THE NOVA SCOTIA HUMAN RIGHTS COMMISSION
BOARD OF INQUIRY

BETWEEN:

Ray Adekayode

-and-

Halifax Regional Municipality

-and-

International Association of Fire Fighters, Local 268

-and-

Nova Scotia Human Rights Commission

Case Number: 42000-30-H099-0078

Decision

1. Ray and Angela Adekayode are the natural parents of three young children. Ray and Angela became aware that Angela was pregnant with their third child while she was still on maternity leave for their second. The initial plan had been that Angela would return to work full-time after taking maternity leave for their second child so that she could resume her career with Capital Health. The back-up "plan B" was that she and Ray would be able to split the parental leave for child number 3 so that she could resume her working career as soon as possible. However when Ray inquired about his parental leave benefits under the collective agreement between Halifax Regional Municipality (HRM) and the International Association of Firefighters, Local 268 (IAFF), it became apparent that he was not entitled to any financial top-up of employment insurance benefits as a biological father.

2. Given the family financial implications of Ray not being entitled to employment insurance top-up benefits, it was necessary for Ray and Angela to move to "Plan C": Ray would not take any parental leave, while Angela took the full leave that would be supported by employment insurance. "Plan C" meant less income for the family and a longer work interruption for Angela, but most important it meant a significant reduction in the amount and kind of time that Ray Adekayode was able to enjoy with his newborn.

3. Ray Adekayode has complained that the failure of the HRM/IAFF collective agreement to provide parental leave top-up benefits to himself while providing an adoption leave top-up to adoptive parent employees was discriminatory under the provisions of the Nova Scotia *Human Rights Act*, R.S.N.S.1989, c.214. Both HRM and the IAFF acknowledge that there was no parental leave top-up for biological parents. HRM alternatively characterizes the provision of adoption leave top-up benefits as:

a) a practical, negotiated gain for the IAFF union membership as a whole; as well as,

b) a targeted benefit designed to meet and support the special needs of adoptive parents.

The IAFF acknowledged that when adoption leave top-up became part of the collective agreement, it was not based on any calculated effort to provide for the special needs of adoptive parents. It was simply a gain achieved at the bargaining table. However, the IAFF nevertheless took the position that its presence in the applicable collective agreement was not discriminatory within the meaning of the *Human Rights Act*.

Meaning of "discrimination"

4. Most Canadian provinces and territories approach the protection of human rights by prohibiting certain specific practices or behaviours that are based on particular human characteristics – such as declaring that it is discriminatory to refuse rental accommodation to someone for reasons of race, or marital status, or family status. Many of the Acts also say that these specific examples of prohibited behaviours are *included* in what discrimination is. However, these Acts do not go any further in legislatively defining what it means to "discriminate".

5. *The Human Rights Code* in Manitoba is significantly different in its philosophy. In the Manitoba *Code*, C.C.S.M., c.H175, the s.9 definition of "discrimination" does not actually require anything more than "differential treatment":

> s.9(1) In this Code, *"discrimination" means*
>
> (a) *differential treatment* of an individual on the basis of the individual's actual or presumed membership in or association with some class or group of persons, rather than on the basis of personal merit; or
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> (b) *differential treatment* of an individual or group on the basis of any characteristic referred to in subsection (2); or
>
> (c) *differential treatment* of an individual or group on the basis of the individual's or group's actual or presumed association with another individual or group whose identity or membership is determined by any characteristic referred to in subsection (2); or
>
> (d) failure to make reasonable accommodation for the special needs of any individual or group, if those special needs are based upon any characteristic referred to in subsection (2).
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> [*Emphasis* added]

6. In Manitoba's legislation, there is no added element of an *unfavourable* burden, or a denial of advantage, to establish "discrimination" after a finding of "differential treatment". This demonstrates the philosophy that the essence of the evil in discriminating does not truly lie in one ultimate, or particular, act or behaviour. Instead, the essence of the evil in discriminating is the attitude that the identified ground alone (be it race, creed, or family status) permits or justifies "differential treatment" other than in a situation of certain provable "special needs".

7. The *Canadian Human Rights Act*, R.S.C.1985, c.H-6 employs the "prohibited acts" approach, but also endeavours to capture behaviour that "differentiates adversely" with respect to certain identified protected grounds. This is also the approach of Yukon's *Human Rights Act*, R.S.Y. 2002, c.116, s.7, which requires that discrimination involve "unfavourable treatment" based on identified grounds.

8. The approach of the Nova Scotia *Human Rights Act*, s.4 lies between the concept of the Manitoba *Act*, and the philosophy of the Canadian and Yukon *Acts*, by providing that:

> . . . 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 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.

Intentionally or not, this is very nearly a verbatim quotation of the language used by Justice McIntyre in *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at para.37 (in dissent on another issue), and subsequently used by the Supreme Court of Canada as the definition of discrimination in, for example, *Withler v. Canada (Attorney General),* 2011 SCC 12, at para.29.

9. Therefore, in Nova Scotia, there not only has to be a *distinction*, but also an *effect*. The distinctions must relate to characteristics such as sex, or gender identity, gender expression, or family status. The *effect* of the distinction, whether intended or not, may be to impose burdens not imposed on others, or to withhold or limit access to opportunities, benefits and advantages available to other individuals or classes of individuals in society. A distinction in treatment that does not produce those types of *effects* is not discrimination within the meaning of the Nova Scotia *Act*.

10. There is no legislative requirement in Nova Scotia, nor in any other jurisdiction in Canada, requiring a human rights claimant to establish some *historical disadvantage* or *stereotyping* as a precondition to a legitimate claim of discrimination. While an historical disadvantage or stereotyping may inform our current understanding about whether there is an *effect* from the making of a distinction, or the significance of such an effect, proof of an historical disadvantage is not a pre-condition to a successful claim under the Nova Scotia *Act*.

11. It was suggested in the course of these proceedings that the Section 15 *Canadian Charter of Rights and Freedoms* jurisprudence has constitutionalized an element of *historical disadvantage*, and that human rights legislation should be interpreted in a way that is consistent with that constitutional interpretation. This was a prelude to suggesting that biological parents such as Mr Adekayode have not suffered an identifiable historical disadvantage, and therefore could not be discriminated against by a financial benefit payable to adoptive parents. Reference was made to the decision in *Ontario Secondary School Teachers' Federation v. Upper Canada District School Board* (2005), 203 O.A.C. 98 (Div.Ct.).

12. I disagree with the premise of that argument. While the *Charter*'s Section 15 may be employed to not only redress discriminatory behaviour, it can also be employed to invalidate legislation, which was the request made in *Withler, supra*. As the Supreme Court of Canada explained at para.4 of *Withler*: "The appellants

challenge the constitutionality of the benefit provisions of the *Public Service Superannuation Act . . .*" The Court was not dealing with a negotiated collective agreement. The Court's decision in *Withler* also referred specifically to the process of identifying the appropriate comparator groups where *a law* makes a distinction on the basis of an enumerated or analogous ground: *e.g.,* paras.40, 64, 65, and 68. There are many reasons for an enhanced level of contextual scrutiny where the constitutionality of legislation is in issue rather than the evaluation of the effect of a private agreement of limited application. See, for example: *Ontario (Director, Disability and Support Program) v. Tranchemontagne*, 2010 ONCA 593, at paras.88, 95 – 96, 104.

13. Of course the *Ontario Secondary School Teachers' Federation* case validated an arbitrator's use of the Supreme Court of Canada's s.15 *Charter* analysis in a case dealing with alleged "family status" discrimination involving adoptive rather than biological parents. That analysis, taken from *Law v. Canada (Minister of Employment and Immigration),* [1999] 1 S.C.R. 497, summarized at para.88, does indeed require a finding of (i) differential treatment, (ii) based on one or more enumerated grounds, and which (iii) imposes a burden or withholds a benefit:

> in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration.

14. Our provincial *Human Rights Act* has an important but less encompassing mandate than s.15 of the *Charter*. The provincial *Act* only authorizes us to evaluate and, where necessary, to redress discriminatory behaviours of individuals, groups, and agencies. Unlike the Ontario *Human Rights Code*, and the *Charter* itself, the Nova Scotia Act specifically defines what discrimination is for the purposes of our province and our *Act*. Our *Act* does not explicitly mandate us to look for and find

historical disadvantage or even a stereotype. What our *Act* does require (and there is nothing new about this) is that the effect of differential treatment engage a component or aspect of the complainant's human dignity. That is consistent, in my view, with the kind of analysis described and approved of in both *Law v. Canada,* and the *Ontario Secondary Schools Teachers' Federation* case, but still respectful of the difference in our legislation.

15. There is also no assumption in Nova Scotia that the conferring of an advantage or benefit on a distinct, identifiable group which may have special needs is non-discriminatory. Sections 6, 6A, 8, and 9 of our *Act* exist to expressly allow exemptions from the obligations of the *Act*. Where a person or group or business wishes to make a distinction that has the effect of granting a benefit to some people rather than others based on a prohibited ground, both sections 6 and 9 provide a mechanism for that to be done without violating the *Act*. As a result, even in cases where historical disadvantage or special need may be provable with respect to a particular individual or class of individuals, in Nova Scotia efforts to ameliorate their perceived disadvantage are not exempted from the definition of what is "discriminatory". Those kinds of distinctions must be excused or authorized or permitted through other provisions of the *Act*.

16. Therefore, even if I were to assume that adoptive parents and their families suffer an historical or distinct disadvantage in the first year or so of family bonding as compared with biological parents, the making of a "family status" distinction in terms of their employment benefits would still be discriminatory within the meaning of the Nova Scotia legislation. The employer and the union could attempt to exempt any program based on a s.5(1)(r) distinction from the prohibitions contained in the *Act* by complying with s.6(i) or s.9 of the *Act*. Here they made no effort to do so during the 10 years that the adoption top-up allowance has been in place.

Meaning of "Family Status"

17. "Family status" is defined in the Nova Scotia *Act*, s.3(h) as "the status of being in a parent-child relationship". It is my view that this concept in the Nova Scotia *Act* includes the way the parent and child came to be in their relationship: whether by birth, adoption placement, foster placement, guardianship, voluntary role acceptance, or even by attachment. However, as the language of the *Act* states, "family status" implies a larger, more active and dynamic quality than its mere origination. The very idea of "*being in a . . . relationship*" means that the ground of "family status" in the Nova Scotia *Act* comprehends the entire scope of legal obligations of care, responsibility, and protection for a child that a person takes on when they enter into a parental relationship with a child. My reasons for this interpretation of the Nova Scotia *Act* have been reached after reviewing the following case authorities.

18. In *Johnstone v. Canada (Border Services Agency)*, 2014 FCA 110, the concept of "family status" was discussed at length in reference to the *Canadian Human Rights Act*. The Canadian *Act* identifies "family status" as a prohibited ground of discrimination in s.3(1) but without any explanatory words as are found in the Nova Scotia *Act's* definition. The Federal Court of Appeal recognized that there was something like a consensus across the country in relation to the concept of "family status". The Court then explained what "family status" meant for the purposes of the *Canadian Human Rights Act* at paras.59 - 60:

> 59 In fact, judges and adjudicators have been almost unanimous in finding that family status incorporates parental obligations such as childcare obligations. . . . .[citations omitted].
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> 60 Our Court is not bound by these decisions, but they are difficult to ignore since their logic is compelling and better reflects the large and liberal interpretation that is to be given to human rights legislation.

The Federal Court of Appeal, with aid of the wording used in the French version of the Canadian *Act*, decided at para.67 that "family status" in human rights legislation should be understood as connoting "family situation" or "family circumstances", rather than a question of formal, static status. That allowed the Court to go on, at paras.68 – 70, to make the following comments, which are particularly relevant for the Adekayode complaint here:

> 68 . . . Prohibited grounds of discrimination generally address immutable or constructively immutable personal characteristics, and the types of childcare needs which are contemplated under family status must therefore be those which have an immutable or constructively immutable characteristic.
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> 69 It is also important not to trivialize human rights legislation by extending human rights protection to personal family choices, such as participation of children in dance classes, sports events like hockey tournaments, and similar voluntary activities. These types of activities would be covered by family status according to one of the counsel who appeared before us, and I disagree with such an interpretation.
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> 70 The childcare obligations that are contemplated under family status should be those that have immutable or constructively immutable characteristics, such as those that form an integral component of the legal relationship between a parent and a child. As a result, the childcare obligations at issue are those which a parent cannot neglect without engaging his or her legal liability. Thus a parent cannot leave a young child without supervision at home in order to pursue his or her work, since this would constitute a form of neglect, which in extreme examples could even engage ss. 215(1) of the *Criminal Code*, ...

19. The meaning of "family status" from the points of view of biological and adoptive parents was specifically addressed by Arbitrator Milton Veinot in *Izaak Walton Killam Health Centre v. N.S.N.U.* 2003 CarswellNS 540. Veinot observed, at para.54:

> 54. Biological parents and adoptive parents are two subsets of persons included in the "family status" definition of section 3(h) of the Human Rights Act. Both are "in a parent-child relationship": the biological parent by nature, and the adoptive parent by virtue of the placement of the child for adoption.

Arbitrator Veinot also went on, at para 76:

> 76. To me, the two leaves – parental and adoptive – do have a similar purpose at the most relevant and important level: they both provide a period of leave for persons who have to cope with a new addition to their family. The adjustments required in each case are not exactly the same, but they do share this most important common ground. I believe both circumstances can be included in the phrase appearing in the passage from *Schafer v. Canada (Attorney General), supra*, that both leaves are essentially concerned with "the social needs of child care".

20. Whether the relationship between a child and his or her parents is *initiated* biologically or by placement, "family status" really comprehends the whole essential social relationship of obligation and dependence between those acting as parents, and those who are children, with respect to care. The concept of "family status" in the Nova Scotia *Human Rights Act* comprehends those things which pertain to that kind of inter-related, mutual identity as parent and child; both for the care-obligated parent, and the care-dependent child.

21. While the initiating source of the status of being in a parent-child relationship (biology or placement) may vary between families, and that initiating event may be embraced as an identity in some families, it is really only one aspect of that family's "family status". This broader understanding of "family status" is consistent with the interpretation given to s.3(h) of the Nova Scotia *Act* by a previous Nova Scotia Board of Inquiry in *Leadley v. Oakland Developments Ltd.*, 2004 CarswellNS 609 (Crawford). It is also consistent with the views that were expressed in *A. v. B.*, 2002 SCC 66, at para.58, about the meaning of "family status" in the similarly worded Ontario *Code*.

22. Therefore, it is my view that the Nova Scotia *Human Rights Act* prohibits discrimination (distinctions that have the effect of creating burdens or denying access to benefits) on the basis of a person's parent/child relationships. That prohibition includes a prohibition on distinctions based on how the parent/child relationship was created, as well as distinctions based on the care obligations created by a person's parent/child relationships.

The Collective Agreement and Related Evidence

23. The Collective Agreement in place between the IAFF and HRM at the time of Mr Adekayode's complaint in 2010, provided for "Pregnancy Leave" (Article 29.01) which could be taken by pregnant women, and "Parental Leave" (Article 29.02.1 – 29.02.7) which could be taken by biological, adoptive and "guardianship" parents. The Agreement also included provision for a "Leave for Adoption Allowance" (Article 29.02.8).

24. The pregnancy leave provision (Article 29.01.10) provided that HRM would essentially pay 75% of a pregnant employee's weekly rate of pay for the 2 week employment insurance waiting period, and then top-up employment insurance benefits to 93% of the weekly rate of pay for a maximum of 15 additional weeks as a Supplementary Unemployment Benefit.

25. The parental leave (Article 29.02.3) could be taken by an employee "who becomes a parent through the birth of a child or the placement of a child in the care of the employee for the purpose of adoption pursuant to the laws of the province", or by guardianship. Parental leave was set at 35 weeks "or, in the case of adoption,

any longer period required by the by the adoption agency or the province"[1]. During parental leave, employees were expected to fund their own ongoing benefit contributions, and then to reimburse the employer for maintaining their pension contributions during the parental leave (Article 29.02.6).

26. The collective agreement did not provide for any pay or top-up to biological or "guardianship" parents during any parental leave. An employee would be restricted during that time to anything that he or she might be entitled to as employment insurance. However, the collective agreement made different provision for adoptive parents. Article 29.02.8 provided that an employee entitled to adoption placement leave, and who would be receiving employment insurance benefits, would be provided with a Supplementary Unemployment Benefit that would:

> a) essentially pay 75% of the employee's weekly rate of pay for the 2 week employment insurance waiting period (Article 29.02.8(ii)(1)); and then
>
> b) top-up employment insurance benefits to 93% of the weekly rate of pay for a maximum of ten additional weeks (Article 29.02.8(ii)(2)).

Interestingly, although the collective agreement provided that adoption leave could be taken for any longer period required by the adoption agency or the province, the financial support of that leave would not continue longer than the 10 weeks.

27. A plain reading of these provisions demonstrates that there is a distinction being made between adoptive parents and other new parents. The adoptive parents get an advantage (top-up of employment insurance benefits for 10 weeks after 2 waiting weeks at 75% pay) that biological parents do not. So there is a distinction made in those provisions on the basis of how the parent-child relationship was initiated, how a person became a "parent" – by biological process or by adoption.

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[1] The duration options for the parental leave were not in issue for the purposes of this Inquiry.

This "biology or adoption" distinction is then used as the basis for making some financial benefits available under the collective agreement to adoptive parents, and withholding access to those same kinds of benefits from biological parents.

28. I have already explained how "family status" in the Nova Scotia *Human Rights Act* comprehends the essential social relationship of obligation and dependence between those acting as parents, and those who are children, with respect to care. I have observed how the originating event of how parents become parents is only one aspect of "family status". Parental care obligations exist whether the parent-child relationship was initiated by biology or by adoptive placement. Differentiating between parents in terms of financial support based on how their children became their children is making a distinction based on one aspect of their "family status". It distinguishes between parents based on how they became obligated to care for their children. Imposing disadvantages on biological parents, or denying access by biological parents to benefits because of the method by which they became parents of their children, is an obvious *effect* of the distinction that has been made by the collective agreement provisions. In my view, that is a violation of the *Human Rights Act*.

29. In evaluating whether there has been a violation of the *Act* here, I have adopted the parties' own delineation of the appropriate comparator groups. The collective agreement says that employees who become parents "through the birth of a child or the placement of a child in the care of the employee for the purpose of adoption pursuant to the laws of the province, or through guardianship" are entitled to parental leave: Article 29.02.3. Within that group of employees who become obligated to provide child care, only employees who become parents "through the placement of a child in the care of the employee for the purpose of adoption pursuant to the laws of the province" are entitled to income replacement top-up: Article 29.02.8(i). There was little or no evidence provided that specifically addressed the third parental relationship experience (by guardianship) identified in

the collective agreement. Therefore, based on the evidence, I have accepted that the appropriate comparator groups are (a) those whose family relationships and obligations are initiated by a biological birthing process, and (b) those whose family relationships and obligations are initiated by an adoption placement.

30. Both HRM and the IAFF provided evidence and submissions about how the adoptive relationship experience differed from the birthed relationship experience. I was also provided with evidence about whether the separate (but frankly rather amorphous) group of "adoptive parents" needed or deserved the special financial support provided by the collective agreement.

31. HRM and the IAFF both urged me to find that there was no discrimination involved in giving enhanced benefits to adoptive parents because of the special and unique needs of adoptive parents. They also proposed that because the provisions in issue are negotiated, collective agreements, arrived at through compromise, that a top-up for adoptive parents was a permissible and acceptable step up benefit from no top-up for anyone, and perhaps a stepping stone towards top-up at some future negotiation for all kinds of parents. I reject both positions.

32. Dr Kristen McLeod and Dr Nina Woulff provided evidence about the unique challenges of being an adoptive parent, particularly now when infant adoption, or the adoption of untroubled children, is less common than it was. Counsel for HRM sought to have me qualify Dr McLeod specifically on the issue of the comparative needs of adoptive parents (parents of "children who weren't theirs") versus biological parents. I declined to qualify her to that extent. I did allow her to describe the factual differences in the care experience of those parents whom she had had an expert opportunity to observe so that I could, if I chose and felt able, to make the adoptive/biological comparison.

33. In that regard I was provided with evidence about the unique stresses that prospective adoptive parents face. Several of these have nothing to do with "adoption leave" provided after an adoptive placement: having to go through pre-screening, including some evaluation of the prospective parents' mental resilience or suitability for coping with the anticipated stresses of adoption, and the burden of sometimes having to wait years for a placement. More to the point in terms of establishing a unique need on the part of adoptive parents post-placement was Dr Woulff's evidence about the very practical fact that any adoptive placement will likely present more than one developmental or integrative kind of challenge to the adoptive parents. Some of Dr Woulff's evidence compared the risk of developmental problems in an adoptive child at 100% and suggested that the risk of such a developmental challenge for a birthed child might be as low as 4%. I thought that Dr Woulff's comparison was somewhat exaggerated, but I am willing to understand that the modern expectation is that a child adopted through a public agency is likely to have at least one, and perhaps more than one, identifiable special need.

34. Even accepting all that, the *objective* of fostering a strong and caring and close parent-child bond remains no different for adoptive parents than it is for biological parents. Based on the evidence before me, I can understand how the fostering of a close bond may be perceived as harder and perhaps riskier for many adoptive parents and their adoptive children, than it is for those connected by biology. HRM particularly argued that this more difficult care obligation experience for adoptive parents justified different treatment. My difficulty with that submission is that the making of a distinction based on care obligation duties of a parent, or the care obligation needs of a child, constitutes a distinction grounded on something that is within the definition of "family status" in the Nova Scotia *Human Rights Act*.

35. I fully appreciate that where contact prior to birth or within the first several months of life has been limited or non-existent, the development of a parent-child bond may be extremely challenging for adoptive parents. The bonds of relationship

may be very fragile even after 35 weeks. The attachment process may be challenged more deeply if the adoptee has had a difficult pre-natal history (such as biological parent substance abuse), and suffered post-natal neglect, or has had what Dr McLeod described as a "trauma-impacted" pre-adoption experience. Dr McLeod made the point that these kinds of challenges have observable and corresponding burdens on the relationships between adoptive parents. Adoption leave support therefore serves to reduce stress in the early stages of placement by allowing parents to be present together with the adoptee, reduce the financial stress of being away from work, and provide some extra time to secure an attachment.

36. This however also leads us back to the argument that the differential treatment of adoptive parents is justified, and is not discriminatory, because the provision of a top-up benefit to them does not have a real effect on biological parents. Again I disagree. Adoption and parental leave, which are dealt with in the same Article of the collective agreement, are designed to allow parents to be off from work when integrating a new child into the family unit. Adoptive parents are given extra financial support in taking that time off and biological parents are not. This is the rule whether a birthed child has special needs, or the adoptive placement child has no special needs. This is the rule whether an adoptive child is an infant adoption through a blood relative, an adoption of a spouse's pre-relationship children, or an adolescent "stranger" adoption after foster care.

37. The evidence as a whole failed to persuade me that the needs of adoptive parents as a group differed in nature or quality from the needs of parents who birthed their own children. While there may be a difference in frequency or risk of difficulties with many adoptive children than with birthed children, those differences were not proven to exist in the ten years of the IAFF adoption experience. Therefore, with respect to the HRM/IAFF collective agreement, I do not believe that there was even an accidental "ameliorative purpose" achieved by the adoption leave "top-up" provision – let alone a planned scheme to address a real and

identified difficulty being experienced by employees seeking to become adoptive parents. In those respects, the evidence and context of this case differs from the evidentiary context of the *Ontario School Teachers' Federation* case, *supra*. I would point out that the arbitration board in the *Ontario Secondary School Teachers' Federation* case self-described their situation as "rare" (quoted at para.14 of the Divisional Court's reasons).

38. Having found that there was a distinction made by the collective agreement based on "family status", it is necessary to assess whether there was an effect on Mr Adekayode which imposed burdens, obligations or disadvantages on an individual or class of individuals not imposed upon others, or withheld or limited access to opportunities, benefits and advantages available to other individuals. Such an effect must also, as I have said, have engaged some component or aspect of Mr Adekayode's legitimate sense of human dignity.

39. What the evidence demonstrated to me was that the lack of access to employment insurance top-up benefits materially affected Ray Adekayode's choices about how to manage the integration of a new infant into his family. The lack of access to employment insurance top-up benefits materially affected his participation in the initial care relationship and care responsibilities involving his son, as well as his ability to model involved parenting to his two older children. All of these things are at the core of what the Nova Scotia *Human Rights Act* endeavours to protect within the ground of "family status" – the condition and circumstances of parents being in a full relationship of care and obligation with their children. I appreciate that counsel for HRM pointed out repeatedly the fairly generous amount of time that firefighters have available to be at home. However, the evidence was just as clear that any attachment between parent and child, adoptive or biological, is more a function of quality of time together rather than any particular quantity of time together. In addition, the value of consistency in the parents' presence during the phase of establishing the parental attachment, and the child's reliance upon that

committed attachment, might not be served by even regular interruptions of a work schedule that could be out of sequence with the child's, and the parent's, need. The effect of the lack of access to advantages available to other individuals here affects a recognized aspect of Mr Adekayode's legitimate sense of human dignity: his ability to create and manage the integration of a new human being into his family.

40. Section 6(i) of the *Human Rights Act* can exempt a "program or activity" from the discrimination provisions of s.5. Even if I were prepared to assume that adoptive parents are currently disadvantaged individuals or a disadvantaged class of individuals because they face challenges at the beginning of parenting that biological parents do not share, I still cannot characterize Article 29.02.8 of the collective agreement as a program or activity that has as its object the amelioration of the conditions of those disadvantaged individuals. As Dr McLeod pointed out in response to a question from Mr Adekayode, having primary care relationship with a child does not necessarily equate to the child making that person their primary attachment. In addition, even in the adoptive context quantity of time is not the equivalent of the quality of time. More specifically, a firefighter is not obligated by the collective agreement to take adoption leave in any specific quantity, or at all. There is thus no "program or activity" that is articulated with defined strategies, components, and outcomes – except the monetary top-up of employment insurance benefits. So there is no "program or activity" of which the top-up forms a part. Perhaps needless to say, there was no suggestion on the evidence that a s.9 Commission exemption existed for this top-up provision either.

41. Article 29.02.8 of the collective agreement is properly characterized as a financial top-up benefit. That characterization of the provision is consistent with the bargaining history evidence provided during the course of this Board of Inquiry. Paul Boyle was on the IAFF bargaining committee in 2004 and 2007. He said, and I accept, that adoption leave top-up was something that the Union agreed to take in 2004 rather than get nothing – it was something that they didn't have before. The

initial bargaining position had been that the top-up be given for all parental leave. That initial position was given up – he assumed – because full parental leave would be expensive and adoption was "relatively rare in our workplace". However his testimony was that the bargaining committee was never told in 2004 that parental leave top-up for all was too expensive. In addition, there was no deep discussion at the bargaining table, or in committee, of the special needs of adoptive parents compared with the needs of other kinds of parents. There was no distinction made between different kinds of adoptive parents (adoption of strangers/adoption within already blended relationships/adoption of blood relatives). The "top-up" was, according to both Mr Boyle and Chief Phil McNulty, strictly a monetary item at the negotiating table during a negotiation where the primary objective was to link firefighter pay scales to those of police services. During the re-opener discussions in 2007, neither Mr Boyle nor Mr McNulty recalled any specific discussion about adoption leave top-up at all. The current agreement awaiting ratification has in fact removed the adoption leave top-up benefit because, in the words of Chief McNulty, it became "an issue with folks". The current idea is to replace the adoption leave top-up "with something that aids all members".

42. Chief Phil McNulty had the experience of acting as lead negotiator for the Union in 2004, and then sitting as the chief negotiator for the Municipality in 2007. He acknowledged that he could not add a whole lot to the evidence provided by Mr Boyle, which he had heard. He described how the specific language arrived at was tasked to John Bowser for completion on a joint Union/Management committee. He did provide interesting evidence about the actual use of adoption leave since June 2004 – each situation having been somewhat unique, which is one reason why I referred earlier to adoptive parents as an "amorphous group". The firefighter experience has involved a couple of international adoptions, a blood relation adoption, and what I will call a "local" adoption. Chief McNulty also indicated the magnitude of difference between the number of biological births for firefighters compared with the number of adoptions since 2004 (a ratio of 25 to 1).

43. Might Article 29.02.8 be excused as a practical, step up benefit achieved for the general membership at the bargaining table? A certain amount of evidence was led about how the IAFF solicited the views of the membership in terms of negotiation needs and wants. As a cost item, adoption leave top-up would not be particularly costly, and could be trumpeted as an enhancement to everyone's benefit package. Parental leave top-up was asked for in 2004, and adoption leave was the compromise reached. I was told that the attitude among the IAFF bargaining committee was essentially that something was better than nothing. The difficulty with that is that the negotiating teams for the IAFF and HRM have never been exempt from the *Human Rights Act*. Benefits cannot be portioned out at the bargaining table, and agreements cannot be made at the bargaining table, which create distinctions with effects based on family status, any more than they could make pay or vacation distinctions based on sex or race or creed. Finally, the membership of the IAFF and HRM who ratified the applicable collective agreement by majority vote were not exempt from the *Human Rights Act* either.

44. Some of the evidence proffered by HRM appeared to have been led for the purpose of suggesting that the general membership did not share Mr Adekayode's interest in the parental leave top-up issue. There was also the suggestion that not even Mr Adekayode did all that he might have done to push for parental leave top-up benefits. Mr Adekayode had no plans to take parental leave until he became aware of the impending birth of his third child. By then the collective agreement was in place. What we know is that when Mr Adekayode might otherwise have been entitled to employment insurance top-up benefits to financially allow him to stay home, the applicable agreement withheld access to that benefit because his new son was conceived and was to be birthed within his existing family, rather than adopted into his family.

The Appropriate Remedy

45. The Nova Scotia *Human Rights Act* provides in s.34(8) that:

> A board of inquiry may order any party who has contravened this Act to do any act or thing that constitutes full compliance with the Act and rectify any injury caused to any person or class of persons or to make compensation therefor and, where authorized by and to the extent permitted by the regulations, may make any order against that party, unless that party is the complainant, as to costs as it considers appropriate in the circumstances.

46. The IAFF and the HRM both laid great stress in evidence and argument on the fact that the adoption leave provision had been a freely negotiated benefit in the context of a broader negotiated settlement. I was made aware that in the most recent round of bargaining, which has produced an agreement that has not yet been ratified, the adoption leave provision was dropped. It will no longer appear in the new agreement because it created "an issue with folks". Counsel for both the IAFF and HRM were concerned that any remedy not disrupt or unbalance the compromises that had been fairly reached at the bargaining table – when putting the adoption leave top-up clause in, and then taking it out.

47. I have reviewed the authorities provided to me in relation this remedial issue, and have found the discussion in *British Columbia Teachers' Federation and Surrey Teachers' Association v. British Columbia Public School Employers' Association and Board of Education of School District No.36 (Surrey)*, [2012] B.C.A.A.A. No.138 (Hall), restored in 2014 SCC 70, particularly helpful. It is not my role to effectively re-negotiate, nor to add, provisions to a collective agreement that has been freely negotiated. It would however be a rather barren exercise here to mandate a re-negotiation of the discriminatory adoption leave top-up provision when it has already been effectively removed from the collective agreement. However, to do nothing further than make a declaration of invalidity would provide no true s.34(8)

remedy to Mr Adekayode who invested his own time, emotion and effort into pursuing redress for what he, and his family, have experienced as an injustice.

48. Although there are many similarities between this case and the facts outlined in the *University of Ottawa v. A.P.U.O.* arbitration, 1999 CarswellOnt 5438 (Adams), I am not comfortable that an award of the financial value of the top-up benefit to Mr Adekayode (about $9,000) would truly be restorative here, and would not represent "full compliance" with the *Act*. I also believe, based on the negotiation history evidence provided to me, that unlike the *University of Ottawa* case, the inclusion of adoption leave top-up benefits in the 2004 collective agreement was a truly mutual decision of the IAFF and HRM. In my view, both entities share responsibility in all respects for the language of their agreement, the financial consequences of their agreement, and the legal impacts of their agreement. Therefore it is my view that there continues to be a role for the IAFF and HRM to participate in resolving the problem created by the agreement that they chose to negotiate in 2004, and which had a discriminatory impact upon Mr Adekayode and his family.

49. For his part, Mr Adekayode indicated that no one can now really compensate him, or his wife, or his child, for the parental leave that he missed, or the employment that his wife missed, upon the birth of their third child. I have no way to measure the employment impact of the discrimination on Mr Adekayode's wife, though I recognize that there was likely some. She is not a named complainant here, and so her loss may be beyond my authority to repair. My sense is that the true effect of the ineligibility for the top-up compensation was that it required the Adekayode family to make different nurturing decisions than they would have made if the top-up provision had been available to Mr Adekayode. The real injury that needs to be rectified here is the loss of Mr Adekayode's opportunity to be home with his son. The difficult question is how to express that in a way that can realistically be enforced as a s.34(8) award.

50. With respect to this aspect of the matter, HRM (and to a lesser extent counsel for the IAFF) suggested that Mr Adekayode did not even avail himself of all the tools in the collective agreement which could have provided him with more paid time off in the notional parental leave period. Counsel for HRM in fact endeavoured to get Mr Adekayode to acknowledge that he had from the time of his training been the beneficiary of preferential treatment in the Fire Department. I did not find these submissions to be particularly persuasive. Mr Adekayode was still a fairly junior firefighter at the time of his complaint in this matter. The evidence demonstrated that his particular experience as part of a cohort of black firefighters, together with his past health-related work absences, contributed to a situation where he was not in a position to be looking for time off favours within his crew. I had the sense that Mr Adekayode doubted that he had sufficient social capital within the workforce to be able to seek the kind of accommodations from his fellow firefighters as were suggested by counsel for HRM. My view of Mr Adekayode's position was affirmed by the evidence of Mr Boyle: that if a firefighter wanted someone else's vacation time, he'd have to be prepared to give up something. Needless to say that this kind of "favour" would have been entirely unnecessary in accessing parental leave.

51. In my view, the choice that Mr Adekayode and his wife made about who would stay home to provide the constant initial nurture for their third child was a purely economic one. That economic choice was forced upon them by the lack of access to a top-up wage benefit that would have been available had Ray and Angela adopted their third child instead of birthing him biologically. That economic imperative overwhelmed their ability to choose the nurturing options they would have preferred to have for the benefit of their children.

52. The evidence showed that Mr Adekayode's commitment to his role as a father, and as a provider of care and comfort to children generally, is an outgrowth of his own difficult experiences in his family and changing family groups of origin.

He has for several years found both part-time and casual employment (and continuing satisfaction) in working with the Compass Program located at the IWK children's hospital. This is a program that requires cueing and providing guidance to emotionally disordered or differentiated children between the ages of 5 and 12. Throughout his evidence, Mr Adekayode indicated that the top-up was not what was important to him about the parental leave. What he wanted was the opportunity to spend those available weeks with his new child. He had many reasons to do so: to provide nurturing that he missed in his own life, to enhance his attachment to his son, to begin the important step of integrating his son into a biracial household in preparation for introducing him to a multiracial world. The employment insurance top-up was the financial benefit or mechanism that would have made staying home with his children financially feasible for the family but was not the reason for Mr Adekayode looking to be on parental leave.

53. For those reasons, I am persuaded that Mr Adekayode's real loss from his differential treatment was his loss of paid leave so that he could participate as fully as possible in integrating a new member into his family. It is my opinion that the appropriate remedy for the discriminatory loss of that opportunity is to provide Mr Adekayode with a substitute opportunity of equivalent duration and value at a time when his third child will be in a position to benefit from his continuing presence in the home. That means that Mr Adekayode shall be provided as a remedy with 12 weeks of parental leave – at 75% of his current regular rate of pay for the first two weeks, and at 93% of his current regular rate of pay for the following ten week period. This leave should be made available to Mr Adekayode at a time when his youngest child is not expected to be in regular attendance at public school (that is, likely during the months between June and September).

54. How HRM and the IAFF decide to manage this leave for Mr Adekayode is up to them. I understand that one available tool is what Chief Executive Officer McNulty described in his evidence as Chief Director's Leave pursuant to Article 30.08 of the

collective agreement. This leave appears to be quite flexible, and is used quite often. It can be paid or unpaid. In Mr Adekayode's case it would be paid if that is the avenue chosen for providing the remedy.

55. The cost of this leave opportunity for Mr Adekayode will be shared by HRM and the IAFF because it was their agreement that created this impact upon Mr Adekayode. The evidence demonstrated that the IAFF and HRM have been able to negotiate how to share the burden of another bargaining table error that resulted in the violation of other provincial legislation. I do appreciate that the cost of supplying this benefit now is going to be substantially more expensive than it would have been to simply provide "top-up" when Mr Adekayode would have been entitled to employment insurance as a new parent. Mr Adekayode made inquiries about parental leave financial support at the appropriate time and was rebuffed by the IAFF. The IAFF, with HRM, have spent the past nearly 6 years resisting Mr Adekayode's continuing pursuit of redress. Therefore, the current cost of providing the appropriate remedy fairly rests on both the IAFF and HRM.

Dated this 18th day of March 2015.

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Donald C. Murray, Q.C.
Board of Inquiry