

IN THE COURT OF QUEEN'S BENCH OF ALBERTA  
JUDICIAL DISTRICT OF CALGARY

IN THE MATTER OF THE ALBERTA *HUMAN RIGHTS, CITIZENSHIP AND MULTICULTURALISM ACT*  
R.S.A. 2000, c. H-14

AND IN THE MATTER OF A DECISION OF A PANEL OF THE ALBERTA HUMAN RIGHTS AND  
CITIZENSHIP COMMISSION, IN REGARDS TO COMPLAINT NO. S.2002/08-0137

BETWEEN:

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

Appellants

- and -

**DARREN LUND**

Respondent

- and -

**THE ATTORNEY GENERAL OF ALBERTA, CANADIAN CIVIL LIBERTIES  
ASSOCIATION and CANADIAN CONSTITUTION FOUNDATION**

Interveners

---

**BRIEF OF THE INTERVENER  
CANADIAN CONSTITUTION FOUNDATION  
September 16 and 17, 2009  
Before the Honourable Mr. Justice E.C. Wilson**

---

<b>Miller Thomson LLP</b> 3000, 700 – 9 <sup>th</sup> Avenue S.W. Calgary, Alberta T2P 3V4 Gerald D. Chipeur, Q.C. Solicitors for Stephen Boissoin	<b>Chivers Carpenter</b> 101, 10426 – 81 <sup>st</sup> Avenue Edmonton, Alberta T6E 1X5 Attention: Patrick Nugent Solicitors for Darren Lund
<b>David Kamal</b> Alberta Justice Room 410, Bowker Building Edmonton, Alberta T5K 2E8 Solicitors for the Attorney General of Alberta	<b>J.P. Peacock, Q.C./Janet L. McCready</b> Peacock, Linder & Halt LLP 1800, 350 – 7 <sup>th</sup> Avenue S.W. Calgary, Alberta T2P 3N9 Solicitors for the Canadian Civil Liberties Association
<b>John V. Carpay/Karen Selick</b> Suite 240, 1830 – 52 <sup>nd</sup> Street S.E. Calgary, Alberta T2B 1N1 Solicitors for the Canadian Constitution Foundation	

## TABLE OF CONTENTS

	<u>Page</u>
I. THE FACTS.....	1
II. ISSUES ON THE APPEAL.....	1
III. THE LAW.....	2
A. Legislation Is Not Within Any Provincial Power.....	2
i. Property and Civil Rights in the Province.....	2
ii. Matters of a Merely Local or Private Nature.....	9
B. Legislation Encroaches on Federal Criminal Law Power.....	9
C. Can Paragraph 3(1)(b) Be Saved by Any Known Doctrine.....	17
IV. NATURE OF RELIEF DESIRED.....	18
V. SCHEDULE “A”—Table of Authorities.....	20
VI. SCHEDULE “B”—Statutory Provisions.....	2

**BRIEF OF THE INTERVENER**  
**CANADIAN CONSTITUTION FOUNDATION**

PART I — THE FACTS

1. As an intervener, the Canadian Constitution Foundation (hereinafter “CCF”) makes no submissions with respect to the facts in this appeal.

PART II — ISSUES ON THE APPEAL

2. The CCF will address the issue of whether subsection 3(1) of the *Human Rights, Citizenship and Multiculturalism Act*<sup>1</sup> is *ultra vires* the provincial legislature of Alberta, and will argue that this legislation is invalid.
3. The first ground of invalidity is that section 92 of the *Constitution Act, 1867* does not give a provincial legislature the authority to enact legislation directly restricting the expression of ideas, beliefs, thoughts and opinions.
4. The second ground of invalidity is that the impugned subsection 3(1) encroaches on the criminal law powers granted exclusively to the federal government by section 91(27) of the *Constitution Act, 1867*.

---

<sup>1</sup> R.S.A. 2000, c. H-14, hereinafter “*HRCMA*.”

## PART III — THE LAW

### A. — Legislation Is Not Within Any Provincial Power

5. Subsection 3(1) of the *HRCMA* is set out in full in Schedule “B”. The crucial element of this subsection is paragraph (b), which prohibits the publication of any statement that “is likely to expose a person or a class of persons to hatred or contempt.”
6. To be constitutionally valid, any law enacted by a provincial legislature must be within the powers granted to the province by section 92 of the *Constitution Act, 1867*, which is also set out in full in Schedule “B.”
7. There is no head of power contained in section 92 that explicitly or obviously grants a provincial legislature the power to regulate or restrict the expression or publication of ideas, thoughts, beliefs or opinions.
8. The only heads of section 92 which could potentially authorize legislation of this nature are sections which frequently serve as “catch-all” sections, namely: 92(13) (“Property and Civil Rights in the Province”) or 92(16) (“Generally all Matters of a merely local or private Nature in the Province”). The CCF submits that in accordance with prior case law and other authorities, neither of these heads of power can be interpreted in a manner that provides a defensible foundation for the validity of subsection 3(1) of the *HRCMA*.

#### **(i) Property and Civil Rights in the Province**

9. The history of the phrase “property and civil rights” is discussed by Professor Peter W. Hogg in his textbook *Constitutional Law of Canada*<sup>2</sup>, on pages 614–616. Prior to confederation, writes Hogg, “...the phrase meant the whole body of law governing relationships *between individuals*...” [emphasis added].
10. The framers of the constitution, Hogg continues:

---

<sup>2</sup> Fifth edition (Scarborough: Thomson Canada Limited, 2007), **Book of Authorities Tab 1**

...understood the familiar phrase in the same sense it obtained in 1792 and 1774, that is to say, as a compendious description of the entire body of private law which governs the relationships *between subject and subject*, as opposed to the law which governs the relationships between the subject and the institutions of government...[emphasis added]

...the term ‘civil rights’ in this context does not bear the meaning which it has acquired in the United States, that is, as meaning the civil liberties which in that country are guaranteed by the Bill of Rights. Civil rights in the sense required by the Constitution Act, 1867 are juristically distinct from civil liberties. The civil rights referred to in the Constitution Act, 1867 comprise primarily proprietary, contractual or tortious rights...

...a law whose pith and substance is the restraint of belief or expression does not come within property and civil rights in the province.<sup>3</sup>

11. The first step in this inquiry is to determine the pith and substance of subsection 3(1). The CCF submits that it is the prohibition of expression of ideas, thoughts or beliefs that the legislature deems to be disparaging towards various persons or classes of persons. In plain terms, the pith and substance of subsection 3(1) is the censorship of what is commonly called “hate speech”.
12. The impugned subsection is contained within a statute which, except for subsection 3(1), might well fall within the ambit of “property and civil rights in the province.” The remainder of the *HRMCA* is designed to govern the “relationships between subject and subject,” as Hogg put it, by preventing discrimination in areas such as the provision of goods, services, accommodation, facilities, or employment. Paragraph 3(1)(b) is different: it does *not* deal with discrimination. One can violate paragraph 3(1)(b), as the appellants allegedly have done, without any injured party suffering a loss in the areas of services, housing or employment.
13. Indeed, paragraph 3(1)(b) appears to be superfluous to the primary anti-discrimination purpose of the *HRMCA*. The equivalent legislation in Ontario, for instance—the *Human*

---

<sup>3</sup> *Ibid.* at 616.

*Rights Code*<sup>4</sup>—lacks any prohibition comparable to that of paragraph 3(1)(b). The Ontario code in section 13 prohibits the publication of a “notice, sign, symbol, emblem or other similar representation” that indicates an intention to discriminate or to incite others to discriminate, but it does not prohibit the publication of statements unconnected to such intentions. Likewise, the provinces of Manitoba, Quebec, New Brunswick, Nova Scotia, Prince Edward Island and Newfoundland and Labrador all lack any prohibition comparable to Alberta’s paragraph 3(1)(b), although all contain prohibitions on publications indicating an intention to discriminate.<sup>5</sup>

14. There is ample case law supporting the proposition that laws interfering with freedom of expression cannot be supported under the head of power “property and civil rights within the province.” In *Reference re: Alberta Statutes*<sup>6</sup>, the Supreme Court of Canada considered the validity of Bill 9 of the Social Credit government, *An Act to ensure the Publication of Accurate News and Information*. The bill would have required newspapers in Alberta to publish statements furnished by the government in order to correct or amplify any statement previously published relating to the government’s policies or activities. As well, it would have required newspapers to furnish detailed written information regarding their sources of information. The court held the legislation to be *ultra vires* the province as not falling within either s. 92(13) or s. 92(16).
15. Duff C.J. wrote at length on the importance of free public discussion of public affairs, describing it as the “breath of life for parliamentary institutions<sup>7</sup>.” He continued:

“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 legislatures of the provinces, or to the legislature of any one of the provinces, as repugnant to the provisions of The British North America Act...The subject matter of such legislation could not be

---

<sup>4</sup> R.S.O. 1990, c. H.19, with the relevant section reproduced in Schedule “B”.

<sup>5</sup> See Schedule “B” for legislation of other provinces.

<sup>6</sup> *Reference Re Alberta Legislation*, [1938] S.C.R. 100, hereinafter “*Alberta Legislation*.” **Appellant’s Book of Authorities Tab 8.**

<sup>7</sup> *Ibid.* at 133.

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.”<sup>8</sup>

16. Cannon J. also discussed this issue in *Alberta Legislation*, thus:

“Freedom of discussion is essential to enlighten public opinion in a democratic State...There must be an untrammelled publication of the news and political opinions of the political parties contending for ascendancy....The province may deal with [a citizen’s] property and civil rights of a local and private nature within the province; but the province cannot interfere with his status as a Canadian citizen and his fundamental right to express freely his untrammelled opinion about government policies and discuss matters of public concern. The mandatory and prohibitory provisions of the Press Bill are, in my opinion, ultra vires of the provincial legislature. They interfere with the free working of the political organization of the Dominion. They have a tendency to nullify the political rights of the inhabitants of Alberta, as citizens of Canada, and cannot be considered as dealing with matters purely private and local in that province. The federal parliament is the sole authority to curtail, if deemed expedient and in the public interest, the freedom of the press in discussing public affairs and the equal rights in that respect of all citizens throughout the Dominion...No province has the power to reduce in that province the political rights of its citizens as compared with those enjoyed by the citizens of other provinces of Canada.”<sup>9</sup>

17. As Cannon J. pointed out, *Bill 9* would have curtailed Albertans’ freedom to discuss public affairs in a manner not denied to other Canadians. Likewise, subsection 3(1) of the *HRCMA* curtails Albertans’ freedoms in a manner not suffered by Ontarians and residents of six other provinces.

18. The case at bar is analogous to the *Alberta Legislation* case in that Mr. Boissoin’s letter to the newspaper contained elements critical of government policies and activities, namely the content of the curricula in the public schools.

19. The issue of provincial competence arose again in *Saumur v. Quebec*<sup>10</sup>. A Quebec City by-law forbade the distribution of booklets, pamphlets and similar literature on city streets

---

<sup>8</sup> *Ibid.* at 134.

<sup>9</sup> *Ibid.* at 145–146.

<sup>10</sup> *Saumur v. City of Quebec*, [1953] 2 S.C.R. 299, hereinafter “*Saumur*.” **Appellant’s Book of Authorities Tab 32.**

without the advance permission of the chief of police. A member of the Jehovah's Witnesses attacked the constitutionality of this municipal by-law.

20. In *Saumur*, the court pronounced the Quebec by-law invalid by a 5-to-4 margin. The nine justices of the Supreme Court wrote seven separate judgments, of which several were based on interference with freedom of religion.
21. However, several justices also raised concerns about freedom of expression. For instance, Kellock J. quoted approvingly and at length from the decision of Duff, C.J. in *Alberta Legislation*, and joined the majority of the Court in invalidating the by-law due to its interference with freedom of expression, in the following words:

I respectfully agree with this view, in the light of which it is plain that by-law 184 cannot be supported as within any of the heads of legislative jurisdiction conferred upon the provinces by section 92. If provincial legislation could validly authorize a by-law such as that here in question, it could legislate so as to prevent the distribution within the whole or any part of the province, of pamphlets or newspapers published elsewhere within or without the province. This is clearly contrary to the law as envisaged by Duff, C.J.<sup>11</sup>

22. In *Switzman v. Elbling*<sup>12</sup>, the court dealt with the so-called "Padlock Act" in Quebec, provincial legislation that banned the publication of communist or bolshevist writings. By a majority of 8 to 1, the Supreme Court held the legislation invalid on several grounds.
23. In particular, Rand J. rejected the argument that the restrictions on expression were similar to the "ordinary civil restrictions of libel or slander," which would have been valid topics of provincial legislation as affecting the rights "between subject and subject." He determined that they were not, stating:

The ban is directed against the freedom or civil liberty of the actor; no civil right of anyone is affected nor is any civil remedy created. The aim of the statute is, by means of penalties, to prevent what is considered a poisoning of men's minds, to shield the individual from exposure to dangerous ideas, to protect him, in short, from his own thinking propensities. There is nothing of civil rights in this; it is to curtail or

---

<sup>11</sup> *Ibid.* at 354.

<sup>12</sup> *Switzman v. Elbling*, [1957] S.C.R. 285, hereinafter "*Switzman*." **Book of Authorities Tab 2.**

proscribe those freedoms which the majority so far consider to be the condition of social cohesion and its ultimate stabilizing force.<sup>13</sup>

24. Subsection 3(1) of the HRCMA likewise reflects the legislature's fear of a widespread poisoning of people's minds, and attempts to shield people from dangerous ideas.

According to Rand J., therefore, it does not fall within the sphere of "civil rights".

25. Also in *Switzman*, Abbott J. referred to the right of "citizens generally to explain, criticize, debate and discuss in the freest possible manner..." He continued:

This right cannot be abrogated by a Provincial Legislature, and the power of such Legislature to limit it, is restricted to what may be necessary to protect purely private rights, such as for example provincial laws of defamation. It is obvious that the impugned statute does not fall within that category. It does not, in substance, deal with matters of property and civil rights or with a local or private matter within the Province and in my opinion is clearly ultra vires.<sup>14</sup>

26. In *Engineering Students' Society University of Saskatchewan v. Saskatchewan (Human Rights Board of Inquiry)*<sup>15</sup>, the Saskatchewan Court of Appeal was required to consider the constitutionality of similar, but not identical legislation to that in the case at bar. Section 14 of the *Saskatchewan Human Rights Code* prohibited the publishing of "any notice, sign, symbol, emblem or other representation" that "exposes, or tends to expose to hatred, ridicules, belittles, or otherwise affronts the dignity of any person, any class of persons or a group of persons because of his or their race, creed, religion,...[etc.]".

27. The publications that had triggered the case were two editions of a student newspaper containing articles, headlines, limericks, photographs and cartoons which the Human Rights Commission alleged were degrading to women. The majority of the Court of Appeal decided that the published items did not fall within the types of prohibited publications; in other words, newspaper articles were not "notices, signs, symbols, emblems or other

---

<sup>13</sup> *Ibid.* at 305.

<sup>14</sup> *Ibid.* at 328.

<sup>15</sup> *Saskatchewan (Human Rights Commission) v. Engineering Students' Society, University of Saskatchewan* (1989), 56 D.L.R. (4th) 604 (Sask. C.A.). **Book of Authorities Tab 3.**

representations.” That portion of the decision should be distinguished from the case at bar since Alberta’s *HRCMA* is even broader than the Saskatchewan *Code*, including among its prohibited vehicles of communications “statements” and “publications”. However, regarding provincial jurisdiction, the court wrote:

...by implication, having regard especially for the **division of powers** between the federal and provincial governments, the section requires that the affront be productive of a specific discriminatory effect or effects. An adverse general effect upon the class will not be sufficient to engage the provision. [emphasis added]<sup>16</sup>

28. In other words, to fit within provincial jurisdiction, the statute had to be read so as to relate to a valid provincial purpose under section 92. Preventing discrimination was a valid provincial purpose. Therefore, only publications which were caught by the statutory language *and* which tended to promote discrimination could legitimately be banned:

...we have concluded in light of the foregoing that the section requires, by implication, that the message have a specific effect or effects in order to be caught by the section. The message must not only ridicule, belittle, or otherwise affront the dignity of the person or the class, it must be such as to cause or be likely to cause others to engage in one or more of the discriminatory practices prohibited by ss. 9 through 13 and 15 through 19.<sup>17</sup>

29. In essence, the Saskatchewan Court of Appeal held that the restrictions on expression in the *Code* had to be limited in the same fashion that Ontario and six other provinces already limit their restrictions.

30. The CCF submits that this reasoning should also apply to subsection. 3(1) of the *HRCMA*. Exposing people to hatred or contempt is not the same thing as, and not necessarily conducive to, causing others to engage in discriminatory practices. In the absence of the necessary nexus to the valid provincial purpose of preventing discrimination, the impugned subsection—or at least, paragraph (b) thereof—cannot stand.

---

<sup>16</sup> *Ibid.* at 4.

<sup>17</sup> *Ibid.* at 30-31.

(ii) **Matters of a Merely Local or Private Nature**

31. The *Alberta Legislation, Saumur* and *Switzman* cases also held that provincial legislation restricting expression cannot be justified as falling within head 92(16) of the *Constitution Act, 1867* (“matters of a merely local or private nature”). Duff J. and Cannon J. addressed this specifically in their quotes, as set out at paragraphs 15 and 16 of this brief.
32. Cannon J.’s statement that restrictions on the press “cannot be considered as dealing with matters purely private and local in the province” was cited approvingly in *Saumur* by Kellock J. at page 306.
33. Likewise, in *Switzman*, Rand J. said:
- ...freedom of discussion in Canada, as a subject-matter of legislation, has a unity of interest and significance extending equally to every part of the Dominion. With such dimensions it is ipso facto excluded from head 16 as a local matter.<sup>18</sup>
34. The CCF therefore submits that the provincial legislature did not have the power, either under 92(13) or 92(16) of the *Constitution Act, 1867*, to enact subsection.3(1) of the *HRCMA*. The Panel erred in paragraph 350.a of its decision in finding that the issue of free expression is a matter of a local or private nature.

**B. Legislation Encroaches on Federal Criminal Law Power**

35. Subsection 3(1) of the *HRCMA* also fails because it encroaches or “trenches” upon the exclusive federal jurisdiction under section 91(27) of the *Constitution Act, 1867*, namely: “The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.”
36. Section 319 of the federally enacted *Criminal Code* (“Public incitement of hatred” — see Schedule “B” for text) outlaws the public incitement of hatred and the willful promotion of hatred. Section 319 survived constitutional challenges in *R. v. Keegstra*<sup>19</sup> and *R. v.*

---

<sup>18</sup> *Switzman*, *supra* note 12 at 306.

<sup>19</sup> *R. v. Keegstra*, [1990] 3 S.C.R. 697.

*Andrews*,<sup>20</sup> and is clearly within the authority of Parliament to enact under the criminal law power of section 91(27). The CCF submits that paragraph 3(1)(b) of the *HRCMA* deals with exactly the same “matter” as section 319 of the *Criminal Code*— namely, the prohibition of statements and other forms of expression that promote hatred towards members of identifiable groups. In pith and substance, paragraph 3(1)(b) is no different from section 319. Since the power to legislate on this matter has been granted exclusively to Parliament, it follows that provincial legislation on the same matter must be *ultra vires*.

37. Although the *HRCMA* does not directly provide for penalties of the same nature as the *Criminal Code* (i.e., it does not explicitly provide for imprisonment), it does so indirectly. Section 36 of the *HRCMA* provides that a human rights panel order may be filed with the Court of Queen’s Bench and is enforceable by that court just like any other Queen’s Bench order. Any breach of the order can therefore bring down upon the guilty party all of the penalties possible for civil contempt under Rule 704 of the *Alberta Rules of Court*, including up to two years’ imprisonment.
38. Furthermore, the *HRCMA* authorizes the human rights panel to make orders for monetary payments by an individual who has been adjudged to have violated the law. Although it characterizes these payments as “compensation” to the complainant, there must be little difference from the payer’s perspective. The person who is compelled to pay out of pocket will likely perceive this as a penalty, regardless of the identity of the recipient (whether the complainant or some government agency which collects fines). Indeed, when antagonistic feelings remain between the parties to a *HRCMA* proceeding, having to pay compensation to the complainant might well be viewed by the payer as more of a punishment than paying a fine to some government body.

---

<sup>20</sup> *R. v. Andrews*, [1990] 3 S.C.R. 870.

39. The seminal case on the question of what is a crime, and what comprises the body of law known as criminal law, is the so-called *Margarine Reference* of 1948<sup>21</sup>. According to an oft-quoted passage by Rand J.:

A crime is an act which the law, with appropriate penal sanctions, forbids; but as prohibitions are not enacted in a vacuum, we can properly look for some evil or injurious or undesirable effect upon the public against which the law is directed. That effect may be in relation to social, economic or political interests; and the legislature has had in mind to suppress the evil or to safeguard the interest threatened...

Is the prohibition then enacted with a view to a public purpose which can support it as being in relation to criminal law? Public peace, order, security, health, morality: these are the ordinary though not exclusive ends served by that law...<sup>22</sup>

40. The CCF submits that *HRCMA* subsection 3(1), and particularly paragraph (b) thereof, meets the foregoing definition of legislation in relation to a crime. The province enacted it with a view to suppressing an evil, injurious and undesirable social effect upon the public—namely, the promulgation of hatred or contempt towards members of minority groups. A hate-filled environment could surely be expected to have some impact on public peace and order, and arguably on the the security and health of those subjected to hateful expression.
41. On the criminal law encroachment issue, there is again ample case precedent to condemn subsection 3(1), including cases already cited in the foregoing pages of this brief.
42. For instance, Cannon J. in *Alberta Legislation* characterized *Bill 9* (the impugned legislation in that case) as an attempt to amend the *Criminal Code* by reviving “the old theory of the crime of seditious libel.” Although sedition remained a crime under the *Criminal Code* at the time when Cannon J. was writing, defences had been added over time to narrow the scope of the offence significantly from its ancient origins. Had the province’s *Bill 9* been allowed to stand, Cannon J. wrote, it would have effectively amended the *Criminal Code* and denied citizens the benefits of those defences.<sup>23</sup> He continued:

---

<sup>21</sup> *Reference re Validity of Section 5 (a) Dairy Industry Act*, [1949] S.C.R. 1. **Book of Authorities Tab 4.**

<sup>22</sup> *Ibid.* at 49.

<sup>23</sup> *Alberta Legislation*, *supra* note 6 at 145.

These subjects were matters of criminal law before Confederation, have been recognized by Parliament as criminal matters and have been expressly dealt with by the criminal code.<sup>24</sup>

43. The concerns expressed by Cannon J. are very apt for the case at bar. Here, too, the provincial legislation attempts to amend the “public incitement of hate” provisions of the *Criminal Code* by denying accused persons the benefit of the four defences explicitly available to them under the criminal law: truth, expression of religious belief, public interest discussion, or quoting with a view to initiating the removal of others’ offensive statements. As well, any individual accused of violating subsection 3(1) is denied other routine protections he or she would have had if charged instead under section 319 of the *Criminal Code*: the presumption of innocence, the necessity of establishing *mens rea*, and the high standard of proof beyond a reasonable doubt, as opposed to the civil standard of proof on the balance of probabilities.
44. The CCF submits that by enacting paragraph 3(1)(b), the Alberta legislature attempted to amend the *Criminal Code*, making convictions easier to obtain and thereby expanding the scope of what is prohibited. This is clearly not permitted to a province under the *Constitution Act, 1867*.
45. In *Saumur*, Locke J. specifically addressed the type of harm that paragraph 3(1)(b) was apparently enacted to address, and which Dr. Lund in the case at bar has raised in support of his position: namely, the concern that unknown persons might be influenced through the statements of an “accused” (in this case, Mr. Boissoin) to engage in violence. Locke J. wrote:

It is also a matter of common knowledge that political writings expressed in pamphlets, circulars and newspapers have many times in the past, and no doubt will many times in the future, cause anger and resentment on the part of those entertaining different political views. If it be accepted for the purpose of argument that the distribution of such literature might induce some persons to commit acts of violence,

---

<sup>24</sup> *Ibid.* at 146.

it is for Parliament to decide whether this should be declared an offence in the Criminal Code. Parliament has not seen fit to pass such legislation and the Province is without any jurisdiction to do so.<sup>25</sup>

46. Thus, even if Dr. Lund's speculation is correct that an assault was perpetrated upon a homosexual in consequence of the writings of Mr. Boissain, that would be a matter for the criminal law to deal with under section 319 of the *Criminal Code*. The alleged incident, and its alleged connection to Mr. Boissain, should be considered by this court to be completely irrelevant in determining the validity of subsection 3(1).
47. In *Westendorp v. the Queen*,<sup>26</sup> the Supreme Court of Canada struck down a Calgary by-law, which prohibited being on the street for the purpose of prostitution, as an unconstitutional encroachment on the federal criminal law power. The Crown argued unsuccessfully that the by-law was in pith and substance related to the "control of the streets".
48. Writing for a unanimous bench of nine, Laskin C.J. observed:

It is patent, from a comparison of s. 6.1 with ss. 3, 4 and 5 of the by-law, that s. 6.1 is of a completely different order from its preceding sections and, certainly, from all those succeeding it. It is specious to regard s. 6.1 as relating to control of the streets. If that were its purpose, it would have dealt with congregation of persons on the streets or with obstruction, unrelated to what the congregating or obstructing persons say or otherwise do.<sup>27</sup>

49. Laskin C.J. then went on to make a "slippery slope" argument:

If a province or municipality may translate a direct attack on prostitution into street control through reliance on public nuisance, it may do the same with respect to trafficking in drugs. And, may it not, on the same view, seek to punish assaults that take place on city streets as an aspect of street control! [exclamation mark in the original]

---

<sup>25</sup> *Saumur*, *supra* note 10 at 378.

<sup>26</sup> *Westendorp v. the Queen*, [1983] 1 S.C.R. 43. **Book of Authorities Tab 5.**

<sup>27</sup> *Ibid.* at para. 16.

However desirable it may be for the municipality to control or prohibit prostitution, there has been an overreaching in the present case which offends the division of legislative powers.<sup>28</sup>

50. The reasoning of this unanimous Supreme Court decision applies to the case at bar.

Paragraph 3(1)(b) can well be described as “of a completely different order” from the other sections in the *HRCMA*. While the other sections are all directed towards the prevention of discrimination in service, accommodation, employment, etc., 3(1)(b) is unrelated to discrimination. If it can be justified under anti-discrimination legislation, why could not the Alberta legislature, through the *HRCMA*, seek to punish assaults that appeared to have an element of discrimination in them? In other words, if subsection 3(1) is allowed to stand as valid provincial legislation, it starts the provinces down the slippery slope towards all manner of encroachment on criminal law territory.

51. The case of *Scowby v. Glendinning*<sup>29</sup> was another instance of provincial human rights legislation encroaching upon the criminal law power. The complainants had sought relief under *The Saskatchewan Human Rights Code*, alleging that they had been arbitrarily arrested by an RCMP officer. Section 7 of the provincial code guaranteed to every person “the right to freedom from arbitrary arrest or detention”.

52. Estey J., writing for the majority of six justices, pointed out the contrast between the subject matter of the impugned section and “the great bulk of the protections granted by such codes”, which deal with “questions of discrimination in housing and employment, and equal access to goods and services...”<sup>30</sup>

53. In words later echoed by Professor Hogg (see paragraph 9 of this brief), Estey J. observed:

In the division of legislative powers, "civil rights" is neither synonymous with nor necessarily inclusive of matters commonly thought of as "civil rights issues".<sup>31</sup>

---

<sup>28</sup> *Ibid.* at paras. 21-22.

<sup>29</sup> *Scowby v. Glendinning*, [1986] 2 S.C.R. 226. **Book of Authorities Tab 6.**

<sup>30</sup> *Ibid.* at para. 4.

<sup>31</sup> *Ibid.* at para. 5.

54. The court went on to cite earlier authorities to support the proposition that Parliament's criminal law jurisdiction under 91(27) is very broad. It is "criminal law in its widest sense".<sup>32</sup> Indeed, there was no mollycoddling of provincial feelings over this:

Parliament's legislative jurisdiction properly founded on s. 91(27) may have a destructive force on encroaching legislation from provincial legislatures, but such is the nature of the allocation procedure in ss. 91 and 92 of the Constitution.<sup>33</sup>

55. Ultimately, the court in *Scowby* determined that the province had engaged in "an exercise...in the enunciation of criminal law" without any "parallel valid provincial aspect or scheme which could support it."<sup>34</sup> Section 7 of the Saskatchewan *Code* was therefore *ultra vires*.

56. In *Starr v. Houlden*<sup>35</sup> the province of Ontario had established a commission of inquiry under the *Public Inquiries Act* to investigate allegations that Starr, an executive of a registered charity, had channelled charitable funds into political donations and other inappropriate uses. The issue before Supreme Court of Canada was whether the province had encroached on the criminal law power of the federal government.

57. The court held that the inquiry was a "substitute police investigation" in respect of a *Criminal Code* offence. It was "...*ultra vires* the province as it is in pith and substance a matter related to criminal law and criminal procedure under the exclusive jurisdiction of Parliament pursuant to s. 91(27) of the Constitution Act, 1867."<sup>36</sup>

58. The court's main concern seemed to be that the province had attempted, in effect, to duplicate a criminal procedure but without the procedural safeguards available to an accused in a criminal trial. Lamer J. wrote:

---

<sup>32</sup> *Ibid.* at para. 10.

<sup>33</sup> *Ibid.* at para. 11.

<sup>34</sup> *Ibid.* at para. 17.

<sup>35</sup> *Starr v. Houlden*, [1990] 1 S.C.R. 1366. **Book of Authorities Tab 7.**

<sup>36</sup> *Ibid.* at para. 17.

- ...the inquiry process cannot be used by a province to investigate the alleged commission of specific criminal offences by named persons. The use of the inquiry process in that way, having regard for the ability to coerce those named individuals to testify, would in effect be circumventing the criminal procedure which is within the exclusive jurisdiction of Parliament.<sup>37</sup>
59. The decision makes it clear that the intentions of the province in enacting the impugned legislation are irrelevant. Lamer J. noted in two places in his judgment<sup>38</sup> that Ontario “may not have intended” to create a substitute police investigation, but that it had nevertheless done so, with fatal consequences to the validity of the proceeding.
60. In the case at bar, the respondent may likewise argue that subsection 3(1) was not intended by Alberta to create a parallel criminal offence to that in section 319 of the *Criminal Code*, since the province may have been motivated by remedial rather than punitive considerations. Nevertheless, examined in its totality, that is what the province has done. The arguably benign intentions of the province cannot, the jurisprudence tells us, save subsection 3(1) from invalidity.
61. In *R. v. Morgentaler*,<sup>39</sup> the Nova Scotia government had enacted regulations prohibiting abortions outside of hospitals. Morgentaler was charged with violating provincial regulations by performing abortions in his private clinic. He argued that the regulations were *ultra vires* the province since they were in pith and substance criminal law.
62. The court agreed, and struck down the provincial law. Particularly noteworthy about this case is that the federal government had chosen not to introduce revised abortion legislation in the interval since the Supreme Court had invalidated the former law in 1988. In other words, even though there was a complete vacuum in the criminal law on the issue of abortion, the court held that the entire field of abortion law properly belonged to the

---

<sup>37</sup> *Ibid.* at para. 26.

<sup>38</sup> *Ibid.* at paras. 17 and 30.

<sup>39</sup> *R. v. Morgentaler*, [1993] 3 S.C.R. 463. **Book of Authorities Tab 8.**

criminal sphere and could not be invaded, even in part, by the province. Writing for a unanimous court of nine, Lamer C.J. expressed the concept thus:

The guiding principle is that the provinces may not invade the criminal field by attempting to stiffen, supplement or replace the criminal law...or to fill perceived defects or gaps therein...

63. In the case at bar, the CCF submits that paragraph 3(1)(b) of the *HRCMA* is an attempt by the province to stiffen the criminal law (by catching more instances of “hate speech” and making convictions easier to obtain) or to fill a perceived gap in the criminal law (by providing different remedies). Whatever the goal, neither is permissible in law. On this point, the Panel’s finding in paragraph 350.c of its decision is erroneous in concluding that “there is a void in the jurisdiction.”

**C. Can Paragraph 3(1)(b) Be Saved by Any Known Doctrine?**

64. The CCF has considered whether paragraph 3(1)(b) of the *HRCMA* might nevertheless be saved by any “sidestream” doctrine of constitutional law; for instance, the “double aspect” doctrine.
65. The CCF submits that it cannot be saved. In order for “double aspect” to apply, both the impugned provincial legislation and its federal counterpart must be validly grounded in their respective sections of the *Constitution Act, 1867*. We have already demonstrated that there is no head of section 92 which forms a basis for legislation whose pith and substance is the restriction of expression. Therefore, this is not a case where two aspects of the same subject can be validly regulated by both levels of government. Rather, it is a case of one level seeking inappropriately to infringe on a subject assigned to the other.
66. The CCF urges this Court to distinguish a case decided by the Saskatchewan Court of Appeal which may be relevant to this discussion. In *Saskatchewan (Human Rights*

*Commission) v. Bell*<sup>40</sup> the court considered section 14 of the Saskatchewan Human Rights Code which contains language similar to subsection 3(1) of the *HRCMA*. The appellant had sold adhesive stickers depicting unattractive portraits of members of minority groups inside a red circle with a bar through them. Members of minority groups testified that they found the stickers insulting and interpreted them to mean that they would not be admitted to the premises bearing such stickers. The court held that section 14 of the *Code* was constitutional *on Charter grounds only*. Although it violated the freedom of expression guarantee in subsection 2(b) of the *Charter of Rights and Freedoms*, it was saved by section 1 of the *Charter*. Nowhere in *Bell* did the court address the argument based upon division of powers which the CCF has made in this brief. We submit that had the argument been raised, the outcome of the *Bell* case might well have been different.

67. The *Bell* case can also be distinguished because the stickers in question violated not just the “free-standing” anti-hate speech portion of section 14, but also the portion of section 14 addressed to preventing signs or symbols indicating an intention to discriminate. In other words, the appellant in that case had violated not only the equivalent of paragraph 3(1)(b) of the *HRMCA*, but also the equivalent of paragraph 3(1)(a)—a fact scenario which is not paralleled in the case at bar.

#### PART IV — NATURE OF RELIEF DESIRED

68. The CCF respectfully submits that the proper course of action for this honourable Court is to find paragraph 3(1)(b) of the *HRCMA* *ultra vires* the province. The offending paragraph should be declared to be of no effect.

---

<sup>40</sup> *Saskatchewan (Human Rights Commission) v. Bell* (1994), 114 D.L.R. (4th) 370. **Book of Authorities Tab 9.**

69. The consequence of that declaration would be to reverse the order of the human rights panel as it relates to Mr. Boissin.

70. The CCF does not seek costs, and asks that no costs be awarded against it.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED.**

Date: July 22, 2009

---

John V. Carpay, Counsel  
Canadian Constitution Foundation

## SCHEDULE “A”

### Paragraph

---

Peter W. Hogg, <i>Constitutional Law of Canada</i> , Fifth edition .....	9
<i>Reference Re Alberta Statutes—The Bank Taxation Act; The Credit Of Alberta Regulation Act; and The Accurate News and Information Act</i> , [1938] S.C.R. 100.....	14
<i>Saumur v. City of Quebec</i> , [1953] 2 S.C.R. 299. ....	19
<i>Switzman v. Elbling</i> , [1957] S.C.R. 285.....	22
<i>Saskatchewan (Human Rights Commission) v. Engineering Students’ Society, University of Saskatchewan</i> (1989), 56 D.L.R. (4th) 604 (Sask. C.A.).....	26
<i>R. v. Keegstra</i> , [1990] 3 S.C.R. 697.....	36
<i>R. v. Andrews</i> , [1990] 3 S.C.R. 870. ....	36
<i>Reference re Validity of Section 5 (a) Dairy Industry Act</i> , [1949] S.C.R. 1. ....	39
<i>Westendorp v. the Queen</i> , [1983] 1 S.C.R. 43.....	47
<i>Scowby v. Glendinning</i> , [1986] 2 S.C.R. 226. ....	51
<i>Starr v. Houlden</i> , [1990] 1 S.C.R. 1366.....	56
<i>R. v. Morgentaler</i> , [1993] 3 S.C.R. 463.....	61
<i>Saskatchewan (Human Rights Commission) v. Bell</i> (1994), 114 D.L.R. (4th) 370.....	66

## SCHEDULE "B"

Paragraph

---

*Human Rights, Citizenship and Multiculturalism Act, R.S.A. 2000, c. H-14*.....2

### **Discrimination re publications, notices**

**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.

...

### **Appeal**

**37. (1)** A party to a proceeding before a human rights panel may appeal an order of the panel to the Court of Queen's Bench by originating notice filed with the clerk of the Court of the judicial district in which the proceeding was held.

**(2)** The originating notice under subsection (1) shall be filed with the clerk and served on the Commission and the other parties within 30 days after the date the appellant receives a copy of the order of the human rights panel.

**(3)** Forthwith after being served with an originating notice under subsection (2), the Commission shall file the following with the clerk of the Court:

(a) the order of the human rights panel, together with reasons;

(b) the complaint;

(c) the evidence taken at the hearing and all exhibits filed.

(4) The Court may

(a) confirm, reverse or vary the order of the human rights panel and make any order that the panel may make under section 32, or

(b) remit the matter back to the panel with directions.

(5) Commencement of an appeal under this section does not operate as a stay of proceedings under the order of the human rights panel unless the Court so orders.

*The Constitution Act, 1867 (U.K.), 30 & 31 Victoria, c. 3. ....3*

## **EXCLUSIVE POWERS OF PROVINCIAL LEGISLATURES**

Subjects of exclusive Provincial Legislation

**92.** In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

1. Repealed.
2. Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes.
3. The borrowing of Money on the sole Credit of the Province
4. The Establishment and Tenure of Provincial Offices and the Appointment and Payment of Provincial Officers.
5. The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon.
6. The Establishment, Maintenance, and Management of Public and Reformatory Prisons in and for the Province.
7. The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals.
8. Municipal Institutions in the Province.
9. Shop, Saloon, Tavern, Auctioneer, and other Licences in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes.

10. Local Works and Undertakings other than such as are of the following Classes:
  - (a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province:
  - (b) Lines of Steam Ships between the Province and any British or Foreign Country:
  - (c) Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.
11. The Incorporation of Companies with Provincial Objects.
12. The Solemnization of Marriage in the Province.
13. Property and Civil Rights in the Province.
14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.
15. The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section.
16. Generally all Matters of a merely local or private Nature in the Province.

*The Constitution Act, 1867 (U.K.), 30 & 31 Victoria, c. 3. ....4*

## **POWERS OF THE PARLIAMENT**

Legislative Authority of Parliament of Canada

**91.** It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

1. Repealed.
- 1A. The Public Debt and Property.

2. The Regulation of Trade and Commerce.
- 2A. Unemployment insurance.
3. The raising of Money by any Mode or System of Taxation.
4. The borrowing of Money on the Public Credit.
5. Postal Service.
6. The Census and Statistics.
7. Militia, Military and Naval Service, and Defence.
8. The fixing of and providing for the Salaries and Allowances of Civil and other Officers of the Government of Canada.
9. Beacons, Buoys, Lighthouses, and Sable Island.
10. Navigation and Shipping.
11. Quarantine and the Establishment and Maintenance of Marine Hospitals.
12. Sea Coast and Inland Fisheries.
13. Ferries between a Province and any British or Foreign Country or between Two Provinces.
14. Currency and Coinage.
15. Banking, Incorporation of Banks, and the Issue of Paper Money.
16. Savings Banks.
17. Weights and Measures.
18. Bills of Exchange and Promissory Notes.
19. Interest.
20. Legal Tender.
21. Bankruptcy and Insolvency.
22. Patents of Invention and Discovery.
23. Copyrights.
24. Indians, and Lands reserved for the Indians.
25. Naturalization and Aliens.
26. Marriage and Divorce.
27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.
28. The Establishment, Maintenance, and Management of Penitentiaries.

**29.** Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

***Human Rights Code, R.S.O. 1990, c. H.19.....13***

**Announced intention to discriminate**

**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.

**Opinion**

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

***Human Rights Code, C.C.S.M. c. H175.....13***

**Discriminatory signs and statements**

**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.

**Charter of Human Rights and Freedoms, R.S.Q. c. C-12.....13**

**Discrimination forbidden**

**10.** Every person has a right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on race, colour, sex, pregnancy, sexual orientation, civil status, age except as provided by law, religion, political convictions, language, ethnic or national origin, social condition, a handicap or the use of any means to palliate a handicap.

**Discrimination defined**

Discrimination exists where such a distinction, exclusion or preference has the effect of nullifying or impairing such right.

**Discriminatory notice forbidden**

**11.** No one may distribute, publish or publicly exhibit a notice, symbol or sign involving discrimination, or authorize anyone to do so.

**Human Rights Act, R.S.N.B. 1973, c. H-11.....13**

**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.

**Human Rights Act, R.S.N.S. 1989, c. 214.....13**

**Publication**

**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.

***Human Rights Act, R.S.P.E.I. 1988, c. H-12.....13***

**Discrimination in advertising prohibited**

12. (1) No person shall publish, display or broadcast, or permit to be published, displayed or broadcasted on lands or premises, or in a newspaper or through a radio or television broadcasting station or by means of any other medium, any notice, sign, symbol, implement or other representation indicating discrimination or an intention to discriminate against any person or class of persons.

**Free expression of opinion**

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

***Human Rights Code, R.S.N.L. 1990, c. H-14.....13***

**Discriminatory publications**

14. (1) A person shall not

(a) publish or display; or

(b) permit to be published or displayed on lands or premises or in a newspaper, through a radio or television broadcasting station or by means of another medium which he or she runs or controls

a notice, sign, symbol, emblem or other representation indicating discrimination or an intention to discriminate against a person or a class of persons because of the race, religion, religious creed, political opinion, colour or ethnic, national or social origin, sex, sexual orientation, marital status, family status, age, physical disability or mental disability of that person or class of persons.

(2) Nothing in this section interferes with the free expression of opinions upon a subject by speech or in writing.

**Public incitement of hatred**

**319. (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.

**Wilful promotion of hatred**

**(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.

**Defences**

**(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, the person expressed or attempted to establish by an argument an opinion on a religious subject or an opinion based on a belief in a religious text;
- (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.