

**FEDERAL COURT**

**BETWEEN:**

**CANADIAN HUMAN RIGHTS COMMISSION**

**Applicant**

**-and-**

**RICHARD WARMAN, ATTORNEY GENERAL OF CANADA  
and MARC LEMIRE**

**Respondents**

**-and-**

**BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, and CANADIAN  
CIVIL LIBERTIES ASSOCIATION**

**Interveners**

**MEMORANDUM OF FACT AND LAW OF THE CANADIAN CIVIL  
LIBERTIES ASSOCIATION**

**PALIARE ROLAND ROSENBERG  
ROTHSTEIN LLP**

Barristers  
Suite 501, 250 University Ave.  
Toronto, ON M5H 3E5

**Andrew K. Lokan (LSUC#31629Q)**

Tel: 416.646.4324  
Fax: 416.646.4301

**Jodi Martin (LSUC#54966V)**

Tel: 416.646.7482  
Fax: 416.646.4301

Lawyers for the Proposed Intervener,  
Canadian Civil Liberties Association

**FEDERAL COURT**

**B E T W E E N:**

**CANADIAN HUMAN RIGHTS COMMISSION**

**Applicant**

**-and-**

**RICHARD WARMAN, ATTORNEY GENERAL OF CANADA  
and MARC LEMIRE**

**Respondents**

**INDEX**

	<b>Page</b>
Part I - Concise Statement of Fact.....	1
Overview.....	1
Background to Application .....	4
Part II - Points in Issue.....	6
Part III - Submissions.....	7
(a) The Effects of a Statutory Scheme, as Administered, are a Proper Consideration in the Context of an Analysis Under Section 1 of the <i>Charter</i> .....	7
(b) The Tribunal did not Err in Failing to Sever the Penalty Provisions in Finding that s.13 was Unconstitutional.....	14
(c) Section 13 Should be Reconsidered in Light of its Extension to the Internet.....	16
(d) This Court Should Declare that Sections 13, 54(1), and 54(1.1) are Invalid .....	18

<b>Part IV - Order Requested .....</b>	<b>19</b>
<b>Part V - Authorities.....</b>	<b>20</b>
<b>Appendix A - Statutory Authorities .....</b>	<b>23</b>

**FEDERAL COURT**

**B E T W E E N:**

**CANADIAN HUMAN RIGHTS COMMISSION**

**Applicant**

**-and-**

**RICHARD WARMAN, ATTORNEY GENERAL OF CANADA  
and MARC LEMIRE**

**Respondents**

**-and-**

**BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, and CANADIAN  
CIVIL LIBERTIES ASSOCIATION**

**Interveners**

**MEMORANDUM OF FACT AND LAW OF THE CANADIAN CIVIL  
LIBERTIES ASSOCIATION**

**PART I – CONCISE STATEMENT OF FACT**

**Overview**

1. This judicial review application considers the constitutionality of s.13 and related remedial provisions of the *Canadian Human Rights Act* (“CHRA”), which prohibit and impose penalties in respect of messages “likely to expose a person or persons to hatred and contempt”. Twenty years ago, s.13 was upheld by the Supreme Court of Canada, by the narrowest of margins, in *Taylor v. Canada*.<sup>1</sup> Since that time, however, the CHRA regime applying to promotion of hatred or contempt has undergone significant amendment. Moreover, experience with hate speech complaints has shown that the majority’s assumptions in *Taylor* have not been borne out.

---

<sup>1</sup> *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892 [“*Taylor*”].

2. Both the majority and minority of the Supreme Court in *Taylor* recognized that freedom of expression has long been a cherished and fundamental freedom in Canada. Among other things, freedom of expression forms the bedrock of our democratic system. Both the majority and minority found that s.13 constitutes a serious infringement of that freedom. They divided on whether the infringement was justified under s.1 of the *Charter*. The majority's decision to uphold the provision rests on its view that the scope of the provision was circumscribed, and that the statutory scheme was exclusively remedial, preventative, and conciliatory in nature.

3. Since 1990, the following has occurred:

- The *CHRA* has been amended to provide for penalties for breach of s.13, the sole provision of the *CHRA* to which such penalties apply;
- The *CHRA* has been applied in such a manner that s.13 complaints are routinely referred to the Tribunal (where s.13 penalties are routinely sought), with little chance of conciliation or settlement, again in contrast to other kinds of complaint;
- The *CHRA* has been amended to apply to the internet, which has itself become almost ubiquitous as a forum for communication;
- The dangers of limiting debate through complainants' access to human rights commissions have become far more apparent; and
- An independent report to the Canadian Human Rights Commission ("Commission") has recommended repeal of s.13.<sup>2</sup>

4. The CCLA intervenes on this judicial review application to make submissions on the important issues of public interest that arise. The CCLA does not take a position on any contested issue of fact.

---

<sup>2</sup> Report to the Canadian Human Rights Commission Concerning Section 13 of the *Canadian Human Rights Act* and the Regulation of Hate Speech on the Internet, Professor Richard Moon, October 2008 [the "Moon Report"].

5. The messages that gave rise to these proceedings are no doubt jarring and offensive to many if not most Canadians. Indeed, the CCLA strongly repudiates the content of these messages. The one publication that was found by the Canadian Human Rights Tribunal (“Tribunal”) to contravene s.13, a polemical article entitled *AIDS Secrets: What the Government And Media Don’t Want You To Know*, takes aim in particular at “perversion” and the “twisted sexual appetites” of “homosexuals”. The CCLA has long advocated for the right of Lesbian, Gay, Bisexual, and Transgendered (“LGBT”) Canadians to be free from discrimination.<sup>3</sup> The CCLA has also vigorously defended the freedom of expression of LGBT Canadians, in circumstances where this expression has been challenged as being outside of the mainstream.<sup>4</sup>

6. The problem with s.13, however, is that it amounts to an exercise in overkill. It is problematic enough that s.13, and its provincial counterparts, reach deeply into matters of morality, politics, history, and current affairs, in a manner that courts and tribunals have found notoriously difficult to balance against freedom of expression concerns.<sup>5</sup> The *CHRA*, as amended, now adds a penalty provision for expression that is found to have crossed that elusive line, and the manner in which s.13 complaints are treated exacerbates these concerns.

7. The legal questions raised by the applicant are whether the operation of a statutory scheme properly forms part of the inquiry into the purpose and effect of impugned legislation under section 1 of the *Charter*, and the appropriateness of

---

<sup>3</sup> The CCLA supported the constitutionality of a federal statute providing for same-sex marriage in *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698. The CCLA was in the forefront of criticism of the notorious “bath-house raids” in Toronto in 1981: see Borovoy, *When Freedoms Collide: The Case for Our Civil Liberties* (Lester & Orpen Dennys, 1988), at 115-18; please also see *In the Matter of Marriage Commissioners Appointed Under the Marriage Act, 1995*, S.S. 1995, c. M-4.1; Sask CA # 1800.

<sup>4</sup> *Chamberlain v. The Board of Trustees of School District #36 (Surrey)*, [2002] 4 S.C.R. 710; *Little Sisters Book and Art Emporium v. Canada (Attorney General)*, [2000] 2 S.C.R. 1120 [“*Little Sisters*”]; *R v. Glad Day Bookshop Inc.*, [2004] O.J. No. 1766 (Ont. Sup. Ct. Jus.).

<sup>5</sup> See e.g. *Whatcott v. Saskatchewan (Human Rights Tribunal)*, 2010 SKCA 26 [“*Whatcott*”] (leave to appeal application to S.C.C. pending); *Boissoin v. Lund*, 2009 ABQB 592 [“*Boissoin*”] (appeal pending); *Elmasry v. Rogers Publishing Limited*, 2008 BCHRT 378, *Owens v. Saskatchewan*, [2006] S.J. No. 221 (C.A.) [“*Owens*”].

severance of the penalty provision as a remedy. These questions can only be assessed in the context of the broader issues raised by s.13.

### **Background to Application**

8. The Commission seeks judicial review of the decision of the Tribunal dated September 2, 2009 (“Decision”). In the Decision, the Tribunal refused to apply section 13 and sections 54(1) and (1.1) of the *CHRA* on the basis that they are unconstitutional.

9. The Decision arose from a complaint filed with the Commission by Richard Warman (“Warman”) against Marc Lemire (“Lemire”) under section 13 of the *CHRA*.<sup>6</sup> Warman alleged that Lemire had communicated, or caused to be communicated, hate messages contrary to section 13 of the *CHRA*.<sup>7</sup>

10. In the proceedings before the Tribunal, Lemire challenged the constitutionality of s.13 of the *CHRA*. Lemire further challenged the constitutionality of sections 54(1) and (1.1) which outline the remedial options available to the Tribunal where a breach of s.13 has been established.<sup>8</sup>

11. The Tribunal determined that Lemire had contravened s.13 of the *CHRA* when he posted an article entitled *AIDS SECRETS: What the Government And Media Don't Want You To Know*, on his website [www.freedomsite.org](http://www.freedomsite.org).<sup>9</sup>

12. The Tribunal refused to apply sections 13, 54(1) and 54(1.1) on the basis that section 13, in conjunction with sections 54(1) and (1.1), of the *CHRA* impose restrictions which are not consistent with the exercise of freedom of expression

---

<sup>6</sup> These proceedings are one of a series of complaints initiated by Warman against those whom he believes to have contravened s.13.

<sup>7</sup> *Warman v. Lemire*, 2009 CHRT 26 [“Decision”], at para. 1.

<sup>8</sup> Decision, *supra*, at para. 3.

<sup>9</sup> Decision, *supra*, at para. 212.

under section 2(b) of the *Charter*, and are not demonstrably justified under section 1 of the *Charter*.<sup>10</sup>

13. In the Decision, the Tribunal distinguished *Taylor*<sup>11</sup> on the basis of an amendment to the *CHRA* which grants the Tribunal discretion to order a monetary penalty of up to \$10,000 when a breach of s.13 is established. The amendment is found in sections 54(1) and (1.1).<sup>12</sup>

14. The decision in *Taylor* was largely premised on an interpretation of s.13 that viewed the provision as being exclusively remedial, preventative and conciliatory in nature. The Tribunal found that the addition of a penalty provision to the *CHRA* changed the nature of s.13 such that it no longer meets the minimal impairment test under section 1 of the *Charter*. In so concluding, the Tribunal noted *Taylor's* analysis of the lack of an intent requirement in s.13, and expressed the view that the inclusion of a penalty provision impacts on this analysis.<sup>13</sup>

15. In analyzing whether s.13 was saved by s.1, the Tribunal considered evidence of Lemire's specific experience with the Commission, as well as overall conciliation rates in s.13 cases.<sup>14</sup> Specifically, the Tribunal noted the following:

- (a) Whereas only 11% of the total number of all human rights complaints filed at the Commission, between 2002 and 2006, were not resolved and were ultimately referred to the Tribunal, 68% of all section 13 complaints filed between 1997 and 2007 were referred to the Tribunal, and only 4% settled.<sup>15</sup>
- (b) In a document entitled '*Regarding Hate on the Internet and the Canadian Human Rights Commission – Questions and Answers*' posted on its website, the Commission wrote that while it generally

---

<sup>10</sup> Decision, *supra*, at para. 307.

<sup>11</sup> *Taylor, supra*.

<sup>12</sup> Decision, *supra*, at para. 290.

<sup>13</sup> Decision, *supra*, para. 261.

<sup>14</sup> Decision, *supra*, at para. 290.

<sup>15</sup> Decision, *supra*, at para. 285.

offers to mediate complaints, “this is not generally done in the case of hate messaging complaints.”<sup>16</sup>

- (c) The Commission and/or complainant have sought a penalty in every section 13 case brought before the Tribunal since the first complaint subject to the amendments was decided in 2002.<sup>17</sup>
- (d) Lemire removed the impugned material from the internet and sought conciliation and mediation as soon as he learned of the complaint against him.<sup>18</sup>

16. For the purpose of this application, the Commission does not take issue with the Tribunal’s refusal to apply the penalty provisions at sections 54(1)(c) and 54(1.1) of the *CHRA* on the ground that they are unconstitutional.<sup>19</sup>

## PART II – POINTS IN ISSUE

17. The CCLA submits that the following points are in issue on this application:

- (a) whether the Tribunal erred in considering the effects of the statutory scheme, as administered, in the context of its s. 1 analysis;
- (b) whether the Tribunal erred in failing to sever the penalty provision in finding that s.13 is unconstitutional;
- (c) whether the Tribunal erred in failing to consider the greater reach of s.13, under the 2001 amendments extending it to the internet; and
- (d) whether this Court should declare that sections 13, 54(1), and 54(1.1.) are invalid.

---

<sup>16</sup> Decision, *supra*, at para. 285.

<sup>17</sup> Decision, *supra*, at para. 260.

<sup>18</sup> Decision, *supra*, at para. 289.

<sup>19</sup> Memorandum of Fact and Law of the Canadian Human Rights Commission, Applicant’s Record, at para. 1 [“Factum of the Applicant”].

### PART III - SUBMISSIONS

**(a) The Effects of a Statutory Scheme, as Administered, are a Proper Consideration in the Context of an Analysis Under Section 1 of the Charter**

18. The CCLA's primary position is that, notwithstanding the Commission's management of section 13 complaints generally, the basic statutory scheme governing hate speech is not capable of being administered with minimal impairment to freedom of expression.<sup>20</sup> As noted by Professor Moon, the complaints process requires that the Commission investigate every complaint that is not frivolous, vexatious, or made in bad faith. The investigation process is unavoidably time-consuming, and compromises a respondent's freedom of expression even if the complaint is dismissed. This process likely has a chilling effect on freedom of expression even though complaints may not ultimately succeed.<sup>21</sup> The CCLA notes that the experience under hate speech provisions has been that extensive litigation is sometimes required before a complaint is dismissed.<sup>22</sup>

19. Since *Taylor*, we have had 20 years of experience in the manner in which complainants and commissions approach hate speech cases. The CCLA acknowledges that this Court is bound by *Taylor*, and does not challenge its holding in this Court. However, the CCLA respectfully submits that this post-*Taylor* experience can be taken into account in determining whether the amended s.13 is unconstitutional. Both the general experience, as described by Professor Moon and as evident from post-*Taylor* cases, and the specific evidence of how the Commission treats s.13 complaints, are relevant to that analysis.

---

<sup>20</sup> See *Little Sisters, supra*, at para. 150.

<sup>21</sup> Moon Report, *supra*, at pages 37-38.

<sup>22</sup> For example, in each of *Whatcott, Boissoin*, and *Owens, supra*, the Tribunals initially upheld the complaint before being overturned in the courts. Appeal processes are still pending in *Whatcott* and *Boissoin*.

20. The analysis under section 1 of the *Charter* mandated by *R. v. Oakes* must be conducted with regard to the factual and social context of each case.<sup>23</sup> It is well established that an analysis under section 1 is an exercise based on the facts of the law, and the “proof offered of its justification, not abstractions”.<sup>24</sup>

21. For example, the majority in *Taylor*, when assessing the constitutionality of section 13 of the *CHRA*, explicitly relied on the conciliatory, preventive, and remedial nature of the statutory scheme in finding that it minimally impaired freedom of expression:

The aim of human rights legislation, and of s.13(1), is not to bring the full force of the state’s power against a blameworthy individual for the purpose of imposing punishment. Instead, provisions found in human rights statutes generally operate in a less confrontational manner, allowing for a conciliatory settlement if possible and, where discrimination exists, gearing remedial responses more towards compensating the victim.<sup>25</sup>

...the purpose and impact of human rights codes is to prevent discriminatory effects rather than to stigmatize and punish those who discriminate.<sup>26</sup>

22. In the instant case, the Tribunal held that the inclusion of a penalty provision at section 54(1) fundamentally altered the nature of section 13 and, therefore, section 13 no longer met the minimal impairment test under s.1 of the *Charter*.<sup>27</sup>

23. As a component of the minimal impairment analysis, the Tribunal considered evidence that respondents to section 13 complaints do not experience a conciliatory, preventative, and remedial process. The Tribunal noted that Lemire had repeatedly requested an opportunity to mediate or

---

<sup>23</sup> *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232 [*“Rocket”*], at page. 18.

<sup>24</sup> Please see reasons of Justice McLachlin, *RJR MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 133; See also *Taylor*, *supra*, at pages 44-47.

<sup>25</sup> *Taylor*, *supra*, at page 29.

<sup>26</sup> *Taylor*, *supra* at page 44.

<sup>27</sup> Decision, *supra*, at para. 307.

conciliate a settlement but that both Warman and the Commission refused.<sup>28</sup> The Tribunal also considered general evidence concerning the Commission's management of s.13 complaints which was consistent with Lemire's individual experience:

- (a) Section 13 complaints are settled less often, and referred to the Tribunal more often, than other complaints filed at the Commission.
- (b) While the Commission generally offers to mediate complaints under the *CHRA*, this is not the general practice for section 13 complaints.
- (c) The Commission and/or complainant have sought a penalty in every case brought before the Tribunal since the first complaint subject to the amendments was decided in 2002.<sup>29</sup>

These underlying facts further supported the Tribunal's assessment that the process was prosecutorial in nature, with a focus on penalty rather than prevention.<sup>30</sup>

24. It has long been held that in constitutional cases, extrinsic materials or evidence may be relied upon to ascertain the operation and effect of impugned legislation.<sup>31</sup> This is particularly true in *Charter* cases, where a challenge to the legislation may be based upon either the purpose or effects of the legislation, or both, and where the court or tribunal is called upon to balance a wide range of considerations on the effects of legislation as part of the s.1 analysis. Indeed, the Court has been critical of parties who have attempted to argue that the effects of a provision limit freedom of expression, without leading evidence as to what those effects are.<sup>32</sup>

---

<sup>28</sup> Decision, *supra*, at para. 284.

<sup>29</sup> Decision, *supra*, at paras. 260 and 285.

<sup>30</sup> Decision, *supra* at paras. 260 & 280-287.

<sup>31</sup> *Reference Re Upper Churchill Water Rights Reversion Act 1980*, [1984] 1 S.C.R. 297, at 318

<sup>32</sup> *MacKay v. Manitoba*, [1989] 2 S.C.R. 357, at 361-62.

25. The Commission argues that the Tribunal erred in considering the Commission's exercise of its discretion to refer complaints to the Tribunal or to appoint conciliators, because those matters are reserved to the Commission under the *CHRA* and can only be challenged by way of judicial review of the Commission's decision to this Court. That may be true, in respect of an individual referral or appointment. However, the constitutionality of s.13 was challenged before the Tribunal. In this context, it was entirely appropriate that there be evidence on the general manner in which s.13 complaints are treated, to provide a record upon which the Tribunal (and subsequently this Court) could rely in making its decision:

...Charter disputes do not take place in a vacuum. They require a thorough understanding of the objectives of the legislative scheme being challenged, as well as of the practical constraints it faces and the consequences of proposed constitutional remedies. This need is heightened when, as is often the case, it becomes necessary to determine whether a *prima facie* violation of a Charter right is justified under s. 1. In this respect, the factual findings and record compiled by an administrative tribunal, as well as its informed and expert view of the various issues raised by a constitutional challenge, will often be invaluable to a reviewing court.<sup>33</sup>

26. For clarity, the Tribunal did not purport to rule on the specific experience of Mr. Lemire in assessing whether the Commission had properly *interpreted or exercised* its statutory mandate. That is, the constitutionality of the Commission's actions in the particular context of this case was not at issue.<sup>34</sup> Rather, the Tribunal considered evidence as to the experience of section 13 respondents to inform its own review of the effect of the statutory scheme in the context of the minimal impairment test under section 1 of the *Charter*.

27. Further, the Tribunal clearly considered and addressed this distinction in the Decision:

---

<sup>33</sup> *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504, at para. 30.

<sup>34</sup> See the Reasons of Justice Wilson in *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69 ["*Osborne*"], at page 13-14; see also *Little Sisters, supra*.

[287] While it is true that a provision must be able to stand constitutionally on its own, the real and factual context in which it exists and is applied cannot be simply ignored. The Supreme Court in *Taylor* certainly did not do so. The majority was clearly of the view, and relied upon its perception, that many, if not all, of the conciliatory measures provided for in the *Act* would find their way into all s.13 proceedings. Thus, the Court emphasized, at 917 and 935-6, that in contrast to criminal law, the provisions found in human rights statutes generally operate in a less confrontational manner, allowing for a conciliatory settlement if possible and, where discrimination exists, gearing remedial responses more towards compensating the victim. At page 924, the Court again noted that the conciliatory nature of the human rights procedure and the absence of criminal sanctions made s.13(1) especially well-suited to encourage reform of the communicator of hate propaganda.

[288] The majority in *Taylor* did not articulate in detail its understanding of the procedure under the *Act*, but the dissenting judgment provides some insight in this respect. At page 963 of the decision Justice McLachlin (as she then was) wrote that “supporters of the legislation” had argued that the process envisaged by the *Act* removed the danger that it would be used to catch conduct that went beyond its objectives. Thus, she wrote that the argument had been advanced that after the complaint is filed, “the Commission at this stage does not only investigate; it attempts to conciliate”. She went on to state that “if the alleged offender is prepared to make concessions and amend his or her conduct, this is the end of the matter.” If, on the other hand the “alleged offender is adamant in resisting the law, a board of inquiry can be established to hold a hearing into the complaint”, and that “given the public nature and the inconvenience of a hearing, many offenders choose to amend their conduct voluntarily”.

...

[290] In my view, it is clear that *Taylor’s* confidence that the human rights process under the *Act* merely serves to prevent discrimination and compensate victims hinged on the absence of any penal provision akin to the one now found at s.54(1)(c), as well as on the belief that the process itself was not only structured, but actually functioned in as conciliatory a manner as possible. The evidence before me demonstrates that the situation is not as the Court contemplated in both respects. Thus, following the reasoning of Justice Dickson, at 933, one can no longer say that the absence of intent in s.13(1) “raises no problem of minimal impairment” and “does not impinge so deleteriously upon the s.2(b) freedom of expression so as to make intolerable” the provision’s existence in a

free and democratic society. On this basis, I find that the *Oakes* minimum impairment test has not been satisfied, and that s.13(1) goes beyond what can be defended as a reasonable limit on free expression under s.1 of the *Charter*.<sup>35</sup>

28. The CCLA respectfully submits that the Tribunal's assessment is correct and appropriate in the context of a section 1 minimal impairment analysis.

29. Contrary to the finding in *Little Sisters* referred to in the Commission's factum,<sup>36</sup> the Tribunal found that the source of the constitutional violation was the *CHRA* itself, and not the administrative actions of Commission staff. The Tribunal turned its mind to Commission activities in investigating and managing section 13 complaints to inform its assessment of the purpose and effect of the statutory scheme, consistent with the Supreme Court's own assessment in *Taylor*.

30. Looking behind the text of the provisions was also required to assess where the penalty fell in the spectrum between administrative and punitive measures.<sup>37</sup> An understanding of the manner in which respondents experience the statutory scheme is highly relevant to a determination of whether a provision, which may at first appear administrative, is actually punitive in nature. Indeed, the Tribunal specifically referred to the evidence as to how s.13 complaints were handled in response to the Attorney General's argument that the penalty was at the far end of the "continuum" of remedies under the *CHRA*, and would only be applied in cases that proved incapable of resolution, for "hard core" respondents who are unwilling to "change their ways". On this evidence, the Attorney General's argument was simply not borne out on the facts.

31. More generally, the CCLA submits that in freedom of expression cases an exploration of the manner in which a statutory scheme functions, and how it is

---

<sup>35</sup> Decision, *supra* at paras. 287-290 (emphasis added).

<sup>36</sup> Factum of the Applicant, Applicant's Record, at para. 12; referring to *Little Sisters*, *supra*, at para. 125.

<sup>37</sup> Decision, *supra*, at paras. 274-279.

experienced by parties, may be desirable to assess the chilling effect of the legislative restriction.

32. The contextual approach forms a fundamental part of the proper inquiry into the nature of a statutory scheme's operation. An assessment of the potential chilling effect of a provision should permit evidence of the manner in which a provision is applied. It is well established that the overbroad application of laws restricting expression may create a chilling effect that raises constitutional concerns.<sup>38</sup>

33. The Court in *Taylor* noted that a section 1 analysis requires an "appreciation of the extent to which a restriction of the activity at issue on the facts of the particular case debilitates or compromises the principles underlying the broad guarantee of freedom of expression."<sup>39</sup> The level of appreciation necessary to conduct the requisite analysis is only achieved by engaging in a contextual analysis which includes a consideration of the operation of the statutory scheme.

34. Although it is perhaps not appropriate for every *Charter* case, the CCLA respectfully submits that this level of contextual inquiry may be appropriate for hate speech cases. The Saskatchewan Court of Appeal has held that it is a constitutional requirement to engage in a careful contextual analysis when considering the application of Saskatchewan's counterpart to s.13, which on its face limits freedom of expression, "to ensure that it does not, in its application, exceed the s.1 justification for this infringement enunciated in *Taylor*".<sup>40</sup> Courts and tribunals have considered, *inter alia*, the impact of the expression on listeners, the social and political context in which the expression takes place, and the surrounding circumstances of the expression said to promote hatred,

---

<sup>38</sup> *Owens v. Saskatchewan*, *supra* at para. 58; *WIC Radio Ltd. v. Simpson*, [2008] 2 S.C.R. 420, at para. 15.

<sup>39</sup> *Taylor*, *supra* at page 33.

<sup>40</sup> *Whatcott v. Saskatchewan (Human Rights Tribunal)*, *supra* at para. 110

including the publication as a whole. The manner in which complaints are handled ought also to be considered as part of this overall context.

**(b) The Tribunal did not Err in Failing to Sever the Penalty Provisions in Finding that s.13 was Unconstitutional**

35. Section 52 of the *Constitution Act, 1982*<sup>41</sup> requires that the Tribunal refuse to apply any law inconsistent with the provisions of the Constitution, to the extent of the inconsistency. However, the CCLA submits that in doing so, the Tribunal must be cognizant of the nature of the constitutional violation and the context of the specific legislation under consideration.<sup>42</sup>

36. The CCLA submits that severance of the penalty provisions in this case is not an appropriate remedy to correct the unconstitutionality of legislation which limits the right to free expression.

37. Similar to reading down, severance attempts to distinguish between components of a statutory scheme that are meant to operate together, and divorce them for the purpose of remedying the constitutional defect.<sup>43</sup> In many respects, severance and reading down are analogous.<sup>44</sup>

38. Parliament clearly intended section 13 and section 54(1) and (1.1) to operate together. This is explicit on the face of section 54:

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

---

<sup>41</sup> The *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11

<sup>42</sup> *Schachter v. Canada*, [1992] 2 S.C.R. 679 [“*Schachter*”], at para 23

<sup>43</sup> *Schachter*, *supra*, at pages 23 -25.

<sup>44</sup> *Osborne*, *supra* at page 43.

39. Section 13 is the only provision of the *CHRA* whose violation attracts a monetary penalty. Parliament's amendment to include the monetary penalty was described in the Legislative Summary as:

...a response to the rising incidence of hate crimes around the world. The government believes that stronger measures are needed to deter individuals and organizations from establishing hate lines. It hopes to accomplish this by allowing victims of such lines to apply for compensation and subjecting offenders to financial penalty.<sup>45</sup>

40. The amendments clearly reflect Parliament's intent with respect to the underlying objective of section 13. The CCLA submits that, together, these sections form a comprehensive scheme for the deterrence and punishment of hate speech communicated via means of telecommunications in Canada.<sup>46</sup>

41. The CCLA does not take the position that Parliament must be given the opportunity to remedy a constitutional defect in every case. However, in this particular case there has been a prominent independent report that recommends the repeal of s.13,<sup>47</sup> and the Attorney General has elected not to participate in this application to defend the legislation. Moreover, as an alternative to repealing s.13, Professor Moon recommended amending s.13 to restrict it to the threat, justification or advocacy of violence against the members of an identifiable group, and to add an intent requirement.<sup>48</sup> The Commission, for its part, has released a report defending s.13, and recommending its own amendments (including, but not limited to, repeal of the penalty provisions).<sup>49</sup> In these specific circumstances, one cannot necessarily infer that Parliament would have intended that s.13 be retained in its current form, but without the penalty provisions, had it

---

<sup>45</sup> Bill S-5: An Act to Amend the Canada Evidence Act, the Criminal Code, and the Canadian Human Rights Act, Legislative Summary, November 12, 1998, available online at the Library of Parliament, <http://dsp-psd.pwgsc.gc.ca/Collection-R/LoPBdP/LS/s5-e.htm>, at page 8.

<sup>46</sup> See *R v. Morgentaler*, 1988 CanLII 90 (S.C.C.), at para 63; *Rocket*, *supra*, at page 24.

<sup>47</sup> Moon Report, *supra*.

<sup>48</sup> Moon Report, *supra*, at pages 33-36.

<sup>49</sup> Canadian Human Rights Commission, *Special Report to Parliament: Freedom of Expression and Freedom to Hate in the Internet Age*, (June, 2009) ["CHRC Special Report"], at page 3.

been aware of the constitutional defect.<sup>50</sup> (For present purposes, the CCLA reserves its position on whether any proposed amendment of s.13 would be constitutional.)

42. The very existence of section 54(1) has coloured the underlying offence of promoting hatred, making it more intrusive on free expression than originally envisioned by the Supreme Court in *Taylor*. The penalty provisions carry significant stigma, and by consequence, a “chilling effect” on free expression.

43. The CCLA submits that in the context of freedom of expression cases more generally, severance may serve to keep impugned statutory provisions “on the books” and thus may contribute to an ongoing chilling effect on free expression, contrary to the *Charter*. The CCLA therefore respectfully submits that the Tribunal did not err in the remedy that it applied.

**(c) Section 13 Should be Reconsidered in Light of its Extension to the Internet**

44. The CCLA respectfully submits that the constitutionality of s.13 can and should be reconsidered, in light of the 2001 amendment extending the scope of the provision to the internet.<sup>51</sup>

45. The Respondent Lemire made argument on this point before the Tribunal below, but was unsuccessful. The CCLA notes that the Respondent Warman has submitted that the parties are barred from raising such points in this Court.<sup>52</sup> With respect, there is no such bar. It is always open to a respondent to advance any argument to sustain the decision below, and the respondent is not limited to

---

<sup>50</sup> Contrast *Vriend v. Alberta*, [1998] 1 S.C.R. 493, at paras. 170-71, where the Court concluded that the legislature intended to leave to the courts the issue of whether sexual orientation should be included as a ground of discrimination under the *Individual Rights Protection Act*.

<sup>51</sup> The CCLA acknowledges that some cases held that the former version of s.13 applied to the internet before it was amended. However, these cases long postdate *Taylor*. The important point is that the internet has developed into an almost ubiquitous form of communication since *Taylor* was decided.

<sup>52</sup> Memorandum of Fact and Law of Richard Warman, paras. 4-6.

the applicant's points of law. A responding party cannot raise an entirely new argument that was not raised below and in relation to which it might have been necessary to adduce evidence, but that is not the case here.<sup>53</sup>

46. The CCLA submits that the internet has greatly expanded the scope of s.13. The internet is a vast forum that provides virtually limitless opportunities for discussion and debate, not just on issues of government and politics, but on a range of subjects as diverse as human thought.

47. As recently noted by the Ontario Superior Court of Justice, "The internet is the most revolutionary communications tool since the printing press. It is extraordinarily accessible and powerful. The user has the ability to roam the internet with anonymity, to read and write just about anything he or she chooses".<sup>54</sup>

48. Vast numbers of Canadians post their thoughts on the internet, in the form of blogs, comments on material posted by others, discussion groups, and the like. Moreover, most mainstream media publications are now reproduced on the internet.<sup>55</sup> Both the Moon Report and the Commission's Special Report to Parliament in response focus on the internet as an important new development since the enactment of s.13.

49. The CCLA respectfully submits that the expanded scope of s.13, a matter not considered in *Taylor*, has significant implications for the freedom of expression analysis. We have already seen an example of a complaint brought in respect of material posted on the internet by mainstream media.<sup>56</sup> Potentially, complaints can now also be filed in respect of a vast range of material posted by Canadians. Every complaint that is not frivolous, vexatious or made in bad faith

---

<sup>53</sup> *R. v. Perka*, [1984] 2 S.C.R. 232, page 5-6.

<sup>54</sup> *York University v. Bell Canada Enterprises*, [2009] O.J. No. 3689, at para. 1 (Ont. S.C.J.)

<sup>55</sup> Moon Report, para. 27.

<sup>56</sup> *Elmasry v. Rogers Publishing Limited*, *supra*, at page 12-13; CHRC Special Report, *supra*, page. 31.

(a low standard in this context) must currently be investigated by the Commission. As noted above, this inevitably affects the freedom of expression of Canadians.

50. The internet is also highly amenable to non-legal responses. A speaker who has offended others may be persuaded to remove his or her message. More fundamentally, Canadians can register their disagreement with expression without difficulty. Generally, in the absence of a compelling justification for limiting expression, “the remedy for speech is more speech, not enforced silence”.<sup>57</sup>

51. The CCLA respectfully submits that in a robust and self-confident democracy, it is far better to explain why messages such as Lemire’s are nonsense, than to risk making him a martyr by enforcing his silence through s.13, at the cost of prohibiting or chilling a range of expression by others. This logic applies with particular force to a medium such as the internet, where “more speech” is a readily available option.

**(d) This Court Should Declare That Sections 13, 54(1), and 54(1.1) are Invalid**

52. It is a well established legal principle that though a Tribunal cannot issue a formal declaration of invalidity, such a declaration is open to the reviewing Court on judicial review.<sup>58</sup>

53. The jurisdiction of the Federal Court on judicial review is governed by s.18.1(3) of the *Federal Courts Act*. The Supreme Court has found that this jurisdiction includes the ability to:

---

<sup>57</sup> *Whitney v. California*, 274 U.S. 357

<sup>58</sup> *Okwuobi v. Lester B. Pearson School Board; Casimir v. Quebec (Attorney General); Zorilla v. Quebec (Attorney General)*, [2005] 1 S.C.R., 257, at para 45; *Ontario Nurses Association v. Mount Sinai Hospital*, 2004 CanLII 15351 (ON S.C.D.C.), at para. 56; *aff’d* at 2005 CanLII 14437 (ON C.A.).

...determine the constitutionality of a federal statute where that issue arises in the course of a proceeding which has arisen under an admittedly valid proceeding conducted before a federal board as defined in the *Federal Courts Act*, and under an admittedly valid federal statute...<sup>59</sup>

54. The Federal Court of Appeal has explicitly interpreted this principle to mean that the Federal Court possesses the jurisdiction to hear Charter-based constitutional challenges to legislation in judicial review proceedings, and to grant declaratory relief in judicial review proceedings brought pursuant to section 18 of the *Federal Courts Act*.<sup>60</sup>

55. On judicial review, the Court is not limited to granting only those remedies sought by the applicant. Otherwise, the result would be inconsistent with section 52 of the *Constitution Act 1982*. Should the Court find that sections 13, 54(1) and 54(1.1) are unconstitutional, they are no longer “valid laws of Canada” and a formal declaration of invalidity will be appropriate.

#### **PART IV – ORDER REQUESTED**

56. The CCLA respectfully requests that this Court determine the issues in a manner that is consistent with the principles set out above, and grant the following relief:

- (a) Declare that sections 13, 54(1), and 54(1.1) of the *CHRA* are invalid on the basis that they are unconstitutional;
- (b) Dismiss this judicial review application.

57. The CCLA, as a public interest litigant represented by counsel acting *pro bono publico*, does not ask for costs against any party, and asks that no costs be awarded against it.

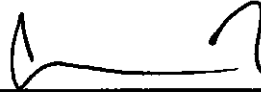
---

<sup>59</sup> *Northern Telecom v. Communication Workers*, [1983] 1 S.C.R. 733, page 7-9.

<sup>60</sup> *Moktari v. Canada (Minister of Citizenship and Immigration)*, [2000] 2 F.C. 341 (Federal Court of Appeal), paras 4-6.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED.**

Date: April 30, 2010



---

**Paliare Roland Rosenberg Rothstein LLP**  
250 University Avenue  
Suite 501  
Toronto, ON M5H 3E5

**Andrew K. Lokan (LSUC #31629Q)**  
**Jodi Martin (LSUC # 54966V)**  
Tel: 416.646.4300  
Fax: 416.646.4301  
andrew.lokan@paliareroland.com  
jodi.martin@paliareroland.com

**Lawyers for the Intervener, the Canadian  
Civil Liberties Association**

755180\_1.DOC

## PART V – AUTHORITIES

1. *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892
2. Report to the Canadian Human Rights Commission Concerning Section 13 of the *Canadian Human Rights Act* and the Regulation of Hate Speech on the Internet, Professor Richard Moon, October 2008
3. Borovoy, *When Freedoms Collide: The Case for Our Civil Liberties* (Lester & Orpen Dennys, 1988)
4. *Little Sisters Book and Art Emporium v. Canada (Attorney General)*, [2000] 2 S.C.R. 1120
5. *Whatcott v. Saskatchewan (Human Rights Tribunal)*, 2010 SKCA 26 (CanLII)
6. *Boissoin v. Lund*, 2009 ABQB 592
7. *Elmasry v. Rogers Publishing Limited*, 2008 BCHRT 378 (CanLII)
8. *Whitney v. California*, 274 U.S. 357
9. *Owens v. Saskatchewan*, [2006] S.J. No. 221 (C.A.)
10. *Warman v. Lemire*, 2009 CHRT 26
11. *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232
12. *RJR MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, CCLA
13. *Reference Re Upper Churchill Water Rights Reversion Act 1980*, [1984] 1 S.C.R. 297
14. *MacKay v. Manitoba*, [1989] 2 S.C.R. 357
15. *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504
16. *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69
17. *WIC Radio Ltd. v. Simpson*, [2008] 2 S.C.R. 420
18. *Schachter v. Canada*, [1992] 2 S.C.R. 679

19. Bill S-5: An Act to Amend the Canada Evidence Act, the Criminal Code, and the Canadian Human Rights Act, Legislative Summary, November 12, 1998
20. *R v. Morgentaler*, 1998 CanLII 90 (S.C.C)
21. Canadian Human Rights Commission, *Special Report to Parliament: Freedom of Expression and Freedom to Hate in the Internet Age*, (June, 2009)
22. *Vriend v. Alberta*, [1998] 1 S.C.R. 493
23. *R. v. Perka*, [1984] 2 S.C.R. 232
24. *York University v. Bell Canada Enterprises*, [2009] O.J. No. 3689
25. *Okwuobi v. Lester B. Pearson School Board; Casimir v. Quebec (Attorney General); Zorilla v. Quebec (Attorney General)*, [2005] 1 S.C.R., 257
26. *Ontario Nurses Association v. Mount Sinai Hospital*, 2004 CanLII 15351 (ON S.C.D.C.)
27. *Northern Telecom v. Communication Workers*, [1983] 1 S.C.R. 733
28. *Moktari v. Canada Minister of Citizenship and Immigration*, [2000] 2 F.C. 341 (Federal Court of Appeal)



**Loi constitutionnelle de 1982 (R.-U.), constituant l'annexe B de la Loi de 1982 sur le Canada (R.-U.), 1982, c. 11**

**Garantie des droits et libertés**

- Droits et libertés au Canada**
1. La *Charte canadienne des droits et libertés* garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.

**Libertés fondamentales**

- Libertés fondamentales**
2. Chacun a les libertés fondamentales suivantes :
- a) liberté de conscience et de religion;
  - b) liberté de pensée, de croyance, d'opinion et d'expression, y compris la liberté de la presse et des autres moyens de communication;
  - c) liberté de réunion pacifique;
  - d) liberté d'association.

**DISPOSITIONS GÉNÉRALES**

- Primauté de la Constitution du Canada**
52. (1) La Constitution du Canada est la loi suprême du Canada; elle rend inopérantes les dispositions incompatibles de toute autre règle de droit.

## **Canadian Human Rights Act, H-6**

### **Hate messages**

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

### **Interpretation**

**(2)** For greater certainty, subsection (1) applies in respect of a matter that is communicated by means of a computer or a group of interconnected or related computers, including the Internet, or any similar means of communication, but does not apply in respect of a matter that is communicated in whole or in part by means of the facilities of a broadcasting undertaking.

### **Interpretation**

**(3)** For the purposes of this section, no owner or operator of a telecommunication undertaking communicates or causes to be communicated any matter described in subsection (1) by reason only that the facilities of a telecommunication undertaking owned or operated by that person are used by other persons for the transmission of that matter.

### **Orders relating to hate messages**

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

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

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

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

### **Factors**

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

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

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

**Idem**

**(2) No order under subsection 53(2) may contain a term**

**(a) requiring the removal of an individual from a position if that individual accepted employment in that position in good faith; or**

**(b) requiring the expulsion of an occupant from any premises or accommodation, if that occupant obtained such premises or accommodation in good faith.**

## **Loi canadienne sur les droits de la personne**

### **Propagande haineuse**

**13.** (1) Constitue un acte discriminatoire le fait, pour une personne ou un groupe de personnes agissant d'un commun accord, d'utiliser ou de faire utiliser un téléphone de façon répétée en recourant ou en faisant recourir aux services d'une entreprise de télécommunication relevant de la compétence du Parlement pour aborder ou faire aborder des questions susceptibles d'exposer à la haine ou au mépris des personnes appartenant à un groupe identifiable sur la base des critères énoncés à l'article 3.

### **Interprétation**

(2) Il demeure entendu que le paragraphe (1) s'applique à l'utilisation d'un ordinateur, d'un ensemble d'ordinateurs connectés ou reliés les uns aux autres, notamment d'Internet, ou de tout autre moyen de communication semblable mais qu'il ne s'applique pas dans les cas où les services d'une entreprise de radiodiffusion sont utilisés.

### **Interprétation**

(3) Pour l'application du présent article, le propriétaire ou exploitant d'une entreprise de télécommunication ne commet pas un acte discriminatoire du seul fait que des tiers ont utilisé ses installations pour aborder des questions visées au paragraphe (1).

### **Cas de propagande haineuse**

**54.** (1) Le membre instructeur qui juge fondée une plainte tombant sous le coup de l'article 13 peut rendre :

- a) l'ordonnance prévue à l'alinéa 53(2)a);
- b) l'ordonnance prévue au paragraphe 53(3) — avec ou sans intérêts — pour indemniser la victime identifiée dans la communication constituant l'acte discriminatoire;
- c) une ordonnance imposant une sanction pécuniaire d'au plus 10 000 \$.

### **Facteurs**

(1.1) Il tient compte, avant d'imposer la sanction pécuniaire visée à l'alinéa (1)c) :

- a) de la nature et de la gravité de l'acte discriminatoire ainsi que des circonstances l'entourant;

**b) de la nature délibérée de l'acte, des antécédents discriminatoires de son auteur et de sa capacité de payer.**

**Idem**

**(2) L'ordonnance prévue au paragraphe 53(2) ne peut exiger :**

**a) le retrait d'un employé d'un poste qu'il a accepté de bonne foi;**

**b) l'expulsion de l'occupant de bonne foi de locaux, moyens d'hébergement ou logements.**

## **Federal Courts Act (R.S., 1985, c. F-7)**

### **Application for Judicial Review**

**18.1 (1)** An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.

### **Time limitation**

**(2)** An application for judicial review in respect of a decision or an order of a federal board, commission or other tribunal shall be made within 30 days after the time the decision or order was first communicated by the federal board, commission or other tribunal to the office of the Deputy Attorney General of Canada or to the party directly affected by it, or within any further time that a judge of the Federal Court may fix or allow before or after the end of those 30 days.

### **Powers of Federal Court**

**(3)** On an application for judicial review, the Federal Court may

- (a)** order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or
- (b)** declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.

### **Grounds of review**

**(4)** The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal

- (a)** acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;
- (b)** failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;
- (c)** erred in law in making a decision or an order, whether or not the error appears on the face of the record;

(d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;

(e) acted, or failed to act, by reason of fraud or perjured evidence; or

(f) acted in any other way that was contrary to law.

**Defect in form or technical irregularity**

(5) If the sole ground for relief established on an application for judicial review is a defect in form or a technical irregularity, the Federal Court may

(a) refuse the relief if it finds that no substantial wrong or miscarriage of justice has occurred; and

(b) in the case of a defect in form or a technical irregularity in a decision or an order, make an order validating the decision or order, to have effect from any time and on any terms that it considers appropriate.

## **Cours fédérales, Loi sur les**

### **Demande de contrôle judiciaire**

**18.1 (1)** Une demande de contrôle judiciaire peut être présentée par le procureur général du Canada ou par quiconque est directement touché par l'objet de la demande.

#### **Délai de présentation**

(2) Les demandes de contrôle judiciaire sont à présenter dans les trente jours qui suivent la première communication, par l'office fédéral, de sa décision ou de son ordonnance au bureau du sous-procureur général du Canada ou à la partie concernée, ou dans le délai supplémentaire qu'un juge de la Cour fédérale peut, avant ou après l'expiration de ces trente jours, fixer ou accorder.

#### **Pouvoirs de la Cour fédérale**

(3) Sur présentation d'une demande de contrôle judiciaire, la Cour fédérale peut :

- a) ordonner à l'office fédéral en cause d'accomplir tout acte qu'il a illégalement omis ou refusé d'accomplir ou dont il a retardé l'exécution de manière déraisonnable;
- b) déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu'elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l'office fédéral.

#### **Motifs**

(4) Les mesures prévues au paragraphe (3) sont prises si la Cour fédérale est convaincue que l'office fédéral, selon le cas :

- a) a agi sans compétence, outrepassé celle-ci ou refusé de l'exercer;
- b) n'a pas observé un principe de justice naturelle ou d'équité procédurale ou toute autre procédure qu'il était légalement tenu de respecter;
- c) a rendu une décision ou une ordonnance entachée d'une erreur de droit, que celle-ci soit manifeste ou non au vu du dossier;
- d) a rendu une décision ou une ordonnance fondée sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments dont il dispose;
- e) a agi ou omis d'agir en raison d'une fraude ou de faux témoignages;
- f) a agi de toute autre façon contraire à la loi.

#### **Vice de forme**

(5) La Cour fédérale peut rejeter toute demande de contrôle judiciaire fondée uniquement sur un vice de forme si elle estime qu'en l'occurrence le vice

n'entraîne aucun dommage important ni déni de justice et, le cas échéant, valider la décision ou l'ordonnance entachée du vice et donner effet à celle-ci selon les modalités de temps et autres qu'elle estime indiquées.