The Alberta Election and Human Rights

By Jennifer Koshan

Several human rights issues have been raised in the Alberta election campaign to date. Perhaps most significantly, the Wildrose party's platform on Justice, Policing and Human Rights proposes major changes to the *Alberta Human Rights Act*, RSA 2000, c A-25.5 (*AHRA*), changes that are both substantive and procedural in nature. I will set out those proposed changes in this post, and raise some related concerns.

The Wildrose platform on Justice, Policing and Human Rights states the following:

> Albertans overwhelmingly support the principles of equality, freedom of speech, freedom of religion and all other rights protected under Alberta and Canadian human rights legislation. It is critical that we protect the human rights of all members of society, whatever their ethnicity, religion or background, and regardless of whether they have the financial means to defend those rights in our oftentimes expensive and complicated justice system.
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> However, the current Alberta Human Rights Commission has failed to fairly deal with human rights complaints. In fact, the Commission and their tribunals have become something akin to 'kangaroo courts', where rights are pitted against each other and interpreted by individuals who are often unqualified to make judgments on the most foundational of protected rights in society. In addition, the hallmarks of justice, such as the rules of evidence, standards of proof, and protections against frivolous and vexatious lawsuits, are not afforded in these Commissions or their related tribunals, bringing the administration of justice into disrepute.
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> In fact, over the past 20 years many of the worst abuses of human rights in our province have been attacks against freedom of speech that, ironically, have been perpetrated by the very Commission tasked with protecting our human rights. …
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> We need to guarantee that our inalienable rights of freedom of speech, freedom of the press, and freedom of religion are not unjustly overridden by those with pre-conceived agendas and an almost fanatical devotion to political correctness.

The Wildrose platform proposes to reform human rights legislation in several ways.

First, the Wildrose states that it would repeal section 3 of the *AHRA*. This section currently prohibits the publication or display of any statement, notice, sign, symbol, etc. that either indicates discrimination or is likely to expose to hatred or contempt a person or a class of persons protected under the *AHRA* (subject to a couple of caveats, including the guarantee in section 3(2) that "Nothing in this section shall be deemed to interfere with the free expression of opinion on any subject"). The Wildrose says that the revised legislation "will maintain the criminal code

standard of banning speech that advocates for acts of violence or genocide against any individual or identifiable group." Presumably, this change is in response to the "attacks against freedom of speech" alleged by the Wildrose.

There are a few issues with this proposal. Although the Wildrose refers to the repeal of section 3 in its entirety, its proposal to replace it with a different standard for hate speech makes it unclear whether it plans to repeal only the hate speech portion of section 3 (section 3(1)(b)), or also the prohibition on discriminatory publications (section 3(1)(a)). If it repeals the latter prohibition, that would leave a gap in the legislation that would fail to cover publications that are discriminatory but do not reach the level of promoting hatred. The Wildrose plan to use the criminal standard of hate speech under section 319(2) of the *Criminal Code*, RSC 1985, c C-46 also raises concerns. The *Code* only protects "identifiable groups" against hate speech, and defines those groups as sections of the public "distinguished by colour, race, religion, ethnic origin, or sexual orientation". Does the Wildrose intend to use the *Criminal Code* list of grounds, or maintain the full list in the *AHRA*, which covers many other grounds including gender, disability, and source of income? The proposed change may also run afoul of the division of powers between the federal and provincial governments, under which only the federal government can enact criminal law (see section 91(27) of the *Constitution Act, 1867*). This concern is exacerbated by the platform's proposal to "impose stringent penalties and remedies for human rights violations". Human rights legislation has historically been seen as remedial rather than punitive, and a criminal hate speech standard combined with a punitive approach to remedies may overstep provincial jurisdiction. On the other hand, provinces can impose penalties under section 92(15) of the *Constitution Act, 1867*, as noted in *Boissoin v. Lund*, 2009 ABQB 592, a case which upheld the constitutionality of the current version of section 3(1)(b) (see my post on that case here; the case is now before the Alberta Court of Appeal).

The repeal of section 3(1)(b) of the *AHRA* is supported by The Alberta Democracy Project, an initiative of the Progressive Group for Independent Business which calls itself "Alberta's fastest growing business and taxpayer organization." In *Boissoin v. Lund, the* Canadian Civil Liberties Association and Canadian Constitution Foundation both intervened to argue that section 3(1)(b) was unconstitutional. It is unclear whether these groups would support the Wildrose plan to introduce a different approach to hate speech that would capture a narrower range of conduct rather than repealing section 3(1)(b) altogether.

Wildrose's second key reform would "Replace the Human Rights Commission with a new Human Rights Division of the Provincial Court of Alberta, which will adjudicate all human rights complaints." This is presumably in response to the Wildrose's "kangaroo court" and "political correctness" allegations. In addition to being inflammatory, the Wildrose seems to lump together the Commission – which is responsible for human rights research and education and the investigation and settlement of complaints – with tribunals, which hear and rule upon those complaints (see *AHRA* sections 16, 21, 23, 27). The Wildrose proposal would seem to do away with both the Commission and tribunals, with nothing in their place to deal with human

rights research and education. In some ways, this is similar to the approach in provinces that have eliminated human rights commissions in favour of direct access to tribunals (see e.g. BC's *Human Rights Code*, RSBC 1996, c 210 and Ontario's *Human Rights Code*, RSO 1990, c H.19, section 34 and 45.2). However, Wildrose is going further by proposing to replace tribunals with Provincial Court jurisdiction over human rights matters, and by not assigning responsibility over human rights education elsewhere (in BC, for example, human rights education is the responsibility of the appropriate minister under section 5 of the *Human Rights Code*).

The new Human Rights Division of the Provincial Court of Alberta is to "use streamlined and simplified rules of procedure, which will include standardized forms for a complaint, defense, and other court documents, mandatory alternative dispute resolution, and case flow management." On the face of it, this aspect of the proposal seems designed to speak to the fact that human rights processes are meant to be less formal and more accessible than court proceedings. One might have concerns with the mandatory ADR component of the proposal, however – is this appropriate in cases where the complainant alleges serious harassment against the respondent? Furthermore, human rights tribunals, like all administrative tribunals, are supposed to be characterized by the expertise of the decision makers (although Wildrose alleges that tribunal members are "often unqualified to make judgments on the most foundational of protected rights in society"). Would the Wildrose institute judicial education in human rights as part of its overhaul of the system?

The Wildrose proposal also notes that complainants who wish to have legal assistance will be supplied with a referral roster of Human Rights Advocates by the Clerk of the Provincial Court. These Advocates, who would be members of The Law Society of Alberta with "experience in constitutional and human rights law," would represent the complainant throughout the process if their complaint is found by the Advocate to be legitimate. In the alternative, a complainant could retain a lawyer personally, and would in fact be obliged to do so if the Advocate found that the complaint was not legitimate (or the complainant could represent him or herself). The platform also provides that Advocates could lose their designation if they "repeatedly represent complainants with frivolous and vexatious complaints." It is unclear who would make this determination, but if not the Law Society of Alberta, that gives rise to concerns about who should be governing lawyers' conduct. If the government can both add a lawyer to the roster of Advocates and remove that lawyer if it does not like his or her approach to assessing the legitimacy of complaints, that creates a potential conflict of interest, especially since the government itself can be the subject of human rights complaints. This approach may also impede lawyers from being zealous advocates for their clients, a particular concern in cases that would push the boundaries of human rights jurisprudence.

The Wildrose platform states that its proposed changes to the process for human rights cases would be "funded in a cost-neutral manner by re-directing funding spent on … Commissions to provide funding for the cost of the provision of legal services by Human Rights Advocates as well as the Provincial Court of Alberta for the additional cost of the administration of justice,

including the appointment of any additional judges that may be needed to ensure the Courts are not overburdened by an increased case load." I am skeptical about this claim – could Wildrose really maintain the same level of resources for adjudicating human rights complaints in a cost-neutral way, given that Provincial Court judges are likely higher paid than tribunal members, and it would be adding the cost of Advocates as well? If so, this underscores the loss of the Commission's research and education function. The platform also provides that costs could be ordered against unsuccessful respondents or complainants, including costs to / against the government if a complainant is represented by an Advocate. This approach departs from that taken in *Boissoin v. Lund*, where the respondent Boissoin (who was successful in arguing that his conduct did not amount to a violation of section 3(1)(b)) was not granted costs, given the public interest aspect of Lund's claim (see 2010 ABQB 123 and Linda McKay Panos's post on that decision).

Another major issue flowing from the Wildrose proposal is that there would no longer be judicial review of human rights tribunal decisions according to the principles of administrative law, but an appeal process dictated by, one assumes, the normal standards of review for Provincial Court decisions. This may mean less deference to human rights decision makers and more appeals. Also, while human rights bodies are not empowered to apply the *Charter* (see the *Administrative Procedures and Jurisdiction Act*, RSA 2000, c A-3 and the *Designation of Constitutional Decision Makers Regulation*, Alta Reg 69/2006, Schedule 1), the Provincial Court would have the power to do so. This jurisdictional change is implicitly addressed in the Wildrose platform, which notes the importance of freedom of religion. This is a freedom that is protected under the *Charter* rather than the *AHRA*, and so if it is to be balanced against human rights protections then the decision-maker must have the jurisdiction to consider the *Charter*.

Comments by the Wildrose on the campaign trail in relation to "conscience rights" also refer to the proposed new human rights process. According to the Globe and Mail, the Wildrose has indicated that conscience rights cases – dealing with whether, for example, civil servants could be exempted from performing same sex marriages on the basis of their freedom of conscience – "will be among those heard by justices in a new Human Rights Division of the Alberta provincial court." A previous attempt to protect conscience rights in Alberta was defeated in 2006 when a private member's bill, the *Protection of Fundamental Freedoms (Marriage) Statutes Amendment Act, 2006*, was blocked by opposition parties. More recently, a similar attempt to protect such rights in Saskatchewan was defeated by the courts (see here).

Alberta Progressive Conservative leader Alison Redford has called the spectre of conscience rights "frightening," and Liberal leader Raj Sherman has also spoken out against such rights, calling them "simply a clever phrasing of support and consent to systemic discrimination against gays and lesbians or other minorities." However, the New Democratic Party is the only other major party that speaks to human rights issues in its platform, with proposals to "Expand the Human Rights Commission's authority and jurisdiction," "Promote and enforce rights of people with disabilities to be accommodated in workplaces", "Repeal the section of the Human Rights

Act [section 11.1] that may censor classroom discussion and allow teachers to be brought before the Human Rights Commission", and "Improve the human rights content of the public school curriculum." It is to be hoped that the major reforms to human rights legislation proposed by the Wildrose party will be the subject of vigorous debate and discussion before election day.