

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

AND IN THE MATTER of three complaints
before The Alberta Human Rights and Citizenship Commission
Complaint Nos.S9610179, S9709097, S9709098

BETWEEN:

QUINTIN JOHNSON

COMPLAINANT

- and -

**MUSIC WORLD LTD., HMV CANADA, AND
A.V.E. ENTERTAINMENT (FORMERLY KNOWN AS TOP FORTY MUSIC)**

RESPONDENTS

HUMAN RIGHTS PANEL DECISION

Panel Chair:	Ms. Lori G. Andreachuk, Q.C.
Panel Members:	Ms. Beth Bryant HCol. Delano Tolley
Complainant:	Mr. Quintin Johnson
Representatives of the Complainant:	Ms. Johanna Fipke Ms. Taryn Moore Ms. Avery Smith (Students-at-Law)
Counsel for the Respondent:	Mr. Graham Howell Counsel for HMV
Respondent:	A.V.E. Entertainment – Unrepresented
Respondent:	Music World Ltd. – Unrepresented
Place and Date of Hearing	Edmonton, Alberta March 4, 2003

PRELIMINARY MATTERS

The panel received a written communication from Mr. Graham Howell, Company Secretary and legal advisor from HMV setting forward the position of HMV. The panel ruled that service on HMV was affected.

The panel received communication from Darren Throop at CD Plus Partnership indicating CD Plus acquired the assets of A.V.E. Entertainment, and not the shares of the company, and denying any liability for the actions of the predecessor company. The panel ruled that A.V.E. Entertainment and CD Plus Partnership had been properly served with the Notice of Hearing.

Upon reviewing details of service on Music World Ltd., the panel ruled that Music World Ltd. had been appropriately served with the Notice of Hearing.

The panel received submissions of the complainant, Quintin Johnson, and a Book of Authorities. The panel accepted these.

Exhibits included the complaints and attachments, copies of the alleged prohibited materials including CD covers and lyrics, Music World Ltd.'s response form, Top Forty's response via Attic Records Limited, HMV's response and additional information, Canadian Recording Industry Association (CRIA) policy on explicit lyrics and labeling.

The panel also heard and entered into evidence compact discs by Deicide - "Upon the Cross", specifically the song "Kill the Christian" and the compact disc by Type O Negative, specifically the song "Kill all the White People".

(It should be noted at the outset that this decision references Sections 2 and 3 of the Act for continuity

in referencing the annotated case law, however, the panel notes that the *Human Rights, Citizenship and Multiculturalism Act* now has revised section numbers in that Section 2 is now Section 3 and Section 3 is now Section 4.)

ISSUES

The issue before the panel was whether or not the respondents contravened Sections 2 and 3 of the *Human Rights, Citizenship and Multiculturalism Act* on the grounds of gender-female, race, colour, and religious beliefs in the areas of notices, publications and services.

REMEDIES SOUGHT

The complainant sought a finding of the following remedies:

1. A finding of merit.
2. An Order and Direction of the Commission directing the respondents to revise their policy on displaying for sale discriminatory materials.
3. A removal from the display of the discriminatory materials forthwith.

LEGISLATION IN QUESTION

The complaints were taken under Section 2 and 3 of the *Human Rights, Citizenship and Multiculturalism Act* which provides as follows:

- 2(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 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.*
- (2) *Nothing in this section shall be deemed to interfere with the free expression of opinion on any subject.*
- (3) *Subsection (1) does not apply to:*
- (a) *the display of a notice, sign, symbol, emblem or other representation displayed to identify facilities customarily used by one gender,*
 - (b) *the display or publication by or on behalf of an organization that:*
 - (i) *is composed exclusively or primarily of persons having the same political or religious beliefs, ancestry or place of origin, and*
 - (ii) *is not operated for private profit,*
 - of a statement, publication, notice, sign, symbol, emblem or other representation indicating a purpose or membership qualification of that organization, or*
 - (c) *the display or publication of a form of application or an advertisement that may be used, circulated or published pursuant to 8(2),*
if the statement, publication, notice, sign, symbol, emblem or other representation is not derogatory, offensive, or otherwise improper.
3. *No person shall*
- (a) *deny to any person or class of persons any goods, services, accommodation or facilities that are customarily available to the public,*
or

(b) discriminate against any person or class of persons with respect to any goods, services, accommodation or facilities that are customarily available to the public,

because of the race, religious beliefs, colour, gender, physical disability, mental disability, ancestry, place of origin, marital status, source of income or family status of that person or class of persons or of any other person or class of persons.

On the issue of remedy, the complainant relied upon Section 32 of the *Act* which provides as follows:

32(1) *A human rights panel*

(a) Shall, if it finds that a complaint is without merit, order that the complaint be dismissed, and

(b) May, if it finds that a complaint has merit in whole or in part, order the person against whom the finding was made to do any or all of the following:

- (i) to cease the contravention complained of;*
- (ii) to refrain in the future from committing the same or any similar contravention;*
- (iii) to make available to the person dealt with contrary to this Act the rights, opportunities or privileges that person was denied contrary to this Act;*
- (iv) to compensate the person dealt with contrary to this Act for all or any part of any wages or income lost or expenses incurred by reason of the contravention of this Act;*
- (v) To take any other action the panel considers proper to place the person dealt with contrary to this Act in the position the person would have been in but for the contravention of this Act.*

(2) A human rights panel may make any order as to costs that it considers appropriate.

(3) A human rights panel shall serve a copy of its decision, including the findings of fact on which the decision was based and the reasons for the decision, on the parties to the proceeding.

EVIDENCE OF QUINTIN JOHNSON

Mr. Johnson testified that he was shopping for music in the Music World outlet in Red Deer in the summer of 1997. He decided to browse in the heavy metal section of the store where he viewed the disc of “Deicide” entitled “Upon the Cross” and noticed that there was a song on the disc entitled “Kill the Christian”.

The complainant testified that he was upset at the distributor for marketing the product and the irresponsibility of the artists. He later bought the CD in question, went home and played the song “Kill the Christian”. Upon reading the lyrics, he indicated that he became offended, and also noted that the tone of the singing of the words was as offensive to him as the words themselves.

The lyrics were read into the record by the complainant and were as follows:

Kill The Christian

You are the one we despise
Day in day out your words compromise lies
I will love watching you die
Soon it will be and by your own demise

Buried in hypocrisy
Lacerate your faith in God
Morally diseased
On the cross of Calvary your body bashed defeated stabbed

Blessing as you hate
Loyal to your enemies
Monetary faith
As him you will pay for the lies of your prophecies
Satan wants you dead

Kill the Christian, kill the Christian
Kill the Christian, kill the Christian

Kill the Christian, kill the Christian, kill the Christian

Armies of darkness unite
Destroy their temples and churches with fire
Where in this world will you hide
Sentenced to death, the anointment of Christ

In due time your path leads to me
Put you out of your misery

The death of prediction
Kill the Christian

Kill the Christian, dead!

The complainant testified the curiosity prompted him to purchase the compact disc.

The complainant also played for the panel a CD by Type O Negative entitled “Bloody Kisses”, particularly a song entitled “Kill All the White People” which lyrics were read into evidence as follows:

Kill All The White People

Kill all the white people
Then we’ll be free

The complainant testified these CD’s are available where music is sold and do not carry an advisory label, which in the view of the complainant was simply a disclaimer for distributors.

The complainant testified that as a Christian, a white person and as an artist, he feels he has as many rights as the rest of the public. Further that he has a responsibility to the community at large to take a stand on what he considers to be discriminatory action by the distributors.

The complainant testified that these CD's are available for listening in music booths at various record stores as well as if an individual buys the CD and takes the same home.

The complainant testified that he felt discriminated against by these distributors based on his religious faith and upbringing. He felt that the distribution of these CD's exposes Christians to hatred. He felt that because this music was available to the public, his rights were less valuable than others. He also testified that he felt that the distribution of these CD's was simply a matter of commerce. The cost of these CD's was approximately \$20 and he believed that the distributor was only interested in garnering a profit.

He felt that the CD's in question left no room for alternative construction and that they were blatant discrimination and proliferation of hatred.

The complainant filed his complaints on August 27, 1997 against Music World Ltd., HMV Canada and Top Forty Music (currently A.V.E. Entertainment and now CD Plus Partnership). In the complaints he alleged he was discriminated against on the grounds of race, colour, gender and religious beliefs in contravention of Section (2)(1)a and (2)(1)b of the *Human Rights, Citizenship and Multiculturalism Act*. He noted that amendments to the legislation came out after his complaint was filed.

After investigating the complaint, the director dismissed the complaint on January 14, 2000 citing that Section (3)(2) of the *Act* shielded the material based on artistic merit. Mr. Johnson appealed the director's decision to the chief commissioner on April 20, 2000 and the chief commissioner decided that the complaint should not be dismissed and referred the complaint to the panel for hearing.

POSITION OF THE RESPONDENTS

No oral evidence from the respondents was received, however, they did respond in various manners. Music World Limited took the following position:

They are neither a manufacturer or distributor of the CD's in question. They are not the proper respondents. They took the position that responsibility for the control of these matters should fall within an un-associated Federal body which deals with freedom of speech issues. They indicated that the lyrics included in the music described by the complainant do not reflect the feeling of the company and that they cannot possibly satisfy all people on all issues. They took the position that the responsibility lies with the manufacturers and not with the distributors.

Attic Records responded:

The complaint had been forwarded to them as they were the Canadian licensee of Roadrunner Records, the originating label for Type O Negative and Deicide. They indicated that the recordings are sold in sealed packaging with appropriate warning labels regarding the fact that some people may find the material offensive, indicating that there is no free distribution to the public in any way and that retailers normally won't sell product with warning labels to juveniles.

They stated that in the case of Type O Negative, Peter Steele, the lead singer and writer of their material considers what he does to be "over the top" and does not expect the group to be taken seriously.

The principal of Attic Records Limited indicated he had no personal knowledge of the group Deicide and could not comment on their lyrics. He indicated that artists who are in the leading edge of change

both positive or negative should be supported and have the right to make their art available to those

who wish to purchase it.

CD Plus on behalf of Top Forty Music and A.V.E. Entertainment took the position that they were not liable for A.V.E. Entertainment or the acts of Top Forty Music.

HMV took the following position:

- a) HMV was not the publisher, issuer or displayer of the materials within the context of the *Act*.
- b) The *Act* provided that nothing should interfere with the freedom of expression of opinion upon any subject.
- c) The complainant was free to purchase the goods in question or not purchase them, it was his decision.
- d) The product must be looked at in the context in which it is sold as it is sold in a music store containing many various types of music.
- e) The music referred to in the complaint is located in bins enclosed in plastic wrappers with covers that show a title and a cover picture, the name of the group and name of artists and pictures are found on the back cover.
- f) The manufacturer must take responsibility and has done so by attaching a parental advisory on the front cover of the Deicide CD indicating explicit lyrics.
- g) The consumer has the choice of buying or not buying the CD or reading the lyrics.
- h) HMV is not the proper respondent as they do not publish or create any publications or statements that would promote hatred or contempt. They are simply a retailer of various types of music.
- i) HMV is a firm believer in freedom of speech and information and does not attempt to act as a censor.
- j) HMV is constitutionally protected under the Canadian Charter of Rights and Freedoms to offer for sale various music products.

- k) HMV group has never withdrawn a product because a customer did not like it. No customer is obliged to purchase a particular product.
- l) HMV is the wrong respondent. The respondent should be the manufacturer or the artist.
- m) HMV does not publish or create any publications, notices, signs, etc. that would promote hatred or contempt and the products were not played in stores or advertised in windows or displayed on racks in the front of the store.

ISSUE I

Are the retailers as the respondents the appropriate respondents in that they are not the producers or publishers or distributors of the material in question, but only caused the material to be made available for purchase.

The complainant cites the words in Section 2(1) of the *Act* “*cause to be published, issued, or displayed before the public...*” as the basis upon which the respondents in the within complaint should be found by the panel to be the appropriate respondents.

The complainant, through his agent, states that the goods were displayed and accessible to the public by the retail store outlets who make the product available to the public through distribution chains. He argued that the sole purpose for displaying the product is to make them available to the general public for purchase, therefore the respondents have caused the same to be displayed.

The respondents rely on the decision of Mr. Justice Rooke in *Kane [2001] A.J. No. 915*. A referral to the Court of Queen’s Bench on several questions of law. The question relevant to this appeal is whether or not it is sufficient reason to name an individual in a complaint if the individual caused the offending material to be published, issued, or displayed.

Justice Rooke stated the purpose of the *Act* is to prevent discrimination, in quoting from the Supreme Court of Canada decision in *CNR v Canada (Human Rights Commission)* [1987] 1S.C.R. page 1114, where Justice Dickson stated:

“The purpose of the Act would appear to be patently obvious, in light of the powerful language of Section 2 in order to promote the goal of equal opportunity for each individual to achieve ‘the life that he or she is able and wishes to have’, the Act seeks to prevent all ‘discriminatory practices’ based, inter alia, on sex. It is the practice itself which is sought to be precluded. The purpose of the Act is not to punish the wrongdoing, but to prevent discrimination.”

Further, Justice Rooke quotes Justice Dickson in *Canada (HRC) v Taylor* [1993] S.C.R. 892 at 917:

“The aim of human rights legislation... is not to bring the full force of the state’s power against a blameworthy individual for the purpose of imposing punishment”.

and at 933:

“...the purpose and impact of human rights codes is to prevent discriminatory effects rather than to stigmatize and punish those who discriminate.”

Justice Rooke stated using the rationale expressed by Justice Dickson in the two cases referenced above at paragraph 31 the following:

“Because the intention of the Act is remedial and preventative, Section 2(1) should be interpreted to allow for the potential liability of only those directors and officers who were causally connected with the publication, issuance, or display of an offending representation.”

At paragraph 32 he stated:

“‘Cause to be published’ for the purposes of Section 2 must be given a broad interpretation. In other words, a respondent does not need to be involved in the publication, issuance or display of the representation in a ‘hands on’ sense to be liable under the Act. It would be sufficient in my view for a director, officer or board member to be indirectly involved. Indirect involvement, which may expose an

individual to liability may include: instigating or promoting the publication, issuance or display. The degree of indirect involvement that will ground liability will have to be considered on a case-by-case basis as part of a full contextual review. This is consistent with the principal that human rights legislation should be given full effect through a 'fair, large and liberal interpretation'."

Justice Rooke further stated at paragraph 35:

"The remedial nature of the Act dictates against limiting the pool of potential respondents to the publishing corporation. If corporate entities were appropriate respondents, any remedial order ultimately made by a Panel may be of little effect as it would permit the individuals responsible to shield themselves behind a corporation. Obviously this would do little to advance the purpose of the Act."

and at paragraph 38 he stated:

"I am also of the view that in order for an individual to be named as a respondent, there must be prima facie evidence at the time that the complaint is laid, demonstrating the requisite causal connection."

It would appear, therefore, that the tests for liability as a distributor as set out by Justice Rooke requires a prima facie case at the time the complaint is laid showing that there is a causal connection between the respondents and the discriminatory practices.

It is therefore the conclusion of this panel the respondents were appropriately named as respondents in these complaints in that there is prima facie evidence on the face of the complaints that the respondents were causally connected to the discriminatory practices by the display of the alleged prohibited material. The fact that the purpose of human rights legislation is to prevent and compensate for discrimination rather than to punish wrongdoers. Additionally, this panel does not find that the

respondents should be relieved of their obligation because of the warning label or because of the fact that the allegedly offensive material was found in cases at the back of the record store and that consumers would have to attend and seek out the materials.

Further, this panel does not find that the respondents should be extricated from the complaints on the argument of a captive audience, the argument being that the purchaser would have a choice of whether or not to listen to the music. There are no circumstances in the evidence before us that a reasonable listener could have foreseen that the music he or she was offered to purchase by the respondent was discriminatory in nature.

ISSUE II

Does the material in question and the retailing of that material constitute an infringement of the complainant's rights under Section 3(1) of the Act. In order for the complainant to show a breach has occurred under Section 3(1)(a) of the Act, the complainant must show that the materials are consistent with discrimination or an intention to discriminate against a class of persons.

Discrimination is well defined by the Supreme Court of Canada and is often quoted in *Andrews v. The Law Society of British Columbia (1989) 56 D.L.R. (4th) 1*, where the Supreme Court of Canada stated:

“Discrimination may be described as a distinction, whether intentional or not, but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits and advantages available to other members of society.”

In *Law v. Canada (Minister of Employment and Immigration) [1999] 1 S.C.R. 497*, the Supreme Court of Canada explains further the essence of discrimination as it exists in the Charter as follows:

“In general terms, the purpose of s. 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or

political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.”

The complainant argues that the lyrics of the various songs throughout the music in question violates groups of people based on enumerated grounds including: colour, race, gender, and religious beliefs. It was also argued that the materials incite hatred by advertising the killing of such groups. He found the product in question demeaning and demoralizing towards Christians, Caucasian and women and argued that the materials show a context that is insensitive to upholding a concern and a respect for others.

The complainant’s representatives submitted that the offensive materials are likely to expose a person or class of persons to hatred and contempt and argued that the ill will toward another person or group of persons is best demonstrated by the word “kill” used in the lyrics and argued that there is no stronger word to suggest one’s hatred or contempt for another.

The complainant’s representatives also argue that the CD’s in question are likely to expose a person or persons of a class to hatred or contempt. They argue that the offensive materials were indeed displayed before the public and were fully available and accessible to the public in the retail store.

The complainant argues that **Kane**, (Supra) at page 109, discusses the meaning of “Expose” as defined in the **Taylor (Tribunal)**, (Supra) decision as follows:

“To expose to hatred also indicates a more subtle and indirect type of communication than vulgar abuse or overtly offensive language. ‘Expose’ means: to leave a person unprotected; to leave without shelter or defence; to lay open (to danger, ridicule, censure etc.). In other words, if one is creating the right conditions for hatred to flourish, leaving the identifiable group open or vulnerable to ill-feelings or hostility, if one is putting them at risk of being hated, in a situation where hatred or contempt are inevitable, one then falls within the compass of s. 13(1) of the Human Rights Act.

The complainant argues applying meanings is not necessary to demonstrate that any particular group or individual who have viewed or listened to the offensive CD's have actually directed hatred or contempt towards a Christian or a Caucasian. Instead, due to the fact that the respondent's outlets are exposing their customers to offensive material, there is a reasonable risk of customers viewing the material and reacting so as to transform the propaganda into hatred or contempt against the target groups.

Justice Rooke, in the *Kane*, (Supra) decision determined that in order to find a contravention of the *Act* a two-step process is required. The first consideration should be whether there has been a breach of Section 2(1) and if a breach is found, then the test must go on to balance that breach and the interest of prohibiting discrimination, against the interests of freedom of expression.

The question for this panel firstly, therefore, is whether or not there has been a breach of Section 2(1) and a prima facie case established.

Justice Rooke finds that a flexible approach to determine whether there has been a breach under Section 2(1) is necessary. He finds that the test in the context of Section 2 of the *Act* is not whether the listener has been persuaded, but rather whether the target group is more likely to be exposed to hatred or contempt as a result of the representation.

Justice Rooke directs tribunals to consider a number of factors in relation to the communication, the target group, and the method of publication in order to determine whether the test has been satisfied.

These include:

1. The content of the communication;
2. The tone of the communication;
3. The image conveyed, including whether the use of quotations or reference sources

- give the message more credibility;
4. The vulnerability of the target group;
 5. The degree to which the expressions reinforce existing stereotypes;
 6. The circumstances surrounding the message, including whether the messages appeal to well-publicized issues;
 7. The medium used to convey the message;
 8. The circulation of the publication;
 9. The credibility to be afforded the communications;
 10. The context of publication for example, whether it is part of the debate or whether it is presented as news or as a purportedly authoritative analysis.

Justice Rooke indicates that this list might provide some guidance to human rights tribunals, but it is not exhaustive and the full context of each case will have to be considered to determine whether or not Section 2(1) of the *Act* has been contravened.

It is the decision of this panel that Section 2(1) of the *Act* has not been satisfied given the content alleged. These alleged discriminatory acts are considerate. This panel finds that, while the content and tone of the communications appear on the face of them to be discriminatory, there is very little vulnerability of the target group. The expressions used do not reinforce existing stereotypes, nor do the messages appeal to well-publicized issues. More importantly, however, the medium used to convey the message is extremely suspect, lacks credibility and has a small circulation. The context of

the publication is not presented as a debate or any purportedly authoritative analysis and the target group is not vulnerable as, in order for the group to receive the message, the purchase of these would be by an extremely limited audience and only an audience seeking to receive messages such as those conveyed. The fact that in the case of “Bloody Kisses” the artist himself does not expect to be taken seriously and communicates this willingly to the public, underscores that the content of the communication is not to be taken seriously. Further, the medium used to convey the message in that

context is not one which would be found to be credible by the target audience.

Justice Rooke's decision clearly establishes that the definition of "likely to expose" should focus on the impact of the communication on the target group, specifically whether the communication makes it more likely than not that a target group would be exposed to hatred and contempt. Any test applied to determine whether a representation is likely to expose a person or class of persons to hatred or contempt must be highly contextual and responsive to the legislation.

It is the decision of this panel that there is very little likelihood of a representation to expose a person or class of persons to hatred or contempt in the context of this particular medium which is unlikely to be taken seriously or credibly by the target group.

Justice Rooke, in establishing the framework for the panel, indicates the panel should draw on various factors and considerations including the message which relates to the content, tone, images conveyed, reinforcement of stereotypes and surrounding circumstances. The medium must be considered which includes the credibility, circulation, and context of the publication and the audience which relates to the vulnerability of the target group.

Analyzing the framework, it is the decision of this panel that the message, which includes its content, tone and surrounding circumstances, is highly unlikely to affect the target group. It is further the

decision of the panel that the medium lacks credibility and circulation and is quite unlikely to have any affect on the target group. Further, the context of the songs must be considered as lacking in credibility or reality. The vulnerability of the target group would be extremely limited, if at all and the audience, including the exposed, would be limited in nature and would only come into possession of these particular CD's in an overt act of volition on their own behalf.

It is therefore the position of this panel that there has been no breach of Section 2 of the *Act* by the

respondents in question. Therefore, the panel need not look into the issue of the test of freedom of opinion on this subject.

This panel therefore dismisses the complaints of the complainant.

Lori G. Andreachuk, Q.C.
Panel Chair

May 7, 2003

Beth Bryant
Panel Member

DISSENTING OPINION

It is the decision of this panel member that section 2(1) of the Act has not been satisfied given the actions alleged to the respondents. These alleged discriminatory acts are considerable. I do find that the content and tone of the material in question are discriminatory, and could expose a class of persons to hatred because of race and religious beliefs if promoted. However no evidence was presented that the respondents carried out the actions given in Section 2(1) of the Act.

In fact, evidence submitted by the complainant indicated that for a person to be exposed to the hate material relevant to this hearing, that person would have to search and find the offending compact disc from among a myriad of others, and then request an agent for the respondent to break the container seal and play the lyrics in a special listening booth where only that person would hear the offending material. An alternate exposure method given by the complainant was to again search out the offending disc, purchase it, break the seal, and then either listen to it or search the printed lyrics enclosed to find the hate material. None of these actions are deemed by this panel member to fall within the terms of the Act. I therefore see no requirement to address the issue of freedom of opinion with regard to the offending material, and hereby dismiss the complaints.

May 7, 2003

Colonel Delano Tolley
Panel Member