

## Offensive Publication Case Highlights the Tension Between Human Rights and Civil Liberties

By Linda McKay-Panos

### Cases Considered:

[\*Darren Lund v. Stephen Boissoin and the Concerned Christian Coalition Inc.\*](#) (November 30, 2007, Alta. H.R.P.; Lori G. Andreachuk, Q.C., Panel Chair)

In many circumstances, human rights and civil liberties principles are complementary. However, in some cases—such as those involving freedom of expression—they can conflict. In examining s. 3 of Alberta’s Human Rights, Citizenship and Multiculturalism Act (“HRCMA”), R.S.A. 2000, c. H-14, the tension between these two values is acute. A recent Alberta Human Rights Panel (“Panel”) decision illustrates how difficult it is to balance freedom of expression (supported by freedom of religion) and freedom from discrimination in Alberta.

Darren Lund, a University of Calgary professor, filed a human rights complaint alleging discrimination in the area of publications and notices on the basis of sexual orientation, after Stephen Boissoin, then the executive director of the Concerned Christian Coalition, wrote a letter to the editor of the Red Deer Advocate, entitled “Homosexual Agenda Wicked.” Lund initially complained against both the Red Deer Advocate and Boissoin. The Red Deer Advocate entered into a settlement and enacted a policy statement that provides: “The Advocate will not publish statements that indicate unlawful discrimination or intent to discriminate against a class of persons, or are likely to expose people to hatred or contempt because of...sexual orientation.” The complaint proceeded against Boissoin and the Concerned Christian Coalition under s. 3 of the HRCMA, which provides as follows:

- 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
- (a) indicates discrimination or an intention to discriminate against a person or a class of persons, or
  - (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. ...

(3) Subsection (1) does not apply to

(a) the display of a notice, sign, symbol, emblem or other representation displayed to identify facilities customarily used by one gender,

(b) the display or publication by or on behalf of an organization that

(i) is composed exclusively or primarily of persons having the same political or religious beliefs, ancestry or place of origin, and

(ii) is not operated for private profit, of a statement, publication, notice, sign, symbol, emblem or other representation indicating a purpose or membership qualification of the organization, or

(c) the display or publication of a form of application or an advertisement that may be used, circulated or published pursuant to section 8(2), if the statement, publication, notice, sign, symbol, emblem or other representation is not derogatory, offensive or otherwise improper.

By virtue of *Vriend v. Alberta*, [1998] 1 S.C.R. 493, “sexual orientation” is read into this section as a protected ground.

The Panel dealt with three main issues:

1. Did Boissoin’s letter breach HRCMA s. 3(1)?
2. Is subsection 3(2) a defence to the breach of s. 3(1)?
3. Does the Human Rights and Citizenship Commission have jurisdiction to adjudicate on the complaint?

On the first issue, the Panel found that Boissoin’s letter violated s. 3(1) because it caused the publication of statements that, on the balance of probabilities, were likely to expose gays, a vulnerable group, to hatred and contempt due to their sexual orientation, effectively making it more acceptable to others to manifest hatred toward gays. The Panel relied on the factors set out in *Re Kane*, 2001 ABQB 570, a decision of Justice John Rooke, to determine whether the publication was “likely to expose” gays to hatred and contempt. These include:

- the content of the communication,
- the tone of the communication,
- the image conveyed, including whether the issues of quotations and reference sources, gives the message more credibility,
- the vulnerability of the target group,
- the degree to which the expression reinforces existing stereotypes,
- the circumstances surrounding the issues, including whether the messages appeal to well publicized issues,
- the medium used to convey the message,
- the circulation of the publication and its credibility, and
- the context of the publication – whether it is part of a debate or whether it is presented as news or as a purportedly authoritative analysis.

The Panel held that the letter's content exposed gays to contempt and reinforced existing stereotypes. The Panel noted the allegation that a local young gay man was beaten by a regular visitor to a drop-in centre operated by Boissoin within two weeks of the letter's publication. The Panel also heard evidence about the prevalence of hate bias crimes against gays in Alberta from a former police officer from Calgary who had served for a number of years as the hate bias officer. Extensive quotations from the letter in question are set out in the judgment, and will not be repeated here.

With respect to the second issue, the purpose and effect of subsection 3(2), or its equivalent in other jurisdictions, have been the subject of some legal decisions. After considering a number of authorities, the Panel determined that the role of s. 3(2) was to admonish the Panel to balance freedom of expression with the eradication of discrimination in the consideration of complaints under s. 3, but noted also that s. 3(2) is not a complete defence nor a justification for a breach of s. 3(1).

Boissoin argued that he wrote the letter hoping to promote spirited debate in the community, to educate youth and to promote political action, and that he did not intend to discriminate against gays. The intervenor Canadian Civil Liberties Association (CCLA), while finding Boissoin's message abhorrent, supported Boissoin's right to freedom of expression and freedom of religion, arguing that the effects of the impugned letter could be countered by published rebuttal. CCLA argued that Boissoin's views may be "jarring, extreme, polemical, offensive and confrontational," but posited that when offensive speech is subjected to legal prohibition, serious dangers arise. First, it may result in the prohibition of expression that is fundamental to the rigorous debate and individual decision-making that underlies a functioning democracy. Second, such prohibition casts a chill over all future speakers, leading to self-censorship. The CCLA also noted that the Supreme Court has held that the guarantee of free expression in the Canadian Charter of Rights and Freedoms ("Charter") s. 2(b) applies equally to speech that is regarded as wrong, false and offensive.

The Panel held that the Alberta legislature did not intend to protect hatred under s. 3(2). The Panel relied on Justice Rooke's statement in *Re Kane* at para. 67 (quoting the Supreme Court of Canada in *R. v. Keegstra*, [1990] 3 S.C.R. 697), that "protection from discriminatory and hate/contempt-based expression is a pressing and substantial objective, and is justified in a free and democratic society." Individuals expressing their opinions or expressing political statements must make their views known in a responsible manner. Thus, the broad protection granted to freedom of expression and freedom of religion under the Charter did not override the protection against hatred and contempt provided under the HRCMA.

On the third issue, Boissoin and the CCLA argued that the Panel did not have jurisdiction to hear the complaint because the provincial legislature may only curtail expression directly linked to specific discriminatory actions prohibited by the HRCMA. Thus, Boissoin's letter lacked a direct link to a discriminatory practice within the legislative jurisdiction of the province. Legislating against hate speech should be dealt with under the criminal law jurisdiction of the federal government. The Panel found that it had jurisdiction to hear the complaint, because the

complaint concerned a matter that was local and private in nature and therefore within provincial legislative jurisdiction. Boissoin's letter was related to the educational system in Alberta and there was circumstantial connection between the hate speech and the attack on the gay teenager in Red Deer within two weeks of the publication of the offending letter.

Interestingly, none of the parties raised the issue of whether Boissoin could have relied upon the defence in s. 3(3) or the general defence found in HRCMA s. 11.

The Panel left the issue of the appropriate remedy to a future decision.

The larger issue raised by this case is what is the best method for dealing with hate speech? Many civil libertarians do not support hate expression laws because they represent a danger to unpopular forms of expression, and could be misapplied to seriously chill public debate. A better option, in their view, would be to follow the American approach and permit the expression of all ideas and beliefs, no matter how offensive, in a free marketplace of ideas where the give and take of uncensored debate will expose the absurdity of hate propaganda.

On the other hand, those who support HRCMA s. 3 and other hate expression laws note that the core message of hate expression is that the target group and its members are different from, and therefore inferior to, the group with whom the source of the expression identifies. A second message generally accompanies the first message—the target group has harmed, or threatens to harm, the group to which the speaker belongs. Thus, the target group is not worthy of the same dignity or respect that ought to be shown the members of the speaker's group, and to members of society in general. The conclusion may be that the target group and its members are not entitled to the same basic rights and liberties as the rest of society or the group with which the speaker identifies.

Defenders of hate expression laws also argue that hate expression may have negative effects on the members of the target groups and the rest of society. Persons who are the subject of hate speech may internalize the contempt they are exposed to and suffer from a reduced sense of selfworth and dignity. They may feel they do not belong to the larger community and withdraw from that larger community, creating the twin problems of ghettoization and silencing (a "chilled freedom of expression"), as well as adverse economic and social consequences for the target group. Target group members may try to assimilate and pass for majority members; or, they may aggressively defend themselves and their community, thereby increasing social tensions, the potential for violence, and a polarized society. Any of these understandable reactions diminishes the quality of the target group's participation in society, and in turn damages the fabric of Canada's multicultural society and its commitment to the equality of persons. As the majority of the Supreme Court of Canada recognized in *Keegstra*, this is the early damage that hate expression can do to the fabric of a tolerant, multicultural society, whether people speak out against hate expression or ignore it.

Thus, we are left with the original question: how do we balance freedom of expression and freedom from discrimination in Alberta.