IN THE MATTER OF:	**THE NOVA SCOTIA HUMAN RIGHTS COMMISSION**
	- and -
IN THE MATTER OF:	**IAN MACDONALD** and **THE EXECUTIVE COUNCIL, PROVINCE OF NOVA SCOTIA** and **HER MAJESTY IN RIGHT OF THE PROVINCE (DEPARTMENT OF JUSTICE)**
HEARD BEFORE:	**THE HONOURABLE JOHN M. DAVISON,** in **CHAMBERS**
COUNSEL:	**MAUREEN E. SHEBIB**, **RANDALL DUPLAK, Q.C.**, **H. ARCHIBALD KAISER**

PLACE HEARD: Halifax, Nova Scotia

DATE HEARD: November 18, 1999

DECISION: November 26, 1999

DECISION

In March, 1995 Mr. Archibald Kaiser submitted to the Nova Scotia Human Rights Commission (the Commission) the allegation that he had been discriminated against in respect to employment on the basis of his "political belief, affiliation or activity" contrary to s. 5 (1) (d), (u) of the *Human Rights Acts* (the *Act*). In July 1998 the commissioners appointed a Board of Inquiry to inquiry into Mr. Kaiser's complaint, but on application to the Supreme Court in March of 1999 the appointment was quashed, and the complaint was returned to the Commission for further investigation. Mr. William Grant was directed to complete the investigation into Mr. Kaiser's complaint.

Mr. Ian MacDonald is a potential witness to the complaint of Mr. Kaiser, and he was contacted by Mr. Grant in September of 1999 with a view to arranging an interview. Mr. MacDonald indicated to Mr. Grant that he was prepared to submit further information to the Commission but was unwilling to be interviewed without the presence of Mr. Randall Duplak, Q.C., solicitor for the respondents in this proceeding.

Mr. MacDonald was advised by the Commission that he was permitted to bring counsel to an interview, but Mr. Duplak, who represented the respondent, would not be welcome. On September 21, 1999 Mr. MacDonald confirmed in a letter to Mr. Grant that he was not compelled to participate in an interview without the presence of Mr. Duplak and also directed Mr. Grant to forward any correspondence regarding the matter to Mr. Duplak.

The position of the Commission is that Mr. MacDonald is entitled to have counsel present at the interview but not counsel representing the parties to the complaint. It is not clear why Mr. MacDonald particularly insists on the presence of Mr. Duplak who denies that he is Mr. MacDonald's solicitor but was only called upon by Mr. MacDonald to provide "support and assistance".

This proceeding involves applications by the Commission which raise two requests. The first application was filed by an originating notice (application inter parties) on September 29, 1999, and an amended originating notice was filed on October 28, 1999. The application dated September 29, 1999 reads as follows:

TAKE NOTICE that an application will be made on behalf of the Applicant to the Judge presiding in Chambers at the Law Courts in Halifax, Nova Scotia on Thursday, the 18th day of November, 1999, at the hour of 11-12:30 o'clock in the forenoon or so soon thereafter as the application can be made for an order under section 31(1) of the Nova Scotia Human Rights Act, R.S., c. 214, requiring Mr. Ian MacDonald, witness in the Complaint under section 5(1)(d)(u) the Nova Scotia Human Rights Act (H. Archibald Kaiser v. Executive Council et al.) to be interviewed in course of the human rights investigation into the above mentioned Complaint without the Respondent's legal counsel present or any other legal counsel who may in any sense be representing a party to the Complaint, or who otherwise may be or may be seen to be in a conflict of interest as a result of that counsel's employment by the Province of Nova Scotia.

AND TAKE NOTICE that an application will be made for a [sic] order of general application in all future complaints that legal counsel for any party to a Complaint may not be present during Nova Scotia Human Rights Commission interviews of witnesses to that Complaint.

The amending application contained the following terms in its originating notice:

TAKE NOTICE that an application will be made on behalf of the Applicant to the Judge presiding in Chambers at the Law Courts in Halifax, Nova Scotia on Thursday, the 18th day of November, 1999, at the hour of 11-12:30 o'clock in the forenoon or so soon thereafter as the application can be made for an order under section 31(1) of the Nova Scotia *Human Rights Act,* R.S., c. 214, requiring Mr. Ian MacDonald, witness in the Complaint under section 5(1)(d)(u) the Nova Scotia *Human Rights Act* (H. Archibald Kaiser v. Executive Council et al.) to be interviewed in course of the human rights investigation into the above mentioned Complaint without the Respondent's legal counsel present or any other legal counsel who may in any sense be representing a party to the Complaint, or who otherwise may be or may be seen to be in a conflict of interest as a result of that counsel's employment by the Province of Nova Scotia.

AND TAKE NOTICE that an application will be made for a declaration of the court that legal counsel for any party to a Complaint brought under the Nova Scotia Human Rights Act, R.S. c. 214, may not be present during interviews of witnesses or potential witnesses to that complaint when such interviews are conducted by or on behalf of the Nova Scotia Human Rights Commission.

Sections 30 and 31 of the *Act* read as follows:

Power of investigator of complaint

30 The Director or officer acting under the authority of the Commission in the investigation of a complaint or other process under this Act may

ary to further the investigation or process; and
cess refers.

Application for order upon refusal

31 (1) Where any person refuses to furnish information or records or to permit entry to premises at reasonable times as authorized by Section 30, the Commission may apply on notice to a judge of the Trial Division of the Supreme Court for an order directing that information or records be furnished or entry permitted.

Order of judge

(2) The judge may make such order as he thinks just and the order may be enforced as any other order or judgment of the Supreme Court.

Mr. Kaiser was granted standing in the proceeding, and he supports the position of the Commission that Mr. MacDonald should be interviewed in the absence of Mr. Duplak. Mr. MacDonald is not a party and has not been named in the complaint and is at liberty to retain his own counsel to attend the interview. The procedure involves an investigation, and upon the completion of the investigation, a summary of the investigation will be submitted to all parties, and all parties will have the opportunity to cross examine at the time of any inquiry.

In March of 1999 there was an application for *certiorari* to quash the decision of the Commission dated July 30, 1998 which called for the appointment of a public board of inquiry into the complaint of Mr. Kaiser. Mr. Justice Saunders granted the application, and during the course of his oral decision dated March 30, 1999 Mr. Justice Saunders clearly stated the unfortunate delay which has been occasioned in this proceeding. Justice Saunders said:

Before turning to the subject of costs I want to say something about delay in this case. Obviously the merits of Mr. Kaiser's complaints are not before me and I do not intend to comment upon them except to state the obvious. They are serious. It is in the best interests of both this complainant and these applicants that they be dealt with without delay. Four years is an entirely unreasonable period of time. There is nothing in the record before me to justify such a lack of progress. Were it in my power to do so I would be inclined to order that this Commission complete its work by a date certain. But being aware of no such authority, I simply urge in the strongest terms that these complaints be addressed by this Commission with dispatch and that some priority be given to them.

It is the position of the solicitor for the Commission that the insistence of witnesses to have counsel for either the respondent or the applicant present at the interviews will cause significant delay in the investigation. It is argued there is an independent right of the Commission to interview witnesses without the necessity of reaching agreement with respect to the particulars of the interview with other counsel who are representing parties in the complaint.

It is the position of the solicitor for the respondents that the court has no jurisdiction to give the remedy requested by the Commission. It is said that s. 31(1) does not apply because there has been no refusal by Mr. MacDonald to furnish information. It is argued that there is no right to demand an individual be interviewed and that past practices of the Commission have prevented the attendance of counsel to a party to the interview. It is argued that the information can be "furnished" by written letter or answer to interrogatories and that the Act does not affirmatively state a witness must attend an interview.

There were other submissions made to the court including arguments flowing from allegations that Mr. Duplak and the Department of Justice stand in a conflict of interest position. There was reference to a possible application to the court to have Mr. Duplak removed as counsel in the complaint proceedings. That issue is not before me and was not the subject of any initiating document to permit counsel to be prepared to argue the point. Conflict of interest is only relevant in this proceeding to the extent it relates to the two remedies sought by the Commission.

It is a benefit to look at the general principals for interpreting human rights legislation. In *Re Winnipeg School Division No. 1 and Craton et al.* (1995), 21 D.L.R. (4th) 1, the Supreme Court of Canada indicated that human rights legislation must be recognized as fundamental law "of a special nature and declares public policy regarding matters of general concern".

In *Re Ontario Human Rights Commission et al. and Simpson-Sears Limited* (1985), 23 D.L.R. (4th) 321 the Supreme Court interpreted the *Ontario Human Rights Code,* and indicated that such legislation must be interpreted having regard to its special nature and its purposes. Justice MacIntyre stated at p. 328:

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

It has been said that even differences in wording in various Provincial Statutes should not deter the attempt to seek a purposive approach in interpretation, and the Supreme Court stated in *University of British Columbia v. Berg,* [1993] 2 S.C.R. 353:

If human rights legislation is to be interpreted in a purposive manner, differences in wording between provinces should not obscure the essentially similar purposes of such provisions, unless the wording clearly evinces a different purpose on behalf of a particular provincial legislature.

It would seem that in order to give a purposive approach to this type of legislation, we must be fair and liberal in construing the terms of the statute to ensure that the objectives of the statute are obtained. Quite relevant to this proceeding are the words of Dickson, C.J.C. in *Action Travail Des Femmes v. Canadian National Railway Company et al.* (1986), 76 N.R. 161 when he rejected a strict grammatical construction of human rights legislation that would limit its remedial effect and said at p. 182:

Human rights legislation is intended to give rise, amongst other things, to individual rights of vital importance, rights capable of enforcement, in the final analysis, in a court of law. I recognize that in the construction of such legislation the words of the **Act** must be given their plain meaning, but it is equally important that the rights enunciated be given their full recognition and effect. We should not search for ways and means to minimize those rights and to enfeeble their proper impact. Although it may seem commonplace, it may be wise to remind ourselves of the statutory guidance given by the federal **Interpretation Act,** which asserts that statutes are deemed to be remedial and are thus to be given such fair, large and liberal interpretation as will best ensure that their objects are attained. See s. 11 of the **Interpretation Act,** R.S.C. 1970, c. I-23, as amended. As E.A. Driedger, Construction of Statutes (2nd ed. 1983), p. 87 has written:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

The Commission is basically a fact finding body. It does not determine whether there has been discrimination. It only decides whether a board of inquiry should be appointed, and the chair of such a board is chosen by the Chief Judge of the Provincial Court. As stated by Justice LaForest in *Re Attorney-General of Canada and Mossop* (1993), 100 D.L.R. (4th) 658 at 675 that the expertise of a human rights tribunal "relates to fact-finding and adjudication in a human rights context".

It should be noted all parties have a good opportunity to question any facts found by the Commission. In addition to the right to counsel at interviews and other procedures, it was said

by counsel, "very thorough" summaries of the facts with the names of witnesses and details of proposed evidence is given to the parties. It is said there is full disclosure of interview reports. Witnesses also get copies of reports and are permitted to change errors.

It is the position of the Commission that to attain the purpose of the legislation, the Commission should have control over the procedure. The issues raised in the legislation are sensitive with associated nuances. There need be careful investigation of the facts by the Commission in its objective position.

The Commission relies on the comments of the Supreme Court of Canada in *Re Irvine et al. and Restrictive Trade Practices Commission et al.* (1987), 41 D.L.R. (4th) 429. In that case, the Restrictive Trade Practices Commission made an order to have persons appear before the chairman and appointed a person to examine these witnesses. The hearing was a fact finding exercise pursuant to the *Combines Investigation Act.* During the course of the hearings there were a number of rulings on procedure and the issues in the appeal involved the rights and responsibilities of persons concerned with procedure under the *Act.*

Section 8 of the Act reads:

8. The Director shall

suant to section 29, 29.1 or 30,

art IV.1, or

mmitted, or

stances described in subparagraphs (b)(i) to (iii) exists, cause an inquiry to be made into all such matters as he

On p. 440 Justice Estey noted:

Section 8 contains no rules or procedures for the guidance of the Director in investigating those matters by statute assigned to him. ... The section does not set up any organization in the sense that the word inquiry is sometimes employed. Nor does it prescribe any process or procedure or rules for the guidance of the Director in making his inquiry.

By other sections in Part I the Director is authorized in the course of the conduct of his inquiry to enter premises and copy or remove documents, or to require a return of any information required of a business. Where circumstances require, the Director may apply to the Commission for authority to require evidence upon affidavit.

Estey, J. said at p. 452:

... By reason of the investigative nature of the inquiry, the corporations whose officers were being investigated had no right to notice or to attend or to cross-examine witnesses who gave evidence which was potentially against the interests of such persons: *St. John v. Fraser* (1935), 64 C.C.C. 90, [1935] 3 D.L.R. 465, [1935] S.C.R. 441. The issue was the right of counsel for such persons to cross-examine other witnesses appearing during the investigation.

In referring to the decision of Davis, J. in *St. John v. Fraser,* [1935] S.C.R. 441 Justice Estey said at p. 453:

... He found after an examination of the statute as a whole that the investigator was essentially an administrative officer operating machinery set up in the statute to collect information and to inquire as to whether or not certain fraudulent practices had been carried on. The statute did not set the investigator up as a court of law. He was clearly established as an administrative body. Counsel for the witness being examined took the position that denial of the witness's right through counsel to cross-examine all the other witnesses heard by the investigator was contrary to natural justice. Davis J. rejected this argument on the basis of his interpretation of the statute as establishing an administrative tribunal dedicated to the assembly of facts through an inquiry but not to the adjudication of a *lis inter partes.* He observed: "It means that the tribunal while exercising administrative functions must act 'judicially' in the sense that it must act fairly and impartially (p. 101 C.C.C., p. 452 S.C.R.), but that did not give those under investigation the right to cross-examine other witnesses.

On observing that of relevance was only "the first stage of information gathering", it was concluded at p. 466:

... Fairness is a flexible concept and its content varies depending on the nature of the inquiry and the consequences for the individuals involved. The characteristics of the proceeding, the nature of the resulting report and its circulation to the public, and the penalties which will result when events succeeding the report are put in train will determine the extent of the right to counsel and, where counsel is authorized by statute without further directive, the role of such counsel. The investigating body must control its own procedure. When that body has determinative powers, different considerations enter the process. The case against the investigated must be made known to him. This is provided for in the Act at each of the progressive stages of the inquiry.

Again at p. 469 Estey, J. said:

These proceedings have not reached the stage, in the words of Lord Wilberforce in *Wiseman v. Borneman,* [1971] A.C. 297 at p. 317, that "It is necessary to look at the procedure in its setting and ask the question whether it operates unfairly to the taxpayer to a point where the courts must supply the legislative omission". Courts must, in the exercise of this discretion, remain alert to the danger of unduly burdening and complicating the law enforcement investigative process. Where that process is in embryonic form engaged in the gathering of the raw material for further consideration, the inclination of the courts is away from intervention. Where, on the other hand, the investigation is conducted by a body seized of powers to determine, in a final sense or in the sense that detrimental impact may be suffered by the individual, the courts are more inclined to intervene.

The *St. John v. Fraser* case was also referred to in *Guay v. Lafleur* (1964), 47 D.L.R. (2d) 226. It was said at p. 236:

... during the course of the argument, I attempted to ascertain from counsel for the respondent whether, in fact, his present demand that he should be allowed to be present during the examination of all witnesses and therefore necessarily to have notice of such examinations, was not merely preliminary to a demand that counsel have leave to cross-examine such witnesses, and, in my opinion, the prejudice to the respondent suggested in the reasons for judgment of Owen, J., could not be avoided without such right of cross-examination being exercised. However, even if the respondent were to confine his demand to a simple right to be present in person and with counsel during such examination, in my view, to give effect to that demand would be for the judiciary to attempt to impose its own methods on an administrative officer and,

with respect, I am of the opinion that Davis, J., rightly held that the judiciary should not make such an attempt. The fact that the investigator is bound to act judicially in the sense of being fair and impartial does not require the investigator to permit the respondent and his counsel to be present during every examination carried on

When you consider these principles, it is inconceivable to me that the legislature intended a witness to dictate the procedures the Commission must follow in searching for facts. The manner in which information is to be furnished under s. 30 (a) is for the Commission to decide.

To suggest a witness could simply write out a statement or answer programmed interrogatories gives no thought to the need of the Commission to exercise care in being thorough with respect to their inquiries. The procedure must be flexible and an interview gives the Commission opportunity to respond to and follow up the information given by the witness with further inquiries.

In my view the submission of Mr. Duplak that s. 30 (a) only requires Mr. MacDonald to furnish information in the manner in which he sees fit to furnish such information or to suggest it be done by written statement or by interrogatories is, to use the words of Justice MacIntyre in the *Re Ontario Human Rights Commission et al. and Simpson-Sears Limited* case (*supra*), placing the "narrowest interpretation of the words employed" in the *Act* and ignores the remedies intended as expressed in the context of the *Act.*

In my view, the refusal of Mr. Ian MacDonald to attend an interview unless Mr. Duplak is present is a refusal to furnish information under s. 31(1) and an order can issue under s. 31(2) for Mr. Ian MacDonald to attend for the interview with the right, if he wishes, to bring counsel who is completely independent of the issues in the proceeding. In other words, the remedy sought in the originating notice dated September 29, 1999 will be granted.

With respect to the remedy sought in the originating notice dated October 27, 1999, it seems to be a broad request and perhaps superfluous when it is stated the Commission can adopt its own procedure for investigating the relevant facts as long as it does not contravene the *Act.* I do not grant the remedy set out in the originating notice dated October 27, 1999.

If there is a dispute as to costs, I invite written submissions from counsel.

JOHN M. DAVISON