Court Cases-
Oram & Mckaren vs Frank Pho.

FOLDER NO. 3-12

V. S. W.

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

and

IN THE MATTER OF a complaint by Douglas Oram and Marian Joan McLaren against Frank Pho made pursuant to S.3 of the said Human Rights Code.

Complainant alleged that two persons were, without reasonable cause, (long hair) denied service customarily available to the Public at the Lucerne Public House in New Denver, B.C. The respondent alleged that this ground was not covered by section 3 of the Human Rights Code. Secondly, he argued that he had a right to refuse to serve the complainants under section 7 of the Innkeepers Act. His third ground was that the complaint should have been brought against the server, if anyone, and that as owner he had not personally refused service to anyone.

The Board held in favour of the complainants, on all three grounds. As to the first ground, it was held that any unreasonable ground of refusal of service is covered by Section 3. The Board said: "Section 3 of the Code clearly states that no person shall be denied any service customarily available to the public unless there exists reasonable cause for such denial. Using subsection 2 as an aid to interpreting the phrase "reasonable cause" as found in subsection 1 it is clear that the very heart and purpose of that section is to protect those persons who for one reason or another find themselves possessed of some differentiating characteristic which attracts to them prejudicial discriminatory conduct. The examples given in subsection 2 of race, religion, colour, ancestry, and place of origin were clearly not intended by the legislature of this Province to have been an exhaustive list of the types of minorities to be protected. One must accept the legislation and the intent of the legislature as protecting all minorities from disfavourable conduct, from discrimination and from denial of service when that conduct, discrimination or denial is based upon personal taste, or bias unfavourable to the specific minority in question.

"Turning to the specific complaint before the Board there can be no question that in recent years styles of dress and fashions of personal appearance have undergone significant and in some cases profound changes. Quite naturally these changes are looked upon with favour by some and disfavour by others. Indeed, that in itself is a healthy symptom for the indirect tyranny of a society composed of individuals who all think, look, dress and behave in precisely the same manner would be no less a horror than a society which did not permit persons with different tastes to exercise those differences within proper limits of public order and decency.

"Along with the changes in style of dress and fashions of personal appearance referred to above, there has developed an increasing tendency on the part of those who disfavour such changes to exercise various forms of discrimination and oppressive conduct against those who favour them. The passage of the Human Rights Code by the legislature of this Province in 1973 resulted in a declaration that such discriminatory and oppressive practices be removed from those spheres of commercial activity described therein.

"This Board has no hesitation in finding that the denial of service to Frederick Douglas Oram and Marian McLaren at the Lucerne Lions Public House on March 1st, 1975, was without reasonable cause."

As to the second point, the Board held that section 7 of the Innkeepers Act does not render section 3 of the Human Rights Code inoperative. Dealing with this issue, the Board said:

"Section 7 of the Innkeepers Act reads as follows:

"Any innkeeper or his representative may require any person, not registered as a guest, border or lodger, whom he deems undesirable to leave the inn, and in the

event of such person failing to leave, may eject him from the inn premises."

"The Board rules that section 7 of the Innkeepers Act does not, in fact, conflict with the requirements of Section 3 of the Human Rights Code of British Columbia. The Board accepts the submission presented by Mr. Sperry, Counsel for the complainants that the use of the word "deems" in section 7 of the Innkeepers Act requires the innkeeper to adjudicate upon the exercise of his descretion in determining whether or not a particular individual is "undesirable".

"In deeming a person "undesirable" an innkeeper must do so on the evidence and according to principles of reason and justice.

"Section 3 of the Human Rights Code requires a reasonable cause to exist before there can be a denial of service. Section 7 of the Innkeepers Act requires an inkeeper to act reasonably in determining whether or not any particular individual is undesirable. Common sense compels one to the conclusion that the powers found in these two sections of these different statutes are not in conflict, but in fact, compliment one another. In so far as an innkeeper may have ahd a wider discretion under Section 7 of the Act prior to the passing of the Human Rights Code in British Columbia, Section 3 of the Code has now provided the innkeeper with valuable assistance in determining in a given situation what may or may not be reasonable cause.

"The Board therefore finds that Section 7 of the Innkeepers Act does not act to suspend or nullify the operation of Section 3 of the Human Rights Code of British Columbia, supra, and that therefore a violation of the Code has occurred and the responsibility for that violation rests with the respondent Frank Pho."

As to the third ground, the Board held that the owner of an establishment is responsible for all acts done by employees within the scope of their employment. This principle was said to be well established in the common law.

Pursuant to section 17(2) of the Human Rights Code, the Board ordered the respondent to cease contravening section 3(1) and to make service available to the complainants. Since the complainants had no expenses arising out of the violation, no order was made under section 17(2)(b).

With regard to aggravated damages, the Board stated:

"Section 17(2)(c) provides that where the person who contravenes the Act did so knowingly or with wanton disregard and the person discriminated against has suffered aggravated damages in respect of his feelings or self-respect the Board may order the person who contravened the Act to pay the person discriminated against such compensation, not exceeding $5,000.00 as the Board may determine. Whatever may have been the reasons for Mr. Pho and Wanda Carlson refusing the complainants service on March 1st last the evidence would not appear to go so far as to demonstrate a wanton desregard for the terms of the Human Rights Code. One suspects that there was more to the denial than just the length and styling of the complainant's hair, particularly in the light of the thrust of cross-examination by the respondent's Counsel which dwelt with such totally irrelevant matters as the marital status of the complainants and their means of support. In any event, in determining whether or not the contravention of Section 3 of the Human Rights Code by Mr. Pho was done knowingly, as that term is used in Section 17(2)(c)(i) one must have regard to the term "wanton disregard" and contrue the term "knowingly" in the light of the use of that term. It is the feeling of the Board that the power to award compensation under this subsection of the code ought to be reserved for more flagrant cases where a deterrent is required. To impose a compensation order on Mr. Frank Pho would, under the circumstances, probably only serve to exacerbate a problem which will eventually have to be resolved by a meeting of

minds around a table of mutual understanding rather than before a Board of Inquiry.

"In considering whether or not to act under Section 17(1)(c) of the Code the Board also must have regard for the evidence which indicated that the complainants attended at the Lucerne Lions Public House on the evening in question with the specific intention of determining whether or not they would be served. Under these circumstances the complainants must be said to have expected, at least to some extent, that there would be a refusal of service and must therefore to some extent have been prepared for that eventuality. Under those circumstances it would be difficult to find that either of the complainants had suffered aggravated damages in respect of their feelings or self-respect.

"Under those circumstances the Board is not inclined to order compensation although the Board is satisfied that at the time of the incident Mr. Pho knew precisely what was occurring and was aware that his denial of service was not a justifiable or reasonable one."

The Board also ordered that the respondent pay the costs of the proceedings to complainants in the amount of $375.00. In making this award, the Board took into account the fact that the respondent had refused to cooperate with the investigation made by the Human Rights Branch.

(Editorial note: The preceeding decision is now under appeal. Also, a provincial court judge in Vancouver has held that section 7 of the Innkeepers Act does make section 3 of the Human Rights Code inoperative. Therefore, it is important to advise complainants to file complaints against hotels, motels, pubs, etc. with the Human Rights Branch rather than laying a charge in court under section 24 of the Code.)

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JUDGMENT

The Board of Inquiry is regularly constituted pursuant to Section 16(1) of the Human Rights Code of British Columbia, being Statutes of B.C., 1973 (2nd session) Chapter 119, (hereinafter referred to as "the Code") to hear and determine a complaint brought before it by Frederick Douglas Oram and Marian Joan McLaren. The complaint alleged is that these two persons were, without reasonable cause, denied service customarily available to the public at the Lucerne Lions Public House in New Denver, British Columbia. The date of the alleged violation of Section 3(1)(a) of the Code was March 1st, 1975. The form 1 complaint, which was filed as Exhibit 1 in the proceedings before the Board, was signed by the complainant Douglas Oram on May 22nd, 1975. The Board of Inquiry convened in Nelson, British Columbia, on August 8th, 1975, at which time the complainants were represented by D.L. Sperry, Esq., and the

respondent Frank Pho was represented by E.M. Moran, Esq. Q.C. In addition, Ms. Kathleen Ruff appeared before the Board representing the Human Rights Branch.

Prior to evidence being called Counsel for the respondent Frank Pho moved to dismiss the allegations of complaint on two separate grounds. The first ground argued by the respondent was that the form 1 complaint previously referred to was insufficient and lacked particularity. Specific objection was taken to the reference "bar girl" and to the phrasing of the complaint which appears on the back of the form 1 complaint as follows:

> "We have been discriminated against at Lucerne Lions Public House on March 1st for no just cause."

It was the contention of the respondent that he did not know what complaint it was he had to meet, nor did he know the identity of the "bar girl" who, it was suggested, was the principle offender if, indeed, there was an offender at all.

During the course of argument Mr. Moran conceded that the respondent had been served with a copy of the form 1 complaint together with a copy of the Report to the Minister of Labour prepared by one Gary Carsen, Esq., an Assistant Director appointed under the Code. After a reply by Mr. Sperry the

Board announced its intention of reserving on this objection and proceeding with the hearing of evidence, subject to the resolution of Mr. Moran's second motion to quash the proceedings. The Board proposes to deal with this matter now.

In a criminal proceeding a motion to quash can be taken on the grounds that an allegation against an accused person is insufficient in detail or in substance. Such application would be brought pursuant to Section 510 of the Criminal Code, R.S.C. 1970, c.C-34 and amendments thereto, and if successful would result in the quashing of the charge and release of the accused. The proceedings before a Board of Inquiry constituted pursuant to the provisions of the Human Rights Code, are not criminal proceedings and are not subject to the provisions of the Criminal Code. While there is a complaint to determine and while, at the discretion of the Board of Inquiry penal consequences may flow from a determination of that complaint against the respondent, there is nowhere contained in the Act any reference to the Criminal Code or any suggestion that the sometimes delicate procedural technicalities of the criminal law should be applied to proceedings before a Board of Inquiry. Indeed, on the contrary, S.21 of the Human Rights Code,

specifically provides that no proceeding taken under that Act shall be deemed invalid by reason of any defect in form or any technical irregularity.

An alternative to the motion to quash in a criminal proceeding would be a motion for further and better particulars made pursuant to Section 516 of the Criminal Code, supra. The origin of Section 516 of the Criminal Code has it roots in the long standing, common sense notion that in order for any party to a dispute to receive a fair hearing it is necessary that such person be fully aware of the exact circumstances complained of so that a full and, hopefully, frank response can be made. The provisions of Section 516 of the Criminal Code, supra, find their counterpart in the rules of procedure relating to the conduct of civil actions before our Courts and the principle also finds application in quasi judicial proceedings before boards of review and other tribunals with a function similar to those facing the Board of Inquiry in this case. Under normal circumstances, therefore, Boards of Inquiry should be prepared to entertain applications for further and better particulars on the part of respondents or other parties who are interested and to deal with those applications according to the merits of each case, bearing in mind the

over-riding principle that fairness as well as the rules of natural justice require that a respondent be made aware of the nature of the complaint against him, with sufficient detail, to enable him to fully present his side of the dispute. Although Mr. Moran did not make an application for particulars, the Board of Inquiry would dismiss the motion to quash the proceedings and would treat the application as one for further and better particulars.

In determining the question of whether or not a respondent has sufficient particulars of a complaint alleged against him to enable him to present an adequate response, consideration must be given not only to the form of the complaint filed, but also to the nature of the proceedings and other circumstances which may tend to show the true state of the respondent's mind in so far as the complaint is concerned. In this case objection was taken firstly to the designation "bar girl" set out on the face of the form 1 complaint signed by Mr. Oram. Counsel for the respondent initially took the position that the identity of this "unknown nymph" remained a mystery to both himself and Mr. Pho. The further submission was made that

Mr. Pho was uncertain as to whether it was he or the bar girl who was required to answer the Section 3 complaint. Dealing with the latter submission first, even a most brief and superficial reference to the wording of the form 1 complaint leaves no doubt in the mind of any reader of average intelligence that the complaint is against the conduct of both Mr. Pho and the "bar girl." Any doubts that Mr. Pho may have had as to whether or not he was required to answer the complaint appears to have been resolved by him long before the hearing since the Board was appraised of the fact that he had instructed Counsel well in advance of the actual hearing date. His presence before the Board of Inquiry on August 8th, 1975, can be interpreted only as an act of intention on his part to respond on his own behalf to the complaint brought by Mr. Oram and Mrs. McLaren.

Dealing with the question of the identity of the "bar girl" it became apparent early in the evidence that the female in question was an employee and apparently the only employee actively on duty at the Lucerne Lions Public House on the day in question. When the Board of Inquiry called Mr. Pho as its own witness he testified that

this bar girl was indeed an employee of his at the time of the alleged incident and that her name was Wanda Carlson. At no time during his evidence did he indicate that he was in any doubt as to the identity of the female person against whose conduct complaint was taken nor did he profess himself to be disadvantaged in his response to the complaint by the wording on the face of the written form 1 complaint.

The Board of Inquiry was not presented with much detail as to the efforts made by the respondent to obtain the identity of the bar girl in question. Mr. Guilbault, a Human Rights Officer appointed to investigate the complaint, testified that he made efforts to obtain the name of this employee, but that those efforts met with no success. A rational and common sense approach to complaints of this nature leads one inevitably to the conclusion that there would be few occasions indeed when the identity of an employee would not be known or could not be easily determined by the employer. Had it become apparent, at any point in the proceedings, that the respondent was, in any way, frustrated or impeded in his response to the complaint by a lack of understanding or uncertainty as to which of his

employees was directly responsible for the conduct complained of, the Board would have had no hesitation whatsoever in immediately granting him an adjournment in order that further and better particulars could have been supplied. As already indicated above, however, far from being uncertain as to the identity of the bar girl or employee concerned Mr. Pho demonstrated on the witness stand that he was in no way disadvantaged or hindered in his response by the use of the designation "bar girl" on the face of the form 1 complaint.

Turning to the second objection taken by Mr. Moran it was submitted that the description of the discrimination and the details of the complaint as set out on the reverse side of the form 1 complaint lacked sufficient particularity to enable the respondent, Mr. Pho, to properly answer the complaint. The Board notes initially that under the description of the type of discrimination the complainant has written "no just cause." This wording does not conform exactly to Section 3(1) of the Code, where the words "reasonable cause" are to be found. While philosophically active minds might take delight in considering the situations where a just cause would not be a reasonable cause or vice versa, a common sense approach to the question would lead one inevitably to the conclusion that, under the circumstances in question, the intent of Section 3(1) of the Code is adequately conveyed by the words "no just cause." The Board is further confirmed in this view by noting that

the face of the form 1 complaint return specifically to Section 3 of the Code. Any question that the respondent may therefore have had as to the meaning of the term "no just cause" could have been easily and speedily resolved by a quick reference to the Code itself.

Turning to the description of the alleged incident which appears following the notation "details" on the reverse side of the form 1 complaint the Board agrees that this description is not as fully particularized as it might have been. The date of the alleged incident appears together with the assertion that the complainants were discriminated against for no just cause. If the only document served on the respondent, Mr. Pho, and/or his Counsel, Mr. Moran, had been the form 1 complaint the Board would have been inclined to grant an application for further and better particulars and to have adjourned the hearing on August 8th last to enable the respondent to fully familiarize himself with such particulars when they were delivered. As already indicated, however, Mr. Moran readily acknowledged during his submission that in addition to the form 1 complaint and the notice of hearing, the respondent was served with a copy of the Report to the Minister of Labour prepared, as noted above by one Gary Carsen. While that Report was not entered as an exhibit before the Board on August 8th the Board has referred to it for

the sole purpose of determining its contents. It is to be noted that under the heading "officers Report" the following appears:

> "The officer reports that:
>
> He entered the public house on March 1st, 1975, with Doug and Marian Oram. He sat at a separate table and heard Doug order beer for himself and Marian. They were refused service and Marian asked the waitress the reason. The waitress allegedly said "You know, long hair, uncombed and we don't know how many more of your kind you might have outside."
>
> Mr. Guilbault attempted to speak with the manager of the establishment, Mr. Frank Pho about this policy. Mr. Pho was unco-operative, refused to discuss the matter and told Mr. Guilbault to see the RCMP if he had a problem....."

The Board repeats that the foregoing Report is referred to solely for the purpose of determining what notice, if any, the respondent has had of the nature of the allegation against him. In no way is any effect given to the assertions or allegations contained in the Report. In this respect the Board relies only on the evidence given before it at the hearing on August 8th, 1975.

It is clear from reference to that portion of the Report to the Minister which is quoted above that a far more adequate description of the alleged complaint is contained therein and was served upon the respondent well in advance of the hearing date.

Any doubt that the Board may have had as to the sufficiency of detail available to the respondent in order to enable him to

prepare his response, was removed by the evidence of the respondent himself. At no time during his evidence did he declare himself to be uncertain as to the allegation contained in the complaint. His recollection of the incident was extraordinary in its detail, to the point where he even appraised the Board of the exact value of the steaks which he had cooking on the grill of his restaurant kitchen at the time he was called to the licenced premises in answer to Wanda Carlson's second telephone call. It was evident to the Board that Mr. Pho had not only had an adequate opportunity to prepare himself to respond to the complaint alleged, but that he had, in fact, availed himself of that opportunity.

The conclusion of the Board is, therefore, that under the circumstances of the present case the form 1 complaint, a copy of which was served on the respondent Mr. Pho, was sufficient in detail to enable him to make a full response to the complaint when he appeared before the Board of Inquiry on August 8th last. The application for further and better particulars is therefore refused.

Following respondent's motion to quash the complaint Mr. Moran then moved to quash the proceedings on the basis that the Board of Inquiry was without jurisdiction to hear the alleged complaint, because the conduct

of the respondent was justified under Section 7 of the Innkeepers Act, R.S.B.C. 1960, c. 195. This motion was denied by the Board after hearing argument from Counsel for both the complainant and the respondent as well as from Ms. Ruff on behalf of the Human Rights Branch. The short answer to this motion was and is that nothing contained in the Innkeepers Act, supra, deprives the Board of Inquiry of jurisdiction to hear the evidence, to determine whether or not Section 7 of the Innkeepers Act, supra, does effect the operation of Section 3 of the Code and to rule accordingly. The Board will deal more fully with the arguments of respective Counsel when considering this question later on in the judgment.

The Board turns now to the evidence tendered at the hearing. There appears to be little dispute that on March 1st, 1975, Frederick Douglas Oram and Marian McLaren attended at the Lucerne Lions Public House, a licenced premise situate in New Denver, British Columbia, and were there refused service. Mrs. McLaren testified that after speaking with the Human Rights Officer, whom she identified as Maurice Guilbault, at the home of a friend, she and Mr. Oram proceeded to the Lucerne Lions Public House where they sat at a table adjacent to one occupied by Mr. Guilbault. She states that Mr. Oram ordered two glasses of beer from the

bar girl Wanda Carlson. This person was carrying a tray with empty glasses and was engaged in activity behind the bar of the licenced premises to the extent that she concluded this person was in fact an employee of the public house. The bar girl came over to the table and stated to Mrs. McLaren and Mr. Oram "you will have to leave we can't serve your types." Mrs. McLaren asked "why not?" To which the girl replied "you know, dirty, unkempt hair. We don't know how many more of your type are outside." Mrs. McLaren protested that she had just bathed prior to attending the public house. Exhibits 3 and 4, filed before the Board of Inquiry, were photogrpahs of Mrs. McLaren and Mr. Oram taken at a friends house just before their trip to the Lucerne Lions Public House. In addition to their appearance as exemplified by the photographs Mrs. McLaren testified that she and Mr. Oram wore jackets which they removed upon entering the licenced premises. Their appearance as they sat at the table and were faced by the bar girl Wanda Carlson was, therefore, as shown in the photographs exhibits 3 and 4.

Immediately upon concluding the foregoing conversation Mr. Guilbault, who it will be remembered was seated at the next table, stood up and accosted the bar girl Wanda Carlson and asked her if she was in fact refusing service to the two complainants. She stated that she was

indeed and Mr. Guilbault testified that he then told her that she had better call the manager. She replied that she had just spoken to the manager on the telephone. This was confirmed by the evidence of Mr. Oram and Mrs. McLaren both of whom testified that immediately upon Mr. Oram ordering two glasses of beer the bar girl went to a telephone behind the bar and appeared to speak into it for several minutes. It was further confirmed by Mr. Pho himself when he testified that while cooking in the kitchen of his restaurant he received a call from Wanda Carlson in the bar who stated that she "had a couple of people who she said she didn't think I would want her to serve." Mr. Pho's evidence was that he told her to "do what she thought was right."

After the bar girl Wanda Carlson indicated to Mr. Guilbault that she had already spoken to Mr. Pho, Mr. Guilbault advised her that she should speak to him once again and he testified that he indentified himself to her as a Human Rights Officer. As a result of this conversation she once again went to the telephone behind the bar and a few moments later Mr. Pho appeared in the bar area of the licenced premises. Mr. Guilbault testified that he introduced himself to Mr. Pho as a Human Rights Officer and stated that he would like to know why these people (indicating Mr. Oram and Mrs. McLaren) were being refused service. He states that he showed his Human Rights Officers identification

Complaint by Douglas Oram and Miriam McLAREN against Frank PHO made pursuant to S.3 of the said Human Rights Code.

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The Board held in favour of the complainants on all three grounds. Section 3 covers any unreasonable ground of refusal of service unless there exists "reasonable cause" for such denial. In subjection 1 it is clear that the very heart and purpose of that section is to protect those persons who for one reason or another find themselves having some differentiating characteristic which attracts to them discrimination or denial based on personal taste or bias unfavorable to the specific minority in question.

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The Board ordered the respondent to cease contravening section 3(1) and to make service available to the complainants. Since the complainants had no expenses arising out of the violation, no order

was made under section 17(2)(b). The respondent was ordered to pay the costs of the proceedings to complainants in the amount of $375.00. In making this award, the Board took into account that fact that the respondent had refused to cooperate with the investigation made by the Human Rights Branch.

(Editorial note) The preceding decision is now under appeal. Also, a provincial court judge in Vancouver has held that Sec. 7 of the Innkeepers Act does make section 3 of the Human Rights Code inoperative. Therefore, it is important to advise complainants to file complaints against hotels, motels, pubs, etc. with the Human Rights Branch, rather than laying a charge in court under section 24 of the code.