QUEEN'S BENCH FOR SASKATCHEWAN

Citation: **2016 SKQB 289**

Date: **2016 09 01**
Docket: QBG 2351 of 2015
Judicial Centre: Regina

BETWEEN:

HUGH OWENS

COMPLAINANT

- and -

POST MEDIA NETWORK INC. (operating as "THE LEADER-POST")

RESPONDENT

Counsel:

Scott A. Newell	for the complainant
Sean Sinclair	for Post Media Network Inc.

JUDGMENT BROWN J.
SEPTEMBER 1, 2016

INTRODUCTION

[1] This matter involves the prohibition against discrimination regarding services offered to the public as set out in s. 12 of *The Saskatchewan Human Rights Code*, SS 1979, c S-24.1 [*Code*] and how this provision impacts advertising in a daily newspaper. It therefore also involves consideration of the right to freedom of expression and freedom of the press as

set out in s. 5 of the *Code* within the context of how these rights interact with the s. 4 right to freedom of conscience, belief and religious association.

[2] The interpretation of what is discriminatory, including resolution of conflicts amongst various rights, must be accomplished on a case by case basis with close attention being paid to the facts in each instance. In the circumstances of this case, there has been no discrimination. In addition, Post Media's freedom of expression in the context of freedom of the press is more significantly impacted than Mr. Owens' freedom of religion in the circumstances here and therefore will direct the outcome.

[3] For the reasons that follow, Mr. Owens' complaint of discrimination is dismissed.

FACTS

[4] Mr. Owens is a member of the Christian faith. As a part of his faith he holds certain beliefs with respect to homosexuality. He says his beliefs in that regard are set out in a number of verses from the New International Version Bible, the three pertinent ones for this matter being:

> ***Romans 1:21-27***
>
> [21]For although they knew God, they neither glorified him as God nor gave thanks to him, but their thinking became futile and their foolish hearts were darkened. [22]Although they claimed to be wise, they became fools [23] and exchanged the glory of the immortal God for images made to look like mortal man and birds and animals and reptiles.
>
> [24]Therefore God gave them over in the sinful desires of their hearts to sexual impurity for the degrading of their bodies with one another. [25]They exchanged the truth of God for a lie,

> and worshiped and served created things rather than the Creator – who is forever praised. Amen.
>
> [26]Because of this, God gave them over to shameful lusts. Even their women exchanged natural relations for unnatural ones.
>
> [27]In the same way the men also abandoned natural relations with women and were inflamed with lust for one another. Men committed indecent acts with other men, and received in themselves the due penalty for their perversion.
>
> ***Leviticus 18:22***
>
> [22] Do not lie with a man as one lies with a woman; that is detestable.
>
> ***1 Corinthians 6:9-11***
>
> *Lawsuits Among Believers*
>
> [9]Do you not know that the wicked will not inherit the kingdom of God? Do not be deceived: Neither the sexually immoral, nor idolaters, not adulterers, nor male prostitutes, nor homosexual offenders, [10]nor thieves, nor the greedy, nor drunkards, nor slanderers, nor swindlers will inherit the kingdom of God. [11]And that is what some of you were. But you were washed, you were sanctified, you were justified in the name of the Lord Jesus Christ and by the Spirit of our God.

[5] Mr. Owens also believes he should tell others about this perspective so as to convince them to believe as he does on the subject. In furtherance of this belief Mr. Owens has essentially, on an annual basis between 1997 and 2013, purchased advertising in the Regina Leader-Post [LP] and printed these, and at earlier times, some additional verses. Post Media Network Inc. [Post Media] is a corporation that publishes the LP newspaper in Regina. The LP had a paid readership of approximately 35,000-40,000 people at the relevant time.

[6] On June 7, 2013 Mr. Owens proceeded to purchase advertising space in the LP for the purpose of running his advertisement which consisted of the verses as set out above and an indication the advertisement was paid for by himself. This time of year was important to Mr. Owens as it coincides with Gay Pride week, which has been the occasion he has traditionally targeted with his advertisement. However on June 7, 2013 he was advised by staff at the LP that his advertisement was not going to be run that year as it had been flagged for refusal. Mr. Owens' advertisement had been flagged in 2012 after an employee of the LP made a written complaint that the advertisement was offensive to him and others.

[7] Mr. Owens wrote to the LP to obtain further information regarding the refusal. He was advised on July 22, 2013 by letter from LP staff that the advertisement had been rejected based on the publisher's discretion. The LP subsequently advised Mr. Owens his advertisement was considered offensive to staff at the LP as well as to readers. He was further advised that, based on the LP's written policy containing the reservation of the right to reject any advertisement, including when its contents are deemed offensive to its readers, the advertisement was being refused.

[8] Mr. Owens then submitted a complaint of discrimination on the basis of religion to the Saskatchewan Human Rights Commission [Commission]. The Commission concluded discrimination on the basis of Mr. Owens' religion had occurred within the meaning of s. 12 of the *Code* and initiated a request for a hearing pursuant to s. 29.6 of the *Code*.

[9] The parties attended mediation to explore resolution of the complaint but this did not resolve matters. Both Mr. Owens and the LP confirmed that neither was willing to change their position. Mr. Owens says that either the advertisement he brought in on June 7, 2013 runs or nothing runs. The LP maintains that the advertisement Mr. Owens insists on is contrary to their policy regarding printing matters that may offend its readers and is against their corporate values and, as a result, they will not run it.

[10] A hearing pursuant to s. 29.7 of the *Code* was therefore required to resolve the matter.

[11] At the hearing, Post Media established that the advertisement ran counter to its core values, something the Publisher, Marty Klyne, had insisted would be an integral element of the culture at the LP. This included placing a priority on the respect to be shown others, treating others as one would want to be treated and "taking the high road" in all endeavors as part of the organization's goal of possessing and demonstrating integrity.

[12] It was also established that Mr. Owens' advertisement was not refused based on his faith or religious affiliation. Mr. Owens was denied the placement of the advertisement based on the LP's identified concern that it would be offensive to the gay and lesbian community, a traditionally disadvantaged group. It was acknowledged by the Commission and Mr. Owens that the advertisement would be considered offensive to that group and others.

[13] Post Media confirmed in the evidence led that advertisements in the LP that are determined to be offensive to its staff and readership are regularly declined. This is based on a written policy that identifies Post

Media's right to refuse advertisements. Paragraph 1 of the General Information portion of the policy states:

> The Publisher reserves the right to reject, discontinue or omit any advertisement or to cancel any advertising contract, for reasons satisfactory to the Publisher without notice or without penalty to either party. All Advertising subject to Publisher's approval...

[14] Paragraph 5 states:

> The Publisher will not knowingly publish any advertisement which is illegal, misleading, or offensive to its readers.

[15] All advertisements sought to be placed in the LP are reviewed by staff. The Post Media management and editorial staff have refused to run advertisements in the LP for these reasons on a number of occasions, including on this occasion in relation to Mr. Owens.

[16] Mr. Owens has not sought to place his advertisement in other publications nor sought to have it air with other media outlets, electronic or otherwise.

ISSUES

[17] The issue of whether Mr. Owens has been discriminated against by Post Media in a way that is prohibited by s. 12 of the *Code* is divided into the following questions:

1. Has *prima facie* discrimination on the basis of Mr. Owens' religion been made out as against Post Media in turning down the placement of his advertisement?

2. If a *prima facie* case of discrimination has been made out, has Post Media justified its decision or conduct on the basis of the provisions of the *Code* or as developed by the courts?

3. If discrimination has in fact occurred, what is the appropriate remedy?

DISCUSSION

Law

[18] The *Code* provisions which have application here are:

> 3 The objects of this Act are:
>
> > (a) to promote recognition of the inherent dignity and the equal inalienable rights of all members of the human family; and
> >
> > (b) to further public policy in Saskatchewan that every person is free and equal in dignity and rights and to discourage and eliminate discrimination.
>
> 4 Every person and every class of persons shall enjoy the right to freedom of conscience, opinion and belief and freedom of religious association, teaching, practice and worship.
>
> 5 Every person and every class of persons shall, under the law, enjoy the right to freedom of expression through all means of communication, including, without limiting the

generality of the foregoing, the arts, speech, the press or radio, television or any other broadcasting device.

...

12(1) No person, directly or indirectly, alone or with another, or by the interposition of another shall, on the basis of a prohibited ground:

> (a) deny to any person or class of persons the accommodation, services or facilities to which the public is customarily admitted or that are offered to the public; or
>
> (b) discriminate against any person or class of persons with respect to the accommodation, services or facilities to which the public is customarily admitted or that are offered to the public.

(2) Subsection (1) does not apply to prevent the barring of any person because of the sex of that person from any accommodation, services or facilities upon the ground of public decency.

(3) Repealed. 2007, c.39, s.5.

(4) Subsection (1) does not apply to prevent the giving of preference because of age, marital status or family status with respect to membership dues, fees or other charges for services or facilities.

...

39(1) Where, in a proceeding under this Act, it is established that the party complained against, directly or indirectly, by himself, herself or any other person on his or her behalf:

> (a) deprived or attempted to deprive a person or class of persons of the enjoyment;
>
> (b) abridged or attempted to abridge the enjoyment by a person or class of persons; or
>
> (c) otherwise restricted or attempted to otherwise restrict a person or class of persons in the enjoyment;

of any accommodation, services or facilities which are offered to the public or which are ordinarily available to the public, or to which the public is customarily admitted, or of the occupancy of any housing accommodation or commercial unit, the onus is on the party against whom the complaint is made or the accused, as the case may be, to prove on a balance of probabilities that the deprivation, abridgment, restriction or attempted deprivation, abridgment or restriction was not because of discrimination against that person or class of persons contrary to any provisions of this Act or any other Act administered by the commission.

(2) Where, in a proceeding under this Act, it is established that the party complained against, directly or indirectly, by himself, herself or any other person on his or her behalf, refused to employ or continue to employ or otherwise discriminated against any person or class of persons with respect to employment or any term, condition or privilege of employment, the onus is on the party against whom the complaint is made or the accused, as the case may be, to prove on a balance of probabilities that the refusal or discrimination was not because of discrimination against that person or class of persons contrary to any provision of this or any other Act administered by the commission.

...

48(1) Subject to subsection (2), it is not a contravention of this Act for a person to adopt or implement a reasonable and justifiable measure:

> (a) designed to prevent disadvantages that are likely to be suffered by, or to eliminate or reduce disadvantages that are suffered by, any group of individuals if those disadvantages would be or are based on or related to one or more prohibited grounds; and
>
> (b) that achieves or is reasonably likely to achieve that object.

(2) If a program has been approved or ordered pursuant to section 47, a measure mentioned in subsection (1) must comply with the terms and conditions of that program.

Interpretation of Human Rights Legislation

[19] Human rights legislation occupies a unique place in Canada. In the context of provisions equivalent to s. 12 of the *Code*, in *Insurance Corporation of British Columbia v Heerspink*, [1982] 2 SCR 145, Justice Lamer (as he then was) commented at 157-58:

> When the subject matter of a law is said to be the comprehensive statement of the "human rights" of the people living in that jurisdiction, then there is no doubt in my mind that the people of that jurisdiction have through their legislature clearly indicated that they consider that law, and. the values it endeavours to buttress and protect, are, save their constitutional laws, more important than all others. ...

[20] In *University of British Columbia v Berg*, [1993] 2 SCR 353 [*Berg*], Chief Justice Lamer further stated at 370-371:

> Following *Heerspink*, this Court has had many occasions to comment on the privileged status of human rights legislation. In *Ontario Human Rights Commission v. Simpsons-Sears Ltd., supra*, McIntyre J. observed (at p. 547) that "[l]egislation of this type is of a special nature, not quite constitutional but certainly more than the ordinary -- and it is for the courts to seek out its purpose and give it effect." This Court has repeatedly stressed that a broad, liberal and purposive approach is appropriate to human rights legislation, and that such legislation, according to La Forest J. in *Robichaud*, at p. 89, "must be so interpreted as to advance the broad policy considerations underlying it". These comments serve to underline the importance of the mandate of s. 12 of the *Interpretation Act*, R.S.C., 1985, c. I-21, which directs that "[e]very enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects."

[21] In *Gould v Yukon Order of Pioneers*, [1996] 1 SCR 571 [*Gould*] the approach regarding application of provisions respecting services customarily provided to the public, or their equivalent, found in various jurisdictions was the subject of comment at paras 6 and 7:

> 6 On the one hand, as the Chief Justice explained in *Berg, supra*, at p. 373 (in a passage which is also quoted in part by my colleague La Forest J., for somewhat different purposes),
>
> > [i]f human rights legislation is to be interpreted in a purposive manner, differences in wording between provinces should not obscure the essentially similar purposes of such provisions, unless the wording clearly evinces a different purpose on behalf of a particular provincial legislature.
>
> In *Berg* it was held that the fact that s. 3 of the British Columbia legislation prohibited discrimination with respect to accommodations, services or facilities "customarily available to the public", while other statutes used phrases such as "ordinarily offered to the public" or "available in any place to which the public is customarily admitted", should not result in divergent interpretations, because these provisions are functionally synonymous. However, on the other hand, as the Chief Justice explained, at p. 371,
>
> > [t]his interpretive approach [i.e., a broad, liberal and purposive approach] does not give a board or court license to ignore the words of the Act in order to prevent discrimination wherever it is found. While this may be a laudable goal, the legislature has stated, through the limiting words in s. 3 [i.e., the phrase "customarily available to the public"], that some relationships will not be subject to scrutiny under human rights legislation. It is the duty of boards and courts to give s. 3 a liberal and purposive construction, without reading the limiting words out of the Act or otherwise circumventing the intention of the legislature.
>
> 7 A true purposive approach looks at the wording of the statute itself, with a view to discerning and advancing the

> legislature's intent. Our task is to breathe life, and generously so, into the particular statutory provisions that are before us.

[22] Recently at para 31 of *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Bombardier Inc. (Bombardier Aerospace Training Centre)*, 2015 SCC 39, [2015] 2 SCR 789 [*Bombardier*], in reliance on *New Brunswick (Human Rights Commission) v Potash Corporation of Saskatchewan Inc.*, 2008 SCC 45, at para 68, [2008] 2 SCR 604, the Supreme Court confirmed once more that a consistent interpretation of the various provincial human rights statutes is favoured unless it can be seen that a legislature intends otherwise.

[23] In Saskatchewan this approach has similarly been applied by the Court of Appeal on more than one occasion. (See *Canadian Odeon Theatres Ltd. v Human Rights Commission (Sask.) and Huck* (1985), 39 Sask R 81 (QB) [*Odeon Theatres*] at para 50; and *Saskatchewan (Human Rights Commission) v Prince Albert Elks Club Inc.*, 2002 SKCA 106, at paras 18-21, 227 Sask R 21)

1. Discrimination Under s. 12 of the *Code- Prima Facie* Case

[24] It is common ground that Mr. Owens needs to establish a *prima facie* case of discrimination in the provision of services that are offered to the public by Post Media. If a *prima facie* case of discrimination is made out then Post Media has the opportunity to justify its decision on the basis of exemptions provided in the *Code* or those developed by the courts. If Post Media fails to do so, then discrimination is made out (see *Bombardier*, paras 35-38).

[25] In *Ontario Human Rights Commission v Simpsons-Sears*, [1985] 2 SCR 536 [*O'Malley*] at 558, the Supreme Court of Canada explained the nature of a *prima facie* case as follows:

> ... A *prima facie* case in this context is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent-employer.

[26] A description of the test for establishing a *prima facie* case was set out in *Moore v British Columbia (Education)*, 2012 SCC 61, [2012] 3 SCR 360 [*Moore*] at para 33, in the following terms:

> 33 As the Tribunal properly recognized, to demonstrate prima facie discrimination, complainants are required to show that they have a characteristic protected from discrimination under the *Code*; that they experienced an adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact. Once a prima facie case has been established, the burden shifts to the respondent to justify the conduct or practice, within the framework of the exemptions available under human rights statutes. If it cannot be justified, discrimination will be found to occur.

[27] The Supreme Court of Canada recently addressed the approach respecting an allegation of discrimination in *Bombardier* at paras 40-56. There it was stated that in order to establish a *prima facie* case, a complainant must prove three elements: 1) a distinction, exclusion or preference that is based on one of the grounds listed in the human rights statute; 2) that there is a connection between a prohibited ground of discrimination and the distinction, exclusion or preference; and 3) that the distinction, exclusion or preference has the effect of nullifying or impairing the right to full and equal recognition and exercise of a human right or freedom.

[28] All parties to this proceeding made submissions based on the test outlined in *Bombardier* and agreed that was the correct approach to utilize. As can be seen, it is not an identical formulation of the test set out in *Moore*. The *Bombardier* test derives some of its language directly from the wording of the Quebec *Charter of Human Rights and Freedoms*, CQLR, c C-12[1] whereas the test in *Moore* is one established in the context of the British Columbia *Human Rights Code*, RSBC 1996, c 210.

[29] While ultimately the same issues will be considered whether the *Moore* or the *Bombardier* formulation is applied, given the agreement of all parties, their approach to the proceeding and the structure of their submissions utilizing the *Bombardier* formulation, it is appropriate here to view the issues through the *Bombardier* lens and then address any issues that may remain when considering the *Moore* lens. These may not be significant given the direction to approach human rights codes consistently unless it is apparent that was not intended by the legislature.

[30] The three essential elements to a *prima facie* case of discrimination are to be proven on a balance of probabilities. If the complainant succeeds, the respondent can then justify his or her decision or conduct on the basis of the exemptions provided for in the applicable human rights legislation or those developed by the courts.

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[1] Section 10 of the Quebec *Charter of Human Rights and Freedoms* says: Every person has a right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on race, colour, sex, pregnancy, sexual orientation, civil status, age except as provided by law, religion, political convictions, language, ethnic or national origin, social condition, a handicap or the use of any means to palliate his handicap.
Discrimination exists where such a distinction, exclusion or preference has the effect of nullifying or impairing such right.

[31] With respect to the issue of proof of any intent to discriminate by a respondent, the Supreme Court of Canada indicated in *Bombardier* at para 40:

> ... we believe it will be helpful to point out that under both Canadian law and Quebec law, the plaintiff is not required to prove that the defendant intended to discriminate against him or her:
>
> > To . . . hold that intent is a required element of discrimination under the *Code* would seem to me to place a virtually insuperable barrier in the way of a complainant seeking a remedy. It would be extremely difficult in most circumstances to prove motive, and motive would be easy to cloak in the formation of rules which, though imposing equal standards, could create . . . injustice and discrimination by the equal treatment of those who are unequal . . . . [Citations omitted; *O'Malley*, at p. 549.]
>
> (See also *Andrews v. Law Society of British Columbia*, 1989 CanLII 2 (SCC), [1989] 1 S.C.R. 143, at p. 173; *City of Montréal*, at para. 35; *Commission des droits de la personne du Québec v. Ville de Québec*, 1989 CanLII 613 (QC CA), [1989] R.J.Q. 831 (C.A.), at pp. 840-41, leave to appeal refused, [1989] 2 S.C.R. vi.)

[32] *Prichard v Ziedler*, 2007 CarswellSask 857 (WL) (SK HRT) provides a helpful observation regarding circumstantial evidence in such matters:

> 55 The test to be applied in matters involving circumstantial evidence, as in the within case, has been well formulated by Vizkelety in *Proving Discrimination in Canada*, Carswell, 1987, as follows:
>
> > An inference of discrimination may be drawn where the evidence offered in support of it renders such an inference more probable than the other possible inferences or hypotheses.

[33] Section 39 of the *Code* provides that the onus shifts if the complainant has established that he or she has been deprived of or restricted in the enjoyment of services which are offered to the public.

[34] The first step therefore is that *prima facie* discrimination against Mr. Owens as defined must be proven by addressing the relevant criteria and establishing them on a balance of probabilities.

Preliminary Matter: Service Offered to the Public

[35] Whether undertaken within one of the three tests applicable to determining if *prima facie* discrimination has occurred or prior to considering each of the three elements, it is essential that clarity be achieved in relation to the issue of just what is complained of and whether it involves a "service offered to the public".

[36] The Commission argues that Post Media offers advertising services to the public in exchange for a fee. It continues that, as the LP refused to print Mr. Owens' advertisement, and as publication of paid advertising by a newspaper is a service offered to the public, this necessary element is established.

[37] Post Media, however, replies that one must determine whether a service was in fact offered to the public as described by Mr. Owens. In reliance on para 55 of *Gould*, Post Media argues the first question is what constitutes the service in question. Next the court must consider whether the

service creates a public relationship between the service provider and the service user.

[38] In accordance with *Berg* and *Gould*, Post Media argues the service offered here is limited. It does not offer to publish any materials that might be submitted by third parties, nor does it offer the service of permitting any interested party to express his or her views in the public forum of the newspaper. Rather, it is the service of considering advertisements for publication and determining whether those advertisements accord with its established criteria and its freedom of speech that is offered to the public.

[39] Further, Post Media submits that, as set out in *Gay Alliance Toward Equality v Vancouver Sun*, [1979] 2 SCR 435 [*Gay Alliance*] at 455-456 and *Nachbaur v PFW Publications Ltd.*, 2011 CarswellBC 853 at paras 18-22 (WL) (BC HRT) [*Nachbaur*], the service offered by Post Media is narrow, it being to have materials considered for publication in accordance with the parameters determined by Post Media.

[40] Post Media accepts that based on the second part of the *Gould* test, and based on *Berg*, the public includes Mr. Owens. However, it says no public relationship is formed on the submission of an advertisement for publication because the service offered is that it will be considered, not published. As Post Media did consider it, and declined to accept the advertisement based on its non-discriminatory internal standards, in accordance with its right to freedom of expression and freedom of the press, no public relationship was entered into.

[41] *Nova Scotia (Human Rights Commission) v Canada Life Assurance Company* (1992), 109 NSR (2d) 40 (WL) (NS CA) [*Canada Life*] provides support for Post Media's approach on this issue. It holds that merely because a bank opens its doors to the public, that does not make the provision of any and all particular financial services open to acceptance by everyone walking through those doors.

[42] At para 16 of *Canada Life* the Nova Scotia Supreme Court, Appeal Division, indicates the Nova Scotia *Human Rights Act*, RSNS, 1989, c 214 does not dictate the nature and scope of a service that must be offered to the public. Quoting from *Gay Alliance*, at 456, the court notes that Nova Scotia's *Human Rights Act* leaves the question of the scope of service unanswered. In the context of mortgage insurance for an unhealthy borrower who was, as a result, denied coverage, that type of differential treatment is not caught by the equivalent provision to s. 12 of Saskatchewan's *Code*.

[43] In recognizing there are essential distinctions which must be identified prior to defining what a "service" is and who "the public" includes, Justice Wimmer in *Saskatchewan (Workers' Compensation Board) v Saskatchewan (Human Rights Commission)* (1998), 169 Sask R 316 (QB) addressed the matter this way at para 8:

> ...A programme falls within the ambit of a "service" provided it is a programme of general application available to all who qualify. There can be eligibility requirements with the only restriction being that the service provider cannot discriminate amongst those who are eligible. Workers' compensation meets these criteria. Even though it is not offered to every member of the public, it is a service equally available to all who qualify.

[44] In *Odeon Theatres,* the theater operator argued that it offered only the service of seeing a movie. The court, however, found members of the public were being offered both a movie and a view of the movie from a place of their choice from which to watch it. It was apparent that characterization of the service being offered was critical in determining the parameters in which to frame the question within that context.

[45] Determining the issue here must include consideration of whether the provision of advertising is different than other aspects of a newspaper. It is clear that certain activities regarding the content of newspapers are not services offered to the public. Content such as articles as well as editorials are not included in s. 12. Support for this is found in *Whiteley v Osprey Media Publishing*, 2010 HRTO 2152 at para 7 and the authorities relied on therein at para 12 including *Warren v Manitoba Human Rights Commission* (1985), 6 CHRR 2777 (Man CA) and *Saskatchewan (Human Rights Commission) v Engineering Students' Society* (1989), 10 CHRR 5636 (Sask CA). This draws general support from the rationale in *Canada Life* at para 15.

[46] The only authority from the Supreme Court of Canada addressing newspaper advertising in a similar context is *Gay Alliance* which indicates at 455-456 that the service which is made available to the public with respect to advertising in a newspaper is a limited one and includes the right of the newspaper to control the content of such advertising. Justice Martland, speaking for the majority, found that there was a form of service offered to the public at 436:

> The service which is customarily available to the public in the case of a newspaper which accepts advertising is a service

> subject to the right of the newspaper to control the content of such advertising. ...

[47] *Gay Alliance* determined that in the context of newspaper advertising there is a service offered to the public, albeit a restricted one. Here the situation is very similar. The LP offers advertising space to the public but that offer is made subject to the right of the newspaper to control the content of such advertising based on its code of conduct and on it being illegal, misleading or objectively determined to be offensive to its readers. Absent a change to the law as set out in *Gay Alliance*, the issue ends there.

[48] The Commission counters that there has been sufficient alteration to the law that a different outcome from *Gay Alliance* is now mandated. The Commission points to *Berg* and Chief Justice Lamer's recognition of the limitations *Gay Alliance* has as precedent as a result.

Berg Set Gay Alliance Aside

[49] Chief Justice Lamer addresses *Gay Alliance* in the following excerpt, taken from *Berg* at 379:

> I agree, and would limit the holding in *Gay Alliance* on two bases: (i) the respondent's competing interest in the freedom of the press was used to limit the complainant's right to freedom from discrimination in that decision, and (ii) the reasoning of Martland J. leads to an artificial and unacceptable distinction between the rights a person has at the threshold of admission to an accommodation, service or facility, and the rights he or she has once admitted to the accommodation, service or facility.

[50] It is important to keep in mind the parameters within which the noted comments were made. In *Berg* the issue was with respect to a Masters student at the University of British Columbia [UBC] and the interest that she had in receiving access keys and a completed rating sheet in support of her application for a dietetic internship at a hospital. These had been customarily provided to students in the Master's program. They were, in her case however, not provided to her. The reason they were not provided was based on a mental disability being recurrent but treatable depression.

[51] While *Berg* introduced greater nuance into the analysis of what a "service offered to the public" includes, the fact that Lamer C.J. notes the public nature of the institution at p. 387 and the absence of the factual backdrop there being in the context of a newspaper is also important. Here we are dealing with a fully private organization which is a newspaper, making the applicability of *Berg* somewhat limited in this situation.

[52] While *Berg* does indicate it intended to limit *Gay Alliance,* it was only capable of doing so in the context in which it was applied which did not include advertising in a newspaper as those were not the facts at issue in *Berg*.

The Ratio in Gay Alliance Has Been Altered Subsequent to Berg

[53] The Commission further argues that *Gay Alliance* has been altered considerably by subsequent decisions to *Berg* and therefore *Gay Alliance* is no longer good authority to be relied upon regarding services offered to the public. The argument begins with *Berg* and continues that subsequent decisions eclipsing *Gay Alliance* are now the appropriate authorities to be relied upon.

[54] As noted earlier, *Berg* is not a case involving a newspaper. Nor did *Berg* involve a situation where the right to have a condemnatory aspect of one's religious views advanced through the publication by another, over their objection, was at issue. The distinction was not lost on Lamer C.J. (see *Berg* at 384).

[55] *Berg* and subsequent authorities are also not so broad as to require that simply because some of an organization's activities are carried out in a way to involve the public, therefore all of the organization's activities are "services" which are "offered to the public". There is a need to apply appropriate considerations to the determination of the scope of a service that is offered to the public when determining what limits will apply. Included in that determination is the relationship between the respondent and the public as well as who "the public" includes. This was recognized by Lamer C.J. in *Berg* at 383:

> ...I would reject any definition of "public" which refuses to recognize that any accommodation, service or facility will only ever be available to a subset of the public. Students admitted to a university or school within the university, or people who enter into contracts of insurance with a public insurer, or people who open accounts with financial institutions, become the "public" for that service. Every service has its own public, and once that "public" has been defined through the use of eligibility criteria, the Act prohibits discrimination within that public.

[56] The key is, therefore, first ascertaining what "the service" is that is being offered, if any, and if there is one, determining next who "the public" is. Further directing the inquiry in this regard at 387 of *Berg*, Chief Justice Lamer says:

> ... one must take a principled approach which looks to the relationship created between the service or facility provider and the service or facility user by the particular service or facility. Some services or facilities will create public relationships between the School's representatives and its students, while other services or facilities may establish only private relationships between the same individuals.

[57] When one examines the relationship and the service at issue here, it is noteworthy that the LP is not a public or quasi-public institution such as the UBC. Post Media is a privately run business. As noted by Lamer C.J. at 387 of *Berg* regarding the UBC:

> The School exists to provide accommodations, services or facilities to its students which will further their education and social activities relating to the School. It is a publicly funded institution (although this is not a determinative factor), which makes its educational and recreational resources available to all who are admitted. When individual faculty members act in their capacity as representatives of the university, at least when they are on campus, they are its public face. If a university (and the School which is part of it) is not as "public" an institution as the government, it surely is very close to the "public" end of the spectrum.

[58] In *Gould* Justice Iacobucci on behalf of the majority confirms the approach begun in *Berg* and at para 55 points out that the inquiry should be upon the service being offered. "In this regard, the analysis becomes service-driven". Para 58 of *Gould* is also of assistance:

> ...It is, in my view, essential to such a determination that the nature of the service is the context within which the relationship must be considered. It is important to avoid an analysis that inquires into the nature of the relationship first and in a manner abstracted from the services in question. Such an analysis could lead to a finding that an intimate and apparently private organization maintained only private relationships, when in fact, it did offer some services to the

> public. Thus, the correct approach is to identify the service in question, and then to determine whether that service gives rise to a public relationship between the service provider and the service user.

[59] Justice Iacobucci went on to determine that "Ultimately, the determination must turn on the facts placed before the court in a given case." (para 59 of *Gould*). How the public relationship is to be defined was addressed at para. 60 and following. Of note here is the two step analysis outlined at para. 68:

> A proper interpretation of s. 8(a), for the purposes of this appeal, is one which gives rise to a two-part analysis. The first step in the analysis involves a determination of what constitutes the "service", based on the facts before the court. Having determined what the "service" is, the next step requires a determination of whether the service creates a public relationship between the service provider and the service user. ...A public relationship is to be determined by examining the relevant factors in a contextual manner.

[60] *Gould* confirms that an organization may have certain aspects of its activities which are services to which the public is offered access and others that are not. In *Gould* the only aspects of the respondent's activities that were services offered to the public were the provision to the public of historical data, records and materials, responding to the public's requests for information and soliciting information from the public. The organization's act of collecting and recording the requisite history was not found to engage the public in any way and thus that sphere of activity was not subject to the Yukon's equivalent of s.12 of Saskatchewan's *Code*.

[61] Post Media through the LP similarly offers some aspects of its corporate activities as services to the public while not offering all of them.

Notably, what content will run in articles and editorials is not a service the LP offered to the public. While the public is involved in purchasing the newspaper and reading those articles and editorials, this does not create any obligation to include the public in deriving the content should members of the public so desire.

[62] In addition, while the possibility of placing advertisements in the newspaper is offered to the public, it is not an unlimited service. LP staff screen advertisements that are submitted for publication in order to determine whether they are offensive. This was established by the evidence of Rob McLaughlin, a senior editor of the LP. Advertisements must meet the values of the Post Media organization and must not be considered to have the effect of offending its readers. Advertisements that do not meet these requirements have been turned down on numerous occasions for a variety of reasons including that they contain graphic images, demean women, or are overtly sexual in nature. Advertisements are not turned down as a result of the beliefs held by those submitting them but only as a result of the content of the advertisements themselves based on non-discriminatory standards.

[63] While the analogy between this situation and *Berg* becomes somewhat strained given the fundamental factual differences, to put this in terms of Chief Justice Lamer's observations at 379 of *Berg* regarding the limitations he would place on *Gay Alliance*, the imposition of an appropriately applied "offensive to readers" filter to those seeking to advertise does not create an artificial distinction between the rights a person has at the threshold of admission to the service of advertising in the LP and the rights they have once admitted to the facility. In these circumstances the restricted access to

the service is applied without the "imposition of a threshold followed by a prohibited exclusion", the situation Lamer C.J. found problematic and addressed in *Berg*.

[64] I find that the service which is offered to the public here is to have one's advertisement considered for publication and screened not based on the personal characteristics or beliefs of the proponent but appropriately and objectively evaluated on the basis of the content of the advertisement and whether it will offend readers. As such, *Gay Alliance* and decisions following it including *Berg* and, in particular *Gould*, confirm this as a proper characterization of the service being offered here.

Differential Treatment

[65] The first element of the test in *Bombardier* is that Mr. Owens must prove the existence of differential treatment, namely that the Post Media decision, measure or conduct "affects him or her differently from others to whom it may apply". This is set out at para 42 of *Bombardier*:

> 42 The first element of discrimination is not problematic. The plaintiff must prove the existence of differential treatment, that is, that a decision, a measure or conduct "affects [him or her] differently from others to whom it may apply": *O'Malley*, at p. 551. This might be the case, for example, of obligations, penalties or restrictive conditions that are not imposed on others: *ibid.*; see also *Andrews*, at pp. 173-74.

[66] The differential treatment at issue here arises in the context of s. 12 of the *Code*. As such, the question is; given the service offered to the public by Post Media, what does Mr. Owens allege was the differential

treatment he experienced in attempting to access that service? (See *Odeon Theatres* at para 74).

[67] *Odeon Theatres* makes this observation regarding the service offered and proof of differential treatment:

> 79 I agree with the statements made by the board of Inquiry that in order to find whether Mr. Huck was discriminated against, it was necessary to determine "if the service or facility offered [Huck] varied in any significant manner from the service or facility offered by the respondent to the general public."

[68] *Nova Scotia Liquor Corporation v Nova Scotia (Board of Inquiry)*, 2016 NSCA 28, 371 NSR (2d) 367 similarly determined that the complainant must establish adverse treatment different from that imposed on other individuals or identified groups. In the absence of that, there is no discrimination:

> 61 ...Both s. 4 of the *Act* and the case authorities are clear. It is not sufficient that a complainant is subjected to unfavourable, insensitive, or petty treatment, rather it must be adverse treatment different from that imposed on other individuals or identified groups. Not only is an analysis of that requirement absent in the reasons, the evidence of a distinction between Ms. Kelly and others is absent from the record. It is entirely unclear whether Ms. Kelly, in being sent the letter, was treated differently from non-disabled employees; differently from other disabled employees who had received letters with a more acceptable "tone"; or differently from some other group or individual.
>
> 62 Absent a finding of a necessary distinction, the Board's conclusion is unreasonable. I would allow this ground of appeal and set aside the Board's finding of discrimination on the basis of mental disability.

[69] Here, the LP has established that it regularly screens out advertisements that it considers offensive or do not meet with the standards it has and which it believes will offend readers. Mr. Owens has not established that he was treated differently than other individuals who seek to place an advertisement that is determined to have offending content. It is a part of the normal process the LP employs and thus not discriminatory within the meaning of this first test.

[70] As it is acknowledged this advertisement was not denied due to any religious views or affiliations of Mr. Owens, there is a gap in establishing differential treatment from other advertisers with advertisements objectively considered offensive to readers. This results in this element of the test not being met.

[71] The Commission counters that neither intent nor motive are required elements anymore, therefore the outcome will be different when that is considered.

Intent or Motive is Not a Required Element of a Prima Facie Case

[72] As noted in *O'Malley* and *Bombardier*, it is not a required element of a complainant's case to prove the respondent intended to discriminate against the complainant on the prohibited ground. Adverse effect discrimination is discrimination nonetheless. It is not in dispute that there was no intent by the LP to target Mr. Owens based on his religious views.

[73] In *O'Malley* adverse effect discrimination was found to have occurred when the employer made a rule which appeared neutral on its face

and which applied to all employees, but which had an unfair or discriminatory impact on a particular group of people.

[74] In *O'Malley* the general policy of employees being required to work on Saturdays was effectively discriminatory against the Seventh-Day Adventists notwithstanding no intent for it to be discriminatory because compliance with the policy resulted in a breach of the religious beliefs of the complainant.

[75] There are some notable differences in this situation from *O'Malley*. As was also the case in *Thibodeau v Prince Edward Island (Human Rights Commission)*, 2016 PESC 10, 377 Nfld & PEIR 28, this is not an employment situation. Mr. Owens is not working for Post Media and is not being impacted in his capacity to carry on his chosen occupation by observing his religious obligations. The scope of impact on Mr. Owens is considerably different here.

[76] In addition, Mr. Owens' assertion that he is required to share his views regarding his position on homosexuality allows him to do that in many ways. He is not mandated to do so by purchasing an advertisement in the LP, nor in any other particular type of publication. He is not obliged to use media outlets in order to do so. This is established by the fact that he has not sought to advertise his beliefs elsewhere nor has he used radio or television to do so. It is not part of his religious belief system that his duty to convince others to think as he does on this topic requires that he purchase advertisements or, more specifically, advertise in the LP.

[77] While one may readily accept that Mr. Owens believes he should, as part of his faith, share his views, given there are myriad ways he can do this, the fact that he is not able to do this via a print advertisement in the LP is not akin to *O'Malley*. There, the complainant's religious views could not be maintained if she was to comply with her employer's policy. Mr. Owens quite clearly can maintain his religious perspective including trying to persuade others of his views in a public way even if he is not permitted to print his advertisement in the LP.

[78] While consideration of the balancing of other interests is addressed later, *Syndicat Northcrest v Amselem*, 2004 SCC 47, [2004] 2 SCR 551 [*Syndicat*] has some parallels to this situation. In *Syndicat* the religious practice at issue was found not to have been capable of exercise if the complainants complied with the contractual terms of their tenancy and could not utilize their balconies to erect the succah. The denial to use their balcony for that purpose eliminated their participation in the religious event, thus raising the conflict.

[79] Such is not the case here. There are many ways Mr. Owens can still participate in the exercise of telling others about his beliefs regarding homosexuality in an effort to have them believe as he does without it including advertising in the LP.

[80] Given that it has not been established that publishing verses outlining his beliefs, in the LP in particular, is the religious practice that must be carried out, I am not persuaded adverse effect discrimination has been made out here.

"Reasonable Cause" in the British Columbia Human Rights Code

[81] The Commission argues the difference in wording between the British Columbia *Human Rights Code* and the Saskatchewan *Code* results in a different outcome here. It is important to keep in mind the directive of Chief Justice Lamer in *Berg* at 373 when considering differing human rights codes:

> ... If human rights legislation is to be interpreted in a purposive manner, differences in wording between provinces should not obscure the essentially similar purposes of such provisions, unless the wording clearly evinces a different purpose on behalf of a particular provincial legislature. ...

[82] This is similarly confirmed in *Bombardier* at para 31:

> ... The Court also favours a consistent interpretation of the various provincial human rights statutes unless a legislature intends otherwise: *New Brunswick (Human Rights Commission) v. Potash Corporation of Saskatchewan Inc.*, 2008 SCC 45 (CanLII), [2008] 2 S.C.R. 604, at para. 68; *City of Montréal*, at para. 45. ...

[83] Addition of the language enabling "reasonable cause" to be shown regarding a denial in Saskatchewan would seemingly add little more than would reasonably be inferred into an analysis undertaken pursuant to the *Code* absent that phrase. Even without inclusion of "reasonable cause" it should still be considered appropriate to perform an analysis that takes into account reasonable behavior as grounds advanced by the parties relating to a determination.

[84] The correlative to this argument would suggest that in Saskatchewan one can simply ignore reasonable grounds regarding a basis for a denial to services. This does not seem to be the intent of the legislature.

[85] However, s. 48 of the *Code* is of application here and has, at the very least, the effect of imbuing the inquiry with concepts of appropriateness, balance and fairness. The content of Mr. Owens' advertisement is directed at a traditionally disadvantaged group, as recognized consistently in Canadian jurisprudence, including at para. 65 from Mr. Owens' previous court proceedings, *Owens #1*:

> 65 Part of the context which must inform the meaning of Mr. Owens' advertisement is the long history of discrimination against gay, lesbian, bisexual and trans-identified people in this country and elsewhere. As Cory J. said in *Egan v. Canada*, 1995 CanLII 98 (SCC), [1995] 2 S.C.R. 513 at para. 175, gays and lesbians "whether as individuals or couples, form an identifiable minority who have suffered and continue to suffer serious social, political and economic disadvantage." The evidence of the complainants in this case clearly revealed the marginalization and fear which are part of the life many gay men are obliged to live.

[86] Having been a participant in court proceedings with respect to his advertisements previously, this would not be a surprise to Mr. Owens. He admitted to the stark form in which the message is put as being of value to him in pursuing his objective.

[87] Here, Post Media declined to print Mr. Owens' advertisement as the advertisement targeted and offended a traditionally disadvantaged group. Declining for those reasons brings Post Media's action within the ambit of adopting or implementing a reasonable and justifiable measure designed to

prevent disadvantages suffered by a group of individuals based on a prohibited ground.

[88] In this situation, the response of a reasonable measure does exist within the Saskatchewan context. I do not, therefore, find that absence of the words "reasonable cause" in the *Code* creates a distinction between this situation and the ratio in *Gay Alliance*.

Conclusion Regarding Exclusion Based on an Enumerated Ground

[89] I do not find Mr. Owens has established that he suffered an exclusion based on an enumerated ground. If, however, I am wrong in the conclusion that the first part of the test for *prima facie* discrimination has not been met and differential treatment has been made out here, then the other portions of the *prima facie* discrimination test must be considered.

Connection Between Differential Treatment and Prohibited Ground

[90] The second element of the test is that the prohibited ground needed to be connected to the differential treatment. This was described as a factor in the distinction, exclusion or preference and is identified at para 52 of *Bombardier*:

> 52 In short, as regards the second element of *prima facie* discrimination, the plaintiff has the burden of showing that there is a connection between a prohibited ground of discrimination and the distinction, exclusion or preference of which he or she complains or, in other words, that the ground in question was a factor in the distinction, exclusion or preference. . .

[91] A causal connection is not required. Para 56 of *Bombardier* describes this:

> 56 In our opinion, even though the plaintiff and the defendant have separate burdens of proof in an application under the *Charter*, and even though the proof required of the plaintiff is of a simple "connection" or "factor" rather than of a "causal connection", he or she must nonetheless prove the three elements of discrimination on a balance of probabilities. This means that the "connection" or "factor" must be proven on a balance of probabilities.

[92] Further elaboration of the application of the connection test is found in *Bombardier*, at paras 88 and 89, which confirms that evidence of discrimination must be tangibly related to the impugned decision or conduct. There must be evidence sufficiently related to the facts to establish a connection between the decision and the alleged basis of discrimination. As an example, a presumption made solely on the basis of the social context of discrimination against a group resulting in discrimination against an individual member of that group is therefore inappropriate as it effectively reverses the burden of proof.

[93] The Commission argues that even though the Post Media refusal was based on the content of the advertisement, the advertisement set out Mr. Owens' religious views which he needs to communicate and thus there is a clear connection; given the views held are closely tied to his religious views, this is enough.

[94] Post Media says nothing establishes that Mr. Owens being Christian was a factor in their decision to decline, therefore the complaint fails as the second criteria has not been established. Post Media also argues that

there is no evidence of a connection between his religion and the declining of printing his advertisement as it was not based on his religion at all. Further, while Post Media agrees there is no need for Mr. Owens to prove intent to discriminate, they argue that when s. 39 is considered, a non-discriminatory reason to deny services is relevant; a non-discriminatory reason relieves Post Media from obligations it may otherwise have.

[95] Post Media points to the fact that it has considerable Christian content in its newspaper on a regular basis, therefore it is clear that they do not discriminate on the basis of Christianity; the content of this advertisement is the only issue.

[96] As with the first part of the test enumerated above, here too it is Mr. Owens' belief that he must communicate his views that is the aspect of his faith that must be considered. There is no issue regarding his holding certain views regarding homosexuality or his freedom to communicate those views. Rather, it is the perceived obligation Mr. Owens holds regarding convincing others to believe as he does that is at issue.

[97] Considering the test as outlined in *Bombardier* at para 52, it has not been established that Mr. Owens' faith, including that he feels he must tell others of his beliefs that is connected to the denial to print his advertisement. The content of the advertisement, regardless of any religious perspective Mr. Owens holds, was rejected. The same message, if stated without any connection to any religion, would similarly have been rejected. The content, regardless of any religious reasons motivating Mr. Owens, was the issue.

[98] Put in the language of *McGill University Health Centre (Montreal General Hospital) v Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4, at para 48, [2007] 1 SCR 161, there was no arbitrariness or stereotyping involved in the decision to or effect of denying the advertisement. While a distinction was made based on the fact that the advertisement was perceived to be offensive to a disadvantaged group, staff and other readers as noted, not all distinctions are discriminatory. There is no link between Mr. Owens' membership in the group he identifies with, being Christians, and an arbitrary disadvantaging criterion at play here.

[99] Denying Mr. Owens the placement of his advertisement in the LP is not an affront to concepts of human dignity. It has not been established that there is a sufficient link, connection or nexus between the alleged ground of discrimination and the exclusion, distinction or preference complained of.

The Moore Lens

[100] While Mr. Owens likely meets the first criteria of *Moore,* as he has a characteristic protected from discrimination, (his beliefs regarding communication of his religion to others so as to convince them to think as he does), he encounters difficulties at subsequent stages of the inquiry.

[101] In the application of the *Moore* criteria there must, at the subsequent stages, also be a connection shown between the protected ground or characteristic and the adverse treatment. The required link is incorporated into the core test for ascertaining *prima facie* discrimination. The strength or proximity of that link or nexus is a mixed

question of fact and law, and an important component in the analysis is whether the treatment is in fact stereotypical or arbitrary, and whether it affronts concepts of human dignity. Not any nexus or connection, no matter how remote, is sufficient. (see *Wright v College and Association of Registered Nurses of Alberta (Appeals Committee)*, 2012 ABCA 267, at para 65, 355 DLR (4th) 197; *Armstrong v International Brotherhood of Boilermakers Local 146*, 2010 ABCA 326, at para 24, 326 DLR (4th) 263; and *Ontario (Disability Support Program) v Tranchemontagne*, 2010 ONCA 593, at paras 101 – 104, 324 DLR (4th) 87)

[102] This is similar to the explanation of the nexus that must be determined in *Bombardier* and other cases following it. As such, it is a common element between the test in *Moore* and the test in *Bombardier*.

[103] As with the lack of connection pursuant to the *Bombardier* test, it has also not been established that Mr. Owens has been discriminated against on the basis of being denied a service customarily provided to the public utilizing the *Moore* analysis. He has been provided the service everyone else is provided; the right to advertise provided his advertisement is not objectively offensive to readers.

[104] All parties agreed at the hearing that the advertisement would be considered offensive to members of the gay and lesbian community as well as other readers. This is an objective determination which all parties hold in common.

The Distinction has an Effect on Mr. Owens' Right to Freedom of Religion

[105] The third element of the test was that the distinction that is shown by the plaintiff affects the full and equal exercise of a right or freedom guaranteed to him or her as set out at para 53 of *Bombardier*:

> 53 Lastly, the plaintiff must show that the distinction, exclusion or preference affects the full and equal exercise of a right or freedom guaranteed to him or her by the *Charter*. The *Charter*, unlike the *Canadian Charter*, does not protect the right to equality per se; this right is protected only in the exercise of the other rights and freedoms guaranteed by the *Charter*: see, *inter alia*, *Ruel v. Marois*, 2001 CanLII 27967 (QC CA), [2001] R.J.Q. 2590 (C.A.), at para. 129; *Velk v. McGill University*, 2011 QCCA 578, at para. 42 (CanLII); see also Ford, at pp. 786-87.

[106] Post Media agrees if Mr. Owens succeeds on the first two grounds, the third is made out. As such, analysis of this third ground is made unnecessary.

2. If *prima facie* discrimination is made out, what effect does s. 39 and s. 5 have?

[107] Should the foregoing conclusions be incorrect and a case of *prima facie* discrimination be established, consideration of the second stage of the inquiry is necessary. This involves assessing whether the *Code* or the authorities provide a basis for Post Media to have acted as it did without it being considered discrimination. This consideration also results in Mr. Owens' complaint being dismissed.

[108] As set out earlier, s. 39 allows for Post Media to establish on a balance of probabilities that the deprivation, abridgment or restriction was not because of discrimination against Mr. Owens contrary to the *Code*. Section 48

has already been recognized as applicable here with the result that the rejection of Mr. Owens' advertisement was a reasonable and justifiable measure designed to prevent disadvantages suffered by a group of individuals based on a prohibited ground.

[109] It is also common ground that ss. 4 and 5 provide Post Media with the right of freedom of conscience, opinion and expression including through freedom of speech and freedom of the press. It is also common ground that Post Media has a s. 2 *Canadian Charter of Rights and Freedoms* right to freedom of thought, belief, opinion and expression including freedom of the press. The point of divergence, however, is how Mr. Owens' religious rights are impacted by Post Media's rights.

[110] Conflict amongst various rights is inevitable. As indicated by Justice Richards (as he then as) in *Owens v Saskatchewan (Human Rights Commission)*, 2006 SKCA 41, 279 Sask R 161, [*Owens #1*] at para 56:

> 56 ....Iacobucci J. recently underlined this point when exploring the allowable limitations on religious freedom in *Syndicat Northcrest v. Amselem*, 2004 SCC 47 (CanLII), [2004] 2 S.C.R. 551 at para. 61:
>
> > 61 In this respect, it should be emphasized that not every action will become summarily unassailable and receive automatic protection under the banner of freedom of religion. No right, including freedom of religion, is absolute: see, e.g., *Big M, supra; P. (D.) v. S. (C.)*, 1993 CanLII 35 (SCC), [1993] 4 S.C.R. 141, at p. 182; *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, 1995 CanLII 115 (SCC), [1995] 1 S.C.R. 315, at para. 226; *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 772, 2001 SCC 31 (CanLII), at para. 29. This is so because we live in a society of individuals in which

> we must always take the rights of others into account. In the words of John Stuart Mill: "The only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it": On Liberty and Considerations on Representative Government (1946), at p. 11. In the real world, oftentimes the fundamental rights of individuals will conflict or compete with one another.

[111] Paragraph 57 of *Owens #1* further states relevant considerations one must keep in mind:

> 57 The Constitution protects all dimensions of freedom of religion. However, it also accommodates the need to safeguard citizens from harm and to ensure that each of them has non-discriminatory access to education, employment, accommodation and services. In situations where religiously motivated speech involves injury or harm to others, it is necessarily subject to reasonable limitations.

[112] Freedom of expression and freedom of the press are both intimately connected to each other. Both are essential in our society. As recognized by Justice Cory in *Edmonton Journal v Alberta, (Attorney General),* [1989] 2 SCR 1326 at 1336, a democracy cannot exist without the freedom to express new ideas and opinions. He notes that the importance of the concept cannot be over emphasized.

[113] With respect to the media's role, in *Canadian Broadcasting Corp. (CBC) v New Brunswick (Attorney General),* [1991] 3 SCR 459 at 475, Justice Cory recognized the important, indeed vital, role the media plays in democratic society.

[114] Freedom of speech includes the freedom to refrain from participating in a form of speech and freedom not to be compelled to express a viewpoint which is contrary to one's own beliefs. (see *RJR-MacDonald Inc. v Canada*, [1995] 3 SCR 199 at para 113 and *National Bank of Canada v Retail Clerks' International Union,*[1984] 1 SCR 269 at 296).

[115] *Gay Alliance* addressed the interplay between freedom of expression as it interrelates with freedom of the press in the context of newspaper advertising. Post Media argues *Gay Alliance* answers the question in its entirety. The Commission argues *Gay Alliance* no longer carries the day with respect to the balancing of the rights at issue between Mr. Owens and a newspaper.

Gay Alliance

[116] If *Gay Alliance* has not been overtaken by developments in the law, the result is the dismissal of Mr. Owens' complaint. As set out at 454 and 455 of *Gay Alliance*:

> The Canadian Bill of Rights, s. 1(f), recognizes freedom of the press as a fundamental freedom.
>
> ...
>
> The law has recognized the freedom of the press to propagate its views and ideas on any issue and to select the material which it publishes. As a corollary to that a newspaper also has the right to refuse to publish material which runs contrary to the views which it expresses. A newspaper published by a religious organization does not have to publish an advertisement advocating atheistic doctrine. A newspaper supporting certain political views does not have to publish an advertisement advancing contrary views. In fact, the judgments of Duff C.J., Davis J., and Cannon J., in the

> Alberta Press case [*Reference re; Alberta Legislation*, [1938] SCR 100], previously mentioned, suggest that provincial legislation to compel such publication may be unconstitutional.

[117] The Commission argues the clarity of *Gay Alliance* as precedent is in question as it has been effectively overruled by subsequent authority. The Commision argues that *Berg* and the notion of "balancing" as set out in *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11, [2013] 1 SCR 467 [*Whatcott*]. The position advanced is that the current state of the law is now in accord with the dissenting views in *Gay Alliance* and the cases subsequent to *Gay Alliance* thereby separating the present state of the law from the majority decision therein.

Berg

[118] The problem with *Berg* as the basis on which to distinguish this situation from *Gay Alliance* is that Lamer C.J. specifically acknowledged that *Berg* was not a situation where freedom of the press was in competition with the rights to receive a service available to the public. As *Berg* had no competing issue of freedom of the press, it cannot be relied upon here for the argument the Commission advances.

Whatcott

[119] The Commission next argues that *Whatcott* rejects the idea that one can separate the actor from the actions, which makes matters quite different now than when *Gay Alliance* was decided. The Commission equates this to not being able to separate content-expressing beliefs from the person

holding the beliefs seeking to publish the content, which the majority in *Gay Alliance* failed to do. As such, this development also effectively overturns *Gay Alliance*.

[120] While the content-expressing beliefs developments in the law may dictate a different outcome now in a case that has precisely the same facts as *Gay Alliance,* those are not the facts here. As such, even though one may be able to envision *Gay Alliance* being decided differently today, that does not translate into Mr. Owens having a right to require Post Media to publish his advertisement over their objection given the advertisement targets a traditionally disadvantaged group and it is understood it would be offensive to that group.

[121] Reliance is also placed by the Commission on cases where it was concluded that mayoral proclamations regarding gay pride week could not be denied as these were public services. (See *Oliver v Hamilton (City)*, 1995 CarswellOnt 169 (WL) (Ont HRTD); *Hughson v Oliver (Town)*, 2000 BCHRT 24; *Hudler v London (City)*, 1997 CarswellOnt 6136 (WL) (Ont HRTD); and *Ontario Human Rights Commission v Etobicoke*, [1982] 1 SCR 202)

[122] The cases involving civic proclamations are distinguishable from this situation. As with *Berg* they involve public entities and have no element of freedom of the press at play. It is quite a different thing to seek access to a public forum which is regularly used for proclamations of all sorts than to require a privately owned newspaper to publish material it chooses not to publish as contrary to its core values and because it is objectively understood

will offend some of its readers. The balancing of rights here involves very different considerations than were at play in those cases.

[123] There has been an evolution of the concepts underlying what represents a particular human right and included in the milieu presently is a blending of belief and the individual. However, this line of argument does not, in a principled way, address how to resolve the conflict between Post Media's rights to express itself and exercise its freedom of the press with Mr. Owens' religiously based right to tell others that they ought to believe as he does on the subject of homosexuality.

[124] As such, one is therefore still required to perform a weighing or balancing of the rights as occurred in *Syndicat*. The factors to consider include the nature of the right and its place amongst the other forms of rights it is in competition with. This was recognized as being a "delineation" of the rights and values involved with a proper definition of the scope of the rights as occurred in *Trinity Western University v British Columbia College of Teachers,* 2001 SCC 31, [2001] 1 SCR 772 [*Trinity*].

[125] In *Whatcott* it was held that not all expressions will be treated equally in determining an appropriate balancing of competing values. Negative forms of speech including hate speech, as they do little to promote, and likely impede, freedom of expression, are accorded lower value.

[126] *Syndicat* is also instructive. It dealt with the issue of resolving a conflict between freedom of religious practice on one hand and the right of freedom of contract and enjoyment of property, also protected by the Quebec *Charter of Human Rights and Freedoms*, on the other. At para 62:

> 62 ...However, our jurisprudence does not allow individuals to do absolutely anything in the name of that freedom. Even if individuals demonstrate that they sincerely believe in the religious essence of an action, for example, that a particular practice will subjectively engender a genuine connection with the divine or with the subject or object of their faith, and even if they successfully demonstrate non-trivial or non-insubstantial interference with that practice, they will still have to consider how the exercise of their right impacts upon the rights of others in the context of the competing rights of private individuals. Conduct which would potentially cause harm to or interference with the rights of others would not automatically be protected. The ultimate protection of any particular Charter right must be measured in relation to other rights and with a view to the underlying context in which the apparent conflict arises.

[127] The conflict in *Syndicat* was resolved contextually with reference to the significance of each to the individuals affected and the situation at hand. At para 60:

> 60 At this stage, as a general matter, one can do no more than say that the context of each case must be examined to ascertain whether the interference is more than trivial or insubstantial. But it is important to observe what examining that context involves.

[128] Given the one set of rights was found to be minimal, they were not considered "valid for the purpose of imposing limits" on the exercise of the complainant's religious freedoms which were found to not be trivial.

[129] Here, Mr. Owens puts forward the right to proselytize, to convince others to hold a negative perspective of a traditionally disadvantaged group in our society, as he does. The Christian faith is much broader than that and, as was aptly put at para 79 of *Owens #1,* has much that commends itself to public invitation:

> 79 ...One need not be a Biblical scholar, or even a Christian, to know that the Bible as a whole is the source of more than one sort of message and, more specifically, is the source of messages involving themes of love, tolerance and forgiveness. It contains many passages of that sort: Mark 12:31 "Love your neighbor as yourself."; Matthew 6:14-15 "For if you forgive men when they sin against you, your heavenly Father will also forgive you. But if you do not forgive men their sins, your Father will not forgive your sins." Matthew 7:1 "Do not judge, or you too will be judged." Leviticus 19:18 "Do not seek revenge or bear a grudge against one of your people, but love your neighbor as yourself." Proverbs 10:12 "Hatred stirs up dissension, but love covers over all wrongs." ...

[130] Mr. Owens does not disagree that his faith is not entirely defined by nor contained in his advertisement. As such, publishing these select verses in an effort to have others come to share his perspective on the issue he targets would seem to do less to promote the underlying right to hold and act on the values of religious freedom, (in this case in the context of the Christian faith), than declining to publish the negative message while being willing to advance information respecting Christianity that is not condemnatory, as Post Media is.

[131] Looked at in another way, to oblige Post Media to publish Mr. Owens' advertisement, given Post Media's objection to it and the reasons for such objection, significantly impairs Post Media's right of freedom of expression and freedom of the press. However, to deny Mr. Owens publication of his advertisement in the LP is at best a minimal impairment of his right to communicate his message which is delivered in an effort to convince others to hold similar views. He is free to hold his views and communicate them to others in many ways, but not through the conscription of those who object based on a different perspective.

[132] The LP has a right to decline advertisements it legitimately and objectively concludes carries a negative message that will offend its readers. There is no subterfuge in their position. It has done so on many occasions. It was agreed by all that the advertisement Mr. Owens sought to publish would offend and that it targeted a traditionally disadvantaged group.

[133] The following excerpt from *Trinity* at paras 36 and 37 is on point:

> 36 Instead, the proper place to draw the line in cases like the one at bar is generally between belief and conduct. The freedom to hold beliefs is broader than the freedom to act on them. ...For better or for worse, tolerance of divergent beliefs is a hallmark of a democratic society.
>
> 37 Acting on those beliefs, however, is a very different matter. ...

[134] Based on the balancing of the rights at issue here as advanced in *Syndicat* and *Whatcott*, while Mr. Owens has the right to hold the beliefs he does, including the right to engage others so as to have them come to share those beliefs, he does not have the right to require the LP to communicate those notwithstanding their difference of perspective. As stated at 336-337 of *R v Big M Drug Mart Ltd.*, [1985] 1 SCR 295:

> ... Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. 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.

Brockie

[135] The Commission argues that *Ontario (Human Rights Commission) v Brockie* (2002), 222 DLR (4th) 174 (WL) (Ont Sup Ct) [*Brockie*] contains the correct approach and outcome to the balancing that is to occur. There the respondent was required to print the business cards of the complainant group but not information which was attempting to proselytize others.

[136] With respect to the *Brockie* determination, while not binding on this Court, the application of that decision in these circumstances also results in Mr. Owens' complaint being dismissed. It is clear from his evidence that the excerpted portion of his beliefs as identified in the advertisement are not the full extent of his faith, which extends well beyond his views on homosexuality. He determined he would become involved in this particular issue after having been a member of the Christian faith for some time.

[137] It is clear that the purpose of printing the advertisement is due to Mr. Owens' desire to proselytize, to persuade others, to be of the same view as he is regarding homosexuality. As recognized at paras 42, 54 and 55 of *Brockie:*

> 42 The freedom to hold beliefs is broader than the freedom to act on them. The freedom to exercise genuine religious belief does not include the right to interfere with the rights of others: *Trinity Western University v. College of Teachers (British Columbia)* (2001), 199 D.L.R. (4th) 1 (S.C.C.) at p. 33.
>
> ...
>
> 54 Mr. Brockie's exercise of his right of freedom of religion in the commercial marketplace is, at best, at the fringes of that right. The exercise of his right in this case impacts adversely on the rights of homosexuals in private commercial transactions under s. 1 of the *Code* to participate

> fully in the community and the province free of discrimination in the marketplace because of sexual orientation. Their rights are similar to those protected by s. 15 of the *Charter* from discrimination by the conduct of state actors because of sexual orientation.
>
> 55 Accordingly, limits on Mr. Brockie's right to freedom of religion in the peripheral area of the commercial marketplace are justified where the exercise of that freedom causes harm to others; in the present case, by infringing the *Code* right to be free from discrimination based on sexual orientation in obtaining commercial services.

[138] As recognized in para 56 of *Brockie*, if a particular printing project contained material that conveyed a message proselytizing and promoting those things the respondent found to be in conflict with his core beliefs, that would not be required of the respondent pursuant to Ontario's equivalent to Saskatchewan's s. 12 of the *Code*.

[139] Application of the principles identified in *Brockie* results in Mr. Owens' complaint being dismissed as well.

CONCLUSION

[140] For the reasons set out, the complaint is dismissed.

[141] There will be no order as to costs in this matter.

J.
D.J. BROWN