

BOARD OF ADJUDICATION DECISION UNDER THE
HUMAN RIGHTS ACT

MADELEINE GOULD

COMPLAINANT

V.

YUKON ORDER OF PIONEERS, DAWSON LODGE #1

RESPONDENT

AND

YUKON STATUS OF WOMEN COUNCIL

INTERVENOR

Date of Complaint: December 8, 1987
Date of Decision: January 24, 1989
Place of Hearing: City of Dawson, Yukon Territory
Before: Clive Boyd, Chairperson, and Betty Toews,
Rosemary Trehearne, Dorothy Lattin, and
Arthur Pearson, Members
Appearances by: Paul O'Brien, Counsel for Madeleine Gould
Brian Campion, Counsel for Yukon Order of Pioneers,
Dawson Lodge #1
Diane Freed, for Yukon Status of Women Council

DECISION AND ORDER

I. INTRODUCTION

The Complainant ("Mrs. Gould"), a female person, made application to join the Respondent organization ("the Lodge") as a member. It is common ground that her application was rejected on the basis of her gender. The evidence of Mrs. Gould and the Lodge was presented by a written Agreed Statement of Facts, which Statement had attached various Admitted Documents. At the hearing two further facts and a document entitled Guidelines for Recommending and Investigating Members were submitted on agreement of Counsel.

At the commencement of the hearing, the Board heard submissions from all parties, with respect to the status of the Intervenor ("Status of Women"). The Board, being satisfied that the requirements of Section 16(1) of the Regulations to the Human Rights Act were met, granted Intervenor status to the Status of Women, without conditions. The Status of Women then presented various documentary evidence in support of its argument.

No party presented oral evidence.

II. EVIDENCE

By the Agreed Statement of Facts, Mrs. Gould and the Lodge presented a brief historical review of the Yukon Order of Pioneers ("the Order"). Apparently the Order was formed in 1894, for purposes of establishing a police force and a fraternal group whose primary concern would be the welfare, security and well-being of its members. By the early 1900's the policing activities of the Order were no longer required, so that since that time, the primary objects of the Order, at least as established by the practice of the members, have been social, historical and cultural in nature, with its paramount concern being the welfare and well-being of its members.

It is agreed between Counsel that the major part of the activities of the Order, in practice, is focused on its members and internal fraternal affairs, and only a minor part of its activities is directed towards matters involving collection and preservation of Yukon history. The Board accepts as a fact that, at present and in practice, that part of the Order's activities devoted to public service is minor in relation to the Order's other activities.

Examining the Constitution of the Order, reference should be made to the following:

"PURPOSES

Its purpose shall be the advancement of the Yukon Territory, the mutual protection of its members, and to unite these members in the strong tie of brotherhood; and to preserve the names of all Yukon Pioneers on its rolls; to collect and preserve the literature and incidents of Yukon's history."

The Constitution further sets out that the Grand Lodge of the Order "is and shall be the only source of power and authority", and that "The Power of the Grand Lodge is legislative, executive, judicial and absolutely final." Provision is then made for the formation of Subordinate Lodges, such as the Respondent, Dawson Lodge #1. The Constitution then sets out a Constitution for Subordinate Lodges, which re-states as "Purposes" those Purposes applicable to the Grand Lodge set out above. Membership in the Subordinate Lodge is governed by the following provision:

"MEMBERSHIP

Candidates for membership by initiation in this Order may be of any race or an offspring of a member, he must also have been within the watershed of the Yukon River, and or, the Territorial Boundaries of the Yukon Territory prior to Twenty years and remained.

The name of a person offered for membership must be presented by two members in writing, at a regular meeting (or a special meeting called for that purpose), and then referred to a committee of three Brothers for investigation, who shall make a written report at the next succeeding meeting (or at the same meeting if considered necessary by two-thirds vote of the Lodge), when the candidate may, if the Committee report be favorable, be balloted for and initiated; if one black ball shall appear in every five he shall be rejected."

Counsel for the Lodge presented to the Board a copy of the organization's Guidelines for Recommending and Investigating Members, governing the process for election to membership. Counsel did not suggest that the membership election process, as governed by the Constitution and the Guidelines for Recommending and Investigating Members, was just a formality. Further, there was no evidence presented to indicate that election to membership in the organization followed automatically from an application. The Board therefore finds that the Lodge's membership selection process is genuine and not a mere facade.

The Status of Women were supportive of Mrs. Gould's application, taking the position that the Order offers a public service in the recording and preservation of Yukon history, and excluding women from participating in those services by excluding them from membership, resulted in a gender-biased view of Yukon history.

III. ISSUES

It is not disputed that discrimination in an abstract sense has been established, and that the actions of the Lodge constitute discrimination against Mrs. Gould and women in general, by virtue of Section 6(f) of the Act. The essential issues, then, are as follows: *Prohibited grounds*

1. Is the discrimination as established prohibited conduct within the meaning of Section 8(a) of the Act?

Prohibited Discrimination

2. If so, is the exemption clause at Section 10(1) applicable?

IV. DECISION

Counsel for Mrs. Gould submitted that the Human Rights Act, in general, and Section 8(a) in particular, should be given a "broad and liberal" interpretation so as to meet the legislative objects as set out at Section 1 of the Act. The Status of Women also argued for a liberal interpretation of the Act so as to meet the goal of discouraging discrimination against women. The Board finds that a liberal interpretation of the statute is in accordance with Supreme Court of Canada rulings dealing with interpretation of human rights legislation. As stated by LaForest, J., in Robichaud and Canadian Human Rights Commission v. Her Majesty the Queen, [1987] 2 S.C.R. 84 at p. 89:

"The purpose of the Act is set forth in section 2 as being to extend the laws of Canada to give effect to the principle that every individual should have any equal opportunity with other individuals to live his or her own life without being hindered by discriminatory practices based on certain prohibited grounds of discrimination, including discrimination on the ground of sex. As McIntyre J., speaking for this Court, recently explained in Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd. [1985] 2 S.C.R. 536, (7 C.H.R.R. D/3102), the Act must be so interpreted as to advance the broad policy considerations underlying it. That task should not be approached in a niggardly fashion but in a manner befitting the special nature of the legislation, which he described as "not quite constitutional"; see also Insurance Corporation of British Columbia v. Heerspink, [1982] 2 S.C.R. 145, (3 C.H.H.R. D/1163) per Lamer J., at pp. 157-58. By this expression, it is not suggested, of course, that the Act is somehow entrenched but rather that it incorporates certain basic goals of our society. More recently still, Chief Justice Dickson in Action Travail des Femmes v. Compagnie des Chemins de Fer Nationaux du Canada, pronounced June 25, 1987 [8 C.H.H.R. D/4210 (sub nom. Canadian National Rail Co. v. Canada (Canadian Human Rights Commission))], emphasized that the rights enunciated in the Act must be given full recognition and effect consistent with the dictates of the Interpretation Act that statutes must be given such fair, large and liberal interpretation as will best ensure the attainment of their objects."

Section 8(a) of the Act reads as follows:

"8. No person shall discriminate

(a) when offering or providing services, goods or facilities to the public,"

The question that must be answered is whether the Lodge offers or provides "services to the public". Both Mrs. Gould and the Lodge agree that there is some element of public service but that this element is minor. The Lodge contends that the public service element is only ancillary and incidental to its primary objectives. Both parties agree that reference may be made to both the present practice of the members, and the Constitution, in determining the issue.

On the facts presented, the Board is satisfied that the public service aspect of the Lodge is not the predominant activity of the present membership. However, and as agreed by Counsel, that is not the sole determinant of the issue. The "Purposes" as set out in the Constitution refer to "the advancement of the Yukon Territory", and the collection and preservation of "the literature and incidents of Yukon's history". An important public service element is therefore contemplated by the Constitution of the Lodge. As the membership of the Lodge may change the emphasis of its activities from time to time, within the framework of its Constitution, the Board is not prepared to assume that at some period, the public service element would not predominate. Further, the Board is of the opinion that it is not necessary to find that the public service element of an organization's activities predominates before finding that Section 8(a) of the Act is applicable. As long as some significant element of the organization's activities are directed towards public service, then Section 8(a) is applicable. The Board is of the opinion that that is the case here, and that the Lodge does in fact offer or provide "services to the public" within the meaning of Section 8(a).

The question then is, does the Lodge discriminate when offering or providing those services by virtue of the fact that it excludes females from membership? Counsel for the Lodge drew a distinction between discrimination relating to membership, and discrimination in the offering or providing of services to the public. Counsel for Mrs. Gould, and the Status of Women, encouraged the Board to give Section 8(a) a wide or liberal construction, reasoning that the public service element of the Lodge's activities could not be properly performed without female input through membership.

The Board is of the opinion that Section 8(a) should be given a liberal construction, and that the Section is applicable to govern discrimination in relation to membership in at least two situations:

(1) where membership election is a mere formality, an organization will be considered to be acting in a discriminatory manner if it refuses to provide services of a public nature by withholding membership. See the Judgment of Lord Reid in Charter and Others v. Race Relations Board, [1973] 1 All E.R. 512 at 516.

(2) where the quality of the service is affected by discriminatory acts such as screening of membership.

On the evidence and as stated previously, the Board is satisfied that the membership screening process is genuine, and that election to membership does not automatically follow from an application. The first situation is therefore not applicable.

Turning to the second situation, Mrs. Gould and the Status of Women argue that, at least in relation to the role of the Lodge in the collection and preservation of Yukon's history, this public service cannot be performed properly without the active input, through membership in the Lodge, of the female segment of the population. They reason that history will be distorted in favour of the male role if it is recorded solely by males. While the Board is of the opinion that the evidence presented at the hearing in relation to that point was of such a nature that it could not be accorded much weight, the Board is prepared to accept the proposition from a common sense standpoint. An analogy can be made to the recording of North American history by Europeans, and the emphasis placed in our schools on the role of the non-indigenous element of our society because of the lack of participation by indigenous people in that recording.

③ The Board therefore finds that there has been discrimination by the Lodge, in the rejection of Mrs. Gould's application for membership, and that this discrimination is of the type prohibited by Section 8(a) of the Act.

Having found a prohibited discrimination in relation to the provision of services to the public, the Board must now deal with the second issue of whether the exemption clause at Section 10(1) is applicable. The issue is whether the Lodge, being a social or cultural organization is entitled to discriminate in granting membership on the grounds that this is simply the giving of a preference "to the people the organization exists to serve".

④ The Board is of the opinion that exemption clauses of this nature should be construed strictly so as to limit their scope. See Ehinder and The Canadian Human Rights Commission v. The Canadian National Railway Company [1985] 2 S.C.R..

Using this method of construction, the Board has reached the conclusion that "the people the organization exists to serve", at least in relation to the collection and preservation of Yukon History, is the whole community, both male and female. Restricting the scope of the clause to male pioneers is overly restrictive, and begs the questions. The Board therefore finds that the exemption clause, Section 10(1) is inapplicable.

In summation then, and by unanimous decision, the Board has reached the conclusion that there has been discrimination by the Lodge of a type prohibited by the Act, and that Section 10(1) of the Act is inapplicable.

While not necessary for the conclusion reached, the Board deems it appropriate to deal with two issues that arose in relation to the consideration of the scope of Section 10(1).

Firstly, both Counsel referred to the Explanatory Notes accompanying the publicly-circulated booklet version of the Act. The Board is of the opinion that little or no weight should be attached to these Notes. Explanatory Notes are simply the opinion of the administrative arm of government as to the effect of legislation passed by the legislature. Section 9 of the Interpretation Act, R.S.Y.T. 1986, c. 93 indicates that marginal notes form no part of an enactment but shall be deemed to have been inserted for convenience only. The Board is of the opinion that explanatory notes should be considered in a similar manner.

Secondly, the Board is not persuaded that the Constitution of the Order and the Lodge does in fact preclude female membership. While words of male connotation, such as "Brother" and "brotherhood" are used in the document, the Board is of the opinion that there is insufficient evidence to demonstrate that it was the intent of the drafters of the present Constitution of the Order to exclude women. What evidence there is suggests that, at some juncture, the Constitution was changed to remove a specific reference to the male gender in the membership clause, and an inference adverse to the Lodge's position may be drawn from that change. The Board is also of the opinion that, by reviewing the Constitution, as a whole, and in its historical context, those words of male connotation in the Constitution should be given an inclusive meaning.

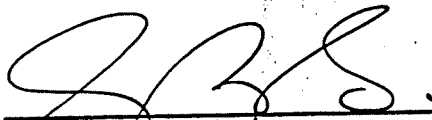
Finally, the Board makes no award as to costs.

V. ORDER

Having found discrimination, as alleged by the Complainant, Mrs. Gould, the Board orders as follows:

1. The Respondent, Yukon Order of Pioneers, Dawson Lodge #1, shall cease the discrimination complained of by the Complainant, and shall consider the application for membership of the Complainant, without reference to her sex.

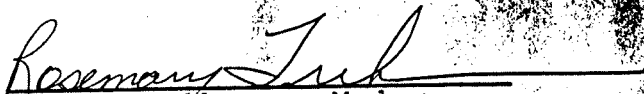
2. The Respondent shall consider all other applications for membership without reference to the sex of the applicant.




Olive Boyd, Chairperson




Betty Toews, Member



Rosemary Trehearne, Member



Dorothy Lattin, Member



Arthur Pearson, Member