IN THE MATTER OF THE HUMAN RIGHTS CODE, R.S.B.C. 1979, c. 186

AND

LESLIE JAMES McCARTNEY, Complainant

WOODWARD STORES LTD., Respondent

DIRECTOR, HUMAN RIGHTS CODE, A party pursuant to s.16(3) of the Human Rights Code

BOARD OF INQUIRY

April 20 and 21, 1982, Vancouver, B.C.

CHAIRPERSON: Lynn Smith

APPEARANCES: John Baigent and April Katz, for the Complainant and the Director

William MacDonald and Duncan McPhail, for the Respondent

INTRODUCTION

The allegation in this case is that the Respondent discriminated against the Complainant by refusing to promote him and by terminating him from employment because of a previous criminal conviction, without reasonable cause. The applicable portions of the Human Rights Code, R.S.B.C. 1979, c. 186 are sections 8(1) and (2):

> 8.(1) Every person has the right of equality of opportunity based on 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) no employment agency shall refuse to refer him for employment,
>
> unless reasonable cause exists for the refusal or discrimination.
>
> (2) For the purposes of subsection (1),
>
> (a) the race, religion, colour, age, marital status, ancestry, place of origin or political belief of any person or class of persons shall not constitute reasonable cause;
>
> (b) a provision respecting Canadian citizenship in an Act constitutes reasonable cause;
>
> (c) the sex of a person shall not constitute reasonable cause unless it relates to the maintenance of public decency;
>
> (d) a conviction for a criminal or summary conviction charge shall not constitute reasonable cause unless the charge relates

to the occupation or employment, or to the intended occupation, employment, advancement or promotion of a person.

The B.C. human rights legislation is unusual in containing a provision such as s.8(2)(d); to my knowledge, in Canada only the federal Human Rights Act contains an equivalent provision. The instant complaint is apparently the first one raising squarely the meaning of s.8(2)(d) of the Code to go to a hearing. I say "squarely" because although s.8(2)(d) was applied in a previous decision of a Board of Inquiry, in the case of Darlene Driedioer v. Glen Dalke, Don Marshall and Peace River Block News Ltd. (B.C.H.R.B.I. May 30, 1977), that was a case in which the criminal charge had not resulted in a conviction. The Board in the Driediger case reached its decision on the basis that a mere charge (in that case, trafficking in marijuana) could not constitute reasonable cause for dismissal within the meaning of the Code.

The charge against this Complainant was for theft under $50 (shoplifting) and resulted in a conviction and a prison term. The Respondent is a retail department store. It has a strong legitimate interest in protecting itself from internal theft through ensuring that its employees are persons of honesty and integrity. The Complainant has a strong legitimate interest in having the opportunity to earn a living in work for which he is qualified and thereby to

support himself and a young family. The two interests seem to conflict in this case.

Without the Code, there is no doubt how the conflict would be resolved -- in the absence of a collective agreement, an employer can dismiss an employee for any reason or no reason, providing he gives reasonable notice in the absence of proper cause. The legislature, in enacting s.8(2)(d) of the Code, has intervened to change that situation in the case of employees with criminal convictions unrelated to the employment, and has gone on to provide in s. 17 of the Code that a Board may order reinstatement or compensation if a contravention of the Code is proved. Presumably, the policy behind this legislation is to ensure that persons convicted of criminal offences shall be given a fair chance to rejoin the main stream of society (assuming the mainstream is represented by the work force, an assumption which seems less and less warranted in these economically difficult times) and to rehabilitate themselves, thus lessening the recidivism rate and increasing the productivity of society.

In the light of the Code and the judicial or Board of Inquiry decisions under it, how should the conflict be resolved in this case?

Reaching a resolution is not a simple matter, not only because of the strength of the competing interests but also

because, as usual, the conflict did not arise in completely straightforward circumstances. The general outline of the issues which follows will show what some of these circumstances were.

It is clearly established on the facts that the Complainant was dismissed by the Respondent as a direct result of the revelation that he had been convicted of shoplifting eight and one-half years previously, when he was seventeen years old.

The Complainant failed to disclose the conviction when he first applied for a job with the Respondent. This gives rise to what might be called the Respondent's first line of defence: that the Respondent dismissed the Complainant not because of his conviction but because of his dishonest failure to disclose it, and that dismissal on that basis is quite proper under the Code.

The Complainant's testimony at the hearing did not impress me as completely candid, for reasons which I will discuss below. This apparent lack of candour at the hearing gave rise to the Respondent's second line of defence: that the manner in which the Complainant gave his evidence at the hearing amply supports the inference that there was, objectively, reasonable cause for dismissal on the ground of dishonesty, whether the Respondent was aware of it or not.

The third line of defence does arise quite straightforwardly. The Respondent argues that even if I find that the dismissal was made, in whole or in part, because of the criminal conviction, there was reasonable cause since the conviction related to the "occupation or employment" of the Complainant. It is only here that the central issue about the meaning of s.8(2)(d) comes into focus. What does constitute reasonable cause under that section? May an employer simply say "No-one with a conviction for shoplifting may work at my retail department store because every position in the store involves access to the stock and the opportunity for dishonesty?" Or must an employer consider the circumstances and particulars of an individual's conviction in the light of his overall record and present situation?

AGREED FACTS

The parties agreed as to most of the facts of this case. The Complaint form, the application for employment form, the Information upon which the Complainant was convicted and the Respondent's documents relating to the Complainant's employment were all made exhibits by agreement.

The Complainant was born on June 30th, 1953. On November 30th, 1970, when seventeen years old, he was

arrested on a charge of theft under $50 in Vancouver. On December 1st, 1970, he pleaded guilty to that charge, unrepresented by counsel. He was sentenced to a prison term of six months determinate and six months indeterminate. He has no other criminal record.

He worked as a cook and painter in a logging camp between 1971 and 1978. On March 7th, 1978, he made an application for employment with the Respondent. The application form includes the question "Have you ever been convicted of a criminal offence that may relate to your employment -- If yes, give details." Just above the space for the job applicant's signature on the following page appear the words, "I hereby certify that the answers given by me in this application are true and complete, and I understand that any false answers or statements made by me may lead to termination of employment." The Complainant answered "No" to the question regarding conviction for a criminal offence and signed the form.

The Complainant was hired by the Respondent and worked, at first part-time and then full-time, in the furniture stockroom at the Oakridge store from March 22nd, 1978 to July 13, 1979, the date of his dismissal. All reviews of his performance showed him to be a satisfactory employee in every respect.

In June, 1979, the Complainant applied to be transferred

to the maintenance crew on the night shift at the Park Royal store, a position which paid a higher wage. A security check was required. The Complainant, therefore, on June 28th, 1978, submitted an authorization form and his fingerprints to the Criminal Records Section of the Vancouver Police Department. This permitted the release of information about his criminal record to the Respondent.

The security check turned up the Complainant's conviction. On July 13th, 1979, he was called to a meeting with the Respondent's Employment Manager, Mr. R. Cornish, and the Store Manager of the Park Royal branch, Mr. J. Carpenter, and told that his employment with the Respondent was terminated effective July 14th, 1979.

The Complaint form filed by the Complainant is dated November 23, 1979 and names Ralph Cornish, Employment Manager, Woodward Stores Ltd. as the Respondent. The allegation is stated as follows: "I was denied a promotion and fired because of a criminal conviction nine years ago."

TESTIMONY

Two witnesses gave evidence at the hearing, both called by the Complainant and Director. The Respondent chose not to call any evidence. I will restrict my review of the testimony to those portions regarding matters more or less in

dispute.

The first witness called on behalf of the Complainant was Valerie Embree, the Human Rights Officer who investigated the case. She gave evidence about two meetings which she had with representatives of the Respondent. The first meeting was on December 10th, 1979. The persons present were Peter Richardson, who was the Respondent's Industrial Relations Manager; Ralph Cornish, its Employment Manager; Ms. Goldstein, a secretary employed by the Respondent; as well as Valerie Embree and a Human Rights Officer in training named Peter Threlfall. The second meeting was on August 5, 1980 and involved the same participants as the first one, except that Mr. Threlfall was not present.

Ms. Embree testified that the discussion on the Respondent's part at both meetings was mainly conducted by Mr. Richardson, although comments were made by the others. She was not usually specific as to who said what in the discussion. I will simply adopt the shorthand "The Respondent said..." when Ms. Embree did not state which of the Respondent's representatives was responsible for a comment. Nor will I distinguish between the two meetings because nothing appears to turn on the particular occasion at which something was said.

During these meetings, the Respondent told Ms. Embree that the job sought by the Complainant at the Park Royal

store required security clearance because it involved work after store hours and that when the Complainant's criminal record came to light, he was terminated for reason of the falsification of the application form and misrepresention of his criminal record.

The Respondent confirmed that the Complainant's employee record was good and that, had it not been for the information about the criminal record, the Complainant would have been successful in obtaining the promotion he sought because he was the only candidate from within the organization.

Ms. Embree asked whether the Complainant would have been hired by the Respondent in the first place if he had disclosed his conviction on the application form. The Respondent replied that the Complainant would not have been hired; he would have had only a "counter interview" (a discussion with the clerk whose job it is to distribute and collect the application forms) and would not have been called in for a specific job interview. The Respondent noted particularly that the Complainant had indicated an interest in grocery stock and stocking on his application, and therefore certainly would not have been considered for that type of job. During further discussion about whether there might have been some positions open to the Complainant in the Respondent's operation, various possibilities were raised such as clerical or data processing jobs, but the Respondent

said in the end that even those jobs were not an option because they involved an earlier starting time than the rest of the staff so that the store would be "very vulnerable". The furniture stocking position which the Complainant had held, because it involved "back of the house" access, was also seen as a sensitive one. At one point, Ms. Embree testified, the Respondent said that there was no place for the Complainant in the organization.

At the time of dismissal, the Respondent had not sought any details about the circumstances surrounding the conviction and sentence, but commented to Ms. Embree that the severity of the Complainant's sentence suggested the possibility of previous criminal activity.

Ms. Embree was asked whether the Respondent had made any other comments about the way in which the application form had been filled out apart from the question relating to the criminal conviction. She said that either Mr. Richardson or Mr. Cornish had said something like "This is a cover-up situation" and then proceeded to say that, for example, the Complainant's character reference was also his job reference, and may have been falsified. Ms. Embree testified that after the December meeting, she contacted the references and ascertained that they were true and accurate. She also contacted the R.C.M.P. and Probation Services and was told that the Complainant had no other criminal record and no

criminal history (juvenile or adult).

The Respondent at one point referred to the Complainant in terms of "a theft problem", and Ms. Embree asked whether the Respondent considered one conviction for theft under $50 to be a theft problem. She said that the answer was "Yes" and that the Respondent again referred to the fact that the sentence received by the Complainant was unlikely if the offence had been a single incident.

Mr. Cornish said that at the meeting with the Complainant he had given the Complainant his name on a piece of paper and told him that he would be willing to give him a good reference so long as the prospective employment was not in a retail store.

In her direct examination, Ms. Embree stated that there was discussion about the gravity of the problem of internal theft for this employer. This was followed up on cross examination, and Ms. Embree expanded on her intial statement to say that the Respondent had told her that theft, including internal theft, accounted for one to two per cent of its sales, which were approximately $1,000,000,000 per year. The Respondent said that more than 50% of that would be internal theft, leading to the conclusion that somewhere in the neighbourhood of $5 - $10 million annually was lost through employee thievery.

She was also asked on cross examination what the

Respondent stressed to her as its concern about the Complainant and answered that "it was stated initially and occasionally throughout the meeting that the issue was one of misrepresentation, reference to cover-up was made, in addition there was extensive discussion about the significance of criminal convictions for Woodwards," particularly convictions for theft. She said that the Respondent gave no indication of being suspicious of the Complainant's honesty during his period of employment, and in fact, that it saw the Complainant as at least a satisfactory and probably better than average employee.

Ms. Embree was asked whether the Respondent had said at the meetings with her that all cases of misrepresentation on application forms would be dealt with the same way as the Complainant's and she answered, "certainly, I understood that was their policy." However, she had no personal knowledge of the Respondent's policy and was unable to provide any examples of it when asked.

The second and final witness was the Complainant himself. He testified about family difficulties which led him to leave home and school when he was one month short of grade 11, in May, 1970. He worked for 3 months for Ridgewood Timber Ltd. in a small logging mill on Redondo Island, then returned to Vancouver. He stayed at a hotel, worked at casual jobs and used up his savings. The upshot was that he

found himself destitute with no job or friends, and ineligible for welfare. He panhandled for two weeks or a month and then committed the shoplifting offence at Eaton's department store with the intention of reselling the merchandise.

He stated that he had put on three shirts in a changing booth, left the department but not the store, then changed his mind and returned to the shirt department, started to take the shirts off, and was interrupted by a store detective. He entered a guilty plea to the charge because someone advised him to, he stated, and he recalled having no lawyer in court. The Complainant did not recall any interview prior to his sentencing. If he is correct, it is fair to infer that there was no pre-sentence report. He testified that he had never been in court before nor in trouble before.

He spent one month in Oakalla, then the balance of his six month sentence in Boulder Bay, on a survival course. He was released on parole in May of 1971, whereupon he went to Europe for five months, visiting his father there. He returned and went to work again for Ridgewood Timber Ltd. He left that company 6 1/2 years later in 1978 because he wanted a change. He came to Vancouver. He then applied at the Respondent's store.

He testified that he read the application form carefully

when he filled it out. He said that he answered "No" to the question about a criminal conviction because "I didn't believe I had ever been convicted of a criminal offence that related to my employment." He said that he did not think it was related to his employment because "it occurred so long ago, about seven and 1/2 years previous to me filling out this application, and I was a juvenile at the time, I believe, and it was a once only offence, a mistake I had made and never repeated it. It was ancient history to me. I didn't believe it was in any way relevant to my present circumstances." He also said that he did not know if he had a record at the time because he was a juvenile when he committed the offence and he had heard something to the effect that convictions were wiped out after a certain period of time automatically. (The Complainant was not a juvenile at the time, because as of November 30th, 1970, the age of majority had been changed from 18 to 17. He was tried and convicted in adult court.)

He added that he would have answered the same way even if he had known he had a record because he considered it irrelevant.

In June of 1979, the Complainant applied for the maintenance position which was posted on a board. He went for an initial interview in the personnel department downtown, then on to Park Royal where the job was located.

There, he had an interview with the head of the Maintenance Department and, said the Complainant, "...it was quite a favourable interview and he gave me a starting date and said more or less, 'O.K. you can start next week.'"

A week or so after he had been to the police department in connection with the security check, the Complainant began to make enquiries about the delay. He was then called to the July 13 meeting. He said that Mr. Cornish informed him that in reviewing his application for the promotion, they had uncovered the fact that he had a previous criminal conviction and that they were going to have to let him go. He said that he replied, "That is discrimination, isn't it?" And that they replied, "Our lawyers have looked into that." He said he then attempted to discuss the circumstances leading to his conviction and that "they listened, but they didn't seem really interested in that information." The Respondent did not ask the Complainant at any time during the interview why he had given the answer "No" on the application form.

The Complainant asked whether he might be able to work in other areas of the store, and the Respondent's reply was that they felt they couldn't use him anywhere in the store because no matter which department he was in, one way or another he would have access to merchandise. The Complainant testified that he became angry because he felt that he was being unjustly fired because he had a conviction. He felt

that the conviction was the reason because "they had made no attempt to discuss with me my answer on the application... the other thing was that it brought up this information about it being a retail store and the handling of merchandise." The Complainant testified that he said "you probably wouldn't have hired me if you had previous knowledge I had a conviction" and that they replied "that's right". The Complainant confirmed that Mr. Cornish had said he could have a reference so long as the application was for a non-retail job. He also testified that his pay was already prepared when he left the meeting.

The Complainant testified that he he would like to resume working for the Respondent, in the job that he applied for in maintenance at the Park Royal outlet.

On cross-examination the Complainant was asked about some discrepancies between what he wrote on his application form and what he said at the hearing. In particular, his application form stated that he had left school in 1971, and had worked at Ridgewood Timber from June, 1971 to February, 1978. In fact, he had not started work at Ridgewood Timber in 1971 until approximately October. It was suggested to him in cross-examination that the application form would give the impression that he had left school in June of 1971 and immediately gone to work for Ridgewood Timber, rather than the true sequence which was that he had left school in May,

1970, worked for Ridgewood Timber for three months, spent time in Vancouver, then in jail, gone to Europe, and then returned to work at Ridgewood Timber. The Complainant was asked how he could have omitted all of those matters and answered that he had forgotten the exact dates when he was filling in the form.

On cross-examination, the Complainant agreed with the suggestion that at the termination meeting, the Respondent stated that the reason he was being discharged was the false statement on his application.

The Complainant did not impress me as a credible witness. It is impossible to believe that, when he completed the application form for the job at Woodward's, he was not aware of what he was doing in moving back the date at which he left school at one end and moving forward the starting date at Ridgewood Timber at the other end -- he was giving a false account of himself for the period of time in which he was imprisoned. The decision to give a false account in this manner was perhaps an inevitable consequence of the initial decision not to disclose the conviction, either because the conviction did not relate to the employment or because the Complainant probably believed, realistically as it turned out, that he would never be hired if the conviction were disclosed. Inevitable consequence or not, it appears to have been deliberate misrepresentation. Moreover, to be less than

candid about the matter under oath at the hearing is a very serious matter. One consequence is that I can give little weight to the Complainant's evidence where it is not confirmed in some way by other evidence.

The Human Rights officer, Ms. Embree, impressed me as a credible witness, and I accept her evidence, which was in any event uncontradicted. However the weight to be given to various portions of her evidence (insofar as much of it was hearsay) will vary according to the trustworthiness appropriate to its nature. For example, admissions made by the Respondent (such as the admission that the Complainant would not have been granted an interview or hired if the conviction had been disclosed) must be given full weight. On the other hand, the evidence concerning what the Respondent told Ms. Embree about the magnitude of its internal theft problem can be given little weight as proving that there was a problem of that magnitude because the source of the data is unknown and there was no opportunity to cross-examine anyone about the figures. Similarly, little weight can be given to the evidence of the Respondent's statements about its policies regarding dismissal for misrepresentation on application forms. That evidence was vague and again consisted of the repetition of hearsay not subject to cross-examination.

FINDINGS OF FACT

There are few disputed issues of fact. These are:

(1) Whether the conviction was the cause or part of the cause of the Complainant's termination;

(2) Whether the circumstances of the Complainant's conviction were as he described;

(3) Whether the Complainant misrepresented any facts to the Respondent in his application for employment;

(4) Whether the Complainant would have been successful in receiving the promotion but for the information about the conviction.

The first three are relevant to the determination of whether there has been a contravention of the Code; the third goes to the appropriate order if a contravention is proved.

As to the first issue, the documents (the "employee leaving slip", etc.) consistently show the cause of the dismissal to be the misrepresentation on the application form. The Complainant's evidence, even if it were that of a wholly credible witness, would not support a finding that the reason or part of the reason for his dismissal was the fact of a conviction rather than the misrepresentation.

Ms. Embree's evidence, however, does point more strongly in that direction. Although the Respondent gave Ms. Embree no explicit reason for the dismissal aside from the misrepresentation on the application form, much of the

discussion with her focussed on the vulnerability of the department store to theft from employees. The Respondent's policy about employees with convictions for shoplifting appeared to be not to consider them for employment. The reason for which there was no place for the Complainant in the Respondent's organization centred around the fact that he would have access to merchandise no matter where he was working.

There was no evidence that the Respondent considered why the Complainant gave the "No" answer on the application form. In fact, the Complainant's evidence was that the Respondent never asked about that matter. If the misrepresentation had been the major source of concern, there would have been some discussion about it, especially in the light of the date of the offence.

Moreover, although the Respondent argued that the dismissal here was for a material misrepresentation, consistent with a company policy of dismissing all employees who were discovered to have made such misrepresentations on their application forms, there was no evidence proving that such a policy existed or was consistently followed.

Considering all of the evidence, I must conclude that the conviction for shoplifting was an important factor in the Respondent's decision to dismiss the Complainant. There is no reason to think that the misrepresentation was not also

important in the decision-making; but the content of the misrepresentation was not a neutral factor. In fact, it seems most probable, from the Respondent's actions and from its policy not to hire persons convicted of shoplifting, that even if the Complainant had revealed the conviction but had been hired through administrative error, when the conviction was discovered he would still have been dismissed.

Because the conviction itself was at least a significant part of the reason for dismissal, it is not necessary to decide whether the Complainant was misrepresenting a fact when he answered the question the way he did. (The question about misrepresenting the criminal conviction is in any event a circular one, because it depends upon whether it may have related to his employment. In other words if the conviction was unrelated to his employment, he did not misrepresent the facts; if the conviction was related to his employment, then the Respondent did not contravene the Code in dismissing him because of it, and the misrepresentation is irrelevant.)

However, I do find as a fact that the Complainant misrepresented his activities between 1970 and 1971 on his application.

As to the circumstances surrounding the Complainant's conviction and sentence, I can make very limited findings because of the unsatisfactory nature of the Complainant's

evidence. The following facts are either agreed specifically or appear in the Information:

(1) The offence involved the theft of three shirts from the T. Eaton Company Limited;

(2) The Complainant pleaded guilty;

(3) The conviction took place when the Complainant was 17 years old;

(4) The Complainant was convicted on December 1, 1970 and sentenced on December 9, 1970 to a prison sentence of six months determinate (with a recommendation that the sentence be served in the Haney Correctional Institution) and six months indeterminate (in Oakalla Prison Farm).

(5) The Complainant in fact served his sentence in Oakalla and Boulder Bay.

THE LAW

The Complainant and the Director must establish, on a balance of probabilities, that there has been a violation of the Code. The essential ingredients of the case are:

(1) That the Complainant was dismissed or refused a promotion. This was admitted.

(2) That the dismissal or refusal was, wholly or in part, because of a previous criminal conviction. This was

established through the testimony of Ms. Embree.

(3) That the dismissal or refusal was without reasonable cause.

In connection with (2) above, I will explain that I disagree, with respect, with the majority decision in Jorgensen v. B.C. Ice and Cold Storage Ltd. (B.C.H.R.B.I., February 6, 1981) and with the decision of the Board of Inquiry in Lopetrone, Bilga, and Garosico v. The Juan de Fuca Hospital Society (B.C.H.R.B.I., March 31, 1976). These decisions seem to support the view that the Code permits a complainant to obtain relief from an employer's action which lacks reasonable cause "at large" -- that is, that actions which do not rest, in whole or in part, upon the basis of one of the "prohibited categories" in s.8 or upon any kind of categorization, but which are unreasonable in the sense of being irrational or unfair, may still be reviewed under the Code. The effect would be to permit the Code to be used as a substitute for a grievance under a collective agreement or for a wrongful dismissal action in the courts. In my opinion this section should be read in the manner suggested by the Board of Inquiry in Jefferson v. The British Columbia Ferries Services (B.C.H.R.B.I., September 29, 1976), in which the Board said:

> We view the Human Rights Code more as a discrimination statute than as a statute designed to upgrade the reasoning processes of prospective employers.

Another example of this approach is the decision in Georgina Anne Bremer v. Board of School Trustees, School District No. 62 (Sooke) and Percy B. Polinger, (B.C.H.R.B.I., June 10, 1977), where the Board said:

> ...the reasonable cause concept is intended to protect classes or categories of persons and individual members of such classes or categories from prejudicial conduct related to the differentiating group characteristic which distinguishes a class or category from others in society.

In an article entitled "Compensation for Discrimination" in (1982)16 U.B.C L.Rev., Professor J.C. Smith discusses many of the Human Rights Board of Inquiry decisions and concludes as follows on this point (at p. 91):

> If we take the clear and unambiguous language of the Human Rights Code, the Lopetrone and Jorgensen cases are correctly decided. If, however, we take the probable intent of the legislature as our guide, the Jefferson and Bremer cases are probably correct.

In my opinion, the language of s. 8 is not so clear and unambiguous as is suggested when the opening and over-riding words of s.8 are given their due weight -- "Every person has the right of equality of opportunity based on bona fide qualifications in respect of his occupation or employment..." seems to me to suggest that equality of opportunity connoting abolition of irrational barriers based on such factors as race, sex, and religion is the key concept.

The Board of Inquiry in Robert C. Heerspink v. The Insurance Corporation of British Columbia (B.C.H.R.B.I.,

March 8, 1979) expressed its agreement with the Bremer analysis of reasonable cause. Without going into a detailed history of the Heerspink case, I will mention that in reviews of various aspects of the Board decisions in Heerspink by the British Columbia Supreme Court, the British Columbia Court of Appeal, and the Supreme Court of Canada, no court has disagreed with the Board on this point. The Heerspink case is concerned with the right of an insurer to cancel the fire insurance coverage of a person charged with possession and trafficking in marijuana, in the light of s.3 of the Code. S.3 is worded somewhat differently from s.8:

> 3(1) No person shall
> (a) deny to a person or class of persons any accommodation, service or facility customarily available to the public; or
> (b) discriminate against a person or class of persons with respect to any accommodation, service or facility customarily available to the public,
> unless reasonable cause exists for the denial or discrimination.

The section then sets forth, in a similar manner to that of s.8, a number of factors (race, religion, etc.) which shall not constitute reasonable cause. The most conspicuous difference between the two sections is the absence of opening words in s.3 similar to those in s. 8. Nevertheless, in my view, "reasonable cause" should be construed in the same way in both sections. It seems unlikely that the legislature would have intended the term to have different meanings in different sections of the Code. Thus, the judicial decisions

under the Code have not emphasized a distinction, but rather have discussed "reasonable cause" in a general way.

Therefore, a Complainant must satisfy the Board of Inquiry on a balance of probabilities that an action or course of action has been taken by a Respondent which affects him adversely and which is based upon some differentiating group characteristic. It may be the result of the application of a "neutral" policy (e.g. a height requirement) which has inordinate impact on a particular group whether or not such impact is intended. It may be based upon reasoning in the form:

"All persons with characteristic X are Y:

Complainant has characteristic X;

Therefore Complainant is Y"

where characteristic X is expressly included in the Code or where a Board of Inquiry determines that it is covered by the Code. For example, if X is "Indian" and Y is "unsuitable for employment", then Complainant has made out his case since the Code, in s.8(2)(a), expressly states that race shall not constitute reasonable cause. If the characteristic is not expressly included in the Code, eg. if X is "long-haired" and Y is "likely to cause trouble", then Complainant must also satisfy the Board that the categorization and inference made are "without reasonable cause" such that the Code may be invoked. (To say that the Complainant must satisfy the Board

as to this issue is not to suggest that the evidentiary burden invariably is on the Complainant. It may well shift to the Respondent when, for example, the Complainant has led evidence giving rise to a reasonable inference that discrimination has occurred and the facts are uniquely within the knowledge of the Respondent.)

However, the Code specifies that "a conviction for a criminal or summary conviction charge shall not constitute reasonable cause unless the charge relates to the occupation or employment, or to the intended occupation, employment, advancement or promotion of a person." Therefore, if X is "Convict" and Y is "Unsuitable for employment", the Complainant has made out his case unless the charge relates to the occupation or employment.

Turning now to (3) above, that is, whether the existence of reasonable cause has been established as a defence to the allegation, several previous Board of Inquiry decisions [such as Bremer and Heerspink, referred to above, as well as Kathleen A. Guay v. Sechelt Building Supplies (1978) Ltd. (B.C.H.R.B.I., May 17, 1979)] have considered which party must satisfy the evidentiary burden as to the presence or absence of reasonable cause. I agree with them that the burden of establishing reasonable cause is on the Respondent. In Gay Alliance Toward Equality v. The Vancouver Sun [1979] 2 S.C.R. 435, an appeal from a decision of the British Columbia

Court of Appeal, Mr. Justice Dickson summarized his views about reasonable cause under the Code as follows:

> It would be impracticable and manifestly unwise to endeavour to formulate an acceptable definition of all that is encompassed within the phrase "reasonable cause" as used in the British Columbia Human Rights Code. One can say, however, as a matter of law: (i) the test is an objective, as distinct from a subjective, one; (ii) the words "reasonable cause" are of wide application, the only restraint being that spelled out as in s.3(2); (iii) the word "unless" in the phrase "unless reasonable cause exists" places the onus of establishing reasonable cause upon the person against whom the complaint was brought; (iv) the cause relied upon as justifying the denial of service or the discrimination must be honestly held; (v) "reasonable cause" must be determined on the particular facts of each case.

While Dickson J. was dissenting on the merits, the majority opinion of the Court did not address this point at all, and while he was referring to a case under s.3 of the Code and a case in which the categorization complained of (homosexuality) was not specifically mentioned in the Code, his words seem to me to be intended to be of general application. Certainly both s.3 and s.8 use the phrase "unless reasonable cause exists", pointing to the shift of onus he describes.

The Reasons of the British Columbia Court of Appeal in the G.A.T.E. case do not reveal a majority opinion on the meaning of "reasonable cause" under the Code. I therefore adopt, with respect, the statement of Dickson J. set forth above as a statement of the law pertaining to reasonable

cause under s.8 of the Code.

I have already discussed the fact that, in my view, once the Complainant has satisfied the Board that there was a denial or discrimination based upon either one of the named categories in s.8 or upon some other categorization which is found offensive to the Code, the burden will shift to the Respondent to lead evidence that reasonable cause existed for the impugned decision or action. Here, I have found as a fact that the conviction was the reason or part of the reason for the decision. The Respondent therefore has the evidentiary burden of showing that reasonable cause existed for its decision.

The Complainant and Director's counsel argued that even if I found that it was simply the misrepresentation, not the conviction, which was the cause of the dismissal, to accept that as reasonable cause would be to permit an "end run" around the Code. He pointed to the undisputed evidence that the Respondent would not have hired the Complainant in the first place if he had revealed the conviction. The situation does have a certain "Catch 22" aspect to it which is striking. It also seems to me to be rather similar to the situation in Heerspink, where the insurance policy cancelled because of the trafficking charge contained a "termination clause" as follows:

> This contract may be terminated
> (a) by the insurer giving to the insured fifteen

> days' notice of termination by registered mail, or five days' written notice of termination personally delivered; or by the insured at any time upon request.

Lamer J. in the Supreme Court of Canada made some comments (arguably obiter dicta but nonetheless providing an interesting analogy) about the termination clause and its efficacy as establishing "reasonable cause" under the Code:

> A termination clause is a mechanism for denying the continuation of services the provision of which had been agreed to at the beginning. Once exercised, the right to terminate results in a denial of services not differing from a denial, had there been one, at the outset. Therefore the reasons for a denial of services through the operation of a termination clause should be no more but also no less subject to s. 3 of the Code than when denied initially.
>
> The reasons for denying services at the outset are, whether they be expressed or not, subject, if there is a complaint, to being investigated and their reasonableness subject to determination by the commission through boards of inquiry. The same applies to reasons for denial of service by virtue of a termination clause even where no reasons need be given.
>
> The Legislature by enacting s. 3 of the Code has, as a matter of policy, subjected to the Code the exercise of many traditionally unhindered constractual rights and given the commission very wide powers. Be that as it may, I agree with the Chief Justice when he said in Gay Alliance v. Vancouver Sun, [1979] 2 S.C.R. 435 (at p.447):
>
> > "The policy embodied is plain and clear. Every person or class of person is entitled to avail himself or themselves of such services or facilities unless reasonable grounds are shown for denying them or discriminating in respect of them. This Court is obliged to enforce this policy regardless of whether it thinks it to be ill-advised."

One way to characterize the Respondent's argument in this case is that it has a contractual right at common law and by virtue of the statement on the application form (that the applicant understands he may be terminated for making any mis-statements therein) to terminate an employee who has made material misrepresentations at the application stage, regardless of the fact that the misrepresentations relate to matters specifically covered by the Human Rights Code. An analogy might be an employer who has a policy not to hire Jews. He asks for religious affiliation on the application form, which includes a term similar to that on the Respondent's form, and later dismisses someone for misrepresenting himself in this regard. Surely, as in the Heerspink case, a contractual term could not insulate such activities from the effect of the Code.

Here, the question was in language very similar to that of s.8(2)(d) ("Have you ever been convicted of a criminal offence that may relate to your employment?"), and presumably a deceptive answer could warrant termination if the conviction was related to the employment within the meaning of the Code -- otherwise, as in Heerspink, the reasons for termination are as subject to review under the Code as reasons for not hiring initially would have been.

The Respondent argued strongly that the Complainant's criminal record was related to the employment here. It

contended that a Board must not look to the conviction but to the charge, to see whether there was reasonable cause based on the wording of s.8(2)(d), ("unless the charge relates....") Such an interpretation of s.8(2)(d) would imply that an employer may decide that convictions for a particular list of offences under the Criminal Code will inherently preclude employment. For example. a social agency which runs a home for abused children could say "No-one convicted of an offence under the Criminal Code involving sexual misconduct with a minor need apply for a job with us." A trust company could refuse to consider anyone with a conviction for fraud, embezzlement or breach of trust on his record. And a retail department store could rule out those convicted of shoplifting. It would only be necessary for an employer to go through the Criminal Code and tick off "yes" or "no" beside all possible offences, then screen candidates through a simple matching process. While presumably a Human Rights Code Board of Inquiry could review an employer's decisions about whether or not to include a given offence, it could not review individual decisions about persons who had committed them.

In order to make this line of argument applicable to this case, the Respondent elicited evidence from the Human Rights Officer in cross-examination that the Respondent told her it would have considered the Complainant for employment

if his conviction had been for certain offences other than shoplifting (the example given was that he could have had a position despite a conviction for impaired driving, so long as the job did not require driving.) For the purposes of this argument, I will accept that the Respondent's policy was as stated.

Given the fact that the legislature clearly intended to provide protection for persons with criminal records from arbitrary decisions based upon those records, could it have intended that only the wording of the Criminal Code section is relevant and that an employer is as entitled to dismiss an employee with a ten-year-old impaired driving charge where there was a breathalyzer reading of .09, no evidence of bad driving and no property damage, as an employee with a recent impaired driving charge involving a breathalyzer reading of .29 and serious personal injuries or property damage?

The wording of s.8(2)(d) of the Code does not preclude consideration of the circumstances of the charge which leads to the conviction and the circumstances of the individual who is convicted. In my view, in fact, the Code requires consideration of those circumstances through its statement that the charge must relate to the occupation or employment, or to the intended occupation, employment, advancement or promotion of a person. Simply put, it is not possible for anyone to know whether that relationship exists without

knowing more about the charge than the section of the Criminal Code under which it was laid.

It is interesting to observe what the American courts have done with an analogous issue -- the permitted use of employee criminal records as employment qualifications under Title VII to the Civil Rights Act of 1964. Title VII prohibits discrimination in employment by reason of race, and is silent about criminal convictions, but early on the U.S. Supreme Court held [Griggs v. Duke Power 401 U.S. 424 (1971)] that facially neutral policies which nevertheless have a disproportionate racial impact will be justifiable only when the employer can show business necessity for them. Later cases held that employer use of criminal convictions, although ostensibly a neutral policy, has a disproportionate impact on blacks. In determining whether there has been business necessity justifying the use of criminal records as employment criteria, the American courts have been looking at essentially the same issue which arises under s.8(2)(d) of the Human Rights Code -- the strength of the relationship between the criminal conviction and the employment.

The Equal Employment Opportunity Commission, which is charged with the administration of Title VII, has recommended to employers that the following information about an applicant be considered in determining the employment-relatedness of a conviction: the number of criminal acts

involved, types of criminal acts, circumstances of the criminal acts' occurrences, length of time since the conviction, and applicants' recent employment history [Michael Genz, "Employers' Use of Criminal Records Under Title VII", (1979-80) 29 Catholic University Law Review 597, at p. 614.]

Counsel for the Complainant and the Director cited one case to the Board as an illustration of the way that the Equal Employment Opportunity Commission treats this issue [Decision of Equal Employment Opportunity Commission No. 78-10 (1981) C.C.H. Employment Practices 6715.] In that case a black applicant for a position of bus driver had been rejected because he had a record of two convictions, one for forgery and one for burglary. He had also failed a standard driving test which all applicants had to pass, and therefore would not have been hired in any event. However, the Commission gave an opinion on the criminal record issue in which it said:

> Thus, while an employer violates Title VII when it arbitrarily excludes all persons who have been convicted of certain types of offenses from employment, it is entitled to evaluate, on an individual basis, the record of a person who has been convicted of a crime against the requirements of a specific job. When this evaluation results in a disqualification, the burden of justifying this rejection must be borne by the employer.... The most important factor and the one most often cited by the courts is the relationship of the conviction to the specific position the applicant is seeking....Even if it is determined that the offense for which the individual was convicted is

> job related, the employer may not disqualify the individual without further inquiry and evaluation. The employer must examine other relevant factors to determine whether, all factors considered, the conviction affects the individual's ability to perform the job consistent with the safe and efficient operation of Respondent's business.

The Commission went on to discuss the other relevant factors, which were: (1) The number of offenses and circumstances of each offence for which the individual was convicted;

(2) The length of time intervening between the conviction and the employment decision;

(3) The individual's employment history;

(4) The individual's efforts at rehabilitation.

It concluded that:

> While the above factors cannot be evaluated with scientific certainty, the employer must demonstrate to the Commission that rejection of the individual was reasonable in light of the facts and circumstances and the nature of the job...it must appear reasonable...that the conviction renders the individual unable to perform the job consistent with the safe and efficient operation of Respondent's business.

Counsel for both sides also referred me to labour arbitration cases regarding grievances under collective agreements against dismissals where the cause for dismissal arose out of the failure to reveal a criminal conviction record, e.g. Gould Manufacturing of Canada and United Steelworkers (1972) 1 L.A.C. 314; Commonwealth of Pennsylvania and American Federation of State, County and Municipal Employees, District Council 85 (1976) 76-1 A.R.B.

8186. These cases seem to focus on the criteria for determining whether the falsification of an employee application relates to a material fact. The criteria applied to determine that issue do not necessarily coincide with the criteria applied to determine whether a complaint has been made out under the Code; however, I have considered the cases and the tests which they use.

In the light of the wording of the Code and the policy behind it, I conclude that whether a charge or conviction is related to the occupation or employment of a person, depends upon all of the circumstances of the individual case, including at least the following:

(1) Does the behaviour for which the charge was laid, if repeated, pose any threat to the employer's ability to carry on its business safely and efficiently?

(2) What were the circumstances of the charge and the particulars of the offence involved, e.g. how old was the individual when the events in question occurred, were there any extenuating circumstances?

(3) How much time has elapsed between the charge and the employment decision? What has the individual done during that period of time? Has he shown any tendencies to repeat the kind of behaviour for which he was charged? Has he shown a firm intention to rehabilitate himself?

Therefore, in my view, an employer must, in dealing with

an employee who has a criminal record, consider the factors listed above in deciding whether this employee's criminal record relates to this employee's job. A Board of Inquiry must consider the same factors in reviewing an employer's actions in connection with such an employee.

CONCLUSION

Applying the criteria listed above to the facts of this case, I conclude that the conviction was not related to the occupation or employment of the Complainant in the furniture stockroom job at the Oakridge store. Although there is no doubt that the behaviour in question (theft), if repeated, would pose a serious threat to the Respondent's ability to carry on its business safely and efficiently, the length of time since the conviction (eight and one half years between the conviction and the dismissal, more than eleven years between the conviction and the hearing), the fact that the Complainant was seventeen years old when the offence occurred, the fact that there was no evidence of conduct on his part since December 1970 (aside from the misrepresentations alleged on the application form) which would indicate dishonest behaviour on his part, and his work record with the Respondent all point to the conclusion that the conviction was unrelated within the meaning of the Code.

It seems to me that possibly the severity of the sentence had an inordinate impact on the Respondent's thinking- -it presumed that the heavy sentence reflected other conduct by the Complainant. It would appear that that conclusion was erroneous. It may be, in fact, that the severity of the sentence points to another possible conclusion -- that the Complainant, having served time in prison for his offence, well and truly learned the lesson taught.

However, I also conclude that the conviction is sufficiently related to the the maintenance job on the night shift at the Park Royal store to provide reasonable cause for the Respondent to refuse the promotion. The fact that the Park Royal job required a security check while the Oakridge position did not points to a greater measure of caution as appropriate. The Complainant proved himself as a good employee in the Oakridge job. He also proved himself capable of untruthfulness at the hearing, and in the statements about his activities between 1970 and 1971 on the application form. Therefore, bearing in mind that "reasonable cause" must be measured by an objective test [see, for example, British Columbia Forest Products Limited v. Foster (1979) 80 C.L.L.C. 12, 131 (B.C.S.C.) and the dissenting reasons of Dickson J. in the G.A.T.E. case (p. 27 above)], I conclude, in the light of all of the evidence, that the Respondent did not contravene the Code in refusing

the promotion. (I hasten to add that, in my view, should the Complainant continue to maintain a clean criminal record and a good record as an employee with the Respondent, there will come a time when the Respondent would contravene the Code in refusing the Complainant a promotion, even if the position sought did require a security check.)

One further matter was raised at the hearing. The complaint was initially made against Ralph Cornish, Employment Manager, Woodward Stores Ltd., rather than against the corporate entity itself. It was agreed by the parties at the hearing that Mr. Cornish's name would be deleted and the matter would proceed against Woodward Stores Ltd. However, when the complaint was filed, the Code was still in the form considered by the British Columbia Court of Appeal in the case of Nelson v. Byron Price & Assoc. Ltd. (1981) 27 B.C.L.R. 284, in which that Court held that the Code did not provide for vicarious liability by an employer for its employee's acts.

The Code has now been amended by the addition of s.19(2), which reads:

> s.19(2) Any act or thing done or omitted by an employee, officer, director, official or agent of any person within the scope of his authority shall be deemed to be an act or thing done or omitted by that person.

Because that amendment is not stated to be retroactive, and because it affects the substantive rights and remedies of

persons concerned, in my view it cannot be given any effect in this case.

Therefore, does the complaint fail against Woodward Stores Ltd? I think not. In the Nelson v. Byron Price case, the Board of Inquiry did not find as a fact that the employer had authorized, condoned, adopted or ratified the employee's discriminatory act. Here, it is clear from the evidence and I find as a fact that, not only was Mr. Cornish acting within the scope of his employment when he dismissed the Complainant, but also the Respondent company has adopted and ratified his act by its conduct since that time and through its statements to the Human Rights Officer at the meetings with her. The Respondent led no evidence to show that Mr. Cornish's act was not the act of the company, and made no submissions on the issue of vicarious liability until its argument in reply. This was a simple case of a company acting through and by its employee; Mr. Cornish's act was Woodward's. It is not a case of vicarious liability and therefore the Nelson v. Byron Price case does not apply.

Counsel agreed that I would retain jurisdiction to determine the amount of any compensation to be paid to the Complainant. No evidence was led on that matter at the hearing. I think that some compensation for back wages might be warranted in the circumstances although possibly not the full amount which the Complainant might have earned since

July 14, 1979 in the light of the lengthy delay which was the fault of neither party.

Having concluded that part of the allegation is justified, this Board makes the following orders:

(1) That Woodward Stores Ltd. cease to contravene s.8(2)(d) of the Human Rights Code and refrain from committing the same or a similar contravention;

(2) That the Complainant be reinstated in a position in the furniture stockroom at the Oakridge store or in an equivalent position satisfactory to him;

(3) That, failing agreement, the parties make further submissions to this Board as to the appropriate amount of compensation for the Complainant, if any, at a time and place to be agreed.

Lynn Smith

Lynn Smith, Chairperson

September 7, 1982