

COURT FILE NO.: 04-CV-26550SR

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)

RICHARD WARMAN)

) Pam MacEachern, for the Plaintiff

) Plaintiff)

- and -)

) PAUL FROMM and CANADIAN)
ASSOCIATION FOR FREE EXPRESSION)
INC.)) Chi-Kun Shi and Douglas H. Christie, for
the Defendants)

) Defendants)

) HEARD: February 25-26, 2007
and May 30, 2007METIVIER RSJ**DECISION**

[1] This action is brought under the simplified procedure rule.

[2] The plaintiff, Richard Warman (the "plaintiff"), is a lawyer. He worked as an investigator for the Canadian Human Rights Commission ("CHRC") from July 2002 to July 2004. He now works for the federal government and resides in the city of Ottawa, Ontario.

[3] Mr. Warman pleads that the defendants are responsible for libeling him in nine postings on various Internet websites. These postings characterize him as, among other things, an enemy of free speech, a member of the thought police, a high priest of censorship, and an employee who abused his position at the CHRC in order to limit freedom of expression and pursue his own ideological agenda.

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[4] The plaintiff seeks damages from the defendants for those allegedly defamatory comments together with a complete public retraction of those comments published on the defendants' website. He seeks general damages as well as aggravated and punitive damages.

[5] The plaintiff describes himself as a lawyer dedicated to human rights and has brought numerous complaints about "hate speech" on the Internet to the CHRC.

[6] The Canadian Association for Free Expression (CAFE) and Paul Fromm (the "defendants") do not dispute that they were and are, at all times relevant, responsible for posting the articles alleged to be defamatory to the plaintiff on certain different websites. The postings were published on a site called Freedomsite.org using a server located in the United States, and frequently republished on another site, Canadian Heritage Alliance. Several other sites have also republished the articles; among them Yahoo and Birdman.org, Google, White Nationalist Community and Stormfront. The postings sometimes incorporate newspaper articles which are preceded by commentary from Mr. Fromm.

[7] The evidence was that some of the material would be reposted on other sites by way of an e-mail sent by Mr. Fromm to a large distribution list.

[8] Mr. Fromm further admits sending letters, also alleged to be defamatory, via facsimile to the plaintiff's former employer. The defendant Mr. Fromm also admits making certain statements which the plaintiff alleges are defamatory at a press conference on Parliament Hill in his role as Director of the defendant CAFE. These comments were later published on the Internet.

[9] The defendant describes himself as dedicated to the preservation of free speech. The defendant association is described in the statement of defence as:

... a non-profit educational organization dedicated to securing the maximum application of freedom of speech and freedom of expression as guaranteed under the Canadian Charter of Rights and Freedoms. It does this through public commentary on threats to free speech; through the presentation of briefs on issues affecting freedom of speech; through interventions in free speech cases, including the Ernst Zundel and John Micka Internet cases and the Doug Collins B.C. human

rights case; through lobbying politicians; and through newsletters and e-mails to supporters; and through letters-to-the-editors whenever freedom of speech is under attack in Canada.

[10] The defence is that Mr. Fromin's comments are fair: the plaintiff is a public person, and the public has an interest in knowing that he is against "free speech" and is attempting to throttle it.

[11] The defendants claim that their remarks are fair comment on matters of public interest. They allege that the plaintiff's numerous complaints under the Canadian Human Rights Act and the libel actions he has instituted against various people are intended to intimidate and prevent Canadians from exercising their constitutionally protected rights to freedom of expression, which they say includes the freedom to hold unpopular views.

[12] The defence of fair comment applies where an opinion is expressed honestly, in good faith, and on facts which are true on a matter of public interest. Certainly, every citizen has the right to comment upon or criticize a matter of public interest. (Raymond E. Brown, *The Law of Defamation*, 2nd ed. (loose leaf) (Toronto: Carswell 1999))

[13] The plaintiff worked for 2 years as an investigator for the CHRC. His role at the CHRC was as an investigator who had no decision-making power as to whether the Commission proceeded against someone disseminating hate speech.

[14] The plaintiff responds that he has been attacking "hate" messages for many years and that he has merely availed himself of the law. The plaintiff claims that the postings are defamatory in that these messages attack his honesty and integrity when they say he is corrupt and an enemy of free speech. He claims that both in his profession as a lawyer and personally, these defamatory comments have damaged his reputation.

[15] The plaintiff also pleads that the defendants acted maliciously in that:

- (a) After a notice of libel was sent to the defendants, they continued to post defamatory materials on various websites;

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- (b) The defendants have not, as of the date of trial, removed any of the Postings;
- (c) The defendants have not, as of the date of trial, retracted the Postings and/or apologized to the plaintiff for having defamed him.

[16] The court has examined the postings by taking into consideration all the circumstances of each posting including the context in which the words are used, what can be reasonably inferred from them, the audience to whom they were published and the way in which they were presented. In many cases the postings were republished and frequently other participants adopted some of Mr. Fromm's comments.

[17] The postings are reproduced and analyzed below in an excerpted form to illustrate the nature and tenour of the material.

[18] ~~The question to be answered is whether the defendants published material that is defamatory?~~

[19] That is, do the statements tend to lower a person in the estimation of right thinking members of society, or to expose a person to hatred, contempt or ridicule. *Botiuk v. Toronto Free Publications Ltd.* (1995), 126 D.L.R. (4th) 609 (S.C.C.) at para. 62. To answer this question, one can consider either the ordinary meaning of the words or the surrounding circumstances. That is to say, would a reasonable person to whom they were published understand them in a defamatory sense?

The First Posting

[20] The plaintiff complains of the following words, as were posted on the Freedomsite.org website in an article entitled "Richard Warman, high priest of censorship, on rampage in London" and as posted on the Canadian Heritage Alliance website in an article entitled "We're Coming for You". Both were posted in September 2003 and they read:

Well, see your federal tax dollars at work, Lawyer, frequent litigant and investigator for the Canadian Human Rights Commission, Richard Warman – a fanatically anti-speech cabal of the politically correct – is on the warpath again.

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His latest victim is Polish immigrant Tomasz Winnicki. Perhaps because English isn't his first language. Mr. Winnicki isn't as delicate in his expression as he might be in minority-coddling Canada [...]

Human Rights persecutor Warman doesn't like being called an enemy of free speech. [...] Well, Warman IS an enemy of free speech.

There you have it: The Human Rights Commission and operatives like Warman are to be the political thought police [...]

Warman makes a habit of muscling the ISP's who host politically incorrect sites.

The war on free speech has been escalated by this complaint.

[21] The plaintiff complains of the comments that the plaintiff is a "fanatically anti-free speech cabal." In his evidence, the defendant explained that he really meant the CHRC. The sentence is not very clear but a reader would, from the ordinary meaning of the words, understand the plaintiff to be included in such a "cabal".

[22] One of the activities complained of in this posting is that the plaintiff had, in his own name, filed a complaint to the CHRC, based on procedures permitted by law, against Bell Canada who provided website space to Mr. Tomasz Winnicki. The latter's site warned Jewish people "We're coming for you and your servile dogs".

[23] The defendant in his comments on the Internet explains that the Winnicki site changed the word "Jews" to "Zionists" (a political faction rather than a religion) but he fails to mention that the amendment of the name was accompanied by the addition of swastikas.

[24] The defendant also points out in his comments that the plaintiff has sued the Northern Alliance of Canada group for libel for calling him "an enemy of free speech" who has "escalated the war on free speech".

[25]. The implication, as well as the clear meaning of the words, is that the plaintiff is doing something wrong. The comment "Well, see your tax dollars at work" also implies that Mr. Warman misused public funds for this "war on free speech".

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[26] The plaintiff was using legal means to complain of speech that he alleged was "hate" speech.

[27] The evidence was that Mr. Warman was successful in both the complaint and a libel action which he instituted.

[28] Freedom of expression is not a right that has no boundaries. These parameters are outlined in various legislative directives and jurisprudence. I find Mr. Fromm has exceeded these. This posting is defamatory.

The Second Posting

[29] The Plaintiff complains of the following words which were posted on the FreedomSite.org website along with an article published in the Toronto Star in October 2003 entitled "Jewish Lobby Being Re-Organized". Mr. Fromm's comments preceded the article commenting that "Lobbying by various Jewish groups has led to increased gagging of free speech in Canada" (as referring directly or implicitly to the Plaintiff). Mr. Fromm further commented as follows:

[...] and turned over control of the Internet to the censors of the Canadian Human Rights Commission, where truth is no defence. Since then, a number of dissidents have been dragged before human rights tribunals, largely through the efforts of CHRC hatchetman Richard Warman.

[30] The article itself outlined the concerns and structural challenges of several Jewish organizations that seemed to have conflicting views on matters. It sets out the opinions of some representatives that there has been a rise in anti-Semitism world-wide and that Canadians are becoming less sympathetic to Israel.

[31] The prefatory comments disputes these views, criticizes s. 319 of the *Criminal Code*, and Bill C-36 which the defendant asserts turned over control of the Internet to the censors of the CHRC, "where truth is no defence".

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[32] While opposition to legislation is permitted, it is defamatory to say that Mr. Warman is largely responsible for "dragging" dissidents before the human rights tribunal, when in fact the "dissidents" were disseminating prohibited hate speech. The tribunal upheld the complaint. This posting is also defamatory.

The Third Posting

[33] The Plaintiff complains of the following words which were posted on the Canadian Heritage Alliance website in September of 2003 under the heading "White Supremacists Sued". The following words were in prefatory comments to a newspaper story about the plaintiff's first libel lawsuit against a white supremacist group

Warman, apparently, objects to being called an enemy of free speech. There is no doubt that the Canadian Human Rights Commission is a mortal enemy of free speech and free thought. It is a form of political police." [Mr. Warman was described as a lawyer who works for the CHRC]

It's strange that Mr. Warman, who seems to make a career out of throttling the expression of those whose views he doesn't like, objects to being identified as an enemy of free speech. A similar scare tactic was used by the Canadian Human Rights Commission in the John Micka Internet case in 2001.

Apparently here in Absurdistan, we must let the thought police shut us down and not even call attention to the fact or to the names of our oppressors!

[34] The group which was the subject of the lawsuit was the Northern Alliance of Canada, self-described as "an advocacy group that is devoted to promoting freedom of speech and expression. We are also dedicated to the protection and advancements of the rights of Canadians of European descent". The article states that the group opposes immigrants of non-European countries, foreign aid, same sex marriage and inter-racial marriage.

[35] The prefatory comments by Mr. Fromm include, as an example of Mr. Warman's conduct as the "enemy of free speech", a recital of details of a lawsuit by Mr. Warman against "a writer and lecturer David Icke". The evidence discloses that Mr. Icke has, in a book called "Children of

the Matrix," accused Mr. Warman of various things including a cover up of satanic sacrifices, child murder, etc. Mr. Icke is the subject of another libel suit by the plaintiff.

[36] The comments by Mr. Fromm also refer to the fact that Mr. Warman wrote letters to "have the U.S. webserver of tax-fighter Richard Kyburz of Alberta shut him down". The evidence was that the Kyburz website was shut down by the Federal Court.

[37] They go on to say that Mr. Warman then filed a CHCR complaint against Mr. Kyburz for the content of his site and sought further punishment for Mr. Kyburz for "having criticized his persecutor online". Mr. Kyburz did not attend the Canadian Human Rights Tribunal hearings. In absentia, he was fined \$33,000, including \$13,000 for Mr. Warman's injured feelings. The description of Mr. Kyburz as a tax-fighter is misleading. No part of the complaint brought by Mr. Warman refers to his stance on taxes. The complaint was focused entirely on the virulently anti-Jewish messages Mr. Kyburz was posting.

[38] The words of this posting in their ordinary meaning state that the plaintiff is an enemy of free speech, a member of the government's thought police and that he makes a career out of preventing free speech. The comparison of a proper use of legal process to a "scare tactic" or a "retaliatory" action is inaccurate and incorrect. The defamatory effect is clear. Mr. Warman is held up to ridicule and contempt in a way that would lower him in the estimation of right thinking members of society. A reasonable person would be negatively impacted as to Mr. Warman's integrity and might reasonably form the view that this was because of a particular stance on taxation, a fact that is untrue.

[39] This posting is defamatory.

The Fourth Posting

[40] The Plaintiff complains of words which were posted on the FreedomSite.org website and entitled "Free Speech Supporters to Protest Meeting of Censorship Advocates in Victoria". It was repeated on the Birdman Bryant site of the Canadian Heritage Alliance organization.

[41] The posting gave details of an upcoming conference in Victoria. The defendants and other like-minded individuals and groups planned to picket in protest. The posting includes the following words:

Sunday a rather nasty group of enemies of free speech is holding a conference here in Victoria. One of their key aims is further persecution of free thinkers on the Internet.

Richard Warman, a lawyer with the Canadian Human Rights Commission, has been attacking the web sites of tax critics and opponents of Israel.

[...] powerful forces, using taxpayers' money, are working hard to throttle the Internet.

[42] This posting clearly states that the plaintiff is part of a "rather nasty group of enemies of free speech".

[43] The clear meaning of these words is defamatory and would lead to the plaintiff being lowered in the estimation of right thinking members of society. The "tax critic" Mr. Fromm refers to is Mr. Kyburz and the opponent of Israel is Mr. Winnicki. Both these gentlemen have been found to be disseminating hate speech. The description of these gentlemen in such innocuous terms omits the reality of their hate speech.

[44] The reference to "taxpayers' money" suggests the wrongful use of public funds.

[45] These words, both by their ordinary meanings and inferentially or by innuendo, are defamatory.

The Fifth and Sixth Posting

[46] These publications incorporate Mr. Fromm's comments which he had made at a press conference on October 29, 2003 (5th posting) as well as the actual text (6th posting). The Plaintiff complains of the following words, posted on the FreedomSite.org website and on the Canadian Heritage Alliance site with the title, "Hands Off Internet – Protest & Tell Ottawa".

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[47] This posting describes the press conference during which the following comments were made:

Richard Warman [...] has been attacking the websites of tax critics and opponents of Israel.

These self-appointed thought police and [sic] trying to throttle one of the most democratic media and they're doing it with taxpayers' money."

One of the most open and free media is the Internet. It's accessible to the average man. Yet, this is the very medium censors like Richard Warman are trying to throttle. In particular, we protest the use of taxpayers' money to restrict freedom of speech.

We say: "Hands off the Internet. Give free speech a chance. Shame on the thought police!

[48] At the press conference after Mr. Fromm's comments, he introduced three other people who spoke of their "problems with Richard Warman". Mr. Fromm added, after one speaker:

Thank you very much, Jason. So, for posting an opinion, the same sort of opinion that might have appeared in editorial pages in newspapers across this country, Jason and the Northern Alliance, his site has come under attack and people who are just ordinary Canadians find themselves in front of the courts for nothing more serious than expressing their opinion. This is being done with taxpayers' money. I find that reprehensible.

[49] In one posting Mr. Fromm describes Mr. Warman's "campaign of intimidation" reciting various actions taken by Mr. Warman. He states that freedom of the Internet was the key issue.

[50] Again Mr. Warman was referred to as acting like a one-man thought police agency.

[51] The plaintiff is accused of using taxpayer money to "restrict freedom of speech" and of refusing "to allow those with differing opinions the right to express their views."

[52] The tone of all these allegations is derisive and holds the plaintiff up to ridicule and contempt. The words themselves and the inferences to be drawn are all defamatory.

[53] These two postings are also defamatory.

The Seventh Posting

[54] On two occasions Mr. Fromm, director of CAFÉ, wrote to the Chief Commissioner of the Canadian Human Rights Commission, first on November 12, 2003 and again on November 23, 2003 with a formal complaint about Mr. Warman. These letters were later posted on the website FreedomSite.Org and the website Stormfront White Nationalist Community under the title "CAFÉ complaint against CHRC lawyer Richard Warman". The postings consisted of the letters sent by Mr. Fromm to the Chief Commissioner of CHRC, excerpts of which are set out below:

Mr. Warman seems to be using his position at the Commission to carry on an ideological vendetta against people he disagrees with. [...]

However, with E.T. in the Zundel case, and A.W. in the Micka case, we found the Commission's lawyers or representatives to be professional in their behaviour. Mr. Warman is another matter. He [sic] seems to behave as a professional censor and, then, when criticized, slaps his critics with libel actions.

[55] Mr. Fromm then sets out a list of Mr. Warman's objectionable activities which includes the following:

[...] Warman filed a Canadian Human Rights Commission complaint against Tadeuz [sic] Winnicki, a Polish immigrant in London, for comments critical of Israel on his website [...]

Mr. Warman's behaviour strongly suggests he is a driven ideologue with an agenda of denying free speech to groups and persons with whom he disagrees. Furthermore, his response to criticism is to threaten or launch defamation actions.

[56] The letter alleges that Mr. Warman is using his position at the Commission to carry on an ideological vendetta with people with whose views he disagrees. Mr. Warman gave evidence that he took no part in the adjudication of any complaints in his role as an employee of the

CHRC, or even in the decision as to whether certain matters would be referred from the Commission to the Tribunal.

[57] Again, in this posting, there is criticism of the plaintiff having filed a complaint against Mr. Winnicki, a Polish immigrant in London, for comments "critical of Israel". As noted above, that complaint was upheld by the CHRC on the basis of Mr. Winnicki's hate speech and racial slurs.

[58] The letter goes to specify that while other of the Commission's lawyers or representatives acted professionally, Mr. Warman behaved as a professional censor, who, when criticized, "slapped his critics with libel actions". In fact, every complaint initiated by Mr. Warman, if it has finished the CHRC process, has been upheld. Similarly, all libel actions to date have been successful.

[59] Mr. Warman is criticized for his anti-hate speech stance, and his professionalism and integrity are attacked. This would lead a reasonable reader to conclude that the plaintiff was an ideologue who wanted only to deny freedom of speech to those with whom he disagrees.

[60] I find this posting defamatory.

The Eighth Posting

[61] This posting appeared on the website FreedomSite.Org under the title "Warman Watch: Make International Criminals Out Of Web Dissidents!" That posting also appeared on the Canadian Heritage Alliance site. It featured an article from the Jewish Western Bulletin entitled "Combating Hate on the Internet. Canada's Experience May Help at a Future UN Meeting in Tunis".

Richard Warman, the high priest of Internet censorship at the Canadian Human Rights Commission [...]

Here Warman illustrates the totalitarian fanaticism that seems to drive him. He envisions international agreements that would criminalize – without a trial? – those spreading "hate" – that is criticism of privileged groups – on the Internet.

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Orwell spoke of the totalitarian's vision of the future in his novel 1984 and said it was that of a boot grinding itself into a human face. That somewhat reminds one of Warman's vision.

[62] The title of the posting on the Freedomsite.org is notable: "Warman Watch: Make International Criminals out of Web Dissidents". The comments repeat some themes from earlier publications, i.e. "the high priest of internet censorship", and addresses speeches given by Mr. Warman about possible ways that international communities may decide to deal with what he described as the proliferation of hate material on the Internet.

[63] The posting also compares Mr. Warman's "vision" to Orwell's view (in his novel 1984) of the totalitarian vision of the future as that "of a boot grinding itself into a human face". This comparison is not a direct one, as Mr. Fromm carefully notes that the comparison "somewhat reminds me" [of Orwell's view], but the innuendo is clear.

[64] The tenour of the posting is such that a reasonable person would believe that Mr. Warman was not merely musing about the possibilities of evolving hate speech laws but was stridently advocating the particular points Mr. Fromm singled out. The insertion of "without a trial" suggests Mr. Warman is advocating a lack of legal process which Mr. Warman denies. I accept his evidence on this point.

[65] This posting is also defamatory.

The Ninth Posting

[66] The Plaintiff complains of the following words posted on the Freedomsite.org website in an article entitled "Why So Shy, Mr. Warman?"

Richard Warman is the high priest of media censorship at the Canadian Human Rights Commission.

He's a censor with a mission – purge the Internet of politically incorrect thought.

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As the Canadian Human Rights Commission's lead counsel on Internet persecution Warman has taken aim at patriotic or populist dissent on the Internet [...]

Richard Warman, as a lawyer for the Canadian Human Rights Commission, must be seen as fair in discharging his public duties. His attendance at this conference, sponsored as it is, by one of the most mortal enemies of free speech on the Internet, raises questions of his fairness. Worse, is he promoting the censorship agenda of a private lobby group?

I include some fascinating correspondence involving the usually mouthy Warman which was posted on David Icke's website this week.

[67] Mr. Fromm then posted an exchange of letters between Mr. Warman and another individual. The exchange consists of a question to Mr. Warman of who paid his expenses on a trip to a conference, Mr. Warman's refusal to answer, and a further question by the individual. The trip was to a conference organized under the aegis of Unesco, but convened by the Simon Wiesenthal Centre. The conference was entitled "Educating for Tolerance: The Case of Resurgent Antisemitism".

[68] This publication describes Mr. Warman again as a censor – this time with "a mission – to purge the internet of politically incorrect thought" and to curb "patriotic or populist dissent". The comments suggest he does not discharge his duties as a lawyer fairly, and questions whether his attendance at the conference means he is promoting the "censorship agenda of a private lobby group, one of the most mortal enemies of free speech on the Internet". There is no evidence as to the truth of this comment.

[69] These comments and the tone of this posting generally would hold Mr. Warman up to ridicule and contempt and cause his reputation as a lawyer to be negatively affected.

[70] I find that this posting is also defamatory.

Notice Pursuant to *Libel and Slander Act*

[71] The plaintiff served notice with respect to four of the postings pursuant to the *Libel and Slander Act*, R.S.O. 1990, c. L-12 (the "*Act*"). No retraction or apology was made by the defendant. But he did not serve notice for the last five postings.

What is the impact of the failure to provide notice for the other five of the postings?

[72] Section 5(1) of the *Act* provides:

No action for libel in a newspaper or in a broadcast lies unless the plaintiff has, within 6 weeks after the alleged libel, come to the plaintiff's knowledge, given to the defendant, notice in writing, specifying the matter complained of, which shall be served in the same manner as a statement of claim or by delivering it to a grown-up person at the chief office of the defendant.

[73] The defendant moved for summary judgment for dismissal of the claims relating to those five postings for which no notice was served. That motion was dismissed, as was the application for Leave to Appeal, on the basis that the law was unsettled as to whether publication on the internet is a "broadcast" requiring notice pursuant to s. 5(1) of the *Act*.

[74] Having now heard all of the evidence at the three day trial, this court will consider the Notice issue afresh.

[75] The plaintiff does not dispute that if s. 5(1) applies, the failure to give notice is a complete bar to his claims for postings 5 through 9.

[76] However, the plaintiff contends that the notice provisions do not apply to Internet postings. He relies on s. 7 of the *Act* which provides that s. 5(1) applies only to "broadcasts from a station in Ontario".

[77] The questions still to be answered become:

- (a) Were the last 5 internet postings "broadcasts" within the meaning of the *Act*?
- (b) If they were, were the broadcasts from a station in Ontario?

Both questions require an affirmative answer in order for the Notice provisions under s. 5(1) to apply.

[78] In *Bahlheda v. Santa* (2003), 68 O.R. (3d) 115, the Ontario Court of Appeal found several errors in a motion decision which held that the Internet posting was a "broadcast". The Court of Appeal noted that there was a conflict in expert testimony on that issue. It also noted that those conflicting expert opinions raised considerations "that are germane not only to deciding whether internet publications are a broadcast within the meaning of the legislation but also to determining whether subsequent viewing of the internet message by 3rd parties amounts to a republication of material, or is transient or immediate".

[79] In the case at hand, there was no expert evidence and little or no evidence on which a court can decide exactly what a broadcast is.

[80] The defendants submit that the policy of the *Act* should bring an internet publication within the protocol afforded by s. 5(1). For that proposition they rely on *Janssen-Ortho Inc. v. Amgen Canada Inc.*, [2005] O.J. No. 2265 (C.A.) ["*Jansen-Ortho*"]. The Court of Appeal made an inference in that case that since the radio station that broadcast the material was in Ontario, the internet broadcast was also in Ontario.

[81] The argument in *Jansen-Ortho* does not assist us here, as these are Internet postings, e-mails or faxes, however, no newspaper or radio broadcast is involved.

[82] The 2004 Supreme Court of Canada in *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, [2004] 2 S.C.R. 427 ["*Socan*"] dealt with copyright issues and the Internet. The Supreme Court dealt specifically with whether an Internet communication occurs in Canada. The comments on the technology of the Internet and the choice of end user, host server, or content provider may serve as guideposts in the future. This court, however, would have required evidence on some of these points and none was proffered in this simplified procedure trial.

[83] In *Jansen-Ortho, supra*, no reference was made to *Socan* by the Ontario Court of Appeal.

[84] It remains accurate to say that the meaning of "broadcast" has not been conclusively determined in the case law as was enunciated by the Ontario Court of Appeal in *Romano v. D'Onofrio*, [2005] 77 O.R. (3d) while disposing of an appeal from a summary judgment motion.

[85] I conclude that the definition of broadcast must be left for a case where the evidentiary record is sufficient to permit the court to make an informed decision. However, in my view, this court can go on to examine the law as it pertains to the requirement that this "broadcast", if it is one, be "in Ontario".

[86] The only evidence before the court is that the main server is located in the United States. There was no evidence led, or submissions made, to the contrary.

[87] Accordingly, whatever "broadcast" in the *Act* means, there is no evidence that the "Ontario" requirement has been met. Since both elements must be proven, I find that s. 5(1) does not apply. Notice is therefore not required with respect to the five relevant postings in this case.

[88] I further rely on *Weiss v. Sawyer* (2002), 61 O.R. (3d) 526, where the Court of Appeal held that the benefit of s. 5(1) inures to the defendant only if the alleged libel is in a newspaper or a broadcast. No notice is required for faxes, nor for e-mail transmissions.

[89] At this time, an extremely broad application of the Notice provision of the *Act's* original purpose might not serve the legislation. The original purpose was to allow a newspaper to mitigate its damages by retracting or apologizing for words published as a mistake made in good faith.

[90] Extending the *Act's* application to a medium where words can be instantaneously disseminated around the entire globe repeatedly and with no viable possibility of effective complete retraction requires further judicial examination.

[91] There would be no notice required for the libel in the Sixth Posting which consisted of words in a speech by Mr. Fromm. Similarly, the Ninth Posting consists of letters sent by fax, and therefore no notice is required.

[92] I find that the failure to provide notice for the last five postings has no impact on the plaintiff's claims.

Defence of Fair Comment

[93] Cory J. observed in *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 [*"Hill v. Scientology"*], at para.107 and 108, that much had been written about the importance of freedom of expression but little had been written about the importance of reputation. Reputation, he said, is equally worthy of protection in a democratic society concerned about respect for the individual:

Democracy has always recognized and cherished the fundamental importance of an individual. That importance must, in turn, be based upon the good repute of a person. It is good repute which enhances an individual's sense of worth and value. False allegations can so very quickly and completely destroy a good reputation. A reputation tarnished by libel can seldom regain its former luster. A democratic society, therefore, has an interest in ensuring that its members can enjoy and protect their good reputation so long as it is merited.

[94] The law of defamation protects a person's reputation from defamatory falsehoods. In the case at bar the defamation has been established. However, the defendant relies on the defence of fair comment. Brown states in *The Law of Defamation in Canada, supra*, at pp 14, 15 that for the defence to succeed, the defendant must prove that a statement is:

- (1) a comment, not a statement of fact
- (2) based upon true facts
- (3) on a matter of public interest
- (4) made honestly and fairly
- (5) without malice

Comments – not statements of fact

[95] The plaintiff submits that the postings cannot all not be recognized as comments since sometimes they are statements of fact and sometimes they are a mixture of comment and facts. Any statement that is not reasonably a clear comment cannot be protected by the defence of fair comment. A statement must be clearly recognizable as a statement of opinion, and not a bare statement of fact.

True Facts

[96] In many cases these “facts” are untrue or half true. They are at the least reckless with regard to the truth. The most striking examples are the repeated innocuous descriptions of Mr. Kyburz as a tax critic and Mr. Winnicki as an anti-Israel critic. They have been found to be disseminating material which in each case is virulently anti-Semitic, racist, promotes hatred, and which is prohibited by Canadian laws.

Matter of Public Interest

[97] The plaintiff submits there is no public interest in harsh criticism of the plaintiff simply for pursuing rights granted by legislation which prohibits the dissemination of hate speech.

Made Honestly and Fairly

[98] The use of omissions or half-truths permits the defendant to hold the plaintiff up to contempt and to ridicule him in an unfair way. Mr. Warman is simply not doing what Mr. Fromm says he is. Objective evidence of this can be seen in the fact that all of the plaintiff's complaints to CHRC have been successful to date. One was settled at mediation, and several are still winding their way through the process, but overall Mr. Warman's position has been upheld by the law.

[99] The fairness of the comments is not to be assessed in reference to mere name calling, although that is present in abundance (i.e. “establishment scumball”, “chief hitman for thought

control drunk government”, “six foot tall worm from Ottawa”, a “fanatic” etc.). The comments in the postings go far beyond such name-calling and I have already found them to be defamatory.

[100] The defence of fair comment has not been made out on 4 of above 5 elements. The last element, that of the statement being made without malice, is discussed below.

Malice

[101] Malice was described by Cory J. in *Hill v. Scientology, supra*, at p. 1189, as follows:

Malice is commonly understood, in the popular sense, as spite or ill-will. However, it also includes [...] “any indirect motive or ulterior purpose” that conflicts with the sense of duty or the mutual interest which the occasion created [...] Malice may also be established by showing that the defendant spoke dishonestly, or in knowing or reckless disregard for the truth.

[102] There is sufficient evidence before me to find that Mr. Fromm’s comments were designed to hold Mr. Warman up to ridicule. Mr. Fromm did so in part by staying away from the truth behind Mr. Warman’s actions because of his own profound philosophical support for unbounded and unlimited freedom of expression, despite the parameters and constraints imposed by law. This was seen in many forms, most blatantly by repeated references to “tax critic” and “opponent of Israel” even though he knew the extent of the vitriolic speech of both Mr. Winnicki and Mr. Kyburz.

[103] Mr. Fromm’s postings were published either knowing the fundamental falseness of the accusations he leveled at Mr. Warman, or being reckless as to the truth of these.

[104] I find Mr. Fromm’s dominant motive was to attack Mr. Warman personally in retaliation for Mr. Warman’s use of legal processes to restrain illegal speech. The motive of malice is seen throughout the evidence, including the context of the publications, the flavour and tone of the intemperate and unnecessarily inflammatory language used, the extent of his e-mail distribution list which Mr. Fromm admitted was in the thousands, and the letters to Mr. Warman’s employer, the CHRC.

[105] The steady diet of diatribe and insults, couched in half truths and omissions all lead to the finding of malice such that the defamatory statements are not protected by the defence of fair comment.

Damages

[106] It is of note that the defendants' postings often elicited responses which generated more insults. These responses, found on other websites, usually first quoted materials by Mr. Fromm which I have already concluded are defamatory. The evidence was that Mr. Fromm's original postings would be sent by way of e-mail to an extremely large distribution list. Mr. Fromm estimated the recipients of his list included thousands of people.

[107] Each libel case is unique. In *Hill v. Scientology, supra*, the Supreme Court stated at paragraph 107:

The assessment of damages in a libel case flows from a particular confluence of the following elements: the nature and circumstances of the publication of the libel, the nature and position of the victim of the libel, the possible effects of the libel statement upon the life of the plaintiff, and the actions and motivations of the defendants.

[108] The factors to be taken into account also include the mode and extent of publication; the absence or refusal of any retraction or apology; and the whole conduct and motive of the defendant from publication through judgment.

[109] I accept Mr. Warman's evidence as to the impact of these postings on his reputation. It is not proven that the impact extended to his employment, however, when the CHRC downsized in 2004, he was the only investigator laid off.

[110] I note that there has been no retraction of any kind and no apology. Indeed Mr. Fromm admitted that he continues to speak of Mr. Warman "fairly often" on a radio broadcast. As Mr. Fromm also said "There is no libel" until the trial [and presumably the judgment] is over so what Mr. Warman calls the "unrelenting campaign to ruin my reputation as a lawyer" appears to have continued up to the trial date. Given the instant and possibly global dissemination of

messages over the Internet, the damage may continue for years. As Mr. Warman puts it "It is like an oil spill on the water of my reputation, I don't know how to put a stop to it."

[111] It is trite law to say that general damages for libel do not require proof of injury. The damages are presumed from the very publication of the false statement. There is no precise formula for the quantification of these damages.

[112] Aggravated damages are designed to compensate a plaintiff with an extra measure of damages and they are only justified in cases of malice. These are a restricted head of damages and take into account increased mental distress, humiliation and anxiety suffered by a plaintiff as a result of the malicious, outrageous conduct of the defendant. They are compensatory in nature. In assessing these, the court considers whether there was a withdrawal of the libellous statements.

[113] I also take note of the fact that the plaintiff is a lawyer. A reputation for integrity and trustworthiness is an imperative in the legal profession. Notwithstanding that the plaintiff is not engaged at present in the practice of law per se, his professional reputation continues to be of paramount importance to him now and in the future.

[114] The purpose of punitive damages was set out in *Hill v. Scientology, supra*, where it is noted that it is reserved for cases where the defendant's misconduct is so "malicious oppressive and high handed that it offends the court's sense of decency. The aim of these is not to compensate the plaintiff but rather to punish the defendant".

[115] In *Vaquero Energy Ltd. v. Weir*, [2004] A.J. No. 84 (Alberta Court of Queen's Bench) the court quotes an article in *The Lawyers' Weekly*, Vol. 19, No. 15, August 27, 1999 where Roger D. McConchic, commenting on a decision of the British Columbia Supreme Court in *Southam Inc. v. Chelebis*, [1998] B.C.J. No. 848 (appeal dismissed, [2000] B.C.J. No. 314), said:

With its global reach, capacity for instantaneous re-publication in limitless numbers, and permanent accessibility in electronic databases, Internet libel

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might do irrevocable damage to a business reputation before it comes to the attention of its targets.

[116] I find the length of time over which Mr. Warman has been the subject of Mr. Fromm's defamatory comments and the fact that these have been published literally to the world justifies the imposition of aggravated damages.

[117] In all of the circumstances here present, I award damages to the plaintiff in the total amount of \$30,000.00; \$20,000.00 as general damages and \$10,000.00 as aggravated damages. Given the combined award of general and aggravated damages, I do not find there is justification here for punitive damages.

[118] I also order that the defendant post full retractions of the postings on all websites on which he himself has posted and this within 10 days of this judgment.

[119] The parties may provide brief written submissions on costs within 15 days of this judgment.


The Honourable Madam Justice M. Métivier

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