Court File No. 179/2000

ONTARIO SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

BETWEEN:

ONTARIO HUMAN RIGHTS COMMISSION

Applicant (Respondent)

- and -

RAY BRILLINGER and
THE CANADIAN LESBIAN AND GAY ARCHIVES

Applicants (Respondents)

- and –

SCOTT BROCKIE and
IMAGING EXCELLENCE INC.

Respondents (Appellants)

- and -

CANADIAN RELIGIOUS FREEDOM ALLIANCE

Intervenor

FACTUM OF THE INTERVENOR, CANADIAN RELIGIOUS FREEDOM ALLIANCE

PART I – OVERVIEW

1. In its recent decision in *Trinity Western University* v. *British Columbia College of Teachers*, the Supreme Court of Canada stated: "Freedom of religion, conscience and association coexist with the right to be free of discrimination based on sexual orientation." This appeal requires the court to consider again the coexistence of those rights – the proper boundary of

each right and the place of conscientious objection in the process of drawing those boundary lines. The Canadian Religious Freedom Alliance submits that the Board of Inquiry (the "Board") erred in its analysis of the proper scope of each of these legal guarantees. On the one hand, it employed a narrow view of freedom of conscience and religion inconsistent with the rich jurisprudence which Canadian courts have developed around that freedom, especially in its public manifestation. On the other hand, it failed to distinguish between a refusal to provide a service to a person and the refusal to provide a service to a cause or public advocacy group whose message is disagreed with for reasons of conscience or religious belief. The Canadian Constitution requires legislation and governmental tribunals to provide reasonable accommodation to conscientious and religious beliefs. The Board in the present case failed to do so because it failed to recognize that the Ontario Human Rights Code ("OHRC") does not require a person to provide a service to a cause or public advocacy group with which a person disagrees on sincerely-held conscientious or religious grounds.

PART II - THE FACTS

2. The Canadian Religious Freedom Alliance ("CRFA") consists of three member organizations, The Evangelical Fellowship of Canada, The Christian Legal Fellowship and The Catholic Civil Rights League, which have participated in legal proceedings before provincial superior and appellate courts and before the Supreme Court of Canada on important social issues, including the protection of religious liberty. The CRFA was granted leave to intervene in this appeal as a friend of the court by order of The Honourable Mr. Justice Wright made May 23, 2001.

3. For the purposes of this appeal, the CRFA adopts the facts as set out in the appellants' factum. In addition, CRFA submits the following facts are critical to this appeal:

(i) the documentary exhibits filed with the Board of Inquiry indicate that the Respondent, the Canadian Lesbian and Gay Archives, is a public advocacy group or cause designed to preserve information about, promote and celebrate gay and lesbian lives;

See, for example, Exhibits 1, 2, 3 and 4, *Appeal Book*, Tabs 11, 12, 13, and 14

(ii) there was no dispute in the evidence that the appellant, Brockie, was a born again Christian and that his conviction that homosexuality was contrary to the teachings of the Bible was sincerely-held;

Interim Decision of the Board of Inquiry ("*Interim Decision*"), p.2, *Appeal Book*, Tab 3, p. 26

(iii) Brockie and his company have provided services to gays and lesbians. On this point the Board of Inquiry found:

> "It was Brockie's evidence that Imaging Excellence did not deny printing services to individuals who were known to it to be lesbians or gay men. Accepting his evidence on this point, I can conclude that, if Brillinger as a gay man, sought ***personal*** printing services for a purpose unrelated to the Archives, he would have received the service." (emphasis added)

Interim Decision, p. 6, *Appeal Book*, Tab 3, p. 30

(iv) the reason Brockie refused to provide printing services was the advocacy character of the Canadian Gay and Lesbian Archives . In its *Interim Decision* the Board of Inquiry stated:

> "The only reason for the denial was the direct association between Brillinger and his organization, the Archives."

Interim Decision, p. 6, *Appeal Book*, Tab 3, p. 30

In its Decision on Remedy the Board stated:

> "…[Brockie] acknowledged that Imaging Excellence provided printing services to a company called Body Body Wear which produces underwear marketed to the gay male population. Although Brockie admitted during his cross-examination that he found Body Body Wear's advertisement equally detestable, he provided the service. He was apparently able to distinguish this from the work sought by the Archives, on the basis that the Archives was involved in furthering and supporting the lesbian and gay "lifestyle"."

Decision on Remedy of the Board of Inquiry ("*Remedy Decision*"), p. 9, *Appeal Book*, Tab 2, p. 18

(v) the Respondents acknowledged that the remedy they were seeking from the Board would violate Brockie's constitutional rights.

Remedy Decision, p. 3, *Appeal Book*, Tab 2, p. 12

PART III - ISSUES

4. The CRFA will make submissions on the following issues raised by this appeal:

(i) the Board erred in its approach to adjudicating the contending legal claims of the parties**;**

(ii) the proper delineation of the *Charter*-guaranteed freedom of conscience and religion;

(iii) the proper delineation of the right to be free of discrimination based on sexual orientation in the provision of services as protected by section 1 of the OHRC; and,

(iv) in light of the delineation of the competing, but coexisting, rights at issue in this appeal, where do the boundaries lie between these co-existing rights?

PART IV - ARGUMENT

First Issue: What is the proper legal approach to adjudicating the contending legal claims of the parties?

5. This case involves a conflict between two important, yet contending legal claims – the freedom of conscience and religion guaranteed to persons by the *Canadian Constitution*, and the protection afforded to persons by the *Ontario Human Rights Code* that they not be refused services because of a prohibited ground of discrimination, in this case sexual orientation. That this appeal raises an issue with ramifications which extend well beyond the facts of this case can readily be seen by referring to other circumstances in which this conflict could arise:

> (i) a Jewish printer is approached by a person of Palestinian background who, on behalf of a Palestinian cultural group in Canada, asks the Jewish printer to print pamphlets which call for the expulsion of all Jews from Palestine and a return of all occupied territory. The Jewish printer refuses, citing his religious belief that Holy Scripture states that God promised those lands to the Hebrews;
>
> (ii) a Muslim lawyer is approached by EGALE, the prominent gay rights advocacy group, and is asked to act for them in bringing a constitutional challenge to some legislation which denies a benefit to same-sex couples. The lawyer refuses, citing his religious belief that the Koran states that same-sex relationships are contrary to the law of Allah;
>
> (iii) a gay man who runs a printing shop is approached by a religious group which is known for its advocacy for the repeal of legislation which has granted same-sex couples benefits previously enjoyed only by opposite-sex couples. The group asks the printer to print its annual report. For reasons of conscience, the gay printer refuses to accept the order.

Are all of these persons required to provide the requested services without reservation, or does the OHRC provide some accommodation of their conscientious or religious beliefs?

6. In its recent decision in the *Trinity Western University* ('TWU") case, the Supreme Court of Canada observed that the diversity of Canadian society requires respecting the diversity of views:

> "The diversity of Canadian society is partly reflected in the multiple religious organizations that mark the societal landscape and this diversity of views should be respected… Freedom of religion, conscience and association coexist with the right to be free of discrimination based on sexual orientation."

How, then, does the right to be free of discrimination based on sexual orientation coexist, on the facts of this appeal, with the appellant's freedom of conscience and religion? This is the key question to be decided on this appeal.

> *Trinity Western University* v. *British Columbia College of Teachers, (2001),* 199 D.L.R. (4th) 1, at pp. 31-32, paras. 33 and 34

7. The CRFA submits that the Board employed an incorrect analytical approach in its effort to answer this key question. The Board first found a breach of the OHRC and only then proceeded to engage in a "balancing" of rights when it dealt with the issue of remedy for breach. The CRFA submits that this approach is inconsistent with the established jurisprudence of the Supreme Court of Canada dealing with the balancing of competing legal rights, especially the recent *TWU* decision. While the Board was correct to consider the application of the Charter to the remedy which it fashioned, the Board was also required to interpret the obligations imposed by section 1 of the OHRC in light of the guarantees contained in the Charter. That is to say, the law requires the Board to engage in the balancing of coexisting rights as part of its determination of whether a breach of the OHRC has occurred, and not simply as a matter of remedy. To leave the balancing of rights to the remedies stage implicitly adopts a "hierarchy of rights" approach, which, as will be discussed below, the Supreme Court of Canada has forcefully rejected on numerous occasions.

8. The analytical elements of the proper approach to adjudicating contending legal claims were set out by the Supreme Court of Canada in its recent decision in *Trinity Western University v. British Columbia College of Teachers*, a decision released after the Board rendered its decision in this case. The Board therefore did not have the benefit of the Supreme Court's analysis. Two elements characterize the Supreme Court's analytical approach to the coexistence of rights. First, the Supreme Court of Canada has recognized that rights, including equality rights, are not absolute. Because rights are not absolute, no hierarchy of rights exists. As noted by the Supreme Court in *TWU*:

> "In addition, the Charter must be read as a whole, so that one right is not privileged at the expense of another. As Lamer C.J. stated for the majority of this Court in *Dagenais v. Canadian Broadcasting Corp*., [1994] 3 S.C.R. 835, at p. 877:
>
> > A hierarchical approach to rights, which places some over others, must be avoided, both when interpreting the Charter and when developing the common law. When the protected rights of two individuals come into conflict…Charter principles require a balance to be achieved that fully respects the importance of both sets of rights."
>
> *Trinity Western University, supra.,* at p. 31, para. 31

9. Second, in adjudicating competing human rights a tribunal must properly understand the scope of the respective rights in order to determine whether or not a conflict exists. In the *TWU* decision the Supreme Court recited the robust definition of freedom of conscience and religion enunciated by Dickson, J. in *Big M Drug Mart* which concluded with the following statement:

> "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."

The Board quoted this passage as well in its *Remedy Decision*. However, in the *TWU* decision the Supreme Court went on to explain how this passage should be applied in practice:

> " It is interesting to note that this passage presages the very situation which has arisen in this appeal, namely, one where the religious freedom of one individual is claimed to interfere with the fundamental rights and freedoms of another. The issue at the heart of this appeal is how to reconcile the religious freedoms of individuals wishing to attend TWU with the equality concerns of students in B.C.'s public school system, concerns that may be shared with parents and society generally.
>
> *In our opinion, this is a case where any potential conflict should be resolved through the proper delineation of the rights and values involved. In essence, properly defining the scope of rights avoids a conflict in this case. Neither freedom of religion nor the guarantee against discrimination based on sexual orientation is absolute."* (emphasis added)
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> *Trinity Western University*, *supra*., pp. 29 – 30, paras. 28 and 29
> Remedy Decision, p. 4, *Appeal Book*, Tab 2, p. 13

10. If this approach had been taken by the Board of Inquiry, the CRFA submits that three results would have followed: (i) a fuller understanding of the scope of freedom of conscience and religion; (ii) a better appreciation that section 1 of the OHRC is directed at discrimination against persons, not against the refusal to serve causes; and (iii) a determination that once the contending claims in this case are properly understood, there really was no conflict, in that the OHRC does not make it discriminatory to refuse to provide services to a cause to which one conscientiously objects.

B. Second Issue: What is the proper delineation of the *Charter*-guaranteed freedom of conscience and religion?

11. The CRFA submits that the Board of Inquiry made three errors of law in its interpretation and application of the principles of freedom of conscience and religion:

(i) the Board failed to acknowledge the public dimension of the freedom;

(ii) the Board failed to interpret the OHRC in a way which accommodates the freedom as it is required to do by law; and,

(iii) the Board applied an improper analysis in examining the sincerity of the appellant's religious beliefs.

Each will be considered in turn.

(a) Failure to acknowledge the public dimension of freedom of conscience and religion

12. The Board properly referred to the meaning of the concept of freedom of religion set out by the late Chief Justice Dickson in the *Big M Drug Mart* case where he stated:

> "The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, *the right to declare religious beliefs* openly and without fear of hindrance or reprisal, and *the right to manifest religious belief by* worship and practice or by teaching and dissemination.
>
> Freedom is characterized by the absence of compulsion or coercion. One of the goals of section 2(a) of the Charter is to protect individuals against compulsions which violate their religious freedom or their conscience." (emphasis added)
>
> *R.* v. *Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 336

13. However, the Board then proceeded to depart from this understanding of freedom of religion by relegating the practice of religion to the private, or non-public, sphere of life. The Board stated in its *Remedy Decision*:

> "…in fact nothing in my order will prevent Brockie from continuing to hold and practice his religious beliefs. Brockie remains free to hold his religious beliefs and to practice them in his home, and in his Christian community…What he is not free to do, when he enters the public marketplace and offers services to the public in Ontario, is to practice those beliefs in a manner that discriminates against lesbians and gays by denying them a service available to everyone else."

With all due respect to the Board, this concept of "public right, but private practice" does not accord with the jurisprudence of the courts on the scope of freedom of religion. One need look no farther than the recent decision of the Supreme Court of Canada in *TWU* in which it emphasized the public dimension of freedom of conscience and religion:

> "The *public* dimension of religious freedom and the right to determine one's moral conduct have been recognized long before the advent of the Charter (see *Saumur v. City of Quebec*, [1953] 2 S.C.R. 299, at p. 329…" (emphasis added)

In restricting the places in which Brockie could practise his religion to his home, and in his Christian community, the Board fundamentally misconstrued the content of freedom of religion and erred in law.

> *Trinity Western University*, *supra.*, pp. 25-6, at para. 19

(b) The Board failed to interpret section 1 of the OHRC in a way which accommodates freedom of conscience and religion as it is required to do by law

14. The accommodation of the public exercise of religious or conscientious belief has a long history in Canada, best exemplified by the series of court decisions in the 1940's and 1950's involving members of the Jehovah's Witnesses. In its 1945 decision in *Donald v. The Board of Education for the City of Hamilton*, the Ontario Court of Appeal interpreted

provisions in the *Education Act* exempting a public school student from participation in "any exercise of devotion or religion" as entitling Jehovah's Witnesses children to refrain from saluting the flag and joining in the signing of the national anthem in the classroom, both exercises which they considered contrary to their religious beliefs.

Donald v. The Board of Education for the City of Hamilton, [1945] O.R. 518 (C.A.)

15. The relentless campaigned waged by Quebec's Duplessis government against the Jehovah's Witnesses in the 1950's included an attempt, by means of municipal by-laws, to prohibit Jehovah's Witnesses from distributing pamphlets on public streets. One pamphlet in particular entitled, "Quebec's Burning Hate for God and Christ and Freedom is the Shame of All Canada", was considered by Catholic Quebecers of the day to be tantamount to hate literature. However, in *Saumur v. City of Quebec* the Supreme Court of Canada struck down the prohibition and upheld the public dimension of the right to profess one's faith by disseminating pamphlets on public streets.

Saumur v. City of Quebec, [1953] 2 S.C.R. 299

16. A rich jurisprudence has developed under the Charter and provincial rights codes regarding the duty of legislators, regulators and employers to provide reasonable accommodation to the public practice of religious beliefs. The cases illustrate that the law has required the accommodation of a variety of public practices of religious beliefs up to the point "of undue hardship"– the closing of one's business for religious reasons on a day other than Sunday (*Edwards Books*), the inability to work on one's holy day (*Renaud*) or the inability to perform a particular task at work, such as the setting out of Christmas decorations, which is proscribed by one's faith (*Jones* v. *Eisler*).

Edwards Books and Art v. *The Queen*, [1986] S.C.R. 713
Central Okanagan School District No. 23 v. Renaud (1992), 95 D.L.R. (4th) 577 (S.C.C.) at 584 – 5
Jones v. *Eisler*, [2001] B.C.H.R.T.D. No. 1

17. The *TWU* decision also involved the issue of accommodation, in that case the accommodation of a religious educational institution within a provincial statutory scheme regulating teacher education. While the present appeal deals with an individual, Brockie, and not an institution, the legal duty to accommodate the public profession and practice of faith does not change. The protection afforded by our Constitution to religious individuals when acting in association with one another is no different than the protection afforded when a person acts alone on his or her conscientious or religious beliefs.

TWU, supra, pp. 32-32, at paras. 34 and 35.

18. A helpful and comprehensive summary of the principles surrounding the obligation to accommodate freedom of religion which have emerged in the jurisprudence can be found in the June, 2001 decision of the Quebec Superior Court of Justice in *Rosenberg v. City of Outremont* where Justice Hilton stated:

> "The concept of religious freedom in Canada is well anchored in the Canadian Charter of Rights and Freedoms and the Quebec Charter of Human Rights and Freedoms. It is also acknowledged that prior to the enactment of the

Charters, courts in this country were rendering judgments in which the principles of freedom of religion were applied. Although no law or regulation is being attacked in these proceedings, the case law decided under the Charter is useful to ascertain the limits of the rights themselves and the corresponding obligations of regulatory authorities. Without purporting to be exhaustive, the case law shows that:

- Charter rights, including freedom of religion, must be given a generous and purposive interpretation without however going beyond the actual purpose of the right in question;

- The right of freedom of religion includes the right to practice the religion and *to openly demonstrate or manifest that practice*, while all the while insuring that no injury is caused to one's neighbours or their right to hold and display different beliefs;

- In determining what essential practices are in any religion, the role that the practices and beliefs play in the religion must be analyzed;

- *Where there is a conflict between the exercise of a Charter right and some perceived public interest or private concern, reasonable accommodation, meaning accommodation up to the point of undue hardship, must be shown to facilitate the exercise of the Charter right;…"*

  Rosenberg v. *City of Outremont*, unreported decision of the Quebec Superior Court, June 21, 2001, No. 500-05-060659-008, at pp. 7-8, (emphasis added)

19. In light of this well-known jurisprudence on the duty to accommodate the public expression and practice of one's freedom of conscience and religion, it is surprising that the Board of Inquiry made no reference to these cases. Its failure to do so marks a critical error which it made in its legal analysis. The obligations imposed by section 1 of the OHRC must be read, interpreted and applied within the context of this legally-mandated duty to accommodate freedom of conscience and religion "up to the point of undue hardship".

(c) the Board applied an improper analysis in examining the sincerity of the appellant's religious beliefs.

20. In an early part of its *Remedy Decision* the Board stated that it "did not doubt Brockie's sincerity", yet it then proceeded to rely on the evidence of Dr. McLeod, a United Church minister, to call into question the sincerity of Brockie's religious beliefs regarding homosexuality. The Board stated:

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

Brockie is not a member of the United Church, yet the Board relied on the evidence of the practice of that denomination to impugn the sincerity of Brockie's religious beliefs by attributing a certain rigidity to them. Brockie, the Board seems to be implying, is outside of the "mainstream" of Christian views about homosexuality which in turn undermines the credibility of his beliefs.

21. The Board made a fundamental error of law in considering the sincerity of Brockie's religious beliefs by relying on evidence from a religious group of which Brockie is not a member. Jurisprudence under the *Charter* has made it clear that the sincerity of one's religious belief is to be viewed in the context of the religion of which one is a member, not some other group. In admitting and giving weight to Dr. McLeod's evidence, the Board improperly allowed irrelevant evidence to cloud its decision-making process.

R. v. *Videoflicks Ltd*. (1984), 48 O.R. (2d) 395 (C.A.), at p. 423d-h
Salvation Army, Canada East v. *Ontario (Attorney General)*, [1992] O.J. No. 123

(d) The limits on freedom of conscience and religion

22. In summary, the CRFA submits that the Board erred in law in its delineation of the guarantee of freedom of conscience and religion by failing to recognize that the freedom ensures the public practice of one's beliefs and that laws are required to extend reasonable accommodation to such public practices "up to the point of undue hardship". At the same time, no right is absolute and the public practice of religion is subject to some limits. As stated by the Supreme Court in the *TWU* case: "The freedom to hold beliefs is broader than the freedom to act on them." This does not mean that one does not have the freedom to act publicly on one's beliefs; it simply means that since any civil right is practiced in a social context in interaction with other members of society, some limits may be placed on such rights to preserve the public order. As put by Dickson J. in *Big M Drug Mart*: "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." In the context of the present case, how broad was Brockie's freedom to act on his religious beliefs? The answer to that question, the CRFA submits, lies in a proper understanding of the scope of the competing right, the right to be free of discrimination based on sexual orientation

TWU, *supra.*, p.33 at para. 36

C. Third Issue: What is the proper delineation of the right to be free of discrimination based on sexual orientation in the provision of services as protected by section 1 of the OHRC?

23. The analysis of coexisting, yet competing, rights set down by the Supreme Court in the *TWU* decision next requires a consideration of the proper scope of the competing interest in this case, i.e. the principle that "every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of …sexual orientation.." as enshrined in section 1 of the OHRC. It is well established in the human rights jurisprudence that the object of provisions such as section 1 of the OHRC is to prevent the denial of services to persons because, or due to, some personal characteristic of that person, characteristics which are enumerated as "prohibited grounds of discrimination". As well, section 12 of the OHRC prohibits discrimination against a person who, although he or she may not possess a particular personal characteristic, may nonetheless be associated with a person identified by a prohibited ground of discrimination (eg. the white tenant of an apartment who is evicted because he entertains black guests.)

24. Courts, however, have distinguished between discrimination against a person and discrimination against a cause, idea or advocacy group. For example, in its 1979 decision in *Gay Alliance Toward Equality v. Vancouver Sun*, the Supreme Court of Canada held that the refusal of a newspaper to run an ad for a gay advocacy group did not violate the provisions of the Human Rights Code of British Columbia prohibiting the denial of a service to a person "unless reasonable cause exists". Although the decision predated the enactment of the Charter, the decision of the majority was strongly influenced by considerations of accommodating freedom of expression, including the freedom of the press. The majority appeared to distinguish the provision of services to a person from the provision of services to a cause or advocacy group. In writing for the majority Martland, J. stated:

> "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 the present case the Sun had adopted a position on the controversial subject of homosexuality. It did not wish to accept an advertisement seeking subscription to a publication which propagates the views of the Alliance. Such refusal was not based upon any personal characteristic of the person seeking to place that advertisement, but upon the content of the advertisement itself."
>
> *Gay Alliance Toward Equality v. Vancouver Sun* (1979), 97 D.L.R. (3d) 577 (S.C.C.), at p. 591. See the subsequent discussion by the Supreme Court of Canada on the *Gay Alliance* decision in *Berg* v. *University of British Columbia* (1993), 13 Admin L.R. (2d) 141, especially the comments on the "competing interest of freedom of the press" at pp. 161-164.

25. The distinction between refusing services to a person and refusing services to a cause was also well illustrated in the 1994 decision of the Supreme Court of Vermont in *Paquette* v. *Regal Art Press Inc.*. In that case the plaintiff asked the

defendant printer to print membership cards for Vermont Catholics for Free Choice. The printer, a Catholic, refused, and the plaintiff commenced an action alleging a violation of 9 V.S.A. § 4502(a) which prohibited discrimination in places of public accommodation. While the printer's motion to move for judgment on the basis of the pleadings was dismissed by the majority of the court on procedural considerations about the appropriate inferences to be drawn from the pleadings on such a motion, the dissenting judge, Justice Morse, noted the submissions made by the plaintiff's counsel during argument:

> "I would affirm for the reason expressed by plaintiff's counsel at oral argument – disagreement over the issue of abortion is not protected under the Act. Counsel added:
>
> > If [the defendant] Regal Art Press had said at the time, 'We decline to print your order because we perceive the content of that order to be pro abortion, and we are morally or even religiously opposed to abortion, therefore we won't print your cards for you", we wouldn't be here today. Plaintiff would not have a complaint, and I want to make sure that's clear from the outset."

Justice Morse added:

> "The facts of this case show the folly that erupts when a political question is superficially intertwined with a religious label. I do not believe that the Legislature intended to extend the protection of 9 V.S.A. § 4502 to political agendas, even if those agendas are pursued by religious groups. Vermont Catholics for Free Choice is a political group taking political action. Consequently, it should garner no greater protection than any other politically motivated group."
>
> *Paquette* v. *Regal Art Press, Inc.*, 656 A. 2d 209 (1994) (Supreme Court of Vermont), at p. 211

26. The protection afforded by the OHRC is personal in nature and it proscribes certain conduct which, in the words of the Supreme Court of Canada in the *Vancouver Sun* case, is "based upon any personal characteristic of the person". Thus, a service cannot be denied to a person simply on the basis of "who that person is". In the present case the Board found as follows: "…I can conclude that, if Brillinger as a gay man, sought *personal* printing services for a purpose unrelated to the Archives, he would have received the service." That is to say, this case is not simply about refusing to serve a gay man because of his sexual orientation. As the Board made clear, Brockie's refusal was based on the cause which the Archives advocates: "The only reason for the denial was the direct association between Brillinger and his organization, the Archives."

> Interim Decision, pp. 5-6, *Appeal Book*, Tab 3, pp. 29-30.

D. Fourth Issue: In light of the delineation of the competing, but coexisting, rights at issue in this appeal, where do the boundaries lie between these co-existing rights?

27. The parties to this appeal suggest two differing ways to resolve the boundaries between the co-existing rights. On the one hand, the respondent supports the findings and remedy of the Board declaring Brockie in violation of section 1 of the OHRC and requiring Brockie to provide services "to organizations in existence for [the] benefit" of gays and lesbians even when to do so would compel Brockie to act against his sincerely held religious beliefs. Simply put, freedom of conscience and religion is subordinated to equality rights based on sexual orientation. This approach effectively requires any person "to check his conscientious or religious beliefs at the door" when he engages in any business activity with members of the public. It marks a "zero tolerance" approach to the public exercise of conscientious or religious belief. For the reasons set out above, the CRFA submits that such an approach is inconsistent with the jurisprudence to date on freedom of conscience and religion.

Remedy Decision, p. 13, *Appeal Book*, Tab 2, p. 22

28. On the other hand, the appellants not only seek to set aside the decisions of the Board, but they also seek declarations that the OHRC is unconstitutional "in failing to provide a defence of bona fide conscience or religious exemption to Section 1". While the CRFA is sympathetic to a future amendment to the OHRC to include an express exemption based on sincerely-held conscientious or religious beliefs, the CRFA submits that this Court is not required to find section 1 of the OHRC unconstitutional in order to allow the appeal because as the law now stands the provisions of the OHRC must be interpreted in light of, and consistent with, the demands of the *Charter*.

29. Such an interpretation, the CRFA submits, can be achieved by employing the analytical principles set down by the Supreme Court of Canada in the *TWU* decision. The public dimension of freedom of conscience and religion can easily be accommodated within the existing framework of the OHRC by interpreting section 1 of the OHRC as extending its protection to persons and not to causes. Such an interpretation does not do violence to the objectives of the OHRC – one still cannot discriminate against a person simply because of "who he is". But one can decline to provide a service to a cause or advocacy group whose views one disagrees with. Such an interpretation enables the coexistence of two competing rights, without having one right "trump" the other, as was the result of the Board's decisions.

30. Some might object to this interpretation of section 1 of the OHRC by contending that you cannot separate a cause from the people who are involved in the cause. Of course there is an element of truth to this assertion – all causes and advocacy groups are composed of individuals. Yet all causes or advocacy groups must operate within the larger social community. One of the key limitations placed on causes or advocacy groups which operate within a democratic community is that they cannot compel people to support them, let alone compel a person to support them if to do so would violate that person's conscience. That is the essence of freedom of conscience and religion in democracy. So while in a certain sense one cannot separate a cause from the people who are involved in it, by the same token people involved in a cause cannot legitimately expect those who disagree with their cause to support it. That is the balance which a democracy strikes amongst contending causes and views.

31. In determining the manner in which religious freedom coexists with the right to be free from discrimination based on sexual orientation, the law must accord some place to conscientious objectors. Objection to a cause, but not to a person, strikes the appropriate balance, the CRFA submits, between these coexisting rights. Whether the basis of the objection in any particular case rests in the person or in the cause will be a matter of fact for a board of inquiry to determine. The CRFA submits that in light of the findings of fact made by the Board in this case, as set out in paragraphs 3 (iii), (iv) and 26 above, it

is clear that Brockie objected to a cause, and not to a person. For that reason, the CRFA submits that this appeal should be allowed and the complaint of the respondents dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

August 10, 2001

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SCHEDULE "A"

LIST OF AUTHORITIES

TAB

1. *Berg v. University of British Columbia* (1993), 13 Admin. L.R. (2d) 141 at pp. 161-164
2. *Central Okanagan School District No. 23 v. Renaud* (1992), 95 D.L.R. (4th) 577 (S.C.C.), at pp. 584-5
3. *Donald* v. *The Board of Education for the City of Hamilton*, [1945] O.R. 518 (C.A.)
4. *Edwards Books and Art* v. *The Queen*, [1986] S.C.P. 713
5. *Gay Alliance Toward Equality v. Vancouver Sun* (1979), 97 D.L.R. (3d) 577 (S.C.C.) at p. 591
6. *Jones* v. *Eisler*, [2001] B.C.H.R.T.D. No. 1
7. *Paquette* v. *Regal Art Press, Inc.*, 656 A. 2d 209 (1994) (Supreme Court of Vermont), at p. 211
8. *R.* v. *Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 336
9. *R.* v. *Videoflicks Ltd*. (1984), 48 O.R. (2d) 395 (C.A.), at p. 423d-h
10. *Rosenberg v. City of Outremont*, unreported decision of Quebec Superior Court June 21, 2001
11. *Salvation Army, Canada East* v. *Ontario (Attorney General)*, [1992] O.J. No. 123
12. *Saumur* v. *City of Quebec*, [1953] 2 S.C.R. 299
13. *Trinity Western University v. British Columbia College of Teachers*, (2001), 199 D.L.R. (4th) 1