

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF CALGARY

IN THE MATTER OF THE ALBERTA *HUMAN RIGHTS, CITIZENSHIP AND
MULTICULTURALISM ACT*, R.S.A. 2000, c. H-14

AND IN THE MATTER OF A DECISION OF A PANEL OF
THE ALBERTA HUMAN RIGHTS AND CITIZENSHIP COMMISSION,
IN REGARDS TO COMPLAINT NO. S2002/08/0137

BETWEEN:

**STEPHEN BOISSOIN and the
CONCERNED CHRISTIAN COALITION INC.**

Appellants

- and -

DARREN LUND

Respondent

- and -

**THE ATTORNEY GENERAL OF ALBERTA, CANADIAN CIVIL LIBERTIES
ASSOCIATION and CANADIAN CONSTITUTION FOUNDATION**

Interveners

**BRIEF OF ARGUMENT OF THE INTERVENER,
THE CANADIAN CIVIL LIBERTIES ASSOCIATION**
Special Application before the Honourable Mr. Justice E.C. Wilson
on Wednesday Sept. 16 and Thursday Sept. 17, 2009 at 10:00 a.m.

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Action No.: 0801-07613

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I. OVERVIEW

1. Mr. Stephen Boissoin, the Appellant, wrote a letter to the editor of a newspaper expressing his opinion on a moral, religious and political issue. Mr. Darren Lund filed a complaint under s. 3 of Alberta's (the "*Act*"), seeking a declaration that Mr. Boissoin's expression of opinion constituted discrimination contrary to the *Act*.

2. A Panel of the Human Rights and Citizenship Commission, in written reasons delivered November 30, 2007, found that the publication of the letter contravened the *Act*. In further reasons delivered May 30, 2008, the Panel ordered that, *inter alia*, the respondents:

...shall cease publishing in newspapers, by email, on the radio, in public speeches, or on the internet, in future, disparaging remarks about gays and homosexuals. Further, they shall not and are prohibited from making disparaging remarks in the future about Dr. Lund or Dr. Lund's witnesses relating to their involvement in this complaint. Further, all disparaging remarks versus homosexuals are directed to be removed from current web sites and publications of Mr. Boissoin and The Concerned Christian Coalition Inc.¹

3. Leave to review this decision was granted, and the CCLA was granted leave to intervene in this hearing by order of this honourable Court on April 9, 2009.

4. The CCLA intervenes in this appeal to assist the Court in analyzing the constitutional issues. The CCLA does not intervene in this appeal to defend the merits of the Appellant's views; indeed, the CCLA explicitly rejects such views. Rather, the CCLA seeks to ensure that the fundamental rights to freedom of expression, conscience, and religion are given a robust application, and that where there is a perceived conflict between these rights and countervailing equality rights, a nuanced and careful balancing takes place.

5. The CCLA has no doubt that many, if not most, Canadians would find the Appellant's message to be unpleasant and extreme. However, the CCLA submits that

¹ Decision on Remedy at para. 14(a)

generally, the proper response to speech that is offensive, distasteful, or upsetting is counter-speech.

6. When offensive speech is subject to legal prohibition, serious dangers arise: first, expression that is fundamental to the rigorous debate and individual decision-making that underlies a functioning democracy may be prohibited; second, such prohibitions cast a chill over all future speakers.

7. The CCLA will make the following submissions:

- a. S. 3(1)(b) of the *Act*, as interpreted and applied by the Human Rights Panel of Alberta (the “Panel”), should be struck down, as it unjustifiably infringes the fundamental freedoms of expression and religion enshrined in ss. 2(b) and 2(a) of the *Canadian Charter of Rights and Freedoms* (“*Charter*”):
 - i. The provision is a serious infringement, as it prohibits core expressive and potentially religious activity; and
 - ii. The infringement is not justified under s. 1.
- b. In the alternative, s. 3(1)(b) should be read down to prohibit publishing or displaying materials that lead to specific acts of discrimination in the provision of goods and services;
- c. Unless it is read down, s. 3(1)(b) of the *Code* is *ultra vires* the Province and thus of no force and effect;
- d. In the event that s. 3(1)(b) is found to be constitutional, the Panel’s decisions should nonetheless be overturned as:
 - i. The Panel failed to undertake a full s. 1 analysis as mandated by the *Multani* case, and the Decision on the merits unjustifiably infringes the Appellant’s ss. 2(b) and (a) *Charter* rights; and

- ii. The Panel's Decision on Remedies unjustifiably infringes the Appellant's ss. 2(b) and (a) *Charter* rights.

II. ARGUMENT

A. S.3(1)(b), as interpreted and applied by the Panel, unjustifiably infringes ss.2(b) and 2(a) of the *Charter*

- i. The Panel's interpretation of s. 3(1)(b) is a breach of the section 2 protections for freedom of expression and freedom of religion

8. CCLA submits that there are two possible interpretations of s. 3:

- (1) A narrow, contextual and purposive interpretation (the "*Contextual*" reading) that sees the provision in its context as aiming to reinforce and promote the goals of the *Act*, by preventing specific acts of discrimination in the fields of activity listed in the statute. These fields of activity include accommodation, property, tenancy and employment. S. 3 is therefore read as an independent prohibition against publishing or displaying materials that would directly lead to specific acts of discrimination in these fields.
- (2) A broad, literal interpretation (the "*Literal*" reading), that views s. 3(1)(b) as a stand-alone prohibition on hateful or contemptuous expression in any public forum, however remote this may be from the listed fields in the *Act*.

9. In the decision under review, the Panel adopted a broad interpretation of section 3(1)(b) that prohibits all hateful and contemptuous expression in any public forum. If this is the proper interpretation of section 3(1)(b), it cannot sustain constitutional scrutiny.

10. Activities that convey or attempt to convey meaning are protected under section 2 of the *Charter*, and any State prohibition on speech is a prima facie violation of section 2(b).² In the context of the prohibition enacted by s. 3(1)(b), either the Contextual or the

² (Irwin Toys; Greater Vancouver Transport Authority)

Literal reading would curtail individual expression, and thereby infringe s. 2(b). To the extent that religious expression might contravene the provision, both interpretations could also infringe an individual's right to freedom of religion. By adopting the broader reading of the provision, however, the Panel has endorsed an interpretation that restricts core expressive activity and a potentially wide range of religious beliefs. The breadth of this restriction is aptly illustrated by three factual elements in this case:

- i. The prohibited speech took the form of a letter to the editor
- ii. The prohibited speech concerned a political and moral issue
- iii. The prohibited speech stemmed from religious beliefs

The centrality of free expression and freedom of religion in these areas will be canvassed below.

Freedom of expression and letters to the editor in newspapers

11. As the courts have reiterated on numerous occasions, news organizations and the various means by which they disseminate the news ("the press") are crucial platforms for free expression and play a pivotal role in building and maintaining a free and democratic society.

12. The special role of the press in a democratic society was emphasized by the Supreme Court of Canada in *Edmonton Journal v. Alberta (Attorney General)*,³ [Tab 1] and *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)* [Tab 2]. In both decisions, the Court noted that the media, "by gathering and disseminating news, enable members of our society to make an informed assessment of the issues which may significantly affect their lives and well-being."⁴

13. Letters to the editor have a long history in Canadian and Western society, and are an important means by which individuals may express their opinions on matters of public

³ [1989] 2 S.C.R. 1326, at paras. 18 & 83.

⁴ [1991] 3 S.C.R. 459 at para. 30.

concern. Writing in dissent in *Cherneskey v. Armadale Publishers Ltd.*,⁵ [Tab 3] a defamation case arising from a letter to the editor of a newspaper, Justice Brian Dickson, as he then was, commented on the importance of letters to the editor, and on the function of the press as a sounding board for public discussion:

... A free and general discussion of public matters is fundamental to a democratic society. Citizens, as decision-makers, cannot be expected to exercise wise and informed judgment unless they are exposed to the widest variety of ideas from diverse and antagonistic sources. Full disclosure exposes and protects against false doctrine.

It is not only the right but the duty of the press, in pursuit of its legitimate objectives, to act as a sounding board for the free flow of new and different ideas. It is one of the few means of getting the heterodox and controversial before the public. Many of the unorthodox points of view get newspaper space through letters to the editor. It is one of the few ways in which the public gains access to the press. By these means various points of view, old and new grievances and proposed remedies get aired. The public interest is incidentally served by providing a safety valve for people.

14. Justice Dickson took issue with the view that a publisher could only avail itself of the defamation defence of fair comment if it shared the view of the impugned letter to the editor that it had printed. His comments in disagreeing with that conclusion are equally apt outside of the defamation context, and demonstrate the vital importance of letters to the editor as part of democratic debate:

Newspapers will not be able to provide a forum for dissemination of ideas if they are limited to publishing opinions with which they agree. If editors are faced with the choice of publishing only those letters which espouse their own particular ideology, or being without defence if sued for defamation, democratic dialogue will be stifled. Healthy debate will likely be replaced by monotonous repetition of majoritarian ideas and conformity to accepted taste. In one-newspaper towns, of which there are many, competing ideas will no longer gain access. Readers will be exposed to a single political, economic and social point of view. In a public controversy, the tendency will be to suppress those letters with which the editor is not in agreement. This runs directly counter to the increasing tendency of North American newspapers generally to become less devoted to the publishers' opinions and to print, without fear or

⁵ [1979] 1 S.C.R. 1067 at paras. 76-77.

favour, the widest possible range of opinions on matters of public interest.⁶

The reasoning in the above cases confirm that even where the press, including letters to the editor, express an opinion that many, or most, in the community find unpalatable or reprehensible, they perform a function crucial to any democratic society: the stimulation of debate and the exchange of ideas. With the *Charter* in mind, courts and tribunals should be extremely reluctant to limit the freedom of the press, and of individuals to express themselves through letters in the press.

Freedom of Expression and the Importance of Debate on Matters of Morality

15. The CCLA condemns discrimination on the grounds of sexual orientation. However, it is fundamental to democracy that individuals be able to comment on political and social issues. This includes those situations where the discussion concerns the morality of others' behaviour. Even where many in society believe that the basis of the discussion is not morality, but prejudice, this opinion alone is an insufficient basis to curtail an individual's speech. Within a democracy, norms of behaviour must generally be debatable. In this way, people are enabled to reach their own conclusions as to what behaviours should be adopted, encouraged, or discouraged.

16. The right to debate is fundamental to our notions of democracy. Given its fundamental nature, this right cannot be limited to expressions which use polite terms in non-confrontational settings. In a robust democracy, we must have a high degree of tolerance for debates about issues, even when expressed in polemical terms, provided the speaker does not engage in violence, incitement to violence, or threats.

17. Polemical expression has a role to play in such debate. Since long before the enactment of the *Charter*, Canadian courts have displayed tolerance for extreme messages in heated and emotive debates. In *R. v. Boucher*,⁷ [Tab 4] the Supreme Court acquitted a Jehovah's Witness of seditious libel for distributing a pamphlet entitled

⁶ *Ibid.* at para. 78.

⁷ *R. v. Boucher*, [1951] S.C.R. 265.

“Québec's Burning Hate for God and Christ and Freedom Is the Shame of all Canada”, containing many strong statements about Quebec society, the clergy, and the courts.

18. Where individuals are discussing what they feel to be moral issues, emotions often run high. To a person who is convinced that homosexuality is a mortal sin, and who feels a religious and moral duty to persuade others of that fact, putting opinions in polemical terms may be a natural response. Some of the most celebrated political speakers use polemical speech to persuade others. While the CCLA, the Court or the audience may not agree with a given speaker's message, the measure of what polemic speech is legally acceptable should not be determined by the speaker's substantive position. From a *Charter* perspective, courts should display a high degree of tolerance for such expression, and only uphold its limitation where a compelling case of justification has been made. A provision or order that prohibits debate on the morality of behaviour represents a serious and unwarranted incursion into freedom of expression and religion.

Freedom of expression and freedom of religion

19. The courts have noted on numerous occasions the importance of respecting freedom of religion and of conscience. For example, The Supreme Court of Canada has stated that “[t]he protection of freedom of religion afforded by s. 2(a) of the *Charter* is broad and jealously guarded in our *Charter* jurisprudence”⁸ and that “human rights codes must be interpreted and applied in a manner that respects [this] broad protection granted to religious freedom”.⁹ [Tab 5]

20. In *R. v. Big M Drug Mart Ltd.*, [Tab 6] the Supreme Court of Canada observed:

The **essence** of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, **the right to declare religious beliefs openly** and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and **dissemination**.

[...] Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety,

⁸ *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698 at para. 53.

⁹ *Ibid.* at para. 55.

order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.¹⁰ [Emphasis added]

21. The Supreme Court also explained in *Syndicat Northcrest v. Amselem* [Tab 7] that the freedom of religion consists

... of the freedom to undertake practices and harbour beliefs, having a nexus with religion, in which an individual demonstrates he or she sincerely believes or is sincerely undertaking in order to connect with the divine or as a function of his or her spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials.¹¹

The Court held that both obligatory and voluntary expressions of faith enjoyed *Charter* protection.¹²

22. The Supreme Court of Canada has thus made clear that the freedom of religion encompasses a wide range of action and belief connected to religion, whether or not those practices or beliefs are formally required by a particular religious doctrine. It includes the right to openly declare one's religious beliefs without fear of reprisal, and to manifest those beliefs publicly through education and dissemination.

23. Recourse to a standard of objective reasonableness does not lessen the seriousness of the s. 2 infringements. There are undoubtedly many religious doctrines and statements in religious texts that would be considered offensive by "reasonable" people, but, as discussed above, freedom of religion has received strong protection in Canadian jurisprudence.

24. The present intersection of freedom of religion and restrictions on expression is not unique.¹³ There are numerous situations in which religious publications, sermons, expressions and protests can and have been hurtful to certain groups. There is strong, arguably offensive and hateful language in certain core religious texts. These kinds of

¹⁰ [1985] 1 S.C.R. 295, [*Big M Drug Mart*] at paras. 95-95.

¹¹ [2004] 2 S.C.R. 551 [*Amselem*] at para. 46.

¹² *Ibid.* at para 47.

¹³ See, for example, *Hellquist v. Owens*, 2006 SKCA 41 [Brief of the Attorney General, Tab 8]

messages have also been communicated from pulpits, and in the context of public political debates over such issues as abortion, same-sex marriage, divorce and polygamy. Any prohibition on this type of material represents a core intrusion on the freedoms protected by s. 2.

ii) Section 3(1)(b), as interpreted and applied by the Panel, cannot be justified under s. 1 of the Charter and should be struck down

25. The CCLA acknowledges that the Supreme Court of Canada upheld a “hate speech” provision in the *Canadian Human Rights Act* in *Taylor* [Appellant’s Authorities, Vol. I, Tab 6], but submits that the decision is distinguishable. The statutory provision at issue in *Taylor*¹⁴ was far more restricted in its scope. It involved a provision that prohibited hateful material conveyed repeatedly through telephonic communications. The provision at issue in the *Alberta Human Rights Act*, however, is much broader.

26. First, the statutory prohibition in *Taylor* was restricted to a 1990 interpretation of “telephonic communications”. In its s. 1 analysis, therefore, the Court did not need to concern itself with restrictions on the Internet, newspapers, broadcasting, publications, or other printed material, all of which are within the scope of s.3(1)(b). The direct nature and limited scope of telephone communication that was considered in *Taylor* is quite distinct from the much broader prohibition at issue in this case, which encompasses most, if not all, public communication media.

27. Furthermore, the “repeated” nature of the communication was a matter of some emphasis by the Court - yet this feature does not appear in s.3(1)(b) of the *Code*. Again, this difference significantly widens the scope of the prohibition at issue here as compared

¹⁴ At that time, s. 13(1) of the *Canadian Human Rights Act*, S.C. 1976-1977, c. 33 read:

It is a discriminatory practice for a person or a group of persons acting in concert to communicate telephonically or to cause to be so communicated, repeatedly, in whole or in part by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament, any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination.

with that which was considered in *Taylor*. The CCLA respectfully submits, therefore, that a careful and distinct s. 1 analysis is necessary.

28. The CCLA agrees that the impugned provision relates to concerns that are pressing and substantial in a free and democratic society. The goal of giving effect to equality rights and the principle of equality of opportunity without discrimination due to the enumerated grounds is unassailable. The real concerns flow from the remainder of the s. 1 analysis: rational connection, minimal impairment, and proportionality.

29. First, CCLA submits that it is not clear that s. 3(1)(b) is carefully crafted so as to serve the purposes of decreasing discrimination in the provision of basic services. 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.

30. S. 3(1)(b) also fails on the minimal impairment requirement. As interpreted by the Panel, there is no need to connect the impugned expression to actual discrimination, or even show that it is likely to encourage discrimination. At the same time, the prohibition *prima facie* captures a wide range of speech that has considerable merit. This may include political speech that does not advocate or condone violence, expression with artistic merit, and statements that are sincerely believed, reasonably believed, or even true.

31. Finally, CCLA submits that effects of s. 3(1)(b) are not proportional to the objective of eliminating discrimination. As interpreted by the Panel, it places severe restrictions on a wide swath of core expressive and religious activity. The harms that follow include not only the potential suppression of individuals' core expressive and religious activities, but also the self-censorship of future speakers.

32. It should be noted that the inclusion of s. 3(2) does not address the fundamental flaws with s. 3(1)(b). The requirement that the application of s. 3(1)(b) not interfere with "the free expression of opinion on any subject" does nothing to address the inherently vague nature of the impugned provision. Moreover, (as demonstrated by the Panel's decision in

this case), s. 3(2) does not serve as a sufficient guarantee that freedom of expression will be adequately protected. In CCLA's view, the broad interpretation adopted by the Panel is simply incompatible with the *Charter* guarantees of freedom of expression.

33. S. 3(1)(b) of the *Code* therefore represents an unjustifiable limit on freedom of expression, and should be struck down.

B. In the alternative, s. 3(1)(b) should be read down to be limited to a prohibition against publishing or displaying materials that lead to specific acts of discrimination in provision of goods and services

34. In the alternative, s.3(1)(b) should be read down and given a narrow, contextual and purposive interpretation, applying only to expression that itself signals an intention to engage in discriminatory behaviour, or seeks to persuade another person to do so. This interpretation recognizes that the *Act* is primarily concerned with addressing discriminatory practices in certain fields of activity, such as accommodation, services, employment, and tenancy. When read contextually, section 3(1)(b) serves both as an independent prohibition on publishing discriminatory material in these fields, and as a further means to aid and protect human rights in these areas. While this approach limits the reach of the statute to the fields listed in the *Act*, it does so in a manner that may provide strong protection from discrimination, mistreatment and abuse, by addressing areas which s. 3(1)(a) may not cover.

35. For example, a landlord may plaster the walls of his or her office with newspaper articles about the financial unreliability of single mothers, and the difficulties for landlords in evicting these women. Such articles may never be viewed by the prospective tenants, and so may never fall under s. 3(1)(a). And yet in the context of the situation, a reasonable superintendent might be likely to see this as a directive from the landlord to either reject tenancy applications from single mothers, or to extract unfair conditions and terms from them. Both of these situations may be addressed under s. 3(1)(b).

36. Similarly, if a business owner posted hateful messages about certain group members in the staff lounge, in certain circumstances, this is likely to be viewed by reasonable employees as a directive to deny service to or mistreat certain individuals; to deny them employment or to hire them only for undesirable tasks.

37. Thus representations emanating from the policy-setters, that are likely to lead reasonable policy-implementers to engage in unfair practices or treatment in tenancy, employment, services and so forth, may be dealt with under s. 3(1)(b). This is significant, since it is not clear that all of these situations could be dealt with under s. 3(1)(a).

38. In the result, the narrowed reading would allow for a purposive approach to the statute, and a robust protection from discrimination in the *Act's* listed fields of activity. Limiting the application of this provision to circumstances where there is a demonstrable link to discriminatory conduct, thereby satisfying the need to show harm to justify an infringement of the *Charter*, would prevent expression from being curtailed on the basis that listeners are merely offended, or even outraged. Where a provision can be construed so as to avoid breaching the *Charter*, it should be so construed.¹⁵

C. Unless it is read down, s. 3(1)(b) is *ultra vires* the Province and thus of no force and effect

39. 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.

40. The Saskatchewan Court of Appeal reached this conclusion in *Saskatchewan (Human Rights Commission) v. Engineering Students' Society*,¹⁶ [Tab 8] in which it interpreted

¹⁵ *R. v. Sharpe*, [2001] 1 S.C.R. 45.

¹⁶ (1989), 56 D.L.R. (4th) 604 (Sask. C.A.) [*Engineering Students' Society*].

the scope of s.14(1) of the *Saskatchewan Human Rights Code*,¹⁷ a provision analogous to section 3(1) of Alberta's *Act*.

41. The Saskatchewan Court of Appeal stated:

... [H]aving regard especially for the division of powers between the federal and provincial governments, the section requires that the affront be productive of a specific discriminatory effect or effects. An adverse general effect upon the class will not be sufficient to engage the provision.¹⁸

42. The Court of Appeal went on to hold that expression prohibited by Section 14(1) must be “such as to cause or be likely to cause others to engage in one or more of the discriminatory practices”¹⁹ prohibited elsewhere in the *Code*, for example discrimination in employment, housing, or contracting.²⁰ This holding was reaffirmed in *Saskatchewan (Human Rights Commission) v. Bell*²¹ [Tab 9] and provides strong guidance as to the proper interpretation of section 3(1) of the Alberta *Act*, because of the close similarity in the construction of the Saskatchewan and Alberta provisions.

43. The requirement of a link between the prohibited expression and a matter falling within provincial jurisdiction has also been noted by Walter Tarnopolsky:

The prohibition of discrimination is a “matter” concerning primarily “property or civil rights” or “matters of a merely local and private nature” or “local works and undertaking” – all three being classes of subjects listed in section 92 of the *Constitution Act, 1867* as coming within the exclusive legislative authority of the provinces. Therefore, human rights legislation in Canada, which prohibits discrimination with respect to employment, residential and commercial accommodation, goods, services, facilities and public accommodation, and **publication or broadcasting with respect thereto**, is essentially within the legislative jurisdiction of the provinces.²² [Emphasis added]

¹⁷ S.S. 1979 c. S-24.1.

¹⁸ *Engineering Students' Society, supra*, at para 6.

¹⁹ *Ibid.* at para. 59.

²⁰ *Ibid.* at para. 38.

²¹ 114 D.L.R. (4th) 370 (Sask. C.A.) at paras. 18-23 (requiring that statements “caused or tended to cause others to engage in a discriminatory practice”). The scope of provincial jurisdiction was not an issue in *Taylor v. Canada (Human Rights Commission)*, which is therefore distinguishable on this point.

²² W. Tarnopolsky & W. Pentney, *Discrimination and the Law*, looseleaf (Toronto: Thomson Carswell, 2006) at 3-56.3. [Brief of the Attorney General, Tab 2]

44. The CCLA agrees that the expression caught by section 3(1)(b) of the *Act* **must be directly connected to the prohibited areas** of discriminatory practices under the *Act*. The CCLA submits that the requirement of a specific link to discriminatory practices is important, not least because, as discussed, it helps to confine the provision from undue incursion into *Charter*-protected expression²³ [Tab 10].

45. The Panel found that it had jurisdiction in the matter in part because the article was indirectly related to the educational system in Alberta. In this case, however, the impugned letter to the editor was a statement of opinion aired in the public forum of the media. It was not directly connected to any specific prohibited discriminatory act. It cannot be that case that, simply because a publication addresses issues within the provincial school system, it therefore comes within the jurisdiction of the province for the purposes of the *Act*. The criteria is not the subject-matter of the impugned statements, but rather a direct connection to the production of discriminatory effects.

46. The Panel also based its jurisdiction on the finding that there was a “circumstantial connection between the hate speech of Mr. Boissoin and the CCC and the beating of a gay teenager in Red Deer”.²⁴ It is the CCLA’s position that the link as identified is insufficient to bring an impugned statement within provincial jurisdiction. A direct link must be established between the publication and the discriminatory effect. The CCLA takes no position on any contested findings of fact on this appeal. Suffice to say, however, that more than a “circumstantial connection” to prohibited discriminatory conduct must be demonstrated in order for the province to exercise jurisdiction.

D. In the event that s. 3(1)(b) is found to be constitutional, the Panel’s decisions should nevertheless be overturned

i. The Panel failed to undertake a full s. 1 analysis as mandated by *Multani*, and the Decision on the merits unjustifiably infringes the Appellant’s ss. 2(b) and (a) *Charter* rights

²³ *Trinity Western University v. British Columbia College of Teacher*, [2001] 1 S.C.R. 772.

²⁴ DECISION at para. 350.

47. It is submitted that the Supreme Court of Canada's decision in *Multani v. Commission Scolaire Marguerite-Bourgeoys*²⁵ effectively mandates a s.1 analysis whenever *Charter* values are in play.

48. The Court in *Multani* overturned the decision of an administrative tribunal that had failed to balance *Charter* values using a s. 1 analysis. As Justice Charron, writing for the majority, stated at para. 16:

The rights and freedoms guaranteed by the Canadian *Charter* establish a minimum constitutional protection that must be taken into account by the legislature and by every person or body subject to the Canadian *Charter*. The role of constitutional law is therefore to define the scope of the protection of these rights and freedoms. An infringement of a protected right will be found to be constitutional only if it meets the requirements of s. 1 of the Canadian *Charter*. Moreover, as Dickson C.J. noted in *Slaight Communications v. Davidson* [...], the more sophisticated and structured analysis of s. 1 is the proper framework within which to review the values protected by the Canadian *Charter*.

49. For the reasons outlined in our preceding arguments, the CCLA submits that the Panel's decision finding a violation of the *Act* is an unjustifiable infringement of the Appellant's ss. 2(a) and 2(b) *Charter* rights.

ii. The Panel's Decision on Remedies unjustifiably infringes the Appellant's ss. 2(b) and (a) *Charter* rights

50. The Panel's Order on remedies also fails *Charter* scrutiny. The CCLA submits that the *Charter*'s protection of freedom of expression and religion requires, at the very least, that ambiguous speech in this area be given the benefit of the doubt. To the extent that published statements can reasonably be interpreted as carrying meanings that do not raise "unusually strong and deep-felt emotions of detestation, calumny and vilification", they should be so interpreted.

²⁵ 2006 SCC 6 [Brief of the Attorney General, Tab 6].

51. A wide-ranging order requiring the removal of all “disparaging remarks” from “current websites and publications”, and enjoining the future publication of “disparaging remarks” about “gays and homosexuals” is inconsistent with these principles.

52. While a finding as to the constitutionality of particular decisions would not resolve the fundamental issues at stake, nor lift the chill cast by the provision, nor even provide great comfort to respondents who may have had to face extensive investigation and litigation, it could nevertheless provide relief in individual cases.

III. ORDER REQUESTED

53. The CCLA respectfully requests that this Court determine the issues in a manner that is consistent with the principles set out above, and grant the following relief:

- (a) Strike down s.3(1)(b) of the *Code*;
- (b) Alternatively, read down s.3(1)(b) as set out above;
- (c) In the further alternative, overturn the Panel’s order as set out above.

54. The CCLA does not seek costs, and asks that no costs be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

PEACOCK LINDER & HALT LLP

Per: 

J.P. PEACOCK, Q.C./Janet L. McCready
Solicitors for the Intervener, the
Canadian Civil Liberties Association

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