Hate Speech and Canadian Law

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A. Criminal Law

1. *Criminal Code* Section 318 (Advocating genocide)

(1) Every one who advocates or promotes genocide is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

(2) In this section, "genocide" means any of the following acts committed with intent to destroy in whole or in part any identifiable group, namely,

- (a) killing members of the group; or
- (b) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction.

(3) No proceeding for an offence under this section shall be instituted without the consent of the Attorney General.

(4) In this section, "identifiable group" means any section of the public distinguished by colour, race, religion, ethnic origin or sexual orientation.

[amended in 2004 to add "sexual orientation"]

What needs to be proved:

- accused's conduct must amount to advocating or promoting genocide. To "advocate" means to argue in favour of or to recommend publicly a particular course of action or conduct. To "promote" is to further, advance, encourage or actively support a course of action or conduct.
- genocide is defined in (2) - this is what must be advocated or promoted.
- genocide involves both acts and a mental element. The acts may be killing the members of an identifiable group or deliberately inflicting upon them conditions of life calculated to bring about its physical destruction. The mental element is the intention to destroy, in whole or in part, the identifiable group. "Identifiable group" is defined in s. 318(4).
- The accused must intend to cause the promotion or advocacy of genocide.
- The Attorney General of the province must consent to the institution of proceedings.

Cases have said:

***Mugesera v. Canada (Minister of Citizenship and Immigration)* 2005 SCC: The** Crown [the prosecutor] does not need to establish a direct causal link between the accused's speech and any acts of murder or violence. The act of incitement must be direct and public. For the speech to constitute direct incitement, the words used must be clear enough to be immediately understood by the intended audience. The Crown must prove that the accused intended to directly prompt or invoke another to commit genocide. The accused must also have specific intent to commit genocide. Intent can be inferred from the circumstances.

2. *Criminal Code* Section 319(1) (Public incitement of hatred; wilful promotion of hatred)

(1) Every one who, by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace is guilty of
    (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or
    (b) an offence punishable on summary conviction...

(2) Every one who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of
    (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or
    (b) an offence punishable on summary conviction.

(3) No person shall be convicted of an offence under subsection (2)
    (a) if he establishes that the statements communicated were true;
    (b) if, in good faith, he expressed or attempted to establish by argument an opinion on a religious subject <u>or an opinion based on a belief in a religious text</u>;
    (c) if the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds he believed them to be true; or
    (d) if in good faith, he intended to point out, for the purpose of removal, matters producing or tending to produce feelings of hatred toward an identifiable group in Canada...

....

(6) No proceeding for an offence under subsection (2) shall be instituted without the consent of the Attorney General.

(7) In this section,
"communicating" includes communicating by telephone broadcasting or other audible or visible means;
"identifiable group" has the same meaning as in section 318;
"public place" includes any place to which the public have access as of right or by invitation, express or implied;
"statements" includes words spoken or written or recorded electro-magnetically or otherwise, and gestures, signs or other visible representations.

[underlined portion added in 2004]

What needs to be proved:

Public incitement of hatred (319(1)):

- <u>communication</u> of <u>statements</u> in a <u>public place</u> (see definitions in 319(7))
- by communicating statements in a public place, accused must <u>incite</u> hatred against an <u>identifiable group</u> (see ss. 319(7) and 318(4) (see above on page 1)
- the incitement must lead to a breach of the peace

- the mental element consists of the intention to cause the above circumstances to occur

Wilful promotion of hatred (319(2)):

- communication of statements other than in private conversation (public place **not** required)
- promotion of hatred must be against an identifiable group
- the mental element consists of the intention to promote hatred
- Defences to 319(2): see 319(3)

Cases have said:

- ***R.* v. *Keegstra*** (1990) Supreme Court of Canada: Section 319(2) offends the freedom of expression guarantee in Charter s. 2(b), but is saved by Charter s. 1, as a reasonable limit on this freedom.
- ***R.* v. *Andrews*** Supreme Court of Canada (1990): "Wilful" - what is required: this offence does not include speech which is merely intemperate. Thus, even though a group that is the target of hateful intemperate remarks may suffer significant damage to its reputation as a result of those intemperate remarks, s. 319(2) will not be available to penalize the maker of those remarks.
- ***R. v. Krymowski*** (2005) SCC: The gist of the offence is the wilful promotion of hatred against any identifiable group.
- ***R. v. Harding*** (2001) Ont. C.A.: The mental element under 319(2) includes wilful blindness but not recklessness. Wilful blindness requires that the accused had a subjective realization of the likely result of his/her actions, and deliberately avoided actual knowledge while engaged in or pursuing the activity. Willful blindness is the equivalent of knowledge.
- ***R.* v. *Buzzanga*** (1979) Ontario Court of Appeal: An accused wilfully promotes hatred only if (a) his conscious purpose in distributing documents was to promote hatred or (b) he foresaw that the promotion of hatred was certain or almost certain to result.

Defences:

- The offence of wilfully promoting hatred also provides the accused person with four defences (s. 319(3)). One of these defences is that of truth, such that the law will not convict a person for promoting hatred if the statements are true or if the accused reasonably believes the statements are true. As a result, the truth or untruth of the statements in question are clearly relevant. Thus, the defence will be faced with the task of proving that the statements are true, while the Crown in prosecuting such an offence will be faced with the task of rebutting the defendant's assertions by proving that the statements were untrue.

B. Other Law

1. *Canadian Human Rights Act* (applicable to organizations and activities which are subject to regulation by the federal government)
Provision:

- The federal human rights legislation directly addresses hate propaganda. In addition to prohibiting discrimination in the areas of employment, public services and accommodation, and in addition to prohibiting discriminatory notices and signs, **s. 13(1) of the *Canadian Human Rights Act*** prohibits hate messages. Pursuant to this provision,

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

Cases and discussion:

- ***League for Human Rights B'Nai Brith Canada (Midwest Region)* v. *Manitoba Knights of the Ku Klux Klan*** (1992) Canadian Human Rights Tribunal: For the legislation to apply, the Crown must establish that:

  1. the communication took place in whole or in part by means of a telecommunication undertaking within the legislative authority of Parliament—that is, using a telephone-type device on a system controlled by the Canadian Radio and Television Commission—;
  2. it was the person named in the complaint who communicated or caused to be communicated the messages; and
  3. the subject matter of the messages is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or persons are identifiable on the basis of a prohibited ground of discrimination.

- ***Canada (Canadian Human Rights Commission)* v. *Taylor*** (1990) Supreme Court of Canada; and ***Nealy* v. *Johnston*** (1989 (Can. H.R. Tribunal): In both cases, a telephone number was advertised in the local newspaper, and readers were invited to call for more information. When a caller accessed the telephone number, recorded messages containing anti-Semitic and anti-immigrant sentiments were played. Complaints were made by members of the groups targeted by these hate messages, and the federal human rights code was used to obtain cease and desist orders to end these telephone messages. see also: ***B'Nai Brith Canada* v. *KKK*** (above) and ***Canadian Human Rights Commission v. Heritage Front*** (1993) Federal Court Trial Division.

- There are three advantages in using this section of the Canadian human rights legislation as compared with using the hate literature provisions of the *Criminal Code*. (1) truth is not available as a defence to a complaint under s. 13(1) of the federal human rights legislation, while it is available as a defence under the *Criminal Code* hate literature provisions. Thus, the federal Human Rights Commission does not have the task of proving whether or not the telephone statements are false; (2) the intention of the statement maker is irrelevant under this section. As a result, the Commission does not have to prove any mental element on the part of the offender, as must be proven to establish the *Criminal Code* offences of promoting hatred and publishing false news and (3) this section does not require that the complainant prove that the messages were taken seriously by any person or that any person was a victim of violence as a result of the telephone broadcast. The test in assessing the potential impact of a message is not how a "reasonable listener" would respond, but rather whether there is anybody who might be inspired to treat the target group with hatred or contempt.

- The Supreme Court of Canada, in the ***Taylor*** decision, held that although s. 13(1) does violate s. 2(b) of the *Charter*, it was nonetheless a reasonable limitation on freedom of expression, and was therefore saved by s. 1 of the *Charter*.

2. *Alberta Human Rights, Citizenship and Multiculturalism Act*
Provisions:
HRCMA Section 3 provides:

> **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.

[By virtue of the *Vriend* case, "sexual orientation" is read into this section as a protected ground.]

Defence:

11. A contravention of this Act shall be deemed not to have occurred if the person who is alleged to have contravened the Act shows that the alleged contravention was reasonable and justifiable in the circumstances.

History of this section of the Alberta Act: HRCMA Section 3 was amended in 1996 to add newspapers and public statements and to add 3(1)(b).

It used to read:

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. Similar, but not identical, provisions exist in many provinces. Examples:

British Columbia's *Human Rights Code:*

7(1) A person must not publish, issue or display, or cause to be published, issued or displayed, any statement, publication, notice, sign, symbol, emblem or other representation that

(a) indicates discrimination or an intention to discriminate against a person or a group or class of persons, or
(b) is likely to expose a person or a group or class of persons to hatred or contempt
because of the race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age of that person or that group or class of persons.

(2) Subsection (1) does not apply to a private communication or to a communication intended to be private.

Manitoba's *Human Rights Code*:

18 No person shall publish, broadcast, circulate or publicly display, or cause to be published, broadcast, circulated or publicly displayed, any sign, symbol, notice or statement that
(a) discriminates or indicates intention to discriminate in respect of an activity or undertaking to which this Code applies; or
(b) incites, advocates or counsels discrimination in respect of an activity or undertaking to which this Code applies;
unless bona fide and reasonable cause exists for the discrimination.

New Brunswick's *Human Rights Act*

6(1)No person shall
(a)publish, display, or cause to be published or displayed, or
(b)permit to be published or displayed on lands or premises, in a newspaper, through a television or radio broadcasting station, or by means of any other medium that he owns or controls,
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 race, colour, religion, national origin, ancestry, place of origin, age, physical disability, mental disability, marital status, sexual orientation, sex, social condition, political belief or activity.

6(2)Nothing in this section interferes with, restricts, or prohibits the free expression of opinions upon any subject by speech or in writing.

6(3)Notwithstanding subsection (1), a limitation, specification, exclusion, denial or preference because of sex, social condition, political belief or activity, physical disability, mental disability, marital status or sexual orientation shall be permitted if such limitation, specification, exclusion, denial or preference is based upon a bona fide qualification as determined by the Commission.
6(4)The provisions of subsection (1) as to age do not apply to a limitation, specification, exclusion, denial or preference in relation to a person who has not attained the age of majority if the limitation, specification, exclusion, denial or preference is required or authorized by an Act of the Legislature or a regulation made under that Act.

Nova Scotia's *Human Rights Act*

7 (1) Subject to Section 6, no person shall publish, display or broadcast, or permit to be published, displayed or broadcast, on lands or premises, in a newspaper, by radio or television or by means of any medium, a notice, sign, symbol, implement or other representation indicating discrimination or an intention to discriminate against an individual or class of individuals because of a characteristic referred to in clauses (h) to (v) of subsection (1) of Section 5.

(2) Nothing in this Section is deemed to interfere with the free expression of opinion upon any subject in speech or in writing. 1991, c. 12, s. 1.

Ontario's *Human Rights Code*

13.(1) A right under Part I is infringed by a person who publishes or displays before the public or causes the publication or display before the public of any notice, sign, symbol, emblem, or other similar representation that indicates the intention of the person to infringe a right under Part I or that is intended by the person to incite the infringement of a right under Part I.

(2) Subsection (1) shall not interfere with freedom of expression of opinion.

Cases:

- The British Columbia Human Rights Tribunal analyzed a section similar to s. 3(b) in ***Canadian Jewish Congress* v. *North Shore Free Press Ltd. (cob North Shore News)*** (November 4, 1997). The B.C. Human Rights Tribunal heard two complaints that Doug Collins and North Shore Free Press Ltd. had written and published an opinion column which was likely to expose Jewish persons to hatred or contempt on the basis of their race, religion or ancestry. The respondents disputed the case on the merits and challenged the constitutional validity of the legislation. The Tribunal held that while s. 7(1)(b) of the B.C. *Human Rights Code* infringed the guarantee of freedom of expression under *Charter* s. 2(b), it was saved by *Charter* s. 1, being demonstrably justified as a reasonable limit in a free and democratic society. As for the merits of the case, the Tribunal held that s. 7(1)(b) of the B.C. legislation was not infringed, and the complaint against Collins and North Shore News was dismissed.

- ***Kane* v. *Church of Jesus Christ Christian-Aryan Nations*** (1992) Alberta Board of Inquiry: In this case, Terry Long, Ray Bradley, and the Church of Jesus Christ Christian-Aryan Nations organized an event which was held on Bradley's farm on September 8-9, 1990. Long wrote to 40 people, inviting them and their "White friends" to attend. During that event, a "Swastika flag" and a sign that read "KKK White Power" were displayed on the farm so that they were visible to passers-by on the road adjoining the farm. A cross was set on fire at night. A number of attendees wore KKK or Nazi garb, and weapons were displayed. The atmosphere was apparently one of menace and intimidation, and persons attending the Aryan Fest hectored and threatened protesters. A number of persons laid a complaint of discrimination under s. 2(1) of Alberta's Individual's Rights Protection Act (“IRPA”), which prohibited the publication or display of discriminatory notices, signs, symbols, emblems or other representations. The Board of Inquiry found the complaints justified in whole. The respondents were ordered to refrain from the same or any similar public display of the Swastika, "White Power" signs and symbols, burning or lighted crosses; and signs or symbols indicating an affiliation with the KKK.

- As s. 2 of the IRPA (the predecessor act) had not previously been interpreted, the Board of Inquiry interpreted several words and phrases in that section:

- **"before":** The Board used the dictionary definition for the word "before", meaning "in front so as to be in the sight of; under the cognizance of". It was thus not a defence that these symbols and sign were on private land, since they were visible to the public. According to the Board, signs and symbols infringing the IRPA cannot be displayed before the public, whether from private or public land.

- **"display or cause to display"**: The Board used dictionary definitions of the word "display", which means "exhibit, expose to view, show; show ostentatiously; reveal, betray, allow to appear, present as a display". The Swastika, burning cross, and KKK White Power sign were all displayed, as they were shown ostentatiously by the respondents. Thus, even if the meeting was private, the display was not.

- **"for any purpose":** The Board found that s.2(1) of the IRPA applies to displays indicating discrimination or an intention to discriminate about matters not otherwise prohibited in the IRPA, but that any such matters must be within provincial legislative competence. Here, the Board found that the "Church" was a conspiracy to create a nation for the "Aryan" race, and the policy of the Church was set out in the National State Platform. The Platform encompassed matters within both federal and provincial jurisdiction.

- **"indicate discrimination":** The Board referred to the dictionary definition of "indicate" as meaning "to point out, point to, make known, show (more or less distinctly); to be a sign or symptom of; to betoken". The Board adopted the definition of "discrimination" from *SHRC* v. *Engineering Students' Society*, referring to any distinction, exclusion, restriction or preference founded on the specified characteristics, which in purpose or effect impairs the enjoyment of persons of their rights to equal opportunities in the fields covered by the human rights legislation. The Board held that there does not have to be an actual act of discrimination for there to be an indication of discrimination; the rights of the target group to obtain equal opportunities in employment, housing, and public accommodation are endangered by displays which reinforce prejudice or promote latent discrimination; and there does not have to be evidence of an intention to discrimination to find an indication of discrimination.

- **"interfere with the free expression of opinion on any subject":** The Board employed the analysis used in *R.* v. *Oakes* to balance the interests of freedom of expression against the restrictions on the display of signs and symbols in s.2(1) and concluded that the IRPA did not unacceptably abridge the free expression of opinion on any subject.

- **"public":** The Board said that some of the persons attending the Aryan Fest were members of the public within the meaning of the IRPA. The invitation was to addressees and their "White friends", not to members of an exclusive club. Attendance was not limited to church members, and thus persons attracted to the Aryan Fest were members of the public, since they were a "portion of the public".

- ***Harvey Kane and The Jewish Defense League of Canada v. Milan Papez, Sr., Milan Papez, Jr. and The Silver Bullet*** (June 13, 2002; Alta. H.R.P. - Deborah E. Prowse, Panel Chair). The respondents published a pamphlet entitled “The Silver Bullet”. The Panel discussed the definitions of the words “signs”, “symbol or emblem”, “notice” and “representation” and concluded that the publication is of the form contemplated under s.2. [now s.3] of the Act. The Panel concluded that the respondents had contravened s.3 by publishing and/or displaying messages that indicate discrimination and an intention to discriminate. The Panel relied on the opinion of Justice Rooke in ***Kane et al. v. Alberta Report et al.***, May, 2001, AB QB, where he said that “s.3(2) provides neither a defense nor a justification for a breach of s.3(1) rather s.3(2) is an admonition to balance the competing objectives of freedom

of expression and the eradication of discrimination". Justice Rooke set out a two-part test:

(a) Does the communication itself express hatred or contempt of a person or a group on the basis of one or more of the listed grounds? Would a reasonable person informed about the context, understand the message as expressing hatred or contempt?

(b) Assessed in its context, is the likely effect of the communication to make it more acceptable to others to manifest hatred or contempt against the person or group considered? Would a reasonable person consider it more likely than not to expose members of the target group to hatred and contempt?

The Panel referred to the Supreme Court of Canada decision, *Taylor (supra*) for the definition of "hatred" and concludes that the respondents' publications reflect hatred and contempt for Jews and Asians. The Panel considers the following factors: how extreme is the language used, what statements are made, what threats and solutions suggested, the number and frequency of the publications, the broad generalizations arising out of specific personal experiences, and the purpose of the publications. The critical feature of human rights law is that it is the impact upon targeted groups and not intention that is determinative of discrimination. The Panel found that the respondents have failed to raise any defense and order publication to cease and damages for pain and suffering in the amount of $2,500.00.

- ***Kane v. Alberta Report*** (December 2001; Alta. H.R.P. - Deborah Prowse, Panel Chair); ***Alberta Report v. Alberta (Human Rights and Citizenship Commission),*** **[2002] A. J. No. 1539 (QB**) Mr. Kane filed a complaint against the Alberta Report news magazine alleging the publication of discriminatory, anti-Semitic comments. In support of Mr. Kane's position the Panel took notice of evidence given before another tribunal and quoted in case law provided by the intervener L.E.A.F. The Panel found a breach of s. 2(1)(a) [now s.3(1)(a)] of the HRCMA. On appeal to the Court of Queen's Bench, Alberta Report argued a breach of procedural fairness had occurred when there had been no notice of the expert evidence that would be used. The Commission felt that since the evidence came from the case law given to all parties, that there had been sufficient notice. The Court of Queen's Bench did not agree. The Court held that "[t]he rules of evidence do not strictly apply" and the tribunal is permitted to take notice of evidence that "everybody knows" and that "anybody can find out" (*R. v. Williams*, [1998] 1 S.C.R. 1128). The Court also held that "to require the complainant or the Commission to call expert evidence in each case to prove how a certain group suffers discrimination would defeat the purpose of the legislation". However, here the case law was submitted to "speak to points of law" and was not submitted as evidence. In the interests of fairness, the Court held this is not sufficient notice and sent the matter back to the Panel for a new hearing.

At the rehearing, ***Kane v. Alberta Report* (2002),** 43 C.H.R.R.D/112 (Alta. H.R.P. – Deborah Prowse, Panel Chair), the Panel held that Alberta Report contravened this section and that the appropriate remedy would be the publisher's offer of space in the magazine to address the impact of the article. [This remedy has not been suggested in any other reported decisions.] This 2002 decision was appealed to the Court of Queen's Bench: *Alberta Report v. Alberta (Human Rights and Citizenship Commission)* 2002 ABQB 1081 where the court ordered a re-hearing because the Panel had not provided sufficient notice to the parties that it was going to rely on evidence from a decision of a British Columbia Human Rights tribunal.

It does not appear that a re-hearing has been held.

- ***Re Kane,* [2001] A.J. No. 915 (Alta. Q.B.)** A statement, publication, notice, sign, symbol, or other representation need not be phrased or structured in any particular way in order to constitute an opinion. It is the content of the message in the context of which it is both made and received which is determinative. S.2(2) [now s. 3(2)] is neither a defence nor a justification for a breach of s. 2(1).

- **Q*uintin Johnson v. Music World Ltd., HMV Canada, and A.V.E. Entertainment (Formerly Known as Top Forty Music*)** (May 7, 2003; Alta. H.R.P. - Lori G. Andreachuk, Panel Chair). The complainant was shopping in a mall when he came across a CD by the group, Decide, titled "Upon the Cross" and Type O Negative called "Bloody Kisses". He listened to the CD and found various songs to be highly offensive to Caucasians, women and Christians. The complainant argued that he was discriminated against and that the music made Christians vulnerable to hate because the respondents allowed this music to be available to the public either through music booths or purchase.

  The complaint was dismissed by the director, but on appeal to the Chief Commissioner, the complaint was directed to the Panel. The complainant sought to have the allegedly discriminatory materials removed from display in the store and sought an order for the respondents to revise their policies on displaying discriminatory materials for sale in the future. The Panel found that there was a causal connection between the respondent and the alleged discriminatory practice by displaying the music, for the claim to be brought against the record store, as opposed to the producer of the album. Next, the Panel applied the test established in *Kane* to determine whether there is discriminatory behaviour that breaches s.2(1) (now s.3(1)). In applying the analysis, the Panel held that there was no breach of s.2(1) (now s.3(1)). The Panel explained that although the alleged discriminatory words in the music appear to be extreme, the message conveyed does not reinforce stereotypes and is not well publicized. The target group is only made vulnerable in a limited sense, and the method of communication lacks credibility. Further, the Panel found that the music appeals to a small audience, an audience who actively seeks out materials that convey that message. In looking at the context in which the message is conveyed, the Panel held that the alleged discriminatory practice was not more likely

to expose the target group to hatred. Therefore, there was no breach of s.2(1) (now s.3(1)) and the complaint was dismissed.

- ***Darren Lund v. Stephen Boissoin and the Concerned Christian Coalition Inc.*** (November 30, 2007, Alta. H.R.P.; Lori G. Andreachuk, Q.C., Panel Chair). Darren Lund, a University of Calgary professor, filed a human rights complaint alleging discrimination in the area of publications and notices on the basis of sexual orientation, after Stephen Boissoin, then the executive director of the Concerned Christian Coalition, wrote a letter to the editor of the Red Deer Advocate, entitled "Homosexual Agenda Wicked." Lund initially complained against both the Red Deer Advocate and Boissoin. The Red Deer Advocate entered into a settlement and enacted a policy statement that provides: "The Advocate will not publish statements that indicate unlawful discrimination or intent to discriminate against a class of persons, or are likely to expose people to hatred or contempt because of…sexual orientation." The complaint proceeded against Boissoin and the Concerned Christian Coalition.

  The Panel dealt with three main issues:
  1. Did Boissoin's letter breach *HRCMA* s. 3(1)?
  2. Is subsection 3(2) a defence to the breach of s. 3(1)?
  3. Does the Human Rights and Citizenship Commission have jurisdiction to adjudicate on the complaint?

  1. The Panel found that Boissoin's letter violated s. 3(1) because it caused the publication of statements that, on the balance of probabilities, were likely to expose gays, a vulnerable group, to hatred and contempt due to their sexual orientation, effectively making it more acceptable to others to manifest hatred toward gays. The Panel relied on the factors set out in the *Re Kane* (2001 ABQB 570) decision of Justice Rooke to determine whether the publication was "likely to expose" gays to hatred and contempt. These include:

    - the content of the communication,
    - the tone of the communication,
    - the image conveyed, including whether the issues of quotations and reference sources, gives the message more credibility,
    - the vulnerability of the target group,
    - the degree to which the expression reinforces existing stereotypes,
    - the circumstances surrounding the issues, including whether the messages appeal to well publicized issues,
    - the medium used to convey the message,
    - the circulation of the publication and its credibility, and
    - the context of the publication – whether it is part of a debate or whether it is presented as news or as a purportedly authoritative analysis.

The Panel held that the letter's content exposed gays to contempt and reinforced existing stereotypes. The Panel noted the allegation that a local young gay man was beaten by a regular visitor to a drop-in centre operated by Boissoin within two weeks of the letter's publication. The Panel also heard evidence about the prevalence of hate bias crimes against gays in Alberta from a former police officer from Calgary who had served for a number of years as the hate bias officer. (Note: extensive quotations from the letter in question are set out in the judgment.)

2. The purpose and effect of subsection 3(2), or its equivalent in other jurisdictions, have been the subject of some legal decisions. After considering a number of authorities, the Panel determined that the role of s. 3(2) was to admonish the Panel to balance freedom of expression with the eradication of discrimination in the consideration of complaints under s. 3, but noted also that s. 3(2) is not a complete defence nor a justification for a breach of s. 3(1).

Boissoin argued that he wrote the letter hoping to promote spirited debate in the community, to educate youth and to promote political action, and that he did not intend to discriminate against gays. The intervenor Canadian Civil Liberties Association (CCLA), while finding Boissoin's message abhorrent, supported Boissoin's right to freedom of expression and freedom of religion, arguing that the effects of the impugned letter could be countered by published rebuttal. CCLA argued that Boissoin's views may be "jarring, extreme, polemical, offensive and confrontational," but posited that when offensive speech is subjected to legal prohibition, serious dangers arise. First, it may result in the prohibition of expression that is fundamental to the rigorous debate and individual decision-making that underlies a functioning democracy. Second, such prohibition casts a chill over all future speakers, leading to self-censorship. The CCLA also noted that the Supreme Court has held that the guarantee of free expression in the *Canadian Charter of Rights and Freedoms* ("*Charter*") s. 2(b) applies equally to speech that is regarded as wrong, false and offensive.

The Panel held that the Alberta legislature did not intend to protect hatred under s. 3(2). The Panel relied on Justice Rooke's statement in *Re Kane* [para. 67] (quoting the Supreme Court of Canada in *R. v. Keegstra,* 1990), that "protection from discriminatory and hate/contempt-based expression is a pressing and substantial objective, and is justified in a free and democratic society." Individuals expressing their opinions or expressing political statements must make their views known in a responsible manner. Thus, the broad protection granted to freedom of expression and freedom of religion under the *Charter* did not override the protection against hatred and contempt provided under the *HRCMA*.

3. Finally, Boissoin and the CCLA argued that the Panel did not have jurisdiction to hear the complaint because the provincial legislature may only curtail expression directly linked to specific discriminatory actions prohibited by the *HRCMA*. Thus, Boissoin's letter lacked a direct link to a discriminatory practice within the legislative jurisdiction of the province. Legislating against hate speech should be dealt with

under the criminal law jurisdiction of the federal government. The Panel found that it had jurisdiction to hear the complaint, because the complaint concerned a matter that was local and private in nature and therefore within provincial legislative jurisdiction. Boissoin's letter was related to the educational system in Alberta and there was circumstantial connection between the hate speech and the attack on the gay teenager in Red Deer within two weeks of the publication of the offending letter.

Interestingly, none of the parties raised the issue of whether Boissoin could have relied upon the defence in s. 3(3) or the general defence found in *HRCMA* s. 11.

The Panel left the issue of the appropriate remedy to a future decision.