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IN THE MATTER OF THE *HUMAN RIGHTS CODE*
R.S.B.C. 1996, c. 210 (as amended)

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

B E T W E E N:

Mohamed Elmasry, on behalf of Muslim residents of the Province of British Columbia, and Naiyer Habib

COMPLAINANTS

A N D:

Roger's Publishing Ltd. and Ken MacQueen

RESPONDENTS

A N D:

Canadian Civil Liberties Association, British Columbia Civil Liberties Association, Canadian Arab Federation, and Canadian Association of Journalists

INTERVENORS

REASONS FOR DECISION

Tribunal Panel:	Heather M. MacNaughton, Tonie Beharrell and Kurt Neuenfeldt
Counsel for the Complainants:	Faisal Joseph
Counsel for the Respondents:	Roger D. McConchie, Julian Porter Q.C. and Allan McConchie

Counsel for the British Columbia Civil Liberties Association and the Canadian Association of Journalists:	Jason Gratl and Megan Vis-Dunbar
Counsel for the Canadian Civil Liberties Association:	Noa Mendelsohn Aviv
On behalf of the Canadian Arab Federation (Written Submissions Only):	Khaled Mouammar
Dates of Hearing:	June 2-6, 2008 Written submissions followed.

I INTRODUCTION

[1] Dr. Mohamed Elmasry, on behalf of all Muslim residents of British Columbia, and Dr. Naiyer Habib, each filed a complaint with the Tribunal. Dr. Elmasry is the National President of the Canadian Islamic Congress and Dr. Habib is a cardiologist from Abbotsford, British Columbia. The complaints relate to an article written by Mark Steyn and published by Roger's Publishing Ltd. and its publisher Ken MacQueen, in the October 23, 2006 edition of Maclean's magazine (the "Article"). The respondents will be collectively referred to throughout this decision as Maclean's.

[2] Entitled "*The New World Order*", the text of the Article has been reproduced as an appendix to this decision. The Article is an excerpt from *America Alone*, a book written by Mr. Steyn. In brief, the Article concerns Mr. Steyn's view that Muslims, adherents of the religion of Islam, have serious global ambitions for world religious domination, which they will be assisted in achieving by demographically outnumbering the populations in traditional Western cultures and, if necessary, by the use of violence.

[3] The cover page for the Maclean's issue, in which the Article was published, depicts a group of women all fully clothed in black burkhas so that their faces are not visible. Among them is a young girl whose face is exposed.

[4] The complaints are virtually identical and allege that the Article exposes Muslims in British Columbia to hatred and contempt, on the basis of their religion, in breach of s. 7(1)(b) of the *Human Rights Code*.

[5] In this decision, we first explore the importance of the issues raised by these complaints. We then explain the Tribunal's processes and what we view as the themes of the Article. We set out some of the case commentary on the importance of the competing rights engaged in these complaints and the case law dealing with hate publication provisions. We determine the test we will apply to the evidence and then review the evidence and reach our conclusions.

II DECISION

[6] The panel has concluded that the complaints must be dismissed. The complainants have not met their burden of demonstrating that, read in its context, the Article breaches s. 7(1)(b) of the *Code.* That is because the complainants have not shown that the Article rises to the level of hatred and contempt, as those terms have been defined by the Supreme Court of Canada, to breach s. 7(1)(b) of the *Code.*

III THE IMPORTANCE OF THE ISSUES IN THIS CASE

[7] This case raises issues of importance to all Canadians, including Muslim Canadians, and to Canada's print journalists and publishers. The issues require us to look at two important values of our democracy, the *Code* and constitutionally protected right to live in a society that is free from discrimination, and the constitutionally protected right to freedom of speech. The Tribunal is therefore engaged in balancing two important and potentially competing rights. Not surprisingly, the balance that must be struck between those two rights is controversial and is the subject of legitimate and healthy debate within Canada. Cases such as this allow Canadians to explore that debate in a contextual and fact-specific way. The debate, however, is not new. The freedoms it engages have been the subject of a number of comments by the Supreme Court of Canada, some of which will be considered in this decision.

IV THE TRIBUNAL'S PROCESSES

[8] As a result of significant legislative amendments to the *Code*, proclaimed in effect on March 31, 2003, the British Columbia legislature made the Tribunal a direct access tribunal, the first of its kind in Canada. Complainants who believe that their human rights have been violated may file a complaint directly with the Tribunal. Upon receipt of a complaint, the Tribunal engages in a process called "screening". During screening, the Tribunal determines whether a complaint alleges facts that, if proven, could contravene the *Code.* The threshold is necessarily a low one, requiring that a complaint is based on more than conjecture or speculation. The Tribunal also determines whether it has jurisdiction over the subject matter of the complaint, and the complaint is timely. Once

screened, the Tribunal will provide the respondents with a copy of the complaint and they will be asked to respond to it.

[9] Pursuant to the *Code*, the Tribunal does not initiate complaints nor can it refuse to accept a timely complaint of discrimination that is within its jurisdiction. The Tribunal cannot investigate complaints and will not dismiss a complaint without receiving submissions from both parties, almost always on application by a respondent.

[10] Respondents may apply to the Tribunal to dismiss a complaint, in advance of a hearing, on one of the grounds set out in s. 27 of the *Code*. Parties may also voluntarily participate in Tribunal-assisted settlement meetings to try to resolve the issues in a complaint before a hearing.

[11] In this case, Maclean's did not apply to dismiss the complaints under s. 27 in advance of the hearing. Maclean's filed responses to the complaints, denying that the Article was likely to expose Muslims to hatred or contempt because of their religion and making three alternative arguments. Maclean's said that the Article was "defensible as fair comment on a subject of public interest, … that statements of fact made in [it] are true, or alternatively [that the Article] was published on an occasion of public privilege, qualified or otherwise, on a subject of public interest."

[12] Maclean's chose to call no evidence at the hearing. As a result, the Tribunal did not hear from Mr. Steyn as to the Article's content, its truth, his reasons for writing it, or the basis for the opinions he expressed in it. Nor did it hear from Mr. MacQueen or anyone else on Maclean's editorial staff as to its decision to publish the Article or their view of its contents.

[13] The Tribunal received five requests for intervenor status. The Canadian Association of Journalists, the BC Civil Liberties Association, the Canadian Civil Liberties Association and the Canadian Arab Federation were granted status to make submissions with respect to the appropriate interpretation and application of s. 7 in the context of the protection of freedom of expression. Professor John Miller was denied intervenor status. All but the Canadian Arab Federation were granted permission to make oral, and file written, submissions. The Canadian Arab Federation sought and was granted permission to file written submissions only. (See: *Elmasry and Habib v. Roger's*

Publishing and MacQueen, 2008 BCHRT 199; *Elmasry and Habib v. Roger's Publishing and MacQueen (No. 2)*, 2008 BCHRT 201; and *Elmasry and Habib v. Roger's Publishing and MacQueen (No. 3)*, 2008 BCHRT 2002). The panel has considered all of the submissions filed by the intervenors.

[14] The Tribunal heard evidence from five witnesses on behalf of the complainants: Khurrum Awan, an articling student from Ontario who, along with others and on behalf of the Canadian Islamic Congress, assisted in drafting the complaints; Dr. Naiyer Habib, one of the complainants; and experts Drs. Andrew Rippin, Mahmoud Ayoub and Faiza Hirji. While we do not refer to all of the witnesses' evidence in this decision, we have considered it.

V THE THEMES OF THE ARTICLE WHICH GAVE RISE TO THESE COMPLAINTS

[15] As noted above, the Article is appended to this decision. For ease of reference, we summarize its five primary themes. The first is based on demographic concerns because, in the author's words:

> it is the most basic root of all. A people that won't multiply can't go forth or go anywhere. Those who do will shape the age we live in. Demographic decline and the unsustainability of the social democratic state are closely related.

[16] The essence of the author's argument, as it relates to Muslims, is that the Muslim population of Europe, through higher birthrates, is expanding at a much faster rate than domestic European populations. Muslim populations are, as a result, younger.

[17] Second, Europe's reliance on social democracy has made European populations weak and vulnerable. As the author puts it: "Islam has youth and will, Europe has age and welfare." The essence of this theme is that the rise of social democratic states has led to a complacency which will allow Muslims to influence European laws and culture.

[18] Third, the author claims that "Islam has serious global ambitions and [Islam] forms the primal, core identity of most of its adherents." The essence of this theme is that at its core, Islam seeks world religious domination and that to its adherents Islam is more important than national identity and loyalty.

[19] Fourth, the author argues that "[t]he modern multicultural state is too watery a concept to bind huge numbers of immigrants to the land of their nominal citizenship. So they look elsewhere and find the jihad." The essence of this theme is that Muslim immigrants do not identify with their European countries of residence and that violence or armed struggle is more likely to bind them.

[20] Finally, "[o]n the continent the successor population is already in place and the only question is how bloody the transfer of real estate will be. … Native populations are aging and fading and being supplanted remorselessly by a young Muslim demographic." In some ways, this theme is the culmination of the effect predicted by the author of the other four.

VI THE STATUTORY BASIS FOR THE COMPLAINTS

[21] These complaints are brought under s. 7(1)(b) of the *Code*, which provides:

> 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
>
> …
>
> (b) is likely to expose a person or a group or class of persons to hatred or contempt.

[22] The "hatred or contempt" wording in s. 7(1)(b) is not new to the *Code.* It first appeared, in identical words, in a human rights statute in British Columbia in 1993 when a predecessor section in the then *Human Rights Act*, S.B.C. 1984, c. 22 was repealed and the statute amended to include s. 2(1)(b).

[23] There have only been a few cases decided under s. 7(1)(b) or the earlier s. 2(1)(b). However, the application of the section, like similar sections in the federal and other provincial human rights statutes, and a somewhat similar provision in the *Criminal Code*, has been controversial. The concern is that such a section will unjustifiably limit the right to freedom of expression, which is constitutionally guaranteed in s. 2 of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B

to the *Canada Act*, 1982 (U.K.), 1982, c. 11 (the "*Charter*"). Section 2(b) provides as follows:

> 2. Everyone has the following fundamental freedoms:
>
> …
>
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

[24] Section 1 of the *Charter* imposes a permissible limit on all of the rights and freedoms in the *Charter*, including s. 2. It provides:

> The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[25] Maclean's, while saying that it questioned the constitutional validity of s. 7(1), did not bring a constitutional challenge before the British Columbia courts. Nor did they do so before the Tribunal because of s. 45(1) of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 (the "*ATA*"), which is made applicable to the Tribunal by virtue of s. 32 of the *Code*. Section 45(1) of the *ATA* provides:

> The [Human Rights T]ribunal does not have jurisdiction over constitutional questions relating to the *Canadian Charter of Rights and Freedoms.*

[26] Instead, as discussed above, Maclean's chose to defend against the complaints on the basis that the Article did not breach s. 7(1)(b) of the *Code*.

[27] The BC Civil Liberties Association, the Canadian Association of Journalists, and the Canadian Civil Liberties Association also questioned the constitutional validity of s. 7(1), but did not argue that matter before the Tribunal.

VII THE NATURE OF THE COMPETING RIGHTS

[28] As we have said, this case engages two competing and fundamentally important rights, one enshrined in the *Charter* and the other enshrined both in the *Charter* and in the *Code.* It is helpful to consider what the Supreme Court of Canada has said about the importance of both of these rights.

A. The Importance of Freedom of Speech or Expression

[29] In *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, the Supreme Court of Canada considered whether Quebec legislation prohibiting commercial advertising directed at children violated s. 2(b) of the *Charter*, and if so, whether the limitation was justified under s. 1 of the *Charter*. The majority emphasized the importance of freedom of expression and said:

> … Freedom of expression was entrenched in our Constitution and is guaranteed in the Quebec *Charter* so as to ensure that everyone can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream. Such protection is, in the words of both the Canadian and Quebec Charters, "fundamental" because in a free, pluralistic and democratic society we prize a diversity of ideas and opinions for their inherent value both to the community and to the individual. … (para. 41)

[30] Then, in *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, the Supreme Court considered whether a statutory provision restricting the publication of certain information obtained in matrimonial proceedings and at pre-trial stages of civil actions violated s. 2(b) of the *Charter*, and if so, whether the legislation was justified under s. 1. The Court once again emphasized the importance to our democratic society of freedom of expression:

> It is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression. Indeed a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions. The concept of free and uninhibited speech permeates all truly democratic societies and institutions. The vital importance of the concept cannot be over-emphasized. … (para. 3)

[31] In *R. v. Keegstra*, [1990] 3 S.C.R. 697, the Court considered whether the hate speech sections of the *Criminal Code* infringed the guarantee of freedom of expression in s. 2(b) of the *Charter*. The Court discussed the importance of the guarantee of freedom of expression to our constitutional democracy and said:

> That the freedom to express oneself openly and fully is of crucial importance in a free and democratic society was recognized by Canadian courts prior to the enactment of the *Charter*. … freedom of expression was seen as an essential value of Canadian parliamentary democracy …

> …[W]ith the *Charter* came not only its increased importance, but also a more careful and generous study of the values informing the freedom.
>
> … the reach of s. 2(b) is potentially very wide, expression being deserving of constitutional protection if "it serves individual and societal values in a free and democratic society". In subsequent cases, the Court has not lost sight of this broad view of the values underlying the freedom of expression, though the majority decision in *Irwin Toy* perhaps goes further towards stressing as primary the "democratic commitment" said to delineate the protected sphere of liberty (p. 971). Moreover, the Court has attempted to articulate more precisely some of the convictions fueling the freedom of expression, these being summarized in *Irwin Toy* (at p. 976) as follows: (1) seeking and attaining truth is an inherently good activity; (2) participation in social and political decision-making is to be fostered and encouraged; and (3) diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated in a tolerant and welcoming environment for the sake of both those who convey a meaning and those to whom meaning is conveyed. (paras. 25-27)

[32] The Supreme Court of Canada recently summarized the scope of s. 2(b) in *Montréal (City) v. 2952-1366 Québec Inc.*, [2005] 3 S.C.R 141, as follows:

> The fact that [a] message may not, in the view of some, have been particularly valuable, or may even have been offensive, does not deprive it of s. 2(b) protection. Expressive activity is not excluded from the scope of the guarantee because of its particular message. Subject to objections on the ground of method or location, as discussed below, all expressive activity is presumptively protected by s. 2(b) … (para. 58)

[33] We turn now to consider what the courts have said about the importance of the equality rights protected in the *Charter* and the *Code.*

B. The Equality Rights Protection in the Charter

[34] Section 15(1) of the *Charter* guarantees the right of all Canadians to the equal protection and benefit of the law without discrimination. It provides:

> 15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[35] In discussing the importance of the guarantee in s. 15(1), the Supreme Court of Canada said in *Vriend v. Alberta*, [1998] 1 S.C.R. 493:

> The rights enshrined in s. 15(1) of the Charter are fundamental to Canada. They reflect the fondest dreams, the highest hopes and finest aspirations of Canadian society. When universal suffrage was granted it recognized to some extent the importance of the individual. Canada by the broad scope and fundamental fairness of the provisions of s. 15(1) has taken a further step in the recognition of the fundamental importance and the innate dignity of the individual. That it has done so is not only praiseworthy but essential to achieving the magnificent goal of equal dignity for all. It is the means of giving Canadians a sense of pride. In order to achieve equality the intrinsic worthiness and importance of every individual must be recognized regardless of the age, sex, colour, origins, or other characteristics of the person. This in turn should lead to a sense of dignity and worthiness for every Canadian and the greatest possible pride and appreciation in being a part of a great nation. (para. 67)

[36] Thus, Muslim Canadians or other minority groups, when confronting state action which might be discriminatory, can have recourse to the s. 15 equality guarantee. The *Charter* also recognizes Canada's commitment to multiculturalism in s. 27:

> 27. This *Charter* shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

C. The Importance of the Anti-Discrimination Protections in Human Rights Legislation

[37] The *Code*, which is a remedial, not a punitive statute, has a number of important purposes. They are set out in s. 3 as follows:

> (a) to foster a society in British Columbia in which there are no impediments to full and free participation in the economic, social, political and cultural life of British Columbia;
>
> (b) to promote a climate of understanding and mutual respect where all are equal in dignity and rights;
>
> (c) to prevent discrimination prohibited by this *Code*;
>
> (d) to identify and eliminate persistent patterns of inequality associated with discrimination prohibited by this *Code*;
>
> (e) to provide a means of redress for those persons who are discriminated against contrary to this *Code*.

[38] As the Supreme Court of Canada has repeatedly said, human rights protections are quasi-constitutional, fundamental laws. The Supreme Court of Canada, in *Ontario*

(Human Rights Comm.) and O'Malley v. Simpsons-Sears Ltd., [1985] 2 S.C.R. 536, para. 12, described the quasi-constitutional nature of human rights legislation. It stated that, in recognition of the special nature and purposes of such legislation, human rights codes should be given an interpretation which will best advance their broad remedial purposes. (see also: *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission*, [1987] 1 S.C.R. 1114)

[39] In *Insurance Corporation of B.C. v. Heerspink*, [1982] 2 S.C.R. 145, Mr. Justice Lamer, writing for two other members of the Supreme Court of Canada, described human rights codes as "fundamental law" and, save constitutional laws, "more important than all others" (pp. 157-58). Similar sentiments were expressed by the full Supreme Court in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3:

> Although the various human rights statutes have an elevated legal status, … they remain legislative pronouncements and, in the absence of a constitutional challenge, this Court must interpret them according to their terms, and in light of their purposes. …
>
> In British Columbia, the relevant purposes are stated in s. 3. … This Court has held that, because of their status as "fundamental law", human rights statutes must be interpreted liberally, so that they may better fulfill their objectives. (paras. 43 and 44)

D. Balancing Competing Rights

[40] Because no *Charter* right is absolute, and all rights have the potential to conflict with others, the Supreme Court has had various opportunities to address the complexity of balancing competing rights. In *Trinity Western University v. College of Teachers (British Columbia)*, 2001 SCC 31, the Court had to consider balancing two competing *Charter* guarantees: freedom of religion and sexual orientation equality rights. The Court said that conflicts between rights should be resolved through defining the scope of the rights involved. Neither freedom of religion nor the guarantee against discrimination based on sexual orientation is absolute. (paras. 29-30) The Court said that distinguishing between beliefs and conduct could serve to delineate the proper scope of freedom of religion: "the proper place to draw the line is generally between belief and conduct. The freedom to hold beliefs is broader than the freedom to act on them." (para. 36) So long as

a discriminatory belief is not translated into discriminatory behaviour or actions, individuals, and in the case of *Trinity Western*, institutions, have the right to hold those beliefs. It is instructive that the Court considered the scope of the right in relation to the factual context in that case. A similar approach was applied by the Court in *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698.

[41] Freedom of speech is also not an absolute right. That principle was made clear by the Supreme Court when it upheld s. 13(1) of the *Canadian Human Rights Act* in *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892, which will be discussed in more detail below. Further, in *Keegstra*, the Court wrote about the competing values of freedom of expression and the right of marginalized groups in our society to live free from discrimination. The Court cited the preface to the report of the Special Committee on Hate Propaganda in Canada (the "Cohen Report"):

> [The Cohen] Report is a study in the power of words to maim, and what it is that a civilized society can do about it. … But every society from time to time draws lines at the point where the intolerable and the impermissible coincide. In a free society such as our own, where the privilege of speech can induce ideas that may change the very order itself, there is a bias weighted heavily in favour of the maximum of rhetoric whatever the cost and consequences. But that bias stops this side of injury to the community itself and to individual members or identifiable groups innocently caught in verbal cross-fire that goes beyond legitimate debate. (para. 22)

[42] In discussing the impact of hate propaganda in *Keegstra*, the Court said:

> … a response of humiliation and degradation from an individual targeted by hate propaganda is to be expected. A person's sense of human dignity and belonging to the community at large is closely linked to the concern and respect accorded the groups to which he or she belongs … The derision, hostility and abuse encouraged by hate propaganda therefore have a severely negative impact on the individual's sense of self-worth and acceptance … Such consequences bear heavily in a nation that prides itself on tolerance and the fostering of human dignity through, among other things, respect for the many racial, religious and cultural groups in our society.
>
> A second harmful effect of hate propaganda … is its influence upon society at large. The Cohen Committee noted that individuals can be persuaded to believe "almost anything" (p. 30) if information or ideas are communicated using the right technique and in the proper circumstances … The threat to the self-dignity of target group members is thus matched

> by the possibility that prejudiced messages will gain some credence, with the attendant result of discrimination, and perhaps even violence, against minority groups in Canadian society. (paras. 61- 63)

[43] It is with these comments and interpretive principles in mind that we now turn to the legal issues presented in this case.

VIII THE TRIBUNAL'S JURISDICTION OVER MACLEAN'S WEBSITE

[44] At various points in the hearing, Maclean's challenged the Tribunal's jurisdiction over the Maclean's website and the ability of the Tribunal to consider evidence obtained from Internet sources.

[45] As part of its screening of this complaint, the Tribunal concluded that it did not have jurisdiction over the Internet version of the Article. The rationale for that decision follows.

[46] Section 92(10) of the *Constitution Act, 1867*, 30 & 31 Victoria, c. 3 (U.K.), provides that, with three exceptions, provincial governments have the power to make laws in relation to local works and undertakings. One of those exceptions includes "…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."

[47] Section 92(10) gives the federal parliament, and therefore the federal human rights system, jurisdiction over interprovincial or international modes of communication: *Toronto v. Bell Telephone Co. (1905)*, [1905] A.C. 53 (J.C.P.C.). 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.

[48] The Canadian Human Rights Tribunal has decided a number of cases involving websites alleged to breach s. 13(1) of the *Act.* It has consistently concluded that it has jurisdiction over the Internet on the basis that the Internet is a form of telecommunication: *Schnell v. Machiavelli and Associates Memprize Inc. et al.*, (2002), 41 C.H.R.R. D/274 (C.H.R.T.), para. 130; and *Citron and Toronto Mayor's Committee v. Zundel*, (2002), 41 C.H.R.R. D/274 (C.H.R.T.), para. 117.

[49] Most recently in *Warman v. Kulbashian*, 2006 CHRT 11, the Canadian Human Rights Tribunal considered an argument that s. 13(1) did not extend to the Internet:

> Section 13 was originally enacted well before the pervasive global growth of the Internet, and there was no mention of the Internet to be found in the provision itself. In 2001, however, s. 13(2) was amended by the *Anti-Terrorism Act*, S.C. 2001, c.41, s. 88, to provide that, "for greater certainty", the proscribed discriminatory practice extended to "matter that is communicated by means of a computer or a group of interconnected or related computers, including the Internet". This amendment came into force on December 23, 2001 (P.C. 2001-2425, SI/2002-16, Canada Gazette Part II, Vol. 136, No. 1).
>
> Mr. Warman viewed the material that is the object of his complaint, on the Internet, in 2001 and 2002, before and after the coming into force of the enactment amending s. 13. As the Tribunal in *Warman v. Kyburz* 2003 CHRT 18 (CanLII), 2003 CHRT 18, 43 C.H.R.R D/425 (C.H.R.T.) at para. 15 ("*Kyburz*") noted, however, whether or not any of the communications occurred before the amendment is ultimately of no consequence. The earlier version of s. 13 was found to encompass Internet communications in both *Citron v. Zündel* (2002), 41 C.H.R.R. D/274 (C.H.R.T.), and in *Schnell v. Machiavelli and Associates Meprizer Inc. et al.* (2002), 43 C.H.R.R. D/453 (C.H.R.T.). In my view, the issue is now settled. Matter that was communicated over the Internet, whether before or after the amendments, is subject to s. 13 of the *Act*. (paras. 9-10)

[50] We agree that communication over the Internet is under federal jurisdiction and that, as a result, this Tribunal does not have jurisdiction over the Internet version of the Article. Thus, in screening these complaints, which referred to both the print and Internet versions of the Article, the Tribunal determined that it did not have jurisdiction over the Internet version.

[51] We understand from Mr. Awan's evidence that, following the Tribunal's screening decision, complaints were filed with the Canadian Human Rights Commission regarding the Internet version of the Article.

[52] During the course of the hearing, Maclean's argued that, because we did not have jurisdiction over the Internet, we could not consider evidence from Internet sources, particularly "blog" entries, when determining whether the Article exposed the complainants to hatred or contempt. We did not accept those arguments. There is a significant difference between the Tribunal's jurisdiction over a publication, and the

question of whether documents or publications may be entered as evidence with the Tribunal.

[53] Section 27.2 of the *Code* gives the Tribunal ability to consider all forms of evidence that it considers necessary and appropriate. That provision extends to considering evidence obtained from all sources, including the Internet.

IX IS THE TRIBUNAL'S JURISDICTION UNDER S. 7 LIMITED TO PUBLICATIONS RELATING TO THE TRIBUNAL'S OTHER AREAS OF JURISDICTION?

[54] The BC and Canadian Civil Liberties Associations and the Canadian Association of Journalists urge us to determine that there is no "stand-alone" protection against hate publications in s. 7(1)(b) of the *Code.* They submit that s. 7(1)(b) should be interpreted as extending only to publications which otherwise relate to one of the areas of activity for which protection is provided in the *Code*. For example, the section could be applied with respect to publications regarding employment, services, or one of the other areas covered by the *Code.*

[55] Maclean's did not make this argument and, in our view, it is not sustainable on the clear wording of the *Code*.

[56] As noted above, the complaints before us were brought under s. 7(1)(b) of the *Code.* However, it is useful, for the purposes of considering this argument, to set out s. 7 in its entirety:

> 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 or class of persons.

> (2) Subsection (1) does not apply to a private communication, a communication intended to be private or a communication related to an activity otherwise permitted by this *Code*.

[57] The *Code* defines "discrimination" in s. 1:

> "**discrimination**" includes the conduct described in section 7, 8(1)(a), 9(a) or (b), 10(a), 11, 13(1)(a) or (2), 14(a) or (b) or 43

[58] In its earlier case law, the Tribunal determined that s. 7(1)(a) did not prohibit all forms of discriminatory publications but only those that "indicate discrimination or an intention to discriminate with respect to the fields of activity that are covered by the other sections of the *Code*." (See *Stacey v. Campbell*, 2002 BCHRT 35, paras. 27-34 and *Khanna v. Common Ground Publishing*, 2005 BCHRT 398, para. 34).

[59] More recently, the Tribunal has reconsidered that interpretation and determined that it is not essential to a finding that s. 7(1)(a) has been breached for a complaint to allege that the publication was discriminatory with respect to an area of activity otherwise protected by the *Code*: *Koehler v. Carson and others (No. 2)*, 2006 BCHRT 178. In *Koehler*, the Tribunal said:

> A plain language interpretation of the words in s. 7(1)(a) … does not suggest reading in "a field of activity under the *Code*" or in any way suggest a legislative intent to limit the scope of the plain words. And as noted, the principles of interpretation for human rights legislation, consistently articulated by the Supreme Court of Canada, support a large and liberal interpretation in order to effect the policy objectives underlying the legislation. (para. 46)

[60] The Tribunal's reasoning in *Koehler* was affirmed on judicial review by the BC Supreme Court in *Carson v. Knucwentwecw Society*, 2006 BCSC 1779, para. 33.

[61] It is even more apparent from the clear wording of s. 7(1)(b) that a breach of that provision does not require that the publication be in relation to a field of activity otherwise protected by the *Code.* In our view, such an interpretation would severely limit the application of the section and would not be in accordance with its clear wording and the broad and purposive principles of interpretation applicable to the *Code* discussed above.

X HUMAN RIGHTS CASES CONSIDERING HATE PUBLICATION PROVISIONS

[62] The words, "hatred", "contempt" and "expose", which appear in s. 7(1)(b) of the *Code*, also appear in s. 13(1) of the *Canadian Human Rights Act*:

> 13.(1) It is a discriminatory practice for a person or a group of persons acting in concert to communicate telephonically or to cause to be so communicated, repeatedly, in whole or in part by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament, any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination. (emphasis added)

[63] That section was the subject of a constitutional challenge to the Supreme Court of Canada in *Canada (Human Rights Commission) v. Taylor*, cited above. Mr. Taylor operated a telephone message service through which the public could call a telephone number and listen to a recorded message denigrating the Jewish race and religion. The Court considered the scope of s. 13(1), its interpretation, whether it violated the protection for freedom of expression in s. 2(b) of the *Charter* and, if so, whether it was saved by s. 1 of the *Charter*. In making its assessment, the Supreme Court considered the Canadian Human Rights Tribunal's earlier decisions.

[64] In *Canadian Human Rights Commission, et al. v. the Western Guard Party and John Ross Taylor*, unreported, July 20, 1979, the Canadian Human Rights Tribunal, relying on dictionary sources, defined "hatred" as active dislike, detestation, enmity, ill will, and malevolence. It defined "contempt" as the condition of being condemned or despised, dishonoured, or disgraced. (p. 28)

[65] The Tribunal determined that "expose" was a passive word as compared to incite. The use of the words to "expose to hatred or contempt" indicated that there was no need for an active effort or intent on the part of the communicator, nor was there a requirement for a violent reaction by the recipient of the message. Rather, the Tribunal determined that to "expose" was more subtle and indirect and meant to leave a person unprotected or to lay them open to ridicule, censure or danger, thus creating the right conditions for

hatred or contempt to flourish; leaving the identifiable group vulnerable to ill feelings or hostility; or putting them at risk to be hated. (p. 29)

[66] That decision was followed in another Canadian Human Rights Tribunal decision, *Nealy et al. v. Johnston et al.*, unreported, July 25, 1989. There, the Tribunal accepted and elaborated upon the definitions adopted by it in its earlier decision in *Taylor*. In the Tribunal's view, hatred involved feelings of extreme ill will toward another person or group of persons. To say that one hated another meant that one found no redeeming qualities in the latter. Contempt, on the other hand, suggested looking down upon, or treating as inferior, the object of one's feelings. The words did not mean the same thing because hatred, in some instances, may be the result of envy of superior qualities such as intelligence, wealth and power, which contempt, by definition, cannot. (pp. 21-22)

[67] In *Nealy*, the Tribunal also went on to say that the use of the word "likely" in s. 13(1) meant that it was not necessary to prove that the effect of the publication would be that those who received it would direct hatred or contempt against others. Nor was it necessary to show that anyone was victimized as a result. (p. 22)

[68] The Canadian Human Rights Tribunal's decision in *Taylor* was ultimately appealed to the Supreme Court of Canada. The main issue was the constitutionality of s. 13(1) of the *Act* relative to s. 2(b) of the *Charter*. The majority, in reasons written by then Chief Justice Dickson, upheld s. 13(1) as being a reasonable limit on the right to freedom of expression guaranteed by s. 2(b) of the *Charter*. There was a strong dissent by McLachlin J., as she then was. Because we are not dealing with a constitutional challenge to s. 7(1)(b), it is not necessary for us to consider the Court's constitutional analysis.

[69] However, what is helpful is Chief Justice Dickson's review of the Tribunal's interpretation of the meaning of "hatred" and "contempt", and in particular:

> The approach taken in *Nealy* gives full force and recognition to the purpose of the *Canadian Human Rights Act* while remaining consistent with the *Charter*. The reference to "hatred" … speaks of "extreme" ill-will and an emotion which allows for "no redeeming qualities" in the person at whom it is directed. "Contempt" appears to be viewed as similarly extreme, though is felt by the Tribunal to describe more appropriately circumstances where the object of one's feelings is looked

> down upon. According to the reading of the Tribunal, s. 13(1) thus refers to unusually strong and deep-felt emotions of detestation, calumny and vilification, and I do not find this interpretation to be particularly expansive. To the extent that the section may impose a slightly broader limit upon freedom of expression than does s. 319(2) of the *Criminal Code*, however, I am of the view that the conciliatory bent of a human rights statute renders such a limit more acceptable than would be the case with a criminal provision.
>
> In sum, the language employed in s. 13(1) of the *Canadian Human Rights Act* extends only to that expression giving rise to the evil sought to be eradicated and provides a standard of conduct sufficiently precise to prevent the unacceptable chilling of expressive activity. Moreover, as long as the Human Rights Tribunal continues to be well aware of the purpose of s. 13(1) and pays heed to the ardent and extreme nature of feeling described in the phrase "hatred or contempt", there is little danger that subjective opinion as to offensiveness will supplant the proper meaning of the section. (paras. 61-62)

[70] The key words are the admonition that it is only publications which involve feelings of an "ardent and extreme nature" and expressing "unusually strong and deep-felt emotions of detestation, calumny and vilification" which will override the constitutional guarantee of freedom of expression. Expressive activities advocating unpopular or discredited positions are not to be accorded reduced constitutional protection as a matter of routine.

[71] The Supreme Court of Canada's definition of hatred and contempt in *Taylor* was adopted by this Tribunal, when interpreting s. 7(1)(b) of the *Code*, in *Canadian Jewish Congress v. North Shore Free Press Ltd. (No. 7)*, (1997), 30 C.H.R.R. D/5 ("*CJC*") and in *Abrams v. North Shore Free Press Ltd. (c.o.b. "North Shore News")*, [1999] B.C.H.R.T.D. No. 5 ("*Abrams*").

[72] In *CJC*, the Tribunal also considered the meaning of "likely to expose" and said:

> … s. 7(1)(b) of the *Code* is not so much concerned with the existence of hatred or contempt towards a vulnerable person or group, it is directed at the manifestation of hatred and contempt. The s. 7(1)(b) inquiry is … about whether the communication is likely to increase the risk of manifestation of hateful or contemptuous behaviour. In other words, can it be said that the effect of the message is to increase the likelihood that members of the target group will be exposed to hatred or contempt because the message makes it more acceptable (and so more likely) for recipients to express or act upon their feelings of hatred or contempt for members of

> the target group? This is an assessment which can be made on a reasonable standard. (para. 128)

[73] In assessing a publication under s. 7(1)(b), the Tribunal in *CJC* said that it required the application of a two-part test:

> First, does the communication itself express hatred or contempt of a person or group on the basis of one or more of the listed grounds? Would a reasonable person understand this message as expressing hatred or contempt?
>
> Second, assessed it its context, is the likely effect of the communication to make it more acceptable for others to manifest hatred or contempt against the person or group concerned? Would a reasonable person consider it likely to increase the risk of exposure of target group members to hatred or contempt? (paras. 139 and 140)

[74] The Tribunal acknowledged that it was, through its interpretation, potentially limiting the scope of s. 7(1)(b) but did so because it believed that a broader application would result in the section conflicting with the guarantee of freedom of expression in s. 2(b) of the *Charter*. (para. 148)

[75] Under the two-part *CJC* test, to breach s. 7(1)(b), a publication must both express hatred or contempt in and of itself, and also make it more acceptable for others to manifest hatred or contempt against the target person or group. Thus, a communication which is not itself hateful or contemptuous, but which has the effect of increasing the risk of exposing the target group to hatred or contempt, does not contravene s. 7(1)(b).

[76] In *Abrams*, the Tribunal applied a slightly restated two-part test and considered whether the communication, viewed objectively, was hateful or comptemptuous and, assessed in its context, whether its likely effect was to make it more acceptable for others to manifest hatred or contempt against the person or group concerned.

[77] In *Kane (Re)*, [2001] A. J. No. 915, the Alberta Court of Queens Bench was asked to provide its guidance on a number of questions of law submitted to it by a panel of the Alberta Human Rights and Citizenship Commission, arising from similar hate expression provisions in the Alberta *Human Rights, Citizenship and Multiculturalism Act*, R.S.A. 1980, c. H-11.7.

[78] The Court addressed what was required to properly balance the competing interests of freedom of expression and the hate expression provisions of that *Act*. The Court did not agree with the test formulated by this Tribunal in *CJC*: see paras. 115, 121, 122 and 123. The Court modified the *Abrams* test and outlined:

> What is required … is an examination of the nature of the statement in a full, contextual manner which recognizes the objectives and goals of the legislation and is *Charter* sensitive. It will also be necessary for the Panel to apply other principles enunciated by the Supreme Court of Canada in relation to s. 2(b). In particular it is essential that the Panel consider the nature and context of the expression and the degree of protection which this type of expression is afforded (*Keegstra* at 766; and *Taylor* at 922). The Panel should also give full recognition to the other provisions of the *Charter* which may come into play. These may include s. 15(equality rights); s. 25 (aboriginal rights); s. 27 (multicultural rights); s. 28 (sexual equality); and s. 2(a) (freedom of religion).
>
> …
>
> Accordingly, in my opinion, the test set out in *Abrams* as modified to reflect the *Act's* requirements would be one such standard which may be applied in the context of s. 2(1)(b). Such a test might enquire:
>
> > Does the communication itself express hatred or contempt of a person or group on a basis of one or more of the listed grounds? Would a reasonable person, informed about the context, understand the message as expressing hatred or contempt?
> >
> > Assessed in its context, is the likely effect of the communication to make it more acceptable to others to manifest hatred or contempt against the person or group concerned? Would a reasonable person consider it more likely than not to expose members of the target group to hatred and contempt? (paras. 85 and 125)

[79] This panel accepts that the appropriate test is an objective one, and agrees with the Saskatchewan Court of Appeal's articulation in *Owens v. Sask. (Human Rights Commission)*, [2006] S. J. No. 221, as follows:

> The sensibilities and vulnerabilities of the individuals who are the target of speech which is alleged to breach s. 14(1)(b) should not be disregarded in deciding whether there has been a violation of the *Code*. However, the question of how a particular individual or particular individuals understand a message cannot determine whether it should be found to involve hate, belittlement, ridicule or is an affront to dignity. Injecting that sort of

> subjectivity into the analysis would make the reach of the section entirely unpredictable and, as a result, would create an unacceptable chilling effect on free speech.
>
> Similarly, the perspective of the person who sends a message cannot control the outcome of the inquiry as to whether the message violates s. 14(1)(b). He or she might have a sense of the meaning of the message which, because of prejudice or otherwise, is wholly inconsistent with its actual effect. Focusing on the subjective views of the person alleged to have offended s. 14(1)(b) thus runs the risk of making that provision inapplicable to even the most offensive and dangerous messages and, consequently, of defeating its purpose.
>
> As a result, it is apparent that s. 14(1)(b) must be applied using an objective approach. The question is whether, when considered objectively by a reasonable person aware of the relevant context and circumstances, the speech in question would be understood as exposing or tending to expose members of the target group to hatred or as ridiculing, belittling or affronting their dignity within the restricted meaning of those terms as prescribed by *Bell*. (paras. 58-60)

[80] In our view, the Saskatchewan Court of Appeal's comments in *Owens*, adapted to the specific wording of the *Code*, are helpful in articulating the appropriate test and synthesizing the case law in a meaningful way. Although articulated somewhat differently than was done by the Tribunal in *CJC* and *Abrams*, the essence of the analysis is the same. That is, objectively considered by a reasonable person aware of the relevant context and circumstances, does the publication in question expose the target group to feelings of an ardent nature and unusually strong and deeply felt emotions of detestation, calumny and vilification?

[81] To the extent that we may be seen to be departing from the Tribunal's earlier statements of the appropriate test under s. 7(1)(b), in the panel's view, the *Owens* test best reflects an appropriate and *Charter* sensitive balancing of the two competing rights in this case. It is also sufficiently flexible to take into account the overwhelming presence of the Internet and the dramatic changes in the public's access to information and modes of communication that were in their infancy when both *CJC* and *Abrams* were decided. The interpretation and application of human rights law must be flexible enough to ensure that each case brought under s. 7(1)(b) of the *Code* is considered in light of the context in which the communication is made.

[82] We note that, in considering similar wording in the *Civil Rights Protection Act*, R.S.B.C. 1996, c. 49, the *Owens* test was cited with approval by the BC Supreme Court in *Maughan v. UBC*, 2008 BCSC 14, paras. 343-345.

[83] We conclude that assessing the publication's meaning in its context includes consideration of:

- the vulnerability of the target group;
- the degree to which the publication on its face contains hateful words or reinforces existing stereotypes;
- the content and tone of the message;
- the social and historical background for the publication;
- the credibility likely to be accorded the publication; and
- how the publication is presented.

[84] In any given case, one or more of the considerations might predominate the assessment, and other considerations might be appropriate.

[85] Although, on its face, s. 7(1)(b) does not include any specific defences, factors such as whether the statement or publication is true or is part of a larger political debate are also contextual considerations that are relevant to determining whether, objectively, a publication is more likely to expose a person or group to hatred or contempt. These issues are most appropriately considered in assessing the relevant context and circumstances in which a publication is made.

[86] The harm addressed by s. 7(1)(b) is that when messages are conveyed that arouse "unusually strong feelings and deeply felt emotions of detestation, calumny and vilification" they will undermine the promotion of equality, guaranteed in the *Charter* and reflected in one of the *Code's* purposes, as outlined in s. 3.

[87] Having set out the test we intend to apply, we now turn to a consideration of the evidence.

XI THE EVIDENCE

[88] As outlined above, the panel heard evidence from five witnesses. Of these, two were lay witnesses, Dr. Habib and Mr. Awan. The panel also heard evidence from three expert witnesses called by the complainants: Drs. Rippin, Ayoub, and Hirji. Below, we summarize the evidence which was before the panel.

[89] At different points in their evidence, each of the witnesses referred to the term "Islamophobia". The term was not formally defined before us but, in general, is understood to refer to the targeting of Muslims and Islam, drawing on common stereotypes about their association with terrorism and violence, in order to generate fear.

A. Dr. Habib and Mr. Awan

[90] The panel heard evidence from one of the complainants, Dr. Habib. Dr. Habib first came to Canada in 1973 and has practiced medicine since his arrival. He moved to Abbotsford in 2004, having spent his earlier years in Saskatchewan.

[91] Dr. Habib is a prominent member of the Canadian Muslim community, in which he has been active for over 30 years. For 21 years, he was a board member of the Islamic Association of Saskatchewan and served as its President for a number of those years. He was active in establishing an interfaith committee involving Muslim, Christian and Jewish groups. He is the co-founder and founding president of Muslims for Peace and Justice, an organization he established following the events of September 11, 2001 and in reaction to the resulting Islamophobia. The organization's goal was to educate about Muslims and Islam. He was a Regional Director of the Canadian Islamic Congress from 2002-2004, and is currently a board member.

[92] Dr. Habib testified that he learned of the Article shortly after it was published. He took the panel through the Article and highlighted those portions about which he was concerned. When giving his evidence, his distress over the content of the Article was palpable.

[93] Dr. Habib highlighted the repeated depiction of Muslim youth as threatening; the connection of all Muslims and Islam to terrorism; the demonization of the Islamic religion, the characterization of Muslims as being unable or unwilling to integrate into

Western society; and the Article's reference to multiculturalism opening the door to Muslim foreigners. He felt the message behind the Article was that Muslims are not "Westerners". He indicated that he interpreted the young Muslim girl on the cover page as being distressed and apprehensive about what was to happen next.

[94] Dr. Habib testified that, after he read the Article, he began searching the Internet for comments about, and in reaction to, it. He discovered several Internet blogs referring to the Article. He was offended by their content, which included calls to exterminate European Muslims with DDT because they were multiplying like mosquitoes (mosquitoes being a comparator used in the last paragraph of the Article), calls for an end to Muslim immigration, and calls for enough bullets or nuclear bombs to eliminate the Muslim "problem".

[95] Dr. Habib discussed the Article with several members of his religious community in Abbotsford. They agreed that something should be done about the Article, and they looked to him, as a leader in their community, to take steps. He contacted Dr. Elmasry, the President of the Canadian Islamic Congress, and was advised that the Congress was looking into its options and that someone would contact him. Mr. Awan then contacted Dr. Habib. Mr. Awan indicated that the Congress was taking steps, and that they first intended to try to settle the matter amicably with Maclean's. Mr. Awan later told Dr. Habib that those settlement efforts were unsuccessful.

[96] Dr. Habib felt that he had a responsibility to do something in British Columbia, as his community continued to be upset about the Article. In discussions with Mr. Awan, he agreed that he would file a human rights complaint in British Columbia and later did so with Mr. Awan's assistance.

[97] The panel also heard evidence from Mr. Awan. Mr. Awan has been actively involved as a volunteer with the Canadian Islamic Congress. He testified that he had become personally interested in what he described as the negative portrayal of Muslims in the media through his volunteer work and his law studies.

[98] Mr. Awan learned of the Article through a media release from the Canadian Council on American Islamic Relations, calling on all Canadians of good conscience to

write to Maclean's about the content of the Article. He therefore read the Article with concern.

[99] Mr. Awan testified at length about the efforts he and three other law students made, on behalf of the Canadian Islamic Congress, to resolve the issues raised in these complaints before any complaints were filed.

[100] Mr. Awan testified that following publication of the Article, and in light of his concerns and the concerns of others in the Muslim community regarding its content, he sought an opportunity to meet with Maclean's publishers to discuss those concerns and to propose a method of addressing them.

[101] On March 30, 2007, he and three other law students met with Kenneth Whyte, Maclean's Editor-in-Chief, and Mark Stevenson, its Editor. Before doing so, the students discussed with each other what they hoped to achieve. They agreed on a "bottom-line position", which was that they would only resolve their issues if Maclean's agreed to publish an article of equal length and prominence by a mutually-agreed upon, recognized member of the Muslim Community.

[102] For a number of reasons, the meeting did not go well.

[103] Mr. Whyte and Mr. Stevenson were joined at the meeting by Maclean's legal counsel. Although an alternate version of what occurred at the meeting was put to Mr. Awan in cross-examination, we accept his version, as the Maclean's participants did not testify at the hearing and Mr. Awan's evidence about the meeting therefore went uncontradicted. In any event, Mr. Awan's evidence was consistent and not shaken on cross-examination.

[104] Mr. Awan testified that the students opened the discussion by expressing their concern about what they saw as a series of anti-Muslim articles that had been published by Maclean's. They requested that Maclean's publish an article in response of equal length and prominence by an author of the students' choosing. In cross-examination, Mr. Awan acknowledged that they also requested that Maclean's make a $10,000 donation to a race-relations foundation. They expected that Maclean's would respond to their proposal and be willing to discuss options. They received a negative reaction to their

opening offer. Mr. Whyte responded that he would rather Maclean's "go bankrupt" than publish a response to the Article. When the students attempted to open discussions about what type of response Maclean's would be willing to consider, counsel for Maclean's made clear to them that his client was not interested in publishing any response.

[105] As a result, the students never got to their "bottom line" position and Maclean's did not have an opportunity to consider it. Later attempts by the students to discuss concerns with Edward Rogers, the President and CEO of Roger's Communications, were rebuffed by Roger's staff, on the basis that Roger's Communications did not agree that the Article was offensive and would not interfere with editorial decisions in their magazines. Roger's directed Mr. Awan to the letters criticizing the Article which Maclean's had published in its letters-to-the-editor in the weeks following its publication.

[106] Mr. Awan took the panel through the Article in detail, highlighting those parts which he found offensive. He was concerned about what he viewed as the overall theme of the Article that the West should fear Muslims because of their numbers and their wish to impose on Western society oppressive Islamic laws through a bloody takeover. He was concerned that the Article deliberately cast suspicion on all Muslims by referring to the "Islamic religion", as opposed to a small group of extremists, as being at the heart of the terrorist threat.

[107] Mr. Awan pointed out that while the author acknowledged that he was broadly generalizing about Muslims being "hot for jihad", he undermined his acknowledgement by saying that it was "obligatory", and that even if not all Muslims were "hot for jihad", enough were that the West needed to be concerned. He also said that the Article's suggestion, that Muslims are disloyal and unable to live in a democratic multicultural society, would lead to greater fear of Muslims, who would be seen as a threat that was already in place in Western society.

[108] It was clear from Dr. Habib's and Mr. Awan's evidence that, from their subjective viewpoint as Muslim Canadians, the Article's theme and content were very upsetting. In their evidence, they directed the panel to specific paragraphs that were particularly troubling to them. Overall, their concerns were about the recurring theme that all Muslims, not just a marginalized few, are to be feared because of the numbers in which

they exist in Western societies. Given the recurring themes in the Article, and Dr. Habib's and Mr. Awan's evidence regarding the Article's impact on them and other members of the Muslim community, in the panel's view, we can conclude that their reaction generally reflected that of many Muslims in British Columbia. Maclean's led no evidence to the contrary.

B. The Expert Evidence

[109] The panel heard evidence from three experts, all called by the complainants. Two of the experts were internationally recognized Islamic scholars. The first was Dr. Andrew Rippin, a Professor of Islamic History and the Dean of the Faculty of Humanities at the University of Victoria. Dr. Rippin was qualified to give expert evidence as a specialist in Islamic studies, particularly with respect to the Qur'an and its interpretation.

[110] The second was Dr. Mahmoud Ayoub, a Professor Emeritus of Islamic Studies and Comparative Religions in the Department of Religion in the College of Liberal Arts at Temple University in Philadelphia. Dr. Ayoub is also a visiting professor at the Pacific School of Religion in Berkeley, California. Dr. Ayoub, a scholar in comparative religions, was qualified to give expert evidence about the Islamic religion, Islamic traditions and the Qur'an.

[111] Maclean's did not object to either Dr. Rippin or Dr. Ayoub being qualified as experts.

[112] The third proposed expert was Dr. Faiza Hirji, an Instructor in the School of Journalism and Communication at Carleton University. Dr. Hirji has a PhD in Communications from Carleton University. She teaches undergraduate communications courses and a graduate course in media, culture, and gender.

[113] Maclean's contested Dr. Hirji's expert qualifications. However, relying on *R. v. Marquard*, [1993] 4 SCR 223, the panel determined that she had expertise that went beyond our own and that her evidence would be helpful to us in determining the issues in this complaint. The panel reserved on the question of the weight to be accorded Dr. Hirji's testimony. Dr. Hirji was qualified as an expert in analyzing stereotypes in the

media with a specialty in analyzing the impact of stereotypes on minorities, particularly Muslims.

1. The Inaccuracies in the Article

[114] Drs. Rippin and Ayoub testified about the historical and religious inaccuracies in the Article. Their evidence was uncontroverted.

[115] Both agreed that the Article's description of an Islamic conspiracy with "serious global ambitions" to dominate the world, and create what the Article calls "Eurabia", has no basis in the Qur'an or Islamic traditions. As part of their beliefs, adherents of Islam are not exhorted to conspire to take over the world. Dr. Ayoub testified that similar accusations had historically been levelled at the Jewish community.

[116] Dr. Rippin explained that there is a "primal coreness" to being a Muslim. The core of the religion is explained in the Qur'an as humans having a natural inclination to submission to God. However, that idea is not connected to social action nor, as is suggested in the Article, global ambition.

[117] Dr. Rippin said that it is inaccurate to suggest, as the Article does, that Islam drives all aspects of Muslim life and that Muslims cannot act outside what the Qur'an says. He indicated that it is clear historically that the way in which Muslims interact with the Qur'an means that there is no single "primal drive" orienting Muslim life. This misunderstanding creates a sense of fear in non-Muslims; they fear the character of Islam itself. The Article thus shows a false understanding of Muslim doctrine. Dr. Rippin testified that analysis of Islamophobia indicates that it is defined by the way in which Islam is presented as an unchanging single entity, "other" than Euro-American society, and characterized by barbarism, sexism and violence. This misunderstanding stems from seeing Islam as driven by a single understanding of the Qur'an, thereby creating a sense of fear.

[118] Dr. Rippin said that it is historically inaccurate to depict Islam as an unchanging and homogenous religion about which generalizations can be made. He agreed, however, that taken out of its context, and not viewed within the history of the Muslim community's interaction with it, the Qur'an could be understood to say things which today might be considered inflammatory.

[119] Dr. Ayoub testified that Islam is a pluralistic religion following, as it did, the establishment of Judaism and Christianity. Islam is, he said, a "religion of the middle way". To the extent that the Article portrays Islam and Muslims as an underground movement, it is inaccurate because Islam did not begin as an underground movement but as an open religion. Dr. Rippin described the Qur'an as requiring Muslims to show respect to other communities and tolerance of other religions.

[120] Dr. Ayoub expressed concern about the Article's depiction of Islam as an Arab religion, given that Arabs constitute only about 25% of Muslims (Indonesia being the country with the largest Muslim population in the world). This misconception came about, in part, because the language of the Qur'an and the Hadith, the traditions of Muhammad setting up authoritative practices in relation to the Qur'an, is Arabic. On the other hand, while emphasising the broad demographic scope of Islam, Dr. Rippin noted that it was impossible to understand the history of Islam without a good understanding of Arabic.

[121] Both Drs. Rippin and Ayoub expressed concern about the inaccurate depiction of an Islamic identity. The Article hypothesizes that Muslims do not want nation states because the core identity of Islam transcends them. Dr. Ayoub explained that within the Muslim community there is great diversity of languages, cultures and races. Islam is not monolithic. Dr. Ayoub identified the Article's definition of an "Islamic" identity that transcends borders as one of its major inaccuracies.

[122] Dr. Ayoub also testified about the Article's misuse of the term "jihad". He explained that the Article misleadingly equates jihad with the fighting and terrorism equated with al-Qaeda. He explained that the word "jihad" comes from the Arabic verb meaning "to strive to achieve something". The Qur'an uses "jihad" in a number of ways, including the jihad in God, the spiritual jihad, which must go on in each human life, and is the struggle against a person's carnal soul and its evil tendencies. He testified that the Prophet Muhammad called this the "greater jihad".

[123] Second, the Qur'an uses jihad in the context of the "social jihad". Dr. Ayoub explained that Muhammad said that Muslims must act when they see something

reprehensible, first with their hands, then with their tongues, and finally, with their hearts. Jihad, when used in this context, is not a call to violence.

[124] The third meaning of jihad, which Dr. Ayoub explains is the prevailing Western view, and the view of some Muslims, is the "jihad of the sword" or the armed struggle. In the West, this has been referred to as a holy war, although that term is not used in Islam. It has been called the "lesser jihad" and permits armed struggle in self-defence to a challenge to Islam. It is this third meaning of jihad that is used throughout the Article. Dr. Ayoub described armed struggle as only one small part of the early Islamic tradition of jihad.

[125] Dr. Ayoub acknowledged that there are those of the Islamic faith, both historically and today, who believe that they understand the "true Islam" or claim exclusive knowledge of the faith. Today's violence, perpetrated in the name of Islam, is not based in Islamic tradition or in scripture. Dr. Ayoub's concern about the Article is that the actions of a fringe group like al-Qaeda are described as being the norm. That is, the reader is asked to conclude that all Muslims believe or act in this way. He testified that Islamic extremists, who represent only a small group of Muslims, generally pose a problem world wide and specifically pose a problem for Muslims. This is particularly true for Indonesia, a Muslim country, and among the world's most peaceful.

[126] Drs. Rippin and Ayoub criticized the Article's inaccurate and misleading reporting of events in different European countries. The Article uses these erroneous reports to show Islam as an unchanging and homogenous religion about which generalizations can be made or to create fear of the impact Muslims have on European culture. Examples of these inaccuracies include the Article's description of "flaming cars on the evening news toward the end of 2005" in France. The Article depicted Muslim youth engaged in religious violence, whereas Dr. Ayoub explained that those involved were, in fact, French, secularized young Muslim men protesting their lack of jobs and education. Dr. Rippin highlighted the Article's reporting of the discussions within the Church of England about removing St. George as the country's patron saint because, in part, St. George is offensive to Muslims. The Article did not explain that it was an Anglican Bishop and not Muslims who had initiated the discussions.

[127] Drs. Rippin and Ayoub acknowledged that some Muslims have perpetrated violence in the name of Islam. Dr. Rippin, in cross-examination, acknowledged that there is an ancient and radical view of Islam, Wahhabi Islam, which takes a theological attitude toward sin meaning that a Muslim who sins takes themselves out of the community of Islam. Osama bin Laden is an adherent of that view of Islam.

[128] Wahhabi Islam is dedicated to keeping close reins over its members and demanding rigid adherence to a narrow set of rules to protect the unity of the community in the face of perceived internal and external pressures. There is an ongoing debate about those radical views, through, for example, the writings of a Saudi jurist, Ibn Baz. Dr. Ayoub also testified as to how the actions of Osama bin Laden were of great concern to all of us including Muslims, noting "we are all part of the same world."

[129] The panel accepts the evidence of Drs. Rippin and Ayoub. Maclean's did not seriously challenge their evidence in cross-examination and, in our view, their evidence helpfully explained the history of Islam, its tenets, and some of the internal struggle within the Islamic community. Based on their evidence, the Panel accepts that the Article contains numerous factual, historical, and religious inaccuracies about Islam and Muslims. Maclean's did not call evidence to the contrary.

2. The Muslim Stereotypes in the Article

[130] Dr. Hirji testified about the Article's stereotypical presentation of Muslims. Although Maclean's questioned Dr. Hirji's expert qualifications, it did not call an expert to contradict her evidence.

[131] Dr. Hirji indicated that she had reviewed some of the significant body of literature exploring racism in the media.

[132] Dr. Hirji testified that although some commentators believe that the media is deliberately racist, she is not among them. Rather, she thought it more likely that journalists did not receive specific training about cultural and religious differences and religious history. As a result, in an industry relying on sound bites and short articles produced under time pressure, she believed that journalists fell back on recognized "shorthand", which may include racist stereotypes.

[133] In Dr. Hirji's opinion, the Article reflects common negative stereotypes about Islam. She gave as an example the repeated theme of Muslims as a threat to Western society through the equation of all Muslims with terrorism. She said that the Maclean's cover photograph of Muslim women fully covered in black burkhas is a common image used to depict Muslims as foreign, different and threatening. She believed that it was common for the media to depict Muslim women and children as oppressed. She did not interpret the young girl in the photograph as threatening until she considered the photo in the context of the text of the Article.

[134] Dr. Hirji specifically directed us to the Article's use of the phrase "the top of the iceberg [Muslims] bobbed up and toppled the twin towers" as presenting Muslims as the principal threat to Western society. She indicated that, in her view, the description of Europe as being too enfeebled to resist a remorseless transformation into "Eurabia", represented a stereotypical view that Europe is under siege from foreigners, specifically Muslims, who are opposed to "civilization" and "modernity", and will attack anything related to Western civilization.

[135] Dr. Hirji testified that the threat of Islam taking over the world is repeated throughout the Article. The threat is attributed to the religion, not to specific individuals, and there is no differentiation between those Muslims who hold terrorist views and the views of the majority of Muslims. Dr. Hirji referenced the specific use of the words "Western Muslim's pan-Islamic identity" as representing the threat as not being distant, but "inside" Western culture. The Article warns against a threat not from a stranger, but from the Muslim who is your friend or neighbour. This theme is repeated when the Article describes "radical Imams", or Islamic clerics, "settling the metropolis". It depicts, she says, Islamic religious leaders moving in to Western culture.

[136] Dr. Hirji also commented on the use of the word "jihad" in the Article. She explained that jihad is repeatedly used in the media as shorthand for expressing an Islamic-driven war which terrorists feel compelled to carry out.

[137] Dr. Hirji was critical of the Article's use of quotations around the words "of course" when the writer explains that "of course" not all Muslims are terrorists or "hot for

jihad". She said that the use of quotation marks mocked those who would criticize the Article's broad generalizations.

XII APPLYING THE APPLICABLE TEST TO THE EVIDENCE

[138] We now consider whether the complainants have met their burden of demonstrating, on a balance of probabilities, that the Article, viewed objectively, from the standpoint of a person aware of the relevant context and circumstances, exposes Muslims in British Columbia to "feelings of an ardent nature and unusually strong and deeply felt emotions of detestation, calumny and vilification", the definition of hatred and contempt in s. 7(1)(b).

[139] For the reasons which follow, we have concluded that they have not.

[140] We have accepted the expert evidence of Drs. Rippin and Ayoub that the Article contains historical, religious and factual inaccuracies. However, their expertise did not extend to linking the inaccuracies in the Article to the probability that it would expose Muslims in B.C. to the level of "unusually strong feelings and deeply felt emotions of detestation, calumny and vilification" required by *Taylor*.

[141] The only other expert evidence called by the complainants was the evidence of Dr. Hirji, and we find that we can give it little weight because much of the evidence she gave fell outside the scope of her expertise. At times, she slipped into giving her personal interpretation of, and reaction to, the Article as opposed to describing the impact on Muslims of the stereotypes in the Article.

[142] We do, however, accept Dr. Hirji's evidence that the Article used common Muslim stereotypes. For example, when commenting on the cover page of the Maclean's issue, she indicated that the black burkha is often used as a common image to depict Muslims as foreign and that it was common to show women and children as markers of the oppression of Islam. However, she did not link that stereotype with the impact its use might have on an objective reader of the Article. This was through no fault of her own. Her expertise did not extend to the impact of the use of language or stereotypes on all readers and she was not qualified to give evidence about the ability of the media to influence perception.

[143] We were not provided with evidence from, for example, an expert qualified to identify a writer's use of words and their intended meaning or effect of the recipient of a communication. Such an expert was of great assistance to the Canadian Human Rights Tribunal in *Citron v. Zundel*, cited above. Nor were we provided with expert evidence from a sociologist, who could explain the nature of Islamophobia and how the themes and stereotypes in the Article might increase its prevalence.

[144] We were provided with various Internet blog entries on which the complainants relied to establish that the Article exposed them to hatred and contempt. Often horrible things were written in these blogs, and it is no surprise to the panel that they were most upsetting to the complainants. They are disturbing to read.

[145] There can be no doubt that the Internet has revolutionized global communication and access to information. As the proliferation of Internet blogs increases, writers, who may be located anywhere in the world, and with any agenda, can anonymously weigh in on issues they believe to be of importance. They can write often outrageous things without any subsequent reader knowing the source of their information, or whether they are responding to the first blog in a series or the entry immediately proceeding theirs. The writers often use one or more blog names.

[146] It is impossible for the panel to know whether the "bloggers" who commented upon the Article read it in the print form over which we have jurisdiction or in the Internet form over which we do not. We cannot know what part of the Article the bloggers read, what their personal beliefs were with respect to the issues raised in it, or what else might have influenced them. As a result, we have approached the evidence of what was said in the blogs with a great deal of caution and give it only limited weight in assessing whether the complainants have met their burden.

[147] While it was clear to us that both Mr. Awan and Dr. Habib were deeply offended by the Article and its contents, and we accept that many would share their views, their evidence is entirely subjective. It was about how they interpreted what was being written in light of their personal experiences. As we have outlined, the test is not subjective but objective.

[148] The problem associated with relying on subjective views about the Article was highlighted when contrasting the evidence of Dr. Hirji and Dr. Habib with respect to their interpretation of the image of the young girl on the Maclean's cover page. At first, Dr. Hirji did not consider the young girl's image as threatening. She only interpreted the image as threatening after reading the text of the Article. In contrast, Dr. Habib described the young girl as appearing distressed and apprehensive about what was to happen next. The image is therefore capable of a number of interpretations.

[149] The media plays a significant role in the public's perception of a person, a group, or an issue. With that role comes a significant responsibility. In this case, Maclean's promoted itself as a national news magazine with close to three million readers. By publishing the Article, Maclean's lends credibility to the views expressed in it. However, Maclean's did not explicitly endorse the author's views, as it indicated that it was publishing an excerpt from a book, and published letters to the editor critical of the Article's content following its release.

[150] The Article expresses strong, polemical, and, at times, glib opinions about Muslims, as well as world demographics and democracies. It contains few scholarly trappings, at least in the form presented in the magazine. It is inaccurate in some respects and we accept that it was hurtful and distasteful to Mr. Awan, Dr. Habib and other Muslims. However, read in its context, the Article is essentially an expression of opinion on political issues which, in light of recent historical events involving extremist Muslims and the problems facing the vast majority of the Muslim community that does not support extremism, are legitimate subjects for public discussion.

[151] Read objectively, the tone and content of the Article was not nearly as offensive as some of the Internet blogs which post-dated it. While such blogs do provide some evidence that the Article exposed the complainants to hatred and contempt, the inherent weaknesses in that evidence, which we outlined above, mean that without other objective evidence, we are unable to rely on it. Further, Maclean's cannot be held responsible for all of the blogs' contents.

[152] Some of the controversy surrounding the Article and this case was fuelled by Maclean's approach to those who expressed concerns about the Article. That approach

continued after the complaint was filed and during the hearing. At times, Maclean's conduct of its case appeared to be directed to the media coverage of the hearing rather than supporting the positions it had taken in its original response to the complaint.

[153] The controversy was also fuelled by both parties' use of the media to express their views about the case. Some of the blog entries directly related to these activities. Maclean's, for example, published an editorial critical of the complainants and the human rights process and, as we learned from Mr. Awan's evidence, he was involved in at least one press conference with respect to the filing of these and other complaints and appeared on CBC television with others, including the author of the Article, to debate the issues raised in it.

[154] Canadians live in a pluralistic society and try to balance and accommodate a wide variety of beliefs, and a diversity of tastes and pursuits, customs and codes of conduct: (*Big M DrugMart*, [1985] 1. S.C.R. 295, at p. 336) We refer to the Supreme Court of Canada's discussion of the nature of Canadian democracy in *Reference Re Secession of Quebec*, [1998] 2 S.C.R. 217, where the Court explained the importance to our democracy of public debate:

> … we highlight that a functioning democracy requires a continuous process of discussion. The Constitution mandates government by democratic legislatures, and an executive accountable to them, "resting ultimately on public opinion reached by discussion and the interplay of ideas: (*Saumur v. City of Quebec*, [1953] 2 S.C.R. 299 at p. 330). At both the federal and provincial level, by its very nature, the need to build majorities necessitates compromise, negotiation, and deliberation. No one has a monopoly on truth, and our system is predicated on the faith that in the marketplace of ideas, the best solutions to public problems will rise to the top. Inevitably, there will be dissenting voices. A democratic system of government is committed to considering those dissenting voices, and seeking to acknowledge and address those voices in the laws by which all the community must live. (para. 68)

[155] Whether we agree with the Article's content is not the issue. The Article sets out purported facts, draws conclusions from these facts, and expresses opinions, which many would, and did, find objectionable and disagreeable. The BC and Canadian Civil Liberties Associations expressed their concern about the hurtful impact of the publication, while intervening to defend the right of Maclean's to publish it.

[156] However, as explained above, we have determined that, considered in its context, and on the evidence before us, the complainants have not met their burden of demonstrating that the Article rises to the level of detestation, calumny and vilification necessary to breach s. 7(1)(b) of the *Code.*

[157] We think that Dr. Rippin put it best when he said that the Article is a rallying cry to the "West". The Article may attempt to rally public opinion by exaggeration and causing the reader to fear Muslims, but fear is not synonymous with hatred and contempt.

[158] We accept that it may be possible to link feelings of fear with hatred and contempt but in the absence of any expert evidence which makes that link in the context of the Article, we cannot find that it was done so in this case.

[159] The Article, with all its inaccuracies and hyperbole, has resulted in political debate which, in our view, s. 7(1)(b) was never intended to suppress. In fact, as the evidence in this case amply demonstrates, the debate has not been suppressed and the concerns about the impact of hate speech silencing a minority have not been borne out.

XIII CONCLUSION

[160] The panel has concluded that the complaints are not justified because the complainants have not established that the Article is likely to expose them to hatred or contempt on the basis of their religion. Therefore, pursuant to s. 37(1) the complaints are dismissed.

Heather M. MacNaughton, Tribunal Chair

Tonie Beharrell, Tribunal Member

Kurt Neuenfeldt, Tribunal Member

Appendix

Cover Page October 23, 2006

WHY THE FUTURE BELONGS TO ISLAM

The Muslim word has youth, numbers and global ambition. The West is old, barren and exhausted. Mark Steyn maps the new world order. P. 30

[Found at p. 30]

THE NEW WORLD ORDER

The Muslim world has youth, numbers and global ambitions. The West is growing old and enfeebled, and lacks the will to rebuff those who would supplant it. It's the end of the world as we've known it. An excerpt from 'America Alone'.

BY MARK STEYN

Sept. 11, 2001, was not "the day everything changed," but the day that revealed how much had already changed. On Sept. 10, how many journalists had the Council of American-Islamic Relations or the Canadian Islamic Congress or the Muslim Council of Britain in their Rolodexes? If you'd said that whether something does or does not cause offence to Muslims would be the early 21st century's principal political dynamic in Denmark, Sweden, the Netherlands, Belgium, France and the United Kingdom, most folks would have thought you were crazy. Yet on that Tuesday morning the top of the iceberg bobbed up and toppled the Twin Towers.

This is about the seven-eighths below the surface - the larger forces at play in the developed world that have left Europe too enfeebled to resist its remorseless transformation into Eurabia and that call into question the future of much of the rest of the world. The key factors are: demographic decline; the unsustainability of the social democratic state; and civilizational exhaustion.

Let's start with demography, because everything does:

PEOPLE POWER

If your school has 200 guys and you're playing a school with 2,000 pupils, it doesn't mean your baseball team is definitely going to lose but it certainly gives the other fellows a big starting advantage. Likewise, if you want to launch a revolution, it's not very likely if you've only got seven revolutionaries. And they're all over 80. But, if

you've got two million and seven revolutionaries and they're all under 30 you're in business.

For example, I wonder how many pontificators on the "Middle East peace process" ever run this number:

The median age in the Gaza Strip is 15.8 years.

Once you know that, all the rest is details. If you were a "moderate Palestinian" leader, would you want to try to persuade a nation - or pseudo-nation - of unemployed poorly educated teenage boys raised in a UN-supervised European-funded death cult to see sense? Any analysis of the "Palestinian problem" that doesn't take into account the most important determinant on the ground is a waste of time.

Likewise, the salient feature of Europe, Canada, Japan and Russia is that they're running out of babies. What's happening in the developed world is one of the fastest demographic evolutions in history: most of us have seen a gazillion heartwarming ethnic comedies - *My Big Fat Greek Wedding* and its ilk - in which some uptight WASPy type starts dating a gal from a vast loving fecund Mediterranean family, so abundantly endowed with sisters and cousins and uncles that you can barely get in the room. It is, in fact, the inversion of the truth. Greece has a fertility rate hovering just below 1.3 births per couple, which is what demographers call the point of "lowest-low" fertility from which no human society has ever recovered. And Greece's fertility is the healthiest in Mediterranean Europe: Italy has a fertility rate of 1.2, Spain 1.1. Insofar as any citizens of the developed world have "big" families these days, it's the anglo democracies: America's fertility rate is 2.1, New Zealand a little below. Hollywood should be making *My Big Fat Uptight Protestant Wedding* in which some sad Greek only child marries into a big heartwarming New Zealand family where the spouse actually has a sibling.

As I say, this isn't a projection: it's happening now. There's no need to extrapolate, and if you do it gets a little freaky, but, just for fun, here goes: by 2050, 60 per cent of Italians will have no brothers, no sisters, no cousins, no aunts, no uncles. The big Italian family, with papa pouring the vino and mama spooning out the pasta down an endless table of grandparents and nieces and nephews, will be gone, no more, dead as the dinosaurs. As Noel Coward once remarked in another context, "Funiculi, funicula, funic yourself." By mid-century, Italians will have no choice in the matter.

Experts talk about root causes. But demography is the most basic root of all. A people that won't multiply can't go forth or go anywhere. Those who do will shape the age we live in.

WELFARE AND WARFARE

Demographic decline and the unsustainability of the social democratic state are closely related. In America, politicians upset about the federal deficit like to complain that we're piling up debts our children and grandchildren will have to pay off. But in

Europe the unaffordable entitlements are in even worse shape: there are no kids or grandkids to stick it to.

You might formulate it like this:

Age + Welfare = Disaster for you;

Youth + Will = Disaster for whoever gets in your way.

By "will," I mean the metaphorical spine of a culture. Africa, to take another example, also has plenty of young people, but it's riddled with AIDS and, for the most part, Africans don't think of themselves as Africans: as we saw in Rwanda, their primary identity is tribal, and most tribes have no global ambitions. Islam, however, has serious global ambitions, and it forms the primal, core identity of most of its adherents - in the Middle East, South Asia and elsewhere.

Islam has youth and will, Europe has age and welfare.

We are witnessing the end of the late 20th- century progressive welfare democracy. Its fiscal bankruptcy is merely a symptom of a more fundamental bankruptcy: its insufficiency as an animating principle for society. The children and grandchildren of those fascists and republicans who waged a bitter civil war for the future of Spain now shrug when a bunch of foreigners blow up their capital. Too sedated even to sue for terms, they capitulate instantly. Over on the other side of the equation, the modern multicultural state is too watery a concept to bind huge numbers of immigrants to the land of their nominal citizenship. So they look elsewhere and find the jihad. The Western Muslim's pan-Islamic identity is merely the first great cause in a world where globalized pathologies are taking the place of old-school nationalism.

For states in demographic decline with ever more lavish social programs, the question is a simple one: can they get real? Can they grow up before they grow old? If not, then they'll end their days in societies dominated by people with a very different world view.

FIGHTING VAINLY THE OLD ENNUI

Which brings us to the third factor - the enervated state of the Western world, the sense of civilizational ennui, of nations too mired in cultural relativism to understand what's at stake. As it happens, that third point is closely related to the first two. To Americans, it doesn't always seem obvious that there's any connection between the "war on terror" and the so-called "pocketbook issues" of domestic politics. But there is a correlation between the structural weaknesses of the social democratic state and the rise of a globalized Islam. The state has gradually annexed all the responsibilities of adulthood - health care, child care, care of the elderly - to the point where it's effectively severed its citizens from humanity's primal instincts, not least the survival instinct. In the American context, the federal "deficit" isn't the problem; it's the government programs that cause the deficit. These programs would still be wrong even if Bill Gates wrote a

cheque to cover them each month. They corrode the citizen's sense of self-reliance to a potentially fatal degree. Big government is a national security threat: it increases your vulnerability to threats like Islamism, and makes it less likely you'll be able to summon the will to rebuff it. We should have learned that lesson on Sept. 11, 2001, when big government flopped big-time and the only good news of the day came from the ad hoc citizen militia of Flight 93.

There were two forces at play in the late 20th century: in the Eastern bloc, the collapse of Communism; in the West, the collapse of confidence. One of the most obvious refutations of Francis Fukuyama's famous thesis *The End Of History* - written at the victory of liberal pluralist democracy over Soviet Communism - is that the victors didn't see it as such. Americans - or at least non-Democrat-voting Americans - may talk about "winning" the Cold War but the French and the Belgians and Germans and Canadians don't. Very few British do. These are all formal NATO allies - they were, technically, on the winning side against a horrible tyranny few would wish to live under themselves. In Europe, there was an initial moment of euphoria: it was hard not be moved by the crowds sweeping through the Berlin Wall, especially as so many of them were hot-looking Red babes eager to enjoy a Carlsberg or Stella Artois with even the nerdiest running dog of imperialism. But, when the moment faded, *pace* Fukuyama, there was no sense on the Continent that our Big Idea had beaten their Big Idea. With the best will in the world, it's hard to credit the citizens of France or Italy as having made any serious contribution to the defeat of Communism. *Au contraire*, millions of them voted for it, year in, year out. And, with the end of the Soviet existential threat, the enervation of the West only accelerated.

In Thomas P. M. Barnett's book *Blueprint For Action*, Robert D. Kaplan, a very shrewd observer of global affairs, is quoted referring to the lawless fringes of the map as "Indian territory." It's a droll joke but a misleading one. The difference between the old Indian territory and the new is this: no one had to worry about the Sioux riding down Fifth Avenue. Today, with a few hundred bucks on his ATM card, the fellow from the badlands can be in the heart of the metropolis within hours.

Here's another difference: in the old days, the white man settled the Indian territory. Now the followers of the badland's radical imams settle the metropolis.

And another difference: technology. In the old days, the Injuns had bows and arrows and the cavalry had rifles. In today's Indian territory, countries that can't feed their own people have nuclear weapons.

But beyond that the very phrase "Indian territory" presumes that inevitably these badlands will be brought within the bounds of the ordered world. In fact, a lot of today's "Indian territory" was relatively ordered a generation or two back - West Africa, Pakistan, Bosnia. Though Eastern Europe and Latin America and parts of Asia are freer now than they were in the seventies, other swaths of the map have spiralled backwards. Which is more likely? That the parts of the world under pressure will turn into post-Communist Poland or post-Communist Yugoslavia? In Europe, the demographic pressures favour the latter.

The enemies we face in the future will look a lot like al-Qaeda: transnational, globalized, locally franchised, extensively outsourced - but tied together through a powerful identity that leaps frontiers and continents. They won't be nation-states and they'll have no interest in becoming nation-states, though they might use the husks thereof, as they did in Afghanistan and then Somalia. The jihad may be the first, but other transnational deformities will embrace similar techniques. Sept. 10 institutions like the UN and the EU will be unlikely to provide effective responses.

We can argue about what consequences these demographic trends will have, but to say blithely they have none is ridiculous. The basic demography explains, for example, the critical difference between the "war on terror" for Americans and Europeans: in the U.S., the war is something to be fought in the treacherous sands of the Sunni Triangle and the caves of the Hindu Kush; you go to faraway places and kill foreigners. But, in Europe, it's a civil war. Neville Chamberlain dismissed Czechoslovakia as "a faraway country of which we know little." This time round, for much of western Europe it turned out the faraway country of which they knew little was their own.

Four years into the "war on terror," the Bush administration began promoting a new formulation: "the long war." Not a good sign. In a short war, put your money on tanks and bombs. In a long war, the better bet is will and manpower. The longer the long war gets, the harder it will be, because it's a race against time, against lengthening demographic, economic and geopolitical odds. By "demographic," I mean the Muslim world's high birth rate, which by mid-century will give tiny Yemen a higher population than vast empty Russia. By "economic," I mean the perfect storm the Europeans will face within this decade, because their lavish welfare states are unsustainable on their post-Christian birth rates. By "geopolitical," I mean that, if you think the United Nations and other international organizations are antipathetic to America now, wait a few years and see what kind of support you get from a semi-Islamified Europe.

GOING…GOING…GONE

Almost every geopolitical challenge in the years ahead has its roots in demography, but not every demographic crisis will play out the same way. That's what makes doing anything about it even more problematic - because different countries' reactions to their own particular domestic circumstances are likely to play out in destabilizing ways on the international scene. In Japan, the demographic crisis exists virtually in laboratory conditions - no complicating factors; in Russia, it will be determined by the country's relationship with a cramped neighbour - China; and in Europe, the new owners are already in place - like a tenant with a right-to-buy agreement.

Let's start in the most geriatric jurisdiction on the planet. In Japan, the rising sun has already passed into the next phase of its long sunset: net population loss. 2005 was the first year since records began in which the country had more deaths than births. Japan offers the chance to observe the demographic death spiral in its purest form. It's a country with no immigration, no significant minorities and no desire for any: just the Japanese, aging and dwindling.

At first it doesn't sound too bad: compared with the United States, most advanced societies are very crowded. If you're in a cramped apartment in a noisy congested city, losing a couple hundred thousand seems a fine trade-off. The difficulty, in a modern social democratic state, is managing which people to lose: already, according to the *Japan Times*, depopulation is "presenting the government with pressing challenges on the social and economic front, including ensuring provision of social security services and securing the labour force." For one thing, the shortage of children has led to a shortage of obstetricians. Why would any talented ambitious med school student want to go into a field in such precipitous decline? As a result, if you live in certain parts of Japan, childbirth is all in the timing. On Oki Island, try to time the contractions for Monday morning. That's when the maternity ward is open - first day of the week, 10 a.m., when an obstetrician flies in to attend to any pregnant mothers who happen to be around. And at 5.30 p.m. she flies out. So, if you've been careless enough to time your childbirth for Tuesday through Sunday, you'll have to climb into a helicopter and zip off to give birth alone in a strange hospital unsurrounded by tiresome loved ones. Do Lamaze classes on Oki now teach you to time your breathing to the whirring of the chopper blades?

The last local obstetrician left the island in 2006 and the health service isn't expecting any more. Doubtless most of us can recall reading similar stories over the years from remote rural districts in America, Canada, Australia. After all, why would a village of a few hundred people have a great medical system? But Oki has a population of 17,000, and there are still no obstetricians: birthing is a dying business.

So what will happen? There are a couple of scenarios: whatever Japanese feelings on immigration, a country with great infrastructure won't empty out for long, any more than a state-of-the-art factory that goes belly up stays empty for long. At some point, someone else will move in to Japan's plant.

And the alternative? In *The Children Of Men*, P. D. James' dystopian fantasy about a barren world, there are special dolls for women whose maternal instinct has gone unfulfilled: pretend mothers take their artificial children for walks on the street or to the swings in the park. In Japan, that's no longer the stuff of dystopian fantasy. At the beginning of the century, the country's toy makers noticed they had a problem: toys are for children and Japan doesn't have many. What to do? In 2005, Tomy began marketing a new doll called Yumel - a baby boy with a range of 1,200 phrases designed to serve as companions for the elderly. He says not just the usual things - "I wuv you" - but also asks the questions your grandchildren would ask if you had any: "Why do elephants have long noses?" Yumel joins his friend, the Snuggling Ifbot, a toy designed to have the conversation of a five-year old child which its makers, with the usual Japanese efficiency, have determined is just enough chit-chat to prevent the old folks going senile. It seems an appropriate final comment on the social democratic state: in a childish infantilized self-absorbed society where adults have been stripped of all responsibility, you need never stop playing with toys. We are the children we never had.

And why leave it at that? Is it likely an ever smaller number of young people will want to spend their active years looking after an ever greater number of old people? Or will it be simpler to put all that cutting-edge Japanese technology to good use and take a

flier on Mister Roboto and the post-human future? After all, what's easier for the governing class? Weaning a pampered population off the good life and re-teaching them the lost biological impulse or giving the Sony Corporation a licence to become the Cloney Corporation? If you need to justify it to yourself, you'd grab the graphs and say, well, demographic decline is universal. It's like industrialization a couple of centuries back; everyone will get to it eventually, but the first to do so will have huge advantages: the relevant comparison is not with England's early 19th century population surge but with England's Industrial Revolution. In the industrial age, manpower was critical. In the new technological age, manpower will be optional - and indeed, if most of the available manpower's Muslim, it's actually a disadvantage. As the most advanced society with the most advanced demographic crisis, Japan seems likely to be the first jurisdiction to embrace robots and cloning and embark on the slippery slope to transhumanism.

LES FEUILLES MORTES

Demographic origin need not be the final word. In 1775, Benjamin Franklin wrote a letter to Joseph Priestly suggesting a mutual English friend might like to apply his mind to the conundrum the Crown faced:

Britain, at the expense of three millions, has killed 150 Yankees this campaign, which is £20000 a head... During the same time, 60000 children have been born in America. From these data his mathematical head will easily calculate the time and the expense necessary to kill us all.

Obviously, Franklin was oversimplifying. Not every American colonist identified himself as a rebel. After the revolution, there were massive population displacements: as United Empire Loyalists well know, large numbers of New Yorkers left the colony to resettle in what's now Ontario. Some American Negroes were so anxious to remain subjects of King George III they resettled as far as Sierra Leone. For these people, their primary identity was not as American colonists but as British subjects. For others, their new identity as Americans had supplanted their formal allegiance to the Crown. The question for today's Europe is whether the primary identity of their fastest-growing demographic is Muslim or Belgian, Muslim or Dutch, Muslim or French.

That's where civilizational confidence comes in: if "Dutchness" or "Frenchness" seems a weak attenuated thing, then the stronger identity will prevail. One notes other similarities between revolutionary America and contemporary Europe: the United Empire Loyalists were older and wealthier; the rebels were younger and poorer. In the end, the former simply lacked the latter's strength of will.

Europe, like Japan, has catastrophic birth rates and a swollen pampered elderly class determined to live in defiance of economic reality. But the difference is that on the Continent the successor population is already in place and the only question is how bloody the transfer of real estate will be.

If America's "allies" failed to grasp the significance of 9/11, it's because Europe's home-grown terrorism problems had all taken place among notably static populations,

such as Ulster and the Basque country. One could make generally safe extrapolations about the likelihood of holding Northern Ireland to what cynical strategists in Her Majesty's Government used to call an "acceptable level of violence." But in the same three decades as Ulster's "Troubles," the hitherto moderate Muslim populations of south Asia were radicalized by a politicized form of Islam; previously formally un-Islamic societies such as Nigeria became semi-Islamist; and large Muslim populations settled in parts of Europe that had little or no experience of mass immigration.

On the Continent and elsewhere in the West, native populations are aging and fading and being supplanted remorselessly by a young Muslim demographic. Time for the obligatory "of courses": *of course*, not all Muslims are terrorists - though enough are hot for jihad to provide an impressive support network of mosques from Vienna to Stockholm to Toronto to Seattle. *Of course*, not all Muslims support terrorists - though enough of them share their basic objectives (the wish to live under Islamic law in Europe and North America) to function wittingly or otherwise as the "good cop" end of an Islamic good cop/bad cop routine. But, at the very minimum, this fast-moving demographic transformation provides a huge comfort zone for the jihad to move around in. And in a more profound way it rationalizes what would otherwise be the nuttiness of the terrorists' demands. An IRA man blows up a pub in defiance of democratic reality - because he knows that at the ballot box the Ulster Loyalists win the elections and the Irish Republicans lose. When a European jihadist blows something up, that's not in defiance of democratic reality but merely a portent of democratic reality to come. He's jumping the gun, but in every respect things are moving his way.

You may vaguely remember seeing some flaming cars on the evening news toward the end of 2005. Something going on in France, apparently. Something to do with - what's the word? - "youths." When I pointed out the media's strange reluctance to use the M-word vis-à-vis the rioting "youths," I received a ton of emails arguing there's no Islamist component, they're not the *madrasa* crowd, they may be Muslim but they're secular and Westernized and into drugs and rap and meaningless sex with no emotional commitment, and rioting and looting and torching and trashing, just like any normal healthy Western teenagers. These guys have economic concerns, it's the lack of jobs, it's conditions peculiar to France, etc. As one correspondent wrote, "You right-wing shit-for-brains think everything's about jihad."

Actually, I don't think everything's about jihad. But I do think, as I said, that a good 90 per cent of everything's about demography. Take that media characterization of those French rioters: "youths." What's the salient point about youths? They're youthful. Very few octogenarians want to go torching Renaults every night. It's not easy lobbing a Molotov cocktail into a police station and then hobbling back with your walker across the street before the searing heat of the explosion melts your hip replacement. Civil disobedience is a young man's game.

In June 2006, a 54-year-old Flemish train conductor called Guido Demoor got on the Number 23 bus in Antwerp to go to work. Six - what's that word again? - "youths" boarded the bus and commenced intimidating the other riders. There were some 40 passengers aboard. But the "youths" were youthful and the other passengers less so.

Nonetheless, Mr. Demoor asked the lads to cut it out and so they turned on him, thumping and kicking him. Of those 40 other passengers, none intervened to help the man under attack. Instead, at the next stop, 30 of the 40 scrammed, leaving Mr. Demoor to be beaten to death. Three "youths" were arrested, and proved to be - *quelle surprise*! - of Moroccan origin. The ringleader escaped and, despite police assurances of complete confidentiality, of those 40 passengers only four came forward to speak to investigators. "You see what happens if you intervene," a fellow rail worker told the Belgian newspaper *De Morgen*. "If Guido had not opened his mouth he would still be alive."

No, he wouldn't. He would be as dead as those 40 passengers are, as the Belgian state is, keeping his head down, trying not to make eye contact, cowering behind his newspaper in the corner seat and hoping just to be left alone. What future in "their" country do Mr. Demoor's two children have? My mother and grandparents came from Sint-Niklaas, a town I remember well from many childhood visits. When we stayed with great-aunts and other relatives, the upstairs floors of the row houses had no bathrooms, just chamber pots. My sister and I were left to mooch around cobbled streets with our little cousin for hours on end, wandering aimlessly past smoke-wreathed bars and cafes, occasionally buying *frites* with mayonnaise. With hindsight it seemed as parochially Flemish as could be imagined. Not anymore. The week before Mr. Demoor was murdered in plain sight, bus drivers in Sint-Niklaas walked off the job to protest the thuggery of the - here it comes again - "youths." In little more than a generation, a town has been transformed.

Of the ethnic Belgian population, some 17 per cent are under 18 years old. Of the country's Turkish and Moroccan population, 35 per cent are under 18 years old. The "youths" get ever more numerous, the non-youths get older. To avoid the ruthless arithmetic posited by Benjamin Franklin, it is necessary for those "youths" to feel more Belgian. Is that likely? Colonel Gadhafi doesn't think so:

There are signs that Allah will grant Islam victory in Europe - without swords, without guns, without conquests. The fifty million Muslims of Europe will turn it into a Muslim continent within a few decades.

On Sept. 11, 2001, the American mainland was attacked for the first time since the War of 1812. The perpetrators were foreign - Saudis and Egyptians. Since 9/11, Europe has seen the London Tube bombings, the French riots, Dutch murders of nationalist politicians. The perpetrators are their own citizens - British subjects, *citoyens de la République française*. In Linz, Austria, Muslims are demanding that all female teachers, believers or infidels, wear head scarves in class. The Muslim Council of Britain wants Holocaust Day abolished because it focuses "only" on the Nazis'(alleged) Holocaust of the Jews and not the Israelis' ongoing Holocaust of the Palestinians.

How does the state react? In Seville, King Ferdinand III is no longer patron saint of the annual fiesta because his splendid record in fighting for Spanish independence from the Moors was felt to be insensitive to Muslims. In London, a judge agreed to the removal of Jews and Hindus from a trial jury because the Muslim defendant's counsel argued he couldn't get a fair verdict from them. The Church of England is considering

removing St. George as the country's patron saint on the grounds that, according to various Anglican clergy, he's too "militaristic" and "offensive to Muslims." They wish to replace him with St. Alban, and replace St. George's cross on the revamped Union Flag, which would instead show St. Alban's cross as a thin yellow streak.

In a few years, as millions of Muslim teenagers are entering their voting booths, some European countries will not be living formally under sharia, but - as much as parts of Nigeria, they will have reached an accommodation with their radicalized Islamic compatriots, who like many intolerant types are expert at exploiting the "tolerance" of pluralist societies. In other Continental countries, things are likely to play out in more traditional fashion, though without a significantly different ending. Wherever one's sympathies lie on Islam's multiple battle fronts the fact is the jihad has held out a long time against very tough enemies. If you're not shy about taking on the Israelis and Russians, why wouldn't you fancy your chances against the Belgians and Spaniards?

"We're the ones who will change you," the Norwegian imam Mullah Krekar told the Oslo newspaper *Dagbladet* in 2006. "Just look at the development within Europe, where the number of Muslims is expanding like mosquitoes. Every Western woman in the EU is producing an average of 1.4 children. Every Muslim woman in the same countries is producing 3.5 children." As he summed it up: "Our way of thinking will prove more powerful than yours." M