

Hate speech law unconstitutional: rights tribunal

Presented by



Joseph Brean, National Post

The Canadian Human Rights Tribunal has ruled that Section 13, Canada's much maligned human rights hate speech law, is an unconstitutional violation of the Charter right to free expression because of its penalty provisions.

The decision released this morning by Tribunal chair Athanasios Hadjis appears to strip the Canadian Human Rights Commission of its controversial legal mandate to pursue hate on the Internet, which it has strenuously defended against complaints of censorship.

It also marks the first major failure of Section 13(1) of the Canadian Human Rights Act, an anti-hate law that was conceived in the 1960s to target racist telephone hotlines, then expanded in 2001 to the include the entire Internet, and for the last decade used almost exclusively by one complainant, activist Ottawa lawyer Richard Warman.

Today's shocking decision is a victory over Mr. Warman by Marc Lemire, webmaster of freedomsite.org and a prominent figure in the Canadian far right, who was supported in his constitutional challenge of Section 13 by the legal team defended Holocaust denier Ernst Zundel.

Mr. Warman alleged that postings on Mr. Lemire's website, written by others, contravened Section 13 in that they were "likely to expose" identifiable groups to "hatred or contempt."

Mr. Lemire responded by challenging the law itself, which was last upheld by the Supreme Court of Canada in a 1990 split decision, before the Internet age.

That decision, about neo-Nazi John Ross Taylor, upheld the law as a justifiable limit on free expression largely because of its supposedly remedial, non-punitive purpose. But Mr. Hadjis found that that, today, the pursuit of Section 13(1) cases "can no longer be considered exclusively remedial, preventative and conciliatory in nature." Rather, the law "has become more penal in nature."

He cited Mr. Warman's request for a \$7500 penalty against Mr. Lemire. Mr. Warman has won over a dozen other Section 13(1) cases, many leading to similar fines as well as legal restrictions on Internet activity.

This criticism about a penal law masquerading as a remedial one echoes that of Richard Moon, a law professor hired by the CHRC last year to provide an expert analysis of their online hate speech mandate. In essence, his advice was that it could not be done fairly, and so should not be done at all.

Mr. Hadjis' decision to reject the law as unconstitutional, in light of its penalty provisions, leaves a central area Canada's human rights in limbo, and kicks a political hot potato over to the government and the Canadian Human Rights Commission, which can appeal the ruling to Federal Court.

Mr. Warman's case was supported by the CHRC, and various advocacy groups joined the case as intervenors in support of Section 13.

Mr. Hadjis rejected Mr. Warman's complaints in all but one instance, an article called AIDS Secrets. He found that this posting contravened Section 13(1). But he also found the law itself -- with its

threat of penalties such as an order to cease the discriminatory messages, or pay fines up to \$10,000 -- violates Mr. Lemire's Charter right to freedom of expression, and therefore refused to make any order against him.

"Since a formal declaration of invalidity [of Section 13(1)] is not a remedy available to the Tribunal, I will simply refuse to apply these provisions for the purposes of the complaint against Mr. Lemire and I will not issue any remedial order against him," Mr. Hadjis wrote.

More to come....