In the Court of Appeal of Alberta

Citation: Lund v. Boissoin, 2012 ABCA 300

Date: 20121017
Docket: 1001-0078-AC
Registry: Calgary

Between:

Stephen Boissoin and the Concerned Christian Coalition Inc.

Respondents

- and -

Darren Lund

Appellant

- and -

The Attorney General of Alberta and
Canadian Civil Liberties Association

Interveners

The Court:

The Honourable Madam Justice Carole Conrad
The Honourable Mr. Justice Clifton O'Brien
The Honourable Mr. Justice Brian O'Ferrall

Reasons for Judgment Reserved of The Honourable Mr. Justice O'Brien
Concurred in by The Honourable Madam Justice Conrad
Concurred in by The Honourable Mr. Justice O'Ferrall

Appeal from the whole of the Order by
The Honourable Mr. Justice E.C. Wilson
Dated the 3rd day of December, 2009 and the 17th day of February 2010
(Docket: 0801-07613)

Reasons for Judgment Reserved of
The Honourable Mr. Justice O'Brien

I. Introduction

[1] This appeal requires the Court to construe the prohibition found in Alberta's human rights legislation against language commonly known as "hate speech". It concerns the line to be drawn between "hate speech", which is prohibited, and speech that may be hurtful and offensive, but which is protected by the fundamental freedom of expression.

[2] A human rights tribunal held that a letter to the editor published in an Alberta daily newspaper exposed homosexuals to hatred or contempt, and directed remedies, including an order to cease and desist and an award of damages. On appeal, a Queen's Bench judge set aside the tribunal's finding. The judge held that while the language of the letter "may be jarring, offensive, bewildering, puerile, nonsensical and insulting", it was not likely to expose homosexuals to hatred or contempt within the meaning of the Alberta statute. I agree that the letter is offensive; it is coarse, crude and insensitive. However, in my view, the letter constituted an expression of opinion that did not infringe the statute. For the reasons which follow, I would dismiss the appeal.

II. Background

[3] The respondent, Stephen Boissoin, wrote a letter to the editor of the *Red Deer Advocate*, (the newspaper), which published it on June 17, 2002, under the headline "Homosexual Agenda Wicked". The newspaper composed the headline. At the time, Boissoin was the executive director of the respondent Concerned Christian Coalition Inc., (Coalition). The target audience of the letter was people whom Boissoin believed were apathetic to the inroads made by the "homosexual machine", primarily in respect to educating children that homosexuality is a morally acceptable choice and lifestyle.

[4] The letter stated:

> The following is not intended for those who are suffering from an unwanted sexual identity crisis. For you, I have understanding, care, compassion and tolerance. I sympathize with you and offer you my love and fellowship.
>
> I prayerfully beseech you to seek help, and I assure you that your present enslavement to homosexuality can be remedied. Many outspoken, former homosexuals are free today.
>
> Instead, this is aimed precisely at every individual that in any way supports the homosexual machine that has been mercilessly gaining ground in our society since the 1960's. I cannot pity you any longer and remain inactive. You have caused far too much damage.

My banner has now been raised and war has been declared so as to defend the precious sanctity of our innocent children and youth , that you so eagerly toil, day and night, to consume. With me stand the greatest weapons that you have encountered to date – God and the "Moral Majority." Know this, we will defeat you, then heal the damage you have caused.

Modern society has become dispassionate to the cause of righteousness. Many people are so apathetic and desensitized today that they cannot even accurately define the term "morality."

The masses have dug in and continue to excuse their failure to stand against horrendous atrocities such as the aggressive propagation of homo- and bisexuality. Inexcusable justifications such as "I'm just not sure where the truth lies" or "If they don't affect me then I don't care what they do," abound from the lips of the quantifiable majority.

Face the facts, it is affecting you. Like it or not, every professing heterosexual is having their future aggressively chopped at the roots.

Edmund Burke's observation that, "All that is required for the triumph of evil is that good men do nothing," has been confirmed time and time again. From kindergarten class on, our children, your grandchildren are being strategically targeted, psychologically abused and brainwashed by homosexual and pro-homosexual educators.

Our children are being victimized by repugnant and premeditated strategies, aimed at desensitizing and eventually recruiting our young into their camps. Think about it, children as young as five and six years of age are being subjected to psychologically and physiologically damaging pro-homosexual literature and guidance in the public school system; all under the fraudulent guise of equal rights.

Your children are being warped into believing that same-sex families are acceptable; that men kissing men is appropriate.

Your teenagers are being instructed on how to perform so-called safe same gender oral and anal sex and at the same time being told that it is normal, natural and even productive. Will your child be the next victim that tests homosexuality positive?

> Come on people, wake up! It's time to stand together and take whatever steps are necessary to reverse the wickedness that our lethargy has authorized to spawn. Where homosexuality flourishes, all manner of wickedness abounds.
>
> Regardless of what you hear, the militant homosexual agenda isn't rooted in protecting homosexuals from "gay bashing" The agenda is clearly about homosexual activists that include, teachers, politicians, lawyers, Supreme Court judges, and God forbid, even so-called ministers, who are all determined to gain complete equality in our nation and even worse, our world.
>
> Don't allow yourself to be deceived any longer. These activists are not morally upright citizens, concerned about the best interests of our society. They are perverse, self-centred and morally deprived individuals who are spreading their psychological disease into every area of our lives. Homosexual rights activists and those that defend them, are just as immoral as the pedophiles, drug dealers and pimps that plague our communities.
>
> The homosexual agenda is not gaining ground because it is morally backed. It is gaining ground simply because you, Mr. and Mrs. Heterosexual, do nothing to stop it. It is only a matter of time before some of these same morally bankrupt individuals such as those involved with NAMBLA, the North American Man/Boy Lovers [*sic*] Association, will achieve their goal to have sexual relations with children and assert that it is a matter of free choice and claim that we are intolerant bigots not to accept it.
>
> If you are reading this and think that this is alarmist, then I simply ask you this: how bad do things have to become before you will get involved? It's time to start taking back what the enemy has taken from you. The safety and future of our children is at stake.
>
> (signed) Rev. Stephen Boissoin, Central Alberta Chairman, Concerned Christian Coalition, Red Deer.

[5] A news item published in the newspaper about two weeks later became important, as it reported that a gay teenager had been assaulted in downtown Red Deer – solely because he was gay. In the course of detailing a number of comments attributed to the victim, the newspaper reported:

> He also doesn't feel safe reading the anti-gay statements like the ones in the *Red Deer Advocate's* June 17 letter to the editor from Stephen

> Boissoin of the Concerned Christian Coalition. “I feel the letter was just encouragement for people to go out and stop the gay rights movement.”

[6] The appellant, Dr. Darren Lund, describes himself as a human rights educator and activist. In 2002, he was a member of the faculty of the University of Calgary, and had previously taught as a high school teacher in Red Deer, where he was involved with the Gay/Straight Alliance. He explained in later testimony that the reported assault, and the specific reference by the alleged victim to Boissoin’s letter, triggered his complaint to the Human Rights and Citizenship Commission in July 2002. He maintained that Boissoin’s letter exposed people to hatred and contempt, and that it fostered an atmosphere of violence, citing the reported assault and the alleged quotation of the victim as support for his claim.

III. Alberta Human Rights Legislation

[7] In 2002, section 3 of the *Human Rights, Multiculturalism and Citizenship Act*, RSA 2000, c H-14 (*Act*), provided:

> 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 or family status 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.
>
> (3) Subsection (1) does not apply to
>
> (a) the display of a notice, sign, symbol, emblem or other representation displayed to identify facilities customarily used by one gender,

> (b) the display or publication by or on behalf of an organization that
>
> (i) is composed exclusively or primarily of persons having the same political or religious beliefs, ancestry or place of origin, and
>
> (ii) is not operated for private profit,
>
> of a statement, publication, notice, sign, symbol, emblem or other representation indicating a purpose or membership qualification of the organization, or
>
> (c) the display or publication of a form of application or an advertisement that may be used, circulated or published pursuant to section 8(2),
>
> if the statement, publication, notice, sign, symbol, emblem or other representation is not derogatory, offensive or otherwise improper.

[8] It is noteworthy that subsection 3(1) did not include a reference to sexual orientation. It was accepted as part of the statute, nonetheless, as a result of the decision of the Supreme Court of Canada in *Vriend v Alberta*, [1998] 1 SCR 493, 156 DLR (4th) 385, where sexual orientation was read into the Alberta human rights legislation. In 2009, the *Act* was amended to change the title and chapter to the *Alberta Human Rights Act*, RSA 2000, c A-25.5, and to expressly include sexual orientation as a prohibited ground of discrimination: *Human Rights, Citizenship and Multiculturalism Amendment Act*, SA 2009, c 26. Subsections (2) and (3) of section 3 were not amended and remained in the *Act*.

[9] The other relevant provision of the *Act* for this appeal is section 32, which provides:

> 32(1) A human rights panel
>
> (a) shall, if it finds that a complaint is without merit, order that the complaint be dismissed, and

> (b) may, if it finds that a complaint has merit in whole or in part, order the person against whom the finding was made to do any or all of the following:
>
> (i) to cease the contravention complained of;
>
> (ii) to refrain in the future from committing the same or any similar contravention;
>
> (iii) to make available to the person dealt with contrary to this Act the rights, opportunities or privileges that person was denied contrary to this Act;
>
> (iv) to compensate the person dealt with contrary to this Act for all or any part of any wages or income lost or expenses incurred by reason of the contravention of this Act;
>
> (v) to take any other action the panel considers proper to place the person dealt with contrary to this Act in the position the person would have been in but for the contravention of this Act.
>
> (2) A human rights panel may make any order as to costs that it considers appropriate.

IV. Decisions of the Human Rights Panel: 2007 AHRC 11; 2008 AHRC 6

[10] Lund's complaint was initially dismissed by the Southern Regional Office of the Alberta Human Rights and Citizenship Commission. On appeal to the Chief Commissioner, the complaint was allowed to advance to a panel hearing, subject to Lund agreeing to take carriage of the complaint. In a written decision issued on May 25, 2005, the Chief Commissioner wrote:

> Determinations / Reasons: Having completed a documentary file review it is my view that respondents were at least partially responsible for the publication of the letter which they wrote and *which contained the inflammatory, hateful and untruthful comments*

> being complained about. I believe there is a reasonable basis in the evidence to advance this case to the panel hearing stage. In accordance with s. 27(1) I shall appoint a hearing panel to hear the case subject to the complainant wanting to take charge of it.
> [emphasis in original]

[11] A one-person panel was subsequently appointed to hear the complaint, which Lund agreed to prosecute. The newspaper was not a party in the complaint hearing. The panel explained in its decision that in 2004 the newspaper had expanded its letter publishing policy so as not to publish statements that indicate unlawful discrimination or intent to discriminate against a person or class of persons, or are likely to expose people to hatred or contempt because of ... sexual orientation (para 6).

[12] Boissoin submitted that his letter raised objections, manifesting his religious beliefs, against teaching "school-aged children in grades K through 12 that homosexuality was normal, necessary, acceptable and productive," and that the issue was a matter for political debate because tax payers' dollars were used for the purpose of this education. For its part, the Coalition made no submissions, other than to seek its removal as a party.

[13] The Attorney General of Alberta intervened[1] and asserted that since Boissoin was not making a *Charter* challenge to section 3 of the *Act* he was not entitled to a constitutional remedy, such as reading down the legislation (para 216) . The Attorney General further submitted that section 3 of the *Act* applied to all forms of discriminatory expression, including political and religious speech (para 246).The Canadian Civil Liberties Association (CCLA) was also granted intervener status before the panel. It argued that section 3 applied only to expression linked to the specific discriminatory actions prohibited by the *Act* (paras 252, 254).

[14] In its decision on November 29, 2007, the panel found that the Commission had jurisdiction to deal with the complaint on the following basis:

> (i) Boissoin's article was, in fact, a matter of local and private nature related to, albeit perhaps somewhat indirectly, the educational system in Alberta;
>
> (ii) Secondly, there was a circumstantial connection between the hate speech of Boissoin and the Coalition and the beating of a gay teenager in Red Deer less than two weeks following the publication of the letter; and
>
> (iii) "Without evidence of a crime as captured in the *Criminal Code*, after finding this letter is likely to expose people to hate and or contempt, there is a void in jurisdiction. Without the crime, the Parliament has no jurisdiction. Because it is

> hate speech, it becomes a local matter. Not taking jurisdiction would mean that inciting hatred would be acceptable up to the point that a crime occurs as a result of it. This cannot be the case, given the context of this being rural Alberta that is a matter of a local nature."
> [para 350]

[15] The panel further elaborated on the connection between the alleged beating and the publication of the letter, at para 354:

> While the evidence of the beating of the gay man two weeks after the publication of the letter was indirect, I find in addition, that there was sufficient nexus to conclude circumstantially, that the two matters may be connected.

[16] In response to Boissoin's submissions, the panel found that "there appeared to be no raging debate in the community at the time that the letter was published," so that "the context of the letter is not within the context of a public debate" (paras 324F-I, 338).The panel refused the Coalition's application for removal as a party, finding that both Boissoin and the Coalition published the letter in the newspaper, or caused it to be published, because Boissoin submitted the letter with the intent that it be published (paras 300-311).

[17] The panel then considered subsection 3(1). Relying on the decision of Rooke J., as he then was, in *Re Kane* (*sub nom Kane v Alberta Report*), 2001 ABQB 570, 291 AR 71, the panel asked itself these questions: Does the communication itself express hatred or contempt of a person or group on a basis of one or more of the listed grounds, and would a reasonable person, informed about the context, understand the message as expressing hatred or contempt? The panel held that it was "clear that the letter expresses hatred or contempt for a group of persons on the basis of their sexual preference." Further, the panel agreed with Lund that the letter exposed homosexuals to hatred or contempt. The panel concluded that Boissoin and the Coalition violated subsection 3(1)(b) of the *Act*.

[18] The panel held that subsection 3(2) was "not a defence to the breach of subsection 3(1)". It viewed subsection 3(2) as "an admonition for Panels to balance the freedom of expression with the eradication of discrimination in the consideration of complaints under s. 3" (para 346). The panel stated:

> It is my view that the views of individuals expressing their opinions or expressing political statements must be made in a responsible manner. I am not prepared to afford Mr. Boissoin and the CCC an absolute defence to their responsibility for statements they made, simply because they are attempting to express their statements under the guise of political speech or opinion. [para 345]

[19] In the panel's subsequent decision dealing with remedy, dated May 30, 2008, Boissoin and the Coalition were ordered to cease publishing disparaging remarks about gays and homosexuals in newspapers, by electronic mail, on the radio, in public speeches or on the internet in future. They were also ordered to write an apology, pay Lund an award of damages in the amount of $5000, and pay expenses up to $2000 for one of the witnesses.

V. Decisions of Wilson J: 2009 ABQB 592; 2010 ABQB 123

[20] Boissoin and the Coalition appealed by originating notice pursuant to section 37 of the *Act*. The Attorney General of Alberta and the CCLA were again granted intervener status, as was a third intervener, the Canadian Constitutional Foundation.

[21] The reviewing judge found, as a preliminary matter, that the Province has jurisdiction to regulate discriminatory expression with respect to matters within its provincial sphere. He then interpreted subsection 3(1)(b) in a manner that required any allegedly hateful or contemptuous speech be linked to other discriminatory practices in the *Act*, such as discrimination in employment or with regard to accommodation. He reasoned that without this linkage the section would be *ultra vires* the province (paras 33 and 67).

[22] He also interpreted the section to require further "linkages." He found that subsection 3(1)(b) applied only to hateful expression that itself signals an intention to engage in discriminatory behaviour or seeks to persuade another person to do so, and that both the message and its intended effect must be considered. In addition, he found there must be some likelihood that the message might bring about a prohibited discriminatory practice, and there was an obligation on the complainant to produce evidence to this effect – as he would not presume discriminating practices are likely to ensue simply from a finding that the impugned expression was hateful or contemptuous (paras 24-37, 56, 67).

[23] Applying this construction of section 3, the reviewing judge concluded that the letter, and the evidence before the panel about its potential effects, were not sufficient to create a linkage between the letter in question and other discriminatory practices described in the statute (paras 59-67). He also found that the impugned letter could not be linked to the likelihood of further discriminatory acts. In this regard, he dealt with the alleged assault on the gay teenager which had been relied upon by the panel. He found that there was no evidence that an assault had taken place, and furthermore, even assuming an assault had occurred, there was no evidence to support an inference that the person committing the assault had read the letter or been influenced by it to commit his crime (paras 20-23).

[24] Having found these reasons to overturn the panel's conclusions, the reviewing judge went on to find that the panel had also erred in its finding that the impugned letter was hateful and contemptuous of homosexuals, and that it had failed to properly conduct the balancing of freedom of speech required by subsection 3(2) (para 89). Further, the judge found that the panel overlooked evidence demonstrating that there had been pre-existing public debate about whether and how homosexuality should be taught as a matter of public education, being the general topic discussed

in Boissoin's letter. The judge concluded that the panel's erroneous factual findings had stripped Boissoin of any credible contextual basis to claim that the letter manifested political or religious expression, (para 105).

[25] With respect to the *Charter*, the judge noted that the parties agreed with the Crown's concession that subsection 3(1)(b) of the *Act* infringed subsection 2(b) of the *Charter* protecting freedom of expression (para 118). He held, however, that such infringement was reasonably justified for the reasons set out in the decision of the Supreme Court of Canada in *Canada (Human Rights Commission) v Taylor*, [1990] 3 SCR 892, 75 DLR (4th) 577.

[26] The reviewing judge observed that the Coalition was not named as a party in the original complaint, and that the panel overlooked or ignored evidence that Boissoin had written the subject letter in his individual capacity. The judge consequently held that the evidence failed to establish that the Coalition had contravened subsection 3(1)(b) of the *Act*.

[27] Finally, the court held the remedies directed by the panel were without legal foundation and beyond the remedial powers granted by section 32 of the *Act*. In particular, the reviewing judge found it was beyond the power of the *Act* to regulate and restrain "disparaging remarks" or "same or similar contraventions" of the *Act*; Lund did not qualify to receive an ordered apology; there was no authority in the *Act* allowing the panel to order publication of an apology; Lund did not meet the criteria for receiving damages, namely he was not a person dealt with contrary to the *Act*; and there was no authority to order payment of expenses incurred by a witness. The court further directed that each party bear its own costs.

VI. Grounds of Appeal

[28] The appellant essentially challenges the reviewing judge's interpretation of subsection 3(1)(b) of the *Act*. Lund submits the reviewing judge erred:

> (i) in requiring the hateful or contemptuous speech to be directly linked to areas of prohibited discriminatory practice, and in holding that subsection 3(1)(b) applied to only such expression that encouraged or indicated the intention to do so;
>
> (ii) in requiring that a complainant demonstrate the likelihood of discriminatory practices resulting from the hateful or contemptuous speech;
>
> (iii) in considering the intention of the impugned speech; and
>
> (iv) in determining that the impugned letter did not reach the level of hate speech.

[29] Even though the reviewing judge found that the broad interpretation of the *Act* which Lund had advanced would mean that the legislation was *ultra vires* of provincial jurisdiction, Lund makes no submissions on the constitutionality of section 3, either from the standpoint of the *Charter* or the division of powers. Further, Lund does not challenge the removal of the Coalition as a party, nor the ruling with respect to remedies, with the exception of the finding that he personally was not dealt with contrary to the *Act*. He seeks to uphold the award of $5,000 made by the panel in his favour.

VII. Positions of the Respondent and Interveners

1. The Respondent

[30] Boissoin likewise does not argue the constitutional issues raised in the Court of Queen's Bench, and asserts that "the constitutional questions need not and should not be answered in this appeal". He relies upon the reviewing judge's construction of the *Act* in finding that subsection 3(1) had not been contravened. In any event, he submits that the panel's findings and conclusions should be disregarded, as they were materially influenced by the errors and omissions in the panel's fact findings as identified by the court below.

[31] Boissoin submits, further, that the subject letter was an expression of political and religious opinion and thereby excluded by subsection 3(2) from the impact of subsection 3(1) of the *Act*. Finally, Boissoin characterizes the panel's award of damages to Lund as an "unlawful bounty," and submitted that the reviewing judge was correct in finding that Lund was not a person dealt with contrary to the *Act*.

2. The Attorney General of Alberta

[32] The Attorney General of Alberta notes that the parties in this appeal are not explicitly challenging the constitutionality of section 3 of the *Act*, and further asserts that the reviewing judge correctly construed the legislation. The Attorney General, however, takes no position with respect to the subject letter. Importantly, the Attorney General asserts that the Province's ability to limit hateful or contemptuous speech occurs only when it is linked to acts of discrimination falling within provincial subject matters.

[33] More particularly, the Attorney General disagrees with Boissoin's submission that subsection 3(2) gives a blanket exemption to hateful and contemptuous political and religious discourse. The Attorney General claims jurisdiction on behalf of the Province to limit all discriminatory expression, which it defines as "*any* expression that either (1) *expressly advocates* discriminatory practice with respect to the subject matters enumerated in the *Act*, or (2) is hateful and contemptuous and *linked* to discriminatory acts with respect to subject matters enumerated in the *Act*"(emphasis added).

3. Canadian Civil Liberties Association

[34] The CCLA rejects the views of Boissoin as expressed in his letter, but intervenes to ensure that the fundamental rights to freedom of expression, conscience and religion are given a robust application. The CCLA submits that the reviewing judge correctly read down subsection 3(1)(b) of the *Act* as prohibiting the publication or display of materials that lead to specific acts of discrimination in the provision of goods and services. While the CCLA acknowledges that the

constitutionality of subsection 3(1)(b) from a *Charter* aspect was not argued by the parties, it submits that unless subsection 3(1)(b) is read down in the manner suggested by the reviewing judge, the section is vulnerable to challenge as infringing upon subsections 2(a) and 2(b) of the *Charter*.

VIII. Standards of Review

[35] It must first be determined whether the reviewing judge chose and applied the correct standard of review. If he did, then this court must consider whether he applied it correctly. If he did not, the tribunal's decision must be reviewed applying the correct standard: *Dr Q v College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 SCR 226, at para 43. The practical effect of these obligations, in this case, is that this court is entitled to determine the appropriate standard of review to apply to the panel and then apply it.

[36] This Court has previously set a correctness standard of review for decisions on questions of law by Human Rights Panels: *Lockerbie & Hole Industrial Inc v Alberta (Human Rights and Citizenship Commission, Director)*, 2011 ABCA 3, 329 DLR (4th) 76, at paras 8-10; *Alberta (Human Rights and Citizenship Commission) v Kellogg Brown & Root (Canada) Company*, 2007 ABCA 426, 425 AR 35, at paras 16-28.

[37] In the case before us, the interpretation and application of section 3 of the *Act*, intertwined as it is with constitutional and jurisdictional issues, is a question of law of general importance to the legal system so that the correctness standard applies: *Rogers Communications Inc. v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, at paras 10-20. Further, the members of human rights tribunals in Alberta are not full-time human rights adjudicators, but are lawyers in private practice appointed on an *ad hoc* basis, so that we are not dealing with a specialized board which has acquired an expertise in this area.

[38] In its decision in *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, (*Mowat*), 2011 SCC 53, [2011] 3 SCR 471, the Supreme Court recognized that not all questions of general law entrusted to human rights tribunals rise to the level of issues of central importance to the legal system, or fall outside the adjudicator's specialized area of expertise, requiring that proper distinctions be drawn (para 22). In that case, the Supreme Court concluded that the question of whether legal costs may be awarded in a compensation order was reviewable on a standard of reasonableness. However, it excepted "issues of general legal importance" (para 24), to which correctness applies.

IX. Analysis

[39] I begin by emphasizing that the parties have chosen not to argue the constitutionality of section 3, either from the aspect of whether that section is *ultra vires* of the Province's jurisdiction based upon distribution of powers, or whether the section unjustifiably violates the fundamental freedoms recognized in section 2 of the *The Canadian Charter of Rights and Freedoms*, Schedule B to the *Canada Act* 1982 (UK), 1982, c 11. In view of my ultimate decision, I am satisfied that these important constitutional issues can be left to another day.

[40] The issues before this Court are consequently ones involving the interpretation and application of section 3 of the *Act* with regard to the impugned publication – issues to be determined on the correctness standard. I will first consider the interpretation placed upon the statute by the reviewing judge, and explain where and why I differ. I will next give my reasons for agreeing with the judge that the letter in question does not meet the threshold of hate speech. I will also examine the purpose and effect the exemption provided by subsection 3(2). Finally, I will express my concerns, which arise out of the issues on this appeal, about the lack of clarity in the legislation.

1. The Reviewing Judge's Interpretation of subsection 3(1)(b)

[41] Subsection 3(1)(b) directly prohibits the publication before the public of any statement that is likely to expose a person or a class of persons to hatred or contempt on the basis of the listed grounds. The rationale for like prohibitions contained in federal and provincial statutes is that speech exposing persons to hatred or contempt "may result in increased acts of discrimination, including the denial of equal opportunity in the provision of goods, services and facilities, and even incidents of violence": *Taylor* at 918-19. Further, it should be noted that federal legislation under review in *Taylor* expressly made the subject communication "a discriminatory practice".

[42] The reviewing judge interpreted subsection 3(1)(b) as requiring a "causal link between publication of the message and the infringement of rights contained in the *Act*" (para 38), and further requiring some "concrete evidence" linking the message to the prohibited practices listed in section 3, (para 56). He accepted that "hateful or contemptuous speech" may prompt or even add to existing prejudice, but that "more" was required to be demonstrated under section 3. In my view, neither of these implied linkages is supported by the language of the *Act*. Furthermore, the requirement that there be a causal link between the publication and other rights contained in the *Act* comes from the inappropriate use of the constitutional remedy of "reading down."

A. The language of the *Act*

[43] It is trite law that the words of a statute must be read in their ordinary sense harmoniously with the scheme and object of the *Act* and the intention of the Legislature. In my view, a plain and ordinary reading of subsection 3(1)(b) requires only a demonstration that the publication is likely to expose a person or a class of persons to hatred or contempt. The trigger is *exposure*. No evidence of a subsequent discriminatory activity caused by such exposure is required to make the prohibition effective. To that extent, the prohibition against hateful and contemptuous speech is "freestanding", as Lund submits. However, the Alberta statute does not identify such speech as in itself being an act of discrimination, as did the legislation in *Taylor*.

[44] Giving effect to the plain and ordinary meaning of the words of subsection 3(1)(b) serves the purpose and objective of the statute and the intention of the Legislature in attempting to strike at a cause of discriminatory activities. It is also consistent with the history of the legislation. Section 3(1), in its previous incarnation, appeared as section 2(1) of the *Individual's Rights Protection Act*, RSA 1980, c I-2. It read as follows:

> 2(1) No person shall publish or display before the public or cause to be published before the public any notice, sign, symbol, emblem or other representation indicating discrimination or an intention to discriminate against any person or class of persons for any purpose because of the race, religious beliefs, colour, gender, physical disability, mental disability, age, ancestry or place of origin of that person or class of persons.

[45] In 1996, however, the Alberta Legislature broadened the scope of this provision. It did so, at least in part, in response to recommendations made in a report by the Human Rights Review Panel entitled *Equal in Dignity and Rights* (otherwise known as the *O'Neill Report*). The Panel recommended that section 2 be broadened for the purposes of "prohibiting the spread of hatred through public media" (at 68). The name of the enactment was changed to the *Human Rights, Citizenship and Multiculturalism Act*, and, among other changes, the present subsection 3(1)(b) was introduced into the legislation. The elimination of the spread of hatred through public speech motivated the amendment to subsection 3(1) in 1996. This prohibition was additional to the discriminatory practices which were prohibited under the prior legislation, and was aimed at eradicating one underlying cause of such activities (i.e., speech that promotes hatred).

[46] In my view, therefore, there is no need to prove a connection or linkage between the impugned message and a subsequent discriminatory practice in order to restrain the message, as the reviewing judge held (para 60).

B. Reading down not permissible

[47] The reviewing judge rejected a "narrow, literal interpretation" of section 3 which would give rise to a "stand-alone" prohibition on hateful and contemptuous expression in any public forum, (paras 28-29). It appears that he did so, at least in part, to avoid giving the statute an interpretation that would make it *ultra vires* provincial jurisdiction. He stated: "the purpose of the section cannot be to simply restrain hateful or contemptuous speech *per se*. Such legislation would be *ultra vires* the province" (para 33). The judge cited the majority judgment of Cameron J.A. of the Saskatchewan Court of Appeal in *Saskatchewan (Human Rights Commission) v Engineering Students' Society* (1989), 56 DLR (4th) 604, 72 Sask R 161, in support of the proposition that legislation should be interpreted in such a fashion as to sustain its constitutional validity, speaking in that case to the division of powers aspect.

[48] It is correct, of course, that "if words in a statute are fairly susceptible of two constructions of which one will result in the statute being *intra vires* and the other will leave a contrary result, the former is to be adopted": *McKay v The Queen*, [1965] SCR 798 at 803–4, 53 DLR (2d) 532. In my view, however, the words of the statute in this case are not susceptible to two alternative constructions. With respect, the reviewing judge has, in effect, read down section 3 in order to produce a perceived need for a constitutional fit. This is the wrong approach.

[49] The difficulty with this approach is that the court did not begin with an analysis of the "pith and substance" of the impugned section, which is a mandatory first step in determining whether a statute is within the jurisdiction of the enacting body: *Canadian Western Bank v Alberta*, 2007 SCC 22, [2007] 2 SCR 3, at para 25. Once the "pith and substance" or "matter" of a statutory provision is characterized, the second step is to determine whether the matter falls under a head of power assigned to that body: *Reference re Assisted Human Reproduction Act*, 2010 SCC 61, [2010] 3 SCR 457, at para 19.

[50] The pith and substance doctrine permits a statute that is otherwise *intra vires* to have ancillary extra-provincial and "incidental" effects; i.e., effects that may be of significant practical importance, but are collateral and secondary to the mandate of the enacting legislatures: *British Columbia v Imperial Tobacco Canada Ltd.*,2005 SCC 49, [2005] 2 SCR 473, at para 28. When "incidental effects" infringe upon the other level of government sufficiently to place the impugned statute under another head of power in pith and substance, the remedy of "reading down" may be employed. As Binnie and LeBel JJ. summarized in *Canadian Western Bank*, at para 31:

> When problems resulting from incidental effects arise, it may often be possible to resolve them by a firm application of the pith and substance analysis. The scale of the alleged incidental effects may indeed put a law in a different light so as to place it in another constitutional head of power. The usual interpretation techniques of constitutional interpretation, such as *reading down*, may then play a useful role in determining on a case-by-case basis what falls exclusively to a given level of government. In this manner, the courts incrementally define the scope of the relevant heads of power. The flexible nature of the pith and substance analysis makes it perfectly suited to the modern views of federalism in our constitutional jurisprudence. [emphasis added]

[51] Reading down, within the context of division of powers jurisdiction, is thus a remedy for extra-jurisdictional effects that are beyond "incidental". In the absence of a pith and substance analysis, and a determination that the statute is in fact *ultra vires*, it is inappropriate to read the legislation down.

[52] As the parties have chosen not to make submissions on the constitutional validity of the statute, and as it is unnecessary to do so because of my interpretation of the letter, I will not attempt to deal with the constitutional issue. I would note only that Peter Hogg (*Constitutional Law of Canada*, loose-leaf (Toronto: Carswell, 2007) at 34–10 points out that the pith and substance of anti-discrimination laws is best determined, not necessarily by reference to the law's effects on freedom of speech or expression, for example, but rather to the types of activities specifically being regulated. As Estey J. commented in *Scowby v Glendinning*, [1986] 2 SCR 226, at para 8; 32 DLR (4th) 161:

> In each case, the essential question is whether provincial legislation is valid as in relation to property and civil rights or some other head of s. 92, or impermissibly deals with matters in relation to a subject over which Parliament has been given exclusive legislative jurisdiction. Should the root of the human rights legislation under challenge be within the territory of pure criminal law, and not in a valid provincial legislative object, it is beyond the powers of the provincial legislature.

[53] Here the reviewing judge did not analyse whether subsection 3(1)(b) was in pith and substance a matter of property and civil rights. Rather, he interpreted the section in such a way as to ensure its *vires*. As pointed out, this is an incorrect approach. In my view, the words of subsection 3(1)(b), given their plain and ordinary meaning, constitute a free-standing prohibition against speech that is likely to expose a person or class of persons to hatred or contempt. It only remains to be said that there is a serious issue whether the regulation of speech in that fashion falls within the power of the Province as a matter of property or civil rights, or falls within the power of the Federal Government as criminal power or otherwise: *Reference Re Alberta Statutes*, [1938] SCR 100, [1938] 2 DLR 81, and *Saumur v The City of Quebec*, [1953] 2 SCR 299, [1953] 4 DLR 641. The sole point I make in this regard is that not having undertaken the required pith and substance analysis, the reviewing judge had no foundation upon which to read down the statute from the jurisdictional division of powers aspect.

[54] There is a second constitutional basis for reading down a statute, namely, as a remedy to avoid an interpretation of a statute which would offend the *Charter*. Here, the CCLA submits that reading down subsection 3(1)(b) of the *Act* accords with its purposes, and reconciles the goals of prohibiting discrimination and protecting the freedom of expression and religion. It argues that failing to read down subsection 3(1)(b) calls its constitutionality into question on *Charter* grounds. Thus, on this basis, the CCLA supports the judge's interpretation of subsection 3(1).

[55] It should be noted, on this point, that the reviewing judge found that subsection 3(1)(b) did not violate the *Charter*, (paras 8 and 126). Thus, the remedy of reading down can have no application. While I appreciate that the judge's determination that subsection 3(1)(b) did not violate the *Charter* was grounded, at least in part, upon his restrictive interpretation of the subsection, the parties have chosen not to place in issue the constitutionality of the section on any basis, including the *Charter*. It would therefore be inappropriate to now undertake an analysis whether subsection 3(1)(b) can withstand a *Charter* challenge, in light of its interpretation as being a free-standing restriction on speech.

[56] Furthermore, the restrictive interpretation advanced by the CCLA (and agreed with by the Attorney General) cannot be supported on the basis that subsection 3(1)(b) must be so interpreted to comply with *Charter* values. The proper limits of *Charter* values as an interpretive tool were set out by Charron J. in her majority judgment in *R v Rodgers*, 2006 SCC 15, [2006] 1 SCR 554, at paras 18-19:

> ... it is equally well settled that, in the interpretation of a statute, Charter values as an interpretative tool can only play a role where there is a genuine ambiguity in the legislation. In other words, where the legislation permits two different, yet equally plausible, interpretations, each of which is equally consistent with the apparent purpose of the statute, it is appropriate to prefer the interpretation that accords with *Charter* principles. However, where a statute is not ambiguous, the court must give effect to the clearly expressed legislative intent and not use the Charter to achieve a different result. In *Bell ExpressVu Ltd. Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42 (S.C.C.), at para. 62, Iacobucci J., writing for a unanimous court, firmly reiterated this rule:
>
> > ...to the extent this Court has recognized a "*Charter values"* interpretive principle, such principle can only receive application in circumstances of genuine ambiguity, i.e., where a statutory provision is subject to differing, but equally plausible, interpretations. [emphasis in original]
>
> If this limit were not imposed on the use of the *Charter* as an interpretative tool, the application of *Charter* principles as an overarching rule of statutory interpretation could well frustrate the legislator's intent in the enactment of the provision. Moreover, it would deprive the *Charter* of its more powerful purpose — the determination of the constitutional validity of the legislation: *Symes v. R.*, [1993] 4 S.C.R. 695 (S.C.C.), at p. 752; *Willick v. Willick*, [1994] 3 S.C.R. 670 (S.C.C.), at pp. 679-80; *Vriend v. Alberta*, [1998] 1 S.C.R. 493 (S.C.C.), at paras. 136-42; *Bell ExpressVu*, at paras. 60-66; *Charlebois c. Saint John (City)* (2005), [2005] 3 S.C.R. 563, 2005 SCC 74 (S.C.C.), at paras. 23-24.

[57] For reasons discussed earlier, the words of subsection 3(1)(b) do not yield two alternate and plausible interpretations. The subsection must be construed in accordance with its plain and ordinary meaning and within the context of the statute as a whole. I would not, therefore, uphold the dismissal of Lund's complaint on the basis that he had failed, on an evidentiary basis, to establish a connection or linkage between the impugned message and the discriminatory practices set out in the *Act*.

2. Does the letter violate subsection 3(1)?

[58] As stated at the outset, the reviewing judge considered the subject letter to be "jarring, offensive, bewildering, puerile, nonsensical, and insulting", but that its language did not go "so far

as to fall within the prohibited status of 'hate' or 'contempt'" (para 90). For the reasons that follow, I agree with him.

A. The *Taylor* test

[59] It is useful to begin by setting out the standard by which hateful or contemptuous speech is measured in the context of the prohibition contained in subsection 3(1)(b). "Hatred and contempt" are words capable of broad or narrow interpretation. These words were interpreted in *Taylor*, however, having regard to *Charter* values, and the bar was set high because a free and democratic society places a premium on the free expression of opinion and the free exchange of ideas. Accordingly, as Chief Justice Dickson explained in *Taylor*, a statutory prohibition of free speech is only justifiable under section 1 of the *Charter* if it is directed at "speech of an ardent and extreme nature" (at 929). The Chief Justice expanded on this necessity at page 928:

> The reference to "hatred" in the above quotation speaks of "extreme" ill-will and an emotion which allows for "no redeeming qualities" in the person at whom it is directed. "Contempt" appears to be viewed as similarly extreme, though is felt by the Tribunal to describe more appropriately circumstances where the object of one's feelings is looked down upon. According to the reading of the Tribunal, s. 13(1) thus refers to unusually strong and deep-felt emotions of detestation, calumny and vilification, and I do not find this interpretation to be particularly expansive.

[60] The statutory reference in this passage is to subsection 13(1) of the *Canadian Human Rights Act*, SC 1976-1977, c-33, which referred to telephonic communications that were "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." Nonetheless, I accept that for purposes of this appeal, the words "hatred or contempt", found in subsection 3(1)(b), fall to be interpreted according to the Supreme Court's decision in *Taylor*. I would note, however, that the speech considered in *Taylor* was repetitive hate propaganda. The words were not spoken in the course of debate on a matter of public interest. Language which is offensive and hurtful to others does not necessarily qualify as hateful or contemptuous speech.

B. Consideration of context

[61] In cases subsequent to *Taylor*, the importance of the context and the circumstances of the publication have been emphasized. For example, in considering the application of the comparable Saskatchewan legislation, Richards J.A., in *Owens v Saskatchewan Human Rights Commission*, 2006 SKCA 41, stated at para 60:

> As a result, it is apparent that s. 14(1)(b) must be applied using an objective approach. The question is whether, when considered objectively by a reasonable person aware of the relevant context and circumstances, the speech in question would be understood as

> exposing or tending to expose members of the target group to hatred
> ...

[62] In *Whatcott v Saskatchewan (Human Rights Tribunal)*, 2010 SKCA 26, 317 DLR (4th) 69, Hunter J.A. spoke of the "particular importance" of context in cases such as the one before this Court. She stated at para 62:

> Context is of particular importance when considering complaints based on sexual orientation and the impact on freedom of expression. Most often, underlying these complaints are issues relating to matters of morality. It is acceptable, in a democracy, for individuals to comment on the morality of another's behaviour. For this reason there will be a relatively high degree of tolerance for the language used in debates about moral issues, subject, of course, to limitations. Anything that limits debate on the morality of behaviour is an intrusion on the right to freedom of expression.

[63] Moreover, the court noted at para. 120 that a contextual analysis is required to ensure that the application of the statutory provision does not exceed the limitations to freedom of expression justifiable in a free and democratic society. In addition to freedom of expression, the *Charter* also identifies the related freedoms of thought, belief ,and opinion as fundamental freedoms.

[64] I would add that moral issues often also relate to the freedom of religion – another fundamental right protected by the *Charter*. A moral statement arising out of religious conviction may, in some cases, be seen as the dissemination of religious belief – an aspect of freedom of religion. Dickson J., as he then was, underscored this point in *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at 336, 18 DLR (4th) 321:

> 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.

[65] I agree with the observation of the reviewing judge that the primary freedom applicable in this case is that of freedom of expression. The letter is not so much an expression or dissemination of religious beliefs, as "a manifestation of" Boissoin's beliefs (para 117).

C. Examination of the letter

[66] As suggested above, it is essential to place the letter in context and to examine it as a whole, not piecemeal. It is unfortunate that the panel, in this case, appears either to have misapprehended, ignored, or overlooked evidence required to place the letter in context. I agree with the reviewing

judge that this led to erroneous fact findings by the panel which stripped the speech from its contextual setting.

[67] It should first be noted that the "statement" in question is a letter written to the editor of a daily newspaper. Letters to the editor are an important means by which citizens express their opinions on matters of public interest. As was stated in dissent by Dickson J., as he then was, in *Cherneskey v Armdale Publishers Ltd.*, [1979] 1 SCR 1067, 90 DLR (3d) 321, a defamation case arising from a letter to an editor:

> 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. [1096-7]

[68] Boissoin wrote his letter for publication and, in that very limited sense, may have caused its publication. It was the newspaper, however, that determined whether or not it would be published. The newspaper decided to publish it because the letter was identified as expressing an opinion on a matter of public interest, and the newspaper was correct in coming to this conclusion. In *WIC Radio Ltd v Simpson*, 2008 SCC 40, [2008] 2 SCR 420, the Supreme Court observed at para 57: "The public debate about the inclusion in schools of educational material on homosexuality clearly engages the public interest."

[69] The reviewing judge observed, and I agree, that the panel's oversight in failing to consider the affidavit of Joe McLaughlin, Managing Editor of the newspaper, also stripped the subject letter of context. The affidavit was filed as an exhibit in the proceedings. McLaughlin was not cross-examined on it, and his evidence was not otherwise challenged. The affidavit attached McLaughlin's Memorandum, dated September 12, 2002, to the Alberta Human Rights and Citizenship Commission in response to Lund's complaint. McLaughlin stated therein:

> The Advocate disagrees with Lund's suggestion that by publishing Boissoin's letter, the Advocate engaged in conduct likely to promote the discrimination on the basis of sexual orientation. We believe Advocate editorials, commentary and letters written in critical response to Boissoin's letter are more likely than not to promote tolerance of homosexuals rather than discrimination.
> . . .

> The most fundamental thing to understand about Boissoin's letter is that it is not directed specifically, narrowly or exclusively to homosexuals. He states at the outset that his target is not homosexuals, but the "machine" that supports them. He expresses sympathy, love and fellowship for some homosexuals. While we do not agree with or support much of what Boissoin says, we believe his views are honestly felt, based on his understanding of the Bible. We believe that he has a right to express his views, and the Advocate has the responsibility to publish letters on issues of wide public interest.
> . . .
>
> Boissoin's letter of June 17, (Homosexual agenda wicked) was written a [*sic*] part of a campaign "to fight moral decay in Canada." It's a campaign which we first reported in a front-page story by reporter Cameron Kennedy on April 29, (Christian coalition takes political role) and in a commentary by Advocate columnist Mary-Ann Barr the following day. (Religious diversity should be celebrated.) Boissoin objected to some characterization in the news story and column, so he sought and was given the right of reply in a guest opinion column on May 13. (Christian coalition back morality.) Publishing that column fulfilled our responsibilities under the Alberta Press Council Code of Practice: "It is the duty of newspapers to allow fair opportunity for reply when reasonably called for." Other reaction to our news coverage was published in a letter on May 17 (Advocate columnist unfair to Christian organization.) On June 17, Boissoin's letter (Homosexual agenda wicked) was published further advancing his political agenda, followed by a flurry of letters supporting and opposing his views.

[70] McLaughlin's views need not be accepted, nor does the newspaper's decision to publish the letter determine whether the letter offends the *Act*. Nevertheless, it is evidence that the newspaper published the subject letter because it decided that it was an honestly-held expression of opinion by Boissoin on an issue of public debate. The purpose of its publication, therefore, was to further public debate. The newspaper was independent of Boissoin, and its decision to publish signals that its publication was considered to be a matter of public interest. Nor can the letter reasonably be viewed as advocacy for discriminatory practices prohibited by the *Act*. The letter is of a different nature and quality than the repetitive telephonic hate propaganda dealt with in *Taylor* and other cases. Whether offensive or not, the letter was perceived to stimulate and add to an ongoing public debate on matters of public interest, as distinct from hate propaganda which serves no useful function and has no redeeming qualities. A certain amount of public debate concerning such an issue must be permitted, even if some of it is offensive, to make the general public aware that such type of thinking is present in the community and to allow for its rebuttal.

[71] As I agree with the reviewing judge's analysis with respect to various parts of the letter, I need not repeat it. Suffice to say that the letter is essentially an expression of Boissoin's opinion that teaching children at school that homosexuality is normal, and that same sex families are equivalent to heterosexual families, is morally wrong and should not be tolerated. In the words of the panel, the "letter is, on the face of it, a critique of the homosexual agenda which [Boissoin] alleged existed in the school system in Red Deer, Alberta" (para 351). Boissoin hoped to rouse others of like mind and involve them in the public debate. While his views are expressed in strong, insensitive, and some might say bigoted terms, the words are clearly the expression of his opinion. And the aim of the letter was to stir apathetic people, who agreed with him, to his cause.

[72] Matters of morality, including the perceived morality of certain types of sexual behaviour, are topics for discussion in the public forum. Frequently, expression on these topics arises from deep seated religious conviction , and is not always temperate. It is unfortunate when some choose to express their opinions in a crude and offensive manner, but sincerely held convictions sometimes give rise to extreme polemical speech. Freedom of speech does not just protect polite speech. Further, in my view, some latitude should be given to those who do not have the educational advantage of being able to communicate their message in more sophisticated language. Indeed, a message in sophisticated language may be capable of greater harm, as listeners may give it more credence than a message delivered in coarse and crude language. In this regard, the reviewing judge pointed out that an expert witness called by Lund was of the view that Boissoin's letter was so extreme that it would be immediately dismissed by a reasonable person reading the letter (para 65).

[73] As editor McLaughlin observed, the target of the letter is not homosexuals, but rather all those that promote the teaching that homosexuality is normal and acceptable. Boissoin was calling upon those of like mind to that of his own to take a stand. The subject and perceived target of the speech was sexual behaviour; i.e., homosexuality, rather than homosexuals. In particular, I agree with the reviewing judge's observation, at para 96 of his reasons, that the letter's reference to pedophilia was only to those involved in the North American Man / Boy Love Association, and was not suggestive of general behaviour. Rather it expressed the writer's apprehension that if homosexual behaviour is accepted as normal then the door will be open for acceptance of other forms of sexual behaviour.

[74] The distinction between disapprobation of conduct and behaviour, and the persons who engage in that conduct and behaviour, is itself a matter of debate and has been rejected by many. In her dissent in *Trinity Western University v College of Teachers*, 2001 SCC 31, [2001] 1 SCR 772, L'Heureux-Dubé J. expressed her "dismay" at the idea that "one can separate condemnation of the 'sexual sin' of 'homosexual behaviour' from intolerance of those with homosexual or bisexual orientations", and challenged "the idea that it is possible to condemn a practice so central to the identity of a protracted and vulnerable minority, thereby discriminating against its members and affronting their human dignity and personhood" (para 69). The majority in *Trinity*, however, drew the line between belief and conduct, and pointed out that "the freedom to hold beliefs is broader than the freedom to act on them", and refused to presume that the belief that homosexual conduct is immoral was itself a discriminatory practice or would necessarily result in discrimination (para 36).

[75] Boissoin and others have the freedom to think, whether stemming from their religious convictions or not, that homosexuality is sinful and morally wrong. In my view, it follows that they have the right to express that thought to others. This is not a license to engage in discriminatory practices or to advocate them. I agree with the observation of Smith J.A. in *Whatcott* that while exception is understandably taken to the extreme and polemical language employed in cases such as this, the "real objection is to the essential message" contained in such publications (para 136). In other words, the message would be hurtful no matter how politely expressed. That message is that homosexuality is morally wrong and sinful, and the author does not want its mandated acceptance to be taught to children. It is doubtful that such a message would ever sit well with those that accept that homosexuality is an identity, not a behaviour.

[76] Does Boissoin's condemnation of homosexuality, albeit in extreme and intemperate language, subject him to censorship by the human rights panel? The *Act* provides no exemption for religious leaders or public places of worship. If it is not possible to condemn sexual behaviour which is said to be central to the identity of homosexuals, without discriminating against them and offending their human dignity, then is it possible for any pastor, priest, rabbi or imam to publicly declare that homosexuality is sinful and morally wrong? Or does it depend upon how polite the language of condemnation is? The point is that subject and context are so very important when interpreting a letter like Boissoin's. Its broad subjects are sexual behaviour and morality, and education about these subjects in public schools funded by taxpayers. The letter attempts to engage in public debate with respect to these matters, as the newspaper editor perceived when he deemed it worthy of publication.

[77] It is difficult to make an objective determination of what constitutes hate speech as the perceptions of reasonable persons often differ. I have attempted to analyse the impugned speech, however, from the perspective of a reasonable reader who is aware of the context and circumstances of the letter's publication. In my view, the letter would properly be viewed as a polemic on a matter of public interest and does not qualify as reaching the extreme limits mandated by *Taylor* to expose persons to hatred or contempt. While expressing hostility to teaching tolerance of homosexuality in school, it does not, on the whole, elicit emotions of detestation, calumny, or vilification against homosexuals. Nor, I think, would a reasonable person, aware of the relevant context and circumstances, understand the letter as likely to expose homosexuals to hatred or contempt. It would be understood more as an overstated and intemperate opinion of a writer whose extreme and insensitive language undermines whatever credibility he might otherwise have hoped to have. It is not necessary to agree with the content of the letter to acknowledging the writer's freedom to express his views. Thus, I agree with the reviewing judge's conclusion that the letter does not breach subsection 3(1)(b) of the statute.

3. Consideration of subsection 3(2) of the *Act*

[78] In my view, the letter also constitutes an expression of opinion in the course of public discourse within the meaning of subsection 3(2) of the *Act*, which exempts it from the application

of subsection 3(1)(b). This is a further ground for upholding the conclusion reached by the reviewing judge.

[79] Subsection 3(2) was contained in the Alberta legislation prior to the 1996 amendments that introduced the prohibition against statements and publications likely to expose a person or a class of persons to hatred or contempt. The *O'Neill Report* recommended that the subsection "be kept as a safeguard of free expression". Subsection 3(2), however, raises a formidable challenge to anyone seeking to interpret and apply it within its legislative context. The difficulty in interpreting the subsection lies in the fact that the preceding subsection, 3(1), prohibits any public statements that are likely to expose a person or class of persons to hatred or contempt. This gives rise to the question: How does one give meaning to each subsection when they appear, on their face, to collide? Various solutions to this paradox have been proposed.

[80] In *Taylor*, Chief Justice Dickson commented in *obiter* upon the effect of provisions such as subsection 3(2) in provincial human rights legislation. He observed that such provisions may be "best seen as indicating to human rights tribunals the necessity of balancing the objective of eradicating discrimination with the need to protect free expression" (at 930). While some respectful weight must be accorded to the Chief Justice's comments, the force of the *dictum* is diminished due to the fact that none of the provincial enactments, and in particular the Alberta statute, were before him for interpretation. Further, the federal statute which he was interpreting was very narrow in scope, being directed only at repetitive telephonic "hate propaganda". This difference may have led to his observation that the so-called provincial "exemptions ... are found in provisions which appear to be radically different from s.13(1)", (at 930).

[81] In *Kane*, Rooke J., as he then was, adopted the *obiter* of Dickson C.J.C. in *Taylor*, and held that subsection 3(2) "is an admonition to balance the two competing objectives of freedom of expression and the eradification of discrimination" (para 72). He rejected interpreting the term "opinion", as used in subsection 3(2), as being narrower than all forms of expression, and thereby construed the subsection to apply to all manner of speech (para 69). The reviewing judge in this case did not treat subsection 3(2) as providing an exemption, because he was concerned that to do so would "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'" (para 85).

[82] In my view, the words "nothing in this section" cannot be interpreted reasonably as *sometimes* permitting interference with the free expression of opinion. Once again, the canons of construction call for an interpretation that, if reasonably possible, gives each subsection meaning and fits them together into the overall scheme of the legislation. I note that in considering the comparable exempting provision in the Saskatchewan statute, Hunter J.A pointed out in *Whatcott* at para 57 the need to apply general principles of interpretation:

> ...it is presumed that the legislature avoids superfluous or meaningless words, that it does not pointlessly repeat itself or speak in vain ...

and that

> ... every word and provision found in a statute is supposed to have a meaning and a function. For this reason courts should avoid, as much as possible, adopting interpretations that would render any portion of a statute meaningless or pointless or redundant.

[83] Moreover, the intent of the legislators in retaining subsection 3(2), when amending the statute to broaden it to include the prohibition against statements likely to expose persons to hatred or contempt, should not be ignored. In attempting to discover that intent, it is necessary to consider the scope of the prohibition set forth in subsection 3(1). The words "issue", "publication", and "statement" were added in 1996, as well as the new subsection 3(1)(b), with the effect that the prohibition applies to all matters of speech, both written and oral, and by every means, provided that the communication is public. More pertinent to this case, the prohibition applies to statements made in the press which also has an impact upon freedom of the press.

[84] In short, the prohibition, as framed, applies to all manner of public speech, whether printed in a newspaper, whether made by a candidate in the course of political debate during a campaign, or made by a pastor, priest or imam to his congregation in a public place of worship. Neither a political campaign, nor a place of worship, is excluded from the scope of subsection (1), provided the speech is public.

[85] It is also relevant to examine subsection (3) for the purpose of interpreting subsection 3(2). Section 3(3)(b) provides that subsection (1) does not apply to:

> . . .
>
> (b) the display or publication by or on behalf of an organization that
>
> (i) is composed exclusively or primarily of persons having the same political or religious beliefs, ancestry or place of origin, and
>
> (ii) is not operated for private profit.
>
> of a statement, publication, notice, sign, symbol, emblem or other representation

> indicating a purpose or membership qualifications of the organization, or
>
> . . .
>
> if the statement, publication, notice, sign, symbol, emblem or other representation is not derogatory, offensive or otherwise improper.

[86] This subsection also vexes a determination of legislative intent. Regarding the application of sub-subsection3(3)(b), which relates to "persons having the same political or religious beliefs, ancestry or place of origin," it is clear that the exempted communication is limited to "a purpose or membership qualification of the organization". Further, subsection 3(3) exempts only statements and publications that are "not derogatory, offensive or otherwise improper". These words impose a much laxer test than words "likely to expose persons to hatred or contempt," so that it is difficult to conceive that subsection 3(3) would ever be applicable if the speech offended subsection 3(1).

[87] Having regard then to the sweep of subsection 3(1), and the narrow, if any, application of subsection 3(3), it seems likely that in retaining subsection 3(2) the legislators were seeking, firstly, to ensure that in matters coming within provincial legislative authority Alberta citizens enjoyed the freedoms of speech and religion recognized in the *Alberta Bills of Rights*, RSA 2000, c A-14. Secondly the legislators were attempting to tailor the section to ensure it was within their provincial jurisdiction. It is pertinent, in this regard, to consider Duff C.J.'s remarks in *Reference re Alberta Statutes* at 134:

> Any attempt to abrogate this right of public debate or to suppress the traditional forms of the exercise of the right (in public meeting and through the press) would, in our opinion, be incompetent to the legislature of the provinces, or to the legislature of any one of the provinces, as repugnant to the provisions of *The British North America Act*, by which the Parliament of Canada is established as the legislative organ of the people of Canada under the Crown, and Dominion legislation enacted pursuant to the legislative authority given by those provisions. The subject matter of such legislation could not be described as a provincial matter purely; as in substance exclusively a matter of property and civil rights within the province, or a matter private or local within the province.

[88] More recently, McLachlin C.J. and Major J. articulated similar sentiments in *Harper v Canada (Attorney General)*, 2004 SCC 33, [2004] 1 SCR 827, at para 12:

> The right of the people to discuss and debate ideas forms the very foundation of democracy... For this reason, the Supreme Court of Canada has assiduously protected the right of each citizen to participate in political debate.

[89] Thus, it would appear that in attempting to protect the expression of opinion, the Legislature, was drawing a line between pure opinion in the context of public discourse, and statement and publications of a different nature and character. I consider it contrary to standard principles of statutory interpretation either to read in, or read out, any words of subsection 3(2). The plain meaning of "nothing in this section" cannot be subverted to "sometimes" or some other contrary meaning. Nor do I think that the resulting interpretation clothes "all communication with blanket protection", as feared by the reviewing judge.

[90] Subsection 3(2), therefore, is directed solely at the free expression of *opinion*. An opinion has been defined as "a belief or assessment based on grounds short of proof" or "what one thinks about a particular topic or question": *Canadian Oxford Dictionary*, 2d ed, *sub verbo* "opinion". Drawing from law relating to defamatory statements, whether a statement is capable of being construed as an opinion is a matter for the jury. For example, mere invective does not constitute opinion; nor do directions and commands; nor lies, statements of purported facts; nor misstatement of historical facts. In other words, not all communication constitutes opinion. Only the free expression of opinion is protected – not all speech. Whether a message is a "political, religious or personal opinion" is a question of fact to be determined by the trier of fact. The simple device of labelling a message as "opinion" does not make it so.

[91] Within the context of the legislation in question, a sign or other notice stating that certain persons are excluded from service or accommodation cannot be construed as an opinion but rather as a directive discriminating against such persons. Likewise, a statement advocating discriminatory activities of a kind prohibited by the statute is not likely to qualify as an expression of opinion, albeit it may stem from an opinion held by the maker thereof. Subsection 3(2) is confined to "expression of opinion", as distinct from directives and calls to action of discriminatory conduct, and does not thereby offer blanket protection.

[92] I acknowledge that drawing the distinction between expressions of opinion, and statements of another kind, may sometimes be difficult to draw, and may depend upon the context of the statement. In *Grant v Torstar Corp.*, 2009 SCC 61, [2009] 3 SCR 640, it was said that statements of opinion are a category "which includes any deduction, inference, conclusion, criticism, judgment, remark or observation which is generally incapable of proof" (para 31), and further, that in determining whether a publication is an a matter of public interest, the judge must consider the subject matter of the publication as a whole. In that case, the Supreme Court modified the law of defamation to include a new defence of responsible journalism on matters of public interest. While the task of separating and distinguishing *opinion* from facts and other types of statement may not always be easy, it should be no more difficult than determining whether the publication of a defamatory communication was responsible journalism, or any of the other questions that commonly arise in a defamation action.

[93] Accordingly, in my view, if the public statement properly qualifies as an expression of opinion, and is not something more than that, or something of a different character, then pursuant to subsection 3(2) the statement of opinion is exempt from the prohibition set forth in subsection

3(1). In this case, I have already found that Boissoin's letter, seen in context, was an opinion on a subject of public debate – teaching in schools concerning homosexuality. It was, therefore, protected speech under this section of the *Act*. I would add, as a final comment, that even if the application of subsection 3(2) only required balancing freedom of expression against the goal of eradicating discrimination, as suggested in both *Taylor* and *Kane*, the fact that Boissoin's letter constituted a freely expressed opinion on a matter of public interest would be a significant factor in considering context in the application of subsection 3(1)(b), and would tend against an interpretation that the letter violated the subsection.

4. Comments on the legislation

[94] The objective of statutory interpretation is to discern the legislative intent from the language of the legislation, if possible, and to give effect to such intent. This objective becomes difficult to attain when there is conflict, imprecision, or a lack of clarity in the legislation. Of particular concern in the area of human rights law is that a lack of clarity will cast a chill on the exercise of the fundamental freedoms, such as freedom of expression and religion.

[95] The goals of protecting the freedoms of expression and religion, on the one hand, and protecting vulnerable minorities from discrimination, on the other, are matters of primary concern to the citizens of this Province. It is unfortunate, therefore, that section 3 gives rise to the difficulties of interpretation manifest in this judgment and the decisions below. This lack of clarity has resulted in this protracted litigation, to the detriment and expense of all parties.

[96] The Attorney General in his factum claims the ability to limit expression that is characterized as "hateful" or "contemptuous" only when such expression "is linked to acts of discrimination falling within provincial subject matters". In his view, section 3 is to be interpreted as "dealing with a narrow range of extreme expression that clearly falls outside the bounds of normal discourse *and leads to discriminatory acts*" (emphasis added). If that is the intent of the legislators, it would be helpful if they said so clearly.

[97] Further, this judgment has attempted to grapple with reconciling the "free expression of opinion on any subject" with the broad prohibition against statements, publications, and other representations by any means and in any public place that are likely to expose a person or a class of persons to hatred or contempt. I am reluctant to accede to the views of others, referred to in this judgment, that a provision such as subsection 3(2) is either superfluous or merely cautionary in face of the introductory words "nothing in this section". On the other hand, it cannot have been the intent of the legislators, in retaining the subsection in1996, to wholly nullify the prohibition against statements, publications, and other representations likely to expose a person or persons to hatred or contempt. If the Legislature thinks it appropriate to regulate speech in this area, then it is incumbent upon it to do so in a clear fashion.

[98] Finally, in the course of this judgment I have touched upon subsection 3(3), which exempts, in very limited circumstances, statements, publications, and other representations "not derogatory, offensive or otherwise improper". This begs the question whether the legislators thought they were

regulating speech that was merely derogatory or offensive. Indeed, as pointed out in the judgment, it is virtually impossible to give this exemption any meaning.

[99] In my view, the citizens of this Province are entitled to certainty when it comes to exercise of their fundamental rights. It is ironic that the *O'Neill Report*, which inspired the 1996 amendments, recommended that "the *Act* be rewritten in plain language". In my view, it would serve the interests of the citizens of this Province if the Legislature would direct its attention to this objective.

X. Conclusion

[100] The appeal is dismissed.

[101] The respondent, Boissoin, sought costs in the event that the appeal was unsuccessful – in this Court, in the Court of Queen's Bench, and before the Tribunal. The reviewing judge denied costs, up to this stage of the proceeding, on a public interest basis, and I see no good reason to reverse his direction. However, after a full hearing before the panel, and in the Court of Queen's Bench, Lund chose to appeal hoping to recover the damages awarded by the panel. In my view, therefore, the general rule that costs follow the result is applicable. Accordingly, the respondent will have his costs of the appeal, taxable on Column 2 of Schedule C. The interveners neither sought nor will recover costs.

Appeal heard on December 7, 2011

Reasons filed at Calgary, Alberta
this 17th day of October, 2012

O'Brien J.A.

I concur: Conrad J.A.

I concur: O'Ferrall J.A.

Appearances:

G. Chipeur, Q.C.
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for the Appellant

D. Kamal
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J. McCready
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Endnotes

1. Pursuant to the *Designation of Constitutional Decision Makers Regulations*, AR 69/2006, made pursuant to the *Administrative Procedures and Jurisdiction Act*, RSA 2000, c A-3, a human rights panel has jurisdiction to determine "questions of constitutional law arising from the federal or provincial distribution of powers under the Constitution of Canada," but is not given jurisdiction to determine questions of constitutional law that relate to the *Canadian Charter of Rights and Freedoms*. In its Preliminary Matters Decision dated June 28, 2007, the panel noted that a Notice of Constitutional Question had been given by Boissoin, but observed that he was not seeking "a constitutional remedy such as a declaration that the statute has no force or effect under the *Charter*, or a remedy prescribed under section 24 of the *Charter*". The panel agreed, however, that it could hear argument relating to the interpretation of the statute having regard to *Charter* values. With respect to the question of constitutionality based upon the distribution of powers, the panel noted that it had jurisdiction to make a ruling pursuant to the aforementioned *Regulation*, but that it would not do so at a preliminary stage. The record discloses that subsequent to the decision of the panel on November 29, 2007, Boissoin served Notice of Constitutional Questions. The Attorney General of Alberta responded that he was appearing on the appeal to the Court of Queen's Bench of Alberta "solely for the purpose of defending Alberta's human rights legislation against Mr. Boissoin's constitutional challenge". The Attorney General of Canada advised that he did "not intend to intervene on the constitutional issue at this stage of the proceedings".