

IN THE MATTER OF AN ARBITRATION PURSUANT TO THE PRIDE TORONTO
DISPUTE RESOLUTION PROCESS (“PTDRP”)

AND IN THE MATTER OF A COMPLAINT BY PAUL BERNER (Complainant) v. PRIDE
TORONTO (Respondent);

BEFORE A BOARD OF ARBITRATION COMPOSED OF MARTHA MCCARTHY
(CHAIR), SUSAN URSEL, AND ELIZABETH MCINTYRE

Hearing held on May 15, 2013, Toronto, Ontario, Canada

REASONS FOR DECISION

1. On July 12, 2012, Mr. Paul Berner submitted a complaint against Pride Toronto under the Pride Toronto Dispute Resolution Process (DRP). The complaint called for Pride Toronto to disallow Queer’s Against Israeli Apartheid (QuAIA) from participating in the Pride Parade.
2. On March 5, 2013, the DRP Panel invited Mr. Berner to attend before the Panel and make submissions regarding whether the Panel had jurisdiction to hear his complaint in light of the DRP decision in *The League for Human Rights of B’Nai Brith Canada versus QuAIA and Leon Kushner versus QuAIA* dated July 9, 2012.
3. The interim hearing with respect to jurisdiction proceeded on May 15, 2013. In addition to Mr. Berner, representatives of QuAIA and Pride Toronto were also in attendance. Charles Campbell, Tony Souza, Shelina Ali, and Corvin Russell attended on behalf of QuAIA and Sean Hillier and Susan Gapka attended on behalf of Pride Toronto. All interested parties were given the opportunity to make submissions.
4. Finally, a representative from Xtra news attended the hearing with the consent of everyone present.

Mr. Berner’s Submissions

5. In his submissions, Mr. Berner made the following arguments:
 - (a) Mr. Berner does not believe the Pride Parade is a forum for the type of demonstrating that QuAIA does; and,
 - (b) Mr. Berner does not believe that QuAIA complies with the Mission Statement of Pride Toronto and therefore should not be allowed in the parade. Pride Toronto says it

“exists to celebrate the history, courage, diversity, and future of LGBTTIWQQ2SA communities” and Mr. Berner does not believe that QuAIA’s practices, which he characterized as “complaining about the internal policies of a foreign country”, are consistent with this statement

6. Mr. Berner also submitted that for QuAIA to be accepted into the Pride Parade, Pride Toronto would have to broaden their Mission Statement. When asked by the panel specifically whether Mr. Berner was asking Pride Toronto to change their Mission Statement, Mr. Berner was unequivocal that he was not seeking this relief. He did not think this would be appropriate, and believed that this would be entirely up to Pride Toronto and was their decision.
7. The decision of a prior Pride Toronto Dispute Resolution Panel, dated July 9, 2012, in the complaint by The League for Human Rights of B’Nai Brith Canada versus QuAIA and the complaint by Leon Kushner versus QuAIA was brought to Mr. Berner’s attention. A copy of that decision is appended to these reasons.
8. When asked why his complaint was different, Mr. Berner responded that he does not agree with the findings made with respect to that complaint and that his complaint is against Pride Toronto, not QuAIA.

Pride Toronto’s Submissions

9. Sean Hillier made submissions on behalf of Pride Toronto. Pride took the position that there is no jurisdiction under the Pride Dispute Resolution Process for a complaint to be heard against Pride. Mr. Hillier also advised that he concurred with the submissions of Shelina Ali on behalf of QuAIA that are set out below.

QuAIA’s Submissions

10. While the complaint by Mr. Berner is against Pride Toronto, the subject matter of the complaint is QuAIA’s participation in the Pride Parade. As a result, Shelina Ali was given the opportunity to make submissions on behalf of QuAIA.
11. QuAIA submitted that the issues raised by Mr. Berner were matters that were considered and decided at the June 27, 2012 hearing of The League for Human Rights of B’Nai Brith Canada versus QuAIA and Leon Kushner versus QuAIA by a DRP tribunal composed of Robert Coates (chair), Maurice Green, and Raja Khouri.
12. QuAIA seeks a stay of Mr. Berner’s complaint as an abuse of process, since it deals with matters already decided.

13. In the alternative, should Mr. Berner's complaint proceed to a hearing, QuAIA requests the right to appear as a respondent along with Pride Toronto.

Issues

A. Is Mr. Berner's complaint barred by the doctrine of abuse of process or some other principle of law as a result of the DRP Panel's decision in *The League for Human Rights of B'Nai Brith Canada versus QuAIA and Leon Kushner versus QuAIA*?

B. Is there jurisdiction for the Panel to hear a complaint against Pride Toronto under the DRP?

14. Having listened to all of the submissions, and for the reasons set out in more detail below, this Panel dismisses Mr. Berner's complaint on the basis that, *inter alia*, the issues raised were finally decided by the DRP in the decision in *The League for Human Rights of B'Nai Brith Canada versus QuAIA and Leon Kushner versus QuAIA*. Having decided this issue, it is not necessary for the Panel to consider whether there is jurisdiction for the Panel to hear a complaint against Pride Toronto.

15. On June 27, 2012 the Pride Toronto Dispute Resolution Panel heard a complaint brought by the League for Human Rights of B'nai Brith Canada. The complainants argued that the activities of QuAIA fall outside the core missions of Pride Toronto and breached its policies and further that QuAIA was likely to present images or messages that promote, condone or may promote or condone violence, hatred, and degradation or negative stereotypes of any person(s), group(s) contrary to the City of Toronto's Anti-Discrimination Policy.

16. On June 29, 2012, the Panel found:

1. That the activities of QuAIA are not contrary to the core missions or policies of Pride Toronto;

2. That the activities of QuAIA, described in the Complaint and at the hearing, are not likely to present images or messages that promote, condone or may promote or condone violence, hatred, and degradation or negative stereotypes of any person(s), group(s) contrary to the City of Toronto's Anti-Discrimination Policy (the "Prior QuAIA Decision").

As a result, the Panel dismissed the complaint.

17. Decisions made by the Pride Toronto Dispute Resolution process are binding on Pride Toronto, the Complainant, and the Respondent (Pride Toronto Dispute Resolution Process Terms of Reference p. 10, para. 2). The Prior QuAIA Decision is therefore binding on Pride Toronto. The result of this, of course, is that it is not open to Pride Toronto to relitigate the decision to allow QuAIA to march in the Pride Parade.
18. The principle of stare decisis provides that even where there are different parties and different causes of action, but a case involves the same legal principle on similar facts, then the precedent will bind the parties unless distinguished.
19. Mr. Berner has not provided any new evidence with respect to QuAIA's practices and bases his complaint on the same practices that were dealt with in the Prior QuAIA decision. The only difference between the complaint brought by Mr. Berner and those brought by B'Nai Brith and Leon Kushner is that Mr. Berner has framed his complaint as a complaint against Pride Toronto. Without deciding the issue of whether Mr. Berner can, in fact, bring a complaint against Pride Toronto, it is clear that the principle of stare decisis applies. The exact same issues are engaged as in the Prior QuAIA decision.
20. As a decision on this matter has already been made, the Panel is bound by it and dismisses this complaint.
21. In the alternative, the panel relies on the doctrine of res judicata in dismissing Mr. Berner's complaint. The applicable branch of res judicata is abuse of process. It is invoked when there is a previous final decision on a central issue, one party in common between the two proceedings, and one party attempting to re-litigate an adverse finding in the previous proceeding.
22. In *Toronto (City) v. C.U.P.E., Local 79* 2003 CarswellOnt 4328 Supreme Court of Canada, 2003, the Supreme Court of Canada addressed abuse of process at length. The majority held the primary focus of the doctrine is the integrity of the courts. It found that an attempt to impeach a judicial finding by relitigation is improper. Relitigation carries serious detrimental effects and should be avoided unless the circumstances indicate it will enhance the credibility and effectiveness of the adjudicative process as a whole. The motive of the party who seeks to relitigate and whether he or she is a plaintiff or a defendant are not decisive factors in the application of the bar against relitigation.

23. Justice Stephen Goudge of the Ontario Court of Appeal also addressed abuse of process in *Canam Enterprises Inc. v. Coles (2000)*, 51 O.R. (3d) 481 (Ont. C.A.). At paras. 55-56 he wrote:

The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel.... One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined.

24. Applying the two cases to this complaint, the Panel concludes that it is contrary to public policy and principles of fundamental justice if the issues decided in the Prior QuAIA Decision are repeatedly litigated.

25. As a result and in the alternative, the Panel dismisses the complaint as an abuse of process.

26. In the further alternative, we have also reviewed the question of our jurisdiction to hear a complaint against Pride Toronto. We have noted above that Pride Toronto is bound by the previous decision of the DRP. The within complaint is in effect a subsequent complaint against Pride Toronto for following a DRP decision they are bound by on the terms of the DRP policy. It raises no new evidence or legal arguments that have not been canvassed in the July 9, 2012 decision. We have no jurisdiction under the DRP process to sit on appeal of the July 9, 2012 decision. We have no jurisdiction to relieve Pride Toronto of its obligation to follow that decision under the DRP process. We therefore conclude that we have no jurisdiction to entertain this complaint under the DRP policy.

27. We know Mr. Berner has genuine concerns, and strongly feels it is inappropriate that QuAIA be allowed to partake in the Pride Toronto parade. The Panel has no doubt about the sincerity of his concerns and thanks him, along with counsel, for his able submissions.

DATED AT TORONTO this 6th day of June, 2013

“Elizabeth McIntyre”
Elizabeth McIntyre

“Susan Ursel”
Susan Ursel

“Martha McCarthy”
Martha McCarthy