Saskatchewan Human Rights Commission

1983 ANNUAL REPORT

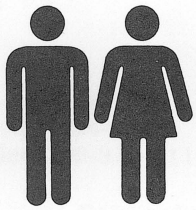
"...recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world..."

Universal Declaration of Human Rights, United Nations, December 10, 1948.

35th Anniversary of the Universal Declaration of Human Rights

DECEMBER 10th 1948-1983

Saskatchewan Human Rights Commission 1983 Annual Report



THE 35th ANNIVERSARY OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

Now, therefore, THE GENERAL ASSEMBLY *proclaims*

This Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

UNIVERSAL DECLARATION OF HUMAN RIGHTS

DECEMBER 10, 1948

A TIME TO CELEBRATE

Saskatchewan Human Rights Commission

Room 802 Canterbury Towers
224-4th Avenue South
Saskatoon, Saskatchewan
S7K 5M5

Phone: 306-664-5952
Telewriter: 306-373-2119

Chief Commissioner
Ron Kruzeniski

Deputy Chief Commissioner
Theresa Holizki

Commissioners
Helen Hnatyshyn
Kayla Hock
Jan L. Kernaghan
Jack Sharp
Myles Venne

Director
Shelagh Day

March 20, 1985

Refer to file

The Hon. J. Gary Lane, Q.C.
Minister of Justice and Attorney General
Room 345, Legislative Building
REGINA, Saskatchewan

Dear Mr. Lane:

It is with great pleasure that I, on behalf of the Saskatchewan Human Rights Commission, transmit to you, and through your offices to the Legislative Assembly for Saskatchewan, the 1983 Annual Report for the Saskatchewan Human Rights Commission. This is done pursuant to Section 49 of The Saskatchewan Human Rights Code and The Tabling of Documents Act.

1983 has seen a change in the membership of the Saskatchewan Human Rights Commission. All members of the Commission look forward to the challenge of the 1980's in the area of human rights.

One of the first challenges that will soon be upon us is that on April 17th, 1985, Section 15 of the Canadian Charter of Rights and Freedoms will be in force. We believe it will be necessary to amend The Saskatchewan Human Rights Code so that the Code will be consistent with SEction 15 of the Charter.

Another challenge for the Commission is the development of affirmative action programs. Since 1979, very few employment related affirmative action programs have been introduced. It is hoped that the 1980's will see more employers proceed with affirmative action programs. It is also hoped that the Government of Saskatchewan will take a leadership role in developing an affirmative action program for the civil service of the Province.

A third challenge is in the area of accessibility legislation. The Government of Saskatchewan has introduced legislation regarding accessibility for physically disabled persons. The Commission is of the opinion that The Saskatchewan Human Rights Code guarantees accessibility to the physically disabled. It is hoped that any final legislation introduced by your Government will affirm that guarantee.

Finally, a fourth challenge will be a recognition that the Human Rights Commission ought to be independent from the operation of government, as is the Ombudsman and the Provincial Auditor. It is hoped that the Government of Saskatchewan will recognize the importance of having an independent Human Rights Commission, and take the necessary steps to further this concept. To start this process of independence I ask that, beginning in the 1984-85 fiscal year, the Commission be given the financial responsibility to manage and account for its funds.

Again, it is with great pleasure that I, on behalf of the Saskatchewan Human Rights Commission, transmit to you our 1983 Annual Report.

Yours sincerely,

Ronald J. Kruzeniski
Chief Commissioner

Saskatchewan Human Rights Commission Members

January 1st to September 27th, 1983

Ken Norman,
Chief Commissioner

Louise Simard
Deputy Chief Commissioner

Gordon DeMarsh

William G. Gilbey

Helen Hnatyshyn

Kayla Hock

Chief Hilliard McNab

September 28th to December 31st, 1983

Ron Kruzeniski,
Chief Commissioner

Theresa Holizki,
Deputy Chief Commissioner

Helen Hnatyshyn

Kayla Hock

Jan Kernaghan

Jack Sharp

Myles Venne

Saskatchewan Human Rights Commission Offices

Shelagh Day, Director

Head Office:
8th Floor, Canterbury Towers
224 4th Avenue South
Saskatoon, Saskatchewan
S7K 5M5
Telephone: 664-5952
Telewriter: 373-2119

Regional Office:
5th Floor, McIntosh Mall
800 Central Avenue
Prince Albert, Saskatchewan
S6V 4V1
Telephone: 922-2296

Regional Office:
1819 Cornwall Street
Regina, Saskatchewan
S4P 3V7
Telephone: 565-2530

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Looking Forward

Amendments to The Saskatchewan Human Rights Code

The *Universal Declaration of Human Rights* was proclaimed by the United Nations General Assembly on December 10th, 1948. Since its proclamation it has served as an inspiration for many national constitutions and laws, including Canada's new Constitution contained in the *Canada Act*.

Our new Constitution, which includes the *Charter of Rights and Freedoms*, was proclaimed on April 17th, 1982. Section 15 of the Charter, which contains the equality provisions, did not come into effect on that day. Rather, the implementation of Section 15 was delayed for three years to allow the Legislative Assemblies and Parliament to review all statutes and amend them where necessary so that they are compatible with the requirements of Section 15.

Section 15 states:

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The Saskatchewan Human Rights Commission expects that the Government of Saskatchewan will amend *The Saskatchewan Human Rights Code* so that all classes of people to whom the Charter affords protection are also guaranteed equal rights under *The Saskatchewan Human Rights Code*. This will require at the very least that "mental disability" be included in the Code as a protected characteristic and that the prescribed limitations on the definition of "age" (18 to 64) be dropped.

The preamble to the Charter of Rights and Freedoms states that Canada is founded upon a recognition of the supremacy of the rule of law. To assure the public that the Government of Saskatchewan is also subject to the rule of law in this important area of human rights, the Saskatchewan Human Rights Commission urges the government to amend *The Saskatchewan Human Rights Code* so that the Commission is independent and can be clearly seen to be independent from the Government.

Mandatory Affirmative Action Programs

In 1979 a new provision was introduced into *The Saskatchewan Human Rights Code*, allowing for affirmative action programs. These programs are designed to eliminate and counteract disadvantages experienced by persons of Indian ancestry, women and persons with physical disabilities. Employment and educational institutions can sponsor such programs and can apply to the Saskatchewan Human Rights Commission for an approval which gives the program legal protection and sanction. Since 1979 the Saskatchewan Human Rights Commission has encouraged employers and educational institutions to engage in affirmative action programs voluntarily. The results have been disheartening.

During 1983 the Saskatchewan Human Rights Commission approved six affirmative action programs and of these only two were with employers. Of the twenty-one programs approved by the Commission since 1979, only ten are employment programs, and of these ten, only two address all three target groups—women, persons of Indian ancestry and persons with physical disabilities. We are particularly disappointed with the performance of the Government and its related agencies since 1979. The Public Service Commission, an agency of the Saskatchewan Government, is the largest employer in the province and it does not have an approved affirmative action program.

From the twenty-one Crown Corporations, we have received and approved only two programs. Two other programs with Crown Corporations are presently under consideration.

The Commission's experience with affirmative action since 1979 demonstrates that the voluntary introduction of affirmative action programs does not result in a sufficient number of programs to have a significant impact on opportunities for members of disadvantaged groups.

For this reason, the Saskatchewan Human Rights Commission is presently considering other, more effective, methods of bringing affirmative action programs into being. The Commission is considering the possible use of its power to order programs pursuant to Section 47. We would ask the Government to consider using its power to make affirmative action a requirement in issuing contracts, loans, grants and leases.

Accessibility Legislation

The theme of the 1981 International Year of Disabled Persons was "Full Participation and Equality." This theme reflects the goals of *The Saskatchewan Human Rights Code*, which guarantees disabled persons the equal right to employment, education, housing and the use of services and facilities available to the public. The 1981 theme and the principles of *The Saskatchewan Human Rights Code* cannot be realized if buildings, by their very design, impede these rights and the realization of "Full Participation and Equality".

Inaccessible buildings are still being built in the Province of Saskatchewan. The Saskatchewan Human Rights Commission has, for the past two years, urged the Government of Saskatchewan to enact accessibility legislation which will ensure that all new buildings and newly renovated areas of buildings are accessible to physically disabled persons.

On December 7th, 1983, the Honourable Lorne McLaren, Minister of Labour, introduced Bill 19 (*An Act Respecting Building and Accessibility Standards and the Inspection of Buildings*). The Saskatchewan Human Rights Commission has informed the Minister of Labour that Bill 19, as it is written, will restrict the rights of disabled persons to equal access as guaranteed in *The Saskatchewan Human Rights Code* by limiting the scope of accessibility requirements.

The Saskatchewan Human Rights Commission has requested that the Government of Saskatchewan:

– amend Bill 19 by removing all restrictions presently contained in Part III of Bill 19; and
– enact regulations similar to the Accessibility Standard adopted by the Saskatchewan Human Rights Commission in 1980.

Race Relations

The Saskatchewan Human Rights Commission is concerned by the racism and racial discrimination in the Province. In particular, the Commission is concerned by the disadvantages experienced by Indian and Metis people with respect to education, employment, housing and public services.

The Commission will continue to encourage Boards of Education, municipal governments and municipal police forces to employ persons of Indian ancestry as teachers and police officers, and to work with Indian and Metis organizations to improve relations.

The reports of high drop-out rates among native children in our schools are alarming, since education remains a key to future opportunities. The education of native children in the Province requires attention and will be a Commission concern in 1984.

The Mandate of the Commission

The Saskatchewan Human Rights Commission is a law enforcement agency responsible for the administration of *The Saskatchewan Human Rights Code*. Section 3 of the Code states that:

3. The objects of this Act are:

a) to promote recognition of the inherent dignity and the equal inalienable rights of all members of the human family; and
b) to further public policy in Saskatchewan that every person is free and equal in dignity and rights and to discourage and eliminate discrimination.

These objects are derived from the *Universal Declaration of Human Rights* adopted 35 years ago by the General Assembly of the United Nations.

The Code gives the Saskatchewan Human Rights Commission the authority to investigate and settle complaints of discrimination, to carry complaints before Boards of Inquiry, to approve or order affirmative action programs, to grant exemptions from certain 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.

The Structure of the Commission

The Commission is composed of seven Commissioners appointed by the Lieutenant-Governor-in-Council, one of whom is the Chief Commissioner and another the Deputy Chief Commissioner. The Commission sets policy, approves settlements of complaints, reviews complaints which are dismissed, and considers applications for affirmative action programs and exemptions.

The staff of the Commission is divided into three divisions: investigation, affirmative action and education.

The Investigation Division is staffed with six Investigating Officers, a Chief Human Rights Officer and a Staff Counsel. The Investigation Division is responsible for receiving, investigating, and settling complaints of discrimination. Complaints which cannot be settled are referred to the Commission, who may direct that a Board of Inquiry be appointed to hear and decide the matter. At such a hearing, the Commission represents the complainant and presents evidence regarding the complaint to the Board of Inquiry.

The Affirmative Action Division, with two Affirmative Action Officers, reviews and monitors all affirmative action programs brought to the Commission for approval. They are also responsible for reviewing all applications requesting exemptions from certain provisions of the Code.

The Education Division, composed of a Director of Education and two Education Officers, is responsible for providing information on human rights to the public. (During 1983, the usual complement of two Education Officers was reduced to one for a 10½ month period.) The Division conducts workshops, makes public presentations and consults with educational institutions and community organizations. They are also responsible for conducting research into human rights issues.

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 guaranteees 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 protects the rights of all residents to equality. Discrimination is prohibited in the following areas: employment; employment applications and advertisements; rental of housing accommodation; purchase of property; provision of accommodation, services and facilities to the public; education; publication and display of signs and notices; membership in trade unions, professional societies and occupational associations; and contracts.

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.

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 the jurisdiction of *The Saskatchewan Human Rights Code*, 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. A Human Rights 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 (see p. 5 for examples of settlements).

If a settlement cannot be effected, the Human Rights Commission may direct that the Attorney General appoint a Board of Inquiry, composed of one or more persons, to hear and decide the matter. The Board of Inquiry hears the evidence of both the complainant and the respondent.

When a Board is appointed, the Commission has carriage of the complaint, and the Commission's legal counsel appears before the Board to present the Commission's evidence and argument. The complainant may rely on the Commission's representation, or retain their own legal counsel at their own expense.

If a Board of Inquiry finds that a contravention of the Code has occurred, it may order the person, company or organization 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 courts.

Nature and Disposition of Informal Complaints

The Saskatchewan Human Rights Commission received and investigated 376 informal complaints during 1983. Complaints are accepted informally when preliminary investigation is required to determine jurisdictional issues or to establish that there are 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 (49%) followed by public services (17%), and application forms (16%). These three areas account for 83% of the informal complaints filed with the Commission (see Table I).

Complaints of discrimination on the grounds of sex (25%), race (22%), and physical disability (14.5%) are the most frequently alleged informal complaints (see Table I).

Sexual harassment complaints comprise 12% of all complaints, while 16% of all informal complaints are filed by persons of Indian ancestry.

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

Of the 376 informal complaints received in 1983, 166 have been settled, 24 have been withdrawn, 72 have been transferred to formal inquiries, 36 were concluded to have no reasonable grounds, and 78 are presently under investigation (see Table II).

Nature and Disposition of Formal Complaints

An examination of the 216 formal complaints filed during 1983 shows that discrimination in employment is still the most significant area of complaint, accounting for 63% of the formal complaints filed with the Saskatchewan Human Rights Commission. Complaints in the area of public services comprised 14.5% of all formal complaints, while complaints in the area of housing accommodation comprise 13.5% of the total number of complaints. Therefore, these three areas—employment, public services and housing accommodation—account for 91% of the formal complaints filed during the reporting period (see Table III).

Sex discrimination continues to be the most frequently alleged ground of complaint (40.5%), followed by complaints on the basis of physical disability (19.5%). Race discrimination complaints account for 15% of the formal complaints during 1983.

As in 1982, the highest number of complaints in the employment area are under the category of sex discrimination. Sexual harassment complaints account for 18% of all complaints. Complaints on the basis of physical disability and age are also prevalent.

Discrimination on the basis of physical disability made up the majority of complaints in the area of public services.

Of the 216 formal complaints alleging violations of the Code, 10 have been settled, 28 have been withdrawn or dismissed, 148 are presently under investigation, and 11 have been referred to the Saskatchewan Human Rights Commission (see Table IV). The Commission dismissed 4 of these complaints, refused to direct a Board of Inquiry in 1, and directed the Attorney General to appoint a Board of Inquiry in 6 cases (see Table V).

Settlement

The mandate of the Saskatchewan Human Rights Commission with respect to complaints is twofold. According to the requirements of Section 28(1) of the Code, the Commission must inquire into complaints and endeavour to effect a settlement. Therefore, in each complaint where a determination is made that probable cause exists to believe a violation of the Code has occurred, the Commission must attempt to effect settlement. The settlement of a complaint is designed to remedy the situation and put the complainant in the situation he/she would have been in had the discrimination not occurred. Elimination of discriminatory practices which violate *The Saskatchewan Human Rights Code* is both a policy and the law of this province and settlements of complaints must reflect this. The following are some examples of complaints which were settled during 1983:

Example I. Physical Disability

On June 22nd, 1983 a complaint was settled which was filed by Ray Nichol against Saskatoon Centennial Auditorium Foundation. Mr. Nichol alleged that he was discriminated against because of his physical disability when he was required to sit in the aisleway to watch a performance at the Centennial Auditorium. Through settlement, the Centennial Auditorium Foundation agreed to provide twelve spaces in the theatre suitable for patrons who use wheelchairs. Some seats have been removed to provide spaces in the main viewing area of the theatre so that those using wheelchairs can have a flat area and a good view of the performances. Until the settlement of the complaint, the only space available for wheelchair users was in the aisles which are sloped, and therefore awkward and uncomfortable. For Ray Nichol and other disabled people who are regular theatre patrons, the renovations made to the theatre by the Centennial Auditorium Foundation will mean that disabled people receive the same level of service that able-bodied people receive.

Example II. Sex Discrimination

An agreement was entered into on September 28th, 1983 settling the complaint between Nadia Arneson and Snap-On-Tools Canada Ltd. Ms. Arneson had been refused a Snap-On-Tools dealership, and she filed a complaint with the Saskatchewan Human Rights Commission alleging she had been refused the right to engage in an occupation because of her sex.

While not conceding that discrimination occurred, Snap-On-Tools agreed in settlement to pay Ms. Arneson $3,000.00 in compensation for loss of self respect and humiliation suffered as a result of the actions of the company, and $457.69 for telephone, travel and family expenses. The respondent also agreed to forward Ms. Arneson a letter of apology, provide a notice to all present employees that all applications for transfers, promotions, or new positions will be treated equally without regard to the sex of the applicant, and advertise all future dealer positions in a manner which encourages both men and women applicants.

Example III. Sexual Harassment

In August, 1983 the Commission settled a complaint of sexual harassment filed by Shirley Peterson against the Hudson Bay Company and one of its supervisors in Meadow Lake. Ms. Peterson alleged that she had been subjected to sexually harassing conditions of employment in violation of Section 16 of *The Saskatchewan Human Rights Code*.

Settlement of this case included the payment of $3,400.00 to Ms. Peterson for damages to self-respect, the development of a company policy designed to prevent sexual harassment, and providing notice to all female employees in the Meadow Lake store of the new policy.

Boards of Inquiry

The Saskatchewan Human Rights Code

During 1983 the following cases were adjudicated by Boards of Inquiry:

S.H.R.C. v. University of Saskatchewan Engineering Students Society:
Board of Inquiry: Professor Paul Havemann, Joan Thorstenstein and Rueben Richert
Under Section 14 of *The Saskatchewan Human Rights Code:*
The complainant alleges that certain issues of the Engineering Students Society's paper, "The Red Eye", ridicule, belittle and affront the dignity of women.

Hearings into this matter were held on January 13th, March 9th and 10th, and May 3rd, 4th and 5th, 1982. The Board adjourned on May 6th when the respondent indicated an intention to apply to the Court of Queen's Bench for a Writ of Prohibition to bar the Board of Inquiry from hearing and adjudicating the complaint. When no application was forthcoming, the Board convened once again on October 18th, 1982, at which time the Engineering Student's Society served notice that they had applied to the Court of Queen's Bench for a Writ of Prohibition.

The hearing on the application was heard in the Court of Queen's Bench in Saskatoon on November 30th, 1982. The application was dismissed by the Court as the Board of Inquiry had not been named as a party to the application. The Engineering Student's Society reapplied for a Writ to prohibit the Board of Inquiry from hearing this complaint.

The hearing on the application was heard in the Court of Queen's Bench in Saskatoon on February 15th, 1983. The Court issued its decision on March 30th, rejecting the application. In his decision, Mr. Justice David H. Wright said, "I reject emphatically the complaint that the Board has 'delayed the hearing in this matter'. The affidavit material leads me to the contrary conclusion. If blame is to be attributed to any person it is to the Society". Mr. Justice Wright continued, "(t)he persons aggrieved by the publication and the members of the Society are not the only persons affected by this delay. The community as a whole is affected if its members suspect that charges of sexism, racism, or whatever cannot be investigated and determined promptly by tribunals created for that specific purpose."

The Board of Inquiry reconvened on April 21st and 22nd, 1983 in Saskatoon. The final testimony was heard from all parties and written arguments were requested by the Board. A decision has not yet been rendered.

Eileen Saunders v. Dave Brotten and Dave's Painting and Design:
Board of Inquiry: Ronald Kruzeniski
Under Section 16(1) of *The Saskatchewan Human Rights Code:*
The complainant alleged she was discriminated against because of her sex when she was refused a job as a painter at Dave's Painting and Design. The Board of Inquiry heard the matter on February 28th, 1983 in Regina. In its decision dated March 24th, 1983, the Board of Inquiry found that Ms. Saunders had been discriminated against. In its decision the Board stated, "I find that (Dave Brotten) did deny Eileen Saunders the opportunity to work for him because she was a woman." Ms. Saunders was awarded $484.00 in compensation for lost wages.

Evelyn Anderson v. Violet Woloshyn and SEDCO:
Board of Inquiry: Irving Goldenberg
Under Section 16(1) of *The Saskatchewan Human Rights Code:*
The complainant alleges she was discriminated against when she was refused a transfer to a position of receptionist at SEDCO because of a physical disability. The Board of Inquiry heard the matter on June 27th, 28th and 29th, 1983 in Regina, and requested written arguments from the parties. A decision has not yet been rendered.

S.H.R.C. v. Citation Investments Limited, Quadra Investments Ltd., and Cudlow Holdings Limited:
Board of Inquiry: Elizabeth Halstead
Under Section 11(1) of *The Saskatchewan Human Rights Code:*
The complainant alleges that the landlords discriminated on the basis of marital status when they charged higher rents to single people sharing suites than to married couples renting similar suites. The Board of Inquiry heard the three complaints on May 26th, 1983, and has not yet handed down its decision.

Roy Day v. City of Moose Jaw and Moose Jaw Firefighters Association
Board of Inquiry: Terrance Bekolay
Under Section 16 and 18 of *The Saskatchewan Human Rights Code:*
Roy Day alleged he was discriminated against on the basis of age when he was forced to retire at age 62 according to the Collective Bargaining Agreement between the City of Moose Jaw and the Moose Jaw Firefighters Association. The Board of Inquiry heard the matter on July 27th, 28th and 29th, 1982 in Moose Jaw.

The Board's decision was handed down on November 1st, 1983. In his decision, Mr. Bekolay found that Roy Day had been discriminated against because of his age, in violation of Sections 16(1) and 18 of *The Saskatchewan Human Rights Code*. In his decision Mr. Bekolay stated, "The Board of Inquiry is satisfied...that functional performance can easily be predicted and the Board therefore concludes that it is unnecessary to make any distinctions solely on the basis of age to ensure a firefighting force with a high level of functional ability."

The Board also said, "On the evidence...the Board finds and concludes that the respondents have not met their burden of proving on a balance of probabilities that age constitutes a reasonable occupational qualification for lieutenants in the Moose Jaw Fire Department so that the complainant could be justly retired at age 62. The respondents have not convinced this Board that there is sufficient risk of employee failure in those over the mandatory retirement age to warrant the early retirement in the interest of safety of the employee, his fellow employees and the public at large."

The Board of Inquiry ordered that the City of Moose Jaw and the Moose Jaw Firefighters Association Local 553 of the International Association of Firefighters cease requiring mandatory retirement under the age of 65 years; that the City of Moose Jaw and the Moose Jaw Firefighters Association each pay $1,000.00 to Roy Day in compensation in respect of hurt feelings; and that the City of Moose Jaw pay damages for lost wages to Roy Day for regular wages he would have received had he continued to be employed to age 65, plus 7% for loss of pension benefits. The City of Moose Jaw and the Moose Jaw Firefighters Association have appealed this decision. The application for appeal is to be heard by the Court of Queen's Bench in Moose Jaw on January 9th, 1984.

During 1983 the following decisions were appealed to the courts:

Yvonne Peters v. University Hospital Board:
Appeal: Court of Appeal for Saskatchewan
On May 17th, 1983 the Court of Appeal for Saskatchewan ruled that the decision of the original Board of Inquiry in this case should be restored, and the judgment of the Court of Queen's Bench overturned. Peter Glendinning, who sat as the Board of Inquiry, found in his original decision that Yvonne Peters had been discriminated against when the University Hospital placed different restrictions on her entrance to the hospital with her guide dog than on other visitors to the hospital. The Court of Queen's Bench reversed this decision, saying that the University Hospital was not an accommodation, service or facility "to which the public is customarily admitted", and therefore was outside the jurisdiction of *The Saskatchewan Human Rights Code*. In overturning the Queen's Bench decision, Chief Justice E. D. Bayda of the Court of Appeal stated in his decision, "...I have no hesitation in concluding as a matter of law that the visitor facilities...fall within the purview of the phrase 'accommodation, services or facilities'..."

The University Hospital Board did not appeal the decision of the Court of Appeal for Saskatchewan. This decision now stands as the most superior court decision across Canada on the rights of blind persons who use guide dogs.

Michael Huck v. Canadian Odeon Theatre
Appeal: Court of Appeal for Saskatchewan
In a Board of Inquiry decision dated July 9th, 1980, the Coronet Theatre in Regina was found to have violated *The Saskatchewan Human Rights Code* by failing to provide adequate seating in the theatre for wheelchair users. Michael Huck filed a complaint against Canadian Odeon Theatres when he was required to sit in front of the front row of seats.

The Board of Inquiry decision was appealed to the Court of Queen's Bench by Canadian Odeon Theatres. The Court of Queen's Bench reversed the decision of the Board of Inquiry and ruled that *The Saskatchewan Human Rights Code* requires only that providers of services make their facilities available to physically disabled people in the same manner as they make it available to other members of the public. The decision of the Court of Queen's Bench was appealed to the Court of Appeal by Michael Huck and the Saskatchewan Human Rights Commission. The appeal is to be heard on January 17th, 1984.

During 1983 the following jurisdictional issues were referred to the Courts for adjudication:

Scowby et al. v. Peter Glendinning:
Appeal: Supreme Court of Canada
The Saskatchewan Human Rights Commission appealed a Queen's Bench Court decision which ruled that a Board of Inquiry lacked jurisdiction to enquire into complaints against RCMP officers because the RCMP is a federal force. The appeal was heard in the Court of Appeal for Saskatchewan on December 20th and 21st, 1982. The court ruled on March 24th, 1983 that the Saskatchewan

Human Rights Commission has jurisdiction to deal with complaints against individual RCMP officers. This decision means that complaints alleging arbitrary arrest or detention can be filed against any police officers in the province, including RCMP officers, under Section 7 of *The Saskatchewan Human Rights Code*. This decision of the Court of Appeal has been appealed to the Supreme Court of Canada by the RCMP. The application made by the RCMP officers for leave to appeal was heard on June 20th, 1983 and leave was granted. No dates for the appeal have been set.

James Weatherall v. City of Moose Jaw:
Appeal: Court of Appeal for Saskatchewan
Theresa Holizki was originally appointed as a Board of Inquiry to hear the complaint of James Weatherall, who alleges he was discriminated against because of his physical disability when his employment with the City of Moose Jaw was terminated. Mr. Weatherall suffers from high blood pressure. The Board of Inquiry convened to hear the matter on December 9th, 1982 in Moose Jaw. However, on the date the hearing was convened the City of Moose Jaw indicated that it had made an application to the Court of Queen's Bench to prohibit the Board from hearing the matter on the grounds that Mr. Weatherall had earlier filed a grievance with his union with respect to this same matter. The arbitration decision regarding the grievance was released on December 8th, 1982. The Board of Inquiry adjourned to await the outcome of the respondent's application for prohibition before reconvening. The application was heard in the Court of Queen's Bench in Moose Jaw on January 10th, 1983, and in its decision of February 2nd, 1983, the Court of Queen's Bench ruled the Board of Inquiry had jurisdiction to hear the complaint of James Weatherall. Mr. Justice MacLean said in his decision, "...in my view the questions which were decided by the arbitration board were not the same questions to be decided by the Board of Inquiry...". The City of Moose Jaw has appealed the Queen's Bench Court decision to the Court of Appeal, and no hearing dates have yet been set.

During 1983 the following complaints were referred to Boards of Inquiry, but were not yet adjudicated:

Cheryl Sandiford v. Mac Jenkins and Base Communications
Board of Inquiry: Randy Katzman
Under Section 16(1) of *The Saskatchewan Human Rights Code:*
The complainant alleges she was discriminated against because of a physical disability when she was terminated from her position as switchboard operator at Base Communications. The Board of Inquiry is scheduled to hear the matter on January 26th and 27th, 1984 in Saskatoon.

Len Craig v. The City of Saskatoon and the Saskatoon Professional Firefighters Union, Local 80 of the International Association of Firefighters:
Board of Inquiry: E. Robert Stromberg
Under Section 16(1) and Section 18 of *The Saskatchewan Human Rights Code:*
The complainant alleges he was discriminated against because of his age when his employment as fire marshall with the Saskatoon Fire Department was terminated when he reached age 60 in accordance with Article 51 of the Saskatoon Pension By-law No. 5585 and the pension plan between the City of Saskatoon and Saskatoon Professional Firefighters. The Board of Inquiry is scheduled to hear the matter on February 13th, 14th and 15th, 1984 in Saskatoon.

The 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 Department of Labour.

During this reporting period, the Saskatchewan Human Rights Commission released a decision in the following complaint:

Jane Bublish v. Saskatchewan Union of Nurses
Under Section 17(1) of *The Labour Standards Act:*
The complainant alleged that the Saskatchewan Union of Nurses was paying a male employment relations officer a starting rate of pay higher than the starting rate of pay received by her. A panel of the Saskatchewan Human Rights Commission heard the matter on March 8th, 9th and 10th, 1982 in Regina. In its decision rendered February 9th, 1983, the Saskatchewan Human Rights Commission dismissed the complaint on the basis that the jobs were not sufficiently similar in nature to warrant a finding of a violation.

During 1983 the following decision of the Saskatchewan Human Rights Commission was appealed to the Courts:

Beatrice Harmatiuk et al. v. Pasqua Hospital, The Board of Governors of the South Saskatchewan Hospital Centre:
Court of Appeal for Saskatchewan:
By a decision dated December 1st, 1982, the

Saskatchewan Human Rights Commission ruled that Pasqua Hospital was in violation of Section 17 of *The Labour Standards Act* by paying female housekeeping aides at a rate of pay less than that paid to male caretakers employed at the hospital, and that the housekeeping aides and caretakers performed similar work. Pasqua Hospital appealed this decision to the Court of Queen's Bench. The appeal was heard on April 7th, 1983, and in a decision dated June 30th, 1983, Mr. Justice E. A. Sheibel upheld the decision of the Commission and dismissed the appeal. Pasqua Hospital is appealing the Queen's Bench Court decision to the Court of Appeal. No dates have been scheduled.

Miscellaneous Inquiries

During the 1983 reporting period the Commission handled 4,057 miscellaneous inquiries. These inquiries include requests for information and interpretation of Human Rights Laws, requests for pamphlets and brochures, as well as inquiries which require referrals to other agencies.

Special Programs – Affirmative Action

Affirmative action programs address the disadvantages experienced by persons of Indian ancestry, persons with physical disabilities and women, by consciously measuring representation by race, sex and physical disability in order to identify and remove the systemic barriers which may adversely affect these groups, and increase their participation in employment and education. An affirmative action plan represents a commitment to alter the policies, practices and procedures of institutions so as to open the door for members of the target groups. The facts regarding unemployment and underutilization of members of all three target groups continues to provide disturbing evidence that members of these target groups have historically been disadvantaged and are still affected in today's workplaces and educational institutions.

While these disparities in economic status stem from a complex set of factors, they provide strong evidence of the persistence of systemic discriminatory practices in the workplace and in related institutions. Considered in this context, the purposes of affirmative action initiatives are to eliminate the institutional barriers which have excluded these groups and to redress present imbalances in our labour force.

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 that a program be 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 the applicant with legal protection for any preferential measures which may be undertaken. With the proclamation of Section 15(2) of the *Charter of Rights and Freedoms*, on April 17th, 1985, additional Constitutional protection for affirmative action will be in place.

Approved Affirmative Action Programs

During 1983, the following programs were granted approval pursuant to the proposed affirmative action regulations adopted by the Saskatchewan Human Rights Commission on April 9th, 1980 and Section 47 of *The Saskatchewan Human Rights Code*.

1. Pre-Trades Training Program for Women, Coteau Range Community College, Moose Jaw

A Pre-Trades Training Program for Women, conducted by the Coteau Range Community College of Moose Jaw, was granted approval on February 24th, 1983. The goal of the program is to provide women with exposure to a variety of trades in order to increase the participation of women in the skilled trades areas.

A paper entitled "Saskatchewan's Labour Market in the '80s", put out by the Economic Planning and Analysis Branch, Saskatchewan Region, Canada Employment and Immigration Commission, indicates that among the critical occupational demands of the '80s will be jobs requiring technical skills. The low numbers of women entering non-traditional employment in Saskatchewan indicates the necessity of special programs to familiarize women with the language, tools and training opportunities available to them.

2. Pre-Trades Training Program for Women, Parkland Community College, Melville

Approval was granted on February 24th, 1983 to Melville Parkland Community College for a program similar to that of Coteau Range Community College. This pre-trades training program accommodates 12 participants in both Yorkton and Melville.

The program was designed to remedy the serious under-representation of women in the trades and to provide resources for women in meeting future demands of the labour market.

Approval was granted on condition that all materials used to advertise this program indicate clearly that the building is accessible to women with physical disabilities, and that women with disabilities be encouraged to participate.

3. Gabriel Dumont Institute of Native Studies and Applied Research

Approval was granted to the Gabriel Dumont Institute of Native Studies and Applied Research to advertise and recruit Metis and Non-Status Indian students for three of their programs:

i) The Human Resources Development Training program;

ii) The Native Studies Instructor program;

iii) The Native Recreation Technology program

The Gabriel Dumont Institute provided statistics to indicate that of the 85,000 Metis and Non-Status Indian persons in Saskatchewan, only 240 or .0028% are studying in either universities or technical institutes in Saskatchewan.

The Institute wishes to create a positive learning environment for Metis and Non-Status Indian persons through a number of special measures, including utilizing a curriculum which will enhance the students' pride in their native heritage.

All of the programs are accredited, should further study be desired.

4. Pre-Technology Programs for Women, Regina Plains Community College

Approval was granted to the Regina Plains Community College on November 4th, 1983, to conduct a Pre-Technology Program for Women.

The specific areas of technology addressed in this program include computers, engineering, and architectural technology.

A Saskatchewan Labour Report entitled "Wages and Working Conditions by Occupation" of June, 1982, estimates that the employment rate of women in the technology related fields is approximately 14.05%. The aim of this program is to provide women with the opportunity to explore the possibility of careers in technology occupations and increase the representation of women in these occupations.

Another goal of the program, among others, is to provide alternatives to those women who are facing elimination of their present occupation.

5. Flin Flon Mines Ltd.

Approval was granted on November 24th, 1983 to the Flin Flon Mines Ltd. affirmative action program. Flin Flon Mines Ltd. proposes to construct and operate two mines and a mill in northeastern Saskatchewan. The target group for this affirmative action program is persons of Indian ancestry who are residents of the north. This project is of a small size and will employ no more than 45 persons. Statistics indicate that in Northern Saskatchewan approximately 70% of the population is comprised of persons of Indian ancestry. Flin Flon Mines Ltd. proposes to hire 20% persons of Indian ancestry in its first year of operation, and 30% in its second year.

A number of actions to reduce employment barriers to persons of Indian ancestry have also been introduced.

6. The City of Regina

Interim approval was granted to the City of Regina on November 24th, 1983, to recruit and hire 7 persons of Indian ancestry as firefighters, 4 persons of Indian ancestry as bus operators, and persons of Indian ancestry into casual positions.

The City is committed to developing and implementing a comprehensive affirmative action program which will address the employment opportunities of women and persons with physical disabilities.

Interim approval was granted on conditions specified by the Commission with respect to development of this comprehensive program.

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 applying for an exemption and for the convening of a public hearing to determine whether the exemption should be granted.

The following exemption applications were considered by the Saskatchewan Human Rights Commission during the 1983 reporting year:

1. Saskatoon Catholic Schools

The Director granted an exemption from Section 16(1) of *The Saskatchewan Human Rights Code* for a one year period to Saskatoon Catholic Schools on February 24th, 1983. The exemption allows Saskatoon Catholic Schools to hire teacher-aides on the basis of sex when a teacher-aide is required to assist a student over 10 years of age who is physically or orthopedically handicapped and requires personal care, when there is a written request from a parent or a student for an assistant of the same sex.

2. University Hospital Board - Youth Services Parent Therapist Program

The University Hospital Board requested an exemption from Sections 16 and 19 of *The Saskatchewan Human Rights Code* to enable the Parent Therapist Program to lawfully advertise and hire couples to assist young persons in dealing with emotional problems and family crises, and to lawfully inquire into languages spoken. The Director granted the exemption on February 24th, 1983 for a one year period. The exemption granted is narrow and does not exempt the Parent Therapist Program from any other provisions of Section 16 or Section 19 of *The Saskatchewan Human Rights Code*.

3. Saskatoon Region of the Department of Social Services - Parent Therapist Program

An exemption was granted to the Parent Therapist Program of the Saskatoon Region of the Department of Social Services on November 23rd, 1983. The exemption from Section 19 of *The Saskatchewan Human Rights Code* allows the Parent Therapist Program to inquire into languages spoken, but does not exempt the Program from any other provisions of Sections 16 and 19 of the Code. The exemption is granted for a one year period.

4. Opportunity Handicap Ltd.

On January 12th, 1983 the Saskatchewan Human Rights Commission issued a decision rejecting an application made by Opportunity Handicap Ltd. requesting an exemption pursuant to Section 48 of *The Saskatchewan Human Rights Code*. Opportunity Handicap Ltd. is a business enterprise which markets five year guaranteed light bulbs by means of telephone solicitation. They applied to the Saskatchewan Human Rights Commission for an exemption from the Code so that they could recruit and hire disabled people exclusively. At the request of the applicant, the Saskatchewan Human Rights Commission considered the application by way of an oral hearing held on December 3rd, 1982. Interested parties were invited to attend the hearing and present their views respecting the exemption application.

Organizations representing disabled people such as the Co-ordinating Council on Social Planning, Saskatchewan Voice of the Handicapped, the Coalition of Provincial Organizations of the Handicapped, the Canadian Paraplegic Association, Services for Hearing Impaired Persons, Disabled Persons Employment Service and the Saskatchewan Association for the Mentally Retarded urged the Commission to deny an exemption on the grounds that the employment practices and marketing techniques utilized by the company affronted the dignity of disabled people and contradicted the objective of integrating disabled people into mainstream employment. Support for the application was received from Cosmopolitan Industries, Dr. P. K. B. White, Wascana Hospital and Ruth Collins-Ewen.

After deliberation, the Saskatchewan Human Rights Commission concluded that a segregated workplace was a contravention of the spirit and intent of the Code. In addition, the Commission noted that the requirement upon employees of Opportunity Handicap Ltd. to give the name of the company and identify it as an employer of the handicapped has the effect of identifying the worker as a handicapped person. This puts the worker in the position of appearing to be soliciting the charitable responses of the prospective customer, which does not enhance the dignity or achieve equality for disabled people.

The Commission found the proprietor and representative for Opportunity Handicap Ltd. to be well intentioned and sincere in the concern that they expressed for disabled persons in our society. However, in its decision, the Saskatchewan Human Rights Commission referred to its responsibility to promote business practices which contribute to and do not detract from the inherent dignity and equality of disabled persons. The Commission made it clear that this does not mean that Opportunity Handicap Ltd. cannot carry on a business in Saskatchewan. It does mean, however, that in order to lawfully carry on business as an employer in the Province, Opportunity Handicap must bring its practices within the Human Rights Code. To do so, Opportunity Handicap would need to drop the use of pre-employment medical certificates and any reference to handicap, including the present name of the company, from its sales promotion.

In this decision regarding Opportunity Handicap Ltd., the Saskatchewan Human Rights Commission has rejected segregated employment for disabled persons, and supported affirmative action measures to integrate disabled persons into mainstream employment as the best strategy for overcoming the staggeringly high unemployment rate faced by disabled people today.

Education and Research

Education Activities

The Saskatchewan Human Rights Code provides the Commission with 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 of 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 educational role, the Commission attempts to keep the public and affected groups informed of new developments in all areas.

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

During 1983 the Commission received and responded to 508 requests to send speakers to conferences, workshops, community meetings, school and university classes and training sessions (see Table VII). These requests came from professional associations, business organizations, members of consumer, community and advocacy groups, teachers, students, labour unions, staff associations, employers 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 approximately four times per 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 (see Table VIII).

The Saskatchewan Human Rights Commission's Schools Newsletter "On Rights" continues to be published in response to Canada's international commitment, along with other members of the United Nations Educational, Scientific and Cultural Organization (UNESCO), to incorporate the teaching of human rights into school curricula by 1986. The newsletter is being circulated to all Grades 7 to 12 schools in Saskatchewan. Each edition of "On Rights" features an article on a human rights issue, along with classroom projects and exercises. It also includes a list of resource materials (books and audio-visual material).

On February 26th, 1983 the Saskatchewan Human Rights Commission presented a brief to the Curriculum and Instruction Review Committee. The Committee was established by the Minister of Education to review Saskatchewan's education system. The Commission's presentation stressed two major themes: that because of Canada's international human rights commitments, incorporating human rights education into all aspects of the school curriculum is essential; and that the principles of human rights must be manifested in the education system so that education will be provided to all students in a bias-free environment and one which will eliminate the effects of past discrimination.

The Commission staff took part in "Showcase '83", an exposition and conference designed specifically for educators during March, 1983. The Commission staff presented workshops on the Human Rights Code, Charter of Rights and Freedoms, Canada's international commitments and the education system.

As well, on March 30th, 1983 the Commission, with other organizations, sponsored a seminar in Regina. The theme of the seminar was "Affirmative Action: The Industrial Relations Issue of the '80s". The keynote speech was given by Gordon Fairweather, Chief Commissioner of the Canadian Human Rights Commission.

During the months of January to May, 1983, the Commission staff participated in the development of public programs of interest to disabled people. Five programs were held at the Frances Morrison Library in Saskatoon. They were jointly sponsored by the Saskatoon Public Library System, the Saskatchewan Human Rights Commission, the Voice of the Handicapped, the Saskatchewan Association for the Mentally Retarded, Services for Hearing Impaired Persons Inc., the Saskatchewan Association on Human Rights and the Public Legal Education Association. The programs focused on such topics as independent living, support systems for disabled people and their families, the People First movement among mentally disabled people, as well as two programs which examined existing housing and alternative housing for disabled people in Saskatoon and Saskatchewan.

The Saskatchewan Human Rights Commission and the Canadian Human Rights Commission co-ordinated a tour of southern Saskatchewan during March of 1983. Members of the two Commissions and staff held public meetings in Gravelbourg, Swift Current and Maple Creek, to which individuals, employer and employee associations, and interested groups were invited to attend. Similar meetings were held in Prince Albert later that month.

The staff of the Commission provided two workshops for provincial government employees at the request of the Public Service Commission. The workshops dealt with specific employment issues such as employment application forms, affirmative action, reasonable accommodation, reasonable occupational qualifications and sexual harassment.

On May 30th to June 1st, 1983, the Saskatchewan Human Rights Commission hosted the Annual Conference of the Canadian Association of Statutory Human Rights Agencies (CASHRA) in Saskatoon. CASHRA's members are the statutory agencies in each Canadian jurisdiction which administer and enforce human rights law. CASHRA devoted a portion of the conference to the study of international human rights instruments in the Canadian perspective. Other conference sessions dealt with discrimination in pension, benefit and insurance plans, recent developments in human rights legislation, affirmative action and mandatory measures, physical disability and human rights laws, systemic discrimination, and aboriginal rights and the Canadian Constitution. Distinguished speakers addressing the conference were Walter S. Tarnopolsky, now a Justice of the Ontario Court of Appeal, and J. Gary Lane, Minister of Justice and Attorney General for Saskatchewan.

On October 25th, 1983 the Saskatchewan Human Rights Commission made a public presentation in Regina to the Special Parliamentary Committee on Participation of Visible Minorities in Canadian Society. The Committee was mandated to seek positive and constructive ideas and models to ameliorate relations within Canada between visible minorities and other Canadians, and recommend the development of positive programs to promote racial understanding, tolerance and harmony. The Commission took this opportunity to present its views on positive models to combat racism in the area of hate literature and through the implementation of

affirmative action programs. The Commission urged the Parliamentary Committee to endorse the concept of affirmative action, and make recommendations to the Federal Government to proceed with the development and implementation of its own program, and programs for its agencies and crown corporations. The Commission also explained the problems it had encountered when attempting to deal with hate literature provisions in both federal and provincial laws.

A summer project was undertaken in 1983 by both the Saskatchewan Human Rights Commission and the Saskatchewan Association on Human Rights to review current Social Studies textbooks. The review was a follow-up to a 10 year old study undertaken by the Saskatchewan Human Rights Commission in 1973 and published under the title "Prejudice in Social Studies Textbooks" in 1974. The current review was to determine if textbooks have improved in their portrayal of minorities. The results have not yet been published.

Accessibility Standard

The Saskatchewan Human Rights Code states that physically disabled persons have the right to equal access and cannot be discriminated against in areas such as employment, housing, public accommodation and education. However, physically disabled individuals are often denied their rights to equal opportunity 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.

During 1982 the Commission received 153 sets of building plans for review. 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 buildings accessible.

In our 1981 and 1982 Annual Reports, the Saskatchewan Human Rights Commission has urged the Saskatchewan Provincial Government to incorporate acessibility standards under a Provincial Building Code. On December 7th, 1983 the Honourable Lorne McLaren, Minister of Labour, introduced Bill 19 *(An Act Respecting Building and Accessibility Standards and the Inspection of Buildings)* to the Legislative Assembly.

The Saskatchewan Human Rights Commission has expressed its concern to the Honorable Lorne McLaren that Bill 19 will restrict the rights of disabled people to equal access as guaranteed in *The Saskatchewan Human Rights Code* by limiting the scope of accessibility requirements. The Commission has requested that the Government of Saskatchewan:

– amend Bill 19 by removing all restrictions presently contained in Part III of Bill 19; and

– enshrine regulations similar to the "Accessibility Standard" adopted by the Saskatchewan Human Rights Commission in 1980.

Saskatchewan Activities in Celebration of the 35th Anniversary of the Universal Declaration of Human Rights

Saskatchewan organizations were enthusiastic in their response to the Human Rights Coalition's (Canada) suggestion to celebrate the 35th Anniversary of the proclamation of the *Universal Declaration of Human Rights* by the United Nations General Assembly on December 10th, 1948. Coordinating committees for Saskatchewan were organized in both Saskatoon and Regina.

The Saskatchewan Human Rights Commission played a major role in providing public education on the *Universal Declaration of Human Rights*. The Commission reprinted the Universal Declaration in its regular newsletter, and produced a poster commemorating the anniversary. All schools in the province were provided with a copy of the Commission's newsletter and a poster. Posters were also distributed to all municipalities and government offices in the province.

The community response was encouraging. The Commission staff spoke about the 35th anniversary on numerous occasions to women's organizations, service clubs, race relations conferences, inmate groups, organizations of disabled people, and the media. As well, special events were organized in Saskatoon and Regina to commemorate the Anniversary, particularly during Human Rights Week.

Public forums were held at the Frances Morrison Library in Saskatoon on December 5th and 6th to discuss domestic and international human rights issues, native rights and the rights of people with mental conditions. Two public meetings were held in Regina at the Public Library on December 9th. The noon hour forum discussed Canadian human rights issues, while the evening forum examined human rights issues in the international domain. Candlelight vigils were organized by Amnesty International in both Saskatoon and Regina on December 9th.

Education in the school setting was a priority. Elementary, high school, and university classes were addressed. The Commission was also invited to speak to life skills courses and other post-secondary institutions, such as the Saskatchewan Indian Federated College.

The Saskatchewan Human Rights Commission also took this opportunity to translate *The Saskatchewan Human Rights Code* into the Spanish and Cree languages. The Code will be available in French in the near future.

The Minister of Justice, J. Gary Lane, designated December 4th to 10th as Human Rights Week, and December 10th as Human Rights Day, at the request of the Saskatchewan Human Rights Commission and Amnesty International. Municipalities were asked to designate the week as Human Rights Week by the Saskatchewan Association on Human Rights.

Resource Centre

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

Our collection includes approximately 900 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 Charter of Rights and Freedoms
- Canadian Charter of Rights Annotated
- Canadian Human Rights Reporter
- Canadian Labour Law Reporter
- Canadian Native Law Reporter
- Disability Law Reporter
- Employment Practices Guide
- Employment and Training Reporter
- Equal Opportunity in Housing
- European Convention on Human Rights Decisions
- European Human Rights Reports
- Fair Employment Practice Service
- Human Rights Law Journal
- Supreme Court of Canada Decisions

Table I

Summary of Informal Complaints by Grounds and Category

Category	Grounds															
	Application Forms	Sex		Colour	Race		Religion*	Nationality/ Citizenship	Marital Status	Age	Ancestry**	Physical Disability		Other	Total	Percent
		Sexual Harass.	Other		Native Ancestry	Other						Access	Other			
Accommodation, Services and Facilities		1	9		27	3	1	1	6	2		4	8	2	64	17%
Notices/Publications			4			1	1			1					7	2%
Employment		43	36		18	13	5	1	4	22	2	1	39		184	49%
Employment Advertisements						1									1	.25%
Trade Unions							2							1	3	1%
Application Forms/Interviews	61														61	16%
Bill of Rights														16	16	4%
Right to Education		1			4	1	4								10	3%
Right to Engage in Occupations					1	1					1		1		4	1%
Property/Housing		1			10	2			7				1	2	23	6%
Membership in Associations																
Reprisal														2	2	.5%
Contracts					1										1	.25%
Total	61	46	49		61	22	13	2	17	25	3	5	49	23	376	
Percent	16%	12%	13%		16%	6%	3.5%	.5%	4.5%	7%	1%	1.5%	13%	6%		100%

* Includes "creed"
* * Includes "place of origin"

Table II

Disposition of Informal Complaints

Disposition	Number	Percent
Settled	166	44 %
Withdrawn	24	6.5%
No Reasonable Grounds	36	9.5%
Transferred to Formal Inquiry	72	19 %
Total	298	79 %
Under Investigation	78	21 %
Grand Total	376	100.0%

Table III

Summary of Formal Complaints by Grounds and Category

Category	Sex		Colour	Race		Religion*	Nationality/ Citizenship	Marital Status	Age	Ancestry**	Physical Disability		Other	Total	Percent
	Sexual Harass.	Other		Native Ancestry	Other						Access	Other			
Accommodation, Services and Facilities	1	2		4				5	2	4	4	9		31	14.5%
Notices/Publications		5												5	2.5%
Employment	38	38	1	2	10	4		3	14	1		26		137	63%
Employment Advertisements															
Trade Unions															
Application Forms/Interviews													1	1	.5%
Bill of Rights													4	4	2%
Right to Education				5							1	1		7	3%
Right to Engage in Occupations								1						1	.5%
Property/Housing		4		6	6		1	8		3	1			29	13.5%
Membership in Associations															
Reprisal													1	1	.5%
Contracts															
Other															
Total	39	49	1	17	16	4	1	17	16	8	6	36	6	216	
Percent	18%	22.5%	.5	8%	7%	2%	.5%	8%	7%	4%	3%	16.5%	3%		100%

* Includes "creed"

* * Includes "place of origin"

Table IV

Disposition of Formal Complaints

Disposition	Number	Percent
Settled	10	5%
Withdrawn	21	9.5%
No Probable Cause	19	9%
Dismissed	7	3%
Referred to Commission	11	5%
Total	68	31.5%
Under Investigation	148	68.5%
Grand Total	216	100.0%

Table V

Complaints Referred to the Saskatchewan Human Rights Commission

Number, Category and Grounds of Complaints Referred to the Saskatchewan Human Rights Commission

	Grounds						
Category	**Sexual Harass.**	**Physical Disability**	**Native Ancestry**	**Marital Status**	**Age**	**Other**	**Total**
Employment	4	1		1	1		7
Education		1					1
Housing			1	1			2
Reprisal						1	1
Total	4	2	1	2	1	1	11

Disposition of Complaints Referred to the Saskatchewan Human Rights Commission

Board of Inquiry Directed	6
Dismissed	4
Board of Inquiry Not Directed	1
Total	11

Table VI

Boards of Inquiry

Number, Category and Grounds of Complaints in which Boards of Inquiry Were Directed by the SHRC in 1983

	Grounds					
Category	**Sexual Harass.**	**Physical Disability**	**Native Ancestry**	**Age**	**Other**	**Total**
Employment	2	1		1		4
Housing			1			1
Reprisal					1	1
Total	2	1	1	1	1	6

Disposition of Complaints Referred to Boards of Inquiry

Settled	
Board Pending	4
Board in Progress	1
No Decision to Date	1
Total	**6**

Table VII

Education Statistics

Type of Activity	Number
Speeches	67
Community Consultations	171
Meetings	64
Conferences and Workshops	41
Literature Displays	5
Radio, Television and Newspaper Interviews	160
Total	508

Table VIII

Requests For Literature

	Number of Requests	Number Given
Written	812	3,117
Personal	5,421	7,397
Telephone	1,755	7,559
Conferences, Displays	11,207	12,530
Total	19,195	30,603

List of Saskatchewan Human Rights Commission Staff

(as of December, 1983)

Molly Barber
May Barr
Debra Bell
Jan Cadman
Laurena Daniels
Shelagh Day
John Doyle
Debra Fink
Mona Frederickson
Norma Green
Guy Herriges
Judy Kostyshyn
Genevieve Leslie
Bev MacSorley
Caryl McKenzie
Robin McMillan
Yvonne Peters
Wm. Rafoss
Karen Ross
Suzanne Smart
Cynthia Thomas
June Vargo
Theresa Walker
M. Woodard

List of Human Rights Commission Publications

1. The Saskatchewan Human Rights Code and Regulations
2. Pamphlets and Brochures:
   - Saskatchewan Human Rights Commission —Information Kit
   - Doing What's Right: The Saskatchewan Human Rights Code
   - Getting About: Rights of the Physically Disabled
   - Finding a Home: Landlord and Realtor Responsibilities
   - Rights on the Job: Employer's Guide
   - Application Forms and Interview Guide: A Guideline for Employers and Job Applicants
   - You've Filed a Complaint: Now What Happens?
3. Saskatchewan Human Rights Commission Newsletters:
   - Compulsory Retirement: Elements of the Debate
   - Sexual Harassment: Taking a Stand
   - The KKK: An Editorial Statement
   - Making Saskatchewan Accessible
   - The Education System and Human Rights
   - Saskatchewan Human Rights Commission Releases Interpretive Document on Pensions, Employee Benefits and Insurance
   - Sexual Harassment: New Developments and Interpretations
   - Independence for Human Rights Commissions: An Idea Whose Time Has Come
   - Canada's Constitution and Charter of Rights and Freedoms
   - Aboriginal Peoples of Canada and the Constitutional Process: The Task Ahead
   - Affirmative Action and Human Rights in the 1980s
   - The 35th Anniversary of the Universal Declaration of Human Rights: A Time to Celebrate
   - Arbitrary Arrest and Detention
   - Affirmative Action News No.1
   - Affirmative Action News No. 2
4. "On Rights", Saskatchewan Human Rights Commission Schools Newsletter
   - Volume 1, No.1 — An Introduction to Human Rights
   - Volume 1, No. 2 — The Canadian Constitution and the Charter of Rights and Freedoms: A History of Civil Liberties in Canada
5. Other Materials:
   - Accessibility Standard
   - Human Rights and Benefits in the '80s: An Interpretation of the Saskatchewan Human Rights Code as it Applies to Pensions, Employee Benefits and Insurance
   - Steps for Developing an Affirmative Action Program
   - A Pictorial History of the Metis and Non-Status Indian in Saskatchewan
   - *TASC Workshop on Sexism
   - *TASC Workshop on Racism
   - *TASC Workshop on Handicapism
   - *Prejudice in Social Studies Textbooks along with supplement
   - *Sex Bias in Primary Readers
   - Saskatchewan Human Rights Commission Affirmative Action Decisions
   - Saskatchewan Human Rights Commission Exemption Orders
   - Saskatchewan Human Rights Commission Equal Pay Decisions
   - Saskatchewan Human Rights Commission Annual Reports 1981 and 1982
6. Posters
   - *Opportunities are Everyone's Right
   - *35th Anniversary of the Universal Declaration of Human Rights

List of Other Publications Distributed by the Commission

1. Sexual Harassment at Work — National Union of Provincial Government Employees Publication
2. Human Rights Saskatchewan — Public Legal Education Association of Saskatchewan Publication
3. Dick and Jane as Victims: Sex Stereotyping in Children's Readers — Women and Words and Images Publication
4. The Canadian Constitution, 1981

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CANADIAN HUMAN RIGHTS REPORTER

SASKATCHEWAN / PROHIBITION
Court of Queen's Bench
City of Moose Jaw v. James Weatherall

Volume 4, Decision 252 Paragraphs 10959 - 10985 March, 1983

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

City of Moose Jaw

Applicant

v.

Theresa Anne Holizki, Board of Inquiry
and
Saskatchewan Human Rights Commission
and
James Weatherall

Respondents

Date: February 2, 1983

Place: Moose Jaw, Saskatchewan

Before: MacLean, J.

Appearances by: J.C. Zimmer, Counsel for the City of Moose Jaw
M.C. Woodard, Counsel for the Saskatchewan Human Rights Commission

Summary: *The Court dismisses the application by the City of Moose Jaw for a writ of prohibition to prevent a Board of Inquiry from hearing and deciding a complaint filed by James Weatherall under the Saskatchewan Human Rights Code which alleges that he was refused permanent employment by the City because of a disability.*

The City of Moose Jaw argued that because James Weatherall filed a grievance under the collective agreement between the City and the Canadian Union of Public Employees about the refusal to employ him and this grievance was heard by an arbitration board, the matter is res judicata and the Board of Inquiry should not be allowed to proceed.

The Court rejects this argument, ruling that the questions which were decided by the arbitration board are not the same questions to be decided by the Board of Inquiry. In addition, the Court rules that having chosen to proceed to arbitration does not foreclose Mr. Weatherall's right to any other remedy. The right to have an employer abide by the collective agreement and the right of an employee not to be discriminated against exist independently.

The application for prohibition is dismissed.

10959 This is an application by the City of Moose Jaw (the City) for an order to prohibit the Saskatchewan Human Rights Commission (the Commission) from proceeding with an inquiry pursuant to Section 31 of *The Saskatchewan Human Rights Code*, S.S., Chapter S-24.1. In addition to the Commission, the applicant city has also joined as respondents, Theresa Anne Holizki, the chairperson and sole member of the board of inquiry appointed by the Attorney General in accordance with Section 29(2) of the said Act, and the complainant James Robert Weatherall.

10960 From the material filed by the parties the following facts emerge. The complainant Weatherall was hired as a temporary laborer with the City's sewage and water department in 1978. He was laid off in the fall of 1978 and re-hired in the spring of 1979. On January 16, 1980, he was hired as a laborer on a permanent basis. At that time he was sent a pre-employment medical form which he was required to have completed and return to the City. He successfully completed a six-month probationary period on July 16, 1980.

10961 The City had not by this date received the pre-employment medical report from his doctor. This was not received until August 18, 1980, and indicated him to be obese and to have high blood pressure. The City took the position that Mr. Weatherall was not medically fit to become a permanent employee of the sewage and water department, and in accordance with Article 15(2) of the collective bargaining agreement with its employees purported to terminate his employment effective September 30, 1980

10962 On September 22, 1980, Mr. Weatherall, through his Union, launched grievance proceedings in accordance with the collective bargaining agreement. When these failed, arbitration as provided in the agreement, and in accordance with Section 26 of *The Trade Union Act* followed.

10963 I have carefully reviewed the award of the arbitration board. While it is true that the arbitrators stated in their award that they took into account the entire collective bargaining agreement (which prohibits all types of discrimination), nevertheless, I think that clearly they did not consider the question of discrimination.

10964 It seems apparent to me that in arriving at their decision the arbitrators considered several provisions of the collective bargaining agreement. Specifically they considered Article 14, which deals with the dismissal of an employee; Article 15 which has to do with the furnishing of a physician's certificate which indicates physical and mental fitness for the job; and finally, Article 23 which deals with the various grievance procedures.

10965 The majority of the arbitrators found in Mr. Weatherall's favor and ordered his reinstatement as a permanent laborer with the sewage and water department. They also awarded him a portion of the wages which he lost as the result of his dismissal.

10966 On October 28, 1980, Mr. Weatherall also filed a complaint with the Saskatchewan Human Rights Commission alleging that he was being discriminated against because of his physical disability. The staff of the Commission thereafter conducted an investigation and as a result, Shelagh Day, the director of the Commission, found there to be probable cause to believe that a violation of the Act had occurred.

10967 The City was notified of these findings on January 23, 1981. Through its solicitor the City requested the matter be left in abeyance pending receipt of the arbitration award. This is what occurred. Only when the award was given (after a

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lengthy delay) did the Commission request the Minister to appoint a board of inquiry.

10968 The City contends that it is entitled to the order on four grounds:

1. That the board of inquiry and the Commission have no jurisdiction to hear and determine the complaint since the matter is *res judicata*.

2. The second argument is a variation of the first. The City submits that the inquiry has power to impose a penalty and therefore is *quasi criminal* in nature. The matter having been heard and determined by the arbitration board, the hearing by the board of inquiry has the effect of trying the City twice for the same offence contrary to Section 11(h) of *The Charter of Rights and Freedoms*.

3. The inquiry failed to proceed within a reasonable time to hear and determine the complaint, and that this also is contrary to *The Charter of Rights and Freedoms*.

4. The respondent, James Weatherall, by electing to have the matter decided by an arbitration board has exhausted the remedies which were open to him.

The Question of Res Judicata

10969 Article 23 of the collective bargaining agreement between the City and its employees provides the grievance procedures which must be followed. As a last resort the Union may submit a grievance to a board of arbitration. The collective agreement provides that in this event the procedure to be used is that contained in Section 26 of *The Trade Union Act*. Section 25 of the same Act provides *inter alia* that the powers of the arbitration board include, where the collective agreement is silent on the point, the power to impose such penalty as to the arbitration board seems just and reasonable.

10970 The City adopts the view that the proposed inquiry under the Human Rights Code will simply be a re-hash of the same evidence and the same arguments that were placed before the arbitration board.

10971 I previously alluded to what I consider to be the substance of the arbitrators' award. In my view they considered those sections of the collective agreement which I mentioned, and applied them to the grievance. The arbitrators found that Mr. Weatherall was, having regard to those sections of the agreement, wrongfully dismissed. The arbitrators, as they were entitled to do, then imposed certain penalties upon the City, namely, reinstatement to the position and payment of a portion of the lost wages.

10972 The proposed hearing by the board of inquiry will be concerned exclusively with Section 16(1) of *The Saskatchewan Human Rights Code* which reads as follows:

> "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.

10973 The hearing of the board of inquiry will be restricted to determining whether the City was guilty of discrimination toward Mr. Weatherall.

10974 Counsel for the City relies heavily upon the recent decision of *Bouten* v. *Mynarski Park School District No. 5012*, [1982] 5 W.W.R. 488.[1] The factual situation in that case is somewhat similar to the present one. The applicant, Bouten, a teacher, was employed by the respondent school board. His employment was terminated. He appealed his dismissal and a board of reference was appointed by the Minister of Education to hear and determine the appeal, which was dismissed. The teacher then complained to the Alberta Human Rights Commission, which, after an investigation, recommended that there be a board of inquiry. The board of inquiry was then appointed by the Minister of Labour.

10975 Sinclair, C.J. determined that the board of inquiry has no jurisdiction to hear the complaint because the matter fell within the jurisdiction of the board of reference which had decided the matter. He held also that the Alberta Human Rights Commission had no jurisdiction to inquire into the matter because it was *res judicata*.

10976 In the *Bouten* decision beginning at p. 457, Sinclair, C.J. quoted at length from *Spencer-Bower and Turner* on "*res judicata*." The authors in part have this to say:

> "Any party who is desirous of setting up *res judicata* by way of estoppel . . . must establish all the constituent elements of an estoppel of this description . . . the burden is on him of establishing . . . the following:
>
> " '(i) that the alleged judicial decision was what in law is deemed such;
>
> " '(ii) that the particular judicial decision relied upon was in fact pronounced, as alleged;
>
> " '(iii) that the judicial tribunal pronouncing the decision had competent jurisdiction in that behalf;
>
> " '(iv) that the judicial decision was final;
>
> " '(v) that the judicial decision was, or involved, a determination of the same question as that sought to be controverted in the litigation in which the estoppel is raised;
>
> " '(vi) that the parties to the judicial decision, or their privies, were the same persons as the parties to the proceeding in which the estoppel is raised, or their privies, or that the decision was conclusive *in rem*.' "

10977 In my view paragraphs (v) and (vi) above precludes the City from successfully relying upon *res judicata*. I have already indicated the questions which were determined by the arbitration board. In my opinion, these were not the same questions which must be determined by the board of inquiry. It is true that much of the same evidence will be relevant to both proceedings, but this is of itself not sufficient reason to bar the board of inquiry. Paragraph (vi) is also applicable in that the parties to both proceedings will not be the same.

10978 It seems to me the *Bouten* decision differs significantly from the present case. *The Schcol Act* of Alberta provides a statutory right of appeal for a teacher. The Alberta legislation provides that a board of reference is required to take into account the termination of the teacher's contract "and matters connected therewith" and "make such order as it considers just."

10979 In the present case, the board of arbitration and its procedures were the subject of a collective bargaining

[1] Editor's note: (1982) C.H.R.R., D/1050.

agreement. Mr. Weatherall had only those rights which were negotiated on his behalf by the Union with the City. The arbitration board had power to grant him relief only with respect to those rights granted to him in the collective bargaining agreement.

10980 In conclusion, in my view, the questions which were decided by the arbitration board are not the same questions to be decided by the board of inquiry, therefore, the applicant city must fail on its first and second submissions.

Failure to Proceed Within a Reasonable Time

10981 The short answer to this submission is that the Commission did not proceed sooner because of the City's request that it wait until the arbitration was concluded. The City cannot now be heard to complain about undue delay.

The Election of a Remedy

10982 This ground too appears to be another variation of the City's first argument. Counsel for the City submits that Mr. Weatherall having elected his remedy by filing a grievance through his Union, and submitting to arbitration, he cannot also file a complaint with the Human Rights Commission. He appears to suggest that this situation is analogous to that which confronted the Chief Justice of this Court in *Jackson* v. *Saskatoon School Division*, [1980] 3 S.R. 142. With deference I cannot agree. In that case the plaintiff's union had entered into a collective bargaining agreement with the defendant. As a result the plaintiff was precluded from suing the defendant for wrongful dismissal. The collective agreement governed the terms of the plaintiff's employment by the defendant, and not the common law of master and servant.

10983 In my view the Human Rights Commission is not restricted by the collective bargaining agreement between the City and its employees from determining if discrimination existed. It is true that Mr. Weatherall initiated both proceedings, however, in the case of the Commission, it thereafter launched an independent investigation and concluded that an inquiry was warranted.

10984 Mr. Weatherall did not have two or more remedies which were open to him, and by choosing one remedy he foreclosed his right to any other. The right to have an employer abide by a collective agreement and the right of an employee not to be discriminated against exist independently of each other. The first right is enforced pursuant to a collective agreement, the second by legislation. A situation may arise where a board of arbitrators is required to decide upon a question of discrimination. That situation did not occur in the present case, and there is no need for me to comment upon it.

10985 For these reasons the application is dismissed. Costs may be spoken to.

R.A. MacLean, J.

CANADIAN HUMAN RIGHTS REPORTER

SASKATCHEWAN / EMPLOYMENT / SEX
Board of Inquiry
Eileen Saunders v. David Carl Brotten

Volume 4, Decision 274 Paragraphs 11679 - 11688 April/May, 1983

Board of Inquiry Decision under the
SASKATCHEWAN HUMAN RIGHTS CODE

Eileen Saunders

Complainant

v.

David Carl Brotten

Respondent

Date: March 24, 1983

Place: Regina, Saskatchewan

Before: Ronald J. Kruzeniski

Appearances by: Milton Woodard, Counsel for the Saskatchewan Human Rights Commission and Eileen Saunders

Summary: *The Board of Inquiry finds that David Brotten discriminated against Eileen Saunders when he refused her a job as a painter because of her sex. The Board awards Eileen Saunders 484 dollars in compensation for wages lost due to the discrimination.*

DECISION AND ORDER

11679 This sole Board of Inquiry was appointed by the Attorney General for Saskatchewan on December 30, 1982. The Board of Inquiry was appointed to consider a complaint dated May 25, 1981 by Eileen Saunders against David Carl Brotten, carrying on business under the name "Dave's Painting and Design."

11680 The Human Rights Commission, Eileen Saunders and David Carl Brotten were served with a Notice of Formal Inquiry with a hearing date set for Febraury 28, 1982. The Board of Inquiry convened on that date and the following persons were present:

(1) The Human Rights Commission, represented by Mr. Mickey Woodard;
(2) Eileen Saunders represented by Mr. Mickey Woodard;
(c) Mr. David Carl Brotten, initially unrepresented but after an adjournment for the purpose represented by Mr. Bob Baker.

11681 An application was made on behalf of the Respondent to set aside the default of filing an answer to the complaint. That application was granted. Eileen Saunders gave evidence that she was the complainant. Her evidence was to the effect that on May 13, 1981, she was looking for work. When she was at the Canada Employment Centre, Student Placement Office, she was informed by a counsellor that there was a job available at Dave's Painting and Design. She was given the phone number of Dave's Painting and Design. She made a telephone call and asked for Mr. Brotten. The person answering the phone acknowledged that he was David Carl Brotten. She indicated that she wanted to apply for a job. Mr. Brotten indicated that he did not want a woman. He said he had reasons for this. He said he had told the counsellors that he did not want women to apply. He said the job was temporarily filled. Eileen Saunders told her counsellor what had taken place in the conversation with Mr. Brotten. Her counsellor was Luke Chabot. Eileen Saunders said she was surprised and frustrated. She felt that it was discriminatory. She then took steps to lodge a complaint with The Human Rights Commission.

11682 Eileen Saunders found employment by June 1, 1981. After May 13, 1981, Eileen Saunders continued to seek employment. Robin MacMillan gave evidence to the effect that she received the complaint from Eileen Saunders. Luke Chabot gave evidence. He was employed at Canada Employment Centre, Student Placement Office. Eileen Saunders came in looking for employment and indicated that she had done some painting. He referred her to Dave's Painting and Design. He had received a job order regarding this job. Eileen Saunders made a call from the office. After she hung up, Eileen Saunders indicated that the person was not hiring women. She was angry and upset. After discussing it with Mr. Chabot, she discussed it with Mr. Rick Moats.

11683 Mr. Rick Moats gave evidence. He was the supervisor of the Canada Employment Centre, Student Placement

ISNN 0226-2177 Cite: C.H.R.R. D/1353

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Office. He held that position in May of 1981. On May 13, 1981, he called Mr. David Carl Brotten. He took the phone number off the job order, 352-4870. He told Mr. Brotten what Eileen Saunders had said to him. He told him that she had said that she was refused a job because of her sex. Mr. Brotten said he was only 24 years of age and his wife would be jealous if he hired a woman. He advised him he was discriminating regarding sex. Mr. Brotten advised Mr. Moats that he had a person who worked for him one or two days and quit. Mr. Moats indicated that he cancelled the job order. It was cancelled May 13, 1981.

11684 Mr. Brotten then took the stand. He admitted he had placed the job order with Canada Employment Centre. He indicated he had hired one person. He indicated that person had worked one or two days and then that person did not show up. He indicated he did not recall a phone call from Eileen Saunders. He indicated that he was ready to give anyone the opportunity to work. He did hire another person in June of 1981. Mr. Brotten recalls talking to Mr. Moats. Mr. Brotten told Mr. Moats that the person he had hired had quit.

11685 I find from the evidence that Eileen Saunders did call Mr. David Carl Brotten on May 13, 1981. I find at that time Mr. Brotten did not have anyone else working for him. I find that he was looking for an employee. In fact, he hired someone in late May or early June of 1981. I find that he did deny Eileen Saunders the opportunity to work for him because she was a woman. I find that Mr. Brotten, carrying on business under the name "Dave's Painting and Design," violated Section 16(1) of The Human Right Code. The Human Rights Code, R.S.S. 1978, c. S-24.1, Section 16(1) provides as follows:

> 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.

11686 Mr. Woodard, in his argument, discussed the question of damages. He indicated that the evidence was that Mr. Brotten was prepared to pay $5.50 per hour. He indicated that Eileen Saunders, as a result of the discrimination, did not work from May 13, 1981, until May 31, 1981. This constituted eleven working days. Mr. Woodard indicated that the total loss of income was $484.00. Mr. Woodard asked that we award damages in that amount to Eileen Saunders. Section 31(7) of The Human Rights Code, R.S.S. 1978, c. S-24.1, provides as follows:

> 31. (7) Where, at the conclusion of an inquiry, the board of inquiry finds that the complaint to which the inquiry relates is substantiated on a balance of probabilities, the board may, subject to subsections (9) and (10), order any person who has contravened any provision of this Act, or any other Act administered by the commission, to do any act or thing that in the opinion of the board constitutes full compliance with that provision and to rectify any injury caused to any person and to make compensation therefor, including, without restricting the generality of the foregoing, an order:
>
> (a) requiring that person to cease contravening that provision and, in consultation with the commission on the general purposes thereof, to take measures, including adoption of a program mentioned in section 47, to prevent the same or similar contravention occurring in the future;
>
> (b) requiring that person to make available to any person injured by that contravention, on the first reasonable occasion, any rights, opportunities or privileges that, in the opinion of the board of inquiry, are being or were being denied the person so injured and including, but without restricting the generality of this clause, reinstatement in employment;
>
> (c) requiring that person to compensate any person injured by that contravention for any or all of the wages and other benefits of which the person so injured was deprived and any expenses incurred by the person so injured as a result of the contravention;
>
> (d) requiring that person to make any compensation that the board of inquiry may consider proper, to any person injured by that contravention, for any or all additional costs of obtaining alternative goods, services, facilities or accommodation and any expenses incurred by the person so injured as a result of the contravention.

11687 We particularly note Section 31(7)(c) which allows the Board to require a person to compensate another person injured for any or all wages and other benefits. I find I do have the power to award damages for the loss of wages and other benefits. No evidence was given as to the other benefits.

11688 I therefore order that Eileen Saunders is entitled to loss of wages in the amount of $484.00 and order that David Carl Brotten pay Eileen Saunders the sum of $484.00.

Volume 4, Decision 275 Paragraphs 11689 - 11725 April/May, 1983

Saskatchewan Court of Appeal Decision
under the
SASKATCHEWAN HUMAN RIGHTS CODE

Peter Glendinning, Chairman of the Board of Inquiry

Appellant

and The Attorney-General for the Province of Saskatchewan

Intervenor

v.

Corporal V.B. Scowby, Corporal W.L. Ganes, Constable J.A. Clarke, Constable A.R. Hopper, Constable B.C. Woodward and Stephen B. MacBride

Respondents

Date:	March 24, 1983
Place:	Regina, Saskatchewan
Before:	The Honourable Chief Justice E.D. Bayda, the Honourable Mr. Justice Mervyn Woods, the Honourable Mr. Justice C.F. Tallis.
Appearances by:	M.C. Woodard, Counsel for the Appellant J. MacPherson, Counsel for the Intervenor C. Dean Campbell, Counsel for the Respondents
Judgment by:	Tallis, J.A. Concurred in by Bayda, C.J.S. and Woods, J.A.

Summary: *In a unanimous decision, the Court allows the appeal from a decision of the lower Court which found that Royal Canadian Mounted Police Officers could not be complained against under the provisions of the Saskatchewan Human Rights Code which prohibit arbitrary arrest or detention because the R.C.M.P. is a federal force and the Code is a provincial statute.*

The Court of Appeal rules that R.C.M.P. Officers are not immune to provincial law and that while a provincially constituted agency or Board of Inquiry does not have the jurisdiction to inquire into the internal management or administration of the Royal Canadian Mounted Police, it can deal with complaints alleging that individual R.C.M.P. Officers have contravened provincial law. Being employed by a federal employer does not place the individual Officer outside the ambit of provincial statute law. The identity or occupation of the alleged offender is not a bar to an inquiry under the Code as long as the inquiry is conducted within proper bounds.

The Court of Appeal also rejects the Respondents' argument that a Board of Inquiry established pursuant to the provisions of the Saskatchewan Human Rights Code functions as a Section 96 Court and is therefore unconstitutional since Section 96 Courts must be federally appointed under the terms of the Constitution Act, 1867.

The Court finds that a human rights Board of Inquiry is only a part of the administration of human rights and the institutional setting for that administration. The mere assignment of a judicial function to an administrative agency does not turn the agency into a Section 96 court. There is an intertwined administration under the Code which brings the Commission and the Board of Inquiry into a broad social policy framework.

On these grounds the Court finds that the Board of Inquiry is not usurping the functions of a Section 96 court and is constitutional.

The appeal is allowed.

JUDGMENT OF THE COURT **TALLIS, J.A.**

11689 This is an appeal from an order of prohibition made by Maher, J., (139 D.L.R. (3d) 44),[1] whereby Peter Glendinning, sitting as a Board of Inquiry appointed pursuant to Section 29 of *The Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1, (hereinafter called "the Code"), was prohibited from inquiring into a complaint by Joseph Dumont, Keith Dieter, Wesley Ironstar and Fred Runns, Jr., that their right to freedom from arbitrary arrest or detention had been infringed in the Hudson Bay area of Saskatchewan on 28 September, 1980, contrary to Section 7 of the *Code* which provides:

> 7. *Every person and every class of persons shall enjoy the right to freedom from arbitrary arrest or detention*, and every person who is arrested or detained shall enjoy the right to an immediate judicial determination of the legality of his detention and to notice of the charges on which he is detained.
>
> (emphasis added)

11690 At all times material to these proceedings, the respondents were members of the Royal Canadian Mounted Police, stationed in Saskatchewan. They were subject to the *Royal Canadian Mounted Police Act*, 1970 R.S.C., c. R-9, (hereinafter called "the Act"), and the Regulations. It is common ground that members of the R.C.M.P. are subject to the statutory discipline code contained in the *Act* and Regulations and are under a legal duty to strictly observe the law: vide Regulation 25 of The Royal Canadian Mounted Police Regulations.

11691 The Province of Saskatchewan has entered into a provincial policing agreement, pursuant to Section 20 of the *Act*, with federal authorities in aid of the administration of justice in the Province and "in carrying into the effect the laws in force therein." Under this agreement certain areas of the province are policed by members of the R.C.M.P.

[1] Editor's note: see also (1982) 3 C.H.R.R., D/972.

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11692 In his affidavit in support of the application for prohibition, Corporal Scowby deposes, *inter alia*, as follows:

> 2. THAT I was on duty as a member of the Royal Canadian Mounted Police on September 27th and 28th, 1980, at the Hudson Bay Rural Detachment of the Royal Canadian Mounted Police in the Town of Hudson Bay, in the Province of Saskatchewan.
>
> 3. THAT as a result of a complaint of an alleged assault made to me by Robert Seniuk, Conservation Officer with the Department of Tourism and Renewable Resources, Province of Saskatchewan, an investigation was commenced for the purpose of finding and apprehending the alleged assailant for committing an offence under the Criminal Code of Canada.
>
> 4. THAT as a result of the said criminal investigation one Frederick Runns, Sr. was found and apprehended in the early morning of September 28th, 1980.
>
> 5. THAT on the dates in question a number of Royal Canadian Mounted Police officers were on duty assisting me in the above described criminal investigation including the following:
>
> (1) Cst. Allen R. Hopper, of the Hudson Bay Detachment.
>
> (2) Cst. Brian C. Woodward, of the Hudson Bay Detachment.
>
> (3) Stephen Bradley MacBride, who has since left the employ of the Royal Canadian Mounted Police but who was at the time so employed and stationed at the Hudson Bay Detachment.
>
> (4) Cpl. Warren L. Ganes, of the Prince Albert Detachment in the City of Prince Albert, in the Province of Saskatchewan.
>
> 6. THAT I am advised and do verily believe the same to be true that a Cst. John A. Clarke of the Pelly Detachment, in the Town of Pelly, in the Province of Saskatchewan was on duty on the dates in question and assisted me in the said investigation.
>
> 7. THAT attached hereto as Exhibit 'A' to this my affidavit is a copy of a complaint dated March 13th, 1981 at Hudson Bay, Saskatchewan by ones (sic) Joseph Dumont, Keith Deiter, Wesley Ironstar, Fred Runns, Jr., received from the Saskatchewan Human Rights Commission.

Strictly speaking, paragraph 7 of this affidavit is not admissible on a final application: vide *Beauchene and Peltier v. Gunson*, [1928] 2 W.W.R. 497; *Selch v. Baker*, [1922] 1 W.W.R. 785; *Block v. Schauerte* (1965), 52 W.W.R. 548. However, learned counsel for the appellant took no objection to the affidavit and proceeded on the footing that the statement in paragraph 7 was factually correct.

11693 The complaint which was filed with the Saskatchewan Human Rights Commission, (hereinafter called "the Commission"), on 13 March 1981, sets out the following particulars in paragraph 4:

> 4. The particulars of the alleged violation are as follows:
>
> On September 27th, 1980, we, Joseph Dumont, Keith Deiter, Fred Runns, Jr. and Wesley Ironstar were southeast of Hudson Bay, along the Ridge Road, hunting moose. We hunted for several hours, then proceeded back to a cabin at Moose Range Lodge, where we all went to sleep for the night. Several hours later, approximately 2:00 a.m., we were awakened by a man's voice amplified by a loudspeaker stating that it was the R.C.M.P., that Fred Runns was under arrest, and that he should come out of the cabin with his hands behind his head. Runns did this. We were then instructed to come out of the cabin one at a time with our hands behind our heads, and not to bother to dress.
>
> Once outside, we saw headlights directed at the cabin and the silhouettes of a number of men, surrounding the cabin, with guns pointed at us. We were all instructed to lay face down on the ground, with our hands behind our heads and not to move. A man questioned Runns, and in the meanwhile, other men laughed, made jokes about the situation, and ridiculed us. A dog was barking and growling during this time, and we perceived him to be loose as he came very close to our heads on several occasions while doing this. During this time someone stepped down on the back of the heads of both Mr. Deiter and Mr. Dumont.
>
> Finally, after approximately one-half hour of laying on the ground, not adequately clothed, in below-zero temperatures, we were told to get up one at a time and asked our names and addresses, then told by an R.C.M.P. Officer to get back into the cabin.
>
> We believe these R.C.M.P. Officers violated our rights by arbitrarily detaining us and by not informing us as to the charges on which we were being detained. We believe this is in contravention of the Bill of Rights under the Saskatchewan Human Rights Code, Section 7.
>
> We further believe that our experience is indicative of a general pattern and practice of the Royal Canadian Mounted Police in contravening Section 7 of the Bill of Rights.

11694 The Commission conducted the required inquiry into the complaint under Section 28 of the *Code* and then unsuccessfully endeavored to effect a settlement of the matter. A formal inquiry was then instituted under Section 29 of the *Code*, with Peter Glendinning being appointed Chairman and sole member of the Board of Inquiry.

11695 By "Notice of Formal Inquiry" dated 14 December 1981, Peter Glendinning, as Chairman of the Board of Inquiry, notified the respondents that he had fixed 26 January 1982, at 9:30 a.m., in Regina as the date, time and place for the commencement of the inquiry. The gist of the inquiry as set forth in the Notice is an allegation that the complainants' rights under Section 7 of the *Code* have been violated.

11696 On 20 January 1982, the respondents applied for an order of prohibition, and by consent of the parties, the inquiry was adjourned *sine die* pending the determination of this motion. The grounds advanced in the Court below were:

> (a) THAT the Saskatchewan Human Rights Commission and the Respondent Chairman of the Board of Inquiry lack jurisdiction to inquire into complaints against the conduct of members of the Royal Canadian Mounted Police while on duty.
>
> (b) THAT Section 7 of the Saskatchewan Human Rights Code cannot be employed to establish rights or procedures in matters of criminal law and has no application to members of the Royal Canadian Mounted Police engaged in the investigation of offences under the Criminal Code of Canada.
>
> (c) THAT Sections 29 and 31 of the Saskatchewan Human Rights Code are beyond the competence of the Saskatchewan Legislature in that they purport to confer upon the Board of Inquiry judicial powers and functions analagous to those performed by judges of a Superior, District or County Court appointed pursuant to Section 96 of the British North America Act.

Maher, J., upheld the objections to jurisdiction advanced by the respondents under grounds (a) and (b) and granted an

order prohibiting Peter Glendinning from further proceeding as a Board of Inquiry under Section 29 of the *Code*.

11697 The reasons for judgment will be canvassed in greater detail when I deal with the questions raised on this appeal. However, it is important to observe that the bite of the order of prohibition has cut off the commencement of any inquiry by the Commission into the allegations made by the complainants that their human or civil rights have been violated in a reprehensible fashion. Particulars of their complaint have been quoted in earlier passages, but the full details have yet to be heard under oath. If the judgment below is correct, it means that members of the R.C.M.P. are immune from any complaint addressed to the Commission alleging a violation of human rights, even though their actions may have been unlawful in the civil context and without any pretense of justification. Under the *Code*, the respondents have the right to answer the allegations, but they maintain that the Board has no jurisdiction to enter on the inquiry into the complaint involving their alleged actions.

11698 This is an appropriate point to observe that police officers, whether members of the R.C.M.P. or otherwise, may be held civilly liable for false arrest, false imprisonment, assault and malicious prosecution, in cases where they have overstepped the bounds of their authority: vide *Lang v. Burch and Carlson* [1983], 1 W.W.R. 55. However, the complainants in this case have not resorted to the traditional process in the superior court — they have chosen another forum, the Commission, which is a public institution charged with statutory responsibilities pertaining to, *inter alia*, human rights within the province.

11699 This appeal raises a number of important questions which may be paraphrased as follows:

(i) Whether, in the light of the provisions of Section 96 of *The Constitution Act, 1867* (formerly the British North America Act, 1867), Sections 29 and 31 of *The Saskatchewan Human Rights Code* are *intra vires* of the Legislature of Saskatchewan insofar as they purport to confer jurisdiction on a Board of Inquiry constituted thereunder to inquire into and adjudicate upon violations of human rights under the *Code*;

(ii) Whether the *Code* properly construed can be said to apply to the actions of *persons employed by federal institutions*;

(iii) Whether, assuming the answer to question (ii) is "yes," the learned Chamber judge erred in holding that the Board of Inquiry lacked jurisdiction, by reason of the provisions of *The Constitution Act, 1867*, to inquire into the alleged violations of human rights under Saskatchewan law when the alleged violators were individual members or employees of a federal institution;

(iv) Whether the learned Chamber judge erred in applying the paramountcy doctrine and holding that Section 7 of the *Code* had no application to individual members of the R.C.M.P. engaged in the investigation of offences under *The Criminal Code of Canada*;

(v) Whether the learned Chamber judge erred in holding that the application for prohibition was not premature because the complaint in question was clearly and beyond doubt outside the jurisdiction of the Board of Inquiry.

11700 I now propose to address the question whether Section 96 of *The Constitution Act, 1867*, is offended by vesting the powers set forth in Part IV of the *Code* in the Saskatchewan Human Rights Commission and any Board of Inquiry constituted thereunder. Maher, J., did not deal with this issue but it was vigorously pressed by learned counsel for the respondents in argument before this Court. The central point taken by counsel for the respondents was that the *Code* purports to vest judicial adjudicative functions in the Commission or a Board of Inquiry constituted thereunder which belong exclusively to the superior courts of this province. It was submitted that the powers of the Board of Inquiry, as set out in Sections 29 and 31 of the *Code*, are analagous to those performed by a Judge of the Superior, District or County Court pursuant to Section 96 of *The Constitution Act, 1867*; vide *Massey-Ferguson Industries Limited, et al v. The Government of Saskatchewan, et al*, [1981] 2 S.C.R. 413; *Re The Residential Tenancies Act, 1979*, [1981] 1 S.C.R. 714, and *Capital Region District v. Concerned Citizens of British Columbia, et al* (unreported judgment of the Supreme Court of Canada dated 21 December 1982).

11701 In my opinion, this question cannot be answered without reference to the institutional setting of the Commission and the Board of Inquiry constituted thereunder. In more recent times, there has been a marked shift in emphasis to human rights, not only at the provincial and national level but also at the international level. As a starting point, I would make passing reference to the "International Covenant on Civil and Political Rights and the Optional Protocol to the International Covenant," which was adopted by the United Nations General Assembly on 16 December 1966, and which came into effect on 23 March 1976. On 16 May 1976, Canada became a party to the Covenant and its Optional Protocol, with the same taking effect in Canada on 19 August 1976. Article 9(1) of this Covenant provides:

> Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.

For a report on the measures taken at both the federal and provincial levels to give effect to the rights recognized in the International Covenant, see *International Covenant on Civil and Political Rights: Report of Canada on Implementation of the Provisions of the Covenant*, March 1979, published by the Department of the Secretary of State for Canada.

11702 For the most part, Saskatchewan legislation is in harmony with the International Covenant. In some areas, legislation in respect of human rights was enacted long before the International Covenant: vide *The Saskatchewan Bill of Rights Act* that was first enacted as *The Saskatchewan Bill of Rights Act*, S.S. 1947, c. 35. *The Saskatchewan Human Rights Code* is a consolidation of a number of earlier statutes, The Blind Persons' Rights Act, The Fair Accommodation Practices Act, The Fair Employment Practices Act, The Saskatchewan Bill of Rights Act and The Saskatchewan Human Rights Commission Act. The stated objects of the *Code* are set out in Section 3:

> (a) to promote recognition of the inherent dignity and the equal inalienable rights of all members of the human family; and
>
> (b) to further public policy in Saskatchewan that every person is free and equal in dignity and rights and to dis-

courage and eliminate discrimination.

The *Code* is binding on the Crown (in the Right of the Province of Saskatchewan).

11703 Sections 4 to 8, inclusive of the *Code*, contain a Bill of Rights which guarantees freedom of conscience, freedom of expression, peaceable assembly and association, *freedom from arbitrary arrest* or *detention*, and free elections. Part II of the *Code* prohibits discrimination with respect to certain specified matters, including, *inter alia*, employment, housing, occupation, business, education, access to public facilities, membership in trade and professions, on the ground of race, creed, religion, colour, sex, marital status, physical disability, age, nationality, ancestry, or place of origin.

11704 Under the *Code* the work of the Commission is not limited to instituting prosecutions for violations or making compensation awards. In my opinion, the *Code*, when looked at as a whole, reflects the public's growing interest in human rights. This is illustrated by the statutory duties imposed on the Commission under Section 25 which reads:

> 25. The commission shall:
>
> (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 of 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.

11705 The remedies available to an aggrieved person who has been discriminated against are many and varied. Anyone contravening the *Code* may be prosecuted under Sections 35 or 36, (as the case may be), which provides:

> 35.—(1) Every person who contravenes or fails to comply with an order made under section 31, 32 or 38 is guilty of an offence and liable on summary conviction to the penalties provided in subsection (3).
>
> (2) Every person who deprives, abridges or otherwise restricts or attempts to deprive, abridge or otherwise restrict any person or class of persons in the enjoyment of a right under this Act, or any other Act administered by the commission, or who contravenes any provision of any such Act for which no other penalty is imposed, is guilty of an offence and liable on summary conviction to the penalties provided in subsection (3).
>
> (3) Any person who is convicted of an offence mentioned in subsection (1) or (2) and who is:
>
> (a) an individual is liable to a fine of not more than $500 in the case of a first offence or to a fine of not more than $2,000 in the case of a subsequent offence;
>
> (b) a person other than an individual is liable to a fine of not more than $2,000 in the case of a first offence or to a fine of not more than $3,000 in the case of a subsequent offence.
>
> (4) The penalties provided by this section may be enforced upon the information of the Director of Human Rights or of any person alleging on behalf of himself or of any class of persons that a right that he or any class of persons or a member of any such class of persons is entitled to enjoy under this Act or any other Act administered by the commission has been denied, abridged or restricted.
>
> 36.—(1) A prosecution for an offence under this Act may be instituted against a trade union, occupation association or employers' organization.
>
> (2) For the purpose of this Act, a trade union, occupational association or an employers' organization is deemed to be a legal entity and any act or thing done or omitted to be done by an officer or agent of a trade union, occupational association or an employers' organization who is acting within the scope of his authority on behalf of the trade union, occupational association or employers' organization is deemed to be an act or thing done or omitted to be done by the trade union, occupational association or employers' organization, as the case may be.

11706 Section 38 of the *Code* provides for injunctive relief to enjoin an offender from continuing an offence:

> 38.—(1) Where a person has been convicted of an offence under this Act or any other Act administered by the commission, the commission may apply by way of notice of motion to a judge of the Court of Queen's Bench for an order enjoining that person from continuing or repeating the offence, and the judge may make any order that he considers fit.
>
> (2) Any order made under subsection (1) may be enforced in the same manner as any other order or judgment of the Court of Queen's Bench.
>
> (3) A person who deprives, abridges or otherwise restricts or attempts to deprive, abridge or otherwise restrict a person or class of persons in the enjoyment of a right under this Act or any other Act administered by the commission, or who has contravened any provision of any such Act, may be restrained by an injunction issued in an action in the Court of Queen's Bench brought by any person against the person responsible for such contravention, deprivation, abridgment or other restriction, or any attempt thereat.

11707 The Commission, as an instrument of social policy, is assigned the task of administering the *Code*. In carrying out its mandate, it not only has the right, but also the duty, to inquire into complaints and endeavor to achieve a settlement. If it is not able to effect a settlement, it may direct a formal inquiry before a Board which may order compliance with the legislation and direct compensation. The remedy, if any, that is ordered will undoubtedly depend on the circumstances of each case. The following statutory provisions are relevant to this phase of the Commission's work:

> 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, may file with the commission a complaint in the form prescribed by the commission.

(2) . . .

(3) Where the commission 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, the commission may initiate a complaint.

(4) Where, at any time, including during the course of any inquiry pursuant to this Act, the commission, or any person designated by the commission, is satisfied that a complaint is without merit, the commission or its designate may dismiss the complaint.

28.—(1) Where a complaint is filed with, or initiated by, the commission, the commission, or any person designated by the commission, shall, subject to subsection 27(4), inquire into the complaint and endeavour to effect a settlement of the matter.

(2) Where a complaint is filed with the commission, the matter shall be considered settled for the purposes of this Act only if the commission is a party to the settlement and has agreed to its terms.

(3) Where a settlement is effected in accordance with subsection (2) or a decision or order is made under section 31 by a board of inquiry, the commission may, in its discretion, publicize in any manner the results of the settlement, decision or order.

(4) . . .

(5) . . .

(6) The commission, or a person designated by the commission, may, at all reasonable times, for the purposes of an inquiry under subsection (1):

(a) demand the production of and inspect all or any of the books, documents, correspondence or records of the person whose conduct is the subject of the complaint;

(b) require production of and examine employment applications, payrolls, records, documents, writings and papers or copies thereof in the possession of any person; and

(c) obtain information or take extracts from or make copies of any items mentioned in clauses (a) and (b);

and, where the commission or its designate has so demanded or required the production of any items mentioned in clauses (a) and (b), the person upon whom the demand or request has been made shall comply with the demand or request.

(7) . . .

(8) The commission, or any person designated by the commission, may, where any person has refused or failed to comply with a demand, requirement or request under subsection (6), upon application *ex parte*, request a judge of the Court of Queen's Bench to grant an order requiring the person whose conduct is the subject of the complaint or any person who it appears has possession of any items described in subsection (6) to immediately produce those items to the commission or its designate, and the judge may make any other order that he considers necessary to enforce the provisions of subsection (6).

29.—(1) Where the commission, or a person conducting an inquiry on behalf of the commission, is unable to effect a settlement of the matter complained of, the commission shall report to the minister and, in its discretion, may direct a formal inquiry into the complaint to hear and decide the matter or, in the absence of a direction by the commission, the minister may direct such a formal inquiry.

(2) . . .

(3) . . .

(4) . . .

30.—(1) The parties to a proceeding before a board of inquiry with respect to any complaint are:

(a) the commission, which shall have the carriage of the complaint;

(b) the person named in the complaint as the complainant;

(c) any person named in the complaint who is alleged to have been dealt with contrary to the provisions of this Act;

(d) any person named in the complaint who is alleged to have contravened this Act; and

(e) any other person specified by the board, upon any notice that the board may determine and after such person has been given an opportunity to be heard against his joinder as a party.

(2) A true copy of the complaint shall be annexed to the notice of the hearing that is given to any party other than the commission.

31.—(1) Subject to any guidelines for formal inquiries that may be established by the commission and to subsections (2) and (3), a board of inquiry may determine its own procedure and may receive and accept any evidence and information on oath, affidavit or otherwise that in its discretion it considers fit and proper, whether admissible as evidence in a court of law or not, and the board of inquiry and each member thereof has all the powers conferred upon commissioners by sections 3 and 4 of *The Public Inquiries Act*.

(2) The oral evidence taken before a board of inquiry shall be recorded.

(3) Without restricting the generality of subsection (1), a board of inquiry shall, on a formal inquiry, be entitled to receive and accept evidence led for the purpose of establishing a pattern or practice of resistance to or disregard or denial of any of the rights secured by this Act, and the board of inquiry shall be entitled to place any reliance that it considers fit and proper on such evidence and on any pattern or practice disclosed thereby in arriving at its decision.

(4) Counsel for the commission is entitled to participate in any formal inquiry in the same manner as counsel representing any party thereto, including the right to call, examine and cross-examine witnesses and to address the board of inquiry.

(5) The board of inquiry shall inquire into the matters complained of and give full opportunity to all parties to present evidence and make representations, through counsel or otherwise.

(6) Where, at the conclusion of an inquiry, the board of inquiry finds that the complaint to which the inquiry relates is not substantiated, it shall dismiss the complaint.

(7) Where, at the conclusion of an inquiry, the board of inquiry finds that the complaint to which the inquiry relates is substantial on a balance of probabilities, the board *may*, subject to subsections (9) and (10), order any person who has contravened any provision of this Act, or any other Act administered by the commission, to do any act or thing that in the opinion of the board constitutes full compliance with that provision and to rectify any injury caused to any person and to make compensation therefor, including, without restricting the generality of the foregoing, an order:

(a) requiring that person to cease contravening that provision and, in consultation with the commission on the general purposes thereof, to take measures,

including adoption of a program mentioned in section 47, to prevent the same or similar contravention occurring in the future;

(b) . . .

(c) requiring that person to compensate any person injured by that contravention for any or all of the wages and other benefits of which the person so injured was deprived and any expenses incurred by the person so injured as a result of the contravention;

(d) requiring that person to make any compensation that the board of inquiry may consider proper, to any person injured by that contravention, for any or all additional costs of obtaining alternative goods, services, facilities or accommodation and any expenses incurred by the person so injured as a result of the contravention.

(8) Where a board of inquiry finds that:

(a) a person has wilfully and recklessly contravened or is wilfully and recklessly contravening any provision of this Act or any other Act administered by the commission; or

(b) the person injured by a contravention of any provision of this Act or any other Act administered by the commission has suffered in respect of feeling or self-respect as a result of the contravention;

the board of inquiry may, in addition to any other order it may make under subsection (7), order the person who has contavened or is contravening that provision to pay any compensation to the person injured by that contravention that the board of inquiry may determine, to a maximum of $5,000.

(9) . . .

(10) . . .

(11) . . .

(12) . . .

32.—(1) Any party to a proceeding before a board of inquiry may appeal on a question of law from the decision or order of the board to a judge of the Court of Queen's Bench by serving a notice of motion, in accordance with The Queen's Bench Rules, within thirty days after the decision or order of the board of inquiry, on:

(a) the board of inquiry;

(b) the commission; and

(c) the other parties in the proceedings before the board of inquiry.

(2) . . .

(3) . . .

(4) . . .

(5) The decision of the Court of Queen's Bench may be appealed to the Court of Appeal.

33.—(1) Any order made under section 31 by a board of inquiry shall, on filing of a certified copy thereof in the office of the local registrar of the Court of Queen's Bench at the judicial centre nearest to the place where the formal inquiry was held, be entered as a judgment of the Court of Queen's Bench and may be enforced as such.

(2) . . .

(3) . . .

(4) An application to enforce an order of the board of inquiry may be made to the court by and in the name of any one or more of the parties to the proceedings, and, upon the hearing of that application, the court is bound by the findings of the board of inquiry and shall make any order or orders that may be necessary to cause every party with respect to which the application is made to comply with the order of the board of inquiry.

(emphasis added)

11708 In dealing with the Section 96 question, I observe that this statute does not contain a privative clause. No attempt is made to oust the authority of the Court to review any alleged excess or want of jurisdiction. Moreover, Section 32 (quoted above) expressly grants a right of appeal on questions of law. In the circumstances of this case, the principle enunciated in *Crevier v. The Attorney General of the Province of Quebec*, [1981] 2 S.C.R. 220, that a provincially-constituted tribunal could not constitutionally be immunized from review of decisions on questions of jurisdiction is of no application.

11709 In dealing with the Section 96 question raised on this appeal, I am guided by the three-part test articulated by Mr. Justice Dickson, speaking for the full Court, in *Re Residential Tenancies Act, 1979*, [1981] 1 S.C.R. 714. As I understand the approach, this test involves asking three questions in respect of the impugned function:

(i) whether or not it conforms to a function exercised by a superior, district or country court judge at the time of Confederation;

(ii) if so, whether or not the function can still be considered a "judicial" function when viewed in its institutional setting; and

(iii) if so, whether or not the adjudicative function is the sole or central function of the tribunal so that it can be said to operate like a Section 96 court.

The mere assignment of a judicial function to an administrative agency does not turn the agency into a Section 96 court. All three of the above questions must be answered in the affirmative for the function of the tribunal to be declared unconstitutional.

11710 In the circumstances of this case, it is unnecessary for me to deal with the first question posed under the three-part test because I am of the clear opinion that questions (ii) and (iii) of the test must be answered in the negative. There is, in my opinion, an intertwined administration under the *Code* which brings the Commission and the impugned Board of Inquiry into a broad social policy framework. The *Code* emphasizes public education in the area of human rights and the amicable resolution of disputes arising thereunder. If the settlement process fails, there is a system of adjudication available as a last resort. There is a judicial function involved in the adjudication, but it goes beyond the concept of a *lis* between parties and involves considerations of the collective good of the community as a whole. Under Section 30 of the *Code* (quoted above), the proceedings are carried by the Commission which represents not only the interests of the complainants but also the interests of the public. While there is admittedly a judicial element in its operation, it is not the sole or central function of the Board of Inquiry so as to characterize it as operating in its institutional framework like a Section 96 court. The institutional setting of the Board of Inquiry, with the judicial element in its function, does not offend Section 96: vide *Tomko v. Labour Relations Board (Nova Scotia)*, [1977] 1 S.C.R. 112; *The Corporation of the City of Mississauga v. The Regional Municipality of Peel, et al*, [1979] 2 S.C.R. 244; *Massey-Ferguson Industries Ltd., et al v. Government of Saskatchewan, et al* (1981), 127 D.L.R. (3d) 513 (S.C.C.);

Capital Regional District v. Concerned Citizens of British Columbia, et al (unreported judgment of Supreme Court of Canada dated 21 December 1982). I accordingly answer the constitutional question in the affirmative.

11711 I now turn to the question whether the *Code* was ever intended to apply to *persons employed by federal institutions*. There is no doubt that a statute may, as a matter of interpretation, exclude from its purview various persons and institutions. In argument before this Court, learned counsel for the respondents referred in particular to *Re Ombudsman Act*, [1974] 5 W.W.R. 176, where Bayda J. (as he then was) held that the *Ombudsman Act*, when viewed as a whole, was not intended to apply to federal institutions. That case is distinguishable on the wording of the respective statutes. Section 2(m) of the *Code* reads:

> 2. In this Act:
>
> (m) 'person', in addition to the extended meaning contained in *The Interpretations Act*, includes an employment agency, employers' organization, occupational association or trade union;

In my opinion this definition, when read with the statute as a whole, shows a clear intendment to extend its operation to employees of federal institutions. The Board of Inquiry proposes to inquire into certain specific acts of individual members of the R.C.M.P. arising out of a specific complaint. This is quite different from an attempt to inquire into the operation and management of the R.C.M.P. itself, or the general conduct of members of the Force. It is common ground that legislation purporting to authorize such a step would be *ultra vires* the Legislature of Saskatchewan. The legislation under consideration does not intend that federal employees who violate provincial law can hide behind the shield of their employment by a federal institution to avoid criminal or civil liability before provincial courts or institutions. In dealing with this aspect of the case, learned counsel for the respondents conceded that they would be subject to proceedings under the *Code* if their alleged actions were taken while "off duty." More will be said of it later but I agree with the submission of learned counsel for the Attorney General of Saskatchewan that as a general proposition, individuals employed by a federal institution are subject to provincial laws of general application.

11712 On this branch of the case, learned counsel for the respondents submitted that the procedure provisions contained in Sections 28 and 31 of the *Code* would operate in violation of the Crown prerogative against discovery. This reference was made in support of the contention that the statute, when viewed as a whole, was never intended to cover the actions of individual employees of a federal institution while purporting to carry out their duties. In my opinion, the *Code* does not foreclose consideration of questions of privilege that may arise during the inquiry. Questions of testimonial immunity or privilege may arise during the course of such an inquiry, and if so, the issue of admissibility can be raised and argued. It is not for the Court to speculate or prejudge such issues, which, if they do arise, must be dealt with in the context of the examination of witnesses and documents before the Board of Inquiry: vide *Canadian Javelin Ltd., Re; Sparling et al v. Smallwood* (1982), 44 N.R. 571. Furthermore, under certain circumstances, there is added protection under Section 28(8) of the *Code*.

11713 I now turn to the constitutional question of whether the Board of Inquiry lacked jurisdiction to inquire into alleged violations of human rights under Saskatchewan law because the alleged violations were committed by members or employees of a federal institution, namely, the Royal Canadian Mounted Police, during the course of their employment. In answering this question in the affirmative, the learned Chamber judge applied the principles enunciated in *Attorney General of The Province of Quebec and Keable v. The Attorney General of Canada, et al*, [1979] 1 S.C.R. 218, 90 D.L.R. (3d) 161, and *The Attorney General of Alberta, et al v. Putnam, et al*, [1981] 2 S.C.R. 267, 123 D.L.R. (3d) 257. The relevant portion of his judgment on this issue reads thus:

> While both these decisions relate to the limitation on the right of a province to inquire into criminal activity pursuant to its jurisdiction over the administration of justice under sec. 92 (14) of the *British North America Act*, the principles enunciated therein would apply equally to the right of a province to enact a Human Rights Code pursuant to its jurisdiction under sec. 92(13), property or civil rights in the province. It follows that a Board of Inquiry constituted under a Human Rights Code with power to inquire into acts that may constitute a violation or violations of such code does not have the authority to extend such inquiry into the administration and management of the Royal Canadian Mounted Police.
>
> The question is whether the mandate given to the Board of Inquiry in the present case does extend into the administration and management of the Royal Canadian Mounted Police. If so, it is beyond the power of the province to direct a board to make such inquiry and it lacks the jurisdiction to do so.
>
> It is clear from the particulars of the complaint that the R.C.M.P. officers involved were engaged in the exercise of their duties as police officers when the alleged violation of the Human Rights Code occurred. If the allegations are substantiated the Board of Inquiry must decide whether or not the actions of the officers, in insisting that individuals other than the suspect be detained, amounted to arbitrary detention and arrest contrary to sec. 7 of the code. In the first instance the necessity for the detention of these individuals would be a matter for determination by the officer or senior member in charge of the investigation. If such officer or member decided that it was necessary to detain the individuals in order to successfully complete the investigation and subsequent arrest of the suspect, the other members present would be required to obey any order he might give to carry out such detention. Failure on the part of a member to comply with such order would subject that member to prosecution under the *Royal Canadian Mounted Police Act* and the question as to whether the order was lawfully given would be a matter for determination by a service tribunal as provided in that act.
>
> Likewise if no orders were given the extent of and necessity for the detention of one or all of the individuals by a member would be determined by that member. His decision would also be subject to investigation and discipline either on the initiative of the force itself or, as in the present case, on the complaint of an individual detained.
>
> In either case the disciplinary provisions contained in the *Royal Canadian Mounted Police Act* and the regulations would apply. For a Board of Inquiry constituted under the Saskatchewan Human Rights Code to also inquire into the same facts and circumstances and make its own finding would, in my view, constitute an inquiry into the administration and internal management of the Royal Canadian Mounted Police.
>
> The Board of Inquiry would apply its own standards in

> determining whether or not there had been arbitrary detention of the complainants contrary to The Human Rights Code. It would be highly unlikely that the standards that would be applied by the Board of Inquiry, taking into consideration the fact that it would make such determination in the context of a statute designed to protect the rights of individuals, would coincide with the findings of the service tribunal of a police force whose primary concern is the preservation of peace and the prevention of crime.
>
> There could very well be a finding by the Board of Inquiry of a violation of section 7 of the Human Rights Code while a service tribunal, dealing with the same circumstances, could exonerate the actions of the member or members of the R.C.M.P. In the event that the Board of Inquiry determined that a member or members of the R.C.M.P. had violated the code, it has broad powers to not only order the member or members to do any act or thing that it deems necessary to constitute compliance with the code, but may also order that person to cease contravening that provision of the code (sec. 31(7)). Moreover, when a person has been convicted of an offence under the code, the Human Rights Commission may apply to a Judge of the Court of Queen's Bench for an order enjoining that person from continuing or repeating (the offence.-(Sec. 38). If such an order were made, it is conceivable that an R.C.M.P. member could be in violation of an order of the Court of Queen's Bench if he obeyed a lawful order of a superior R.C.M.P. officer as long as the enjoining order remained in force.
>
> Adopting the phraseology of McGillivray, C.J. in re *Attorney General of Alberta et al v. Putnam et al*, (supra) this could result in an impossible situation which would bring the force into disrepute and which would affect the morale of the personnel of the force.
>
> In my opinion, the inquiry directed to be made by the Board of Inquiry in this case is an inquiry into the administration and management of the Royal Canadian Mounted Police.

11714 With respect, I do not agree that the principles in *Keable* and *Putnam* apply to this case. During the course of argument before this Court and in the Court below, learned counsel for the appellant Commission specifically stated that the Board of Inquiry cannot, and does not intend to extend its investigation into "a general pattern and practice of the Royal Canadian Mounted Police" as alleged in the last paragraph of the written complaint. In view of this concession, it is not necessary to limit the Board's mandate. This inquiry does not involve a colourable attempt to exceed constitutional limits. This is not a situation where the Board of Inquiry, under the guise of inquiry into alleged violations of provincial law, seeks to pursue an inquiry into the administration and management of the R.C.M.P. With the Board's mandate so limited, I fail to see how the proposed inquiry offends, at this stage, the principles enunciated in *Keable*. In that case, the provincial inquiry into allegedly illegal acts undertaken by various police forces in Quebec, including the R.C.M.P., was not completely prohibited but the Commission's mandate was amended to exclude references to the management of the R.C.M.P. In all other respects, the inquiry came within the scope of provincial authority in the area of "the administration of justice in the province." The mandate of the inquiry in the present case is to investigate a complaint about specific acts allegedly committed by individual members of the R.C.M.P. on a specific date. On the face of it, this inquiry is concerned with civil rights as well as the administration of justice.

11715 In *Putnam*, the provincial law authorizing the inquiry into police conduct was basically a law whose subject was police discipline. The Province of Alberta purported to extend this legislation to the Royal Canadian Mounted Police, which already has a statutory code of discipline under federal law. *The Police Act* of Alberta established a Code of Procedure to investigate matters relating to the conduct and discipline of police officers, including the R.C.M.P. Moreover, the impugned legislation sought to superimpose an Appeal Board on the existing federal legislation relating to R.C.M.P. discipline, with power to substitute its judgment for that of a Commanding Officer of the Force. In this case, counsel for the appellant made it clear that the Commission or Board of Inquiry does not assert any mandate to intervene or inquire into matters of discipline that may have taken place as a result of the incident which gave rise to the complaint. The internal discipline of the Force, or in respect of any individual officer, is not the subject matter of this inquiry. Furthermore, there is no suggestion that this is a colourable attempt to inquire into, or interfere with, matters of discipline. The decision in *Putnam* is of no application because the impugned legislation does not contemplate an appeal from any decision of the Commanding Officer; it does not contemplate a review of, or inquiry into, discipline proceedings, if any, that were taken. In short, the question of discipline by the R.C.M.P. is irrelevant to the inquiry.

11716 The liabilities and penalties which may apply to a violator of the *Code* are not "discipline" as that term is used in paramilitary institutions. The *Code* is a statute of general application which concerns the violation of human rights under provincial law. Whether the same conduct also involves a breach of professional standards, thereby subjecting the individual officer to internal discipline, is a matter of no concern to the Board of Inquiry. By the same process, a police officer charged under a provincial *Liquor Act* may face internal discipline for his conduct. However, the matter of discipline is of no concern to the Provincial Court judge trying the alleged violation of provincial law. A police officer overstepping the bounds of the law may be civilly liable in damages for false arrest, assault and battery, malicious prosecution, or false imprisonment. Whether or not he is subject to internal discipline is of no concern to the civil court — furthermore, the fact that he is subject to discipline proceedings is not a matter of defence that he can raise before the trial court.

11717 I view the cases of *Keable* and *Putnam* as confirming the right of the provinces to investigate and prosecute criminal acts committed by members of the R.C.M.P. I refer, in particular, to the statement of Pigeon, J., in *Keable* (supra) at page 242:

> Parliament's authority for the establishment of this force and its management as part of the Government of Canada in unquestioned. It is therefore clear that no provincial authority may intrude into its management. While members of the force enjoy no immunity from the criminal law and the jurisdiction of the proper provincial authorities to investigate and prosecute criminal acts committed by any of them as by any other person, these authorities cannot, under the guise of carrying on such investigations, pursue the inquiry into the administration and management of the force.

and the statement of Laskin, C.J., in *Putnam* (supra) at page 272:

> This Court decided in the *Keable* case that it was beyond the competence of a Province to authorize a provincial

> board of inquiry, concerned with looking into allegations of illegal or reprehensible acts by various police forces, including the R.C.M.P., to extend its inquiry into the administration and management of that police force.

11718 I want to emphasize that at no time did counsel for the respondents suggest that individual members of the R.C.M.P. were above provincial law. Furthermore, there is no suggestion that any alleged acts of reprehensible conduct, if they did in fact occur, were authorized or condoned by senior officers of the Force. On the contrary, everything said before us is consistent with the following statement in the "Second Report of the Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police" (the "McDonald Commission"):

> Generally speaking, the application of provincial penal statutes to members of the R.C.M.P. would not appear to be inconsistent with maintaining the integrity of Parliament's power to provide for the management and administration of the force. Disciplinary measures internal to the R.C.M.P. could still be taken with respect to conduct that constituted a provincial offence, subject to any applicable rules designed to prevent double jeopardy. To the extent that Parliament might see provincial laws as an embarrassment to the R.C.M.P. and their invocation against a member of the Force intolerable, it could effectively oust the provincial laws by providing specifically that they were not to apply to members of the R.C.M.P. (The doctrine of paramountcy . . . would apply.)

11719 This approach is in fact incorporated in the applicable federal legislation and regulations thereunder and in the Standing Orders of the R.C.M.P. Section 37(3) of the *Act* provides:

> (3) Nothing in subsection (2) prejudices any right or remedy that may exist apart from this section against any person for damage to or loss of property in respect to which a member is under this section ordered to make payment or restitution . . .

Regulation 25 under the *Act* provides:

> 25. It is the duty and responsibility of every person in charge of a post to ensure that there is at all times strict observance of the law . . . by all members of the Force.

And finally, the following Standing Orders are quite explicit:

> STATUTORY VIOLATIONS
>
> H. 1. Commanding Officer
>
> . . .
>
> H. 1. b. If investigation discloses that a member has violated . . . a provincial statute or regulation, refer the matter to the appropriate law officer or police force, i.e.,
>
> 1. In a contract province — to the Attorney General or his agent, crown prosecutor, municipal solicitor or municipal police force, as applicable.
>
> 1. c. Make it clear to an outside agency that where there is sufficient evidence to support a charge the Force would prefer that prosecution be entered in the ordinary courts.

11720 In my opinion, the Board of Inquiry under the *Code* has the power to inquire into alleged violations of human rights within the province. One should not overlook the existence of the complainants who allege that their rights have been breached. One would expect the province to have an interest in determining whether human rights under its legislation have been violated, whether by law enforcement officers or others. If the allegations involve the conduct of a conservation officer employed by the Government of Saskatchewan, no question of jurisdiction would arise. The identity or occupation of the alleged offender is not a bar to an inquiry under the *Code* as long as the inquiry is conducted within proper bounds. The mere fact that law enforcement is carried out by members of the R.C.M.P. pursuant to a provincial policing contract does not alter the situation. Can it be said that the Board of Inquiry has no jurisdiction where the alleged violator of statutory human rights does so while purporting to act as a postal assistant, tax collector, or investigator in the course of employment with a federal government agency? I think not.

11721 I turn now to the subsidiary question of whether Section 7 of the *Code* has any application to individual members of the R.C.M.P. engaged in the investigation of offences under *The Criminal Code of Canada*. In answering this question in the negative, the learned Chamber judge held that Section 7 of the *Code* cannot be employed to establish rightful procedures in matters of criminal law, and accordingly, has no application to members of the R.C.M.P. or any other police Force engaged in the investigation of offences under the *Criminal Code*. The relevant portion of the judgment on this issue is as follows:

> The submission of the applicants is that the exclusive jurisdiction of the Federal Government in criminal law and procedure in criminal matters as set out in section 91(27) of the *British North America Act* extends to the exercise of police powers with respect to the detention of individuals and to the judicial determination of the legality of detention. In this area the federal government, having enacted legislation in the Criminal Code, has occupied the field and the doctrine of paramouncy (sic) prevails insofar as the legislation relates to matters that affect the detention and arrest of persons during the course of an investigation of a criminal offence.
>
> Numerous provision of the Criminal Code relate to the release of persons detained or arrested by police officers. Superior courts are authorized to make rules regulating habeas corpus proceedings that are available to persons illegally detained. (Sec. 438). Under certain conditions police officers have the power to release persons from custody and are deemed to have been acting lawfully if the requirements of the provisions of the criminal code are complied with (sec. 451-453). The detention of persons arrested pending their appearance before a justice is authorized by sec. 454, and there is provision for judicial interim release and release from detention when trial is delayed in sections 457 and 459.
>
> It is not disputed by the respondent that at the time of the alleged arbitrary detention, the R.C.M.P. were investigating a criminal offence and that decisions had to be made with respect to the detention or arrest of certain individuals. The validity of any detention or arrest allegedly unlawfully made, and the legality thereof, must be subject to the relevant provisions of the Criminal Code. As the Parliament of Canada has legislated in the area, the doctrine of paramouncy (sic) applies. Obviously it is open to a province to legislate against arbitrary detention and arrest under sec. 92(13), but such legislation is inoperative and has no application to members of the Royal Canadian Mounted Police engaged in the investigation of offences under the Criminal Code. It is not necessary for me to come to a decision on the last question in order to dispose of the appeal. But I am of the view that insofar as sec. 7 of the Saskatchewan Human Rights Code purports to establish

> rights and procedures in relation to members of the Royal Canadian Mounted Police engaged in the investigation of offences under the Criminal Code, the doctrine of paramouncy (sic) would prevail and sec. 7 would not be applicable in such circumstances.

11722 With respect, I do not agree that the doctrine of paramountcy is applicable, with the result that Section 7 of the *Code* is rendered inoperative insofar as it purports to apply to police officers, including members of the R.C.M.P.

11723 The subject matter of Section 7 of the *Code* is arbitrary arrest and detention — a matter which not only involves human rights but a potential claim for damages in the civil law context: vide *Chartier v. The Attorney General of the Province of Quebec*, [1979] 2 S.C.R. 474. On the other hand, the subject matter of Sections 450-454, 457 and 459 of *The Criminal Code of Canada* is lawful arrest and matters ancillary thereto. I see no conflict with these provisions on which to invoke the paramountcy doctrine. Indeed, claims for false arrest, assault, false imprisonment and malicious prosecution against police officers, whether R.C.M.P. of otherwise, have co-existed with the provisions of *The Criminal Code* for decades. A police officer who carries out his duties according to law has a defence to any civil claim or criminal charge. However, if he oversteps the bounds of his authority, he cannot erect his position as an absolute shield against civil or criminal liability. He cannot, under the guise of carrying out police duties, commit a tort. In both our civil and criminal law, the power of arrest and the use of force is circumscribed by definite rules which place limits on the power of police officers. The authorities cited persuade me that the impugned legislation can exist in harmony with the above provisions of *The Criminal Code*.

11724 Having concluded that the appeal must be allowed for the foregoing reasons, it is unnecessary for me to deal with the question whether the application for prohibition was premature.

11725 Counsel agreed that no costs should be awarded in this case, and under the circumstances, the within appeal is accordingly allowed without costs.

TALLIS, J.A. for the Court.

CORAM: BAYDA, C.J.S., WOODS and TALLIS, JJ.A.

CANADIAN HUMAN RIGHTS REPORTER

SASKATCHEWAN / PUBLIC SERVICES / DISABILITY
Saskatchewan Court of Appeal
Yvonne Peters v. University Hospital

Volume 4, Decision 292 Paragraphs 12544 - 12651 July, 1983

Saskatchewan Court of Appeal Decision
under the
SASKATCHEWAN HUMAN RIGHTS CODE

Yvonne Peters and the Saskatchewan Human Rights Commission
Appellants

v.

University Hospital Board
Respondent

Date:	May 17, 1983
Place:	Regina, Saskatchewan
Before:	The Honourable Chief Justice E.D. Bayda The Honourable Mr. Justice R.L. Brownridge The Honourable Mr. Justice R.N. Hall The Honourable Mr. Justice R.A. MacDonald The Honourable Mr. Justice S.J. Cameron
Appearances by:	G.J.D. Taylor, Counsel for Yvonne Peters M. Woodard and R.P. MacKinnon, Counsel for the Saskatchewan Human Rights Commission D.E. Gauley, Counsel for University Hospital Board
Judgments by:	Bayda, C.J.S. Hall, J.A. Concurred in by Brownridge, J.A. and MacDonald, J.A. Cameron, J.A.

Summary: *By a split 4-1 decision, the Court of Appeal overturns the Court of Queen's Bench decision and reinstates the decision of the Board of Inquiry which ruled that Yvonne Peters was discriminated against when she was treated differently from other visitors to University Hospital because she was accompanied by a guide dog.*

In two different majority decisions, the Court rules that blind persons with guide dogs must be treated in the same manner as other members of the public and that hospitals are public places to which human rights legislation applies.

Mr. Justice Cameron dissents on the ground that the Board of Inquiry erred when it found that there was a violation of the Saskatchewan Human Rights Code because the complaint was filed under an earlier statute, the Blind Persons' Rights Act, and any violation found had to be a violation of that statute rather than the Code.

JUDGMENT **BAYDA, C.J.S.**

12544 The essential facts, and many of the statutory enactments to which I desire to refer, are found in the reasons for judgment, which I have had an opportunity of reading, prepared by my brother Cameron. I agree, with respect, with his conclusion that the University Hospital Board, the respondent in this appeal, should not have been held by the Board of Inquiry to have committed a violation of *The Saskatchewan Human Rights Code*, 1979 S.S., c. S-24.1 (the "*Code*"), but find myself in disagreement with his further conclusion that for that reason the appeal should be dismissed. I prefer to dispose of this appeal using an approach less strict than the one adopted by him. The case, in my respectful view, lends itself to such a disposition. The Board of Inquiry consisting of only one member, Mr. Peter Glendinning, within whose sole purview lay questions of fact, found every fact requisite for a disposition — after an application of the pertinent law — of the complaint alleging a violation of *The Blind Persons' Rights Act*, 1978 S.S., c. 4 (the "*Act*"). The questions of fact, thus, are not in doubt. The only questions in doubt requiring resolution before a disposition may be made are questions of law, and these questions, as expressly provided in Section 32 of the *Code* — and it is not seriously disputed that this appeal in procedural matters is governed by the *Code* — are within the competence of this Court to decide.

12545 The complaint made by Yvonne Peters, one of the appellants, as finally amended and which was the basis for the

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proceedings before Mr. Glendinning (who was appointed under Section 29 of the *Code*) was in these terms:

COMPLAINT

THE SASKATCHEWAN HUMAN RIGHTS COMMISSION ACT, 1972

To: THE SASKATCHEWAN HUMAN RIGHTS COMMISSION on the complaint of Yvonne Peters against University Hospital.

I, Yvonne Peters living at 1216 Wiggins Avenue, telephone 343-7626 complain against University Hospital whose address is University of Saskatchewan, Saskatoon, Saskatchewan, telephone 343-2112. The alleged violation took place on or about December 17th, 1978 through Mr. Gren Smith-Windsor (Name of person committing alleged violation).

The particulars are as follows:

I am a blind woman, within the meaning of the White Cane Act. On December 17th, 1978 at about 7:00 p.m. I went to the University Hospital to visit a relative. I was accompanied by my guide dog that is trained as a guide for a blind person by a recognized school. While visiting I was told I would not be allowed back in with my guide dog, by the Assistant Administrator, Gren Smith-Windsor. The next day, December 18th, 1978, I was informed by Ms. McKillop from the University Hospital that I could visit the hospital on a restricted basis.

I believe the restrictions placed on me are discriminatory, with respect to denying me access to facilities customarily available to the public, by reason only of the fact that I am accompanied by a guide dog, in violation of Section 4(1) of the Blind Persons' Rights Act, 1978.

While visiting, I was told by a nurse that I was not allowed to bring my dog into the hospital, and that my dog would be taken away from me by the hospital. I had three encounters of this nature that evening in the hospital. I was told I would not be allowed back into the hospital with my guide dog by the Assistant Administrator, Gren Smith-Windsor. The next day, December 18th, 1978, I was informed by Ms. McKillop from the University Hospital that I could visit the hospital on a restricted basis.

I believe the treatment I received and the restrictions denying and limiting my access to the hospital, a facility customarily available to the public, by reason only of the fact that I am accompanied by a guide dog, is a violation of Section 4(1) of *The Blind Person's Rights Act*, 1978.

DATED at the City of Saskatoon, in the Province of Saskatchewan, this 18th day of March, A.D. 1980.

Yvonne Peters

12546 It is noted that Ms. Peters alleged, first, that she is a blind person; secondly, that the respondent committed acts of discrimination against her comprising: "the treatment I received", which presumably has reference to what she was told by the nurse, by Mr. Gren Smith-Windsor, and by Ms. McKillop, and "the restrictions denying and limiting my access to the hospital", which presumably has reference to her access *qua* visitor and not *qua* patient; thirdly, that the acts of discrimination or denial took place "by reason only of the fact that I am [sic] accompanied by a guide dog"; and fourthly, that the acts of discrimination or denial were with respect to a "hospital, a facility customarily available to the public". In short, she alleged all the ingredients necessary for a violation under Section 4(1) of the *Act*. It is noted, also, that Ms. Peters specifically alleged a violation of Section 4(1) of the *Act* and not a violation of any section of the *Code*.

Section 4(1) reads thus:

> 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.

For a violation to occur, these four ingredients must be present:

1. An act of discrimination against, or an act of denial in relation to, a blind person;
2. The act of discrimination or denial must be "by reason only of the fact that the blind person is accompanied by a guide dog";
3. The act of discrimination or denial must be with respect to "accommodation, services or facilities";
4. The accommodation, services or facilities must be "available in any place to which the public is customarily admitted".

12547 Mr. Glendinning was required by the statute that governed the procedure of the inquiry (Section 29(2) of the *Code*) "to hear and determine the complaint." In carrying out this function, he made certain findings of fact and of law. It is proposed to examine Mr. Glendinning's reasons for his decision from the standpoint of his findings of fact to determine whether those findings are evidence of each of the ingredients needed for a violation of Section 4(1) of the *Act*, and from the standpoint of his impugned findings of law to determine (a) whether those findings are properly before us on appeal, (b) whether they are correct, and (c) their bearing upon the issue whether a violation of Section 4(1) of the *Act* occurred.

12548 His findings relevant to the first ingredient are contained in the following excerpts from his reasons:

> 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.
>
> * * * * *
>
> 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.
>
> * * * * *
>
> I am prepared to . . . find that the alleged act of discrimination was constituted by the actions of the hospital personnel in questioning Ms. Peters as to the 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.

12549 His finding respecting the words spoken by the nurse, by Mr. Gren Smith-Windsor and by Ms. McKillop, and his finding respecting the policy outlining the things Ms. Peters, a blind person, would be required to do during her future visits to the hospital, were findings of fact. They are not subject to review on appeal. The question whether the scope of the term "discrimination" used in Section 4(1) of the *Act* embraced those words and that statement of policy, or, put another way, whether those words and that statement were capable of constituting "discrimination" within the meaning of the *Act* was a question of law. Mr. Glendinning found that question of law in favour of Ms. Peters. That finding was not appealed to the Court of Queen's Bench or to this Court and thus is not before us. Accordingly, the presence of the first ingredient, an act of discrimination by the respondent against a blind person, was clearly found by Mr. Glendinning and that finding remains unimpeached before this Court.

12550 In considering the presence of the second ingredient ("by reason only of the fact that the blind person is accompanied by a guide dog"), Mr. Glendinning put the issue this way:

> 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 . . .

It will be noted that Mr. Glendinning cast the issue in the terminology of Section 4 of the *Act* when he used the phrase "on the fact that the person was accompanied by a guide dog." The issue was essentially, if not exclusively, a question of fact. Whether the hospital did what it did (and thereby committed an act of discrimination), for reason A, or reason B, or for both reasons, involves no law and is a pure question of fact. From the standpoint of this ingredient, no question of law arose from the need to construe the statutory provision (e.g. there was no need to interpret the statute to determine what is and what is not a guide dog). In considering this issue, Mr. Glendinning dwelt considerably upon the need for the hospital to provide sanitary and healthy conditions for its patients and to pay heed to any risks that may be associated with having a dog in their midst. He engaged in a process of balancing, on the one hand, the hospital's right to impose a policy of restrictions on visitors for the benefit of the patients, and on the other hand, the individual visitor's right not to be discriminated against. He concluded that the reasons advanced by the hospital for restricting the presence of guide dogs within the hospital — lofty and noble though those reasons may be — did not displace Ms. Peters' right to be in the hospital as if she were not accompanied by a guide dog. While he did not expressly say so, it is, I think, fair to infer — particularly given the way he described the issue in the first place — that Mr. Glendinning found as a fact that the act of discrimination complained of took place "by reason only of the fact that the blind person [Ms. Peters, was] accompanied by a guide dog." Whether this finding of fact was right or wrong, and whether I would have made a similar finding had I been the Board of Inquiry, are irrelevant questions on this appeal. The finding is not appealable to this Court. Thus, the second ingredient stands before this Court unimpeached.

12551 The presence of the third ingredient raised two questions, one of fact and one of law. The question of fact involved a determination of what it was, specifically, that Ms. Peters wanted to do but could not that formed the basis of her complaint. Mr. Glendinning found that she wanted to enter a hospital ward and visit with a patient in the patient's room but could not without being discriminated against. The essence of his finding in this respect is contained in an excerpt quoted earlier:

> 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*.
>
> (emphasis added)

12552 He found as a fact that the act of discrimination occurred with respect to those facilities (without specifically identifying them) that the hospital provided to visitors who desired to visit patients in their rooms located in the hospital wards (for the sake of brevity hereinafter referred to as "visitor facilities"). That finding of fact is not reviewable by this Court.

12553 The question of law raised by the third ingredient may be put in two ways: Does the scope of the phrase "accommodation, services or facilities" appearing in Section 4(1), properly construed, embrace visitor facilities? Are visitor facilities capable of constituting "accommodation, services or facilities" within the meaning of Section 4(1)?

12554 Before examining Mr. Glendinning's decision in this respect, I digress briefly to consider whether the question I have framed as one of law is indeed one of law and not one of fact. Often, the determination whether a particular question is one of law or fact is vexed. I am attracted to the following observation by Etienne Mureinik in his article, "The Application of Rules: Law or Fact?" published in (1982) 98 Law Quarterly Review, p. 587:

> Most common lawyers would agree that certain questions are clearly of law or of fact. They would agree that questions of the existence of a rule or the choice between two competing rules or the constitutional validity of a rule or the interpretation of a rule are all questions of law, and that questions of the credibility of a witness or of simple inference, such as whether an accused's presence in a room should be inferred from his observed proximity to it, are questions of fact. But they disagree about a sort of question that lies at the intersection of these two groups of kinds of questions. They disagree — whether explicitly or by implication from the way they argue or decide cases — about whether a question of application is one of law or fact. This is the question whether a rule should be taken to cover or apply to particular facts, whether proven or uncontested, or, what is the same thing, whether particular facts should be regarded as coming within the purview or the intendment of the rule.

12555 The nature of the problem is illustrated by these three House of Lords cases I have chosen as examples. In *Commissioners of Inland Revenue v. Lysaght*, [1928] A.C. 234, the House of Lords had before it the question whether the

respondent was "ordinarily resident" and "resident" in the United Kingdom within the meaning of the Income Tax Act then in force. Lord Buckmaster summarized the issue and the nature of the problem thus:

> My Lords, the real question that arises in this case is whether the finding of the Commissioners that the respondent was resident and ordinarily resident in England is a finding of fact which cannot be disturbed, or whether it is open to examine the circumstances set out by the Commissioners for the purpose of seeing whether the conclusion they drew is one that this House will accept. The distinction between questions of fact and questions of law is difficult to define, but according to the respondent whether a man is resident or ordinarily resident here must always be a question of law dependent upon the legal construction to be placed upon the provisions of an Act of Parliament. I find myself unable to accept this view. It may be true that the word "reside" or "residence" in other Acts may have special meanings, but in the Income Tax Acts it is, I think, used in its common sense and it is essentially a question of fact whether a man does or does not comply with its meaning.

And later (at p. 249) he said:

> The argument of the Attorney-General in this House was rested exclusively on the contention that the questions to be determined are both questions of degree and therefore of fact and that there was on each question evidence on which the Commissioners might reasonably come to the conclusion at which they arrived, and consequently their decision was not subject to review.
>
> I have reluctantly come to the conclusion that it is now settled by authority that the question of residence or ordinary residence is one of degree, that there is no technical or special meaning attached to either expression for the purposes of the Income Tax Act, and accordingly a decision of the Commissioners on the question is a finding of fact and cannot be reviewed unless it is made out to be based on some error in law, including the absence of evidence on which such a decision could properly be founded.

He then quoted approvingly the following illuminating excerpt from the judgment of Lord Clyde in *Reid v. Inland Revenue Commissioners*, [1926] S.C. 589 at 594:

> It is obvious that the more general and wide the scope of expressions used in a statute, the more difficult it may become to convict those whose duty it is to interpret it of an error or misdirection in applying it to a given state of facts. It may be possible in such cases to predicate of a particular state of facts that they lie outside the scope of the expressions used, although it may be really an impossible task to define that scope positively and with exact accuracy. The expression "resident in the United Kingdom" and the qualification of that expression implied in the word "ordinarily" so resident are just about as wide and general and difficult to define with positive precision as any that could have been used. The result is to make the question of law become (as it were) so attenuated, and the field occupied by the questions of fact become so enlarged, as to make it difficult to say that a decision arrived at by the Commissioners, with respect to a particular state of facts held proved by them, is wrong.

Viscount Sumner, at p. 246, put, and resolved, the issue this way:

> It is attractive to say, as in substance was the opinion of the Court of Appeal, that "resident" in this case is a matter of law, as being a matter of interpretation, but that does not cover the ground. Interpretation only says what the Act itself refrains from telling us — namely, the meaning of the word "resident" — but, as that meaning is its meaning in the speech of plain men, the question still remains, whether plain men would find that the result of the facts found was "residence" in its plain sense, and I do not doubt that the Commissioners understood the word not otherwise than in its correct legal signification and so applied it. Accordingly I do not think that their decision can be interfered with.

12556 Two years later in *Shotts Iron Company, Limited v. Fordyce*, [1930] A.C. 503, the House of Lords had before it the question whether the facts found by an arbitrator under the Workmen's Compensation Act, 1925, constitute "reasonable cause" for the failure of an injured workman to give notice of the accident or to claim compensation within the statutory period was a question of law and therefore open to review, or a question of fact and not open to review. Lord Buckmaster said simply (p. 512):

> It was at one time suggested in the argument that the question of reasonable cause was one of fact, but this is contrary to authority and to the ordinary rules of construction.

12557 Lord Sankey, the Lord Chancellor, was equally terse (p. 508):

> In my view, the question whether the facts as found amount to reasonable cause is one of law.

The other Law Lords agreed.

12558 In *Brutus v. Cozens*, [1973] A.C. 854, the House of Lords was called upon to decide whether the meaning of the phrase "insulting behaviour" found in Section 5 of the Public Order Act, 1956, under which the appellant was charged, was a question of law. Their Lordships held that it was not. Lord Reid said (p. 861):

> The meaning of an ordinary word of the English language is not a question of law. The proper construction of a statute is a question of law. If the context shows that a word is used in an unusual sense the court will determine in other words what that unusual sense is. But here there is in my opinion no question of the word "insulting" being used in any unusual sense. It appears to me, for reasons which I shall give later, to be intended to have its ordinary meaning. It is for the tribunal which decides the case to consider, not as law but as fact, whether in the whole circumstances the words of the statute do or do not as a matter of ordinary usage of the English language cover or apply to the facts which have been proved. If it is alleged that the tribunal has reached a wrong decision then there can be a question of law but only of a limited character. The question would normally be whether their decision was unreasonable in the sense that no tribunal acquainted with the ordinary use of language could reasonably reach that decision.

12559 Counsel referred us to the decision by the Supreme Court of Canada in *Canadian Lift Truck Co. Ltd. v. Deputy Minister of National Revenue for Customs and Excise* (1956), 1 D.L.R. (2d) 497, and in particular, to the following passage from the judgment of the court delivered by Kellock, J., at p. 498:

> While the construction of a statutory enactment is a question of law, *and the question as to whether a particular matter or thing is of such a nature or kind as to fall within the legal definition is a question of fact*, nevertheless if it appears to the appellate Court that the tribunal of fact had acted either without any evidence or that no person, properly instructed as to the law and acting judicially, could

> have reached the particular determination, the Court may proceed on the assumption that a misconception of law has been responsible for the determination; *Edwards v. Bairstow*, [1955] 3 All E.R. 48.
>
> (emphasis added to the part which is of special significance to the point under discussion)

The passage is not of any particular assistance. The interpretation of a statutory enactment frequently, if not invariably, will determine its applicability to the thing sought to be categorized, and similarly, the application or non-application of the facts found will determine the meaning of the statutory enactment.

12560 The result of my brief analysis is this: The answer to the question whether a particular set of facts falls within the scope or purview of a term in a statute is one of fact or law depends largely upon the term itself. Where the term is simple and ordinary, and, as it were, can be reduced no further in simplicity or definition, and which to define would require words that themselves need definition, the question is one of fact. The terms "resident" and "insulting" are good examples. Where the term gives rise to some complexity, or has acquired a special or technical meaning, the question is likely, but not always one of law.

12561 The phrase "accommodation, services and facilities" used in Section 4(1) of the *Act* does not contain such ordinary or simple terms as to permit of no further reduction in simplicity or definition. The phrase presents some complexity and may have a special meaning in the context of human rights legislation. In short, the phrase should be construed. I have concluded, therefore, that the question under scrutiny is one of law.

12562 Mr. Glendinning appears not to have addressed himself directly to the question. The only oblique reference to it that I could find in his decision was in the context of whether the "facilities" and "services" were included in the phrase "to which the public is customarily admitted," that is, in the context of the fourth ingredient (according to my categorization). He said:

> 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 . . .

He appears to have done one of two things. He either overlooked the presence or significance of the question of law, or he made an assumption with respect to it and proceeded from the premise that there was no doubt about whether the visitor facilities fell within the purview of "accommodation, service and facilities" as used in Section 4(1), and that the only doubt that existed was whether those facilities qualified under the requirement "available at any place to which the public is customarily admitted."

12563 The question of law raised by this third ingredient was subject to review by the Court of Queen's Bench and by this Court (see Section 32 of the *Code*), and as noted below, was raised by the notice of appeal filed in the Court of Queen's Bench and by the notice filed in this Court. The issue of whether the question was correctly dealt with by Mr. Glendinning will be more fully developed presently. Subject, however, to the correctness of Mr. Glendinning's apparent assumption respecting the question of law (or his oversight), the presence of the third ingredient — given his findings of fact — is unassailable.

12564 I turn to the presence of a fourth ingredient. Did the visitor facilities qualify under the requirement "available in any place to which the public is customarily admitted?" The question was one of fact and, at most, a mixed question of fact and law. Once it is decided that the visitor facilities fall within the purview of "accommodation, services and facilities" as used in Section 4(1), the question whether those visitor facilities are available in "any place to which the public is customarily admitted" can really be nothing more than a question of fact. The terminology is simple and ordinary and of the same genus as "ordinarily resident" considered in *Lysaght*, supra, and "insulting" in *Brutus*, supra.

12565 On the issue whether the question is one of fact or law, the respondent derives no assistance from the majority decision in *Gay Alliance Toward Equality v. The Vancouver Sun* (1980), 97 D.L.R. (3d) 577. In the first place, the text of the pertinent statutory enactment there under consideration was sufficiently different from the text of the enactment in the present case to distinguish that case from the present one. The enactment in *Gay Alliance* was in these terms:

> 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) distriminate (sic) 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.

The enactment makes no reference to a "place." There is, I think, a difference between an "accommodation, service or facility customarily available to the public" on the one hand, and an "accommodation, services or facilities available in any place to which the public is customarily admitted" on the other. Moreover, and more importantly, the issue whether the question was one of law or fact appears not to have been raised in the *Gay Alliance* case, and as a consequence, was not squarely faced by the court. The case cannot be said to be precedentially binding on that point.

12566 For similar reasons, I do not regard the decision of the Nova Scotia Court of Appeal in *Beattie et al v. Governors of Acadia University et al* (1977) 72 D.L.R. (3d) 718, as applicable to the issue of whether the question under scrutiny is one of law or fact.

12567 On the question of fact inherent in the fourth ingredient, Mr. Glendinning's findings are expressed in the following excerpt from his decision:

> 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.

There can be little doubt that he found as a fact that the place where the visitor facilities were available was a "place to which the public is customarily admitted." The finding is not appealable; hence, the fourth ingredient, too, stands before this Court unimpeached.

12568 It is desirable next to consider the powers conferred upon a Board of Inquiry respecting the disposition of a complaint and to consider the disposition made in this instance by Mr. Glendinning.

12569 The powers are set forth in Section 31 of the *Code*, particularly subsections 6 and 7, which I now quote:

> 31.—(6) Where, at the conclusion of an inquiry, the board of inquiry finds that the complaint to which the inquiry relates is not substantiated, it shall dismiss the complaint.
>
> (7) Where, at the conclusion of an inquiry, the board of inquiry finds that the complaint to which the inquiry relates is substantiated on a balance of probabilities, the board may, subject to subsections (9) and (10), order any person who has contravened any provision of this Act, or any act or thing that in the opinion of the board constitutes full compliance with that provision and to rectify any injury caused to any person and to make compensation therefor, including, without restricting the generality of the foregoing, an order:
>
> [there follows descriptions of the types of order that a Board is competent to make]

12570 Mr. Glendinning made his disposition in these words:

> 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.

12571 Having made the findings of fact that he did, as well as the necessary findings of law, and, in effect, having determined the presence of the four ingredients prescribed by Section 4(1) of the *Act* for a violation, he could have, and should have, expressly found a violation of Section 4(1). Indeed, there is some room to argue that the words "the complaint is justified" constitute such a ruling. The complaint, it will be recalled, plainly alleged a violation of Section 4(1) of the *Act*. A ruling that the complaint is "justified" may be tantamount to a ruling that there was a "violation." Upon such an interpretation, the additional ruling by him that the hospital was in breach of "the Human Rights Code" becomes surplusage and irrelevant. It is proposed later to examine further the propriety of Mr. Glendinning's holding that the hospital was in breach of the *Code* and to consider further this Court's competence to deal with that holding.

12572 At this juncture, it is appropriate to point out that for the purposes of this appeal, the decision by the Board of Inquiry is vulnerable in only two respects, first, the finding (if a finding it was) of law that the visitor facilities with respect to which the discrimination complained of occurred, constitute "accommodation, services and facilities" within the meaning of the *Act*, and secondly, the conclusion that the respondent committed a violation not of Section 4(1) of the *Act* but of a section of the *Code*. It, therefore, becomes necessary to determine whether these issues are properly before this Court, whether they were correctly decided by Mr. Glendinning and if not, what, if anything, this Court can do about any such wrong decision.

12573 This brings me to a consideration of the case as presented to the Court of Queen's Bench on appeal from Mr. Glendinning's decision.

12574 The powers of the Court of Queen's Bench hearing an appeal are set out in Section 32(4):

> 32.—(4) Where an appeal is taken under this section, the judge shall determine any question of law relating to the appeal and may affirm or reverse the decision or order of the board of inquiry or remit the matter back [sic] to the board of inquiry for amendment of its decision or order.

12575 The appeal to the Court of Queen's Bench from the Board's decision was based on five grounds. The first two attacked the Board's jurisdiction to conduct the inquiry and were rightly rejected by the learned Justice on appeal. The third ground involved a question of fact and it, too, was rightly rejected. The fourth and fifth grounds were as follows:

> (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.

12576 The learned appeal judge found that these two grounds may be considered together. He applied the definition used by Mr. Justice Martland in the *Gay Alliance* case (p. 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."

He then reasoned:

> 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.

He reaffirmed this conclusion after reviewing, with approval, the decision by MacKeigan, C.J.N.S., writing for the Court in *Beattie*.

12577 The learned appeal judge's final conclusion is contained in this passage:

> 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.
>
> To hold otherwise creates a ludicrous situation.

12578 The appeal judge made reference, as well, to *Re Cummings and Ontario Minor Hockey Association* (1979) 7 R.F.L. (2d) 359, and *Ontario Human Rights Commission and Bannerman v. Ontario Rural Softball Association* (1979), 10 R.F.L. (2d) 97, but only to buttress his conclusion that "accommodation, services and facilities," as contemplated by the *Code*, did not embrace visitor facilities. He found the decision by Mr. Glendinning wrong and allowed the appeal.

12579 The appeal taken to this Court by Ms. Peters and the Human Rights Commission is on two grounds as follows:

> 1. THAT the learned trial judge erred in holding that the accommodation, services and facilities provided by the University Hospital cannot be considered as accommodation, services or facilities to which the public is customarilly admitted or which are offered to the public, within the meaning of *The Blind Persons' Rights Act*, Statute of Saskatchewan, Chap. B-3.1 or *The Saskatchewan Human Rights Code*, Statues [sic] of Saskatchewan, Chap. S-24.1.
>
> 2. THAT the learned judge erred in holding that any denial of the use of the facility to or discrimination against Ms. Peters as a visitor to the University Hospital did not constitute a breach of the said legislation.

It will be noted that these two grounds raise the same basic issues as the fourth and fifth grounds in the appeal to the Court of Queen's Bench.

12580 I turn, initially, to the second ground of appeal before this Court and what was the fifth ground before the appeal judge in the Court of Queen's Bench. The ground may be disposed of quite shortly. Mr. Glendinning dealt with the hospital's policy of restricting visitors in the context of determining a question of fact. He was required to decide whether the act of discrimination complained of occurred "by reason only of the fact that the blind person was accompanied by a guide dog" or by reason of some other fact as, for example, the hospital's overall policy of restricting visitors for the patients' benefit, or by reason of a combination of these or some other facts. In short, he was considering the presence of what I have referred to earlier as "the second ingredient." He decided, as noted, that the act of discrimination occurred by reason only of the fact that Ms. Peters was accompanied by a guide dog. That finding, whether right or wrong, was a finding of fact and hence was not reviewable by the appeal judge. On that basis the appeal judge should have found that ground untenable. He erred in not dealing with the fifth ground before him in that manner. For these same reasons, I find untenable the second ground in the notice of appeal filed in this Court.

12581 I turn next to the first ground raised by the notice of appeal in this Court, which, as indicated, was the fourth ground in the notice of appeal filed in the Court of Queen's Bench. Earlier, I identified this ground as the first area of vulnerability in Mr. Glendinning's judgment.

12582 The ground raises a question of law that focuses on the third ingredient. The question, as noted earlier, is this: Does the scope of the phrase "accommodation, services and facilities" found in Section 4(1), properly construed, embrace visitor facilities (as I have been using that phrase — to include those facilities that the hospital provided to visitors who desired to visit patients in their rooms located in the hospital wards)? The question may also be stated thus: Are visitor facilities capable of constituting "accommodation, services or facilities" within the meaning of Section 4(1)?

12583 In addressing the issue, a good starting point is to ask whether hospitals are commonly known to provide "accommodation, services or facilities" as those terms are generally understood by ordinary people? The answer is yes, beyond any doubt. The *raison d'être* of a hospital is to provide accommodation, services and facilities for persons who are sick and require medical and nursing treatment and a place to convalesce. In short, the *raison d'être* of a hospital is to provide accommodation, services and facilities for patients. But, one asks, does it follow that a hospital provides accommodation, services and facilities to a class other than patients, and more specifically, to a class generally described as patients' visitors? Our society is so structured, and the human personality is such that a visit by a person, whether blind or sighted, to a sick friend who is in the hospital convalescing is a perfectly normal, predictable, human act. Most often, if there is to be a visit at all, that visit must take place, by reason of the patient's condition, in the patient's room in the hospital ward. It is a principle of ordinary living that a visit to a patient in a hospital normally benefits both the patient and the visitor. Hospitals and medical authorities, of course, recognize this principle and do not discourage visits to patients. It is fair, therefore, to say that a concomitant of the *raison d'être* of a hospital is the provision by the hospital of accommodation, services or facilities for visitors who desire to visit patients. This is especially true of those hospitals that are public institutions, that is, hospitals maintained and operated by public funds. It is common knowledge that in this province most, if not all, hospitals, including the respondent hospital, fall into that category. Thus, the words "accommodation, services or facilities," as generally understood by ordinary people, are capable of describing those things that a hospital provides to visitors who desire to visit patients in their hospital rooms. There remains to consider whether those things fall within the purview of the phrase "accommodation, services or facilities" as used in Section 4(1) of the *Act*.

12584 The construction of the phrase necessitates establishing the intention of the legislature as expressed by the *Act* as a whole, the object of the *Act*, and the scheme of the *Act*. The *Act* is short. It comprises but eight sections. The intention of the legislature is manifest. The legislature intended to eliminate from the lives of blind persons as they go about in public trying to lead normal independent lives, discrimination against them emanating from, or ascribable to, their being accompanied by guide dogs. The object was to enhance the rights of blind persons accompanied by guide dogs, to the end that they may be treated by the public as if they were not accompanied by guide dogs. The scheme of the *Act* was to prohibit the offensive behaviour by members of the public and to subject the offenders to penalties.

12585 In view of the intention of the *Act*, the object of the *Act* and the scheme, I have no hesitation in concluding as a matter of law that the visitor facilities, as I have described them in these reasons, fall within the purview of the phrase "accommodation, services or facilities" used in section 4(1) of the *Act*.

12586 Does this conclusion conflict with the decision in the *Gay Alliance* case? I think not. The *ratio decidendi* of that case is contained in these words appearing in the judgment of Martland, J. (p. 591):

> As a corollary to [freedom of the press], a newspaper also has the right to refuse to publish material which runs contrary to the views which it expresses.
>
> * * * * *
>
> In my opinion the service which is customarily available to the public in the case of a newspaper which accepts advertising is a service subject to the right of the newspaper to control the content of such advertising.
>
> * * * * *
>
> Section 3 of the Act [quoted above] does not purport to dictate the nature and scope of a service which must be offered to the public.

It is readily apparent that this ratio has no relevance whatever to the issue now under scrutiny in the present case.

12587 Unlike the present case, the court in the *Gay Alliance* case was not concerned with the issue whether the service under scrutiny (namely, the classified advertising service offered by the respondent newspaper) constituted an "accommodation, service or facility" within the meaning of the statute. The court proceeded on the footing that it was. The concern, rather, was whether the service was "customarily available to the public." The counter-part of that issue in the present case is the issue whether the visitor facilities were "available in any place to which the public was customarily admitted." As stated earlier, that issue was treated as the fourth ingredient in the present case and was found to be one of fact.

12588 Nor does the conclusion under discussion contradict the definition of the terms "accommodation," "service" and "facility" expressed by Martland, J. (at p. 519) and quoted earlier in these reasons. Those definitions were not intended as exhaustive and do not preclude the inclusion of visitor facilities to a hospital.

12589 It is noteworthy, as well, that the wording of the statutory enactment (Section 3(1) quoted earlier) under consideration in the *Gay Alliance* case, was materially different from the pertinent enactment in the present case.

12590 So, too, the decision of the Nova Scotia Court of Appeal in *Beattie* may be distinguished. The issue there was whether athletic facilities provided by a private university for its members were facilities "customarily provided to members of the public." There, too, the court, unlike the present case, was not concerned with whether the facilities under scrutiny constituted an "accommodation, service or facility" within the meaning of the statute. That was accepted. MacKeigan, C.J.N.S., speaking for the court said (at p. 723):

> I shall accept that the denial of such opportunity is probably a denial of "facilities," interpreted in the broadest possible way.

The concern was with the issue whether the facilities were "customarily provided to members of the public." The counterpart of that issue in the present case is the issue whether the visitor facilities were "available in any place to which the public were customarily admitted." As stated earlier, that issue was treated as the fourth ingredient in the present case and is an issue of fact.

12591 Similarly, it is noted that the relevant statutory enactments in the two cases, *Beattie* and the present case, are materially different.

12592 In the result, I find that the first ground outlined in the notice of appeal filed in this Court is tenable and should be given effect, and that the learned Queen's Bench judge sitting on appeal erred in not giving effect to what was contained in the notice of appeal before him as the fourth ground.

12593 The result of the foregoing analysis is that on the facts as found by him, Mr. Glendinning was entitled in law to find a violation of Section 4(1) of the *Act*. He appears not to have done that (although the point, as noted earlier, is arguable). Instead, he held that the respondent committed a breach of the *Code*. As I have already said, he was wrong to so hold. That issue was not before him. What, if anything, can this Court do about correcting that wrong conclusion? It is a conclusion of law, not of fact, and is subject to review by this Court. While the correctness of that conclusion was not raised in the notice of appeal filed in this Court (or the notice that was filed in the Court of Queen's Bench), the issue was raised by the Bench and was fully argued. It is properly before the Court should we choose to rely on it. As I said before, the proper conclusion of law for Mr. Glendinning to have made on the facts found by him was that the respondent hospital committed a violation of Section 4(1) of the *Act*. It is a conclusion that Section 32 of the *Code* empowers this Court to draw, and I see no reason why this Court should not exercise that power. To fail to exercise the power would likely entail a fresh extended hearing involving a further expenditure of time and money to retry facts that have already been tried and adjudicated upon. Such a course should be avoided if no injustice ensues. I can see no injustice stemming from the exercise of this Court's power to make, in effect, an order that ought to have been made by the Board of Inquiry. The exercise of such a power is contemplated and not uncommon in criminal appeals (see Section 613 of the *Criminal Code*, and for exercise of the power, see the recent decision of this Court in *R. v. Crowe*, unreported, April 4, 1983) or in appeals in ordinary civil matters (see Section 8 of *The Court of Appeal Act*, R.S.S. 1978, c. C-42, rule 41 of the Rules of the Court of Appeal and such cases as *Upper Canada College v. F.J. Smith*, [1921] 61 S.C.R. 413, at p. 431-435, per Duff, J.; *Waghorn v. George Wimpey & Co. Ltd.*, [1970] 1 All E.R. 474 at 478).

12594 For these reasons, I would allow the appeal, set aside the judgment of the learned judge of the Court of Queen's Bench, restore the decision of the Board of Inquiry with the direction that the decision be amended by deleting the holding that the respondent committed a breach of the *Code* and substituting therefor a holding that the respondent committed a violation of Section 4(1) of the *Act*.

12595 The appellants will have their costs of this appeal and the costs in the Court of Queen's Bench.

DATED at the City of Regina, in the Province of Saskatchewan, this 17th day of May, A.D. 1983.

Bayda, C.J.S.

CORAM: Bayda, C.J.S., Brownridge, Hall, MacDonald and Cameron, JJ.A.

JUDGMENT **HALL, J.A.**

12596 The facts and the pertinent sections of the relevant legislation have been set out by Cameron, J.A., in his reasons for judgment which I have had the advantage of reading.

12597 I agree with Cameron, J.A. that the dispute in relation to which the inquiry was ordered and conducted consisted of whether there had been a contravention of Section 4(1) of *The Blind Persons' Rights Act, 1978*. I do not, however, agree with the suggestion that the Board of Inquiry did not address the resolution of that issue.

12598 Some confusion in the use of terms may have arisen as a result of the respondent's preliminary objection to the jurisdiction of the Board of Inquiry. The objection was described by the Chairman in his decision as follows:

> 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*, 1978, was 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.
>
> 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 was not procedural, but are substantive.

12599 After examining some aspects of the law applicable the Chairman said:

> 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.

12600 The Chairman then proceeded to consider the Statutes directly involved, including *The Interpretation Act*, R.S.S. 1978, Chap. I-11. He summed up his conclusions as follows:

> In reading Section 23(2)(c) and (d) (of The Interpretation Act) 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."
>
> 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.
>
> 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.

12601 In so stating his conclusions the Chairman clearly indicated that the substantive right which he was about to examine was that which arose under *The Blind Persons' Rights Act*.

12602 The Chairman proceeded to examine the evidence. With regard to the circumstances surrounding the complaint he said:

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

12603 The Chairman, in finding that the acts of the respondent amounted to discrimination, said:

> 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.

12604 When he turned to the question of whether the services or facilities were those contemplated by the legislation he said:

> 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, (sic) 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.

12605 The Chairman then addressed the contention of the respondent that if there had been a denial of access it was not based solely on the fact that the complainant was accompanied by a guide dog. It was quite clear on the evidence that it was only the presence of the dog which concerned the respondent. There was on the other hand the testimony of ex-

pert witnesses, accepted by the Board of Inquiry, that the presence of the dog presented no more risk to a hospital environment than the humans who were allowed free access to the facilities in question. The Chairman summed up his findings on this point by saying:

> The situation is actually quite straight-forward — 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.

12606 There was evidence to support the findings of fact made. The facts as found clearly establish a contravention of Section 4(1) of *The Blind Persons' Rights Act*. It is true that from time to time the Chairman referred to "the Code", Counsel for the respondent appears to have referred to it throughout. The learned Chambers Judge also referred to the Code and not the Act. However, when a breach of Section 4(1) has been established on the facts the finding should not be set aside merely because of the confusion in terms.

12607 In any event, the language of the respective acts is such that a contravention of Section 12(1) of *The Human Rights Code* in respect of a blind person, would necessarily include a contravention of *The Blind Persons' Rights Act*.

12608 It now becomes necessary to examine the basis upon which the learned Chambers Judge allowed the appeal by the respondent, from the Board of Inquiry. The learned Chambers Judge did not find it necessary to consider Grounds of Appeal Nos. 1 and 2. I agree with Cameron, J., that the rights under *The Blind Persons' Rights Act* were preserved, and that the procedure provided by the new Code applied. The Board of Inquiry therefore had jurisdiction to entertain the complaint and Ground of Appeal number 1 cannot be sustained.

12609 For the reasons I have above set out Ground number 2 must also fail.

12610 The Chambers Judge properly rejected Ground Number 3 as raising a question of fact which he had no power to entertain.

12611 The Chambers Judge considered the final two grounds of appeal together. He did so with reference to The Human Rights Code and not with reference to *The Blind Persons' Rights Act*.

12612 In my opinion, ground of appeal number 5 is also a question of fact and ground number 4 is a question of mixed fact and law, and the Chambers Judge should not have considered them. In any event, after referring to the meaning ascribed to similar words by Martland, J., in the *Gay Alliance* case [1979] 2 S.C.R. 435 he said:

> 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.

12613 With all respect, this passage indicates the fundamental error on the part of the Chambers Judge in his approach to the case. The complaint and Inquiry did not involve patients of the hospital nor any of the services designed and provided for patients. Admittedly they are not for the use of the public. However, the Board of Inquiry has found that the respondent allowed the public, during certain periods of time, free access to its ward to visit patients. This was, as the Board found, a facility or service available to the public.

12614 The Chambers Judge considered also *Beattie et al v. Governors of Acadian University et al*, (1977) 72 D.L.R. (3d) 718. However, the factual situation in that case was quite different to that of the case at hand.

12615 The Chambers Judge, after speculating as to what might happen if the complainant were to be admitted as a patient, said:

> 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.

12616 The answer to that is that if a privilege is extended to the public, it cannot either under *The Blind Persons' Rights Act* or under The Human Rights Code be restricted in an individual case solely because that person is blind and is accompanied by a guide dog. If the complainant herself was considered a risk of being infected with a contagious disease or was rowdy or misbehaved she as an individual could be restricted. When, however, the respondent says it does not want her dog to go with her it is discriminating against her solely by reason of her being accompanied by her dog.

12617 The complainant here is not asking to be admitted as a patient, nor is she asking for facilities or services provided for patients. Apart from the accommodation, facilities and services provided for patients the respondent has provided a facility or service to which the public is customarily admitted. The Chambers Judge has said that the failure to make the facility available to the complainant was not because of her physical disability. However, because of her blindness she was accompanied by her dog. Because she was accompanied by her dog she was not allowed to use the facility as a member of the public. As the Chairman of the Board of Inquiry said:

> 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."

12618 I would allow the appeal with costs and restore the decision of the Board. If it is thought to make any difference to

the result, I would order that the matter be remitted to the Board to amend its decision to read that the Hospital is in breach of *The Blind Persons Act* rather than the *Human Rights Code*.

DATED at the City of Regina, in the Province of Saskatchewan, this 17th day of May, A.D. 1983.

Hall, J.A.

CORAM: Bayda, C.J.S., Brownridge, Hall, MacDonald and Cameron, JJ.A.

I concur:
R.L. Brownridge, J.A.
R.A. MacDonald, J.A.

JUDGMENT **CAMERON, J.A.**

12619 On December 17th, 1978, Yvonne Peters, who is blind, went to the University Hospital in Saskatoon, accompanied by her guide dog, to visit her father-in-law who was a patient in the hospital. While there, she and members of the hospital staff had a disagreement over the presence of the dog in the patient's room, which prompted Miss Peters, three days later to complain to the Saskatchewan Human Rights Commission alleging that her treatment at the hospital constituted a violation of her rights under *The Blind Persons' Rights Act*, (S.S. 1978 C. B-3.1). Her "*Complaint*" dated December 29th, 1978 was framed in this way:

> I am a blind woman within the meaning of the White Cane Act. On December 17th, 1978 at about 7:00 p.m. I went to the University Hospital to visit a relative. I was accompanied by my guide dog that is trained as a guide for a blind person by a recognized school. While visiting I was told I would not be allowed back in with my guide dog, by the Assistant Administrator, Gren Smith-Windsor. The next day, December 18th, 1978, I was informed by Ms. McKillop from the University Hospital that I could visit the hospital on a restricted basis. I believe the restrictions placed on me are discriminatory with respect to denying me access to facilities customarily available to the public, by reason only of the fact that I am accompanied by a guide dog, in violation of Section 4(1) of *The Blind Persons' Rights Act*, 1978.

12620 In the ensuing eleven months the parties tried to settle the complaint, but failed to do so, and thereafter, on the request of the Commission, the Attorney General instituted an inquiry, pursuant to section 29 of *The Saskatchewan Human Rights Code* (S.S. 1979 Chap. S-24.1). He appointed Mr. Peter Glendinning to hear and decide the complaint.

12621 On February 12th, 1980, Mr. Glendinning issued a *Notice of Formal Inquiry* as follows:

> In the matter of *The Human Rights Code* and in the matter of a complaint of the 20th day of December, A.D. 1978, by Ms. Yvonne Peters against the Board of Governors, University Hospital, Saskatoon, Saskatchewan, on the grounds of discrimination.
>
> 1. Take notice that a Formal Inquiry will be held into the aforementioned complaint on the 6th day of March, A.D. 1980 at 9:30 o'clock in the City of Saskatoon, in the Province of Saskatchewan, (Sheraton Cavalier — Canadian Room).
>
> 2. And further take notice that the Respondent, The Board of Governors, University Hospital, Saskatoon, Saskatchewan, may file an answer to this complaint with the Human Rights Commission, by personal delivery to the Commission at 219A - 21st Street, E., Saskatoon, Saskatchewan, S7K 0B7, in the Province of Saskatchewan, or by sending the same by registered mail, by the 25th day of February, A.D. 1980, (Ten (10) days after the date of service of this Notice.)
>
> DATED at the City of Regina, in the Province of Saskatchewan, this 12th day of February, A.D. 1980.
>
> 'P. Glendinning'
> Board of Inquiry.
> (emphasis added)

12622 On February 25th, 1980, the Hospital filed this *Answer*:

> TO The Saskatchewan Human Rights Commission
> The Board of Governors of the University Hospital hereby reply to the complaint of Yvonne Peters dated December 20, 1978:
>
> OUTLINE OF REPLY
>
> 1) The Saskatchewan Human Rights Commission, as continued by Section 21 of the *Saskatchewan Human Rights Code* is not clothed with the jurisdiction to hear the within complaint.
>
> 2) The factual particulars of the complaint do not disclose a violation of section 4(1) of *The Blind Persons' Rights Act, 1978*.
>
> 3) The within complaint does not constitute a discrimination with respect to the denial of "accommodation, services, or facilities."
>
> 4) Even if the within complaint does constitute a denial of "accommodation, services or facilities," it is submitted that such denial is not based only on the fact that the blind person is accompanied by a guide dog.
>
> ALL OF WHICH IS RESPECTFULLY SUBMITTED
>
> DATED at the City of Saskatoon, in the Province of Saskatchewan, this 25th day of February, A.D. 1980.

12623 The inquiry was conducted on March 6th and 7th, 1980. Later counsel for the Saskatchewan Human Rights Commission filed and served a *Notice of Amendment* (dated March 18, 1980) which was drawn as follows:

> TAKE NOTICE that on or about the 19th day of March, A.D. 1980, at 2:00 p.m. in the afternoon, at the Parktown Motor Hotel, in the City of Saskatoon, in the Province of Saskatchewan, an application will be made on behalf of the Saskatchewan Human Rights Commission to the Board of Inquiry to amend the complaint form in this matter as follows:
>
> The particulars of the complaint are as follows:
> I am a blind woman, within the meaning of *The White Cane Act*. On or about the 17th day of December, A.D. 1978, at approximately 7:00 p.m., I went to the University Hospital, University of Saskatchewan, Saskatoon, Saskatchewan, to visit a relative. I was accompanied by my guide dog that is trained as a guide for a blind person by a recognized school. While visiting, I was told by a nurse that I was not allowed to bring my dog into the hospital, and that my dog would be taken away from me by the hospital. I had three encounters of this nature that evening in the hospital. I was told I would not be allowed back into the hospital with my

> guide dog by the Assistant Administrator, Gren Smith-Windsor. The next day, December 18th, 1978, I was informed by Ms. McKillop from the University Hospital that I could visit the hospital on a restricted basis.
>
> I believe the treatment I received and the restrictions denying and limiting my access to the hospital, a facility customarily available to the public, by reason only of the fact that I am accompanied by a guide dog, is a violation of Section 4(1) of *The Blind Persons' Rights Act*, 1978.

12624 I pause here to note that Ms. Peters' *Complaint* (in both its original and amended forms) alleged a contravention of Section 4(1) of *The Blind Persons' Rights Act*, 1978 and that the hospital's *Answer* denied a violation thereof. This section 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.

It is clear that the dispute — in relation to which the inquiry was both ordered and conducted — consisted of whether there had been a contravention of this section.

12625 On February 13, 1981, Mr. Glendinning delivered a written decision. First, he disposed of the jurisdictional challenge — finding that he had jurisdiction to conduct the inquiry notwithstanding the repeal of *The Blind Persons' Act* 1978, and *The Saskatchewan Human Rights Commission Act* (S.S. 1972, C. 108) under which, respectively, the complaint was founded and then pursued. He held that, by virtue of *The Interpretation Act*, (R.S.S. 1978, C. I-11), the alleged violation of *The Blind Persons' Rights Act* constituted an accrued right which survived the repeal of the latter *Act* and that the proceedings in relation to the complaint, which were initiated under *The Saskatchewan Human Rights Commission Act*, fell to be continued under *The Saskatchewan Human Rights Code*, (S.S. 1979 C. S-24.1). Then he turned to the merits of the issue and summed up the facts and the issues as follows:

> 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 rooms. 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 the ability to have the dog in her company while visiting in the hospital.
> There were no issues as to the qualifications of the dog in question to bring it within the scope of the Act.
>
> * * * * *
>
> 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 guide dog.
>
> * * * * *
>
> 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 the 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 her dog guide. The fact that the hospital never in fact denied access by Ms. Peters in company with her dog, to the hospital is not significant. The questions which arose, and more specifically, the statement of policy with respect to her dog guide 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 respects that other persons not so accompanied. *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?* (emphasis added)

12626 Bearing in mind that the substantive issue consisted of whether or not there had been a contravention of Section 4(1) of *The Blind Persons' Rights Act*, 1978, one wonders why the Chairman of the Board of Inquiry cast that issue in relation to *The Saskatchewan Human Rights Code* — a question to which I shall return later — but having done so he concluded with this finding:

> 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.

Mr. Glendinning then awarded Ms. Peters "nominal damages" of $100.00.

12627 The University Hospital appealed this decision to the Court of Queen's Bench pursuant to Section 32 of the Code which section provides as follows:

> 32.-(1) Any party to a proceeding before a Board of Inquiry may appeal *on a question of law* from the decision or order of the board to a judge of the Court of Queen's Bench by serving a notice of motion, in accordance with The Queen's Bench Rules, within thirty days after the decision or order of the board of inquiry, on:
> (a) the board of inquiry;
> (b) the commission; and
> (c) the other parties in the proceedings before the board of inquiry.
>
> * * * * *
>
> (4) Where an appeal is taken under this section, the judge shall determine *any question of law* relating to the appeal and may *affirm* or *reverse* the decision or order of the board of inquiry or *remit the matter back* (sic) to the board of inquiry for *amendment* of its decision or order.
>
> (5) The decision of the Court of Queen's Bench may be appealed to the Court of Appeal. (emphasis added)

12628 The appeal to the Court of Queen's Bench was taken on the following grounds:

(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.

12629 The appeal to the Court of Queen's Bench was allowed by Mr. Justice Maher. He did not find it necessary to consider the first three grounds of appeal. In dealing with the two remaining grounds, he said:

> The accommodation, service 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 Section 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 for whom the accommodation, services and facilities are provided, namely, the patients.
>
> * * * * *
>
> 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."
>
> * * * * *
>
> 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*.
>
> * * * * *
>
> . . . 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 to 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.

Having reached these conclusions, Mr. Justice Maher directed that the order of the Board of Inquiry "be quashed and set aside."

12630 With that, Ms. Peters and the Commission appealed to this Court on the following grounds:

1. That the learned Judge erred in holding that 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, within the meaning of *The Blind Persons' Rights Act, 1978,* or *The Saskatchewan Human Rights Code*.
2. That the learned Judge erred in holding that any denial of the use of the facility to or discrimination against Ms. Peters as a visitor to the University Hospital did not constitute a breach of the said legislation.
3. And upon such further grounds as may appear from the pleadings and proceedings had and taken in the above styled proceedings to date or that counsel for the appellant may advise and this Honourable Court of Appeal may permit.

12631 I now return to the question I posed earlier: why — if he did so — did the Chairman of the Board of Inquiry treat the issue as though it concerned a breach of *The Saskatchewan Human Rights Code* when what was alleged was that Section 4(1) of *The Blind Persons' Rights Act* had been violated. I begin with an historical review of the relevant legislation.

12632 *The Saskatchewan Human Rights Commission Act* (S.S. 1972, c. 108), which came into effect on November 1st, 1972, created a Human Rights Commission charged with the obligation of promoting understanding and acceptance of the notions of equality of opportunity, dignity, and entitlement — without regard to race, creed, religion, colour, sex, nationality, ancestry, or place of origin. The primary function of the Commission was educational; it was supposed to encourage research, to expand and heighten understanding, and generally to advance the broad acceptance of the values embraced by the legislation. But it was also armed with the power to order compliance with those laws, the administration of which was assigned to it; and it was empowered to rectify any injury caused by violation of such laws, which included the power to order payment of compensation.

12633 Section 8 of the 1972 enactment assigned to the administration of the Commission *The Saskatchewan Bill of Rights Act, The Fair Accommodation Practices Act, The Fair Employment Practices Act* and;

> (d) such other Acts as are assigned by the Lieutenant Governor in Council to be administered by it under the direction of the minister.

The Blind Persons' Act, which was passed in the Winter of 1978, and came into force on May 26th, of that year, was assigned to be administered by the Commission.

12634 The following year the Legislature enacted *The Saskatchewan Human Rights Code* which was proclaimed in force on August 7th, 1979. The Code repealed both *The Blind Persons' Rights Act* and *The Saskatchewan Human Rights Commission Act*, but legislated afresh in relation to the subject matter of those former enactments.

12635 Since I shall be contrasting the rights of blind persons created by *The Blind Persons' Rights Act* ("the Act") with those secured by *The Saskatchewan Human Rights Code* ("the Code") I will now set opposite one another the respective applicable provisions of the *Act* (Sections 4, 5 and 6) and the *Code* (Sections 12(1) and 2(n)).

THE BLIND PERSONS' RIGHTS ACT

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.

5. No person shall:

(a) deny to any blind person occupancy of any self-contained dwelling unit; or
(b) discriminate against any blind person with respect to any term or condition of occupancy of any such dwelling unit;

by reason only of the fact that the blind person keeps or is customarily *accompanied* by a guide dog.

6. Nothing in section 4 or 5 shall be construed as entitling a blind person to require any service, facility or accommodation in respect of a guide dog, other than his right to be *accompanied* by the guide dog.

THE HUMAN RIGHTS CODE

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. In this Act:

(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 (emphasis added)

12636 I begin by noting two differences in phraseology — the significance of which I will deal with later:

(i) Section 4 of the *Act* shields a blind person from discrimination if "*accompanied* by a guide dog"; Section 12 of the *Code* protects from discrimination by reason of physical disability, which includes "physical *reliance* on a guide dog;"
(ii) Section 4 is aimed at discrimination with respect to "the accommodation, services or facilities *available in any place* to which the public is customarily admitted." Section 12 prevents discrimination against a person with respect to "the accommodation, services or facilities to which the public is customarily admitted or which are offered to the public."

12637 Turning from form to substance, and adopting the appellant's construction of section 4 of the *Act*, it will be seen that it simply protects blind persons *accompanied* by guide dogs — one class of persons; in contrast Section 12 of the *Code* protects not only blind persons *reliant* on guide dogs, but blind persons generally and those suffering from visual impairment. Thus, more than one class of protected persons is created by Section 12. Moreover the nature of the discrimination proscribed by section 12 is different from and broader than that dealt with by Section 4. This, I think, is of significance if, in fact, the Board of Inquiry determined that there was a contravention of the *Code*, rather than a violation of Section 4(1) of the *Act*. I now turn to that question.

12638 In the passages from the Board's written reasons, to which I earlier referred, the Chairman of the Board refers to the *Code* as the governing statute. As may be seen in the language he employs to frame the issue this is no mere mistaken reference to the *Act*. He uses the phrase "*reliance* upon a guide dog" (which is the language of the *Code*) and speaks of the hospital as "a facility [to] which the public is invited as a matter of course" and "within the category of facilities 'to which the public is customarily admitted' " (again that is the language of the *Code*, rather than of Section 4 of the *Act*.) Other passages from his reasons make it clear that he had in mind the *Code*, rather than the *Act*, in making his determination. He said this:

> 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.
>
> * * * * *
>
> 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," mean simply that. The circumstances surrounding the particular situation must be examined and a determination made if in those circumstances the facility is one to which the public is customarily admitted.
>
> * * * * *
>
> 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.
>
> * * * * *
>
> 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.
>
> * * * * *
>
> 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 a 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.

12639 Finally, the Chairman of the Board concluded as follows:

> Through its behaviour 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 sufficient to establish that the Hospital has discriminated against Ms. Peters insofar as her admission to its facilities as a visitor is concerned. Since such behaviour is declared inappropriate by the *Code*, the Hospital is found in breach of *that legislation*
>
> (emphasis added)

* * * * *

12640 I believe it is beyond dispute that the Board of Inquiry concerned itself with whether there had been a violation of the *Code* rather than a breach of Section 4(1) of *The Blind Persons' Rights Act*. The Board of Inquiry was not empowered to do that. When, in November of 1979, the Attorney General ordered the Inquiry he did so pursuant to Section 29 of the *Code* which empowered him to direct a formal inquiry "to hear and decide *the complaint*" (Ms. Peters' complaint of December 20th, 1978 alleging a violation of her rights under *The Blind Persons' Rights Act*.) Having ordered the Inquiry, Section 31(5) of the Code then governed the matter; in part it reads thus:

> 31.-(5) The board of inquiry *shall* inquire into the matters *complained of* and give full opportunity to all parties to present evidence and make representations, through counsel or otherwise.
>
> (6) Where, at the conclusion of an inquiry, the board of inquiry finds that *the complaint to which the inquiry relates* is not substantiated, it shall *dismiss* the complaint.
>
> (7) Where, at the conclusion of an inquiry, the board of inquiry, finds that *the complaint to which the inquiry relates* is substantiated on a balance of probabilities, the board *may*, subject to subsections (9) and (10), order any person who has contravened any provision of this Act, or any other Act administered by the commission, to do any act or thing that in the opinion of the board constitutes full compliance with that provision and to rectify any injury caused to any person and to make compensation therefor,
>
> (emphasis added)

The Chairman had no authority to decide anything except Ms. Peters' complaint which was that her rights under *The Blind Persons' Rights Act*, (not the *Code*) had been violated.

12641 In my opinion, the Commission was right in concluding that even though *The Blind Persons' Rights Act* had been repealed Ms. Peter's complaint that its provisions had been contravened was preserved by that part of *The Interpretation Act* entitled "Repeal and Amendments," and in particular, Sections 23, 24 and 26. Unfortunately, the Commission erred in not sticking with that decision.

12642 While matters of *procedure* in relation to the Inquiry fell to be governed by the provisions of the new *Code*, the *Code* had no bearing on the *substantive* issue, namely, whether the violation complained of had occurred. The substantive sections of the *Code* did not apply retrospectively, and obviously it was impossible for the University Hospital, in December, 1978, to have contravened the provisions of the *Code*, since it did not come into existence until a year and a half after the occurrence of the events which gave rise to the complaint. And so, in my opinion, the Commission of Inquiry erred in law in determining that the *Code* (it did not specify which provision) had been contravened, when what was before it was, whether Section 4(1) of *The Blind Persons' Rights Act* had been violated. That then leads to a consideration of what ought to be done.

12643 Section 32(4) allows an appeal court to "affirm or reverse" a decision or order of a Board, or to "remit the matter back [sic] to the Board of Inquiry for amendment." Obviously the decision cannot be affirmed. Should it be set aside; or should the matter be remitted; or should this Court attempt to decide the issue?

12644 Since the right of appeal extends only to questions of law, and the Code limits the Appeal Court to affirming, reversing or remitting, I do not think this Court should, itself, decide whether, on the evidence, there was a breach of Section 4(1) of *The Blind Persons' Rights Act*.

12645 Nor do I think this is a case for remitting. Section 32(4) only empowers the Court to remit to the Board for "amendment"; the power to amend, as distinct from one to reconsider, or rehear, is, ex facia, more limited; it suggests rectification of omissions, or the correction of slips or errors, or attending to incidentals; it does not suggest reconsideration after a failure as fundamental as that which occurred in this case. And nowhere does the *Code* empower the Board to "rehear" or to "reconsider," or for example, to review, rescind, change, alter, or vary, as occasionally will be found in statutes creating and empowering administrative tribunals.

12646 Moreover, and in any event, I am doubtful about whether it would be in the interests of justice to remit this matter to the Board of Inquiry in view of the course which the proceeding has taken and the length of time it has consumed. The matter complained of occurred over four years ago, in December 1978; it was the subject of investigation and unsuccessful conciliation; then in March 1981, over two years later, it was the subject of formal inquiry. Two additional years have intervened as a result of these appeals. The expense to the parties must be very considerable.

12647 I am troubled as well by the possibility that, however well intentioned, the Board of Inquiry may not be able — or perhaps equally important, appear to be able — to approach the question again with a fresh mind. Having committed himself to the conclusion that the conduct of the hospital amounted to a contravention of the provisions of the *Code* it seems to me that even with the very best of will it would be difficult for the Chairman to reconsider the issue with an entirely free mind.

12648 I am, therefore, led to think that the appeal should simply be dismissed, which would leave the decision of the Board set aside pursuant to the judgment of Mr. Justice Maher.

12649 Perhaps the Attorney-General will consider further inquiry, if he, being the responsible minister who ordered the inquiry in the first place, believes the issue ought to be pursued to a conclusion on its merits.

12650 In any event, for all of the foregoing reasons I would simply dismiss the appeal, the effect of which would be to leave the decision of the Board set aside.

12651 In the circumstances, I would make no order as to costs.

DATED at the City of Regina, in the Province of Saskatchewan, this 17th day of May, A.D. 1983.

Cameron, J.A.

CORAM: Bayda, C.J.S., Brownridge, Hall, MacDonald and Cameron, JJ.A.

CANADIAN HUMAN RIGHTS REPORTER

SASKATCHEWAN / EMPLOYMENT / AGE
Board of Inquiry
Roy Day v. The City of Moose Jaw and the Moose Jaw Fire Fighters' Association

Volume 4, Decision 332 Paragraphs 15388 - 15491 December, 1983

Board of Inquiry Decision under the SASKATCHEWAN HUMAN RIGHTS CODE

Roy Day

Complainant

v.

The City of Moose Jaw

and

The Moose Jaw Fire Fighters' Association, Local 553 of the International Association of Fire Fighters

Respondents

Date: November 1, 1983

Place: Moose Jaw, Saskatchewan

Before: Terrence Bekolay

Appearances by: Milton Woodard, Counsel for the Saskatchewan Human Rights Commission and Roy Day
John Zimmer, Counsel for the City of Moose Jaw
R. Hagan, Counsel for the Moose Jaw Fire Fighters' Association

Summary: *The Board of Inquiry finds that the City of Moose Jaw and the Moose Jaw Fire Fighters' Association discriminated against Roy Day by requiring him, through the provisions of the collective agreement, to retire from his position as a firefighter at the age of 62.*

Applying the test set out in the Supreme Court of Canada decision in Ontario Human Rights Commission v. Borough of Etobicoke, the Board rules that on the basis of objective evidence being of an age less than 62 is not a bona fide occupational qualification for the position of firefighter. The Board accepts expert testimony presented by the Saskatchewan Human Rights Commission which indicates that chronological age is not the best test of functional ability and that other, more precise tests of functional ability and risk factors are available and can be used to provide individual assessments.

Since the Board finds that age is not a bona fide occupational qualification, the requirement that Roy Day retire before 65 is found to be a contravention of the Code.

The Board orders the City to pay Roy Day approximately two years' lost wages plus seven per cent of this amount for loss of pension benefits. In addition, the Board orders both the City and the Union to pay Roy Day one thousand dollars in general damages, the parties are further ordered to cease contravening the Human Rights Code by requiring retirement before age 65.

REASONS FOR DECISION

15388 On July 27, 1982, the Board of Inquiry having given all parties to the matter adequate notice of its intention to do so, commenced a formal inquiry into the complaint of Roy Day, living at 635 Ominica Street, in Moose Jaw, in the Province of Saskatchewan, against: The Moose Jaw Fire Fighters Association Local 553 of the International Association of Fire Fighters whose address is: 136 Fairford West, Moose Jaw, Saskatchewan, and, the City of Moose Jaw, of 228 Main North, Moose Jaw, in the Province of Saskatchewan. The complaint, as amended, alleged that a violation of *The Saskatchewan Human Rights Code* took place on or about February 28, 1980 when the Complainant was discriminated against by the Respondent because of age. The complaint alleged that the particulars of the violation were as follows:

(1) In 1974 The Moose Jaw Fire Fighters Association Local 553 and the City of Moose Jaw signed an Agreement, Section 27(4) of which states that retirement from the City Fire Fighters Service will be decreased one year every two years until 1984 when retirement will be at age 60;

(2) Roy Day commenced employment with the City of Moose Jaw in 1947 as a fire fighter and in February 1980 he was still so employed as a lieutenant and as such he was subject to the above noted Agreement;

(3) At the end of February, 1980, being 62 years of age the Complainant, Roy Day, was required by the City of Moose Jaw to retire. In addition, the Union would not grant permission to negotiate an extension of the Complainant's retirement date as is provided for in the said Agreement;

(4) The Respondent, City of Moose Jaw, refused to continue to employ Roy Day because of his age contrary to Section 16(1) of *The Saskatchewan Human Rights Code*;

(5) The City of Moose Jaw discriminated against Roy Day with respect to the terms and conditions of his employment by negotiating and maintaining in force in February, 1980 mandatory retirement rules which denied Roy Day continued employment because of his age;

(6) The Respondent Union discriminated against Roy Day in regards to his employment with the City of Moose Jaw by negotiating and maintaining in force in February 1980, mandatory retirement rules which denied Roy Day continued employment because of his age.

The Issues

15389 The issues before the Board of Inquiry are:

(1) Whether the City of Moose Jaw violated Section 16(1) of *The Saskatchewan Human Rights Code* (hereinafter referred to as the "*Code*"):
   (a) By refusing to continue to employ the Complainant, Roy Day, beyond February 29, 1980, because of his age which was over 62, but under 65; and/or,
   (b) By being a party to a Collective Agreement which required all persons and, in particular, the Complainant, to retire at age 62;

(2) Whether The Moose Jaw Fire Fighters Association Local 553 of The International Association of Fire Fighters (hereinafter

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referred to as the "Union") violated Section 18 of the *Code*:

(a) When it refused to grant permission to negotiate an extension of Mr. Roy Day's retirement date as was provided for in the Agreement; and/or,

(b) By being a party to a Collective Agreement which required all persons and, in particular, the Complainant, to retire at age 62.

(3) Whether, if the City and/or the Union prima facie violated the respective sections of the act, the Respondents have justified their actions within the terms of Section 16(7) of the *Code*.

Facts

15390 In 1974 the City of Moose Jaw (hereinafter referred to as the "City") and the Union negotiated a reduction in the normal retirement date of all the members of the Union employed by the City, to age sixty (60) from age sixty-five (65). The reduction of age for normal retirement was to take place gradually in one year of age steps occurring every two years so that by 1984 the normal retirement date would be based on sixty (60) years of age. For some time, and until expiry on December 31, 1979 of the 1978-79 Collective Agreement between the City and the Union, it was provided that retirement would be mandatory at the normal retirement date and pension benefits would be payable from that date, although provisions were made for extensions provided there was approval of the Fire Chief, the City Commissioner and the Union. The 1978-79 Agreement was entered into between the City and the Union on the 6th day of July, A.D. 1978. The age discrimination provisions in the *Code* were proclaimed August 7, 1979. On the 27th of April, 1981 the City and the Union entered into a Collective Bargaining Agreement for the year 1st of January, 1980 to the 31st of December, 1980. In Sections 26 and 27 thereof the parties continued their previous Agreement by providing for compulsory retirement at age 62, but in this contract made no provision for any extension of the normal retirement date.

15391 The Complainant, Roy Day, became 62 years of age in April of 1979 and on February 29, 1980, according to the Agreement between the City and the Union, the normal retirement date was reduced to age 62. As Mr. Day was already 62 years of age his normal retirement date became March 1, 1980 when he was 62 years, 10 months of age. By letter directed to Fire Chief E.R. Belsey dated the 6th of April, 1979, Mr. Day applied for an extension to his normal retirement date and subsequently Mr. Day received the approval of the Fire Chief. At this time he also submitted a medical, indicating his health to be sound. However, both the City Commissioner and the Union refused their approval and the application was rejected by a letter to Mr. Day dated July 20, 1979 and under the signature of C.N. Renwick, Personnel Director for the City, W.L. Johnson, City Commissioner, and H.A. Mortenson, President of the Union. In June of 1979, the Union, at its regular monthly meeting had passed a motion that all applications for the approval of the Union to the extension of a member's normal retirement date be rejected.

15392 In early 1980, well after the coming into force of the *Code*, Mr. Day again sought the consent of the Union so that he might further pursue an application for extension to his normal retirement date, but the Union rejected his request. On February 29, 1980, Mr. Day was required by the City to cease his employment according to the compulsory retirement provisions of the Collective Bargaining Agreement.

15393 At all material times, Roy Day was an employee of the City as a lieutenant in its Fire Department and a member of the Union. He had always carried out his duties. He was in good health and in good physical condition, which would have made it possible for him to continue to perform the functions of his employment. Had he not been required to retire, he would clearly have continued his employment until the end of April 1982 being the month in which he turned 65 years of age and accordingly he would have worked an additional two years, two months.

15394 The work of a firefighter, particularly of a lieutenant in the City's Fire Department, is hard physical labor. A lieutenant in the City's Fire Department has the following duties:

(1) To ride the first alarm fire truck to the scene of the fire; to direct and supervise all firefighting activities until the arrival of a senior officer; to call by radio for reinforcements from the Fire Hall when required;

(2) To ensure the use of proper and safe working procedures for firefighting, handling equipment, cleaning up and for various related activities; to advise and instruct personnel regarding proper use of equipment; to watch for the safety of personnel under his jurisdiction during drill, training or firefighting activities;

(3) To plan, co-ordinate and supervise the activities of approximately 14 firefighter-drivers and firefighters engaged in firefighting, stand-by and miscellaneous duties as required; to make recommendations regarding the training and discipline of personnel within his jurisdiction;

(4) To perform routine inspectional duties of living quarters, fire apparatus and equipment and related facilities;

(5) To prepare work and duty rosters monthly; to prepare reports on fires, accidents, sickness, etc.

15395 Roy Day, former Chief E.R. Belsey, Chief W.H. Stack, H.A. Mortenson and K.W. Deans all testified to the rigors of firefighting and particularly to the physical demands of the lieutenant's position. There was no evidence before the Board to suggest that given the physical demands of the job Roy Day would not be able to perform his duties. On the contrary, I wholly accept the testimony of Roy Day that he was able, ready and willing to continue to perform his duties and, the testimony of former Chief E.R. Belsey, who was Chief at the relevant time, that Roy Day had always carried out his duties to his satisfaction and that he had no doubt that he would have continued to do so had he been allowed to remain at his job.

The Question of Prima Facie Violation of Section 16(1) and Section 18 of the Code

15396 I shall deal but briefly with the issues of prima facie violation of Section 16(1) and Section 18 of the *Code* as all parties appearing before the Board conducted their cases, for the most part, on the basis that the facts as outlined above amounted to a prima facie violation of the relevant sections of the *Code*.

Section 16(1) of the *Code* states:

> "*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, color, sex, marital status, physical disability, *age*, nationality, ancestry or place of origin." (emphasis mine).

15397 While Mr. Day's retirement was a matter dealt with by Collective Bargaining and while the Collective Agreement provided for compulsory retirement, there is no doubt that:

(a) Mr. Day did not wish to retire; and,

(b) The City would not have allowed Mr. Day to continue in in his employment from March 1, 1980 onward.

Although this Board has some reservations about interfering with an Agreement arrived at by the Collective Bargaining process, clearly in enacting the *Code* the legislature intended to protect the rights of the individual as against the rights of the Collective, as represented by the Union as a whole. The legislature clearly also intended that an employer could not take refuge behind a Collective Agreement that violates the rights of the individual member of the Union. The Board rejects the City's suggestion that the Collective Agreement, which was voluntarily entered into, bound the City to discriminate and consequently the City is not at fault. Further, the Board accepts the proposition that parties to a Collective Agreement cannot contract out of the rights and prohibitions prescribed by The Human Rights Legislation. In so holding the Board relies on the decision of The Supreme Court of Canada in *The Ontario Human Rights Commission et al* v. *The Borough of Etobicoke* (1982),[1] 40 N.R. 159 at para. 6905 (hereinafter referred to as the *Etobicoke* case); and on the decision of the The Manitoba Court of Appeal in *Imogene McIntire* v. *The University of Manitoba* (1981) 2 C.H.R.R. 305 at p. D/310. The Board concludes that on the basis of the facts as outlined above the City is prima facie in violation of Section 16 of the *Code*.

Section 18 of the *Code* states:

> "*No trade union shall* exclude any person from full membership or expel, suspend, or otherwise discriminate against any of its members, or *discriminate against any person in regard to employment by any employer because of* the race, creed, religion, color, sex, marital status, physical disability, *age*, nationality, ancestry or place of origin *of that person or member*." (emphasis mine).

15398 As outlined in the facts as found by this Board the Union negotiated a pension plan scheme and mandatory retirement scheme with the City prior to the proclamation of the *Code* on August 7, 1979. In the said 1979 Collective Agreement an employee could apply for an extension with, in part, the approval of the Union. Shortly before the passage of the *Code*, the Union, at its June, 1979 regular monthly meeting passed a resolution that no applications for extensions would be granted. It clearly was not in violation of the relevant Saskatchewan Human Rights legislation at that time. But after the passage of the *Code*, the Union put this policy into effect by, in February of 1980, at its regular monthly meeting, refusing the application of Roy Day for the approval of the Union to his request for an extension. Such action had the effect of continuing to maintain in force to the detriment of the Complainant, Roy Day, a discriminatory contractual provision under which Mr. Day was required to cease his employment, to retire, because of his age.

15399 In addition, the Collective Agreement negotiated by the Union on behalf of its members, including the Complainant, for the year 1980 continued to include clause 26, making retirement at age 62 mandatory, with the only difference being that no provisions were made for extensions. Just as the City cannot raise the Collective Agreement as a defense nor can the Union. On these facts the Board concludes the Union has prima facie discriminated against Roy Day in regard to his employment with the City of Moose Jaw because of his age.

The Reasonable Occupational Qualification Issue

15400 Clearly, the main issue before the Board was the issue raised by Section 16(7) of the *Code* which states:

> "The provisions of this section relating to any discrimination, limitation, specification or preference for a position or employment based on sex, physical disability or age do not apply where sex, physical disability or age is a *reasonable occupational qualification* and requirement for the position of employment." (emphasis mine).

15401 Section 1 of the regulations to the *Code* define reasonable occupational qualification as follows:

> "(b) "reasonable occupational qualification" means inter alia, a qualification:
>
> (i) that renders it necessary to hire members of one sex, one age group or of a certain physical ability exclusively in order that the essence of the business operation is not undermined; or
>
> (ii) that is essential or an overriding, legitimate business purpose; or
>
> (iii) that renders it necessary to hire members of one sex, one age group or of a certain physical ability exclusively in order that the duties of a job involved can be performed safely; but does not include, inter alia, a qualification:
>
> (iv) based on assumptions of the comparative employment characteristics of that sex, age group or state of physical ability in general;
>
> (v) based on stereotyped characterizations of the sex, age group or physical disability;
>
> (vi) based on the preferences of co-workers, the employer, clients or customers, except that where it is necessary for the purpose of authenticity or genuineness, sex shall be a reasonable occupational qualification;
>
> (vii) that distinguishes between "light" and "heavy" jobs which operate in a distinguished form of classification by sex and which creates unreasonable obstacles to the advancement by females into jobs which females could reasonably be expected to perform."

15402 The Board concludes that once a prima facie violation of the *Code* is established, as in the present case, the burden shifts to the Respondent City and Union to prove by clear objective evidence that the requirement of retirement at age 62 and eventually at age 60 is necessary to the essence of the business operation, to the essential purpose of the organization, in order that the duties of the job can be performed safely; and that either substantially all members of the protected class (those over age 62 and eventually 60 but under age 65) would be unable to

[1] Editor's note: See also 3 C.H.R.R. D/781

perform the tasks of the job safely, or that, it is not possible to distinguish between those members of the class who could perform and those who could not.

Review of the Case Law

15403 Counsel for the Commission urged the Board to consider the American experience. He pointed out that the concept of a "*bona fide occupational qualification*" was developed in the United States under *The Civil Rights Act*, 1964, Title VII, 42 U.S.C. p. 2000. This same qualification was incorporated into the *The Age Discrimination In Employment Act*, 29 U.S.C. pp. 621 (ADEA). All Canadian jurisdictions have incorporated this concept into their legislation, some, such as Saskatchewan and Manitoba, referring to a "reasonable" rather than a "bona fide" qualification. Because of the development of this concept in the United States, the similarity of the wording and the longer period of experience in the United States, the Board, keeping in mind that it is not bound by any of these decisions, has considered them for their persuasive value.

"The Reasonable" versus "Bona Fide" Question

15404 Before reviewing the American experience and so the difference in wording can be kept in mind when so doing, the Board addressed the question of the significance of the difference in wording. The Supreme Court of Canada in the *Etobicoke* case (supra) outlined what constitutes a "bona fide occupational qualification" at p. 19 where McIntyre J. stated:

> "To be a bona fide occupational qualification and requirement a limitation, such as a mandatory retirement at fixed age, must be imposed honestly, in good faith, and in a sincerely held belief that such limitation is imposed in the interests of the adequate performance of the work involved with all reasonable dispatch, safety and economy, and not for ulterior or extraneous reasons aimed at objectives which could defeat the purpose of the *Code*. In addition it must be related in an objective sense to the performance of the employment concerned, in that it is reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public."

In other words, the test for a "bona fide occupational qualification" according to The Supreme Court of Canada involves both an objective and a subjective element. But what is the test then for a "reasonable occupational qualification," as that is the language of the Saskatchewan *Code*. The wording of the Saskatchewan *Code* is identical to the wording of *The Manitoba Human Rights Act*, Chapter H 175 R.S.S.M. 1970 and amendments thereto, and The Manitoba Act has recently been considered in the unreported case of *The Manitoba Human Rights Commission and John W. Finlayson* v. *The City of Winnipeg et al*, where Hamilton, J. after considering the test outlined by The Supreme Court of Canada, stated:

> "Upon further considering the *Etobicoke* case and the Manitoba legislation, however, I am of the opinion that an age that has been previously set for other reasons may nevertheless be justified and upheld. The Manitoba Act says that the provisions against discrimination do not apply where . . . age . . . is a reasonable occupational qualification and requirement. It does not speak of whether the employer has established the age with those matters in mind or not. It would appear that as long as the employer can satisfy a Board of Adjudication or the Court that 60 is a reasonable, or reasonably necessary, retirement for this type of employee, his discharge at that age may be upheld."

15405 This Board accepts the reasoning of the Honourable Mr. Justice Hamilton of the Manitoba Court of Queen's Bench and concludes that there is no subjective element to the test where the term "reasonable" is used, and that the proper test is an objective one being, "whether the employer can justify to a Board of Adjudication or the Court that 60 is a reasonable or reasonably necessary, retirement age for this type of employee" and if so, "his discharge at that age may be upheld." Mr. Justice Hamilton concluded that the motive for inserting the mandatory retirement provision into the Collective Bargaining Agreement between the City of Winnipeg and its policemen was irrelevant and this Board concludes that the same principal applies to the present case. That is, that the motive for the inserting of Sections 26 and 27 of the Collective Bargaining Agreement between the City of Moose Jaw and the Union is irrelevant. Keeping this difference in wording in mind between the Saskatchewan Statute and the American Law the Board returns to consideration of the American experience.

American Case Law

15406 The American cases are quite clear that, as the very purpose of prohibitions against discrimination is to prevent stereotyped assumptions of class characteristics and capabilities from being applied to employment decisions, there is an onus upon the Respondent to establish the clear and pervasive nature of the negative employment characteristic that so embues the entire class as to make impossible the employment of any of that class of persons without detrimentally and substantially affecting the essence of the business or enterprise.

15407 Two classic decisions were rendered by the fifth circuit of the Federal Court of Appeal both in 1971. In *Diaz* v. *Pan American World Airways*, 3 E.P.D. p. 8166, in a sex discrimination case, the Court stated that the bona fide occupational qualification exemption would only be made out "when the essence of the business operation would be undermined by not hiring members of one sex exclusively." In *Weeks* v. *Southern Bell Telephone & Telegraph Co.*, 1 E.P.D. p. 9970 the Court stated:

> "We think it is clear that the burden of proof must be on Southern Bell to demonstrate that this position fits within the one, *bona fide* occupational qualification, exception. The legislative history indicates this exception was intended to be narrowly construed."

15408 The Company attempted to argue that a switchman's duties regarding lifting and other physically strenuous activities were so severe that it was highly unlikely that any woman could do the job. The Court rejected the motion that physical limitations which might, on the average, decrease the capabilities of women should be used to exclude all women. They held: "we conclude that the principle of nondiscrimination requires that in order to rely on the *bona fide* occupational qualification exception an employer has the burden of proving that he had reasonable cause to believe, that is, a factual basis for believing, that *all or substantially all woman would be unable to perform safely and efficiently the duties of the job involved.*" (emphasis mine).

15409 These two cases, placing the onus upon the employer to deal with the essence of the business and the pervasive nature

of class characteristics have become known as the *Weeks-Diaz* test.

15410 In 1974 the seventh circuit the Court of Appeal dealt with the bona fide occupational qualification exception in circumstances where public safety was involved: *Hodgson* v. *Greyhound Lines, Inc.*, 7 E.P.D. pp. 9286. In this case a bus company refused to consider applicants over age 35 for jobs as busdrivers, arguing that the irregular hours and runs caused by their "extra board system" placed stress on middle-aged drivers that had the effect of decreasing safety. They also argued that degenerative changes occurred in the body from age 35 onward which could not be detected by physical examination. The Court held that the *Weeks* part of the test did not apply "where the lives of numerous persons are completely dependent upon the capabilities of the job applicant." But it was necessary for Greyhound to show that the essence of its business operation would be endangered, nonetheless:

> "Greyhound needed only demonstrate, however, a minimum increase in risk of harm for it is enough to show that elimination of the hiring policy might jeopardize the life of one more person than might otherwise occur under the present hiring practice."

15411 It might be suggested that the *Greyhound case* establishes a broad exception to the *Weeks* case in public safety situations which might well apply to firefighters. Subsequent cases do not appear to bear this out.

15412 The fifth circuit in *Usery* v. *Tamiami Trail Tours, Inc.*, 11 E.P.D. pp. 10916 (1976, CIR.) had occasion to consider both of its previous decisions in *Weeks* and *Diaz* as well as the *Greyhound* case. In essence, the Court agreed that while the safety of the public was a factor that could not be ignored, that the safety factor was already appropriately highlighted within the framework of the *Weeks-Diaz* test. While public safety could be the basis of more stringent job requirements, the Court said that an employer must nonetheless first prove that the job duties which allegedly would be impaired by removal of the age restriction are reasonably necessary to the essence of the business. Additionally, in order to establish that the particular restrictions constitute a bona fide occupational qualification, an employer would still be required to prove one of two other elements in accordance with *Weeks*. It must show either that:

(a) There was a factual basis for believing that all or substantially all persons older than the age at which the restriction had been set were unable to perform the duties of the job, or

(b) The process of aging caused physical impairment which precluded efficient job performance which the employer could not practically ascertain on an individual basis by some test other than automatic exclusion on the basis of age.

15413 The *Tamiami case* was preferred over the *Greyhound case* in the fourth circuit: *Arritt* v. *Gerisell*, 15 E.P.D. pp. 8012 (1977); in the eighth circuit: *Hougton* v. *McDonnell Douglas Corporation*, 13 E.P.D. pp. 11, 623 (1977); in the ninth circuit: *E.E.O.C.* v. *City of St. Paul*, 28 E.P.D. pp. 32, 523.

In the *Arritt* case the Court stated:

> "The District Court adopted the standard applied in *Hodgson* v. *Greyhound Lines* . . . we believe, however, that the proper standard is the two-pronged test formulated in *Usery* and *Tamiami Trail Tours* . . . that the burden is on the employer to show (1) that the bona fide occupational qualification which it envokes is reasonably necessary to the essence of its business (here the operation of an efficient police department for the protection of the public), and (2) that the employer has reasonable cause, i.e., a factual basis for believing that all or substantially all persons within the class (in our case, persons over 35 years of age) would be unable to perform safely and efficiently the duties of the job involved, or that it is impossible or impractical to deal with persons over the age limit on an individualized basis."

15414 The case of *Johnson* v. *Mayor and City Council of Baltimore*, 29 E.P.D. pp. 32784 (Fed. Ct. 1981) deals with the firefighting situation very similar to the case before the Board. There the Court dealt with provisions of the City code requiring that firefighters retire (depending on Department) at ages 55 and 60. At page 1295, the Court specifically adopts the test in the *Tamiami case*, citing also *Arritt* v. *Gerisell* and *Hougton* v. *McDonnell Douglas Corporation*. At paragraph 25653 the Court states:

> "On the record here, this Court finds and concludes that Defendants have not met their burden of proving that it is impossible or highly impractical to deal with the retirement of Baltimore City Firefighters between the ages of 60 and 65 on an individualized basis. As to this issue, the expert testimony presented by the Plaintiffs was much more convincing than that of the Defendants."

Further on:

> "Plaintiffs expert witnesses also readily concede that firefighters as a class are particularly subject to heart disease and that the risk of heart disease increases with age. But facts such as these do not under the ADEA (*Age Discrimination and Employment Act*) permit Defendants to stereotype City firefighters between the ages of 60 and 65 and conclude that all or substantially all of them are no longer capable of performing their assigned duties safely and efficiently."

15415 Another firefighters case, *Aaron* v. *Davis*, 12 E.P.D. pp. 11053 further limits the application of the *Greyhound* case to public transportation situations where the tragic consequences of mistakes are greatly amplified:

> "Although considerations of public safety are involved in both the *Greyhound* and the instant case, this Court finds and concludes that the nature of that concern differs in the two situations both in kind and degree; further, the Court concludes that there are a myriad of other factors and circumstances, as discussed *supra*, which distinguished this Case from *Greyhound*. It is of considerable importance that the risk inherent in the two situations are markedly different. *The risk is far greater that a slight error in judgment, or a slight physical defect, in a person who is piloting a jetliner or driving a bus would produce "magnified" tragic results than they would in a case of one participating in a joint effort to extinguish a fire.* A contrast of the two cases further reveals that the degenerative physical and sensory changes mentioned in *Greyhound* (which would result in the impairment of driving ability; are more subtle and not as readily detectable by physical examination as are the physical and mental changes mentioned by Dr. Conrad in the instant case which he felt might impair the performance of firemen."

15416 In the United States Supreme Court, in the case of *Dothard* v. *Rawlinson*, 14 E.P.D. pp. 7632 (1977), the Court had to consider the bona fide occupational qualification exception in relation to correctional counsellors. While neither the

Greyhound case nor the *Tamiami* decision were considered, the Court did cite both *Weeks* v. *Southern Bell Telephone* and *Diaz and Pan American World Airways* and stated:

> "We are persuaded by the restrictive language of Section 703E, the relevant legislative history, and the consistent interpretation of the Equal Employment Opportunity Commission — that the bona fide occupational qualification exception was in fact meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex."

15417 In the case of *Rosenfeldt* v. *Southern Pacific Company*, 3 E.P.D. pp. 8247 the American Court established the proposition that it is also necessary to show that the physical characteristic which the employer maintains is inconsistent with job performance is in fact unique to the class of persons which the employer is attempting to exclude. It would not be logical to refuse employment to women in a certain industry because of a 35% occurrence rate of a certain occupational disease among women, if men had exactly the same occurrence rate. Similarly, it could be concluded that on the basis of the American experience that it is not sufficient for the Respondents in the case before the Board to simply indicate that the physical exertion and stress of firefighting on employees over the age of 59 or 61 has a certain effect, if it cannot be shown that this effect is substantially greater than occurs with younger firefighters.

15418 The American authorities also have dealt with the question of the standard of proof in respect to the Respondents establishing a bona fide occupational qualification and they have without exception established the ordinary civil standard of proof, that is upon a balance of probabilities. I do not choose to deal at any length with the American authorities in respect to the standard of proof as Canadian case law has dealt with that issue and has come to the same conclusion as the American case law.

Canadian Case Law

15419 The leading Canadian decision is clearly the decision of the Supreme Court of Canada in the *Ontario Human Rights Commission et al* v. *The Borough of Etobicoke, supra* where the Court dealt with a firefighter situation on facts virtually indistinguishable from our own. The Board regards this case as being binding upon it.

15420 This case was the final adjudication between two Boards of Inquiry: *Cosgrove* v. *City of North Bay* (unreported, Ontario Tribunal, 1976) and *Hall and Gray* v. *The Borough of Etobicoke* (unreported, Ontario Tribunal, 1977). In the *Cosgrove* case, four professional firefighters of considerable experience, including a firefighter for 23 years, two fire chiefs and a chief fire prevention officer all testified to the dangers, stress, and extreme physical demands created by firefighting. It was their opinion that the performance of firefighters deteriorated with age so that older firefighters were less capable of coping. While some younger personnel might be incapable and some older firefighters still able, in the interests of safety they thought age 60 was a reasonable "rounding-off" figure for compulsory retirement. R.L. MacKay, Q.C., accepted this and formulated what became known as the MacKay Test. To quote the Supreme Court:

> "The MacKay Test provides that to be a *bona fide* qualification and requirement the limitation complained of must be imposed honestly, that is in good faith, and not based on any extraneous or ulterior motive, and it must bare a reasonable relationship to the circumstances of employment." He said: "In other words, although it is essential that a limitation be enacted or imposed honestly or with sincere intentions it must in addition be supported in fact and reason based on the practical reality of the work-a-day world and of life."

It was his opinion that the evidence of the professionals met this burden.

15421 On the other hand, in the *Hall and Gray* case, Mr. Bruce Dunlop heard similar evidence to the effect that firefighting was "a young man's game." However, he termed this evidence as "impressionistic" and formulated what became known as the "Dunlop Test," that is:

> "The meaning of *bona fide* that seems most consistent with this objective would be real or genuine that is that there is a sound reason for imposing an age limitation and the onus of establishing this justification for discrimination is on the person alleging it to be justified."

Dunlop referred to the need for medical and scientific evidence, rather than "gut-level feeling."

15422 The Ontario High Court and Court of Appeal confirmed the decision of R.L. MacKay, Q.C., in re: *Ontario Human Rights Commission and City of North Bay*, (1977) 17 O.R. (2d) 712, with the Ontario Court of Appeal refusing leave to appeal.

15423 On the other hand, the High Court overturned the *Etobicoke* decision in *Borough of Etobicoke* and *Ontario Human Rights Commission*, (1979) 80 C.L.L.C. pp. 14, 038 stating:

> "He appears not to have put his mind at all to the question of whether the Borough in agreeing to the age limitation acted honestly and with sincere intentions, and *in requiring a scientific conclusion that there was a significant increase in the risk to individual firefighters, their colleagues or to the public at large in allowing firefighters to work beyond the age of 60, he was requiring the employer to do far more than to show that the age limitation was supported in fact and reason based on the practical reality of the work-a-day world.*
>
> *In my view the evidence indicates that in agreeing to the 60 year age limitation, and enforcing it, the Borough of Etobicoke honestly believed that it was doing that which was in the best interest of its firefighters individually and collectively, and of the public which they served.* I am further of the view that an employer can establish that an age limitation requirement is *bona fide* without bringing forward scientific or statistical data to prove it, although, of course, such evidence is desirable if it is available." (emphasis mine).

15424 The Court of Appeal confirmed the High Court decision adopting the reasons of that Court. To this point then, the MacKay Test was adopted, the Dunlop Test was rejected, and the appearance was that good faith and subjective evidence would be sufficient to establish a *bona fide* occupational qualification.

15425 However, in the Supreme Court, the appeal in the *Borough of Etobicoke* case was allowed and the Dunlop decision restored. Mr. Justice McIntyre, speaking for the entire Court confirmed the overall onus upon an employer raising a bona fide occupational qualification defence:

> "Once a Complainant has established before a Board of Inquiry a *prima facie* case of discrimination, in this case proof of a mandatory retirement of age 60 as a condition of employment, he is entitled to relief in the absence of justification by

> the employer. The only justification which can avail the employer in the case at bar, is the proof, the burden of which lies upon him, that such compulsory retirement is a *bona fide* occupational qualification and requirement for the employment concerned. The proof, in my view, must be made according to the ordinary civil standard of proof, that is upon a balance of probabilities. (paragraph 6893)."

15426 In his opinion there was no difference between the MacKay and Dunlop Test. He characterized the test as follows:

> "To be a *bona fide* occupational qualification and requirement a limitation, such as a mandatory retirement at a fixed age, must be imposed honestly, in good faith, and in a sincerely held belief that such limitation is imposed in the interests of the adequate performance of the work involved with all reasonable dispatch, safety and economy, and not for ulterior or extraneous reasons aimed at objectives which could defeat the purpose of the *Code. In addition it must be related in an objective sense to the performance of the employment concerned, in that it is reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public.*" (emphasis mine).

The Board concludes that the relevant test within the terms of the Saskatchewan legislation is that once a prima facie case of discrimination is established, the employer, to establish a reasonable occupational qualification must show in an objective sense that the requirement is necessary to the performance of the employment concerned to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public. The Board takes the position as outlined above, that the question of the honesty with which the limitation is imposed, whether or not it is imposed in good faith and whether or not the employer sincerely held a belief that such limitation is imposed in the interests of adequate performance of the work involved with all reasonable dispatch, safety and economy, and not for any ulterior or extraneous reason, is not an issue under the terms of the Saskatchewan legislation.

15427 The Learned Judge in the *Etobicoke* case recognized that the "public safety" situation did merit special attention:

15428 At paragraph 6896:

> ". . . In certain types of employment, particularly in those affecting public safety such as that of airline pilots, train and bus drivers, police and firemen, consider that the risk of unpredicted individual human failure involved in continuing all employees to age 65 may be such that an arbitrary retirement age may be justified for application to all employees. In the case at bar it may be said that the employment falls into that category. While it is no doubt true that some below the age of 60 may become unfit for firefighting and many above the age may remain fit, recognition of this proposition affords no assistance in resolving the second question."

15429 However, the test is still according to the Court as follows:

At paragraph 6896:

> "In an occupation where, as in the case at bar, the employer seeks to justify the retirement in the interest of public safety to decide whether a *bona fide* occupational qualification and requirement has been shown, the Board of Inquiry and the Court must consider whether the evidence adduced justifies the conclusion that there is sufficient risk of employee failure in those over the mandatory retirement age to warrant the early retirement in the interests of safety of the employee, his fellow employees and the public at large."

15430 The Learned Judge rejected the notion that research on aging is not available and placed the onus squarely on the employer to adduce this evidence. In the case before the Board both the Commission and Complainant and the Respondents clearly took to heart the statements of the Court in this regard and both called considerable evidence and placed a considerable number of learned articles on aging before the Board.

15431 As the Supreme Court of Canada in the *Borough of Etobicoke* case indicated that the firefighting situation fit into the class of public risk cases, the Board wishes to review at some further length the Canadian public risk cases. It would appear to the Board that prior to the *Borough of Etobicoke* case, there has not been in Canada any clear formulation of a special rule for establishing a *bona fide* occupational qualification or reasonable occupational qualification, exception in "public risk" situations. While a number of cases including the *O'Bryan* case at pp. 4627 and the *Bhinder* case at pp. 5146, as well as *Little* and *St. Johns Shipbuilding and Drydock Company Ltd.*, (1980) 1 C.H.R.R. 1 (N.B. Human Rights Board), accept that the burden is "lighter" where risk to the public is involved, in none of those cases was public risk of central concern.

15432 *C.H.R.C.* v. *Voyageur Colonial Limited*, (1980) 1 C.H.R.R. 239 (Canadian Human Rights Tribunal) is the one exception. This case followed the *Greyhound* case and MacKay in *Cosgrove* and *The City of North Bay* and found that it was a *bona fide* occupational qualification to refuse to hire beginning bus drivers over age 40. The Board does not accept this case as binding upon it nor does it accept the reasoning in the case as persuasive in that the *Cosgrove* decision was essentially overruled by the Supreme Court in the *Borough of Etobicoke* case. Further the Board is of the view that public transportation cases are clearly unique public risk situations and are not on all fours with cases involving firefighters. Public transportation cases involve a great number of individuals being entirely dependent upon the health and well-being of one individual whereas a firefighting situation is a joint venture.

15433 The Manitoba Queen's Bench has recently considered the *Etobicoke* case in *Manitoba Human Rights Commission and John W. Finlayson* v. *City of Winnipeg*, unreported.[2] In that case a police officer was mandatorily retired pursuant to a City By-law. The Board of Inquiry decision in *Finlayson* v. *Winnipeg City Police, supra* upheld a reasonable occupational qualification defence and the appeal to the Queen's Bench was dismissed on the basis that the evidence was sufficient, it being of a scientific and medical nature. The witnesses before the Board were a sociologist, specializing in aging, a cardiologist, a psychiatrist, and psychologist with experience working with police. The case deals with the specific merits of the evidence adduced, and points out that such evidence must be seen in relation to the job to which the exception applies:

15434 The Honourable Queen's Bench Judge stated at page 11:

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[2]Editor's note: See (1982) 3 C.H.R.R. D/902.

> "I do not wish to be interpreted as upholding the City by-law in total. The by-law refers to various classifications of police officers, but it also covers a number of other occupations in the police department that may not have the same type of responsibilities. The imposition of a compulsory retirement age with respect to these other categories of employees may or may not be able to be justified as a reasonable occupational qualification and requirement."

15435 On the other hand, in the recent Canadian Tribunal case of *Carson et al* v. *Air Canada* (1982) 3 C.H.R.R. 8818, in a case similar to *Greyhound & Voyageur Colonial, supra* except that it dealt with air transportation, the Board found that the *bona fide* occupational qualification exception could not be established on the evidence for entry level pilots over age 27. That Board also considered the *Etobicoke* case and concluded that there was no indication by the Supreme Court that in public risk cases the burden of establishing the *bona fide* occupational qualification would be any lighter, although what would have to be proved would be an unacceptable risk of employee failure. In this case, the Board in rejecting the *bona fide* occupational qualification, relied on the expertise of Dr. Stanley R. Mohler, an acknowledged expert in aerospace medicine, who had published widely on the medical aspects of aging.

Summary

15436 There can be no doubt that the standard of proof in respect to establishing a reasonable occupational qualification exception is that of the ordinary civil burden, balance of probabilities. There can also be no doubt that in public risk situations there has been authority: *Greyhound, Voyageur Colonial, St. Johns Shipbuilding* to the effect that the burden may be somewhat "lighter" in those circumstances. It is the Board's view that the case law establishes that it is still necessary for the employer to show that all members of the restricted class (in this case, those over 62 and eventually over 60) had the intolerable characteristic or that the incidence in that group was so great and not sufficiently identifiable as to make the risks from continuing to employ members of the group intolerable in the circumstances. It is the Board's view that the wording of this test, although taken from the *Tamiami* decision was adopted by the Supreme Court of Canada in the *Etobicoke* case when the Court made reference to "sufficient risk of employee failure."

15437 The Board concludes that the standard of proof to be applied by the Board in this case is the ordinary civil standard of proof on a balance of probabilities.

15438 One striking feature of all these cases is that the *bona fide* occupational qualification or reasonable occupational qualification exception must be determined in relation to the specific work to be performed and the consequences resulting from employee failure, as analyzed in relation to human performance capabilities by the particular experts brought forward in the case.

15439 From its review of the case law the Board concludes that in order to establish a reasonable occupational qualification exception within the meaning of Section 16(7) of the *Code* the Respondent must meet the following requirements:

(a) In situations where employment involves risk to the public, which includes the case before the Board, the *Etobicoke* case establishes the test as: "whether the evidence adduced justifies the conclusion that there is sufficient risk of employee failure in those over the mandatory retirement age to warrant the early retirement in the interests of safety of the employee, his fellow employees and the public at large."

(b) That, in attempting to meet this burden, evidence of a medical and scientific nature will be considerably more persuasive than impressionistic evidence.

(c) That the burden of proof, which is on the Respondent is no less in "public risk" situations, but merely that the Respondent is allowed to establish risk as opposed to inability and to establish that risk on the balance of probabilities.

(d) That before risk of employee failure can be identified with a certain class it must be shown that that the characteristics creating the risk either pervade the entire class or that those members of the class having such characteristics cannot be sufficiently identified through testing or other means in order that they might be retired.

(e) That what will amount to "sufficient risk" must be determined in relation to the severity of the consequences, so that less increased risk might establish the exception where the results could be catastrophic, such as in the transportation cases whereas greater risk might not be sufficient in situations where there is more possibility of backup and support such as in a group or team type of work.

(f) That the imposition of the requirement must be reasonable, that is a reasonable solution to the presence of the risk which needs to be minimized.

The Defence of Reasonable Occupational Qualification in the Case before the Board

15440 The Board now turns to the issue of whether or not the Respondents can avail themselves of the exception under Section 16(7) of the *Code*. The Board wishes to commend counsel for all of the parties before it in respect to the cases they presented to the Board on this issue. The Board has had the benefit of the opinions of some of the continent's leading experts in the fields of cardiology, exercise physiology, gerontology, rehabilitation and firefighting. The Board has also had the benefit of the numerous articles filed by the parties in relation to aging and its effects on the human body and human activity many of them specifically related to firefighters. The board will consider the expert testimony in order of the appearance of the witnesses before it and will consider the literature filed with the Board subsequently unless that literature was the work of one of the expert's appearing before the Board or was commented on by one of the said experts in which case it will be considered along with the evidence before the Board of that witness.

The Experts

A. Dr. Arthur S. Leon

15441 Dr. Arthur S. Leon is clearly a highly qualified cardiologist, who has been active and has published in the fields of cardiology, biochemistry, exercise physiology, gerontology, epidemiology and pharmacology. His areas of interest and research include exercise performance, cardio-vascular function, the effects of aging on work performance, sports medicine and fitness. He has been directly involved in longitudinal aging studies. In addition, he is a Colonel in the American Army Reserve

active in the development of performance criteria for soldiers. And perhaps most importantly, he has been directly involved in the performance appraisal and fitness development of firefighters of the City of St. Paul.

15442 Dr. Leon testified that while there can be no doubt that as a general rule the human body degenerates with age, the rate of which this degeneration occurs varies radically among individuals so much so that Dr. Leon stated that chronological age was not a reasonable predictor of ability, in itself, until age 85 years. He testified to the work that has been and is being done to move from using chronological age as an indicator to physiological age as a more accurate reflection of a person's functional ability. Biological or physiological age may be determined by assessing a number of variants including, percent body fat, hair greying, lung functions, cardiogram, muscle strength, reaction times, blood/sugar levels, medical history re disease, use of alcohol and/or tobacco, etc. He made reference to the work of Dr. Brian Sharkey whose paper entitled "Age and Performance" was entered as Exhibit P.A. 22 and I quote from the article ". . . healthy men aged 60 to 70, who remain physically active, have better simple reaction times, choice reaction times, and movement times than sedentary men in the 20 to 30 age group." Dr. Leon testified that not age but percent of body fat was the major factor in declining performance. He testified that strength declines very little with age in the healthy male up to at least age 65. Aerobic capacity is an excellent predictor of work performance. Dr. Leon prepared a table which was entered as Exhibit P23 to show how healthy active 65 year olds had better aerobic capacity and might well be able to perform his work better than a healthy non-athletic 25 year old. He testified that in addition to being physically active a person's life style can have a marked effect on their ability to perform, on their physiological age. A study done by Nedra Belloc and Lester Breslow entitled "Relationship of Physical Health Status and Health Practices," entered as Exhibit PA24, put it this way at p. 419: ". . . the average physical health status of those over 75 of the good practices was about the same as those 35-44 who followed fewer than three . . . Similarly, those aged 55-64 who followed all seven good health practices were at the same physical health status as those 25-34 . . ."

15443 Dr. Leon testified that one can evaluate work capacity and fitness by means other than age. As already stated aerobic capacity, the ability of the cardio vascular system to cope, is an important element. Aerobic capacity can be easily measured by use of a tread mill test or by field tests for work capacity. Dr. Leon stated that good estimates or work capacity and physical fitness of middle aged men (by which he meant men 40 to 65) can be obtained by standard questionnaires on life style and simple physical measures.

15444 Dr Leon also addressed his mind to the question of risk of employee failure. The most likely risk of employee failure in a firefighter is that of heart attack. Dr. Leon testified that you can predict coronary heart disease other than through age as a sole criteria. Consideration should be given to all of the risk factors: blood cholesterol, high animal fat intake, blood pressure, smoking, diabetes, physical inactivity, heart rate, ECG reading, along with readings taken during a tread mill test. Dr. Leon admitted that the tread mill test alone was not as good a predictor as a multivariant system including all risk factors. He made reference to the work of Dr. Diamond and Dr. Forrester, entered as Exhibit PA28 and I quote from p. 1350 "A 'positive' electrocardiographic stress test in an asymtomatic patient, for example, has a predictive accuracy of only 30 percent for the presence of angiographic coronary-artery disease." But the exercise stress test together with the risk factors give good predictability of coronary heart disease. Dr. Leon testified that the Fire Department at St. Paul, Minnesota now has a physical fitness program in place in which risk factors and stress tests are used exclusively as a predictor, not age. He testified that an interview questionnaire and the tests could be administered by any General Practitioner.

15445 When asked whether he would be concerned to have men over 59 working as firefighters, Dr. Leon testified that he certainly would not, that there is no validity to link age to performance or even to risk of employee failure through sudden death. In support of his opinion he made reference to a chart in a book entitled *Fourth Symposium On Occupational Health Hazards of the Fire Service*, said chart was entered as Exhibit PA32. The chart clearly shows that the highest incidents of fatal heart attack or stroke occur in the 46-50 year age category. At p. 19 of the said book Philip Schoenman of the U.S. National Fire Data Centre states, "Firefighters in the prime age group of 26-35 years old incur more injuries than those in any other age group . . ." Dr. Leon testified similarly that he would be concerned with the loss of experience, loss of the stabilizing force, that would occur with early retirement of the more experienced firefighters. Dr. Leon made reference to the work of Dr. R. James Barnard whose paper on "Heart Disease in Firefighters" was entered as Exhibit PA34. Dr. Barnard's conclusion, which has since been challenged by other research also before the Board, Exhibit PA35, is that ". . . the data overwhelmingly support the contention that firefighters do indeed have abnormally high incidence of heart disease. The information available on the stress associated with the job of fire fighting strongly suggests a causal relationship with this abnormally high incidence of heart disease." Dr. Leon has done research on the effects of stress on aging both with animals and in relation to the human body. He said that he has concluded that repeated stress and training reduce the body's response to stress. Those firefighters over 60 are the survivors, the ones who have adjusted, adapted to the stress through experience and training and that is why they have less incidence of sudden death from heart attack and stroke. In cross examination Dr. Leon clarified the question of the relationship of age to heart attack. Increased age means increased incidence of heart attack but at age 50 increased age means a decrease in the incidence of sudden death from heart attack.

15446 In summary, Dr. Leon would not be concerned about the effectiveness of a firefighting force that retained employees past age 60. But, he would make every effort to eliminate smoking, reduce body fat composition, prescribe exercise programs and do non-invasive testing to eliminate those at any age who through unsatisfactory health status or lack of functional ability were unable to perform the work, rather than make stereotyped assumptions concerning abilities and risks of employee failure based on age over 59.

B. Dr. Robert A. Bruce

15447 Dr. Robert A. Bruce has nothing short of outstanding qualifications in the area of cardiology and identification of risk

factors for incidence of a CHD events. He is best known as the prime instigator of the Seattle Heart Watch in Seattle, Washington, U.S.A. and for the development of the Bruce Protocol for tread mill testing. His preeminence in these areas was even indirectly acknowledged by experts testifying for the Respondents.

15448 Dr. Bruce testified extensively in respect to the practical application of the type of non-invasive medical testing which is used in risk prediction for incidence of CHD events. One of the risk factors identified by Dr. Bruce was age. In fact he acknowledged that in an univariant analysis age was, aside from sex, the single most predictive factor. But he went on to point out that multivariant analysis of risk is far more useful as a predictor of CHD events. In fact, using standard risk predictors, multivariant analysis, it is possible to identify 41 percent of the population who have less than a 1 per cent chance of a CHD event, 58 percent who have 1.5 percent chance, and only 1 percent of the population that is at very high risk, one chance in three of having a CHD event (Exhibit P-37). The risk factors to be considered are sex, age, diabetes, obesity, smoking, ECG, medical history (family history of heart disease — mother, father, siblings), cigarette smoking, hypertension — blood pressure, cholesterol, with the last four being most significant as risk predictors for any age group. In fact Dr. Bruce testified that if none of those four risk predictors were present then he would not recommend a tread mill test. But, if any of the four risk factors were present then a tread mill test should be conducted giving four stress indicators — chest pain during testing, less than six minutes on the tread mill (completion of phase II), failure to achieve 90 percent of the heart rate for age range, and ST depression on the ECG during testing. Dr. Bruce testified that it was predictable that the subject who had one or more of the risk factors and two or more of the stress test indicators would have a CHD event within five years. It could safely be said of any subject with one or less stress indicators that he was highly unlikely to have a CHD event within a year.

15449 It was Dr. Bruce's testimony that the risk factor screening and the stress testing could be done by any General Practitioner and in the Seattle context at a cost of approximately, U.S. $130.00 to $150.00.

15450 Dr. Bruce testified as to the development and practical use of the concept of functional age as opposed to chronological age as a predictor of aerobic capacity and cardiopulmonary function. He developed a monogram to predict a person's functional age (Exhibit P-3, p. 163).

15451 Dr. Bruce took the time, prior to testifying before the Board to address his mind to the question before the Board. Given his expertise in the area of cardiology, gerontology and identification of risk factors for incidence of CHD events, the Board greatly valued the opinions expressed by Dr. Bruce in this short article (Exhibit P-38). But, the Board, nevertheless was cognizant of the good Doctor's lack of expertise in the law — and American background in this regard. In the article Dr. Bruce pointed out (1) that there is considerable variation between individuals; (2) that not all individuals age at the same rate in a functional sense; (3) that functional age can be readily estimated; (4) that functional age should be the determining factor if the employee will undergo clinical and medical tests to determine health status and presence of risk factors or manifestations of disease followed by stress testing where risk factors are found to be present; (5) that in the absence of symptomatic clinical disease (risk factors and stress indicators), the risk from sudden incapacitation is minimal; (6) that for the most serious and frequent cause of incapacitation namely heart disease, medical science has established important and identifiable risk factors; (7) and finally that, if chronological age is adopted as a predictor of risk, it must be remembered that there is a significant portion of the population under the determining age who will continue to pose the same threat to the public because in fact they are functionally older than those eliminated.

15452 In cross examination Dr. Bruce acknowledged that on the basis of a univariant analysis of prediction of CHD events age 55 or more was the determinative factor — not age 50 nor age 60 but age 55. Dr. Bruce was also given an opportunity to respond to the criticism of his work by Dr. Roy Shephard in "A Critique: Coronary Disease and Exercise Stress Tests" (Exhibit RA4). Dr. Bruce pointed out that much of the criticism of lack of predictability of CHD events by stress tests has been overcome by the multivariant approach he now recommends. But even Dr. Shephard states and I quote, "If rigid criteria are laid down for the diagnosis of an abnormal electrocardiogram, an exercise stress test can be devised that is both valid and reliable, having a high specificity and sensitivity" (Exhibit RA4, p. 599).

C. Dr. Paul Davis

15453 Dr. Paul Davis was also a highly qualified expert in his field which was exercise testing having conducted much research into functional capacity. His Ph.D. was based on firefighting and he along with three others, have prepared a paper entitled, "Medical Examination of Firefighters: Factors to be Evaluated in Determining Fitness for Duty" (Exhibit P45). As well, he is the Director of the Institute of Human Performance which has contracted with a number of firefighting departments to analyze the functional capabilities of their firefighting team and to intervene to improve the same.

15454 Dr. Davis's testimony clearly established that tests have been developed which can predict a person's functional ability to perform the tasks of a firefighter (Exhibits 42, 44 & 45). The Board is satisfied on the basis of his evidence and that of Dr. Earl Ferguson, a witness called by the Respondent, whose evidence will be considered in detail below, that functional performance can easily be predicted and the Board therefore concludes that it is unnecessary to make any distinctions solely on the basis of age to ensure a firefighting force with a high level of functional ability.

15455 Dr. Davis presented research material to the Board (Exhibits P43 & P44) on the question of age and its relationship to physical performance showing that age has been inappropriately used as a predictor of performance based on univariant analysis.

15456 An example used by Dr. Davis, was that as men age they tend to gain weight and increase the percentage composition of body fat. As men age their ability to perform certain tasks decreases. A univariant analysis between age and functional ability therefore will produce a direct correlation. However, if functional ability also decreases with percentage body fat, the

correlation between age and performance is misleading. To identify the true factor, both age and body fat must be considered in a multivariant analysis. Dr. Davis performed this analysis through the use of a correlation coefficient which expresses the strength of association between two variables. In this way he was able to keep body fat constant, thus counterbalancing the tendency to put on weight with age. His analysis showed that using this procedure physical ability to perform the tasks indicative of firefighting ability did not decrease with age to a value that was statistically relevant. Thus it would be far more significant functionally to attempt to control body fat than to eliminate employees on the basis of age.

D. Dr. Earl Ferguson

15457 The first expert witness called for the Respondent City was Dr. Earl Ferguson whom I had no hesitation in qualifying as an expert in the fields of performance testing and cardiology. His curriculum vitae (Exhibit R33) indicates that he has had extensive experience in both of these areas but that he has not done any original research in respect to the issue of prediction of CHD events. He testified in this regard based on his review of the literature and a paper he published on that review (Exhibit R34).

15458 Dr. Ferguson testified that in terms of the data presented (he had heard most of the testimony of the other expert witnesses), he agreed with 90-95%. In terms of the interpretation of the data, he agreed with approximately 85%. I do not intend to review at length his testimony in respect to the points of agreement. Suffice it to say he, like the other experts, believes that there should be good medicals, annually after 40, exercise programs in place for a firefighting department; and performance testing of the firefighting force.

15459 He testified that there is conflicting data on the incidence of CHD events in firefighters as compared to the general population. But says it is his conclusion that there is a greater problem in firefighters than in the population at large and that that problem is likely stress related. He would not link aerobic capacity to age in the way Dr. Bruce does as he believes aerobic capacity is determined to a large extent by unalterable factors such as heredity, sex, and age.

15460 The literature he had reviewed and filed before the Board has some interesting statistics. The figures on deaths among all career firefighters in the U.S. from heart attack and stroke are most interesting:

Exhibit RA36	1978	over age 60	2 deaths
Exhibit RA37	1979	over age 60	4 deaths
* the 1980 statistics were not filed with the Board.			
Exhibit RA59	1981	over age 60	5 deaths

15461 In each year for which statistics were filed there were more deaths from heart attack and stroke among the 46-50 year olds than among those over 60 years of age. Some explanations suggested in the literature but not verified by study are that experience leads to less reaction to stress and that there are fewer older firefighters.

15462 Dr. Ferguson testified that age 60 was a significant demarcation in respect to the left ventricular ejection fraction during exercise (Exhibit RA38). He did not suggest that this problem could not be dealt with by means of elimination of people on the basis of performance testing. But he did question the value of maximal exercise testing to predict and remove those who might have a CHD event. He stated that the tests were very predictive when used to test a population that had problems; but not very predictive when used on an asymptomatic population. Although he seemed to be saying his position in this regard was different from that of Dr. Bruce, given Dr. Bruce's testimony that he would only test those with one or more of the risk factors he identified — the difference is minimal. It was Dr. Ferguson's view that maximum exercise testing as a predictor of CHD events might lead, because of the problem with false positives, to very early retirement for some and loss of insurance coverage for others.

15463 In summary, Dr. Ferguson's position was: (1) firefighters are at increased risk of CHD events and, as with the general population this risk increases with age; (2) that this problem is accelerated by the decreased ability of the cardio-vascular system to support high levels of exercise as age increases; (3) that exercise testing is not a sufficiently accurate tool in the identification of CHD events; and (4) that consequently the risk of CHD in asymptomatic firefighters over age 55 is unacceptably high. Thus on the ultimate question before the Board, the last point, Dr. Ferguson expresses an opinion at variance with the opinions of the experts called for the Commission and the Complainant.

E. Dr. David Mymin

15464 Dr. David Mymin was qualified by the Board as an expert in the fields of cardiology and performance testing. As with Dr. Ferguson there was no doubt about his qualifications in these areas. He has done some original research in the area of aging in the "Manitoba Follow-up Study" — a study of approximately 4,000 air crew and pilots followed since 1948. The study is not complete and there was at the time of the hearing limited statistics available from the study and none were presented to the Board.

15465 Dr. Mymin testified that one of the results the Study had shown was a rapid increase in morbidity at age 50 years with another marked increase in morbidity covering the 55 to 60 year age range. Dr. Mymin agreed that stress testing is useful for detection of heart disease. But, he emphasized that the test is crude, by which he meant many cases of heart disease are missed and still others that have no heart disease are shown to have it. Dr. Mymin also testified that it is very difficult to reduce risk factors — people do not readily change their lifestyles.

15466 Dr. Mymin reviewed the changes that occur in human body with age — accepted by all expert witnesses before the Board and concluded, that in his opinion, the proper age of retirement in public risk occupations was 55 to 60 years of age. He emphasized the effect of stress, effect of sudden activity after being sedentary for a time and effect of temperature variation.

15467 Dr. Mymin agreed in cross examination that it is possible to have a 50 year old and a 60 year old with the same risk factors. He also admitted that he had given a qualified recommendation for a firefighter to return to work after having had a heart attack even though he accepted that the younger person who had had a heart attack was at greater risk of having another CHD event than the 60 year old who had not. He stated that he would no longer make such a recommendation.

F. Dr. Terence Bates

15468 Dr. Terence Bates, a Toronto Family Physician, who is employed parttime as Director of the Medical Department of the Toronto Fire Department, was qualified as an expert in the sense of his being a family physician with extensive experience as a physician to firefighters. He is also in charge of the fitness program of the Toronto Fire Department.

15469 Dr. Bates' evidence consisted mainly of his observations of the effects of aging on firefighters. He has done no statistical analysis to support his observations and the Board concluded that most of his evidence was of an impressionistic nature such as was rejected in the *Etobicoke* case.

The Literature

15470 Both the Commission and the City submitted a large number of papers and published articles to the Board. Some of which we have referred to in the context of the testimony of the expert witnesses. But the Board has considered all of the literature filed with it and some points from the literature should be highlighted. Doctors White, Edwards and Dry in an article entitled "The Relationship of the Degree of Coronary Atherosclerosis with Age in Men" reported, after studying 100 hearts from men in each decade of life:

> "The main purpose of this study was to determine whether the average grade of coronary sclerosis, as observed in necropsy material, increases progressively with age, as has been repeatedly stated in the literature. The present series failed to substantiate this contention." (Exhibit RA39)

15471 The Respondents experts challenged the usefulness of exercise testing as a predictor of CHD events and yet in an article submitted by the Respondents, Exhibit RA42, Doctors Epstein, Redwood and Borer, after pointing out the shortcomings and limitations of exercise stress tests as a predictor conclude, "on the other hand, though questionable as a routine procedure, such a policy (exercise stress testing as a routine screening procedure) might be reasonable to pursue in those subjects whose occupations are such that an acute coronary event might place other individuals at risk."

15472 Doctors Myerburg and Davis addressed the primary question before the Board in their article "The Medical Ecology of Public Safety — Sudden Death due to Coronary Heart Disease" Exhibit RA48. They concluded, "with the possible general exception of aviation and certain specific exceptions in ground transportation, there does not appear to be justification to interfere with the activities or occupations of coronary patients on the basis of public hazard. Even the grounding of airline pilots who have a history of coronary heart disease may be open to question."

The Decision

1. The Prima Facie Violation

15473 The Board concludes that the evidence of Roy Day, Ex-Chief E.R. Belsey, Mr. C.N. Renwick and Mr. H.A. Mortenson together with the documentation filed before the Board establish the facts as outlined earlier and also establish the prima facie violation of the *Code*. The Board accepts the argument of the Complainant and the Commission that the gravamen of the violation by the City is the position it took on March 1, 1980 that Roy Day would not on that day or subsequently be allowed to continue in his employment as a firefighter, against his clearly stated wishes. In this regard, the Board has kept in consideration the history of the negotiations, the pension scheme, the benefits provided to Mr. Day, and the subsequent pension by-law which the Board concludes serve to further establish age as the sole reason for Mr. Day's termination.

15474 With respect to the Union, the evidence of Mr. Mortenson and that of Mr. Day established that subsequent to the passing of the *Code* on the 7th of August, 1979 the Union maintained that Mr. Day should be required to retire and refused his request for consent to an extension under the terms of the Agreement then in force between the City and the Union.

15475 While the terms of the Collective Agreement continue to be discriminatory, the Union refused to grant its consent to an extension to Mr. Day's normal retirement date which could have prevented the Agreement from impacting on Mr. Day. And in fact, Exhibit R28, clause 11 and the testimony of Mr. H.A. Mortenson established that at the same time Mr. Day was being denied consent to an extension, the Union was actively engaged in negotiating changes to the Collective Agreement which would prevent applications for extensions altogether. Clearly the Union was continuing to enforce and promote mandatory retirement provisions in the Collective Agreement based solely on age well after the proclamation of the *Code*. The Union in refusing its consent and in continuing to enforce and promote Section 26 of the Agreement was in violation of Section 18 of the *Code*.

2. The Reasonable Occupational Qualification Exception

15476 The Complainant having established the prima facie violation of the *Code* the burden shifted to the Respondents to establish a reasonable occupational qualification defence. On the evidence as outlined above the Board finds and concludes that the Respondents have not met their burden of proving on a balance of probabilities that age constitutes a reasonable occupational qualification for lieutenants in the Moose Jaw Fire Department so that the Complainant could justly be retired at age 62. The Respondents have not convinced this Board that there is sufficient risk of employee failure in those over the mandatory retirement age to warrant the early retirement in the interests of safety of the employee, his fellow employees and the public at large.

15477 In attempting to meet their burden the Respondents emphasized the arduous nature of firefighting duties and the physical demands of the job. This Board accepted those points. But, all experts before the Board agreed that performance testing could be effectively done to eliminate all those who, regardless of age, are unable to perform the tasks required of a firefighter.

15478 The Respondents then attempted to establish their defence on the basis of the risk of employee failure in those over 62 (and eventually over 60) due to the likelihood of occurrence of CHD events. In so doing they attempted to meet the requirement as laid down by the Supreme Court of Canada in the *Etobicoke* case. They called two cardiologists and a family physician. These witnesses suggest that disease processes in persons age 55 or older precludes the safe and efficient perfor-

mance of their duties by firefighters over that age and that these medical conditions cannot adequately be ascertained by means other than knowledge of the individual's age. It was their contention that a mandatory retirement requirement for firefighters at age 55 or 60 is based on sound physiological and medical data and is the most reliable way to remove firefighters with coronary disease from the Fire Department. Respondents argue that the testimony of the experts called by them proves that it is impossible or highly impractical to deal with the retirement of firefighters between the ages of 60 and 65 on an individualized basis. As to this issue, the expert testimony presented by the Commission and the Complainant was much more convincing than that of the Defendants. In particular, the Board, as indicated above, was most impressed with the testimony of Dr. Arthur S. Leon and with that of Dr. Robert A. Bruce. The Board concludes that, even though there was no burden on it to do so, the Commission has established on a balance of probabilities that individual firefighters at high risk of having a CHD event can be detected and removed from the firefighting force without a blanket resort to age and at a cost which would not be prohibitive. Conventional risk factors can first be determined by way of a medical history, and, in many instances, where recognized risk factors are absent, further testing would not be required. Where indicated by the presence of one or more risk factors, a firefighter 60 years of age or older can take an exercise stress test (a tread mill test) to further define his risk of having a CHD event.

15479 The expert testimony relied upon by the Respondents was less convincing than that of the Commission. Dr. Bruce may be the foremost researcher on the continent in respect to prediction of CHD events. Both he and Dr. Leon clearly had more experience and had done more research in the areas of detection of CHD events and in performance testing than had Dr. Ferguson and Dr. Mymin.

15480 What the Human Rights Code requires in a case such as this is a balancing of the right of each individual employee to continue to work in spite of his age against the risk to the public and to other employees created by the nature of the duties to be performed. This Board has taken its obligation to balance the right against the risk extremely seriously and is satisfied that the risk of employee failure can be adequately reduced by performance testing and screening for potential CHD events through medical histories followed by possible tread mill stress testing.

Damages

15481 The Board accepts the evidence of Roy Day and the documents filed with the Board in support thereof that he has by reason of the actions of the Respondent City, lost wages for the period March 1, 1980 to and including April 30, 1982.

15482 Further, the Board accepts the evidence of Roy Day that he felt humiliated and hurt by the actions of the Respondent City and Respondent Union to the extent that he refused to attend a retirement party put on for him.

ORDER

15483 THIS MATTER coming on for hearing the 27th day of July, A.D. 1982, before a Board of Inquiry, efforts at settlement having failed, and the Minister having directed a formal inquiry pursuant to Section 29 of The Saskatchewan Human Rights Code, in the presence of counsel for the Commission, who also acted as counsel for the Complainant, and in the presence of counsel for the Respondents;

15484 UPON HEARING the evidence adduced by the parties and what was alleged by all parties, on the 27th, 28th, 29th and 30th days of July, A.D. 1982, and upon the findings of the Board of Inquiry that the complaint of Roy Day against the Moose Jaw Fire Fighters Association Local 553 of the International Association of Fire Fighters and the City of Moose Jaw was well founded and that he was discriminated against on the basis of his age in relation to his employment, as alleged;

15485 IT IS HEREBY ORDERED AND DECLARED that Section 26 of the Collective Bargaining Agreement between the City of Moose Jaw and the said Moose Jaw Fire Fighters Association Local 553 of the International Association of Fire Fighters is in violation of The Saskatchewan Human Rights Code to the extent that it requires any person under age 65 to retire;

15486 AND IT IS FURTHER ORDERED that the City of Moose Jaw and the Moose Jaw Fire Fighters Association Local 553 of the International Association of Fire Fighters do cease requiring mandatory retirement in contravention of The Saskatchewan Human Rights Code with respect to any persons under the age of 65 years;

15487 AND IT IS FURTHER ORDERED that the Respondent, Moose Jaw Fire Fighters Association Local 553 of the International Association of Fire Fighters, pay to the Complainant, Roy Day, as compensation in respect of hurt feelings the sum of $1,000.00 by forwarding the said sum of $1,000.00 to the offices of The Saskatchewan Human Rights Commission at 8th Floor, Canterbury Towers, 224 - 4th Avenue South, Saskatoon, Saskatchewan, S7K 5M5;

15488 AND IT IS FURTHER ORDERED that the Respondent, the City of Moose Jaw, pay to the Complainant, Roy Day, as compensation in respect of hurt feelings, the sum of $1,000.00 by forwarding the said sum of $1,000.00 to the offices of The Saskatchewan Human Rights Commission, 8th Floor, Canterbury Towers, 224 - 4th Avenue South, Saskatoon, Saskatchewan, S7K 5M5;

15489 AND IT IS FURTHER ORDERED that the Respondent, City of Moose Jaw, pay damages for lost wages to the Complainant, Roy Day, in an amount to be determined by agreement between The Saskatchewan Human Rights Commission and the City of Moose Jaw taking into consideration what the Complainant's regular wages would have been had he continued to be employed to age 65 plus 7% for loss of pension benefits;

15490 IT BEING FURTHER ORDERED that if the parties cannot agree on the sum payable as damages for loss of wages then leave is hereby granted to apply to the Board on reasonable notice to all parties concerned for determination of the amount payable under this head.

15491 DATED at the City of Prince Albert, in the Province of Saskatchewan, this 1st day of November, A.D. 1983.

Terrence Bekolay
Chairperson, Board of Inquiry

CANADIAN HUMAN RIGHTS REPORTER

SASKATCHEWAN / EXEMPTION / DISABILITY
Saskatchewan Human Rights Commission
Opportunity Handicap Ltd.

Volume 4, Decision 245 Paragraphs 10783 - 10828 February, 1983

Saskatchewan Human Rights Commission Decision
under the
SASKATCHEWAN HUMAN RIGHTS CODE

Opportunity Handicap Ltd.
Applicant

and

Saskatchewan Co-ordinating Council on Social Planning
and
Disabled Persons' Employment Service
and
Saskatchewan Voice of the Handicapped
and
Saskatchewan Voice of the Handicapped, Saskatoon Chapter
and
Coalition of Provincial Organizations of the Handicapped
Intervenors

Date: January 12, 1983

Place: Saskatoon, Saskatchewan

Before: Ken Norman, Kayla Hock, Helen Hnatyshyn, Gordon DeMarsh

Appearances by: Ray Rutman, Counsel for Opportunity Handicap Ltd.

Summary: *The Saskatchewan Human Rights Commission refuses to grant an exemption to Opportunity Handicap Ltd. to allow it to recruit and employ only disabled persons to sell light bulbs by means of telephone solicitation.*

The Commission finds that the telephone script, which the employees of Opportunity Handicap Ltd. are required to use, identifies them as handicapped persons and puts them in the position of appearing to solicit charitable responses from their prospective customers. The Commission finds that this amounts to discrimination in a term or condition of employment and declines to grant an exemption to allow the telephone solicitation to be performed in this manner, since it is undignified exploitation of disabled persons.

Additionally, the Commission finds that the requirement that job applicants provide Opportunity Handicap Ltd. with medical certificates establishing that they are 'bona fide' disabled persons serves no positive or dignified purpose and violates the provisions of the Code which prohibit inquiries prior to

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employment. The Commission declines to exempt this practice also.

10783 On September 22, 1982, Opportunity Handicap Ltd. requested that the Saskatchewan Human Rights Commission grant an exemption pursuant to Section 48 of *The Saskatchewan Human Rights Code* to enable the above-named company to recruit and employ disabled persons exclusively to sell five-year guaranteed light bulbs by means of telephone solicitation. Ray Rutman, counsel for Opportunity Handicap Ltd. also requested that the Commission's consideration of the matter be by way of oral hearing.

10784 Consequently, a hearing was set for December 3, 1982 and interested parties and the public were notified by letter and newspaper advertisements in the manner specified in the Regulations and *The Saskatchewan Human Rights Code*.

10785 At the hearing, the Commission heard evidence from Jacqueline Wright, the President of the company and from Rita Henderson, the Regional Manager. Argument was then presented in favour of the application by Mr. Ray Rutman.

10786 In response, the Commission heard oral interventions from representatives of the Saskatchewan Co-ordinating Council on Social Planning, Disabled Persons' Employment Services, the Saskatchewan Voice of the Handicapped, the Saskatoon Chapter of the Voice of the Handicapped, the Coalition of Provincial Organizations of the Handicapped, Ruth Collins-Ewen, Bob Mair, and Marty Schreiter, the Assistant Director of the Saskatchewan Human Rights Commission.

10787 The Commission also received written submissions from Cosmopolitan Industries, Dr. P. K. B. White of Wascana Hospital, The Canadian Paraplegic Association, the Saskatchewan Association for the Mentally Retarded, Services for Hearing Impaired Persons and the Battlefords Chapter of the Voice of the Handicapped.

10788 Opportunity Handicap Ltd. is a private company which sells five-year guaranteed light bulbs by means of telephone solicitation. The company's head office is in Atlanta, Georgia and through affiliated companies it is currently operating in a number of Canadian cities, including Vancouver, Calgary, Edmonton, Winnipeg, Windsor, Hamilton, London, Kitchener, St. Catharines, Toronto, Ottawa and Montreal.

10789 Ms. Wright stated that Opportunity Handicap Ltd. has about 150 employees in Canada and throughout its history has hired disabled persons exclusively. Opportunity Handicap Ltd. is operated for profit; it is not a charity of any sort. The company's position is that it does a social good by employing disabled people and also operates on a private enterprise basis.

10790 Mrs. Wright stated that employees of Opportunity Handicap Ltd. are paid minimum wage plus a 10¢ commission for each light bulb sold in excess of the daily sales quota. For a 40-hour week, the average income of a fulltime worker for Opportunity Handicap Ltd. is approximately $10,000 per year.

10791 Employees must be able to use a telephone directory, write legibly and deliver a prepared sales script over the telephone.

10792 Applicants are required to produce a doctor's certificate establishing that they are a disabled person in order to be considered for employment. Mr. Rutman filed with the Commission a copy of the form which Opportunity Handicap Ltd. requires to be filled out by a doctor as proof that a job applicant is disabled. This form reads as follows:

Date _____ No. 21

I Consider _____ to be handicapped.
Name

Nature of Handicap _____

Dr. _____

_____
Address

_____
Phone No.

Note: If there is a fee involved, Company is not liable.

10793 Other documents filed with the Commission were the application form presently in use by Opportunity Handicap Ltd. in Manitoba, the order form, a copy of the advertisement which was carried in the Winnipeg Free Press and the telephone script used by employees to solicit sales.

The telephone script reads as follows:

"Good morning Mr./Mrs. _____. My name is _____. I'm calling from Opportunity Handicap Ltd., employer of the handicapped. I am taking orders for five year guaranteed light bulbs. These bulbs are guaranteed in writing for five years and are sold for _____ per bulb. They are in packages of four or more, and if you buy six bulbs you get one free, making it seven for the price of six. We were wondering if you could use a few of our bulbs at this time."

10794 In the province of Saskatchewan, Opportunity Handicap Ltd. plans to employ between ten and sixteen disabled persons in the cities of Regina and Saskatoon to solicit sales of their light bulbs by telephone.

10795 Ms. Wright indicated that Opportunity Handicap Ltd. plans to locate its Saskatchewan offices in Regina and Saskatoon in downtown areas, close to public transit and to ensure that its offices are accessible to wheelchair users. In addition Opportunity Handicap Ltd. can provide telephone amplifiers for the hard of hearing, headsets and touchtone telephone dialers which require only one hand to use, and some accommodation for blind persons.

10796 Opportunity Handicap Ltd.'s application for an exemption was supported by two letters and one intervenor.

10797 Cosmopolitan Industries indicated by way of a brief letter that it had no objection to an exemption being granted. Dr. P. K. B. White, consultant in Physical Medicine at Wascana Hospital wrote to support the application on the grounds that disabled persons are often very good workers and they need to be employed in gainful labour. Ruth Collins-Ewen spoke of her experience with recovering psychiatric

patients, many of whom are unemployed, and suggested that the Commission should grant the exemption if the telephone script is altered so that it does not mention handicap.

10798 Representatives of disabled organizations in Saskatchewan, with one exception, urged the Commission not to grant an exemption to Opportunity Handicap Ltd. to allow them to recruit and hire disabled persons exclusively. Far from embracing the offered employment opportunities, these organizations submitted that the nature of the employment contemplated runs directly contrary to what these organizations are working to achieve for disabled persons in Saskatchewan.

10799 These organizations take exception to the granting of an exemption to Opportunity Handicap Ltd. for two main reasons: its employment practices and its marketing techniques.

10800 First, among their objections with respect to employment practices is the objection of these organizations to the segregation of disabled workers into a separate place and kind of employment. As Herb Essenberg, representing the Saskatchewan Co-ordinating Council on Social Planning, expressed it, "Granting this exemption would open a Pandora's box of exemptions which would make a mockery of the objectives of integration of disabled persons into the workforce. We do not approve of segregation." In support of this position, Mr. Essenberg, and others, cited the theme of the International Year of Disabled Persons which was "Full Participation and Equality." In the view of these organizations full participation and equality requires the integration of disabled persons into existing workforces where they can be recognized and accepted as workers on the same basis as others.

10801 A representative of the Saskatoon Chapter of the Voice of the Handicapped, Shelly Grunerud, addressed the same issue in the following way: "The Voice acknowledges the fact that disabled people have a very high rate of unemployment compared to the rest of society. However, we do not feel that a segregated workplace, such as Opportunity Handicap Ltd. is proposing is a viable solution to that problem. A legislative program such as Affirmative Action which promotes the concept of integration of disabled people into the mainstream of the job market is a much more acceptable and, in the long term, effective answer. Keeping disabled people in a segregated work situation only serves to reinforce old myths which we in the Saskatoon Voice of the Handicapped are trying to dispel. Myths that state that disabled people are 'different' and not quite socially acceptable, that disabled people need to be 'protected' from the realities of life in the mainstream of society, and that disabled people are happiest when they are 'among their own kind.' "

10802 In the view of these organizations, segregation of disabled persons reinforces negative attitudes and stereotypes by implying that the needs of disabled people are so special and so different that they can only be served effectively by segregated employment.

10803 Representatives of disabled organizations also took exception to other employment practices of Opportunity Handicap Ltd. The use of the medical form requiring job applicants to establish that they are 'bona fide disabled persons' focuses attention not on the abilities, but on the disabilities of the applicant. This runs counter to the efforts of these organizations to persuade employers to consider disabled persons on the basis of their competence and skills, not their disabilities.

10804 Patty Holmes, the representative of the Coalition of Provincial Organizations of the Handicapped (COPOH), gave uncontradicted evidence with respect to three complaints COPOH has received from disabled persons in Winnipeg who applied for work with Opportunity Handicap Ltd. One of these persons was refused employment because he has a visual impairment and would require accommodation. Two others were refused employment because the washroom in the Winnipeg office was not accessible for wheelchair users.

10805 The advertisement which Opportunity Handicap Ltd. ran in the Winnipeg Free Press, and which was filed by Mr. Rutman as an exhibit, appears to support this testimony. The ad reads: "Are you handicapped? We are looking for people who are disabled by polio, heart condition, arthritis or other disabilities for telephone work . . ." The implication raised by the wording of this ad in combination with the testimony of Ms. Holmes is that Opportunity Handicap Ltd., at least in its Manitoba operation, may give preference to those disabled persons who require least accommodation with respect to work sites and aides.

10806 With respect to marketing techniques, the objections of the organizations representing disabled persons are perhaps best summarized in the submission of Disabled Persons Employment Service. That organization stated its objections this way:

> "1. We question the company's name, Opportunity Handicap Ltd., and suggest that a name which says something about the product rather than the employees would be more appropriate and certainly be more in keeping with the trend within the rest of the business community. It is, however, difficult to imagine that a change in name would have an adverse impact on sales volume as it would appear that the name has been chosen as a means of stimulating the potential customers' charity ethic as opposed to his or her good business sense.
>
> 2. In the sales pitch, the employee is required to tell the prospective buyer that the company employs handicapped people. Again, we see this as an exploitation of the image of disabled people as requiring charity. It is difficult to imagine why else the company chooses to tell their customers about the physical characteristics of its employees. This is certainly not the norm in that request of the business community which uses telephone sales as a marketing device . . .
>
> 3. The order form further exploits this theme of poor disabled persons, benevolent employer and good-willed customer in a number of instances. The customer is asked to please be kind enough to pay as soon as possible as the company depends on this income to pay its employees. We would again suggest that this is not a general business practice. This approach has taken what we would consider to be a common assumption, ie: that when you buy something you are expected to pay for it — and twisted it in such a way that the customer is made to feel responsible for the working conditions and welfare of Opportunity Handicap Ltd.'s employees . . ."

10807 In short, representatives of the disabled organizations take exception to the name of the company and the identification of the company in the script as an employer of the handicapped since they feel this an unnecessary tug on the heartstrings of the prospective customer and puts the employee in the position of using his or her handicap to sell the product.

10808 The issue at stake here is not an easy one. The rate of unemployment experienced by disabled people is staggeringly high. Estimates vary from 50% to 80%. In the face of this, Opportunity Handicap Ltd. wants the Human Rights Commission to consider that the ten to sixteen jobs they propose can make some tiny dent in these unemployment figures. However, practically all of the organizations representing disabled persons in the province, who are certainly concerned by this rate of unemployment, wish us not to grant this exemption because they say that it is a counter productive 'solution' to the problem of unemployment on the part of disabled people.

10809 Since the introduction of the new Human Rights Code in 1979, the Commission has made efforts to encourage Saskatchewan employers to recruit and hire disabled persons into jobs in 'mainstream' workforces. We have seen some results. In particular, we are pleased by the introduction in 1982 of two affirmative action programs at Saskatchewan Telecommunications[1] and Saskatchewan Oil and Gas Corporation[2] through which we will see a gradual increase in the numbers of disabled persons employed by these corporations. The Commission hopes to see more proposals of this kind in the near future since affirmative action programs represent the best strategy for improving the employment rate of disabled persons in this province and the best hope for making the concept of 'full participation and equality' a reality.

10810 The public policy expressed in our Human Rights Code supports the integration of disabled persons into regular employment. Sections 19 and 16 of *The Saskatchewan Human Rights Code* prohibit discrimination against disabled persons with respect to recruitment, hiring and terms or conditions of employment. These sections bind all provincial employers. The intent of these provisions is clearly to ensure that disabled persons are integrated into the province's workforces on the basis of fair and individual evaluations of job related skills.

10811 This does not mean that there is no place for segregated workforces. Social or charitable organizations, such as Cosmopolitan Industries, which are not operated for profit, can employ members of the group they represent exclusively since they are not "employers" within the Code's definitions.

10812 But the direction set by our human rights legislation is towards integration. 'Full participation and equality' is the express intent and object of the law, although we acknowledge that, as a society we are, sadly, far from achieving this.

10813 In addition, the Commission finds that the requirement upon employees of Opportunity Handicap Ltd. to give the name of the company and identify it as an employer of the handicapped has the effect of identifying the worker as a handicapped person and puts that worker in the position of appearing to be soliciting the charitable responses of prospective customers. This does not enhance the dignity or achieve equality for disabled persons.

10814 Section 3 of *The Saskatchewan Human Rights Code* states that:

> The objects of this Act are:
>
> (a) to promote recognition of the inherent dignity and the equal inalienable rights of all members of the human family; and
>
> (b) to further public policy in Saskatchewan that every person is free and equal in dignity and rights and to discourage and eliminate discrimination.

10815 As a guide to interpretation of Sections 19 and 16 of the Code, Section 3 serves to remind us of the need to keep human dignity foremost in our minds. This objective flows from Article 1 of the *Universal Declaration of Human Rights*, adopted and proclaimed by the General Assembly of the United Nations, resolution 217 A (III) of 10 December, 1948. In this year of 1983, when the 35th Anniversary of the Universal Declaration is being celebrated, it would be particularly inappropriate for this Commission to overlook the central principle of the dignity of disabled persons in an effort to facilitate some job creation.

10816 It is the Commission's conclusion, then, that the consideration of two factors — central to the Applicant's enterprise — segregation and the requirement to identify oneself both as a job applicant and as a worker by one's disability — contravene the spirit, intent and letter of Saskatchewan's human rights law.

10817 Despite this, the Commission found the proprietor and representatives of Opportunity Handicap Ltd. to be well-intentioned and sincere in the concern they expressed for disabled persons in our society. But, good intentions do not ensure good business practices which contribute to rather than detract from the inherent dignity of persons with physical disabilities. It is incumbent upon us to objectively assess the impact on disabled persons and the public of the style and manner of operation of Opportunity Handicap Ltd. and to determine whether the business complies with the spirit of the Code, so as to justify an exemption from the letter thereof. We are of the opinion that it does not. And we so find.

10818 Although Mr. Rutman applied for this exemption on behalf of Opportunity Handicap Ltd., at the hearing he expressed the view that Opportunity Handicap Ltd. did not need an exemption in order to operate in the province since nothing the company proposed to do constitutes a violation of the Code. Mr. Rutman stated that because there is no protection afforded by the Code to persons who are *not* disabled, the exclusive employment of disabled persons does not contravene the provisions of the Code, and he asked us to consider issuing a declaration to this effect so that no exemption is necessary.

10819 This submission invites us to look carefully at Sections 19 and 16. Section 19 of the Code reads:

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[1] Editor's note: To be reported in March, 1983 issue C.H.R.R.

[2] Editor's note: See (1982) 3 C.H.R.R., D/932.

Forms of application and advertisements for employment, etc., not to express discrimination

19. No person shall use or circulate any form of application for employment to which this Act applies or publish any advertisement in connection with such employment or prospective employment or make any written or oral inquiry in connection with such employment that:

(a) expresses, either directly or indirectly a limitation, specification or preference indicating discrimination or an intention to discriminate on the basis of race, creed, religion, colour, sex, marital status, physical disability, age, nationality, ancestry or place or origin;

(b) contains a question or request for particulars as to the race, creed, religion, colour, sex, marital status, physical disability, age, nationality, ancestry or place or origin of an applicant for employment.

10820 The advertisement published by Opportunity Handicap Ltd. in the Winnipeg Free Press, which is quoted above, and which the Commission has been given to understand is the type of ad Opportunity Handicap Ltd. wishes to publish in order to recruit job applicants in Saskatchewan, does contain "a question or request for particulars as to . . . physical disability". In addition, the requirement that applicants for employment submit a medical certificate specifying that they are disabled and the nature of their disability contravenes Section 19(b) and the provisions of the Commission's recently reissued exemption order on the questions of information regarding disability and medical examinations. This reissued exemption order, dated October 13, 1982,[3] like the original one issued in November, 1980[4] exempts employers in the province from provisions of Section 19 with respect to disability but only to the limited extent of allowing employers to ask prior to employment "Do you have a disability which would interfere with your ability to perform the job for which you have applied?" No questions are permitted as to the nature or extent of a disability and compliance with this exemption order requires that medical examinations only be conducted after an offer of employment has been made in writing and only where a reasonable occupational requirement for the position in question has been identified.

10821 The Commission allows, as it has in the case of Saskatchewan Telecommunication and Saskatchewan Gas and Oil Corporation, the use of advertisements which specifically encourage disabled persons to apply for employment and an invitation to disabled persons to identify themselves prior to employment. The Commission permits these steps to be taken when they are within the context of a fully developed affirmative action program aimed at integration of disabled persons into mainstream employment situations and for the purpose of the applicant declaring that he or she is a member of one of the target groups to which the program is directed. Such actions, however, require approval of the Commission under Section 47 to be lawful, and the Commission allows this advertising and self-identification because it is for the positive purpose of giving disabled persons access to normal work experiences.

10822 The Commission can see no positive or dignified purpose which is served by the requirement of Opportunity Handicap Ltd. that job applicants provide a doctor's certificate stating that they are disabled and the nature of their disability. Allowing Opportunity Handicap Ltd. to undertake this practice in Saskatchewan would require an exemption from our already existing order on this subject. The Commission cannot envision any circumstances in which it would find it necessary or advisable to do this.

10823 Section 16(1) of *The Saskatchewan Human Rights Code* reads:

Discrimination prohibited in employment

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 or origin

10824 The Commission takes Mr. Rutman's point that, since the Code provides no protections for those who are physically able, and it is the physically able who are being refused employment by Opportunity Handicap Ltd. no contravention of Section 16(1) flows from this practice.

10825 The contrary argument is that a contravention occurs when disabled persons are recruited into an entire segregated disabled workforce because such a circumstance is, in and of itself, a limitation upon their dignity and equality, in the same way that segregated washrooms and drinking fountains were finally acknowledged in the United States to be a limitation upon the dignity and equality of blacks. However, the Commission declines to make any finding on this point.

10826 The Commission does find, however, that the requirement that employees of Opportunity Handicap Ltd. use the telephone script which has the effect of identifying them as handicapped and puts them in the position of appearing to solicit charitable responses from their prospective customers, amounts to discrimination under Section 16 with respect to employment or a term or condition of employment because of physical disability.

10827 Consequently, it is the Commission's position that Opportunity Handicap Ltd. requires an exemption from Section 16 and 19 of *The Saskatchewan Human Rights Code* in order to carry out business as it proposes to do in the Province of Saskatchewan. For the reasons which we have given, the Saskatchewan Human Rights Commission is not persuaded that such an exemption is warranted.

10828 This does not mean, in our view, that Opportunity Handicap Ltd. cannot carry on business in Saskatchewan, nor does it mean that Opportunity Handicap Ltd. cannot employ disabled persons as light bulb salespeople. It does mean, however, that in order to lawfully carry on business as an employer in this Province, Opportunity Handicap Ltd. must bring its' practices within the Human Rights Code. To do this, Opportunity Handicap Ltd. would need to drop the use of its' medical certificate and any reference to handicap, including the present name of the company, from its' sales pitch, that is, its' telephone script. If Opportunity Handicap Ltd. is prepared to take these steps, in short to keep its' fingers away from consumers' heartstrings, and thus to curtail a practice of undigni-

[3] Editor's note: To be reported in March, 1983 issue C.H.R.R.

[4] Editor's note: See (1981) 2 C.H.R.R., D/261.

fied exploitation of disabled persons, then the Commission stands ready to consider granting an exemption to allow the company to advertise specifically for disabled persons and to invite disabled persons to identify themselves as such prior to employment.

Ken Norman,
Chief Commissioner

CANADIAN HUMAN RIGHTS REPORTER

SASKATCHEWAN / EXEMPTION / SEX
Saskatchewan Human Rights Commission
Saskatchewan Social Services, Corrections Branch

Volume 4, Decision 246 Paragraphs 10829 - 10846 February, 1983

Saskatchewan Human Rights Decision
under the
SASKATCHEWAN HUMAN RIGHTS CODE

Saskatchewan Social Services, Corrections Branch

and

Saskatchewan Government Employees' Union

Date: January 14, 1983

Place: Saskatoon, Saskatchewan

Before: Ken Norman, Kayla Hock, Helen Hnatyshyn, Bill Gilbey

Summary: *The Saskatchewan Human Rights Commission rejects an application from the Saskatchewan Government Employees' Union to have the exemption which allows women to be refused employment in certain areas of the new correctional institutions in Saskatchewan.*

The number of positions to which the exemption applies is reduced, but the exemption is maintained to disallow women from being employed in remand, secure and semi-secure areas in the Saskatoon and Prince Albert Correctional Institutions. (See earlier decisions: Volume 1 C.H.R.R., D/49 and Volume 3 C.H.R.R., D/1047.)

10829 On June 24, 1982, the Applicant, Saskatchewan Government Employees' Union requested that the Human Rights Commission review and consider terminating a certain Exemption Order authored on February 27, 1980 with regard to the matter of sex bars to certain job functions within the Respondent's correctional facilities. Section 48(2) of *The Saskatchewan Human Rights Code* provides for just such an application, in the following language:

> Notwithstanding that an exemption order has been made under subsection (1), the commission may, on its own initiative, or upon application from any person or class of persons terminate the exemption order, but the person or class of persons in whose favour the exemption order was made shall receive thirty days' written notice that the exemption order may be terminated and shall be allowed to make representation to the commission.

10830 On August 20, 1982, the Commission resolved to hold a hearing into the matter. By letter of August 31, the Respondent was formally advised that the hearing would take place on October 28. As well, notices of the time and place of the hearing were published in the *Saskatoon Star-Phoenix*, the *Regina Leader Post*, and the *Prince Albert Daily Herald*.

10831 The Application and consequent hearing, which took place on the assigned day, arose out of a decision of the Commission, published on July 7, 1982 with regard to the 'old' correctional centres in Regina and North Battleford for adult males and with regard to the Pine Grove Centre for adult females in Prince Albert.[1] During the course of the hearing into these institutions, held on June 15, the Saskatchewan Government Employees' Union requested the Commission to reconsider the rationale underpinning our Exemption Order of February 27, 1980.[2] But we did not do so. At page 9 of our decision we explained why we had declined to engage in such an analysis. We said that we felt compelled to apply the same considerations to the 'old' facilities, then before us, as we had done in the original Order with regard to the two new physical plants in Prince Albert and Saskatoon. Our decision, on this point, reads as follows:

> . . . it seems to us to be only fair to remain true to the rationale expressed by us in our earlier decision, which continues to prevail with regard to the two new facilities for adult males in Saskatoon and Prince Albert. To reiterate the principle involved, we said that:
>
> > Where the compelling interest of (a high) degree of security dictates surveillance or searching of the person, at any given moment, at the option of custodial workers, conventional standards of public decency in this Province, at this point in time, clearly require that custodial staff be of the same sex as the inmate.
>
> If the rationale is to disappear then it ought properly to be brought before us on an application for termination of the entire Exemption Order, pursuant to the provisions of Section 48 (2) of the Code.[3]

[1] Editor's note: see (1982) 3 C.H.R.R., D/1047.

[2] Editor's note: see (1980) 1 C.H.R.R., D/49.

[3] (1982) 3 C.H.R.R., paragraph 9269.

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10832 Over the past three years, the Corrections Division has treated the Commission's Order, in operational terms, as endorsing the principle that when either a 'skin frisk' is called for, or deliberate observation of an inmate showering, bathing, using toilet facilities, dressing, undressing or changing clothes is required, then the Corrections worker in question must be of the same sex as the inmate.

10833 At very least, it is the Applicant's position and that of Mr. Schreiter on behalf of the staff of the commission, that this principle has outlived its purpose. Given the evolution in practices and attitudes which has taken place in the time since our first Exemption Order in 1980, it is submitted that it is the common experience of managers and staff that the introduction of female Corrections Workers into the two new facilities has not only gone smoothly, the net effect of their presence has been to reduce tensions and improve inmate behavior and hygiene.

10834 Ron Monk, on behalf of the application, noted that there were now some seventeen female Correctional Workers in the new Saskatoon Centre whereas there were only thirteen in the identical facility in Prince Albert. (It should be noted that the above figures reflect only the women in permanent positions at the two centres. Mr. Monk said that, in terms of females actually presently working, including those in temporary positions, there were now twenty-six women in the line corrections staff of the Saskatoon Centre and seventeen in the Prince Albert Centre.) He said that, over the course of the past year, there have been no assaults on these women. He granted that there was one hostage-taking incident but no harm was suffered by the female officer in question. In contrast, some five male staff have been assaulted in the Saskatoon Centre and twelve in the Prince Albert facility, during the same period of time.

10835 Beyond the very positive experience of the past three years, Mr. Monk reiterated the argument made in earlier hearings from the point of view of the professionalism of Corrections Workers. He said:

> We would like to return to professionalism for a moment. The standards of Corrections Workers in Saskatchewan is high and probably the highest in the Correctional field provincially. This is a result of the screening process that takes place before a person is accepted and the Department has to be complimented on the selections that they make.
>
> As a result of this process they have developed a Corrections Worker of a high degree of professionalism in the profession. Those who can not meet this standard are quickly removed from the system and therefore there have been very few problems with the integration of females working in a previously male work place.

10836 In sum, it is the Applicant's very firm view that no compelling case continues to exist for the continuance of our Exemption Order of February 27, 1980. On the footing of professionalism and encouraged by the positive experiences involving the introduction of female Corrections Workers into the two 'new' institutions, Mr. Monk rested his case for termination of our Order.

10837 Rod Brandvold, for the Respondent echoed what was said by Ron Monk, so far as the experience in the time since our original Order is concerned. He said:

> Inmates, staff and managers generally agree that maximizing employment opportunities for women results in positive impact on the Correctional Centre environment, and has been accomplished virtually without incident. The extent to which the Correctional Centre has employed female Corrections Workers to date would not appear to violate public standards of decency or inmate rights . . .
>
> Women have been successfully employed in the normal living units where low security inmates are assigned. A good deal of privacy is afforded the inmates in these areas due to the physical structure of the individual bedrooms. The Corrections Division has experimented with assigning women to Security Pool positions which involve escort duty and emergency response capability, as well as to Recreation positions, and positions in facilities in Northern Saskatchewan. In these situations the sex of the workers seems to have been irrelevant. In fact, having a more normal mix of male and female workers around has helped to "normalize" the institutional environment.

10838 With regard to these latter positions, the Respondent has come to the conclusion that the sex bar, established by the Exemption Order, can be removed. And, the Commission is invited to do so. But, with regard to the Remand, Secure/Semi-Secure and Admitting Areas of the two new centres and with regard to the remote Camps, where one staff member is left alone with the inmates, skin frisking and prolonged observations of inmates in states of undress cannot be avoided. In these positions, the Respondent urges the Commission to stand by its Order of 1980. If the Commission were to go this far, but no further, Mr. Brandvold stated that some twenty-six positions in Prince Albert, Saskatoon and in the remote Camps, would be opened-up to women. Put another way, the Exemption Order would continue to bar females from ninety positions out of a staff complement of 328, as opposed to 116 positions, under the existing Order.

10839 In conclusion, Mr. Brandvold argued that the standard of decency adopted by the Commission in 1980 ought still to prevail. In addition to the normal tensions which might be expected to arise, both with regard to inmates and male staff, with the introduction of female staff into Remand and Secure/Semi-Secure, in particular, Mr. Brandvold reminded the Commission that all facilities were presently over-crowded and hence under special strains. Dramatic change of any kind was to be avoided under these circumstances.

10840 Evidence was heard from John McInnis, Chairman of the Inmate Committee at the Saskatoon Centre. He said that he had made a point of going down to Remand and to Secure/Semi-Secure, in order to talk to the inmates about the pending Application. He said that he got a 'general feeling' that the prisoners did not want women 'down there'. He said that the lay-out of cells in Remand and in Secure was such that there was none of the privacy afforded by the Normal Living Units. In addition, Mr. McInnis testified that he "had done an awful lot of time" in his life and that he could speak from long experience to the special set of tensions which pertain to men in Remand and Secure holding cells. He said that, in time, the change might be able to be made without problems. And, given the experience in the Normal Living Units with the introduction of female workers, he was personally convinced that Remand and Secure/Semi-Secure would be better places to live, once the change was made. But he was sure that, so far as the inmates presently in these cells were concerned, "they just aren't prepared to accept women right now".

10841 With regard to the inmates in Prince Albert, a tape recording of a conversation held between several of them and Marty Schreiter was submitted to the hearing. An edited transcript of this tape was made available to the parties. The gist of the inmates' views was that they favoured the introduction of female workers, at least, in theory and in due course. One inmate was confident that female workers would help alleviate stress, an all too common commodity in Remand and Secure/Semi-Secure. "It's just that men here have a certain image of themselves which makes the atmosphere a lot more tense". But, doubts were expressed. And, with regard to Secure/Semi-Secure, there was a general word of caution that care ought to be taken to move gradually if female workers were to be integrated.

10842 On behalf of the staff of the Human Rights Commission, Marty Schreiter argued that the Exemption Order ought to now be 'lifted'. Given the tensions perceived by inmates, managers and staff in the areas under review, Mr. Schreiter suggested that the Commission consider stating that the Order would be lifted at some given date in the future, in order to give everyone concerned an opportunity to prepare for the changes that would be entailed in effecting a smooth transition to the goal of removing all sex bars within the institutions in question. (For the record, it ought to be said that the staff of the Commission stand on no new ground with regard to this issue. During the first hearing of January 16, 1980 and the second of June 15, 1982, staff stood opposed to any exemption at all being granted.)

10843 In the end, the question left for us to answer is whether the positive record of the past three years, so far as incorporation of female Corrections Workers in the male institutions is concerned, justifies reversal of our earlier rationale for an exemption. There is no doubt but that all parties favourably perceive the present roles of female workers in the Normal Living Units in Security Pool and Recreation and Recreation positions. Indeed, all are agreed that their presence in the ranks of line correctional staff has aided the respondent in meeting its institutional goals. And, with regard to the areas of Security Pool and Recreation, and the larger Northern Centres, in Buffalo Narrows, Creighton, and Besnard Lake, the Corrections Branch has come to the conclusion that no continuance of our first exemption is required. On this footing, a reissued Exemption Order would open-up twenty-six positions to women, from which they are hitherto barred. For the Commission to now go further than this would entail a reversal of the stated justification for our initial Order. And, we are not persuaded that a case has been established by the Applicant, under Section 48 (2) of the Code, for such a determination.

10844 However successfully the integration of female line staff Correctional Workers may have taken place over the past three years, that experience does not erase the need for the dignity of the inmate to be respected by his keepers. And, it is this central issue of human dignity which underlies our initial and subsequent Exemption Orders. On the footing of community standards of public decency or personal privacy, it continues to strike this Commission as being offensive for 'skin frisks' to be done to a male by a female. Equally, in situations such as those which obtain in Remand, in Secure/Semi-Secure and in the small outlying Camps, deliberate scrutiny of an inmate in states of nudity is required. In such circumstances, conventional standards of decency continue, in our estimation, to require that Corrections Workers be of the same sex as inmates.

10845 But, this is not to say that the Commission considers its opinion to be chipped in stone. No one could disagree with the proposition that a great deal of water has passed under the bridge in the past three years with regard to the subject matter at hand. The presence of women in the ranks of Correctional Workers has been of benefit to all concerned. Attitudes on this issue have changed rapidly, based on this experience. In time, the required exemption might well be limited to a narrower compass than that which we will shortly define. The question can always be brought back to the Commission by any party under Section 48 (2) for reconsideration. In this regard should such an application materialize, the Commission would prefer to see the Applicant and the Respondent approach the Commission jointly. The delicate nature of the issues presented by both the Remand and the Secure/Semi-Secure units, make it rather unlikely that the Commission would be able to do "justice to the situation without prior consultation and consensus from at least the Respondent and the Applicant, if not the Inmate Committees. But, this speaks only to the issue of deliberate scrutiny of an inmate in a state of undress. It does not address the matter of 'skin frisks'. On this question, we are not of the opinion that the passage of time will alter our analysis. Positions which entail 'skin frisking' as an ordinary aspect of job performance, such as the Corrections Work I job in the Admitting Area, need to be exempted on the ground of decency. And this is a condition which we do not anticipate will wither away with time.

10846 For the reasons which we have given, the application is hereby granted, in part. The exemption order of February 27, 1980 is hereby reissued and narrowed. The respondent, corrections branch, is granted exemption from the provisions of section 16 of Part II of The Saskatchewan Human Rights Code, relating to sex discrimination, to this limited extent:

> The Corrections Branch is permitted to exclude women from employment in the Prince Albert and Saskatoon Correctional Centres in Corrections Worker I positions in the Admitting Area, in the Secure/Semi-Secure Unit and in the Remand Unit and with regard to outlying corrections camps employing only one corrections worker on a given shift, all positions assigned.

Ken Norman,
Chief Commissioner

CANADIAN HUMAN RIGHTS REPORTER

SASKATCHEWAN / AFFIRMATIVE ACTION
Saskatchewan Human Rights Commission
Gabriel Dumont Institute of Native Studies and Applied Research

Volume 4, Decision 325 Paragraphs 14449 - 14469 November 1983

Saskatchewan Human Rights Commission Decision
under the
SASKATCHEWAN HUMAN RIGHTS CODE

Gabriel Dumont Institute of Native Studies and Applied Research
Applicant

Date: September 16, 1983

Place: Saskatoon, Saskatchewan

Before: Saskatchewan Human Rights Commission

Decision by: Louise Simard, Deputy Chief Commissioner

Summary: *The Saskatchewan Human Rights Commission grants an approval under Section 47 of the Saskatchewan Human Rights Code to the Gabriel Dumont Institute for three programs which will be provided specifically to Metis and Non-Status Indian candidates.*

The programs are designed to provide professional and technical training in the fields of human resource development, native studies, and recreational technology.

The approval allows the Institute to advertise for, recruit, and train persons of Metis and Non-Status Indian ancestry exclusively.

14449 By a submission of July 18, 1983, over the signature of Mr. Ken Whyte, Executive Director, the applicant sought approval for the following three programs which include:

1. The Human Resource Development Training Program
2. The Native Studies Instructors Program
3. The Native Recreational Technology Program

As no oral hearing was requested by the applicant, the written submission was considered by the Commission at its regularly scheduled meeting on August 4, 1983, pursuant to Section 34 and 41(1) of the regulations under *The Saskatchewan Human Rights Code*.

14450 In his application for approval, Mr. Whyte made the following submission justifying a series of special affirmative action initiatives in the area of education through the Gabriel Dumont Institute:

14451 "The goal of the Institute is to promote the renewal and development of native culture through appropriate research activities, through the development of resources and materials, through the distribution of these materials and by implementing specific educational and cultural programs and services.

14452 Since 1980 we have received numerous requests from people for certified training programs. Consequently, in the fall of 1981 we have applied for funding from the Canada Employment and Immigration Commission under the National Training Act to enable us to develop training programs in thirteen regional training centres in the province. The Institute was successful in obtaining some of this funding and will commence training in four centres in the fall of 1983. Gabriel Dumont Institute would like to preferentially advertise and recruit students who are Métis and Non-Status Indians, as the goal of AMNSIS is to implement a comprehensive economic development strategy that will incorporate program strategies for professional certification that will assist Métis and Non-Status Indian people in achieving employment opportunities".

14453 On April 9, 1980, the conclusion of a rule-making process which included public hearings and extensive consultations with interested and affected persons and groups, the Commission adopted a set of proposed Regulations governing special program approval applications under Section 47 of the Code. Our reasons for this decision will now be set forth, within these proposed Regulations, which we hereby incorporate, by reference, into this document, as embodying the criteria to be addressed by the Commission in considering Section 47 applications.

Description of Training Programs

14454 This is a two year certificate program designed to train persons of native ancestry in areas such as administration, management, counselling and adult education. The program will be held in Lloydminster and Il-a-lacrosse. The objective of the program is to train twenty people in each centre. Graduates from this program will be qualified for positions in areas such as management, counselling and adult education programming.

14455 The first year of the program will focus on native education employment development section (NEED). The second year will focus on skills such as science, adult education, administration, management and counselling. The certificate course is a blend of skills training and accredited university classes. Following the two year program students are able to continue working towards their selected degree through the University of Regina.

14456 The need for such a program has been well documented by the Gabriel Dumont Institute. During the past several years, the Dumont Institute has received numerous requests from persons of Indian ancestry for accredited vocational and educational programs. A recent study completed by the Gabriel Dumont Institute in co-operation with the Department of Continuing Education, indicated that of a total of 85,000 Métis and Non-Status Indian persons approximately 240 or .0028% are studying at either a university or a technical institute in Saskatchewan. The Human Resource Development Program is attempting to increase these statistics by creating a positive learning milieu which will encourage persons who are Métis and Non-Status Indians to become qualified professionals.

2. **Native Studies Instructors Program**

14457 This is a one year certificate program which will be located in Saskatoon. The program is designed to train twenty people to be instructors of courses in native studies. Graduates from the program will be qualified to teach native studies at vocational STEP (Saskatchewan Training for Employment Program) centres, technical institutes and community colleges.

14458 At present there are no programs available in the province or elsewhere where people can acquire competency in native studies and adult education in one year. Credits acquired through the course will be recognized by the University of Saskatchewan if further study is desired.

3. **Recreation Technology Program**

14459 This program will operate out of Regina. It is designed as a two year program and is based on the recreational technology program that is offered at Kelsey Institute in Saskatoon. The program can accommodate up to twenty students and will utilize a combination of university courses and non-credit courses, seminars and practical experience. Graduates from the program will be qualified to work in areas such as city recreational programs, native recreational programs, provincial recreational programs, and private organizations such as the YWCA and the YMCA.

Application of Approval Criteria

14460 REGULATION 50(c)

> "SPONSOR ORGANIZATION" INCLUDES A "PERSON" AS DEFINED BY SECTION 2(m) OF THE ACT, AND A BOARD OF EDUCATION, A SCHOOL OR INSTITUTION AS DEFINED IN *THE UNIVERSITIES COMMISSION ACT*, OR OTHER INSTITUTION OR PLACE OF LEARNING, VOCATIONAL TRAINING, OR APPRENTICESHIP, OR ANY INSTITUTION, ORGANIZATION, ASSOCIATION, BUSINESS OR ENTERPRISE, OR ANY INSTITUTION, ORGANIZATION, ASSOCIATION, BUSINESS OR ENTERPRISE WHICH PROVIDES FUNDS TO OTHER INSTITUTIONS, ORGANIZATIONS, ASSOCIATIONS, BUSINESSES OR ENTERPRISES;

The Gabriel Dumont Institute of Native Studies and Applied Research is the sponsor organization by virtue of being an institution and place of learning.

14461 REGULATION 50(d)

> "TARGET GROUPS" MEANS PERSONS OF INDIAN ANCESTRY, PERSONS WITH PHYSICAL DISABILITIES, AND WOMEN;

Persons who are Métis or who are Non-Status Indians have been identified as the target groups for this application.

14462 REGULATION 52(d)

> THE NATURE OF THE BUSINESS ENGAGED IN OR THE SERVICES BEING PROVIDED BY THE SPONSOR ORGANIZATION JUSTIFIES THE SPECIAL PROGRAM BEING SO DESIGNED;
>
> (e) THE COMPOSITION OF THE CLIENT POPULATION JUSTIFIES THE SPECIAL PROGRAM BEING SO DESIGNED;

The Gabriel Dumont Institute has acquired funds from the Canada Employment and Immigration Commission to set up three training programs aimed at providing training for men and women who are Métis and who are Non-Status Indians. The Gabriel Dumont Institute has provided the Commission with statistics (see chart page 5) which reveal a serious underrepresentation of Métis and Non-Status Indians in Saskatchewan universities, technical institutes, trade schools and community colleges. The statistics justify the need for special measures which will improve and enhance learning opportunities for Métis and Non-Status Indian people. The application does not specifically address the

needs of Métis and Non-Status Indians who are physically disabled.

14463 REGULATION 53(a)

A SPECIAL PROGRAM SHALL INCLUDE THE FOLLOWING:
ANALYSIS, AS FOLLOWS:

(i) "SPONSOR ORGANIZATION ANALYSIS":

AN ANALYSIS OF THE REPRESENTATION OF MEMBERS OF THE TARGET GROUPS, AND OTHER PROTECTED GROUPS DESIGNATED BY THE SPONSOR ORGANIZATION, IN ALL SECTORS, UNITS, AND LEVELS IN THE SPONSOR ORGANIZATION;

The sponsor organization is specifically seeking approval to operate and deliver specially designed training programs for Métis and Non-Status Indian persons. Therefore, it is not necessary to conduct a workforce analysis of the sponsor organization in this application. It is more appropriate to determine the rate of participation of Métis and Non-Status Indian persons in educational institutions such as universities, technical institutes, trade schools and community colleges.

University — Summary Sheet
Number of Students by Type of Course

Type of Course	1979-80*	1980-81**	1981-82***
1. Liberal Arts and Science	33	83	56
2. Education	11	21	11
3. High Tech. or professional (i.e. law, medicine, nursing, agriculture, pharmacy, etc.	10	16	16
4. Commerce and Admin.	16	9	19
5. Social and Human Justice Work	6	5	15
6. Native Ed. Service (i.e. SIFC, ITEP, ISWEP)	20	15	—1
7. Summer School	Not avail.	20	Not avail.
8. Intercession	Not avail.	1	Not avail.
9. Entrance Program	1	1	9
TOTALS	97	194	167

*	Male 41	Female 56	Total 97
**	Male 79115	Female 194	Total
***	Male 70	Female 97	Total 167

All Institutes Table I, offering certified courses

Type of Course	1979-80	1980-81
1. Beauty and Cosmetic	44 (18%)	34 (12%)
2. Business and Administration	106 (44%)	125 (44%)
3. Trades	62 (26%)	96 (33%)
4. Medical	14 (6%)	31 (11%)
5. Social Services and Education	13 (5%)	1
TOTAL	239	287

14464 REGULATION 53(a)

(ii) "COMMUNITY ANALYSIS": AN ANALYSIS OF THE REPRESENTATION OF MEMBERS OF THE TARGET GROUPS, AND OTHER PROTECTED GROUPS DESIGNATED BY THE SPONSOR ORGANIZATION, IN THE POPULATION, OR IN THE SUB-CLASSES OF THE POPULATION DEFINED BY QUALIFICATION, ELIGIBILITY, OR GEOGRAPHY, FROM WHICH THE SPONSOR MAY REASONABLY BE EXPECTED TO DRAW ITS EMPLOYEES, STUDENTS, TENANTS, CLIENTS, CUSTOMERS OR MEMBERS;

A number of estimates have been made regarding the number of Métis and Non-Status Indian people in Saskatchewan. According to the Gabriel Dumont Institute, there are approximately 65,000 Métis and Non-Status Indian people in Saskatchewan.

14465 REGULATION 53(a)

(iii) "PARTICIPATION ANALYSIS": AN IDENTIFICATION OF ALL SECTORS, UNITS, GROUPINGS, CLASSIFICATIONS, AND LEVELS IN THE SPONSOR ORGANIZATION IN WHICH MEMBERS OF THE TARGET OR PROTECTED GROUPS ARE UNDERREPRESENTED.

14466 REGULATION 53(b)

"GOALS" AND "TIMETABLES", AS FOLLOWS:

(i) Goals, which shall be expressed in numbers and percentages, for increasing the representation of the target or protected groups that are included in the program, in those sectors, units, groupings, classifications and levels where underrepresentation has been identified, and timetables, both short and long term for meeting the established goals;

(ii) Goals and timetables, for the achievement thereof, shall be set separately for each target or protected group that is included in the program, and for each sector, unit, grouping, classification and level where underrepresentation has been identified pertaining to that group;

(iii) Goals shall be based on the extent of underrepresentation identified and on the availability of members of the target or protected groups who are qualified, or who can become qualified through reasonable efforts on the part of the sponsor organization, or who are eligible or who can become eligible through reasonable efforts on the part of the sponsor organization, for positions or places within the sponsor organization;

(iv) Timetables, for the achievement of each goal, shall be based on the anticipated increase and decrease in the number of people within the sponsor organization, and the anticipated turnover of people within the sponsor organization;

(v) Goals and timetables shall be reasonable and flexible.

Although the Gabriel Dumont Institute would like to develop and provide a variety of training programs, they have only received enough funds to operate three training programs.

At present, it is not known whether or not funds will be available to operate these programs on an ongoing basis. The following chart specifies the proposed goals and timetables for these three training programs.

Name of Training Program	Location	No. of Years	No. of Students
1. Human Resource Development Program	Lloydminster	2 yrs.	20
2. Native Studies	Saskatoon	1 yr.	20
3. Native Recreational Technology Program	Regina	2 yrs.	20

14467 REGULATION 53(c)

"PROGRAM ELEMENTS", AS FOLLOWS:

(i) PROGRAMS ELEMENTS DESIGNED TO PREVENT, ELIMINATE, OR REDUCE DISADVANTAGES THAT ARE LIKELY TO BE SUFFERED BY, OR ARE SUFFERED BY, MEMBERS OF THE TARGET OR PROTECTED GROUPS THAT ARE INCLUDED IN THE PROGRAM, BY IMPROVING OPPORTUNITIES FOR SUCH GROUPS;

(ii) PROGRAM ELEMENTS DESIGNED SPECIFICALLY TO ADDRESS AND REMEDY THE UNDERREPRESENTATION OF TARGET OR PROTECTED GROUPS THAT ARE INCLUDED IN THE PROGRAM AS IDENTIFIED PURSUANT TO SECTION 53 (a) (i) OF THESE REGULATIONS.

Although each training program has been specially designed to meet the unique needs of the participants, the following elements are common to all three programs:

1. **Recruitment**

Advertisements will be issued specifically inviting men and women who are Métis or who are Non-Status Indians to enrol in the proposed training programs. (See Appendix A).

2. **Selection Criteria**

Generally, it is preferred that students have a Grade 11 or 12 standing. However, a Grade 10 will be accepted if it can be demonstrated that the applicant is mature and has a strong work record.

3. **Funding**

The Gabriel Dumont Institute is committed to procuring funds for the trainees which will adequately cover relocation expenses, transportation, living costs and child care.

4. **Support Services**

All of the students who enrol in the training programs, will have access to counselling and tutorial services.

5. **Life Skills and Upgrading**

All of the training programs include and integrate as closely as possible upgrading and life skills training.

6. **Learning Environment**

The following characteristics assist in making these training programs a unique and positive learning experience for Métis and Non-Status Indian people.

(i) It allows native people to freely express their culture and background.

(ii) Native people are directly involved in the design and management of the training programs.

(iii) Training programs are enriched with native studies and native content.

(iv) The training programs produce a learning environment which sees native people in the majority and as positive role models. As well, the training programs utilize a curriculum which has been adapted to enhance students' sense of pride in their native heritage.

14468 REGULATION 53(d)

DESIGNATION BY THE SPONSOR ORGANIZATION OF A PERSON TO BE RESPONSIBLE FOR THE ADMINISTRATION OF ITS SPECIAL PROGRAM.

Ken Whyte, Executive Director of the Gabriel Dumont Institute of Native Studies and Applied Research, has been designated as the person responsible for overseeing the administration of these three training programs.

TERMS AND CONDITIONS

14469 The foregoing criteria having been met by the applicant to the satisfaction of the Saskatchewan Human Rights Commission, approval is hereby granted to these three affirmative action training programs, pursuant to Section 47 subject to the following condition:

1. THAT THE GABRIEL DUMONT INSTITUTE OF NATIVE STUDIES AND APPLIED RESEARCH DEVELOP STRATEGIES TO ENSURE THAT INDIAN AND METIS PERSONS WHO ARE PHYSICALLY DISABLED HAVE THE OPPORTUNITIES TO PARTICIPATE IN THE THREE TRAINING PROGRAMS AS DESCRIBED IN THIS APPLICATION AND THAT THESE STRATEGIES INCLUDE ACTIVE OUTREACH INTO THE COMMUNITIES IN WHICH THESE PROGRAMS ARE BEING OFFERED AND THAT ACCESSIBLE FACILITIES AND JOB ACCOMMODATION BE ASSURED FOR ANY PERSONS OF INDIAN ANCESTRY WHO ARE PHYSICALLY DISABLED WHO WISH TO BE CONSIDERED FOR THESE TRAINING PROGRAMS.

(b) General Damages

10417 I have set out (supra) the reaction of each complainant to being fired. Clearly both complainants were upset, embarrassed and inconvenienced. To both it was particularly galling to be fired since their competence was never questioned. In a letter dated January 19, 1981 to Best Personnel, Mr. Belair confirmed that both complainants were "competent." Nevertheless, each complainant understandably regarded the termination as a slur on her professionalism; as such, it was difficult and embarrassing to explain to professional colleagues. These factors suggest that a substantial monetary award, by way of general damages, would be appropriate.

10418 However, there are also mitigating factors. Both complainants understood from the beginning that this was temporary, not permanent, employment. Also, the dismissal occurred before either had built up much reliance interest in this job. Indeed, Helen McInnis worked but one full day; Chris Bruton only two. Also, the economic expectations that the complainants justifiably had will be met by the order I have made for payment of special damages by way of lost wages. Also, I must consider that any remaining slur on their professional competence should be dispelled by this decision.

10419 After conscientiously weighing these considerations, and allowing for the inexact nature of such calculations, I have concluded that $1000 would be an appropriate figure for general damages to be awarded to each complainant.

(c) Posting of Code Cards

10420 The posting of Human Rights Code cards may serve as a reminder both to employers of their statutory obligation and to employees of their rights under Ontario's human rights law.

10421 Accordingly, I shall make an order requiring the company to post Human Rights Code cards in appropriate locations.

Ian A. Hunter

ORDER

This matter coming on for hearing on the 23rd and 24th day of August, 1982, before this Board of Inquiry, pursuant to the appointment of Russell Ramsay, Minister of Labour, dated April 8, 1982, in the presence of counsel for the Commission and the complainants, and counsel for the respondent, upon hearing evidence adduced by the parties and what was alleged by the parties, and upon finding that the complaints are substantiated by the evidence:

IT IS HEREBY ORDERED THAT:

(1) The respondent M.H.G. International Limited pay to each complainant the sum of three thousand and ninety dollars $3,090) as compensation for lost wages and injury to dignity, reputation and feelings as a result of the discriminatory act; and

(2) that the respondent post not fewer than two copies of Ontario Human Rights Code cards, to be supplied to the respondent by the Ontario Human Rights Commission, at conspicuous locations at each and all of its business and construction sites located in the Province of Ontario.

Ian A. Hunter

CANADIAN HUMAN RIGHTS REPORTER

SASKATCHEWAN / EQUAL PAY / SEX
Saskatchewan Human Rights Commission
Beatrice Harmatiuk v. Pasqua Hospital

Volume 4, Decision 239 Paragraphs 10422 - 10458 January, 1983

Saskatchewan Human Rights Commission Decision
under the
SASKATCHEWAN LABOUR STANDARDS ACT

Beatrice Harmatiuk
Complainant

v.

Pasqua Hospital
and
The Board of Governors of the South Saskatchewan Hospital Centre
Respondents

Date:	December 1, 1982
Place:	Regina, Saskatchewan
Before:	Louise Simard, Helen Hnatyshyn, William Gilbey
Appearances by:	William Lawton, Counsel for Beatrice Harmatiuk and the Women's Division, Department of Labour Maurice LaPrairie, Counsel for Pasqua Hospital

ISNN 0226-2177 Cite: C.H.R.R. D/1177

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Summary: *The Saskatchewan Human Rights Commission rules that Pasqua Hospital contravened the equal pay provisions of the Labour Standards Act by paying women who are housekeeping aides less than men who are caretakers.*

The Saskatchewan Human Rights Commission finds that the jobs are substantially similar and declines to defer to the conclusion of a wage study which evaluated the two jobs and assigned fewer job evaluation points to the housekeeper aides' job. The Commission rules that despite the wage study, the employer must conform to the provisions of the Labour Standards Act and the Commission can find no difference between the jobs which justifies the wage differential.

Beatrice Harmatiuk and the other women in her job category are awarded back pay to the date of the complaint to remedy the wage differential.

10422 Beatrice Harmatiuk, the Complainant, on her own behalf and on behalf of the housekeeping aides of the Pasqua Hospital, says that her employer, the Pasqua Hospital and the Board of Governors of the South Saskatchewan Hospital Centre had violated *The Labour Standards Act* by failing to pay housekeeping aides working at the Pasqua Hospital at the same rate of pay as the caretakers working at that hospital. Subsection 17(1) of *The Labour Standards Act* provides as follows:

> "No employer or person acting on behalf of an employer shall discriminate between his male and female employees by paying a female employee a rate of pay less than the rate of pay paid to a male employee, or *vice versa*, where such employees are employed by him for similar work which is performed in the same establishment under similar working conditions and the performance of which requires similar skill, effort and responsibility, except where such payment is made pursuant to a seniority system or merit system."

10423 Mr. Maurice Laprairie as Counsel for the Pasqua Hospital and Mr. William Lawton, Q.C., as Counsel for Beatrice Harmatiuk consented to this Board treating the Complainant as a complaint on behalf of a group, rather than a complaint on behalf of a particular individual.

10424 Sixteen housekeeping aides filed complaints dated November, 1979, with the Women's Division of the Department of Labour with respect to the aforementioned disparity between the pay ranges of housekeeping aides and caretakers. In February of 1980 Irmgard Krasilowez, an investigator with the Department of Labour, inquired into the said complaints. She concluded that the work performed under the 2 job classifications was "*similar work*" within the meaning of section 17(1) of *The Labour Standards Act* and the Pasqua Hospital was in violation of the said section. When Irmgard Krasilowez was unable to effect a settlement of the matter, the Saskatchewan Human Rights Commission was asked to conduct a formal inquiry.

10425 It was agreed by both parties that the work of the housekeeping aides and the caretakers was performed in the same establishment under similar working conditions, and that the work of both groups required similar skill and responsibility. The hours of work are not in dispute nor are the salaries being paid to the 2 groups, as well, the difference in pay is not made pursuant to a seniority or merit system. Thus, the matter falls to be determined on whether the physical effort involved in the performance of the 2 positions is substantially different and thus would warrant the existing wage disparity.

10426 In *Schiltz v. Solar Sales Ltd.*, [1981] 2 C.H.R.R. 477, the Saskatchewan Human Rights Commission stated that in order for the difference in degree of physical effort to be enough to justify a disparity in pay, it must be determined whether the difference is:

> "substantial enough to constitute a realistic basis for the existing wage disparity, or whether such difference is unsubstantial and incidental to the performance of the primary function of the job." (at p. 481 of *Schiltz v. Solar Sales Ltd. supra*).

10427 The definition of "*effort*" was set out by The Saskatchewan Human Rights Commission in a decision dated September 8, 1975, which was sustained on appeal *sub non Re Department of Labour and University of Regina* (1976), 62 D.L.R. (3d) 717:

> "Effort includes the measurement of the quality and quantity of physical or mental exertion needed for the performance of a job."

10428 The Commission heard evidence for a total of 6 days. We heard from the investigator from the Women's Division, Department of Labour, Irmgard Krasilowez; from 3 women currently employed as housekeeping aides at Pasqua Hospital; from 3 men who are or have been employed at the hospital as caretakers; from Robert Allen, Personnel Manager of the South Saskatchewan Hospital Centre (which includes Pasqua Hospital); from Barry Woulds, Assistant Executive Director of Saskatchewan Health Care Association, from Eva Dulmage, Retired Supervisor, Housekeeping Department, Pasqua Hospital; and from the Director of Housekeeping at the hospital, Gunther Petrowski.

10429 The evidence established that all housekeeping aides at the Pasqua Hospital are female, whereas all caretakers are male. The housekeeping aides and caretakers are part of the housekeeping department at the Pasqua Hospital and neither position requires educational qualifications, nor any formal training program. Each caretaker and housekeeping aide is assigned to a specific area or areas of the hospital that are his or her individual responsibility. However, in both categories there are persons who are referred to as floats, who perform relief work when one of the others is sick, on holidays or regular days off. The primary responsibility of both the housekeeping aides and caretakers is the cleaning of the hospital. Generally speaking, the housekeeping aides are responsible for the cleaning of the patients' rooms, utility rooms, washrooms, nursing station and offices while the caretakers are primarily concerned with the cleaning of the hallways, stairwells, sitting areas, television areas and other large areas.

10430 In 1972 the Canadian Union of Public Employees, Saskatchewan Employees International Union, the Saskatchewan Department of Health and the hospitals in the Province of Saskatchewan established the Co-operative Wage Study. The purpose of this study was to rationalize and rectify any inequities that may have existed in pay rates throughout the Province of Saskatchewan in the various hospitals. The Co-operative Wage Study examined the various job classifications existing in each hospital and award-

ed each job a point value out of a maximum point value of 950. The job classification of caretaker at the Pasqua Hospital received a point value of 285, while the job classification of housekeeping aides received a point value of 265. The 20 point value difference between the 2 classifications was due to the position of caretaker being awarded 20 more points for extra physical effort expended on the job. The housekeeping aides appealed the grade point assessment to the Central Evaluations Committee. The Central Evaluations Committee, composed of 2 management and 2 union representatives, unanimously dismissed the appeal.

10431 On December 1, 1981, the rate of pay for the non-red circled caretakers was $.20 per hour higher than the rate of pay for the non-red circles housekeeping aides (as set out in Exhibit C-1 filed in the hearing). On December 1, 1981, the housekeeping aides were paid a starting wage of $6.57 per hour and escalated to $6.77 and to $6.99 per hour, while the caretakers basic wage was $6.77 which escalated to $6.99 and $7.19 per hour.

10432 Both the caretakers and aides spend approximately 50 per cent of their time wet and dry mopping floors. (at pages 212 and 213 of the transcript). The caretakers use a 24 ounce mop and the aides a 12 ounce mop. (at page 209 of the transcript). The reason given for the different size of mops was efficiency because it is easier to mop a large area with a large mop and a small area with a small mop, and the housekeeping aides use the small mop to mop around furniture and the caretakers use the large mop to mop the hallways.

10433 Evidence was lead that the larger mop is heavier when it is wet. The Respondent attempted to equate the heaviness of the mop with the effort required to use it. Harvey Pranke, in his evidence stated that he used both the 12 ounce and 24 ounce mop and at page 361 of the transcript in response to a question as to which mop was the heaviest and most difficult to use he stated that

> "the larger mop is the harder one to use."

and then in answer to the question

> "Is it significantly harder to use?"

he stated

> "No."

10434 In her testimony Beatrice Harmatiuk said that in order to wet mop the patients' rooms and utlity rooms it is necessary to move furniture, namely lockers, chairs, garbage disposal cans and occasionally a patient's bed. The 3 caretakers also gave evidence that it was necessary for them to move furniture in order to wet mop namely, to move chairs and tables.

10435 The housekeeping aides who testified stated that approximately 30 per cent of their time was spent in dusting (pages 97 and 177 of the transcript). In this regard Barbara Hoffert said she had to:

> "Do my dusting, my sinks, I have to vacuum my rugs, pick up the garbage, wipe the counters down and they have cupboards in there, I have to wipe them down and shelves". (at page 239 of the transcript)

and then at page 240 of the transcript

> "I go down to my sitting room. I also have to wipe the chairs there, clean up the ashtrays, pick up the garbage and scrub my floor with the wet mop."

10436 The housekeeping aides spend the remaining 20 per cent of their time performing extra duties such as stripping and placing sealer on the floors, spot washing the walls from the floor to as high as they can reach, washing the lower panes of the windows, cleaning the pipes with a dry mop, changing the bedside curtains (see pages 181, 182, 214 and 247 of the transcript).

10437 From the evidence it would appear some of the housekeeping aides use the same machines as the caretakers. Alma Oneiu, for instance, uses the vacuum cleaner and the 3 brush stripper for stripping wax off the floors. (at page 179 of the transcript). Barbara Hoffert uses the same vacuum cleaner as the caretakers (at page 240 of the transcript) as well she strips and places sealer on the floors in her area approximately once every 6 months (at page 249 of the transcript) and in so doing has used the 1 pad stripper and the 3 pad stripper to strip the wax off the floor and to polish the floor (at page 272 of the transcript).

10438 The women spot wash walls regularly and once a year wash walls from the floor to as far as they can reach. Approximately once a year the men wash the walls from the ceiling down to where the women have cleaned and wash the ceilings with a special extension mop.

10439 Harvey Pranke who was employed as a caretaker for 1½ years testified that during that time he had washed the walls in the halls and stairways and they were done about once a year (page 317 of the transcript), he had cleaned the ceiling approximately once or twice (page 318 of the transcript), and he has washed 3 windows (page 338 of the transcript).

10440 Jake Fischer testified he washes the ceilings and walls of approximately 3 or 4 rooms per year, strips the floors of approximately 2 or 3 rooms per year (page 403 of the transcript), washes the walls of the halls approximately once a year (page 368 of the transcript) and washes approximately 100 windows per year (page 384 of the transcript). A caretaker in order to wash the windows has to climb a ladder, remove the window, clean it and replace it while the housekeeping aides merely wash the inside lower pane.

10441 Jake Fischer (on page 395 of the transcript) also testified that he occasionally changed bedside curtains in the psychiatric unit and (on page 383 of the transcript) when asked

> Q. "Would they weigh about the same or would the curtains weigh more or would the drapes weigh more?"
>
> A.: "Well the drapes would weigh a little more."
>
> Q.: "A little more but basically about the same?"
>
> A.: "Probably they'd be about the same."

10442 Both groups are responsible for garbage removal in the areas. The women take the garbage in the large plastic bags to the utility room on their assigned floor and either leave it on the floor of the room or place it in the garbage cart. The men do the same, as well, when the garbage cart is full the caretakers move the cart to the garbage room, empty it and return the cart to the floor. The caretakers also clean the garbage cans. However, according to the evidence heard by this Board neither the pushing of the garbage cart onto the elevator and down to the garbage room nor the cleaning of the garbage cans is an especially onerous task.

10443 The women are responsible for cleaning beds in their area and Alma Oneiu, for example, estimates that she cleans 5 or 6 beds a night (at page 178 of the transcript) while Barbara Hoffert does 4 to 12 a night (at page 244 of the transcript).

10444 Beatrice Harmatiuk talked about the bending and lifting involved in the job of housekeeping aides at page 122 and 123 and she gave evidence as to the additional responsibilities the housekeeping aides have because they work in patients' rooms when patients are there. This is not a part of the job of the caretakers. She said (at page 125 of the transcript):

A.: "Well you have to be thinking what you are doing. I mean you go into a room you just can't knock and go, you've got to think there's patients there, ill patients, some that are not ill but don't want noise, you've got to concentrate on doing your work with as little noise as possible and yet doing a thorough job. You've got to — also, when you're coming around the beds, either wet mopping, not to knock the beds. It is very disturbing for some patients. You have to consider the patients in your daily work. Some rooms that do get on a person's — shall I say nerves because the patients — no, we have different patients, the same as different people. There is some that are sicker, others are a little touchier, you've got to remember all these things as you go along. Now you've got to concentrate too. Yes I've done this . . .

Q.: "Your work does require some planning in order to get it done?"

A.: "It does require planning and it does require what shall we say, studying of the patients. When they are up and about if you do knock a chair or something it isn't as bad as when they are really ill and that you know that if you knock that chair they're going to jump up. You know you have to — you've got to get to know your patients and that takes thinking . . . You've got to think of each individual patient as you go around the beds, as you go into the rooms. Then you've got to consider the doctors . . ."

10445 The evidence established that the caretakers spend approximately 50 per cent of their time wet and dry mopping as aforesaid, 30 per cent of their time on garbage detail and 20 per cent of their time on extra duties such as washing the walls and ceilings down to where the housekeeping aides have washed, washing the upper panes of the windows, both inside and outside, removing and replacing drapes, stripping and waxing the floors, changing mattresses and dusting pipes. (see pages 336, 368, 369, 370 and 376 of the transcript).

10446 Under examination Guenther Petrowski said (page 216 of the transcript):

Q.: "Are you able to tell us which job description requires more effort to perform? That of a caretaker or that or a housekeeping aide?"

A.: "Well definitely that of a caretaker."

Q.: "Is it a significant amount of more effort?"

A.: "In my opinion, yes."

Q.: ". . . why is there a significant amount of more effort in the caretaking position than that in the housekeeping aide position?"

A.: "Well the nature of their equipment and the type of duties they have . . ."

Q.: "What particularly about their equipment first?"

A.: "Well to begin with, like the machines and the size of the mops and the carts . . . And also by the nature of their jobs."

Q.: "How do you mean?"

A.: "Well using the heavier mop and hand mopping, wall washing, window cleaning, taking the windows out of their frames. High dusting of pipes, extending their arms above heads and using an extension pole."

10447 In his statement Guenther Petrowski referred to the type of duties assigned to the caretakers and those are the same as those specified as extra duties by the caretakers in their evidence. As stated earlier in this decision, both the housekeeping aides and the caretakers spend approximately 20 per cent of their time performing extra duties. The extra duties performed by the 2 job classifications and the number of times they are performed have been previously dealt with. The amount of time spent on those extra duties is minimal.

10448 Also, as indicated earlier in this decision it would appear that the following equipment used by housekeeping aides are the vacuum cleaner, 3 pad scrubber and 1 pad scrubber but that they never use the big scrubber which is a heavy piece of equipment. However, according to the testimony of Guenther Petrowski and the 3 caretakers at this hearing, even though 10 of the 12 caretakers employed at the Pasqua Hospital know how to operate this machine it is primarily handled by Mike Radd (at page 222 of the transcript). According to the evidence, 1 caretaker as part of his daily routine goes to every floor and utilizes the big scrubber in the hallways while the caretaker assigned to that particular area moves any chairs or objects out of the way. (pages 372 and 373 of the transcript).

10449 It should also be pointed out that 50 per cent of the time of both the housekeeping aides and caretakers is spent wet and dry mopping and although Guenther Petrowski is of the opinion that the heavier mop is significantly more difficult to use, the caretakers who testified, testified that the larger mop was not significantly harder to use.

10450 It appears therefore from the evidence that some extra physical effort is required of the caretakers when performing duties such as cleaning windows, ceilings and dusting pipes. On the other hand it appears some extra mental effort is required of the aides when they are working in the patients' rooms.

10451 As mentioned earlier in this decision the Commission heard evidence with respect to the Co-operative Wage Study, which study concluded there was a 20 point difference in effort between the 2 job classifications. While the Commission can and should take into account a study such as this, it is incumbent on the Commission to reach its decision based on the evidence presented to it at the hearing in light of section 17 of *The Labour Standards Act*. There is no evidence before the Commission that section 17 was considered in the preparation of the Co-operative Wage Study and the fact that the Co-operative Wage Study was completed does not allow the Commission to abdicate its responsibility to make a decision or to defer to the decision of the committee responsible for the Co-operative Wage Study. The equal pay standard is not dependent on classifications, point values, or job titles, but

rather on actual job requirements and performance. Job content is the controlling factor. The Act contains its own definition of equal work which is independent of any classification system. Thus, although the point values allocated to 2 jobs may add up to unequal totals, it does not necessarily follow that the work being performed in such jobs is inequal when the statutory tests of the equal pay standard are applied.

10452 It is well established in Canada, and in other countries with similar legislation to the equal pay provision the Commission is enforcing, that "*similar work*" does not mean "*identical work*". There must be a substantial similarity between the jobs and the fact finder must make that assessment based on an objective basis. In the *Schiltz* decision (*supra*) the Saskatchewan Human Rights Commission reviewed the case law in Canada and the United States of America on these 2 points.

10453 With respect to the question of effort, a finding, that some employees must expend greater effort for a portion of their time than other employees, does not, of itself, establish that the 2 jobs do not constitute equal work under our laws. That fact that the caretakers spend some of their time exerting greater physical strength does not in our opinion justify a differential where the continuation by the aides of their regular duties involves an equal or perhaps a greater amount of effort, although of a different kind than exercised by the caretakers.

10454 The Commission heard evidence as to whether the Respondent hospital was activated by motives of sex discrimination. All those appearing on behalf of the Respondent expressed their view that women would be as acceptable as men for the caretaking position. Section 17 of *The Labour Standards Act* contains its own definition of the "*discrimination*" which the equal pay laws are designed to prevent and that is

> "discriminate . . . by paying a female employee at a rate of pay less than the rate of pay paid to a male employee or vice versa . . . for similar work performed in the same establishment, the performance of which requires similar skill, effort and responsibility, and which is performed under similar working conditions, except where such payment is made pursuant to a seniority system or merit system."

10455 The Commission has made it clear in other decisions, *Department of Labour v. Board of Yorkton Regional High School* dated March 30, 1976, for example, that it is not necessary to define present or past intent to discriminate on the ground of sex in order for there to be a violation of the equal pay laws.

10456 It is clear that the legislation makes it illegal to provide less remuneration to persons of one sex doing similar work in the same establishment, which require similar skill, effort and responsibility to persons of the opposite sex unless the reason for this difference is based on a merit or seniority system. No other reason for the difference would be acceptable under the pay laws of Saskatchewan. We are unanimous in our opinion that Pasqua Hospital had no intention to discriminate on the basis of sex between the 2 groups of employees, however, this lack of intent simply is not a relevant factor to be taken into consideration in determining whether or not the equal pay laws have been infringed or breached

> "It is the discriminatory result which is prohibited and not the discriminatory intent."[1]

10457 We find that the Pasqua Hospital has been in violation of section 17 of *The Labour Standards Act* by paying female housekeeping aides at a rate of pay less than paid to male caretakers employed at the hospital.

10458 In most equal pay cases the order would be dated back to the point in time when the violation of the equal pay provisions first occurred. In this case because of the Letter of Understanding from Lynn Pearson, Director of the Women's Division, that because of the Co-operative Wage Study the Division would not go back beyond the date of the complaint, this Commission will order back pay to the housekeeping aides employed at Pasqua Hospital from the date the complaints were filed with the Department of Labour.

Helen Hnatyshyn
William Gilbey
Louise Simard, Chairperson

[1] Hon. Justice D.C. McDonald, S.C. of Alberta, A.G. for the Province of Alberta and Doreen Gares et al and Board of Governors of Royal Alexandra Hospital, and the Alberta Hospital Association, C.U.P.E. Local 41 and Board of Industrial Relations for the Province of Alberta and the Alberta Association of Registered Nursing Orderlies — unreported judgment dated January 27, 1976. [Editor's note: see *Re Attorney General for Alberta and Gares et al* (1976), 67 D.L.R. 635 (Alta. S.C.)]

CANADIAN HUMAN RIGHTS REPORTER

SASKATCHEWAN / EMPLOYMENT / EQUAL PAY
Court of Queen's Bench
Pasqua Hospital v. Beatrice Harmatiuk

Volume 4, Decision 318 Paragraphs 14112 - 14139 November 1983

Court of Queen's Bench Descision under the LABOUR STANDARDS ACT

Pasqua Hospital, The Board of Governors of the South Saskatchewan Hospital Centre
Appellant

v.

Beatrice Harmatiuk
Respondent

Date: June 30, 1983

Place: Regina, Saskatchewan

Before: Scheibel, J.

Appearances by: M. O. Laprairie, Counsel for Pasqua Hospital
W. N. Lawton, Counsel for Beatrice Harmatiuk

Summary: *The Court of Queen's Bench rejects an appeal by Pasqua Hospital from a decision of the Saskatchewan Human Rights Commission. The Commission found that the Hospital violated provincial equal pay provisions by paying female housekeeping aids less than male caretakers for performing similar work.*

The Hospital appealed on the grounds that the Commission erred in law when it found that the work performed by the men and women was substantially similar and when it found that an intention to discriminate was not necessary to finding that a violation of equal pay provisions had occurred.

The Court finds that determining whether similar work is performed is a matter of fact, not law and is therefore not subject to review by the Court. In addition, the Court finds that Section 17(1) of the Saskatchewan Labour Standards Act creates an offence of absolute liability. Proving intention is not required.

The Court upholds the Commission's decision and dismisses the appeal.

14112 This is an appeal of the decision of the Saskatchewan Human Rights Commission (the "Commission") wherein the Commission found the appellant, Pasqua Hospital, to have been in violation of ss. 17(1) of *The Labour Standards Act*, R.S.S. 1978, c. L-1. Subsection 17(1) provides as follows:

> "No employer or person acting on behalf of an employer shall discriminate between his male and female employees by paying a female employee at a rate of pay less than the rate of pay paid to a male employee, or vice versa, where such employees are employed by him for similar work which is performed in the same establishment under similar working conditions and the performance of which requires similar skill, effort and responsibility, except where such payment is made pursuant to a seniority system or merit system."

14113 The grounds of appeal are as follows:

1. That the said Commission erred in law in finding as it did, that the housekeeping aids and caretakers are employed by the appellant to do similar work, the performance of which requires similar effort within the meaning of s. 17 (1) of *The Labour Standards Act* when the evidence presented to the said Commission does not support this finding as a rational and reasonable conclusion arising from the whole of the evidence;
2. That the said Commission erred in law in interpreting s. 27 of *The Labour Standards Act* and in particular interpreting the word "discriminate" as it appears in the said section when the said Commission found the appellant in violation of the said section despite the concurrent finding that the appellant had no intention to discriminate.

14114 Both grounds of appeal allege error of law. The right to appeal a decision of the Commission is limited to questions of law by s. 32 of *The Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1.

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14115 For a violation of ss. 17(1) of *The Labour Standards Act* ("the Act") to occur, several elements must be established. However, it was agreed by both parties that the only element in issue before the commission was whether there was similar work, the performance of which required similar effort, as required by ss. 17(1).

14116 In respect to the issue of similar effort, the Commission, made the following finding:

> "It appears therefore from the evidence that some extra physical effort is required of the caretakers when performing duties such as cleaning windows, ceilings and dusting pipes. On the other hand it appears some extra mental effort is required of the aids when they are working in the patients' rooms."

The Commission then concluded that:

> "With respect to the question of effort, a finding, that some employees must expend greater effort for a portion of their time than other employees, does not, of itself, establish that the 2 jobs do not constitute equal work under our laws. That fact that the caretakers spend some of their time exerting greater physical strength does not in our opinion justify a differential where the continuation by the aids of their regular duties involves an equal or perhaps a greater amount of effort, although of a different kind than exercised by the caretakers."

14117 The first grounds of appeal alleges that the Commission erred in law in reaching this conclusion. The appellant does not contend that the determination of this issue is a question of law. The appellant's position is that the Commission has erred in law by making a decision that is not a rational and reasonable conclusion based on the evidence as a whole. More specifically, the appellant's position is that there was no evidence adduced which compared the degree of mental effort extended by the housekeeping aids to the degree of physical effort extended by the caretakers, and as a result the Commission had no evidential basis on which to conclude that the extra mental effort was equal to the extra physical effort and that the performance of each job required similar effort.

14118 In order to deal with the first ground of appeal, it is necessary to understand the nature of the process by which the Commission must determine whether there has been a violation of the Act. The Commission must first establish the factual situation, and then determine whether the factual situation is within the scope of the Act. (For a detailed discussion of this process, see *de Smith's Judicial Review of Administrative Action*, 4th ed., London: Stevens & Sons, 1980, at pp. 126-39).

14119 The factual situation is established by hearing evidence. In this case the Commission spent six days hearing evidence. From the evidence the Commission must then establish what has been called the primary facts. Denning, L.J. (as he then was) provides a useful definition of primary facts in *British Launderers' Research Association v. Hendon Rating Authority*, [1949] 1 K.B. 462 at p. 474:

> *"Primary facts are facts which are observed by witnesses and proved by oral testimony or facts proved by the production of a things itself, such as original documents. Their determination is essentially a question of fact for the tribunal of fact, and the only question of law that can arise on them is whether there was any evidence to support the finding."*
>
> (emphasis added)

14120 The conclusions of the Commission as to the factual situation that existed, need not be based entirely on the primary facts; it may be necessary to draw inferences from the primary facts. The drawing of inferences may be a matter of law or a matter of fact. This depends on the nature of the inference. Again I refer to Lord Denning's speech in the *British Launderers'* case, supra:

> "The conclusions from primary facts are, however, inferences deduced by a process of reasoning from them. If, and in so far as, those conclusions can as well be drawn by a layman (properly instructed on the law) as by a lawyer, they are conclusions of fact for the tribunal of fact: and the only questions of law which can arise on them are whether there was a proper direction in point of law; and whether the conclusion is one which could reasonably be drawn from the primary facts: see *Bracegirdle v. Oxley* ([1947] K.B. 349). If, and in so far, however, as the correct conclusion to be drawn from primary facts requires, for its correctness, determination by a trained lawyer — as, for instance, because it involves the interpretation of documents or because the law and the facts cannot be separated, or because the law on the point cannot properly be understood or applied except by a trained lawyer — the conclusion is a conclusion of law on which an appellate tribunal is as competent to form an opinion as the tribunal of the first instance."

14121 Applying this analysis to this appeal, it becomes apparent that there is no merit to the first ground of appeal.

14122 The Commission had an abundance of evidence before it. From this evidence it established certain primary facts. The Commission spent some 11 pages in its written decision reviewing its findings in this respect. The Commission made findings as to the daily routine and duties of each position, the type of equipment used by each, the amount of time spent in performing the different duties and the area of the hospital in which each duty was performed. The Commission then concluded that:

> "It appears therefore from the evidence that some extra physical effort is required of the caretakers when performing duties such as cleaning windows, ceilings and dusting pipes. On the other hand it appears some extra mental effort is required of the aids when they are working in the patients' rooms."

14123 The Commission has not erred in law in reaching these conclusions, even if it is assumed that the Commission heard no direct evidence as to the mental effort required of the respective positions. (In fact the transcript reveals that there was some testimony dealing with mental effort.) The degree of mental effort involved in the respective positions can quite properly be inferred from the primary facts which the Commission established. An error of law is established only if these inferences are unsupported by any of the primary facts.

14124 This point is made in *de Smith's Judicial Review of Administrative Action*, supra, at page 133 as follows:

> "A tribunal which has made a finding of fact wholly unsupported by evidence, or which has drawn an inference wholly unsupported by any of the primary facts found by it, will be held to have erred in point of law."

14125 That is not the situation in this case. I find that there is ample evidence to support the conclusions reached by the Commission, and that the inferences drawn in arriving at these conclusions are matters of fact. The Commission is in the best position to make such inferences; they cannot be interfered with on an appeal that is limited to questions of law.

14126 The further question of whether the factual situation as found by the Commission is within the scope of the term "similar effort" as used in s. 17(1) of the Act, is a question of application.

14127 As has been recently pointed out by Chief Justice Bayda in *Peters v. University Hospital Board*, (Sask.C.A., May 17, 1983, unreported)[1], a question of application may be either one of law or fact. At page 16 of is judgment, Bayda, C.J. states:

> "The answer to the question whether a particular set of facts falls within the scope or purview of a term in a statute is one of fact or law depends largely upon the term itself. Where the term is simple and ordinary, and, as it were, can be reduced no further in simplicity or definition, and which to define would require words that themselves need definition, the question is one of fact. The terms 'resident' and 'insulting' are good examples. Where the term gives rise to some complexity, or has acquired a special or technical meaning, the question is likely, but not always one of law."

14128 I am of the opinion that the term "similar effort" is simple and ordinary, and the determination of whether a particular factual situation comes within the scope of the term "similar effort" is a question of fact.

14129 I find support for this conclusion in another recent Sask. C.A. decision: *Solar Sales Ltd. v. The Dept. of Labour,* (June 9, 1983), unreported).[2]

14130 I turn now to the second ground of appeal. The appellant makes two alternative submissions with respect to the second ground of appeal. The first is that an intent to discriminate is a necessary element in establishing a violation of ss. 17(1) of the Act. The second is that ss. 17(1) creates a strict liability offence in which it is open to the appellant to avoid liability by proving that he took all reasonable care. For reasons which will become obvious I will deal with the second submission first.

14131 The second submission is based on the threefold classification of offences set out by the Supreme Court of Canada in *Regina v. Sault Ste. Marie* (1978), 85 D.L.R. (3d) 161. In that case Dickson, J., speaking for the court, expressed the opinion that three categories of offences should be recognized: *mens rea* offences, strict liability offences, and absolute liability offences. *Mens rea* offences are offences which require that some positive state of mind such as intent, knowledge, or recklessness must be proved by the prosecution. Strict liability offences are offences in which the doing of the prohibited act *prima facie* imports the offence, but it is open to the accused to avoid liability by proving that he took all reasonable care. Absolute liability offences are offences in which the doing of the prohibited act conclusively establishes the offence.

14132 Mr. Justice Dickson provides some guidance in determining which of the three categories a particular offence should fall into. He states at p. 182:

> "Offences which are criminal in the true sense fall in the first category. Public welfare offences would, *prima facie*, be in the second category. They are not subject to the presumption of full *mens rea*. An offence of this type would fall in the first category only if such words as 'wilfully,' 'with intent,' 'knowingly,' or 'intentionally' are contained in the statutory provision creating the offence. On the other hand, the principle that punishment should in general not be inflicted on those without fault applies. Offences of absolute liability would be those in respect of which the Legislature had made it clear that guilt would follow proof merely of the proscribed act. The over-all regulatory pattern adopted by the Legislature, the subject-matter of the legislation, the importance of the penalty, and the precision of the language used will be primary considerations in determining whether the offence falls into the third category."

14133 The unequal pay provisions of s. 17 of *The Labour Standards Act* create what Dickson, J. refers to as a public welfare offence. As such there is a presumption that the offence is one of strict liability. An examination of the considerations suggested by Dickson, J. is necessary to determine if the presumption is displaced in this particular case.

14134 Although there is a possibility of penal sanctions for a violation of ss. 17(1) — s. 85 of the Act provides that a person who violates provisions of the Act is liable on summary convictions to a fine of not more than $200.00 for the first offence — the overall regulatory pattern adopted by the legislature is clearly aimed at affecting settlement of complaints, and providing compensation to persons suffering a loss as a result of a violation of the Act.

14135 The subject matter of the legislation is of fundamental importance. The legislation is aimed at creating an equality between the sexes in the work place. If an employer could avoid liability by establishing that he took all reasonable care to avoid discriminating between male and female employees, or that he did not intend to discriminate, then the fact of discrimination would continue. The legislation is aimed at ending discrimination in fact, it is not concerned with the culpability of the employer.

14136 Finally, the language used is clear. There is no indication in the language that a mental element is a constituant element of a violation of ss. 17(1). Subsection 17(1) provides only two possible justifications for unequal pay for similar work; unequal pay is justified only where it is made pursuant to a seniority system or a merit system.

14137 Having regard to these considerations, I am satisfied that the presumption is displaced in this particular case. Subsection 17(1) of *The Labour Standards Act* creates an absolute liability offence.

14138 Having concluded this it becomes unnecessary to deal with the first submission. An absolute liability offence does not require proof of intention.

14139 I find no error of law in the decision of the Commission and accordingly the appeal is dismissed with costs to the respondent.

[1] Editor's note: Now reported (1983) 4 C.H.R.R., D/1464.
[2] Editor's note: Now reported (1983) 4 C.H.R.R. D/1605.

CANADIAN HUMAN RIGHTS REPORTER

SASKATCHEWAN / EMPLOYMENT / EQUAL PAY
Saskatchewan Human Rights Commission
Jane Bublish v. Saskatchewan Union of Nurses

Volume 4, Decision 254 Paragraphs 11015 - 11034 March, 1983

Saskatchewan Human Rights Commission Decision
under the
LABOUR STANDARDS ACT

Jane Bublish

Complainant

v.

Saskatchewan Union of Nurses

Respondent

Date: February 9, 1983

Place: Regina, Saskatchewan

Before: Louise Simard, Gordon DeMarsh, Kayla Hock

Summary: *The Saskatchewan Human Rights Commission dismisses the complaint in which Jane Bublish alleged that she was paid at a lesser rate of pay than a man performing a similar job.*

The positions in question are employment relations officer positions with the Saskatchewan Union of Nurses. The Commission finds that the positions are not sufficiently similar to warrant a ruling that the equal pay provisions of the Labour Standards Act were contravened, since the position held by the complainant entailed servicing locals of the Union while the position held by the man entailed developing and implementing a formal education program for the members of the Union.

11015 Jane Bublish, the complainant, says that her employer, the Saskatchewan Union of Nurses violated *The Labour Standards Act* by paying a male employment relations officer a higher starting rate of pay than the starting rate of pay paid to her. Subsection 17(1) of *The Labour Standards Act* provides as follows:

> "No employer or person acting on behalf of an employer shall discriminate between his male and female employees by paying a female employee a rate of pay less than the rate of pay paid to a male employee, or *vice versa*, where such employees are employed by him for similar work which is performed in the same establishment under similar working conditions and the performance of which requires similar skill, effort and responsibility, except where such payment is made pursuant to a seniority system or merit system."

11016 Jane Bublish filed a complaint in 1980, with the Women's Division of the Department of Labour with respect to the aforementioned disparity between the starting rate of pay paid to Larry LeMoal and herself. In November of 1980 Eleanor Nicholson, an investigator with the Department of

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Labour, inquired into the said complaint. She concluded that the work performed by the two employment relations officers was "similar work" within the meaning of section 17(1) of *The Labour Standards Act* and that the Saskatchewan Union of Nurses was in violation of the said section. When Eleanor Nicholson was unable to effect a settlement of the matter, the Saskatchewan Human Rights Commission was asked to conduct a formal inquiry.

11017 The Commission heard evidence for a total of 3 days. We heard from the said investigator Eleanor Nicholson; from 3 women who are or were employed as employment relations officers by the Saskatchewan Union of Nurses; from one man who is employed as an employment relations officer by the Saskatchewan Union of Nurses; and from Al Shalansky, Chief Executive Officer for the Saskatchewan Union of Nurses.

11018 The evidence established that both Jane Bublish and Larry LeMoal were employed by the Saskatchewan Union of Nurses as employment relations officers and that their work was performed in a similar establishment under similar working conditions. Jane Bublish worked out of the Saskatchewan Union of Nurses Sub Office in Saskatoon while Larry LeMoal was located at the Saskatchewan Union of Nurses Office in Regina. Both of them worked in an office and were required to do a lot of travelling in their job. According to the testimony of the witnesses the effort involved in performing the job of an employment relations officer is primarily mental rather than physical effort and this Board heard evidence as to the experience and skill Jane Bublish and Larry LeMoal had in the area of labour relations. This Board must therefore determine whether the work performed by Jane Bublish and the work performed by Larry LeMoal required similar skill, effort and responsibility within the meaning of the said subsection 17(1) of *The Labour Standards Act* and if the work was similar whether the difference in starting pay for Jane Bublish and Larry LeMoal was made pursuant to a seniority or merit system. If a seniority or merit system exists it is a defence to the said subsection 17(1).

11019 Jane Bublish testified on page 23 of the transcript that the underlying top priority of an employment relations officer's job is to serve the members in his or her local. According to the employment relations officers who testified before this Board servicing the locals entails setting up locals, assisting in the grievance procedure, negotiating collective agreements, answering questions on the interpretation of the collective agreements, assisting in union and management meetings, and appearing before the Labour Relations Board on certification applications. Education forms a substantial part of an employment relations officer's job but it is ordinarily of an informal nature rather than formal. Under examination Jane Bublish said: (p. 32-33)

> "Q. You've indicated that the work you're doing is primarily educational, is that correct?
>
> A. Yes.
>
> "Q. But your educational approach is informal, rather than formal.
>
> A. Well, informal in the — with respect to the fact that I don't actually set something up, but when — like the teaching is continuous and ongoing . . ."

11020 Fran Eldridge an employment relations officer testified that prior to Larry LeMoal being hired the Saskatchewan Union of Nurses was not operating an ongoing formalized education program for its members (at pages 234-235 of the transcript). The employment relations officers testified that whenever they assisted a member or officer of the union they would attempt to accomplish two things, namely:

1. to solve the problem, and
2. to educate the member or officer with respect to his or her rights.

11021 Larry LeMoal testified (at page 306 of the transcript) that his job as employment relations officer consisted of two components, namely:

1. to develop and implement a formal education program for the Saskatchewan Union of Nurses, and
2. to service the locals assigned to him,

the former taking approximately 60% of his time and the latter taking approximately 40% of his time.

11022 According to a letter dated October 1, 1980, written by Al Shalansky, offering Larry LeMoal a job as an employment relations officer his ". . . primary responsibility shall be that of implementing and conducting an education program for the union's members . . ." (Exhibit R-10). The Saskatchewan Union of Nurses originally wanted someone to establish a formal education program for them. In the meantime the job of employment relations officer was advertised, and Larry LeMoal had wanted full time employment as opposed to the part time employment being offered to him to establish a formal education program. He therefore applied for the job of employment relations officer and was hired as such but was given the primary responsibility of implementing and conducting a formal education program. In order to hire Larry LeMoal it was necessary for them to hire him at a salary greater than that paid to the female employment relations officers when they commenced working. The employer now argues that because of Larry LeMoal's education responsibilities the jobs performed by the male employment relations officer and the female employment relations officers were not similar in nature.

11023 During the course of his employment Larry LeMoal established four educational programs for the members of the Saskatchewan Union of Nurses. He testified that the seminars ranged from one day to one week depending on the particular program involved. He also testified that he is responsible for developing and implementing the programs which included such things as selecting the topics to be taught at the seminars, obtaining instructors and reporting to the Education Committee. The three women employment relations officers all testified that except when they were asked by Larry LeMoal to lecture at one of the seminars, they did not have any involvement or responsibilities with respect to the formal education program.

11024 Under examination Larry LeMoal stated his job was different from the other employment relations officers since he spends approximately 3 days a week on education and approximately 2 days a week on servicing the locals (at page 282 of the transcript). Larry LeMoal testified to the following: (at page 279 of the transcript):

> "Q. Well is your job different from the other employment relations officers?
>
> A. Well it is different to the extent of how I spend my time. And the question of long term planning and the

> question of structured educated versus servicing responsibilities."

11025 Jane Bublish gave evidence that she had been assigned 42 locals to service (at page 36 of the transcript). Nancy Davis testified (at page 55 of the transcript) that she was responsible for servicing 35 locals and Fran Eldridge testified that her job entailed servicing 54 locals (at page 203 of the transcript), while the geographical area assigned to Larry LeMoal to service as an employment relations officer consisted of 6 locals only (at page 259 of the transcript).

11026 The equal pay standard contained in subsection 17(1) of *The Labour Standards Act* is not dependent on the actual job requirements and duties performed. Although, it is well established in Canada that "similar work" does not mean "identical work", the complainant must establish similarities between the jobs that lead the fact finder to the objective conclusion that the female applicant is being paid an unequal wage for a similar job. Authority for this principle can be found in *Schiltz* v. *Solar Sales Ltd.* (1981) 2 C.H.R.R. 477 (Saskatchewan Human Rights Commission).

11027 "Similar" means substantially similar and in this case the Board must primarily consider the amount of time spent in the performance of duties, the degree of difference in skill, effort and responsibility required to perform those duties and the respective job requirements in order to determine whether or not the jobs were similar. One asks where does one draw the line? When is it similar enough to be similar work within the meaning of the said subsection 17(1) or conversely when is it sufficiently dissimilar to take it out of the said subsection 17(1). There is no hard and fast rule and there should be no hard and fast rule because one must look at the facts of each case and determine it on its individual merits.

11028 It was argued that Larry LeMoal had more skill in collective bargaining than the other employment relations officers and that Jane Bublish actually did not have the skill required to perform the job for which Larry LeMoal was hired. Jane Bublish had testified (at page 85-87 of the transcript) that she had originally resigned from the job of employment relations officer because she did not have sufficient knowledge in labour relations. When she was subsequently rehired she had little further training in labour relations (at page 100 of the transcript).

11029 It was also argued that the employment of Larry LeMoal as an employment relations officer was done as a matter of convenience only and not because it was intended that he carry on the same duties as other employment relations officers.

11030 In determining whether or not the job requires similar skill, one looks objectively at the skill required to perform the job and not at the individual personal skills of the occupants of the position. However, if a merit system is established then one would consider the individual's personal skills. But unless a merit system can be established Larry LeMoal's or Jane Bublish's personal skills are relevant to this hearing only to the extent it may corroborate the contention of the employer that in hiring Larry LeMoal what they really wanted was to hire someone competent to establish a formal education program.

11031 As to whether or not there was a merit system Al Shalansky testified that the hiring policy of the Board of Directors of the Saskatchewan Union of Nurses in 1977 was that all employment relations officers should be registered nurses and should be paid the same rate of pay as a general duty nurse. In 1980 the employment relations officers requested that they meet with management to clarify their status. At the negotiating table, all of the employment relations officers were present and suggested some recognition be given to past experience, which suggestion management refused. Management on the following day made a counter proposal that management would be prepared to recognize recent directly related experience to a limited extent. However, this proposal was not accepted by the employment relations officers, nor was it included in the memorandum of agreement (at pages 44, 45, 402, 403 and 405 of the transcript). According to the testimony of the employment relations officers they were never notified that the proposal made by management at the negotiating table with respect to experience was in fact a new policy of the Board of Directors of the Saskatchewan Union of Nurses. Fran Eldridge testified (at page 202 of the transcript) that even though she had been a member of the negotiating team for the Saskatchewan Union of Nurses it was her understanding even after the negotiations had been completed that anybody starting as an employment relations officer had to start at the trainee rate regardless of their previous experience.

11032 In order for the employer to demonstrate that a merit or seniority system has been instituted and is valid and binding such that it falls within the said subsection 17(1), the employer must demonstrate:

1. that the system is an established one;
2. that its essential terms and conditions have been communicated to the affected employees;
3. it must not be based upon sex (see *Equal Employment Opportunity Commission, Appellant* v. *Aetna Insurance Co.* 22 E.P.D. at page 15575).

11033 The evidence tendered at the hearing does not support the contention that there was in existence a merit or seniority system justifying the hiring of Larry LeMoal at a higher salary than a female employment relations officer. The female employment relations officers testified that the alleged merit system had not been communicated to them.

11034 However, this Board is not satisfied that the complainant has established that the work requires similar skill, effort and responsibility and finds that it was intended that Larry LeMoal primarily perform the job of developing and implementing a formal educational program and that he actually spent the majority of his time in this pursuit; and notwithstanding that he spent some of his time performing a similar job to that of a female employment relations officer the whole job performed by him required different skill and responsibility such that it was not similar within the meaning of the said sub-section 17(1).

THE COMPLAINT IS THEREFORE DISMISSED.

Kayla Hock
Gordon DeMarsh
R.M. Louise Simard, Chairperson