T-209-92

Between:

CANADIAN HUMAN RIGHTS COMMISSION,

Applicant,

- and -

CANADIAN LIBERTY NET
and DEREK J. PETERSON,

Respondents.

REASONS FOR ORDER

Muldoon, J.

According to the counsel on each side, this is a matter of first impression in Canada. That is virtually the case.

The applicant (sometimes hereinafter, Commission or CHRC), moves for an order that the respondents (hereinafter sometimes the Net, and Peterson) by themselves or by their servants, agents or otherwise, anyone having knowledge of the order, be restrained and enjoined

> . . . until a final order is rendered in the proceeding before the Canadian Human Rights Tribunal [the tribunal], from communicating or causing to be communicated, by telephonic means, messages that are likely to expose persons to hatred or contempt by reason of the fact that those persons are identifiable on the basis of race, national or ethnic origin, colour or religion and in particular the message as attached as Exhibit "B" (Appendix I) to the affidavit of Lucie Veillette sworn the 23rd day of January, 1992.

The grounds of the originating motion are stated to include sections 25 and 44 of the *Federal Court Act*; and sections 13, 27 and 57 of the *Canadian Human Rights Act*, R.S.C. 1985, Chap. H-6. In support of this motion are filed the affidavits of L. Veillette, above mentioned, of Réal Fortin sworn January 23, 1992 and of Gordon Thompson sworn January 24, 1992.

This is a free-standing motion for an interlocutory injunction, there being no statement of claim lodged in this Court by the applicant. There have, however, been five complaints filed by three complainants with the CHRC concerning the impugned telephone messages. Four of the complaints allege that the telephone messages denigrate Jewish and non-white persons; the fifth complaint alleged again denigration of non-whites. Those messages are described by that party's counsel as "hate propaganda", to summarize the cumulative inclusionary effect of the statutory prose of subsections 3(1) and 13(1) of the *Canadian Human Rights Act* (sometimes hereinafter, the Act).

FACTS:

According to the complainants, by telephoning an advertised telephone number in British Columbia, one can listen to a "menu" of messages which, they urge, are likely to expose persons to hatred or contempt by reason of prohibited grounds of discrimination. The telephone number is advertised in a small journal which claims that its approximate readership is "12,000 and growing", as disclosed by exhibit "A" to Réal Fortin's affidavit.

Pertinent passages from the article, "Canadian Liberty Net", in the small journal run as follows:

> Canada's first computer operated voice mail system has made its debut. It was launched to promote cultural and racial awareness among White people. The system is run completely free of charge, but there are expenses. The system is operated on donations and donations are needed all the time.
>
> . . .
>
> The purpose of Liberty Net is to provide a forum for the free exchange of ideas and opinions from people and organizations across North America and the world. The system contains several messages from various "freedom" movement leaders from as far away as Australia, while also dealing with issues closer to home.
>
> . . .
>
> Although Liberty Net do [sic] not believe they have broken any laws, they are under threat of being closed down. Upon discovery of the phone line, an investigation was launched by the Office of the Attorney General of B.C. and two complaints have been filed with the Canadian "Human" Rights Commission.

> [Two of the three complainants] claim they have been discriminated against by the Liberty Net. The pair say the system contains messages which claim that the "holocaust" never happened, that non-White aliens are importing crime into the country, and that, heaven forbid, there is a "Kosher" food tax levied on all consumers. The human rights investigation was completed and recommendations made that the matter be dealt with before a human rights tribunal (here we go again).
>
> This has yet to be decided. It will be interesting to see how many hundreds of thousands of tax-dollars are wasted on yet another of these witchhunts!
>
> This system is available to anyone free of charge, but Liberty Net need help with operating expenses. Your financial contributions would be greatly appreciated. The number to dial is (604) *** [here recited] *** to hear a message or to leave one.

The text of the various messages transcribed by CHRC investigators is too voluminous to recite here in full. However, an investigator made a synopsis after listening to a Net program, and it, with rare exception conforms with the message transcriptions.

It is replicated in Ms. Veillette's exhibit "C" at page 00031, which, with the Court's few corrections in [square] parentheses, runs thus:

> 13. The investigator called the message line, from 12-15 (inclusive) December 1991. The selection of messages appeared to be identical each time. The system is structured as follows:
>
> a) A taped voice introduces the Canadian Liberty Net, a computer-operated message line. The voice says that those people who would be offended by the contents should exit the system and not call back.
>
> b) The system then offers a "menu" of messages, selectable with a touch-tone telephone. The "main menu" offers "Leadership", "History", "Miscellaneous Messages," and "Leave a Message."
>
> c) "Leadership" offers Canadian and American messages.
>
> d) In one of the two Canadian messages, an update is provided regarding the Munich trial of Ernst [Zündel]. The other message is from the "Heritage Front," which opposes the problems that "aliens" bring to Canada, giving a Toronto box number where listeners can write for more material.
>
> e) There were three American leadership messages. The first is from the National Alliance, based in West Virginia. This group attributes western civilization to white people who kept their superior race apart from the many tribes and races of "sub-men" who threaten the existence of whites via race-mixing. The second message is from Tom Metzger of White Aryan Resistance [W.A.R.], who self-censors his messages and includes a California mail address, from which Metzger states he can smuggle in some "free speech" across the border. The third message is from Fred Leuchter, ["an expert on execution technology"], who claims that he has been victimized by a conspiracy [to destroy his credibility because of his previous testimony about Auschwitz, Berkenau etc.].
>
> f) The "History Menu" contains two messages, both denying the Holocaust, [or, at least, the numerical extent of the Nazis' victims].

> g) The "Miscellaneous Messages Menu" has four categories. In "Music," the speaker indicates that European music [and architecture are] being suppressed by modern [trends] which impeded creativity. In "Kosher Tax," the speaker states that some foodstuffs are subject to increased costs in order to have them certified acceptable to orthodox Jews. This message concludes that the consumer should avoid kosher products, which can be identified by product labels. In "Hollywood Name Changers," a list of apparently Jewish-sounding (i.e. suffixed with "stein", "ski", "man") names is provided along with the changed versions. In "Masters of Hollywood," the speaker states that Hollywood is dominated by Jews, citing examples of various past and present movie executives with Jewish-sounding names.
>
> h) The "Leave a Message" selection connects the caller to a voice-mail box for the Canadian Liberty Net.

That these messages seem to this Court to be fatuous and shallow, quite apart from their racial and religious disparagement of all of humanity except for the "pure-euro", will be considered later in these reasons.

According to the affidavit of Human Rights Officer Yamauchi, certain additional messages were available to be heard on January 28, 1992, when he dialled the Canadian Liberty Net telephone number. They are transcribed in exhibit "A" to his affidavit sworn on the next day. Those additional messages do indeed denigrate the value of non-"aryan" human life in several ways. Talking of the alleged "six million killed in the Holocaust", the message concludes horrifically and fatuously:

> Perhaps if Dr. Samuel Kerkovsky took the time to calculate more accurately, he would find only 70,000 names in the Auschwitz death books, not 500,000. These books also contain no mention of deaths by lethal gas.

Is it possible that the western Allies and the media and the "lest we forget" organizations have wronged those earnest hard-working Nazis of the nineteen-thirties and 'forties for slaughtering fewer thousands of fellow human beings than alleged? Tut-tut.

The pertinent passages of another additional message emitted on the Canadian Liberty Net are of such sinister implication and incitement to violence as to warrant repetition here:

> Recently in Edmonton, a gang calling itself Brown Nation terrorized white students at high schools * * *. The following excerpts are from the *Calgary Herald*, November 30, 1991:

> Police have warned Bonnie Doon high school students in Edmonton to travel in pairs for protection, after a new teenage gang armed with guns, crowbars and baseball bats visited their school. The incident marked the latest in a string of attacks by Brown Nation gang members who had swarmed down on at least five south-side schools this fall.
>
> "Anybody white they'll go after", said Barb, a Grade Twelve student. "They won't get you if you're coloured."
>
> Brown Nation is made up from more than one hundred East Indian, Hispanic, Chinese, black and Pakistani youths each from 15 to 21, mainly from Harry Ainley and J. Percy Page high schools. Some don't go to school.
>
> "Gang members put a mark on certain people and get them at school, bus stops, or just walking around", said Dan Bateman, Mr. Bateman being a Guidance Counsellor at Bonnie Doon. "They basically hit the individuals", said Mr. Bateman.
>
> Bonnie Doon students and teachers were terrified Monday, November 25, when more than fifty Brown Nation members arrived in at least seven different vehicles and a pickup truck during lunch.
>
> "They had crowbars and baseball bats and the teachers had to break it up", said Samantha, a Grade Eleven student.
>
> ... ...
>
> Of course, not a peep has been said over this incident outside of Calgary, because the papers are too busy writing about the German youths, say, terrorizing foreigners in Germany. If a gang of fifty to one hundred whites went to various schools beating up and threatening non-white students, the War Measures Act would be introduced and the army called in to quell the disturbance. Perhaps what we need in Canada now is not more Third World immigrants, ***but a couple of thousand boisterous young Germans to set matters straight.***

To do what? To counter-attack? One does not take from that message any inference of challenging the others to a debating contest or a soccer match or even to a demonstration of love and respect "to set matters straight". The message does not call upon law-abiding non-violent Canadians of German origin to do anything, but rather it calls for the immigration of thousands of "boisterous young Germans", meaning what? Neo-Nazis? To terrorize "foreigners" in Canada? Despite the message's inconsistencies (allegedly victimizing all Whites at random, and specially "marked" individuals), it is a clear demonstration of a secular anti-social evil. Racism begets racism; and violence. Violence begets violence in return.

Presumably the respondents could just go along adding to the repertoire of the messages so as to flummox the CHRC's attempts to cause

a tribunal to deal with a crystallized, up-to-date complaint or complaints. Perhaps "flummox" is too harsh and judgmental a word. Perhaps the respondents are just continuing innocently to transmit by telephone their brand of "enlightenment" and "good-citizenship" simply as the thoughts occur to them without any ulterior motive. Needless to emphasize, to be constitutionally protected, speech and expression do not need to evince enlightenment and good citizenship.

Canadian Liberty Net is not shown to be a corporation. It appears to be "a group of persons" contemplated in section 13 of the Act. How numerous they are is not shown. From Veillette's affidavit, exhibits "D", "E" and "F", Yamauchi's affidavit, paragraph 4, and Vicki Lynn Hobman's affidavit, paragraph 4, the following facts are known. Derek J. Peterson subscribes to, or rents, the telephone line involved herein. Cori Keating rents the post office box by which the Net communicates by mail. Tony McAleer operates their facsimile communications machine.

As a result of the complaints and pertinent investigations, the Commission, on January 17, 1992, decided, pursuant to paragraph 44(3)(a) of the Act, to request the president of the Human Rights Tribunal Panel to appoint a Human Rights Tribunal to enquire into the complaints, and pursuant to subsection 40(4) to deal with them together. Ms. Veillette wrote to the president, Sidney Lederman, Q.C. on January 20, 1992, conveying the CHRC's request.

Two general issues are here presented to the Court: could the Court enjoin the respondents' impugned activities; and if so, should the Court enjoin the respondents' impugned activities? The first issue was raised by the respondents' counsel as a preliminary objection to the Court's having any jurisdiction to grant an injunction in these circumstances.

JURISDICTION:

The respondents' counsel argues that the two provisions of this Court's constituent statute, sections 25 and 44 do not help to invest the Court with the power to do what the applicant seeks. The CHRC, it will be remembered, has not commenced a lawsuit by means of a statement of claim in this Court. This Court, too, with every other Court in Canada, lacks the jurisdiction to make the adjudication, cease-and-desist pronouncement or other dispositions which the Act reserves to the Human Rights Tribunal (hereinafter sometimes, the Tribunal).

The two provisions of the ***Federal Court Act*** relied upon by the applicant ***in toto***, like that Act itself, were enacted by Parliament pursuant to section 101 of the ***Constitution Act, 1867***:

> 101. The Parliament of Canada may, **notwithstanding anything in this Act,** from time to time provide for the constitution, maintenance, and organization of a general Court of Appeal for Canada, and for the establishment of any additional Courts **for the better administration** of the laws of Canada.

This constitutional legislation has been interpreted several times by both the Judicial Committee of the Privy Council and the Supreme Court of Canada. All Canadian Courts must loyally abide by the Supreme Court's interpretation of this provision, but it is difficult not to notice that in three momentous judgments[1] which drastically curtailed this Court's jurisdiction to entertain Crown counterclaims and third-party notices, the previous Supreme Court benches which decided them (with Mr. Justice Martland, alone, dissenting in the last) simply did not consider, interpret or deal with the emphasized expressions above recited.

When one compares Parliament's power under section 101 to create this Court, and the provincial legislatures' power under section 92, head 14 to

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[1] McNamara Construction (Western) Ltd. & al. v. The Queen [1977] 2 S.C.R. 654; Québec North Shore Paper Co. & al. v. Canadian Pacific Ltd. [1977] 2 S.C.R. 1054; and The Queen v. Thos. Fuller Construction Co. (1958) Ltd., [1980] 1 S.C.R. 695 (Martland J. dissenting).

create their superior Courts one sees at once that the constitutional text does not compel conclusions that the Federal Court does or could wield less inherent jurisdiction in its proper sphere than the provincial Courts in theirs, nor that the Federal Court is "only" a statutory Court, but the provincial Courts are somehow not statutory Courts. Of course, one must accept authoritative interpretations of these constitutional texts, especially when imparted by the Supreme Court of Canada. One should not assume a lack of jurisdiction unless it has been imposed by authoritative judicial pronouncement. Now one should review the two provisions of the ***Federal Court Act*** invoked by the applicant. They are these sections:

> 25. The Trial Division has original jurisdiction, between subject and subject as well as otherwise, in any case in which a claim for relief is made or a remedy is sought under or by virtue of the laws of Canada if no other court constituted, established or continued under any of the **Constitution Acts 1867 to 1982** has jurisdiction in respect of that claim or remedy.
>
> 44. In addition to any other relief that the Court may grant or award, a **mandamus**, injunction or order for specific performance may be granted or a receiver appointed by the Court in all cases in which it appears to the Court to be just or convenient to do so, and any such order may be made either unconditionally or on such terms and conditions as the Court deems just.

These days, when one seeks any reliable statement of this Court's jurisdiction, one resorts to the judgment of the Supreme Court of Canada in ***ITO - International Terminal Operators v. Miida Electronics***, [1986] 1 S.C.R. 752, a closely split decision, in which Mr. Justice McIntyre wrote the majority decision. There are three essential analytical criteria enunciated by the Supreme Court's majority.

There must be a statutory grant of jurisdiction by Parliament. It seems clear that sections 25 and 44 of the ***Federal Court Act***, above recited, satisfy this first requirement in according jurisdiction to this Court. Those two sections are nothing, if not statutory grants of jurisdiction. In particular, when read together, they accord jurisdiction to grant or award an injunction in any case in which that relief is sought, between "subject and subject", under or by virtue of the laws of Canada, where it appears to be just or convenient to do so, if no other Court constituted, established or continued under any of the

Constitution Acts 1867 to 1982 has jurisdiction in respect of that claim or remedy.

The second and third requirements set out in the *ITO* case were made separate to meet the exigencies of that case's circumstances, but ordinarily they can be consolidated into one statement. There must be an existing body of federal law on which the case is based - a "law of Canada" as expressed in section 101 of the *Constitution Act, 1867* - which is essential to the disposition of the case, and which nourishes the statutory grant of jurisdiction. This case is based on the *Canadian Human Rights Act*, an authentic "law of Canada" within the contemplation of section 101 of the *Constitution Act, 1867.* If it were not for the provisions of that statute bearing on the subject matter here - the respondents' denigration and mockery of non-whites and Jews,(which, the applicant submits, likely exposes them repeatedly by telephonic communication to hatred or contempt) - as set out in section 13 of the Act, these proceedings could not have been undertaken. It is, thus, clear that the Act is a body of federal law which, in these particular circumstances, is essential to the disposition of this case and which nourishes the Court's statutory grant of jurisdiction invoked by the applicant. The *Canadian Human Rights Act* describes and denounces a discriminatory practice, if so found, which can ultimately be enjoined by the order of a Human Rights Tribunal only "at the conclusion of its inquiry".

Parliament has created a jurisdictionally symbiotic relationship between the CHRC, its investigators and Tribunals on the one hand and the Federal Court on the other by means of sections 57 and 58 of the Act. Such provisions designate the Federal Court for the enforcement of any order of a Tribunal or the Review Tribunal, and of any of their orders for claimed disclosure of any information from a minister of the Crown. No other Court mentioned in section 25 of the *Federal Court Act* is designated as an

enforcement arm for the operations of the CHRC, its investigators, Tribunals or the Review Tribunal. The ***Canadian Human Rights Act*** is surely one operative law under which this Court can properly entertain originating motions for relief against the CHRC. That is because the CHRC, with the Tribunals, is surely a federal board, ***commission*** or other ***tribunal*** defined in section 2 of the ***Federal Court Act***, subject to the supervising jurisdiction of this superior Court. No statutory law or rule of practice forbids the Commission from initiating an originating motion under its constituent statute.

The respondents' counsel urges that there is another court pursuant to section 25 which has jurisdiction in respect of these proceedings, and that is a Human Rights Tribunal or a Review Tribunal, which is empowered to make a cease-and desist order pursuant to subsections 53(2), 54(1) and 56(2). Thus, he asserts, this Court is actually precluded by section 25, not empowered by it in these circumstances. It will be noted, however, that the Tribunal's (or Review Tribunal's) powers to order cessation of discriminatory practices may be exercised only "at the ***conclusion*** of its inquiry" according to subsection 53(2) of the Act. No Tribunal or Review Tribunal is empowered to make an ***interlocutory*** order. This is a power which Parliament has conferred upon this Court, but not upon a Tribunal which is not composed of professional judges, even if it be a "section 101 Court", as the respondents' counsel seems to suggest.

Even so, the respondents' counsel objects, one cannot find anywhere in the law an instance where any injunction may be granted to restrain the exercise of a ***Charter***-protected freedom. This argument to a degree impinges upon the question of whether the Court should grant the sought-for injunction. It raises the discretionary nature of the relief sought as well as the question which the Court is bound to consider in regard to section 1 of the ***Charter***, which, it will be remembered runs thus:

> 1. The ***Canadian Charter of Rights and Freedoms*** guarantees the rights and freedoms set out in it ***subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.***
>
> [emphasis not in original text]

The emphasized words describe the test which must be applied in order to determine whether any purported restraint of the exercise of a *Charter* guaranteed right or freedom be lawful or not. However, whether counsel can or cannot find an instance of interlocutory restraint of an apparently *Charter*-guaranteed freedom in circumstances not yet judicially balanced off against the reasonable limits mentioned in section 1, the possibility is not absolutely unthinkable. Indeed, the imposition of such restraints most often occurs in regard to speech and expression, with regard to trade-marks and copyrights and advertising.

In regard to the operations of law, government and politics many a cynic has said "money talks" and one can obtain interlocutory injunctive relief in commercial matters of trade-mark, copyright, patent and industrial design cases, most especially at the behest of the commercial goliaths whose business interests may be in jeopardy. The cynics may be correct, or not, but this is not a case for cynicism. It does not appear that the commercial goliaths suffer any greater harm in the alleged infringement of their trade-marks, copyrights and advertising than do those individuals who are mocked and denigrated for being Jews and non-whites.

The respondents' counsel further contends that a free-standing application, such as this, where no action is instituted by the applicant for permanent relief, is also beyond this Court's jurisdiction. Powers are vested in a Human Rights Tribunal under subsections 53(2), 54(1) and 56(2) of the Act. Those powers and that jurisdiction are not vested in this Court or any other Court. They include the making of a permanent cease-and-desist order if the complaint be substantiated. There is no power in the tribunal to make

an interlocutory order, and there is no power in the Court to make a permanent order. The "repair" (if such it be) of this jurisdictional asymmetry is contemplated and made available by sections 25 and 44 of the *Federal Court Act*. Thus, a free-standing application may be granted - if warranted - with no violence to the apparent purpose and intention of Parliament, but rather in agreeable accord.

Such free-standing applications for injunctions, where no other action is instituted in the Court, have become rather numerous in recent decades and several have succeeded. That is to say, in the words of section 44, the injunction is granted *in addition* to *any other* relief which the Court *may* grant or award, in *all cases in which it appears to the Court* to be just or convenient to do so. The emphasized words imply a free standing relief, not only one which is awarded concurrently in a single proceeding. In these circumstances, as noted, this section ought to be read with section 25, but despite the respondents' opposition, Parliament ought not to be taken to have enacted a dead letter, "for the *better administration* of the laws of Canada".

In the matter of free standing injunctions becoming more and more accepted in recent decades, the applicant's counsel points to the judgment of the House of Lords in *Siskina (Cargo Owners) v. Distos S.A.*, [1979] A.C. 210, as marking the turning point. In that matter Lord Denning M.R. in the Court of Appeal had reversed the disposition made by Kerr J. and the Court of Appeal had granted an injunction in England to restrain the removal of insurance moneys pending the outcome of the parties' litigation in the courts of Italy, or Cyprus, or by means of arbitration, and he put the cargo owners on terms to proceed speedily in that litigation or arbitration. At pages 235-36, the Master of the Rolls is reported to be urging English judges not to be "timorous souls" in reforming the law to "find a good way to law reform". One of Lord Denning's colleagues, Lord Lawton, heeded his call to boldness, and

the other, Lord Bridge (at pp. 242-43) declined, and so the decision of the Court of Appeal was not unanimous. The House of Lords also rejected the call to boldness. In terms here pertinent, Lord Diplock noted that subsection 45(1) of the *Supreme Court of Judicature (Consolidation) Act of 1925* (differing from section 44 of the *Federal Court Act* in this respect) gave jurisdiction to make only an interlocutory order, (section 44 is not so restricted) and held that such formulation "presupposes the existence of an action, actual or potential, claiming substantive relief, * * * to which the interlocutory orders * * * are but ancillary." Lord Hailsham agreed in the result, but foresaw (at pp. 260-61) developments in the future more in accord with Lord Denning's call to be bold, not "timorous". However, like Lord Justice Bridge in the Court of Appeal, Lord Hailsham foresaw the need for legislation, as well as judicial law reform.

The reform came, in fact, through legislation, which the applicant's counsel contends was still not so encompassing as are sections 25 and 44 of the *Federal Court Act*. Counsel cited the then triumphant Lord Denning in the English Court of Appeal case of *Chief Constable of Kent v. V et al.*, [1983] 1 Q.B. 34, where, at pp. 42 and 43, the Master of the Rolls is reported as quoting the above cited reasoning of Lord Diplock, and going on to say:

> Now that reasoning has been circumvented by section 37(1) of the *Supreme Court Act 1981* which came into force on January 1, 1982. It says:
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> > "The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so."
>
> Those words in brackets show that Parliament did not like the limitation to "interlocutory." It is no longer necessary that the injunction should be ancillary to an action claiming a legal or equitable right. It can stand on its own. The section as it now stands plainly confers a new and extensive jurisdiction on the High Court to grant an injunction. It is far wider than anything that had been known in our courts before. There is no reason whatever why the courts should cut down this jurisdiction by reference to previous technical distinctions. Thus Parliament has restored the law to what my great predecessor Sir George Jessel M.R. said it was in *Beddow v. Beddow* (1878) 9 Ch.D. 89, 93 and which I applied in *Mareva Compania Naviera S.A. v. International Bulkcarriers S.A.* [1975] 2 Lloyd's Rep 509, 510: "I have unlimited power to grant an injunction in any case where it would be right or just to do so: . . ." Subject, however, to this qualification: I would not say the power was "unlimited". I think that the applicant for an injunction must have a sufficient interest in a matter to warrant him asking for an injunction. Whereas previously it was said that he had to have a "legal or equitable right" in himself, now he has to have a locus standi to apply. He must have a

> sufficient interest. This is a good and sensible test. It is the self-same test of locus standi as the legislature itself authorised in section 31(3) of the ***Supreme Court Act 1981.*** Next, it must be just and convenient that an injunction should be granted at his instance as, for example, so as to preserve the assets or property which might otherwise be lost or dissipated. On this principle I think that the ***Siskina*** case [1979] A.C. 210 would be decided differently today. The cargo owners had plainly a sufficient interest: it would have been most just and convenient to have granted an injunction, as I pointed out in the Court of Appeal in the ***Siskina*** case, [1979] A.C. 210, 228E. It was most unjust for the House of Lords to refuse it.

In support of his contentions concerning the Court's jurisdiction to grant the injunction sought, on a basis somewhat akin to that underlying the *Mareva* injunction, the applicant's counsel cites passages from I.C.F. Spry's *The Principles of Equitable Remedies: Specific Performance, Injunctions, Rectification and Equitable Damages*, 4th ed. (Canada, Carswell Co.). That learned author, at p. 443, opines that even at the time of the House of Lords' decision in the *Siskina* case, the Lords were being "unduly restrictive", in terms of the development of common law, equity and legislation in 1979. He urges at p. 444, that in other jurisdictions than England, even, "the powers of courts with equitable jurisdiction to grant interlocutory injunctions must, subject to any relevant territorial restrictions, now be taken to be without limits." That is a thought not easy to reconcile in Canada, where the Federal Court is a "mere" statutory Court without, it is said, any inherent jurisdiction yet enjoys territorially trans-provincial jurisdiction, whereas provincial superior Courts, created also by statute - provincial statute - have been held to have inherent jurisdiction but it may be exercised territorially only "in and for the province".

As noted earlier herein, because Parliament was acting under a constitutional provision which empowered it "notwithstanding anything" in the *Constitution Act*, to provide for the establishment of the Federal Court of Canada "for the better administration of the laws of Canada", it can be held that the Federal Court's inherent jurisdiction in its proper sphere operates insofar as legislation and judicial authority have not suppressed it. On that basis it is apparent that there may be many cases - the present case could be among them - in which it would be just and convenient to enjoin a person,

firm or corporation from apparently flouting the laws of Canada, until the question is authoritatively resolved by arbitration pursuant to federal law or before the federal administrative tribunal having the jurisdiction to perform that authoritative resolution. On this basis, then, this Court's jurisdiction, whether inherent or statutory, is well founded.

The jurisprudence cited by the applicant, more than mentioned herein, emanates from England, and for that reason it was intimated by counsel that this is a case of first impression in Canada. However the granting of an interlocutory injunction where it would not even be ancillary to substantive relief claimed in an action has at least one precedent in Canada. There may well be others, but the prime authority in this regard appears to be ***Amchem Products Inc. v. British Columbia (Workers' Compensation Board)***, (1989) 42 B.C.L.R. (2d) 77, a judgment of Esson C.J.S.C., and (1990) 50 B.C.L.R. (2d) 218, a unanimous judgment of the British Columbia Court of Appeal rendered principally by Hollinrake J.A. The appeal and cross-appeal were dismissed.

In the circumstances of the ***Amchem*** case, 194 individual defendants were plaintiffs in a Texas action against 28 corporate plaintiffs for damages alleged to arise from exposure to asbestos fibres of products allegedly manufactured and marketed outside of Canada by those corporate plaintiffs. Most of those corporate plaintiffs were U.S. companies, but none was incorporated in Texas. None of the corporate plaintiffs had any connection with British Columbia, but the individual defendants (plaintiffs in Texas) were actual or former British Columbians whose alleged injuries were sustained in the province. The corporate plaintiffs (defendants in Texas) unsuccessfully tried to persuade the Texas courts to decline jurisdiction, seemingly because it was not open to a Texas court to grant a stay on the basis of ***forum non conveniens***. The plaintiffs sought an injunction, an "anti-suit" injunction in British Columbia to restrain the defendants from proceeding with the Texas

action, and the Supreme Court of British Columbia granted an interlocutory injunction.

In the trial court, Chief Justice Esson wrote as a subject headline in his reasons, "*Is there power to grant an interlocutory injunction?*", and on p. 106, he is reported to have written this:

> * * * I accept that the only substantial relief sought in the action is the injunction.
>
> The question whether an interlocutory injunction can be granted except where it is ancillary to other relief being sought in the action is one which has been much considered by the English courts in recent years, and specifically in relation to injunctions of this general kind. Virtually all of the cases to which I have been referred in which anti-suit injunctions have been granted have been ones in which the application was brought in already existing litigation. But in many cases, of which *Castanho* [[1981] A.C. 557 (H.L.)] and *SNI* [[1987] 3 All E.R. 510 (P.C.)] are examples, the application was brought by defendants in the action who could not be said to be seeking an injunction as ancillary to other relief being sought by them. I think that the better view is that this form of injunction constitutes an exception to the basic principle restricting the grant of injunctions to certain exclusive categories. That view was adopted by the House of Lords in what appears to be the most authoritative case on the point: *South Carolina Ins. Co. v. Assurantie Maatschappij "De Zeven Provincien" N.V.; South Carolina Ins. Co. v. Al Ahlia Ins. Co.*, [1987] A.C. 24, [1986] 3 W.L.R. 398, [1986] 3 All E.R. 487, per Lord Brandon at p. 40. It is interesting to note that Lord Brandon, speaking for the majority on this view, took a narrower view than that taken by Lord Mackay and Lord Goff, who expressed doubt that the power of the court to grant injunctions is no longer restricted to exclusive categories.
>
> As our underlying law governing the grant of injunctions is essentially the same as that of England, I see no reason not to accept the view of the law stated by Lord Brandon. That is enough to dispose of the objection.

In the Court of Appeal, Hollinrake J.A. adopted and ratified this statement simply by quoting it (on p. 242) and writing: "I agree with what Chief Justice Esson said on this issue."

So, at least in the *Amchem* case, the free standing application for an interlocutory injunction is known in Canada, and was approved by both the

trial and appeal courts of British Columbia. It was granted in order to prevent oppression against persons not resident in British Columbia, coming nevertheless to the provincial court for nothing more than the injunction itself.

Does this Court's own Rule 469 prevent the same assumption of jurisdiction as was effected by the British Columbia courts? There, of course, the injunction seekers filed an empty shell of a statement of claim, as the Chief Justice perceived and noted in his reasons. No doubt an empty-shell pleading by the CHRC would have made an empty formal compliance with Rule 469, because the only effective relief which it seeks in these proceedings is the injunction. Indeed, because this Court's rôle is to provide enforcement for Tribunals' orders, but cannot adjudicate the matter as only the Tribunals can, there would be nothing to plead in a statement of claim. There is no action cognizable by the Court for the jurisdiction to adjudicate under the Act is conferred on the Tribunals, not the Court.

However, if there be a legitimate jurisdiction in aid, as has been demonstrated in the jurisprudence and textbooks, Rule 469 relating to ordinary actions will not stand in the way. Such indeed is the purpose and meaning of Rule 6 which permits dispensation from ordinary rules, when necessary "in the interests of justice".

Now are there circumstances in which such persons could obtain such protection from oppression if they were not even applicants for the injunction but were represented by a "protector" so to speak? In other circumstances might the community at large or general public gain such protection through an intercessor? Such a situation arose in this Court in 1979, albeit in an *ex parte* application in ***The Queen in Right of Canada and Attorney General of Canada v. National Assoc'n of Broadcast Employees and Technicians et al.***, [1980] 1 F.C. 716, a decision of the then Associate Chief Justice, Hon. A.L.

Thurlow. Unlike the ***Amchem*** case, Thurlow A.C.J. had before him a privative provision of the ***Canada Labour Code***, but also what seems to have been a mere hollow shell of a lawsuit not unlike that in the ***Amchem*** case which arose a decade later. The Attorney General's application was for an interim injunction to restrain violation by the defendants of subsection 180(2) of the ***Labour Code***. Two of the defendants attended the hearing but made no representations. Thurlow A.C.J. granted the injunction in order to abort the defendants' announced purpose to flout the law.

Neither counsel noticed that the above cited judgment in ***The Queen & Attorney General v. N.A.B.E.T.*** was overruled by the Appeal Division beginning at p. 820 ***post*** in the same volume. The appeal Court's ***ratio***, written by Pratte J., is on p. 825, and is this:

> * * * It is apparent from the statement of claim that the Crown and the Attorney General were merely acting on behalf of the Canadian Broadcasting Corporation; this is not a case where the Attorney General was acting in his own right as the representative of the public interest. It was, for that reason, a case where the jurisdiction was specially assigned to the Canada Labour Relations Board and where, consequently, the Trial Division had no jurisdiction.

Here, the rôle undertaken by the CHRC is surely representative of the public interest, for this is no labour dispute involving primarily employers' and employees' interests.

The only comfort CHRC can take from that reversal resides in the concurring reasons of Kerr D.J. at p. 826:

> * * * As the Attorney General was not, in our opinion, acting in this case in his own right as guardian of the legal rights of the public the decision being here given should in no way be construed as implying that the Trial Division does not have jurisdiction to grant, on an application of the Attorney General acting as such guardian, an injunction against a threatened violation of section 180 of the ***Canada Labour Code*** in circumstances where there is no other available remedy to deal with the matter in time to prevent serious harm to the public.

Telephonic messages designed to disparage and mock some of the public for their ancestry, and to set other members of the public against them, constitute ***prima facie*** serious harm to the public.

In that exceptional case, the Associate Chief Justice granted an interlocutory injunction which was to endure only nine days before it automatically dissolved.

That action by the Court's order to prevent apprehended flouting of the law is apparently not so exceptional as a general proposition of English law, to which one may resort, as did the British Columbia courts, at least for general principles. Once again the English Court of Appeal, this time in *Stafford Borough Council v. Elkenford Ltd.*, [1977] 2 All E.R. 519, gives an example. The fourth edition of Halsbury, published in 1979 about the time of the developments of the law discussed herein, has this passage in vol. 24 at p. 520, para. 921:

> Where statute provides a particular remedy. Where a statute provides a particular remedy for the infringement of a right created by it or existing at common law, the court's jurisdiction to protect the right by injunction is not excluded unless the statute expressly or by necessary implication so provides. Moreover, notwithstanding that a statute provides a remedy in an inferior court for breach of its provisions, the High Court has power to enforce obedience to the law as enacted by way of injunction whenever it is just and convenient to do so. Where a statute merely creates an offence, without creating a right of property, and provides a summary remedy, a person aggrieved by commission of the offence is confined to the summary remedy, and cannot claim an injunction, although proceedings may be brought by the Attorney General if the public interest is affected.
>
> The High Court, however, has jurisdiction to grant a declaration and ancillary injunction, notwithstanding that its effect is to establish the existence or non-existence of a liability which could be enforced only in a court of summary jurisdiction. In a case where a person would otherwise be without remedy for an injustice, the court has a discretionary power to intervene by way of declaration and injunction in a dispute upon which a statutory tribunal has adjudicated. However, where the legislature has pointed out a special tribunal, another court will not, as a general rule, restrain proceedings before it by injunction.

Here the inferior court, the Tribunal, as noted can grant the final injunction, but the common law or the legislation, or both, accord jurisdiction to the superior court to intervene to prevent a flouting of the law at an interlocutory stage. An example of the Attorney General moving the superior court for an injunction to stop activities in breach of a statute - flouting in the expression of Phillimore L.J. - is the case of *Attorney General v. Chaudry & al.*, [1971] 3 All E.R. 938 (Ch.D. and C/A). There, at the instance of the Attorney General, the superior court enjoined the continuation of a

residential fire hazard until the case could be adjudicated by the magistrates' court. In *Attorney General of British Columbia v. Wale*, (1986) 9 B.C.L.R. (2d) 333, McLachlin J.A. (as she then was), for the majority, acknowledged the rôle of the Attorney General to act on behalf of disaffected groups of persons (p. 344) and the practice of the Crown seeking to enforce by injunction what is *prima facie* the law of the land.

It is a nice question as to whether this undoubted rôle of the chief law officer of the Crown - the Attorney General - goes to the Court's jurisdiction, or to the Court's discretion. However, it is convenient to address the matter under the rubric of jurisdiction.

In Robert J. Sharpe's *Injunctions and Specific Performance* (Toronto: Canada Law Book, 1983) the learned author confirms, at p. 121, the "well-established jurisdiction to award injunctions at the suit of the Attorney-General to enjoin public wrongs". He notes, at p. 122, that the rôle of the "Attorney-General in suing in the public interest to enjoin public nuisances is of great antiquity and continues to have importance". Public nuisances are not the only basis for application by the Attorney General for an injunction. In regard to statutes which do not qualify as true criminal law, but which may be enforced by fines which do not deter offenders from flouting the law, Prof. Sharpe writes:

> There is now considerable authority in favour of injunctions in such cases in Canada. An Alberta court granted an injunction enjoining the unauthorized practice of dentistry, although there was no evidence of actual harm from the practice in question, on the grounds that there had been open, continuous, flagrant and profitable violation of the statute for which the statutory penalties were completely ineffective. More recently in Ontario, a trucking company which persistently operated without the required licence notwithstanding numerous convictions was enjoined at the suit of the Attorney-General, the court holding that such relief was appropriate "where the law as contained in a public statute is being flouted." The Alberta Court of Appeal has held that an injunction may be awarded at the suit of the Attorney-General to prevent further violations of the Lord's Day Act where the facts demonstrated "an open and continuous disregard of an imperative public statute and its usual sanctions which is unlikely to be thwarted without the intervention of the Court."
>
> The rationale in this type of case seems clear; despite the absence of actual or threatened injury to persons or property, the public's interest in seeing the law obeyed justifies equitable intervention where the defendant is

> a persistent offender who will not be stopped by the penalties provided by statute.

It may be noted that although the ***Lord's Day Act***, above mentioned, has been struck down, the ***Canadian Human Rights Act*** still stands.

The CHRC's counsel contends that the Court ought to take cognizance of, and jurisdiction over the Commission's application for an interlocutory injunction because, in a real sense, the CHRC is assimilated to the rôle of the Attorney General for the proper enforcement, and the suppression of flouting, of the provisions of the ***Canadian Human Rights Act***. Because of the place and status conferred upon the CHRC by Parliament in formulating and enacting the Act, there is great merit in counsel's contention.

The CHRC comes to the Court in its own strong and independent right and not as a relator under the general supervision of the Attorney General. The CHRC in its own right is truly the guardian of the federal human rights legislation. For example, the CHRC is invested with a wide array of considerable power and discretionary authority by section 27 alone, in Part II of the Act. Here are some pertinent passages:

> 27.(1) In ***addition to its duties*** under Part III with respect to discriminatory practices, ***the Commission is generally*** [note: not exclusively] ***responsible for the administration of this Part and Parts I and III*** and
>
> > [(*a*) through (*g*) authorize research, study, public information powers, review of statutory rules, regulations, orders, by-laws and other instruments to identify inconsistencies with the principles stated in section 2]; and
> >
> > (*h*) shall, so far as is practical and consistent with the application of Part III, ***endeavour by*** persuasion, publicity or ***any other means*** that it considers appropriate ***to discourage and reduce discriminatory practices referred to in sections 5 to 14.***
>
> [emphasis not in original text]

It requires no further elaboration (although much more could be performed) that among the means to discourage and reduce discriminatory practices referred to in section 13, the CHRC may seek an interlocutory injunction in this Court, fulfilling the same rôle as the Attorney General, since the Commission is generally, but not exclusively responsible for the administration of Parts I, II and III of the Act, the major parts. (Because the non-whites whom the respondents denigrate and mock on a racial basis must surely include the aboriginal peoples, it is perhaps ominous that section 67 in Part IV provides that nothing in this Act affects any provision of the ***Indian Act*** or any provision made under or pursuant to that Act.) This Court is also established for the better administration of the laws - including the human rights laws - of Canada, a rôle not excluded by the CHRC's general responsibility enacted in subsection 27(1) of the Act.

The turning point in Canada for the granting of standing in litigation came in the late nineteen-seventies. It was evinced in these judgments of the Supreme Court of Canada:

Thorson v. Canada (Attorney General) (No. 2), [1975] 1 S.C. 138;

MacNeil v. Nova Scotia (Bd. of Censors), [1975] 2 S.C.R. 265; and

Borowski v. Canada (Minister of Justice), [1981] 2 S.C.R. 575.

As the notion of the authoritarian administration of justice became more and more diluted, the notion of relator actions brought by interested persons under supervision of the Chief Law Officer of the Crown fell more and more out of favour. In a passage which now can be seen to support the CHRC's right to bring this application, and the Court's jurisdiction to take cognizance of it, Mr. Justice Laskin is reported to have written this in the ***Thorson*** case, at pp. 146-47:

> If a previous request to the Attorney General to institute proceedings or to agree to a relator action is a condition of a private person's right to initiate proceedings such as this on his own (see ***Attorney General v. Independent Broadcasting Authority, ex parte McWhirter*** [[1973] 1 All E.R. 689], at p. 698) that condition has been met in this case. I doubt, however, whether such a condition can have any application in a federal system where the Attorney

> General is the legal officer of a Government obliged to enforce legislation enacted by Parliament and a challenge is made to the validity of the legislation. The situation is markedly different from that of unitary Great Britain where there is no unconstitutional legislation and the Attorney General, where he proceeds as guardian of the public interest, does so against subordinate delegated authorities. Indeed, in such situations the decision of the Attorney General to proceed on his own or to permit a relator action is within his discretion and not subject to judicial control: see ***London County Council v. Attorney General*** [[1902] A.C. 165]. Nevertheless, what was said by Lord Denning in the ***McWhirter*** case, ***supra***, on the position of a member of the public where the Attorney General refuses without good reason to take proceedings ***ex officio*** or to give leave for relator proceedings, is relevant to a distinction that I take and on which, in my opinion, the result in this case turns. I shall come to this later in these reasons.

Here, of course, the applicant does not impugn the Act's validity, but rather, in the place of the Attorney General, seeks its interlocutory enforcement. The status of the CHRC, with its statutory powers and responsibilities, is such that it is the natural and prime applicant to move the Court to grant a free standing interlocutory injunction, which is within the Court's jurisdiction to consider and to grant or to decline. Upon all the foregoing considerations the Court finds jurisdiction herein to act upon the applicant's invocation of sections 25 and 44 of the ***Federal Court Act***. The Court possesses the jurisdiction in these circumstances to grant or award an interlocutory injunction of the sort sought by the applicant.

SHOULD THE COURT GRANT THE INJUNCTION?

The applicant needs only to establish a serious question to be tried as stated by Lord Diplock in ***American Cyanamic Co. v. Ethicon Ltd.***, [1975] A.C. 396, but in truth it has gone further and established the higher test of a ***prima facie*** case, as mentioned also, and explained later, by Lord Diplock in ***N.W.L. v. Woods***, [1979] 3 All E.R. 614. This is known as the "***Woods*** exception". It would apply where the grant or refusal of an interlocutory injunction at this stage would, in effect, dispose of the action finally in favour of whichever side is successful in these proceedings. This is not apparently the circumstance here, for if the respondents be successful herein, the applicant will surely not withdraw the case from the Human Rights Tribunal. Equally, if the applicant

be successful here, the respondents are still quite able to go before that Tribunal putting to the applicant the burden of persuasion to show that the respondents' messages are "likely to expose" those persons against whom they speak "to hatred or contempt by reason of the fact that * * * those persons are identifiable on the basis of a prohibited ground of discrimination". That decision, ultimately, will be the Tribunal's after hearing the evidence and the parties' submissions. The respondents' position against the granting of an injunction comprises arguments which are far from negligible.

The respondents' strongest argument goes like this: There is no freedom of speech and expression unless one be free to give offence, since freedom to speak and give no offence permeates even totalitarian States and societies. A truly free and democratic society exacts the guaranty of rights and freedoms which really "bite", which guarantee the exercise of those rights and freedoms when one really needs that guaranty, as the respondents say they do, now. They probably do not need, and have surely transcended the tame "freedoms" of speech and expression which are accorded only by totalitarian States.

The argument is so powerful in the right circumstances that to many it will seem to be conclusive for the respondents in these circumstances. Indeed that argument invokes at least the semantics, if not the inherent substance, of Canada's Constitution, whose purpose, values and imperatives must be among the most beautifully humane and tolerant in all the world. That is not to say that those values are basically mush which exacts no intellectual fibre or rigour to apply, for they surely do not lead necessarily to their own dilution, suppression or extinction. They have to be upheld by all branches of government, legislative, executive and judicial, without the betrayal of dilution of or compromise in their continued operation in this free and democratic society. Only a decadent society lacks the tough mindedness to sustain its own fundamental values.

That said, it may be just as well that the Attorney-General has not intervened to seek an injunction against these respondents, for in Canada, unlike so many other free and democratic societies in the same tradition, Canada's attorney-general is a member of the cabinet, a member of the government of the day, and not an independent law officer. Therefore, it is much better to avoid the undoubted weight and suspicion of partisanship of any government of the day, in taking proceedings in which the respondents are going inevitably to assert that their *Charter*-protected rights are sought to be suppressed, rather than to be upheld. The CHRC (in common with other commissions, such as the Law Reform Commission, the Immigration and Refugee Board, etc. for example) is not in or of the government of the day, but stands apart from that government. It is, however, the institution created by Parliament to vivify the operations, meaning, purpose and public import of the *Canadian Human Rights Act*. The CHRC performs its duties, not perfectly, (in common with all human institutions), but according to its dedicated view and understanding of its mandate, and it is subject to judicial supervision, with the latter's own inbuilt appeal process. As the CHRC well knows, its own relationship with this Court is very much "at arm's length".

Would the imposition of an interlocutory injunction in these circumstances be an unwarranted interference with the respondents' rights and freedoms? When one penetrates the bodyguard of semantics, what essentially are their rights and freedoms? Is one of the world's most humane declarations of human rights and freedoms a vehicle for legitimating the disparagement and ridicule of human beings for no just cause? Such, the Court finds those messages, or most of them to be.

There is the problem and vice of the respondents' telephone messages. Is it unobjectionable, is it past the line of permissibility or not, to warn that what is about to be heard will offend some people, thereupon invited to exit from the program; and then to go on to disparage and ridicule Jews, and non-

whites as sub-human, or to make light of the lethal fury of the cowardly Nazis' holocaust, because maybe somewhat fewer than six million "sub-men" were ruthlessly murdered?

Does Canada's beautiful and humane rights-and-freedoms package look with unmoved disinterest upon the use of the telephones - a mass communication system - to injure humans' worth by mocking them just for being what they are? No one ever chose his or her own biological parents or ancestors. Therefore no one is justified in attempting to inflate his own would-be nobility of character or lineage on the basis of who his or her ancestors were.

Indeed many, many peoples' ancestors were bigots, haters and even Nazis. If one is going to teach a history lesson about the transmission of civilization one does not need to begin with "true men" keeping apart from sub-humans. Apes and chimpanzees are sub-human. That which identifies the human race, or, in deference to the respondents, the human races, is that the people are all inter-fertile. That is surely the means of identifying and defining all humans on the planet Earth. Again, it is remarkable that in his dithyrambic rhapsody about pure euro-civilization, the recorded "historian" either ignored or did not even know about the great, semitic empire of the Islamic Abbasids (A.D. 750 - 1250 approx.), with its Jewish, Persian and even Christian officers of State, and scholars. Prosperous urban cultural centres inhabited and inspired by non-euros, even "brown nations", flourished in greatly distant places such as Cordoba in the west, Palermo, Cairo, Baghdad, unto Nishapur in the east. Almost any European or American encyclopaedia could reveal to the author of the "history lesson" that the Abbasid culture, learning and scholarship saved and preserved the ancient Greek learning, and vastly outshone a Europe festering in the general ignorance and brutality of the Dark Ages. That grave omission from the "history lesson" reveals how shallow and fatuous it is.

Racism, which always consists, in large part, of ancestor-worship and ancestor-advocacy, evinces at least two pernicious propensities. There is the propensity to injure others to whom one fancies oneself so superior because of the imagined virtues of mind and physique and culture which one inherited from forebears who always seem to have been just as bigoted, narrow-minded and hateful as their descendants of the day. From whom, after all, was racism transmitted to the not-much-advanced modern world? There is the other propensity to nurture the hurts and grievances of one's ancestors in order constantly to fling them with their claws and fangs of guilt into the faces of certain contemporaries whose long-gone ancestors may have been the only ones to have bloodily inflicted those hurts and grievances. And so it goes. Just as one cannot claim virtue from one's ancestry, so one cannot be responsible for their aggressions. The racists forget nothing and learn nothing. (It may well be that the very racial mixing, which modern-day spewers of hatred, superiority and violence so abhor, would be the salvation of the human species. Then humanity might go to work on eliminating the domination/damnation virulence of religious intolerance.) Raised fatuously and magnified falsely to the level of political philosophy or religion, those racist propensities can be seen clearly to be inimical to the beautiful imperatives and values of Canada's constitution.

This demonstrates the silliness of ancestor-worship or ancestor-advocacy. That silliness, however, becomes downright injurious and potentially lethal when it turns against other humans on the basis of who their unchosen ancestors were. That is the effect of turning against people for what they cannot help, for what they cannot change even if they wished to do so. The rotten corrosiveness of racism disparages and ridicules other people just for drawing breath, for living.

So often the racists are of such blinkered ignorance that they denigrate people without knowing whom they victimize. For example, the so-called "Kosher-tax" program could be expressed in a legitimate free-speech modality to alert consumers that they are (if so) all paying extra for a small minority's religious requirements, and that the cost ought justly to be borne by those who cause it to be imposed. Freedom of thought, opinion and expression surely allow for and protect that communication and it ridicules no one. The respondents may be surprised to learn that it is not only Jews who seek kosher food, if not soaps also. They are referred to *Al-Qur'an* (the Koran) Surah V, verses 3 and 5. So also the program's abstruse, but shallow, complaints about the displacement of western-European-style-and-origin architecture and music could be legitimately expressed and protected by the *Charter* provisions above mentioned. It is not for the Court to pronounce a judgment on the merits - rather for a Human Rights Tribunal - but it may be that the architecture-music passages do not transgress in their emitted configuration. They are, however, part of a "menu" where they reinforce the racist messages which they accompany.

Canada, whose Constitution asserts the freedoms of conscience and religion simultaneously with those of thought, belief, opinion and expression must be - is - by necessary implication a secular State. (The one historic exception generated long ago when no one could foresee anything but a euro- or aborigino-Christian nation, is the recognition of separate schools.) With those constitutional provisions above recited, however, Canada could never become a theocracy no matter what beliefs about God, Yahweh, Allah or multiple deities were held by a majority of the population, for the State would always have to guarantee all of those freedoms simultaneously. *Charter* section 29 is the one above mentioned, notable, and apparently ineradicable, exception to the secularity of the Canadian State. Perhaps it proves the rule.

Is there then any natural or inherent limitation on those freedoms, even apart from considerations generated by section 1 of the *Charter*, and even despite the exclusivity which section 1 arrogates to itself? Such limitation arises inherently and naturally at a point where the scope of each freedom collides repugnantly with the scope of another. For example, where religious belief required the genital mutilation of girls, or the incitement of the faithful to murder an alleged blasphemer, the freedoms of conscience, religion and belief simply must yield to the other guaranteed rights to life and security of the person. Such practices, even if asserted with a bodyguard of semantics about freedom of religion simply ought to excite the attentions of the police and of children's aid societies.

Disparaging, dehumanizing messages place the people whom they target into plights of humiliation and mockery. The *Charter* surely does not guarantee the dissemination of such messages. So there is an inherent limitation on freedom of speech and expression at the point where it collides (or they collide) with those rights articulated in sections 7, 12, 15, 27 and perhaps 28. Although the *Charter* applies, by section 32, to governments and legislatures, it must not be forgotten that the rights and freedoms extended to individuals are *guaranteed*, and if not by the State, then by whom? The Court's rôle is not pro-active, as demonstrated by section 24, but re-active. Who then is to guarantee Jews and the non-euro "sub-humans" from the cruel treatment imposed upon them by that pernicious disparagement, that manifestly unequal discrimination based on race, ethnic origin, colour or religion, or cultural heritage or sometimes even gender disparity, if not the State? As noted, the Court can guarantee rights and freedoms, but only after the fact of infringement or denial thereof. In these considerations no breach of section 26 of the *Charter* is promoted, for the limitation-by-collision of certain rights and freedoms is *not* construing their being guaranteed, as though

denying the existence of other rights and freedoms, but rather only construing their natural or inherent limitation of scope.

To the extent that this notion of inherent or natural limitation has been considered in the jurisprudence, including ***Canada (Human Rights Commission) v. Taylor and the Western Guard Party***, [1990] 3 S.C.R. 892, then it must be reconsidered or modified, for in the aforementioned judgment it appears that none of the judges of the Supreme Court of Canada, construing ***Irwin Toy Ltd. v. Québec (Attorney-General)***, [1989] 1 S.C.R. 927, recognized any limitation on content of expression or message in contemplation of section 2(*b*) of the *Charter*. Perhaps no expression of speech can be so horrid (short of incitement to murder, publication of the infamous *fatwah* or the like) as to exhaust the extent of protection guaranteed by paragraph 2(*b*) even in seeming collision with other *Charter* rights. Of course it may be said that the other rights themselves incorporate inherently reasonable limits prescribed by law, which are demonstrably justified.

In any event, Parliament has purported to give a State guaranty of people's rights when it enacted limits prescribed by law, in the form of the *Canadian Human Rights Act*. That statute engages the requirement for "law" or "a law" exacted by *Charter* section 1. A numerically slim majority of the Supreme Court of Canada, four of the seven judges, in the ***Taylor & Western Guard*** case, found that, despite the inconsistency of subsection 13(1) of the Act with the freedom enunciated in paragraph 2(*b*) of the *Charter*, that section nevertheless constituted a reasonable limit on that freedom, within the meaning of section 1 of the *Charter*.

It will be the task of the Human Rights Tribunal, not this Court, to determine whether the respondents' messages are truly likely to expose persons to hatred or contempt in contemplation of subsection 13(1) of the

Act. Having found that those messages do constitute disparagement and ridicule of the target humans, the Court holds that they are capable of doing the mischief which the Act is emplaced to combat. Should they be enjoined, even if only temporarily? Here, indeed, is a serious question to be tried by a Tribunal, as Parliament enacted. Here, starkly, is the dilemma presented when constitutional values and imperatives collide or appear to do so. Ernst Ziindel is a convict, but should the respondents who disseminate news of him be enjoined from doing that? Should their whole menu be considered for injunction or only parts of it? Do any of their messages reify the ideals and imperatives of the Constitution, which, they assert, protect their telephonic uttering of such messages?

It is not an easy choice to make between freedom of expression and speech on the one hand, and its temporary suppression in the name of sparing people the injury of verbal disparagement just for being what they are. The Court in its discretion concludes that the expression of the disparaging words can wait or be stilled pending the deliberations of the Tribunal. If the Tribunal should find that the respondents' messages do not expose persons to hatred or contempt by reason of their race, national or ethnic origin, colour or religion, then it may be noted that, absent some genocidal cataclysm, the respondents will still have plenty of non-pure-euros in the populaiton about whom to make their disparaging observations in the future; so, they will have suffered no irreparable loss. That position may be contrasted with the pernicious degradation and humiliation cast upon the respondents' human targets.

So also must be adjudged the balance of convenience. It is surely more terrible than a mere inconvenience to be disparaged and ridiculed just for drawing breath, but it is not terrible at all for the respondents to be silenced for a time. True, it is terrible to have one's freedom of speech stifled, even for a relatively short time. The respondents really are asserting their freedom

of denigrating people for their ancestry; but the whole object of the Tribunal's proceedings is to determine authoritatively whether it be demonstrably justifiable to stifle it forever. The object of those proceedings is not to determine authoritatively whether the respondents' targets are really human beings deserving not to be disparaged just for being who they are. It is, of course, just the same for those who would disparage people of European ancestry just for being who they are. The Act after all is concerned with ***human*** rights.

Given the Court's finding that the respondents' messages are disparaging and injurious to the self-respect of those humans who are its targets, there exists either a strong ***prima facie*** case for the applicant; or the applicant has at least demonstrated a serious issue to be tried by a Human Rights Tribunal. They come to the same ground for granting an interlocutory injunction in these circumstances.

The Court concludes that whereas some of the respondents' messages could be legitimately expressed without disparagement and ridicule, the entire context of the respondents' menu of messages is altogether so redolent of disparagement, humiliation and ridicule of the Jews and non-whites that it ought all to be temporarily enjoined.

Some week-and-a-half after the hearing in Vancouver, which occurred on February 5 and 6, 1992, two audio tapes of the messages emitted on the respondents' "Liberty Net" were received from the applicant's counsel, although they had not been received in evidence at the hearing. On that basis, those tapes were declined. By letter dated February 26, the respondents' solicitor and counsel wrote:

> This will confirm that on behalf of Canadian Liberty Net I do not object to your forwarding the audio tapes to Mr. Justice Muldoon and have no desire for copies myself.
>
> P.S. This is on the understanding that the tapes provided to the Judge be those messages that form the subject matter of the complaint itself and not any tape regarding Mr. Joseph Thompson.

The present judge listened to a few skipped, interrupted segments of side A of the tape whose original was recorded on December 14, 1991, by Mr. Yamauchi, not the one labelled "copy of additional messages". Although the sound level and quality are poor, the tape appears to confirm the transcripts appended to the affidavit evidence.

At the hearing of this matter the applicant's counsel was of the impression that no Human Rights Tribunal had yet been assembled and that such occurrence was not immediately predictable. In that circumstance the Court would have imposed conditions. However since the hearing, it has been made known that the Tribunal is assembled and is about to begin its adjudications. Any necessary delay ought to be minimal, but the respondents would be, and are hereby, entitled to seek conditions if the Tribunal does not proceed with deliberate speed, with, of course, the respondents' co-operation, else they would have no legitimate complaint about delay.

There will be an order enjoining the respondents by themselves or by their servants, agents, volunteers, co-operants or otherwise anyone, having knowledge of it from doing the acts described in the applicant's originating notice. Costs will follow the event, so that an order for costs must await the outcome of the Tribunal's deliberations, and any appeals therefrom. If the parties think that these proceedings, virtually of first impression, instituted by the CHRC assuming the rôle of Attorney General, ought not to bear costs, there is sufficient time to make representations to that effect.

The applicant's solicitors may draw a draft order as contemplated in Rule 337(2)(*b*). They should give the respondents' solicitors a reasonable opportunity to comment to them and/or to the Court on the form of the draft order before submitting it for signature.

F.C. Muldoon
Judge

Toronto, Ontario
March 3, 1992

FEDERAL COURT OF CANADA

Names of Counsel and Solicitors of Record

COURT NO:	**T-209-92**
STYLE OF CAUSE:	**CANADIAN HUMAN RIGHTS COMMISSION** **- and -** **CANADIAN LIBERTY NET, et al**
PLACE OF HEARING:	**Vancouver, B.C.**
DATE OF HEARING:	**February 5, 6, 1992**
REASONS FOR ORDER BY:	**Muldoon, J.**
DATED:	**March 3, 1992**

APPEARANCES:

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