



Justice Centre for Constitutional Freedoms

From Bad to Worse

Examining Restrictions on Speech and Procedural Fairness in Human Rights Legislation in fourteen Canadian Jurisdictions

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Executive Summary

All of Canada's provinces and territories, as well as the federal government, have human rights legislation that forbids discrimination in accommodation, employment, contracts, facilities, the sale of goods and services, and other areas. The prohibition on discrimination in these areas seems to enjoy broad public support.

However, many Canadians are concerned about the legislation's lack of procedural fairness. None of the fourteen jurisdictions (ten provinces, three territories, one federal government) have human rights legislation that provides for much procedural fairness, hence this paper's title "From Bad to Worse." Nunavut and B.C. display the least amount of procedural unfairness in their legislation. The worst jurisdiction for procedural fairness is Ontario, followed closely by Alberta and P.E.I.

Further, in at least four jurisdictions, the legislation undermines the long-standing right of Canadians to express their opinions about social, political, moral, religious, cultural and other topics. When it comes to respecting freedom of expression, Yukon, Ontario, Nunavut and Manitoba are among the better jurisdictions in Canada. Canada's worst violators of free speech rights are B.C., Alberta, Saskatchewan, and the federal government.

Freedom of Expression

In Alberta, British Columbia, Saskatchewan, and at the federal level, prohibiting discrimination in the area of "publications" has proven to be a serious violation of the fundamentally important right of Canadians to express their views. These laws enable human rights complaints to be filed against citizens for expressing "discriminatory" opinion in a variety of media, including newspapers, pamphlets, flyers, and on the internet. The prohibition on discriminatory publications restricts debate about public policy issues (eg. immigration, criminal justice, foreign

policy, social assistance, aboriginal policy) because these issues will frequently, *and necessarily*, include references to enumerated grounds set out in human rights legislation, such as race, ethnicity, religion, sexual orientation, and age. A person can violate human rights legislation simply by participating in public debate over the contents of the public school curriculum, or who should be eligible to receive social assistance, or the kind of foreign policy that Canada should pursue in the Middle East, naming just three examples.

In Alberta, human rights legislation has been used against Stephen Boissoin (letter-to-the-editor about the contents of a public school curriculum), Catholic Bishop Fred Henry (disseminating his Church's teaching about the definition of marriage) and Ezra Levant (publishing the "Danish cartoons" of Mohammed in the *Western Standard* magazine). In B.C., human rights legislation has been used against *Maclean's* magazine (publishing excerpts from Mark Steyn's book *America Alone*) and comedian Guy Earle (dealing with hecklers during his stand-up comedy routine). In Saskatchewan, William Whatcott was ordered to pay \$17,500 to four complainants whose feelings were hurt by the contents of flyers he distributed, in a case awaiting a decision from the Supreme Court of Canada (*Whatcott v. Saskatchewan Human Rights Tribunal*).

In each of these four jurisdictions, individuals have been forced to incur thousands of dollars – in some cases tens of thousands of dollars – in legal costs to defend against human rights complaints that were filed purely in respect of the expression of opinion, without any actual discrimination in employment, goods, services or other areas.

A "discriminatory" statement which touches on religion, race, age, disability, or another listed ground, can violate human rights legislation even when the statement is true, and even when the statement merely expresses an opinion. The common law checks and balances which provide fairness between plaintiffs and defendants are excluded from human rights legislation. A defendant who is sued for defamation in court can raise the defences of "truth" and of "fair comment." But these defences are not available to people who face a human rights complaint in regards to their speech. In practice, the hurt feelings of a complainant are usually sufficient to establish that a respondent has violated human rights legislation, even if the respondent's statements are true.

It is not necessary to undermine centuries old constitutionally protected free speech rights in order to legislate against discrimination in employment, housing, and services. This is demonstrated by Yukon, Nunavut, Ontario, and Manitoba, which prohibit discrimination without restricting their respective citizens' right to express opinions on social, moral, political, cultural, and public policy matters. Yukon's *Human Rights Act* says nothing about publications. Nunavut, Ontario and Manitoba indicate that discriminatory signs, notices and publications are prohibited *only in relation to employment, housing, facilities, goods, services, contracts and other areas where the legislation seeks to address actual discrimination*. In other words, it is illegal to advertise the availability of a rental unit and say that a particular group (for example, women, aboriginals, seniors) need not apply, but there are no restrictions on the contents of a politically incorrect letter-to-the-editor, flyer, or pamphlet.



Procedural fairness

In addition to restrictions on speech, the second major area of concern about Canada's human rights legislation is its lack of procedural fairness. Firstly, governments typically only assist complainants, while respondents are burdened with paying all their own costs. Secondly, those who adjudicate human rights complaints do not need to have a law degree, or be trained as lawyers to understand procedural fairness. Thirdly, human rights tribunals can, and often do, accept hearsay evidence which is normally excluded by courts because of its unreliability. Fourthly, people can file frivolous or malicious complaints without risking any consequences, all while forcing respondents to pay for their own legal costs. Finally, the legislation authorizes the imposition of large and sometimes unlimited awards in respect of hurt feelings.

In all fourteen Canadian jurisdictions, the government provides direct or indirect assistance to complainants, in one or more of the following ways:

- The human rights commission can file or initiate complaints against a person
- The human rights commission has carriage of the complaint, and presents the complainant's case at the hearing;
- The human rights commission has standing as a party at the hearing, and takes a position that is identical to, or similar to, the position taken by the complainant;
- The human rights commission provides or pays for legal representation for the complainant;
- The government provides funding to organizations which assist complainants.

With the exception of B.C. and Nunavut, every jurisdiction in Canada has a human rights commission, which actively assists complainants, but provides no assistance to respondents.

In Saskatchewan, Manitoba, Ontario, the Northwest Territories and at the federal level, the commission itself can also function like a prosecutor, by initiating a human rights complaint against a person.

In most jurisdictions, if the commission decides that the complaint should go to a hearing, the commission will have carriage of the complaint, and put forth the complainant's case at the hearing. The commission will also be a party at the hearing, in addition to the complainant. While technically not providing legal representation for complainants, the commission assists complainants by presenting their complaint at the hearing.

Conversely, a respondent to a complaint needs to represent herself or himself, or pay for a lawyer for representation.

Human rights commissions are fond of declaring that they do not provide legal representation to complainants or to respondents. This may be technically true, but this position ignores the reality that these same commissions provide significant assistance to complainants by presenting the complaint at the hearing, or appearing as a party at the hearing and advocating for a position that is similar to, or identical to, the complainant's position. Therefore, complainants do not need legal representation, because they are already receiving help from the commission. The



assertion that “both complainants and respondents are free to retain legal counsel if they choose” is a half truth. It ignores the structural biases which favour the complainant.

All fourteen Canadian jurisdictions permit hearsay evidence (eg. “I heard Mark Smith say that . . .”). Hearsay evidence is normally excluded from court proceedings because its accuracy cannot be tested by cross-examination. Courts regard hearsay as inherently unfair. In contrast, human rights tribunals are authorized by human rights legislation to accept hearsay evidence.

In most of Canada’s fourteen jurisdictions, it is not necessary for the adjudicator of a human rights complaint to be a lawyer, or to possess a law degree. While lawyers are frequently appointed to human rights tribunals, this is not required by legislation.

Most of Canada’s fourteen jurisdictions allow human rights complaints to be filed by “third parties” who themselves have not suffered any alleged discrimination, thereby allowing “community activists” to advance political agendas.

With few exceptions, Canada’s human rights laws do not impose any penalty, costs, or other consequence on complainants, even those who file frivolous, malicious, or baseless complaints. This means that the respondent is forced to absorb all of the legal costs of defending herself or himself against the frivolous complaint, while the complainant suffers no burden at all.

The absence of monetary consequences makes human rights legislation radically different from the civil court system, in which the loser (whether plaintiff or defendant) pays a substantial portion of the winner’s legal costs. The civil court system discourages frivolous and unfounded actions, because the potential plaintiff must seriously consider the actual merits of her or his case, and must be willing to risk paying the other side’s legal costs if unsuccessful. In the same way, the civil court system also discourages defendants from taking unfounded or unsupported positions, since the practice of awarding costs against the unsuccessful party applies to the defendant as well as the plaintiff.

Unlike courts, which have limited powers to award damages for hurt feelings, human rights tribunals can order the respondent to pay money to the complainant for hurt feelings, often characterized in legislation with terms such as “injury to dignity and self-respect.” Most jurisdictions place no limit on the amount of money that a respondent can be ordered to pay a complainant for hurt feelings. The courts have never recognized this type of damage because of its inherent subjectivity and unfairness.

When it comes to respecting and preserving the citizen’s free speech rights, Ontario is among the four best jurisdictions in Canada.

However, when it comes to procedural fairness in human rights proceedings, Ontario is the worst jurisdiction in Canada:

- Hearsay evidence is admissible;
- the decision-maker does not need a law degree or training as a lawyer;



- the Ontario Human Rights Commission actively assists complainants without providing any assistance or legal representation to respondents;
- the Commission can initiate complaints;
- third parties can file complaints without having suffered discrimination themselves;
- there are no consequences for those who file frivolous or malicious complaints; and
- there is no cap or ceiling on the amount of damages that can be awarded for hurt feelings.

When it comes to lacking procedural fairness, Alberta and P.E.I. are a close second to Ontario. In Alberta and in P.E.I., the commission is not authorized to initiate complaints. Otherwise, in respect of the other criteria in the paragraph above, the legislation in Alberta and P.E.I. is like Ontario's human rights legislation.

The least amount of procedural unfairness can be found in human rights legislation in Nunavut and B.C. Neither jurisdiction has a human rights commission, which means that complainants and respondents are more likely to be on an equal footing. In B.C. some respondents may qualify for legal assistance and representation. In Nunavut a complainant could potentially face monetary consequences for filing a frivolous or malicious complaint. However, in both B.C. and Nunavut:

- Hearsay evidence is admissible;
- the decision-maker does not need a law degree or training as a lawyer;
- third parties can file complaints without having suffered discrimination themselves; and
- there is no cap or ceiling on the amount of damages that can be awarded for hurt feelings.

As set out in the Summary of Findings on the next page, the remaining nine jurisdictions exhibit degrees of procedural unfairness that fall between the legislation of Ontario and the legislation in Nunavut and B.C. Regarding procedural unfairness, the fourteen jurisdictions, *from bad to worse*, are:

- Nunavut
- B.C.
- Saskatchewan
- Northwest Territories
- Nova Scotia
- the federal government
- Yukon
- Newfoundland
- New Brunswick
- Quebec
- Manitoba
- P.E.I.
- Alberta
- Ontario



Summary of findings

A – impact on free expression (none, minimal, some, large)

B – defences of truth and fair comment available to person accused of violating legislation

C – hearsay evidence can be admitted in a hearing

D – decision-maker must be a lawyer, or must have a law degree

E – has a Commission (as a separate body from the decision-maker)

F – Commission takes carriage of human rights complaint, has standing at the hearing, or both

G – Commission is expressly authorized by legislation to initiate or file complaints

H – third parties, who have not suffered discrimination themselves, can file complaints

I – consequences for complainants who file frivolous complaints

J – government assistance for complainants

K – government assistance for respondents

L – cap or ceiling on damages for hurt feelings and loss of dignity

	A	B	C	D	E	F	G	H	I	J	K	L
Fed	large	No	Yes	partly	Yes	No	Yes	Yes	No	Yes	No	\$20K
BC	large	No	Yes	No	No	N.A.	N.A.	Yes	No	Yes	Yes	No
AB	large	No	Yes	No	Yes	Yes	No	Yes	No	Yes	No	No
SK	large	No	Yes	Yes	Yes	Yes	Yes	Yes	unclear	Yes	No	\$10K
MB	minimal	N.A.	Yes	No	Yes	Yes	Yes	Yes	Yes	Yes	No	\$2K
ON	none	N.A.	Yes	No	Yes	Yes	Yes	Yes	No	Yes	No	No
QB	minimal	N.A.	Yes	partly	Yes	Yes	No	Yes	No	Yes	No	No
NB	minimal	N.A.	Yes	No	Yes	Yes	No	No	No	Yes	No	No
NS	minimal	N.A.	Yes	Yes	Yes	Yes	No	No	No	Yes	No	No
PE	minimal	N.A.	Yes	No	Yes	Yes	No	Yes	No	Yes	No	No
NL	minimal	N.A.	Yes	No	Yes	Yes	No	Yes	Yes	Yes	No	No
YK	none	N.A.	Yes	No	Yes	Yes	No	No	No	Yes	No	No
NT	some	No	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes	No	No
NU	none	N.A.	Yes	No	No	N.A.	N.A.	Yes	Yes	Yes	No	No

