CARTERS.ca

CHARITY LAW BULLETIN NO. 127

CARTERS PROFESSIONAL CORPORATION
Barristers, Solicitors & Trade-mark Agents / Avocats et agents de marques de commerce
Affiliated with **Fasken Martineau DuMoulin LLP** / Affilié avec Fasken Martineau DuMoulin S.E.N.C.R.L., s.r.l.

OCTOBER 29, 2007

Editor: Terrance S. Carter

WHAT CONSTITUTES A SERVICE AVAILABLE TO THE PUBLIC UNDER B.C. HUMAN RIGHTS LEGISLATION?

By Dawn E. Philips, B.A., LL.B. Candidate, and Terrance S. Carter, B.A., LL.B. and Trade-mark Agent

A. INTRODUCTION

The human rights legislation in each Canadian province or territory contains a provision that prohibits discrimination with respect to the provision of a service ("Service Provision"). In each jurisdiction, except Ontario and Nova Scotia, this Service Provision applies only to services that are made generally available to the public.[1] This *Charity Law Bulletin* ("Bulletin") examines the recent British Columbia Court of Appeal decision, *Buntain et al. v. Marine Drive Golf Club*[2], which outlines when a private, membership based, non-profit organization will be considered 'providing services generally available to the public', and thus when that organization may be subject to a Service Provision under applicable human rights legislation.

B. BACKGROUND TO *MARINE DRIVE GOLF CLUB*

The case involves a dispute between the Marine Drive Golf Club ("Golf Club") and a group of its members and their guests ("Members"). The Golf Club's Board of Directors passed a resolution that prevented females from having the ability to enter or use the 'men's lounge' located in the Golf Club. The Members filed a complaint to the British Columbia Human Rights Coalition alleging that the Golf Club, a private club

[1] Legislation that requires a service to be generally available to the public in order for it to apply include; *Human Rights, Citizenship and Multiculturalism Act,* R.S.A. 2000, c. H-14, s. 4; *Human Rights Code*, C.C.S.M. c. H175, s. 13; *Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1, s. 12; *Charter of human rights and freedoms*, R.S.Q. c. C-12, s. 15 and s 111; *Human Rights Act*, R.S.P.E.I. 1988, c. H-12, s. 2; *Human Rights Act*, R.S.N.B. 1973, c. H-11, s. 5; *Human Rights Code*, R.S.N.L. 1990, c. H-14, s. 6; *Human Rights Act*, S.N.W.T. 2002, c. 18, s. 11; *Human Rights Act*, S.Nu. 2003, c. 12, s. 12; *Human Rights Act*, R.S.Y. 2002, c. 116, s. 9; and *Human Rights Code* R.S.B.C. 1996, c. 210., s. 8.

[2] (2007) 278 D.L.R. (4th) 309. [*Marine Drive Golf Club*].

and non-profit society for the purposes of the *Income Tax Act*,[3] and its Board of Directors had discriminated against them contrary to the British Columbia *Human Rights Code*[4] ("the Code"), on the basis of their sex and sexual orientation.

The question before the Court in *Marine Drive Golf Club* was not one of discrimination; the Members and the Golf Club were in agreement that the Board of Director's decision to prohibit females from being able to enter or use the 'men's lounge' was discriminatory. Rather, the Court was asked to determine whether this discrimination fell under the jurisdiction of the Service Provision in the British Columbia *Human Rights Code*[5] ("the Code"). This Service Provision, section 8 of the Code, prohibits discrimination against a person or class of persons regarding any 'accommodation, service or facility that is customarily available to the public'. While the Members submitted that the 'men's lounge' was a service customarily available to the public, the Golf Club submitted that the 'men's lounge' was a private service, not customarily available to the public, and they requested the claim be dismissed on the basis that the Code had no application to their actions.

C. SUPREME COURT OF CANADA JURISPRUDENCE

Judicial consideration in *Marine Drive Golf Club* and earlier decisions in that case by the Human Rights Tribunal and British Columbia Court of Justice[6], were based in part on the Supreme Court of Canada precedent decisions of *Gould v. Yukon Order of Pioneers*[7] and *University of British Columbia v. Berg*[8]. Each of these Supreme Court of Canada decisions is comparable to the facts of *Marine Drive Golf Club* because they concern a Service Provision complaint that was filed against a non-profit organization in their role as a service provider.

In *Gould*, a complaint of gender-based discrimination was filed by a woman against an all-male organization that had as its purpose the preserving and collecting of historical literature and materials ("Yukon Order"). The cause of the complaint was the denial of the complainants request for membership to the organization on the basis that she was not a male. Under Yukon Territory legislation, discrimination in granting 'membership'

[3] R.S.C. 1985, c.1 (5th Supp.).
[4] R.S.B.C. 1996, c. 210.
[5] *Ibid* at s. 8 (1).
[6] *Buntain v. Marine Drive Golf Club*, [2005] B.C.H.R.T.D. No. 119. [Human Rights Tribunal Decision], *Marine Drive Golf Club v. Buntain*, [2007] B.C.J. No. 37 [B.C. Supreme Court Decision].
[7] (1996), 133 D.L.R. (4th) 449. [Hereafter referred to as *Gould*].
[8] (1993), 102 D.L.R. (4th) 665. [Hereafter referred to as *Berg*].

was dealt with separately from the Service Provision, but because the membership provision was held to apply to economic organizations rather than social ones, the Supreme Court of Canada held that the refusal to extend membership to the complainant was the refusal to provide a service. Despite this, the Court held that the only service Yukon Order provided generally to the public was the supply of historical literature and materials for public review, and this service was provided without discrimination. The Court found that the service of providing membership carried out by Yukon Order was a private service creating no public relationship and therefore causing no violation of the Service Provision.

In *Berg*, a complaint was filed based on discrimination because of mental disability. The complaint was filed by a graduate student at the University of British Columbia ("UBC") against UBC because of their refusal to both issue her the standard building key that all other graduate students received and to complete a rating sheet she required in order to apply for an internship. The Supreme Court of Canada held that the legislature did not intend the word 'public' to be interpreted so that a service was only public if all members of the public had access to it. Instead, 'public' was to be interpreted in relational terms. The Court set out the test to be used in these circumstances as a principled approach that examines both the nature of the service and the relationship created between the service provider and the service user.

The Court in *Berg* elaborated on further the test. They confirmed that the test is so dependant on the specific relationship between the service provider and the service user, that some services may create a public relationship between the provider and the user, while other similar services may create a private relationship between similar parties. It is not simply the nature of the service that is determinative, but the specific details of the relationship at issue.

Using this test with the facts of *Berg*, the Court held that the services involved in the complaint were customarily available to the public, regardless of the fact that the admission process restricted those to whom UBC customarily offered their services.

D. THE REASONING IN *MARINE DRIVE GOLF CLUB*

At the Human Rights Tribunal[9] hearing of the Members complaint in *Marine Drive Golf Club*, the Tribunal found that the Golf Club had provided the 'men's lounge' as a service customarily available to the public. In making their decision, the Tribunal reasoned that when the Court looks to the service in question, it is

[9] Human Rights Tribunal Decision, s*upra* note 6.

important to focus not on the nature of the enterprise or the service provider, but on the nature of the service being offered. The Tribunal found that the commercial service of providing food and beverage was customarily available to the public. Further, although a majority of the individuals who use the Golf Club were members that had been privately screened and accepted, the member's guests and the guests of their family members who attended at the club were not privately selected. On this basis the Tribunal found that access to the 'men's lounge' was customarily available to the public of the Golf Club and thus it was within the jurisdiction of the Tribunal to find that discrimination had taken place.

Following this decision, the Golf Club, appealed. They argued that because they were a private club, they were not providing a service customarily available to the public and that the Tribunal had erred in their application of the test. The Supreme Court of British Columbia allowed the Golf Club's appeal.[10]

After further reviewing the decisions of *Gould* and *Berg*, the Supreme Court of British Columbia found that the Tribunal had erred in law by focusing only on the nature of the service provided. The Court indicated that the correct test as outlined in *Berg* involves first considering the nature of the service, and then going on to consider whether the service provided creates either a public or private relationship between the provider and the user. The Tribunal, they argued, had failed to address the later portion of this test and merely went on to define the public for the purpose of the service in issue. The only opportunity that the Tribunal had provided for recognition that the Golf Club was of a private nature was their consideration of whether the service at issue was ever available to anyone not selected through a private selection process.

The Supreme Court of British Columbia relied on the British cases of *Dockers' Labour Club v. Race Relations*[11] and *Race Relations Board v. Charter*[12] to reject the Tribunal's conclusion that the Golf Club's lack of direct control over the choice of all the individuals that attended at the Golf Club was determinative of whether there was a public or private relationship between the Golf Club and its users. They held instead that the relationship which is created must be examined in light of the nature of the service.

On the portion of the test that examines the nature of the service, the Supreme Court of British Columbia ultimately concluded that the service of providing food and beverage is one that is commonly available in

[10] B.C. Supreme Court Decision, *supra* note 6.
[11] (1974) 3 All E.R. 592 (H.L.).
[12] (1973) All E.R. 512 (H.L.).

private and public as well as commercial and non-commercial settings. In proceeding to examine the relationship between the Members and the Golf Club, they found that the requisite public relationship referred to in *Gould* and found in *Berg* was absent on the facts of *Marine Drive Golf Club.*

The Court emphasized that the general public had no access to the Golf Club, and although some unapproved guests of members enjoyed limited access, the relationship between the Golf Club and its users remained primarily private. The Court further cited the formalized selection process for determining members as evidence of a private relationship. They held that the allowance of visitors to the Golf Club should be regarded only as the Golf Club trusting their members to privately select appropriate users rather than automatic indicia of a public relationship.

Following this decision, the Members appealed. The British Columbia Court of Appeal adopted the findings of the Supreme Court of British Columbia and held that the Golf Club is a private club, with a formal selection process for determining its members. While the Golf Club may lack control over all of the users of its service, the relationship between the Golf Club and those users remains a private relationship and thus, the Golf Club and the 'men's lounge' were found not to be services customarily available to the public and accordingly not to be subject to the scrutiny of the Service Provision in the Code.

The Members applied for leave to the Supreme Court of Canada and were denied that leave on June 28, 2007 without reason.[13]

E. COMMENTARY

Marine Drive Golf Club confirms that a principled approach should be used to determine whether a public relationship exists when non-profit organizations provide services to their members. Courts will consider both the nature of the service as well as the actual relationship that the service provided creates between the service provider and the service user. Factors such as the selection of members or the portion of the public who have access that service are relevant, but not determinative. In each circumstance, various factors may become relevant in making that determination.

This decision makes it clear that the traditional limitation on the application of Human Rights legislation to private acts remains. Yet there is an obvious willingness by the courts to extend that application if it is found

[13] *Marine Drive Golf Club v. Buntain*, [2007] S.C.C.A. No. 112.

that a seemingly private organization delivers a service to a user and creates a public relationship in the process.

The decision in *Marine Drive Golf Course* provides a useful test, but the wide variety of services that can be provided by non-profit organizations prevents those organizations from having the ability to anticipate when their services could become subject to a valid discrimination complaint. Nonetheless, this decision can provide organizations with grounds to remain aware of possible discrimination in the services they provide and to implement and evaluate 'access to service' policies that can assist them in preventing the violations of human rights in services they may be found to provide to the public in general.

Further, as mentioned above, the issues examined in this Bulletin pertain only to those jurisdictions that restrict the application of their Service Provision to services generally available to the public. Both the Ontario *Human Rights Code* and the Nova Scotia *Human Rights Act* contain no such restriction.[14] In Ontario, the phrase "to which the public is customarily admitted" was purposely removed from the relevant section of their *Human Rights Code* in 1981.[15] In these jurisdictions, individuals have a general right to services without discrimination—the service need not be available to the public.

[14] *Human Rights Code*, R.S.O. 1990, c. H.19, s. 1 and *Human Rights Act*, R.S.N.S. 1989, c. 214, s 5.
[15] *Barclay v. Royal Canadian Legion, Branch 12* (1997), CarswellOnt 6135. Commenting on this removal the adjudicator in this case indicated at ¶ 69 that the removal of reference to the public from the Ontario statute "clearly shows that the legislature did not intend to insulate the provision of services in a private club from human rights provisions."

CARTERS.ca

CARTERS PROFESSIONAL CORPORATION
Société professionnelle Carters
Barristers, Solicitors & Trade-mark Agents
Affiliated with **Fasken Martineau DuMoulin LLP**
Avocats et agents de marques de commerce
Affilié avec Fasken Martineau DuMoulin S.E.N.C.R.L., s.r.l.

Offices / Bureaux
Ottawa (613) 235-4774
Mississauga (416) 675-3766
Orangeville (519) 942-0001
Toll Free: 1-877-942-0001

By Appointment / Par rendez-vous
Toronto (416) 675-3766
London (519) 937-2333
Vancouver (877) 942-0001

www.charitylaw.ca