T.D. 4/94
Decision rendered on January 27, 1994

THE CANADIAN HUMAN RIGHTS ACT
R.S.C. 1985, c. H-6 (as amended)

HUMAN RIGHTS TRIBUNAL

BETWEEN:

JOHN PAYZANT
Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION
Commission

- and -

TONY MCALEER
CANADIAN LIBERTY NET
HARRY VACCARO
Respondents

TRIBUNAL DECISION

TRIBUNAL: KEITH C. NORTON, Q.C., B.A., LL.B. - Chairman
LEE ONGMAN - Member
LYMAN R. ROBINSON - Member

APPEARANCES: Prakash Diar and Eddie Taylor, representing the Canadian Human Rights Commission

Douglas H. Christie, representing the Respondent, Tony McAleer

DATES AND
LOCATION OF HEARING: January 24 to 27, 1994
Vancouver, British Columbia

A. INTRODUCTION

Following a hearing on September 1, 1993 at which preliminary matters were addressed, this inquiry was conducted in Vancouver, British Columbia over four days from January 24, 1994 to January 27, 1994. At the conclusion of the inquiry, the Tribunal rendered an oral decision finding that the complaint had been substantiated and issued an order directing the Respondents to cease the discriminatory practice.

What follows are the reasons for that decision.

B. THE COMPLAINTS

The complaints in this matter are brought by one individual, John Payzant, under subsection 13(1) of the Canadian Human Rights Act ("CHRA").

Subsection 13(1) of the Canadian Human Rights Act, R.S.C., 1985, c. H-6 (CHRA) 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 the person or those persons are identifiable on the basis of a prohibited ground of discrimination."

Subsection 3(1) of the Act sets out the following prohibited grounds of discrimination: race, national or ethnic origin, colour, religion, age, sex, marital status, family status, disability and conviction for which a pardon has been granted.

In addition to these proscribed grounds, the Ontario Court of Appeal in 1992 made an order "declaring that the Canadian Human Rights Act, R.S.C. 1985, c. H-6 be interpreted, applied and administered as though it contained 'sexual orientation' as a proscribed ground of discrimination in s. 3 of the Act": see Haig v. Canada (Minister of Justice) (August 6, 1992), available in QUICKLAW at [1992], O.J. No. 1609.

The Minister of Justice subsequently announced that the decision would not be appealed and would stand as the law of Canada.

There are three complaints which are all the same in substance and arise from the same telephonically communicated message. However, each identifies a different Respondent.

For the purpose of this decision only the particulars of the complaint against Tony McAleer will be reproduced and they are as follows:

"Tony McAleer discriminated against me and gays and lesbians on the ground of sexual orientation by repeatedly communicating, or

causing to be communicated, telephonic messages which exposed us to hatred and contempt, in violation of section 13 of the Canadian Human Rights Act.

I dialled telephone number (604) 572-8863 on several occasions between December 31, 1992 and January 15, 1993 and heard messages which advocated hatred and contempt against gays and lesbians. I was particularly offended by a message which said the Celts "used to take their queers and tramped them into peat bogs" and added that to do so was "not a bad idea", and that the "Burns Bog in Delta" was "big enough for Vancouver". The message states that one has reached the Canadian Liberty Net. I also believe that Tony McAleer is the operator of the Canadian Liberty Net."

This complaint was dated February 2, 1993. A second complaint on the same date named Respondent Harry Vaccaro and a third dated January 25, 1993 named the Respondent Canadian Liberty Net.

A transcription of the above-noted message and that of a second message were entered as exhibits TM-1 and TM-2.

Counsel for Respondent Tony McAleer, at the hearing on September 1, 1993, identified the messages and, following some corrections noted on the exhibits stated "... on behalf of Tony McAleer, I am prepared to concede and admit that these messages originated from Tony McAleer". (Transcript for September 1, 1993, page 7.)

C. THE RESPONDENTS

Tony McAleer is a resident of British Columbia and appeared at the inquiry represented by counsel. He testified that the message forming the ground for the complaint and the second message entered as an exhibit were his messages.

The Canadian Liberty Net (CLN) was not represented at the inquiry although McAleer in his evidence indicated that he was the operator of CLN and that it has no members.

Respondent Harry Vaccaro did not appear in person or through counsel. At the hearing on September 1, 1993, documents were filed indicating that at least one Canada Post "Acknowledgement of Receipt of a Registered Item Card" was returned signed indicating someone had accepted a registered letter notifying Harry Vaccaro of the date of that hearing. (Exhibit No. T-8) He did not appear at that time.

D. THE ISSUES

In proceeding towards a decision as to whether or not the complaints under subsection 13(1) CHRA have been substantiated, there are several issues to be examined:

(1) For the legislation to apply and for this Tribunal to have jurisdiction, it must be established that the communication took

place "in whole or in part by means of a telecommunication undertaking within the legislative authority of Parliament".

(2) There must be sufficient evidence to establish, on a balance of probabilities, that the named Respondents, Tony McAleer, Canadian Liberty Net and Harry Vaccaro did "communicate or cause to be communicated repeatedly" the message giving rise to this complaint.

(3) It must be established that the subject matter of the message "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".

E. DISCUSSION OF THE ISSUES

(1) Were the messages communicated in whole or in part by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament?

Tony McAleer identified the subject messages in this inquiry as his messages and admitted that they were transmitted over his telephone. There was evidence before the Tribunal that Tony McAleer's telephone was in the 604 area code of the B.C. Telephone system.

This Tribunal makes the same finding that was made by the Tribunal in Khaki et al v. Canadian Liberty Net and Derek J. Peterson, T.D. 17/93, at page 45, where it was found that B.C. Telephone is an undertaking within the legislative authority of Parliament. Even if B.C. Telephone had not been incorporated pursuant to an Act of the Parliament of Canada, it is the view of this Tribunal that the decision by the Supreme Court of Canada in the case of Alberta Government Telephone v. CRTC [1989] 2 S.C.R., 225 would lead to the same conclusion.

(2) Did the Respondents Tony McAleer, Canadian Liberty Net and Harry Vaccaro "communicate telephonically or cause to be so communicated repeatedly" the subject messages?

Respondent Tony McAleer testified that he did cause these messages to be communicated over his telephone line and also admitted his involvement with CLN.

No evidence was presented showing involvement of Harry Vaccaro.

(3) Were the messages communicated "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"?

For the purposes of analysis of the impact of the messages in this case within the meaning of s. 13(1) of the Canadian Human Rights Act this

Tribunal is guided by the words Dickson, J. in the Supreme Court of Canada in Taylor and the Western Guard v. The Canadian Human Rights Commission et al [1990] 3 S.C.R. 892 where he stated that: (at pp. 927-928)

In my view, there is no conflict between providing a meaningful interpretation of s. 13(1) and protecting the s. 2(b) freedom of expression, so long as the interpretation of the words "hatred"

and "contempt" is fully informed by an awareness that Parliament's objective is to protect the equality and dignity of all individuals by reducing the incidents of harm - causing expression. Such a perspective was used by the Human Rights Tribunal in Nealy v. Johnston (1989) 10 C.H.R.R. D/6450, the most recent decision regarding s. 13(1) where it was noted that: (at p. D/6469)

"In defining "hatred" the Tribunal [in Taylor] applied the definition in the Oxford English Dictionary (1971 ed.) which reads:

active dislike. detestation. enmity. ill-will. malevolence.

The Tribunal drew on the same source for their definition of "contempt". It was characterized as:

the condition of being contemned or despised; dishonour or disgrace.

As there is no definition of "hatred" or "contempt" within the [Canadian Human Rights Act] it is necessary to rely on what might be described as common understandings of the meaning of these terms. Clearly these are terms which have a potentially emotive content and how they are related to particular factual context by different individuals will vary. There is nevertheless an important core of meaning in both, which the dictionary definitions capture. With "hatred" the focus is a set of emotions and feelings which involve extreme ill will towards another person or group of persons. To say that one "hates" another means in effect that one finds no redeeming qualities in the latter. It is a term however which does not necessarily involve the mental process of "looking down" on another or others. It is quite possible to "hate" someone who one feels is superior to one in intelligence, wealth or power. None of the synonyms used in the dictionary definition for "hatred" give any clues to the motivation for the ill will. "Contempt" is by contrast a term which suggests a mental process of "looking down" upon or treating as inferior the object of one's feelings. This is captured by the dictionary definition relied on in Taylor... in the use of the terms "despised", "dishonour" or "disgrace". Although the person can be "hated" (i.e. actively disliked) and treated with "contempt" (i.e. looked down upon), the terms are not fully extensive, because "hatred" is in some instances the product of envy of superior qualities, which "contempt" by

definition cannot be [Emphasis added]"

Dickson, J. also stated that an intent to discriminate is not a pre-condition to a finding of discrimination under human rights legislation. To require a subjective intent requirement rather than focusing solely upon effects would defeat one of the primary goals of anti-discrimination legislation which is to prevent discriminatory effects rather than punish those who discriminate. For the same reason, there is no exemption or defence of justification for truthful statements in section 13(1).

Finally, there is the question of the meaning of "expose" in section 13(1). The Tribunal in Taylor considered the meaning of this word:

> ""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." (at p. D/6470)

A transcription of the message upon which the complaint is founded is appended to this decision as Exhibit TM-1.

The message begins with a warning of an attack on one's freedom of speech and one's freedom to read. It proceeds to identify a publication, the N.A.M.B.L.A. newsletter, and with an expression of disgust, points out that it is a "newsletter for child molesters" and that N.A.M.B.L.A. stands

for North American Man Boy Love Association which believes in legalized sex with children.

It then identifies the attack on freedom as the movement afoot to make the possession of such material an offense. This move is opposed, it would appear, because the proposal would also make it a crime to possess "so-called hate literature".

The author or speaker then expresses the view that "the newsletter should be allowed in Canada but that child molesters, homo or otherwise, should be executed. This should decrease the possession or circulation

within Canada of the newsletter". (Exhibit TM-1, p.1)

Then comes the passage triggering the greatest controversy:

"Hell the ancient Celts used to take their queers and trample them into the peat bogs. It's not such a bad idea, maybe. Perhaps we have finally stumbled across the argument which will save the Burns Bog in Delta from development because it is the only bog big enough to service the needs of the progressive city of Vancouver."

Dr. Gary Prideaux, Professor of Linguistics at the University of Alberta, was called as a witness by the Commission. He was qualified as an expert to give expert opinion evidence on the subject of linguistics.

Dr. Prideaux expressed the opinion and the Tribunal finds as a fact that the portion of the message which expresses disgust for child molestation and paedophilia is used as a "priming process" to evoke hatred or contempt against "queers" who are referred to in the subsequent part of the message that refers to the alleged practice of ancient Celts trampling their queers into peat bogs.

The third issue articulated on page 7 of this decision contains two sub-issues:

(i) Was the message likely to expose persons to hatred or contempt?

(ii) Are those persons identifiable on the basis of a prohibited ground of discrimination?

With respect to the first sub-issue, Dickson J. in Taylor and the Western Guard v. The Canadian Human Rights Commission, supra, defined the word "hatred" as involving:

"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."

The message in TM-1 advocated that queers be trampled into a peat bog. This message clearly communicates extreme ill will towards another group of persons, namely queers, and suggests that such persons have no redeeming qualities.

In Taylor and the Western Guard v. The Canadian Human Rights Commission, the Tribunal defined "expose" as:

"... creating the right conditions for hatred to flourish, leaving the identifiable group open or vulnerable to ill-feelings or hostility ..."

The message in TM-1, by advocating that queers be trampled into a peat bog, creates a condition for hatred to flourish by condoning and purporting to legitimize expressions of ill will against "queers". Such advocacy

leaves "queers" vulnerable to further expressions of hostility by those who listen to the message and who are thereby encouraged to express hostility toward queers.

With respect to the second sub-issue, Haig v. Canada (Minister of Justice), supra, is the authority for including sexual orientation among the prohibited grounds of discrimination in section 3 of the Act. Counsel for the Respondent McAleer invited the Tribunal to define the meaning and scope of the term "sexual orientation". It is clear that the Ontario Court of Appeal in Haig regarded sexual orientation as including the sexual orientation of being homosexual. It is not necessary in this decision to go any further in defining the scope of the term "sexual orientation". Therefore, a message which is likely to expose a person or persons to hatred or contempt by reason of their being homosexual contravenes section 13 of the Act. The message in TM-1 used the term "queers" as a noun. Several respected contemporary dictionaries define the noun "queer" as a derogatory term for a homosexual person. The complainant and two other

witnesses who are members of the homosexual community in Vancouver testified with respect to their personal experiences related to the use of the word "queer" as a noun. Mr. Harry Grunsky testified to his experiences where the word "queer" had been used in a derogatory manner to refer to a homosexual person. A letter addressed to Mr. Grunsky, Exhibit HR-7, is an example of the derogatory use of the term "queer" in relation to homosexuals. Ms. Betty Baxter testified that in her experience, whether the term "queer" is used in a derogatory manner "...depends on the intent of the person saying it in some ways or the context that they say it in".

The Tribunal finds that the word "queers", when used as a noun in common parlance is a derogatory term for a homosexual person.

Therefore, the Tribunal finds that the message in TM-1 was likely to expose homosexual
persons to hatred and that homosexual persons are persons who are identifiable on the basis of a prohibited ground of discrimination, namely, sexual orientation.

In his testimony the Respondent McAleer identified his source for his reference to the Celts as being a Time Life publication. When counsel for the Commission asked Mr. McAleer in cross-examination to produce the Time Life publication for examination, it became clear that the passage referred to the ancient Celts trampling their sodomites into the bog. The word "queers" did not appear in the Time Life publication and was introduced by Mr. McAleer. The word "queers" is clearly not a synonym for "sodomites".

The Respondent McAleer testified that the reference in the message to the manner in which the ancient Celts allegedly treated their queers was an attempt at humour. The Respondent McAleer's categorization of this passage as a statement made "tongue-in-cheek" or as humour and satire is reflected in a subsequent message, which is not part of the complaint but which was entered as Exhibit TM-2. As cited earlier in this decision, the Supreme Court of Canada has stated that an intent to discriminate is not a pre-condition to a finding of discrimination under human rights legislation.

Therefore, it is the effect of the message rather than the intent of its author or communicator that must be assessed.

Looking at the message in Exhibit TM-1 as a whole, observing the "priming" of the listener with disgust for paedophilia, the hostility inherent in advocating their execution and then the shift to references to homos and queers and what sounds like an incitement to follow the

example, though incorrectly quoted, of the Celts - "It's not such a bad idea, maybe." - this Tribunal finds that the effect of the message is to expose homosexual persons to hatred or contempt.

It matters not that the intent of the speaker was to be humorous if the effect is likely to expose a person or persons to discrimination under s.13(1) CHRA. The purpose of the legislation is to prevent discriminatory effects rather than punish those who discriminate.

Counsel for the Respondent McAleer based part of his argument on fair comment and free speech. The fact that the Respondent does not approve of homosexuality is certainly a view he is free to communicate telephonically as long as he does not do so in such a manner as to offend s.13(1) of CHRA.

ORDER

This Tribunal orders the respondent, Tony McAleer and the respondent, Canadian Liberty Net and any other individuals who are members of, or act in the name of, or in concert with Tony McAleer or Canadian Liberty Net, to cease the discriminatory practice of communicating telephonically or causing to be communicated telephonically by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament, matters 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 a prohibited ground of discrimination, including sexual orientation, and in particular on the basis of their homosexuality and, to refrain from any such action in the future, anywhere within Canada.

Dated this 27th day of January, 1994.

Keith C. Norton, Chairman

Lee Ongman, Member

Lyman R. Robinson, Member