IN THE MATTER OF THE HUMAN RIGHTS ACT

and

IN THE MATTER OF A COMPLAINT

BY

GENE KEYES

AGAINST

PANDORA PUBLISHING ASSOCIATION

MOTION FOR DETERMINATION OF SETTLEMENT

DATE:	December 13, 1991
PLACE:	Halifax, Nova Scotia
BEFORE:	David Miller
COUNSEL:	Randall R. Duplak, Q.C. for the Nova Scotia Human Rights Commission
	Anne S. Derrick for Pandora Publishing Association
	Gene Keyes, Personally
DECISION ON MOTION:	December , 1991.

IN THE MATTER OF THE HUMAN RIGHTS ACT

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AGAINST

PANDORA PUBLISHING ASSOCIATION

MOTION FOR DETERMINATION OF SETTLEMENT

This is a motion made by the Nova Scotia Human Rights Commission (the "Commission") for a determination as to whether or not the complaint of the Complainant Gene Keyes ("Keyes") against the Respondent Pandora Publishing Association ("Pandora") has been settled and, if so, if an Order should be made directing enforcement of the terms of the settlement. Evidence on the motion was tendered on the motion with the agreement of the parties by way of documents only which were marked as Exhibits 1 through 8 inclusive.

Keyes made a complaint pursuant to the Nova Scotia Human Rights Act (the "Act") to the Commission on June 21, 1990 against Pandora. The complaint was that Pandora had discriminated

against him in or about March, 1990 in the matter of Services and Advertisement because of his sex. The nature of the complaint was described as follows:

> I am a Nova Scotian male. The letter policy of Pandora's Publishing Association as outlined in the March, 1990 issue of Pandora indicates that letters must be written by women. As a result I am prohibited from expressing my views in Pandora. I allege I have been discriminated against because of my sex in contravention of Sections 12(1)(a) and 17 of the Nova Scotia Human Rights Act. [sic].
>
> (Exhibit 6).

Concilliation was undertaken by the Commission. This resulted in an agreement in writing dated the 21st day of December, 1990 between Pandora and Keyes. The agreement recited that "the parties hereto have reached a settlement of the complaint by Complainant" and went on to recite the terms of the settlement as follows:

> 1. Pandora will print a disclaimer regarding the advertisements placed in the newspaper.
>
> 2. Pandora will apply for an exemption under Section 25 of the Nova Scotia Human Rights Act. Pandora agrees to make this application within the next three (3) months.
>
> (i) Should the exemption be granted, Keyes will withdraw his request that the letter policy be changed, and the file will be closed.
>
> (ii) Should the exemption be denied, the parties will return to conciliation.

Keyes acknowledged in the agreement that the "settlement is made 'without prejudice' and with a denial by Respondent [Pandora] of any liability to Complainant." (Exhibit 1).

I was told at the hearing that Pandora was represented by legal counsel in the conciliation process leading up to the written agreement of December 21, 1990.

On March 15, 1991 Pandora wrote the Commission advising that it had printed a disclaimer and had begun the preparation of an application to the Commission for an exemption under the Act. However, Pandora went on to advise that for the reasons set out in its letter it had concluded that the application for the exemption was contrary to the broader issue of women's equality, the promotion of which was the reason for Pandora's existence. Pandora advised that in the result it would not be forwarding an application to the Commission for the exemption.

On March 26, 1991 Janet McKinnon, the Human Rights Officer assigned by the Commission to handle the complaint wrote Pandora in response to its March 15, 1991 letter and stated in part as follows:

> The position of Pandora Publishing as outlined in this letter means that conciliation has not been successful and that the complaint has not been resolved.
>
> It is the duty of the staff of the Commission to report to the Board of Commissioners when we have not been able to effect a settlement of a complaint, therefore this complaint will be forwarded to the Board and to the Minister to determine whether or not a Board of Inquiry should be appointed. (The complainant will be advised of your position and informed he has the option of withdrawing his complaint or having it forwarded for this review.)
>
> (Exhibit 3).

On the same date Ms. McKinnon wrote Keyes in part as follows:

> Pandora Publishing has informed me that they will not be forwarding an application for a human rights exemption. They report that upon reflection, they do not believe this is an appropriate action. They have and will continue to print a disclaimer regarding advertisements.
>
> This position means that conciliation has not been successful and the complaint has not resolved. The complaint will now be forwarded to the Board of Commissioners and to the Minister to determine whether or not a Board of Inquiry should be appointed. As the complainant, if you do not wish to pursue this course, you may withdraw your complaint.
>
> (Exhibit 4).

Keyes acknowledged the Commission's letter on April 5, 1991. He stated in part as follows:

> I will let the complaint go forward.
>
> (Exhibit 5).

On the motion of December 13 Mr. Keyes agreed that his intention and a reasonable inference from his letter was that he was prepared to abandon the settlement agreement and let his complaint against Pandora go forward to a hearing on the merits.

The Act as it stood at the relevant time provided as follows:

> Section 32 (1) If the Director or other officer is unable to effect a settlement of the matters complained of, the Commission shall make a report to the Minister and the Minister may appoint one or more persons to be a board of inquiry to investigate and seek settlement of the complaint.

The report to the Minister was not before me. However, it was common ground among all the parties to the motion that such a report had been made.

Pursuant to the report of the Commission I was appointed a Board cf Inquiry under the Act. The appointment dated June 17, 1991 provided as follows:

> The Nova Scotia Human Rights Commission, having reported that it is not able to effect a settlement of a complaint by Gene Keyes against Pandora Publishing Association, I, therefore, hereby appoint, pursuant to Section 32(1) of the Human Rights Act, Chapter 214 of the Revised Statutes of Nova Scotia, 1989, David A. Miller to constitute a Board of Inquiry.
>
> The purpose of the Board of Inquiry is to investigate and seek settlement of the following complaint:
>
> That Pandora Publishing Association did, on or about March, 1990, discriminate against Geney Keyes by denying him services and advertisement by prohibiting him from expressing his views because of his sex contrary to Sections 12(1)(a) and 17 of the Human Rights Act.
>
> (Exhibit 8).

The appointment was accompanied by a letter of the same date (Exhibit 7).

The Commission submits that the complaint was settled by the written agreement of December 21, 1990 and that I as the Board of Inquiry have the authority under Section 34 of the Act to determine that such a settlement has been made and to order the parties to comply with the terms of the settlement. The

motion was opposed by Mr. Keyes. He submitted that the complaint should go forward to be dealt with on its merits. The motion was also opposed by Pandora.

Having given careful consideration to the evidence before me and the submissions of the parties, I find as a matter of fact that at least from April 5, 1991 (Keyes' letter, Exhibit 5) there was no enforceable settlement agreement among the parties and accordingly I must dismiss the motion.

The settlement agreement of December 21, 1990 is stated to have been reached between "the parties hereto" who are named as Pandora and Keyes. The Commission is not stated to be a party to the agreement. By its letter of March 15, 1991 (Exhibit 2) Pandora clearly repudiated the settlement. This repudiation was accepted by Keyes by his letter of April 5, 1991 (Exhibit 5).

Accordingly, I find that even if there was a binding settlement agreement between the parties as contemplated by the Act pursuant to the agreement of December 21, 1990, such agreement was effectively abandoned by the mutual agreement of the parties to it and that it is no longer enforceable. Indeed, neither of the parties to the agreement, Pandora or Keyes, sought to enforce the agreement. Rather, they each took the position that the complaint should go forward on its merits.

In passing, I note that I have some difficulty with the submission that the agreement of December 21, 1990 is the kind of

settlement agreement contemplated by the Act, even if made after the appointment of a Board of Inquiry. The so called settlement is, at most, conditional. It contemplates not the final settlement of the complaint, but rather, only that the complaint be held in suspension pending an application by Pandora for an exemption under the Act. As I understand the agreement, if the exemption were not granted, Keyes' intended that his complaint go forward. Having regard to my other findings, however, it is not necessary for me to determine whether or not the agreement sets out a settlement which under appropriate circumstances could be reported by a Board of Inquiry as settlement of a complaint.

In my opinion, the Commission is not a party to the settlement agreement of December 21, 1990 and accordingly cannot seek to enforce it, particularly over the objections of the parties to the agreement, Pandora and Keyes. If I am wrong in this respect, however, and if the Commission is in some way a party and has status to seek enforcement of the agreement before me, I find as a matter of fact that the Commission, too, like Keyes and Pandora accepted that the Agreement would be rescinded and set aside. I note particularly the language of the Commission's letters of March 26, 1991 to Pandora and Keyes. I did not hear evidence from Ms. McKinnon, the author of those letters. However, I can only infer from the language used by Ms. McKinnon in the letters that the Commission concluded that the complaint was not settled and that the complaint would have to go forward to a Board of Inquiry if so determined by the Commission for a decision as to whether or not there had been a violation of

the Act by Pandora. If the position of the Commission as stated by Ms. McKinnon in her letters of March 26, 1991 had been that there was in fact a settlement and that all that remained to be done was to take steps to enforce the terms of the settlement, I would have expected her to have used far different language than is set out in her letters. Accordingly, I conclude from the letters that the Commission accepted that the attempted settlement had failed and that if there were to be further proceedings the matter would have to go forward on its merits.

It was also submitted on behalf of the Commission that even if the Commission was not a party to the agreement of December 20, 1990 then having regard to the public interest in the enforcement of the Act the Commission had the authority to make application to the Board of Inquiry for enforcement of the settlement. I have already held that the Commission, like Keyes and Pandora, had also consented to the abandonment of the agreement. The Commission cannot now change that position. If, however, I am wrong in determining that the Commission had consented to abandonment of the agreement and if the Commission has the authority to request a Board of Inquiry to enforce a settlement agreement which has been abandoned between the Complainant and the Respondent (which I am not prepared to determine) in my opinion this is not an appropriate case for such an Order. In my opinion, in this case the public interest is better served by permitting this complaint to proceed on the merits rather than to order enforcement of the December 20, 1990 agreement.

Even if I am wrong that there was no settlement agreement to enforce after at least April 5, 1991 because the parties to the agreement, Keyes and Pandora, had agreed to abandon it and because the Commission, if it had any standing in respect of the agreement, had also agreed to abandonment, I still would not have allowed the motion.

Section 32 (1) of the Act provides that if the Director or other officer of the Commission "is unable to effect a settlement of the matters complained of" the Commission shall report to the Minister and the Minister might appoint a board of inquiry. I was invited to interpret the words "effect a settlement" as comprising not only the reaching of a settlement agreement, but also the performance and discharge of such a settlement agreement. In other words, it was suggested that a settlement has not been "effected" until it has been agreed to and the terms of the settlement agreement have been performed. I am not able to place such a construction on the section. In my opinion, under the Act as it stood at the relevant time a settlement of the complaint has been "effected" when an agreement has been reached between the Complainant and the Respondent. The enforcement of the settlement agreement is another matter altogether.

Accordingly, in my opinion I must conclude from the fact that a report was made by the Commission to the Minister and I was appointed a Board of Inquiry that the complaint had not been

settled. This reinforces my earlier conclusion that the Commission, like Pandora and Keyes, had agreed to abandon any settlement agreement which might have been made.

Further, the Board of Inquiry appointed under Section 32 (1) is directed "to investigate and seek settlement of the complaint." I cannot read into those words an authority to determine whether or not the complaint has been settled and enforce the settlement. Indeed, in my opinion, the specific authority "to investigate and seek settlement" implies that it is the subject matter of the complaint which is to be investigated and that a settlement has not been made as of the time of the appointment of the board of inquiry.

Finally, as I have held that the Commission shall report to the Minister under Section 32 (1) and a board of inquiry shall be appointed only if a settlement has not been reached, if I were to find that a settlement had been made prior to my appointment and if I were to proceed to order enforcement of that settlement then I would, in my opinion, be questioning the authority of the Minister to have made the appointment. Counsel for the parties agreed that such was not within my jurisdiction. It may be, accordingly, that I should not have entertained this motion as it developed in the evidence that the only allegation of agreement was prior to my appointment of the Board of Inquiry. In my opinion, the powers conferred on the board of inquiry by Section 34 (5) and 34 (8) arise only in respect of settlements made after the appointment of the board of inquiry. It is not necessary,

accordingly, to decide whether or not a settlement agreement made without an admission of a violation of the Act can be enforced by the board of inquiry. However, as I have held that any settlement agreement which had been reached prior to my appointment was rescinded by the mutual agreement of the parties (Keyes and Pandora) and the Commission the result remains the same.

The motion is dismised. The hearing of the complaints on the merits will proceed as scheduled on January 13, 1992.

DATED at Halifax, Nova Scotia, this 19th day of December, 1991.

David Miller
Board of Inquiry

IN THE MATTER OF THE HUMAN RIGHTS ACT

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GENE KEYES

AGAINST

PANDORA PUBLISHING ASSOCIATION

MOTION FOR DETERMINATION OF SETTLEMENT

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m0790614

IN THE MATTER OF THE HUMAN RIGHTS ACT

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AGAINST

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D E C I S I O N

BEFORE: David Miller

COUNSEL: Randall R. Duplak, Q.C. for the Nova Scotia Human Rights Commission

Anne S. Derrick for Pandora Publishing Association

Gene Keyes, Personally

DECISION: March 17, 1992.

IN THE MATTER OF: THE NOVA SCOTIA HUMAN RIGHTS ACT

- and -

IN THE MATTER OF: A COMPLAINT BY GENE KEYES AGAINST PANDORA PUBLISHING LIMITED

DECISION

THE COMPLAINT

This is a complaint by Gene Keyes ("Keyes") to the Nova Scotia Human Rights Commission (the "Commission") against Pandora Publishing Association ("Pandora") pursuant to the provisions of the Human Rights Act (the "Act").

Keyes currently is a resident of Halifax, Nova Scotia. He holds a Ph.D. in political science. He is formerly a professor of political science at St. Thomas University in Fredericton, New Brunswick and at Brandon University in Brandon, Manitoba. At the present time he works as a self-employed researcher at Halifax.

Pandora is a society incorporated under the Societies Act of Nova Scotia. The Memorandum of Association and Articles of Association of Pandora are found at Exhibit 9, Tab 7. Testimony was given as to an amendment to the articles and Exhibit 21 was tendered in that respect. I am satisfied that Exhibit 21 properly sets out an amendment to the Articles of Association of Pandora which was properly past prior to the dates relevant to this complaint. The amendment restricted membership in the society to women. It also reflected the collective nature of management and governance of the society's affairs as spoken

to in the evidence by various witnesses (particularly Beverly Stone, Sheila Morris, Mary Jones and Betty-Ann Lloyd).

Pandora publishes a quarterly newspaper called Pandora. Pandora has distribution throughout the Provinces of Nova Scotia and Prince Edward Island. I was told in the evidence and it is stated in Pandora that Pandora is for, by and about women.

Pandora publishes a notice in each edition stating that letters to the Editor will be accepted only if they are written by women. A sample of the notice is reproduced at Exhibit 9, Tab 1. The relevant portion of the policy is as follows:

> Pandora reserves the right to publish only letters that fall within the guidelines of our editorial policy: letters must be written by women and be women positive; we do not accept material that is intolerant or oppressive.
>
> We prefer that letters are in direct response to an article or current concern. Should it refer to an article appearing in Pandora, the author of the article will be contacted and given an opportunity to respond.
>
> We will print letters anonymously, but at least two women in Pandora must know the woman's real name and have a contact number for her.
>
> Pandora reserves the right to edit for length; however, the writer will be notified should this be necessary. We request that all letters include a phone number so we may contact the writer should it become necessary.

Keyes saw an article in the March, 1990 edition of Pandora (Exhibit 10 entitled "Inequality Between Women and Men Strengthened by Father's 'Rights'". The article was admitted

into evidence over the objection of Ms. Derrick on behalf of Pandora for the purpose of setting out the context in which the complaint arose.

I ruled that the content of the article and the opinions expressed therein were not relevant to the Inquiry. I ruled that I would not hear evidence concerning those views or other or contrary opinions on the subject. The complaint before me relates to Pandora's letter policy, not to the publication or contents of the article.

The subject matter of the article is self-explanatory from the title. Keyes had a particular interest in that subject matter. He had been involved in long and protracted legal proceedings respecting custody of and access to his children. The details of this litigation were not relevant to the Inquiry and accordingly were not before me. I took it from the evidence which was before me, however, that Keyes was not satisfied with the results of those legal proceedings. I also understand Mr. Keyes is of the opinion that he was discriminated against in those legal proceedings because he is a man.

In any event, Keyes decided that he wished to respond to Exhibit 10 by writing a letter to the Editor for publication in Pandora. In the same general time frame as the article was published, Keyes telephoned Pandora to inquire whether he would be permitted to submit a letter. While there was no direct evidence on this, presumably Keyes telephoned Pandora rather than simply sending a letter in for publication because of Pandora's stated letter policy. He spoke to a woman, later identified as the witness Sheila Morris (pseudonym), who advised him that under no circumstances would his letter be published because he was a man.

Faced with this rebuff, Keyes did not then prepare or send a letter to the Editor of Pandora. He complained to the Commission and on June 21, 1990 filed a formal complaint. The complaint was as follows (Exhibit 6):

> I am a Nova Scotian male. The letter policy of Pandora's Publishing Association as outlined in the March, 1990, issue of Pandora indicates that letters must be written by women. As a result I am prohibited from expressing my views in Pandora. I allege I have been discriminated against because of my sex in contravention of Sections 12(1) and 17 of the Nova Scotia Human Rights act.

At the same time Keyes prepared a letter which he wished to be published. He delivered the letter to the Commission, which eventually provided a copy to Pandora. I ruled that the contents of the letter were not relevant to this Inquiry and refused to admit it in evidence.

To the extent that it has any relevance or importance to this Inquiry, I am satisfied that Keyes had a legitimate interest in the subject matter of the article with which he took issue and that he acted in good faith throughout.

The complaint made by Keyes to the Commission against Pandora was not resolved. Accordingly, this Board of Inquiry was appointed on June 17, 1991. The appointment of the Board (Exhibit 8) provided, in part, as follows:

> The purpose of the Board of Inquiry is to investigate and seek settlement of the following complaint:
>
> That Pandora Publishing Association did, on or about March, 1990, discriminate against Gene Keyes by denying him services and advertisement by prohibiting him from expressing his views because of his sex contrary to Sections 12(1)(a) and 17 of the Human Rights Act.

After two pre-hearing conferences on September 9, 1991 and December 13, 1991, and the hearing of a preliminary motion by the Commission that the complaint had been settled on December 13, 1991, I heard the evidence on the complaint on January 13 through January 17, 1992 at Halifax, Nova Scotia. Subsequently, written submissions and rebuttal submissions were filed by the parties and oral argument was heard on March 6, 1992.

I will first deal with two rulings which I made in the course of the hearing as to evidence sought to be lead by the parties and which I ruled would not be permitted.

MR. KEYES' EVIDENCE OF AN ALLEGED DISADVANTAGED SUB-GROUP OF MALES

I was asked by the Complainant supported by the Commission to hear evidence in support of the proposition that the Plaintiff was a member of a disadvantaged sub-group of males, being divorced and separated fathers claiming custody or access rights to their children. Mr. Keyes advised that in his view the disadvantage arose from a bias in the laws of this Province and in the application of those laws by the legal system favouring women over men in cases involving child custody and access.

As I understand, it was submitted that if Pandora as a single sex organization intended to promote women's equality is justified in attempting to redress women's inequality by advantaging women by, inter alia, publishing letters written only by women, then that justification does not extend to advantaging women over the sub-group proposed by Mr. Keyes as in Mr. Keyes' view that sub-group also is discriminated against on the basis of sex. Accordingly, it was suggested that even if Pandora could advantage women over men generally in its letter writing policy, it could not advantage women over this alleged sub-group of men claimed to have been discriminated against on the basis of sex.

In my opinion, the proposition has no merit. I ruled that I would not hear any evidence in support of the assertion that divorced and separated fathers are discriminated against by the laws and the legal system of this Province on the basis of sex. It was apparent to me from the remarks made on behalf of the parties that to have embarked on such an inquiry would have greatly extended the scope and length of the hearing and the costs to all concerned. As I see no merit in the proposition I do not consider that it would have been appropriate to have heard the evidence proposed by Mr. Keyes and contrary evidence which Ms. Derrick advised would be lead by Pandora.

In the first place, it is clear on the evidence and I find as a fact that Pandora did not discriminate against Mr. Keyes because he was a divorced father but rather simply because he was a man. This is apparent in the Pandora letter policy (Exhibit 9, Tab 1) and the evidence of the Pandora witnesses (particularly Ms. Stone, Ms. Jones and Ms. Lloyd).

There was no evidence before me that Pandora was even aware at the time of the refusal that Mr. Keyes was a divorced or separated father claimed to have been unjustly denied or restricted in his custody and access rights on the basis of sex. Mr. Keyes testified as to his conversation with a representative of Pandora (who he could not identify) following publication of the article with which he took issue. Mr. Keyes' testimony was vague as to whether or not he had advised this person of his status. I cannot find on the basis of Mr. Keyes' evidence that he had communicated to the Pandora representative that he was a member of the sub-group which he now asserts and that on that basis he claimed a right to have a reply to the article published in Pandora by way of a letter to the editor. The Pandora representative who took the telephone call, Ms. Jones, also testified. She was not cross-examined on this point

and there was no evidence from her that she was aware of Mr. Keyes alleged special interest in the article or his alleged special status.

Thus, even if I accepted the proposition put to me that Pandora was not entitled to advantage women over the alleged disadvantaged sub-group of men and even if it were further established that the facts supported a finding of the existence of such an alleged disadvantaged sub-group based on sex, I would not have been satisfied that Pandora had in fact discriminated against Mr. Keyes on this basis. Rather, Pandora's refusal to print the letter was based on its overall policy of refusing to publish any materials, letters or otherwise, written by men.

Secondly, accepting that a disadvantaged group whose rights are given legal protection by the Act may prefer the members of that group over the advantaged group, I know of no authority to break down the advantaged group further and to prohibit the disadvantaged group from preferring its members over the members of an alleged disadvantaged sub-group of the advantaged group.

The assertion here is that the alleged disadvantaged sub-group of the advantaged group is disadvantaged on the same basis, sex, as is the disadvantaged group, women. This case, accordingly, can easily be distinguished from a complaint by members of a disadvantaged group protected by the Act (such as on the basis of race) being discriminated by another disadvantaged group also protected by the Act (such as on the basis of sex). Disadvantage alone, of course, is not sufficient to support Mr. Keyes' proposition - it must be disadvantage based on a prohibited ground of discrimination as set out in the Act.

In my opinion, it is implicit in the Act and in the right of the disadvantaged group to prefer its members over the

advantaged group that individual members of the advantaged group will be discriminated against (or will feel discriminated against) in the course of promoting equality and advantaging the disadvantaged group. Therefore, the mere fact that Mr. Keyes feels discriminated against on the basis of sex as a result of Pandora's letter writing policy, does not ipso facto negate Pandora's right to prefer women in its publication.

I do not see any basis, at least in this case, to find that disadvantage on the basis of sex to individuals or even a sub-group of the male group (even if that were in fact established) should limit Pandora's right to advantage women.

In any event, I am not convinced that the alleged sub-group referred to by Mr. Keyes is in fact a disadvantaged group within the ambit of the Act even if the alleged discrimination based on sex could be established. The sub-group proposed by Mr. Keyes is very different than the groups whose protection clearly is recognized by the Act (such as women, minority racial groups and the disabled) who clearly are the victims of discrimination and disadvantage in society because of who they are. Mr. Keyes' sub-group, on the other hand, is formed only as the result of individual judicial decisions affecting individual cases. Clearly, it was acknowledged by Mr. Keyes that not all fathers fall into the disadvantaged sub-group. It is as a result of these individual decisions that Mr. Keyes and, apparently, certain other fathers consider themselves to have been discriminated against on the basis of sex. There was no suggestion of the alleged sub-group having any other characteristics in common to pre-determine the discrimination based on sex. It was not said that all men are denied custody or reasonable access rights to their children. There was no suggestion that these men are generally discriminated against or disadvantaged on the basis of sex. Accordingly, I do not see this alleged sub-group as the kind of group intended to be protected by the Act.

Thirdly, even if I did accept that Mr. Keyes' alleged sub-group could be protected under the Act and even if I were satisfied that such discrimination based on sex against that sub-group had existed, I would not have found that this limited Pandora's right to prefer women in its letters to the Editor policy.

The evidence which I heard at the hearing satisfied me that historically and to the present day women as a group in our society have suffered substantially inequality and disadvantages in all aspects of public and private life. I am also satisfied that this inequality continues to the present day to a sufficient degree that it is reasonable that women's groups may decide to form women-only organizations, such as Pandora, for the promotion of women's equality and that such organizations may advantage women over men.

The evidence which I heard as to women's disadvantage and inequality ranging over the whole sphere of public and private life contrasts sharply with the inequality based on sex alleged by Mr. Keyes in respect of his rights to custody of or access to his children. While I do not trivialize the importance of those rights to Mr. Keyes or, indeed, to any other parent, I do find that the discrimination alleged by Mr. Keyes relates to a single facet of his overall public and private life. I cannot accept that such single facet discrimination (even if proved) could override the rights of women to single sex organizations promoting their equality on a broad range of issues in the private and public spheres. As I am satisfied that Pandora could reasonably decide on a single sex policy advantaging women over men with a view to promoting women's equality, and as I am further satisfied that the purposes and aims of Pandora in promoting women's equality would be substantially disrupted by permitting men to participate in Pandora, even to the limited

extent of writing letters to the editor, I cannot find that this alleged single facet discrimination complained of by Mr. Keyes would be sufficient to interfere with Pandora's rights.

Further, I also note that while Mr. Keyes may consider himself disadvantaged on the basis of sex as respects his claim for custody of or access to his children, the fact remains that other than in this respect, he remains a member of the dominant group with all the advantages that pertain to that advantaged group as explained to me in the evidence. Thus, I do not see that it is necessary or even important to Mr. Keyes or the other members of his alleged sub-group to have access to Pandora. They have other, and adequate means of public expression of their views. On the other hand, to permit access by some part of the advantaged group to a single sex publication of the disadvantaged group would be to import into that publication the difficulties and disadvantages which I was told women experienced in their dealings with men and would thereby, to some material degree at least, defeat the purpose of such an organization and the purposes of the Act in promoting equality by preferring disadvantaged groups.

For these reasons, even if Mr. Keyes could establish the alleged discrimination against divorced or separated fathers seeking custody of or access to their children on the basis of sex, I would not have found that this required Pandora to make an exception for that sub-group of men as respects its letter writing policy of printing letters written by women only.

Fourthly, I do not consider the issue raised by Mr. Keyes to be before me on this Inquiry or within the range of this Inquiry.

Mr. Keyes' complaint to the Commission was as follows:

> I am a Nova Scotian male. The letter policy of Pandora's Publishing Association as outlined in the March, 1990, issue of Pandora indicates that letters must be written by women. As a result I am prohibited from expressing my views in Pandora. I allege I have been discriminated against because of my sex in contravention of Sections 12(1) and 17 of the Nova Scotia Human Rights act.

My appointment as the Board of Inquiry pursuant to that complaint was as follows:

> The purpose of the Board of Inquiry is to investigate and seek settlement of the following complaint:
>
> That Pandora Publishing Association did, on or about March, 1990, discriminate against Gene Keyes by denying him services and advertisement by prohibiting him from expressing his views because of his sex contrary to Sections 12(1)(a) and 17 of the Human Rights Act.

The complaint as advanced by Mr. Keyes and my appointment were in respect of Pandora's letter writing policy limiting letters to be published to those written by women. That is the matter I have been directed to inquire into and that is the limit of my authority.

Mr. Keyes alleged bias in the Nova Scotia legal system based on sex against fathers seeking custody of or access rights to their children. Mr. Keyes complains that the laws of this Province favour women over men in such cases in a general sense. He further alleged that such a bias is re-enforced and implemented by the administration of justice in this Province by lawyers, Court officials and Judges. That, I understand, is the basis of his allegation that he and others like him are discriminated against on the basis of sex.

Such an inquiry is, in my opinion, far outside this complaint and far beyond the scope of this Inquiry. To embark on an Inquiry as to whether or not there is a systemic or institutional bias in the legal system of this Province and in the administration of justice in this Province against fathers in child custody and access cases on the basis of sex and to make a determination in that respect would, in my opinion, amount to me usurping an authority which I do not have. Accordingly, I refused to embark on any such inquiry.

Further, and finally, objection was taken to this line of inquiry by Ms. Derrick on behalf of Pandora. Ms. Derrick asserted that she was taken by surprise and advised that if the evidence proposed by Mr. Keyes were adduced Pandora would be prejudiced in its defence and would require additional evidence.

There are, of course, no pleadings in the usual or formal sense on this Inquiry. However, as noted, in my opinion, the jurisdiction of this Board is framed by the complaint and the appointment by the Minister.

At my request an initial Pre-Hearing Conference was held with the parties on September 9, 1991. At that time, with some difficulty, dates were agreed to for the hearing and subsequently, for argument. It also was agreed to for the preliminary motion which was heard on December 13, 1991. At that time I asked counsel to consider the issues which would be before the Board so that there would be no surprises and no difficulty with the presentation of the evidence. I was much concerned as to the possibility of requests for adjournments and needlessly prolonging both the evidence on the Inquiry and the time frame in which dates could be obtained should an adjournment be necessary. I prepared a Memorandum of the Conference which was circulated to the parties which included the following as respects my request for advice as to the issues:

Issues

As there are no formal pleadings as such, the parties will endeavour to agree on a statement of the issues on the Inquiry. Failing agreement, the parties will provide a statement of what they individually consider to be the issues.

The second Pre-Hearing Conference was held after the hearing of the preliminary motion on December 13, 1991. I again made a request to be advised of the issues on the Inquiry and asked that brief Pre-Hearing submissions outlining the issues and the essential positions of the parties be submitted by January 6, 1992. I again prepared a Memorandum of the Conference which I circulated to the parties. I said as follows with respect to the question of the issues:

Issues

It was generally agreed that the issue on the hearing of the inquiry is as set out in Ms. Derrick's letter of December 6, 1991 to me. Mr Keyes made reference to the publication of the Notice of the letter policy, the refusal to publish his letter and the refusal to publish letters written by men generally. It appeared, however, that this distinction did not affect the essential issue to be determined.

The letter of December 6, 1991 from Ms. Derrick referred to in the Memorandum stated as follows with respect to the issues on the Inquiry:

1. "Does Pandora Publishing's letter policy constitute sex discrimination under the Nova Scotia Human Rights Act, in particular, does it constitute a violation of ss.12(1)(a) and/or s.17?

Mention had been made on a number of occasions that the contents of the article to which Mr. Keyes took exception and the opinions and views of the authors of those articles on the question of child custody and access were not in issue before me.

Certainly, I understood from the complaint, the appointment, and the discussions with the parties at the Pre-Hearing Conference that the issue on the Inquiry was the letter writing policy of Pandora preferring women over men in a general sense. I agreed with Ms. Derrick's objection that Mr. Keyes was attempting to frame the evidence on the hearing in a very different manner than had been understood to that date and that it would be procedurally unfair to Pandora to permit the hearing to move forward on that basis and to permit such evidence to be adduced.

Accordingly, quite apart from the foregoing reasons I would not have permitted this Inquiry to proceed other than on the basis of Pandora's general letter policy prohibiting publication materials written other than by women.

ADMISSIBILITY OF CRTC AND MEDIAWATCH REPORTS

I was asked by counsel for Pandora to admit into evidence without formal proof and without cross-examination two reports:

1. "Portrayal of Gender in Canadian Broadcasting" CRTC, 1990 (the "Erin Report");

2. "Sexism in Canadian Newspapers", Mediawatch, 1990.

I was told that these reports dealt with the portrayal of women and women's issues in the mainstream media in Canada. The CRTC is a federal administrative and regulatory body. Mediawatch was

described in the evidence of Ms. Forsyth-Smith as a private organization.

It was suggested that the evidence was admissible as extrinsic evidence. I was referred to pages 75-96 of Evidence and the Charter of Rights and Freedoms (Charles, Cromwell & Jobson, Butterworths, 1989). In that work the authors state as follows at page 75:

> Defined very broadly, extrinsic evidence can include any material external to the statute being interpreted. This would include such items as prior versions of the same statute or other statutes, "in pari teria". Usually, however, the term is used to describe materials relating in some way to the legislative process leading to enactment.

After reviewing the decision of the Supreme Court of Canada in Reference re Residential Tenancies Act [1981] 1 S.C.R. 714 the authors summarize what they describe as "basically a codification or summary of the situation in Canada insofar as the judicial use of extrinsic evidence is concerned" as follows at page 78:

1. Extrinsic evidence may be admitted to show the operation and effect of the legislation.

2. Extrinsic evidence may be admitted to show the true purpose and object of the legislation.

3. Extrinsic evidence cannot be used as an aid to the construction of a statute.

4. Generally, speeches made inside the legislature are inadmissible because they have little weight.

5. Extrinsic evidence may be admitted to show the general background against which the legislation is enacted;

BUT

6. Evidence is inadmissible if it is inherently unreliable or against public policy.

They go on to say:

> Other extrinsic evidence may be admitted to show (a) the operation and effect of the statute or the true purpose of the legislation or to outline the general background against which the legislation was passed.
>
> ...
>
> This evidence merely provides the court with additional information, apart from the text of the legislation, from which inferences may be drawn by the court as to the most appropriate meaning to be given to legislative language. Such evidence cannot be used as direct evidence of legislative intention ... .

The authors also point out that the Courts "recognizing that they are involved in a special interpretative process, when confronted with a Charter issue ... have elected to be guided by principles that direct a liberal interpretation of the Charter. Such an approach permits and dictates a generous use of extrinsic evidence." (Page 78)

Counsel were unable to provide me with any authority as to the requirement, if any, for proof of such extrinsic evidence if found to be admissible.

In my opinion, the reports in question are not extrinsic evidence in this Inquiry. I will not order that they be admitted in evidence as extrinsic evidence.

I do not see how the reports fit into any of the categories of extrinsic evidence set out by Dickson, C.J. Extrinsic evidence appears to be admissible for the purpose of assisting interpretation and application of specific legislation.

The provisions of the Act at issue are the portion of the preamble dealing with equalities of rights and Section 12 prohibiting discrimination on the basis of sex. The reports as described to me would not assist me in determining the meaning of the word "equal" as used in the preamble nor what amounts to sex discrimination as prohibited by Section 12. Further, admission of the reports would not assist me in a determination of the evil to be remedied by the Act and, particularly, Section 12 except, perhaps, in the narrowest sense of inequality and disadvantage suffered by women on the basis of sex in the media. If the legislation in question dealt specifically with discrimination against women in the media those reports might conceivably have been relevant as extrinsic evidence. However, Section 12 of the Act and the complaint before me raise issues relating to women generally and not specifically to women employed in the media.

The issues of women's specific inequality and a disadvantage on the basis of sex in the mainstream media is, at best, a collateral issue on this Inquiry. Evidence in that particular respect was lead, as I took it, to support Pandora's women only policy. In light of the evidence I heard as to women's general inequality and disadvantage in society based on sex, I would have been satisfied that Pandora was justified in making a women only policy and that such policy was reasonable whether or not I had been satisfied as to women's specific inequality and disadvantage based on sex in the mainstream media. Pandora is a private women's publication (in the sense that it is for, by and about women) directed at women's equality and remedying disadvantage based on sex relating to a broad range of issues not limited to the media.

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Accordingly, at best, the reports are relevant to establish such inequality and disadvantage based on sex in the mainstream media. In that respect, notwithstanding the power which I am satisfied that I have under Regulation 7 made pursuant to the 1991 amendments to the Act to admit such written hearsay evidence, I am persuaded by the objections made by Mr. Duplak on behalf of the Commission that I should not admit the report without the opportunity for cross-examination. Ms. Derrick

advised that if the report would only be admitted if properly proved and subject to cross-examination she would not attempt further to tender the reports in evidence.

However, as stated elsewhere in this decision, I am satisfied on the evidence before me that women suffer from inequalities and disadvantages based on sex in respect of participation in the mainstream media and the portrayal of women and the treatment of women's issues in that media as an aspect of women's overall inequality and disadvantages based on sex in society.

Accordingly, the reports were not admitted into evidence on this Inquiry.

WOMEN'S INEQUALITY AND DISADVANTAGE

The Commission did not lead viva voce evidence on its principal case. An exhibit volume (Exhibit 9) was tendered by the parties by agreement. Keyes testified on his own behalf and as well called two witnesses, Reverend Darrell Grey and Mark Hurcko. Keyes called one witness in rebuttal, Charles Phillips and gave rebuttal evidence himself.

Pandora called a number of witnesses. I heard testimony from Beverly Stone, Sheila Morris and Mary Jones who are now all involved in the production of Pandora. I also heard testimony from Betty-Ann Lloyd who was the founder of Pandora. Additional witnesses called were Rebecca West, Janet Rice, Brenda Thompson, Muriel Dixon, Anne Bishop and Diane Day.

In addition, Pandora also presented expert evidence from the following witnesses who I qualified as set out:

1. Dr. Margaret Conrad - History of Women and Women's Status in Nova Scotia;
2. Donna Smyth - Women in Language and Writing, Uses of Language by Women and The Significance of Women's Only Spaces;
3. Dr. Marguarite Cassin - Social Organization of Knowledge, Feminism, Gender Inequality and Management and Organization;
4. Debbie Forsyth-Smith -- Treatment of Women in the Mainstream Media, Treatment of Women in Society and The Role and Function of Women's Only Space;
5. Betty-Ann Lloyd -- Women and Literacy, Power Relationships between Reader and Writer and The Role of Women Only Spaces;
6. Sharon Fraser -- Journalism in Mainstream and Non-Mass Media and The Role of Women's Only Spaces;
7. Leah M. F. Nomm -- Therapist.
8. Dr. Blye Fraser -- Social Organization and Construction of Gender and Masculinity and Nature and Function of Male Privilege.

The qualifications of all the above noted experts were agreed to by the other parties with the exception of Leah M. F. Nomm. After hearing evidence, cross examination and argument with respect to Mr. Nomm's qualifications I qualified her as an expert, but more narrowly than had been requested by Pandora.

Much evidence, both expert and lay and essentially uncontradicted, was presented to me through the course of the hearing concerning the historical development of women's status in society and the current status of women. In conjunction with that evidence I also heard evidence of both an historical and current nature concerning inequalities and disadvantages suffered by women by reason of sex in relation to men on a broad spectrum of public and private aspects of life. I was given many examples of discrimination and inequality in women's participation in domestic life, education, employment and business, and government and politics.

Based on this evidence, which I accept, I find as a fact that women as a group are and remain materially disadvantaged and unequal to men as a group by reason of sex in fact if not in law.

Evidence was led and I was asked to consider the particular disadvantages suffered by certain sub-groups of women by reason of sex. I was referred by way of example to women who are victims of violence by men and to lesbians. I do not, however, make any findings with respect to discrimination on the basis of sex against those sub-groups nor do I take that evidence into account in my findings and decision as respects Keyes' complaint.

In my opinion, insofar as I am required to consider the inequality of women and the disadvantages experienced by women on the basis of sex in this Inquiry, I should do so on the basis of women generally and not as respects any particular sub-groups. Pandora as explained to me does not limit its participation or activities to sub-groups of women other, perhaps, than on the basis of acceptance of certain political positions. The Pandora witnesses acknowledged that Pandora is not representative of all

women who share Pandora's political views. However, as I understand, that is not by design or exclusion. Thus, as I see it, the letter writing policy of Pandora is for the benefit of women in a general sense (subject to accepting Pandora's political positions) and not for the benefit of specific sub-groups.

I have already stated my opinion that whether or not Keyes is the member of a sub-group of males disadvantaged by reason of sex cannot limit the rights of Pandora to prefer women at the expense of men. In my opinion, just as such an alleged sub group of men cannot limit Pandora's right, so Pandora cannot extend rights or privileges to women generally based on considerations relating only to certain sub-groups which are said to be particularly the victims of discrimination, disadvantage and inequality based on sex.

In my opinion, the right of Pandora to maintain its women only letter policy must be decided in relation to the position of women generally and not with respect to any particular sub-groups or collection of sub-groups of women.

In addition to the evidence that women are generally disadvantaged and unequal in society and are discriminated against on the basis of sex, I also heard particular evidence that women are disadvantaged in discourse (written or oral) with men generally. I was told that men tend to dominate such discourse and to direct such discourse and that women tend to be disadvantaged in such circumstances. I accept this evidence. Further, there was also expert and lay evidence dealing in particular with women's participation in and treatment by the media as an aspect of discourse. I was told that the mainstream media tends to ignore women's issues and to portray women's issues (and indeed issues generally) from the point of view of men rather than women. I was also told that such media tends to

portray women in unfavourable light and gives only limited access to women and women's issues.

In addition, there was evidence adduced of limited opportunities for women to work in the media, either as writers/broadcasters or in management.

Finally, as respects the media I was told of difficulties of many women having access to the mainstream media. Reference was made to the difficulties many such women writing letters or articles for publication and the reluctance of women to engage in debate in the mainstream media on issues related to women's inequality and, particularly, to engage in discourse and debate in the media with men on such issues.

I permitted evidence as to women's disadvantage and inequality in the media only because Pandora publishes a newspaper. Based on the evidence which I have heard I am satisfied that the disadvantage and inequality based on sex from which women suffer in society in general is also found in the media.

SERVICE...CUSTOMARILY PROVIDED TO MEMBERS OF THE PUBLIC

Mr. Keyes' complaint was that Pandora allegedly acted in breach of Sections 12(1)(a) and 17 of the Human Rights Act in refusing to publish his letter to the editor because he was a man.

At the hearing the parties agreed that the reference to Section 17 did not add any matters of substance to the complaint in addition to Section 12(1)(a).

The initial question for determination is whether or not the letters to the editor section of Pandora is a service...customarily provided to members of the public".

In the course of argument Ms. Derrick on behalf of Pandora stated that Pandora did not rest its defence of its letter writing policy on any general right of newspapers to exclude letters to the editor for whatever reason they might choose. Accordingly, I was not asked to consider whether or not the letters to the editor section was other than a service customarily provided to members of the public in the context of the decision of the Supreme Court of Canada in Gay Alliance Toward Equality v. Vancouver Sun, [1979] 2 S.C.R. 435, (1979) 27 N.R. 117. Ms. Derrick submitted in her memorandum of argument that decision might well have been decided differently under the Charter of Rights.

Further, Ms. Derrick agreed that a service could not be rendered something other than one customarily provided to members of the public simply as the result of the provider deciding to limit the service on the basis of a ground of discrimination prohibited by the Act.

Rather, Ms. Derrick submitted on behalf of Pandora that even if the letters to the editor section of a newspaper is a service customarily provided to members of the public, the letters to the editor section of Pandora is not in fact provided to members of the public generally, but rather only to women, and that that limitation is justified by reason of what Pandora says is the right of women to (in this case) a single sex newspaper for the purpose of remedying disadvantage and promoting equality. Accordingly, as I understand it, Pandora's argument that its letters to the editor page is not a service customarily provided to members of the public stands or falls with its argument that in law it is permitted under the Act to maintain a

single sex newspaper for the purpose of remedying disadvantage and promoting the equality of women.

EQUALITY AND DISCRIMINATION

The Preamble to the Act provides in part as follows:

> AND WHEREAS in recognition that human rights must be protected by the rule of law, this Legislature affirms the principle that every person is free and equal in dignity and rights without regard to ...sex...

Section 12 of the Act provides as follows:

> No person shall deny to or discriminate against any individual or class of individuals because of the sex of the individual or class of individuals, in providing or refusing to provide any of the following:
>
> (a) ...services and facilities customarily provided to members of the public;

I am satisfied that one of the purposes of the Act is to promote equality by prohibiting discrimination on the basis of sex.

The Supreme Court of Canada considered the meaning of "equality" and "discrimination" in Andrews v. Law Society of British Columbia [1989] 1 S.C.R. 143 ("Andrews") in the context of Section 15 of the Charter of Rights which provides as follows:

> (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.

McIntyre, J. reviewed at some length at pp. 172-176 the concept of discrimination. His Lordship referred to the Human Rights Acts of the various Provinces which had been enacted prior to the Charter. He stated (at p. 175) that "in general, it may be said that the principles which have been applied under the Human Rights Acts are equally applicable in considering questions of discrimination under Section 15(1)". He also stated (at p. 176) that "discrimination under Section 15(1) will be of the same nature and in descriptive terms will fit the concept of discrimination developed under the Human Rights Acts....".

In defining discrimination His Lordship stated as follows at page 174:

> 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. 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 classed.

His Lordship also addressed the concept of equality (at pp. 163-171). He stated at p. 171 as follows:

> It must be recognized, however, as well that the promotion of equality under s.15 has a much more specific goal than the mere elimination of distinctions. If the Charter was intended to eliminate all distinctions, then there would be no place for sections such as 27 (multicultural heritage); 2(a) (freedom of conscience and religion); 25 (aboriginal rights and freedoms); and other such provisions designed to safeguard certain distinctions. Moreover, the fact that identical treatment may frequently produce serious inequality is recognized in s.15(2), which states that the equality rights in s.15(1) do "not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups...."

The question then is whether under the Act as it stood at the relevant time a programme or activity whose object was to promote equality and to remedy disadvantages of a disadvantaged group protected under the Act by favouring the disadvantaged group over the advantaged group constituted discrimination prohibited by Section 12 of the Act.

As I have set out above, McIntyre, J. was satisfied that "identical treatment may frequently produce serious inequality" (p. 171). I note, however, that he was able to hold that equal treatment was not always required to comply with the Charter by reason of the provision of Section 15(2).

At the relevant time the Act did not contain a provision analogous to Section 15(2) of the Charter. I do not see, accordingly, that applying the usual principles of statutory interpretation alone I can construe the word "discriminate" as used in Section 12 of the Act to permit a disadvantaged group to make a distinction against the advantaged group without an exemption from the Commission having been sought and obtained.

However, it was submitted on behalf of Pandora that as a matter of law I must construe and apply the word "discriminate" as used in the Act in a manner consistent with the concept of discrimination as set out in the Charter and the decisions of the Supreme Court of Canada in relation thereto. As I understood, it was submitted that if the legal content of the word "discriminate" as used in the Act was as asserted by the Commission (that is, that the prohibition against discrimination was absolute) the Act would be in conflict with the Charter and could not stand in that respect. As such, it was submitted that the legal content of discrimination under the Act must be the same as under the Charter.

I raised in the course of the oral argument the question as to whether or not this issue could or should have been dealt with by way of judicial review prior to the hearing of this Inquiry. I was told that counsel considered that a factual basis was necessary for any such determination by the Court and that accordingly this Board of Inquiry had to proceed.

I was much concerned as to my jurisdiction to determine whether or not the legal content of the prohibition against discrimination under the Act was the same as the prohibition against discrimination under the Charter in the absence of the equivalent of Section 15(2) of the Charter.

In Canada (Attorney General) v. Martin (1990), 13 C.H.R.R. D/517 (F.C.T.D.), Mr. Justice Rouleau dealt with an application by the Attorney General of Canada for an Order to quash a decision of the Canadian Human Rights Commission to refer a question of whether Section 15(b) of the Canadian Human Rights Act violates Section 15 of the Charter of Rights and Freedoms to a Tribunal for hearing and determination. The case arose out of a complaint based on mandatory retirement for members of the Canadian Armed Forces.

The Court held that the Commission's decision to refer the question of the constitutional validity of Section 15(b) of the Canadian Human Rights Act (which provides that it is not a discriminatory practice to retire a person who has reached the maximum age that applies to that person's employment by law of regulation) to a Tribunal for hearing and determination was within its jurisdiction and was reasonable. Further, the Federal Court was of the view that it was bound by the Tetreault-Gadoury v. Canada (Employment and Immigration Commission) (1989), 53 D.L.R. (4th) 384 decision of the Federal Court of Appeal which held that the inferior Tribunals have the authority to hear and determine Charter issues.

Since the Martin decision, the Supreme Court of Canada held in Cuddy Chicks Ltd. v. Ontario (Labour Relations Board), [1991] 2 S.C.R., ("Cuddy Chicks") that administrative Tribunals which are granted the authority to decide "any question of law or fact" have the jurisdiction to address questions regarding the constitutional validity of their own legislation and also have the obligation to apply the law in a way that complies with the Constitution. Additional support for this authority is found in Tetreault-Gadoury v. Canada (Employment and Immigration Commission), [1991] 2 S.C.R. 22 (S.C.C.).

Section 34(7) of the Act confers this jurisdiction upon the Board of Inquiry:

> A board of inquiry has jurisdiction and authority to determine any question of fact or law or both required to be decided in reaching a decision as to whether or not any person has contravened this Act or for the making of any order pursuant to such decision.

As I understand the decision of the Supreme Court of Canada in Cuddy Chicks, where a Tribunal is required as part of its statutory functions to apply or interpret legislation relating to its own jurisdiction, it also has the authority to declare such legislation contrary to the Charter. The Board of Inquiry must apply the provisions of the Act and I have concluded that I have the jurisdiction to interpret and apply the Act in light of the Charter.

I must first consider the relationship between the Charter and the Act.

Canadian National Railway Co. v. Canada (Canadian Human Rights Commission, [1987] 1 S.C.R. 1114 ("Action Travail") is, in my opinion, of assistance in the interpretation of human rights legislation. The decision was written by then Chief Justice Dickson. At page 1136, he referred to an earlier decision written by Mr. Justice McIntyre for the unanimous Court in Winnipeg School Division No. 1 v. Craton, [1985] 2 S.C.R. 150 at 156, 161 N.R. 241 as follows:

> 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.

In the same case, Mr. Justice Dickson said human rights legislation should be recognized as a fundamental law, not just another ordinary law of general application.

In Attorney General of Canada v. Mossop (1990), 12 C.H.R.R. D/355 (F.C.A.), there was an allegation that a collective agreement was discriminatory in its failure to accord a homosexual family the same treatment with respect to time off for death of a member of "immediate family" as accorded to other families. Leave to appeal to the Supreme Court of Canada was granted on January 25, 1991.

A single member Tribunal established under the Canadian Human Rights Act concluded that the homosexual relationship between Mossop and his partner fell within the meaning of "family status" under the Canadian Human Rights Act. Sexual orientation is not a protected ground under the Canadian Human Rights Act. The Federal Court of Appeal concluded that the Tribunal erred in its decision. Marceau, J. A. took the view that the Charter could not be used "as a kind of ipso facto legislative amendment machine requiring its doctrine to be incorporated in the human rights legislation by stretching the meaning of terms beyond their boundaries." (p. D/362). Mr. Justice Marceau said human rights codes impact on areas of the private sector of economic life which are not readily seen to fall within the scope of the Charter.

He went on to address the link between Charter and human rights legislation at p. D/362 as follows:

> For another thing, the Charter contains within it a general balancing mechanism, in the form of s.1, which is not present

> in human rights codes. To advance their position that the human rights legislation and the Charter must be linked together, the respondent and the Commission referred to a passage in the reasons of McIntyre, J. in Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143, 56 D.L.R. (4th) 1, 10 C.H.R.R. D/5719, at page 176:
>
> > While discrimination under s. 15(1) will be of the same nature and in descriptive terms will fit the concept of discrimination developed under the human rights acts, a further step will be required in order to decided whether discriminatory laws can be justified under s. 1. The onus will be on the state to establish this. This is a distinct step called for under the Charter which is not found in most human rights acts, because in those acts justification for or defence to discrimination is generally found in specific exceptions to the substantive rights.
>
> The passage, in my view, helps me to make my point. These specific exceptions (e.g., bona fide occupational requirements) are present in human rights legislation as a result of consideration by the legislatures, and quite possibly as a result of political compromise reached through the democratic process. If tribunals begin to read into those statutes unforeseen meanings on the basis that Charter jurisprudence has found such meanings to constitute "analogous grounds" under s. 15, there will be no s. 1 analysis, and no occasion for the development of specific exceptions to substantive rights referred to by McIntyre J.

Mr. Justice Stone in a concurring decision made an even stronger statement:

> While accepting that human rights legislation should be interpreted, as much

> as possible, in a manner consistent with the provisions of the Charter and its interpretation, I cannot accept that the Charter should operate so as to mandate the courts to ascribe to a statutory term a meaning which it was not intended to possess...The absence of "sexual orientation" from the list of grounds of discrimination prohibited by s. 3(1) of the Act as infringing a right enshrined in the Charter is not raised in this appeal, and I refrain from expressing an opinion on the matter.

I am conscious of the limitations in the application of the Charter to human rights legislation. However, I do not see that those limitations apply when the issue is the legal content of the prohibition against discrimination.

It is to be noted that The Supreme Court of Canada in Retail Wholesale and Department Store Union, Local 580 v. Dolphin Delivery Ltd. (1986), 71 N.R. 83, [1986] 2 S.C.R. 573 held the Charter does not apply to purely private litigation between private parties which does not involve reliance on governmental action. However, in my opinion this complaint goes beyond purely private litigation to consideration of the anti-discrimination provisions of the Act.

I find support for this conclusion in the decision of the Ontario Court of Appeal in Re Blainey and Ontario Hockey Association et al. (1986), 14 O.A.C. 194; 26 D.L.R. (4th) 728; 54 O.R. (2d) 513. Mr. Justice Dubin, speaking for the majority said:

> In my opinion, s. 15 of the Charter does not reach private activity within the province.

He expressed agreement with Tarnopolsky and Beaudoin, The Canadian Charter of Rights and Freedoms -- Commentary, at page 422-423, as follows:

> ...although an anti-discrimination (human rights) law should itself have to conform to s. 15, it, and not s. 15, would be directly applicable to discriminatory actions by private persons.

The issue in Re Blainey arose from a complaint by a 12 year-old girl who had been refused permission to play hockey as a member of a boys' team. The complaint was initially dismissed by the Ontario Human Rights Commission because of the wording of Section 19(2) of the Ontario Human Rights Code, which provides as follows:

> 19(2) The right under s. 1 to equal treatment with respect to services and facilities is not infringed where membership in an athletic organization or participation in an athletic activity is restricted to persons of the same sex.

The Ontario Court of Appeal held that the provisions of Section 19(2) conflicted with the equality provisions of Section 15(1) of the Charter and were of no force and effect. Therefore, in the Blainey case which was a lawsuit between private parties, the Charter was applied because one of the parties acted on the authority of a statute, Section 19(2) of the Human Rights Code, which infringed the Charter rights of the other party.

Mr. Justice Dubin's assessment of the applicability of the Charter was endorsed by the Supreme Court of Canada in Dolphin Delivery. Of interest is this comment of Mr. Justice McIntyre at p. 119, paragraph 39 of Dolphin Delivery:

> Where such exercise of, or reliance upon, governmental action is present and where one private party invokes or relies upon

> it to produce an infringement of the Charter rights of another, the Charter will be applicable. Where, however, private party "A" sues private party "B" relying on the common law and where no act of government is relied upon to support the action, the Charter will not apply. I should make it clear, however, that this is a distinct issue from the question whether the judiciary ought to apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution. The answer to this question must be in the affirmative. In this sense, then, the Charter is far from irrelevant to private litigants whose disputes fall to be decided at common law.

In Blainey the issue was whether or not the anti-discrimination provisions of the Ontario Human Rights Act were limited by the anti-discrimination provisions of the Charter. The Court held that they were and struck down the section of the Act that purported to permit discrimination which was prohibited by the Charter.

I have concluded, accordingly, that as a matter of law the Act cannot justify discrimination which is prohibited by the Charter. Accordingly, in my opinion, the provisions of Section 12 of the Act must be interpreted and applied so as to permit the making of distinctions between classes of individuals if the distinction is part of an activity or programme that has as its object the amelioration of conditions of disadvantaged individuals or groups.

In this respect I note that the amended Act now provides as follows in Section 2(d) and in Section 5(1)(m):

2 The purpose of this Act is to...

> (d) affirm the principle that every person is free and equal in dignity and rights;
>
> ...
>
> 5(1) No person shall in respect of
>
> (a) the provision of or access to services or facilities
>
> ...discriminate against an individual or class of individuals on account of
>
> ...
>
> (m) sex....

The amended Act also now provides a definition of discrimination in Section 4 as follows:

> 4 For the purpose of this Act, a person discriminates where the person makes a distinction, whether intentional or not, based on a characteristic, or perceived characteristic, referred to in clauses (h) to (v) of subsection (1) of Section 5 that has the effect of imposing burdens, obligations or disadvantages on an individual or a class of individuals not imposed upon others or which withholds or limits access to opportunities, benefits and advantages available to other individuals or classes of individuals in society.

This definition of discrimination is very close to the language used by McIntyre, J. in his definition of discrimination at p. 174 of the Andrews decision.

Further, the amending Act now provides as follows in Section 6(i):

> Subsection (1) of Section 5 does not apply
>
> ...

> (i) to preclude a law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or classes of individuals including those who are disadvantaged because of a characteristic referred to in clauses (h) to (v) of subsection (1) of Section 5.

In all material respects Section 6(i) is identical to Section 15(2) of the Charter.

In my opinion, the foregoing provisions of the amending Act simply bring the language of the Act into conformity with the Charter, but the Act was already subject to the Charter in those respects.

Accordingly, I am satisfied that in law women may form single sex organizations for the purpose of promoting equality. I am further satisfied as a general statement, of the law, that such organizations may prefer or advantage women even if the effect of that is to discriminate against men (as a group or individually) on the basis of sex, without violating the anti-discrimination provisions of the Act.

PANDORA AS AN ACTIVITY WHOSE OBJECT IS TO PROMOTE WOMEN'S EQUALITY AND REMEDY DISADVANTAGE

I heard evidence concerning the operation of Pandora and the publication of its newspaper, Pandora. Membership in Pandora is limited to women. Pandora is said to be published by, for and about women. Issues are addressed in Pandora which promote women's equality. All issues are dealt with from women's point of view. Among the objectives of Pandora are the following:

1. to encourage writing by women who would not otherwise write for the public;

2. to bring forward issues and perspectives and opinions which probably would not be found in the mainstream media;

3. to assist women in acquiring the various skills necessary to publish a newspaper.

It has been the clear editorial policy of Pandora that it will accept letters and articles only if written by women.

Exhibit 22 is an extract from Pandora published apparently in June, 1986. While the publication of exhibit 22 pre-dates the filing of this complaint by about four years, nonetheless I am satisfied that certain statements of policy set out in the extract are applicable to the relevant time:

> Pandora is a newspaper produced by, for and about women.
>
> We actively seek participation on any level from women who do not have access to mainstream media. Low income women, women of color, women involved in organized labour and women who work without benefit of organization, disabled women, native women, lesbian women, women in conflict with the law, immigrant women, older women, younger women, ALL kinds of women, are encouraged to contact members of the Outreach working group or any Pandora women, to explore their particulars ideas and concerns.
>
> ...
>
> We cannot accept material that is intolerant or oppressive -- for example, (but not exclusively) sexist, racist, classist, homophobic, ageist or ablist. We are, however, committed to working with women to help them express their experience in a positive way.
>
> ...

> Women are asked to write from their personal experience as if writing a letter to a close friend.
>
> ...
>
> Pandora is a forum for women who are speaking out of their experience -- expressing their perspective on issues that are important to them. We do not necessarily attempt to present all perspectives in any one issue at any one time.
>
> Women who have concerns about anything they find in Pandora are encouraged to write a letter for the next issue.

Accordingly, on the basis of the evidence before me I accept and find as a fact that Pandora and its newspaper Pandora is a single sex organization of women designed to promote the equality of women and to remedy disadvantages experienced by women on the basis of sex. As such I am satisfied that Pandora is justified in advantaging women over men in the promotion of those goals.

The question, then, is whether the policy of accepting letters written only by women falls within the ambit of the privilege of Pandora to prefer women over men.

Evidence was led that certain other women's publications do not prohibit the publication of articles or letters written by men. In particular Atlantis (Exhibit 9, Tab 3), Resources for Feminist Research (Exhibit 9, Tab 4) and Kenisis (Exhibit 9, Tab 6) fall into this category. No evidence was presented as to why that policy has been adopted by those publications. On the other hand, there was also evidence of publications which, like Pandora, restrict publication to material written by women. Women's Education (Exhibit 9, Tab 5) and Northern Woman Journal (Exhibit 9, Tab 8) fall into this category.

I also heard evidence from Rev. Darrell Grey. Rev. Grey described himself as the owner of the Provincial Monitor, a black newspaper published in this Province. Rev. Grey testified that the Provincial Monitor did not have a policy limiting articles and letters printed in the newspaper to those written by blacks. Rev. Grey testified that in his opinion the newspaper should generate and promote a free exchange of ideas. He also testified that as advertising was carried in the newspaper funded by the Provincial and Federal Governments he felt an obligation not to discriminate against other than black writers.

I accept Rev. Grey's evidence and evidence that there are single sex publications which do not restrict letters and articles to those written by women. However, in my opinion, this evidence and this finding is in no way determinative of the issues before me.

The publishers and editors of those publications may for a variety of reasons consistent with the objectives and purposes of their publications consider such policies appropriate. I do not think, however, that I need find that it is absolutely necessary for all women's newspapers to have a policy of excluding all material which is not written by women in order for Pandora to justify its letter to the editor policy.

I can well accept that reasonable women might take different views as to whether or not a women's newspaper should limit itself to letters and articles written by women only. I can also accept that women might reasonably conclude that such a policy is appropriate to one women's publication having regard to the circumstances and objectives of that publication and that it is not appropriate to another having regard to its circumstances and objectives.

Exhibit 26 is an article written by Betty-Ann Lloyd and published in Canadian Women's Studies. I qualified Ms. Lloyd as an expert but expressed some concern as to opinion evidence from her having regard to her very close involvement with Pandora. However, the article makes what I consider to be some very useful factual points concerning Pandora which I set out as follows:

> In the "Journey is Home" (Boston: Beacon Press, 1985) Nelle Morton takes about her understanding of "hearing women into speech." She says we are powerful when we provide a safe place for women to express themselves -- when we listen is such a way that women are heard into their own speech. She says we are expressive when other women provide that space and that listening for us. She is saying, also, that women cannot become powerful or expressive by being spoken to, by being spoken for or, especially, by being spoken about. It is by being heard that women become empowered.
>
> And this is where I feel the feminist press can begin to enter into an effective, affirming relationship with the women of our particular communities. Our part is providing safe space so that women who are so often silenced, so rarely heard, can risk speaking, can find a respectful, questioning and challenging ear.
>
> Women can use this space to speak of their experience. They can speak of the connections they have begun to make between that experience and the experience of other women. They can speak of the analysis that grows out of making connections, the vision that expands that analysis and the strategies that further the vision.

The foregoing extracts from the Lloyd article are, in my opinion, consistent with the evidence which I heard at the hearing as to the objectives and experience of Pandora from those witnesses currently involved in the publication of the newspaper.

I heard much evidence, again from the expert and lay witnesses, that women require a "safe place" to write, particularly concerning equality issues. In this context a "safe place" is one occupied by women only. I was told that if Pandora was not a women only publication many women would be reluctant to expose their writing to debate and criticism by men. I was also told that as Pandora circulates largely (but, admittedly, not exclusively) in the community of women, and that women feel more comfortable in discussing and dealing with issues relating to equality than they do in the mainstream media or in media which has a larger distribution among men. I was further told that the purpose of Pandora was to deal with such issues as were considered important and relevant to women and from a women's point of view. Concern was expressed that if men were allowed to publish letters in Pandora they would at least to some extent control the agenda of the publication, discourage at least some women from publishing their writing (or at least expressing freely their opinions and views) and that permitting such participation by men would divert the time and energy of Pandora from the purposes and objectives of the newspaper to dealing with and responding to these views.

On the basis of the evidence which I have heard, I am satisfied and find as a fact that a safe place for women's writing as that was defined in the evidence might reasonably be considered appropriate and necessary for the promotion of women's equality and remedying disadvantage on the basis of sex.

In my opinion, it is not for me to make any fine distinction as to whether or not the women only policy is absolutely necessary for Pandora, only if it is a policy which might reasonably be adopted in all the circumstances.

In my opinion, such a policy is reasonable in the circumstances. Pandora is by, for, and about women. It is a women only publication designed to promote women's equality and to remedy disadvantage based on sex. It is not about men or men's issues. It deals with issues and opinions and points of view not expected to be addressed in the mainstream media. Many of the writers in Pandora would not participate fully if it were not a women only publication. In the circumstances, it is, in my opinion, reasonable for Pandora to maintain a policy of publishing letters by women only in Pandora.

It is important to note that Pandora does not pretend to be part of the mainstream media -- it is said not to be objective but to present views on issues from a point of view. Pandora does not even pretend to express the views of all women. Rather, Pandora projects a feminist point of view taking the view that the mainstream media, although purporting to be objective, projects an other than feminist view.

It is also important to remember that Pandora represents only one limited aspect of the lives of the women who are involved in its publication and the women who read the newspaper. As was pointed out to me by a number of witnesses, all these women must, of course, function in the real world. In that context Pandora provides a place where women's views and women's views only are expressed.

It was suggested on behalf of the Commission and Mr. Keyes that a distinction should be drawn between the letters to the editor section of the newspaper and the balance of the newspaper and membership in Pandora. In my opinion, I see no distinction between material written by men if it is intended for the letters to the editor section or the editorial section of Pandora. While again I can accept that reasonable women might have differences of opinion as to whether or not men should be

excluded entirely from such a newspaper or should be allowed to have letters to the editor published (provided that they meet the editorial criteria of the newspaper) I cannot say that it is unreasonable to maintain a policy of publishing writing by women only. Indeed, that policy does appear to me to be consistent with the overall objectives and policies of Pandora.

In my opinion, having regard to all the foregoing, the policy of publishing only letters written by women is consistent and reasonable having regard to the point of view of the newspaper and its objectives.

The necessary implication of Pandora's letter writing policy is discrimination in fact against men generally. They are denied access to the newspaper. This, in my opinion, does not constitute a violation of the Act. On the evidence I have heard I am satisfied that the denial of access by Pandora to men does not cause material or substantial harm to men, particularly in comparison to the benefit to women of having a women's only publication dealing with women's equality issues from women's perspective and providing a safe place for a wide variety of women to express such views. I am satisfied and I find that men have adequate opportunity to express their views and opinions in the mainstream media without entry into this women's place.

It was suggested that Pandora's publication of extracts from a letter written by Bill Donovan, regional manager of the CBC (exhibit 9, tab 1) was not in accordance with Pandora's policy. The extract was published unsigned. A number of explanations were profferred by various witnesses for the publication of these extracts and the form of the publication. I was not persuaded by any of these explanations that the publication of those extracts was anything other than a breach of the letter writing policy.

However, even if the publication of those extracts was a breach of Pandora's letter policy, I attach no significance to that. I do not see that a single publication of unattributed extracts from a letter written by a man affects my finding that Pandora indeed has a policy of publishing letters written only or that such single publication in effect destroys that policy.

After the Charter litigation in Blainey, that matter then went forward on the basis of the Human Rights complaint in Blainey v. Ontario Hockey Association (1988), 9 C.H.R.R., D/4543 35381. That case held that the organization of a women only hockey league was not discrimination prohibited by the Ontario Human Rights Act. Section 13(1) of the Ontario Act is reported in the decision as providing as follows at the relevant time:

> 13.(1) A right under Part I is not infringed by the implementation of a special program designed to relieve hardship or economic disadvantage or to assist disadvantaged persons or groups to achieve or attempt to achieve equal opportunity or that is likely to contribute to the elimination of the infringement of rights under Part I.

This provision appears to me to be identical in substance to Section 15(2) of the Charter and Section 6(i) of the amended Act. I have already expressed my opinion that the legal content of the prohibition against discrimination in the Act must be afforded the same meaning as in Section 15 of the Charter.

The decision of the Board of Inquiry under the Ontario Human Rights Code concluded as follows with respect to the programme of a womens only hockey league:

> I am satisfied that the hockey program offered by the OWHA does, in fact, qualify as a special program under section 13(1) of the Code. The evidence clearly establishes that as a group females in

> this province do not have the same opportunity as males to play organized competitive hockey. Female hockey must continually struggle against the view that hockey is a male only sport. It must also struggle for access to ice time. Because of these handicaps, the program offered by the OWHA does not have the same level of participation as does male hockey. Further, while post-puberty females can compete against similar age males in terms of skill and intelligence, the majority cannot compete in terms of size and strength. Although pre-pubescent girls can compete equally with pre-pubescent males to allow young boys to play on girls' teams would lead to serious difficulties for female hockey. Many parents are opposed to their daughters playing hockey, even on all-female teams. This opposition would likely intensify if males were permitted to play on female teams. Most females desire to play on all-female teams. To allow males to play female hockey would likely result in a large number of female players deciding to leave the sport. It follows that if males were permitted to play OWHA hockey, even a small number of them would likely have a major adverse effect on the already limited opportunities for females to play competitive hockey. My finding that the OWHA's program of female hockey meets the requirements for a special program under section 13(1) of the Code means that OWHA teams can continue to refuse to admit males without infringing section 1 of the Code.

I have accepted the evidence lead by Pandora as to the reasonableness of a womens only newspaper and that the purpose of Pandora is to remedy disadvantage and promote equality. Accordingly, in my opinion, the same result should be reached here as was reached in the Blainey case and accordingly in my opinion Pandora's policy of publishing letters to the editor written by women only is not discrimination as prohibited by Section 12 of the Act.

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CONCLUSION

I am satisfied on the evidence before me that women as a group have been and are disadvantaged and unequal in our society by reason of sex. Accordingly, women are entitled to the protection of Section 12 which prohibits discrimination on the basis of sex.

I am also satisfied that as a matter of law the concepts of equality and discrimination under the Act must be consistent with those concepts in the Charter. McIntyre, J. in Andrews stated that the promotion of equality in the prohibition against discrimination has a more specific goal than the mere elimination of distinctions and that identical treatment may produce inequality. It follows, accordingly, that a disadvantaged group may undertake a programme or activity which has as its object the amelioration of conditions of disadvantaged individuals or classes of individuals including those discriminated against on the basis of sex even if that results in distinctions being made with respect to the advantaged group.

Finally, I am also satisfied that Pandora underlined is an activity which has as its object the amelioration of conditions of disadvantage to women based on sex. I am also satisfied that Pandora's policy of maintaining Pandora as a single sex newspaper is reasonable for the purpose of ameliorating disadvantage.

In the result, I find that Pandora was not in breach of Section 12(1)(a) or Section 17 of the Act in its letters to the

editor policy or its refusal to publish Mr. Keyes' letter and accordingly I dismiss the complaint.

Dated at Halifax, Nova Scotia this 17th day of March, 1992.

David Miller
Board of Inquiry

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CANADIAN C. H. R. R. HUMAN RIGHTS REPORTER

NOVA SCOTIA
SEX DISCRIMINATION / PUBLICATIONS
Indexed as: Keyes v. Pandora Publishing Assn. (No. 2)

Volume 16, Decision 18 Paragraphs 1 - 127 August 1992

Gene Keyes
Complainant

v.

Pandora Publishing Association
Respondent

Date of Decision: March 17, 1992

Before: Nova Scotia Board of Inquiry, David Miller

Appearances by: Gene Keyes, on his own behalf

Randall R. Duplak, Counsel for the Commission

Anne S. Derrick, Counsel for the Respondent

SEX DISCRIMINATION—publication denied to male—fathers claiming custody rights as disadvantaged subgroup of males—PUBLICATIONS—newspaper publication of letter to the editor denied on basis of gender—AFFIRMATIVE ACTION—validity of editorial policy as special measure—EXEMPTIONS—gender discrimination exemption for newspaper—PUBLIC SERVICES AND FACILITIES—access to newspaper letters to the editor section

INTERPRETATION OF STATUTES—definition of "service . . . customarily provided to members of the public"—DISCRIMINATION—definition of discrimination—HUMAN RIGHTS—nature and purpose of human rights legislation—human rights legislation subject to other enactments—EQUALITY—relationship between equality under human rights legislation and equality under the Charter—EVIDENCE—admissibility of extrinsic evidence

Summary: *The Board of Inquiry finds that Pandora Publishing Association did not discriminate against Gene Keyes when it refused to publish, in Pandora, a letter he wrote to the editor. Pandora, which is a women's newspaper, has a policy of publishing only letters from women readers.*

Mr. Keyes alleged that he was discriminated against because of his sex by the newspaper's "women-only" policy. Pandora Publishing Association takes the position that because women are disadvantaged in Canadian society they need a "safe place" to express their views about equality for women and having that "safe place" requires a women-only space. Pandora is a newspaper by, for, and about women.

The Board of Inquiry finds that women are a disadvantaged group in Canadian society, and that Pandora is designed to promote women's equality and remedy disadvantage based on sex. In light of this it is appropriate and reasonable to maintain a policy of publishing only letters written by women. The policy is consistent with the objectives of Pandora.

The Board rules that denial of access to men to Pandora does not constitute a violation of the Nova Scotia Human Rights Act. The concepts of equality and discrimination in the Act must be consistent with these concepts in the Charter. McIntyre J., in Andrews v. Law Society of British Columbia, stated that the prohibition against discrimination has a more specific goal than the mere elimination of distinctions and that identical treatment may produce inequality. It follows accordingly that a disadvantaged group may undertake a program or activity which has as its object the amelioration of conditions of disadvantaged individuals or groups even if that results in distinctions being made with respect to the advantaged group.

The complaint is dismissed.

[Ed. note: See also interim decision on motion for determination of settlement (1991), 16 C.H.R.R. D/145.]

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Nova Scotia
Human Rights Act, R.S.N.S. 1989, c. 214
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THE COMPLAINT

[1] This is a complaint by Gene Keyes ("Keyes") to the Nova Scotia Human Rights Commission (the "Commission") against Pandora Publishing Association ("Pandora") pursuant to the provisions of the *Human Rights Act* [R.S.N.S. 1989, c. 214] (the "*Act*").

[2] Keyes currently is a resident of Halifax, Nova Scotia. He holds a Ph.D. in political science. He is formerly a professor of political science at St. Thomas University in Fredericton, New Brunswick and at Brandon University in Brandon, Manitoba. At the present time he works as a self-employed researcher in Halifax.

[3] Pandora is a society incorporated under the *Societies Act* [R.S.N.S. 1989, c. 435] of Nova Scotia. The Memorandum of Association and Articles of Association of Pandora are found at Exhibit 9, Tab 7.[1] Testimony was given as to an amendment to the articles and Exhibit 21 was tendered in that respect. I am satisfied that Exhibit 21 properly sets out an amendment to the Articles of Association of Pandora which was properly past [*sic*] prior to the dates relevant to this complaint. The amendment restricted membership in the society to women. It also reflected the collective nature of management and governance of the society's affairs as spoken to in the evidence by various witnesses (particularly Beverly Stone, Sheila Morris, Mary Jones and Betty-Ann Lloyd).

[1] Ed. note: Not published here.

[4] Pandora publishes a quarterly newspaper called *Pandora*. *Pandora* has distribution throughout the provinces of Nova Scotia and Prince Edward Island. I was told in the evidence and it is stated in *Pandora* that *Pandora* is for, by and about women.

[5] *Pandora* publishes a notice in each edition stating that letters to the editor will be accepted only if they are written by women. A sample of the notice is reproduced at Exhibit 9, Tab 1. The relevant portion of the policy is as follows:

> Pandora reserves the right to publish only letters that fall within the guidelines of our editorial policy: letters must be written by women and be women positive; we do not accept material that is intolerant or oppressive.
>
> We prefer that letters are in direct response to an article or current concern. Should it refer to an article appearing in Pandora, the author of the article will be contacted and given an opportunity to respond.
>
> We will print letters anonymously, but at least two women in Pandora must know the woman's real name and have a contact number for her.
>
> Pandora reserves the right to edit for length; however, the writer will be notified should this be necessary. We request that all letters include a phone number so we may contact the writer should it become necessary.

[6] Keyes saw an article in the March 1990 edition of *Pandora* (Exhibit 10, entitled "Inequality Between Women and Men Strengthened by Father's 'Rights'." The article was admitted into evidence over the objection of Ms. Derrick on behalf of Pandora for the purpose of setting out the context in which the complaint arose.

[7] I ruled that the content of the article and the opinions expressed therein were not relevant to the Inquiry. I ruled that I would not hear evidence concerning those views or other or [*sic*] contrary opinions on the subject. The complaint before me relates to *Pandora*'s letter policy, not to the publication or contents of the article.

[8] The subject matter of the article is self-explanatory from the title. Keyes had a particular interest in that subject matter. He had been involved in long and protracted legal proceedings respecting custody of and access to his children. The details of this litigation were not relevant to the Inquiry and accordingly were not before me. I took it from the evidence which was before me, however, that Keyes was not satisfied with the results of those legal proceedings. I also understand Mr. Keyes is of the opinion that he was discriminated against in those legal proceedings because he is a man.

[9] In any event, Keyes decided that he wished to respond to Exhibit 10 by writing a letter to the editor for publication in *Pandora*. In the same general time frame as the article was published, Keyes telephoned Pandora to inquire whether he would be permitted to submit a letter. While there was no direct evidence on this, presumably Keyes telephoned Pandora rather than simply sending a letter in for publication because of *Pandora*'s stated letter policy. He spoke to a woman, later identified as the witness Sheila Morris (pseud-

onym), who advised him that under no circumstances would his letter be published because he was a man.

[10] Faced with this rebuff, Keyes did not then prepare or send a letter to the editor of *Pandora*. He complained to the Commission and on June 21, 1990, filed a formal complaint. The complaint was as follows (Exhibit 6):

> I am a Nova Scotian male. The letter policy of Pandora's Publishing Association as outlined in the March, 1990, issue of Pandora indicates that letters must be written by women. As a result I am prohibited from expressing my views in Pandora. I allege I have been discriminated against because of my sex in contravention of Sections 12(1) and 17 of the Nova Scotia Human Rights Act.

At the same time Keyes prepared a letter which he wished to be published. He delivered the letter to the Commission, which eventually provided a copy to Pandora. I ruled that the contents of the letter were not relevant to this Inquiry and refused to admit it in evidence.

[11] To the extent that it has any relevance or importance to this Inquiry, I am satisfied that Keyes had a legitimate interest in the subject matter of the article with which he took issue and that he acted in good faith throughout.

[12] The complaint made by Keyes to the Commission against Pandora was not resolved. Accordingly, this Board of Inquiry was appointed on June 17, 1991. The appointment of the Board (Exhibit 8) provided, in part, as follows:

> The purpose of the Board of Inquiry is to investigate and seek settlement of the following complaint:
>
> That Pandora Publishing Association did, on or about March, 1990, discriminate against Gene Keyes by denying him services and advertisement by prohibiting him from expressing his views because of his sex contrary to Sections 12(1)(a) and 17 of the Human Rights Act.

[13] After two pre-hearing conferences on September 9, 1991, and December 13, 1991, and the hearing of a preliminary motion by the Commission that the complaint had been settled on December 13, 1991, I heard the evidence on the complaint on January 13 through January 17, 1992, at Halifax, Nova Scotia. Subsequently, written submissions and rebuttal submissions were filed by the parties and oral argument was heard on March 6, 1992.

[14] I will first deal with two rulings which I made in the course of the hearing as to evidence sought to be led by the parties and which I ruled would not be permitted.

MR. KEYES' EVIDENCE OF AN ALLEGED DISADVANTAGED SUB-GROUP OF MALES

[15] I was asked by the complainant, supported by the Commission, to hear evidence in support of the proposition that the plaintiff was a member of a disadvantaged sub-group of males, being divorced and separated fathers claiming custody or access rights to their children. Mr. Keyes advised that in his view the disadvantage arose from a bias in the laws of this province and in the application of those laws by the legal system favouring women over men in cases involving child custody and access.

[16] As I understand, it was submitted that if Pandora as a single-sex organization intended to promote women's equality is justified in attempting to redress women's inequality by advantaging women by, *inter alia*, publishing letters written only by women, then that justification does not extend to advantaging women over the sub-group proposed by Mr. Keyes as in Mr. Keyes' view that sub-group also is discriminated against on the basis of sex. Accordingly, it was suggested that even if Pandora could advantage women over men generally in its letter writing policy, it could not advantage women over this alleged sub-group of men claimed to have been discriminated against on the basis of sex.

[17] In my opinion, the proposition has no merit. I ruled that I would not hear any evidence in support of the assertion that divorced and separated fathers are discriminated against by the laws and the legal system of this province on the basis of sex. It was apparent to me from the remarks made on behalf of the parties that to have embarked on such an inquiry would have greatly extended the scope and length of the hearing and the costs to all concerned. As I see no merit in the proposition I do not consider that it would have been appropriate to have heard the evidence proposed by Mr. Keyes and contrary evidence which Ms. Derrick advised would be led by Pandora.

[18] In the first place, it is clear on the evidence, and I find as a fact, that Pandora did not discriminate against Mr. Keyes because he was a divorced father but, rather, simply because he was a man. This is apparent in the Pandora letter policy (Exhibit 9, Tab 1) and the evidence of the Pandora witnesses (particularly Ms. Stone, Ms. Jones and Ms. Lloyd).

[19] There was no evidence before me that Pandora was even aware at the time of the refusal that Mr. Keyes was a divorced or separated father claimed to have been unjustly denied or restricted in his custody and access rights on the basis of sex. Mr. Keyes testified as to his conversation with a representative of Pandora (whom he could not identify) following publication of the article with which he took issue. Mr. Keyes' testimony was vague as to whether or not he had advised this person of his status. I cannot find on the basis of Mr. Keyes' evidence that he had communicated to the Pandora representative that he was a member of the sub-group which he now asserts, and that on that basis he claimed a right to have a reply to the article published in *Pandora* by way of a letter to the editor. The Pandora representative who took the telephone call, Ms. Jones, also testified. She was not cross-examined on this point and there was no evidence from her that she was aware of Mr. Keyes' alleged special interest in the article or his alleged special status.

[20] Thus, even if I accepted the proposition put to me that Pandora was not entitled to advantage women over the alleged disadvantaged sub-group of men, and even if it were further established that the facts supported a finding of the existence of such an alleged disadvantaged sub-group based on sex, I would not have been satisfied that Pandora had in fact discriminated against Mr. Keyes on this basis.

Rather, Pandora's refusal to print the letter was based on its overall policy of refusing to publish any materials, letters or otherwise, written by men.

[21] Secondly, accepting that a disadvantaged group whose rights are given legal protection by the *Act* may prefer the members of that group over the advantaged group, I know of no authority to break down the advantaged group further and to prohibit the disadvantaged group from preferring its members over the members of an alleged disadvantaged sub-group of the advantaged group.

[22] The assertion here is that the alleged disadvantaged sub-group of the advantaged group is disadvantaged on the same basis, sex, as is the disadvantaged group, women. This case, accordingly, can easily be distinguished from a complaint by members of a disadvantaged group protected by the *Act* (such as on the basis of race) being discriminated by another disadvantaged group also protected by the *Act* (such as on the basis of sex). Disadvantage alone, of course, is not sufficient to support Mr. Keyes' proposition—it must be disadvantage based on a prohibited ground of discrimination as set out in the *Act*.

[23] In my opinion, it is implicit in the *Act* and in the right of the disadvantaged group to prefer its members over the advantaged group that individual members of the advantaged group will be discriminated against (or will feel discriminated against) in the course of promoting equality and advantaging the disadvantaged group. Therefore, the mere fact that Mr. Keyes feels discriminated against on the basis of sex as a result of *Pandora*'s letter writing policy, does not *ipso facto* negate Pandora's right to prefer women in its publication.

[24] I do not see any basis, at least in this case, to find that disadvantage on the basis of sex to individuals or even a sub-group of the male group (even if that were in fact established) should limit Pandora's right to advantage women.

[25] In any event, I am not convinced that the alleged sub-group referred to by Mr. Keyes is in fact a disadvantaged group within the ambit of the *Act* even if the alleged discrimination based on sex could be established. The sub-group proposed by Mr. Keyes is very different than the groups whose protection clearly is recognized by the *Act* (such as women, minority racial groups and the disabled) who clearly are the victims of discrimination and disadvantage in society because of who they are. Mr. Keyes' sub-group, on the other hand, is formed only as the result of individual judicial decisions affecting individual cases. Clearly, it was acknowledged by Mr. Keyes that not all fathers fall into the disadvantaged sub-group. It is as a result of these individual decisions that Mr. Keyes and, apparently, certain other fathers consider themselves to have been discriminated against on the basis of sex. There was no suggestion of the alleged sub-group having any other characteristics in common to pre-determine the discrimination based on sex. It was not said that all men are denied custody or reasonable access rights to their children. There was no suggestion that these men are generally discriminated against or disadvantaged on the basis of sex. Accordingly, I do not see this alleged sub-group as the kind of group intended to be protected by the *Act*.

[26] Thirdly, even if I did accept that Mr. Keyes' alleged sub-group could be protected under the *Act* and even if I were satisfied that such discrimination based on sex against that sub-group had existed, I would not have found that this limited Pandora's right to prefer women in its letters to the editor policy.

[27] The evidence which I heard at the hearing satisfied me that historically, and to the present day, women as a group in our society have suffered substantially [*sic*] inequality and disadvantages in all aspects of public and private life. I am also satisfied that this inequality continues to the present day to a sufficient degree, that it is reasonable that women's groups may decide to form women-only organizations, such as Pandora, for the promotion of women's equality and that such organizations may advantage women over men.

[28] The evidence which I heard as to women's disadvantage and inequality ranging over the whole sphere of public and private life contrasts sharply with the inequality based on sex alleged by Mr. Keyes in respect of his rights to custody of or access to his children. While I do not trivialize the importance of those rights to Mr. Keyes or, indeed, to any other parent, I do find that the discrimination alleged by Mr. Keyes relates to a single facet of his overall public and private life. I cannot accept that such single facet discrimination (even if proved) could override the rights of women to single-sex organizations promoting their equality on a broad range of issues in the private and public spheres. As I am satisfied that Pandora could reasonably decide on a single-sex policy advantaging women over men with a view to promoting women's equality, and as I am further satisfied that the purposes and aims of Pandora in promoting women's equality would be substantially disrupted by permitting men to participate in *Pandora*, even to the limited extent of writing letters to the editor, I cannot find that this alleged single facet discrimination complained of by Mr. Keyes would be sufficient to interfere with Pandora's rights.

[29] Further, I also note that while Mr. Keyes may consider himself disadvantaged on the basis of sex as respects his claim for custody of or access to his children, the fact remains that, other than in this respect, he remains a member of the dominant group with all the advantages that pertain to that advantaged group as explained to me in the evidence. Thus, I do not see that it is necessary or even important to Mr. Keyes or the other members of his alleged sub-group to have access to *Pandora*. They have other, and adequate means of public expression of their views. On the other hand, to permit access by some part of the advantaged group to a single-sex publication of the disadvantaged group would be to import into that publication the difficulties and disadvantages which I was told women experienced in their dealings with men and would thereby, to some material degree at least, defeat the purpose of such an organization and the purposes of the *Act* in promoting equality by preferring disadvantaged groups.

[30] For these reasons, even if Mr. Keyes could establish the alleged discrimination against divorced or separated fathers, seeking custody of or access to their children, on the basis of sex, I would not have found that this required Pan-

dora to make an exception for that sub-group of men as respects its letter writing policy of printing letters written by women only.

[31] Fourthly, I do not consider the issue raised by Mr. Keyes to be before me on this Inquiry or within the range of this Inquiry.

[32] Mr. Keyes' complaint to the Commission was as follows:

> I am a Nova Scotian male. The letter policy of Pandora's Publishing Association as outlined in the March, 1990, issue of Pandora indicates that letters must be written by women. As a result I am prohibited from expressing my views in Pandora. I allege I have been discriminated against because of my sex in contravention of Sections 12(1) and 17 of the Nova Scotia Human Rights Act.

[33] My appointment as the Board of Inquiry pursuant to that complaint was as follows:

> The purpose of the Board of Inquiry is to investigate and seek settlement of the following complaint:
>
> That Pandora Publishing Association did, on or about March, 1990, discriminate against Gene Keyes by denying him services and advertisement by prohibiting him from expressing his views because of his sex contrary to Sections 12(1)(a) and 17 of the Human Rights Act.

[34] The complaint as advanced by Mr. Keyes and my appointment were in respect of Pandora's letter writing policy limiting letters to be published to those written by women. That is the matter I have been directed to inquire into and that is the limit of my authority.

[35] Mr. Keyes alleged bias in the Nova Scotia legal system based on sex against fathers seeking custody of or access rights to their children. Mr. Keyes complains that the laws of this province favour women over men in such cases in a general sense. He further alleged that such a bias is re-enforced and implemented by the administration of justice in this province by lawyers, court officials and judges. That, I understand, is the basis of his allegation that he and others like him are discriminated against on the basis of sex.

[36] Such an inquiry is, in my opinion, far outside this complaint and far beyond the scope of this Inquiry. To embark on an inquiry as to whether or not there is a systemic or institutional bias in the legal system of this province and in the administration of justice in this province against fathers in child custody and access cases on the basis of sex, and to make a determination in that respect would, in my opinion, amount to me usurping an authority which I do not have. Accordingly, I refused to embark on any such inquiry.

[37] Further, and finally, objection was taken to this line of inquiry by Ms. Derrick on behalf of Pandora. Ms. Derrick asserted that she was taken by surprise and advised that if the evidence proposed by Mr. Keyes were adduced Pandora would be prejudiced in its defence and would require additional evidence.

[38] There are, of course, no pleadings in the usual or formal sense on this Inquiry. However, as noted, in my opinion, the jurisdiction of this Board is framed by the complaint and the appointment by the Minister.

[39] At my request an initial pre-hearing conference was held with the parties on September 9, 1991. At that time, with some difficulty, dates were agreed to for the hearing and subsequently, for argument. It also was agreed to for the preliminary motion which was heard on December 13, 1991. At that time I asked counsel to consider the issues which would be before the Board so that there would be no surprises and no difficulty with the presentation of the evidence. I was much concerned as to the possibility of requests for adjournments and needlessly prolonging both the evidence on the Inquiry and the time frame in which dates could be obtained should an adjournment be necessary. I prepared a memorandum of the conference, which was circulated to the parties, which included the following as respects my request for advice as to the issues:

> *Issues*
> As there are no formal pleadings as such, the parties will endeavour to agree on a statement of the issues on the Inquiry. Failing agreement, the parties will provide a statement of what they individually consider to be the issues.

[40] The second pre-hearing conference was held after the hearing of the preliminary motion on December 13, 1991. I again made a request to be advised of the issues on the Inquiry and asked that brief pre-hearing submissions outlining the issues and the essential positions of the parties be submitted by January 6, 1992. I again prepared a memorandum of the conference which I circulated to the parties. I said as follows with respect to the question of the issues:

> *Issues*
> It was generally agreed that the issue on the hearing of the inquiry is as set out in Ms. Derrick's letter of December 6, 1991 to me. Mr Keyes made reference to the publication of the Notice of the letter policy, the refusal to publish his letter and the refusal to publish letters written by men generally. It appeared, however, that this distinction did not affect the essential issue to be determined.

[41] The letter of December 6, 1991, from Ms. Derrick referred to in the memorandum stated as follows with respect to the issues on the Inquiry:

> 1. Does Pandora Publishing's letter policy constitute sex discrimination under the Nova Scotia *Human Rights Act*, in particular, does it constitute a violation of ss. 12(1)(a) and/or s. 17?

[42] Mention had been made on a number of occasions that the contents of the article to which Mr. Keyes took exception, and the opinions and views of the authors of those articles on the question of child custody and access were not in issue before me.

[43] Certainly, I understood from the complaint, the appointment, and the discussions with the parties at the pre-hearing conference that the issue on the Inquiry was the

letter writing policy of *Pandora* preferring women over men in a general sense. I agreed with Ms. Derrick's objection that Mr. Keyes was attempting to frame the evidence on the hearing in a very different manner than had been understood to that date and that it would be procedurally unfair to Pandora to permit the hearing to move forward on that basis and to permit such evidence to be adduced.

[44] Accordingly, quite apart from the foregoing reasons I would not have permitted this Inquiry to proceed other than on the basis of *Pandora*'s general letter policy prohibiting publication materials written other than by women.

ADMISSIBILITY OF CRTC AND MEDIAWATCH REPORTS

[45] I was asked by counsel for Pandora to admit into evidence without formal proof and without cross-examination two reports:

1. *Portrayal of Gender in Canadian Broadcasting* CRTC, 1990 (the "Erin *Report*");

2. *Sexism in Canadian Newspapers*, Mediawatch, 1990.

I was told that these reports dealt with the portrayal of women and women's issues in the mainstream media in Canada. The CRTC is a federal administrative and regulatory body. Mediawatch was described in the evidence of Ms. Forsyth-Smith as a private organization.

[46] It was suggested that the evidence was admissible as extrinsic evidence. I was referred to pp. 75–96 of *Evidence and the Charter of Rights and Freedoms* (W.H. Charles, Thomas A. Cromwell & Keith Jobson, Toronto: Butterworths, 1989). In that work the authors state as follows at p. 75:

> Defined very broadly, extrinsic evidence can include any material external to the statute being interpreted. This would include such items as prior versions of the same statute or other statutes, "in pari teria". Usually, however, the term is used to describe materials relating in some way to the legislative process leading to enactment.

After reviewing the decision of the Supreme Court of Canada in *Reference re Residential Tenancies Act*, [1981] 1 S.C.R. 714 the authors summarize what they describe as "basically a codification or summary of the situation in Canada insofar as the judicial use of extrinsic evidence is concerned" as follows at p. 78:

> 1. Extrinsic evidence may be admitted to show the operation and effect of the legislation.
>
> 2. Extrinsic evidence may be admitted to show the true purpose and object of the legislation.
>
> 3. Extrinsic evidence cannot be used as an aid to the construction of a statute.
>
> 4. Generally, speeches made inside the legislature are inadmissible because they have little weight.
>
> 5. Extrinsic evidence may be admitted to show the general background against which the legislation is enacted;
>
> BUT
>
> 6. Evidence is inadmissible if it is inherently unreliable or against public policy.

They go on to say:

> Other extrinsic evidence may be admitted to show (a) the operation and effect of the statute or the true purpose of the legislation or to outline the general background against which the legislation was passed . . .
>
> This evidence merely provides the court with additional information, apart from the text of the legislation, from which inferences may be drawn by the court as to the most appropriate meaning to be given to legislative language. Such evidence cannot be used as direct evidence of legislative intention . . .

The authors also point out that the courts (p. 78)

> recognizing that they are involved in a special interpretative process, when confronted with a *Charter* issue . . . have elected to be guided by principles that direct a liberal interpretation of the *Charter*. Such an approach permits and dictates a generous use of extrinsic evidence.

[47] Counsel were unable to provide me with any authority as to the requirement, if any, for proof of such extrinsic evidence if found to be admissible.

In my opinion, the reports in question are not extrinsic evidence in this Inquiry. I will not order that they be admitted in evidence as extrinsic evidence.

I do not see how the reports fit into any of the categories of extrinsic evidence set out by Dickson C.J. Extrinsic evidence appears to be admissible for the purpose of assisting interpretation and application of specific legislation.

[48] The provisions of the *Act* at issue are the portion of the preamble dealing with equalities of rights and s. 12 prohibiting discrimination on the basis of sex. The reports as described to me would not assist me in determining the meaning of the word "equal" as used in the preamble nor what amounts to sex discrimination as prohibited by s. 12. Further, admission of the reports would not assist me in a determination of the evil to be remedied by the *Act* and, particularly, s. 12 except, perhaps, in the narrowest sense of inequality and disadvantage suffered by women on the basis of sex in the media. If the legislation in question dealt specifically with discrimination against women in the media those reports might conceivably have been relevant as extrinsic evidence. However, s. 12 of the *Act* and the complaint before me raise issues relating to women generally and not specifically to women employed in the media.

[49] The issues of women's specific inequality and a disadvantage on the basis of sex in the mainstream media is, at best, a collateral issue on this Inquiry. Evidence in that particular respect was led, as I took it, to support *Pandora*'s women only policy. In light of the evidence I heard as to women's general inequality and disadvantage in society based on sex, I would have been satisfied that *Pandora* was justified in making a women only policy and that such policy was reasonable whether or not I had been satisfied as to women's specific inequality and disadvantage based on sex in the mainstream media. *Pandora* is a private women's publication (in the sense that it is for, by and about women) directed at women's equality and remedying disadvantage

based on sex relating to a broad range of issues not limited to the media.

[50] Accordingly, at best, the reports are relevant to establish such inequality and disadvantage based on sex in the mainstream media. In that respect, notwithstanding the power which I am satisfied that I have under reg. 7 made pursuant to the 1991 amendments to the *Act* to admit such written hearsay evidence, I am persuaded by the objections made by Mr. Duplak on behalf of the Commission that I should not admit the report without the opportunity for cross-examination. Ms. Derrick advised that if the report would only be admitted if properly proved and subject to cross-examination she would not attempt further to tender the reports in evidence.

[51] However, as stated elsewhere in this decision, I am satisfied on the evidence before me that women suffer from inequalities and disadvantages based on sex in respect of participation in the mainstream media and the portrayal of women and the treatment of women's issues in that media as an aspect of women's overall inequality and disadvantages based on sex in society.

Accordingly, the reports were not admitted into evidence on this Inquiry.

WOMEN'S INEQUALITY AND DISADVANTAGE

[52] The Commission did not lead *viva voce* evidence on its principal case. An exhibit volume (Exhibit 9) was tendered by the parties by agreement. Keyes testified on his own behalf and as well called two witnesses, Reverend Darrell Grey and Mark Hurcko. Keyes called one witness in rebuttal, Charles Phillips and gave rebuttal evidence himself.

[53] Pandora called a number of witnesses. I heard testimony from Beverly Stone, Sheila Morris and Mary Jones who are now all involved in the production of *Pandora*. I also heard testimony from Betty-Ann Lloyd who was the founder of *Pandora*. Additional witnesses called were Rebecca West, Janet Rice, Brenda Thompson, Muriel Dixon, Anne Bishop and Diane Day.

[54] In addition, Pandora also presented expert evidence from the following witnesses whom I qualified as set out:

1. Dr. Margaret Conrad—History of Women and Women's Status in Nova Scotia;

2. Donna Smyth—Women in Language and Writing, Uses of Language by Women and The Significance of Women's Only Spaces;

3. Dr. Marguarite Cassin—Social Organization of Knowledge, Feminism, Gender Inequality and Management and Organization;

4. Debbie Forsyth-Smith—Treatment of Women in the Mainstream Media, Treatment of Women in Society and The Role and Function of Women's Only Space;

5. Betty-Ann Lloyd—Women and Literacy, Power Relationships between Reader and Writer and The Role of Women Only Spaces;

6. Sharon Fraser—Journalism in Mainstream and Non-Mass Media and The Role of Women's Only Spaces;

7. Leah M.F. Nomm—Therapist.

8. Dr. Blye Fraser—Social Organization and Construction of Gender and Masculinity and Nature and Function of Male Privilege.

The qualifications of all the above noted experts were agreed to by the other parties with the exception of Leah M.F. Nomm. After hearing evidence, cross-examination and argument with respect to Ms. Nomm's qualifications I qualified her as an expert, but more narrowly than had been requested by Pandora.

[55] Much evidence, both expert and lay and essentially uncontradicted, was presented to me through the course of the hearing concerning the historical development of women's status in society and the current status of women. In conjunction with that evidence I also heard evidence of both an historical and current nature concerning inequalities and disadvantages suffered by women by reason of sex in relation to men on a broad spectrum of public and private aspects of life. I was given many examples of discrimination and inequality in women's participation in domestic life, education, employment and business, and government and politics.

[56] Based on this evidence, which I accept, I find as a fact that women as a group are and remain materially disadvantaged and unequal to men as a group by reason of sex in fact if not in law.

[57] Evidence was led and I was asked to consider the particular disadvantages suffered by certain sub-groups of women by reason of sex. I was referred, by way of example, to women who are victims of violence by men and to lesbians. I do not, however, make any findings with respect to discrimination on the basis of sex against those sub-groups nor do I take that evidence into account in my findings and decision as respects Keyes' complaint.

[58] In my opinion, insofar as I am required to consider the inequality of women and the disadvantages experienced by women on the basis of sex in this Inquiry, I should do so on the basis of women generally and not as respects any particular sub-groups. Pandora, as explained to me, does not limit its participation or activities to sub-groups of women other, perhaps, than on the basis of acceptance of certain political positions. The Pandora witnesses acknowledged that Pandora is not representative of all women who share Pandora's political views. However, as I understand, that is not by design or exclusion. Thus, as I see it, the letter writing policy of *Pandora* is for the benefit of women in a general sense (subject to accepting Pandora's political positions) and not for the benefit of specific sub-groups.

[59] I have already stated my opinion that whether or not Keyes is the member of a sub-group of males disadvantaged by reason of sex cannot limit the rights of Pandora to prefer women at the expense of men. In my opinion, just as such an alleged sub-group of men cannot limit Pandora's right, so Pandora cannot extend rights or privileges to women gener-

ally based on considerations relating only to certain sub-groups which are said to be particularly the victims of discrimination, disadvantage and inequality based on sex.

[60] In my opinion, the right of Pandora to maintain its women only letter policy must be decided in relation to the position of women generally and not with respect to any particular sub-groups or collection of sub-groups of women.

[61] In addition to the evidence that women are generally disadvantaged and unequal in society and are discriminated against on the basis of sex, I also heard particular evidence that women are disadvantaged in discourse (written or oral) with men generally. I was told that men tend to dominate such discourse and to direct such discourse and that women tend to be disadvantaged in such circumstances. I accept this evidence. Further, there was also expert and lay evidence dealing in particular with women's participation in and treatment by the media as an aspect of discourse. I was told that the mainstream media tends to ignore women's issues and to portray women's issues (and indeed issues generally) from the point of view of men rather than women. I was also told that such media tends to portray women in unfavourable light and gives only limited access to women and women's issues.

[62] In addition, there was evidence adduced of limited opportunities for women to work in the media, either as writers/broadcasters or in management.

[63] Finally, as respects the media I was told of difficulties of many women having access to the mainstream media. Reference was made to the difficulties many such women [*sic*] writing letters or articles for publication and the reluctance of women to engage in debate in the mainstream media on issues related to women's inequality and, particularly, to engage in discourse and debate in the media with men on such issues.

[64] I permitted evidence as to women's disadvantage and inequality in the media only because Pandora publishes a newspaper. Based on the evidence which I have heard I am satisfied that the disadvantage and inequality based on sex from which women suffer in society in general is also found in the media.

SERVICE . . . CUSTOMARILY PROVIDED TO MEMBERS OF THE PUBLIC

[65] Mr. Keyes' complaint was that Pandora allegedly acted in breach of ss. 12(1)(a) and 17 of the *Human Rights Act* in refusing to publish his letter to the editor because he was a man.

[66] At the hearing the parties agreed that the reference to s. 17 did not add any matters of substance to the complaint in addition to s. 12(1)(a).

[67] The initial question for determination is whether or not the letters to the editor section of *Pandora* is a "service . . . customarily provided to members of the public."

[68] In the course of argument Ms. Derrick, on behalf of Pandora, stated that Pandora did not rest its defence of its letter writing policy on any general right of newspapers to exclude letters to the editor for whatever reason they might choose. Accordingly, I was not asked to consider whether or not the letters to the editor section was other than a service customarily provided to members of the public in the context of the decision of the Supreme Court of Canada in *Gay Alliance Toward Equality* v. *Vancouver Sun*, [1979] 2 S.C.R. 435, 27 N.R. 117. Ms. Derrick submitted in her memorandum of argument that decision might well have been decided differently under the *Charter of Rights*.

[69] Further, Ms. Derrick agreed that a service could not be rendered something other than one customarily provided to members of the public simply as the result of the provider deciding to limit the service on the basis of a ground of discrimination prohibited by the *Act*.

[70] Rather, Ms. Derrick submitted on behalf of Pandora that even if the letters to the editor section of a newspaper is a service customarily provided to members of the public, the letters to the editor section of *Pandora* is not in fact provided to members of the public generally, but rather only to women, and that that limitation is justified by reason of what Pandora says is the right of women to (in this case) a single-sex newspaper for the purpose of remedying disadvantage and promoting equality. Accordingly, as I understand it, Pandora's argument that its letters to the editor page is not a service customarily provided to members of the public stands or falls with its argument that in law it is permitted under the *Act* to maintain a single-sex newspaper for the purpose of remedying disadvantage and promoting the equality of women.

EQUALITY AND DISCRIMINATION

[71] The Preamble to the *Act* provides in part as follows:

> AND WHEREAS in recognition that human rights must be protected by the rule of law, this legislature affirms the principle that every person is free and equal in dignity and rights without regard to . . . sex . . .

Section 12 of the *Act* provides as follows:

> No person shall deny to or discriminate against any individual or class of individuals because of the sex of the individual or class of individuals, in providing or refusing to provide any of the following:
>
> (a) . . . services and facilities customarily provided to members of the public;

I am satisfied that one of the purposes of the *Act* is to promote equality by prohibiting discrimination on the basis of sex.

[72] The Supreme Court of Canada considered the meaning of "equality" and "discrimination" in *Andrews* v. *Law Society of British Columbia*, [1989] 1 S.C.R. 143 [10 C.H.R.R. D/5719] ("*Andrews*") in the context of s. 15 of the *Charter of Rights* which provides as follows:

> (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.

[73] McIntyre J. reviewed at some length at pp. 172–76 [D/5744–D/5748] the concept of discrimination. His Lordship referred to the human rights acts of the various provinces which had been enacted prior to the *Charter*. He stated (at p. 175 [D/5746, para. 41760]) that "in general, it may be said that the principles which have been applied under the human rights acts are equally applicable in considering questions of discrimination under section 15(1)." He also stated (at p. 176 [D/5747, para. 41761]) that "discrimination under section 15(1) will be of the same nature and in descriptive terms will fit the concept of discrimination developed under the human rights acts . . ."

[74] In defining discrimination His Lordship stated as follows at p. 174 [D/5746, para. 41759]:

> 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. 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 classed.

[75] His Lordship also addressed the concept of equality (at pp. 163–71 [D/5738–D/5744]). He stated at p. 171 [D/5744, para. 41755] as follows:

> It must be recognized, however, as well that the promotion of equality under s. 15 has a much more specific goal than the mere elimination of distinctions. If the *Charter* was intended to eliminate all distinctions, then there would be no place for sections such as 27 (multicultural heritage); 2(a) (freedom of conscience and religion); 25 (aboriginal rights and freedoms); and other such provisions designed to safeguard certain distinctions. Moreover, the fact that identical treatment may frequently produce serious inequality is recognized in s. 15(2), which states that the equality rights in s. 15(1) do "not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups . . ."

[76] The question then is whether under the *Act*, as it stood at the relevant time, a program or activity whose object was to promote equality and to remedy disadvantages of a disadvantaged group protected under the *Act* by favouring the disadvantaged group over the advantaged group constituted discrimination prohibited by s. 12 of the *Act*.

[77] As I have set out above, McIntyre J. was satisfied that "identical treatment may frequently produce serious inequality" (p. 171 [D/5744, para. 41755]). I note, however, that he was able to hold that equal treatment was not always required to comply with the *Charter* by reason of the provision of s. 15(2).

[78] At the relevant time the *Act* did not contain a provision analogous to s. 15(2) of the *Charter*. I do not see, accordingly, that applying the usual principles of statutory interpretation alone, I can construe the word "discriminate" as used in s. 12 of the *Act* to permit a disadvantaged group to make a distinction against the advantaged group without an exemption from the Commission having been sought and obtained.

[79] However, it was submitted on behalf of Pandora that as a matter of law I must construe and apply the word "discriminate" as used in the *Act* in a manner consistent with the concept of discrimination as set out in the *Charter* and the decisions of the Supreme Court of Canada in relation thereto. As I understood, it was submitted that if the legal content of the word "discriminate" as used in the *Act* was as asserted by the Commission (that is, that the prohibition against discrimination was absolute) the *Act* would be in conflict with the *Charter* and could not stand in that respect. As such, it was submitted that the legal content of discrimination under the *Act* must be the same as under the *Charter*.

[80] I raised in the course of the oral argument the question as to whether or not this issue could or should have been dealt with by way of judicial review prior to the hearing of this Inquiry. I was told that counsel considered that a factual basis was necessary for any such determination by the court and that accordingly this Board of Inquiry had to proceed.

[81] I was much concerned as to my jurisdiction to determine whether or not the legal content of the prohibition against discrimination under the *Act* was the same as the prohibition against discrimination under the *Charter* in the absence of the equivalent of s. 15(2) of the *Charter*.

[82] In *Canada (Attorney General)* v. *Martin* (1990), 13 C.H.R.R. D/517 (F.C.T.D.), Mr. Justice Rouleau dealt with an application by the Attorney General of Canada for an order to quash a decision of the Canadian Human Rights Commission to refer a question of whether s. 15(b) of the *Canadian Human Rights Act* [R.S.C. 1985, c. H-6] violates s. 15 of the *Charter of Rights and Freedoms* to a Tribunal for hearing and determination. The case arose out of a complaint based on mandatory retirement for members of the Canadian Armed Forces.

[83] The Court held that the Commission's decision to refer the question of the constitutional validity of s. 15(b) of the *Canadian Human Rights Act* (which provides that it is not a discriminatory practice to retire a person who has reached the maximum age that applies to that person's employment by law or regulation) to a Tribunal for hearing and determination was within its jurisdiction and was reasonable. Further, the Federal Court was of the view that it was bound by the *Tetreault-Gadoury* v. *Canada (Employment and Immigration Commission)* (1989), 53 D.L.R. (4th) 384 decision of the Fed-

eral Court of Appeal which held that the inferior Tribunals have the authority to hear and determine *Charter* issues.

[84] Since the *Martin* decision, *supra*, the Supreme Court of Canada held in *Cuddy Chicks Ltd.* v. *Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5 ("*Cuddy Chicks*") that administrative tribunals which are granted the authority to decide "any question of law or fact" have the jurisdiction to address questions regarding the constitutional validity of their own legislation and also have the obligation to apply the law in a way that complies with the *Constitution*. Additional support for this authority is found in *Tetreault-Gadoury* v. *Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22 (S.C.C.).

[85] Section 34(7) of the *Act* confers this jurisdiction upon the Board of Inquiry:

> A board of inquiry has jurisdiction and authority to determine any question of fact or law or both required to be decided in reaching a decision as to whether or not any person has contravened this Act or for the making of any order pursuant to such decision.

[86] As I understand the decision of the Supreme Court of Canada in *Cuddy Chicks*, *supra*, where a tribunal is required as part of its statutory functions to apply or interpret legislation relating to its own jurisdiction, it also has the authority to declare such legislation contrary to the *Charter*. The board of inquiry must apply the provisions of the *Act* and I have concluded that I have the jurisdiction to interpret and apply the *Act* in light of the *Charter*.

[87] I must first consider the relationship between the *Charter* and the *Act*.

Canadian National Railway Co. v. *Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114 [8 C.H.R.R. D/4210] ("*Action travail*") is, in my opinion, of assistance in the interpretation of human rights legislation. The decision was written by then Chief Justice Dickson. At p. 1136 [D/4225, para. 33242], he referred to an earlier decision written by Mr. Justice McIntyre for the unanimous Court in *Winnipeg School Division No. 1* v. *Craton*, [1985] 2 S.C.R. 150 at 156 [6 C.H.R.R. D/3014 at D/3016, para. 24270], 161 N.R. 241 as follows:

> Human rights legislation if 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 pronouncements.

In the same case, Mr. Justice Dickson said human rights legislation should be recognized as a fundamental law, not just another ordinary law of general application.

[88] In *Attorney General of Canada* v. *Mossop* (1990), 12 C.H.R.R. D/355 (F.C.A.), there was an allegation that a collective agreement was discriminatory in its failure to accord a homosexual family the same treatment with respect to time off for death of a member of "immediate family" as accorded to other families. Leave to appeal to the Supreme Court of Canada was granted on January 25, 1991.

[89] A single member Tribunal established under the *Canadian Human Rights Act* that the homosexual relationship between Mossop and his partner fell within the meaning of "family status" under the *Canadian Human Rights Act*. Sexual orientation is not a protected ground under the *Canadian Human Rights Act*. The Federal Court of Appeal concluded that the Tribunal erred in its decision. Marceau J.A. took the view that the *Charter* could not be used "as a kind of *ipso facto* legislative amendment machine requiring its doctrine to be incorporated in the human rights legislation by stretching the meaning of terms beyond their boundaries" (p. D/362 [para. 32]). Mr. Justice Marceau said human rights codes impact on areas of the private sector of economic life which are not readily seen to fall within the scope of the *Charter*.

[90] He went on to address the link between *Charter* and human rights legislation at p. 362 [para. 39] as follows:

> For another thing, the *Charter* contains within it a general balancing mechanism, in the form of s. 1, which is not present in human rights codes. To advance their position that the human rights legislation and the *Charter* must be linked together, the respondent and the Commission referred to a passage in the reasons of McIntyre J. in *Andrews* v. *Law Society of British Columbia*, [1989] 1 S.C.R. 143, 56 D.L.R. (4th) 1, 10 C.H.R.R. D/5719, at p. 176 [S.C.R., D/5747 C.H.R.R], reading:
>
> > While discrimination under s. 15(1) will be of the same nature and in descriptive terms will fit the concept of discrimination developed under the human rights Acts, a further step will be required in order to decide whether discriminatory laws can be justified under s. 1. The onus will be on the state to establish this. This is a distinct step called for under the *Charter* which is not found in most human rights Acts, because in those Acts justification for or defence to discrimination is generally found in specific exceptions to the substantive rights.
>
> The passage, in my view, helps me to make my point. These specific exceptions (e.g., *bona fide* occupational requirements) are present in human rights legislation as a result of consideration by the legislatures, and quite possibly as a result of political compromise reached through the democratic process. If tribunals begin to read into those statutes unforeseen meanings on the basis that *Charter* jurisprudence has found such meanings to constitute "analogous grounds" under s. 15, there will be no s. 1 analysis, and no occasion for the development of specific exceptions to substantive rights referred to by McIntyre J.

[91] Mr. Justice Stone in a concurring decision made an even stronger statement [D/363, para. 50]:

> While accepting that human rights legislation should be interpreted, as much as possible, in a manner consistent with the provisions of the *Charter* and its interpretation, I cannot accept that the *Charter* should operate so as to mandate the courts to ascribe to a statutory term a mean-

> ing which it was not intended to possess . . . The absence of "sexual orientation" from the list of grounds of discrimination prohibited by s. 3(1) of the *Act* as infringing a right enshrined in the *Charter* is not raised in this appeal, and I refrain from expressing an opinion on the matter.

[92] I am conscious of the limitations in the application of the *Charter* to human rights legislation. However, I do not see that those limitations apply when the issue is the legal content of the prohibition against discrimination.

[93] It is to be noted that the Supreme Court of Canada in *Retail, Wholesale and Department Store Union, Local 580* v. *Dolphin Delivery Ltd.* (1986), 71 N.R. 83, [1986] 2 S.C.R. 573 held the *Charter* does not apply to purely private litigation between private parties which does not involve reliance on governmental action. However, in my opinion this complaint goes beyond purely private litigation to consideration of the anti-discrimination provisions of the *Act*.

[94] I find support for this conclusion in the decision of the Ontario Court of Appeal in *Re Blainey and Ontario Hockey Association et al.* (1986), 14 O.A.C. 194, 26 D.L.R. (4th) 728, 54 O.R. (2d) 513 [7 C.H.R.R. D/3529]. Mr. Justice Dubin, speaking for the majority said [D/3536, para. 28165]: "In my opinion, s. 15 of the *Charter* does not reach private activity within the province."

He expressed agreement with Tarnopolsky and Beaudoin, *The Canadian Charter of Rights and Freedoms: Commentary* [Toronto: Carswell, 1982], at pp. 422–23, as follows:

> . . . although an anti-discrimination (human rights law) should *itself* have to conform to s. 15, it, and not s. 15, would be directly applicable to discriminatory actions by private persons.

[95] The issue in *Re Blainey, supra,* arose from a complaint by a 12-year-old girl who had been refused permission to play hockey as a member of a boys' team. The complaint was initially dismissed by the Ontario Human Rights Commission because of the wording of s. 19(2) of the Ontario *Human Rights Code, 1981* [S.O. 1981, c. 53], which provides as follows:

> 19 (2) The right under s. 1 to equal treatment with respect to services and facilities is not infringed where membership in an athletic organization or participation in an athletic activity is restricted to persons of the same sex.

[96] The Ontario Court of Appeal held that the provisions of s. 19(2) conflicted with the equality provisions of s. 15(1) of the *Charter* and were of no force and effect. Therefore, in the *Blainey* case, *supra,* which was a lawsuit between private parties, the *Charter* was applied because one of the parties acted on the authority of a statute, s. 19(2) of the *Human Rights Code*, which infringed the *Charter* rights of the other party.

[97] Mr. Justice Dubin's assessment of the applicability of the *Charter* was endorsed by the Supreme Court of Canada in *Dolphin Delivery, supra.* Of interest is this comment of Mr. Justice McIntyre at p. 119, para. 39 of *Dolphin Delivery:*

> Where such exercise of, or reliance upon, governmental action is present and where one private party invokes or relies upon it to produce an infringement of the *Charter* rights of another, the *Charter* will be applicable. Where, however, private party "A" sues private party "B" relying on the common law and where no act of government is relied upon to support the action, the *Charter* will not apply. I should make it clear, however, that this is a distinct issue from the question whether the judiciary ought to apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the *Constitution.* The answer to this question must be in the affirmative. In this sense, then, the *Charter* is far from irrelevant to private litigants whose disputes fail to be decided at common law.

[98] In *Blainey, supra,* the issue was whether or not the anti-discrimination provisions of the Ontario *Human Rights Act [Code]* were limited by the anti-discrimination provisions of the *Charter.* The Court held that they were and struck down the section of the *Act [Code]* that purported to permit discrimination which was prohibited by the *Charter.*

[99] I have concluded, accordingly, that as a matter of law the *Act* cannot justify discrimination which is prohibited by the *Charter.* Accordingly, in my opinion, the provisions of s. 12 of the *Act* must be interpreted and applied so as to permit the making of distinctions between classes of individuals if the distinction is part of an activity or program that has as its object the amelioration of conditions of disadvantaged individuals or groups.

[100] In this respect I note that the amended *Act* now provides as follows in s. 2(d) and in s. 5(1)(m):

> 2 The purpose of this Act is to . . .
>
> (d) affirm the principle that every person is free and equal in dignity and rights;
>
> 5 (1) No person shall in respect of
>
> (a) the provision of or access to services or facilities . . .
>
> discriminate against an individual or class of individuals on account of
>
> (m) sex;

The amended *Act* also now provides a definition of discrimination in s. 4 as follows:

> 4 For the purpose of this Act, a person discriminates where the person makes a distinction, whether intentional or not, based on a characteristic, or perceived characteristic, referred to in clauses (h) to (v) of subsection (1) of Section 5 that has the effect of imposing burdens, obligations or disadvantages on an individual or a class of individuals not imposed upon others or which withholds or limits access to opportunities, benefits and advantages available to other individuals or classes of individuals in society.

This definition of discrimination is very close to the language used by McIntyre J. in his definition of discrimination at p. 174 of the *Andrews* decision, *supra.*

[101] Further, the amending *Act* now provides as follows in s. 6(h)(i):

> Subsection (1) of Section 5 does not apply . . .
>
> (i) to preclude a law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or classes of individuals including those who are disadvantaged because of a characteristic referred to in clauses (h) to (v) of subsection (1) of Section 5.

In all material respects s. 6(h)(i) is identical to s. 15(2) of the *Charter*.

[102] In my opinion, the foregoing provisions of the amending *Act* simply bring the language of the *Act* into conformity with the *Charter*, but the *Act* was already subject to the *Charter* in those respects.

[103] Accordingly, I am satisfied that in law women may form single-sex organizations for the purpose of promoting equality. I am further satisfied as a general statement, of the law, that such organizations may prefer or advantage women even if the effect of that is to discriminate against men (as a group or individually) on the basis of sex, without violating the anti-discrimination provisions of the *Act*.

PANDORA AS AN ACTIVITY WHOSE OBJECT IS TO PROMOTE WOMEN'S EQUALITY AND REMEDY DISADVANTAGE

[104] I heard evidence concerning the operation of Pandora and the publication of its newspaper, *Pandora*. Membership in Pandora is limited to women. *Pandora* is said to be published by, for and about women. Issues are addressed in *Pandora* which promote women's equality. All issues are dealt with from women's point of view. Among the objectives of *Pandora* are the following:

> 1. to encourage writing by women who would not otherwise write for the public;
>
> 2. to bring forward issues and perspectives and opinions which probably would not be found in the mainstream media;
>
> 3. to assist women in acquiring the various skills necessary to publish a newspaper.

It has been the clear editorial policy of *Pandora* that it will accept letters and articles only if written by women.

[105] Exhibit 22 is an extract from *Pandora* published apparently in June, 1986. While the publication of Exhibit 22 pre-dates the filing of this complaint by about four years, nonetheless I am satisfied that certain statements of policy set out in the extract are applicable to the relevant time:

> Pandora is a newspaper produced by, for and about women.
>
> We actively seek participation on any level from women who do not have access to mainstream media. Low income women, women of color, women involved in organized labour and women who work without benefit of organization, disabled women, native women, lesbian women, women in conflict with the law, immigrant women, older women, younger women, ALL kinds of women, are encouraged to contact members of the Outreach working group or any Pandora women, to explore their particulars [*sic*] ideas and concerns . . .
>
> We cannot accept material that is intolerant or oppressive—for example, (but not exclusively) sexist, racist, classist, homophobic, ageist or ablist. We are, however, committed to working with women to help them express their experience in a positive way . . .
>
> Women are asked to write from their personal experience as if writing a letter to a close friend . . .
>
> *Pandora* is a forum for women who are speaking out of their experience—expressing their perspective on issues that are important to them. We do not necessarily attempt to present all perspectives in any one issue at any one time.
>
> Women who have concerns about anything they find in *Pandora* are encouraged to write a letter for the next issue.

[106] Accordingly, on the basis of the evidence before me I accept and find as a fact that Pandora and its newspaper *Pandora* is a single-sex organization of women designed to promote the equality of women and to remedy disadvantages experienced by women on the basis of sex. As such I am satisfied that *Pandora* is justified in advantaging women over men in the promotion of those goals.

The question, then, is whether the policy of accepting letters written only by women falls within the ambit of the privilege of Pandora to prefer women over men.

[107] Evidence was led that certain other women's publications do not prohibit the publication of articles or letters written by men. In particular *Atlantis* (Exhibit 9, Tab 3), *Resources for Feminist Research* (Exhibit 9, Tab 4) and *Kenisis* (Exhibit 9, Tab 6) fall into this category. No evidence was presented as to why that policy has been adopted by those publications. On the other hand, there was also evidence of publications which, like *Pandora*, restrict publication to material written by women. *Women's Education* (Exhibit 9, Tab 5) and *Northern Woman Journal* (Exhibit 9, Tab 8) fall into this category.

[108] I also heard evidence from Rev. Darrell Grey. Rev. Grey described himself as the owner of the *Provincial Monitor*, a black newspaper published in this province. Rev. Grey testified that the *Provincial Monitor* did not have a policy limiting articles and letters printed in the newspaper to those written by blacks. Rev. Grey testified that in his opinion the newspaper should generate and promote a free exchange of ideas. He also testified that as advertising was carried in the newspaper funded by the provincial and federal governments he felt an obligation not to discriminate against other than black writers.

I accept Rev. Grey's evidence and evidence that there are single-sex publications which do not restrict letters and articles to those written by women. However, in my opinion, this evidence and this finding is in no way determinative of the issues before me.

[109] The publishers and editors of those publications may, for a variety of reasons consistent with the objectives and purposes of their publications, consider such policies appropriate. I do not think, however, that I need find that it is absolutely necessary for all women's newspapers to have a policy of excluding all material which is not written by women in order for *Pandora* to justify its letter to the editor policy.

[110] I can well accept that reasonable women might take different views as to whether or not a women's newspaper should limit itself to letters and articles written by women only. I can also accept that women might reasonably conclude that such a policy is appropriate to one women's publication having regard to the circumstances and objectives of that publication and that it is not appropriate to another having regard to its circumstances and objectives.

[111] Exhibit 26 is an article written by Betty-Ann Lloyd and published in *Canadian Women's Studies*. I qualified Ms. Lloyd as an expert but expressed some concern as to opinion evidence from her having regard to her very close involvement with *Pandora*. However, the article makes what I consider to be some very useful factual points concerning *Pandora* which I set out as follows:

> In the "Journey is Home" (Boston: Beacon Press, 1985) Nelle Morton takes [*sic*] about her understanding of "hearing women into speech." She says we are powerful when we provide a safe place for women to express themselves —when we listen is [*sic*] such a way that women are heard into their own speech. She says we are expressive when other women provide that space and that listening for us. She is saying, also, that women cannot become powerful or expressive by being spoken to, by being spoken for or, especially, by being spoken about. It is by being heard that women become empowered.
>
> And this is where I feel the feminist press can begin to enter into an effective, affirming relationship with the women of our particular communities. Our part is providing safe space so that women who are so often silenced, so rarely heard, can risk speaking, can find a respectful, questioning and challenging ear.
>
> Women can use this space to speak of their experience. They can speak of the connections they have begun to make between that experience and the experience of other women. They can speak of the analysis that grows out of making connections, the vision that expands that analysis and the strategies that further the vision.

The foregoing extracts from the Lloyd article are, in my opinion, consistent with the evidence which I heard at the hearing as to the objectives and experience of *Pandora* from those witnesses currently involved in the publication of the newspaper.

[112] I heard much evidence, again from the expert and lay witnesses, that women require a "safe place" to write, particularly concerning equality issues. In this context a "safe place" is one occupied by women only. I was told that if *Pandora* was not a women only publication many women would be reluctant to expose their writing to debate and criticism by men. I was also told that as *Pandora* circulates largely (but, admittedly, not exclusively) in the community of women, and that women feel more comfortable in discussing and dealing with issues relating to equality than they do in the mainstream media or in media which has a larger distribution among men. I was further told that the purpose of Pandora was to deal with such issues as were considered important and relevant to women and from a women's point of view. Concern was expressed that if men were allowed to publish letters in *Pandora* they would at least to some extent control the agenda of the publication, discourage at least some women from publishing their writing (or at least expressing freely their opinions and views) and that permitting such participation by men would divert the time and energy of Pandora from the purposes and objectives of the newspaper to dealing with and responding to these views.

[113] On the basis of the evidence which I have heard, I am satisfied and find as a fact that a safe place for women's writing as that was defined in the evidence might reasonably be considered appropriate and necessary for the promotion of women's equality and remedying disadvantage on the basis of sex.

[114] In my opinion, it is not for me to make any fine distinction as to whether or not the women only policy is absolutely necessary for *Pandora*, only if it is a policy which might reasonably be adopted in all the circumstances.

[115] In my opinion, such a policy is reasonable in the circumstances. *Pandora* is by, for, and about women. It is a women only publication designed to promote women's equality and to remedy disadvantage based on sex. It is not about men or men's issues. It deals with issues and opinions and points of view not expected to be addressed in the mainstream media. Many of the writers in *Pandora* would not participate fully if it were not a women only publication. In the circumstances, it is, in my opinion, reasonable for Pandora to maintain a policy of publishing letters by women only in *Pandora*.

[116] It is important to note that *Pandora* does not pretend to be part of the mainstream media—it is said not to be objective but to present views on issues from a point of view. *Pandora* does not even pretend to express the views of all women. Rather, *Pandora* projects a feminist point of view taking the view that the mainstream media, although purporting to be objective, projects an other than feminist view.

[117] It is also important to remember that *Pandora* represents only one limited aspect of the lives of the women who are involved in its publication and the women who read the newspaper. As was pointed out to me by a number of witnesses, all these women must, of course, function in the real world. In that context *Pandora* provides a place where women's views and women's views only are expressed.

[118] It was suggested on behalf of the Commission and Mr. Keyes that a distinction should be drawn between the letters to the editor section of the newspaper and the balance of the newspaper and membership in Pandora. In my opinion, I see no distinction between material written by men if it is intended for the letters to the editor section or the

editorial section of *Pandora*. While again I can accept that reasonable women might have differences of opinion as to whether or not men should be excluded entirely from such a newspaper or should be allowed to have letters to the editor published (provided that they meet the editorial criteria of the newspaper) I cannot say that it is unreasonable to maintain a policy of publishing writing by women only. Indeed, that policy does appear to me to be consistent with the overall objectives and policies of Pandora.

[119] In my opinion, having regard to all the foregoing, the policy of publishing only letters written by women is consistent and reasonable having regard to the point of view of the newspaper and its objectives.

[120] The necessary implication of Pandora's letter writing policy is discrimination, in fact, against men generally. They are denied access to the newspaper. This, in my opinion, does not constitute a violation of the *Act*. On the evidence I have heard I am satisfied that the denial of access by *Pandora* to men does not cause material or substantial harm to men, particularly in comparison to the benefit to women of having a women's only publication dealing with women's equality issues from women's perspective and providing a safe place for a wide variety of women to express such views. I am satisfied and I find that men have adequate opportunity to express their views and opinions in the mainstream media without entry into this women's place.

[121] It was suggested that *Pandora*'s publication of extracts from a letter written by Bill Donovan, regional manager of CBC (Exhibit 9, Tab 1) was not in accordance with *Pandora*'s policy. The extract was published unsigned. A number of explanations were proffered by various witnesses for the publication of these extracts and the form of the publication. I was not persuaded by any of these explanations that the publication of those extracts was anything other than a breach of the letter writing policy.

However, even if the publication of those extracts was a breach of Pandora's letter policy, I attach no significance to that. I do not see that a single publication of unattributed extracts from a letter written by a man affects my finding that *Pandora* indeed has a policy of publishing letters written [by women] only or that such single publication in effect destroys that policy.

[122] After the *Charter* litigation in *Blainey*, *supra*, that matter then went forward on the basis of the human rights complaint in *Blainey* v. *Ontario Hockey Association* (1987), 9 C.H.R.R. D/4549. That case held that the organization of a women only hockey league was not discrimination prohibited by the Ontario *Human Rights Act [Code]*. Section 13(1) of the Ontario Act is reported in the decision as providing as follows at the relevant time:

> 13 (1) A right under Part I is not infringed by the implementation of a special program designed to relieve hardship or economic disadvantage or to assist disadvantaged persons or groups to achieve or attempt to achieve equal opportunity or that is likely to contribute to the elimination of the infringement of rights under Part I.

This provision appears to me to be identical in substance to s. 15(2) of the *Charter* and s. 6(h)(i) of the amended *Act*. I have already expressed my opinion that the legal content of the prohibition against discrimination in the *Act* must be afforded the same meaning as in s. 15 of the *Charter*.

[123] The decision of the Board of Inquiry under the Ontario *Human Rights Code* concluded as follows with respect to the program of a women only hockey league [at p. D/4554, para. 35401]:

> I am satisfied that the hockey program offered by the OWHA does, in fact, qualify as a special program under section 13(1) of the *Code*. The evidence clearly establishes that as a group females in this province do not have the same opportunity as males to play organized competitive hockey. Female hockey must continually struggle against the view that hockey is a male only sport. It must also struggle for access to ice time. Because of these handicaps, the program offered by the OWHA does not have the same level of participation as does male hockey. Further, while post-puberty females can compete against similar age males in terms of skill and intelligence, the majority cannot compete in terms of size and strength. Although pre-pubescent girls can compete equally with pre-pubescent males to allow young boys to play on girls' teams would lead to serious difficulties for female hockey. Many parents are opposed to their daughters playing hockey, even on all-female teams. This opposition would likely intensify if males were permitted to play on female teams. Most females desire to play on all-female teams. To allow males to play female hockey would likely result in a large number of female players deciding to leave the sport. It follows that if males were permitted to play OWHA hockey, even a small number of them would likely have a major adverse effect on the already limited opportunities for females to play competitive hockey. My finding that the OWHA's program of female hockey meets the requirements for a special program under section 13(1) of the *Code* means that OWHA teams can continue to refuse to admit males without infringing section 1 of the *Code*.

I have accepted the evidence led by Pandora as to the reasonableness of a women only newspaper and that the purpose of *Pandora* is to remedy disadvantage and promote equality. Accordingly, in my opinion, the same result should be reached here as was reached in the *Blainey* case, *supra*, and accordingly in my opinion *Pandora*'s policy of publishing letters to the editor written by women only is not discrimination as prohibited by s. 12 of the *Act*.

CONCLUSION

[124] I am satisfied on the evidence before me that women as a group have been and are disadvantaged and unequal in our society by reason of sex. Accordingly, women are entitled to the protection of s. 12 which prohibits discrimination on the basis of sex.

[125] I am also satisfied that as a matter of law the concepts of equality and discrimination under the *Act* must be consistent with those concepts in the *Charter*. McIntyre J. in *Andrews*, *supra*, stated that the promotion of equality in the

prohibition against discrimination has a more specific goal than the mere elimination of distinctions and that identical treatment may produce inequality. It follows, accordingly, that a disadvantaged group may undertake a program or activity which has as its object the amelioration of conditions of disadvantaged individuals or classes of individuals including those discriminated against on the basis of sex even if that results in distinctions being made with respect to the advantaged group.

[126] Finally, I am also satisfied that *Pandora* underlined [*sic*] is an activity which has as its object the amelioration of conditions of disadvantage to women based on sex. I am also satisfied that Pandora's policy of maintaining *Pandora* as a single-sex newspaper is reasonable for the purpose of ameliorating disadvantage.

[127] In the result, I find that Pandora was not in breach of s. 12(1)(a) or s. 17 of the *Act* in its letters to the editor policy or its refusal to publish Mr. Keyes' letter and accordingly I dismiss the complaint.

CANADIAN C. H. R. R. HUMAN RIGHTS REPORTER

ONTARIO
PARTIES / EVIDENCE

Indexed as: Thornton v. North American Life Assurance Co. (No. 1)

Volume 16, Decision 19 Paragraphs 1 - 52 August 1992

Gary Thornton

Complainant

v.

North American Life Assurance Company

Respondent

Date of Complaint: February 15, 1990

Date of Decision: December 27, 1991

Before: Ontario Board of Inquiry, W. Gunther Plaut

Comm. Decision No.: 429

PARTIES—adding a respondent—EVIDENCE—immunity of witnesses in future proceedings—BOARDS OF INQUIRY/TRIBUNALS—authority to order immunity—COMPLAINTS—order sought not to initiate future complaints—PROCEDURE—procedural fairness

Summary: *This is a decision on three preliminary issues raised by the respondent company, North American Life Assurance Company, prior to the hearing of the merits of a complaint filed against it by Gary Thornton alleging discrimination because long-term disability payments to him were disallowed.*

The North American Life Assurance Company (NAL) requests that the Board of Inquiry issue an order binding the Commission not to initiate a complaint against any insurer not named in this complaint. NAL argues that a statement by Chief Commissioner Catherine Frazee to the effect that the complaint has broad implications has put NAL's defence in a precarious position because the kinds of witnesses it could call come from the insurance industry and the industry itself is now at risk. Witnesses might be afraid to testify fully for fear that they will become targets of complaints themselves.

The Board rules that the statement made by the Chief Commissioner is in no way prejudicial to the case. She has merely given her opinion that this case has industry-wide impact because the complaint deals with a clause which is standard in many contracts. In addition, the Board finds that it has no power to issue such an order since its jurisdiction is to hear and decide the complaint before it.

NAL's second motion is a request that witnesses be given use immunity, that is, that evidence given by them cannot be used to incriminate them in other proceedings. The Board finds that it does have the authority to make decisions regarding immunity. However, relying on R. v. Juldip, a Supreme Court of Canada decision on this issue, it also finds that decisions can only be made about immunity at the time of the second proceeding. Consequently, the Board declines to extend immunity to witnesses at this point.

The Board of Inquiry agrees to the third request made by NAL which is to join the employer of Mr. Thornton, the Clarendon Foundation, as a respondent. The Board has the authority to do this and finds that even though it is the insurer who denied the disputed benefits, employers also have a responsibility to provide a discrimination-free work environment.

The motions to bar the Commission from initiating further complaints against insurers and to provide use immunity to witnesses are denied. The employer is joined as a respondent.

Cases Cited

Brooks v. Canada Safeway Ltd., [1989] 1 S.C.R. 1219, 10 C.H.R.R. D/6183: 18, 44

Gohm v. Domtar Inc. (No. 4) (1990), 12 C.H.R.R. D/161 (Ont. Bd.Inq.): 45