IN THE MATTER OF:	***The Human Rights Act,*** R.S.N.S., 1989 c.214, Amended 1991 c. 12
	-and-
IN THE MATTER OF:	5(1)(d)(m)
	-and-
IN THE MATTER OF:	A Complaint under the ***Human Rights Act***
	By Debbie Reid, Valerie Munroe and Janis MacDonald, Complainants
	against Town of Truro, Respondent
BEFORE:	Kenneth D. Crawford, Q.C., Chair
DATE OF DECISION:	April 29, 2009
PLACE:	Truro, Nova Scotia
APPEARANCES BY:	Jennifer H. Ross, Counsel for the Nova Scotia Human Rights Commission
	David Fisher, Counsel for the Police Association of Nova Scotia (PANS) and the Complainants
	Eric B. Durnford, Q.C., Counsel for Town of Truro

NOVA SCOTIA HUMAN RIGHTS COMMISSION

Complaint under the *Human Rights Act*
R.S.N.S., 1989, c. 214, as Amended 1991 c. 12

Complainants	**Respondent**
Debbie Reid	Town of Truro
Valerie Munroe	
Janis MacDonald	

Nature of Complaint	**Case Number 02.0129 (B)**
Employment/Sex	
Section 5 (1)(d)(m)	

DECISION OF THE BOARD OF INQUIRY

BACKGROUND

On 16, March, 2008, I was appointed as a Board of Inquiry under the ***Nova Scotia Human Rights Act,*** R.S.N.S., 1989, c. 214, amended 1991 c. 12, to investigate, seek settlement and decide the complaints of Debbie Reid, Valerie Munroe and Janis

MacDonald, alleging discrimination against them because of "employment" / "sex" contrary to Section 5(1)(d)(m) of the ***Nova Scotia Human Rights Act*** (hereinafter referred to as the "Act").

On 22 March, 2008, I received copy of a letter from Eric Durnford directed to Connie Bollivar, Chairperson of the Human Rights Commission indicating he intended to challenge my appointment by making an application for a judicial review to the Nova Scotia Supreme Court.

Mr. Durnford subsequently abandoned the above application and on 14 May, 2008 by teleconference with the solicitors for the parties and I, Mr. Durnford advised he intended to make a preliminary application before me sitting as a Board of Inquiry to decide whether I had the jurisdiction to hear the complaints and if my determination was in the affirmative, then I should add the Police Association of Nova Scotia (Union), Local 211 as a Respondent, pursuant to Section 33(a) of the Act.

The matter came on for hearing on 16 October, 2008 at Truro, Nova Scotia.

THE COMPLAINTS

In February 2003, the Complainants, Debbie Reid, Janis MacDonald and Valerie Munroe filed complaints with the Nova Scotia Human Rights Commission alleging the Town of Truro discriminated against them in that they were paid less by the Town of Truro for work of equal value than male employees who had less skill, less seniority and less experience.

The Complainants are civilians who work for the Truro Police Department and are members of the Police Association of Nova Scotia (PANS), Local 211, which is the union that represents police employees. They are employed in the positions of Administrative Assistant, Operations Assistant and Court Records Assistant.

The Complaints are made by virtue of Section 5(1)(d)(m) of the ***Nova Scotia Human Rights Act*** which provides that no person shall discriminate against an individual in respect of employment because of their sex.

PRELIMINARY MOTIONS

The Town takes the position that this Board of Inquiry has no jurisdiction pursuant to the *Human Rights Act* to hear complaints regarding pay equity as this issue is specifically addressed in the Nova Scotia *Labour Standards Code* and the *Pay Equity Act.* In other words, the Town asserts there is nothing expressed or implied in the *Human Rights Act* which gives the Board the power to consider complaints which are in reality, pay equity claims.

The Town argues alternatively that if this Board has jurisdiction to consider the complaints, it should exercise its jurisdiction pursuant to section 33(e) of the *Human Rights Act* and add the Union as a respondent.

LEGISLATION

The ***Nova Scotia Human Rights Act***, as amended, provides:

2 The purpose of this Act is to

(a) recognize the inherent dignity and the equal and inalienable rights of all members of the human family;

(b) proclaim a common standard for achievement of basic rights by all Nova Scotians;

(c) recognize that human rights must be protected by the rule of law;

(d) affirm the principle that every person is free and equal in dignity and rights;

(e) 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; and

(f) extend the statute law relating to human rights and provide for its effective administration;

3 (b) "Commission" means the Nova Scotia Human Rights Commission.

Meaning of Discrimination

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

5(1) No person shall in respect of
(d) employment
discriminate against an individual or class of individuals on account of
(m) sex

24(1)(a) the Commission shall administer and enforce the provisions of this Act;

29(1) the Commission shall inquire into and endeavour to effect a settlement of any complaint of an alleged violation of this Act where

(a) the person aggrieved makes a complaint in writing on a form prescribed by the Director; or

(b) the Commission has reasonable grounds for believing that a complaint exists.

32 **(1)** When, at any stage after the filing of a complaint and before the commencement of a hearing before a board of inquiry, a settlement is agreed on by the parties, the terms of the settlement shall be referred to the Commission for approval or rejection.

(2) Where the Commission approves or rejects the terms of a settlement referred to in subsection (1), it shall so certify and notify the parties.

32A **(1)** The Commission may, at any stage after the filing of a complaint, appoint a board of inquiry to inquire into the complaint.

33 The parties to a proceeding before a board of inquiry with respect to any complaint are:

(a) the Commission;
(b) the person named in the complaint as the complainant;
(c) any person named in the complaint and alleged to have been dealt with contrary to the provisions of this Act;
(d) any person named in the complaint and alleged to have contravened this Act; and
(e) <u>any other person specified by the board</u> (underlining added) upon such notice as the board may determine and after the person has been given an opportunity to be heard against joinder as a party.

Labour Standards Code

The *Labour Standards Code* contains the following provisions which provide for equal pay for male and female employees for "substantially the same work" and provides for the ability of an employee to file a complaint with the Director of Labour Standards:

Equal pay for women and men

57(1) An employer and any person acting on his behalf shall not pay a female employee at a rate of wages less than the rate of wages paid to a male employee, or a male employee at a rate of wages less than the rate of wages paid to a female employee, employed by him for substantially the same work performed in the same establishment, the performance of which requires substantially equal skill, effort and responsibility and which is performed under similar working conditions.

(2) Where an employer or person acting on the employer's behalf establishes that a different rate of wages is justified based on payment in accordance with

(a) a seniority system;

(b) a merit system;

(c) a system that measures wages by quantity or quality of production; or

(d) another differential based on a factor other than sex,

A difference in the rate of wages between a male and a female employee based on any of the factors referred to in clauses (a) to (d) does not constitute a failure to comply with this Section.

(3) No employer shall reduce the rate of wages of an employee in order to comply with this Section.

(4) Every employer shall post and keep posted in a conspicuous place in the employer's establishment, a copy of this Section so that all employees may have ready access to and see the same.

Complaint to Director or Tribunal

58(1) An employee who is denied equal pay to which the employee is entitled by Section 57 may make a complaint to the Director in accordance with Section 21.

(2) An employee who has made a complaint pursuant to subsection (1) and who is not satisfied with the result may make a complaint to the Tribunal in accordance with Section 23.

Pay Equity Act

2 The purpose of this Act is to increase the pay of employees in classes which are predominantly female where it is determined, by the process set out in this Act, that, by reason of sex discrimination, those employees are paid less than they should be.

3(1) In this Act,

(b) "classification" means a position or group of positions that have the same classification title, require the same or like qualifications and have the same salary grade or range of salary rates;

(j) "female-dominated class" means a group of ten or more employees with the same employer in the same classification, where sixty per cent or more of the employees are female;

(m) "male-dominated class" means a group of ten or more employees with the same employer in the same classification, where sixty per cent or more of the employees are male;

4(1) This Act applies to

(a) employees in the Civil Service, corrections employees; highway workers and employees of the Victoria General Hospital and the Nova Scotia Hospital who are not in the Civil Service and, in respect of those persons, Her Majesty in right of the Province;

(b) Crown corporations, hospitals and school boards and to their employees; and

(c) universities, municipalities and municipal enterprises and to their employees; and

(d) public-sector corporations or bodies specified in the regulations and to their employees.

(2) Nothing in this Act affects the provisions in the *Human Rights Act* and the *Labour Standards Code* prohibiting discrimination based upon sex (underlining added);

12 Within six months of the pay equity process beginning, an employer and all of its employee representatives shall endeavor to agree upon a single system, that does not discriminate on the basis of sex, for the evaluation of all female-dominated classes and male-dominated classes employed by the employer and, where there is failure to agree within the six months, a determination shall be made within a further two months by the Commission and such determination is an agreement for the purpose of Section 13.

13(1) Upon agreement on an evaluation system and within twenty-one months of the pay equity process beginning, an employer and all of its employee

representatives shall apply, or cause to be applied, the agreed-upon evaluation system to determine and compare the value of the work performed by the female-dominated classes and male-dominated classes employed by the employer and to eliminate sex discrimination in pay for work performed by employees in female-dominated classes.

(2) Where the Commission is of the opinion that an employer and its employee representatives are not applying the agreed-upon evaluation system in a timely fashion, the Commission may make such determinations as it considers necessary to complete the application of the evaluation system within the required time.

(3) Sex discrimination in pay is to be identified by undertaking comparisons between each female-dominated class in an employee unit and all male-dominated classes employed by the employer, whether in the same or another employee unit, in terms of pay and in terms of the value of the work performed.

(4) In making comparisons required by this Section, there is no sex discrimination in pay where a pay difference is the result of

(a) a formal seniority system that does not discriminate on the basis of sex;

(b) a temporary employee-training or employee-development program or assignment which is equally available to male and female employees and leads to career advancement for those involved in the program or assignment;

(c) a merit pay plan that is based on formal performance ratings, that has been brought to the attention of the employees and that does not discriminate on the basis of sex;

(d) a skills shortage that is causing a temporary inflation in pay because the employer is encountering difficulties in recruiting employees with the requisite skills.

(e) The criteria to be applied in determining the value of work as required by this Section are the skill, effort and responsibility normally required in the performance of the work and the conditions under which the work is performed;

Section 17 of the Act sets out the comparator groups to consider for achieving pay equity:

17 Pay equity is achieved in a female-dominated class when the pay rate for the class is equal to

(a) where there is only one male-dominated class of the same employer performing work of equal or comparable value, the rate of pay of that class;

(b) where there are two or more male-dominated classes of the same employer performing work of equal or comparable value, at least the pay rate of the class with the lowest pay rate;

(c) where there is no male-dominated class of the same employer performing work of equal or comparable value and only one male-dominated class with a previously higher pay rate and performing work of lower value, the pay rate of that class; or

where there is no male-dominated class of the same employer performing work of equal or comparable value and two or more male-dominated classes with a previously higher pay rate and performing work of lower value, the pay rate of the class with the highest pay rate.

ARGUMENT AND LEGAL PRINCIPLES – RESPONDENT'S SIDE

Jurisdiction

Eric Durnford, solicitor for the Town of Truro argues this Board of Inquiry has no jurisdiction to hear pay equity complaints under the Nova Scotia Human Rights Act. He asserts there are two pieces of legislation which expressly deal with pay equity; namely, the *Labour Standards Code* and the *Pay Equity Act.* The Town refers to sections 3(b), 4, 24(1) and 29(1) of the *Human Rights Act* (hereinafter called the "Act") to emphasize its position that the Commission and Board of Inquiry are creatures of the *Act* and that jurisdiction is tied inextricably and exclusively to the Act. Section 3(b) defines the Commission. Section 4 explains the meaning of discrimination. Section 24(1)(a) deals with the Commission's responsibility to administer and enforce the provisions of the Act and section 29(1) describes the complaint process and speaks to the Human Rights Commission inquiring into and endeavouring to effect settlements of complaints.

The Town contends the effect of the provisions regarding equal pay in the Nova Scotia *Labour Standards Code* and the *Pay Equity Act* together with the exclusion of pay equity provisions in the *Human Rights Act* was intended by the Legislature to exclude jurisdiction to consider complaints of unequal pay by a Board of Inquiry appointed under the Act.

Mr. Durnford's position is that the Human Rights Commission and its subordinate delegates, such as the Board of Inquiry are statutorily limited entities and in support of his proposition, he heavily relies on the Nova Scotia Court of Appeal case of *Aylward v. Dalhousie University (2002), N.S.C.A. 76; (2002), 205 N.S.R. (2d) 325.* Before dealing with the facts of the case, I refer to Mr. Durnford's submission at the hearing wherein he indicated that the Nova Scotia Supreme Court had awarded costs on a solicitor/client basis. He was incorrect. Costs were awarded on a party and party basis. The Court found that the Human Rights Commission's handling of the matter, while problematic, was not sufficiently egregious to warrant solicitor/client costs. Nevertheless, the costs awarded were of great magnitude.

The facts in *Aylward* can be briefly stated. In August, 1999, Ms. Aylward, a professor at Dalhousie Law School, wrote to the Human Rights Commission advising she intended to file a complaint against Dalhousie University, the University President, the Dean of the Law School and certain colleagues of the Faculty of Law, alleging discrimination on the basis of her color. She indicated there was potential for a conflict of interest with the matter being dealt with by the Commission due to the relationship she and other individuals named in the complaint had with the Commission. Previously, Ms. Aylward sat as a Commissioner on the Board of the Human Rights Commission. Moreover, one of the respondents to her complaint was a professor at the Law School and was previously the Executive Director of the Commission.

The then Executive Director and the Commission, because of an alleged apprehension of bias, decided to refer the matter to the office of the provincial

Ombudsman to act as a "trustee". The Ombudsman's office, the Executive Director advised, was to determine an independent body to investigate the complaints. Subsequently, the Ombudsman entered into discussions with the Ontario Human Rights Commission to have it deal with Ms. Aylward's complaint. Her complaint was not filed with the Commission (N.S.) but rather, was filed in August of 2000 with the Ontario Human Rights Commission.

Dalhousie University subsequently made application to the Supreme Court of Nova Scotia requesting the Court quash the decision of the Nova Scotia Human Rights Commission which had delegated its authority to the Ombudsman and the Ontario Human Rights Commission. In a decision of Scanlan J. (*Cowan vs. Aylward (2001*), 193 N.S.R. (2d) 111; (2001), 39 C.H.R.R. 312), he found the Commission did not have the authority to delegate its powers. Justice Scanlan spoke of the fundamental principle of administrative law that statutory bodies are required to act within the limits of their statutory authority and that any actions carried out by such bodies without lawful authority would have no legal effect.

Ms. Aylward then appealed to the Nova Scotia Court of Appeal (*Dalhousie University vs. Aylward* [2002] N.S.J. No.267; 205 N.S.R. (2d) 324), and, writing for the Court, Hallett, J.A. affirmed the decision of the Nova Scotia Supreme Court. The Court referred to section 29 of the Act which provides that the Commission shall instruct the Director or some other officer to inquire into and endeavour to effect a settlement of any complaint where the person aggrieved makes a complaint in writing or the Commission has reasonable grounds for believing that a complaint exists.

The Court then referred to section 32 which deals with what occurs after the filing of a complaint and before the commencement of a hearing before a board of inquiry.

Hallett, J.A. stated at para. 34:

> In my opinion, s. 29 establishes what is the core function of the Executive Director and the Commission with respect to complaints. Pursuant to s. 29, where a person has made a written complaint or where the Commission has reasonable grounds for believing that a complaint exists, the Commission shall instruct the Director or some other officer to both inquire into the matter and endeavour to effect a settlement of any complaint of an alleged violation of the Act. However, pursuant to s. 32(1) it would appear that it is only <u>after</u> (underlining added) the filing of a compliant, and before the commencement of a hearing by a board of inquiry, that a settlement that is agreed upon by the parties shall be referred to the Commission for approval or rejection. This provision of s. 32 seems to be a pre-condition, that before a settlement that is agreed to by the parties can be submitted to the Commission for approval or rejection there must have been a written complaint filed.

He continued at paras. 50-52:

> On September 29, 1999, when the Executive Director authorized the Ombudsman to handle Professor Aylward's complaint, there was no express authority in the Act for the Executive Director to delegate to the Ombudsman that function. It is clear from the Executive Director's letter of September 29, 1999 to Professor Aylward that the Commission intended that the Ombudsman would also determine the independent body to investigate the complaint. <u>It is likewise important to note that the Executive Director did more than simply authorize the Ombudsman to investigate, which power might be implied from the wording of s. 32A (3) of the Act, but rather, the Executive Director intended to and did delegate to the Ombudsman the duty of handling the</u>

> complaint including the power to determine what independent body would investigate the complaint (underlining added).

> There is nothing in the Act that empowers the Executive Director to delegate her duty to endeavour to effect a settlement to the Ombudsman. The September 29, 1999, letters and the subsequent acquiescence of the Commission in what was being undertaken by the Ombudsman and the Ontario Human Rights Commission impliedly endorsed the actions taken by the Ombudsman in engaging the Ontario Human Rights Commission to investigate and to endeavour to settle the complaint.;

> The Act empowers the Commission to appoint boards of inquiry to inquire into complaints. That is a function to be performed by the Commission. There is nothing in the Act which authorizes the Commission to delegate this function. The Legislature intended that the Commission would appoint boards of inquiry. These actions taken by the Executive Director and the Commission show an abdication (underlining added) of the respective duties imposed on them pursuant to ss. 29 and 32A(1) of the Act. There is no express power in the Act to delegate the mandatory duty to inquire into and attempt to effect a settlement nor is there a power to delegate to the Ombudsman the function of appointing another body to perform these duties. This is what happened.

Based on the foregoing, the Town strongly suggests there is nothing in the *Act* expressed or implied that gives the Commission the power to deal with pay equity matters. Indeed, Mr. Durnford is of the view that the Complainants and the solicitor for the Human Rights Commission have referred to this matter as a pay equity complaint and thus, this reinforces the Town's position that the *Human Rights Act* does not cover such

situations. This will be dealt with in more detail when attention is turned to the arguments of the Commission and the Complainants.

Mr. Durnford contends that pay equity is not a human right in Nova Scotia. For ease of reference, I refer to pp. 27-28 of his written Submissions where he asks:

> Is it a human right in Nova Scotia to not pay a woman or a man equal pay where there jobs are of equal value. That's the question. Is it a human right. The answer, Mr. Chair, is no. That is not a human right in this Province, for I stress again, for provincially regulated employees such as the ones in this case, meaning those that are working in the Provincial labour jurisdiction.
>
> There is no such human right of pay equity. It does not exist.
> In Nova Scotia, pay equity is a labour standard, it is not a human right. It is a labour standard. And this labour standard is enforced by the will of the legislature through the *Labour Standards Code* itself and the *Pay Equity Act*, those two statutes. It's a labour standard. It is not a human right. A human right is only that which the legislature specifies as a human right.

In *Lockhart v. Village of New Minas* (unreported, 17 March, 2008, N.S. Board of Inquiry, Dennis James), Ms. Lockhart alleged she was paid less for her work than male employees employed by the same Municipal unit. The complaint was one of unequal pay for work of equal value. The Board, hearing the matter as a preliminary motion, found that it had jurisdiction under the *Human Rights Act* to hear pay equity complaints. Section 4(2) of the *Pay Equity Act* provides that nothing in the *Act* affects the provisions of the *Human Rights Act* and the *Labour Standards Code* prohibiting discrimination based upon sex. Bd. Chair James stated at p.7:

> Section 4(2) advises that nothing within the *Pay Equity Act* is intended to abrogate provisions within the *Act* prohibiting discrimination based upon sex. Sections 5(1)(d) (m) of the *Act* prohibits discrimination based upon sex. There is no other expressed provision in the *Act* that does

> prohibit discrimination in the employment relationship based upon sex; no other section that may permit a board to consider a complaint of discrimination based upon unequal pay for work of equal value. If as the Village suggests the *Act* does not provide the jurisdiction to deal with pay equity complaints, that begs the question what Section 4(2) of the *Pay Equity Act* was intended to protect against. In the Board's view, the only reasonable interpretation was that the Legislature expressly authorized the *Act* as part of the legislative network that addresses the issue of unequal pay for work of unequal value in Nova Scotia. In Section 4(2) the legislature recognizes the intersection and interaction of all three pieces of legislation – the *Human Rights Act,* the *Labour Standards Code* and the *Pay Equity Act*.

Mr. Durnford is of the view that *Lockhart* was wrongly decided. In a well expressed argument, he argues the *Pay Equity Act* is not complaint driven but rather, a regulatory mechanism to deal with systemic pay equity concerns. He stresses section 4(2) does nothing more than establish that the prohibitions, protections and complaint procedures in the *Labour Standards Code* and the *Human Rights Act* remain intact, but that it should not be interpreted as providing a greater jurisdiction to a Board of Inquiry.

Mr. Durnford heavily relies on the case of *University of Saskatchewan v. Dumbovic*, [2007] S.J. No. 317; 60 C.H.R.R.D./413 (Sask. Q.B.). The Court found that Section 16 of the *Saskatchewan Human Rights Code* (a successor to Section 5(1)(d)(m) of our *Act*) did not confer original jurisdiction on a human rights tribunal to adjudicate a complaint of equal pay for equal or similar work. The facts can be briefly stated. Five steno-clerks who were employed at the University of Saskatchewan claimed gender discrimination based on their wage schedules and used dissimilar male-dominated job titles for comparison. The Court found that a Human Rights Tribunal under the *Saskatchewan Human Rights Code* lacked jurisdiction to hear complaints seeking equal pay for work for equal value. Ball J., wrote at para.108:

> Adjudicators must understand the difference between interpretation

> and application of the law, on the one hand, and creation of the law, on the other. In this case, the legal and regulatory structures necessary to implement, administer and enforce a regime of equal pay for work of equal value in Saskatchewan workplaces can only be created by appropriate legislation. Any attempt to construct them under the guise of interpreting Subsection 16(1) of the *Code* would go well beyond acceptable limits of statutory interpretation. It would intrude into the role and responsibility of the legislature.

JOINDER OF UNION - TOWN'S ARGUMENT

If I find this Board of Inquiry has jurisdiction to hear the complaints, the Town's position is that I should add the Complainants' Union as a Respondent to the complaint. I receive my authority for doing so by virtue of section 33(e) of the *Act* which provides that the parties to a proceeding before a board of inquiry with respect to any complaint are….and any other person specified by the board upon such notice as the board may determine (underlining added) and after the person has been given an opportunity to be heard against joinder as a party.

The Complainants were and are members of a bargaining unit represented by the Police Association of Nova Scotia, Local 211 (PANS). On certification, the Union acquired exclusive bargaining authority on behalf of the employees.

Unions can be liable for acts of discrimination if they participate in negotiating a collective agreement which contains discriminatory terms. This is what occurred in *Central Okanagan School District v. Renaud,* [1992] 2N.C.R. 970; [1992] S.C.J. No. 75. The Appellant, a Seventh-day Adventist was a unionized employee who worked for the respondent school board Monday to Friday. The work schedule which formed part of the collective agreement included a shift which included Friday evening.

The Appellant's religion prevented his working on the Sabbath; that is, from sundown Friday to sundown Saturday. The only practical accommodation was to create a shift from Sunday to Thursday. However, this accommodation involved an exception to the collective agreement and required union consent. The union demanded the school board rescind the Sunday-Thursday shift proposal and threatened a grievance. After some attempts to accommodate the appellant, the school board eventually terminated his employment on his refusal to complete the regular Friday night shift.

The Appellant then filed discrimination complaints against the school board and the union. The Appellant, at one stage in the proceedings amended his claim to join the Union in his complaint.

The Court found discriminatory effects had resulted from the creation of the foregoing workplace conditions. Both the employer and the union had an impact on setting these conditions and thus both were responsible for remedying any adverse effects caused by those conditions. Moreover, neither the school board nor the union discharged its duty to accommodate. Sopinka J., writing for the majority said at p. 990:

> As I have previously observed, the duty to accommodate only arises if a union is party to discrimination. It may become a party in two ways;
>
> First, it may cause or contribute to the discrimination in the first instance by participating in the formulation of the work rule that has the discriminatory effect on the complainant. This will generally be the case if the rule is a provision in the collective agreement. It has to be assumed that all provisions are formulated jointly by the parties and that they bear responsibility equally for their effect on employees. I do not find persuasive the submission that the negotiations be re-examined to determine which party pressed for a provision which turns out to be the cause of a discriminatory result. This is especially so when a party insisted that the provision be enforced. In this respect, I am in agreement with the majority of the Ontario Divisional Court in *Office and Professional Employees International Union, Local 267 v. Domtar Inc*. (Ontario Divisional Court, March 19, 1992, unreported). That case dealt with a provision in a collective agreement which required the

> complainant to work one Saturday in six for four hours. This conflicted with her religious beliefs. The majority view expressed by Campbell J. was that the inclusion of the Saturday work schedule was merely a recognition by the union of the company's policy in this regard. The majority concluded, however, that the presence of the provision in the agreement was a barrier to the continued employment of the complainant, and the union, having aided in the creation of the barrier, was jointly liable to her.
>
> Second, a union may be liable for failure to accommodate the religious beliefs of an employee notwithstanding that it did not participate in the formulation or application of a discriminatory rule or practice. This may occur if the union impedes the reasonable efforts of an employer to accommodate. In this situation, it will be known that some condition of employment is operating in a manner that discriminates on religious grounds against an employee and the employer is seeking to remove or to alleviate the discriminatory effect. If reasonable accommodation is only possible with the union's cooperation and the union blocks the employer's effort to remove or alleviate the discriminatory effect, it becomes a party to the discrimination……..

Mr. Durnford opines the discriminating act in the present case was the Union's agreement to set wage rates during the negotiation of collective agreements which spanned a point in time from 1997 to 2008. He further contends the Union cannot now state that it does not want to be responsible for the wage rates it negotiated and subsequently formed terms of the three collective agreements. The Town emphasizes that it is not requesting the three Complainants be added as Respondents but rather, that the Union acting as a bargaining agent for the Complainants be added notwithstanding the Complainants' Local only consists of the three Complainants.

In summary, the Town's position is that given the Union's role in negotiating the wage rates and the fact that the Union was a party to the Collective Agreements which contain the impugned wage rates, it is only logical to conclude that the Union be held

responsible for any resulting discriminatory effect of the wage rate provisions. Thus, the Union should be joined as a party to the complaint.

To support his position on joinder, Mr. Durnford referred to the following cases:

> *Canada Safeway Limited v. Alberta Human Rights and Citizenship Commission*, (2000), AB.Q.B. 897
>
> *Morrison v. O'Leary Associates*, [1990] N.S.H.R.B.I.D. No. 3
>
> *Taylor v. Coquitlan* (City), [2005] B.C.H.R.T.D. No. 40
>
> *Gohm v. Domtar Inc.* (1992), 39 C.C.E.L.213; 89 D.L.R.(4th) 305

ARGUMENT AND LEGAL PRINCIPLES – COMPLAINANTS' SIDE

Jurisdiction

Ms. Ross, solicitor for the Human Rights Commission acknowledges the *Aylward* case, *supra*, stands for the proposition that the Commission cannot exceed its statutory authority to perform functions not contemplated under the *Act* or its *Regulations*. She states the problem in *Hayward* was that the Executive Director delegated her authority for the investigation of, or the inquiry into the complaint, to the Ontario Human Rights Commission which to use her words, "was clearly not permissible under the *Act*".

However, Ms. Ross is of the view *Hayward* has no application to the fact situation. She proceeds to discuss the purpose of the *Act* which is set out in section 2, *supra*, under the heading, **Legislation**. She makes reference to the overarching principle of statutory interpretation with respect to human rights legislation which is that it is, quasi-constitutional. That is to say, it is more than ordinary. It is not quite constitutional but it is more than ordinary legislation and must be interpreted in a broad, liberal and purposive manner.

Thus, human rights legislation is to be interpreted broadly keeping in mind the purpose of the *Act* which is set out in section 2 as follows:

> The purpose of this Act is to…….
> (e) 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.

Ms. Ross makes reference to section 4 of the *Act* which defines discrimination to mean that one discriminates when that person makes a distinction based on a characteristic that has the effect of imposing burdens or disadvantages on another individual which are not imposed on other individuals or classes of individuals in this society.

Section 5(1)(d)(m)of the *Act* deals with discrimination in employment. It states that no one shall discriminate in employment against an individual because of their sex or gender.

Section 6 of the *Act* deals with exceptions; that is, situations which would not constitute discrimination. However, there is no mention of pay equity complaints being considered as an exception under this section.

Section 29(1) of the *Act* speaks of the requirement of the Commission to inquire into and endeavour to effect a settlement of a complaint that is in violation of the *Act*. Where the parties to a complaint are unable to resolve same through settlement and the Commission is of the view that the matter should be referred to a board of inquiry, the Commission can under section 32A (1) appoint a board of inquiry.

Based on the foregoing, the solicitor for the Commission distinguishes the *Aylward* case from our fact situation. She argues the Commission in *Aylward* went outside of its mandate under the *Act* to inquire into the complaint in that it handed over the matter to the Ontario Human Rights Commission. Here, the Commission investigated the complaints and subsequently referred the matter to a board of inquiry.

Ms. Ross takes issue with what she referred to as, "Mr. Durnford's mischaracterization of this matter as a pay equity complaint". She argues she used the term in her submissions to mean that this matter was an employment discrimination case based on sex. She further indicates she described the matter as pay equity, "but at its' heart it's a complaint of discrimination based on sex".

She makes reference to the exact wording of one of the complaints as follows:

> I, Debbie Reid complain against the Town of Truro that on or about June, 1987 to present and continuing, it did discriminate against me in the matter of <u>employment</u>

> because of my sex (underlining added). The particulars of my complaint are as follows…… I have been an employee of the Town of Truro since 1987. I am presently a Court Records Assistant for the Truro Police Service….. My duties include preparing all documents for court purposes, recording charges and outcomes, notifying police officers of court dates and arranging subpoenas…..

Ms. Ross takes strongly disagrees with Mr. Durnford's assertion that pay equity is not a human right. I quote her instructive argument at from the transcript of proceedings:

> Saying that pay equity is not a human right is (sic) with respect - that's just erroneous. What is a human right is the freedom to be - or the ability to be free from discrimination based, in any of those contexts, on any of those prohibitive grounds. Clearly what we have here is an allegation that in the context of employment three employees of the Town of Truro were discriminated against because of nothing more then their sex, in that they are paid less for the work that they do, which is of equal value to the work done by male employees who are paid more. So this is very clearly just a matter of sex-based discrimination. It can be termed pay equity, in the same way that discrimination based on sex, if there is a harassing character to it, can be characterized as sexual harassment, in the same way that if it happens to relate to pregnancy it can be a pregnancy-related complaint. But at the core of it, it's just clearly a matter of discrimination based on nothing more than the fact that these women are women and they are paid less in their employment than the men are. It's sex-based discrimination. Whether pay equity happens to also fall under the realm of the labour relations world is not the issue. It very clearly falls under the *Human Rights Act*. And that's certainly a finding which has been made by another board of inquiry, in the *Lockhart* decision, just about six months ago.

The question of whether pay equity complaints can be dealt with under the sex discrimination provisions of provincial human rights legislation was dealt with by the Ontario Divisional Court in *Nishimura v. Ontario* (Human Rights Commission) (1989), 11 C.H.R.R.D/246 (Ont. Div. Crt.). The Court found that unequal pay for work of equal

value can constitute sex discrimination under the *Human Rights Code* (now the *Ontario Human Rights Act)* and that failure to provide equal pay for work of equal value fell within the definition of discrimination. Gray J., discussed at para. 19, four other reasons as to why pay equity complaints fell under the auspices of sex discrimination in the *Code*:

> Four other principles support my conclusion. First, that a broad and liberal construction is required when one is considering human rights legislation, because of its quasi-constitutional status….Secondly, that with respect to the *Code*, it is not necessary to provide an intent to discriminate. Thirdly, that a decision to dismiss as outside the jurisdiction of the Commission should only be reached in the clearest cases, and fourthly, that the question of whether the very broad language of the *Code* includes structural and pay discrimination is a question to be decided by the Commission itself.

The Court also found that the existence of the *Employees Standards Act* and the *Pay Equity Act* did not preclude pay equity complaints from being heard by the *Human Rights Commission.*

As earlier stated, the Town strongly relied on the *Dumbovic* case in asserting that human rights tribunals lack jurisdiction to hear complaints where a complainant is seeking equal pay for work of equal value. The Commission argues that *Dumbovic* is not binding on a board of inquiry in Nova Scotia. Ms. Ross states that until a case is heard in either the Nova Scotia Court of Appeal or the Supreme Court of Canada, cases from other jurisdictions may be persuasive but not necessarily binding on a Nova Scotia board of inquiry.

In addition to the *Nishimura* case, the Commission relies on the following cases to support its position that human rights tribunals have jurisdiction to hear pay equity complaints. In *Canada Safeway Ltd. v. Saskatchewan (Human Rights Commission)* (No.2) (1999), 34 C.H.R.R.D/409, the Saskatchewan Queen's Bench reached an opposite conclusion from that in *Dumbovic*. Wimmer, J. at para. 13 said:

> Counsel for Canada Safeway dismisses *Nishimura* as "wrongly decided" but I am not so sure. In any event, it seems to me implicit in the Court of Appeal disposition of Canada Safeway's first application that the class complaint, embracing as it does both the employer and the unions representing the employees, is within the scope of the Commission's authority to investigate. It is for a board of inquiry, should one be appointed following the investigation, to decide whether facts established by the evidence constitute the kind of gender discrimination disallowed by the *Code.* Should the board commit some reviewable error in the process, then it is the time for aggrieved parties to seek a remedy.

The Commission emphasizes *Dumbovic* did not overturn the above *Canada Safeway* case as both were decisions of the Saskatchewan Queen's Bench.

The Saskatchewan Court of Appeal in *Canada Safeway Ltd. v. Saskatchewan (Human Rights Commission)* (1997), 29C.H.R.R.D/435 implicitly decided that the *Saskatchewan Human Rights Code* had jurisdiction to hear pay equity complaints. The main issue was whether a pay equity complaint filed under the *Saskatchewan Human Rights Code* as discrimination based on sex should be certified as a class complaint. The complainant was a part-time cashier who was earning less than the predominantly male

food clerks. The complainant alleged female cashiers of the Company were victims of sex discrimination based on the Company maintaining different terms and conditions as to pay for the female group mainly composed of women, as compared to the food clerk group which was predominantly male. At both the Commission and the Queen's Bench level, both levels had certified the complaint against the Company as a class complaint. The Court of Appeal reversed that decision and ruled the requirements for the class action under the *Saskatchewan Human Rights Regulations* were not proven. The matter was sent back to the human rights tribunal. Implicit in the decision was that the complaint was to be heard as a pay equity matter under the Saskatchewan Human Rights Code.

There were some pay equity cases emanating from the Saskatchewan Court of Appeal which were decided following referral to a human rights tribunal pursuant to the Saskatchewan *Labour Standards Act*. In *Pasqua Hospital v. Harmatiuk* (1987), 8C.H.R.R.D/4242, the Court of Appeal affirmed the decisions of the Human Rights Commission and the Court of Queen's Bench finding that the hospital had discriminated against female employees by paying them less than male employees performing similar work.

Pasqua Hospital dealt with complaints which were filed by fifteen women employed in the Hospital's housekeeping department, pursuant to section 17(1) of the *Labour Standards Act* which prohibits discrimination between male and female employees carrying out similar work in the same establishment under similar work conditions and which require similar skill, effort and responsibility. They alleged they were paid less than the men who were employed as caretakers at the Hospital. Note, the

wording of section 17(1) of the Saskatchewan *Labour Standards Act* is identical to the wording of section 51(1) of the Nova Scotia *Labour Standards Code*.

In the *Pasqua* case, the Director of Labour Standards appointed an officer in an attempt to effect a settlement. When this proved unsuccessful, the Director requested the Saskatchewan Human Rights Commission conduct an inquiry into the complaints under the *Human Rights Act*. Section 19(1) of the *Labour Standards Act* which gives the director, provides:

> Where the officer appointed pursuant to section 18 is unable to effect a settlement, the director may advise the chairperson of the human rights tribunal panel appointed pursuant to the Saskatchewan *Human Rights Code* and request the chairperson to appoint a human rights tribunal to conduct an inquiry into the matter.

The Court found the Director of Labour Standards had the power to appoint a Human Rights Tribunal to hear a pay equity complaint.

A similar decision occurred in the Saskatchewan Court of Appeal case of *Solar Sales Limited v. Schlitz* (1983), 4C.H.R.R.D/1605, where a complaint was initially made to the Department of Labour pursuant to section 17 of the *Labour Standards Act.* When a settlement could not be effected, the Director requested that the Human Rights Commission appoint a human rights tribunal to hear the complaint.

As the *Schlitz* and *Pasqua Hospital* cases were heard by a human rights tribunal convened pursuant to labour standards legislation, Ms. Ross argues there was clear legislative intent which granted a human rights tribunal the jurisdiction to hear pay equity complaints.

The Commission submits the *Lockhart* case, *supra*, as most persuasive on the matter of jurisdiction of a human rights tribunal to hear pay equity complaints. Ms. Ross on p. 5 of the Board's decision as follows:

> If one accepts pay equity as a human right it seems to follow that the violation of the principle of pay equity may constitute sex discrimination under either the general no discrimination provision for an employment relationship, or if present, under an express provision dealing with equal pay for work of equal value.

There is a reference to the *Labour Standards Code* and the *Human Rights Act* in section 4(2) of the Nova Scotia *Pay Equity Act* where it states that nothing in the *Act* will affect the prohibitions against sex discrimination.

Ms. Ross argues the foregoing constitutes an acknowledgment of concurrent rather than exclusive jurisdiction. The findings of the Board in *Lockhart* with respect to section 4(2) are worthy of note at p. 16 of this decision:

> Section 4(2) advises that nothing within the *Pay Equity Act* is intended to abrogate provisions within the *Act* prohibiting discrimination based upon sex. Sections 5(1)(d) and (m) of the *Act* prohibit discrimination based upon sex. There is no other express provision in the *Act* that does prohibit discrimination in the employment relationship based upon sex; no other section that may permit a Board to consider a complaint of discrimination based upon unequal pay for work of equal value. If, as the Village suggests, the Act does not provide the jurisdiction to deal with pay equity complaints that begs the question what Section 4(2) of the Pay Equity Act was intended to protect against. In the Board's view the only reasonable interpretation is that the legislature expressly recognized the Act as part of the legislative network that addresses the issue of unequal pay for work of equal value in Nova Scotia. <u>In Section 4(2) the legislature expressly recognizes the intersection and interaction of all three pieces of legislation - the Human Rights Act, the Labour Standards Code and the Pay Equity Act</u> (underlining added).

Some human rights tribunals have decided they have jurisdiction to hear pay equity complaints notwithstanding respondents' arguments that a pay equity act or labour standards code are the proper forms for hearing such matters. In *Gale v. Miracle Food Mart* (No.2) (1992), 17C.C.H.R.R.D/495 (Ont. Bd. Inq.), a human rights tribunal found it had the jurisdiction to hear pay equity complaints. The Board stated at p.7:

> In any event, the existence of the Employment Standards Act and the Pay Equity Act does not remove complaints from the jurisdiction of the Commission (*Nishimura v. Ontario Human Rights Commission* (1989), 11C.H.R.R.D/246 (Ont. Div. Ct.)). The code is much broader than the Pay Equity Act. It covers more employees and more matters connected with employment. Further, the powers provided to boards of inquiry under s.41 of the Code [1990] are much broader than those available under the Pay Equity Act. Section 47(2) of the Code [1990] states that the Code has primacy over other statutes.

In a recent Saskatchewan case (*Cruise Pratchler v. Wood Creek* (Rural Municipality (No. 281) (2008), C.H.R.R. Doc. 08-068), the tribunal found that it had jurisdiction to hear a pay equity complaint.

JOINDER OF UNION—COMMISSION'S ARGUMENT

If the Board finds it has the power to hear the complaints as pay equity matters, the Commission states the Complainants' Union should not be added as a party to the complaints. Ms. Ross points out the process under the *Human Rights Act* is complaint-driven. That is to say, she/he is at liberty to file a complaint against an individual or an entity whom she/he alleges has committed an act or acts of discrimination.

The Commission refers to the specific complaints and stresses there is no reference to the Union having committed a violation against the Complainants. The

complaint simply states the Town of Truro discriminated against the Complainants in the matter of employment by virtue of their sex.

I refer to pp. 122-123 of the transcript of proceedings wherein the Commission puts forth its argument as to why the Union should not be added as a respondent to the complaints:

> …….I take my Friend's position that this is a very small and atypical example where you've three members of a bargaining unit. But I do take my Friend, Mr. Durnford's comment that the Union itself is an entity separate and apart from the members which comprise it. But with respect to adding the Union as a respondent, there's just no basis for it here. The complaint here talks about a comparative process. It's a comparison of what these employees are paid as compared to what are paid to male employees at the Town of Truro elsewhere. Now, if, for example, the Schedule A to the Collective Agreement, which is the section of the Collective Agreement which sets out the amounts of pay for these particular employees, if that had, for example, other job positions held by male employees and those jobs were paid at the rate of $18.00 or $19.00 an hour, in the terms of the came Collective Agreement, if there were provisions where male employees were paid more than the female employees, <u>then absolutely that would be a case in which the Union should be added as a respondent, because the Union would have been a party to a Collective Agreement which itself contains those discriminatory provisions</u>. (underlining added)…..;

And at p. 125 Ms. Ross states:

> ……Here what we have is a collective agreement that says the operations assistant shall be paid X number of dollars, an administrative assistant shall be paid X number of dollars and the court records assistant shall be paid X number of dollars. There is no comparative basis there. It's not a matter of the operations assistant shall be paid $12.00 an hour and the male staff member shall be paid $17.00 an hour, the discrimination here arises by virtue of the fact that it's the employer here who has set rates which are lower for this group of female works than rates which are paid to male workers <u>in other bargaining units, or even possibly non-unionized employees</u> (underlining added)…..;

And finally at p. 132:

> ……The focus is not on the collective agreement. With respect, that's the red herring here. That's the big red herring. The collective agreement is not the focus. The focus is on the Town of Truro and the rates that it pays other people. Where those rates are different, if the only basis for paying higher rates are because the other employees are male, then that is discrimination. That is a distinction being made based on a characteristic under the Act which has the effect of imposing a disadvantage or a burden on this particular class of individuals. That's the discrimination. There is no need to add the Union as a respondent because there is nothing here on the face of the complaints, there is nothing that I am aware in the context of the investigation to date, which points to any kind of contribution to discrimination by the Union….

To reinforce her position on non-joinder of the Union to the complaint, Ms. Ross referred to *Reid v. Vancouver (Police) (Board)*(No.1)(1993), 27 C.H.R.R.D/283(B.C.C.H.R.). In that case, some female complainants who were employed as police dispatchers complained they were paid less than a group of male employees who worked as firefighter dispatchers. The respondent was the City of Vancouver. Subsequently, the City made application to join the police and firefighter's unions as respondents.

The complainants alleged that the discrimination lay in the differential rates paid to male and female workers who were members of different unions but performing similar work. They were not alleging the discrimination was due to the differential rates of pay to male and female employees <u>in the same union</u> (underlining added).

The tribunal refused to add the unions as respondents. The tribunal stated at para.35:

> Moreover, the potential liability of the Union is not as clear in this case as in *Renaud, supra,* where the Union refused to accommodate a member who was denied the opportunity to practice his religion because of a provision in the collective agreement, or as in *Mossop, supra,* where a provision in a collective agreement was alleged to differentiate between members of the bargaining unit. In this case, it is not alleged that the Union has negotiated wage rates that favour some of its members over others; the complaint relates to a comparison with members of another union;

And at para. 39:

> The injustice that the Police Board may face in having to answer the complaints without the Union facing similar jeopardy must be balanced against the injustice in forcing the complainants to proceed against the Union in which they are members. The courts are clearly reluctant to require a plaintiff to proceed against someone they do not wish to sue, at least in part because of the danger in permitting joinder in such circumstances invites abuse of the process. In the annotations to Annual Practice 1894, Vol. 1 (London: Sweet and Maxwell) at 358, the editors state:
>
> > "Generally—This rule [allowing a judge to add a party] was not intended to apply where the parties sought to be made defendants were persons against whom the plaintiff did not desire to prosecute any claim (underlined in original case), and whom the defendant only wished to add for his own convenience. This rule must be applied strictly, otherwise it may be used in a way exceedingly harassing to plaintiffs".
>
> As I discussed elsewhere in these reasons, the general principle is not absolute; however, strong reasons are required to add a defendant against whom the plaintiff does not wish to proceed. The only human rights case referred to me in which a respondent was added at the request of another respondent is *Thorton, supra.* That case, like *Renaud, supra,* is distinguishable on the basis that the complainant had initially complained against the party added and supported the application.

The solicitor for the Commission argues that since there is an absence of evidence to support a finding that the Union played a role in conduct which was discriminatory to its members, there is no need to add PANS, Local 211, as a respondent.

ARGUMENT AND LEGAL PRINCIPLES - UNION

David Fisher is the solicitor for the Complainants' Union (the Truro Police Association (Civilian Unit), Local 211 of the Police Association of Nova Scotia).

The Police Association of Nova Scotia is a bargaining agent that represents unionized police officers and civilian employees of police departments (through the vehicle of a local union) in the provinces of Nova Scotia and Prince Edward Island. The Association, also known as PANS also provides services to the members of its local unions to assist them in the negotiation and administration of collective agreements along with their ongoing employment relationship with their employers.

The Truro Police Association (Civil Unit), Local 211 of PANS, is an independent union which elects its own executive, bargaining team and makes its own decisions with respect to accepting or rejecting proposed collective agreements. It consists of only three members, the Complainants in this matter.

Counsel for the Complainants has agreed with and adopted the arguments of the Commission as they relate to jurisdiction and wishes to put forth some additional arguments concerning the matter of joinder of the Union as a respondent; that is, provided the Board finds that it has the jurisdiction to hear the complaints.

The Complainants in their submissions argue the Town's request in joining the Complainants is to seek contribution for potential damages in the event the Board finds it has the jurisdiction to hear the complaints and subsequently determines at a board of inquiry that the Town discriminated against the Complainants pursuant to Section 5(1)(d)(m) of the *Act*. Mr. Fisher points out that neither the Town nor the Commission has alleged discrimination against the Union. Nor, he says, was there evidence of any

allegation of discrimination of the Union. He further states there are many instances where unions have actively participated in discrimination against their members. However, there is no evidence of this occurrence in this matter. Thus, he argues, there is no justification to add the Union as a party.

Mr. Fisher distinguished some decisions referred to in Mr. Durnford's written submissions, where unions had discriminated against their members resulting in the unions being added as respondents. In the *Renaud* and *Grohm* cases, *supra*, both dealt with a discriminatory rule created in the collective agreements and imposed by the majority members on a disadvantaged minority. In the present case, he argues no such rule was created in the Complainants' collective agreement nor was it imposed on a disadvantaged minority by a majority of the union members.

The Town of Truro also referred to the *Canada Safeway* case, (Alberta), *supra,* to support its position on joinder. This case dealt with a buy-out program that arose out of a memorandum of settlement between *Safeway* and the union. The result was to exclude fifteen disabled employees from the buy-out program. In effect, the union had negotiated an agreement for all of its employees except a disadvantaged group of fifteen employees. The court ordered joinder of the union because it had discriminated against a minority group of its members. Mr. Fisher argues this situation is inapplicable to this Board of Inquiry as there were no similar negotiations.

The Complainants refer to another case cited by the Town of Truro; viz, *Port Coquitlam, supra.* There, the Complainant alleged the City of Port Coquitlam and the union had discriminated against him by reason of his physical disability. He further alleged that the union had not raised objections nor did it file grievances on his behalf when positions were subsequently filled by other union members. This case arose out of the failure to accommodate and alleged the union had participated in the failure to

accommodate. As a result, the tribunal joined the union as a party. Again, the Complainants say there is no similar situation present.

The Complainants referred to the *Reid* case, *supra*, in the Commission's written submissions and argue *Reid* is very similar to the case before this Board of Inquiry in that it dealt with rates of pay to be found in other collective agreements of different bargaining units. Mr. Fisher referred to the following in *Reid* at para. 7:

> ….Despite their thorough research, counsel were unable to refer me to any cases where a human rights tribunal had added a respondent over the objections of the complainant;

paras. 34-35

> ….In this case, the complainants are not seeking damages from the Union; rather, the Police Board is seeking to share the burden if it is required to pay damages.
>
> Moreover, the potential liability of the Union is not as clear in this case as in *Renaud, supra*, where the Union refused to accommodate a member who was denied the opportunity to practice his religion because of a provision in the collective agreement or as in *Mossop, supra*, where a provision in a collective agreement was alleged to differentiate between the members of the bargaining unit. In this case, it is not alleged that the Union has negotiated wage rates that favour some of its members over others; the complaint refers to a comparison with members of another union;

and at paras. 36-37 and 39:

> In *Local 916, Energy and Chemical Workers v. Atomic Energy of Canada Ltd.* (1984), 5 C.H.R.R.D/2066 (Can. Trib.), The employer sought to add the union as a respondent in an equal pay complaint for reasons similar to those advanced by the Police Board in this case. The Tribunal declined to add the union, reasoning at D/2070, (para.17583) that: "while it is true that the company cannot set wages unilaterally, it does not necessarily follow that the parties are thereby equal". Similarly, in *Smith v. Lewisporte Wholesalers Ltd.* (1988), 10 C.H.R.R.D/

> 5769 (Nfld. Comm. Inq.) which was also, in part, an equal pay case, the Commission of Inquiry refused an employer's request to add a union as a third party because the Commission was satisfied that the applicant had not demonstrated the necessity of joining the union.
>
> ….However, the nexus between the Union and the alleged conduct is not nearly as clear as in *Renaud*. Moreover, the Complainants do not seek a remedy from the Union. It appears to me that the Police Board is seeking a remedy in the form of contribution;
>
> …The injustice that the Police Board may face in having to answer the complaints without the Union facing similar jeopardy must be balanced against the injustice in forcing
>
> the complainants to proceed against the union in which they are members. The courts are clearly reluctant to require a plaintiff to proceed against someone they do not wish to sue, at least in part because of the danger that permitting joinder in such circumstances invites abuse of the process. (underlining added).

I found it useful to refer to Mr. Fisher's clearly expressed summary of his position in his written Submissions where he states:

> (1) The usual factual basis for joining a union unto a complaint is that the union used its power to negotiate discriminatory provisions and imposed those on a minority group of disadvantaged and protected employees. For example, if the 3 complainants were part of a large union and the majority of the union imposed a discriminatory wages and benefits on the 3 complainants, there would be some basis to considering adding the union to the complaint.
> The facts of this case are clear that no such occurrence happened. The 3 complainants are the only members of the local union and made the decision to accept discriminatory wages and pursue their complaints in a form that they considered to be more appropriate for dealing with discrimination. As indicated previously in this submission, a binding conciliation board which specializes in determining wages and benefits in accordance with other settlements is not adept at dealing with direct and systemic discrimination issues.

> (2) In order to join a union as a party because of alleged discrimination, someone must allege discrimination against the union. The Union consists of the three Complainants. They have not alleged discrimination by their own union nor have they alleged that they discriminated against themselves. They simply chose what they felt was the best form to deal with discrimination issues (the Human Rights Commission) rather than a binding conciliation board.
>
> The Respondent Town has not alleged discrimination, in fact, the Town says there is no discrimination.
>
> The only allegation of discrimination is by the complainants against the Town;
>
> (3) A Human Rights Board of Inquiry would be reluctant to join a third party onto an inquiry when they have not had the opportunity to participate in the processes through the investigative and other processes through the *Human Rights Act*. The *Human Rights Act* is a settlement orientated statute. When you add a third party on as a complainant, they lose the opportunity to make representations to the investigators, the *Human Rights Commission* and to participate in any mediation process which might lead to a settlement or resolution;
>
> (4) The Respondent's request to join the union as a party to this proceeding is absurd. The Respondent knows full well that the the three complainants are the only members of the union. By asking this Board of Inquiry to join the union as a respondent, they are in fact asking to join the complainants as respondents to their own complaint.
>
> The Respondents' request in its simplest form is to effectively add the Complainants on as respondents on to their own complaint. In other words, the Town of Truro says there was no discrimination but if there was any discrimination it was the Complainants who discriminated against themselves.

DECISION

After very carefully analyzing and taking into account the *Nova Scotia Human Rights Act, Labour Standards Code, Pay Equity Act*, Counsels' comprehensive and well-

thought out oral and written Submissions, two voluminous volumes of Indices to File Disclosure and the caselaw, I conclude this Board of Inquiry has the jurisdiction to hear the complaints of Munroe, MacDonald and Reid with respect to pay equity pursuant to the *Human Rights Act*.

As to Issue 2 of the Respondent Town's Application, I find that the Union should not be joined as a Respondent to the complaints.

EVALUATION OF ARGUMENTS

Since this Application deals with human rights and discrimination, I thought it most useful to observe how the courts have defined discrimination and interpreted human rights legislation. The Supreme Court of Canada in *Law Society of British Columbia v. Andrews* (1989), 56 D.L.R. (4th) 1; 10 C.H.R.R.D/5719, spoke of discrimination. McIntyre, J. at p.18 [D/5746, para.41759] stated:

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

The above definition is a carbon copy of the definition of discrimination found in section 4 of the *Nova Scotia Human Rights Act.* McIntyre, J. went on to say at p. D/3106:

> …there is the concept of adverse effect discrimination. It arises where an employer for genuine business reasons adopts the rule or standards which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force…..An employment rule honestly made for sound economic or business reasons, equally applicable to all to whom it is intended to apply, may yet be discriminatory if it affects a person or a group of persons differently from others to whom it may apply.

Dickson, C.J.C. in the case of *Action travail des femmes v. Canadian National Railway Company* (1987), 8 C.H.R.R.D/4210 (S.C.C.) at p.D/4424 spoke of the interpretation of human rights legislation. He said:

> 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 (underlining added). Although it may be 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.

There is no doubt human rights legislation is to be given an expansive reading to further the broad objective set out in the preamble of the *Act* (section 2, *supra*). In *Ontario Human Rights Commission and O'Malley v. Simpson-Sears Ltd.* (1985) 2 S.C.R.

536,7 C.H.R.R.D/3102, McIntyre J. writing for the court, stated at p. 547 S.C.R., D/3105 C.H.R.R.D:

> 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. The Code aims at the removal of discrimination. This is to state the obvious. Its main approach, however, is not to punish the discriminator, but rather to provide relief for the victims of discrimination. It is the result or the effect of the action complained of which is significant. If it does in fact, cause discrimination; if its efect (sic) is to impose on one person or group of persons obligations, penalties, or restrictive conditions not imposed on other members of the community, it is discriminatory.

Based on the foregoing, it is my view that human rights legislators intended to provide human rights protection to particular groups using language of the grounds of discrimination malleable enough to allow for an expansive interpretation. L'Heureux-Dube J. in *Canada (Attorney-General) v. Mossop* [1993] 1 S.C.R. 554, would appear to share a similar view. She emphasized that unless constrained by the clear words of the statute, human rights tribunals should adopt a "living tree" approach to the interpretation of human rights laws. She said at 621-22:

> Even if Parliament had in mind a specific idea of the scope of "family status", in the absence of a definition in the Act which embodies this scope, concepts of equality and liberty

> which appear in human rights documents are not bounded by the precise understanding of those who drafted them. Human rights codes are documents that embody fundamental principles, but which permit the understanding and application of these principles to change over time. These codes leave ample scope for interpretation by those charged with that task. The "living-tree" doctrine, well understood and accepted as a principle of constitutional interpretation, is particularly well suited to human rights legislation. The enumerated grounds of discrimination must be examined in the context of contemporary values, and not in a vacuum… the meaning of the enumerated grounds….is not "frozen in time" and the scope of each ground may evolve.

It is considered with the relative principles of statutory interpretation that there is a presumption that legislation is internally consistent and coherent. As explained in *R. v Sullivan*, the provisions of a statute are presumed to fit together logically to form a rational, internally consistent framework. Because the framework has a purpose, the parts are also presumed to work together dynamically each contributing something toward accomplishing the intended goal. (Sullivan and Driedger on the Construction of Statutes, 4th ed. 2002 at p.168).

Applying the above rationale to the *Act*, there is no doubt the provisions of the *Act* should be harmoniously read in accordance with the presumption of coherence. Counsel for the Town argues section 5(1)(d)(m) of the *Act* does not apply to this case. If the Legislature had intended pay equity to be included as one of the prohibited grounds in section 5, it would have done so. With respect, I am not persuaded by this argument. In applying the statement of the authors of the Construction of Statutes, *supra*, and previous references to the proper interpretation of human rights legislation, it is abundantly clear the Complainants properly framed their complaints under the proper legislation.

The purpose of the prohibited ground of discrimination in employment based on sex could, given its ordinary meaning, consist of, for example, an employer dismissing an employee because of pregnancy or in this case, three complainants filing a complaint

with the Commission alleging the Town of Truro discriminated against them on the basis it does not pay female employees equally for work of equal value as compared to men performing work of equal value. Common sense dictates their complaints can fall under the umbrella of section 5(1)(d)(m) of the *Act*. Moreover, in keeping with the proper interpretation of human rights legislation, I am giving the words in the section a fair, large and liberal interpretation as to best insure their objects are attained.

The Board in *Lockhart, supra,* made certain comments at p.6 which I quote and adopt:

> The motion brought by the Village in this instance requires that the Board consider whether the allegation of unequal pay for work of equal value can constitute discrimination contrary to Section 5(1)(d) and (m). More precisely, the motion raises the question based on pay equity can be considered under the *Act* in the absence of a more detailed provision within the *Act* dealing expressly and specifically with the issue of equal pay for work of equal value. The answer to that question in the Board's respectful view is yes.
>
> If one accepts pay equity as a human right it seems to follow that the violation of the principle of pay equity may constitute sex discrimination either under the general no discrimination provision for an employment relationship or if present, under an express provision dealing with equal pay for work of equal value.

In discussing pay equity as being a human right, Board Chair James in *Lockhart* referred to *Employment Law in Canada, Fourth Edition* at para. 8.296, p. 8-335 where the authors state:

> A major impetus driving this legislative (sic) is a view that equal pay is a fundamental human right. This view relies on a plethora of international covenants and conventions respecting employment and human rights that commit signatory countries eliminating gender discrimination in employment and particularly gender-based wage discrimination.

and at para. 8.294, p. 8-344

> Legislation in all provinces in the federal jurisdiction has been enacted in response to Canada's problem of unequal compensation for women….three levels of legislation may interact, depending on the jurisdiction: the employment standards, the human rights and in some provinces, special 'pay equity' legislation. This body of legislation marks the high water mark for the influence of the 'rights' paradigm in Canadian employment law.

As earlier discussed, the *Aylward* case, *supra,* stands for the proposition that the Commission had no authority either express or implied to delegate its statutory power to Ombudsman with a subsequent referral to the Ontario Human Rights Commission.

I reject the submission of counsel for the Town wherein he argues *Aylward* is applicable to his Application. Mr. Durnford argues the Commission can only perform those functions which the *Act* authorizes it to carry out. Briefly, his argument is that the Commission has no power pursuant to the *Act* to deal with pay equity matters. His rationale is that the legislature would have included pay equity to be dealt with under the *Act* had it so desired and thus, its omission can only be interpreted to mean that pay equity is not a human right. He says that in Nova Scotia, pay equity is a labour standard and that standard is carried out through the *Labour Standard Code* and the *Pay Equity Act.* As earlier indicated I agree with the Board Chair in *Lockhart* where he stated pay equity is a human right.

I previously stated earlier *Aylward* is not relevant to this Application. The *Aylward* case dealt with to say the least, an unusual set of circumstances. Although the Commission was efficacious in attempting to delegate its authority to eliminate an apprehension of bias, it patently exceeded its authority by delegating same to the Ombudsman. There was no judicial precedent nor was there any legislative authority to support the delegation of its power. It is important to note that given the above remarks, it is not my intention to be disingenuous to the Commission but rather, it is extremely important that I distinguish *Aylward* from the present case in its strongest terms. I wish to note the Commission was acting in good faith at the time it delegated its authority to the Ombudsman.

The Complainants filed a proper complaint under the *Act* and after a period of investigation, the Commission, using its authority under the *Act*, referred the complaints to a board of inquiry. There was no improper delegation of authority. *Aylward* was a different matter. The Commission did not inquire into the complaint but rather, handed over that responsibility to an outside jurisdiction (Ontario Human Rights Commission) vis a vie the Ombudsman

Earlier reference was made to section 4(2) of the *Pay Equity Act* which states that nothing in the *Act* will affect the provisions in the *Human Rights Act* and the *Labour Standards Code* prohibiting discrimination based upon sex. In perusing this section, I ask the rhetorical question, "why did the legislature enact this section of the Act? Was it for "window dressing" or was it to make it abundantly clear that an aggrieved party had the option of filing a complaint under the *Human Rights Act* or the *Code.* I would answer,

the latter. The three legislative regimes all have concurrent jurisdiction. No one statute overpowers the other.

See the following cases on concurrent jurisdiction:

The Nova Scotia Human Rights Commission v. The Halifax Halifax Regional Municipality (2007), N.S.S.C. 163 (LeBlanc, J.)

Webber v. Ontario Hydro [1995], 2 S.C.R. 929; [1995] S.C.J. No. 59 (McLachlin, J.) (as she then was)

St. Anne Nackawic Pulp and Paper Co. v. Canadian Paper Workers Union, Local 219 [1986], 1 S.C.R.704 (Estey, J.)

Quebec (Commission des droits de la personne et des droits de la Jeunesse) v. Quebec (Attorney General) [2004], 2 N.C.R. 185; 2004 S.C.C. 39 (Morin, J.)

Cadillac Fairview Corp. v. Saskatchewan (Human Rights Commission) [1999], 173 D.L.R. (4th) 609 (Sask.C.A.)

As to my refusal to join the Union as a respondent, I base my decision on the oral and written submissions of both, counsel for the Commission and the Complainants.

I attached very little weight to the two volumes of the Index to File Disclosure which the solicitor for the Town provided just at the commencement of his Application. The usual procedure is for the Commission to present these materials at the commencement of a board of inquiry in the spirit of fairness and natural justice to the parties. These materials consist of the complete files of the Commission, save for solicitor/client privileged documents. Ms. Ross argued, and I agree, receiving these materials when they were provided at the beginning of the Respondent's Application would not afford all parties an opportunity to test the evidence.

DATED at Hammonds Plains, Nova Scotia, this 29th day of April, 2009

Kenneth D. Crawford, Q.C. – Board of Inquiry