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The Justice Minister's Take on Current Human Rights and Civil Liberties Issues in Alberta

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On January 25, 2013, Alberta Justice Minister Jonathan Denis spoke to a crowd of about 50 people gathered by the Sheldon Chumir Foundation for Ethics in Leadership and the Rocky Mountain Civil Liberties Association . The audience included lawyers, educators, government folks, NGO representatives, and advocates for human rights and civil liberties. Minister Denis delivered remarks on current human rights and civil liberties issues in the province and also took questions from the audience. His remarks and the Q + A covered issues concerning access to justice, the government's position on the fate of sections 3 and 11.1 of the *Alberta Human Rights Act*, RSA 2000, c A-25.5 (*AHRA*), Alberta's new drinking and driving law, and peaceful protests, all of which will be explored in this post.

The Minister began by articulating his commitment to access to justice. He noted ways in which the province is attempting to deal with access to justice issues, for example by allowing justices of the peace to hear criminal matters on first appearance, by increasing the number of provincial court judges, and by providing access to the Minister himself (in this regard, he mentioned his meeting with members of lesbian, gay, bisexual, and transgender communities targeted for hate crimes). The Minister emphasized the government's commitment to creating a climate of acceptance, tolerance and equality in the province.

Next, Minister Denis addressed the controversy surrounding section 3 of the *AHRA*, which prohibits publications and notices that are discriminatory (section 3(1)(a)), and those that are likely to expose person(s) to hatred or contempt on the basis of a range of protected grounds (section 3(1)(b)). The Minister asserted what appeared to be his own view that by continuing to prohibit hate speech under the *AHRA*, the government is creating a forum for those forms of expression. He also noted other arguments against the hate speech provision, including those that the law is too vague, that it unreasonably limits freedom of expression, and that hate speech is already covered under the *Criminal Code*. At the same time, the Minister noted that repeal of section 3 as a whole (which was supported by some political leaders at the time of the last provincial election (see Rocky Mountain Civil Liberties Association Alberta Civil Liberties blog post here), would also do away with section 3(1) (a), which is a longstanding, important provision that is replicated in almost every other human rights statute in Canada. Ultimately, the Minister indicated that the government will not determine the fate of section 3 until the Supreme Court of Canada decides the appeal in *Whatcott v Saskatchewan (Human Rights Tribunal)*, 2010 SKCA 26, where a similar section of the *Saskatchewan Human Rights Code*, SS 1979, c S-24.1, is being challenged as contrary to freedom of religion and expression under the *Charter*. *Whatcott* was heard in October 2011, and is the longest outstanding SCC decision at the moment. The Alberta Human Rights Commission was one of many interveners in the case (see SCC case information here).

Minister Denis also noted the lack of clarity surrounding the scope and constitutionality of section 3(1)(b) of the *AHRA* following the decision in *Lund v Boissoin*, 2012 ABCA 300. In an earlier decision in *Lund* (2009 ABQB 592), the Alberta Court of Queen's Bench held that in order to ensure that it was within provincial powers, section 3(1)(b) should be read down to require that allegations of hate speech be linked to other discriminatory practices in the *AHRA*, for example those relating to employment or accommodation (see 2012 ABCA 300, at para 21, and my ABlawg post on the ABQB decision, here). The ABQB also found that hate speech must indicate an intention to engage in discriminatory behaviour or seek to persuade another person to do so, and that there must be evidence establishing a likelihood that the message might cause a prohibited discriminatory practice (see 2012 ABCA 300, at para 22). Based on this narrow reading, the ABQB found that section 3(1)(b) was not *ultra vires*, nor did it violate the *Charter*. On appeal, the constitutional issues were not directly before the Court of Appeal, yet it found that the ABQB's interpretation of section 3(1)(b) was not supported by the language of the *AHRA* and amounted to an "inappropriate use of the constitutional remedy of "reading down"" (at para 42). In the ABCA's opinion, section 3(1)(b) must be interpreted as a freestanding limit on hate speech (at para 43), and the ABQB should have considered its validity and its compliance with the *Charter* in that light rather than reading it down to ensure its constitutionality (at paras 53, 55). This leaves the constitutionality of Alberta's hate speech provision up in the air.

On the subject of Alberta's new drinking and driving law, Minister Denis addressed section 88 of the *Traffic Safety Act*, RSA 2000, c T-6. This section allows peace officers to require a person whom they believe on reasonable and probable grounds to have driven a motor vehicle with over 50 mg of alcohol in their blood to surrender their operator's licence, which is then suspended for a period of at least 3 days, depending on whether it is their first suspension. The Minister indicated that the government considered driving to be a privilege, not a right, and noted that the law is not aimed at social drinkers. He also suggested that Alberta's law was less intrusive than similar laws in BC and Ontario, which allow the imposition of fines in addition to driving suspensions. The Minister indicated that the law is currently being challenged for its constitutionality, but did not provide further details. If any readers have details about this challenge that you are willing to share, please do so by posting a comment to ABlawg.

The last topic of the Minister's prepared remarks was the right to peaceful protest (which is actually a freedom in Hohfeldian terms, but I will use the Minister's terminology here). Minister Denis indicated that he supports this right and thinks we should facilitate it. At the same time, limits will need to be placed on this right when its exercise poses public safety concerns, like a blockade on a highway might do.

The Minister did not address section 11.1 of the *AHRA* in his prepared comments, but that section came up in the Q + A. Section 11.1 requires Alberta school boards to "provide notice to a parent or guardian of a student where courses of study, educational programs or instructional materials, or instruction or exercises … include subject-matter that deals primarily and explicitly with religion, human sexuality or sexual orientation." Teachers receiving written requests from parents or guardians that students be excluded from such instruction must permit the students to opt out. Section 11.1 has been widely criticized, including in ABlawg posts by Linda McKay Panos (see here and here). Minister Denis was asked to respond to concerns that the section has a chilling effect on teachers who wish to engage their students in discussions of issues related to sexuality and sexual orientation, and that it impairs the right of children and youth to receive a broad based education. The Minister disputed that the section is having such "unintended

consequences," and noted that it protects parental rights to instill morality in their children, which is not the role of the state. He also suggested that there have been no complaints made under section 11.1 since it came into force. This is not correct. Two parents in Morinville, Alberta brought complaints under section 11.1 based on the lack of secular public education available in Morinville at the time. In January 2012, the Morinville Press (see here) reported that the Alberta Human Rights Commission had dismissed the complaints on the basis that they would be better addressed in another forum (see *AHRA* section 22(1.1) for the authority of the Commission to refuse to accept complaints in this way). The Morinville complaints were aimed at a different problem, and it is difficult to envision how the chilling effect of section 11.1 on public education might be challenged, unless a student could prove that he or she is being deprived of education involving issues of sexuality, sexual orientation or religion in a way that is discriminatory under the Act. Parents are not likely to file complaints unless school boards or teachers violate section 11.1, but those complaints would only reinforce the potential chilling effect of the section (as noted by participants at the January 25 event). Whether further complaints are filed or not, this does not seem to be an issue that the government is prepared to respond to at the moment.

Other questions at the forum focused on the government's support for civil legal aid, how it is responding to poverty and homelessness issues, its willingness to work with NGOs, and the problems faced by persons with foreign degrees in having their credentials recognized in Alberta.

Minister Denis is visiting our law school on February 12, 2013 to deliver the William A. Howard Lecture on the topic of "Peaceful Assembly, Public Protest and the Law." It will be interesting to hear him expand his thoughts on this topic, and hopefully, to take further questions on current human rights and civil liberties issues in Alberta.