IN THE MATTER OF:	**The *Human Rights Act*, R.S.N.S. 1989, c. 214, as amended by 1991 c. 12**
AND IN THE MATTER OF:	**A complaint of Mary Harnish against Halifax Regional Municipality and Halifax Regional Police Department ("HRM")**
AND IN THE MATTER OF:	**HRM's Motion for Determination of Certain Preliminary Issues**
HEARD BEFORE:	**Gilles Deveau, Chair – Board of Inquiry ("Board")**
LOCATION:	**Halifax, Nova Scotia**
DATE HEARD:	**November 20, 2007**
COUNSEL:	**Jennifer Ross for the Nova Scotia Human Rights Commission ("the Commission")**
	Randolph Kinghorne, with Jessica Lightbourne, Articling Student, for HRM

Background

Mary Harnish alleges in a complaint dated May 18, 2005 and submitted to the Nova Scotia Human Rights Commission that she was discriminated against as an employee by her employer HRM based on race/colour and retaliation contrary to s. 5 (1) (i) & (j) and 11 of the Nova Scotia *Human Rights Act* (the *"Act")*. Since Ms. Harnish's Complaint was filed, the Commission has withdrawn the complaint of retaliation. The Board heard oral submissions on November 20, 2007 and made determinations with reasons that follow.

The following documents were submitted by both the Commission and HRM:

1. HRM's Brief – Jurisdiction of the Board of Inquiry;
2. HRM's Brief – Statutory Parties to the Proceeding;
3. HRM's Brief – Scope of the Proceeding;
4. HRM's letter dated October 31, 2007 Re: "additional alleged incidences";
5. HRM: Affidavit of Laura Gay sworn to November 5, 2007;
6. Commission's Brief on the Preliminary Issues – November 6, 2007;
7. Commission's Pre-Hearing Brief - October 15, 2007.

In addition, Mr. Kinghorne submitted the following case at the hearing:
Amalgamated Transit Union, Local 583 v. Calgary (City) [2007] A.J. No. 374

Ms. Harnish was in attendance at the hearing. Although Bianca Krueger has been acting as legal counsel to Ms. Harnish at the hearing, she indicated to the Board that she would not be attending this preliminary hearing, but expected to continue to assist Ms. Harnish at the full hearing of the Complaint.

Issues

HRM has asked the Board to rule on the following matters in sequence:

1. What is the proper scope of Ms. Harnish's complaint?

2. Who is required to be named as a party to these proceedings as provided under s. 33 of the *Act*?

3. What is the proper forum for the adjudication of this matter as between the *Act* and the *Trade Union Act* and the grievance provisions of the collective agreement?

1. What is the proper scope of Ms. Harnish's complaint?

HRM submits that the scope of the hearing should be restricted to the elements of racial harassment as explicitly set out in the formal Complaint dated May 18, 2005. Ms. Harnish's Complaint alleges "racially discriminatory comments and incidences" and provides two examples. Mr. Kinghorne points to what he considers to be seven additional factual allegations as contained in correspondence dating to October 29, 2007 from Ms. Krueger, and considers that each such allegation could have been dealt with in a separate complaint. It is acknowledged by Mr. Kinghorne that these allegations are also contained in a March 2007 fax from Ms. Krueger arising out of mediation sessions at that time. He adds this it is entirely possible that there may yet be additional allegations brought forth by Ms. Harnish at the hearing. There is no indication that any of these additional incidences and allegations were the subject of the Commission's investigation or that the Commission was even aware of such new allegations.

Mr. Kinghorne argues that a complaint requires that each factual allegation be clearly stated: s. 4 of the *Human Rights Act*. The Commission's own Policy No. 7.3.1 provides that the Commission will not deal with a complaint if "it does not set out sufficient facts to make it a violation of the *Act*. The investigation exercise piloted by the Commission is "fact driven", such that any facts that are not offered up by Ms. Harnish at the investigation stage may result in the outcome of the investigation of the Complaint (and subsequent referral of the complaint to a Board) being incomplete or even defective. For example, he submits that the Commission has already chosen to sever the "retaliation" issue from the complaint and may have severed other issues with the benefit of additional allegations and a more complete and thorough investigation based on such additional

allegations. Mr. Kinghorne submits that the Commission did not do a full investigation of the Complaint as it is required to do. Mr. Kinghorne laments that the absence of such additional allegations is that the Complaint as it presently stands (and as it was used by the Commission) as the basis of its investigation may well have left out significant facts. The Complaint may therefore contain insufficient facts to constitute a violation of the Act.

It is Mr. Kinghorne's submission that the absence of sufficient facts appropriately disclosed by the Commission to HRM constitutes a breach of the Commission's duty of procedural fairness to HRM: *Syndicats des employés de production du Québec et de l'Acadie v. Canada (Huan Rights Commission)*, [1989] 2 S.C.R. 879; *Radulesco v. Canada (Canadian Human Rights Commission)*, 1984 2 S.C.R. 407. The effect of the addition of new allegations is that HRM has not been provided with full disclosure of the substance of the claim against it and has not been given the opportunity to make a full submission against the complaint: *Raheja v. Newfoundland (Human Rights Commission)*, [1977] N.J. No. 185. HRM is equally emphatic in its opposition to any request by either Ms. Harnish or the Commission that the Board amend Ms. Harnish's Complaint.

Taking the opposite view, the Commission submits that HRM's recourse to the duty to procedural fairness arises from an application for judicial review, not a submission to the Board. Ms. Ross submits that the substance of the Complaint is clear and straightforward. Ms. Harnish claims to have been the victim of racial discrimination in the context of her employment with HRM resulting from a poisoned workplace. The two examples provided by Ms. Harnish in her complaint are not meant to be an exhaustive presentation of all of the incidences of discrimination that have occurred. To the contrary, they are inclusive, allowing for other examples to be submitted by Ms. Harnish as evidence at the hearing. She adds that the Commission has an informal policy restricting the contents of a complaint to two pages which appears to be consistent with the length of Ms. Harnish's complaint. A complaint is simply the starting point in the evolution of a matter before the Board, and is not meant to be comparable to the iconic status of pleadings in civil matters. She relies on the liberal and purposive interpretation that ought to be given to human rights legislation and submits that the nature of human rights matters permit the inclusion of additional factual allegations. While she acknowledges that a complaint should not be a moving target, she submits that the Complaint is sufficiently clear and substantive to permit HRM to adequately know the case made against it. In particular, she reminds the Board that HRM has had since the February 2007 disclosure of the additional allegations to gain further knowledge of the case it had to meet, including the possibility of interviewing witnesses.

Commission counsel submits that the Board should be guided by observations contained in *Toneguzzo v. Kimberley-Clark Inc.* (No. 3) (2005), CHRR Doc. 05-653, 2005 HRTO 45. In that case it was held that a Board of Inquiry should not accept that the 'subject matter of the complaint' should be restricted to the 'specific factual allegations' contained in the original complaint form, or that the complaint form itself serves a similar purpose to that of pleadings in a civil action." The Board ought to determine the "substance" of the complaint: *Welch v. Eggloff* (No. 2) (1998), 34 C.H.R.R. D/483

(B.C.H.R.T.). In *Toneguzzo,* the Board dismissed the Respondent's application to strike various parts of the complaint akin to pleading in civil proceedings, finding that the impugned material facts were part of a "continuum of events" of the complaint.

2. Who is required to be named as a party to these proceedings as provided under s. 33 of the Act?

Ms. Harnish has only named HRM as a respondent in her Complaint. HRM objects to this. HRM's position is that persons named in Ms. Harnish's Complaint should automatically be named parties to the Complaint. It relies on the authority of Section 33 (d) of the *Human Right Act* which provides as follows:

"The parties to a proceeding before a board of inquiry with respect to any complaint are (d) any person named in the complaint and alleged to have contravened this Act..."

Mr. Kinghorne's submission is that such provision is mandatory on the Board. The Board does not benefit from any discretion on this matter. He submits that the intention of such mandatory provision is clear. It is inserted for the benefit of a person named in a proceeding before the Board whose reputation is at risk of being tarnished by evidence of its conduct that is the subject of the Complaint. Mr. Kinghorne is of course concerned specifically about the allegations against some of Ms. Harnish's co-workers who may have been the authors of racial harassment. He is also concerned about other persons whose names have yet to be revealed but may be the subject of additional, future allegations or incidences. Such named person needs to be able to have notice of the proceeding and fully defend her name. She may be at risk of being terminated based on findings that she has contravened the *Act*. She needs to be added as a party.

Ms. Ross takes the contrary position that the Board has the authority and jurisdiction to determine whether "any person" has contravened the *Act*. She submits that whether there are legal consequences for such person is not something that the Board should concern itself with. Ms. Ross also relies on section 2 (e) of the *Act* which sets out the purpose of the Act: "Recognize that the government, all public agencies and all persons in the Province have the responsibility to ensure that every individual in the Province is afforded an equal opportunity to enjoy a full and productive life and that failure to provide equality of opportunity threatens the status of all persons…". She extrapolates from this broad definition and makes the connection with the case of *Reid v. Vancouver Police Board (No. 1)* (1993), 27 C.H.R.R.D/283 (B.C.C.R.H.) where it was held that neither the municipal employees nor the firefighters' union who were sought to be added as parties should be so added. The Board held that the firefights' union should be left out of the proceedings as it had no potential liability for discrimination - it did not represent the complainants and was not a party to the collective agreement. The Board held that while *Central Okanagan School Board No. 23 v. Renaud* (1992), 16 CHRR D/425 (S.C.C.) is authority for the possibility of a union's exposure to liability in a discrimination claim arising out of a collective agreement, municipal employees' union should not be made a party since the union had not been the proponent of rate pay differentials that were the subject of the complaint.

Most importantly, the Board in *Reid* concluded that the aim of human rights legislation "…was to create a mechanism that is less restrictive concerning procedural matters than the courts tend to be" and that a "broad and liberal" interpretation should be taken when dealing with procedural issues such as the addition of parties: paragraphs 15 and 16. It is instructive that the Board in *Reid* concluded that while the common law principle that a plaintiff should be entitled to chose the party against whom it proceeds should a factor considered in human rights matters to guard against abuse of process, it is not absolute. Rather, the Board should apply a two-part test: (1) is the presence of a party likely to assist the Board in adjudicating matters; and (2) will the addition of a party be consistent with the remedial purposes of the human rights legislation: paragraphs 19-20.

The test for adding a party was again articulated in *Arzem v. Ontario (Ministry of Community and Social Services) (No. 3)* (2005), CHRR Doc. 05-644, 2005 HRTO 42 where the Board found the need for a nexus between the party sought to be added and the allegations, as well as the potential adverse effects on that party:

> In determining whether to add a prospective respondent party to a proceeding, the Tribunal must consider, among other things: (i) whether on the face of the record, there are any factual underpinnings that establish a nexus between the complainant's allegation and the party it seeks to add, and whether the allegations, if believed, may lead to a finding, which affects the prospective party directly or indirectly to the extent that the Tribunal's order can be foiled without more, if the party does not comply; and (ii) whether by adding a party, give rise to any prejudicial impact on that party, and the degree of the impact. [Emphasis added]

In *Payne v. Otsuka Pharmaceutical Co. (No. 2)* (2001), 41 C.H.R.R. D/52 (Ont. Bd. Inq.), the Board determined that the test for adding a party was twofold, consisting of whether (1) there was "some reliable evidence" on which a finding of liability could be made against the party and (2) the prejudice against the party would not outweigh the benefits of adding the party. The Board made this particularly compelling statement with respect to the prejudice part of the test at para. 20:

> Regarding the other aspect of the test – prejudice suffered – the Board will not add a party, even if it appears to the Board that the party violated the rights of a complainant, if by doing so, that party would suffer real, substantial prejudice that is not capable of being cured by the Board (e.g., through an adjournment, further disclosure, etc.). To do so otherwise would violate the principles of fairness and natural justice."

In *Bartlett v. Dover Corp. (Canada) Ltd.* (1998), 34 C.H.R.R. D/151 (B.C.H.R.T.), the Board was asked by the Respondent employer to add the union for purposes of contribution and indemnity. The Board was therefore faced with the interpretation of "party" in light of the following definition at s. 1 of the B.C. human rights legislation and set out at para. 43 of the decision:

> "party with respect to a complaint, means the complainant and the person against whom the complaint is made and includes the deputy chief commissioner, if that commissioner is added as a party under s. 21 (3) or 36 (1). [Emphasis added]

In *Bartlett*, the tribunal found that the relief of contribution and indemnity was not available to the employer as against the union and that it had no jurisdiction to add the union as a party. Ms. Ross warns the Board against considering relief in the nature of contribution in this case. While contribution may be a concern for HRM, the reality is that compensation is not the only source of remedy to which a complainant is typically entitled under the *Act*.

The issue of naming individual employees where the employer is named as respondent is expressly covered in both *Makkar v. Scarborough (City)* (1987), 8 C.H.R.R. D/4280 (Ont. Bd. Inq.) and *Abouchar v. Metropolitan Toronto School Board* (1995), C.H.R.R. NP/96-106, 1995 CarswellOnt 4225 (Ont. Bd. Inq.). In *Makkar*, the Board held that the Commission should exercise great caution when it decides to name an individual as a party to proceedings. Individuals should not be named unless there is a real need to include them as parties and unless the Commission has a real intention to proceed against them. This is especially so where there is a corporate respondent and no practical need to name individuals in order to process the claim." The Board in *Abouchar* followed the approach in *Makkar*, and determined that it was not appropriate to add the individual superintendent of schools as well as the Department of Education where the school board was the named respondent six years after the filing of the complaint. In summary, Ms. Ross takes the position that the effect of adding additional parties would be to subject the *Act* to a literal interpretation, contrary to established jurisprudence which requires that human rights legislation be given a broad and liberal interpretation. In addition, this would mean adding additional complexities to the Act where such is not warranted.

Section 34 of the *Act* distinguishes between a "party"and a "person" for purposes of determining contraventions of the *Act*. Section 34 (7) of the *Act* assigns jurisdiction to a Board to make a determination whether a "person" has contravened the *Act*. Section 34 (8) provides that an order may be made against any "party" which has contravened the *Act* by virtue of injuring a "person". However, it is Ms. Ross's submission that the *Act* clearly provides that any remedy under the *Act* is only available as against a "party". She challenges Mr. Kinghorne's submission on the implication of being a named witness in the Complainant's claim. A witness who is not a named party may well be found to have contravened the *Act*, but will not be exposed to legal liability in this proceeding unless the witness is a named party. Similarly, a witness who is providing factual testimony is not required to "mount a defence" as there are no allegations against such witness in terms of being a party.

3. What is the proper forum for the adjudication of this matter as between the Act and the Trade Union Act and the grievance provisions of the collective agreement?

HRM takes the position that Ms. Harnish was at all material times an HRM unionized employee whose work was governed by the provisions of two successive collective agreements, as substantiated by the affidavit evidence of Laura Gay. HRM submits that the collective agreement contains provisions that are broader than those contained in the *Act* for purposes of assessing the allegations contained in Ms. Harnish's complaint.

The collective agreement is a consensual document agreed to by both the union and management and is a practical tool reflecting the intention of the parties as to how workplace-based disputes should be resolved. It also offers a relatively inexpensive, quick and specialized approach to resolving workplace disputes, featuring an experienced adjudicator driven by practical considerations and shorter time frames. HRM submits that Ms. Harnish "could" have filed a grievance with respect to the allegations contained in her complaint, as both arbitral jurisprudence as well as the explicit provisions of the collective agreement pertaining to harassment issues permit a labour arbitrator to adjudicate such matters. In fact, Mr. Kinghorne suggests that the evidence indicates NSUPE has worked on Ms. Harnish's behalf and there is no reason to believe that it would not fulfill its legal obligations to her: p. 21 of HRM's brief.

The Supreme Court of Canada decision in *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929 (S.C.C.) (along with *New Brunswick v. O'Leary*, [1995] 2 S.C.R 967 released concurrently) is likely the high water mark of the jurisprudence holding that a labour arbitrator had exclusive jurisdiction over matters arising from the collective agreement, including general laws and the *Charter of Rights*, based on the essential character of the dispute and the provisions of the collective agreement. This was held to be true whether the dispute arises expressly or inferentially from the agreement. Substantive rights contained within human rights legislation are incorporated into all collective agreements over which a labour arbitrator has both the power and obligation to adjudicate regardless of whether the collective agreement expressly provides for such incorporation: *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, [2003] 2 S.C.R. 157 (S.C.C.). In both *Weber* and *O'Leary*, the choice of jurisdiction was between a labour tribunal and a civil court, not a labour tribunal and a human rights tribunal as is the case with Ms. Harnish. In *Weber*, the employee was subject to private investigation including surveillance by his employer, and commenced a civil action against his employer in tort as well as breach of his constitutional rights under sections 7 & 8 of the *Charter*. It is particularly significant that the court held that the labour arbitrator should have jurisdiction over civil courts in a *Charter* matter. The Court held that the dispute arose out of the collective agreement. In *New Brunswick v. O'Leary*, where the contest of jurisdiction was between the employee seeking to bring a civil action against the employee in negligence versus the union seeking to have the matter heard by an arbitrator under the collective agreement, the court held that the dispute should be governed by the collective agreement.

However, in further elaboration of the jurisprudence, HRM acknowledges the authority provided in the leading case of *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Quebec (Attorney General)* [2004] 2 S.C.R. 185, 2004 SCC 39 ("*Morin").* *Morin* establishes a simple and practical test for resolving the contest of jurisdiction between a labour arbitration tribunal and a human right tribunal: the enabling statute's provision with respect to jurisdiction and nature of the dispute. However, what is clear from *Morin* is that the *Weber* approach has evolved, or at least has been further articulated, as evidenced by the analysis of McLachlin, C.J.C. in resolving the contest between a labour tribunal and a human rights tribunal and stated as follows for the majority at para. 11 of he decision:

> 11 Weber holds that the model that applies in a given situation depends on the governing legislation, as applied to the dispute viewed in its factual matrix. In *Weber*, the concurrent and overlapping jurisdiction approaches were ruled out because the provisions of the Ontario Labour Relations Act, R.S.O. 1990, c. L.2, when applied to the facts of the dispute, dictated that the labour arbitrator had exclusive jurisdiction over the dispute. However, *Weber* does not stand for the proposition that labour arbitrators always have exclusive jurisdiction in employer-union disputes. Depending on the legislation and the nature of the dispute, other tribunals may possess overlapping jurisdiction, concurrent jurisdiction, or themselves be endowed with exclusive jurisdiction…" [Emphasis added]

Mr. Kinghorne further submits that civil courts must yield to labour arbitrators as having exclusive jurisdiction over matters falling within the ambit of the collective agreement (*Allen v. Alberta*, (2002), S.C.J. 80 (S.C.C.)) or involving disputes which in the essential character arise out of the collective agreement (Cromwell, J.A. in *Nova Scotia Government and General Employees Union v. Nova Scotia (Public Service Commission)*, 2004) N.S.J. No. 144 (N.S.C.A.)). However, the competing jurisdictional claim in Ms. Harnish's complaint can be distinguished from the above cases as it does not involve a contest between civil courts and labour arbitration. Rather, Ms. Harnish's complaint involves competing jurisdiction as between a labour arbitration tribunal and a human right tribunal.

In addition, Mr. Kinghorne relies on the authority of *Amalgamated Transit Union, Local 583 v. Calgary (City)* [2007] A.J. No. 374. In that case, a labour arbitration board had been struck to hear a union grievance for termination under the provisions of the collective agreement. The collective agreement contained a clause explicitly prohibiting discrimination and harassment. The employee responded by filing a human rights complaint without the support of its union as the union had chosen not to grieve the human rights matter by agreement with the employee. The Board determined that it held exclusive jurisdiction to deal with both the employee's termination grievance as well as her human rights complaint. The Alberta Court of Appeal held that while it was the union's right not to take a human rights matter to grievance under a collective agreement, it did not remove the employee's right to access the human rights regime, setting out the crux of its reasons at paras. 68 and 69:

> The legislative intent revealed by the *Human Rights Act* is to grant to all Albertans access to human rights protection. In the absence of a clear indication to the contrary in the Labour Relations Code, I cannot conclude that the intent of the legislature was effectively to remove that right of access to unionized employees. Where neither applicable legislative regime expressly precludes access to the other forum, and particularly where, as here, one of those fora is not entitled to decline to hear a matter, the jurisdiction over the matter is concurrent. Both tribunals have jurisdiction over the human rights issues raised by these disputes. … [Emphasis added]

Furthermore, at para. 69, the court concludes:

> The larger concern, and a legitimate one, is that the process is less expeditious than the employer would like. However, until the legislature says otherwise, efficiency alone is not a reason to restrict access to the human rights complaints process.

According to Mr. Kinghorne, particular attention needs to be placed on the specific language of the respective tribunal's enabling statute. Mr. Kinghorne submits that the relevant provisions of the *Nova Scotia Trade Union Act* suggest the collective agreement is the exclusive source of authority for the adjudication of workplace disputes such as the Harnish matter. He adds that the "legislative intent" in Nova Scotia is that workplace infringements of the *Trade Union Act* are required be submitted to the grievance/arbitration procedure rather than the Human Rights Commission. For example, he points to two provisions of the *Trade Union Act* which he submits confirm the exclusive authority of a labour arbitrator in any workplace dispute:

The *Trade Union Act* provides a "final settlement" provision at s. 42 (3) and contains other provisions as follows:

> Section 42 (1) Every collective agreement shall contain a provision for **final settlement** without stoppage of work, by arbitration or otherwise, **of all differences** between the parties to or persons bound by the agreement or on whose behalf it was entered into, concerning its meaning or violation. [Emphasis added]

> Section 43 (1) An arbitrator or an arbitration board appointed pursuant to this Act or to a collective agreement (e) **has power to treat as part of the collective agreement the provisions of any statute of the province** governing relations between the parties to the collective agreement. [Emphasis added]

In contrast, the *Act* does not contain any provision purporting to give the Commission exclusive jurisdiction in the administration of rights under the *Act*.

Mr. Kinghorne turns to the matching provisions of the collective agreement and submits that Ms. Harnish's complaint "clearly falls within the scope of the collective agreement". Article 27 provides that a "grievance" ("any question submitted to arbitration") must be put to a decision or an arbitrator that is "final and binding". More importantly, the "essence" of the dispute is covered by the following collective agreement provisions, placing Ms. Harnish's complaint in the nature of human rights "squarely within" the 'exclusive' jurisdiction of the grievance/arbitration procedure, which the Board summarizes as follows:

> Article 5.01 – precludes discrimination or harassment by reason of race or colour;

> Article 5.02 – recognizes the need to implement and improve employment equity for individuals identified based on the prohibited grounds of discrimination set out in the Act;

> Article 5.04 – prohibits personal harassment consisting of abusive conduct which has the effect of unreasonably interfering with an employee's work performance or creates an intimidating, hostile or offensive work environment.

Mr. Kinghorne briefly refers to the decision of LeBlanc, J. in *Nova Scotia (Human Rights Commission) v. Halifax (Regional Municipality)*, 2007 NSSC 163, acknowledging that LeBlanc held that the language of the Act did not grant exclusive jurisdiction to a labour arbitrator over matters otherwise falling under the *Act*. He submits that the decision supports HRM's position in this matter based on Mr. J. LeBlanc's remarks at para. 63: "I am not convinced that a labour arbitrator has significantly greater expertise to offer than a human rights tribunal in this matter". Mr. Kinghorne interprets this to mean that while a labour arbitrator may not have "significantly greater expertise", he would at least have "greater expertise". Alternatively, Mr. Kinghorne submits that LeBlanc J. erred in failing to give due consideration to the union's duty to fair representation. The decision is presently under appeal and set to be heard in January 2008.

Ms. Ross submits that the applicable jurisdictional model in this matter is concurrent jurisdiction. She relies on the authority of *Nova Scotia (Human Rights Commission) v. Halifax (Regional Municipality)*, where Mr. Justice LeBlanc of the Nova Scotia Supreme Court rejected HRM's application for a declaration that a human rights complaint was governed by the collective agreement and that the Commission had no jurisdiction. In that case, an African Nova Scotian filed a complaint with the Commission which alleged that he had been subjected to racial discrimination from co-workers and passed over for job advancement. Justice LeBlanc chose to apply the test set out in *Morin*. First, LeBlanc, J. held that the provisions of both the *Act* and the *Trade Union Act* must be reviewed to determine what each statute provides with respect to jurisdiction. Second, the nature of the dispute must be assessed to determine if there is concurrent or exclusive jurisdiction.

Ms. Ross submits that the *Trade Union Act* expressly provides that either of the parties *may* submit a matter for arbitration arising under the collective agreement. There is nothing in the *Trade Union Act* that precludes the Commission from having jurisdiction over a dispute arising from a matter arising out of a collective agreement. Conversely, there is nothing in the *Act* that requires deference to another legislative scheme such as the *Trade Union Act*. The nature of the dispute is Ms. Harnish's allegation that she was the victim of racial discrimination while working as an employee in the records management division of HRM's police department. The complaint is about a poisoned workplace and excludes any claim for retaliation. The conduct of members of the bargaining unit vis-à-vis each other does not fall within the "primary ambit" of the collective agreement. Although such aspect of employment may be considered as governed by the collective agreement, it can equally be dealt with under the *Act*. She relies on the authority of Mr. LeBlanc's conclusion that nothing in the *Trade Union Act* provides for exclusive authority to an arbitrator over matters otherwise adjudicated under the *Act*. It is worth considering Justice LeBlanc's reason in support of his finding that there is current jurisdiction at paras. 59 & 60:

> [59] Among the potential pitfalls of concluding that a fact situation such as this one falls exclusively to the jurisdiction of an arbitrator under the *Trade Union Act* is the fact that, as has been pointed out in several cases cited above, this could lead to the Union being required to decide between the competing interests of several members, where the

> complaint is against other members of the union. As Paperny J.A. noted in *ATU*, there is a risk that a complainant could be left without a remedy, if the union chooses not to proceed by way of arbitration. This problem is not answered by HRM's argument that finding that the Human Rights Commission has jurisdiction where there is a collective agreement in place "would permit complainants to ignore the grievance procedure for the purpose of taking proceedings against individual co-workers." Unlike the situation in *Weber*, this issue does not arise from the interpretation, application or administration of the collective agreement. The heart of this dispute is the issue of racial discrimination, not necessarily the specific effects of the alleged discrimination. In this regard, it is important to be mindful of the "quasi-constitutional" nature of the *Human Rights Act*.
>
> [60] Despite subsection 42(1) of the *Trade Union Act*, providing for final and binding arbitration relative to employment disputes, I am of the view that the conduct in question has a broader reach than simply an employment dispute. It is my view that given the broad nature of the issue, an arbitrator under the *Trade Union Act* would be no better situated to deal with it than would the Human Rights Commission. In reaching this conclusion I have found the reasoning in *Cadillac Fairview* and *Westfair Foods* persuasive, reinforced by the more recent decision in *ATU v. Calgary*.

Mr. Kinghorne submits that to hold that Ms. Harnish's complaint is a matter of concurrent jurisdiction would be doubly faulty. It would be both contrary to the "final and binding" nature of the grievance process under the collective agreement as well as an abuse of process arising from the risk of re-litigation. According to Mr. Kinghorne, "…the possibility is clearly raised…" that two different tribunals would be struck each reaching a different conclusion. Or, a party to the grievance could possible chose to "re-litigate" the facts of the dispute, resulting in an unacceptable abuse of process: *Toronto (City) v. CUPE Local 79* [2003] 3 S.C.R. 77. Mr. Kinghorne warns at p. 18 of his brief that "…human rights issues…must be resolved between parties on a once-and-for-all basis rather than being dragged out through parallel proceedings".

Finally, Mr. Kinghorne states that labour arbitration is more suited for adjudication arising from Ms. Harnish's complaint as it features more sophisticated knowledge, more efficient practices and quicker decisions: *Toronto (City) Board of Education v. O.S.S.T.F. District 15,* [1997] 1 S.C.R. 487. There is no time constraint on a human rights investigation or hearing, it being submitted by HRM that the Commission's own estimate is that the average time frame for a complaint to be "finalized" is approximately 18 months. In contrast, the *Trade Union Act* values the importance of expediency in grievance resolution. Section 46A (1) requires that an arbitrator be appointed and the disputed matter under the collective agreement be heard within 30 days. The labour arbitration forum is more suited to this dispute even if the nature of the allegations is a violation of human rights. Concern over the proper adjudication of a human rights matter is overweighed by the benefit of a prompt resolution of issues in an accessible and informal forum perpetuating the continuing relationship between labour and management: *Parry Sound*.

Analysis and Finding

1. What is the proper scope of Ms. Harnish's complaint?

The Board has no difficulty in determining that the legal test in determining the proper scope of the complaint is set out in *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears*, requiring that the allegations made and particularly set out in the complaint must be "complete and sufficient". The issue of the proper scope of a complaint has been extensively canvassed by boards of inquiry. In *Halliday v. Michelin North America (Canada) Ltd. (No. 1)* (2006), CHRR Doc. 06-817 (N.S. Bd. Inq.), the Board proceeded on the basis that the scope of a complaint should contain all of the "essential elements": *Neush v. Ontario (Ministry of Transportation)*, [2002] O.H.R.B.I.D. No. 11 (Ontario Board of Inquiry.

While the Commission submits that the Board should be guided by observations contained in *Toneguzzo*, and generally that the scope of a complaint in a human rights complaint is not as stringent as pleadings in a civil trial, the Board finds that there are two broad observations flowing out of *Toneguzzo*. While the 'subject matter of the complaint' should not be restricted to the 'specific factual allegations' contained in the original complaint, the hearing of the complaint should not be a "moving target" for HRM.

The Board also has no problem concluding that "racial discrimination" is a prohibited ground under the *Act*. The Board does not find inherent contradiction or confusion in Ms. Harnish's complaint. The inclusion of new incidences in support of the allegations of racial discrimination does not have the effect of expanding or shifting such a complaint in the nature of "racial discrimination". It certainly does not have the effect of changing the essential elements of the complaint and constitute a "moving target" for HRM to the point of causing a serious prejudice to HRM as is cautioned against in *Usher v. Jenner Chevrolet Oldsmobile Ltd.* (2000), 37 C.H.R.R. D/116, 2000 BCHRT 2. The Board finds that the allegations of racial discrimination against Ms. Harnish as supported by various incidences can constitute evidence of racial discrimination for the purposes of making a *prima facie* case of disability. The Board concludes that an allegation of "racial discrimination" contained within a complaint under the *Act* does not require a comprehensive listing and description of all of the incidences that support the allegations in the complaint so as to provide sufficient evidence of the essential elements of racial discrimination.

Mr. Kinghorne warns against any attempts to amend Ms. Harnish's complaint at this rather late juncture in this proceeding. As neither Ms. Harnish nor the Commission have sought to have Ms. Harnish's complaint amended, the Board chooses not to amend the complaint. In view of the observations in *Welsh* that the Board should determine the substance of the complaint and that the complaint contain the "essential elements" of racial discrimination (*Neush*), the Board has no difficulty determining that Ms. Harnish's complaint as set out in her complaint is in the nature of racial discrimination as set out at paragraph 2 of her complaint:

> Throughout my employment, I have been subjected to racially discriminatory comments and incidents on a number of occasions. Two examples of this sort of treatment are included below.

The Board agrees with Ms. Ross that the nature of new allegations do not have the troubling and confusing effect of leading evidence on an unrelated matter (e.g., sexual discrimination). It is not as if the Commission has investigated a complaint of racial discrimination up to this point, and now has to change course and launch an investigation into sexual harassment. The fact that certain issues were not investigated by the Commission does not necessarily lead to the conclusion that those issues fall outside the scope of the complaint if those issues reasonably fall within its scope: *Corren v. British Columbia (Ministry of Education) (No. 2)* (2005), CHRR Doc. 05-635, 2005 BCHRT 497. The additional allegations simply seek to provide additional examples by reference to separate incidences of the type of discrimination allegedly suffered by Ms. Harnish. Such additional allegations arise out of the same basic set of facts on which the original complaint is rooted: *Farias v. Chuang (No. 1)* (2005), CHRR Doc. 05-092, 2005 HRTO 8. While the original complaint was filed in May 2005, it would appear from the complaint that Ms. Harnish's allegations of racial discrimination were made known to her employer as far back as 2002. That is, Ms. Harnish alleged she was the victim of racial discrimination as an employee within the Respondent's poisoned workplace. The Board finds that the complaint with its reference to "harassment" and "discrimination" related to "race" is sufficiently broad to incorporate additional particulars of racial discrimination. The Board finds that it is entirely appropriate and indeed helpful for Ms. Harnish to offer examples in her Complaint of incidences forming the basis of her allegations. This would be consistent with the nature of a Complaint: to set out allegations, not to provide a complete and extensive set of facts.

The Board finds that if the Commission has failed to discharge its duty to procedural fairness or has not followed its own Policy, HRM's recourse lies with an application for judicial review before a superior court. Judicial review is not within the jurisdiction of the Board.

2. Who is required to be named as a party to these proceedings as provided under s. 33 of the Act?

On its face, and at first glance, the s. 33 of the *Act* would appear to compel the inclusion as a party any person named in a complaint: "The parties to a proceeding before a board of inquiry with respect to any complaint are (d) any person named in the complaint and alleged to have contravened this Act...". However, the Board finds that the question of adding parties must be approached in a purposeful way with a view to balancing the interests of the parties. The Board in *Reid* applied a two-part test: (1) is the presence of a party likely to assist the Board in adjudicating matters; and (2) will the addition of a party be consistent with the remedial purposes of the human rights legislation. In both *Arzem* and *Payne*, each Board warned against the danger of a real and substantial prejudice suffered by the party added to the proceedings.

This Board finds any person named in Ms. Harnish's complaint may make full contribution to the determination of Ms. Harnish's complaint by virtue of being

subpoenaed as a witness by the Commission. In addition, the Board finds that it may not have to rely on a named person to Ms. Harnish's complaint to provide assistance in adjudicating matters. In the case of Ms. Harnish's complaint, HRM as respondent and employer will be expected to provide must assistance to the Board in its defence. The Board accepts the findings in *Makkar* where the Board held that the Commission should exercise great caution when it decides to name an individual as a party to proceedings, especially where there is a corporate respondent and no practical need to name individuals in order to process the claim.". The Board finds that it is clear from Ms. Ross' submission that the Commission has no intention of adding additional parties to these proceedings. The Board is therefore guided by the principle set out in *Makkar* that individuals should not be named unless there is a real need to include them as parties and unless the Commission has a real intention to proceed against them.

It is particularly disconcerting for the Board to contemplate the prejudice that could plague an added party at this stage in the proceedings. As submitted by Ms. Ross, a witness who is not a named party may well be found to have contravened the *Act*, but will not be exposed to legal liability in this proceeding unless the witness is a named party. Similarly, a witness who is providing factual testimony is not required to "mount a defence" as there are no allegations against such witness in terms of being a party. The Board finds that the burden on a party from being made a party would have a chilling effect, unnecessarily complicating the broad legislative purpose of human right adjudication. Alternatively, the Board finds that forsaking the addition of such person as added party is adequately cured by virtue of the subpoena of witnesses and the further disclosure and production of evidence.

The Board also finds that it has now been two and a half years since Ms. Harnish filed her complaint. In addition, the bulk of the allegations found in Ms. Harnish's complaint reach even beyond the time of the filing of her complaint to 2002. The Board accepts the approach used in *Abouchar* and followed the approach in *Makkar* where it was determined not to add the individual superintendent of schools as well as the Department of Education where the school board was the named respondent six years after the filing of the complaint.

It is clear from Mr. Kinghorne's oral submissions that HRM is seeking to avail itself of the legal remedy of contribution from other parties. In other words, it appears that HRM would be looking to other parties to share the burden if it was held liable to pay damages to Ms. Harnish. Although this remedy is well-recognized at common law, there is nothing in the *Act* that expressly recognizes such a remedy. In addition, Mr. Kinghorne has not referred the Board to any human right jurisprudence where such a remedy was awarded. The Board accepts Ms. Ross's submission and finds that the Board has the authority and jurisdiction to determine whether "any person" has contravened the *Act*. It is not for the Board to determine whether there are legal consequences for such person named in the complaint.

In conclusion, the Board accepts Ms. Ross' position that for the Board to feel compelled to add additional parties would be to subject the *Act* to a literal interpretation, contrary to

established jurisprudence which requires that human rights legislation be given a broad and liberal interpretation. In addition, this would mean adding unnecessary, additional complexities to the *Act*. The Board therefore cannot accept Mr. Kinghorne's submission that such provision is mandatory on the Board.

3. What is the proper forum for the adjudication of this matter as between the Act and the Trade Union Act and the grievance provisions of the collective agreement?

It is a well-established principle of administrative law articulated by McLachlin, J. (as she then was) in *Morin* and followed by LeBlanc, J. in *Nova Scotia (Human Rights Commission) v. Halifax (Regional Municipality)* that there are three models of jurisdiction: exclusive, overlapping and concurrent. It is the position of HRM that the Supreme Court of Canada jurisprudence led by *Weber* clearly states that a contravention of human rights legislation is a contravention of the provisions of a workplace collective agreement and that all disputes arising in respect of the provisions of a collective agreement must be dealt with by the applicable grievance/arbitration provisions and that no other venue has jurisdiction. However, the Board finds that Mr. Kinghorne's interpretation does not fully match up against the authority of McLachlin, J. (as she then was) in *Morin* where she explicitly finds that "…*Weber* does not stand for the proposition that labour arbitrators always have exclusive jurisdiction in employer-union disputes. Depending on the legislation and the nature of the dispute, other tribunals may possess overlapping jurisdiction, concurrent jurisdiction, or themselves be endowed with exclusive jurisdiction…".

However, the Board is unable to conclude that the language of the *Trade Union Act* provides "exclusive" authority to a labour arbitrator to deal with all unionized workplace disputes in the province. The Board simply cannot accept Mr. Kinghorne's submission that "…this dispute falls squarely within the collective agreement and is an arbitral issue for which the remedy lies outside the jurisdiction of the Commission." Such an interpretation is clearly not supported by McLachlin, J. in *Morin*. At best, the language appears to contemplate concurrent authority, not exclusive authority to the labour arbitrator. For example, while s. 43 (1) provides that an arbitrator has the power to incorporate the provisions of that *Act*, it certainly does not claim that as between him and a human rights tribunal, he wins the jurisdiction contest. While Mr. Kinghorne accurately submits that the *Act* does not contain any provision purporting to give the Commission exclusive jurisdiction in the administration of rights under the *Act*, neither does the *Trade Union Act*.

The Board is particularly troubled by the fact that Ms. Harnish would be indirectly involved if the substance of her Complaint were to be adjudicated under the *Trade Union Act*. While the *Trade Union Act* provides explicit provisions for finality (s. 43 (2) - "final settlement") and concurrent jurisdiction (s. 43 (1) - "has power to treat as part of the collective agreement the provisions of any statute of the province"), s. 42 (3) "every person bound by the collective agreement" technically does not include Ms. Harnish. It is an elementary aspect of trade union law that neither the collective agreement nor the

Trade Union Act recognizes Ms. Harnish as a party to the collective bargaining agreement. Rather, only the employer and the union are legally recognized parties to the agreement. In Ms. Harnish's case, her union has chosen neither to grieve Ms. Harnish's matter nor to be a party to these proceeding. In fairness to the union, the Board suspects that it is awkward for the union to grieve this matter on behalf of Ms. Harnish as this may mean being drawn into a dispute between members of the same union and ultimately taking sides. However, the unfortunate outcome for Ms. Harnish is that she is isolated by the labour arbitration regime as such regime is inaccessible to her personally. The Board finds that it is in such cases where the contest of jurisdiction is not in favour of labour arbitration.

While Mr. Kinghorne submits that Ms. Harnish "could" have filed a grievance with respect to the allegations contained in her complaint, the operative term is "could". The Board finds that Ms. Harnish had the choice of what forum she would use to pursue her claim. She chose the route of the human rights process over that of labour arbitration. While Mr. Kinghorne is technically accurate to point to the union's obligation to advance a grievance under its duty of fair representation owed to Ms. Harnish, the reality is that it may be significantly inconvenient and prohibitively expensive for Ms. Harnish to commence a legal action against her union based on her right to fair representation. But ultimately, the Board finds that it is Ms. Harnish's right to chose the forum in which her claim will be adjudicated. She has made her choice in a clear, unequivocal manner. The Board agrees with *Amalgamated Transit Union, Local 583 v. Calgary (City)* and finds that it could not have been the intent of the legislature to remove the right of access to unionized employees. As neither applicable legislative regime expressly precludes access to the other forum, the jurisdiction over the matter is concurrent. Both tribunals have jurisdiction over the human rights issues raised by these disputes.

The Board accepts Ms. Ross's submission that the *Trade Union Act* expressly provides that either of the parties *may* submit a matter for arbitration arising under the collective agreement. There is nothing in the *Trade Union Act* that precludes the Commission from having jurisdiction over a dispute arising from a matter arising out of a collective agreement. But perhaps most importantly, the Board finds that the nature of the dispute is Ms. Harnish's allegation that she was the victim of racial discrimination while working as an employee in the records management division of HRM's police department. The allegations faced by Mr. LeBlanc in LeBlanc, J. in *Nova Scotia (Human Rights Commission) v. Halifax (Regional Municipality)* are almost identical to those arising from Ms. Harnish's complaint. LeBlanc, J.'s conclusion is that nothing in the *Trade Union Act* provides for exclusive authority to an arbitrator over matters otherwise adjudicated under the *Act.* LeBlanc, J. also concludes that "the heart of this dispute is the issue of racial discrimination, not necessarily the specific effects of the alleged discrimination." Furthermore, as observed by LeBlanc, J, this Board is mindful of the "quasi-constitutional" nature of human rights legislation and that the allegations raised in Ms. Harnish's complaint have a broader reach than a classic unionized workplace dispute.

Contrary to Mr. Kinghorne's submission, there is overwhelming evidence that while Nova Scotia Union of Public and Private Employees ("NSUPE") has had ample notice of Ms. Harnish's complaint, it has declined the opportunity to be a party in this matter before this Board. It is clear from the evidence before the Board that Ms. Harnish was at all relevant times a unionized employee. Furthermore, it is also clear that the union has had proper notice of these proceedings and actually participated in a October 29, 2007 pre-hearing conference at which time Ron Stockton on behalf of NSUPE had an opportunity to become fully aware of the nature of these proceedings as well as to determine and seek instructions on his client's interest in this proceeding. Mr. Stockton dutifully confirmed to the Board in a November 1, 2007 letter that he had clear instructions from his client NSUPE that it would not be seeking to be made an intervenor or party to these proceedings. While this Board is not directing its mind to whether NSUPE has discharged its duty to fair representation to Ms. Harnish, its decision not to be a party to these proceeding does not provide much comfort to Ms. Harnish that NSUPE would likely fulfill its duty to fair representation.

Regrettably, Mr. Kinghorne's warnings of the risk of abuse of process are not particularly relevant to Ms. Harnish's complaint. Specifically, the Board finds that it is mere speculation to suggest that there could be multiple adjudication of Ms. Harnish's complaint with conflicting results. At the very least, there is no evidence that any of the entities involved are contemplating a re-litigation of the dispute. In fact, the Board finds that there is no clear threat that "parallel" proceedings are the inevitable outcome of this dispute. However, even if there were benefits from efficiency in having the matter heard by a labour arbitrator, this Board relies on *Amalgamated Transit Union, Local 583 v. Calgary (City)*: "The larger concern, and a legitimate one, is that the process is less expeditious than the employer would like. However, until the legislature says otherwise, efficiency alone is not a reason to restrict access to the human rights complaints process."

Based on the above reasons, the Board rejects HRM's motion with respect to all three preliminary matters.

GILLES DEVEAU, CHAIR
BOARD OF INQUIRY