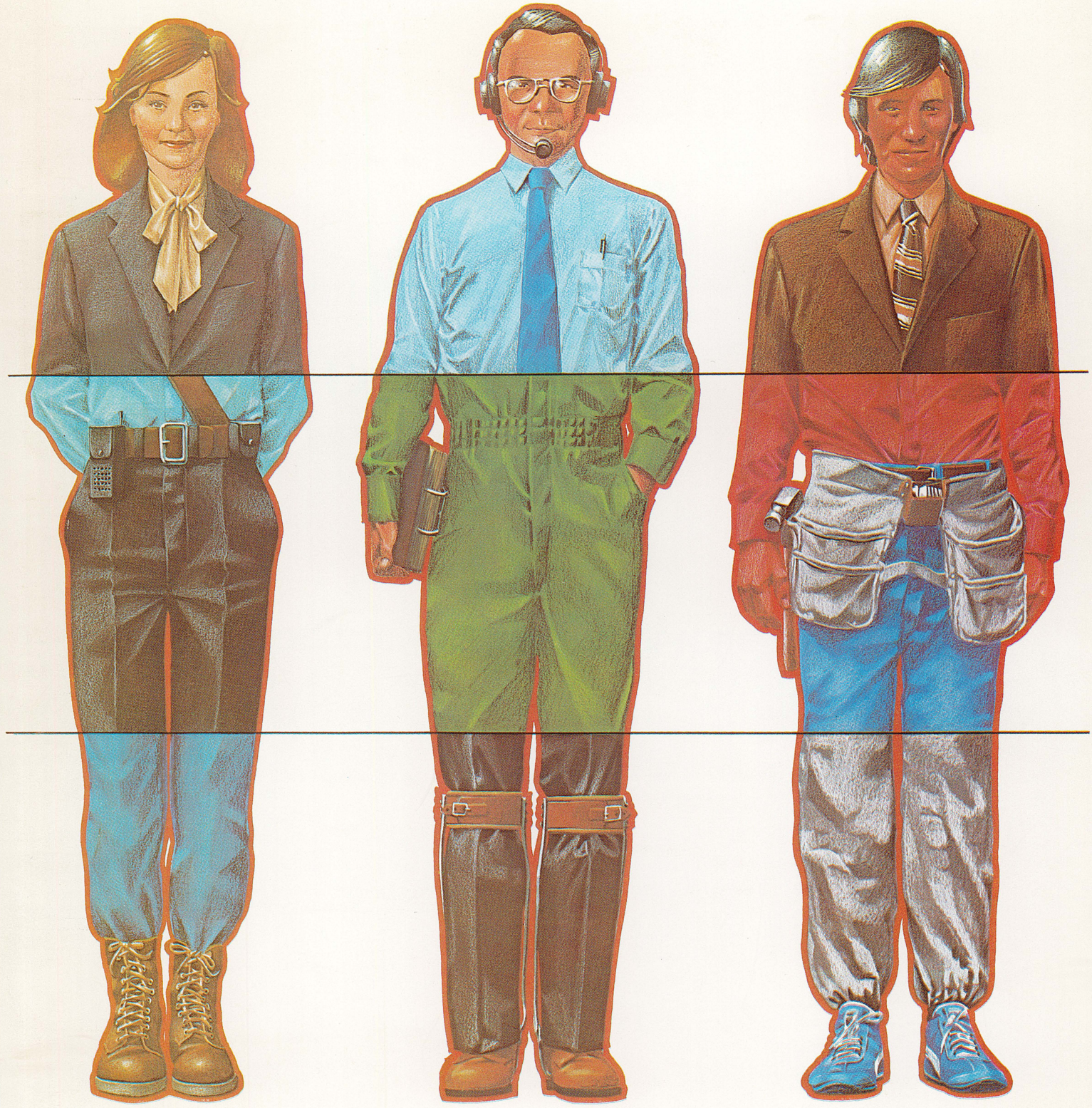
Saskatchewan Human Rights Commission
1981 Annual Report



Opportunities are Everyone's Right

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March 11, 1982

Refer to file

Hon. Roy J. Romanow, Q.C.
Attorney General
Room 338, Legislative Building
Regina, Saskatchewan
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Dear Minister:

I have the honour to transmit this our Annual Report to you and through you to the Legislative Assembly pursuant to Section 49 of The Saskatchewan Human Rights Code and The Tabling of Documents Act.

As this report chronicles, during 1981 a number of diverse activities occupied the time of the Commission and the scarce resources of our staff. Permit me to pay special attention to just two areas in this covering letter. Firstly, the International Year of Disabled Persons helped establish a climate of opinion which enabled a good deal of headway to be made on the question of building accessibility standards. The Government's promise of legislation in the field set a most welcome tone for the concluding days of the International Year. The Commission looks forward to the "Accessibility Standard", which we adopted on August 14th, 1980, attaining the force of building code law in the coming months.

Secondly, 1981 saw an increased involvement, on the part of my colleagues and I, in the area of affirmative action approvals, under Section 47 of the Code. The thoughtful and realistic programs which we have approved to date do indeed take us a deliberate step closer to a day when we might truly say that equal opportunity exists for all residents of this province.

Finally, let me say that this past year has witnessed a growing amount of public understanding of and support for the work of our Commission. Some two years ago the Canadian Human Rights Commission conducted a poll which revealed that 73% of those responding were aware of the existence of human rights commissions in Canada and that 68% of those who had heard about commissions' efforts in the preceding twelve months found commissions effective in removing discrimination. Had we the budget to conduct such a survey today, I am confident that an even more positive response would be forthcoming in Saskatchewan. Given the disturbing result of the Gallup poll released February 27th, 1982 showing 31.3% of Canadians prepared to support organizations that would work towards preserving Canada for whites only, we in the Commission know that we have some of our work cut out for us. As we press forward on this and on other points, in administering the Code, it is a comfort to feel the presence of substantial public support for our efforts.

Yours sincerely,

Ken Norman

Ken Norman,
Chief Commissioner.

KN/sa.

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The Mandate of the Commission

The Saskatchewan Human Rights Commission is a law enforcement, regulatory and educational agency responsible for the administration of *The Saskatchewan Human Rights Code.*

The Code gives the Commission the authority to investigate and settle complaints of discrimination, to carry complaints before Boards of Inquiry, to approve or order special programs which are designed to eliminate disadvantages, to grant exemptions from the provisions of the Code, to make regulations subject to the approval of the Lieutenant-Governor-in-Council, and to carry out research and educational programs which will advance the principles of equality and eliminate discriminatory practices.

Law Enforcement

The Saskatchewan Human Rights Code

The basic protections afforded by *The Saskatchewan Human Rights Code* are set out in two substantive sections. Part I of the Code contains the Bill of Rights, which protects the fundamental rights and freedoms of all residents of Saskatchewan. The Bill of Rights guarantees freedom of conscience, freedom of expression and association, freedom from arbitrary arrest and detention, and the right of all adult citizens to vote in provincial elections at least once every five years.

Part II of the Code prohibits certain discriminatory practices. Discrimination is prohibited in the following areas: employment, employment applications and advertisements, rental of housing accommodation, provision of services and facilities to the public, education, publication and display of signs and notices, membership in trade unions, professional societies and occupational associations, contracts, and the purchase of property.

The prohibited grounds of discrimination are race, creed, religion, colour, sex, marital status, physical disability, age (18 to 64), nationality, ancestry and place of origin.

Amendments to The Saskatchewan Human Rights Code

The Saskatchewan Legislature voted unanimously to amend four sections of *The Saskatchewan Human Rights Code* during the 1981 spring session. An amendment to Section 27(1) now ensures that individuals may file class action complaints by adding explicit reference to "a class of persons". The other amendments to the Code are: the repeal of section 15(2) which has the effect of broadening the protection afforded women in the provision of contracts; a reference to "colleges under provincial law" in Section 16(5) which provides for the hiring of teachers of a particular religious denomination in separate educational institutions; and the strengthening of the Commission's enforcement powers in the area of affirmative action programs by making explicit reference to Section 47(1) in Section 35(1) which provides for penalties when a violation of *The Saskatchewan Human Rights Code* has occurred.

The amended sections now read as follows:

** Please note that the underlined words in Sections 16(5), 27(1) and 35(1) denote the changes to these sections.*

Section 15

Section 15(2) has been repealed effective April 27th, 1981.

Section 15(1) now reads:

15. (1) No person shall, in making available to any person a contract that is offered to the public:

(a) discriminate against any person or class of persons; or

(b) include terms or conditions in any such contract that discriminate against a person or class of persons;

because of the race, creed, religion, colour, sex, marital status, nationality, ancestry, or place of origin of that person or class of persons.

Section 16(5)

Section 16(5) has been amended, effective April 27th, 1981 to read as follows:

16. (5) Nothing in this section deprives a college established pursuant to an Act of the Legislature, a school or a board of education of the right to employ persons of a particular religion or religous creed where religious instruction forms or may form the whole or part of the instruction or training provided by the college, school or board of education pursuant to *The Education Act.*

Section 27

Section 27 has been amended effective May 19th, 1981 to read as follows:

27. (1) Any person who has reasonable grounds for believing that any person has contravened a provision of this Act, or any other Act administered by the commission, in respect of a person or class of persons, may file with the commission, a complaint in the form prescribed by the commission.

Section 35

Section 35(1) has been amended, effective April 27th, 1981 to read as follows:

35. (1) Every person who contravenes or fails to comply with an order made under section 31, 32 or 38, or under subsection 47(1), is guilty of an offence and liable on summary conviction to the penalties provided in subsection (3).

(For complete accuracy, refer to *The Saskatchewan Human Rights Code*, Statutes of Saskatchewan, S-24.1 as amended.)

Enforcement Procedures

Any person, who has reasonable grounds to believe that a provision of the Code has been violated, may file a complaint with the Saskatchewan Human Rights Commission. In addition, the Commission may initiate a complaint on its own authority.

A preliminary informal investigation is undertaken to determine whether the complaint falls within our jurisdiction, and if there are reasonable grounds to believe that the Code has been violated.

When a formal complaint is filed, a Human Rights Officer is appointed to investigate, and through investigation the Officer determines whether there is evidence to substantiate the allegation that a provision of the Code has been violated. An Investigating Officer has the legal authority to examine records and documents and to obtain information pertinent to the complaint.

Where the investigation does not substantiate the allegation, the complaint file is closed, or the complaint is formally dismissed. However, where the evidence gathered through investigation supports the claim, an attempt to settle the complaint is made.

A settlement may take any form which is appropriate to the circumstances of the complainant and the respondent, the nature of the violation, and the opportunities lost or damages caused by it.

If a settlement cannot be effected, the Human Rights Commission may direct that a formal inquiry be held to decide the matter. In such cases, the Attorney General appoints a Board of Inquiry, which is composed of one or more persons.

When a Board is appointed, the Commission has carriage of the complaint, and the Commission's Counsel appears before the Board to present the Commission's and the complainant's evidence and argument.

A Board of Inquiry, when it finds that a contravention of the Code has occurred, may order the person who contravened the Code to comply with the legislation, to rectify any injury caused, to pay compensation for expenses or lost wages, or to pay damages for humiliation suffered. An Order of a Board of Inquiry may be appealed on a question of law to the superior courts.

Nature and Disposition of Informal Complaints

The Saskatchewan Human Rights Commission received 355 informal complaints during this reporting period. Complaints are accepted informally when preliminary investigation is required to determine jurisdictional issues or to establish that the complaint has reasonable grounds to believe the Code has been violated. Some informal complaints are filed as formal complaints subsequent to this preliminary examination, and others are resolved at this informal stage.

The informal complaints filed during this period show that complaints received in the area of employment are the highest (37%), followed by public services (16%), application forms (18%), and housing (9%). These four areas account for 80% of the informal complaints filed with the Commission. (See Table I.)

Complaints of discrmination on the grounds of sex (21%), race (17%), and physical disability (16.5%) are the most frequently alleged informal complaints. Complaints against discriminatory employment application forms accounts for another 18% of the total. (See Table II.)

It is of particular interest to the Commission that sexual harassment complaints comprise 33% of all informal sex discrimination complaints.

As well, 21% of the informal complaints based on the grounds of physical disability allege that facilities customarily available to the public are not accessible to persons with physical disabilities.

Informal complaints in the area of employment consisted mainly of those alleging discrimination because of sex, physical disability and race. The highest number of informal complaints in the area of public services were made on the basis of discrimination because of physical disability. Race discrimination accounted for the majority of informal complaints in the housing category. (See Table III.)

Of the 355 informal complaints received in this reporting period, 99 have been settled, 68 have been withdrawn or dismissed, 61 have been transferred to formal inquiries, 25 were concluded to have no reasonable grounds, and 102 are still under investigation. (See Table IV.)

Nature and Disposition of Formal Complaints

An examination of the 176 formal complaints filed during the period January 1st, 1981 to December 31st, 1981 shows that discrimination in employment is by far the most significant area of complaint, accounting for 44% of the total complaints filed with the Saskatchewan Human Rights Commission. Complaints in the areas of public services and housing accommodation each comprise 17% of the total number of complaints. Therefore, these three areas, employment, public services and housing accommodation, account for 78% of the formal complaints filed during this reporting period. (See Table V.)

Sex discrimination continues to be the most frequently alleged ground of complaint (29%), followed closely by allegations of race discrimination (20%). Complaints on the basis of physical disability and marital status have risen substantially, such that they now comprise 20% and 15%, respectively. (See Table VI.)

During this reporting period, 35% of the formal sex discrimination complaints are allegations of sexual harassment, and 34% of the formal complaints based on the grounds of physical disability allege that facilities customarily available to the public are not accessible to persons with physical disabilities.

The highest number of complaints in the employment area are under the category of sex discrimination. Complaints on the basis of physical disability are also prevalent under this heading. Complaints alleging discrimination in public services were almost evenly divided between those involving race discrimination and those involving discrimination on the basis of physical disability. (See Table VII.)

Of the 176 formal complaints alleging violations of the Code, 12 have been settled, 21 have been withdrawn or dismissed, 2 have been referred to Boards of Inquiry for adjudication, and 101 are presently under investigation. (See Table VIII.)

Miscellaneous Inquiries

Finally, the Commission handled 3,319 miscellaneous inquiries during this period. These inquiries include requests for information and interpretation of human rights law, requests for pamphlets and brochures, as well as inquiries which require referral to other agencies.

Boards of Inquiry

The Saskatchewan Human Rights Code

During the reporting period, the following cases have been adjudicated by Boards of Inquiry:

Leslie Wormsbecker v. Westfair Foods
Board of Inquiry: Peter Glendinning, Errol Young, Fran Alexson
Under Section 16 of *The Saskatchewan Human Rights Code*:
Complaint alleged discrimination in employment because of pregnancy. A hearing was held on December 18th, 1980, and in a decision handed down on February 16th, 1981 the Board of Inquiry ruled that a violation of the Code had occurred.

A further hearing was convened on April 2nd, 1981 to consider the matter of remedy. Subsequent to this hearing, the Board ordered on April 22nd, 1981 that Westfair Foods pay to Ms. Wormsbecker $178.25 for monetary loss due to non-promotion, and a further sum of $1,000 as compensation for humiliation and anguish suffered by Ms. Wormsbecker. Also, the Board required the employer to post a letter in each of its stores assuring its employees that they will take every precaution to ensure that women who are pregnant will not be discriminated against, and that women on leave for pregnancy will suffer no loss of rights or opportunities for promotion.

Yvonne Peters v. University Hospital
Board of Inquiry: Peter Glendinning
Under *The Blind Person's Rights Act*:
Complaint alleged discrimination in access to a facility customarily available to the public because of reliance on a dog guide. A hearing into this matter was held March 6th and 7th, 1980 and by decision dated February 13th, 1981 Glendinning ruled that there was a violation of *The Blind Person's Rights Act.*

Yvonne Peters v. University Hospital
Appeal: Court of Queen's Bench
Under *The Saskatchewan Human Rights Code*:
Glendinning's decision was appealed by the respondent to the Court of Queen's Bench for Saskatchewan, and on August 14th, 1981, Maher, J. allowed the appeal, ruling that a hospital is not a place to which the public is customarily admitted. This ruling is presently under appeal to the Court of Appeal for Saskatchewan by the complainant and the Commission.

Ruby Swindler v. Wally Hampton
Board of Inquiry: Bette Halstead
Under Section 11 of *The Saskatchewan Human Rights Code*:
This complaint alleged denial of housing accommodation because of race. The Board found, on May 22nd, 1981, that Mr. Hampton was not in violation of the legislation.

Michael Huck v. Canadian Odeon Theatres Limited
Board of Inquiry: Terry Bekolay
Under Section 12 of *The Saskatchewan Human Rights Code*:
Complaint alleged discrimination in the provision of a public service because of a physical disability. A preliminary hearing into whether the complaint could proceed as a class action suit was heard January 9th, 1981 and on February 4th, 1981, Mr. Bekolay

ruled that the complaint could not proceed as a class action. This decision was appealed by the Commission and the complainant to the Court of Queen's Bench for Saskatchewan. In his decision dated March 17th, 1981, Maher, J. upheld Bekolay's decision.

The hearing on the merits proceeded as an individual complaint on February 10th, 1981. By decision dated August 5th, 1981 Mr. Bekolay found that the theatre had discriminated against Mr. Huck in not making sufficient viewing space available to him as a wheelchair user. Following further argument as to remedy, Mr. Bekolay handed down a decision on September 14th, 1981 indicating the remedial steps he deemed necessary, subject to further argument on architectural feasibility. The respondent is appealing Mr. Bekolay's decision on the complaint matter to the Court of Queen's Bench for Saskatchewan. That action is pending.

During the reporting period, the following complaints have been referred to Boards of Inquiry, but have not yet been adjudicated:

Keith Dieter, Joseph Dumont, Wesley Ironstar and Fred Runns, Jr. v. R.C.M.P. Officers Scowby, Hopper, McBride, Woodward, Clark and Gaines
Board of Inquiry: Peter Glendinning
Under Section 7 of *The Saskatchewan Human Rights Code*:
The complainants are alleging that they were arbitrarily arrested and detained. The respondents are moving to have the Board prohibited from proceeding to hear the complaint, which matter was heard on January 26th, 1982 in the Court of Queen's Bench for Saskatchewan. The decision is pending.

Kathleen Storrie v. The Engineering Students' Society and "The Red Eye", and the Saskatchewan Human Rights Commission v. Waldo et al. and The Engineering Students' Society
Board of Inquiry: Professor Paul Havemann, Joan Thorstenstein and Rueben Richert
Under Section 14 of *The Saskatchewan Human Right Code*:
Two complaints alleging that certain materials printed in "The Red Eye", a publication of The Engineering Students' Society at the University of Saskatchewan, ridicules, belittles and affronts the dignity of women. The Board was scheduled to proceed on January 21st, 1982, at which time it was adjourned to March 9th and 10th, 1982.

Mr. and Mrs. Henry Dyck v. Odeon-Morton Theatres Limited
Board of Inquiry: Bette Halstead
Under Section 12 of *The Saskatchewan Human Rights Code*:
This complaint alleges discrimination in the provision of a public service because of a physical disability. This Board is in abeyance pending the outcome of the case of *Michael Huck v. Canadian Odeon Theatres Limited*, aforementioned.

Barbara Kvale v. Odeon-Morton Theatres Limited
Board of Inquiry: Bette Halstead
Under Section 12 of *The Saskatchewan Human Rights Code*:
This complaint alleges discrimination in the provision of a public service because of a physical disability. This Board is in abeyance pending the outcome of the case of *Michael Huck v. Canadian Odeon Theatres Limited*, aforementioned.

Labour Standards Act

As provided for in Sections 19 and 20 of *The Labour Standards Act*, the Saskatchewan Human Rights Commission sits as the adjudicating body for equal pay complaints which are referred to them after investigation by the Women's Division of the Department of Labour.

During this period, the Saskatchewan Human Rights Commission heard the following complaint:

Anita Schiltz v. Solar Sales Ltd.
Board of Inquiry: Saskatchewan Human Rights Commission
Under Section 17(1) of *The Labour Standards Act*:
Ms. Schiltz complained that she and her female co-workers were not given pay equal to that of a male co-worker. The Commission ruled, in its decision dated July 28th, 1981, that Section 17(1) of *The Labour Standards Act* had been violated. The matter of compensation was left for the parties to negotiate, but if negotiations failed to settle the matter, the hearing would reconvene to rule on that question. The decision of the Commission was appealed to the Court of Queen's Bench for Saskatchewan where the appeal was dismissed by Dielschneider, J. on November 5th, 1981.

During the reporting period, two further complaints were referred to the Human Rights Commission by the Women's Division of the Department of Labour for Boards of Inquiry, but have not yet been adjudicated:

Jane Bublish v. Saskatchewan Union of Nurses
Board of Inquiry: Saskatchewan Human Rights Commission
Under Section 17(1) of *The Labour Standards Act*:
Ms. Bublish complained that the Saskatchewan Union of Nurses violated Section 17(1) of *The Labour Standards Act* by paying a male Employment Relations Officer a starting rate of pay higher than the starting rate of pay received by her. The hearing was scheduled to proceed on January 13th, 1982 in Regina, and at that time was adjourned to March 8th, 1982.

Beatrice Harmatiuk et al. v. Pasqua Hospital, The Board of Governors of The South Saskatchewan Hospital Centre
Board of Inquiry: Saskatchewan Human Rights Commission
Under Section 17(1) of *The Labour Standards Act*:
Ms. Harmatiuk alleges that she and her female

co-workers employed as Housekeeping Aides at the Pasqua Hospital in Regina were paid at a lower base rate than two male Caretakers who performed similar work at the hospital. The Board of Inquiry in this matter is scheduled to proceed on February 17th, 1982 in Regina.

Special Programs — Affirmative Action

General Provisions

Nine of the eleven human rights Statutes across Canada presently provide for special programs designed to overcome discrimination. The *Canadian Charter of Rights and Freedoms* contains similar provisions in Sections 15(2) and 6(4). In our province, Section 47 of *The Saskatchewan Human Rights Code* allows for the development of these special programs which are designed to prevent, eliminate or reduce disadvantages and improve opportunities for classes of persons protected by human rights legislation.

The inclusion of this enabling provision in the Code marks a significant recognition that, while the individual complaint procedure is important and must be a permanent feature of human rights legislation, it is not the sole or even the best tool for eliminating the discriminatory impact of traditional practices on whole groups of disadvantaged people within our society.

Systemic discrimination results in and perpetuates patterns of exclusion, job segregation and under-employment, particularly for persons of Indian ancestry, women, and persons with physical disabilities.

If the opportunities and status of persons of Indian ancestry, women, and persons with physical disabilities are to improve, surely comprehensive and system-wide programs are required.

The Saskatchewan Human Rights Code provides four ways in which affirmative action programs can be introduced:

1. The Commission may approve a voluntary program (Section 47);
2. The Commission may order a program put into place (Section 47);
3. A Board of Inquiry may order a program as a remedy where there is evidence of discrimination (Section 31(7)(a));
4. An affirmative action program may be introduced as settlement of a complaint.

The approval of a program under Section 47 provides that program with legal protection. The Commission also has the authority to monitor, vary, impose conditions, or withdraw approval of the program where circumstances warrant.

Approved Affirmative Action Programs

During the 1981 reporting year the following programs were granted approval pursuant to the proposed regulations of April 9th, 1980, which the Commission incorporated by reference into each of its published decisions.

1. Saskatchewan Piping Industry Joint Training Board

Approval was granted to the Saskatchewan Piping Industry Joint Training Board on June 9th, 1981, as a result of an oral hearing, to implement a special training program in the Northern Administration District which will increase the number of people of Indian ancestry, both men and women, in the plumbing and pipefitting trade.

Evidence was provided by the applicant to show that persons of Indian ancestry compose 11.5%-14.7% of the working age population. Present statistics show that of the 512 journeymen in the pipe trades in Saskatchewan, 9 (1.75%) are persons of Indian ancestry. This clearly demonstrates an underrepresentation of approximately 13%, which supports the need for a special program in the plumbing and pipefitting industry. The program will endeavor to recruit 30 people of Indian ancestry each year into the pipe trades apprenticeship program. It is estimated by 1989, 14% of the apprentices will be persons of Indian ancestry.

The approval also established specific conditions to ensure that measures be taken to gain a further understanding of "physical disability", with a view to the potential recruitment of disabled persons of Indian ancestry into this program.

2. St. Andrew's College

Approval was granted to St. Andrew's College on April 10th, 1981 to initiate a special program to increase the representation of women on the College faculty.

The student body of St. Andrew's College is comprised of 24 male students and 16 female students, and at the time of the approval, there were no female faculty members.

3. Northern Teacher Education Program

Approval was granted to the Northern Lights School Division #113 on September 21st, 1981 to develop the Northern Teacher Education Program (NORTEP) as an approved affirmative action program.

The goals of the Northern Teacher Education Program are to train Northern people of Indian ancestry to achieve the level of a "Standard A" teaching certificate and to assure teaching positions for their graduates with the Northern Lights School Division #113.

The Northern Lights School Division provided the following evidence that showed a substantial underrepresentation of teachers of Indian ancestry:

The number of schools in the Northern Lights School Division	31
The present enrollment of students in these schools	4,200
The percentage of students of Indian ancestry in these schools	65%-70%
The number of teachers working with the Northern Lights School Division	252
The percentage of teachers of Indian ancestry working with the Northern Lights School Division	25(10%)

Currently, only 10% of the teachers are persons of Indian ancestry, while 65%-70% of the student population are of Indian ancestry. The evidence supports the need for a special program. The program projects that by 1986, 27% of the teachers employed by the Northern Lights School Division would be persons of Indian ancestry.

4. Pre-Trades Training Program for Women

Approval was granted to the Regina Plains Community College on October 29th, 1981 to conduct a Pre-Trades Training Program for Women. The goal of the program is to increase the participation of women in non-traditional trades by providing exposure to a variety of non-traditional trades.

In 1978 there were 27 women registered in the Apprenticeship Branch of the Department of Labour, out of a total of 3,271 apprentices. The distribution can be charted as follows:

Trade Area	Female	Male
1. Carpentry	2	1,039
2. Cooking	15	25
3. Electrical	1	978
4. Heavy Duty Repair Mechanics	2	219
5. Motor Vehicle Mechanics	2	742
6. Painting and Decorating	2	41
7. Radio and Television Electronics	1	45
8. Welding	2	155

This means that less than 1% of all apprentices in Saskatchewan are women.

Statistics from the Women's Division, Department of Labour, indicate that 39% of the Saskatchewan workforce is made up of women. Therefore, according to these statistics, at least 39% or 1,275 of the 3,271 apprentices should be women. This 38% underrepresentation of women in the non-traditional trade area justifies the need for a Pre-Trades Training Program.

5. Saskatchewan Power Corporation

Interim approval was granted to Saskatchewan Power Corporation on December 31st, 1981 for immediate special measures to be directed towards the recruitment and hiring of persons of Indian ancestry.

There are 3,385 employees in Saskatchewan Power Corporation's workforce, of which 57(1.7%) are of Indian ancestry, two of whom are in management positions. Using the figure that 11.5% of the working age population of Saskatchewan are persons of Indian ancestry, it is evident that there is an underrepresentation of approximately 400(10%) employees who are persons of Indian ancestry. By using the same calculations, approximately 90 persons of Indian ancestry should be in positions of management.

The Saskatchewan Power Corporation has established the following long-term goals:

	Current Status	Short Term Goal 1982 Dec.	Intermediate Term Goal 1986 Dec.	Long Term Goal 1991-1996
Total Natives	57	80	180	400
— Management	2	5	15	80

Approval was granted with the condition that the Saskatchewan Power Corporation submit a plan to the Saskatchewan Human Rights Commission in the first quarter of 1982 which will address the disadvantages of all three target groups.

6. Potash Corporation of Saskatchewan

Interim approval was granted to the Potash Corporation of Saskatchewan on December 31st, 1981 for the purpose of recruiting and hiring 4 persons of Indian ancestry. A preliminary workforce analysis of the head office of the Potash Corporation of Saskatchewan has established that out of 227 employees, 3(0.73%) are persons of Indian ancestry, an underrepresentation of approximately 10%. The approval was granted with the condition the Potash Corporation of Saskatchewan submit to the Saskatchewan Human Rights Commission, within a reasonable period of time, an overall affirmative action plan which addresses all three target groups.

Criteria For Interim Approval

The Commission recognizes that organizations sponsoring affirmative action programs may wish to begin certain affirmative action measures before a full program is completely developed. Therefore, they have set forth the elements they consider necessary

in an interim approval application so as to bring such a proposal within the provisions of Section 47 and the proposed regulations.

In short, the Saskatchewan Human Rights Commission will expect the sponsoring organizations to demonstrate:

1. That underrepresentation or unequal distribution of target group members is documented, thereby establishing the need for the program within the particular workforce;
2. That the sponsor organization is committed to undertaking a full program addressed to all three target groups where the need to do so is established by a workforce analysis, and that the full program will be submitted for approval within a reasonable period of time;
3. That the immediate measures to be undertaken are approprate;
4. That a union-management committee or employee-management committee has been established to design the full program, and that any unions with bargaining rights in the sponsoring organization support the interim proposal being considered by the Commission without a public hearing.

With this information, the Commission is able to determine that there is a need for the program, that union participation and agreement has been sought, that the sponsoring organization is committed to developing a full program addressed to all three target groups, and that the immediate measures being undertaken are appropriate and ought to be protected from complaints of discrimination.

Exemptions

Section 48 of *The Saskatchewan Human Rights Code* allows the Commission or the Director to grant exemptions from any provision of the Code "where any person or class of persons is entitled to an exemption . . . under any provisions of this Act" or "where the Commission . . . considers (an exemption) necessary and advisable".

The Code, and Regulations pursuant to the Code, outline procedures for application for an exemption and for the convening of a public hearing to determine whether the exemption should be granted.

1. Simpsons-Sears Limited, Regina

An exemption from Section 19 of *The Saskatchewan Human Rights Code* was granted to Simpsons-Sears Limited on February 24th, 1981 which permits advertising for one half-time female Porter and one full-time female Porter to clean and service women's washrooms in the Sears Regina Catalogue Centre. The exemption was granted with the understanding that, in this instance, sex is a reasonable occupational requirement.

2. Canada Employment and Immigration Commission, Training Division (Saskatchewan Region)

On September 21st, 1981 an exemption from Section 16(1) of *The Saskatchewan Human Rights Code* was granted to the Canada Employment and Immigration Commission, Training Division (Saskatchewan Region), on behalf of provincial employers, to allow small employers, who have Canada Manpower Industrial Training Program contracts, to recruit and hire persons of Indian ancestry, women, and persons with physical disabilities for short-term training opportunities.

Employers who provide training to unskilled target group members can obtain wage subsidies through CMITP for the training they provide. (This exemption applies exclusively to employers who have less than 25 employees).

3. Canada Employment and Immigration Commission, Employment Development Branch (Saskatchewan Region)

An exemption from Section 16(1) of *The Saskatchewan Human Rights Code* was granted on July 27th, 1981 to the Canada Employment and Immigration Commission, Employment Development Branch (Saskatchewan Region) in order to allow certain hiring procedures which are undertaken by employers involved in the following short-term job creation programs:

1. Local Employment Assistance Program
2. Canada Community Development Program
3. Canada Community Services Program
4. Summer Canada: Student Employment Programs

These four programs are designed to address, in part, the problems of high unemployment experienced by persons of Indian ancestry, women and persons with physical disabilities. In addition to these three target groups, the Summer Canada Program is designed to provide youths, between the ages of 15-24, with short-term work experience.

Proposed Special Program Regulations Pursuant to Section 47

In order to ensure the clear, predictable and effective administration of Section 47 of the Code, and in order to define the essential criteria for Commission approval of a special program, the Commission drafted regulations, in the fall of 1979, pursuant to Section 46 of the Code.

The Commission then held two days of rule-making hearings on the proposed regulations. Thirty-three written and oral submissions were received from various interested individuals and organizations including presentations from business and labour organizations, lawyers, educators, community organizations and human rights experts. Among the points emphasized in these submissions were:

(1) The importance of coordinating programs so that discrimination is eliminated and opportunities are improved for the three groups experiencing major disadvantages in the areas of employment and education: persons of Indian ancestry, women, and persons with physical disabilities;

(2) The need to involve trade unions and representatives of the target groups in the design, implementation and monitoring of the program;

(3) The need to ensure that programs are comprehensive.

On the basis of these submissions, the Commission reconsidered and re-drafted its proposed special program regulations and submitted them to the Attorney General in April, 1980 for Cabinet approval.

Education and Research

Education Activities

The Saskatchewan Human Rights Code gives the Commission a broad mandate to further equality and the recognition of rights through research and education programs. The Commission has the duty under Section 25 of the Code to:

(a) forward the principle that every person is free and equal in dignity and rights without regard to his race, creed, religion, colour, sex, marital status, physical disability, age, nationality, ancestry or place or origin;

(b) promote an understanding and acceptance of, and compliance with, this Act;

(c) develop and conduct educational programs designed to eliminate discriminatory practices related to the race, creed, religion, colour, sex, marital status, physical disability, age, nationality, ancestry or place of origin of any person or class of persons;

(d) disseminate information and promote understanding of the legal rights of residents of the province and conduct educational programs in that respect;

(e) further the principle of the equality of opportunities for persons, and equality in the exercise of the legal rights of persons, regardless of their status;

(f) conduct and encourage research by persons and associations actively engaged in the field of promoting human rights;

(g) forward the principle that cultural diversity is a basic human right and fundamental human value.

In fulfilling its education role, the Commission keeps the public and affected groups informed of new developments in all areas.

The Commission's education activities, therefore, provide information on new developments in legal provisions, law enforcement procedures, Board of Inquiry decisions in Saskatchewan and other jurisdictions, special programs, exemptions, and accessibility. This information is disseminated through speaking engagements and meetings, media contact, printed materials and newsletters.

During 1981 the Commission received and responded to 656 requests to send speakers to conferences, workshops, community meetings, school and university classes and training sessions. These requests came from professional associations, business organizations, members of consumer, community and advocacy groups, teachers, students, labour unions, staff associations, and social service agencies.

In addition, many students, teachers, lawyers and professional consultants contacted the Commission with requests for materials, case decisions, and general information to help them develop papers, courses, articles or theses on human rights issues.

The Commission publishes a newsletter five times a year which is distributed to 10,000 people in the Province.

Our staff has also prepared and distributed hundreds of pamphlets on all aspects of the Code.

The United Nations declared 1981 as the "International Year of Disabled Persons". As a result, our office received specific requests for public speakers, written materials and general information on the rights of physically disabled persons.

We have also noticed an increase in requests to discuss the issue of sexual harassment. Sexual harassment in employment is considered a violation of Section 16 of *The Saskatchewan Human Rights Code*, in that it is a different term or condition of employment placed on individuals by virtue of their sex.

During the next year the Commission will be undertaking a study on race relations in the Regina schools and expects to become involved in producing material for teacher use on a number of human rights issues. Another major objective for the upcoming year will be a concentration of education activities in the North.

Accessibility Standard

The proclamation of *The Saskatchewan Human Rights Code* in 1979 brought with it, for the first time in Saskatchewan, protection under human rights legislation for persons with physical disabilities. The Code states that no person can discriminate against an individual because they have a physical disability, in such areas as employment, housing, public accommodation, and education. However, physically disabled individuals are often denied their right to equal opportunities and access because of architectural barriers. In order to eliminate these barriers in the future, the Commission adopted the "Accessibility Standard" on August 14th, 1980.

The "Accessibility Standard" was produced by the Provincial Accessibility Committee of Saskatchewan, a committee originally established as a working committee by the Commission. The "Accessibility Standard" is a formal interpretive guideline which provides building specifications for all of the built environment so that all new buildings, additions and renovations to existing buildings are completely accessible to persons with physical disabilities. The Standard is more extensive in its coverage than other building codes, since it also sets criteria for exterior facilities such as crosswalks, parking facilities, and recreational facilities.

The Standard is unique in that it takes into consideration not only the accessibility problems of persons with mobility limitations, but also those persons with visual and hearing impairments, by including such things as tactile cues for persons with visual limitations, and communication aids and visual alarms for persons with hearing limitations. The Standard will make buildings accessible for persons with physical disabilities, as well as making mobility easier for the aged, expectant mothers, children, and those with temporary physical limitations.

The Commission has received 23 sets of building plans for review during 1981. A large number of the plans submitted to us are plans for new schools or additions and/or alterations to existing schools. The Department of Education has requested that all plans for schools be submitted to the Commission to ensure that they conform to the "Accessibility Standard". The Department of Government Services has also submitted a number of plans for review. Other plans are sent to us for our comments on a voluntary basis by architects throughout the province.

The Commission staff is also called upon to evaluate existing buildings in light of the provisions outlined in the Standard, and submit their recommendations on the necessary changes required to make the building accessible.

The Commission has found it very encouraging that so many architects, designers, and contractors are taking the theme of the International Year of Disabled Persons, "full participation and equality", into consideration by incorporating the "Accessibility Standard".

Resource Centre

Our Commission office in Saskatoon has a Resource Centre which is available for public use.

Our collection includes approximately 800 books, 330 serial publications of which 300 are current, an extensive vertical file collection and various audio-visual material. The Resource Centre is used by university and high school students, teachers, professors, lawyers and the general public.

Our Resource Centre also has on hand the following law reporters:

- Affirmative Action Compliance Manual for Federal Contractors
- Canadian Human Rights Reporter
- Canadian Labour Law Reporter
- Employment Practices Guide
- Employment and Training Reporter
- Equal Opportunity in Housing
- Fair Employment Practice Service

Human Rights and Benefits in the 80's

On November 17th, 1981 the Saskatchewan Human Rights Commission issued an interpretation of *The Saskatchewan Human Rights Code* as it applies in the areas of pensions, employee benefits and insurance.

Since the proclamation of the Code in August, 1979 the Commission and its staff have received numerous inquiries with respect to the interpretation of the law in these areas. It became increasingly clear to the Commission that there was a need to provide a clarification with respect to the application of the new provisions of the law to employee benefits, pension plans and insurance. The purpose of the paper is to interpret and clarify the effect of the law.

The interpretation deals with discrimination in benefits, pensions and insurance on the basis of sex, marital status, physical disability and age. But the two major issues addressed are the unequal benefits provided to women in some pension schemes, and the potential impact of the abolition of mandatory retirement on benefits and pensions.

Because of the use of sex-based mortality tables, in some pension plans, benefits for all woman are reduced in order to cover the greater predicted cost of paying out benefits to women over a longer time. The fact is that only 10% of women live longer than average, but benefits for all women are reduced. This

practice has been found discriminatory by the U.S. Supreme Court and by an Alberta Board of Inquiry. In its interpretation, the Commission proposes two alternative ways of removing sex discrimination from the provision of benefits: requiring either that equal benefits be paid to women with the provision that employers can contribute more for women in order to provide the equal benefits, or that unisex rather that sex-based mortality tables be used to determine levels of contribution and benefits.

With respect to age discrimination, the Commission has taken the opportunity in its interpretation to explore the impact which the abolition of mandatory reitirement would have on pension schemes and benefits. The need for this became apparent at the Commission's November, 1980 hearings on possible amendments to the Code, where a number of organizations urged the Commission to recommened that mandatory retirement at age 65 be abolished. There are very strong arguments being made right across the country for abolition of mandatory retirement, and in every jurisdiction it is being seriously studied. Consequently, in this interpretation, the Commission has explored the effect of abolition on pension schemes and has considered the effect of a change in the definition of 'age' which is presently in the Code.

The general principles of the document are as follows:

1. The intent of non-discriminatory provisions as they relate to benefits and pensions is to achieve equal benefits for all persons.
2. In both pension and benefit plans equal periodic benefits will be provided to men and women similarly situated.
3. Since sex discrimination encompasses discrimination on the basis of pregnancy and pregnancy-related illnesses, the provision of benefits for these causes will be at least the same as that accorded for comparable causes.
4. "Head of Household" or "Primary Wage Earner" criteria have had the effect of discriminating on the basis of sex and may not be used in determining benefits.
5. No change in the marital status of a person (employee or survivor) will affect the right of that person to continue to receive a benefit which began before the change in marital status occurred.
6. The principles of non-discrimination on the basis of age, sex, marital status and physical disability will apply to dependents and survivors, as well as to employees and policyholders, unless variation is permitted within these standards.
7. Dependency may be presumed in the case of spouses and children (as defined). Other dependents are included where there is financial dependency and financial dependency is determined in accordance with an objective standard applied uniformly.
8. The existence of a pension or benefit plan and the requirements for participation therein may not be used as a reason to refuse to hire or promote or to terminate a person because of his or her age, sex, marital status or physical disability.
9. Employees, or persons who were previously prevented from participating in a pension or benefit plan because of discriminatory rules, shall not be required to participate when these rules are removed, but shall have the right to indicate within a limited period of time if they wish to participate.
10. Service requirements in excess of three years have had the effect of discriminating against older workers and will be deemed to be age discrimination.
11. Any changes made to a pension or benefit plan in order to comply with the Code will not cause any reduction in the expected value of the benefits as a result of service prior to the date these changes are made to comply.
12. All pension and benefit plans must be in compliance with the Code within one year of the finalization of these standards or by the expiry date of any Collective Agreement in effect on the date of finalization where a plan is subject to that Collective Agreement.

The Commission issued this interpretation with a 90-day comment period to end February 15th, 1982. The comment period has been extended to March 15th, 1982. Individuals, employers, unions and groups who may be affected by the provisions of the law in this area and by this interpretation have been invited to comment.

List of Saskatchewan Human Rights Commission Staff as of December 31, 1981

(listed alphabetically)

Saskatoon (Head Office):

Nadine Bogren	Affirmative Action Officer
Pat Cook	Secretary
Shelagh Day	Director
John Doyle	Library Technician (part-time)
Beverly Edwards	Secretary
Susan Fraser	Secretary (part-time)
Carole Geller	Director (Presently on Education leave)
Beverly Keeshig	Investigating Officer
Judy Kostyshyn	Office Manager
Karen MacLachlan	Investigating Officer
Beverly MacSorley	Secretary (Presently on leave of absence)
Mike O'Sullivan	Director of Education (Presently on leave of absence)
Yvonne Peters	Affirmative Action Officer
Marty Schreiter	Assistant Director
June Vargo	Secretary
Mickey Woodard	Staff Solicitor
Ailsa Watkinson	Director of Education

(In addition, during the period under review, the following staff person served the Commission in the Saskatoon office: Collin Rope, Investigating Officer.)

Prince Albert (Regional Office):

May Barr	Secretary
Greg Deren	Investigating Officer
Brenda Green	Secretary (part-time)
Norma Green	Investigating Officer

(In addition during the period under review the following staff person served the Commission in the Prince Albert office: Elaine Mathieson, Secretary (part-time).)

Regina (Regional Office):

Molly Barber	Investigating Officer
Bill Fayant	Education Officer
Caryl MacKenzie	Secretary
Robin McMillan	Investigating Officer
Sue Smart	Secretary (part-time)

(In addition, during the period under review the following staff persons served the Commission in the Regina office: Elaine Condon, Investigating Officer; Greg Murdoch, Education Officer; Laurene Daniels, Secretary (part-time); Cheryl Herback, Secretary (part-time).)

Table I

Summary of Informal Complaints by Category

January 1, 1981 – December 31, 1981

Category	Number	%
Accommodation/Services/ Facilities	56	16
Notices/Publications/ Broadcasts	7	2
Employment	131	37
Employment Advertisements	6	1.5
Application Forms	65	18
Bill of Rights	10	2.5
Right to Education	18	5
Right to Engage in Occupations	3	1
Property/Housing	32	9
Contracts	3	1
Other	24	7
Total	355	100.00%

Table II

Summary of Informal Complaints by Grounds

January 1, 1981 – December 31, 1981

Complaints	Number	%
Sex	76	21
Race	60	17
Religion	9	2.5
Marital Status	20	6
Nationality	4	1
Ancestry	11	3
Age	16	4.5
Physical Disability	58	16.5
Bill of Rights	10	3
Application Forms	65	18
Other	26	7.5
Total	355	100.00%

Table III

Summary of Informal Complaints by Grounds and Category

January 1, 1981 — December 31, 1981

Public Services	
Sex	7
Race	17
Religion	2
Nationality	1
Marital Status	4
Age	2
Ancestry	1
Physical Disability	21
Other	1
Total	56
Notices/Publications/Broadcasts	
Race	2
Nationality	1
Ancestry	4
Total	7
Employment	
Sex	58
Race	17
Religion	2
Nationality	2
Marital Status	7
Age	12
Ancestry	5
Physical Disability	28
Total	131
Employment Advertisements	
Sex	4
Marital Status	1
Other	1
Total	6
Application Forms	
Total	65
Bill of Rights	
Total	10
Right to Education	
Sex	3
Race	6
Religion	3
Physical Disability	6
Total	18
Right to Engage in Occupations	
Religion	2
Marital Status	1
Total	3
Property/Housing	
Sex	3
Race	17
Marital Status	7
Age	1
Ancestry	1
Physical Disability	3
Total	32
Contracts	
Sex	1
Race	1
Marital Status	1
Total	3
Other	24
Total Informal Complaints	355

Table IV

Disposition of Informal Complaints

January 1, 1981 — December 31, 1981

Disposition	Number	%
Settled	99	28
Dismissed	3	1
Withdrawn	65	18
*No Reasonable Grounds	25	7
Transferred to Formal Inquiry	61	17
Total	253	71
Under Investigation	102	29
Grand Total	355	100%

** Cases in which we lack jurisdiction either because the alleged facts did not disclose a violation of one of our sections, or because of legal limits on our jurisdiction.*

Table V

Summary of Formal Complaints by Category

January 1, 1981 — December 31, 1981

Complaint Category	Number	%
Public Accommodation/Services	31	17
Notices	3	2
Employment	78	44
Trade Unions	1	.5
Application Forms	1	.5
Employment Advertisements	12	7
Housing	30	17
Aribitrary Arrest	2	1
Right to Education	5	3
Right to Engage in Occupations	5	3
Contracts	5	3
Reprisal	3	2
Totals	176	100.00%

Table VI

Summary of Formal Complaints by Grounds

January 1, 1981 — December 31, 1981

Complaint	Number	%
Sex	51	29
Race	36	20
Religion	6	3
Nationality	3	2
Marital Status	26	15
Age	10	5.5
Ancestry	3	2
Physical Disability	35	20
Aribitrary Arrest	2	1
Reprisal	3	2
Application Forms	1	.5
Totals	176	100.00%

Table VII

Summary of Formal Complaints by Grounds and Category

January 1, 1981 — December 31, 1981

Public Services	
Sex	1
Marital Status	2
Race	14
Physical Disability	14
Total	31
Employment	
Sex	40
Race	8
Religion	5
Marital Status	3
Age	5
Physical Disability	17
Total	78
Housing	
Sex	4
Race	9
Marital Status	15
Ancestry	1
Physical Disability	1
Total	30
Publications/Notices/Broadcasts	
Sex	2
Ancestry	1
Total	3
Trade Unions	
Physical Disability	1
Total	1
Employment Advertisements	
Sex	4
Age	5
Marital Status	1
Nationality	1
Ancestry	1
Total	12
Right to Engage in Occupations	
Race	1
Marital Status	1
Nationality	2
Physical Disability	1
Total	5
Right to Education	
Race	3
Religion	1
Physical Disability	1
Total	5
Contracts	
Race	1
Marital Status	4
Total	5
Arbitrary Arrest	2
Application Forms	1
Reprisal	3
Total	176

Table VIII

Disposition of Formal Complaints

January 1, 1981 — December 31, 1981

Disposition	Number	%
Settled	52	30
Withdrawn	10	6
Dismissed	11	6
Referred to Board of Inquiry	2	1
Total	75	43
Under Investigation	101	57
Grand Total	176	100.00%

Table IX

Boards of Inquiry

Number and Nature of Complaints Referred to Boards of Inquiry:

Accommodation	4
Notices, Publications	1
Housing	1
Arbitrary Arrest	1
	7

Grounds of Complaints Referred to Boards of Inquiry:

Physical Disability	4
Sex	1
Race	1
Arbitrary Arrest	1
	7

Disposition of Complaints Referred to Board of Inquiry:

Complaint Dismissed	1
On Appeal	2
No Decision to Date	4
	7

Table X

Education Statistics For 1981

Type of Activity	No. of Events
Formal Speeches	75
Community Speeches	422
Conferences	32
Media Contacts	121
Literature Displays	6
Total	656

CANADIAN HUMAN RIGHTS REPORTER

SASKATCHEWAN / FAILURE TO PROMOTE / PREGNANCY
Board of Inquiry
Wormsbecker v. Super Valu and Westfair Foods Ltd.

Volume 2, Decision 73 Paragraphs 3110 - 3147 April 20, 1981

Board of Inquiry Decision under the
SASKATCHEWAN HUMAN RIGHTS CODE

Leslie Wormsbecker
Complainant

vs.

Super Valu and Westfair Foods Ltd.
Respondents

Date:	December 18, 1980
Place:	Saskatoon, Saskatchewan
Before:	Peter W. Glendinning, Chairman Errol Young Fran Alexson
Appearances by:	Milton Woodard, Counsel for the Complainant and the Saskatchewan Human Rights Commission Larry Seiferling, Counsel for the Respondents

Summary: *The Complainant, a cashier, was pregnant when a position for which she had been trained became available. She was not promoted to the position and filed a complaint of discrimination because of pregnancy. The board of inquiry rejected the Respondent's argument that there was no discrimination because it was the future absence due to pregnancy, not the pregnancy itself, that accounted for the employer's decision. The board also rejected the Respondent's claim that there was no discrimination because the employee's status was not reduced. The decision of the board was that discrimination did occur.*

3110 Counsel for each party greatly facilitated this hearing by agreeing to a Statement of Facts at its commencement. They are to be commended for the effort expended in this area and as well for their effort in providing this Board with an informative and cogent argument with respect to the matter under consideration.

3111 The Complainant, Leslie Wormsbecker, is an individual who was clearly interested in advancing her career, hopefully into management, with her employer, Westfair Foods Ltd. To this end, she availed herself of a transfer and started work on January 9th, 1979 at the Super Valu store at Confederation Park in Saskatoon.

3112 After two weeks of training she and five others began to train sixty (60) new persons as cashiers. She, along with one (1) other individual, was placed in training for the position of assistant head cashier and as a consequence her work responsibilities carried additional duties in excess of the normal cashier duties — supervising other cashiers, maintaining cash flow records, and the provision to her of access to the computer through an over-ride number which enabled her to authorize cheques in excess of the amount authorized by regular cashiers.

3113 Sometime after Wormsbecker became pregnant the assistant head cashier position became vacant and was filled on or about October 1st, 1979 by her co-trainee, Elizabeth Johnson.

3114 On November 1st, 1979 the position again became open. At this time it was filled by Donna Slykwa, an individual who had not trained with the Complainant and whose training and experience were less than that of the Complainant.

3115 It is apparent that the employer, in filling the position on November 1st, 1979, was aware that Ms. Wormsbecker would be absent in the future for pregnancy leave since the Complainant approached Brian Myers, Manager of the store as to the reasons for her failure to gain the promotion on or about November 1st, 1979. Both parties agree that at this time Ms. Wormsbecker was advised that she had not been promoted because she would be absent on maternity leave during a period of time when Westfair Foods Ltd. planned to be opening a new store. It was indicated that the encumbent in the position of assistant head cashier would be required to be present at the time of the new store opening.

3116 As agreed in the Statement of Facts, the reasons she did not receive a promotion on or about October 1st, 1979 remains a matter of conjecture. Evidence called, specifically Yolande Walker, indicated that Ms. Walker had been aware of Wormsbecker's pregnancy prior to October 1st, 1979 and prior to that date discussed the Complainant's likely absence during the new store opening with the Confederation Park manager, Myers. Indeed, Walker herself, had suggested that consideration be given to keeping Wormsbecker "out of sight" when she became obviously pregnant — and that she had expressed the view that since the Complainant would not be at the new store when it opened, "she'd be of no use to us."

3117 It is suggested by counsel for the Complainant that it would be an appropriate inference to assume that the reasoning given for non-promotion November 1st, 1979 was the same reason that pertained on October 1st, 1979. The evidence discloses that the successful applicant on October 1st, 1979 was considered to be of equal competence. In spite of this it is our view that there is sufficient evidence from which the inference can properly be drawn that the employer's knowledge and attitude towards the pregnancy and the subsequent leave involved, was at least in part, the reason Elizabeth Johnson was selected for the position on or about October 1st, 1979. (see *R.* v. *Bushnell Communications Ltd. et al* 4 O.R. (2nd) 288 at 290; and British Columbia Human Rights decision, July 22nd, 1976 between H.W. and Jack R. Kroff and Riviere Reservations of Canada Ltd.)

3118 We are therefore satisfied that the reasons for the lack of promotion on November 1st, 1979 prevailed on October 1st, 1979.

3119 These facts as found lead us to a consideration of the substantive issues involved. First, if the failure to promote was due to the Complainant's absence due to pregnancy, is this sufficient to bring the complaint within the scope of Section 16 and Section 2, subsection 0 of the Human Rights Code, which provide in part as follows:

> "Section 16(1) — No employer shall refuse to employ or continue to employ or otherwise discriminate against any person or class of persons with respect to employment, or any term or condition of employment, because of his or their race, creed, religion, colour, sex, marital status, physical disability, age, nationality, ancestry, or place of origin.
>
> Section 2(0) — Sex — means gender and, unless otherwise provided in this Act, discrimination on the basis of pregnancy-related illnesses is deemed to be discrimination on the basis of sex."

Counsel for the Respondents suggest that the employer's reasoning was due strictly to its business needs as they were perceived at the expected time of birth, and as such its actions were not in consideration of the pregnancy itself, but rather for very practical reasons — the fact that the encumbent in that position would be required at a time when the Complainant would not be available for the opening of the new store. To put the matter another way — that it was the absence, not the pregnancy, that led to the decision. In other words, had Wormsbecker been known to have planned an extended vacation during the time when the new store was to open, the employer's position would have been precisely the same.

3120 This reasoning is sound and it is obvious that, subject to the terms of an employment agreement between the parties, the employer would be entitled to exercise its management function in such a way. However, in the instance before us the fact that the future absence was occasioned by a pregnancy rather than a vacation is significant since the Human Rights Code, along with *The Labour Standards Act* for the Province of Saskatchewan specifically raise this matter in an attempt to provide to individuals in such condition certain protections and rights. In other words, in instances of absence by way of pregnancy, the employer's right to manage as it sees fit is circumvented, at least in certain respects.

3121 Therefore there is no analogy provided that we accept that absence due to pregnancy is within the scope of the Human Rights Code and it is this issue which constitutes the second arm of the Respondents' argument in this area — that the Code deals only with pregnancy or related illnesses, not with an absence due to pregnancy.

3122 With respect, this is too fine a line to be accepted since it would require that the Complainant in such instances establish that the employer acted out of an inherent dislike of women who are pregnant and thus that an action based upon the appearance of a pregnant woman could not be construed as discrimination within Section 2(0) and Section 16 of the Human Rights Code. Surely the legislature intended that pregnancy be construed as to describe all aspects of that condition such as appearance, physical limitations, and the absence of an employee for purpose of giving birth, among many things.

3123 We therefore find that the employer's decisions, while made for business reasons, were such as to bring its actions within the scope of Section 2(0) and Section 16 of the Human Rights Code. Clearly, the employer did not intend to discriminate because the Complainant was pregnant, and it is likely that the employer was surprised at the suggestion. No proof of such intention is required. In this respect the Article by William Black, *Canadian Human Rights Reporter*, "From intent to effect; new standards in Human Rights," February 1980 and the cases cited therein offers an appropriate review of this issue.

3124 Discrimination is rarely blatant or obvious — it is almost by definition found in acts or practices with historical bases or which are founded upon approved business practices. Unfortunately, this does not reduce the impact of such discrimination upon the party concerned.

3125 This does not conclude the matter since counsel for the Respondent has strenuously and effectively argued that even if the Board were to find discrimination, as we have, that this tribunal has no jurisdiction to act in this situation since Section 16(6) of the Code sets limits upon our deliberations, binding us to parameters established by *The Labour Standards Act* for the Province of Saskatchewan, which act is not

"assigned" to the Human Rights Commission pursuant to the provisions of the Human Rights Code and its regulations.

3126 Specifically, Mr. Seiferling suggests that Section 16(6) of the Code is a provision as contemplated by Section 2(0) of that Act and that by including *The Labour Standards Act* the legislature has "otherwise provided" and thus excluded for purposes of Section 16, pregnancy or pregnancy-related illnesses.

3127 He further argues that this restricts the rights of pregnant persons vis à vis employers to those provided in *The Labour Standards Act* — specifically, rights to maternity leave and not to have the employee's status in the workplace reduced due to such leave, or the pregnancy itself. Section 27 of *The Labour Standards Act* provides that:

> Subsection (1) — No employer shall dismiss, lay-off, suspend or otherwise discriminate against an employee by reason of the fact that she:
> (a) is pregnant;
> (b) is temporarily disabled because of pregnancy; or
> (c) has applied for maternity leave in accordance with this part . . .

It is reasoned that since this was not a diminution of the employee's position, but rather a failure to provide a promotion, a finding in favour of the employee would constitute an enlargement of the rights provided pursuant to *The Labour Standards Act* to female persons and hence be offensive to Section 16(6) of the Human Rights Code.

3128 As well, Mr. Seiferling argues that with the above constraint the only remedy is that provided by *The Labour Standards Act* and hence the employee's remedies fall within the provisions of the said Act.

3129 In the matter before us the evidence discloses that there was no reduction in status in economic terms. The employee was properly granted maternity leave and returned to the position which she held prior to her departure. She did not resume the additional responsibilities held prior to her departure but her salary remained the same. Although Wormsbecker indicated that she was subsequently not given promotions in either March of 1980 or May of 1980 and that she felt this was due to the fact that she was viewed by the employer as a trouble maker, this is not an issue of concern to the Board in reaching its decision at this time.

3130 It is acknowledged that this indeed could be a consideration with respect to the matter of damages — an issue upon which both parties have agreed to present further evidence and argument, if required.

3131 Mr. Seiferling stresses that Section 27 of *The Labour Standards Act* clearly restricts itself to acts of discrimination which amount to a reduction of the employee's status and in so doing invokes the the application of the *Ejusdem Generis* rule with the conclusion that its consideration will enable us to determine that the expression "or otherwise discriminated" in Section 27(1) of *The Labour Standards Act* deals with only actions falling within the category of a "reduction of status." Hence, since failure to promote is not such a reduction, the matter should be dismissed.

3132 Counsel for the Complainant and the Commission argues that the interpretation of the Code, in conjunction with *The Labour Standards Act*, should be read within the context of the two Acts together and a broad interpretation placed upon the intent of the relevant sections when read in this way. He further suggests that the list of possible "reduction of status" situations is exhaustive of that category and in that respect the words "or otherwise discriminate" must have some other meaning. In this regard, the list cannot be seen as exhaustive since other possibilities come to mind such as "demotion" — if the categorization suggested by counsel for the Respondent is accepted.

3133 It was suggested by the Respondent that to allow such a broad interpretation would place the employer in a position whereby he would have to give a pregnant applicant a position if she qualified, although she may well not be available for work for several weeks due to pregnancy.

3134 It is not considered that we are bound by *The Labour Standards Act* as counsel for the Respondent suggested. Rather, that in such a matter this tribunal must give consideration to *The Labour Standards Act* for purposes of ascertaining whether in upholding or denying the complaint the decision has served to "*restrict* or *enlarge* upon the rights provided to female persons by *The Labour Standards Act*." What rights are provided by the Act in question? If we accept Mr. Seiferling's proposition this Act gives an employee a right to certain periods of maternity leave provided certain criteria are satisfied, without prejudicing her employment position.

3135 It would appear that one method of *restricting* such a right would be to either reduce periods of leave, or to vary the criteria to make the attainment of leave more difficult. The right granted could be expanded by increasing the periods of leave provided, or altering the criteria so as to make the obtaining of such leave easier than set out by *The Labour Standards Act*. The Code does neither.

3136 In other words, in our view, Section 16(6) states that there can be no limiting or enlarging upon the rights provided by *The Labour Standards Act* — it does *not* state that there cannot be any additional rights created by Section 16 of the Human Rights Code. This can be the only logical interpretation of Section 16(6) which is contained in a statute designed clearly to provide rights to several classes of persons, including pregnant women.

3137 In our view the purpose of Section 16(6) was strictly to ensure that an employer, acting in accordance with *The Labour Standards Act*, could not then be found to be in breach of Section 16 of the Human Rights Code by virtue of, say, having refused a period of time in excess of that provided by *The Labour Standards Act*, to a pregnant person. Were it not for Section 16(6) such a refusal could well be considered to be discriminatory.

3138 This section cannot be intended to have set a limit on the number of rights such a person may have, but rather was intended to have defined the bounds of the particular rights provided by *The Labour Standards Act* when read in conjunction with the Human Rights Code.

3139 As well, it is our view that Section 27 is not necessarily restricted to instances of a "reduction of status." When consideration is given to the fact that Section 27(3) of *The Labour Standards Act* provides for remedies other than the reinstatement of an employee to a former position or the granting of maternity leave or the provision of retroactive pay.

> "Where an employer is convicted of failure to comply with any provision of this Part, the convicting magistrate may, in addition to any other penalty imposed for the offence . . .,"

It is our view that the power to impose any other penalty, although available as a punitive measure along with the other

remedies cited above, can be read with the prohibition in Section 27(1) that any employer shall not "otherwise discriminate."

3140 It is our view that the category of offences described in Section 27(1) encompasses all acts of retribution which an employer has within its power to carry out as against an employee, not limited solely to reductions of status. Viewed from this perspective *The Labour Standards Act* is not in conflict with the Human Rights Code — it does not restrict its enforcement to instances of reductions of status but rather, provides for penalties in instances of other forms of discrimination by the employer — if due to the circumstances described in Section 27(1)(a), (b) or (c).

3141 Having thus found, the argument as to the restriction of remedies to those contained within *The Labour Standards Act*, fails, although it is acknowledged that were the discriminatory practice complained of to have been a "reduction of status" the employee would appear to have two alternative remedies to pursue (See Section 36, *The Interpretation Act*, Province of Saskatchewan).

3142 Having decided as outlined above there is no need to comment with respect to the question of whether, upon Ms. Wormsbecker's return to employment, her status had been reduced because she no longer had the same responsibilities, although her salary remained the same.

3143 Although it is not a matter under consideration at this time, in response to the suggestion by the Respondent (Paragraph 3133) that such a finding would require an employee to give a qualified pregnant applicant a position although she would not be immediately available, it is our view that indeed this finding means that in those circumstances the employer would be required to offer the job.

3144 The agreed Statement of Facts spoke to the question of specific damages and the figures so stated are accepted. The Act of discrimination having been found to have taken place on or about October 1st, 1979.

3145 It was agreed during the course of the hearing that, if necessary, counsel would have the opportunity to adduce further evidence and to present additional argument, if desired, on the matter of damages as contemplated by Section 31 of the Human Rights Code.

3146 Such opportunity will be provided at a date and time to be fixed by this Board.

3147 Relief as to reinstatement to the position in question not having been sought, no such relief shall be granted.

Errol Young,
Fran Alexson and
Peter W. Glendinning
Regina, Saskatchewan
February 16, 1981

CANADIAN HUMAN RIGHTS REPORTER

SASKATCHEWAN / STATUTORY INTERPRETATION / CLASS ACTION
Board of Inquiry
Huck v. Canadian Odeon Theatres Ltd.

Volume 2. Decision 74 Paragraphs 3148 - 3155 April 20, 1981

Board of Inquiry Decision under the
SASKATCHEWAN HUMAN RIGHTS CODE
AND REGULATIONS TO THE CODE

Michael Huck
Complainant

vs.

Canadian Odeon Theatres Ltd.
Respondent

Date: January 9, 1981

Place: Regina, Saskatchewan

Before: Terrence Bekolay
Board of Inquiry

Summary: *The Complainant, Michael Huck, alleged discrimination in the provision of a service customarily available to the public against a class of persons, namely, those persons in the city of Regina who are reliant on wheelchairs. An interim hearing was held to determine whether the complaint can be maintained as a class action. Regulation 12 under the Saskatchewan Human Rights Code providing for class action was determined to be beyond the scope of the Code, specifically s. 27 of the Code.*

REASONS FOR DECISION RE INTERIM HEARING UNDER REGULATION 12 OF THE REGULATIONS TO THE SASKATCHEWAN HUMAN RIGHTS CODE

3148 The complaint of Michael Huck having been received by the Saskatchewan Human Rights Commission, and a settlement having been attempted but not reached, the Board of Inquiry was appointed by the Honourable, the Attorney General, pursuant to the terms of Section 29(1) of the Saskatchewan Human Rights Code s.s. 1979, C.s-24.1 and amendments thereto (hereinafter referred to as the code). As the complaint of Michael Huck purported to be filed on behalf of a class of persons without naming each member of the class, the Board gave notice to the Complainant, Michael Huck, the Respondent, Odeon Morton Theatres, now known as Canadian Odeon Theatres Ltd. and to the Saskatchewan Human Rights Commission that a hearing would be held in order to assist the Board of Inquiry to determine whether the complaint of Michael Huck is to be maintained as a class action, and if so, what persons constitute the class and what

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shall constitute best notice practical under the circumstances to members of the class. The hearing took place on the 9th day of January, A.D. 1981 at Regina, Saskatchewan.

3149 The Respondent raised the issue of whether or not the provisions of the Regulations that purport to permit an action to be maintained as a "class action" are intra vires the powers conferred by the Legislature of the Province of Saskatchewan upon the Lieutenant Governor in Council. The power to make regulations is found in Section 46 of the Saskatchewan Human Rights Code which reads as follows:

> "46. For the purpose of carrying out the provisions of this Act according to their intent, the Lieutenant Governor in Council or the Commission, subject to the approval of the Lieutenant Governor in Council, may make regulations that are ancillary to this Act, and every regulation made under this Section has the force of law and, without restricting the generality of the foregoing, the Lieutenant Governor in Council or the Commission, subject to the approval of the Lieutenant Governor in Council, may make regulations:
>
> (a) defining any word or expression used in this Act but not defined in this Act;
> (b) exempting persons or classes of persons from the provisions of Part II subject to any terms and conditions that the Lieutenant Governor in Council or Commission may specify;
> (c) prescribing procedures for the commencement and conduct of formal inquiries;
> (d) prescribing qualifications for guide dogs."

3150 In addressing the issue raised by the Respondent I have kept in mind the following rules of Statutory interpretation:

1. "it is always necessary to read the words conferring the power in the context of the authorizing statute. The intent of the Statute transcends and governs the intent of the regulations." E.A. Driedger, *The Construction of Statutes*, at page 199.
2. Where the power to make regulations is conferred for the purposes of the Act or for carrying out the provisions and purposes of the Act, such as is the case with Section 46 of the Code, then the purposes of the Act must be gathered from the reading of the Act as a whole and power granted in these terms are to be ordinarily interpreted as less extensive than where a specific purpose is stated by the Statute. E.A. Driedger, *The Construction of Statutes*, at page 200.
3. The plain meaning rule that is, the words are to be given their ordinary and plain meaning in the context of the Statute. E.A. Driedger, *The Construction of Statutes*, at page 27.
4. The rule in favour of internal harmony. E.A. Driedger, *The Construction of Statutes*, at page 185. In the case of this particular rule I have accepted the argument on behalf of the Complainant that this rule is logically extended to interpreting a Statute and its regulations.
5. The broad interpretation rule — that is that statutory words should be given a fair, large and liberal construction which best achieves the objects of the Act in question. Interpretation Act, R.S.S., 1978, Chapter I-11, Section 11.

3151 On an overall reading of the Saskatchewan Human Rights Code it is apparent that the Legislature intended that a class of persons as well as individuals should have specified rights and specified protection against discriminatory acts. Therefore, unless the Act in some other way negatives the general power granted in Section 46 to make regulations "prescribing procedures for the commencement and conduct of formal inquiries," then it is entirely consistent with the purpose of the Act that regulations governing the commencement and conduct of formal inquiries involving a class of persons is within the intent of the Statute.

3152 The Respondent suggested that Section 27 of the Code, which deals with the question of who may initiate a complaint, is inconsistent with Section 12 of the Regulations in that it doesn't specifically state that a complainant may file a complaint *on behalf of* a class of persons. The Section does provide that a complaint may be filed on behalf of others by a person who is not affected with the consent of persons affected. It also states that the Commission may initiate a complaint in respect of a person or class of persons. But nowhere in the Section is the general power of a person offended against to initiate a complaint on behalf of himself and others restricted. There is therefore, no inconsistency between Section 12 of the Regulations and Section 27 of the Act.

3153 The Respondent also suggested that Section 12 of the Regulations is inconsistent with Section 30 of the Code which states who the parties to proceedings before a Board of Inquiry are to be. When Section 12 of the Code is read together with subsection 30(1)(c) and subsection 30(1)(e) then one must conclude that at a minimum parties to proceedings include a class of specified persons. But can it be said that the provisions of Section 12 of the Regulations which purport to set out rules for determining that an action may be maintained on behalf of a class *without naming each member* of the class are consistent with the Code, especially Section 30(1), and therefore authorized by it? The plain meaning of Section 30(1) is an exhaustive list of entities that may be parties to proceedings before a Board of Inquiry. If the list were not meant to be exhaustive the Legislators could easily have used the words "inter alia" or something similar. Moreover, if the Legislators had intended that a class of persons as such should be a party to the action, they could have easily provided for the same by adding the words, "or class of persons" after the word person in subsection 30(1)(e). Section 30 also clearly outlines that all parties to proceedings before a Board of Inquiry are to be named, there is no suggestion that anybody may be a party without being named as Section 12 of the Regulations purports to provide for. I must, therefore, conclude that Section 12 of the Regulations is inconsistent with Section 30(1) of the Code.

3154 But if we conclude that Section 12 of the Regulations is ultra vires does that mean that the Legislators, who clearly granted rights and protections under Parts I & II of the Code to a class of persons, meant there was to be no means of enforcing those rights and protections? I think not, I think an entirely consistent interpretation of the Statute would lead one to conclude that the Legislators placed their confidence in the Saskatchewan Human Rights Commission which they had created to protect these rights and protections in respect to classes of persons. (Section 30(1)(a).)

3155 In conclusion, I rule that the Regulations, particularly Regulation 12, under the Saskatchewan Human Rights Code, to the extent that they purport to authorize the filing of a complaint on behalf of a class without naming each member of the class are ultra vires and beyond the powers conferred by the Legislature of the Province of Saskatchewan upon the Lieutenant Governor in Council.

Terrence Bekolay
Board of Inquiry
Prince Albert, Saskatchewan
February 4, 1981

CANADIAN HUMAN RIGHTS REPORTER

SASKATCHEWAN / ACCESS TO FACILITIES / PHYSICAL DISABILITY
Board of Inquiry
Peters v. University Hospital, Saskatoon

Volume 2, Decision 77 Paragraphs 3193 - 3250 April 20, 1981

Board of Inquiry Decision and Order under the SASKATCHEWAN HUMAN RIGHTS CODE

Yvonne Peters
Complainant

vs.

University Hospital, Saskatoon
Respondent

Date: March 6, 7 and 19, 1980

Place: Saskatoon, Saskatchewan

Before: Peter W. Glendinning
Chairman, Board of Inquiry

Appearances by: Myron Kuziak, Counsel for the Saskatchewan Human Rights Commission
Tom Gauley, Counsel for the University Hospital

Summary: *The Respondent's objection to the board of inquiry is dismissed. Although legislation which was in place when the complaint was filed did not provide for a board of inquiry, the former legislation was administered by the Human Rights Com-*

mission which had essentially the same processes and powers as the board of inquiry has under the present Code.

The Complainant is a blind woman with a guide dog. She alleged discrimination under the Human Rights Code when she was told that, when accompanied by her dog, she could not have the same access as other visitors to the hospital wards. The board ruled that the hospital has the right to impose certain restrictions on visitors, however, it is a public facility and must justify such restrictions. The reasons given for refusing admittance to the guide dog are not sufficient to justify treating blind persons differently from other members of the public. The Complainant's allegation of discrimination is upheld by the board.

DECISION

3193 At the outset objection was taken by counsel for the Respondent as to the jurisdiction of this Board of Inquiry to hear the inquiry. Having made his argument with respect to the objection, counsel for the Respondent graciously consented to having the hearing proceed without requiring a decision as to the rather complex jurisdictional issue which he had raised. It is noted that in future hearings of this nature, an effort ought to be made by the Board to ascertain whether such procedural objections are to be taken in order that the opportunity would be afforded each counsel to first deal with such matters, if possible, prior to the commencement of the actual hearing, that is, the calling of evidence and presentation of argument.

3194 Mr. Gauley effectively argued that this complaint ought to be dealt with by way of procedures in place at such time as *The Saskatchewan Human Rights Commission Act*, now repealed, and *The Blind Persons Rights' Act*, 1978, were in force; and as a consequence this tribunal is without jurisdiction to hear or adjudicate upon the issue since its authority arises under the terms of the "new" Human Rights Code.

3195 In sum, it is the Respondent's position that the University Hospital has a right to a hearing under the provisions of the former legislation, and that that enactment is the only vehicle available whereby an award for this complaint can be made. It is argued that the changes made by way of the Human Rights Code are not procedural, but are substantive.

3196 Counsel for the Commission stresses that at the time the complaint was lodged the Human Rights Commission had authority to administer *The Blind Persons Rights' Act* by virtue of Section 8 of *The Human Rights Commission Act*, and by way of Order-in-Council, 1572/78, October 31st, 1978, Gazetted, November 10th, 1978. This Order-in-Council assigned administration of the former Act to the Human Rights Commission. The authority of the Lieutenant-Governor-in-Council to make such an assignment has not been questioned. Mr. Kuziak hence takes the position that if there is any "right" of the Complainant by virtue of laying the complaint, then it is accrued and the legal proceeding proceeds as if the Act had not been repealed.

3197 As to the question of jurisdiction the facts are as follows: On December 20th, 1978, Yvonne Peters filed a complaint with the Human Rights Commission. By Order in Council 1572/78 dated October 31st, 1978, the Lieutenant Governor in Council had given the Commission jurisdiction over *The Blind Persons Rights' Act*, Section 8 of *The Human Rights Commission Act* stated that where any Act was administered by them they "shall inquire into the complaint of any person that an infringement of or an attempt to infringe a right under an Act administered by the Commission . . . has taken place . . .". Therefore, at the time this complaint was laid before the Commission the Commission was administering the Act and had the duty to investigate the alleged infringement. *The Blind Persons Rights' Act* and *The Saskatchewan Human Rights Commission Act* were both repealed on August 7th, 1979, when the Saskatchewan Human Rights Code came into effect. On October 2nd, 1979 the Commission wrote the Minister requesting that a hearing be held with regard to the above complaint. The Minister then appointed a Board of Inquiry under Section 29 of the Human Rights Code.

3198 In presentation of his argument, Mr. Gauley relied upon the decision in *Bell Canada vs. Palmer* (1973) F.C. 982 (Trial Division — Federal Court) upheld at (1974) F.C. 186 (Appeal Division). Indeed, both parties relied upon this case in support of their argument, in the *Bell Canada* case the *Female Employees' Equal Pay Act*, 1956, Chapter 38 provided that any person claiming to be aggrieved because of a violation of the Act could complain to the Minister who might refer the matter on to the Fair Wage Officer and if the matter could not, then, be settled, it would go to a referee. This referee was in a position to make any order he felt appropriate, including remuneration. The Act was repealed effective July 1, 1971 by a statute which replaced it, but did not provide for the reference of disputes to a Fair Wage Officer and a referee. The new Act restricted enforcement of the equal pay provisions to summary conviction procedures.

3199 On November 26th, 1970 two women employees of Bell Canada complained of a grievance and the complaint was referred to a Fair Wage Officer. He was unable to settle the matter and on February 23rd, 1973 the Minister referred the complaint to a referee. Bell Canada applied for a Writ of Prohibition. The Writ was refused having regard to Sections 35(c) and sub-section (e) of the *Interpretation Act of Canada*, since the court found that there were acquired rights by the Complainants under the repealed statute. In dealing with this matter at trial, Mr. Justice Heald noted, at page 985, that:

> "A comparison of the provisions enforced after July 1st, 1971 with those enforced prior thereto makes it obvious that the Enforcement Procedure provisions of Section 6 of the old Act have disappeared and are not present in the new legislation."

3200 Mr. Justice Heald further noted that at the time of the repeal of the Act, the Complainants had acquired and accrued a substantial right under the provisions of the Act, and that they had a right to an ongoing inquiry and investigation. He went on to note that the referee appointed by the Minister in this case continued to have jurisdiction because of Sections 35 and 36 of the *Interpretation Act of Canada*.

3201 On appeal the appeal division of the Federal Court upheld the finding of the trial division and itself relied upon Section 35(c) and (e) of the *Interpretation Act of Canada* and stated that the rights acquired by the Complainant under the repealed statute were preserved. Mr. Justice Thurlow noted that the procedure under the old Act had been that if the Fair Wage Officer was unable to effect a settlement the Minister referred the matter to a referee who was to inquire into the matter and decide it. The new Act made no provision for the ordering of payment of any difference in pay, and provided nothing resembling the authority to order remuneration that the referee had originally. Mr. Justice Thurlow agreed that the Complainants had an accrued right at the time of the repeal of the first Act, and he felt that Section 35 of the *Interpretation Act of Canada* applied to preserve both a substantive right and the obligation and the procedure to enforce them.

3202 In considering Section 35 and 36 of the *Interpretation Act of Canada* together, Mr. Justice Thurlow stated that:

> "There was in my view a repeal to which Section 35 applies and has effect save to the extent that a substitution for the repealed enactment may bring into play the provisions of Section 36. . . . The effect of this, as I read it, if it has any application to the present situation, though I do not think that it has is that the proceeding already commenced under the repealed enactment is to be carried on in conformity with the new enactment so far as it may be done consistently with the new enactment, but as there is no like proceeding provided for by the new enactment there is no alteration to the procedure required to carry it on consistently with the new enactment."

3203 The question under consideration is whether the Complainant has an accrued right which continues at the time the legislation is repealed, and whether new legislation substitutes procedures which enable the enforcement of the right to continue in a manner not inconsistent with that right as it then exists, or which does not limit the exercise of that right.

3204 In the matter of *Eisener* vs. *Minister of Lands and Forest* (1975) 10 N.S.R. (2nd) 160 (N.S.S.C. Appeal Division) land was appropriated on November 10th, 1971. In May of 1974 the owner of the property applied to a judge under provisions of *The Expropriation Procedure Act* for a hearing date to determine compensation. The hearing was set for September, 1974.

3205 On June 20th, 1974, *The Expropriation Act, 1973* was proclaimed which Act repealed *The Expropriation Procedure Act*. The new Act provided that compensation questions were to be determined by a new Board rather than a Judge as provided in the repealed Act. Upon the reference the Judge held he did not have jurisdiction to determine the compensation because of the new Act. On appeal, the decision of the lower court Judge was set aside.

3206 The Court looked at Section 22 of the Nova Scotia *Interpretation Act* which is similar to Section 23(1)(e) of the *Saskatchewan Interpretation Act*. The Court also gave consideration to Section 22(3)(c) and (d) of the Nova Scotia *Interpretation Act* which is similar to the *Saskatchewan Interpretation Act*, Section 23(2)(c) and (d). It was noted that these last two clauses showed that a proceeding must be continued in conformity with any new procedural provisions in the substituted Act *which can be adapted to it*. They found here that the new procedural provisions to be used in front of a Board could not be adapted to a proceeding before a Judge. At page 169 of his Judgment, Chief Justice MacKeigan stated the following:

> "I do not think that Section 36 of the new Act which would assign the parties to an entirely different tribunal is a provision establishing 'procedure' which can apply to an existing 'proceeding.' It directs that cases to which it applies be carried out by an entirely different type of proceeding before a different tribunal with different rights of appeal."

3207 As a consequence, the Applicant was allowed to have his hearing for compensation determined under the old Act.

3208 One further case is worth noting, that of *R. vs. MacDonald* (1973) 4 N.S.R. (2nd) 190 (N.S.S.C. Appeal Division), in which an accused was convicted on a charge of impaired driving contrary to Section 222 of the 1953-1954 Criminal Code. The old Code was repealed before the date of the accused's trial and replaced by Section 234 of 1970 Criminal Code. The accused appealed his conviction arguing that there were no transitional provisions included in the new Code and in the absence of such transitional provisions there was a gap which deprived the Court's jurisdiction to put him on trial.

3209 Crown counsel argued that transitional provisions are to be found in the *Interpretation Act*, R.S.C. 1970, Chapter I-23 in Section 26(c) and (f) which are similar to our Section 23(2)(c). Mr. Justice Cooper at page 197, in referring to Section 36(c) found that the effect of that clause was that the charge laid under Section 222 of the 1953-54 Code is to be continued under the 1970 Code. In order that the provisions of the 1970 Code were in substance the same as those of 1953-1954 Code, therefore the 1970 Code does not operate as new law, but must be construed and has effect as a consolidation of the law in the 1953-54 Code.

3210 It ought to be noted that in reaching this decision he also relied upon sub-section (f) of Section 36 which is not to be found in the Saskatchewan *Interpretation Act* but which is a Section stating that the repeal in substitution effects the consolidation and is declaratory of the law as contained in the former enactment except where inconsistent. However, it ought to be noted that this is basically what is the presumption stated at common law as found in the cases, *Trans-Canada Insurance Company and Winter* (1935). S.C.R. 184 and *Regina* vs. *Parrot* (1967) 52 WWR 235 which state that where an enactment is repealed and replaced the new enactment is retrospective so far as it is a repetition of the former enactment. For ease of comparison I have made a chart as to the former and new legislation, for those areas germane to this inquiry. It is obvious that the two pieces of legislation are very similar.

Saskatchewan Human Rights Commission Act	**Saskatchewan Human Rights Code**
Section 10(1) is the same as	Section 29 (1)
Section 10(2) is now covered by	Section 14(4) of the Regulations
Also, the restriction against proceeding by certiorari, etc., under the old Act is not to be found in the new Code.	
Section 10(3) is now repeated in	Section 31(1)
Section 10(4) is now repeated in	Section 31(2)
	Section 31(3) is a new provision, but deals entirely with matters of evidence which are matters of procedure and could have been covered in the old Act in section 10(3).
	Section 31(4) is a new section, however, this is how proceeding normally were run under the old Act — with counsel for the Commission representing the complainant.
Section 10(5) is now repealed in provisions	Section 31(5), (6) and (7). The only change would be that section 31(7) now speaks of "a balance of probabilities" which phrasing is not found in the old legislation, however, I suggest this has to have been the test used under the old legislation or, if not, then the Board will have to proceed under the old onus.

Section 12 allowed for appeal to the Court of Queen's Bench from a decision of the Commission. It also noted that there was no appeal from the decision of the Court of Queen's Bench

Section 32 of the new *Code* allows the same provisions with regard to appeal and further allows that the court of Queen's Bench decision may be appealed to the Court of Appeal. Thus, under the new Act, no accrued right is lost, but indeed a new right is gained.

As well, *The Interpretation Act* for Saskatchewan, specifically Section 23(1)(c) and (e) and Section 23(2)(c) and (d) reads as follows:

> "23. (1) Where an Act or enactment is repealed in whole or in part or a regulation revoked in whole or in part, the repeal or revocation does not:
>
> (c) affect any right, privilege, obligation or liability acquired, accrued, accruing or incurred under the Act, enactment or regulation so repealed or revoked;
>
> (e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment;
>
> and the investigation, legal proceeding or remedy may be instituted, continued or enforced and the penalty, forfeiture or punishment imposed as if the Act, enactment or regulation had not been repealed or revoked.
>
> (2) Where an Act or enactment is repealed in whole or in part or a regulation revoked in whole or in part and other provisions are substituted therefore:
>
> (c) every proceeding taken under the Act, enactment or regulation so repealed or revoked shall be taken up and continued under and in conformity with the provisions so constituted, so far as consistently may be;
>
> (d) in the recovery or enforcement of penalties and forfeitures incurred and in the enforcement of rights, existing or accruing under the Act, enactment or regulation so repealed or revoked, or in any proceedings in relation to matters which have happened before the repeal or revocation, the procedure established by the substituted provision shall be followed so far as it can be adapted;"

3211 These sections are similar to the Sections relied upon in the *Bell Canada* case, Sections 35 and 36.

3212 Having regard for the cases cited by counsel, and those reviewed here, it is clear that the processes and powers of the Commission and latterly, the Board are for all intents and purposes, the same. In such a situation it is difficult to ascertain what substantive right of the Respondent, or for that matter of the Complainant, is jeopardized.

3213 In reading Section 23(2)(c) and (d) these two provisions clearly overlap — subsection (d) deals more directly with procedural matters and subsection (c) deals more with the actual form. It is logical therefore that these be read to provide that proceedings taken under a repealed Act are to be continued under the new Act and that the enforcement of rights is to be followed through substitute proceedings, "so far as it can be adapted."

3214 In light of this, and with particular regard for the *Bell Canada* case it is apparent that if the new forum and the proceedings are consistent with the exercise of the accrued right of the former legislation, then the new format is to be followed insofar as it is not inconsistent with the proceedings provided in the old Act.

3215 The accrued right in view of the legislation discussed earlier would not be substantially altered by the new procedures and hence this Board is considered to have the authority to hear and adjudicate on the issue.

3216 In this matter the Complainant, Ms. Yvonne Peters, a blind person, while visiting her father-in-law in the University Hospital in Saskatoon was questioned as to the presence of her guide-dog in the patient's room. Although she and the dog were eventually allowed to remain, she was later advised that in the future she would be required to call and obtain permission to enter the hospital wards in company with the dog. This latter advice was later defined to provide that she could wait in the lobby area with the dog while permission was sought from administrative staff as to her ability to have the dog in her company while visiting in the hospital.

3217 There were no issues as to the qualifications of the dog in question to bring it within the scope of the Act.

3218 It is argued that these circumstances create two acts of discrimination, specifically:

> (i) Discrimination against a blind person with respect to the accommodation, services or facilities available in any place to which the public is customarily admitted by reason only of the fact that the blind person is accompanied by a guide dog, which discrimination occurred on December 17th, 1978, in the University Hospital by virtue of differential treatment accorded to Yvonne Peters as a hospital visitor, such differential treatment including intimidation and threats of eviction, resulting in adverse consequences to Ms. Peters, including embarrassment, humiliation and emotional upset. Another way of characterizing the episode would be to see it as an attack upon her dignity, and
>
> (ii) Discrimination with respect to or a denial of the said accommodation, services or facilities on December 17th and December 18th, as well as thereafter, by the advice of the University Hospital to Ms. Peters that she must not return with her dog without calling in advance to obtain permission, and the advice at a later time, amending the admission policy by permitting her to attend at the lobby-reception desk without telephoning in advance, but still requiring her to await permission from the hospital administration to the intended visit.

3219 The Respondent takes the position that its actions simply do not constitute a breach of the Human Rights Code since Ms. Peters in the first instance was allowed to continue her visit with the dog present, and was never denied access to the hospital for reason of her reliance upon a dog guide.

3220 At the conclusion of the hearing counsel for the Commission applied for an amendment of the original complaint in order that it conform with the evidence called during the course of the hearing. I am prepared to accept the amendment and hence find that the alleged act of discrimination was constituted by the actions of the hospital personnel in questioning Ms. Peters as to presence of the dog on her initial visit and further by the delineation of policy with respect to Ms. Peters as to what she would, in future, be required to do should she wish to enter the hospital accompanied by dog guide.

3221 The fact that the hospital never in fact denied access by Ms. Peters in company with her dog, to the hospital facilities is not significant. The questions which arose, and

more specifically, the statement of policy with respect to her dog guides and all dog guides in general, amount, in effect, to placing a sign in a window indicating that persons with "dog-guides" will be dealt with in a manner different in certain respect than other persons not so accompanied.

3222 The issue then becomes, was this Act such as to bring it within the scope of the Human Rights Code and therefore constitute a breach of that legislation?

3223 Mr. Gauley on behalf of the University Hospital takes the position that its actions were not in breach of the Code since visiting privileges at this hospital, as in most if not all hospitals, do not place the institution within the category of facilities "to which the public is customarily admitted." In other words, that this is not a facility which the public is invited as a matter of course to use and enjoy for the specific reason that all visitors to the hospital are at all times subject to restriction by the hospital if admission of such persons would conflict with the hospital's ability to fulfill its primary obligations to the care of its patients.

3224 He cites the Supreme Court of Canada decision in the case of *Gay Alliance toward Equality* vs. *Vancouver Sun* (1979) 97 D.L.R. 577 in support for the definition of such facilities and cites Mr. Justice Martland at page 590:

> "Accommodation refers to such matters as accommodation in hotels, inns and motels. Service refers to such matters as restaurants, bars, taverns, service stations, public transportation and public utilities. Facility refers to such matters as public parks and recreational facilities. These are all items customarily available to the public."

3225 He further outlines the procedures which have been set down to apply to visitors upon their attendance at the hospital and while it is recognized that many visitors violate these provisions, or to put it another way, the provisions are not strictly enforced, in his words "the fact remains that the regulations and restrictions are still part of the hospital's policy which applies to all visitors. Administrative problems with enforcement do not justify the elimination of the rules themselves."

3226 I have considered the definitions provided by counsel for each party as to "facilities" and "services." It is my view that the inclusion of the expression "to which the public is customarily admitted," means simply that. The circumstances surrounding the particular situation must be examined and a determination made if in those circumstances the facility is one to one, to which the public is customarily admitted. I fully appreciate that in fact the University Hospital does provide for procedures which it hopes would be followed by persons visiting its facilities, namely that they first confirm the location of the person to be visited at the information desk and determine whether in fact any restrictions have been placed upon access to that patient. However, such is not the practice and indeed it is customary for the public to have virtually free admission through the lobby of the hospital into the wards of the facility. Certainly this is the operative point — by the practice of the University Hospital the public is customarily admitted and in this regard I find that the University Hospital constitutes a facility which brings it within the scope of the provisions of the Human Rights Code with respect to this Inquiry.

3227 The hospital further argues that if a denial of access is found by this Board that such a denial was not based *solely* on the fact that the person was accompanied by a guide dog; rather denial of access was based upon the policy of the hospital as part of its overall policy which is motivated by an attempt to achieve an acceptable level of patient care — in other words, that consideration ought to be given to the broad policy basis for such a restriction and in turn, as Mr. Gauley states, that such human rights legislation ought to be interpreted under a common sense approach with a view to the public policy behind the Code.

3228 In support of this contention Mr. Gauley cites the case of Ontario Human Rights Commission and *Bannerman* vs. *Ontario Rural Softball Association* (1979) 10 R.F.L. (2nd) 97 in which the Ontario Court of Appeal, and specifically Weatherston, J. A. stated that at page 115:

> "This section is one of several in the Code which seek to govern social behavior in accordance with modern notions of human rights by giving effect to the policy in Ontario (which the Code recites in its preamble) that every person is free and equal in dignity and rights without regard to race, creed, colour, sex, marital status, nationality, ancestry or place of origin. Because it is intended to give effect to public policy, the Code should not be interpreted in a narrow and pedantic way; on the other hand it should not be given such a broad interpretation as to offend the common sense. It should be so construed that its application to have given set of circumstances should not depend on the tolerance of the enforcement officials (as was suggested by Counsel) or the good sense of all members of the public."

3229 This matter dealt with a case of sexual discrimination in which the question was whether or not girls would be allowed to play on teams within a specific League. The court found that the facts indicated a discrimination on the basis of sex but suggested that in fact they were entitled to consider the broader policy basis for placing such restrictions on the League. Further in his Judgment Mr. Justice Weatherston indicated, at page 120:

> "Where, as here, there is a manifest attempt to achieve fairness and competition amongst teams in the several series and where, to achieve that end, some discrimination because of sex is inevitable, I do not think it an offence if sex is merely one of the general criteria for dividing players amongst several series. The real reason for the separation of boys and girls is overall fairness. It is not sufficient to show that in a particular case sex is not a relevant criteria."

3230 I have been persuaded by Mr. Gauley's arguments and I do believe that in fact decisions in matters of this nature must give consideration to common sense or to put it on a slightly higher level, the question of the public policy behind such legislation as the Code.

3231 It is therefore the latter argument by counsel for the Respondent which has posed the most difficulty to myself in arriving at a conclusion with respect to the circumstances outlined during the presentation of evidence. This argument is founded on the principal that the hospital has a right to restrict visitors so as to preserve its ability to provide proper conditions for its patients although such restrictions may interfere with the rights of individuals seeking access to those patients. But the question does not end at this point — it must also be considered as to whether the hospital in exercising its right has done so in a manner so as to discriminate against certain groups or classes of individuals.

3232 At this point it ought to be stated that the evidence, and argument, has effectively established that each party to this issue has significant rights and obligations, and that each sincerely holds its views of its rights for equally valid reasons. The difficulty which arises is that these mutually held rights

and obligations have been brought at the direct confrontation in the circumstances outlined in the evidence.

3233 It is impossible to duplicate at this time the very real impression which has been left with me by the testimony of Ms. Peters except to say that her evidence was an education in itself as to the reasons that rights to persons in her situation are enshrined in human rights legislation. Equally impressive was the testimony presented by the Respondent in support of its position which appeared as a party with no intention whatsoever to discriminate, attempting to be sensitive to the rights of persons such as Ms. Peters and seeking only to balance its rights and obligations with a concern for Ms. Peters' situation.

3234 Therefore this matter becomes not simply a question as to whether public accommodation, and the hospital has been so found to fall within this definition, has been denied to an individual, but rather a question of whether such a facility can place its rights and obligations above those of the particular individuals with whom it is dealing. Which right is to be considered paramount? Is the right of Ms. Peters to function, as she is accustomed and entitled to, without restriction, to be considered superior to the right of the Hospital to protect the patients entrusted to its care?

3235 It would be a simple matter to determine that the Hospital has acted properly, and with sensitivity, and that consequently Ms. Peters insistence upon her rights, or the rights of any general member of the public to gain access cannot be given precedence over the Hospital's obligation. It would be easy to determine that Ms. Peters would suffer no great harm by being assisted, without the company of her guide-dog to whichever ward she chose to visit. However, this quite clearly is the point. In such a circumstance she would be treated differently or as she has so aptly expressed it, "feel blind."

3236 It is further clear on the basis of the evidence that the Hospital's chief concern in this matter, albeit sincerely held, has been for the impact which Ms. Peters' dog may have if allowed on the wards, either from a sanitary or emotional point of view.

3237 In such an instance a line must necessarily be drawn no matter how difficult the intent. Furthermore, such a procedure must be continually assessed, for once such a demarcation has been made, it is not sacrosanct — it is a process which must be continually under review.

3238 This is not to suggest that rights in themselves may vary, but the application of rights vis à vis other rights, must be continually under consideration. By way of illustration, the strict provision of rights of due process are historic, and fundamental to our society, yet to impose these with such rigidity as to allow individuals their freedom from proper judicial process must continually be under consideration if the result imposes on other deprivation of their rights to walk freely within that society without fear of molestation.

3239 In the same way assessment must now be made as to whether the Hospital has properly balanced its rights with the rights afforded to Ms. Peters.

3240 There can be no doubt that the Hospital has a right to ensure the objectives of its operation, and although it has been determined to be a public facility within the meaning of the Code its very objectives enable it to justify, at certain times, and for certain reasons, the imposition of restraints on all persons who have access to its facilities. Indeed, all meaningful freedoms in today's complex society involve the imposition of restraints at some stage, since the restraint of one man in one respect is the condition of the freedom of other men in that respect. This is precisely the dilemma — which restriction and which freedom, is to prevail?

3241 It is appropriate to consider the Hospital's exercise of its rights insofar as all individuals are concerned, whether sighted, blind or blind in company with guide dog. Clearly, the Hospital, through its practices has established a policy which differentiates between Ms. Peters and sighted persons, or indeed other blind persons without a guide dog. It is accepted that visiting privileges are indeed a privilege and the Hospital is entitled to restrict these privileges in the interest of its operation and for the security of its patients. However, when the Hospital does not provide such restrictions in uniformity it risks placing itself in a situation in which such restrictions on particular classes of individuals can be seen as nothing other than discrimination of that particular class.

3242 A great deal of evidence has been called by each party as to the risk incurred by the introduction of a guide dog into hospital facilities. It is my view that in an ideal situation the risk of infection which is created by such a circumstance are desirable to avoid by such institutions as the University Hospital but it has been further established that such ideal situations would necessarily preclude the introduction of most, if not all, human visitors. I can find no basis for which to consider guide dogs as being a more serious risk to a hospital environment than individuals allowed free access to such facilities directly from the street. Clearly, the legislators were fully aware of the care, breeding and conditions afforded guide dogs and from this point of view felt satisfied that facilities which provided access to the public would be placed at a risk which was worth accepting in order to preserve the rights of individuals so accompanied.

3243 As to the possibility that a phobia or fear of the animal by certain patients might be exhibited, this is indeed a matter for concern, but again no more concern ought to be expressed in this particular instance than a concern with the equal risk that such a situation may prevail with respect to customers in restaurants, theatres or other facilities to which access is given by the public. Such a possibility exists in those instances, and it exists here, but again clearly that risk has been legislated to be determined in favour of the individual relying upon the guide dog — a difficult but appropriate decision — whether the facility be a hospital, restaurant or theatre.

3244 The situation is actually quite straightforward — the Hospital has chosen, out of concern for the impact which the dog may have, to place Ms. Peters in a category distinct from other members of the general public. Having accepted that the dog bears no significant degree of higher risk than other members of the general public the position of the Hospital can only be accepted if the precautions required of Ms. Peters in company with the dog were required in turn of all visitors. Only in such circumstances when such precautions were applied uniformly and in such instances that the precautions could not be physically taken with respect to the guide dog, could there be said to be no form of discrimination.

3245 Through its behavior and the establishment of its policy the Hospital has differentiated between Ms. Peters and sighted persons, or blind persons without guide dogs — this lack of uniformity in the application of its regulations is suffi-

cient to establish that the Hospital has discriminated against Ms. Peters insofar as her admission to its facilities as a visitor is concerned. Since such behavior is declared inappropriate by the Code, the Hospital is found in breach of that legislation.

3246 It should be noted that Ms. Peters has taken the position that the restrictions upon her ought to be left to her common sense and good judgment. With this concept I cannot agree. To accept this proposition would be moving from one extreme to another. The problem in this instance arises through a lack of uniform application of restrictions upon members of the general public of which Ms. Peters accompanied by her guide dog are one such member. To leave the scope of necessary restrictions to the common sense of members of the general public is not acceptable any more than it would be appropriate to leave the interference with the rights of such individuals to the benevolence of the individuals responsible for enforcement. Therefore had the Hospital established procedures which applied to, and were practiced with respect to, each and every member of the general public Ms. Peters would have no quarrel. If Ms. Peters in company with the guide dog were to be stopped and forbidden entrance to certain areas of the Hospital, and were similar restrictions to be placed upon all other members of the general public seeking such admission, there could be no proper complaint. Such is not the case in this matter.

3247 I therefore find that the complaint is justified and that the Hospital is in breach of the Human Rights Code for the Province of Saskatchewan.

ORDER

3248 As to the question of damages the Commission, without seeking to set a precedent, has deferred the damages sought to the Complainant, Ms. Peters. The evidence convinces me that should the Hospital practice the policy which it has established its impact upon Ms. Peters and persons in her situation could well be significant. It must be borne in mind that in fact no actual deprivation occurred although the actions were discriminatory.

3249 Furthermore, consideration must be given to Ms. Peters herself who is an extremely capable and independent person. I have no doubt that her involvement with the guide dog provides her with a good deal of her independence but I cannot find that the circumstances in this matter have created undue emotional stress upon Ms. Peters which would call for a significant monetary award in her favour.

3250 In addition, upon consideration of the view held by the Hospital, which was an action taken without malice nor intent to discriminate without justification, I am prepared to award nominal damages to Ms. Peters in the amount of One Hundred ($100.00) Dollars.

Peter W. Glendinning
Chairman, Board of Inquiry
Regina, Saskatchewan
February 13, 1981

CANADIAN HUMAN RIGHTS REPORTER

SASKATCHEWAN / SERVICES / DISABILITY
Board of Inquiry
Michael Huck v. Canadian Odeon Theatres

Volume 2, Decision 114 Paragraphs 4728 - 4743 October, 20, 1981

Board of Inquiry Decision under the
SASKATCHEWAN HUMAN RIGHTS CODE

Michael Huck

Complainant

vs.

Canadian Odeon Theatres Ltd.

Respondent

Dates:	August 5, 1981 and September 14, 1981
Place:	Regina, Saskatchewan
Before:	Terrence Bekolay
Appearances by:	M. Woodard, Counsel for Michael Huck and the Saskatchewan Human Rights Commission D.K. McPherson and J. Busse, Counsel for Canadian Odeon Theatres

Summary: *The Board of Inquiry rules that Canadian Odeon Theatres provided a service in a discriminatory manner when it required Mr. Huck, who relies on a wheelchair, to view a movie from in front of the front row of seats.*

Since the theatre was constructed prior to the introduction in 1979 of the new Saskatchewan Human Rights Code, the Respondent argued that the provisions of the Code protecting disabled persons should not apply. The Board of Inquiry rejects this argument, ruling that the rights of disabled persons to accessible services are protected from the date of proclamation of the Code and are not determined by the date of construction of the building.

After a subsequent hearing, the Board provides a directive to the parties outlining the remedy it intends to order so that the parties may address the matter of whether the remedy will impose an 'undue hardship' upon the Respondent.

4728 On February 10, 1981 the Board of Inquiry having given all parties to the matter adequate notice of its intention to do so, held a formal inquiry into the complaint of Michael Huck, living at No. 46 - 702 Sangster Blvd., in the City of Regina, in the Province of Saskatchewan, against Odeon Morton Theatres Limited (amended to read Canadian Odeon Theatres Limited), of 364 Smith Street, in the City of Winnipeg, in the Province of Manitoba and Coronet Theatre, of Albert Street and 11th Avenue, in the City of Regina, in the Province of Saskatchewan, on grounds of discriminating against a person and/or a class of persons with respect to accommodation, services or facilities to which the public is customarily admitted or which are offered to the public because of that person and/or class of persons physical disability in violation of Section 12(1)(b) of the Saskatchewan Human Rights Code. The Board of Inquiry, having ruled by its decision of February 4, 1981 that the regulations, particularly Regulation 12, under the Saskatchewan Human Rights Code, to the extent that they purport to authorize the filing of a complaint on behalf of a class without naming each member of the class and to the extent that they purport to make a class of persons a party to the proceedings before a Board of Inquiry, are ultra vires and beyond the powers conferred by the Legislature of the Province of Saskatchewan upon the Lieutenant Governor in Council, the inquiry proceeded as a complaint by Michael Huck on his own behalf.

THE ISSUE:

4729 The issue before this Board of Inquiry is whether or not the Respondent discriminated against the complainant, Michael Huck, with respect to the accommodation, services or facilities to which the public is customarily admitted or which are offered to the public, because of the physical disability of the complainant?

FACTS:

4730 The parties submitted the following agreed statement of facts to the Board:

> "The Respondent is lawfully prohibited because of the danger of fire from permitting wheelchairs to be left in the aisles in the theatre by which patrons gain ingress or egress to or from any of the theatres in the Coronet Theatre."

4731 All witnesses called before the Board of Inquiry were extremely credible and the Board accepts the testimony given. There is no significant dispute as to the facts separate and apart from how those facts should be categorized. On May 16, 1980, the Plaintiff arrived at the Coronet Theatre, located at the corner of Albert Street and 11th Avenue, in the City of Regina, in the Province of Saskatchewan and operated by Canadian Odeon Theatres Ltd. The Theatre had been built some time prior to June 15, 1979, on which date the Theatre opened for business. The Theatre had been built in conformity with all requirements of the law in respect to the physically handicapped as they existed prior to June 15, 1979. The Theatre was built so that a person in a wheelchair might gain entrance from the street, to the wicket for purchasing tickets, to the washrooms and their facilities and to the three Theatres in the building without significant difficulty. On the date in question the Complainant did gain entry and purchase his ticket, and gain entry to the Theatre in which the movie he wished to view was to be shown without difficulty. But, as the Theatre was constructed so that with the exception of aisleways and a space immediately in front of the screen, all of the floor is occupied with seats fixed to the floor, the Complainant was compelled to view the movie from in front of the front row of seats. It is to this fact the Complainant takes exception. It is his complaint that his not having a choice of space from which to view a movie is an act of discrimination against him in violation of the Saskatchewan Human Rights Code. He also made reference to the provision for fire exits at the front of the Theatre not being wheelchair accessible. The Respondent suggested that perhaps the complainant was not physically reliant upon a wheelchair but simply had a preference to stay in his wheelchair. Given that the complainant testified that he cannot walk across a room without the aid of his wheelchair, and given the Board's opportunity to observe the complainant, the Board concludes without reservation that the complainant is physically reliant on a wheelchair and is therefore a person who has a physical disability and whom section 12 of the Code intended to prohibit discrimination against.

ISNN 0226-2177 Cite: C.H.R.R. D/521

THE RETROSPECTIVITY QUESTION:

4732 The Respondent invites the Board of Inquiry to conclude that the Code is not of retrospective effect and therefore the Board does not have jurisdiction to find any act based on an event prior to the coming into force of the Act to be an act of discrimination. In so doing the Respondent suggests that the event addressed by the Act is the construction of the Theatre which clearly took place before the coming into force of the portions of the Code relevant to this matter. The Board does not accept the proposition that the event addressed by the Act is the construction of the Theatre. The Code is not a building code. The object of the Human Rights Code is to protect certain rights for individuals and to protect members of minority groups from discrimination because of their status as a member of a minority group. The event addressed by Section 12 is the attempt by a member of a minority group to make use of accommodation, services or facilities to which the public is customarily admitted or which are offered to the public and the denial of such use or the providing of such accommodation, services or facilities for that member of the minority group in a manner that is different from the manner in which the accommodation, services or facilities would be provided to other members of the public who are not members of the minority group. Thus, in this particular case the event addressed by the legislation is the attendance by Mr. Michael Huck, a member of a minority group protected by the Code, at the Coronet Theatre on May 16, 1980. There is therefore no need in the Board's mind to consider the question of retrospectivity as the Code is not attaching new consequences to an event that occurred prior to its enactment but is addressing an event that occurred well after its enactment and will continue to occur on any occasion when a person who is physically handicapped attends the Coronet Theatre and wishes to sit anywhere other than in front of the front row of seats.

4733 Further, although the Board concludes that the Code adversely affects antecedently acquired property rights of the Respondent, this in itself is not sufficient to lead to the conclusion that the Code is necessarily retrospective in its operation. (The issue of affect on prior existent property rights will be addressed in more detail below). Thirdly, as indicated the Code is brought into operation not by the fact situation of the physical structure of the building but by the attendance of a member of a minority group and his/her request for services etc. and the consequent response of the person offering the service etc.

PRESUMPTION AGAINST INTERFERENCE WITH VESTED RIGHTS

4734 The Respondent argues in the alternative that the Board must, given the vested property rights of the Respondent and the ambiguity of the statute with respect to intention to affect the prior vested rights of property owners, apply the judicial "presumption" that the legislature did not intend that the statute should empower the Board to interfere with or alter an existing right to enjoyment of property, and particularly, the Respondent's right to its enjoyment of its property. The Respondent was very helpful in presenting the Board with the rules of statutory interpretation in respect to interference with vested rights. In *City of Calgary* vs. *Reid and Vincent* (1958), 27 W.W.R. 193, 17 D.L.R. (2d) 198 (Alta. C.A.), Egbert, J. (at trial) stated the rules as follows:

> "At common law a man was free to use his land and buildings as he pleased, so long as he was committing no crime, and so long as he was not creating a nuisance. That common law right is a right that is not to be taken away except by clear, unambiguous words in a statute created by a competent authority."

And in *Prevost Investments and Development Ltd.* v. *Government of Prince Edward Island* (1977), 76 D.L.R. (3d) 659 at 662-3 (P.E.I.S.C.), McQuaid, J. stated:

> "This is legislation which relates directly to the use and enjoyment of private property, a right which is firmly entranced in the common law.
>
> . . .
>
> The concept of the right to the use and enjoyment of private property is recognized in Canada, as expressed in the Canadian Bill of Rights:
>
> > "1. (a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;"
>
> This is not to say, however, that, by due process of law, that right to enjoyment of property cannot be restricted and prescribed by the Provincial Legislature, which is sovereign in the field, provided that it is done in clear, concise and explicit terms, and that the intent of the Legislature in so doing be unambiguous. That the Courts have always examined closely, and construed strictly, legislation which purported to circumscribe the right of the individual to the use and enjoyment of that which is his, is clearly set out in a long line of authoritative cases."

4735 In order to meet the objects of the statute and enforce its provisions one must draw the inference that the Legislature intended to interfere with vested property rights. To conclude that vested proprietory rights were not to be interfered with would defeat the objects of the Act. For example, is a landlord who owned his apartment block prior to the proclamation of the Code to have the right to discriminate against any person because he is a member of any of the minority groups protected by the Code? The unavoidable conclusion one must reach on reading the code is "no". Further, a legislative intent to interfere with vested property rights is the unavoidable inference to be drawn from a reading of subsection 31(9) of the Code, which states:

> "Where an inquiry is based on a complaint regarding discrimination on the basis of physical disability and the board of inquiry finds that the complaint is substantiated but that the premises or facilities of the person found to be engaging or to have engaged in the discrimination impede physical access thereto by, or lack proper amenities for, persons suffering from the physical disability that was the subject of the inquiry, the board of inquiry shall, by order, so indicate and shall include in its order any recommendations that it considers appropriate, but, where the person found to be engaging in or to have engaged in the discrimination establishes that the cost or business inconvenience that would be occasioned in the provision of such amenities or physical access would constitute, in the opinion of the board, an undue hardship, then the board of inquiry may not make an order under subsection (7)."

Therefore, the Board concludes that on reading the Code as a whole, the Legislature intended to affect the vested rights of property owners.

THE SERVICE OFFERED:

4736 The Respondent admits that it offers to the public a service or facility. It instructs the Board that the service or facility offered by the Coronet Theatre is a two-fold service or facility. That is, the Theatre offers a movie and a seat from which to view the movie, concurrently. The Respondent argues that it is for the Respondent to determine the nature and scope of the services and facilities it offers to the public. The Respondent, having categorized its offer to the public as

a movie to view *and* a seat from which to view the movie, submits that to the extent that a person's physical limitation, such as being physically reliant on a wheelchair, does not permit him to take advantage of the service or facility offered, there is no discrimination against such person by the operator of such service or facility, but merely a limitation inherent in the characteristics or abilities of the person physically reliant on a wheelchair to take part in or be admitted to the facility or service in question. The Respondent relies on one paragraph in the Judgment of Martland, J., speaking for the majority of the Supreme Court of Canada in the "*Gay Alliance Toward Equality*" v. *The Vancouver Sun* (hereinafter referred to as the *Gay Alliance Case*) [1979] 4 W.W.R. 118 at p. 126 where the Learned Judge stated:

> "Section 3 of the Act (British Columbia Human Rights Code) does not purport to dictate the nature and scope of a service which must be offered to the public. *In the case of a newspaper,**, the nature and scope of the service which it offers, including advertising service, is determined by the newspaper itself."

4737 The Respondent invites the Board to conclude that in so stating the Learned Supreme Court Justice was laying down a general rule that in all human rights cases involving the offering of a service or facility to the public, the nature and scope of the services and/or facilities offered to the public is determined by the entrepreneur in question and seems impliedly to suggest that the entrepreneur's view of what it is he is offering to the public is conclusive. The Board of Inqury thinks it unlikely that the Learned Supreme Court Judge was laying down any such general rule, but finds that it need not express a view on this. The Board rejects the implication in the Respondent's argument that its view of what service or facility it is offering to the public is conclusive. The Board notes that the Respondent did sell tickets to persons who were physically reliant on wheelchairs and who consented to sit in the space provided for wheelchairs in front of the front row of seats. Therefore, the Board concludes that the service or facility being offered by the Respondent is a movie and a place, whether seat or space to place a wheelchair, from which to view the movie.

4738 That brings us back to the main issue before this Board of Inquiry. "Whether or not the Respondent discriminated against the Complainant, Michael Huck, with respect to the accommodation, services or facilities to which the public is customarily admitted or which are offered to the public, because of the physical disability of the Complainant?" In order to answer this question one must determine if the service or facility offered to the Complainant varied in any significant manner from the service or facility offered by the Respondent to the general public. And if it did so, was the variance because of the physical disability fo the Complainant. As stated above, the Respondent offers to the general public a movie and a place from which to view the movie. An inherent term of this offer is that there are a variety of places from which to view the movie and the purchasers who take up the offer may claim their choice of place on a first come basis. Did the offer to the Complainant, Mr. Michael Huck, vary in any significant way from this offer to the general public. Indeed it did. Mr. Huck testified, that on approaching the wicket to purchase his ticket he was asked if he would be transferring to a fixed seat. He advised the personnel of the Theatre that he would not be and was told in turn that he must therefore take a space in front of the front row of seats. Alternatively stated, the Respondent offered the Complainant a movie and a specified space regardless of numbers of persons already in the Theatre, from which to view the movie. It is quite apparent that the difference in the offer made to the Complainant from that generally made to the public at large was because of the physical disability of the Complainant. Therefore, the Board concludes that in offering the Complainant, regardless of how many empty seats remained in the theatre, only a space in front of the front row of fixed seats, as a space from which he could view the movie, the Respondent has discriminated against the Complainant with respect to the services or facilities which are offered to the public because of the physical disability of the Complainant.

4739 The parties to the proceedings asked that should the Board find that the Code has been violated, it refrain from considering the appropriate remedy until the parties had been given an opportunity to address the Board, the Board therefore reserves the question of the proper remedy until the parties have been heard on the question.

Terrence Bekolay,
Board of Inquiry.
August 5, 1981

DIRECTIVE FOR THE ASSISTANCE OF THE PARTIES

4740 Following Notice of Resumption of a hearing under the Human Rights Code, the Board of Inquiry convened a hearing in respect to the proper remedy given the decision of the Board, rendered August 5, 1981, that the complaint of Michael Huck was justified. Upon hearing argument of both parties and upon hearing the evidence presented on behalf of the Complainant and the Saskatchewan Human Rights Commission the Board indicated to the parties that, subject to hearing any further argument and receiving any further evidence which the parties may wish to present to the Board after the appeal, which has been commenced by the Respondent in respect to the decision of the Board dated August 5, 1981 has been heard, and after any further rights of appeal have been exhausted, the Board is presently contemplating making an Order in the following form:

4741 Subject to any deletions as may be necessitated to avoid any undue hardship as defined by Section 1(d) of the Regulations to *The Saskatchewan Human Rights Code*, as may be agreed upon between the Saskatchewan Human Rights Commission (hereinafter referred to as "the Commission"), Michael Huck (hereinafter referred to as "the Complainant") and Canadian Odeon Theatres Ltd. (hereinafter referred to as "the Respondent"), the Respondent shall renovate the Coronet Theatre in Regina, in the manner following and in accordance with the terms herein specified:

1. Renovations shall meet the following specifications:

a) In each viewing area known as "Coronet I and Coronet III" there shall be six wheelchair spaces provided on level flooring in the regular viewing area in either two groups of three or three groups of two.

b) In the viewing area known as "Coronet II" there shall be five wheelchair spaces provided on level flooring in the regular viewing area in one group of three seats and one group of two seats.

c) The wheelchair spaces provided shall be located next to regular theatre seats and shall not be located in the front 1/3 of the rows in each theatre.

d) In each viewing area the groups of wheelchair spaces provided shall be separated laterally by but not less than four seats.

* (emphasis mine)

e) The size of wheelchair space provided shall approximate the space required for 1½ regular theatre seats, in width and be sufficiently deep to allow:

(i) independent mobility of wheelchairs of all types; and,

(ii) users of regular theatre seats to exist and enter in the normal manner if required or allowed to do so past the wheelchair spaces.

f) Paths of travel from the main entrance and the nearest fire exit to the wheelchair spaces shall be paths accessible by wheelchair.

2. The Respondent shall take immediate steps to prepare plans to renovate in accordance with these specifications and shall present those plans to the Commission and the Complainant for approval.

3. Following the agreement of the Respondent, the Commission and the Complainant, renovations shall be made forthwith in accordance with the plans agreed upon.

4. Following completion of the renovations and for a period of six months, the Respondent shall include in any advertisement of the movies showing at the Coronet Theatre the following words: "The Coronet Theatre provides viewing spaces for wheelchair users".

5. This matter shall be adjourned *sine die* to be reconvened for further directions upon 20 days notice, if the Complainant, the Commission and the Respondent cannot agree to a plan for renovations or to any deletions from such plans as may be necessitated to avoid undue hardship, as defined by the said Act.

4742 The Board gives this indication to the parties to assist the parties in preparing for a further hearing under Section 31 to assist the Board to determine the proper order to be made in the event that the honourable appeal Court or Courts should uphold the decision of the Board rendered the 5th day of August, 1981. It is the opinion of the Board that such an indication at this time will be helpful to the parties by saving costs and time as it will allow the parties to prepare the case in relation to specific proposals. The Board is of the view this will be particularly of assistance in respect to preparing of evidence in relation to the provisions contained in Subsection 31(9) which states:

> Where an inquiry is based on a complaint regarding discrimination on the basis of physical disability and the Board of Inquiry finds that the complaint is substantiated but that the premises or facilities of the person found to be engaging or to have engaged in the discrimination impede physical access thereto by, or lack proper amenities for, persons suffering from the physical disability that was the subject of the inquiry, the Board of Inquiry shall by order so indicate and shall include in its order any recommendations that it considers appropriate but where the person found to be engaging in or to have engaged in the discrimination establishes that the cost or business inconvenience that would be occasioned in the provision of such amenities or physical access would constitute, in the opinion of the Board, an undue hardship, then the Board of Inquiry may not make an Order under Subsection 7.

4743 I trust this directive will prove helpful.

Terrence Bekolay,
Board of Inquiry.
September 14, 1981

CANADIAN HUMAN RIGHTS REPORTER

SASKATCHEWAN / FACILITIES / DISABILITY
Court of Queen's Bench
University Hospital v. Yvonne Peters

Volume 2, Decision 115 Paragraphs 4744 - 4774 October 20, 1981

Court of Queen's Bench Decision under the SASKATCHEWAN HUMAN RIGHTS CODE

University Hospital Board

Appellant

vs.

Yvonne Peters and the Saskatchewan Human Rights Commission

Respondents

Date:	August 14, 1981
Place:	Saskatoon, Saskatchewan
Before:	Maher, J.
Appearances by:	D.E. Gauley, Q.C., Counsel for the University Hospital Board M. Woodard, Counsel for Yvonne Peters and the Saskatchewan Human Rights Commission B. Pottruff, Counsel for the Attorney-General of Saskatchewan

Summary: *On appeal from a Board of Inquiry decision which ruled in favour of Yvonne Peters, the Court reverses, finding that Ms. Peters was not discriminated against when she was denied the same hospital visiting rights as others because of her reliance on a guide dog.*

The Court rules that the hospital is not a facility to which the public is customarily admitted, and that consequently the provisions of the Human Rights Code do not apply.

4744 This is an appeal from the decision of Peter W. Glendinning, a board of inquiry appointed by virtue of Order-in-Council 2065/79 to conduct an inquiry pursuant to the provisions of sec. 29 of the Saskatchewan Human Rights Code, S.S. 1979, cap. S-24.1 into the matter of a complaint by Ms. Yvonne Peters against the University Hospital Board of the City of Saskatoon, in the Province of Saskatchewan.

4745 The board of inquiry found that the University Hospital Board contravened the provisions of the Saskatchewan Human Rights Code in that it discriminated between Ms. Peters, a blind person in the company of a guide dog, and other persons respecting admission as visitors to the University Hospital.

The grounds of appeal are as follows:

> "(1) The Board of Inquiry did not have jurisdiction to entertain the Complaint of Yvonne Peters as the said Complaint was instituted prior to the enactment of *The Saskatchewan Human Rights Code*.
>
> (2) The Board of Inquiry erred in law in enforcing the Complainant's alleged rights under *The Saskatchewan Human Rights Code* rather than proceeding to inquire as to her rights under the legislation that existed at the time of the Complaint, which was prior to the enactment of *The Saskatchewan Human Rights Code*.
>
> (3) The Board of Inquiry's finding that the introduction of a guide dog into the Hospital involves no more risk than allowing free access to all persons directly from the street cannot be supported by the evidence presented.
>
> (4) The Board of Inquiry erred in law in characterizing the University Hospital as a facility to which the public is customarily admitted.
>
> (5) The Board of Inquiry erred in law by characterizing the Hospital's policy with respect to guide dogs as discriminatory, as opposed to 'an overall policy' directed at ensuring the health and welfare of its patients."

4746 The appeal is taken pursuant to sec. 32 of the Code, which authorizes an appeal on a question of law from a decision or order of a board of inquiry to a Judge of the Court of Queen's Bench. Subsec. (3) of sec. 32 requires a judge to determine any question of law relating to the appeal and empowers such judge to affirm or reverse the decision or order of the board of inquiry or remit the matter back for amendment of its decision or order.

4747 I do not deem it necessary to deal with the first three grounds of appeal. The first two grounds relate to the jurisdiction of the board of inquiry and the procedure it followed in making its findings, and the conclusions I have reached do not require a consideration of either of these grounds. The third ground of appeal is with respect to a finding of fact, with respect to which I have some doubt as to whether such a ground may be a matter for review on this application, but it is also unnecessary for me to make a finding on this ground.

4748 The final two grounds of appeal may be considered together. In effect, they allege error on the part of the board of inquiry in its finding that the University Hospital is a facility to which the public is admitted, as contemplated by the Human Rights Code, and also error on the part of the board in characterizing the policy of the hospital as discriminatory. To consider these grounds of appeal, a review of the factual situation that led up to the filing of the complaint, as well as the reasons for the findings of the board, is necessary.

4749 On December 17, 1978, Ms. Yvonne Peters, a blind person, was visiting her father-in-law at the University Hospital, and was accompanied by her guide dog. She was questioned by the hospital staff regarding the presence of the dog in a patient's room, and although allowed to remain, she was informed that on future visits, she would be required to call beforehand and obtain permission before she would be allowed to enter the wards of the hospital in company with the dog. Later she was informed that she must wait in the lobby area of the hospital with the dog until permission had been obtained for her to visit a patient accompanied with the guide dog. While the original complaint alleged discrimination in the denial of access to facilities customarily available to the public, an amendment was permitted at the conclusion of the hearing, whereby the chairman found that:

> ". . . the alleged act of discrimination was constituted by the actions of the hospital personnel in questioning Ms. Peters as to presence of the dog on her initial visit and further by the delineation of policy with respect to Ms. Peters as to what she would, in future, be required to do should she wish to enter the hospital accompanied by dog guide."

4750 On the evidence, the board of inquiry found that the University Hospital constitutes a facility within the scope of the provision of the Human Rights Code, as it was the practice of the hospital to permit the entry of visitors with virtually no restrictions. It found further that a visit to a hospital to see a patient was a privilege, the granting of which was in the discretion of the hospital, having regard to its operation and the security of its patients. It concluded, however, that when a hospital fails to uniformly apply any restriction it chooses to impose upon patients in uniformity:

> ". . . it risks placing itself in a situation in which such restrictions on particular classes of individuals can be seen as nothing other than discrimination of that particular class."

4751 On the evidence adduced, the board found that through its behaviour and the establishment of its policy, the hospital had differentiated between Ms. Peters and sighted persons, or blind persons without guide dogs. It held that this lack of uniformity in the application of its regulations was sufficient to establish that the University Hospital had discriminated against Ms. Peters, and was in breach of the Saskatchewan Human Rights Code. It awarded Ms. Peters the sum of One Hundred Dollars ($100.00) in damages.

4752 As at the dates of the alleged discrimination, The Blind Persons' Rights Act, R.S.S. 1978, cap. B-3-1 was in effect in this province. It prohibited discrimination against a blind person in the terms set out in sec. 4(1) of the Act, which reads as follows:

> "4.-(1) No person shall discriminate against a blind person with respect to, or deny a blind person, the accommodation, services or facilities available in any place to which the public is customarily admitted, or discriminate with respect to the charges made for their use, by reason only of the fact that the blind person is accompanied by a guide dog."

4753 The administration of this Act was assigned to the Saskatchewan Human Rights Commission on October 31, 1978 by Order-in-Council 1572/78 giving it the right to investigate alleged infringements of the Act. Both The Blind Persons' Rights Act and The Saskatchewan Human Rights Commission Act, R.S.S. 1978, cap. S-25, were repealed and replaced by the present Saskatchewan Human Rights Code, effective August 7, 1979.

4754 I have briefly reviewed the history of the legislation for two reasons. It reflects the problems that the board of inquiry had to decide with respect to jurisdiction, and the procedure followed by the board of inquiry, which decisions I have determined need not be decided on this appeal, although their validity is questioned in grounds 1 and 2 of the notice of appeal. My second reason is to illustrate the difference in wording between the prohibition sections of The Blind Per-

sons' Rights Act and the Saskatchewan Human Rights Code, as both versions appear in human rights legislation of the various provinces, and have been subject to judicial interpretation by the courts.

4755 The relevant prohibition section of the Human Rights Code in effect in this province is sec. 12, and it reads as follows:

> "12.-(1) No person, directly or indirectly, alone or with another, by himself or by the interposition of another, shall:
>
> (a) deny to any person or class of persons the accommodation, services or facilities to which the public is customarily admitted or which are offered to the public; or
>
> (b) discriminate against any person or class of persons with respect to the accommodation, services or facilities to which the public is customarily admitted or which are offered to the public;
>
> because of the race, creed, religion, colour, sex, marital status, physical disability, age, nationality, ancestry or place of origin of that person or class of persons or of any other person or class of persons.
>
> (2) Subsection (1) does not apply to prevent the barring of any person because of his sex from any accommodation, services or facilities upon the ground of public decency.
>
> (3) Subsection (1) does not apply to prevent the denial or refusal of any accommodation, services or facilities to a person on the basis of age, if the accommodation, services or facilities are not available to that person by virtue of any law or regulation in force in the province."

4756 The term "physical disability" is defined in sec. 2(n) as follows:

> "(n) 'physical disability' means any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, includes epilepsy, any degree of paralysis, amputation, lack of physical coordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or on a wheelchair or other remedial appliance or device;"

4757 The prohibition section of the Human Rights Code of British Columbia, 1973 B.C. (2 Sess.) cap. 19 is similar in wording to sec. 12(1) of our Code. Sec. 3 of the British Columbia Code reads:

> "3.(1) No person shall
>
> (a) deny to any person or class of persons any accommodation, service, or facility customarily available to the public; or
>
> (b) discriminate against any person or class of persons with respect to any accommodation, service, or facility customarily available to the public,
>
> unless reasonable cause exists for such denial or discrimination.
>
> (2) For the purposes of subsection (1),
>
> (a) the race, religion, colour, ancestry, or place of origin of any person or class of persons shall not constitute reasonable cause; and
>
> (b) the sex of any person shall not constitute reasonable cause unless it relates to the maintenance of public decency or to the determination of premiums or benefits under contracts of insurance."

4758 This section was considered by the Supreme Court of Canada in *Gay Alliance Toward Equality v. Vancouver Sun British Columbia Human Rights Commission v. Vancouver Sun*, (1980) 97 D.L.R. (3d) 577, on appeal from the British Columbia Court of Appeal (1978) 77 D.L.R. (3d) 487. In that case, the manager of the classified ad department at the Vancouver Sun newspaper refused to publish an advertisement promoting subscription to a journal entitled "Gay Tide" on the ground that the policy of the advertising department of the newspaper was to avoid any advertising material dealing with homosexuals or homosexuality. A board of inquiry found that the actions of the newspaper, in refusing the advertisement, constituted an infraction of sec. 3 of the British Columbia Human Rights Code. An appeal of this finding to the Supreme Court of British Columbia was dismissed, but was allowed on appeal to the British Columbia Court of Appeal, and the finding of the board of inquiry was set aside. The decision of the Court of Appeal was upheld by a majority decision of the Supreme Court of Canada.

4759 In delivering the majority judgment of the Supreme Court, Martland, J., held that sec. 3 of the Act was not applicable in the circumstances of the case, as the nature and scope of the service a newspaper offered was to be determined by the newspaper itself, and not by sec. 3 of the Code, and it was only when the service it offered was denied to particular members of the public that the section applied. Coming to this conclusion, he made the following comment with respect to this section of the Code at p. 590:

> "Section 3 of the Act refers, in paras. (a) and (b), to 'service . . . customarily available to the public'. It forbids the denial of such a service to any person or class of persons and it forbids discrimination against any person or class of persons with respect to such a service, unless reasonable cause exists for such denial or discrimination.
>
> In my opinion the general purpose of s.3 was to prevent discrimination against individuals in respect of the provision of certain things available generally to the public. The items dealt with are similar to those covered by legislation in the United States, both federal and state. 'Accommodation' refers to such matters as accommodation in hotels, inns and motels. 'Service' refers to such matters as restaurants, bars, taverns, service stations, public transportation and public utilities. 'Facility' refers to such matters as public parks and recreational facilities. These are all items 'customarily available to the public'. It is matters such as these which have been dealt with in American case law on the subject of civil rights."

4760 If one adopts the meaning ascribed to these words by Martland, J., when they are used in a code of human rights, it is difficult to conclude that the accommodation, services or facilities that are designed for and provided to patients of the University Hospital fall within these classifications. None are provided for the use of the public or any segment thereof.

4761 In an earlier case, *Beattie et al. v. Governors of Acadia University et al.*, (1977) 72 D.L.R. (3d) 718 the Appellate Division of the Nova Scotia Supreme Court held that athletic facilities provided by a university to its students were not "customarily provided to members of the public" within the provisions of sec. 3 of The Human Rights Act, 1969 N.S. cap. 11, nor were they facilities "to which members of the public have access". Sec. 3 of the Nova Scotia Human Rights Code is in similar terms to sec. 12 of the Saskatchewan Code. At p. 723, MacKeigan, C.J.N.S., had this to say with respect to the application of the Act to a private university:

> "The Act does not, however, guarantee the right to enjoyment of all 'facilities' but only those 'customarily provided to members of the public' (s.3(a)) or facilities 'to which members of the public have access': s.4. Here I regretfully

> conclude that the appellants' claim must surely founder. No matter how I strain to extend the meaning of the clear words used, I find it impossible to conclude that facilities provided by a private university for students that it has chosen to admit to the university can be considered facilities which are 'customarily provided' to members of the public or facilities to which 'members of the public have access'. *The facilities are not provided for the public at large but are provided only for the registered students of the university.* A member of the public has no right of access, unless he is a student, to athletic or other facilities of a university, or to be considered for participation in university athletics."
>
> (emphasis added)

The learned Chief Justice went on at p. 724:

> ". . . It would be unthinkable that any university such as Acadia would knowingly discriminate in supplying, say, accommodation in a university residence or admission to a university cafeteria. *The fact remains, however, that such laudable conduct by the universities is voluntary.* Some provisions of the Act, such as the employment provisions, apply to all persons, including universities. The provisions respecting discrimination in enjoyment of accommodations, services and facilities, however, do not, in my opinion, extend to accommodations, services or facilities provided only to the students of a private institution, such as Acadia University."
>
> (emphasis added)

4762 In my view, the opinions expressed by MacKeigan, C.J., apply to the present case. The accommodation, services and facilities provided by the University Hospital are not provided for the public at large, but only for patients of the hospital. It follows that the provisions of sec. 3 of the Saskatchewan Code respecting discrimination would not extend to the accommodation, services or the facilities provided by the hospital to its patients. The fact that the hospital incidentally grants the privilege of entry into its facilities to visitors of patients would hardly be a sufficient reason to make the provisions of the Code apply to the visitors when it does not apply to the persons to whom the accommodation, services and facilities are provided, namely the patients.

4763 To hold otherwise creates a ludicrous situation. I am satisfied that in the event Ms. Peters were admitted to the hospital as a patient, the refusal to also admit her guide dog and provide it with accommodation, services or facilities in the form of a kennel and dog food would not be deemed discriminatory within the meaning of sec. 3 of the Human Rights Code. A disabled person physically dependent upon a wheelchair might well be deprived of the use of a cumbersome type of machine that he desires to bring with him when admitted as a patient, and this could hardly be regarded as discriminatory. Patients are admitted to the University Hospital that are victims of physical disabilities in varying forms. Based on the type of disability, decisions are made to assign them to various areas of the hospital, some of which will obviously have vastly inferior services to other areas. This would hardly be classified as discrimination, as envisaged by the provisions of the Human Rights Code. I fail to see how limited privileges incidental to the function of the hospital and extended to members of the public that are restricted in an individual case can be classified as an act of discrimination within the meaning of the Code. I cannot accept the finding of the board that such a restriction is a violation of the Code when, in the words of the chairman, "the hospital does not provide such restrictions in uniformity".

4764 To require the hospital to ensure that there is uniformity in restrictions on visitors places upon it a duty that it does not have to assume with respect to the persons to whom the services and facilities were designed to be provided, namely the patients. Moreover, from a practical point of view, it would require the hospital to do the impossible. It must be able to anticipate all possible situations that could arise, and have rules and regulations in place to ensure that they would be uniformly dealt with by members of the hospital staff. An example that comes to mind is a medical decision to refuse a priest or minister the right to visit a patient being treated for a mental disorder. I understand that this does happen on occasion. When such a decision has to be made in the interests of a patient, but is made on the spot, as it were, upon the arrival of the member of the clergy, could it be said that the decision might be classified as discriminatory on the grounds that no uniform policy had been established to deal with such a situation? There are no doubt other situations of a like nature that require decisions to be made that have the effect of discriminating against a visitor in the same manner as such decisions may discriminate against a patient. In my view, the obvious answer is that it was never intended that accommodation, services or facilities that are provided by hospitals be included in the classification of acts of discrimination prohibited by the Human Rights Code.

4765 Two decisions of the courts of Ontario that relate to alleged sexual discrimination against girls seeking the right to play on boys' hockey and softball teams support the view that services and facilities provided to a specific group are not services and facilities supplied to the public, as envisaged by the Human Rights Code of Ontario.

4766 In the Province of Ontario, the section of the Code that prohibits discrimination in the provision of accommodation, services or facilities is in terms similar to sec. 4(1) of The Blind Persons' Rights Act. It prohibits discrimination with respect to the accommodation, services or facilities available, in any place to which the public is customarily admitted. The words "in any place" are not included in the present Human Rights Code.

4767 In *Re Cummings and Ontario Minor Hockey Association*, (1979) 7 R.F.L. (2d) 359, the Divisional Court of Ontario held that the refusal of the Ontario Minor Hockey Association to permit a girl to play in its competitions that were restricted to boys of certain ages did not constitute discrimination within the provisions of the Code. Evans, C.J.H.C., who delivered the decision on behalf of the court, found that as the services or facilities provided by O.M.H.A. were not open to be made use of by the public, the refusal to make such services and facilities available to the public was not a breach of the Ontario Human Rights Code. He said at p. 364:

> "In my view, Professor Eberts erred in concluding that the facilities of the O.M.H.A. were open to the public. Whatever service the O.M.H.A. renders in operating competitions, conducting referee and coaching clinics is not a service extended to the public, but is a service extended to and to the advantage of boys who fall within the age category of those groups which they supervise. The fact that the competitions are held in arenas that are publicly owned or to which the public are admitted does not, in my view, make the service rendered by the O.M.H.A. a service to the public. . . ."

4768 In *Ontario Human Rights Commission and Bannerman v. Ontario Rural Softball Association*, (1979) 10 R.F.L. (2d) 97, the Ontario Court of Appeal, by a majority decision, held that the refusal to issue a playing certificate to a girl, thereby denying her an opportunity to play for a boys' softball team was not a violation of the Ontario Human Rights Code. Houlden, J.A. held that the words "services or facilities" as used in the Code, should not be given an unlimited meaning,

and should be retricted to services and facilities offered in places such as restaurants, hotels, public parks and the like. In his view, the examples given by Martland, J., in *Gay Alliance Toward Equality v. Vancouver Sun*, supra, and as quoted above, were good illustrations of the situations that were intended to be covered by the code. He found that the structured program offered by O.R.S.A. did not fall within the provisions of the Code, and that if it was intended that it should, the legislature should have said so in clear and unequivocal language.

4769 Weatherston, J.A., came to the same conclusion, but for different reasons. In his opinion, the extent of the offer of accommodation, services or faciltiies, must first be looked to in order to determine what is being made available, and to whom. If, incidentally, they cannot be used by or made available to a member of one of the groups mentioned in the Code against whom discrimination is prohibited, there is no offence if the facilities or services are not supplied to that member. Secondly, if the denial of or the discrimination with respect to the accommodation, services and facilities is not made because of one of the proscribed grounds, as set out in the Code, and there is some other valid and predominant reason, the real reason, then there can be no violation of the Code.

4770 In arriving at these conclusions, Weatherston, J.A., reviewed a number of cases that dealt with the interpretation of Human Rights Codes similar to the Ontario Code, including *Charter v. Race Relations Board*, (1973) A.C. 868; *Gay Alliance Toward Equality v. The Vancouver Sun*, supra; *R. v. Burnshine*, (1975) 1 S.C.R. 693, and concluded at p. 118:

> "These cases support two propositions that are relevant to any case where there is an alleged violation of the Code: (1) there can be no denial of, or discrimination in respect of, any accommodation, service or facility unless the subject matter of the complaint is within the description and scope of what is made available (*Gay Alliance*, supra); and (2) even if there has been a denial of, or discrimination in respect of, an available accommodation, service or facility, there is no offence unless the real reason for the denial or discrimination has been because of the proscribed grounds (*Charter*, supra)."

4771 With this reasoning, I am in complete agreement, and applying these principles, as well as findings in the other decisions to which I have referred, I am of the opinion that the decision of the board of inquiry cannot be upheld.I come to this conclusion for two reasons. Firstly, the accommodation, services and facilities provided by the University Hospital cannot be considered as accommodation, services or facilities to which the public is customarily admitted or which are offered to the public. They are designed for and provided to the patients of the hospital, and the failure of the hospital to provide them to a member of the public or to discriminate with respect to the person to whom they are provided is not, in my opinion, a violation of the Human Rights Code. Secondly, the real reason for the failure to make the use of the facility available to Ms. Peters was not because of her physical disability. It was done in the interests of those for whom the facility was provided, the patients of the hospital, and it follows that any denial of the use of the facility to or discrimination against Ms. Peters does not constitute a breach of the legislation.

4772 For the foregoing reasons, it is my conclusion that the decision of the board of inquiry was wrong in law when it found that the University Hospital was in breach of the provisions of the Saskatchewan Human Rights Code. It follows that the decision cannot stand.

4773 The appeal is allowed.

4774 There will be an order that the decision of the board of inquiry bearing date the 13th day of February, 1981 be quashed and set aside. The matter of costs may be spoken to.

Maher, J.

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