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Amendments to Bill 44 Worsen a Bad Bill

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Legislation Considered:

Bill 44, *Human Rights Citizenship and Multiculturalism Amendment Act*; *Amendment A1A*; *Amendment A1B*

In a previous post, I discussed a number of concerns about the proposed amendments to Alberta's *Human Rights Citizenship and Multiculturalism Act*, R.S.A. 2000 c. H-14 ("Act"). One of the proposed amendments in Bill 44, referred to as the parental opt-out provision, has been the subject of much criticism. See Janet Keeping and Sheila Pratt, for example.

The proposed addition to the Act originally read as follows (emphasis added):

> 11.1(1) A board as defined in the School Act shall provide notice to a parent or guardian of a student where courses of study, educational programs or instructional materials, or instruction or exercises, prescribed under that Act include *subject-matter that deals explicitly with religion, sexuality or sexual orientation.*
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> (2) Where a teacher or other person providing instruction, teaching a course of study or educational program or using the instructional materials referred to in subsection (1) receives a written request signed by a parent or guardian of a student that the student be excluded from the instruction, course of study, educational program or use of instructional materials, the teacher or other person shall in accordance with the request of the parent or guardian and without academic penalty permit the student
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> > (a) to leave the classroom or place where the instruction, course of study or educational program is taking place or the instructional materials are being used for the duration of the part of the instruction, course of study or educational program, or the use of the instructional materials, that includes the subject-matter referred to in subsection (1), or
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> > (b) to remain in the classroom or place without taking part in the instruction, course of study or educational program or using the instructional materials.

There are two main amendments which were passed in the Legislature on May 26, 2009. Both are intended to address concerns about the parental opt-out provision. The first amendment

provides that the phrase “explicitly with religion, sexuality or sexual orientation” be replaced with “*primarily and* explicitly with religion, *human* sexuality or sexual orientation” (emphasis added). The addition of “human” before “sexuality” addresses the concern that the opt-out as originally worded could apply to all education about animal reproduction. The addition of the word “primarily” is presumably intended to ensure that casual references to these subjects in the classroom will not trigger the need to notify the parents of their right to opt the child out.

Similarly, an additional subsection is added:

> (3) This section does not apply to incidental or indirect references to religion, religious themes, human sexuality or sexual orientation in a course of study, educational program, instruction or exercises or in the use of instructional materials.

However, these amendments are not going to address the concerns raised about s. 11.1. The words “primarily”, “incidental” or “indirect” will now have to be interpreted by human rights tribunals and/or the courts. Will it mean a lesson of a particular length (e.g., 20 minute discussion versus a 30 second reference to one of the three issues)? Or, if parents are truly concerned that their child not be exposed to material or discussion on issues that they have determined are unsuitable, will even a brief reference in class that deals directly with the impugned topics be sufficient to raise their concerns and cause a complaint to be made? This does not fix the problem raised by the amendment. It adds an additional problem: interpretation of “primarily”, “indirect” or “incidental”.

The second amendment seeks to address the concern that teachers and school administrators could be the subject of a human rights complaint. It provides the Director of the Human Rights Commission (”Commission”) with the authority to refuse to accept a complaint that “could or should more appropriately be dealt with, has already been dealt with, or is scheduled to be heard in another forum or under another Act” (the proposed section 22(1.1)).

The notion was likely that in the case of educators, the more appropriate forum would be the principal’s office or the school board. However, this section is not limited to complaints that section 11.1 has been violated. It applies to the Act in its entirety. Thus, in any area covered by the Act (e.g., employment, services customarily available to the public, tenancy, or trade unions) on any ground covered (e.g., race, religion, ancestry, gender, disability), the Director, a provincial employee who is not the Chief Commissioner, would have the authority to refuse to accept a complaint even if the Commission would otherwise have jurisdiction.

Further, the amended legislation does not define “forum”. A more appropriate “forum” could also mean you should complain to your supervisor or to the press. Perhaps the Commission staff would be pleased that they can expect less work as they can deflect complaints elsewhere! In addition, even if we confine “forum” to mean an administrative body or court, this amendment (probably hastily made without consultation about the consequences) fails to recognize that the courts have already addressed the situation where more than one forum has jurisdiction to deal with a human rights complaint. This situation arises most often in employment and labour cases.

For example, both a labour arbitration board and the Commission could have jurisdiction. Because these tribunals have different functions and procedures, complainants choose where they will pursue a remedy.

In this situation, the factors that influence the decision are as follows. First, human rights commissions have been criticized for being too slow, dismissing too many complaints or failing adequately to help complainants through the process. Further, there is a concern that the maximum amount of financial redress human rights legislation provides is too modest (J. Payne and C. Rootham, "Are Human Rights Commissions Still Relevant?" Paper prepared for the First Annual Catherine Helen MacLean Memorial Lecture (2005) at 1-3). On the other hand, labour arbitration boards are considered more expeditious in resolving complaints and an "accessible and inexpensive forum" for dispute resolution (*Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324* (2003), 230 D.L.R. (4th) 257 (S.C.C.) at para. 50). However, since most complaints are brought by unions, there is a concern that the collectivist nature of a trade union (i.e., its interest in protecting the majority of the workers) might work against an employee who raises a human rights issue before a labour arbitration board (Payne and Rootham at 26).

In most provinces, human rights commissions first decide whether the complaint is made in a timely way (e.g., within one year of the event) and whether another tribunal should hear the complaint (e.g., the Canadian Human Rights Commission if the matter is governed federally), and will then either take the complaint or not. If they decide to take the complaint, commissions then usually appoint an investigator to investigate and prepare a report for the Commission, who decides whether to dismiss the complaint or to refer it to a tribunal (panel). The Commission may also decide to settle a complaint at any stage of the matter, including those cases that have been referred to a tribunal. Most cases before human rights commissions are either dismissed or settled before they reach a tribunal. Confidentiality rules mean that the public will not have access to the results. On the other hand, in labour arbitration, a complaint is brought by the union, which has control over how the case proceeds. A private arbitrator, chosen and paid for by the parties, makes a binding decision. Labour arbitrators are trained to make decisions that encourage "industrial peace" or avoid strikes (B. Etherington, "Promises, Promises: Notes on Diversity and Access to Justice" (2000), 26 Queen's L.J. 43 at para. 22).

The Court of Appeal of Alberta has concluded in two recent decisions, *Amalgamated Transit Union, Local 583 v. City of Calgary and Labour Arbitration Board*, 2007 ABCA 121 and *Calgary Health Region v. Alberta Human Rights and Citizenship Commission and Diana Hurkens-Reurink*, 2007 ABCA 120, that where both the Commission and the labour arbitration board were available, the employee or his/her union could pursue either avenue for a remedy. However, the court also made it clear that the first tribunal's decision might be binding on the second tribunal. Consequently, if the labour arbitrator found that there was no discrimination in the case, that ruling would probably be binding on the Commission (if that process occurred later).

This amendment is effectively putting the choice of forum in the hands of the Director and out of the hands of the complainant. It is likely that this consequence was not contemplated in the addition of this amendment. Because these amendments were hastily made without adequate consultation, they are making a bad Bill even worse. In light of these developments, Bill 44 should be scrapped altogether. However, it is anticipated the Bill will become law next week.