Gooding v. *Edlow Investment Corp:*

Ethnocentric Discrimination and Freedom of Contract In a Changing Social Climate

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A. Introduction

At the very heart of any legal order there is a conflict between two diametrically opposite, but nevertheless essential, values. These values are the autonomy of the human will, and the necessity to subjugate that will to the demands of public order. The conflict between them forms the matrix of our legal system, and the laws which emerge are not only an indication of man's relative capacities for justice and injustice ,but indicate as well what the concept of "Justice" means at any given time.

The problem which we will discuss in this paper is whether ethnocentric discrimination is still a justifiable basis for refusing to enter into a contractual agreement. This problem is an excellent example of how these two basically incompatible values have resulted in a conflict of such dynamism and importance that bench, bar and the legislature itself have seen fit to try and bring the law more in step with present day social needs. Our purpose is to examine how these needs are being met.

B. "Chaque propriétaire est maître chez lui"

It is a basic postulate of the Civil Law that anyone having the necessary capacity is free either to enter into a contract or to refuse to enter into that contract. As a corollary, it is generally felt that the offeror may attach whatever conditions he wishes to the offer, as long as these conditions do not contravene public order and good morals (Art. 13 C.C.) or any mandatory provision of law. What concerns us here is that in general the courts have upheld the validity of conditions which were based on ethnocentric prejudice, *e.g.* discrimination based on colour, race, language, religion or even economic status.

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One of the first cases on this point was *Sparrow* v. *Johnson*,[1] and, at first, that judgment seemed to bode ill for discriminatory conditions. One of the incidental issues in that case was whether the defendant, a theater manager, could prohibit the use of certain portions of the theater to coloured persons. On this point Archibald, J. said:

> "This position cannot be maintained. It would perhaps be trite to speak of slavery in this connection, and yet the regulation in question is undoubtedly a survival of prejudice created by the system of negro slavery." [2]

and later,

> "Our constitution is and always has been essentially democratic, and it does not admit of distinctions of races and classes. All men are equal before the law and each has equal rights as a member of the community." [3]

But this judgment, although obiter in that a valid contract had already been entered into between plaintiff and defendant, was years ahead of its time as illustrated by Lamothe, C.J.'s view in the case of *Loew's Montreal Theatre Ltd.* v. *Reynolds*.[4] Although the situation was somewhat factually different from the *Sparrow* case, the theoretical question was the same. The Chief Justice answered the question thus :

> "Aucune loi, dans notre province, n'interdit aux propriétaires de théâtres de faire une règle semblable... alors, chaque propriétaire est maître chez lui; il peut à son gré établir toutes règles non contraires aux bonnes moeurs et à l'ordre public." [5]

The essential phrase in this judgment is the reference to public order and good morals, for, as we shall discover, the very same criterion is used today.

The *ratio decidendi* of Lamothe, C.J. was consecrated by the Court of King's Bench and the Supreme Court in what was perhaps the most celebrated case on the topic of discrimination, namely, *Christie* v. *The York Corporation*. [6] In that case, Christie, a negro, was refused beer in a tavern on the sole grounds of his being coloured. He claimed damages for pain, suffering and humiliation caused in the presence of the other customers, and the suit was taken under both contract and delict.

Christie claimed, first of all, that the tavern had issued a general invitation to the public to buy beer, and that he had accepted the

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[1] (1899) 15 C.S. 104, (1899) 8 B.R. 379.
[2] (1899) 15 C.S. 104, at p. 107.
[3] *Ibid.*, at p. 110.
[4] (1921) 30 B.R. 459.
[5] *Ibid.*, at pp. 460, 461.
[6] (1938) 65 B.R. 104, (1940) S.C.R. 139.

offer, thus completing the contract. Christie's action was maintained in the Superior Court, but on entirely different grounds, and Bond, J., in the Court of King's Bench, discussed the matter of contract as follows:

> "There is no doubt, I should say, that there was an implied if not an express invitation on the part of the appellant, — but I have been unable to find any legal ground or justification for the contention that the appellant was not at liberty to attach conditions to its offer or to restrict it... In the absence of any special law, I would say that a merchant or trader is free to carry on his business in the manner that he conceives to be best for that business." [7]

Let us keep in mind the important words, "in the absence of any special law", for they are just as significant in 1966 as they were in 1940.

As to the claim under delict, that same judge remarked:

> "In order to invoke Art. 1053 C.C., the respondent must show some breach of a duty or fault on the part of the appellant; and I am unable to find any such wrong committed. If... there was no duty cast by law upon the appellant to serve the respondent, then its refusal to do so is an innocent act." [8]

The Supreme Court upheld this decision, and for many years there was no real change in the law. The scales were clearly balanced in favour of the "Autonomous Will".

C. "Chaque propriétaire n'est plus l'absolue maître chez lui"

It is an asset, if not a necessity, of the Civil Law that its system of interlocking principles is flexible enough to admit changes, even radical changes, when the situation demands it, and in the next twenty years after *Christie* v. *The York Corporation* was decided, the pendulum began to swing in the opposite direction, *i.e.* people began to become more aware of the negative aspects of discrimination. Whether this was due to the atrocities committed against minorities in World War II, or to the fervour accompanying the signing of the U.N. Declaration of the Rights of Man [9] or to the racial trouble in the

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[7] (1938) 65 B.R. 104, at p. 107.

[8] *Ibid.*, pp. 111, 112.

[9] On this point see *Re Drummond Wren* (1945) 4 D.L.R. 675. This was an Ontario case in which the issue was whether a restrictive covenant on land to the effect that the "land not be sold to Jews, or to persons of objectionable nationality" was valid. Mackay, J., in holding it invalid, said:

> "First and of profound significance is the recent San Francisco Charter to which Canada was a signatory, and which the Dominion Parliament has now ratified... Under Articles 1 and 55 of this Charter, Canada is pledged to promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion." "

When, however, the same type of situation occurred a few years later in the case of *Noble and Wolfe* v. *Alley*, 1951 S.C.R. 64, the Supreme Court came to the same conclusion as Mackay J. but did not even mention his *ration decidenti*.

United States, the one certain fact was that the "Autonomous Will", once considered to be stainless and pure had become somewhat tarnished and ugly, and it was recognized that the will was capable of destructive abuse even when acting in virtue of a right.

This changing social climate was, at length, reflected in legislation and jurisprudence. In two important Acts, the Quebec Legislature sharply restricted the right to discriminate. The first step was taken in the Hotels Act,[10] section 8 of which states:

> "No owner or keeper of a hotel, restaurant or camping ground shall, directly or through his agent or a third party :
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> (a) Refuse to provide any person or class of persons with lodging, food or any other service offered to the public in the establishment, or
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> (b) Exercise any discrimination to the detriment of any person or class of persons as regards lodging, food or any other service offered to the public in the establishment, because of the race, belief, colour, nationality, ethnic origin or place of birth of such person or class of persons."

Another important step was taken in the Employment Discrimination Act,[11] where section 2 provides that:

> "No employer or person acting on behalf of an employer or employer's association shall resort to discrimination in hiring, promoting, laying off or dismissing an employee or in the conditions of his employment."

But even more significant than the Acts of the Legislature is the recent decision of *Gooding* v. *Edlow Investment Corp.*[12] In that case, the agent of the defendant had entered into a telephone agreement with the plaintiff to lease an apartment to her. Pursuant to this conservation, he made an appointment with her to sign the lease which he had himself already signed. When, however, the defendant's agent discovered that the plaintiff was coloured, he refused to allow her to sign the lease and, in the presence of her friend, he told her it was because she was coloured.

Nadeau, J., recently appointed to the bench, gave damages for breach of contract, but more significant is his following judgment:

> "Considérant que toute discrimination raciale est illégale parce que contraire à l'ordre public et aux bonnes moeurs;
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> Considérant que le geste discriminatoire posé par la défenderesse constitue une violation des règles couramment admises de la morale, applicables à la

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[10] (11-12 Eliz. II, c. 40), R.S.Q. 1964, c. 205.

[11] (12-13 Eliz. II, c. 46), R.S.Q. 1964, c. 142.

[12] [1966] C.S. 436.

vie en société; qu'il est aussi de la catégorie des actes attentatoires à l'ordre public, étant de nature à troubler la paix dans la société;

Considérant qu'un tel acte de discrimination posé dans les circonstances exposées plus haut constitue une faute civile délictuelle, dont la défenderesse doit répondre."

For these reasons, Nadeau, J. awarded plaintiff $225.45 damages for breach of contract and $300.00 damages for the delict.

Our task is now to determine what weight to attach to this judgment, i.e. where does it stand in the line of jurisprudence and what hope would Christie have today, if the same situation occurred.

It is the guarded opinion of the author that all the ramifications of the controversy concerning discrimination and freedom of contract converge in *Gooding* v. *Edlow Inv. Corp.*, and that this case has the effect of overruling *Christie* v. *York Corp.* The following reasons are submitted for this view:

(a) Under Contract

At first glance, the fact that plaintiff and defendant had already entered into a valid contract of lease seems to render Nadeau, J's. remarks obiter as far as the issue of contract is concerned, but, in fact, this judgment strikes right at the very heart of the issue; Lamothe, C.J.[13] and Bond, J.,[14] as we recall, spoke of the freedom of the trader to attach whatever conditions he wished to the offer, as long as no law was contravened. Now, Nadeau, J. has flatly stated that "toute discrimination raciale est illégale parce que contraire à l'ordre public et aux bonnes moeurs." Consequently, any condition which is based on discrimination and which is attached to an offer will be illegal as contravening the law of public order and good morals, or, to put it more exactly, the condition will be illegal insofar as Nadeau J's. interpretation of public order and good morals is concerned.

(b) Under Delict

Bond J's. decision on the claim under Art. 1053 C.C. was based on the absence of any duty imposed on the defendant to serve Christie.[15] But Nadeau, J's. judgment shows that such a duty does today exist, i.e., according to the law of public order and good morals everyone has the duty to respect the person and personality of his fellows.

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[13] *Supra* p. 187.

[14] *Supra* p. 188.

[15] *Supra* p. 188.

It might be immediately pointed out that the importance of this case has been greatly exaggerated, because it rests on the rather fragile basis of Nadeau, J's. personal interpretation of public order and good morals. To this, I answer that in view of the general social antipathy for discrimination, as reflected so clearly in recent legislation, Nadeau J's. judgment is more than just a personal crusade against prejudice — it, too, reflects the dynamic growth of the sphere of public order.