The Issues in Boissoin v. Lund: Expression and Discrimination under Alberta Human Rights Law

On September 16-17, 2009 the Alberta Court of Queen's Bench heard arguments about the constitutionality of a controversial section in Alberta's human rights code. This article fills in the background to the dispute and outlines the constitutional arguments, based on written submissions to the court. Since 1996, the *Human Rights, Citizenship and Multiculturalism Act*[2] (HRCMA) has prohibited Albertans from publishing any statement that "is likely to expose a person or a class of persons to hatred or contempt" based on a list of personal characteristics.[3] These characteristics are referred to as "protected grounds." A decision of the Supreme Court of Canada in 1998 added sexual orientation to the list of protected grounds.[4] The Alberta legislature formalized this change to the Act in Bill 44 – passed in 2009 – but "sexual orientation" has been an enforceable prohibited ground since 1998. Accompanying the section on discriminatory statements is a section which says that the prohibition shall not "be deemed to interfere with the free expression of opinion on any subject."[5] A 2007 decision of the Human Rights Panel of Alberta applied the HRCMA to a letter to the editor published in the *Red Deer Advocate* in 2002.[6] The author of the letter, Stephen Boissoin, was then Central Alberta Chairman of an organization called The Concerned Christian Coalition Inc. (CCC); his letter mentioned his position in the Coalition and to his title of Reverend.[7] The Panel determined that statements in the letter were "likely to expose homosexuals to hatred and contempt due to their sexual preference" and found that Boissoin and the Coalition had both contravened the Act by "causing [the letter] to be published."[8] The constitutionality of this part of the HRCMA has been called into question. Alberta's Human Rights Panels do not have jurisdiction to decide on *Charter* issues, but they may decide matters arising from the federal-provincial division of powers.[9] The Panel analyzed provincial jurisdiction and determined that it was empowered to decide the case. Mr. Boisson appealed the Panel's decision to the Court of Queen's Bench. Unlike the Panel, the court may consider the full range of constitutional issues the dispute raises.

Section 3 of the Alberta *Human Rights, Citizenship and Multiculturalism Act*

The current wording of the publications section of the Act (incorporating the addition of "sexual orientation") is as follows:

> ***3 (1)*** *No person shall publish, issue or display or cause to be published, issued or displayed before the public any statement, publication, notice, sign, symbol, emblem or other representation that* ***(a)*** *indicates discrimination or an intention to discriminate against a person or a class of persons, or* ***(b)*** *is likely to expose a person or a class of persons to hatred or contempt because of the race, religious beliefs, colour, gender,*

> *physical disability, mental disability, age, ancestry, place of origin, marital status, source of income, family status or sexual orientation of that person or class of persons.*
> ***(2)** Nothing in this section shall be deemed to interfere with the free expression of opinion on any subject….*

The Human Rights Panel Decision The issues came before an Alberta Human Rights Panel after a formal complaint from Dr. Darren Lund in 2002, shortly after the letter to the editor was published. The Chief Commissioner of the Alberta Human Rights and Citizenship Commission allowed Lund's complaint to proceed to a panel hearing in 2005. A related complaint against the *Red Deer Advocate* was settled, in part by a formal change in the paper's policy for printing discriminatory statements.[10] Dr. Lund was not named in the letter, but he had lived for some years in Red Deer. He launched the complaint out of concern for how the letter could "cause young gay, lesbian, trans-gender, bisexual young people in central Alberta to be especially vulnerable."[11] The Panel's 80-page decision first considered whether the letter to the *Red Deer Advocate* had breached section 3(1). It concluded that Boissoin "caused" the letter to be published by submitting it to the newspaper.[12] It then found that "any person of reasonable intelligence informed about the context" of the letter "would understand the message is expressing hatred and/or contempt" under section 3(1)(b).[13] To assess whether the letter exposed a "class of persons" to hatred or contempt, the Panel applied the factors set out by the Alberta Court of Queen's Bench in a 2001 case:

- the content of the communication,
- the tone of the communication,
- the image conveyed, including whether the issues of quotations and reference sources, gives the message more credibility,
- the vulnerability of the target group,
- the degree to which the expression reinforces existing stereotypes,
- the circumstances surrounding the issues, including whether the messages appeal to well publicized issues,
- the medium used to convey the message,
- the circulation of the publication and its credibility, and
- the context of the publication – whether it is part of a debate or whether it is presented as news or as a purportedly authoritative analysis.[14]

Based on these factors, the Panel found that "the publication … was, on the balance of probabilities, likely to expose homosexuals to hatred and/or contempt."[15] The Panel concluded that both Boissoin and The Concerned Christian Coalition Inc. were in breach of section 3(1).[16] The second legal issue the Panel considered was the effect of section 3(2). It rejected Boissoin's argument that his letter was "opinion" and therefore not subject to section 3(1).[17] Likewise, it did not agree with the argument that section 3(2) provides "further protection for political speech." Instead, the Panel concluded that section 3(2)

"bolsters the necessity to balance competing rights using Charter values."[18] Balancing freedom of expression and freedom from discrimination, the Panel found that "the eradication of hate speech … is paramount to the freedom Mr. Boissoin and the CCC should have to speak their views."[19] The third legal issue before the Panel was its own jurisdiction to hear the complaint. Boisson argued that freedom of expression is not under provincial authority, and that hate is a criminal matter under federal jurisdiction. The Canadian Civil Liberties Association, intervening in the case, supported Boissoin's argument that the Panel only has jurisdiction if there is "a direct link between the discriminatory expression and a prohibit[ed] discriminatory act."[20] The Panel found the required "crucial link to matters under provincial jurisdiction" in the letter's connection ("albeit perhaps somewhat indirectly") to the provincial education system. It also found a "circumstantial connection" between the letter and a subsequent beating of a gay teenager in Red Deer. The subject of the complaint was also "a local matter" under provincial jurisdiction. The Panel added that if it did not accept jurisdiction for the complaint, "inciting hatred would be acceptable up to the point that a crime occurs as a result of it."[21] A subsequent Panel decision issued orders on Boissoin and the Coalition. The orders were not intended to be punitive or to compensate any "direct victim" of their contravention of the Act.[22] The panel ordered:

- payment of damages to Lund and reimbursement of expenses to a witness,
- a written apology to Lund for the letter to the editor, and submission of the apology letter to the Red Deer Advocate for reprinting in the paper,
- a cease-publishing order, "in newspapers, by email, on the radio, in public speeches, or on the internet, in future, of disparaging remarks about gays and homosexuals," or about Lund or any witnesses in the complaint, and
- removal of "all disparaging remarks versus homosexuals" from existing websites and publications of Boissoin and the Coalition.[23]

Charter Issues in the Appeal

Mr. Boissoin's brief to the Court of Queen's Bench argues that sections 2(a) and 2(b) of the *Charter* – respectively, "freedom of conscience and religion" and "freedom of thought, belief, opinion and expression" – render section 3(1) of the HRCMA unconstitutional.[24] According to Boissoin's submissions, the prohibition is "unconstitutional to the extent it is applied to expression other than advertisements related to activities" that are prohibited elsewhere in the HRCMA.[25] He argues that comparable prohibitions that have been upheld by the courts were less far-reaching than the Alberta statute.[26] He also cites Canadian experts in arguing that Alberta's relatively broad prohibition is not "consistent with [the] current commitment by Canadian society to freedom of expression."[27] Boisson argues that the Panel took the wrong approach to its consideration of "*Charter* values" in interpreting the HRCMA: it "was wrong to state that the 'eradication of discrimination' is a 'freedom' to be balanced with another 'freedom,' that

of expression." Combating discrimination is merely a "legislative objective," not a right to be balanced against another right.[28] The Panel's error, in Boissoin's view, extended to using section 3(2) of the HRCMA to balance the prohibition in section 3(1); he takes the position that the reference to "free expression of opinion" in the Act provides an exemption, not just a countervailing consideration.[29] The brief of the Canadian Civil Liberties Association, intervening in the appeal, supports some of Boissoin's*Charter* arguments (while rejecting the views in his letter). In principle, the CCLA takes the view that "generally, the proper response to speech that is offensive, distasteful, or upsetting is counter-speech."[30] The CCLA argues that section 3(1)(b) – "is likely to expose a person or a class of persons to hatred or contempt" – should be struck down by the court as infringing the *Charter* freedoms of expression and religion. Alternatively, they propose that the section should be "read down" so that it only applies to "materials that lead to specific acts of discrimination in the provision of goods and services."[31] The CCLA emphasizes that the expression at issue "took the form of a letter to the editor," it "concerned a political and moral issue," and it "stemmed from religious beliefs."[32] Freedom of the press has "a special role in a democratic society" that calls for a minimum of limitation by courts and tribunals.[33] "Polemical expression" should be tolerated in the interest of democratic debate: "this right cannot be limited to expressions which use polite terms in non-confrontational settings."[34] As for religious expression:

> *There are numerous situations in which religious publications, sermons, expressions and protests can and have been hurtful to certain groups…. Any prohibition on this type of material represents a core intrusion on the freedoms protected by s.2 [of the Charter].[35]*

Like Boissoin, the CCLA observes that Canadian courts have upheld laws limiting expression under the "reasonable limits" section of the *Charter*, but these laws were narrower in scope than section 3 of Alberta's HRCMA.[36] Part of the CCLA's argument on reasonable limits is its submission that:

> *It is far from certain that suppressing expression, rather than allowing for an exchange of ideas, beliefs and opinions, is the most effective way to promote tolerance, understanding and equality.[37]*

The brief of the Attorney General of Alberta, also intervening on the constitutional issues, takes the opposing position on the application of the *Charter* to the HRCMA. Arguing that section 3 of the Act should be upheld, Alberta says that political and religious expression should both be subject to reasonable limitation.[38]Alberta's submissions reflect the province's interpretation of Supreme Court of Canada precedents: freedom-of-expression claims are to be analyzed

> *…by their connection to a 'core' of democratic values including the search for political, artistic and scientific truth, the protection of individual autonomy and self-development, and the promotion of public participation in the democratic process.[39]*

Alberta rejects the position that section 3(2) of the HRCMA is a "saving provision" that would exempt some statements from the application of section 3(1) if they are "discriminatory or hateful" but expressed in terms of "opinion."[40] On the reasonable limits test, Alberta's arguments emphasize judicial deference to legislative choices:

> *It is submitted that anti-discrimination legislation involves the protection of vulnerable groups, complex social issues, and the reconciliation of competing interests. In these respects, this honourable Court should give some degree of deference to the legislative decision to enact s. 3 HRCMA.[41]*

Dr. Lund's brief offers a thorough defence of the constitutionality of the Act.[42] Lund agrees that the expression in the Boissoin letter "comes within section 2(b) of the *Charter*."[43] However, Lund submits that "every Court and tribunal that has considered a Charter challenge to provisions regulating hate propaganda … has determined the provisions to be justified and constitutional."[44] He rebuts the argument that the Alberta HRCMA approach should be an exception to the pattern. Dr. Lund agrees with the Alberta government that a "degree of deference" should be shown by the court to the legislature's choice of how to regulate hate speech.[45] He does not share the CCLA's faith in "counter-speech" as an adequate response to offensive statements: "The argument that we should have faith in human reason is belied by history."[46] Lund takes the position that the HRCMA reflects the *Charter* right to equality, so a balancing of equality against the freedoms of expression and religion must be part of the*Charter* analysis.[47] This position is reflected in Lund's argument about proportional effects under the reasonable-limits analysis:

> *Upholding s. 3(1)(b) of the HRCMA gives effect to equality rights protected under the Charter, with only limited effect on freedom of expression – since critical speech, even offensive speech is not prohibited. But removing the protection of s. 3(1)(b) of the HRCMA obliterates equality rights in favour of expression.[48]*

Division-of-Powers Issues in the Appeal

Relying on pre-*Charter* precedents, Boissoin argues that only the federal Parliament may legislate to limit free expression "relating to 'public affairs and the equal rights in that respect of all citizens'."[49] Limits on such expression "are considered to be in the nature of criminal law, an exclusively federal responsibility."[50]According to this view, then, "When provincial legislation intrudes deeply into the fundamental freedoms of speech, religion, association or assembly, the provincial legislature is said to be creating criminal legislation."[51] Mr. Boissoin emphasizes the "political nature" of his letter to the editor to place it within the scope of public affairs; Lund's complaint thus harnessed the HRCMA to a political "strategy … to silence opposition."[52] To use the HRCMA in this way cannot be constitutional, according to Boissoin's argument. The brief of the Canadian Constitution Foundation, the third intervenor in the appeal, elaborates on the argument about federal jurisdiction over criminal law. The CCF submits that section 3(1)(b) of the HRCMA is "in

pith and substance … no different from section 319" of the *Criminal Code*, which outlaws the public incitement and willful promotion of hatred.[53] Moreover, the provincial prohibition lacks the defences available under the criminal law – "truth, expression of religious belief, public interest discussion, or quoting with a view to initiating the removal of others' offensive statements" – and therefore it represents a provincial attempt to amend a federal statute.[54] The CCF canvasses provincial heads of power under the constitution that could provide a constitutional basis for section 3(1) of the HRCMA, but rejects them:

> *There is no head of power contained in section 92 [of the Constitution Act, 1867] that explicitly or obviously grants a provincial legislature the power to regulate or restrict the expression or publication of ideas, thoughts beliefs or opinions.[55]*

While it is constitutional for a province to deal with discrimination, the CCF argues that section 3(1) does not have this legitimate purpose: "One can violate paragraph 3(1)(b) … without any injured party suffering a loss in the areas of services, housing or employment."[56] The CCLA echoes the CCF's insistence that there must be a closer connection between the prohibited expression and "specific discriminatory acts that the province has the power to prohibit" if the prohibition is to be valid as an exercise of provincial legislative jurisdiction:

> *The division of powers, as set out in sections 91 and 92 of the Constitution Act, 1867, does not allow a province to restrict expression that may be considered offensive simply because it has the capacity to offend. The provincial legislature may only legitimately curtail such expression directly linked to specific discriminatory acts that the province has the power to prohibit.[57]*

The CCLA does not accept that the letter's implications for policy in the provincial education system have any bearing on the constitutionality of the HRCMA: "simply because a publication addresses issues within the provincial school system," it does not come within provincial jurisdiction to regulate it.[58] The Attorney General of Alberta affirms provincial jurisdiction under the *Constitution Act, 1867* to "limit discriminatory expression that touches upon subject matters falling within provincial jurisdiction," such as property and civil rights (section 92(13)), or matters of a local or private nature (section 92(16)); "Whether such expression is characterized as being 'religious' or 'political' does not affect that ability."[59] Dr. Lund's brief sets out the most detailed arguments on the division of powers.[60] He submits that the Panel correctly found that it had jurisdiction to hear Lund's complaint and decide the case; specifically, "the matter was of a local or private nature, it did not involve criminal law, and the nature of the speech at issue was within provincial jurisdiction."[61] Lund refers to recent Supreme Court decisions that reject the idea of a strict segregation of federal and provincial legislative authority.[62] Lund also argues that the content of Boissoin's letter illustrates how section 3(1) of the HRCMA links communication with discrimination: the letter

> *…advocates against employment of homosexuals in schools …, against inclusion of sexual*

> *orientation in the curriculum …, and against the equality and dignity of homosexuals, which will have repercussions in each of the areas of prohibited discrimination.[63]*

Criminal law is not the only way – and may not be the best way – to regulate publications that may promote hatred and contempt, according to Lund. He refers to Supreme Court statements that "circumstances involving publications likely to expose to hatred or contempt are better dealt with through remedial human rights provisions."[64] Lund agrees with the Attorney General that recent Canadian jurisprudence has rejected the idea that expression is under exclusive federal jurisdiction.[65] He notes that Alberta regulates "political speech" under its *Election Act*.[66] The prohibition at issue in *Boissoin v. Lund* was enacted in 1996. The Alberta legislature opted not to alter it in the most recent amendments to the HRCMA, passed in 2009.[67] Canadian human rights laws pursue the same general purposes in all jurisdictions, but there is considerable variation in their details. Much of the legal argument before the Alberta Court of Queen's Bench deals with cases from other jurisdictions, where courts had to consider differently-worded prohibitions, often at a different stage in the evolution of the case law. The court heard final oral arguments on September 16 and 17, 2009. Its decision could be issued at any time.

Further Reading

Linda McKay-Panos, "Offensive Publication Case Highlights the Tension Between Human Rights and Civil Liberties" *Alberta Civil Liberties Research Centre* (11 December 2007).
Chris Younker, "The Canadian Human Rights Act & Freedom of Speech: On Parliament's To-Do List?"*Centre for Constitutional Studies* (19 June 2009).

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[1] Ken Dickerson is Program Manager at the Centre for Constitutional Studies. The author's views do not necessarily reflect those of the Management Board and staff of the Centre for Constitutional Studies. Research assistance was provided by Chris Younker, a student in the Faculty of Law, University of Alberta. [2] R.S.A. 2000, c. H-14. [3] *Ibid*. at section 3(1). [4] Vriend v. Alberta, [1998] 1 S.C.R. 697. [5] *Supra* note 1 at section 3(2). [6] *Darren Lund v. Stephen Boissoin and the Concerned Christian Coalition Inc. (November 30, 2007, Alta. H.R.P.; Lori G. Andreachuk, Q.C., Panel Chair).* [7] *Ibid*. at para. 53. [8] *Ibid*. at paras. 331 and 360-3. [9] *Designation of Constitutional Decision Makers Regulation*, Alta. Reg. 69/2006. [10] *Supra* note 6 at paras. 1-6. [11] *Ibid*. at paras. 15-17. [12] *Ibid*. at para. 311. [13] *Ibid*. at para. 320. [14] Linda McKay-Panos, "Offensive Publication Case Highlights the Tension Between Human Rights and Civil Liberties*Alberta Civil Liberties Research Centre* (11 December 2007). See also Panel at paras. 321-324." [15] *Supra* note 6 at para. 325. [16] *Ibid*. at para. 333. [17] *Ibid*. at para. 341. [18] *Ibid*. at para. 345. [19] *Ibid*. at para. 346. [20] *Ibid*. at para. 347-348. [21] *Ibid*. at paras. 349-352. [22] Decision on Remedy, *Darren Lund v. Stephen Boissoin and the Concerned Christian Coalition Inc*. (May 30, 2008, Alta. H.R.P.; Lori G. Andreachuk, Q.C., Panel Chair) at paras. 9-10. [23] *Ibid*. at para. 14. [24] Brief of the Appellant Stephen Boissoin, *Boissoin v. Lund*, Court of Queen's Bench of Alberta, Action no. 0801-07613 ("Boissoin Brief") at paras. 24-41.. [25] *Ibid*. at

para. 27. [26] *Ibid*. at paras. 25-27. [27] *Ibid*. at para. 27; see also paras. 29-31. [28] *Ibid*. at paras. 52-53. [29] *Ibid*. at paras. 57-60. [30] Brief of Argument of the Intervener, the Canadian Civil Liberties Association, *Boissoin v. Lund*, Court of Queen's Bench of Alberta, Action no. 0801-07613 ("CCLA Brief") at paras. 4-5. [31] *Ibid*. at para. 7. [32] *Ibid*. at para. 10. [33] *Ibid*. at paras. 11-14. [34] *Ibid*. at paras. 16-17. [35] *Ibid*. at para. 24. [36] *Ibid*. at paras. 25-33. [37] *Ibid*. at para. 29. [38] Brief of the Intervener, the Attorney General of Alberta, *Boissoin v. Lund*, Court of Queen's Bench of Alberta, Action no. 0801-07613 ("AG Brief") at paras. 15-20. [39] *Ibid*. at para. 13. [40] *Ibid*. at para. 31. [41] *Ibid*. at para. 53. [42] Brief of the Respondent Darren Lund, *Boissoin v. Lund*, Court of Queen's Bench of Alberta, Action no. 0801-07613 ("Lund Brief") at paras. 72-142. [43] *Ibid*. at para. 79. [44] *Ibid*. at para. 81. [45] *Ibid*. at para. 83. [46] *Ibid*. at para. 105. [47] *Ibid*. at para. 111. [48] *Ibid*. at para. 141. [49] Boissoin Briefat para. 61, citing *Reference re. Alberta Legislation*, [1938] S.C.R. 100. [50] *Ibid*. [51] *Ibid*. at para. 65. [52] *Ibid*. at paras. 71-72. [53] *Ibid*. at para. 36. [54] *Ibid*. at para. 43-44. [55] *Ibid*. at para. 7. [56] *Ibid*. at para. 12. [57] CCLA Brief at para. 39. [58] *Ibid*. at para. 46. [59] *Ibid*. at para. 10. [60] Lund Briefat paras. 145-196. [61] *Ibid*. at para. 145. [62] *Ibid*. at paras. 146-149. [63] *Ibid*. at para. 161. [64] *Ibid*. at para. 173. [65] *Ibid*. at paras. 182-190. [66] *Ibid*. at para. 191. [67] Anna-May Choles, "Bill 44 Amended and Passed by Alberta Legislature in Marathon Session; Few MLAs Show Up for Final Vote on Human Rights Changes" *Centre for Constitutional Studies* (3 June 2009).