

Canadian Human
Rights Tribunal



Tribunal canadien
des droits de la personne

BETWEEN:

RICHARD WARMAN

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

ELDON WARMAN

Respondent

REASONS FOR DECISION

PANEL/MEMBER: Dr. Paul Groarke

2005 CHRT 36
2005/09/23

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
A. Service	2
II. FACTS	3
A. Background	3
B. The Postings	5
III. LIABILITY	8
A. General Approach	8
(i) The Law against Hate Messages	10
(ii) The Requirements of Section 13	11
IV. PENALTY	12
A. Constitutional Issues	13
(i) Taylor	13
(ii) Zündel	13
(iii) Schnell	14
(iv) Kyburz	15
(v) Conclusions	16
B. Range	19
V. RULING	20
A. Liability	20
B. Penalty	21

I. INTRODUCTION

[1] The present complaint alleges that Eldon Warman contravened section 13 of the Canadian Human Rights Act by posting anti-semitic messages on the internet. On April 27, 2005, in the course of the hearing, I made the following ruling on liability.

THE CHAIRPERSON:

...I have reviewed the evidence and the jurisprudence provided by the Commission. I am satisfied, on a balance of probabilities, that the postings that were entered into evidence are communications from Eldon Warman, within the meaning of section 13 of the Canadian Human Rights Act.

I am not here to regulate the free exchange of ideas. There may be an element of legitimate political debate in the material entered into evidence and the Respondent has a right to his views. Some of the postings go beyond the legal parameters of public debate, however, and contravene the provisions of the Act.

My concern is with the sentiments expressed in this material. The postings from the Respondent express an open hatred of Jews. They demean and vilify Jewish people. They promote hatred and contempt. This strikes at the dignity of all persons and harms the public good.

I am satisfied that the complaint has been substantiated, and I will provide the parties with written reasons at a later date.

So you have a finding of liability. I think, in terms of the order, that I will move to the order and then I will hear from the Commission.

ORDER BY THE TRIBUNAL

I have already heard from the parties on remedy and there is no need for further submissions on the request for an order under section 54(1)(a) and section 53(2)(a) of the Canadian Human Rights Act. I am prepared to grant an order, in the general terms set out in the decision of this Tribunal in *Warman v. Kyburz*, the citation being 2003 CHRT 18, at paragraph 83.

I hereby order the Respondent, Eldon Warman, who has identified himself as Eldon-Gerald of the Warman family, to cease the discriminatory practice of posting messages or other material on the internet that is likely to expose Jews or any other member of an identifiable racial, religious or ethnic group to hatred or contempt.

I would ask the Commission to provide me with a formal order. (T. 344)

I reserved my decision on the question of penalty and advised the parties that I would issue written reasons at a later date.

A. Service

[2] The Commission and the Tribunal have served Eldon Warman with documents relating to the hearing on many occasions. He has persistently avoided service. A Table setting out the details of the many attempts to serve him was entered as exhibit "T-5" during the course of the hearing. Exhibit "T-5" is attached as an appendix to this decision.

[3] One package of documents was returned to the Tribunal on April 20, 2005. It contained a "NOTICE" stating, *inter alia*:

This would appear to be important documents to you, so I am returning them intact and unopened. If you intended them for me, I hereby refuse your offer of contract, or any assumed contract, regarding your claimed right to jurisdiction over me.

In the same Notice, Eldon Warman takes issue with the use of his name and states that the "person" referred to in his birth certificate is a legal fiction, the property of the Crown in right of the Province of New Brunswick.

[4] On March 31, 2005, Eldon Warman was personally served with documents from the Commission. There was something of an altercation. The affidavit from the process server states that he served Eldon Warman with documents and began to walk away.

The said Respondent then picked up a rock about the size of his hand. I turned and

advised him that if he touched me that I would charge him with assault. He then stated “you couldn’t charge me with assault because I’m going to fucking kill you”. I then ran to my car and left the area.

This seems to reflect Mr. Warman’s attitude towards the present proceedings.

[5] There is another affidavit stating that there were eight attempts to personally serve Eldon Warman with documents from the Tribunal. I subsequently issued an order for substitutional service. On a number of occasions, documents have been left affixed to the main door of his residence. I am satisfied that Eldon Warman is aware of the present proceedings and has chosen not to participate in them.

[6] The attempts to serve Eldon Warman continued, after the question of liability was decided. I insisted that the Commission serve a notice on Eldon Warman that it was seeking a penalty of 10,000 dollars under section 54(2) of the *Canadian Human Rights Act*. Although the Commission was unable to complete personal service, this notice was left taped to his door, along with my order to cease and desist.

[7] I think the situation before me is more than a simple attempt to evade service. It is really a question of affrontment. The evidence in the case indicates that Eldon Warman refuses to accept the authority of the courts and the other legal institutions in this country. I think it is clear that he does not accept the jurisdiction of the Tribunal in the matter.

II. FACTS

A. Background

[8] The Complainant, Richard Warman, is not related to the Respondent. He advised the Tribunal that he has spent 15 years campaigning against hate messages. About five years ago, he focused on the internet. Although he was not qualified as an expert, I allowed him to provide some background on the material that was entered into evidence.

[9] Richard Warman informed the Tribunal that there is a “freeman” or “sovereign citizens” movement. There are elements of the *Posse Comitatus* in the thinking of the movement. Its proponents believe that the only legitimate source of political power is local. This has given rise to a “de-tax” movement, which believes that the taxes imposed by government are unlawful. There is an idea that taxation is contrary to the *Magna Carta*.

[10] Eldon Warman is a leading person in the de-tax movement. He has received some attention from the media and has given seminars that explain why individuals have no obligation to pay taxes. The evidence established that he operates a website called “©Detax Canada®” which advises people how to “Permanently-Effectively-Lawfully” stop paying tax. This website can be found at: www.detaxcanada.org.

[11] The website espouses a radical libertarianism, which places individual rights above the moral reach of government. The website contains a mix of morality, law, and politics, with exhortations not to pay tax, recover Canada “as a free country”, and restore the “God Given INDIVIDUAL RIGHTS” of Canadians. Some of the material is rather banal, such as the reference to the CCRA, the Canada Customs and Revenue Agency as “Cursed Cannibals and Rabid Animals”.

[12] The website attacks the legitimacy of the legal order. One of the introductory boxes states::

YOU ARE BEING SUBJECTED TO HIGH TREASON

Judges are primary factor in this TREASON against the Canadian people

Canadian judges are using an American produced “Anti-Government Movement Guidebook” to deprive sovereign Canadians of their God Given Rights within the de facto corporate commercial Canadian court system - controlled by the Inner Temple of the ‘City of London, a hostile foreign entity.

The threat is palpable. A box states: “you have a right to use **deadly force** to stop these unlawful acts against you”. There are dark suggestions that the sovereignty of the people should be restored.

[13] There is a section on the web-site devoted to the establishment of a “Canadian *Magna Carta*” that lists the “grievances” of the Canadian people. There is a suggestion that the federal and provincial governments are “unlawful”. The *Constitution Act* of 1982 “is an absolute HOAX and FRAUD”. The Canadian people “have been unlawfully converted into chattel corporate slaves” by the “massive debt” of these governments, which is based “upon counterfeit money borrowed from foreign bankers”.

[14] This seems to be the place where anti-semitism enters into the discourse. The same document argues that the “Banksters of the City of London” have usurped the authority of the British Crown and are using the taxation system to produce income for themselves. It is apparent from other material that the word “bankster” is a reference to Jewish interests. The website alleges that our government has been corrupted by an illicit conspiracy between Jews and free masons.

[15] I want to be fair. There are some attempts to separate this kind of conspiracy theory from any racial, ethnic or religious views. One entry on the site states: “I have no ‘axe to grind’ with any ethnic, racial or religious grouping of people in Canada, or elsewhere.”

B. The Postings

[16] The substantive evidence against Eldon Warman consisted primarily of copies of e-mail postings on public sites. These messages were collected by the Complainant through the use of internet search engines. Some of the messages appeared on “bulletin boards” and in “newsgroups”, arranged by topic. Some of the messages were taken from one posting and pasted to another.

[17] Eldon Warman’s name appears on the postings. The author of the postings can also be deduced from the return addresses and the contents of the messages. The earlier messages use two

addresses: *egwarman@hotmail.com* and *warmael@hotmail.com*. Eldon Warman used the latter address when he registered the www.detaxcanada.org website on the *whois* registry of domains. There is a third address on the later postings, from 2002 on: *egwarman@outgun.com*. This address appears on the detax website.

[18] The messages speak in one voice. The author uses the same language and returns repeatedly to the same themes. I think that I can draw the natural inference from the multitude of sources in front of me, in the absence of any other evidence, and conclude that Eldon Warman was the author of these messages. It would be speculative to find otherwise.

[19] The messages that were entered into evidence portray the Jewish people as enemies. Eldon Warman traces a number of ills to the Jewish people. This ranges from abortion clinics to the Rwandan genocide. There are abusive references to the Jewish tradition. The Talmud is referred to as “hate literature” and the “evil trash of the Rabbim of the Synagogue of Satan”.

[20] Most of the messages are from email conversations that took place on the internet. Eldon Warman replies to someone, perhaps a civil servant, in the following terms.

So you stinking Fu*kin TRAITOR Zionist Jew BASTARD – hows that for anti-Edomite, er...anti-semitic if you prefer...If you represent that which is called a “semite”, then you’d better believe that I am an “anti-semite....I am very intolerant of NAZI-ZIONIST MURDERING JEW slime like you Freddie. A jerk who is employed to attempt to keep Canadians in slavery and to destroy Canadian People and their families.

There are many abusive comments.

[21] Eldon Warman debases the Jewish people. Elsewhere, he responds to a correspondent in the following terms:

Criswell, go back to screwing little goy boys, like the good Zionist Jew you obviously are.

Another correspondent suggests that Eldon Warman is mentally ill. He replies:

It seems I have the Jew boys really slinging their PIG SHIT, instead of doing what they do best, declare it kosher and dine on it....And, may their babies be butchered in their Jew owned abortion clinics.

The tone of the messages is dehumanizing.

[22] The most disturbing message is at p. 131 of the transcript:

MS. PHILLIPS: Why don't you read the last paragraph, then, Mr. Warman.

[RICHARD] WARMAN: The last paragraph states:

"Joe the JewBoy, Thanks for bringing back this reminder for the People of Canada and the United States to read and refresh their memory of what your NAZI-ZIONIST JEWS have done to the People of America. It's too bad we don't have a greater need for soap and lampshades, but, I suppose it would be difficult to get the stench of pig shit out of that slimy fat.

Eldon Warman"

THE CHAIRPERSON: Let's be clear about this. What is this reference -- I think I understand. This is someone else posting a message that Eldon Warman had sent in the past? That's what it seems to be.

MS PHILLIPS: It seems to me that Joe, this person with a very long e-mail, re-posted a previous posting by Mr. Warman within the thread of this bulletin board, and he has brought it back to the attention of the people who are currently discussing on the bulletin board to give them an idea of who Mr. Eldon Warman is, and then at the part that Mr. Richard Warman just read out, Mr. Eldon Warman is thanking him for bringing back the reminder to the people of Canada.

THE CHAIRPERSON: So there is some kind of debate or discussion taking place, and someone else goes back and posts this previous message from Eldon Warman -- and that is his message -- and then, of course, Mr. Eldon Warman comes back again and responds to that particular posting. I think I understand.

MR. [RICHARD] WARMAN: Yes.

The original posting was in 1999. The message containing it was dated May 8, 2002.

[23] I allowed Richard Warman to explain that Eldon Warman was referring to the fact that lampshades and soap were made from the bodies of the Jews who died in the concentration camps of the Third Reich. Eldon Warman was clearly exploiting these kinds of associations, to demonstrate the extent of his commitment to his political views. If he needed racial slurs to advance his political agenda, he was prepared to make use of them.

[24] There are passages in which Eldon Warman denies the suggestion that he is a racist. He often tries to protect himself from accusations of racism by distinguishing between Jews and Zionist Jews. In one message, he says that his life does not revolve around “Jew hatred” and states:

... I do fear greatly for my grandchildren, and the world in which they must try to live their lives with value and meaning – and, not as slaves of Zionist Jew banksters.

Some of the postings contain legitimate political commentary. This is full of invective, however. Eldon Warman refers to “George Bush, the Unelected Jewnited States Fuhrer” as leader of the ‘jackbooted’ NAZI style goon squad.”

[25] I can see the beginning of a distinction here, but it does not matter. There is a racial agenda in the postings. I think it is impossible to disentangle Eldon Warman’s attitude to “Zionist Jews” from a more general antipathy towards the Jewish people. The material incites hatred.

III. LIABILITY

A. General Approach

[26] Section 13(1) of the *Canadian Human Rights Act* reads as follows:

13. (1) It is a discriminatory practice for a person ... to communicate telephonically ..., repeatedly ..., any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination.

Section 13(2) extends this provision to communications made on the internet.

[27] It seems to me that it is a mistake to see section 13 of the *Canadian Human Rights Act* as an independent legal restriction. The purpose of the section is to place some necessary and reasonable limits on our freedom of expression. It qualifies our freedom. This is important for the purposes of analysis, since it means that a Tribunal applying the section should start with the premise that individuals are free to express themselves. The task is to determine the limits of that freedom.

[28] It is plain that that freedom of expression is part of the fundamental law. Article 19 of the *Universal Declaration of Human Rights* (GA Res 217A (III), UN Doc. A/810 (1948)) states that everyone has the right to “receive and impart information and ideas through any media and regardless of frontiers.” Article 19(2) of the *International Covenant on Civil and Political Rights* (19 December 1966, 999 U.N.T.S. 171) holds:

19(2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

Article 19(3) subjects these freedoms to “certain restrictions”, which are necessary “for respect of the rights or reputations of others”.

[29] The domestic law uses the same paradigm. The concept of free speech has always held an important place in our democratic tradition. This has been enshrined in section 2(b) of the *Canadian Charter of Rights and Freedoms*, which states:

2. Everyone has the following fundamental freedoms:

b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

[30] The Supreme Court recognized that section 13 violated this provision in *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892. It was nevertheless a reasonable limit under section 1 of the *Charter*, and was demonstrably justified in a free and democratic society.

[31] My point is simply that a Tribunal applying section 13 of the *Canadian Human Rights Act* is engaged in the rather sensitive task of determining the limits of our fundamental freedoms. This calls for a careful weighing of the constitutional values that are threatened by its application. I do not think that I am overstating the matter when I say that a tribunal that fails to appreciate the constitutional factors that come into play in such an exercise has probably misapplied the section.

(i) The Law against Hate Messages

[32] The legal machinery that finds expression in section 13 of the *Canadian Human Rights Act* has its origins in the international law. Article 7 of the *Universal Declaration of Human Rights* states:

7. All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

It is the suggestion that other people do not deserve equal treatment that offends this kind of provision.

[33] There is a law against statements that disseminate hatred. Article 20(2) of the *International Covenant on Civil and Political Rights* states:

20(2) Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

Section 13 of the *Canadian Human Rights Act* comes within the general auspices of this article.

[34] Article 4(a) of the *International Convention on the Elimination of All Forms of Racial Discrimination* (21 Dec. 1965, 66 U.N.T.S. 195) is more explicit. It requires that the state parties:

4(a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred . . .

The *Canadian Human Rights Act* is designed to uphold the principle of equality. Section 13 and the related provisions achieve this by preventing the promotion of hatred and removing legally offensive material from the internet.

[35] Section 13 characterizes the communication of hate messages as a form of discrimination. There are reasons for this. The laws that prohibit the dissemination of hatred derive from the right of individual persons to live their lives, free from hatred and inequality. I think Parliament has taken the position that the good relations that provide the foundations of civil society rest on the belief that the people in different groups are equal. This is a fundamental legal and political tenet. Any other view is illegitimate.

(ii) The Requirements of Section 13

[36] The purpose of section 13 of the *Canadian Human Rights Act* is to remove dangerous elements of speech from the public discourse. The removal of these elements of speech from the public discourse promotes equality, tolerance, and the dignity of the person. It also protects the members of minorities from the psychological harm caused by the dissemination of racial views. These views result inevitably in prejudice, discrimination and the potential of physical violence.

[37] The words “expose”, “hatred” and “contempt” have their ordinary meanings and the only comment I would make is that the concern with hatred in the context of the *Canadian Human Rights Act* arises out of the fact that hatred for other people imperils their equality. The messages prohibited by the section rob the victims of their dignity as persons and justifies their unequal treatment. This is not permissible.

[38] The word “contempt” contains this association of inferiority. It is sufficient if the material is *likely* to expose a person to hatred or contempt. There is a certain gravity that is nevertheless required, to justify any infringement of freedom of expression. I do not believe that the section catches trivial or inconsequential comments.

[39] I am satisfied that the requirements of the section have been met in the present case. The frequency of the messages and the nature of their posting on the internet is enough to meet any requirement that they be repeated.

[40] The Tribunal should also be careful not to enter into the discussion of religious texts. Freedom of religion includes the freedom to dissent. I would nevertheless add that the promulgation of views that promote a contemptuous attitude towards fundamental religious tracts is likely to subject the groups that hold these texts sacred to hatred or contempt.

[41] I have already issued an order to cease and desist. The Tribunal has been advised by the Commission that the material has been removed from the internet. The fundamental purposes of the *Act* have accordingly been met.

IV. PENALTY

[42] The Human Rights Commission is also asking for a penalty under section 54(1)(c) of the *Canadian Human Rights Act*, which states:

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

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

The Commission is asking for the maximum penalty of 10,000 dollars.

[43] Section 54(1.1) sets out a number of factors that the Tribunal must consider in assessing a penalty under this provision.

54(1.1) In deciding whether to order the person to pay the penalty, the member or panel shall take into account the following factors:

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

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

The caselaw is too limited to provide much direction outside of these provisions.

A. Constitutional Issues

[44] I originally thought that the constitutional issues that arise in the instance of section 54(1)(c) have been decided. When I reviewed the caselaw, I discovered that this is not the case.

(i) Taylor

[45] The constitutionality of section 13 of the *Canadian Human Rights Act* was upheld by the Supreme Court of Canada in *Canada (Human Rights Commission) v. Taylor, supra*, where the Supreme Court held that the purpose of section 13 was to prevent the harm caused by hate messages. The penalty in section 54(1)(c) was not added to the legislation until 1998. I cannot see anything in *Taylor* that speaks to the constitutionality of the penalty provision.

(ii) Zündel

[46] The Tribunal has rendered two decisions that address the constitutionality of section 13. The first is *Citron v. Zündel*, [2002] C.H.R.D. No. 1. The comments of the panel in *Zündel* are

obiter, however, since the complaint arose before the penalty provision came into effect. The panel merely held that the provision had no retroactive effect.

[47] The views of the *Ziindel* panel with respect to the Tribunal's mandate under section 13 are nevertheless instructive. At para. 256, the Tribunal found that the majority in *Taylor* "clearly distinguished a complaint under the *Canadian Human Rights Act* from an offence under the *Criminal Code*." It then quoted the following passage in *Taylor*, at p. 917:

It is essential ... to recognize that, as an instrument especially designed to prevent the spread of prejudice and to foster tolerance and equality in the community, the *Canadian Human Rights Act* is very different from the *Criminal Code*. The aim of human rights legislation, and of s.13(1) is not to bring the full force of the state's power against a blameworthy individual for the purpose of imposing punishment. Instead, provisions found in human rights statutes generally operate in a less confrontational manner, allowing for a conciliatory settlement if possible and, where discrimination exists, gearing remedial responses more towards compensation of the victim.

I think the Tribunal was right to focus on this aspect of the *Taylor* decision.

(iii) Schnell

[48] The Tribunal reconsidered the matter in *Schnell v. Machiavelli and Associates Emprize Inc.*, [2002] C.H.R.D. No. 21, which was decided after the penalty provision came into effect. The argument before Mr. Sinclair was that the introduction of the penalty provision had compromised the constitutional validity of section 13. The Respondent submitted that the section could no longer be justified under s. 1 of the *Canadian Charter of Rights and Freedoms*.

[49] I agree with the Tribunal in *Schnell* that this argument must be rejected. Mr. Sinclair found that the passage of section 54(1)(c) has pushed section 13 closer to its constitutional limits. He nevertheless felt that the decision of the Supreme Court in *Taylor* had not been affected by the introduction of the penalty provision. The importance of *Schnell* is, accordingly, that it reaffirms the constitutionality of section 13.

[50] I think the significant point in the present context is that the two provisions are severable. The penalty provision may be defective, independently of section 13. I am accordingly of the view that the issues regarding section 54(1)(c) have not been resolved.

[51] There are other differences. The Commission did not request a penalty in *Schnell* and the Tribunal declined to exercise its jurisdiction on that basis, so the matter was arguably moot. Mr. Sinclair was also concerned about the lack of information before him, in determining what penalty would be appropriate.

[52] I think that any decision regarding the validity of section 54(1)(c) must be made in a case where a Tribunal is called upon to award a penalty. There are many reasons for this, not the least of which is that it is impossible for a Member to fully appreciate the weight of such a penalty until he is obliged to impose it. This does not change because the views are repugnant.

(iv) Kyburz

[53] The only case in which the Tribunal has awarded a penalty under section 54(1)(c) is *Warman v. Kyburz*, [2003] C.H.R.D. No. 18. The constitutionality of the penalty provision was not contested in the case. This was apparently because Mr. Kyburz did not appear.

[54] The difference between the present case and *Kyburz, supra*, is that I feel obliged to bring these kinds of issues to the attention of the parties. Some of this may be attributable to the fact that the circumstances of the present case are less compelling than the circumstances in *Kyburz*. This brings the *Charter* issues into the foreground.

[55] I nevertheless agree with the panel in *Kyburz*, which stated that the imposition of a financial penalty under section 54(1)(c) takes the Tribunal well outside the normal parameters of its jurisdiction. At para. 94, the Tribunal held:

Awards of special compensation made under section 54(1)(b) in relation to section 13 complaints are intended to compensate individuals specifically named in hate

messages. In contrast, penalties levied pursuant to section 54(1)(c) of the *Act* are intended to reflect society's opprobrium for the respondent's conduct.

It is the moral blameworthiness of the Respondent's conduct that attracts the penalty.

[56] It is significant that the Tribunal in *Kyburz* found itself unable to apply the penalty provision without using the language of the criminal law. The Tribunal speaks of the penalty as a "fine" and refers to the Respondent's violation of the *Act* as a "first offence". It is impossible to escape the correlations between the sentencing process in the criminal courts and the imposition of a penalty under section 54(2).

(v) **Conclusions**

[57] It will be apparent from my review of the caselaw that the issues regarding the constitutional validity of section 54(1)(c) have not been settled. This is in spite of the fact that the provision obviously restricts the freedom of expression guaranteed by the *Canadian Charter of Rights and Freedoms*. The factor that distinguishes the present case from other cases is that the obvious issues in the case are constitutional. These issues arise on the surface of the legislation.

[58] The problem is that Eldon Warman refuses to recognize the authority of the Tribunal and perhaps the legal system as a whole. He has chosen not to participate in the inquiry. As a result, the issues that should have been raised on the Respondent's side of the case were never addressed.

[59] There is very little that I can say about this. The Commission suggested that Eldon Warman must accept the consequences of his decision not to participate. He should not be rewarded for failing to appear. I agree with the Commission, but I cannot see how it affects the situation in which I find myself. The Respondent has lost the opportunity to address the issues in the inquiry. This applies as much to the constitutional issues as to any other issues in the case. I cannot see how this can be construed as an advantage or reward.

[60] I find it regrettable that the Respondent refused to participate in the process. That does not deprive him of his right to a fair hearing, however, and I think it is incumbent on the Tribunal to see that the issues that arise on his side of the case are properly examined. The Respondent does not waive his right to a proper airing of the issues, or lose his fundamental freedoms under the *Charter of Rights*, simply by refusing to appear. Eldon Warman has his rights and freedoms, whether he wants them or not. Natural justice still applies.

[61] There is no hiding from the fact that a Tribunal exercising its authority under section 54(1)(c) is setting limits on the scope of our freedom of expression under section 2(b) of the *Canadian Charter of Rights and Freedoms*. The outstanding question is whether these limits can be justified under section 1 of the *Charter*. There are a number of points that could be made in this context.

[62] The first point is that there are different forms of speech, which may attract different degrees of protection under the constitution. Even before the *Charter*, there were many judicial suggestions that Canada has an implied bill of rights, which protects political speech. This is important because the dialogue that Mr. Warman has participated in, over the internet, is fundamentally political. It may be pernicious and divisive. It is still a political dialogue.

[63] The second point is that the Supreme Court upheld the provisions of the *Canadian Human Rights Act* relating to hate messages in *Taylor* on the basis that the *Act* is remedial. At some point in the evolution of the law, I accordingly think that the Commission has an obligation to explain how section 54(1)(c) fits into the remedial scheme of the *Act*. The Tribunal has already recognized on a number of occasions that the penalty provision departs from the scheme of the *Act*.

[64] There is nothing incidental in this. The penalty contemplated by section 54(1)(c) is inherently punitive. It is intended to deter those individuals who would attack the essential equality on which the relations in society are based. The magnitude of the penalty should not be minimized. A fine of ten thousand dollars for expressing one's views is no mean thing. It opens the Respondent to all the rigours of recovery and proceedings for contempt.

[65] The situation might be different if the financial penalty could be construed as a form of aggravated damages, or some other form of compensation. There would be less of a question if the penalty was used to alleviate the problems associated with hate messages. I have been informed, however, that the money is payable to the Receiver General and goes into general revenue. It does not go into education, a victim's fund, or some other compensatory measure.

[66] The third point is related to the ordinary distribution of adjudicative duties in our system of justice. This usually leaves the punishment of individuals who commit moral wrongs in the hands of the criminal courts. There are reasons for this. There are institutional safeguards in the criminal process, which make it a better forum in which to pursue a penalty against an individual for impermissible comments.

[67] The proceedings before the Tribunal are in the nature of civil proceedings. The present complaint was filed by a private individual, against a private individual. The purpose of an inquiry under the *Canadian Human Rights Act* is not to measure the moral blame that attaches to a Respondent's actions. It is to rectify discrimination. The task of imposing a punishment and assessing a pecuniary penalty falls outside the normal ambit of the Tribunal's responsibilities.

[68] This explains some of the differences in the process in the two arenas. The burden in the criminal courts is beyond a reasonable doubt, as opposed to a balance of probabilities. It is apparent that a Tribunal could entertain some doubt as to the culpability of a respondent—I think culpability is the right word here—and still award the penalty under section 54(1)(c). There is nothing to prevent the Complainant or the Commission from seeking criminal charges, if they are warranted.

[69] The constitutional issue is whether the Respondent's freedom of expression can be restricted in this kind of way, without the kind of institutional and procedural safeguards that exist in the criminal process. This includes a higher standard of proof, proof of *mens rea*, and the strict application of the rules of evidence. It is one thing to punish an individual after a trial in a criminal court, with all the protections that the law extends to the accused. It is another thing to do so, in a process designed for other purposes.

[70] It would be wrong to say anything more at this point in the process. I simply want to set out some of the issues that need to be addressed, if the Complainant and the Commission wish to invoke the penalty provision. I feel obliged to add that all of these issues go to the public interest under s. 51 of the *Canadian Human Rights Act*. This suggests that the Commission, at least, has an obligation to address them.

B. Range

[71] There is a second kind of issue that arises under section 54(1)(c). That is arises out of the fact that the maximum penalty is reserved for the worst cases. There has to be a range. This poses a problem in the present case, since I have not been directed to a reliable source of precedents, on which I could determine where it should be placed in the spectrum of possible cases. I think that previous Tribunals have run into similar difficulties.

[72] These concerns are highlighted by the fact that the present complaint was filed by a private complainant. It would be wrong to assess penalties against individual respondents on an *ad hoc* basis. I do not see how a Tribunal can assess a fair penalty against Eldon Warman without some means of determining how the present case compares with other cases that might arise under the provision. This could be provided by expert evidence, which would at least establish the nature and frequency of the hate material that is available on the internet.

[73] There may also be precedents in the criminal law that provide a basis for analysis. There is, for example, the rather notorious case of *R. v. Ahenakew*, [2005] S.J. No. 439 (Sask. Prov. Ct.), now under appeal, in which the accused was convicted of promoting hatred for describing the Jewish people as a “disease”. The accused was fined 1,000 dollars. The contrast with the present case is troubling. Here, the Commission is asking for a fine of 10,000 dollars, in a civil process, in *absentia*, without the safeguards of the criminal process.

[74] I only mention *Ahenakew* by way of illustration. I cannot say what would constitute an appropriate penalty in the case before me. My point is simply that the Commission has an obligation to provide the Tribunal with information that would establish where a case fits in the

range of cases that might come before the Tribunal. One would nevertheless think that the penalties awarded in the criminal law and the law of human rights should be consistent. This is a question of proportionality.

[75] I am aware that subs. 54(2) sets out a number of factors that must be considered by the Tribunal. Although this provides some useful criteria, it seems to me that any Tribunal cognizant of its obligations would have reference to these kinds of factors, with or without the statutory direction. It does not really matter. These kinds of factors cannot provide the benchmarks that are needed, to establish the necessary scale. This requires an analysis of specific sets of facts.

[76] All of this is compounded, once again, by the complete absence of any submissions from the Respondent. I realize that the Respondent must be held accountable for this. This does not make an inappropriate fine any more appropriate, however, and is still a concern. I suspect that the real solution lies in compelling the Respondent to appear. This only suggests, however, that the exercise should be conducted in a forum where some form of attendance is mandatory.

V. RULING

A. Liability

[77] I cannot see how the *prima facie* analysis in the case law applies to hate messages. It does not matter. The postings are offensive under section 13 of the *Canadian Human Rights Act*. The Complainant and the Commission have met the required standard of proof and the complaint is substantiated.

[78] The primary objective of section 13 is to remove repugnant and I daresay dangerous material from the public discourse. The real issue on liability is whether the material is offensive: issues of culpability are secondary and the responsibilities of the Tribunal consist primarily in keeping the channels of free speech clear of messages that threaten the normative foundations of our society.

[79] The material before me undermines the principle that all people are equal. This is one of the axioms on which the legal and social order rests. Taken as a whole, the postings vilify the Jewish people. The theme is that Jews are part of an evil conspiracy. I think this feeds into a kind of racial, ethnic or religious enmity that presents dangers for society as a whole.

[80] There is another factor. The material before me makes it clear that the respondent does not accept the legitimacy of the legal and political system. This is a subtext in the postings, which attack the validity of the laws that protect the members of minorities from discrimination, harassment and the overt expression of hate. I think this is an aggravating circumstance, which makes the material more offensive.

[81] I make no comment on the political arguments that surface in the material before me. Eldon Warman lives in a free society and is entitled to his views, whatever I may think of them. I would not want to restrict the political discourse that is essential to the proper functioning of a free and democratic society.

[82] The Tribunal should also be careful not to enter into the discussion of religious texts. Freedom of religion includes the freedom to dissent. I would nevertheless add that the promulgation of views that promote a contemptuous attitude towards fundamental religious tracts is likely to subject the groups that hold these texts sacred to hatred or contempt.

[83] I have already issued an order to cease and desist. The Tribunal has been advised by the Commission that the material has been removed from the internet. The fundamental purposes of the *Act* have accordingly been met.

B. Penalty

[84] It will be apparent that I find myself unable to deal with the request for a penalty under section 54(1)(c) without further submissions. I am accordingly reserving my jurisdiction in the case for 30 days, to give the Complainant and the Commission an opportunity to decide whether they wish to respond to my concerns. If they wish to provide further submissions, I think they

should provide constitutional notice under Rule 9(7) of the Canadian Human Rights Tribunal's Rules of Procedure.

[85] I am directing that Eldon Warman be provided with a copy of this decision, by substitutional service.

“Signed by”

Dr. Paul Groarke

OTTAWA, Ontario
September 23, 2005

CANADIAN HUMAN RIGHTS TRIBUNAL

PARTIES OF RECORD

TRIBUNAL FILE:	T998/11804
STYLE OF CAUSE:	Richard Warman v. Eldon Warman
DATE AND PLACE OF HEARING:	April 25, 26, 27, 2005 May 26, 2005 Ottawa, Ontario
DECISION OF THE TRIBUNAL DATED:	September 23, 2005
APPEARANCES:	
Richard Warman	On his own behalf
Valerie Phillips Monette Maillet	For the Canadian Human Rights Commission
Eldon Warman	No one appearing for Eldon Warman

April 22, 2005

Documents Sent to Eldon Warman

Description of Document	Date / Method of Delivery	Date Returned to the Tribunal/ Reasons Indicated for Return
Letter from the Tribunal dated November 22, 2004 regarding mediation by the Tribunal	1) Nov. 22, 2005 - Courier 2) March 1, 2, 3, 5, 6, 7, 9, 10, 2005 - Process Server 3) April 13, 2005 - Process Server*	1) Nov. 26, 2005 - Not known at this address 2) April 7, 2005- unable to personally serve 3) April 13, 2005 (received April 20, 2005) - refused by addressee, returned intact and unopened
Letter from the Tribunal dated November 25, 2004 enclosing a questionnaire	1) Nov. 25, 2005 - Courier 2) March 1, 2, 3, 5, 6, 7, 9, 10, 2005 - Process Server 3) April 13, 2005 - Process Server*	1) Dec. 22, 2005 - Unclaimed 2) April 7, 2005- unable to personally serve 3) April 13, 2005 (received April 20, 2005) - refused by addressee, returned intact and unopened
Letter from the Tribunal dated December 30, 2004 enclosing the above two letters	1) Dec. 30, 2004 - Courier 2) Dec. 30, 2004 - Regular Mail 3) March 1, 2, 3, 5, 6, 7, 9, 10, 2005 - Process Server 4) April 13, 2005 - Process Server*	1) Feb. 17, 2005 - Unclaimed 2) Jan. 18, 2005 (approx) - Return to sender 3) April 7, 2005- unable to personally serve 4) April 13, 2005 (received April 20, 2005) - refused by addressee, returned intact and unopened
Letter from the Tribunal dated January 21, 2005 providing the Tribunal's directions to the parties	1) Jan. 21, 2005 - Courier 2) Jan. 21, 2005 - Regular Mail 3) March 1, 2, 3, 5, 6, 7, 9, 10, 2005 - Process Server 4) April 13, 2005 - Process Server*	1) Feb. 21, 2005 - Unclaimed 2) Feb. 7, 2005- Return to sender, refused by addressee 3) April 7, 2005- unable to personally serve 4) April 13, 2005 (received April 20, 2005) - refused by addressee, returned intact and unopened

Description of Document	Date / Method of Delivery	Date Returned to the Tribunal/ Reasons Indicated for Return
Letter from the Tribunal dated February 7, 2005, enclosing a Notice of Hearing	1) Feb. 7, 2005 - Courier 2) Feb. 7, 2005 - Regular Mail 3) March 1, 2, 3, 5, 6, 7, 9, 10, 2005 - Process Server 4) April 13, 2005 - Process Server*	1) Mar. 7, 2005 - Unclaimed 2) Feb. 15, 2005 - Return to sender, refused by addressee 3) April 7, 2005- unable to personally serve 4) April 13, 2005 (received April 20, 2005) - refused by addressee, returned intact and unopened
Letter from the Tribunal dated February 15, 2005 extending the parties' disclosure deadlines	1) Feb.15, 2005 - Courier 2) Feb.15, 2005 - Regular Mail 3) March 1, 2, 3, 5, 6, 7, 9, 10, 2005 - Process Server 4) April 13, 2005 - Process Server*	1) Mar. 7, 2005 - Unclaimed 2) Mar. 14, 2005 - Return to sender 3) April 7, 2005- unable to personally serve 4) April 13, 2005 (received April 20, 2005) - refused by addressee, returned intact and unopened
Letter from the Tribunal dated February 22, 2005 regarding the filing of exhibits	1) March 1, 2, 3, 5, 6, 7, 9, 10, 2005 - Process Server 2) April 13, 2005 - Process Server*	1) April 7, 2005- unable to personally serve 2) April 13, 2005 (received April 20, 2005) - refused by addressee, returned intact and unopened
Letter from the Tribunal dated February 23, 2005 enclosing copy of all correspondence sent to date and advising of liability for any order made	1) March 1, 2, 3, 5, 6, 7, 9, 10, 2005 - Process Server 2) April 13, 2005 - Process Server*	1) April 7, 2005- unable to personally serve 2) April 13, 2005 (received April 20, 2005) - refused by addressee, returned intact and unopened
Letter from the Tribunal dated April 7, 2005 enclosing a Notice of Change of Venue (hearing rooms)	1) April 13, 2005 - Process Server*	1) April 13, 2005 (received April 20, 2005) - refused by addressee, returned intact and unopened
Letter from the Tribunal dated April 7, 2005 regarding written particulars	1) April 13, 2005 - Process Server*	1) April 13, 2005 (received April 20, 2005) - refused by addressee, returned intact and unopened
Letter from the Tribunal dated April 7, 2005 enclosing all copy of all correspondence sent to date and advising of liability for any order made	1) April 13, 2005 - Process Server*	1) April 13, 2005 (received April 20, 2005) - refused by addressee, returned intact and unopened

* An Order for Substitutional Service was made by the Tribunal on April 7, 2005