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Alberta's Hate Speech Law Under Challenge

By Jennifer Koshan

Cases Considered:

Boissoin and the Concerned Christian Coalition Inc. v. Lund, currently before the Alberta Court of Queen's Bench

There has been much talk recently of whether hate speech laws are properly included in human rights legislation. When Alberta moved to amend its human rights legislation in 2009, some argued that section 3 of Alberta's *Human Rights, Citizenship and Multiculturalism Act*, R.S.A. 2000, c. H-14 (*HRCMA*), our hate speech law, should be amended or repealed altogether. A 2008 report by Richard Moon recommended that the analogous provision in the *Canadian Human Rights Act*, R.S.C. 1985, c.H-6 (*CHRA*), section 13, should be repealed and that the hate speech provisions of the *Criminal Code*, R.S.C. 1985, c. C-46, should be used instead. Most recently, in *Warman v. Lemire*, 2009 CHRT 26, the Canadian Human Rights Tribunal held that section 13 of the *CHRA* violated freedom of expression as guaranteed by section 2(b) of the *Charter*, and could not be justified as a reasonable limit under section 1 of the *Charter*. The tribunal thus refused to apply section 13 and declined to grant a remedy against the respondent, Lemire, even though his actions met the definition of hate speech. These developments will all be significant in the case of *Boissoin and the Concerned Christian Coalition Inc. v. Lund*, where the appellant, along with interveners the Canadian Civil Liberties Association and the Canadian Constitution Foundation, are challenging the constitutionality of section 3 of the *HRCMA* before the Alberta Court of Queen's Bench.

Linda McKay Panos commented on earlier decisions in *Lund v. Boissoin* on ABlawg (see Offensive Publication Case Highlights the Tension Between Human Rights and Civil Liberties and Remedy Decision Released in the Lund v. Boissoin Case). The case involves a complaint made under section 3 of the *HRCMA* by Darren Lund against Stephen Boissoin, who published a letter in a Red Deer newspaper entitled "Homosexual Agenda Wicked". The Alberta Human Rights Panel found that Boissoin's publication violated section 3, which provides as follows:

Discrimination re publications, notices

> 3(1) No person shall publish, issue or display or cause to be published, issued or displayed before the public any statement, publication, notice, sign, symbol, emblem or other representation that
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> > (a) indicates discrimination or an intention to discriminate against a person or a class of persons, or
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> > (b) is likely to expose a person or a class of persons to hatred or contempt

> because of the race, religious beliefs, colour, gender, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income or family status of that person or class of persons.
>
> (2) Nothing in this section shall be deemed to interfere with the free expression of opinion on any subject. …

The Human Rights Panel ordered the following remedies against Boissoin and the Concerned Christian Coalition, the organization of which he was Executive Director at the time:

- $5,000 damages to Darren Lund, the complainant.
- $2,000 for the expenses of a witness.
- An order to cease publication of future disparaging remarks about gays, Dr. Lund and other witnesses.
- An order requiring removal of all disparaging remarks against gay people on their websites and in their publications.
- An apology to Dr. Lund for the offending article, along with a request that the Red Deer Advocate publish the written apology *(Darren E. Lund v. Stephen Boissoin and the Concerned Christian Coalition Inc.* (May 30, 2008 Lori G. Andreachuck, Q.C. Panel Chair) at para. 14).

Boissoin appealed the Human Rights Panel's ruling to the Alberta Court of Queen's Bench, which heard arguments on September 16 and 17, 2009. The appeal includes a constitutional challenge to section 3 of the *HRCMA*. Boissoin's counsel and one of the interveners, the Canadian Constitution Foundation, argue that this section is *ultra vires* – i.e. beyond the constitutional powers of the provincial government. Their focus is section 3(1)(b), which deals with publications "likely to expose a person or a class of persons to hatred or contempt" and which they argue cannot be supported under any provincial heads of power. The Foundation's brief is available online, and cites a number of old cases in furtherance of this argument, including *Reference Re Alberta Legislation*, [1938] S.C.R. 100; *Saumur v. Quebec*, [1953] 2 S.C.R. 299, and *Switzman v. Elbling*, [1957] S.C.R. 285, all of which found provincial legislation interfering with freedom of expression to be invalid.

However, these cases were decided before provincial human rights legislation was in place. Provincial human rights legislation is generally aimed at preventing discrimination in accommodation, employment, and the provision of goods and services, and would likely be valid under section 92(13) of the *Constitution Act, 1867* (property and civil rights). While the Foundation does not dispute this point, it argues that section 3(1)(b) is "superfluous to the primary anti-discrimination purpose of the *HRCMA*" (at para. 13). It also points out that most other Canadian provinces do not contain provisions similar to section 3(1)(b) in their human rights legislation, rather they focus on publications which "indicate discrimination or an intention to discriminate against a person or a class of persons" (as does *HRCMA* section 3(1)(a)).

Further, the Foundation argues that section 3(1)(b) encroaches on the federal government's powers over criminal law under section 91(27) of the *Constitution Act, 1867*. Here it notes that section 319 of the *Criminal Code* prohibits hate speech, and was found to be valid in *R. v. Keegstra*, [1990] 3 S.C.R. 697 (although this case dealt with a *Charter* rather than division of powers challenge).

The Alberta government's brief is not available on-line, but in arguing that the legislation is constitutionally valid, it would likely contend that section 3(1) can be supported by the ancillary powers doctrine. This doctrine provides that where a section of an act encroaches on the powers

of the other level of government, it can nevertheless be validated if the rest of the act is *intra vires*, and the impugned provision is sufficiently connected to the rest of the act (see *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641). The Alberta government might also argue that section 3(1)(b) of the *HRCMA* does not encroach on the federal government's criminal law powers in any event, as it does not contain an intent element and does not have a criminal law purpose. Human rights legislation is widely agreed to be remedial rather than punitive. As noted by the Supreme Court in *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84 (at para. 11), "the central purpose of a human rights Act is remedial--to eradicate anti-social conditions without regard to the motives or intention of those who cause them."

The other main aspect of Boissoin's claim is that section 3(1)(b) of the *HRCMA* violates freedom of expression contrary to section 2(b) of the *Charter*. This is the focus of the arguments of the other intervener, the Canadian Civil Liberties Association (CCLA). It is important to note that this is the first time in the proceedings that *Charter* arguments have been directly raised, as the Human Rights Panel did not have the jurisdiction to consider such arguments in light of the *Administrative Procedures and Jurisdiction Act*, R.S.A. 2000, c. A-3 and the *Designation of Constitutional Decision Makers Regulation*, Alta. Reg. 69/2006.

As in *Warman v. Lemire*, one of the main *Charter* issues in *Boissoin v. Lund* will be whether *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892, can be distinguished. In *Taylor*, the Supreme Court upheld section 13 of the *CHRA*, the federal analog to section 3 of the *HRCMA*, as constitutional. Released the same day as the decision in *Keegstra*, *Taylor* saw a majority of the Court coming to a similar conclusion: that although the *CHRA* hate speech provision violated freedom of expression (as did the *Criminal Code*'s prohibition against hate speech), it could be justified as a reasonable limit on expression under section 1 of the *Charter*.

Importantly, however, the *CHRA* has been amended since *Taylor*. In *Warman v. Lemire*, the Canadian Human Rights Tribunal stated that section 13 of the *CHRA* "can no longer be considered exclusively remedial, preventative and conciliatory in nature, which was at the core of the Court's finding in *Taylor* that s. 13(1)'s limitation of freedom of expression is demonstrably justifiable in a free and democratic society, and thereby "saved" under s. 1 of the *Charter*" (at para. 279). The relevant amendments to the *CHRA* are described as follows in *Warman v. Lemire* (at para. 218):

> Under the version of the *Act* examined by the *Taylor* decision, the Tribunal could only make an order referred to in s. 53(2)(*a*) of the *Act* after finding a s. 13 complaint substantiated. Thus, a person who engaged in this form of discriminatory practice could only be ordered to cease that practice (commonly referred to as a "cease and desist order") and take measures in consultation with the Commission to prevent the same or similar practice from occurring in the future. In 1998 (S.C. 1998, c. 9, s. 28), s. 54(1) was replaced with a provision stating that the Tribunal could not only issue a s. 53(2)(*a*) order, but it could now also order a respondent
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> - where the discrimination was wilful or reckless, to compensate a victim who was secifically [sic] identified in the hate message with special compensation of up to $20,000, pursuant to s. 53(3), and
> - to pay a penalty of up to $10,000.

How do these changes compare with the remedial provisions of *HRCMA*? *HRCMA*'s remedy provision, section 32(1), provides as follows:

32(1) A human rights panel

(a) shall, if it finds that a complaint is without merit, order that the complaint be dismissed, and

(b) may, if it finds that a complaint has merit in whole or in part, order the person against whom the finding was made to do any or all of the following:

(i) to cease the contravention complained of;

(ii) to refrain in the future from committing the same or any similar contravention;

(iii) to make available to the person dealt with contrary to this Act the rights, opportunities or privileges that person was denied contrary to this Act;

(iv) to compensate the person dealt with contrary to this Act for all or part of any wages or income lost or expenses incurred by reason of the contravention of this Act;

(v) to take any other action the panel considers proper to place the person dealt with contrary to this Act in the position the person would have been in but for the contravention of this Act.

Notably, there is no authority in the *HRCMA* for a Panel to impose a penalty on the respondent, although damages awards are commonly made under section 32(1)(iv) and (v). Orders to pay damages, however, do not undermine the remedial nature of the legislation, nor do they support a criminal characterization of the legislation. The remedies available under section 32(1) of the *HRCMA* do not go as far as those in the *CHRA*, and may more easily be seen as minimally impairing freedom of expression. This was the stage at which the *CHRA* failed the section 1 justification test in *Warman v. Lemire*.

There is another issue that the *Warman v. Lemire* and *Boissoin v. Lund* cases raise, and that is their implications for the *Criminal Code* prohibition against hate speech. It must be recalled that this provision was upheld in *Keegstra* by a slim 4:3 majority. Further, one of the majority's arguments for upholding the constitutionality of a criminal law against hate speech was that it would be reserved for the most serious cases – less serious cases could be dealt with under human rights legislation. As noted by Chief Justice Brian Dickson for the majority in *Keegstra* (at para 131):

> … the state has the option of responding to hate propaganda by acting under either the *Criminal Code* or human rights provisions. In my view, having both avenues of redress at the state's disposal is justified in a free and democratic society. I see no reason to assume that the state will always utilize the most severe tool at hand, namely, the criminal law, to prevent the dissemination of hate propaganda. Where use of the sanction provided by s. 319(2) is imprudent, employing human rights legislation may be the more attractive route to take, but there may equally be circumstances in which the more confrontational response of criminal prosecution is best suited to punish a recalcitrant hate-monger. To send out a strong message of condemnation, both reinforcing the values underlying s. 319(2) and deterring the few individuals who would harm target group members and the

> larger community by intentionally communicating hate propaganda, will occasionally require use of the criminal law.

If the hate speech provisions in human rights legislation are struck down, the issues in *Keegstra* surrounding the constitutionality of the criminal provisions against hate speech may be revisited as well. And even if the criminal provisions are upheld, the elimination of human rights protections against hate speech would deprive governments of more conciliatory and less draconian ways of dealing with this social problem.