

Court of Appeal for the Yukon Territory

Date: 19930309  
Docket: YU00165

BETWEEN:

YUKON HUMAN RIGHTS COMMISSION AND MADELEINE GOULD

APPELLANTS

YUKON ORDER OF PIONEERS, DAWSON LODGE #1 AND WALTER GRONER

RESPONDENTS

THE YUKON STATUS OF WOMEN COUNCIL

INTERVENOR

Before: The Honourable Mr. Justice Hinkson

The Honourable Mr. Justice Toy

The Honourable Mr. Justice Taylor

Counsel for the Appellants: Mary Eberts, Paul O'Brien and J. M. Le Dain

Counsel for the Respondents : Richard A. Buchan

Counsel for the. Intervenor: Gwen Brodsky

Place and Date of Hearing: Whitehorse, Yukon Territories December 7 and 8, 1992

Place and Date of Judgment: Vancouver, British Columbia March 9, 1993

Written Reasons by: The Honourable Mr. Justice Hinkson

Concurred in by: The Honourable Mr. Justice Toy

The Honourable Mr. Justice Taylor

Reasons for Judgment of the Honourable Mr. Justice Hinkson

The appellant, Madeleine Gould, sought to become a member of the respondent which is a fraternal organization. Her application was denied because she is a female. As a result she filed a complaint with the Yukon Human Rights Commission pursuant to the provisions of the Yukon Human Rights Act. The Commission asked a Board of adjudication to decide the complaint. Before the Board, the parties agreed on a statement of facts. Ultimately, the Board held that the complainant had been discriminated against contrary to the provisions of s.8(a) of the Yukon Human Rights Act and ordered the respondent Lodge to consider the application without reference to sex. An appeal from that disposition was taken to Wachowich J. He concluded the Board had fallen into error and therefore remitted the matter to the Board for further consideration pursuant to the directions he gave to the Board. The present appeal is from the decision of Wachowich J.

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#### BACKGROUND FACTS.

In the early 1890's there existed a community at 40 Mile in the Yukon Territory. The population of this community, due to the remoteness of this location and the hardships of daily life, was predominantly male. Organized law enforcement had not yet arrived and the community was plagued by the presence of nefarious and transient rogues whose activities included hooliganism, claim jumping, theft, fraud, and other illegal and immoral acts.

In 1894, leading citizens of the 40 Mile community proposed the organization of a moral fraternal order for the purposes of establishing a police force and a fraternal group whose primary concern would be the welfare, security and well being of its members. As a result, the Yukon Order of Pioneers was formed on December 1, 1894. Membership was restricted to male persons of integrity and good character who met a ten year residency requirement. The Northwest Mounted Police arrived in the Yukon in 1895. Initially, the Order assisted the police. With the arrival of the Klondike gold rush the 40 Mile population decreased dramatically with most of the members of the Order moving to the Dawson City area. The Dawson Lodge of the Order was created in 1897.

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By the early 1900's, the policing activities of the Order were no longer required and those activities ceased. Since then to the present date the primary objects of the Order have been

social, historical and cultural with its paramount concern being the welfare and well being of its members.

5 At present there are only two active Lodges of the Order, those being the Dawson City and Whitehorse Lodges.

5 The objects of the Order as set out in the agreed statement of facts are as follows:

(ix) the primary objects and focus of the Order are the mutual protection of its members and the uniting of those members in the strong tie of brotherhood. The order is dedicated to preserving the history of the Order and of its members. It is equally dedicated to preserving the moral values, male camaraderie and mutual respect traditions and secret rites that were engendered by and formed the fabric of a Klondike brotherhood of the 1890's;

(x) other objects of the Order are the advancement of the Yukon Territory, preserving the names of all Yukon Pioneers on the rolls of the Order and collecting and preserving the literature and incidents of Yukon's history. In this latter regard the Order's historian, Mr. Laurent Cyr, who serves in a voluntary and unpaid capacity, engages in the following activities:

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(a) responds to requests from the public for information on the Order's past members and on the history of the Order;

(b) provides historical data, records and materials on the Order and its members to the Yukon Archives;

(c) solicits information on the history of the Order and its members from members and other individuals and organizations;

(d) collects data, records, photos and other historical material respecting the Order and its members.

#### THE APPLICATION FOR MEMBERSHIP.

On September 2, 1987, the complainant, Madeleine Gould, made formal application to join Dawson Lodge #1 of the Yukon order of Pioneers.

Mrs. Gould's application was rejected on the ground that, being a female, she was not qualified for membership by the Order's constitution and tradition because it is a fraternal brotherhood and membership is restricted to male persons. For the purposes of the hearing before the Hoard the respondents were prepared to assume that the complainant met the other qualifications for membership. As a result of the decision of the Order, Mrs. Gould filed a complaint with the Human Rights Commission dated December 8, 1987.

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In that complaint the appellant, Madeleine Gould, asserted that the respondents had contravened as 8(a) and 11 of the Yukon Human Rights Act on the basis of sex.

## RELEVANT PROVISIONS OF THE YUKON HUMAN RIGHTS ACT.

The Yukon legislature enacted the Human Rights Act as SY 1987, It was assented to on February 12, 1987.

In s.1 the objects of the Act are stated as follows:

1.(1) The objects of this Act are

- (a) to further in the Yukon the public policy that every individual is free and equal in dignity and rights,
- (b) to discourage and eliminate discrimination,
- (c) to promote recognition of the inherent dignity and worth and of the equal and inalienable rights of all members of the human family, these being principles underlying the Canadian Charter of Rights and Freedoms and the Universal Declaration of Human Rights and other solemn undertakings, international and national, which Canada honours.

Part 1 of the Act contains a Bill of Rights in the following terms:

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### PART 1 BILL OF RIGHTS

Right to freedom of religion and of conscience

3. Every individual and every group shall, in accordance with the law, enjoy the right to freedom of religion, conscience, opinion, and belief.

Right to freedom of expression

4. Every individual and every group shall, in accordance with the law, enjoy the right to freedom of expression, including freedom of the press and other media of communication.

Right to freedom of assembly and of association

5. Every individual and every group shall, in accordance with the law, enjoy the right to peaceable assembly with others and the right to form with others associations of any character.

Right to enjoyment and disposition of property

5.1 Every individual has a right to the peaceful enjoyment and free disposition of his or her property, except to the extent provided by law, and no one shall be deprived of that right except with just compensation.

Next, the Act, in Part 2, describes Discriminatory Practices in the following terms:

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## PART 2

### DISCRIMINATORY PRACTICES Prohibited grounds

6. It is discrimination to treat any individual or group unfavourably on any of the following grounds:

- (a) ancestry, including colour and race,
- (b) national origin,
- (c) ethnic or linguistic background or origin,
- (d) religion or creed, or religious belief, religious association, or religious activity,
- (e) age,
- (f) sex, including pregnancy, and pregnancy related conditions,
- (g) sexual orientation,
- (h) physical or mental disability,
- (i) criminal charges or criminal record,
- (j) political belief, political association or political activity,
- (k) marital or family status,
- (l) actual or presumed association with other individuals or groups, whose identity or membership is determined by any of the grounds listed in paragraphs (a) to (k).

Section 8 deals with prohibited discrimination and provides:

#### 8. No person shall discriminate

- (a) when offering or providing services, goods, or facilities to the public,
- (b) in connection with any aspect of employment or application for employment,

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- (c) in connection with any aspect of membership in or representation by any trade union, trade association, occupational association, or professional association,
- (d) in connection with any aspect of the occupancy, possession, lease, or sale of property offered to the public,
- (e) in the negotiation or performance of any contract that is offered to or for which offers are invited from the public.

Finally, s.11 provides:

#### Systemic discrimination

11. Any conduct that results in discrimination is discrimination.

### INTERPRETATION OF HUMAN RIGHTS LEGISLATION.

The approach to be taken to the interpretation of human rights legislation was discussed in the decision of the Supreme Court of Canada in *Action Travail des Femmes v. Canadian National Railway Co. et al.* (1987) , 40 D.L.R. (4th) 193. The court was there considering the

provisions of the Canadian Human Rights Act. Dickson C.J.C., speaking for the court, said at p.206:

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The purposes of the Act would appear to be patently obvious, in light of the powerful language of s.2. In order to promote the goal of equal opportunity for each individual to achieve "the life that he or she is able and wishes to have", the Act seeks to prevent all "discriminatory practices" based, inter alia, on sex. It is the practice itself which is sought to be precluded. The purpose of the Act is not to punish wrongdoing but to prevent discrimination.

Dickson C.J.C. continued at p. 207:

The first comprehensive judicial statement of the correct attitude towards the interpretation of human rights legislation can be found in *Insurance Corp. of H.C. v. Heerspink* (1982), 137 D.L.R. (3d) 219 at p. 229, [1982] 2 S.C.R. 145 at p. 158, 39 3.C.L.R. 145, where Lamer J. emphasized that a Human Rights Code "is not to be treated as another ordinary law of general application. It should be recognized for what it is, a fundamental law". This principle of interpretation was further articulated by McIntyre J., for a unanimous court, in *Re Winnipeg School Division No. 1 and Craton* (1985), 21 D.L.R. (4th) 1 at p. 6, [1985] 2 S.C.R. 150 at p. 156, [1985] 6 W.W.R. 166:

Human rights legislation is of a special nature and declares public policy regarding matters of general concern. It is not constitutional in nature in the sense that it may not be altered, amended, or repealed by the Legislature. It is, however, of such nature that it may not be altered, amended, or repealed, nor may exceptions be created to its provisions, save by clear legislative pronouncement.

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The emphasis upon the "special nature" of human rights enactments was a strong indication of the court's general attitude to the interpretation of such legislation.

In *Re Ontario Human Rights Cornell and Simpsons-Sear Ltd.* (1985), 23 D.L.R. (4th) 321, [1985] 2 S.C.R. 536, 9 C.C.E.L. 185, the court set out explicitly the governing principles in the interpretation of human rights statutes. Again writing for a unanimous court, McIntyre J. held, at pp. 3289 D.L.R., pp. 546-7 S.C.R.:

It is not, in my view, a sound approach to say that according to established rules of construction no broader meaning can be given to the Code than the narrowest interpretation of the words employed. The accepted rules of construction are flexible enough to enable the court to recognize in the construction of a human rights code the special nature and purpose of the enactment ... and give it an interpretation which will advance its broad purposes. Legislation of this type is of a special nature, not quite constitutional but certainly more than the ordinary -- and it is for the courts to seek out its purpose and give it effect. The Code aims at the removal of discrimination.

It is that approach which must guide the Board and the courts in the interpretation of the Yukon Human Rights Act. The objects of the Act set out in s.1 make it clear as to the purpose

of the legislature in enacting the statute, • namely, to further the public policy that "every individual is free and equal in dignity and rights" and to "discourage and eliminate discrimination".

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In *Law Society of British Columbia et al. v. Andrews et al*, (1989 ), 56 D.L.R. (4th) 1, McIntyre J., who dissented in the result, contrasted s.15(1) of the Charter with human rights legislation generally and commented at p.18:

Certain differences arising from the difference between the Charter and Human Rights Acts must, however, be considered. To begin with, discrimination in s.15(1) is limited to discrimination caused by the application or operation of law, whereas the Human Rights Acts apply also to private activities. Furthermore, and this is a distinction of more importance, all the Human Rights Acts passed in Canada specifically designate a certain limited number of grounds upon which discrimination is forbidden.

That analysis applies to the Yukon Human Rights Act. Section 8 of the Act designates a certain limited number of grounds upon which discrimination is forbidden.

#### DISCRIMINATION UNDER THE ACT.

On this appeal the appellants made reference to the definition of discrimination contained in the judgment of McIntyre J. in *Andrews*, supra. He said at p.18:

There are many other statements which have aimed at a short definition of the term discrimination. In general, they are in accord with the statements referred to above.

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I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.

In the course of its decision the Board said:

It is not disputed that discrimination in an abstract sense has been established, and that the actions of the Lodge constitute discrimination against Mrs. Gould and women in general, by virtue of Section 6(f) of the Act.

Before Wachowich J. and again on this appeal the respondents contended that they had not conceded before the Board that the conduct of the Lodge constituted discrimination against Mrs. Gould.

The concern of the appellants with respect to the meaning of discrimination arises from the conclusion expressed by Wachowich J. when he said:

No one would dispute that the Human Rights Act must be consistent with the supreme law of Canada, the Charter of Rights and Freedoms. Yet, unlike the Board, I am reluctant to state uncategorically and without more that the conduct of the Pioneers in the rejection of Madeleine Gould's membership

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application amounts to discrimination, either directly or by adverse effect.

He concluded on this aspect of the matter:

Whether or not discrimination has been established is a question of law, The Board, by stating that discrimination in the abstract had been established, failed to take into account relevant considerations respecting the issue of discrimination and erred in law. The Board must view the definitions of discrimination in a broader social, political and legal context. The Board must consider the objectives the legislation sought to achieve. The Board must recognize that not all differential treatment is necessarily discriminatory treatment. The guidelines of our highest Court must be adhered to. In particular, the Board must carefully find and apply the particular facts of any case to the legislation in determining whether discrimination, as a matter of law, has been established. This will be the first task for the Board on the re-hearing of this matter.

With respect, I do not share the views expressed by Wachowich in the foregoing passages. In my opinion, s.6 of the Yukon Human Rights Act defines discrimination for the purposes of the Act. That section provides that it is discrimination to treat any individual or group unfavourably on the ground of sex. On the basis of the agreed statement of facts it was open to the Board to conclude, as it did, that Mrs. Gould had been discriminated against with respect of her application for membership in the Lodge. As the Act itself provides its own definition of discrimination it is

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unnecessary to resort to decisions of the Supreme Court of Canada in order to determine whether or not the Board was correct in its Interpretation of s.6 of the Act and its application of that interpretation to the agreed facts before it. Thus I conclude that the Board did not err in law in reaching the conclusion that Mrs. Gould had established that, with respect to her application for membership, she had suffered discrimination.

THE PROPER INTERPRETATION OF S.8(a) OF THE ACT.

After determining that discrimination had been established by Mrs. Gould pursuant to the provisions of s.6(f) of the Act the Board then turned to a consideration of whether or not that discrimination was proscribed by the provisions of s.8(a) of the Act. The Board said:

Turning to the second situation, Mrs. Gould and the Status of Women argue that, at least in relation to the role of the Lodge in the collection and preservation of Yukon's history, this public service cannot be performed properly without the active input, through membership in the Lodge, of the female segment of the population. They reason that history will be distorted in favour of the male role if it is recorded solely by males. While the Board is of the opinion that the evidence presented at the hearing in relation to that point was of such a nature that it could not be accorded much weight, the Board is prepared to accept the proposition from a common sense standpoint. An analogy can be made to the recording 'of North American history by Europeans, and the emphasis placed

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in our schools on the role of the non-indigenous element of our society because of the lack of participation by indigenous people in that recording.

The Board therefore finds that there has been discrimination by the Lodge, in the rejection of Mrs. Gould's application for membership, and that this discrimination is of the type prohibited by Section 8(a) of the Act.

To begin with Wachowich J. considered that in resorting to e. common sense standpoint the Board was purporting to take judicial Notice of the fact. Counsel for the respondents made that submission on the hearing of this appeal in my opinion, what the 3card was doing was setting out how it had proceeded logically to reach a conclusion based upon an inference it drew from the evidence before it. Viewed in that way I would not criticise the reasoning of the Board.

However, a more significant issue arises with respect to the interpretation placed on s.8(a) of the Act by the Board. Wachowich J. and this Court are limited by the provisions of the Act to considering questions of law on any appeal from the decision of the Board. Any decision of the Board on the facts is therefore final.

The complaint of Mrs. Gould is not that the Lodge discriminated against her as a member of the public with respect to providing to her its collection of Yukon history gathered by the

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Order's historians, including the present historian Mr. Cyr. No such discrimination emerges from the agreed statement of facts before the Board.

Rather Mrs. Gould's complaint was that in the collection and preservation of the history of the Yukon by the Order there was discrimination against her as a member of the public because the collection and preservation of that history was collected, preserved and recorded solely by males.

The collection and preservation of history of the Yukon by the historians of the Order, including Mr. Cyr, is the product of the efforts of such historians on behalf of the Lodge.

The issue for the Board on the interpretation of s.8(a) of the Act was whether that provision in the Act had any application to the collection and preservation conducted by the historians of the Lodge.

In interpreting s.8(a) of the Act in accordance with the principles enunciated by the Supreme Court of Canada it is necessary to give it a broad interpretation to ensure that the stated objects and purposes are fulfilled.

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In my opinion, the purpose in s.8(a) of the Act is to proscribe discrimination when offering or providing services to the public. This approach is consistent with the object set out in the Act, namely, to ensure that every individual is free and equal in dignity and rights. Thus every individual is equally entitled to any services offered or provided to the public.

The appellants sought to support the reasoning of the Board by concentrating on the meaning to be given "providing" in s.8(a) of the Act. The appellants contended that "providing" should be construed to encompass the collection and preservation of history by the Lodge. Reference was made to the definition given to "provide" by the Shorter Oxford English Dictionary (3rd. ed.):

1. To prepare, get ready, or arrange (something) beforehand. Now rare, late M.E.
2. To make preparation, get ready. 3. To supply or furnish for use; to yield, afford.

Reference was also made to Black's Law Dictionary (6th ed., 1990) which defines "provide" as follows:

Provide. To make, procure, or furnish for future use, prepare. To supply; to afford; to contribute.

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It was urged by the appellants that the preparation of the historical record as done by the Pioneers involves discrimination in two aspects. First, the discriminatory act of excluding women from membership in the Pioneers affects the nature of the historical record prepared by the Pioneers, by distorting Yukon history in favour of the male role. As long as the Pioneers remain male, the Pioneers' mandate to record and disseminate the history of the Pioneers will focus on the activities of men. As long as the recorders of the Pioneers' activity are only male the perspective of women in identifying, for example, topics for investigation, sorting facts, and conducting interviews or research will be lacking.

Second, the appellants contend that Mrs. Gould has herself been discriminated against in the preparing of the historical record by the Pioneers. The writing of history involves conscious intellectual decisions about what aspects of the past to explore, what details to research and how to preserve the results of that research. These kinds of decisions profoundly affect the nature of the product which will be disseminated by the Pioneers as historical fact. Through the denial of membership, Mrs. Gould has been denied the opportunity to be present at and take part in the kinds of intellectual decisions that shape how Yukon history will be collected and reported by the Pioneers.

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In my opinion the starting point for the interpretation of s.8(a) of the Act is to consider the service that the Lodge is providing to the public. The Board concluded that the service being provided to the public by the Lodge was the collection and preservation of the history of the Yukon. The Board reasoned that that service could not be performed properly without the active input, through membership in the Lodge, of the female segment of the population.

However, the Lodge does not offer or provide a service to the public by way of enabling the public or members of the public to engage in collecting, preserving and publishing the history of the Yukon. That is not the type of service that is provided by the Lodge to the public. For example, the Lodge does not offer to provide research facilities to members of the public with respect to the history of the Yukon. That aspect of the function of the Lodge is purely private. Nor does it offer to provide genealogical research to members of the public.

The service provided to the public is to make available at the request of any member of the public the results of the collection, research and recording of the history of the Yukon by Mr.

Cyr and others. Section 8(a) of the Act imposes on the Lodge the obligation to make such research available to any member of the public without discrimination.

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The Board fell into error in treating the service provided by the Lodge to the public as the collection and preservation of the history of the Yukon. It is not the collection and preservation of that history that is the service offered to the public but rather the fruits of its, labours in investigating, collecting and recording such history .that is provided to the public at the request of any member of the public.

The effect of the interpretation by the Board of the meaning to be given to s.8(a) of the Act is to permit the Board to consider the content of the material provided by the Lodge as a service to the public. Thus the Board was able to conclude that without the active input of the female segment of the population the history prepared by Mr. Cyr and others will be distorted.

In my opinion, s.8(a) of the Act does not permit the Board to consider the content of the material provided by the Lodge as a service to the public.

To interpret s.8(a) of the Act in the manner adopted by the Board would have far-reaching implications.

To begin with the effect would be to limit the right to freedom of expression in s.4 of the Act by holding that any expression related to one of the subjects enumerated in s.6 which

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is not evenly balanced, or which is limited to expressing ea particular point of view would amount to proscribed discrimination.

The Yukon enjoys a multicultural heritage. Section 2 of the Act recognizes this fact. It provides:

2. This Act shall be interpreted in a manner consistent with the preservation and enhancement of the multi-cultural heritage of the residents of the Yukon.

The fabric of society is the result of the contribution of many diverse and distinct points of view. The interpretation by the Board of s.8(a) would mean that any individual or group in Yukon society could claim discrimination because something offered or provided as a service

to the public expressed only a limited or narrow point of view with respect to the enumerated matters. That was not the purpose in enacting s.8(a).

Further, in my opinion, if the legislature intended to restrict the freedom of expression in 8.4 of the Act by the provisions found in s.8(a) of the Act it would require clear language to do so. There is nothing in s.8(a) which would indicate that the legislature intended to deal in that section of the Act with the content of any material offered or provided by way of a service to the public.

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Further, to subscribe to the interpretation placed on s.8(a) by the Board would give to the Board a right of censorship over any material provided to the public by any individual or group. That was clearly not the intention of the legislature in enacting s.8(a).

Therefore I conclude that the Board fell into error in its interpretation of s.8(a) of the Act when it concluded that within that section the collection and preservation of the history of the Yukon by the Lodge, recorded solely by males, constituted discrimination with respect to Mrs. Gould.

As a result the Board was in error in its interpretation of the provisions of s.8(e) of the Act.

#### OTHER SUBMISSIONS RAISED ON THE APPEAL.

In his reasons for judgment Wachowich J. canvassed the provisions of s.9 and 5.10 of the Act and made a number of observations which he considered would assist the Board.

In my opinion, the discussion of the provisions of s. 9 and s.10 of the Act should be left to an appropriate proceeding in which they fall to be determined by a Board.

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In the view I take of this matter it was unnecessary for Wachowich J. to consider those provisions. In the result it is unnecessary to canvass the submissions made by counsel with respect to those matters on the hearing of this appeal.

#### COSTS.

The respondents seek a direction that they are entitled to the costs of the appeal. Before the Board and on the appeal to Wachowich J. no direction was made with respect to costs.

On this appeal it was contended that the appellant Yukon Human rights Commission is a creation of the Yukon Legislature and is funded by the Yukon Government. The respondent Lodge, on the other hand, is funded by the membership fees of its members. The struggle from an economic point of view is said to be unequal. The respondents further contend that the circumstances of this case warrant an award of costs on a scale higher than the basic tariff for a number of reasons.

In my opinion it is not appropriate to make any special direction with respect to costs other than to direct that costs shall follow the event.

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#### THE CONSTITUTIONAL ISSUE.

Before the Board and before Wachowich J. the respondents' position was that no constitutional challenge to the Yukon Human Rights Act was being raised. However, the respondents in their factum in this appeal sought to raise a constitutional challenge to certain provisions of the Act. The appellants complained that this change in position by the respondents prejudiced the appellants because the record did not contain any evidence to meet a challenge under s.1 of the Charter of Rights and Freedoms. On a preliminary application in Chambers a ruling was made that it was not open to the respondents to raise a constitutional challenge at this stage of the proceedings. As a result no submissions were made with respect to this aspect of the appeal.

#### CONCLUSION.

For the foregoing reasons I conclude that this matter must be remitted to the Board to properly apply s.8(a) of the Act to the facts before it. On a proper application of that section to the facts found by the Board, the Board was in my view obliged to dismiss the complaint.

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In the result I would dismiss the appeal.

The Honourable Mr. Justice Hinkson

I AGREE:

The Honourable Justice Toy

I AGREE:

The Honourable Mr. Justice Taylor

ON APPEAL FROM THE DECISION OF THE BOARD OF ADJUDICATION UNDER THE HUMAN RIGHTS ACT, DATED THE 24TH DAY OF JANUARY, 1989, HEARD IN THE CITY OF DAWSON, YUKON TERRITORY

BETWEEN:

Madeleine Gould

Complainant (Respondent)

AND:

Yukon Order of Pioneers, Dawson Lodge No. 1 and Walter Groner

Respondents (Appellants)

AND:

YUKON STATUS OF WOMEN COUNCIL

Intervenor

Reasons for Judgment of the Honourable Mr. Justice Allan H. Wachowich

I

BACKGROUND

A. INTRODUCTION

This is an appeal by the Yukon Order of Pioneers, Dawson Lodge #1 and Walter Groner ("Pioneers") from a decision of a Board of Adjudication ("Board") under the Human Rights Act, S.Y. 1987, c. 3 ("Human Rights Act" or "Act").

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In September of 1987, one Madeleine Gould applied to join the Pioneers. Her application was rejected by the Pioneers because, being female, she did not qualify for membership.

In December of 1987, Madeleine Gould complained to the Human Rights Commission that the Pioneers had contravened certain provisions of the Human Rights Act. The hearing before the Board took place in early January of 1989. A written decision was issued by the Board on January 24, 1989. It is from this decision that the Pioneers appeal.

## B. RELEVANT LEGISLATION

The complaint to the Commission alleged that the Pioneers had contravened sections 8(a) and 11 of the Human Rights Act, the relevant provisions of which include:

Recognizing that respect for human rights is a fundamental part of Canada's heritage,

That Canada is a party to the United Nations' Universal Declaration of Human Rights and other international undertakings having as their object the improvement of human rights in Canada and other nations of the world,

That the Yukon Government has a responsibility to encourage an understanding and recognition of human rights that is consistent with Canada's international undertakings and with the initiatives taken by Canada and the provinces, and

That it is just and consistent with Canada's international undertakings to recognize and make special provision for the unique needs and cultural heritage of the aboriginal peoples of the Yukon,

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The commissioner of the Yukon Territory, by and with the advice and consent of the Legislative Assembly, enacts as follows:

### Objects

1. (1) The objects of this Act are

(a) to further in the Yukon the public policy that every individual is free and equal in dignity and rights,

(b) to discourage and eliminate discrimination,

(c) to promote recognition of the inherent dignity and worth and of the equal and inalienable rights of all members of the human family, these being principles underlying the Canadian Charter of Rights and Freedoms and the Universal Declaration of Human Rights and other solemn undertakings, international and national, which Canada honours.

(2) This Act does not affect rights pertaining to aboriginal peoples established by the Constitution of Canada or by a land claims agreement.

### Multi-cultural heritage

2. This Act shall be interpreted in a manner consistent with the preservation and enhancement of the multi-cultural heritage of the residents of the Yukon.

## PART I

### BILL OF RIGHTS

Right to freedom of religion and of conscience

3. Every individual and every group shall, in accordance with the law, enjoy the right to freedom of religion, conscience, opinion, and belief.

Right to Freedom of Expression

4. Every individual and every group shall, in accordance with the law, enjoy the right to freedom of expression, including freedom of the press and other media of communication.

Right to enjoyment and disposition of property

5. Every individual and every group shall, in

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accordance with the law, enjoy the right to peaceable assembly with others and the right to form with others associations of any character.

Right to Enjoyment and Disposition of Property

PART 2

DISCRIMINATORY PRACTICES

Prohibited Grounds

6. It is discrimination to treat any individual or group unfavourably on any of the following grounds:

(f) sex, including pregnancy, and pregnancy related conditions,...

(l) actual or presumed association with other individuals or groups whose identity or membership is determined by any of the grounds listed in paragraphs (a) to (k).

Duty to Provide for Special Needs

Prohibited Discrimination

8. No person shall discriminate

(a) when offering or providing services, goods, or facilities to the public,

(b) in connection with any aspect of employment or application for employment,

(c) in connection with any aspect of membership in or representation by any trade union, trade association, occupational association, or professional association,

(d) in connection with any aspect of the occupancy, possession, lease, or sale of property offered to the public,

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(e) in the negotiation or performance of any contract that is offered to or for which offers are invited from the public.

Reasonable cause

9. It is not discrimination if treatment is based on

(a) reasonable requirements or qualifications for the employment,

(b) on a criminal record...

(c) sex, so as to respect the privacy of the people to whom accommodations or a service or facility is offered, or

(d) other factors establishing reasonable cause for the discrimination.

#### Exemptions

10.(1) It is not discrimination for a religious, charitable, educational, social, cultural, or athletic organization to give preference to its members or to people the organization exists to serve.

(2) It is not discrimination for individuals to give preference to members of their family.

(3) Section 8 does not apply to

(a) the employment of a person to provide services in a private home or in any exclusively religious, charitable, educational, social, cultural or athletic organization,

(b) the choice by an occupant of a private home of a boarder....

#### Systemic Discrimination

11. Any conduct that results in discrimination is discrimination.

#### Special programs and affirmative action

#### Harassment

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#### Equal Pay for work of equal value

### PART 3 YUKON HUMAN RIGHTS COMMISSION

#### Human Rights Commission

#### Appointment of Commission

#### Annual report of commission

#### Director of Human Rights

### PART 4

## COMPLAINTS

#### Complaints

19.(1) Any person believing that there has been a contravention of this Act against him or her may complain to the commission who shall investigate the complaint unless

(a) the complaint is beyond the jurisdiction of the commission,

(b) the complaint is frivolous or vexatious: or

(c) the victim of the contravention asks that the investigation be stopped.

(2) A complaint must be made within six months of the alleged contravention.

#### Disposition of complaints by commission

#### Panel of Adjudicators

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#### Fundamental justice

22. The board of adjudication shall conduct its hearings in accordance with the principles of fundamental justice and may exercise all the powers of a board of adjudication appointed under the Public Inquiries Act.

Where complaint established

23. (1) If the complaint is proven on the balance of probabilities the board may order the party who discriminated to

- (a) stop the discrimination,
- (b) rectify any condition that causes the discrimination,
- (c) pay damages for any financial loss suffered as a result of the discrimination,
- (d) pay damages for injury to dignity, feelings, or self-respect,
- (e) pay exemplary damages if the contravention was done maliciously
- (f) pay costs.

Costs of adjudication

Enforcement of adjudication orders by court

Appeals

26.(1) Any party to a proceeding before a board of adjudication may appeal final decisions of the board to the Supreme Court by filing a notice of appeal with the court within thirty days after the order of the board of adjudication is pronounced.

(2) The procedure for the appeal shall be the same as for an appeal in the Court of Appeal.

(3) An appeal under this section may be made on questions of law and the court may affirm or set aside the order of the board and direct the board to conduct a new hearing.

(4) The only proceeding that may be taken to set aside or

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vary decisions of the board is the right of appeal given by this Act.

PART 5

OFFENCES

PART 6

MISCELLANEOUS

"person" includes a partnership, an unincorporated organization or association, and a trade union.

36. This Act supersedes every other Act, whether enacted before or after this Act, unless it is expressly declared by the other Act that it shall supersede this Act.

37. The Fair Practices Act is repealed.

Pursuant to s. 33 of the Human Rights Act and by Order-in-Council 1988/170 dated October 17, 1988, the Commissioner in Executive Council ordered that the Human Rights Regulations be made and established. Provisions directly concerning the present appeal include the following:

## Requests for board of adjudication

7.(1) The Director of Human Rights, the complainant, or the respondent may request the Commission to ask a board of adjudication to decide the complaint.

## Order for presenting case to board of adjudication

10. The normal procedure shall be that evidence shall be presented by the Commission, then by the complainant, and then by the respondent, and argument shall be presented in the same

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order as the evidence but the board of adjudication may modify that order where it seems appropriate for the effective conduct of the hearing.

## Admissible evidence

11.(1) In addition to receiving evidence in accordance with the Evidence Act, the board of adjudication may receive or view any relevant evidence whether under oath or otherwise and irrespective of whether that evidence would be admissible in proceedings in court, and the board may act according to its view of the reliability and import of the evidence.

(2) The board of adjudication may receive evidence of similar acts for the purpose of proving a pattern of conduct or a practice.

(3) Where a party has introduced documentary evidence, the board of adjudication may require the attendance of the author of the document for the purposes of cross-examination on the document, but the costs occasioned by the attendance of the author shall be borne by the party who requests the author's attendance unless the board is satisfied that it would have been misled by the document in some material respect if the cross-examination had not been heard.

## Intervenors

16.(1) The Chief Adjudicator or, after the adjudication hearing has begun, the board of adjudication may allow a person to intervene and take part in the hearing in the way and on the conditions determined by the board where

(a) the decision about the complaint will affect the person, or the class the person represents, in a substantial way differently from the way it will affect the public at large, and

(b) the person can make a contribution which will assist the board in fairly and effectively resolving the issues brought before it by the Commission, the complainant, and the respondent.

(2) A person shall not be allowed to intervene where

(a) the dominant characteristic of their intervention would be to duplicate or support the evidence and submissions of others who are already parties, or

(b) the intervention would introduce new issues that

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need not be dealt with in order to decide the complaint.

Since the Commission may exercise all the powers of a board "appointed under the Public Inquiries Act", it is appropriate to briefly review the provisions of this legislation. Essentially, the Public Inquiries Act, R.S.Y. 1986, c. 137, permits the appointment of tribunals relating to any matter of public concern. Sections 4 and 5 deal with the powers of a board under this Act, as follows:

4. Every board shall have the power, subject to reasonable notice, of summoning any person as a witness and of requiring him to give evidence on oath or affirmation and to produce such documents and things as the board considers necessary.
5. Every board shall have the same power as is vested in a court of record of civil cases,
  - (a) to enforce the attendance of persons as witnesses,
  - (b) to compel them to give evidence, and
  - (c) to compel them to produce documents and things.

The central issue of this appeal relates to the Board's interpretation of relevant legislation.

## C. FACTS

The application before the Board was brought by way of a statement of facts, about which there was agreement between Counsel for the Pioneers and Counsel for Madeleine Gould. The Intervenor was not a party to this agreement. These facts are important to a

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proper understanding of the issues raised on this appeal and were stated as follows:

### A. Relevant History and Objects of the Order

1. In the early 1890's there existed a community at Forty Mile in the Yukon Territory. The population of this community, due to the remoteness of its location and the hardships of daily life, was predominantly male. Organized law enforcement had not yet arrived and the community was plagued by the presence of certain nefarious and transient rogues whose activities included hooliganism, claim jumping, theft, fraud and other illegal and immoral acts.

2. In 1894 leading citizens of the Forty Mile community proposed the organization of a moral fraternal order for the purposes of establishing a police force and a fraternal group whose primary concern would be the welfare, security and well being of its members. As a result, the Yukon Order of Pioneers (the "Order") was formed on 1 December 1894

with 156 charter members. Being a fraternal order, membership was restricted to male persons of integrity and good character who met a ten year residency requirement.

3. The North West Mounted Police arrived in 1895 and were helped in their early endeavours by the Order. With the arrival of the Klondike Gold Rush, the Forty Mile population decreased dramatically with most of the members of the Order moving to the Dawson city area. The Dawson Lodge of the Order was created in 1897.

4. 'By the early 1900's the policing activities of the Order were no longer required and those activities ceased. Since then to the present date the primary objects of the Order have been social, historical and cultural with its paramount concern being the welfare and well being of its members.

5. At present there are only two active Lodges of the Order, those being the Dawson City and Whitehorse Lodges. The Whitehorse Lodge owns no fixed assets and conducts its meeting and social events in rented premises. The Dawson Lodge owns its own building.

6. The Order conducts no significant revenue raising activities and depends primarily on membership dues and member donations as its sources of income. An exception to this is that the Dawson Lodge offers its premises for rent to the public and uses rental receipts to defray the expenses of ownership and operation of the premises (i.e. insurance, taxes, utilities, etc.). In the past two years the Dawson

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Lodge premises have been rented approximately twenty-five times and gross rental income over that period has been approximately \$3,950.00.

7. The majority of the Order's members are gentlemen in the retired and senior citizen age grouping.

8. The present day activities of the Lodges can be summarized as follows:

(i) ten monthly membership meetings per year (recess in July and August). Monthly meetings last about two to three hours each. The routine monthly business and rituals of the Lodge take up about one to one and one half hours and the members thereafter retire to coffee and sandwiches and a social hour. The social time is

predominantly spent in reviewing acquaintances, catching up on news affecting members, social visiting and, in large part, reminiscing about events and members of years gone by;

(ii) two social functions per year for members and guests;

(iii) one annual Grand Lodge meeting (jointly attended by Dawson and Whitehorse Lodge members - election of executives - followed by social function);

(iv) the Dawson Lodge participates in the Discovery Day parade;

(v) the Whitehorse Lodge participates in the Rendezvous parade;

(vi) the Order recommends to the Sourdough Rendezvous the selection of Mr. and Mrs. Yukon for each year;

(vii) the Lodges each have committees to attend to the welfare and well being of the members. The "Sick Committee", for example, visits sick members, sends cards and flowers, informs the membership as to the member's status and progress, and attends to the needs of the member and his family;

(viii) sections within the Dawson City and Whitehorse public cemeteries are reserved for members and their families and, at the request of a member or his family, the Order will provide its traditional funeral and burial ceremony and rites;

(ix) the primary objects and focus of the Order are the mutual protection of its members and the uniting of those

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members in the strong tie of brotherhood. The order is dedicating to preserving the history of the Order and of its members. It is equally dedicated to preserving the moral values, male camaraderie and mutual respect, traditions and secret rites that were engendered by and formed the fabric of a Klondike brotherhood in the 1890's;

(x) other objects of the Order are the advancement of the Yukon Territory, preserving the names of all Yukon Pioneers on the rolls of the Order and collecting and preserving the literature and incidents of Yukon's history. In this latter regard

the Order's historian, Mr. Laurent Cyr, whose serves in a voluntary and unpaid capacity, engages in the following activities:

- (a) responds to requests from the public for information on the Order's past members and on the history of the Order;
- (b) provides historical data, records and materials on the Order and its members to the Yukon Archives;
- (c) solicits information on the history of the Order and its members from members and other individuals and organizations;
- (d) collects data, records, photos and other historical information respecting the Order and its members.

#### B. Facts Pertinent to Ms. Gould's Complaint

1. On or about 2 September 1987 the complainant, Madeleine Anita Gould, made formal application to join Dawson Lodge No. 1 of the Yukon Order of Pioneers.
2. Ms. Gould's application was rejected on the ground that, being a female, she was not qualified for membership. By the Order's constitution and tradition, it is a fraternal brotherhood and membership is restricted to male persons.
3. Having rejected Ms. Gould's application on the foregoing basis, the Dawson Lodge did not deem it necessary to consider or rule on her other qualifications for membership. For the purposes of this hearing, the Respondents are prepared to assume that the Complainant meets the other qualifications for membership.

During the course of the hearing on January 11 and 12, 1989,

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two additional facts agreed upon by Counsel for the Pioneers and Counsel for Madeleine Gould were submitted to the Board:

1. Applicants for membership in the Order are screened by two recommending members and also by a committee of investigating members, and

2. the bulk of the activities of the Order is focused on its members and internal fraternal affairs. Only a minor percentage of its activities is spent on matters involving collection and preservation of history.

In addition, the Yukon Status of Women Council ("Intervenor") made written submissions to the Board. At the hearing, discussion ensued about the nature of the materials being put forward by the Intervenor. It is unclear whether the Board accepted the Intervenor's materials as argument only, or whether a portion of it was admitted as evidence.

In my view, the Board did not err in initially allowing the Intervenor's submissions. Section 11 of the Human Rights Regulations confers on the Board wide latitude "to receive and view any relevant evidence." One can readily infer that the Board considered the Intervenor's materials relevant to the matter before it and, therefore, admissible. In my view the Board makes no error in doing so but what weight is given such material I will discuss later in the Judgment. The Board is clearly not fettered, as is a court of law, by formalized rules of evidence and I am of the view that it would be incorrect to attempt to place strict limits on the Board's discretion as to what is relevant. Relevance, for the

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purpose of admissibility, should be broadly construed. Having said that, however, it must be borne in mind that section 22 of the Human Rights Act requires that the Board conduct its hearings "in accordance with the principles of fundamental justice". Section 11(1) of the Human Rights Regulations states that the Board "may act according to its view of the reliability and import of the evidence." What is evidence in a particular situation is not an easy question. I conclude, however, that the determination by the Board of evidentiary issues, including the weight to be given the Intervenor's materials critically affected its ultimate decision.

Evidentiary issues arising on this appeal require careful consideration and will be addressed separately from issues of statutory interpretation. In the end result, however, I also conclude that the submissions of the Intervenor relating to the collection and preservation of history cannot properly be characterized as evidence and should not have been given any weight by the Board in respect of the critical finding of prohibited discrimination. This is not to say, however, that the Board was precluded from using the materials for any purpose. I will attempt to clarify this distinction in the latter part of this judgment.

Similarly, I conclude that the Board could not reach "from a common sense standpoint", the decision it did. I will elaborate this point also.

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Since I am of the view that this appeal does not turn solely on the admissibility or consideration by the Board of the Intervenor's submissions whether as evidence or argument, I will incorporate the Intervenor's submissions into my consideration of the correct interpretation to be placed on certain provisions of the Human Rights Act. This will permit me to canvass the positions of all parties to this appeal to the fullest extent. This I was asked to do during the course of argument and I trust that this lengthy Judgment meets the invitation extended to me by counsel.

#### D. SUBMISSIONS OF THE INTERVENOR

In addition, it is said that the Pioneers provide "services to the public by recording, preserving, collecting and making public,

In its brief, the Intervenor stated that the decision rendered by the Board would affect women in a substantial way and differently from the rest of the public in that it might well have a bearing on whether females can become members of a variety of organizations currently restricting membership to males only. I infer that the Board allowed representation of the Intervenor on this basis also: section 16, Human Rights Regulations.

In written argument, the Intervenor referred to the constitution of the Pioneers and noted that it does not expressly exclude females.

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various materials on the history of the Yukon," and that by excluding females from membership in the organization, females are therefore denied equal representation in the history recording carried out by the Pioneers. The Intervenor argues there is a lack of historical materials available respecting Yukon women and there has been little research done on the nature of women's contributions and participation in the making of Yukon history. The essence of the Intervenor's submission is stated at page 3:

By ignoring women in historical recordings, historians have given the public a lop-sided view of history. Women's role in history is seen as peripheral, and not as important as that of men. This situation has cultivated the view that women are not as important as

men in the shaping of our society. The invisibility of women in history serves to perpetuate ,discrimination against women.

Our views about the past shape the way we perceive the present. Students learn that history is a male domain, that men were the key historical players. This perception affects the way in which we view the role of women today.

By restricting membership to men, [the Pioneers] excludes women in the collecting and recording of history carried out by [the Pioneers]. Women's names, stories and points of view are excluded from [Pioneer] records, even though [the Pioneers'] aim is to preserve the history of the Yukon as a whole. While [the Pioneers] are not solely responsible for the discrimination against women in history, [the Pioneers'] actions do contribute to this distortion of history.

It is incumbent upon all contributing parties to take immediate action to rectify this discrimination. [The Pioneers] should end its part in this discrimination by allowing women to become full members of the organization.

The Intervenor also submitted that s. 10 of the Human Rights Act should be construed narrowly since to do otherwise would have significant undesirable consequences for membership in a variety of

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organizations.

The Intervenor stated a number of propositions in support of its submission that the Pioneers should allow women to become full members, beginning with the statement that more and more male-only clubs are being pressured to change and are voluntarily changing membership policies. Secondly, while there is no proof that Pioneers engage in (to use the Intervenor's words) "commercial activities" at its meetings, the organization has contributed to the historical discrimination against women by not allowing women to take part in the Pioneers' preservation and collection of history. The Intervenor relies on the significance of the constitution of the Pioneers which does not expressly exclude women from membership and concluded that the constitution therefore allows the participation of women as members. Simply stated failing to exclude results in inclusion. It is further said that the Pioneers provide a service by collecting and "making public" records, artifacts, photographs and other materials collected from Pioneer members. Much was made of this point; however, it is conceded by the Intervenor that distribution of collected information to the public is without discrimination.

Notwithstanding a lack of discrimination in distribution the Intervenor's submissions clearly point out that the Pioneers, however, discriminate in the preparation or processing of this information. There, argument is that to meet the overall aims of

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the legislation, interpretation of the verbs "offering" and "providing" found in section 8(a) of the Human Rights Act should be read to include delivery AND preparation. As the Pioneers are "active in collecting, recording and preserving history for the public use," the Intervenor concluded that "[all] these activities fall into the category of offering or providing services to the public" and, moreover, excluding women from membership results in discrimination against all women.

The Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW") and the Charter of Rights and Freedoms ("Charter"), said to be the "... basis upon which the objects of the Yukon Human Rights Act are built," are offered both for their principles and as interpretive aids. The intervenor suggests that "we may well see more court challenges of the human rights exemption clauses in the future on the basis that these exemptions infringe on equality rights as articulated in s. 15 of the Charter." To the extent necessary for the purposes of this appeal, this matter will also be touched upon.

The Intervenor made reference to other published materials and submits that these materials support the argument that, for the most part, women have gone unmentioned in historical accounts because historians were male and the milieu in which historians worked tended to preclude women. Author Angela Wheelock is quoted, at page 16:

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I have discovered fascinating information on many of these women during my research, from dancehall girls to miners' wives to native women to school teachers. Yet most of these women never appear in the best known accounts of the gold rush.

This is even more true of the native women who married early prospectors and traders, and the women who worked as seamstresses, cooks, and at laundries in Dawson, providing necessary services for the thousands of miners who came in search of gold.

This author goes on to point out that many of the Pioneers were married to these women but their names never appeared in the histories completed by the designated Pioneer member. The Intervenor also provided brief biographies of Belinda Muironee, Martha Louise Black and Victoria Faulkner, three Yukon women who made significant contributions to their communities and the Yukon at large.

If one accepts the view stated at page 1 of Rethinking Canada: The Promise of Women's History, V. Strong-Hoag and A. Fellman, eds., not only women were ignored in historical accounts:

History is a retelling of human experience. To give meaning to that experience, we focus the beams of memory and research on certain events, people, and places, leaving others in the shadows. From time to time, influenced in part by what seems to be important in our own lives, we move the beams to illuminate unfairly obscured aspects of the human past.

Until recent years the telling of Canadian history has focused most on the economic and political origins of the two founding cultures, and on the winning of nationhood. The primary actors in these dramas were seen to be fur traders, merchants, lumberjacks, and politicians.... Left in the shadows were native peoples, non-charter ethnic groups, geographical areas outside central Canada, the inner lives of Canadians, most members of the working class, and almost all women. The focus

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on public figures fed a particular view of time as well....

Events in our own times have prompted us to rethink Canadian history to understand more fully the participation and importance of groups and areas previously slighted. Pushed by the contemporary women's movement to become more conscious of gender as a category of analysis, and aided by a resurgence of interest in social history, which broadened the range of legitimate historical topics, researchers have begun exploring the history of Canadian women. They do so for two basic reasons. Inasmuch as we as human beings need to place ourselves in time, to tie ourselves to those who came before us, it is only just that women - and men too - know as much as possible about the lives of their female ancestors. To be denied a sense of one's own history, indeed to be informed that there exists no history worth recounting, is to have an essential part of one's humanity denied. The second reason that historians have begun to study women is the gradual realization that we cannot pretend to reconstruct a reasonable history of the Canadian people by ignoring the lives and participation of half of them.

It is contended by the Intervenor that limiting history to specific economic or political events leads to an incomplete and distorted view of Canadian history and more and more historians are recognizing that traditional research methods are inadequate; therefore, it follows that the Pioneers' exclusion of females from membership, "... has far-reaching implications," and "[t]he ignoring of women's role in history does produce adverse effects on women." Furthermore, the Intervenor urged that the right to freely associate must be balanced with the right to equal treatment of other people. The Intervenor concluded that:

If we are to eliminate discrimination against women in the future, we must address the past and present treatment of women in all facets of life, including the writing of our collective histories.

The focus of this appeal is whether, on the facts of this

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particular case, the Human Rights Act can be invoked as a means to that end.

## OTHER MATERIALS

In addition to the Agreed Statement of Facts and the Intervenor's submissions, the Board was provided with written synopses of argument both from Counsel for the Pioneers and for Madeleine Gould. Also provided were copies of the Pioneers' constitutional documents, a list of guidelines for recommending and investigating members, a brochure produced by the Government of the Yukon explanatory of its new human rights legislation (then Bill 99), and human rights case law. A verbatim transcript of the hearing was prepared.

## DECISION OF THE BOARD

Firstly, the Board found that the process by which application for membership in the Pioneers was made was genuine and enforced. This process required that an applicant for membership be presented by two members in writing at a regular meeting and then referred to a committee for investigation. If the committee report was favourable and the ballots of members positive, the applicant would be admitted as a member.

The first question the Board asked was whether the Pioneers

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offer or provide "services to the public." The Board stated that both Madeleine Gould and the Pioneers agreed that there was some element of "public service" albeit a minor element. The Board reviewed the constitution of the Pioneers and the stated objects of the organization and decided that as long as some "significant element" of the organization's activities are directed toward public service, then section 8(a) of the Human Rights Act applies.

Counsel for the Pioneers urged that there is a distinction between discrimination relating to membership and discrimination in the offering or providing of services to the public. Counsel for Madeleine Gould and for the Intervenor, on the other hand, argued that the public service element could not be properly performed without input of female members.

In arriving at its decision, the Board indicated that section 8(a) of the Act is applicable to govern the membership policies of organizations in at least two situations:

(1) Where membership election is a mere formality, an organization will be considered to be acting in a discriminatory manner if it refuses to provide services of a public nature by withholding membership. The Board cites to the reasoning of Lord Reid in Charter et al. v. The Race Relations Board, [1973] 1 All E.R. 512 at 516.

(2) Where the quality of the service is affected by discriminatory acts such as screening of membership.

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The Board held that the first situation was not applicable because the membership screening process, in this case, was genuine. As to the second situation, however, the Board accepted from a "common sense standpoint" that history would be distorted in favour of the male role if recorded solely by males. Although the Board noted that the evidence presented at the hearing on this point could not be accorded much weight, it was of the view that an analogy could be made to the recording of North American history by Europeans and the emphasis placed in our schools on the role of the non-indigenous element of our society because of the lack of participation of indigenous people in that recording. The Board found that there had been discrimination in the rejection of Madeleine Gould's application for membership and this discrimination was of the type prohibited by section 8(a) of the Human Rights Act.

As a result of this determination, the Board next considered whether section 10 of the Human Rights Act was applicable. The Board applied a restrictive approach to the construction of this section, citing Bhinder and the Canadian Human Rights Commission v. The Canadian National Railway Company, [1985] 2 S.C.R. 561 and concluded that "the people the organization exists to serve", in relation to the collection and preservation of Yukon history, is the whole community. The Board suggested that limiting the scope of the clause to male pioneers is overly restrictive and "begs the question". Thus, this group exemption section did not apply.

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The Board dealt with two further matters. It held that explanatory notes attached to a government publication explaining the provisions of the Act were of little or no weight. An analogy was drawn to explanatory notes in statute books where margin notes form no part of an enactment and are inserted for convenience only. Lastly, the Board was not persuaded that the constitution of the Order does, in fact, preclude female membership and, in any event, the words of male connotation in the constitution should be given an inclusive meaning.

The Pioneers appeal.

## G. GROUNDS OF APPEAL

The grounds of appeal are:

1. The Board of Adjudicators erred in law in its interpretation of the Human Rights Act and of the Yukon Order of Pioneers' ascertaining documents.
2. The Board of Adjudicators erred in law in making findings of fact which were perverse and contrary to the evidence and or unsupported by the evidence.
3. The Board of Adjudicators erred in law in accepting as evidence the submissions of the intervenor and in accepting as evidence that which was not evidence.
4. The Board of Adjudicators erred in law by failing to conduct its hearing in accordance with the principals (sic) of fundamental and natural justice and by exceeding its jurisdiction.
5. The Board of Adjudicators erred in law in its interpretation and application and failure to apply the Canadian Charter of Rights and Freedoms.

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6. The Board of Adjudicators erred in law in finding the respondent Yukon Order of Pioneers' rejection of the complainant's membership application to be discrimination.

II

## ANALYSIS

### A. INTRODUCTION

This fact situation is unique. I have been unable to find authorities directly applicable to the present case and none were offered.

In legislating in the realm of human rights, as in most areas of human endeavour, perfection is impossible. The democratic process, fuelled by the enlightened criticism of the electorate, demands that our legislators carefully balance ideals of conventional morality with new visions of our collective future. Ideally, by this process, they transcend social horizons currently accepted and develop the law. Free dialogue by informed persons of goodwill may ultimately produce consensus but, more likely, acceptable compromise. The promise of law is that it can be a stabilizing and unifying influence in a divided society. Situated in social, political and historical context, just laws will find the acceptance of rational human beings.

I will attempt to identify the law. I am faced with the necessity of finding answers and, for this case, the answers lie in

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the Human Rights Act notwithstanding that reflected in the arguments I have heard and materials I have read are clear and, perhaps, irreconcilable differences going to the very core of human rights theory. That each case must be decided on its own facts is particularly true of human rights matters. Cases cited by Counsel are entirely distinguishable from the facts that were before the Board and now before me. For this reason, I conclude that it would be unwise to attempt to state principles of general application and I decline to do so.

Stated in its broadest terms, the question that must finally be answered is: To what extent does the Human Rights Act impose upon the Pioneers an obligation to do some act or accept some liability it would not otherwise have done or accepted? In proceeding, I am mindful of the admonition of McIntyre, J. in Ontario Human Rights Commission and O'Malley v. Simpson-Sears Ltd., [1985] 2 S.C.R. 536 at 554, (1986) 7 C.H.R.R. D/3102:

While no right can be regarded as absolute, a natural corollary to the recognition of a right must be the social acceptance of a general duty to respect and to act within reason to protect it. In any society the rights of one will inevitably come into conflict with the rights of others. It is obvious then that all rights must be limited in the interest of preserving a social structure in which each right may receive protection without undue interference with others.

What follows may be seen as little more than judicial line-drawing. While precision along these lines is impossible I am, nevertheless, firmly of the view that the Board made errors of law which compel me to set aside this decision and direct the Board to

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conduct a new hearing. My aim is to facilitate the proper functioning of this Board, not to impede it; to clarify, not confound.

## B. JURISDICTION OF THIS COURT

The first matter arising on this appeal concerns the jurisdiction of this Court. In The Board of Governors of Seneca College .of Applied Arts and Technology v. Bhadauria, [1981] 2 S.C.R. 181, the Supreme Court of Canada foreclosed any common law cause of action for discrimination. However, both the Charter of Rights and Freedoms and human rights legislation address this common law limitation to the extent of their application to a given situation.

By sections 26(3) and 26(4), the Human Rights Act provides that an appeal may be made from a Board decision on questions of law. The only proceeding that may be taken to "set aside or vary" decisions is the appeal procedure provided in the Act.

In Harelkin v. University of Regina, [1979] 2 S.C.R. 561, 26 N.R. 364, 96 D.L.R. (3d) 14, the Supreme Court of Canada dealt with the availability of an appeal from a void or null decision. The Court held that the statutory right to appeal applied whether or not the decision was null or void citing to its earlier decision in Provincial Secretary of Prince Edward Island v. Egan, [1941] S.C.R.

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396 at 399 (per Duff, C.J.) . In the present case, because there is a statutory right of appeal on questions of law, I conclude that I need not decide if the Board's decision was void or merely voidable.

It is beyond controversy that a superior court can review for error in jurisdiction: Crevier v. A.G. Que., [1981] 2 S.C.R. 220 at pp. 236-237. It is also clear that, in the face of a so-called "privative" clause, a Court ought not to brand as jurisdictional that which is doubtfully so: C.U.P.E. v. N.B. Liquor Corp., [1979] 2 S.C.R. 227 at 233, 97 D.L.R. (3d) 417.

There is a difference, however, between the scope of this Court's jurisdiction on appeal and that of a court on judicial review. Despite the restrictions Canadian courts have recently placed on the parameters of judicial review to correct intrajurisdictional errors of law, I am of the view that the correct statement of the law respecting statutory appeals is found in Jones and deVillars, Principles of Administrative Law (1985), at page 339:

The "patently unreasonable" test has no application in the context of statutory appeals on "law or jurisdiction". In the first place, the legislature has granted an appeal from all errors of law, not just those which are patently unreasonable. Accordingly, it is the court's duty to determine the law in every case. Secondly, the very existence of such an appeal provision negates any concept of curial deference to the delegate's expertise, specialization or specific right to determine the matter finally, simply because the courts have been given such an explicit appellate power. Accordingly, there can be no argument that the statutory delegate has any

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right to make an error of law, however reasonable it might seem. As Beetz J. said in Le Syndicat des Employes de Production du Quebec et de l'Acadie v. Can. L.R.B. ([1984] 2 S.C.R. 412 at 441):

Unquestionably,... it is often difficult to determine what constitutes a question of jurisdiction, and administrative tribunals like the Board must generally be given the benefit of any doubt. Once the classification has been established, however, it does not matter whether an error as to such a question is doubtful, excusable or not unreasonable. What makes this kind of error fatal, whether serious or slight, is its jurisdictional nature; and what leads to excluding the ... ["patently unreasonable"] rule... is the duty imposed on the Federal Court of Appeal to exercise the jurisdiction conferred on .it... .

This same reasoning applies where the legislature has specifically imposed the duty on the court to correct errors of law. Accordingly, it does not matter whether an error is "doubtful, excusable or not unreasonable", the court has no authority not to correct such errors. This result must arise whether the alleged error is one of law or is jurisdictional in nature, because the legislation in question imposes the duty on the courts to correct all errors of both types. Accordingly, the only type of error which the court cannot correct is one relating solely to the merits of the delegate's decision, involving no question of law or of jurisdiction.

[Emphasis added]

Moreover, while Courts tend to treat the decisions of administrative tribunals deferentially, particularly if the delegate has some expertise, in not all cases on appeal is such deference warranted. This point was expressly dealt with in *Bell Canada v. Canada (C.R.T.C.)*, [1989] 1 S.C.R. 1722 at pp. 1743-1746 in a judgment of Gonthier, J. for the Court, which I quote at length:

Where the legislator has clearly stated that the decision of an administrative tribunal is final and binding, courts of original jurisdiction cannot interfere with such decisions unless the tribunal has committed an error which goes to its

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jurisdiction. Thus, this Court has decided in the CUPE case that judicial review cannot be completely excluded by statute and that courts of original jurisdiction can always quash a decision if it is 'so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review.' (p.237). Decisions which are so protected are, in that sense, entitled to a non-discretionary form of deference because the legislator intended them to be final and conclusive and, in turn, this intention arises out of the desire to leave the resolution of some issues in the hands of a specialized tribunal. In the CUPE case, Dickson, J., as he then was, described the legislator's intention as follows, at pp. 235-6:

Section 101 constitutes a clear statutory direction on the part of the Legislature that public sector labour matters be promptly and finally decided by the Board. Privative clauses of this type are typically found in labour relations legislation....

However, it is important to stress the fact that the decision of an administrative tribunal can only be entitled to such deference if the legislator has clearly expressed his intention to protect such decisions through the use of privative clauses or clauses which state that the

decision is final and without appeal. As formulated, NAPO's argument must be rejected because it fails to recognize the basic difference between appellate review and judicial review of decisions which do not fall within the jurisdiction of the lower tribunal.... [T]he appellant's decisions are subject to appeal....

It is trite to say that the jurisdiction of a court on appeal is much broader than the jurisdiction of a court on judicial review. In principle, a court is entitled, on appeal, to disagree with the reasoning of the lower tribunal.

[Emphasis added]

The Supreme Court of Canada went on to recognize that within the context of a statutory appeal from an administrative tribunal, consideration must also be given to the principle of specialization of duties. At page 1746:

Although an appeal tribunal has the right to disagree with the

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lower tribunal on issues which fall within the scope of the statutory appeal, curial deference should be given to the opinion of the lower tribunal on issues which fall squarely within its area of expertise.

With respect, matters of statutory interpretation and questions of evidence are not matters falling squarely within this Board's expertise, particularly since this was the first occasion upon which the Board was required to address these issues. The Board was required to deal with questions of law which could not be resolved without an analysis of the pertinent statutory enactments. In the course of its analysis, the Board made errors of law.

An appeal lies from questions of law. There is no appeal on questions of fact. Of utmost importance, therefore, is the distinction between the two types of errors.

Errors of law are commonly errors in the application or interpretation of some legal standard, statutory or otherwise: J. Kavanagh, A Guide to Judicial Review, 2nd ed. (1984). Thus, once basic facts are established the determination of whether those facts fall within the ambit of a particular statutory provision becomes a question of law. In Wade, Administrative Law, 4th ed., (1977) at page 775 the distinction between error of law and error of fact is stated as follows:

There is only one clear and logical point at which the line [between errors of law and errors of fact] can be drawn, and - it has been recognized in many judgments. This is that questions of fact are the primary facts of a particular case

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which have to be established before the law can be applied, the "facts which are observed by the witnesses and proved by testimony" to which should be added any facts of common knowledge which the court will take notice without proof. Whether these facts, once established, satisfy some legal definition or requirement is a question of law, for the question then is how to interpret and apply the law to those established facts.

Accordingly, the questions of what facts will satisfy the statutory definition of "discrimination", the correct statutory interpretation of other sections of the Human Rights Act (in particular, the phrase "... when offering or providing services, goods or facilities to the public") and the evidentiary standards to be applied during a hearing under the Act are questions of law. I will now turn to consideration of the Human Rights Act, both generally and in respect to specific provisions.

### C. APPROACHES TO INTERPRETATION OF HUMAN RIGHTS LEGISLATION

A recent decision of the Supreme Court of Canada, McKinney et al. v. Board of Governors of Laurentian University and A.G. Ont., judgment rendered December 6, 1990, #20747, provides insight into the difficult policy issues that inform any judicial consideration of legislation involving human rights.. Several passages from the judgment of LaForest, J. (for the majority), although dealing with s. 1 of the Charter, are compelling. At page 71 of his judgment, LaForest, J. comments that it is not surprising that in the face of competing views in the area of human rights, legislators may opt to take a cautious approach to enacting remedial legislation.

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Discrimination legislation must to some extent impinge on important rights. Legislation, suggests LaForest, J. [at page 79] "must be applied on a realistic basis taking account of the practical, living facts to which legislation is addressed." LaForest, J. also states, at page 81:

In looking at this type of issue, it is important to remember that a Legislature should not be obliged to deal with all aspects of a problem at once. It must surely be permitted to take incremental measures. It must be given reasonable leeway to deal with problems one step at a time, to balance possible inequalities under the law against other inequalities resulting from the adoption of a course of action, and to take account of the difficulties, whether social, economic or budgetary, that would arise if it attempted to deal

with social and economic problems in their entirety, assuming such problems can ever be perceived in their entirety.

Legislation may differ, sometimes markedly, from one jurisdiction to another. This, as LaForest, J. states "did not result from judicial fiat, but out of a legislative choice." [page 71]. The approach taken by the Yukon Legislature was a choice made in light of the need to reasonably balance competing social demands.

Before turning to specific provisions of the Human Rights Act, it is noted that reference to international conventions is now a legitimate method of interpretation, at least for Charter cases: Alberta Union of Provincial Employees v. A.G. (Alta.), (1988) 28 C.R.R. 305 at 328 (S.C.C.). The non-Charter use of international human rights law is less settled. In this appeal, clearly the legal status of the parties is governed by the domestic law, albeit

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that the provisions of the Human Rights Act may be affected by Canada's international obligations. There is a fine line, however, between saying that an applicant's claim or right is determined by the international agreement and saying that those rights are defined by the domestic law as influenced by the international agreement.

The Intervenor cited to CEDAW and urged that the Human Rights Act definition of "discrimination" should be interpreted in light of this international agreement. Assuming international agreements are relevant and persuasive when interpreting domestic legislation limited to a certain jurisdiction, I nevertheless have a number of concerns with such an approach.

First, it should not necessarily be assumed that a term in a domestic statute is intended by the Legislature to have precisely the same meaning that the term may have elsewhere. This is a question of statutory interpretation to which the context in which the term is used is highly relevant: J.M. Evans et al., in Administrative Law, Cases, Texts and Materials, 3rd. ed. (1989), at pages 387 et seq. For example, the meaning of "social" and "cultural" in the CEDAW definition of "discrimination" may easily differ from the meaning of "social" or "cultural" in the context of the Human Rights Act - the latter, perhaps, being descriptive of discrete organizations established for the pursuit of common interests and the former referring to more generalized human

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relationships on a wider spectrum of social cooperation and interdependence.

In light of its focus on the treatment of women, it is also important to read CEDAW in the context of its placement amongst other international human rights instruments having equal force, particularly those intended to have a broader perspective. It must be remembered that CEDAW speaks of women's rights, and that is its primary purpose. Thus, for example, CEDAW must be read in conjunction with the Universal Declaration of Human Rights, specifically mentioned in the preamble to the Human Rights Act. I note in reviewing the Declaration that Member States pledged to promote universal respect for and observance of human rights and fundamental freedoms in recognition that "the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world." Thirty separate articles of the Declaration enumerate the common standards to be achieved. Article 7 states, for example, that "all are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration...." Separate Articles enumerate different, though equally important, rights:

Article 18. Everyone has the right to freedom of thought, conscience and religion...

Article 19: Everyone has the right to freedom of opinion and expression: this right includes freedom to hold opinions

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without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Article 20. (1) Everyone has the right to freedom of peaceful assembly and association. (2) No one may be compelled to belong to an association.

Article 29. (1) Everyone has duties to the community in which alone the free and full development of his personality is possible. (2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society. (3) These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

There is a recognition in the Universal Declaration of Human Rights that the goal of equality cannot, beyond certain limits, be achieved at the expense of other, and equally important, human rights.

In no sense whatsoever do I intend to minimize the considerable importance of CEDAW to the advancement of human rights generally. Considering the enormous diversity in the social

and cultural systems of States Parties to this Convention it stands as an astonishing achievement in human understanding - an articulate appeal to compassion and reason. However, in the absence of a thorough examination of international instruments in the context of such factors as mentioned, it is in my view inappropriate to insist on an equivalent meaning for domestic legislation.

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And, while Legislatures may impose limits on rights or freedoms, at page 27 of his memorandum of judgment in R. v. Keegstra, judgment rendered December 13, 1990, #21118, Dickson, C.J. repeats the warning of Wilson, J. that there is a critical danger in attempting to balance competing values without the benefit of a context. Such balancing cannot be done in the abstract: Edmonton Journal v. Alberta (Attorney General), [1989] 2 S.C.R. 1326. The point I wish to make is that while the objectives of the Human Rights Act and CEDAW are entirely compatible, as an aid to interpretation I find CEDAW to be of little assistance.

#### D. INTERPRETATION OF THE YUKON HUMAN RIGHTS ACT

In my view, the first question the Board was required to answer was as follows: Did the exclusion of Madeleine Gould from membership in the Pioneers, by reason of the fact that she is female, constitute discrimination within the meaning of the Act? It is only if the conduct complained of fits within section 6 or section 11 of the Act when read together with section 8 of the Act that the two situations relating to an organization's membership policy, as referred to by the Board in its decision, would have any relevance, and then only if the conduct does not otherwise fit into one of the defences or exemptions provided by the Act. It seems logical, therefore, to initially determine the membership policy

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issue separately from the issue of collection and preservation of "history" and proceed from that point to considering the relationship between them. I propose to deal with the membership policy issue first.

Section 6 of the Human Rights Act states that it is "discrimination to treat any individual or group unfavourably on any of the following grounds", thereafter enumerated. Section 11 provides that "any conduct that results in discrimination is discrimination." The Board stated that "it is not disputed that discrimination in an abstract sense has been established." If this is

meant to suggest that the Pioneers agreed that there was "discrimination" within the meaning of the Act in refusing Madeleine Gould's application for membership, the Board's statement cannot be reconciled with the sixth ground of appeal stated in the Amended Notice of Appeal. The transcript of the hearing also suggests to me that there was dispute on the issue of whether the exclusion amounted to "discrimination" within the meaning of the Act.

Simply put, the conduct complained of must first be "discrimination" as defined by section 6 or 11 of the Act. This will be the first step in any determination as to whether there was prohibited, discrimination under the Act.

In Ontario Human Rights Commission and O'Malley v. Simpson Sears Ltd., supra,

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the Supreme Court of Canada held that established rules of construction are sufficiently flexible to recognize in a human rights code its special nature and purpose and to give it an interpretation which will advance its broad purposes. See also: Insurance Corporation of British Columbia v. Heerspink and Director, Human Rights Code, [1982] 2 S.C.R. 145 at 157-8, (1982) 3 C.H.R.R. D/1162. In O'Malley at page 547 [S.C.R.] McIntyre, J. states:

Legislation of this type is of a special nature, not quite constitutional but certainly more than the ordinary - and it is for the courts to seek out its purpose and to give it effect. The Code aims at the removal of discrimination. This is to state the obvious. Its main approach, however, is not to punish the discriminator, but rather to provide relief for the victims of discrimination. It is the result or the effect of the action complained of which is significant. If it does, in fact, cause discrimination; if its effect is to impose on one person or group of persons obligations, penalties, or restrictive conditions not imposed on other members of the community, it is discriminatory.

To like effect see: Winnipeg School Division No. 1 v. Craton [1985] 2 S.C.R. 150, Robichaud v. Canada (Treasury Board), (1987) 8 C.H.R.R. D/4326, 87 C.L.L.C. 17,025 (S.C.C.) and Action Travail des Femmes v. Compagnie des Chemins de Fer Nationaux du Canada, [1987] 1 S.C.R. 1114 at 1134, (1987) 8 C.H.R.R. D/4210 (S.C.C.) wherein Dickson, C. J. (as he then was), states:

Human rights legislation is intended to give rise, amongst other things, to individual rights of vital importance, rights capable of enforcement, in the final analysis, in a court of law. I recognize that in the construction of such legislation the words of the Act must be given their plain meaning, but it is equally important that the rights enunciated be given their

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full recognition and effect. We should not search for ways and means to minimize those rights and to enfeeble their proper impact. Although it may seem commonplace, it may be wise to remind ourselves of the statutory guidance given by the federal Interpretation Act which asserts that statutes are deemed to be remedial and are thus to be given such fair, large and liberal interpretation as will best ensure that their objects are attained.

The Interpretation Act, S.Y. 1987, c. 93, dictates the same approach.

It is quite clear that it is the discriminatory result or effect, not a discriminatory intent which is significant. To require a complainant to establish discriminatory intent would be to defeat the objectives of the Act since, in most cases, it would be near impossible to prove motive.

I accept without reservation that sections 6 and 11 of the Act must be interpreted in a manner consistent with the guidelines of the Supreme Court of Canada in light of the objectives sought to be achieved by the Human Rights Act.

I also accept that to the extent that cases interpreting the Canadian Charter of Rights And Freedoms may illuminate the content of the legislatively protected right to be free from discrimination, such cases are valuable.

Several recent decisions of the Supreme Court of Canada have considered the meaning of discrimination. In Brooks, Allen and Dixon v. Canada Safeway Ltd., (1989) 59 D.L.R. (4th) 321, 4 W.W.R. 193, 58 Man. R. (2d) 161, 10 C.H.R.R. D/6183,

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the Supreme Court of Canada dealt with the meaning of discrimination and adopted the pronouncement of McIntyre, J. in Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143 at 173-75, 56 D.L.R. (4th) 1 10 C.H.R.R. D/5719, 34 B.C.L.R. (2d) 273, wherein at p. 174 [S.C.R.], McIntyre, J. stated that discrimination maybe described as:

... a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.

Brooks involved an employer benefits plan which made pregnant women ineligible for medical benefits otherwise paid to employees under the plan. O'Malley also involved an employment situation in which an avowed sabbatarian was required to work on days of religious

significance. Action Travail related to an employment situation in which women were consistently and systematically denied equal opportunity to advancement in various sectors of a railway undertaking. These fact situations are essentially

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different from the facts of this case.

No one would dispute that the Human Rights Act must be consistent with the supreme law of Canada, the Charter of Rights and Freedoms. Yet, unlike the Board, I am reluctant to state uncategorically and without more that the conduct of the Pioneers in the rejection of Madeleine Gould's membership application amounts to discrimination, either directly or by adverse effect.

This reticence arises from certain comments of Wilson, J. in R. v. Turpin, [1989] 1 S.C.-R. 1296, (1989) 69 C.R. (3d) 97, (judgment rendered May 4, 1989, the same day as Brooks). Whereas Brooks involved a complaint to the Manitoba human rights commission in respect to an allegedly discriminatory practice involving an employee benefits package, Turpin dealt with s. 15 of the Charter in respect to equality under the law, one of four legal rights protected by s. 15 of the Charter:

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The learned judge says, at page 1332 (S.C.R.), that:

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A finding that there is discrimination will, I think, in most but perhaps not all cases, necessarily entail a search for disadvantage that exists apart from and independent of the particular legal distinction being challenged.

[Emphasis added]

The underlined phrase appears to import a qualification into a section 15 Charter finding of discrimination.

In Turpin, Wilson, J. for the Court followed upon her judgment in Andrews, supra, in holding that the determination of whether a group falls into an analogous category to those specifically enumerated in section 15 is not to be made only in the context of the law which is subject to challenge but rather in the context of the place of the group in the entire social, political and legal fabric of our society. Wilson, J. also refers to McIntyre, J.'s reasoning in Andrews, supra, in which he held that non-citizens permanently resident in Canada were a good example of "a discrete and insular minority" who came within the protection of section 15 of the Charter and disposes of the appeal by stating, at pp. 13321333 [S.C.R.]:

The appellants claim that because they are accused of one of the indictable offences listed in s. 427 of the Criminal Code but do not have an opportunity, as do persons charged with the same offence in Alberta, to be tried by judge alone, they are victims of discrimination. I disagree. In my respectful view, it would be stretching the imagination to characterize persons accused of one of the crimes listed in s. 427 of the Criminal Code in all the provinces except Alberta as members of a "discrete and insular minority".

[Emphasis added]

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The learned judge added that this categorization is not an end in itself but merely one of the analytical tools which are of assistance in determining whether the interest advanced by a particular claimant is the kind of interest s. 15 of the Charter is designed to protect. It is said to be a means of ensuring that equality rights are given the same kind of broad, purposive interpretation accorded to other Charter rights. But if discrimination in section 15 of the Charter is to be defined in terms of "minorities", then it is less readily apparent that it is available to combat allegedly discriminatory behaviour against all women. In my view women, as a group, are not what is commonly understood to be a "minority" in Canadian society. The Intervenor stated that a recent Yukon census showed that 53.1% of the population was male, while 46.9% was female. Whether this constitutes a minority that can be discriminated against is in doubt.

Moreover, if discrimination must be defined in terms of "insular minorities" as Wilson, J. seems to be suggesting, then the vehicle of section 15 of the Charter for the advancement of women's equality by the elimination of gender-based discrimination is seriously impaired. The quality of being "insular" is defined in The Oxford English Dictionary (2nd. ed.) as "... having the character which is developed by living on an island detached from free intercourse with

other people; esp. narrowness of ideas, feelings or outlook; situated alone." Few Canadian women would

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wish to be so characterized. Finally, a requirement that the affected group be "discrete", which can mean "separate, individually distinct, detached from others; individually distinct, but not different in kind," conceivably creates a further impediment to the type of complaint urged by the Intervenor and the search for indicia of discrimination that this type of inquiry compels. Assuming an analogous method of interpretation may be used to determine the threshold question of discrimination in section 6 and 11 of the Human Rights Act, it could be said that differential treatment is not necessarily discriminatory treatment.

The Board found that it was "...common ground that Madeleine Gould's application was rejected on the basis of her gender." That is a finding of fact that cannot be disturbed. It is still open to question, however, whether this bare finding establishes discrimination within the meaning of either section 6 or section 11 of the Act against Madeleine Gould specifically or women in general. One might ask whether the particular type of conduct complained of by Madeleine Gould was of a type that the Human Rights Act was designed to protect. The comments of McIntyre, J. at p. 164 [S.C.R.] in Andrews, supra, are apt:

The concept of equality has long been a feature of Western thought. As embodied in s. 15(1) of the Charter, it is an elusive concept and, more than any of the other rights and freedoms guaranteed in the Charter, it lacks precise definition. As has been stated by John H. Schaar, "Equality of Opportunity and Beyond", in Nomos IX: Equality, ed. J. Roland Pennock and John W. Chapman (1967), at p. 228:

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Equality is a protean word. It is one of those political symbols - liberty and fraternity are others - into which men have poured the deepest urgings of their heart. Every strongly held theory or conception of equality is a once a psychology, an ethic, a theory of social relations, and a vision of the good society.

It is a comparative concept, the condition of which may only be attained or discerned by comparison with the condition of others in the social and political setting in which the question arises. It must be recognized at once, however, that every difference in treatment between individuals under the law will not necessarily result in inequality and, as well, that identical treatment may frequently produce serious inequality.

In this judgment, McIntyre, J. also considered the historical development of Canadian human rights legislation, at page 172 [S.C.R.]:

With the steady increase in population from the earliest days of European emigration into Canada and with the consequential growth of industry, agriculture and commerce and the vast increase in national wealth which followed, many social problems developed. The contact of the European immigrant with the indigenous population, the steady increase in immigration bringing those of neither French nor British background, and in more recent years the greatly expanded role of women in all forms of industrial, commercial and professional activity led to much inequality and many forms of discrimination. In great part these developments, in the absence of any significant legislative protection for the victims of discrimination, called into being the Human Rights

If it can be said that the conduct of the Pioneers was found to be based on a personal characteristic of Madeleine Gould, whether this fits within the "treating unfavourably" form of discrimination in section 6 or the broader form of discrimination defined in section 11 is, nonetheless, arguable.

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Similarly, does the rejection of membership have the effect of withholding or limiting access to opportunities, benefits or advantages available to others? Even if it can be said that there is such a denial, a proper consideration of the concerns this human rights legislation was designed to address may involve setting a qualitative content to "opportunities, benefits or advantages". These are the difficult and highly relevant issues that the Board must consider in the first branch of any inquiry as to what constitutes discrimination under the Act.

Since a proper interpretive approach will focus on the legislation, it is also extremely important for the Board to bear in mind the differences in interpretive approaches taken in respect to the Charter as compared to human rights legislation. In Andrews, supra, McIntyre, J. states clearly this difference in approach, at pp. 175-176:

To begin with, discrimination in s. 15(1) is limited to discrimination caused by the application or operation of law, whereas the Human Rights Acts apply also to private activities. Furthermore, and this is a distinction of more importance, all the Human Rights Acts passed in Canada specifically designate a certain limited number of grounds upon which discrimination is forbidden. Section 15(1) of the Charter is not so limited....

It should be noted as well that when the Human Rights Acts create exemptions or defences, such as a bona fide occupational requirement, an exemption for religious and political organizations, or definitional limits on age discrimination, these generally have the effect of completely removing the conduct complained of from the reach of the Act.... Where discrimination is forbidden in the Human Rights Acts it is done in absolute terms, and where a defence or exception is allowed it, too, speaks in absolute terms and the discrimination is excused. There is, in this sense, no middle

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ground.

In considering a provision in the English Sex Discrimination Act 1975 similar in wording to section 6 of the Yukon Human Rights Act, the House of Lords in *James v. Eastleigh Borough Council*, [1990] 2 All E.R. 607 at 612 adopted an objective test fashioned by Lord Goff in Equal Opportunities Commission v. Birmingham City Council, [1989] 1 All E.R. 769, [1989] A.C. 1155 (H.L.):

Lord Goff's test, it will be observed, is not subjective, but objective. Adopting it here the question becomes: would the plaintiff, a man of 61, have received the same treatment as his wife but for his sex? An affirmative answer is inescapable.

Can it be said, on the present facts, that Madeleine Gould would have received the same treatment as a Yukon man, but for her sex? Is an affirmative answer inescapable?

Whether or not discrimination has been established is a question of law. The Board, by stating that discrimination in the abstract had been established, failed to take into account relevant considerations respecting the issue of discrimination and erred in law. The Board must view the definitions of discrimination in a broader social, political and legal context. The Board must consider the objectives the legislation sought to achieve. The Board must recognize that not all differential treatment is necessarily discriminatory treatment. The guidelines of our highest Court must be adhered to. In particular, the Board must carefully find and apply the particular facts of any case to the

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legislation in determining whether discrimination, as a matter of law, has been established. This will be the first task for the Board on the re-hearing of this matter.

Standing alone, a determination that there has been an act of discrimination as defined does not suffice to resolve the question of whether the conduct is either regulated or prohibited by the Human Rights Act. It is not every discriminatory practice that is prohibited by the Human Rights Act. For the balance of this judgment, however, I will assume without deciding that the Board was correct in holding that the all-male membership limitation adhered to by the Pioneers was contrary to section 6 or section 11 of the Act and was, therefore, discrimination against Madeleine Gould, as defined. This will permit me to consider the other matters that are raised on this appeal.

There are five basic situations described in section 8 of the Act in which discrimination is prohibited, including section 8(a). By section 8(a) discrimination is prohibited "when offering or providing services, goods or facilities to the public." Therefore, sections 6 and it must be read together with section 8. There are also provisions in the Act exempting conduct which might otherwise fit within the definition of discrimination. I do not take Counsel on this appeal to be suggesting that the facts here fit within those situations described in section 8(b), (c), (d) or (e). Therefore, the second branch of the membership policy question is:

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If the conduct is discriminatory within the meaning of section 6 or section 11 of the Act, is it discrimination of a type prohibited by section 8(a) of the Act?

In my view, in determining whether discrimination on an enumerated ground has been established, it is necessary to look not only at the situations described in section 8 of the Act wherein discrimination is proscribed, but to interpret section 8 in its social, political and legal context. It is largely by reference to this latter perspective that it is possible to conclude that differential treatment (excluding women) in relation to the Pioneers' membership policy is not discriminatory conduct as contemplated by section 8 of the Human Rights Act. This is because the Pioneers, as an organization, do not provide goods, facilities or services of a type which attracts the regulation (and sanctions) of the Human Rights Act. Before I consider this proposition, though, I wish to comment further on the relationship between the Charter of Rights and Freedoms and the Human Rights Act and some procedural distinctions between the two.

It must be borne in mind that while, in descriptive terms, "discrimination" under section 15(1) may fit the concept of discrimination developed in human rights legislation, to which I adverted earlier, a further step will be required under the Charter to decide whether the very content of human rights legislation is discriminatory. If a court finds that the legislation is

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discriminatory and consequently inconsistent with the Charter, it would then become a complex question of whether the discriminatory law can be saved under section 1 of the Charter. This is a distinct step called for under the Charter which is not required in the Human Rights Acts of each jurisdiction. This is because, in the latter, justifications or defences to discrimination are found in the specific exemptions to the substantive rights.

It is now clear, in light of the decision of the Supreme Court of Canada in McKinney v. Board of Governors of Laurentian University and A.G. Ont., judgment rendered December 6, 1990, #20747, that the Charter does not directly apply to private conduct. In his memorandum of judgment LaForest, J. indicated that an entity such as the Pioneers is not, in the governance of its activities, subject to the Charter. This would be so even if the Pioneers was extensively regulated, received assistance from government sources or engaged in activities that were subject to either federal or provincial legislative jurisdiction. In short, the Pioneers do not fall within the "governmental apparatus of the state." This view draws upon and applies the Courts earlier reasoning in R.W.D.S.U. v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573.

The control of non-governmental forms of discrimination is left to the provincial and territorial governments as part of their legislative sovereignty in respect to property and civil rights.

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A challenge to this sovereignty must be brought on proper notice so that each party entitled to intervene is given a full and fair opportunity to be heard. On the present appeal, Counsel during argument made it clear that they were not constitutionally challenging any provisions of the Human Rights Act on the basis of inconsistency with the Canadian Charter of Rights and Freedoms, although the Charter was raised in the context of interpreting the Human Rights Act both in the Intervenor's submissions at the hearing and by Counsel on appeal. In any event, I am of the view that a constitutional challenge to the legislation would require proper notice to necessary parties and I so indicated to the parties. I therefore decline to enter into a section 1 Charter analysis of provisions of the Human Rights Act.

Having said that, I do not wish to be taken to have suggested that the Board has jurisdiction to hear a constitutional challenge, despite comments of the Supreme Court of Canada in Douglas/Kwantlen Faculty Association v. Douglas College, judgment rendered December 6, 1990, #20800 (S.C.C.). In Douglas, the decision of an arbitration board was being reviewed. The legislation differed considerably from that here. The Human Rights Act has not be considered in the context of a constitutional challenge. In the absence of specific provisions in governing legislation it may still be open to question whether, in accordance with the mandate given by its legislation, a particular administrative tribunal has jurisdiction to hear constitutional arguments in respect to the

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## Charter.

During the course of argument, Counsel in the present case did not suggest that the Board conducted itself in a manner which violated the Charter rights of any person unless it can be argued that issues pertaining to evidence are violative of the principles of fundamental justice, the burden to which the legislation holds the Board. As to the regulation and advancement of human rights in the non-governmental sector, in McKinney, supra, LaForest, J. comments at pp. 82-83:

The Charter, we saw earlier, was expressly framed so as not to apply to private conduct. It left the task of regulating and advancing the cause of human rights in the private sector to the legislative branch. This invites a measure of deference for legislative choice. As Counsel for the Attorney General for Saskatchewan colourfully put it, this "should lead us to ensure that the Charter doesn't do through the back door what it clearly can't do through the front door". Not, I repeat, that the courts should stand idly by in the face of a breach of human rights in the Code itself, as occurred in Blainey. But generally the courts should not lightly use the Charter to second-guess legislative judgment as to just how quickly it should proceed in moving forward towards the ideal of equality. The courts should adopt a stance that encourages legislative advances in the protection of human rights. Some of the steps adopted may well fall short of perfection, but as earlier mentioned, the recognition of human rights emerges slowly out of the human condition, and short or incremental steps may at times be a harbinger of a developing right, a further step in the long journey towards full and ungrudging recognition of the dignity of the human person.

Since I conclude that the regulation and advancement of human rights in the private sector and, specifically, the regulation of the Pioneers, if any, have been left to development by the Yukon Legislature, I return now to a consideration of the Pioneers'

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membership policy.

It is necessary to state with all possible clarity the breadth and complexity of the issue now before me. In the process of interpreting human rights legislation, recognizing that the Legislature seeks to achieve a proper balance between first principles of a free and democratic society is, in my view, absolutely necessary. There is a certain tension between promoting equality by eliminating gender-based discrimination, on the one hand, and the right of individuals to form with others associations of any character, on the other, a right expressly conferred by the Human Rights Act:

5. Every individual and every group shall, in accordance with the law, enjoy the right to peaceable assembly with others and the right to form with others associations of any character.

There is also a recognized connection between the right to freely associate and the exercise of other fundamental freedoms.

In the present context, the right to be treated equally directly collides with the right to choose those with whom one wishes to associate. In working to achieve the stated objectives of its human rights legislation, the Yukon legislators gave careful consideration to each of these fundamental democratic principles as reflected in the present provisions of the Human Rights Act. Notwithstanding that I conclude that if the Pioneers' activities

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are regulated, it is the Human Rights Act that governs its activities, Charter cases may assist in interpreting the meaning of certain Act provisions.

Freedom of association is expressly guaranteed in the Canadian Charter of Rights and Freedoms, by s. 2. As previously noted, similar protections are reflected in the Yukon Human Rights Act, Part I. Perhaps the most comprehensive case to date on the interpretation of the constitutionally guaranteed right of association is Re: Public Service Employees Relation Act, (1987) 38 D.L.R. (4th) 161 (S.C.C.), a case involving the right of provincial employees to strike. In this case, LeDain, J. for the majority states that it is essential to bear in mind that freedom of association applies to a broad range of organizations and stresses the importance of freedom of association in the context of the exercise of other fundamental rights of expression, conscience, and religion. To LeDain, J., freedom of association includes the freedom to work for the establishment of an association, to belong to an association, to maintain it, and to participate in its lawful activities without penalty or reprisal [at page 239].

In a concurring judgment, McIntyre, J. identifies six approaches to the interpretation of freedom of association:

1. Individuals may form groups to promote their common interests provided they do nothing unlawful in carrying out their activities: Collymore v. Attorney-General [1970] A.C. 538 (per Sir Hugh Wooding, C.J. of the Court of Appeal of Trinidad and Tobago). The objects of associating could be

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broad - religious, social, political, philosophical, economic, cultural, charitable and so forth, but groups cannot act contrary to the peace, order and good government of a country;

2. Individuals may join together to do those things which they have a constitutional right to do as individuals. In other words, a collective exercise of constitutional rights. The American interpretation of this derivative right, necessary to the enjoyment of other rights, is expressed by Brennan, J. in Roberts v. United States Jaycees, (1984) 468 U.S. 609.

3. Individuals may do in combination such acts as are not prohibited if done alone. Unlawful acts if done alone would not be rendered lawful if done collectively. Adopted by Bayda, C.J.S. in Re Retail, Wholesale & Dept. Store Union, Locs. 544, 496, 635 & 955 and Government of Saskatchewan, 19 D.L.R. (4th) 609 at 619 ("Dairy Workers" case).

4. Certain activities done by individuals with others are so fundamental as to be constitutionally protected (eg. marrying, pursuing an education or livelihood). This was the view of Kerans, J.A. in Black v. The Law Society of Alberta [1986] 3 W.W.R. 590 (Alta. C.A.) at 612.

5. Freedom of association protects those things essential to the attainment of the lawful objects of an association. Both Galligan, J. and Smith, J. articulated this view in Re Service Employee's International Union, Local 204 and Broadway Manor Nursing Home (1983) 44 O.R. (2d) 392 (Ont. Div. Ct.) at 409 and 463, respectively.

6. Any actions that are inherently incapable of being performed by one can be performed by a group in association provided that the intent of the action is not to inflict harm. Also suggested by Bayda, C.J.S. in Dairy Workers case, supra.

McIntyre, J. held that, at a minimum, freedom of association in s. 2 of the Charter, guarantees the first, second and third approaches - that individuals could band together to pursue lawful purposes through lawful means and to do as a group those acts that would be lawful if done by one. At page 227-228 [D.L.R.], he states:

Of the remaining approaches, it must surely be accepted that the concept of freedom of association includes at least the

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right to join with others in lawful, common pursuits and to establish and maintain organizations and associations as set out in the first approach. This is essentially the freedom of association enjoyed prior to the adoption of the Charter. It is, I believe, equally clear that, in accordance with the second approach, freedom of association should guarantee the collective exercise of constitutional rights. Individual rights protected by the Constitution do not lose that protection when exercised in common with others. People must be free to engage collectively in those activities which are constitutionally protected for each individual. This second definition of freedom of association embraces the purposes and values of the freedoms which were identified earlier. For instance, the indispensable role played by freedom of association in the democratic process is fully protected by guaranteeing the collective exercise of freedom of expression. Group advocacy, which is at the heart of all political parties and special interest groups, would be protected under this definition. As well, group expression

directed at educating or informing the public would be protected from government interference: see the judgment of this Court in Dolphin Delivery, *supra*. Indeed, virtually every group activity which is important to the functioning of a democracy would be protected by guaranteeing that freedom of expression can be exercised in association with others. Furthermore, religious groups would receive protection if their activities constituted the collective exercise of freedom of religion. Thus, the principal purposes or values of freedom of association would be realized by interpreting s. 2(d) as protecting the collective exercise of the rights enumerated in the Charter.

One enters upon more controversial ground when considering the third approach which provides that whatever action an individual can lawfully pursue as an individual, freedom of association ensures he can pursue with others. Conversely, individuals or organizations have no constitutional right to do in concert what is unlawful when done alone. This approach is broader than the second, since constitutional protection attaches to all group acts which can be lawfully performed by an individual, whether or not that individual has a constitutional right to perform them. It is true, of course, that in this approach the range of Charter-protected activity could be reduced by legislation, because the legislature has the power to declare what is and what is not unlawful activity for the individual....

On this analysis, the third approach would not permit a Legislature

[Emphasis in original]

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to attack the associational nature of a group directly, since it would be constitutionally bound to treat groups and individuals alike. The Legislature, however, could totally prohibit some form of activity as within its power to say what is or is not unlawful. In such a case, an unlawful act would be equally unlawful for an individual as for a group. But this legislative power to render an activity unlawful is, in itself, limited with reference to other constitutionally protected rights: Blainey v. Ontario Hockey Association, (1986), 54 O. R. (2d) 513 (leave to appeal to the Supreme Court of Canada denied, [1986] 1 S.C.R. xii).

On this appeal, the Intervenor argued that there is a qualitative difference between the content of association for intimate purposes and the content of association for expressive purposes. What is clear, nonetheless, is that the content of freedom of association is not fixed. In failing to consider that the Pioneers may have a right to associate both constitutionally and under the Human Rights Act, and in failing to recognize that this right may represent an interest that must be balanced against the right of Madeleine Gould to be free from discrimination, the Board erred in law.

When I consider the Pioneers' collection and preservation of "history" activities I will consider the Charter in the context of freedom of expression, also protected under the Human Rights Act. In respect of membership policies, however, I will next turn to

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American and English authorities and a brief review of academic opinion.

Laframboise and West, in "The Case of All-Male Clubs: Freedom to Associate or Licence to Discriminate?" (1987-88) 2 Can. J. W. L. 335, anticipated the challenge now before this Court. They note that the line to be drawn with respect to the application of human rights legislation to membership policies may be determined by reference to the "public" nature of the club's activities [at page 340]:

There are various ways to characterize business and service clubs as services or facilities. Service clubs often provide leadership training and experience. Both service and business clubs offer valuable opportunities to make business contacts and to conduct business. Contact with politicians and other policymakers is often an additional attribute to the exclusive business club. Restaurant and recreational facilities are often available at business clubs and sometimes overnight accommodation is possible. The human rights codes in all jurisdictions but Ontario prohibit discrimination in the provision of public accommodation, services, and facilities. Therefore, whether the exclusion of women is prohibited under the code often turns on whether the club's activities are public or private. Even if it is shown the club's activities are sufficiently public, there are further exemptions in all but four of the human rights codes....

[Emphasis added]

The characterization of activities in this way is seen as a legitimate approach to determining whether or not a group's activities are regulated by human rights legislation. This approach would permit the Board to carefully weigh and balance the interests and policy concerns at the very heart of this matter.

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Laframboise and West explain that a set of criteria for distinguishing between private and public clubs has developed in the United States. In the 1970's, a number of state legislatures added sex as a prohibited basis of discrimination in public accommodation but exempted private clubs from the ambit of the legislation. It became critical for judges to distinguish between clubs that were genuinely private in nature, composed only of social intimates, and those in reality "public accommodations". The authors identify three major considerations

employed to distinguish private and public clubs: membership selection and criteria, guest policies, and the business functions or characteristics of the club. At page 341-342:

According to United States caselaw, a truly private club will establish a highly selective test based on prior congeniality to control admission of its members. If invitations to membership are widely issued and if such invitations tend to be extended to men who are in influential public and professional positions rather than to men on the basis of their personal characteristics, it becomes difficult to argue that selection is made purely on the basis of congeniality and intimacy....

Secondly, clubs which liberally extend guest memberships and open dining areas and other facilities to non-members may also fall outside the criteria for a truly private club. When a club has an extensive membership and liberal guest policies, it becomes less intimate and more divorced from the notion that the private club is an "extension of the living room." It becomes more and more obvious that the club is better described as an extension of a member's business.

Finally, clubs which exhibit the commercial characteristics of a business may be found to be quasi-public. The ability of employers to deduct the cost of their employees' membership fees where such costs can be related to business profits highlights the importance of clubs to the transaction of

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business and leaves open to question the claim that the private club is merely social.

[Emphasis in original]

Numerous American cases have considered the private/public distinction, including: Roberts v. Jaycees, (1984) 104 S. Ct. 3244, 468 U.S. 609, 82 L.Ed. 2d 462; New York State Club Ass'n v. City of New York, (1988) 108 S. Ct. 2225, 487 U.S. 1, 101 L.Ed. 2d 1; Board of Directors of Rotary International v. Rotary Club of Duarte, (1987) 107 S. Ct. 1940, 481 U.S. 537, 95 L. Ed. 2d 474 and, Concord Rod and Gun Club v. Massachusetts Commission Against Discrimination (1988) 524 N.E. 2d 1364 (Supreme Judicial Court of Massachusetts). In order to be properly understood in the context of any application to the present appeal, these cases must be carefully examined.

In Roberts, the Supreme Court of the United States was required to address the conflict between the State's efforts to eliminate discrimination and the constitutional freedom of association asserted by members of an organization. The Court began by analyzing freedom of association in two distinct senses. According to Brennan, J., writing for the majority, associational rights comprise the rights of "intimate association" and "expressive association". Brennan, J. explained that in one line of cases, the Court had held that choices to enter into and maintain certain human relationships must be secure against undue intrusion by the

State because of the role of such relationships in safeguarding the individual freedom of association central to the

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American constitutional scheme. In another set of cases, addressing expressive association, the Court had recognized the right to associate for the purposes of engaging in those rights protected by the First Amendment, including speech, assembly, petition for the redress of grievances, and the exercise of religion. The nature and degree of constitutional protection would vary depending on the extent to which one of the protected variants of freedom of association was affected.

The Court expressly left open the exact ambit of intimate association. In considering the Jaycees claim, however, the Court did list a number of factors which might underlie a classification of an organization as worthy of protection, at page 473 [L.Ed. 2d]:

[Between two extremes] lies a broad range of human relationships that may make greater or lesser claims to constitutional protection from particular incursions by the State. Determining the limits of state authority over an individual's freedom to enter into a particular association therefore unavoidably entails a careful assessment of where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments. See generally *Runyon v. McCrary*, 427 US 160, 187-189, 49 L Ed 2d 415, 96 S Ct 2586 (1976) (Powell, J. concurring). We need not mark the potentially significant points on this terrain with any precision. We note only that factors that may be relevant include size, purpose, policies, selectivity, congeniality, and other characteristics that in a particular case may be pertinent.

Of critical importance in the case, which took the Jaycees out of the category of relationships worthy of intimate associational protection was the finding at page 474, that:

In short, the local chapters of the Jaycees are neither small

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nor selective. Moreover, much of the activity central to the formation and maintenance of the association involves the participation of strangers to that relationship. Accordingly, we conclude that the Jaycees chapters lack the distinctive characteristics that might afford constitutional protection to the decision of its members to exclude women.

The Supreme Court of the United States went on to consider the balance to be struck between the right to associate for expressive purposes and infringements of that right for compelling state purposes that cannot be achieved by less intrusive means. Here, the Court notes, at page 474, that it has been long understood:

...as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.

The Court concluded that, in view of the activities the Jaycees engaged in, this right to associate was plainly implicated. Interference with associational freedom may take several forms, including the interference with the internal organization or affairs of the group. At pages 474-475:

There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire. Such a regulation may impair the ability of the original members to express only those views that brought them together. Freedom of association therefore plainly presupposes a freedom not to associate.

In a statement that seems to echo that of LaForest, J. in *Andrews*, / *supra*, the Supreme Court of the United States went on to state that

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such right to associate is not absolute. Infringements on the right may be justified by regulations designed to serve "compelling state interests", unrelated to the suppression of ideas, that cannot be achieved through means less restrictive of associational freedoms. Having regard to the organizational factors noted above, including the Jaycees size and lack of genuine membership selectivity, the Court found that the impairment of the Jaycees' associational rights were, in the circumstances of the case, justified. One commentator has suggested that *Roberts* is useful as a point of orientation but not as a guide to future cases because the case for the State, as interpreted by the Court, was so one-sided. See Linder, "Freedom of Association After Roberts v. United States Jaycees," (1984) 82 Michigan L. Rev. 1878.

In 1987 Rotary International, *supra*, followed the Roberts reasoning as to the two part analysis of associational freedom and restated the distinctive characteristics of size, purpose and the exclusion of others from activities that identify a right to intimate associational protection. The Court found again, primarily because the businesslike nature of Rotary activities made it a business establishment, the organization had a high drop-out rate and many activities were carried out in front of strangers, that the Rotarians were subject to the provisions of the applicable anti-discrimination legislation. While in both the Roberts and

Rotary challenges the Supreme Court of the United States upheld state civil rights laws banning gender-based discrimination as

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justified in the face of associational rights, the Court expressly left open the exact ambit of the criteria necessary for intimate association protection, noting only that family relationships are definitely protected. Significantly, in Rotary the Court made the following statement, in footnote six [at page 486, 95 L.Ed. 2d]:

We have no occasion in this case to consider the extent to which the First Amendment protects the rights of individuals to associate in the many clubs and other entities with selective membership that are found throughout the country.

The next case I discuss raises this very issue.

The text of the First Amendment to the Constitution of the United States, ratified by three-fourths of the States December 15, 1791, is as follows:

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 a redress of grievances.

New York State Club Association Inc. v. City of New York was decided by the U.S. Supreme Court in June of 1988 and centred on a challenge to a New York City statute which banned discrimination by "private clubs" on the basis of gender. The wording of the challenged law (Local Law 63 of 1984, a City Ordinance) as amended, provided as follows:

An institution, club or place of accommodation shall not be considered in its nature distinctly private if [1] it has more

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than four hundred members, [2] provides regular meal service and [3] regularly receives payment for dues, fees, usage of space, facilities, services, meals or beverages directly or indirectly from or on behalf of nonmembers for the furtherance of trade or business. For the purposes of this section a corporation incorporated under the benevolent orders law or described in the benevolent orders law but formed under any other law of this state, or a religious corporation incorporated under the education law or the religious corporations law shall be deemed to be in its nature distinctly private.

This amendment specified three criteria which would make a club or organization a "public accommodation" within the reach of antidiscrimination laws. In considering intimate association, White, J. for the Court repeated that this right undoubtedly protected family

relationships; importantly, however, the Court acknowledged that intimate associational protection might well extend further. In concurring on this point, O'Connor, J. surmised, at page 20 [ 101 L.Ed. 2d] that:

In a city as large and diverse as New York City, there surely will be organizations that fall within the potential reach of Local Law 63 and yet are deserving of constitutional protection. For example, in such a large city a club with over 400 members may still be relatively intimate in nature, so that a constitutional right to control membership takes precedence.

And further, at page 20, O'Connor, J. added:

Similarly, there may well be organizations whose expressive purposes would be substantially undermined if they were unable to confine their membership to those of the same sex, race, religion, or ethnic background or who share some other such common bond. The associational rights of such organizations must be respected.

In Roberts, O'Connor, J. stated her preference for an "expressive

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commercial" test rather than the "compelling State interest" balancing test preferred by the Court [ 468 U. S. at 635]. O'Connor, J.'s test would simply involve determining whether the organization was involved in commercial or expressive activities. In qualifying the test, O'Connor, J. recognized that it is unlikely ever that an organization will be exclusively engaged in expressive activities, if only for the reason that members might collect dues, purchase goods for use of the membership, rent lecture halls or meeting space and serve coffee and cake at its meeting. Therefore, in O'Connor, J.'s view, "an association should be characterized as commercial, and therefore subject to rationally related state regulation of its membership and other associational activities when, and only when, the association's activities are not predominantly of the type protected by the First Amendment." [468 U.S. at 635, emphasis added]. The primary difference between O'Connor, J.'s test and that of the majority is that this test does not require an organization to demonstrate a change in content or message of its speech; in other words, showing that admission of women would force an alteration in protected activities. In this case, the Supreme Court of the United States left open the possibility that an individual club could make a fact-based claim that it has sufficient of the distinctive characteristics to claim intimate associational protection. The Court was strongly of the view, however, that such cases can and should be settled on a case-by-case basis at the administrative tribunal level: 108 S. Ct. at page 2235 (per White, J.), and also at page 2237 (per O'Connor,

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J.).

In my view, the Supreme Court of the United States was correct in not providing a more definitive test. Marshall, in "Discrimination and the Right of Association," (1986) 81 Nw. University L. Rev. 68 at page 69, suggests the rationale for this reticence:

The Court's reluctance to formulate a categorical response to the antidiscrimination/private organization question is understandable. The issue may prove to be one of the most problematic areas in constitutional law because, as we shall see, it is an issue beset with inherent conflict and tension. The most obvious conflict raised, for example, involves the two virtual first principles of contemporary constitutional law: freedom and equality. The right to choose one's associates (freedom) is pitted against the right to equal treatment (equality), a most fundamental conflict.

Marshall notes that not only are competing values present, but that the same values compete on both sides of the issue, for the right of one group to exclude others is inevitably a limitation upon the freedom — including associational freedom - of these others. He concludes that drawing the line with "a per se rule is impossible."

I note, however, that in Kiwanis Club of Great Neck, Inc. v. Board of Trustees of Kiwanis Int'l, 383 N.Y.S. 2d 383 at 387, 52 Appl. Div. 2d 906 (Supreme Court, Appellate Division), a private club was defined as one:

... which is purely social in purpose, or which has some single narrow purpose which benefits the selfish interests of its members, such as golf clubs, social clubs, swimming clubs,

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recreational clubs, etc., and which establishes prior congeniality with those already members as a test of membership eligibility.

[Emphasis in original]

The Concord Rod and Gun Club, supra, although entirely distinguishable from the facts before me is also worthy of note. First, the gun club conceded that it was a "place of accommodation, resort or amusement". It disputed, however, that it was "public". The Court held that the determinative factor requiring the conclusion of publicness was the total absence of genuine selectivity in membership [at page 1366]:

The records of the board of governors' meetings reflect that separate votes were not taken on each individual applicant. Instead, one en masse vote was taken on all the applicants presented at each meeting as a group. The number of applicants accepted at

one time in that manner was as high as eleven. There was no requirement that a sponsor appear at the board of governors' meeting considering the sponsored applicant nor was there a requirement that the applicant appear at the general meeting voting on his application. In 1980, the year Page [female] applied, and in 1981, every male applicant who appeared for his interview was unanimously approved by the board and unanimously approved by the membership. Fifty-two new members were admitted in 1980 and 1981. Based on these many facts, the commissioner concluded that the obtaining of a sponsorship and cosponsorship was easy to do and was tantamount to acceptance of an applicant as a member of the Club.

Another helpful case is Moose Lodge No. 107 v. Irvis, (1972) 92 S. Ct. 1965, 407 U.S. 163, 32 L. Ed. 2d. 627 (U.S.S.C.). The complaint was raised on the basis of the Fourteenth Amendment to the United States Constitution. A non-Caucasian was refused service of liquor on Moose Lodge premises. It was argued that because the State of Pennsylvania licensed the club for liquor,

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this amounted to such state involvement with the club's activities as to make its discriminatory practices forbidden by the Equal Protection Clause of the Fourteenth Amendment.

In delivering the opinion of the Court, Rehnquist, J. found that Moose Lodge was a private club within the ordinary meaning of the word, a fraternal organization with well-defined requirements for membership. It conducted all of its activities in a building owned by it. The club was not publicly funded. Only members and guests were allowed into a lodge and membership was limited by invitation of a member or a club committee. The issue was whether the discriminatory membership policy (Caucasian only) was private, on the one hand, or amounted to "state action" on the other, in the sense that some type of state action enforced privately organized racial discrimination. It was necessary to show a sufficient nexus between the club's practices and the state before the discrimination would fall within that prohibited by the Equal Protection Clause of the Fourteenth Amendment. The Appellant, Irvis, conceded "the right of private clubs to choose members upon a discriminatory basis" (p. 636, 32 L.Ed. 2d]. In the result, the majority provided a narrow remedy to the Appellant, Irvis. In Jackson v. Metropolitan Edison Co., (1974) 419 U.S. 345 at 351, citing to Moose Lodge v. Irvis, supra, the Supreme Court of the United States crystallized the "nexus" concept and stated the test in the following terms:

The inquiry must be whether there is a sufficiently close

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nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself.

Additionally, in Moose Lodge, supra, at page 641, Douglas, J. (dissenting in the result, but not on this point) was of the view that the scope of associational freedom had evolved to include the freedom to associate exclusively:

My view of the First Amendment and the related guarantees of the Bill of Rights is that they create a zone of privacy which precludes government from interfering with private clubs or groups. The associational rights which our system honours permit all white, all black, all brown, and all yellow clubs to be formed. They also permit all Catholic, all Jewish, or all agnostic clubs to be established. Government may not tell a man or woman who his or her associates must be. The individual can be as selective as he desires. So the fact that the Moose Lodge allows only Caucasians to join or come as guests is constitutionally irrelevant, as is the decision of the Black Muslims to admit to their services only members of their race. The problem is different, however, where the public domain is concerned.... [W]here restaurants or other facilities serving the public are concerned and licenses are obtained from the State for operating the business, the "public" may not be defined by the proprietor to include only people of his choice....

This passage was cited with approval in Gilmore v. City of Montgomery, (1974) 94 S. Ct. 2416, 417 U.S. 556, 41 L.Ed. 2d 304.

L. Hollingsworth, in "Sex Discrimination in Private Clubs," (1977) 29 Hastings Law J. 417 at 421, describes the typical American constitutional challenge on the basis of sex discrimination:

An allegation of unconstitutional sex discrimination made against a private club will face the defense that the club is

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private and thus protected by the freedom of association. Unless a club is truly private in every way, however, freedom of association will not protect it. Should the freedom of association defense fail, the challenger of constitutionality must satisfy the elements of the fourteenth amendment in which the threshold question is whether there is sufficient state action to justify its application. If the state action requirement is met, the challenger must show a denial of equal protection.

Hollingsworth notes, at pp. 421-422, that freedom of association is a pervasive theme in the private club - sex discrimination context:

It properly serves to protect truly private associations from attack on constitutional or state statutory grounds. In a free society it is the right of each citizen to associate with whomever he or she wishes to relate in a close, personal, social, and continuing way. This constitutional protection applies to genuinely private clubs and extends to include any close, personal group of intimates who have joined together, to the exclusion of others, for the sake of mutual association.

It is clear that activities undertaken in exercising the right of association may be protected by the shield of associational freedom. Hollingsworth describes the American experience, at page 423:

Although the freedom of association should act as a shield for genuinely private clubs, in those instances where a so-called private club, is, in fact, quasi-private, courts should be more sensitive to the interests at issue. In a businessman's luncheon club, for example, the male's interest in excluding women for business reasons, as opposed to personal reasons, must be carefully scrutinized. In a club that permits members to bring in any nonfemale member of the public, especially when that occurs in a business setting, the members' interest in privacy and free association is abrogated because members have no control over one another's nonfemale guests. The

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public nature of such a quasi-private club, like that of a restaurant, demonstrates that the males' interest in exclusive association is slight compared to the females' right of access to public places.

A valid freedom of association claim will serve as a complete defense to a private club's discriminatory conduct if there is no significant state involvement with the club. If state action is shown, however, only conduct that is not violative of equal protection is protected by freedom of association. It is at this crucial point of examining equal protection that courts weigh the interest of those who are included against the interests of those who are excluded.

The American position differs from ours in at least two important respects. First, the Fourteenth Amendment of the United States Constitution that "no state shall... deny to any person within its jurisdiction the equal protection of the laws" is, by its terms, limited to actions by the state. Second, freedom of association is not expressly constitutionally guaranteed in the United States Constitution - its content has evolved from cases interpreting the First, Ninth and Fourteenth Amendments to the Constitution of the United States and from concepts of substantive due process.

American case law is not binding on this Court or Canadian administrative tribunals. Nevertheless our highest Court has, on more than one occasion, indicated that in interpreting our supreme law, the Charter of Rights and Freedoms, we may benefit from the nearly 200 years' of experience of our continental neighbours in determining matters of fundamental constitutional importance: See, for example, R. v. Simmons, [1988] 2 S.C.R. 495; R. v. Keegstra,

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judgment rendered December 13, 1990, #21118 (S.C.C.). Perhaps the same can be said regarding the interpretation of human rights legislation.

English law is also instructive. The English courts have considered the matter of what is "the public" in two cases, the first being Charter v. Race Relations Board, [1973] 1 All E.R. 512. This case concerned a social members' club with premises in which members met for social intercourse and to enjoy the services the club provided. All male Conservatives over age 18 were eligible for membership. The club rules provided that an applicant for membership had to find a proposer and seconder amongst the members who would vouch for the applicant's fitness to become a member. The nomination forms were then posted for seven days before an applicant could be approved for membership. An East Indian man was rejected on the basis of his skin colour.

The Race Relations Board brought proceedings, lost at trial, won before the Court of Appeal and lost before the House of Lords. Lord Reid held [at page 515] that an important criterion for determining what is a private club was whether "there is a careful selection of candidates so that only those who are thought to be acceptable to other members are admitted." He felt that there was no public element where a personally selected group of people meet in private premises as such a club does not provide facilities or services to the public. Lord Reid put the dividing line in the

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following terms, at page 516:

Some clubs have a very domestic appearance and atmosphere, some less so ... But a clear dividing line does emerge if entry to a club is no more than a formality. This may be because the club rules do not provide for any true selection or because in practice the rules are disregarded. There are, or at least have been, clubs which are in fact no more difficult to enter than a restaurant.

The club rules were reviewed by the Court which concluded that none were a "mere formality". Lord Reid felt that the selection process was genuine. The legislation in question stated:

It shall be unlawful for any person concerned with the provision to the public or a section of the public (whether on payment or otherwise) of any goods, facilities or services to discriminate against any person seeking to obtain or use those goods, facilities or services by refusing or deliberately omitting to provide him with any of them....

Lord Hudson and Lord Simon similarly emphasized that the dividing line lies in the personal selection of members with the view to their common acceptability. At page 529, Lord Simon stated the test as follows:

The essential feature is that there should be a genuine screening at some stage as a pledge of general acceptability to fellow members. It is this screening that determines that membership is a private role. [case citation omitted] Without it the association remains a section of the public.... The rules will determine prima facie whether the association is in this way a private club or a section of the public;... But this is a rebuttable presumption....

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Within a year of the Charter decision, the House of Lords again considered the quoted legislation in Dockers' Labour Club v. Race Relations Board, [1974] 3 All E.R. 592. This case concerned a working men's club, one of 4,000 similar clubs which were members of a union.

There was provision for an associate membership which entitled the individual, on payment of a small fee, to enter club premises and enjoy substantially the same benefits as full members. Some clubs, however, operated what were known as "colour bars". A "coloured" associate from another club came to the Dockers' and asked for a drink. He was refused service. The House of Lords reversed the Court of Appeal and held that the Dockers' was a private club that provided goods and services privately and not to members of the public.

In 1976, the English law changed partly, no doubt, in response to the Charter and Dockers decisions. The new legislation contained two rather detailed provisions:

25.(1) This section applies to any association of persons (however described, whether corporate or unincorporate, and whether or not its activities are carried on for profit) if -

- (a) it has twenty-five or more members; and
- (b) admission to membership is regulated by its constitution and is so conducted that the members do not constitute a section of the public....
- (c) it is not an organization to which section 11 applies.

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(2) It is unlawful for an association to which this section applies, in the case of a person who is not a member of the association, to discriminate against him -

- (a) in the terms on which it is prepared to admit him to membership; or
- (b) by refusing or deliberately omitting to accept his application for membership...

26.(1) An association to which section 25 applies is within this subsection if the main object of the association is to enable the benefits of membership (whatever they may

be) to be enjoyed by persons of a particular racial group defined otherwise than by reference to colour;...

(2) In the case of an association within subsection (1), nothing in section 25 shall render unlawful any act not involving discrimination on the ground of colour.

The change in legislation was clearly designed to remedy a perceived injustice or unfairness but reflects a cautionary approach to legislative initiatives in the face of competing societal perceptions and values.

In any event, in a sex discrimination appeal, it is perhaps more germane to look at the sex discrimination legislation of different jurisdictions to gain a more thorough understanding of the issues at stake. Accordingly, I have briefly reviewed the provisions of the English Sex Discrimination Act, 1975, c. 65, amended in 1986. Sex discrimination against women is defined in section 1:

(1) A person discriminates against a women in. any circumstances relevant for the purposes of any provision of this Act if-

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(a) on the ground of her sex he treats her less favourably than he treats or would treat a man....

Section 29 of the Act is analogous to section 8 of the Human Rights Act, in that it specifies circumstances in which it is unlawful to discriminate against a woman:

29(1) It is unlawful for any person concerned with the provision (for payment or not) of goods, facilities or services to the public or a section of the public to discriminate against a woman who seeks to obtain or use those goods, facilities or services-

(a) by refusing or deliberately omitting to provide her with any of them, or

(b) by refusing or deliberately omitting to provide her with goods, facilities or service of the like quality, in the like manner and on the like terms as are normal in his case in relation to male members of the public or (where she belongs to a section of the public) to male members of that section.

(2) The following are examples of the facilities and services mentioned in subsection (1)-

(a) access to and use of any place which members of the public or a section of the public are permitted to enter;

(b) accommodation in a hotel, boarding house or other similar establishment;

(c) facilities by way of banking or insurance or for grants, loans, credit or finance;

(d) facilities for education;

(e) facilities for entertainment, recreation or refreshment;

(f) facilities for transport or travel;

(g) the service of any profession or trade, or any local or other public authority.

Notably, sections 33 and 34 provide exceptions for political

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parties and for voluntary bodies. The latter section speaks directly to the restriction of membership to one sex. The section applies to a body the activities of which are carried on otherwise than for profit and which was not set up by an enactment. It states that:

34(2) Sections 29(1) and 30 shall not be construed as rendering unlawful:

- (a) the restriction of membership of any such body to persons of one sex (disregarding any minor exceptions), or
- (b) the provision of benefits, facilities or services to members of any such body where the membership is so restricted,

even though membership of the body is open to the public, or to a section of the public.

The English Sex Discrimination Act, 1975 and several other English statutes were amended by the Sex Discrimination Act, 1986, c. 59, to bring the legislation in line with European Community law. The amendments were prompted by two major decisions of the European Court of Justice for failure to comply with the Equal Treatment Directive (76/207/EEC) and, in the result, protective legislation applying to only one sex was repealed, as well as provisions for differential retirement ages for women and men, the upper age limit for unfair dismissal cases and other provisions. Importantly, there was no amendment to sections 29, 30 or 34 of the 1975 Act. Perhaps it can be inferred from this that the exemption of voluntary or substantially private organizations from antidiscrimination regulation under the Human Rights Act is an

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acceptable and rational method of balancing social interests.

I have reviewed Canadian, American and English authorities in detail to illustrate the necessity of carefully balancing fundamental but conflicting rights of human beings in interpreting legislation which is alleged to govern cases such as the one before me on appeal.

The Human Rights Act contains legislation of a quasi-constitutional stature. It is vitally important legislation in the context of Canadian society. Lodging a complaint against an individual or an organization is, therefore, a serious matter indeed. I do not question in the slightest the bona fides of Madeleine Gould's complaint. At the same time, I have no doubt whatsoever that to be found in violation of the Human Rights Act attracts a certain stigma,

particularly in a relatively small community. It also must be recalled that the Act gives the Board broad powers to fashion remedies and set damages. That the Board did not assess damages in the present case is, in my view, irrelevant. We are not dealing here with an issue of trifling importance - the very reason for the Intervenor's participation is that the Board's decision could have far-reaching ramifications for vast numbers of people in a wide array of circumstances.

The elimination of discrimination is a concern of all fair-minded people in Canada. Treating persons unfavourably because of

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race, age, religion, sex or another enumerated ground when offering services, accommodations, or goods, in the employment sector (including trade, professional or occupational associations), in connection with property, or in the negotiation or performance of any contract (all situations described in section 8 of the Act), is clearly prohibited. This is by legislative choice. As McIntyre, J. suggests in Andrews, supra, human rights legislation is of relatively recent vintage in Canada and has, to date, addressed the most common forms of discrimination borne of an expanding industrial and commercial society.

I am in no way persuaded that the Human Rights Act was designed to address the fact situation on this appeal. And whatever one's personal views might be, Boards of Adjudication cannot indulge in academic exercises based on unproven hypotheses divorced from the social, political and legal context in which the legislation operates. The decision of the Board in this case has serious consequences - it compels the Pioneers to alter conduct that they have chosen not to alter voluntarily, however laudable such a course of action might be. There is now the potential for a coercive element being brought to bear on the Pioneers that will compel a change in their conduct, based on the rationale that this is the type of conduct that human rights legislation was designed to eradicate in the interest of promoting gender-neutral equality.

In my view, it is entirely insufficient for the Board to minded people in Canada. Treating persons unfavourably because of

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consider the conduct complained of in isolation from the essential balancing of equally important interests: legislation aimed at eradicating gender-based discrimination in the interests of equality is in direct conflict with interests aimed at recognizing the rights of free citizens to form associations with whomever they might wish and, as will be discussed, the right to freely express oneself. No right is absolute. That is the lesson that the emerging law interpreting the Canadian Charter of Rights and Freedoms has taught us. It is impossible, therefore, to consider' the legislative protection of one right without also considering the right or rights that the legislative protection may be encroaching upon, rights of equal social value.

Boards of Adjudication entrusted with the application of this law to their fellow citizens must, in circumstances such as this, undertake an appropriate inquiry into the balancing of protected rights. The Board's failure to address these highly relevant issues adequately, if at all, was at the very least an error in law since it is not possible to properly interpret the law without giving the legislation such fair, large and liberal construction as best ensures the attainment of its objects according to its true intent, meaning and spirit, to paraphrase the Interpretation Act.

In conclusion, with respect to membership policy, the Board found explicitly that the Pioneers' membership policy was "genuine". It involves screening by two recommending members and

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also by a committee of investigating members. This suggests that applicants must be, at some level, acceptable to current members. To qualify for membership also requires a minimal residency in the Yukon.

At monthly meetings, members engage in routine organization business and other activities including rituals, reviewing acquaintances, socializing and reminiscing. This would doubtless require a certain amount of congeniality. The Pioneers participate in local parades and plan two social functions per year to which guests are invited. The Intervenor conceded that the Pioneers did not engage in any "commercial activities".

There is no evidence to suggest that invitations to join the Pioneers are widely issued or that member selection is a mere formality. Apart from infrequent members' social events and hall rentals, there is no evidence that the Pioneers' building was freely open to non-members. The organization was not an extension of the members' businesses and there was no deduction of dues as a business expense - unlikely given that the majority of members are retired senior

citizens. In the Agreed Statement of Facts the primary objects of the Pioneers were stated to be "the mutual protection of its members and the uniting of those members in the strong tie of brotherhood."

I also conclude that the Board did not adequately take into

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account these relevant considerations, if at all. Consequently, the Board could not properly interpret sections 6 or 11 of the Human Rights Act when read together with section 8 of the Act. These provisions must be fully considered before it is necessary to consider any applicable defences or group exemptions. The Board failed to address membership policy criteria in light of the stated objectives of the human rights legislation and therefore failed to consider that criteria which might operate to take the Pioneers out of the reach of the Human Rights Act.

Thus, the Pioneers' membership policy may not be discriminatory, within the meaning of the Act. If it is discriminatory, it may not be discriminatory activity of the type prohibited by section 8(a) of the Human Rights Act.

The Pioneers submitted that a distinction must be made between discrimination relating to membership policies and discrimination relating to the offering of services to the public. I agree to the extent that, for the purpose of proper analysis, these activities must be treated separately. On the ultimate question of whether what the Pioneers do amounts to prohibited discrimination, all activities must be considered together to produce a complete picture of this organization and the conduct of the Pioneers which is alleged to be discriminatory.

## E. COLLECTING AND PRESERVING HISTORY

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The Intervenor maintains that the Pioneers' activities include the collection and reporting of Yukon history and that the Pioneers' membership rolls form part of that history. The names and experiences of Yukon women are, in the Intervenor's words, "notably absent" from the membership rolls and reports. - as a consequence of male only membership, women are excluded from the organization's history collection and preservation activities which, in turn, results in the under-representation of women in the reporting. Thus, the Intervenor concluded

that the Pioneers' "membership policy is discriminatory by virtue of its indirect effect on women."

The first difficulty I have is equating this activity with the meaning of the word "services" in the Human Rights Act. The "services" undertaken by Mr. Cyr in a voluntary capacity predominantly consisted of making inquiries, gathering and compiling information and preserving this information in some form. The inquiring, gathering, compiling and preserving related exclusively to members - information of a personal nature about various members' lives.

There is no evidence that Mr. Cyr or the Pioneers as a group offer this or any similar service to the public. What is undertaken by Mr. Cyr is presumably undertaken out of personal interest, as a service to the Pioneers in his capacity as their "historian". I note that the Pioneers' constitution indicates that

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he is charged with the duty:

"...to secure and preserve all matters of interest pertaining not only to Yukon Order of Pioneers, but to the whole Yukon Territory."

Mr. Cyr's limited duties consist of compiling, collecting, preserving organization records and other materials of historical value (perhaps members' diaries, journals, photographs and so forth.) On behalf of the Pioneers, the Agreed Statement of Facts indicates that in his position, Mr. Cyr:

- (a) responds to requests for information on past members and the history of the Pioneers;
- (b) provides same to the Yukon Archives;
- (c) solicits organization-specific data on the history of the Pioneers and its members from members;
- (d) collects organization-specific data on the history of the Pioneers and its members.

The Intervenor submitted that the activities of the Pioneers include corresponding with the public, providing information on the history of the Pioneers and individual members, sharing information between members about the history of the Yukon, providing information to archives and museums, preserving members' names on its rolls, maintaining Pioneer plots in local cemeteries, collecting records, photographs and other data on members, especially from

the Klondike Gold Rush period, asking for the full cooperation of members in gathering this information and publication of materials. It is conceded that if Mr. Cyr's efforts

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yield information and if this information is asked for, it is willingly provided to the public. I find Canada Trust Co. v. Ontario (Human Rights Commission), (1990) 12 C.H.R.R. D/184 (Ont. C.A.) of little assistance since there the trust document, premised on notions of racism and religious superiority clearly contravened contemporary notions of public policy, as reflected both in domestic and international human rights law. Robins, J.A. expressly left open for another day the question whether scholarships restricting eligibility on the basis of sex, to name one of the mentioned grounds, might also be contrary to public policy.

An interpretive approach which permits this Board to interpret the legislation in a manner that would further one of its objectives - removing discrimination, is quite proper, but the words of the legislation cannot be ignored. A broad interpretation is one which, in the context, the words of the legislation can bear. I agree with Dickson, C.J. in Action Travail, supra, at page 182, that "...in the construction of such legislation the words of the Act must be given their plain meaning, but it is equally important that the rights enunciated be given their full recognition and effect. We should not search for ways and means to minimize those rights and enfeeble their proper impact."

Even assuming, for the purposes of this appeal, that Mr. Cyr's efforts amount to "services" within the meaning of the Act and that

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the information gleaned amounts to "goods" within the meaning of the Act, the question then is whether such "services" or "goods" are "offered or provided to the public." It bears repeating that it is conceded by the Intervenor that there is no discriminatory practice in distributing the information to the "public" - those who ask for it are provided with it.

But the Intervenor contended that this is not the end of the matter. It is said that the verbs "offered" and "provided" should be read to include the process of preparation. If I understand the argument correctly, services or goods under the Act can be inherently discriminatory, irrespective of whether there is any discriminatory conduct in the actual dissemination of information to individuals or group. Put another way, it is unlawful for Mr. Cyr or the Pioneers

to compile information on members in the absence of female input because this process has the result or the effect of distorting the information. The effect is that Yukon women are disadvantaged - an effect prohibited by s. 11 of the Human Rights Act. Presumably, it would not assist the Pioneers to cease distributing the information altogether, since it is the actual processing of the information that is discriminatory. The actual information is tainted with discrimination from its creation, having been created solely by men.

I note that the word "services" is totally unqualified in the legislation. The Board, nonetheless, continually referred to

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"public service". In my view, this phrase is conceptually distinct from "services to the public". Nothing in the legislation qualifies or limits the type, nature, essence or kind of services offered. "Public" is not used as an adjective to modify "services". The legislation does not circumscribe the nature or quality of services - it only proscribes certain conduct (i.e. discriminatory conduct) in relation to dealings with other individuals or groups, the "public". I conclude that the Board erred in using the word "public" to modify "services":

The question that must be answered is whether the Lodge offers or provides "services to the public". Both Mrs. Gould and the Lodge agree that there is some element of public service....

It is agreed between Counsel that the major part of the activities of the Order, in practice, is focused on its members and internal fraternal affairs, and only a minor part of its activities is directed towards matters involving collection and preservation of Yukon history. The Board accepts as a fact that, at present and in practice, that part of the Order's activities devoted to public service is minor in relation to the Order's other activities."

[Emphasis added]

The question asked by the Board was undoubtedly correct. But, in the process of answering that question, the Board fell into error. Even if the Pioneers' collecting and preserving of history amounts to what can be characterized as a "public" service (which some might debate) that finding is, with respect, irrelevant.

The proper question is: Is the service offered or provided to the public? If the answer is "yes", then, the next question is: In offering or providing the service, do the Pioneers treat any of

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the public unfavourably on any of the enumerated grounds? If the answer is "yes", then there is prohibited discrimination. Here, arguably, the answer should be "no". The services, no matter how biased, one-sided, lop-sided or inherently deficient, were offered by the Pioneers to the public, without discrimination. On the broadest possible interpretation of "public", the Pioneers did not discriminate. It strikes me that, had the Legislature wished to qualify "services" in any way, it could easily have done so.

The Board decided, however, that it is discrimination if the "quality of the service is affected by discriminatory acts." The vice of discrimination, then, arises from the membership policies - the cure is to require the Pioneers to open membership to females. This proposition was accepted by the Board because "common sense" dictates the conclusion that all-male history distorts history.

Leaving aside discussion of any evidentiary problems, in my view, the quality of the services was not affected by discriminatory acts. The stated activities with respect to historical gatherings are set out in item 8(x) of the Agreed Statement of Facts. Upon reviewing these activities it becomes clear that Mr. Cyr, although called an "historian" is, in reality, an archivist or record-keeper. An archivist is defined in Webster's Third New International Dictionary as:

"archivist'....: one who is charge of archives: one responsible for the collection, cataloguing, and preservation of archives.

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'archives'....b: a repository for any documents or other materials esp. of historical value...."

Neither in the Agreed Statement of Facts nor in the submissions of the Intervenor is it suggested that Mr. Cyr possesses any particular training or expertise. There is no evidence that Mr. Cyr scrutinizes the information or verifies its accuracy or completeness or otherwise. It is not evident that he engages in any scholarly interpretation or analysis of the information he collects. Mr. Cyr does not attempt to synthesize this material or to cull from it that which he considers to be historically significant from that which is not. In short, Mr. Cyr is not an historian in the commonly accepted sense of the word, as defined in Webster's Third New International Dictionary:

"historian'... 1. a writer of history; esp: one that produces a work or scholarly synthesis as distinguished from a compilation or chronicle (an [historian] and not a mere chronicler) - Times Lit. Supp. 2. Chronicler"

A chronicler denotes one who produces an historical account of facts in order of time, usually continuous and detailed, but without analysis or interpretation. A chronicler collects, an historian interprets. A narrow perspective of what is historically significant may affect the "quality" of an historical writing since it is qualitatively different than a recording of facts. It is possible that all historical writings are biased, if for no other reason than the fact that writings may to some degree take on the colour and flavour of the times in which they are written; without

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more, however, I am not inclined to accept that this is so or, if this is a correct statement, that this amounts to prohibited discrimination. I cannot readily accept that an activity involving the individual or collective creation of information, shared freely with all members 'of the public who desire it, is the type of conduct caught by the Yukon Human Rights Act.

The right to free expression of one's ideas is protected in both the Human Rights Act and s. 2(b) of the Canadian Charter of Rights and Freedoms. Freedom of expression is a cornerstone of a free and democratic society. Any limitation on the free expression of ideas must be most carefully scrutinized.

The Board did not perceive this adjudication as involving a question of the limits of free expression. I can see it as little else. That this is so is brought forcefully home in the recent judgment of the Supreme Court of Canada in R. v. Keegstra, supra. In this constitutional challenge to the wilful promotion of hatred provision in the Criminal Code, Dickson, C.J. (as he then was) commented on the ambit of this fundamental right, at pages 18 and 19 of his memorandum of judgment:

That the freedom to express oneself openly and fully is of crucial importance in a free and democratic society was recognized by Canadian courts prior to the enactment of the Charter....

Without explicit protection under a written constitution, however, the freedom of expression was not always accorded careful consideration in pre-Charter cases (see Clare Beckton,

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"Freedom of Expression" in G.-A. Beaudoin and E. Ratushny, eds., The Canadian Charter of Rights and Freedoms (2nd ed. 1989), p. 195, at pp. 197-98). Moreover, pre-Charter jurisprudence used freedom of expression primarily in relation to political expression, a context which restricted somewhat the content of the freedom....

While the pre-Charter era saw a role for the freedom of expression, then, with the Charter came not only its increased importance, but also a more careful and generous study of the values informing the freedom.

Dickson, C.J. concluded that the reach of freedom of expression is very wide, expression being deserving of protection if it serves individual and social values in a free and democratic society. The Court attempted to articulate more precisely the convictions that inform the right: (1) seeking and attaining the truth is an inherently good activity; (2) participation in social and political decision-making is to be fostered and encouraged; and (3) diversity in forms of individual self-fulfilment and human flourishing ought to be cultivated in a tolerant and welcoming environment for the sake of both those who convey a meaning and those to whom meaning is conveyed. See: Irwin Tov Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 927 at 976 and at p. 968 wherein it is said:

"Expression" has both a content and a form, and the two can be inextricably connected. Activity is expressive if it attempts to convey meaning. That meaning is its content. Freedom of expression was entrenched in our Constitution and is guaranteed in the Quebec Charter so as to ensure that everyone can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream. Such protection is, in the words of both the Canadian and Quebec Charters, "fundamental" because in a free, pluralistic and democratic society we prize a diversity of ideas and opinions for their inherent value both to the community and to the individual.

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In other words, expression embraces all content of expression irrespective of the particular meaning or message sought to be conveyed: Reference re ss. 193 and 195.1(1)(c) of The Criminal Code of Canada (Man.), [1990] 1 S.C.R. 1123 at 1181.

In Keegstra, Dickson, C.J. noted that the impugned provision aimed directly at words and that the purpose of the provision was to restrict the content of expression by singling out particular meanings that are not to be conveyed - an overt attempt to prevent the communication of expression. Accordingly, the provision infringed section 2(b) of the Charter. In his section 1 analysis Dickson, C. J. noted that the commonality that links the guarantees of rights and freedoms to section 1 of the Charter is the phrase "free and democratic society" and cited with approval to the following statement in Slaight Communications Inc. v. Davidson, [1989] 1 S.C.R. 1038 at 1056:

The underlying values of a free and democratic society both guarantee the rights in the Charter and, in appropriate circumstances, justify limitations upon those rights.

The phrase "free and democratic society" is not, in Dickson, C.J.'s view an empty "incantation". At pages 30-31 of his judgment in Keegstra, supra, he says:

To a large extent, a free and democratic society embraces the very values and principles which Canadians have sought to protect and further by entrenching specific rights and freedoms in the Constitution, although the balancing exercise in s. 1 is not restricted to values expressly set out in the

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Charter (Sleight, supra, at p. 1056). With this guideline in mind, in Oakes ([1986] 1 S.C.R. 103) I commented upon some of the ideals that inform our understanding of a free and democratic society, saying (at p. 136);

The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the Charter and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonably and demonstrably justified.

Dickson, C. J. stresses the importance of not losing sight of the factual circumstances of a particular case, for these shape the Court's view of both the right or freedom at stake and the limit proposed and neither can be surveyed in the abstract. The same approach must inform any inquiry taken under the Human Rights Act. Surely the correct view is that "...the proper judicial perspective under s. 1 must be derived from an awareness of the synergetic relation between two elements: the values underlying the Charter and the circumstances of the particular case." [Keegstra, page 32, per Dickson, C. J.]. An inquiry sensitive to the values and circumstances particular to an appeal is vital and the essence of a flexible approach, the performance of which was described by LaForest, J. in United States of America v. Cotroni, [1989] 1 S.C.R. 1469 at 1489-90:

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In the performance of the balancing task under s. 1, it seems to me, a mechanistic approach must be avoided. While the rights guaranteed by the Charter must be given priority in the equation, the underlying values must be sensitively weighed in a particular context against other values of a free and democratic society sought to be promoted by the legislature.

Placing conflicting values in their factual and social context permits a tribunal or a Court to have regard to the special features of the expression in question: see Edmonton Journal v. Alberta (Attorney General), [1989] 2 S.C.R. 1326. Not all expression is equally worthy of

protection nor are all infringements of free expression equally serious. In Rocket v. Royal College of Dental Surgeons of Ontario, [1990] 2 S.C.R. 232, a less serious infringement might be easier to justify if the curtailment of the right involved neither participation in the political process nor the ability to achieve spiritual and artistic self-fulfilment. In Keegstra, at page 63, Dickson, C.J. was of the view that at the core of freedom of expression

lies the need to ensure that truth and the common good are attained, whether in scientific and artistic endeavors or in the process of determining the best course to take in our political affairs. Since truth and the ideal form of political and social organization can rarely, if at all, be identified with absolute certainty, it is difficult to prohibit expression without impeding the free exchange of potentially valuable information.

While the Chief Justice cautions against taking this position to the extreme to hold that rationality will overcome all falsehoods in the unregulated marketplace of ideas, we must be concerned about the vital role of free expression as a means of ensuring

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individuals the ability to gain self-fulfilment by developing and articulating thoughts and ideas as they see fit. And, while it is true that a provision which prohibits the wilful promotion of hatred arguably works against freedom of expression values, such wilful expression can also work to undermine our commitment to democracy where employed to propagate ideas harmful to democratic aspirations and values. Hate propaganda is said to work this way because it argues for a society in which the democratic process is subverted and individuals are denied respect and dignity simply because of racial or religious characteristics.

Can an analogous argument be marshalled in support of regulating (perhaps muzzling) the message conveyed by the Pioneers? Can it be said that the Pioneers' message, like hate propaganda:

... advocates with inordinate vitriol an intolerance and prejudice which views as execrable the process of self-development and human flourishing among all members of society[?]

[Keegstra, pp. 64-65]

Dickson, C. J. was able to find that the particular anti-hate law in question was a justifiable limit on free expression. But it was with an important warning that he did so. At page 68:

... condoning a democracy's collective decision to protect itself from certain types of expression may lead to a slippery slope on which encroachments on expression central to s. 2(b) values are permitted. To guard against such a result, the protection of

communications virulently unsupportive of free expression values may be necessary in order to ensure that

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expression more compatible with these values is never unjustifiably limited.

And at page 69:

As a final point, it should be stressed that in discussing the relationship between hate propaganda and freedom of expression values I do not wish to be taken as advocating an inflexible "levels of scrutiny" categorization of expressive activity. The contextual approach necessitates an open discussion of the manner in which s. 2(b) values are engaged in the circumstances of an appeal. To become transfixed with categorization schemes risks losing the advantage associated with this sensitive examination of free expression principles, and I would be loath to sanction such a result.

The Board must make these sensitive inquires as well. There is little doubt that the activity of the Pioneers is expressive. Activity is expressive if it attempts to convey meaning. That meaning is its content. Therefore, the Pioneers' activities in relating to the collection and preservation of information fit within protected freedom of expression. Indeed, the Intervenor on this appeal suggests that the meaning being conveyed by the Pioneers, that meaning being the content of the information provided by the Pioneers, is of serious concern, particularly for women.

Assuming, without deciding, that the message conveyed by the Pioneers is discriminatory conduct of a type prohibited by the Human Rights Act, on the facts of this appeal, should the Pioneers' rights of associational freedom and freedom of expression give way to the right of Madeleine Gould to be free from discrimination?

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The principle of restraint requires lawmakers to concern themselves not only with whom they want to catch by their laws, but also with whom they do not want to catch: (1986) Canada Law Reform Commission Working Paper 50 on "Hate Propaganda". This principle must inform any interpretation of legislation, particularly human rights legislation. The Board must address what is at stake here and, in rendering its decision, the Board must be fully accountable for its interpretation of the objectives of the legislation and those activities it was enacted to regulate.

I conclude that, in considering the activities of the Pioneers relating to the collecting and preserving of information, the Board ought to have proceeded with the two step analysis

previously discussed. Again, the first step involves a determination of discrimination within the meaning of section 6 or section 11. If it is established that the conduct complained of (here, the collecting and preservation of history solely by male Pioneers) amounts to a form of discrimination as defined in the Act, then, it is necessary to decide whether the discriminatory act is of a type proscribed by one of the situations in section 8.

## F. DEFENCES

If the Board decides that there is discrimination in a form proscribed by the Act, then the third step in the Board's analysis

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is to consider any defences that the Pioneers may rely upon in response to a finding of discrimination. One such defence is found in section 9 of the Human Rights Act:

9. It is not discrimination if treatment is based on

(d) other factors establishing reasonable cause for the discrimination.

I agree that defences to what would otherwise be construed as discriminatory behaviour should be narrowly construed: Bhinder. Nevertheless, one might ask whether the right to freely associate and the right to free expression may be reasonable causes, in the circumstances, that would take the Pioneers' out of the reach of sections 6 or 11. The Board did not consider section 9 for any purpose. In my view, it must.

## G. EXEMPTIONS

If no defences are available to the Pioneers in this complaint proceeding, it is then necessary to proceed to the fourth and final consideration on these facts - to determine if the Pioneers are an exempted group under section 10 of the Human Rights Act.

Does section 10 of the Human Rights Act, which for convenience I shall call the "group exemption section", apply? It will be recalled that s. 10 provides as follows:

10. It is not discrimination for a religious, charitable, educational, social, cultural, or athletic organization to

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give preference to its members or to people the organization exists to serve.

I have no doubt that the Pioneers fit within one of the enumerated categories of organization, perhaps most accurately classified as a "social" organization within the meaning of section 10. In argument, there was no suggestion to the contrary. In my view, this section deems non-discriminatory distinctions, exclusions or preferences which would otherwise be prohibited. Section 10 is an exception to the anti-discrimination norm. It seems to me, therefore, that the exemption for a social organization provided for in section 10 need only be invoked following a determination that certain behaviour is discriminatory. The wording of each provision in section 10 reflects this connection negating that which would otherwise be defined as discriminatory behaviour. In other words, a condition precedent to consideration of section 10 is a finding of discriminatory behaviour.

In Ontario Human Rights Commission v. Borough of Etobicoke, [1982] 1 S.C.R. 202, 3 C.H.R.R. D/781 and affirmed in Bhinder v. Canadian National Railway Co., [1985] 2 S.C.R. 561, 63 N.R. 185, 7 C.H.R.R. D/3023, 132 D.L.R. (3d) 14, it was held that bona fide occupational qualification exceptions should, in principle, be treated restrictively since they take away rights which otherwise benefit from a liberal interpretation. I agree.

But in my view, there is a distinction between legislative

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provisions which limit rights and those that are, in fact, integral to the determination of the scope and ambit of the human rights statute and which must be given full effect. This is the fundamental distinction between sections 9 and 10 of the Human Rights Act.

In Brossard (Town) v. Que. (Commission des Droits), (1989) 10 C.H.R.R. D/5515 at D/5554 (S.C.C.), a provision of the Quebec Charter of Human Rights, R.S.Q. 1977, c. C-12 read as follows:

20. A distinction, exclusion or preference... justified by the charitable, philanthropic, religious, political or educational nature of a non-profit institution or of an institution devoted exclusively to the well-being of an ethnic group, is deemed non-discriminatory.

I first note that "social" is not included in this provision whereas the word "social" is expressly included as a category of organization in section 10 of the Human Rights Act. Beetz, J. held that although several cases have apparently taken a restrictive view of the section, inappropriate methods of interpretation and oversimplifications of the nature of the provision were caused by focusing on a liberal/restrictive difference in approach. In Brossard, supra,

Beetz, J. equated section 20 of the Quebec Charter of Human Rights with section 22 of the British Columbia Human Rights Code, which was under consideration in Caldwell v. Stuart, [1984] 2 S.C.R. 603 at 627 (sub nom. Caldwell v. St. Thomas Aquinas High School), 6 C.H.R.R. D/2643:

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22. Where a charitable, philanthropic, educational, fraternal, religious or social organization or corporation that is not operated for profit has as a primary purpose the promotion of the interests and welfare of an identifiable group or class of persons characterized by a common race, religion, age, sex, that organization shall not be considered as contravening this Act because it is granting a preference to members of the identifiable group or class of persons.

In Caldwell, McIntyre, J. stated that such a clause should not be narrowly construed because it not only limited rights but conferred and protected rights too. It was the only section of the Act that specifically preserved the right to associate. It is plain to me that section 10 has a similar purpose - it allows certain organizations to create distinctions, exclusions or preferences which would otherwise violate the Yukon legislation. McIntyre, J.'s approach was adopted in Brossard (Town) v. Que. (Commission des Droits), supra. Exemptions should be interpreted objectively, not based on a capricious distinction exercised by the organization in question, but by facts which make the exclusion a rational and logical consequence of the nature of the organization. At page D/5544:

The better view is that like s. 22 of the B.C. Code, the second branch of s. 20 has a dual purpose: when it applies, it at once confers rights upon some persons and imposes a limitation on the rights of others. That it limits an individual's right to be free from discrimination is plain. It is also designed, however, to allow certain non-profit institutions to create distinctions, exclusions or preferences which would otherwise violate the [Quebec] Charter if those distinctions, exclusions or preferences are justified by the charitable, philanthropic, religious, political or educational nature of the institution in question. In this sense, s. 20 confers rights upon certain groups. In my view, this branch

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of s. 20 was designed to promote the fundamental right of individuals to freely associate in groups for the purpose of expressing particular views or engaging in particular pursuits. Its effect is to establish the primacy of the rights of the group over the rights of the individual in specified circumstances. Rather than adopting a liberal or restrictive interpretation of the second branch, I shall therefore endeavour to give the expressions "non-profit institution" and "political nature" their ordinary meaning, using the tradition rules of statutory interpretation.

[Emphasis added]

Similarly, a restrictive reading of section 10 may be inappropriate having regard to the ordinary meaning of the words used in that section. At pp. D/5552-5553 [C.H.R.R.], Beetz, J. analyzed the type of connection required to exist between the conduct engaged in and the nature of the institution under the Quebec Charter:

As I have said, s.20 protects the right to associate freely in groups for the purpose of expressing particular views or for engaging in particular pursuits. Section 20 has, however, a limited legislative purpose: it is intended as an answer for "distinctions, exclusions or preferences" which would otherwise be discriminatory under s. 10. It is logical that s. 20 protection only be extended to groups for which the mere fact of associating results in discrimination founded on a s. 10 ground. The institution must have, as a primary purpose, the promotion of the interests and welfare of an identifiable group of persons characterized by a common ground under s. 10: race, colour, sex.... to cite the enumerated grounds of the amended provision. The institution itself may fall into one or another of the s. 20 types but there must always be a congruence between a primary group purpose and the s. 10 ground of discrimination practised [examples cited].... Whether these exclusions are "justified" is, as I have said, a question separate from the applicability of the second branch. But in each of these cases, and indeed in every case in which s. 20 is invoked, the [Quebec] Charter protects the freedom of association of a non-profit institution which promotes the interest and welfare of an identifiable group of persons characterized by a factor enumerated in s. 10.

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[Emphasis added]

Notwithstanding the differences in wording between the provisions under consideration in Caldwell and Brossard, in my view the underlying policy objectives are identical to that of section 10 of the Yukon Human Rights Act. The group rights exemption in section 10 of the Yukon Human Rights Act is designed to promote the fundamental freedom of individuals to associate in groups for the purposes of expressing particular views or engaging in particular pursuits unrestricted by the anti-discriminatory rules which are the norm, subject to restrictions as to the nature of the organization. While the wording of exemption sections vary from jurisdiction to jurisdiction, the essence of the protection afforded groups and the reasons for this protection are the same.

In addition, the two phrases in section 10 should be read disjunctively since they are separated by the word "or". Thus, if the section is applicable, the Pioneers are entitled to give preference to members OR to people it exists to serve. To give preference suggests conduct that is functionally opposite from treating unfavourably. This is consistent with the view that group exemption provisions are exceptions to the anti-discriminatory norm.

I conclude that exemption provisions are not equivalent to defences. Defences are set forth in section 9 of the Human Rights

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Act and provide an additional or independent response to a complaint of discrimination. In determining bona fide occupational requirements and other provisions of section 9 of the Act, the "Bhinder" approach may be proper. However, this is not necessarily the appropriate interpretive approach when considering section 10 of the Act.

I conclude that the Pioneers is an organization that may well fit within the parameters of section 10 of the Human Rights Act. Whereas the Quebec Charter required the exclusion to be "justified", there is no such requirement in the Yukon Act. The Board must give the words of section 10 of the Act their ordinary meaning. Given the comments made in Brossard and Caldwell, supra, on the facts of this particular case, it is open to question whether in the context of section 10 of the Act, the "people the [Pioneers] exists to serve", is the entire Yukon community. Providing information to the public does not, in my view, alter the characterization of the people the Pioneers exist to serve. In any event, in failing to consider the applicability of section 10, having regard to the proper interpretive method to be employed and the interests it seeks to serve, the Board erred in law.

#### H. YUKON LEGISLATIVE ASSEMBLY, DEBATES AND PROCEEDINGS

Common law courts in Canada and England have historically taken the position that statements made by members of the

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legislature during the legislative process cannot be used as evidence of legislative intent or may be used for a limited purpose only (not to construe or apply the provisions of the legislation but to ascertain its constitutional pivot: see Re Residential Tenancies Act, [1981] 1 S.C.R. 714 and per Beetz, J. in Anti-Inflation Act, [1976] 2 S.C.R. 373).

This approach may be undergoing refinement. In McKinney, supra, LaForest, J. cited to the debates leading to the enactment of Ontario human rights legislation. Moreover, LaForest, J. agreed with the approach taken by Gray, J. who had used the debates to illuminate the complexity of the socio-economic issues related to mandatory retirement and the scope of the Ontario Human Rights Code.

Although I have reviewed the Yukon debates and proceedings, I hesitate to place more than slight reliance on them as an interpretive aid. It is plain that the process leading to proclamation of this legislation - two draft Bills (#56 and #99), a White Paper, a Green Paper, numerous public hearings, fact sheets, information pamphlets, an advertising campaign and extensive debate in the Legislature - caused unprecedented controversy amongst Yukoners. Debate was lengthy and sometimes acrimonious. Many questioned the need for such legislation, in any form. Others thought that the legislation went too far. Still others complained that the legislation did not go far enough.

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There appeared to be little ultimate consensus. Eventually, however, the final draft was introduced to the Legislative Assembly.

On December 4, 1986, on second reading of Bill No. 99, the Minister of Justice, the Honourable Mr. Kimmerly stated the objectives of the Act in these terms, at page 166:

Hon. Mr. Kimmerly: The objects of this Act are to further, in the Yukon, the public policy that every individual is free and equal in dignity and rights; to discourage and eliminate discrimination; to recognize the unique needs and cultural heritage of the aboriginal peoples of the Yukon; and preserve and enhance the multicultural heritage of Yukon residents.

This Act is about our fundamental principles about democracy.... This government excludes no group whatsoever. This government will not allow any group of citizens or any adult individual citizen to be left out in the cold, to be discriminated against concerning jobs, accommodation, and goods and services that are offered to the public.

Democracy means dignity and respect for every individual. We may not like a person. We may have a different religion. We may have a different morality, but democracy demands that we afford that person fundamental, basic human rights. There can be no exceptions. Everyone in the Yukon must have equal dignity and equal rights....

We do not claim for a minute that there is unanimity on all these measures. There is not, but democracy itself requires our tolerance of other citizens.... My neighbours, even though their beliefs offend me, have every bit as much right to jobs, accommodation, good and service [sic] as I do....

This bill, for the very first time in Yukon history, declares a Bill of Rights, a declaration of our civil rights in the territorial jurisdiction. These rights are paramount over other laws... and services, accommodations and jobs open to the public.

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The last two paragraphs, in particular, are somewhat useful to the statutory interpretation process. It is clear that the Honourable Minister felt that fundamental democratic rights, including freedom of association, were paramount. This is also reflected in their placement in

the Human Rights Act as the Bill of Rights. The Act reflects a democratically achieved compromise regarding basic human rights issues about which there was enormous and fundamental disagreement. Any provisions of the Act must arguably be read in the context of the intended paramountcy of these rights.

It also seems tolerably clear that the remedial aspects of the Act were designed to regulate dealings having a public aspect, as opposed to purely private dealings or matters not "open to the public," as evidenced by the last quoted sentence.

In addition, on January 12, 1987, the Hon. Mr. Kimmerly had this to say:

When we think about freedom of religion, conscience, opinion, belief, speech and peaceable assembly, I cannot think of any concrete examples where you would wish to deny a group that right. Therefore, I think it is important to include the concept that groups have rights as well as only individuals. If there is any harm, I cannot think of it.

On February 11, 1987 at page 691, during debate on an amendment to section 10(3)(a), the Honourable Minister used the Pioneers as an

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example of the type of social organization that section 10 was designed to accommodate:

The phrase "social organization" is a very wide phrase. It would include things like the Legion, the Yukon Order of Pioneers, the Elks Club, the Rotary Club, and those kinds of organizations. The principle that the government is promoting is that those organizations should have the right to promote their own organization, or to give preference to their own members and, also, to people who the organization exists to serve, if they are actually a service organization.

As far as I am aware, there was no debate whatsoever regarding. section 10(1). In any event, I am quite satisfied that the analysis preceding this section is neither helped nor hurt by the content of the debates of the Yukon Legislative Assembly.

I will now turn to the final portion of the analysis of issues raised on this appeal - questions of law relating to evidence.

### I. Evidentiary Issues

If I am wrong in my interpretation of the Yukon Human Rights Act there are further matters of concern that, in my view, are sufficient to set aside the Board's decision.

Section 23 of the Human Rights Act states:

23.(1) If the complaint is proven on a balance of probabilities the board may order the party who discriminated to...

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In O'Malley, supra, at page 558 [S.C.R.] McIntyre, J. discusses the need to assign a burden of proof:

To begin with, experience has shown that in the resolution of disputes by the employment of the judicial process, the assignment of a burden of proof to one party or the other is an essential element. The burden need not in all cases be heavy - it will vary with particular cases - and it may not apply to one party on all issues in the case; it may shift from one to the other. But as a practical expedient it has been found necessary, in order to insure a clear result in any judicial proceeding to have available as a 'tie-breaker' the concept of onus of proof. I agree then with the Board of Inquiry that each case will come down to a question of proof, and therefore there must be a clearly-recognized and clearly-assigned burden of proof in these cases as in all civil proceedings. To whom should it be assigned? Following the well-settled rule in civil cases, the plaintiff bears the burden. He who alleges must prove.

In this case, the onus of proof is expressly established - the complainant was required to prove on a balance of probabilities that she had been discriminated against within the meaning of the Act. In Smith v. Smith et al., [1952] 2 S.C.R. 312 at 332, [1952] 3 D.L.R. 449, Cartwright, J. adopted the following passage of Dixon, J. from Briginshaw v. Briginshaw (1938), 60 C.L.R. 336 (Aust. H.C.):

The truth is that, when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality. No doubt an opinion that a state of facts exists may be held according to indefinite gradations of certainty; and this has led to attempts to define exactly the certainty required by the law for various purposes.... But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or

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facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect inferences.

It is only when a complaint is "proven on a balance of probabilities" that the Board may make an order. It seems incontestable that this is a question of law in an area in which

the superior court has particular competence. After careful consideration, I cannot accept that here the Board could reasonably conclude that the complainant proved, on a balance of probabilities, that there had been discrimination as prohibited by the Act adverse or otherwise and, in so finding, the Board committed an error of law.

Additional evidentiary issues arise, the first concerning the sufficiency of the evidence before the Board and the second concerning those matters of which the Board may take notice in the absence of evidence.

Courts seem to have adopted the position taken in Nat Bell Liquors, (1922) 65 D.L.R. 1 (P.C.) that the sufficiency of evidence is not a question of law; on the other hand, total lack of evidence appears to be a jurisdictional error capable of judicial review. An unreasonable appreciation of the facts may also constitute jurisdictional error which justifies intervention by the courts.

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This was recognized by Lamer, J. in Blanchard v. Control Data Canada Limited, [1984] 2 S.C.R. 476 at 494-495:

An administrative tribunal has the necessary jurisdiction to make a mistake, and even a serious one, but not to be unreasonable. The unreasonable finding is no less fatal to jurisdiction because the finding is one of fact rather than law. An unreasonable finding is what justifies intervention by the courts. jurisdictional error which justifies intervention by the courts. was reasonably capable of supporting the following findings and

Not only is the distinction between error of law and of fact superfluous in light of an unreasonable finding or conclusion, but the reference to error itself is as well. Indeed, though all errors do not lead to unreasonable findings, every unreasonable finding results from an error (whether of law, fact, or a combination of the two) which is unreasonable.

In conclusion, an unreasonable finding, whatever its origin, affects the jurisdiction of the tribunals. I hasten to add that the distinction between an error of law and one of fact is still entirely valid when the tribunal is not protected by a privative clause. Indeed, although all errors of law are then subjected to review, only unreasonable errors of fact are, and no others.

[Emphasis added]

To find facts based on no evidence is, by a well established rule, an error of law. In principle, therefore, a tribunal's findings of fact can be challenged by way of appeal on a point of law if they are based on no evidence. But as Wade points out in Administrative Law, at pages 274-275:

"No evidence" does not mean a total dearth of evidence. It extends to any case where the evidence, taken as a whole, is not reasonably capable of supporting the finding; or where, in other words, no tribunal could reasonably reach that conclusion on that evidence.

The issues then arising are whether the evidence before the Board was reasonably capable of supporting the following findings and

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whether the Board could reasonably reach the following conclusions:

1. "The Board is not prepared to assume that at some period, the public service element would not predominate...."
2. "Some significant element of the Order's activities are directed to public service and the Order does in fact offer or provide services to the public."
3. "The effect of the membership policy means that the public service cannot be performed properly due to the lack of female input."
4. "They [Counsel for Madeleine Gould and the Intervenor] reason that history will be distorted in favour of the male role if it is recorded solely by males. While the Board is of the opinion that the evidence presented at the hearing in relation to that point was of such a nature that it could not be accorded much weight, the Board is prepared to accept the proposition from a common sense standpoint."

As I earlier concluded, the Board properly allowed the Intervenor leave to make submissions given the broad discretion of the Board has in such a situation. This does not, however, resolve the difficulty grounded in the Board's acceptance of the Intervenor's brief of submissions in the face of an Agreed Statement of Facts nor does it answer the "common sense" acceptance by the Board that history will be distorted if recorded solely by males particularly since "... the evidence presented at the hearing in relation to that point was of such a nature that it could not be accorded much weight."

It is clear that the Board is not bound by the strict rules of evidence that may constrain a court of law - it may receive or view any relevant evidence and may act according to its view of the

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reliability and import of the evidence. Granting the Board the widest latitude, with respect, it must still be evidence. The evidence of a fact is that which tends to prove it - something which may satisfy the inquirer of the facts existence: Cross on Evidence, 6th ed. (1985) 1. Thus, there is a fact-based and relational quality to evidence - it is more than conjecture or speculation or opinion (except in the case of qualified experts). Where, as here, a Board

admittedly relies on common sense to reach a conclusion it may be difficult to find an evidentiary base to what is, essentially, an opinion. And, if the Board used the Intervenor's materials at all, it seems to me that the Board could only base its opinion on another opinion - that of academic writers. I read the Intervenor's submissions carefully and more than once. I have some question whether, when read in the context of the writings from which they were taken, the excerpts relied upon by the Intervenor stand exactly for the propositions urged.

In my view, section 11 of the Human Rights Regulations, in permitting the board to "...act according to its view of the reliability and import of the evidence", was aiming more at decisions regarding admissibility of certain materials, than weight. The Board may consider something both relevant and admissible, but this is quite a different matter than the question of what weight should be given this material.

Moreover, this Board was expressly bound to conduct its

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hearing in accordance with "the principles of fundamental justice". Whatever the exact substantive content of this phrase might be it requires, at minimum, that the Board not conclude that there has been a contravention of the Act in the absence of evidence supportive of that finding. There is a difference, in my view, between the Board assessing the "reliability" and "import" of evidence and reaching a decision in the absence of evidence. The latter is nothing more than unsubstantiated opinion.

In certain circumstances, the law differentiates between matters of fact which must be proven and those facts which the adjudicator may accept as true without any evidence. What is unique about this doctrine of judicial notice is that it relieves a party from the obligation of proving the proposition of fact on the ground that no reasonable person, including the adversary, can dispute the proposition.

The Board was entitled to consider evidence beyond that which is ordinarily admissible by the strict rules of evidence. There is authority for the view that a tribunal can make extensive use of personal knowledge in deciding an issue, even beyond the scope of facts of which judicial notice may be taken in a court of law: A.G.B.C. v. Martinoff, [1977] 6 W.W.R. 764 (B.C.Co.Ct.); Singh v. Min. Employment and Immigration, (1984) Admin. L. R. 38 (Fed. C.A.).

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The Intervenor urged that the Board was entitled to take notice of historical analogies on the same reasoning that applies to documentary submissions in constitutional cases; that is, as the facts in such cases tend to be more abstract and difficult of proof than in other proceedings, courts have broadened the range of facts which it may notice. But in my view, there is a distinction between the use of extrinsic evidence to determine constitutional validity or, perhaps, whether impugned legislation should be saved under a s. 1 analysis of the Charter of Rights and Freedoms and its use in determining the proper interpretation or construction of presumptively valid legislation.

On the present appeal, it is not entirely clear whether the Board made an assumption without facts or made a decision dependent on the Intervenor's submission. In either case, the Board did not have any, or any sufficient evidence' before it to reach the decision it did. What is before the Board must even under the Human Rights Act be "evidence" having some probative force. Wigmore on Evidence, 3rd. ed. vol. 1, pages 1-2, gives many definitions of "evidence" and distinguishes between evidence acceptable in judicial proceedings and what may be called evidence for the purpose of demonstrating an asserted fact. One of the clearest definitions of evidence is that in Blackstone's Commentaries, vol. III, p. 367: "Evidence signifies that which demonstrates, makes clear, or ascertains the truth of the very fact or point in issue, either on the one side or the other." To borrow

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the words of Diplock, L.J. in R. v. Deputy Industrial Injuries Commissioner Ex Parte Moore, [1965] 1 Q.B. 456 at 458:

The requirement that a person exercising quasi-judicial functions must base his decision upon evidence means no more than it must be based upon material which tends logically to show the existence or non-existence of facts relevant to the issue to be determined, or to show the likelihood or unlikelihood of the occurrence of some future event the occurrence of which would be relevant. It means that he must not spin a coin or consult an astrologer, but that he must take into account any material which, as a matter of reason, has some probative value in the sense mentioned above.

[Emphasis added]

In "The Law of Evidence", (1989) 11 Supreme Court Law Review 275 at 342, Marilyn MacCrimmon notes that the finding of social facts falls outside the rationalist model of evidence. In "There is a Book Out An Analysis of Judicial Absorption of Legislative Facts", (1987) 100:5 Harvard Law Rev. 1539, however, P. Davis suggests that there is always the

danger that a tribunal may proceed to develop the law or effect a change in the law without carefully considering either the soundness of a particular theory or the impact of its application beyond the facts of a particular case:

This tendency is unfortunate. The evidence in a particular case may argue strongly for a legal principle that would ease the burden or win the day for the more persuasive side. But the apparent strength of the evidence may result from a litigation imbalance. Expert witnesses may have overstated premises as a result of their conviction concerning case-specific conclusions. And it is unlikely that the experts will have considered or communicated the implications of broad applications of those premises.

A controversial theory may appropriately serve as background

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for drawing functional conclusions in the course of applying an established rule of law, yet use of the same theory as a legislative fact may be entirely unwarranted.

In the present factual circumstances, the danger that theories may be stated overbroadly and may have unwarranted and unthought of implications is very real. As Professor Davis points out at page 1602 of her article, the process by which judges learn from individual cases and, from that learning, announce or argue for changes in the law is valuable. This process is more valuable:

... to the extent that judges correct for distortions that are possible when legislative facts are gathered in the context of narrowly focused litigation, and protect against the risk of making bad - or inappropriately broad - law in compelling cases.

The learned author concludes that because of its complexity the matter of judicial notice of legislative facts should not be forced into a rigid pattern; at the same time, however, the use to which legislative facts are put cannot proceed in an unconscious and unregulated manner. Modern rules of evidence are silent regarding judicial notice of legislative facts.

In "The Law of Evidence", supra, L. MacCrimmon suggests that respect for judicial decisions is lessened if they conflict with empirical evidence. Should we, therefore, apply the same constraints to the proof of social facts as to adjudicative facts, or allow proof of social facts to be made through submissions of briefs and arguments? The Supreme Court of Canada is not entirely

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in agreement on this subject: see, for e.g. McIntyre, J. in R. v. Morgentaler, [1988] 1 S.C.R. 30. But, whatever else might be said about this type of evidence, as MacCrimmon says [at p. 342, "The Law of Evidence"]:

The finding of social facts, by definition, requires more than common sense reasoning. Witnesses are not, as with adjudicative facts, testifying on the basis of their personal knowledge. Assessment of the weight of their testimony does not depend on common sense generalizations about credibility, but on the expertise of the source. This suggests that the traditional methods of proof should not be adopted without an express consideration of their appropriateness for the finding of social fact.

It is absolutely critical that Boards of Adjudication under the Human Rights Act understand the type of evidentiary issues that are in the forefront of this type of litigation. The Board must be wary of accepting any proposition that will have an effect on an issue of fact or law central to the particular facts of the case. The Board must ensure that legislative facts brought into the hearing in the form of briefs, submissions, academic writings, reports or otherwise are scrutinized carefully. They may be overbroad, or inappropriate; helpful or wholly irrelevant. Social facts must also be viewed in light of the necessity, adverted to earlier, of according to Legislatures a certain deference in the development of human rights legislation. The legislation simply may not have addressed the particular legislative facts brought forward.

The finding by the Board that history is distorted in favour

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of the male role if recorded solely by males led the Board to find prohibited discrimination in the rejection of Madeleine Gould's application for membership in the Pioneers. Even granting that the Board was entitled to take judicial notice of a distortion of history concept, having regard to the totality of the materials before it and the statutory burden of persuasion to which the Board is held in weighing evidence and applying policy, I am of the firm view that the Board erred in law in reaching the conclusion it did. A misapprehension as to the law of evidence is an error of law.

Finally, as to the nature or necessity of evidence in general, the comments of Sopinka, J. in R. v. Danson, decided on October 4, 1990 are apt notwithstanding that the Board may be permitted a lower evidentiary standard than this Court. At pages 13-14 of his memorandum of judgment, Sopinka, J. referred to Mackay v. Manitoba, [1989] 2 S.C.R. 357 wherein Cory, J. stated for a unanimous Court, at pp. 361-362:

Charter decisions should not and must not be made in a factual vacuum. To attempt to do so would trivialize the Charter and inevitably result in ill-considered opinions. The presentation of facts is not, as stated by the respondent, a mere technicality; rather, it is essential to a proper consideration of Charter issues...Charter decisions cannot be based upon the unsupported hypotheses of enthusiastic counsel.

Later, at page 366, Cory, J. stated:

A factual foundation is of fundamental importance on this appeal. It is not the purpose of the legislation which is

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said to infringe the Charter but its effects. If the deleterious effects are not established there can be no Charter violation and no case has been made out. Thus the absence of a factual base is not just a technicality that could be overlooked, but rather it is a flaw that is fatal to the appellant's position.

The importance of human rights legislation also militates against findings of fact or law in the absence of some evidence from which such conclusions could reasonably be reached. Decisions of such far-reaching importance cannot be made in a vacuum. Assuming, for the moment, that opinion devoid of factual foundation and absent any test of inherent reliability or trustworthiness could properly form the basis for a conclusion in law central to the issues in question, and assuming that intelligent people could not reasonably dispute the stated proposition that male-only history is distorted history, I conclude that even by the most relaxed standard of evidence permitted administrative tribunals, the complainant has not proven her case.

III

## DISPOSITION

This appeal brought to the forefront one of the most difficult constitutional issues of our time - the conflict between freedom and equality. The process of developing human rights legislation involves the careful balancing of fundamental democratic

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principles, principles which may, from time to time, clash.

Human rights legislation has a near constitutional status in Canada. It is to state the obvious to say that it is important law. The responsibility undertaken by Boards of Adjudication in interpreting the Yukon Human Rights Act is therefore weighty. It is my view that such a responsibility cannot be properly discharged in the absence of a proper interpretation of the legislation in light of both the objectives sought to be achieved and the balancing of interests that is necessary. This responsibility is made even more onerous by the evidentiary problems

that confront any administrative tribunal concerned with social policy - legislative facts are not susceptible to traditional methods of proof.

On this appeal, I have attempted to illustrate to the Board for both its immediate and future guidance the considerations that must inform any finding under the Human Rights Act and, in the process, have tried to move somewhat closer to resolving this most vexing social issue.

I conclude for the reasons stated throughout that the Board made errors in law in the application of the facts of this particular case to the law, the Human Rights Act. I therefore set

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aside the decision of the Board and direct the Board to conduct a new hearing in accordance with law.

D.J.S.C.Y.T.

Paul S. O'Brien for the Complainant (Respondent)

Richard A. Buchan for the Respondents (Appellants)

Gwen Brodsky for the Intervenor

DATED In the City of Edmonton this 8th day of March, A.D. 1991

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