

## **“Ethics and Human Rights Law: What role ought human rights law to play vis-a-vis offensive speech?”**

Speaking Notes, Janet Keeping, President, Sheldon Chumir Foundation for Ethics in Leadership

“Freedom of Expression and Discrimination under Alberta’s Human Rights Law”,  
A Panel Discussion on Thursday, October 29, 2009, organized by the Alberta Civil Liberties Research Centre, University of Calgary

1. The gist of our approach: We are primarily interested in the ethics of this issue: What is an appropriate role for human rights law vis-a-vis offensive speech? What *ought* the law in this area to be? This is ultimately for the public to decide because the ethical question is not the same as the constitutional issue.
2. Caveat: Neither I nor my colleagues at the Chumir Foundation are of the view that human rights commissions have outlived their usefulness. On the one hand, these agencies are facing very serious challenges. On the other hand, we recognize that discrimination is still a serious problem in Canadian society and that those who face discrimination in critical aspects of their lives – employment, housing and services usually available to the public (restaurants, hotels, as well as those offered by public agencies) – need a legal remedy for that discrimination which, without human rights codes, they (pretty much) do not have in Canadian law.

We share some views with the loudest critics of the commissions, but we do not share all their opinions and in fact have publicly repudiated the way in which they too often advance their views, that is, for example, through gross exaggeration, deliberate misstatement and personal attacks. That is all quite another story, of course, but I thought it worthwhile to get it out on the table.

3. Our primary concern is with the words "... likely to expose a person or class of persons to hatred or contempt ...". These are in our view unacceptable in a democratic society that should be working to nurture and protect a broad freedom of expression, if it is going to flourish; we want people to participate, to express their opinions, to speak out. People in a democratic society should not be encumbered by law which targets (at least on its face and really that is, in this public policy context, all that matters) such an extraordinarily broad range of public discourse.
4. How broad? Consider these examples:
  - a. October 21 G+M: Story out of Toronto about proponents of an "all-boys public elementary school." Evidence cited in this article to support 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 provincial human rights statutes, e.g., Ontario's HRC, but would Alberta's HRA.
  - b. Women doctors work fewer hours than men; perhaps we should be training fewer of them, not admitting so many to medical schools.
  - c. "You white people just don't get it, do you? You are so blind to your privilege, you can't see your own racism." Or, "Straight people have no idea what it's like to be gay in Alberta. 93% of the population assumes everyone is like them – heterosexual. That's cruel, because some of us are very different, if only in that one way."
  - d. In other words, such a provision captures way, way, way too much. As much as I have suggested? Well, in a sense no and in a sense yes. No: if you are a lawyer, because 1) interpretation that has been put on similar provisions from other jurisdictions, and 2) there is always the "reasonable and justifiable" defense.

Section 11 of the Alberta Act provides that, “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.”

But almost no one without legal or similar training would 1) know that such a provision exists or 2) be able to understand its legal significance, even if they ran across it.

But really yes, because 1) ordinary people can’t understand what the scope of the law actually is (so both as potential complainants and as potential respondents they are operating largely in a state of ignorance) and 2) even many legally trained people regularly get it wrong. So, yes, in its effect, and in its chilling effect on speech, this sort of provision is every bit as broad as I suggest it is.

What is that chilling effect?: things never expressed that would have been. Even where a complaint is dismissed or ultimately held unfounded, as Richard Moon puts it “free speech interests are affected every time an investigation occurs – particularly since the investigation engages the parties and takes 8 to 10 months to conclude”.<sup>1</sup> [I would go further – every time a complaint is lodged, which may or may not be the same thing.]

- e. Although from another point of view, I can of course see the superficial attractiveness of this kind of law (it *looks* like a good thing), it is deeply puzzling to me why those concerned about the status of minorities, and discrimination against them, often favour this kind of provision. Consider what cannot be said without fear of a complaint being filed: see above.

---

<sup>1</sup> Richard Moon “Speaking Notes for address entitled ‘The Attack on Human Rights Commissions and the Corruption of Public Discourse’”, University of Saskatchewan, Faculty of Law, October 19, 2009.

- f. The situation is actually worse than I am making it sound. The history of Canadian censorship laws shows they are often used in counter-intuitive 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 – pure persecution of gay bookstores in both Toronto and Vancouver.
- g. Fact that so much speech falls afoul of this sort of provision ought, I think, to suggest that the law is not the solution. As Richard Moon puts it:

“... less extreme forms of discriminatory expression [that is, language that would probably not be caught by the Criminal Code], although harmful, cannot simply be censored out of public discourse. Any attempt to exclude from public discourse, speech that stereotypes or defames the members of an identifiable group would require extraordinary intervention by the state and would dramatically compromise the public commitment to freedom of expression.”

## 5. An actual case: Lund v Boissin

- a. Decision is poorly reasoned – explain;
- b. Just a badly handled case? No, I don't think so. Human rights doctrine, as it has evolved over the last 20 or so years is largely inappropriate and even dangerous to free expression. Richard Moon again:
  - i. “... a narrowly drawn ban on hate speech that focuses on expression that is tied to violence does not fit easily or simply into a human rights law that takes an expansive view of discrimination, emphasizes the effect of the action on the victim rather than the intention or misconduct of the actor and employs

a process that is designed to engage the parties and facilitate a non-adjudicative resolution of the “dispute” between them.”

- ii. “... because s. 13 is located in a law that seeks to advance the goal of social equality through education and conciliation, the CHRC may be inclined to err on the side of inclusion when deciding whether a complaint should be rejected prior to investigation on the grounds that it is trivial. Human rights commissions may be reluctant to exclude a complaint prior to investigation on the grounds that it is trivial, because such a finding may be seen as downplaying the genuine feelings of hurt or injury experienced by minority group members and will preclude the possibility of a facilitated resolution of the “dispute”.”

## 6. Our recommendations

- a. Amend section 3 of the AHRA: take it back to its pre-1996 changes. This would get rid of what is by far the worse threat posed by such sections. This is what SCF recommended to the provincial government. As something of an aside:
  - i. We were told members of caucus broke down and cried during their internal debate on the issue;
  - ii. Dismal leadership on the issue: contrast with approach taken by one of the opposition parties that called in expert help to answer the questions of some caucus members. Then they were united behind the need to amend s. 3.
  
- b. I would have been happy to go further in our recommendations regarding s. 3: I think that the remaining words present far less threat, but 1) they present some threat (Aryan Nations case, e.g., is somewhat worrisome) and 2) don't actually do much good. [Tim Horton's in Lethbridge.] So, really no point. But if more politically acceptable, OK with me.

- c. Although the issue is not one that we have considered as an organization (i.e., including our Board of Directors), my personal view is that s. 13 of the CHRA should be repealed.
7. Law is not the only response available to us.
- a. Some people keen on using the law in these circumstances will ask, but don't you care about the horrible things that are said? Of course. Very much. But it is not as if we have no tools at our disposal to deal with offensive speech. The civil libertarian response is more speech, more activism, get off your butts and do something about what you don't like, don't sit back and urge law-makers to censor expression.
    - i. Response to white supremacists on streets of Calgary?  
Counter-protest: as long as peaceful and non-violent, then by far the best way – in my opinion – to show society's denunciation of hate, racism and all the other discriminations, when that denunciation is called for.
    - ii. Sometimes publicity (public denunciation) isn't the right way to go. Paying attention can give those who really are hateful more publicity than they could ever buy and make martyrs of them. In the words of Alan Borovoy: sometimes the best approach is to ignore the racists, to leave them "in the obscurity which they so richly deserve."
  - b. And of course there are other bodies of law to deal with speech that crosses clear lines, such as defamation, and criminal law on encouraging people to commit criminal offenses and on hate speech. About the latter, another day.
8. Final comment: just because a proposed or existing legal provision is constitutional (and I don't really see how any of these broadly worded human rights provisions are – but we do have the Taylor case to get around), it doesn't follow that it is wise or contributes to the betterment of society. All it means is that it is permissible given the limitations imposed on our legislatures by the constitution. And to return to the ethical perspective:

constitutional doesn't equal ethical, although – in a state governed by the Rule of Law – there is of course a connection of sorts between the two.