

IN THE MATTER OF THE HUMAN RIGHTS CODE OF BRITISH COLUMBIA  
S. B. C. 1973 , CHAPTER 119

AND

IN THE MATTER OF THE FOLLOWING COMPLAINTS MADE PURSUANT TO  
SECTION 3 OF THE HUMAN RIGHTS CODE AGAINST E. B. MISTY INC.,  
THE RESPONDENT, THE COMPLAINTS BEING MADE BY THE FOLLOWING  
PERSONS IN RESPECT OF THE DATES HEREINAFTER SET OUT, NAMELY:

LESLIE FINLAYSON	MAY 27, 1978
MAUREEN McCOLL	JUNE 10, 1978 &
	JUNE 30, 1978
JUSTYNA DEBOGORSKI	JUNE 19, 1978
PARMINDER HEIR	JUNE 24, 1978
KEITH McMILLAN	JUNE 27, 1978
RANDY CLARK	JUNE 27, 1978
AUDREY KURYK	JULY 7, 1978
WENDY HOUSECHILD	JULY 8, 1978
CHERYL JONES	JULY 15, 1978
JUDY LEE YOUNG	JULY 25, 1978
VIE ANN CLARK	OCT. 20, 1978
ADRIAN LEFTWICH	OCT. 20, 1978
DONALD CRAIG	OCT. 20, 1978 &
	OCT. 21, 1978
DELVIN NATHAN	OCT. 20, 1978
BARBARA & JERRY WHITWORTH	OCT. 25, 1978
LUKE WARRINGTON	DEC. 20, 1978

AND

DIRECTOR, HUMAN RIGHTS CODE, A PARTY PURSUANT TO SECTION  
16(3) OF THE HUMAN RIGHTS CODE OF BRITISH COLUMBIA

BOARD:

D. OWEN-FLOOD, ESQ.	CHAIRMAN
S. KELLEHER, ESQ.	MEMBER
MS. M. JACKSON	MEMBER

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## REASONS FOR JUDGMENT

This Board of Inquiry has been established pursuant to Section 16 of the Human Rights Code of British Columbia, to hear and determine the various complaints itemized above. These complaints arise under Section 3 of the Human Rights Code. By each of them it is alleged that one or more individuals, all of whom were black, were discriminated against in respect of a public facility without reasonable cause. These complaints have arisen over a period of some seven months, from May to December of 1978, and are brought against the Respondent, E. B. Misty Inc., the operator of a licenced dance hall in the City of Vancouver, known as "Misty's Cabaret". The substance of the complaints is that this discrimination occurred because of the race, colour or place of origin of the persons involved.

### PRELIMINARY OBJECTION

The first question before this Board is whether it is properly constituted pursuant to Section 16(1) of the Human Rights Code of British Columbia, being S. B. C. 1973, c. 119 (hereinafter referred to as "the Code"), in regard to each, or any one or more, of the complaints.

The Respondent's position as set out in page 4 of his  
Written Argument is:

"It may be in law, however, and these objections have not been raised before, that a number of these complaints are not properly before the Board and there is lacking any jurisdiction to make a finding with respect to these complaints."

The Respondent goes on to state:

"This issue is only now raised after considering the evidence introduced by Mr. Guilbault and particularly that evidence introduced on the first day of the hearing prior to our (that is to say Counsel for the Respondent) appearance on behalf of the Respondent."

The Respondent submits that it is a condition precedent to the Minister of Labour exercising his power to appoint a Board pursuant to Section 16(1), subsection (a) of the Code, that the director discharge her statutory duties under Section 15, subsection (1) and Section 16, subsection (1) of the Code.

Section 15, subsection (1) reads:

"15. (1) Where the director,  
(a) receives a complaint alleging that a person, whether or not he is the complainant, has been discriminated against contrary to this Act; or

(b) receives a complaint alleging that a person has contravened this Act; or

(c) alleges, whether or not a complaint is received, that a person has contravened this Act or that a person has been discriminated against contrary to this Act; or

(d) receives from the commission an allegation that a person has contravened this Act or that a person has been discriminated against contrary to this Act,

the director shall forthwith inquire into, investigate, and endeavour to effect a settlement of the alleged discrimination or contravention."

The Respondent does not deny that the director received complaints within the meaning of Section 15(1), subclauses (a), (b) and (c), but does deny that the director carried out her obligation to:

"... forthwith inquire into, investigate and endeavour to effect a settlement of the alleged discrimination or contravention."

as set out in Section 15(1).

Section 16(1) states:

"16 (1) Where the director is unable to settle an allegation, or where he is of the opinion that the allegation will not be settled by him, the director shall make a report to the Ministry of Labour, who may refer the allegation to a Board of Inquiry and ....."

The Respondent in effect denies that the director was either:

".... unable to settle an allegation or ..... of the opinion that an allegation will not be settled by him ....."

The Respondent, on page 10 of its Written Argument says:

"It is our submission that the Director or her representative has not shown that the proper investigation took place and has certainly not shown that there was a proper endeavour to effect a settlement."

The Respondent goes on to submit:

"If there was an opinion formed that this was a matter or these were matters in which a settlement was unlikely to be effected, that opinion must be formed on reasonable grounds. It is respectfully suggested that the frustration in attempting only to obtain the particular information with respect to the employees, without more, did not constitute reasonable grounds and that, therefore, the matter is not yet one properly for a Board of Inquiry."

In considering this preliminary objection to the jurisdiction of this Board, the following questions must be answered seriatim:

1. Is the Respondent correct in its submission that compliance with ss. 15 and 16, are conditions precedent to this Board's jurisdiction?

2. If so, does this Board have the jurisdiction to look behind the order of the Minister constituting it, and sit in judgment on the sufficiency of the procedures followed by the director or the Minister, which led to its appointment?

3. If so, what is the permissible scope of review in this Board in the exercise of the jurisdiction posited in question number 2 above?

4. Finally, within the permitted scope of review, ought this Board on the evidence before it reach the conclusion that there has been insufficient compliance, on the part of the director or the Minister, with statutory preconditions set out in ss. 15 and 16 of the Code?

This Board is of the opinion that sufficient compliance with ss. 15 and 16, both by the Minister and the director, are conditions precedent to its proper constitution under the Code, and so are matters which go to its jurisdiction.

This conclusion follows from the words of ss. 15 and 16 and what this Board believes to be the clear intent of the

Legislature in using them. That is, before complaints of the nature before this Board can be dealt with in a quasi-judicial fashion upon a reference from the Minister, that all proper investigatory and conciliatory steps have been taken pursuant to ss. 15 and 16. That upon receipt of a complaint the director has inquired into, investigated and attempted to effect settlement of the alleged complaint. As a result of those efforts, that she be of the opinion that the allegation cannot be settled by her. That she has made a proper report to the Minister of Labour. Finally, that the Minister of Labour upon receipt of the report, has made a reference to a Board of Inquiry.

As indicated by the four questions posed above, the success of the Respondent's submission on this point requires the Board to go much further than the conclusion so far reached. We must now consider whether this Board has the jurisdiction to sit in judgment on the procedures employed by the director or the Minister, in purported compliance with the requirements of ss. 15 and 16 of the Code. In effect, to look behind the order of the Minister constituting the Board.

We are not of the view that this Board has any such jurisdiction. We do not find that jurisdiction in any of the provisions of the Code. This Board is not to presume any jurisdiction it has not been given by Legislative fiat. The

operative presumption, if there be one at all, is that this Board's jurisdiction, if not found within the four corners of its empowering statute, does not exist. Certainly, the question of whether the statutory preconditions to the proper constitution of this Board have been met, is a subject upon which the Supreme Court of British Columbia could venture an opinion in proceedings properly constituted pursuant to the Judicial Review Procedure Act, S.B.C. 1976, c. 25 and amendments thereto.

Certainly, a Board of Inquiry constituted under s. 16 of the Code has a jurisdiction which resembles some of those of a Court of Law. However, it must always be remembered, if Boards such as these are to perform their proper function, that they are not courts of plenary jurisdiction, but the creatures of their empowering statute. We must look to the Code for our jurisdiction, and in it cannot be found the jurisdiction that the Respondent now seeks to invoke. The Board notes that the Respondent was unable to provide it with any authority for the proposition advanced, and as well, that a similar argument was rejected by a previous Board of Inquiry in Garnett v. Kompleat Janitorial Services, August 17, 1978.

In light of these conclusions, and despite the able submission of counsel for the Respondent, we do not think that

this Board has the jurisdiction to sit in judgment on the sufficiency of the procedures adopted by either the Minister or the director, in compliance with ss. 15 and 16 of the Code.

Even if the jurisdiction did not exist in this Board, the Board is not satisfied on the evidence before it that there was an insufficient compliance with the provisions of ss. 15 and 16, by either the director or the Minister. We would characterize the functions of the director pursuant to ss. 15 and 16 as investigatory and conciliatory. || Considered in light of the overall provisions of the Code, they are essentially administrative in character. Of necessity, there must be a great deal of discretion in both the director and the Minister in performing those functions. We are not persuaded on the evidence that the required procedures were not properly followed.

On the contrary, the evidence before the Board indicates that the director did investigate and inquire into the allegations now before the Board. A copy of the director's report to the Minister was made an exhibit in these proceedings.

That report outlines the procedures followed on behalf of the director to investigate and conciliate the disputes. The vive voce evidence heard by the Board substantiates the contents of that report. In all the circumstances, if it is for this Board to do so, it concludes that the statutory preconditions set out in ss. 15 and 16 of the Code were complied with. We are, therefore, of the opinion that this Board does have the jurisdiction to deal with the allegations before it, and it is to those we now turn.

#### THE LESLIE FINLAYSON COMPLAINT

Ms. Leslie Finlayson, in her written complaint, alleges that the Respondent, on the 27th day of May, 1978, violated Section 3 of the Code by denying entry into Misty's Cabaret to Kofi Kyeremeteng, Damian Kakwaya and Gloria Herbert, because of their race and colour and thereby discriminating against them.

Ms. Finlayson testified that on the night in question she, in the company of the people mentioned, went to Misty's Cabaret. When they tried to pay the entrance fee, the man in charge of admission said to them that he was sorry, but that they could not go in. Mr. Kyeremeteng asked if Misty's was full and received the answer from the doorman that they were

not full, but that he did not like the looks of the companions of the complainant. Gloria Herbert commented to her companions that, "They don't like our colour or something". The doorman just shrugged. Mr. Kyeremeteng and Mr. Kakwaya were upset about being refused entrance without a legitimate reason being given.

It is to be noted that Mr. Pokoj, the manager, was present throughout the whole incident and that, in the meantime, while the Finlayson party were being refused, other people, all white, were being admitted to the Club. They were not being hindered or bothered in any way by the doorman.

Ten or fifteen minutes later, Leslie Finlayson returned by herself to inquire why her friends had not been allowed to go into the Club. The doorman told her that she could go in. She pointed out that her friends, unlike her, were black. The doorman said, in effect, that was a good reason for not letting them in.

The police, Kofi Kyeremeteng testified, told him that night that the Respondent had a right to refuse entrance. He also said that he asked for reasons from Misty's, and that they declined to give him reasons for this refusal.

Mr. Kakwaya testified, and corroborated the essentials of the testimony given by Ms. Finlayson and Mr. Kyeremeteng. He added that the doorman, when he persisted in asking him for a reason for the refusal said, "You can't come in. That's it. Now, if you persist we'll call the police and say you're being rowdy." Mr. Kakwaya invited the Misty's people to call the police and the two Misty employees carried out their threat by calling the police and wrongly alleging to them that Mr. Kakwaya and party were being rowdy. Mr. Kakwaya insisted that at no time was he or any of his party guilty of any unbecoming conduct. Mr. Kakwaya also said that the police referred to a numbered section and added that the Respondent did not have to give any reason for refusing entry and had a right to refuse entry.

In reply to this evidence the Respondent, while through its counsel admitting that discrimination had probably occurred, said that if it had, it was the result of the Club's attempts to comply with the Liquor Act. The Respondent's counsel referred to Section 52 of the Liquor Control and Licensing Act, being Chapter 38 of the Statutes of British Columbia.

Section 52, subsection (1) reads as follows:

"(1) A licensee or an employee of a licensee may:

(a) request a person to leave or

(b) forbid a person to enter a licenced establishment if for any reason he is of the opinion that the presence of that person in a licensed establishment is undesirable or that person is intoxicated, but the licensee or his employee, in reaching that opinion, shall not contravene the provisions of the Human Rights Code of British Columbia."

It is to be noted that Section 43 of the Liquor

Control Act provides:

"No person holding a licence under this Act, nor any employee of that person, shall authorize or permit in the establishment for which the licence is issued

- (a) any gambling, drunkenness or any violent, quarrelsome, riotous or disorderly conduct to take place, or

- (b) any person of notoriously

bad character to remain, or

- (c) any device used for gambling to be placed, kept or maintained."

Mr. Pokoj testified on behalf of the Respondent. He stated that he had been the manager of the club for two years and three months. His evidence was that the police and liquor licensing authorities were bringing pressure to bear on Misty's, accusing the Respondent of letting in an undesirable element, and so prejudicing their liquor license. Mr. Pokoj said that there were three areas of concern, pimping, prostitution and drugs. He stated that the normal procedure would be that he, Pokoj, as manager would point out that somebody was undesirable to the doorman and say that the person should not be allowed in, but that sometimes he had to leave it to the discretion of the doorman.

Specifically, insofar as the Finlayson complaint was concerned, Mr. Pokoj said the two people who would have been on duty at the door would have been Wayne March and Linda Eastrom. That both of these people had told him that the Finlayson party was somewhat obnoxious and rude, and that on that basis they were asking for identification. The Board notes that none of the people in that party made any mention in their evidence of a request for identification made of them.

In cross-examination Mr. Pokoj admitted that he told his door people that the majority of the problems were stemming

from people of black origin. He did not deny that black people were singled out and asked for reams of identification.

Linda Eastrom testified that she remembered the Finlayson incident. She recalled them as a group of people coming up the stairs in a loud, boisterous manner, who did not seem eager to pay the cover charge. As well, that the doorman, Wayne March, asked them for identification, and that later, when he asked them to leave, they dared him to phone the police and have them removed. She recalls as well that the police did in fact attend at Misty's premises.

Wayne March, the doorman, testified that the Finlayson party was being a bit sarcastic while their identification was being checked. So he decided that they would be better off without them and asked them to leave. He had the coat-check girl call the police. His evidence was that, upon request, the Finlayson party produced acceptable identification.

There is obviously some discrepancy between the evidence of the complainants and that of the employees of the Respondent in respect of the Finlayson incident. That should surprise no one. Insofar as there is a conflict, the Board prefers the evidence of the complainants. That their recollection should be more vivid is understandable. For them, this incident stood in isolation, and so would be more vividly

recalled. As well, and credence is given to this, their individual recollection of the events were in essential harmony, one with the other. On the other hand, the evidence of March and Eastrom suffered from their apparent inability to distinguish this particular incident from a variety of other similar ones that they encountered in the course of their duties. Counsel for the Respondent, in his submission to the Board conceded as much. That this has occurred is to a large extent borne out by the evidence of Mr. Guilbault in respect of the conversations he had when he investigated the matter on June 22nd, 1978.

On all the evidence heard, and in light of the findings made in respect of credibility, the Board concludes that the Respondent did discriminate against Mr. Kyerementeng, Mr. Kakawaya and Ms. Gloria Herbert as alleged, by denying them access to Misty's Cabaret, a facility customarily available to the public. The Board also concludes that the operative reason for this discriminatory practice was none other than the colour of their skin, and so was without reasonable cause.

The Board is satisfied that the persons referred to in this complaint were behaving in a normal manner and that their behaviour could give no cause for the refusal of admission. Further, the Board is satisfied that if the refusal of access was in purported compliance with the Respondent's understanding of its duties under the Liquor Control and Licensing Act, that the criterion adopted on this occasion in the performance of

those duties, was solely that of skin colour. Finally, the Board concludes that such a policy is both misguided and in contravention of the provisions of the Human Rights Code of British Columbia.

The fact that Misty's, like other cabarets, as a result of problems with drugs, pimping and prostitution, was under pressure to adequately police its admissions, does not and cannot justify a discriminatory policy which relies for an efficient criterion upon the colour of a man's skin.

Accordingly, the Board concludes that Misty's had no reasonable cause for such denial or discrimination, and finds the complaint to have been proven.

The Respondent, in its Written Argument, made the following submissions:

- (1) "Misty's has at no time actively engaged in a policy intended to discriminate against one race, colour or minority group."

This contention is not in accordance with the evidence and the Board finds that Misty's did in fact, albeit in an attempt to deal with its problems of pimping, drugs and prostitution, discriminate against people by reason of their race or colour.

- (2) Further it contended that, in those instances where discrimination may have in fact occurred, it arose out of an honest attempt by the Respondent to deal effectively with

another problem. Counsel referred the Board to the decision of the Honourable Mr. Justice Branca, as he then was, in Vancouver Sun v. Gay Alliance Towards Equality (1977) 5 W.W.R. 198, at page 207, where speaking for the majority of the court, he said:

"It seems to me that the real question for determination was not whether certain individuals within management had a bias against homosexuals or homosexuality which may have motivated the policy, but whether or not the resultant policy dealing with public decency, even though motivated by a bias on the part of certain individuals, constituted a reasonable cause for the refusal to publish ....."

Mr. Justice Branca went on to say at page 209:

"In the absence of a finding of a bias based on bad faith, how can it be justly said that the bias held by such individuals is one that might not have been reasonably and honestly entertained by them? This was never determined by the Board. If the bias was honestly entertained, then there was not an unreasonable bias.

To go one step further, if the policy was motivated by an honest bias, why then is the policy unreasonable?"

In the Gay Alliance case, the substance of the complaint alleged was the refusal by the Vancouver Sun to publish an advertisement sponsored by the Gay Alliance Towards Equality. The Supreme Court of Canada held that the publication in question was not a facility customarily available to the public and because of this the Sun had the right to control the content of its advertising. Thus, Section 3 of the Code was not applicable and, therefore, the Sun had the right to refuse the advertisement.

It seems that, although the Supreme Court of Canada by its decision reached the same result as did the British Columbia Court of Appeal, it did so for very different reasons.

In any event, in light of s.3 (2) (a) of the Code, which provides:

- "(2) For the purposes of subsection (1)
  - (a) the race, religion, colour, ancestry or place of origin of any person or class of person, shall not constitute reasonable cause;"

Discrimination in public facilities, which is motivated by and operates on a criterion of race or skin colour, can in no circumstances be reasonable, however "honest" the belief in the bias that is the foundation of the policy.

The Respondent and its employees took the position, as the evidence clearly indicates, that they had a right to prohibit entry for any reason they considered appropriate. The Respondent also has a notice on its premises to that effect. Be that as it may, the evidence does make clear that in fact the Respondent did operate a night club that was not a private and restricted one, but one which offered its services and facilities customarily to the public as a whole. Therefore, in light of the reasoning of the Supreme Court of Canada in Vancouver Sun v. Gay Alliance Towards Equality, s. 3 of the Code clearly applies.

The evidence further establishes that what the Respondent really was attempting to do was carry out its obligations under Section 52, subsection (1) of the Liquor Control and Licensing Act. That in attempting to carry out those obligations, it adopted, in many of the instances that are before the Board, a blanket policy of discriminating against black people, by either directly prohibiting them entry, or indirectly by hassling them inordinately in regard to their identification.

In doing so they exceeded their powers under Section 52, subsection (1) of the Liquor Control and Licensing Act, and violated Section 3 of the Human Rights Code of British Columbia. The Respondent holds a liquor licence to operate a facility that is open to the public. It does not hold a liquor licence as a private club. The Liquor Control and Licensing Act, Section 52, makes clear that a licensee or an employee of a licensee may request a person to leave or forbid a person to enter, but it may not do so in contravention of the provisions of the Human Rights Code of British Columbia.

Accordingly, the defence of the Respondent that it had a reasonable cause to commit the acts of discrimination, being in the circumstances found, a defence which is expressly proscribed by Statute, must fail. The fact that Misty's was faced with a problem, as were many other clubs in the Hornby

Street area, as submitted by its counsel, does not justify its breach of the Human Rights Code.

It is the most transparent sophistry to contend that the circumstances in which the Respondent found itself as a result of police and liquor licensing authority pressures, justified it in engaging in the discriminatory practices which it adopted. No doubt, a policy of policing admissions would be necessary in the circumstances, but the policy adopted cannot be in contravention of the Human Rights Code. In a society governed by law, one cannot resort to illegal means, even in an effort to effect a necessary or socially desirable end.

The next question before the Board, having found that in respect of the Finlayson complaint the Code was violated as alleged, is whether the Board should accede to Counsel for the director's submission to exercise, in addition to the mandatory power of directing the Respondent to cease and refrain from committing the same, or any similar contravention, the discretionary powers set out in Section 17, subsection (2)(c) and Section 17 (3) of the Human Rights Code. Section 17 (2)(c) and 17 (3) read as follows:

"17. (2) Where a board of inquiry is of the opinion that an allegation is justified, the board of inquiry shall order any person who contravenes this

Act to cease such contravention and to refrain from committing the same or a similar contravention and may

(c) where the board is of the opinion that

(i) the person who contravenes this Act did so knowingly or with a wanton disregard; and

(ii) the person discriminated against suffered aggravated damages in respect of his feelings or self respect, the board may order the person who contravened this Act to pay to the person discriminated against such compensation not exceeding five thousand dollars, as the Board may determine.

(3) The board of inquiry may make such order as to costs as it considers appropriate."

It appears from s.17 (2)(c) that two conditions must be satisfied before the Board may exercise the power to award compensation to the person discriminated against.

The Board is satisfied that the Respondent both knowingly and wantonly discriminated against many black people over the period covered by the complaints, through its various policies and practices designed to prevent their admission to the Club. Much of the evidence led by Counsel for the director supports this conclusion. Particular relevance is ascribed to the evidence of Mr. Guilbault and the other witnesses from the Human Rights Branch. Their evidence indicates that the Respondent was aware of the problems

associated with its policies as early as November 1977, long before any of the complaints now before the Board arose. As well, there is the evidence that in March of 1978 the Respondent entered into a Memorandum of Agreement with an officer of the Human Rights Branch, by which it agreed to cease and desist all discriminatory door practices. Since that date, the evidence clearly shows that the Respondent persisted in the course of action which gives rise to the complaints now before the Board. The evidence of both Mr. Pokoj and Mr. Williams, on behalf of the Respondent, did nothing to dispel this conclusion. With respect, the Board accepts the submission of Counsel for the director that the Respondent, throughout the entirety of the period covered by these complaints, demonstrated a wanton disregard for the provisions of the Human Rights Code.

With reference to the second condition set out in s.17 (2)(a) of the Code, and in respect of the persons discriminated against in the Finlayson complaint, the Board concludes that the three people involved did suffer aggravated damages in respect of their feelings or self respect. Unfortunately, the Code provides little guidance as to the principles to be applied in fixing the amount of compensation. It is to be noted that s.17 (2)(c) speaks in terms of compensation and damages. However, the effect of s. 24(2) of the Code suggests that where damages are awarded pursuant to s. 17 (2)(c), they are to embrace as well a penal element. Therefore, this Board

concludes that, although the damages to be awarded pursuant to s. 17 (2)(a) are primarily compensatory, there does exist in appropriate cases a jurisdiction to consider a punitive element in the award.

That being the case, there remains the difficult task of fixing the damages appropriate for the injury and insult suffered by Mr. Kyeremeteng, Mr. Kakwaya and Ms. Herbert, in respect of their feelings and self respect. Bearing in mind all the circumstances associated with this particular incident of discrimination, the background to it as disclosed by the evidence, and the two-fold character of the damages awarded; the Board assesses those damages in regard to this complaint at \$500.00 to each of the three individuals involved. The Respondent is ordered to pay those sums.

The fixing of such compensation must, of necessity, be to some extent arbitrary and left to the good judgment of the Board. The Board has experienced great difficulty in fixing an appropriate amount by way of compensation, and it should be noted that any doubts remaining are that the damages awarded are on the low side. The matter of costs, will be dealt with at the conclusion of these reasons.

With reference to the remaining complaints before the Board, it is not necessary to deal extensively with the position of the Respondent generally, as that has been

exhaustively considered and the general conclusions reached above, unless otherwise noted, apply with equal force to the remaining complaints.

THE MAUREEN McCOLL COMPLAINT

Maureen McColl's complaint, as amended, alleges that on the 27th day of May, 1978, and the 30th day of June, 1978, certain un-named black males were discriminated against when they were denied entry into Misty's Cabaret because of race and colour.

She says that on May 27th she and her girlfriend, Jean Foster, watched as various unknown black people were being refused entry, or being subjected to what appeared to be undue checks for identification. Checks which white people were not being subjected to. While white people were being allowed in, black people were being turned away and being told by the Misty door people that they were sorry but the Club was full, even though they offered to wait in line.

In regard to the alleged incident of June 30th, 1978, Maureen McColl testified that she saw a black person being asked for identification with pictures, and that the doorman at Misty's said, "Before they get in they have to have pictures". She pointed out that from her observation, black patrons were asked for identification and white ones were not.

It should be noted that none of the un-named people who were the subjects of the alleged discrimination, either by being refused entry, or by being subject to allegedly unnecessary harrassment in regard to identification, testified before the Board.

Nevertheless, the conclusion of this Board insofar as that part of Maureen McColl's complaint which relates to the incidents of the 27th of May, 1978, is that the two un-named black males referred to by Maureen McColl and Jean Foster in their testimony, were discriminated against by being denied entry into Misty's Cabaret without reasonable cause. Their race and colour being the only cause. The reason advanced for such refusal by the employee at the door, that the club was full, is on the evidence shown to have been untrue. That evidence, and the general evidence of the policy of Misty's with respect to the admission of blacks, satisfies this Board that the reason for the denial of access that did occur, was only that of skin colour.

Insofar as the evidence in regard to that part of the complaint which refers to the incident of June 30th, 1978, is concerned, the Board finds that there is evidence that several blacks were subjected to what appears to have been undue harrassment for identification with photographs. It is true that Maureen McColl and Jean Foster saw these people being extensively questioned for identification with photographs, and

that this to them may well have appeared to have been done by Misty's by reasons of unreasonable discrimination. However, given the paucity of evidence in respect of this complaint, and that the persons concerned have not testified, this Board is of the opinion that it would be unsafe to conclude that those persons were being questioned for identification and as a result, denied access to the premises, in contravention of the provisions of the Code. Accordingly, that portion of the complaint is dismissed.

In these circumstances, although there can be no doubt that the unknown black males who were the victims of the incident of May 27th, 1978, did suffer aggravated damages in respect of their feelings and self respect as a result of this discriminatory act; because the proper party to receive damages is the person discriminated against, and because these people were not witnesses before the Board, and indeed unknown to it, there is no justification for an award of damages. Accordingly no damages are awarded. As previously indicated, costs will be dealt with at the conclusion of these reasons.

THE JUSTYNA DEBORGORSKI COMPLAINT

The complaint of Justyna Deborgorski is that on the 19th of June, 1978, Steven Omolelli and Jacob Moyani were discriminated against by being denied entry to the Respondent's

premises. The Board is satisfied, on the evidence heard, that this complaint has been proven as charged.

It was most unfortunate that these two gentlemen felt constrained not to appear before the Board as witnesses. Evidence was led which indicated that the reasons for this failure were entirely collateral to the proceedings before the Board. Although the Board has every sympathy with those reasons, in the absence of their testimony, we are unable on the evidence to find it appropriate to award damages to Mr. Omolelli and Mr. Moyani in respect of the incident of June 19th, 1978.

THE PARMINDER HEIR COMPLAINT

The Board dismisses this complaint, there being no evidence acceptable to the Board in support of it. It is dismissed without costs.

THE KEITH ALGERNON McMILLAN COMPLAINT

Mr. McMillan alleges that on the 27th of June, 1978, he was discriminated against by the Respondent. In this complaint, the discrimination alleged took the form of harassment and a threatened expulsion from the Cabaret upon the failure of Mr. McMillan to produce adequate identification. The Board

notes that Mr. McMillan was initially admitted to the club upon production of his British Columbia driver's licence, and this apparently by Mr. March.

Sometime after entering the club Mr. McMillan was accosted by Bert Levesque, an employee, who grabbed him and took him into a small room on the premises and inquired how he got in. Mr. McMillan, perhaps not appreciating the subtlety of the enquiry, replied, "Through the front door, like anybody else". Mr. McMillan was then subjected to a request for identification from this employee of the Respondent. He produced both a British Columbia driver's licence with a picture on it, and pursuant to a demand for further identification, an employee's card from Imperial Oil, which had on it not only his photograph but also identified him as an employee of that company. Mr. McMillan was advised that his identification was insufficient and that he would have to leave. Upon being so informed, he requested the full name of his persecutor. That information was refused, and Mr. Levesque on reconsidering Mr. McMillan's identification permitted him to remain in the Club.

The evidence of Mr. McMillan was in no way impeached. Indeed, the Respondent through its counsel accepted responsibility for what transpired. On all the evidence the Board is satisfied that this complaint has been proven as charged.

In addition the Board is satisfied that Mr. McMillan suffered aggravated damages in respect of his feelings and self respect as a result of this incident of discrimination. In the circumstances, the Board orders that the Respondent pay to Mr. McMillan compensation in the amount of \$500.00.

THE RANDY CLARK COMPLAINT

Mr. Randy Clark complains that on the 27th of June, 1978, he was the victim of racial discrimination. His evidence is that on that day he went to Misty's Disco with his friend, Ray Morell. Mr. Clark is black. Mr. Morell is white. They were refused permission to go into the club. At first they were not given any reason for this refusal. Mr. Morell complained and they were told that they were not being allowed in because they were wearing jeans. Mr. Clark testified that his friend, Mr. Morell, was wearing jeans, but that he, Mr. Clark, had on slacks and a sweater. Mr. Clark in his evidence said that he was puzzled at the grounds for refusal given. This because it was a weekday, and normally people were allowed to go into Misty's wearing jeans, save on weekends.

THE RANDY CLARK COMPLAINT

Mr. Clark also said that on the 27th of December, 1978, he and his friend were prohibited from entering Misty's. They were told that they had to have passes, yet to their obser-

vation, white people were being allowed in without passes. However, the incident of December 27, 1978, in which Mr. Clark was, according to his evidence, discriminated against by reason of his race, is not the subject matter of a complaint before this Board.

The incident that is the subject of the complaint is the one alleged to have taken place on June 27th, 1978. After reviewing the evidence in detail, and accepting the evidence of Mr. Clark, the Board concludes that the complaint has been established. In the circumstances, we find Mr. Clark suffered aggravated damages in respect of his feelings or self-respect. The Board orders compensation to Mr. Clark payable by the Respondent in the amount of \$500.00 pursuant to Section 17 (2) (c).

THE AUDREY KURYK COMPLAINT

Audrey Kuryk complains that she was discriminated against on July 7th, 1978, when two friends of hers were denied entry into Misty's Cabaret because of their race. There was no evidence led in support of that complaint which the Board could accept and, accordingly, it is dismissed without costs.

THE WENDY HOUSECHILD COMPLAINT

Wendy Housechild complains that on July 8th, 1978, Morris Nelson was discriminated against.

Mr. Wood, the counsel for the Director of the Human Rights Branch, conceded, that in regard to this complaint, he had nothing but hearsay evidence to present. The Board agrees with Mr. Wood. In light of there being nothing but hearsay evidence, the Board dismisses this complaint without costs.

THE CHERYL JONES COMPLAINT

Cheryl Jones complains that Mr. Henry Pettiford was the victim of racial discrimination on the 15th of July, 1978.

She said that she went with Hank Pettiford, a member of the United States navy, and her sister, Bonnie Parker, to Misty's on July 15th, 1978. Mr. Pettiford, who is black, was asked for some identification. He produced three pieces of identification, all with pictures, including his driver's licence, his naval card and a credit card. He was then asked if he had any more identification such as a passport. He pointed out that he was not in the habit of carrying his passport around and was refused entrance notwithstanding all this. While this was going on about six to eight people, all white, were admitted without any checks for identification.

The Board is satisfied that this complaint has been proven. There is not sufficient evidence on which it would be safe to make the findings required by s.17 (2) (c) of the Human Rights Code of British Columbia.

THE JUDY LEE YOUNG COMPLAINT

Judy Lee Young complains that on the 25th of July, 1978, she and her companion were discriminated against.

She testified that on the 25th of July, 1978, she went to Misty's with a black person, Roosevelt Wallace. Roosevelt Wallace was asked to produce identification and Judy Lee Young told him not to produce it and pointed out to the doorman that they had already that evening been inside Misty's and Mr. Wallace had in fact left his camera with the coat-check. He had a claim tag for it and it was still there. The doorman then said that they could both go in and they entered.

Judy Lee Young was irritated about this incident and went back to the doorway to observe what was going on. She watched some fifteen to twenty people arrive, and noticed that all the white people were allowed in without identification. Three black men though, on several occasions, came up to the doorway and were asked for identification. Notwithstanding the fact that they appeared to produce proper identification they were turned away.

All the black people that she saw during that period were turned away.

The Board notes that in her complaint Ms. Young uses the words, "we have been discriminated against". The Board concludes on the evidence heard, that both the Complainant and her companion, Mr. Wallace, were the victims of a discriminatory act in contravention of s.3 of the Code. This, in that they were initially denied access to the Club, unless adequate identification were produced. There being no reasonable cause for that demand, and in light of all the circumstances, particularly the evidence of Ms. Young as to what she observed after the refusal that forms the subject matter of this complaint, the Board does conclude that the only reason for the initial, albeit transitory, denial of entry to these people to the Club's premises was Mr. Wallace's colour. Regardless of whether the discrimination was directed specifically at Ms. Young, the Board is of the opinion that in any event, an indirect form of discrimination against her also offends the provisions of s.3 of the Code. It is as wrong under the Human Rights Code of British Columbia to discriminate against a person for the colour of their skin, as it is to discriminate against a person for the colour of their friend's skin.

In light of that conclusion, and in all the circumstances, the Board finds that Ms. Young suffered aggravated damages in respect of her feelings or self-respect as a result of this discriminatory incident. The Board orders compensation to her, pursuant to s. 17 (2)(c) in the amount of \$250.00, payable by the Respondent.

THE VIE ANN CLARK COMPLAINT

This complainant states that on the 25th of July, 1978, she was discriminated against.

This complaint presents a difficulty to the Board. The Board was very impressed with the testimony of Vie Ann Clark. She said that, because of her colour, she was obliged to pay an increased price to check her shawl, namely one dollar, as opposed to the usual quarter or fifty cents.

Mr. Pokoj testified that there was definitely no policy that the Club would charge one race more than another for coat-checking.

The Board concludes that the evidence in regard to the complaint of Vie Ann Clark relating to July 25th, 1978, does not establish that the overcharging of her was done contrary to s. 3 of the Code and accordingly dismisses the complaint without costs.

THE ADRIAN LEFTWICH COMPLAINT

Adrian Leftwich complains that on the 20th of October, 1978, he was the victim of discrimination.

His testimony establishes that he was discriminated

against. He approached Misty's and the two doormen asked him whether or not he had a membership card. He had been there before without a membership card and had not previously been denied admission for want of one. Indeed, his evidence indicates that he had been attending at Misty's prior to October 20th, 1978, on a regular basis. He noticed at the time he was refused admission that white people were being permitted to enter the premises without any request for identification, or indeed, for the production of membership card.

The Board concludes that this complaint has been proven and also, on the evidence, this is a proper case to award compensation. Clearly Mr. Leftwich's feelings and self-respect were upset and he suffered aggravated damages. In fact, he made unsuccessful attempts to get a membership card. The Board orders that the Respondent pay Mr. Leftwich the sum of \$500.00 as compensation for the aggravated damages he suffered in respect of his feelings or self-respect, as a result of its act of discrimination.

#### THE DONALD CRAIG COMPLAINT

Mr. Craig alleges that he was discriminated against on October 20th and 21st, 1978. No evidence was called in support of this complaint and it is accordingly dismissed without costs.

THE DELVIN NATHAN COMPLAINT

Mr. Nathan complains that on October 20th, 1978 he was the victim of discrimination.

Delvin Nathan testified that on October 20th, 1978, a Friday night, he went to Misty's Disco. On his way in he was met by two employees of Misty's who said that he could not go in. Mr. Nathan is a black man. He enquired, "Why not?", and they simply said, "You can't go in". He asked for a reason and was told that he could not go in because they were telling him that he could not go in. He pointed out that he worked for Pacific Press and had never had any difficulty in Misty's. While all this was going on white people were passing in and out without any let or hindrance.

Mr. Nathan told the Misty's employees that what they were doing was against the law. He said that if they would give him a valid reason, he would accept the reason and go away and not bother them anymore. He was simply told that he could not go in. He then went to Pacific Press and came back with a reporter, Christopher Gaynor. When Mr. Nathan and Mr. Gaynor returned to the Club they were approached by another black gentleman who told them that he always was given a hassle when he tried to enter the Club. At the door Mr. Nathan asked to see the manager and an employee came back fifteen minutes later and told Mr. Nathan and Mr. Gaynor that they could both now

enter the Club. Then they met the manager, Mr. Pokoj, and he took them into the V.I.P. lounge and offered them drinks. Mr. Nathan asked Mr. Pokoj why they would not let him in and Mr. Pokoj was unable to give any valid reason, but did suggest that Mr. Nathan was blowing the whole thing out of proportion. Mr. Pokoj informed them that there was a club in New York called "Studio 54" which dictated who enters its premises. Mr. Pokoj also commented that Misty's was going to be a private club.

Mr. Nathan also testified about being discriminated against along with Keith Wilson and Melford Barnett a week later on the 27th of October, 1978, at Misty's Cabaret. As well, he related a similar experience that occurred on November 8, 1978, and the fact that three weeks before testifying before the Board he had returned to Misty's and had been admitted without any problem. In fact, on that occasion he was offered a job by Misty's. Mr. Williams, one of the principals of Misty's, told him on the 27th of October, 1978, that it was his Club and he was not going to admit black Americans to it. That admission is a damning piece of evidence against the Respondent, and it is just that sort of policy which not only offends our Human Rights Code, but also should offend every right-thinking member of our community.

Mr. Gaynor testified in respect of this incident as well, and he corroborated the evidence of Mr. Nathan. On cross-examination, he did say that not being allowed into the

Club was a very disconcerting experience for Mr. Nathan.

This Board concludes that Mr. Nathan was indeed discriminated against as alleged and that this, as in all the other cases where discriminations have been found, was done knowingly and with a wanton disregard for the provisions of the Human Rights Code. As well, the Board is satisfied that Mr. Nathan suffered aggravated damages in respect of his feelings or self-respect as a result of this discriminatory incident, and accordingly awards him damages in the amount of \$500.00 as compensation therefore. The Respondent is ordered to pay Mr. Nathan that amount of money.

THE BARBARA WHITWORTH COMPLAINT

There being no evidence called in support of this complaint, it is dismissed without costs.

THE LUKE WARRINGTON COMPLAINT

Mr. Warrington complains that on December 20th, 1978, he was the victim of discrimination.

When he arrived at Misty's on December 20th, 1978, he was asked for a pass and passes were clearly not necessary as a rule or on that specific occasion. He then barged in and was harrassed when inside the club. In due course the police

were summoned. Up to that point the evidence seems clear and, of course, what happened after the police arrived is not really a matter that has direct bearing on the question whether or not Mr. Warrington's complaint has been proven. In the opinion of this Board his complaint has been established.

The Club's position was that Mr. Warrington had a "Code 5", that is to say that, in the opinion of police officers, he was a person who was dangerous in that he was a person whom the police regarded as of an unsafe, volatile disposition. "A man of fiery temperament", as Mr. Pokoj put it. who said that there never had been any difficulties with Mr. Warrington before this.

Mr. Pokoj, the manager of the Respondent, said that Mr. Warrington had been pointed out to him by the police before this complaint and the doorman had pointed out Mr. Warrington to Mr. Pokoj as being a person who looked as if he was going to be violent. The doorman had told Mr. Pokoj that Mr. Warrington had come in, cursed, and pushed his way into the Club and sat down.

This Board concludes that last allegation may be true, but the plain fact of the matter is that Mr. Warrington, in the opinion of this Board, was being harrassed because of his colour when he first sought to use the facilities of the Club. That such racial harrassment could antagonize its victim should surprise no one. It certainly comes as no

surprise to the Board. Indeed, throughout the proceedings, and indeed now, the Board remains impressed by the manner in which the vast majority of the victims of this racial prejudice and unlawful discrimination, reacted to it. That there was so little violence is surely a matter for favourable comment.

It is to be noted that Mr. Warrington, according to his testimony, had been at Misty's some eight times or more that same year, prior to this incident. That he had never before had any problems at the club with admission or otherwise. His testimony on that point was corroborated by Mr. Pokoj, who said that there never had been any difficulties with Mr. Warrington before this.

Mr. Warrington said the police officers in effect had abused him, and roughed him up and that he feared that they were going to do serious injury to him. During his confrontation in the club with the police, a scuffle ensued, and he eventually was escorted across the parking lot to the police car where he was released.

The police officers' account of what happened when they arrived at Misty's in respect of the complaint against Mr. Warrington, to the effect that Mr. Warrington behaved like a madman and they deny behaving in any way improperly towards him. Be that as it may, the significant incident to the Board's mind had occurred prior to their arrival.

In all the circumstances of this particular complaint the Board, while finding the complaint proven, is not prepared to exercise its power to award compensation pursuant to Section 17, subsection 2(c) of the Code, in view of the conduct of Mr. Warrington in forcing his entry into the Club and refusing to leave when asked to do so. While his behaviour may appear justified in light of the discrimination that occurred, it is this Board's view that individuals should follow the procedures of the Human Rights Code in complaining about such discrimination in order to be entitled to the discretionary remedies of the Code.

#### COSTS

Save where the complaints have been dismissed without costs, the Board has indicated in its reasons that it intends to deal with the matter separately. Pursuant to s. 17 (3) of the Code, the Board is empowered to award costs as it considers appropriate. The Board understands that the principles applicable should be those well understood in our law, and reference can accordingly be made to those principles and to the relevant appendices of the Supreme Court Rules for guidance.

The Board is of the opinion that the Respondent should bear some pro rata share of the proper costs of the Director. This, as the Board has indicated, because it is of the opinion

that the Director achieved substantial success in respect of the complaints alleged.

In the result, the Board has found ten of the eighteen complaints to have been proven. Simple arithmetic would dictate that the Respondent's pro rata share of the Director's costs would be slightly over one-half. However, the Board is of the opinion that this simple conclusion would be inappropriate in the circumstances. Many of the complaints were dismissed as a result of a want of any, or insufficient evidence. Although some of the complaints dismissed aroused in the Board the gravest suspicions. As well, it need be noted that counsel on behalf of the Director sought leave of the Board to withdraw some of these complaints. That application was opposed by counsel for the Respondent, and leave to do so was refused by the Board. Finally, the delay associated with the Respondent's failure initially to appear with counsel must be considered. In the result, the Board is of the opinion that the most appropriate method of apportionment would be that the Respondent pay to the Director three quarters of her proper costs in these proceedings. Of course, as indicated throughout these reasons, the Respondent will bear all its own costs without any contribution from the Director. mutatis mutandis, and this Board reserves jurisdiction to give dir-

actions in respect of any matter that might arise out of its award of costs.

### CONCLUSION

It goes without saying that the Board orders the Respondent to cease such contraventions of the Code, and to refrain from committing the same or similar contraventions in the future.

The Board is not unmindful of the problems faced by operators in the restaurant and night club trades in the course of their businesses. The Board is aware that these premises may be abused by persons who are involved in criminal, or other undesirable activities. The evidence heard by the Board in the course of these proceedings clearly shows that the Respondent Club was under pressure from both the police and the liquor licensing authorities to adequately police its premises, particularly with a view to preventing pimps, prostitutes and drug traffickers from frequenting them.

There is a heavy onus on all and a duty on the police to uphold and enforce not only the Liquor Control and Licencing Act, but also the Human Rights Code. In this case, it seems clear that the significance of this fact is not fully under-

stood, if indeed understood at all by some of the officials involved.

The Board recognizes the significance of a liquor licence to many such operators which makes these operators particularly susceptible to any pressures which threaten them with a suspension or cancellation of their licence. The evidence before the Board indicates that the Respondent Club was very much subject to just those sorts of pressures during much of the time span of the complaints. All of this is to say that the Board accepts the Respondent's contention that during the time covered by these complaints, the Respondent felt obliged to deal efficiently with the problems it encountered in performing its statutory duty under the Liquor Control and Licensing Act to adequately police its premises.

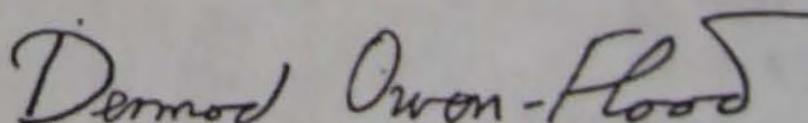
However, accepting all that, there still can be no justification for the policies adopted and implemented by the Respondent in the effort asserted to achieve the desired result. The policies adopted, as evidenced in these

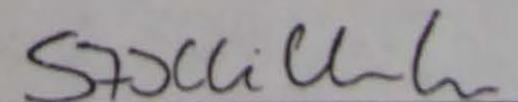
proceedings were blatantly racist, and of such an obnoxious and patently deceitful character that they must offend every decent and responsible member of our society.

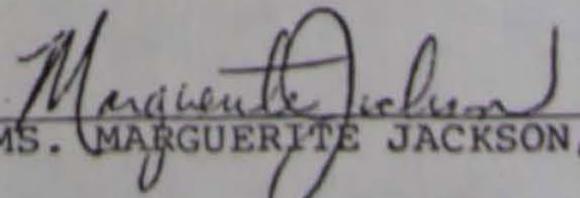
In a just society there is no room for prejudice. What has perhaps been most disconcerting to this Board is that the evidence did nothing to suggest that the intolerant and ignorant attitudes which gave rise to this type of behaviour are isolated in our society.

There is a rumour about in this country that there is tolerance, humanity and decency in the attitudes towards and behaviour between our various races. The evidence heard in these proceedings makes a nonsense of that rumour. For now, it is a myth. For the future, an ideal.

DATED at the City of Vancouver, in the Province of British Columbia, this 25th day of October, A.D. 1979.

  
DERMOD OWEN-FLOOD, ESQ. CHAIRMAN

  
STEPHEN KELLEHER, ESQ. MEMBER

  
MS. MARGUERITE JACKSON, MEMBER