The Boissoin v. Lund Decision: If Alberta's Hate-Speech Law is Constitutional, What Does It Actually Prohibit?

On December 3, 2009, the Court of Queen's Bench of Alberta issued its decision in *Boissoin v. Lund*.[1] This decision is a judicial review of a 2007 ruling of the Human Rights Panel of Alberta, and of the panel's 2008 decision on remedies in the case.[2] An earlier article outlined the background of the case, the panel decisions, and the constitutional arguments before the court. This article summarizes the court's decision on constitutional issues and its impact on the publication of "hate speech" in Alberta.[3] In brief, in 2002 the *Red Deer Advocate* published a letter to the editor written by Stephen Boissoin, identified as Reverend and Central Alberta Chairman of the Concerned Christian Coalition. The letter – several hundred words, quoted in full in the Queen's Bench decision – was "aimed precisely at every individual that in any way supports the homosexual machine;" it urged readers to "stand together and take whatever steps are necessary to reverse the wickedness that our lethargy has authorized to spawn." The letter attracted local attention and elicited a number of replies in the newspaper. A couple of weeks later, when the *Red Deer Advocate* reported an assault on a local gay teenager, the victim was quoted as saying that anti-gay statements made him feel unsafe and they encouraged people to "go out and stop the gay rights movement." Dr. Darren Lund read the newspaper story and decided to complain to the Alberta Human Rights Commission.[4] Some years later, a panel of the Commission ruled for Lund and ordered a set of remedies for Boissoin's breach of Alberta's prohibition on publishing "any statement … that … is likely to expose a person or class of persons to hatred or contempt because of the … sexual orientation … of that person or class of persons."[5] Boissoin's appeal to the Court of Queen's Bench took issue with the way the panel applied the law to his particular case, and also with the constitutionality of the law itself.

Section 3 of Alberta's (HRCMA)

Human Rights, Citizenship and Multiculturalism Act The constitutional arguments before the court turned on a section of the HRCMA that dates from 1996. The section says: **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.… "Sexual orientation" was added to the section by the Alberta legislature in 2009, but the section had already been interpreted to include sexual orientation in a 1998 Supreme Court of Canada decision, *Vriend v. Alberta*.[6]

Jurisdictional Limits on Provincial Regulation of Expression

The Court of Queen's Bench considered the argument that the wording of section 3 of the HRCMA addressed*all* discriminatory publications in Alberta, and that a provincial legislature lacks the constitutional authority to legislate so broadly.[7] The court rejected this interpretation based on its understanding of the entire scheme of the HRCMA, not just the words of section 3: In my opinion the broad intent of the *Act* is to achieve equality for all through the prohibition of specific discriminatory practices or activities in the provision of goods, services, accommodations and facilities (s.4); tenancies (s.5); and, employment practices (s.s. 6, 7, 8 & 9). While the Act seeks to achieve its intent in various ways, 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.[8] This interpretation puts section 3 safely within provincial jurisdiction. Applied to alleged hate propaganda in the form of homophobic publications, then, …s. 3(1)(b) is directed at eliminating statements which are hateful or contemptuous of a person or class or persons due to their sexual orientation, and which are also likely to cause others to engage in any of the discriminatory practices listed in the *Act*.[9] To make its interpretation clearer, the decision describes a prohibition that a province could *not* enact: unlike discrimination in tenancies, services, employment and so forth, "hateful expressions that could lead to violence … is a matter governed by the criminal law power reserved solely to Parliament."[10] The *Boissoin v. Lund* decision reinforces a line of precedent on provincial human rights codes dating back at least to 1986, when the Supreme Court of Canada held: These legislative protections are valid not because they affirm interests such as liberty, or human dignity, but because the activities legislated, that is, for example, housing, employment, and education, are themselves legitimate areas of provincial concern under ss. 92 and 93 [of the*Constitution Act, 1867*].[11]

***Charter* Limits on Regulating Publications**

Arguments under the *Canadian Charter of Rights and Freedoms* were not decisive for the Court of Queen's Bench. A 1990 Supreme Court of Canada decision, upholding a similar provision in federal human rights legislation, determined the *Charter* issue.[12] The court nonetheless dealt with Boissoin's view that his letter to the editor brought freedom of the press into play, alongside freedom of expression. It did not sympathize with this argument: …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. I also fear that if it were otherwise then some mischievous writer may choose to reconfigure his letter as a newspaper journal solely to claim a greater freedom of expression. That cannot be what the framers of the *Charter* intended.[13] The court also considered a recent decision of the Canadian Human Rights Tribunal, which

found the prohibition of "hate messages" in the *Canadian Human Rights Act*[14] contrary to the *Charter*. The tribunal decision concluded that the prohibition does not satisfy the test for "minimal impairment" of freedom of expression.[15] The tribunal's decision hinged on new punishments (added in 1998) for breaches of the federal Act. Noting the contrast between the punishment provisions of the federal *Act* and Alberta's statutory scheme, the Court of Queen's Bench concluded, "No analogy can be fairly drawn."[16] The 1990 Supreme Court precedent therefore guided the court in its analysis of *Charter* issues in the Alberta HRCMA.

"free expression of opinion on any subject"

Parties and interveners in *Boissoin v. Lund* offered arguments on the proper interpretation of subsection 3(2) of the HRCMA. Boissoin saw the section as an exemption: as long as a person was exercising "free expression of opinion on any subject" the publication could not be caught by the subsection 3(1) prohibition.[17] The court followed precedent from Alberta and other jurisdictions in rejecting this interpretation: [T]his subsection does not operate to provide blanket protection for the publication of an otherwise unlawful message through the simple device of describing that message as a political, religious or personal "opinion." …Indeed, one can say that every message contains some measure of the author's opinion which he freely seeks to express.[18] Instead, subsection 3(2) requires a balancing of "the two competing objectives of freedom of expression and the eradication of discrimination" in addressing complaints under subsection 3(1).[19] The Court of Queen's Bench went on to reject the Alberta Human Rights Panel's finding that Boissoin's letter was "hateful and contemptuous of homosexuals."[20]

What Can't an Albertan Publish?

Darren Lund called the court's decision "a step backward for our province.… In my view, the judge's ruling sets such strict standards for hate speech that this section is rendered all but unenforceable." [21] He added, "If our human rights laws say that writing like this is OK, that is very detrimental to creating safe communities.… It makes you wonder what are the reasonable limits on hate speech in Alberta?"[22] Stephen Boissoin called the outcome "an incredible victory for freedom of speech and for all Albertans who want to share their opinions on the social and moral issues of our day."[23] Still, the Canadian Constitution Foundation, which lost its argument that the Alberta law exceeded provincial jurisdiction, expressed its continuing concern for outspoken Albertans: In spite of today's court ruling, Albertans need to continue to exercise extreme caution when speaking about public policy issues, lest they offend someone who then files a human rights complaint. No citizen is safe from being subjected to a taxpayer-funded prosecution for having spoken or written something that a fellow citizen finds offensive.[24] The HRCMA itself, along with Alberta's system for accepting, investigating and adjudicating human rights complaints, remains intact in the wake of *Boissoin v. Lund*. What the decision seems to have changed are the thresholds the Commission must apply to complaints about "hate speech" in the form of written publications. The Court of Queen's Bench concluded: [T]he allegedly hateful or contemptuous speech must be directly linked to areas of prohibited discriminatory practices

and … 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…. [Moreover], there must be some likelihood that the message might bring about a prohibited discriminatory practice in order to engage s. 3(1)(b).[25] The writer of the discriminatory publication must *intend* to contribute to discriminatory practices.[26] The court also notes the importance of an increased likelihood of discriminatory actions: "Simply fostering discriminatory beliefs in another does not automatically make it likely that the individual might then act out those beliefs through prohibited discriminatory activity."[27] Therefore: "Hateful or contemptuous speech that may prompt or even add to existing prejudice against a class of persons is not prohibited *per se* by the*Act*."[28] In short, "Care must be taken not to simply move from a finding that the message is hateful or contemptuous to then presume that discriminatory practices are likely to ensue."[29] It seems, then, that a written expression of strong hostility to people covered by the "prohibited grounds" in section 3 of the HRCMA, even when the expression is accompanied by a *general* encouragement to take action against them, do not run afoul of Alberta's human rights protections. To be caught by the HRCMA, a "hate speech" publication would have to be quite specific in inciting particular forms of discrimination – in housing, services, employment and so forth – and would have to be persuasive enough that some readers would likely engage in discriminatory practices because of it.

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[1] 2009 ACQB 592 . [2] *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); 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). [3] *Boissoin* at para. 13. [4] *Ibid*. at paras. 14-17. [5] *Alberta Human Rights, Citizenship and Multiculturalism Act*, R.S.A. 2000, c. H-14 at section 3. [6] [1998] 1 S.C.R. 493. [7] *Boissoin* at para. 28. See also the section on "Division-of-Powers Issues in the Appeal" in Ken Dickerson, "The Issues in *Boissoin v. Lund*: Expression and Discrimination under Alberta Human Rights Law" *Centre for Constitutional Studies* (17 September 2009). [8] *Boissoin* at para. 31. [9] *Ibid*. at para. 33 (emphasis in original). [10] *Ibid*. at para. 36. [11] *Scowby v.Glendinning* [1986] 2 S.C.R. 226. [12] *Boissoin* at paras. 119 and 122-123, citing *Canada (Human Rights Commission) v. Taylor* [1990] 3 S.C.R. 892. [13] *Ibid*. at para. 121. [14] R.S.C. 1985, c. H-6 at section 13. [15] *Warman v. Lemire*, 2009 CHRT 26 at para. 290. [16] *Boissoin* at paras. 124-126. [17] See the section on "Charter Issues in the Appeal" in Dickerson, *supra* note 7. [18] *Boissoin* at para. 85. [19] *Ibid*. at para. 86, quoting *Kane v. Alberta Report* 2001 ABQB 570 at para. 73. [20] *Ibid*. at para. 89. [21] "Court quashes human rights anti-gay ruling" *CBC.ca* (4 December 2009). [22] Deborah Tetley, "Judge overturns hate ruling in Red Deer case, allows anti-gay remarks" *Calgary Herald* (4 December 2009). [23] *Ibid*. [24] News release, "Partial victory for free speech in Boissoin court judgment" *Canadian Constitution Foundation* (3 December 2009). [25] *Boissoin* at para. 43. [26] *Ibid*. at para. 44. [27] *Ibid*. at para. 51. [28] *Ibid*. at para. 55. [29] *Ibid*. at para. 56.