BRITISH COLUMBIA HUMAN RIGHTS COMMISSION

BOARD OF INQUIRY

IN THE MATTER OF HUMAN RIGHTS CODE OF B. C.

AND

IN THE MATTER OF SUSAN JORGENSEN, COMPLAINANT

AND

IN THE MATTER OF B.C. ICE & COLD STORAGE LTD., RESPONDENT

AND

IN THE MATTER OF THE UNITED FISHERMEN & ALLIED WORKERS UNION, RESPONDENT

BOARD OF INQUIRY:

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| JOHN A. BOURNE, Q.C. | - | CHAIRMAN |
| C. LYNN SMITH | - | MEMBER |
| C. J. ALCOTT | - | MEMBER |

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| T. A. ROPER, ESQ. | - | appearing for B.C. Ice & Cold Storage Ltd. |
| J. J. CAMP, ESQ. | - | appearing for The Director of Human Rights and for Susan Jorgensen |
| J. NICHOL, ESQ. | - | appearing for United Fishermen & Allied Workers Union |

MAJORITY OPINION OF JOHN A. BOURNE, Q.C., CHAIRMAN AND C. J. ALCOTT, MEMBER

Unfortunately the Board has not been able to reach a unanimous decision and report with respect to this complaint. However, we do agree to a great extent upon our assessment of the evidence. The majority of the Board has carefully examined and assessed the analysis of the facts, the motives of the parties, and the opinions which Lynn Smith expresses in her dissenting opinion. The majority respects the very learned and studied opinion which she has expressed, but we do not feel we can agree with her rationale or her ultimate conclusions. The majority has refrained from writing a treatise on the Human Rights Code and from any detailed critique of Lynn Smith's opinions. The majority confines its remarks to what it considers the essential elements of the matter which has been put before us, considering case law and the large body of the evidence which was presented to the Board.

In the result the Board does agree that Susan Jorgensen was discriminated against and agrees, except with respect to the question of pay rates, upon our proposed remedy. Where the Members of the Board mainly differ is whether the sex of Susan Jorgensen was the motive or ingredient in the Employer's decision to deny her the further opportunity to perform Group 1 work, which work will be more extensively referred to later in these Reasons.

Pursuant to Section 13 (1) of the Human Rights Code this Board of Inquiry was appointed by the Minister of Labour on January 31, 1979.

The hearings commenced on April 24, 1979 and continued on April 25 and June 1. During the hearing on the latter day Jack Nichol on behalf of the United Fishermen & Allied Workers' Union objected to the composition of the Board upon the grounds which were stated at some length. Submissions with respect to the matter were heard on June 1 and June 4 and on July 3. On August 16, 1979, the Board in a written decision stated that in its opinion and in the circumstances and in law, the Board could not properly disqualify itself or any of its Members. The Board declined to do so and stated that it intended to proceed with the hearing of the complaint. This decision is appended as a Schedule to these Reasons.

Hearings resumed on January 7, 1980 and continued on January 8, January 9, January 10, January 11, February 18, February 19, March 24 and March 25.

Argument was heard on March 26, 1980, April 7, April 9, May 21 and May 22.

The Board reserved its disposition of the matter of the complaint. Due to personal problems and commitments of Members of the Board this decision has been delayed.

The Respondent B.C. Ice & Cold Storage Ltd. is engaged in the business of processing fish products for its own account and for customers. It has freezing and storage facilities. While the Board of Inquiry has had a view of the premises and is generally familiar with its operation, the understanding

of the case is not furthered by going into great detail of these operations.

The Respondent Union and the Employer have been parties to collective agreements over a considerable period of time.

The Collective Agreement with which we are concerned contains reference to Group 1 and Group 2 classifications. The work in Group 1 classifications is, generally speaking, more arduous than the work in Group 2 classifications. Prior to 1973 the reference was to male and female classifications, the former generally corresponding to what is now Group 1 and the latter to what is now Group 2. The change in reference to the classifications occurred in the Collective Agreement negotiated in or about 1973. The evidence is that over the years male applicants for employment have always applied for and have been assigned to Group 1 work and female employees have always applied for and have been assigned to Group 2 work. The evidence is that in recent years, at least, the difference in the work has been explained to applicants. The Group 1 starting rate was in 1978 and prior years lower than the Group 2 starting rate but the structure of rates enabled the employee in Group 1 ultimately to exceed the rate for the employee in Group 2. The evidence is that persons in Group 1 are expected ultimately to be able to perform all the job classifications

in Group 1, and although many have done so, some have not been called upon to nor have in fact performed them all. In this pattern no male has, at the time of hiring, applied for and been designated for the Group 2 classification, nor has any female, at the time of hiring, applied for and been designated for Group 1 classifications.

The issues before this Board contained in the Report to the Minister and, as we understand it, agreed to by the parties are as follows:

(1) Has Ms. Jorgensen been denied and is she being denied equal opportunity to perform Group 1 work?

(2) Was Ms. Jorgensen discriminated against in not being paid a Group 1 rate, or being classified as a Group 1 worker, when she performed Group 1 work?

(3) Does the Collective Agreement discriminate against women employees of B.C. Ice & Cold Storage Ltd. by not providing a one thousand hour rate in the Group 2 classification?

(4) Did Clause 602 of the 1976 Collective Agreement have a discriminatory impact in the employment of women at B.C. Ice & Cold Storage Ltd.?

ISSUE (1)

This will be dealt with in detail below.

ISSUE (2)

Susan Jorgensen performed work that comes within the description of Group 1 on occasions in January and in March, 1977. At that time she was being paid the top Group 2 rate which was approximately 21¢ per hour above the four hundred hour rate for Group 1 work but less than the one thousand hour rate of Group 1. Her complaint is that she should have been paid the one thousand hour rate, i.e. given credit for the hours she had performed in Group 2 towards a one thousand hour rate for Group 1. The Employer's position is that she does not get credit for the hours performed in Group 2 towards the one thousand hour rate for Group 1. Either at that time, but certainly later, the Employer rationalized this by stating that they were prepared to allow a credit for Group 2 persons performing Group 1 work up to six hundred hours. The Employer says that this is covered by the transfer provision in the Collective Agreement (8.01.2) which reads as follows:

> "8.01.2 An employee transferred from one department to another shall be credited with all hours worked (up to a maximum of 400) in establishing a rate in such department."

and that a Group 2 employee performing Group 1 work would only get the one thousand hour rate for Group 1 when that employee had performed six hundred additional hours of Group 1 work. However, the Employer was willing to concede a six hundred hour, rather than a four hundred hour, credit.

If there had been a male employee in Group 2 under similar circumstances, presumably he would have been in the same position. If either Susan Jorgensen or the male employee did not agree with the Employer's interpretation of the Collective Agreement, that employee could file a grievance but it does not seem to us to be discrimination against a female employee. It is a question of a grievance rather than a violation of the Human Rights Code.

ISSUE (3)

It should be noted that in 1979 and subsequent thereto, a one thousand hour rate did apply to Group 2. The Collective Agreement that was in effect in 1976 had one reference, and one reference only, to female and that is in Section 6.02 which is referred to in our analysis of Issue (4) below. The parties did address themselves to the matter of potential sex discrimination in their negotiations in or about 1973 and in subsequent negotiations. There is no other reference in the 1976 Collective Agreement or any reference in subsequent collective agreements that identify discriminatory practices in respect to sex, either in terms or rates of pay or of opportunities to perform certain work. There is no doubt in our view that historically there was that clear distinction drawn between female and male employees but the parties addressed

themselves to the question and removed that distinction. It would appear that in earlier collective agreements there was a male classification and a female classification, and the male classification covered jobs which are presently covered, more or less, in Group 1, and the female classification covered, more or less, jobs which are presently covered in Group 2. It therefore appears to us that, on the face of it, there is no discrimination in the Collective Agreement itself against women. We have addressed ourselves to the fact that in the interpretation and the administration of a collective agreement there may arise a conscious or subconscious discrimination against women. Such discrimination might arise in the application of the collective agreement or practices arising out of its administration without the Employer or those in authority specifically or consciously interpreting the collective agreement in a manner which would be discriminatory. Virtually every collective agreement has the capability of being interpreted in a discriminatory way by some party whether intentionally or unintentionally. The question of interpretation of the language of a collective agreement would better be dealt with in the grievance and arbitration procedure rather than as a complaint under the Human Rights Code. The issue as set forth deals only with the absence at the time of the laying of the complaint of a one thousand hour rate in Group 2 classifications as discriminatory against women. This difference in the hourly structure

was removed in 1979. We, however, have addressed ourselves to that matter and any other apparent discrimination in the Collective Agreement and have found that the Collective Agreement itself does not discriminate against women.

ISSUE (4)

Clause 6.02 in the 1976 Collective Agreement is contained as part of the attachment to Exhibit 7 and reads:

> "It is clearly understood that female employees shall not be required to work in low temperature rooms in cold storage."
>
> (Emphasis added)

Such a provision is not contained in the 1977 or subsequent collective agreements. If Clause 6.02 of the 1976 Agreement is discriminatory, it is discriminatory against males rather than females in that it permits females to refuse such work but does not, on its face, permit males to refuse such work. This complaint was withdrawn by the Branch.

This, then, in our view, leaves Issue (1) and the ancillary matters relating to it as the only Issue to be determined by this Board.

Section 8 of the Human Rights Code reads, in part, as follows:

> "8. (1) Every person has the right of equality of opportunity based upon bona fide qualifications in respect of his occupation or employment, or in respect of an intended occupation, employment,

"advancement, or promotion; and, without limiting the generality of the foregoing,

(a) no employer shall refuse to employ, or to continue to employ, or to advance or promote that person, or discriminate against that person in respect of employment or a condition of employment; and

(b) ... unless reasonable cause exists for such refusal or discrimination.

(2) For the purposes of subsection (1),

(b) the sex of any person shall not constitute reasonable cause unless it relates to the maintenance of public decency; "

(Emphasis added)

It will be noted that the prohibition against discrimination includes, but is not limited to, discrimination by reason of sex.

The reason given by S. W. Reeder, President, to this Board and to Ms. Embree of the Human Rights Branch as to why the Employer subsequent to March, 1977, refused or declined to permit Susan Jorgensen to be engaged in Group 1 work was that because of alleged wrist and back problems she would be more likely to be susceptible to injury than if she were engaged in Group 2 work. This conclusion was arrived at by knowledge and observation that Susan Jorgensen wore wrist bands and taped her wrists and on one occasion requested Mr. Geoff Leyland, Plant Manager of the Employer, to tape them for her, and the observation of Mr. Leyland of Susan Jorgensen away from her

work station holding her back and indicating a back fatigue or back complaint. There was no other incident of back complaint or back ache nor was there anything other than the taping of wrists or wearing wrist bands which led management to conclude that she had back or wrist impairment. Mention was made of two occasions in 1978 when Susan Jorgensen was working washing fish in cold water and because of the discomfort to her wrists she asked for other work, which her seniority permitted her to do. Mr. Reeder also stated that he did not think he found her to have a disability but rather to exhibit back complaints and wrist complaints which indicated either weakness or impairments.

Mr. Reeder testified that based upon Dr. William Buckler's medical report and difficulties which very well may not have shown up in Dr. Buckler's office, he would not now offer Susan Jorgensen any opportunity to do Group 1 work. He says, "What we saw, we still cannot ignore."

Dr. Buckler conducted an examination of Susan Jorgensen on April 5, 1979, approximately two years after the complaint herein was filed, and she then had no physical complaints and appeared to be an average healthy young woman of average weight and build and strength and there were no objective findings of physical damage or injury. His opinion, based upon given assumptions and general evidence as to the strength and physical capabilities of males, females and human beings generally, will be dealt with at a later stage.

The Employer's position is that one of the factors which the Employer took into account in declining or refusing to allot Group 1 work to or permit Susan Jorgensen to perform Group 1 work was the condition of her wrists.

It is therefore necessary to arrive at a conclusion upon the evidence as to the actual condition of Susan Jorgensen's wrists and as to whether that condition would constitute a valid factor in refusing or declining to allow her to perform Group 1 work.

It should be noted that in the various questions to Susan Jorgensen and to the other witnesses various terms were used with respect to the condition of her wrists, such as "complained", "experienced" and other terms of communication with respect to the condition of her wrists.

Susan Jorgensen admitted that her wrists were, on occasions, tired and she seems, on occasion in her evidence, to have acquiesced in the term "sore" but usually under questioning returned to the term "tired". She stated that at no time did she receive any treatment with respect to her wrists nor did she consult any doctor. She never filed an accident report with respect to her wrists. She never refused work because of the condition of her wrists and, in spite of soreness, she worked in any event. She never made any complaints as to being unable to perform her work because of the condition

of her wrists. She denies the suggestion that on one occasion when racking fish that the water was too cold for her wrists and that she wanted to go off the washing line and onto the afternoon shift. She contended that she preferred more comfortable work and that because of her seniority she was entitled to ask for this type of work.

Susan Jorgensen admitted that she did tape her wrists periodically and that she wore wrist bands, some of which were supplied through First Aid and some of which were her own. She admitted that on one occasion she asked Geoff Leyland to tape her wrists for her. She stated that the reason for her taping her wrists and asking them to be taped for her was for protection and that she had her wrists taped irrespective of the job she was to perform. It would appear that Susan Jorgensen consistently taped her wrists, and that Faye Newman also did so to some considerable extent, and some employees did so occasionally.

The witness L. Jackson testified that Susan Jorgensen did mention the soreness of wrists and that she taped her wrists and that Jackson had taped them for her. This was done for support and it was not uncommon for employees to tape their wrists.

L. Mulroney testified that Susan Jorgensen did tape her wrists. This was not uncommon but she did complain about tired and sore wrists, as did others.

The witness Faye Newman testified that Susan Jorgensen had complained to her about sore wrists but no more so than had some other employees. This would appear to be in 1976, and after the summer of 1977 when she had ceased to perform Group 1 work. She stated that not only did Susan Jorgensen wear wrist bands but she, herself, and other employees, wore wrist bands for support of their wrists.

The witness Mick Louis testified that Susan Jorgensen never complained to him about sore wrists but that she did tape her wrists.

The witness Vince Casano said that he had heard that Susan Jorgensen had sore wrists and knew that she wore wrist bands or taped her wrists.

Gordon Jorgensen, brother of Susan Jorgensen, stated that he knew his sister had tired wrists and that she taped her wrists with elastic. He stated that she had never discussed this at home.

Mrs. G. M. McKenzie stated that she was aware that Susan Jorgensen taped her wrists or used wrist bands but she assumed that this was merely because her wrists were sore or weak.

Mrs. M. Hull stated that Susan Jorgensen never complained to her about sore wrists but she knew that she wore wrist bands but did not know why.

Mrs. L. Mackay gave similar evidence.

Peter Storness-Kress testified that Susan Jorgensen never made any complaint to him about sore wrists.

W. P. Hunter said that Susan Jorgensen had sore wrists on occasion but he cannot recall that it was a problem and he thinks she said that she was tired.

Karnal Manhas testified that Susan Jorgensen wore wrist bands, he assumed for strength in her arms but it never appeared to affect her ability to do work at the plant.

E. Gagnevin said that she knew Susan Jorgensen wore wrist bands but it was just to protect her wrists and that Susan Jorgensen had told her so.

Dr. Buckler, in addition to the evidence already referred to, stated that the absence of physical findings in his examination was not inconsistent with any strain on the back or sore wrists which had occurred in the past, nor did this exclude the possibility of strain in the future. He said that she did not have teno-synovitis but she had a risk of getting it.

Geoff Leyland referred to the occasion when he was asked by Susan Jorgensen to adjust the tightness on the bandage around her wrist with an elastic band that belonged to her. He thought this was an unusual request to a representative of management. However, on another occasion Faye Newman had

asked him to tape her wrists. Leyland said that Susan Jorgensen had stated that she taped her wrists for protection and that this was the first occasion upon which he was aware that Susan Jorgensen had her wrists taped.

J. Wolkosky recalled the occasion in 1978, which is after the complaint was filed, when Susan Jorgensen had been washing fish and had asked to be transferred from the day shift to the afternoon shift, giving the reason that her wrists were too sore for the job of washing fish. A similar request was made several days later but on that occasion she did not mention about sore wrists. He agreed that on the first occasion Susan Jorgensen mentioned sore wrists as the reason for the transfer and on the second occasion it was because the water was too cold for her. Susan Jorgensen, as previously stated, denied the words attributed to her.

With respect to the condition of Susan Jorgensen's back, the evidence is as follows.

Susan Jorgensen said that she had never felt any problem with her back, she had never felt fatigued or tired in her back or experienced any soreness in her back concerned with her work. She then was asked if she had ever experienced any soreness at any other time concerned with anything other than work and after remarking that it was embarrassing, she went on to relate that at one point in her life she had had

an intra-uterine device installed and her body rejected it and that she had had really bad back aches and cramps from it. This would be in 1976 or 1977. She recalled the incident when Geoff Leyland saw her when she was feeling tired and he asked her what the trouble was and she said that her back hurt. These symptoms lasted about a week and she ended up in hospital. Since that time she has had no trouble with her back and never made any complaints with respect to her back other than on that occasion. She has had no further physical problems and considers herself to be healthy.

Mr. Mulroney stated that Susan Jorgensen had never complained to him about a sore back.

Faye Newman gave similar testimony as did Mick Louis, Gordon Jorgensen, G. M. McKenzie, M. Hull, L. Mackay and Storness-Kress.

Dr. Buckler confirmed that in his examination Susan Jorgensen had told him about the back ache that had been associated with the intra-uterine device for preventing pregnancy. He stated that it is not infrequent for back pains to be associated with an intra-uterine device and that back pain was relieved by the removal of the device.

In his report (Exhibit 27) Dr. Buckler states that he was told certain things about the work to be done in the plant and of Susan Jorgensen's complaints with respect to her

back and wrists. In spite of his own negative objective findings, he proceeded in his report and in his evidence to give opinions concerning her ability to do certain work and the likelihood of her injuring herself. He then dealt with general statistics with respect to certain anatomical and physiological factors of males and females and he quoted statistics. Additional and differing statistics, and differences between males, and between persons of different racial origins, were put to him. In view of the evidence heard by the Board on these subjects, we discount the rather speculative opinion evidence of Dr. Buckler insofar as it relates to the condition of Susan Jorgensen's back and wrists, and the likelihood of her injuring herself.

In summary, with respect to Susan Jorgensen's wrists and back, the Board's view, upon the evidence, is that she had no significant problems nor had she experienced any unique physical conditions which would of themselves unduly affect her ability to perform Group 1 or Group 2 work, or which would of themselves likely expose her to job related injury.

Disregarding for the moment what is <u>not</u> "reasonable cause", pursuant to Section 8 (2) of the Code, it is our understanding of Mr. Roper's argument with respect to that subject that if the Employer held an "honest belief" that if Susan Jorgensen continued to perform Group 1 work after March,

1977, she might be exposed to job related injury because of the condition of her wrists and back, the holding of such honest belief would be reasonable cause even if the Board would not have come to the same conclusion.

He referred to the following cases as authorities.

The Vancouver Sun vs Gay Alliance Towards Equality (1977) 5 W.W.R. 198 (a decision of the Court of Appeal of British Columbia).

It was submitted that the decision of the Court that

> "the fact that such policy was motivated by bias on the part of certain individuals in the Appellant's management could not be said to have no reasonable foundation as long as the bias was honestly, not maliciously, held"

supported the Employer's position if it honestly held the belief referred to with respect to Susan Jorgensen's condition.

Branca, J.A. at page 209 said:

> "The question still remains: Was the policy of the newspaper based on reasonable cause? The Board did not attribute bad faith to the bias of the individual. It did not consider the second question at all, that is, whether or not the policy, despite bias, constituted reasonable cause."

Robertson, J.A., while observing that the correct test is the objective rather than the subjective test when on to say at page 210:

> "Conversely, if reasonable cause does not in fact exist, the other person cannot justify his act of discrimination by a genuine belief that a reasonable cause did exist."

The case went to the Supreme Court of Canada where the appeal was dismissed.

It seems to us that applying the above statements of the Court of Appeal that even if the Employer held an honest belief with respect to the above mentioned matters, such honest belief would not constitute reasonable cause if the alleged facts upon which such honest belief were based did not, in fact, exist or were not as the Employer believed. In other words, if Susan Jorgensen's condition with respect to her wrists and back would not, in fact, unduly affect her ability to perform Group 1 work or which would, of themselves, likely expose her to job related injury if performing such work, the fact that the Employer held an honest belief in that respect would not constitute reasonable cause within the meaning of the Code.

The second case relied on in that respect by Counsel for the Employer is

> British Columvia Forest Products Limited and Janice Lynn Foster vs The Director (1980) 2 W.W.R. 289.
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> Chief Justice McEachern stated:
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> "It seems clear from the authorities that to determine whether reasonable cause exists, it is necessary to apply an objective test, and the Appellant would have reasonable cause to refuse to employ the Respondent if facts existed which would constitute reasonable cause even if such facts were not known at the time of the application for employment."
>
> (Emphasis added)

Dealing with the particular facts as they related to the medical condition in that case, the Chief Justice stated:

> "For there to be reasonable cause it would be necessary for the Appellant to establish that the Respondent, in answering the said question as she did, misstated facts relevant to the question of employment. In my view the Appellant has not established a sufficient factual basis for such a conclusion. A misaligned vertebra does not necessarily indicate back weakness, and the word 'strain' usually connotes a soft tissue injury. I have no way of knowing if a hip condition such as described in the Stated Case constitutes a back weakness or strain, but I would surmise, which is the best I can do, that it would not."

The Chief Justice then went on to say:

> "In closing, even though it is not necessary to this decision I do wish to say that I agree entirely with Mr. Horne's very frank submission that there would be no discrimination which offends against the Code if the Appellant had declined to employ the Respondent because of an honest belief that her size or weight made it, in the Appellant's judgment, unlikely or impossible that she could do the job."

It should be noted that this statement is obiter. The honest belief was with respect to a judgment based on known facts of size and weight, not upon assumed physical conditions. It would appear to follow from the Chief Justice's earlier remarks in the case and upon the latter statement by way of obiter, that if the facts did not exist, such honest belief that they did so exist would not amount to reasonable cause within the meaning of the Sections in the Code.

Apart from the question of rates paid to Susan Jorgensen while she was performing work in Group 1, which matter

has already been dealt with under Issue (2), there was no discrimination against Susan Jorgensen either on the grounds of sex or on any other grounds before late March, 1977. She was assigned to perform Group 1 work in January and in March, 1977.

Mr. Leyland related the incidents in March of 1977 with respect to his observations relating to Susan Jorgensen's wrist and back. He recalls that this was near the end of the herring season which ended on March 22, 1977. He stated that the incident relating to the wrists was within a day or so of that which we take to mean a day or so before the end of the herring season on March 22, 1977. His observance with respect to Susan Jorgensen's back was also before that date. Mr. Leyland says he took no immediate steps with respect to his observation relating to Susan Jorgensen. He said it was near the end of the herring season and he wanted time to relax. He stated that it was customary at the end of the herring season for him and Mr. Reeder to meet to discuss the manner in which the operations had been carried out during the season, with a view to future planning and other items of interest in that respect. Leyland and Reeder had lunch together at which some of these matters were discussed and, on that occasion, Leyland reported to Reeder his observations concerning Susan Jorgensen. As a result of a discussion between them it was concluded that Susan Jorgensen would no longer continue to perform Group 1 work.

The herring season having ended and no Group 1 work having been assigned to Susan Jorgensen, she was laid off. It appears clear that after the layoff, Group 1 work was available and was performed by employees junior to Susan Jorgensen. It would appear that she complained to the Union and her complaint was taken up by Jack Nichol and another Union representative, O'Shaughnessy, on separate occasions. They were told that the employees concerned were "doing Group 1 work that Susan was not capable of doing". Apparently the Employer's concern with respect to possible injury to Susan Jorgensen was conveyed to O'Shaughnessy and it would appear that some details with respect to the observations relating to Susan Jorgensen's wrists and back were conveyed to O'Shaughnessy.

Mr. Reeder confirmed in his evidence that a decision was made not to permit Susan Jorgensen to pursue Group 1 work because of the observations relating to her wrist and back and he says he would have made the same decision with respect to male employees. He states he was concerned with respect to the Employer's position under the provisions of the Workers' Compensation Act and Regulations relating to employees performing work under circumstances such as those which he considered he was faced with and felt the Employer was "between a rock and a hard place". It would appear he gave instructions to management to observe Susan Jorgensen's performance and that

this was done and thus, the episode in July, 1978, was noted when Susan Jorgensen on two occasions requested she be taken off the job of washing fish. This, of course, was long after Susan Jorgensen's complaint was lodged. He states that she continued to wear wrist bands after that but he never enquired as to the reason for this.

It would appear that in the Fall of 1977 Lydia McKay, Shop Steward, complained in connection with women not being given the opportunity to perform Group 1 work and, as a result, discussion took place with the women employees and they were given the opportunity to perform Group 1 work if they wished and felt they were able to do so. It would appear that after some discussion the only one who did perform Group 1 work was Faye Newman. It is clear that because of the Employer's attitude with respect to Susan Jorgensen, she was not given the opportunity to perform Group 1 work.

The evidence seems clear that at the time of hiring of employees, all male employees were assigned to Group 1 work and all female employees were assigned to Group 2 work. It was stated that this was of their own choice and that discussions took place at the time of hiring with respect to the nature of the work. Thus it would appear that of all female employees the only ones to complain were Susan Jorgensen and Faye Newman. The latter did perform Group 1 work for some time and there was

considerable evidence as to her ability to continue to perform such work and, ultimately, she was taken off that type of work.

One of the considerations (though minor) with respect to the decision relating to Susan Jorgensen was her productivity in performing Group 1 work in January and March, 1977. Lynn Smith in her opinion has dealt with this matter in some detail, particularly as to whether her individual assessment or a group assessment of women in general was made. In the view of the majority of the Board we consider this factor was minor. We are cognizant of the decisions which hold that even though that factor was a minor one, if it were an element in the decision and it was based upon a consideration of sex, it would offend the Code.

However, in the case before us, the three reasons under consideration are inextricably bound together. We consider the Employer's officials in fact (though mistakenly) believed that Susan Jorgensen had wrist and back problems which inhibited her ability to perform Group 1 work. We also accept the evidence outlined by Lynn Smith that, in fact, Susan Jorgensen's productivity in Group 1 work was adequate. In effect the Employer representatives made three errors; these are the decisions with respect to the condition of her wrists, her back and her productivity. However, even assuming the Employer misjudged her productivity and would require her

to increase it, their decision was that because of their (mistaken) view relating to her wrists and back they would not ask her to, or indeed permit her to, increase her productivity for fear of her injuring herself - again a mistaken view.

In the opinion of the majority of the Board, considering all the evidence and assessing the veracity of the witnesses, the consideration of the sex of Susan Jorgensen was not a factor in the decision to deny her the opportunity of performing Group 1 work.

Returning to Issue (1), it would be noted that Section 8 (1) provides that "every person has the right of equality of opportunity based upon bona fide qualifications in respect of his occupation or employment". Section 8 (1) (a) contains a prohibition against discriminating against a person in respect of employment or a condition of employment unless reasonable cause exists for such discrimination. Subsection (2) provides that the sex of any person shall not constitute reasonable cause unless it relates to the maintenance of public decency. While the thrust of the evidence and argument was to a great extent directed to discrimination by reason of sex, it will be seen that the prohibition in the Section is not so limited.

Upon the evidence, the view of the majority of the Board is that Susan Jorgensen was not discriminated against

because of her sex but that she was, in fact, discriminated against because of the Employer's belief that her physical condition exposed her to the risk of physical injury if she continued to perform Group 1 work and the inadequate information it had with respect to her productivity. The Employer's position is that this belief was honestly held and that it constitutes reasonable cause for discriminating against Susan Jorgensen. In the Employer's submission such reasonable cause exists even though the Board might have come to a different view.

In the view of the majority of the Board, which we consider to be supported by the authorities already cited, there is a distinct difference between the situation where an employer, based upon an individual assessment of the employee, makes a decision with respect to the employee's individual ability to perform the work expected of the employee and that of a situation where employees are assessed as a group, whether by sex or other criteria. In the case of Susan Jorgensen such decision to discriminate against her was based upon the belief that she had physical problems with respect to her wrists and back which rendered her susceptible to injury if she continued to perform Group 1 work (and the related consideration of her productivity). This belief with respect to her physical condition was based upon the observations of Mr. Leyland on one occasion only with respect to wrists and one occasion

only with respect to her back and upon his subsequent discussion with Mr. Reeder with respect to those conditions. It was not until nearly two years later that Susan Jorgensen was required to undergo a physical examination. The Employer was aware that she continued to wear wrist bands but was not sure of the reason. The episode in relating to the two requests to be transferred from washing fish in cold water was over a year following the date of the complaint and seems to be explained by Susan Jorgensen's right to request a change from such work because of her seniority.

The Employer relies upon its belief that certain physical conditions with respect to Susan Jorgensen's wrists and back actually did exist. As previously stated, the Board's view is that she had no significant problems nor had she experienced any unique physical conditions which would, of themselves, unduly affect her ability to perform Group 1 or Group 2 work or which would, of themselves, likely expose her to job related injury. If such physical condition did not, in fact, exist, the Employer's belief that they did so exist does not constitute reasonable cause to relieve the Employer of the prohibition contained in Section 8 (1) of the Code.

The opinion of the majority of the Board, pursuant to Section 17 (2) of the Code is that the complaint covered by Issue (1) is justified but not on the grounds of discrimination

due to her sex. The complaints covered by Issues (2), (3) and (4) are not justified.

A remedy in this case is a difficult one to determine. Over three and one-half years have elapsed since the complaint was filed. On the evidence before the Board it is not possible to determine the extent of the loss of job opportunities which Susan Jorgensen might have had to her advantage, and the appropriate compensation with respect to any such loss.

The Order of the Board is:

A. Susan Jorgensen be afforded the opportunity of performing Group 1 work with the Employer. Her ability to perform such work should be determined upon an individual assessment of her performance in such work.

B. With respect to the question of financial loss to Susan Jorgensen as a result of her not being given the opportunity to continue to perform Group 1 work after March, 1977, there is some evidence that employees junior to her performed such work while she was laid off. However, we have no particulars in this respect nor can we determine whether (apart from the wrist and back consideration with which we have already dealt) she would have proven herself capable of continuing successfully to perform Group 1 work with a view to qualifying as a Group 1 employee. We are not, therefore, at this stage able to make any Order as to

any monetary settlement with Susan Jorgensen. However, the Board will for a period of two (2) months remain seized of this matter so that one or all of the Parties may apply to the Board to present further evidence with respect to such loss of opportunity and financial loss she may have suffered as a result.

C. Under all the circumstances which are outlined in these Reasons, there should be no award with respect to costs.

Dated at Vancouver, B. C., this 6th day of February, 1981.

John A. Bourne, Chairman

C. J. Alcott, Member

IN THE MATTER OF HUMAN RIGHTS CODE OF BRITISH COLUMBIA

AND

SUSAN JORGENSEN, COMPLAINANT

AND

B.C. ICE & COLD STORAGE LIMITED AND UNITED FISHERMEN & ALLIED WORKERS' UNION, RESPONDENTS

AND

DIRECTOR, HUMAN RIGHTS CODE

A party pursuant to Section 16(3) of the Human Rights Code of British Columbia.

DECISION OF BOARD OF INQUIRY WITH RESPECT TO ITS QUALIFICATIONS TO CONTINUE WITH THE INQUIRY

A Board of Inquiry was appointed by the Minister of Labour of British Columbia under Section 16 of the Human Rights Code of British Columbia comprised of John A. Bourne, Q.C., Chairman, Lynn Smith and Claire Alcott, Members, to deal with complaints under Sections 6, 8 and 9 of the Human Rights Code brought by Susan Jorgensen, Complainant, against B.C. Ice & Cold Storage Limited and United Fishermen and Allied Workers' Union, Respondents.

The Board of Inquiry commenced its hearings on April 24, 1979 and, in response to a question by the Chairman, there was no disagreement that the Board was properly constituted.

The hearing proceeded on the morning and afternoon of April 24, 1979, on the morning and afternoon of April 25, 1979, and on the morning of June 1, 1979. At the recommencement of proceedings in the afternoon of June 1st, Mr. Jack Nichol, President of and appearing on behalf of the Respondent Union, raised the question of the proper constitution of the

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Board of Inquiry arising out of an apprehension of bias on the part of the Chairman. Mr. Nichol stated that he had remembered and confirmed that the Chairman of this Board, John A. Bourne, had been a member of an Arbitration Board as the employer nominee in an arbitration between United Fishermen & Allied Workers' Union and Nelson Brothers Fisheries Ltd. held in late 1965, the date of the Award being January 7, 1966. The Majority Award was that of the Chairman and the Nominee appointed by the Union. Mr. Bourne published a Dissenting Award. The matter in the arbitration related to whether or not an employee, Clarke, did or did not come within the terms of the Collective Agreement and should be paid under its provisions over a considerable period of time. The majority held that he did come within the provisions of the Collective Agreement and made an award accordingly. Mr. Bourne dissented and published a Minority Award on the basis of construction of the applicable documents and on the question of onus of proof. An application was made to the Supreme Court of British Columbia to set aside or remit the Majority Award, and the Court set aside the Award and refused, on grounds other than those which appeared in Mr. Bourne's Minority Award, to remit it to the Arbitration Board.

This Board of Inquiry heard argument on Mr. Nichol's submission on June 1st and adjourned the matter to June 4th for further argument. A request for further submissions was made and the Board heard further argument on July 3, 1979.

Mr. Nichol at the outset stated that he did not intend in any way to cast reflection or aspersion on the integrity of the individual Board Members but that, in accordance with the old adage of law, "justice must not only be done but it must be seen to be done", and took the position that because Mr. Bourne had been associated with the Board of Arbitration above referred to in which he had been nominated by the Employer Company, he should disqualify himself as Chairman of this Board of Inquiry. It was agreed that

Nelson Brothers Fisheries Limited had no connection with B.C. Ice & Cold Storage Limited but it was noted that United Fishermen & Allied Workers' Union was involved in that arbitration as well as in the matter before this Board of Inquiry.

Mr. Nichol further submitted that Ms. Smith and Mr. Alcott, Members of this Board, should also disqualify themselves, not because of any previous involvements or associations of themselves personally with one or more of the parties, but because they had proceeded in association with Mr. Bourne on this inquiry up to June 1, 1979, and there had likely been communication between themselves and Mr. Bourne. Counsel for the Company, for the Union and for the Complainant and for the Director of the Human Rights Code, appeared to agree that if Mr. Bourne were disqualified it would be inappropriate for Ms. Smith and Mr. Alcott to proceed together as a two-person Board.

The Supreme Court of Canada has dealt with the question of bias of members of boards and tribunals in the case Committee for Justice and Liberty et al v. National Energy Board (1976) 68 D.L.R. 3d p. 716. At page 733 Laskin, C.J.C., in the majority decision stated a follows:

> " This Court in fixing on the test of reasonable apprehension of bias, as in Ghirardosi v. Minister of Highways (B.C.) (1966) 56 D.L.R. (2d) 469, (1966) S.C.R. 367, 55 W.W.R. 750, and again in Blanchette v. C.I.S. Ltd. (1973) 36 D.L.R. (3d) 561, (1973) S.C.R. 833, (1973) 5 W.W.R. 547 (where Pigeon, J., said at p. 579 D.L.R., p. 842-3 S.C.R., that 'a reasonable apprehension that the Judge might not act in an entirely impartial manner is ground for disqualification'), was merely restating what Rand, J., said in Szilard v. Szasz, (1955) 1 D.L.R. 370 at p. 373, (1955) S.C.R. 3 at pp. 6-7, in speaking of the 'probability or reasoned suspicion of biased appraisal and judgment, unintended though it be'. This test is grounded in a firm concern that there be no lack of public confidence in the impartiality of adjudicative agencies..."

DeGrandpre, J., in a dissenting judgment stated at page 735:

> " The proper test to be applied in a matter of this type was correctly expressed by the Court of Appeal. As already seen by the quotation above, the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal (at p. 667), that test is 'what would an informed person, viewing the matter realistically and practically - and having thought the matter through - conclude. Would he think that it is more likely than not that Mr. Crowe, whether consciously or unconsciously, would not decide fairly?'
>
> " I can see no real difference between the expressions found in the decided cases, be they 'reasonable apprehension of bias', 'reasonable suspicion of bias', or 'real likelihood of bias'. The grounds for this apprehension must, however, be substantial and I entirely agree with the Federal Court of Appeal which refused to accept the suggestion that the test be related to the 'very sensitive or scrupulous conscience'.
>
> " This is the proper approach which, of course, must be adjusted to the facts of the case. ..."

Other cases relating to this matter are:

Regina v. Pickersgill et al
(1970) 14 D.L.R. (3d) 717;

Winnipeg Free Press Ltd. v. Winnipeg Labour Board et al
(1973) 39 W.W.R. 609;

Re Marques and Dylex Ltd.
(1977) 18 O.R. (2d) 58;

Re: Canadian Association of Industrial, Mechanical and Allied Workers et al
(1978) 85 D.L.R. (3d) 441.

In the Marques case, it was argued that the sitting of a Vice-Chairman of a Labour Relations Board panel could give rise to a reasonable apprehension of bias because he

had previously worked for the law firm which acted as solicitors for the Union in the matter. His involvement with the law firm had ceased one year before the hearing, and the firm had had no involvement with the matter in question while he was with the firm. Mr. Justice Morden, speaking for the Divisional Court of the High Court of Justice, said at page 69:

" On behalf of the employer it is not submitted that any one of the foregoing matters, that is to say, previous association with the law firm, professional relationship with the union, identification as a union lawyer or refusal to remove himself when one party raised the issue of apprehended bias, gives rise to a reasonable apprehension of bias but that their cumulative effect does. Reference was made to several authorities. The most recent is that of the Supreme Court of Canada in Committee for Justice and Liberty et al v. National Energy Board et al (1976), 68 D.L.R. (3d) 716, 9 N.R. 115, where Chief Justice Laskin, for the majority of the Court, said at p. 733:

> ' This Court in fixing on the test of reasonable apprehension of bias, as in Ghirardosi v. Minister of Highways (B.C.) (1966), 56 D.L.R. (2d) 469, [1966] S.C.R. 367, 55 W.W.R. 750, and again in Blanchette v. C.I.S. Ltd. (1973), 36 D.L.R. (3d) 561, [1973] 5 W.W.R. 547 (where Pigeon, J., said at p. 579 D.L.R. p. 842-3 S.C.R., that "a reasonable apprehension that the Judge might not act in an entirely impartial manner is ground for disqualification"), was merely restating what Rand, J., said in Szilard v. Szasz, [1955] 1 D.L.R. 370 at p. 373, [1955] S.C.R. 3 at pp. 6-7, in speaking of the "probability or reasoned suspicion of biased appraisal and judgment, unintended though it be"'.

" While the test, as broadly stated and as particularized somewhat in the quotations, is in general terms and while the categories of reasonable apprehension of bias cannot really be closed, some assistance as to the content of the principle can, I think, be gleaned from the cases. In this regard, no case has been brought to our attention in which a prior professional association with a party has been held to be a ground of reasonable apprehension of bias nor has any case in which a prior professional relationship with one of the

counsel, which has led to this result. The situation is different, of course, if the tribunal member had anything to do with the actual case before him. I refer to the Committee for Justice and Liberty et al case itself in this regard.

" With respect to the existence of a prior association in itself, in that case, business association, if I may loosely put it that way, Chief Justice Laskin in Committee for Justice and Liberty et al said, at p. 730:

> ' While I would not see any vice in Mr. Crowe sitting on an application coming from or through the Study Group in relation to a matter in which he was not involved, even though it was decided upon shortly after his dissociation from the Study Group, that is not this case.'

" In looking at the cumulative effect of the factors relied upon by counsel for the employer there are certain other factors which have to be weighed in the balance. They are as follows. The vice-chairman had nothing to do with any aspect of the present proceedings, as part of his association with the law firm or otherwise, and neither did the law firm itself during the currency of his association with it. Over a year had elapsed since he had anything to do with the union, or more correctly, one of its predecessors. Almost a year had elapsed since his connection with the law firm terminated.

" Further, on a more general plane, the nature and functions of the Board itself have to be regarded. The fact that a Judge in similar circumstances would not, I would think, have heard the case is not determinative. (In saying this I am not expressing an opinion on minimum legal standards.) We can take judicial notice, if it is not apparent from the Labour Relations Act itself, that members of the Labour Relations Board and in particular the chairmen of panels will have had experience and expertise in the law and labour relations. The Government of Ontario looks to people with such a background in making appointments. Most, if not all of those appointed, are bound to have some prior association with parties coming before the Board. In this connection the remarks of Mr. Justice Hyde in R. v. Picard et al, Exp. Int'l Longshoremen's Ass'n, Local 375 (1968), 65 D.L.R. (2d) 658 at p. 661, [1968] Que. Q.B. 301, are apposite:

> ' The only basis for any apprehension of bias submitted by appellant is that Commissioner Picard had been consulted more than a year before his appointment as Commissioner by Aluminium Limited which is a company which controls one of the parties before the Commission, namely, the respondent Saguenay Shipping Ltd....I am quite unable to anticipate a biased approach by Commissioner Picard on the ground raised by appellant. Professional persons are called upon to serve in judicial, quasi-judicial and administrative posts in many fields and if Governments were to exclude candidates on such a ground, they would find themselves deprived of the services of most professionals with any experience in the matters in respect of which their services are sought.'

" Such people, having taken an oath of office [the Labour Relations Act, s. 91(18)] and, at least in the case of trained lawyers, being conscious of the necessity of ridding their minds of extraneous matters, it is not unreasonable to assume that they, in exercising their jurisdiction, will act in good faith. Reference may be had to several useful examples of legislative policy respecting what is considered to be not permissible conduct by persons exercising important functions in the field of labour relations, having regard to past associations. Section 5(11) of the Hospital Labour Disputes Arbitration Act, R.S.O. 1970, c. 208, provides that no person shall be appointed a member of a board of arbitration

> '5(11)...who has any pecuniary interest in the matters coming before it or who is acting or has, within a period of six months preceding the date of his appointment, acted as solicitor, counsel or agent of either of the parties.'

" For provisions to the same effect reference may also be made to the Crown Employees Collective Bargaining Act, 1972 (Ont.), c. 67, as amended by 1974, c. 135, s. 5, the School Boards and Teachers Collective Negotiations Bargaining Act, 1975 (Ont.), c. 72, ss. 17, 30 and 39, and the Colleges Collective Bargaining Act, 1975 (Ont.), c. 74, ss. 12, 25 and 34.

" Taking all of the foregoing into account, it is my view, that in the circumstances of this case there was not a reasonable apprehension of bias as that term is understood and has been applied. The matter of the prudence of the vice-chairman in

sitting in the case is another issue which is not, of course, before us for decision.

" In the result, both applications are dismissed."

In the present case, the only reason for the reasonable apprehension of bias alleged by the Union is the one-time participation, fourteen years ago, by Mr. Bourne in an arbitration involving one of the present parties and none of the present issues, acting as nominee for another party not related to any in the present proceedings.

It is our opinion that the mere participation of Mr. Bourne in the aforementioned arbitration board proceedings over fourteen years ago would not give rise to a reasonable apprehension of bias held by reasonable and right minded persons applying themselves to the question and obtaining thereon the required information.

Therefore, this Board is of the opinion that in these circumstances and in law it cannot properly disqualify itself or any of its Members. The Board declines to do so and intends to proceed with the hearing of this complaint.

Lynn Smith

AA/L

BRITISH COLUMBIA HUMAN RIGHTS COMMISSION

BOARD OF INQUIRY

IN THE MATTER OF HUMAN RIGHTS CODE OF B.C.

AND

IN THE MATTER OF SUSAN JORGENSEN, COMPLAINANT

AND

IN THE MATTER OF B. C. ICE & COLD STORAGE LTD.
RESPONDENT

AND

IN THE MATTER OF THE UNITED FISHERMEN
& ALLIED WORKERS UNION,
RESPONDENT

BOARD OF INQUIRY:

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| J. A. BOURNE, Q. C. | CHAIRMAN |
| C. L. SMITH | MEMBER |
| C. J. ALCOTT | MEMBER |

| | |
|---|---|
| T. A. ROPER, ESQ., | appearing for B. C. Ice & Cold Storage Ltd. |
| J. J. CAMP, ESQ., | appearing for The Director of Human Rights and for Susan Jorgensen |
| J. NICHOL, ESQ., | appearing for United Fishermen & Allied Workers Union |

DISSENTING OPINION OF LYNN SMITH, MEMBER

Although I agree with some of the findings of fact of the other two members of the Board of Inquiry, I disagree in some respects with those findings. I disagree as well with the statement of the issues by the Majority, and with some of the conclusions drawn by the Majority. In particular, I conclude that the Complainant was discriminated against by reason of sex while the Majority concludes that she was discriminataed against but not by reason of sex.

## I. THE PARTIES

Susan Jorgenson (the "Complainant") is a 24 - year old woman who has been employed by the Respondent company since 1973. She was, at the time of the hearing, 36th on the seniority list. She enjoys good health and appears to be of at least average strength and fitness.

The Director of the Human Rights Code also participated as a party in the proceedings, and was represented by the same counsel as the Complainant.

The Respondent, B. C. Ice & Cold Storage Ltd. (the "Company") operates freezing and storage facilities at the location known as the Harbour Plant in Vancouver, British Columbia. The part of its operations relevant to these proceedings consists of receiving fish in a fresh or

frozen state, and processing or storing the fish for its owners. The processing may consist, among other things, of heading the fish, removing the innards, coating the fish with a glazing substance, freezing it, bagging and boxing it. Throughout processing and storage, fish for each customer must be kept separate from fish belonging to other customers. The Company operates the Harbour Plant year round but during the winter months (the off-season) the crew is reduced to a small number - at its smallest, around 10 to 20 workers. During peak periods, the crew can swell to 110 to 120 workers.

The workers at the Harbour Plant are represented in collective bargaining by the other Respondent, the United Fishermen & Allied Workers Union (the "Union"), and have been so represented for many years. The Union was represented at the Hearing by its President, Jack Nichol.

## II. THE COMPLAINTS

On April 13, 1977, the Complainant made complaints under the Human Rights Code as follows:

A. " ... under sections 6, 8, 9 of the Human Rights Code of British Columbia that I was discriminated against by Manager, B. C. Ice & Cold Storage Ltd., 2155 Commissionier Street, Vancouver, ...

[date of offence] "ongoing" ... [type of discrimination] discrimination on the basis of sex ... [details] I allege that I am not paid a wage equal to male employees for similar work; that I have been discriminated against in my job and that the collective agreement discriminates against me and all women on the ground of sex.

B. " ... under section 9 of the Human Rights Code of British Columbia I was discriminated against by United Fishermen & Allied Workers Union, 138 East Cordova Street, Vancouver, ... [date of offence] 'ongoing' ... [type of discrimination] discrimination on the basis of sex ... [details] I allege that the collective agreement of the United Fishermen & Allied Workers Union discriminates against the female members on the basis of sex.

Pursuant to section 16(1) of the Human Rights Code, the Director of the Human Rights Code made a Report to the Minister of Labour, a copy of which Report was provided to the members of the Board as is required under the Human Rights Code. A copy of the Report to the Minister (which has been referred to by members of the Board only for the limited purpose of determining what notice was given to the Respondents of the allegations they would have to meet, and not as evidence of the truth of its contents) is attached as a Schedule to these reasons. In the Report, under the heading "Issues Raised", the following is set forth:

1. Has Ms. Jorgensen been denied and is she being denied equal opportunity to perform Group 1 work?

2. Was Ms. Jorgensen discriminated against in not being paid a Group 1 rate, or being classified as a Group 1 worker, when she performed Group 1 work?
3. Does the collective agreement discriminate against women employees at the B. C. Ice & Cold Storage Ltd. by not providing a 1,000 hour rate in the Group 2 classification?
4. Did clause 602 of the 1976 collective agreement have a discriminatory impact in the employment of women at B. C. Ice & Cold Storage Ltd.?

## III. THE ISSUES

Issue 4 above was abandoned by the Complainant and the Director at the hearing as was the complaint under Section 6 of the Human Rights Code for equal pay for substantially similar work. Although the Majority states that the parties agreed that the issues were as set forth in the Report to the Minister, in fact the Complainant and the Director argued that the issues to be decided by the Board are not only those set forth as Issues 1, 2 and 3 above but also somewhat broader issues as to whether there is discrimination against women employees at the Harbour Plant through the principles by which the groups of employees are structured and the manner in which tasks are assigned to each group, resulting in restricted access by women to the higher-paid or otherwise preferable jobs.

It would be useful at this point to restate the issues, for clarity, as follows:

A. SUSAN JORGENSEN

1. Did the Company discriminate against the Complainant in refusing to allow her to resume Group 1 work after an initial attempt by her to perform such work, and if so, was there reasonable cause for the company's decision?
2. Did the Company discriminate against the Complainant in paying her a rate of pay less than the Group 1 1,000 hour rate while she was performing Group 1 work in January and March, 1977?

B. COLLECTIVE AGREEMENT

1. Was the collective agreement at the date of the complaint discriminatory against women on its face?
2. Was there, at the relevant time, discrimination against women through, or pursuant to, the collective agreement in any of the following ways:
   (i) through the categorization of workers into those who perform jobs of a more onerous

nature and those who perform lighter work, the categories of workers being called "Group 1" and "Group 2" respectively, and the Group 1 workers receiving a higher top rate of pay than the Group 2 workers?

(ii) through the manner in which the Company (whether or not with the acquiescence of the Union) has allocated particular tasks performed in the Harbour Plant to Group 1 and Group 2 respectively?

(iii) through the manner in which persons are hired into the respective Groups, allowed to transfer from one group into the other, or to qualify for specialized jobs with higher rates, known as the Classified/Preferential jobs?

3. Was there discrimination against women employees in 1977 by virtue of the fact that, although there were three rates of pay for Group 1 workers (under 400 hours, between 400 and 1,000 hours and over 1,000 hours), there were only two rates of pay for Group 2 workers (under 400 hours and over 400 hours)?

## IV. THE JURISDICTIONAL ISSUE

The Company argued that the jurisdiction of this

Board is strictly limited to those issues stated in the Report to the Minister of Labour because of the provisions of s. 16 of the Human Rights Code:

> s. 16(1): Where the Director is unable to settle an allegation ... the Director shall make a report to the Minister of Labour, who may refer the allegation to a Board of Inquiry and ...
>
> (b) fix a place at which and a date on which the Board of Inquiry shall hear and decide upon the allegations.

Counsel for the Company also pointed to the provisions of Human Rights Code s. 17 (the Board may make a number of orders where it is of the opinion "that an allegation is justified") and s. 15 (which refers to "a complaint" which may be referred to a Board of Inquiry if unable to be settled).

The Company maintained, in short, that the Board has jurisdiction only to hear evidence and render a decision with respect to "the allegation", meaning the particular allegation which was investigated by the Human Rights Branch pursuant to section 15, described in the Report to the Minister of Labour under Section 16 and referred by the Minister to the Board of Inquiry under Section 16(1)(b). It was submitted that unless those three conditions are met with respect to an allegation, its subject - matter falls outside the Board's jurisdiction.

Counsel for the Company referred to two cases in this regard. The first case concerned a complaint by Douglas Oram and Marian Joan McLaren against Frank Pho, a decision of a British Columbia Human Rights Board of Inquiry of September 5, 1975. In that case, the Respondent argued that the complaint form lacked particularity. The Board refused to quash the proceedings and instead treated the respondent's application as one for further and better particulars. The Board stated that:

> Under normal circumstances ... the Board of Inquiry should be prepared to entertain applications for further and better particulars on the part of the respondents or other parties who are interested and to deal with those applications according the merits in each case, bearing in mind the over-riding principle that fairness as well as the rules of natural justice require that a respondent be made aware of the nature of the complaint against him with sufficient detail, to enable him to fully present his side of the dispute ... in determining the question of whether or not a respondent has sufficient particulars of a complaint alleged against him to enable him to present an adequate response, consideration must be given not only to the form of the complaint filed but also to the nature of the proceedings and other circumstances which may tend to show the true state of the respondent's mind insofar as the complaint is concerned.

The Board also considered the contents of the Report to the Minister and decided that the Report contained "a far more adequate description of the alleged complaint ... and was served upon the respondent well in advance of the hearing date."

Second, counsel for the Company relied upon a case in the Alberta Supreme Court, Trial Division, Re Attorney General for Alberta and Gares et. al., (1976) 67 D.L.R. (3d) 635, which involved a complaint by seven female certified nursing aides under the Individual's Rights Protection Act of Alberta that a hospital violated section 5(1)(a) of that Act by employing them at a lower rate of pay than that which male nursing orderlies were receiving for similar or substantially similar work. The complaint succeeded and counsel for the complainants sought an Order that there be a retroactive award not only for the seven complainants, but also for all other certified nursing aides in the same position as the complainants. The court refused to make such an order, stating:

> The Board of Inquiry did not have jurisdiction to award compensation by way of back pay to the certified nursing aides other than the seven complainants. The Board of Inquiry, pursuant to section 18(1), could investigate only 'the matter complained of' and, pursuant to section 22(1), could make recommendations only as to 'the course of action it thinks ought to be taken with respect to the complaint'. The word 'complaint' must refer to the complaint which has been made in writing by 'a person who believes he has been discriminated against' (section 17(1)(a)) ... the complainant can complain only in respect of discrimination against him (or her).

The Company says that, by the same token, in the

present case the Board only has jurisdiction with respect to "the allegation" or "the complaint", which means that the Board may consider, at most, only those issues contained in the Report to the Minister.

The principles of natural justice, including the right to notice of the case which must be met, and the right to a fair hearing, were cited in further support of the Company's position. It must be noted, however, that the Company does not rest its argument upon lack of notice of the case to be met. It did not request an adjournment or further particulars, and admits that it has not been taken by surprise. Rather, the argument rests upon what the Company says is the proper interpretation to be given to the express statutory requirements of the Code.

The Director and the Complainant argued first of all, that if the issues are alluded to, or would be reasonably understood to arise, from either the Complaint forms, the Report to the Minister or the Human Rights Code sections cited in those documents, those issues form part of the "allegation" over which the Board has jursidiction. Second, they argued that the Human Rights Code must be given a fair, large and liberal interpretation, in order to give it the effect intended by the Legislature. Counsel for those parties argued as well that it would be

an unusual situation in which issues could be identified with precision at the investigative stage thus enabling the three pre-conditions argued by the Respondent to be met, and that this could not have been the Legislature's intention. It was argued that the Pho case does not support the interpretation urged by the Company, but rather shows that if an allegation or complaint is imprecise, the result is not a lack of jurisdiction in the Board to consider the complaint, but a right to further particulars and an adjournment if necessary. Finally, it was argued that when the Complaint forms and the Report to the Minister are read as a whole along with the Code section to which they refer, the issues argued by the Complainant and Director are set forth in general terms.

On page 1 of the Report to the Minister, the statement is made:

> Ms. Jorgensen filed a complaint alleging that B. C. Ice & Cold Storage Ltd. has discriminated against her and against all women in employment on the basis of sex. She alleges that - 1. female employees are not given equal opportunity to enter the Group 1 classification; 2. Ms. Jorgensen was not paid a wage equal to male employees for similar work or substantially similar work.

Paragraph 10 on page 3 of the Report to the Minister is as follows:

Women at B. C. Ice have performed work which is clearly recognized as Group 1. Men at B. C. Ice perform work which is most frequently done by women. The distinction of light and heavy work, which is to be allocated to Group 1 and Group 2 respectively, is not clear, notwithstanding the division of work provided by the company as shown in Exhibit "D"

Upon consideration of all of the above, the course of the hearing and the relevant evidence, I conclude that the Board has jurisdiction with respect to the issues raised by the Director and the Complainant during the hearing of this matter. In the Gares case, it was a matter of seeking to add new complainants with new complaints (even though the complaints would be identical to the existing ones). In this case, it is a matter of seeking to spell out or particularize the discrimination alleged. If lack of notice had been argued, the Respondent company might have been entitled to particulars or an adjournment, but jurisdiction is not lacking.

## V. THE FACTS

### A. The Collective Agreement

For several years, the Respondent Company has not been part of the Fisheries Association of British Columbia and has therefore not taken part in industry wide

bargaining. However, the Collective Agreement between the Company and the Union follows the same format as the industry agreement with a Wage Supplement including some individualized features and somewhat higher wages. Until 1973, as was the case throughout the industry, the Collective Agreement at the Harbour Plant provided for different wage scales for general labour by men and women under the headings "Fresh Fish Shed - Male" and "Fresh Fish Shed - Female". The wage scales were printed on blue and pink paper respectively. The wage scales on the blue paper were higher than those on the pink paper. Beginning with the 1974 Collective Agreement, these terms and this style of printing were eliminated. From that time there have been three headings under clause 1.02 of the Wage Supplement for B. C. Ice & Cold Storage Ltd.: "Cold Storage", "Group 1 - Fresh Fish Shed Workers" and "Group 2 - Fresh Fish Line Workers".

The meanings of the latter two of these terms are spelled out in some more detail in clause 1.06 of the Wage Supplement, as follows:

> Group 1 - Fresh fish Shed Workers grouping consists of more onerous jobs in Fresh Fish such as unloading, grading, operating tow motors, heading, etc. and employees so categorized must be physically capable of performing such work and related heavy lifting.

> Group 2 - Fresh Fish Line Workers grouping consists of work of a lighter nature such as wrapping, panning, weighing and other related work.

It was Mr. Nichol's evidence, being the President of the Union and aware of the negotiations over the years, that Clauses 1.02 and 1.06 were not bargained "deeply" and that, in some ways, the wording resulted from the need to describe the work done in a number of different plants in the industry. (The wording of these clauses is identical, the Board was told, to that used in collective agreements resulting from industry-wide bargaining). For example, Mr. Nichol testified that the reason that "washing" is not mentioned under either Group 1 or Group 2 is that in some plants it is done by men and in other plants by women.

Exhibit 4 in these proceedings (attached to the report to the Minister as Exhibit "D") may not form part of the Collective Agreement, but is properly discussed at this point. It was prepared by the Company as a particularization of the tasks which fell under the Group 1 and Group 2 headings. Mr. Leyland, the plant manager, stated that he prepared it soon after he started work with the Company in 1976. The evidence conflicts as to whether the employees or the union became aware of the existence

of Exhibit 4 and its contents before the hearing of this complaint. Mr. Leyland gave evidence that he consulted some charge hands while drawing up the list, and that it had been posted in the plant. There were no complaints or grievances about its contents. Various employees called by the Complainant and the Director, however, testified that they had never seen nor heard of Exhibit 4 until the hearing. Mrs. Lydia McKay, a Shop Steward, testified that she had seen Exhibit 4 for the first time at a meeting concerning the possibility of "the girls" at the plant performing Group 1 work, which took place in late fall or winter of 1977. The Complainant testified that she saw it for the first time in October or November, 1977 at a grievance meeting about the same subject matter as this complaint. The Union's position was that it was not aware of Exhibit 4, that it had had no part in drawing it up, and it had certainly not acquiesced in its becoming part of the collective agreement. The issue of the degree of Union involvement in Exhibit 4 achieves some importance if this Board decided that the way in which the tasks are allocated at the plant causes or perpetuates discrimination against female employees. However, it would be the Union's involvement in that allocation, rather than just in the preparation of Exhibit 4, which would carry responsibility for any resultant discrimination.

Three things should be stated about Exhibit 4 at this juncture:

1. The evidence seems clear that, with few if any exceptions, the tasks listed under "Group 1" are those tasks formerly performed by male workers under the "Fresh Fish Shed - Male" rates and those tasks listed under "Group 2" are those formerly performed by female workers under the "Fresh Fish Shed - Female" rates. Group 1 has always consisted entirely of male workers, and Group 2 of female workers.

2. The testimony of both Mr. Leyland and Mr. Reeder, who participated in drawing up Exhibit 4, was that largely they had relied upon history and experience, as well as their subjective assessment of the difficulty of the tasks, in allocating them between the Groups.

3. The most difficult tasks in Group 1 are significantly more difficult than the most difficult tasks in Group 2, but there may be some overlap in connection with the less difficult task in Group 1 and a number of the more

difficult tasks in Group 2. Various employees stated, in fact, that certain tasks in Group 2 are more difficult than certain tasks in Group 1. Mr. Reeder stated that, in his view, all of the Group 1 work is heavier, when performed on a production basis, than the Group 2 work, although the categorization may not be perfect.

The allocation of tasks to the Groups is one side of the coin. The other side of the coin is the allocation of people to the Groups. There are no relevant provisions in the Collective Agreement with respect to hiring. Hiring practices prior to 1973, because of the wording of the collective agreement, must have meant simply putting the prospective employee in the appropriate category according to sex. After that year and until 1979, it appears that there was no stated Company policy of automatically hiring men into Group 1 and women into Group 2, nor, on the other hand, of ensuring that prospective male employees and prospective female employees both knew, when they were hired, that they could go into either of the groups. Rather, it was stated by witnesses called on behalf of the Company, a process of "natural selection" took place whereby men would come and ask for jobs "in the warehouse" or the like and would be put into Group 1, and

women would come and ask for jobs "washing fish", etc. and would be put into Group 2. Since 1979, there has been a package handed to prospective employees by the Company which explains the Group 1 and Group 2 categories, includes a copy of Exhibit 4, and states that the applicant may join either Group so long as he or she is capable of performing all tasks in the Group in the view of the Company.

The Company's position is that it has always been a known requirement of membership in Group 1 that the employee be physically able to perform all Group 1 tasks and all Group 2 tasks, and a requirement of membership in Group 2 that the employee be able to perform all Group 2 tasks. This position is supported to some extent by evidence of employees called by the Director and the Complainant, although some Group 1 employees stated that they have not in fact performed all tasks in Group 1 and most of the more senior Group 1 employees testified that, most of the time, they perform only certain tasks at which they have become particularly adept.

According to the dates set out on the seniority list prepared by the Company, down to number 29 on the seniority list, the employees were hired prior to 1973 and

the change from "Fresh Fish - Male" to "Group 1" and "Fresh Fish Shed - Female" to "Group 2". That is, the employees were hired at a time when the Groups to which they went were expressly determined by their sex.

The Director and the Complainant argued that the Collective Agreement is discriminatory in that the division of tasks into Group 1 and Group 2 simply perpetuates the old system and sets up an artificial barrier to change by including in Group 1 tasks which would be eventually difficult for most women to perform and which would discourage women from trying to join that Group.

B. Susan Jorgensen (the Complainant)

At the time of the hearing, the Complainant was 36th on the company seniority list. She was first employed by the company in 1973 on a temporary basis and in September, 1975 on a permanent basis. She does not recall any discussion when she was hired regarding Group 1 and Group 2, or any choice being presented regarding the type of work she would do. Rather, she was just hired and put to work. Her employment was subject to seasonal lay-offs. In early 1977, while working at the Plant, she observed that operations were gearing down and that

layoffs were imminent for the female Group 2 workers. She also observed that there was work yet to be done, namely stripping racks of frozen herring, which would be performed by male Group 1 employees junior to her in seniority. She felt she was capable of doing that work, and wished to continue working rather than be laid off. (She testified that she had made a complaint to her foreman about a similar situation in December of 1976, but had not been called in to work although her brother, Gordon Jorgensen, who was junior to her, had been given work chipping ice. The foreman, whose name was "Al" told her that she could not work in the freezer.) She and some other women in the plant, through Mrs. Lydia McKay, a Shop Steward, made representations to the Company that they be permitted to stay on and perform the Group 1 work in preference to the junior men. The Company agreed to this. The result was that during January and March of 1977, Susan Jorgensen along with several other Group 2 women, performed a Group 1 task known as "Stripping herring". This task was generally agreed to be around the middle of the scale of difficulty for Group 1 jobs. The work ended towards the end of March of 1977. The Complainant was then laid off.

While performing the Group 1 work, the women were paid their usual Group 2 rates, which were in all cases the qualified 400 hour rates. The Company's reason for paying those rates rather than Group 1 rates was that it would not have been fair to pay the top Group 1 rate (the 1,000 hour rate) to employees who had not put in 1,000 hours in Group 1. However, the women were given a credit of 600 hours towards the attainment of the Group 1 1,000 hour rate. The principle of rate retention required payment at the Group 2 400 hour rate rather than the Group 1 400 hour rate because the former rate was, at the time, higher than the latter because of a historical anomaly. The evidence of the Complainant was that she had not been told that that was the reason for her being paid the Group 2 400 hour rate.

Just after the end of the herring season in March, 1977, the plant manager, Mr. J. Leyland, and the Company President, Mr. Stuart Reeder, held a meeting to discuss and review plant operations during the season. It was decided at that meeting to refuse to allow the Complainant to continue to perform Group 1 work. According to the two participants in the meeting, the reasons were threefold: 1. The Complainant's wrist

problems; 2. Her back problems; 3. The need for her to make an effort to improve her productivity in order to meet the standards required of Group 1 workers, which effort could have a deleterious effect on her wrists or back.

In April, 1977, before she was aware of the Company's decision not to permit her to continue Group 1 work, the Complainant filed the complaints which led to this Inquiry and which are set out in full above. In her evidence, she stated that when she filed the complaints, she was concerned about two matters:

(1) The denial of work in December, 1976, and

(2) The fact that she did not receive the Group 1 1000 hour rate while she was performing the Group 1 work in January and March of 1977.

Between March and the summer season, the Union through Mr. Nichol and Mrs. H. O'Shaughnessy, the Business Agent, made inquiries about why the Complainant was not called in to work, but no formal steps were taken to

challenge the Company on its response to those inquiries, which rsponse was that there was no work then available which the Complainant was capable of doing.

The Complainant worked that year during the summer season at the Plant, generally performing the job of racking salmon (a Group 2 task according to Exhibit 4), and it was only when she was laid off at the end of the salmon season and felt that she should have been kept on to perform the work which remained in preference to the junior male employees who were kept on, that she became aware of the Company's decison. She filed a grievance at that point, and meetings were held in connection with that grievance in October and November of 1977. The Complainant stated that she was not told until the occasion of one of those meetings what the Company's reasons for its decision were. However, it appears from the evidence of Mr. Leyland that the Company's decision and the reasons for it had been communicated to Mrs. O'Shaughnessy, by a much earlier date in the spring of 1977, but that the information, for whatever reason, was not passed along to the Complainant. Mrs. O'Shaughnessy was not called, and Mr. Leyland's evidence on the point was uncontradicated.

It appears that at least by the time of the meetings in October and November, the Complainant had made known to the Company her views about her physical ability to do Group 1 work and her explanations for the matters which the Company had described as giving rise to its concerns.

During this same period in the fall of 1977, Valerie Embree, the Human Rights Officer who had been appointed, was carrying out her investigation of the complaint. (The complaint had not been brought to the Company's attention until August, 1977 because, according to Ms. Embree, there was not sufficient staff to deal with it.) Subsequent to her investigation, there were attempts to bring about a settlement of the matter, but those attempts were unsuccessful.

## VI. DECISION

### A. The Complainant

One of the issues before the Board, as set forth above, is whether the Complainant was discriminated against by reason of sex without reasonable cause by virtue of the Company's refusal to allow her to resume

Group 1 work after March of 1977. Was there discrimination against the Complainant within the definition of the word "discrimination" adopted by the British Columbia Supreme Court in Nelson & Atco Lumber Ltd. v. Borho (1976) 1 B.C.L.R. 207 (B.C.S.C.)? The Court said in that case, at p.214:

> The verb 'to discriminate' was considered where it was used in the English Industrial Relations Act, 1971, Chapter 72 in Post Office v. Crouch, 1974 1 W.L.R. 89, 1974 1 All E.R. 29 (sub-nom Post Office v. Union and Post Office Workers). In the House of Lords, Lord Reed said at page 238:
>
> > Discrimination implies a comparison. Here I think that the meaning could be either that by reason of the discrimination the worker is worse off in some way than he would have been if there had been no discrimination against him, or that by reason of the discrimination he is worse off than someone else in a comparable position against whom there had been no discrimination. It may not make much difference which meaning is taken but I prefer the latter as the more natural meaning of the word, and is the most appropriate in the present case.

If the Complainant suffered from physical weaknesses or problems which would have created a significantly increased risk of injury for her in attempting Group 1 work at an appropriate level of productivity, then that is the end of the matter because she is no worse off than someone else in a comparable position against whom there had been no discrimination. However, if there were in

fact no such physical problems, then the further question must be asked: what prompted the decision on the part of the Company? The issue is not to determine the Company's motivation, for I accept that discriminatory thoughts or motives are not prohibited by the Code unless they result in discriminatory conduct, but rather to determine whether the Complainant's gender was a factor in the Company's decision, resulting in her being treated differently than she would have been if she were a man. The Board heard argument from counsel as to the law in this respect, and I agree with the following statement in the Bremer case (H.R.B.I., June 10, 1980, p. 14):

> It is thus the view of this Board that a prohibited consideration need not be the "sole" or even the "effective" reason for the denial or other discriminatory conduct in order for a contravention to have occurred. It is sufficient if the prohibited consideration was a significant reason even though it may be only one of perhaps several factors and even though it may not be the most important factor of the several which together triggered the impugned conduct ... It is the opinion of this Board that, having once determined a prohibited consideration was one of the reasons for the refusal, there should have followed a finding that a contravention had occurred. The Jefferson Board supported its result by reliance upon an "objective managerial discretion". As we have said, the respondent's fair-mindedness is not relevant if one of the reasons for a denial is a prohibited consideration. To conclude otherwise would be to invite an inevitable erosion of the force of the Code.

To summarize, then, the Board must determine (1) whether the Complainant's physical condition warranted refusing her the opportunity to perform further Group 1 work, and, if it did not, then (2) whether the Company's decision to refuse her that opportunity turned, in some way, upon the fact that she is a woman. If the answer to (1) is No and (2) is Yes, then the Complainant was discriminated against by reason of sex. Because the Code specifies that the sex of a person discriminated against shall not constitute reasonable cause for that discrimination unless it relates to the maintenance of public decency (and there is no contention that it did so here) then the Complaint against the Company would be made out in this respect.

To address the first issue, was the decision to remove the Complainant from the work justified, objectively, by the facts?

In support of its argument that the Complainant's weak wrists and back, combined with her need to increase productivity, justified the decision, the Company relied at the hearing not only upon evidence of matters which were known to it prior to the making of the decision, but also on evidence of matters which were not known to it at

that time including some which occurred subsequent to the decision. I agree with submissions from counsel for the Company that the issue is not whether there were facts known by the Company at the time of the decision which justified it, but whether the Complainant did have physical problems, known to the Company or not, which dictated that she not be put to work on Group 1 tasks. Therefore, all of the evidence of the Complainant's physical symptoms has been considered.

The Majority has found as a fact that the Complainant had no significant problems or unique physical conditions relating to her ability to perform Group 1 work, and has set forth in detail the evidence of witnesses in that respect. I agree with that finding of fact.

The third reason alleged by the Company for withdrawing the Complainant from Group 1 work was that her physical symptoms combined with the need for her to increase her productivity in order to meet the Group 1 standard, brought about an unacceptable exposure to injury. Both Mr. Reeder and Mr. Leyland said that it was one of the three factors which caused them to remove the Complainant from the work. Therefore, I will examine the evidence about productivity in detail.

Mr. J. Leyland said that "the productivity was lower than what it should be" when asked about "the productivity of Group 2 workers in general, and Ms. Jorgensen in particular", and that it was "at, you might say, an acceptable level on the low side." "To come up to a really positive productivity, it would have to be pushed a little bit." However, he said, it was not so low that disciplinary action had to be taken. When asked on what basis he reached these conclusions, this witness stated, "On the tours of the plant that I made frequently throughout the day, I was able to observe them doing work."

Later, Mr. Leyland was cross-examined by Mr. Nichol, and stated that he had made the comparison on productivity with the male employees in the March period, during the last three or four days, "what the majority were doing." When cross-examined by Mr. Camp, he stated, with reference to the Group 2 employees, "they all were not up to speed", but that the Complainant was as productive as the other women who were stripping the herring racks. When asked about specific problems experienced by some of the other women in doing the work (one woman being too short to reach the top of the racks, one finding that she fatigued rather quickly while doing the job), the witness stated that he had neither observed

nor become aware of those matters. The witness recalled seeing at work Margaret Hall, June Clayton and Susan Jorgensen on the last day. When it was suggested to him that in fact Susan had not worked alongside the women, but in fact had been working alongside two men, he agreed "That is possible." "I wasn't there the whole day." It was further suggested that fellow employees had given evidence that the Complainant's productivity had been as good as the men's, and the witness stated that he could not form any conclusion as to whether or not those witnesses were being honest with the panel. The witness agreed that Karnal Manhas, a Charge Hand, would have some skills in assessing productivity, and stated that he would put some stock in the views of Mr. Manhas, in most cases. The question "And in any event, your bottom line is that she had just started in this role and with supervision and with further learning time, her productivity might have come up to scratch?" was put to Mr. Leyland, and he replied, "It could have, yes."

In redirect examination, Mr. Leyland was asked what standard he was applying when he was making the productivity assessments in March, 1977, whether he was commenting on the ability of the women to come up the same standard as the existing Group 1 employees, or comparing

them to how other Group 1 employees would do with about their experience, and replied, "Well, it was to bring them up to the standard of the rest of the Group 1 employees."

In response to a question from a member of the panel, the witness said that he had used some measurements to ascertain the productivity of the Group 2 workers, although he kept no notes of them, and that, on the average, the Group 2 workers had come out about one-third less than the Group 1 workers in terms of movement of cases from the racks to the pallet, or into the totes. These measurements had been made by comparing the productivity of the group in which the women were working (which was not an all-female group) against the productivity of another, all-male group.

The other witness called by the Company in this regard was Mr. Jay Wolkosky, who became Foreman just prior to March, 1977. He stated that he observed Group 2 workers performing Group 1 work in March of 1977, stripping herring racks, and that "the Group 2 employees were much slower in their work efforts, much slower at delivering the fish from the rack to the pallet." He reported these observations to Mr. Leyland. Later, under cross-examination by Mr. Nichol, he stated that he judged

the productivity of the Group 2 workers "By their movements, effort, the time it takes to carry a box of herring from the rack and put it on the pallets, go back in and get another one, general movements." However, he admitted that he had made no measurements to ascertain how many pounds per shift were being moved by the Group 2 workers and whether they measured up in that regard to the normal expectation that two Group 1 workers would be able to move 60,000 pounds in a night. He stated that, to the best of his knowledge, Mr. Leyland had not made an estimation that the Group 2 workers were one-third slower, nor had anyone else.

Under cross-examination by Mr. Camp, Mr. Wolkosky stated that he saw the Complainant stripping herring racks on day shift in March, 1977, and that that was the only time saw her doing the work. Later, Mr. Camp put the following question to the witness, "I am suggesting to you, Mr. Wolkosky, that your recollection is nothing more than this; that on a few occasions, as you walked by the Group 2 workers, during the latter part of March, you concluded that their productivity was not as good as the Group 1 workers, is that a fair statement?", and the witness replied, "That's a fair statement." He further admitted that he had no distinct recollection of the

Complainant's productivity compared to the other females who were doing the work, and that he had not particularly discerned the Complainant's productivity.

In light of the fact that Mr. Wolkosky's views as to the productivity of the Group 2 workers were reported to Mr. Leyland, and thus, presumably, were taken into account by Mr. Leyland and Mr. Reeder in their assessment of the Complainant's productivity, it is also relevant to note his answers to further questioning about his views in general pertaining to women. Mr. Wolkosky stated that he holds the view that men are generally stronger than women, that if women do hard physical labour at B. C. Ice they have an increased risk of hurting themselves, and that he would hate to see Susan Jorgensen or Margaret Hall doing this heavy work, for fear that they would hurt themselves. All of these statements were made in response to suggestions put to him in cross-examination by Mr. Camp.

In re-direct examination, Mr. Wolkosky said that, although he had not particularly discerned the productivity of the Complainant, she had not risen above the average or less than average level of the Group 2 workers, and was performing the same below-average work as the others.

In response to questioning from one of the members of the panel, the witness stated that his observations as the productivity of the Group 2 workers were made on the basis of observing them for a few minutes a a time, from a vantage point a little ways back.

To complete the picture, evidence of the Company records as led through Mr. Reeder and through the Human Rights Officer, Ms. Embree, indicates that the Complainant worked on the night shift during March of 1977, with the exception of two days, March 21 and 22.

Witnesses called by the Director and the Complainant, all fellow employees of the Complainant, generally stated that they observed her as having no problems with productivity.

The charge hand, Karnal Manhas, who was responsible for the night shift during a period of time when the Complainant was performing group 1 work on that shift, stated that while the Complainant was stripping herring racks, "she did the same as anybody else did on night shift." He stated that he was working close at hand so tht he had a pretty good look at her, and that "as far as the crew, they all did, you know, they were told to do

that job and they were all doing it." He further stated that he had no reason to believe that senior management was other than satisfied with the way the Complainant worked. In cross-examination, Mr. Manhas was asked whether the Complainant had been one of a crew that was otherwise composed of males during the herring season in early 1977, and stated that she had been, and was then asked how her productivity compared with that of other members of that crew. His answer was "Okay. The same or more", that he had observed her at the work whenever the work was going on, but that she had performed that work very seldom because she would usually be the tally person and therefore would not be actually stripping the herring racks. Mr. Manhas also stated that the taping of her wrists appeared not to have affected her work, in terms of productivity as a line worker.

Generally speaking, other employees, including those who worked beside the Complainant, did not make any close observations of her productivity. Their comments were similar to those of Nick Lewis, who said "I wasn't really watching, but as far as I know she kept up to most of us, yes." Larry Mulroney testified that he had observed the Complainant stripping herring racks in 1977, at the same time as he was performing the task himself,

and stated "she was adequate, the same as all the rest of us." He further stated that the Complainant was "about the same as the male employees" when he saw her do the work.

Vince Casano, who worked with the Complainant for three or four days stripping the herring racks, was asked whether he had a chance to see how she worked out, and replied "I don't know what you mean by that. I mean, you work side by side. I don't watch what she is doing, you know, you just do it, so - ". He stated that nothing had come to his attention which led him to believe that she was no good at the job "because I kind of move around too much around there."

Warren Hunter, who had worked with the Complainant in a crew which was stripping boxes of herring from the racks, was asked how she had performed and replied "average, the same as everybody."

One notable feature of the evidence of Mr. Leyland and Mr. Wolkowski with respect to productivity is its lack of specific reference to the Complainant. Both of these witnesses refer almost exclusively to the Group 2 workers as a whole, rather than to the Complainant as an individual. Further, it appears that the opportunity for

Mr. Leyland and Mr. Wolkowski to observe the Complainant was somewhat limited, because she was working on the night shift for much of the relevant period.

On the other hand, the observations of the Complainant's fellow employees, who worked beside her or around her, are that she, as an individual, was as productive as the average, that she "kept up", or that "the line didn't stop" (Lionel Jackson). Some of these witnesses distinguish between the Complainant and the older women, stating that although the work was too difficult for the older women, it was not for the Complainant.

In my view, there was no evidence upon which it would be reasonable to conclude that the Complainant's productivity needed improvement, whether or not it might have been the case that the Group 2 workers in general were slower than the Group 1 workers. It does not even appear that the Complainant worked for most of the time with the other women who were performing the Group 1 work; rather, she was working in crews which were otherwise all male most of the time. Therefore the evidence from Mr. Leyland and Mr. Wolkowski as to her productivity can have little weight, and we are left with the evidence of the

fellow employees and of the Complaint herself, who stated that they thought she kept up.

It therefore follows that none of the Company's stated reasons for refusing the Complainant the further opportunity to perform Group 1 work, either alone or in combination, has proved to have an objective basis.

The next question is whether the Complainant's sex was a factor in the Company's decision. The Company pointed to several matters indicating that sex was not a factor:

1. In 1977, after its decision about the Complainant but before the Human Rights complaints had come to its attention, the Company offered to all women at the plant except the Complainant the opportunity to try Group 1 work. The only one who took advantage of the opportunity was Faye Newman, one of the younger and more junior women. She withdrew from the trial at Group 1 work in circumstances which will be discussed briefly below.

2. Women, including the Complainant, had been doing tally work, a "Classified Preferential" job formerly only performed by Group 1 workers, for a period of time

before the complaint was filed and before the Complainant began agitating for Group 1 work in late 1976.

3. The Harbour Plant seniority list had been integrated with respect to men and women several years before the complaint. In contrast, there was evidence from Mr. Nichol that at other plants there are still different seniority lists for men and for women.

4. Paragraph 6.02 of the Collective Agreement, which prohibited the Company from requiring women to go into the freezer, had been deleted after the complaint but prior to the hearing.

On the other hand, there is some evidence which may indicate that the Complainant's sex was a factor in the Company's decision:

1. The nature of the evidence from Mr. Wolkowski and Mr. Leyland as to the Complainant's productivity - its failure to treat the Complainant as an individual. The Company appears to have assumed that the Complainant's productivity was low because it was thought that the productivity of the women as a group was low. There is no evidence to indicate that the

company would have reached its decision regarding the Complainant without its belief in her need to improve her productivity. Therefore, if sex was a factor in the assessment of the Complainant's productivity, then it was a factor in the Company's decision to remove her from Group 1 work.

2. The history of the division of labour betwen men and women at the B.C. Ice Plant and of the previous collective agreements is relevant in determining whether or not sex was a factor in the Company's decision. The General Electric Corporation v. Commonwealth of Pennyslvania case in the Pennyslvania Supreme Court (1976)13E.P.D.6024, cited to the Board by the Director and the Complainant, contains persuasive reasoning to the effect that "abandoned discriminatory practices which appear to be carried forward by new facially neutral policies can be evidence that the factor formerly enunciated in the discriminatory practices is present in the decision making." Except with respect to those matters enumerated above (the tally work, Clause 6.02 and the offer to the other women) the practice at the plant (which sex does which jobs for what pay) remains

unchanged. It seems that past discriminatory practices may well be having an impact on present conditions.

3. The nature of the trial at Group 1 work given to Faye Newman in June, 1979, which may be considered by this Board in attempting to ascertain the Company's attitude toward women entering Group 1, points to a less than fair-minded approach. It would appear from the evidence that it was something of a "show trial", with Ms. Newman assigned to a task (unloading halibut from a four foot high tote, Ms. Newman being herself about five feet tall) which would be inherently and uniquely difficult for someone of her size, to be performed with an unwilling co-worker, before an amused audience. This is circumstantial evidence that the Company's position was that it was not to be made any easier than it had to be for women to enter Group 1.

4. There was evidence that, as might have been expected, the male workers at the Plant were reluctant to imagine women doing a new kind of work. In his evidence, Mr. Wolkowski said that one Ron Massey stated that he did not want to work with a woman when

Faye Newman was sent to load a truck with him on the occasion of her trial at Group 1 work. Mr. Nichol gave evidence to the effect that there were union members holding views (contrary to his own) that women should not have equal opportunity. Ms. Embree reported a concern expressed to her by the charge hands that an all-female crew would be of low productivity. The newness of the situation and some reluctance among the Group 1 workers may have influenced the Company to be overly cautious with the Complainant.

5. A key matter in determining whether or not sex was a factor in the decision is whether a male employee would have been treated the same way. In deciding whether a male employee would have been treated the same way, one can only look at the way in which male employees with similar problems have in fact been treated. The evidence before us was that male employees with similar problems (that is, perceived physical weaknesses) were either accommodated (allowed to avoid work they were physically incapable of doing) or dismissed - but they were never put into Group 2. This points to a view on the part of the Company that Group 2 work is "women's work" only.

6. It appears also that the Company's offer to all of the women except the Complainant of the opportunity to perform Group 1 work was not made in the same terms in which male workers who had been hired by the Company in the past had been offered Group 1 work. The women, already employees of the Company, were told that they could try out for Group 1 work and that they would be expected to perform every task in Group 1 including the very heaviest ones. No male worker had a recollection of being told the same thing when he was hired, although many of them testified that in fact they understand that they are required to perform all the taks in Group 1. However, most of them do not in fact perform anywhere near all of the Group 1 tasks on a regular basis.

Taking all of the evidence into account, have the Complainant and the Director proved, on a balance of probabilities, that the Complainant's sex was a factor in the Company's decision? I think so, particularly in the light of the evidence about the assessment of the Complainant's productivity. She was not really assessed as an individual. An assessment was made of the productivity of the women, and it was then assumed that the Complainant was not different. It is that kind of

assessment which, it seems to, the Human Rights Code is designed to prevent. I conclude that the Complainant was discriminated against by reason of sex, without reasonable cause.

I agree with the Majority that the Complainant must be afforded the opportunity to perform Group 1 work by the Company and be assessed as an individual on her performance. I would add that her pay, from the outset, should be at the Group 1 1,000 hour rate. Although there is some merit in the Company's argument that the Complainant should not receive 1,000 hours of credit toward Group 1 from having performed Group 2 work, there is more merit to the argument expressed by Mrs. Lydia McKay that "a woman's seniority should be worth as much as a man's" - a woman who has put in many thousands of hours at the Plant in Group 2 and who moves into Group 1, now that it is open to her, should receive the pay commensurate with her seniority at the Plant, especially in the light of the evidence that the nature of the work in the two Groups is similar in many respects. I agree with the Majority that further evidence is necessary to determine the amount of financial loss, if any, suffered by the Complainant as a result of the Company's discrimination in refusing to permit her to continue Group

l work, but would order that she be paid the difference between what she earned while she was doing Group 1 work and what she would have earned during that period had she received the Group 1 1,000 hour rate.

The Collective Agreement

Referring to the issues raised concerning the Collective Agreement, I will deal with them in order:

1. I do not think that the Collective Agreement at the date of the complaint was discriminatory against women on its face, aside possibly from Clause 6.02 which has since been deleted.

2. (i) and (ii)

I do not think that there is sufficient evidence upon which it can be concluded that there is discrimination through or pursuant to the Collective Agreement and the groupings thereunder. In the Ontario Human Rights Board case of Ms. Anne Colfer, Ont.H.R.B.I., January 12, 1979, which was cited to us by Counsel for the Complainant and the Director, there was statistical evidence to show that the height requirement for police officers had a greater impact on women than on men, and that the height requirement was not objectively justified. That Board therefore held that the height requirement was discriminatory. In the

present case, although there was a body of evidence throwing serious doubt upon the objective justification for the groupings, there was no statistical evidence that there was a greater impact on women than on men from the manner in which the tasks were allotted to the groups along with the requirement that all members of Group 1 be able to perform all Group 1 tasks. The subjective evidence as to whether most women would be able to do all of the Group 1 tasks was inconclusive. Some witnesses said most women could not do the most difficult tasks in Group 1; others said some women could; there was evidence that Mrs. Lydia McKay had, in fact, tried most of the Group 1 jobs. The onus is on the Director and the Complainant to show that an objectively neutral requirement has an inordinate impact on a particular group, and in my view that onus was not satisfied, even though the history of the evolution of the groupings raises some real questions in this regard.

2. (iii)

There was no particular complaint from an individual regarding hiring or regarding refusal of a promotion to a Classified/Preferential job, and I do not

consider that the complaint has been made out in that respect. However, I think that the Company's policy of refusing to pay the women who were trying out for Group 1 work the full 1,000 hour rate was discriminatory, as discussed above, and I would order that the Company pay Group 2 workers the full 1,000 rate when they attempt to move into Group 1, so long as they have achieved the 1,000 hour rate in Group 2.

3. The fact that there did not exist, until the current Collective Agreement, a 1,000 hour rate for Group 2, does not seem to me to amount to discrimination against the women in Group 2 unless the groupings themselves are discriminatory. I have concluded that there is not sufficient evidence to find that they are discriminatory.

It follows from what I have said above that the Respondent Union has not been proved to have discriminated against the Complainant or other women in the manner alleged. The Complainant and the Director have succeeded against the Company in part. However, I agree with the Majority that no costs should be awarded, in all the circumstances.

Ex. 1

# BOARD OF INQUIRY

COMPLAINT: Pursuant to Sections 6, 8 & 9 of the Human Rights Code of British Columbia.

CATEGORY:
(1) Discrimination in pay on the basis of sex

(2) Discrimination in employment on the basis of sex.

(3) Discrimination in a Collective Agreement on the basis of sex.

COMPLAINANT: Susan Jorgensen

RESPONDENTS: B.C. Ice and Cold Storage Limited and United Fishermen and Allied Workers Union

DATE OF ALLEGED CONTRAVENTION: January, February, March 1977 and ongoing

EXHIBITS:
"A" -Complaint Forms (2) dated April 13, 1977, signed by Susan Jorgensen

"B" -Wage Rates and Protective Clause 602 from 1976 Collective Agreement

"C" -Seniority List dated September 7, 1977

"D" -Listing - Plant Jobs, prepared by B.C. Ice and Cold Storage Limited

"E" -Listing of dates of non-payment of Group 1 rate and non-call-in on seniority basis.

SUMMARY OF INVESTIGATIVE FINDINGS:

Ms. Jorgensen filed a complaint alleging that B.C. Ice and Cold Storage Limited has discriminated against her and against all women in employment on the basis of sex. She alleges that -

(1) female employees are not given equal opportunity to enter the Group 1 classification

(2) Ms. Jorgensen was not paid a wage equal to male employees for similar or substantially similar work.

Ms. Jorgensen also filed a complaint alleging that the United Fishermen and Allied Workers Union negotiated a Collective Agreement that discriminates against her and other women employees by denying Group 2 workers the 1,000-hour rate.

...2

The investigation of the complaint revealed the following:

(1) Susan Jorgenson has been an employee of B.C. Ice and Cold Storage Limited since September 10, 1975. She had worked for the company as well in 1973. Her classification is and has been Group 2.

(2) At B.C. Ice and Cold Storage Limited, all men are classified Group 1, all women are classified Group 2. Three women do Tally and receive a 20¢ per hour bonus; women hold no other classified or preferential jobs. 31 of the 35 men on the seniority list are classified to do Cold Storage work, as well as Fresh Fish Group 1 work. Men are also Fork Lift Drivers, Graders, Tally-persons and Charge-Hands.

(3) During March 1977, Ms. Jorgensen pulled Herring Racks, a task recognized by all parties as Group 1 work. Ms. Jorgensen states that she was not counselled about any problems with this work and that she suffered no physical problems as a result of performing this work.

(4) Ms. Jorgensen did not receive Group 1 rate of pay for this work. She remained classified as a Group 2 worker.

(5) Ms. Jorgensen requested Group 1 work and classification at numerous times, including February 1977.

(6) On at least two occasions in April and May 1977, men junior to Ms. Jorgensen were called in and were performing work Ms. Jorgensen had done or could do. Senior workers and union representatives questioned the company about this practice to no effect.

(7) The Officer reviewed payroll printouts from October 6, 1977 to December 31, 1977. Exhibit E reports the number of days that men junior to the complainant in seniority were called in to do work Ms. Jorgensen had done, could do, or had not been given the opportunity to do, and was not called in to do.

(8) The Plant Manager interviwed all women employees, other than the complainant,

...3

on October 14, 1977 and informed them of the heavy nature of the work in the Group 1 classification and enquired if they wanted to be classified in Group 1. All women, other than the complainant, are between 49 and 61 years of age. The complainant is 23.

(9) The company alleges that Ms. Jorgensen has physical problems, or physical impairment which results in injury when she does Group 1 work, or places her at high risk of injury were she to do Group 1 work. This has not been substantiated by any evidence.

(10) Women at B.C. Ice have performed work which is clearly recognized as Group 1. Men at B.C. Ice perform work which is most frequently done by women. The distinction of light and heavy work, which is to be allocated to Group 1 and Group 2 work respectively, is not clear, notwithstanding the division of work provided by the company as shown in Exhibit D.

(11) In the Group 1 classification, filled by men, the hourly rate increases by 21¢ after 400 hours and increases by another 82¢ after 1,000 hours. In the Group 2 classification, filled by women, the hourly rate increases by 21¢ after 400 hours. There is no further increase in the hourly rate.

ISSUES RAISED:

(1) Has Ms. Jorgensen been denied and is she being denied equal opportunity to perform Group 1 work?

(2) Was Ms. Jorgensen discriminated against in not being paid a Group 1 rate, or being classified as a Group 1 worker, when she performed Group 1 work?

(3) Does the Collective Agreement discriminate against women employees at B.C. Ice and Cold Storage Limited by not providing a one thousand hour rate in the Group 2 classification?

(4) Did Clause 602 of the 1976 Collective Agreement have a discriminatory impact in the employment of women at B.C. Ice and Cold Storage Limited?

SUMMARY OF EFFORTS MADE TO EFFECT SETTLEMENT:

(1) On February 10 and February 21, 1978 the Human Rights Officer met with the President, Plant Manager and Lawyer for B.C. Ice and Cold Storage Limited in an endeavour to bring about a settlement.

(2) On February 10, February 27, March 6 and March 23, 1978 the Human Rights Officer wrote to the company in endeavours to bring about a settlement. In their responses of February 15, February 24, March 1 and March 8, 1978, B.C. Ice and Cold Storage Limited maintained that they have not discriminated against Susan Jorgensen. It has thus not been possible to settle the complaint.

K. Ruff

Kathleen Ruff
Director
Human Rights Code

SUMMARY OF EFFORTS MADE TO EFFECT SETTLEMENT:

(1) On February 10 and February 21, 1978 the Human Rights Officer met with the President, Plant Manager and Lawyer for B.C. Ice and Cold Storage Limited in an endeavour to bring about a settlement.

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K. Ruff

Kathleen Ruff
Director
Human Rights Code

Exhibit A

COMPLAINT

FORM 1

No._____

# HUMAN RIGHTS CODE OF BRITISH COLUMBIA

Director,
Human Rights Code,
Parliament Buildings,
Victoria, B.C. V8V 1X4

I, Ms. Susan Jorgensen
(Name in full)

1460 East 37th Avenue (Street address) Vancouver (City)

324-3141 or 876-8536
(Home telephone) (Business telephone)

complain under section s 6, 8, 9 of the *Human Rights Code of British Columbia* that I was discriminated against by

(Name in full)

Manager (Position or title) B.C. Ice & Cold Storage Ltd. (Company name)

2155 Commissionier Street (Street address) Vancouver (City)

(Home telephone) 255-4656 (Business telephone)

on on going (Date of offence), last.

NOTE—Complaint must be filed within six months—of the alleged incident.

April 13 1977 (Date) (Signature) Susan Jorgensen

Please fill in details on back.

Discrimination on the basis of

☐ race ☐ religion ☐ colour ☐ age ☐ marital status

☐ ancestry ☐ place of origin ☐ political belief ☐ criminal conviction

☒ other SEX

Details I allege that I am not paid a wage equal to male employees for similar work; that I have been discriminated against in my job and that the collective agreement discriminates against me and all women on the grounds of sex.

OFFICE USE ONLY

☐ proceeding
☐ under investigation
☐ waiting for reply
☐ informal follow-up
☐ refer to
☐ send material

*Result*

☐ information
☐ dismiss
☐ withdrawn
☐ settled
☐ Board of Inquiry

*Officer*

Exhibit A

COMPLAINT

FORM 1

No._____

THE GOVERNMENT OF THE PROVINCE OF BRITISH COLUMBIA

# HUMAN RIGHTS CODE OF BRITISH COLUMBIA

Director,
Human Rights Code,
Parliament Buildings,
Victoria, B.C. V8V 1X4

I, Ms. Susan Jorgensen
(Name in full)

1460 East 37th Avenue — Vancouver
(Street address) — (City)

876-8536 — 324-3141
(Home telephone) — (Business telephone)

complain under section 9 of the *Human Rights Code of British Columbia* that I was discriminated against by

(Name in full)

United Fishermen and Allied Workers Union
(Position or title) — (Company name)

138 East Cordova Street — Vancouver
(Street address) — (City)

684-3254
(Home telephone) — (Business telephone)

on on going, 19__
(Date of offence)

NOTE—Complaint must be filed within six months—of the alleged incident.

April 13, 1977 (Signature) Susan Jorgensen
(Date)

Please fill in details on back.

Discrimination on the basis of

☐ race ☐ religion ☐ colour ☐ age ☐ marital status

☐ ancestry ☐ place of origin ☐ political belief ☐ criminal conviction

☒ other SEX

Details I allege that the Collective Agreement of the United Fishermen & Allied Workers Union discriminates against the female members on the basis of sex.

OFFICE USE ONLY

| | Result | Officer |
|---|---|---|
| ☐ proceeding | ☐ information | |
| ☐ under investigation | ☐ dismiss | |
| ☐ waiting for reply | ☐ withdrawn | |
| ☐ informal follow-up | ☐ settled | |
| ☐ refer to | ☐ Board of Inquiry | |
| ☐ send material | | |

BM 175-0293

EXHIBIT B

# FRESH FISH AND COLD STORAGE SUPPLEMENT

in effect to 31 Aug/77

## 1976

## Section 1 - Wages

1.01 The wage scales set out hereunder are the minimum scales for the listed classifications. Any prior commitments to individuals for rates in excess of those shown in this supplement shall be honoured.

1.02 General Wage Scale - Effective April 19, 1976

| CLASSIFICATION | Hourly Rate $ | Time and One-Half $ | Double Time $ |
|---|---|---|---|
| **Cold Storage** | | | |
| Start | 5.61 | 8.41½ | 11.22 |
| After 400 hours | 6.77 | 10.15½ | 13.54 |
| After 1000 hours | 7.56 | 11.34 | 15.12 |
| Charge Hand | 8.02 | 12.03 | 16.04 |
| **Group 1 - Fresh Fish Shed Workers** | | | |
| Start | 5.36 | 8.04 | 10.72 |
| After 400 hours | 6.52 | 9.78 | 13.04 |
| After 1000 hours | 7.34 | 11.01 | 14.68 |
| Grader | 7.67 | 11.50½ | 15.34 |
| Tallyman | 7.67 | 11.50½ | 15.34 |
| Charge Hand | 8.02 | 12.03 | 16.04 |
| **Group 2 - Fresh Fish Line Workers** | | | |
| Start | 5.57 | 8.35½ | 11.14 |
| After 400 hours | 6.73 | 10.09½ | 13.46 |
| **Filleters** | | | |
| Inexperienced | 6.73 | 10.09½ | 13.46 |
| Semi-Qualified | 6.91 | 10.36½ | 13.82 |
| Qualified | 7.13 | 10.69½ | 14.26 |
| Qualified (Effective June 28, 1976.) | 7.18 | 10.77 | 14.36 |

1.03 For every hour or major portion of an hour employed driving "Jeeps" jeep drivers shall receive ten cents (10¢) per hour in addition to their regular rate of pay. Employees employed driving jeeps for more than four hours in any particular day shall receive the ten cents per hour premium for the entire day. Jeep Drivers who work both in and out of cold storage shall receive the cold storage rate.

1.04 An employee who is employed as fresh fish tallyman but who does not have the ability to grade fish, or an employee employed as tallyman on a temporary basis, shall be paid twenty cents (20¢) per hour in addition to the regular wage rate for all hours actually employed as tallyman.

Ex. (1)

1976 Agreement
O.E

Plant Seniority Plans

18 In recognition of the differing problems which arise on seniority and the desire of both parties to have seniority applied in a way which is reasonable, fair and understandable, encouragement shall be given to the working out of a plant seniority plan, and such plan when mutually agreed upon shall be considered as part of this Master Agreement.

19 Meetings to discuss plant seniority plans either in the way of amendment of an existing plan or for drafting a plan of coverage for the plant (or portion of the plant) shall be held at the request of either management or Shop Steward Committee.

20 During discussion and negotiation of plant seniority plan, every effort shall be made by both parties, subject to proper consideration of overall problems, and to peculiar problems which may exist in the plant to include as many employees and classifications as possible in each seniority grouping to the end that as few seniority groupings as practicably possible are instituted.

21 During discussion of plant seniority plan the question of seniority determining the order of call-out for overtime work, should such problem exist in a plant, shall also be discussed. Call-out for overtime shall be on a basis equitable to the members of the regular crew, capable of doing the work required. Any unjustified deviation from this practice or any problem arising on overtime call-out shall be discussed between Shop Steward Committee and management.

Plant Seniority Lists

22 The Company shall prepare and maintain a seniority list for the plant on the basis of the conditions as set forth in this Article. The plant seniority list shall provide the basis for lay-offs and hiring whether of a sporadic or seasonal nature, subject to the conditions of this Article. The list shall be amended as new employees qualify for seniority and as employees are dropped from seniority listing. Should mistakes or discrepancies occur in such list, such mistakes or discrepancies shall be discussed between the Shop Steward Committee and the management with a view to correcting same.

23 The plant seniority list shall be available to the Shop Steward Committee or Headquarters of the Union upon request and shall also be posted in a conspicuous place in the plant.

24 Any dispute in regard to Article 5, Seniority, which cannot be settled in discussions between management and the Shop Steward Committee at the plant or between Headquarters of the Union and the Company, shall be dealt with under the Grievance Procedure herein.

ARTICLE 6 - WORKING CONDITIONS

61 Employees when not doing work covered by their own classification shall do such work as instructed by management.

It is clearly understood that female employees shall not be required to work in low temperature rooms in cold storage.

Relief Periods

.03 A relief period of fifteen minutes in the morning and fifteen minutes in the afternoon shall be allowed to all employees without pay deductions, such rest periods to be as close to 10:00 a.m. and 3.00 p.m. as possible. Consideration should be given to advancing the first relief period of sections of a department in the event of an early callout.

.04 Should overtime be worked a similar rest period shall be allowed two (2) hours after commencement of overtime providing the work to be done cannot be completed in two and one-half hours or less.

.05 If emergency conditions arise which are beyond the control of the Company, the management may vary the time at which the rest period is usually taken. Any abuse of this Article by either Party shall be subject to corrective action by the Shop Steward Committee and/or the management.

Cooling Off Periods

.06 When cold storage employees are required to load railway cars or trucks or to do other heavy work outside of cold storage, those who have been so occupied shall be allowed an adequate period to cool off before being required to re-enter low temperature rooms. In determining the length of the cooling off period it is agreed employees should not go into low temperatures when they are still damp with perspiration nor should they be required to enter cold storage if their clothes are wet.

Meal Periods

.07 No employee shall be required to work over five (5) hours in any one shift without being relieved for meals.

.08 Time and duration of meal periods shall be determined in consultation between management and crew through the Shop Steward Committee.

.09 When, because of emergency reasons, a meal period less than one-half hour is given, employees shall be paid for such meal periods.

.10 After four (4) hours' overtime have been worked following a supper break on weekdays, a one-half hour meal break shall be given without pay deduction, if work is to continue after such break. The Company shall provide sandwiches and coffee without charge to those involved. In no instance shall the work period be extended beyond four (4) hours without a break for the stated meal period with the exception that on the final day of processing in any particular week the meal period may be waived provided the work remaining can be completed in one-half hour or less.

Shift Arrangements

General

.11 In the event that regular night or graveyard shifts are instituted, hourly and overtime conditions shall be based upon the same principles as set forth in "Hours of Work and Overtime".

EXHIBIT C

# UNIT I SENICRITY LIST

Sep. 7, 1977

| SEN. # | NAME | Sex | Charge Hand | Tally | Grader | Forklift | Cold Storage | Group I | Group II | STARTING DA |
|---|---|---|---|---|---|---|---|---|---|---|
| 1 | DUMKA, Robert | M | X | X | X | | X | X | X | 1956 |
| 2 | BODNAR, Paul | M | X | | | | X | X | X | 1957 |
| 3 | DGBROWOLSKY, Luba | F | | | | | | | X | 1959 |
| 4 | HALL, Margaret | F | | | | | | | X | 1959 |
| 5 | MULROY, Walter | M | | | X | | | X | X | 1960 |
| 6 | MODY, Harry | M | | | | | X | X | X | 1960 |
| 7 | JACKSON, Lionel | M | | X | X | X | X | X | X | 1960 |
| 8 | FEDIUK, Mike | M | X | X | | X | X | X | X | 1962 |
| 9 | JENSEN, Arvid | M | | | | X | X | X | X | 1962 |
| 10 | KRESS, Pete | M | | | | X | X | X | X | 1962 |
| 11 | ANTONYSHYN, Matt | M | | | | | X | X | X | 1965 |
| 12 | NAPPER, Kerry | M | | X | X | X | X | X | X | 1967 |
| 13 | McKAY, Lydia | F | | X | | | | | X | 1968 |
| 14 | BEVILACQUA, Luigi | M | | | | | X | X | X | 1968 |
| 15 | NAPPER, Larry | M | | X | X | X | X | X | X | 25 Jul 69 |
| 16 | GAGNEBIN, Elinor (Bcxline) | F | | X | | | | | X | 31 Jul 69 |
| 17 | CLAYTON, June | F | | | | | | | X | 11 Aug 69 |
| 18 | BASSETT, Bill | M | | | | X | X | X | X | 05 Sep 69 |
| 19 | FIORANTE, Tony | M | | | | X | X | X | X | 20 Jul 70 |
| 20 | BUSSANICH, Marco | M | | | | | X | X | X | 22 Jul 70 |
| 21 | LEWIS, Mick | M | X | X | | X | X | X | X | 02 Jul 71 |
| 22 | MANHAS, Kernal | M | X | X | | X | X | X | X | 04 Sep 71 |
| 23 | CASSANO, Vince | M | | | X | | X | X | X | 07 Mar 72 |
| 24 | McKENZIE, Geraldine | F | | | | | | | X | 16 Jul 72 |
| 25 | HOBBS, Sam | M | | | | | X | X | X | 25 Aug 72 |
| 26 | DUMAY, Bill | M | | | | X | X | X | X | 28 Aug 72 |
| 27 | GURNEY, Bill | M | | | | X | X | X | X | 28 Aug 72 |
| 28 | STORNESS-BLISS, B. | M | | X | | X | X | X | X | 27 Sep 72 |
| 29 | DITOMASO, Luigi | M | | | | | X | X | X | 07 Mar 73 |
| 30 | SEMKIW, Lillian | F | | | | | | | X | 27 Jun 73 |
| 31 | MYSYK, Mike | M | | | | | X | X | X | 24 Jul 73 |
| 32 | CRAIG, Ken | M | | | | | X | X | X | 21 Mar 74 |
| 33 | MULRONEY, Larry | M | | | X | | X | X | X | 19 Mar 75 |
| 34 | FIORANTE, Ben | M | | | | | X | X | X | 20 Mar 75 |
| 35 | BODNAR, Carey | M | | | | X | X | X | X | 24 Jul 75 |
| 36 | JORGENSEN, Susan | F | | X | | | | | X | 10 Sep 75 |
| 37 | BLIGHT, Bill | M | | | | X | X | X | X | 08 Mar 76 |
| 38 | HUNTER, Warren | M | | | | X | X | X | X | 08 Mar 76 |
| 39 | ROY, J. | M | | | | X | X | X | X | 08 Mar 76 |
| 40 | STORNESS-BLISS, N. | M | | | | | X | X | X | 08 Mar 76 |
| 41 | DOBROWOLSKY, John | M | | | | | | X | X | 26 Jun 76 |
| 42 | HOUGHAM, D. | M | | | | | | X | X | 20 Mar 75 |
| 43 | WILSON, Jim | M | | | | | | X | X | 07 Sep 76 |

EX. (5)

EXHIBIT "D"

# PLANT JOBS

## (A) CLASSIFIED/PREFERENTIAL

1. Charge Hand
2. Forklift
3. Grader
4. Tally Person - Fresh Fish
5. Tally - For Totes & Boxing
6. First Aid Attendant

## (B) GENERAL LABOR

### HEAVY (Group 1)

Boat Unloading
Winch
Head
Rip Belly
Load/unload Plate Freezers
Unload Racks (Fr)
Lug Halibut
Halibut Handling
Chip Ice & Snow
Load & Unload Trucks
Stacking Cartons
Line and Move Totes
Load Buggies & Push to Glazer
Winch Operator - Dip Tank
Unload/Trim Totes Fish
Strap Cartons
Repair Totes/ Pallets

### LIGHT (Group 2)

Reaming
Pick Roe
Blood
Wash
Rack Fresh
Clean-up ( Light)
Boxing Line - 1. Stapling
2. Stencil
3. Scale
4. Bagging Fish
End of glazing line ( Toting)

Ex. (4)

EXHIB - E

Section 8 - Equal opportunity in Employment - Susan Jorgensen v.
B.C. Ice & Cold Storage

| Date: | Crew Size: | Men junior to Susan Jorgensen called i |
|---|---|---|
| October 4 | 34 | S.J. worked |
| October 5 | 36 | S.J. worked |
| October 6 | 36 | S.J.-½ day |
| October 7 | 32 | S.J. (holiday) 37,38,41 Matinovich |
| October 11 | 22 | |
| October 12 | 27 | |
| October 13 | 28 | |
| October 14 | 27 | |
| October 17 | 30 | |
| October 18 | 9 | |
| October 19 | 20 | |
| October 20 | 26 | |
| October 21 | 19 | |
| October 22 | 3 | |
| October 24 | 17 | |
| October 25 | 17 | |
| October 26 | 18 | |
| October 27 | 22 | |
| October 28 | 29 | S.J. worked |
| October 29 | 3 | |
| October 31 | 31 | S.J. - A 43, Purdon J & G, Dobbs |

21 working days: 2 days S.J. not working when junior men worked.

| | | |
|---|---|---|
| November 1 | 33 | Purden, J & G, 41, 43, Matinovich<br>S.J. - A |
| November 2 | 30 | 41, 43, Purden J & G, S.J. -A |
| November 3 | 28 (& 4 on night) | 41, 43 |
| November 4 | 33 | 41,43, Purdon J & G |
| November 7 | 36 | S.J. worked |
| November 8 | 37 | S.J. worked |
| November 9 | 37 | S.J. worked |
| November 10 | 39 | S.J. worked |
| November 12 | 3 | |
| November 14 | 41 | S.J.-½ day only (as other?)junior men had 8 hrs + overtime; 37,41,43,Creanza Plouffe, Waller, Shields, McJoe, Cameron, Tinsdell, Anderson |
| November 15 | 42 | S.J. - L.O.; Purden J & G, 37, 41, 43, Cameron, Brown, McCrae, etc. Plouffe - detailed report on 15th re jobs. |
| November 16 | 49 | S.J. - A |
| November 17 | 45 | S.J. - A |
| November 18 | 46 | S.J. - L.O. |
| November 19 | 13 | |
| November 21 | 48 | S.J. - A 37,41,43 + |
| November 22 | 49 | S.J. - A |
| November 23 | 48 | S.J. - L.O. |
| November 24 | 48 | S.J. - L.O. |
| November 25 | 49 | S.J. - L.O. 37,41,43,+ (detailed repor |

| Seniority Number | Name | | Seniority Date | Date Left |
|---|---|---|---|---|
| **RKLIFT DRIVER** | | | | |
| 7 | L. JACKSON | | 1960 | |
| 9 | A. JENSEN | | 1962 | |
| 10 | P. KRESS | | 1962 | |
| 12 | K. NAPPER | | 1957 | |
| 15 | L. NAPPER | | 25 Jul 69 | |
| 18 | W. BASSETT | | 05 Sep 69 | |
| 19 | T. FICRANTE | | 20 Jul 70 | |
| 21 | M. LEWIS | | 02 Jul 71 | |
| 22 | K. MANHAS | | 04 Sep 71 | |
| 26 | W. GURNEY | (Seasonal) | 28 Aug 72 | |
| 27 | W. DUMAY | (Seasonal) | 26 Aug 72 | |
| 28 | B. STORNESS-BLISS | (Seasonal) | 27 Sep 72 | |
| 35 | C. BODNAR | (Seasonal) | 24 Jul 75 | |
| 37 | B. BLIGHT | (Seasonal) | 08 Mar 76 | 25 Aug 76 |
| 38 | W. HUNTER | (Seasonal) | 08 Mar 76 | 07 Sep 76 |
| 39 | J. ROY | (Seasonal) | 08 Mar 76 | 01 Apr 76 |
| **RGE HANDS** | | | | |
| 1 | R. DUMKA | | 1956 | |
| 2 | P. BODNAR | | 1957 | |
| 8 | M. FEDIUK | | 1962 | |
| 5 | L. NAPPER | (Backup) | 25 Jul 69 | |
| 1 | M. LEWIS | (Backup) | 02 Jul 71 | |
| 2 | K. MANHAS | | 04 Sep 71 | |
| 7 | W. DUMAY | (Backup) | 28 Aug 72 | |
| **LY PERSONS** | | | | |
| 7 | L. JACKSON | | 1960 | |
| 3 | L. McKAY | | 1968 | |
| 5 | L. NAPPER | (Backup) | 25 Jul 69 | |
| 6 | S. JORGENSEN | (Backup) | 10 Sep 75 | |
| **DERS** | | | | |
| 7 | L. JACKSON | | 1960 | |
| 5 | L. NAPPER | | 25 Jul 69 | |
| 3 | V. CASSANO | | 07 Mar 72 | |
| | L. MULRONEY | (Backup) | 19 Mar 75 | |

| | | |
|---|---|---|
| November 26 | 9 | |
| November 28 | 45 | S.J. - L.O. |
| November 29 | 48 | S.J. - L.O. |
| November 30 | 50 | S.J. - L.O. |

24 working days - 17 days S.J. not working and junior men were called in.

| | | |
|---|---|---|
| December 1 | 55 | S.J. - L.O. |
| December 2 | 47 | S.J. - L.O. |
| December 3 | 7(Pd 4 hr) | S.J. - not called in |
| December 5 | 45 | S.J. - L.O. |
| December 6 | 24 | |
| December 7 | 10 | |

S.Jorgensen still on printout to 7 Dec. NOT on printout Dec 8.

| | | |
|---|---|---|
| December 8 | 30 | (note 37,43,40, 35 all in - S.J. is #36 |
| December 9 | 33 | #37 in, #41 in & got 1000 hr shed rate cold rate (7.99) (7.76) #43 - cold rate + non-seniority - Purdon, G. |
| December 10 | 11 | |
| December 12 | 35 | Purdon, J & G, + 37,40,43,41,Cameron, Creanza, McRae, Baldwin |
| December 13 | 43 | Purdon, J & G, 37, 40,41,43, Cameron, Creanza, McRae, Waller, Shields, Baldwin, Gore, Jacobson |
| December 14 | 42 | Purdon, J & G, 37,38,40,41,43, Cameron (fork), Creanza, McRae, Walker, Shields Ansdell, Gore, Jacobsen |
| December 15 | 44 | Purdon J & G, 37, 40, 41,43, Creanza, McRae, Gagnon, Shields, Baldwin, Marsden, Gore, Jacobsen, Walker |
| December 16 | 43 | Purdon J & G etc. |
| December 19 | 42 | Purdon J & G etc. |
| December 20 | 33 | 37 (fork), 38,40,41,43, Walker |
| December 21 | 27 | |
| December 22 | 19 | |
| December 23 | 16 | |
| December 28 | 15 | 38, 43 |
| December 29 | 15 | 38, 43 |
| December 30 | 14 | 38, 43 |

December summary: # of days worked - 21; # days men junior to S. Jorgensen called in - 14.

| | October | November | December |
|---|---|---|---|
| TOTAL working days | 21 | 24 | 21 |
| Days S. Jorgensen did not work & junior men were called in: | 2 | 17 | 14 |

Estimated wages: 8 x 33 x 7.76 = $2048.64

NIGHT SHIFT

| Date: | Hours: | Rate: |
|---|---|---|
| 19 March | 8 | Overtime |
| 18 March | 8 | Straight time |
| 17 March | 8 | Straight time |
| 16 March | 8 | Straight time |
| 15 March | 8 | Straight time |
| 14 March | 8 | Straight time |
| | 2 | Overtime |
| 13 March | 8 | Double time |
| 12 March | 8 | Overtime |
| | 2 | Double time |
| 11 March | 8 | Straight time |
| | 0.2 | Overtime |

1976 CONTRACT RATES

| | GP.II-400 hr/rate | GP. I-1000 hr/rate | Differential |
|---|---|---|---|
| Straight time: | 6.73/hr | 7.34/hr | .61/hr |
| Over time: | 10.10/hr | 11.01/hr | .91/hr |
| Double time: | 13.46/hr | 14.68/hr | 1.22/hr |

| | | | | |
|---|---|---|---|---|
| 48 | hours | at straight time | = | 29.28 |
| 18.2 | hours | at overtime | = | 16.56 |
| 10 | hours | at double time | = | 12.20 |
| | | | | $58.04 |

NOTE: 1. 15¢ night shift differential is not included since it was added to all workers rates.

2. It is acknowledged by all parties that some time was spent by the complainant on day shift doing Group 1 work; this is not included.