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Court upholds Alberta's Hate Speech Law

By Jennifer Koshan

Cases Considered:

Boissoin v. Lund, 2009 ABQB 592

Back in September, I predicted the failure of a constitutional challenge to Alberta's hate speech law, section 3 of Alberta's *Human Rights, Citizenship and Multiculturalism Act*, R.S.A. 2000, c. H-14 (*HRCMA*) (recently re-enacted as the *Alberta Human Rights Act*, R.S.A. 2000, c. A-25.5). The law was challenged by Stephen Boissoin on both division of powers and *Charter* grounds as part of his effort to overturn an earlier decision of the Alberta Human Rights Panel which found that Boissoin had engaged in hate speech for his letter to the editor "Homosexual Agenda Wicked", published in the Red Deer Advocate. On December 3, 2009 Justice Earl Wilson of the Court of Queen's Bench upheld the constitutionality of section 3. However, he also found that Boissoin's publication did not amount to hate speech under that section. I will deal with the constitutional issues in this post; Linda McKay Panos will be posting on the interpretive issues.

Justice Wilson summarized the relevant provision, section 3(1)(b), as follows:

> No person shall publish … or cause to be published … before the public any statement … that … is likely to expose a person or a class of persons to hatred or contempt because of the … sexual orientation … of that person or class of persons.

On the question of the jurisdiction of the province to enact this law, Justice Wilson noted that there was no question about the constitutionality of human rights legislation as a whole. As found in *Scowby v. Saskatchewan (Board of Inquiry)*, [1986] 2 S.C.R. 226, human rights laws are valid provincial legislation under ss. 92(13) and (16) of the *Constitution Act, 1867*, as they deal with discrimination in matters of housing, employment, and education, all of which are within provincial competence.

However, was section 3(1)(b) of the *HRCMA* a "stand-alone prohibition" on hate speech, too "remote from the listed fields in the Act", as argued by the intervener Canadian Civil Liberties Association (at para. 28)? Or, as the intervener Canadian Constitution Foundation contended, was it problematic that a person could seemingly violate section 3(1)(b) without any connection to the areas of housing, employment and services customarily available to the public?

Justice Wilson rejected these arguments as "mistaken reliance upon a narrow, literal interpretation of the section" (at para. 29). Such an interpretation, he found, would be contrary to the *Interpretation Act*, R.S.A. 2000, c. I-8, which provides that "[a]n enactment shall be construed as being remedial, and shall be given the fair, large and liberal construction and interpretation that best ensures the attainment of its objects" (section 10, erroneously referred to as section 11 of the *Alberta Interpretation Act* at para. 30).

Taking such an approach, Justice Wilson held that "the aim of section 3(1) is to discourage, if not eliminate activity which reenforces [sic] prejudice which, in turn, fosters discrimination and discriminatory practices against persons or classes of persons" (at para. 31). Put another way, "the failure to prohibit such hateful or contemptuous statements can result in other persons – readers or listeners – engaging in prohibited discriminatory practices or activities against a person or class of persons because of their sexual orientation" (at para. 33).

Without saying so explicitly, Justice Wilson was using the ancillary powers doctrine to support the validity of section 3(1)(b) because of its connection to the rest of the Act. He noted that this section standing alone would be *ultra vires* the province: "to be clear, the purpose of the section cannot be to simply restrain hateful or contemptuous speech *per se*" (at para. 33). This would intrude on the federal government's powers to make criminal law under section 91(27) of the *Constitution Act 1867*. However, because the section reinforces the rest of the *HRCMA* by restraining publications which could lead to discriminatory conduct in the protected areas, section 3(1)(b) could stand. It would have been helpful if Justice Wilson had adverted to the ancillary powers doctrine more explicitly and had been clear as to whether he was applying a rational functional connection test or the more stringent necessarily incidental test (see *General Motors v. City National Leasing*, [1989] 1 S.C.R. 641).

Importantly, Justice Wilson also dismissed the hypothetical that section 3(1)(b) would be invalid if it provided for penalties upon violation of the section. Citing *Scowby v. Saskatchewan*, he noted that such penalties could be supported under section 92(15) of the *Constitution Act 1867*, which allows provinces to enforce compliance with their laws by creating offences and penalties. Penalty provisions may nevertheless be relevant to the constitutionality of hate speech provisions under the *Charter*, as seen in the recent case of *Warman v. Lemire*, 2009 CHRT 26. More on this later.

Overall, then, section 3(1)(b) was found to be *intra vires* the province of Alberta.

Justice Wilson's reasons for decision relating to the *Charter* are *obiter*, as he held that Boissoin's publication did not fall within the scope of section 3(1)(b) of the *HRCMA*. It is interesting that he sandwiched the issue of how section 3(1)(b) should be interpreted and applied between the two constitutional issues. This could be seen as analogous to the approach taken in cases such as *R. v. Keegstra*, [1990] 3 S.C.R. 697 and *R. v. Butler*, [1992] 1 S.C.R. 452, where the Supreme Court effectively read down the provisions in questions before ruling on their compliance with the *Charter*.

Under the *Charter*, Boissoin had argued that both his freedom of religion (*Charter* section 2(a)) and freedom of expression (*Charter* section 2(b)) were engaged by section 3(1)(b) of the *HRCMA*. Justice Wilson decided the proper focus was section 2(b) of the *Charter*, as the publication was "really but a manifestation of his religious beliefs" (at para. 117). Further, the Crown and Lund had conceded a violation of freedom of expression. The focus of the *Charter* claim was therefore whether the infringement of section 2(b) could be justified under section 1 of the *Charter*.

As predicted, the case of *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892 was seen to be a binding precedent. In that case, the Supreme Court upheld the hate speech provision in section 13 of the *Canadian Human Rights Act*, R.S.C. 1985, c.H-6 (*CHRA*). Justice Wilson noted the similarity in language between section 13 of the *CHRA* and section 3 of the *HRCMA*, and that the remedies under the two statutes were "essentially similar", at least at the time of *Taylor* (at paras. 122-3). He also noted that the Saskatchewan Court of Appeal had dismissed a *Charter* challenge to its hate speech law in *Saskatchewan (Human Rights Commission) v. Bell* (1994), 114 D.L.R. (4th) 370, 1994 CanLII 4699, on the basis that *Taylor* was binding.

Boissoin endeavoured to distinguish *Taylor* on the ground that his case added a dimension of freedom of the press, since the Red Deer Advocate had published "Homosexual Agenda Wicked" as a letter to the editor. This argument was along the lines that the involvement of the press made the violation of freedom of expression more serious, and harder to justify under section 1. Justice Wilson dismissed this argument, stating as follows:

> While I acknowledge the vital public role of the media in gathering and disseminating news and the value of letters to the editor in particular, I am not satisfied that the appellant can properly claim some type of super-added right by riding the newspaper's constitutional coattails simply because of the latter's involvement in choosing to publish the letter (at para. 121, footnotes omitted).

Boissoin also relied on *Warman v. Lemire*, which departed from *Taylor* and found that amendments to the remedies provisions associated with section 13 of the *CHRA* rendered that provision unconstitutional. The amendments create the potential for a penalty in addition to damages for those who wilfully or recklessly breach section 13 (*CHRA* section 54(1)(c)). Justice Wilson refused to follow *Warman v. Lemire*, finding that the legal and factual contexts of that case were very different from those at issue in *Boissoin v. Lund*. Perhaps most significantly, a breach of section 3 of the *HRCMA* does not attract penalties as does a breach of section 13 of the *CHRA*. *Taylor* was thus seen as continuing to bind the Court, and Justice Wilson found section 3 of the *HRCMA* constitutional on that basis.

My view is that Justice Wilson's decision on the *Charter* issue is correct. Until *Taylor* is overruled by the Supreme Court, or unless section 3 of the *HRCMA* is amended so that it can be distinguished from the law at issue in *Taylor*, section 3 should stand as a constitutional response to hate speech.

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