

CANADA / JUDGMENT

Egale Canada v. Canada (Attorney General of)

2002 BCCA 710

COURT

British Columbia Court of Appeal

DECIDED

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2002BCCA0710 Citation: Egale Canada et al v. Att. Gen. (Can) et al Date:20021108 2002 BCCA 710 Docket: CA029048 CA029017 Registry: Vancouver COURT OF APPEAL FOR BRITISH COLUMBIA ORAL REASONS FOR JUDGMENT BEFORE THE HONOURABLE Mr. Justice Lambert November 8, 2002 IN CHAMBERS BETWEEN: EGALÉ CANADA INC., DAVID SHORTT and SHANE MCCLOSKEY, MELINDA ROY and TANYA CHAMBERS, LLOYD THORNHILL and ROBERT PEACOCK, ROBIN ROBERTS and DIANA DENNY, WENDY YOUNG and MARY THERESA HEALY APPELLANTS (PETITIONERS) AND: THE ATTORNEY GENERAL OF CANADA, THE ATTORNEY GENERAL OF BRITISH COLUMBIA THE DIRECTOR OF VITAL STATISTICS FOR BRITISH COLUMBIA RESPONDENTS (RESPONDENTS) CA029017 BETWEEN: DAWN BARBEAU and ELIZABETH BARBEAU PETER COOK and MURRAY WARREN JANE HAMILTON and JOY MASUHARA APPELLANTS (PETITIONERS) AND: THE ATTORNEY GENERAL OF CANADA, THE ATTORNEY GENERAL OF BRITISH COLUMBIA RESPONDENTS (DEFENDANTS) L. Reaume appearing for the Applicant, Canadian Human Rights Commission K. Chapman appearing for the Appellant, Egale Canada Inc. R. Hughes appearing for the Appellants, D. & E. Barbeau L. Greathead appearing for the Respondent, A.G.(B.C.) Vital Statistics W. Divoky appearing for the Respondent, A.G. (Can.)

- [1] LAMBERT, J.A.: This is an application by the Canadian Human Rights Commission for leave to intervene in these two appeals.
- [2] The Director of Vital Statistics, an issuer of marriage licences under the Marriage Act of British Columbia, declined to issue marriage licences under the Marriage Act with respect to a number of couples, each couple being of the same sex as each other.
- [3] The Attorney General of British Columbia filed a petition. It is not necessary for me to describe that petition because it has since been withdrawn. However, two further petitions have been brought, one by Egale Canada Inc. Egale Canada Inc. is an incorporated entity and the acronym stands for Equality for Gays and Lesbians Everywhere. Added as petitioners were a number of individuals. The defendants in that action were the Attorney General of Canada, the Attorney General of British Columbia and the Director of Vital Statistics for British Columbia. In the other action, there were three same sex couples who

were the petitioners and the Attorney General of Canada and the Attorney General of British Columbia were the defendants.

- [4] On November 28, 2000, Chief Justice Brenner ordered that the petitions be heard together. Chief Justice Brenner at that time granted intervenor status to the British Columbia Coalition for Marriage and Family and to the Interfaith Coalition for Marriage. On July 2001, the Attorney General, as I have said, withdrew its petition. Between July 23, 2001, and August 3, 2001, Mr. Justice Pitfield heard the petitions. His Reasons for Judgment were delivered on October 2, 2001 and a corrigendum two days later.
- [5] Egale and the plaintiffs in the non-Egale action, who have been called collectively, as plaintiffs, the B.C. Partners, both filed Notices of Appeals. The appeals are scheduled to be heard together in February 2003. In March 2002, Egale and the B.C. Partners filed their factums. On June 6, 2002, Madam Justice Rowles granted intervenor status to the British Columbia Coalition for Marriage and Family and to the Interfaith Coalition for Marriage, both of whom were intervenors before Mr. Justice Pitfield. On June 21, 2002, Madam Justice Rowles granted intervenor status to the Coalition of Liberal Rabbis. On July 5, 2002, the Attorney General of British Columbia and the Attorney General of Canada filed their factums. On the same date the Coalition of Liberal Rabbis also filed its factum. On July 12, the Interfaith Coalition for Marriage and the British Columbia Coalition for Marriage and Family filed their factums.
- [6] On October 18, 2002, more than one year after the chambers judge issued his Reasons for Judgment, after all of the factums had been filed and approximately four months before the date set to the hearing of the appeal, the Canadian Human Rights Commission brought this application for intervenor status.
- [7] I reject the application of the Canadian Human Rights Commission and I refuse to grant it intervenor status for three reasons.
- [8] My first reason for rejecting this intervention application relates to the capacity and powers of the Commission. I propose to quote some of the provisions of the Canadian Human Rights Act: PURPOSE OF ACT
2. The purpose of this Act is to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence for which a pardon has been granted. PART 1 PROSCRIBED DISCRIMINATION General 3.(1) For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for which a pardon has

been granted. Discriminatory Practices

5. It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public
 - (a) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or
 - (b) to differentiate adversely in relation to any individual, on a prohibited ground of discrimination.
6. It is a discriminatory practice in the provision of commercial premises or residential accommodation
 - (a) to deny occupancy of such premises or accommodation to any individual, or
 - (b) to differentiate adversely in relation to any individual, on a prohibited ground of discrimination.
7. It is a discriminatory practice, directly or indirectly,
 - (a) to refuse to employ or continue to employ any individual, or
 - (b) in the course of employment, to differentiate adversely in relation to an employee. on a prohibited ground of discrimination.
8. It is a discriminatory practice
 - (a) to use or circulate any form of application for employment, or
 - (b) in connection with employment or prospective employment, to publish any advertisement or to make any written or oral inquiry. that expresses or implies any limitation, specification or preference based on a prohibited ground of discrimination.
12. It is a discriminatory practice to publish or display before the public or to cause to be published or displayed before the public any notice, sign, symbol, emblem or other representation that
 - (a) expresses or implies discrimination or an intention to discriminate, or
 - (b) incites or is calculated to incite others to discriminate if the discrimination expressed or implied, intended to be expressed or implied or incited or calculated to be incited would otherwise, if engaged in, be a discriminatory practice described in any of sections 5 to 11 in section 14. 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. 14.(1) It is a discriminatory practice,

- (a) in the provision of goods, services, facilities or accommodation customarily available to the general public,
- (b) in the provision of commercial premises or residential accommodation, or
- (c) in matters related to employment, to harass an individual on a prohibited ground of discrimination.

(2) Without limiting the generality of subsection (1), sexual harassment shall, for the purposes of that subsection, be deemed to be harassment on a prohibited ground of discrimination.

14.1 It is discriminatory practice for a person against whom a complaint has been filed under Part III, or any person acting on their behalf, to retaliate or threaten retaliation against the individual who filed the complaint or the alleged victim. PART II CANADIAN HUMAN RIGHTS COMMISSION Powers Duties and Functions 27(1) In addition to its duties under Part III with respect to complaints regarding discriminatory practices, the Commission is generally responsible for the administration of this Part and Parts I and III and

- (a) shall develop and conduct information programs to foster public understanding of this Act and of the role and activities of the Commission thereunder and to foster public recognition of the principle described in section 2
- (b) shall undertake or sponsor research programs relating to its duties and functions under this Act and respecting the principle described in section 2;
- (f) shall carry out or cause to be carried out such studies concerning human rights and freedoms as may be referred to it by the Minister of Justice and include in a report referred to in section 61 a report setting out the results of each such study together with such recommendations in relation thereto as it considers appropriate.
- (h) shall, so far as is practical and consistent with the application of Part III, try by persuasion, publicity or any other means that it considers appropriate to discourage and reduce discriminatory practices referred to in sections 5 to 14.1.

[9] In my opinion, from the wording chosen in s.2, particularly the words "within the purview of matters coming within the legislative authority of Parliament" and from the words to the same effect in s. 13(1) with respect to telecommunications undertakings, it is clear that the Parliament of Canada in enacting the Canadian Human Rights Code did not intend that the Canadian Human Rights Code should apply beyond the legislative jurisdiction of the Parliament of Canada or intrude into the legislative jurisdiction of the provinces.

[10] The Act is further limited in its dealing with discriminatory practices. The discriminatory practices dealt with are all either the provision of goods, services, facilities or accommodation, customarily available to the general public, or the provision of commercial premises or residential accommodation, or employment. In my opinion, when those sections are read in a background of the legislative capacity of the Parliament of Canada

they must be restricted to the provision of goods and services, the provision of commercial premises and employment within that legislative capacity.

- [11] With respect to marriage, of course, s. 91 of the Constitution Act, 1867, under head 26 gives competency over marriage and divorce to the Parliament of Canada. Section 92 by head 12 gives the solemnization of marriage in the province to the province. It gives property and civil rights in the province to the province, and it gives generally all matters of a merely local or private nature in the province to the province. The latter two heads being head 13 and head 16.
- [12] The director of Vital Statistics, in his authority over the issuance of marriage licences, and in his declining to issue marriage licences in this case was, in my opinion, acting under the properly constituted British Columbia legislation in the Marriage Act, and dealing with the matter of the solemnization of marriage.
- [13] Counsel for the Human Rights Commission was asked during the course of argument what was the service or the housing or the employment to which it was alleged there was a discriminatory practice. Counsel said it was the service in relation to the issuance of marriage licences. In my opinion that is a service within the legislative capacity of the legislature of British Columbia, and outside the sphere of interest of the Parliament of Canada or of the Canadian Human Rights Commission.
- [14] Counsel referred to a number of cases where the Canadian Human Rights Commission has been granted leave to intervene. The first in order of time is *Haig v. Canada* (1992) 9 O.R. (3d) 495. That was a case involving the Canadian military and an alleged discrimination because of sexual orientation. I do not have any doubt that there was capacity in the Canadian Human Rights Commission to apply for intervenor status in that case before the Ontario courts, and it was granted.
- [15] The second case is *Egan v. Canada* [1995] 2 S.C.R. 513. In that case the discrimination was with respect to the spousal entitlement under the Old Age Security Act to those spouses whose combined incomes fall below a certain level. Since it was the Old Age Security Act of Canada, again it seems to me to be a matter with an employment and a service within the constitutional sphere of Parliament. Leave was granted.
- [16] The third case is *Vriend v. Alberta* [1998] 1 S.C.R. 493. In that case the alleged discrimination dealt with a teacher's employment at a college, which was terminated on the basis of homosexuality. Sexual orientation was not a prohibited ground of discrimination under the Individual Rights Protection Act of Alberta. I believe that this case came within the legislative and executive competence of the Province of Alberta. Nonetheless, the Canadian Human Rights Commission was granted intervenor status in the Supreme Court of Canada. The reasons disclose no consideration of the issue that is guiding me in this case on my first ground for refusing the application. I propose to assume that the point was not argued or decided when intervenor status leave was granted.

- [17] The same is true in the fourth case, *Blencoe v. British Columbia (Human Rights Commission)* [2000] 2 S.C.R. 307. The issue there is related to sexual harassment by a cabinet minister in the government of British Columbia. It was certainly within the provincial sphere. The Canadian Human Rights Commission was granted leave to intervene in the Supreme Court of Canada. Again, the basis of the intervention was not addressed by the Supreme Court of Canada. For that reason I do not regard this as a binding authority that the Canadian Human Rights Commission has within its capacity the power to intervene in provincial matters.
- [18] I have set out s. 27(1)(h). That is the paragraph that is relied on by counsel for the Commission as giving power to the Commission to intervene in a case of this type. It deals with the power to try by persuasion, publicity or any other means that it considers appropriate, to discourage and reduce discriminatory practices. But it restricts the scope of that power to those discriminatory practices referred to in ss. 5 to 14.1. I am not entirely satisfied that intervening in a case in the British Columbia Court of Appeal could be regarded as persuasion or publicity, but I suppose it could be "any other means" that it considers appropriate to discourage and reduce discriminatory practices. However, as I have said, I do not consider that it is reducing discriminatory practices referred to in s. 5 to 14.1.
- [19] I conclude that not only does the Canadian Human Rights Commission not have the constitutional competence to intervene in provincial matters, but that it does not have the specific power in its legislation to intervene in this case.
- [20] My second reason for refusing this application relates to the question of prejudice. The question of failure to provide equal treatment and the question of discrimination have been raised by the parties in relation to s. 15 and to s. 1 of the Charter of Rights and Freedoms. The issue on which the Canadian Human Rights Commission says that it has a special expertise and would bring a unique and helpful point of view based on that unique experience is with respect to discrimination under the Canadian Human Rights Code.
- [21] The Attorney General of British Columbia has said in argument that the evidence before the trial judge was not presented by the Attorney General of British Columbia in a way that would meet the arguments that the Canadian Human Rights Commission would wish to raise in support of the points it wishes to advance in the intervention, were the intervention to be permitted. The Attorney General of British Columbia says that it suffered irremediable prejudice through not having an opportunity to lead the relevant evidence on the different point that the Canadian Human Rights Commission wishes to advance.
- [22] I consider that this prejudice has been made out. I also note that there is some procedural prejudice in relation to the very late date at which the Canadian Human Rights Commission is making this application. It was not made at the trial. Even on the appeal, it is made after all the factums have been filed.

- [23] On those two bases of prejudice, the first, I think more significant than the second, I would also refuse this application. I say as a second ground of my refusal that prejudice would have prevented me from granting this application.
- [24] My third reason for refusing the application is that I am not satisfied that the Canadian Human Rights Commission wishes to present a unique perspective that is not going to be fully presented by the existing parties. On reading the Canadian Human Rights Act, there is a discriminatory practice in relation to religion as well as to sexual orientation. The fact that marriage is a sacrament in the Christian religion, and I believe in other religions with adherents in Canada, seems to me to be a relevant issue in relation to a particular view about discriminatory practices.
- [25] There is nothing in the argument that is proposed to be made by the Canadian Human Rights Commission that indicates that there is any balancing required in the treatment of the refusal to issue a marriage licence to same sex couples as a discriminatory practice.
- [26] As I understand the argument that is to be made, what might have been a unique perspective is not being advanced and what are advanced as unique perspectives are matters that are fully covered by the very experienced counsel for the parties and for the Attorney General of Canada and for the Attorney General of British Columbia.
- [27] I do not think that the basis for permitting an intervention, that a unique perspective will be brought to bear, is established in this case.
- [28] For those three reasons, I dismiss the application. "The Honourable Mr. Justice Lambert"

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