



BOARD OF INQUIRY (*Human Rights Code*)

IN THE MATTER OF the Ontario *Human Rights Code*, R.S.O. 1990, c. H.19, as amended;

AND IN THE MATTER OF the complaint by Ray Brillinger and the Canadian Lesbian and Gay Archives dated June 3, 1996 alleging discrimination based on sexual orientation and/or association with individuals identified by sexual orientation by the Personal Respondent Scott Brockie and the Corporate Respondent Imaging Excellence.

B E T W E E N:

Ontario Human Rights Commission

- and -

Ray Brillinger and the Canadian Lesbian and Gay Archives

Complainants

- and -

Scott Brockie and Imaging Excellence Inc.

Respondents

DECISION ON REMEDY

Adjudicator : Heather M. MacNaughton

Date : February, 24, 2000

Board File No: BI-0179-98

Decision No : 00-003-R

Board of Inquiry (*Human Rights Code*)
505 University Avenue
2nd Floor, Toronto ON M5G 2P3
Phone (416) 314-0004 Toll free 1-800-668-3946 Fax: (416) 314-8743
TTY: (416) 314-2379 TTY Tollfree: 1-800-424-1168

Introduction

In a decision released on September 29, 1999, I found that the rights of Ray Brillinger ("Brillinger"), and of the Canadian Lesbian and Gay Archives (the "Archives"), under the *Human Rights Code* R.S.O. 1990, c. H.19, as amended ("*Code*"), had been infringed by Scott Brockie ("Brockie") and Imaging Excellence Inc. ("Imaging Excellence"). In particular, I found that Brockie's refusal to provide a printing service to the Archives discriminated against both it, and Brillinger, directly, and by their association with the members of the lesbian and gay community, on the ground of sexual orientation.

All parties requested that I deal with a remedy for the breach subsequent to my finding of liability because Counsel for the Respondents had, throughout, challenged my jurisdiction to make a remedial order on constitutional grounds. Specifically, he submitted that a remedial order under the *Code* would breach Brockie's right to freedom of conscience and religion, a right guaranteed by the *Canadian Charter of Rights and Freedoms* [Part 1 of the *Constitution Act*, 1982, being Schedule B of the *Canada Act* 1982 (U.K.), 1982, c.11, the "*Charter*"].

The Remedy Sought

Counsel for the Ontario Human Rights Commission ("Commission") seeks an order requiring Brockie and Imaging Excellence to provide to lesbians and gays, and to organizations in existence for the benefit, the printing services that they provide to others. Counsel for the Complainants seeks, in addition, damages in the amount of \$5000 for the breach of the *Code*, and a written apology.

The Evidence

Hearing dates were set for the calling of expert constitutional evidence by all of the parties. Pursuant to my order, Counsel for the Respondents was to serve and file his expert's reports by September 10, 1999, and Counsel for the Commission and Counsel for the Complainants were to respond by October 8, 1999.

October 25, 26 and 27, 1999 were set for the hearing of the expert evidence. Counsel for the Respondents did not file his evidence as required. Despite this failure, both Counsel for the Commission and Counsel for the Complainants filed their evidence. A conference call was held to clarify how the hearing was to proceed, at which time Counsel for the Respondents indicated, for the first time, that he would not be calling any expert constitutional evidence. Hence, the hearing was scheduled to proceed with the Commission's and Complainants' evidence.

At the outset of the scheduled hearing dates, Counsel for the Respondents argued, again for the first time, that no constitutional evidence was relevant. In a ruling delivered orally, I allowed the Commission to call its evidence on the basis that it would assist me to balance the competing rights of the Complainants against those of the Respondents.

In this regard, I heard evidence from Professor Kathleen Lahey, a law professor at Queen's University, who has published an interdisciplinary text on sexuality. She testified about the social, historical, and legal context of discrimination against lesbians and gays. I also heard from Professor Barry Adam, a sociology professor at the University of Western Ontario, who gave evidence about the impact of discrimination on the lesbian and gay community as a sector of society, and the larger impact of this discrimination on society as a whole. Finally, I heard evidence from Dr. Bruce McLeod, the former Moderator of the United Church of Canada, who testified about the Church's experience in addressing discrimination against lesbians and gays in that Christian community.

The Issues

Counsel for the Respondents, in his Notice of Constitutional Question, and in his argument, does not allege that the provisions of the *Code* are unconstitutional. Instead he submits that, due to the acknowledged religious beliefs of Brockie and relying on his *Charter* right to religious and conscientious freedom, no remedy can be ordered against him, or against Imaging Excellence, for the breach of the *Code* which I found in my earlier decision.

Both Counsel for the Commission and Counsel for the Complainants, acknowledge that the orders they seek would infringe Brockie's constitutional rights by compelling him to provide a service to members of the lesbian and gay community, and to their organizations. They accept that Brockie believes that such a compulsion would cause him to act against his religious convictions and his understanding of the teachings of the Christian Bible. Both Counsel submit, however, that such an infringement is justifiable in a free and democratic society under section 1 of the *Charter*.

All Counsel agree that, in deciding the scope of the limitation in section 1 of the *Charter*, what I must do is balance the competing rights of Brillinger and the Archives to be free from discrimination based on sexual orientation, and Brockie's freedom of conscience and religion as guaranteed by the *Charter*.

The parties disagree about whether a remedy can be ordered against Imaging Excellence. Counsel for the Commission and Counsel for the Complainants submit that Imaging Excellence, as a corporate entity, cannot have religious beliefs, or a conscience, and hence the constitutional issue does not arise with respect to it.

Counsel for Imaging Excellence disagrees. He submits that the religious beliefs of Brockie cannot be separated from the corporation of which he is a principal and the directing mind.

I propose to deal first with the issue of the scope of the individual right to religious and conscientious freedom and the limitation on that freedom that may be appropriate under section 1. If necessary, I will then deal with the appropriateness of a remedy against Imaging Excellence.

The Charter Provisions

Freedom of conscience and religion is protected in section 2(a) of the *Charter* as follows:

Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion.....

The late Chief Justice Dickson, writing for the majority, in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at 336 set out what is meant by freedom of religion:

The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination.

Freedom is characterized by the absence of compulsion or coercion. One of the goals of section 2(a) of the *Charter* is to protect individuals against compulsions which violate their religious freedom or their conscience.

This freedom is not unlimited, however. At page 337 of *R. v. Big M Drug Mart Ltd.*, *supra*, Mr. Justice Dickson said:

Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the **fundamental rights and freedoms of others**, no one is to be forced to act in a way contrary to his beliefs or his conscience. (emphasis added)

This limitation has recently been repeated by the Supreme Court in *Ross v. New Brunswick School District No. 15*. [1996] 1 S.C.R. 825 where, at page 868, the Court stated that freedom of religion is “subject to such limitations as are necessary to protect public safety, order, health or morals and the fundamental rights and freedoms of others.”

Rather than limiting the scope of the fundamental freedoms in section 2, the cases require that reconciliation of competing rights and interests be considered under a section 1 analysis. (*Ross, supra* and *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995], 1 S.C.R. 315 at p. 384)

In the result, freedom of conscience and religion is guaranteed “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”.

Section 1 Analysis

All Counsel agreed that the test for establishing that a limit is reasonable and demonstrably justified in a free and democratic society was first set out by the Supreme Court of Canada in *R. v. Oakes* [1986] 1 S.C.R.103. Chief Justice Dickson said at p. 136:

[t]he Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter* and the ultimate standard against which a lit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.

The Court went on to set out the factors that must be considered in applying the *Oakes* test. Those factors are:

First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in the first sense, should impair “as little as possible” the right or freedom in question...Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of “sufficient importance”.

In subsequent decisions, the Supreme Court has said that, the *Oakes* test should be applied flexibly to achieve a balance between individual rights and community needs. Conflicting values must be placed in their factual and social context. (*RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199 and *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232)

When applying the *Oakes* test to the circumstances in this case, I am directed to ensure that my order (the infringing measure) employs means to achieve its objective which are proportional, in that they are rationally connected to the objective, and minimally impair Brockie's constitutional rights. Further, the infringement must be outweighed by the objectives and benefits served by the impugned *Code* provisions. Finally, I must consider whether less intrusive means are available to me.

Given the special remedial nature of the *Code*, and its quasi-constitutional status, the Section 1 analysis must also be informed by the need to give the *Code* its fullest possible effect. (*Ross, supra*)

Is the Objective of the *Code* Sufficiently Important to Override a Constitutionally Guaranteed Right or Freedom?

The special status of the *Code* as fundamental and quasi-constitutional legislation has been recognized by the Supreme Court of Canada in *Insurance Corporation of British Columbia v. Heerspink*, [1992] 2 S.C.R. 145. Its stated purpose, as set out in the Preamble, is to recognize "the inherent dignity and worth of every person" and to provide for "equal rights and opportunities without discrimination." Further, it is to create a "climate of understanding and mutual respect for the dignity and worth of each person" so that each feels a part of, and is "able to contribute fully to the development and well being, of the community." In the circumstances of this case, the objective of the *Code* prohibition against discrimination in the delivery of services, and the objective of the order sought, is to eradicate discrimination on the basis of sexual orientation.

There is no question that this is a pressing and substantial objective. The Supreme Court of Canada has clearly confirmed in *Egan v. Canada* [1995] 2 S.C.R. 513, and more recently in *Vriend v. Alberta* [1998] 1 S.C.R. 493, that protection from discrimination because of an individual's sexual orientation is a substantial objective. *Vriend* involved a challenge to Alberta's *Individual's Rights Protection Act* R.S.A. 1980, c. I-2 on the basis that its failure to include sexual orientation as a protected ground was discriminatory. Justices Cory and Iacobucci said at p. 551:

The exclusion sends a message to all Albertans that it is permissible, and perhaps even acceptable, to discriminate against individuals on the basis of their sexual orientation. The effect of that message on gays and lesbians is one whose significance cannot be underestimated. As a practical matter, it tells them that they have no protection from discrimination on the basis of their sexual orientation. Deprived of any legal redress they must accept and live in constant fear of discrimination. These are burdens which are not imposed on heterosexuals.

Perhaps most important is the psychological harm which may ensue from this state of affairs. Fear of discrimination will logically lead to concealment of true identity and this must be harmful to personal confidence and self-esteem. Compounding that effect is the implicit message conveyed by the exclusion, that gays and lesbians, unlike other individuals, are not worthy of protection. This is clearly an example of a distinction which demeans the individual and strengthens and perpetrates the view that gays and lesbians are less worthy of protection as individuals in Canada's society. The potential harm to the dignity and perceived worth of gay and lesbian individuals constitutes a particularly cruel form of discrimination.

Is the order sought rationally connected to the objective?

It is clear that the order that is sought is rationally connected to this objective. A declaration that conduct is discriminatory, without an order compelling that the discrimination not be repeated, would not ensure inclusion.

The more troubling assessment is whether the orders sought would impair Brockie's rights "as little as possible" in proportion to the objective sought to be achieved.

Proportionality and Minimal Impairment

In assessing this proportionality component, I must attempt to balance the religious rights of Brockie on the one hand, with the equality rights of Brillinger, and members of the Archives, on the other. Further, if the constitutional rights of an individual would be infringed by the remedy sought under the *Code*, the onus is on the Commission to demonstrate that the infringement is important for the benefit of the community and that the infringement meets the requirements of *Oakes*.

Counsel for the Respondents submitted that the Respondents' refusal to provide the requested printing services was not a refusal to supply a necessity of life and that no true harm had

come to the Complainants. He argued that there was no harm because printing services were otherwise available to Brillinger and to the Archives. He contrasted what he described as a "disappointment" to the Complainants with the proposed interference with an essential part of Brockie's life, his religious beliefs. In this context, he said, the order sought by Counsel for the Commission and Counsel for the Complainants was not the least intrusive measure available, nor would it appropriately balance the interests of the parties involved.

Counsel for the Respondents submitted that I should incorporate into the *Code* a provision which would allow the refusal of a non-life-essential service on a prohibited ground, if the person refusing was able to demonstrate a clear religious belief that prevented them from providing the service.

Both Counsel for the Complainants and Counsel for the Commission take the opposite view.

The Contextual Evidence

In balancing the interests of the parties in this case, I was assisted by the contextual evidence given by the experts called jointly by the Commission and the Complainants.

The evidence of Professors Lahey and Adams was clear and uncontroverted; failure to protect the rights of lesbians and gays from discrimination because of sexual orientation results in a silencing of a part of our society and a marginalization of certain of its members. They both gave evidence about the long-standing social prejudice against, and economic disadvantage of, members of the lesbian and gay community. They testified that this has resulted in lesbians and gays choosing invisibility and privacy as a means of avoiding the effects of prejudice against them.

In particular, Professor Lahey testified that lesbians and gays continue to suffer discrimination in employment, housing and accommodation, in the education system, and in the provision of services. She testified that there continues to be a heavy pressure on lesbians and gays to conceal their identity to avoid experiencing discrimination. She described a "spiral of silence" in which lesbians and gays modify their behaviour to avoid the impact of prejudice.

Dr. Barry Adam testified that concealment of their sexuality has had deleterious psychological and emotional effects on lesbians and gays. He said that one implication of limiting the participation of lesbians and gays in broader society is to create a so-called "separate but equal" regime. In practice, however, he said such regimes are historically separate but unequal. The minority community always ends up with fewer options in a wide range of activities, and with greater limits on their cultural expression and political and social participation.

Dr. McLeod testified that the United Church, after a lengthy and divisive debate, declined to introduce a discriminatory practice into its Church policy that would have excluded lesbians and gays from ordination. He said that those in the Church who disagreed with this decision were welcome to remain members of the Church and that the Church respected their right to continue to hold beliefs opposite to those of Church policy. They were not, however, able to impose those opposite beliefs on Church policy, or behaviour, in a manner that would harm lesbians and gays.

In contrast, the only evidence before me of Brockie's religious beliefs was his own. He testified that he endeavours to live his life according to biblical principals which, he testified, include a stated belief that homosexuality is detestable. He testified that providing printing services to lesbian and gay organizations would be in direct opposition to his beliefs.

While I did not doubt Brockie's sincerity, it was also apparent from his evidence that he was able to make distinctions which allowed him to provide printing services to other organizations which cater to the lesbian or gay community. For example, he acknowledged that Imaging Excellence provided printing services to a company called Body Body Wear which produces underwear marketed to the gay male population. Although Brockie admitted during his cross-examination that he found Body Body Wear's advertisements equally detestable, he provided the service. He was apparently able to distinguish this from the work sought by the Archives, on the basis that the Archives was involved in furthering and supporting the lesbian and gay "lifestyle".

I accept the evidence of the experts who testified on behalf of the Commission and the Complainants. I further accept that, while great achievements have been made, invisibility of, and discrimination against the lesbian and gay community continues to impact on the ability of lesbians and gays to function fully and openly in contemporary society.

Conclusion

Having considered all of the evidence before me, and in balancing the competing rights, I have concluded that it is reasonable to limit Brockie's freedom of religion in order to prevent the very real harm to members of the lesbian and gay community, and their organizations, by the denial of services because of their sexual orientation. The infringement of the rights of Brockie is warranted in our Canadian society, which has seen fit, through the terms and provisions of the *Code*, and through the identification of sexual orientation as an analogous ground of protection under the *Charter*, to protect the rights of its lesbian and gay members from discrimination because of sexual orientation. (*Egan and Vriend, supra*) I conclude that in order to eradicate discrimination by Brockie, I must compel him, and Imaging Excellence, to provide the service they earlier denied. A declaratory order and/or monetary compensation will not achieve this objective.

In light of my finding against Brockie, it is not necessary for me to consider ordering a separate remedy against Imaging Excellence. I accept the submissions from Counsel for the Commission and Counsel for the Complainants that since *R.v. Big M Drug Mart Ltd., supra*, it has been decided that freedom of religion is an individual freedom and does not provide a charter defence to corporations.

However, considering Imaging Excellence as a separate corporate entity for the purpose of a remedial order is, in my view, too simplistic in this case. Imaging Excellence is a small and closely-held corporation, where the principals are actively involved in the day to day business operations. Further Brockie, who would be required to implement

my order, is one and the same as the individual respondent who holds the religious belief. He was able to impose his religious beliefs on Imaging Excellence and to cause it to deny the service to Brillinger and to the Archives. An order against Imaging Excellence would have directly impacted Brockie.

To accept the arguments of Counsel for the Respondents that no harm was suffered by Brillinger and the Archives because they were able to obtain the printing service elsewhere, would be to focus on the nature of the service that was denied and to minimize the harm that was experienced. It was clear from the evidence of Brillinger, and of the experts, that the impact of the denial of services went well beyond the actual printing service that was denied and affected the dignity and self-worth of Brillinger and the members of the Archives. Focusing on the 'non-essential' nature of the service would not reflect the seriousness of the impact on the Complainants of this refusal in the context of historical and continuing discrimination. Such a focus devalues their experience of discrimination and the endeavour the Archives is involved in to allow lesbians and gays to live open and proud lives. As Dr. Robin Brownlie testified during the first phase of these proceedings, "each new incident (of denial) reopens the wound of that discrimination and harm."

Nor does Counsel for the Respondents' argument reflect the fact that, while other services are currently available to the lesbian and gay community in Toronto, a large metropolitan center, this will not necessarily be the case in smaller centers. Further, even in Toronto, allowing Brockie to rely on his religious freedom to deny a service could result in an erosion of other services that are currently available to lesbians and gays. The testimony of Dr. Adams was helpful in this area. He testified that, even in large centers, there is nothing to prevent a ripple effect, with increasing numbers of services being denied on the basis of religious freedom, until society is left with fewer and fewer services available to members of marginalized groups. He testified that sanctioning the denial of services in just one instance risks creating a license to discriminate for all potential providers of services, leaving ever reduced options available to members of our society.

No less intrusive order would be appropriate.

While it may be difficult to see any "balance" in an imposition of a penalty against Brockie and Imaging Excellence, in fact nothing in my order will prevent Brockie from continuing to hold, and practice, his religious beliefs. Brockie remains free to hold his religious beliefs and to practice them in his home, and in his Christian community. He is free to espouse those beliefs and to educate others as to them. He remains free to try to persuade elected representatives, through his involvement in the democratic process, that the *Code* protections currently granted to the lesbian and gay community, are wrong.

What he is not free to do, when he enters the public marketplace and offers services to the public in Ontario, is to practice those beliefs in a manner that discriminates against lesbians and gays by denying them a service available to everyone else. He must respect the publicly-arrived-at community standards embodied in the *Code*. My order does not restrict Brockie's right to believe as he does, just the manner in which he may practice those beliefs.

The evidence of Dr. McLeod gave one example of a Christian community which was able to achieve a balance by allowing members who disagreed with established church policy to continue to hold their beliefs, and respecting their right to do so, while denying them the right to impose those beliefs on church policy.

Further, providing a commercial printing service does not require Brockie or Imaging Excellence to be a part of the Archives or to associate their name with its activities. The connection between providing the printing services and maintaining and exercising a private belief that homosexuality is "detestable" is extremely remote. Brockie has been able to make these types of distinctions already when Imaging Excellence decided to provide printing services to Body Body Wear.

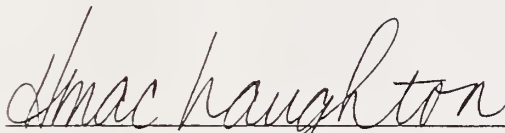
Order

I therefore order Brockie and Imaging Excellence to provide the printing services that they provide to others, to lesbians and gays and to organizations in existence for their benefit.

I further order that Brockie and Imaging Excellence pay damages in the amount of \$5000 to Brillinger and the Archives. It is only through an award of damages of this magnitude that I am able to indicate the seriousness of the breach that occurred here. Counsel for the Respondents in this case repeatedly referred to the issues in this case as being ones of "political correctness". While it is apparent to me that nothing in this decision will persuade Brockie of the serious impact of his discriminatory act, I am hopeful that others will be informed by it.

I decline to order Brockie to provide Brillinger and the Archives with an apology because I seriously doubt the effectiveness of such an order in this case.

Dated at Toronto this 24th day of February, 2000



Heather M. MacNaughton
Chair, Board of Inquiry

[Faint, illegible text covering the majority of the page]

