

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE HUMAN RIGHTS CODE OF
BRITISH COLUMBIA, STATUTES OF BRITISH COLUMBIA
1973, (SECOND SESSION) CHAPTER 119

AND

IN THE MATTER OF A COMPLAINT BY JEAN SAM, AGAINST
PAUL TYMTSCHISCHIN AND THE TWEEDSMUIR HOTEL LTD.,
PURSUANT TO SECTION 3(1) OF THE HUMAN RIGHTS CODE

AND

PAUL TYMTSCHISCHIN AND THE TWEEDSMUIR HOTEL LTD.

APPELLANTS

TO: THE HUMAN RIGHTS BOARD OF INQUIRY

PURSUANT to Section 18 of the Human Rights Code of British Columbia, Statutes of British Columbia 1973, (Second Session) Chapter 119, and the Summary Convictions Act, Revised Statutes of British Columbia 1960, Chapter 373, we, the undersigned, Paul Tymtscheschin and the Tweedsmuir Hotel Ltd., desire to question the Judgment made by you on the 2nd day of February, A.D., 1976, and the Order made by you on the 4th day of February, A.D., 1976, pursuant to a Hearing held at the Village Office at Burns Lake, in the Province of British Columbia, and held by you on the 8th day of January, A.D., 1976, which Judgment and Order was made pursuant to a complaint filed by Jean Sam, pursuant to the said Human Rights Code of British Columbia, and which complaint alleged discrimination by the Appellants; and we desire to question your Judgment and Order on the ground that the said Judgment and Order is erroneous in point of Law for reasons herein stated, and that the ruling was made without jurisdiction for reasons herein stated, and that you made manifestly incorrect findings of fact which findings of fact were necessary to establish jurisdiction; and we do hereby apply to you to state and sign a case setting forth the facts of the case in the grounds on which the same is questioned by us, to wit:

1. Did we err in Law by holding that we were properly authorized and entitled to hold a Hearing pursuant to Section 16(1) of the Human Rights Code of British Columbia 1973, (Second Session) Chapter 119 and amendments thereto.

2. Did we err in Law in not first ascertaining whether we were properly authorized and entitled to hold a Hearing pursuant to Section 16(1) of the Human Rights Code of British Columbia 1973, (Second Session) Chapter 119 and amendments thereto.

3. Did we err in Law by not exercising our discretion, under Section 16(5) of the Human Rights Code of British Columbia 1973, (Second Session) Chapter 119 and amendments thereto, and not requiring a full representation of the Appellants' impressions of the matter.
4. Did we err in Law in holding that there is no conflict between the Innkeepers Act and the Human Rights Code.
5. Did we err in Law by not fully ascertaining what the Appellants' rights and duties are under the Innkeepers Act.
6. Did we err in Law in awarding seven hundred and fifty dollars (\$750.00) in costs without first requesting a Taxation of Costs.
7. Did we err in Law in awarding any costs or compensation without first having proof of Service of the Notice of Hearing on the Appellants.
8. Did we err in Law in finding that there had been a violation of Section 3(1) of the Human Rights Code, Statutes of British Columbia 1973, (Second Session) Chapter 119 and amendments thereto.
9. Did we make a manifestly incorrect finding of fact, which fact is necessary to establish jurisdiction, in finding that Notice of the Hearing had reached the Appellants at least fifteen (15) days before the Hearing or at all.
10. Did we exceed our jurisdiction and fail to consider the main issue of whether the Appellants had breached Section 3(1) of the Human Rights Code, Statutes of British Columbia 1973, (Second Session) Chapter 119 and amendments thereto, and did we so exceed our jurisdiction by making the findings of fact and Law that: "For such people as Paul Tymtschischin, whose minds are warped by feelings of racial superiority, the Code is a declaration that they must change their ways. For people like Jean Sam for whom discrimination such as this has become a way of life, the Code is a declaration that our society will no longer permit their dignity to be insulted by ignorance and bias."
11. Did we exceed our jurisdiction by considering evidence not immediately related to the act alleged and complained of by Jean Sam.

DATED at Prince George, British Columbia, this 24 day of February, A.D., 1976.

T. J. J.
Signature of Solicitor for the Appellants

HUMAN RIGHTS BOARD OF INQUIRY,
Parliament Buildings. 550 Douglas

20.75, 0104

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE HUMAN RIGHTS CODE OF
BRITISH COLUMBIA, STATUTES OF BRITISH COLUMBIA
1973, (SECOND SESSION) CHAPTER 119

AND

IN THE MATTER OF A COMPLAINT BY JEAN SAM,
AGAINST PAUL TYMTSCHISCHIN AND THE
TWEEDSMUIR HOTEL LTD., PURSUANT TO
SECTION 3(1) OF THE HUMAN RIGHTS CODE

AND

PAUL TYMTSCHISCHIN AND THE TWEEDSMUIR
HOTEL LTD.

APPELLANTS

APPEAL BY WAY OF STATED CASE

PRINCE GEORGE, B. C.
RECEIVED

FEB 17 1976

SHERIFF'S OFFICE

MKP/dw

File: 5133.13

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 Jean Sam
against Paul Tymchischin and the Tweedsmuir
Hotel Ltd. pursuant to S.3(1) of the Human
Rights Code.

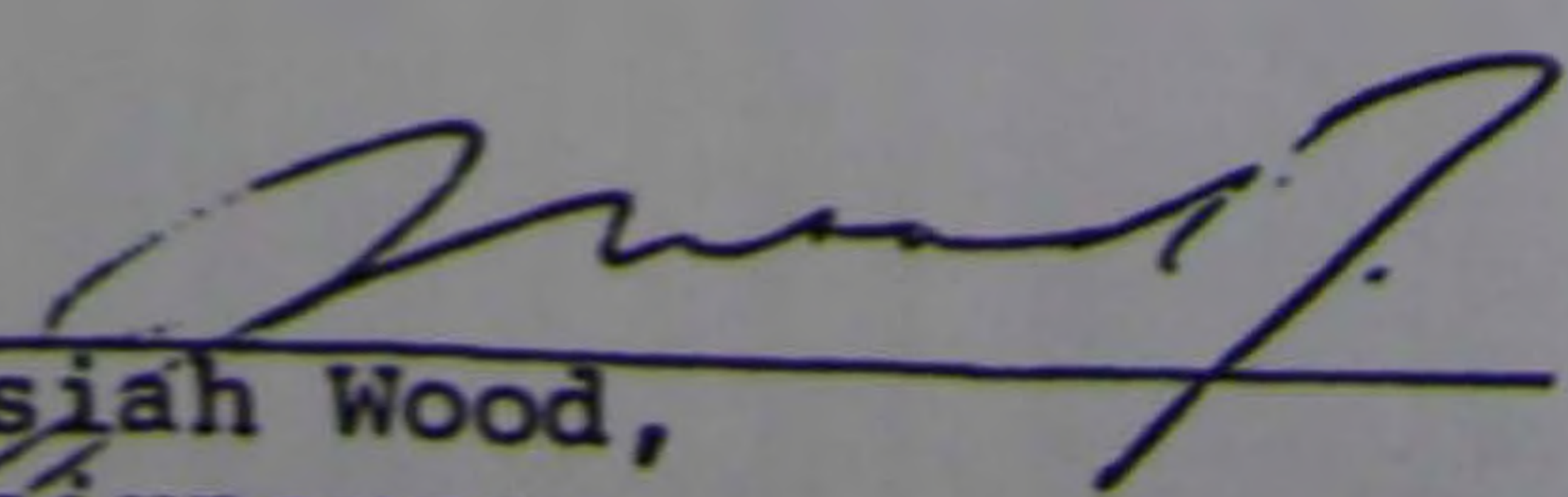
O R D E R

THIS matter coming on for hearing
on the 8th day of January, A.D. 1976,
before a Board of Inquiry constituted by
order of the Minister of Labour in and
for the Province of British Columbia pursuant
to S.16(1) of the Human Rights Code of
British Columbia, S.B.C. 1973, (2nd session)
c.119 and amendments thereto; And after
hearing R.J. Jephson, of Counsel for the
Complainant; and nobody appearing for
or on behalf of the Respondents; And after
hearing the evidence and what was alleged
by Counsel as aforesaid; And after finding
pursuant to the inquiry as aforementioned
that a violation of S.3(1) of the Human
Rights Code, S.B.C. 1973, (2nd session)
c.119 and amendments thereto was committed
against the Complainant by the Respondents
and each of them on or about the 30th day of
May, A.D. 1975, at Burns Lake, in the Province

of British Columbia:

1. THIS Board of Inquiry orders that the Respondents Paul Tymchischin and the Tweedsmuir Hotel Company Ltd. make available to the Complainant Jean Sam the facilities of the Tweedsmuir Hotel in accordance with the same rules and practices as it makes those facilities available to caucasian members of the community.
2. THIS Board of Inquiry further orders that the Respondents Paul Tymchischin and the Tweedsmuir Hotel Company Ltd. refrain from committing any further violation of S.3(1) of the Human Rights Code, S.B.C. 1973, (2nd session) c.119 and amendments thereto.
3. THIS Board of Inquiry further orders that the Respondents jointly and severally pay forthwith to the Complainant the sum of \$500.00 by way of compensation to the Complainant for damages in respect of her feelings and self-respect.
4. AND this Board of Inquiry further orders that the Respondents jointly and severally pay forthwith to the Complainant costs in the amount of \$750.00.

DATED this 30th day of January,
A.D. 1976.



Josiah Wood,
Chairperson

DATED: January 30, 1976.

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 Jean Sam against Paul
Tymchischin and the Tweedsmuir
Hotel Ltd. pursuant to S.3(1)
of the Human Rights Code.

O R D E R

Josiah Wood, Esq.,
Deverell, Harrop & Company,
No. 2 Gaolers Mews,
Gastown,
Vancouver, B.C.

IN THE SUPREME COURT OF BRITISH COLUMBIA

NO. SC095/76

Prince George, B.C.

November 30, 1976

IN THE MATTER OF THE HUMAN RIGHTS)
CODE OF BRITISH COLUMBIA,)
RESPONDENTS)
AND:)
PAUL TYMCHISCHIN and THE)
TWEEDSMUIR HOTEL LTD.,)
APPELLANTS)

ORAL REASONS FOR

JUDGEMENT OF THE

HONOURABLE

MR. JUSTICE LEGG

D.E.M. JENKINS, ESQ.,

Appearing on behalf of
the Respondents

M.K. PREFONTAINE, ESQ.,

Appearing on behalf of
the Appellants

ORAL REASONS FOR JUDGMENT:

THE CLERK: In the Matter of the Human Rights Code of
British Columbia and Paul Tymchischin and
the Tweedsmuir Hotel Ltd.

THE COURT:

I said yesterday afternoon when Court was adjourned
that I would reserve on this matter and consider whether I
could give judgment this morning. I have given anxious
consideration to this case and have reached some conclusions.
These are as follows:

This appeal by way of stated case is taken from a
decision of a Board of Inquiry appointed by the Minister
of Labour, under Section 16 of the Human Rights Code of
British Columbia, Chapter 119, Statutes of British Columbia
1973.

COPY

The stated case is a lengthy document setting out a mixture of facts and evidence. The case recites that the Board of Inquiry ordered Paul Tymchischin and the Tweedsmuir Hotel Ltd. make available to the complainant, Jean Sam, the facilities of the Tweedsmuir Hotel Limited, that they refrain from committing any further violations of Section 3(1) and that they pay the complainant compensation of \$500.00 and costs of \$750.00.

The stated case further recites that notices of the Board of Inquiry's inquiry were sent by regular mail to the parties concerned. In view of the importance that I give to the sending of this notice in my disposition of this case, I quote the pertinent passage from page 2 of the case as follows:

"(1) On December 10, 1975 notices were sent by regular mail to the parties concerned, and on December 18, 1975 the Burns Lake Native Development Council received a notice in the following form:

NOTICE OF HEARING

TAKE NOTICE that, under authority of Section 16 of the Human Rights Code of British Columbia, a Board of Inquiry will hear the following matter:

Jean Sam
Complainant

Paul Tymchischin and
the Tweedsmuir Hotel
Respondent

Section 3 of the Human Rights Code
at the Village Council Chambers, Village Office,
Civic Center, Burns Lake, B.C., which Hearing will
commence at the hour of 10:30 a.m., on the 8th
day of January, 1976.

The Board may, at the request of any party to the proceedings or on its own motion, direct that a transcript be made of the proceedings. Such a request in writing is to be received by the undersigned no later than five (5) days prior to the date set for the Hearing.

Dated at the City of Victoria, in the Province of British Columbia, this 10th day of December, 1975.

Gerald H. O'Neill
(for) Board of Inquiry

*A copy of this notice of hearing was filed as Exhibit 2 in the proceedings before the Board of Inquiry on January 8, 1976.

(2) There was no direct evidence that the Appellants had received such a notice, and no direct evidence that if they had received a notice then how long before the Hearing it was received, and there was no evidence that the Appellants were ever made aware of what type of decision, if any decision, could flow from the Hearing which was to be held.

(3) It was further ascertained that Ukranian Christmas fell on January 6, 1976, and that Ukranian New Year was on January 12, 1976.

(4) After the adjournment two people gave evidence that during the adjournment they saw and spoke to Paul Tymchischim, one of the Appellants herein, engaged in his business about the Tweedsmuir Hotel.

(5) The Board noted that who is to be notified and how they are to be notified of the Hearing is determined by the requirements of Section 16 of the said Human Rights Code, the requirements of natural justice, and

the regulations contained in Order and Council Number 593, dated February 18, 1975."

After hearing the submissions of counsel I considered whether the notice sent by the Board of Inquiry complied with the provisions of the Human Rights Code and the regulations governing the procedure of the Board.

In considering this I considered Section 16 of the Human Rights Code and the regulations.

Section 16 reads as follows:

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

(a) appoint a board of inquiry consisting of one or more panel members appointed under section 13; and

(b) fix a place at which and a date on which the board of inquiry shall hear and decide upon the allegation.

(2) A board of inquiry and every member thereof has, for the purposes of a reference under subsection (1), the powers of a commissioner appointed under the Public Inquiries Act.

(3) For the purposes of a reference under subsection (1), the persons who are entitled to be parties to a proceeding before the board of inquiry are

(a) the director, commission, or person who made the allegation;

(b) the person alleged to have been discriminated against contrary to this Act;

(c) the person who is alleged to have contravened this Act; and

(d) any other person who, in the opinion of the board of inquiry, would be directly affected by an order made by it.

(4) A board of inquiry shall give the parties opportunity to be represented by counsel, to present relevant evidence, to cross-examine any witnesses, and to make submissions.

(5) The board of inquiry may receive and accept on oath, affidavit; or otherwise, such evidence or information as it, in its discretion, considers necessary and appropriate, whether or not such evidence or information would be admissible in a court of law.

(6) The Lieutenant-Governor in Council may, by Order, establish rules governing the procedure of a board of inquiry."

Order in Council 593, dated February 18, 1975, referred to on page 3 of the stated case at the end of sub-paragraph (5) of paragraph 5, regulates the giving of notice.

Regulations 4, 5, 6 and 10 read as follows:

"4. Where the Minister has referred an allegation to a Board, under section 16(1) of the Code, the Director shall give not later than 15 days prior to the date fixed for the hearing,

(a) notice for the place and the date fixed by the Minister for the hearing,

(b) notice of the time at which the hearing is scheduled to commence, and

(c) a copy of the Report concerning the allegation in respect of which the Board has been appointed, to the following persons:

- (i) each member of the Board,
- (ii) the complainant,
- (iii) the person alleged to have been discriminated against contrary to the Code,
- (iv) the person who is alleged to have contravened the Code, and
- (v) any other person who, in the opinion of the Board, would be directly affected by an order made by the Board

5.(1) The Director, Commission or any person who has received notice under section 4 may make a submission to the Board with respect to the proceedings before the Board by mailing the submission or delivering it to the office of the Director not later than ten days prior to the date fixed for the hearing.

(2) The Director shall, immediately upon receipt of a submission made under sub-section (1) and not later than five days prior to the date fixed for the hearing, give copies of the submission to all other persons notified under section 4 of these regulations.

(3) A submission shall

(a) state whether or not a hearing is requested for the purpose of making oral representations or presenting evidence, and

(b) state the nature of the order which is sought from the Board,

and may in addition

(c) admit or deny the conclusions of fact contained in the report, and

(d) contain a concise statement of the facts upon which the person making the submission intends to rely

(e) give reasons in support of their submissions

6. A Board may seek and receive such evidence and information on oath, affidavit or otherwise as in its discretion it considers proper.

10. Where any document is required by these regulations to be given to any party, it may be given

(a) by handing it to the party

(b) by registered mail, addressing to the party at the party's last known or usual address or at the address of the party shown in any document filed with the Board by that party; or

(c) in such other manner as a Board may direct."

It was submitted before me by counsel for the appellants here (that is the persons whose conduct is alleged to have contravened the Human Rights Code). that Regulation 4 has not been complied with in that a copy of the report made to the Minister by the Director concerning the allegation in respect of which the Board has been appointed, was not "given" to the appellants here.

It was further submitted by counsel that notice of hearing was not given pursuant to Regulation 10 because there was no direction of the Board as to how the notice was to be given.

Counsel for the appellants made additional submissions but in the view I take of the stated case and the conclusions that I have reached, I shall not deal with counsel's additional submissions or the submissions of counsel for the respondent in respect to those submissions.

A perusal of the stated case indicates that the stated case is silent and does not expressly state that a copy of the Director's report was sent to the appellants. Nor does the stated case expressly state that the Board of Inquiry

directed that the notice of hearing and a copy of the report be given by ordinary mail.

The stated case after reciting evidence and facts sets out 11 questions to be answered by this Court. Not one of those questions deals expressly with the question raised by counsel for the appellants, namely whether the notice sent by the Board of Inquiry "gave" a copy of the Director's report to the appellants. Those questions in the case which touch most closely on this subject are questions 9 and 3. Question 3 reads:

"(3) Did we err in law by not exercising our discretion, under Section 16(4) of the Human Rights Code of British Columbia 1973, (Second Session) Chapter 119 and Amendments thereto, and not requiring a full representation of the Appellants' impressions of the matter."

Question 9 reads:

"(9) Did we make a manifestly incorrect finding of fact, which fact is necessary to establish jurisdiction, in finding that Notice of the Hearing had reached the Appellants at least fifteen (15) days before the Hearing or at all."

Neither of these questions purport to deal with the question of notice in the manner in which counsel for the appellants submits is fundamental to the jurisdiction of the Board of Inquiry.

The matter of giving adequate and proper notice by a tribunal performing a judicial function is fundamental to the jurisdiction of that tribunal.

Robert F. Reid in his excellent work on Administrative Law and Practice, page 1, makes the point which is fundamental to all fields of administrative law. He quotes from an ancient case and says: "Besides the objection of want of

Notice can never be got over..."

Where a tribunal's own rules prescribe how the notice should be given, the failure to comply with them has been held to go to the root of jurisdiction of that tribunal. (See Wiswell v. Metro Corporation of Greater Winnipeg, (1965) 51 D.L.R. (2d) 754 (Supreme Court of Canada)).

Even where an appearance has been entered to the proceedings of a tribunal, it has been held that where notice goes to the jurisdiction of the tribunal the want of such notice is fatal. I quote from a decision of this Court, pronounced by Mr. Justice Aikins, Maskall v. Chiropractor's Association of British Columbia and Board of Chiropractors, (1968) 62 W.W.R. 129 at 133.

In that case Mr. Justice Aikins was dealing with the respondent board's exercising of disciplinary powers over the members of the respondent's Chiropractic Association. There were two complaints made against the applicant and it was decided to hold a hearing to investigate them. The applicant was informed of the time and place of hearing but was not furnished with a copy of the complaint as submitted by the Registrar to the Board and as required by the regulations, although the applicant was informed by letter from the Association of the fact that the complaint had been made by two named persons. The letter was too imprecise to advise him fully of the nature of the charges against him in order that he could properly prepare a defence. At the hearing applicant's counsel indicated that the appellant intended to plead guilty to the charges. Even under those circumstances Mr. Justice Aikins quashed the decision. After quoting from the regulations in the case before him and holding that they went to the jurisdiction of the tribunal, he said at page 133:

"I am of this opinion for two reasons. (1) Because it is quite clear that the regulation is couched

in mandatory terms; if the Board decides to investigate a complaint, then the Registrar must send a copy of the complaint to the person against whom it is made. (2) It seems to me beyond question that if there is to be an inquiry in the form of a hearing as to whether or not a person has been guilty of professional conduct with the possibility of serious consequences to the person whose conduct is in question, then that person shall be told before the hearing what it is that he is alleged to have done. To proceed otherwise necessarily involves a denial of natural justice because the person in question would have no proper opportunity to prepare a defence."

I consider that the regulations which I have quoted above and in particular regulation 4, being a regulation enacted by the Lieutenant Governor, pursuant to the Code, are mandatory in their terms in requiring a copy of the report to go to the person who is alleged to have contravened the Code. It appears from the context of the notice that this may not have occurred. However, there is no express finding of fact on this point.

Under Section 18 of the Human Rights Code, an appeal lies from the decision of a Board of Inquiry to the Supreme Court.

Section 18 reads:

"18. An appeal lies from a decision of a board of inquiry to the Supreme Court upon

(a) any point or question of law or jurisdiction;

or

(b) any finding of fact necessary to establish

its jurisdiction that is manifestly incorrect,

and the rules under the Summary Convictions Act

governing appeals by way of stated case to that court apply to appeals under this section, and a reference to the word "Justice" shall be deemed to be a reference to the board of inquiry."

It appears to me that what is required here is an amendment to the stated case showing what notice was given and in particular whether or not a copy of the report issued by the Director to the Minister of Labour was given by the Board of Inquiry to the persons who are alleged to have contravened the Code, namely the appellants here.

Therefore, pursuant to Section 91(b) of the Summary Convictions Act, I shall cause the case to be sent back to the Board of Inquiry for amendment and then deliver judgment after it has been amended.

The amendment which should be made should deal with what I have noted, that is, whether or not the notice was sent in compliance with regulation 4 and in particular whether or not a copy of the report of the Director was sent to those who are alleged to have infringed the Human Rights Code and in particular the appellants.

Further, the Board of Inquiry should amend the stated case to cover whether in fact the board directed the giving of the notice and the report of the Director by ordinary mail, pursuant to regulation 10.

I do not deal with the remaining questions in the stated case.

While I have considered the important subject of human rights under the Human Rights Code of this Province, and in particular the importance of the rights of a Canadian Indian, I must also keep in view a fundamental concept that underlies the Code and our law, namely, the rights afforded persons in the position of the appellants under our common law.

The giving of proper notice to a person who is alleged to have contravened a public statute and whose conduct is the subject of an inquiry by an administrative tribunal must be vigilantly maintained. It is with that in mind that I direct the case be sent back for amendment.

I am prepared to hear from counsel on what further directions may be required or may be appropriate, having regard to the provisions of Section 91 of the Summary Convictions Act. I direct counsels' attention to Section 91(d). It states that I may make any other order in relation to the matter that I consider proper. Further, under subsection (e) I may make any order with respect to costs that I consider proper and which could be made by a Justice.

MR. JENKINS:

The only thing that I can suggest, My Lord, be included in the Order that you did not mention is that the matter -- that after the Board of Inquiry has dealt with this and given this Court the answers that this Court, in fact, wants in terms of facts that have given rise to the stated case, that they be immediately, after approval by both counsel, sent to you for your ultimate determinations of the matter. It seems to me that you have determined it pending receipt of our advice concerning these facts.

THE COURT:

I had in mind inviting counsel to speak to the question of the compensation and costs that this Board of Inquiry directed be paid. It seems to me that these costs and compensation may be, and I will not pre-judge the matter, based upon the facts in the stated case. The question of jurisdiction will be governed by the adequacy of the notice and the matters that I have referred to. Depending upon those facts, certain results would follow.

Now, what do counsel have to submit about the present directions of the Board of Inquiry?

The Board has directed that there is a contravention of Section 3 of the Human Rights Code and has gone on to say that there should be no further contravention and that there should be payment of compensation and costs.

MR. PREFONTAINE:

My Lord, I submitted yesterday that even if the notice had been properly given, it was still lacking in certain respects in that the appellants weren't given proper notice of the sort of decision which would be handed down by the Board. I don't know if Your Lordship is prepared to --

THE COURT:

That would depend upon the stated fact as to whether the Director's report was sent to the persons whose conduct was complained of. There is nothing in the stated case to show whether that was or was not done.

MR. PREFONTAINE:

And possibly, we should have a clarification to the particular report, if there was a Director's report sent. Whether it dealt with the matters of costs and remuneration.

THE COURT:

If a Director's report was in fact sent to the parties whose conduct was complained of, it would seem to me that it might make some difference to the facts which could properly be stated concerning your client's position, Mr. Prefontaine.

What I had in mind, was your submissions regarding the payment or otherwise of the compensation, payment or otherwise of the costs.

MR. PREFONTAINE:

I perused the file more carefully than I previously had to determine what had gone on between myself and Mr. Jeffson. It appeared that his last letter written to us that he was obtaining further direction from his principles.

Subsequent to that, we had a telephone conversation in which we were attempting to have a local Judge hear the matter. That fell through and I would say because of that, it is open to my friends to request the payment into Court of the fine of --

THE COURT:

It is not a fine. Compensation.

MR. PREFONTAINE:

Compensations and the costs pending the outcome of this matter.

MR. JENKINS:

Our present instructions do not permit us to advise you that the Director of Human Rights is prepared to waive the mandatory requirements, that Section 86 of the Summary Convictions Act imposes.

THE COURT:

I am entitled to make any other order that I consider proper under Section 91 of this section. Subsection (d).

I am prepared to stay the payment of those costs and that compensation pending the matter coming back to me on an amended stated case. I think that would suit the justice of the situation that appears from the facts stated in the stated case. However, I won't make that order until I have heard from you, Mr. Jenkins. What is your position on that?

MR. JENKINS:

I have nothing to say with respect to that, My Lord. I think to me, it is eminently sensible. I can see a practical problem arising, however, in when the case returns from Burns Lake and the Board of Inquiry, we are going to have to reconvene. I am wondering whether or not it should be in Vancouver or whether it should be back in Prince George. I doubt that you will be back here for sometime, My Lord.

THE COURT:

I may not have that pleasure. I am prepared to leave that until the stated case has been amended and it may be that in view of the fullness of the argument that has been addressed to me, that might be dealt with by written argument.

Is there anything further, gentlemen?

You may adjourn chambers, Mr. Registrar.