IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

BETWEEN:

JOHN ROSS TAYLOR and
THE WESTERN GUARD PARTY

Appellants

- and -

CANADIAN HUMAN RIGHTS COMMISSION and
THE ATTORNEY GENERAL OF CANADA

Respondents

- and -

THE ATTORNEYS GENERAL OF ONTARIO, QUEBEC, MANITOBA and BRITISH COLUMBIA, CANADIAN CIVIL LIBERTIES ASSOCIATION, LEAGUE FOR HUMAN RIGHTS OF B'NAI BRITH CANADA, CANADIAN HOLOCAUST REMEMBRANCE ASSOCIATION, CANADIAN JEWISH CONGRESS and WOMEN'S LEGAL EDUCATION AND ACTION FUND

Interveners

FACTUM OF THE WOMEN'S LEGAL EDUCATION AND ACTION FUND

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INDEX

PART I: STATEMENT OF FACTS

1. The Women's Legal Education and Action Fund (LEAF) offers no comment on the facts as outlined by the Appellants and Respondents herein, except to say that the facts as found below fall within section 13(1) of the Canadian Human Rights Act, R.S.C. 1985, c. H-6, as amended (the "Act").

PART II: POINTS IN ISSUE

2. The constitutional questions are as framed by this Court pursuant to the Order of Dickson C.J.C. dated February 10, 1988.

PART III: ARGUMENT

3. LEAF submits that the repeated telephonic communication of hate messages is not protected expression under section 2(b) of the Canadian Charter of Rights and Freedoms (the "Charter"). As a recognized practice of discrimination, such communications promote inequality and are inconsistent with the reasons expression is protected. Reading the Charter purposively and as a whole, sections 15 and 28 support the constitutionality of section 13(1) prior to reaching section 1.

4. Should this Court decide to the contrary and reach section 1, LEAF respectfully submits that section 13(1) of the Act restricts expressive rights minimally, if at all, and it effectively furthers equality. The limits it imposes are demonstrably justified in a free and democratic society that has equality as a constitutional guarantee.

5. The case at bar, together with the closely related cases of Her Majesty the Queen v. Keegstra and Andrews and Smith v. Her Majesty the Queen, raise constitutional issues of whether the Charter permits group hate communications to be regulated by law and the constitutional standards, if any, governing proof of truth or falsity of group defamation. While Keegstra and Andrews and Smith challenge a criminal provision limited to the wilful public promotion of group hatred, the

case at bar challenges a civil law provision limited to the repeated telephonic communication of hate messages and which expressly acknowledges group hatred or contempt as a discriminatory practice.

I. HATE MESSAGES PROMOTE INEQUALITY. SINCE SECTION 13(1) OF THE CANADIAN HUMAN RIGHTS ACT PROTECTS AND PROMOTES EQUALITY, IT IS SUPPORTED BY SECTIONS 15 AND 28 OF THE CHARTER.

6. This Court has identified equality as one of the underlying values and principles of a free and democratic society, the genesis of the rights and freedoms guaranteed by the Charter, and the ultimate standard against which the objects of all legislation must be measured.

R. v. Oakes, [1986] 1 S.C.R. 103 at 136

7. This Court has said that the section 15 guarantee "is the broadest of all guarantees in the Charter. It applies to and supports all other rights guaranteed by the Charter."

Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143 at 185

8. In Andrews v. Law Society of British Columbia, supra, Wilson J. stated at 154 that "s. 15 is designed to protect those groups who suffer social, political and legal disadvantage in our society". In assessing whether a group is discriminated against within the meaning of section 15, this Court in R. v. Turpin et al., [1989] 1 S.C.R. 1296 at 1331 directed inquiry into "the larger social, political and legal context" and at 1333 enumerated "indicia of discrimination such as stereotyping, historical disadvantage or vulnerability to political and social prejudice."

9. Human rights legislation generally, and the Act in particular, constitute fundamental law. This Court has accepted this premise by elevating human rights legislation to quasi-constitutional status, by holding that persons may not contract out of their rights and by establishing the primacy of human rights legislation over other statutes.

Ontario Human Rights Commission et al. v. The Borough of Etobicoke, [1982] 1 S.C.R. 202 at 213

The Winnipeg School Division No. 1 v. Craton et al., [1985] 2 S.C.R. 150 at 153-54

Ontario Human Rights Commission et al. v. Simpson Sears Limited, [1985] 2 S.C.R. 536 at 546-47

Robichaud v. Canada (Treasury Board), [1987] 2 S.C.R. 84 at 89-91

Insurance Corporation of British Columbia v. Heerspink and Director, Human Rights Code, [1982] 2 S.C.R. 145 at 157-8

10. The importance of human rights legislation was stressed by Dickson C.J.C. in Canadian National Railway Co. v. Canada (Canadian Human Rights Commission), [1987] 1 S.C.R. 1114, as follows at 1134:

> Human rights legislation is intended to give rise, amongst other things, to individual rights of vital importance, rights capable of enforcement, in the final analysis, in a court of law. I recognize that in the construction of such legislation the words of the Act must be given their plain meaning, but it is equally important that the rights enunciated be given their full recognition and effect. We should not search for ways to enfeeble their proper impact.

11. Numerous studies have linked hate propaganda with discrimination.

The Report Arising out of the Activities of the Ku Klux Klan in British Columbia (The McAlpine Report), (1981) at 40, 60

"Equality Now!" The Report of the Special Parliamentary Committee on Participation of Visible Minorities in Canadian Society, (1984) at 35-40

"Hatred and the Law", Report of the Special Committee on Racial and Religious Hatred, Canadian Bar Association, (1984) at 8-12

Group Defamation Submissions to the Attorney-General of Ontario (The Lawlor Report), (1984) at 95-97

"Hate Propaganda", Working Paper 50, Law Reform Commission of Canada, (1986) at 32 and 39.

Life Together: A Report on Human Rights in Ontario (The Symons Report), (1971)

Report of the Special Committee on Hate Propaganda in Canada (Cohen Report) Queen's Printer, Ottawa, (1966)

12. The concrete adverse effects of the repeated telephonic communication of hate messages similar to those at bar were considered by the Human Rights Tribunal in Nealy et al. v. Johnston et al.; Goldberg v. Church of Jesus Christ Christian-Aryan Nations, (unreported, July 25, 1989) at 20-29. The Tribunal accepted the characterization of this practice as a "quite sophisticated propaganda technique" and found that it reinforced negative stereotypes, incited listeners to aggressive feelings or even violence and encouraged violence as a pro-active means of defence against any who were seen as the enemies of racial purity. The Tribunal summarized as follows at 28:

> Simply put, its [the hate messages'] thrust is to deny the humanity of any group in Canadian society which does not conform to the promoters' perverted notions of "Aryan purity", and in doing so creates fear and anxiety within the membership of those groups which are targeted.

13. Negative stereotyping and the denial of a group's humanity can adversely affect individual members of the group. Their employment and educational opportunities and the dignity afforded to them may depend as much on the reputation of the group as on their individual abilities. LEAF submits that no individual can receive equality of opportunity if surrounded by an atmosphere of group hatred or contempt.

Beauharnais v. Illinois, 343 U.S. 250 (1951), (U.S.S.C.) at 263

14. Section 13(1) expressly recognizes that the repeated telephonic communication of hate messages is a discriminatory practice and violates human rights. Section 13(1) prohibits the repeated telephonic communication of hate messages against groups identified by "race,

national or ethnic origin, colour, religion, age, sex, marital status, family status, disability and conviction for which a pardon has been granted". Section 15 of the Charter guarantees freedom from discrimination on many of the same enumerated grounds. Both generate out of the same historic systemic discrimination affecting the same groups as were victimized by hate in the case at bar.

15. LEAF submits that some Charter rights require only that existing law be properly applied. Other Charter rights require affirmative legislation for their achievement. Equality is an example of the second. As noted by Dickson C.J.C. in Reference Re Public Service Employee Relations Act (Alta), [1987] 1 S.C.R. 313 at 361, the notion of "rights" is "said to impose a corresponding duty or obligation on another party to ensure the protection of the right". It is submitted that the upholding of section 13(1) as equality-promoting legislation is an appropriate example of the latter. Just as Charter rights can be used to challenge legislation, they can be used to uphold legislation that furthers constitutional rights.

16. Parliament promotes equality and moves against inequality when it prohibits the repeated telephonic communication of hate messages in the Act. Similarly, regulations under the Broadcasting Act, R.S.C. 1985, c. B-9, as amended, which prohibit "any abusive comment that, when taken in context, tends or is likely to expose an individual or a group or class of individuals to hatred or contempt on the basis of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability" are a further recognition by Parliament of its duty to prevent discrimination and promote equality through the regulation of communication undertakings under its control.

> Radio Regulations, 1986, SOR/86-982, section 3(b)
>
> Television Broadcasting Regulations, 1987, SOR/87-49, section 5(b)

17. Government sponsored group hatred would violate section 15 of the Charter. It follows that government action against group hate, because it promotes social equality, deserves special constitutional

consideration under section 15. Indeed, the government would arguably be sponsoring group hatred if it permitted a public undertaking to be used to undermine the guarantee of equality rights in the Charter.

18. In addition to being protected by section 15, section 13(1) is protected by section 28 of the Charter. The fact that "sex" is a protected ground under the Act invokes a further constitutional basis for upholding section 13(1).

19. In the result, LEAF submits that since section 13(1) protects and promotes equality as comprehended by the Charter, it deserves special constitutional consideration prior to any consideration under section 1.

II. THE REPEATED TELEPHONIC COMMUNICATION OF HATE MESSAGES AS PROHIBITED UNDER SECTION 13(1), IS NOT PROTECTED UNDER SECTION 2(b) OF THE CHARTER.

A. COLLISION OF VALUES AND RIGHTS UNDER SECTION 2(b)

20. This Court has recognized that the rights and freedoms guaranteed by the Charter are not absolute and are subject to limitations even before a section 1 inquiry is undertaken.

> Operation Dismantle Inc. et al. v. Her Majesty the Queen et al., [1985] 1 S.C.R. 441 at 489
>
> Jones v. The Queen, [1986] 2 S.C.R. 284 at 300

21. LEAF submits that each provision of the Charter must be read in light of or in the context of the others, prior to any recourse to section 1. This preserves the Charter's integrity, the purpose of all its provisions and the distinctive role of section 1.

22. This Court has held that freedom of expression is not absolute. In Fraser v. Public Service Staff Relations Board, [1985] 2 S.C.R. 455, Dickson C.J.C. stated at 463 and 467:

> All important values must be qualified, and balanced against, other important, and often

> competing, values. This process of definition, qualification and balancing is as much required with respect to the value of "freedom of speech" as it is for other values.
>
> . . . Sometimes these other values supplement, and build on, the value of speech. But in other situations there is a collision. When that happens the value of speech may be cut back if the competing value is a powerful one. (emphasis added)

23. This Court has inextricably linked the value of equality with the concept of a free society. In R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295, Dickson C.J.C. stated at 336 that: "A free society is one which aims at equality with respect to the enjoyment of fundamental freedoms and I say this without any reliance upon s. 15 of the Charter." This suggests that the value of equality is an inherent limit on section 2(b) without reliance upon section 15. When read with section 15, the conclusion is inescapable that freedom of expression must be interpreted in a manner consistent with the equality rights of others.

24. LEAF submits that in the case at bar this Court is faced with the "collision" of competing values referred to in Fraser, supra. In these circumstances, freedom of expression ought to accommodate the guarantee of equality.

25. Moreover, LEAF submits that there is a further collision between freedom of expression and multiculturalism. All freedoms and rights in the Charter must be interpreted and applied in accordance with section 27 thereof, in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

> R. v. Edwards Books and Art Ltd., [1986] 2 S.C.R. 713 at 752
>
> R. v. Big M. Drug Mart, supra, at 360-61

26. The repeated telephonic communication of hate messages contradicts and erodes the multicultural heritage of all Canadians,

which section 27 affirms as a fundamental characteristic of Canadian society.

27. Parliament has recognized its duty to preserve, foster and promote multiculturalism through enactment of the Canadian Multiculturalism Act, R.S.C. 1985 (4th Supp.), c. 24, which makes reference to section 15 of the Charter and to the Act.

B. CONTENT REGULATION UNDER SECTION 2(b)

28. In Irwin Toy Ltd. v. Quebec, [1989] 1 S.C.R. 927 this Court enunciated a test to be used to determine whether any particular activity is protected by section 2(b). Dickson C.J.C. said at 978:

> . . . the first step in the analysis is to determine whether the plaintiff's activity falls within the sphere of conduct protected by the guarantee. Activity which (1) does not convey or attempt to convey a meaning, and thus has no content of expression or (2) which conveys a meaning but through a violent form of expression, is not within the protected sphere of conduct. (emphasis in original)

29. Hatred and contempt are vehicles for content, and as such are closer to form. Arguably, section 13(1) contains no express content element. Under section 13(1), certain people are protected when they are subjected to a pattern of behaviour likely to expose them to hatred or contempt by telephonic means. In other words, to regulate matter because it is likely to expose protected groups to hatred or contempt because they are identifiable on the basis of a prohibited ground is not the same as regulating matter because it promotes hatred on a prohibited ground. The latter, as in Keegstra, contains a content element, the former, as here, merely identifies the groups who are subjected to this form of discrimination.

30. LEAF argued in Keegstra and Andrews and Smith that violations of section 281.2(2) of the Criminal Code, a provision which does contain a content element, nonetheless constitute a "violent form of expression". Violations of section 13(1) of the Act, a provision which contains no content restriction on expression as such, constitute even more clearly a "violent form of expression".

"Aryan Nation" videotape produced by Lawrence Ryckman, (1985)

31. In any event, LEAF respectfully submits that the content/form distinction is more properly viewed as a continuum, with regulation of pure content at one end and more violent forms of expression at the other.

32. Virtually all human activity conveys some meaning. In Irwin Toy, supra, this Court at 970 expressly declined to exhaust the types of expression that may or may not be protected. Presumably, a practice of inequality like racial segregation would not become protected expression because it conveys a meaning, even if not always violently. The same sensitivity that recognized that a "violent form of expression" is unprotected would, in LEAF's submission, extend to the use of words when likely to expose people to hatred or contempt on prohibited grounds. The denial of equality rights through discriminatory practices deserves the same constitutional consideration under section 2(b) as does violence or threats of violence.

33. This Court has accepted that group-based harassment may be prohibited as discrimination even when it consists entirely of words, words with content. This Court noted with approval the view that a hostile or offensive working environment created by sexual harassment "is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality". The Court treats inequality garbed as expression as inequality.

Janzen v. Platy Enterprises Ltd., [1989] 1 S.C.R. 1252 at 1284

Robichaud v. Canada, supra

34. The Appellants argue that to be likely to be exposed to hatred or contempt is anticipatory and not real. To so hold would be to require that hate messages be permitted to do even more damage to equality rights before intervention is possible. If hatemongering in this form is recognized as a discriminatory practice in itself, and the

Appellants have not argued that it is not, it should be permissible to legislate against it.

35. Should this Court decide that section 13(1) requires further scrutiny, LEAF submits that the clear purpose of the section is to promote equality, not to restrict expression. The provision protects members of identifiable groups from the likelihood of exposure to hatred or contempt. In this way, it is clearly aimed at controlling the unequal consequences of particular conduct, some of which are physical, rather than expression as such.

> Canada, Parliament, House of Commons Debates, February 11, 1977 at 2975-2992
>
> Canada, Parliament, House of Commons, Standing Committee on Justice and Legal Affairs, May 18, 1977, 12:24-12:30

36. Moreover, hatemongering does not further any of the values underlying freedom of expression, as summarized in Irwin Toy, supra, at 976. The Appellants have not met their burden of proof to show that the effects of the telephone communications fit within the reasons expression is protected. In fact, the repeated telephonic communication of hate messages inhibits truth-seeking, because it intimidates the target groups from asserting the truth. Rather than encouraging community participation, group defamation restricts the participation of disadvantaged groups by undermining respect for them and spreading fear. If the individuals who engage in communicating such messages are thereby fulfilled, it is at the expense of others. Human flourishing is constrained by the atmosphere of fear and contempt engendered by telephone hate messages.

37. In Irwin Toy, supra, this Court did not have to consider a conflict between one constitutional right embodied in a statutory provision, equality, and another constitutional freedom, expression. LEAF submits that the purpose of promoting equality, a constitutionally entrenched guarantee, deserves greater judicial consideration than non-constitutional interests such as consumer protection, as recognized in Irwin Toy.

38. Furthermore, it is submitted that section 15(2) of the Charter strengthens this interpretation of the relation between section 15 and section 2(b). Section 15(2) clearly contemplates that the disadvantaged will be the beneficiaries of governmental acts, and defines such initiatives as consistent with constitutional equality. LEAF submits that to be consistent with section 15, any test developed to evaluate the constitutionality of equality-promoting legislation under section 2(b) should be one that does not prejudice the disadvantaged.

39. In the result, it is submitted that the repeated telephonic communication of hate messages falls outside the sphere of conduct protected by section 2(b) of the Charter.

III. IN THE ALTERNATIVE, SECTION 13(1) SHOULD BE UPHELD UNDER SECTION 1 OF THE CHARTER.

40. It is submitted that the task of section 1 in the case at bar is to balance the tension between harms which flow from regulating expression under section 13(1) and the harms which, unregulated by law, are actualized through the repeated telephonic communication of hate messages. LEAF submits that the importance of promoting equality, including equal access to expression by disadvantaged groups, and the absence of any significant infringement of freedom of expression, significantly weighs the balance in favour of upholding section 13(1) under section 1 of the Charter.

41. In Irwin Toy, supra, this Court at 990 and 993-94 distinguished between situations where the government mediates between different groups with competing interests and those situations where government is the singular antagonist of the individual whose right has been infringed. In the case at bar, the Appellants cast themselves as victims of government, when in reality they are the aggressors in a social conflict between unequal groups. Section 13(1) advances the interests of the disadvantaged while the Appellants advance the interests of the advantaged.

42. This Court also acknowledged at 990 that where groups conflict, legislation inevitably draws a line between their claims. In such situations, LEAF submits that where Parliament has favoured disadvantaged groups in the sense of Andrews v. Law Society of British Columbia, supra, this Court should support that assessment.

43. The relative burdens of the parties under section 1 should be assessed in this context. LEAF submits that the Appellants must justify limiting the equality rights of disadvantaged groups just as the Crown must justify limiting freedom of expression.

44. In applying section 1, this Court is guided by the values and principles essential to a free and democratic society. These include, inter alia, respect for the inherent dignity of the human person, commitment to social justice and equality, and respect for cultural and group identity. This Court has recognized that it may become necessary to limit rights and freedoms in circumstances where their exercise would be inimical to the realization of collective goals of fundamental importance.

R. v. Oakes, supra, at 136

Slaight Communications Inc. v. Davidson, [1989] 1 S.C.R. 1038 at 1056

45. It is submitted that the repeated telephonic communication of hate messages is antithetical to these essential values and principles, and that the requirements of "pressing and substantial concern" and proportionality are met.

R. v. Edwards Books and Art Ltd., supra, at 768

46. In Edwards Books and Art Ltd. this Court was concerned at 779 to avoid use of the Charter as "an instrument of better situated individuals to roll back legislation which has as its object the improvement of the condition of less advantaged persons." The legislation under attack at bar has such an object; invalidating it would be such a misuse.

47. LEAF submits that legislative action taken to deter the repeated telephonic communication of hate messages goes some way to redress the imbalance of power between advantaged and disadvantaged groups. Protection from hate is necessary to protect freedom of expression and the inherent dignity and worth of all human beings in society.

48. LEAF submits that both the promotion of section 15 and section 28 equality rights and the preservation and enhancement of Canada's multicultural heritage under section 27 are pressing and substantial concerns.

49. A proscription against the repeated telephonic communication of hate messages is rationally connected to the objectives of equality and the preservation and enhancement of the multicultural heritage of Canada.

50. LEAF submits that section 13(1) does little, if any, damage to freedom of expression because the repeated telephonic communication of hate messages is contrary to the principles and values which this Court has stated underlie the protection of freedom of expression. Any limit on freedom of expression is slight when compared with the deleterious effect group hatred has on target groups, their members, and society as a whole.

51. The application of section 13(1) is limited to disadvantaged groups enumerated in section 3 of the Act and in accordance with Andrews v. Law Society of British Columbia, supra, thus minimizing any impairment of freedom of expression.

52. LEAF submits that reliance on the "marketplace of ideas" as the appropriate protection for disadvantaged groups unless direct physical harm results from expression is in error. For a marketplace of ideas to function there must be equality, including equal ability to speak and be heard. Because equality does not exist in Canadian society as a whole,

the use of "the marketplace of ideas" concept to assess permissible limits on freedom of expression is fundamentally flawed when considering that the repeated telephonic communication of hate messages is targeted against disadvantaged groups. Advantaged groups "own" a disproportionate share of freedom of expression by virtue of their greater share of power and wealth. In a marketplace where some have a greater ability to speak and be heard than others, it is more likely that the ideas of the advantaged will emerge out of the competition of ideas, rather than the truth.

53. The case at bar is a challenge to section 13(1) on its face, but its facts do not expressly address all the protected groups whose interests are at stake. For example, if section 13(1) is invalidated, practices such as telephone pornography, which arguably discriminate on the basis of sex, could not be regulated by this means, without ever having a hearing on the merits. If the Act is unconstitutional, discriminatory forms of expression by telephone become protected expression. Would this mean that repeated telephonic sexual harassment would not be actionable discrimination, but the same sexual harassment in person would be? Should section 13(1) be declared unconstitutional, such questions would be resolved against the interests of the protected groups.

54. Dickson C.J.C., dissenting in Reference Re Public Service Employee Relations Act (Alta), supra, at 194 recognized that government intervention, rather than impeding the enjoyment of fundamental freedoms such as freedom of expression, may in some instances protect and enhance their enjoyment. LEAF submits that this analysis applies directly to the freedom of expression of disadvantaged groups, which is promoted by section 13(1).

55. In answer to the Appellants' submission that section 13(1) is unconstitutional because it does not allow for a defence of truth, LEAF submits that a defence of truth is not constitutionally required and may, at times, even be perverse where discrimination is the activity regulated. Advantaged and dominant groups often impose stereotypes on

subordinate groups that socially shape them in the image of these stereotypes. It would be ironic if, having enforced such stereotypes, repeated hate communications became protected expression for the reason that they became, to some degree, accurate. Communications that spread hatred or contempt against disadvantaged groups can be invidious when there is some factual support for them as well as when they are proveably false.

56. Section 13(1) therefore constitutionally advances the equality of disadvantaged groups in the sense section 15 of the Charter exists to promote equality, and is a narrowly tailored and finely limited instrument that infringes protected expression little, if at all, while advancing equality substantially by section 1 standards.

PART IV: NATURE OF ORDER SOUGHT

57. In the result, LEAF respectfully submits that the first two constitutional questions posed be answered as follows:

Question #1: Yes
Question #2: Yes

58. LEAF takes no position with respect to the third and fourth constitutional questions.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Kathleen E. Mahoney

Linda A. Taylor

Of Counsel for the Women's Legal Education and Action Fund

PART V: LIST OF AUTHORITIES

APPENDIX

1. Broadcasting Act, R.S.C. 1985, c. B-9, as amended, section 6(1)
2. Canadian Charter of Rights and Freedoms, Constitution Act, 1982 (Part I), Sections 1, 2(b), 15, 27 and 28
3. Canadian Human Rights Act, R.S.C. 1985, c. H-6, as amended, section 13(1)
4. Canadian Multiculturalism Act, R.S.C. 1985 (4th Supp.) c. 24
5. Radio Regulations, 1986, SOR/86-982, section 3(b)
6. Television Broadcasting Regulations 1987, SOR/87-49, section 5(b)

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