HUMAN RIGHTS CODE

GAY ALLIANCE TOWARD EQUALITY
AGAINST THE VANCOUVER SUN

JUDGMENT

Details of Complaint

Section 3 of the Human Rights Code prohibits discrimination 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 discrimination. On November 14, 1974 Maurice Flood filed a complaint under the Human Rights Code on behalf of the Gay Alliance Toward Equality alleging that the Vancouver Sun had refused to publish the following advertisement submitted by the Gay Alliance Toward Equality:

Subs. To GAY TIDE, gay lib
paper $1.00 for 6 issues.
2146 Yew St., Vancouver

It was not possible to settle the complaint and the case was referred by the then Minister of Labour to a Board of Inquiry. A hearing was held on February 28, 1975 before a Board of Inquiry consisting of Joe Wood, Rod Germaine, Robert Moore, John Gebbie and Dorothy Smith. The Judgement of J. Wood in which Rod Germaine, Robert Moore and John Gebbie concurred, is summarized below. Dorothy Smith agreed with the conclusion of this Judgment but did not agree with the interpretation made in the Judgment concerning the reasons given by the Respondent for their decision not to publish the advertisement for the Gay Alliance Toward Equality.

Human Rights Code is not limited to specific more notorious forms of discrimination listed in the Code, but is wide in scope.

SUMMARY OF JUDGMENT

"The passage of the Human Rights Code by the Legislature of British Columbia in 1973 heralded a new era in the regulation of conduct between parties to the various kinds of commercial activities described therein. Sections 2 through 10 prohibit various forms of conduct which civilized persons of good will have long regarded as discriminatory. Each of the sections describe in a very broad general way a form of discrimination which is now prohibited in this Province. Needless to say no attempt has been made to exhaustively define all types of discrimination. Such an effort would necessarily have resulted in narrowing the effect of the legislation.

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Certain of the sections make specific reference to the more notorious form: of discriminatory conduct with which our society is burdened such as those based on race, sex, religion, colour, ancestry, and place of origin. These references, however, for the most part appear in a context which is clearly designed to be illustrative and not determinative of the broad scope of the prohibition with which they are preceded.

Human Rights Code provides powerful declaration against discrimination and must be accorded liberal and broad interpretation.

"The legislation is to be construed as remedial in nature and must therefore be accorded a liberal and broad interpretation. Bearing this in mind it is clear that Section 3 (1) of the Code provides a very powerful declaration against discrimination in the area of services or facilities which are customarily made available to the public.

Classified advertising section of Vancouver Sun -- a facility available to the public.

"The evidence clearly establishes that the Vancouver Sun, a subsidiary of Pacific Press Ltd. customarily makes available to members of the public the facilities of its classified advertising section. The position of the Vancouver Sun with respect to this particular form of advertising facility is almost monopolistic in nature. The evidence established a daily circulation in the neighbourhood of two hundred and fifty thousand copies with its closest rival, (excluding the Vancouver Province which is another subsidiary of Pacific Press Ltd.) the New Westminster Columbian, having a circulation of less than 1/8th that size. It has Province wide circulation and in its last fiscal year grossed something over thirty-four million dollars revenue from its classified advertising alone.

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Newspaper has right to set standards.

"Unquestionably any facility such as the Vancouver Sun must employ certain standards when accepting advertisements from the public. The question to be dealt with here is not the necessity of imposing standards upon such a facility, but the reasonableness of a particular standard which, it is asserted, has given rise to the denial under review here.

Argument that the advertisement would offend some subscribers has little merit.

"The Respondent was worried or afraid that the advertisement in question would offend some of its subscribers. When one considers this rationalization for a moment it appears to bear very little merit. The notion that the content of a newspaper, whether it be advertising or editorial, be governed by this standard is ludicrous. With an admitted Province wide circulation of approximately two hundred and fifty thousand copies daily, strict adherence to this standard would result in almost nothing being published. Indeed, Mr. Toogood admitted that complaints from subscribers would not necessarily cause the paper to alter or remove a given advertisement depending on whether or not they (the individual components of management) thought that they were right in publishing the item in question.

Inconsistency in policy

"In any event the apparent policy inconsistency between the Editorial Department on the one hand and the Advertising Department on the other would tend to belie the suggestion that the management of the Respondent newspaper is truly concerned about offending some of its subscribers. The evidence was clear that the Editorial Department has quite a different policy with respect to homosexual content. Articles of an editorial as well as a reporting nature containing references to homosexuals or homosexuality and general discussion about the subject matter frequently appear in the pages of the Respondent newspaper.

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The notion that a subscriber or reader who would not be offended with such written material would take umbrage with an advertisement such as that tendered by the Complainant herein seems to the Board to be a little far fetched. Mr. Toogood conceded that the advertisement in issue here was not, on its face, lascivious, obscene or suggestive. Nothing in the advertisement advocates homosexuality or suggests that the Vancouver Sun advocates or encourages homosexuality.

"While on the subject of inconsistencies it is perhaps pertinent to point out that the Advertising Department of the Respondent does not always appear to enforce its policy of protecting its subscribers and readers from material that might possibly offend some of them. In the October 28, 1974 edition of the Respondent newspaper, a number of advertisements appear dealing with theatres and movie houses with warnings of the British Columbia Film Classification Director to the effect that the films advertised contain brutality, coarse language and are completely concerned with sex. One such advertisement warns of an orgy of sex and violence. One advertisement contains warnings with respect to "group sex and lesbianism" and "male nudity and sex". These advertisements in addition contained illustrations of pictures suggestive of the content warned of.

Income

"These movie advertisements, of course, represent a rather more valuable source of revenue to the Respondent, the smallest of them, on the evidence of Mr. Toogood, probably costing something in the neighbourhood of $50.00 a day. By contrast the advertisement under consideration here would have netted the Respondent approximately $15.00 for the four days that it was intended to be displayed. Without being too cynical one cannot help but wonder how the desire of the Respondent not to offend some of its subscribers in respect of the particular advertisement under review here might have been affected had the Complainant sought to have inserted an advertisement of the general size and cost represented by those advertisements in the theatre section already referred to.

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Difficult to understand the advertisement itself can be offensive to public decency.

"It is difficult to understand how the advertisement (for Gay Tide) itself can be offensive to public decency when it does nothing more than to purport to invite those who are interested to subscribe to the publication in question. Nothing more confronts the eyes of the reader of this advertisement than the suggestion that if he is interested in obtaining and digesting the content of a copy of the publication in question he may send his money to a specified address.

Duty to protect morals of the community.

"One reason offered to justify the Respondent's policy against advertisements dealing with or relating to homosexuality, was that the Respondent newspaper had some sort of duty to protect the morals of the community.

Amendment to Criminal Code by Parliament concerning homosexuality.

"It is interesting to note that the Parliament of this country in 1969 (S.C. 1968-69 c. 38, s.7) determined that in so far as sexual practices are concerned those that took place between consenting adults in private were no longer the concern of either the Courts or the law. Interestingly enough Mr. Toogood acknowledged that at the time of this legislative change the policy of the Respondent newspaper was discussed by management and it was decided that that policy would remain unchanged. One would hesitate to draw the conclusion that Parliament, whatever its intrinsic weaknesses may be, deliberately adopted a policy designed to enlarge a threat to society when it passed the amendments to the Criminal Code already referred to. In any event, it appears that our confidence in Parliament can be encouraged by the fact that no dire consequences appear to have resulted from the enactment referred to.

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Standards of public decency.

"Central theme which continually re-appeared in Respondent's testimony was to the effect that the policy in question was predicated on a desire to protect a reasonable standard of public decency and good taste. This is a worthy motive for any policy and the Board accepts this suggestion seriously. The strength of this submission is weakened to some extent, however, by the acknowledgment of Mr. Toogood that in arriving at this policy no guidance was sought or received from those provisions of the Criminal Code which purport to effect the same end. Nor is the Criminal Code the only already established norm of public taste and decency which is ignored by the Respondent. With respect to film or movie advertisements, which have already been the subject of some comment, Mr. Toogood acknowledged that no regard was paid to the Film Classification Director's decision on films.

"The strength of the Respondent's submission that its policy is founded upon a worthy concern for standards of public decency and good taste is further weakened by the frank admission on the part of Mr. Toogood that the publication GAY TIDE itself played no part in the determination made by his department not to publish the advertisement submitted by Mr. Flood. The decision not to accept the advertisement in question was, in fact, made before the advertisement itself was even submitted for publication.

GAY TIDE contains nothing of an improper or illegal nature.

"The Board has carefully reviewed the content of issue No. 1 of Volume II of the GAY TIDE (Exhibit No. 8).

"Applying the tests to be found in some of the relevant Appellate Court decisions dealing with standards of decency and the tests by which that standard is to be judged the Board concluded that there is nothing of an indecent, lascivious, or improper nature contained anywhere in Exhibit 8.

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Apart from a general theme of urging all homosexuals to recognize themselves as a first step towards greater public acceptance, the publication does not purport to advocate homosexual activity for all members of society nor does it purport to counsel heterosexuals to change their way of life. Nothing contained in the paper could be considered illegal. Nothing in the paper advocates nor counsels the commission of an illegal act by any person.

Policy of Sun not based on a concern for any standard of public decency but on bias against homosexuals.

"Had Mr. Toogood or any other member of the Respondent's management at least taken the trouble to consider carefully the content of Exhibit 8, one might have viewed their asserted concern for standards of public decency with somewhat greater approbation.

"Assessing all of the evidence offered on the question of the reasonableness of the cause or motivation behind the Respondent's refusal to publish the Complainant's advertisement the Board comes to the inevitable conclusion that the real reason behind the "policy" of the Respondent was not a concern for any standard of public decency, but was, in fact, the personal bias against homosexuals and homosexuality on the part of various individuals within the management of the Respondent.

Standards of public decency is nevertheless a valid issue.

"Notwithstanding the failure of the Respondent to meet the test of sincerity with respect to its purported concern for standards of public decency, the issue raised is a valid one and presents a dilemma of sorts which must be resolved. On one side of the dilemma is the argument that society must strive to define and protect a strong acceptable standard of public decency. Such a standard, while flexible enough to enable it to respond to the ever changing attitudes displayed by the constitutent elements of our community, must, at the same time, have sufficient rigidity and strength to ensure the protection of those basic concepts of decency and propriety that are fundamental to a civilized way of life.

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"On the other side of the dilemma is the assertion, exemplified by the Code, that society must actively seek to protect those portions of its citizenry, who are different in some way and who thus attract to themselves acts of discrimination that are fostered by pre-conceived and unreasonable judgments or opinions marked by suspicion, fear, intolerance or hatred.

"The answer to the dilemma lies in the willingness of a mature society to recognize and to accept that people are different and to tolerate those differences. By recognizing that homosexuals exist, society is simply acknowledging that there are, in fact, people who do have, what is for them at least, a quite natural ability to relate sexually and emotionally to others of the same sex. By accepting this fact society is having regard to the preponderance of evidence and professional opinion that exists to the effect that homosexuality is not an illness or a mental disorder and that it is a predominant and permanent characteristic of a significant portion of our population - perhaps as much as 10% thereof.

"For centuries most of the so-called progressive societies of the world have forced homosexuals to lead almost schizophrenic lives, denying their true nature to all but their fellows. History has documented some of the sorry occasions when the secret lives of such men or women have been exposed to the hatred, ridicule, contempt and indeed the complete persecution of intolerant populations and institutions of government. Motivated by fear and intolerance such societies, including our own, have proceeded on the assumption that if sufficiently harassed and persecuted the homosexual will either disappear or change his or her errant ways. Surely now in the 1970's our fear of the different or the unusual must be overcome by our confidence in the strength of our social fabric taken as a whole. Acceptance of people for what they are does not require that society at the same time encourage or promote homosexuality or convert those who are not naturally so inclined. To recognize and respect the beliefs or practices of others without necessarily agreeing or sympathizing with them is to show the sort of tolerance that is the mark of a truly civilized and mature society.

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"So it is that we can safely conclude that the acceptable standard of decency which we wish our society to maintain is in no way threatened or challenged by our taking, as a society, a tolerant and mature approach to those homosexuals who are not breaking the law and who seek only the right to live normally in society without fear of persecution or discrimination.

Challenge of jurisdiction and Freedom of the Press

"The Respondent has challenged the jurisdiction of the Board on what would appear to be a constitutional ground. The thrust of this submission is that any interference with the right of a newspaper to control its content is an attempt to abrogate the rights of a free press and is, consequently, outside of the legislative jurisdiction of the Legislature of British Columbia. Reliance is placed upon a portion of the judgment of Chief Justice Duff in the Supreme Court of Canada in Reference re Alberta Statutes (1938) S.C.R. 100.....

....."Any attempt to abrogate this right of public debate or to suppress the traditional forms of the exercise of the right (in public meeting and through the press) would, in our opinion, be incompetent to the legislatures of the provinces, or to the legislature of any one of the provinces, as repugnant to the provisions of the British North America Act, by which the Parliament of Canada is established as the legislative organ of the people of Canada under the Crown, and Dominion legislation enacted pursuant to the legislative authority given by those provisions.....'

"The Act under review by Chief Justice Duff was one of a series passed by the Legislature of Alberta designed to impose a complete new economic order upon the people of that Province and was entitled "An Act To Ensure the Publication of Accurate News and Information." This Bill applied to all newspapers or periodicals published in the Province. Where any such paper had published a statement relating to any policy or activity of the Provincial Government, the proprietor, editor, publisher or manager was bound, when so required by the chairman of the Social Credit Board, to publish in the paper a statement of no greater length and of equal prominence and type with the previous statement.

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The object of the chairman's statement was to be the correction or amplification of the previous statement and it was to be stated that it was published by his direction. The Bill further provided that the proprietor, editor, publisher or manager of a paper would be obliged on requisition of the chairman of the Social Credit Board to divulge the particulars of every source of information upon which any statement appearing in his paper was based. Any contravention of the provisions of the Bill was liable to be punished by money penalties and might entail the suspension of the paper or part of its material.

"One pauses here for a moment to reflect that it would be an extra-ordinary imagination indeed which would purport to draw a parallel between that type of legislation and Section 3 of the Human Rights Code as applied to the advertising policy of a newspaper. The learned Chief Justice having decided that the act in question was ultra vires the Legislature of Alberta, went on to say:

> 'The statute contemplates a parliament working under the influence of public opinion and public discussion. There can be no controversy that such institutions derive their efficacy from the free public discussion of affairs, from criticism and answer and counter-criticism, from attack under policy and administration and defence and counter-attack; from the freest and fullest analysis and examination from every point of view of political proposals. It is axiomatic that the practice of this right of free public discussion of public affairs, not-withstanding its incidental mischiefs, is the breath of life for parliamentary institutions.'

"It can be seen in an instant that the threat to the freedom of the press that the learned Chief Justice is talking about has nothing whatever to do with the sort of regulation or control envisioned by Section 3 of the Code. Indeed, a cogent argument could be made to the effect that the policy of the Respondent is the very sort of policy criticized by implication in the judgment of the learned Chief Justice.

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By refusing to publish the advertisement in question, by denying homosexuals the right to avail themselves of advertising which would assist in the circulation of their newspaper - a newspaper which is devoted purely to a legitimate and informative discussion of homosexuality - the Respondent is in fact restricting the right of homosexuals to their enjoyment of freedom of the press.

"The nature of interference of freedom of the press that was under review by Chief Justice Duff in the case relied upon by the Respondent has absolutely nothing to do with the issue which is before this Board. The argument advanced by the Respondent ignores the very important distinction between legislation designed to control the editorial content of a newspaper on the one hand and that designed to control discriminatory practices in the offering of commercial services to the public on the other. In the wide field of legislative authority that the provinces do have over newspapers is included the authority to require newspapers within the Province of British Columbia to adopt advertising policies that are not in violation of the principles set out in the Human Rights Code.

"When the Board first considered the submissions of the Respondent in respect of this issue it was concerned that judgment on this aspect might have to be reserved until after proper notices had been directed to the Attorney-General of Canada and the Attorney-General of the Province of British Columbia in accordance with the provisions of S. 10 of the Constitutional Questions Determination Act, being R.S.B.C. 1960, c.72. Since in the Board's view there is no merit whatsoever to the constitutional argument raised by the Respondent the Board rules that it is entitled to adjudicate upon this issue without adjourning to notify the various parties designated in Section 10 of the aforementioned Act.

Complaint justified. Board orders Vancouver Sun to - make facilities available; cease and desist; pay $500. costs.

After considering all the evidence offered at the

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hearing and the various arguments put forward by the parties to this complaint, this Board is of the opinion that no reasonable cause existed for the refusal of the Respondent to publish the advertisement submitted by the Complainant. The allegation of the Complainant is therefore justified and accordingly, pursuant to the powers vested in it by Section 17 (2) of the Human Rights Code this Board orders the Respondent to cease contravening Section 3 (1) of the Human Rights Code. Specifically the Board orders the Respondent to make the facilities of its classified advertising section available to the Complainant. It goes without saying that any advertisement submitted by the Complainant to the Respondent for publication must, of necessity, meet those proper standards of decency and legality in so far as its form and substance are concerned.

"The Board further orders the Respondent to refrain from committing the same or any similar contravention of Section 3 (1) of the Code in the future.

"Section 17 (2) (c) of the Code provides for an order of compensation, not exceeding $5,000.00 in such cases where the Board is of the opinion that the person who contravened the Act did so knowingly or with wanton disregard; and that the person discriminated against suffered aggravated damages in respect of his feelings or self-respect.

"This Board has previously ruled that the punitive results of applying this section of the Code should be reserved for those extreme or aggravated cases where the full meaning of the terms "wanton disregard" and "aggravated damages" can be given effect to. In this case the evidence clearly established that the Complainant sought an opportunity to test the effectiveness of the Human Rights legislation and accordingly it would be difficult to find that the Complainant had suffered aggravated damages in respect of its feelings or self-respect. Accordingly, the Board makes no order under this subsection of Section 17.

"Section 17 (3) of the Code entitles the Board to make such order as to costs as it considers appropriate. Attempts were made firstly by the Complainant itself and secondly by the Human Rights Branch to negotiate a settlement

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of this complaint. Had these attempts been successful the necessity of a Board of Inquiry hearing would have been obviated. Under these circumstances there would appear to be no reason why the Board should not order costs against the Respondent. The Board assesses costs in the amount of $500.00 and orders that the Respondent pay that sum forthwith to the Complainant."

Per: "J. Wood"

Chairperson of the Board
of Inquiry

FOR MORE INFORMATION CONTACT: Kathleen Ruff,
Director,
Human Rights Branch
387-6861

IN THE MATTER of the Human Rights Code of British Columbia, S.B.C. 1973, (2nd session) Chapter 119

and

IN THE MATTER of a complaint by the Gay Alliance Toward Equality against the Vancouver Sun made pursuant to S.3 of the Human Rights Code

JUDGMENT OF JOSIAH WOOD, Chairperson, concurred in by Board Members Rod Germaine, Robert Moore and John Gebbie

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Pursuant to Section 16(1) of the Human Rights Code of British Columbia, being Statutes of British Columbia, 1973, (2nd session) Chapter 119, (hereinafter referred to as the Code) the Minister of Labour has referred to this Board of Inquiry a complaint dated the 14th day of November, 1974, and filed by the Gay Alliance Toward Equality. The Complainant, an unregistered society, alleges a violation of Section 3(1) of the Code by the Respondent Vancouver Sun. The date of the alleged infraction was on or about the 24th day of October, 1974.

The Board of Inquiry convened on February 28, 1975, at which time evidence of the alleged violation was heard and the various parties to the inquiry had an opportunity to examine that evidence and make preliminary submissions. David Mossop, appeared as Counsel for the Complainant and J.W. Toogood appeared on behalf of the Respondent Vancouver Sun. In addition

to the foregoing principal parties, the Human Rights Commission was represented by William Black and leave was given by the Board to Malcolm Crane to intervene on behalf of the Society for Education, Action, Research and Counselling on Homosexuality. At the conclusion of the evidence the inquiry was adjourned to permit all of the parties who desired to present written arguments based on the evidence which had been taken before the Board of Inquiry. The last of these arguments in reply were filed with the Board on June 16th, 1975.

There exists between the parties no dispute as to the chain of circumstances which give rise to the complaint under consideration here. On the 23rd day of October, 1974, Maurice J. Flood, an authorized representative of the Complainant association, wrote to the classified advertising department of the Respondent newspaper requesting that the following advertisement appear under the business personals column of the classified advertising section for four days commencing Monday, October 28, 1974:

> Subs. To GAY TIDE, gay lib paper $1.00 for 6 issues. 2146 Yew St., Vancouver.

A blank cheque was enclosed with Mr. Flood's letter to cover payment of the advertising

rates.

My letter dated October 24th, 1974, addressed to the Gay Alliance Toward Equality, L.J. Stone, the Assistant Manager of the Classified Advertising Department of the Respondent Vancouver Sun, advised Mr. Flood that the advertisement was "not acceptable for publication in this newspaper." Mr. Stone's letter returned Mr. Flood's cheque.

Mr. Flood followed up this refusal of the Respondent newspaper by writing J.W. Toogood, the Director of Advertising and Marketing for the Respondent newspaper. This letter requested a meeting to discuss the policy of the newspaper. By letter dated October 29th, 1974, Mr. Toogood declined such a suggestion and affirmed the decision of Mr. Stone.

The Respondent refused to print the advertisement submitted by the Complainant because that advertisement promoted subscriptions to a journal entitled "GAY TIDE" the official publication of the Complainant Gay Alliance Toward Equality. The evidence of Mr. Flood established that the Gay Alliance Toward Equality is an association of homosexual or gay individuals whose common goal is to establish recognition for their thesis that homosexuality is a valid and legitimate form of human sexual and emotional

expression, in no way harmful to society or the individual, and completely on a par with heterosexuality. The refusal by the Respondent to publish the advertisement in question was stated to be the result of a policy which the paper has in its advertising department (as distinct from its editorial department) to avoid any advertising material dealing with homosexuals or homosexuality.

As already indicated the Complainant alleges a violation of Section 3 of the Human Rights Code. That section states as follows:

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

The specific allegation here is that the Respondent Vancouver Sun has denied to Maurice Flood and/or the Complainant association a service or facility customarily made available to the public namely access to its classified advertising section. To put it another way it is alleged that the Respondent Vancouver Sun has discriminated against homosexuals and/or homosexual organizations by denying to them the opportunity of placing advertisements in the classified section. In presenting its case, the Complainant, of course, alleges that no reasonable cause exists for the denial or the discrimination offered to it by the Respondent Vancouver Sun.

The passage of the Human Rights Code by the Legislature of British Columbia in 1973 heralded a new era in the regulation of conduct between parties to the various kinds of commercial activities described therein. Sections 2 through 10 inclusive of the Code appear under the general entitlement of "discriminatory practices." Those sections prohibit various forms of conduct which civilized persons of good will have long regarded as discriminatory. Each of the sections describe in a very broad general way a form of discrimination which is now prohibited in this Province. Needless to say no attempt has been made to exhaustively define all types of discrimination. Such an effort would

necessarily have resulted in narrowing the effect of the legislation. Certain of the sections make specific reference to the more notorious forms of discriminatory conduct with which our society is burdened such as those based on race, sex, religion, colour, ancestry, and place of origin. These references, however, for the most part appear in a context which is clearly designed to be illustrative and not determinative of the broad scope of the prohibition with which they are preceded.

Such is clearly the case with respect to Section 3 of the Code. The general prohibitions which are found in subsection 1 thereof are clearly not intended to be limited in scope by the examples of those more notorious forms of discriminatory conduct which are set out in subsection 2.

Particularly, the use of the term sex in subsection 2, paragraph (b) must not be accorded a restrictive interpretation. The clear intent of the Legislature in this subsection was to draw attention to the fact that in some instances it is necessary to differentiate between men and women in the offering of accommodations, services or facilities

customarily made available to the public, in order to maintain and protect the standards of public decency to which we, as a civilized society, have become accustomed.

The legislation is to be construed as remedial in nature and must therefore be accorded a liberal and broad interpretation. Bearing this in mind it is clear that Section 3(1) of the Code provides a very powerful declaration against discrimination in the area of services or facilities which are customarily made available to the public.

The evidence clearly establishes that the Vancouver Sun, a subsidiary of Pacific Press Ltd., customarily makes available to members of the public the facilities of its classified advertising section. The position of the Vancouver Sun with respect to this particular form of advertising facility is almost monopolistic in nature. The evidence established a daily circulation in the neighbourhood of two hundred and fifty thousand copies with its closest rival, (excluding the Vancouver Province which is another subsidiary of Pacific Press Ltd) the New Westminster Columbian, having a circulation of less than 1/8th that size. It has Province wide circulation and in its last fiscal year

grossed something over thirty-four million dollars revenue from its classified advertising alone.

Section 3(1) of the Code uses the terms "person" and "class of persons" to designate both the originator and the object of the discrimination therein prohibited. This has given rise to a submission on the part of the Respondent herein to the effect that the discriminatory conduct alleged against the Respondent was directed towards the "content" of the proposed advertisement and not against any person or class of persons. This is, with respect, a specious argument.

The term "class of persons" as used in Section 3(1) of the Code means simply a collection of individuals grouped together by a common bond which, within the ambit of the Code, would be one or more of those differentiating characteristics such as race, religion or colour which distinguish them from all others in society. Homosexuality has been defined as the ability to relate both sexually and emotionally to others of the same sex. In so far as homosexual men and women have a different ability than non-homosexual men and women to relate sexually and emotionally to others of the same sex they must, of necessity,

constitute a "class of persons" within the meaning of that term as used in the Code.

The Gay Alliance Toward Equality as has already been indicated, is an unregistered society whose membership consists of homosexual men and women. The fact that the society or association is not registered in no way affects the right of its members, all of whom are members of a "class of persons", to be afforded the full protection of Section 3 of the Code.

The publication GAY TIDE is the official journal of the Gay Alliance Toward Equality and in so far as its editors pursue the objects of that association the content of the paper will be indistinguishable from the subject matter of the common bond which determines the class of person represented by the paper. To discriminate against the paper is to discriminate at one and the same time against the Gay Alliance Toward Equality and against each of its composite members.

Reverting for a moment to the argument of the Respondent, the "content" of the advertisement rejected was the subscription address and rate of

of the publication GAY TIDE. In so far as the policy of the Respondent is directed against advertisements dealing with homosexuals and homosexuality that policy has resulted in a denial of a service or facility customarily made available to the public. The "content" of the advertising is but a reflection of the subject matter of the paper in question which, in turn, is merely a reflection of the common purpose of the association. That common purpose, as has already been stated, is indistinguishable from the common bond of the class of persons who constitute the association.

Quite apart from the foregoing the denial of service was directed towards Maurice Flood personally who, unquestionably, is a person within the meaning of that term as found in Section 3(1) of the Code. Once the fact of denial is established the question of cause is immediately raised and the Board of Inquiry has jurisdiction to embark on an inquiry into the reasonableness of that cause.

It follows that the refusal by the Vancouver Sun on October 24th, 1974, to publish the advertisement submitted by Mr. Flood constituted a denial to a person or class of persons of a facility customarily made available to the public.

Alternatively the said refusal amounted to a discrimination against a person or class of persons with respect to a facility customarily made available to the public.

In determining whether or not the Respondent has violated Section 3(1)(a) or (b) of the Code there remains only the necessity of considering whether or not reasonable cause existed for the denial or discrimination described above. Before considering the reasonableness or otherwise of the "cause" offered by the Respondent to explain its refusal and/or discrimination as aforesaid it would seem appropriate here to determine a few general guidelines to be applied when considering complaints under this section of the Code.

Once a denial or a discrimination with respect to a service or facility customarily made available to the public is established the onus rests upon the Respondent to satisfy the Board of Inquiry that reasonable cause existed for the refusal and/or discrimination. Were it otherwise a Complainant would be required to establish a cause for the denial or discrimination which would be a difficult if not impossible enterprise under those circumstances where a Respondent has denied a service without giving reasons.

Requiring the Complainant to both establish the cause for the denial or discrimination as well as the lack of reasonableness of same, would in such circumstances enable the Respondent to avoid responsibility for what would otherwise be a discriminatory act, by simply remaining silent. The very expression "reasonable cause" impels one to the conclusion that no cause at all would, prima facie, be unreasonable. Accordingly a Respondent faced with proof of a denial of a service or discrimination in respect thereof must of necessity establish two things if he is to avoid the consequences of a finding that the allegation is justified under Section 17(2) of the Code. He must first establish the cause for the discrimination and secondly he must satisfy the Board of Inquiry that the cause was a reasonable one.

As earlier stated the Respondent in this case has been quite candid in stating the reason for the refusal on October 24th, 1974, to publish the advertisement in question. The advertisement purported to deal with subscription rates to a publication that espoused views favourable to homosexuals and to homosexuality. The policy of the paper is said to be to refuse any advertising material which deals with such subject matter.

In doing so the Respondent relies upon a "right" which it states it has reserved to itself to revise, edit, classify, or reject any advertisements submitted to it for publication. This reservation is displayed daily at the head of the classified advertisement section of the newspaper published by the Respondent. While Mr. Toogood asserted that many advertisements were rejected on a daily basis by the Respondent we are concerned here only with the rejection of that advertisement tendered by Mr. Flood in October of 1974. Unquestionably any facility such as the Vancouver Sun must employ certain standards when accepting advertisements from the public. Indeed, the Human Rights Code itself establishes a form of standard in both Sections 2 and 7 thereof. The question to be dealt with here is not the necessity of imposing standards upon such a facility, but the reasonableness of a particular standard which, it is asserted, has given rise to the denial under review here.

In an effort to justify the policy the Respondent has offered three distinct reasons for its existence. First of all the Respondent, through its publisher Mr. Keate, has offered the view

that homosexuality is offensive to public decency. This view was reported in the evidence of Ms. Kathleen Ruff, the Director of the Human Rights Branch, who, in addition to her testimony before the Board of Inquiry, prepared and submitted a Report to the Minister of Labour in which Report Mr. Koste was quoted to that effect. Mr. Toogood adopted that statement on behalf of the Respondent at the beginning of his testimony before the Board (see transcript of his evidence, page 37). As his testimony progressed Mr. Toogood offered a somewhat more narrow version of the same suggestion when he repeatedly asserted that the management of the Respondent newspaper, of which he is part, feels that homosexuality is not the sort of thing that the papers subscribers would want to have drawn to their attention by way of an advertisement. "Any association with gay liberation would be offensive to some of our subscribers" (see transcript of evidence page 42). This rationalization seemed to diminish in importance as the testimony of Mr. Toogood progressed, to the point where he concurred with the suggestion that it all boiled down to the fact that the Respondent was worried or afraid that the advertisement in question would offend <u>some</u> of its subscribers (see transcript of evidence page 75).

When one considers this rationalisation for a moment it appears to bear very little merit. The notion that the content of a newspaper, whether it be advertising or editorial, be governed by this standard is ludicrous. With an admitted Province wide circulation of approximately two hundred and fifty thousand copies daily, strict adherence to this standard would result in almost nothing being published. Indeed, Mr. Toogood admitted that complaints from subscribers would not necessarily cause the paper to alter or remove a given advertisement dependiny on whether or not they (the individual components of management) thought that they were right in publishing the item in question (see transcript of evidence page 52).

There would, of course, notwithstanding the protestations of Mr. Toogood to the contrary, be a point where economic considerations would prevail if significant numbers of subscribers began to discontinue using the paper because of such an advertisement. It is not necessary for the Board to decide whether such economic circumstances would amount to reasonable cause because no evidence was offered to show what percentage of the Respondent's subscribers or readers would object to such an advertisement nor was it suggested at any point in the evidence that that number would be a large one.

In any event the apparent policy inconsistency between the Editorial Department on the one hand and the Advertising Department on the other would tend to belie the suggestion that the management of the Respondent newspaper is truly concerned about offending some of its subscribers. The evidence was clear that the Editorial Department has quite a different policy with respect to homosexual content. Articles of an editorial as well as a reporting nature containing references to homosexuals or homosexuality and general discussion about the subject matter frequently appear in the pages of the Respondent newspaper. The notion that a subscriber or reader who would not be offended with such written material would take umbrage with an advertisement such as that tendered by the Complainant herein seems to the Board to be a little far fetched. Mr. Toogood conceded that the advertisement in issue here was not, on its face, lascivious, obscene or suggestive. Nothing in the advertisement advocates homosexuality or suggests that the Vancouver Sun advocates or encourages homosexuality.

While on the subject of inconsistencies it is perhaps pertinent to point out that the Advertising Department of the Respondent does not always appear to

enforce its policy of protecting its subscribers and readers from material that might possibly offend some of them. In the October 28th, 1974, edition of the Respondent newspaper, the day upon which the advertisement in question would have first appeared had it been accepted for publication, a number of advertisements appear in that part of the classified advertising dealing with theatres and movie houses. Without describing these advertisements in detail it is sufficient to note that a number of them reprint the warnings of the British Columbia Film Classification Director to the effect that the films advertised contain brutality, coarse language and are completely concerned with sex. One such advertisement warns of an orgy of sex and violence. One advertisement in particular contains two warnings, one with respect to each of two films which apparently were being shown at the time on a continuous basis from 1:00 p.m. in the afternoon until 11:00 p.m. in the evening. The warning with respect to the first film is "group sex and lesbianism" and with respect to the second film "male nudity and sex". These advertisements were included as exhibits in the report of Ms. Ruff, the Director of the Human Rights

Branch to the Minister of Labour and as such form part of Exhibit 3. Mr. Toogood testified that the Respondent newspaper was obligated to print the Classification Director's warnings, however, he condeded that the Vancouver Sun did not have to publish those advertisements which, in addition to the foregoing warnings, contained illustrations of pictures suggestive of the content warned of. These advertisements, of course, represent a rather more valuable source of revenue to the Respondent, the smallest of them, on the evidence of Mr. Toogood, probably costing something in the neighbourhood of $50.00 a day. By contrast the advertisement under consideration here would have netted the Respondent approximately $15.00 for the four days that it was intended to be displayed. (see transcript of evidence page 70). Without being too cynical one cannot help but wonder how the desire of the Respondent not to offend some of its subscribers in respect of the particular advertisement under review here might have been affected had the Complainant sought to have inserted an advertisement of the general size and cost represented by those advertisements in the theatre section already referred to.

The second reason offered by the Respondent to justify its policy against

accepting any advertisements relating to or dealing with homosexuality was to the effect that the Code of Advertising Standards, a code of advertising ethics subscribed to by most of the daily newspapers in Canada, includes, inter alia, the following section:

> "Public decency - no advertisement shall be prepared, or be knowingly accepted, which is vulgar, suggestive or in any way offensive to public decency."

Here the suggestion is that there is imposed upon the industry, of which the Respondent is part, a standard which prevents them from accepting the advertisement in question. To some extent the same test is applied here since it will be noted that the words "public decency" once again appear. The difference between this and the first reason offered as justification for the policy of the Respondent is that this rationalization relies upon a form of stricture which, it is suggested, the industry has imposed upon itself. There is, of course, no suggestion that the advertisement in question was either vulgar or suggestive. It is difficult to understand how the advertisement itself can be offensive to public decency when it does nothing more than to purport to invite those who are interested to subscribe to the publication in question. Nothing more confronts the eyes of the reader of this

advertisement than the suggestion that if he is interested in obtaining and digesting the content of a copy of the publication in question he may send his money to a specified address. In any event after some reflection and upon further examination Mr. Toogood conceded that the advertising code was only a guide intended for the use of smaller newspapers who didn't have the facilities possessed by the Respondent. The suggestion was that an organization as large as the Respondent had, over the course of many years, developed its own policy as well as its own method of applying that policy to any advertising submitted to it for publication. One got the distinct impression from this evidence that the Code of Advertising Standards was not really a factor in the ultimate decision made by the Respondent to refuse publication of the Complainant's advertisement.

The third reason offered to justify the Respondent's policy against advertisements dealing with or relating to homosexuality, was that the Respondent newspaper had some sort of duty to protect the morals of the community. This suggestion appeared both in the testimony of Mr. Toogood and in the written submission presented by the Respondent's counsel.

In the latter the Respondent adopted a suggestion made at one time, apparently by the then Minister of Labour, to the effect that homosexuality presented some sort of threat to society. It is not clear what sort of threat homosexuality poses to society as a whole since no evidence was led by the Respondent to justify such a statement. As has already been stated homosexuality has been defined as the ability to relate both sexually and emotionally to others of the same sex. It is probably fair to say that the threat to society is seen more in the sexual relations between individuals of the same sex than in the emotional relations alluded to by the foregoing definition. In this respect it is interesting to note that the Parliament of this country in 1969 (S.C. 1968-69 c.38, s.7) determined that in so far as sexual practices are concerned those that took place between consenting adults in private were no longer the concern of either the Courts or the law. Interestingly enough Mr. Toogood acknowledged that at the time of this legislative change the policy of the Respondent newspaper was discussed by management and it was decided that that policy would remain unchanged. One would hesitate to draw the conclusion that Parliament, whatever its intrinsic

weaknesses may be, deliberately adopted a policy designed to enlarge a threat to society when it passed the amendments to the Criminal Code already referred to. In any event, it appears that our confidence in Parliament can be encouraged by the fact that no dire consequences appear to have resulted from the enactment referred to. The original suggestion that the policy of the Respondent was designed to protect the morals of the community quickly reduced itself, under questioning of Mr. Toogood to one of protecting subscribers from what the Respondent feels they want to avoid (see transcript of evidence page 67). By this statement the Respondent's argument had really come full circle back to its original statement that it wished to avoid offending some of its subscribers.

Throughout most of the testimony offered on behalf of the Respondent the central theme which continually re-appeared was to the effect that the policy in question was predicated on a desire to protect a reasonable standard of public decency and good taste. This is a worthy motive for any policy and the Board accepts this suggestion seriously. The strength of this submission is weakened to some extent, however, by the acknowledgment of Mr. Toogood that in arriving at this policy no guidance was sought or received from those

provisions of the Criminal Code which purport to effect the same end. Nor is the Criminal Code the only already established norm of public taste and decency which is ignored by the Respondent. With respect to film or movie advertisements, which have already been the subject of some comment, Mr. Toogood acknowledged that no regard was paid to the Film Classification Director's decision on films. This is confirmed by the fact that the Respondent newspaper regularly publishes advertisements for so-called "blue" movies showing in Blaine, Washington, and other theatres adjacent to the Lower Mainland theatre going public, but outside of the jurisdiction of the British Columbia Classification Director. On the evidence of Mr. Toogood the policy of his department would not necessarily be concerned with whether or not such films had been approved by the Classification Director of British Columbia.

The strength of the Respondent's submission that its policy is founded upon a worthy concern for standards of public decency and good taste is further weakened by the frank admission on the part of Mr. Toogood that the publication GAY TIDE itself played no part in the determination made by

his department not to publish the advertisement submitted by Mr. Flood. Although a copy of issue No. 1 of Volume II of the GAY TIDE paper was apparently enclosed in the original letter sent by Mr. Flood to the Respondent's office, Mr. Toogood stated that while he glanced through the publication he would not read it. He went on to state that he glanced through it and saw what he wanted to see (see transcript of evidence page 41). He expressed the opinion that he was quite familiar with the magazine and he conceded under later questioning that there was nothing overtly obscene or lascivious about either the pictures or the content contained therein. When asked whether what he saw in the paper played any part in his determination not to publish the advertisement in question he replied:

> "No, if the paper hadn't been sent along, we still wouldn't have published the advertisement." (see transcript of evidence page 69).

The decision not to accept the advertisement in question was, in fact, made before the advertisement itself was even submitted for publication.

The Board has carefully reviewed the content of issue No. 1 of Volume II of the GAY TIDE. This issue was filed as Exhibit No. 8 in the proceedings before the

Board. Applying the tests to be found in some of the relevant Appellate Court decisions dealing with standards of decency and the testsby which that standard is to be judged the Board concluded that there is nothing of an indecent, lascivious, or improper nature contained anywhere in Exhibit B. Apart from a general theme of urging all homosexuals to recognize themselves as a first step towards greater public acceptance, the publication does not purport to advocate homosexual activity for all members of society nor does it purport to counsel heterosexuals to change their way of life. Nothing contained in the paper could be considered illegal. Nothing in the paper advocates nor counsels the commission of an illegal act by any person.

Had Mr. Toogood or any other member of the Respondent's management at least taken the trouble to consider carefully the content of Exhibit B, one might have viewed their asserted concern for standards of public decency with somewhat greater approbation.

Assessing all of the evidence offered on the question of the reasonableness of the cause or motivation behind the Respondent's refusal to publish the Complainant's advertisement the Board comes to the inevitable conclusion that the real reason behind the "policy" of the Respondent

was not a concern for any standard of public decency, but was, in fact, the personal bias against homosexuals and homosexuality on the part of various individuals within the management of the Respondent.

Notwithstanding the failure of the Respondent to meet the test of sincerity with respect to its purported concern for standards of public decency, the issue raised is a valid one and presents a dilemma of sorts which must be resolved. On one side of the dilemma is the argument that society must strive to define and protect a strong acceptable standard of public decency. Such a standard, while flexible enough to enable it to respond to the ever changing attitudes displayed by the constitutent elements of our community, must, at the same time, have sufficient rigidity and strength to ensure the protection of those basic concepts of decency and propriety that are fundamental to a civilized way of life.

On the other side of the dilemma is the assertion, exemplified by the Code, that society must actively seek to protect those portions of its citizenry, who are different in some way and who thus attract to themselves acts of discrimination that are

fostered by pre-conceived and unreasonable judgments or opinions marked by suspicion, fear, intolerance or hatred.

The answer to the dilemma lies in the willingness of a mature society to recognise and to accept that people are different and to tolerate those differences. By recognizing that homosexuals exist, society is simply acknowledging that there are, in fact, people who do have, what is for them at least, a quite natural ability to relate sexually and emotionally to others of the same sex. By accepting this fact society is having regard to the preponderance of evidence and professional opinion that exists to the effect that homosexuality is not an illness or a mental disorder and that it is a predominant and permanent characteristic of a significant portion of our population - perhaps as much as 10% thereof.

For centuries most of the so-called progressive societies of the world have forced homosexuals to lead almost schizophrenic lives, denying their true nature to all but thei. fellows. History has documented some of the sorry occasions when the secret lives of such men or women have been exposed to the hatred, ridicule, contempt and indeed the complete persecution of intolerant populations and institutions

of government. Motivated by fear and intolerance such societies, including our own, have proceeded on the assumption that if sufficiently harassed and persecuted the homosexual will either disappear or change his or her errant ways. Surely now in the 1970's our fear of the different or the unusual must be overcome by our confidence in the strength of our social fabric taken as a whole. Acceptance of people for what they are does not require that society at the same time encourage or promote homosexuality or convert those who are not naturally so inclined. To recognize and respect the beliefs or practices of others without necessarily agreeing or sympathizing with them is to show the sort of tolerance that is the mark of a truly civilized and mature society.

So it is that we can safely conclude that the acceptable standard of decency which we wish our society to maintain is in no way threatened or challenged by our taking, as a society, a tolerant and mature approach to those homosexuals who are not breaking the law and who seek only the right to live normally in society without fear of persecution or discrimination.

Before concluding the judgment is is necessary to consider one

further argument submitted on behalf of the Respondent. In its written submission the Respondent has challenged the jurisdiction of the Board on what would appear to be a constitutional ground. The thrust of this submission is that any interference with the right of a newspaper to control its content is an attempt to abrogate the rights of a free press and is, consequently, outside of the legislative jurisdiction of the Legislature of British Columbia. In short the argument appears to be that Section 3 of the Human Rights Code is ultra vires the Legislature of British Columbia if it purports to extend its jurisdiction over newspapers. Reliance is placed upon a portion of the judgment of Chief Justice Duff in the Supreme Court of Canada in Reference re Alberta Statutes [1938] S.C.R. 100. The Respondent relies particularly on a passage of that judgment, taken out of context, which appears on Page 134 of the Report as follows:-

> But this by no means exhausts the matter. Any attempt to abrogate this right of public debate or to suppress the traditional forms of the exercise of the right (in public meeting and through the press) would, in our opinion, be incompetent to the legislatures of the provinces,

> or to the legislature of any one of the provinces, as repugnant to the provisions of the British North America Act, by which the Parliament of Canada is established as the legislative organ of the people of Canada under the Crown, and Dominion legislation enacted pursuant to the legislative authority given by those provisions.

(UNDERLINING ADDED)

To understand the foregoing passage and to properly appreciate the context in which it appeared in the judgment of Chief Justice Duff one must understand the nature of the legislation under review by the Court. The Act in question was one of a series passed by the Legislature of Alberta designed to impose a complete new economic order upon the people of that Province. A number of these Statutes were set aside by way of Federal executive action and three in particular were referred to the Supreme Court of Canada for a decision on their constitutional validity. The Act under review was one of these three and was entitled "An Act To Ensure the Publication of Accurate News and Information." This Bill applied to all newspapers or periodicals published in the Province. Where any such paper had published a statement relating to any policy or activity of the Provincial Government, the proprietor, editor, publisher

or manager was bound, when so required by the chairman of the Social Credit Board, to publish in the paper a statement of no greater length and of equal prominence and type with the previous statement. The object of the chairman's statement was to be the correction or amplification of the previous statement and it was to be stated that it was published by his direction. The Bill further provided that the proprietor, editor, publisher or manager of a paper would be obliged on requisition of the chairman of the Social Credit Board to divulge the particulars of every source of information upon which any statement appearing in his paper was based. Any contravention of the provisions of the Bill was liable to be punished by money penalties and might entail the suspension of the paper or part of its material.

One pauses here for a moment to reflect that it would be an extra-ordinary imagination indeed which would purport to draw a parallel between that type of legislation and Section 3 of the Human Rights Code as applied to the advertising policy of a newspaper.

Returning to the judgment of Chief Justice Duff a portion of that judgment must be set out at some length in order

to fully appreciate the content in which the remarks quoted by the Respondent were made. The learned Chief Justice having decided that the act in question was ultra vires the Legislature of Alberta because it was ancillary and dependent legislation to "The Alberta Social Credit Act" which had previously been declared ultra vires went on to say as follows at Page 132 of the Report:-

> This is sufficient for disposing of the question referred to us but, we think, there are some further observations upon the Bill which may properly be made.
>
> Under the constitution established by The British North America Act, legislative power for Canada is vested in one Parliament consisting of the Sovereign, an upper house styled the Senate, and the House of Commons. Without entering in detail upon an examination of the enactment of the Act relating to the House of Commons, it can be said that these provisions manifestly contemplate a House of Commons which is to be, as the name itself implies, a representative body; constituted, that is to say, by members elected by such of the population of the united provinces as may be qualified to vote. The preamble of the statute, moreover, shows plainly enough that the constitution of the Dominion is to be similar in principle to that of the United Kingdom. The statute contemplates a parliament working under the influence of public opinion and public discussion. There can be no controversy that such institutions derive their efficacy from the free public discussion of affairs, from criticism and answer and counter-criticism, from attack under policy and administration and defence and counter-attack;

> from the freest and fullest analysis and examination from every point of view of political proposals. This is signally true in respect of the discharge by Ministers of the Crown of their responsibility to Parliament, by members of Parliament of their duty to the electors, and by the electors themselves of their representatives.
>
> The right of public discussion is, of course, subject to legal restrictions; those based upon considerations of decency and public order, and others conceived for the protection of various private and public interests with which, for example, the laws of defamation and sedition are concerned. In a word, freedom of discussion means, to quote the words of Lord Wright in James v Commonwealth [1936] A.C. 578 "freedom governed by law."
>
> Even within its legal limits, it is liable to abuse and grave abuse, and such abuse is constantly exemplified before our eyes; but it is axiomatic that the practice of this right of free public discussion of public affairs, notwithstanding its incidental mischiefs, is the breath of life for parliamentary institutions.
>
> We do not doubt that (in addition to the power of disallowance vested in the Governor General) the Parliament of Canada possesses authority to legislate for the protection of this right. That authority rests upon the principle that the powers requisite for the protection of the constitution itself arise by necessary implication from The British North America Act as a whole (Port Frances Pulp & Power Co. Ltd. v. Manitoba Free Press Co. Ltd. [1923] A.C. 659); and since the subject-matter in relation to which the power is exercised is not exclusively a provincial matter, it is necessarily vested in Parliament.
>
> But this by no means exhausts the matter. Any attempt to abrogate this right of public debate or to suppress the traditional forms of the exercise of the right (in public

> meeting and through the press) would, in our opinion, be incompetent to the legislatures of the provinces, or to the legislature of any one of the provinces, as repugnant to the provisions of The British North America Act, by which the Parliament of Canada is established as the legislative organ of the people of Canada under the Crown, and Dominion legislation enacted pursuant to the legislative authority given by those provisions. The subject matter of such legislation could not be described as a provincial matter purely; as in substance exclusively a matter of property and civil rights within the province, or a matter private or local within the province. It would not be, to quote the words of the judgment of the Judicial Committee in Great West Saddlery Co. v. The King [1921] A.C. 91, "legislation directed solely to the purposes specified in s. 92;" and it would be invalid on the principles enunciated in that judgment and adopted in Caron v. The King [1924] A.C. 999.

Taking the passage as a whole as set out above, including the passage relied on by the Respondent, it can be seen in an instant that the threat to the freedom of the press that the learned Chief Justice is talking about has nothing whatever to do with the sort of regulation or control envisioned by Section 3 of the Code. Indeed, a cogent argument could be made to the effect that the policy of the Respondent is the very sort of policy criticized by implication in the judgment of the learned Chief Justice. By refusing

to publish the advertisement in question, by denying homosexuals the right to avail themselves of advertising which would assist in the circulation of their newspaper - a newspaper which is devoted purely to a legitimate and informative discussion of homosexuality - the Respondent is in fact restricting the right of homosexuals to their enjoyment of freedom of the press. But this by no means ends our consideration of the Reference Re Alberta Statute case, supra, relied upon by the Respondent in its argument that the legislature of this Province had no jurisdiction to enact Section 3 of the Human Rights Code. In the very next paragraph of his judgment Chief Justice Duff states as follows:

> The question, discussed in argument, of the validity of the legislation before us, considered as a wholly independent enactment having no relation to the Alberta Social Credit Act, presents no little difficulty. Some degree of regulation of newspapers everybody would concede to the provinces. Indeed, there is a very wide field in which the provinces undoubtedly are invested with legislative authority over newspapers; but the limit, in our opinion, is reached when the legislation effects such a curtailment of the exercise of the right of public discussion as substantially to interfere with

> the working of the parliamentary institutions of Canada as contemplated by the provisions of The British North America Act and the statutes of the Dominion of Canada. Such a limitation is necessary, in our opinion, "in order" to adapt the words quoted above from the judgment in Bank of Toronto v. Lambe (1887) 12 A.C. 575 "to afford scope" for the working of such parliamentary institutions. In this region of constitutional practice, it is not permitted to a provincial legislature to do indirectly what cannot be done directly (Great West Saddlery Co. v. The King [1921] 2 A.C. 91.
>
> (EMPHASIS ADDED)

The underlined passage above clearly demonstrates once again the nature of interference of freedom of the press that was under review by Chief Justice Duff and the other members of the Court in the case relied upon by the Respondent. It has absolutely nothing to do with the issue which is before this Board. The argument advanced by the Respondent ignores the very important distinction between legislation designed to control the editorial content of a newspaper on the one hand and that designed to control discriminatory practices in the offering of commercial services to the public on the other. In the wide field of legislative authority that the provinces

do have over newspapers is included the authority to require newspapers within the Province of British Columbia to adopt advertising policies that are not in violation of the principles set out in the Human Rights Code.

In addition the legislature of British Columbia has the power to regulate individual forms of trade and commerce that are confined to the Province. Section 3 of the Human Rights Code does not purport to exercise any form of extra territorial jurisdiction. Its regulatory effect is clearly confined to those forms of commercial activity that take place within the geographical boundaries of the Province of British Columbia. The pith and substance of the legislation is that it is an act to regulate various types of commercially based activities taking place entirely within the Province. In this respect it is similar to the type of regulatory legislation contained in the Tobacco Advertising Restraint Act, S.B.C. 1971, c.65, the constitutional validity of which was upheld by the Supreme Court of British Columbia in Benson and Hedges (Canada) Ltd. et al v. Attorney-General of British Columbia (1972) 27 DLR (3d) 257.

In that judgment Mr. Justice Hinkson, after referring to Canadian Federation of Agriculture v. The A-G of Quebec et al [1950] 4 DLR 689, [1951] A.C. 179, and Reference re Farm Products Marketing Act, R.S.O. 1950, Chapter 131 as amended, (1957) 7 DLR (2d) 257, [1957] S.C.R. 198 said at page 273 of the Report:

> These authorities support the contention of counsel for the Attorney-General that the Province has the power to regulate individual forms of trade confined to the Province. In Shannon et al v. Lower Mainland Dairy Products Board [1938] 4 DLR 81, [1938] A.C. 708 [1938] 2 WWR 604, in the course of considering a milk marketing scheme of the Province of British Columbia, Lord Atkin said at page 86:
>
> > The pith and substance of this Act is that it is an Act to regulate particular businesses entirely within the Province, and it is therefore intra vires of the Province.
>
> That statement really sums up the position of the Attorney-General in relation to the Tobacco Advertising Restraint Act. It is said to be an Act to restrain the advertising of tobacco products and is hence one method of regulating the tobacco business within the Province.

When the Board first considered the submissions of the Respondent in respect of this issue it was concerned that judgment

on this aspect might have to be reserved until after proper notices had been directed to the Attorney-General of Canada and the Attorney-General of the Province of British Columbia in accordance with the provisions of S.10 of the Constitutional Questions Determination Act, being R.S.B.C. 1960, c.72. However, after considering that section carefully it is the Board's conclusion that the notices therein referred to must only be served in the event that the adjudicating tribunal is prepared to declare the contested statute invalid. Since in the Board's view there is no merit whatsoever to the constitutional argument raised by the Respondent the Board does not intend to declare Section 3 of the Code invalid. Accordingly the Board rules that it is entitled to adjudicate upon this issue without adjourning to notify the various parties designated in Section 10 of the aforementioned Act.

After considering all of the evidence offered at the hearing and the various arguments put forward by the parties to this complaint, this Board is of the opinion that no reasonable cause existed for the refusal of the Respondent to publish the advertisement submitted by

the Complainant. The allegation of the Complainant is therefore justified and accordingly, pursuant to the powers vested in it by Section 17(2) of the Human Rights Code this Board orders the Respondent to cease contravening Section 3(1) of the Human Rights Code. Specifically the Board orders the Respondent to make the facilities of its classified advertising section available to the Complainant. It goes without saying that any advertisement submitted by the Complainant to the Respondent for publication must, of necessity, meet those proper standards of decency and legality in so far as its form and substance are concerned.

The Board further orders the Respondent to refrain from committing the same or any similar contravention of Section 3(1) of the Code in the future.

Section 17(2)(c) of the Code provides for an order of compensation, not exceeding $5,000.00 in such cases where the Board is of the opinion that the person who contravened the Act did so knowingly or with wanton disregard; and that the person discriminated against suffered aggravated damages in respect of his feelings or self-respect.

This Board has previously ruled that the punitive results of applying this

section of the Code should be reserved for those extreme or aggravated cases where the full meaning of the terms "wanton disregard" and "aggravated damages" can be given effect to. In this case the evidence clearly established that the Complainant sought an opportunity to test the effectiveness of the Human Rights legislation and accordingly it would be difficult to find that the Complainant had suffered aggravated damages in respect of its feelings or self-respect. Accordingly, the Board makes no order under this subsection of Section 17.

Section 17(3) of the Code entitles the Board to make such order as to costs as it considers appropriate. Attempts were made firstly by the Complainant itself and secondly by the Human Rights Branch to negotiate a settlement of this complaint. Had these attempts been successful the necessity of a Board of Inquiry hearing would have been obviated. Under these circumstances there would appear to be no reason why the Board should not order costs against the Respondent. The difficulty with the legislation is that it does not provide any guide as to the scale on which costs should be awarded. Appendix N of the Supreme Court

Rules would not appear to be applicable in toto, however, applying the principles contained therein and bearing in mind the nature and length of the proceedings had before this Board of Inquiry the Board assesses costs in the amount of $500.00 and orders that the Respondent pay that sum forthwith to the Complainant.

Per: _____

Chairperson of the Board of Inquiry