IN THE MATTER OF: **The Human Rights Act, R.S.N.S., 1989, c.214 as amended S.N.S. 1991, c.12**

BETWEEN: **Ahmed Assal,**

COMPLAINANT

-And -

Halifax Condominium Corporation No 4.

RESPONDENT

-And-

Nova Scotia Human Rights Commission

BEFORE BOARD OF INQUIRY CHAIR:	J. Royden Trainor
FOR THE COMMISSION:	Legal Counsel, Jennifer Ross, Jason T. Cooke
FOR THE RESPONDENT:	John Buck, (non-lawyer) for Halifax Condominium Corporation No 4.
THE COMPLAINANT:	Ahmed Assal**,** **(**Self-represented)

DECISION

Date of Decision: April 3, 2007

Summary of Facts:

This matter could have proceeded by way of an agreed statement of facts. There was no material disagreement on the facts or events that are the subject matter of this complaint. This decision is the result of a complaint filed under the provisions of the Nova Scotia *Human Rights Act*, R.S.N.S., 1989,c.214 as amended by S.N.S. 1991, c. 12 (Human Rights Act), the appointment of a single person Board of Inquiry and formal hearings and argument on the complaint.

This matter involves condominium by-laws and the question of whether the application of a particular condominium by-law has the effect of resulting in discrimination under the Nova Scotia *Human Rights Act*. In the facts of the matter before this Board, a conflict has arisen between the Complainants, who wished to erect an external satellite dish on the condominium corporation common area contrary to the condominium by-laws. This particular satellite dish is of the larger variety and requires that it be mounted outside, in this case attached to a tree on the common area. The Complainant's family says this particular satellite service is used in the ongoing cultural and religious education of the family.

The Complainant and his family are landed immigrants arriving in Canada from Egypt in May 2000. They are Muslims and place great importance in remaining connected to their culture, language and religion. They are particularly concerned that their children are exposed to and well versed in their language, cultural and religious traditions. The Board heard evidence that Metro Halifax has a growing and vibrant Muslim community that includes at least two Mosques and community organizations. That said, the Complainant's family is part of a cultural and religious minority group even in a multi-cultural metropolitan area such as Halifax. As such, supporting their ongoing religious and cultural development can be a challenge. The Complainant's wife indicated to the Board that the cultural, language and religious education of the children is a primary responsibility to which she dedicates great effort basically on full-time basis.

The Board heard that since their arrival in Nova Scotia and prior to their January 30, 2002 purchase of a condominium at 240 Willett Street (Unit 41) (part of Respondent's Halifax County Condominium Corporation No. 4) the Complainant's family lived at two other locations, one in Cowie Hill and the other in the Clayton Park area. The family did not access satellite services at these previous locations.

The Halifax County Condominium Corporation No.4 is a large 90-unit development in Halifax and appears to be one of the earlier large condominium developments in the Halifax region. At the time of the original development it appears to have been designed to be state of the art. For instance, all telephone and power lines are buried and the grounds are extensively landscaped and well kept. The condominium corporation appears to take its management responsibilities seriously and has an active Board of Directors with regular meetings, property managers, regular use of caretakers, maintenance staff, landscapers, semi-regular newsletters from the Board of Directors to unit owners. The Condominium Board of Directors appears to pay attention to the

maintenance, upkeep and the overall appearance of the development. These attributes appear to have been attractive features to the family, particularly as the Complainant's work often took him away from the family home.

The Respondent employs a management company to assist the corporation in carrying out its responsibilities and to manage the day-to-day issues of the operation. The property managers for the Condominium Corporation are Mr. and Mrs. Buck, both retired schoolteachers.

Prior to January 30, 2002, the Complainant sought to purchase a home in the Halifax area and with the assistance of a real estate agent looked at a number of properties. The Complainant appeared to have taken an early liking to the Respondent Condominium development, Unit 41. Prior to making an offer on this unit the Complainant researched the condo development and the condo by-laws. The Complainant told the Board that he carefully reviewed the condominium by-laws and was aware of the type of restrictions, shared ownership, and responsibilities that are a part of condominium life. The Complainant also received advice from his real estate and lawyer prior to the purchase. It was the Complainant's evidence that he was aware of the content of all the by-laws and in particular aware of Section 14, which prohibits the erection of external satellite dishes prior to the purchase of the unit at the Respondent condominium complex. While aware of the prohibition against external satellite dishes, the Complainant indicated that it was his own belief that notwithstanding the by-law prohibition, he would be allowed to erect a satellite dish given he would use it to receive religious and cultural programming.

Shortly after the Complainant closed on the purchase of unit 41 the he approached the property managers of the condominium requesting permission to erect an "Arab Satellite" dish outside the condominium unit. There is disagreement in the evidence if these early post closing communications included the suggestion by the managers that if an unobtrusive way was found to mount the external satellite the condominium Board of Directors may approve it. There is, however, no question that The Complainant made verbal and later written requests to the Respondent requesting permission for the erection of an external satellite dish. The Respondents were made aware that the request to construct an external satellite dish was for the stated purpose of obtaining religious, language, cultural and educational programming.

The property managers and representatives of the Board of Directors maintained that the condominium by-laws prohibited the Complainant from erecting an external satellite dish. There was no disagreement in the evidence that the wording the Respondent's by-laws prohibits individual unit owners from erecting things like external satellite dishes, antennas, aerials, etc.

The Respondent considered the Complainant's request and the minutes of the Board of Directors meetings suggest the issue of external satellite dishes was the subject of discussion, generally, as well as how it related to the Complainant's family and that specific request. Ultimately, however, the Respondent did not change the by-law; provide an exemption or special permission to the Complainant to erect an external satellite dish.

Frustrated and concluding the Respondent was not prepared to grant permission for the erection of an external satellite dish and that he would be unsuccessful at having the by-law changed, the Complainant engaged a supplier of "Arabic Satellite" dishes to install an external satellite dish for his family's use. The "Arabic Satellite" dish is a particular technology and because it was significantly larger then what was described as the standard "Express-Vu" size dish, and for other technological reasons, it needed to be affixed in a particular location on the common grounds, at a particular angle, outside the building and outside Complainant's area of "exclusive use". In October 2003, the supplier installed the exterior satellite dish by attaching it to a tree on the common area close to the condominium unit 41. The Respondent quickly became aware of the satellite dish and appears to have received complaints from other unit owners. On October 27, 2003 the property manager telephoned the Complainant and asked him to remove the dish. The Complainant refused. On November 4, 2003, the Complainant received a letter from the property managers of the Condo Corporation, demanding that the dish and cables be removed by November 12, 2003. On or about November 05, 2003, the Complainant attended at the offices of the Nova Scotia Human Rights Commission and on December 18, 2003, filed a formal complaint against the Respondent alleging discrimination in the matter of accommodation and/or provision of or access to services because of his religion and/or ethnic/national origin, contrary to section 5(1)(a), (b), (k), and (q) of the Human Rights Act. As of the date of the hearing before the board, the dish remained in place and in use.

Legal Issues:

Evidence Applicable at a Hearing

This Board, which was appointed under the *Human Rights Act*, is not a civil proceeding subject to the Nova Scotia Civil Procedure Rules and the traditional rules of evidence. The jurisdiction of a Board of Inquiry is found at section 34(7) of the *Human Rights Act*, which is as follows:

> 34(7) 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 a decision.

The evidence that a Board of Inquiry may hear is described at section 7 of the *Boards of Inquiry Regulations*, NS Reg 221/91 as follows:

> 7. In relation to a hearing before a Board of Inquiry, a Board of Inquiry may receive and accept such evidence and other information, whether on oath or affidavit or otherwise, as the Board of Inquiry sees fit, whether or not such evidence or other information is or would be admissible in a court of law; notwithstanding, however, a Board of Inquiry may not receive or accept as evidence anything that would be inadmissible in a court by reason of any privilege under the law of evidence.

While there was little conflict in the evidence provided by witnesses before the Board there is value in noting the appropriate tools for the assessment of witness credibility in determining whether a complaint has been made out. It is the Board's function to determine witness credibility and to accept or reject portions of the evidence presented by a witness on the stand.

In Leach v. Canadian Blood Services, 2001 ABQB 54, at para. 70:

> I adopt the test for assessing credibility set out by Foster J. in *Sylvan Lake Golf & Tennis Club Ltd. v. Performance Industries Ltd. and O'Connor* (1996), 190 A.R. 321 (Q.B.) at para. 27:
>
> > The tests for assessing credibility in this court are well-established and may be summarized as follows:
> >
> > > 1. The witness's evidence should first be considered on a "stand alone" basis. In this regard, [the trier of fact should consider] factors such as firmness, memory, accuracy, evasiveness, and whether the witness's story is inherently believable.
> > >
> > > 2. If the witness's evidence survives the first test above, the assessment moves on to a comparison of that witness's evidence with the evidence of others and documentary evidence.
> > >
> > > 3. Finally, the court must determine which version of events, if conflicting versions exist, is

> most consistent with "the preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions."

Burden of Proof

The standard for assessing the evidence before the Board of Inquiry is on the civil balance of probabilities. If the Board of Inquiry is satisfied on balance that the Complainant has proved the discrimination alleged and that there is no justification or defense available to the Respondent, then the Board can fashion a remedy. If the Board is not satisfied that the Complainant has met this burden, then the Board can dismiss the complaint.

The Complainant must establish a prima facie case of adverse treatment, which it can reasonably be inferred, arose because of race, ethnic or national origin. The cases speak of race being an "operative" element in the conduct alleged to be discriminatory; it need not be the main or major cause of the adverse treatment; see Fuller v. Candur Plastics (1981), 2 C.H.R.R. D/419 (Ont. Bd. Inq.); Basi v. CNR (1988), 9 C.H.R.R. D/5029 (C.H.R.T.). The burden then shifts to the Respondent to demonstrate a rational and credible justification for their conduct. The Complainant may then try to show that such justifications are mere pretexts or veils for conduct which is actually discriminatory. In most such cases, circumstantial evidence and inference are heavily relied upon as there is seldom direct evidence of discriminatory conduct.

The Board was impressed by the articulation of the burden of proof setout by Board Inquiry Chair David Bright in McLellan v. Mentor Investments Ltd. (1991), 15 C.H.R.R. D/134 para. [15] (N.S. Bd. Inq.):

> …The civil burden or preponderance of evidence or poof of a fact on a balance of probabilities has been described as, it must carry a reasonable degree of probability, but not so high as is required in a criminal case. If this evidence is such that the tribunal can say," we think it more probable then not," the burden is discharged, but if the probabilities are equal, it is not."

The Supreme Court of Canada accepted the following as appropriate:

> "[I]t is impossible to lay down in words any scale or standard by which you can measure the degree of proof which will suffice to support a particular conclusion of fact. The applicant must prove his case. This does not mean he must demonstrate his case. If the more probable conclusion is that for which he contends, and there is anything pointing to it, then there is evidence for a court to act upon. Richard Evans & Co. v. Astley, [1911] A.C. 674 (H.L.), per Earl Loreburn quoted by Duff, J. in G.T.R. v. Griffith (1911), 45 S.C.R. 380."

The Board has also reviewed the work of Vizkelety, in, Proving Discrimination in

Canada, (Toronto: Carswell, 1987 on this point at pp. 142-43:

> "There is indeed, virtual unanimity that the usual standard of proof in discrimination cases is a civil standard of preponderance. The appropriate test in matters involving circumstantial evidence, which should be consistent with this standard, may therefore be formulated in this manner. An inference of discrimination may be drawn where the evidence offered in support of it renders such an inference more probable than the other possible inferences or hypotheses.
>
> Where there is an undertaking to proceed by way of circumstantial evidence, to prove a fact in issue piece by piece, bit by bit, the probative value of each item, when taken singly, will not always be apparent … But in many instances it may well be impossible to prove the discrimination otherwise. At the very least, a decision on relevance should take into account the fact that the evidence being tendered is but part of an aggregate from which the fact finder will ultimately be asked to infer the existence of a fact in issue."

The complaint that is the subject matter of this inquiry relates in particular to the allegation of discrimination based on Religion and/or Ethnic/National Origin, to wit, a violation of section 5(1) of the *Nova Scotia Human Rights Act.*

Discrimination on the Basis of Religion and/or Ethnic/National Origin

The relevant prohibition against discrimination in the *Human Rights Act* is as follows:

> 5 (1) No person shall in respect of
>
> (a) the provision of or access to services or facilities;
>
> (b) accommodation;
>
> discriminate against an individual or class of individuals on account of
>
> (k) religion;
>
> (q) ethnic, national or aboriginal origin;

Adverse Effect and Undue Hardship

There was no claim made or evidence to suggest that Respondent had engaged in conduct that intentionally discriminated against the Complainant. The claim of discrimination turns on what is generally referred to and widely accepted as "adverse effect discrimination". A leading case in the matter of "adverse effect" discrimination is ***Meiorin*** (***British Columbia (Public Service Employee Relations Comm.) v. B.C.G.E.U.***, [1999] 3 S.C.R. 3, 35 C.H.R.R. D/257 (S.C.C.), courts and tribunals have applied a new test for dealing with discrimination.

The Commission aptly summarized the current law on adverse effect at page 6 of its pre-trail submission:

> "The ***Meiorin*** decision collapsed the previous distinction between adverse effect and direct discrimination, and created a new three-part test for determining whether the discriminatory conduct could be justified. Under the old system, there was a duty to accommodate in cases of adverse effect discrimination, and the test to be applied in cases of direct discrimination was whether the impugned qualification was a *bona fide* occupational requirement or qualification. The new test requires that the standard be rationally connected to the function being performed, and be held in good faith. In order to qualify as a reasonably necessary standard (the third element of the test), the respondent has to demonstrate that it was unable to accommodate the complainant to the point of undue hardship."

In the Supreme Court of Canada decision, ***Central Okanagan School District No. 23 v. Renaud*** (1992), 16 C.H.R.R. D/425 at D/432, the duty to accommodate to the point of undue hardship requires more than inconvenience to the respondent:

> More than mere negligible effort is required to satisfy the duty to accommodate. The use of the term "undue" infers that some hardship is acceptable; it is only "undue" hardship that satisfies the test.

Decision:

The Board had reached its conclusions and decision after carefully reviewing the evidence including exhibits, written submissions, sworn testimony, argument and the relevant jurisprudence. The Board is mindful of the special purpose and of the *Nova Scotia Human Rights Act* and similar legislation including the *Charter of Rights and Freedoms.* The Board recognizes Human Rights legislation does have a special and a progressive, social and legal purpose. It is likewise appropriate that the Board apply a large and liberal approach with respect to the interpretation and application of the Human Rights legislation; it is through this legal lens that the Board has made its findings and drawn is conclusions.

The first and fundamental question the Board must ask in drawing its conclusions is a simple one: has the Complainant(s) met its burden of establishing, a violation of the *Nova Scotia Human Rights Act*, taken place? In other words, has the case been made supporting the conclusion that on the evidence the Complainant's family was discriminated against in the matter of accommodation and/or provision of or access to services because of its religion and/or ethnic/national origin, contrary to section 5(1)(a), (b), (k), and (q) of the *Human Rights Act* ?

The Human Rights Commission cited a number of cases relating to circumstances where the application of condominium by-laws was found to be discriminatory. In particular, the Commission referenced a 2004 decision of the Supreme Court of Canada involving freedom of religion in a housing accommodation context under the Canadian *Charter of*

Rights and Freedoms and the Quebec *Charter of Human Rights and Freedoms*. In ***Syndicat Northcrest v. Amselem***, [2004] 2 S.C.R. 551, four appellants, Orthodox Jews, and were co-owners of units in a luxury condominium complex. One of the appellants set up a "succah" (a small enclosed hut open to the sky) on his balcony for a nine-day religious festival known as succahs. The Respondent claimed that erecting a succah on the balcony was in violation of the condominium by-laws, the Claimants that it was a requirement of their religion, a religious practice.

In its decision, The Supreme Court made clear that religious belief should be judged on some objective standard of what is a *bona fide* or necessary precept of a religion. At paragraph 43, Justice Iacobucci, writing for the majority, made the following comments:

> The emphasis then is on personal choice of religious beliefs. In my opinion, these decisions and commentary should not be construed to imply that freedom of religion protects only those aspects of religious belief or conduct that are objectively recognized by religious experts as being obligatory tenets or precepts of a particular religion. Consequently, claimants seeking to invoke freedom of religion should not need to prove the objective validity of their beliefs in that their beliefs are objectively recognized as valid by other members of the same religion, nor is such an inquiry appropriate for courts to make; see, e.g., Re Funk and Manitoba Labour Board (1976), 66 D.L.R. (3d) 35 (Man. C.A.), at pp. 37-38. In fact, this Court has indicated on several occasions that, if anything, a person must show "[s]incerity of belief" (*Edwards Books*, *supra*, at p. 735) and not that a particular belief is "valid". (Emphasis added)

At paragraph 69, the Supreme Court articulated a definition of freedom of religion that is centred on an individual's belief of the religious significance.

> 69 Rather, as I have stated above, regardless of the position taken by religious officials and in religious texts, provided that an individual demonstrates that he or she sincerely believes that a certain practice or belief is experientially religious in nature in that it is either objectively required by the religion, or that he or she subjectively believes that it is required by the religion, or that he or she sincerely believes that the practice engenders a personal, subjective connection to the divine or to the subject or object of his or her spiritual faith, and as long as that practice has a nexus with religion, it should trigger the protection of s. 3 of the Quebec *Charter* or that of s. 2(*a*) of the Canadian *Charter*, or both, depending on the context.

At para. 87 the Court went on to state:

> In a multi-ethnic and multicultural country such as ours, which accentuates and advertises its modern record of respecting cultural diversity and human rights and of promoting tolerance of religious and ethnic minorities - and is in many ways an example thereof for other societies -, the argument of the respondent that nominal, minimally intruded-upon aesthetic interests should outweigh the exercise of the appellants' religious freedom is unacceptable. Indeed, mutual tolerance is one of the cornerstones of all democratic societies. Living in a community that attempts to maximize human rights invariably requires openness to and recognition of the rights of others.

Reference to "practice" in this context is a religious practice. The Supreme Court expressed the view that it was inappropriate to apply an objective standard as to weather a particular religious practice was a requirement of the religious belief or dogma. The case largely turned on the exercise of a particular religious practice and belief and that the denial of allowing the construction of a saccah would prevent the Claimants from practicing what they considered to be a religious requirement of their faith. While, the Board finds ***Syndicat Northcrest v. Amselem***, instructive there are a number of distinguishing elements on the facts of the matter before it. Unlike ***Syndicat Northcrest v. Amselem***, in the matter before this Board the evidence does not support the conclusion or include the assertion that the Complainant subjectively or otherwise believed that accessing this particular satellite service was anything like a religious belief or requirement, a religious practice or custom. Further, the matter before this Board the evidence does not support a reasonable conclusion that access to the satellite service, as described in ***Northcrest v. Amselem***, as *" experientially religious in nature in that it is either objectively required by the religion, or that he or she subjectively believes that it is required by the religion, or that he or she sincerely believes that the practice engenders a personal, subjective connection to the divine or to the subject or object of his or her spiritual faith"*. In ***Northcrest v. Amselem*** the by-law in question prevented the construction of a succah, which the Complainants argued prevented them from conducting a requirement of their religious faith. There is no such similar evidence or claim in the matter before this Board.

The evidence received by the Board about the satellite service and how it used was of a highly general nature, except that it involved broadcasts containing religious content and exposure to their language and culture. The Board accepts that access to this technological aid was preferred by the Complainant's family over other options, including other technological tools such as the internet which the Complainant rejected as inferior to the services provided by the satellite dish. Demonstration of a breach the *Human Rights Act* and sustaining the claim of discrimination in the matter of accommodation and/or provision of or access to services because of his religion and/or ethnic/national origin, contrary to section 5(1)(a), (b), (k), and (q) of the *Human Rights Act*, requires more than being able to draw some connection to religion and the impugned by-law. The Complainant family's ongoing devotion to the practices and tenets of their

faith and cultural identity will continue unimpeded, uninterrupted and undiminished with or without access to a particular satellite dish and service. The Complainant's wife also acknowledged that the family had always practiced its faith and participated in religious practices, language, cultural exposure and instruction prior to moving to the Respondent's condominium complex and absents of the technological assistance any satellite dish service. Accessing this particular satellite dish and service could be fairly described as an additional source of information and exposure, there was no expression of belief the satellite service was a religious practice, belief, part of the tenets faith or culture. Unlike ***Syndicat Northcrest v. Amsele,*** the Board was not presented evidence that accessing this satellite service was itself a religious practice or that the absence of access to this technology would compromise or restrict exercise any religious practice or belief.

In, ***Chauhan v. Norkam Seniors Housing Cooperative Assn.*** (2004), 51 C.H.R.R. D/126 (B.C.H.R.T.), referenced by the Commission, the Complainant was a retired teacher of East Indian ancestry who purchased a life sub-lease for a unit in a seniors housing facility. One of the rules in the lease stated that tenants would not create a nuisance that would disturb the quiet enjoyment of their neighbors. While this case is at the tribunal level it is useful to this Board in undertaking its analysis. In this case the tribunal found that cooking the particular ethnic foods that caused the odors complained of, was directly related to the expression of the Complainant's cultural heritage and the prohibition from cooking their traditional ethnic food had a significant impact central to their identity. The facts and circumstances of the matter do not support a similar conclusion by this Board. Unlike being denied the ability to consume one's traditional ethnic food, and being central to ones identity on the evidence before this Board, it cannot conclude the absence of the access to the satellite service results in the same type of impact central to the family's cultural heritage and identity.

Condominium living involves a balance of ownerships, responsibilities and duties, and there is a trade of flexibility and rights of an individual owner to do whatever they want with their condominium unit, common areas and the limitations that come with living in a condominium. This was understood by the Complainant's family prior to the purchase of their condominium unit and in particular the restriction reflected in the by-laws relating the erection of an external satellite dish was specifically known and understood by all parties. The by-laws must conform to, among other things, the provisions of the *Condominium Act* and the *Nova Scotia Human Rights Act*. The Board's role is to assess if the imposition of the by-law in question has the effect or an impact resulting discrimination against the Complainant under the Nova Scotia *Human Rights Act*.

The Board acknowledges the special nature and purpose of the Human Rights legislation and the protections it affords. The Board appreciates that it must apply a large and liberal approach to the interpretation and application of the *Human Rights Act.* However this special purpose does not obviate the necessity of meeting the burden, on the evidence, of demonstrating a violation of the *Human Rights Act* has taken place, to wit, that the rights and protections setout in the *Human Rights Act* has been infringed. In the matter before the Board from a legal and evidential perspective the reach has exceeded the grasp in the demonstration that violation of the *Human Rights Act* has taken place.

The Board is not satisfied that the Complainant has met the necessary burden demonstrating the Complainant (or his family) was discriminated against in the matter of accommodation and/or provision of or access to services because of its religion and/or ethnic/national origin, contrary to section 5(1)(a), (b), (k), and (q) of the Nova Scotia *Human Rights Act*.

Complaint Dismissed

Royden Trainor
Inquiry Chair