

KEEPING FREE EXPRESSION FREE:

Why Section 3 of the Alberta Human Rights Act should be amended

A position paper of the Sheldon Chumir Foundation for Ethics in Leadership

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[PLEASE NOTE: This paper argues that in order to better protect freedom of expression, Section 3 of the Alberta Human Rights Act should be amended. It should be significantly reduced in its scope by removing the “likely to expose to hatred or contempt” clause. Since the formulation of our position, Premier Alison Redford committed herself to repealing section 3 in its entirety. Between leaving Section 3 as it is (as of October 11, 2011) and totally repealing it, by far the better course is to repeal it.]

I. SUMMARY

Wording inserted into Alberta’s human rights legislation in 1996 opened the door to complaints that illegitimately restrict freedom of expression. Our primary concern with the wording of Section 3 is with the words “likely to expose a person or class of persons to hatred or contempt”. This casts far too wide a net and risks discouraging or suppressing expression on controversial topics of importance to public discussion.

Even if some hate-speech restrictions are necessary or legitimate, they belong in the *Criminal Code of Canada* and should be dealt with in the courts, where the usual defences of truth and fair comment apply, where the intention to promote hatred is required for a guilty verdict and where the burden of proof is much stricter. The *Criminal Code of Canada* already makes hate speech a crime. Anything less than that should be dealt with through criticism, debate and protest. We respectfully request that the Alberta government restore Section 3 of the *Alberta Human Rights Act* to its pre-1996 wording. Failing that, Section 3 should be repealed in its entirety. This would allow the Alberta Human Rights Commission to focus on its mandate of upholding equality and ending discrimination in Alberta.

II. INTRODUCTION

Many of the most serious criticisms leveled at the Alberta Human Rights Commission in recent years concern its application of Section 3 of the *Alberta Human Rights Act*, which makes illegal statements or publications that are “likely to expose a person or a class of persons to hatred or contempt”. Two specific cases have drawn a great deal of negative attention to that section: That of Stephen Boissoin, who in 2002 wrote an anti-gay letter to the editor of the Red Deer Advocate and was subsequently forbidden by the commission from expressing his opinions on homosexuality for the rest of his life¹; and that of Ezra Levant, who published cartoons depicting the Prophet Mohammed in the Western Standard in 2006, but had the complaint against him dismissed by the commission. A similar case in British Columbia, Ontario and Canada against columnist Mark Steyn for a 2006 article in Macleans headlined “The Future Belongs to Islam” fuelled the controversy, although it ended with the human rights tribunals of Canada, B.C. and Ontario dismissing the complaint.²

The two Alberta complaints were made under Section 3 of the *Alberta Human Rights Act*. The Steyn case was based on similar provisions in the Canadian and B.C. human rights legislation.³ In all three cases, the opinions expressed caused offence, either by stereotyping a group of people (homosexuals in the case of Rev. Boissoin and Muslims in the other two cases) and, in the case of Mr. Levant, by violating religious sensibilities, given the Islamic prohibition on depicting the Prophet Mohammed.

The cases sparked a rancorous national debate that exposed deep tensions between the right to freedom of expression and the right to equality, construed as the right to be free from discrimination.

The central question in the debate is: In a liberal democracy, to what extent

¹ The commission decision was later overturned by the Alberta Court of Queen’s Bench but is being appealed by the original complainant.

² The Canadian Human Rights Commission and the B.C. Human Rights Tribunal dismissed it on its merits; the Ontario Human Rights Commission dismissed it for lack of jurisdiction.

³ Section 13 of the Canadian Human Rights Act and Section 7 of the British Columbia Human Rights Code.

should we be tolerant of speech that marginalizes, or even vilifies, an identifiable group of people whom we wish to protect with anti-discrimination measures? In other words, how tolerant should we be of speech that expresses intolerance?

Some free speech advocates maintain they have the right to be maximally offensive, even to the point of expressing discriminatory attitudes that vilify identifiable minorities. They maintain that legislation curtailing this right stifles the expression of opinion on matters of public concern that need to be debated. However, some human rights and anti-discrimination advocates say that people's dignity, self-respect and standing in the community can be deeply harmed by some forms of offensive or intolerant speech and that people have a right to state protection from that kind of speech.

A second point of contention is whether a human rights commission is the appropriate body to decide whether and how speech is to be limited. Those who feel human rights commissions should not be dealing with this issue point out that public incitement of hatred is already a crime under the *Criminal Code of Canada* (Section 319).

This long-running debate is distracting human rights commissions and damaging their reputations and ability to carry out their proper mandate.

In the midst of the controversy, the Sheldon Chumir Foundation for Ethics in Leadership conducted a three-year Human Rights Project (2005-2008), which involved broad public consultation in eight Alberta communities and three research reports. We delivered our report on that research, *Toward Equal Opportunity for All Albertans*,⁴ to the Alberta government in September 2008. The report contained 21 recommendations on how to improve what is now called the Alberta Human Rights Commission and supporting legislation. One of the recommendations was that Section 3 be greatly reduced in scope by restoring it to its pre-1996 wording. (See the textboxes in part IV below for details of the changes we recommend.)

While the Alberta government initially appeared open to making the recommended change to Section 3, when the government finally introduced

⁴ http://www.chumirethicsfoundation.ca/files/pdf/Toward-Equal-Opportunity_SCF.pdf

legislation to amend the human rights legislation in 2009, Section 3 was left untouched. This was baffling given the level of concern that had been registered about it. We believe the government can and should amend Section 3, or repeal it altogether.

III. THE GOVERNMENT'S POSITION

When in 2008 the Sheldon Chumir Foundation for Ethics in Leadership first approached Lindsay Blackett, who as Alberta Minister of Culture and Community Spirit was responsible for human rights legislation, he indicated his support for changing Section 3. People, he said, "should have the ability to say what they say and somebody should have their ability to have the counter argument. That is what a free and open society does."⁵

After the government decided not to take any action on the section, Mr. Blackett indicated he was over-ruled by his fellow government members. "I can have my opinion but, when it comes to caucus, the caucus decision goes forward," he said at the time.⁶

Yet after the Alberta Court of Queen's Bench overturned the commission's ruling on Boissoin in December 2009, Mr. Blackett said he did not think the human rights commission should have dealt with the complaint about the anti-gay letter. "It (the commission) is not there to mediate hurt feelings caused by some words or not," Mr. Blackett told a CBC reporter in April 2010. "If it's hateful, then that's a hate crime. And that's something for Crown attorneys and the police services to investigate. But the goal of the commission is to make sure people are protected against discrimination where they work, or access to accommodation, access to government services."⁷ We couldn't agree more. And yet the Alberta government has not to date taken the obvious step and amended the section of the legislation that makes such complaints possible.

⁵ Alberta minister wants our human rights commission to get back to fighting for real freedoms, Calgary Sun, February 17, 2009.

⁶ Freedom of speech is out but parent power is in, Calgary Sun, April 29, 2009.

⁷ Anti-gay letter isn't human rights case: Minister, CBC News, April 8, 2010.

IV. THE SHELDON CHUMIR FOUNDATION'S POSITION

There are several good reasons for changing the current legislation governing human rights in Alberta. On a general level, there is the importance of preserving freedom of expression and of avoiding state censorship. On a more specific level, the wording of the section allows the human rights commission to cast too wide a net in determining what complaints fall within its jurisdiction. Section 3 can also have a chilling effect on discussion of controversial issues of importance to the public. Leaving the current law in place also means that the human rights commission will continue to be distracted by this debate, which has undermined its authority and led to questions about its existence. No government that believes in upholding human rights would allow this situation to continue.

1. The importance of freedom of expression:

You will sometimes hear people say that “too much” freedom of expression undermines democracy. We believe the opposite and agree with philosopher Ronald Dworkin when he said: “Free speech is a condition of legitimate government. Laws and policies are not legitimate unless they have been adopted through a democratic process, and a process is not democratic if government has prevented anyone from expressing his (or her) convictions about what those laws and policies should be.”

We also agree with Mr. Dworkin’s statement that, “in a democracy no one, however powerful or impotent, can have a right not to be insulted or offended.... Whatever multiculturalism means—whatever it means to call for increased “respect” for all citizens and groups—these virtues would be self-defeating if they were thought to justify official censorship.”

2. The danger of state censorship:

We understand the motivation behind calls for censorship. But it must be resisted. Where the offending speech concerns not just your beliefs, but a deep aspect of your identity such as your religion or sexuality, the desire to silence speech which is inimical to who you are can be very strong. This logic of “shooting the messenger” has played out in the human rights cases discussed above.

But acting on this inclination by demanding that the state silence someone who does not share your views is wrong, except in those limited circumstances where the harm is serious, irreparable or imminent, such as in the famous prohibition on falsely yelling “fire” in a crowded theatre. Such a prank could lead to panic, a stampede and injury, even death. Someone who needlessly caused such a horrible thing has committed a criminal offence and could be prosecuted under the Criminal Code. There is no need for human rights legislation in such cases.

Censorship opens the door to harm far greater than the good it is thought by some to achieve. For example, the reasoning behind the ruling that Mr. Boissoin’s letter to the editor violated Alberta’s human rights statute was abysmal, the penalty imposed on him absurd. Before the Alberta Court of Queen’s Bench overturned the decision, Boissoin was banned, for life, from expressing his sincere, religiously founded opinion that homosexuality is evil. The decision made a mockery of the Alberta Human Rights Commission.

While we detest Boissoin’s opinions, giving a human rights commissioner the power to shut you up forever because he or she thinks something you said is offensive or hateful is dangerously wrong. Boissoin’s views may have no social value, but what about the next visionary dissident with an unfashionable truth to tell? Stifling people will not make their views go away; it will only force them underground, where they can fester and grow even more virulent.

Whatever good could possibly come of human rights commissions’ censorship is vastly outweighed by the harm it would cause. The history of Canadian censorship laws shows they are often used in counterintuitive ways and in fact have often been used to target minorities, not protect them. The use of the censorship provisions in the Customs and Excise legislation is classic – the persecution of gay bookstores in both Toronto and Vancouver. There are other means of combatting offensive speech. We can shun the source of it, demonstrate or protest, make calls, send e-mails, and so on. The democratic antidote to nasty speech is criticism, debate and protest.

BOX 1: SECTION 3 OF THE ALBERTA HUMAN RIGHTS ACT

This is the current version of Section 3. The underlined words were added in 1996.

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.

BOX 2: SECTION 3 OF THE ALBERTA HUMAN RIGHTS ACT – PRE-1996 WORDING

This is how Section 3 (previously, Section 2) read prior to 1996:

2(1) No person shall publish or display before the public or cause to be published or displayed 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.

2(2) Nothing in this section shall be deemed to interfere with the free expression of opinion on any subject.

2(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 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 notice, sign, symbol, emblem or other representation is not derogatory, offensive or otherwise improper.

3. The problem with casting too broad a net:

Our primary concern with the wording of Section 3 is with the words “likely to expose a person or class of persons to hatred or contempt”. This casts far too wide a net and risks discouraging or suppressing legitimate expression on topics of importance to public discussion, such as gay marriage or Islamic terrorism. While the act states that Section 3 is not to “interfere with free expression”, it is susceptible to ideologically motivated use, much more so than other parts of the act that prohibit discrimination in employment, housing and publicly available services.

Consider what appear to be recent Canadian “honour” killings of four females from Montreal allegedly murdered by the mother, father and brother of three of them. A perfectly reasonable person might respond by saying that people coming to Canada from Afghanistan (the home country of all involved) are in greater need of enlightenment on gender equality than, say, those who came from Sweden. This statement could violate the hate speech provisions of many Canadian human rights laws. Why? Because it can be seen as denigrating a group of people from a particular country of origin by suggesting their treatment of women is problematic.

But if we cannot talk about the special problems women from Afghanistan face, how are they to get the assistance they need? Why does anyone think such restrictions on speech do the vulnerable any favours?

Another example is a story out of Toronto about proponents of an “all boys public elementary school”. The evidence cited in this article to support the claim that boys need specific and separate schooling included statements such as “boys were 3.5 times more likely than girls to be suspended. They underperform compared to girls regardless of age, socioeconomic class or ethnicity, and are more likely to need learning support programs”. These words would not trigger the complaint mechanisms in some provinces, such as Ontario, but they could in Alberta under section 3 of the Alberta Human Rights Act as it currently reads.

As Alan Borovoy, former general counsel of the Canadian Civil Liberties Association, says, even a book telling the truth about the Holocaust would violate Section 3 since it would be “likely to expose” Germans to “hatred or contempt”.

If a democratic society is to flourish, it must work on nurturing and protecting freedom of expression. We want people to participate, to express their opinions, to speak out. A law that targets such an extraordinarily broad range of public discourse has no legitimate place in a democratic society.

4. The necessity of the commission sticking to its mandate:

Even if some hate-speech restrictions are necessary or legitimate, they belong in the *Criminal Code of Canada* and should be dealt with in the courts, where the usual defences of truth and fair comment apply, where the intention to promote

hatred is required for a guilty verdict and where the burden of proof is much stricter. Human rights legislation, which is aimed at promoting tolerance and combating discrimination, should not be used to restrict speech that expresses intolerance or discriminatory attitudes.

5. The need to protect the commission's reputation:

The firestorm of criticism over the free speech cases has severely damaged the reputation of the Alberta Human Rights Commission and hence its ability to carry out its proper mandate. The debate has led to a campaign to get rid of human rights commissions altogether. For example, in Alberta, a majority of members of the Wildrose Party voted in June 2011 to disband the Alberta Human Rights Commission. Danielle Smith, the party leader, said the commission had discredited itself by taking on “frivolous” cases.⁸

V: WHAT WE RECOMMEND

The most dangerous words in Section 3, which were added in 1996, should be removed. This would mean the removal of the words *issue*, *issued*, *statement* and *publication* and the part of the law referring to material that *is likely to expose a person or a class of persons to hatred or contempt (See Box on page 7)*.

The words *issue* and *issued* do not add anything to the section and make it confusing and hard to read. The words *statements* and *publications* and the phrase *likely to expose* greatly expand the scope of the section into expression of political opinion and other public statements. Their removal would strengthen the protection of free speech in Alberta.

In our view this would suffice to eliminate the menace presented by the section in its current form. This would get the human rights commission out of dealing with the expression of opinion in the press. The commission would still deal with the intention to discriminate in employment, housing and access to services. For example, an ad for a job or an apartment or a sign in a restaurant window that

⁸ Wildrose preps policy at annual convention, Calgary Herald, June 26, 2011.

said *No Indians* or *No dogs or Jews* would fall afoul of the provision, but newspaper columns about corruption involving Indian band councils or purported links between Islam and terrorism would not. But if the better-supported view were that, in order to properly protect free expression, Section 3 should be repealed in its entirety, we would endorse that outcome.

VI. CONCLUSION

We should take seriously the ways in which marginalized groups can be and sometimes are demonized in public discourse. But in terms of human rights statutes, we should repeal legal restrictions on expression in favour of public education, rebuttal, protest and other forms of moral suasion. In a democracy not every problem can or should have a legal solution. Heavy-handed use of the law can make matters worse, not better.

The amendments to Section 3 that we suggest have to be complemented with other needed changes, such as a more active and publicly engaged human rights commission, which would speak out at appropriate moments on the harm done by hurtful and offensive speech. The commission should show ethical leadership in support of people, for example, Muslims, gays, or fundamentalist Christians, who feel that they are sometimes under siege in public discussion. But the commission should not have the legal mandate to stifle speech which, no matter how unethical, obnoxious or just plain ill-considered, should not be censored by the state.