

Appeal No. 1001-0078AC
Q.B. No. 0801-07613

**IN THE COURT OF APPEAL OF ALBERTA
JUDICIAL DISTRICT OF ALBERTA**

BETWEEN:

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

Respondents (Appellants)

- and -

DARREN LUND

Appellant (Respondent)

- and -

CANADIAN CIVIL LIBERTIES ASSOCIATION

Intervener

**FACTUM OF THE INTERVENER,
CANADIAN CIVIL LIBERTIES ASSOCIATION**

**Appeal from the Decision of The Honourable Mr. Justice E.C. Wilson
dated the 3rd day of December, 2009 and filed the 11th day of March, 2010**

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TABLE OF CONTENTS

APPEAL OVERVIEW 1

PART I - STATEMENT OF FACTS 2

PART II - GROUNDS OF APPEAL..... 2
 Standard of Review **2**

PART III - POINTS OF LAW 3

 A. Reading down s.3(1)(b) of the *Act* accords with the purposes of the *Act* and
 appropriately reconciles the goals of prohibiting discrimination and protecting freedom of
 expression and religion 3

 B. Failing to read down s. 3(1)(b) of the *Act* calls its constitutionality into question on
 Charter grounds 4

 C. The remedial powers of the Panel must be interpreted in line with the *Act* and the
 Charter 10

PART IV - NATURE OF RELIEF DESIRED 11

LIST OF AUTHORITIES..... 12

APPEAL OVERVIEW

1. This case involves a complaint filed by Dr. Darren Lund, the Appellant, under s. 3 of the *Alberta Human Rights, Citizenship and Multiculturalism Act* (the "Act"), seeking a declaration that the opinion expressed by Mr. Stephen Boissain, the Respondent, in a letter to the editor of a newspaper, constituted discrimination contrary to the *Act*.
2. The Canadian Civil Liberties Association ("CCLA") does not intervene in this appeal to defend the merits of the Respondent's views; indeed, the CCLA explicitly rejects such views. Rather, the CCLA seeks to assist the Court in ensuring 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 reconciliation of rights takes place.
3. The CCLA intervenes to make the following submissions:
 - a. Justice Wilson correctly read down s. 3(1)(b) of the *Act* as prohibiting only the publishing or display of materials that leads to specific acts of discrimination in the provision of goods and services;
 - b. Unless it is read down, s. 3(1)(b) of the *Act* unjustifiably infringes ss. 2(b) and 2(a) of the *Canadian Charter of Rights and Freedoms* (the "*Charter*");
 - c. The remedies prescribed by the Panel of the Human Rights and Citizenship Commission (the "*Panel*") unjustifiably infringe the Respondent's rights under ss. 2(b) and 2(a) of the *Charter*.
4. The CCLA submits that, generally, the proper response to speech that is offensive, distasteful, or upsetting is counter-speech rather than censorship. When offensive speech is subject to legal prohibition, serious dangers arise: first, expression fundamental to rigorous debates and individual decision-making that underlie a functioning democracy may be prohibited and censored; second, such prohibitions cast a chill over all future speakers.

PART I - STATEMENT OF FACTS

5. Mr. Boissoin wrote a letter to the editor of a newspaper expressing his opinion on a moral, religious and political issue. Dr. Lund subsequently filed a human rights complaint arguing that Mr. Boissoin's expression of opinion constituted discrimination contrary to s. 3 of the *Alberta Human Rights, Citizenship and Multiculturalism Act* (the "Act").

6. A Panel of the Human Rights and Citizenship Commission (the "Panel") found that the publication of the letter to the editor contravened the *Act* and ordered Mr. Boissoin to, *inter alia*,

... 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.

- Decision of Human Rights Panels of Alberta on Remedy, paragraph 14(a) [Appeal Record Digest Part II, pages F83-F84].

7. Upon appeal, Wilson J. of the Court of Queen's Bench of Alberta overturned the Panel's ruling, finding that the contents of the letter to the editor did not contravene s. 3(1)(b) of the *Act* and that the remedies awarded by the Panel were without proper legal authority.

8. The CCLA was granted intervener status before the Panel and again by Justice Wilson, and was granted intervener status on this Appeal by the Order of Madam Justice Rowbotham granted March 23, 2011.

PART II - GROUNDS OF APPEAL

9. The Intervener takes no position with respect to the grounds of appeal or standard of review as stated by the parties.

PART III - POINTS OF LAW**A. Reading down s.3(1)(b) of the *Act* accords with the purposes of the *Act* and appropriately reconciles the goals of prohibiting discrimination and protecting freedom of expression and religion**

10. Section 3(1)(b) of the *Act* provides in relevant part:

No person shall publish...or cause to be published...before the public 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.¹

[Authorities of the Respondent, Tab 1]

11. At the Court of Queen's Bench, the CCLA submitted that s. 3(1)(b) should be read down and given a narrow, contextual and purposive interpretation, applying only to expression that leads to discriminatory behaviours prohibited by the *Act*. Justice Wilson agreed with this interpretation. [Digest Part II, page F477, paragraph 43.]

12. The CCLA submits that this interpretation of s. 3(1)(b) is congruent with the primary focus of the *Act* on addressing discrimination in relation to accommodation, service provision, employment and tenancy. When read in this light, s. 3(1)(b) serves as a further means to aid and protect human rights in these domains.

13. Section 3(1)(b) may be particularly useful to address representations or statements made by those who set policy, where those statements are likely to lead reasonable policy-implementers to engage in unfair practices or discrimination prohibited by the *Act*. For example, consider a situation where a landlord plasters 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. To the extent that the landlord's practice may indicate an intention to discriminate on the bases of gender and family status, a prospective tenant who is a single mother might be able to seek recourse under s. 3(1)(a) of the *Act*, if she is aware of the postings. In addition, in this context, a reasonable superintendent might be likely to see the display of these

¹ As noted by the Court of Queen's Bench, "sexual orientation" did not appear in the *Act*, but was added to the list of prohibited grounds of discrimination by the Supreme Court of Canada's decision in *Vriend v. Alberta*, [1998] 1 S.C.R. 493. This language was incorporated into the *Alberta Human Rights Act* in 2009.

articles as a directive from the landlord to either reject tenancy applications from single mothers or to extract unfair conditions and terms from them. Provided that there is evidentiary support for this likelihood, s. 3(1)(b) might be used to address such a situation. As such, s. 3(1)(b) enhances the *Act's* protection against discriminatory acts, mistreatment, and abuse by addressing expression linked to actions that fall within the scope of the *Act* but not covered under s. 3(1)(a).

14. Similarly, if a business owner posted hateful messages in the staff lounge about certain groups, in some circumstances, this might likely be viewed by reasonable employees as a directive to deny services to members of these groups or to deny them employment opportunities. This may be part of creating a poisonous environment. Section 3(1)(b) might be engaged in such a circumstance as well.

15. In sum, in order to trigger s. 3(1)(b), a direct link must be established between the publication and display of materials and a discriminatory action. This direct link should be supported by evidence that shows more than a “circumstantial connection,” a standard adopted by the Panel at paragraph 350b [Digest Part II, pages F74-F75]. Limiting the application of the section in this manner will satisfy the need to show harm to justify an infringement of the *Charter*, will prevent curtailing expression simply on the basis that it is offensive to some, and will give effect to s. 3(2) of the *Act* which protects “the free expression of opinion on any subject.”

B. Failing to read down s. 3(1)(b) of the *Act* calls its constitutionality into question on *Charter* grounds

16. The CCLA acknowledges that the constitutionality of s. 3(1)(b) of the *Act* is not before this Court, but submits that, unless it is read down, the section is vulnerable to challenge as infringing sections 2(b) and 2(a) of the *Charter*. [Respondent's Authorities, Tab 13]. A consideration of the constitutional implications of a broader reading helps to demonstrate why a more contextual and purposive interpretation of the section is both appropriate and necessary.

17. The CCLA submits that s. 3(1)(b) of the *Act*, unless interpreted narrowly as Wilson J. did, infringes sections 2(b) and 2(a) of the *Charter* and cannot be justified under section 1.

18. Any state prohibition on activities, with the exception of violence, that convey or attempt to convey meaning is a *prima facie* violation of section 2(b) of the *Charter*:

- *Irwin Toy Ltd. v. Quebec (A.G.)*, [1989] 1 S.C.R. 927 at paragraphs 49-50 and 41 *et seq.* [Authorities, Tab 1]

19. Insofar as religious expressions might contravene s. 3(1)(b), the impugned human rights provision could also infringe an individual's right to freedom of religion under section s. 2(a) of the *Charter*. The breadth of restrictions imposed by a broad reading of s. 3(1)(b) on an individual's fundamental freedoms is aptly illustrated by three factual elements in this case:

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

Freedom of Expression and the Importance of Debate on Political and Moral Issues

20. 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, including discussions concerning 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.

21. The right to debate is fundamental to our notions of democracy and has been an important tool used by many minority groups in an effort to eradicate discrimination and hatred against them. It is almost impossible to imagine the successes of the U.S. civil rights movement, the women's rights movement, or the gay rights movement without this protection. Given its fundamental nature, freedom of expression 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.

22. 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*, the Supreme Court acquitted a Jehovah's Witness of seditious libel for distributing a pamphlet entitled "Quebec'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.

- [1951] S.C.R. 265 at paragraphs 41-45 [Authorities, Tab 2]

23. Where individuals are discussing what they feel to be moral issues, emotions often run high. 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 can be made. A provision that prohibits debate on the morality of behaviour represents a serious and unwarranted incursion into freedom of expression and is not in keeping with the purposes of the *Act*.

Freedom of Expression and Letters to the Editor in Newspapers

24. 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 concern. The use of a broad interpretation of s. 3(1)(b) of the *Act* to curtail expressions in the form of letters to the editor would deny Canadians a pivotal mechanism to disseminate and to gather a wide range of opinions on matters of public interest.

25. Writing in dissent in *Cherneskey v. Armadale Publishers Ltd.*, a defamation case arising from a letter to the editor, Justice 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 discussions:

... 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.

- [1979] 1 S.C.R. 1067, paragraphs 76-77 [Authorities, Tab 3]

26. Justice Dickson's reasoning confirms that even where letters to the editor express opinions that many, if not 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. Indeed, in this case Justice Wilson referenced letters to the editor that followed the one at issue in this appeal, some of which were supportive of the Respondent's message, and others which were contradictory. [Digest Part II, page F484, paragraphs 75-76.]

27. While the CCLA agrees with Wilson J.'s comment at paragraph 121 of his decision [Digest Part II, page F493] that the forum of expression in this case does not give the Respondent a "super-added right by riding the newspaper's constitutional [freedom of the press] coattails," it does demonstrate that this expression does not lie far from the core values underlying the freedom of expression. As such, courts and tribunals should be extremely reluctant to limit the right of individuals to freely express themselves by way of letters to the editor.

Freedom of Expression and Freedom of Religion

28. The seriousness of the impact of a broad reading of s. 3(1)(b) on individuals' fundamental freedoms is accentuated in situations where the provision is used, as in this case, to prohibit expression rooted in religious beliefs. Canadian courts have noted on numerous occasions the importance of respecting freedom of religion and conscience. For example, the Supreme Court 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" and that "human rights codes must be interpreted and applied in a manner that respects [this] broad protection granted to religious freedom."

- *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698, at paragraphs 53 and 55. [Authorities, Tab 4]

29. In *R. v. Big M Drug Mart Ltd.*, the Supreme Court 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.

- [1985] 1 S.C.R. 295, at paragraph 94. [Authorities, Tab 5]

30. The Supreme Court also explained in *Syndicat Northcrest v. Amselem* that the right to 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.

- [2004] 2 S.C.R. 551, at paragraph 46. [Authorities, Tab 6]

31. The Supreme Court has therefore made clear that freedom of religion encompasses a wide range of actions and beliefs 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.

32. Such an intersection between freedoms of religion and expression further highlights the severity and compounded nature of the intrusion that a broad interpretation of s. 3(1)(b) could have on individuals' fundamental freedoms.

Section 1 Analysis

33. In light of these restrictions on core expressive activities and a potentially wide range of religious beliefs, the CCLA submits that *Charter* violations resulting from a broad reading of s. 3(1)(b) cannot be justified under section 1 of the *Charter*.

34. The CCLA acknowledges that the Supreme Court of Canada upheld a "hate speech" provision in the *Canadian Human Rights Act* in *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892 [Appellant's Authorities, Tab 10], but submits that the decision is distinguishable. The statutory prohibition at issue in that case was far more restricted in its scope, focusing on hateful materials conveyed repeatedly through telephonic communications. Section

3(1)(b) of the *Alberta Act* at issue in this case, if not read down, prohibits a much broader range of expression.

35. On the one hand, the direct nature and limited scope of telephone communication that was considered in *Taylor* is quite distinct from a s. 3(1)(b) prohibition that, if interpreted broadly, encompasses most, if not all, public communication media. On the other hand, the "repeated" nature of the communication was a matter of some emphasis by the Court in *Taylor* whereas this feature does not appear in s. 3(1)(b). This difference significantly widens the scope of the impugned prohibition in this case. The CCLA respectfully submits, therefore, that a careful and distinct section 1 analysis is necessary when considering the constitutionality of s. 3(1)(b).

36. The CCLA agrees that s. 3(1)(b) 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 on the basis of enumerated grounds is unassailable. However, the CCLA has real concerns about s. 3(1)(b) with respect to the remainder of the section 1 analysis.

37. First, the CCLA submits that it is not clear that s. 3(1)(b), when interpreted broadly, serves the purpose 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 in society.

38. Second, a broad reading of s. 3(1)(b) fails to meet the minimal impairment requirement. Unless it is read down, the impugned provision could potentially capture expression that is not linked to, or lack even the likelihood of encouraging, actual discrimination. It could be used to curtail a wide range of expression that may well have considerable merit simply because listeners are offended or outraged.

39. Third, the CCLA submits that the deleterious effects of a broad reading of s. 3(1)(b) are not proportional to the objective of eliminating discrimination. As mentioned, s. 3(1)(b) when interpreted broadly places severe restrictions on a wide swath of core expressive activities and religious beliefs. It could even be interpreted in a manner that would prohibit speaking out against those who are seen as oppressing minorities or perpetuating discrimination in society. Such a blanket prohibition on expression is likely to result in self-censorship of future speakers.

40. As such, a broad reading of s. 3(1)(b) of the *Act* represents an unjustifiable limit on *Charter*-guaranteed freedom of expression and freedom of religion. The purposive and contextual understanding of the provision described in Section A above is in keeping with both the purpose of the *Act* and the mandates of the Constitution.

C. The remedial powers of the Panel must be interpreted in line with the *Act* and the *Charter*

41. In the event that a broad interpretation of s. 3(1)(b) is found to be constitutional and the Respondent's letter to the editor is found to violate the *Act*, the CCLA submits that Justice Wilson nevertheless correctly overturned the remedies granted by the Panel.

42. In finding that the Panel's order on remedies lacked the proper legal authority, Wilson J. raised particular concerns about, *inter alia*, the Panel's direction that the Respondent ceases and desists the publishing of "disparaging remarks" about homosexuals. It is this portion of the remedies ordered by the Panel with which CCLA takes particular issue. As held by Wilson J. at para. 149a [Digest Part II, page F497]:

... "Disparaging remarks" were not defined by the Panel. But clearly, "disparaging remarks" are remarks much less serious than hateful and contemptuous remarks and are quite lawful to make. They are beyond the power of the *Act* to regulate and the power of the Province to restrain.

43. The CCLA submits that a sweeping order requiring the removal of all "disparaging remarks" from "current websites and publications" and enjoining "the publishing in newspapers, by email, on the radio, in public speeches, or on the internet, in future, disparaging remarks about gays and homosexuals" unjustifiably infringes the Respondent's *Charter* rights.

44. Leaving aside the potential ambiguity around determining whether a remark made by the Respondent would be considered disparaging, as observed by Justice Wilson, disparaging remarks are much less serious than hateful or contemptuous expressions. A prohibition against these remarks therefore represents an even more extensive restriction on individuals' freedom of expression and religion than would a broad reading of s. 3(1)(b). For the reasons outlined in our preceding arguments, the CCLA submits that a further intrusion as such into individuals' ss. 2(b) and 2(a) *Charter* rights cannot be saved by section 1 of the *Charter*.

45. 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 human rights provision, nor even provide great comfort to respondents who may have had to face extensive investigation and litigation, it could nonetheless provide relief in individual cases.

PART IV - NATURE OF RELIEF DESIRED

46. 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:

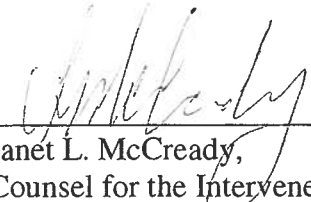
- (a) Uphold Justice Wilson's interpretation of s. 3(1)(b) of the *Act*;
- (b) Uphold Justice Wilson's decision to overturn the Panel's orders.

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

Estimated time for argument: 30 minutes

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 28 day of April, 2011.

PEACOCK LINDER & HALT LLP

Per: 

Janet L. McCready,
Counsel for the Intervener,
Canadian Civil Liberties Association

LIST OF AUTHORITIES

1. *Irwin Toy Ltd. v. Quebec (A.G.)*, [1989] 1 S.C.R. 927, 1989 CarswellQue 115.
2. *R. v. Boucher*, [1951] S.C.R. 265, 1950 CarswellQue11. [headnote and extract]
3. *Cherneskey v. Armadale Publishers Ltd.*, [1979] 1 S.C.R. 1067, 1978 CarswellSask 103.
4. *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698, 2004 CarswellNat 4422.
5. *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, 1985 CarswellAlta 316. [headnote and extract]
6. *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551, 2004 CarswellQue 1543. [English headnote and extract]