IN THE MATTER OF THE HUMAN RIGHTS CODE OF BRITISH COLUMBIA, S.B.C. 1973, (2d. Session) Chapter 119

AND

IN THE MATTER OF A COMPLAINT BY ROBERT C. HEERSPINK

AGAINST

INSURANCE CORPORATION OF BRITISH COLUMBIA

Appearances:

S. F. D. Kelleher, for the Complainant and the Director, Human Rights.

K. C. MacKenzie and Bruce Fraser, for the Insurance Corporation of British Columbia.

Hearing held: January 16, 17, and 26, 1979.

REASONS FOR DECISION OF THE BOARD OF ENQUIRY

At the opening of the hearing of this matter, in March, 1977, an objection was taken by counsel for the Insurance Corporation of British Columbia (I.C.B.C.) to the jurisdiction of the Board of Inquiry to deal with the subject matter of the complaint. It was agreed that the Board should rule on the objection, and, by a decision dated March 16, 1977, I held that the Board did have jurisdiction. I.C.B.C. thereupon appealed by way of Stated Case to the

Supreme Court of British Columbia, and Mr. Justice Meredith in a decision reported sub nom. Insurance Corporation of British Columbia v. Heerspink, (1977) 6 W.W.R.286, upheld the jurisdiction of the Board. A further appeal was taken to the British Columbia Court of Appeal which, in a per curiam judgment of Robertson, J. A. reported at (1978) 6 W.W.R. 702, dismissed the appeal and remitted the matter to the Board which accordingly reconvened on January 16, 1979 to hear the evidence.

The essential facts are simple and not in dispute. Mr. Robert Heerspink is the registered owner of a fourplex and a triplex in Sidney, B.C., in respect of which I.C.B.C. had issued a Composite Mercantile Insurance Policy. On April 24, 1976, the Victoria columnist newspaper briefly reported that Mr. Heerspink had been committed for trial "following a preliminary hearing on a charge of trafficking in marijuana in Sidney, December 11, 1975". By a process which it is not necessary to detail, a clipping of this report was forwarded to the head office of I.C.B.C. in Vancouver where, towards the end of May, 1976, it came to the attention of Mr. C. E. Thomas, an underwriter with the Corporation.

Among the functions of the Underwriting Department of I.C.B.C. is "risk analysis". According to the evidence adduced, the method of risk analysis used by the Corporation is somewhat more elaborate than that employed in other

risk review by four levels of underwriter. Each is required to appraise the risk, and to make a recommendation as to whether or not it should be accepted, declined, or cancelled. Each appraisal is recorded on a Risk Analysis form, the instructions on which state that "if recommendation is to decline or cancel refer to Underwriting Director or approval".

On June 11, 1976 Mr. Thomas recorded his appraisal as follows:

> "Insured charged with trafficking. This opens all kinds of avenues of speculation, but purely because of "criminal involvement", & etc. feel we should cancel forthwith, notwithstanding agency support."

The Risk Analysis form was then forwarded to Mr. Douglas Watkin, a senior underwriter with the Corporation, who on the same day, wrote on it:

> "Agree to proposed action questionable risk to begin with - occupancy."

Also on June 11, 1976 Mr. David Wilson, the Manager of the Commercial Property Department of I.C.B.C. made his contribution to the Risk Analysis, as follows:

> "I would disregard agency support in an instance such as this. Insd. has only been charged - do we have to wait outcome of trial before acting? Would recommend cancellation simply on moral grounds. In addition we are exposing ourselves to possible damage to insured property by persons with whom Insured has been dealing."

> "Discuss with agent for background information - if no extenuating circumstances, issue registered letter of cancellation."

The matter was then referred back to Mr. Thomas who on June 15, 1976, in accordance with the instructions of Mr. Corcoran, telephoned Mr. Heerspink's agent, Mr. John Tuffrey, of Tuffrey & Mills Ltd., a firm of insurance agents in Victoria. Mr. Thomas' note of that telephone conversation is as follows:

> "Agent surprised at news of charge. Indicated he was impressed with Insd., who seemed a hardworking individual, with lots of money - agt. muttered to himself - may be that's how he got all his money - Wasn't upset over cancellation & agreed with our action. P. L. Dept. advised of cancellation as agt. says he sent in P. L. Appn. in the past couple of days."

On June 16, 1976 I.C.B.C. sent a registered letter to Mr. Heerspink cancelling the insurance policy upon the expiration of 15 days' notice. This notice was given pursuant to Statutory Condition 5 of the Policy. No reasons for cancellation were given. On June 18, 1976 Mr. Heerspink telephoned to I.C.B.C. requesting reasons for the cancellation, and subsequently followed this up with a letter. On July 30, 1976 a letter was sent to him by Mr. J. F. Woolard, senior underwriter in the Mercantile Department of the Corporation stating that I.C.B.C. was "unable to divulge the reasons for the cancellation," and refusing to reinstate the policy. The letter concluded:

> Robert Heerspink of 9909, Fifth Street, Sidney was ordered to higher court trial on a charge of trafficking in marijuana."

It might be observed in passing here, though in fact it is irrelevant to the matter to be determined, that there were two charges against Mr. Heerspink, one of trafficking, and the other of possession. He was subsequently convicted on both charges, being fined $300.00 on the former and $200.00 on the latter. It should also be observed that Mr. Heerspink was in fact able to obtain replacement insurance from another insurer.

It was in these circumstances that Mr. Heerspink came to make his complaint to the Director, Human Rights. The complaint is, in essence, that the Corporation's decision to cancel his insurance was, in the circumstances, a violation of Section 3 of the Human Rights Code. Section 3 of the Code reads:

> (1) No person shall
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> (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,
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> unless a reasonable cause exists for such denial or discrimination.

(2) For the purposes of sub-section (1),

(a) the race, religion, colour, ancestry, or place of origin of any person or class of persons shall not constitute reasonable cause; and

(b) the sex of any person shall not constitute reasonable cause unless it relates to the maintenance of public decency or to the determination of premiums or benefits under contracts of insurance.

Statutory Condition 5 of the Policy (which is deemed to be part of every insurance contract - see section 208 of the Insurance Act, R.S.B.C. 1960, c.197) provides that an insurer may terminate an insurance contract by giving fifteen days' notice of termination by registered mail, or five days' written notice of termination personally delivered, to the insured. In its decision of March 16, 1977, dealing with the matter of jurisdiction, this Board held first, that the Insurance Act "simply does not touch the right to terminate. It deals only with the procedure for its exercise"; and secondly that section 3(1) of Code has significantly restricted the formerly unrestricted and arbitrary right enjoyed by an insurer at common law to cancel a contract of insurance for whatever reason appeals to it. To quote section 3(1), the insurer must have "reasonable cause" for cancellation, or denial, of insurance.

On the uncontradicted evidence of the witnesses who testified on behalf of I.C.B.C., there is little doubt that the ground for cancellation of Mr. Heerspink's Policy

was that he had been charged with trafficking in marijuana. Indeed, at no point did the Corporation seek to contend otherwise. The question, of course, is whether the cancellation of the Policy on this ground constitutes a denial of a service or facility customarily available to the public, without reasonable cause.

Burden of Proof

The first issue that should perhaps be addressed is that of the burden of proof. Counsel for the Corporation contended that the onus of proof of establishing that the denial of insurance was without a reasonable cause rested on the Director, and upon the Complainant. Counsel for the latter, however, asserted that once it had been shown that a denial had taken place, the onus shifted to the Corporation to establish that it had reasonable cause for such denial - to show, in other words, acceptable justification for its decision.

In support of his position, Mr. Kelleher, on behalf of the Director, relied upon the decision of the Board of Inquiry in Bremer (June 10, 1977). In that decision the Board of Inquiry followed the view adopted by an earlier Board of Inquiry in GATE & The Sun, (1975), expressed as follows:

> "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 a 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 any 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 a 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 discrimation 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 of the discrimination and secondly he must satisfy the Board of Inquiry that the cause was a reasonable one.

I find this reasoning persuasive, and, adopting it, have come to the conclusion that the contention of the Director is correct, and that the onus of establishing that there was reasonable cause for the cancellation of Mr. Heerspink's policy of insurance rests, in the circumstances, upon I.C.B.C.

<u>The Concept of "reasonable cause"</u>

The general nature of the concept of reasonable cause as used in the Code has been examined carefully and at length in the Reasons for Decison of a number of Boards of

to commence that examination afresh here. It is now clearly established that the factors referred to in section 3(2) of the Code (and the counterpart of sub-section (2) in other sections) do not constitute an exhaustive list of the considerations which do not constitute reasonable cause. The fact that a person against whom a prima facie case of denial or discrimination has been made out, can show that the consideration that led to the conduct complained of is not "on the list", is not conclusive of the question whether that conduct had a reasonable cause within the meaning of the Code. See generally GATE and The Sun, supra; Jefferson and the B.C. Ferries et al, (B.I. September 29, 1976), and Bremer, supra.

Perhaps the most elaborate discussion of reasonable cause is to be found in the Reasons of the Board of Inquiry in Bremer. Although those Reasons were concerned with an allegation of a violation of Section 8 of the Code, much of what was said is relevant here. After examining a number of earlier decisions under various provisions of the Code, the Board said:

> In every contravention the respondent's reasons for the prohibited conduct are related to the failure of the respondent to make an individual assessment of the person discriminated against. The reasonable cause standard requires a consideration of the individual in relation to the pertinent employment or other protected opportunity, a consideration free of any reference to the individual's "differentiating characteristic". A contravention of the reasonable cause standard will manifest a refusal to engage in such an individual assessment.

> In every contravention the respondent's reasons for the prohibited conduct involve a consideration by the respondent of the Complainant's group factor or characteristic such as, for example, race or religion. Such group factors are, of course, totally irrelevant and unrelated to the opportunity denied or in respect of which the Complainant is treated unequally. All too frequently, a contravention will be recognizable by a quality of pre-conceived and unreasonble opinion held by the respondent in relation to the irrelevant and unrelated factor.
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> An example will illustrate these indicia of a contravention of the reasonable cause standard. A refusal to employ a woman in a sawmill because the particular applicant is not physically strong enough to perform the required work is not a violation of the Code. On the other hand, a refusal to employ a woman in a sawmill for the reason that women are not physically strong enough to do the work is a classic contravention. The refusal for the latter reason precludes any assessment of the physical strength of any particular woman seeking the work ....
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> It is worth adding that no amount of statistical analysis suggesting the average female has a lower level of physical strength than the average male will serve to make the sex of a particular person relevant to a decision concerning an employment opportunity requiring a certain level of physical strength. Such statistics would not alter the logical falllacy inherent in an assumption about a particular individual due to the individual's sex. It is to be noted that, in describing a statistical analysis of this nature as irrelevant, we are not saying that for other purposes statistical analyses could never be of assistance in human rights proceedings.

Much of the above is mere dictum. I have referred to it at length, however, because it provides a useful framework of principle within which to analyse the issues presented for determination by Mr. Heerspink's complaint. In particular I wish to emphasise the repeated insistence of the Board in Bremer upon the necessity to make individual

of the Code, and to express my agreement with it.

The only information that the officials of I.C.B.C. who dealt with the matter had at their disposal at the time the decision was made to cancel, was that contained in the newspaper report that Mr. Heerspink had been "ordered to higher court trial on a charge of trafficking in marijuana". It is clear from the evidence given by those officials that, without exception, they regarded it as being of the essence of the charge of "trafficking" that those so charged have been engaged in the sale of the drug for profit. Mr. Thomas, it will be recalled, noted in his contribution to the risk analysis that the trafficking charge "opens all kinds of avenues of speculation", and referred to "criminal involvement". In his evidence before the Board, Mr. Thomas stated quite unequivocally that "trafficking means selling drugs". Mr. Watkin, in his evidence, explained that in his view, trafficking means "profiteering". The other I.C.B.C. officials testified to similar effect.

It is clear also from the evidence that in the minds of the relevant I.C.B.C. officials persons engaged in the drug trade are unusually vulnerable to property damage, to say nothing of physical injury, and that the risk involved to the property insurer, therefore, is considerably increased. The theory behind this conclusion is, of course, that since

the drug trade is an illegal trade, those who do not honour their commitments, or whose performance of those commitments is less than perfect (for example because they do not pay for goods sold and delivered, or do not pay promptly, or do not deliver goods of acceptable quality) cannot be proceeded against in the usual way that merchants proceed against one another to resolve disputes arising in the course of the conduct of legitimate business. The courts will not lend their assistance to the enforecement of illegal bargains, so those engaged in those bargains must resort to illegal or, as Mr. Mackenzie preferred to described them, "extra-legal" methods, such as "knee-capping" and the infliction of other forms of physical disfigurement, and, more relevant here, damage to or destruction of property.

A good deal of evidence was presented to the Board that was directed to the question whether this appreciation was sound of the relationship between being involved in the drug trade and being exposed to greater risks of property damage than those normally attendant on the conduct of various forms of legitimate business enterprise. Corporal Kenneth Doern, a member of the Vancouver City Police Department with some considerable experience in drug investigations, including a number of years as an undercover agent, was called on behalf of I.C.B.C. By and large, his evidence tended to confirm the view of the I.C.B.C. officials. On the other hand, Dr. John Hogarth and Mr. Peter Stein, who

were called on behalf of the Director and Mr. Heerspink, testified, in essence, that the relationship between drug trafficking and the risk of personal injury or property damage was a much more complex one than Corporal Doern's evidence suggested, and depended upon a large number of variables, such as the extent of a particular alleged trafficker's involvement in the trade, and the commodities in which he deals. Dr. Hogarth is a Professor of Law at the University of British Columbia, and has been, at various times, Chariman of the British Columbia Police Commission, a member of the Board of the Co-ordinated Law Enforcement Unit (CLEU) of the Ministry of the Attorney-General in British Columbia, and a principal research investigator for the Le Dain Commission on Non-Medical Use of Drugs. Mr. Stein was at various times a member of the Le Dain Commission, and Chairman of the British Columbia Alcohol and Drug Commission. In essence, the position stated by Dr. Hogarth and Mr. Stein was that there may or may not be the connection between drug trafficking and risk of damage to property that is believed to exist by the officials of I.C.B.C. The question as to whether such a relationship exists cannot, in their view be answered in general terms.

In the view that I take of the issues involved in this hearing, it is not important for me to choose between the views of Corporal Doern, and Dr. Hogarth and Mr. Stein.

to its essentials, the position of I.C.B.C. can be stated in the form of the following propositions:

I. All persons who are charged with trafficking in marijuana are traders in the drug for profit.

II. All persons who trade in marijuana for profit are unusually vulnerable to physical injury and property damage.

III. All persons who are unusually vulnerable to physical injury and property damage represent an unacceptable insurance risk.

IV. Mr. Heerspink was charged with trafficking in marijuana.

V. Therefore Mr. Heerspink

(a) was engaged in dealing in marijuana for profit;

(b) was unusually vulnerable to physical injury and property damage;

(c) represented an unacceptable insurance risk.

It will be seen immediately that, thus stated, the position of I.C.B.C. in this matter clearly runs afoul of the principles set out in the Reasons in Bremer. The analogy between the reasoning implicit in that position and that involved in the situation described by the Bremer Board as "a classic contravention" of the reasonable cause standard - i.e. the case of a refusal to employ a woman in a sawmill for the reason that women are not physically strong enough to perform the required work - is evident.

Even if this were not so, however, there remains an equally important flaw in I.C.B.C.'s analysis, and that resides in the premise that all persons charged with trafficking are engaged in dealing in drugs for profit. The law is, of course, otherwise. Section 4 of the Narcotic Control Act, R.S.C. 1970, c. N-1 makes it an offence to traffic or be in possession of a narcotic; and section 2 of that Act defines "traffic" to mean "(a) to manufacture, sell, give, administer, transport, send, deliver or distribute, or (b) to offer to do anything mentioned in paragraph (a)" otherwise than under the authority of that Act. (Cf. also Food and Drugs Act, R.S.C. 1970, c. F-27).

The I.C.B.C. officials who testified were not, of course, lawyers, and in explaining their view of the significance

or to rest their decision to cancel Mr. Heerspink's policy on legal grounds. They were acting strictly as insurance men attempting in a perfectly bona fide fashion to do their job of assessing risk. They might have argued that, as a practical matter of legal administration, it is unlikely that trafficking charges are laid these days against persons other than those who deal commercially in marijuana. I.C.B.C. did not, however, take this position, and in any event no evidence was led on this issue.

To say that they were wrong, in the sense that they proceeded from a false premise, is easy. They were, however, engaged in a process which, while perhaps unintelligible to the uninitiated, is nonetheless well-understood and well-established in the insurance industry. It involves taking account of what is referred to as "moral risk". That is a notion which, it will be recalled, was specifically referred to by Mr. Wilson in his contribution to the Risk Analysis. To say that they were wrong, therefore, and in being wrong, were in violation of the Code, necessarily involves the modification of practices of long-standing and wide acceptance in the insurance industry.

The most useful evidence on the subject of "moral risk" was given by Mr. R.J. McCormick, the Vice-President and Manager for Canada of the Reliance Insurance Company and

Bureau of Canada. Mr. McCormick's evidence was primarily directed to explaining the components of the underwriting decision, and while Mr. Kelleher did appear to enter a soft reservation as to Mr. McCormick's qualifications as an expert on this subject, he did not in fact object to those qualifications.

Mr. McCormick explained that "judgment" is an unavoidable element in every underwriting decision:

> The underwriter uses judgment not only in the absence of but in conjunction with statistical data ... The data itself will give you the frequency of loss, the severity of loss. And, from that, the rate that should be charged fora standard piece of business in that class ... But then judgment has to come in. Looking at the specific piece of business ... (the underwriter has to decide whether) that piece of business (is) fairly close to the standard. Perhaps it is better than the standard and so he should reduce the rate. But perhaps it is lower than standard and what can be done to bring it up to standard whereby that rate could be charged. For example, if there are volatiles in the risk perhaps the volatiles can be put into a separate ... room so that they do not affect the risk from an explosion standpoint ...

Mr. McCormick was here speaking, obviously, of physical risk, the ways in which it could be modified, and its effect upon rates (and, it should be added, scope of insurance coverage). Two underwriters might come to different conclusions as to these matters, depending upon their evaluation, or judgment, of the elements of the risk. They might equally come to the same conclusions. Both, however, would be

attempting to come to a conclusion about the individual circumstances surrounding a particular risk proposed for insurance.

With respect to "moral hazard", or "moral risk", however, according to Mr. McCormick's evidence, the role of judgment is different. He put it this way:

> With the physical aspects you can have inspection and engineering reports, loss control reports completed on the risk ... And so you have ... a very definite idea of the physical aspects. And they are tangible and they are right there. But the moral hazard is a doubt, a serious doubt, but it is an intangible which cannot be scrutinized in a test-tube ... there either is or there isn't a moral hazard ... I would say that once moral hazard has been established, then the underwriter would cancel ...

Mr. McCormick went on to offer the following definition of "moral hazard":

> Moral hazard is the intangible element of the risk which produces a negative aspect as to the acceptability of the piece of business. It pertains not to the physical property but to the insured. That is, his character, reputation and circumstances. Moral hazard creates a serious doubt about his business transaction in the mind of the underwriter. He has reason to believe that the risk is not as he had contemplated, that it has a greater exposure to loss than he would care to accept. Since this possibility increased exposure cannot be corrected by rating or engineering because it deals with the intangible rather than the physical, the underwriter no longer wishes to be a party to the transaction and cancels the contract. This is a business decision, not a legal judgment. The underwriter is not willing to take a chance of exposing his Company's assets on this risk.

The crucial distinction between physical and moral hazard, therefore, lies in the fact that the former is, in principle, capable of being manipulated, both by the insured (by taking appropriate steps to contain or reduce the risk) and by the insurer (by adjusting rates and scope of coverage), whereas the latter is not. In other words, the exercise of the underwriter's judgment about physical risks can to some degree be influenced by manipulating the characteristics of the risk that caused him concern; whereas the exercise of the underwriter's judgment with respect to moral hazard cannot be so influenced. It relates to personal characteristics that are not amenable to modification. The essence of the judgment about physical risks is a combination of group characteristics and individual characteristics; the essence of the judgment about moral risk is that it is based upon group characteristics only.

Once this is understood, it will readily be seen that once a characteristic - for example, being charged with trafficking in marijuana - is regard by the insurance industry as raising a question of moral hazard, no further enquiry need be made. The judgment concerning persons who are charged with trafficking in marijuana rests upon grounds that are entirely a priori. It was conceded, indeed, that there was no evidence about the loss record of persons charged with trafficking in drugs. I.C.B.C. might, with as much (or as little) justification, say that "all black

or "all Chinese". And if blackness or being a woman, or Chinese, is regarded as raising a moral hazard, the conclusion that coverage ought to be denied follows as inexorably as night follows day.

Some of the I.C.B.C. officials who testified seemed, at times, to be saying that their conclusion with respect to the significance of the charge against Mr. Heerspink, and the action taken on the basis of that conclusion, was supported by common experience, or observation. The difficulty about this position, as it seems to me, is that frequently common observation or experience is based upon a misconception of the facts or, indeed, upon no facts at all. A misconception does not cease to be a misconception for all that is widely held.

To conclude, as I do, that the decision reached by I.C.B.C. in this instance, and the manner in which it was reached, constituted a contravention of the Code, does not carry with it the unavoidable implication that there is no longer any room for the making of underwriting decisions which have in them a subjective element, nor does it mean the evisceration of the concept of moral hazard. What it does mean is that moral hazard can no longer have the absolute, dispositive effect that it seems to have had. Mr. Mackenzie, in the course of his final argument, contended that moral

that contention is unsound, both independently and by reason of the provisions of section 3(2) of the Code. It may be right to say that the fact that a person has been charged with the offence of trafficking raises a prima facie case as it were, of moral hazard. It seems to me, however, that while it may be right to say, as Mr. McCormick did in his evidence, that moral hazard represents "an intangible which cannot be scrutinized in a test-tube", it does not follow that there cannot be degrees of moral hazard. That the judgment of degree is subjective cannot be denied. If it is based on no facts, however, or, as here upon a fact (the charge) that is not, without more, demonstrably relevant to the existence, nature and extent of the risk, then it is at best a theological judgment, a matter of faith, or belief, or ideology, or conviction, and at worst, a reflection of naked prejudice. As with most matters of ideology, it does not rest upon nor can it be tested against considerations of reason. It has no "reasonable cause" within the meaning of section 3(2) of the Human Rights Code.

It is possible, of course, that two conscientious underwriters faced with the same facts could, in the exercise of their independent subjective judgments, reasonably come to two different conclusions as to the degree of risk presented. If honest historians can differ about the interpretation of past events, it is equally likely that conscientious prophets

insurance is, after all, a matter of making reasonable predictions about the future, and anticipating it. Nothing in the conclusive I have come to in any way affects this state of affairs.

The Board finds that the complaint of Mr. Heerspink that he has been denied insurance by I.C.B.C. without reasonable cause in violation of section 3(1)(a) of the Human Rights Code has been made out, and, pursuant to section 17(2) of the Code, I order that I.C.B.C. refrain from committing any similar contravention in the future. Mr. Heerspink has found other insurance, so there is no point in making any order with respect to his situation.

DATED at Vancouver this 8th day of March, 1979.

Board of Inquiry
per Leon Getz