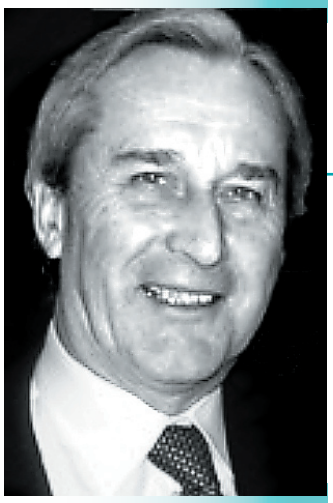
FRONTIER CENTRE FOR PUBLIC POLICY
POLICY SERIES
FCPP POLICY SERIES NO. 45 · JULY 2008

The Commission of Human Wrongs

BY NIGEL HANNAFORD



About the Author

Nigel Hannaford, 60, is a 32-year newspaperman, for many years in operations, but now serving on the editorial board of the *Calgary Herald.* British by birth, Hannaford has worked in Canada for most of his professional life. Educ: B.Sc (Southampton) 1969, Politics and Strategic Studies. Licenced to drive a semi as a result of early foray into Canadian Arctic oilpatch, Hannaford also maintains a commercial pilot's licence in case the newspaper thing doesn't work out. Married, two children, two grandchildren. Various professional memberships, and past experience on government boards during a former incarnation. *The Herald* is part of the CanWest chain, which also owns the *National Post,* most of the large city dailies outside Toronto, and Global Television.

The Frontier Centre for Public Policy is an independent, non-profit organization that under-takes research and education in support of economic growth and social outcomes that will enhance the quality of life in our communities. Through a variety of publications and public forums, the Centre explores policy innovations required to make the eastern prairies region a winner in the open economy. It also provides new insights into solving important issues facing our cities, towns and provinces. These include improving the performance of public expenditures in important areas like local government, education, health and social policy.

The author of this study has worked independently and the opinions expressed are therefore his own, and do not necessarily reflect the opinions of the board of the Frontier Centre for Public Policy.

Date of First Issue: May, 2008
Reproduced here with permission of the author.
ISSN 1491-78

MB: Suite 25 Lombard Concourse, One Lombard Place,
Winnipeg, Manitoba CANADA R3B 0X3
Tel: 204 957-1567 Fax: 204 957-1570

SK: 2353 McIntyre Street,
Regina, Saskatchewan CANADA S4P 2S3
Tel: 306 352-2915 Fax: 306 352-2938

AB: Ste. 2000 – 444, 5th Avenue SW
Calgary, Alberta CANADA T2P 278
Tel: (403) 230-2435

www.fcpp.org

FCPP Policy Series No. 45 • July 2008

The Commission of Human Wrongs

BY NIGEL HANNAFORD

Table of Contents

Executive Summary

The In Canada, speech is policed by two parallel justice systems, which have significantly different rules of appointment, legislation, evidence and procedure.

1. The court system, which administers the anti-hate provision of the Canadian Criminal Code, Sections 318 and 319 and
2. The provincial and federal human rights commissions (HRCs), which were established by each jurisdiction under its own legislation.

It is the contention of this paper that although the commissions were founded to address insupportable abuses in the areas of employment and accommodation, their mandate has been unwisely expanded to include what is, in effect, a censor's role. Of especial concern is that in comparison to those accused of hate crimes in a court of law, respondents before HRCs have virtually no defence and are disadvantaged in several other ways.

Free speech is a core Canadian value, an essential element in a free and prosperous society, and it is significantly endangered by the growing body of unchallenged precedent that has been accumulated by an agenda-driven HRC system. Canadians are becoming unsure of what words may safely be said and which may not. Debate on vital matters of public policy has been chilled, as valuable voices are silenced along with those of marginal utility. Those functions of HRCs that remain useful to society should be transferred to the regular court system and the HRCs retired.

Failing this ideal solution, human rights codes should be amended by the removal of speech-restrictive sections or, if this too is beyond the reach of timid politicians, the specific inclusion in legislation of common law defences such as truth and fair comment. The onus is on the federal government to take the lead.

How Human Rights Commissions Developed

The brainchild of activists who wanted to promote human rights, human rights commissions were established in Canada during the 1960s and 1970s. Their stated purpose was to provide quick, inexpensive remedies outside of the regular court system for victims of discrimination in the areas of employment and accommodation.

They have since evolved into a second tier of justice within Canada. Parallel to the court system, HRCs occasionally draw upon its precedents, and in some provinces it is subject to the court's limited review. Nevertheless, HRCs are independent of the courts, operate by different rules with reduced thresholds of proof and have their own body of precedents.

Lawyers typically staff tribunals called under the auspices of an HRC, but Order in Council appointments govern the commissions. These appointees often have connections to the political party in power, and unlike judges in the parallel court system, there is no statutory requirement that commissioners be legally trained: They may be chosen for reasons other than their technical expertise.

Before HRCs, discriminatory practices were prohibited under various provincial fair-employment and fair-accommodation laws, the first of which dates from the early 1950s. These were supplemented by legislation that required equal pay for women. However, activists claimed, not unreasonably, that seeking redress through civil action was costly and slow and therefore offered less protection to marginalised individuals than an administrative tribunal such as an HRC might.

In 1961, Ontario became the first provincial government to consolidate the powers of its scattered anti-discrimination laws into a human rights commission. By 1975, all provinces had HRCs.[1] The federal Canadian Human Rights Commission, which dealt exclusively with areas of federal jurisdiction, completed the array of rights-oriented administrative tribunals in 1977. Initially, HRCs were largely occupied with gender-discrimination complaints. In its first three years, 75 per cent of the cases heard by the Alberta Human Rights Commission (established in 1973) related to unequal treatment of women in the workplace.[2]

By 1975 all provinces had HRCs

Lawyers typically staff HRC tribunals, called under the auspices of of an HRC, but Order in Council appointments govern commissions... and unlike judges, there is no statutory requirement that commissioners be trained...

1. Dates HRCs founded: Ontario 1961, New Brunswick 1967, Nova Scotia 1967 (Act 1962?), B.C. 1969, Newfoundland 1971, the Prairie provinces 1972, Quebec 1975, P.E.I. 1976, Ottawa 1977, Yukon
2. Alberta in the Twentieth Century, History Book Publications, Page 59.1987.

Censorship Creeps In

However, as early as 1980, HRCs began to hear cases where the remedy was suppression of an individual's free speech rights.

In 1980, a disabled Saskatchewan woman complained to the HRC about an open letter to the premier that a businessman posted in his shop window. In a notable venting, he compared the provincial government to mentally retarded people. The woman alleged he had thereby equated physical disability with incompetence. The HRC, while conceding the businessman had been attacking the government and not disabled people, nevertheless ruled that he had violated the section of the provincial human rights code that forbids the ridicule of disabled people, and it ordered him to delete the offending sentences from his display.[3]

It was a hint of things to come. During the 1990s, many legislatures (federal and provincial) expanded their roles to include discriminatory publication, thus giving HRCs what is effectively a censor's role. They did this by adding language forbidding the publication of anything likely to bring an identifiable minority into hatred or contempt. Typical was that of Section 3 of the Alberta code, as amended in 1966:

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 representation that

a) indicates discrimination or an intention to discriminate against a person or class of persons, or

b) is likely to expose a person or 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"

The bulk of all discriminatory speech or publication prosecutions has been directed at individuals whose circumstances, whether educational or financial, rendered them unable to offer a protracted or sophisticated defence.

(Sexual orientation was read in, or added, to the code by the Supreme Court of Canada in 1998.)

Broadly similar wording exists in the human rights codes of B.C. and Saskatchewan. Inciting discrimination is included in the codes of other provinces. All have sub-sections that appear to protect free speech; thus, Section 13 (2) of the Ontario Human Rights Code states, "Subsection (1) shall not interfere with freedom of expression of opinion." It may seem a contradiction for codes to, on one hand, prohibit certain types of publication and, on the other hand, to affirm free speech. However, this is almost invariably resolved by treating free speech as a secondary value by using convenient arguments derived from the regular courts.[4]

The bulk of all discriminatory speech or publication prosecutions has been directed at individuals whose circumstances, whether educational or financial, rendered them unable to offer a protracted or sophisticated defence. Many held opinions so divergent from mainstream thought that they elicited little public sympathy anyway, thus enabling HRCs to amass a formidable body of precedents with little difficulty, and hardly any has been tested by a higher authority. Intended to be arm's length from government, they are so far removed they have become unaccountable.

3. For a fuller account, see The New Anti-Liberals by A. Alan Borovoy. (Canadian Scholars Press Inc., 1998) Page 39 ff.

4. See Dickson CJ, quoted here in the section on his Taylor judgment.

Complaints too bold?

The prosecution of two high-profile cases in 2007-2008, one involving the decades-old and well-respected news magazine *Maclean's* and the other the now-defunct Western Standard, has, however, pitted two HRCs against stronger defendants who hold less-disconcerting views.

The *Maclean's* case was launched by Muslim activists in Toronto against author Mark Steyn and the magazine after it published an extract from Steyn's book America Alone. In it, Steyn speculates about what impact increasing Muslim populations would have on European law and culture. Both the Canadian and the B.C. Human Rights Commissions accepted the complaint.

Muslim advocates complained to the Alberta Human Rights Commission about Ezra Levant's reproduction in *Western Standard* magazine of controversial Danish cartoons of the Prophet Mohammed. The implications for debate on matters of public interest led Liberal MP Keith Martin (Esquimalt-Juan de Fuca) to propose a private member's bill for HRC reform.

In remarkable testimony at a CHRC hearing in March 2008, investigators admitted using fictitious names to post provocative comments on a conservative website. The owner, Mark Lemire, alleged that a Wi-Fi link that did not belong to the CHRC was used without the owner's permission to post the comments. In the wake of this, commentators have called for the abolition of HRCs.[1]

> It is important to acknowledge that the number of complaints that threaten free speech rights is a small fraction of the commissions' caseload. During 2007, out of the 796 cases taken up by the B.C. Human Rights Tribunal (the successor organization to the provincial HRC), two-thirds related to employment, a quarter to access to services and less than one per cent to publication.

Nevertheless, it is the latter cases that have the greatest potential to erode Canadian liberties and are therefore of interest here.

1 Ezra Levant, for instance.

The Importance of Free Speech to an Open and Prosperous Society

Free speech is a Canadian value

The fundamental importance of free speech in Canada is recognized by Canada's signing of the 1948 UN Universal Declaration of Human Rights and its inclusion in the 1982 Canadian Charter of Rights and Freedoms, which states, "Section 2 (b) Everyone has the following fundamental freedoms … freedom of thought, belief, opinion and expression, including freedom of the press, and other media of communication."

Free speech is also explicitly acknowledged in virtually all provincial human rights codes.[1] Indeed, the traditional right of Canadians to speak without fear of government censure was established through key court cases that go back as far as 1835, when Joseph Howe successfully pleaded truth after his reporting of corruption in Nova Scotia's colonial government led to seditious libel charges against him.

Free speech leads to better government

The roots of free speech rights are found in the British and European reaction to religious persecution during the Reformation, when religious authorities (and later governments) attempted to control the output of printing presses. The earliest claimants to the right were Protestant reformers, many of whom were killed as a result. They were joined later by secular voices such as those of Locke and Voltaire, whose famous dictum about defending to the death the right of those he disagreed with to speak freely neatly encapsulated progressive thought on the matter at the end of the 18th century. Today, John Stuart Mill's 1859 classic *On Liberty* is the most popular reference point for free speech advocates. Mill offers both a utilitarian argument and a moral one.

He says the free exchange of ideas in open debate reveals truth, exposes error and is thus the necessary foundation of good government.

> No argument, we may suppose, can now be needed against permitting a legislature or an executive not identified in interest with the people, to prescribe opinions to them, and determine what doctrines or what arguments they shall be allowed to hear … The peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.

And later, "We can never be sure that the opinion we are endeavouring to stifle is a false opinion; and if we were sure, stifling it would be an evil still." [2]

It is axiomatic that those who love public policy or sausages should not watch either being made. Therefore, nobody should suppose that public policy that was formed in the crucible of a Millsian collision of truth and error was settled without injury to somebody's self-esteem.

1. For instance, that of Ontario, cited above, or Section 3 (2) of Alberta's Human Rights, Citizenship and Multiculturalism Act, thus 3 (2) Nothing in this section shall be deemed to interfere with the free expression of opinion on any subject.

2. See also a similar American point of view, Justice Oliver Wendell Holmes Jr. "The very aim and end of our institutions is just this: that we may think what we like, and say what we think." And "When men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas … that the best test of truth is the power of the thought to get itself accepted in the competition of the market." And Noam Chomsky: "If you don't believe in freedom of expression for people we despise, we don't believe in it at all."

Free speech works

Word-to-word combat does work in practice, however. One can readily enough adduce examples of societies founded on liberty-based values including free speech that are more open, pleasant places to live than those distinguished by their lack. Typically, they are also wealthier and more technically advanced when liberty of enquiry animates the pursuit of knowledge.

Mill's second argument is even more powerful: Free speech rights are inherent, that is, people have the right to say what they want unless the harm of their words can be demonstrated. To suppose otherwise is to treat the state as greater than the people rather than as the recipient of their delegated powers of coercion. Yet, the true importance of the widest possible freedom in expression is not to be found in what it bestows on a man but in what it says about him: He is not the creature of the state but a shareholder in it, a partial owner with all the dignity that entails.

Thus, even in the late 20th century, as activists were co-opting HRCs as mechanisms to eliminate speech they considered offensive and to reduce public discourse to the exchange of acceptable anodynes, the robust free speech tradition continued to be widely respected and defended. Curiously, its frequent defeats before human rights commissions were regarded as anomalies.

They are not.

Free speech is in serious trouble in Canada. The deck is stacked against those who try to use it to object to the agendas of those who have captured the human rights commissions for partisan purposes that would normally be pursued within the law.

How HRCs Threaten Free Speech

Citizens unfamiliar with HRCs tend to assume they are just another justice system that, like the courts, makes an effort to be fair to all concerned.

This is a complete misapprehension. As the cases cited in the next section demonstrate, HRCs are intentionally uneven playing fields upon which to decide free speech issues. They remove the defendants' defences. No harm or intent to do harm is necessary for a conviction to stand. The rules of engagement are quite unlike those of the regular court system. It is a world in which some people are less equal than others.

This is because the purpose of HRCs is not to find blame and punish wrongdoers but to enforce government orthodoxy in the area of anti-discrimination at the expense, if necessary, of basic Charter rights. HRCs threaten free speech, because free speech is the enemy of what they are supposed to do.

These cases are examples of HRC abuses:

1. Once accepted, a case is carried by the HRC at no cost to the complainant. Meanwhile, the respondent bears the costs of his or her defence. The theory is that marginalized people may be too poor to secure their rights; in practice, the most severe free speech limitations have been imposed in decisions on cases brought by well-funded interest groups against isolated individuals.

2. Should the defendant win, no costs will be awarded against the complainant. The complainant and the respondent thus enter the human rights tribunal in very different situations: The complainant's bills are paid, and the complainant risks nothing, while the respondent may spend considerable sums on legal defence and may face further penalties if the defence loses.

3. No harm need have occurred. When the offence is that a publication "is likely" to have a certain effect, the accused may end up on trial for something that has not happened.

There is an Orwellian dimension to an HRC...

(And in instances where the HRC brings the charge, over something for which no individual has claimed offence). That there was no consequence to the publication is not accepted as proof that it is not "likely" to have that effect.

4. The traditional common law libel defences "truth, fair comment, lack of intent to harm" are not accepted. This is a particularly odious feature of HRCs. The ordinary citizen finds it hard to imagine how stating the truth, even a distasteful truth, can be illegal. Canada's defining free speech case in 1835 (the previously mentioned Howe) was precisely about his right to publish uncontested facts that embarrassed the colonial government. Likewise, proof of the truth of an alleged libel is usually[1] devastating to a plaintiff's case.

5. Rules of evidence are casual. Hearsay, conjecture and other evidence not necessarily admissible in a court of law are explicitly permitted under the *Canadian Human Rights Act*.

6. Chill and confusion. Although the penalties available to HRCs are not large and do not include prison, defending against a complaint is costly, and the process may drag on for years. (As Ezra Levant commented on his own experiences with the Alberta Human Rights Commission, the process has become the punishment).[2] To stay out of trouble, many people choose self-censorship. Unfortunately, in avoiding speech that might violate a human rights code, they may also avoid speech that would not. Thus, confusion over what is legal and what is not leads to the chilling of speech and thereby inhibits legitimate discussion of public affairs. For example, homosexual practices have public-health implications, legalized same-sex relationships redefine the meaning of the word "family" and decisions about which cultures Canada recruits immigrants from will undoubtedly affect the character of the country in the long term. All of these things are important to society and should be fair game for public debate. Yet, in portraying opposition to their agenda as offensive speech likely to bring certain groups of people into hatred or contempt, HRC advocates have made effective use of HRCs to shut down reasonable debate .

7. Their purpose is not justice but the redistribution of power among groups within society.

a. There is an Orwellian dimension to an HRC: While all people are considered equal before the law in a regular court, and the ostensible purpose of HRCs is to promote equality, not all people are in fact equal before a human rights commission. Some are intentionally disadvantaged. In the world of HRCs, society is divided into oppressor groups and victim groups. The latter includes women, people of colour, gays, bisexuals or indeed members of any of up to 15 demographics now listed as prohibited grounds of discrimination under Canadian human rights codes. These groups are seen as more deserving of protection than are the former, who are members of what is seen as the old power elite that needs to be equalized: straight white males and Christians of any sect or ethnic origin. Members of oppressor groups have very little protection before an HRC. Thus, those cynics who say the author of some scathing anti-Christian remark would never have gotten away with it if he had said it about Jews or Muslims are not witnessing an unintended consequence. They have unwittingly put their fingers upon one of the core operating principles of human rights administration in Canada today. This will be dealt with fully in the section on notable cases.

b. It is easier to silence dissenters by using an HRC than by using the hate-crimes provisions of the Canadian Criminal Code.

2. But not always. Courts are beginning to treat even true statements as potentially actionable if malice can be established in their repetition.

3. Ezra Levant's statement to the Alberta Human Rights Commission, quoted in the *National Post* Jan. 15, 2008.

The prosecution of Ernst Zundel, who used mail and the Internet to dispute the extent of Jewish persecution and genocide during World War II, is an illustrative example.

Jewish advocates tried to shut down his mailing privileges but were unsuccessful . Prosecution under the Canadian Criminal Code required the consent of the provincial attorney-general. This was withheld. A private prosecution for the archaic crime of spreading false news went all the way to the Supreme Court of Canada, where it failed. The common feature of each of these instances was that the legal system provided constitutional protections for the accused in the form of process, common law defences, rules concerning the admissibility of evidence and so on. A complaint to the Canadian Human Rights Commission started a chain of events that led to Zundel's deportation to Germany.

In 1996, Sabrina Citron, who identified herself to the CHRC as a Jewish holocaust survivor, complained of the anti-Semitic material on the Zundelsite, Zundel's website.

It took six years, but eventually the CHRC issued a cease-and-desist order. Zundel, meanwhile, had moved to the United States.

Having overstayed his visa, he was deported to Canada. Upon arrival, he was held in custody as a security risk, mainly on the basis of the CHRC hearing.

Ultimately, the Canadian government issued a security certificate authorizing his deportation to his native Germany, where he was arrested upon arrival.

8. HRCs have demonstrated a history of subordinating free speech protections contained within human rights codes to the rights of complainants not to be offended.

Some Concrete Illustrations

HRCs, then, have become agencies with quasi-judicial powers, but they have virtually none of the legal or procedural barriers that prevail in a court that administers the criminal code.

Like the Star Chamber, conceived as an avenue of direct appeal to the king, bypassing the inefficient and often corrupt English courts of 1485, the HRCs were intended for a worthy purpose. The Star Chamber devolved into a convenient private court for the king's use, unfettered by even such protections as offered by Mediaeval courts. By its abolition 150 years later during the English Civil War, it had become a metaphor for oppression that still resonates today.

In just such a way and in a much shorter time, human rights commissions in the hands of selected appointees have become agents of a different orthodoxy. Whatever useful redress they may have achieved for genuine victims of racial discrimination, in their efforts to enforce their template of acceptable speech, they are guilty of substantial slaughter in the area of basic liberties.

Four Supreme Court of Canada appeals determined the status of free speech in this country: Keegstra, Taylor, Ross and Zundel. The effect of the first, in which human rights commissions had no part, was to establish the high level of proof required to win a hate conviction under the Canadian Criminal Code. The latter three involved HRCs, and the effect of the Supreme Court of Canada reviews was to affirm the HRCs' conclusions and thereby their arbitrary methods.

A survey of cases 1989-2000

In the past two decades, a plethora of cases has come before human rights commissions across Canada. This section and the Appendices give concrete illustrations of how these cases have played out. It is worth noting that many of the respondents in these cases have been called before HRCs for actions that few Canadians support. However, the popularity of the respondents' views should not be the point at issue. Rather, each case has illustrated serious departures from the

conventions of traditional justice and has progressively created the set of precedents that all defendants now face.

In 1989, Randy Johnston and Terry Long were called before the Canadian Human Rights Commission on the accusation of running a telephonic service carrying discriminatory messages.[1] The most important development in this case from the viewpoint of all Canadians exposed to Human Rights Commissions is the following passage from the commission's Chairman, which made the commission's quasi-legal nature apparent.

> In administrative tribunals, the rules of evidence are usually relaxed. This is because administrative tribunals are striving towards goals that are different from those of a court of law; in particular, administrative tribunals are more consciously involved in the formulation of policy than are courts.

One year later, John Ross Taylor was called before the HRC for similar activities.[2] He was jailed after ignoring a cease-and-desist order from the Canadian HRC in 1979. Upon his release from prison, he recommenced his activities and in 1990 found himself responding to the commission once more. Again, this case would have much wider implications for the way HRCs could operate. The commission's decision was tested in the Supreme Court, whose ruling became the touchstone for all HRCs considering the defence of free speech.

> Parliament's objective of promoting equal opportunity unhindered by discriminatory practices, and thus of preventing the harm caused by hate propaganda, is of sufficient importance to warrant overriding a constitutional freedom.

It went on to say in section 65:

> Perhaps the so-called exemptions found in many human rights statutes are best seen as indicating to human rights tribunals the necessity of balancing the objective of eradicating discrimination with the need to protect free expression.

In 1996, Malcolm Ross, a New Brunswick teacher, was hauled before the province's HRC on the accusation that anti-Semitic publications he produced compromised the learning environment at his school.[3] This despite the fact he had avoided expressing any of the views in question at his school, as was noted in section 41 by the Chief Justice of the Supreme Court. "It is to be noted that the testimony of the students did not establish any direct evidence of an impact upon the school district caused by the respondent's off-duty conduct." However, the Supreme Court upheld the HRC decision.

As well as going through a long and arduous legal process, Ross lost his job. However, the case also established the precedent that merely creating the likelihood of discrimination warranted censure by an HRC. The Supreme Court said,

> Although there was no evidence that any of the students making anti-Jewish remarks were directly influenced by any of Malcolm Ross's teachings, given the high degree of publicity surrounding Malcolm Ross's publications it would be reasonable to anticipate that his writings were a factor influencing some discriminatory conduct by the students.

A 1997 case brought before the B.C. Human Rights Tribunal introduced the concept of different rights and vulnerabilities for different groups to the HRC precedents.[4] It was also the first time since 1835 that a journalist had to defend his published expressions against the state. When Doug Collins, a decorated World War II soldier and veteran journalist, was called before the HRC to respond to accusations concerning his questioning of the accuracy of the Steven Spielberg film *Schindler's List*, more-organised civil liberties groups came to his defence.

The tribunal found itself in a difficult position, caught between condoning unpopular anti-

1. See Appendix A: Robert Nealy et al. vs. Randy Johnston, Terry Long, Church of Jesus Christ Christian-Aryan Nations (1989)
2. See Appendix B: CHRC vs. Taylor
3. See Appendix C: Malcolm Ross vs. New Brunswick Human Rights Commission (1996)
4. See Canadian Jewish Congress vs. North Shore Free Press dba *North Shore News*, and Doug Collins (1997)

Semitic sentiments and attacking the popular concept of free speech used to express them. Collins was found not guilty. However, the tribunal set a new precedent while navigating its impasse. The following statements were not necessary for the ruling but presumably helped the tribunal justify a difficult decision. Nitya Iyer said, "… the more vulnerable the group, the more likely it is that the overall meaning conveyed by the expression will be hateful or contemptuous," and "Would a reasonable person consider it likely to increase the risk of exposure of target group members to hatred or contempt?"

In effect, she introduced the concept of vulnerable groups and oppressor groups and made findings contingent on the identity of the complainants and respondents.

Darren Lund vs. Stephen Boissoin

This decision of the Alberta Human Rights Tribunal further illustrates how the reduced standards of evidence endorsed in Taylor have been applied.

In 2002, the issue of gay marriage was a matter of earnest national debate, both in newspapers and Parliament. Boissoin, a Red Deer youth pastor with an active street ministry, opposed same-sex unions on religious grounds and wrote several strongly worded letters to the local paper, the *Red Deer Advocate*. Darren Lund, a University of Calgary professor, challenged him before the Alberta Human Rights Tribunal. The panel ruled Boissoin's letters were likely to expose gays, a vulnerable group, to hatred and contempt due to their sexual orientation.

Reporters made much of the onward-Christian-soldiers imagery contained in Boissoin's writing. Less well observed was the weight given by the tribunal to Lund's account of an assault upon a gay teenager in Red Deer nearly three weeks after the appearance of one of Boissoin's letters.

Lund contended Boissoin's letter inflamed anti-homosexual opinion in Red Deer, and this led directly to the assault. Key to his evidence, however, was not Boissoin's words

"In effect, Nitya Iyer… made findings contingent on the identity of complainants and respondents."

"for nowhere did he urge actual harm" but a statement from the assault victim saying that reading the letter made him feel unsafe.

This shallow causal link would not have satisfied a regular court. A prosecutor in a regular court would have had to establish the following:

- there was a violent, anti-gay sub-culture specializing in opportunistic gay-bashing for Boissoin to inflame;
- if there was, the gay teen's assailant was part of it; and
- the gay teen's assailant had either read or was aware of Boissoin's letters and was influenced by them.

At the Alberta Human Rights Tribunal, however, assertions were simply accepted, as in Nealy and Taylor.

Meanwhile, that the feelings of the assault victim were offered as evidence speaks to a fundamental difference between the courts and the commissions. Before the courts will restrain speech, as they did in the case of Alberta teacher Jim Keegstra, who taught his students the existence of "an international Jewish conspiracy," the prosecution must demonstrate intent or actual harm.

Aggrieved feelings alone are not enough to secure a conviction in court. However, before a commission, a conviction is inevitable if the commissioners are convinced a member of a victim group – in Boissoin's case, a gay youth – was offended.

On May 30, 2008, Boissoin was fined $5,000, told to pay costs of $2,000 to his accusers and ordered to write a letter of apology. He was prohibited from publishing "disparaging remarks" about homosexuals in "newspapers, by email, on the radio, in public speeches, or

on the internet." He was also prohibited from making "disparaging remarks" about Lund or his witnesses in relation to their involvement in the complaint.

Considering that the views he was attempting to uphold have been considered orthodox by every major religion in the world for thousands of years, his complete silencing in this manner is a remarkable testament to the power of the Canadian human rights commissions. (The case will be appealed: 4/6/2008)

Hugh Owens vs. the Saskatchewan Human Rights Tribunal

This decision of the Saskatchewan Human Rights Tribunal illustrated the reasoning through which free speech rights are usually subordinated to the right of vulnerable groups not to be offended. It further illustrates that lack of intent to cause harm is not a defence.

The Court of Appeal for Saskatchewan would later reverse the ruling, but as Alan Borovoy, chief counsel for the Canadian Civil Liberties Association, remarked, an acquittal is something from which only a lawyer can take comfort. From initial publication to successful appeal, this exercise of Owens' free speech rights occupied nine years of his life and was a time of ongoing stress and financial pressure.

When in June 1997 prison guard Owens saw a notice in the Saskatoon *Star Phoenix* drawing attention to a forthcoming Gay Pride Week, he felt driven by his Christian faith to respond in kind with an advertisement showing two men holding hands with the universal circle-slash prohibition symbol superimposed. The advertisement also cited Bible passages describing homosexuality as sinful and detestable.

Three men filed identical complaints with the SHRC, identifying themselves as gay men and saying in part that Owens' publication "tends to restrict the enjoyment of rights which I am entitled to under the law and which exposes me to hatred and otherwise affronts my dignity of [sic] sexual orientation, contrary to Section 14 of the Saskatchewan Human Rights Code."

The SHRC's Board of Inquiry agreed.

> It wrote, "… the universal symbol for forbidden … may itself not communicate hatred. However, when combined with passages from the Bible, the board finds that the advertisement would expose homosexuals to hatred or ridicule …."

While accepting that Owens' religious expression rights would be compromised, they declared there was a Charter justification for abridging them.

Citing the foundational Supreme Court of Canada ruling (Taylor, 1990), the board declared there must be an "objective test" to determine whether Owens' ad had breached the code. That Owens had earlier declared he had no evil intent was thus unimportant.

Board Chair Valerie Watson wrote:

> The intention of Mr. Owens in placing the advertisement and to a degree the intention of the newspaper in publishing it are not determinative of whether or not the advertisement had the effect that is being alleged.

It is also instructive to see how Watson then dealt with that part of the code that guarantees free speech rights: "14 (2) Nothing in sub-section 1 restricts the right to freedom of speech under the law upon any subject."

Solidly unambiguous as that appears, it melted in Watson's hands as she quoted Justice Dickson in Taylor.

These supposed protections always do. The Supreme Court of Canada's advice to human rights commissions can be translated as "don't worry about free expression, if you don't want to."

It is all a matter of opinion, then, and HRCs prefer Dickson's. (The same preference was cited in the Boissoin case, above.)

Thus, HRCs have been increasingly used by litigants to suppress opinions with which they disagree or which obstruct their legislative goals – that is, to silence opposition.

Ezra Levant, Mark Steyn and *Maclean's*

Never was this more evident than in the case of two high-profile writers whose work offended some Muslim groups. In January 2006, Levant reproduced controversial Danish cartoons in his *Western Standard* magazine that depicted the Prophet Muhammad. The cartoons had caused riots elsewhere in the world, and in February, two complaints were lodged with the Alberta Human Rights Commission after Calgary police told the complainants a criminal code prosecution was unlikely to succeed.

One complaint was withdrawn, and the other is in abeyance.

This case is notable for Levant's videotaped feisty exchange with an investigating officer who had intended to interview him before recommending whether the case should proceed. Available on YouTube, it has received more than 550,000 hits.[1]

Also in 2006, Mark Steyn published his book *America Alone*. *Maclean's* excerpted a section in which Steyn examined the possibility that an enfeebled Europe, whose demography suggested it was in a kind of societal suicide, would be profoundly changed by opportunistic Islamic immigrants.

Three complaints were lodged against Steyn and *Maclean's* in B.C. to the Canadian Human Rights Commission and with the Ontario Human Rights Commission by a group of Muslim law students at Osgoode Hall and Mohamed Elmasry, leader of the Canadian Islamic Congress.

The OHRC claimed it did not have jurisdiction and refused to hear the complaint. Hearings in B.C. began June 2, and the CHRC hearing is supposed to happen later this year.

What Is To Be Done?

Given the clear, intended and government-ordained threat to free speech rights the HRC system represents, the obvious step is their complete abolition. Their useful anti-discrimination functions are amenable to some process within the court system that is modelled on the settlement of small claims. Their role in policing speech must be discontinued and truly egregious infractions left to the law courts and the Canadian Criminal Code.

Politically, there are few achievable goals, for there are significant obstacles to the reform of HRCs.

It could be argued that simply removing the portions of the human rights codes most offensive to free speech values would retain the best of the HRCs while meeting the goal of salvaging free expression.

Another partial remedy would be to introduce common law defences into the enabling legislation. Politically, these might be the only achievable goals, for there are significant obstacles to the reform of HRCs.

Politicians are skilled at being elected, not philosophy. One seldom encounters an elected official who really understands what the commissions are and what they do, though legion are those who know any principled attempt to reform them would carry high political costs In an atmosphere of political correctness, timidity abounds.

There are 13 commissions to deal with, each requiring its own legislation to take action. The situation is not helped by the difficulty of defending hard cases. Anti-Semites whose cases did much to define the law Canadians now struggle with have little public following. (One wonders how much of the little they do have stems from their status as free speech martyrs. As Canadian Civil Liberties lawyer Alan Borovoy has argued, they really would have been better left alone.[2]

1. Levant says his strategy is to "denormalize" HRCs through mockery and the highlighting of the kind of wrongdoing allegedly perpetrated during the Lemire investigation.

2 Borovoy, ibid.

Finally, there are the vested interests that have grown up around the commissions in the past 40 years (the lawyers, the patronage appointments, the quotable expert witnesses). Some of them would undoubtedly subscribe to radical lawyer James Chalmers McRuer's bromide: "The fundamental protection of the rights of the individual is not so much in the substantive law as in the procedure by which it is administered." Yet , such surgical reforms are very much the prizes of consolation and should be considered mere way stations to the ultimate goal.

As long as the commissions exist, even in skeletal form, the temptation to rebuild them as agencies of social control will remain and will almost certainly be too much for some government to resist.

This should give serious pause to those interest groups that have been the commissions' most prolific and rewarded clients. In Canada's relatively short history, many groups have had their difficult years: the Fenians, the Communists and the Jehovah's Witnesses, to name a few. Nobody cares much any of them now, as new issues come to the fore and new overlords settle old scores.

Not to put too fine a point on it, times change and those in the saddle today may find themselves under the horse's heels tomorrow.[3] Then, their reduction of liberty during their few years of transcendence will be revealed as a bitter curse. Liberty is the friend of all, must be nurtured by all and defended for the sake of all.

The commissions must go. Ottawa must show the way by winding up the Canadian Human Rights Commission, for it is from Ottawa that the provinces will take their signal.

Appendices

Appendix A: Robert Nealy et al. vs. Randy Johnston, Terry Long, Church of Jesus Christ Christian-Aryan Nations (1989)

This decision of the CHRC affirmed the relaxed rules of evidence that characterize HRCs and showed how their role is not so much justice as policy formulation.

The complainants alleged that Johnston and Long were running a telephonic service carrying messages of a discriminatory nature. This was ultimately concluded to be the case and a cease-and-desist order was issued. However, Long's involvement had to be established during the proceedings, which lead to a discussion of the admissibility of hearsay and circumstantial evidence. In another frequently cited passage, Chairman Norman Fetterly drew attention to the *Canadian Human Rights Act*, which explicitly exempts its tribunals from a fastidious observance of procedure, thus:

> 40 (3) In relation to a hearing under this Part, a Tribunal may (c) receive and accept such evidence and other information, whether on oath or by affidavit or otherwise, as the Tribunal sees fit, whether or not such evidence or information is or would admissible in a court of law.

He further commented on a previous CHRC ruling:

> In administrative tribunals, the rules of evidence are usually relaxed. This is because administrative tribunals are striving towards goals that are different from those of a court of law; in particular, administrative tribunals are more consciously involved in the formulation of policy than are courts.

3. Lawyer Doug Christie during an interview.

Appendix B: CHRC vs. Taylor (1990)

Chief Justice Brian Dickson's ruling in this often-cited case explicitly described "Parliament's objective of promoting equal opportunity unhindered by discriminatory practices, and thus of preventing the harm caused by hate propaganda is of sufficient importance to warrant overriding a constitutional freedom."

Dickson's view was supported by three other judges. It became the reference point for all HRCs listening to a free speech defence based on Section 2 (b) of the Charter. It is worth noting that it was a 4-3 split, indicating the same facts viewed by seven judges at the peak of their professional careers could reasonably be interpreted in more than one way. Justice Beverley McLachlin (now Chief Justice McLachlin) wrote several pages arguing the majority was wrong and that the *Canadian Human Rights Act* (in the Taylor case) was NOT consistent with the Charter free speech guarantee.

John Ross Taylor, leader of the long-defunct Western Guard Party, circulated business cards inviting people to call a certain number, where they would hear a recorded message about a minute long alleging the existence of a carefully shrouded international Jewish conspiracy. In 1979, the CHRC received complaints, convened a tribunal and ordered Taylor to cease and desist. He did not, and he went to jail and upon his release reinstated the telephonic message board.

A further complaint to the CHRC worked its way up to the Supreme Court, which determined that a) the restrictions contained in Section 13 (1) of the *Canadian Human Rights Act* violated Charter free speech rights but that b) it was a justifiable infringement given the importance of the government's objectives. The ruling also found that even though the Act did not provide for a defence of truth or intent, this did "not give it a fatally broad scope."

It would be hard to exaggerate the significance of Dickson's view prevailing, undercutting as it did whatever free speech protections provincial governments included within their human rights codes.

Perhaps sensing the potential for this issue to arise in the future, Dickson addressed it directly. He wrote in sections 64 and 65:

> Though not wishing to disparage legislative efforts to bolster free expression, for several reasons I think it mistaken to place too great an emphasis upon the explicit protection of expressive activity in a human rights statute. … Having decided that there exists an objective in restricting hate propaganda of sufficient importance to warrant placing some limits upon the freedom of expression, it would be incongruous to require that [the law] exempt all activity falling under the rubric of "expression."
>
> Perhaps the so-called exemptions found in many human rights statutes are best seen as indicating to human rights tribunals the necessity of balancing the objective of eradicating discrimination with the need to protect free expression.

It has often been relied upon.

Appendix C: Malcolm Ross vs. New Brunswick Human Rights Commission (1996)

This ruling weighed the obligation of a public school board to provide a learning environment free of discrimination against the fundamental freedom of a teacher to publicly express his views and to exercise his religious beliefs during his off-duty hours. It also dealt with whether firing him infringed his freedom of expression.

Ross published a number of anti-Semitic booklets, but unlike Jim Keegstra, he did not mention his beliefs in the classroom. Nevertheless, a Jewish parent complained to the New Brunswick.

Human Rights Commission that by failing to discipline Ross, his employer condoned his beliefs and created a discriminatory atmosphere in the school.

The Board of Inquiry set up by the HRC ordered Ross placed on unpaid leave for 18 months unless a non-teaching position he would accept came up. If he did not accept such a post by the end of that time, he was to be permanently released.

The case was appealed to the Supreme Court, which upheld the HRC decision and overturned the ruling of the New Brunswick Court of Appeal. While Ross's freedom of religion and expression had undoubtedly been infringed, his continued employment made for a "poisoned" learning environment, thus making the school board guilty of discrimination. This case is noteworthy for its explicit concession that there was no evidence of harm, but that harm could still be assumed, which is a difficult situation for an accused to defend.

Chief Justice Antonio Lamer wrote in section 41:

> It is to be noted that the testimony of the students did not establish any direct evidence of an impact upon the school district caused by the respondent's off-duty conduct.

But, he went on to say,

> Although there was no evidence that any of the students making anti-Jewish remarks were directly influenced by any of Malcolm Ross' teachings, given the high degree of publicity surrounding Malcolm Ross' publications it would be reasonable to anticipate that his writings were a factor influencing some discriminatory conduct by the students.

Appendix D: Canadian Jewish Congress vs. North Shore Free Press dba *North Shore News*, and Doug Collins (1997)

This ruling by the B.C. Human Rights Tribunal established the distinction between victim and oppressor groups, and held that they may be treated differently.

The late Doug Collins, a decorated British World War II veteran and long-time Canadian journalist, wrote a weekly column in the *North Shore News* for many years. A prolific and strident critic of political correctness, multiculturalism, feminism and indeed virtually every ascendant train of thought in Canada's cultural revolution, Collins had written that the Stephen Spielberg film *Schindler's List* was Jewish propaganda. It was not the first of Collins' columns that offended Jews, and the Canadian Jewish Congress complained to the B.C. Human Rights Commission that it exposed Jewish people to hatred or contempt based on their race, religion or ancestry.

They based their complaint on a freshly amended version of the B.C. Human Rights Code, to which this wording had been added in 1996:

> 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 of persons.

The lengthy hearing before the B.C. Human Rights Tribunal that followed was the first time a Canadian journalist had been required to answer to a government agency for his published opinions since Joseph Howe's case in 1835. Collins' case was widely reported at the time. Collins and the *North Shore News* disputed the case on its merits, and they challenged the Act's constitutionality.

The tribunal ruled:

a. On the merits, the Hollywood Propaganda column did not violate Section 7 (1) (b) of the B.C. Human Rights Code. Though offensive and hurtful, it did not capture the degree of calumny, detestation or vilification signified by "hatred or contempt."

b. Although the respondents were correct that their free speech rights were impugned by the B.C. Human Rights Code, such infringement was justified by Section 1 of the *Canadian Charter of Rights and Freedoms*, that is, it was "demonstrably justified as a reasonable limit in a free and democratic society."

Member Nitya Iyer therefore found him not guilty, effectively releasing the steam from public concern. Instead of simply dismissing the complaint and leaving it at that – which she could have done – she gleaned some moral comfort from it (from her perspective) by exercising her option to rule restrictively on the constitutional argument. In particular, she introduced the concept of vulnerable groups and increased risk to Canadian human rights law. She wrote, "the more vulnerable the group, the more likely it is that the overall meaning conveyed by the expression will be hateful or contemptuous." She also wrote: "Would a reasonable person consider it likely to increase the risk of exposure of target group members to hatred or contempt?"

The latter has every appearance of an attempt to lower the burden of proof for complainants. An increased risk of exposure is easier to claim than likely to expose and easier for a tribunal to find.

In any case, neither concept was expressed in the language chosen by the B.C. legislature nor were they supported by prior jurisprudence.

Yet, their effect is to divide the population into vulnerable groups such as women, gay people and visible minorities and oppressor groups, basically white, straight males, the former enjoying a higher level of protection than the latter.

To be blunt, by Iyer's interpretation, it remains legal to ascribe sinister motives and attributes to white males or Christian institutions that if published with respect to victim groups would not be legal. The law, by its unequal application, was thus to affirm and accommodate appellants based upon their group identity rather than their grievances.

This is Iyer's unique contribution to human rights jurisprudence, though its roots may be traced to the writings of left-wing American academics.[1]

Collins died in 2001 before an appeal of this case and a subsequent one in which he was involved in could be heard. Iyer's ruling therefore stands and with it, her vulnerability test of what ought to be considered a hateful expression of opinion.

Iyer, by the way, attached little importance to the dangers for democracy of government agencies policing the contents of newspapers.

Rather, she deplored newspapers' "enormous control over very influential forums for the dissemination of expression … the sorry history of incidents of abuses of the power of the press," and she warned the media are "capable of diminishing the rights and freedoms of the vulnerable."

1. For instance, "Words that Wound, the Critical Race Theory, Assaultive Speech, and the First Amendment."