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The Gay Alliance Case Reconsidered

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THE *GAY ALLIANCE* CASE RECONSIDERED

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If one could posit a general thesis for Professor Black's case comment on *Gay Alliance Toward Equality* v. *Vancouver Sun*,[1] it is that the *GATE* case[2] presented the Supreme Court of Canada with a choice between two competing claims: that of the *Vancouver Sun* to refuse a paid advertisement for a newspaper advocating gay rights on the grounds of public decency, and that of the plaintiff to have the advertisement published.

While this thesis is consistent with the view taken by the majority,[3] Chief Justice Laskin, in his brief but incisive dissent, defines the key issue in substantially different terms. He views the appeal as involving an ongoing issue in the area of administrative law. "The problem in this case," states Chief Justice Laskin,

> is whether or not a board of inquiry . . . *made a finding of fact or commited 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. . . .[4] [Emphasis added.]

It is a trite observation that the Supreme Court of Canada, as well as other courts of superior jurisdiction, has been repeatedly confronted with cases raising the question of the reviewability of the decisions of statutory tribunals. In the *GATE* case, section 18 of the *Human Rights Code* of British Columbia[5] specifically limits appeals from a board of inquiry's decision under the human rights legislation to "any point or question of law or jurisdiction, or . . . any finding of fact necessary to establish its jurisdiction that is manifestly incorrect."[6] Therefore, the Supreme Court of Canada was bound to accept the Board's findings of fact and did not have any jurisdiction to interfere with the findings of fact already made.

The findings of fact made by the Board amounted to a rejection of the *Vancouver Sun's* contention that the advertisement was refused because of a concern for public decency or that such a concern played any role whatever in the *Sun's* decision to carry advertisements. In fact, the *Sun* regularly carried advertisements for films whose vulgarity was conceded by counsel for the

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1 (1979), 17 Osgoode Hall L.J. 649.

2 *Gay Alliance Toward Equality* v. *Vancouver Sun*, [1979] 2 S.C.R. 435, 97 D.L.R. (3d) 577, [1979] 4 W.W.R. 118 [hereinafter *GATE*].

3 *Id.* at 448-56 (S.C.R.), 585-91 (D.L.R.), 119-26 (W.W.R.).

4 *Id.* at 439 (S.C.R.), 578 (D.L.R.), 126 (W.W.R.).

5 *Human Rights Code*, R.S.B.C. 1979, c. 186.

6 *Id.*, s. 18.

newspaper at the Board hearing.[7] As Laskin C.J.C. observed, the Board of Inquiry was fully within its rights to determine as a question of fact that the violation of section 3 of the *Human Rights Code* was based on a prejudice against homosexuals and homosexuality in general, and that such a prejudice could not be a reasonable cause within the meaning of that section.[8]

In addition to the statutory bar that restricts the court's jurisdiction solely to questions of law or jurisdiction, there has developed in Canada and England a body of case law suggesting that the determination as to whether there was reasonable cause for a certain course of action is a question of degree and a conclusion on a question of degree is a conclusion of fact, observation and credibility.[9] Thus, the determination of questions of fact, and the weight to be given to the facts that led the Board to decide that no reasonable cause existed under section 3 for the refusal of services, was exclusively a decision for the Board to make and could only be interfered with by the appellate court where there was no evidence to support the conclusion.[10]

Notwithstanding these statutory and common law restrictions, the majority judgment of Martland J. explicitly reversed the Board on its findings of fact that the refusal of the service was motivated by a bias against homosexuals.[11] Martland J. found that the *Vancouver Sun* did not wish to accept

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[7] It was found by the Board of Inquiry (unreported judgment, 25 February 1975) that in the issue of the *Sun* that should have contained the advertisement in question had it been accepted, a number of advertisements appeared for films advertised in the Sun as involving "group sex and lesbianism," "male nudity and sex" (*op. cit.*, at 17). It was also found that the advertisement in question was neither vulgar nor suggestive (*op. cit.*, at 16). The Board held that the *Sun* failed to meet the test of sincerity with respect to its purported concern for standards of public decency.

[8] *Supra* note 2, at 445 (S.C.R.), 583 (D.L.R.), 131-32 (W.W.R.). It is instructive to remember in this regard that one of the Board members dissented on the finding that bias motivated the *Vancouver Sun* in refusing the advertisement but nonetheless concluded that there was no reasonable cause to justify the denial of service (*id.* at 43).

[9] *Bracegirdle* v. *Oxley*, [1946] K.B. 349 at 358, [1947] 1 All E.R. 126 at 130, 176 L.T. 187 at 190-91; *In Re K. (An Infant)*, [1953] 1 Q.B. 117 at 130, [1952] 2 All E.R. 877 at 884-85, [1952] 2 T.L.R. 745 at 752 (C.A.); *In Re W. (An Infant)*, [1971] A.C. 682 at 698-700, [1971] 2 All E.R. 49 at 55-56, [1971] 2 W.L.R. 1011 at 1020-21 (H.L.); *R.* v. *Higgins*, [1948] 1 K.B. 165; [1947] 2 All E.R. 619, 117 L.J.R. 442 (C.C.A.). The question of what motivated the *Sun* in its denial or discrimination is also a question of fact, observation and credibility, and constitutes a finding of primary fact. See *British Launderers Res. Auth.* v. *Borough of Hendon Rating Auth.*, [1949] 1 K.B. 462 at 471-72, [1949] 1 All E.R. 21 at 25-26, 118 L.J.R. 416 at 421 (C.A.); *Bracegirdle, op. cit.* The credit or weight due to the facts that lead the Board to make its findings of fact in this particular case were for the Board to decide and their conclusion could only be interfered with by an appellate court where there is no evidence to support the conclusions, see *Bracegirdle, op. cit.*, at 353, 358 (K.B.), 127, 130 (All E.R.), 188, 190-91 (L.T.); *R.* v. *Fredericks* (1962), 47 M.P.R. 324 at 333, [1963] 1 C.C.C. 271 at 281 (N.S.S.C.); *R.* v. *United Auto Wrecking* (1966), 67 D.L.R. (2d) 545, 56 W.W.R. 490 (B.C.C.A.).

[10] See *British Launderers, id.; Bracegirdle, id.* at 353, 358 (K.B.), 127, 130 (All E.R.), 188, 190-91 (L.T.); *Fredericks, id.; In re K., id.* at 121 (Q.B.), 878 (All E.R.), 746 (T.L.R.); *In re W., id.* at 699, 721-22, 724, 727 (A.C.), 55, 75, 77-78, 79-80 (All E.R.), 1020, 1041, 1044, 1046-47 (W.L.R.); *R.* v. *McBride* (1973), 43 D.L.R. (3d) 430 at 444, [1974] 1 W.W.R. 500 at 566, 15 C.C.C. (2d) 154 at 158 (B.C.C.A.). The Board's conclusions on findings of fact are always subject to the limitations in law placed on the triers of fact by section 3(1) of the *Human Rights Code*.

[11] *Supra* note 2, at 455 (S.C.R.), 591 (D.L.R.), 125-26 (W.W.R.).

an advertisement seeking subscriptions for a publication that propagates the views of the Gay Alliance. He went on to point out in his brief judgment that the refusal in this particular case was not based upon any personal characteristic of the person who sought to have the advertisement inserted in the *Vancouver Sun,* but rather because of the content of the submitted advertisement.[12]

This view of the facts was not shared by Dickson J. who pointed out in his dissent that the newspaper's concern with the decency of the advertisement was specifically rejected by the Board of Inquiry and that the real reason for the refusal to publish was personal bias against homosexuals on the part of various individuals within the management of the newspaper.[13] The newspaper therefore failed to establish reasonable cause. As reasonableness is normally a question of fact and as there was an absence of convincing proof that the Board of Inquiry misunderstood the evidence or misdirected itself in law, he concluded that the appeal should be dismissed.[14]

In dealing with the argument of the *Vancouver Sun's* counsel that a newspaper should not be compelled to accept advertisements that it can reasonably be said will harm its reputation and standing, Dickson J. pointed out that, "what counsel was really asking this court to do is make new findings of fact."[15]

Having identified concern over the decency of the advertisement's contents rather than bias against homosexuals as the cause for the rejection, the Court proceeded to determine whether the plaintiff had been denied "any accommodation, service or facility customarily available to the public" as a result of this new finding of fact. The majority of the Court determined that due to a daily disclaimer published by the *Vancouver Sun,* which reserved to itself the right to edit the contents of advertisements, the provision of advertising space was not a service customarily available to the public.[16] Therefore, the majority dismissed the appeal.

This was not the first time that the character of the advertising services to which access was denied was considered in the judicial proceedings involving *GATE.* On February 25, 1976, the Board of Inquiry had stated a case for the consideration of the Supreme Court of British Columbia setting out the following three questions as requested by the Sun:

> (a) Was the board 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?
>
> (b) Was the board correct in law in holding that the *Sun* denied to any person or class of persons any accommodation, service or facility cusomarily available to the public or discriminated against a 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?*

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[12] *Id.* at 456 (S.C.R.), 591 (D.L.R.), 126 (W.W.R.).

[13] *Id.* at 470 (S.C.R.), 602-603 (D.L.R.), 146-47 (W.W.R.).

[14] *Id.* at 471-72 (S.C.R.), 603-604 (D.L.R.), 147-48 (W.W.R.).

[15] *Id.* at 472 (S.C.R.), 604 (D.L.R.), 148 (W.W.R.).

[16] *Id.* at 455 (S.C.R.), 591 (D.L.R.), 125-26 (W.W.R.).

(c) Was the board correct in law in holding that the *Sun* did not have reasonable cause for the alleged denial and did not have reasonable cause for the alleged discrimination?[17]

However, when the stated case came to be heard by MacDonald J. of the Supreme Court of British Columbia, the *Vancouver Sun* did not present argument on the first two questions set out in the stated case but addressed argument only to whether it had reasonable cause for the denial of services.

When the case was appealed further by the *Vancouver Sun* to the Court of Appeal of British Columbia, the *Sun* once again restricted its argument to the existence of reasonable cause for the denial of services and did not raise the first two issues mentioned in the original stated case.[18] Similarly, when the case came to be heard by the Supreme Court of Canada, the *Vancouver Sun* did not raise these two questions either in its oral presentation or in the two memoranda of law that it had filed with the court. As Laskin C.J.C. pointed out, no issue was taken by the *Vancouver Sun* in the Supreme Court of Canada that its classified advertising section was a service customarily available to the public.[19] No dispute was raised about the refusal of access to the appellant association of the classified advertising sections of the *Vancouver Sun.*

Dickson J. addressed this issue in the following terms in his dissent:

> 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 proffered 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.[20]

Notwithstanding that these two issues were never raised in the previous appeal hearings, the majority in the Supreme Court of Canada felt it necessary to deal with them. Martland J. specifically indicated that the two questions of law that had not been argued raised an important issue involving the ability of the British Columbia Legislature through its *Human Rights Code* to restrict the traditional discretion of newspaper publishers to control the contents of their own newspapers.[21]

It is unusual for a court to determine an issue on a question of law that has already been conceded by a party. In fact, the law in this area has developed to the stage of even forbidding a party from raising a point he has already conceded. In *Scott* v. *Fernie Lumber Co.*[22] Buff J. stated:

> It is, perhaps needless to say that in these circumstances, but for the legislation hereinafter referred to, the rule long established, which holds a litigant to a position

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[17] Cited in the judgment of Branca J.A. at the British Columbia Court of Appeal. See *Vancouver Sun* v. *Gay Alliance Toward Equality* (1977), 77 D.L.R. (3d) 487 at 490, [1977] 5 W.W.R. 198 at 202-203 (B.C.C.A.).

[18] *Id.* at 491 (D.L.R.), 203 (W.W.R.).

[19] *Supra* note 2, at 441 (S.C.R.), 480 (D.L.R.), 128 (W.W.R.).

[20] *Id.* at 458 (S.C.R.), 593 (D.L.R.), 136 (W.W.R.).

[21] *Id.* at 453 (S.C.R.), 589 (D.L.R.), 123 (W.W.R.).

[22] (1904), 11 B.C.R. 91 (S.C.).

> deliberately assumed by his counsel at the trial, would preclude in this Court any discussion of the sufficiency of the findings to support the judgment. The rule is no mere technicality of practice; but the particular application of the sound and all-important maxim—that litigants shall not play fast and loose with the course of litigation—finding a place one should expect, in any enlightened system of forensic procedure.[23]

As Laskin C.J.C. points out, it has been conceded in the courts below that a facility customarily available to the public was denied to the plaintiff herein and the appeal to the Supreme Court of Canada was on a previously conceded ground.[24] It goes without saying that a court should not reopen an issue of this sort when the plaintiff in whose favour the point had been decided would himself not be able to do so.

The implications of the Supreme Court's finding that the *Sun's* advertising services were not services customarily available to the public may be quite far-reaching. Professor Black suggests that the Court's reasoning creates "a narrow exception that applies specifically to publishers."[25] While it would be desirable to share his optimism, it would appear more likely that the weight given by the majority to the importance of the disclaimer may provide a dangerous precedent. Institutions and individuals offering services to the public may mask a policy of discrimination behind a published reservation that may be ostensibly innocuous but in practice directed against an otherwise protected group. The party responsible for the discrimination might also adopt the argument of the majority that the service being offered was not the actual service being performed (whether it be a service performed by a restaurant, hotel, recreational facility or a utility) but the service itself *subject to the reservation.*

Professor Black seems to recognize the immense danger of this aspect of the Supreme Court of Canada's decision, for he observes that "human rights statutes would be useless if businesses could exempt themselves simply by posting a notice saying, 'We do not serve women or Indians.' "[26] But his attempt to deny the danger in this case is not entirely successful. For example, he fails to appreciate that the narrowing of the scope of the service using a reservation as an excuse would have the same discriminatory effect as a decision to permit discrimination with regard to the service offered.

In dealing with the decision's impact on the meaning of the words "reasonable cause," Professor Black argues that the decision should not be interpreted to restrict the words "reasonable cause" to denials based on personal characteristics.[27] However, that is precisely the point that Martland J. makes when he argues that the refusal, because of the contents of the advertisement, placed it outside the scope of the Code.[28] The very heart of Martland J.'s argument is that in this particular case the discrimination and denial of services was based upon the contents of the advertisement and not upon a

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[23] *Id.* at 96.

[24] *Supra* note 2, at 441 (S.C.R.), 580 (D.L.R.), 128 (W.W.R.).

[25] *Supra* note 1, at 651.

[26] *Id.*

[27] *Id.* at 652.

[28] *Supra* note 2, at 456 (S.C.R.), 591 (D.L.R.), 126 (W.W.R.).

personal characteristic of the member of GATE who sought to place the advertisement. That such an argument could be used as a ruse to mask real discrimination against individuals because of their personal characteristics was underlined by Laskin C.J.C. who referred to this argument using an interesting anology referred to by Professor Black:

> 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.
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> The argument is a desparate 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 his attributes.[29]

Professor Black's suggestion that the words "reasonable cause" should be limited to conduct in some way related to unequal treatment of an identifiable group is not supported by the wording of the *Human Rights Code* itself. Furthermore his assertion that the legislature did not intend to "prohibit any form of unreasonable conduct whether or not it relates to discrimination"[30] is inappropriate in the context of human rights statutes and is not supported by the history of the bill enacting the Code.

In fact, the context of the British Columbia *Human Rights Code* is substantially different from that of other provincial human rights codes.

The fairly short, simple Code, which established a bold and innovative scheme for enforcing human rights, was passed in the first year of the existence of British Columbia's New Democratic Party government under ex-Premier Barrett. While the Code continues the traditional formula of outlawing discrimination on enumerated grounds such as age, sex, colour and nationality, the provision in the Code that outlaws discrimination in public facilities against anyone—unless reasonable cause exists for such discrimination—was a conscious decision of that government.[31] According to statements made by the labour minister who was responsible for enacting the legislation, its intention was to prohibit discrimination against groups like the aged, homosexuals and handicapped people who are not specifically referred to in the Code.[32] In fact, when the Code was passed, the provincial labour minister proclaimed on November 10, 1973, that "homosexuals will be protected under the human rights code."[33]

The protection of unspecified groups by the inclusion of the "reasonable cause" prohibition did in fact broaden the scope of human rights legislation in a manner that has seldom been seen in Canada. In practice, under the leadership of the director of the human rights branch, and with the backing

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[29] *Id.* at 447 (S.C.R.), 584 (D.L.R.), 133 (W.W.R.).

[30] *Supra* note 1, at 653.

[31] *Gay Tide,* September 1977 (No. 17) at 3.

[32] *Id.* See also *The Province,* November 10, 1973 at 8; *Vancouver Sun,* November 10, 1973 at 14.

[33] *Id.*

of the then NDP labour minister, the human rights branch administering the Code established an impressive series of precedents. The human rights branch persuaded the government to raise the pay of several hundred women in the province's hospitals, thereby enforcing the concept of equal pay for work of equal value.[34] The branch successfully prevented, on the grounds of discrimination, the British Columbia College of Physicians and Surgeons from forcing immigrant doctors to practice in remote areas of the province.[35] The branch ordered the RCMP to pay its female police clerks as much as male guard dispatchers since both did substantially the same work.[36] A woman fired from her job because she was pregnant was found to have been discriminated against.[37]

In the process of interpreting section 3, the human rights branch was following the clear legislative scheme created by the Code. As Dickson J. points out in his dissenting judgment, there are two standards set by the Code with respect to the prohibition of discriminatory behaviour.[38] Private institutions are prohibited from discriminating on the basis of a list of prescribed forms of discrimination such as race, religion, colour, or sex. Public institutions (that is, those that provide services customarily available to the public) are required to make their services available to anyone unless reasonable cause exists for the denial of these services. With respect to these more "fundamental" activities, Dickson J. concludes that 'there is no inherent limitation upon the possible prohibited forms of discrimination in these areas."[39]

Laskin C.J.C. makes the same point in the following words:

> I confine myself to s. 3. It deals not with all services of 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 persons 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.[40]

Despite the history of the legislation and its schemes of operation, Professor Black suggests that the prohibition of all forms of unreasonable conduct, whether or not it relates to discrimination, was not the legislative intent. Rather, he sees his interpretation of reasonable cause as being "consistent with the other decided cases."[41] Unfortunately the author's insistence that the test for determining the reasonableness of the denial of services be related to discrimination against an identifiable group appears to lean heavily in the direction of attempting to formulate an acceptable definition of all things that could fall within the meaning of the phrase "reasonable casue"

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[34] Day, "Recent Developments in Human Rights," in B.C. Dept. of Lab., *Labour Research Bulletin* (Victoria: Dept. of Lab., 1977) 16 at 17.

[35] *Id.* at 22.

[36] *Id.* at 19.

[37] *Id.* at 21.

[38] *Supra* note 2, at 459 (S.C.R.), 594 (D.L.R.), 137 (W.W.R.).

[39] *Id.* at 460 (S.C.R.), 595 (D.L.R.), 138 (W.W.R.).

[40] *Id.* at 447 (S.C.R.), 584 (D.L.R.), 133 (W.W.R.).

[41] *Supra* note 1, at 653.

as used in the British Columbia *Human Rights Code.* However, as a matter of long-established law, whether a matter is reasonable or not has to be decided with reference to the particular facts of the instant case and in light of the totality of the circumstances in any particular case.[42] No formula can be devised to delimit all unreasonable behaviour prohibited by section 3 of the Code. Though Professor Black asserts that his interpretation is consistent with the purposes of human rights legislation, he appears to have failed to give the unique aspects of the Code their due weight. The purposes of human rights legislation are in a constant state of flux just as forms of discrimination and popular bias continually shift. It is not so extraordinary a measure for the legislature to insist that those providing services to the public be reasonable in determining whether to withhold them from anyone.

The decided cases that Professor Black alludes to as consistent with this conclusion are not discussed.[43] While it may be conceded as a general statement of law that any legislative enactment should be defined in order to promote its general purpose and preamble, such a broad principle can scarcely be used to justify a reinterpretation of the legislation in question in face of its plain and ordinary meaning.

While legislative intention is always at best unclear, the drafters of the Code may well have intended to broaden the scope of the Code in order to avoid the difficulty that human rights branches have had in other provincial jurisdictions in proving the existence of bias.

It has always been a stumbling block for enforcers of human rights legislation to prove the actual existence of bias. Seldom do those who discriminate proclaim their biases openly. By broadening the words in the manner that section 3 does in the Code, the problem of having to prove the existence of an actual bias against an identifiable group is done away with. While the scope of the legislation may thereby be broadened, so also is its effectiveness.

This was evidently the case with the British Columbia *Human Rights Code.* The number of complaints investigated by the human rights branch increased from twenty-seven in 1970 to 714 in 1975.[44] Not surprisingly, many

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[42] See *supra* note 9.

[43] *Supra* note 1, at 653-54.

[44] See Day, *supra* note 34, at 16.

Table I – *Number of Complaints*

Year	*Complaints Investigated*
1970	27
1971	36
1972	47
1973	98
1974	241
1975	714
1976	578*

* The decline in the number of complaints investigated from 1975 to 1976 may be associated with the election of a Social Credit government, which appeared to be less responsive to the human rights needs of British Columbians than the previous

of the individuals availing themselves of protection under the legislation did so on the basis of discrimination "without reasonable cause" rather than on the enumerated grounds.[45]

Professor Black's suggestion that the phrase "reasonable cause" be interpreted to relate only to conduct that has a discriminatory effect upon an identifiable group constitutes a narrowing of the scope of the Code. While Professor Black's solution purports to clarify the debate concerning how reasonable cause is to be assessed, he himself acknowledges that his solution adds further ambiguity concerning the meaning of the word "group."[46]

It would appear that only Laskin C.J.C.'s interpretation of the words in controversy, giving them their plain and ordinary meaning rather than reading into them interpretations that are not there, avoids the particular problems encountered by this redefinition.[47]

The confusion introduced by Professor Black into the discussion concerning the meaning of the words "reasonable cause" is evident when he comes to discuss the issue of freedom of the press, which he regards as the central question before the Supreme Court of Canada. He expresses concern at the "considerable discretion" that the legislature has given to the human rights branch because of the use of the phrase "reasonable cause." "Discretion can be abused," he argues, "and it is worth considering whether there is a risk that the *Human Rights Code* could be misapplied so as to restrict free speech unduly."[48]

Of course, the objective measure of reasonableness has been used in

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government. In fact, in 1975, the NDP's Labour Minister appointed twenty-five Boards but the Social Credit Labour Minister appointed only ten. During this same period, the previous policy of the Human Rights Branch to advertise that its services were available was discontinued. In addition, there was severe understaffing of two of the Human Rights Branch offices in Prince George and Victoria. See *The Vancouver Sun*, January 28, 1978.

[45] See Day, *id.*

Table II – *Nature of Complaints, 1976*

	Number	*%*
Race	98	17
Place of Origin	29	5
Colour	22	4
Ancestry	1	–
Sex	210	36
Sex & Marital Status	22	4
Marital Status	53	9
Religion	9	2
Age	32	6
Political Belief	5	1
Criminal Conviction	14	2
Without Reasonable Cause	82	14
Total	578	100

[46] *Supra* note 1, at 653n. 20.

[47] *Supra* note 2, at 447-48 (S.C.R.), 585 (D.L.R.), 133 (W.W.R.).

[48] *Supra* note 1, at 665.

other contexts without resulting in judicial abuse of other competing interests. For example, the test of reasonableness has traditionally been applied in adoption cases when courts in England have had to deal with whether or not such proceedings should continue notwithstanding the refusal of the actual parents to consent.[49] The case law indicates that there has rarely been a danger that the interests of natural parents would be abused or that the interests of the child would be made secondary to those of the parents. The test has usually resulted in the courts making an objective assessment of the particular facts of any given situation and there has been no attempt to formulate an all-encompassing interpretation of the meaning of the word "reasonableness" that would result in certain factors (the child's interest, the parents' right to refuse) being given predetermined weight independent of the given circumstances of any particular situation. Professor Black fails to provide examples of abuse that may have taken place either in the administration of the British Columbia *Human Rights Code* in the administration of human rights statutes containing similar words, or in the long standing experience of the common law where the test of reasonableness has been applied to providers of public transportation services and other similar facilities. His concern about the possible abuse of the discretion also seems to contradict his personal opinion, expressed elsewhere in his case comment,[50] that the boards of inquiry should be permitted to retain jurisdiction with respect to the issue of reasonable cause.

Professor Black's solution to the problem of the Code having a "potential conflict with freedom of expression"[51] simply involves providing a formula for reasonableness. His suggestion that the Court could have imposed a variety of limitations on the meaning of the words "reasonable cause"[52] vitiates the very point of the pragmatic test of reasonableness. His suggestions that the Court could have specified that a newspaper could have refused an advertisement when its large size would require newspaper columns to be restricted or the suggestion that the Court "could have acknowledged the right of the paper to edit offensive language in a non-discriminatory manner"[53] are matters that cannot be elaborated as principles of law. If in fact the situation arises where an advertisement is given of such a large size or contains offensive language, the Board of Inquiry would be the best party to determine whether or not the refusal or discrimination is reasonable in the circumstances. The Board would be able to view the entire situation and give these factors such weight as they would determine within the context of the particular case.[54]

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[49] See *supra* note 9.

[50] *Supra* note 1, at 659.

[51] *Id.* at 665.

[52] *Id.*

[53] *Id.*

[54] The language of The Honourable Mr. Justice MacDonald of the Supreme Court of British Columbia is most apt in this regard. He held that:

> 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

By leaving such determination on questions of fact to the Board, the Board could also block attempts by providers of public services to discriminate in fact against identifiable groups under the pretext of reserving for themselves certain rights. Professor Black's suggestion that Dickson J.'s dissenting judgment made a start in the direction of elaborating a test for reasonableness and limiting its applicability in certain situations is difficult to understand.

Dickson J. emphasizes that reasonable cause should be judged by an objective test.[55] This underlies the view that no predetermined weight should be given to defined factors and that each denial should be dealt with on its own facts. Further, the distinction that Dickson J. makes by "emphasizing the immunity of news and editorial columns from regulation"[56] does not place limitations on the words "reasonable cause;" on the contrary, it merely reflects his belief that in the context of the British Columbia *Human Rights Code* the news and editorial columns are not a service customarily available to the public. This is the only interpretation that could be made of Dickson J.'s comments and it is difficult to see how Professor Black could possibly relate this distinction to the meaning of the words "reasonable cause."

The main flaw that emerges when Professor Black deals with the issue of freedom of the press in the broader context of the significance of the case is his ready acceptance of what the majority purports to be deciding rather than dealing with what it is actually deciding. He appears to favour Martland J.'s assertion that the key issues posed on the appeal were the parameters of section 3 in light of the need to protect freedom of the press.[57] The majority, however, far from resolving this issue, decided the case by determining that the facilities that were refused were beyond the scope of the legislation as not being customarily available to the public. Thus, the broad generalizations concerning the importance of freedom of the press and the reference to the *Canadian Bill of Rights* and American case law in this connection, strictly speaking, cannot be broadly regarded as intrinsically related to the *ratio* of the case and in the final analysis, may be regarded as *obiter dicta.*

As a result of his failure to focus on what the Court actually decides, Professor Black's dissertation on the significance of the case for freedom of speech becomes somewhat scholastic and abstracted. Clearly central to the considerations of the majority was the fact that the *Vancouver Sun* daily published a disclaimer reserving to itself the right to edit the contents of the

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> 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 submision is sound, how long is the list of different plausible circumstances which the Court would be bound to find constituted reasonable cause?

Cited in the judgment of Seaton J.A. in the Court of Appeal: *supra* note 17, at 502-503 (D.L.R.), 218 (W.W.R.).

[55] *Supra* note 1, at 665.

[56] *Id.*

[57] *Id.* at 672-75.

submitted advertisements.[58] The chain of logic constructed by the majority weakens considerably in the absence of such a disclaimer, notwithstanding the way in which the majority clothed its decision in broad language concerning freedom of the press.

In light of this analysis, the conundrum contemplated by Professor Black, wherein traditional "liberals" on issues of freedom of speech voted against the *Vancouver Sun's* right to reject the advertisement while the traditional "conservatives" supported its right, becomes somewhat more solvable. It is no longer necessary to wonder about the turn taken by the Supreme Court of Canada towards embracing freedom of the press. It is no longer necessary to speculate whether the majority invoked the rule of construction that legislation should be construed narrowly if a broader construction were to infringe upon a fundamental right. Nor is it necessary to attempt to explain the "striking" contrast between the Court's approach to freedom of expression in the instant case and in the recent *Dupond*[59] case where freedom of expression was not given any significant weight despite the fact that one of the central issues before the Supreme Court of Canada in that particular case involved the validity of a by-law banning parades and demonstrations.

Professor Black canvasses at length the various other cases dealing with freedom of expression decided by the Supreme Court of Canada in the recent past in order to search for clues that might explain the *volte-face* in *GATE*. He concludes that freedom of speech was relegated to a lesser position in many of these other cases and fails to explain what distinctive factual features before the Court in the *GATE* case resulted in such heavy emphasis being placed on freedom of the press.[60] This failure is especially noteworthy when one realizes that the other cases pose a more significant threat to freedom of expression than the "threat" to the *Vancouver Sun* by GATE. Professor Black's inability to adequately explain the Court's favourable references to United States decisions concerning fundamental liberties and the positive references made to the *Canadian Bill of Rights* shows a serious weakness in his analysis.

Professor Black's essential thesis is that the Court was forced to make a fundamental value judgment about the relative importance of the two competing claims to freedom of expression. He hypothesizes three possible explanations for the change of direction contained in *GATE*.[61] The first is that the Court now has decided to give freedom of speech more weight than it has in the recent past. The second explanation is that the Court assigned little weight to protecting minorities and establishing equality. The third choice that he puts forward is that the Court is unwilling to extend protection to homosexuals.

With respect to the first choice, Professor Black expresses doubt about this interpretation on the basis that the Court was less than forthright about changing its approach if in fact the *GATE* case did constitute a change of

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[58] *Supra* note 2, at 455 (S.C.R.), 591 (D.L.R.), 125 (W.W.R.).

[59] *A.G. Can* v. *Dupond*, [1973] 2 S.C.R. 770, 84 D.L.R. (3d) 420, 5 M.P.L.R. 4.

[60] *Supra* note 1, at 663.

[61] *Id.* at 672.

approach. In addition, he ruminates quixotically over the liberal/conservative split, pointing out that four of the six justices in the majority approach the issue in a manner inconsistent with their positions expressed in previous cases.[62] He appears to hold out some optimism for believing that a real shift has taken place in the Court's attitude to freedom of expression, and he even suggests that "there should be a suitable return on [the] jurisprudential investment"[63] placed in the interests and rights.

Professor Black appears to favour the second hypothesis, stating that perhaps *GATE* is "best explained on the basis that the Court continues to assign more importance to the right of freedom of commerce than to egalitarian rights."[64]

There can be no argument with Professor Black on this point. The history of the Supreme Court for at least the past forty years has properly given it a reputation for narrowly construing human rights statutes. However, one hesitates to concede that it is freedom of commerce that is being protected in the *GATE* case. As Dickson J. points out in his dissenting judgment,

> 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 polity, 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.[65]

A careful analysis of the comments of Martland J. on the freedom of the press aspect of the case conclusively indicates that what is really involved is not freedom of commerce but freedom to hold prejudices. The majority reasoning on freedom of the press contains numerous *non sequiturs*. There is too great a jump in logic from citing Burger C.J. of the Supreme Court of the United States approvingly with respect to the right of the press to exercise editorial control and judgment to the right of the *Vancouver Sun* to refuse advertisements from GATE to its classified advertising section. GATE was not asking the *Vancouver Sun* to approve its views editorially; it was simply seeking to avail itself of a service customarily available to the public with respect to placing advertisements to third parties.

When Professor Black writes about how the majority balanced rights in the *GATE* case, one wonders whether he is using those words ironically. He

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[62] *Id.* at 673.

[63] *Id.* at 675.

[64] *Id.*

[65] *Supra* note 2, at 469 (S.C.R.), 601-602 (D.L.R.), 145-46 (W.W.R.).

himself concedes that the Court's apparent commitment to freedom of the press lacks forthrightness and seems to be incomplete and contradictory. Similarly, Professor Black admits that the Court interpreted the human rights statutes in question in a very restrictive fashion at great cost to the homosexual minority.[66]

It would appear to be Professor Black's third thesis, namely, that the court was unwilling to extend protection to homosexuals, that is most consistent with the analysis of the case presented in this article. This interpretation would explain why the Court appeared to endorse the interests of freedom of expression when it was only a right to discriminate that was being protected. This interpretation also explains why the Court was willing to decide the case on a point that had not been argued before the Court and that involved interference with a finding of fact made by the Board of Inquiry. While the case may conceivably end up having some significance as *obiter* to those advocating freedom of the press in circumstances where such freedom may in fact be threatened, the greater likelihood is that the major impact of the case will be felt in the narrowing of the scope of the British Columbia *Human Rights Code* and its ability to protect the human rights of minority groups.

[66] *Supra* note 1, at 675.