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Notes & Analysis on the Procedural Complaints Expressed at the Pride Toronto Dispute Resolution Hearing on June 27, 2012

Queer Ontario attended the first hearings of Pride Toronto's Dispute Resolution Process ("DRP") on June 27, 2012, to monitor and document a process that we consider to be highly problematic. Heard was the case mounted by B'nai Brith's Human Rights League ("B'nai Brith") against the participation of Queers Against Israeli Apartheid ("QuAIA") in the Toronto Pride Parade, where a number of complaints came forward regarding the process. We are providing these complaints here for public information.

ONE. Pride Toronto's lack of involvement with the Dispute Resolution Process

Anita Bromberg, legal counsel for B'nai Brith, called the process "illegitimate" and contrary to the Arbitration Act after learning that the Dispute Resolution Panel was going to rule on the complaint without considering the positions of the organization whose policies and enforcement practices were being challenged – Pride Toronto. She, like the other persons who appeared to speak against QuAIA's participation in the Parade,[1] was under the impression that Pride Toronto would be receiving and responding to the complaints, with the Panel stepping in to resolve any irresolvable issues. This was not the case: Pride Toronto is only required to respond if it is listed as a 'Respondent' and is given the mandated amount of time to prepare its case.

TWO. Breaches in the panel selection process, including a lack of transparency

QuAIA expressed concerns about a number of breaches in the panel selection process after DRP Chair Douglas Elliott allegedly failed to follow the procedures outlined in the *2012 Pride Parade Terms and Conditions*. When asked by QuAIA to provide information on the procedure that will be used to select the panelists, Robert Coates, the Panel President, told them that "We advise that the internal administration of the DRP is a private matter," and that their questions were inappropriate. This violates the DRP's mandate to "provide an objective, ***transparent*** appeal mechanism to review and resolve complaints about participation in the Pride parade and march."

THREE. Reasonable apprehensions of bias against Raja Khouri and the DRP Chair

Both QuAIA and B'nai Brith had apprehensions of bias against Raja Khouri, one of the designated panelists, as well as DRP Chair Douglas Elliott in QuAIA's case. QuAIA's concerns about the objectivity and impartiality of the DRP Chair stem from a speech he gave to the Law Society of Upper Canada in June of 2010, which expressed his opinions on what should take place in the Pride Parade, and what should be done with politicized groups like QuAIA who want to take part in it.[2] Similarly, QuAIA's concern with the objectivity and impartiality of Raja Khouri stems from his participation as a member of the Community Advisory Panel alongside

[1] Leon Kushner, who withdrew his complaint against QuAIA because he wanted Pride Toronto, and *not* QuAIA, to respond to it; and Paul Berner, who was unable to present due the recency of his complaint.

[2] See also our April 15, 2011 Statement on the DRP: http://www.scribd.com/doc/53078516/QO-DRP-Statement

Douglas Elliott, where he expressed the opinion that QuAIA's use of the phrase "Israeli Apartheid" was "inflammatory".

B'nai Brith's concerns stemmed from Khouri's previous writing on the topic of Israeli apartheid, and the fact that he entered evidence during the hearing to challenge B'nai Brith's ideas on the offensiveness of the phrase "Israeli apartheid". When a request was made by B'nai Brith for the members of the panel to disclose if they have ever written on the topic of "Israeli apartheid" in the past, none of the panelists came forward.

ANALYSIS

It was clear to us that both parties were putting forward their very personal opinions on how Pride Toronto's mission, vision, and policies should be interpreted, and to dispel any misconceptions or mischaracterizations about their group or their group's messaging. Understandably, this was done to effect their desired outcome.

It is now the duty of the Panel to determine how Pride Toronto's mission, vision, and policies are to be interpreted -- in as 'fair' and as 'impartial' a manner as possible. The problem with the issue of 'fairness,' of course, is that the final decision runs the risk of conceding to the desires and wishes of a party that is spiteful, closed-minded, uninformed, or not-otherwise-invested in the Pride festival. It also runs the risk of trampling on the freedom of speech, freedom of expression, and freedom of assembly of a recognized, but largely misunderstood, community group.

It is not lost on us that the Pride Toronto Board, the body that was elected to interpret, embody, and enact the organization's mission, has completely absolved itself of its interpretive, oversight, and decision-making duties, which names 'respect for diversity' and 'community building' as two of its core values. It is wholly unfair to put the question of a community group's right to participate in the festival up for debate, and to then force these groups and organizations to justify their right to be in the festival using inaccessible "legal" processes and procedures.

THEREFORE: We reiterate our call for the dissolution of the Dispute Resolution Process
(http://www.scribd.com/doc/98260181/QueerOntario-CalltoAction-DisputeResolutionProcess)

We urge Pride Toronto to undertake its mission far more comprehensively to include community engagement and development. The role of Pride Toronto should not be limited to fundraising and event planning alone, but should also include public education and process work around our community's complex politics of difference. Pride Toronto is encouraged to invest its time and efforts on an inclusive approach that works towards developing spaces for the various social and political dimensions within our communities, rather than trying to determine whom to exclude.

We have appended a copy of QuAIA's Procedural Complaints, which was submitted to the Dispute Resolution Panel as information.

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(ADDENDUM)

Procedural arguments to the Pride Toronto Dispute Resolution Panel in the matter of B'nai Brith, Leon Kushner, and Paul Berner vs. Queers Against Israeli Apartheid, June 27, 2012.

Mr. President, panelists. We have a few procedural concerns we would like to raise today. These come under three broad headings: first, there are concerns about the panel selection process, in particular the concern that the tribunal was not constituted according to the 2012 Pride Parade Terms and Conditions. Secondly, we have concerns that there is a reasonable apprehension of bias in this process. Finally, we have concerns that the requirements of procedural fairness and the right to know the case to be responded to have not been met.

The composition of the tribunal was not in accordance with the arbitration agreement in the 2012 Toronto Pride Parade Terms and Conditions

1. This panel was not selected in accordance with the rules as set out in the 2012 Pride Parade Terms and Conditions ("the agreement"). In particular, the agreement states that:

> *…the Chair will assign a lead DRO who will act as the Panel President who will work with the parties to assign the remaining arbitrators.*
>
> *[...]*
>
> *In the event that either the complainant or respondent fail to nominate their choice for DROs within this timeframe, the Chair of the Dispute Resolution Process will assign DROs to the remaining vacant panel position(s) in order to constitute the panel.*

The agreement clearly states that the only case in which the Chair of the Dispute Resolution Process (DRP) assigns DROs to the remaining vacant panel position(s) is the case in which a party has failed to nominate their choice for DROs within the timeframe. If it were otherwise, it would be otiose to mention that "the Panel President…will work with the parties to assign the remaining arbitrators". Section 46 (1) of the 1991 Arbitration Act governing these proceedings states that arbitration awards may be set aside by the courts if "the composition of the tribunal was not in accordance with the arbitration agreement." [3] This procedure could only be modified by agreement of the parties, which was clearly not the case in this instance. Neither can one party, by its own failure to act, deprive another party of its procedural rights under the agreement.

[3] *Arbitration Act*, SO 1991, c 17, s 46 (1)

2. Notwithstanding that according to the agreement, the Panel President will work with the parties to assign the remaining panelists, the Chair of the DRP informed us that none of our nominees were available and that he would select the remaining panelists according to the same process used to select the Panel President.

3. In response to our request for transparency about the appointment of the panelists, the Panel President replied to us that "We advise that the internal administration of the DRP is a private matter", and that our questions were inappropriate.

4. However, we have information that a DRO who appears on the list before Mr. Green in alphabetical order was available on the arbitration dates but was, it appears, not asked to serve.

Reasonable apprehension of bias

5. These points are especially of concern to us since the Chair of the DRP is on the record (June 2010, Law Society of Upper Canada Pride panel) expressing clear views about QuAIA and on the matter in dispute (which can be read here: https://www.facebook.com/note.php?note_id=131455656883707). These remarks speak to a clearly formed opinion on the following questions and concerns:

    a. Whether or not QuAIA is speaking to a gay issue.
    b. Whether LGBT identity in the Pride parade must be considered apart from other cross-cutting issues such as social justice and exclusion ("intersectionalities").
    c. The remarks say we should "tone it down a little"
    d. It suggests that if you want to relive the political Pride of old, you should do it elsewhere, instead of bringing politics into Pride here.
    e. It ends by suggesting the creation of an "anarchist zone" of free speech where groups like QuAIA could march, apart from the Pride Parade, alongside groups advocating that homosexuality can be cured.

6. These concerns (ss 1-5) raise an apprehension of bias in the panel selection process and in the process as a whole. Because the selection process has been made private and our questions have gone unanswered, there is a reasonable apprehension of bias – we don't know whether there is bias, but there is a reasonable apprehension of bias. Under the Arbitration Act, courts may set aside awards if "there is a reasonable apprehension of bias" *Arbitration Act*, SO 1991, c 17, s 46 (1), in the interest of maintaining confidence in the fairness of tribunals and their administration. The Supreme Court in *Baker v. Canada (Minister of Citizenship and Immigration)* has held that the test of reasonable apprehension of bias does not only apply to the final decision maker in a tribunal, but also to anyone with a central role in the process. ([1999] 2 S.C.R. 817)

7. We have information that Mr. Khouri, during the time he served alongside Doug Elliott on Pride Toronto's Community Advisory Panel in 2010, expressed the opinion that QuAIA's use of the phrase "Israeli apartheid" was "inflammatory". Is this correct? As this suggests Mr. Khouri has a formed opinion that goes to the question in dispute, it seems to us to raise a reasonable apprehension of bias. We would appreciate clarification on this point.

Fair treatment and the right to know the case to be responded to

8. We note that while the agreement clearly states that the hearing date (or dates) is flexible and defined by the DRO and "agreement with Complainant and Respondent", we were not consulted on the scheduling of the hearing. In *Baker,* the Supreme Court has held that "the legitimate expectations of the person challenging the decision may also determine what procedures the duty of fairness requires in given circumstances", and that "this doctrine, as applied in Canada, is based on the principle that the 'circumstances' affecting procedural fairness take into account the promises or regular practices of administrative decision-makers, and that it will generally be unfair for them to act in contravention of representations as to procedure." ([1999] 2 S.C.R. 817)

9. We are no strangers to these debates and controversies, with their many approaches and nuances. However, being asked to respond in a hearing when we have not been told the contours of the case to be met (evidence to be adduced, documents to be presented) seems unfair and unreasonable. The *Arbitration Act* states:

> **19.** (1) In an arbitration, the parties shall be treated equally and fairly. 1991, c. 17, s. 19 (1).
>
> (2) Each party shall be given an opportunity to present a case and to respond to the other parties' cases. 1991, c. 17, s. 19 (2).

The principle of natural justice requires that we be given not only notice of hearing, but notice of the case to be made against us – otherwise, this surely will turn into a questionable exercise with dubious and arbitrary results. If the arbitration hearing is to proceed, and if evidence is to be presented by the complainants that has not been disclosed, we request disclosure of the evidence and adjournment to allow us to prepare our response on a subsequent date.

I thank you for your time.