The Gay Alliance Toward Equality *Appellant*;

and

The Vancouver Sun *Respondent.*

The British Columbia Human Rights Commission *Appellant*;

and

The Vancouver Sun *Respondent.*

1978: October 5; 1979: May 22.

Present: Laskin C.J. and Martland, Ritchie, Spence, Pigeon, Dickson, Beetz, Estey and Pratte JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Civil rights — Refusal of newspaper to publish advertisement promoting sale of subscriptions to homosexual publication — Whether board of inquiry erred in law in holding no reasonable cause for refusing advertisement — Human Rights Code of British Columbia, 1973 (B.C.) (2nd Sess.), c. 119, ss. 3, 18.

Section 3 of the *Human Rights Code of British Columbia* provides, in part, that no person shall deny to any person or class of persons any service customarily available to the public unless reasonable cause exists for such denial. The Code provides for the establishment of a Human Rights Commission and the appointment of a director. Where the director is unable to settle an allegation of breach of the Code, provision is made for the appointment of a board of inquiry which investigates the allegation. The board of inquiry, if it is of the opinion that an allegation is justified, may order a person who has contravened the Code to cease such contravention and may order such person to make available to the person discriminated against such rights, opportunities, or privileges which, in the opinion of the board, he was denied. An appeal is given from a decision of the board of inquiry to the Supreme Court on any question of law or jurisdiction or any finding of fact necessary to establish its jurisdiction that is manifestly incorrect.

A complaint was filed by an individual complainant on behalf of the appellant Alliance alleging that the respondent, The Vancouver Sun, had refused to publish an advertisement promoting the sale of subscriptions to

"Gay Tide" in the classified advertising section of The Sun in violation of s. 3 of the Code. The Sun advised the Alliance by letter that the advertisement was "not acceptable for publication in this newspaper".

The Sun's refusal to print the advertisement was because it promoted subscriptions to "Gay Tide". "Gay Tide" is a publication which reflects the purposes of the Alliance, *i.e.* to establish recognition for the thesis that homosexuality is a valid and legitimate form of human sexual and emotional expression in no way harmful to society or the individual and completely on a par with heterosexuality.

A board of inquiry was constituted to consider the complaint of the Alliance. After conducting a hearing, the board found that there had been a violation of s. 3 of the *Human Rights Code*. The board ordered The Sun to make the facilities of its classified advertising section available to the Alliance. An appeal was then taken by way of stated case to the Supreme Court of British Columbia in accordance with s. 18 of the Code. The Sun's appeal was dismissed by MacDonald J., but a further appeal to the Court of Appeal was allowed by a majority decision. The Alliance then appealed to this Court, pursuant to leave.

Held (Laskin C.J., Dickson and Estey JJ. dissenting): The appeal should be dismissed.

Per Martland, Ritchie, Spence, Pigeon, Beetz and Pratte JJ.: The law has recognized the freedom of the press to propagate its views and ideas on any issue and to select the material which it publishes. As a corollary to that a newspaper also has the right to refuse to publish material which runs contrary to the views which it expresses.

The service which is customarily available to the public in the case of a newspaper which accepts advertising is a service subject to the right of the newspaper to control the content of such advertising. In the present case, The Sun had adopted a position on the controversial subject of homosexuality. It did not wish to accept an advertisement seeking subscription to a publication which propagates the views of the Alliance. Such refusal was not based upon any personal characteristic of the person seeking to place that advertisement, but upon the content of the advertisement itself.

Section 3 of the *Human Rights Code* does not purport to dictate the nature and scope of a service which must be offered to the public. In the case of a newspaper, the nature and scope of the service which it offers, including advertising service, is determined by the newspaper itself. What s. 3 does is to provide that a service which is offered to the public is to be available to all persons

seeking to use it and the newspaper cannot deny the service which it offers to any particular member of the public unless reasonable cause exists for so doing.

The board of inquiry erred in law in considering that s. 3 was applicable in the circumstances of this case.

Per Laskin C.J., *dissenting*: As held by the judge before whom the appeal by way of stated case first came, and by the judge who dissented in the Court of Appeal, the board's conclusion that no reasonable cause was shown under s. 3 was, in the circumstances, a conclusion of fact. At most, it was a conclusion of mixed fact and law. Therefore, the majority judgment of the Court of Appeal was not well founded. Branca J.A.'s conclusion was that a bias against homosexuals, if honestly held by the newspaper, provided reasonable cause under s. 3 unless there was bad faith. Robertson J.A. came to the same conclusion. In each instance, there was a direct substitution of the judge's opinion for that of the board.

As to the preoccupation of the Court of Appeal majority with the term "motivation", a matter also emphasized in this Court by counsel for the respondent, the board, a lay group, could properly use the word motive as a synonym for reason or ground. What appeared to have occurred in this case was a concern with "motive" as if it was being differentiated from "intent" for criminal law purposes. Intent is not, however, an issue under s. 3 of the *Human Rights Code*.

With reference to the respondent's main argument, the gist of which was that the *Human Rights Code* proscribes discrimination only on the basis of an attribute or characteristic of a person or class of persons, the argument was a desperate one, seeking to circumvent the question of reasonable cause, which is the only question to be decided once it is determined that a service or facility customarily available to the public has been denied to a person, whatever be his attributes. The attributes or characteristics may themselves provide reasonable grounds for refusal (so long as they do not fall within s. 3(2) of the *Human Rights Code*) and, if not, there may be transcending grounds that may afford reasonable cause, but it is impossible to begin the inquiry into reasonable cause by excluding everything except a consideration of a complainant's characteristics or attributes. That flies in the face of the *Human Rights Code* and in the face of the plain words of s. 3. There is no limitation to personal characteristics or attributes.

The findings in this case amounted to a rejection of the respondent's contention that the refusal of the advertisement was motivated by a concern for public decency or that such a concern had anything to do with the refusal. It was, indeed, difficult to square such concern with the various illustrated advertisements of films which appear regularly in The Sun, advertisements whose occasional vulgarity and offensiveness to decency were conceded by counsel for the newspaper. The board of inquiry was entitled to find as a fact, as the majority did, that the violation of s. 3 was based on a bias against homosexuals and homosexuality and that this was not a reasonable cause. The board member who dissented on the finding of bias, nonetheless took the view that apart from any question of such bias, there was no reasonable cause established to justify the discrimination. There was no basis on which a Court could or should decide otherwise.

Per Dickson and Estey JJ., *dissenting*: Whatever else it may have done, the board of inquiry in this case found the fact of "reasonable cause" adversely to the respondent. From that finding, there was a very limited right of appeal under the appeal provisions of the Code. The jurisdiction of the board of inquiry was not challenged. Insufficiency of evidence was not even argued in this Court or in the Courts below.

Counsel for The Sun argued that the *Human Rights Code* does not purport to be, and should not be employed as, an instrument to compel a newspaper to accept advertisements which it can reasonably be said will harm its reputation and standing. If the paper had taken that position before the board and had established adverse economic impact, the board's conclusions might well have been different. What counsel was really asking this Court to do was make new findings of fact. This the Court could not undertake unless there was no evidence to support the board's findings or unless those findings were perverse.

In an alternative argument, counsel submitted that if the board did address itself to whether reasonable cause for the refusal existed on an objective basis, then the board erred in failing to construe the term "reasonable cause" solely in relation to the characteristics of the person tendering the advertisement. The argument would limit the Code to unreasonable refusals based upon the characteristics of the persons seeking the public service. It was said the board erred in considering the text of the advertisement which gave rise to the denial of service. The paper, at most, discriminated against the idea of a thesis of homosexuality, and it is no

offence to discriminate against ideas. The argument, although an interesting one, should be rejected for the reasons given by the Chief Justice.

A newspaper or any other institution or business providing a service to the public, cannot insulate itself from human rights legislation by relying upon "honest" bias, or upon a statement of policy which reserves to the proprietor the right to decide whom he shall serve.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], allowing the respondent's appeal from a judgment of MacDonald J. dismissing an appeal from a decision of a board of inquiry under the *Human Rights Code of British Columbia*. Appeal dismissed, the Chief Justice, Dickson and Estey JJ. dissenting.

Harry Kopyto, for the appellant, The Gay Alliance Toward Equality.

M. R. V. Storrow, for the appellant, The British Columbia Human Rights Commission.

Jack Giles and *Peter Parsons*, for the respondent.

THE CHIEF JUSTICE (*dissenting*)—This appeal, which is here by leave of this Court, involves a recurring question in administrative law, namely, the reviewability on questions allegedly of law or of jurisdiction, of the decision of a statutory tribunal. The problem in this case is whether or not a board of inquiry, established under the *British Columbia Human Rights Code*, 1973 (B.C.) (2nd Sess.), c. 119, as amended, made a finding of fact or committed an error of law in deciding that no reasonable cause was shown by the respondent Vancouver Sun for denying to the appellant, The Gay Alliance Toward Equality, access to a service or facility customarily available to the public, namely, the classified advertising section of that daily newspaper and, also, discriminated against this appellant with respect to that service or facility.

[1] [1975] 5 W.W.R. 198, 77 D.L.R. (3d) 487.

This issue engages, in the main, two sections of the *Human Rights Code*, they being ss. 3 and 18, reading as follows:

> 3. (1) No person shall
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> (*a*) deny to any person or class of persons any accommodation, service, or facility customarily available to the public; or
>
> (*b*) discriminate against any person or class of persons with respect to any accommodation, service, or facility customarily available to the public,
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> unless reasonable cause exists for such denial or discrimination.
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> (2) For the purposes of subsection (1),
>
> (*a*) the race, religion, colour, ancestry, or place of origin of any person or class of persons shall not constitute reasonable cause; and
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> (*b*) the sex of any person shall not constitute reasonable cause unless it relates to the maintenance of public decency or to the determination of premiums or benefits under contracts of insurance.
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> . . .
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> 18. An appeal lies from a decision of a board of inquiry to the Supreme Court upon
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> (*a*) any point or question of law or jurisdiction; or
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> (*b*) any finding of fact necessary to establish its jurisdiction that is manifestly incorrect,
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> 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.

Following the decision of the board of inquiry a case was stated, at the request of the Vancouver Sun, in which the relevant facts leading to the board's challenged decision were set out and three questions were posed for determination by the Supreme Court of British Columbia. These are the three questions:

> 1. Was the Board of Inquiry correct in law in holding that pursuant to Section 3(1) of the Human Rights Code of British Columbia that classified advertising was a service or facility customarily available to the public?

2. Was the Board of Inquiry correct in law in holding that the Appellant herein denied to any person or class of persons any accommodation, service or facility customarily available to the public or discriminated against any person or class of persons with respect to any accommodation service or facility customarily available to the public pursuant to Section 3(1) of the Human Rights Code of British Columbia?

3. Was the Board of Inquiry correct in law in holding that pursuant to Section 3(1) of the Human Rights Code of British Columbia that the Appellant herein did not have reasonable cause for the alleged denial and did not have reasonable cause for the alleged discrimination?

Only the third question was argued on the appeal heard by MacDonald J. and on the further appeal to the British Columbia Court of Appeal. Indeed, in this Court too no issue was taken by the Vancouver Sun that its classified advertising section was a service customarily available to the public, nor was there any dispute about the denial to the appellant association of access to that service or of discrimination against it with respect to use of the service.

The factual background of this case is not in dispute. The Gay Alliance Toward Equality is an association of homosexuals, men and women, whose main object is to protect the social and legal interests of its members and to advance their claim to equality of treatment with all other members of society. It is not doubted that the association is a lawful one. On October 23, 1974, a representative of the association sought to insert an advertisement in the business personals column of the Vancouver Sun's classified advertising section. The advertisement was as follows:

Subs. to GAY TIDE, gay lib paper. $1.00 for 6 issues. 2146 Yew St., Vancouver.

There was and is no suggestion that the contents of the proposed advertisement were in any way unlawful.

The Vancouver Sun refused to accept the advertisement for publication. Its letter of rejection stated only that the proffered advertisement "was

not acceptable for publication in this newspaper". The rejection did not turn on the contents of the journal which the appellant association wished to advertise. There followed attempts to have the newspaper reconsider the rejection and thereafter a complaint was made to the British Columbia Human Rights Commission. Efforts at settlement, in accordance with the primary mandate of the Commission, proved unavailing and, finally, the Minister of Labour appointed a board of inquiry pursuant to s. 16 of the *Human Rights Code*, reading 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.

. . .

The Vancouver Sun's contention of reasonable cause, that is, reasonable grounds, for its rejection of the proffered advertisement, which promoted subscriptions to the official publication of the appellant association, was, as set out in the stated case, a three-fold one:

(1) That homosexuality is offensive to public decency and that the advertisement would offend some of its subscribers;

(2) That the Code of Advertising Standards, a Code of Advertising Ethics subscribed to by most of the daily newspapers in Canada includes the following section:

> "Public decency—no advertisement shall be prepared, or be knowingly accepted which is vulgar, suggestive or in any way offensive to public decency."

and that the advertisement in question did not conform to the standards therein set out; and

(3) That the Appellant newspaper had a duty to protect the morals of the community.

After hearing evidence the board of inquiry concluded unanimously that no reasonable cause was shown. Paragraph 12 of the stated case, which was the focus of considerable argument in this Court, is as follows:

12. Assessing all the evidence offered on the question of the cause or motivation behind the Appellant's refusal to publish the Respondent's advertisement, the majority of the Board of Inquiry found the inevitable conclusion to be that the real reason behind the policy was not a concern for any standard of public decency, but was, in fact, a personal bias against homosexuals and homosexuality on the part of various individuals within the management of the Appellant newspaper. Board Member Dr. Dorothy Smith dissented on this point and held that there was no evidence whatsœver on which the Board could make such a finding; and that, in particular there was no evidence to rebut the Appellant's repeated statements that its policy was predicated on a desire to protect a reasonable standard of decency and good taste.

(I should note that the dissent of board member Dr. Dorothy Smith in respect of one of the findings by the board majority did not affect her concurrence in the conclusion that the Vancouver Sun violated s. 3 of the *Human Rights Code*.)

I agree with MacDonald J., before whom the appeal by way of stated case first came, and with Seaton J.A., who dissented on the British Columbia Court of Appeal, that the board's conclusion that no reasonable cause was shown under s. 3 was, in the circumstances, a conclusion of fact. At most, it was a conclusion of mixed fact and law. In my opinion, therefore, the majority judgment of the British Columbia Court of Appeal was not well founded. Indeed, although it was argued strenuously in this Court that "reasonable cause" involved an objective standard, Branca J.A. took a different view, one that can only be seen as destructive of the substance of s. 3 and of the policy embodied in it. It was his conclusion that a bias against homosexuals, if honestly held by the newspaper, provided reasonable cause under s. 3 unless there was bad faith. (*Quaere*, whether honesty and bad faith can co-exist!) I quote several passages from his reasons:

> The Board did not find that the various individuals within the management of the appellant newspaper were impelled towards their bias because of base views or by spite, malice or in bad faith or indeed, in circumstances other than good faith. 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 reasonable 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.
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> To go one step further, if the policy was motivated by an honest bias, why then is the policy unreasonable?
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> Alternatively, let us assume that the bias was one held in bad faith by the individuals mentioned by the Board. The question still remained: was the policy of the newspaper based on reasonable cause? The Board did not attribute bad faith to the bias of the individuals. It did not consider the second question at all and that is whether or not the policy, despite the bias, constituted reasonable cause.

The last-quoted paragraph is nothing more than a direct substitution of the learned judge's opinion for that of the board.

Robertson J.A., who came to the same conclusion as Branca J.A. and thus formed with him the majority of the British Columbia Court of Appeal, was more restrained in his assessment of the issue of reasonable cause. He viewed it as turning upon an objective test and then chided the board of inquiry for applying what he said was a subjective test, namely what motivated the Vancouver Sun in its denial or discrimination and was this motivation reasonable cause? In short, it was the learned judge's opinion that the board erred in law in applying what he said was the test of motivation. He went on to say that in applying the wrong test the board "gave no effect to evidence that the advertisement would offend some of the newspaper's subscribers, which in addition would, of course result in a loss of subscribers and afford reasonable cause for declining to accept the business".

I find this no less a plain substitution of the learned judge's opinion for that of the board than that which was expressed in the reasons of Branca J.A. Was the board not entitled to say that the potential loss of subscribers, a subjective opinion of the Vancouver Sun, would not be a reasonable ground for refusing the advertisement? If Robertson J.A. is right, a person who operates a service or facility customarily available to the public can destroy the prohibition against denial of its service, save for reasonable cause, by parading his apprehensions that he will lose some business. Moreover, this would destroy the prohibition not only in respect of a class of persons such as the appellant association, but against a complaining black person or a Catholic or any other person in the categories mentioned in s. 3(2)(*a*) of the *Human Rights Code*. "It is not because of their race or colour or religion that we deny our service" would be the submission, "but because of the possible loss of customers." It is the very kind of subjective analysis which the Court of Appeal majority charged against the board and, wrongly, in my opinion.

I take first that Court's preoccupation with the term "motivation", a matter also emphasized in

this Court by counsel for the Vancouver Sun. The term was used in para. 12 of the stated case as a disjunctive with the word "cause". It would, I am sure, have been less confusing if the Legislature had used the phrase "reasonable grounds" rather than "reasonable cause", but in context there is no doubt that the exonerating principle is that of reasonable grounds. "Cause" in any sense of causation is not involved in the operation of the *Human Rights Code*. The board was using a word which in *Black's Law Dictionary* (1968, revised 4th ed.), for example, is defined as "cause or reason that moves the will and induces action". *The Oxford English Dictionary* (1970, vol. 6) at p. 698 defines "motive" as, *inter alia*, "that which moves or induces a person to act in a certain way". *Wigmore on Evidence* (1940, 3rd ed. vol. 1), at p. 561, s. 119 recites various uses of the word "motive" as a *fact in issue* and one of such uses is as follows:

> "(3) motive may be in issue in the sense of reason or ground for conduct."

Again, *Chadman's Dictionary of Law* (1909) at p. 74 defines "*causa*" to mean, *inter alia*, "motive, ground, reason or consideration".

I refer to the foregoing to show that the board, a lay group, could properly use the word motive as a synonym for reason or ground. Certainly, its meaning, as does the meaning of "reasonable cause", depends on the context in which it is used. What appears to me to have occurred in this case is a concern with "motive" as if it was being differentiated from "intent" for criminal law purposes. Intent is not, however, an issue under s. 3 of the *Human Rights Code*.

Secondly, I wish to refer to what counsel for the Vancouver Sun put forward as his main argument in this Court. It was not, it seems, an argument addressed to the Courts below. The gist of the argument was that the *Human Rights Code* proscribes discrimination only on the basis of an attribute or characteristic of a person or class of persons;

it does not prohibit all unreasonable denials or discriminations and, hence, as in this case, a denial or discrimination based on a newspaper policy or even on "some personal quirk" (to use counsel's words in his supplementary factum) of the newspaper publisher would be outside the scope of the statute. This is an untenable submission, however beguiling it may seem at first blush. It evades the very questions which arise under s. 3 or under the comparable s. 8 which deals with discrimination in employment.

I confine myself here to s. 3. It deals not with all services or facilities but only with those services or facilities which are customarily available to the public. The policy embodied is plain and clear. Every person or class of person is entitled to avail himself or themselves of such services or facilities unless reasonable grounds are shown for denying them or discriminating in respect of them. This Court is obliged to enforce this policy regardless of whether it thinks it to be ill-advised. There is more, however, that needs to be said. Counsel for the Vancouver Sun would have it that although it could not discriminate against a person on the ground that he had only one eye—that would be a discrimination related to an attribute of the person—it could refuse an advertisement soliciting subscriptions to a periodical for the blind because of newspaper policy against accepting such an advertisement.

The argument is a desperate one, seeking to circumvent the question of reasonable cause, which is the only question to be decided once it is determined that a service or facility customarily available to the public has been denied to a person, whatever be his attributes. The attributes or characteristics may themselves provide reasonable grounds for refusal (so long as they do not fall within s. 3(2) of the *Human Rights Code*) and, if not, there may be transcending grounds that may afford reasonable cause, but it is impossible to begin the inquiry into reasonable cause by excluding everything except a consideration of a complainant's characteristics or attributes. That flies

in the face of the *Human Rights Code* and in the face of the plain words of s. 3. There is no limitation to personal characteristics or attributes.

This brings me back to the findings in this case. They amount to a rejection of the Vancouver Sun's contention that the refusal of the advertisement was motivated (if I may use the word) by a concern for public decency or that such a concern had anything to do with the refusal. It is, indeed, difficult to square such concern with the various illustrated advertisements of films which appear regularly in the Vancouver Sun, advertisements whose occasional vulgarity and offensiveness to decency were conceded by counsel for the newspaper. The board of inquiry was entitled to find as a fact, as the majority did, that the violation of s. 3 was based on a bias against homosexuals and homosexuality and that this was not a reasonable cause. The board member who dissented on the finding of bias, nonetheless took the view—one which I have expressed here—that apart from any question of such bias, there was no reasonable cause established to justify the discrimination. I can find no basis on which a Court could or should decide otherwise.

. . . . . .

There was some reference in the respondent's factum and in the argument of its counsel to constitutional issues respecting freedom of the press but they were not pursued and, indeed, could not be without proper notice to the Attorney General of the Province and to the Attorney General of Canada.

The appeal should be allowed, the judgment of the British Columbia Court of Appeal should be set aside and the judgment of MacDonald J. and the order of the board of inquiry restored. The appellant association is entitled to costs throughout. There will be no costs to the British Columbia Human Rights Commission.

The judgment of Martland, Ritchie, Spence, Pigeon, Beetz and Pratte JJ. was delivered by

MARTLAND J.—The issues in this appeal arise in respect of the application of the provisions of s. 3 of the *Human Rights Code of British Columbia*

Act, 1973 (B.C.) (2nd Sess.), c. 119. That section appears under a heading "Discriminatory Practices" and it read at the relevant time as follows:

> 3. (1) No person shall
>
> (*a*) deny to any person or class of persons any accommodation, service, or facility customarily available to the public; or
>
> (*b*) discriminate against any person or class of persons with respect to any accommodation, service, or facility customarily available to the public,
>
> unless reasonable cause exists for such denial or discrimination.
>
> (2) For the purposes of subsection (1),
>
> (*a*) the race, religion, colour, ancestry, or place of origin of any person or class of persons shall not constitute reasonable cause; and
>
> (*b*) the sex of any person shall not constitute reasonable cause unless it relates to the maintenance of public decency.

The Act established a commission, the British Columbia Human Rights Commission. It provided for the appointment of a director, who is the chief executive officer of the Commission. When the director receives a complaint alleging a contravention of the Act, he is required to investigate and endeavour to effect a settlement of the alleged contravention. If he is unable to settle an allegation, provision is made for the appointment of a board of inquiry which investigates the allegation. The board of inquiry, if it is of the opinion that an allegation is justified, may order a person who has contravened the Act to cease such contravention and may order such person to make available to the person discriminated against such rights, opportunities, or privileges as, in the opinion of the board, he was denied. The board is also empowered to direct the payment of compensation and to make orders as to costs.

An appeal is given from a decision of the board of inquiry to the Supreme Court on any question of law or jurisdiction or any finding of fact necessary to establish its jurisdiction that is manifestly incorrect. The rules under the *Summary Convictions Act*, R.S.B.C. 1960, c. 373, governing ap-

peals by way of stated case are made applicable.

A complaint was filed by an individual complainant on behalf of the appellant, The Gay Alliance Toward Equality, hereinafter referred to as "Alliance", alleging that the respondent, The Vancouver Sun, hereinafter referred to as "Sun", had refused to publish an advertisement promoting the sale of subscriptions to "Gay Tide" in the classified advertising section of The Sun newspaper in violation of s. 3 of the Act. The Sun advised the Alliance by letter that the advertisement was "not acceptable for publication in this newspaper".

The Sun's refusal to print the advertisement was because it promoted subscriptions to "Gay Tide". "Gay Tide" is a publication which reflects the purposes of the Alliance, *i.e.* to establish recognition for the thesis that homosexuality is a valid and legitimate form of human sexual and emotional expression in no way harmful to society or the individual and completely on a par with heterosexuality.

A Board of Inquiry was constituted to consider the complaint of the Alliance. After conducting a hearing, the Board found that there had been a violation of s. 3 of the *Human Rights Code*. From this decision The Sun appealed. A case was stated by the Board as required under the Act. The stated case referred to the facts previously mentioned. Paragraphs 10, 11 and 12 of the stated case are as follows:

10. The refusal by the Appellant to publish the advertisement in question was stated to be the result of a policy which the paper has in its advertising department (as distinct from its editorial department) to avoid any advertising material dealing with homosexuals or homosexuality, and the Appellant argued that this policy was justified on three grounds:

(1) That homosexuality is offensive to public decency and that the advertisement would offend some of its subscribers;

(2) That the Code of Advertising Standards, a Code of Advertising Ethics subscribed to by most of the daily newspapers in Canada includes the following section:

> "Public decency—no advertisement shall be prepared, or be knowingly accepted which is vulgar,

suggestive or in any way offensive to public decency."

and that the advertisement in question did not conform to the standards therein set out; and

(3) That the Appellant newspaper had a duty to protect the morals of the community.

11. This Board of Inquiry found that the central theme of the Appellant's argument was that the policy in question was predicated on a desire to protect a reasonable standard of decency and good taste.

12. Assessing all the evidence offered on the question of the cause or motivation behind the Appellant's refusal to publish the Respondent's advertisement, the majority of the Board of Inquiry found the inevitable conclusion to be that the real reason behind the policy was not a concern for any standard of public decency, but was, in fact, a personal bias against homosexuals and homosexuality on the part of various individuals within the management of the Appellant newspaper. Board Member Dr. Dorothy Smith dissented on this point and held that there was no evidence whatsoever on which the Board could make such a finding; and that, in particular there was no evidence to rebut the Appellant's repeated statements that its policy was predicated on a desire to protect a reasonable standard of decency and good taste.

The questions of law stated in the stated case are as follows:

The appellant desires to question the finding that a violation did take place on the grounds that the said Judgment was erroneous in point of law or in excess of jurisdiction, the questions submitted being:

1. Was the Board of Inquiry correct in law in holding that pursuant to Section 3(1) of the Human Rights Code of British Columbia that classified advertising was a service or facility customarily available to the public?
2. Was the Board of Inquiry correct in law in holding that the Appellant herein denied to any person or class of persons any accommodation, service or facility customarily available to the public or discriminated against any person or class of persons with respect to any accommodation, service or facility customarily available to the public pursuant to Section 3(1) of the Human Rights Code of British Columbia?
3. Was the Board of Inquiry correct in law in holding that pursuant to Section 3(1) of the Human Rights Code of British Columbia that the Appellant herein did not have reasonable cause for the alleged denial

and did not have reasonable cause for the alleged discrimination?

Sun's appeal to a judge of the Supreme Court of British Columbia was dismissed, but its appeal to the Court of Appeal succeeded by a majority decision. It is from that judgment that the present appeal, with leave, has been brought to this Court.

The following excerpts from the judgments of Branca J.A. and Robertson J.A., who comprised the majority in the Court of Appeal, state the basis upon which they were of the opinion that Sun's appeal should be allowed:

Per Branca J.A.:

The Board concluded that having assessed all of the evidence that it was a personal bias on the part of various individuals, within the management of the advertising department of the newspaper, which was the real reason motivating the refusal to publish and not a genuine concern on the part of the newspaper for any standard of public decency. 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. In other words, despite the fact that certain individuals may have had that bias and that bias might well have motivated the refusal, the vital question remained: did the resultant policy of the newspaper furnish reasonable cause within the meaning of those words as used in s. 3 of the Human Rights Code which in that event might constitute a lawful ground for refusal.

Per Robertson J.A.:

It is my view that the words in s. 3(1) of the Code, "unless reasonable cause exists" require the application of an objective test: does such a cause exist? It is wrong in law to substitute for this the subjective test that the Board applied: what motivated the person who denied or discriminated and was this motivation reasonable cause for the denial or discrimination? To put it another way: If reasonable cause does in fact exist, the person discriminated against cannot claim the benefit of s. 3, even though the other person did not know of the existence of the cause; conversely, if reasonable cause does not in fact exist, the other person cannot justify his act of

discrimination by a genuine belief that a reasonable cause did exist.

Of course, in applying the Code the "cause" must be considered in relation to the person and the circumstances. Also, it must be borne in mind that the members of majorities have rights and sensibilities. I do not think that it is the intention of the Code that these are generally to be ignored for the benefit of those who are different. The words "unless reasonable cause exists" make this abundantly clear.

If the grounds upon which the Board reached its decision are to be gathered from the stated case alone, it appears from paragraph 12 that the Board went wrong, in that it applied the wrong test, that of motivation, and gave no effect to the evidence referred to in paragraph 10(1), that the advertisement would offend some of the newspaper's subscribers, which in addition would, of course, result in a loss of subscribers and afford reasonable cause for declining to accept the business.

The first two questions of law stated in the stated case raise a serious issue as to the extent to which the discretion of a newspaper publisher to determine what he wishes to publish in his newspaper has been curtailed by the *Human Rights Code*. Is his decision not to publish some item in his newspaper subject to review by a board of inquiry set up under the Act, with power, if it considers his decision unreasonable, to compel him to publish that which he does not wish to publish?

The Supreme Court of the United States, in 1974, in *Miami Herald Publishing Co., Division of Knight Newspapers, Inc. v. Tornillo*[2], had to consider whether a Florida statute violated the First Amendment's guarantee of freedom of the press. This statute granted to a political candidate the right to equal space in a newspaper to answer criticism and attacks on his record by a newspaper. This right is somewhat similar to that defined in s. 3 of Bill No. 9 entitled "An Act to ensure the Publication of Accurate News and Information", which had been reserved by the Lieutenant-Governor of Alberta, and which was under consideration in this Court[3].

[2] 418 U.S. 241.
[3] [1938] S.C.R. 100.

The Supreme Court of the United States held that the statute under consideration was a violation of the First Amendment. In the course of his reasons for judgment, Chief Justice Burger, who delivered the opinion of the Court, said that the statute failed to clear the barriers of the First Amendment because of its intrusion into the function of editors. He went on to say at p. 258:

> A newspaper is more than a passive receptacle or conduit of news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulations of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved at this time.

The Canadian Bill of Rights, s. 1(*f*), recognizes freedom of the press as a fundamental freedom.

While there is no legislation in British Columbia in relation to freedom of the press, similar to the First Amendment or to the Canadian Bill of Rights, and while there is no attack made in this appeal on the constitutional validity of the *Human Rights Code*, I think that Chief Justice Burger's statement about editorial control and judgment in relation to a newspaper is of assistance in considering one of the essential ingredients of freedom of the press. The issue which arises in this appeal is as to whether s. 3 of the Act is to be construed as purporting to limit that freedom.

Section 3 of the Act refers, in paras. (*a*) and (*b*), to "service . . . customarily available to the public". It forbids the denial of such a service to any person or class of persons and it forbids discrimination against any person or class of persons with respect to such a service, unless reasonable cause exists for such denial or discrimination.

In my opinion the general purpose of s. 3 was to prevent discrimination against individuals or groups of individuals in respect of the provision of certain things available generally to the public. The items dealt with are similar to those covered

by legislation in the United States, both federal and state. "Accommodation" refers to such matters as accommodation in hotels, inns and motels. "Service" refers to such matters as restaurants, bars, taverns, service stations, public transportation and public utilities. "Facility" refers to such matters as public parks and recreational facilities. These are all items "customarily available to the public". It is matters such as these which have been dealt with in American case law on the subject of civil rights.

The case in question here deals with the refusal by a newspaper to publish a classified advertisement, but it raises larger issues, which would include the whole field of newspaper advertising and letters to the editor. A newspaper exists for the purpose of disseminating information and for the expression of its views on a wide variety of issues. Revenues are derived from the sale of its newspapers and from advertising. It is true that its advertising facilities are made available, at a price, to the general public. But Sun reserved to itself the right to revise, edit, classify or reject any advertisement submitted to it for publication and this reservation was displayed daily at the head of its classified advertisement section.

The law has recognized the freedom of the press to propagate its views and ideas on any issue and to select the material which it publishes. As a corollary to that a newspaper also has the right to refuse to publish material which runs contrary to the views which it expresses. A newspaper published by a religious organization does not have to publish an advertisement advocating atheistic doctrine. A newspaper supporting certain political views does not have to publish an advertisement advancing contrary views. In fact, the judgments of Duff C.J., Davis J., and Cannon J., in the *Alberta Press* case, previously mentioned, suggest that provincial legislation to compel such publication may be unconstitutional.

In my opinion the service which is customarily available to the public in the case of a newspaper which accepts advertising is a service subject to the right of the newspaper to control the content of such advertising. In the present case, The Sun had adopted a position on the controversial subject of

homosexuality. It did not wish to accept an advertisement seeking subscription to a publication which propagates the views of the Alliance. Such refusal was not based upon any personal characteristic of the person seeking to place that advertisement, but upon the content of the advertisement itself.

Section 3 of the Act does not purport to dictate the nature and scope of a service which must be offered to the public. In the case of a newspaper, the nature and scope of the service which it offers, including advertising service, is determined by the newspaper itself. What s. 3 does is to provide that a service which is offered to the public is to be available to all persons seeking to use it and the newspaper cannot deny the service which it offers to any particular member of the public unless reasonable cause exists for so doing.

In my opinion the Board erred in law in considering that s. 3 was applicable in the circumstances of this case. I would dismiss the appeal with costs.

The judgment of Dickson and Estey JJ. was delivered by

DICKSON J. (*dissenting*)—The Gay Alliance Toward Equality is an association of homosexuals. Its official publication is the "Gay Tide". On October 23, 1974, a representative of the Gay Alliance wrote to the Vancouver Sun (the largest newspaper in British Columbia with a daily circulation of approximately 250,000) requesting that the following advertisement appear in the classified advertising section of the paper:

Subs. to GAY TIDE, gay lib paper. $1.00 for 6 issues. 2146 Yew St., Vancouver.

The Sun refused to publish the advertisement, stating that its refusal was the result of a policy in its advertising department to avoid any material dealing with homosexuals or homosexuality. The Gay Alliance filed a complaint under the *Human Rights Code of British Columbia.*

I

Section 3 of the Code, the section upon which the complaint of the Gay Alliance was based, reads:

> 3. (1) No person shall
>
> (*a*) deny to any person or class of persons any accommodation, service, or facility customarily available to the public; or
>
> (*b*) discriminate against any person or class of persons with respect to any accommodation, service, or facility customarily available to the public,
>
> unless reasonable cause exists for such denial or discrimination.
>
> (2) For the purposes of subsection (1),
>
> (*a*) the race, religion, colour, ancestry, or place of origin of any person or class of persons shall not constitute reasonable cause; and
>
> (*b*) the sex of the person shall not constitute reasonable cause unless it relates to the maintenance of public decency or to the determination of premiums or benefits under contracts of insurance.

In short, the Code provides that no person shall (i) *deny* to any person or group of persons (ii) any *service customarily available to the public* (iii) unless *reasonable cause* exists for such denial.

The British Columbia *Human Rights Code* provides for the establishment of a Human Rights Commission and the appointment of a director and other employees. Where the director is unable to settle an allegation, a report must be made to the Minister of Labour who may refer the allegation to a board of inquiry. That is the action taken in this instance. Following a hearing, the board of inquiry ordered the Vancouver Sun to make the facilities of its classified advertising section available to The Gay Alliance Toward Equality.

An appeal was taken by way of stated case to the Supreme Court of British Columbia in accordance with s. 18 of the Code. The Sun challenged the finding that a violation had taken place, and three questions were submitted in the stated case:

> 1. Was the Board of Inquiry correct in law in holding that pursuant to Section 3(1) of the *Human Rights Code* of British Columbia that classified advertising was a service or facility customarily available to the public?

2. Was the Board of Inquiry correct in law in holding that the Appellant herein denied to any person or class of persons any accommodation, service or facility customarily available to the public or discriminated against any person or class of persons with respect to any accommodation service or facility customarily available to the public pursuant to Section 3(1) of the *Human Rights Code* of British Columbia?

3. Was the Board of Inquiry correct in law in holding that pursuant to Section 3(1) of the *Human Rights Code* of British Columbia that the Appellant herein did not have reasonable cause for the alleged denial and did not have reasonable cause for the alleged discrimination?

The appeal was dismissed by Mr. Justice MacDonald, but a further appeal to the British Columbia Court of Appeal was allowed (Branca and Robertson JJ.A., Seaton J.A. dissenting). The Gay Alliance Toward Equality now appeals to this Court, pursuant to leave.

Before the board of inquiry it was contended that the classified advertising columns of The Sun newspaper were not a "service customarily available to the public", but this argument was not pursued in the British Columbia Courts, or in this Court, and I therefore give it no further heed. It is common ground that the Gay Alliance was denied the opportunity to have the proferred advertisement published. Only one issue is left in this appeal, namely, whether the board of inquiry convened to consider the complaint erred in law in holding there was no reasonable cause for refusing the advertisement.

II

It is critical to an understanding of the issues in this case, and the resolution of those issues, to appreciate the structure of the Code. Without such an appreciation, it is impossible to grasp the importance of the concept of "reasonable cause" in the decision-making and jurisdiction of a board of inquiry.

The unique structure of the British Columbia Code may be said to have given rise to the present controversy. Most human rights codes in Canada follow a well-worn path. *The Ontario Human Rights Code*, R.S.O. 1970, c. 318, as amended,

will serve as an example. As in the British Columbia Code, the Ontario Code prohibits discrimination in the following fields of activity: publication or display of notices and signs; accommodation, services or facilities available in any place to which the public is customarily admitted; occupancy of commercial units or housing accommodation; a detailed range of employment practices; membership in trade unions; and membership in self-governing professions. The fundamental differences between the British Columbia and Ontario Codes lie in the method employed to define "discrimination". In Ontario, and most other Canadian provinces, a list of proscribed forms of discrimination is set out in the statute—in Ontario, these are "race, creed, colour, age, sex, marital status, nationality, ancestry or place of origin". Those forms of discrimination, and only those forms, can engage the enforcement mechanisms of the human rights codes.

The unique nature of the British Columbia Code lies in the fact that the Code distinguishes between activities in the test to be applied for discrimination. Two differing tests are revealed and a sensible distinction is drawn between different types of activities.

Following the common human rights practice, the Code sets out a list of proscribed forms of discrimination—"race, religion, colour, sex, ancestry, place of origin or marital status", to which are added, in some cases, age, political belief, or conviction for a criminal or summary conviction offence. In the case of certain types of private conduct, or conduct where a large element of personal preference must enter into a decision, only the prohibited forms of discrimination can support a complaint. Such conduct would embrace the purchase of a commercial unit or dwelling unit or land (s. 4), the occupancy of premises as a tenant (s. 5), and employment applications, advertisements and inquiries (s. 7).

On the other hand, there are certain interests of a more fundamental nature, either owing to their public nature, or to their critical relationship to an individual's livelihood, which are given broader

protection from discrimination. These interests are: provision of any accommodation, service or facility customarily available to the public (s. 3), equality of opportunity based upon *bona fide* qualifications in respect of occupation or employment referable to both employers and employment agencies (s. 8), and membership in trade unions, employers' associations and occupational associations (s. 9). Here a different approach is adopted by the Legislature. In the case of these more fundamental activities, no person shall discriminate without "reasonable cause" and then certain proscribed classifications are stated not to constitute reasonable cause. The result is that there is no inherent limitation upon the possible prohibited forms of discrimination in these areas.

One can see similarities between the approach to discrimination found in the British Columbia Code and the judicially-developed "equal protection" analysis based upon the Fourteenth Amendment in the United States: see "Developments in the Law of Equal Protection" (1969), 82 Harv. L.R. 1065. A fair statement of the American approach can be found at p. 1076 of the Harvard Law Review article, taken from one of the older cases:

> But the classification must be reasonable, not arbitrary, and must rest on some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.

Broadly speaking, the American courts have adopted two standards of equal protection review—restrained review that only requires a reasonable classification relevant to the stated legislative purpose, and active review where a suspect classification is involved or a fundamental personal interest infringed. Either a suspect classification or a fundamental interest will trigger a much more stringent degree of judicial review.

In the British Columbia Code, a somewhat different approach is taken. Certain classifications are automatically deemed "unreasonable", whatever the interest involved. Then there are certain interests which are defined to be fundamental and call for a broader standard of review. But, once one moves beyond the proscribed forms of discrimination in these areas of activity, the test of

"reasonable cause" indicates a more restrained standard of review and a means of balancing the competing interests involved. In the context of this more restrained review, a board of inquiry must look to the classification adopted by the person whose actions are challenged, to the interest which that person seeks to forward as opposed to that of the complainant and to the relation between the classification adopted and the interest put forward.

The British Columbia Code is silent as to "sexual orientation", but it is precisely because the British Columbia Code goes well beyond its counterparts in other provinces that the present case got before the board of inquiry. The absence of sexual orientation from the list of specifically proscribed forms of discrimination may indicate a lesser degree of protection in the weighing of reasonable cause, but it must be emphasized that there is no necessary limitation upon "reasonable cause" to be read into the statute by the mere absence of reference to sexual orientation.

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

III

Counsel for the Vancouver Sun strongly contended for the traditional right of editorial control over newspaper content, including advertising.

English law is remarkably bereft of guidance on the subject of editorial control over advertising. But in the United States, the common law is clear. Perhaps the best statement of the law is found in *Approved Personnel Inc. v. The Tribune Company*[4], at p. 706:

In the absence of any statutory provisions to the contrary, the law seems to be uniformly settled by the great weight of authority throughout the United States that the newspaper publishing business is a private enterprise and is neither a public utility nor affected with the public interest. The decisions appear to hold that even though a particular newspaper may enjoy a virtual monopoly in the area of its publication, this fact is neither unusual nor of important significance. The courts have consistently held that in the absence of statutory regulation on the subject, a newspaper may publish or reject commercial advertising tendered to it as its judgment best dictates without incurring liability for advertisements rejected by it.

In "Annotation—Right of Publisher of Newspaper or Magazine, in Absence of Contractual Obligation, to Refuse Publication of Advertisement", 18 ALR 3d 1286 at pp. 1287-8, the following summary is provided:

With the exception of one case, it has universally been held that in the absence of circumstances amounting to an illegal monopoly or conspiracy, the publisher of a newspaper or magazine is not required by law to accept and publish an advertisement, even where the advertisement is a proper one, and the regular fee for publication has been paid or tendered.

. . .

The reasons for refusing to compel publication of an advertisement are that at common law a newspaper is strictly a private enterprise, is not a business clothed or affected with a public interest as is a public utility, innkeepeer, or railroad, and that newspaper publishers are accordingly free to contract and deal with whom they please in conformity with the inherent right of every person to refuse to maintain trade relations with any individual.

In the British Royal Commission on the Press, 1947-1949, *Report* (Cmd 7700, 1949), there is a brief discussion of the "right of newspapers to reject advertisements" at p. 144:

We have received evidence that some newspapers refuse all advertisements of a particular class. This is a differ-

[4] 177 So. 2d 704 (1965) (Dist. C.A. Fla.).

ent matter. We consider that a newspaper has a right to refuse advertisements of any kind which is contrary to its standards or may be objectionable to its readers. This right, however, should not be exercised arbitrarily.

I think it would be correct to state that a newspaper has a right to reject advertising at common law.

IV

Apart from the common law position, counsel for the Vancouver Sun also cast his argument in terms of press freedom. This raises issues which have not been satisfactorily resolved, either in Canada, in Britain, or in the United States. These issues which can be defined broadly as (1) the content of the term "freedom of the press", (2) the distinction between "political" and "commercial" speech, and (3) the vexed issue of access to the press. The discussion which follows is not for the purpose of resolving any constitutional issue. There is no constitutional challenge to s. 3(1) of the *Human Rights Code of British Columbia.* I wish merely to sketch the broad and important judicial background to the question posed in the case at bar.

As a starting point, I can do no better than quote from the British Royal Commission on the Press, *Final Report* (Cmd 6810, 1977) at pp. 8-9:

Freedom of the press carries different meanings for different people. Some emphasise the freedom of proprietors to market their publications, other the freedom of individuals, whether professional journalists or not, to address the public through the press; still others stress the freedom of editors to decide what shall be published. These are all elements in the right to freedom of expression. But proprietors, contributors and editors must accept the limits to free expression set by the need to reconcile claims which may often conflict. The public, too, asserts a right to accurate information and fair comment which, in turn, has to be balanced against the claims both of national security and of individuals to safeguards for their reputation and privacy except when these are overridden by the public interest. But the public interest does not reside in whatever the public may happen to find interesting, and the press must be careful not to perpetrate abuses and call them freedom. Freedom of the press cannot be absolute. There must be

boundaries to it and realistic discussion concerns where those boundaries ought to be set.

We define freedom of the press as that degree of freedom from restraint which is essential to enable proprietors, editors and journalists to advance the public interest by publishing the facts and opinions without which a democratic electorate cannot make responsible judgments.

Later in their report, the Commissioners discuss legal constraints on the press and make the following general comment which, save for the freedom of the press assured by the *Canadian Bill of Rights*, is equally applicable to Canada:

This country is unlike many others in having no laws which relate specifically to the press. There is no constitutional guarantee of the freedom of the press, as there is in the United States, and no judicial surveillance of the contents of the newspapers, as there is in Sweden. Nevertheless, there are areas of general law which related predominantly, and in some cases almost exclusively, to the activities of the press. In important ways, legal provisions help to maintain the delicate balance between freedom of the press and the public interest (p. 183).

In Canada, as in Britain, much of the protection of the freedom of the press must derive from the interpretation of the "general law" rather than from a constitutional guarantee, and from the interpretation of statutes such as the British Columbia *Human Rights Code* as they may affect the press. While admittedly the *Alberta Press case*[5], dealt with the constitutional validity of the Alberta Press bill, as it was termed, the comments of Chief Justice Duff and Mr. Justice Cannon in that case are important in defining the notion of freedom of the press in the Canadian context.

In the United States, freedom of the press rests upon the First Amendment, which reads:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for redress of grievances.

[5] [1938] S.C.R. 100.

The framers of the United States Constitution linked freedom of speech in the First Amendment to freedom of the press to provide an effective forum for such expression: "Conflict Within the First Amendment: A Right of Access to Newspapers" (1973), 48 N.Y.U.L.R. 1200. In the result, there would appear to be general agreement in Britain, Canada, and the United States, as to the "free public discussion" rationale for freedom of the press.

V

Within the First Amendment in the United States two issues have been much discussed: whether the First Amendment mandates equal protection for "commercial" as opposed to "political" speech, and whether the First Amendment not only protects expression once it comes to the fore, but also serves to ground an affirmative right of access to the media. In response to these issues two trends can be discerned in the American cases. The first is the obliteration of any meaningful distinction between "political" and "commercial" speech within the First Amendment. The second is the rejection of a right of access to the press based upon the First Amendment.

The so-called "commercial speech" doctrine finds its original in the case of *Valentine v. Crestensen*[6], where Mr. Justice Roberts, on behalf of the Court, stated unequivocally: "We are equally clear that the Constitution [the First Amendment] imposes no such restraint on government as respects purely commercial advertising." I do not intend any detailed canvas of the American authorities other than to say that the "commercial" exception appeared to retain its virility as recently as the case of *Pittsburg Press Co. v. Pittsburgh Commission on Human Relations*[7], but the ambit of that case was shortly thereafter cut down in *Bigelow v. Virginia*[8], and further narrowed the following year in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer*

[6] 316 U.S. 52 (1942).
[7] 413 U.S. 376 (1973).
[8] 421 U.S. 809 (1975).

Council Inc.[9], where the Court struck down the restrictions on prescription drug advertising found in Virginia law as violating the First Amendment. Nor has this wave receded: see *Bates v. State Bar of Arizona*[10], where state bar restrictions on advertising by lawyers were struck down.

A separate line of cases has upheld the view that the First Amendment serves no affirmative function, *i.e.* it does not mandate any right of access, however limited, to the media: see *Chicago Joint Board, Amalgamated Clothing Workers of America AFL—CIO v. Chicago Tribune Company*[11]. Any doubts, so far as the United States is concerned, as to a right of access to newspapers, would appear to be settled by the Supreme Court in *Miami Herald Publishing Co. v. Tornillo*[12]. The newspaper had refused to print Tornillo's replies to editorials critical of his candidacy for state office and Tornillo brought suit seeking injunctive and declaratory relief under Florida's "right of reply" statute. That statute provided that:

> . . . if a candidate for nomination or election is assailed regarding his personal character or official record by any newspaper, the candidate has the right to demand that the newspaper print, free of cost to the candidate, any reply the candidate may make to the newpaper's charges. The reply must appear in as conspicuous a place and in the same kind of type as the charges which prompted the reply, provided it does not take up more space than the charges. Failure to comply with the statute constitutes a first-degree misdemeanour.

While the Circuit Court held the statute unconstitutional as an infringement on the freedom of the press under the First and Fourteenth Amendments, the Florida Supreme Court found no such violation, free speech being enhanced and not abridged by the statute, which furthered the

[9] 425 U.S. 748 (1976).
[10] 97 S. Ct. 2691 (1977).
[11] 307 F. Supp. 422 (N.D. Illinois, 1969), aff'd 435 F. 2d 470 (7th Cir. 1970), cert. denied 402 U.S. 973 (1971).
[12] 418 U.S. 241 (1974).

"broad societal interest in the free flow of information to the public". This view was rejected by the Supreme Court on the ground that it constituted interference by the government with the exercise of editorial control and judgment, and hence with First Amendment guarantees of a free press. See also *C.B.S. Inc. v. Democratic National Committee*[13].

Before leaving the American cases it is, I think, appropriate to note that these cases were decided in light of a strong First Amendment constitutional underpinning, and legislation such as that found in the British Columbia *Human Rights Code* was not in issue. Our limited jurisprudence, to which I will shortly refer, would appear to accept a greater degree of regulation in respect of newspaper advertising than is apparent in the United States.

VI

Although freedom of the press is one of our cherished freedoms, recognized in the quasi-constitutional *Canadian Bill of Rights*, the freedom is not absolute. Publishers of newspapers are amenable to civil and criminal laws which bear equally upon all businessmen and employers, generally, in the community; for example, those regulating labour relations, combines, or imposing non-discriminatory general taxation. False and misleading advertising may properly be proscribed. In *Cowen et al. v. Attorney General of British Columbia*[14], the central question was whether a 1939 amendment to the British Columbia *Dentistry Act*, which barred any person not registered under the Act from practising or offering to practise dentistry in the Province, was limited to acts within the Province, and press freedom was not raised. The result of the decision, however, was the maintenance of an injunction to prevent the publication of certain advertisements in a daily newspaper. In *Benson and Hedges (Canada) Ltd. et al. v. Attorney Gen-*

[13] 412 U.S. 94 (1973).
[14] [1941] S.C.R. 321.

eral of British Columbia[15], an act, the effect of which was "to prohibit advertising by any person of tobacco products", was upheld, although press freedom does not appear to have been in issue or argued. In *Regina v. Toronto Magistrates, Ex p. Telegram Publishing Co.*[16], Mr. Justice Schatz held that a section of *The Liquor Control Act* of Ontario prohibiting publication of any announcement concerning liquor was not an encroachment on the freedom of the press, or upon freedom of speech.

Newspapers occupy a unique place in western society. The press has been felicitously referred to by de Tocqueville as "the chief democratic instrument of freedom." Blackstone wrote "The liberty of the press is indeed essential to the nature of a free state." Jefferson went so far as to assert "Where it left for me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter." There is a direct and vital relationship between a free press and a free society. The right to speak freely, publish freely, and worship freely, are fundamental and indigenous rights, but it is "freedom governed by law", as Lord Wright observed in *James v. Commonwealth*[17], at p. 627. In the *Alberta Press* case, *supra*, we find these words of Duff C.J. at p. 134 of the report:

> Some degree of regulation of newspapers everybody would concede to the provinces. Indeed, there is a very wide field in which the provinces undoubtedly are invested with legislative authority over newspapers; but the limit, in our opinion, is reached when the legislation effects such a curtailment of the exercise of the right of public discussion as substantially to interfere with the working of the parliamentary institutions of Canada.

Governments in Canada have generally respected press independence and have followed a policy of non-intervention.

[15] (1972), 27 D.L.R. (3d) 257 (B.C.S.C.).
[16] [1960] O.R. 518 (Ont. H.C.).
[17] [1936] A.C. 578.

There is an important distinction to be made between legislation designed to control the editorial content of a newspaper, and legislation designed to control discriminatory practices in the offering of commercial services to the public. We are dealing in this case with the classified advertising section of a newspaper. The primary purpose of commercial advertising is to advance the economic welfare of the newspaper. That part of the paper is not concerned with freedom of speech on matters of public concern as a condition of democratic policy, but rather with the provision of a "service or facility customarily available to the public" with a view to profit. As such, in British Columbia a newspaper is impressed with a statutory obligation not to deny space or discriminate with respect to classified advertising, unless for reasonable cause. It should also be made clear that the right of access with which we are here concerned has nothing to do with those parts of the paper where one finds news or editorial content, parts which can in no way be characterized as a service customarily available to the public. The effect of s. 3 of the British Columbia *Human Rights Code* is to require newspapers within the province to adopt advertising policies which are not in violation of the principles set out in the Code.

VII

I turn now to the stated case, paras. 10, 11 and 12 of which read:

10. The refusal by the Appellant to publish the advertisement in question was stated to be the result of a policy which the paper has in its advertising department (as distinct from its editorial department) to avoid any advertising material dealing with homosexuals or homosexuality, and the Appellant argued that this policy was justified on three grounds:

(1) That homosexuality is offensive to public decency and that the advertisement would offend some of its subscribers;

(2) That the Code of Advertising Standards, a Code of Advertising Ethics subscribed to by most of the daily newspapers in Canada includes the following section:

> "Public decency—no advertisement shall be prepared, or be knowingly accepted which is vulgar,

> suggestive or in any way offensive to public decency."
>
> and that the advertisement in question did not conform to the standards therein set out; and
>
> (3) That the Appellant newspaper had a duty to protect the morals of the community.
>
> 11. This Board of Inquiry found that the central theme of the Appellant's argument was that the policy in question was predicated on a desire to protect a reasonable standard of decency and good taste.
>
> 12. Assessing all the evidence offered on the question of the cause or motivation behind the Appellant's refusal to publish the Respondent's advertisement, the majority of the Board of Inquiry found the inevitable conclusion to be that the real reason behind the policy was not a concern for any standard of public decency, but was, in fact, a personal bias against homosexuals and homosexuality on the part of various individuals within the management of the Appellant newspaper. Board Member Dr. Dorothy Smith dissented on this point and held that there was no evidence whatsoever on which the Board could make such a finding; and that, in particular there was no evidence to rebut the Appellant's repeated statements that its policy was predicated on a desire to protect a reasonable standard of decency and good taste.

It seems clear from the foregoing that the Vancouver Sun in its advertising department, as distinct from its editorial department, had a particular policy. That policy was to avoid any advertising material dealing with homosexuals or homosexuality. The paper advanced three grounds as constituting reasonable cause, the "central theme" of which was a "desire to protect a reasonable standard for decency and good taste".

In its main factum, the respondent newspaper contended that the board failed to address itself to the only question posed by the statute, "did reasonable cause exist?" and instead substituted a determination as to motive for refusing the advertisement. Although the stated case leaves something to be desired in terms of clarity, there does not seem to be any doubt that the board rejected the three grounds advanced on the part of the paper in justification of its refusal to publish the advertisement. A majority of the board also found that the real reason for the refusal to publish was a personal bias against homosexuals and homosexuality on the part of various individuals within the

management of the newspaper. The paper, therefore, had failed to establish reasonable cause. Much was made of the word "motivation" and "the real reason behind the policy". These words do not give any particular trouble. We need not indulge in nice appraisal based upon casuistic distinctions between the meaning of "cause" and "motive", words which are virtually synonymous.

I have earlier adverted to the matter of reasonable cause. "Reasonableness" is normally a question of fact. The most recent authoritative affirmation of that statement is from Lord Hailsham L.C. in *In re W (an Infant)*[18], at p. 699:

> And, be it observed, "reasonableness," or "unreasonableness," where either word is employed in English law, is normally a question of fact and degree and not a question of law so long as there is evidence to support the finding of the court.

Whatever else it may have done, the board of inquiry in the case at bar found the fact of "reasonable cause" adversely to the respondent newspaper. From that finding, there is a very limited right of appeal provided by s. 18 of the British Columbia *Human Rights Code*. The section reads in part:

> 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,

The jurisdiction of the board of inquiry is not challenged. Insufficiency of evidence was not even argued in this Court or in the Courts below.

Counsel for The Sun argued that the *Human Rights Code* does not purport to be, and should not be employed as, an instrument to compel a newspaper to accept advertisements which it can reasonably be said will harm its reputation and standing. If the paper had taken that position

[18] [1971] A.C. 682.

before the board and had established adverse economic impact, the board's conclusions might well have been different. What counsel is really asking this Court to do is make new findings of fact. This we cannot undertake unless there is no evidence to support the board's findings or unless those findings are perverse. In my view, Mr. Justice MacDonald expressed the legal position correctly when he said:

> Whether particular circumstances amount to reasonable cause for denial or discrimination under s. 3 is purely a question of fact. It must be decided as a matter of law, under a proper definition of the phrase "reasonable cause". The only restraints which the law places upon the triers of fact are the provisions of s. 3(2). They may not find the race, religion, colour, ancestry, or place of origin of any person or class of persons reasonable cause unless it relates to the maintenance of public decency or to the determination of premiums or benefits under contracts of insurance. What the appellant's submission does is to take some elements—what it submits are the circumstances of its case—and ask the Court to find that, as a matter of law, they must constitute reasonable cause. But it is really an invasion of the area of fact. If the appellant's submission is sound, how long is the list of different plausible circumstances which the Court would be bound to find constituted reasonable cause?

In an alternative argument, counsel submitted that if the board did address itself to whether reasonable cause for the refusal existed on an objective basis, then the board erred in failing to construe the term "reasonable cause" solely in relation to the characteristics of the person tendering the advertisement. The argument, as I understand it, would limit the Code to unreasonable refusals based upon the characteristics of the persons seeking the public service. It was said the board erred in considering the text of the advertisement which gave rise to the denial of service. The paper, at most, discriminated against the idea of a thesis of homosexuality, and it is no offence to discriminate against ideas. A number of American authorities based on the First Amendment, to which I have earlier referred, were relied upon. The argument is an interesting one but, for the

reasons given by the Chief Justice, whose judgment in draft I have had the advantage of reading, I would reject the argument.

I would only add in concluding that I do not think a newspaper, or any other institution or business providing a service to the public, can insulate itself from human rights legislation by relying upon "honest" bias, or upon a statement of policy which reserves to the proprietor the right to decide whom he shall serve.

I am unable to find in the stated case any convincing proof that the board of inquiry misunderstood the evidence or misdirected itself in law. I note again that there has been no constitutional challenge on the ground that interference with the right of a newspaper to control its content is an attempt to abrogate the rights of a free press and is, consequently, outside the legislative jurisdiction of the Province of British Columbia.

I would allow the appeal, set aside the judgment of the British Columbia Court of Appeal and restore the judgment of MacDonald J. and the order of the board of inquiry, with costs throughout.

Appeal dismissed with costs, LASKIN C.J. *and* DICKSON *and* ESTEY JJ. *dissenting.*

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