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IN THE MATTER OF THE *HUMAN RIGHTS CODE,*
RSBC 1996, c. 210 (as amended)

AND IN THE MATTER of a complaint before
the British Columbia Human Rights Tribunal

BETWEEN:

British Columbia Teachers' Federation obo Chilliwack Teachers' Association

COMPLAINANT

AND:

Barry Neufeld

RESPONDENT

AND:

British Columbia Human Rights Commissioner

INTERVENOR

AND:

Attorney General of British Columbia

PURSUANT TO THE *CONSTITUTIONAL QUESTION ACT*

REASONS FOR DECISION
CONSTITIONAL QUESTION

Tribunal Members:	Devyn Cousineau, Ijeamaka Anika, & Robin Dean
Counsel for the Complainant:	Lindsay A. Waddell and Alanna Tom
For the Respondent (oral argument only):	Kari Simpson

Counsel for BC's Human Rights Commissioner:	Sarah Y. Khan, KC, and Eileen Myrdahl
Counsel for the Attorney General of British Columbia:	Fernando de Lima and Lauren Witten
Date of Hearing:	July 4, 2024
Location of Hearing:	Vancouver, BC

I INTRODUCTION

[1] This decision is about whether the province has the ability under the *Constitution Act, 1867* to regulate discriminatory publications made on the internet.

[2] The complaint arises out of statements made by Barry Neufeld during his tenure as an elected Trustee of the Chilliwack Board of Education, about the provincial curriculum on sexual orientation and gender identity. The British Columbia Teachers' Federation [**BCTF**] and the Chilliwack Teachers' Association [**CTA**] bring this complaint on behalf of CTA members who identify as 2SLGBTQ+ [**the Class**] and the former president of the BCTF [together, the **Complainants**]. They allege that Mr. Neufeld's statements discriminated against the Class based on their gender identity, gender expression, and/or sexual orientation in violation of ss. 7 and 13 of the *Human Rights Code*. They further allege that Mr. Neufeld retaliated against the former BCTF president, in violation of s. 43 of the *Code,* by suing him for defamation. The merits of the complaint will be heard in the fall of 2024.

[3] Mr. Neufeld made his statements in person and on the internet. As a preliminary issue, he challenges the constitutionality of s. 7 of the *Code,* prohibiting discriminatory publications, as it applies to his comments on the internet. He argues that the federal government – and not the province – has exclusive constitutional authority to regulate discriminatory publications as part of its telecommunications power, under s. 92(10)(a) of the *Constitution Act, 1867*. He relies on a line of cases from this Tribunal, finding that the internet falls within exclusive federal jurisdiction over telecommunications.

[4] The Attorneys General were given notice of Mr. Neufeld's constitutional question. The Attorney General of Canada declined to participate. The Attorney General of BC made written and oral submissions, as did the parties and BC's Human Rights Commissioner, who is intervening in the complaint. With the exception of Mr. Neufeld, every participant argues that s. 7 regulates discriminatory publications on the internet and, in doing so, falls within the province's constitutional authority to legislate respecting property and civil rights: *Constitution Act, 1867,* s. 92(13).

[5] We agree. Section 7 is, in pith and substance, a law to reduce the personal and social costs of discrimination and to provide a means of redress to persons whose rights have been violated. This falls within the province's constitutional jurisdiction over property and civil rights. Any effects that may flow from provincial regulation of online publications are merely incidental to the federal government's authority over telecommunications. We conclude that s. 7 applies to discriminatory publications on the internet. Therefore, we will decide the merits of the Complainants' allegations about Mr. Neufeld's online publications when the hearing resumes in the fall.

[6] We are grateful to everyone for their excellent submissions.[1]

II DECISION

[7] The purposes of the *Human Rights Code* are to prevent and address discrimination in the province: s. 3. To do this, the *Code* prohibits discriminatory behaviour in specific contexts of vulnerability: *British Columbia (Human Rights Tribunal) v. Schrenk*, 2017 SCC 62 at para. 48. Within this scheme, s. 7 targets publications that perpetrate discrimination and hatred against protected groups. It prohibits the publication of any statement that:

[1] Mr. Neufeld was not represented by legal counsel during the oral hearing of arguments related to jurisdiction. However, he submitted, and we have relied on, legal arguments prepared by his former legal counsel in relation to a petition filed in BC Supreme Court. Ultimately, he did not pursue the constitutional issue in that proceeding: *British Columbia Teachers' Association v. Neufeld,* 2023 BCSC 1460.

> (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 Indigenous identity, race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex, sexual orientation, gender identity or expression, or age of that person or that group or class of persons.

These two subsections address different ways in which publications can operate to exclude, marginalize, and harm people and groups based on their connection with a historically disadvantaged group: *Saskatchewan (Human Rights Commission) v. Whatcott,* 2013 SCC 11 [***Whatcott***] at para. 71; *Oger v. Whatcott (No. 7),* 2019 BCHRT 58 at para. 51.

[8] Mr. Neufeld argues that publications on the internet fall outside the scope of s. 7 of the *Code,* because the internet is within exclusive federal power over telecommunications: *Constitution Act, 1867*, s. 92(10)(a). As a result, he says that statements that he made on Facebook, and which were published exclusively online, cannot be regulated by the province.

[9] This argument calls for a constitutional division of powers analysis. This analysis is grounded in a framework of cooperative federalism that allows for "a fair amount of interplay and indeed overlap between federal and provincial powers": *OPSEU v. Ontario (Attorney General),* [1987] 2 SCR 2 at p. 17. The “dominant tide” of constitutional law in Canada favours “the ordinary operation of statutes enacted by both levels of government”: *Canadian Western Bank v. Alberta*, 2007 SCC 22 at para. 37. Courts and tribunals should, for the most part, restrict themselves to “interpreting statutes of different jurisdictions in the same area, in order to avoid conflict, and applying a doctrine of paramountcy in the few situations which are left”: Professor Paul Weiler, cited in *Canadian Western Bank* at para. 37.

[10] Within this framework, we start with the presumption that provincial human rights legislation is validly enacted: *Jim Pattison Enterprises Ltd. v. British Columbia (Workers Compensation Board),* 2011 BCCA 35 at para. 61; *Scowby v. Glendenning*, [1986] 2 SCR 226 at p. 233. Mr. Neufeld bears the burden of proving otherwise. We are also mindful that the Attorney

General of Canada has not exercised his right to participate in this complaint, signalling that the federal government does not share Mr. Neufeld's concerns about the province's authority to regulate discriminatory speech online. In this circumstance, the Tribunal must exercise caution before invalidating the provincial law: *OPSEU* at pp. 19–20.

[11] The first step of the division of powers analysis is to determine the pith and substance of s. 7: *Canadian Western Bank* at para. 25. If the pith and substance fall wholly within provincial power, then the law is within its constitutional authority ("*intra vires*"). Next, we must consider Mr. Neufeld's argument that the law is inapplicable because of its impacts on an area of federal authority. This engages the constitutional doctrine of interjurisdictional immunity.

A. Pith and substance

[12] The pith and substance analysis has two distinct parts: characterization and classification: *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 [***Greenhouse Gas***] at para. 56. The characterization of a law identifies its true, or dominant, purpose. It looks to the law's legal and practical effects. At the classification stage, we classify that pith and substance according to one or more of the heads of power set out in ss. 91 or 92 of the *Constitution Act*: *Reference re Firearms Act (Can),* 2000 SCC 31 at para. 25.

1. Characterization: Section 7 is a law to address and remedy discrimination

[13] Mr. Neufeld argues that the pith and substance of s. 7 is "to prevent the publication and transmission of discriminatory signs, publications, and hate speech". However, he says that, if it is applied to telecommunications, then s. 7 "amounts to the direct regulation of publications over the internet".

[14] Respectfully, Mr. Neufeld's argument collapses the characterization of s. 7 with its classification under one of the heads of power. By relying on its possible effects on a federal power, Mr. Neufeld reasons backwards to conclude that s. 7 is, at its core, aimed at telecommunications. In doing so, he falls into the risk identified by the Supreme Court of

Canada, that the exercise becomes “blurred and overly oriented towards results”: *Chatterjee v. Ontario (Attorney General),* 2009 SCC 19, at para. 16; *Greenhouse Gas* at para. 56.

[15] The Complainants, Human Rights Commissioner, and Attorney General of BC say that the pith and substance of s. 7 has already been correctly identified by the Tribunal in *Oger.* We agree and adopt the Tribunal’s analysis in that case: paras. 91-104 and 185-200.

[16] The dominant purpose of s. 7 is to reduce "the harmful effects and social costs of discrimination by tackling certain causes of discriminatory activity": *Whatcott* at para. 71. Its “main thrust” is to “reduce the social costs of discrimination and to provide a means of redress to persons whose rights have been violated under that section”: *Oger* at para. 200; see also para. 186. This purpose is consistent with its legal effect, which is to create a mechanism for bringing a complaint about discriminatory publications, having it resolved by the Tribunal, and – where the section is violated – allowing for remedies under s. 37(2) of the *Code*.

[17] This purpose does not change based on the medium of the publication. Mr. Neufeld has not pointed to any intrinsic or extrinsic evidence to support such a proposition.

[18] In fact, the purpose of s. 7 is highly engaged by discriminatory publications on the internet. Courts have recognized the power of the internet to spread harmful information quickly and widely, with very serious consequences: *Hudson v. Myong,* 2020 BCSC 517 at para. 160; see also *Douez v. Facebook Inc.,* 2017 SCC 33 at para. 59. It is “a particularly dangerous mode of publication”: *Pineau v. KMI Publishing and Events Ltd.,* 2021 BCSC 1952 at para. 96. In criminal law, using the internet to disseminate hate speech can be an aggravating factor on sentencing, because “it provides the potential for a wide audience”, with far reaching impacts including “extremism and the potential of mass casualties”: *R. v. Topham,* 2017 BCSC 551 at para. 32; *R. v. Sears,* 2019 ONCJ 607 at para. 27. It is difficult to see how s. 7 could achieve its purpose if it was inapplicable to discriminatory publications on the internet.

[19] Having characterized s. 7, we turn to classification.

2. Classification: Section 7 is a law about civil rights

[20] As the Supreme Court of Canada has recognized, "the great bulk of the protections granted by [provincial human rights] codes would appear to be beyond challenge as being legislation in relation to property and civil rights, or to matters of merely local or private nature": *Scowby* at para. 4. In our view, s. 7 is no exception.

[21] We acknowledge Mr. Neufeld's argument that s. 7 is somewhat unique in the scheme of the *Code*, because of its express and exclusive focus on speech: *Oger* at para. 53. However, this does not transform its pith and substance or its status as a law about civil rights. The Tribunal addressed the issue in *Canadian Jewish Congress v. North Shore News and Collins,* 1997 BCHRT 35:

> Speech (or expression) itself is not explicitly mentioned as a subject matter under ss. 91 or 92; neither is accommodation or employment. However, the regulation of speech through the common law tort of defamation falls within provincial jurisdiction under s. 92(13), as part of the general body of tort law, which concerns the legal rights of persons against each other: *Hogg, supra*, at 958. The province is legislatively competent to modify the substance or procedure for enforcing common law torts, as for example, in the *Libel and Slander Act,* R.S.B.C. 1996, c. 263. By analogy, the fact that a province chooses to regulate some speech by means of an administrative process rather than through the civil litigation process does not, without more, deprive the province of its jurisdiction over speech under s. 92(13). The enforcement may occur in administrative rather than civil form, but generally, as long as it is civil rights that are being enforced, the matter falls within provincial jurisdiction. [para. 42]

[22] The Tribunal's conclusion in *Oger* was to similar effect:

> The province's power to enact human rights legislation stems from its jurisdiction over property and civil rights in the province: *Constitution Act*, 1867, s. 92(13). Section 7 creates civil rights connected to speech which indicates discrimination, or an intention to discriminate, or which is likely to expose people to hatred. This, in my view, falls squarely within the domain of property and civil rights in the province. (para. 201)

[23] We agree. As a law fundamentally about civil rights, s. 7 is within the province's authority to enact legislation regarding property and civil rights. The purpose of the provision, and its status as a law regarding civil rights in BC, does not depend on the medium of the publication at issue.

[24] We are not persuaded by Mr. Neufeld's argument that when s. 7 is applied to online publications, its pith and substance is properly classified under the federal government's power to regulate telecommunications under s. 92(10)(a) of the *Constitution Act*, *1867*. First, the medium of the internet is not, on its own, dispositive of the constitutional issue. Second, the telecommunications power is "exceptional" and focused on the systems of communication rather than its content. Third, any impacts that s. 7 may have on the federal telecommunications power is incidental and does not impact its constitutionality or applicability to online publications. Finally, we decline to follow previous Tribunal authority holding that publications on the internet are exclusively federal.

[25] We explain each of these conclusions in the next sections.

3. The medium does not define legislative jurisdiction

[26] Mr. Neufeld argues that, because s. 7 specifically targets publications, its application to the internet properly falls within the federal power over telecommunications. He argues that "[a]ny law purporting to regulate the *content* of internet publications falls within federal jurisdiction" [emphasis in original]. We cannot agree.

[27] The internet touches nearly all aspects of modern life. It is so pervasive that "that all areas of law, federal and provincial, may potentially present issues within the scope of the medium": Robert Howell, *Canadian Telecommunications Law,* Toronto, Irwin Law, 2011 at pp. 33-34. Professor Robert Howell describes cooperative federalism in the context of the internet as analogous to a garden, in which the "federal footprint" does not cover the whole garden:

> A footprint, however, does not cover an entire garden and the Internet presents a substantial and pervasive garden. There is room to preserve federal exclusivity in the important media or system-related contexts

> without losing the conceptual and policy sophistication of identifying appropriate provincial exclusivity or shared jurisdiction. If an exclusively federal jurisdiction were to be applied to the Internet as categorically has been done with traditional media, a substantial and questionable expansion of federal jurisdiction would be the outcome. This would be entirely inconsistent with the recent emphasis on cooperative federalism. … [pp. 33-34]

[28] In this context, Professor Howell explains that "greater scope will exist for provincial jurisdiction when the conceptual focus moves away from the system or the mode of communication itself and toward issues of content or use or application": *Canadian Telecommunications Law,* Toronto, Irwin Law, 2011 at pp. 33-34. Guy Régimbald and Dwight Newman agree and explain that "civil conduct on the Internet is usually going to be something relating to provincial jurisdiction": *The Law of the Canadian Constitution,* 2nd ed., Toronto, LexisNexis, 2017 at 5.52.

[29] In light of these principles, it is clear that the province has constitutional authority to regulate conduct on the internet when – applying a pith and substance analysis – that conduct falls within an area of provincial authority. The proper analysis is set out in two cases from the Supreme Court of Canada: *Attorney General (Que) v. Kellogg's Co. of Canada et al.,* [1978] 2 SCR 211 [***Kellogg***] and *Irwin Toy v. Quebec (Attorney General),* 1989 1 SCR 927.

[30] In *Kellogg,* Quebec enacted a law prohibiting certain advertisements intended for children. Kellogg argued that, to the extent the law applied to advertisements broadcast on television, the law was outside the province's constitutional authority. The Supreme Court of Canada disagreed. It considered two earlier decisions relied on by Mr. Neufeld: *Re CFRB and Attorney-General for Canada et al.,* [1973] OR 819 (ONCA) (leave to appeal to SCC denied) and *Capital Cities Communications Inc. v. Canadian Radio-Television Commission,* [1978] 2 SCR 141. The Court described the impact of these decisions as limited to "the legislative power to regulate and control broadcast undertakings engaged in the transmission and reception of radio or television signals": p. 222. It distinguished that issue from the circumstance where a province enacted legislation aimed at "controlling the commercial activity" of a company: p. 225. It found that the medium alone cannot be determinative, reasoning:

> Kellogg is not exempted from the application of restriction upon its advertising practices because it elects to advertise through a medium which is subject to federal control. A person who caused defamatory material to be published by means of a televised program would not be exempted from liability under provincial law because the means of publication were subject to federal control. Further, he could be enjoined from repeating the publication. In my opinion the position of Kellogg in relation to this regulation is analogous. **It cannot justify conduct which has been rendered illegal because it is using the medium of television**. [emphasis added, p. 225]

[31] Similarly, in *Irwin Toy,* the Court found that legislation prohibiting television advertising aimed at children was enacted in relation to the province's power over consumer protection and not a "colourable attempt" to "legislate in relation to television advertising". Again, the medium was not determinative of the dominant or true purpose of the law, or which level of government had jurisdiction.

[32] Since *Kellogg* and *Irwin Toy,* courts have upheld provincial authority to regulate conduct within their legislative jurisdiction, even where the internet is used as a medium: see e.g. *Reid v. Court of Québec,* 2003 CanLII 17980 (QC CS) (commercial internet publications); *Quebec (Attorney General) c. 156158 Canada Inc. (Boulangerie Maxie's),* 2015 QCCA 354 (language laws). In other cases, provincial jurisdiction is acknowledged without challenge: e.g. *Douez* (privacy); *Hudson* at para. 105 (defamation); *Pineau* at para. 96 (defamation); *AB v. CD,* 2020 BCCA 11 at para. 177 (family law); *Griffin v. Sullivan,* 2008 BCSC 827 (privacy law); *Severs v. Hyp3R Inc.,* 2021 BCSC 2261 (class action for breach of *Privacy Act* and tort of intrusion). Indeed, we note as an aside that Mr. Neufeld availed himself of provincial jurisdiction over defamation to sue the former BCTF President for statements that he made on the internet: *Hansman v. Neufeld,* 2023 SCC 14 at para. 3.

[33] In the human rights context, the Federal Court has rejected the proposition that the medium of the internet is determinative of legislative jurisdiction. In *Papouchine v. Best Buy Canada,* 2018 FC 1236, the Court upheld the Canadian Human Rights Tribunal's decision finding that the province had jurisdiction over Best Buy's online commerce. The Court rejected the argument that Best Buy's use of the internet was dispositive of the jurisdictional question: "The

fact that Best Buy uses its website as a sales tool, or in the case at hand used email as a communications tool, cannot be determinative of the jurisdictional question": paras. 25 and 27.

[34] In our view, the same reasoning applies here. Mr. Neufeld is not exempt from provincial law prohibiting discriminatory publications because he is using the internet.

[35] Indeed, Mr. Neufeld concedes that the Tribunal has jurisdiction over conduct on the internet which is related to other areas regulated by the *Code,* including employment, services, and tenancy. We agree with BC's Human Rights Commissioner that there is no principled basis to treat s. 7 differently from these other sections*,* in order to carve internet publications from its scope. All areas protected by the *Code* are "contexts of vulnerability" warranting protection from discrimination: *Schrenk* at paras. 48-49.

[36] There are circumstances where a provincial law purporting to regulate conduct on the internet will be outside its constitutional authority. For example, in *Procureur général du Québec c. Association canadienne des télécommunications sans fil,* 2021 QCCA 730*,* the Quebec Court of Appeal concluded that a provincial law aimed at online gaming was not, in pith and substance, about consumer protection. Rather, its purpose and effect were to "regulate, control and significantly intrude in the management by [internet service providers], which are federal undertakings, of their modes and systems for emitting, receiving and transmitting Internet signals": para. 123. This fell within federal power over telecommunications. Importantly, however, the medium alone was not determinative. The Court cited Robert Howell's observation that "Any regulation of [the Internet] **as a communications system** is almost certainly a federal jurisdiction": *Canadian Telecommunications Law,* Toronto, Irwin Law, 2011, p. 33 [cited at para. 121, emphasis added]. At the same time, it recognized that "much regulation concerning conduct on the internet will actually be provincial" and "exclusive federal jurisdiction over telecommunications would not defeat validly enacted provincial legislation regulating certain transactions or conduct on the Internet, such as pursuant to the provincial jurisdiction over property and civil rights": paras. 121-122.

[37] Given the ubiquity of the internet, and how deeply entrenched it is in almost every aspect of our daily lives, Mr. Neufeld's argument that the federal power over telecommunications subsumes "regulation of content" would have constitutional implications across many areas of provincial law, including family law, defamation, consumer transactions, elections law, and privacy law. Provincial legislation like the *Intimate Images Protection Act* – targeting the circulation of intimate images on the internet – would be invalid. We agree with the Attorney General of BC that this reasoning, and its outcome, would seriously entrench on the province's authority over property and civil rights, leading to absurd results with adverse consequences for how people access justice. It is "untenable".

4. Section 7 does not regulate telecommunications

[38] Mr. Neufeld's argument is also inconsistent with the scope of the federal government's power over telecommunications.

[39] Federal power over telecommunications is grounded in s. 92(10)(a) of the *Constitution Act*, *1867*. That section identifies exemptions to the provincial power over "local works and undertakings", including:

> Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province.

[40] Federal power under this provision is "exceptional and should be treated as such": *Consolidated Fastfrate Inc. v. Western Canada Council of Teamsters,* 2009 SCC 53 at para. 68. It has been interpreted to include the authority to regulate:

a. "radio communication, including the transmission and reception of signs, signals, pictures and sounds of all kinds by means of Hertzian waves… including the right to determine the character, use and location of apparatus employed": *Quebec (Attorney General) v. Canada (Attorney General),* [1932] JCJ No. 1.

b. "the operation of cable distribution systems through which television signals were captured and transmitted to subscribers": *Public Service Board et al. v. Dionne et al.,* [1978] 2 SCR 191.

c. access to, and the ability to construct, telecommunications infrastructure (such as the construction of conduits, laying cables, or erecting telephone poles along streets and highways): *Corporation of the City of Toronto v. Bell Telephone Company of Canada,* [1905] AC 52.

d. "the planning, construction, management, location, use and upkeep of telecommunication networks, as well as the decision whether or not to keep them in place": *Calgary v. Bell Canada Inc.,* 2020 ABCA 211 at para. 94.

e. "modes and systems for emitting, receiving and transmitting Internet signals" by internet service providers: *Procureur général du Québec* at para. 123.

[41] We agree with the Attorney General of BC that the unifying theme of these cases is to "limit exclusive federal jurisdiction to functional and operational aspects of telecommunications, focused on the regulation of the planning, construction, management, location, use and upkeep of telecommunication networks". It is an exception to local regulation and does not purport to capture all possible matters relating to telecommunications.

[42] Mr. Neufeld's argument does not engage directly with the pith and substance analysis. It does not identify a dominant purpose of s. 7 in its application to online publications that falls under the telecommunications power. As we have said, there is no evidence to support that, when applied to online publications, the dominant purpose or legal effect of s. 7 transforms to be the regulation of functional or operational aspects of the internet. As such, it is not properly classified under s. 92(10)(a) of the *Constitution Act, 1867.*

5. Any impacts on telecommunications are incidental

[43] Within a framework of cooperative federalism, incidental effects on matters beyond the legislature's jurisdiction are "proper and to be expected", and do not disturb its

constitutionality: *Canadian Western Bank* at para. 28; *Global Securities Corp. v British Columbia (Securities Commission),* 2000 SCC 21 at para. 23. "Incidental" means "effects that may be of significant practical importance but are collateral and secondary to the mandate of the enacting legislature": *Canadian Western Bank* at para. 28.

[44] Mr. Neufeld has not identified any specific ways that applying s. 7 to online publications would impact the federal government's power to regulate telecommunications. Rather, his argument appears to focus on the federal government's decision to enact, and repeal, a section in the *Canadian Human Rights Act* respecting internet hate speech. The Supreme Court of Canada considered that provision in *Canada (Human Rights Commission) v. Taylor,* [1990] 3 SCR 892, finding that it did not violate the *Charter's* guarantee of free expression. Subsequently, the Canadian Human Rights Tribunal held that the provision applied to speech on the internet: *Citron v. Zündel (No. 4),* 2002 CanLII 78205*; Warman v. Kyburz,* 2003 CHRT 18; *Warman v. Wilkinson,* 2007 CHRT 2.

[45] However, the fact that the Canadian government has legislated about hate speech on the internet, and the Canadian Human Rights Tribunal has adjudicated cases under that legislation, cannot be determinative of the constitutional issue in this case: *Quebec (Attorney General) v. Canadian Owners and Pilots Association,* 2010 SCC 39 at paras. 53 and 60. There is overlap in the human rights protections in nearly all areas of life regulated by the legislation, including services, employment, and housing. The law has developed principles that help to draw jurisdictional lines between the respective human rights bodies. This includes the functional analysis for determining whether an entity's human rights obligations are federally regulated, and the test of "sufficient connection" to determine whether the facts in a complaint are sufficiently connected to BC to ground this Tribunal's jurisdiction: *NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union,* 2010 SCC 45; *MacLeod v. Ravenspur Developments and Watson,* 2008 BCHRT 306. For example, during the hearing, Mr. Neufeld's advocate submitted a screening letter from the Tribunal, in which the Tribunal declined to proceed with a s. 7 complaint against the Canadian Broadcasting Company. This may be an example where the Tribunal determined it did not have jurisdiction over a federally

regulated entity. It is not an example of s. 7 being constitutionally invalid or inapplicable to communications on the internet.

[46] The fact that the federal government has, at times, also legislated human rights protections against online hate speech is not evidence that s. 7 has any impact on the federal government's telecommunications power. If, in future, there were a constitutional conflict between federal and provincial laws regarding online discriminatory speech, that conflict would most likely be resolved through the doctrine of paramountcy.

[47] To the extent that applying s. 7 to online speech has any impact on federal jurisdiction (and it is not clear that it does), the impact is merely incidental, in the same way as provincial law regarding defamation, privacy, consumer protection, elections law, employment, housing, commerce, or family law: see e.g. *Kellogg; Irwin Toy*. It does not affect the constitutionality of s. 7's application to discriminatory publications on the internet.

6. Earlier Tribunal authorities are not persuasive

[48] We have concluded that s. 7 is constitutionally applicable to discriminatory publications on the internet. As a result, the Tribunal will hear the Complainants' allegations that Mr. Neufeld's internet publications were discriminatory. In doing so, we acknowledge that we are departing from a line of Tribunal authority which has held that the Tribunal does not have jurisdiction to hear complaints about conduct on the internet: see e.g. *Strikes with a Gun v. Patel,* 2006 BCHRT 367; *Elmasry and Habib v. Roger's Publishing and MacQueen (No. 4),* 2008 BCHRT 378; *Fossum v. Society of Notaries,* 2009 BCHRT 392; *Paquette v. Amaruk Wilderness and another (No. 4),* 2016 BCHRT 35; *Cristiano v. Canadian Society of Immigration Consultants,* 2016 BCHRT 175; and *Elson v. Facebook Inc.,* 2021 BCHRT 155.[2]

[49] These cases are not binding: *Canada (Minister of Citizenship and Immigration v. Vavilov,* 2019 SCC 65 at paras. 129. Further, in our very respectful view, they are not persuasive on the

[2] We note that the issue in these cases was not the constitutional validity of the legislation, but the Tribunal's jurisdiction to hear a particular complaint. Though these are, to some extent, distinct issues, they drive at the same point: whether a complaint arises in respect of a matter "coming within the legislative authority of Parliament" for the purpose of triggering the jurisdiction of the *Canadian Human Rights Act*, s. 2; *NIL/TU,O* at para. 12.

issue because they do not engage in a division of powers analysis before concluding that conduct on the internet falls outside provincial legislative jurisdiction.

[50] The most substantive reasoning on this issue was set out in *Elmasry.* The complaint was about an article published in Maclean's magazine, both in print and online. At the screening stage of its process, without submissions from the parties, the Tribunal declined to proceed with the allegations about the online article on the basis that it did not have jurisdiction. The Tribunal explained this decision later, in four paragraphs in its final decision. In doing so, the Tribunal did not engage in a constitutional analysis. Rather, it identified s. 92(10) of the *Constitution Act, 1867*, and concluded:

> A transportation or communication undertaking is subject to regulation by only one level of government. As a result, once classified as interprovincial, all of an undertaking's services are subject to federal jurisdiction. [paras. 46 and 47]

[51] It appears that the "undertaking" the Tribunal was referring to is "communication over the internet": para. 50. This reasoning does not reflect the pith and substance analysis, or the principles of cooperative federalism. It does not consider the scope and content of the federal government's powers under s. 92(10)(a), to explain how s. 7's application to discriminatory publications on the internet falls within that "exceptional" power: *Consolidated Fastrate* at para. 68. Alternatively, it does not explain how applying s. 7 to discriminatory publications on the internet impairs the "essential and vital elements" of a federal undertaking so as to render it inapplicable: *Canadian Western Bank* at para. 51.

[52] The Tribunal in *Elmasry* cited cases from the Canadian Human Rights Tribunal, finding that the federal tribunal had jurisdiction over allegations of hate speech on the internet. However, none of those cases concerned the division of powers issue, or the respective powers of federal and provincial governments to regulate discriminatory speech online: *Schnell v. Machiavelli and Associates Emprize Inc. (No. 2)* (2002), 41 CHRR D/274 (CHRT); *Citron;* and *Warman.* They are not helpful to, much less determinative of, the analysis.

[53] Following *Elmasry,* the Tribunal has cited its reasoning for the proposition that it does not have jurisdiction over internet communications. For example, in *Fossum*, the Tribunal relied on *Elmasry* to dismiss allegations about a publication on the respondent's website: at paras. 22-23.

[54] Next, in *Paquette*, the Tribunal acknowledged the case law holding that "internet communications" were under federal jurisdiction, but found that law inapplicable to direct internet communications regarding an application for employment: paras. 84-85. It reasoned that such communications were "no different than a letter (the mail) or a telephone conversation (telecommunications) ... indeed such communications take place every day and the civil courts of this Province have no difficulty exercising jurisdiction over the disputes arising therefrom": *Paquette*, at paras. 84-85. We agree with the Complainants' submission that this distinction is unprincipled and untenable:

> There is no principled reason to distinguish person-to-person communications that occur online on the basis that the same communications could have happened by some other mode of communication, while also attempting to abide by the conclusion in *Elmasry* that all internet communication comes under federal jurisdiction simply because of the mode of communication or publication used.

[55] The issue in *Cristiano* was slightly different. The respondent was a federally-incorporated society which ran an online training academy: para. 6. The Tribunal concluded that it had no jurisdiction over the complaint, reasoning:

> The education delivered by [the respondent] is delivered via the Internet, and in no other way. It must be concluded that the Internet is an integral and essential aspect of its operation. Thus, it appears to me that CSIC's operation is under federal jurisdiction. [para. 34]

Again, there is no constitutional analysis to support the underlying assumption that "the Internet is under federal jurisdiction": para. 11. Further, the Tribunal's reasoning suggests that the jurisdictional issue turned on a finding that the respondent was classified as a federal undertaking, rather than federal jurisdiction over the "internet". This reasoning could not apply here, because there is no suggestion that Mr. Neufeld is a federally-regulated entity.

[56] After this Tribunal dismissed her complaint, Ms. Cristiano brought her complaint to the Canadian Human Rights Tribunal and the Ontario Human Rights Tribunal. The Canadian Tribunal applied the Supreme Court of Canada's functional analysis to determine whether the respondent's services were federally regulated, and concluded they were not: *NIL/TU,O*. The Ontario Human Rights Tribunal agreed that the respondent was not federally regulated and, in doing so, expressly disagreed with the BC Tribunal's reasoning: *Cristiano v. PDLES*, 2022 HRTO 812 at para. 24. We respectfully agree with this critique. In the result, we do not find that this Tribunal's decision in *Cristiano* is persuasive on the issue that we must decide.

[57] Finally, in *Elson*, the Tribunal cited *Elmasry, Fossum, Cristiano, Citron,* and two Ontario human rights cases to conclude:

> … whether content published exclusively on the internet is discriminatory falls within federal jurisdiction, and … when a business provides services exclusively over the internet, complaints of discrimination in provision of the services … or in employment with the business … fall within federal jurisdiction. [para. 27, citations omitted]

[58] The reasoning in *Elson* is founded on a line of authorities we are not persuaded to follow. The Tribunal does not undertake either a division of powers analysis to determine whether the section is constitutionally valid or a functional analysis to determine whether Facebook is a federal undertaking, such that a human rights complaint about its services is federally regulated: *NIL/TU,O*; *D.L. v. BC Ministry of Children and Family Development and others (No. 3),* 2021 BCHRT 35 at paras. 11-13. In the absence of a constitutional analysis, we do not find the outcome of *Elson* to be persuasive and we decline to follow it in this case.

[59] In sum, none of the Tribunal's previous cases, cited by Mr. Neufeld, engage in a division of powers analysis before concluding that conduct on the internet falls outside provincial jurisdiction. Rather, in each case, the Tribunal effectively reasons that "communication over the Internet is under federal jurisdiction and … as a result, the Tribunal does not have jurisdiction": *Elmasry* at para. 50; see also *Strikes with a Gun* at paras. 17-18; *Fossum* at para. 23. For the reasons set out above, we decline to follow these authorities to conclude that Mr. Neufeld's online speech is outside the proper scope of s. 7.

7. Pith and substance: Conclusion

[60] In sum, we find that the pith and substance of s. 7 is to reduce the personal and social costs of discrimination and to provide a means of redress to persons whose rights have been violated. This purpose does not change when applied to publications on the internet. It is a law fundamentally about civil rights and falls within provincial jurisdiction over property and civil rights. We find that s. 7 is constitutionally valid as it applies to online publications.

[61] Next, we consider Mr. Neufeld's argument that s. 7 is inapplicable or inoperative in respect of online speech because of the doctrine of interjurisdictional immunity.

B. Interjurisdictional immunity

[62] There are limited circumstances where a provincial law so profoundly impairs the core of a federal power that it is inoperable to the extend of that impairment. This is called the doctrine of interjurisdictional immunity. Mr. Neufeld argues that this doctrine applies to make s. 7 inoperative regarding internet communications.

[63] The doctrine of interjurisdictional immunity is one of "limited application", which should generally only be applied in "situations already covered by precedent": *Canadian Western Bank* at para. 77. The onus is on Mr. Neufeld to demonstrate that it applies here: *Canadian Western Bank* at para. 83.

[64] Given our analysis above, we conclude that it is not necessary to resort to the doctrine of interjurisdictional immunity. Section 92(10)(a) does not grant the federal government exclusive jurisdiction to regulate speech on the internet. Rather, as we have described, it is a power aimed at the **systems** of telecommunications and not necessarily their content. Section 7 does not impact this power, much less to impair its "basic, minimum and unassailable" aspects: *Bell Canada v. Quebec (Commission de la Santé et de la Sécurité du Travail),* [1988] 1 SCR 749 at para. 254; *Jim Pattison Enterprises* at para. 125.

[65] Mr. Neufeld has not persuaded us that s. 7 of the *Code* impairs the core of the federal government's authority in a way to trigger the doctrine of interjurisdictional immunity. We find

that s. 7 is constitutionally valid and operative regarding allegations of discriminatory publications on the internet.

III CONCLUSION

[66] We conclude that the application of s. 7 of the *Code* to discriminatory publications on the internet is within provincial jurisdiction. The Complainants' allegations regarding Mr. Neufeld's online speech will be decided on their merits, at a hearing.

Devyn Cousineau
Vice Chair

I AGREE: Ijeamaka Anika, Tribunal Member

I AGREE: Robin Dean, Tribunal Member