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Court of Queen's Bench Overturns Panel Decision in *Boissoin v. Lund*

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Cases Considered:

Boissoin v. Lund, 2009 ABQB 592

Justice Earl Wilson of the Alberta Court of Queen's Bench recently overturned the Human Rights Panel decision, which found that Mr. Stephen Boissoin and the Concerned Christian Coalition Inc. had, in a letter to the editor of a newspaper published June 17, 2002, expressed comments likely to expose gay persons to hatred and/or contempt due to their sexual orientation. See my earlier ABlawg posts on the Panel decision and the remedy decision.

The Panel found that Boissoin violated s. 3(1)(b) of the Alberta *Human Rights, Citizenship and Multiculturalism Act* R.S.A. 2000, c. H-14 (recently re-enacted as the *Alberta Human Rights Act*, R.S.A. 2000, c. A-25.5) ("Act") which provides:

> 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.

Boissoin argued that 1) the legislation is *ultra vires* (outside the jurisdiction of the provincial government); 2) the legislation violates *Canadian Charter of Rights and Freedoms* ss. 2(a) and (b) and cannot be saved by *Charter* s. 1; 3) the letter's contents were not hateful or contemptuous of gay people, and, in any event, were protected speech under the *Charter* and 4) the remedies imposed were unlawful or unconstitutional. In a separate post, Jennifer Koshan addressed the first two issues. This post will focus on the latter two.

Dr. Lund conceded during argument that there were some legal deficiencies in the remedies granted by the Panel. Justice Wilson concluded that the contents of the letter did not violate the Act and that the remedies imposed by the Panel were either unlawful or unconstitutional. He also provided observations regarding "various troubling aspects of the process leading to the decision of the Panel, including my finding that the Panel was wrong in holding that the Concerned Christian Coalition Inc., was properly before it; alternatively, wrong in holding that that organization had violated the Act."(para. 8)

In analyzing whether s. 3(1)(b) was violated, Justice Wilson first concluded that the allegedly hateful or contemptuous speech must be directly linked to areas of prohibited discriminatory practices in order to be *intra vires* the province (see Jennifer Koshan's post). He thus concluded that s. 3(1)(b) applies only to hateful expression that itself signals an intention to engage in discriminatory behaviour or seeks to persuade another person to do so. Thus, in order to give proper effect to s. 3(1)(b), both the message and its intended effect must be considered. Secondly, there must be some likelihood that the message might bring about a prohibited discriminatory practice in order to engage s. 3(1)(b). In making these determinations, Justice Wilson agreed with the submission of the intervenor Canadian Civil Liberties Association (para. 43).

Justice Wilson recognized that s. 3(1)(b) is silent about the writer's motivation or intent, but concluded that every message has some purpose or intent behind "its thoughtful creation and planned dissemination to others" (para. 44). Taken with the reference in s. 3(2) to "free expression of opinion", this led to the conclusion that the writer's motivation or intent must therefore be implicated in s. 3(1)(b). Indeed, Justice Wilson held that, "Properly drawing the link or connection between the discriminatory message and an intended discriminatory practice is crucial." (para. 46)

Justice Wilson provided the example of *Saskatchewan (Human Rights Commission) v. Bell* (1994), 114 D.L.R. (4th) 370, 1994 CanLII 4699 (C.A.), to illustrate how the use of a symbol (stickers which depicted caricatures of racialized minority persons with a red circle and slash superimposed) had led to the conclusion that they had the purpose and effect of causing or tending to cause others to engage in discriminatory practices (paras. 47-49). However, Justice Wilson noted that there should have been some evidence that a landlord or shopkeeper in Saskatchewan "might be persuaded to knowingly violate the law" (para. 54).

Justice Wilson stated at para. 56:

> Absent some "concrete evidence" linking the message to discriminatory practices, only reasonable and appropriate inferences as to discriminatory effects may be drawn and relied upon when considering the "likely to expose" requirement.

He also distinguished the SCC decision *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892 ("*Taylor*") with reference to this point, noting that the federal human rights legislation requires no connection to prohibited discriminatory activity, which is different from our provincial legislation (para. 56).

Justice Wilson concluded that the letter and the evidence provided at the Panel about its potential effects were not sufficient to create a linkage between the impugned message and discriminatory practices (para. 61). In particular, there was no direct evidence that a person was assaulted because of his sexual orientation, and no evidence that the letter actually served as a trigger for the assault. The evidence provided to the Panel about the gay person who was assaulted was hearsay.

Justice Wilson also concluded that the Panel incorrectly applied the test developed by Justice Rooke to determine if a message was "likely to expose" people to hatred or contempt in the *Re Kane* case, 2001 ABQB 570 ("*Kane*"), which included these questions:

> Does the communication itself express hatred or contempt of a person or group on a basis of one or more of the listed grounds? Would a reasonable person, informed about the context, understand the message as expressing hatred or contempt?

The Panel had relied on subsequent letters to the editor of the Red Deer Advocate responding to the impugned letter to the editor to conclude that the message was likely to expose people to hatred or contempt. However, Justice Wilson held that there was no basis to settle the "reasonable person's understanding" of the letter's message simply by reading subsequent letters to the editor. Further, the Panel had not explained how she arrived at the conclusion that the writers were "informed about the context", which is also a requirement of the reasonable person test set out by Justice Rooke. Thus, in concluding that a reasonable person would understand the message as expressing hatred or contempt, the Panel had taken irrelevant considerations into account (para. 78).

Finally, Justice Wilson ruled on whether the letter to the editor expressed hatred or contempt for gay persons. He also followed the approach suggested by Justice Rooke in ensuring that the section did not "interfere with the free expression of opinion on any subject" (per s. 3(2)). Justice Rooke had recommended that once a *prima facie* breach of s. 3(1)(b) was found, the Panel must go on to specifically balance freedom of expression against the particular breach.

Justice Wilson concluded that the Panel had erred in finding that the letter was hateful and contemptuous of gay persons and that the Panel further erred by failing to properly conduct the balancing required by s. 3(2). Justice Wilson held that the language of the letter was not of the extreme nature required by the definitions set down in other precedents (e.g. *Taylor* and *Kane*). He noted that the Panel had misread the letter when she held that the letter [made] erroneous connections between homosexuality and disease and "[drew] false analogies between homosexuality and pedophilia". He also noted that the "militaristic tone" of the letter was for metaphorical purposes only (paras. 95-7).

While he did not need to (having concluded that the letter was not hateful or contemptuous), Justice Wilson proceeded to look at the balancing required under s. 3(2). He discussed the Panel's misapprehension of the evidence that there had been pre-existing debate about the topic, such as indicated by the evidence of newspaper columns and previous letters on the topic provided by the editor of the Red Deer Advocate. Concluding that there was no pre-existing debate on the topic stripped Boissoin of any credible, contextual basis to claim that the letter manifested political or religious expression (para. 105).

The cumulative errors made by the Panel led Justice Wilson to conclude that the Panel's decision could not stand.

Because the Concerned Christian Coalition (CCC) was not named in the original complaint, other than to identify Stephen Boissoin's position as Executive Director of the organization, and there was no evidence of its involvement in the letter, Justice Wilson held that the Panel erred in law in fixing any liability on the CCC.

Justice Wilson also held that the remedies imposed by the Panel were all without legal foundation or beyond the authority granted by s. 32 of the Act. His reasons were as follows (para. 149):

> a) the direction to cease and desist the publishing of "disparaging remarks about gays and homosexuals" is beyond the power of the Panel. "Disparaging remarks" were not defined by the Panel. But clearly, "disparaging remarks" are remarks much less serious than hateful and contemptuous remarks and are quite lawful to make. They are beyond the power of the *Act* to regulate and the power of the Province to restrain.
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> b) the direction to cease and desist "from committing the same or similar contraventions of the *Act*" is unlawful as, again, "same or similar contraventions" are not defined and leave the parties in a state of uncertainty as to what precise speech is proscribed. To the extent that this "remedy" is linked to (a) it suffers from the same absence of legal foundation.
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> c) the direction to issue a written apology to Dr. Lund is beyond the power of the Panel to order in this case. The classic example, where it is appropriate, would be an apology to an individual who lost out on an accommodation because of discrimination. Here Dr. Lund suffered no loss of any kind. He does not qualify to receive an ordered apology.
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> d) the order that the Red Deer Advocate be requested to publish the written apology to Dr. Lund fails on the basis that no written apology could be properly ordered. The related order that the Red Deer Advocate be requested by the Appellant to publish a copy of the Remedy Order of the Panel fails on the basis that there is no authority in the *Act* which allows a panel to make such an order.
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> e) the direction that Dr. Lund be awarded \$5,000 in damages (assuming "damages" falls within the scope of s. 32 (1)(b)(v) of the *Act)* fails on the basis that there was no evidence that Dr. Lund met the criterion of being a person "dealt with contrary to this *Act*". But further Dr. Lund's "damages" related to what he described as the retaliatory lawsuit launched by the Appellant directly related to the complaint, which lawsuit he says was frivolous and without merit. But Dr. Lund also advised that the parties agreed to the discontinuance of that lawsuit "without costs." The \$5000 "damages claim" was asserted to be partial compensation of the more than \$30,000 in legal costs he incurred in defending that lawsuit. Bluntly stated, parties can't claim for costs and damages in one proceeding relating to costs or damages said to arise in a different proceeding;

particularly where costs were abandoned.

f) the Order directing the payment of expenses incurred by a witness called by Dr. Lund fails on the basis that there is no authority in the *Act* to permit such an Order. In addition to the curious fact that the Panel ruled that she would privately decide what witness expenses would be honoured and up to a $2000 ceiling amount, there is the additional fact that Dr. Lund had only sought damages for the witness's "pain and suffering". It's not clear how that claim was transformed into the remedy ordered. Regardless neither matter is a permitted remedy under the *Act*.

Finally, Justice Wilson commented on some other issues. First, Boissoin argued that Dr. Lund was a "Private Prosecutor with a Cause", much in the same vein as stated about Richard Warman in an article written by Mark Steyn about the *Warman v. Lemire*, 2009 CHRT 26 decision. Justice Wilson correctly noted that a complainant's motivations to complain were strictly speaking irrelevant. Dr. Lund was well within his rights to take carriage of the complaint under the Act. Justice Wilson said that if Boissoin had any issues with the process, they should be taken up with the Legislature, and not the complainant.

Second, Boissoin argued that the statements made by the Chief Commissioner in ordering that the Panel hear the matter ("the letter which they wrote and which contained the inflammatory, hateful and untruthful comments") were prejudicial. Justice Wilson noted that the Chief Commissioner should not have made those comments and that the Panel should have expressed a "cleansing self instruction that she had disabused her mind of both the unfortunate words and apparent prejudgment expressed by the Chief Commissioner" Para. 161).

Third, there should have been some cleansing self instruction with regard to some aspects of the cross-examination of Boissoin, which was prejudicial. For example, Boissoin was asked if he had ever referred to the Human Rights Commission as a "kangaroo court".

Fourth, the Panel said too much when discussing the fact that the Red Deer Advocate was not part of the complaint. Noting that the newspaper had expanded its letters policy wrongly left the impression that the newspaper had agreed that it had breached the Act when it published the letter and had taken steps not to repeat that transgression in the future.

In reviewing the decision, it is difficult to imagine evidence that would have led Justice Wilson to find that s. 3(1)(b) was contravened. Would it have been sufficient if the victim of the gay bashing had testified and provided evidence that the bashing was precipitated by the letter's content? Perhaps not. This is because Justice Wilson concluded that the letter's language did not rise to hateful or contemptuous. Even if the gay bashing would provide sufficient evidence from which one could reasonably conclude the language was likely to expose a person to hatred or contempt, would the gay bashing itself be a discriminatory practice covered under the Act? It would certainly be based on the ground of sexual orientation. However, it would also have to be linked to an area covered under the Act: employment, services customarily available to the public, tenancy, or trade union membership. The information provided does not seem to indicate

that the gay bashing occurred in any of these contexts. One would have to argue that evidence of gay bashing in another context illustrates that discrimination is likely to occur in a context to which the Act applies.

I take from this case that in order to be *intra vires* the province, s. 3 will only apply to discrimination or exposure to hatred or contempt that is linked to discriminatory practices that are prohibited under the Act. Although s. 3 does not so state, Justice Wilson has made it clear that this is a requirement. This is a significant development.