Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

BETWEEN:

RICHARD WARMAN

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

TOMASZ WINNICKI

Respondent

REASONS FOR DECISION

MEMBER: Karen A. Jensen

2006 CHRT 20
2006/04/13

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I. THE COMPLAINTS

[1] This is a decision regarding two complaints filed by Mr. Richard Warman against Mr. Tomasz Winnicki. The first complaint involves the alleged communication of hate messages contrary to s. 13(1) of the *Canadian Human Rights Act* ("the *Act").* The second complaint involves allegations of retaliation or threatened retaliation contrary to s. 14.1 of the *Act*.

[2] I heard both complaints together in July and December, 2005. The Canadian Human Rights Commission ("the Commission") participated fully in the hearing. The Complainant, who is a lawyer, represented himself. The Respondent represented himself for the first day of the hearing and thereafter was represented by counsel. The Respondent chose not to testify.

II. WHAT CIRCUMSTANCES GAVE RISE TO THESE COMPLAINTS?

[3] The Complainant testified that, about 15 years ago, he became interested in the issue of hate speech. He began to monitor the activities of organized groups and individuals in Canada that he suspected were spreading hate messages.

[4] During the course of his monitoring activities, the Complainant became aware of material on the Internet that was apparently posted by the Respondent, Mr. Tomasz Winnicki. He testified that he thought the material violated s. 13(1), the hate message provision of the *Canadian Human Rights Act*, in that it was likely to expose people of the Jewish faith to hatred or contempt. As a result, on September 7, 2003, the Complainant filed a human rights complaint with the Canadian Human Rights Commission. He appended material that he downloaded from the Internet, which was allegedly communicated by the Respondent, to the s. 13(1) complaint.

[5] The Complainant testified that he subsequently became aware of other messages on the Internet which he believed were posted by the Respondent in retaliation against him for filing a human rights complaint. The Complainant then filed a retaliation complaint with the Canadian

Human Rights Commission dated June 1, 2004 alleging that the Respondent had violated s. 14.1 of the *Act.* The Complainant appended the allegedly retaliatory messages to the s. 14.1 complaint.

[6] The Canadian Human Rights Commission subsequently decided to refer both complaints to the Tribunal for further inquiry. After the Commission had referred the complaints to the Tribunal, the Complainant testified that he found additional material on the Internet that was allegedly posted by the Respondent. It was believed that this material was likely to expose people to hatred or contempt on the basis of race, national or ethnic origin and colour. As a result, on May 20, 2005, the Canadian Human Rights Commission requested leave from the Tribunal to amend the first complaint to include the additional grounds of race, national or ethnic origin and colour. The Respondent was served with the motion and the additional material that was found on the Internet.

[7] On July 11, 2005, I granted the Commission's request to amend the s.13(1) complaint on the basis that the substance of the original complaint was not altered by the addition of the new grounds; a new discriminatory practice was not being alleged. I also found that the Respondent had been given sufficient notice to enable him to properly defend himself against the amended complaint. Accordingly, the s. 13(1) complaint was amended to include the additional grounds and the new material was appended to the revised complaint.

[8] After the amendment was made but prior to the hearing, the Complainant testified that he found more material on the Internet that was allegedly posted by the Respondent. This material was disclosed to the Respondent before the hearing and it was alleged that the material was further evidence of the Respondent's ongoing violation of sections 13(1) and 14.1. (For ease of reference all of the material that was found on the Internet after the complaint was referred to the Tribunal, including the material that was appended to the amended complaint, will be referred to as "the post-referral evidence")

[9] On July 27, 2005, the Commission filed a motion with the Federal Court requesting an interlocutory injunction against the Respondent pending a final decision by this Tribunal. The Federal Court granted the Commission's motion on October 4, 2005 and, as a result, from that

date until the date of this decision, the Respondent was prevented from communicating, by means of the Internet, messages of the kind found in the material that was filed with the Federal Court (*Canadian Human Rights Commission v. Winnicki* 2005 FC 1493).

[10] Before this Tribunal, the Complainant and the Commission requested an order requiring the Respondent to cease and desist from communicating messages of the kind that were submitted with the complaints. They also sought compensation for the pain and suffering that the Complainant allegedly experienced as a result of the retaliation, in addition to special compensation and reimbursement for costs incurred by the Complainant to attend the hearing.

[11] The Respondent, through his counsel, admitted to having communicated the messages that were the subject of the original complaints filed on September 7, 2003 and June 1, 2004. The Respondent objected, however, to the consideration of any of the post-referral material by the Tribunal on the basis that it was not part of the original complaint. The Respondent denied that any of the material exposed members of an identifiable group to hatred or contempt. He also denied having retaliated against the Complainant for filing a human rights complaint against him. Finally, the Respondent disputed the appropriateness of the remedies requested by the Complainant and the Commission.

III. WHAT QUESTIONS NEED TO BE ADDRESSED IN THIS CASE?

[12] I must address the following questions in this case:

(1) Is the Tribunal permitted to rule on material that was not included in the original complaint?

(2) What are the sources of the material that allegedly violate s. 13(1)?

(3) Did the Respondent communicate the impugned messages repeatedly, by means of the Internet?

(4) Is the material likely to expose persons to hatred or contempt by reason of the fact that they are identifiable on the basis of a prohibited ground of discrimination?

(5) Did the Respondent retaliate against the Complainant after he filed his complaint with the Canadian Human Rights Commission?

[13] For the reasons that follow, I have concluded that the Respondent willfully and repeatedly communicated messages via the Internet that are likely to expose persons of the Jewish faith, black race and other non-Caucasian races, and persons of African origin to hatred or contempt. I have also concluded that the Respondent willfully retaliated against the Complainant for filing a human rights complaint. As a result, I find that both complaints against the Respondent are substantiated.

A. Question 1 - Is the Tribunal Permitted to Rule on Material That Was Not Included In the Original Complaint?

[14] Although the Respondent did not object when the Commission introduced the post-referral evidence during the hearing, at the close of the hearing the Respondent argued that the Tribunal could not consider this evidence since it essentially constituted the basis for new complaints which should have first been submitted to the Canadian Human Rights Commission.

[15] I disagree with this argument for a number of reasons. Firstly, the Respondent is essentially attempting to re-litigate the motion to amend the original s. 13(1) complaint. The motion to amend the s. 13(1) complaint was granted on the basis of the post-referral evidence that was filed in support of that motion. In deciding that an amendment to the original complaint was appropriate, the issue of whether that evidence constituted the basis for a new complaint was conclusively determined. As a result of that Ruling, excerpts of the post-referral evidence were incorporated into the particulars of the amended complaint. Therefore, it cannot now be argued that the evidence that was the basis for the amendment is, in fact, the basis of a new complaint. This would effectively constitute an attempt to re-argue the motion to amend the complaint. To do so would be an abuse of process and will not be permitted (*Cremasco v. Canada Post Corporation* 2002/09/30 - Ruling No. 1, at para. 77, aff'd 2004 FCA 363).

[16] Secondly, with regard to the second batch of post-referral evidence that was disclosed after the complaint was amended, I am also of the view that it may properly be considered by the Tribunal. The evidence does not disclose the basis for a new complaint or a new series of complaints, but rather goes to the issue of whether the Respondent was engaging in an ongoing violation of sections 14.1 and 13(1) of the *Act*. The amended s. 13(1) complaint specifically contemplates the possibility that additional evidence of the violation of s. 13(1) would occur by including the words "and ongoing" in the date of the alleged discriminatory conduct.

[17] In *LeBlanc v. Canada Post Corporation* (1992), 18 C.H.R.R. D/57, the Tribunal discussed a similar objection to the one raised by the Respondent in the present case. In that case, the Canadian Human Rights Commission indicated that it intended to lead evidence of other incidents of alleged discrimination which were not set out in the complaint form. Counsel for the Respondent objected. The Tribunal ruled that the evidence was admissible because the complaint form referred to incidents of discrimination that were ongoing and the evidence appeared to be the continuation of the complaint. Moreover, the Tribunal ruled that the Commission and the complainant are not necessarily restricted to the four corners of the complaint form. The essential question is whether it would be fair to admit the evidence. If there is no evidence of surprise and the Respondent is aware that the complaint relates to ongoing events, then it is difficult for the Respondent to argue prejudice.

[18] In the present case, there is no evidence that the Respondent was caught be surprise by the introduction of the evidence. It was disclosed to him prior to the hearing and, as stated above, the amended s. 13(1) complaint form indicated that the complaint related to ongoing events. Finally, the Commission's application to the Federal Court for an interlocutory injunction would have been a clear signal to the Respondent that the Commission was taking issue with the Respondent's continued communication of material that was allegedly in violation of s. 13(1).

[19] It was not indicated on the s. 14.1 complaint form that the complaint related to ongoing events. However, I find that in the context of the ongoing disclosure that was taking place prior to the hearing, and the motions that were being made before the Tribunal and the Federal Court, this is not significant. It would hardly have come as a surprise to the Respondent that any messages

that were found on the Internet that could be construed as retaliatory might well be introduced as evidence at the hearing.

[20] The Respondent argued that he was deprived of an opportunity to engage in conciliation and to respond to the post-referral messages before the Canadian Human Rights Commission. This argument rings hollow. The post-referral messages are of the same nature as the material that was submitted to the Commission as part of the original complaints. The Respondent would have had the opportunity to engage in conciliation and to respond to the messages that were part of the original complaint. It is unlikely that the additional material would have made any difference to the conciliation and settlement efforts.

[21] The present case is very different from *Canada (Attorney General) v. Canada (Canadian Human Rights Commission*) (1991), F.T.R. 47 (“*Pitawanakwat”*) upon which the Respondent relies in support of his argument that the Tribunal does not have the jurisdiction to consider the post-referral evidence. The *Pitawanakwat* case dealt with the Commission’s jurisdiction to refer an amended complaint to the Tribunal that included a new allegation of discrimination based on a different ground some four years after the original complaint had been signed. The case did not deal with the Tribunal’s jurisdiction to accept post-referral evidence.

[22] Therefore, given that the evidence relates to the issue of the ongoing nature of the violations and the fact that the Respondent had adequate notice and an opportunity to address the post-referral evidence, I find that the Tribunal is entitled to consider the post-referral evidence.

B. Question 2 – What are the sources of the material that allegedly violates s. 13(1)?

[23] The Complainant testified that there are essentially three sources of the impugned messages: The Northern Alliance Guestbook; the Respondent’s own website; and the Vanguard News Network. The majority of the impugned messages were found in the VNN Forum. However, some were from the Northern Alliance Guestbook and some from the Respondent’s own website.

(i) The Northern Alliance Guestbook

[24] The Complainant testified that he viewed material on a website on the Internet called "Northern Alliance". He downloaded the material that he believed was communicated by the Respondent and submitted it as an attachment to his original s. 13(1) complaint dated September 3, 2003. The Complainant testified that the Northern Alliance was a group based in London, Ontario that offered a Guestbook on the Internet where people could make on-line comments about various topics. The Guestbook consisted of a series of comments one after the other without any real structure to it. The banner across the top of the Guestbook reads:

> Northern Alliance
>
> The new voice of the Canadian majority

[25] There were two entries to the Northern Alliance Guestbook made by the Respondent that were submitted as part of the s. 13 complaint. The Complainant testified that, to the best of his knowledge, by the time of the hearing into this matter, the Northern Alliance Guestbook had been deleted.

(ii) The Winnicki Website

[26] The Complainant testified that, while visiting the Northern Alliance Guestbook, he clicked on the link that was provided with the Respondent's comments and was taken to the following website address: WW3.sympatico.ca/tom.winnicki. On that website he found several graphic images together with statements such as "WHITE REVOLUTION …. ITZ COMING …. AND ITZ GIGANTIC…" Links to websites were also provided that claimed to provide "unbiased history". The Complainant testified that he believed the material on the website found at WW3.sympatico.ca/tom.winnicki was communicated by the Respondent. He downloaded it on September 3, 2003 and appended it to his human rights complaint alleging that the communications violated s. 13(1) of the *Act.*

[27] The Complainant testified that, at the time that he filed his s. 13(1) complaint with the Canadian Human Rights Commission in September 2003, he raised concerns about the Repondent's website with Bell Sympatico. He was led to believe that Bell Sympatico ultimately shut down the WW3.sympatico.ca/tom.winnicki website.

(iii) The Vanguard News Network

[28] The Complainant testified that he conducted an Internet search on the name "Tom Winnicki". One of the results of that search led him to a website called the Vanguard News Network. The Complainant testified that to the best of his knowledge, the Vanguard News Network ("VNN") was a website that was registered in the United States and was controlled by persons who lived in the United States. Among other things, the website provided news briefs from a neo-Nazi perspective. According to the Complainant, the website also provided a forum where people could discuss a number of issues.

[29] The Complainant testified that, once he had accessed the main page of the VNN, he was then able to choose from a number of options. One of these options was the VNN Forum. When he clicked on the VNN "Forum" icon, he was linked to another page on the website that presented him with another set of options, known as "threads". According to the Complainant, threads are topics of discussion that are initiated by members of the VNN. Members of the Forum may post (or communicate) publicly accessible messages that follow one from the other within a given thread or topic of conversation. The term "This Just In" introduces a new thread, or topic of discussion. There are other threads that are listed within the categories in the Forum.

[30] According to the Complainant, becoming a member of the Forum was a relatively straightforward process that involved providing a valid e-mail address and registration information.

C. Question 3 - Did the Respondent repeatedly communicate the impugned messages from the above noted sources by means of the Internet?

(i) Who was the communicator of the impugned material?

[31] Through his counsel, the Respondent admitted that he communicated the messages which were included in the original complaints that were investigated by the Canadian Human Rights Commission and subsequently referred to the Tribunal. These messages included those found by the Complainant on the Northern Alliance website and on the Winnicki website, as well as some from the VNN Forum.

[32] It was unclear, however, whether the Respondent's admission that he communicated the impugned messages extended to the post-referral material. Therefore, I have reviewed this material and find, for the following reasons, that the Respondent was, in fact, the person who communicated the post-referral material that was filed as evidence during the hearing in this matter.

[33] In the messages that formed part of the original complaints, the Respondent alternated between the use of the pseudonym "Thexder 3D" and the name "Tom Winnicki". When the pseudonym was used, it was accompanied by a robot symbol.

[34] The communicator of the post-referral messages refers to himself as "Thexder 3D" and Tomasz Winnicki. In one such message Tomasz Winnicki corrected a misspelling of his pseudonym stating:

> "It's "Thex**d**er" not "Thexter" but that's of little importance. Use my real name "Tomasz Winnicki from now on. "Tomasz" in Polish is the formal form for "Tom", so you can also address me as that."

[35] Thus, the evidence demonstrates that the Respondent, who went by the names Tom Winnicki and Tomasz Winnicki, and used the pseudonym "Thexder 3D" together with a robot symbol, was the person who communicated the post-referral material.

(ii) Did the Respondent repeatedly communicate the allegedly discriminatory material?

[36] In *Schnell v. Machiavelli and Associates Emprize Inc.*, (2002), 43 C.H.R.R. D/453, the Tribunal held that the use of the word "repeatedly" in s. 13(1) suggests that s. 13(1) is aimed not at private communications with friends, but rather at a series of messages that form a larger-scale, public scheme for the dissemination of certain ideas or opinions, designed to gain converts from the public (*Schnell, supra*, at para. 129).

[37] The Mission Statement of the Vanguard News Network, which was entered into evidence during the hearing, states that the VNN is a group of “disgusted and disaffected writers” that have come together in order to “reclaim the American mind from the Jews”. Thus, it is apparent that the Respondent’s communications in that Forum were part of a larger-scale scheme for the dissemination of opinions, designed to gain converts from the public.

[38] There was a difference of opinion between the Complainant and the witness for the Respondent, Mr. Paul Fromm, as to whether the messages on the VNN Forum were accessible to the public. The Complainant testified that all of the messages could be viewed by the public without being a member of the VNN Forum. Mr. Fromm, on the other hand, testified that some of the messages were not accessible to the public; one had to be a member to view some of the messages.

[39] Mr. Fromm’s testimony in that regard was shaken on cross-examination. During the hearing, and using the Tribunal Registry Officer’s computer, the Complainant led Mr. Fromm through the steps involved in accessing a number of postings within a “thread” from the VNN forum. Mr. Fromm admitted that during this demonstration, he was able to directly access the website with the URL of www.vnnforum.com and several pages within the Forum were viewed without the need to establish membership in the Forum. On the basis of this evidence, I find the Complainant’s testimony regarding the public accessibility of the Respondent’s postings to be more credible than that of Mr. Fromm. I also accept the Complainant’s testimony that the messages on the VNN Forum remained accessible to the public at least until the first day of the hearing, which was August 8, 2005.

[40] Similarly, the evidence provided above regarding the Northern Alliance Guestbook and the Winnicki website indicates that the Respondent's communications on these websites did not constitute private communications among friends. They were posted for broader consumption and were accessible to the public (until they were shut down) through an Internet search engine or directly by typing the Internet address into a computer.

[41] Therefore, I find that the Respondent repeatedly communicated all of the impugned messages over the Internet.

D. Question 4 - Is the material likely to expose persons to hatred or contempt by reason of the fact that they are identifiable on the basis of a prohibited ground of discrimination?

(i) The Law

[42] In answering this question the Tribunal is guided by the definitions of the words "hatred", "contempt", "expose" and "likely" that have been provided in decisions of the Canadian Human Rights Tribunal, the Federal Court of Canada and the Supreme Court of Canada.

[43] In *Canada (Human Rights Commission) v. Taylor* [1990] 3 S.C.R. 892, the Supreme Court of Canada adopted the Tribunal's definition of "hatred" and "contempt" (*Taylor, supra,* at para. 60; *Nealy v. Johnston* (1989), 10 C.H.R.R. D/6450 at p. D/6469; *Taylor and the Western Guard Party v. Canadian Human Rights Commission and Attorney General of Canada* (1979), T.D. 1/79 (hereinafter referred to as "the Tribunal's decision in *Taylor*"). "Hatred" is defined as active dislike, detestation, enmity, ill-will and malevolence. It means, in effect, that one finds no redeeming qualities in the object of one's detestation. It is a term, however, which does not necessarily involve the mental process of "looking down" on another or others. It is quite possible to "hate" someone who one feels is superior to one in intelligence, wealth, or power.

[44] “Contempt”, in contrast, does suggest a mental process of “looking down” upon or treating as inferior the object of one's feelings. This reflects the dictionary definition of despise, dishonour or disgrace (*Taylor*, supra, at para. 60)

[45] “Expose” means: to leave a person unprotected; to leave without shelter or defence; to lay open to danger, ridicule or censure. (the Tribunal’s decision in *Taylor, supra,* at p. 29). In *Taylor*, the Tribunal held that “expose” is a more passive word than “incite”. This suggests that active effort or intent on the part of the communicator is not envisaged. Similarly, the use of the word “expose” in s. 13(1) suggests that a violent reaction on the part of the recipient of the message is not envisaged. In other words, the Tribunal stated, if one is creating the right conditions for hatred to flourish, leaving the identifiable group open or vulnerable to ill-feelings or hostility, if one is putting them at risk of being hated, in a situation where hatred or contempt are inevitable, one then falls within the compass of s. 13(1) of the Human Rights Act (p.29).

[46] The Tribunal in *Nealy v. Johnston* stated that the use of the word “likely” in s. 13(1) means that it is not necessary that evidence be adduced to prove that any particular individual or group took the messages seriously and directed hatred or contempt toward others. Nor is it necessary to show that, in fact, anyone was so victimized. Unlike the other sections in the *Act* dealing with discrimination, s. 13(1) provides for liability where there is no proven or provable discriminatory impact (*Nealy v. Johnston, supra,* at para. 45697). The Tribunal alluded to the difficulty involved in determining how many people had received the message and to gauging the impact of the message on these people. This, in the Tribunal’s view, justified the extension of liability under s. 13(1) to cases where there is no proven or provable actual discriminatory effect.

[47] The Respondent in this case took issue with the interpretation of s. 13(1) provided by the Tribunal in *Nealy v. Johnston*, arguing that the majority of the Supreme Court in *Taylor* did not endorse this interpretation. The Respondent based his argument on statements made by Dickson C.J., on behalf of the majority of the Supreme Court in that case. At paragraph 60, Dickson C.J. stated:

> In my view, there is no conflict between providing a meaningful interpretation of s. 13(1) and protecting the s. 2(b) freedom of expression so long as the interpretation of the words "hatred" and "contempt" is fully informed by an awareness that Parliament's objective is to protect the equality and dignity of all individuals by reducing the incidence of **harm-causing expression**." (emphasis added)

[48] The Respondent has interpreted this statement, and others made by the majority in *Taylor* regarding the importance of focusing on the effects of discrimination, to mean that s. 13(1) requires proof that the impugned material caused harm.

[49] I disagree with the Respondent's interpretation of the majority's decision in *Taylor*. Moreover, it does not accord with the wording of s. 13(1) of the *Act*. Section 13(1) makes it is a discriminatory practice to communicate messages that are likely to expose a person or persons to hatred or contempt. The provision does not state that it is a discriminatory practice to communicate messages that cause others to feel hatred or contempt toward members of the targeted group.

[50] As the majority in *Taylor* stated, hate messages, by their very nature, do cause harm in two significant ways. First, they undermine the dignity and self-worth of target group members and, secondly, they erode the tolerance and open-mindedness that must flourish in a multi-cultural society that is committed to the idea of equality". The statement was based on numerous studies and Reports that established the harm that is caused by hate messages. (*Taylor*, *supra*, at para. 41) There is no suggestion that the majority's conclusion with regard to the harm that is caused by hate messages was limited to the particular facts of the case.

[51] Therefore, messages that fall within the definition of "hate messages" in s. 13(1) do cause harm. Proof of harm is not required. The key is to ensure that only those messages that are likely

to expose members of the targeted group to unusually strong and deep-felt emotions of detestation, calumny and vilification are caught by s. 13(1).

The Likelihood of Exposure to Harm

[52] How is the likelihood of exposure to hatred or contempt to be determined? Is it sufficient for the Tribunal to have regard to the messages alone and then draw an inference, based on the content, tone and presentation of the messages as to whether they are likely to expose members of the targeted group(s) to hatred or contempt? Or must there be other evidence to assist the Tribunal in determining whether the messages are likely to expose members of the targeted groups to hatred or contempt?

[53] In *Citron v. Zundel*, (No. 4) (2002), 41 C.H.R.R. D/274, at para. 141, the Tribunal stated that, although the expert evidence in that case was helpful, it was the language used in the messages themselves that persuaded the Tribunal that the material offended s. 13(1) of the *Act*. Similarly, in *Warman v. Kyburz*, 2003 CHRT 18, the Tribunal noted the expert's evidence that suggested the messages were likely to expose people of the Jewish faith to hatred and contempt, but the Tribunal found that it was evident from the messages themselves that they exposed Jewish people to hatred (*Kyburz, supra*, at para. 43).

[54] The Respondent has argued that the likelihood of exposure to hatred and contempt should not be assessed on the basis of the Tribunal's own subjective impressions of the material, nor should it be based on the Tribunal's assessment of the potential impact of the messages on the most "malevolent or unthinking person" as suggested in *Nealy v. Johnston.* Rather, the Respondent argued that the assessment should be made on the basis of the likely reaction of the Canadian public.

[55] The likely reaction of the Canadian public to the impugned messages is determined by comparing the impugned messages to messages of a similar nature that are available on the Internet where the reaction of the Canadian public is known. The Respondent called the latter

messages "the tolerated messages". I disagree with the term "tolerated" for the reasons that follow, but for ease of reference, I will continue to use the term the Respondent has given them.

The "Tolerated Messages"

[56] During the hearing, counsel for the Respondent led evidence that consisted of excerpts from the Bible, the Koran, *The Merchant of Venice* by William Shakespeare, *The Adventures of Huckleberry Finn* by Mark Twain, *Mein Kampf* by Adolph Hitler, lyrics from contemporary Rap music available on the Internet and other written material that is available online. This material was provided as examples of material that is likely to expose members of a group identifiable on the basis of a prohibited ground of discrimination to hatred or contempt. For example, in *The Merchant of Venice*, Shakespeare describes Shylock, a Jewish money lender, as a "dog Jew". In the book of Leviticus in the Bible, homosexuality is described as an abomination and homosexuals as ignorant transgressors that should be put to death. The Rap music that was introduced into evidence describes "the white man" as the devil and advocates the killing of White people because they are "not worthy to walk the earth with the original black man".

[57] Counsel for the Respondent asserted that these messages were of a comparable nature to the impugned messages. She then stated that uncontradicted evidence showed that the Canadian public has not reacted with hatred or contempt against the targeted groups as a result of these messages which, in the opinion of counsel for the Respondent, are undoubtedly more influential and widely disseminated than the impugned messages. Therefore, counsel for the Respondent asserted, the Canadian public is unlikely to react with hatred and contempt to the impugned messages.

[58] The "uncontradicted evidence" would appear to be statements by Respondent counsel, in closing argument, such as the following:

> "Regarding sexual orientation, the Catholic Church's vocal opposition of homosexuality is current, well-known, extensive, long term and government subsidized through the church's favorable tax status. Yet, it is also well-known that last year, despite its minority nature, federal Parliament successfully passed

> law legalizing same sex marriages. Canadian public has shown itself unlikely to be inspired by this message to hold hatred and contempt against homosexuals, its repeated communication notwithstanding."

[59] Counsel for the Respondent further asserted that the fact that Canada's Governor General, Her Excellency Michaëlle Jean, is a Black woman and that multi-faith weddings occur is further uncontradicted proof that the "tolerated messages" have not resulted in hatred or contempt being directed at the targeted groups.

[60] There are a number of flaws in this approach. Firstly, I find no basis for the Respondent's assertion that "uncontradicted evidence" demonstrates that the Canadian public has not reacted with hatred or contempt as a result of the tolerated messages. The fact that the Governor General of Canada is a Black woman, for example, in no way proves that the "tolerated messages" that disparage Black people have not caused some people to react with hatred and contempt towards Black people. The fact that there are inter-faith marriages does not prove that messages advocating the annihilation of Jewish people have not caused some people to react with hatred and contempt toward people of the Jewish faith.

[61] Secondly, and perhaps more importantly, whether or not Canadians have reacted with hatred or contempt to any of the so-called tolerated messages has no bearing whatsoever on my evaluation of the Respondent's messages. As I indicated above, it is not necessary for the Complainant to prove that the Respondent's messages, much less other messages found on the Internet, have caused others to react with hatred or contempt toward the targeted groups. The question is whether the Respondent's messages are likely to expose members of the targeted groups to hatred or contempt.

[62] If the Respondent's argument is that there is no evidence that the tolerated messages have exposed members of the targeted group to hatred or contempt, again I disagree. The fact that same-sex marriage has been legalized in some jurisdictions in no way demonstrates that the "tolerated messages" advocating violence against homosexuals are unlikely to expose homosexuals to hatred and contempt. In that regard, I note that the Biblical passage which states that if a man lies with a man he must be put to death, when combined with an anti-gay symbol has

been found by the Saskatchewan Board of Inquiry to expose homosexuals to hatred (*Hellquist v. Owens* (2001), 40 C.H.R.R. D/197, aff'd, 2002 SKQB 506, on appeal to the Sask. C.A.). Therefore, it cannot be argued that there is no evidence that the tolerated messages have exposed members of the targeted group to hatred or contempt.

[63] As a culture, we may be exposed, on a frequent basis, to messages that convey hate. However, the likelihood that a message will expose people to hatred and contempt does not diminish because there are numerous others like it circulating in society. The goal of promoting equality of opportunity unhindered by discriminatory practices is not advanced by importing a standard that effectively asks: "in comparison to the many messages in society that are likely to expose people to hatred or contempt, are these messages really so bad?"

[64] For these reasons, in determining whether the impugned messages are likely to expose persons to hatred or contempt, I cannot give any weight to the widespread existence of other messages that are alleged to have the same effect. Rather, I must focus on whether it is reasonable to conclude, on the basis of the language, tone, presentation and content of the impugned messages, that they might well have exposed members of the targeted groups to hatred and contempt.

[65] Moreover, as the majority of the Supreme Court in *Taylor* stated, as long as the Tribunal continues to sanction only those communications that are likely to expose members of the targeted groups to unusually strong and deep-felt emotions of hatred and contempt, there is little risk that the subjective opinion of the Tribunal will result in the prohibition of merely offensive communications. The Tribunal must also bear in mind that the goal of s. 13(1) is to prohibit hate messages that, by their very nature, create harm. The goal of s. 13(1) is not to rid the Internet of vulgar, distasteful and offensive material.

(ii) The Impugned Messages

The Northern Alliance Guestbook

[66] In a message on the Northern Alliance Guestbook dated July 12, 2003, the Respondent expressed his disgust for Black people and people of the Jewish faith. He called Black people "niggers" and described them as intellectually inferior to "white people". He stated that he dislikes Blacks in general. The reasons he provided are that Black people are violent and stupid. He stated that Jewish people are responsible for having "infested us with the nigger" and, therefore, Jewish people should be forced to live with Black people in Israel. He asserted that Jewish people control the media and that is why people like Einstein have received far more acclaim than non-Jewish inventors. The Respondent also expressed his admiration for the Japanese and their culture. He stated that the Japanese are very racially aware and have very strict immigration laws. He stated "It will be interesting to see how they handle the Jewish problem."

[67] In this message, the Respondent attempts to legitimize an attitude of contempt and hatred for people of the Black race by portraying them as intellectually inferior, violent and stupid - in short, devoid of any redeeming qualities. He weaves into this message a theory that blames Jewish people for bringing Black people into White civilization and for taking credit for new inventions. The message fosters the belief that both Black and Jewish people are ruining Canadian society. It is therefore, likely to expose members of these groups to hatred or contempt.

The Winnicki Website

[68] On the website found at WWW3.sympatico.ca/tom.winnicki, the Complainant found a graphic image or poster that included swastikas, a robot and several other images over which was superimposed the following words:

> "WHITE REVOLUTION IS COMING …… AND IT'S GIGANTIC."

[69] Then, in smaller letters under the robot image, was the following:

> "HOLOHOAX DEBUNKED. FOR UNBIASED HISTORY GO TO: WWW.ihr.org. FOR WHITE NEWS FORGET CNN? GO TO WWW.GOVNN.COM"

[70] Underneath the poster, in capital and bolded letters was the following message:

> "WE'RE COMING FOR YOU, YOU JEW FUCKS, YOU AND YOUR SERVILE DOGS TOO."

[71] This message contains a number of elements that make it likely to expose Jewish people to hatred or contempt. Firstly, it refers to the Holocaust as the "Holohoax". This term inspires contempt and ill-will towards Jewish people by suggesting that the mass murder of millions of Jewish people during the Second World War did not happen and was merely a "hoax". Secondly, there is a clear threat of harm and ill-will toward Jewish people conveyed in this message. Therefore, I find that the message is likely to expose people of the Jewish faith to hatred or contempt.

The Vanguard News Network

Black and Other Non-Caucasian People

[72] The following are examples of some of the Respondent's postings regarding Black and other non-Caucasian people on the VNN Forum.

[73] In an entry on the VNN Forum entitled "Toronto's ghettos move to the 'burbs", the Respondent comments on an article in the National Post early in 2004 about the increase in poverty in Toronto. He quotes parts of the article which indicate that the higher poverty neigbourhoods which were previously clustered in the downtown have now become prevalent in suburbs such as North York and Scarborough. The Respondent then states in parentheses:

> "What those idiots are actually saying is that North York and Scarborough are infested with lazy, savage and totally worthless negroids and other muds of unidentified kind. It took my family less than a year to become productive members of the Canadian society. How long does it take for a 3rd world shit-skin to become a productive member of a white society? That's right, forever. On commie CBC we'll hear about all those Asian tiger entrepreneurs making it big in the promised land – Canada. Of course, commie CBC misses the forest for the few, very few trees. For every one of those shit-skin businessmen, whose businesses are infected with white tax dollars, there are thousands of worthless sub-human scum".

[74] In another entry in the same thread entitled "Toronto's ghettos move to the 'burbs", the Respondent comments on a different article regarding affordable housing. He quotes the following from the article: "How can this be happening in a city like this? sighed Connie Richards, as she waited for her clothes at the Wash & Fold laundry in Back Creek, a neighbourhood among those identified in the report". The Respondent posted the following reaction to the quote:

> [How? HOW?! Fuck you negroes? Sorry, I should not blame the negroes for their inherent nature. I meant to write Fuck you Jews – nation wreckers, you flooded them here. Hey Connie, fold your filthy negro laundry, pack up your illegitimate (10 or whatever you squeezed out) niglets and get the hell out of our white civilization. I'll even pay for a first-class ticket to Afreaka for you, now about it?]

[75] There is more of the same kind of commentary that follows this statement.

[76] In yet another entry on the VNN Forum entitled: “Hey Polish girl … why don’t you get a Polish boyfriend” on an article about the murder of a woman, the Respondent states:

> Polish women must be total fucking idiots. I’ve heard so many stories of those whores (not that they’re the only ones) dating and screwing with nigs and other muds, it’s truly sickening. This race-mixing slut got what she bargained for.

[77] The Respondent initiated a thread entitled “Another brazen daylight shooting in multi-culti Toronto”. It contains a number of URL links to news stories. Following the links, the Respondent provides his commentary. He assumed that it was someone of the Black race that committed a shooting in Toronto. These were his words:

> "I bet you $1000 it was a nigger or some other assorted type of shit colored man... errr I mean sub-human. Are niggers really such lousy shots? I mean, he was shooting at a car from close range but still managed to hit two passerbys. Stupid nigger-ape. How do you like multi-culturalism Toronto? Good? And Brad Love, a hard working Canadian who saw his city being turned into shit over a few decades is in jail right now for writing perfectly legal (non-threatening that is) anti non-white immigration letters to MPs. I want the Dominion back."

[78] He then went on to state: “Shitskin sexually assaults (a white I presume) woman.” He gave a link to another story on a website called “pulse 24” and then stated: “Shitskins turn everything into shit, everything they touch or come into close vicinity with.” He provided yet another URL link and concluded with the following message to Black people:

> “Message to all you coloreds: Get out (if you’re already here), stay out and never come back to my city. Don’t even come near it, you civilization wrecking muds. Go to multi-culti Toronto. … better yet, go back to Africa.

[79] The Respondent also targeted people of East Indian descent stating:

> “**NIGGERS AND EAST INDIANS ARE SHIT!!!! GET OUT OF OUR CIVILIZATION YOU FUCKING MUDS!!!!”**

[80] In the messages quoted above, the Respondent portrayed Black people and other non-White people, especially immigrants, as criminals with sub-average intelligence. He frequently

referred to them in terms of human excrement and filth. Black people were described as being worse than "violent, thieving, lying bastards". The Respondent called Black people "niggers", "nigger sub-humans", "fucking subhuman, fucking mud, fucking cockroach, a.k.a. fucking coon, a.k.a. fucking nigger". These kinds of descriptions and epithets are de-humanizing, degrading and highly likely to expose Black people and other non-White or non-Caucasian people to hatred and contempt.

[81] The clear message throughout all of the Respondent's communications regarding Black people, East Indian people and other non-Caucasian people is that they are such detestable, violent and stupid human beings that they must be removed from Canada or segregated from the pure White population. They have no redeeming qualities and are so dangerous and harmful that extreme hatred is justified.

[82] I find that Respondent was not merely venting his emotions; he was also imploring visitors to the website to see things his way. He was seeking converts to his point of view. This is evidenced by the fact that he signed all of his posting with the words: "COME WITH US, I SEE PASSION IN YOUR EYES". The Respondent's use of newspaper articles as "evidence" supporting his statements lends a certain appearance of legitimacy and an air of "social commentary" to his messages. In my view, it is likely that some will find these messages persuasive. I find that the content and manner in which the messages regarding Black people and other non-Caucasian races created a likelihood that members of these groups will be exposed to hatred and contempt.

[83] One of the Respondent's most disturbing postings is found within a thread entitled "Topeka May 15th Demonstration – Be There?" on the Vanguard News Network. According to the Complainant's testimony, the participants in this discussion forum were discussing a counter demonstration in the United States to show their disapproval of the celebration of the anniversary of the United States Supreme Court decision in *Brown v. Topeka Board of Education*, 347 U.S. 483 (1954). That decision resulted in the desegregation of American schools.

[84] In the posting beside the Respondent's pseudonym "Thexder 3D", the Respondent described how he was denied entry to the United States to attend the counter-demonstration in Topeka. At the end of his description, the Respondent made an impassioned plea to the forum readers to print his sign, which he attached to his posting, and "hold it up high for the world to see at the rally". He stated: "I would love to see the faces on those Negroes and the Mud when they see my sign on TV".

[85] The sign that was attached to the Respondent's posting consisted of a collage of four photographs with text superimposed over the photographs and then a second page of text. Three of the four photographs on the first page show the picture of a dead Black man from different angles. In each of the three pictures it appears that the man's brains are oozing from his smashed skull. The internal parts of his neck are also distended from a gash in his neck area. The fourth photograph shows a live Black man smiling and supporting the head of what appears to be a dead or unconscious Black man (perhaps the same man as the one in the other three photographs).

[86] Superimposed over the photograph of the live Black man supporting the head of the dead or unconscious Black man (to the side of the image) are the words: "Proudly Celebwating Afwikan Kultcha, at www.govnn.com. Then in the bottom left hand corner are the words "Monrovia, Liberia". Around the perimeter of this collage of four photographs, one reads the following:

> **JEWS PRODUCED ZIMBABWE DO YOU WANT AFRICA HERE? THINK WHITE MAN, WHITE WOMAN, IT DOESN'T HURT.**

[87] The second page of the attachment reads as follows:

> **"STOP THE GENOCIDE OF THE WHITE CREATOR RACE! FREEDOM OF ASSOCIATION FOR WHITES!'**
>
> **THOMAS JEFFERSON: "TWO RACES, 'EQUALLY FREE, CANNOT LIVE IN THE SAME GOVERNMENT."**
>
> **CIVILIZATION IS A FUNCTION OF RACE.**

PROOF: HAITI vs ICELAND.

Lim [IQ (COLOR)] = 0
color -> black

FORCED INTEGRATION IS MURDER OF WHITE CHILDREN!

DID BLACKS RUIN YOUR SCHOOL YET?
YOUR NEIGHBOURHOOD? YOUR CITY?
YOUR STATE? YOUR COUNTRY?

WHITE EUROPEAN CREATOR RACE MUST SURVIVE!"

[88] This would all appear to be part of the sign that the Respondent wanted the readers of his message to download and take to the demonstration in Topeka.

[89] On a second occasion, the Respondent made use of photographic imagery to convey his message of hatred. In a posting he made within a thread entitled "Chopping hands off, stoning, throwing kids from an overpass onto a busy highway", the Respondent asked his readers: "What's next Toronto, this?" He then posted a picture of a group of Black people, some holding the legs of an obviously dead Black man or boy whose body looked charred. The words that were superimposed above the photograph read: "In Africa, this lynch mob lit this person on fire and dragged him through the streets, but not before beating him senseless". This horrifying image and invitation to contemplate whether this could happen in Toronto is followed by the Respondent's signature line: "**COME WITH US, I SEE PASSION IN YOUR EYES**."

[90] In a sea of words, pictures act as an irresistible lure to draw people in. Pictures also convey and distort meaning in very powerful ways. While there are undoubtedly some people that would find the imagery in the Respondent's material to be so nauseating they would immediately turn away, still others would be like highway motorists slowing down to see if anyone was bleeding at the roadside accident. The messages, which were superimposed over the photographs, would have a more powerful effect, in my view, when coupled with the strong feelings that are naturally aroused by seeing burnt and disemboweled bodies. They convey the

impression that committing atrocities against other human beings is normal African culture or behaviour and suggest that these events could happen in Canada. The message is clearly that Blacks are a dangerous, murderous menace and worthy of nothing but the deepest feelings of disgust and loathing. Moreover, I find that the use of photographic imagery with incendiary words superimposed over them adds extra virulence to the hatred and contempt to which Black people would likely be exposed as a result of the messages.

[91] For these reasons, I find that the messages on the VNN forum which were submitted in evidence during the hearing dealing with Black and other non-Caucasian races, and persons of African origin are likely to expose members of these groups to hatred or contempt.

People of the Jewish Faith

[92] The Respondent describes Jewish people in the most vulgar and hostile of terms. His basic theme is that Jewish people are a foul and evil people bent on destroying White European civilization. His messages exhort White Canadians to adopt his belief that Jewish people control the media and government and have invented or exaggerated the Holocaust in order to "extort" money from governments and institutions around the world. For example, in one posting, the Respondent takes issue with a statement by a member of a national Jewish organization regarding s. 319 of the *Criminal Code*, which deals with hate crimes. After stating that Jewish people are an alien race totally lacking in values, the Respondent asks a series of questions that are clearly designed to elicit the response that Jewish people are trying to manipulate Canadian laws. The Respondent asks:

> What do you think White Canadian? Should Jews be allowed to have any say or any influence whatsoever, direct or indirect, in forming laws in our Dominion? Ever hear "None is too many"? Do you know who said it? Do you know why? Do you know that Jews have been expelled, en masse, pretty much from every European nation at one time or another? From some even more than once. Why do you think that is? Do you think we should be passing laws to grant more freedoms to citizens or take freedoms away? What are Jews attempting to do? Why, why, why, damit … why?

> While I still can …
>
> **"FUCK YOU JEWS!**
> **YOU FUCKING HEEBES**
> **YOU FUCKING KIKES**
> **YOU FUCKING YIDS**
> **YOU FUCKING ZHIDS**
> **YOU FUCKING SHEENIES**
> **YOU FUCKING (what's the best word for Jews?) JEWS!!!**
>
> **[**Damn it! I want bigger fonts! ✍]"

[93] In my view, the reason that the message above is likely to expose people of the Jewish faith to hatred and contempt lies not just in the abusive language that is used toward Jewish people, but also because it is highly likely to foster the idea that Jewish people are creating laws like s. 319 of the *Criminal Code* in order ruin the world for "white Canadians". It creates the impression that if Jewish people are a dangerous menace to society.

[94] In another posting, the Respondent provides his views that the Jewish Holocaust was a "Jewish Holohoax" designed to extort trillions of dollars from countries like Germany. He states:

> And what was all that crap I've heard about lampshades and soap in my high school history class? I'm still looking for detailed information on how the genial Germans turned a Jew into a bar of soap. They were, and still are, very creative people, so if there was a way I'm sure they would have found it. If they have indeed turned corpses of dead Jews into soap, I'd like evidence as to how they did it.

[95] The trivialization and denial of the Holocaust is likely to provoke many reactions in people. For those who have lived through the Holocaust, it may lead to feelings of rage and despair that an experience that they lived through is being denied. In others, the allegation that the Holocaust is a hoax may well lead them to feel extreme anger that the world has been duped and "robbed" by Jewish people. This in turn leads to hatred and other feelings of deep resentment toward people of the Jewish faith.

[96] The Respondent also used photographs to convey his hatred for Jewish people. For example, in his posting to the VNN website, he posted the picture of four girls over which he superimposed the words in large letters:

> Jews hate European beauty and nobility. All these girls were brutally murdered by savage commie Jews. We are coming for you, you Jew bastards, and there will be hell to pay.
>
> **MURDERED BY JEWS**.

[97] The innocence and beauty of the picture of the four girls is powerfully contrasted to the savage allegation of murder. There is little that incites violent hatred more than allegations of the brutal murder of innocent children. This is essentially a poster advocating revenge against Jewish people.

[98] Indeed, in one of his postings, in which the Respondent was expressing his rage about a statement that foreign workers are taking American jobs, he stated:

> "When does the blood-bath begin? I'm reasonably well off, steady full-time job, not much expenditures, all bills paid on time without much hassle, however, I feel for all those white Americans, Canadians and Europeans who are loosing their life at the behest of the ZOG. **I wouldn't mind one single bit if the Holy Racial War started tomorrow**". (emphasis added)

[99] The Complainant testified that within the neo-Nazi movement the expression, as it is commonly known "Racial Holy War" (sometimes shortened to "Rahowa"), refers to an apocalyptic race war. It is believed that, at some point in the future, all Whites will be forced to slaughter all of the other races in order to maintain what is perceived to be their supremacy. ZOG is the acronym for "Zionist order government", which refers to the theory that Jewish people control the governments in all countries of the world.

[100] In the posting above, the Respondent was clearly laying the blame for unemployment at the feet of Jewish people and suggesting that the slaughter of all non-Caucasian people would be the appropriate response. The inference that Jewish people are responsible for unemployment and

poverty, in my view, is likely to expose them to extreme ill will that could well manifest itself in violent action.

Conclusion: The Messages Constitute Hate Messages

[101] I find that the messages in the Northern Alliance Guestbook, the Winnicki website and the VNN website and forum are likely to expose people of the Jewish faith, Black race and other non-Caucasian races, and persons of African origin to hatred and contempt. I base this conclusion on the following findings: the messages portray members of the target groups as sub-human filth that are worthy of nothing but the highest degree of contempt and hatred; they convey the idea that members of the targeted groups are dangerous, evil and a menace to White Canadians; they express virulent hatred toward members of the targeted groups in abusive and threatening terms; they exhort others to adopt the same position as the Respondent; and, they seek to justify, motivate and legitimize violent action against members of the targeted groups. The result is that the targeted groups are highly vulnerable to hatred, contempt and even violence as a result of the messages.

[102] The Respondent argued that the messages were not likely to expose members of the targeted groups to hatred and contempt since anyone surfing the Internet would have fair warning of the content of the messages by the nature of the banners on the frames of the VNN. The banners of the VNN announce: “White Revolution Panzerfaust Records” and sometimes: “Radio White Now Playing HateMonger – The Battle is not Over off of HateMonger”. Therefore, according to the Respondent, people would have a choice whether to read the messages or not.

[103] The same choice was available to people who called in to the telephone message service in the *Taylor* case to receive the messages that were found in that case to violate s. 13(1) of the *Act*. The Tribunal held that it was of no consequence that people accessed the message voluntarily, knowing what to expect. This did not affect the fact that the messages were likely to expose members of the targeted groups to hatred or contempt. In the same way, I find the fact that the banners provided some vague indication of the content of the website does not put the messages beyond the reach of s. 13(1). Whether some stumbled unintentionally upon the messages or

others actively sought them out, there is, in my view, a strong likelihood that the messages would expose members of the targeted groups to extreme hatred and contempt.

[104] Therefore, I find that, in repeatedly communicating, by means of the Internet, the messages that were entered into evidence at the hearing in this matter, the Respondent violated s. 13(1) of the Act.

The Messages Where the Complainant is Named Personally

[105] The Commission introduced eight messages into evidence where the Complainant was named personally. The Complainant was described as "a Jew", "a suspected Jew", "a vile, acidic Jew" and the suggestion was made that his motivation in filing human rights complaints was to seek money "like all Jews". It was argued that, in the context of the Respondent's other messages that were likely to expose Jewish people to hatred or contempt, the identification of the Complainant as a Jewish person exposed him to the same hatred or contempt.

[106] The messages in which the Complainant is named personally are as follows:

(1) The first message was communicated on the VNN forum within a thread, or topic of discussion, entitled "Anti-Semitism's Hateful Resurgence". The Complainant testified that this thread was started on January 17, 2004. The Respondent stated:

> … Jews become increasingly insane each day trying to figure out how to censor the Internet. I myself already have been a victim of this when Bell Sympatico gave in to Jewish pressure, courtesy of Jew Richard Warman who works for the Canadian (kill the white men) Human Rights Commission. The fuckers didn't just delete the 'offending' page (even after I changed the forbidden word "Jews" to "Zionists") but also deleted all my programming and all my 3D art as well. As long as Jewish lies continue to fly, Jews will continue to reap billions and billions of dollars in extortion-reparations, so it's very important to the Jews to censor our Internet, sites such as the Zundelsite, VNN and others, but alas...TOO LATE YOU STUPID FUCKING JEWS, YOU (ADL, SPLC JDL, CJC et. al.) FUCKED UP! [This felt good.] Now it's just a matter of time. I praise those nerds who invented the Internet. I'm

> willing to bet money on it that exposing Jews was one of their objectives."

(2) In another message communicated on March 13, 2004 on the VNN Forum within a thread entitled “Americans are not humans”, the Respondent stated:

> “I myself have fallen under the Jew radar when a vile, acidic Jew - Richard Warman (he says he's NOT a Jew) launched a complaint against me to the CHRC [Canadian Human (read 'Kill the White Men') Rights Commission]. It was mostly because of some comments I made on the Northern Alliance's, now defunct, guestbook and a picture of Tsar's daughters that I (and others) circulated around the net. Maybe you've seen it, it was posted on VNN once."

(3) On August 23, 2004, the Respondent communicated a message on the VNN Forum entitled: “My reply to Randy Richmond’s article”. In this message, the Respondent referred to an article in the London Free Press written by Randy Richmond dated August 18, 2004. The London Free Press article described the fact that the police had launched a criminal investigation into the Respondent’s activities. It provided quotes from a number of sources, including the Complainant, conveying their opinions about the impugned messages.

In response to this newspaper article, the Respondent asked:

> Why am I threatened with the police, 4 anti-white European organizations (ironically funded by White Europeans) and possibly Jewish lawyer for doing so? Why aren’t the police doing their job protecting our White European society and shipping out negroes back to their natural habitat … Africa?

Again on August 24, 2004, the Respondent wrote:

> “Does Warman = Jewman? Why doesn’t Warman go to Israel and speak out against the Israeli’s racism and horrific oppression of the poor Palestinian peoples?

(4) Later, on August 24, 2004, in another message within the same thread the Respondent stated: “I suspect Warman is a JEW”. The word “JEW” is written in capital letters and is then repeated 117 times with the final “JEW” in enlarged, bolded capital letters followed by three exclamation marks.

The comment then continued with the following:

> "Oh, by the way. Thanks to Warman, Bell has canceled my email account, which was very important to me at the time since I was trying to sell a piece of software I wrote."

(5) In a message communicated on September 9, 2004, the Respondent commented on another human rights case involving the Complainant which dealt with allegations of hate messaging contrary to s. 13(1) of the *Act*. In that case, like the present case, the Complainant sought damages for being personally targeted. The thread is entitled "JOG goes after Webhosting ISP's". The Respondent stated:

> "Note, those worthless fucking lawyers want **$80,000** in...'reparations'. **OY VEY!!! OY PAY!!!** How very, very JOO-ISH, demanding free money. I suspect most of it would go to Mr. Vermin, whom I suspect to be a **JEW**. That's what he does people. The scumbag surfs around on the Internet, looking for any remotely pro-White European site and if he finds anything remotely 'offensive' to our privileged minorities in Canada, he files a complaint to the CHRC (Canadian Human Rights Commission -> hates white people). When the case goes to a tribunal he hopes the accused will give up. After that he takes them to the small claims court and sues them for like $9999.99, just below the $10,000 mark so it's still under the small claims court jurisdiction (if I'm not mistaken, the mark may be set to $5000, in which case he'd sue them for $4999.99). When he wins, he gets the money, and that's how he makes his living, so I suspect. Probably gets tons of handouts from his **JOO-ISH** buddies in CJC (Canadian Jewish Congress) who get millions of free dollars, care of the Canadian ZOG, financed by the White Canadian taxpayer. Some civilization builders those **JOOZ**, eh? Always trying to get something for nothing. $6 billion from the Swiss banks, $6 trillion from the U.S. government, $6 trillion from the German government, $6,000 from a local 'white hater'. Good business ITZ, no?"

(6) On September 11, 2004, the Respondent started a thread entitled "Suspected JEW Richard Warman attacks Whites in Canada … again". This thread referred to human rights complaints that had been filed by the Complainant against other individuals. Following the heading, the Respondent re-posted material from a third party that referred to the Complainant as a "professional campaigner against free speech" and a "censor".

(7) On October 29, 2004, the Respondent initiated a thread with the following: "Richard Warman is at it again. FUCK YOU THOUGHT POLICE".

(8) In May 2005, the Respondent communicated a number of messages within a thread that was entitled "Jews and anti-White European haters launch a new assault on a White Freedom Fighter". Most of the Respondent's messages in that thread related to an open letter that was drafted and publicly released by a number of groups and individuals such as the Complainant, calling for police and government action against the Respondent. In one of the messages within that thread, the Respondent provided a list of what purported to be recent human rights complaints against what he called "Nationalist and pro-White activists in Canada". The complaint against the Respondent that gave rise to these proceedings was first on that list.

[107] In yet another message within that thread, the Respondent wrote a heading in large, block, bold letters: "**MY ENEMIES**". After this heading, the Respondent posted photographs of three individuals, one of whom was the Complainant. On each of the foreheads of the three photographed individuals, a Star of David was superimposed. Then, at the base of the pictures, are the captions: "Most likely a Jew", "Possible Jew" and "Honorary Jew". The Complainant is described as "Possible Jew".

[108] In all but one of the above messages, the Complainant is portrayed as a "vile, acidic Jew", "suspected Jew", "Mr. Vermin" or simply a "Jew" and the allegation is made that, like other Jews (according to the Respondent) the Complainant is extorting money from White Canadians and suppressing free speech.

[109] The Complainant testified that he is not, in fact, Jewish. However, I agree with other members of this Tribunal that it does not matter whether Mr. Warman was in fact Jewish or not. A person who is perceived to have the characteristics of someone who falls within one of the prohibited grounds of discrimination may be the object of discrimination, even though he does not actually have those characteristics (*School District No. 44 (North Vancouver) v. Jubran*, 2005 BCCA 201 at para. 41, leave to appeal to S.C.C. refused; see also *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montreal (City)*, [2000] 1 S.C.R. 665). Taken in this context, the Complainant was, in my view, identifiable on the basis of a prohibited ground of discrimination.

[110] The tone of the messages is extremely hostile and threatening. The messages convey the clear impression that the Complainant, as a perceived member of the Jewish faith, is a

contemptible human being worthy of nothing more than the deepest hatred. The allegation that the Complainant's activities are part of a larger international Jewish conspiracy to extort money from non-Jewish people is likely, in my view, to expose the Complainant, as well as members of the Jewish faith, to deep feelings of anger, resentment and hatred.

[111] Therefore, I find that the messages in which the Complainant is named personally violate s. 13(1) of the *Act*.

E. Question 5 – Did the Respondent Retaliate or Threaten Retaliation Against the Complainant?

[112] Section 14.1 of the *Act* makes it a discriminatory practice to retaliate or threaten retaliation against the alleged victim of a discriminatory practice or the person who has filed a human rights complaint. This provision in the Act is important because, without it, many would be hesitant to complain about discrimination for fear of reprisal. It provides complainants and alleged victims of discrimination with the assurance that, if action is taken or threats are made against them as a result of the filing of the complaint, redress will be provided. Section 14.1 may also act as a deterrent to those who would take action or threaten action against someone who has filed a complaint either to "punish" the complainant or to coerce the complainant to withdraw the complaint.

[113] What kind of conduct constitutes retaliation or threats of retaliation within the meaning of s. 14.1? The following are examples of some of the conduct that this Tribunal has found to violate s. 14.1:

[114] sending a letter to the complainant's employer in an effort to have the complainant fired from his employment (Kyburz, supra, at para. 73);

- threatening the complainant's life (Kyburz, supra, at para. 74);

- threatening to ruin the complainant's career and life (Kyburz, supra, at para. 75);

- refusing to renew a work contract (In *Nkwazi v. Canada (Correctional Service)* [2001] C.H.R.D. No. 1) at para. 233, the Tribunal found that this action constituted retaliation but held that the actions predated the entry into force of the retaliation provisions);

- publishing derogatory remarks about the Complainant (*Bressette v. Kettle and Stony Point First Nation Band Council* 2004 CHRT 40 at para. 58)

- revoking the complainant's position on an Annual General Assembly (*Bressette v. Kettle and Stony Point First Nation Band Council* 2004 CHRT 40 at para. 60)

[115] Is it necessary to prove that the Respondent intended to cause the Complainant or the victim harm in order to prove retaliation? Some members of this Tribunal are of the view that proof of intent is necessary in retaliation complaints. (see, for example: *Roger Virk v. Bell Canada (Ontario)* 2005 CHRT 2 at para. 156). Other members have held that, if a complainant *reasonably perceived* the impugned conduct to be in retaliation for the laying of a human rights complaint, this could amount to retaliation quite apart from any proven intention of the Respondent (see, for example: *Wong v. Royal Bank of Canada* [2001] C.H.R.D. No. 11 (Q.L.) at para. 222*; Bressette v. Kettle and Stony Point First Nation Band Council, supra,* at para.) However, the reasonableness of the complainant's perception must be measured. Respondents should not be held accountable for any unreasonable anxiety or undue reaction of complainants.

[116] I am inclined to follow the line of reasoning in *Wong* and *Bressette.* In my view, it is in keeping with the Supreme Court's statement in *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84, that the *Act* is remedial in nature, not punitive, and that therefore, the motives or intention of those who discriminate are not central to the concerns of the *Act*.

[117] In the present case, the Commission argued that the same eight messages in which the Respondent named the Complainant, and which were found to be violations of s. 13(1), also violate s. 14.1 of the *Act*. While it is possible that the same conduct will be found to have violated

more than one provision of the *Act*, the question then arises as to whether, in the circumstances of the case, it is reasonable to provide compensation twice for the same conduct. I will address that issue later in the "Remedies" section of my decision.

[118] The question at this stage of the analysis is whether the Complainant reasonably perceived that the impugned messages were retaliatory or were threats of retaliation for filing a human rights complaint against the Respondent.

[119] As has been noted, the messages described the Complainant in highly derogatory terms. In all but one of the above-noted postings, the Complainant is referred to as a Jew, a "vile acidic Jew", or a suspected Jew. I find that the messages were very threatening. The last message in which a Star of David is superimposed over a photograph of the Complainant is particularly disturbing. It looks decidedly like a target mark.

[120] The Complainant testified that he was so alarmed about the last posting that he contacted the police to determine whether charges of uttering threats could be laid against the Respondent. He also consulted with a lawyer about the possibility of seeking a peace bond against the Respondent. In the context of the Respondent's other messages encouraging the annihilation of the Jewish people, I find that the messages could reasonably be perceived as retaliation or threats of retaliation.

[121] The question is whether the messages were posted in retaliation for the filing of the human rights complaint against the Respondent.

[122] The evidence disclosed that there was a history of animosity between the Complainant and the Respondent. It was clear from the evidence that the Complainant took a number of actions against the Respondent in an effort to stop the latter from using the Internet to communicate hate messages. In August and September of 2003, the Complainant complained to the Respondent's internet service provider about the Respondent's website. The Respondent's website was subsequently shut down.

[123] On September 7, 2003, the Complainant filed a human rights complaint against the Respondent. After filing the human rights complaint, the Complainant testified that he took further action against the Respondent including: complaining to the London Police about the Respondent's Internet messages, participating with a number of other organizations in an open letter calling for action against the Respondent, providing information to a London Free Press reporter about the Respondent and giving a speech at a conference in Toronto that included a discussion about the Respondent's case.

[124] The Respondent was clearly angry with the Complainant for taking these actions against him and other "white nationalists". He communicated his anger through the series of messages on the VNN Forum that were listed above. All of the postings post-date the filing of the human rights complaint. However, not all of the messages make mention of the human rights complaint against the Respondent.

[125] In *Bressette,* the Tribunal stated that when there has been a history of conflict between the complainant and the respondent it can be difficult to discern whether certain incidents arose simply as a result of the ongoing conflict, or whether they were linked to the human rights complaint (*Bressette, supra, at para.* 52). The Tribunal adopted an approach in that case which I think is appropriate in the present case.

[126] The Tribunal member in *Bressette* first determined whether he could accept, on a *prima facie* basis, that the human rights complaint was at least one of the factors influencing the differential treatment that the Complainant received. After he found that he could, the onus then shifted to the Respondent to provide a credible explanation for the treatment.

[127] Although not all of the messages made reference to the Complainant's human rights complaint against the Respondent, I think that it is a reasonable perception that the filing of the complaint was at least one of the factors influencing the Respondent's conduct towards the Complainant. The postings were all made after the filing of the human rights complaint. At least three of the postings specifically mention the human rights complaint against the Respondent or the Complainant's use of the human rights process to "extort" money from people like him.

[128] Clearly there were other actions taken by the Complainant which angered the Respondent and may have played a role in the Respondent's communication of threatening messages about the Complainant. However, the Respondent, who chose not to testify, provided no evidence whatsoever that would rule out a finding that the filing of the human rights complaint against the Respondent was at least one of the factors influencing the posting of the messages.

Conclusion Regarding Retaliation

[129] For the foregoing reasons, I find that the above-noted messages constitute retaliation or threats of retaliation against the Complainant for the filing of a human rights complaint, contrary to s. 14.1 of the *Act*.

IV. REMEDIES

[130] Counsel for the Respondent raised several general arguments with respect to remedies that merit some discussion. First, counsel argued that compensation and a penalty would be inappropriate in this case since the only remedy that was subjected to constitutional scrutiny by the Supreme Court in *Taylor* was the cease and desist order. Therefore, any other remedy is constitutionally uncertain. This argument ignores the fact that in *Schnell,* the Tribunal held that the penalty and special compensation provisions that were provided in the post-*Taylor* amendments to the *Act* did not push s. 13(1) over the line into unconstitutionality. Furthermore, for reasons that I will provide in the section dealing with the penalty provisions under s. 54(1)(c), I am of the view that the Tribunal cannot refuse to apply the law out of a fear of constitutional uncertainty.

[131] The Respondent's second argument is that the Complainant's conduct militates against an award of compensation or a penalty. Specifically, counsel argued that there was evidence that the Complainant not only encouraged the Respondent to violate the *Act*, but also that he participated in the violation of the *Act* and in the violation of the Federal Court injunction order. Counsel further alleged that the Complainant engaged in violent and criminal activities. She argued that

any order against the Respondent would effectively condone the Complainant's conduct in that regard and, therefore, should not be made.

[132] The Respondent is free to pursue any claims he might have with regard to the Complainant's conduct in the appropriate venue. However, my consideration of the evidence is limited to a determination of whether this evidence affects the Complainant's credibility regarding the pain and suffering he experienced as a result of the retaliatory messages. Beyond this issue, the evidence has no relevance.

[133] Although it is customary to address the remedies for breaches of the hate message provision before the retaliation component, I have decided to reverse that order for reasons of logical consistency, which will become apparent later in this decision.

A. Retaliation – Section 14.1

[134] Section 14.1 provides that it is a discriminatory practice to retaliate against a person who has filed a human rights complaint. Section 53 authorizes the Tribunal to make certain orders against a person found to be engaging or to have engaged in a discriminatory practice. Section 53(2) provides a wide range of potential orders that may be made.

[135] In the present case, the Commission and the Complainant have requested the following orders:

(1) An order that the Respondent cease and desist from retaliating against the Complainant for having filed a human rights complaint against him;

(2) An order that the Respondent provide the Complainant $20,000 in compensation for pain and suffering;

(3) An order that the Respondent provide the Complainant with special compensation in the amount of $20,000;

(4) An order that the Respondent compensate the Complainant for his expenses related to the hearing which were not otherwise covered by the Commission.

(i) Cease and Desist Order

[136] The Respondent argued that a cease and desist order would send the wrong message to the Respondent. It would communicate to him the idea that disagreeable thoughts are not permitted in Canadian society. This is not true. Disagreeable public messages are permissible as long as they do not violate the law. In this case, the Respondent violated s. 14.1 of the *Act* by retaliating or threatening retaliation against the Complainant by means of Internet communications. The evidence indicates that he was doing so right up until the hearing in this matter began. Illegal conduct of this nature must not be permitted to continue.

[137] Therefore, pursuant to s. 53(2)(a) of the *Act*, the Respondent is ordered to cease and desist from retaliating against the Complainant for having filed his human rights complaint with the Canadian Human Rights Commission. This order covers retaliatory conduct including, but not limited to Internet postings, whether on the VNN forum or elsewhere on the Internet, that is similar to the material that was entered into evidence during the hearing into this matter. The Respondent is directed to cease his retaliatory activity immediately upon becoming aware of the Tribunal's decision.

(ii) Compensation for Pain and Suffering

[138] Section 53(2)(e) allows the Tribunal to order that the Respondent compensate the victim in an amount not exceeding $20,000 for any pain and suffering that the victim experienced as a result of the discriminatory practice.

[139] The Complainant testified that, in the context of the Respondent’s stated desire to see the world rid of Jewish people and knowing what he knows about the Second World War, he was alarmed by the repeated references to him as a Jew. He was alarmed because the postings were going to a fairly large neo-Nazi forum. He stated that there was an extensive history of violence

within the neo-Nazi movement and, therefore, he feared he would be made a target of violent attack.

[140] This fear increased when he saw the picture of himself with the Star of David superimposed over his forehead. The Complainant testified that the location of the Star of David on his forehead gave him the impression that a target mark had been placed on his forehead. As a result, he contacted the police to determine whether charges of uttering threats could be laid against the Respondent. He also consulted with a lawyer about the possibility of seeking a peace bond against the Respondent.

[141] The Complainant claims to have been so alarmed and frightened that compensation in the amount of $20,000 would be appropriate. This is the maximum allowed under section 53(2)(e) of the *Act*.

[142] Counsel for the Respondent argued that the Complainant was not to be believed when he testified that he experienced pain and suffering as a result of the retaliatory messages. Respondent Counsel tendered evidence that, she claimed, discredited the Complainant's testimony in that regard.

[143] Counsel also argued that the evidence indicated that the Complainant's conduct with regard to this matter was so reprehensible that an award for pain and suffering would be inappropriate. This argument, however, runs counter to the statements made by the Federal Court in *Pitawanakwat v. Canada (A.G.)* [1994] 3 F.C. 298. There the Court said that to deny an award for hurt feelings on the basis of the conduct of the complainant is, in effect, to condone discrimination on the basis of a prohibited ground where the conduct of the complainant is, for whatever reason, less than exemplary.

[144] Thus, my consideration of the following evidence is strictly limited to its impact on the credibility of the Complainant's claim to have experienced pain and suffering.

Evidence Regarding the Extent of the Complainant's Pain and Suffering

[145] The evidence regarding the Complainant's credibility consisted of: a Statement of Claim by the Complainant against Mr. Paul Fromm for libel, two video tapes about the Complainant's alleged involvement in violent activities, speaking notes from a speech that the Complainant gave to the ARA annual meeting; newspaper articles about the Complainant written by Mr. Randy Richmond and published in the London Free Press, and postings made by the Complainant on the VNN Forum.

[146] I permitted the evidence to be admitted on the basis that it was relevant to the question of whether the Complainant had experienced pain and suffering as a result of the alleged retaliation against him by the Respondent. However, I reserved my decision as to what weight I would give the evidence until after I had heard the entire case and was rendering my decision.

The libel suit and the London Free Press Article by Randy Richmond

[147] The Respondent tendered a Statement of Claim filed in the Ontario Superior Court of Justice indicating that the Complainant was suing Mr. Paul Fromm for statements the latter made that were allegedly libelous and slanderous. The Respondent also produced a newspaper article from the London Free Press dated March 31, 2005, in which some of the same statements that were said to be libelous in the law suit were reproduced. Specifically, Mr. Fromm is alleged to have called the Complainant, among other things, "the high priest of censorship". This label was reproduced in Mr. Richmond's Free Press article. The Complainant admitted that he provided Mr. Richmond with some of the quotes that were used in the article.

[148] It was argued that this evidence demonstrated that the Complainant is not to be believed when he says that he has suffered because, on the one hand, he sued Mr. Fromm for statements that Mr. Fromm allegedly made about him and, on the other hand, he offered these same statements to Mr. Richmond and did not complain when these statements were reproduced in the London Free Press article.

[149] I accord little weight to this evidence. Firstly, the evidence does not prove that the Complainant did not suffer any pain and suffering as a result of the allegedly libelous remarks. Secondly, the allegedly libelous statements are different from the allegedly retaliatory messages in this case. Thus, it would not be reasonable for me to draw inferences about the Complainant's reaction to the retaliatory messages in the present context based on the allegedly libelous statements in the other case.

[150] *The Complainant's Speaking Notes For a Speech entitled "Maximum Disruption: Stopping Neo-Nazis By (Almost) Any Means Necessary" and a Video of CBC coverage of the Zundel Demonstration*

[151] A copy of speaking notes from a presentation that the Complainant gave on July 6, 2005 to the annual meeting of a group known as Anti-Racist Action ("ARA") was entered into evidence. The speech was entitled: "Maximum Disruption: Stopping Neo-Nazis By (Almost) Any Means Necessary". The Complainant testified that he is not a member of the ARA. He testified that he was invited by the group to give the speech and that it was similar to ones he had given at other events.

[152] In his speech, the Complainant testified that he presented what he called a "broad front approach to dealing with Neo-Nazi activity" in Canada. This approach involved working with the police, the Canadian Human Rights Commission and other organizations to create "maximum disruption" within what he perceives to be the Neo-Nazi movement in Canada. The Complainant analyzed three different cases in which he was involved, and showed how the "broad front approach" played out in those cases.

[153] The Complainant's notes indicate that he uses the "maximum disruption" approach when it is most helpful or even if he just feels it will be the most "fun". In his notes, he also stated that if he found someone particularly annoying he would "move them up the list a bit".

[154] In cross-examination, the Complainant testified that when he stated, during his speech, that he derived "fun" from the "maximum disruption approach" and that he moved people up the

list when he found them annoying, he was attempting to be humorous. He testified that, like anyone, he took some pleasure in doing meaningful work, but that the work to stop White nationalists from spreading hate on the Internet had caused considerable hardship to himself and to his family.

[155] One of the three cases that the Complainant discussed during his speech was that of the Respondent. Another was the case of Ernst Zundel. In the context of his discussion on the Zundel case, the Complainant expressed his disapproval of serious incidents that had occurred when mail bombs were sent to Mr. Zundel and his bunker was severely damaged by an arsonist.

[156] The Complainant testified that he had intended to show a photograph of the Respondent during the speech. However, the equipment needed to project the photograph was not available and, therefore, the picture was not shown.

[157] During the hearing, I viewed a video from a CBC program of a physical confrontation that occurred between members of the ARA and pro-Zundel supporters during a demonstration in support of Mr. Zundel in September, 2004. In his speech to the ARA, the Complainant noted that the Respondent had been part of the Zundel demonstration and that the Respondent had been charged with a criminal offense when weapons were found in his car on this occasion. The Complainant stated, in his speech: "The demonstration they were headed for, of course, was one where Anti-Racist Action Toronto was going to be attending to ensure that public support for one of the world's worst Holocaust-deniers would not go unopposed."

[158] I was invited to conclude that these comments signaled the Complainant's tacit approval of the violence that erupted at the Zundel demonstration. I see no basis for this conclusion. The Complainant makes no mention whatsoever of the physical confrontation between the two groups in his speech. The fact that he did not mention the confrontation does not, in my mind, signal his approval for the violence that occurred after the demonstration. Moreover, in my view, whether the Complainant approved of the ARA's tactics and its alleged tendency toward violence is not relevant to the question of whether the Complainant experienced pain and suffering as a result of the retaliatory messages.

[159] I find, however, that the Complainant's speaking notes do suggest a certain robustness of spirit and even an enjoyment of the thrust and parry of the battle. His ability to derive pleasure out of his "maximum disruption" approach and to use it to deal with people he finds annoying, suggests a degree of imperviousness to the pain and suffering that some victims might experience as a result of retaliation.

[160] I also find it significant that the Complainant would be prepared to display a photograph of the Respondent to members of the ARA and call him "a nasty piece of work" only a few months after the Respondent had posted a picture of the Complainant on the Internet. The nature and tone of this reaction suggests a resiliency that is not consistent with a claim to have suffered greatly as a result of the Respondent's retaliatory messages.

[161] I find, however, that the video about the confrontation between members of the ARA and pro-Zundel supporters deserves minimal weight. The confrontation did not involve the Complainant and, as I stated above, I find no indication in the evidence that the Complainant condoned the violence that occurred there. I stand by my ruling during the hearing that the violent or non-violent nature of the ARA was not relevant to the inquiry.

The David Icke Video

[162] During the hearing, a video was tendered regarding the Complainant's involvement in action taken against an individual by the name of David Icke, who was in Vancouver on a speaking tour a number of years ago. Mr. Icke, who wrote a book involving a conspiracy theory, was apparently considered by some to be a proponent of anti-Semitism.

[163] Most of the video deals with Mr. Icke's activities and beliefs. However, there is a point in the video where the Complainant is shown having a beer with some people and discussing an event at a Vancouver book store where Mr. Icke would be present to sign his book. Although it was not entirely clear, it would appear that the Complainant suggested that a pie might be thrown at Mr. Icke during the book signing. The video shows that this pie was eventually thrown at Mr. Icke.

[164] I find that the video has little weight. It is based on incidents that occurred in March 2000. This predates the complaint by a significant amount of time. It does, however, lend limited support to the finding that the Complainant has a combative spirit that may render him somewhat impervious to threatening behaviour.

The Complainant's Participation in the VNN Forum and Cooperation with Journalists

[165] The Complainant participated in the VNN Forum under the pseudonym "Axetogrind". He testified that he did so in order to monitor the website. To do this, he would pose as someone who was interested in or supportive of the ideas that were being expressed in the Forum. He would ask questions such as "So what, you're going to keep us in suspense?" and, at times, he would express his agreement with comments made on the Forum. In cross-examination, the Complainant was asked whether his questions were attempts to get the Respondent into more trouble. The Complainant denied this, stating that the questions were posed in order to get clarification on issues that the Respondent had previously raised. The evidence revealed that the Complainant made 32 postings to the VNN Forum.

[166] The Complainant also testified that he provided quotes from the Respondent's messages to journalists.

[167] The Respondent argued that the Complainant's participation in the VNN Forum and the provision of quotes to journalists demonstrated that the Complainant was not particularly sensitive to the kinds of comments that were made about him in the retaliatory messages. That is debatable. I do think that even the most battle-hardened individual may experience emotional suffering when the line is crossed between the expected exchange between two opponents and an escalated attack. However, taken together with the other evidence of the Complainant's campaign against hate messages, the evidence of the Complainant's involvement in the VNN Forum and the provision of quotes to a journalist suggests that the Complainant may have developed a certain emotional detachment and hardiness as compared to other victims of retaliation.

Conclusion Regarding the Complainant's Pain and Suffering

[168] I believe that the Complainant was concerned when he read postings describing him as a "vile acidic Jew", a "suspected Jew" and other similar terms. In the context of the Respondent's clearly expressed animosity toward people of the Jewish faith, the Complainant's concern was understandable. However, I am not persuaded that the degree of anxiety he experienced justifies the maximum award under s. 53(2)(e).

[169] The evidence indicated that the Complainant has extensive experience and involvement in organized activities aimed at combatting hate propaganda. Indeed, he has been invited to speak at a number of public events because of his expertise in this area. It is to be expected that involvement in activities of this nature would expose one, on a regular basis, to a certain amount of abusive talk and threatening behaviour. Nevertheless, there is still a line that can be crossed and, suddenly, the situation becomes more serious. Did the Respondent cross that line when he posted a picture of the Complainant on the VNN Forum with the Star of David on his head that looked decidedly like a target mark?

[170] The difficulty I have with the Complainant's claim to have suffered greatly is that a month or two after the posting with his photograph was made, he was able to publicly state, in a speech to the ARA, that he uses his "maximum disruption" approach, which includes the laying of human rights complaints, whenever he thinks it will be most helpful or even if he just feels it will be "the most fun". He also indicated that he files human rights complaints against "neo-Nazis" starting on a "worst offender" basis, although if he finds people to be "particularly annoying this may move them up the list a bit".

[171] It appears to me that there was a certain amount of "saber rattling" that went on between the Complainant and the Respondent and this does not appear to have immobilized the Complainant with fear. Indeed, although he stated that he was extremely concerned about the photograph of himself on the Internet, the Complainant subsequently intended to publicly display the Respondent's picture at the ARA conference, and in his speech he called the Respondent "a nasty piece of work". That kind of conduct is not suggestive of someone who is terribly alarmed

by the Respondent. Rather, it suggests somewhat of a cavalier attitude and even a whimsical mockery of the Respondent's activities. I agree with the Respondent that this lends an air of implausibility to the Complainant's claim to have suffered to such an extent that a damage award in the order of $20,000.00 would be warranted.

[172] Thus, I find that although the Complainant likely experienced some concern about the retaliatory messages, he appears to be a very resilient person who is somewhat impervious to threats and insults. Therefore, in all the circumstances, I am of the view that an award of $500 for pain and suffering is appropriate.

(iii) Special Compensation

[173] Section 53(3) of the *Act* provides that the Tribunal may award compensation in an amount not exceeding $20,000 to the victim where a respondent has engaged in the discriminatory practice willfully or recklessly.

[174] I find that the Respondent either intended to retaliate against the Complainant or he acted in reckless disregard of the consequences of posting the messages about the Complainant.

[175] There are two messages which provide evidence that the Respondent intentionally retaliated or threatened retaliation against the Complainant for filing a human rights complaint against him. In the posting made on March 13, 2004, the Respondent stated that he had fallen under the "Jew radar" when a "vile acidic Jew - Richard Warman (he says he's NOT a Jew) launched a complaint" against him.

[176] The second message is the one communicated in May 2005, in which the Respondent displayed the Complainant's picture under the heading "My Enemies" with the Star of David emblazoned on his forehead. Within that same thread, the Respondent provided a "roundup", or a list of the human rights complaints against White nationalists and placed the complaint against him first on that list. I find that the proximity of the "My Enemies" posting to the list of human

rights complaints gives rise to an inference that the "enemies" posting was also intended as retaliation or a threat of retaliation for the human rights complaint.

[177] On the basis of the above-noted evidence, it can reasonably be inferred that the other messages in which the Respondent refers to the Complainant in derogatory and threatening terms were part of an intentional campaign on the part of the Respondent to retaliate against the Complainant. While there were other reasons that could have motivated the Respondent to target the Complainant, there was no evidence of targeting before the complaint was filed. Therefore, I find that a significant factor influencing the Respondent's retaliatory conduct was the fact that the Complainant had filed a human rights complaint against him.

[178] In determining the appropriate quantum for an award under s. 53(3), the Tribunal's focus is on the Respondent's conduct and not on the effect that this conduct has had on the Complainant. (See for example: *Milano v. Triple K. Transport Ltd*. 2003 CHRT 30; *Woiden v. Lynn* [2002] C.H.R.D. No. 18 (Q.L.); *Bressette v. Kettle and Stony Point First Nation Band Council*, *supra*; *Kyburz, supra*). The effects of the conduct are considered when remedies are ordered under s. 53(2) of the *Act.*

[179] Counsel for the Respondent argued that the term "compensation" must involve compensation for a loss, intangible though it might be. Therefore, the extent to which the Complainant suffered as a result of the retaliatory action must be relevant in determining the quantum of an award for compensation under s. 53(3).

[180] I disagree. In my view, the wording of s. 53(3) clearly indicates that compensation is provided for the willful and reckless nature of the Respondent's conduct. There is no indication in s. 53(3) that the victim's suffering must be established in order to make an award for compensation. The provision for compensation for willful and reckless discriminatory conduct under s. 53(3) is separate from s. 53(2)(e) which provides for compensation for pain and suffering. Section 53(3) makes no reference whatsoever to s. 53(2). Thus, in my view, s. 53(3) is aimed at providing compensation for willful and reckless discriminatory conduct regardless of its

effects on the complainant. The effects of the respondent's conduct are considered when remedies are ordered under s. 53(2) of the *Act*.

[181] Given the willful nature of the Respondent's discriminatory conduct, and in particular his brazen use of the Complainant's photograph with what looked like a target mark on his forehead, I am of the view that the appropriate award for special compensation, pursuant to s. 53(3) of the *Act*, is $5,000.

(iv) Expenses Related to the Hearing

[182] On behalf of the Complainant, the Commission requested compensation from the Respondent for reasonable travel, meal and accommodation costs incurred by the Complainant in order to attend the hearing. The Commission stated that the venue was not within commuting distance to the Complainant's residence. Therefore, he incurred costs that he would not have incurred had he not been a victim of the discriminatory practice. The Commission paid for a portion of those expenses because the Complainant appeared as a witness for the Commission. However, the Commission argued that, in accordance with the goal of making the victim whole, the Respondent should reimburse the Complainant for that portion of his travel, meal and accommodation costs that were not covered by the Commission. There was no evidence provided as to what these costs might be.

[183] Section 53(2)(c) provides that, where the complaint is substantiated, the Tribunal may compensate victims for any expenses incurred as a result of the discriminatory practice. The power to award compensation under this provision, like all orders under s. 53, is discretionary. It is true that the exercise of the Tribunal's remedial discretion is guided by the principle of making the victim whole. However, not all expenses incurred as a result of a Tribunal hearing have been found to be sufficiently connected to the discriminatory practice to permit them to fall within the reach of s. 53(2)(c). For example, in *Attorney General of Canada v. Lambie,* (1996), 124 F.T.R. 303 (F.C.T.D.) at para. 41, the Federal Court held that the word "expense" is not broad enough to cover time spent in preparation for a hearing except in exceptional circumstances.

[184] It is not at all clear that travel, accommodation and meal expenses are the kind of expenses contemplated by s. 53(2)(c). Indeed, counsel for the Commission conceded that she could not find any authority for such an award. Unlike the situation in *Brown v. R.C.M.P.*, 2004 CHRT 30, the expenses in this case are not directly related to presenting a case before the Tribunal; they are one step removed from the actual presentation of a case. Moreover, I am of the view that there is nothing exceptional about the circumstances that would warrant an award for reimbursement of travel, meal and accommodation costs in the present case.

[185] The Complainant, who testified that he is a lawyer, represented himself during the hearing. The Canadian Human Rights Commission, whose role is to represent the public interest, was represented by two lawyers. Although not always the case, in the present inquiry the interests of the Commission and the Complainant were well aligned. Indeed, the Commission called the Complainant as a witness and therefore, according to Commission counsel, was able to cover some of the expenses that the Complainant incurred as a result of the hearing into this matter.

[186] For these reasons I am not convinced that it would be appropriate to order the Respondent to reimburse the Complainant's travel, accommodation and meal costs. I, therefore, decline to make the order requested by the Commission under s. 53(2)(c).

(v) Interest

[187] Section 53(4) provides the Tribunal with the authority to include an award of interest. Interest shall be paid on the monies awarded pursuant to this decision in accordance with Rule 9(12) of the Canadian Human Rights Tribunal Rules of Procedure. Interest will start to run from the date of this decision to the date of payment. In no case, however, should the total amount payable under s. 53(2)(e), including interest, exceed $20,000: *Hebert v. Canada (Canadian Armed Forces)*, (1993), 23 C.H.R.R. D/ 107 (F.C.T.D.). The same is true for the award under s. 53(3).

B. Hate Messages – Section 13

[188] Section 54 sets out the orders that may be made with respect to hate messages. It incorporates, by reference, certain orders that may be made under section 53 for other cases of discrimination. Thus, an order under s. 53(2)(a) may be made which includes, among other measures, an order that the person cease the discriminatory practice. In addition, s. 54 authorizes orders under s. 53(3) to compensate a victim who has been specifically identified in the discriminatory messages. Finally, there is provision for a penalty under s. 54(1)(c) of not more than ten thousand dollars.

[189] The Commission and the Complainant have requested the following:

> (1) an order that the Respondent cease and desist the communication of messages like the ones that were the subject of the section 13 complaint;
>
> (2) an order that the Respondent provide the Complainant with special compensation in the amount of $20,000.
>
> (3) an order that the Respondent pay a penalty in the amount of $10,000.

(i) Cease and Desist Order

[190] Respondent counsel argued that a cease and desist order would produce undesirable effects. It would communicate the message that "disagreeable thoughts" cannot exist in Canada and it may, in fact, promote the expression of such thoughts through other means that are less peaceful than Internet messages. Finally, a cease and desist order would serve to further alienate the Respondent from Canadian society.

[191] I cannot agree. The Respondent is free to express his thoughts and ideas, as disagreeable as those may be, provided they do not violate the law. The Respondent chose not to testify during the hearing. However, while he was representing himself during the early part of the hearing and during the case management process, he struck me as a respectful, reasonable and straightforward

man. He did not behave in a belligerent fashion. He attempted to put forward his point of view with quiet reason. It is to be hoped that in the future, the Respondent will maintain that same composure and respectfulness in his communications with the rest of the world through the Internet.

[192] It should also be noted that, in deciding whether to issue a cease and desist order, the potential impact of such an order on the Respondent is not my only consideration. I must also consider the likely impact of a cease and desist order on other members of Canadian society such as those who are likely to be exposed to hatred or contempt as a result of the Respondent's messages. As the Supreme Court of Canada noted in *Taylor*, the process of hearing a complaint made under s. 13(1) and, if substantiated, issuing a cease and desist order reminds Canadians of our fundamental commitment to equality of opportunity and the eradication of racial and religious intolerance (*Taylor, supra,* at para. 53). Therefore, I am of the view that a cease and desist order is entirely appropriate in the present case.

[193] Accordingly, the Tribunal orders that the Respondent, Mr. Tomasz Winnicki cease the discriminatory practice of communicating by the means described in s. 13 of the *Act*, namely the Internet, material of the type that was found to violate s. 13(1) in the present case, or any other matter of a substantially similar content that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or persons are identifiable on the basis of a prohibited ground of discrimination.

(ii) Section 54(1)(b) - Special Compensation

[194] Section 54(1)(b) provides the Tribunal with the authority to issue an order under subsection 53(3) to compensate a victim specifically identified in the communication that constituted the discriminatory practice. Subsection 53(3) states that the Tribunal may order the person to pay compensation to the victim if the Tribunal finds that the person is engaging or has engaged in the discriminatory practice willfully or recklessly.

[195] The Commission argued that the eight messages that were found to be violations of s. 14.1 also constituted violations of s. 13(1). I agreed and found that the same messages violated both provisions of the *Act*. I awarded the Complainant compensation for pain and suffering under s. 53(2)(e), as well as providing an award under s. 53(3) in recognition of the willful and reckless nature of the discriminatory conduct.

[196] The Commission then argued that the Complainant was also entitled to special compensation under s. 54(1)(b) in respect of the same set of eight messages. According to the Commission, it was plain and obvious on the face of the eight messages in which the Respondent names the Complainant that he intended to do so. The Commission argued that an award of compensation in the amount of $20,000 would be appropriate given the clearly intentional nature of the Respondent's conduct.

[197] The Respondent argued that providing compensation under both s. 54(1)(b) and s. 53(3) for the same messages would amount to double recovery. I agree.

[198] In assessing the appropriateness of an order for special compensation in *Kyburz*, the Tribunal was careful not to include in its consideration, the messages that had been found to be violations of s. 14.1 of the *Act*. It may well be that this was done in order to avoid the potential for double recovery.

[199] In the present case, however, it does not seem logical to dissect the series of eight messages in which the Respondent named and threatened the Complainant in order to fashion a remedy. The messages were part of a continuous pattern of conduct which violated s. 14.1 and s. 13(1) of the *Act*. They were clearly made in response to a series of actions that the Complainant took against the Respondent, including the filing of a human rights complaint. They were part of an ongoing battle between the two individuals and should be viewed as a whole.

[200] I have provided compensation under s. 53(3) for the willful or reckless nature of the Respondent's discriminatory conduct in retaliating or threatening retaliation against the Complainant. It would not, in my view, be appropriate to provide further compensation under

s. 54(1)(b) for the willful or reckless nature of the Respondent's conduct with respect to the same series of messages. This is because I do not think that the willful and reckless conduct of the Respondent in retaliating against the Complainant can be meaningfully distinguished from his willfulness or recklessness in naming the Complainant in the same series of messages.

[201] In *Chopra v. Canada (A.G.)* 2006 FC 9 (appeal pending: A-52-06), the Federal Court stated that a corollary of the principle of restoring a victim to his/her rightful place is that the victim should not be overcompensated. Human rights awards should not result in unrealistic or windfall compensation. Such a result would "undermine the integrity of the strong social justice purpose of the legislation" (*Chopra, supra,* at para. 42).

[202] In my view, providing an award of special compensation under s. 54(1)(b) for conduct relating to the same series of messages for which special compensation has already been provided under s. 53(3) would result in overcompensation of the Complainant.

[203] For these reasons, I decline to order that the Respondent pay special compensation under s. 54(1)(b).

(iii) Penalty

[204] Subsection 54(1)(c) of the *Act* permits the Tribunal to order a respondent in a s. 13 complaint, where substantiated, to pay a penalty of up to $10,000. The Commission requested an Order that the Respondent be required to pay a $10,000 penalty in this case, arguing that the messages in this case are among the most vicious and intensely hateful messages that they have seen. Moreover, right up until a week before the hearing in this case began, the Respondent was still posting messages on the Internet.

[205] The Respondent argues that *Warman v. Warman* 2005 CHRT 36 has cast some uncertainty on the constitutionality of s. 54(1)(c). Although counsel for the Respondent indicated that the Respondent was not challenging the constitutionality of the provision, she argued that the

Tribunal should consider the constitutional uncertainty created by *Warman v. Warman* when deciding whether to order a penalty.

[206] I reject this argument. A legislative provision is valid until such time as it is declared invalid. There is no such thing as constitutional uncertainty, in my view. The Tribunal cannot decline to apply the statute for fear that it may be invalid. It may only decline to apply the statute if it has been found to be invalid, on the basis of evidence and argument, and with proper notice to the Attorneys General. This has not been done in the present case. Moreover, I would note that in *Schnell,* this Tribunal found that the amendments to the *Act* which added the penalty and special compensation provisions to the remedies available under the *Act*, did not render s. 13 unconstitutional.

[207] In deciding whether to order the Respondent to pay a penalty in this case, Parliament has directed, under s. 54(1.1), that the Tribunal take the following factors into account:

> (1) The nature, circumstances, extent and gravity of the discriminatory practice;
>
> (2) The willfulness or intent of the person who engaged in the discriminatory practice;
>
> (3) Any prior discriminatory practices that the person has engaged in; and
>
> (4) The person's ability to pay the penalty.

[208] I find that the messages were vicious and dehumanizing. In my view, there is evidence on the basis of the wording of the messages alone, that the Respondent intended to expose members of the targeted groups to hatred and contempt and that he intended to convince people to think as he did. The Respondent called for the forced expulsion of non-Caucasian people, he threatened violent action against the targets of his hatred and enthusiastically supported a “racial holy war” in which all non-Caucasian people will be destroyed. He made use of exceedingly gruesome photographic imagery to draw in his readers and to communicate his messages of hate all the more powerfully.

[209] The Respondent clearly communicated his messages in willful disregard of the likely consequences of his conduct. He used the Internet, a medium that has a pervasive and powerful presence in society, to engage in this conduct. There is, however, no evidence that the Respondent has engaged in any prior discriminatory practices.

[210] The Respondent chose not to testify in the present case. Therefore, the Tribunal has no indication of his ability to pay other than a posting in which he states that he is “reasonably well off, with a steady paying job, not much expenditures, all bills paid on time without much hassle”. It may be that the Respondent is no longer “reasonably well off”. However, in the absence of any evidence from the Respondent, I find that there is no reason to reduce the penalty on the basis of an inability to pay it.

[211] Taking all of these factors into account, I order the Respondent to pay a penalty in the amount of $6,000. Payment of the penalty shall be made by certified cheque or money order, payable to the "Receiver General for Canada", and must be received by the Tribunal within 120 days of the Respondent being notified of this decision.

“Signed by”

Karen A. Jensen

OTTAWA, Ontario
April 13, 2006

CANADIAN HUMAN RIGHTS TRIBUNAL

PARTIES OF RECORD

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APPEARANCES:	
Richard Warman	For himself
Monette Maillet/ Ikram Warsame	For the Canadian Human Rights Commission
Tomasz Winnicki Assisted by Alex Beadie	For himself