threat to whites. Jews are thought of as clever, dangerous, amoral, vermin, conspiring to take control of the world. The point cannot be stressed too much that the single most important theme running through the various radical right wing organizations is anti-Semitism. (p. viii)

Pamphlets and releases put out by the Aryan Nations in Hayden Lake lend substance to this dual obsession with inter- racial marriage and a Jewish conspiracy to take over the world. In an undated release put out by the Church entitled ominously, "The Death of the White Race" and including a photograph of a black man and white woman embracing which is described as "the ultimate abomination" (Exhibit C- 73) the writer propounds the thesis that the white race is in mortal peril because it is declining in numbers and losing its racial purity through miscegenation. This situation, it is argued, has been engineered by the Jews, who control both government and the media, through the promotion of integration of schools and neighbourhoods. The same theme is taken up in a publication "Calling Our Nation" embellished with a front cover showing "Herman the Cherusk", an Aryan military leader dealing out death to the Jewish hordes (Exhibit C- 74). The message attributed to Herman is clear: "As long as the enemy occupies our land hate is our law, and our first duty, revenge!" The pamphlet includes a feature under the name of Roy Mansker which links the sources of the malaise of white youth, drugs, "free love", homosexuality, the mixing of races and "every other kind of soul destroying evil" to a Jewish conspiracy. The Jews, it claims, created the problem, the Jewish state caught and convicted young whites and Jewish prisons had custody over them. Blacks for their part have been used by the Jews to commit every sort of outrage against whites both inside and outside prison. [The reference to "Jewish" in this context is meant to refer to ZOG, the Zionist Occupation Government, or the Jewish controlled

government of the United States.] The author goes on to suggest that in the process the Jews have created a cadre of victims who are ready to rise up and slay them. The piece concludes with the warning that all white men need to wake up to the reality of Jewish manipulation and that it is part of a plan "to impoverish and destroy the nation". The challenge is to follow the lead of the young whites who "will wage all- out war" and win.

> 15 As the previous excerpts from the publications put out by the Church of Jesus Christ Christian - Aryan Nations, demonstrate, there is a violent undercurrent in the discourse. Mr. Shefman in his evidence indicated that paramilitary training is widespread among the identification groups. In some of the publications put out by the Aryan Nations this is justified in terms of the defence and protection of the white race from the attacks of its enemies, including the State. However, it is clear that there are those within the movement who see aggressive violence as the only way to achieve its ends. Mr. Shefman gave evidence on the Order, a group of younger members and associates of the Aryan Nations, who individually and collectively have perpetrated a series of violence offences in the United States against both persons and property of those they see as enemies of the white race. During the hearing, indeed, a report was carried in the Edmonton Journal, October 27, 1988 out of Boise, Idaho recounting the conviction of four members of the Order on counts of "racketeering, conspiracy, counterfeiting, bombing, illegal possession of weapons and malicious destruction of federal property" (Exhibit C- 61). This is but one of a series of cases in which members of the Order have been charged with and in some

cases convicted of crimes involving murder, bombings, armed robbery and counterfeiting. Although Richard Butler, the leader of the Aryan Nations, has claimed that the Order is a break-away group, frustrated by the failure of the Aryan Nations to take the offensive, Mr. Shefman suggested that in his opinion links have been maintained and mutual support provided. Quoting from a publication of the Anti- Defamation League, "Propaganda of the Deed": The Far Right's Desperate Revolution (Exhibit C- 68) he noted that Butler had announced plans for a memorial service for Robert Matthews, one of the leaders of the Order killed in a shoot- out with F. B. I agents on Whidbey Island, Washington, and described Matthews as "a man of the highest idealism and moral character". The same publication claims that the Order ran off some of its counterfeit notes on the printing press at Hayden Lake.

Based on the evidence led before the tribunal pointing to the existence of a group of individuals in Alberta led by Terry Long who subscribe to the values and views of that section of the "identification church movement" which operates under the name of the Church of Jesus Christ Christian - Aryan Nations, the members of the tribunal are satisfied that the Church in Alberta was correctly named as a respondent in this hearing. Although Terry Long is clearly the driving force in the organization it is not limited to and synonymous with him. Despite the absence of evidence that it has a formal legal status, it does represent a group of people accepting a common religious, political and social agenda who see themselves as part of an institution or

> 16 movement. Moreover, by its own admission it subscribes to basic organizational procedures in its decision making.

In the one other decision of a tribunal set up under the Canadian Human Rights Act to consider a complaint under section 13( 1), Canadian Human Rights Commission et al. v. The Western Guard Party and John Ross Taylor, unreported, Canadian Human Rights Tribunal, July 20, 1979 (per J. Francis Leddy, Sidney Lederman and Rose Volpini) , despite the fact that the Western Guard Party was not incorporated, the tribunal had no trouble concluding on the evidence that it constituted "a group of people acting in concert" under the section.

[T] here is no question that it [the Western Guard Party] constitutes a group of people who have organized themselves under this name. They have a symbol. They have a letter head. They have a post office box number. They have telephone lines in their name. They are listed in the telephone book. They have a bank account and infrastructure with officers and leaders. They hold themselves out as a unit. (Ross Taylor, p. 41)

The evidence in this case is no less clear that the Church of Jesus Christ Christian - Aryan Nations is a "group of persons acting in concert" for purposes of section 13( 1) of the CHRA.

2. Were the communications transmitted by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament As Ms. Crane for the Commission pointed out, there is ample and venerable authority for the proposition that a telecommunications system which connects a province to another province or other provinces, or extends beyond the limits of a particular province falls within the legislative jurisdiction of Parliament. It is covered by the wording of section 92( 10)( a) of the Constitution Act, 1867 which exempts such

operations from provincial jurisdiction over "Local Works and Undertakings". Section 91( 29) of the same Act gives Parliament jurisdiction to make law in relation to:

Such Classes of subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Provinces.

In City of Toronto v. Bell Telephone Co. of Canada (1905] A. C. 52 (P. C.) the Privy Council, drawing on both sections 92( 10)( a) and 91( 29), concluded that a telecommunications system extending beyond a province or connecting a province to one or more other provinces fell within federal jurisdiction.

> 17 The question here is whether Alberta Government Telephones is a telecommunications system of the type contemplated in section 92 (10) (a) and by the City of Toronto case. The status of this particular telecommunications operation was considered by the Federal Court, Trial Division (1985), 2 F. C. 472 and on appeal to the Federal Court of Appeal in Alberta Government Telephones v. CNCP Telecommunications and Canadian Radio- Television Commission [1986] 2 F. C. 179. A. G. T. was seeking a writ of prohibition against the C. R. T. C. to prevent it from proceeding with an application by CNCP for an order requiring A. G. T. to provide interconnection services to CNCP. In that case at the Trial level, the Federal Court held that, while A. G. T. was not a local undertaking and hence subject to federal legislation, it was an agent of the Crown and therefore entitled to immunity from federal legislation. The Federal Court of Appeal rejected the finding of the Trial judge that A. G. T. enjoyed immunity as an agent of the Crown but accepted and

endorsed her finding that A. G. T. was not a local undertaking. The Appeal Court decided that CNCP's application should be allowed as A. G. T. falls within federal jurisdiction under section 92( 10)( a) of the Constitution Act. The argument of A. G. T. that as its physical facilities were in Alberta it was by definition a "local undertaking" was rejected. The court noted that the exemptions in the section related not only to undertakings "extending beyond the limits of the Province" but also to those "connecting the Province with any other or others of the Provinces". It was not necessary, therefore that physical facilities exist outside the boundaries of the province. The important issue here was the nature of the enterprise not its physical equipment. A. G. T. used its facilities to provide its customers with local, interprovincial and international telecommunications service without discrimination. In that sense its services were integrated with an extra- provincial system. While physical interconnection was not necessarily enough to change the character of A. G. T. 's undertaking to that of one within federal jurisdiction, its membership in the TransCanada Telephone system committed it to a common and joint telecommunications enterprise. In consequence the Court found that A. G. T. is an interprovincial undertaking which is not merely local in nature. While A. G. T. controls its own physical facilities, it could not as a practical reality separate itself from the joint enterprise without destroying its telecommunications system in its present form.

The decision of the Federal Court of Appeal has been appealed to the Supreme Court of Canada. In the absence of decision of that higher court the decision represents a definitive and compelling statement of the law and the legal analysis to be applied in determining the application of section 92( 10)( a) and 91( 29) to a telecommunications

> 18 undertaking. The appeal decision in A. G. T. v. CNCP was followed by the Canada Relations Board decision in Alberta Government Telephones v. International Brotherhood of Electrical Workers et al. (1986), 13 C. L. R. B. R. (N. S.) 31 in holding that it had jurisdiction to hear applications for certification by unions claiming to represent employees of A. G. T.. In reaching its decision the Board relied heavily on excerpts from the evidence led in the Federal trial court in the CNCP case as to the character of A. G. T. 's operation. The decision of the Board was subsequently upheld on a reference to the Federal Court of Appeal under section 28( 4) of the Federal Court Act. This was done to facilitate a hearing of both the CNCP and IBEW appeals together by the Supreme Court. In this second appeal, Reference by Canada Labour Relations Board, unreported, F. C. A., February 3, 1987, Court No. A- 523- 86 the court reaffirmed what it had said in CNCP.

Ms. Crane for the Commission argued that it was legitimate for the tribunal, following the lead of the Labour Relations Board, to accept the evidence led in the CNCP case at trial on the character of A. G. T. 's telecommunications system, especially as A. G. T. is not a party to the issue here. The tribunal concerned to satisfy itself that there is factual evidence that the operations of A. G. T. are of the same character as demonstrated in the earlier cases, demurred. It sought an affidavit by a knowledgeable person which would describe the operations of A. G. T. insofar as they involve extra- provincial telephone service. An affidavit was furnished by Mr. James Pratt, Assistant Vice- President of Regulatory and Inter- Carrier Affairs. His affidavit reads in part

"3. that the telecommunications facilities of A. G. T. are

connected to the systems of other telecommunications carriers at the boundaries of the border of the Province of Alberta: by microwave at two places on the Saskatchewan Boundary, at two places on the British Columbia boundary and at one location on the United States border and at one location on the boundary of the North West Territories, and by buried cable at the boundaries and border at various points.

4. That A. G. T. takes signals emanating from its subscribers' telephone sets and transmits them to the boundaries and border of Alberta where they are received by telecommunications facilities owned by others outside Alberta: it takes signals from telecommunications owned by others outside Alberta and transmits them to the intended receiver in Alberta; or in some cases A. G. T. may transmit such signals across Alberta.

> 19 5. That as a result of the connections referred to above, A. G. T. subscribers may access locations outside of Alberta.

6. That a connecting agreement among Alberta Telephones, Bell Canada, British Columbia Telephone Company, Manitoba Telephone System, Maritime Telegraph and Telephone Company Ltd., Newfoundland Telephone Company Ltd., Saskatchewan Telecommunications, Telesat Canada, The Island Telephone Company Ltd. and the New Brunswick Telephone Company Ltd. provides for connection to the next adjacent party of the telecommunications systems owned by each of the parties: provides for revenue sharing among the parties; and provides for the setting of transmission standards and quality".

The affidavit sworn by Mr. Pratt, although stated in capsule form, accords with the evidence relied upon by Reed J. at trial in A. G. T. v. CNCP [1985] 2 F. C. 472 (F. C. T. D.), at pp. 519-521, which was relied on by the Canada Labour Relations Board in A. G. T. v. IBEW (1986), 13 C. L. R. R. (N. S.) 313, at pp. 319- 320. The tribunal is satisfied that the conditions under which A. G. T. operates as a telecommunications undertaking have not changed since the earlier decisions. Despite the fact that the issue of whether A. G. T. is a work or undertaking within the legislative authority of Parliament is under appeal to the Supreme Court of Canada, this tribunal must deal with the constitutional issues as the law currently stands. Accordingly, applying the law on the constitutional status of an inter- provincial telecommunications undertaking as laid down by the Federal Court of Appeal in the CNCP case to the affidavit evidence provided by A. G. T., the tribunal finds that the latter is an undertaking within the legislative authority of the Parliament of Canada, and so within the terms of section 13( 1) of the Canadian Human Rights Act where use is being made of its facilities to transmit matter of the type described in that provision.

Crown immunity was claimed by A. G. T. in both the CNCP and IBEW cases on the ground that as an agent of the Crown in the Right of Alberta it was entitled to the protection of section 16 of the federal Interpretation Act, R. S. C. 1970. c. I- 23 which grants immunity to the Crown from federal legislation unless it is explicitly bound by it. We agree with the argument of Ms. Crane that the possible immunity of A. G. T. is not germane to the issue here, as the telecommunications facility is not a party to this complaint. There is no complaint that A. G. T. was engaged in discriminatory practices under section

13( 1). Its status is only relevant to the issue of whether it is an undertaking within the legislative authority of Parliament whose

> 20 facilities have been used to disseminate discriminatory matter. Even if the issue of Crown immunity was relevant the Federal Court of Appeal in both CNCP and IBEW rejected A. G. T. 's argument on crown immunity, because to accept it would have been to allow A. G. T. which by virtue of operating as a federal undertaking had stepped outside the purposes for which it had been created by provincial legislation, to dodge federal laws applicable to federal undertakings (see CNCP (1986] 2 F. C. 179 (F. C. A.) at p. 194; IBEW, unreported, F. C. A., Feb. 3, 1987, Court No. A- 523- 86, at p. 2).

3. Was the matter communicated in the messages "likely to expose a person or persons to hatred or contempt" on the grounds of race, colour, national or ethic origin or religion?

The first point to note is that Canadian courts in interpreting human rights legislation have asserted that it needs to be read in a liberal, purposive manner. The most authoritative statement of this approach is that of Dickson C. J. C. writing for a unanimous Court in Action Travail des Femmes v. Canadian National Railway [1987] 1 S. C. R. 1114. The Chief Justice in addressing the issue of interpretation of human rights legislation drew attention to the purpose of the Canadian Human Rights Act by quoting section 2 and in particular principle (a) which reads

[E] very 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 or marital status, or conviction for an offence for which a pardon has been granted or by discriminatory employment practices based on physical handicap .... (p. 1133)

The Chief Justice went on to state that the purpose of human rights legislation is "to give rise .... to individual rights of vital importance". Although recognizing that in construing the provisions of such legislation words must be given their plain meaning, he stressed that it is important that "full recognition and effect" be given to the rights in question. He warned against searching "for ways and means to minimize these rights and to enfeeble their proper impact." (p. 1134)

The application of section 13( 1) of the Canadian Human Rights Act has been considered in one previous case. In Canadian Human Rights Commission et al. v. The Western Guard Party and John Ross Taylor, unreported, July 20, 1979 a tribunal established under the CHRA comprising J. Francis

> 21 Leddy, Sidney Lederman and Rose Volpini considered a complaint under that section involving the communication of telephonic messages by the respondents.

In applying section 13( 1) that tribunal concluded that the purpose of this provision is to prevent and treat as unacceptable the use of telephonic communication to disseminate material and ideas with a propensity to expose individuals and groups, identifiable by virtue of their race, national or ethnic origin, colour, religion, age, sex, marital status or physical handicap to the threat of violence or to loss of respect within Canadian society. Parliament has determined that the danger to the physical integrity, mental peace and human dignity of the individuals or groups maligned in such matter warrant decisive action by the state, even though the result may be an abridgement or limitation of freedom of expression.

In its decision which concluded that the messages were "likely to expose a person or persons to hatred and contempt" that tribunal considered the wording of the section, and particular the meaning of "hatred", "contempt" and "expose". In defining "hatred" the tribunal applied the definition in the Oxford English Dictionary (1971 Edition) which reads

"active dislike, detestation, enmity, ill- will, malevolence." (p. 28)

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." (p. 28).

As there is no definition of "hatred" or "contempt" within the CHRA 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

> 22 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.

This tribunal accepts the definitions of "hatred" and "contempt" applied by the tribunal in the Taylor case.

The tribunal in that case also considered the meaning of "expose" in Section 13( 1)

"Expose" is an unusual word to find in legislation designed to

control hate propaganda. More frequently, as in the Broadcasting Act Regulations, Post Office Act provisions and in the various related sections of the Criminal Code, the reference is to matter which is abusive or offensive, or to statements which serve to incite or promote hatred.

"Incite" means to stir up; "promote" means to support actively. "Expose" is a more passive word, which seems to indicate that an active effort or intent on the part of the communicator or a violent reaction on the part of the recipient are not envisaged. To expose to hatred also indicates a more subtle and indirect type of communication than vulgar abuse or overtly offensive language. "Expose" means: to leave a person unprotected; to leave without shelter or defence; to lay open (to danger, ridicule, censure etc.). In other words, if one is creating the right conditions for hatred to flourish, leaving the identifiable group open or vulnerable to ill- feelings or hostility, if one is putting them at risk of being hated, in a situation where hatred or contempt are inevitable, one then falls within the compass of s. 13( 1) of the Human Rights Act.( p. 29)

This tribunal accepts the explication of the use of the word "expose" in section 13( 1) set out in the Ross Taylor decision. We note, as the excerpt suggests, that there is no need for the complainants to prove an active effort or intent on the part of the respondents to produce the adverse consequence contemplated by the section. Moreover, the use of the wording "likely to expose a person or persons to hatred or contempt" means that it is not necessary that evidence be adduced that any particular individual or group took the messages seriously and in fact directed hatred or contempt against another or others, still less that anyone

> 23 has in fact been victimized in this way. It is enough to prove that the matter in the messages is more likely than not to spark a positive reaction amongst some of the listeners to it which will likely in turn manifest itself in "hatred" or "contempt" towards the targets of the messages. Furthermore, in making the case on the potential impact of the matter on recipients of it, the test is not "the reasonable listener" but whether there is anybody, even the most malevolent or

unthinking person, who might be inspired to treat the targets with hatred or contempt. Finally, as the tribunal in Ross Taylor asserted, by contrast with section 281.2( 3) of the Criminal Code (Public Incitement of Hatred) truth is no defence to a complaint under section 13( 1) of the CHRA. As that tribunal put it

Parliament has deemed that the use of the telephone for this kind of discriminatory message is so fundamentally wrong, that no justification for the communication can avail the Respondents. The sole issue is whether the telephonic communications of the Respondents are likely to expose a person or persons to hatred or contempt. (p. 39)

We now turn to an analysis of the telephonic messages which are the focus of the complaints in this hearing and the question of whether they constitute matter "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 a prohibited ground of discrimination".

The evidence called by Counsel for the Commission and for the complainants included the viva voce evidence of the complainants themselves. Additionally, evidence was presented by Rene Jean Ravault. Dr. Ravault who has a Ph. D. in international communications from the University of Iowa and teaches in the field at the graduate level at the University of Quebec at Montreal (U. Q. A. M) is an expert in communications theory, including forms of communication and their impact upon those who receive them.

Dr. Ravault was present throughout the hearing and gave evidence not only as to the content of certain of the taped messages, transcripts of which he examined prior to the trial, but also as to those messages tendered in evidence during the course of the proceedings. A report was prepared by this witness in which a content analysis of the transcripts mentioned above was conducted, the goal of which was to assess the impact of the messages upon those exposed to them. (Exhibit C-59)

Ravault describes communications as a process consisting of a four- part methodology designed to contribute to the building of meaning in the minds of those who receive the

> 24 communications. He applied this methodology to the messages contained in the transcripts which he examined. The medium used to convey the message is the first part of the methodology, in this case the medium being first the newspaper advertising the messages and then the telephone over which the messages were relayed. In the view of the witness the fact that the listener must take a positive step to access the message by placing a phone call to the number published in the paper makes the message more personal and direct. Unlike radio or television broadcasts which may command less attention, taped telephone messages are likely to be listened to more carefully.

The second part of the methodology addresses the reference group targeted to receive the communications. In this case, the newspaper advertisement was published in the personal column of the classifieds. Ravault saw this mode of advertising as designed to attract people who are not well integrated within their communities, people who do not seem to belong and who might be in search of a new cause or reference group. The individuals may be uncertain or

confused about their own future and that of the community at large and looking for support, or already disaffected from and frustrated by conventional political, social and economic solutions and looking for more radical panaceas. Either way such people can be expected to search out those who claim to have the answers to society's ills.

With a willing, impressionable listener on the line, the communicators must then provide an image which makes the message plausible and effective. This is the third element of the methodology of communication described by Dr. Ravault. In the case of the taped phone messages in this case, the use of quotations from or references to sources which may be seen as credible by the listener gives the messages themselves more credibility. References to "the Canadian Police Chief's Convention", "U. S. current statistics", "Colonel Moore, a retired army colonel", "concerned citizens of the university", "Prime Minister William Lyon MacKenzie King", "The Scientific Post" and in particular "The Bible" in the taped messages are, in the witness's view, designed to add authenticity and credibility to them. An attempt is made to lend further weight to the assertions made by juxtaposing these positive sources of insight with what Ravault described as "negative references",

typically references to supposed admissions by members of groups attacked by the messages of deception and evil- doing. Whatever the character of the references most of them are either difficult or impossible to track down and verify. What is left in the mind of the listener who might be sympathetic or open to suggestion is an impression of an argument which is the product of research and reflection.

> 25 The final part of the communications methodology deals with the importance of the circumstances surrounding the message. Dr. Ravault points out that the messages will be more effective if they appeal to well publicized issues of concern to a good portion of the general population. For example, if unemployment is or is perceived to be a problem messages which criticize immigration policy will have greater impact on the listener. The examples cited from the transcripts were "Immigrants staying in luxury hotels", "155 Tamils on a German boat", and "arrival of new Third World refugees in Halifax". People in search of scapegoats for their problems may find such communications very appealing, particularly when it is left to them to make the firm association between the thrust of the message and the alleged problem. The spreading of such messages, according to Ravault, may not only serve to reinforce the attitudes of those who hear them and who are predisposed to such thinking, but may also cause them to become more assertive in their own thinking and vocal in the articulation of those ideas.

Dr. Ravault's testimony involved a detailed review of the telephone messages complained of herein. For purposes of this decision, the Tribunal has concentrated on a sampling of those messages. The target groups of the messages are clearly people whose "race, national or ethnic origin, color or religion" distinguish them from the majority of the general population in terms of section 3( 1) of the Canadian Human Rights Act. In Exhibit C- 3, for example the target group is third world immigrants. The message refers to "the 155 Tamils who lied their way onto Canadian soil .... ", "Sikhs involved in the 747 airplane blowup .... " 40 different and Vietnamese crime organizations .... The thrust of the message, as stated by Dr. Ravault, is that a liberal national immigration policy presents a threat to both the physical and moral welfare of the white race; the goal of the message is to take a newsworthy issue and exaggerate it; and the effect of this is to

create deep concern in the minds of the listeners as to Canada's immigration policy which seems to put every "pure- blooded", God- fearing Canadian in peril. The full implications of this message are worked through in other tapes, which classify non- white races as intellectually and morally inferior (the theological claim is that they were rejected by God before he created Adam and Eve) and as the dupes of the Jews who are bent on world domination (Exhibit C- 13). As Dr. Ravault testified, for those who are confused or disaffected these messages may well reinforce an incipient or existing prejudice and in some cases increase aggressiveness or generate anger towards the target groups.

While other minority groups are targeted by the messages in the ways suggested in the previous paragraph, the Jews are clearly the main target group. The majority of the messages

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reviewed by Dr. Ravault were virulently anti- Semitic, and suggest a fixation in the minds of the producers with explaining all of the country's and the world's ills as the making of a Jewish conspiracy, to which the liberal, white, "Judeo- Christian" political establishment is totally blind. Jewish cunning and deviousness is seen at every turn. Jews, it is claimed, have both the power and will to control merchandizing for their own purposes at the expense of the general public (Exhibit C- 40) ; Judaism by its own admission condones not only the deception but the neglect and even the murder of Christians (Exhibit C- 43) ; Judaism is labelled as anti- Christian, satanic and synonymous with international communism (Exhibits C- 12 and C- 46) ; far from being the "chosen people of Israel" (a prize reserved for the Israelites who made it through the Caucusus to north- western Europe and beyond) the Jews are categorized as "usurpers" who have no claim to modern Israel (Exhibit C- 6) ; Jews are charged with being members of a world- wide Zionist banking conspiracy aimed at the collapse of the western world (Exhibits C- 6 and C- 50); they are further accused of conspiring to rid America of the white race by manipulating immigration and subverting its racial purity by encouraging miscegenation (Exhibit C- 47); the treatment of the Palestinians by the Jews is characterized as barbaric (Exhibit C- 6) ; Dr. Henry Morgantaler is described as a "Caanite abortionist" whose goal is to exterminate white reproduction (Exhibit C- 50) Zionist conspiracies, it is claimed, have victimized white patriots from Jesus Christ to Jim Keegstra, Kurt Waldheim and Malcolm Ross (Exhibits C- 15 and C- 17).

While, it may be thought that the anti- Semitic material contained in these messages is so outrageous as to repel rather than to attract attention and sympathy, Dr. Ravault was able to demonstrate that by the use of quite sophisticated propaganda techniques, of which the drafters of these messages seem to be aware, negative sentiment can be built up in the mind of a listener who is open to suggestion to the point where this kind of material acts to affirm and reaffirm less despicable material and to prove that the individual has genuine cause for anxiety. Ravault showed the working of a variable process of playing on doubts, anxieties and biases which can produce a negative attitude towards a target population, be it through a single claim or a cumulation of assertions. For example: the use of rumour to incite negative feelings towards a group (the letters "K" and U" as Kosher signs on food packaging as evidence of Jewish control of the food market); pointing out inconsequential matter such as dietary habits to reinforce the stereotype of a group as unwilling to conform with the dominant values of the community; identifying a target group with a philosophy known to be the subject of general disapproval

(Judaism as synonymous with Bolshevism) ; taking quotations out of context or from a source difficult to

> 27 check on (the use of alleged quotations from Jewish publications of the 1910s and 1920s) ; the repetition and apparent corroboration of earlier messages to give more credibility to them; playing upon widespread doubts about the advisability of particular social practices, such as interracial marriage. In a sense there is something in these messages for every one who is ready to listen to and absorb the suggestion that Canadians are the "sport" of sinister forces both inside and outside the country. As Dr. Ravault notes, a particular piquancy is added to the messages by a form of reverse psychology which asserts that it is the white race which has been put on the defensive, white patriots who are the victims of persecution, whites who have been conditioned by the government and media, both subservient to Jewish interests, to feel ashamed of their race and thus the white race which needs to fight back and take its rightful, dominant place in

the world. As section 13 (1) of CHRA requires that the communications complained of be of a kind "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" ' the opinion of Dr. Ravault as to the potential effects of the communications on individuals receiving the messages is crucial. It was Ravault's position that the communications in question, though seen by many as repugnant and nonsensical, appeal more to the emotional than to the rational in people and prey upon their common desire to find someone or something to blame for their and society's troubles. The messages, according to Dr. Ravault, do not stop there, however. They go further to incite the listener to aggressive feelings or even to violence by seeking to reverse his or her perception of who is the aggressor. By way of example he pointed out that one of the messages encourages "sending immigrants back where they came from" and suggests active discrimination against them as long as they remain. others depict minorities as being either cunning and manipulative or "pre- human", deserving of either hatred or contempt or both, and encourage the taking of steps to prevent "the legalized racial genocide against us, the white race". In summarizing his view of the messages and their effects upon some listeners, Dr. Ravault described the themes of the communications as being dangerous because the proposals for their resolution of the perceived problems advocate enforced deportation or at least segregation of "undesirable", that is racially or ethnically unacceptable, immigrant populations. Moreover, they encourage violence as a proactive means of defence against any who are seen as the enemies of racial purity. He felt that the messages have strong similarities with Nazi propaganda and argue effectively for apartheid. He concluded his evidence by expressing anxiety about where such communications could

> 28 lead in terms of their impact on frustrated, anxious, disaffected, not to mention maladjusted, minds.

As we have noted above, evidence was also presented by the individual complainants and by other witnesses as to the discriminatory behaviour to which they have been subjected personally. Mr. Nealy is a black and Ms. Glaser, Messrs. Wallace, Wasserman and Mr. Goldberg, Jews. All of them testified to the revulsion which they felt at hearing particular taped messages in the sequence put out by the respondents. Moreover, both they and other witnesses revealed that as members of minority groups they had been subject at various points in their lives to disparaging

remarks and discriminatory behaviour. Mr. Nealy gave evidence that in recent years in Edmonton he had noted an increase in the gratuitous, racial slurs directed against him as a black, and recounted one incident in which he had been knocked off his bicycle by a pick- up truck, the occupant of whom had yelled. "Too bad we didn't get you nigger". Deborah Glaser who is currently the Western Regional Director for B'Nai Brith Canada testified that during her term of office, from December, 1987 to the date of the hearing, her records showed 10 incidents of anti-Semitism within the Province of Alberta including a range of activities, e. g. the leaving of hate literature on car windshields, damage to the exterior of her office in Edmonton and a plot to blow up the Jewish Community Centre in Calgary. It is of course not possible to make a provable causal link between the messages under scrutiny and these reported incidents, nor are we required by section 13( 1) of the CHRA to do so. What these incidents do demonstrate, however, is that there are individuals within the population who are eminently capable of

responding in demeaning and violent ways to the type of assertions made in the messages.

The Tribunal accepts the evidence of Dr. Ravault as to the effect of the communications complained of upon those who are most likely to receive them, and that of the complainants as showing that there are people within the community who are likely to respond to the messages by victimizing members of target groups. We are satisfied that the Commission and the complainants have established on a balance of probabilities that the communications in question are "likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination" namely race, national or ethnic origin, colour or religion under section 13( 1) of the CHRA. The material reflects the racist and apocalyptic traits associated by Mr. Shefman and Dr. Barrett (supra pp. 13- 15) with the identification church movement in the United States and the ultra right wing in Canada. Simply put, its thrust is to deny the humanity of any group in Canadian society which does not conform to the promoters' perverted notions

> 29 of "Aryan purity", and in doing so creates fear and anxiety within the membership of those groups which are targeted.

4. Does section 13( 1) offend the Charter of Rights and Freedoms and especially freedom of expression under section 2 (b) ? If it does. is the section saved by section 1 of the Charter?

Freedom of expression is protected in section 2( b) of the Canadian Charter of Rights and Freedoms

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;

By virtue of section 1 of the Charter freedom of expression is guaranteed "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". Laws which are inconsistent with the rights and freedoms guaranteed in the charter may be declared "of no force and effect" to the extent of the inconsistency under section 52( 1) of the Constitution Act, 1982.

The possible effect of the Charter on section 13( 1) was not, of course, canvassed in the tribunal hearing of Ross Taylor which took place in 1979. However, its impact was discussed in a later decision of the Federal Court of Appeal arising indirectly out of the earlier hearing, John Ross Taylor and Western Guard v. Canadian Human- Rights Commission [1987] 3 F. C. 593. John Ross Taylor and the Western Guard who had been ordered by the tribunal in 1979 "to cease their discriminatory practice of using the telephone to communicate repeatedly the subject matter which formed the content of the tape recorded messages" which they put out defied the order and continued the practice. In a decision of the Federal Court, Canadian Human Rights Commission v. John Ross Taylor and the Western Guard Party [1980] 1 C. H. R. R. D/ 47 (F. C. T. D.), the defendants were found guilty of contempt by Dube J. Ross Taylor was sentenced to prison for one year and the Party was fined $5,000, but both sentences were suspended, only to take effect if the

respondents continued to disobey the order of the Tribunal. When the respondents persisted in communicating hate messages the Canadian Human Rights Commission moved to have the suspension of the sentences revoked. The suspension of the sentences was lifted. In the course of argument before the court to which application was made counsel for the respondents challenged the order on the ground that the hate message provision in section 13( 1) of the CHRA was unconstitutional. In that action, Canadian Human Rights Commission v. John Ross Taylor (1985] C. H. R. R. D/ 2595, the

> 30 Court allowed argument on the constitutional issue. In his judgement, Jerome A. C. J. held that the provision in question amounted to a reasonable restriction on freedom of speech

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 relevant sections of the Canadian Human Rights Act endeavour to combat and .... I am not persuaded that the resulting restriction upon freedom of speech is out of proportion to that objective. There is therefor no basis for finding that these legislative provisions exceed "reasonable limits ... demonstrably justified in a free and democratic society.". (p. D/ 2598)

On appeal, John Ross Taylor and the Western Guard arty v. Canadian Human Rights Commission [1987] 3 F. C. 593., the Court criticized the trial judge for pronouncing on the constitutional argument on the ground that it was not pertinent to the issue of contempt of the original order. However, as the judge's findings on the constitutional status of the hate message provision had been appealed, the appeal court gave full consideration to it. As the Federal Court of Appeal decided to treat what might otherwise have been obiter dicta as appealable, we are satisfied that what it had to say on the constitutional status of section 13( 1) of the CHRA constitutes part of the ratio of its decision.

In the Federal Court of Appeal, Mahoney J. for the court, asserted that if section 13( 1) was to be upheld it would be through the invocation of section 1 of the Charter. In assessing the provision he applied the test and mode of analysis set out in The Queen v. Oakes [1986] 1 S. C. R. 104 and held that it had been met.

It is of interest to note that before the Federal Court of Appeal in Ross Taylor, both counsel for the appellant and the Commission agreed that the issue was to be resolved by recourse to section 1 of the Charter. only the Attorney General of Canada argued that the messages in that case were not comprehended by the protection afforded to freedom of expression under section 2( b) of the Charter, drawing on statements of Wilson J. and Dickson C. J. C. in R. v. Jones [1986] 2 S. C. R. 284 and R. v. Edwards Books and Art Ltd [1986] 2 S. C. R. 713 respectively suggesting that insubstantial or trivial burdens on religious freedom or observance did or would not fall afoul of section 2( a). Mahoney J. rejected the suggested equation between those statements and the case before the court, noting simply that "[ t] here is nothing trivial, insubstantial, indirect or unintentional in the impact of subsection 13( 1) on freedom of expression".

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31 The question of whether expression which spreads lies about or incites hatred or contempt towards another or others is protected by section 2( b) of the Charter cannot be said to have been finally settled in Canada. In two decisions of the Ontario Court of Appeal, the Court has accepted that certain forms of printed materials which have offended Criminal Code provisions against the willful spreading of false news (section 177) and willful promotion of hatred (section 281.2( 2)) do not constitute expression for purposes of section 2 (b). In R. v Zundel (1987), 58 0. R. (2d) 129 the Court, pointing out that freedom of expression has never been absolute and must have regard to the rights and freedoms of other persons, concluded that a publication put out by the accused which denied the Holocaust had none of the attributes which could justify it as legitimate expression, and therefore fell within a permissibly regulated area of expression which is not constitutionally protected. This line of reasoning was followed in the more recent case of The Queen v. Andrews and Smith, unreported, July 29, 1988 in which a majority of the Court upheld section 281.2( 2) of the Criminal Code on the ground that it did not strike at any form of expression comprehended by section 2 (b) . In the latter case the accused had published and distributed white supremacist and anti- semitic materials.

A contrary conclusion was reached by the Alberta Court of Appeal in R. v. Keegstra [1988] 5 W. W. R. 211. In that case which involved the prosecution of the accused under section 281.2( 2) of the Criminal code for the anti- semitic statements he had communicated to students in his capacity as a high school teacher, the court concluded that the Code section was inconsistent with section 2( b) of the Charter because it made a crime of imprudent speech. Kerans J. A., speaking for the Court, concluded that "imprudent promotion of hatred" falls within the definition of freedom of expression. In a dissenting opinion in The Queen v. Andrews and Smith Cory J. A., as he then was, disagreed with his brothers and concluded that section 281.2( 2) did offend section 2 (b) of the Charter. He did so on the ground that freedom of thought and expression are so crucial to the democratic form of government that "that freedom should not be readily restrained".

The tribunal concludes that section 13( 1) of the Canadian Human Rights Act does represent an infringement of freedom of expression which is protected under section 2( b) of the Charter. Although it is not a criminal law provision which, it can be argued cogently, raises stronger concerns about the curtailment of political discourse because of the penalties attached, it is a

provision which is potentially wider in its embrace than the Criminal Code provisions canvassed in Zundel and Andrews and Smith. The wording of

> 32 section 13( 1) of the CHRA, as we have noted earlier in this decision, is drawn, so that it is not necessary to establish an intent to communicate hateful or contemptuous matter, a hateful or contemptuous response by anyone hearing the material or the existence of an actual victim of hatred or contempt. It is a provision which is based more clearly on objective criteria than the offences in section 177 and 281.2( 2) of the Criminal Code. This is entirely in tune with the general objectives of the CHRA which is to address and deal with conduct which has a discriminatory effect or impact, even though that was not intended. It does, however, mean that matter may be covered which, while apparently tactless, blunt and even acerbic, may seem at first blush to lack an openly hateful or contemptuous quality. We agree with the comment of Mahoney J. in the Federal Court of Appeal in Ross Taylor

that the impact of section 13( 1) of the CHRA on freedom of expression is not "trivial, insubstantial, indirect or unintentional" and his conclusion that it is a measure which must be justified under section 1 of the Charter.

In John Ross Taylor and the Western Guard Party v. Canadian Human rights Commission [1987] 3 F. C. 593 Mahoney J. for the Federal Court of Appeal in applying the Oakes test first reviewed the legislative objective of section 13( 1) and found avoidance of the propagation of hatred on the grounds set out in the CHRA to be "in itself, properly a pressing and substantial concern in a free and democratic society" (p. 611). The justification for the provision he explained in the following terms

It seems to me 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. Canada, specifically, is populated by immigrants and the descendants of immigrants of numerous races and religions and an indigenous population of races different from the vast majority of the immigrant population. Canada recognizes its multi- culturalism not only as a fact but as a positive characteristic of its national persona.

It is not, in my opinion necessary that vilification by reason of race and/ or religion be rife or have become the subject of active and general public interest to render pressing and substantial the concern to avoid it. (p. 610)

The commitment of Canada as a nation to the objective of multi culturalism was elaborated upon by Cory J. A. in his dissenting opinion in Andrews and Smith. In explaining his conclusion that the legislative objectives of section

> 33 281.2( 2) warrant infringement of freedom of expression, he stated

Section 27 of the Charter provides that "this charter shall be interpreted in a manner consistent with the preservation and enhancement of the multi- cultural heritage of Canadians". It is our multi- cultural background that gives richness, depth and vibrance to Canadian society. The Charter has recognized and emphasized the importance of our background by providing the

Charter itself is to be interpreted so as to preserve and enhance our multi- cultural heritage. That clause in itself gives a very clear indication that s. 1 of the Charter should be applied in this case. The clause coupled with the Canadian multi- cultural heritage gives the strongest possible direction to apply s. 1. (pp. 26- 27)

Cory J. A. went on to consider the implications of striking down a law like section 281.2( 2) of the Criminal Code

Multi- culturalism cannot be preserved let alone enhanced if free rein is given to the promotion of hatred against identifiable groups. What a strange and perverse contradiction it would be if the Charter was to be used and interpreted so as to strike down a law aimed at preserving our multi-cultural heritage by limiting in a minimal and reasonable way freedom of expression. This would be to construe the Charter in a manner prohibited by s. 27.( at p. 31)

This tribunal is of the opinion that Cory J. A. 's espousal of section 27 of

the Charter in justifying section 281.2( 2) of the Criminal Code is equally applicable to section 13( 1) of the Canadian Human Rights Act. Section 281.2( 2) does not cover telephonic communications which are suggestive of hatred or contempt for the members of visible and religious minorities. Section 13( 1) of the CHRA is the vehicle which strikes at that type of matter. Although its terms are not synonymous with section 281.2( 2) of the Code and its objectives more remedial than punitive, its inspiration is similar, a concern to underline the human dignity and worth of all those individuals who make up the Canadian mosaic, whatever their racial, ethnic or religious background.

Justice Cory also considered the legislative objectives of section 281.2( 2) and whether they merited infringement of expression in terms of the historical context of hate propaganda

> 34 I would have thought it sufficient to look back at the quintessence of evil manifested in the Third Reich and its hate propaganda to realize the destructive effects of the promotion of hatred. That dark history provides overwhelming evidence of the catastrophic results of expressions which promote hatred. The National Socialist Party was in the minority in the Weimar Republic when it attained power. The repetition of the loathsome messages of Nazi propaganda led in cruel and rapid succession from the breaking of the shop windows of Jewish merchants to the dispossession of the Jews from their property and their professions, to the establishment of concentration camps and gas chambers. The genocidal horror of the Holocaust were made possible by the deliberate incitement of hatred against the Jewish and other minority peoples.( at p. 28)

While the inhuman policies of National Socialism in Germany were not replicated in Canada, institutionalized and officially condoned racial intolerance was practised in this country over many decades. One only has to consider the hostility directed towards Chinese, Japanese and East Indian citizens and residents of the west coast during a period of, eighty years from 1865 to realize that racial tolerance and a commitment to multi- culturalism in this country is of recent origin and to a significant extent secured only by revulsion at what was done by the Third Reich in the name of racism and racial supremacy. It is the recognition that racial tolerance is a political

and social objective which requires more than abstract articulation that led the Special-Committee on Hate Propaganda in Canada in its 1966 report (the Cohen Report) to suggest that it was legitimate to place reasonable, legislative limits on freedom of expression

In summary, issues relating to freedom of expression are not all open to the simple solutions that would have been applied to them a hundred years ago. Those who urged a century ago that men should be allowed to express themselves with utter freedom even though the heavens fell did so with great confidence that they would not fall. That degree of confidence is not open to us today. We know that, as well as individual interests, there are social interests to be protected, and these are not always protected by unrestricted individual freedom. The triumphs of Fascism in Italy, and National Socialism in Germany through audaciously false propaganda have shown us how fragile tolerant, liberal societies can be in certain circumstances. They have also shown us the large element of

irrationality in > 35

human nature which makes people vulnerable to propaganda in times of stress and strain. Both experience and the changing circumstances of the age require us to look with great care at abuses of freedom of expression. (at p. 9)

As Justice Cory noted in his judgement in Andrews and Smith the Cohen Report provides a strong rationale for legislative intervention to prevent the dissemination of hate propaganda

Canadians who are members of any identifiable group in Canada are entitled to carry on their lives as Canadians without being victimized by the deliberate, vicious promotion of hatred against them. In a democratic society, freedom of speech does not mean the right to villify (sic) . The number of organizations involved and the numbers of persons hurt is no test of the issue: the arithmetic of a free society will not be satisfied with oversimplified statistics demonstrating that few are casting stones and not many are receiving hurts. What matters is that incipient malevolence and violence, all of which are inherent in "hate" activity, deserves national attention.( at pp. 28- 29 quoting from pp. 24- 25 of The Cohen Report)

The challenge presented by the Cohen Report in this latter passage has not gone unheeded. There is a national commitment to use of the law to prevent and, where necessary, punish the use of expression to incite or encourage hatred against individuals and groups on the basis of, inter alia, race, national or ethnic origin, colour or religion. Section 13( 1) of the CHRA and section 281.2( 2) of the Criminal Code are the major instruments of this policy.

In his judgement In Andrews and Smith Cory J. A. was also concerned to underline the international commitments which Canada has to eschew hate propaganda. He pointed in particular to Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination (U. N. General Assembly resolution 2106 A (XX), December 21, 1965). It provides in part

Article 4 States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which

attempt to; justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal

> 36 Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, inter alia:

(a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof (cited in judgement at pp. 31- 32)

This international obligation of Canada lent support and justification in the mind of Justice Cory to s. 281.2( 2) of the Criminal Code. We are of the opinion that Article 4 of the Convention also adds weight to section 13( 1) of the CHRA as a reasonable limitation on freedom of expression. We find it particularly instructive in this regard that the Human Rights Committee of the United Nations has had the opportunity of considering section 13( 1) and has concluded that it accords with Canada's obligations under another international covenant, the International Covenant on Civil and Political Rights (U. N. General Assembly resolution 2200 A (XXI) , December 16, 1966). In John Ross Taylor and the Western Guard v. Canada (1984), 5 C. H. R. R. D/ 2097 (U. N. Human Rights Committee) the indefatigable John Ross Taylor and the Western Guard Party, dissatisfied at their treatment by the Canadian courts, sought to lay a complaint before the Committee, alleging infringement of their "right to hold and maintain their opinions without interference in violation of article 19( 1) of the ... Covenant ... and the right to freedom of expression and of the right to seek, receive and impart information and ideas of all kinds through the media of their choice, in violation of article 19( 2) of the Covenant". The decision of the Committee, which was purely on the issue of admissibility, noted that Ross Taylor had been putting out tape- recorded messages on the phone system which were changed periodically but the substance of which was basically the same, to warn those calling "of the dangers of international finance and international Jewry leading the world into wars, unemployment and inflation and the collapse of world values and principles". This had resulted, said the Committee, in the curtailment of the phone service of the complainants for breaches of section 13( 1). After careful examination of the information before it the Committee determined, inter alia, that, while Ross Taylor had exhausted the domestic remedies available to him, the opinions which he sought to communicate were incompatible with the provisions of the Covenant. More specifically the Committee stated

> 37 [T] he opinions which Mr. Taylor seeks to disseminate through the telephone system clearly do constitute the advocacy of racial or religious hatred which Canada has an a obligation under article 20( 2) of the Covenant to prohibit. (p. D/ 2097)

Canada, 's international obligations in the field of human rights have been worked out domestically at both the federal and provincial levels through legislative initiatives, involving both changes to the criminal law of the country and the creation of human rights bodies charged with the administration of anti- discrimination laws. As the decision of the Human Rights

Committee of the United Nations shows, section 13( 1) of the Canadian Human Rights Act is an important element in the Canadian response to the challenge of international human rights obligations and outweighs any concern to protect the dissemination of hate messages. It would be a perverse result if the objects of such a provision which reflect both the consensus of the international community and an ideal of responsible

democracy in which the dignity of both individuals and groups is to be respected were to be impugnable as antithetical to the values of "a free and democratic society".

For the reasons we have adduced above we conclude that the legislative objectives of section 13( 1) of the CHRA amount to a concern which is "pressing and substantial" in the terms set down by Dickson C. J. in R. v. Oakes [1986] 1 S. C. R. 103. The provision is, in our opinion, embraced by the considerations laid out by the Chief Justice of Canada in determining the meaning to be attached to the words "a free and democratic society"

The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity and faith in social and political institutions which enhance the participation of individuals and groups in society. (p. 136)

We see nothing in our conclusion on the application of section 1 of the Charter which is at odds with the decision of the Alberta Court of Appeal in R. v. Keegstra [1988] 5 W. W. R. 211. In that case the Court struck down section 281.2( 2) of the Criminal Code as infringing on section 2( b) of the Charter and as not constituting a reasonable limit on that freedom under section 1. However, the reason for the latter finding was that the promotion of hatred provision in

> 38 the Code failed to meet the requirement of proportionality under the Oakes test. Kerans J. A. for the Court conceded that some limits on freedom of expression prompted by a concern to protect individuals and groups from hatemongering could be justified

I accept the reality of the pain suffered by the vilified, and that it can do serious injury. It may even be that this sort of injury is one idea underlying s. 15 and s. 27 of the Charter, as Quigley J. (the trial judge in Keegstra] claimed. The making of unjust or capricious distinctions is an attack on the dignity of the victim, and can result in a debilitating sense of alienation from society. (p. 230)

Justice Kerans went on later in his judgement In my view, the need to protect the target groups specifically mentioned in s. 281.2 from serious non- physical injury or reputational injury is a sufficient reason to limit imprudent speech. In other words, I accept that, sometimes, the harm is great enough to justify limits on the abuse. If I am right, the real issue is to gauge the proportionality of the intrusion, not to inveigh against all intrusions.

Having concluded that the objective of section 13( 1) of the CHRA is "of sufficient importance to warrant overriding a constitutionally protected right or freedom" we now move to the issue of

proportionality. In R. v. Oakes [1986] 1 S. C. R. 103 Chief Justice Dickson indicated that there are three components of the proportionality test

First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational consideration. In short they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in first sense, should impair "as little as possible" the right or freedom in question ... Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance".

In John Ross Taylor and the Western Guard Party v. Canadian Human Rights Commission [1987] 3 F. C. 179 Mahoney J. for the Federal Court of Appeal evinced no doubts that section 13( 1) of the CHRA met the proportionality test

> 39 As to proportionality, subsection 13( 1) is narrowly drawn. Its rational connection to its object could hardly be plainer. Its limitation on freedom of expression is tailored precisely to the specific practices of those who abuse their freedom by repeatedly communicating hate messages by telephone. (p. 611)

We agree with this assessment. As we have indicated earlier in this decision, the section is drawn in a way which does not tie responsibility to intention, nor application to impacts which are provable as facts. Our understanding of Justice Mahoney's opinion is that his use of the words "narrowly drawn" was not the product of an abstract assessment of meaning, but related clearly to the particular context of hate messages made over telecommunications facilities. His message was, we believe, that the terms are no more broadly drawn than is necessary to achieve the purpose of the section. Two compelling lines of reasoning support this position. In the first place this is a provision which is part of a broader legislative plan, the purpose being, as Chief Justice Dickson made clear in Action Travail des Femmes v. C. N. R. [1987] 1 S. C. R. 1114, at p. 1134, "not to punish wrongdoing but to prevent discrimination". Accordingly, the necessary focus of attention is the impact of the conduct impugned, i. e. its discriminatory effect. Moreover, as the Chief Justice was also at pains to explain in Action Travail des Femmes (at pp. 1134- 1138) it is notoriously difficult to apply notions of intention and fault to conduct which has a discriminatory effect. As a consequence resort to a more objective assessment of alleged discrimination is countenanced. The wording of section 13( 1) of the CHRA reflects the concern to emphasize discriminatory impact on the complainant rather than the culpability of the respondent.

Unlike the other sections in the CHRA dealing with discrimination section 13( 1) provides for liability where there is no proven or provable discriminatory impact. 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 > 40 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. Moreover, apart from records compiled by the phone company, there is no ready gauge of number of those exposed to the messages, let alone what impact the latter might be having. These considerations, we believe, justify the extension of liability under section 13( 1) to cases where there is no proven or provable actual discriminatory effect. To have limited its ambit to cases where a discriminatory impact could be proven would have been to have rendered it a "dead letter", and certainly to have robbed it of any proactive value.

Section 13( 1) meets the first and second elements of the proportionality test. We are also of the opinion that it satisfies the third element, "a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance"." The deleterious effects attached to contravention of the provision are well calibrated to its function. We agree with Justice Mahoney's assessment in the Ross Taylor appeal that "the legislative scheme exemplifies restraint rather than severity". (p. 611) The learned judge left no doubt that the provisions relating to the hearing of, complaints under the CHRA, for appeal, an order and penalties are carefully crafted and well measured.

The determination that a person or group has contravened subsections 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

> 41 prescribed is a $5000 fine or one year imprisonment, not both. This tribunal is of the opinion that the terms of section 13( 1) of the Canadian Human Rights Act meet the requirements of the Oakes test and represent a justifiable limitation on freedom of expression under section 1 of the Charter.

D. The Conclusion

This tribunal is satisfied on the basis of the evidence led before it and the arguments of counsel for both the Commission and the complainants that the three respondents, Terry Long, Randy Johnston and the Church of Jesus Christ Christian - Aryan Nations, are in breach of section 13( 1) of the CHRA and that there is no valid constitutional basis for impugning that section. It

remains to us to deal with the issue of relief. By virtue of section 42( 1) of the Canadian Human Rights Act "[ w] here a Tribunal finds that a complaint related to a discriminatory practice described in section 13 is substantiated, it may make only an order referred to in paragraph 41( 2)( a) ... " The latter paragraph reads in part

(2) If, at the conclusion of its inquiry, a Tribunal finds that the complaint to which the inquiry relates is substantiated, subject to ... section 42, it may make an order against the person found to be engaging or to have engaged [Tribunal's emphasis] in the discriminatory practice and include, in such order any of the following terms it consider appropriate (a) that such person cease such discriminatory practice ...

E. Order We order the respondents Terry Long, Randy Johnston and the Church of Jesus Christ Christian- Aryan Nations, to cease the discriminatory practice of communicating telephonically or causing to be so communicated, repeatedly, matter of the type complained of in this case, i. e. which is likely to expose a person or persons to hatred or contempt by reason that that person or those persons are identifiable on the basis of race, national or ethnic origin, colour or religion and, in the event that the messages of this type are not currently being communicated, to refrain from such action in the future.

> 42 Dated at Victoria, British Columbia, this 31 st day of May, 1989

John P. S. McLaren, Chairman Norman Fetterly Brenda Gash